Copytraps

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Congress has unintentionally evoked copytraps, which exact thousands of dollars from the Internet user who innocently buys music without knowing that it infringes copyright. Copytraps arise when Web sites lure innocent users into downloading expression that seems legal but is actually infringing. Regardless of whether the Web site appears legitimate, whether a user's good-faith belief is reasonable, or whether the Web site owner is unaware that the material is infringing, users who download infringing material face strict liability punishment, and the penalties are severe. It is entrapment, with the spoils from the innocent going to large corporate copyright holders. The law facilitates copytraps because it governs circumstances today that were never contemplated when copyright's strict liability emerged centuries ago. What has been good policy for real space is bad policy for cyberspace. As copytraps become common, end users will increasingly encounter the unfairness of strict liability punishment and ultimately become reluctant to download from unfamiliar sites. The effects of copytraps cast doubt on the wisdom of strict liability: copytraps unfairly punish the innocent, foster copyright abuse, unduly burden commerce, restrict speech, and deter the dissemination of knowledge. Congress should therefore amend the Copyright Act. Rather than imposing statutory damages on innocent downloaders, the Act should require only that innocent downloaders delete infringing material. In the alternative, courts should interpret the Act's strict liability provision as not applying to online expression.

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INTRODUCTION

Long before the Internet began to stir, copyright embraced strict liability.[1] Intended to control copying in the physical world, strict liability emerged without contemplating a virtual existence, becoming well established before the advent of online ontology.[2] As a result, the doctrine that was meant to provide absolute control in real space now threatens lawful commerce and speech in cyberspace.[3] To punish innocent copying on the Internet is to punish virtual existence, and copyright's strict liability does just that.[4] Strict punishment of copying makes no sense in a world where copying is the architecture of being.

This tension between a law designed for a world of physical objects and its application to a world of virtual copying is giving rise to copytraps. A copytrap exists where a Web site leads an Internet user to mistakenly believe that a copyrighted work may be legally downloaded when in fact the work is pirated.[5] Those circumstances

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1. The Internet gained public recognition in the mid to late 1990s. *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD vii (2006). By contrast, the doctrine of strict liability in copyright law traces back to the Statute of Anne. *See* An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 1709, 8 Ann., c. 19 (Eng.) (imposing liability on any "bookseller, printer, or other person whatsoever . . . [who] shall print, reprint, or import, or cause to be printed, reprinted or imported, any such book . . . without the consent of the proprietor"). Early colonial copyright laws subsequently adhered to the English copyright model, applying strict liability. *See* Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 223 (1966). The federal copyright acts of 1790, 1870, and 1909 were all strict liability statutes, as is the present Copyright Act. *See* 17 U.S.C. §§ 101, 106, 501(a) (2006); Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 355–58 (2002) (describing strict liability of all copyright acts preceding the current one).

2. Courts have applied the doctrine without inhibition. *See, e.g.*, Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198 (1931) ("Intention to infringe is not essential under the [Copyright] Act."); BMG Music v. Gonzalez, 430 F.3d 888, 891–92 (7th Cir. 2005) (finding liability despite innocence argument in context of Internet downloading); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963) ("While there have been some complaints concerning the harshness of the principle of strict liability in copyright law . . . courts have consistently refused to honor the defense of absence of knowledge or intention."); De Acosta v. Brown, 146 F.2d 408, 410–12 (2d Cir. 1944) (relying on the "unanimity of view" that liability is strict in copyright to hold that the "protection accorded literary property would be of little value if . . . insulation from payment of damages could be secured by a publisher by merely refraining from making inquiry").

3. *Cf.* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 549, 552–56 (1997) (arguing that copyright law is expanding onto the Internet in a way that is leading to undesirable consequences).

4. *See* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (opining that enforcing copyright's strict liability provision as to innocent Internet actors would "hold the entire Internet liable").

5. *Cf.* Lava Records, LLC v. Ates, No. Civ. A. 05-1314, 2006 WL 1914166, at *1 (W.D. La. July 11, 2006). While he was a high school student, Matt Ates downloaded twenty-five songs through an unauthorized Web site. *Id.* at *1. Based on the Web site's appearance, Matt believed that he had done no wrong. *See* Plaintiffs' Memorandum in Support of Their Motion

trap the innocent downloader,[6] who faces strict liability for unauthorized copying.[7] Under current law, it is irrelevant that the Web site induced the user to form a mistaken belief, that the user's reliance on the Web site's representation was reasonable, or that the user paid money to download.[8] All that matters is that the downloader copied without permission.[9] Where a Web site has led a downloader to mistake the legality of downloading, the fact remains that the downloader made a mistake.[10] Copytraps snare Internet users who download under the mistaken belief that they have permission to copy certain expression on the Information Superhighway. In the copying-dependent world of the Internet, copytraps abound.[11]

The following example illustrates a copytrap. The Social Science Research Network (SSRN) is an online repository of scholarly works through which authors make articles available for free download.[12] Suppose that you download this Article from SSRN, and after doing so, you receive a demand letter from its author.[13] Apparently someone other than the author had posted this article to SSRN. Nevertheless, the Article was

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for Summary Judgment Against Defendant Matthew Ates, No. Civ. A. 05-1314, 2006 WL 1914166 (W.D. La. July 11, 2006); Deposition Transcript of Matthew Ates at 20, Lava Records, LLC v. Ates, No. Civ. A. 05-1314, 2006 WL 1914166 (W.D. La. July 11, 2006) (on file with author). But Matt had done wrong, so five recording companies asserted their statutory rights to $750 per song. *See Lava Records, LLC*, 2006 WL 1914166, at *1, *3. Although Matt maintained his innocence, the pro se high school student was no match for the 250-lawyer law firm at summary judgment. *Id.* at *1–*3. All that mattered was that Matt had downloaded without authorization: infringement had occurred; judgment was automatic. Twenty-five mouse-clicks cost $19,000. *Id.* at *1–*3. Unsurprisingly, Matt now avoids downloading music. *Id.* at *1–*3.

6. This Article employs the term "innocent downloader" to mean a person who downloads infringing material from a Web Site under a reasonable but mistaken belief of fact that the material is not infringing.

7. *See, e.g.*, 17 U.S.C. § 501(a) (2006); *BMG Music*, 430 F.3d at 891–92 (finding liability despite innocence argument); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294 (D. Utah 1999) (suggesting that Internet users are liable for infringement simply by innocently visiting an infringing Web site).

8. Liability lies regardless of the user's ignorance. *See* 17 U.S.C. §§ 106, 501(a). Nevertheless, a court may reduce statutory damages to $200 if it finds that the infringer was unaware of the infringement and had no reason to believe he or she was infringing copyright. 17 U.S.C. § 504(c)(2).

9. *See, e.g.*, 17 U.S.C. § 106(1) (providing copyright holders exclusive rights to reproduce works); *BMG Music*, 430 F.3d at 891–92 (imposing strict liability in downloading context); Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir. 1995) (stating that unknowing infringement does not excuse copyright liability).

10. Robert Brimley is an example of an Internet user falling victim to a copytrap. While married, raising two children, and serving in the Navy, Robert was accused of illegally downloading six songs. *See* Elektra Entm't Group Inc. v. Brimley, No. CV205-134, 2006 WL 2367135, at *2 (S.D. Ga. Aug. 15, 2006). Arguing pro se, he maintained his innocence. *See id.*, at *2. He did not, however, prevail in court and his innocence cost him over $4000. *See id.*, at *2–*3.

11. A copytrap may arise whenever an Internet user downloads anything. Online pictures, videos, songs, and text all introduce the possibility of virtual entrapment by downloading. *See* Lemley, *supra* note 3, at 552–56.

12. SSRN, http://www.ssrn.com.

13. *See* Ned Snow, *Copytraps*, 84 IND. L.J. 285, 287 (2009), *available at* http://ssrn.com/abstract=1019577 (offering manuscript of *Copytraps* for free download).

there, and you downloaded it—without permission—so statutory damages are due.[14] That you were led to mistakenly believe that the download was permitted does not change the fact that you made a mistake.[15] SSRN did not know that the posted article was infringing, so it is not liable, and the poster is nowhere to be found.[16] Your mistake is your problem.

The penalty for getting caught in a copytrap is severe. By design, the punishment for innocent infringement teaches Internet users to think twice before downloading.[17] Minimum statutory damages are $750 per work downloaded.[18] The effect of the punishment, then, is to potentially deter downloading altogether, including legal downloads.[19] Deterrence would occur because of the reasonable possibility of mistaking that a Web site has authority to distribute copyrighted material.[20] Facing a real and costly possibility of mistake, an Internet user might refrain from downloading

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14. *See* 17 U.S.C. § 504(c) (2006).

15. *Cf.* SSRN User HeadQuarters Registration, http://hq.ssrn.com/Participant.cfm?rectype=add&funct=new (authorizing users to download scholarly articles from the site at no cost).

16. SSRN would not be liable to the author because of the safe harbor protection that the Digital Millennium Copyright Act affords content providers. *See* Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c) (2006). Nor would SSRN be liable to the downloader. Copyright law does not provide for indemnification by third parties who have led a defendant to commit copyright infringement. *See, e.g.*, Pure Country Weavers, Inc. v. Bristar, Inc., 410 F. Supp. 2d 439, 448 (W.D.N.C. 2006) ("[N]o right of indemnification was affirmatively created (either expressly or implicitly) by Congress in the Copyright Act, and . . . this is not one of the 'limited situations' in which the Court should formulate federal common law to create such a right."). Furthermore, relief to the downloader through the common law would not be possible unless SSRN acted tortiously in offering the article for download. *See id.* SSRN reasonably attempts to determine that uploaders are authorized to post articles. *See* SSRN, https://ssrn.com/ (follow "Submit" link) (requiring uploaders of articles to have copyright authority to post the articles on SSRN). Therefore, it does not seem likely that an action in tort would lie against SSRN. *Cf.* PROSSER AND KEETON ON TORTS § 32, at 173–75 (William L. Prosser, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton & David G. Owen eds., 5th ed. 1984) (describing reasonable person standard in negligence). *Id.* § 107, at 741 (outlining scienter requirement for tort of misrepresentation). A claim by the downloader under the Uniform Commercial Code would also fail because downloads are not "goods," and, moreover, SSRN does not sell downloads. *See* U.C.C. §§ 2-102, 2-103(k), 2-312(1) (2004) (defining scope of U.C.C., defining goods, and requiring contract of sale for warranty of good title to apply); Fink v. DeClassis, 745 F. Supp. 509, 516 (N.D. Ill. 1990) (refusing to recognize intellectual property as goods under the U.C.C.).

17. *See* H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 ("[B]y establishing a realistic floor for liability, [the 'innocent infringer'] provision preserves its intended deterrent effect.").

18. *See* 17 U.S.C. §§ 402(d), 504(c).

19. *See* Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1554 (9th Cir. 1989) ("Statutory damages are available in order to . . . deter infringement.").

20. *Cf.*, Moeffju.net, LegalSounds?, http://moeffju.net/blog/2006/10/23/legalsounds/ (inquiring whether Web site offering infringing material had authority to offer songs for downloading); Tech Law Advisor, Is allofmp3.com legal?, http://techlawadvisor.com/blog/2004/04/is-allofmp3com-legal.html (debating whether Web site offering songs for download was legal).

seemingly noninfringing material.[21] Strict punishment of illegal downloading potentially chills the practice of legal downloading.

At present, most Internet users are not likely deterred from downloading material that appears to be noninfringing.[22] Most users download without realizing the risk of mistaking facts.[23] But that will likely change.[24] Copyright holders are rapidly increasing lawsuits over illegal downloads, and in doing so, they are not discriminating between innocent and intentional infringers.[25] This makes sense for copyright holders: entitled to $750 for a work that sells for $1, copyright holders have every incentive to enforce their rights, especially against innocent users who are not attempting to disguise their activity.[26] This fact, coupled with the increasing efficiency of tracking downloads,[27] suggests that copyright holders will continue to increase their suits against innocent end users.[28] As suits become commonplace, the risk of downloading seemingly legal material will become apparent. It is only a matter of time before users are deterred from downloading.

This potential deterrent effect of copyright's strict liability is bad policy for a medium that consists entirely of copies. In real space, consumers of copyrighted works need not duplicate the works to legally obtain them because copyright holders

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21. *See* April Marciszewski, *OSU Employee, 15 Students Cited for Illegal Downloads*, TULSA WORLD, May 24, 2007, at A7, *available at* http://www.tulsaworld.com/news/article.aspx?articleID=070524_1_A7_ ISZEW07430. Charles Cox, an upstanding employee of the Oklahoma State University, received a letter from a copyright holder demanding $3000 for illegally downloaded nine songs. *Id.* Cox claimed innocence, but paid the demand. *Id.* The offer was reasonable considering that he would face a minimum liability of $6750 in court. *Id.* Since then, Charles is much more hesitant to download from any site. *Id.*

22. *See* Jason Straziuso, *Lawsuits Deter Some, Not All, Music Downloaders*, CRN MAG., Feb. 22, 2004, at 5, *available at* http://www.crn.com/it-channel/18826346; Interview by David McGuire, Reporter, Washington Post, with Eric Garland, CEO, Big Champagne, in Washington, D.C. (Jan. 22, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A36356-2004Jan21.html [hereinafter Garland Interview] (stating that empirical studies of online tracking company indicate that popularity of file sharing is at all-time high).

23. *Cf.* Marciszewski, *supra* note 21 (providing one example).

24. *Cf*. Straziuso, *supra* note 22, at 5 (reporting Recording Industry Association of America executive's statement that most people will not download pirated material when they understand the legal consequences for doing so).

25. *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 891–92 (7th Cir. 2005) (recognizing liability despite downloader's innocence argument); Elektra Entm't Group Inc. v. Brimley, No. CV205-134, 2006 WL 2367135, at *2 (S.D. Ga. Aug. 15, 2006) (denying innocence argument of downloader); Patrick McCartney, *RIAA Threatens UC Davis Students with More Lawsuits*, CAL. AGGIE, Feb. 8, 2008, at 1, *available at* http://media.collegepublisher.com/media/paper981/documents/5gv41kzb.pdf.

26. *See* Jason Schultz, *The False Origins of the Induce Act*, 32 N. KY. L. REV. 527, 552 (2005) (commenting on the great incentive that copyright's statutory damages provide copyright holders to bring suit).

27. *See, e.g.*, VisualRoute, http://visualroute.visualware.com/index.html (offering software to track IP routing activity).

28. *See* Marc Fisher, *Download Uproar: Record Industry Goes After Personal Use*, WASH. POST, Dec. 30, 2007, at M05, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html.

distribute their works to consumers by selling physical copies.[29] By contrast, in cyberspace, the legal distribution process requires consumer copying.[30] The Internet model for distributing copyrighted works (end-user copying) suggests that the law should encourage, rather than deter, the act of copying a work that appears to be noninfringing.[31] It is unfair to punish conduct that should be encouraged. This unfairness is exacerbated by the excessive penalties for innocent downloading, especially where downloading entails minimal physical and mental effort.[32] The punishment does not fit the crime. Furthermore, the excessive penalties create incentives for copyright holders to abuse the protection of copyright.[33] Innocent downloaders are easy targets for infringement actions, so the law provides copyright holders incentive to profit from the unwary.[34] Finally, copyright's strict liability punishment may create an undue burden on virtual commerce.[35] Lesser-known Web sites may not be trusted to offer legitimate downloads, which would create an advantage for name-brand Web sites, ultimately restraining trade.[36] Punishing innocent downloaders offends basic policies of fairness, copyright distribution, and virtual commerce.

