

Innocent Infringement in U.S. Copyright Law: A History

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INTRODUCTION

Innocent or unknowing copyright infringement occurs when someone engages in infringing activity not knowing that her conduct constitutes infringement—perhaps most commonly when she knowingly copies from another’s work but reasonably believes that her copying is not infringing. After all, “[n]ot all copying . . . is copyright infringement,”¹ and one of copyright law’s most important goals is distinguishing legitimate copying, which is encouraged, from illegitimate copying, which is to be deterred. But since 1931, a defendant’s mental state has clearly not been relevant under U.S. copyright law to the question of liability for direct copyright infringement. As the Supreme Court stated that year, “[i]ntention to infringe is not essential under the Act.”² So innocent infringers are just as liable as those who infringe knowingly or recklessly.

The Anglo-American copyright system, however, has not always been so hostile to the innocent infringer. In fact, the current regime of largely unmitigated liability for unknowing infringement is a relatively recent development, for copyright law historically offered unknowing infringers significant protection. The copyright system originally made most types of innocent infringement easily avoidable, and where innocent infringement was difficult to avoid the imposition of liability in fact depended on a defendant’s culpable mental state.

This Article explores how copyright law addressed the issue of innocent infringement in its early years. Part I discusses how copyright law, from its beginnings in England in 1709 and in the United States in 1790, safeguarded innocent infringers from liability. First, the risk of any infringement was dramatically lower in copyright’s first centuries than it is today because so much less material was protected by copyright and the copyright owner’s exclusive rights were so much more limited. Within the universe of possible infringements,

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1. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).
2. Buck v. Jewell-Lasalle Realty Co., 283 U.S. 191, 198 (1931).

copyright law originally made it relatively easy for users of copyrighted works to avoid infringing: the law made relatively clear which activities it reserved to the owner if a work was copyrighted, and the system made it easy to determine whether a given work was in fact copyrighted. As a result, those who invaded an owner's exclusive rights could generally be expected to have at least constructive knowledge that their activities were infringing.

But in some circumstances a potential user of a work would still have had difficulty determining whether her use would infringe, either because of the nature of the user's activity or the uncertain scope of the owner's rights. In those circumstances, the law tended to look to the user's knowledge or intent in order not to impose liability on someone who did not know that her activities were infringing and who would not have discovered the infringement by reasonable investigation. So until 1909 U.S. law barred the sale of infringing copies of a copyrighted work only if the seller knew that the copies were infringing. And when courts or Congress extended copyright owners' rights beyond verbatim reproduction to imitative copying, they often looked to a defendant's mental state to distinguish acceptable imitation from unacceptable infringement.

Thus, for much of its early history, copyright law overall strove to avoid holding copiers liable for innocent infringement.³ Part II describes how, between 1909 and 1989, almost all of copyright law's original safeguards protecting innocent infringers eroded. The general risk of committing copyright infringement increased dramatically, as ever more material was protected for ever longer periods against ever more uses. While this development itself should perhaps have led to a strengthening of copyright law's solicitude for innocent infringers, the opposite has happened. The features of copyright law that made it easy for most users to determine whether their use would fall within a copyright owner's exclusive rights and whether the work they sought to use was indeed protected by copyright have mostly been eliminated, thus making it more difficult to treat an infringer as one who had at least constructive knowledge that her acts were prohibited. And at the same time, other features of copyright law that excused innocent infringers where they could not have been expected to have known about their infringement through reasonable investigation have also been eliminated. While these changes occurred gradually, and mostly for reasons entirely unrelated to innocent infringement, the end result has been a great increase in the last century in the likelihood that an innocent infringer will be held liable. Since 1909, copyright law's only mechanism for protecting an innocent infringer has been to reduce in some instances the penalties imposed upon her.

3. This was the case despite high-level generalizations by commentators and courts in this period that knowledge or intent was irrelevant to the question of copyright infringement. In some instances, this was flatly incorrect, as the statutes for nearly 120 years in fact required knowledge for certain activities to be infringing. But even where an individual defendant's actual knowledge was in fact not considered in determining liability, these generalizations overlooked the systemic features that protected against innocent infringement and made it possible to consider an actual unknowing infringer to be one who *would have known* of the infringement had she exercised reasonable care.

I. 1709-1909: SAFEGUARDS FOR INNOCENT INFRINGERS

The historical evidence shows that from the beginning, the copyright system was designed to address concerns about imposing liability for unknowing infringement. Those concerns were several. The intangible nature of copyright's subject matter made unknowing infringement a greater risk than in the case of invasions of more tangible property. It was relatively easy to know that you could not ride away on a horse that you had not properly acquired, but harder to know what you could and could not do with a book or map that you had properly acquired.⁴ Furthermore, for some of the activities prohibited by the copyright statute, it would have been difficult for someone to know whether she was engaging in that activity. Thus, the statute barred selling infringing copies of a copyrighted work, but a seller of copyrighted materials might have a difficult time determining whether the particular copies she was offering for sale were infringing if she had merely acquired the finished copies from a third party. Finally, and perhaps most importantly, copyright law sought to encourage the production and dissemination of works of authorship, including new works that drew on previous works. An author who drew on previous works, however, might have a difficult time determining whether her use of the previous work was acceptable or instead went too far and infringed the original author's copyright. Early copyright law used several mechanisms to address all of these concerns.

A. CONSTRUCTIVE KNOWLEDGE OF INFRINGEMENT THROUGH LIMITED EXCLUSIVE RIGHTS PLUS CLEAR COPYRIGHT NOTICE

1. The Limited Scope of Early Copyright Protection

a. Fewer Works Protected

As an initial matter, the risk of liability for innocent infringement in the early years of copyright law was fairly low, in large measure because the risk of committing any act of infringement was relatively small. The relatively low likelihood of infringement compared with today resulted because early copyright law protected far fewer works than copyright law protects today and because copyright owners had fewer exclusive rights in the works that were protected.

4. In the case of tangible property, difficult questions may have persisted, of course, about what constituted proper acquisition of, for example, a wild horse.

Copyright protected a fairly limited universe of authorial works for most of its early history. The very first Anglo-American copyright law, the Statute of Anne, passed in 1709,⁵ covered only books,⁶ while in the United States the 1790 Copyright Act extended only to books, maps and charts.⁷ Additional types of works became eligible for copyright only gradually. While Congress granted protection to “historical or other prints” in 1802,⁸ it did not extend copyright to musical compositions until 1831.⁹ By 1873, the subject matter of copyright protection included “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or . . . painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts . . .”¹⁰ Not until 1909 was copyright protection extended to “all the writings of an author,” a phrase that courts interpreted quite broadly.¹¹

Even within the limited classes of works for which copyright was *available* in its first century in the United States, many—perhaps most—works were never in fact protected by copyright. Securing copyright protection required strict compliance with several formalities. Although the details varied somewhat over

5. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). For a detailed discussion of the origins of the statute, see HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* (1956).

6. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The statute was passed in February 1709 and took effect in April 1710, which was only two months after its passage, as the new year began in March at this time. L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y U.S.A. 365, 374 n.26 (2000).

7. 1790 Copyright Act (Act of May 31, 1790), ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). Nineteenth-century courts in the United States gave a broad construction to the term “book,” not limiting the term to the conventional bound volume but instead interpreting it to include, for example, single printed sheets. See, e.g., Clayton v. Stone, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872); Drury v. Ewing, 7 F. Cas. 1113 (C.C.S.D. Ohio 1862) (No. 4,095); see also EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 142-44 (1879). The liberal construction had limits, however. Thus, courts refused to consider product labels as “books” within the protection of the statute. See, e.g., Scoville v. Toland, 21 F. Cas. 863 (C.C.D. Ohio 1848) (No. 12,553); Coffeen v. Brunton, 5 F. Cas. 1184 (C.C.D. Ind. 1849) (No. 2,946).

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

9. 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870). Musical compositions had in some instances been registered for copyright protection, apparently as “books,” prior to 1831. See Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2,872); FEDERAL COPYRIGHT RECORDS 1790-1800, at xvi (James Gilreath ed., 1987); Frederick R. Goff, *The First Decade of the Federal Act for Copyright, 1790-1800*, in *ESSAYS HONORING LAWRENCE C. WROTH* 101, 107-108, 109 n.1 (1951); William F. Patry, *Copyright and Computer Programs: It’s All in the Definition*, 14 CARDOZO ARTS & ENT. L.J. 1, 24 (1996).

10. Rev. Stat. § 4952 (1873). Protection for photographs had been added in 1865. Act of Mar. 3, 1865, ch. 126 § 1, 13 Stat. 540, 540 (repealed 1870).

11. 1909 Copyright Act (Act of Mar. 4, 1909), ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976); Goldstein v. California, 412 U.S. 546 (1973) (interpreting terms “Writings” and “Author” in U.S. Constitution); S. COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 3, THE MEANING OF “WRITINGS” IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION* (Comm. Print 1960). Current copyright law protects all “original works of authorship,” a phrase that is not defined in the statute but that courts have also interpreted very broadly. 17 U.S.C. § 102 (2000).

Also, until 1891, copyright was available only for works authored by U.S. citizens or residents.

time, between 1790 and 1909 one generally had to take three steps to obtain copyright protection. First, before a work was published, the copyright claimant had to register the title (or in some cases a description) of the work with a government office.¹² Second, notice of the claim of copyright had to be given to the public, in most cases by printing a copyright notice on every published copy of the work.¹³ Third, after publication, the claimant had to deposit a copy or copies of the work with a designated government office by a given deadline.¹⁴ Compliance with each of the requirements was a prerequisite to obtaining copyright protection, and failure to complete any of the three steps resulted in the work entering the public domain.¹⁵ Strict compliance was generally required: for example, printing a copyright notice with an erroneous date would defeat copyright protection,¹⁶ as

12. 1790 Copyright Act (Act of May 31, 1790), ch. 15, § 3, 1 Stat. 124, 125 (repealed 1831) (requiring prepublication deposit of title of book, map, or chart in clerk's office of the district court for the district in which the claimant resided); 1831 Copyright Act § 4 (same requirement for all eligible classes of works); 1870 Copyright Act (Act of July 8, 1870), ch. 230, § 90, 16 Stat. 198, 213 (repealed 1909) (requiring prepublication deposit of title of book or other article, or description of painting, drawing, chromo, statue, statuary, model or design, with the Librarian of Congress); Rev. Stat. § 4956 (1873).

13. 1790 Copyright Act § 3 (requiring that notice of prepublication recordation of work's title be published in a domestic newspaper for four weeks); Act of April 29, 1802, § 1 (requiring in addition that the same notice be printed on copies of the work); 1831 Copyright Act § 5 (prescribing the form and placement of notice to appear "in the several copies of each and every edition" of a work in which copyright was claimed but eliminating requirement of newspaper publication and denying benefit of copyright upon noncompliance); 1870 Copyright Act § 97 (prescribing form and placement of notice to appear on every copy of copyrighted work; denying copyright on noncompliance); Rev. Stat. § 4962 (1873).

14. 1790 Copyright Act § 4 (requiring deposit of one copy of a book, map, or chart with Secretary of State's office within six months after publication); 1831 Copyright Act § 4 (requiring deposit of one copy of copyrighted work with clerk of local district court within three months after publication); 1870 Copyright Act § 93 (requiring mailing of two copies of copyrighted works to the Librarian of Congress within ten days after publication); Rev. Stat. § 4956 (1873); Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106, 1107-08 (repealed 1909) (modifying deposit requirements); Act of Mar. 3, 1893, ch. 215, 27 Stat. 743 (repealed 1909) (extending copyright to claimants whose deposits had not complied with deadline requirements).

15. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 664-65 (1834). See also GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 193-97 (1847) (enumerating three requisites for securing a valid copyright). More reported cases in the first forty-five years of copyright history in the United States dealt with questions of compliance with formalities than with any other single issue. See, e.g., *King v. Force*, 14 F. Cas. 521 (C.C.D.C. 1820) (No. 7,791); *Ewer v. Cox*, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (No. 4,584); *Clayton v. Stone*, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2,872). The issue continued to occupy later courts. See, e.g., *Jollie v. Jaques*, 13 F. Cas. 910, 911 (No. 7,437) (C.C.S.D.N.Y. 1850); *Struve v. Schwedler*, 23 F. Cas. 268 (C.C.S.D.N.Y. 1857) (No. 13,551) (compliance with formalities several years after publication insufficient to secure copyright); *Parkinson v. Laselle*, 18 F. Cas. 1211, 1212 (C.C.D. Cal. 1875) (No. 10,762); *DRONE*, *supra* note 7, at 262-69. See also *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 42-56 (1939) (Black, J., dissenting). See also FEDERAL COPYRIGHT RECORDS, *supra* note 9, at ix.

16. See, e.g., *Baker v. Taylor*, 2 F. Cas. 478 (C.C.S.D.N.Y. 1848) (No. 782). The rule eventually developed that including a date that was a year *earlier* than the actual date of publication was acceptable, with the term being measured from the earlier date printed in the notice, rather than from the later actual date. See *Callaghan v. Myers*, 128 U.S. 617, 657 (1888). Notices with a date more than a year *later* than the actual publication date were generally held insufficient to secure copyright. See PAUL GOLDSTEIN, 1 COPYRIGHT § 3.6.1.2.b at 3:64 (2006).

would depositing the title of the work after publication rather than before.¹⁷ Describing U.S. copyright law up to the 1909 Act, Professor Benjamin Kaplan concluded that “[a]fter more than a century of national regulation of copyright, the old pattern was unbroken: securing copyright depended on compliance, and exact compliance, with formalities—notice, registration, and deposit.”¹⁸

Given the formalities required, many copyrightable works were never actually copyrighted. Early copyright records for seven states (including Massachusetts and Pennsylvania, home to two of the three major publishing centers of the time) show that fewer than 800 works were registered for copyright protection between 1790 and 1800, despite the fact that over 15,000 American imprints are known for the same period.¹⁹ An expert on these early copyright records has estimated that “[e]ven if the lost . . . copyright records [from the other six states] were added to these figures and the number of reprinted English works ineligible for copyright were subtracted [from the total number of imprints], it is unlikely that the percentage of American books that were copyrighted would be significantly larger.”²⁰ This suggests that in its early years, copyright actually protected perhaps only about five percent of the total output of copyrightable works. In fact, the number may have been even smaller, as it appears that for many registered works, the deposit requirement may not have been fulfilled.²¹ Even as late as 1958, when the required formalities were considerably less onerous than they had been before 1909, Professor Kaplan noted that “a very great amount of material published domestically and capable of copyright is not in fact published with notice and passes at once into the public domain without ever touching the Copyright Office.”²²

In addition, the formalities required to obtain copyright in the eighteenth and nineteenth centuries meant that entire categories of common works were unlikely to be protected by copyright. Professor Neil Netanel has observed that the formalities

17. See, e.g., *Baker v. Taylor*, 2 F. Cas. 478 (C.C.S.D.N.Y. 1848) (No. 782).

18. S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 17, THE REGISTRATION OF COPYRIGHT 15 [hereinafter STUDY 17] (Comm. Print 1960).

19. FEDERAL COPYRIGHT RECORDS, *supra* note 9, at ix, xxii. Records of state copyright protection before the adoption of the Constitution indicate similarly that “[f]ew authors and publishers took advantage of the protection offered” by state copyright acts before 1790. *Id.* at xx.

20. *Id.* at xxii. See also Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1061 (2001) (“vast majority” of published work in first decades of U.S. history was not copyrighted).

21. In the early years of U.S. copyright, compliance with the deposit requirement appears to have been spotty at best. See Roger E. Stoddard, *United States Copyright Deposit Copies of Books and Pamphlets Printed Before 1820*, 13 PUBLISHING HISTORY 5, 5 (1983); Frederick R. Goff, *The First Decade of the Federal Act for Copyright, 1790-1800*, in ESSAYS HONORING LAWRENCE C. WROTH 101, 102 (1951). (“This provision does not appear to have been too effectively enforced for between January 19, 1796, and the end of 1800 the register of receipts kept by the Secretary of State records only about a hundred titles . . .”).

22. STUDY NO. 17, *supra* note 18, at 33. Professor Kaplan noted in the study that “Much informational material—e.g., newspapers, State publications, financial reports—thus loses copyright protection, as do many journals issued by scientific, technical, and professional societies and institutions.” *Id.*

required by early copyright statutes “for all practical purposes, excluded from protection the newspapers, magazines, broadsides, and pamphlets that comprised a significant part of print culture.”²³ Indeed, “[w]hole categories like almanacs, juvenile stories, broadsides, sermons, speeches, newspapers, government documents, and club and society rules and charters are almost entirely absent” from the surviving copyright registration records from 1790 to 1800, even though “these were the staples of early American printers.”²⁴ Many works of authorship were thus available for use by subsequent authors, distributors, and the public, free of copyright control because the original authors never obtained copyrights in those works. Publishers took advantage of this availability. For many years, magazines²⁵ and newspapers²⁶ freely reprinted material that had originally been printed elsewhere but that was not protected by copyright.

Even when authors did properly secure copyright protection for their works, that protection lasted only for a fairly short time. Between 1790 and 1831 the maximum term of copyright protection was twenty-eight years, and from 1831 until 1909 the maximum term was forty-two years.²⁷ But most works were protected for a shorter term, since throughout this entire period the final fourteen years of protection was available only if the author (or, in most cases the author’s survivors)

23. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 355 n.325 (1996). See *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872) (improbability of newspaper publisher complying with detailed formalities to obtain copyright protection indicates that Congress did not intend newspapers to be considered “books” within the subject matter of 1790 Copyright Act); CURTIS, *supra* note 15, at 109 n.3 (“In the United States, in order to claim the benefit of the statute, it would be necessary to enter each volume or number of the [periodical] work.”); DRONE, *supra* note 7, at 170 (“[I]t will be necessary to obtain a separate copyright for each issue of the publication. In the case of a daily newspaper, this will be found inconvenient and perhaps impracticable. In practice, it is not done.”).

24. FEDERAL COPYRIGHT RECORDS, *supra* note 9, at xxii. See also Barbara Ringer, *Two Hundred Years of American Copyright Law*, in TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 117, 132 n.17 (1977) (“Indeed the typical colonial printer’s output consisted primarily of government proclamations, political documents (which might be subject to an exclusive grant from the governor), blank forms, personal printing jobs, sermons, handbooks, and newspapers. Most ‘books’ sold by printers during this era were imported.”) (citations omitted).

25. “Magazines freely reprinted from each other, without further payment to the writer, until [two very successful magazines] began to put some curbs on the practice in 1845 by copyrighting the contents of their magazines.” JOHN TEBBEL, *THE AMERICAN MAGAZINE: A COMPACT HISTORY* 70 (1969). See also *id.* at 20 (“Most of the [*Saturday Evening Post*]’s contents in its first five years [starting in 1821] was clipped and pasted from other publications by its editor”); *id.* at 28 (noting that early 19th-century editors responded to a dearth of able contributors by “clipping and pasting”).

26. FRANK L. MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS, 1690 TO 1940*, at 136-37 (1941) (noting that most content in “country” papers in the 1783-1801 period “was acquired by means of scissors and paste-pot”); *id.* at 153-55 (describing how newspapers relied on “exchange” copies of other papers for content); *id.* at 198.

27. 1790 Copyright Act (Act of May 31, 1790), ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (providing for an initial term of fourteen years and a renewal term of fourteen years); 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, §§ 1, 2, 4 Stat. 436, 436-37 (repealed 1870) (providing for initial term of twenty-eight years and renewal term of fourteen years); 1870 Copyright Act (Act of July 8, 1870), ch. 230, §§ 87, 88, 16 Stat. 198, 212-13 (repealed 1909) (same); Rev. Stat. §§ 4953, 4954 (1873) (same). In 1909 the maximum term was extended to fifty-six years. 1909 Copyright Act (Act of Mar. 4, 1909), ch. 320, § 23, 35 Stat. 1075, 1080 (repealed 1976).

complied with prescribed renewal formalities.²⁸ If statistics from the early twentieth century are any guide, few copyrighted works were renewed during the first century of U.S. copyright law. From 1910 until 1928, for works created between 1883 and 1900, no more than five percent of the copyrighted works expiring in any one year were renewed. Although the trend was toward gradually increasing numbers of renewals, even by 1959 fewer than fifteen percent of expiring copyrights were renewed.²⁹ It seems likely, then, that between 1790 and 1831 most copyrights expired after fourteen years and between 1831 and 1909 most copyrights expired after twenty-eight years.

Thus, for much of the early history of copyright in the United States, infringement was likely to be somewhat infrequent, because few works were protected by copyright.³⁰ Even as the categories of works protected by copyright continually expanded in this period, the requirement of strict compliance with formalities to obtain protection meant that much material never obtained a copyright at all, and most material that was protected by a properly secured copyright entered the public domain after a relatively short time.

b. Few Activities Prohibited By Copyright

Another reason for the low risk of infringing a copyright in the early years is that the law allowed copyright owners to exclude others only from a fairly narrow range of activities. From the beginning, copyright protected an author's right to engage in activities that we would today classify as reproduction—printing and reprinting—and distribution—selling, exposing to sale, and importing.³¹ Other activities using the copyrighted work, such as performing the work publicly, did not generally constitute infringement.³²

28. 1790 Copyright Act § 1; 1831 Copyright Act § 2; 1870 Copyright Act § 88; Rev. Stat. § 4954 (1873). The division of copyright protection into two separate terms continued for works copyrighted under the 1909 Act but ended with works created after December 31, 1977. 90 Stat. 2541, 2573, (codified at 17 U.S.C. §§ 302, 304).

29. S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 31, RENEWAL OF COPYRIGHT 222 (Comm. Print 1960).

30. The roughest of statistics on reported infringement lawsuits offers some support for this view. The Copyright Office has published a comprehensive collection of reported copyright decisions between 1790 and 1909. From 1790 to 1819, there are only four reported decisions involving statutory copyrights; for the 1820s and 1830s there are seven in each decade; from 1840 to 1849 there are twenty-four decisions; and from 1850 to 1859 there are twenty-eight. No doubt other decided cases were not reported, and this count of decisions does not account for multiple reported decisions in a single case, but the statistics are at least suggestive.

31. 1790 Copyright Act § 1 (securing to author “the sole right and liberty of printing, reprinting, publishing and vending” copyrighted maps, charts, and books); Act of Apr. 29, 1802, ch. 36, 2 Stat. 171, 171 (repealed 1831) (granting same rights in copyrighted prints and engravings); 1831 Copyright Act § 1 (granting same rights in all copyrightable works). Cf. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.) (granting copyright proprietor the “sole Right and Liberty” to “Print, Reprint, or Import” and to “Sell, Publish, or Expose to Sale” the copyrighted book).

32. See, e.g., CURTIS, *supra* note 15, at 300 (“As to what constitutes infringement, in the case of dramatic and musical compositions, it has been well settled that representation of a published play is not

Because copyright owners had only limited rights against reproduction and distribution, the risk of infringing a copyright was largely limited to those who created, printed, and distributed copyrightable works. Authors or printers who copied from prior works might be in danger of infringing, as might those who sold copies of their works. Professor Larry Lessig has pointed out that in practice, early copyright restrictions in the United States fell on very few shoulders: “While in principle anyone could violate the exclusive right to vend, in 1790, there were only 127 printing establishments in the United States.”³³ Those at risk, of course, would be those most likely to have an awareness and understanding of copyright law, since they might well use the law to protect their own works.³⁴

Private individuals not engaged in the business of creating and disseminating works of authorship probably had little awareness or understanding of copyright law, but they had little need, because they were at very little risk of committing copyright infringement.³⁵ As Justice Brewer wrote in an 1888 decision,

[T]he effect of a copyright is not to prevent any reasonable use of the book which is sold . . . I may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it upon the market, for in so doing so I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes on the copyright.³⁶

Almost all of the uses that a private individual might make of a copyrighted work would not have run afoul of the copyright owners’ rights for most of the nineteenth century. Reading a book aloud in public, singing or playing a song in public (even for remuneration), staging a performance of a play—all of those activities would constitute *prima facie* acts of copyright infringement under modern law but would have in no way trespassed on the rights of copyright owners for most of the period between 1790 and 1870.³⁷

a violation of the copyright in the book itself.”); AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 155-56 (1899) (“The law [under the 1842 British Copyright Act], however, stupidly enough, does not regard the representation on the stage of a dramatic piece as an infringement of the printed book out of which it has been constructed.”).

33. Lessig, *supra* note 20, at 1061 (2001).

34. See JESSICA LITMAN, DIGITAL COPYRIGHT 18-19, 29-30 (2001).

35. Lessig, *supra* note 20, at 1063 (contrasting narrow reach of early copyright law to contemporary copyright law as “regulation of everyone who has any connection to the most trivial of creative authorship”).

36. *Stover v. Lathrop*, 33 F. 348, 349 (C.C.D. Colo. 1888).

37. In 1856 Congress prospectively granted owners of copyrighted dramatic compositions the exclusive right “to act, perform, or represent the same . . . on any stage or public place.” Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138-39 (repealed 1870). The right did not extend to public readings of literary compositions, see DRONE, *supra* note 7, at 495, 629, or to public performances of musical works until 1897.

One possibly common activity—copying out extracts of a work by hand—also appears unlikely to have constituted infringement in this period. Although such copying would have meant reproducing portions of a protected work as that term is currently understood, it presumably did not constitute printing, reprinting, or publishing the work, as the statute defined the copyright owner’s basic right for much of this period. The nineteenth-century statutes eventually prohibited “copying” as well, though this may have been a term of art dealing with engraving. Even if the statutory provision against

Even within the industries that created and disseminated works of authorship, fewer uses of copyrighted works were prohibited than are today. Most significantly, early copyright law did not give copyright owners a general right to prevent others from making what contemporary law would call derivative works.³⁸ Copyright barred verbatim or “duplicative” copying but allowed most “imitative” copying that went beyond duplication. (Indeed, with respect to remedies in law for infringing a copyright in a book, at least one court held that even verbatim copying of only part of a work, rather than the whole, was not subject to the statute’s penalties).³⁹ The 1853 case of *Stowe v. Thomas*, decided by Justice Grier on circuit, is the clearest judicial statement on copyright infringement as limited to direct copying of a protected work.⁴⁰ Harriet Beecher Stowe, author of the enormously popular and successful novel *Uncle Tom’s Cabin*, sued Thomas for copyright infringement based on the defendant’s publishing a German translation of the copyrighted novel, and the defendant claimed that translating a copyrighted book did not infringe the copyright owner’s exclusive statutory rights of “printing, reprinting, publishing, and vending such book.”⁴¹ The court ruled that Stowe could only prevent Thomas from printing and selling a “copy” of her book and agreed with Thomas that a translation was not a “copy”:

[T]he only property . . . which the law gives to [the author], is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. . . . A “copy” of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or “copy” of the same “book”. . . . To call the translations of an author’s ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation. . . . A translation may, in loose phraseology, be called a transcript or copy of [the author’s] thoughts or conceptions, but in no correct sense can it be called a copy of her book.⁴²

Therefore, one who translated a copyrighted work did not violate the statute because she had not printed a “copy” of the work but had printed her own, new

“copying” extended to handwritten excerpts from a literary work, courts of the time might have found such copying to have been a noninfringing use, and of course in any event the likelihood that a copyright owner would detect such activity and go to the expense of trying to stop it must have been virtually nil.

38. A “derivative work” is defined by current law as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2000). On early copyright owners’ inability to prevent derivative uses, see Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 211-13 (1983). On the limited statutory right of early copyright owners to prevent derivative versions of certain copyrighted works, see *infra* text accompanying notes 160-71.

39. See *Rogers v. Jewett*, 20 F. Cas. 1114 (C.C.D. Mass. 1858) (No. 12,012); see *infra* text accompanying notes 170-71.

40. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514); 2 Am.Law.Reg. 210.

41. 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 1, 4 Stat. 436 (repealed 1870).

42. *Stowe*, 23 F. Cas. at 206-08.

work.⁴³ Although the case involved only translations, the court's language suggests that its reasoning encompassed other derivative works, such as adaptations or sequels:

By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. [Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza.] All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose.⁴⁴

The opinion thus not only holds that a translator could produce a German version of *Uncle Tom's Cabin*, but also suggests that “playrights” might produce a stage version of the novel, “imitators” might write other novels using the same characters, and “poetasters” might tell the novel's story in “doggerel,” all without violating Stowe's copyright in the work. Producing a set of paintings or prints depicting scenes from the novel's story might not have infringed the copyright, either.⁴⁵

Expansion of copyright to bar such derivative productions came only gradually.⁴⁶ Copyright statutes did not grant owners the exclusive rights to dramatize and translate a copyrighted work until 1870, and even then the copyright

43. The particular result in *Stowe* regarding translations was not uncontroversial. Six years before the decision, one of the earliest American treatises on copyright noted that the question was an open one and opined that translation *should* constitute an infringement. CURTIS, *supra* note 15, at 290-91. The arguments printed in the case report acknowledge that jurists appear to have been divided on the question, and cite French and Anglo-American commentators (including Curtis) both in favor of and opposed to the position that a translation was a copyright infringement. *Stowe*, 23 F. Cas. at 205-07. Earlier authorities, though, are consonant with the result; Justice Grier's opinion in *Stowe* quotes from three opinions in the landmark British case of *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1769), in support of his position. For later criticism of the result, see, e.g., DRONE, *supra* note 7, at 450-55. For the British position on translations, see BIRRELL, *supra* note 32, at 154 (“[N]othing is said in the [British 1842 Copyright] Act about *translations*, nor is it clear even at the present time, apart from the provisions of the International Copyright Acts, whether an unauthorised translation of a protected work is in law piratical or not.”).

44. *Stowe*, 23 F. Cas. at 208 (citations omitted) (emendation in original).

45. An early opinion suggests that producing an illustration based on a copyrighted text would not constitute infringement: “But if the similitude [between the engravings of fencers made by the plaintiff and by the defendant] can be supposed to have arisen . . . from the artist having sketched the designs merely from reading the letter-press of the plaintiff's work [on fencing], the defendant is not answerable.” *Roworth v. Wilkes*, 1 Camp. 94, *quoted in* *Emerson v. Davies*, 8 F. Cas. 615, 623 (C.C.D. Mass. 1845) (No. 4,436). With respect to derivative uses of musical compositions, see *Jollie v. Jaques*, 13 F. Cas. 910, 913, 914 (C.C.S.D.N.Y. 1850) (No. 7,437) (stating that “the adaptation of [a copyrighted musical composition], either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement,” would be infringement, but “that portions [of such composition] may be taken and mixed up in [a] new arrangement and composition, cannot probably be denied; and there may be great difficulty in distinguishing between those new compositions that do, and those that do not absorb the merit of the original work”).

46. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1885 (1990). On copyright owners limited rights after 1831 to prevent imitative copies of their visual or musical works, see *infra* text accompanying notes 160-71.

owner had to formally reserve those rights to herself.⁴⁷ Thus, early copyright law left subsequent authors free to make significant derivative or transformative uses even of copyrighted works.⁴⁸ Jane Ginsburg has explained this principle in connection with informational works, the bulk of the works protected under early copyright law:

The scope of early copyright protection in informational works, then, was rather thin. It extended to the precise contribution of the first author, but generally not to significant variations that others might make on the underlying information. In modern copyright terms, early copyright jurisprudence recognized the copyright holder's exclusive right of reproduction, but not an exclusive right to make derivative works⁴⁹

Because early copyright law left subsequent authors quite free to make substantial use of copyrighted works in their own creations, those authors, and their publishers and distributors, were less likely to infringe a copyrighted work at all, innocently or otherwise.

For all of these reasons—the grant of copyright protection only to limited (though ever-expanding) categories of works, the required strict compliance with formalities that left most works of authorship in the public domain, the short duration of copyright protection, and (most significantly) the limited rights of the copyright owner against reproduction and distribution—copyright infringement in general was far less likely to occur during the first 120 years of U.S. history than it is today. A lower probability of committing copyright infringement necessarily meant fewer occasions on which a defendant would risk liability for committing copyright infringement unknowingly. In addition, copyright law essentially regulated not the general citizenry but only those involved in the industries built on authorship—those most likely to be aware of, and familiar with, copyright law, and therefore least likely to infringe in complete innocence.

2. Clear Notice: The Ease of Determining a Work's Copyright Status

Even within the limited area in which copyright infringement could occur in copyright's early history, the structure of the copyright system sought to make unknowing infringement particularly unlikely. In large part the system was set up in a way that would allow many potential users of a work to learn easily in advance

47. 1870 Copyright Act (Act of July 8, 1870), ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909). Drone notes that the statute does not prescribe the manner of reserving the translation right, but opines that “[a] notice to that effect, printed on the title-page or that following, would doubtless be enough.” DRONE, *supra* note 7, at 445. A 1792 French copyright decree similarly required playwrights to print a notice at the head of a play's text retaining the right to publicly perform the play if they wished to do so. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991, 1008 (1990).

48. See, e.g., Patterson, *supra* note 6, at 383 (early protection only against copying by duplication, not by imitation).

49. Ginsburg, *supra* note 46, at 1878.

whether their use would constitute infringement.⁵⁰ The system made fairly clear which limited uses of a copyrighted work would infringe and then made it fairly easy to determine whether a particular work was copyrighted. Thus, as noted in the preceding subsection, early copyright owners primarily had an exclusive right to print or reprint their works or any substantial material portion thereof. Fundamentally, copyright law protected against verbatim duplicative copying that we would describe today as piracy (as opposed to the wide scope of protection granted by copyright today). Thus, the primary question facing a potential infringer was not whether her activities were within the scope of the copyright owner's exclusive rights, because those rights were so limited—confined essentially to literal reprinting of the entire work or a substantial portion thereof. Anyone with the principal means of violating the author's rights—a printing press—would surely know that reprinting a copyrighted work was a violation of the copyright owner's rights.⁵¹ Instead, the main question facing a printer who wished to avoid committing copyright infringement was whether a particular work was in fact copyrighted and could not be reprinted without infringing.

From its very beginnings, Anglo-American copyright law sought to make that question fairly simple to answer. The following sections explain how British copyright law first attempted to do so, and how U.S. copyright law took up the British system and modified it to largely succeed in the task. As a result, anyone engaged in the main activity regulated by copyright—printing copies—could easily avoid unknowingly infringing another's copyright by using the methods provided by copyright law to determine whether a work was copyrighted and therefore should not be reprinted without the copyright owner's consent. Anyone who printed a work without bothering to determine its easily verifiable copyright status might properly be deemed to have had constructive knowledge that the work was protected and that reprinting it was prohibited.

a. Britain

The attempt to make a work's copyright status easily discoverable originates in the original Statute of Anne, which shows by its very text the concern for protecting innocent infringers. The framers of the Statute were clearly concerned about the possibility that a person might be held liable for infringing a book's copyright based on acts committed with no awareness of the copyright owner's rights and no intent to infringe those rights, as the text demonstrates: “[M]any Persons may through Ignorance offend against this Act unless some Provision be made whereby the Property in every such Book as is intended by this Act to be secured to the Proprietor or Proprietors thereof may be ascertained”⁵²

50. As noted below, copyright more successfully achieved this goal in the United States than in Britain.

51. At the very least, it seems that anyone who owned a printing press *should* have known that, and could be held to that objective standard of knowledge even in the absence of actual knowledge.

52. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.). Provision was also made for recordation of a copyright owner's consent for another to print a copyrighted book. *Id.* For a brief discussion of these

Having seen the risk of innocent offense, the drafters attempted to reduce this risk through a registration system. Drawing on the existing private registry maintained by the Stationers' Company, the guild that regulated printers, publishers, and booksellers, the Statute provided that:

nothing in this Act contained shall be construed to extend to subject any Bookseller, Printer, or other Person whatsoever to the Forfeitures or Penalties therein mentioned⁵³ for or by reason of the printing or reprinting of any Book or Books without such Consent as aforesaid unless the Title to the Copy of such Book or Books hereafter published shall, before such Publication be entred [sic], in the Register Book of the Company of Stationers in such manner as hath been usual which Register-Book shall at all times be kept at the Hall of the said Company⁵⁴

Thus, although the Statute barred the unauthorized printing, reprinting, or importing of a copyrighted book without expressly requiring that the offender know of the work's protected nature, avoiding such an offense was apparently, in the drafters' view, as simple as checking to see whether the book had been registered. To this end, the Statute further provided that the Stationers' "Register-Book may, at all Seasonable and Convenient times, be Resorted to, and Inspected by any Bookseller, Printer, or other Person, for the Purposes before mentioned, without

provisions as protection for innocent infringers, see Dane S. Ciolino & Eric A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 359 (2002).

