

Cyberspace, Exceptionalism, and Innocent Copyright Infringement

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ABSTRACT

Direct copyright infringement attracts strict liability. However, as a theoretical matter, it is not necessarily clear why. Legislatures and courts have typically imposed strict liability where: (a) a defendant has notice of a plaintiff's rights, particularly where those rights involve a property interest; (b) a mens rea requirement on the part of the defendant would create an untenable burden on the plaintiff; (c) it is easier for the defendant to avoid harming the plaintiff than it is for the plaintiff to avoid the harm; or, (d) it is more administratively or economically efficient for the defendant to bear the risk of the loss. Most of these rationales have been applied at one time or another to copyright law. This Article considers whether it is appropriate to reconsider strict liability in copyright, particularly in the context of today's cut and paste' digital culture. The Author outlines some potential options for reform to mitigate the harshness of the doctrine in appropriate circumstances.

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Historically, copyright infringement claims have been litigated on a strict liability basis.¹ The idea of the “innocent infringer” has generally been relevant only in the context of copyright remedies.² Judges and commentators have advanced various theoretical justifications for strict liability in copyright law.³ Because the United States has maintained a copyright registration system, there may be a stronger case for strict liability here than in the majority of other jurisdictions where notice of registration is not a factor.⁴ If it is reasonable to expect copyright holders to go through the relatively minor costs and formalities associated with registering a copyright, it seems equally reasonable to expect defendants to check the register before making use of a protected work and to be held strictly liable if they fail to do so.⁵ However, even in jurisdictions without copyright registration systems, it may be possible to justify strict liability on other grounds.⁶

This Article examines strict liability for copyright infringement, both historically and in the digital age. The application of strict liability to digital technologies is particularly troubling

1. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW, 539 (5th ed. 2010) (“In general, infringement with innocent intent is *not* a defense to a finding of [copyright infringement] liability. . . . [I]nfringement of copyright is a strict liability rule, where the intent of the copier is not relevant in determining the fact of liability.”); Kent Sinclair, Jr., *Liability for Copyright Infringement—Handling Innocence in a Strict-Liability Context*, 58 CAL. L. REV. 940, 944 (1970) (“The rule is well established in copyright law that lack of intention to infringe is not a defense to an action for infringement. . . . Similarly, the absence of negligence does not excuse infringement. It has been held that direct copying of copyrighted matter is fully actionable even if the infringement is committed in the thoroughly reasonable belief that the material is in the public domain. Neither lack of intent nor negligence is a defense in situations of indirect copying, innocent printing and selling, or infringing acts of employees.”).

2. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (Matthew Bender, ed., 2010) (noting that the innocence of the defendant “may . . . bear upon the remedies available against such a defendant”).

3. See discussion *infra* Part I.A.

4. LEAFFER, *supra* note 1, at 271 (“Copyright registration . . . is a unique feature of American law.”)

5. See *Haas v. Leo Feist, Inc.*, 234 F. 105, 107 (S.D.N.Y. 1916) (“When, as in copyright, the law provides a form of notice, it imposes upon every one at his peril the duty to learn the facts conveyed by the notice.”).

6. See discussion *infra* Part I.A.

because these technologies are largely based on mechanical and often involuntary copying⁷ of software code and program outputs (e.g., graphics, audio, text).⁸

Part I considers the most salient theoretical justifications for strict liability in the copyright context. This Part also critiques strict liability as applied to the “innocent infringer.”⁹ Part II examines the strict liability doctrine in various digital contexts. Part III suggests new approaches to copyright liability that might mitigate the harshness of the strict liability doctrine. These approaches include: (a) adopting “innocent infringement” as a new defense to copyright infringement; (b) adding an intent requirement as an element of the direct infringement action; (c) giving an administrative agency the power to exempt certain infringements from copyright liability; and (d) enacting specific legislative exemptions from liability for certain classes of online conduct. The conclusion summarizes arguments for and against strict liability in the copyright context and identifies issues for future consideration by legislatures and the courts.

I. STRICT LIABILITY IN COPYRIGHT LAW

A. *Theoretical Justifications for Strict Liability*

Judges and scholars have employed various theoretical justifications to explain why copyright infringement attracts strict liability. Strict liability is often premised on equating a copyright with a personal property right.¹⁰ While some uncertainty has existed in American copyright law as to the proprietary status of copyrights,¹¹ many other jurisdictions are more willing to expressly extend a personal property label to copyrights.¹² The property classification plays into strict liability in two distinct but related ways. First, where

7. See discussion of automatic, non-volitional copying *infra* Part II.B.

8. See Ned Snow, *Copytraps*, 84 IND. L.J. 285, 286 (2009) (“Strict punishment of copying makes no sense in a world where copying is the architecture of being.”).

9. See discussion of definition of “innocent infringer” *infra* Part I.B.

10. See, e.g., Sinclair, *supra* note 1, at 945 (“The concept of absolute liability for infringement appears to have stemmed from the early view that no property was more emphatically a man’s own than his literary works, and that therefore they must be afforded legal protection to the same extent as his real or personal property.”).

11. See, e.g., Dane Ciolino & Erin Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 365–70 (2002); Adam Mossoff, *Is Copyright Property?* 42 SAN DIEGO L. REV. 29 (2005).

12. See, e.g., *Copyright Act 1968* (Cth) s 196 (Austl.) (“Copyright is personal property and . . . is transmissible by assignment, by will, and by devolution by operation of law.”); Copyright, Designs, and Patents Act, 1988, c. 5, § 90(1) (U.K.) (“Copyright is transmissible by assignment, by testamentary disposition, or by operation of law as personal or moveable property.”).

the property in question is subject to a registration system—such as the U.S. copyright system—the defendant is arguably given notice of the property right, so the burden falls on her to avoid infringing the right.¹³ Second, strict liability has generally attached to interference with a property holder's enjoyment of her property—for example, through conversion or trespass—because “the injury to a property interest is worthy of redress, regardless of the innocence of the defendant.”¹⁴

Commentators have also raised an economic “loss avoidance,” or administrative efficiency argument to justify strict liability in the copyright infringement context,¹⁵ reasoning that as between the plaintiff and the defendant, the latter can best avoid the loss.¹⁶ Some commentators have even suggested that a defendant accused of unconscious copying is better placed to avoid the infringement than the copyright holder,¹⁷ arguing that the defendant could “avoid such copying at fairly low cost, with just a bit more vigilance.”¹⁸ Proponents of this theory suggest that “as between [copyright] owners and infringers, it is more efficient for infringers to bear the costs of infringement.”¹⁹ Infringers can exercise heightened due diligence as to copyright ownership and may be able to insure against liability.²⁰

Strict liability in copyright may also be necessary to circumvent the inherent difficulty of establishing a defendant's

13. See *Haas v. Leo Feist, Inc.*, 234 F. 105, 107 (S.D.N.Y. 1916) (“When, as in copyright, the law provides a form of notice, it imposes upon every one at his peril the duty to learn the facts conveyed by the notice.”). But note that modern day copyright laws, including American law, no longer require strict systems of registration and notice. See Ciolino & Donelon, *supra* note 11, at 354 (“[E]arly copyright laws, unlike modern American copyright law, provided significant safeguards for innocent infringers through strict systems of recordation and notice.”).

14. NIMMER & NIMMER, *supra* note 2.

15. See, e.g., Ciolino & Donelon, *supra* note 11, at 376–88.

16. Ciolino & Donelon, *supra* note 11, at 354 (“Scholars have contended that strict liability is necessary because an infringer is best able to ‘avoid the loss’ of infringement, and that strict liability somehow fosters administrative efficiency.”); Sinclair, *supra* note 1, at 952 (“[T]he argument is advanced on several levels that of the two innocent parties, infringer and damaged proprietor, the infringer is usually in a better position to protect against the chance of infringement.”).

17. Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1029 (1990) (commenting on PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* (1989)).

18. *Id.*

19. Ciolino & Donelon, *supra* note 11, at 376 (citing EATON DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES*, 403 (1972)); NIMMER & NIMMER, *supra* note 2 (“[A]s between two innocent parties (*i.e.*, the copyright owner and the innocent infringer) it is the latter who should suffer because he, unlike the copyright owner, either has an opportunity to guard against the infringement by diligent inquiry, or at least the ability to guard against liability for infringement by an indemnity agreement from his supplier or by an ‘errors and omissions’ insurance policy.”).

20. See *id.* at 376–77.

culpable state of mind.²¹ In particular, if a defendant decides to lie about her state of mind, it may be difficult, if not impossible, for the copyright owner to disprove the defendant's claim.²²

The "enterprise liability" theory is another basis for a strict liability in copyright, limited to cases in which a copyright owner suffers an actual loss²³: "Since the copyright proprietor is himself an innocent party, purely as a matter of justice it seems that he should not be made to bear the damage caused by another party."²⁴ This approach is premised on the idea that the infringer should bear the costs of the loss when she has introduced the risk into the community and, in so doing, has caused harm to others.²⁵

In a related argument, some commentators have theorized that a restitution or unjust enrichment approach to copyright infringement might support strict liability. Professor Wendy Gordon, who has written extensively on the notion of unjust enrichment in intellectual property, describes unjust enrichment policy:

The central goal of restitution is to prevent "the unjust enrichment of one person at the expense of another." Thus restitution usually is available only where a defendant has been enriched unjustly and at the plaintiff's expense. To fulfill the latter requirement, a restitution plaintiff usually must show either some loss to herself or the violation of some "legally protected interest."²⁶

As with the enterprise liability explanation of strict liability, the unjust enrichment theory requires harm to the plaintiff, which

21. Sinclair, *supra* note 1, at 950 ("[I]t is sometimes suggested that innocence is easy for the defendant to allege and difficult for the plaintiff to disprove."); Snow, *supra* note 8, at 299 ("In real space, strict liability is warranted because circumstances giving rise to a reasonable mistake of fact about whether copying is permissible can be difficult to disprove. The difficulty of proof arises because in real space only exceptional circumstances could lead a person to mistakenly believe that copying is authorized. An oft-cited example is subconscious copying: an infringer might forget that she has seen a copyrighted image and then subconsciously copy the image when creating a new work. Disproving a false allegation that her infringement results from subconscious copying would be pragmatically impossible, for only the infringer knows her consciousness.").

22. Gordon, *supra* note 17, at 1028 (noting that the idea of an "unconscious copying" excuse or defense to a copyright infringement "might encourage a deliberate copyist simply to lie about his state of mind"). Furthermore, "a plea of innocence in a copyright action may often be easy to claim and difficult to disprove." BRUCE A. LEHMAN, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 120 (1995).

23. See Sinclair, *supra* note 1, at 954. ("This justification for imposing liability is a simple enterprise liability argument: since the infringer introduces the risk into the community, he should be made to bear the loss when accidental harm occurs to others as a result of his activities.").

24. *Id.* at 953.

25. *Id.* at 954. ("[S]ince the infringer introduces the risk into the community, he should be made to bear the loss when accidental harm to others occurs as a result of his activities.").

26. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 196-97 (1992) (footnotes omitted).

may be difficult to establish in practice.²⁷ As Professor Gordon notes, it is often extremely difficult in an intellectual property case to establish whether a plaintiff intellectual property producer would have made the product available to the defendant without charging a fee.²⁸ In the absence of this knowledge, it is often difficult to know whether or not the defendant's activities were at the plaintiff's expense.²⁹ Like the enterprise liability approach, an unjust enrichment theory might only justify the imposition of strict liability in cases where it is possible to prove enrichment to the defendant at the plaintiff's expense.³⁰ In practice, these cases may be few and far between.

Finally, one might argue that strict liability deters future infringements. However, this argument is not particularly strong. As one commentator has noted, where innocent infringers are concerned, "[t]he assertion that someone who has no reason to know that he is violating another's rights will be deterred from doing so by strict liability needs only to be fully formulated to be seen as a fallacy."³¹

B. Strict Liability and the Innocent Infringer

A number of commentators have critiqued the strict liability doctrine in copyright law, particularly with respect to "innocent infringers."³² The term "innocent infringer" can refer to a number of distinct classes of defendants. Several commentators have attempted to create a general definition of the term. The salient underlying theme in most of these definitions is a defendant who infringes a

27. *Id.* at 184. ("Some have argued that the availability of restitution for unrequested services should depend, at least in part, on whether the defendant would have agreed to pay for the services had the parties been able to bargain in advance, and it is not clear that intellectual property producers often could make such a showing when they demand payment from persons who copy their databases, designs, or inventions.")

28. *Id.*

29. *Id.* ("In the real world, it may be impossible to know whether a given work or a given use would have been sold with a royalty promise attached."); *see also* Sinclair, *supra* note 1, at 984 (noting that fear of unjust enrichment is not an appropriate basis for imposing strict liability on copyright infringers).