Constitutional tensions also arise from the copyright's strict liability regime.[37] The potential deterrent effect on downloading would interfere with users' right to receive speech.[38] It would also restrict authors' ability to reach virtual audiences.[39] Furthermore, the deterrent effect would create a tension with the Copyright Clause: the deterrence would interrupt the production and dissemination of creative works, which offends the purpose of copyright.[40] An absurdity in copyright law would thereby arise, straining the law's rationality.[41] This strain would raise due process concerns, which would be compounded by the excessive damages for innocent conduct, often 750 times the actual loss. [42]

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29. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. ILL. L. REV. 83, 126 ("[T]he copyright owner's exclusive right of distribution is a right to distribute . . . tangible, physical things.").

30. *See* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1255 (2001) ("Copies of copyrighted works can now be distributed in digital form, without the exchange of any physical object, without any title in physical property changing hands, and all indications suggest that this will only increase over time, as computer network capacities increase and compression technologies improve.").

31. *See infra* Part I.A.2.

32. *See infra* Part I.A.

33. *See infra* Part I.B.

34. *See infra* Part I.B.

35. *See infra* Part I.C.

36. *See infra* Part I.C.2.

37. *See infra* Part II.

38. *See infra* Part II.A.1.

39. *See infra* Part II.A.2.

40. *See infra* Part II.B.

41. *See infra* Part II.C.1.

42. *See infra* Part II.C.2.

In view of these policy and constitutional concerns, Congress should exempt innocent downloaders from strict liability punishment.[43] Innocent downloaders should be required only to delete infringing material upon receiving notice of their infringement.[44] If downloaders ignore the notice, statutory damages for willful infringement should apply in full; otherwise, a good-faith downloader in cyberspace should receive as much protection as a good-faith purchaser in real space.[45] Downloaders should not incur damages for innocent copying.[46]

This Article examines copyright's strict liability regime as it applies to Internet downloading. Part I considers the policy implications of applying the regime. It concludes that reasons of fairness warrant against the strict punishment, that the strict punishment fosters copyright abuse, and that the strict punishment unduly burdens virtual commerce. Part II addresses constitutional issues. It posits that applying strict punishment to innocent downloading creates tensions with the Free Speech, Copyright, and Due Process Clauses. In view of these problems with the present strict liability regime, Part III proposes that the Copyright Act be either amended or interpreted to excuse innocent downloaders from the statutory-damages punishment, such that innocent downloaders would only be required to delete infringing material.

I. POLICY

Policy implications of applying copyright's strict liability regime to Internet downloading raise several issues that suggest against the application. First, fairness suggests that the regime's excessive penalties are unwarranted.[47] Second, the regime could create a perverse incentive for copyright holders to foster innocent online infringement.[48] Third, the regime may unduly burden virtual commerce.[49] These policy implications are discussed in turn below.

A. Fairness

The unfairness of holding an innocent actor liable is not by itself a sufficient reason to condemn copyright's strict liability.[50] But the punitive penalty that follows that strict liability is punishing an innocent downloader with damages that constitute 750 times the actual loss seems too unfair to justify.[51] That unfairness is compounded by the fact

43. *See infra* Part III.
44. *See infra* Part III.A.
45. *See infra* Part III.A–B.
46. *See infra* Part III.B.
47. *See infra* Part I.A.
48. *See infra* Part I.B.
49. *See infra* Part I.C.
50. *See* Fid. Nat'l Title Ins. Co. v. Consumer Home Mortgage, Inc., 708 N.Y.S.2d 445, 447 (N.Y. App. Div. 2000) ("Where a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed."); PROSSER AND KEETON ON TORTS, *supra* note 16, § 75, at 537 ([O]ne who innocently causes harm should make it good.").
51. PROSSER AND KEETON ON TORTS, *supra* note 16, § 2, at 9–10 ("Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive

that end-user copying is necessary for copyright holders to distribute their works on the Internet, that Web sites induce the innocent infringement, that downloading involves minimal physical and mental effort, and that Congress did not likely intend for copyright's strict liability provision to apply to Internet copying.[52] Discussed below are these circumstances suggesting the unfairness of strict liability punishment.

1. Punitive Damages for Innocent Conduct

The punitive nature of copyright's strict liability regime calls into question its fairness as applied to innocent downloaders. The minimum statutory-damages penalty against innocent downloaders represents a punishment in many instances.[53] That penalty is $750 per copied work, which is grossly excessive where a work's value is much less than that.[54] For a song worth one dollar,[55] a $750 penalty becomes punitive.[56] Indeed, legislative history to the Copyright Act indicates that the purpose of even the minimum statutory-damages award is to deter innocent conduct that is infringing.[57] The Act, then, contemplates a punitive remedy against innocent infringers.

This remedy against innocent downloaders is inconsistent with common law principles of strict liability. At common law, strict liability is justified on the general principle that as between two innocent actors, the innocent wrongdoer should bear the loss in question.[58] For reasons of fairness, however, damages are usually limited to the

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on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.").

52. *See infra* Part I.A.2–3.

53. *See* H.R. Rep. No. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 ("[B]y establishing a realistic floor for liability, the [strict liability] provision preserves its intended deterrent effect . . . ."); L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 996 (9th Cir. 1998) ("[A]wards of statutory damages serve . . . punitive purposes . . . ."); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1216–17 & 1217 n.61 (commenting on the punitive nature of copyright's statutory damages). Although it is true that one purpose of statutory damages is to compensate copyright holders where the value of a work is difficult to ascertain, that purpose is not exclusive. *See* La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1199 (10th Cir. 2005) (observing that one purpose of copyright's statutory damages is to compensate an author where actual damages are difficult to ascertain).

54. 17 U.S.C. § 504(c) (2006). Damages may be reduced to $200 if the expression is not embodied on a phonorecord. *See id*. § 412.

55. *See, e.g.*, Apple, iTunes Store, http://www.apple.com/itunes/store.

56. *See* Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1554 (9th Cir. 1989) ("Statutory damages are available in order to . . . deter infringement."); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 525–26 (2004) (arguing that the minimum statutory-damages award is punitive).

57. *See* H.R. Rep. No. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 ("[B]y establishing a realistic floor for liability, the [strict liability] provision preserves its intended deterrent effect . . . .").

58. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 75, at 537. Authority condemning punitive damages for tortious actions committed innocently is relevant to copyright's strict liability regime because copyright infringement constitutes a tortious act. *See* Porter v. United States, 473 F.2d 1329, 1337 (5th Cir. 1973) ("[I]t has always been held that infringement of

actual loss.[59] The only exceptions justifying punitive damages against an innocent actor occur where the actor consciously disregards the interests of others, such that the conduct may be called willful or wanton, or where the conduct poses a great risk of harm to many innocent actors, such that the conduct should be deterred or at least cautioned against.[60] Accordingly, punitive damages are justified for innocently manufacturing a dangerous automobile, whereas they are not for innocently receiving a stolen automobile.[61]

These common law principles suggest that copyright's statutory-damages punishment is not warranted against innocent downloaders. As discussed below, innocent downloading neither entails a conscious disregard of copyright holders nor seems to pose a great risk of harm to many innocent actors. A conscious disregard of copyright holders is not present because for a downloader to be innocent, she[62] must hold a mistaken belief that is reasonable, such that a reasonable person would conclude that the download constitutes noninfringing material.[63] Reasonableness precludes the possibility of conscious disregard. For example, downloading an infringing copy of a computer program from a Web site purporting that the program is open source[64] —in other words, that the program is authorized for download—would likely constitute a reasonable mistake. The downloader has not consciously disregarded the possibility that the program is pirated because the Web site's representation appears legitimate. Thus, punitive damages against innocent downloaders do not seem justified on the basis that the downloader consciously disregards copyright holders.

With respect to whether innocent downloading poses a great risk of harm, at first glance it seems that it does not. One innocent downloader's copying of an infringing work does not seem to introduce the risk of harming many innocent copyright holders. The harm seems to consist solely in depriving one copyright holder of a work's market value.[65] On the other hand, it seems that online infringers harm the entirety of the

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copyright, whether common law or statutory, constitutes a tort.") (citations omitted).

59. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 2, at 9–10 (opining that punitive damages should not be charged "against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort").

60. *See id.* § 2, at 9–10, 14; Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 4–10 (1982). "[D]eterrence objectives justify imposing punitive damages only in cases where compensatory damages alone produce less than optimal deterrence." *Id.* at 9.

61. *Compare* Rinker v. Ford Motor Co., 567 S.W.2d 655, 669 (Mo. Ct. App. 1978) (affirming punitive damages award in strict liability action for faulty manufacture of automobile), *with* Thomas v. Commercial Credit Corp., 335 S.W.2d 703, 706 (Mo. Ct. App. 1960) (vacating punitive damages award where finance company innocently procured property not belonging to it).

62. This Article employs both masculine and feminine pronouns but does not suggest any preference for either one.

63. *Cf.* United States v. U.S. Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 538, 543 (9th Cir. 1988) (interpreting child pornography statute as including innocence defense that requires mistake of fact to be "reasonable").

64. *See, e.g.*, Open Source as Alternative, http://www.osalt.com/about (explaining benefits of open source software).

65. *See* 17 U.S.C. § 504 (2006) (outlining damages available to single copyright owner for copyright infringement).

copyright system.[66] The ease and opportunity for immediate downloading on the Internet make the possibility of innocent infringement great.[67] That downloading is so easy and frequent could suggest that it poses a great harm to all copyright holders.[68] Punitive damages, then, may seem necessary to caution against downloading material that—although seemingly legitimate—hints at illegality. By introducing the cautionary effect of punitive damages, copyright's strict liability arguably decreases a risk of harming all copyright holders.

It may be true that infringing downloads harm the copyright system. But this fact's relevance to the issue of whether punitive damages should apply for innocent downloading is debatable. That all infringing downloaders collectively pose harm to all copyright holders does not seem to justify punitive damages against one innocent downloader. One innocent downloader does not harm the entirety of the copyright system. Rather, the harm to the entirety arises from the collective action of all infringing downloaders. To punish an innocent downloader for the harmful effects that downloading generally poses to copyright is to punish one for the collective effect of many. In other words, by punishing innocent downloaders because of the ease and frequency of illegal downloading, the Copyright Act substitutes the single innocent downloader for all infringing downloaders. Copyright punishes one to deter many.[69] Such an imposition of punitive damages offends elementary notions of fairness.[70]

Even assuming that the punitive damages measure one innocent downloader's individual role in harming all copyright holders, those damages still seem unfair. It is unfair to punish an actor for actions that he committed against third parties who are not represented in the lawsuit through which the punishment arises.[71] In an infringement action against an innocent infringer, all other copyright holders are not parties to the action giving rise to the punitive damages, so it is uncertain whether all the other copyright holders would object to the innocent infringement.[72] Their absence in the

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66. *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1375–76 (2004) (discussing the substantial negative effect that online infringement poses to copyright holders).

67. *See* Lemley, *supra* note 3, at 552–56 (observing the multiple ways for innocently copying material on the Internet); Lemley & Reese, *supra* note 66, at 1375 (noting minimal cost and ease of digital copying).

68. *See* Lemley & Reese, *supra* note 66, at 1375.

69. *Cf. id.* at 1351 ("[T]he only way to effectively deter infringement is to increase the effective sanction substantially for those few who are caught and prosecuted."). Professors Lemley and Reese asserted this point (quoted in the preceding sentence) with respect to *intentional* infringers.

70. Bennis v. Michigan, 516 U.S. 442, 460 (1996) ("[E]lementary notions of fairness require some attention to the impact of a seizure on the rights of innocent parties."). *But cf.* Phile qui tam v. Ship Anna, 1 U.S. 197, 207 (1787) ("The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another.").

71. *See* Phillip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (opining that the imposition of damages to punish defendant for injuries of nonparties to the litigation violated the Due Process Clause because the defendant would not have the opportunity to defend against this claim).

72. *Cf. id.* (contemplating potential for disparate circumstances of nonparty victims).

suit giving rise to the punitive damages suggests that those damages represent an unfairness that is unjustified.

Fairness issues also arise from the punitive nature of the damages because the availability of a large damages award provides an incentive for large corporate copyright holders to pursue individual innocent infringers. Unequal bargaining power thereby arises in copyright litigation.[73] Large corporate copyright holders can minimize transaction costs of bringing suit through economies of scale, often pursuing multiple copyright claims in the same suit against an innocent downloader.[74] Consider the Recording Industry Association of America (RIAA). The RIAA's members produce and sell nearly ninety percent of all music in the United States.[75] That size enables the RIAA to minimize transaction costs of litigation by spreading one-time costs among its many member copyright holders. Large corporate copyright holders are therefore able to realize efficiencies that make pursuing remedies a practical possibility. They are in the business of pursuing infringers.[76] In contrast, innocent downloaders are not accustomed to defending themselves against infringement claims, and likely have minimal resources to devote to that defense.[77] The RIAA is ready to go to court. The innocent downloader is not.

2. Copyright Distribution in Cyberspace

Punishing innocent downloaders is unfair because it contravenes the Internet model for copyright distribution. Copyright holders who distribute their works through the Internet rely on consumers to download those works.[78] Internet distribution requires

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73. *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 891–92 (7th Cir. 2005) (refusing to consider innocence plea where plaintiffs, BMG Music, Sony Music Entertainment, Inc., UMG Recordings, Inc., Fonovisa, Inc., and Atlantic Recording Corp., were large corporate copyright holders); *see also supra* note 5.

74. Transaction costs of bringing suit pose a barrier for smaller copyright holders to pursue an infringement action. *See* Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 143 (2001) (recognizing that litigation costs of pursuing copyright infringement represent rent-seeking costs). Average law firm billing rates were $348 per hour for the year of 2007. Debra Cassens Weiss, *Big Firm Hourly Billing Rates Up Almost 8%; Average is $348*, A.B.A. J., Dec. 11, 2007, *available at* http://www.abajournal.com/news/big_firm_hourly_billing_rates_up_almost_8_average_is_348/.

75. RIAA, Who We Are, http://www.riaa.com/aboutus.php.

76. *See* Press Release, RIAA, RIAA Sends More Pre-Lawsuit Letters to Colleges One Year into Campaign (Feb. 21, 2008), *available at* http://riaa.com/newsitem.php?id=B0FAEEC1-A56A-0F04-D999-94A807ADAA6E.

77. *See* Matthew Sag, *Piracy: Twelve-Year Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation,* 4 NW. J. TECH. & INTELL. PROP. 133, 133–34 (2006); *see also supra* notes 5, 10, and 21.

