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The Age of Forgotten Innocence: The Dangers of Applying Analog Restrictions to Innocent Infringement in the Digital Era

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THE AGE OF FORGOTTEN INNOCENCE: THE DANGERS OF APPLYING ANALOG RESTRICTIONS TO INNOCENT INFRINGEMENT IN THE DIGITAL ERA

Brian Sheridan*

Recently, two popular topics of discussion within intellectual property law have been the statutory damage regime and the legality of peer-to-peer (P2P) downloading. This Note examines a rarely discussed interplay between these two concepts: the innocent infringement defense. Innocent infringement allows a court to dramatically reduce the minimum statutory damage award for an act of copyright infringement from \$750 to \$200 per act. Both the Fifth and Seventh Circuits have found that § 402(d) of the Copyright Act eliminates innocent infringement as a matter of law in a P2P download setting.

This Note examines those circuits' reasoning as well as the various responses from the legal academic community. It argues against those circuits' interpretation of the phrase "access to published phonorecords," found in § 402(d), to mean a general availability and a duty to inquire as to the copyright status of the songs in question. By viewing § 402(d) in this light, those courts have effectively eliminated the defense when applied to P2P downloading. This Note advocates for an actual inquiry into a defendant's state of mind to determine if they had "reason to believe" their actions constituted infringement, which would preserve innocent infringement in a digital environment.

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INTRODUCTION

Compare two scenes. In the first, a teenage girl comes home from school, goes on her computer, and downloads a handful of songs through a peer-to-peer (P2P) file-sharing network.¹ The other takes place in New York City's Chinatown in the late 1980s. Gift shops and flea markets are cashing in on the buzz surrounding the film *Batman*² and making a fortune selling anything they can bearing that infamous bat symbol.³

Without analyzing the relative legal standards, which of these two copyright infringers would you say deserved to claim their innocence—and essentially their ignorance of the copyright violation—to reduce their liability in damages? This Note explores the rationale courts have employed in granting innocent infringer mitigation in the commercial context⁴ but not in the digital download scenario⁵ in which defendants claim a similar “[l]ack of legal sophistication.”⁶

1. See *Maverick Recording Co. v. Harper*, 598 F.3d 193, 194–95 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 590 (2010).

2. *BATMAN* (Warner Brothers 1989).

3. See, e.g., *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 31 (2d Cir. 1990).

4. See *id.* at 37.

5. See *Harper*, 598 F.3d at 199; *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005).

6. *Harper*, 598 F.3d at 199; see also *D.C. Comics*, 912 F.2d at 35 (noting the level of sophistication of the defendants).

Innocent infringement is a component of copyright law's statutory damages scheme.⁷ A court may mitigate a damage award to no lower than \$200 if it finds that the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."⁸ This defense is therefore pertinent to downloading pirated music because defendants often infringe on multiple songs, which increases their total statutory damage penalty.⁹

Both the Fifth and Seventh Circuits have relied on § 402(d) of the Copyright Act in denying innocent infringement mitigation in a P2P downloading scenario.¹⁰ This section bars mitigation if the infringer had "access" to a published "phonorecord" marked with the appropriate copyright notice.¹¹ This Note argues that those circuits' interpretation of the word "access," in the context of digital downloading, is problematic for a variety of reasons.

First, it steps away from the original legislative intent for a general protection of innocent infringers.¹² Second, by not inquiring as to whether the defendant actually had "access" to the published records, those courts have ignored the differences between the modern world and the analog world in which those provisions were written.¹³ Lastly, given the typical infringer's claims of naïveté and innocence,¹⁴ the commonality of P2P downloading as a new social "norm" justifies the defense's application or, at the very least, its consideration.¹⁵ Furthermore, this Note is timely because the applicability of the innocent infringer defense to P2P is the next logical step in a litigation strategy dating back to *A&M Records, Inc. v. Napster, Inc.*¹⁶

Part I of this Note examines the development and legislative history of innocent infringement in American copyright law. Part II discusses P2P downloading as a backdrop for copyright infringement, the difficulties it presents, and the Recording Industry Association of America's (RIAA)

7. See 17 U.S.C. § 504(c)(1) (2006); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 452–53 (2009) (examining the statutory damages provision for copyright infringement and noting that the innocent infringer provision was an attempt by Congress to limit statutory damages).

8. 17 U.S.C. § 504(c)(2).

9. See, e.g., *Harper*, 598 F.3d at 194–95 (noting that computer forensic evidence originally discovered 544 audio files, which were subsequently deleted, and then an additional cache of 700 files; plaintiffs, however, only sought recovery on thirty-seven audio files); *Gonzalez*, 430 F.3d at 889–90 (explaining that originally 1,370 copyrighted files were found but, due to a dispute over which songs the defendant had purchased on CDs before the downloads and which she bought after, the action only focused on thirty undisputed infringing acts).

10. See *infra* notes 188–92, 211–15 and accompanying text.

11. 17 U.S.C. § 402(d).

12. See *infra* Part I.

13. See *infra* Part II.A.

14. See *infra* notes 179, 196–205 and accompanying text.

15. See *infra* notes 124–33 and accompanying text.

16. 239 F.3d 1004 (9th Cir. 2001) (finding Napster guilty of contributory infringement); see *infra* Part II.B.

litigation strategy against both direct and indirect infringers. Part III analyzes the Fifth and Seventh Circuits' denial of the innocent infringer defense in a P2P setting—citing § 402(d)—as well as various critiques of those opinions. Lastly, Part IV argues against those circuits' reasoning and for a more practical interpretation of “access” that will account for both the realities of the digital age and the legislative intent behind § 402(d).

I. THE DEVELOPMENT OF INNOCENT INFRINGEMENT

This part examines the history of innocent infringement in American copyright law. First, it explores the period from America's first copyright statute in 1790 until its initial overhaul in 1909, which was characterized by a high level of protection for innocent infringers. It then analyzes the period from 1909 onward, highlighted by the 1976 revisions that contain the modern statutory damage and innocent infringement provisions. Lastly, it introduces a Second Circuit decision as an example of innocent infringement mitigation.

A. *The Roots of Innocent Infringement*

Like most of the American legal system, copyright law traces its roots to England. Passed in 1709, the Statute of Anne¹⁷ was the first British copyright legislation.¹⁸ Written for the “Encouragement of learned Men to compose and write useful Books,” the Statute of Anne imposed a penalty of one penny per sheet of copyrighted material found in an infringer's possession.¹⁹ Thus, the first Anglo-American copyright law operated under a statutory damage system, rather than requiring the copyright holder to prove actual or punitive damages.²⁰

Warning that “many Persons may through Ignorance offend this Act,” the statute contained an express concern for innocent infringers.²¹ A registration system was designed whereby liability would not attach to those who printed their own copies of a protected work “unless the Title to the Copy of such Book or Books hereafter published [was] . . . entred [sic] in the Register Book of the Company of Stationers.”²² The hope was that such a system would lower the risk of innocent infringement by logging every copyrighted work into a central record.²³

17. 8 Ann., c. 21 (1709) (Eng.).

18. See R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 136 (2007) (discussing the 1790 Copyright Act's similarities to the Statute of Anne).

19. Statute of Anne § 1.

20. See *id.*; 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.01–.04 (2009) (discussing the differences between actual, punitive, and statutory damages for an act of copyright infringement).

21. Statute of Anne § 2; see Reese, *supra* note 18, at 145–46 (discussing the Statute of Anne's concern with innocent infringement and the development of the registration system as a means of protection against such a risk).

22. Statute of Anne § 2.

23. See Reese, *supra* note 18, at 146 (“Having seen the risk of innocent offense, the drafters attempted to reduce this risk through a registration system.”).

With regard to the sale of infringing works, the statute applied only to those individuals who “knowing the same to be so printed or reprinted . . . sell publish or expose to Sale” any book.²⁴ While the act essentially imputed constructive knowledge of the registry on printers, the above provision demonstrates that early British lawmakers were concerned with innocent infringement, specifically the unknowing sale of infringing merchandise.

America did not establish a federal copyright law until 1790.²⁵ Previously, copyright enforcement occurred at the state level, except in Delaware, which had no copyright statute.²⁶ Similar to the Statute of Anne, the 1790 Act allowed for statutory damages at a rate of fifty cents per sheet for any copyrighted material found in an infringer’s possession.²⁷

Knowledge was a crucial element of early American copyright infringement.²⁸ The 1790 Act imposed liability only on those individuals who

shall print, reprint, publish, or import . . . any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof . . . ; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale . . . any copy of such map, chart, book or books, without such consent²⁹

Thus, the law provided the same distinction as the Statute of Anne between printing an infringing copy and selling such a copy. The inclusion of a knowledge requirement appears to be a purposeful safeguard for innocent infringers, as the 1790 Patent Act imposed liability even on unknowing infringers.³⁰ As copyright law slowly grew to protect more types of works, Congress “took care to preserve the distinction between types of infringement and to require knowledge on the part of a seller of unauthorized copies.”³¹ Although the knowledge requirement was ultimately abandoned in 1909,³² the retention of this mens rea element of

24. Statute of Anne § 1.

25. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831); see Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC’Y USA 265, 274–75 (2009) (discussing the circumstances surrounding Congress’s adoption of the original federal copyright act).

26. See, e.g., Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 378 (2002) (further noting that among these twelve, four states did not distinguish innocent from willful infringement).

27. Act of May 31, 1790 § 2, 1 Stat. at 124–25.

28. Reese, *supra* note 18, at 178–79 (stating that the 1909 Copyright Act “abandoned the basic structure of all prior U.S. copyright law that required knowing action for certain acts to constitute infringement”).

29. Act of May 31, 1790 § 2, 1 Stat. at 124–25.

30. The text of the 1790 Patent Act made no reference to any knowledge on the part of the infringer, but rather imposed liability on any person who “shall devise, make, construct, use, employ, or vend” any patented product within the United States. 1790 Patent Act, ch. 7, § 4, 1 Stat. 109, 111.

31. Reese, *supra* note 18, at 156.

32. See *infra* Part I.B.2.

copyright infringement for over 100 years demonstrates a deep-seated concern for innocent infringement.

Another similarity with the Statute of Anne came in the form of a registration component.³³ The 1790 Act system mandated that all copyrighted works be recorded in the clerk's office of the district court in which the author resided.³⁴ In 1802, Congress mandated that protection would only be granted to those holders who placed "the copy of the record, which, by said act he is required to publish in one or more of the newspapers, to be inserted at full length in the title-page or in the page immediately following the title of every such book or books."³⁵ This notice provision reduced the risks of innocent infringement more so than the previous incarnation of the Act, given its convenience over checking each district court's records.³⁶ This would prove to be the nineteenth century's most substantive change to the copyright law with respect to innocent infringement.³⁷

In 1909, the law experienced a comprehensive overhaul, becoming broad enough to cover a variety of works and recognizing the growing landscape of copyright protection.³⁸ An examination of the legislative history behind the 1909 Act provides an interesting picture into the drafters' views on innocent infringement.³⁹

B. Copyright Law Developments in the Twentieth Century

1. The Legislative History of the Copyright Act of 1909

In response to the Senate Committee on Patents' desire to overhaul the copyright regime, the Librarian of Congress called a conference in 1905.⁴⁰ A survey of the debates demonstrates that innocent infringement was a legitimate concern of the time.

33. See *supra* notes 21–23 and accompanying text.

34. See Act of May 31, 1790 § 3, 1 Stat. at 125.

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

36. See Reese, *supra* note 18, at 151–52. The notice requirement ensured that "none could offend ignorantly. [Publication of notice in a newspaper] was mere legal implied notice; [publication of notice on every printed copy of a work] was a notice in fact, which no man could either overlook or mistake." *Id.* (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 698 (1834) (Baldwin, J., dissenting)).

37. See Reese, *supra* note 18, at 150–51 (discussing the origins of the notice requirement and its effect of "obviously provid[ing] significantly greater protection for possible unknowing infringers than did the formalities of the original 1790 Act or the Statute of Anne").

38. Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; see Reese, *supra* note 18, at 175 (noting that the landscape the 1909 copyright system operated in was "radically different[]" than at the time of the 1790 Act).

39. Jackson, *supra* note 26, at 379–84. See generally 1–2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter LEGISLATIVE HISTORY].

40. See 1 LEGISLATIVE HISTORY, *supra* note 39, pt. C, at vii.

As the conference began, lawmakers categorized infringers into certain groups based on their relevant intent.⁴¹ Among these, they distinguished between “the mere pirate” who “would not be [represented at] . . . your hearings” and “the innocent reproducer [who would not be] unrepresented at the conferences or in the discussions.”⁴² With innocent infringers noted as a group deserving consideration, the debates proceeded.⁴³

Notes from the debates evidence a general concern over knowing versus innocent violations. The comments of Robert Underwood Johnson, Secretary of the American (Authors’) Copyright League, are especially telling of this sentiment:

I hope in the new draft [of the Copyright Act] there will be, as far as possible, a careful discrimination between malicious infringement and innocent infringement. Those who innocently infringe a copyright are exposed to enormous penalties under the present draft. These penalties ought not to be imposed for innocent infringement.⁴⁴

Much of the discussion concerning innocent infringement was, as it is today,⁴⁵ tied to the notice requirement.⁴⁶ The final draft of the 1909 Act contained a provision stating that the lack of notice, while not voiding protection for the holder altogether, would “prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice.”⁴⁷ While innocent infringement remained a powerful protection, this change constrained it to instances in which a copy without the proper notice had misled the infringer and only provided the violator with relief from damages.

41. See Berg, *supra* note 25, at 278–79.

42. 4 LEGISLATIVE HISTORY, *supra* note 39, pt. H, at 17 (demonstrating intent to include the views of the latter).

43. See *id.*

44. 2 LEGISLATIVE HISTORY, *supra* note 39, pt. D, at 258 (demonstrating that excessive damage awards against innocent infringers were a concern at the time of drafting). The converse of the innocent infringer provision is the knowing/willful infringement provision. The current version was enacted in 1976 and states that when “the copyright owner sustains the burden of proving, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award . . . to a sum of not more than \$150,000.” 17 U.S.C. § 504(c)(2) (2006); see Berg, *supra* note 25, at 299–300 (discussing the original enactment of the 1976 statutory damage provisions). It is also important to note that the burden of proof for willful infringement is on the holder of the copyright, while the burden of proof for innocent infringement is on the infringer. See § 504(c)(2).

45. See *infra* notes 189–94 and accompanying text.

46. The rationale behind § 20 of the 1909 Act appears, at a glance, to be extremely relevant to the controversy over music downloads where copyright notice is affixed to physical CDs, but never to the digital music file themselves. This is further evidenced by remarks concerning the clause at the 1909 debates:

The last paragraph [which would become § 20] has been to some extent already discussed. The failure, owing to accident or mistake, to give the prescribed notice on a particular copy or copies does not, under the provisions of this bill, invalidate the copyright, but it does provide that if anyone is misled by the failure to give the notice in a copy and innocently infringes, there shall be no recovery of damages against such infringer for what he innocently did

6 LEGISLATIVE HISTORY, *supra* note 39, pt. N, at 13.

47. Act of Mar. 4, 1909, ch. 320, § 20, 35 Stat. 1075, 1080, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

Thus, the debates leading up to the 1909 Copyright Act demonstrate a respect for, and intention to protect the rights of, innocent infringers.⁴⁸

2. The 1909 Provisions: Abandonment of the Knowledge Requirement and Effect of Relief Provisions

Of all the new components of the Copyright Act of 1909, the omission of the knowledge requirement appears to be the most relevant to the innocent infringement discussion.⁴⁹ The Act operated by enumerating certain exclusive rights owed to a copyright holder,⁵⁰ but “never expressly defined infringement and articulated no knowledge or mental-state requirement for any violations.”⁵¹ Pursuant to this structure, courts have generally refrained from inquiring into a defendant’s state of mind in their determinations of infringement since the 1909 Act.⁵²

With the knowledge requirement extinguished, the only protection for innocent infringers was a limitation on the copyright holder’s recovery.⁵³ However, the Act did provide that “in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.”⁵⁴ Reimbursing innocent infringers for their own labor added a level of protection for those who may have invested substantially in their reproductions of a copyrighted work.⁵⁵ Nevertheless, the statute did not excuse the infringer of liability for profits from the reproductions.⁵⁶

The years between the 1909 Act and the next major overhaul in 1976 were marked by two additional protections for innocent infringers. When Congress extended copyright protection to motion pictures in 1912, it provided that statutory damages made “in lieu of actual damages” would be

48. Due to the practicalities of technology of that time, this was a concern with commercial reproductions, as infringement on a small scale or personal level was impractical. *See infra* Part II.A. The remarks of W.A. Livingstone, President, Print Publishers’ Association of America, at the Conference are especially telling: “I wish to point out further that there is no way in which you can frame that provision regarding the notice, so that you will prevent all cases of innocent infringement We cannot escape [sic] some of these troubles.” 3 LEGISLATIVE HISTORY, *supra* note 40, pt. E, at 291.

49. *See supra* notes 28–30 and accompanying text.

50. Section 1 of the Act lists the rights of a copyright holder, while § 5 lists the types of works covered under the Act. *See* Act of Mar. 4, 1909 §§ 1, 5, 35 Stat. at 1075–77.

51. Reese, *supra* note 18, at 179; *see* Jackson, *supra* note 26, at 381–82 (discussing the general strict liability structure used in the 1909 Act).

52. Courts do, however, inquire into a defendant’s mental state when determining the good faith standards of the “fair use” defense. *See infra* note 182 and accompanying text.

53. *See supra* notes 45–47 and accompanying text.

54. Act of Mar. 4, 1909 § 20, 35 Stat. at 1080.

55. *See* Reese, *supra* note 18, at 180 (noting the protective nature, but also warning that the “requirement for reimbursement by the copyright owner was left to the discretion of the court”).

56. *See* ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW: WITH ESPECIAL REFERENCE TO THE PRESENT UNITED STATES COPYRIGHT ACT 354 (1917) (noting that, under the 1909 statutory scheme, the “profits made by an innocent infringer may be recovered,” which was “required by the language of the Act and to be sound, from a technical point of view”).

limited to \$100 when the infringer “was not aware that he was infringing, and that such infringement could not have been reasonably foreseen.”⁵⁷ In 1952, Congress provided an innocent infringer exception for broadcasters who infringed on non-dramatic literary works—which were granted protection in the same amendment—when it could be shown that the broadcaster was not aware that they were infringing.⁵⁸

3. The 1976 Act: Start of the Modern Scheme

With hopes of modernizing the copyright system, the statute was amended again in 1976.⁵⁹ The Copyright Office of the Library of Congress began a series of studies on the current state of the law in 1955 that resulted in the 1976 revision.⁶⁰ When discussions began, a major topic was the notice requirement, which Congress had begun to “liberalize” in 1909.⁶¹

Notice had originally been one of the chief protections for innocent infringers,⁶² and that practical benefit was still apparent at the time of the 1976 Act. The House Reports on the 1976 Act demonstrate the importance that the notice requirement had for the innocent infringer, stating that the:

general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.⁶³

The 1976 Act ultimately retained the notice requirement, although it further relaxed its terms.⁶⁴ It also retained the clause protecting those who were misled by an omission of notice, providing for “no liability for actual or statutory damages.”⁶⁵

57. Act of Aug. 24, 1912, ch. 356, § 25(b), 37 Stat. 488, 489 (repealed 1976); see Jackson, *supra* note 26, at 383 (discussing the 1912 and 1952 innocent infringer amendments and noting that the justification for the filmmaker provision was possibly due to the “frequency of exhibition”).

58. Act of July 17, 1952, Pub. L. No. 82-575, 66 Stat. 752 (repealed 1976). The concept of affording special protection to public broadcasters was something that was retained in the 1976 revision. See *infra* notes 72–75 and accompanying text.

59. See Berg, *supra* note 25, at 300; see also Jackson, *supra* note 57, at 383–90 (surveying the early history surrounding the 1976 revisions and noting that innocent infringement was a concern from the revisions’ start in 1955).

60. See, e.g., WILLIAM S. STRAUSS, STUDY NO. 22: THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW (Oct. 1956), reprinted in 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY ix–32 (George S. Grossman ed., 2001).

61. See *supra* notes 46–47 and accompanying text.

62. See *supra* notes 35–37 and accompanying text.

63. H.R. REP. NO. 94-1476, at 148 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5764.

64. See Copyright Act of 1976, Pub. L. No. 94-533, §§ 405, 406, 90 Stat. 2541, 2578–79 (codified at 17 U.S.C. §§ 405, 406 (2006)); see also Reese, *supra* note 18, at 176–77 (discussing the relaxation of the notice requirement, in terms of form, placement, and errors, and its subsequent effect on innocent infringement).

65. In terms of injunctive relief, the Act also authorized a court to allow the infringer to continue after the infringer had paid a reasonable license fee to the holder of the copyright. Copyright Act of 1976 § 405(b).

The notice provision was completely eliminated in 1988 when the United States joined the Berne Convention,⁶⁶ but Congress sought to retain an incentive for holders to still attach notice to their works, by enacting § 402(d).⁶⁷ This new section provided that “[i]f a notice of copyright . . . appears on the published phonorecord . . . to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.”⁶⁸ In light of the fact that copyright holders today enjoy a larger bundle of rights than in previous incarnations of the regime, the abandonment of the notice requirement proved to be a major blow to innocent infringer protection.⁶⁹

The 1976 Act also introduced the modern statutory damage system, which includes the innocent infringement clause.⁷⁰ Innocent infringement applies when an infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” and allows a court to reduce the award of statutory damages to \$200 per act.⁷¹ At the debates on the proposed amendments, representatives of the broadcasting and educational industries had argued that damages should be completely set aside in cases of “genuinely innocent infringement” unless actual damage could be shown.⁷² Section 504(c)(2) was meant to be a compromise between those two groups and others who advocated for stronger penalties for innocent infringers.⁷³ The Act’s drafters originally understood this provision as “sufficient [enough] to protect against unwarranted liability in cases of occasional or isolated innocent infringement.”⁷⁴ Congress

66. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §7, 102 Stat. 2853, 2857–59 (codified as amended in scattered sections of 17 U.S.C.) The Berne Convention was an international agreement primarily designed to provide reciprocal recognition of signatory countries’ copyright structures.

67. See 17 U.S.C. § 402(d); 2 NIMMER & NIMMER, *supra* note 20, § 7.02(C)(3) (stating that while “notice [was] no longer required at publication . . . [an] incentive for use of the same type of copyright notice” was created in § 402(d)).

68. § 402(d).

69. See Reese, *supra* note 18, at 178 (“The early constructive notice approach to enabling users to avoid infringing depended on a relatively clear demarcation between a copyright owner’s exclusive rights and uses of a work that did not infringe. Today, though [sic] most noninfringing uses of copyrighted works are those allowed under significantly indeterminate doctrines . . . [one] who wants to use a work without infringing must determine not only whether the work is copyright but, more importantly, whether the use is permissible.”).

70. See 17 U.S.C. § 504(c).

71. *Id.* § 504(c)(2).

72. See CAMBRIDGE RESEARCH INST., OMNIBUS COPYRIGHT REVISION: COMPARATIVE ANALYSIS OF THE ISSUES 145 (1973); Berg, *supra* note 25, at 298–99 (discussing the concerns about innocent infringement, as well as those about new technologies, at the debates).

73. See CAMBRIDGE RESEARCH INST., *supra* note 72, at 145; Jackson, *supra* note 26, at 384–86 (summarizing both sides’ arguments in the original innocent infringer debate).

74. H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779; see also Samuelson & Wheatland, *supra* note 7, at 460 (discussing the tripartite system of statutory damages in general, namely standard, innocent, and willful infringement).

ultimately sided with broadcasters and educators, however; the latter portion of § 504(c)(2) provides:

[t]he court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution . . . or (ii) a public broadcasting entity. . . .⁷⁵

The retention of a damage floor generally—as opposed to the specific remittance of damages afforded innocent educators and broadcasters—was intended to preserve a deterrent effect, as it would not allow an infringer to escape liability simply because the holder could not disprove a claim of innocence.⁷⁶

In contrast to the notice requirement, the statutory damages innocent infringement provision has largely remained untouched since its inception.⁷⁷ While the statutory minimum for innocent infringement increased from \$100 to \$200 with the adoption of the Berne Convention,⁷⁸ it has otherwise remained consistent despite subsequent changes to the copyright law to reflect the growing digital environment.⁷⁹

C. A Modern Example of Innocent Infringement in the Courts

An analysis of the Second Circuit's opinion in *D.C. Comics, Inc. v. Mini Gift Shop*⁸⁰ provides a typical example of innocent infringement mitigation of a statutory damage award.⁸¹ The infringers there were a number of recent immigrants who maintained several shops in and around New York City.⁸² At these establishments, the defendants sold various pieces of merchandise that infringed on the Batman license.⁸³ The time of the infringement coincided with the release of Tim Burton's film of the same name.⁸⁴ The plaintiff, Warner Brothers, Inc., owned the Batman mark and various licenses through its subsidiaries.⁸⁵ Throughout the course of litigation, plaintiffs elected to receive statutory damages under § 504 (c)(1)

75. § 504(c)(2).