30. Gordon, *supra* note 26, at 184.

31. Sinclair, *supra* note 1, at 984.

32. For a discussion of innocent infringers in the copyright context, see LEAFFER, *supra* note 1, at 539 (discussing relevance of "innocent intent" in American copyright law); NIMMER & NIMMER, *supra* note 2, § 13.08 (discussing the lack of an "innocent intent" defense in American copyright law); Gordon, *supra* note 17, at 1028-32; *Innocent Participants in Copyright Infringement*, 8 FORDHAM L. REV. 400 (1939); Alan Lautman & William S. Tager, *Liability of Innocent Infringers of Copyrights*, reprinted in 2 COPYRIGHT SOCIETY OF THE U.S.A., STUDIES ON COPYRIGHT (1963); Sinclair, *supra* note 1; (discussing the imposition of strict liability in cases of subconscious copying).

copyright without intending to do so and without having a reason to suspect that she is doing so.³³

The main classes of cases in which “innocent infringement” may arise in practice can be summarized as follows. 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.³⁴ 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.³⁵ 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.³⁶

For example, a defendant may believe she is making a legitimate fair use of the copyrighted work.³⁷ While the fair use defense was historically developed at common law, it was codified in American copyright legislation in 1976.³⁸ The problem with this defense in practice has been that, even since its codification, its boundaries are notoriously difficult to establish *ex ante*.³⁹ The fair use

33. See Lautman & Tager, *supra* note 32, at 155 (“A possible general definition of the innocent infringer is one who invades the rights of the copyright owner without intending to do so and without having reason to suspect that he is doing so. The basis for the innocent infringer’s ignorance will vary according to the factual situation. The consequences attached to his innocence will similarly vary.”); Sinclair, *supra* note 1, at 949 (“The sort of innocent infringement which is dealt with here . . . will be that of the actor who violates the rights of the copyright holder without intending to do so and without having any reason to suspect that he is doing so.”).

34. NIMMER & NIMMER, *supra* note 2 (describing “unconscious copying” as a situation “where the defendant’s expression is copied from the plaintiff, but the defendant, in good faith, has forgotten that this is the source upon which he is drawing”); Gordon, *supra* note 17, at 1028 (describing the “subconscious copying rule” as involving situations where liability is imposed on “a second author or artist who was unaware he was copying from another’s copyrighted work.”).

35. LEAFFER, *supra* note 1, at 539 (noting that strict liability will apply even in situations where a defendant “has relied on a putative author’s misrepresentations about the originality of work.”); NIMMER & NIMMER, *supra* note 2 (“Then there is the situation wherein the defendant’s work is based upon a work furnished by a third party. The defendant’s ignorance that such third party has wrongfully copied from the plaintiff will not immunize him from liability.”).

36. LEAFFER, *supra* note 1, at 539 (noting that the strict liability approach to copyright infringement “is particularly harsh when applied against a person who reasonably believes that the copyrighted work is in the public domain”); NIMMER & NIMMER, *supra* note 2 (“[T]he defendant may consciously and intentionally copy from the plaintiff’s work, believing in good faith that his conduct does not constitute an infringement of copyright.”).

37. See 17 U.S.C. § 107 (2006) (describing fair use).

38. *Id.*

39. See LEAFFER, *supra* note 1, at 494 (“Practical application of § 107’s four factors has not led to predictable results. In a given case, one may find majority and dissenting opinions disagreeing completely on the application of each factor. This is hardly surprising. The factors

defense is intended to operate as a flexible rule of reason that caters to changing circumstances over time.⁴⁰ Thus, even though the Copyright Act completely excuses a fair user from infringement liability,⁴¹ it is virtually impossible in many cases for a potential defendant to know, prior to defending an infringement action, whether or not her use is, in fact, properly characterized as a fair use. Even if the defendant honestly believes she is making a fair use of a work, she will not be excused from liability unless she can establish the defense in litigation. There is no *ex ante* mechanism for establishing fair use.⁴²

None of the categories of innocent infringement will immunize a defendant from liability for copyright infringement.⁴³ However, the innocence of the defendant may affect the remedies available to the plaintiff.⁴⁴ For completeness, it is also worth noting that American copyright legislation does excuse an innocent defendant in some limited circumstances, such as where the defendant has relied in good faith on an error in the name of the copyright holder or an omission of a copyright notice on copies of works publicly distributed before the implementation of the Berne Convention.⁴⁵ The statutory provision establishing the defense in cases of reliance on an error in the copyright holder's name attached to a copyright notice grants complete immunity for copyright liability.⁴⁶ For reliance on the omission of a

are broadly stated, overlapping, and vague, and the legislative history provides little insight as to their meaning, what weight to give them, or how they interrelate.”).

40. *Id.* at 494 (“According to the legislative history, the four [fair use] factors represent a codification of fair use. One might ask why Congress would wish to codify the common law of fair use, with all its disarray and its questionable applicability to a world of new technologies and nonprint media. The goal was not merely to incorporate the past, but also to allow for a flexible and dynamic future.”).

41. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright. . . .”).

42. LEAFFER, *supra* note 1, at 494 (“Practical application of § 107’s four factors has not led to predictable results.”).

43. *Id.* at 539 (“In general, infringement with innocent intent is *not* a defense to a finding of liability.”); NIMMER & NIMMER, *supra* note 2 (“In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.”).

44. NIMMER & NIMMER, *supra* note 2 (noting that the innocence of the defendant “may . . . bear upon the remedies available against such a defendant.”).

45. See 17 U.S.C. §§ 405(b), 406(a) (describing exceptions to liability for “innocent offenders” whose infringing acts involve works publicly distributed by the authorized copyright holder before the implementation of the Berne Convention).

46. *Id.* § 406(a); see also LEAFFER, *supra* note 1, at 539 (“The one exception to the general [strict liability] rule is found in § 406(a), which provides a complete defense to copyright infringement to the person who has relied in good faith on an error in name on the notice of certain copies or phonorecords publicly distributed before the Berne Convention Implementation Act.”).

copyright notice, the provision immunizes the defendant only for actual or statutory damages.⁴⁷

C. Critiquing Strict Liability

While many use property analogies to justify strict liability in copyright law,⁴⁸ the extension of strict liability concepts from physical property laws may not suit the realities of copyright. There is no clear consensus that copyright should be viewed as property in the same sense as realty or personalty.⁴⁹ The confusion about whether intellectual products should be granted a property label derives from the tendency of courts to equate the concept of “value” with the concept of “property.”⁵⁰ If “value equals property,” then, as Professor Gordon argues, there are effectively “no usable limits” inherent in the property concept.⁵¹

Even if it is correct to equate copyright with physical property as a theoretical matter, imposing strict liability for copyright infringement is arguably misplaced. Some commentators have pointed out that real property systems have become more accommodating to innocent infringers than copyright law.⁵² Thus, the application of strict liability in the copyright context no longer makes sense compared to the leniency now built into, for example, real property trespass.⁵³

47. 17 U.S.C. § 405(b); *see also* LEAFFER, *supra* note 1, at 539 (“In one situation, the Copyright Act moderates the harshness of the ‘no innocent defense’ rule. Section 405(b) of the Act provides that an innocent infringer who can show that it was misled by the omission of a notice on copies publicly distributed before the effective date of the Berne Convention Implementation Act (March 1, 1989) will not be liable for actual or statutory damages.”).

48. *See* Sinclair, *supra* note 1, at 950 (citing MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 148 (1970) (“[I]t is said that innocence ‘should no more constitute a defense in an infringement action, whether statutory or common law, than in the case of conversion of tangible personalty.’”).

49. *See* Ciolino & Donelon, *supra* note 11, at 354 (“[C]opyright law, its entitlement, and its subject matter differ significantly from traditional property law, its entitlement, and its subject matter.”); Sinclair, *supra* note 1, at 950 (“It is not at all clear that copyrights should be viewed as property in the sense in which conversion would be an applicable concept.”).

50. Gordon, *supra* note 26, at 179–80 (discussing cases in which conclusions have been drawn that an intangible product is appropriately classified as “property” because of its commercial “value”).

51. *Id.* at 180. (“[T]he perception that ‘value is property’ likely will not yield any usable limits.”).

52. *See, e.g.,* Ciolino & Donelon, *supra* note 11, at 354 (“[C]opyright infringement is frequently analogized to ‘trespass to realty.’ Although the simplicity of this analogy is appealing, it is deeply flawed. Modern laws governing tangible property are far more accommodating and forgiving of its innocent trespassers than copyright law is of its own.”).

53. *See id.* at 369 (“To the extent that tangible property law is sufficiently similar to copyright law to justify similar legal treatment, then the law should treat the two similarly. However, with regard to culpability, it does not. Copyright law is neither as accommodating nor

Further, if the most persuasive arguments for strict liability are premised on compensating an author for diminution of the value of her property, under the enterprise liability and unjust enrichment rationales, this reasoning may be faulty.⁵⁴ The differences between physical property and intellectual property suggest that just because a strict liability approach may be available in one case, it is not necessarily apposite in the case of valuable intangible property.⁵⁵

It is much easier in the case of rivalrous⁵⁶ physical property for the owner to establish clear rights: The fact that real property is fenced in or developed suggests a property right.⁵⁷ The fact that personalty is usually situated in the possession of a given actor also suggests ownership.⁵⁸ In contrast, not all copyrighted works even contain copyright notices or license terms,⁵⁹ so it is often difficult for a

as forgiving of the innocent and ignorant as is traditional property law. Although ‘innocence is no defense’ to the trespass of copyright infringement, innocence is frequently a mitigating factor or a complete defense to trespass, conversion and other laws affecting tangible property.”).

54. Sinclair, *supra* note 1, at 984. (“The goal of compensating the author for diminution of the value of his property is the only serious reason for refusal to fully exempt innocent infringers. . . . The assertion that someone who has no reason to know that he is violating another’s rights will be deterred from doing so by strict liability needs only to be fully formulated to be seen as a fallacy.”).

55. *Id.*

56. See Lawrence Solum, *Questioning Cultural Commons*, 95 CORNELL L. REV. 817, 822 (2010) (“‘Rivalrousness’ is a property of the consumption of a good. Consumption of a good is rivalrous if consumption by one individual X diminished the opportunity of other individuals, Y, Z, etc., to consume the good. Some goods are rivalrous because they are ‘used up.’ If I drink a glass of Heitz Martha’s Vineyard, then you cannot drink that same glass of wine. If I set off a firecracker, you cannot set off the same firecracker. Other goods are rivalrous because of crowding effects. If I am using the free Internet terminal at the student lounge, then you cannot use the same time slice of the terminal—because only one person can sit in front of the screen at the same time.”).

57. Ciolino & Donelon, *supra* note 11, at 374. (“[T]he copyright-as-property analogy is flawed because copyright law, unlike tangible property law, suffers from a severe lack of demarcation. Boundaries establishing the limits of property rights provide advance notice when an act will give rise to rights and obligations established by property law. For example, ‘fences,’ ‘property lines,’ and title records clearly define the boundaries of traditional property. Because of the importance of boundaries, rights affecting tangible property, such as liability for criminal trespass of tangible property and acquisition of property through adverse possession, have historically hinged on the posting of boundaries or on ‘open and notorious’ possession. Unfortunately, works of authorship bear no similar delimiting markings, boundaries or other demarcation.”).

58. Carole Brown & Serena Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 584 (2010). (“Over time, possession grew to be very connected to ownership and legal rules developed to protect the interests of possessors against interference from strangers and even out-of-possession owners. Roman law recognized that a possessor, one without dominion, which again, was the equivalent of ownership, could acquire dominion (legal ownership) based upon possession for a sufficiently long time.”).

59. LEAFFER, *supra* note 1, at 143 (noting that with the passing of the Berne Convention Implementation Act in 1988, notice is no longer required on copyright works in the United States).

potential defendant to establish ownership or the terms on which the owner would allow copying without compensation.

As tangible property exists in only one place at one time, its misappropriation fairly obviously results in a loss to its owner. However, copyrights are nonrivalrous and can exist in multiple places at one time.⁶⁰ The making of a copy of a protected work by a defendant may or may not impact the copyright holder in any significant way.⁶¹ Thus, the loss-benefit equation that can generally be assumed in cases of interference with a physical property right will often not apply to copyright infringement.⁶²

The tendency to equate physical property with copyright in the strict liability context may arise from the existence of registration-and-notice schemes in both physical property and some copyright regimes.⁶³ Prior to implementing the requirements of the Berne Convention,⁶⁴ the American copyright system relied heavily on notice.⁶⁵ Even modern American copyright law maintains a copyright register, unlike most other jurisdictions.⁶⁶ A brief survey of early

60. Ciolino & Donelon, *supra* note 11, at 371–72. (“[T]he copyright-as-property analogy is flawed because the things protected by each body of law are dissimilar. Unlike most tangible property, copyrighted works of authorship are ‘public goods’ which are both ‘nonexcludable’ and ‘inexhaustible.’ As nonexcludable public goods, copyrights can be enjoyed by a ‘second user’ at little or no additional cost. As inexhaustible public goods, copyrights can be used— and reused— with virtually no diminution in value to either the author or the potential user.”).