78. *See* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 383 (1995) ("In the past copyright law . . . [allowed] copyright owners to sell physical copies of their works so purchasers were able to use these physical copies only subject to the owner's exclusive rights. Digitization undermines the copyright owner's ability to sell copies of his work and collect fees."); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1255 (2001)

consumer copying.[79] This requirement means that the Internet method for distributing copyrighted works presumes that copying is permissible absent circumstances suggesting otherwise. There is an expectation that consumers will copy copyrighted works. Strict liability punishment, however, contravenes this expectation. When an Internet user innocently downloads infringing material, the user believes she is acting consistent with the presumption that in the absence of circumstances suggesting otherwise, downloading is legal. Indeed, a downloader can only be innocent if there are no circumstances suggesting that the download is illegal. In view of the model for Internet distribution of copyright works, punishing innocent downloaders reflects bad policy.

This model for copyright distribution in cyberspace—end-user downloading—is notably different than the method for distribution in real space. In real space, distribution of copyrighted works occurs by copyright holders making available physical copies for the public to consume.[80] If consumers in real space seek to legitimately obtain a copyrighted work, they must procure a physical copy of that work rather than making a copy.[81] This fact suggests that a presumption against consumer copying exists. Absent affirmative circumstances suggesting that an author has relinquished her rights or that copying would constitute a fair use, there is no reason for consumers to copy the work.[82] Thus, the real-space model for distributing

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("Copies of copyrighted works can now be distributed in digital form, without the exchange of any physical object, without any title in physical property changing hands, and all indications suggest that this will only increase over time, as computer network capacities increase and compression technologies improve.").

79. *See generally* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.12[E] (2008).

80. *See* 17 U.S.C. §§ 101, 106(3) (2006) (providing copyright holder exclusive right "to distribute copies" of copyrighted work and defining "copies" to be "material objects . . . in which a work is fixed . . . ."); 2 NIMMER & NIMMER , *supra* note 79, § 8.12[E] ("Copyright matured in a universe in which . . . the public . . . typically acquired some physical manifestation containing the work."); R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. ILL. L. REV. 83, 126 (2001) ("[T]he copyright owner's exclusive right of distribution is a right to distribute . . . tangible, physical things.").

81. Implicit support for the factual assumption that consumers of copyrighted works must purchase physical copies of the works arises from the first-sale doctrine. *See* 17 U.S.C. § 109(a). This doctrine limits copyright holders' control over the distribution of their work to the first instance where the work is physically disposed. *See id.*; 2 NIMMER & NIMMER, *supra* note 79, § 8.12[A]. Any person lawfully possessing a copy of the work is entitled to "dispose of the possession of that copy." 17 U.S.C. § 109(a). This Section suggests, then, that the law presumes that persons lawfully acquiring copyrighted works will do so through means of physical procurement rather than through copying.

82. Where a copyright holder does not seek to enforce her rights, she would not place a copyright notation on the work. *See* H.R. REP. NO. 94-1476, at 143 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5759 (describing copyright notice). By observing the absence of a mark, consumers are aware of the intent to not enforce the copyright. Instances where a pirated copy might not contain a copyright notation are usually discernable in real space from instances where a genuine work lacks a notation because of the pirated copy's qualitative difference in appearance. If there is no qualitative difference between the pirated copy and the genuine work, the pirated copy is likely a product of professional duplication, which suggests the work is popular and in high demand, further suggesting that it would be well known if its copyright was

copyrighted works—physical delivery—suggests that copyright holders do not authorize consumer copying. Unlike the cyberspace model of copyright distribution, the real-space model inherently suggests that consumer copying is not authorized.

The fact that downloaders must copy to procure an authorized copy of a work, where real-space consumers need not, implies that innocent downloaders are punished for relying on third-party representations. This fact magnifies the unfairness of their punishment. Internet users rely on representations of Web site operators to determine whether material is authorized for download. Therefore, Web site representations affect a user's liability.[83] If a Web site falsely represents that it is authorized to distribute copyrighted material, and the consumer relies on the representation, then his reliance will result in liability for making an unauthorized copy.[84] The wrongdoing, then, does not merely result from an innocent downloader's mistake; rather, the wrongdoing directly results from another's misrepresentation. The downloader is punished for another's blameworthy conduct. From a moral standpoint, it is unfair to vicariously punish the innocent in place of the blameworthy.[85]

Arguably this unfairness may be alleviated by seeking redress against the blameworthy party. Innocent downloaders, however, usually have no recourse against a Web site offering infringing material. Copyright law does not provide for indemnification by third parties who have led a defendant to commit copyright infringement.[86] Relief through the common law would be possible only where the Web site had acted tortiously in offering the material for download.[87] A Web site would have to misrepresent its legality or negligently post its content for download.[88] Where either of those situations occurs, however, Web sites may be judgment-proof—either jurisdictionally unreachable or lacking in assets.[89] Conversely, Web sites that are not

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being enforced.

83. For instance, users rely on the representations of the SSRN Web site, which represents that the material may be freely downloaded. *See* SSRN, *supra* note 12.

84. *See, e.g.*, Legal Sounds, http://www.legalsounds.com (selling online music for download, and suggesting that the downloading is legal). Alternatively, a Web site might falsely represent that the copyright holder has relinquished rights to a work. An Internet user is unable to observe whether the work has a copyright notation, or whether indications surrounding the work—such as a CD label covering—indicate its illegitimacy, thereby affecting a user's ability to assess the veracity of that representation by the Web site. Finally, a Web site poster might represent that a downloadable file consists of something entirely different from its actual content.

85. *Cf.* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 19, 120–26 (1995) (arguing that an actor must breach a duty to be liable under a corrective justice regime).

86. *See* Pure Country Weavers, Inc. v. Bristar, Inc., 410 F. Supp. 2d 439, 448 (W.D.N.C. 2006) ("[N]o right of indemnification was affirmatively created (either expressly or implicitly) by Congress in the Copyright Act, and . . . this is not one of the 'limited situations' in which the Court should formulate federal common law to create such a right.").

87. *See id.*; *see also* PROSSER AND KEETON ON TORTS, *supra* note 16, § 30, at 164–65 (outlining tort of negligence); *id.* § 106, at 736–38 (outlining tort of misrepresentation). A claim under the Uniform Commercial Code would also fail for the simple reason that intellectual property does not qualify as a "good" under Article 2. *See* Fink v. DeClassis, 745 F. Supp. 509, 516 (N.D. Ill. 1990) (refusing to recognize intellectual property as goods under the U.C.C.).

88. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 30, at 164–65 (outlining tort of negligence); *id.* § 106, at 736–38 (outlining tort of misrepresentation).

89. *Cf.* Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 291–92 (2006) (commenting that authors of piracy code that facilitates Internet copyright

judgment-proof may not be liable under tort law if they are unaware of the infringing nature of the material: where a third party posts the infringing material and the Web site offers it under a reasonable belief that it is not infringing, a Web site cannot be liable for misrepresentation or negligence.[90] With regard to the third-party posters, they are often themselves judgment proof.[91] They can also be difficult to find: Internet users who intentionally post infringing material may take technological precautions against being discovered, such as masking their IP address from the infringing Web site and their Internet service provider (ISP).[92] In sum, innocent downloaders are often left without any practical recourse against the blameworthy party.

The liability that downloaders face when relying on a Web site's false representation contrasts with the absence of liability that consumers face when relying on a real-space distributor's false representations. In real space, a consumer is not liable for relying on a distributor's false representation that the distributor is authorized to distribute copyrighted material.[93] Consumer liability exists only if the consumer makes an unauthorized copy.[94] If a consumer purchases a physical copy not knowing that it is pirated, the consumer is not liable for that purchase, for no copy was made.[95] Indeed, even if a consumer purchases that physical copy knowing that it is pirated, the consumer is not liable for the purchase, for no copy was made.[96] A real-space distributor that misrepresents the authenticity of a pirated copy—or even truthfully represents its lack of authenticity—does not affect the liability of the consumer. Thus, the liability that Internet users face for purchasing a download is distinct from the

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infringing "might never be found and, if found, likely would be judgment-proof").

90. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 32, at 173–75 (describing the reasonable person standard in negligence); *id*. § 107, at 741 (noting the scienter requirement for the tort of misrepresentation); *see, e.g.*, SSRN, *supra* note 12 (follow "Submit" link) (requiring uploaders of articles to have copyright authority to post articles).

91. *Cf.* Zittrain, *supra* note 89, at 291–92.

92. *See, e.g.*, PrivacyView, Anonymous Surfing, http://www.privacyview.com/default.aspx (marketing software that allows user to mask IP address from ISP).

93. Liability would not arise under copyright law for the simple reason that Congress has not granted copyright holders any rights over the receipt of physical copies. Although copyright holders may exclude others from reproducing and distributing their works, they may not exclude others from physically receiving an unauthorized copy. *See* 17 U.S.C. § 106 (2006) (stating exclusive rights of copyright holders without referencing any right over receipt of physical copies); *id.* § 501 (defining infringement as violating exclusive rights of copyright owner); Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627, 629 (2d Cir. 1952) (Hand, J.) ("[O]ne does not infringe a copyright by buying an infringing copy of the 'work,' though the buyer will infringe, if in his turn he sells the copy he has bought, just as he does, if he 'publicly performs' it for profit."); Societe Civile Succession Richard Guino v. Int'l Found. for Anticancer Drug Discovery, 460 F. Supp. 2d 1105, 1107 (D. Ariz. 2006) ("The Copyright Act of 1976 does not authorize the impoundment of infringing property purchased by a non-infringing person."). If, however, the procurer of the physical copy instigated the copying, contributory liability would lie. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement . . . .").

94. *See* 17 U.S.C. § 106(1). Similarly, liability arises if a consumer prepares a derivative work or makes a public display or performance. *See id.* § 106(3)–(4).

95. *See supra* note 93.

96. *See supra* note 93.

liability that real-space consumers face for purchasing a physical copy. In cyberspace, a downloader's mistake of fact is costly. In real space it is not.

The differences between strict liability in real space and in cyberspace underscore the unfairness of applying strict liability in cyberspace. In addition to the differences already discussed, the traditional justification for strict liability in real space simply does not seem to apply in cyberspace. In real space, strict liability is warranted because circumstances giving rise to a reasonable mistake of fact about whether copying is permissible can be difficult to disprove.[97] The difficulty of proof arises because in real space only exceptional circumstances could lead a person to mistakenly believe that copying is authorized.[98] An oft-cited example is subconscious copying: an infringer might forget that she has seen a copyrighted image and then subconsciously copy the image when creating a new work.[99] Disproving a false allegation that her infringement results from subconscious copying would be pragmatically impossible, for only the infringer knows her consciousness.[100] For this reason, strict liability in real space has received support.[101] Cyberspace, on the other hand, does not usually raise the same difficulty of disproving allegations of innocence. An innocence defense requires that the mistake of fact giving rise to the innocence be both actual and reasonable.[102] In the downloading context, the reasonableness of an infringer's mistaken fact would be limited to the conclusions that a reasonable person would draw from the appearance of the Web site at issue. Because the circumstances leading to the alleged mistake of fact are readily observable on the Web site, it would not be difficult to disprove a false allegation of innocence.[103] Circumstances outside of the Web site's appearance—such as representations by other persons in real space—would not likely be sufficient to overcome a conclusion that a Web site's downloads appear unauthorized. So unlike in real space, a false allegation of innocence would not be difficult to disprove in cyberspace.

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97. 4 NIMMER & NIMMER, *supra* note 79, § 13.08.

98. Circumstances would be exceptional because, as discussed above, a presumption exists in real space that copying is prohibited. A misbelief that copying is a fair use would not constitute a circumstance of innocence because "[f]air use is a mixed question of fact and law." *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1984). It should further be noted that innocence is not relevant in the fair use analysis. *See* 17 U.S.C. § 107 (listing criteria for determining whether copying is fair use); *id.* § 504 (imposing statutory damages for innocent copying); Marcus v. Rowley, 695 F.2d 1171, 1177 (9th Cir. 1983) ("[W]hatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe." (quoting Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962))).

99. *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983) (finding liable defendant who had in good faith forgotten that the plaintiff's work was the source of his own).

100. *See* 4 NIMMER & NIMMER, *supra* note 79, § 13.08.

101. *See id.*

102. *Cf.* United States v. U.S. Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 538−43 (9th Cir. 1988) (interpreting Child Protection Act to recognize innocence defense where defense would allow for a "reasonable" mistake of fact).

103. For an example of a Web site offering downloads with an appearance that would not support a reasonable belief that the downloads were noninfringing, see Kazaa, http://kazaa.com.

These distinctions between applying strict liability in real space and applying it in cyberspace suggest that Congress never intended for the Copyright Act's strict liability provision to govern innocent downloading. Enacted in 1976, the current Act reflects good policy for the circumstances of its time.[104] Consumers of copyrighted works were not required to duplicate the works to procure them, implying a presumption against consumer copying.[105] Actual innocence involved exceptional circumstances, like subconscious copying, which would have been easy to allege but difficult to disprove.[106] There was also no risk of punishing a consumer for an act that reflected his good-faith reliance on another's misrepresentation of fact.[107] Yet in contrast to these strong reasons supporting strict liability in 1976, today these reasons are not present in the Internet context. It is unlikely, then, that Congress intended to punish innocent infringers where the means of copyright distribution required consumer copying, or in other words, where the innocence stemmed from normal circumstances of distribution.[108] Indeed, the legislative history suggests that Congress considered instances of innocent infringement to be "occasional" and "isolated."[109] It is further unlikely that Congress intended to deprive an innocent actor of a defense that could be easily disproved.[110] Nothing suggests that Congress ever intended that the Copyright Act's strict liability regime should apply to innocent downloading.

3. The Effortless Nature of Downloading

The fact that downloading requires minimal effort is relevant in evaluating whether strict liability should apply to innocent downloaders. On the one hand, the minimal effort seems reason to invoke stronger protection for copyright holders.[111] The digital architecture is conducive to copying, so intellectual property rights should be strengthened.[112] Where fences and locks fail, legal protection should be strong.[113] On the other hand, the minimal effort in copying suggests that the punishment for innocent

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104. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805, 1001–1205 (2006)).

105. *See supra* notes 80–81 and accompanying text.

106. *See* 4 NIMMER & NIMMER, *supra* note 79, at § 13.08.

107. *See supra* Part I.A.2.

108. *See* H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 (stating that reduction of statutory damages would apply "in cases of occasional or isolated innocent infringement").

109. *Id.*

110. *Cf. id.* ("[B]y establishing a realistic floor for liability, the [strict liability] provision . . . would not allow an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence.").

111. *Cf.* Corey W. Roush, *Database Legislation: Changing Technologies Require Revised Laws*, 28 U. DAYTON L. REV. 269, 303 (2002) (discussing the need for strong copyright protection of databases given the ease of copying on the Internet).

112. *See* Lemley & Reese, *supra* note 66, at 1375−76 (observing that ease of copying in the online context requires enforcement of property rights against infringers).