76. See H.R. REP. NO. 94-1476, at 163, *reprinted in* 1976 U.S.C.C.A.N. at 5779.

77. The lack of change in terms of statutory damages stands in contrast with the technological world, which has been radically altered since the time of the 1976 Act. See *infra* Part II.A.

78. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

79. Compare § 504 (current version), with Copyright Act of 1976 § 504, Pub. L. No. 94-533, 90 Stat. 2541, 2585-86 (original). The Digital Millennium Copyright Act was the largest revision of copyright law since the 1976 Act, but made no modifications to the innocent infringement protections found in 17 USC § 504(c)(2). See Pub. L. No. 105-304, §1, 112 Stat. 2860; DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 385 (2003).

80. 912 F.2d 29 (2d Cir. 1990).

81. See *id.* at 36.

82. *Id.* at 31-32.

83. *Id.* at 31.

84. *Id.*; see also *BATMAN*, *supra* note 2.

85. *D.C. Comics*, 912 F.2d at 31.

of the Copyright Act and the defendants sought mitigation via § 504(c)(2).⁸⁶

The U.S. District Court for the Eastern District of New York granted mitigation to both those defendants who had appeared at trial and those who defaulted.⁸⁷ Plaintiffs appealed the judgment, claiming that granting reduced statutory damages was improper for both sets of defendants.⁸⁸ The Second Circuit held that the district court's extension of the innocent infringer defense to the defaulting defendants was unwarranted because the burden of proof rests on a defendant, and therefore increased their damage penalty to the contemporary minimum of \$500 per act.⁸⁹

It was the Second Circuit's discussion of the appearing defendants, however, that is significant to the innocent infringement debate. The court began by noting that the goods themselves carried no copyright notice and were, to a layperson, virtually indistinguishable from non-infringing merchandise.⁹⁰ The simple absence of the appropriate notice, however, is not enough to establish innocent infringement if the defendant had "reason to believe" the merchandise was copyrighted.⁹¹

Judge Roger J. Miner adopted the paradigmatic understanding of § 504(c)(2) that an "inquiry into the defendant's state of mind" is crucial when considering mitigation.⁹² Relying on transcripts from trial appearances that clearly demonstrated the defendants' lack of business sophistication, the court determined that a defendant's inexperience was "an entirely proper means of determining whether or not his infringement was innocent."⁹³ Such a lack of sophistication added weight to the fact that there was no copyright notice on the infringing goods and, therefore, the Second Circuit held that the defendants deserved damage mitigation as innocent infringers.⁹⁴ Moreover, the shop owner's lack of sophistication and the appearance of the goods provided justification for their failure to "inquire as

86. *Id.* at 35 (discussing a number of defendants in this litigation who failed to appear before the district court).

87. *Id.* at 31.

88. *Id.*

89. *Id.* at 35 (stating that the court simply "could not make any finding of innocence concerning the defendants who failed to appear").

90. *Id.* ("[T]here were no copyright notices on the infringing goods and . . . a layman would not be able to distinguish between licensed and unlicensed goods This evidence tends to establish that defendants' infringement was innocent."). In this regard, the goods in question were similar to a song downloaded through a P2P network. *See infra* note 297 and accompanying text.

91. *D.C. Comics*, 912 F.2d at 35.

92. *Id.* at 35. Furthermore, it is important to note that the "defense" of innocent infringement never absolves liability but merely reduces an award for statutory damages. *See* 17 U.S.C. § 504(c)(2)(2006).

93. *D.C. Comics*, 912 F.2d at 35–36 (remarking that the defendants "lacked 'the sophistication or level of understanding' to prompt an inquiry into the source of the unmarked goods"). Generally, experience can give rise to a duty of inquiry. *See Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) (holding that the defendant, an experienced jukebox operation, "should" have inquired into the copyrighted nature of the copyrighted music).

94. *D.C. Comics*, 912 F.2d at 36.

to the source of the goods,” which may have uncovered their copyrighted nature.⁹⁵ The shop owners were ultimately deemed innocent infringers and their judgment against them was mitigated to \$200 per act.⁹⁶

This application of the innocent infringement provision, as well as statutory damage system in general, has remained nearly untouched since its inception in 1976,⁹⁷ but the landscape in which copyright infringement may take place has experienced an extraordinary transformation.

II. THE DIGITAL REVOLUTION: THE EFFECT OF P2P DOWNLOADING ON COPYRIGHT LAW AND PERSONAL USE

This part focuses on the history of P2P downloading. It begins by examining the radically different landscape in which copyright infringement now exists: the digital arena. It then analyzes the RIAA’s⁹⁸ litigation strategy against P2P services that were used for illegal downloading (indirect infringers). Lastly, this part presents the circumstances that ultimately led the RIAA to bring claims against individuals who had downloaded music files from P2P networks (end-users).

A. Comparison to Infringement in the Analog World

It has been suggested that copyright infringement in the digital era presents several “distinct problems” when applied to the current, pre-digital statutory regime.⁹⁹ This is of no surprise, as copyright law developed around large scale “means for mechanically capturing and reproducing works of authorship . . . and new devices and methods for distributing, receiving, and perceiving [such] content.”¹⁰⁰ Such a system contrasts sharply with the infringement examined in this Note, which is limited to digital downloading, mainly from P2P networks.

95. *Id.*; see also *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347, 1354 (S.D.N.Y. 1987) (finding that a dress supplier’s failure to undertake a copyright search was not enough to find her infringement intentional because she had no notice that the pattern was trademarked and had not dealt with the plaintiff prior to the suit). It is important to note that this conclusion that there was no duty to inquire is the exact opposite of that in *BMG Music v. Gonzalez* where the defendant similarly lacked legal sophistication. See *infra* notes 191–94 and accompanying text.

96. *D.C. Comics*, 912 F.2d at 37.

97. See *supra* note 79 and accompanying text.

98. The RIAA is a trade organization whose members account for the creation, manufacture, and/or distribution of 85 percent of the music produced in the United States. See *Who We Are*, RIAA, <http://www.riaa.com/aboutus.php> (last visited Nov. 16, 2011).

99. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 171–72 (2001); see *infra* Part III.B.i (discussing various alternative proposals to the current copyright scheme that would account for the realities of the digital environment).

100. Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 104 (2003) (giving examples such as “phonographs, photographs, film, and photocopies”). Furthermore, the very term “analog” derives from a mechanical reproduction that operates as an “analogy” to the original work. *Id.*

In general, a P2P network allows individuals to locate and download files from another person's computer over an internet connection.¹⁰¹ Such a file-sharing system can enable an "unauthorized transfer" of copyrighted music files—such as MP3 files—that can be "ripped" from CDs onto a computer.¹⁰² Widespread dissemination is one of the most remarkable advances that characterize the digital era.¹⁰³ Scholars warn that as the costs of producing copies dramatically falls, "the sharp division between professional counterfeiters and end-user copiers breaks down."¹⁰⁴ This situation is exacerbated by the pure ease of digital copying compared to physical photocopying or "taping" in the analog era.¹⁰⁵

Aside from physical differences, the instant accessibility of a seemingly endless amount of information has created new "end user [societal] norms."¹⁰⁶ A "norm" is a pattern of behavior whose context is defined not by statutory constraints, but rather through popular practice.¹⁰⁷ The examination of popular practice is crucial to the P2P discussion because copyright law is not a natural predisposition of Anglo-American culture.¹⁰⁸ Gaps often exist between the actual law and typical activity.¹⁰⁹ Studies have shown this to be a product of the public's understanding of copyright as a "mind-numbing collection of inconsistent, indeed incoherent, complexities."¹¹⁰ Other possible causes for such gaps include exaggerations over a copyright holder's rights, confusion over the role of

101. See MICHAEL A. EINHORN, *MEDIA, TECHNOLOGY, AND COPYRIGHT: INTEGRATING LAW AND ECONOMICS* 79 (2004).

102. *Id.*

103. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1374–75 (2004); see also Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More like a Book*, 48 VILL. L. REV. 13, 17 (2003) (discussing how technological advances have, among other things, led to greater ease in distribution of copyrighted works); Menell, *supra* note 100, at 103 ("[T]he ease with which digital technology enables anyone . . . to reproduce and make available . . . flawless reproductions of works of authorship has proven a far greater concern and more wrenching adjustment for copyright law than accommodating computer software.").

104. Lemley & Reese, *supra* note 103, at 1375. Phrased otherwise, almost everyone today has the means by which to commit certain types of infringement that would be limited to only professional counterfeiters in the analog era. *Id.*

105. *Id.* (noting that copying a CD for someone deprives the record company of a single sale, while posting the files from that same CD online risks depriving the record company of thousands of sales).

106. Bartow, *supra* note 103, at 19–20.

107. *Id.* at 20–21 (citing Steven Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 892 n.53 (2001)).

108. *Id.* at 23.

109. See *id.* at 43–44 (describing the "gap-creating" nature of copyright law).

110. Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 237 (1991); see also Bartow, *supra* note 103, at 44 (noting that the public is often "better versed in copyright myths and urban legends than in actual copyright law"). These complexities, and their relation to norm-gaps, have led the National Research Council to recommend that the digital age requires a re-working of copyright law in favor of "a greater degree of simplicity, clarity, straight-forwardness, and easy comprehensibility" with "sufficient flexibility and adaptability in the law so it can accommodate the future evolution of technologies and behaviors." NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 127 (2000).

publishers and record companies, and the relative ease by which copyright protection can be established in the first place.¹¹¹

The transition from an analog to digital world dramatically altered concepts of typical personal use. In the analog world,¹¹² music could be shared among individuals “without any copying across formats.”¹¹³ The “norm” for similar use in the digital world is fundamentally different because “sharing [MP3 files] as conveniently as tapes or CDs functionally requires making copies.”¹¹⁴ This is crucial in the P2P setting because studies have shown that teenagers, despite the threat of litigation, consider P2P networks the most attractive source of obtaining music.¹¹⁵

The simple act of copying a music file has conflicting legal consequences depending on its analog or digital nature. The Audio Home Recording Act of 1992¹¹⁶ allows the copying—for non-profit use¹¹⁷—of a song to share with others so long as that copying is done by analog means. The use of a P2P network for achieving the exact same purpose, however, has been held to violate the copyright law.¹¹⁸ Some argue that this fundamental difference creates confusion over what the public considers to be a non-infringing activity.¹¹⁹

The extraordinary aspect of digital downloading is that despite the RIAA’s legal victories, the popularity of P2P continues to rise.¹²⁰ The latest generation of P2P downloading, which operates largely through the use of torrent files,¹²¹ accounts for over half of the total upload traffic in North America and 13.2 percent of the downloading traffic.¹²² While legitimate internet media services, such as Netflix, have grown at exponential rates, P2P remains a major aspect of cyber-culture.¹²³

111. See Bartow, *supra* note 103, at 46–48 (using the example of the strong language found in “FBI notice[s]” on videotapes and DVDs).

112. The analog era of music was characterized by records, cassette tapes, and compact discs as the primary means by which individuals purchased—and infringed—a musical work. See *supra* note 100 and accompanying text.

113. Bartow, *supra* note 103, at 22.

114. *Id.* (noting that the alternative, lending an MP3 file as one would a CD, is impractical because it would require the additional lending of a computer or MP3 player).

115. See Menell, *supra* note 100, at 101.

116. 17 U.S.C. § 1008; see Bartow, *supra* note 103, at 31 (stating that the Act “*de facto* legitimized” such analog copying).

117. Academics such as Jessica Litman have argued for the non-profit distinction as an alternative solution to the P2P crisis. See LITMAN, *supra* note 99, at 171–91.

118. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020–22 (9th Cir. 2001) (holding Napster liable on a contributory infringement theory).

119. See Bartow, *supra* note 103, at 43–48 (discussing the phenomenon of “norm gaps” in copyright law).

120. See Menell, *supra* note 100, at 101.

121. Torrent files contain URLs of various “trackers.” An end-user who downloads from a torrent receives pieces of data from multiple users, which the torrent file organizes into a comprehensive whole. See, e.g., *The BitTorrent Protocol Specification*, BITTORRENT.ORG, http://www.bittorrent.org/beps/bep_0003.html (last visited Nov. 16, 2011).

122. *BitTorrent Still Dominates Global Internet Traffic*, TORRENT FREAK (Oct. 26, 2010), <http://torrentfreak.com/bittorrent-still-dominates-global-internet-traffic-101026/>.

