

UPDATE NEEDED? DIGITAL DOWNLOADERS AND THE  
INNOCENT INFRINGER DEFENSE

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ABSTRACT

*Over the past decade, the music industry has suffered unprecedented piracy and digital music has become increasingly prevalent on illegal websites. In response, the Recording Industry Association of America (RIAA) has filed lawsuits against many alleged copyright infringers who have illegally downloaded music from the Internet. A few of these alleged infringers, in an effort to reduce damages, claimed they were “innocent infringers.” Several courts ruled that the innocent infringer defense did not apply, based on 17 U.S.C. § 402(d), which precludes the defense if proper copyright notice appears on “phonorecords” (e.g., compact discs). The Supreme Court denied certiorari in one such case, Harper v. Maverick Recording Co., but Justice Samuel Alito filed a dissent, arguing that certiorari should have been granted to address whether notice published on phonorecords applies to copyright infringement cases involving music downloaded from the Internet. Justice Alito’s dissent raises an important question: should the innocent infringer defense be unavailable as a matter of law in music downloading cases if copyright notice is available on*

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*physical media to which the downloaders may never have had access? This Article explores this issue by examining Justice Alito's dissent and considering whether the Court should address the applicability of § 402(d) in music downloading cases.*

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#### INTRODUCTION

Total revenue in the music business has dropped from \$14.6 billion in 1999 to \$6.3 billion in 2009.<sup>1</sup> Although many factors have contributed to the music industry's financial decline—the rise of online streaming services, the increased availability of podcasts, and the iTunes model of single-song downloads—the increase in online music piracy has been a primary factor. Some individuals have largely stopped purchasing albums and instead illegally download music online free of charge. For years, the Recording Industry Association of America (RIAA) fought back directly, suing over 35,000 people.<sup>2</sup> Many individuals settled, recognizing

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<sup>1</sup> David Godlen, *Music's lost decade: Sales cut in half in 2000s*, CNNMONEY (Feb. 3, 2010), [http://money.cnn.com/2010/02/02/news/companies/napster\\_music\\_industry](http://money.cnn.com/2010/02/02/news/companies/napster_music_industry).

<sup>2</sup> Ashby Jones, *Copy-wrong! Unpacking the 1.92M Downloading Verdict*, THE WALL STREET JOURNAL (June 27, 2009), <http://blogs.wsj.com/law/2009/06/27/copy-wrong-unpacking-the-192m-downloading-verdict/>.

they were caught “red handed” in a clear case of copyright infringement. Some chose to fight back, claiming that any damages should be reduced because they were “innocent infringers” because they were “not aware and had no reason to believe that their acts constituted an infringement of copyright.”<sup>3</sup>

Generally, defendants may assert the innocent infringer defense in copyright litigation. Although innocent infringers are still liable for damages, a court may reduce those damages if the defendant can demonstrate that he or she is an innocent infringer. However, under 17 U.S.C. § 402(d), the defense is not available when a defendant has copied phonorecords that contain a proper copyright notice.

The Fifth Circuit Court of Appeals recently considered the innocent infringer defense in *Maverick Recording Co. v. Harper*.<sup>4</sup> In *Harper*, the 16-year-old defendant claimed that her downloading of 37 songs was innocent because she did not understand that copyrights on published music applied to music downloaded off the Internet. The court disagreed, stating Ms. Harper’s “own understanding of copyright law—or lack thereof—is irrelevant in the context of § 402(d)” and that she could not overcome the notice limitation in § 402(d) because the copyright holder placed appropriate copyright notice on the published song recordings and that these notices were accessible to the public.<sup>5</sup>

The Supreme Court denied certiorari.<sup>6</sup> Justice Alito dissented, arguing that certiorari should have been granted to address whether notice that has been published on phonorecords should apply to copyright infringement cases involving music downloaded from the Internet.<sup>7</sup>

The reasoning underlying Justice Alito’s dissent highlights an important question: should notice of copyright displayed on compact discs (CDs) or other physical media apply to music

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<sup>3</sup> *Maverick Recording Co. v. Harper*, 598 F.3d 193, 198 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 590, 178 L. Ed. 2d 511 (2010) (quoting 17 U.S.C. § 504(c)(2) (2006)).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 199.

