SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 62 | Issue 1 Article 8

2011

The Forgotten Right of Fair Use

Ned Snow

THE FORGOTTEN RIGHT OF FAIR USE

Ned Snow[†]

ABSTRACT

Free speech was once an integral part of copyright law; today it is all but forgotten. At common law, principles of free speech protected those who expressed themselves by using another's expression. Free speech determined whether speakers had infringed a copyright. To prevail on a copyright claim, then, a copyright holder would need to prove that the speaker's use fell outside the scope of permissible speech—or in other words, that the use was not fair. Where uncertainty prevented that proof, fair use would protect speakers from the suppression of copyright. Today, however, all this has changed. Copyright has deeply buried any remnants of free speech, redefining the doctrine of fair use as a pretext for piracy that aims to excuse infringing conduct. Copyright enforcement has become the norm and fair use the exception, resulting in a presumption against fair-use speech. Uncertainty no longer protects speakers; it damns them. The change—from fair use as a strong right of speech to fair use as a weak excuse—occurred subtly, unintentionally, and without reason. It was a mistake. Quickly becoming widespread, the mistake swiftly eroded speech protections in copyright. If left unchecked, the mistake will become immutable. This Article traces the history of fair use from its birth as a strong right of speech to its deterioration into a weak excuse for infringement.

[†] Associate Professor of Law, University of Arkansas School of Law. The author expresses appreciation to professors Mark Lemley, Rebecca Tushnet, Mark Killenbeck, Michael Mullane, Joseph Liu, Gideon Parchomovsky, Thomas Lee, Stephen Sheppard, and Lawrence Solum for their helpful comments on an earlier draft of this Article. The author also acknowledges the insightful comments provided by participants of the 2008 Works in Progress Intellectual Property Colloquium.

INTRODUCTION

For over a century, property rights of copyright holders were subject to speech rights of those who expressed themselves by repeating another's expression.[1] Through the doctrine of fair use, free speech offered presumptive protection to users of copyrighted material: copyright holders had to prove that a use was *un*fair to prevail on a claim of infringement.[2] Today, speech rights of fair users are subject to property rights of copyright holders. Fair use stands as

[1] *See infra* Part II.A (analyzing the history of fair use).

[2] *See, e.g.*, Simms v. Stanton, 75 F. 6, 13 (C.C.N.D. Cal. 1896) (holding for defendant accused of copyright infringement on grounds that copyright holder, "on whom the burden of proof lies," had failed to show that defendant's use of copyrighted material amounted to infringement).

an exception to a copyright norm, available only in extraordinary circumstances:[3] copyright holders prevail unless fair users can prove that their use merits protection.[4] Thus, free speech once defined the scope of copyright; today, copyright defines the scope of free speech.

This change in fair use, from a right of speech to an excuse for infringement, occurred subtly in the path of law. There was no clear and distinct alteration in course; there was no deliberate or intentional decision made.[5] It was unintentional and accidental. Courts simply made a mistake. The speech-protective features of fair use are today all but forgotten as courts now view fair use as an exception to the norm of copyright monopoly. Simply put, where there is doubt as to whether a use is fair—which is always—courts refuse to apply fair use, for they view it as a doctrine that is exceptional, and its exceptionality suggests that circumstances requiring its application must be clear and apparent before it can be invoked.[6] As a result, copyright's interest in suppressing expression has ascended over free speech's interest in building upon expression. Monopolies are prevailing. Speech is suffering.

This Article traces the history of fair use from a speech right that defined the contours of copyright to an exception that excuses infringement. Part I outlines the doctrine of fair use and its role in alleviating the inherent tension between protecting free speech and creating incentives for original expression. Part I also explains the role of the conceptual and procedural framework for applying fair use. Part II recites the relevant history of fair use. It analyzes judicial treatment of fair use from its inception to its present application, pointing out the shift from viewing fair use as a right that defined copyright to an affirmative defense that excused infringement. Part II further recounts indications of congressional intent to make fair use a right; it then points out the Court's faulty interpretation of those indications. Part III examines courts' present treatment of fair use, analyzing specific cases that illustrate the substantive effect of changing the framework of fair use from a right to an excuse.

---

[3] *See* Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) (internal citations omitted) ("The burden of proof is on the copier because fair use is an affirmative defense."); Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) (refusing to recognize fair use based on fact that author never would have consented to use).

[4] *See infra* Part II.A–B (showing evolution of fair use from right to excuse).

[5] *See infra* Part II.B (discussing courts' departure from precedent that treated fair use as a right).

[6] *See infra* Part III (discussing present treatment of fair use).

I. THE ROLE OF FAIR USE

A. A Fundamental Conflict

At war are free speech and copyright. The principle of free speech represents a limitation on the government's ability to restrain expression.[7] Copyright represents a government restraint on the public's ability to communicate copied expression: it restrains those who speak expression already articulated by another.[8] Copyright condones that restraint; free speech condemns it.

From the inception of fair use, the purpose of the fair-use doctrine has been to alleviate the tension between copyright and free speech.[9] Simply put, its ostensible purpose is to reconcile the respective speech-suppressive and speech-protective positions. It is intended to exempt from copyright that which merits protection as speech.[10] If subsequent expression incorporates another's prior expression in order to communicate an original idea, that subsequent expression constitutes a fair use of the prior expression, and so the law should protect it as speech.[11] Fair use, then, is intended to calm the strife between copyright and free speech by delineating core speech that copyright cannot suppress.[12]

Over time, courts developed general principles to determine whether a use of copyrighted expression was permissibly fair.[13] Today, the Copyright Act states some of those principles in a list of four factors that courts must consider in determining fairness.[14] The first factor examines whether the use is transformative and whether the use serves a commercial purpose; the second factor examines whether the nature of the copyrighted work merits strong protection; the third factor examines whether the use constitutes a significant

---

[7] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[8] *See generally* 17 U.S.C. §§ 106, 504 (2006) (endowing copyright holders with exclusive rights over original expression and imposing penalties on persons who violate those rights).

[9] *See generally* 17 U.S.C. § 107 (recognizing fair use as an exception to copyright infringement); Eldred v. Ashcroft, 537 U.S. 186, 219, 221 n.24 (2003) (describing fair use as a free speech safeguard and a First Amendment accommodation); Folsom v. Marsh, 9 F. Cas. 342, 344, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (articulating principles of fair use).

[10] *See Eldred*, 537 U.S. at 219–20 (discussing copyright law's "built-in First Amendment accommodations").

[11] *See id.* at 220 (internal quotations and citation omitted) ("The fair use defense affords considerable latitude for scholarship and comment . . . and even for parody . . . .").

[12] *See infra* Part II.B (discussing fair use as an affirmative defense).

[13] *See* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3–26 (2d ed. 1995) (tracing the history of fair use).

[14] 17 U.S.C. § 107(1)–(4) (2006); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (applying the fair-use factors).

amount or a substantial portion of the copyrighted work; and the fourth factor examines whether the use significantly affects the value of, or a potential market for, the copyrighted work.[15]

The application of these factors to circumstances often raises difficulty for decision makers.[16] Consider the first-factor inquiry into whether a use transforms a copyrighted work. Does a trivia game about the popular television show, Seinfeld, transform the expression in that show?[17] Does a painting of a copyrighted photograph transform that photograph—e.g., