

Associate Professor Tonya M. Evans  
@IPProfEvans  
[www.proftonyaevans.com](http://www.proftonyaevans.com)  
Widener University School of Law –PA  
WIPIP ABSTRACT-DO NOT CITE OR CIRCULATE

### **Is There Any “Safer Harbor” from Statutory Damages in the Digital Age?**

In *Safe Harbor for the Innocent Infringer in the Digital Age (Safe Harbor)*,<sup>1</sup> I argued that certain classes of direct innocent infringers should be afforded safe harbor from liability in light of current accepted online practices of users deemed essential for the proper functioning and progress of the Internet and digital technology. In that article, I offered a statutory amendment to section 512 of the Copyright Act that applies specifically to direct infringers and protects them in ways similar to current protection of online service providers.

It is unlikely however, that Congress would take such a substantial departure from current law (at least in the short term). Therefore, I argue mental state can and should be evaluated along with notice as *factors* to be considered in determining whether the minimum damage award should be granted. Knowledge could even serve to create a strong presumption of standard or even willful liability. But notice alone should not serve as a complete bar to a minimum statutory damage award.

Accordingly, in this article, I answer the question posed by the title by offering an alternate statutory amendment to resolve the copyright liability and remedy conundrum. Specifically, I argue that in lieu of (or in addition to) the innocent infringer safe harbor proposal I offer in *Safe Harbor*, that Congress could adopt a more robust and meaningful minimum statutory damage award under 504 (c) for certain classes of noncommercial infringement. This proposal could apply in the innocent infringement context when safe harbor is not applied and also to other technically infringing activity deemed socially beneficial and/or technologically desirable to support progress. To be sure, limits on statutory damages are desirable even outside of the innocent infringement context (as it is presently defined).

This minimum statutory damages framework could provide “safer harbor” protection for the direct infringers to which it applies from the more onerous and excessive statutory damage awards currently being applied. Instead of discretionary application, a certain class of infringement would lead only to a limited, minimum statutory damage award.

To this end, although I believe the entire statutory damage scheme should be reformed and brought more in line with fair and just results typical and necessary in strict liability offenses across legal disciplines, my proposal seeks: 1) to limit minimum damage awards and 2) to expand the types of activities that might trigger innocent infringement protection during the remedies phase of the infringement lawsuit.

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<sup>1</sup> See Tonya M. Evans, *Safe Harbor for the Innocent Infringer in the Digital Age*, 50 Willamette L. Rev. 1 2013.