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The Questionable Utility of Copyright Notice: Statutory and Nonlegal Incentives in the Post-Berne Era

Thomas P. Arden*

I. INTRODUCTION

Any American who has picked up a book to read or a product to use is familiar with the notice of a claim of copyright. The ubiquitous copyright symbol, accompanied by a date and name, is seen on such disparate items as advertisements, computer chips, maps, and television programs.

For over three years, however, United States copyright law has not required a notice of copyright to preserve rights in a work. In order to join the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"),¹ the United States had to eliminate the notice requirement as well as make other, less significant changes to the Copyright Act.² The Berne Convention, which the United States finally joined on March 1, 1989, in order to secure greater international protection of U.S. works,³ requires

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1. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (1972) (as amended) [hereinafter Berne Convention]. The Berne Convention was first signed on September 9, 1886, and entered into force on December 5, 1887. It has been subject to five revisions: 1908 Berlin Act, 1928 Rome Act, 1948 Brussels Act, 1967 Stockholm Act, and 1971 Paris Act. H.R. REP. NO. 609, 100th Cong., 2d Sess. 12-13 (1988) [hereinafter H.R. REP. NO. 609]. The United States adhered to the Paris text of the Convention. Pub. L. No. 100-568, 102 Stat. 2853 (1988). The text of the Berne Convention signed at Paris is reprinted in 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 27 (1992) [hereinafter NIMMER].

2. For comprehensive discussions of these other changes, see Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988) [hereinafter Ginsburg & Kernochan]; David M. Spector, *Implications of United States Adherence to the Berne Convention*, 17 AIPLA Q.J. 100 (1989) [hereinafter Spector].

3. See generally Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171 (1989) [hereinafter Hatch]; Doraine Lambelet, Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 470-73 (1987) [hereinafter *Internationalizing Copyright*].

all member nations to refrain from conditioning protection upon compliance with formalities, such as including a copyright notice on published works.⁴

Despite eliminating the notice requirement, Congress, in the Berne Convention Implementation Act ("BCIA"),⁵ retained the technical provisions governing use of a copyright notice.⁶ After concluding that the tradition of using a notice should be encouraged, Congress included an amendment providing that an infringer with access to a work containing a proper notice cannot claim innocent infringement to mitigate actual or statutory damages.⁷ Because of this new incentive, authorities have generally recommended the continued use of the statutorily prescribed copyright notice.⁸

This Article questions the assumption that the statutory copyright notice should be of continued utility for the great majority of works governed by the provisions of the BCIA. It will first discuss the former notice requirement and other statutory provisions pertaining to the use of a notice. It will then analyze the amendments to these provisions and the ambiguities resulting from the imprecise language Congress used in creating the incentive to use a notice. This Article will also identify legal provisions outside of the Copyright Act that may be implicated through use of a copyright notice.

This Article will then explore the net effect that surviving legal principles should have in providing an incentive to continue using the traditional copyright notice. It will also explore the nonlegal considerations usually offered in support of using a notice. This Article will conclude that the existing legal incentives should do little to promote the continued use of the statutory notice, and that the surviving nonlegal benefits are limited for most authors and

4. Berne Convention, *supra* note 1, at art. 5(2).

5. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

6. Six sections of the Act are devoted to use of a copyright notice. 17 U.S.C. §§ 401-06 (1992). Four of the six sections are still applicable to works published after March 1, 1989; two (§§ 404-05) were retained simply to be consulted for works first published before March 1, 1989.

7. 17 U.S.C. § 401(d) (1992).

8. See 2 NIMMER, *supra* note 1, § 7.02[C][3] (1992); PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE § 3.5.1 (1989) [hereinafter GOLDSTEIN]; Spector, *supra* note 2, at 118-19; William A. Tanenbaum, *An Analysis and Guide to the Berne Convention Implementation Act: Amendments to the United States Copyright Act*, 13 HAMLINE L. REV. 253, 260-62 (1990); see also *Internationalizing Copyright*, *supra* note 3, at 501 (arguing that while "notice would technically be voluntary, effectively it would not" if an evidentiary incentive applied).

largely attainable without having to resort to the form of notice still prescribed by the Copyright Act.

II. THE FORMER COPYRIGHT NOTICE PROVISIONS

A. *Preservation of Rights*

For more than two hundred years, under U.S. law an author had to use a copyright notice upon publication of his or her work or lose all rights in the work.⁹ This provision entailed technical requirements relating to the proper form, content, and placement of the notice. The Copyright Act of 1976 ("1976 Act"),¹⁰ as well as previous acts,¹¹ required the following elements: (1) the symbol ©, the word *Copyright*, or the abbreviation *Copr.*; (2) the date of first publication; and (3) the name of the copyright owner.¹² The notice had to be placed in a manner giving "reasonable notice of the claim of copyright."¹³

The technical provisions governing notice gave rise to substantial litigation and led to a whole body of law dealing with the use of copyright notice.¹⁴ For example, because a copyright notice was required only when "publication" occurred, numerous cases were decided defining *publication*.¹⁵ Courts also established new doc-

9. In the words of the House Report, the BCIA dispensed with "a device that has been statutorily required for nearly two centuries to identify works under copyright after publication." H.R. REP. NO. 609, *supra* note 1, at 45 & n.106 (citing Act of 1790, ch. 15, 1 Stat. 124).

10. 17 U.S.C. §§ 101-810 (1978).

11. The 1909 Act contained a similar notice requirement. 17 U.S.C. § 19 (1977). In discussing the background of copyright notice requirements, this Article will refer principally to the 1976 Act, which the BCIA amended.

12. 17 U.S.C. § 401(b) (1978). For phonorecords and sound recordings, the 1976 Act required essentially the same elements except that the encircled letter *P* had to be used. *Id.* § 402(b). This Article will refer to the form of copyright notice applicable to works other than phonorecords and sound recordings.

13. *Id.* § 401(c). The Act gave the Register of Copyrights authority to prescribe methods of placement on different types of works, but provided that these regulations would not be exhaustive. *Id.* The Copyright Act of 1909, §§ 19-20, itself contained technical requirements on placement; for example, in the case of books, the copyright notice was to be applied "upon its title page or the page immediately following." 17 U.S.C. §§ 19-20 (1977).

14. The treatise *Nimmer on Copyright* devotes 135 pages to the area. 2 NIMMER, *supra* note 1, §§ 7.02-7.15. Chapter 1000 of THE COMPENDIUM OF COPYRIGHT OFFICE PRACTICES II (1984) [hereinafter COMPENDIUM] contains 58 provisions on notice. The West Publishing Company Digest for the copyright area contains four separate sections covering the notice requirement. 25 WEST'S FEDERAL PRACTICE DIGEST 4TH, Copyrights & Intell. Prop. §§ 50.1-50.6 (1990).

15. Cases focused on a judicially created distinction between a "limited" and a "general" publication, whereby only the latter required copyright notice. *See Data Cash Sys., Inc. v. JS & A Group, Inc.*, 628 F.2d 1038, 1042-43 (7th Cir. 1980); *White v. Kimmell*,

trines resolving questions such as when and to what extent a copyright notice on one part of a multipart work was sufficient¹⁶ and what notations were sufficient to satisfy the provision requiring the name of the copyright owner.¹⁷

The law concerning copyright notice was inconsistent¹⁸ and led to harsh results for failure to include a copyright notice¹⁹ or the proper form of the notice.²⁰ Some courts, most notably in the Second Circuit, occasionally ignored or manipulated the statute to preserve copyrights in works on which notice was difficult to place²¹ and where infringement appeared willful.²²

193 F.2d 744, 746-47 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952); *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303, 1308 (N.D. Ill. 1970).

16. Under the "unit publication" doctrine, not every piece of a multipiece work need be marked with a copyright notice. If all pieces are used and sold together, notice on one piece is sufficient. *See Monogram Models, Inc. v. Industro Motive Corp.*, 492 F.2d 1281, 1284-85 (6th Cir. 1974); *Patterson v. Century Prods.*, 93 F.2d 489, 493 (2d Cir. 1937); *Koontz v. Jaffarian*, 617 F. Supp. 1108, 1112 (E.D. Va. 1985), *aff'd*, 787 F.2d 906, 909 (4th Cir. 1986).

17. Under the 1909 Act, a notice for pictorial, graphic, and sculptural works could contain the initial, monogram, mark or symbol of the copyright owner if the owner's full name was placed elsewhere on the work. 17 U.S.C. § 19 (1977). Courts also accepted the use of initials or abbreviations on other works if they effectively identified the copyright owner. *See Harry Alter Co. v. Graves Refrigerator, Inc.*, 101 F. Supp. 703, 704 (N.D. Ga. 1951); GOLDSTEIN, *supra* note 8, § 3.6.1.b. Under § 401(b)(3) of the 1976 Act, "an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner" is allowed. Authorities have disagreed on whether the use of an owner's initials is sufficient under this provision. *Compare* 2 NIMMER, *supra* note 1, § 7.09[B] (stating that "[i]n most cases a notice which contains the owner's initials but not his name is defective") *with* GOLDSTEIN, *supra* note 8, § 3.6.1.3.a (stating that Congress, in adopting § 401(b)(3), "intended to follow decisions under the 1909 Act authorizing the use of the copyright owner's initials, trademark or other identifying insignia").