53. The Statute provided for forfeiture of every infringing copy and the payment of "One Penny [sic] for every Sheet which shall be found in [the infringer's] Custody, either printed or printing, published or exposed to Sale," with the fine to be split equally between the person suing and the crown. 8 Ann. c. 19. The *qui tam* aspect of the Statute presumably traces to similar provisions in the Licensing Act of 1662, which by allowing citizens to sue for the printing of *unlicensed* works apparently sought to encourage enforcement of state censorship. See L. Ray Patterson & Craig Joyce, *Copyright in 1791*, 52 EMORY L.J. 909, 920-21 n.28 (2003).

54. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.). Additional provisions provided for the issuance of a certificate of entry and for obtaining the benefits of entry, even if actual entry was denied, by publishing an advertisement. *Id.*

Although the Statute's registration requirement was only a limitation on recovery of the penalties and forfeitures provided in the Statute, those appear to have been the only remedies thought worthwhile when the law was enacted. "The [printers] applied to Parliament in 1703, 1706, and 1709 for a bill to protect their copyrights They had so long been secured by penalties that they thought an action at law an inadequate remedy, and had no idea a bill in equity could be entertained but upon letters patent adjudged to be legal. A bill in equity in any other case had never been attempted or thought of: an action upon the case was thought of in [one case], but was not proceeded in." BIRRELL, *supra* note 32, at 91-92 (1899). Only later did injunctive relief come in to frequent use in English copyright cases. "One of the grievances the statute of Anne was intended to alleviate was the absence from our common law of pains and penalties, and these the statute inflicted. But the booksellers did not in practice make much use of penalties. They suddenly fell in love with the High Court of Chancery, and sought injunctions to restrain the publication of the books of which they alleged themselves to be the proprietors. . . . [A]s just about the same time as the passing of the Act of Queen Anne the Chancery judges appear to have relaxed the rule . . . , and to have granted interim injunctions to persons who alleged themselves to be the proprietors of copyright, proceedings in Chancery became the rule. *Id.* at 101-02; see also *id.* at 133-34. See also Patterson, *supra* note 6, at 382 n.43 (quoting former bookseller William Johnston's 1774 statement in parliamentary debate that registration was generally not made because relief by a bill in Chancery was more complete than the penalties in the Statute of Anne, which were not "worth contending for").

any Fee or Reward.”⁵⁵ The Statute envisioned a complete, central registry of all claims of copyright protection, accessible to anyone who wished to check whether printing a book would infringe another’s copyright. Under such a system, anyone who printed a book not knowing that it was copyrighted by another *should* have known that fact, and the Statute can be seen as essentially imputing constructive knowledge to such a person based on the Register-Book.

Given the nature of the printing industry at the time the Statute was enacted, such a registration system might possibly have offered effective protection against liability for unknowingly violating the Statute’s prohibition on unauthorized printing or reprinting of copyrighted books.⁵⁶ The investment involved in printing a book was no doubt large enough to make the effort involved in checking the Register-Book worthwhile before making such an investment. But as printers were increasingly located outside of London, where the records were kept, consulting the registers would be at least inconvenient for many printers.⁵⁷ And given the number of books published annually in the early decades of the 1700s, searching fourteen years of entries without modern search aids would probably have been very time consuming. In any event, few printers appear to have complied with the registration requirements, so the system designed by the Statute’s drafters did not create the intended central, comprehensive source of information about copyright claims. Nevertheless, the premise of the Statute of Anne is clear: because copyright protection presented a serious risk of imposing liability on those who had infringed innocently, potential infringers were to be provided with a simple means of determining whether the book they sought to reprint was in fact copyrighted.

55. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.).

56. In Britain, registration proved ineffective as a legal matter for achieving the stated goal of providing notice so as to avoid innocent infringement. *See, e.g., RANSOM, supra* note 5, at 101. Copyright owners resisted registration, apparently because they objected to the requirement that nine copies of the registered book accompany the registration. Eventually, in *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.), a British court held that registration was not a condition for acquiring copyright protection, and not even a condition for bringing a damages suit for infringement, but only a condition for bringing a suit for the statutory penalties for infringement, which by then had become a less important remedy to the owner than a damage suit or, particularly, an injunction, *see supra* note 54. In 1842, Parliament amended the statutes to make registration a prerequisite to any infringement suit, but the result appears to have been that few works were registered, and then only at the point when litigation was contemplated. In 1911, a new British copyright law omitted any provisions on registration entirely. For a discussion of the evolution of registration under British law, *see STUDY NO. 17, supra* note 18, at 1-9. In the United States, even before the Supreme Court had decided that registration was an absolute condition not simply on remedies but on obtaining a valid copyright, Chancellor Kent, noting the British interpretation, declared that “[t]he act of congress [of 1790] is not susceptible of that construction.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 376 n. a (2d. ed. 1832).

57. The eighteenth century appears to have witnessed a growth in printers outside of London. *See, e.g., BIRRELL, supra* note 32, at 100 (describing controversies between London booksellers and “country” and Scots booksellers); Stephen Stewart, *Two Hundred Years of English Copyright Law*, in TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW 81, 86 (1977).

b. United States

The first U.S. federal copyright act, enacted by the first Congress in 1790, was modeled very closely on the Statute of Anne.⁵⁸ Although the text of the 1790 Act, unlike that of the Statute of Anne, did not expressly advert to the danger that “many Persons may through Ignorance Offend against this Act, unless some Provision be made whereby the Property in every such Book . . . may be ascertained,” the 1790 Act nonetheless did adopt the mechanism used by the Statute of Anne to reduce that danger.⁵⁹ The Act created a recordation system and limited “the benefit of [the] act” to those persons who complied with the recordation requirements.⁶⁰ Entry was not, of course, required in the Stationers’ Register-Book in London; instead, the law required an author or proprietor, before the work’s publication, to deposit “a printed copy of the title of [the] map, chart, book or books, in the clerk’s office of the district court where the author or proprietor shall reside.”⁶¹

The original recordation scheme established in the 1790 Act seems unlikely to have been particularly effective in achieving the goal of providing potential infringers with a convenient means of determining a work’s copyright status before they began printing or publishing it. Because a copyright owner had to record a work’s title only in the district court of the district in which she resided, copyright registration records were scattered throughout the United States.⁶² Instead of being

58. Compare Statute of Anne, 1710, 8 Ann. c. 19 (Eng.) with 1790 Copyright Act (Act of May 31, 1790), ch. 15, 1 Stat. 124 (repealed 1831). The very title of the 1790 Act, “An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,” is almost identical to that of the Statute of Anne: “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.” See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 307 (1827) (describing 1790 Act as “taken generally from the provisions in the statute of 8 Anne, ch. 19”); Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. LEGIS. 223, 223 (1966) (“The Statute of Anne . . . served as a model for the first federal copyright act, passed in 1790.”); Patterson & Joyce, *supra* note 53, at 931-33 (quoting Noah Webster on suggestion for Statute of Anne as source for states in drafting Confederation-era copyright laws and indicating it as source of Continental Congress resolution to states on copyright).

59. State copyright statutes adopted before the Constitution generally also required registration and/or deposit of some sort in accordance with the Statute of Anne, though the degree to which the states followed the details of the Statute varied widely. See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (Rev. ed. 1963) [hereinafter COPYRIGHT ENACTMENTS] (only New Hampshire, New Jersey and Rhode Island had no registration or deposit requirements, while Delaware had no copyright act). Some of the state statutes echoed the Statute of Anne’s language and indicated that the registration or deposit system was needed because otherwise many people might violate the statute through ignorance. See, e.g., Maryland’s “An Act respecting literary property,” *id.* at 6; South Carolina’s “An Act for the encouragement of arts and sciences,” *id.* at 12.

60. 1790 Copyright Act § 3.

61. *Id.* Although the 1790 Act, unlike the Statute of Anne, does not expressly require the court clerk to allow public access to the copyright recordations kept in the clerk’s office, the drafters of the 1790 Act were clearly concerned that claims of exclusive rights under the Act be publicly known.

62. The 1790 Act did require copyright owners to deposit a copy of their copyrighted work, after publication, with the Secretary of State, *id.* § 4, so it is possible that a central repository of deposit copies, though not registration records, could have existed, though it is unclear whether the State Department would have maintained the deposit copies as a comprehensive and open collection. In fact,

able to determine a work's copyright status by checking a single registry, as envisaged in the Statute of Anne, an American printer would have to check the records in each federal district court, of which there were thirteen in 1790.⁶³ Given the state of transportation and communications at the time, it seems unlikely that many printers would have been able to go to the expense of checking such widely dispersed records themselves or even through agents.⁶⁴ Thus, while the registration system in the United States grew out of the early English system with the purpose of providing a potential infringer with a convenient method for determining whether a work was copyright protected, the system as introduced in the United States seems to have been ill-suited to achieving that purpose under the conditions that prevailed here at the time.

However, not long after the 1790 Act, Congress adopted a much more effective solution to the problem of helping potential users determine a work's copyright status in order to avoid unknowing infringement. In the face of the lack of a central registry, as well as the difficulty and expense of consulting any single registry in a growing nation like the United States at a time when transportation and communications were relatively difficult, the solution adopted was to require copyright owners themselves to give notice of their copyright claim to the world at large.

A form of such notice had been required by the 1790 Act, which demanded that the copyright claimant not only record a copy of the title with the court but also publish the fact of recordation within two months from the date of deposit "in one or more of the newspapers printed in the United States, for the space of four weeks."⁶⁵ Thus, information about copyright claims would be available not only in

though, it appears that the deposit obligation was not much complied with. *See supra* note 21.

63. 1790 Judiciary Act, § 2, 1 Stat. 73, 73 (1790) (establishing thirteen districts). The act provided that each district court's records were to be kept at one place, even when that district court held sessions in more than one location in the district. *Id.* at § 3.

64. This lack of a central registry was remedied by the 1831 Copyright Act, which supplemented the basic requirement of prepublication registration in the district courts with a mandate that the clerks of the district courts, "at least once in every year, . . . transmit a certified list of all such records of copyright, including the titles so recorded, and the dates of record, . . . to the Secretary of State, to be preserved in his office." 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 4, 4 Stat. 436, 437 (repealed 1870). The records of the Secretary of State relating to copyright were later ordered transferred to the Department of the Interior, § 8, Act of Feb. 5, 1859, 11 Stat. 379, 380-81 (1859), and still later to the Librarian of Congress, 1870 Copyright Act (Act of July 8, 1870), ch. 230, § 85, 16 Stat. 198, 212 (repealed 1909). In 1870, the law was revised so that a copyright claimant was required to make the prepublication deposit of the title to the Librarian of Congress, who was to maintain such records. 1870 Copyright Act §§ 90-91; Rev. Stat §§ 4956-57 (1873).

Thus, starting with works published in 1831, determining that a work was *not* protected by copyright would have been as simple as searching the deposit records in Washington, D.C. (though even that would no doubt have been somewhat difficult and expensive for printers and publishers located elsewhere in the country), taking into account the delay in transmission of copies of district court records, since the statute required such transmission only once a year. Determining that a work *was* actually protected by copyright would be more difficult, since registration of the work's title was only one of the preconditions to obtaining protection and a copyright claimant shown in the district court's registration records might have failed to comply with one of the other formalities and thus thrust the work into the public domain. *See supra* text accompanying notes 12-22.

65. 1790 Copyright Act § 3. In addition, the author or proprietor of the work was required to

each district court but also in the nation's newspapers.⁶⁶ This original notice requirement, however, seems unlikely to have been much more effective than the original dispersed registration system in making others aware of the author's or publisher's copyright claim. The number of newspapers printed in the United States in the 1790s was surprisingly large (over 200 newspapers were being published at the beginning of 1801),⁶⁷ and access to all of the newspapers in which a registration might be published was no doubt difficult at the time.⁶⁸ And, because the 1790 Act granted rights that lasted for an initial term of fourteen years from the recording of the title,⁶⁹ determining a work's status would have required searching through all of the U.S. newspapers in which the notice might have been published for a period of fourteen years, probably a fairly high obstacle for most printers and publishers of the day. As Justice Baldwin put it in the 1830s, "A publication in any newspaper, printed anywhere in the United States for four weeks, would be a compliance with the law; it cannot be pretended, that this would answer any valuable purpose as notice, or for information, to warn any person from invading the copyright."⁷⁰

After just twelve years of U.S. copyright law, however, Congress adopted a notice requirement that far more effectively allowed potential copiers to determine a work's copyright status.⁷¹ In 1802, Congress amended the 1790 Act to provide that anyone claiming copyright protection for a work

deposit a copy of the work with the Secretary of State. *Id.* § 4; *see supra* text accompanying note 14.

66. *See Nichols v. Ruggles*, 3 Day 145 (Conn. 1808) ("The publication in the newspaper is intended as legal notice of the rights secured to the author."). The conclusion of the court in this case that the publication and deposit requirements of the 1790 Act were merely directory and did not affect the author's copyright was repudiated in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

67. MOTT, *supra* note 26, at 113 n.1. Although "202 papers were being published January 1, 1801," the number of newspapers that would have to be checked for copyright notices was much larger, since many more newspapers existed for short times during the period. Mott notes that "about 450 new papers" were begun between 1783 and 1801, and that "[m]any of these existed but briefly." *Id.*

68. Circulations were small and delivery was often delayed by poor transportation. *See MOTT, supra* note 26, at 159-61, 193-98. *But see id.* at 159, 195 (noting that coffee houses and taverns in large cities "maintained . . . reading rooms . . . at which subscribers could read newspapers from other cities and from abroad").

69. The Act granted a second term of fourteen more years if the author was living at the end of the initial term, but to secure the second term the recording and publication requirements had to be complied with anew. 1790 Copyright Act § 1.

70. *Wheaton*, 33 U.S. at 698y (Brightley's 3d ed.) (Baldwin, J., dissenting). *But see Wheaton v. Peters*, 29 F. Cas. 862, 887 (C.C.E.D. Pa. 1832) (No. 17,486), *aff'd*, 33 U.S. 591 (1834) ("[T]he publication in the newspapers, and the delivery of a copy of the book to the secretary of state are, at least, as important, and more exact and diffusive in their information to the public as the deposit of a printed copy of the title in the clerk's office.").

71. Problems with the adequacy of the recordation formalities of the 1790 Act in providing information to those who might otherwise unknowingly infringe upon the rights of authors and proprietors may well have motivated this first amendment of the 1790 Act, but the published legislative history for the 1802 amendment offers no indication of the motivations for its passage. *See* 11 ANNALS OF CONG. 202, 203, 206, 251, 1129, 1249. A similar notice requirement had been included in Pennsylvania's state copyright statute of 1784, but not in any other state statute before the Constitution. COPYRIGHT ENACTMENTS, *supra* note 59, at 11 ("[N]o author or proprietor of any book or pamphlet shall be entitled to the benefit of this act unless he shall insert on the back of the title page a copy of the certificate of entry obtained of the protonothary aforesaid. . .").

shall, in addition to the [registration and notice formalities set forth in the 1790 Act] . . . give information by causing the copy of the record, which, by said act he is required to publish in one or more of the newspapers, to be inserted at full length in the title-page or in the page immediately following the title of every such book or books⁷²

Printing the record in the book would disclose the copyright claim as well as the claimant's name and the date the work's title was recorded.⁷³ All U.S. copyright acts through the nineteenth century maintained a notice requirement; indeed, mandatory notice remained a cornerstone of U.S. copyright law until 1989.⁷⁴

The notice requirement added in 1802 obviously provided significantly greater protection for possible unknowing infringers than did the formalities of the original 1790 Act or the Statute of Anne. From January 1803 forward, each printed copy of a book, map, chart, or other work for which copyright protection was properly claimed would have to carry with it the information that such protection was claimed, the identity of the claimant, and the date on which the term of protection began to run, thus obviating the need to consult every newspaper published in the United States during the previous fourteen years, or to search fourteen years of records in every district court in the nation, in order to determine the copyright status of a work. Justice Baldwin summarized the change, and its impact on potential unknowing infringers, in 1834:

72. Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171, 171 (repealed 1831). Separate provision was made for notice on the face of a map, chart, or print, in a form that included the date of recordation, the name of the author, and the state of the author's residence. *Id.* The U.S. provision was not the first instance of requiring a work of authorship to bear its own notice of its protected status. In pre-revolutionary France, printing privileges conveying the right of exclusive publication required "inclusion of the text of the privilege in each printed copy." Ginsburg, *supra* note 47, at 997, 1008 n.70. A similar requirement of publication of notice of exclusive printing rights was apparently part of printing privileges under Jewish law in the sixteenth century. Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 388 n. 148 (2004).

73. The form of the record prescribed in the 1790 Act was as follows:
 "District of to wit: *Be it remembered*, that on the day of in the year of the independence of the United States of America, A. B. of the said district, hath deposited in this office the title of a map, chart, book or books, (as the case may be) the right whereof he claims as author or proprietor (as the case may be) in the words following, to wit: [here insert the title] in conformity to the act of the Congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.' C. D. clerk of the district of . . ."

1790 Copyright Act § 3.

74. The particulars of the notice requirement evolved over time. *See, e.g.*, 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 5, 4 Stat. 436, 437 (repealed 1870) ("no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured" by placing a notice in the form required "in the several copies of each and every edition published during the term secured"); 1870 Copyright Act (Act of July 8, 1870), ch. 230, § 97, 16 Stat. 198, 214 (repealed 1909) ("no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published" in the form required); Rev. Stat. § 4962 (1873); 1909 Copyright Act (Act of Mar. 4, 1909), ch. 320, § 9, 35 Stat. 1075, 1077 (repealed 1976); 1976 Copyright Act (Act of Oct. 19, 1976), §§ 401-02, 90 Stat. 2541, 2576-78.

The publishing the copy of the record on the title leaf, as directed by the act of 1802, was to 'give information.' It was effectual notice, for none who would look at the book would fail to see the impress of copyright on the title-page, or the next succeeding one; so that none could offend ignorantly. [Publication of notice in a newspaper] was mere legal implied notice; [publication of notice on every printed copy of a work] was a notice in fact, which no man could either overlook or mistake.⁷⁵

The requirement that a copyright owner provide notice to the public of her copyright claim on each copy of her work appears to have been an innovation of U.S. copyright law that was well suited to providing potential users of copyrighted works with a simple method for determining the work's copyright status. Because placing a proper notice on *every* copy of a work was a condition precedent to obtaining copyright protection, possessing a copy of a book, map, chart, or print that bore no copyright notice generally meant that the work was not protected by copyright.⁷⁶ If the copy did bear a notice, one could use the date given in the notice as the beginning of the copyright term, and simple addition would tell whether the initial term of copyright on the work had expired.⁷⁷

At least one early court viewed the clear purpose of the registration and notice formalities as protecting potential unknowing infringers from liability. Noting that the statute granted copyright owners valuable rights, the court observed:

But some protection is also due on the other side, that innocent and ignorant invaders of the privilege may not be involved in suits and penalties, by the want of accessible means of information of the subject and extent of the grant. With this wise and just object in their view the legislature, at the same time and in the same instrument by which they confer the privilege, enjoin or direct the person who would enjoy it to do certain things . . . that all may know where to go to be correctly and precisely informed of what it is he claims; what is his right, and that thus they may avoid any infringement of it. This is an essential part of the scheme for the encouragement of authors, so as not to bring others innocently into trouble or, it may be ruin.⁷⁸

75. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 698y (1834) (Brightley's 3d ed.) (Baldwin, J., dissenting).