61. *Id.*

62. *Id.* at 372 (“Because copyrighted works are nonexcludable and inexhaustible public goods, the property rights in works of authorship created by copyright law are significantly weaker than the rights in tangible property. For example, unlike tangible property law, copyright law sometimes permits the public to use copyrighted works for free or upon the payment of a statutory royalty. Because another’s use of a nonexcludable work of authorship does not prevent the owner from simultaneously using it, copyright law should, and does, treat intentional takers less harshly than tangible property law treats its unwanted interlopers.”).

63. *Id.* at 359–60 (“[The Statute of Anne, 1710, Eng.] contained stringent registration and notice requirements intended to protect the innocent from liability. Penalties for infringement were expressly conditioned on the pre-publication registration of the title of the copyrighted work in the registry of the Stationers’ Company. This registry of works was designed to be easily accessible and available for inspection, without ‘fee or charge,’ by any ‘bookseller, printer, or other person,’ at all ‘seasonable and convenient times.’ Subsequent British legislation required that notice of registration appear on every copyrighted work. And, as further protection of the ‘ignorant’ infringer, assignments of copyrights were likewise subject to these strict recordation requirements.”).

64. Berne Convention for the Protection of Literary and Artistic Works July 24, 1971, 102 Stat. 2853, 943 U.N.T.S. 178.

65. LEAFFER, *supra* note 1, at 285 (“Under the 1909 Act, federal statutory copyright began not on registration but when the work was published with proper notice. Section 13 of the 1909 Act provided that once a work was copyrighted by publication with notice, ‘there shall be promptly deposited’ the required copies and the claim for registration.”).

66. 17 U.S.C. § 409 (2006) (setting out registration formalities under United States copyright legislation); LEAFFER, *supra* note 1, at 271 (“Copyright registration (and the important role it plays) is a unique feature of American law. The act of registration does not create a

American copyright cases suggests that the notice-and-registration system was a major factor in decisions supporting the strict liability approach to infringement.⁶⁷ Thus, whether a copyright is appropriately labeled as a property right may be less significant to the strict liability question than the fact that, like many real property systems, the American copyright system has traditionally provided express notice of rights to third parties.

Nevertheless, it seems that registration and notice are a questionable basis for justifying strict liability in the copyright system. For one thing, most jurisdictions do not have a copyright registration system.⁶⁸ Thus, even if registration and notice could explain the historical basis of strict liability in the United States, it fails to justify strict liability at a more global level. Additionally, since the United States implemented the Berne Convention, a copyright owner can assert her rights without registration or notice,⁶⁹ although failure to register will significantly curtail the available remedies.⁷⁰

Apart from the difficulty of analogizing copyrighted works and physical property, there are other reasons to question the strict liability doctrine in modern copyright law. The argument that the innocent infringer is better able than the copyright holder to avoid the loss may well be fallacious. Copyright law is vague and complex.⁷¹ Many innocent infringers, particularly those who believe, perhaps erroneously, that they are making a legitimate fair use of a work,⁷² or

copyright; copyright begins when an author fixes his work in a tangible medium of expression. Registration, however, can be critically important to the copyright owner because it can preserve copyright, and for works that originated in the United States, it is a prerequisite for bringing an infringement suit.”).

67. See *Haas v. Leo Feist, Inc.*, 234 F. 105, 107 (S.D.N.Y. 1916) (“When, as in copyright, the law provides a form of notice, it imposes upon every one [sic] at his peril the duty to learn the facts conveyed by the notice.”); *Stern v. Jerome H. Remick & Co.*, 175 F. 282, 282–83 (C.C.S.D.N.Y. 1910) (“It is not necessary that the defendant should have intended to violate the copyright of the plaintiff. He had means of knowledge from the copyright office that the song had been in fact copyrighted; and he, like anyone else, took his chances when he published the song without any inquiry.”).

68. 2 MELVILLE B. NIMMER & DAVID NIMER, *NIMMER ON COPYRIGHT* § 7.01[A] (Matthew Bender, ed., 2010) (noting that the United States has been unique in maintaining a copyright registration system).

69. *Ciolino & Donelon*, *supra* note 11, at 375 (“[C]opyright law no longer mandates notice and registration. The elimination of these requirements . . . has rendered current copyright law a fenceless barren.”).

70. NIMMER & NIMMER, *supra* note 2 (noting that the innocence of the defendant “may . . . bear upon the remedies available against such a defendant.”).

71. *Ciolino & Donelon*, *supra* note 11, at 381–82 (“[C]opyright law is exceedingly complex and fraught with inconsistency and ambiguity.”).

72. *Id.* at 413 (noting that an innocent infringer may mistakenly believe she is making a fair use of the copyright work).

who are not aware that they are borrowing from a protected work,⁷³ may find it very difficult to avoid infringement.⁷⁴

Similarly, economic efficiency justifications for strict liability in copyright may not withstand close scrutiny. It is unclear in practice that it is more economically efficient for innocent infringers to bear the costs of infringement.⁷⁵ The argument in favor of strict liability relies on the fact that the infringer might take measures to avoid infringement such as investigating whether a work is copyrighted, or taking out indemnity insurance.⁷⁶ This approach borrows significantly from tort law, where certain torts warrant strict liability because the tortfeasor is the cheapest cost-avoider of particular accidents and injuries.⁷⁷

However, it is questionable whether the same logic applies in the context of innocent copyright infringers. Many cases of innocent infringement involve defendants who had no means of knowing about the copyright infringement.⁷⁸ Unlike large-scale commercial manufacturers and distributors of potentially dangerous products in tort law, many copyright infringers are small-scale creators with little or no knowledge of the intricacies of copyright law.⁷⁹ While tort law mitigates the harshness of strict liability by limiting its application to

73. *Id.* at 354 (“Innocent infringers, often unaware of the vagaries of copyright law or unaware that they are borrowing from copyrighted sources, are often incapable of avoiding the loss of infringement.”); *id.* at 382–84 (“[An infringer] may reasonable be deceived by false claims of ownership from another and be held liable for copyright infringement. She may assume that she is using public domain material, either because it was once copyrighted but has since lost its protection, or because the material consist of any one of many non-copyrightable categories of expression such as facts, ideas, utilitarian function, or scenes à faire.”).

74. *Id.* at 354, 382–84.

75. *Id.* at 376 (“Commentators viewing strict liability in copyright from a law-and-economics perspective have argued that strict liability is appropriate under ‘loss avoidance’ theory. Analogous to the ‘cheapest cost avoider’ principle in tort law, loss avoidance theory justifies strict liability on the basis that as between owners and infringers, it is more efficient for infringers to bear the costs of infringement.”).

76. *Id.* at 376–77 (“Under [the economic efficiency or loss avoidance theory], strict liability is warranted because potential infringers are better able to avert infringement by, for example, taking precautionary measures such as inquiring into whether the work in question is copyrighted, or, by obtaining insurance for indemnity in the case of innocent infringement.”).

77. *Id.* at 377–78 (“Scholars . . . have long advocated holding manufacturers of products liable without fault because they are presumably the ‘cheapest . . . cost avoiders’ of accidents and injuries. According to this theory, injurers are appropriately held strictly liable because they were in ‘the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.’” (quoting Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972))).

78. *Id.* at 378 (“Perhaps the most obvious and fundamental flaw in the loss avoidance justification [for strict liability in copyright law] stems from the very ignorance or innocence of some infringers. As a practical matter, an innocent infringer is incapable of avoiding infringement of which she is entirely unaware.”).

79. *Id.*

particularly dangerous activities, copyright law does not similarly limit the application of strict liability.⁸⁰

The strict liability rule affects particularly harsh results in the case of unconscious or subconscious copying, in which the defendant has forgotten that she is drawing on the plaintiff's work.⁸¹ To impose strict liability in these cases on the basis of an economic efficiency rationale effectively asks the impossible: "that in the midst of the 'creative process' an author can successfully distill from his subconscious that portion of his work that is derived from other works from that which is truly 'original.'"⁸² Professor Gordon has expressed particular reservations about the subconscious copying doctrine based on the nature of the creative process:

One's opinion of the subconscious copying rule may depend on one's view of the creative process. I find it hard to imagine that subconscious copying only occurs through carelessness, or that it can be avoided at minimal cost. Under what one might call an "influence" view of creativity, subconscious copying occurs constantly, and usually bears valuable fruit.⁸³

She further notes that strict liability raises particular problems in the subconscious copying context; specifically, the available remedies for infringement.⁸⁴ If an innocent infringer were merely required to pay a statutory royalty to the copyright holder, this would perhaps not be such a problem.⁸⁵ However, under the "derivative works" right, the innocent infringer is prevented from asserting copyright in her own

80. *Id.* at 379 ("Tort law mitigates the harshness of [strict liability] by holding actors strictly liable for damages only when they engage in certain limited categories of activities—typically 'ultra-hazardous' or 'unreasonably dangerous' activities such as ownership of wild animals, the use of explosives, or the manufacture of products such as prescription drugs. Presumably, to avoid strict liability in tort individuals can simply avoid these types of activities. In contrast, copyright law does not similarly limit the sweep of strict liability. On the contrary, copyright's broad strict liability regime ensnares those engaged in otherwise reasonable and socially desirable activity—the creation of works of authorship.")

81. NIMMER & NIMMER, *supra* note 2 (describing "unconscious copying" as a situation "where the defendant's expression is copied from the plaintiff, but the defendant, in good faith, has forgotten that this is the source upon which he is drawing."); Ciolino & Donelson, *supra* note 11, at 379 ("Unconscious infringement is often the unfortunate result of the defendant's 'memory playing him a trick,' causing him to forget that the plaintiff's work is actually 'the source upon which he is drawing.'")

82. Ciolino & Donelson, *supra* note 11, at 379–80.

83. Gordon, *supra* note 17, at 1030.

84. *Id.* at 1029 ("[T]he subconscious copying rule may operate unfairly. The person who accidentally and in good faith replicates something heard or seen earlier is surprised by the copyright owner's claim. Were the penalty merely a requirement that the new creator pay the prior creator some fee for use, a finding of liability might cause little if any harm. Under copyright law, however, the unconscious copyist is penalized much further. He has no copyright in what he has produced if the proper work was used 'unlawfully' and pervasively, and his aggrieved predecessor may obtain an injunction against the new project, blocking not only the dissemination of copied elements, but any newly-created ones that are intermixed, as well.")

85. *Id.*

creation.⁸⁶ She may also be blocked by injunction from disseminating her own new work.⁸⁷

The problems with economic efficiency justifications for strict liability are compounded by the fact that notice and registration are no longer technically required formalities under American copyright law.⁸⁸ This impacts the loss avoidance equation. In a system where registration is anticipated and copyright notices are expected to be affixed to protected works, it is much easier to argue that a defendant is in a better position to avoid a given loss. Of course, this rationale may still cause problems in the unconscious copying context, but at least in the presence of a notice-and-registration system, potential defendants may be more likely to see and recall copyright notices on their sources. Additionally, in the absence of registration and notice requirements, defendants may be more likely to assume that a work that has no copyright notice lies in the public domain.⁸⁹

The administrative efficiency rationale for strict liability in copyright law has also been criticized. The idea behind this justification for strict liability is that “innocence in a copyright action may often be easy to claim and difficult to disprove.”⁹⁰ Thus, the argument goes, in the absence of strict liability, plaintiffs would face the unpalatable situation of infringement actions that involve costly and drawn-out conflicts to prove the state of mind of the infringer.⁹¹

Nevertheless, the increased amount of litigation arising as a result of the imposition of strict liability may eclipse the gains to individual plaintiffs as a result of maintaining the rule.⁹² The

86. *Id.*; see also 17 U.S.C. § 103(a) (2006) (“The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); LEAFFER, *supra* note 1, at 65–66 (“A derivative work copyright can only be obtained when the author legally used the material on which the derivative work was based.”).

87. Gordon, *supra* note 17, at 1029.

88. Ciolino & Donelon, *supra* note 11, at 384 (“[T]he inconsistency inherent in a loss avoidance rationale [for strict liability] is compounded by the elimination of the notice and registration requirements in modern copyright law.”).

89. *Id.* at 384–85 (“[I]n light of the fact that many copyright owners fail to affix notice to their works— much less register them— the recent relaxation of statutory formalities adds to the uncertainty of copyright law and serves to confound the potential infringer, who, unfamiliar with the intricacies of copyright law, may naively assume that because her sources lack notice and are not registered, they are in the public domain.”).

90. NIMMER & NIMMER, *supra* note 2.

91. Ciolino & Donelon, *supra* note 11, at 385–86 (“Proponents of [the administrative efficiency] justification argue that absent a strict liability framework all copyright infringement actions will devolve into expensive and time-consuming battles of proof centered on discerning the thoughts and motives of the alleged infringer.”).