123. Thomas Mennecke, *The End of an Era—BitTorrent Challenged by Netflix*, SLYCK (Oct. 26, 2010), http://www.slyck.com/story2106_The_End_of_an_Era_BitTorrent_

P2P's role as a societal norm is noteworthy as judicial opinions considering copyright law often involve an inquiry into the public's use of a given procedure for making copies.¹²⁴ For instance, one of the chief justifications for the U.S. Supreme Court's landmark decision in *Sony Corp. of America v. Universal City Studios, Inc.*¹²⁵—that the Betamax videocassette recorder (VCR) manufacturer was not liable for contributory infringement—was the fact that the public used the VCR in substantial, non-infringing ways.¹²⁶ Today, P2P downloading is recognized as “illegal, but common,” even in the eyes of courts.¹²⁷ This has led some to argue for a framework that would translate analog norms to their digital counterparts.¹²⁸ For example:

[E]nd use purchasers customarily re-read analog books and loan them to friends. . . [and those rights should be protected] when the works are embodied in electronic formats Conversely, [since] consumers do not typically destroy analog books nor rent them out for fees, it would be unnecessary to codify rights to do so specifically with electronic books.¹²⁹

While radical, this approach stresses the importance of societal norms in applying copyright law.

Even the RIAA, the perennial “bad guy” in the public's view of the P2P war, has admitted to the commonality of P2P downloading.¹³⁰ In a recent interview, Cary Sherman, President of the RIAA, admitted that “most people had no idea that what they were doing was illegal, let alone thought it was wrong.”¹³¹ Some commentators, including famous P2P defendant Joel Tenenbaum,¹³² have noted that this seems to undermine the RIAA's claim that these same defendants are undeserving of innocent infringement mitigation.¹³³

Thus, there is a growing tension between the copyright laws and this fundamentally different arena in which digital downloading, and more specifically P2P network “sharing,” exists. The next section explores

Challenged_by_Netflix (noting that Netflix now accounts for over 20 percent of downstream internet content).

124. See generally Bartow, *supra* note 103 (discussing the importance that copyright norms have).

125. 464 U.S. 417 (1984).

126. *Id.* at 451.

127. Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227–28 (D. Minn. 2008) (noting that the defendant “acted like countless other Internet users” when she downloaded music files from the P2P network KaZaA).

128. Bartow, *supra* note 103, at 75.

129. *Id.*

130. See Rocco Castoro, *Downloading Some Bullshit: An Interview with the President of the RIAA*, VICE BETA (Aug. 20, 2010), <http://www.vice.com/read/downloading-some-bullshit-484-v17n8>. Sherman went on to say that despite the retention of public relations firms in an attempt to change the “culture” of digital downloading, the RIAA has come to realize that “none of the messages resonated.” *Id.*

131. *Id.*

132. See *infra* note 221 and accompanying text.

133. See *RIAA President: The Case for the Innocent Infringer*, JOEL FIGHTS BACK (Aug. 21, 2010), <http://joelfightsback.com/#/2010/08/riaapresiden>.

specific P2P systems and how the RIAA initiated their litigation campaign against file-sharing.

B. Early RIAA Litigation Strategy

In 1999, a freshman at Northeastern University developed the original Napster application, setting the stage for the most infamous P2P decision to date.¹³⁴ The system operated through a central server which was owned and maintained by Napster itself.¹³⁵ User software was distributed through Napster's website, which would access the server and locate "donor songs" that could then be downloaded.¹³⁶ Napster's servers, however, could not determine which file a user was searching for or whether the file was under copyright protection.¹³⁷

Facing the variety of concerns discussed above, the RIAA initiated the first generation of P2P lawsuits against services, including Napster, whose central services maintained the files and processed the user requests.¹³⁸ The RIAA's claims at this stage were centered on a theory of indirect liability through contributory infringement.¹³⁹ Contributory infringement, as opposed to direct infringement, exists when someone "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."¹⁴⁰

Prior to *Napster*, the most significant contributory infringement decision was the Supreme Court's opinion in *Sony*.¹⁴¹ That case focused on the legality of the VCR which, as a reproduction technology, had potentially

134. See MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 93 (2007).

135. See *id.*; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (describing the technical makeup of the Napster P2P system). See generally Ashley R. Hudson, Comment, *Can't Get No Satisfaction: The Rise (and Fall?) of Grokster and Peer-to-Peer File Sharing*, 59 ARK. L. REV. 889, 899-902 (2007) (noting the technological distinction between Napster and Aimster in the historical development of P2P).

136. A "donor song" is merely a song, in a digital format, that an individual has made available on Napster's server. See EINHORN, *supra* note 101, at 84.

137. See *id.* Napster's servers were, however, necessary for the system to survive in general, as opposed to those employed by Grokster and StreamCast. Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859, 883-84 (2004).

138. There were, as well, practical and economic reasons for the RIAA to attack facilitators before individual end-users. See Lemley & Reese, *supra* note 103, at 1349 ("From the perspective of the music industry, it was easier and more effective to shut down Napster than to sue the millions of people who illegally traded files on Napster."). Other file-sharing systems, which were confronted with litigation at this phase, included Scour, Aimster/Madster, Audiogalaxy, and iMesh. See EINHORN, *supra* note 101, at 79.

139. See *Napster*, 239 F.3d at 1011; see also Feder, *supra* note 137, at 869-73 (discussing the theories of indirect liability that characterized this stage in the RIAA's litigation strategy).

140. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

141. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); Feder, *supra* note 137, at 879-902 (demonstrating the importance of *Sony* with regard to P2P litigation).

legitimate and illegitimate uses.¹⁴² Sony's Betamax VCR was designed to allow consumers to make personal copies of television programs.¹⁴³ Universal and Disney filed their claim in 1976 alleging that Sony (not the consumers themselves) committed copyright infringement by virtue of manufacturing and producing VCRs.¹⁴⁴ The U.S. District Court for the Central District of California denied any relief to the plaintiffs.¹⁴⁵ On appeal, the Ninth Circuit reversed, held Sony liable for contributory infringement, and remanded proceedings to the district court to determine relief.¹⁴⁶

After remand, the Supreme Court ultimately granted certiorari to review the judgment. Justice John Paul Stevens produced one of the most powerful intellectual property opinions in the Court's history.¹⁴⁷ The potential uses of the device served as the basis for the Court's opinion.¹⁴⁸ Since the VCR could be "widely used for legitimate, unobjectionable purposes," the Court held that the mere sale of it could not constitute contributory infringement.¹⁴⁹ In addition, the Court made an important distinction between commercial and non-commercial uses of the VCR.¹⁵⁰ Justice Stevens explained that "although every commercial use of copyrighted material is presumptively an unfair exploitation . . . [a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."¹⁵¹

142. See *Sony*, 464 U.S. at 436–37.

143. See RIMMER, *supra* note 134, at 60 (discussing the technological significance of the VCR). The Court's opinion has been heralded by many academics, and the twenty-first anniversary of the opinion occasioned numerous tributes to it. Gary Shapiro, Chairman of the Home Recording Rights Coalition, went as far as to call it the "Magna Carta" for the technological industry. *Court Mulls File-Sharing Future*, BBC NEWS (Mar. 30, 2005), <http://news.bbc.co.uk/2/hi/technology/4394371.stm>. *Sony* is such an important precedent that almost all sixty briefs filed in relation to *Metro-Goldwin-Mayer Studios, Inc. v. Grokster Ltd.* at the Supreme Court level, regardless of which side they supported, cited to *Sony*. See *News*, ENJOY THE MUSIC (June 20, 2005), <http://www.enjoythemusic.com/news/0605/> (discussing the continuing effect of the *Sony* decision in a digital environment).

144. See Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 917–25 (2005) (discussing the lead up to the *Sony* decision).

145. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 469 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417.

146. See *Sony*, 659 F.2d at 977.

147. See Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1875 (2006) (remarking that "[o]f the nearly fifty IP decisions rendered by the Supreme Court during the thirty years that Justice Stevens has served on the Court, none has had a more significant economic or social impact"); see also RIMMER, *supra* note 134, at 63, 65 (surveying the academic discourse on Justice Stevens's majority opinion).

148. See *Sony*, 464 U.S. at 419–20.

149. *Id.* at 442. The Court continued that "[i]ndeed, it need merely be capable of substantial noninfringing uses." *Id.*

150. See *id.*; see also EINHORN, *supra* note 101, at 83 (discussing the Supreme Court's use of the commercial versus noncommercial framework in relation to its holding). See generally LITMAN, *supra* note 99, at 171–86 (discussing the possible use of the commercial versus noncommercial distinction for P2P downloading).

151. *Sony*, 464 U.S. at 451.

With *Sony* as the seminal contributory infringement decision, the RIAA formulated their attack against P2P. In December 1999, the RIAA filed a complaint against Napster for vicarious and contributory infringement.¹⁵² One of Napster's primary defenses was that *Sony* barred any finding of contributory infringement,¹⁵³ because an MP3 file could be used as a "space-shifting" mechanism.¹⁵⁴ This referred to instances in which a Napster user would merely download music that they already owned on a CD, thus "shifting" it from physical to digital form by way of Napster, as opposed to "ripping" the song from a physical CD.¹⁵⁵ The Ninth Circuit refused to extend the shifting analysis, employed in both *Sony* and *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*,¹⁵⁶ to Napster because the devices examined in those decisions "did not also simultaneously involve distribution of the copyrighted material to the general public."¹⁵⁷

Napster ultimately lost in the Ninth Circuit, scoring only a minor victory in the court's recognition that record companies have the burden of giving Napster notice of copyrighted works on their service.¹⁵⁸ The RIAA used the momentum of its victory over Napster to attack similar P2P downloading services on the same contributory infringement theory.¹⁵⁹

The next wave of litigation focused on P2P systems that stored files on random users' computers, where others could send a file request through online directories for a given geographical region.¹⁶⁰ These new services were not only technologically distinct, but also attracted far more users than Napster did at its peak.¹⁶¹ In October 2001, companies in the music and

152. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). Vicarious infringement is a concept related to respondeat superior, in which "a person who has promoted or induced the infringing acts . . . [is] jointly and severally liable as a 'vicarious' infringer." See, e.g., *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

153. See *Napster*, 239 F.3d at 1019.

154. See *id.* This argument is similar to the "time-shifting" aspect of the VCR in *Sony*. See *Sony*, 464 U.S. at 423.

155. See *Napster*, 239 F.3d at 1019.

156. 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that a "space-shift" to a personal MP3 player was a fair use).

157. *Napster*, 239 F.3d at 1019.

158. See *id.* at 1027; see also RIMMER, *supra* note 134, at 95.

159. See Hudson, *supra* note 135, at 902 (stating that the *Grokster* decision was brought "[o]n the heels of Napster II"); see also EINHORN, *supra* note 101, at 88 (noting that the parallel suits to *Napster* included claims against Audiogalaxy and Madster).

160. See Feder, *supra* note 137, at 865-66 (discussing the "supernode" model, as employed by *Grokster*, as compared to other types of P2P networks, such as *Napster*).

161. See John Borland, *Suit Hits Popular Post-Napster Network*, CNET NEWS (Oct. 3, 2001), <http://news.cnet.com/2100-1023-273855.html> (discussing the popularity of second generation P2P sites). In fact, the argument has been made that the defeat of *Napster* increased the general public's awareness of illegal downloading on P2P networks and, ultimately, led to the rise in this generation's downloading. See Kristina Groennings, Note, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 573 (2005).

movie industries filed suit against the three most prominent of these networks: KaZaA BV, Grokster, and Music City/StreamCast.¹⁶²

The Central District of California originally granted summary judgment in favor of the P2P networks in *Metro-Goldwyn-Meyer Studios v. Grokster, Ltd.* in April 2003.¹⁶³ This was an unexpected conclusion given the outcome in *Napster*.¹⁶⁴ The court held that the workings of StreamCast and Grokster were more analogous to the VCR examined in *Sony*¹⁶⁵ than to Napster's centralized system.¹⁶⁶ In 2004, the Ninth Circuit upheld the verdict using a similar rationale of lack of user control.¹⁶⁷ But the Supreme Court ultimately vacated that decision and remanded *Grokster* in 2005 to apply a new theory of "inducement."¹⁶⁸ Staying within the framework established by *Sony*, Justice David H. Souter articulated a concept of secondary liability for those "who distribute[] a device with the object of promoting its use to infringe copyright."¹⁶⁹

While the Supreme Court's abrogation of the Central District of California and Ninth Circuit opinions left the door open to actions against services,¹⁷⁰ the lower courts' earlier decisions had already forced copyright holders to pursue alternative strategies and had opened the floodgates to litigation against individual end-users, which caused the filing of lawsuits

162. See Rimmer, *supra* note 134, at 96. KaZaA BV ultimately settled, but the KaZaA software had been sold to Sharman Networks, which therefore was still involved in the litigation at this stage. See EINHORN, *supra* note 101, at 88–91; Feder, *supra* note 137, at 879–93 (surveying P2P litigation beginning with *Napster* and including the *Grokster* decision).

163. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated by* 545 U.S. 913 (2005).

164. See EINHORN, *supra* note 101, at 89; see also Hudson, *supra* note 135, at 906 (noting that the Ninth Circuit's decision in *Grokster* was a "stunning victory over the heavy hitters of the entertainment industry").

165. *Grokster*, 259 F. Supp. 2d at 1043 (remarking that "[d]efendants distribute and support software, the users of which can and do choose to employ it for both lawful and unlawful ends"); see also EINHORN, *supra* note 101, at 89 (discussing the district court's rationale in extending a *Sony* analysis to the P2P networks).

166. *Grokster*, 259 F. Supp. 2d at 1041 (noting that "[n]either StreamCast nor Grokster facilitates the exchange of files between users in the way Napster did"); see Feder, *supra* note 137, at 883–84 (discussing the technological differences between Napster and Grokster as an additional justification for the Ninth Circuit's outcome in *Grokster*).

167. See *Grokster*, 380 F.3d at 1164; see also RIMMER, *supra* note 134, at 97–98 (explaining that the Ninth Circuit decided that Grokster could not be held liable "because they could not police the conduct of their users, as Napster could").

168. *Grokster*, 545 U.S. at 941. After remand, Grokster reached a settlement with the RIAA, the terms of which included that a warning be posted on Grokster's website stating the legality of their P2P network. See RIMMER, *supra* note 134, at 104.

169. *Grokster*, 545 U.S. at 936–37 (continuing that the new rule "premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise"); see also Feder, *supra* note 137, at 881–84.

170. In the wake of *Grokster*, Sharman Networks, which had recently purchased KaZaA, settled, while StreamCast was found liable under the new theory of "inducement" at the district court level after remand. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 983–95 (C.D. Cal. 2006); RIMMER, *supra* note 134, at 104–05.

against 261 individual music downloaders on a single day.¹⁷¹ By 2008, the RIAA had sued over 30,000 individuals for copyright infringement stemming from digital downloading.¹⁷² While the vast majority of these claims have settled, the next part examines a mitigation defense that some of those defendants have attempted to employ.

III. THE INNOCENT INFRINGEMENT DEBATE

This part examines the Fifth and Seventh Circuits' recent jurisprudence on the innocent infringer defense in P2P settings. More specifically, it examines how those courts have interpreted § 402(d) of the Copyright Act as an absolute bar to claims of innocent infringement rooted in the phrase "access to published copies," despite not conducting a fact-finding inquiry into the defendant's actual circumstance.¹⁷³ This part concludes with a survey of various critiques of these opinions based in part on the Second Circuit's decision in *D.C. Comics*.

A. *The Fifth and Seventh Circuits' Non-application of Innocent Infringement to the P2P Setting*

In *BMG Music v. Gonzalez*,¹⁷⁴ a defendant in a P2P downloading action attempted to apply both fair use and innocent infringement defenses to copyright infringement.¹⁷⁵ Cecilia Gonzalez—an unemployed mother of five¹⁷⁶—was ultimately held liable for \$22,500 in statutory damages for thirty acts of copyright infringement.¹⁷⁷

Gonzalez originally downloaded more than 1,370 copyrighted songs from the KaZaA network,¹⁷⁸ which she claimed was merely a "sampling" for purchase at a later date.¹⁷⁹ Furthermore, Gonzalez owned the vast majority of the disputed songs on over 250 CDs, which she claimed she had downloaded in order to avoid the labor of ripping them to her computer.¹⁸⁰ Despite the confusion over when she purchased some of the songs—either after or before they were downloaded—Gonzalez conceded that she never

171. See *RIAA v. the People: Five Years Later*, ELEC. FRONTIER FOUND. 1 (Sept. 30, 2008), <https://www.eff.org/files/eff-riaa-whitepaper.pdf> [hereinafter *Five Years Later*]. See generally Groennings, *supra* note 161, at 572–77 (discussing the importance the Ninth Circuit's opinion had in causing the RIAA to "focus[] exclusively against direct infringers"); John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS (Sept. 8, 2003), http://news.cnet.com/2100-1023_3-5072564.html (further noting that the RIAA considered such personal infringement to be "egregious").

172. See *Five Years Later*, *supra* note 171, at 1.

173. See *infra* notes 191–93, 212–15 and accompanying text.

174. 430 F.3d 888 (7th Cir. 2005).

175. See *id.* at 889, 892.

176. See *RIAA v. the People: Two Years Later*, ELEC. FRONTIER FOUND. 6 (Nov. 3, 2005), http://w2.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf [hereinafter *Two Years Later*].

177. See *Gonzalez*, 430 F.3d at 889; see also RIMMER, *supra* note 134, at 211–14 (surveying the *Gonzalez* decision).

178. *Gonzalez*, 430 F.3d at 889.

179. *Id.* at 889–90.

180. See *Two Years Later*, *supra* note 176.

owned a legitimate version of thirty songs that formed the basis for the plaintiff's action.¹⁸¹

Gonzalez first claimed that her actions constituted a "fair use."¹⁸² Fair use is an exception to copyright holders' exclusive rights and a defense to copyright infringement that asks a district court to consider four factors.¹⁸³ In evaluating her defense, the court examined the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work."¹⁸⁴ Gonzalez contended that her sampling increased the overall market value of the songs as a form of extra advertising, akin to "try-before-you-buy."¹⁸⁵ Both the U.S. District Court for the Northern District of Illinois and the Seventh Circuit rejected the argument, holding that downloading a full-length copy of a song cannot be considered a fair use.¹⁸⁶ On appeal, Judge Frank H. Easterbrook cited both *Grokster* and *Napster* in countering the economic benefit theory of "try-before-you-buy," as he reasoned that many people do not end up buying the songs in question.¹⁸⁷

After Gonzalez was found liable, BMG Music chose to receive statutory damages under § 504(c)(1) of the Copyright Act, as opposed to proving actual injury, and Gonzalez sought damage mitigation as an innocent infringer.¹⁸⁸ Both the trial and appellate courts, however, held that § 402(d)¹⁸⁹ barred innocent infringer mitigation because Gonzalez had "access" to copyright notice on published CDs that contained the songs she ultimately downloaded.¹⁹⁰

Judge Easterbrook's interpretation of § 402(d) was predicated on a theory of inquiry.¹⁹¹ Gonzalez had "access" to proper notice, he reasoned, not because there was a digital stamp of such notice,¹⁹² but because she "could

181. *Gonzalez*, 430 F.3d at 890.

182. *Id.* at 889.

183. These four factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2006).

184. *Gonzalez*, 430 F.3d at 890 (quoting § 107).

185. *Id.*

186. *Id.* at 891; see RIMMER, *supra* note 134, at 211–12 (discussing the Northern District of Illinois's decision).

187. See *Gonzalez*, 430 F.3d at 890; see also RIMMER, *supra* note 134, at 212–13 (describing Judge Easterbrook's rejection of Cecilia Gonzalez's fair use claim approvingly).

188. *Gonzalez*, 430 F.3d at 891–92.

189. 17 U.S.C. § 402(d) (2006). The text of § 402(d) reads: "If a notice of copyright . . . appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement . . ." *Id.*

190. *Gonzalez*, 430 F.3d at 892.

191. See RIMMER, *supra* note 134, at 212.

192. *Gonzalez*, 430 F.3d at 892. While acknowledging that Gonzalez "downloaded data rather than discs, and the data lacked copyright notices," Judge Easterbrook held that the

have learned, had she inquired, that the music was under copyright.”¹⁹³ This interpretation has been called “troubling” because there was no fact-finding inquiry into whether the defendant did—or even practically could—see the notice in question.¹⁹⁴

The Fifth Circuit has recently taken a similar approach in *Maverick Recording Co. v. Harper*.¹⁹⁵ Whitney Harper, a sixteen-year-old from Texas, was charged with downloading thirty-seven songs through the KaZaA network.¹⁹⁶ It was undisputed that Harper did not rip any of these songs from her own CDs, but rather downloaded them directly from the internet to her computer.¹⁹⁷ The plaintiffs—various recording companies who held the copyrights to the songs in question—discovered Harper’s activity through the use of MediaSentry, a company that specializes in forensic investigation of computer systems.¹⁹⁸ MediaSentry initially discovered that 544 songs had been “shared” from Harper’s computer in 2004.¹⁹⁹

During discovery, MediaSentry was allowed to reexamine Harper’s computer.²⁰⁰ This revealed that, in 2005, the operating system had been reinstalled and therefore the majority of the alleged 544 files had been destroyed in the process.²⁰¹ However, this new investigation discovered another group of 700 sound recordings.²⁰² Due to the confusion surrounding file destruction, the plaintiffs’ amended complaint only pursued infringement claims for thirty-seven counts of copyright infringement.²⁰³

Similar to *Gonzalez*, the plaintiffs elected to receive statutory damages under § 504(c)(1), only to be greeted with a claim of innocent infringement.²⁰⁴ Harper contended that she did not understand the nature of a P2P network, but rather believed that her actions were “akin to listening to a non-infringing internet radio station.”²⁰⁵

“statutory question is whether ‘access’ to legitimate works was available rather than whether infringers earlier in the chain attached copyright notices to the pirated works.” *Id.*

193. *Id.*

194. See RIMMER, *supra* note 134, at 213–14; *infra* Part III.B.ii.

195. 598 F.3d 193 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 590 (2010); see generally Chad A. Sanders, Note, *Maverick Recording Co. v. Whitney Harper: How the Fifth Circuit Virtually Eliminated Innocent Infringers Without Noticing*, 13 TUL. J. TECH. & INTELL. PROP. 295 (2010) (commenting on the *Harper* decision at the circuit court level).

196. See Petition for Writ of Certiorari at 3, *Harper*, 131 S. Ct. 590 (No. 10–94), 2010 WL 2797543, at *3.

197. *Harper*, 598 F.3d at 194.

198. *Id.*

199. Of these files, a significant amount were copyrighted sound recordings owned by the plaintiffs. *Id.*

200. *Id.*

201. *Id.*; see Sanders, *supra* note 195, at 295 (discussing the use of MediaSentry during discovery).

202. Fifteen of these songs formed the basis for new allegations in the plaintiffs’ complaint. *Harper*, 598 F.3d at 194–95.

203. *Id.*

204. *Id.*

205. *Id.* at 198; see Sanders, *supra* note 195, at 295–96 (discussing Whitney Harper’s claim of innocence).

The U.S. District Court for the Western District of Texas granted plaintiffs' motion for summary judgment and entered an injunction against Whitney Harper in August 2008.²⁰⁶ The court did, however, find a genuine issue of fact as to Harper's "innocence."²⁰⁷ The plaintiffs reserved the right to appeal the innocent infringer issue if Harper appealed the judgment.²⁰⁸ Interestingly, the plaintiffs only moved for judgment in the amount of \$200 per infringement, which was granted.²⁰⁹ Harper appealed the grant of summary judgment to the Fifth Circuit and the plaintiffs cross-appealed on the innocent infringement issue.²¹⁰

The Fifth Circuit reversed the district court's failure to grant summary judgment on the innocent infringement issue, relying on the text of § 402(d).²¹¹ Writing for the court, Judge Edith Brown Clement found that the circumstances of Harper's P2P downloading made innocent infringement mitigation "unavailable to her as a matter of law."²¹² The court held that the "plain language" of the notice exception overrode Harper's claim that "she was too young and naive to understand that the copyrights on published music applied to downloaded music."²¹³ Examining the context of the simultaneous elimination of the notice requirement and the creation of § 402(d)'s notice exception,²¹⁴ the court noted that "it would make no sense for a copyright defendant's subjective intent to erode the working of § 402(d), which gives publishers the option to trade the extra burden of providing copyright notice for absolute protection against the innocent infringer defense."²¹⁵ The court therefore held that Harper could not claim that her own unsophistication merited mitigation because the plaintiffs had, pursuant to § 402(d), taken the extra step of attaching physical copyright notice to their CDs.²¹⁶

With the innocent infringer defense eliminated as a matter of law, the court proceeded to examine the amount due under the statutory damage provision. Given that the plaintiffs only sought the statutory minimum of \$750 on appeal,²¹⁷ however, the actual "culpability" of Harper was

206. *Harper*, 598 F.3d at 195.

207. *Id.*

208. *Id.*

209. *Id.* This is somewhat ironic because \$200 per act is the exact minimum allowed after innocent infringement damage mitigation. *See* 17 U.S.C. § 504(c)(2) (2006).