113. *See* INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 7–11 (1995) (suggesting that unless copyright law were strengthened in the digital age, authors would refuse to make their works available to the public).

downloading is not commensurate with the passive nature of the conduct at issue.[114] Excessive statutory damages seem inappropriate for conduct that is nearly reflexive in nature.[115]

Although these two positions seem to imply opposite conclusions regarding the application of strict liability, they may not be inconsistent. The stronger legal protection that is necessitated by the ease of downloading does not necessarily imply that punitive remedies are appropriate against the innocent. Statutory damages protect copyright holders against innocent downloading only to the extent that an innocent downloader refrains from downloading anything at all. By definition, an innocent downloader is one who believes that the file she downloads is not infringing, although in fact it is; so to curb the innocent downloader's behavior, the protection must deter all downloading that she believes to be legal. Hence, the remedy for innocent downloading will decrease infringing downloads only to the extent that it also decreases legal downloads. The cost of imposing a stronger remedy on innocent conduct is to chill conduct that should be encouraged. That is, punishing innocent downloaders inhibits downloading of copyrighted works, which includes those works that copyright holders offer for sale, thereby weakening copyright holders' ability to market their copyrighted works, ultimately undermining the purpose of copyright.[116] Thus, the stronger protection that strict punishment could offer copyright holders would quash the model of copyright distribution on the Internet and in some instances weaken copyright.

It could be argued that strict liability punishment could not possibly weaken copyright because those who invoke the doctrine are employing it to protect their copyright interests. If strict liability were harmful to copyright holders, they would not invoke its apparent protection. This argument, however, oversimplifies the actions of copyright holders. The fact that copyright holders punish innocent downloaders does not imply that doing so is in their collective best interest. As long as a threat to innocent downloaders exists, those downloaders will likely be deterred from downloading that which appears to be legitimate. And the threat continues to exist insofar as many copyright holders prosecute the innocent. This means that if an individual copyright holder refrains from prosecuting an innocent downloader, the threat—and thereby the deterrence—will still exist. Acting alone, the individual copyright holder is unable to affect the deterrence of downloaders; so while punishing

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114. *Cf.* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1365–67 (N.D. Cal. 1995) (excusing direct infringement liability of site operator and ISP because copying was nonvolitional).

115. *Cf.* CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 549−51 (4th Cir. 2004) (excusing direct infringement liability of site operator because the conduct involved in copying was akin to that of a copy machine owner).

116. The effect of strict liability, then, is to strengthen copyright to such an extent that it undermines the very purpose of copyright—to further the progress of science. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (warning courts—in the context of fair use—to avoid a rigid application of copyright that would stifle the very creativity that copyright is designed to foster); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887−95 (2007) (observing that strong copyright protection undermines purposes of copyright because copyright users avert potential lawsuits in unsettled areas of fair use by seeking licenses for use rather than determining whether use is fair).

innocent downloaders would be in the individual copyright holder's best interest, it would not be in the collective best interest of copyright holders.[117]

It would appear, then, that the ease of downloading does not warrant strict liability punishment. Indeed, the ease of downloading arguably is reason not to punish.[118] To

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117. It should also be noted that not all copyright holders seek to enforce their right to preclude unauthorized downloading, yet they still retain their copyrights. *See, e.g.*, Creative Commons, http://creativecommons.org (facilitating means for authors to make works available for free online distribution without placing work in public domain). The presence of such copyright holders suggests that imposing strict liability on copyright weakens its value.

118. The argument that the passiveness of an innocent Internet actor's copying should excuse him from liability is not foreign to case law. Where Internet actors' copying has appeared passive, courts have excused them on the grounds that their apparent copying did not constitute copying under the Copyright Act. *See CoStar Group, Inc.*, 373 F.3d at 549–51 (excusing liability of site operator); *Netcom*, 907 F. Supp. at 1365–67 (excusing liability of site operator and ISP). *But see* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1556−59 (M.D. Fla. 1993) (finding operator liable for infringement despite operator's lack of knowledge). In *Netcom*, infringing material appeared on an electronic bulletin board system (BBS), so the copyright holder alleged infringement against both the site operator and the ISP for copying the material: their devices copied the posted works onto the BBS. *Netcom*, 907 F. Supp. at 1367−68, 1373, 1381−82. Refusing to find either actor liable, the court reasoned that "copying" under the Copyright Act required the presence of an affirmative act of volition or causation, in contrast to an act that was automatic or indiscriminate. *Id.* at 1367−72, 1381. Notably, there is nothing in the Copyright Act to support this interpretation of "copying." *See* 17 U.S.C. §§ 101, 106, 501 (2006). The court expressly recognized that the Copyright Act mandates strict liability, but simply refused to apply that mandate. *Netcom*, 907 F. Supp. at 1370.

Another example of a court refusing to apply copyright's strict liability to an innocent Internet actor occurs in *CoStar Group, Inc*, 373 F.3d at 549−551. There, an ISP made a Web site available to its subscribers, real estate brokers, for the purpose of posting real estate listings. *Id.* at 547. The process of posting was rather involved: after a subscriber uploaded a photograph for the ISP to post on its Web site, the ISP would examine the photograph for any evidence that the photograph may have infringed a copyright, and only if the ISP did not find such evidence did the ISP then click a button to make the photograph available for other Web site users. *Id.* Despite these precautions, subscribers posted infringing material on the ISP's Web site, so the copyright holder sued the ISP. *Id.* Adopting the reasoning of *Netcom*, the Fourth Circuit declared that a person must engage in volitional conduct to have committed the act of copying. *See id.* at 549−51. The court made clear that passive conduct on the part of the ISP excused it from liability. *See id.* at 550.

Also notable in the *CoStar* case is the fact that the ISP examined the content of all the photographs. The court employed this fact to bolster its argument against finding liability. *See id.* at 556. This suggests that thoughts and actions undertaken to avoid possible infringement strengthen the argument that strict liability should not apply to actors whose conduct would otherwise be passive in nature. That is, affirmative actions to avoid infringement should not disqualify an otherwise passive actor from asserting an innocence defense. This position is consistent with an innocence defense where innocence must be reasonable to excuse liability, for efforts to avoid infringement strengthen the reasonableness of a mistaken belief giving rise to the innocence. *See, e.g.*, Nolan v. Indiana, 863 N.E.2d 398, 404 (Ind. Ct. App. 2007) (holding that a mistake of fact must be reasonable to recognize a mistake-of-fact defense); *see also* 17 U.S.C. § 504(c)(2) (2006) (requiring defendant to show that he "had no reason to believe" that

be sure, innocent downloading requires minimal physical and mental effort. The physical act involves clicking a mouse button, and such simplicity is enhanced by the fact that it occurs in a physical space that need not be actively sought out—the home, the office, the airport, the coffee shop—the opportunity for downloading is available at practically all physical places.[119] It is also available at many virtual places without having to exert any thoughtful effort. Pop-up advertisements, unsolicited e-mails, and simple links to Web sites may quickly lead users to a Web site offering infringing downloads. Consider the user who clicks on a YouTube clip.[120] The user has copied the clip into his computer's cache memory, which courts have held to be a medium sufficient for infringement.[121] Further, if the YouTube clip is displayed on RealPlayer, the user can simply press a single button while it plays to save an additional copy onto his hard drive.[122] As these examples illustrate, the minimal physical and mental effort involved in innocent downloading approaches passive decision making. Such passive conduct is not commensurate with the statutory damages.[123] The punishment does not fit the crime.

B. Copyright Abuse

Copyright's strict liability punishment of innocent downloading creates a perverse incentive for copyright holders. With the prospect of realizing at least $750 for a downloaded song that would sell for one dollar on the open market,[124] copyright holders have economic incentive to foster infringement that is easily prosecutable. The cost efficiencies of tracking innocent downloaders, in conjunction with the excessive statutory damages, may therefore change the monopoly incentive of copyright from creation to litigation.

In cyberspace, the cost of identifying infringers is quickly dropping.[125] From simple Google searches to chat room inquiries, a copyright holder can quickly identify Web sites that pirate the copyright holder's works. Inquiries with ISPs will then yield the

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his acts constituted infringement for court to discretionarily reduce statutory damage amount). Specifically, the fact that the ISP screened the photographs supports the reasonableness of its belief that the photographs were not infringing. *CoStar* thus supports the argument that innocent actors whose actions are passive should not be liable, and that affirmative actions to avoid infringement should strengthen the claim of innocence.

119. *See* Tech News World, WiFi Hotspot Locator, http://www.technewsworld.com/hotspot-locator/ (providing information regarding physical location of wireless Internet access points).

120. *See* YouTube, http://www.youtube.com.

121. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518−19 (9th Cir. 1993) (holding defendant liable for making infringing "copy" of operating system software that the defendant loaded into computer RAM merely by turning on the computer).

122. RealPlayer, http://realplayer.com/ ("Download videos from thousands of Web sites with just one click.").

123. *See supra* note 118.

124. *See* 17 U.S.C. §§ 412, 504(c)(1) (2006) (imposing minimum statutory damages of $750 for materials embodied on phonorecords); Apple, iTunes Store, http://www.apple.com/itunes/store (selling downloadable music for ninety-nine cents per song).

125. *See* Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 240 (2005) ("[A] reduction in information costs . . . makes it easier for the intermediaries to monitor the conduct of end users . . . .").

identification of the end user infringer.[126] Moreover, the cost of identifying innocent infringers is likely to be lower than the cost of identifying intentional infringers. Because intentional infringers know that they are infringing, they may employ technological means to hide their infringement.[127] Innocent infringers, on the other hand, believe that their downloads are authorized, and so they lack any reason to avoid detection. They accordingly are usually easier to identify. The average Internet user does not attempt to avoid being detected when she downloads a picture from Flickr.com—a Web site dedicated to offering free legal images for download—because she believes that the download is authorized.[128] The innocent downloader, then, is usually the least costly to identify. Efficient tracking technologies make innocent downloaders easy targets for copyright holders to realize statutory damages. Strict liability creates an incentive to trap rather than to distribute.

The existence of this perverse incentive contemplates situations that contravene the public policy underlying copyright.[129] Consider the cited example, where an infringing picture is available for download on Flickr.com. Despite the Web site's statement that it will remove any infringing pictures offered on its site upon notice from a copyright holder, [130] a copyright holder might refrain from providing that notice. The copyright holder might simply wait for many Internet users to download his picture before providing that notice, at which point he would seek statutory damages. Copyright holders would thereby facilitate copytraps in opposition to the public policy underlying copyright.

Despite the existence of this perverse incentive, efficient means for enforcing intellectual property rights should not immediately lead to the conclusion that copyright abuse exists. It seems absurd to posit that authors would create for the purpose of catching infringers. It likewise seems absurd to posit that authors would encourage unlawful copyright infringement simply to collect damages. That copyright rewards an author for enforcing her rights does not imply that authors employ those rights to trap the unwary. Moreover, it is arguable that if a copyright holder were to employ the protections of copyright to trap the unwary, the innocent downloader could prevail on a defense of abandonment or copyright misuse. By choosing not to exercise her right to require a Web site to remove infringing material, a copyright holder seems to abandon her rights.[131] Similarly, by choosing to employ her rights as a means of profiting from innocent downloaders, the copyright holder seems to commit copyright

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126. *See* 17 U.S.C. § 512(h) (2006) (authorizing issuance of subpoena to ISP for identifying copyright infringer).

127. For instance, intentional infringers can mask their IP address from their ISP and download from password-protected sites or sites undetectable to search engines. *See, e.g.*, PrivacyView, Anonymous Surfing, http://www.privacyview.com/default.aspx (marketing software that enables users to mask their IP addresses).

128. *See* Flickr, About Flickr, http://www.flickr.com/about/.

129. *Cf.* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright's purpose is to promote the creation and publication of free expression.").

130. *See* Flickr, http://www.flickr.com (follow "Copyright/IP Policy" link at bottom of page).

131. *See* 4 NIMMER & NIMMER, *supra* note79, § 13.06 ("Abandonment occurs only if there is an intent by the copyright proprietor to surrender rights in his work.").

misuse.[132] These defenses could provide balance to the perverse incentive that copytraps introduce. The perverse incentive might not be as problematic as it first seems.

Nevertheless, the fact that the perverse incentive exists should not be quickly dismissed. As an initial matter, an innocent downloader would face difficulty in establishing either abandonment or copyright misuse. With respect to abandonment, there is a split of authority over whether the defense requires an overt act.[133] Yet regardless of whether there must be an overt act, a copyright holder must intend to surrender rights in the work.[134] In the copytrap situation, there is neither an overt act nor an intent to surrender rights. By refraining from removing infringing works from a Web site, a copyright holder hopes to exercise his rights against potential infringers. To refrain from acting does not constitute an overt act, and a hope to exercise rights in the future does not constitute surrender. Thus, an abandonment defense would not likely prevail. With respect to copyright misuse, the innocent downloader would be hard-pressed to establish that the copyright holder has employed her rights in a manner that violates the public policy of copyright. Although such an allegation may be true, it would be nearly impossible to demonstrate. The line between protecting the right to distribute and profiting from innocent mistakes is not clear. A copyright holder who in good faith seeks to protect her exclusive right to distribute will pursue those infringers who are the least costly to pursue, and those infringers will most likely be innocent downloaders. The point at which the pursuit constitutes a misuse is uncertain because the right is defined to allow for the punishment of innocent downloaders.[135] Unlike a copyright holder who seeks to enjoin others from producing transformative works,[136] or a copyright holder who seeks to tie the licensing of his work to the licensing of another product,[137] a copyright holder who pursues damages against a downloader who has simply made a verbatim copy does not appear to be misusing the protections of copyright.[138] It would likely be pragmatically impossible to establish that a copyright holder's pursuit of innocent infringers amounts to a misuse.

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132. *See* Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 521 (9th Cir. 1997) (explaining that copyright misuse turns on whether the copyright is being used "in a manner violative of the public policy embodied in the grant of a copyright" (quoting Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990))).

133. Dam Things from Denmark v. Russ Berrie & Co., 290 F.3d 548, 560 (3rd Cir. 2002) (recognizing the "split of authority as to whether an overt act is necessary to establish abandonment"); *see also* 4 NIMMER & NIMMER, *supra* note 79, § 13.06 (collecting conflicting authorities).

134. *See* Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471, 483 (2d Cir. 2004) ("[A]bandonment of copyright requires '(1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent.'" (quoting Capitol Records, Inc. v. Naxos of Am., Inc., 262 F. Supp. 2d 204, 211 (S.D.N.Y. 2003))).

135. *See* 17 U.S.C. §§ 106, 501(a), 504(c) (2006) (providing for statutory damages against innocent infringers).

136. *See* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978 (4th Cir. 1990).

137. *See* MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265, 1277−79 (11th Cir. 1999); 4 NIMMER & NIMMER, *supra* note 79, § 13.09[A][1][b].

138. *See* BMG Music v. Gonzalez, 430 F.3d 888, 890–92 (7th Cir. 2005) (finding liability despite innocence argument in context of Internet downloading).

Yet even though misuse cannot be shown, this does not mean that it is not occurring. Indeed, employing copyright to profit from downloaders who reasonably believe that they are not infringing appears contrary to the public policy of copyright.[139] The problem for the innocent downloader in raising this argument is that she must argue against strict liability generally in copyright. That is, copyright law expressly condones punishing innocent infringers, so an argument of misuse would not only be an argument against the actions of an individual copyright holder, but it would also be an argument that copyright law itself violates public policy. So whereas the likelihood of copyright misuse is great, the likelihood of prevailing on that defense is not. Consequently, as copyright holders realize success in pursuing the innocent, it is not inconceivable that they will increase their suits against the innocent. It is further conceivable that as they continue to profit from these efforts, they will seek further opportunities to efficiently exploit the innocent. Albeit seemingly absurd, this possibility is quickly coming into view: it has already happened in patent law.[140] The same practice will likely arise in copyright. Perverse incentives offend public policy by allowing the shield of copyright to be used as a sword.

C. Internet Commerce

Copytraps pose an undue burden for Internet commerce. Unlike in real space, where consumers of copyrighted materials are not punished for procuring a pirated work, in cyberspace consumers are held liable.[141] As copytraps become common, copyright's strict liability will likely deter consumption of copyrighted works.[142] Internet users will likely refrain from downloading much material out of fear that they might mistake infringing material for a legal download.[143] As a result, strict liability punishment will

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139. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[T]he Framers intended copyright itself to be the engine of free expression." (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985))).

140. "Patent trolling" occurs when patent holder firms employ their patents to extract settlements rather than license or manufacture technology. *See generally* Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809 (2007) (discussing history of patent trolling). Congress has considered legislation to eliminate the practice of patent trolling. *See* Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. (2006); Patent Act of 2005, H.R. 2795, 109th Cong. (2005).

141. *See supra* Part I.A.3.

142. *See* Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1554 (9th Cir. 1989) ("Statutory damages are available in order to . . . deter infringement."); H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 ("[B]y establishing a realistic floor for liability, the [strict liability] provision preserves its intended deterrent effect . . . ."); Garland Interview, *supra* note 22 (commenting that empirical studies suggest that suits by the RIAA have stigmatized music downloading, which has resulted in a deterrence of downloading through file-sharing).

143. *See* Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 276–77, 283 (2007) (arguing that where it is unclear whether an author has removed a work from the Creative Commons, "[r]isk averse individuals will steer far clear of any potential infringement and will thus forgo engaging in uses that would be permissible); *cf.* Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L.

likely deter commercial activity that requires downloading. Discussed below is the commercial burden of this deterrent effect.

1. Virtual Consumption

As Internet users account for the risk of strict liability punishment, the risk will pose an added cost to download. That cost will outweigh the benefit of downloading where the potential for statutory damages is excessively greater than the value of the download. The cost of risking a copytrap will likely extinguish the certainty that is necessary for commercial exchange. That cost, then, is analogous to a tax on virtual consumption. Copyright's strict liability punishment effects a sort of tax that inhibits consumption.

The law is not unfamiliar with the negative effect of imposing strict liability on commerce. To avoid this outcome, the law affords good-faith purchasers special protections.[144] The common law refrains from imposing exemplary damages against good-faith purchasers of converted property.[145] The good-faith purchaser is required to either return the property or pay actual damages.[146] In some instances, the return of the property is all that is required.[147] By not imposing exemplary damages, the law decreases the cost of risking a mistake about whether a good is stolen. This approach to dealing with good-faith purchasers of stolen property thus stands in contrast with copyright's approach to dealing with good-faith downloaders of infringing material. The common law imposes no cost on commercial transactions; copyright does.

With regard to copyrighted material in real space, copyright law is consistent with the common law approach. The costly risk of copyright's strict liability regime does not exist in physical markets for copyrighted works.[148] In real space, consumers of copyrighted works purchase physical copies,[149] and consumers are not liable for

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101, 111 (2007) (positing that if service providers and Web site operators were to face the prospect of statutory damages for their innocent acts of copying, they would either cease doing business or restrict the content that they will carry to such an extent that they would "lock down the Internet"); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1879 (2000) ("The risk averse ISP . . . will likely respond to notice of potential subscriber infringement by suspending Internet service.").

144. For example, under the Uniform Commercial Code, a good-faith purchaser receives good title to property acquired from a merchant who was entrusted only to maintain the property. U.C.C. § 2-403(1) (2004).

145. *See* 1 DAN B. DOBBS, THE LAW OF TORTS §§ 66, 67, at 146, 152 (2001) (observing that under traditional common law rule, a good-faith purchaser of converted goods is himself a converter, but punitive damages for conversion lie only where a defendant has a reckless or malicious state of mind).

146. *See id.* § 67, at 150.

147. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 15, at 90 (citing good-faith intent as influential in determining whether to provide a remedy for trespass rather than conversion). Some states have enacted statutes to protect good-faith purchasers and holders of converted property from incurring any damages. *See, e.g.*, COLO. REV. STAT. § 18-4-405 (2004) ("[M]onetary damages . . . shall not be recoverable from a good-faith purchaser or good-faith holder of [stolen] property.").

148. *See supra* Part I.A.2.

149. *See supra* Part I.A.2.

receiving a physical copy of a pirated work.[150] Because the model of distribution for copyright holders in real space is to sell physical copies to consumers, real-space consumers need not entertain the possibility that entering into a transaction for a copyrighted work might subject them to financial liability.[151] Hence, the uncertainty in virtual markets for copyrighted material is not present in real-space markets. The costly risk of mistaking the infringing nature of a copy is present only in virtual markets.

2. Restraint of Trade

Strict liability's deterrent effect on user downloading could create an unreasonable restraint of trade.[152] This conclusion is based on the fact that the commercial value of virtual markets lies in their distributive efficiencies.[153] Virtual markets allow for relatively costless distribution: anyone can distribute ideas to a global market through the Internet.[154] By eliminating the high cost of distribution, the Internet gives rise to myriad commercial enterprises.[155] Consider music.[156] Through direct Internet marketing, musicians can potentially distribute more songs at a lower cost than through record labels.[157] As consumer preference for online music continues to increase, record labels could become obsolete.[158] And even if Sony BMG remains, it must compete

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150. *See* Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627, 629 (2d Cir. 1952) (Hand, J.) ("[O]ne does not infringe a copyright by buying an infringing copy of the 'work,' . . . .").

151. *See supra* Part I.A.2.

152. Although Congress has authority to restrain trade, this does not mean that doing so is good policy. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (finding constitutional a law prohibiting the shipment of filled milk in interstate commerce); *cf.* 15 U.S.C. § 1 (2006) (making illegal private contracts that are "in restraint of trade or commerce"); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (interpreting the Sherman Act as outlawing unreasonable restraints of trade).

153. *See* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 337 (2002) (stating that the ease of dissemination in a virtual market is a result of the removal of distribution intermediaries).

154. *Cf.* Daniel J. Solove, *Should Publishers Put Their Books Online for Free?*, CONCURRING OPINIONS, Feb. 8, 2008, http://www.concurringopinions.com/archives/2008/02/should_publishe.html (contemplating that Internet distribution of downloadable books would reduce production costs and increase revenues for authors).

155. *E.g.*, Lost Cat Records, Indie Music Stop, http://indiemusicstop.blogspot.com/2007/03/industry-feature-april-2007-lost-cat.html (Mar. 31, 2007, 17:57 EST) [hereinafter Lost Cat Records] ("[T]he cost of producing, warehousing and selling physical CD's is cost-prohibitive for a small label like us, whereas the cost of posting and selling digital downloads is within our reach.").

156. *E.g.*, Larry Hardesty, *The Tipping Jar: Does Radiohead's Internet Release of Its Latest Album Tell Us Anything About the Future of the Music Business?*, TECH. REV., Jan.–Feb. 2008, http://www.technologyreview.com/read_article.aspx?id=19870&ch=biztech&a=f.

157. *Are Record Labels Dead?*, CNN.COM, Oct. 12, 2007, http://www.cnn.com/2007/SHOWBIZ/Music/10/12/irrelevantrecordlabels.ap/index.html (describing growing trend in music industry for musicians to cease relations with record labels because of online distribution methods).

158. *See* Litman, *supra* note 153, at 341−42; Future of Music Coalition, iTunes Digital Downloads: An Analysis, http://www.futureofmusic.org/itunes.cfm [hereinafter iTunes

with the artist who distributes directly through lesser-known sites.[159] The Internet phenomenon of efficient distribution thus facilitates competition in markets for copyrighted works.[160]

Strict liability punishment of innocent downloaders threatens this virtual model for efficient competition. If users become reluctant to download from sites where material could possibly be infringing, then they will download from only sites that they trust. Trusted sites would be those that have gained an established reputation of credibility. Trusted sites would be name-brand sites—those whose reputation precludes the possibility that they are transient, jurisdictionally judgment-proof piracy sites.[161] Most importantly, trusted sites would be indemnifying sites—those that assume responsibility for the content of a download. Concerned about possibly downloading infringing material, users would download from only trusted sites.

A shift in consumer preference for trusted Web sites would create a comparative advantage. Internet users would continue to download from iTunes.com, whereas they would be reluctant to download from CreativeCommons.org. Consumers would be confident that the iTunes site would assume responsibility for the content of its music downloads.[162] The Creative Commons site,[163] on the other hand, would lack that consumer confidence. Creative Commons offers material for free download, representing that copyright holders have authorized the downloads, but the site does not warrant the authenticity of copyright holder authorization.[164] Creative Commons does not assume responsibility for its unknowing offer of infringing downloads, so consumers would not likely trust it. Strict liability would place such sites at a disadvantage to larger name-brand corporate sites. The deterrence of end-user downloading would pose a significant barrier for many lesser-known sites to establish the credibility necessary for competition.[165] Trusted sites would be safe; questionable sites would suffer. In this way, copyright's strict liability could lessen virtual competition.

Analysis] ("With no deductions for shipping, storing, breakage, packaging, and returns, the marginal costs of selling songs through digital download services is almost nil. As a result major label artists should demand to be compensated for these sales at a unique and higher rate.").

159. *E.g.*, Posting of Tim Leberecht to CNET, http://www.cnet.com/8301-13641_1-9790113-44.html (Oct. 2, 2007, 23:04 PST) (describing pop music band's decision to market songs directly to public, allowing users to pay consumer-determined value); Posting of Greg Sandoval to CNET Download.com, http://music.download.com/8300-5_32-13.html?keyword=Radiohead (Jan. 25, 2008, 15:07 PST) (same).

160. *See* Lost Cat Records, *supra* note 155 (noting success of Web site that distributes music of lesser-known artists exclusively through downloads because of decreased distribution costs).

161. *See, e.g.*, iTunes Analysis, *supra* note 158 (describing resources that iTunes has expended to build credibility).

162. *See* iTunes, Legal Information & Notices, http://www.apple.com/legal/terms/site.html (representing that all expression on the iTunes Web site is owned by or licensed to the site owner).

163. Creative Commons, http://creativecommons.org.

164. *See* Creative Commons, CCSearch, http://wiki.creativecommons.org/CcSearch.

165. *See* Graham Brown, *The 10 Changes a CEO Needs to Make to Win Young Consumers - 4 Give First (Free is a Viable Business Model)*, MOBILEYOUTH, Feb. 4, 2008, http://www.mobileyouth.org/post/the-10-changes-a-ceo-needs-to-make-to-win-young-consumers-4-give-first-free-is-a-viable-business-model/ (suggesting that offering free downloads is necessary to establish credibility with target market).

3. Piracy Web Sites

In addition to considering the effects on consumers and suppliers of copyrighted expression, an analysis of strict liability's effects on virtual commerce should address the potential effects on piracy sites. It is possible that strict liability's negative effect on virtual consumers and suppliers could be outweighed by decreasing piracy Web sites. As discussed above, Internet users facing strict liability punishment would likely download from only Web sites that they trust.[166] This would likely affect the downloading activity at piracy Web sites. Despite packaging themselves as legitimate sites, piracy sites would not be able to develop name-brand credibility and, as a result, may dwindle. LegalSounds.com—a Russian Web site that offers infringing material for a fee—cannot develop the credibility of iTunes.com.[167] Trust comes by legitimacy. It is arguable, then, that strict liability is justified because any reluctance by users to download would starve piracy Web sites out of existence. Conversely, if downloaders were not strictly punished, piracy would proliferate. Piracy Web sites would realize gain in the form of ad revenues or direct compensation from downloaders who mistakenly believed that those sites were legitimate. Removing copyright's strict punishment would therefore seem to strengthen the practice of piracy; applying the punishment would seem to weaken that practice.

Although it is possible that copyright's strict punishment affects the vitality of piracy Web sites, that fact does not imply that strict liability punishment is worth the cost of consumer uncertainty and distributive inefficiency. The possibility of affecting piracy Web sites is nothing more than a possibility: many such sites would not likely terminate in the absence of consumers who are subject to the jurisdictional reach of the Copyright Act.[168] Likely, piracy sites would continue to exist, catering to foreign consumers. Further, even assuming that the supply of consumers would affect the proliferation of piracy sites, the problem of their existence should be dealt with directly. To punish a consumer for the acts of an illegal vendor is bad policy because good-faith consumers stop consuming. So, rather than deterring piracy Web sites through innocent end users, the law should deal with them directly. If the infringing Web sites are domestic, copyright holders may seek redress.[169] If they are foreign, then the problem is one for international law.[170] If international law fails in providing a means for terminating them, the problem can still be dealt with through technological

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166. *See supra* Part I.C.1.

167. *Compare* LegalSounds, http://www.legalsounds.com, *with* Apple, iTunes, http://www.apple.com/itunes/store.

168. *See* Michael Mertens, *Thieves in Cyberspace: Examining Music Piracy and Copyright Law Deficiencies in Russia as it Enters the Digital Age*, 14 U. MIAMI INT'L & COMP. L. REV. 139, 171 (2006) (noting that United States enforcement of copyright law is dubitable against Russian Web sites offering infringing material).

169. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc. 508 F.3d 1146, 1172 (9th Cir. 2007) (contemplating infringement by Web site if operator had knowledge of infringing material available on its site).

170. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197 (establishing enforcement procedures for international violations of intellectual property).

means for blocking Web sites from the relevant consumer market.[171] The point is that the problem of piracy Web sites should not be resolved by punishing an innocent third party—the innocent downloader. Sinking the pirate by punishing innocent downloaders would also sink the commercial fleet.

II. CONSTITUTIONAL TENSIONS

Constitutional tensions arise from copyright's strict liability punishment of innocent downloaders. The tensions become evident in considering the law's potential effects. If left unresolved, these tensions will invite an application of copyright law that is blatantly unconstitutional. If Congress waits, the potential will come to pass.

The constitutional tensions surround the Free Speech, Copyright, and Due Process Clauses. Copyright's potential deterrent effect on downloading threatens speech interests of Internet downloaders and Internet speakers.[172] That deterrent effect further calls into question whether Congress exceeds its authority under the Copyright Clause to impose strict liability on Internet users.[173] Finally, due process concerns arise over the law's rationality and its excessive punishment of innocent conduct.[174] Discussed below are these tensions.

A. Free Speech

Strict liability punishment of innocent downloaders impedes a free marketplace of ideas.[175] The Internet has been viewed as the most participatory marketplace of ideas ever experienced.[176] It represents a means for inexpensively sharing ideas with the entire world—the vehicle of cheap speech.[177] Strict liability's potential deterrence of downloading, then, represents a deterrence of marketplace participation. That deterrence would restrict authors' ability to convey ideas to Internet users because users would be inhibited from hearing what authors had to say.[178] Deterrence of

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171. *See, e.g.*, Jay Fitzgerald, *Web Traffic Face-Off: Critics Call Comcast "Disaster for Free Speech"*, BOSTON HERALD.COM, Feb. 22, 2008, http://www.bostonherald.com/business/technology/general/view.bg?articleid=1075209 (describing how ISP can interfere with end user access to file-sharing Web sites).

172. *See infra* Part II.A.1–2.

173. *See infra* Part II.B.

174. *See infra* Part II.C.1–2.

175. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

176. *See* ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."), *aff'd*, 521 U.S. 844 (1997).

177. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1808−10 (1995) (positing that the Internet gives rise to democratic and diverse speech).

178. *Cf.* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 335 (2003) (Kennedy, J., dissenting) ("[A] law [is] unconstitutional under any known First Amendment theory that would allow a speaker to say anything he chooses, so long as his intended audience could not hear

downloading constrains speech.[179] It narrows the breathing space that is necessary for free speech within the confines of copyright.[180]

1. Downloaders' Right to Receive

Punishing innocent downloaders will at times be like punishing the crowd that hears a man yell fire.[181] Facing a strict and excessive punishment for hearing unprotected speech, the crowd avoids any instance where fire could possibly be yelled.[182] They will not listen to any person whom they do not trust.[183] Like the crowd, Internet users are punished for receiving speech that is unprotected by the First Amendment.[184] They are punished for receiving infringing material, regardless of their innocence.[185] Facing a strict punishment, they refrain from receiving any expression at all, including that which is legal to receive.[186] They will not download from any site that they do not trust.[187]

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him.").

179. The fact that this First Amendment argument regards the author as the speaker alleviates potential problems with Supreme Court jurisprudence. In *Eldred v. Ashcroft*, the Court considered a challenge to Congress's extension of the copyright term, where the challenger argued that copyright law constituted a content-neutral speech regulation that fails strict-scrutiny analysis. 537 U.S. 186, 218−19 (2003). The challenger posited that copiers engage in protected speech. The Court rejected that argument on the basis that copyright's built-in free speech safeguards, such as the doctrines of fair use and the idea-expression dichotomy, are "generally adequate" to address First Amendment concerns of a copier. *Id.* at 221. In the wake of *Eldred*, then, it seems unlikely that the Court would recognize the merits of a challenge to copyright based on a copier's free speech interests. Because the First Amendment argument herein posits that speech of authors is undermined by strict liability, rather than speech of copying downloaders, this argument is distinguishable from the speech model that *Eldred* rejected.

180. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (recognizing the need for "breathing space" within the confines of copyright in the context of fair use analysis); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279−80 (1964) (requiring breathing space for speakers facing strict punishment of unprotected speech).

181. *Cf*. Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

182. *Cf*. United States v. U.S. Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 536 (9th Cir. 1988) ("[A] rule that would impose strict liability on a publisher for unprotected speech would have an undoubted 'chilling' effect on speech that does have constitutional value.").

183. *Cf.* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (discussing chilling effect on protected speech that results from imposing strict liability for engaging in unprotected speech); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas.").

184. This statement that the Copyright Act targets "unprotected" speech stems from Supreme Court jurisprudence. *See Eldred*, 537 U.S. at 219 (ruling that "built-in First Amendment accommodations" of copyright law make copyright's suppression of copyrighted speech constitutional).

185. *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 891–92 (7th Cir. 2005) (finding liability despite innocence argument in context of Internet downloading).

186. *See supra* Part I.C.1 (discussing deterrent effect on legal downloading).

187. *See supra* Part I.C.2 (discussing result of deterrent effect that users download from only trusted sites).

This potential deterrence of downloading encroaches on users' constitutional right to receive protected speech.[188] The issue here is similar to the issue in *Smith v. California*.[189] There, the Supreme Court considered a strict liability ordinance that imposed penalties on booksellers for possessing obscene material.[190] The Court held the ordinance unconstitutional on the basis that it limited the public's access to constitutionally protected matter.[191] Although the ordinance targeted unprotected speech, the limitation on protected speech occurred because the penalties applied to innocent booksellers; as a result of the strict liability, booksellers would restrict books for sale to those that they had inspected.[192] The effect of the ordinance, then, was to restrict both obscene literature and protected speech.[193] The limitation of public access that arose from punishing innocent booksellers was sufficient to constitute a First Amendment violation.[194]

The strict liability ordinance in *Smith* is similar to the strict liability provision of copyright law. Both tend to restrict public access to constitutionally protected matter. Just as book purchasers in *Smith* could not gain access to protected speech because booksellers were reluctant to vend any book that could potentially be obscene,[195] Internet users may be inhibited from gaining access to protected speech because they are reluctant to download anything that could potentially be infringing.[196] The two situations are distinct, however, in one important respect: punishing innocent downloaders is like punishing innocent book *purchasers* rather than *sellers*. Copyright's punishment of downloaders more directly threatens the public's right of access to protected speech than does a punishment of an intermediate merchant such as a bookseller; by punishing the downloaders, copyright directly punishes the public. The distinction between copyright's strict liability provision and the *Smith* ordinance thus suggests that copyright raises a greater constitutional tension than did the *Smith* ordinance because copyright directly affects public access.

Consistent with *Smith*'s principle of protecting speech distributors from strict liability punishment, copyright law has protected innocent Internet publishers. The Digital Millennium Copyright Act (DMCA) provides a safe harbor for publishers who, among other things, lack knowledge about copyright violations by its users, despite the fact that those publishers copy the infringing material as part of their services.[197] The safe harbor provision was enacted to protect speech interests of electronic

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188. *See* Kleindienst v. Mandel, 408 U.S. 753, 762−63 (1972) ("[T]he Constitution protects the right to receive information and ideas . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." (citations omitted)); *cf.* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447, 451 (2d Cir. 2001) (reasoning that computer code is a form of expression deserving of First Amendment speech protection).

189. 361 U.S. 147 (1959).

190. *Id*. at 148.

191. *Id*. at 153.

192. *Id*.

193. *Id*.

194. *Id*. at 153−55.

195. *Id.* at 153.

196. *See supra* Part I.C.1 (discussing strict liability deterrence of downloading).

197. *See* 17 U.S.C. § 512(c) (2006).

publishers.[198] The fact that copyright law has thus recognized an exception to its strict liability provision for the Internet equivalent of *Smith*'s booksellers suggests that the law should also recognize an exception for the Internet equivalent of *Smith*'s book purchasers, that is, Internet users. Copyright law has implicitly recognized the speech interest in protecting innocent distributors of speech, so it seems requisite that copyright law should also recognize the speech interest in protecting innocent recipients of speech. Just as public access to protected speech cannot be realized where a distributor is deterred, it cannot be realized where the public is deterred.

Although the deterrent effect of strict liability hampers Internet users' ability to receive speech online, that inability does not necessarily imply a violation of users' right to receive.[199] Internet users seem able to receive the speech that they are deterred from downloading simply by employing alternative means of procurement.[200] If a user is uncertain whether a Web site is authorized to distribute a song, the user can simply go to a brick-and-mortar store to purchase a physical copy of the song. Likewise, the user can order the song online for physical delivery.[201] Because there is no liability for receiving a physical copy of pirated expression, real space provides an alternative means for receiving speech.[202] Downloading is not the exclusive means for procuring all expression. Hence, real space opportunities to receive speech seem to alleviate the tension between strict liability deterrence of downloading and an Internet user's right to receive speech.

This alternative means for procuring expression may ease the tension, but it does not eliminate it altogether. As an initial matter, Supreme Court jurisprudence rejects the idea that speech abridgement is permissible where there is an alternative means of procurement.[203] More to the point, alternative means make sense for popular expression that is readily available for physical pickup at the corner store or physical

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198. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330−31 (4th Cir. 1997) (explaining that the DMCA was enacted because "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium"). For ISPs that innocently copy infringing material yet do not satisfy all of the eligibility requirements for the safe harbor of the DMCA, courts have proceeded to recognize an exception to copyright's strict liability for these ISPs. *See, e.g.*, CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 549, 552−53 (4th Cir. 2004) (excusing ISP from liability despite its failure to be eligible for DMCA protection); *see also supra* note 118 (discussing judicial reluctance to apply copyright's strict liability to Web publishers).

199. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 218−20 (2003) (upholding a statute that restricted Internet access to indecent speech for library patrons).

200. *See id.* at 219−20 (upholding a statute restricting Internet access for library patrons on grounds that patrons could employ alternative means for viewing the speech, namely requesting that a librarian remove the filter).

201. *See, e.g.*, Amazon.com, http://www.amazon.com (follow "Music" link).

202. Receiving speech in real space refers to the traditional means of acquiring speech, such as purchasing a book or a CD at a store, as opposed to downloading songs from cyber space.

203. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . ."); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (rejecting the argument that alternative media for receiving speech should altogether extinguish the constitutional tension of restricting public's access to ideas through a specific medium).

delivery from a virtual store. It makes less sense for expression that is available only online. For some speech, the Internet has become the only means for speakers and audiences to communicate.[204] The worldwide audience of the Internet cannot know of the eclectic musician or obscure moviemaker through the means of physically procured expression.[205] Without downloading the artist's work, there are no means to receive such speech. Moreover, as technology progresses, it is conceivable that popular expression will be available only through Internet downloading.[206] It is likely that once-popular expression, now fading from public attention, may become available only online as the costs of physical storage rise.[207] Indeed, as consumer preferences reflect the ease of procuring expression through online means, and as authors exploit the minimal distribution costs of those means, even the most current popular expression may be available exclusively through Internet download.[208] Thus, strict liability threatens users' rights to receive speech despite opportunities to procure that speech in real space. As long as there is speech that only may be obtained by download, the free speech tension exists.

2. Authors' Right to Speak

It is unclear how much speech protection the Internet deserves. It could receive significantly less protection than a public forum, much like the broadcast media.[209] On the other hand, its open access for the general public could suggest that the Internet be viewed as a public forum, entitled to broader protections.[210] Yet however the forum is

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204. The increasingly popular Web site YouTube.com demonstrates myriad instances of speech where Internet speakers attempt to reach a worldwide audience through users downloading expression (into their cache memory). YouTube.com, http://www.youtube.com. The Internet audience is unable to procure much, if not most, of the speech offered for download on YouTube.com through real space means.

205. *See* Lost Cat Records, *supra* note 155 (commenting that musical works of lesser-known artists are available only through Internet distribution).

206. *See, e.g.*, Max Fraser, *The Day the Music Died*, NATION, Nov. 27, 2006, http://www.thenation.com/doc/20061211/fraser (reporting bankruptcy of Tower Records—longtime leading brick-and-mortar record store seller—owing to rise of online music market).

207. The Spin Doctors' song, *Hard to Exist*, may encounter difficulty existing in real space, but not in cyberspace. *See* mp3.com, Spin Doctors, http://www.mp3.com/albums/15045/summary.html (offering Spin Doctors' *Hard to Exist* song for download).

208. *See supra* note 206 and accompanying text.

209. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675, 678 (1998) ("[P]ublic broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine . . . . The Court has rejected the view that traditional public forum status extends beyond its historic confines . . . ."); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1120−21 (2005) (commenting that the hoped-for role of a public-forum Internet has not come to pass); Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS 597, 607 (2007) ("Internet access, even in a public library, is a new means of communication and therefore not part of a public forum.").

210. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) (describing Internet as providing "relatively unlimited, low-cost capacity for communication of all kinds"); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1107 (C.D. Cal. 2004) ("Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication

presently defined, the Internet seems to be progressing toward a forum that should receive strong speech protection.[211] The marketplace of ideas, like debate on public issues, should be "uninhibited, robust, and wide open."[212]

Assuming, then, that the Internet is progressing toward a forum worthy of strong First Amendment protection, its regulation should be limited to reasonable time, place, and manner restrictions.[213] Under that standard, copyright's strict liability regime appears dubitable. The strict liability punishment would pose a problem for authors because, as discussed above, the punishment deters downloading from questionable sites.[214] Authors would likely be compelled to reach their audiences through trusted name-brand Web sites.[215] Copyright would restrict authors—or in other words, Internet speakers—to a limited number of communicative channels, namely, downloader-trusted Web sites.

If the Internet is to represent a marketplace of free-flowing ideas, this limitation is unreasonable. The cost of speaking on the Internet would greatly increase as virtual speech would no longer be cheap: trusted sites would be name-brand sites, and name brands are expensive. Many speakers would be unable to afford the virtual medium for reaching their audience.[216] The unknown music group would not be able to afford distribution through iTunes.[217] Likewise, many speakers would prefer not to speak through trusted sites because those sites restrict content.[218] Trusted sites restrict content to the preferences of their target audience, and the target audience of a name-

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such as electronic communication media like the internet . . . . [C]ourts have uniformly held or, deeming the proposition obvious, simply assumed that internet venues to which members of the public have relatively easy access constitute a 'public forum' or a place 'open to the public' . . . ." (citations omitted)); Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 148 (Cal. Ct. App. 2004) (opining that the contention that the Internet is not a public forum is a peculiar contention that is difficult to take seriously).

211. *See* Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 429 (2008) ("The Internet is an example of new technology that functions as a public forum because it provides an arena for speech and communication that is open and easily accessible.").

212. Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (finding that pamphleteering represents the historical notion of debating public issues). Because the Supreme Court has likened Internet users to modern-day pamphleteers, it would seem that the same principle applies. *See Reno*, 521 U.S. at 870 (comparing an Internet user to a pamphleteer).

213. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so.").

214. *See supra* Part I.C.2.

215. *See supra* Part I.C.2.

216. *See* Lost Cat Records, *supra* note 155.

217. Apple, iTunes Content Providers: Frequently Asked Questions, http://www.apple.com/itunes/contentproviders/faq.html [hereinafter Content Providers] (explaining royalty system for artists seeking to distribute through its Web site). Lesser-known artists seeking exposure seek distribution through any means. *See* Tim Wu, *Pirates of Sundance*, SLATE, Jan. 28, 2008, http://www.slate.com/id/2182950/.

218. *See, e.g.*, Content Providers, *supra* note 217 (explaining the process for gaining eligibility to distribute on the iTunesWeb site); *cf.* Fitzgerald, *supra* note 171 (describing allegations that ISP interferes with its subscribers attempts at online sharing of files).

brand site does not reflect the target audience of the unknown Internet speaker. Trusted sites reflect popular material, and not all speakers are willing to conform their ideas to those that the masses prefer to hear. The deterrent effect of copyright's strict liability would thus force Internet speakers to either conform or be drowned out by popular preference. Copyright's strict liability would silence the unpopular minority by amplifying popular speech that consumers will pay to hear.

B. The Copyright Clause

Congress's facilitation of copytraps raises issues regarding whether Congress has exceeded its authority under the Copyright Clause. That Clause limits congressional authority to legislate copyright law: the law must serve to further the progress of science, or in other words, must serve to further the creation and dissemination of knowledge.[219] Historically, copyright law has furthered the creation and dissemination of knowledge by endowing authors with a monopoly over their expression, and that monopoly provides authors economic incentive to produce and distribute creative works.[220] In this manner, the copyright monopoly has fostered expression that is available for public consumption.[221] Congress has thus stayed within the prescribed limits of its authority where the monopoly has served the purpose of furthering the creation and dissemination of knowledge.[222]

With the advent of the Internet, the scope of that monopoly threatens the creation and dissemination of knowledge. That scope has always included punishing innocent infringers, and in real space, such punishment has not undermined methods of copyright distribution.[223] By contrast, in cyberspace the inclusion of strict liability

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219. U.S. CONST. art. I, § 8, cl. 8 (providing that Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). "Science" connotes "knowledge and learning." Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. & TRADEMARK OFF. SOC'Y 5, 12 & n.14 (1966) (observing that at the time of drafting the Constitution, an authoritative dictionary first listed "knowledge" for a definition of "science"). In *Graham v. John Deere Co.*, the Supreme Court commented that the purpose stated in the Copyright Clause limits congressional power. 383 U.S. 1, 5−6 (1966). The Court stated: "The Congress in the exercise of the patent power [and thereby the copyright power] may not overreach the restraints imposed by the stated constitutional purpose." *Id*. Although the *Graham* Court considered the Clause's application under patent law, Congress's patent power arises from the same Clause, so it seems likely that the Court's comments regarding that Clause would apply in the copyright context as well. *Accord* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) (describing the Copyright Clause as "both a grant of power and a limitation").

220. *Eldred*, 537 U.S. at 219 ("[C]opyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression." (emphasis in original)); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

221. *Cf. Eldred*, 537 U.S. at 219 ("[T]he Framers intended copyright itself to be the engine of free expression.").

222. *See id.* at 212, 219.

223. *See* 17 U.S.C. § 504(c)(2) (2006); *supra* note 1 (detailing history of strict liability in copyright law); *supra* Part I.A.2.

punishment in a copyright holder's monopoly does undermine copyright distribution.[224] The potential effect is to deter legal downloading.[225] So, as Internet users become reluctant to download, the dissemination of knowledge slows. Users do not receive content of authors, and likewise, authors do not receive content from other authors, which adversely affects their ability to create new works.[226] In the absence of user downloading, incentives to create decrease. Congress thus disturbs the creation and dissemination of virtual knowledge by legislating copyright's strict liability punishment so broad as to include virtual actors. Strict punishment of innocent downloading contravenes the dissemination of knowledge that the Copyright Clause demands.[227] It is therefore questionable whether Congress has the authority to strictly punish innocent downloaders.

Arguably, the Supreme Court laid this issue to rest in *Eldred v. Ashcroft*, where the Court made clear that the Copyright Clause provides Congress great flexibility in shaping copyright law.[228] According to the Court, copyright's restrictions on speech are justified because copyright incorporates a speech-protective purpose—to promote the creation and publication of free expression—which ultimately serves the constitutional interest of disseminating ideas.[229] Given this great deference that the Court provided Congress, it seems plausible that the incidental effect of strict liability on innocent downloaders is permissible. *Eldred*, then, arguably allows for the tension that strict liability punishment creates with the Copyright Clause.

Despite the great deference that the Court has given Congress to shape the contours of copyright, the Court has also recognized that the deference is not without limitation.[230] The Court explained that the deference would cease were Congress to alter the "traditional contours" of copyright law.[231] Such an alteration appears to be presently occurring, albeit passively: Congress is altering traditional contours of copyright by failing to address changing circumstances. That is, traditional contours of copyright are being altered because the law has neglected to address technological innovations that require a new rule to uphold long-standing policy.[232] Specifically, the centuries-old strict liability doctrine fulfills its purposes only insofar as that doctrine is sufficiently flexible to contemplate changing circumstances. Where that doctrine

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224. *See supra* Part I.A.2.

225. *See supra* Part I.C.1.

226. *Cf.* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990) ("To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché . . . .").

227. *See* U.S. CONST. art. I, § 8, cl. 8.

228. 537 U.S. 186, 222 (2003) ("[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.").

229. *Id.* at 219.

230. *See id.*

231. *Id.*

232. *See* INFO. INFRASTRUCTURE TASK FORCE, *supra* note 113, at 211 ("It is difficult for intellectual property laws to keep pace with technology. When technological advances cause ambiguity in the law, courts look to the law's underlying purposes to resolve that ambiguity. However, when technology gets too far ahead of the law, and it becomes difficult and awkward to adapt the specific statutory provisions to comport with the law's principles, it is time for reevaluation and change.").

rigidly contemplates only circumstances of its time, its rigidity jeopardizes the fulfillment of copyright's purposes. Today, circumstances are drastically different than those contemplated when strict liability was first introduced into copyright, or even when the current Copyright Act of 1976 was enacted.[233] As the doctrine has stood for centuries, and continues to stand today, it is rigidly inflexible.[234] That rigidity precludes it from fulfilling its purpose. Traditional contours of copyright are, therefore, changing as the law fails to adjust to the Internet ontology. Thus, the Copyright Act is repugnant to the Copyright Clause.[235]

C. Due Process

Copyright's strict liability punishment of innocent downloaders creates a tension with the Due Process Clause.[236] Due process requires a law to be rationally related to a legitimate government interest.[237] It also places limits on punitive damages that a law may impose.[238] As discussed below, these fundamental requirements of due process call into question copyright's strict punishment of innocent downloaders.

1. Rationality of Strict Punishment

As stated above, due process requires a rational relationship between a law and a legitimate government interest.[239] The government interest in copyright is to further the dissemination of knowledge.[240] An intermediate government interest of that provision is to provide authors effective monopolies over their expression, where those monopolies exist ultimately to foster free expression.[241] It is unquestionable that these interests are legitimate.[242]

As applied to innocent downloaders, copyright's strict liability punishment does not seem rationally related to these government interests.[243] The purpose of the strict

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233. *See supra* note 1

234. *See* 17 U.S.C. §§ 106, 504(c)(2) (2006) (imposing liability for innocent infringement without making an exception for innocent downloaders).

235. *Cf*. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) ("An act of congress repugnant to the constitution cannot become a law.").

236. *See* U.S. CONST. amend. V.

237. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

238. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

239. *See Washington*, 521 U.S. at 728.

240. *See supra* note 220.

241. *See supra* note 220.

242. *See supra* note 219 and accompanying text.

243. This contrasts with real space, where copyright's strict liability punishment seems to satisfy the rational basis test for due process. In real space a plea of innocence can be difficult to disprove, such that punishing innocent copiers thwarts intentional copiers who misrepresent their innocence. *See* 4 NIMMER & NIMMER, *supra* note 79, § 13.08. Moreover, innocent copying occurs under exceptional circumstances in real space, so punishing innocent copiers does not interfere with the normal distributive process in which copyright holders distribute physical copies to consumers. *See supra* Part I.A.2. Strict liability in real space serves author monopolies, which is rationally related to the government interest of disseminating ideas and truth.

punishment is to deter even innocent infringement, which in the Internet context requires Internet users to be deterred from downloading all copyrighted works, including those that are legal downloads.[244] Deterrence of innocent infringement cannot occur unless Internet users cease downloading anything that could be infringing, and users cannot identify infringing material that appears noninfringing.[245] As a result, the deterrent design of strict liability punishment restricts the dissemination of virtual expression.[246] And for expression that exists exclusively online, the restriction is absolute: there are no other means available for procuring that expression.[247] A ready and willing good-faith purchaser is deterred from purchasing online expression.[248] An author eager to disseminate his or her ideas is barred from reaching his or her audience.[249] Thus, strict liability on the Internet could upset the purpose of copyright.[250] A monopoly is ineffective where the monopolist cannot reach his or her consumers.[251]

Despite this tension between strict liability punishment on the Internet and the copyright monopoly, it may seem that the monopoly is fulfilling its purpose because copyright holders are enforcing their strict liability rights over Internet users. Were the strict liability punishment not fulfilling the government interest in creating a productive monopoly, it would seem that copyright holders would refrain from enforcing that punishment. But that is not necessarily so. As discussed above, only collectively do copyright holders have incentive to refrain from punishing innocent downloaders.[252] If all copyright holders ceased punishing innocent downloaders, the deterrent effect could be avoided.[253] On the other hand, if only some copyright holders ceased punishing innocent downloaders, the potential punishment for a mistake of fact would still loom, so deterrence would still exist.[254] Individually, it may be in a copyright holder's best interest to pursue innocent downloaders; collectively it is not.[255] So the fact that copyright holders enforce their strict liability rights is not inconsistent with the conclusion that those rights are harmful to the copyright monopoly.

Further evidence of the irrationality of the relationship between the strict liability punishment and the cited government interests is apparent from the copyright holder's perverse incentive to foster innocent infringement by downloaders.[256] If the potential

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244. *See* H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 (stating that deterrent purpose of strict liability applies to innocent infringement); *see also supra* Part I.C.1.

245. *See supra* Part I.C.1.

246. *See supra* Part II.A (discussing restraint that strict liability punishment poses to online speech).

247. *See supra* Part II.A.1.

248. *See supra* Part I.C.1.

249. *See supra* Part II.A.

250. *See supra* Part II.B.

251. *See* BLACK'S LAW DICTIONARY 885 (8th ed. 2004) (defining monopoly to mean "[c]ontrol or advantage obtained by one supplier or producer over the commercial market within a given region").

252. *See supra* Part I.A.1.

253. *See supra* Part I.A.1.

254. *See supra* Part I.A.1.

255. *See supra* Part I.A.1.

256. *See supra* Part I.B.

deterrent effect of the strict liability does not occur, then copyright holders will be able to realize great profits from copyright's statutory damages at minimal cost.[257] The cost to pursue innocent downloaders has been decreasing, and will likely continue to decrease, as Internet technology has provided efficient means for identifying innocent downloaders.[258] The copyright holder's monopoly, then, would exist so that he could foster innocent downloading to profit from the unwary.[259] This perverse incentive contravenes the purpose of providing copyright holders a strict liability shield of protection.[260] Rather than a shield, the law would become a sword.

2. Punitive Damages for Innocent Behavior

The argument that copyright's statutory damages raise due process concerns is not new.[261] Scholars have raised it; courts have rejected it.[262] The argument becomes much stronger in the context of innocent downloading. Due process compels elementary notions of fairness, notions that preclude "judgments without notice," which may arise with excessive civil penalties.[263] Innocent downloaders lack notice that their good-faith conduct may result in a large monetary penalty. In many cases, the penalty consists of at least 750 times the actual damages. The excessive penalties that the Copyright Act contemplates for innocent acts call into question whether the Act satisfies basic elements of due process.

The Supreme Court has repeatedly held that the imposition of a "grossly excessive punishment on a tortfeasor" violates due process.[264] The Court has explained three guideposts for determining whether damages are so excessive as to become

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257. *See supra* Part I.B.

258. *See supra* Part I.B.

259. *See supra* Part I.B.

260. *See supra* note 220.

261. *See, e.g.*, Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 568 (2007) (noting that statutory damages in copyright law suggests a possible violation of due process rights); Tehranian, *supra* note 53, at 1217 n.61 ("[O]ne wonders whether, given the Supreme Court's recent jurisprudence limiting punitive damages on due process grounds . . . , copyright's statutory damages provisions may violate due process rights in many cases." (citation omitted)); Barker, *supra* note 56, at 536 (arguing that substantive due process restricts the aggregation of minimum statutory damages for copyright infringement in file-sharing context).

262. *See, e.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587−88 (6th Cir. 2007) (finding in copyright case that a penalty of forty-four times the actual damages "was not sufficiently oppressive to constitute a deprivation of due process"); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The *Gore* guideposts do not limit the statutory damages here because of . . . difficulties in proving—and in providing compensation for—actual harm in copyright infringement actions.").

263. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

264. *Id*. at 562; *see also* Phillip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994).

constitutionally suspect.[265] The first is the degree of reprehensibility of the conduct at issue.[266] By definition, innocent downloading is not reprehensible. A downloader must reasonably believe that the conduct is permissible under the law to be innocent.[267] The second guidepost is the ratio between the assessed damages and the actual harm.[268] The Court has observed that few awards significantly exceeding a single-digit ratio satisfy due process.[269] In the context of innocent downloading, the downloader faces a potential ratio of 750 to one,[270] well exceeding a permissible ratio.[271] The third guidepost examines the disparity between the punitive damages and penalties imposed in comparable cases.[272] The legal situation most comparable to innocent downloading seems to be common law strict liability for receiving stolen property.[273] That law requires either the return of that property or actual damages, but nothing more.[274]

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265. *See BMW*, 517 U.S. at 574–75.

266. *Id*. at 575. In examining this element, courts consider whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, deceit, or was mere accident. *State Farm*, 538 U.S. at 419.

267. *See supra* text accompanying notes 63–64.

268. *BMW*, 517 U.S. at 580.

269. *State Farm*, 538 U.S. at 425. Ratios higher than double digits are permissible under special circumstances. *See id.* The Court has opined that the following circumstances may justify higher ratios: (1) the conduct at issue is particularly egregious; (2) the injury is hard to detect; or (3) the monetary value of noneconomic harm might be difficult to determine. *See id*. The excessive ratio for innocent downloading, however, does not appear to be justified by any of these circumstances. First, innocent downloading is not egregious conduct. Indeed, downloading material that reasonably appears to be noninfringing furthers virtual commerce and the dissemination of ideas. *See supra* Parts I.C, II.A. Second, innocent infringement likely occurs on Web sites that copyright holders can easily detect. *See supra* Part I.B. Third, although the value of some expression can be difficult to determine, the value of much expression is not difficult to determine. The value of songs that sell for one dollar can be determined easily, yet the statute contemplates the excessive ratio for such songs. Special circumstances do not seem to justify the ratio.

270. A downloader who innocently downloads a song is liable for the statutory penalty of $750. *See* 17 U.S.C. §§ 412, 504(c)(1) (2006). The value of a typical downloadable song is ninety-nine cents. *See* Apple, iTunes Store, http://www.apple.com/itunes/store/ (selling downloadable music for ninety-nine cents per song). Note that $750 is the *minimum* statutory penalty per innocently downloaded song. *See* 17 U.S.C. § 504(c)(1). If a court "considers [it] just," an innocent downloader could be liable for up to $30,000 for every infringing download. *Id.*

271. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062–65 (2007) (concluding that a punitive damages award roughly 100 times the actual damages awarded may not comply with the Due Process Clause and remanding to the Oregon Supreme Court for application of the correct constitutional standard); *State Farm Mut. Auto. Ins. Co*, 538 U.S. at 429 (concluding that a punitive damages award ratio of 145 to one with actual damages did not comport with due process of law); *BMW*, 517 U.S. at 585–86 (concluding that a punitive-damages award of 500 to one ran afoul of the Due Process Clause).

272. *BMW*, 517 U.S. at 583.

273. *See supra* text accompanying notes 145–52.

274. *See* 1 DOBBS, *supra* note 145.

Punitive damages are simply not imposed.[275] Thus, copyright's statutory damages for innocent downloading seem to exceed that which is constitutionally permissible. Innocent downloading is not reprehensible; the damages ratio is grossly high; and comparable cases award no punitive damages. Due process is at issue.