92. *Id.* at 388 (“Because establishing the culpability of an infringer can sometimes be a costly and time-consuming endeavor, eliminating culpability-related issues from copyright cases may serve to reduce the costs associated with resolving individual disputes. In so doing, however,

availability of strict liability arguably encourages more plaintiffs to bring copyright infringement actions, as the strict liability rule appears on its face to make the outcome of the case more predictable for the plaintiff. Nevertheless, copyright cases tend to be long and involved, often requiring experts to opine on difficult questions of fact.⁹³ Thus, while strict liability arguably produces efficiency gains in individual cases, it may also increase the costs of the copyright system overall by increasing the caseload in an area where cases tend to be lengthy and costly.

The strict liability approach to copyright law has also been criticized for chilling expression and innovation,⁹⁴ contrary to the goals of copyright law.⁹⁵ While copyright is intended to foster creativity,⁹⁶ a strict liability approach can chill downstream creativity.⁹⁷ Creativity must be regarded on a continuum, because each new work builds to some extent on preexisting works.⁹⁸ Concerns about the chilling

strict liability may increase overall costs by markedly increasing the total volume of copyright infringement claims.”); *id.* at 390 (“[A]lthough strict liability may offer administrative cost savings on a case-by-case basis, any savings in this regard are likely offset or overtaken by the added costs of administering an increased number of claims.”).

93. *Id.* at 390–91 (“[C]opyright cases are exceedingly complicated, often protracted, and invariably expensive. The reasons for these high costs are manifold. Copyright law is considered a ‘specialty’ among large law firms, with top ‘intellectual property’ lawyers commanding steep hourly rates. Expert witnesses are routinely employed by both plaintiffs and defendants, often at great expense. Copyright infringement suits, like all lawsuits, are arduous, emotional ordeals for both plaintiff and defendant. Strict liability, although heralded for its ‘ease’ and efficiency, has done little to allay these problems or to streamline this process for effective adjudication.”).

94. *Id.* at 413 (“Strict liability overdeters lawful and beneficial uses of copyright works.”); *id.* at 419 (“Indeed, potential authors, wary of the draconian penalties facing even the most innocent infringers, likely refrain both from using other works and from creating new works, thereby reducing the demand for existing copyrighted works and the volume of original works created.”).

95. *Id.* at 410–11 (“Strict liability not only lacks a sound justification in copyright, it affirmatively harms copyright’s fundamental utilitarian goal. Copyright protection, according to the Constitution, exists ‘to promote the Progress of Science [and the Useful Arts].’ Legislation enacted pursuant to the Copyright Clause is simply a ‘means by which an important public purpose’—the production of new works of authorship—is furthered Although performing an indispensable market-creation function, [copyright law’s] exclusive rights tug against the overarching goal of public-access.”); *id.* at 418–19 (“[S]trict liability is affirmatively harmful to copyright’s utilitarian goals. Copyright exists to create a ‘thriving culture’ that produces ‘as many original works available as possible.’ But strict liability, particularly when coupled with copyright’s supercompensatory remedies, severely impedes this utilitarian purpose by inhibiting the artistic creation that copyright law seeks to foster.”).

96. *Id.* at 410.

97. *Id.*

98. Gordon, *supra* note 17, at 1030–31 (“With the past at the center of their work, many artists could not function if a catalogue of that past, and lawyer-like attention to whether things borrowed are ‘idea’ or ‘expression,’ become prerequisites for publication. As Benjamin Kaplan has suggested, the romantic notion of independent creativity is fairly new, but has had an unfortunately strong impact on copyright; the classical approach to art understood and honored (albeit overmuch) the role the past plays in the new.”).

impact of strict liability in copyright take on particular significance in cyberspace.⁹⁹ As so many people globally participate in the online “cut and paste” culture,¹⁰⁰ a strict liability approach to infringement can be problematic to the development of this international communications tool. As noted by Professor Ned Snow:

Strict liability punishment of innocent downloaders impedes a free marketplace of ideas. The Internet has been viewed as the most participatory marketplace of ideas ever experienced. It represents a means for inexpensively sharing ideas with the entire world—the vehicle of cheap speech. Strict liability’s potential deterrence of downloading, then, represents a deterrence of marketplace participation.¹⁰¹

As modern communications technologies allow our society to interact more globally and be creative in myriad new ways,¹⁰² the potential chilling effects of strict liability in copyright law become particularly troubling.

Finally, it is not clear why courts and commentators have historically felt that imposing a *mens rea* requirement on the direct infringement action would be so problematic. Of course it is often difficult to gauge a defendant’s state of mind at a given moment in time, and defendants can always lie about their motives for borrowing from the work of others.¹⁰³ However, it is not immediately obvious why these risks are more problematic in the direct infringement context than in other aspects of infringement such as contributory liability, which does maintain an intent requirement,¹⁰⁴ or the fair use defense, where courts sometimes subjectively or objectively consider the good faith or bad faith of the defendant.¹⁰⁵ Given that the *mens*

99. See discussion *infra* Part II.

100. Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 864 (2008) (describing the significance of user-generated content online and the new “cut and paste” culture).

101. Snow, *supra* note 8, at 311.

102. See generally Hetcher, *supra* note 100 (discussing the significance of user generated culture online and the cultural shift from traditional modes of creation).

103. Gordon, *supra* note 17, at 1028 (noting that the idea of an “unconscious copying” excuse or defense to a copyright infringement “might encourage a deliberate copyist simply to lie about his state of mind”).

104. Ciolino & Donelon, *supra* note 11, at 402 (“The innocence or culpable intent of an infringer is also relevant—and often dispositive—in cases of contributory infringement. In spite of the longstanding ‘unanimity of view’ in favor of strict liability for direct and vicarious infringers of copyright, courts premise liability for contributory infringement, in part, on the intent or knowledge of the contributory infringer. Indeed, in stark contrast to other variants of infringement, knowledge is the very ‘touchstone’ of contributory infringement.”).

105. *Id.* at 403–04 (“Courts have long considered the motives of alleged infringers when evaluating the defense of ‘fair use.’ Although not enumerated among the nonexclusive fair use factors in the Copyright Act, ‘good faith’ and ‘fair dealing’ are factors that courts have considered in evaluating the fairness of particular uses, with the ‘bad faith’ of a user militating heavily against a finding of fair use. Likewise, courts in fair use cases have examined objective manifestations of motive—such as whether the plaintiff’s work was ‘purloined,’ or otherwise

rea elements in contributory liability and fair use have not posed insurmountable problems for plaintiffs, it is difficult to imagine why it would be a prohibitive element for direct infringement.

II. STRICT LIABILITY IN CYBERSPACE

A. Copyright in Cyberspace

The digital revolution has raised significant new challenges for intellectual property law. From the early days of the Internet, the application of traditional copyright law was fraught with difficulty. In an online architecture based almost completely on copying software code, the application of doctrines that curtail copying is extremely problematic.¹⁰⁶

Since the earliest days of the personal computer revolution, courts and legislatures have faced a number of novel issues concerning the application of copyright law to new digital technologies.¹⁰⁷ Law and policymakers had to decide whether software code, the basis of the Internet, is copyrightable.¹⁰⁸ If so, what were the limits of copyright infringement where almost everything is copied as a necessary element of system functionality? Policymakers ultimately decided that original code is generally copyrightable.¹⁰⁹

Next, digital copyright law had to determine exactly what constitutes a “copy” in the digital context. Because computers operate by running programs, which involves making a temporary or permanent copy of the program on the user’s computer, virtually all digital processes involve copying.¹¹⁰ The copying may last for a

misappropriated, and whether the defendant sought to ‘pass off the work as his own.’ This emphasis on motive, although controversial, is gaining increased significance in fair use determinations.”).

106. Snow, *supra* note 8, at 286 (“Strict punishment of copying makes no sense in a world where copying is the architecture of being.”).

107. See, e.g., 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B (Matthew Bender, ed., 2010) (describing new digital challenges for copyright law and legislative/judicial responses).

108. See LEAFFER, *supra* note 1, at 103 (“Computer programs have a different look and feel as compared to more traditional forms of copyrightable subject matter. Reservations on this basis concerning the wholesale inclusion of computer programs in copyright law were expressed in the dissenting and concurring comments of Commissioners Hershey and Nimmer to the CONTU *Final Report*.”).

109. *Id.* at 105 (noting that computer programs “have received expansive [copyright] protection in the courts”); see also *Apple Computer, Inc v. Franklin Computer Corp.*, 714 F.2d 1240, 1244 (3d Cir. 1983) (holding that copyrights can exist in a computer program expressed in object code, a computer program embedded in a ROM, and in an operating system program).

110. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that making a temporary copy of a program in a computer in order to diagnose and repair problems constituted copying for the purposes of the copyright legislation).

fleeting moment, several minutes, or much longer, depending on the system.¹¹¹ Running a program to diagnose computer problems may involve making a relatively fleeting copy,¹¹² whereas hosting a website that caches digital material may involve retaining copies for weeks, months, or even years.¹¹³

Early digital copyright cases tended to err in favor of copyright holders.¹¹⁴ Courts had little trouble holding that making temporary copies of a program, even copies that were not physically viewed by a computer operator, but rather that ran in a computer's memory for diagnostic purposes, amounted to copying for the purposes of copyright law.¹¹⁵ To mitigate the harshness of these early decisions, legislatures in a number of jurisdictions enacted exemptions from copyright liability for various enumerated uses of computer software such as archiving,¹¹⁶ maintenance, and repair purposes.¹¹⁷ Of course,

111. *Id.*; see also *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (holding that copying fragments of copyrighted video programs for a fleeting amount of time—notably about 1.2 seconds—would not amount to copyright for the purposes of the copyright legislation).

112. *MAI Sys. Corp.*, 991 F.2d 511 (holding that making a temporary copy of a program in a computer in order to diagnose and repair problems constituted copying for the purposes of the copyright legislation); see also *Cartoon Network*, 536 F.3d at 128 (noting that in the *MAI* case, “it seems fair to assume that . . . the program was embodied in the RAM for at least several minutes”).

113. *United States v. Ziegler*, 474 F.3d 1184, 1186 n.3 (9th Cir. 2007) (“A cache is a computer memory with very short access time used for storage of frequently or recently used instructions or data. Information is cached by placing it closer to the user or user application in order to make it more readily and speedily available.”) (internal citations omitted).

114. *MAI Sys. Corp.*, 991 F.2d 511 (holding that making a temporary copy of a program in a computer in order to diagnose and repair problems constituted copying for the purposes of the copyright legislation); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that an Internet service provider could be directly liable for infringing the plaintiff's public distribution and public display rights).

115. *MAI Sys. Corp.*, 991 F. 2d 511 (holding that making a temporary copy of a program in a computer in order to diagnose and repair problems constituted copying for the purposes of the copyright legislation).

116. See, e.g., 17 U.S.C. § 117(a)(2) (2006) (“[I]t is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided . . . that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.”); Copyright, Designs, and Patents Act, 1988, c. 3, § 50A(1) (U.K.) (“It is not an infringement of copyright for a lawful user of a copy of a computer program to make any back up copy of it which it is necessary for him to have for the purposes of his lawful use.”).

117. 17 U.S.C. § 117(c)(1) (“[I]t is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if . . . such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed”); Copyright, Designs, and Patents Act, 1988, c. 3, § 50C(2) (U.K.) (“It may, in

applying even these exceptions on a case-by-case basis and defining exactly which uses of proprietary software should be excused have subsequently raised their own interpretive difficulties.¹¹⁸

B. Direct versus Indirect Infringement of Digital Content

The precise mechanics of a digital process would be more clear also impact questions of direct versus indirect copyright liability. It is not always easy to establish definitively which party is responsible for unauthorized copying in systems within which copying is largely automated.¹¹⁹ Further, in the digital world it is often difficult to distinguish primary or direct infringers from secondary infringers.¹²⁰ The distinction is important because certain forms of indirect liability—notably contributory infringement—retain a *mens rea* requirement on the part of the defendant while direct infringement attracts strict liability.

In early Internet cases, courts struggled to determine whether online service providers could be deemed direct infringers with respect to material posted online by their customers.¹²¹ The resulting judicial rulings were somewhat piecemeal and inconsistent. Determinations relied, to a large extent, on a case-by-case analysis of the operation of the relevant online forum, and on precisely which of her exclusive rights the copyright holder alleged had been infringed.¹²² Thus, while a defendant hosting an online bulletin board was found to have directly infringed a copyright holder's public distribution¹²³ and public display rights¹²⁴ by virtue of hosting a forum containing infringing

particular, be necessary for the lawful use of a computer program to copy it or adapt it for the purpose of correcting errors in it.”).

118. See, e.g., *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005) (interpreting the exemptions from copyright liability in 17 U.S.C. § 117(a)(2)); see also LEAFFER, *supra* note 1, at 321–24 (discussing the interpretation of statutory exemptions to infringement liability for certain uses of copyrighted software).