210. *Harper*, 598 F.3d at 195.

211. *Id.* at 199.

212. *Id.* at 198.

213. *Id.* at 199. Judge Clement further noted that "Harper's reliance on her own understanding of copyright law—or lack thereof—is irrelevant in the context of § 402(d)." *Id.*

214. *See supra* notes 66–68 and accompanying text.

215. *Harper*, 598 F.3d at 199; *see Sanders, supra* note 195, at 301 (noting that the "Fifth Circuit only cited § 402's legislative intent and history in its rejection of the lower court's opinion").

216. *Harper*, 598 F.3d at 199.

217. 17 U.S.C. § 504(c)(1) (2006).

effectively a non-issue and no jury trial was warranted.²¹⁸ The Fifth Circuit granted the plaintiffs an award of \$27,750 for the thirty-seven songs.²¹⁹ Harper sought review of her judgment by the Supreme Court, but certiorari was ultimately denied.²²⁰

Thus, the Fifth and Seventh Circuits have interpreted § 402(d) to automatically defeat a claim of innocent infringement in a P2P download setting by broadly reading the word “access” to mean a general availability and a duty to inquire as to whether the songs in question were protected under the copyright law.

B. The (Predominantly) Academic Critique of Harper and Gonzalez’s Understanding of § 402(d)

In general, criticisms of the RIAA’s actions against P2P network users have been plentiful. Popular points of debate include excessive damage claims for willful infringers²²¹ and an overly aggressive strategy under which several lawsuits were brought on completely frivolous grounds.²²² The decisions in *Harper* and *Gonzalez* were likewise subject to academic discussion.²²³ This section examines two facets of those arguments opposing the Fifth and Seventh Circuits. First, some critics, including

218. *Harper*, 598 F.3d at 199 (stating that “because Plaintiffs requested the minimum statutory damages under § 504(c)(1), Harper’s culpability is not an issue and there are no issues left for trial.”).

219. *Id.*

220. Justice Samuel A. Alito did, however, dissent from the denial of certiorari. See *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 590 (2010) (Alito, J., dissenting from denial of certiorari).

221. One now-famous case is that of Joel Tenenbaum, where the original award of \$22,500 per song for willful infringement was recently held to be a violation of the his due process rights and reduced to \$2,500 per song. See *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 87 (D. Mass. 2010), *aff’d in part, vacated in part, rev’d in part*, Nos. 10-1883, 10-1947, 10-2052, 2011 WL 4133920 (1st Cir. Sept. 16, 2011). Another example of an extraordinarily high damage award is the case of Jammie Thomas-Rasset, where, in the latest retrial, a jury awarded \$80,000 per song for willful infringement, amounting to \$1.9 million in total. See *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

222. See, e.g., Ray Beckerman, *Oregon RIAA Victim Fights Back; Sues RIAA for Electronic Trespass, Violations of Computer Fraud & Abuse, Invasion of Privacy, RICO, Fraud*, RECORDING INDUSTRY VS THE PEOPLE (Oct. 3, 2005, 9:50 AM), <http://recordingindustryvspeople.blogspot.com/2005/10/oregon-riaa-victim-fights-back-sues.html> (single parent suing RIAA back); Benny Evangelista, *Download Lawsuit Dismissed / RIAA Drops Claim that Grandmother Stole Online Music*, S.F. CHRON. (Sept. 25, 2003), http://articles.sfgate.com/2003-09-25/business/17508258_1_riaa-kazaa-downloading; Andrew Orłowski, *RIAA Sues the Dead*, REGISTER (Feb. 5, 2005, 2:30 PM), http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead; see also *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 33 (2d Cir. 1990) (noting that Warner Brother’s harassed the defendants in the early stages of discovery). This has led to an overall negative perception of the RIAA. See Catherine Greenman, *Taking Sides in the Napster War*, N.Y. TIMES, Aug. 31, 2000, at G1. See generally RIMMER, *supra* note 134, at 206–18 (discussing various improper lawsuits filed on behalf of the RIAA); Groennings, *supra* note 161, at 576–87 (discussing the inadvertent negative impact the RIAA’s strategy has fostered).

223. See RIMMER, *supra* note 134, at 216–18 (surveying the academic responses to the RIAA’s litigation strategy).

Justice Samuel A. Alito, focus on the aspect that § 402(d) may not be applicable to P2P downloading because the law and its terms were founded in an analog era.²²⁴ Others, such as Professor Charles Nesson, argue that even if § 402(d) did apply to the digital age, the Fifth and Seventh Circuits' interpretation of "access"—and their creation of a duty of inquiry—is overly ambiguous.²²⁵ Lastly, this section revisits *D.C. Comics* as a possible point of conflict among the circuits.

1. Distinctions Between the Analog and Digital Worlds

As discussed in Part II, the analog world in which the Berne Convention and § 402(d) were implemented was dramatically different than the present digital environment.²²⁶ In his dissent from Harper's denial of review, Justice Alito began by acknowledging the "strong argument that § 402(d) does not apply in a case involving the downloading of digital music files."²²⁷

As a starting point, § 402(d) was developed before the internet or P2P downloading was even an inkling, and therefore, the copying against which those statutes sought to protect was analog in nature.²²⁸ The fundamental difference between these two paradigms has not been acknowledged by either the Seventh or Fifth circuit.²²⁹ Justice Alito focused on the context of § 402(d) to posit the theory that it may be inapplicable in the digital era.²³⁰ The logic of that section was founded on the analog understanding that since an individual is copying music from an object that contains the appropriate notice, they possess a "reason to believe that his or her acts constituted an infringement of copyright."²³¹ Because "a person who downloads a digital music file generally does not see any material object bearing a copyright notice," the fundamental nature of § 402(d) is called into question.²³²

224. See, e.g., *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 590 (2010) (Alito, J., dissenting from denial of certiorari).

225. See Motion of Charles Nesson et. al. as Amicus Curiae for Leave to File Brief in Support of Petitioner at 10, *Harper*, 131 S. Ct. at 590 (No. 10–94), 2010 WL 3279299, at *10 [hereinafter Nesson Brief].

226. See *supra* Part II.A.

227. *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting from denial of certiorari) (stating that §402(d) was "adopted in 1988, well before digital music files became available").

228. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:63 (4th ed. 2011) (explaining that § 402(d) was originally concerned with tape and record piracy); see also Lemley & Reese, *supra* note 103, at 1374–75 (explaining how digitization changed the landscape for copyright infringement "as the costs of producing and disseminating copies approach zero, the public goods problem gets worse, because the ratio of cost of creation to the cost of imitation approaches infinity" and furthermore "unlike end-user copying in the analog environment, online copying by end users can be quite substantial").

229. See Nesson Brief, *supra* note 225, at 26 (stating that the "two courts that have addressed this issue as it arises in a digital context have failed to take account of either the statute or the realities of the internet").

230. See *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting from denial of certiorari).

231. 17 U.S.C. § 504(c)(2) (2006); see *supra* notes 70–76 and accompanying text.

232. *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting from denial of certiorari).

In general, there is no standard way for an end-user to see a copyright notice in a digital environment.²³³ While popular music services, such as Apple's iTunes, contain the appropriate notice, it is extremely doubtful that any song downloaded through a P2P network would.²³⁴ Furthermore, Justice Alito noted that the plain language of § 402(d) presents another problem if it were to apply to digital files.²³⁵ That section's limitation only applies when notice appears on "phonorecords."²³⁶ Phonorecords are defined as "material object[s] in which the sounds are first fixed."²³⁷ Therefore, it is doubtful that an MP3 or any other type of digital music file, even if notice was in some way attached to it, would qualify as a "phonorecord" under the statute.²³⁸

Some commentators believe that analog-based laws are so ill-suited to the digital age that the copyright regime should be dramatically altered.²³⁹ The majority of these proposals focus on the ease, extent, and overwhelming commonality of modern-day digital downloading as a basis for their disillusioned view of the current system.²⁴⁰

Ann Litman has posed a possible solution to the "digital dilemma"²⁴¹ premised on a radical redrawing of copyright boundaries.²⁴² The system would build off the public perception—and usually misconception—of a "distinction between commercial and noncommercial behavior."²⁴³ This view directly addresses some of the concerns of innocent infringement as the question would become "what effects [downloading from a P2P network] had on the copyright holder's opportunities for commercial

233. See Chad J. Woodford, *Innocent Infringers and Copyright Notices in the iTunes Age*, L. OFF. CHAD J. WOODFORD (July 21, 2010, 8:11 PM), <http://woodfordiplaw.com/blog/2010/7/21/innocent-infringers-and-copyright-notices-in-the-itunes-age.html>.

234. Compare *id.*, with *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005) (explaining that the disputed songs in *Gonzalez* did not contain any copyright notice "on" them).

235. See *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting from denial of certiorari).

236. 17 U.S.C. § 402(d) (2006).

237. *Id.* § 101.

238. See *Harper*, 131 S. Ct. at 590–91 (Alito, J., dissenting from denial of certiorari); Ben Sheffner, *Peer-to-Peer Defendant Seeks Supreme Court Review of 'Innocent Infringer' Ruling*, COPYRIGHTS & CAMPAIGNS (May 27, 2010, 8:43 AM), <http://copyrightsandcampaigns.blogspot.com/2010/05/peer-to-peer-defendant-seeks-supreme.html>.

239. See *infra* Part III.B.i.

240. See Lemley & Reese, *supra* note 103, at 1373–79 (premising the alternative dispute resolution system on the fact that the digital era sees "substantial" copying done by traditional end-users in addition to professional counterfeiters); see also LITMAN, *supra* note 99, at 180–81 (predicating her commercial/non-commercial copyright structure on mass public perception concerning the legality and ease of MP3 downloads and using Napster as an example for the system's potential uses).

241. See NAT'L RESEARCH COUNCIL, *supra* note 110, at 23–25 (noting the challenges that technological advances have presented to copyright legislation).

242. See LITMAN, *supra* note 99, at 180; see also *supra* notes 150–51 and accompanying text (describing Justice Stevens's distinction between commercial and non-commercial use in *Sony*).

243. LITMAN, *supra* note 99, at 180.

exploitation.”²⁴⁴ The commercial effect standard would be narrowly defined so that only “large-scale interference[s]” by substantial uploaders—but not personal, end-user digital downloads—would be actionable.²⁴⁵ While a self-admitted “radical” change, Litman’s alternative system further acknowledges the current statutory regime’s inadequacy in the digital era.²⁴⁶

Mark Lemley and R. Anthony Reese have proposed other alternatives.²⁴⁷ Their theories also respond to the shortcomings of the RIAA’s earlier strategy of suing “facilitators” as a problematic and potentially dangerous “[l]umping [of] legal and illegal conduct together.”²⁴⁸ One system proposed by Lemley and Reese would involve a levy, through which copyright holders would be compensated in “a form of blanket compulsory license[s], authorizing copying in exchange for a set fee.”²⁴⁹ This levy would be automatically attached to infringement-prone devices, such as computers, or P2P user software, thus eliminating any need for P2P civil actions, innocent or not.²⁵⁰ While such a system has the advantage of ease of enforcement, the authors acknowledge that this system—similar to suing indirect infringers—does not target the actual infringing public.²⁵¹

Another proposal would involve an independent dispute resolution system designed to address digital downloading.²⁵² The Internet Corporation for Assigned Names and Numbers (ICANN) has already implemented a similar system with regard to internet domain name trademark disputes.²⁵³ While ICANN’s system does have some procedural

244. *Id.*; see also Greenman, *supra* note 222 (discussing the public’s perception of P2P downloading).

245. LITMAN, *supra* note 99, at 180–81 (“The fact that a particular individual’s viewing or copying of a digital work might itself supplant the sale of a license to view or copy if such licenses were legally required should count neither as making money nor as large-scale interference with commercial opportunities.”).

246. *Id.* at 180.

247. Lemley & Reese, *supra* note 103, at 1395.

248. *Id.* at 1379. The authors focused on the problematic “binary choice” seen in *Grokster* and *Napster*, where courts are forced with a decision to ban or not to ban that is ill-suited to the reality that such networks have both legitimate and illegitimate uses. *Id.* at 1380.

249. *Id.* at 1406. Lemley and Reese’s system is based off of similar proposals by William Fisher and Neil Netanel. See generally WILLIAM FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 2 (2003).

250. Lemley & Reese, *supra* note 103, at 1406.

251. *Id.* at 1408.