76. One exception might be if the work had left the possession of the copyright proprietor with the proper notice, which had later been removed by a third party. Courts eventually held that copyright protection was not lost in such circumstances, but no early cases or treatises appear to discuss such a scenario. Another exception might be if the copy without notice was itself pirated; the fact that a third party had without permission printed copies and omitted the required copyright notice would presumably not thrust the work into the public domain. Again, though, this does not appear to have been a significant issue for most of the early years of U.S. copyright law.

77. If the initial term had expired and the length of any possible renewal term had not yet elapsed, then research would be required to determine whether the work had in fact been renewed.

78. *Wheaton v. Peters*, 29 F. Cas. 862, 867 (C.C.E.D. Pa. 1832) (No. 17,486), *aff'd*, 33 U.S. (8 Pet.) 591 (1834). The particular formality at issue in *Wheaton* was the postpublication deposit of copies with the Secretary of State. The court observed that the deposit requirement "seems to me to be intended for the same purposes as the drawings and models of machines in the patent-office; that our citizens may know where to go to be correctly informed what it is that is patented, and not to be led into an infringement of the right by an ignorance of what it is. . . . The use or purpose I have assigned to the delivery of this book is not only reasonable, but necessary for the safety of the citizens against the

The new notice requirement of 1802 was important as a mechanism for making potential infringers aware that a work was protected by copyright and therefore off-limits for general use, but it also allowed potential users to determine that a work was *not* protected by copyright and could be freely used. This purpose of the copyright notice can be seen from the provisions of Section 4 of the 1802 act, which imposed a fine of \$100 on any person who, not having legally acquired the copyright of any book, map, chart, or print, nevertheless printed or published such work and “insert[ed] therein or impress[ed] thereon that the same has been entered according to act of Congress, or words purporting the same, or purporting that the copyright thereof has been acquired.”⁷⁹ The only substantial harm from printing a work with a copyright notice when the work was not in fact protected by copyright would be that the work’s potential users, who would in fact have every right to use it without the consent of the putative copyright owner, might be deterred from such use, or might pay the alleged copyright owner for the right to make such use.⁸⁰ That Congress saw fit to levy a \$100 fine in 1802 to deter such harm indicates the importance of copyright notice as a mechanism for marking off the metes and bounds of which works of authorship were protected by copyright and which were available for free use by the public without fear of infringement.

From the very beginning of Anglo-American copyright law, then, the copyright system primarily used structural mechanisms of clear and limited exclusive rights and copyright registration or notice to guard against the possibility of holding someone liable for unknowingly infringing on another person’s copyright. Copyright primarily prohibited people from reprinting a copyrighted work, and anyone who was contemplating printing a work could fairly easily determine

penalties of the act.” *Id.* at 869-70.

See *Parkinson v. Laselle*, 18 F. Cas. 1211, 1212-13 (C.C.D. Cal. 1875) (No. 10,762) (“[I]n order to enforce his right against infringers he must . . . give notice of his right by the means prescribed . . ., so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision.”) (emphasis supplied); *Wheaton*, 33 U.S. at 698y (Brightley’s 3d ed.) (Baldwin, J., dissenting) (“The publishing the copy of the record on the title leaf, as directed by the act of 1802, was to ‘give information’ . . . so that none could offend ignorantly.”).

79. Act of Apr. 29, 1802, ch. 36, § 4, 2 Stat. 171, 172 (repealed 1831). The penalty remained in subsequent revisions of the law through the 1909 Act, though the amount of the fine was never increased. *See* 1831 Copyright Act § 11; 1870 Copyright Act § 98; Rev. Stat. § 4963 (1873); Act of Mar. 3, 1891, ch. 565, § 6, 26 Stat. 1106, 1109 (repealed 1909). These provisions allowed a *qui tam* action for the penalty, to be split equally between the United States and “the person who shall sue” for the penalty. An 1846 case construed the statutory provision strictly, ruling that the statutory phrase “the person who shall sue” did not allow two persons to sue jointly for the penalty. *Ferrett v. Atwill*, 8 F. Cas. 1161 (C.C.S.D.N.Y. 1846) (No. 4,747). In the 1909 Act, the penalty was raised to between \$100 and \$1000. 1909 Copyright Act § 29.

80. “The reason why the U.S. copyright law has continuously provided penalties for false copyright notices seems fairly obvious. The notice is expected to inform the public that the work is copyrighted, and also to identify the copyright owner at the time of publication and the year from which the copyright dates. Notices should be as reliable as possible, and the public should be protected against false assertions of copyright.” S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 10, FALSE USE OF COPYRIGHT NOTICE 118 (Comm. Print 1960).

whether the work was protected by copyright, particularly in the United States, where a copyright notice had to appear on each copy of a work.⁸¹ As a result, even someone who reprinted a copyrighted work without *actual* knowledge that reprinting was a copyright violation or that the work reprinted was protected by copyright can be seen as someone who would have known that her conduct was infringing had she used reasonable care in her activities.

The formula that limited rights plus accessible notice equaled constructive knowledge did not offer absolute protection against holding innocent infringers liable. Where the copyright owner's rights went beyond protection against mere piratical copying, this mechanism might have been of little use. As discussed in the next section, though, other mechanisms were used to address those circumstances. Even in the case of the reproduction right, those who produced copies of copyrightable material might still have infringed innocently, despite the notice provisions. For example, if an author copied a copyrighted work verbatim but appended her own name and her own title, and then sold the manuscript to a printer, the printer would have had no simple way of discovering from the notice and registration records that the manuscript was in fact an infringing copy and that copying it would have constituted infringement. Nevertheless, the combination of limited rights and required notice did offer substantial protection against innocent infringement.

B. WHERE UNKNOWING INFRINGEMENT WAS A HIGH RISK, INFRINGEMENT LIABILITY REQUIRED A CULPABLE MENTAL STATE

Defining clearly what could not legally be done with a copyrighted work, and making it easy to determine whether any particular work was copyrighted, seem to have greatly reduced the likelihood of unknowing copyright infringement. In some situations, however, this formula was of less help to innocent infringers. For example, selling unauthorized copies of a copyrighted work clearly violated the copyright owner's exclusive vending right, but someone in the business of selling books or maps would have no simple way to know whether the particular copies she acquired from a supplier and offered for sale were authorized. Similarly, while it might be clear from copyright notices that a work was copyrighted, as the rights of copyright owners gradually expanded over time, in some situations the outer contours of the owner's rights became less clear, making it harder for a work's potential user to avoid prohibited uses. This Part examines how, for these two kinds of infringement, copyright law protected potential unknowing infringers by turning directly to a consideration of the alleged infringer's mental state, in some instances at the express direction of the legislature, and in other instances as a matter of judicial interpretation.

81. Notice would also have generally been effective in deterring unknowing infringement of the performance right in dramatic compositions when that right was granted, since the right extended only to copyrighted works and the notice on the printed copy of a play communicated that it was copyrighted and not freely available for performance.

1. Sales of Infringing Copies

a. Britain

As noted above, the drafters of the Statute of Anne expressed significant concern about the possibility that people might run afoul of the law's bar on printing a copyrighted book without intending to do so, and they took steps to reduce that possibility by providing for a publicly accessible, centralized registry of copyright claims, designed to make it easy for potential infringers to determine whether reprinting a particular book would violate another person's copyright. The rights of a copyright owner under the original English copyright law, however, extended somewhat beyond the sole right of printing or reprinting the copyrighted book: an owner also had the right to prevent anyone from *selling* copies that had been printed without her consent.⁸² Liability for sellers of infringing copies, however, again raised the danger that persons would violate the Statute unknowingly. Because a bookseller might well not herself have printed the copies that she offered for sale, she might not know whether those copies had been printed by or with the copyright owner's consent or had been pirated.

The Statute's framers dealt directly with this danger of liability for unknowing infringement by sale: they limited the Statute's bar to sales that were made by a seller who knew of the infringing nature of the copies. Thus, with respect to printing, the Statute's forfeiture and penalty provisions applied to anyone who "shall Print [or] Reprint . . . any such Book or Books, without the Consent of the Proprietor or Proprietors thereof."⁸³ But with respect to selling, the penalties only applied "if any other Bookseller, Printer, or other Person whatsoever . . . *Knowing the same to be so Printed or Reprinted, without the Consent of the Proprietors*, shall Sell, Publish, or Expose to Sale . . . any such Book or Books, without [the Proprietor's] Consent . . ."⁸⁴ Thus, the Statute defined the offense of printing a book without the copyright proprietor's consent without reference to the offender's mental state, but one who sold a book printed without the proprietor's consent was liable under the Statute only if the sales were made with knowledge of the improper printing.⁸⁵ While printers could avoid liability for unknowing infringement by consulting the central registry envisioned by the Statute, sellers were entirely absolved from liability for unknowing infringement, undoubtedly because the registry would not give such sellers the information needed to avoid infringing.⁸⁶

82. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.).

83. *Id.* (emphasis supplied). Importation was similarly forbidden. *Id.*

84. *Id.* (emphasis supplied). For a brief discussion of these provisions, and their subsequent American counterparts, as protection for innocent infringers, see Ciolino & Donelon, *supra* note 52, at 360-61.

85. See RANSOM, *supra* note 5, at 100 ("Thus piratical printers, importers, and booksellers were all made subject to the new law, although booksellers were exempt from prosecution for innocent purchase of books illegally printed."). In a sense, the Statute can be seen as treating an unknowing bookseller as a bona fide purchaser for value.

86. Although the knowledge requirement expressly applied only to the penalties and forfeitures set forth in the statute, as noted above those were perceived to be the only effective and available remedies

b. United States

Like the British statute, the first federal copyright act in 1790 gave copyright owners of books, maps and charts the exclusive right both to print and to sell copies of such works.⁸⁷ As to infringements, the 1790 Act retained the Statute of Anne's distinction between printing and selling copies. Thus, the Act imposed penalties on:

any other person or persons [who] . . . shall print, reprint, publish, or import . . . any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing . . . ; or [who] *knowing the same to be so printed, reprinted, or imported*, shall publish, sell, or expose to sale . . . any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid . . .⁸⁸

The decision to limit infringement actions based on sales to situations in which a seller knew of the infringing nature of the material appears to have been quite conscious. The same Congress that enacted the 1790 Copyright Act had some weeks earlier enacted the first U.S. Patent Act.⁸⁹ That statute made anyone who "shall devise, make, construct use, employ, or vend" any patented invention liable to pay damages to the patent owner, and did not require that a vendor know of the infringing nature of the patented invention sold.⁹⁰ Had Congress wished to impose liability even on an unknowing seller of unauthorized copies, it could have done so, as it did in the 1790 Patent Act.

The pattern set by the 1790 Copyright Act, following the Statute of Anne, of expressly imposing infringement liability on a seller of unauthorized copies only when the seller knew the copies were unauthorized, continued unbroken in all U.S. copyright legislation until 1909. During this period, each time that Congress extended copyright protection to additional categories of subject matter, it took care to preserve the distinction between types of infringement and to require knowledge on the part of a seller of unauthorized copies in order for such sales to constitute infringement.⁹¹ And when Congress undertook general revisions of the copyright

when the statute was enacted. *See supra* notes 54-56.

87. 1790 Copyright Act (Act of May 31, 1790), ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). Of the twelve states that enacted copyright laws before the ratification of the Constitution, eight followed the Statute of Anne in distinguishing infringement by vending or publication and requiring knowledge for liability in those situations. *See generally* COPYRIGHT ENACTMENTS, *supra* note 59, at 1-21 (only Massachusetts, New Hampshire, Rhode Island and Pennsylvania did not have an express knowledge requirement for infringing sales; Delaware did not adopt a copyright law).

88. 1790 Copyright Act § 2 (emphasis supplied). The penalties imposed by the 1790 Act on infringers track those imposed by the Statute of Anne (*see supra* note 53): forfeiture of all copies of the infringing work to the author or proprietor of the work and payment of a fine (in the 1790 Act, of fifty cents) for every sheet found in the infringer's possession, with the fine to be divided in equal parts between the United States and the author or proprietor of the work who sued for infringement. *Id.*

89. 1790 Patent Act, 1 Stat. 109. The Patent Act was passed on April 10; the Copyright Act on May 31. 1 Stat. 124.

90. 1790 Patent Act, § 4, 1 Stat. 109, 111.

91. In 1802, Congress extended copyright protection to authors of "any historical or other print or prints" and provided infringement penalties for any person who

laws during this period, it did not take such revision as an opportunity to abandon the knowledge requirement for infringement by sale of unauthorized copies.⁹²

How did the knowledge requirement for infringing sales operate in practice? For example, if a vendor unknowingly purchased unauthorized copies and then the copyright owner notified the vendor that the copies were unauthorized, did the copyright owner's notification make any subsequent sale by the vendor of her innocently purchased, unauthorized copies, an infringing act? Was actual knowledge on the defendant's part required for liability, or was it enough that the defendant had reasonable grounds to know that the copies were unauthorized? Unfortunately, reported cases provide little information on the application of the

shall engrave, etch or work . . . or in any other manner copy or sell, or cause to be engraved, etched, copied or sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause to be printed, re-printed, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof . . . or knowing the same to be so printed or re-printed, without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale or otherwise, or in any other manner dispose of any such print or prints.

Act of Apr. 29, 1802, ch. 36, §§ 2, 3, 2 Stat. 171, 171-72 (repealed 1831) (emphasis supplied). Musical compositions became subject to copyright protection under the general revision of 1831, which, as noted in note 92 *infra*, preserved the knowledge requirement. 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, §§ 1, 7, 4 Stat. 436, 436, 438 (repealed 1870). An act of 1865 brought photographs and negatives into the copyright fold. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540 (repealed 1870). The brief section extending copyright to photographs does not discuss infringement, instead merely providing that the provisions of existing law shall extend to photographs and inure to the benefit of authors thereof "in the same manner, and to the extent, and upon the same conditions as to the authors of prints and engravings." *Id.* That the requirement for knowledge on the part of a seller of unauthorized copies of engravings extended to photographs can be seen from the identical treatment of engravings and photographs in the 1870 revision with respect to such knowledge requirement. 1870 Copyright Act (Act of July 8, 1870), ch. 230, § 100, 16 Stat. 198, 214 (repealed 1909). The 1870 revision for the first time granted protection for any "chromo, statue, statuary" and for "models or designs intended to be perfected as works of the fine arts" and, as noted in note 92 *infra*, preserved the knowledge requirement. *Id.* at 212, 214, §§ 86, 99, 100. In 1891, Congress extended to authors the "exclusive right to dramatize and translate any of their works for which copyright shall have been obtained" but again provided that the sale or exposing to sale of any copy printed, published, engraved, dramatized, translated, or imported without the copyright proprietor's consent constituted infringement only if the seller knew that the copy was unauthorized. Act of Mar. 3, 1891, ch. 565, §§ 1, 7, 8, 26 Stat. 1106, 1106-07, 1109 (repealed 1909).

Congress' approach was different when it extended copyright to cover new rights, rather than new subject matter. In granting to copyright owners of dramatic compositions the exclusive right to perform such works publicly, Congress did not require that a defendant's performance be a knowing infringement, 11 Stat. 138-39, perhaps viewing the notice requirement as sufficiently protecting potential performers against the danger of innocent infringement.

92. See generally 1831 Copyright Act § 6 (defining infringement of copyright in books to include "publish[ing], sell[ing], or expos[ing] to sale" if such acts are done by one "knowing the same" to be printed or imported without consent of the copyright owner) and § 7 (defining infringement with respect to any "print, cut, or engraving, map, chart or musical composition" and requiring the same knowledge with respect to publishing, selling, or exposing to sale); 1870 Copyright Act § 99 (limiting infringement of book by sale or exposure to sale to cases where offender knows such book to be printed, published, or imported without consent of author), and *id.* § 100 (same with respect to all other categories of copyrightable subject matter except for dramatic compositions and negatives); Rev. Stat. § 4964 (limiting infringement of book by sale or exposure to sale to cases where offender knows such book to be printed, published, or imported without consent of author), 4965 (same with respect to all other categories of copyrightable subject matter except for dramatic compositions and negatives) (1873).

knowledge requirement. In some early cases involving sales (including what appears to be the first reported case brought under the 1790 Act), plaintiffs alleged that defendants acted knowingly, though courts resolved those cases on other grounds without discussing the knowledge issue.⁹³ Thus, for example, in a 1799 case the plaintiff copyright owner alleged that the defendant, who was authorized to print 200 copies of the author's book, printed an additional 101 copies of the book and "knowing . . . the said 101 copies . . . to be printed without the consent of the plaintiff, did sell the said 101 copies;" but the report gives only the most meager details as to the outcome of the case, indicating that the court found for the defendant.⁹⁴ In a case decided in 1845 involving similar arithmetic textbooks written by the plaintiff and the defendant, the plaintiff alleged that the defendant "knew the said copies by them so sold and so exposed to sale, to have been . . . printed and published without the consent of the plaintiff," but Justice Story's opinion makes no mention of the issue.⁹⁵ At least two other early cases appear to involve allegations of infringement by sale without any discussion of the seller's knowledge of the infringing nature of the copies in the case reports.⁹⁶

At least one early case appears to have disregarded the knowledge requirement entirely.⁹⁷ The defendant in *Millett v. Snowden* had published in its periodical a musical composition copied from a newspaper; the defendant did not know that the newspaper's song was a copy of the plaintiff's copyrighted composition. The brief jury charge in the report suggests that the defendant was charged with publishing, selling and exposing to sale the unauthorized copies (rather than with printing them), which would bring the case within the class of infringements for which knowledge was required.⁹⁸ Nevertheless, the court instructed the jury that

93. See, e.g., *Kilty v. Green*, 4 H. & McH. 345 (Gen.Ct. Md. 1799), reprinted in 14 COPYRIGHT OFFICE BULLETIN: DECISIONS OF THE UNITED STATES COURTS INVOLVING COPYRIGHT AND LITERARY PROPERTY 1789-1909, at 1500 (1980); *Dwight v. Appleton*, 8 F. Cas. 183 (C.C.S.D.N.Y. 1843) (No. 4,215) (alleging defendants imported and sold forty copies of plaintiffs' book printed in Great Britain, "well knowing the premises, and in fraud of the rights of the plaintiffs").

94. *Kilty*, 4 H. & McH. 345 (emphasis supplied).

95. *Emerson v. Davies*, 8 F. Cas. 615, 616 (C.C.D. Mass. 1845) (No. 4,436).

96. *Stevens v. Gladding*, 23 F. Cas. 15 (C.C.D. R.I. 1850) (No. 13,400) was a suit against defendant booksellers for selling allegedly infringing copies of map. The reports do not indicate that the plaintiff expressly alleged defendants' knowledge of the infringing nature of the copies, and the main issue was whether those copies were infringing. The printing plate from which the copies were printed had been seized from the plaintiff copyright owner for sale to satisfy a judgment and the defendants' supplier had purchased the plate at the sheriff's sale. The Supreme Court eventually held that the sale of the plate did not transfer the right to print and sell copies of the map. *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 453 (1854). Once the copies were determined to be infringing, an injunction and accounting were granted against the booksellers, *Stevens v. Gladding* 23 F. Cas. 14 (C.C.D. R.I. 1856) (No. 13,399), but in an action at law for the statutory penalties from the booksellers the jury returned a verdict for the defendants, which the U.S. Supreme Court did not disturb, though the basis for the verdict is not reported, *Stevens v. Gladding*, 60 U.S. (19 How.) 64 (1856). See also *Lesser v. Sklarz*, 15 F. Cas. 396 (C.C.S.D.N.Y. 1859) (No. 8,276a) (defendant sold copies to plaintiff's employee, but report is unclear whether defendant also printed the copy).

97. See *Millett v. Snowden*, 17 F. Cas. 374 (C.C.S.D.N.Y. 1844) (No. 9,600).

98. *Id.* Although the court charged the jury to assess a penalty for the number of sheets "proved to have been sold, or offered for sale (not the number printed)," the defendant appears to have both printed and sold copies of the plaintiff's musical composition.

“intention could not be taken into view. If a copyright has been invaded, whether the party knew it was copyrighted or not, he is liable to the penalty.”⁹⁹ The court awarded the plaintiff the penalties provided for in the statute, without mentioning the statute’s provision that such penalties were available for the sale of infringing copies only if the seller knew the copies to be infringing. If the presentation of the facts in the report is accurate, the court’s statement of the law, and its award for the plaintiff, are clearly in direct contradiction of the statute’s plain language, which imposed infringement liability for sales of infringing copies only if the seller knew of their infringing nature.¹⁰⁰

Finally, it is unclear whether courts interpreted the requirement that a seller know of the infringing nature of the copies she sold as applying only in suits for recovery of the penalties and forfeitures provided in the statute, or whether they also applied the knowledge requirement in suits for the equitable relief of an injunction and an accounting.¹⁰¹

Despite the lack of attention to the issue in the few reported cases that involved it, the statutory language is clear in requiring knowledge on the seller’s part from 1790 to 1909. Indeed, as late as 1879, a major U.S. treatise on copyright law clearly stated the knowledge requirement: “[I]n the case of the seller, it must be shown that the book was unlawfully printed, published, or imported, and that in selling or exposing to sale he was aware of that fact.”¹⁰² Indeed, in 1897 Congress again exhibited concern about liability for unknowing sellers of copyrightable materials when it revised the prohibition on placing a false copyright notice on a copy of a work that was not copyrighted. Although the provision had been in U.S.

99. *Id.* at 374-75. The court’s comments on intent and knowledge seem to refer to the defendant’s acts of copying, and perhaps not to its acts of selling, since the report indicates that the defendants did not copy directly from the plaintiff’s composition but from a reprint of it in a Boston newspaper, presumably with no notice of copyright.

100. The court’s failure to focus on the knowledge issue may not be surprising: the question does not appear to have arisen in any previous case and none of the early American copyright commentators (Chancellor Kent, Justice Story, and George Curtis) appears to have discussed the provision.

101. Congress in 1819 granted the circuit courts original jurisdiction over copyright cases and expressly empowered the courts “to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States.” Act of Feb. 15, 1819, 3 Stat. 481. In *Greene v. Bishop*, a copyright owner sought to enjoin the defendant from selling copies of a book, written by a third party, that allegedly infringed on the plaintiff’s book. 10 F. Cas. 1128 (C.C.D.Mass. 1858) (No. 5,763). The court granted the injunction without any discussion of the defendant vendor’s knowledge of the book’s infringing nature or any reference to the statute. Indeed, the court said that “[v]endors are liable for the sale of a book which invades the copyright of another, on the same principle, and for the same reasons, that the vendor of a machine or other mechanical structure, in the case of patent rights, is held liable for selling the manufactured article without the license or consent of the patentee.” *Id.* at 1135. It is possible that the court was simply unaware, like the court in *Millett v. Snowden*, of the knowledge requirement in the statute. It is also possible that the court, without mentioning it, believed that the statute’s requirements applied only in suits in which the plaintiff sought the monetary remedies provided by the statute and not in suits seeking equitable relief.

102. *DRONE*, *supra* note 7, at 487 (discussing copyright in books). See also *id.* at 492 (“Guilty knowledge must be shown on the part of the wrong-doer who sells or exposes to sale”) (discussing copyright in maps, charts, musical compositions, and works of art).

law since notice was first required in 1802,¹⁰³ the 1897 revision marked the first time that Congress imposed a penalty on “sell[ing] any article bearing a notice of United States copyright which has not been copyrighted in this country.”¹⁰⁴ But in the same way that a seller of copyrighted works would generally be poorly positioned to determine whether the copies she sold were infringing, she would also be poorly positioned to determine whether a copyright notice on such copies was false. As a result, Congress imposed the penalty only on one who “knowingly” issued or sold an article with a false copyright notice.¹⁰⁵

Because of the substantial risk that imposing liability on any seller of an unauthorized copy of a copyrighted work would result in sellers being held liable for activities they conducted entirely in good faith, and because the mechanisms of registration and notice offered little protection to such vendors, U.S. copyright law for 120 years excused from liability any seller whose acts were committed unknowingly.

2. Infringement by Imitation in the Courts

Selling unauthorized copies was not the only type of infringement which a defendant might be poorly positioned to avoid, because over the course of the nineteenth century, copyright law began to offer owners greater protection against infringement by imitations. While copyright statutes had always barred the unauthorized printing or reprinting of a copyrighted work, courts applying those statutes soon realized that liability must extend beyond exact reproductions—what one court called copying *literatim et verbatim*¹⁰⁶—or else the statute’s protection would be useless: someone could change a few words of the original and reprint essentially the same work. Thus, courts held that producing a close imitation, rather than an exact copy, of a copyrighted work could infringe. Early courts also held, however, that not every work which appeared to imitate a copyrighted work should be deemed infringing—for example, the kind of derivative uses that *Stowe v. Thomas* held and suggested were lawful.¹⁰⁷ Thus, when two works were similar to one another, the question became how a court should decide whether the defendant’s work was an improper copy or a lawful variation.¹⁰⁸ Learned Hand later summed up the problem:

103. Act of Apr. 29, 1802, ch. 36, § 4, 2 Stat. 171, 172 (repealed 1831). See *supra* text accompanying note 79.

104. Act of Mar. 3, 1897, 29 Stat. 694, 694.

105. *Id.* This limitation remains in current copyright law, which imposes a fine of up to \$2,500 on anyone “who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing [a notice of copyright or words of the same purport] that such person *knows to be false*.” 17 U.S.C. § 506(c) (2005) (emphasis supplied).

106. *Webb v. Powers*, 29 F. Cas. 511, 519 (C.C.D. Mass. 1847) (No. 17,323).

107. See *supra* notes 40-45 and accompanying text.

108. Deciding when a defendant’s work that resembles a copyrighted work infringes remains one of the more difficult questions in copyright law.

It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large¹⁰⁹

When a defendant's acts went beyond merely reproducing all or a significant quantity of the plaintiff's work, the defendant might well have infringed unintentionally. If a defendant just reproduced the plaintiff's work verbatim, finding her liable posed little problem. The system was designed so that a user could easily determine whether a work enjoyed copyright protection, and so that a user would know that copyright prohibited reprinting all or substantially all of a copyrighted work. But where the user produced a work that was based on a copyrighted work but not merely a verbatim reproduction, liability was more problematic. Though the user could easily have determined whether the work was protected, she had no easy way to know whether her use of the work fell within the copyright owner's exclusive rights.

Courts early on confronted the problem of determining whether a defendant who had not merely literally copied from a copyrighted work, but had produced an altered version of it, had infringed. Language in some of the early opinions suggests courts attempted to address the need to extend protection beyond literal repetition without eliminating subsequent authors' ability to use existing works by taking a defendant's knowledge or intention into account in deciding whether infringement had occurred. The relevance of a defendant's mental state in that situation varied somewhat from judge to judge and evolved throughout the course of the century, but many courts did consider mental state, either explicitly or implicitly.

a. General Imitative Similarity: "Colorable Alterations"

When a copyright owner claimed infringement by a defendant who had created a work that was similar but not essentially identical to the owner's work, nineteenth-century courts often resolved the claim by comparing the works in a manner that considered whether the defendant acted knowingly, and in bad faith, in imitating (though not identically copying) the plaintiff's work. In comparing two works, courts routinely wrote of the need to determine whether any differences they found between the works were real or only "colorable."¹¹⁰ As one court summarized the

109. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

110. *See, e.g., Emerson v. Davies*, 8 F. Cas. 615, 623 (C.C.D. Mass. 1845) (No. 4,436); *Blunt v. Patten*, 3 F. Cas. 763, 765 (C.C.S.D.N.Y. 1828) (No. 1,580) ("[I]f there was some small variance [between the parties' works], it would be a proper subject of inquiry whether the alteration was not merely colorable."); *Martinetti v. Maguire*, 16 F. Cas. 920, 920-21 (C.C.D. Cal. 1867) (No. 9,173) (defendant's manuscript "was a mere colorable imitation or copy" of plaintiff's work); *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552) ("It is hardly possible that the resemblances [between the parties' plays] are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism."); *Drury v. Ewing*, 7 F. Cas. 1113, 1117 (C.C.S.D. Ohio 1862) (No. 4,095) ("It can not be doubted that [the defendant] has adopted all the essential parts of Mrs. Drury's system, and that so far as there are any apparent alterations they are colorable and evasive."); *Webb*, 29 F. Cas.

law in 1869, “Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the source from which the material was derived”¹¹¹ Commentators similarly spoke of infringement occurring when a defendant’s work was the same as the plaintiff’s except for “colorable alterations.”¹¹²

The oft-repeated principle that a defendant was whose work was similar to the plaintiff’s work except for *colorable* alterations was an infringer suggests that courts viewed such a defendant as a knowing copyist. The Oxford English Dictionary defines “colorable” as “[c]overt, pretended, feigned, counterfeit, collusory, done for appearance’ sake.”¹¹³ For one to make a “colorable” alteration to a copyrighted work, then, one would have to be engaged in copying, fear the copying to be illicit, and make alterations to the copy in an attempt to hide the copying. Indeed, the first edition of *Black’s Law Dictionary* in 1891 defined “colorable alteration” as “[o]ne which makes no real or substantial change, but is introduced only *as a subterfuge or means of evading* the patent or copyright law.”¹¹⁴ Thus, one court characterized a difference between two similar works under review as having been “appended recently with the obvious purpose of negating the identity of the two,” and found the difference itself “evidence of the consciousness of [the defendant], that something was needed to avoid the otherwise inevitable conclusion, that in getting up her guide she was interfering with and pirating on the prior exclusive right of [the plaintiff].”¹¹⁵ Thus, imposing liability on a defendant whose work was similar to the plaintiff’s but for “colorable alterations” meant imposing liability on one who had not infringed unknowingly

at 518 (“The substance, the staple of the book, is then truly original, and not colorably so . . .”).

These American decisions generally built on earlier English cases. *See, e.g.*, *Millar v. Taylor*, (1769) 4 Burr. 2303 (K.B.) (Yates, J., dissenting); *Sayre v. Moore* (1785) 102 Eng. Rep. 138, 139 n. b. (K.B.) (Mansfield, C.J.) (“In all these cases the question of fact to come to a jury, is, whether the alteration be colorable or not. There must be such a similitude as to make it probable and reasonable to suppose, that one is a transcript of the other, and nothing more than a transcript. . . . But upon a question of this nature the jury will decide, whether it be a servile imitation or not.”); *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679, 680 (K.B.) (Ellenborough, L.J.) (instructing jury to determine whether defendant took fairly from plaintiff’s book to prepare an improved variation for the benefit of the public or whether what was copied was “taken colourable, merely with a view to steal the copyright of the plaintiff”).

111. *Lawrence v. Dana*, 15 F.Cas. 26, 59-60 (C.C.D. Mass. 1869) (No. 8,136).

112. *See, e.g.*, *CURTIS*, *supra* note 15, at 253-65 (“[W]here the subject and design [of a print] are purely the product of the artist’s imagination . . . his property in the subject and design would be violated by an imitation falling short of a *fac-simile*, but in which the alterations should be merely colorable.”); *id.* at 238 (enumerating modes of infringement, including “[b]y imitating the whole or a part, or by reproducing the whole or a part with colorable alterations and disguises, intended to give it the character of a new work”). *See also* *DRONE*, *supra* note 7, at 407 (“When the production complained of is a servile imitation, in which the language of the original appears with merely colorable variations, the legal question of piracy becomes a comparatively simple one.”).

113. 3 OXFORD ENGLISH DICTIONARY 503, “colorable,” definition 2c (2d ed. 1989) (citations back to 1440). A recent edition of *Black’s Law Dictionary* similarly defines the word as “[i]ntended to deceive; counterfeit.” BLACK’S LAW DICTIONARY 259, “colorable,” definition 2 (7th ed. 1999).

114. BLACK’S LAW DICTIONARY 223 (1st ed. 1891) (emphasis supplied).

115. *Drury v. Ewing*, 7 F. Cas. 1113, 1117 (C.C.S.D. Ohio 1862) (No. 4,095).

but rather on one who had not only been aware of her potential infringement but who had also taken steps to try to conceal it.

Many opinions made explicit the connection between a “colorable” alteration and the intent or knowledge of the party making that alteration. One court, noting the similarity of the plaintiff’s and defendant’s works, observed that “the discrepancies that appear only show the *intent* of the copyist.”¹¹⁶ Reinforcing this view of colorable alterations as evidence of knowing or intentional infringement, opinions sometimes spoke of colorable alterations as a copyist’s means of “disguising” her copying. Justice Story wrote in one case that “the question [is] whether [the defendant] has, in substance, copied . . . from the plaintiff’s work, with merely colorable alterations and devices *to disguise the copy*, or whether the resemblances are merely accidental . . .”¹¹⁷ Other decisions also used the language of “disguise,”¹¹⁸ as did commentators.¹¹⁹ Similarly, other court opinions spoke of colorable alterations as “evasive.”¹²⁰ And in one decision Justice Story described a defendant’s work with “merely formal or colorable omissions or alterations” as one in which materials “ha[d] been *fraudulently or designedly* borrowed from” another.¹²¹ While courts were no doubt looking to see if the two works were similar enough to justify a finding that the defendant had substantially appropriated the plaintiff’s work to an injurious intent, the emphasis on differences that were “merely colorable,” were used to disguise, or were signs of evasive intent, is telling. The language of these discussions strongly suggests that in many cases courts felt that where two works were sufficiently similar to justify a finding of infringement, the strength of the similarity also demonstrated that the infringer had

116. *Bartlett v. Crittenden*, 2 F. Cas. 967, 969 (C.C.D. Ohio 1849) (No. 1,076) (emphasis supplied).

117. *Emerson v. Davies*, 8 F. Cas. 615, 623 (C.C.D. Mass. 1845) (No. 4,437) (emphasis supplied).

118. *See, e.g., Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552) (“It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, *with a view to disguise the plagiarism.*”) (emphasis supplied); *Lawrence v. Dana*, 15 F. Cas. 26, 59-60 (C.C.D. Mass. 1869) (No. 8,136) (infringing copying includes imitating a work “with more or less colorable alterations *to disguise the source* from which the material was derived.”) (emphasis supplied).

119. *See CURTIS, supra* note 15, at 238 (enumerating modes of infringement, including “[b]y imitating the whole or a part, or by reproducing the whole or a part with colorable alterations and *disguises*, intended to give it the character of a new work”) (emphasis supplied); *id.* at 253 (“Piracy by imitation, or by reproducing with colorable alterations and *disguises assuming the appearance of a new work*. This is, by far, the most frequent form in which the copyright of authors is infringed.”) (emphasis supplied); *id.* at 264 (noting that “where [a defendant’s] alterations and additions are merely colorable . . . he seeks to *disguise* the fact of having copied from the plaintiff”) (emphasis supplied).

120. *Daly v. Palmer*, 6 F. Cas. at 1138 (“It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism. The true test of whether there is piracy or not, is to ascertain whether there is a servile or *evasive* imitation of the plaintiff’s work.”) (emphasis supplied); *Drury v. Ewing*, 7 F. Cas. at 1117 (“It can not be doubted that [the defendant] has adopted all the essential parts of Mrs. Drury’s system, and that so far as there are any apparent alterations they are colorable and *evasive.*”) (emphasis supplied); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1875) (No.4,901) (“[I]n cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as *studied evasions . . .*”) (emphasis supplied).

121. *Emerson v. Davies*, 8 F. Cas. at 621 (emphasis supplied).

acted not unknowingly, but with knowledge that her acts might be wrongful.