III. A PROPOSAL TO EXCUSE PUNISHMENT

The policy and constitutional concerns discussed above require Congress to amend the Copyright Act. The Act should excuse innocent downloaders from financial liability[276] where a downloader infringes under a mistaken belief that is reasonable.[277] Reasonableness would be determined by the appearance of a Web site.[278] If a Web site's appearance suggests that a download is infringing, a downloader's mistaken belief that the download is legal would not excuse financial liability. A person viewing the same Web site as the innocent downloader would need to reach the same mistaken belief.[279]

This requirement of reasonableness would necessitate a factual determination. It may be reasonable to mistakenly believe that a photograph may be legally downloaded from Flickr.com, a site indicating that pictures may be legally downloaded for free.[280] Yet it may not be reasonable to mistakenly believe that an infringing song constitutes a legitimate download from legalsounds.com, even though legalsounds.com indicates that of all its songs may be legally downloaded—for a small fee.[281] This distinction is puzzling given that many pictures on Flickr.com may be worth over $100, whereas many songs on legalsounds.com may be worth less than one dollar.[282] A *free* download of a photo worth over $100 might be reasonable, but a *fee* download of a song worth less than one dollar might not. The reasonableness of a mistaken belief may therefore

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275. *See* PROSSER AND KEETON ON TORTS, *supra* note 16, § 15, at 90.

276. This proposed remedy is consistent with Canada's approach to illegal downloading. The Canadian Copyright Board has opined that downloading infringing material is legal, although uploading that material is not. *See* COPYRIGHT BD. OF CAN., PRIVATE COPYING 2003-2004, at 19–20, *available at* http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf; Posting of John Borland to CNET, http://news.cnet.com/2100-1025_3-5121479.html (Dec. 12, 2003, 14:20 PST).

277. *Cf.* United States v. U.S. Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 538–543 (9th Cir. 1988) (interpreting innocence defense as allowing for only a "reasonable" mistake of fact).

278. *See supra* Part I.A.2 (discussing need for copyright holder to be able to easily disprove mistaken belief that would be unreasonable).

279. *See supra* Part I.A.2 (discussing need for reasonableness standard for prevailing on mistake of fact argument).

280. *See* Flickr, About Flickr, http://www.flickr.com/about/ ("Flickr is the WD-40 that makes it easy to get photos or video from one person to another in whatever way they want.").

281. *See supra* note 84; *supra* text accompanying note 165.

282. *Compare* Fotosearch, Stockbyte, http://www.fotosearch.com/stockbyte/ (offering online photographs for sale at a cost of hundreds of dollars per photo), *with* Apple, iTunes Store, http://www.apple.com/itunes/store/ (offering online music for sale at a cost of ninety-nine cents per song).

vary according to the type of site and the expression at issue. A case-by-case inquiry would be necessary to determine a belief's reasonableness.[283]

A. Content Deletion

The exception for innocent downloading should not endow innocent downloaders with good title to infringing material. Alleviating the deterrent effect of strict liability punishment is possible without passing good title to the downloader.[284] Substantial deterrence would be unlikely to result from requiring the downloader to delete that which he never rightfully possessed.[285] The innocent downloader should not retain the infringing material because otherwise he would be unjustly enriched beyond that which directly resulted from his mistaken belief.[286] He should be required to delete infringing material upon receiving notice of the infringement.[287] By requiring the downloader to delete the material, the author's efforts that gave rise to the expression would not be further exploited without compensation.[288] Strict liability should still apply, but the penalty should be limited to deletion.

If an innocent downloader fails to delete infringing material after receiving notice of his infringement, the downloader would no longer be innocent. By ignoring the copyright holder's notice of infringement, the downloader would effectively lose the protection that his innocence provided him, for his purposeful ignorance would amount to a willful violation. In that instance, statutory penalties for willful infringement should apply, reflecting the law's intolerance for actors who abuse protections for the innocent to further unlawful activity.[289] The severe punishment would target the willful act of retaining pirated copies without deterring downloading.

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283. *Cf*. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) ("The drafters [of the Copyright Act] . . . structured the [fair use] provision as an affirmative defense requiring a case-by-case analysis.").

284. *See* 1 DOBBS, *supra* note 145 (noting that the common law holds a good-faith purchaser of converted goods strictly liable for the value of the goods).

285. Any deterrence would be minimal, reflecting the loss that a downloader would incur from the amount charged by the piracy Web site for the infringing material.

286. *See* 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION, § 4.1(2), at 371 (2d ed. 1993) (describing unjust enrichment claim as arising when "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff").

287. *See id.*

288. *Cf.* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) ("[C]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . ." (quoting Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)) (emphasis in original)).

289. *See* 17 U.S.C. § 504(c) (2006) (providing for a discretionary award of increased damages in the amount of $150,000 per act of infringement where a court finds that the defendant willfully infringed); *accord* Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1010–11, 1014 (2d Cir. 1995) (affirming trial court's finding of willful infringement where defendants had deliberately intended to create a knock-off version of plaintiff's copyrighted clothing, and thereby affirming trial court's award of statutory damages).

The practical effect of this proposed remedy would be that once a copyright holder identified a piracy Web site that appeared legitimate, she would need to notify its downloaders of their infringement. The notice would consist of informing the downloader both that the Web site lacked authority to offer copyrighted material and that the infringer must delete all copies of the material. If after sending the notice, the copyright holder discovered that the downloader continued to infringe, statutory damages would apply for willful infringement. Likewise, statutory damages would apply if the copyright holder discovered that the downloader had failed to delete the material.

A weakness with this proposal is that it might end up protecting intentional infringers. An intentional infringer might search for piracy sites that appeared legitimate and then knowingly download as much infringing material as possible before receiving notice of his infringement. Once notified, the intentional infringer could transfer all the infringing material onto a storage device that would be undetectable to the copyright holder. Knowing that he has one free bite at the apple, the intentional infringer would make it a big one.

Although this possibility does call attention to a potential weakness in the proposal, copyright holders would not be left without recourse against the intentional infringer. Copyright holders could employ the judicial process to discover whether the downloader had deleted the infringing material after receiving notice.[290] Discovery procedures would be available.[291] Where downloaders have copied a large amount of infringing material, the cost of employing these procedures would be justified.[292] If during discovery the downloader failed to disclose infringing material that he had not deleted, he could be held in contempt of court.[293] Thus, the proposal would only be as weak as the judicial process.

B. Actual Damages

It is debatable whether an innocent infringer should be required to pay actual damages. On the one hand, actual damages seem less likely than statutory damages to deter Internet users from downloading. An innocent infringer who is compelled to pay one dollar is less likely to be deterred than one who is compelled to pay $750. Moreover, actual damages would compensate the copyright holder, offsetting the innocent infringer's unjust enrichment.[294] On the other hand, actual damages may deter a significant portion of Internet downloading. In the culture of Web 2.0, information sharing has become common. For instance, users download free open-source programs with the understanding that those programs are noninfringing.[295] Copyright law would

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290. *See* FED. R. CIV. P. 26(b).

291. *Id*.

292. Indeed, copyright holders presently use the judicial process of discovery to enforce their rights. Deposition Transcript of Matthew Ates, Lava Records, LLC v. Ates, No. Civ. A. 05-1314, 2006 WL 1914166 (W.D. La. July 11, 2006) (on file with author).

293. *See* FED. R. CIV. P. 37(b)(2)(A)(vii) (providing that a court may "treat[ ] as a contempt of court" a party's failure to comply with a discovery order).

294. *See generally* 1 DOBBS, *supra* note 286, § 4.1(2), at 557 (explaining unjust enrichment).

295. *See* Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY, Sept. 30, 2005,

deter user downloading of such free noninfringing material if the law was to require innocent downloaders to pay for expression that they reasonably believed was noninfringing. Downloaders would not likely download anything for which they would not pay market price, including much expression that is free and noninfringing.[296]

It may seem that the interests of the copyright holder outweigh this deterrence that results from actual damages. Actual damages seem necessary because the innocent downloader has reaped the benefit of the author's efforts. Even if the innocent downloader deletes the infringing material upon receiving notice of his infringement, he has still benefited for the duration that he held it before receiving the notice.[297] Regardless of whether the innocent downloader would pay market value for the work, the downloader has reaped where he has not sown. The infringer has been unjustly enriched.[298] Equity, it seems, demands compensation.

A problem with this argument is that assessing damages against those who would not pay market price would compensate the author above that which he deserves.[299] The copyright holder should be entitled only to the amount of compensation that reflects an expression's market price.[300] Forcing a downloader to pay compensation for expression where the downloader would not have paid had she known the actual price overcompensates the copyright holder. Only those innocent downloaders who would have paid market price should be forced to pay actual damages to avoid overcompensation. It seems impossible, however, to distinguish innocent downloaders who would pay market price from those who would not. A finder of fact would need to determine how many innocent downloaders would have been willing to pay market price at the time of infringement. It would require determining a hypothetical state of mind for all innocent downloaders—a determination too speculative to be reliable.

Despite this practical difficulty of determining those innocent downloaders who would have paid actual damages, it is possible to ensure at least partial compensation for copyright holders. Partial compensation would come through requiring deletion. Upon deleting the infringing material, the once-innocent downloader who values the expression at market price would likely obtain an authorized copy of the material.[301] Prior unauthorized exposure to the material might increase her desire to procure the expression again through legal means. Accordingly, a copyright holder may be compensated by those innocent downloaders who would have paid market price at the time of infringement. That which is due a copyright holder is that which otherwise would have been paid, which often would be paid after the expression is deleted.[302] By

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http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html.

296. *Cf.* 1 DOBBS, *supra* note 286, § 4.1(2), at 563–64 (commenting that restitution may be bad policy even when unjust enrichment is shown where the resultant effect would be to risk free speech interests).

297. *See id.* § 4.1(2), at 557 (explaining unjust enrichment).

298. *See id.*

299. *Cf. id.* § 4.1(2), at 563–64 (arguing that restitution for unjust enrichment is inappropriate where doing so would risk overcompensating plaintiff).

300. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

301. *Cf.* Martin Peitz & Patrick Waelbroeck, *File-Sharing, Sampling, and Music Distribution* (Int'l Univ. in F.R.G., Working Paper No. 26/2004), *available at* http://ssrn.com/abstract=652743 (arguing that copyright holders' profits may increase from societal practice of unauthorized P2P file-sharing networks).

302. It should also be noted that the difficulty in distinguishing between innocent

requiring deletion, the law would indirectly approximate just compensation for the copyright holder.

C. Judicial Interpretation

In the event that Congress does not amend the Copyright Act, courts must resolve the policy and constitutional issues.[303] This may be accomplished by interpreting the damages provision of the Act as not applying to innocent downloaders.[304] Precedent supports such an interpretation.[305] Moreover, "[f]ederal courts may, in limited circumstances, recognize an affirmative defense where a statute does not expressly provided it."[306] Where the defense was necessary to avoid injustice, oppression, absurd consequences, or constitutional infirmities,[307] and where recognizing the defense

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downloaders who would pay market value for the expression and those who would not pay may not exist under certain circumstances. Specifically, if an infringing Web site charges the innocent downloader a fee equal to or above the market value of the expression, then this circumstance would demonstrate that the downloader values the expression at least as much as the market value. This circumstance, however, should not result in actual damages being imposed against the innocent downloader. Were actual damages imposed, the innocent downloader would be forced to pay twice for the single expression downloaded—once to the infringing Web site and once to the copyright holder. Furthermore, given that the copyright holder was pursuing the downloader rather than the infringing Web site, it is likely that the infringing Web site would be judgment-proof. In that situation, the innocent downloader would not be able to seek restitution for double payment. So the downloader would be paying for the same expression twice, which would ultimately deter him from downloading again. Thus, the fact that an innocent downloader has demonstrated his valuation of infringing downloads by paying for those downloads is not a sufficient reason to impose actual damages on that downloader.

303. *See* Sorrells v. United States, 287 U.S. 435, 447−50 (1932) ("To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.").

304. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 180 (2003) ("When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").

305. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (interpreting the Sherman Act as outlawing "unreasonable" restraints of trade despite an absence of qualifying language in the statute); *Sorrells*, 287 U.S. at 447−52 (recognizing entrapment defense where statute did not so indicate); Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892) (interpreting statute that imposed identification of Chinese nationals as not applying to certain Chinese merchants already domiciled in the United States, despite the absence of a statutory exception); United States v. U.S. Dist. Court for the Cent. Dist. of Cal., 858 F.2d 534, 542−43 (9th Cir. 1988) (recognizing mistake-of-fact defense where statute strictly punished depiction of minor engaging in sexual conduct).

306. *See U.S. Dist. Court*, 858 F.2d at 542.

307. *See Sorrells*, 287 U.S. at 451; United States v. Katz, 271 U.S. 354, 362 (1926) (construing statute so as to avoid unreasonable application of language, which would have caused "extreme or absurd results," where legislative purpose would be satisfied with a more

would not ignore legislative intent,[308] recognition has been permissible. If these circumstances exist, then, courts may construe the Copyright Act as protecting innocent downloaders.

Construing the Act in this manner makes good sense. In 1976, Congress could not have contemplated its application to innocent downloaders.[309] Indeed, the legislative history suggests that Congress intended to punish innocent infringers only in situations that were "occasional or isolated"—situations unlike copytraps.[310] The policy implications and constitutional tensions of strictly punishing innocent downloaders further suggest a lack of congressional intent to foster copytraps.[311] It is therefore appropriate for courts to recognize an exception to copyright's strict liability regime.[312] As discussed above, that exception should excuse innocent downloaders from financial liability if they can show an actual and reasonable mistake of fact.[313] Recognizing this exception would be consistent with congressional intent and it would resolve policy and constitutional concerns.

CONCLUSION

The Copyright Act's strict liability regime fails to contemplate a virtual existence. The current regime assumes that copyright distribution occurs by physical procurement rather than by online copying.[314] It assumes that innocent infringement is exceptional and isolated rather than frequent and widespread.[315] It assumes that identifying infringers is costly rather than efficient.[316] The copy nature of the Internet thus contradicts the assumptions of copyright's strict liability regime. The Internet renders the strict liability regime obsolete.

The tension between a law designed for real space and the ontology of cyberspace must be addressed. If the Internet is to draw widespread participation, it requires

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limited interpretation); *Lau Ow Bew*, 144 U.S. at 59 ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.").

308. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (noting that possible statutory constructions that would avoid constitutional questions must account for legislative will).

309. *See supra* Part I.A.2 (discussing that Congress likely did not intend for copyright's strict liability to apply to the Internet); *cf. U.S. Dist. Court*, 858 F.2d at 542 (recognizing mistake-of-fact defense because "there [was] no evidence that Congress considered and rejected the possibility of providing for such a defense").

310. H.R. REP. NO. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 (stating that minimum statutory damages reduction would apply "in cases of occasional or isolated innocent infringement").

311. *See supra* Parts I, II; *cf. U.S. Dist. Court*, 858 F.2d at 542 ("We have little doubt that Congress would prefer [the statute] with a reasonable mistake of [fact] defense to no statute at all.").

312. This would not be the first time that courts have construed copyright's strict liability provision as not applicable to innocent Internet actors. *See supra* note 118.

313. *See supra* Part III.A–B.

314. *See supra* Part I.A.2.

315. *See supra* Part I.A.2.

316. *See supra* Part I.B.

fairness for the unwary.[317] If the Internet is to fuel the vehicle of commerce, it requires assurances for good-faith purchasers.[318] If the Internet is to breed a marketplace of ideas, it requires breathing space for its speakers.[319] The Internet's great potential for commercial and information exchange may be realized only if innocent actors are not dissuaded from participating.[320] Copytraps must cease.

317. *See supra* Part I.A.
318. *See supra* Part I.C.
319. *See supra* Part II.A.
320. *See supra* Parts I.C, II.A.