252. See *id.* at 1410–25.

253. See *id.* at 1411. ICANN’s system, the Uniform Dispute Resolution Policy, allows for trademark disputes to be heard in an expedited, organized manner in front of a panel of private dispute resolution experts. See *Have a Problem? Dispute Resolution Options*, ICANN, <http://www.icann.org/en/dispute-resolution/> (last visited Nov. 16, 2011); see also Lemley & Reese, *supra* note 103, at 1411 (noting that, as of 2004, the UDRP system had “resolved about 7500 such disputes involving over 13,000 domain names in four years, at a cost of \$1200-\$1500 each and an average resolution time of little more than a month”).

deficiencies.²⁵⁴ Lemley and Reese argue that an analogous system for “relatively straightforward claims of copyright infringement . . . against those alleged to have uploaded copyrighted works to a p2p network and thus made them available for downloading by others” would be beneficial.²⁵⁵ By limiting the dispute system to uploaders who have contributed a substantial number of songs to a P2P network,²⁵⁶ this would (similar to Litman’s commercial distinction) protect this Note’s paradigmatic innocent infringer.

2. Access and Inquiry

This next section focuses on aspects of criticism that assume that § 402(d) applies to the scenario in question. Critics focusing on this aspect argue that the circuits have incorrectly interpreted the term “access” and unjustly created an ambiguous duty of inquiry on virtually all P2P users that prevents them from innocent infringement mitigation by operation of law.

a. Access

As discussed in Part III.A, the Fifth and Seventh Circuits have held “access” to mean a broad, general availability of a published record marked with appropriate copyright notice.²⁵⁷ Phrased otherwise, notice is satisfied—and hence § 402(d) bars innocent infringement mitigation—when the copyright holder affixes notice to a CD jewel case and that case is made available through some public means, typically through sale at a store.²⁵⁸ Interestingly, both circuits have explicitly acknowledged that there is no standard way to affix notice to a digital song,²⁵⁹ and have formulated their understanding of “access” accordingly, viewing “the statutory question [as] whether ‘access’ to legitimate works was available rather than whether infringers earlier in the chain attached copyright notices to the pirated works.”²⁶⁰

Copyright blogger Joe Gratz argues that this definition is troubling because the Seventh Circuit does “not describe how or why this ‘access’ exists, but it apparently finds access in the fact that Gonzalez could have gone to the record store and inspected authorized copies.”²⁶¹ Therefore, the argument has been made that the plain language of the statute, as well as its

254. See Lemley & Reese, *supra* note 103, at 1412 (noting a lack of a standardized appeals process for disputes).

255. *Id.* at 1413.

256. *Id.* at 1419 (Lemley and Reese’s proposal would set the minimum at fifty works, which would also look to incentivize various copyright holders to join their complaints, thus further streamlining the process).

257. See *supra* Part III.A.

258. See *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005).

259. See *supra* notes 233–34 and accompanying text.

260. *Gonzalez*, 430 F.3d at 892.

261. Joe Gratz, *7th Cir.: P2P Downloading Is Not Fair Use*, JOEGRATZ.NET (Dec. 10, 2005), <http://joegratzdotnet.nfshost.com/?p=737>.

legislative history, merits the opposite reading, and bars innocent infringer mitigation only “when notice is sufficiently presented to the infringer.”²⁶²

Harvard Law Professor Charles Nesson, notable for his work in other controversial copyright suits,²⁶³ filed, along with others, an amicus curiae brief in support of Harper’s appeal to the Supreme Court.²⁶⁴ In Professor Nesson’s view, § 402(d)’s requisite “access”—as required by the circuits—is incompatible with digital downloading. Because “a person viewing an internet file in cyberspace who genuinely does not know or have reason to know that the file is copyrighted, [published notices in record stores] provide neither actual notice nor reasonable notice of copyright.”²⁶⁵ Others also feel the underlying rationale of *Harper* is “thin,” because the Fifth Circuit drew its conclusion solely from legislative history and “relied almost exclusively on a treatise to support its holding.”²⁶⁶

Justice Alito seemingly agrees with the above criticism, remarking that “[u]nder this interpretation, it is not necessary that the infringer actually see a material object with the copyright notice.”²⁶⁷ Directly attacking the rationale of *Gonzalez*, Justice Alito noted that this scheme rendered innocent infringement mitigation unavailable merely because an individual could have researched the song in question.²⁶⁸ The problematic interplay between the Fifth and Seventh Circuits’ understandings of “access” and inquiry is examined in greater detail in the following subsection.

These various critics are not alone in their understanding of “access,” as the U.S. District Court for the Middle District of Georgia employed a similar rationale in *Electra Entertainment Group v. McDowell*.²⁶⁹ *McDowell* was based on a nearly identical fact pattern as *Harper*.²⁷⁰ The defendant, Sarah McDowell, was only thirteen or fourteen years old at the time of infringement.²⁷¹ McDowell admitted to forty-eight counts of copyright infringement from P2P network downloads.²⁷² The plaintiffs

262. Nesson Brief, *supra* note 225, at 26.

263. Professor Nesson has given legal assistance to such other notable P2P defendants as Jammie Thomas-Rasset, *see* Nate Anderson, “*It is Groundhog Day*: Third Jammie Thomas P2P Trial Begins,” ARS TECHNICA (Nov. 2, 2010, 9:21 PM), <http://arstechnica.com/tech-policy/news/2010/11/third-jammie-thomas-p2p-trial-begins-it-is-groundhog-day.ars>; and Joel Tenenbaum, *see* John Schwartz, *Tilting at Internet Barrier, a Stalwart is Upended*, N.Y. TIMES, Aug. 11, 2009, at A11.

264. *See generally* Nesson Brief, *supra* note 225.

265. *Id.* at 10.

266. Sanders, *supra* note 195, at 300–01 (while a criticism, the author ultimately concluded that the decision was “properly articulated” with respect to the interplay between § 402(d) and § 504(c)(2)).

267. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari).

268. *See id.* (stating that “it is enough [under *Gonzalez*] that the infringer could have ascertained that the work was copyrighted”).

269. No. 4:06-CV-115, 2007 WL 3286622, at *2 (M.D. Ga. Nov. 6, 2007).

270. *See id.* at *1; *supra* notes 195–210 and accompanying text.

271. *See Electra*, 2007 WL 3286622, at *2.

272. *Id.* at *1 (noting that while plaintiffs contended that McDowell was “actively distributing more than one thousand songs” on a P2P network, they only sought damages for forty-eight acts of infringement).

moved for summary judgment and an award of \$750 per song in statutory damages, totaling \$36,000.²⁷³ In response, McDowell moved for a jury trial on the issue of innocent infringer mitigation under § 504(c)(2).²⁷⁴

The Middle District of Georgia began its analysis with an examination of *Gonzalez* and § 402(d)'s applicability to P2P downloading.²⁷⁵ The plaintiffs contended that Sarah McDowell's actions were analogous to Cecilia Gonzalez's because she had "access to copyright notice at any location sound recordings are sold" and therefore was not due mitigation.²⁷⁶ Further, they argued that because McDowell had purchased a CD in the past—although not necessarily one containing copyright notice or songs controlled by the plaintiffs—that McDowell had practical access to notice as well.²⁷⁷ While the court considered the fact that McDowell had purchased a CD in the past relevant,²⁷⁸ it held that she "did not state whether she regularly purchased compact disks from retail stores at the time she infringed upon Plaintiffs' copyrights."²⁷⁹ Moreover, given the young age of the defendant, further inquiry into the defendant's "access" was justified because at the time of infringement "any compact disk she may have owned would have been bought for her by her mother."²⁸⁰ If this was so, commentators have noted that it would be the mother who had notice and not the daughter who merely received the CDs and later downloaded separate songs through a P2P network.²⁸¹

The court found there to be two legitimate questions of fact and denied the plaintiff's motion.²⁸² First, by virtue of the defendant's young age and unsophistication, there was a question as to whether she was "aware or ha[d] reason to believe that her acts constituted an infringement of copyright."²⁸³ Assuming *arguendo* that the first question would be answered in the affirmative, the court found another question as to whether Sarah McDowell "had access to the notice of copyright such that her innocent infringer defense has no mitigating effect."²⁸⁴ Thus, unlike the

273. *Id.*; see also Zohar Efroni, *Electra Entertainment v. McDowell: Is a Thirteen Year Old Still Innocent (Infringer)?*, STAN. L. SCH.: CTR. FOR INTERNET & SOC'Y (Nov. 14, 2007, 5:17 PM), <http://cyberlaw.stanford.edu/node/5610>.

274. *Electra*, 2007 WL 3286622, at *1.

275. *Id.* at *2.

276. *Id.*

277. *Id.* at *2 n.2.

278. The court's consideration of this fact is in-and-of itself a large departure from *Gonzalez* and *Harper*. See *id.* at *2.

279. *Id.*

280. *Id.* at *2 n.2.

281. See Efroni, *supra* note 273 (noting that practically, the fact that the mother in *McDowell* may be on notice is of little significance because if the daughter was to be found liable, it would be the mother who ultimately paid damages).

282. *Id.* (noting that the two factual questions were interrelated).

283. *Id.* See generally 17 U.S.C. § 504(c)(2) (2006). Justice Alito agrees with this interpretation that age should be a factor in an innocent infringement inquiry. See *infra* note 293 and accompanying text.

284. *Electra*, 2007 WL 3286622, at *2.

courts in *Gonzalez* and *Harper*, § 402(d) did not have an automatically preclusive effect.²⁸⁵

b. Duty of Inquiry

Another critique focuses on the circuits' interpretation of "access" to seemingly create a duty of inquiry. Such a duty, it is argued, "imposes an undue burden on all internet users, no matter how young and unschooled, to determine whether files accessible to them in cyberspace are copyrighted."²⁸⁶ One critic has called this interpretation "shaky" at best.²⁸⁷ Joe Gratz notes that this problematic definition of "access" is a mere rubber stamp and warned that "if 'access' in the copyright context now means that someone could have inspected a copy of a work had they inquired, we may find some mighty odd results in cases looking to whether a small-potatoes plaintiff has shown that a big-time movie studio had access to her unsolicited screenplay."²⁸⁸

This ambiguity was a major point of concern for Justice Alito, who stated that the "Fifth Circuit did not specify what sort of inquiry a person who downloads digital music files is required to make,"²⁸⁹ although he noted that those courts "had in mind" various activities such as "research on the Internet or a visit to a local store in search of a compact disc containing the songs in question."²⁹⁰ In recognition of this ambiguity, some advocate—at the minimum—for a fact finding inquiry to determine how and if the notice bearing CDs were practically accessible to the defendant.²⁹¹

In examining whether an infringer has met their duty of inquiry, the Fifth and Seventh Circuits have discounted their claim of a "lack of legal sophistication."²⁹² Justice Alito noted that disregarding such a crucial factor would be incorrect if § 402(d) did not automatically eliminate a finding of innocent infringement and the determinative question were simply whether the defendant had "reason to believe" that her actions were illegal.²⁹³

285. See *supra* notes 186–92, 211–16 and accompanying text.

286. Nesson Brief, *supra* note 225, at 12.

287. Gratz, *supra* note 261.

288. *Id.*

289. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari).

290. *Id.*

291. See Phil Hill, *Maverick Recording Company v. Whitney Harper*, MUSIC THINK TANK (June 7, 2010), <http://www.musicthinktank.com/blog/maverick-recording-company-v-whitney-harper.html> (noting that, under *Gonzalez* and *Harper*'s definition of access, "everyone is beholden to a warning that they may not understand, may not know to look for, located on an object that they may not know exists, located in a store [that] they may never go to"). Hill further notes that it is not unreasonable, especially in locations such as Texas (where Whitney Harper lived) to be more than fifty miles away from the nearest record store. *Id.*

292. See *supra* note 216 and accompanying text.

293. *Harper*, 131 S. Ct. at 591 (Alito, J., dissenting from denial of certiorari). Justice Alito continued in remarking that "[a]lthough 'reason to believe' is an objective standard, it

In her petition to the Supreme Court, Harper referred the Court's attention to *D.C. Comics*, where the Second Circuit used objective criteria in discussing the infringer's "lack of business sophistication" and possible duty of inquiry.²⁹⁴ While that case dealt with the sale of t-shirts and other movie merchandise, the court nevertheless examined whether a defendant claiming innocent infringement under § 504(c)(2) ever has a duty to inquire as to the copyright status of the goods in question.²⁹⁵ Similar to Whitney Harper, the various shop owners claimed that they were too naïve to understand the nature of their actions.²⁹⁶ Furthermore, both matters involved infringing copies that were entirely indistinguishable from a proper, notice-bearing version.²⁹⁷ Taken together, the Second Circuit found that the defendants were too naïve to "prompt an inquiry into the source of the unmarked goods," and were therefore proper recipients of § 504(c)(2) mitigation.²⁹⁸

IV. WHY THE BROAD DEFENSE-ELIMINATING READING OF § 402(D) IS INCORRECT

Having analyzed the Fifth and Seventh Circuits' interpretations of innocent infringer claims in Part III, this Note argues that the broad reading of "access" taken by those circuits is improper for a variety of reasons. First, the legislative history demonstrates that § 402(d) was implemented in

is by no means clear that certain objective characteristics of the infringer—such as age—may not be taken into account." *Id.*

294. *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 35–36 (2d Cir. 1990); see Petition for Writ of Certiorari, *supra* note 196, at 13. The petition contended that Harper and *D.C. Comics* demonstrated a stereotypical circuit split on the issue of "whether a plaintiff may avoid the defense of innocent infringement by including a copyright notice on published copies of its copyrighted work even though those copies are not the copies that the infringer used for its infringement." *Id.* However, even Justice Alito, in his dissent from denial of certiorari, noted that there is no circuit split on such an issue. See Harper, 131 S. Ct. at 591 (Alito, J., dissenting from denial of certiorari).