<sup>6</sup> *Id.*

<sup>7</sup> *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting).

transferred from these media and ultimately downloaded without the notice?

## I. BACKGROUND

### A. *Digital Downloading*

The manner in which consumers legally purchase music has changed dramatically over the last 20 years. No longer do the vast majority of consumers buy CDs and records at brick-and-mortar stores. Now, because of the omnipresence of the Internet and increased use of smart phones and portable digital music players, more consumers are purchasing music through websites and electronic services like iTunes and the Amazon MP3 store. In 2012, digital music sales surpassed physical CD sales, accounting for more than 37 percent of all album purchases during the 2012 calendar year.<sup>8</sup>

Digital music distribution is popular because purchase and storage is convenient. For example, iTunes users need only set up an account and choose a payment method before they can purchase a song or album from a massive, searchable music database. To purchase, the consumer simply clicks the purchase button located near the song or album, and the software automatically downloads the digital song file onto the user's hard drive and charges the purchase price to the user's account. The process is nearly identical whether a consumer uses a personal computer or a smart phone or other mobile device to download the music. Online piracy has become easier and more user-friendly as well, with peer-to-peer networks and unauthorized download websites offering a plethora of musical works, and many savvy online denizens have downloaded music without purchasing it in any form.

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<sup>8</sup> Drew Garini, *Music Sales in 2012 Prove Digital is rising, CDs are Dead and ... Vinyl Is Alive Once Again*, THE HUFFINGTON POST (Jan. 9, 2013), [http://www.huffingtonpost.com/2013/01/09/music-sales-2012-digital-physical\\_n\\_2440380.html](http://www.huffingtonpost.com/2013/01/09/music-sales-2012-digital-physical_n_2440380.html).

### *B. The Innocent Infringer Defense in Copyright Law*

Section 106 of the Copyright Act grants the owner of a copyright in a musical composition or sound recording the following exclusive rights: “(1) to reproduce the copyrighted work in phonorecords; (2) to prepare derivative works based upon the copyrighted work; [and] (3) to distribute phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .”<sup>9</sup> If another person does any of these things without authorization, that person has infringed the copyright. Defendants may be liable for copyright infringement whether they intended to infringe the copyright or not, so typically the defendant’s state of mind is irrelevant.<sup>10</sup> Successful plaintiffs in a copyright infringement case may elect to recover actual damages or statutory damages.<sup>11</sup>

If an individual knows or should have known that his or her actions constitute infringement, courts will treat the violator as a willful infringer.<sup>12</sup> Willful infringers may be subject to statutory damages between \$750 and \$30,000 per violation.<sup>13</sup> However, if the infringer can show that he or she “‘was not aware and had no reason to believe that his or her acts constituted an infringement,’ then the minimum statutory damages per violation are \$200.”<sup>14</sup> This is known as the innocent infringer defense.

There is an exception to the innocent infringer defense, codified at 17 U.S.C. § 402(d), which can apply to infringement cases involving recorded music:

If a notice of copyright in the form and position specified by this section appears on the published

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<sup>9</sup> 17 U.S.C. § 106 (2006).

<sup>10</sup> 17 U.S.C. § 504(c)(2) (2006).

<sup>11</sup> 17 U.S.C. § 504(c) (2006).

<sup>12</sup> *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 236 (5th Cir. 1988) (holding that a defendant willfully infringes if the defendant “knows his actions constitute an infringement”); *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986) (holding that actual or constructive knowledge is enough for a court to find willful intent).

<sup>13</sup> 17 U.S.C. § 504 (c)(1) (2006).