One who reprinted a work verbatim could be deemed a wrongdoer because verbatim republication of a protected work was clearly prohibited and anyone could easily discover whether a particular work was protected. One who imitated a protected work in creating a new work faced a more difficult task of determining whether her particular imitative creation was distinct enough from the protected work so as not to infringe the latter. By imposing liability in such cases only where a defendant's work was the same as the plaintiff's except for merely colorable alterations, courts appear to have been attempting to sort out defendants who acted with bad intentions from those who were less culpable, thus offering potential innocent infringers some protection against liability in the face of the expansion of copyright rights to reach imitative copying. In general, then, early copyright cases seem to have worked hard to distinguish between acceptable and unacceptable imitation, and to have used the defendant's mental state in making the distinction.

b. "Colorable Alterations" and Similarities Between Informational Works

Courts also judged infringement by looking for "merely colorable" differences even between virtually identical works, if the works at issue were factual or informational. Such works included marine charts,¹²² textbooks,¹²³ collected correspondence,¹²⁴ legal treatises,¹²⁵ and specialized dictionaries.¹²⁶ These made up the bulk of early copyright material and were the works most often involved in the reported court decisions.¹²⁷ The general principle that copyright did not prevent others from producing a transformed or improved variation of a protected work applied to informational works, and courts recognized early on that a copyright in such an informational work did not grant the copyright owner any exclusive rights over the information set out in the work.¹²⁸ But early cases generally gave a right against what Professor Jane Ginsburg has called "infringement by reference"—that is, using the facts gathered in the copyrighted work "to save . . . the research effort of consulting primary sources or of engaging in independent information gathering."¹²⁹ Justice Story summarized the legal position in 1839 using the

122. *Blunt v. Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1,580).

123. *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728) (Latin grammar text); *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436) (elementary arithmetic text).

124. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1875) (No. 4,901) (letters of George Washington).

125. *Story v. Holcombe*, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497) (Story's *Commentaries on Equity Jurisprudence*).

126. *Webb v. Powers*, 29 F. Cas. 511 (C.C.D. Mass. 1847) (No. 17,323) (dictionary of flora).

127. Ginsburg, *supra* note 46, at 1873.

128. The essential modern statement of this position is *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344-51 (1991). Many early cases state the same principle. See *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728); *Blunt v. Patten*, 3 F. Cas. 763, 764 (C.C.S.D.N.Y. 1828) (No. 1,580) ("But the natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart.").

129. Ginsburg, *supra* note 46, at 1878. See, e.g., *Blunt v. Patten* 3 F. Cas. at 765 (copyright in marine chart violated "only when another copies from the chart of him who has secured the copyright,

example of a map:

Now, suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that he has no right, without any . . . surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures. It would be a downright piracy.¹³⁰

The problem in determining whether a defendant had copied from the plaintiff's copyrighted work as a reference or had created her work independently is that in cases of informational works, even when the defendant acted properly and did not copy from the plaintiff's work, the defendant's work would closely resemble the plaintiff's work because both were attempting to represent accurately the same original sources.¹³¹ In the case of a map, Justice Story explained, "it is plain, that in proportion to the accuracy of every such map, must be its similarity to, or even its identity with, every other."¹³²

As a result, in deciding infringement in such cases, courts frequently framed the question in terms that looked in part to a defendant's intent, again using the language of "colorable" alteration, evasion, and disguise.¹³³ As Justice Story wrote

and thereby availing himself of his labor and skill."); *Emerson v. Davies*, 8 F. Cas. at 620 ("The same materials were certainly open to be used by any other author But he could not be at liberty to transcribe the [materials from] the plaintiff, and thus to rob him of the fruits of his industry, his skill, and his expenditures of time and money."); *Story v. Holcombe*, 23 F. Cas. at 175 ("So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works, and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well established principle.")

The contrary view of modern copyright law that permits direct and verbatim copying of unprotected factual matter in a copyrighted work is expressed clearly by the Supreme Court in *Feist*, 499 U.S. at 359: "[C]opyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. . . . Rather, the facts contained in existing works may be freely copied"

130. *Gray v. Russell*, 10 F. Cas. at 1038 (internal citations omitted).

131. Those sources might be the natural world, as in the case of a map or a work of reporting (such as a directory or biography), or they might be previous, uncopyrighted works, as in the case of a textbook, translation, or legal treatise.

132. *Gray v. Russell*, 10 F. Cas. at 1038. *See also* *Emerson v. Davies*, 8 F. Cas. at 621 ("Take the case of two engravings copied from the same picture, or two pictures of natural objects by different artists;—it would not be practicable, in many cases, from the mere inspection of them and their apparent identity, to say, that the one was a transcript of the other."); *Blunt v. Patten*, 3 F. Cas. at 764-65 ("[T]he natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart. And if such surveys and charts are all correct, all will be alike, but no one would complain of his rights having been infringed, and each one may be considered an original chart.")

133. For example, one of the earliest U.S. cases stated that in determining whether a marine chart infringed a prior, copyrighted chart, the question of whether the defendant had copied the plaintiff's map would be for the jury, and "if there was some small variance [between the two charts], it would be a proper subject of inquiry whether the alteration was not merely colorable" *Blunt v. Patten*, 3 F. Cas. at 765. Even if the maps were "in all respects alike," the court noted that while "the prima facie

in a later case involving an arithmetic textbook,

the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with *colorable alterations and variations only to disguise the use thereof*; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources.¹³⁴

Later in the opinion he said that the inquiry was whether the two authors had both used the same common sources or whether the defendant had

borrowed from the [plaintiff], without the employment of any research or skill, with the *disguised but still apparent intention* to appropriate to one what in truth belongs exclusively to the other, and with no other labor than that of mere transcription, with such *omissions or additions as may serve merely to veil the piracy*.¹³⁵

The language in the cases indicates that courts looked to a defendant's knowledge or intent in deciding allegations of infringement of informational works, where the works' factual nature made determinations of whether there was mere duplicative copying particularly difficult. Thus, where two works could be expected to be similar because they each depicted the same factual information, courts inquired into a defendant's mental state in order to determine whether the defendant had in fact copied from the plaintiff's work—and, aware that such copying was wrong, had tried to disguise the copying—or whether the defendant had created her work independently from sources rightfully available for all to use. The defendant's mental state appears to some extent to have served the function of distinguishing culpable, knowing infringers by reference from blameless, independent creators.

c. "Bona Fide" Quotation and Abridgment, and the Evolution of Fair Use

Another set of circumstances which presented a significant risk of liability for innocent infringement that was not reduced by the system of copyright notice

presumption probably would be, that one was a copy of the other, yet both might be originals" if each author had constructed her chart from her own surveys of the area depicted. *Id.*

134. *Emerson v. Davies*, 8 F. Cas. at 624. *See also id.* at 623 ("[T]he question then comes to this, whether [the defendant] has, in substance, copied these pages, in plan, method, arrangement, illustrations and tables, from the plaintiff's work, with merely colorable alterations and devices to disguise the copy, or whether the resemblances are merely accidental, and naturally or necessarily grew out of the objects and scheme of the defendant, Davies's work, without any use of the plaintiff's."). Story also quoted from Lord Mansfield: "In all these cases the question of fact to come to a jury, is, whether the alteration be colorable or not. There must be such a similitude as to make it probable and reasonable to suppose, that one is a transcript of the other, and nothing more than a transcript. . . . But upon a question of this nature the jury will decide, whether it be a servile imitation or not." *Id.* at 623-24 (quoting *Sayre v. Moore*, (1785) 102 Eng. Rep. 138, 139 n. b (K.B.)).

135. *Emerson v. Davies*, 8 F. Cas. at 621 (emphasis supplied).

involved what would today be called fair use of a copyrighted work. At least some early courts seem to have offered protection to innocent infringers in these cases by taking a defendant's intent into account when determining liability.

In the nineteenth century, the general doctrine now known as fair use gradually developed, in large part growing out of court-made doctrines that held certain kinds of copying outside a copyright owner's control. The most important of these particular limitations involved quotation and abridgment. Early on, courts and commentators recognized that one author might quote from another author's copyrighted work without committing copyright infringement,¹³⁶ and early decisions similarly held that a copyright owner could not prevent a third party from making an abridgment of a protected work.¹³⁷

Cases of quotation and abridgment presented problems of line-drawing: determining whether a defendant's quotation was "fair" or excessive, or deciding whether the defendant's work properly abridged the copyrighted work or merely shortened and condensed it. Leading judges and commentators quickly recognized the difficulty of drawing that line properly. Justice Story wrote that determining "what constitutes a *bonâ fide* case of extracts, or a *bonâ fide* abridgment . . . is often a matter of most embarrassing inquiry,"¹³⁸ and Chancellor Kent described the

136. See, e.g., 2 KENT, *supra* note 58, at 313; *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1875) (No. 4,901); *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136) (describing "the privilege allowed by law to a subsequent writer to use without consent or license the contents of a book . . . antecedently made . . . by another author . . ."). See also CURTIS, *supra* note 15, at 236-37 ("[T]he interests of knowledge demand a reasonable freedom in the use of all antecedent literature. To administer the law in such a manner as not to curtail the fair use of existing materials, in any department of letters, is one of the great tasks of jurisprudence. It proposes to itself . . . the acknowledgement upon motives of public policy, of the right to a fair use by any writer of all that has been recorded by previous authors.").

137. See, e.g., 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 939 (1836); 2 KENT, *supra* note 58, at 313-14; CURTIS, *supra* note 15, at 268-69 ("[F]or a considerable length of time the notion has prevailed [in the English caselaw], that what is called a *bona fide* abridgment may be made, without violating the right of property of the original author. In America, the subject has been only incidentally discussed.") (footnote omitted); *Webb v. Powers*, 29 F. Cas. 511, 519 (C.C.D. Mass. 1847) (No. 17,323) ("Nothing improper in an abridgment. If the leading design is truly to abridge and cheapen the price, and that by mental labor is faithfully done, it is no ground for prosecution by the owner of a copyright of the principal work."); *Lawrence v. Dana*, 15 F. Cas. at 59 ("[T]he rule is settled that the publication of an unauthorized but bona fide abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement of the original."); BIRRELL, *supra* note 32, at 158 ("The fact that the Act of 1842 [in Britain] did not deal with *abridgments* can hardly be called an omission, for it was then not only the law, but also the general opinion that a good, honest abridgment was a new book and in no sense a piracy of the original work, and was consequently entitled to copyright on its own account."). For criticism of the rule, see *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (criticizing the doctrine but following it as "long established"); *Lawrence v. Dana*, 15 F. Cas. at 59 ("Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled . . ."); DRONE, *supra* note 7, at 440-45.

138. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 939 (1836). See also *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728) ("In some cases, indeed, it may be a very nice question, what amounts to a piracy of a work, or not."); *Lawrence v. Dana*, 15 F. Cas. at 59 ("What constitutes a fair and bona fide abridgment in the sense of the law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration . . .").

privilege of “fair quotation” as “in all cases very difficult to define.”¹³⁹

The judges’ difficulty in deciding when quotation or abridgment was fair presented a difficulty to potential users, who would seem hard pressed to know whether a court would decide that their quotations were fair or were infringing. While the copyright notice on a work would tell the user that the work she intended to quote was copyrighted, that knowledge would be of no use in avoiding infringement in these circumstances, since the question was not whether the work was protected but whether the proposed use was infringing. The scope of the copyright owner’s rights was simply not clear enough in the context of fair quotation or abridgment for the information provided by the copyright notice to give the user any assistance in avoiding innocent infringement.

Early decisions, however, provided some comfort to potential infringers because, in resolving the question of whether any particular use was fair, some courts looked at least in part to the defendant’s intent. In discussing the question of abridgments and “fair quotation,” courts and commentators often spoke of whether a defendant’s use of a copyrighted work was “bona fide”—in good faith. Thus, Justice Story stated in his *Commentaries* that “[i]t is . . . clearly settled not to be any infringement of the copyright of a book, to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it.”¹⁴⁰ Cases similarly speak of “bona fide” quotation and abridgment.¹⁴¹ The principle that quotations or abridgment must be bona fide, in *good faith*, suggests that the knowledge or intent of the defendant played a role in determining infringement.

Story used similar language from the bench in a way that made the relevance of a defendant’s intent even clearer:

[I]f large extracts are made [from a copyrighted work] in a review, it might be a question, whether those extracts were *designed bona fide* for the mere purpose of criticism, or were designed to supersede the original work *under the pretence* of a review, by giving its substance in a *fugitive* form.¹⁴²

Looking to the defendant’s “design” or “purpose” for her work, and precluding a ruling of fair quotation where the defendant acted under “pretence,” Story seems to have considered the defendant’s mental state relevant to the question of whether her use could be excused as fair.¹⁴³ Similarly, in discussing abridgments, Story wrote

139. 2 KENT, *supra* note 58, at 313 (paraphrasing *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (K.B.)).

140. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 939 (1836).

141. *See, e.g.*, *Gray v. Russell*, 10 F. Cas. at 1038 (“bona fide abridgment”); *Lawrence v. Dana*, 15 F. Cas. at 59 (“bona fide abridgment”); 2 KENT, *supra* note 58, at 313 (“A *bona fide* abridgment of Hawkesworth’s *Voyages* has been held no violation of the original copyright.”). The phrase goes back at least to the landmark English case of *Millar v. Taylor*, in which Justice Willes wrote that “bona fide imitations, translations and abridgments are different, and in respect of property may be considered new works.” (1769) 4 Burr. 2303 (K.B.), *quoted in* *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514).

142. *Gray v. Russell*, 10 F. Cas. at 1038 (emphasis supplied).

143. *See also* *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901) (“[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his *design* be really and

from the bench that “[t]he question, in such a case, must be compounded of various considerations; [including] whether it be a *bona fide* abridgment, or only an *evasion* by the omission of some unimportant parts”¹⁴⁴ A later court, using language familiar from the cases examining the similarity necessary to find infringement, wrote that there would be infringement “if the abridgment or similar work be *colorable* and a mere substitute.”¹⁴⁵ Thus, in cases involving uncertainty about the location of the boundary marking where a copyright owner’s rights ended and where the freedom of the public to use a work began, courts considered an accused infringer’s mental state—in the form of good faith—in deciding whether the defendant had crossed that boundary.

Over time, however, this approach to fair use came into question, first from commentators, and then in the courts. With respect to fair quotation, at least, some nineteenth-century jurists objected to using the defendant’s intention in determining infringement. Chancellor Kent’s view on the relevance of intent to the question of fair quotation appears to be somewhat nuanced. He wrote in 1827 that “[t]he *quo animo* is the inquiry in these cases.”¹⁴⁶ *Black’s Law Dictionary* defines “*quo animo*” as “[w]ith what intention or motive,”¹⁴⁷ suggesting that Kent viewed the inquiry as centered on the copier’s intent. Yet Kent also wrote that a lack of bad intention alone would not foreclose a finding of infringement: “[I]f an encyclopædia or review should copy so much of a book as to serve as a substitute for it, it becomes an actionable violation of literary property, even without the *animus furandi*.”¹⁴⁸ This suggests that even if a defendant lacked *animus furandi*, the “intent to steal, or feloniously to deprive the owner permanently of his property,”¹⁴⁹ she could nonetheless be liable for infringement. The commentary thus leaves some question about Kent’s view of the proper role of consideration of a defendant’s intent in determining infringement in fair quotations. The two major American copyright treatises of the middle and late nineteenth century displayed a

truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, *with a view, not to criticise, but to supersede* the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.”) (emphasis supplied); *Webb v. Powers*, 29 F. Cas. 511, 518-19 (C.C.D. Mass. 1847) (No. 17,323) (taking into account author’s “aim . . . in preparing the defendants’ book” and noting that the author “had a right to [copy from the plaintiff’s work] in some degree, and to some extent, if it was not her *main design* to compile a like treatise, with only *colorable* but not real differences.”) (emphasis supplied); *id.* at 519 (noting that the quantity and the value of the matter extracted were relevant to determining whether the defendant had infringed, and commenting that, in cases in which there was literal copying or close imitation of 75 of 118 pages or 20 of 48 pages, “so great a quantity indicates theft, *animus furandi*”) (emphasis supplied).

144. *Gray v. Russell*, 10 F. Cas. at 1038 (emphasis supplied).

145. *Webb v. Powers*, 29 F. Cas. at 519 (emphasis supplied). See also *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (“Where books are *colorably* shortened only, they are undoubtedly within the meaning of the act of parliament, and are a *mere evasion* of the statute, and can not be called an abridgment.”) (emphasis supplied) (quoting *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Hardwicke, L.J.)).

146. 2 KENT, *supra* note 58, at 314.

147. BLACK’S LAW DICTIONARY 1251 (6th ed. 1990).

148. 2 KENT, *supra* note 58, at 314.

149. BLACK’S LAW DICTIONARY 88 (6th ed. 1990).

similar ambivalence. Both strenuously disputed any implication in the cases that infringement should be determined with reference to the user's knowledge or intent,¹⁵⁰ but each treatise acknowledged a limited role for consideration of the defendant's intent in some fair use cases.¹⁵¹

Over the course of the nineteenth century, courts showed similar ambivalence about considering intent in determining fair quotation or abridgment. In 1847, one circuit court retained the inquiry into the defendant's intent, but cabined it:

The intent not to be guilty of piracy . . . would not be material, if much had actually been copied, and the new work was a mere substitute. But if this be doubtful, the intent not to pilfer from another, colorably or otherwise, for the substantial portions of the new work, may be important.¹⁵²

In that case, the court concluded that the evidence clearly showed "that the main intent was to make a much cheaper work . . . , rather than colorably to republish the plaintiffs' or any similar book," and the court declined to enjoin the defendant's book on the basis that it was a fair abridgment.¹⁵³ Over twenty years later, *Lawrence v. Dana* took a similar approach.¹⁵⁴ The court noted that "[d]ecided cases are referred to where the principal criterion of determination is held to be the intent with which the person acted who is charged with infringement," but concluded that more recent cases "refused to apply that doctrine."¹⁵⁵ The court observed that copyright law had evolved to offer the owner greater protection, stating that "[r]ecent decisions afford more ample protection to copyright than those of an earlier date, and they also restrict the privilege of the subsequent writer or compiler in respect to the use of the matter protected by the copyright, within

150. See CURTIS, *supra* note 15, at 252 n.3 (disagreeing with Godson's treatise and stating that "the more recent authorities, as well as sound principle, do not look at the intention, whether the quantity be large or small. If an injury is caused, there is no occasion to prove the intention directly, or to establish it by inference from the circumstances. If part of one author's book is found in that of another, the question will be, what effect is it to have? not whether it was taken with a bad intent."); DRONE, *supra* note 7, at 402 n.1 (arguing that in the cases, "[t]he true doctrine is not accurately expressed . . . , because the question of piracy is made to depend on the intention of the reviewer, whereas the proper test is the purpose which the publication complained of serves; in other words, how far it may take the place of the original work."). Note that these treatises often argued for more extensive copyright protection than statutes and cases at the time had actually provided.

151. See CURTIS, *supra* note 15, at 247 ("The legitimate influence of the proof of intention is merely to assist the court, among other circumstances, in determining whether the party has transcended the limits of fair quotation. But if he has, with the fairest intentions, published extracts of such a character as to injure the work from which they are taken, his intentions are wholly immaterial to the issue."); DRONE, *supra* note 7, at 402 ("Where it can be readily shown that there has been material copying, it matters not with what intent the copying was done; but where it is difficult to ascertain the extent of the copying, in order to determine whether the use made of a protected work by a subsequent author is 'fair' or unlawful, the *animus furandi* may aid in the solution of the question.").