119. See, e.g., *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

120. Similar issues have recently arisen in the context of digital trademark law. See *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1024 (9th Cir. 2004) (“Whether the defendants are directly or merely contributorily liable proves to be a tricky question. However, we need not decide that question here. We conclude that defendants are either directly or contributorily liable. Under either theory, PEI's case may proceed. Thus, we need not decide this issue.”).

121. *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that an Internet service provider could be directly liable for infringing the plaintiff's public distribution and public display rights); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that an Internet service provider was not directly liable for infringing the plaintiff's reproduction right).

122. 17 U.S.C. § 106 (setting out the exclusive rights of a copyright holder).

123. *Id.* §106(3).

124. *Id.* § 106(5).

material,¹²⁵ another similarly situated defendant was not held liable for directly infringing a plaintiff's *reproduction* right.¹²⁶

In 1998, the U.S. Congress intervened in an attempt to inject some order into determinations of an online service provider's liability for infringement for content transiently passing through a system¹²⁷ or uploaded by a third party.¹²⁸ However, courts continue to struggle with issues of direct and indirect liability in the digital context. *Cartoon Network v. CSC Holdings, Inc.* provides a somewhat complex example of a judicial attempt to draw lines between primary and secondary liability online.¹²⁹

Cartoon Network involved alleged copyright infringements with respect to digital copies of television programs made with a "Remote Storage" Digital Video Recorder (RS-DVR) the defendant sought to offer its customers.¹³⁰ The defendant company, Cablevision, was a cable television broadcaster who wanted to offer the RS-DVR service so its customers could record and remotely store copies of broadcasted content.¹³¹ Cablevision had no license from the content providers to make or to authorize the making of such copies.¹³²

The RS-DVR is a hybrid technology: a cross between a traditional set-top video recorder—like a TiVo—and a video-on-demand or streaming video service.¹³³ As with a set-top recorder, the end user could program the RS-DVR to record a desired program.¹³⁴ However, unlike the set-top recorder, the defendant's service would record and store the program on the defendant's remote servers, rather than on the user's own set-top hard drive.¹³⁵ As with a video-on-demand service, the RS-DVR would replay the program at the end user's request.¹³⁶ However, unlike a typical video-on-demand service, the defendant's service would only offer playback of programs the end user had recorded, rather than of any program the user might want to

125. *Frena*, 839 F. Supp. 1552 (holding that an Internet service provider could be directly liable for infringing the plaintiff's public distribution and public display rights).

126. *Religious Tech. Ctr.*, 907 F. Supp. 1361 (holding that an Internet service provider was not directly liable for infringing the plaintiff's reproduction right).

127. 17 U.S.C. § 512(a).

128. *Id.* § 512(b).

129. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

130. *Id.* at 123–24 (describing operation of the Cablevision RS-DVR system).

131. *Id.*

132. *Id.* at 124 ("Cablevision notified its content providers, including plaintiffs, of its plans to offer RS-DVR, but it did not seek any license from them to operate or sell the RS-DVR.").

133. *Id.* at 123.

134. *Id.* at 124.

135. *Id.*

136. *Id.*

see, distinguishing the RS-DVR from a general video library service like Netflix¹³⁷ or Hulu.¹³⁸

Cartoon Network raised two distinct questions of copyright liability. The first related to temporary buffering of content by the defendant's servers.¹³⁹ The second involved the full recordings of the playback copies of protected works residing on the defendant's servers.¹⁴⁰ With respect to the first issue, the court addressed whether buffering small pieces of protected data for an extremely brief period of time (approximately 1.2 seconds)¹⁴¹ could amount to direct infringement of the plaintiffs' reproduction right.¹⁴² If Cablevision had infringed the plaintiff's reproduction rights, there would be no question that it was the primary entity making the copies and would therefore face direct liability for doing so. In other words, Cablevision would be responsible as a direct infringer because it did the copying for its own purposes, and not at the request of anyone else. Buffering of data is simply an internal mechanism necessary to the operation of Cablevision's technology, thus the buffering of data occurs without an individual customer making a specific request for it to happen. This is different from the recording of playback copies of television programs that must be requested by a customer for Cablevision's system to make copies of them. In any event, after revisiting the statutory

137. *Unlimited TV Shows & Movies. How Does It Work?*, NETFLIX, <http://www.netflix.com/HowItWorks> (last visited Feb. 1, 2011) ("For only \$7.99 a month, instantly watch unlimited TV episodes & movies streaming over the Internet to your TV via an Xbox 360, PS3, Wii or any other device that streams from Netflix. You can also watch instantly on your PC or Mac too!").

138. HULU, <http://www.hulu.com> (last visited Feb. 1, 2011) (offering selection of videos for free online streaming).

139. *Cartoon Network*, 536 F.3d at 127 ("It is undisputed that Cablevision, not any customer or other entity, takes the content from one stream of programming, after the split, and stores it, one small piece at a time, in the BMR buffer and the primary ingest buffer. As a result, the information is buffered before any customer requests a recording, and would be buffered even if no such request were made. The question is whether, by buffering the data that make up a given work, Cablevision 'reproduce[s]' that work 'in copies,' 17 U.S.C. § 106(1), and thereby infringes the copyright holder's reproduction right.").

140. *Id.* at 130 ("In most copyright disputes, the allegedly infringing act and the identity of the infringer are never in doubt. These cases turn on whether the conduct in question does, in fact, infringe the plaintiff's copyright. In this case, however, the core of the dispute is over the authorship of the infringing conduct. After an RS-DVR subscriber selects a program to record, and that program airs, a copy of the program—a copyrighted work—resides on the hard disks of Cablevision's Arroyo Server, its creation unauthorized by the copyright holder. The question is *who* made this copy. If it is Cablevision, plaintiffs' theory of direct infringement succeeds; if it is the customer, plaintiffs' theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs.").

141. *Id.* at 129 ("No bit of data remains in any buffer for more than a fleeting 1.2 seconds.").

142. *Id.* at 127.

definition of “copies”¹⁴³ the court was not convinced that the defendant’s temporarily buffered data amounted to “copies” of the plaintiff’s protected material as defined by the Copyright Act.¹⁴⁴

While the Ninth Circuit, in *MAI v. Peak*,¹⁴⁵ had suggested that the creation of even a fleeting digital copy by the defendant could amount to direct infringement of the reproduction right,¹⁴⁶ the *Cartoon Network* court distinguished *MAI* on the basis of its interpretation of the statutory definition of “copies.”¹⁴⁷ Referring back to the statute, the *Cartoon Network* court held that two elements must exist for the court to find an infringing reproduction of a copyrighted work: The copying must occur (a) in a medium from which it may be perceived and (b) for a period of more than transitory duration.¹⁴⁸

In examining the *MAI* decision, the *Cartoon Network* court found that the earlier court had failed to provide more than a cursory reference to the latter element.¹⁴⁹ Thus the *MAI* holding could only stand as authority for the proposition that

loading a program into a computer’s RAM *can* result in copying that program. We do not read *MAI Systems* as holding that, as a matter of law, loading a program into a form of RAM *always* results in such copying. Such a holding would read the ‘transitory duration’ language out of the definition¹⁵⁰

Ultimately, the *Cartoon Network* court held that the buffering of small amounts of the plaintiffs’ data for fleeting amounts of time did

143. *Id.* (holding that “copies” in the Copyright Act means only those works that are embodied in a medium (the embodiment requirement), which exists for more than a transient duration (the duration requirement)).

144. 17 U.S.C. § 101 (2006) (“‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.”).

145. *MAI Sys. Corp., v. Peak Computer, Inc.* 991 F.2d 511 (9th Cir. 1993).

146. *Id.*; see also LEAFFER, *supra* note 1, at 302 (“To correct problems in the MAI computers, Peak’s technicians frequently made use of the diagnostic software built into the machines, which automatically loaded into the computer’s RAM every time the computer was turned on. The court accepted MAI’s argument that it licensed the software only to the purchasers of the machines and that the service firm’s copying of the software into the machine’s RAM constituted infringement.”).

147. See source cited and explanation *supra* note 143.

148. *Cartoon Network*, 536 F.3d at 127. With respect to the definition of “copies”, the Copyright Act further defines the notion of fixation in the following terms: “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” 17 U.S.C. § 101 (emphasis added).

149. *Cartoon Network*, 536 F.3d at 128.

150. *Id.*

not infringe the reproduction right.¹⁵¹ The copied data remained in the defendant's buffer for only a transitory period of time.¹⁵² Thus, the duration requirement inherent in the statutory definition of "copies" was not satisfied.¹⁵³

The infringement analysis with respect to the playback copies stored on the defendant's servers at its customers' request was more complex. It was not immediately clear who was directly responsible for making the infringing reproductions of the plaintiffs' works: Cablevision or its customers.¹⁵⁴ As between the defendant's customers, who actively chose which programs would be recorded, and the defendant itself, which simply enabled the recording, the court opined that the customers were more appropriately defined as the creators of the copies.¹⁵⁵ In analyzing this issue, the judges likely considered the implications of the strict liability doctrine, and whether in the case of purely mechanical processes, the entity providing the copying service should be held directly liable.

In its holding, the court followed an earlier line of Internet cases that seemed to chip away at the strict liability doctrine in the

151. *Id.* at 130 ("Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not 'embodied' in the buffers for a period of more than transitory duration, and are therefore not 'fixed' in the buffers. Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term.").

152. *Id.*

153. *Id.* at 129 ("No bit of data remains in any buffer for more than a fleeting 1.2 seconds. And unlike the data in cases like *MAI Systems*, which remained embodied in the computer's RAM memory until the user turned the computer off, each bit of data here is rapidly and automatically overwritten as soon as it is processed . . . [T]hese facts strongly suggest that the works in this case are embodied in the buffer for only a 'transitory' period, thus failing the duration requirement.").

154. *Id.* at 130 ("In most copyright disputes, the allegedly infringing act and the identity of the infringer are never in doubt. These cases turn on whether the conduct in question does, in fact, infringe the plaintiff's copyright. In this case, however, the core of the dispute is over the authorship of the infringing conduct. After an RS-DVR subscriber selects a program to record, and that program airs, a copy of the program— a copyrighted work— resides on the hard disks of Cablevision's Arroyo Server, its creation unauthorized by the copyright holder. The question is *who* made this copy. If it is Cablevision, plaintiffs' theory of direct infringement succeeds; if it is the customer, plaintiffs' theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs.").

155. *Id.* at 131 ("In the case of a VCR, it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.").

online context.¹⁵⁶ Presumably the reason for this approach had something to do with the need to balance copyright protection against the public policy of encouraging innovation in new technologies that might enable copying.¹⁵⁷ The *Cartoon Network* court employed an approach adopted in at least one earlier Internet case involving individual copying that had been enabled by an Internet service provider.¹⁵⁸ The earlier case had imposed a “volition” requirement in the context of direct infringement.¹⁵⁹ In other words, the plaintiff needed to prove that the defendant’s conduct was volitional rather than a largely automated technological process.¹⁶⁰ This volition requirement may be seen as a judicial gloss on strict liability to accommodate technological innovation.

Applying the volition test to the case at hand, the *Cartoon Network* court compared the new technology with a more familiar analogue:

There are only two instances of volitional conduct in this case: Cablevision’s conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer’s conduct in ordering that system to produce a copy of a specific program. In the case of a VCR, it seems clear . . . that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR customer to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.¹⁶¹

The problem for the plaintiffs in this situation is that if the defendant is not liable for direct copying, there is a strong argument that it would not be secondarily liable for the direct infringements of its customers either. Because of existing Supreme Court precedent in

156. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (declining to impose direct liability on an Internet service provider with respect to content that was posted on its service by one of its customers on the basis that “although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”).

157. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (“MGM and many of the *amici* fault the Court of Appeals’s holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.”).

158. *Religious Tech. Ctr.*, 907 F. Supp. at 1370.

159. *Id.* at 1370 (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”).

160. *Cartoon Network*, 536 F.3d at 131 (“When there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made.”).

161. *Id.*

*Sony Corp. of America v University City Studios, Inc.*¹⁶² it seems unlikely that those customers using the defendant's RS-DVR services would be regarded by a court as primary infringers. Thus, no secondary liability could attach to the entity that made the copying technology available. The Supreme Court in *Sony* held that customers using a Betamax video recorder to record television programs for "time shifting" purposes—to watch later on—were, in fact, making fair use of the copyrighted works.¹⁶³ Thus, there was no primary copyright infringement for which the manufacturers of the Betamax recorders could be secondarily liable. The Supreme Court in *Sony* also incorporated a "staple article of commerce" doctrine into copyright law,¹⁶⁴ holding that the manufacturer or distributor of a product that could be used to make infringing copies of protected works, but that also had "substantial non-infringing uses," would not be liable for copyright infringement.¹⁶⁵

This may be why the plaintiffs "expressly disavowed" a claim of secondary liability against the defendant in *Cartoon Network*.¹⁶⁶ Presumably both of the holdings from *Sony* might have applied in the *Cartoon Network* context if the plaintiffs had attempted to proceed against the defendant on the basis of secondary liability for alleged direct infringements by its customers. Establishing primary infringement on which to base a claim of secondary liability, would have required the plaintiffs to argue around both holdings in *Sony*—a difficult task in practice.