<sup>14</sup> 17 U.S.C. § 504 (c)(2) (2006).

phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then *no weight* shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages . . . .<sup>15</sup>

There is no question as to whether the § 402(d) exception applies to copyright cases involving physical phonorecords marked with appropriate notice of copyright. But does this statute—adopted in 1988, well before the advent of widespread downloading of music from the Internet—apply to copyright cases involving Internet downloads?<sup>16</sup>

## II. *MAVERICK RECORDING CO. v. HARPER*

In *Maverick Recording Co. v. Harper*, *Maverick Recording* alleged that Whitney Harper, a 16-year-old girl, violated copyright law by illegally downloading 544 songs to her computer.<sup>17</sup> In its motion for summary judgment, *Maverick* asked for injunctive relief and requested minimum statutory damages of \$750 for each of 37 songs at issue in the case.<sup>18</sup> Ms. Harper claimed that she was an innocent infringer, arguing she did not understand the nature of file-sharing programs and that she believed that listening to music from file-sharing networks was akin to listening to a non-

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<sup>15</sup> 17 U.S.C. § 402(d) (emphasis added). There are several exceptions to this provision. Under 17 U.S.C. § 504(c)(2), “[t]he court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in § 188(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.”

<sup>16</sup> See Berne Convention Implementation Act, § 7, 102 Stat. 2857.

<sup>17</sup> *Harper*, 598 F.3d at 194.

<sup>18</sup> *Id.* at 195.

infringing Internet radio station.<sup>19</sup> The district court granted the plaintiff's motion for summary judgment as to the 37 claimed incidents of copyright infringement, but denied its request for statutory damages, ruling there were genuine issues of material fact as to whether Ms. Harper was an innocent infringer. Reserving its right to appeal the district court's decision on the applicability of the innocent infringer defense, Maverick moved for entry of judgment in the amount of \$200 for each infringed work, the minimum amount imposed upon an innocent infringer.<sup>20</sup> The court granted Maverick's motion.

Ms. Harper appealed to the Fifth Circuit, arguing that she did not infringe Maverick's copyrights and that the Copyright Act's damage provisions violated her constitutional right to due process. Maverick cross-appealed, arguing that as a matter of law, under § 402(d), Ms. Harper could not raise the innocent infringer defense.<sup>21</sup>

In its decision, the Fifth Circuit ruled in favor of Maverick on the issue of the innocent infringer defense. The court held that Ms. Harper could not raise the defense as a matter of law, reasoning that proper copyright notice had appeared on CDs that included the downloaded songs and were sold to the public. Because notice was publicly available, Ms. Harper could not claim the innocent infringer defense, even if she had not actually encountered the notice.<sup>22</sup> Relying on the "historical structure of copyright law," the court implied that it was irrelevant that Ms. Harper may not have personally seen the copyright notices because the "lack of legal sophistication cannot overcome a properly asserted § 402(d) limitation to the innocent infringer defense."<sup>23</sup>

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<sup>19</sup> *Id.* at 198.

<sup>20</sup> 17 U.S.C. § 504(c)(2) (2006).

<sup>21</sup> *Harper*, 598 F.3d at 195.

<sup>22</sup> *Id.* at 199.

<sup>23</sup> *Id.* The court noted that § 402(d) was amended by the Berne Convention Implementation Act (BCIA), and is in large part responsible for "preserv[ing] an incentive for use of the same type of copyright notice" by barring the innocent infringer defense in disputes involving copyright plaintiffs who have provided copyright notice. Given this, the court did not see how it could make sense "for a copyright defendant's subjective intent to erode the working of § 402(d)."

While at least one court has expressly held<sup>24</sup> that downloaded files fall within the § 101 definition of “phonorecord,”<sup>25</sup> the Fifth Circuit did not consider this issue. Instead, the Fifth Circuit concluded that § 402(d) barred Ms. Harper from claiming the innocent infringer defense, implying that although Ms. Harper did not actually see the particular “material object” at issue marked with a copyright, she could have easily discovered that the music she downloaded was marked in another format with proper copyright notice as described in § 402(a), (b) and (c).

Ms. Harper filed a petition for certiorari with the United States Supreme Court. On November 29, 2010, the Court denied her petition.<sup>26</sup> Justice Alito filed a dissent.

### III. JUSTICE ALITO’S DISSENT

Justice Alito believes a “strong argument” can be made that § 402(d) does not apply to downloaded digital music files.<sup>27</sup> As he points out in his dissent, the law “was adopted in 1988, well before digital music files were available on the Internet.” Considering the new and different methods of distribution, it may not be prudent to assume a digital downloader has seen any material object bearing a copyright notice. Alito noted that while the concept behind § 402(d) “appears to be that a person who copies music from a material object bearing the prescribed copyright notice is deemed to have ‘reason to believe that his or her acts constituted an infringement’ . . . [an individual who] downloads a digital music file generally does not see any material object bearing a copyright

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<sup>24</sup> See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 171 (D. Mass. 2008) (“The electronic file (or, perhaps more accurately, the appropriate segment of the hard disk) is . . . a ‘phonorecord’ within the meaning of the statute.”).

<sup>25</sup> Section 101 of the Copyright Act defines phonorecords as “material objects in which sounds . . . are fixed . . . and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101 (2006).

<sup>26</sup> *Harper*, 598 F.3d at 193.

<sup>27</sup> *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 590–591, 178 L. Ed. 2d 511 (2010) (Alito, J., dissenting).

notice.”<sup>28</sup> Thus, Alito supposed an argument could be made that § 402(d) does not apply. If this were the case, Alito thought, “the question would simply be whether the infringer ‘was . . . aware and had . . . reason to believe,’ § 504(c)(2), that the downloading was illegal.”<sup>29</sup>

Furthermore, Justice Alito reasoned that the Fifth Circuit’s ruling did not discuss what sort of inquiry a person who downloads digital files is required to make in order to preserve the innocent infringer defense, and he wondered whether online research or seeking out CDs at a local store would suffice. Finally, Alito questioned whether age and lack of legal sophistication should be “relevant considerations.”<sup>30</sup>

In short, Justice Alito was not convinced that the Fifth Circuit’s ruling provided adequate clarification or guidance on the relationship between notice and the downloading of digital music, and he questioned “whether the decision correctly interprets § 402(d).”<sup>31</sup>

#### IV. ANALYSIS

In his dissent, Justice Alito raises an interesting question: should a law effectively barring the innocent infringer defense, and which was enacted before digital music files became available on the Internet, be applied in a digital music download copyright case? There are strong arguments supporting both an affirmative and negative answer.

##### *A. Argument against Barring the Defense*

With the advent of personal digital music players and improved access to computers and smart phones, an increasing number of individuals are obtaining music exclusively from the Internet. Given this, it seems unfair to assume digital music users have purchased or even seen a CD or other packaged phonorecord on

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Berne Convention Implementation Act, § 7, 102 Stat. 2857.

<sup>30</sup> *Harper*, 131 S. Ct. at 590–591 (Alito, J., dissenting).

<sup>31</sup> *Id.*

which notice of copyright is displayed.<sup>32</sup> In addition, although music purchased through iTunes or other legal online distribution platforms include metatags containing notice of copyright, music downloaded from other sources may not, as those tags can be removed or altered, meaning that those who download these types of files may be completely unaware of any copyright liability.

Despite the fact that many online downloaders never see a copyright notice in any form, other courts have used reasoning similar to the Fifth Circuit's in *Harper* and have denied the innocent infringer defense in online music purchase cases. For example, in *BMG Music v. Gonzalez*, a defendant accused of illegally downloading 1,370 songs claimed to be trying the music before buying.<sup>33</sup> The Seventh Circuit held that this was not a fair use of the copyrighted material and that the defendant had no claim of innocent infringement under § 402(d) because she had access to records and CDs bearing the proper copyright notice.<sup>34</sup> The court reasoned that the defendant "could have learned, had she inquired, that the music was under copyright."<sup>35</sup>

It seems unfair for courts to make this assumption on behalf of digital downloaders, as it puts a serious burden on each individual downloader to seek out notice of copyright for potentially every music file they access. As Justice Alito pointed out in his dissent, the Fifth Circuit was silent with respect to the kind of inquiry a person must make to preserve an innocent infringer defense.