18. For example, conflicts arose concerning whether filing a work with a state regulatory agency constituted publication requiring notice. *Compare, e.g., The Progressive Corp. v. Integon P&C Corp.*, 20 U.S.P.Q.2d (BNA) 1682, 1685-86 (4th Cir. 1991) (holding that the filing of a rate manual with a state insurance bureau constituted publication) *with East/West Venture v. Wurmfeld Ass'n, P.C.*, 722 F. Supp. 1064, 1066 (S.D.N.Y. 1989) (holding that the filing of architectural plans with a zoning and planning board was not a publication) *and WPOW, Inc. v. MRLJ Enter.*, 584 F. Supp. 132, 136 (D.D.C. 1984) (holding that the filing of an engineering report with the FCC was not a publication); *see also supra* note 17.

19. *See DeJonge & Co. v. Brueker & Kessler Co.*, 235 U.S. 33, 36-37 (1914); *Cooling Sys. & Flexibles v. Stuart Radiator Co.*, 777 F.2d 485, 489 (9th Cir. 1985); *Data Cash Sys., Inc.*, 628 F.2d at 1043-44; *J.A. Richards, Inc. v. New York Post, Inc.*, 23 F. Supp. 619, 620 (S.D.N.Y. 1938).

20. *See Mifflin v. R.H. White Co.*, 190 U.S. 260, 264 (1903). The Court rejected a claim that "any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained," because "the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it." *Id.*

21. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 490 (2d Cir. 1960), Judge Learned Hand held that notice for a fabric design stamped on the selvage of

In an attempt to remove some of the harsh effects of the notice requirement,²³ in the 1976 Act Congress enacted ameliorative "cure" provisions by which an author could rectify any initial omission of notice within a five-year period.²⁴ In many cases, however, these provisions failed to prevent forfeiture of rights.²⁵ They also led to inconsistent interpretations²⁶ and a further complication

cloth, which necessarily is cut off or sewn in such a way that it is not visible when the clothing is manufactured, was sufficient. Judge Hand stated that the defendant bore the burden of showing that notice "could have been embodied in the design without impairing its market value." *Id.* at 490; *accord* *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 188 F. Supp. 235, 237 (S.D.N.Y. 1960). This standard had no basis in the Copyright Act. *See* BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT 80* (1967) [hereinafter KAPLAN].

22. *See* *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851, 854 (2d Cir. 1967), *cert. denied*, 389 U.S. 801 (1968) (holding that "defendants, as willful infringers wholly aware of the existence of the copyright, are in no position to assert the insufficiency of the notice") (quoting *Dan Kasoff, Inc. v. Novelty Jewelry Co.*, 309 F.2d 745 (2d Cir. 1962)); *accord* *Tonka Corp. v. Tsaisun Inc.*, 1 U.S.P.Q.2d (BNA) 1387, 1400-01 (D. Minn. 1986) (holding that because defendants "were not innocently misled by an omission of copyright notice . . . , they are not in a position to assert the deficiency of the notice").

23. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 146-47 (1976) [hereinafter H.R. REP. NO. 1476].

24. 17 U.S.C. § 405(a) (1978). Under § 405(a)(2), an omission may be cured if the work is registered within five years of publication without notice and if a reasonable effort is made to add notice to all copies distributed after discovery of the omission. *Id.* In addition, § 405(a)(1) excuses omission of a notice "from no more than a relatively small number of copies," and § 405(a)(3) excuses notice omitted in violation of an express written requirement. *Id.*

25. *See* *Princess Fabrics, Inc. v. CHF, Inc.*, 922 F.2d 99, 103 (2d Cir. 1990); *Pacific Creative Advertising v. Southwestern Bell Corp.*, 17 U.S.P.Q.2d (BNA) 1164, 1165-66 (9th Cir. 1990); *Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488, 491 (4th Cir. 1987); *NEC Corp. v. Intel Corp.* 10 U.S.P.Q.2d (BNA) 1177, 1180-83 (N.D. Cal. 1989); *Sunset Lamp Corp v. Alys Corp.*, 698 F. Supp. 1146, 1152-53 n.4 (S.D.N.Y. 1988).

26. For example, a controversy arose regarding whether an author could cure a deliberate omission of notice. *Compare* *Beacon Looms, Inc. v. S. Lichtenberg & Co., Inc.*, 552 F. Supp. 1305, 1310-11 (S.D.N.Y. 1982) (deliberate omission of notice cannot be cured) and 2 NIMMER, *supra* note 1, § 7.13(B)(3) with *Hasbro-Bradley, Inc. v. Sparkle Toys, Inc.* 780 F.2d 189 (2d Cir. 1985) (deliberate omission of notice may be cured) and *O'Neill Devs., Inc. v. Galen Kilburn, Inc.*, 524 F. Supp. 710 (N.D. Ga. 1981). There is also a split of opinion and some confusion concerning when a reasonable effort to add notice to copies of a work under § 405(b)(2) must include efforts to place notice on copies of a work possessed by distributors or retailers. *Donald Frederick Evans v. Continental Homes, Inc.*, 785 F.2d 897, 911 & n.22 (11th Cir. 1986); *see, e.g., Eastern Publishing & Advertising*, 831 F.2d at 491 (holding that placement of notice of copyrighted advertising in later issues of newspaper was ineffective to cure an initial omission); *Shapiro & Son Bedspread Corp. v. Royal Mills Assocs.*, 764 F.2d 69, 74 (2d Cir. 1985) (holding that a bedspread manufacturer's act of affixing notice to bedspreads still in its possession but not to bedspreads shipped to retailers was not necessarily deficient as a "reasonable effort"); *Disenos Artisticos E. Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1261-63 (E.D.N.Y. 1987) (holding that adequate steps to remedy lack of notice had not been taken because none of the products in inventory or possessed by distributors were properly labeled).

of the law.²⁷

B. Remedial Provisions

1. Preclusion of Damages

Section 405(b) of the 1976 Act²⁸ provided that in cases in which no loss of rights resulted from the lack of notice on a work,²⁹ one who innocently copied a work in reliance on the absence of notice would not be liable for either actual or statutory damages.³⁰ The innocence defense provided under section 405(b), however, did not preclude an award of profits, which a court could award in its discretion.³¹

The "innocent-infringement" defense was also subject to two important requirements, which effectively limited the defense to exceptional situations. First, the infringer had to show that he or she had actually relied on and been misled by the omission of a notice.³² Second, the infringer had to show that the copy of the work lacking a notice on which he or she had relied was "authorized" by

27. See *NEC Corp.*, 10 U.S.P.Q.2d (BNA) at 1180 (relying on "twenty federal court decisions" concerning issue of what is a "relatively small number" of copies from which notice is excused under § 405(b)(1)).

28. Section 405(b) stated:

Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice.

17 U.S.C. § 405(b) (1978).

29. An omission of notice continued to be relevant apart from the question of whether the copyright was forfeited if it was cured, *see infra* notes 30, 32, or if notice were omitted from a derivative work without affecting the validity of the underlying work. See *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992); *Applied Innovations v. Regents of the Univ. of Minn.*, 876 F.2d 626, 635-36 (8th Cir. 1989); *Russell v. Price*, 448 F. Supp. 303, 304-05 (C.D. Cal. 1977), *aff'd*, 612 F.2d 1123, 1128 (9th Cir. 1979).

30. See *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186, 190 (5th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989); *Raco Car Wash Sys., Inc. v. Smith*, 730 F. Supp. 695, 705 (D.S.C. 1989); *Ruskin v. Sunrise Mgmt., Inc.*, 506 F. Supp. 1284, 1289 (D. Colo. 1981).

31. 17 U.S.C. § 405(b) (1978). The court could also either enjoin the innocent infringer or require the infringer to pay a reasonable license fee to continue the infringing activity. *Id.*

32. See, e.g., *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 446-47 (4th Cir. 1986) (holding that the defendants were not misled by the lack of copyright notice, although they may have believed that the plaintiff did not own a valid copyright); *Williams v. Arndt*, 626 F. Supp. 571, 581 (D. Mass. 1985) (holding that despite the absence of copyright notice from the plaintiff's work, the defendant did not reasonably rely on the lack of notice).

the copyright holder.³³ Particularly because of this second requirement, courts rejected the innocent-infringement defense even in those cases in which the defendant had little reason to believe a work was copyrighted.³⁴

2. Effect of Notice on Statutory Damages

To the extent that it could affect a defendant's state of mind, the absence of a notice could also be relevant in measuring statutory damages. Under section 504 of the 1976 Act, statutory damages may be awarded in lieu of actual damages and profits, at the copyright owner's request,³⁵ if the plaintiff registered the copyright before the infringement took place or within three months of the first publication of the work.³⁶

Two subsections control the limits on the measure of statutory damages. Section 504(c)(1) governs the usual case, whereby the court has discretion to award between the statutory minimum and maximum, "as the court considers just."³⁷ Although the statute contains no criteria for determining statutory damage awards, courts have been normally guided by the perceived purpose of statutory damage awards as both compensation for the copyright owner and deterrence of future infringement.³⁸ Courts have focused on the plaintiff's estimated actual damages and the defendant's profits and then modified the award on the basis of the perceived degree of the defendant's innocence and the need for deterrence.³⁹ Some courts have indicated that the most relevant fac-

33. See *Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347, 1354 (S.D.N.Y. 1987).

34. *Id.*; GOLDSTEIN, *supra* note 8, § 3.5.3.

35. 17 U.S.C. §§ 504(a), (c) (1978).

36. *Id.* § 412(a).

37. *Id.* § 504(c)(1). Prior to the BCIA, § 504(c)(1) prescribed statutory damages between \$250 and \$10,000. After the BCIA became effective in March 1989, the dollar amounts of statutory damages doubled. Now an ordinary infringer can be liable under § 504(c)(1) for an award between \$500 and \$20,000. 17 U.S.C. § 504(c)(1) (1992). The increases were intended to strengthen incentives to register works. 133 CONG. REC. 14,544 (daily ed. October 5, 1988), *reprinted in* 35 J. COPYRIGHT SOC'Y. 16, 39 (1988).

38. *Warner Bros, Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988), *aff'd in part and rev'd in part*, 877 F.2d 1120 (2d Cir. 1989); *United Feature Syndicate v. Sunrise Mold Co., Inc.*, 569 F. Supp. 1475, 1481 (S.D. Fla. 1983). This differs from the 1909 Act analysis, which allowed statutory damages only if actual damages were difficult to measure. See 3 NIMMER, *supra* note 1, § 14.04[A] n.3.

39. *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 642 F. Supp. 144, 147 (D.D.C. 1986), *aff'd*, 821 F.2d 800 (D.C. Cir. 1987); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1117 (2d Cir. 1986); *Broadcast Music, Inc. v. Allis*, 667 F. Supp. 356, 358 (S.D. Miss. 1986); *Rare Blue Music, Inc. v. Guttadauro*, 616 F. Supp. 1528, 1530 (D. Mass. 1985); *Unimusica, Inc. v. Spanish Community Radio*,

tor in awarding statutory damages is the "blameworthiness" of a defendant's conduct.⁴⁰

Section 504(c)(2) governs "exceptional" cases, in which a defendant either "willfully" infringed or, conversely, "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."⁴¹ If a defendant acted willfully, the \$10,000 limit could be increased, prior to the BCIA, to up to \$50,000.⁴² If the infringer had no reason to believe that he or she was infringing a copyright, statutory damages could be decreased from \$250 to \$100.⁴³

Although section 504(c) has never contained a reference to the use of a copyright notice, courts occasionally considered the presence of a notice in assessing under section 504(c)(2), whether an infringer "had no reason to believe that his or her acts constituted an infringement."⁴⁴ Unlike complete remission of damages under section 405(b), this type of claim of innocence did not depend on whether the relevant copy lacking notice was authorized by the copyright owner⁴⁵ because the claim depended on what the defendant reasonably believed rather than what the plaintiff authorized. This innocent-infringement defense was nonetheless rarely accepted.⁴⁶

Inc., Copyright L. Dec. (CCH) ¶ 26,091 (D.N.M. 1987); *Doehrer v. Caldwell*, 207 U.S.P.Q. (BNA) 391, 393 (N.D. Ill. 1980).

40. *Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 465 (E.D. Pa. 1987); *Milene Music, Inc. v. Gotauco*, 551 F. Supp. 1288, 1296 (D.R.I. 1982). In *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 658 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988), the court stated that "the willfulness of the defendant's conduct, and the deterrent value of the sanction imposed" should be the primary factors in awarding statutory damages; *accord Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 744 F. Supp. 815, 820 (N.D. Ill. 1989), *aff'd*, 905 F.2d 1081 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 1408 (1991).

41. 17 U.S.C. § 504(c)(2) (1978). Section 504(c)(2) places the burden of proof upon the copyright owner to show why ordinary statutory damages should be increased above the statutory maximum provided by § 504(c)(1). *Id.* An infringer must sustain the burden of proving that his or her infringement was innocent in order to show why the ordinary statutory damages should be decreased below the minimum specified in § 504(c)(1). *Id.*

42. *Id.* Now, a willful infringer may be liable for up to \$100,000. 17 U.S.C. § 504(c)(2) (1992); *see also supra* note 37.

43. 17 U.S.C. § 504(c)(2) (1978). Now an innocent infringer may be liable for as little as \$200. 17 U.S.C. § 504(c)(2) (1992); *see also supra* note 37.

44. *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 36 (2d Cir. 1990); *Original Appalachian Artworks*, 658 F. Supp. at 464-65; *see also Plymouth Music Co. v. Magnus Organ Corp.*, 456 F. Supp. 676, 681 (S.D.N.Y. 1978).

45. *See D.C. Comics Inc.*, 912 F.2d at 35-36.

46. *See Jeffrey M. Thomas, Comment, Willful Copyright Infringement: In Search of a Standard*, 65 WASH. L. REV. 903, 919 n.107 (1990) [hereinafter *Willful Infringement*] (*identifying Broadcast Music Inc. v. Coco's Dev. Corp.*, 212 U.S.P.Q. (BNA) 714

C. *Function of Copyright Notice*

Theoretically, formal copyright notice serves important functions by providing information to the public concerning a work. It allows subsequent users to determine: (1) the status of the work as copyrighted; (2) the identity of the owner of the copyright; and (3) the date of the first publication of the work triggering the statutory term of the copyright.⁴⁷ This function of notice, however, has long been exposed as unreliable because of the limited extent and value of the information actually provided.⁴⁸

Because the 1976 Act excuses some omissions and provides a five-year cure period, one cannot rely on a lack of notice to determine the status of a work.⁴⁹ In addition, because copyrights owned by individuals expire fifty years after the death of the author⁵⁰ rather than after a fixed period, one cannot rely on the notice date in determining whether a copyright has expired.

Notice also fails to reveal important information for several types of works. When used on a derivative work, the copyright notice need not disclose any information regarding the underlying work.⁵¹ Similarly, a notice on a collective work gives no information concerning the individual works contained therein.⁵² A notice

(N.D.N.Y. 1981), as the only case in which a defendant was found innocent within the provision and criticizing the result). *But see D.C. Comics Inc.*, 912 F.2d at 35-36; *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769-70 (S.D.N.Y. 1988), *aff'd in part and rev'd in part*, 877 F.2d 1120 (2d Cir. 1989).

47. The House Report on the 1976 Copyright Act also identified "the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting" as a beneficial function of notice. H.R. REP. NO. 1476, *supra* note 23, at 143. This justification is obsolete, in light of the elimination of the copyright notice requirement, regardless of the merits of its rationale that injecting copyrighted matter into the public domain is a good thing.

48. During hearings on United States adherence to Berne, Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, scathingly attacked the purported benefits of notice to subsequent users, stating, "[n]o commercial user with any copyright-common sense would rely on a copyright notice to determine ownership of rights it contemplated buying, licensing or otherwise acquiring." *Hearings Before the Subcomm. on Patents, Copyrights and Trademarks, Comm. on the Judiciary, United States Senate*, 99th Cong., 1st and 2d Sess. 162 (1986) [hereinafter *Hearings*]. Professor John Kernochan concurred, stating that notice is "virtually worthless to users in many situations" and that "[n]o conscientious lawyer can advise a client today that, because a work bears no copyright notice, it may, without more, be assumed to be unprotected by copyright." *Id.* at 182; *see also* KAPLAN, *supra* note 21, at 81-82 (the benefits of notice "are subject to discount in many situations").

49. *See supra* notes 23-24 and accompanying text.

50. 17 U.S.C. § 302(a) (1978); *see also Hearings, supra* note 48, at 128 (prepared statement of Donald J. Quigg).

51. 2 NIMMER, *supra* note 1, § 7.02[A].

52. 17 U.S.C. § 404(a) (1978).

will not reflect a subsequent transfer of ownership rights; and, in many industries, rights must be acquired in unpublished works that are not required to contain any type of notice.⁵³

Thus, even proponents of notice have recognized that a person who wishes to determine ownership in a work "must necessarily go beyond the notice."⁵⁴ To determine the copyright status or ownership of a work, it is far more useful to investigate registration records,⁵⁵ and investigation is universally recommended,⁵⁶ at least for those works that have been registered.

III. THE CURRENT COPYRIGHT NOTICE PROVISIONS

A. *Elimination of Notice as a Requirement for Protection*

Despite its suspect utility as an informational device,⁵⁷ the statutory copyright notice was not seriously challenged until Congress was forced to amend the notice requirements in order to join the Berne Convention.⁵⁸ In order to join the Berne Convention, the Copyright Act notice provisions had to be amended to conform to Berne's prohibition of formalities as a condition to the "enjoyment and the exercise" of rights.⁵⁹ Four approaches were available:⁶⁰ (1) deletion of the provisions relating to notice; (2) creation of provisions for voluntary use, with the statute specifying the form of notice; (3) elimination of notice as a requirement for protection but encouragement of its use through incentives; and (4) creation of an exception to the notice requirements only for works originating in a Berne Union country other than the United States.⁶¹

53. See *Hearings*, *supra* note 48, at 162 (prepared statement of Irwin Karp).

54. *Id.* at 74 (statement of Donald C. Curran). Mr. Curran stated, however, that notice is valuable for providing "at least a starting point for determining ownership and duration." *Id.* at 75.

55. See *Technicon Medical Info. v. Green Bay Packaging*, 687 F.2d 1032, 1036 & n.8 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983) (holding that the use of a notice does not provide actual benefit to a party for purposes of statutory estoppel because "a proper analysis of a work's status under the 1909 Copyright Act must involve more than a reading of the notice of the work").

56. The Copyright Office itself recommends a search of registration records, rather than reliance solely on a copyright notice to determine ownership. *Id.* (citing United States Copyright Office, Library of Congress, Circular No. 22 (1973)).

57. See *supra* notes 48-54 and accompanying text.

58. Berne Convention, *supra* note 1. Several attempts had been made to eliminate notice as a condition for protection during the period between the two world wars in order to join Berne. *Hearings*, *supra* note 48, at 73 (statement of Donald C. Curran).

59. Berne Convention, *supra* note 1, at art. 5(2).

60. These approaches are listed from the most to the least permissive.

61. Staff of the U.S. Copyright Office, *Implementing Legislation to Permit U.S. Adherence to the Berne Convention: A Draft Discussion Bill & Commentary*, in FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE

In keeping with the "minimalist" approach toward amending the Act, the Copyright Office favored the last approach creating a dual system for domestic and foreign authors.⁶² Congress, however, rejected the dual system for copyright notice while adopting it for other formalities.⁶³ Therefore, notice need not be included on copies of any work distributed after March 1, 1989.⁶⁴

Congress did not eliminate the notice provisions because of the perception that the formal copyright notice served an important informational function. Because Congress retained the myriad provisions governing proper use of notice to provide an evidentiary incentive, the substantial body of law that arose governing the use of copyright notice still exists, theoretically, even for post-Berne works.⁶⁵ Whether that precedent will have any future relevance in fact⁶⁶ depends on what importance is given to the use of a notice in the remedying of infringements.

B. Preclusion of Innocence Defense in Awarding Actual Damages

Under the BCIA, the use of a copyright notice in the specified form⁶⁷ will constitute evidence precluding "a defendant's interposition of a defense based on innocent infringement in mitigation of

CONVENTION app. A, reprinted in 10 COLUM.-VLA J.L. & ARTS 513, 633 (1986) [hereinafter *Commentary*]; *Internationalizing Copyright*, *supra* note 3, at 500 & n. 176.

62. The Copyright Office's commentary stated that the long tradition of requiring notice and the informational value of notice to librarians, educators, and students would justify discrimination against U.S. authors. *Commentary*, *supra* note 61, at 121.

63. While foreign authors need not register their copyrights and deposit their works before bringing a suit under the Copyright Act, domestic authors must still follow this practice. 17 U.S.C. § 411(a) (1992). Congress eliminated for both domestic and foreign works the formality requiring that a transfer be recorded before a subsequent owner could bring a copyright action in the owner's name.

64. *Id.* § 401(a). Works that were first published prior to that date without notice are still subject to forfeiture unless the omission is cured. *See supra* notes 23-24 and accompanying text.

65. 2 NIMMER, *supra* note 1, § 7.02[C][3] n.22; GOLDSTEIN, *supra* note 8, § 3.5.1. The COMPENDIUM, *supra* note 14, governing review of works deposited when registering copyrights, has also not been changed since passage of the BCIA.

66. Because notice is no longer required, there should be an increase in the number of infringement actions brought under the Copyright Act. Authors who, through an initial lack of interest in copyright protection, do not place a notice on their works will no longer be deterred from alleging copyright infringement later. An increase in copyright infringement claims should result, particularly in conjunction with suits for other violations. *See infra* note 143 and accompanying text.

67. The form of notice now sufficient to satisfy this provision is the same as that required prior to the BCIA. *See H.R. REP. NO. 609*, *supra* note 1, at 26 ("At the same time, if a copyright owner elects to use a notice, its form is specified in the law.").

actual or statutory damages."⁶⁸ Thus, in considering the continued importance of the statutorily prescribed notice, the effect the innocent-infringement defense may have in mitigating (1) actual damages and (2) statutory damages must be assessed.

Congress amended section 405(b)—the only provision furnishing an innocent-infringement defense to avoid actual damages—to exclude copies of works publicly distributed after the effective date of the BCIA.⁶⁹ Therefore, reliance on the omission of notice from copies of a work distributed after March 1989 should no longer constitute a defense to avoid actual as well as statutory damages under section 405(b).

The exclusion of Berne-era works from the only provision on mitigating actual damages seems contradictory to the BCIA's incentive to use a copyright notice in section 401(d). The legislative history of section 401(d) sheds no light on this apparent contradiction. The House Report broadly states that courts have taken into account "the relative innocence or guilt of the defendant in assessing both actual and statutory damages."⁷⁰ The Report, however, cites three cases that do little to support the contention that innocence has been relevant in assessing actual damages.⁷¹

In one of the cases, the court applied section 405(b).⁷² Because that provision was eliminated for post-Berne works, cases in which it was applied have no relevance to the incentive Congress attempted to create. The only other citations in the House Report are to a 1939 decision by the Second Circuit Court of Appeals⁷³ and a 1960 decision by the District Court for the Southern District of New York,⁷⁴ both of which contained dicta arguably supporting the contention that the defendant's state of mind has been relevant

68. 17 U.S.C. § 401(d) (1992). This section does not preclude the defense of innocent infringement available to nonprofit educational institutions, libraries, and archives and public broadcasting stations that reasonably believe their uses were fair enabling them to remit statutory damages under 17 U.S.C. § 504(c)(2). In addition, in order for works incorporating predominant portions of U.S. government works to receive the evidentiary benefit of § 401(d), a statement must be appended to the notice identifying what is copyrighted by the author. *Id.* § 403.

69. Section 405(b) states that it applies to authorized copies of a work "publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988." *Id.* § 405(b).

70. H.R. REP. NO. 609, *supra* note 1, at 45.

71. *Id.* at 45 n.107 (citing *Ruskin v. Sunrise Mgmt., Inc.*, 506 F. Supp. 1284 (D. Colo. 1981); *Barry v. Hughes*, 103 F.2d 427 (2d Cir.) *cert. denied*, 308 U.S. 604 (1939); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 188 F. Supp. 235 (S.D.N.Y. 1960)).

72. *Ruskin*, 506 F. Supp. at 1289.

73. *Barry*, 103 F.2d at 427.

74. *Peter Pan Fabrics*, 188 F. Supp. at 235.

in assessing actual damages. The dicta in the appellate decision, *Barry v. Hughes*,⁷⁵ was explicitly rejected five years later by the Second Circuit in *DeAcosta v. Brown*,⁷⁶ in which the court affirmed a recovery of actual damages "as against even an innocent copier."⁷⁷

Thus, whether or not statutory copyright notice appears on a work should have no effect on a plaintiff's ability to recover actual damages.⁷⁸ There is simply no authority granting a court discretion to decrease actual damages on the basis of a defendant's state of mind.⁷⁹

C. Preclusion of Innocence Defense to Lower Statutory Damages

The significance of foreclosing an innocent-infringement defense should therefore be limited to assessing statutory damages under section 504(c). In this regard, the BCIA has doubled the amount of statutory damages, so that now an ordinary infringer may be liable for between \$500 and \$20,000, a willful infringer for up to \$100,000, and an innocent infringer for as little as \$200.⁸⁰

Innocent infringement is not defined in section 401(d), nor is the term used in section 504. As it relates to mitigating statutory damages, the phrase *innocent infringement* has generally been used by courts⁸¹ and understood by commentators⁸² to refer to the reduction in the minimum level of statutory damages under section

75. The court stated: "We should hesitate a long while before holding that the use of material, apparently in the public demesne, subjected the user to damages, unless something put him actually on notice." *Barry*, 103 F.2d at 427.

76. 146 F.2d 408, 411-12 (2d Cir. 1944), *cert. denied*, 325 U.S. 862-63 (1945).