In addition to their claim that Cablevision had directly infringed their reproduction rights, the *Cartoon Network* plaintiffs argued that Cablevision was directly liable for infringing their public performance rights.¹⁶⁷ Early Internet cases had distinguished between an online service provider's direct liability under the

162. 464 U.S. 417 (1984).

163. *Id.* at 454–55 ("[W]e must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use.").

164. *Id.* at 442 ("The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective - not merely symbolic - protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.").

165. *Id.*

166. *Cartoon Network*, 536 F.3d at 130 ("The question is *who* made [the playback copies]. If it is Cablevision, plaintiffs theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by the plaintiffs.").

167. *Id.* at 134 ("Plaintiffs' final theory is that Cablevision will violate the Copyright Act by engaging in unauthorized public performances of their works through the playback of RS-DVR copies."); see 17 U.S.C. § 106(4) (2006) (setting out the exclusive right "in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly").

reproduction right and other rights, such as public display and performance rights.¹⁶⁸ It was therefore possible, based on existing precedent, for a defendant to be liable for infringing the performance right, but not liable for infringing the reproduction right.¹⁶⁹ However, the *Cartoon Network* court held that the plaintiffs had failed to establish Cablevision's direct liability for the unauthorized public performance of their works.¹⁷⁰ While it was possible that Cablevision had "performed" the works, the court held that any such performance would not be directed "to the public" as contemplated by the Copyright Act.¹⁷¹

An examination of the precise technical operation of the defendant's RS-DVR system supports the court's holding.¹⁷² When a customer programs the RS-DVR to make a copy of a given program, an individual copy of the program is made on a portion of the defendant's server dedicated to that particular customer.¹⁷³ In other words, if more than one customer requests a recording of the same program, an individual copy is made for *each* of those customers in a dedicated

168. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1370–71 (N.D. Cal. 1995) ("It is clear from the context of this discussion that the *Playboy* court [*Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)] was looking only at the exclusive right to distribute copies to the public, where liability exists regardless of whether the defendant makes copies. Here, however, plaintiffs do not argue that Netcom is liable for its public distribution of copies. Instead, they claim that Netcom is liable because its computers in fact made copies. Therefore, the above-quoted language has no bearing on the issue of direct liability for unauthorized reproductions. Notwithstanding *Playboy's* holding that a BBS operator may be directly liable for distributing or displaying to the public copies of protected works, this court holds that the storage on a defendant's system of infringing copies and retransmission to other servers is not a direct infringement by the BBS operator of the exclusive right to reproduce the work where such copies are uploaded by an infringing user. *Playboy* does not hold otherwise.").

169. *Cartoon Network*, 536 F.3d at 134 ("[W]e note that our conclusion . . . that the customer, not Cablevision, 'does' the copying does not dictate a parallel conclusion that the customer, and not Cablevision, 'performs' the copyrighted work.").

170. *Id.* at 139.

171. *Id.* at 134 ("[E]ven if we assume that Cablevision makes the transmission when as RS-DVR playback occurs, we find that the RS-DVR playback . . . does not involve the transmission of a performance 'to the public.'").

172. *Id.* at 124–25 ("If a customer has requested a particular program, the data for that program move from the primary buffer into a secondary buffer, and then onto a portion of one of the hard disks allocated to that customer. . . . To begin playback, the customer selects the show from an on-screen list of previously recorded programs. The principle difference in operation [between a set-top recorder and the RS-DVR] is that, instead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to the Arroyo Server at Cablevision's central facility. In this respect, RS-DVR more closely resembles a VOD [video-on-demand] service, whereby a cable subscriber uses his remote and cable box to request transmission of content, such as a movie, stored on computers at the cable company's facility. But unlike a VOD service, RS-DVR users can only play content that they previously requested to be recorded.").

173. *Id.*

space on the defendant's servers. Each customer can only play back the copy from her own dedicated space on Cablevision's servers.¹⁷⁴ Earlier courts had held that if digital consumers are all capable of receiving a transmission at the same time, but in different places, this may amount to a performance "to the public."¹⁷⁵ The definition of performing a work "to the public" in the Copyright Act contemplates transmitting the work "by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."¹⁷⁶

Interpreting this definition, the *Cartoon Network* court focused on defining a "transmission" for the purposes of a performance "to the public."¹⁷⁷ While acknowledging that the law on this point is not particularly clear, the court deemed it necessary to establish who is capable of receiving the transmission to establish whether the transmission was *to the public*.¹⁷⁸ In the case of the RS-DVR service, because only one individual could receive any given playback transmission, the court held that Cablevision could not have infringed the plaintiffs' public performance right.¹⁷⁹

While the court did not expressly address any concerns about strict liability in the context of direct infringement of the public performance right, that likely was an underlying concern. In the digital world, courts are constantly faced with the tension between technological innovation and artistic creation.¹⁸⁰ Holding

174. *Id.*

175. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that an Internet service provider was not directly liable for infringing the plaintiff's reproduction right); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that an Internet service provider could be directly liable for infringing the plaintiff's public distribution and public display rights).

176. 17 U.S.C. § 101 (2006) (emphasis added) (defining performance of a work "to the public").

177. *Cartoon Network*, 536 F.3d at 136 ("Although the transmit clause is not a model of clarity, we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission.").

178. *Id.*

179. *Id.* at 139 ("In sum, we find that the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons 'capable of receiving' it, to determine whether that transmission is 'made to the public.' Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public,' and therefore do not infringe any right of public performance.").

180. *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) ("MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright

technological innovators strictly liable for services they provide is likely to impede innovation in socially valuable technologies.¹⁸¹ As a policy matter, courts in the digital age generally seem to err on the side of finding such technological innovators, at most, secondarily liable for their customers' infringements.¹⁸² This allows courts to focus more on doctrines such as contributory liability, which carries a mens rea requirement.¹⁸³ Focusing on contributory liability allows courts more flexibility to discourage uses of innovative technologies conducted predominantly for infringing purposes, while protecting technologies that may have broader non-infringing purposes.¹⁸⁴

As a policy matter, the outcome of the *Cartoon Network* case may be problematic. The case may be seen as a blueprint for future technological innovators to avoid copyright liability by coding their services such that their customers can only access an individual copy of a given work. This could avoid strict liability under the public performance right. The *Cartoon Network* court was quick to note that its holding should not be read in that light and that future innovators who attempt to code around the public performance right might nevertheless be liable under other rights reserved to a copyright holder:

This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.¹⁸⁵

infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.”).

181. *Id.*

182. *See, e.g., id.*; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

183. LEAFFER, *supra* note 1, at 438 (“The doctrine of contributory infringement originates in tort law and stems from the principle that one who directly contributes to another’s infringement should be held accountable. In other words, the common law doctrine is applicable under copyright law. That is, one who knowingly participates in or furthers a tortious act is jointly and severally liable for the principal tortfeasor.”); Ciolino & Donelon, *supra* note 11, at 402 (“The innocence or culpable intent of an infringer is also relevant— and often dispositive— in cases of contributory infringement. In spite of the longstanding ‘unanimity of view’ in favor of strict liability for direct and vicarious infringers of copyright, courts premise liability for contributory infringement, in part, on the intent or knowledge of the contributory infringer. Indeed, in stark contrast to other variants of infringement, knowledge is the very ‘touchstone’ of contributory infringement.”).

184. Of course one might argue that if the focus is on secondary infringement, vicarious liability (like direct liability) attracts strict liability. However, in practice, decisions on vicarious liability in cases that also involve contributory liability seem to follow whatever the court has said about strict liability. A number of digital copyright cases have decided the contributory and vicarious liability questions in favor of the same parties. *See, e.g., Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788 (9th Cir. 2008); *A&M Records*, 239 F.3d 1004.

185. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139–40 (2d Cir. 2008).

Despite the court's suggestion that future innovators could be held liable under the reproduction right,¹⁸⁶ the case itself provides useful guidance on how to avoid that result in practice. As long as a service provider has not actually made illegal copies of a copyrighted work of its own volition, that service provider will not be strictly liable under the reproduction right. Thus, if a potential defendant codes its system so that another entity is regarded as making the copies in question, it can escape direct liability under the reproduction right.

However, contributory liability poses a different question, depending on the operation of the system. If someone uses the system to make illegal copies, or otherwise infringe a copyright holder's exclusive rights, a technological innovator may be contributorily liable for that person's infringements. Because contributory liability requires the plaintiff to establish some form of intent by the defendant, this may achieve a better balance between the often competing public policy aims of encouraging artistic creativity while still fostering technological innovation.

C. Online "Copytraps" and Strict Liability

In addition to these contexts, strict liability theory creates other challenges, many of which arise from the architecture of the Internet. A system that operates on the basis of running copies of software code and that encourages global participation in communications of the "cut and paste" variety will raise a number of questions for copyright law and policy. "To punish innocent copying on the Internet is to punish virtual existence, and copyright's strict liability does just that. Strict punishment of copying makes no sense in a world where copying is the architecture of being."¹⁸⁷

Of particular concern are situations Professor Snow describes as "copytraps."¹⁸⁸ These scenarios involve the category of innocent infringement that results from a third party misleading the infringer into believing that the work belongs to the third party or that the third party is otherwise legally entitled to authorize copying.¹⁸⁹

186. *Id.*

187. Snow, *supra* note 8, at 286.

188. *Id.* at 286-87 ("A copytrap exists where a Web site leads an Internet user to mistakenly believe that a copyrighted work may be legally downloaded when in fact the work is pirated. Those circumstances trap the innocent downloader, who faces strict liability for unauthorized copying.")

189. LEAFFER, *supra* note 1, at 539 (noting that strict liability will apply even in situations where a defendant "has relied on a putative author's misrepresentations about the originality of work."); NIMMER & NIMMER, *supra* note 2 ("Then there is the situation wherein the defendant's work is based upon a work furnished by a third party. The defendant's ignorance that such third party has wrongfully copied from the plaintiff will not immunize him from

Professor Snow argues that the application of strict liability in these cases is particularly harsh because a person who procures a work online must, by necessity, make a copy by downloading it.¹⁹⁰

Online models of distribution generally involve copying as a matter of necessity. Thus, these models are not really comparable with physical world distribution models. In the physical world, a person who procures a copy of an infringing work is not herself required to copy it to enjoy it. While someone who mistakenly believes that she has a right to copy someone else's work may be held strictly liable for copyright infringement, the mere fact of procuring a physical copy of a protected work does not warrant copyright liability in the physical world.¹⁹¹

Applying strict liability to distribution of works online thus effectively traps everyone who downloads a protected work in the mistaken belief that she has the right to do so, for example, because she paid for access to a service, unaware that it was a service distributing pirated copies of protected works. Online, the strict liability approach to infringement traps both innocent *intentional* copiers and unwary procurers of works. This is because, in the online world, intentional reproduction, as well as simply purchasing or procuring a work involve copying.¹⁹²

Many courts and commentators have traditionally been sympathetic to copyright holders in cases where it is costly and difficult for them to prove or disprove the copier's state of mind.¹⁹³ Unconscious copying is a significant example of a situation in which it

liability."); Sinclair, *supra* note 1, at 950 (describing as a class of innocent infringement "good faith use of infringing matter received from others in circumstances warranting the reasonable assumption that it is original material").

190. Snow, *supra* note 8, at 295–96 ("Punishing innocent downloaders is unfair because it contravenes the Internet model for copyright distribution. Copyright holders who distribute their works through the Internet rely on consumers to download those works. Internet distribution requires consumer copying.").

191. *Id.* at 296–97 ("In real space, distribution of copyright works occurs by copyright holders making available physical copies for the public to consume. If consumers in real space seek to legitimately obtain a copyrighted work, they must procure a physical copy of that work rather than making a copy. This fact suggests that a presumption against consumer copying exists. Absent affirmative circumstances suggesting that an author has relinquished her rights or that copying would constitute a fair use, there is no reason for consumers to copy the work. Thus, the real-space model for distributing copyright works—physical delivery—suggests that copyright holders do not authorize consumer copying. Unlike the model of cyberspace distribution, the real-space model inherently suggests that consumer copying is not authorized.").