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<sup>32</sup> Thirty-three percent of Internet users have paid to download music online. Eric Shonfeld, *Pew Shows 65% of People Pay For Digital Content; Mostly Music, Software, and Mobile Apps*, TECHCRUNCH (Dec. 30, 2010), <http://techcrunch.com/2010/12/30/pew-65-percent-pay-digital-content>. In addition, digital platforms account for around 20 percent of global music sales, yet an estimated 95 percent of all downloaded music is illegally downloaded. IFPI Communications, *Digital Music Report 2009: New Business Models for a Changing Environment* 4–5 (Jan. 2009), <http://www.ifpi.org/content/library/DMR2009-real.pdf>.

<sup>33</sup> *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005)

<sup>34</sup> *Id.* at 892 (7th Cir. 2005).

<sup>35</sup> *Id.*

### B. Argument for Barring the Defense

On the other hand, it is fair to question how “innocent” digital users really are when copyright infringement notices are commonly placed on legal phonorecords. Given the holding in *BMG*, the media scrutiny on copyright issues involving piracy on the Internet, and the fact that so many individuals have used web-based download services<sup>36</sup> for which they are required to acknowledge a licensing agreement prior to use, it is hard to imagine most individuals being unaware that music is covered by copyright. Even such websites as ISOhunt, where users can illegally download music, acknowledges legal threats concerning their services,<sup>37</sup> making it probable that users of these sites are at least minimally aware that legal issues exist over the material they choose to download.

### CONCLUSION

The questions about how “innocent” digital infringers really are, and the Supreme Court’s unwillingness to address the topic once and for all, have only added to the confusion over how notice of copyright should apply in the digital music world. While the Supreme Court declined to address these issues when it declined to hear *Harper*, as splits develop in the circuit courts, the Court may have another opportunity to consider the issue soon. Given the scope of the problem, perhaps Congress should amend § 402 and clarify the applicability of the innocent infringer defense to online music downloaders.

It is clear that important questions remain as to whether § 402

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<sup>36</sup> iTunes had over 200 million accounts as of 2011. See MG Siegler, *Apple Now Has 200 Million iTunes Accounts, Biggest Credit Card Hub on Web*, TECHCRUNCH (Mar. 2, 2011), <http://techcrunch.com/2011/03/02/apple-200-million-itunes-accounts>.

<sup>37</sup> IH, *10 years of isoHunt, past and future*, (Jan. 22, 2013, 5:02 AM), isoHunt <http://isohunt.com/forum/viewtopic.php?t=903673>. Another popular downloading website, The Pirate Bay, has a webpage devoted specifically to responses to legal inquiries concerning illegal downloading. The Pirate Bay, *Legal Threats against The Pirate Bay*, <http://thepiratebay.se/legal> (last visited May 1, 2013).

should apply to music downloaded from the Internet or peer-to-peer distribution platforms. One is left to wonder why Congress and the Supreme Court have failed to address it, and when they

might recognize, as Justice Alito suggests, that it is time to clear up the confusion.

#### PRACTICE POINTERS

- Defense attorneys attempting to establish an innocent infringer claim in a downloaded-music copyright infringement case should highlight Justice Alito's dissent.
- Defense attorneys in such cases should stress that courts are unclear as to the type of inquiry required of a consumer who downloads digital files.
- Plaintiffs in these cases can point to the prevalence of information on the Internet about copyright in music (for example, user agreements on digital distribution platforms such as iTunes, and information provided by illegal music-hosting websites, news media, and blogs) to show that regardless of whether a defendant has ever purchased a physical CD or legal music download, he or she should be well aware that downloading digital music without permission is unlawful.
- Congress should step in and clear up this area of the law.