77. *Id.* Other cases in the Second Circuit have subsequently held that innocence is no defense to an award of actual damages. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963); *Plymouth Music Co. v. Magnus Organ Corp.*, 456 F. Supp. 676, 681-82 (S.D.N.Y. 1978); *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 459-60 (S.D.N.Y. 1965); *accord Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 754-55 (W.D. Mo. 1989); *Knickerbocker Toy Co., Inc. v. Genie Toys, Inc.*, 491 F. Supp. 526, 529 (E.D. Mo. 1980).

78. The failure of Congress to consider the validity of this incentive is consistent with the view that the drafting of the Copyright Act has been influenced more by compromise than by concerns over legal principles. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987) ("[E]ven the sponsors of copyright revision [for the 1976 Act] demonstrated little knowledge and few opinions about the substance of the bills they introduced.").

79. 17 U.S.C. § 504(b) (1992) states that "the copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement." *Id.* See also 3 NIMMER, *supra* note 1, § 14.02 n.3.1 ("[I]njury to plaintiff in the marketplace does not hinge on defendant's innocence or willfulness.").

80. 17 U.S.C. § 504(c) (1992); see also *supra* notes 37, 42-43.

81. *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 35 (2d Cir. 1990); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1115 (2d Cir. 1986);

504(c)(2), when an infringer shows he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."⁸³

If limited to section 504(c)(2) in this manner, the effect of section 401(d) would be exceedingly narrow.⁸⁴ Infringers who claim that an award should be decreased to \$200 would not automatically be considered innocent because a work lacked a copyright notice.⁸⁵ To the contrary, because section 504(c)(2) requires defendants to show that they had "no reason to believe" they had infringed,⁸⁶ the fact that the law no longer requires copyright notice should dispose of claims of innocence based solely on an omission of notice.⁸⁷ In other words, if a notice has no effect on the copyright status of a work, the lack of a notice provides no reason to believe that copying is lawful.

Moreover, in order to obtain statutory damages in the first place, a claim of copyright must be registered at the time of the infringement or within three months of a work's publication.⁸⁸ A registration provides constructive notice of a claim and gives a defendant the opportunity to gather more meaningful information about a work than that provided by a notice.⁸⁹ Thus, if a work is registered, omission of notice provides little justification for a claim of innocent intent.⁹⁰

Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc., 658 F. Supp. 458, 464-65 (E.D. Pa. 1987).

82. Ginsburg & Kernochan, *supra* note 2, at 11; Spector, *supra* note 2, at 111 n.24, 113 n.27; *Willful Infringement*, *supra* note 46, at 906; see also 3 NIMMER, *supra* note 1, § 14.04[B].

83. 17 U.S.C. § 504 (c)(2) (1992); see also *supra* notes 41, 43 and accompanying text.

84. Claims of innocence to lower statutory damages under § 504(c)(2), as discussed, have rarely been successful. See *supra* note 46 and accompanying text.

85. 2 NIMMER, *supra* note 1, 7.02[C] n.23 ("[T]he benefit of notice during the Berne era is to establish a bright line rule for preclusion of this defense; notice is not, however, a *sine qua non* for preclusion of the defense.").

86. 17 U.S.C. § 504(c)(2) (1992).

87. See Ginsburg & Kernochan, *supra* note 2, at 11 (arguing that "the 'not aware and had no reason to believe' standard ought not to excuse most defendants engaged in commercial exploitation of copyrighted works" and that application of the standard may "remove any powerful incentive to add notice" after passage of the BCIA, but nonetheless stating that use of the statutory notice is advisable). Congress apparently did not consider this point. See S. REP. NO. 352, 100th Cong. 2d Sess. 43 (1988) [hereinafter S. REP. No. 352] ("Obviously, in a case in which the copies of the work to which the defendant had access do not contain a notice of copyright, the defendant may be able to meet this burden" under § 504(c)(2)).

88. 17 U.S.C. § 412 (1992). Copyright notice need no longer be included on copies of works deposited in the Copyright Office. *Id.* § 407(a).

89. See *supra* notes 55-56 and accompanying text.

90. Cf. WILLIAM F. PATRY, *LATMAN'S THE COPYRIGHT LAW* 175 (6th ed. 1986) (in

The presence of a statutory notice should have the potential to affect the outcome of a case only when the claim of innocence is based on factors other than a lack of notice.⁹¹ Courts construing claims of innocence have often been concerned not with a defendant's belief regarding whether a work was copyrighted but with whether a defendant believed in good faith that he or she was not infringing the copyright.⁹² For example, defendants who merely bought and resold infringing items could claim innocence if they did not realize that the goods they sold were unauthorized.⁹³ The presence of a copyright notice should have no relevance in such situations.⁹⁴ Likewise, in cases in which a defendant believed that the use of a work did not infringe the copyright because no protected expression was taken⁹⁵ or because the use amounted to a fair use,⁹⁶ the presence of a copyright notice is irrelevant to the claim of innocence. Nevertheless, if a copyright notice has been used, sec-

terms of former § 405(b), if a work is registered, "it might . . . be argued that one who does not search [Copyright Office records] cannot be 'innocent' or 'misled' " by lack of notice).

91. Congress apparently did not consider the possibility of precluding a claim of innocence based on facts other than an omission of notice. See S. REP. NO. 352, *supra* note 87, at 43.

92. See *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992) (stating that "an infringement may not be willful when a party, despite warnings to the contrary, 'reasonably and in good faith believes' that its conduct is innocent") (quoting *RCA/Ariola Int'l v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988)); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1115 (2d Cir. 1986) (holding that an infringer acts willfully if it has "knowledge that its actions constitute an infringement").

93. See *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 36 (2d Cir. 1990); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769-70 (S.D.N.Y. 1988), *aff'd in part and rev'd in part*, 877 F.2d 1120 (2d Cir. 1989); *Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 464-65 (E.D. Pa. 1987).

94. In *D.C. Comics Inc.*, 912 F.2d at 36, however, the court affirmed a finding of innocent infringement under § 504(c)(2) in favor of a retailer who merely sold infringing goods manufactured by a third party because of "the lack of business sophistication and the absence of a copyright notice on the infringing goods." The court did not mention that the presence of a notice would have precluded the § 504(c)(2) claim and mentioned the omission of notice as a factor which "explained the failure of defendants to inquire as to the source of the goods." *Id.* The court failed to explain why a notice on an unauthorized copy would have caused the retailer to investigate. The court's other finding on the question of innocence—that lay persons would have difficulty discriminating between licensed and unlicensed products—supports the finding of innocence. *Id.*

95. See *Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 744 F. Supp. 815, 820 (N.D. Ill. 1989), *aff'd*, 905 F.2d 1081 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 1408 (1991).

96. See *MGM v. Showcase Atlanta Coop. Prods.*, 217 U.S.P.Q. (BNA) 857, 859 (N.D. Ga. 1981). Only nonprofit educational institutions, libraries, and archives and public broadcasting stations are able to remit statutory damages entirely because of a belief in the "fair use" of a work, under § 504(c)(2). See *supra* note 68.

tion 401(d) could preclude defendants with such claims from arguing that they were unaware or had no reason to believe that they were infringing a copyright.

It may be argued, however, that despite the common usage of the phrase *innocent infringement* by courts and commentators,⁹⁷ the reference in section 401(d) to "a defense based on innocent infringement" applies to the determination of an award of statutory damages under section 504(c)(1) as well as section 504(c)(2). Plaintiffs have been unable to show willfulness under section 504(c)(2), while at the same time defendants have been unable to meet the "had no reason to know" standard under that section.⁹⁸ Because courts in such cases have still analyzed the degree of innocence and need for deterrence of the defendant,⁹⁹ a defendant's "relative innocence" has been relevant in all cases involving statutory damages, not just in exceptional cases.

The potential effect of section 401(d) would be substantially greater if it were interpreted to apply beyond the innocence defense of section 504(c)(2). Under this interpretation, claims of good faith to avoid enhanced statutory damages based on deterrence under section 504(c)(1)¹⁰⁰ would be precluded if a notice had been used on published copies. Furthermore, a defendant faced with a charge of willfulness under section 504(c)(2) could conceivably have no defense to a claim for maximum statutory damages.¹⁰¹ Thus, a defendant could be barred from showing good faith in response to the plaintiff's evidence of willfulness or relative willfulness.

The legislative history regarding the scope of section 401(d) is conflicting.¹⁰² In its discussion of the effect of section 401(d), the

97. See *supra* notes 81-82 and accompanying text.

98. *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1115 (2d Cir. 1986); *Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 464-65 (E.D. Pa. 1987).

99. See *supra* notes 39-40 and accompanying text; see also *Illinois Bell Tel. Co.*, 744 F. Supp. at 820-21 (rejecting the plaintiff's claim of willful infringement but awarding twice the license fee the defendant would have had to pay the plaintiff "to discourage future violations"); *MGM*, 217 U.S.P.Q. (BNA) at 859 (awarding \$500 rather than \$250 for "unintentional infringement").

100. See *supra* notes 38-40 and accompanying text.

101. See 1 HAROLD ORENSTEIN & DAVID E. GUINN, ENTERTAINMENT LAW AND BUSINESS § 1.7.1 n.133 (1992). The standard of "willfulness" has been expanded by some courts beyond a defendant's knowledge that its actions constituted an infringement to "reckless disregard" of a copyright owner's rights. *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 253 (2d Cir. 1992); *Illinois Bell Tel. Co.*, 744 F. Supp. at 820.

102. The House bill, H.R. 4262, was passed in lieu of the Senate bill, S. 1301, but after its language was amended to contain the text of the Senate bill. There was no

Senate Report refers only to the "was not aware and had no reason to believe" standard of section 504(c)(2).¹⁰³ In the House Report, however, the discussion of section 401(d) is clearly in terms of the usual case involving section 504(c)(1); the "had no reason to believe" standard is mentioned only as one defense that could be precluded through the use of the statutory notice.¹⁰⁴ Immediately after noting that courts have used "the relative innocence of the defendant as a major factor in setting the amount of the award" under section 504(c)(1), the House Report states that "[t]he intent of new sections 401(d) and 402(d) is to direct the courts not to consider the defendant's claim of innocence" if notice is used.¹⁰⁵

It is submitted that the definition of "a defense based on innocent infringement in mitigation of actual or statutory damages"¹⁰⁶ should embrace only claims that a defendant was not aware and had no reason to believe he or she was infringing a copyright under section 504(c)(2). The only specific *defense* to mitigate statutory damages is that found in section 504(c)(2), and only that provision expressly refers to mitigating damages. The statute does not direct a court to conclude that an infringement is willful in terms of section 504(c)(2) or relatively willful in terms of section 504(c)(1) if a notice is used. Defendants thus should not be effectively prevented from claiming either that they were not willful or that deterrence is unnecessary simply because a notice appeared on a work.

By allowing evidence of intent in the usual case, courts would retain one of the only defined criteria for exercising their discretion in awarding statutory damages.¹⁰⁷ Without any evidence of intent, statutory damage awards would become more arbitrary, without any relationship to what "is just"¹⁰⁸ under the circumstances of the

conference report. The provisions concerning notice were substantially similar in both bills prior to the amendment and passage of the House bill. *See infra* note 103.

103. S. REP. NO. 352, *supra* note 87, at 43-44. The Senate had deleted from S. 1301 quotation marks around the term "innocent infringement" and added from the House bill a specific reference to the last sentence in § 504(c)(2). The Joint Explanatory Statement on the amendment states that it was "to clarify that the presence of voluntary notice affects only the ability of a defendant to seek to mitigate damages under the second sentence of 17 U.S.C. § 504(c)(2) (dealing with an infringer who was not aware and had no reason to believe that he was infringing) and not the ability of a library, archives, or public broadcasting defendant to seek remission of damages (as provided by the last sentence of 17 U.S.C. § 504(c)(2)) under a reasonable belief that the fair use provision of 17 U.S.C. [§]107 applied." 134 CONG. REC. S14,556 (daily ed. October 5, 1988).

104. H.R. REP. NO. 609, *supra* note 1, at 45.

105. *Id.*

106. 17 U.S.C. § 401(d) (1992).

107. *See supra* notes 37-40 and accompanying text.

108. 17 U.S.C. § 504(c)(1) (1992).

case.

Limiting the incentive to use a notice only to defeat a section 504(c)(2) claim of innocence is further justified by reference to the Berne Convention's prohibition of formalities as a condition to the enjoyment and exercise of rights.¹⁰⁹ If the incentive to use a notice had been more significant, there arguably would have been a risk of conflict with this provision.¹¹⁰

Limitation of the evidentiary benefit under section 401(d) should also mitigate the potential inconsistency in applying the Copyright Act to foreign authors who do not conform to the U.S. copyright notice requirements.¹¹¹ This inconsistency is aggravated by the coverage of section 401 over works published in the United States "or elsewhere." A foreign author who wishes to ensure he or she benefits from the statutory incentive must place a notice not only on works exported to the United States, but also on works published within the foreign nation to which a U.S. citizen may have access.¹¹²

Thus, although the lack of a definition of the phrase *innocent infringement* as used in section 401(d) and the analysis of that section in the House Report create ambiguities, the Senate Report and the ordinary meaning given the phrase by courts and authorities should support the limitation of section 401(d) to section 504(c)(2) claims to lower minimum statutory damages. This construction also does the least damage to the operation of the statutory damages provisions by avoiding results not addressed by Congress in enacting the BCIA.

109. The Copyright Act expressly provides that the Berne Convention is not self-executing. *Id.* § 104(c). A conflict with Berne therefore would not be determinative in interpreting § 401(d).

110. See Ginsburg & Kernochan, *supra* note 2, at 11-12 (arguing that "while Congress sought to encourage notice, that encouragement was not to assume the form of a disguised requirement," and noting the Senate Report's statement that the BCIA was "creating a *limited* incentive for notice *which is compatible with Berne*") (emphasis added).

111. See *Internationalizing Copyright*, *supra* note 3, at 501; Ginsburg & Kernochan, *supra* note 2, at 18.

112. Ginsburg and Kernochan give the example of a French author whose works are sold without notice in France, bought there by a U.S. citizen, and then copied and distributed in the United States. They conclude that the U.S. citizen "would assert the innocent infringer defense, and perhaps obtain a diminution of damages." Ginsburg & Kernochan, *supra* note 2, at 18.

IV. LEGAL PRINCIPLES BEYOND THE COPYRIGHT ACT

A. *Effect of Notice under Case Law Doctrines*

Outside the strict provisions of the Copyright Act, case law established one cognizable principle giving effect to the use of a notice, which, like statutory damage principles, was based largely on an assessment of a defendant's state of mind. Specifically, a few courts have held that the affirmative defense of estoppel does not apply if a copyright notice appeared on the copied work.¹¹³ The rationale behind this rule is that the presence of a copyright notice gives the infringer continuing notice of a claim of rights, thus destroying the requisite elements of a "holding out" by the plaintiff and reliance and ignorance of the true facts by the defendant.

In light of the abolishment of the notice requirement, it is uncertain whether courts will continue to apply this doctrine. Since notice is irrelevant to the copyright status of a work, the lack of a notice should not *contribute* to a defendant's reliance on an author's inaction.¹¹⁴ In cases in which the copyright in a work is registered, absence of a copyright notice should have even less significance, as registration should provide the same continuing notice of rights.¹¹⁵

B. *Effect of Notice under the Universal Copyright Convention*

The accession of the United States to the Berne Convention does not affect its membership in the Universal Copyright Convention ("UCC"),¹¹⁶ which it helped create and ratified in 1954 as an alternative to Berne. Under Article III of the UCC, a work may be protected in a foreign member nation in accordance with the laws of the nation where protection is sought. Adherence to formalities that are conditions for copyright protection in member nations is excused only if the work contains a copyright notice with the following elements: the symbol ©, the name of the copyright owner,

113. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1184 (W.D.N.Y. 1982). In general, the estoppel defense may bar an action if the following conditions are met: (1) the plaintiff must know the facts; (2) the plaintiff must intend that his conduct shall be acted on or so act that the defendant has a right to believe it is so intended; (3) the defendant must be ignorant of the true facts; and (4) the defendant must rely on the plaintiff's conduct to his detriment. *Hampton*, 279 F.2d at 104.

114. See *supra* notes 86-87 and accompanying text.

115. See *supra* notes 88-90 and accompanying text.

116. The Universal Copyright Convention, Sept. 8, 1952, 6 U.S.T. 2731, *revised* July 24, 1971, 25 U.S.T. 1341 [hereinafter UCC]. The text of the UCC, as revised in Paris in 1971, is reprinted in 5 NIMMER, *supra* note 1, at app. 25.

and the year of first publication.¹¹⁷ The use of the notice is not per se a condition for protection under the UCC but it excuses other formalities,¹¹⁸ such as deposit, registration, and notarial certificates.¹¹⁹

While the UCC notice provision favors continued use of the first of the three forms of copyright notice prescribed in the U.S. Act,¹²⁰ it applies only to protection in countries adhering to the UCC but not to Berne; in countries adhering to both treaties, the Berne Convention takes precedence over the UCC. Twenty-five nations, including South Korea and several Central American and African nations, belong to the UCC but not to Berne.¹²¹

The use of a copyright notice would be necessary to ensure protection in those countries that actually require formalities. Most countries not adhering to Berne do not require formalities.¹²² In addition, the UCC does not *require* a country to deny protection if a formality is not followed and notice is not used.¹²³

The Berne Convention itself also provides a procedural benefit that may be available through the use of a copyright notice. Under Article 15(2) of the Convention, a copyright owner whose name is displayed on a work "in the usual manner" presumptively has standing to institute an infringement proceeding in a member country.¹²⁴ The name in a copyright notice could perhaps satisfy this provision.¹²⁵ This benefit, however, could be obtained without resort to the technical requirements contained in the U.S. Copy-

117. UCC, *supra* note 116, at art. III(1).

118. 3 NIMMER, *supra* note 1, § 17.08.