192. *Id.*

193. *Id.* at 299 ("In real space, strict liability is warranted because circumstances giving rise to a reasonable mistake of fact about whether copying is permissible can be difficult to disprove. The difficulty of proof arises because in real space only exceptional circumstances could lead a person to mistakenly believe that copying is authorized.").

is almost impossible, if not actually impossible, for the copyright holder to establish the defendant's state of mind.¹⁹⁴

Even in the physical world, innocent copying in reliance on a false representation made by a third party may be difficult for a copyright holder to litigate in the absence of strict liability, particularly if the copier alleges a verbal representation by a third party.¹⁹⁵ Where there is no written representation purportedly authorizing the illegal copying, it may be extremely difficult for a plaintiff to establish whether or not the defendant or the third party is lying about the verbal representation. This may be another reason for erring on the side of strict liability in the physical world, despite the numerous criticisms of the doctrine in that context.¹⁹⁶

In the digital world, however, it may be much easier to establish the existence of a third party representation falsely authorizing illegal downloading.¹⁹⁷ Many have criticized the Internet's architecture for the permanence of information, particularly personally sensitive information, residing online.¹⁹⁸ However, this permanent quality of the Internet provides certain advantages in the online downloading or copying context. With many webpages cached, reproduced, and otherwise permanently stored on various servers, false representations made by a third party may be much easier to find than they would be in the physical world.¹⁹⁹ There will likely be a written record of those representations on some server.²⁰⁰ Thus, it

194. See discussion *supra* Part I.A; see also Snow, *supra* note 8, at 299 (“[In cases of subconscious copying] an infringer might forget that she has seen a copyrighted image and then subconsciously copy the image when creating a new work. Disproving a false allegation that her infringement results from subconscious copying would be pragmatically impossible, for only the infringer knows her consciousness. For this reason, strict liability in real space has received support.”).

195. Snow, *supra* note 8, at 299. (“Cyberspace, on the other hand, [as opposed to the physical world] does not usually raise the same difficulty of disproving allegations of innocence In the downloading context, the reasonableness of an infringer's mistaken fact would be limited to the conclusions that a reasonable person would draw from the appearance of the Web site at issue. Because the circumstances leading to the alleged mistake of fact are readily observable on the Web site, it would not be difficult to disprove a false allegation of innocence. Circumstances outside of the Web site's appearance— such as representations by other persons in real space— would not likely be sufficient to overcome a conclusion that a Web site's downloads appear unauthorized. So unlike in real space, a false allegation of innocence would not be difficult to disprove in cyberspace.”).

196. See discussion *supra* Part I.C.

197. Snow, *supra* note 8, at 299.

198. DANIEL SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 33 (2007) (“The Internet . . . makes gossip a permanent reputational stain, one that never fades. It is available around the world, and with Google it can be readily found in less than a second.”).

199. Snow, *supra* note 8, at 299.

200. See source cited and explanation, *supra* note 195.

may be appropriate to inject a *mens rea* element into direct infringement liability involving such websites, and give innocent defendants a chance to prove that they relied on the false representations to avoid liability.²⁰¹

Professor Snow also raises the concern, with respect to online copytraps, that plaintiffs may be more likely to pursue innocent infringers in the online context than intentional infringers.²⁰² Online, innocent infringers are less likely to mask their identities and locations—believing they have nothing to hide—than intentional infringers who know they are committing unauthorized acts.²⁰³ It is relatively easy for a copyright holder to locate and sue a person who is not trying to mask her online presence.²⁰⁴ The copyright holder may employ various means such as Google searches,²⁰⁵ chat room inquiries,²⁰⁶ or, ultimately, seeking identifying information directly from an Internet service provider under relevant provisions of the Copyright Act.²⁰⁷ This may play out differently in the physical world depending on the ease with which a plaintiff can locate innocent versus intentional infringers in practice.²⁰⁸

Imposing strict liability on innocent downloaders may also negatively impact market competition for online distribution of works.²⁰⁹ Because the Internet offers a nearly costless global distribution model, one might hope that smaller market players would be encouraged to compete with larger, more established market participants.²¹⁰ This would lead to greater competition and potentially more choices and lower costs for consumers.²¹¹ However, the

201. Snow, *supra* note 8, at 299.

202. *Id.* at 303–04 (“[T]he cost of identifying innocent infringers is likely to be lower than the cost of identifying intentional infringers. Because intentional infringers know that they are infringing, they may employ technological means to hide their infringement. Innocent infringers, on the other hand, believe that their downloads are authorized, and so they lack any reason to avoid detection. They accordingly are usually easier to identify.”).

203. *Id.*

204. *Id.*

205. *Id.* at 303 (“In cyberspace, the cost of identifying infringers is quickly dropping. From simple Google searches to chat room inquiries, a copyright holder can quickly identify Web sites that pirate the copyright holder’s works. Inquiries with ISPs will then yield the identification of the end user infringer.”).

206. *Id.*

207. 17 U.S.C. § 512(h)(1) (2006) (“A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.”).

208. Snow, *supra* note 8, at 299.

209. *Id.* at 306–11 (describing relevant market issues with strict liability for online copyright infringement).

210. *Id.*

211. *Id.* at 308 (“[T]he commercial value of virtual markets lies in their distributive efficiencies. Virtual markets allow for relatively costless distribution: anyone can distribute ideas

imposition of strict liability on consumers who download works—and hence make copies of them—might encourage consumers to gravitate to more traditional, well-established commercial entities online.²¹² Consumers would likely assume that these sites are trustworthy and thus more likely to only offer legal merchandise.²¹³ They may even believe that such sites would assume liability for any problems arising through use of their services.²¹⁴ Because of concerns about risks of inadvertent illegal downloading, consumers therefore would gravitate to larger, more well-known, commercial websites, such as iTunes for music, rather than smaller, lesser-known sites,²¹⁵ like Creative Commons, which offers material on its website for free downloading.²¹⁶ However, Creative Commons makes no guarantees about copyright holder authorization to download.²¹⁷ Thus, consumers may be deterred from downloading the free material, even in cases where downloads are legitimately authorized.²¹⁸ Professor Snow summarizes his concerns about the potential for online copytraps as follows:

The tension between a law designed for real space and the ontology of cyberspace must be addressed. If the Internet is to draw widespread participation, it requires fairness for the unwary. If the Internet is to fuel the vehicle of commerce, it requires assurances for good-faith purchasers. If the Internet is to breed a marketplace of ideas, it requires breathing space for its speakers. The Internet's great potential for commercial and information exchange may be realized only if innocent actors are not dissuaded from participating.²¹⁹

to a global market through the Internet. By eliminating the high cost of distribution, the Internet gives rise to myriad commercial enterprises.”).

212. *Id.* at 309 (“Strict liability punishment of innocent downloaders threatens this virtual model for efficient competition. If users become reluctant to download from sites where material could possibly be infringing, then they will download only from sites that they trust. Trusted sites would be those that have gained an established reputation of credibility. Trusted sites would be name-brand sites— those whose reputation precludes the possibility that they are transient, jurisdictionally judgment-proof piracy sites.”).

213. *Id.*

214. *Id.* (“[T]rusted sites would be indemnifying sites— those that assume responsibility for the content of a download. Concerned about possibly downloading infringing material, users would download only from trusted sites.”).

215. *Id.* (“A shift in consumer preference for trusted Web sites would create a comparative advantage. Internet users would continue to download from iTunes.com, whereas they would be reluctant to download from CreativeCommons.org. Consumers would be confident that the iTunes site would assume responsibility for the content of its music downloads. The Creative Commons sites, on the other hand, would lack that consumer confidence.”).

216. *Id.* (“Creative Commons offers material for free download, representing that copyright holders have authorized the downloads, but the site does not warrant the authenticity of copyright holder authorization.”).

217. *Id.*

218. *Id.* (“Strict liability would place [pro bono websites such as Creative Commons] at a disadvantage to larger name-brand corporate sites. The deterrence of end-user downloading would pose a significant barrier for many lesser-known sites to establish the credibility necessary for competition. Trusted sites would be safe; questionable sites would suffer.”).

219. *Id.* at 328.

The concerns raised by Professor Snow beg the question whether any reconsideration of strict liability in copyright law should apply only to the virtual world. Professor Snow makes some good points about the fundamental differences between the virtual world and the physical world that may implicate a need to reconsider the application of the strict liability doctrine online. However, he appears to accept a number of the justifications for retaining the strict liability doctrine in the physical world.²²⁰ Both offline and online critiques of the strict liability doctrine raise real concerns about the harshness of its application in various circumstances.²²¹ However, it is unclear whether the concerns about strict liability justify reconsideration of the doctrine generally, or only in specific contexts, such as online downloading.

III. MITIGATING THE HARSHNESS OF STRICT LIABILITY

Assuming good reasons to mitigate the harshness of the strict liability approach to direct copyright infringement exist, particularly given the prevalence of digital copying technologies and the structure of the Internet, the question arises as to how best to tackle the problem. One could attempt specific legislative amendments that would modify the operation of the doctrine either in general or in specific digital contexts, or one could continue to focus on remedies, which is the current practice under statutory copyright law.²²² In the absence of legislative action, the task of better defining the contours of developing common law concepts like “volition” in the direct copying context may fall to the courts.²²³

This Part concentrates on four potential approaches to mitigating the harshness of strict liability. Some are of more general application while others are sector-specific. The reform options comprise: (a) making innocent infringement into an affirmative defense to copyright infringement,²²⁴ (b) requiring proof of a mens rea element to establish liability for direct infringement, (c) developing an administrative mechanism through which an agency might excuse

220. *Id.* at 295–97 (distinguishing between application of strict liability in the physical world and in the virtual world).

221. *See* discussion *supra*, Parts I.C, II.C.

222. NIMMER & NIMMER, *supra* note 2 (noting that the innocence of the defendant “may . . . bear upon the remedies available against such a defendant”).

223. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”).

224. Ciolino & Donelon, *supra* note 11, at 421 (“Congress should establish innocence as an affirmative defense to monetary liability.”).

certain types of innocent infringement from copyright liability, and (d) excusing an innocent downloader from copyright infringement in the online copytrap context.²²⁵

A. Innocent Infringement as an Affirmative Defense

The idea of amending the Copyright Act to incorporate innocent infringement as an affirmative defense is not new.²²⁶ If such an approach were adopted, it would raise questions as to how precisely the defense should operate in practice and whether it should be a defense of general application or limited to specific contexts, such as online downloading. The rationale for the latter approach would be that online downloading significantly alters the balance of harms in copyright law²²⁷ and impedes the free flow of ideas in an important global communications medium.²²⁸ Thus, while it may be acceptable to maintain strict liability in the physical world, innocent infringement should be a defense in online downloading cases.

However, as copyright legislation tends to operate in a relatively general way, rather than focusing on specific spheres of activity, it may be more practical to craft a general innocent infringement defense, rather than a sector-specific approach. On the other hand, the advantages of focusing on Internet downloads would be limiting the defense to a sphere in which innocent copying may be particularly troubling as a policy matter. Thus copyright holders would retain the benefits of strict liability in other areas where the doctrine may be more readily justified.

Regardless of whether an innocent intent defense is of general application or is adopted in a sector-specific manner, certain questions remain. For example, should the defense be limited to monetary liability, or should it also cover injunctive relief? Some commentators have suggested it would be appropriate for such a defense to focus on monetary relief.²²⁹ This would enable the copyright holder prospective protection against unauthorized copying in the form of injunctive

225. Snow, *supra* note 8, at 323 (“The [Copyright] Act should excuse innocent downloaders from financial liability where a downloader infringes under a mistaken belief that is reasonable. Reasonableness would be determined by the appearance of a Web site. If a Web site’s appearance suggests that a download is infringing, the downloader’s mistaken belief that the download is legal would not excuse financial liability.”).

226. Ciolino & Donelon, *supra* note 11, at 421 (suggesting the adoption of an express defense of innocent infringement in the Copyright Act).

227. Snow, *supra* note 8, at 295–97 (distinguishing between application of strict liability in the physical world and in the virtual world).

228. *Id.* at 328.

229. Ciolino & Donelon, *supra* note 11, at 421 (“Congress should establish innocence as an affirmative defense to monetary liability.”).

relief.²³⁰ Naturally, any subsequent copying by the defendant could not qualify as “innocent.”²³¹

Adopting an innocence defense in copyright law would also require a determination of who would bear the burden of proof in establishing the defense. One approach is that copyright owners might first be required to establish a prima facie case of infringement.²³² At that point, the burden would shift to the defendant to establish her innocence by a preponderance of the evidence.²³³ Shifting the burden of proof to the defendant to establish innocence mitigates some of the concerns raised by proponents of strict liability, particularly in relation to difficulties potentially faced by plaintiffs in establishing a defendant’s state of mind.²³⁴

As with the fair use defense,²³⁵ placing the burden on the defendant to establish her innocence may nevertheless chill legitimate expression, both in the online and offline contexts. Individual defendants may not have the financial wherewithal to defend a copyright infringement action and thus deterred from copying in the first place. Further, in some cases it may be almost as difficult for the defendant to adduce objective evidence of her state of mind as it would be for the plaintiff to do so. In cases where the defendant has engaged in unconscious copying, for example, or has relied on a verbal false representation by a third party, she may have no way of establishing her own state of mind.