295. *D.C. Comics*, 912 F.2d at 36. It is essential to note, however, that § 402(d) does have a near-identical sister provision applying to non-sound recordings. See 17 U.S.C. § 401(d) (2006). Section 401(d) has been applied to a variety of works; the most analogous to the infringement seen in *D.C. Comics* has been fabric designs. See generally Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106 (2d Cir. 1998).

296. Compare *D.C. Comics*, 912 F.2d at 35 (stating that "defendants were unsophisticated merchants"), with *Maverick Recording Co. v. Harper*, 598 F.3d 193, 199 (5th Cir.) (recounting that Harper "contended only that she was too young and naïve to understand" the seriousness of her actions), *cert. denied*, 131 S. Ct. 590 (2010).

297. Compare *D.C. Comics*, 912 F.2d at 35 (stating that "a layman would not be able to distinguish between licensed and unlicensed [Batman] goods based on the style or quality of the art work"), with Harper, 598 F.3d at 198 (noting that the only notice associated with the sounds recordings in question appeared "on each of the published phonorecords from which the audio files were taken" and not the files themselves), and *BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005) (noting that Cecilia Gonzalez "downloaded data rather than discs, and the data lacked copyright notice").

298. *D.C. Comics*, 912 F.2d at 35 (stating that the "[p]laintiffs' own evidence also established that the defendants were unsophisticated merchants"). This, of course, only refers to those defendants who initially appeared at trial. See *supra* notes 87–89 and accompanying text (noting that several defendants defaulted and could not be found to have innocently infringed).

an analog era and was never meant to foreclose the innocent infringer defense automatically.²⁹⁹ Second, the formation of a duty of inquiry and the understanding of “access” as general availability effectively eliminate the innocent infringer provision in a P2P setting, which is a far too dramatic conclusion not to have been made explicit in the legislation.

A. *The Realities of the Digital Age*

As technology continues to advance at exponential rates, end-users are changing the way they receive and manipulate digital information.³⁰⁰ Since copyright law is both conceptually abstract and characterized by public misconception, it makes greater sense either for Congress to modify the current law or for judges to interpret the existing law with such fundamental differences in mind.³⁰¹

Those who support the broad reading of “access” fail to acknowledge the differences between copyright infringement in the analog and digital eras. The Fifth Circuit attempted to justify its position by noting the simultaneous destruction of the notice requirement and the creation of the notice exception to innocent infringement found in § 402(d).³⁰² While the *Harper* court correctly noted this trade off,³⁰³ focusing only on whether the copyright holders have provided notice in some form is problematic. Those supporting the above decisions are essentially “remov[ing] the innocent infringer defense altogether” in a digital context.³⁰⁴ This position cannot be supported by the plain text or legislative history of sections 402(d) and 401(d), or the Berne Act, in which the “placement” of notice was discussed as a specific tool against innocent infringement.³⁰⁵

An examination of the legislative history of the Berne Act highlights some problematic aspects of the *Gonzalez* and *Harper* decisions.³⁰⁶ At that time, as in the entire history of innocent infringement,³⁰⁷ notice was expressly seen as a protection for mitigation, not as an excuse for its elimination.³⁰⁸ In discussing § 402(d)’s non-music corollary, § 401(d),³⁰⁹

299. The differences between the analog and digital era are further demonstrated by the massive commonality of P2P downloading as a new end-user “norm.” See *supra* notes 120–23 and accompanying text.

300. See *supra* Part II.A.

301. See *supra* notes 106–15 and accompanying text.

302. See, e.g., *Maverick Recording Co. v. Harper*, 598 F.3d 193, 199 (5th Cir. 2010) (providing the historical justification for its reasoning), *cert. denied*, 131 S. Ct. 590 (2010).

303. See *id.*

304. Nesson Brief, *supra* note 225, at 26.

305. See *infra* notes 309–11 and accompanying text; see also Nate Anderson, *Supreme Court Told P2P Users Can Be “Innocent Infringers,”* ARS TECHNICA (Aug. 20, 2010, 11:03 AM), <http://arstechnica.com/tech-policy/news/2010/08/supreme-court-told-p2p-users-can-be-innocent-infringers.ars> (“The law was written in an analog era, and it targeted those who copied tapes or CDs. Such people couldn’t claim not to know about the copyrighted nature of the works they were copying . . . [b]ut in the digital world, this makes no sense. How could slapping a copyright notice on a CD alert anyone using a P2P network about anything?”).

306. See generally S. REP. NO. 100-352 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706.

307. See *supra* notes 35–37, 62–67 and accompanying text.

308. See *supra* notes 208–15 and accompanying text.

notice was understood to “alert[] users to the fact that copyright is claimed in the work in question, and . . . prevent many instances of unintentional infringement.”³¹⁰ The placement mandated by § 402(d) was an effective “alert” because in the analog age, one needed that original, notice-laden copy in order to infringe in the first place.³¹¹ Therefore, there is no statutory history to justify the Fifth and Seventh Circuits’ destruction of the innocent infringer defense in the P2P context because copyright notice was located on the physical CDs, but not on the digital files that Harper and Gonzalez encountered.

The alternative solutions suggested by Litman, Reese, and Lemley—while some are obviously more radical than others—all acknowledge that digital downloading must be addressed in a fundamentally different manner than the current, outdated statutory scheme.³¹² The added complexity around whether the term “phonorecord” in § 402(d) applies to digital music files further demonstrates that the provision’s analog nature renders it inapplicable to digital acts of infringement.³¹³

Once the circuits’ problematic justification is discounted, one can return to the actual legislative intent behind the mitigation provision of § 504(c)(2): to preserve the innocent infringer defense.³¹⁴ A scheme that examines the defendants’ circumstances to determine their innocence would fall in line with both the original incarnations of the defense³¹⁵ and the 1976 Act that established the modern clause.³¹⁶ While the long-term goal should be to revise the Copyright Act to acknowledge the realities of P2P, the arguments of Justice Alito and Professor Nesson demonstrate that § 402(d) can be interpreted in a manner that requires an actual inquiry into the defendant’s sophistication and circumstances and does not eliminate innocent infringer mitigation for digital infringement.³¹⁷

B. Why the Fifth and Seventh Circuits’ Definition of Access Is Problematic

Given the fundamental differences discussed above, the definition of “access” as “availability” is conceptually impractical. As Justice Alito warned, a defendant under that scheme can be found to have had access to a notice they never could have encountered in a practical manner.³¹⁸ The analysis advocated by critics, and employed by the Middle District of Georgia in *McDowell*, provides an example of how a practical inquiry into access would work.³¹⁹ Under this system, if the court found that a defendant had physical access to a notice-bearing CD jewel case, then

309. See *supra* note 295 and accompanying text.

310. S. REP. NO. 100-352, at 43, *reprinted in* 1988 U.S.C.C.A.N. at 3740–41.

311. See *supra* notes 112–18 and accompanying text.

312. See *supra* notes 241–56 and accompanying text.

313. See *supra* notes 235–38 and accompanying text.

314. See *supra* notes 70–79 and accompanying text.

315. See *supra* notes 21–23 and accompanying text.

316. See *supra* Part I.B.iii.

317. See *supra* Part III.B.

318. See *supra* note 267 and accompanying text.

319. See *supra* notes 269–81 and accompanying text.

§ 402(d) would bar damage mitigation.³²⁰ Once § 402(d) is no longer seen as an absolute bar to mitigation, courts will be able to review the infringer's circumstances objectively, as Justice Alito advocated, to determine whether they actually had reason to know their acts constituted infringement.³²¹ The Second Circuit's opinion in *D.C. Comics* demonstrates that a court could find a lack of legal sophistication, along with a virtually indistinguishable difference between an infringing and legitimate copy—much like the situations of Whitney Harper and Sarah McDowell—to be appropriate circumstances for granting mitigation.³²²

The Fifth and Seventh Circuits' response to the above has been that the defendant had "access" because they were automatically put on notice, and therefore had a duty to inquire about the copyrighted status of the files in question.³²³ Such a duty is simply too vague, however, to be practically implemented. As Professor Nesson warned, the risks of such a system would present two improper effects on a casual internet user accessing a perfectly legitimate P2P network:

First, she can assume, incorrectly, that all music is copyrighted. Alternatively, she can embark on an open-ended quest to verify copyright. Ultimately, even if no copyright notice is found, it will never be safe to assume that a work is in the public domain. Under this scheme, innocent infringement can never be proved.³²⁴

One could imagine many examples where the appropriate CD containing a song in question is located in a notice-laden jewel case that is hundreds of miles away.³²⁵ The Fifth and Seventh Circuits, however, would still hold that this scenario is an appropriate example of "access" to said notice, and would never look into such factors when determining if mitigation is warranted.³²⁶

The reason that access in the above sense is inappropriate in the context of P2P is that the nature of the infringement is radically different.³²⁷ When analog provisions were written, we were still in an age where copyright infringement was mainly undertaken by professional counterfeiters who needed to have a physical copy in order to infringe. In that analog world, § 402(d) made perfect sense because there would be no scenario where one could avoid said notice. In the digital age, however, anyone can download and copy a song with great ease and without ever being presented with copyright notice anywhere in the timeline.³²⁸ Only once the legal community recognizes this fundamental difference can the concept of

320. See *supra* notes 289–91 and accompanying text.

321. See *supra* notes 292–93 and accompanying text.

322. See *supra* notes 294–97 and accompanying text.

323. See *supra* notes 191–94 and accompanying text.

324. Nesson Brief, *supra* note 225, at 27; see also *supra* note 261 and accompanying text (noting the complexities inherent with an interpretation of "access" that means that "someone could have inspected a copy of a work had they inquired").

325. See *supra* note 291 and accompanying text.

326. See *supra* Part III.A.

327. See *supra* Part II.A.

328. See *supra* notes 103–05 and accompanying text.

innocent infringement survive. Condoning the views of the *Harper* and *Maverick* courts runs the risk of accepting the effective elimination without any direction from Congress of one of the few protective provisions in an already controversial statutory damage regime.

CONCLUSION

In his dissent from denial of certiorari in *Harper*, Justice Alito noted that in the “post-‘phonorecord’ age” we need to closely scrutinize copyright standards articulated long before digital means of infringement were developed.³²⁹ He cautioned that “not many cases presenting this issue are likely to reach the Courts of Appeals.”³³⁰ The innocent infringement debate therefore likely will remain stagnant until other circuits analyze the relevant provisions of the 1976 Act.³³¹

Nevertheless, it is important to continue to advocate for a change in copyright law that acknowledges the realities of P2P and the digital age. In the interim, district judges should apply analog standards with this fundamental difference in mind and be careful not to discard innocent infringement. While perhaps morally questionable to some, P2P downloading remains a constant phenomenon of modern culture.³³² The question should not be whether Whitney Harper’s actions were “wrong,” but rather whether her punishment should be reduced because she did not have “reason to believe” her acts constituted copyright infringement.³³³ This distinction is crucial because the most common example of innocent infringement today—and the kind most deserving of the defense—occurs when an individual, like Whitney Harper, Sarah McDowell, and countless others, “knowingly copies from an existing work and reasonably but erroneously believes, because of copyright law’s complex and often indeterminate scope, that her copying is permitted, not prohibited, by copyright law.”³³⁴ Only once others understand that innocent infringement is not an absolution of liability, but rather a mere reduction to account for one’s naïveté, can we return to our legislature’s original intent to afford some protection to innocent infringers.³³⁵

329. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari).

330. *Id.*

331. *Id.*

332. *See supra* notes 121–23 and accompanying text.

333. 17 U.S.C. § 504(c)(2) (2006).

334. Reese, *supra* note 18, at 183; *see also supra* notes 205, 213, 269–74 and accompanying text.

335. *See supra* Part I.