119. The use of the notice will also excuse the requirement, imposed in some nations, that a work first be published within the country's borders. *Id.*; 2 GOLDSTEIN, *supra* note 8, § 16.6.2.

120. *See supra* note 12 and accompanying text.

121. These countries are: Algeria, Andorra, Bangladesh, Belize, Bolivia, Cambodia, Cuba, Dominican Republic, Ecuador, El Salvador, Ghana, Guatemala, Haiti, Kenya, Laos, Malawi, Mauritius, Nicaragua, Nigeria, Paraguay, Panama, Russia, Saint Vincent and the Grenadines, South Korea, and Zambia. *See* 5 NIMMER, *supra* note 1, at app. 21-22. Russia is deemed to be a successor state of the Soviet Union and therefore a participant in the UCC. However, as a result of a bilateral agreement with the United States, Russia is obligated to enact new copyright laws and join the Berne Convention. Allen J. Baden & Charles R. Brainard, *Slow Progress for Intellectual Property Protection*, AM. LAW., Nov. 1992, at 41, 46.

122. 3 NIMMER, *supra* note 1, § 17.08.

123. *Id.*

124. Berne Convention, *supra* note 1, at art. 15(2).

125. *See* PAUL E. GELLER, *International Copyright: An Introduction*, in 1 MELVILLE B. NIMMER & PAUL E. GELLER, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* § 5, Int-141 (1991) [hereinafter GELLER, *International Copyright*]; 2 NIMMER, *supra* note 1, § 7.02[B] n.5.

right Act governing the form of notice.¹²⁶

V. THE FUTURE USE OF COPYRIGHT NOTICE

A. *Effect of Legal Incentives on Continued Use of Notice*

The attempt by Congress to preserve the vitality of the statutorily prescribed copyright notice should provide little incentive to authors to continue its use. The opportunity to preclude "a defense based on innocent infringement" should, initially, be available only if a work has been timely registered so that statutory damages are available.¹²⁷ If an author does not register the copyright in his or her work unless and until a suit is filed, only actual damages and profits will be available,¹²⁸ which should be unaffected by claims of innocence.¹²⁹ For those authors, the statutory incentive itself should be irrelevant to whether a notice is used.

For those who register their works in a timely fashion, there is an identifiable incentive to use a notice. This incentive, however, should consist only of the opportunity to prevent a lowering of the minimum level of statutory damages through a successful claim that an infringer "was not aware and had no reason to believe" his or her conduct constituted copyright infringement.¹³⁰ This incentive is limited because the innocence defense should normally be rejected whether or not a notice is used, due to the abolishment of the copyright notice requirement as a basis on which to believe that a work is not copyrighted and the fact that the defense can necessarily be raised only when an investigation of registration records is available.

A notice should have the potential of precluding a valid defense only in those few cases in which a defendant acted innocently for reasons other than a belief that a work was not copyrighted. In cases where such a defense is not foreclosed because of failure to use a notice, courts nonetheless retain the discretion to refrain

126. Paul E. Geller, *Copyright Protection in the Berne Union: Analyzing the Issues*, 13 COLUMBIA-VLA J.L. & ARTS 435, 464 n.91, 475 n.142 (1989). Professor Geller has also noted that under Article 10^{bis} of the Berne Convention, another "formality" exists: the media may disseminate "articles published in newspapers or periodicals on current economic, political or religious topics or like broadcast works of the same character" unless the reproduction is "expressly reserved." GELLER, *International Copyright*, *supra* note 125, at Int-142 (quoting Berne Convention, *supra* note 1, at art. 10^{bis}(1)). It is doubtful that the traditional copyright notice alone could satisfy this provision.

127. 17 U.S.C. §§ 401(d), 412 (1992).

128. *Id.* § 412(a).

129. *See supra* notes 69-79 and accompanying text.

130. 17 U.S.C. § 504(c)(2) (1992).

from lowering the minimum level of statutory damages.¹³¹ For this reason and because of the fact that courts have rarely accepted section 504(c)(2) claims,¹³² the potential effect that use of a notice would have on an award is slight at best. If an innocence defense is successfully precluded, a court should still be able to reduce statutory damages to \$500.¹³³ Thus, the incentive provided in section 401(d) not only requires an unlikely combination of factors to come into play but also could affect the statutory damages awarded only in a relatively minor fashion.¹³⁴

The other benefit under domestic law from using the statutory notice is precluding an estoppel defense. The absence of a notice alone should not be given a significant effect when assessing such a defense, since a copyright holder need not provide notice to maintain rights to a work. Courts should be hesitant to encourage users of works to remain ignorant of the law or to refrain from investigating possible claims. Rather than relying on notice to avoid an estoppel defense, an author should ensure against such claims by avoiding conduct on which an infringer could rely. As an incentive to use notice, therefore, the benefit of precluding an estoppel defense is speculative and depends on a presumption of self-defeating behavior.

The last identified incentive, based on the provisions of the UCC, has more potential to encourage the continued use of the statutorily prescribed notice than domestic notice provisions. This

131. *Id.*; see also *Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1046 (D.N.J. 1990).

132. See *supra* note 46; see also *Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) (noting that "mere non-deliberate infringement is not 'innocent'; rather, defendants must have acted in complete ignorance of the fact that [their] conduct might somehow infringe upon the rights of another") (citation omitted).

133. See *supra* text accompanying notes 102-12; 3 NIMMER, *supra* note 1, § 14.04[B][2][a].

134. Significantly, the BCIA did not link the use of a copyright notice to the availability of an attorney's fee award, which is available on the same basis as are statutory damages—i.e., if the work is registered at the time of infringement. 17 U.S.C. § 505 (1992). Some courts award fees as a matter of course to prevailing plaintiffs for infringement of registered works. *Micromanipulator Co., Inc. v. Bough*, 779 F.2d 255, 259 (5th Cir. 1985); *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984). Other courts do not view attorney's fees as a routine award but consider various factors, such as whether a defendant has litigated a case in good faith or is an innocent infringer, in determining whether to award fees. See *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 323 (9th Cir. 1987). A defendant's claim that a copied work lacked notice logically should not have an effect on a court's determination of whether an attorney's fee award should be granted, for the same reason it should not enable a defendant to claim statutory damages should be mitigated. See *supra* notes 88-90 and accompanying text. In both cases, registration, providing constructive notice and relevant information on ownership, is a prerequisite to the award.

incentive should apply to authors who wish to ensure protection in the few nations that both adhere to the UCC but not to the Berne Convention and insist on adherence to formalities.

B. Effect of Nonlegal Incentives to Use Notice

However limited the legal incentives to use a notice may be, the practice of using the statutorily prescribed copyright notice may be continued because of nonlegal considerations. The cost of placing a notice on several types of works is insignificant, and the placement of notice has become a customary deterrence device.¹³⁵ In accordance with the traditional rationale in support of a notice requirement,¹³⁶ copyright notice has also been identified as providing an economic benefit to authors in terms of lowering search costs to promote the exploitation of a published work in secondary markets.¹³⁷

For several types of works, however, the nonlegal benefits of using a copyright notice provide no incentive. For works inadvertently lacking a proper notice, placement or correction of the notice on distributed copies can be extremely expensive.¹³⁸ For other works, considerations of lowering search costs for further commercial exploitation are nonexistent, and the burden of including the prescribed notice outweighs any deterrent benefit that notice provides.

For example, courts have long recognized that product labels¹³⁹

135. See S. REP. NO. 352, *supra* note 87, at 128 (use of statutory notice "is, in all probability, the cheapest deterrent to infringement which a copyright holder may take").

136. See text accompanying *supra* note 47.

137. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1612 (1982); KAPLAN, *supra* note 21, at 80; *cf.* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 412 (7th Cir. 1992) (purpose of "work for hire" statutory provision requiring signed written agreement is "to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable").

138. *The Berne Convention Implementation Act of 1987: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House of Representatives Comm. on the Judiciary*, 100th Cong., 1st and 2d Sess. 232-33 (1987) (statement of Peter Nolan) (error in notice date for a motion picture forced publisher to replace prints and create new master negatives at a cost of several thousands of dollars).

139. A product label has long been considered copyrightable as long as it has "some value as a composition." *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87, 93 (9th Cir. 1963) *cert. denied*, 377 U.S. 907 (1964) (quoting *Fargo Mercantile Co. v. Brechet and Richter Co.*, 295 F. 823, 828 (8th Cir. 1924)); *accord* *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959); *Fargo Mercantile Co.*, 295 F. at 827; *Silvers v. Russell*, 113 F. Supp. 119, 122 (S.D. Cal. 1953).

and advertisements¹⁴⁰ are copyrightable. Because the Copyright Act requires that a notice contain the date of first publication of a work,¹⁴¹ manufacturers may be loath to include a notice for fear of dating a product.¹⁴² Because label or packaging artwork may be protected under unfair competition principles,¹⁴³ obtaining an evidentiary advantage for copyrighted artwork appearing on products should be a low priority if dating the products is a concern.