However, to the extent that the theoretical underpinning for strict liability is based on the idea that it is easier for the defendant to bear the burden of proving her innocent state of mind than the plaintiff, an innocence defense may still afford some comfort to potential defendants. Under the strict liability approach, defendants are liable regardless of their state of mind.²³⁶ An innocence defense at least gives them the opportunity to attempt to establish, to the satisfaction of the court, that they acted with innocent intent. As

230. *Id.* (“If successful, the innocent infringer would be relieved of monetary liability. Significantly, however, the infringer’s innocence would not preclude the copyright owner from seeking and obtaining prospective relief, including preliminary or permanent injunctions against future infringement.”).

231. *Id.* (“Indeed, any copying after the issuance of such an injunction could never qualify as ‘innocent.’”).

232. *Id.* (“[O]nce the copyright owner establishes a prima facie case of copyright infringement, an innocent infringer could then undertake to prove that he ‘had no reason to believe that his acts constituted infringement.’ . . . [T]he infringer would bear the burden of proving his own innocence by a preponderance of the evidence.”).

233. *Id.*

234. *See* discussion *supra* Part I.A.

235. *See supra* text accompanying notes 37–42.

236. *See generally supra* Part I.

between the plaintiff and the defendant, there is still no strong justification for putting the burden on the plaintiff to establish the defendant's state of mind.

B. Intent as an Element of the Infringement Action

Adopting a legislative amendment to incorporate intent as an element of a primary infringement action would likely be more problematic in practice than establishing an innocence defense. If, in fact, it is much more difficult for a plaintiff to prove a defendant's state of mind than for a defendant to do so, the incorporation of an intent element into the infringement action is untenable. As long as the plaintiff is expected to make out her cause of action before considering available defenses, it would impose an impossible burden on copyright plaintiffs to establish the defendant's guilty mind as part of the *prima facie* case. Thus, while amending the Copyright Act to incorporate intent as an element of an infringement action is technically possible, it would be highly problematic in practice.

In the alternative, intent could be incorporated into the infringement action in certain sector-specific cases, such as innocent downloading of protected material. Given that content owners criticized for indiscriminately suing individual downloaders of protected content,²³⁷ requiring those copyright owners to establish a guilty intent on the part of the downloader makes some sense. However, a neater solution to the approach of innocent downloading may still be found through the innocence defense approach,²³⁸ rather than through tinkering with the elements of the action. It is easier for a court or legislature to exempt conduct from liability as a defense, rather than alter the boundaries of the initial cause of action. This approach makes sense because most defenses, at least in the copyright context, focus on the position of the defendant,²³⁹ while initial causes of action focus more on the plaintiff's position—specifically, on infringements of the plaintiff's rights.

237. See, e.g., JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU*, 99 (2011) (criticizing the onslaught of legal suits by the RIAA against its customers).

238. Snow, *supra* note 8, at 323 (“The [Copyright] Act should excuse innocent downloaders from financial liability where a downloader infringes under a mistaken belief that is reasonable.”).

239. Of course some defenses, such as contributory liability in the tort of negligence, focus more on the actions of the plaintiff in contributing to her own harm, but the proposition generally rings true in the copyright context in the case of defenses such as fair use and first sale, the typical defenses to a copyright infringement.

C. Administrative Exemptions

Another possibility for mitigating the harshness of the strict liability doctrine would be for Congress to delegate the power to exempt certain classes of activities from infringement to an administrative agency. This would resemble the procedure adopted in the Digital Millennium Copyright Act (DMCA) empowering the Librarian of Congress to conduct a triennial review of the application of the DMCA's anti-circumvention provisions and to exempt certain classes of works from infringement.²⁴⁰ It may be possible for an administrative body to make ex ante determinations of certain classes of innocent infringement. This approach might inject some relatively clear guidelines into the system about the kinds of uses that typically should not constitute a copyright infringement.

An obvious advantage of this approach is that it allows participation in the process by those who use copyright works but who may not have the funds to defend an action brought by a copyright holder. Presumably, making submissions to an administrative body will be cheaper and easier than defending a court action. Additionally, the administrative exemption approach potentially gives participants in the copyright system some ex ante guidance as to whether a particular use will be found infringing. If the administrative agency has exempted a certain type of use as an "innocent infringement," future parties engaging in that use can take some comfort that they will not incur liability for copyright infringement. This will potentially avoid at least some litigation altogether.

The devil would be in the details. How easy would it be for an administrative body to make specific determinations on classes of conduct that amount to innocent infringement without being over-inclusive or under-inclusive? Is this a task best left to the executive, the courts, or the legislature? To what extent could courts review an administrative determination that a particular use should be regarded as an innocent infringement? How easy would it be for them to deal with conflicts over the interpretation of a particular administrative exemption? Perhaps this approach simply adds an additional layer of cost and complexity to an already complex area of the law.

D. Excusing Innocent Downloaders

Returning to actions that legislatures or courts could take to mitigate the harshness of strict liability in copyright, Professor Snow

240. 17 U.S.C. § 1201(a)(1)(C) (2006).

has advocated an exemption to copyright liability for innocent downloaders of protected online content.²⁴¹ His suggestion would be limited to copying resulting from downloading content from a website where a false representation or impression had been created as to the legality of the download.²⁴²

As an alternative to a legislative amendment, Professor Snow suggests judicial action.²⁴³ Courts are empowered to create a judicial “innocent downloading” defense by creatively interpreting the damages provisions of the Copyright Act.²⁴⁴ In Professor Snow’s view, a court could interpret the damages provisions in the Act as inapplicable to innocent downloaders.²⁴⁵ He also suggests that courts have the power to recognize a new affirmative defense where a statute does not specifically provide for one, in cases where the defense is necessary to “avoid injustice, oppression, absurd consequences, or constitutional infirmities, and where recognizing the defense would not ignore legislative intent.”²⁴⁶ Thus, if a defendant could establish to a court’s satisfaction that accepting an innocent downloading defense to infringement would avoid injustice or perhaps even constitutional problems in chilling speech, the court may be persuaded to create such a defense.²⁴⁷

The suggestion of an affirmative defense for innocent downloading is intriguing. It would allow the system to adopt an innocence defense in a limited context and to evaluate any unforeseen problems that may ensue in considering such a defense more broadly in other applications of copyright law. Professor Snow seems to contemplate a burden of proof on the defendant to establish the “reasonableness” of her mistaken belief that her download was authorized.²⁴⁸

He further suggests that even an innocent downloader should not be entitled to retain good title to copyright material she has

241. Snow, *supra* note 8, at 323 (“The [Copyright] Act should excuse innocent downloaders from financial liability where a downloader infringers under a mistaken belief that is reasonable.”).

242. *Id.* (“Reasonableness would be determined by the appearance of a Web site. If a Web site’s appearance suggests that a download is infringing, a downloader’s mistaken belief that the download is legal would not excuse financial liability. A person viewing the same Web site as the innocent downloader would need to reach the same mistaken belief.”).

243. *Id.* at 327 (“In the event that Congress does not amend the Copyright Act, courts must resolve the policy and constitutional issues.”).

244. *Id.* (“[Courts could interpret] the damages provision of the [Copyright] Act as not applying to innocent downloaders.”).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 323.

innocently downloaded without authorization from the copyright holder.²⁴⁹ In this way, the law could mitigate the harshness of the strict liability doctrine without depriving the copyright owner of her rights to be paid for online distributions of her work.²⁵⁰ Of course, enforcing an order that an individual downloader must delete an unauthorized copy of a work may be extremely difficult in practice. However, at least a statement in the legislation depriving the downloader of good title expresses some deference to the rights of the copyright holder. Additionally, if the original downloader failed to delete the infringing material, she would no longer be an innocent infringer and would therefore be subject to statutory penalties for violating the copyright.²⁵¹

Adopting an amendment to the Copyright Act to excuse innocent downloading, along the lines suggested by Professor Snow, may also provide a useful opportunity to explore whether a more general innocence defense could work in the copyright infringement context. A legislative amendment would be preferable to a judicially created defense in this context. The legislature could address the specific contours of the defense, including, for example, Professor Snow's suggestions that a "reasonable belief" test should be built into the exemption,²⁵² and that an innocent downloader should be required to delete content she had innocently downloaded.²⁵³

While most of the proposals made here are controversial, it may nevertheless be time to give these—and similar proposals—some thought. Particularly in the context of the digital age, notions of strict liability may be more problematic than they have been in the past.²⁵⁴ However, even before the Internet age, commentators had criticized

249. *Id.* at 324 ("The exception for innocent downloading should not endow innocent downloaders with good title to infringement material The innocent downloader should not retain the infringing material because otherwise he would be unjustly enriched beyond that which directly resulted from his mistaken belief. He should be required to delete infringing material upon receiving notice of the infringement.").

250. *Id.* ("Alleviating the deterrent effect of strict liability punishment is possible without passing good title to the downloader By requiring the downloader to delete the material, the author's efforts that gave rise to the expression would not be further exploited without compensation.").

251. *Id.* ("If an innocent downloader fails to delete infringing material after receiving notice of his infringement, the downloader would no longer be innocent. By ignoring the copyright holder's notice of infringement, the downloader would effectively lose the protection that his innocence provided him, for his purposeful ignorance would amount to a willful violation. In that instance, statutory penalties for willful infringement should apply, reflecting the law's intolerance for actors who abuse protections for the innocent to further unlawful activity.").

252. *Id.* at 323.

253. *Id.* at 324–25.

254. *Id.*

the strict liability approach to copyright infringement.²⁵⁵ Perhaps the rise of the digital age will give courts and legislatures the impetus they need to reconsider strict liability in the copyright context.

IV. CONCLUSION

Historically, there have been good reasons for the strict liability approach to claims of direct copyright infringement.²⁵⁶ At a time when copyrights were typically registered under early copyright systems and it was relatively easy for users to establish the existence and ownership of a copyright, it seemed reasonable for them to bear the risk of infringement.²⁵⁷ However, as registration formalities have faded away, the notice rationale is less convincing today than it may have been in the past.²⁵⁸

Additionally, the rise of digital technologies has further stretched the already attenuated reasoning behind strict liability. As more copying processes become automated as part of a digital system, it is often difficult to justify imposing liability on a party who has merely enabled copying or incidentally copied in the act of innocently downloading a work. Strict liability for copyright infringement in the digital context, in particular, has the potential to seriously chill speech and technological innovation.²⁵⁹

It may be time for legislatures and courts to reconsider strict liability, both because some of the original justifications for the doctrine have fallen away in the modern world, and because strict liability seems a poor fit for many newer digital technologies. There are a number of possible avenues that legislatures and courts could take to mitigate the harshness of strict liability in today's global digital world. In fact, American courts seem to have made some first steps in this direction by imposing a "volition" requirement on a direct infringement action in certain digital contexts.²⁶⁰ This may be a first step toward broader changes to the strict liability doctrine to better

255. Ciolino & Donelon, *supra* note 11.

256. *See* discussion *supra* Part I.A.

257. *See* discussion *supra* Part I.A.

258. Ciolino & Donelon, *supra* note 11, at 376 ("[C]opyright no longer mandates notice and registration. The elimination of these requirements, which were hallmarks of the Statute of Anne and all federal copyright legislation prior to the 1976 Act, has rendered current copyright law a fenceless barren.").

259. *See* discussion *supra* Part II.C.

260. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.").

protect innocent infringers and to avoid chilling online speech and technological innovation.

Another advantage of mitigating the harshness of strict liability is that if the copyright system better protects innocent infringers, it may encourage copyright owners to make greater use of DRM technologies. Digital technologies enable copyright holders to relatively easily give notice of their rights to potential downstream users.²⁶¹ They can employ content management information to identify their copyright ownership and the terms on which they are prepared to license their works for downstream use.²⁶² Additionally, they can employ a number of technological protective measures to prohibit or limit unauthorized access to and use of their works.²⁶³

More effective use of digital content management information would avoid many cases of innocent infringement, because it would be more difficult for infringers to argue that they did not have notice of a copyright holder's rights, or thought the work was in the public domain. Situations where the work was innocently procured in reliance on false representations of a wrongdoer could be more difficult to resolve if content management information was removed by the wrongdoer. However, there are other ways of dealing with these situations, such as the legislative or judicial exemption from innocent downloading suggested by Professor Snow.²⁶⁴ The strict liability doctrine, a product of a prior time, which was meant to protect and foster innovation, should not be used today in a manner that inadvertently chills technological innovation.

261. NIMMER & NIMMER, *supra* note 107, § 12A.08 (discussing the value of protecting and promoting copyright management information use in the digital age with reference to the 1998 legislative provisions in the DMCA adding new protections for CMI).

262. In fact, the DMCA incorporated new provisions protecting the integrity of "copyright management information." 17 U.S.C. § 1202 (2006).

263. The DMCA also incorporated protections for such technological protection measures. *See id.* § 1201(a), (b).

264. *See* discussion *supra* Part III.D.