152. *Webb v. Powers*, 29 F. Cas. at 520.

153. *Id.* at 520-21.

154. *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869).

155. *Id.* at 60 (citing *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679, 680 (K.B.), and *Spiers v. Brown*, (1858) 6 W.L.R. Rep. 352, 353 (Q.B.), as cases looking to intent, and *Scott v. Stanford*, (1867) 3 L.R.Eq. 718, 722 (Q.B.), as refusing to do so).

narrower limits.”¹⁵⁶ The court therefore held that “[m]ere honest intention on the part of the appropriator will not suffice” to prevent infringement.¹⁵⁷ Even this court, however, was unwilling to dispense entirely with considerations of intent, stating that “[e]vidence of innocent intention may have a bearing upon the question of ‘fair use.’”¹⁵⁸ The court also stated that “where it appeared that the amount taken was small, [evidence of innocent intent] would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused.”¹⁵⁹

Thus, throughout the nineteenth century, courts considered a defendant’s intent in determining whether that defendant’s use of a plaintiff’s work was noninfringing under the precursors of the fair use doctrine. As the century progressed, however, courts appear to have relied less and less on intent in fair use determinations, eventually limiting but not eliminating considerations of intent.

3. Infringement by Imitation in the Statute

The preceding subsections discussed how *courts*, principally deciding cases in equity, looked to a defendant’s mental state in evaluating whether apparently imitative copying was infringing. Congress also recognized the potential risk for holding innocent infringers liable when it expressly granted copyright owners rights to control not only facsimile reproductions of their works but also imitations and provided legal, as opposed to equitable, remedies for violation of those rights. As noted above, for much of copyright’s first century in the United States, the law generally allowed many kinds of imitations of a copyrighted work. Starting in 1831, however, Congress extended the scope of copyright in visual and musical works to expressly include rights against copying by imitation, that is, against certain derivative uses of the work. That year, Congress revised the copyright statute to provide that it would infringe a protected “print, cut, or engraving, map, chart or musical composition” to “engrave, etch, or work, sell, or copy [any such work] . . . , either on the whole, *or by varying, adding to, or diminishing the main design with intent to evade the law*” without the copyright owner’s authorization.¹⁶⁰ Several revisions, some differing slightly in phrasing, kept this provision in force until 1909.¹⁶¹ Indeed, in 1891, Congress added “dramatic compositions” to the

156. *Lawrence v. Dana*, 15 F. Cas. at 60.

157. *Id.*

158. *Id.*

159. *Id.*

160. 1831 Copyright Act (Act of Feb. 8, 1831), ch. 16, § 7, 4 Stat. 436, 438 (repealed 1870) (emphasis supplied). The statute extended the existing legal remedies of penalties and forfeiture to such infringement.

161. In 1865, Congress extended the provision to photographs. Act of Mar. 3, 1865, ch. 126, § 2, 13 Stat. 540, 540 (repealed 1870). The 1870 Act further extended it to “any . . . chromo, or . . . any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts,” and read as follows: “[I]f any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as herein provided, shall, within the term limited, and without the consent of the

categories of work protected under the section and also added dramatizing and translating to the list of activities subject to penalty if done by varying the work with intent to evade the law.¹⁶² In essence, Congress in the statute was doing expressly for visual and musical works (and eventually dramatic works) what courts were doing in the cases discussed in the preceding section: recognizing that protection only against verbatim or identical reproduction was too narrow, and therefore extending that protection to imitative reproduction as well.

And just as courts sought to distinguish between legitimate and illegitimate imitation, and turned to examining a defendant's mental state to help them do so, Congress did the same. If a defendant did not merely copy a protected work, but instead copied the work while "varying, adding to, or diminishing the main design" of the work, then the defendant was subject to the statutory remedies only if she acted "with intent to evade the law."¹⁶³ Any verbatim reproduction was penalized, but nonidentical imitation was wrongful only if done merely to avoid the prohibition of such verbatim reproduction. This suggests Congress did not want to impose liability on one who innocently imitated a copyright work too closely. Because the acceptable degree of imitation might be difficult to predict—in contrast to the express ban on printing or reprinting—this was another situation in which Congress could not rely on clearly limited rights and a required copyright notice to enable users to avoid infringing. Instead, Congress adopted an intent requirement to protect innocent infringers.

The reported decisions have unfortunately left little evidence of how this intent requirement operated. Although several reported cases interpreted this section of the statute, only two of them address the provision limiting liability to cases in which the defendant produced a work altered "with intent to evade the law."¹⁶⁴

proprietor of the copyright first obtained in writing . . . engrave, etch, work, copy, print, publish, or import, either in whole or in part, by varying the main design *with intent to evade the law* [he shall be subject to enumerated penalties for infringement]." 1870 Copyright Act (Act of July 8, 1870), ch. 230, 100, 16 Stat. 198, 214 (repealed 1909) (emphasis supplied). The 1873 revision contained virtually identical language. Rev. Stat. § 4965 (1873).

162. Act of Mar. 3, 1891, ch. 565, § 8, 26 Stat. 1106, 1109 (repealed 1909). The 1891 revision extended the provision to dramatic compositions, and read as follows: "If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing . . . engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design *with intent to evade the law* . . . he shall [be subject to enumerated penalties]." *Id.* The 1895 revision of this section is virtually identical in relevant part. Act of Mar. 2, 1895, ch. 194, § 4965, 28 Stat. 965, 965 (repealed 1909).

163. See *supra* notes 160-61.

164. Most of the decisions deal with the remedial aspects of the section, providing for forfeitures and penalties. The Supreme Court eventually decided that such forfeitures and penalties were—and always had been—the exclusive remedy for copyright infringements covered by them, and were not supplementary to remedies at common law to enforce the exclusive rights granted to copyright proprietors by Congress. *Globe Newspaper Co. v. Walker*, 210 U.S. 356, 367 (1908). Several other decisions interpreting this section address which copies are subject to the fines specified in the Act. See, e.g., *Bolles v. Outing Co.*, 175 U.S. 262, 268 (1899) (recovery is limited to copies actually found in

The first, *Reed v. Carusi*, does not address the intent provision in any depth, though it demonstrates that the provision was known to the bar and used in deciding cases.¹⁶⁵ In the second case, *Springer Lithographing Co. v. Falk*,¹⁶⁶ the owner of the copyright in a photograph sued a lithographer seeking the statutory penalty for 3,000 lithographs found in the defendant's possession that the copyright owner claimed were copied from its photograph. The lithographer had unsuccessfully sought permission to reproduce the photograph, and thereafter created a lithograph that was based on, but not identical to, the photograph. The main question put to the jury, and a principal issue on appeal, was whether the defendant's lithograph copied the plaintiff's photo "by varying the main design with intent to evade the law."¹⁶⁷ The trial judge described the plaintiff's contention to be that the defendant had produced "in lieu of an exact copy, a modified form of this photograph, but so far removed from it that it could not be called an exact copy; in other words, intended to avoid infringement, but retain the substantial fruits of infringement."¹⁶⁸ The court's charge to the jury made clear that the defendant's intent in producing an altered copy of the plaintiff's photograph was at issue:

the precise question before you [is]: Did the lithographs . . . contain the main design, the substantial ideas, the distinctive characteristics, of the original photograph, only so far varied as to intend to evade the law, without actual evasion . . . ? If defendants have reproduced, in substance and effect, the general characteristics of the original, though some minor particulars are *intentionally* avoided, then there is an infringement.¹⁶⁹

defendant's possession and does not extend to all copies traceable to his possession); *Backus v. Gould*, 48 U.S. (7 How.) 798, 811-12 (1849) (same); *Thornton v. Schreiber*, 124 U.S. 612, 619-21 (1888); *Werckmeister v. Am. Tobacco Co.*, 207 U.S. 375, 383-84 (1907) (forfeiture and penalties must be sought in single action).

Jollie v. Jaques, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437) involved the alleged infringement of a musical composition by a similar, though not identical musical composition. The decision did not mention or discuss the "intent to evade the law" requirement, which applied to musical compositions at the time. The court's discussion, however, centered on whether the *plaintiff's* composition was sufficiently different from a prior, public domain composition to qualify for copyright protection at all, not whether the *defendant's* non-identical composition was an infringement of the plaintiff's.

^{165.} The suit involved the alleged infringement of a copyrighted musical composition and sought the penalties prescribed in the 1831 Act. Circuit Justice Taney, in instructing the jury, quoted that statute's prohibition on causing a musical composition to be engraved "either on the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law" and instructed that the defendant "is not liable, unless the musical composition caused to be engraved or printed for sale by him, is the same with that of [the plaintiff], in the main design, and in its material and important parts, altered, as above mentioned, to evade the law." The report, however, merely transcribes Justice Taney's jury instructions and reports that the jury found for the plaintiff, but offers no other insight into the application of the intent requirement in the case at bar. *Reed v. Carusi*, 20 F. Cas. 431, 432 (C.C.D. Md. 1845) (No. 11,642), *overruled on other grounds as noted by* *Bolles v. Outing Co.*, 175 U.S. 262, 267 (1899).

^{166.} 59 F. 707 (2d Cir. 1894), *appeal dismissed*, 17 S. Ct. 998 (1896).

^{167.} *Id.* at 708 (citing Rev. Stat. § 4965 (1873)).

^{168.} 59 F. at 709. The jury charge is printed in full in the reporter's note preceding the opinion.

^{169.} 59 F. at 709, 712 (emphasis supplied).

The Second Circuit approved the trial court's instructions on the point.

The decision appears to be the only reported case to consider the issue. But it shows that the language of the U.S. copyright statutes between 1831 and 1909 was read to impose legal penalties on someone who produced an altered version of certain kinds of copyrighted works only if she altered the underlying work with the *intent* to produce a close but non-identical copy of it in the hope that the variations would thereby allow her to escape liability for copyright infringement. The question for the jury was not just whether the defendant had copied the plaintiff's work and thereby produced a substantially similar, though not identical, work, but also whether the differences between the works had been introduced by the defendant so that she would not be guilty of infringement for having produced an identical copy. Essentially, the statute penalized producing a derivative work only if the work was produced in bad faith, in an effort to avoid infringement on the technical ground that the defendant's work was not identical to the plaintiff's. Liability regardless of knowledge or intent was thus *not* imposed on those who produced derivative works where the statute expressly protected against the making of such derivative works.

The imposition in the nineteenth century of statutory infringement penalties on an imitator of a visual, musical, or dramatic copyrighted work who acted "with intent to evade the law" stood in sharp contrast to the statute's treatment of books for much of that period. Until 1870, when suits by a copyright owner for damages were authorized, the exclusive statutory remedies for infringement of a copyrighted book were forfeitures and specified penalties. And unlike the penalty provision for visual and musical works, the section governing books prohibited printing "any copy" of a protected book but contained no language barring printing a copy in an altered version if the variations were made with intent to evade the law. This difference led Justice Curtis in 1858 to hold that because the defendant allegedly copied the plaintiff's book only in large part and not in its entirety, the defendant was not subject to the statutory penalties.¹⁷⁰ The court ruled that the term "copy" in the statutory provision on books meant a transcript of the *entire* book, and noted that, by contrast, "[a]s to maps, charts, engravings, prints, and musical compositions, the legislature has thought proper to have the penalties applied to any unlawful copy of such work made with design to evade the law."¹⁷¹

170. *Rogers v. Jewett*, 20 F. Cas. 1114 (C.C.D. Mass. 1858) (No. 12,012).

171. *Id.* at 1114-15. The court was influenced by the fact that it deemed the Copyright Act to be "highly penal" and therefore to be strictly construed because of the "severe penalties" imposed. *Id.* at 1115. The court also noted that even if the statutory penalties were unavailable in cases where a defendant had copied only part of a book, copyright owners would still "have their private remedies at law and in equity." *Id.* In equity, courts had come to rule that substantial copying of part of a copyrighted work could be sufficiently wrongful to be enjoined and to require an accounting of profits. With respect to private remedies "at law," however, the *Rogers* view is inconsistent with later Supreme Court rulings on a later version of the Copyright Act, in which the Court held that the statutory penalties for copying engravings, prints, etc. were exclusive of any common-law remedies. *See Globe Newspaper Co. v. Walker*, 210 U.S. 356, 367 (1908). The 1908 decision seems particularly persuasive in light of the fact that the 1790 Patent Act expressly provided that an infringer should "forfeit and pay to the . . . patentee . . . such damages as shall be assessed by a jury . . . , which may be recovered in an action on

The statutory intent provision for imitations thus presents another example of Congress not imposing liability on unknowing infringement where a potential defendant would be poorly positioned to avoid committing an infringement *ex ante*. Someone who wanted to produce an altered version of a copyrighted engraving might not easily be able to tell whether the proposed variations were sufficiently different so that the new work would not infringe on the engraving's copyright. By limiting copyright liability for producing a similar engraving to copyists whose alterations were made "with intent to evade the law," the drafters balanced the desire to protect copyright owners against more than just identical copying with the desire to avoid imposing liability on those who transformed existing works into new and different works.

II. 1909-TODAY: ORIGINAL SAFEGUARDS GRADUALLY REPLACED BY LIMITED REMEDIAL RELIEF

By the end of the twentieth century, the copyright system operated radically differently than it had 100 years earlier. The changes in copyright law over this period significantly increased the risk of infringing a copyrighted work, but they simultaneously had the effect of eliminating many of the mechanisms that had protected innocent infringers from liability. As the copyright system evolved over the last century, all of the doctrines and features that mitigated the potential negative effects of liability for unknowing infringement were removed from the system. The legal changes were mostly gradual and cumulative, and therefore were never really considered as a coherent whole.¹⁷² But they resulted in copyright's moving away from using constructive notice and knowledge requirements to reduce the risk of innocent infringement, and replaced those mechanisms with adjustments in remedies as the sole recognition of an innocent infringer's lack of culpability.

A. LIMITED RIGHTS AND CLEAR NOTICE NO LONGER HELP USERS AVOID INFRINGING

In contrast to the early years of U.S. copyright law, copyright infringement is far more likely to occur today. The amount of material subject to copyright protection has increased dramatically.¹⁷³ Within this much broader range of subject matter,

the case founded on this act." Patent Act of 1790, ch. 7, § 4, 1 Stat. 109, 111. The fact that the first Congress expressly provided patent owners with a general damages action while providing copyright owners only an "action of debt" to recover the specified penalties suggests a conscious choice to limit copyright owners' remedies and not to allow a general damages action.

172. The changes occurred for many reasons, including the increasing importance of works of authorship to the U.S. economy, the increased political power of copyright owners, the entry of the United States into the international copyright system, and the U.S. move from being a net importer to a net exporter of copyrighted works.

173. The limited classes of copyrightable subject matter protected in the early years (for example, only books, maps, and charts in 1790) were expanded in 1909 to include "all the writings of an author," 1909 Copyright Act, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976), and in 1978 to include all

far more works are in fact protected because the formalities required to obtain copyright have gradually been entirely eliminated. This increased number of copyrighted works is protected for a far longer period of time, both because the maximum possible term of protection has continually grown, and because the 1976 Act's adoption of a unitary term of protection means that copyrighted works no longer enter the public domain after only half of the maximum term, as the bulk of those works had done under the renewal system. Furthermore, copyright now protects this vastly increased universe of copyrighted material against many more types of unauthorized use. The 1909 Act continued the nineteenth-century's gradual expansion of copyright owners' rights, and the 1976 Act grants copyright owners very broad exclusive rights, circumscribed only by narrow exceptions for very specific activities,¹⁷⁴ so that a copyright owner now generally has the right to reproduce and distribute copies of her work, to prepare derivative works based on her work, and to perform or display her work publicly.¹⁷⁵ As a result, it is much easier to commit copyright infringement today than it has ever been.

As discussed above, early copyright law sought to avoid holding innocent infringers liable in part by making clear which uses of a copyrighted work were prohibited and by making it easy to determine whether any particular work was copyrighted. Current copyright law has eliminated both features of this "constructive knowledge" mechanism and thereby has substantially reduced its usefulness as a means to allow users to avoid infringing.

First, the law evolved to make it more difficult to determine a work's copyright status than in the nineteenth century. The 1909 Act retained the notice requirement as a condition to obtaining copyright protection for a published work,¹⁷⁶ so every

"original works of authorship," 1976 Copyright Act, 17 U.S.C. § 102(a) (2000).

174. LITMAN, *supra* note 34, at 37; H.R. REP. NO. 94-1476, at 61 (1976) ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms . . . , and then to provide various limitations, qualifications, or exemptions. . . .").

175. 17 U.S.C. § 106 (2000). The reproduction, distribution, and derivative work rights apply to all categories of copyrightable works. 17 U.S.C. § 106(1)-(3). Most works have either the public performance or public display right, or in some cases both. 17 U.S.C. § 106(4)-(6).

176. "[A]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor" 1909 Copyright Act § 9. The basic form of the notice required by the 1909 Act for most types of works included three elements: (1) an indication of copyright (either the word "Copyright," the abbreviation "Copr.," or, for certain types of works, the "circle C" symbol "©"); (2) the name of the copyright proprietor; and (3) "the year in which the copyright was secured by publication." *Id.* § 18. Copyright could be obtained in an unpublished work by deposit of a copy of the work in the Copyright Office. *Id.* § 11.