There has also been some controversy regarding whether a work containing trade secrets should bear a copyright notice.¹⁴⁴ Because trade secrets are by definition unpublished and because use of a copyright notice has been required and continues to be encouraged only for published works, the use of a notice causes some tension in asserting both copyright and trade secret protection.¹⁴⁵

Proper placement of a notice is not practical for other types of works. For example, textile manufacturers have long had difficulty in placing a notice for their designs on fabrics sold in lengthy portions intended to be manufactured into clothing.¹⁴⁶ Works of art that are short-lived or occupy an unconventional amount of space

140. An early Supreme Court case upheld advertisements as proper subjects of copyright. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

141. The problem was addressed in the 1909 Act, which allowed authors to omit the date of publication from works other than a "printed literary, musical, or dramatic work." 17 U.S.C. § 19 (1977). In the 1976 Act, however, that provision was eliminated. Under the 1976 Act, the date of publication need not be included on "pictorial, graphic, or sculptural work[s]" reproduced on certain specified products, which do not include labels, and on "any useful articles." 17 U.S.C. § 401(b)(2) (1992). "Labels" are not considered useful articles. COMPENDIUM, *supra* note 14, § 1006. Because the copyrighted matter is reproduced on the label, the date of publication is necessary.

142. In addition, while the Copyright Act of 1976 allowed a single copyright notice to cover all contributions in a collective work, the Act specifically excluded advertisements from the provision. 17 U.S.C. § 404(a) (1992); *see also* *Canfield v. Ponchatoula Times*, 759 F.2d 493, 495 (5th Cir. 1985).

143. The "trade dress" of a product may be protected under the Lanham Trademark Act, 15 U.S.C. §§ 1051, 1125(a) (1992), if it is inherently distinctive or if it has acquired distinctiveness through use. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753, 2757 (1992).

144. *See* ROGER M. MILGRIM, 2 MILGRIM ON TRADE SECRETS § 9.05[6][b] (1992) [hereinafter MILGRIM]; David Bender, *Protection of Computer Programs: The Copyright/Trade Secret Interface*, 47 U. PITT. L. REV. 907, 940-45 (1986); Peter A. Luccarelli, Jr., *The Supremacy of Federal Copyright Law Over State Trade Secret Law for Copyrightable Computer Programs Marked with a Copyright Notice*, 3 COMPUTER/L.J. 19, 50-51 (1981) [hereinafter Luccarelli].

145. The argument that affixing a copyright notice should preclude a trade secret claim has, however, been rejected in a few cases. *Technicon Medical Info. Sys. Corp. v. Green Bay Packaging, Inc.*, 211 U.S.P.Q. (BNA) 343, 347 (E.D. Wis. 1980), *aff'd*, 687 F.2d 1032 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983); *M. Bryce & Assocs. v. Gladstone*, 319 N.W.2d 907 (Wis. Ct. App.), *cert. denied*, 459 U.S. 944 (1982).

146. *See, e.g.*, *Princess Fabrics, Inc. v. CHF, Inc.*, 922 F.2d 99, 101 (2d Cir. 1990) (omission of notice on bolts of fabric); *Klauber Brothers, Inc. v. Westchester Lace, Inc.*,

similarly are not susceptible to the easy placement of notice.¹⁴⁷

A notice may be aesthetically undesirable for other artistic works, such as paintings and sculptures, on which notice may, as a practical matter, be easily applied. While some problems of placement may be alleviated by regulations of the Register of Copyrights that allow notice to be placed on the back or framing of a painting or on the base or mounting of a sculptural work,¹⁴⁸ artists have felt that marking their works with a technically accurate notice is oppressive.¹⁴⁹

In circumstances in which the statutory form of notice presents practical problems, a truncated or modified notice¹⁵⁰ should be an attractive alternative.¹⁵¹ Such a "defective" notice should serve the same deterrent effect as that served by a valid notice and often would provide better information to potential licensees for those

Copyright L. Dec. (CCH) ¶ 26, 406 (S.D.N.Y. 1989) (notice contained only on open end of each spool of lace); see also *supra* note 21.

147. See Joan Infarinato, Note, *Copyright Protection for Short-Lived Works of Art*, 51 *FORDHAM L. REVIEW* 90, 112 n.127 (1982) (noting that a short-lived work of art by the artist Christo consisting of 24.5-mile long nylon cloth was not copyrighted because of the problem of affixing copyright notice). Forms of art on which placement of a copyright notice is impractical or incongruous include "installation art," which generally comprises a staged or decorated gallery room, and "environment art," which involves a planned three-dimensional space. *THE CONCISE OXFORD DICTIONARY OF ART AND ARTISTS* 148, 230 (Ian Chilvers ed., 1990).

148. *COMPENDIUM*, *supra* note 14, § 1013.11. The regulations concerned copies of works the Copyright Office would accept for deposit.

149. See William A. Carleton III, Note, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit De Suite*, 76 *CORNELL L. REV.* 510, 528 (1991) (noting that "[s]ome artists may resist the line the regulations implicitly draw between the pictorial, graphic, and sculptural work itself and the mundane or functional accoutrements of the work's display"); *Hearings*, *supra* note 48, at 419 (supplementary statement by Tad Crawford on behalf of the Graphic Artists Guild, the American Society of Magazine Photographers, and the Society of Illustrators in Support of Adherence by the United States to the Berne Convention) (noting that the "concept of publication does not easily apply to works of visual art" and that "many artists are unaware of the notice requirements").

150. Commentators have proposed modified notices for works containing trade secrets. See Luccarelli, *supra* note 144, at 51-52 (recommending for works containing trade secrets the legend "Unpublished — All Rights Reserved Under the Copyright Laws" to negate a claim of innocent infringement); *MILGRIM*, *supra* note 144, § 9.05 [6][b] (recommending alternative notice for trade secret and copyright claims for computer software and data bases). The Copyright Office *Compendium* specifically provides that "'All Rights Reserved' or the like, is not acceptable as an element of the copyright notice prescribed by U.S. law." *COMPENDIUM*, *supra* note 14, § 1005.01(b).

151. For authors of visual art, the Visual Artists Rights Act, effective June 1, 1991, provides paintings, drawings, prints and sculptures, and limited editions up to 200 copies thereof, with a form of "moral rights," providing rights of attribution and integrity, if each limited edition copy is consecutively numbered and signed by the author. 17 U.S.C. § 106A (1992); see also William A. Tanenbaum, *Federal Protection of Moral Rights for the First Time: The New Visual Artists Rights Act*, 3 *J. PROPRIETARY RTS.* 2 (1991).

works whose further reproduction is desirable. For authors faced with practical burdens in meeting the statutory provisions, alternative notices would provide flexibility as well as many of the same deterrent and informational functions provided by the technically accurate notice.

If the copyright notice used does not meet the requirements of the Copyright Act, there should be only one effect: the copyright owner cannot conclusively defeat a defense of innocent infringement to mitigate statutory damages to \$200. No statutory penalty exists for using a truncated or technically deficient notice under the Act as long as it is not fraudulent.¹⁵² Because notice in the statutory form is no longer required to maintain a copyright, any kind of notice could, in fact, be considered in assessing a defendant's claim of innocence.

VI. CONCLUSION

While still a comfortable and cautious means of claiming copyright in a work, the familiar copyright notice is no longer a consideration in ensuring that a work is protected under the copyright laws. Unfortunately, in eliminating the notice requirement, Congress did not completely abolish the technical provisions governing its use. Congress's adoption of an evidentiary incentive to encourage the use of a notice presents ambiguities and uncertainties concerning the lingering utility of the statutorily prescribed notice.

As has been argued in this Article, whether or not the prescribed notice appears on a work should not affect the determination of a case governed by the BCIA to any significant degree. Other legal considerations should also have little effect, at least for works protected in the United States or in Berne Convention countries.

For most authors, the question of whether or in what form they should use a copyright notice should depend on the practical burdens involved in placing the notice on their works. Incentives in terms of deterring infringement and providing information to prospective licensees do not necessarily call for the use of the statutorily prescribed notice. Many authors will therefore likely begin considering alternative notice devices as attractive alternatives to the technically accurate form of copyright notice.

152. Under 17 U.S.C. § 506(c), one who knowingly uses a notice with false information can be subject to a criminal fine of up to \$2,500. False representations in notices or of ownership have also been found to violate §43(a) of the Lanham Act. 15 U.S.C. § 1125(a) (1992); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982); *Sunset Lamp Corp. v. Alsy Corp.*, 698 F. Supp. 1146, 1153 (S.D.N.Y. 1988).