The Act effectively eliminated registration and deposit as conditions to securing a valid copyright. Registration was permissive under the 1909 Act. *Id.* § 10 (providing that a person "may obtain registration of his claim to copyright") (emphasis supplied). Deposit of copies of a published work was mandatory under the 1909 Act, but was not a condition to obtaining copyright protection. Failure to make the required deposit did not automatically invalidate a copyright. *See, e.g.,* *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 42 (1939). Rather, the owner became subject to a demand from the Register of Copyrights to make the deposit; only if the owner failed to comply with the demand was the copyright forfeited. 1909 Copyright Act §§ 12-13. Although registration and deposit were not required in order to obtain copyright protection, they were required as a prerequisite to suing

authorized copy of a copyrighted work should have carried with it a notice advising potential users that someone claimed copyright in the work. But the Act took the first step in a progressive loosening of the notice requirement that culminated eighty years later in its complete elimination: failure to provide proper notice did not necessarily forfeit copyright protection. Instead, under the 1909 Act, where the owner “sought to comply” with the notice provisions, “the omission by accident or mistake of the prescribed notice from a particular copy or copies [did] not invalidate the copyright.”¹⁷⁷ So for the first time a work could be protected by copyright while authorized copies were circulating without a copyright notice. In the 1976 Act, Congress further “liberalized the copyright notice requirement, principally by relaxing the rules on the form, content and position of copyright notice, and by providing more generous excuses for errors or omissions of notice.”¹⁷⁸ Finally, in 1989, when the United States joined the Berne Convention, Congress eliminated the notice requirement entirely.¹⁷⁹

The abolition of the notice requirement deprives users of the simplest and least expensive means of determining that copyright protection is claimed for the work, by whom such protection is claimed, and when copyright protection began.¹⁸⁰ The House Report on the 1976 Act identified these informational functions as three of the principal purposes of the copyright notice¹⁸¹ and explained that because “the copyright notice has real values which should be preserved,”¹⁸² Congress retained the notice requirement in the 1976 Act. The House Report makes clear that one of those values was the protection of innocent infringers:

[A] person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and ... if he relies on this assumption, he should be shielded from unreasonable liability.¹⁸³

Even in eliminating the notice requirement in 1989, Congress acknowledged the usefulness of the informational function of the notice provision. The Senate

for copyright infringement. *Id.* § 12. The 1976 Act essentially continued the same regime with respect to registration and deposit. *See* 17 U.S.C. §§ 407, 408, 411.

177. 1909 Copyright Act § 20.

178. 1 GOLDSTEIN, *supra* note 16, at § 3.4, at 3:41. *Cf.* 1909 Copyright Act § 20 with 1976 Copyright Act, 17 U.S.C. §§ 405, 406 (2000). Under the 1976 Act, federal copyright attached immediately on *fixation* without any notice required, and the copyright notice was required in order to maintain protection when the work was *published*.

179. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-59 (1988).

180. Note, *Subsisting Copyrights and Innocent Infringement*, 115 U. PA. L. REV. 129, 129 (1966) (“The notice requirement is designed to warn would-be infringers that the work is protected, as well as to differentiate between those works which may be copied freely and those which can be reproduced only with the author’s permission.”).

181. “Under the present law the copyright notice serves four principal functions. . . : (2) It informs the public as to whether a particular work is copyrighted; (3) It identifies the copyright owner; and (4) It shows the date of publication.” H.R. REP. NO. 94-1476, at 143 (1976).

182. *Id.*

183. *Id.* at 148.

Report, after explaining that notice would no longer be required, continued:

However, the committee recognizes the value of including notice of copyright on publicly distributed works. The placement of such notices on copies of works alerts users to the fact that copyright is claimed in the work in question, and *may prevent many instances of unintentional infringement*.¹⁸⁴

The elimination of the notice requirement means that a potential user's easiest and cheapest potential source of information about details of a work's copyright status will often be unavailable.

But more importantly, even knowing that a work is protected by copyright offers a potential user little help in avoiding innocent infringement under modern copyright law, in large part because the scope of the copyright owner's rights is so much greater today. The early constructive notice approach to enabling users to avoid infringing depended on a relatively clear demarcation between a copyright owner's exclusive rights and uses of a work that did not infringe. Today, though most noninfringing uses of copyrighted works are those allowed under significantly indeterminate doctrines such as the idea-expression dichotomy or fair use—doctrines with extremely uncertain boundaries. Someone who wants to use a work without infringing must determine not only whether the work is copyrighted but, more importantly, whether the use is permissible. Because of the multi-factor, context-sensitive standards that copyright law uses to determine fair use or distinguish idea from expression, it is generally very difficult (and often essentially impossible) to answer that latter question with certainty, short of adjudication. In addition, the legal concept of infringement has expanded so that it no longer consists merely of verbatim use of the whole or a substantial part of the work, as in earlier years. Instead, infringement now includes most imitative copying that was previously acceptable, so that using any portion of a work's protectable expression, either verbatim or in substantially similar form, infringes the work's copyright.

Thus, a major bulwark against liability for innocent infringers in the early years of copyright—the grant of clear, limited rights to authors and the availability of notice of copyright to users—no longer exists. So even if a user knows (or assumes) that a work is copyrighted, she may well use the work in a way that she reasonably believes to be permitted only to find that she has in fact infringed.

B. CONSIDERATION OF DEFENDANT'S KNOWLEDGE OR INTENT IN LIABILITY DETERMINATIONS LARGELY ELIMINATED

Early copyright law's other major protection for innocent infringers was limiting liability in some circumstances (sales of copies, and imitative copying) to parties who knew that their acts were infringing. Since 1909, this approach, too, has been abandoned, and a defendant is now civilly liable for acts of direct infringement without regard to her mental state. The 1909 Act abandoned the basic structure of

184. S. REP. NO. 100-352, at 43 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3740-41 (emphasis supplied). See also H.R. REP. NO. 100-609, at 26-27 (1988).

all prior U.S. copyright law that required knowing action for certain acts to constitute infringement. As discussed above, earlier statutes expressly made sales of unauthorized copies infringing only if made with knowledge that the copies were unauthorized; also, for many kinds of works, infringement by imitation was penalized only if the defendant had intended to evade the law. By contrast, the 1909 Act merely enumerated the exclusive rights to which a copyright owner was entitled but never expressly defined infringement and articulated no knowledge or mental-state requirement for any violations. The express limitations of earlier U.S. copyright statutes as to sales and derivative works thus disappeared from U.S. copyright law upon the enactment of the 1909 Act.¹⁸⁵ As a result, in 1931, the Supreme Court could make the definitive pronouncement that “[i]ntention to infringe is not essential under the [1909] Act.”¹⁸⁶ The 1976 Act maintained the same approach, including essentially no mental-state limits on liability for direct infringement.

Courts have also moved away from their earlier consideration of a defendant’s mental state in determining whether an imitative copy is infringing and in deciding whether a defendant engaged in noninfringing fair use. The basic test for infringement (whether the defendant has in fact copied from the plaintiff and whether that copying amounts to improper appropriation) has no role for a defendant’s mental state. And while courts and commentators still sometimes debate the role of a user’s mental state in determining fair use, that debate has generally centered on whether someone who *cannot* demonstrate that she acted in good faith should nonetheless be entitled to claim fair use, rather than on whether demonstrated good faith should affect the fair use decision.

C. REMEDIAL RELIEF AS SOLE PROTECTION FOR INNOCENT INFRINGERS

Over the course of the last ninety years, then, copyright law’s traditional mechanisms for protecting innocent infringers have gradually been eliminated. As these mechanisms eroded, Congress adopted only one alternative means to protect those who infringe the exclusive rights in a copyrighted work unknowingly: limitations on the recovery that copyright owners could obtain against them.

The first provision offering remedial relief came in the 1909 Act, in response to the loosening of the notice requirement that forgave omission of notice on some copies.¹⁸⁷ In taking this step away from demanding strict compliance with the notice requirement, Congress recognized that someone who possessed such a copy without notice might believe that the work was in the public domain and act

185. That the 1909 Act made such a significant innovation in copyright law without much express consideration in the legislative record was apparently not unusual. See Peter Jaszi, *505 And All That—The Defendant’s Dilemma*, 55 LAW & CONTEMP. PROBS. 107, 107 n.1 (1992) (“Although the entire provision [of the 1909 Act allowing attorney’s fees to prevailing parties] was a novelty in American copyright, it attracted little critical attention during the deliberations over the 1909 Act.”).

186. *Buck v. Jewell-Lasalle Realty Co.*, 283 U.S. 191, 198 (1931).

187. See ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW* 351 (1917) (noting correspondence between loosening of notice requirement and remedial relief for innocent infringer).

accordingly, thus unknowingly infringing the copyright. Congress therefore reduced the remedies available against such an infringer, but did not give a complete defense to an infringement action.¹⁸⁸ An owner's accidental or mistaken omission of notice would "prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice,"¹⁸⁹ though the innocent infringer appears to have remained liable to pay to the copyright owner its profits from the infringement.¹⁹⁰ With respect to injunctive relief, courts could refuse to issue a permanent injunction against an innocent infringer misled by omitted notice, "unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct."¹⁹¹ This provision held out the prospect of significant protection for an innocent infringer. If she had invested in producing the infringing work (for example, by paying for the typesetting and production of printing plates for printing the infringing work, or by paying to create a motion picture based on the copyrighted work), then she might be able to recover that investment from the copyright owner as a condition to an injunction preventing her from exploiting the infringing work. This protection was somewhat uncertain, though, as the requirement for reimbursement by the copyright owner was left to the discretion of the court.

Congress twice amended the 1909 Act to grant additional protections for certain kinds of innocent infringement. Both additions came when Congress was extending protection to new subject matter or was extending new rights in copyrighted subject matter. In 1912, when Congress extended copyright protection to motion pictures, it limited a copyright owner's recovery of damages "in lieu of" actual damages (the 1909 Act's equivalent of today's statutory damages) against an infringer who made a motion picture of the copyrighted work in cases "where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen."¹⁹² If the infringement was

188. 1909 Copyright Act, ch. 320, § 20, 35 Stat. 1075, 1080 (repealed 1976) (After codification by Congress in 1947, these provisions were in 17 U.S.C. § 21. See Pub. L. 80-281, 61 Stat. 652 (1947)). The remedial relief did not apply to "prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it." 1909 Copyright Act § 20 (emphasis supplied). Thus, for example, if a user relied on a copy of a work without a notice but had discovered by a registration search that copyright in the work had been secured, the user would not have been protected by Section 20.

189. *Id.* Because these protections only shield an innocent infringer "who has been misled by the omission of the notice," many types of innocent infringement—such as infringement by one who acted in a reasonable and good-faith belief that her use was a fair use—would appear not to have been protected by Section 20.

190. See WEIL, *supra* note 187, at 354 ("It has . . . been held, that the profits made by an innocent infringer may be recovered in a case covered by [Section 20 of the 1909 Act], although not damages actual or fixed. This decision, unjust as its result appears to be, seems to have been required by the language of the Act and to be sound, from a technical point of view.") (footnote omitted). See also *Strauss v. Penn Printing & Publ'g Co.*, 220 F. 977 (E.D. Pa. 1915). An award of profits is provided for in 1909 Copyright Act § 25(b).

191. 1909 Copyright Act § 20.

192. Act of Aug. 24, 1912, ch. 356, §§ 5(l), 5(m), 25(b), 37 Stat. 488, 488-89 (repealed 1976). The Act provided that this limitation would not apply to infringements occurring after the defendant had

of “an undramatized or nondramatic work by means of motion pictures,” then the innocent infringer was liable for “in lieu” damages of no more than \$100, whereas the normal range of “in lieu” damages was between \$250 and \$5,000, in the court’s discretion.¹⁹³

In 1952, when Congress granted copyright owners of nondramatic literary works (including lectures, sermons, and addresses) the exclusive right to record such works and publicly perform such recordings for profit, it provided that a broadcaster that infringed those rights could not be required to pay damages exceeding \$100 if “the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen.”¹⁹⁴

Thus, under the 1909 Act, Congress addressed innocent infringement solely by limiting the remedies available against innocent infringers under certain circumstances. Only one remedial relief provision was generally applicable—the limitation of relief where an infringer was misled by a copy of a work without a copyright notice—while the other two provisions were restricted to particular industries, the motion picture and broadcasting industries.¹⁹⁵ Furthermore, the remedial relief granted to innocent infringers was only partial: Congress limited certain remedies available to a copyright owner, but did not eliminate them entirely.¹⁹⁶

The 1976 Act continued the 1909 Act’s approach. Any unexcused violation of the copyright owner’s exclusive rights was a civil infringement, regardless of the mental state with which the act was committed, but in some circumstances the remedies available against an innocent infringer were limited. The original 1976

actual notice, either by service of process or other written notice. *Id.* § 25(b). For a case in which a court refused to apply the limitation, holding that the defendant was aware of the infringement, *see Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 371 (9th Cir. 1947).

193. Act of Aug. 24, 1912, § 25(b). The 1912 statute also expressly provided that in cases of innocent infringement of a “dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors,” the “in lieu” damages to be recoverable by the copyright owner “from such infringing maker and his agencies for the distribution to exhibitors” was to be between \$250 and \$5,000. *Id.* The ordinary rule would have made the infringer liable for \$100 for the first, and \$50 for each subsequent, infringing performance. In addition, this provision appears to have made *all* infringers together liable for no more than \$5,000, rather than each infringer being liable for up to \$5,000. The limitation applied only to the “in lieu” (or statutory) damages, and not to awards of actual damages. *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F.2d at 371.

194. Act of July 17, 1952, Pub. L. No. 82-575, 66 Stat. 752, 752 (repealed 1976) (amending 17 U.S.C. § 1(c)).

195. Providing relief specifically directed at a particular industry, rather than more generally, fits the essential pattern of copyright legislation under the 1909 Act that Jessica Litman has identified: copyright laws were essentially negotiated among most of the parties with an interest in such legislation, resulting in specific limitations that were narrowly drafted to address particular concerns that a specific copyright industry brought to the table. *See, e.g., LITMAN, supra* note 34, at 23-25, 35-37.

196. Relief for infringers misled by omitted notice was the most comprehensive, but even there injunctive relief was available against the infringer, and the requirement that the copyright owner compensate the defendant for her outlay before an injunction issued was in the court’s discretion. The limitations for film and broadcast defendants by their terms did not apply to injunctive relief at all, and the former applied only to “in lieu” damages, and not to awards of the copyright owner’s actual damages or the defendant’s profits.

Act followed the pattern begun in 1909 by relaxing certain remedies available against anyone “who innocently infringes a copyright, in reliance upon an authorized copy . . . from which the copyright notice has been omitted”: “if such person proves that he or she was misled by the omission of notice,” the infringer was not liable for any actual or statutory damages, and the court had the authority to decide whether to make an award of the infringer’s profits.¹⁹⁷ The availability of injunctive relief depended in part on whether the innocent infringement was an isolated event or part of a continuing undertaking.¹⁹⁸ While the 1909 Act gave courts discretion to condition an injunction on the copyright owner’s reimbursing the innocent infringer for her reasonable outlays, the 1976 Act allowed courts to enjoin the innocent infringer or instead to “permit[] the continuation of the infringing undertaking” and require that “the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.”¹⁹⁹ Essentially, Congress gave courts the authority to impose compulsory licenses to allow innocent infringers to continue their infringement.²⁰⁰

Aside from the provisions protecting innocent infringers in cases of erroneous or omitted notice, the 1976 Act’s more significant and more generally applicable form of remedial relief for innocent infringers is the possible reduction of the amount of statutory damages: where an infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than

197. 1976 Copyright Act, 90 Stat. 2541, 2578, §§ 405(b), 406(a) (1976). *See also* H.R. REP. NO. 94-1476, at 148 (1976) (“Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances.”). The infringer was liable for infringing acts done after “receiving actual notice that registration for the work has been made.” 90 Stat. at 2578, § 405(b).

In addition to § 405(b), which is discussed in the text and deals with omission of notice, Section 406(a) provides relief in the very limited circumstance in which a copyright notice on a copy distributed with authority of the copyright owner errs in naming the copyright owner. “[W]here someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice . . . the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice.” H.R. REP. NO. 94-1476, at 149 (1976).

198. The House Report on the 1976 Act explained the distinction. “Thus, where the infringement is completed before actual notice has been served—as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like—liability, if any, would be limited to the profits the infringer realized from the act of infringement. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort should check the Copyright Office registration records before starting, even where copies have been published without notice.” H.R. REP. NO. 94-1476, at 148 (1976). Of course, the 1976 Act imposed on copyright owners no requirement to register their works, so that even the most careful check of registration records would not necessarily reveal that copyright was claimed in a work despite the absence of notice from a particular authorized copy.

199. 1976 Copyright Act, 90 Stat. 2541, 2578, § 405(b) (1976).

200. “The purpose of [this provision] is to give the courts broad discretion to balance the equities The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee.” H.R. REP. NO. 94-1476, at 148 (1976).

\$200” rather than following the ordinary minimum of \$750.²⁰¹ Of course, this provision offers no protection for the innocent infringer against injunctive relief or awards of actual damages or profits.²⁰² Nonetheless, Congress stated in 1976 that this provision “is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement.”²⁰³

III. CONCLUSION

From its beginnings, Anglo-American copyright law was particularly concerned about the dangers of unintentional infringement and the potential unfairness of holding unknowing infringers liable. For over a century, U.S. copyright law sought to address these concerns by limiting the risk of innocent infringement, either by providing mechanisms to make it easy to avoid unknowingly committing infringement or by simply limiting some acts of infringement to situations where the defendant knew, or should have known, that her conduct was prohibited. While these mechanisms surely did not offer complete protection against the risk of innocent infringement, they seem to have substantially reduced that risk. In the twentieth century, concerns about liability for unknowing infringement took a back seat to desires to expand copyright’s protections in many dimensions. As those expansions made unknowing infringement more likely, they simultaneously reduced or eliminated the aspects of copyright law that had protected unknowing infringers from liability.

The ways in which U.S. law has dealt with innocent infringement over time suggest reconsidering how current copyright law treats the innocent infringer. A variety of types of innocent infringement likely take place today, but perhaps the most important occurs when someone knowingly copies from an existing work and reasonably but erroneously believes, because of copyright law’s complex and often indeterminate scope, that her copying is permitted, not prohibited, by copyright law. Because copyright law seeks to encourage such noninfringing copying, the possibility of holding innocent infringers liable should be worrisome if it deters potential users from using copyrighted material in ways that might ultimately be found noninfringing. But the only protection that copyright law offers unknowing infringers today is very limited remedial relief, a weak bulwark against the danger that liability will deter permitted uses of copyrighted works. This concern animates continuing work on this topic that, drawing on the historical experience traced here, explores whether the current approach to innocent infringement deters potentially

201. 17 U.S.C. § 504(c)(2) (2000).

202. In addition, of course, the provision only grants courts the discretion to reduce the minimum statutory damage award to \$200; courts retain the discretion to award up to \$30,000 in statutory damages against even innocent infringers. Only in the case of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions for which they work, is a court directed to remit statutory damages entirely if the conditions are met. *Id.* § 504(c).

203. H.R. REP. NO. 94-1476, at 163 (1976). Congress also deemed Section 504(c)’s provisions to offer “adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit.” *Id.*

lawful uses of copyrighted works, whether imposing liability on innocent infringers is justified, and how we might better protect innocent infringers from liability as the scope of copyright expands and the boundaries of acceptable use remain unclear.²⁰⁴

204. R. Anthony Reese, *Innocent Copyright Infringement* (unpublished manuscript on file with author).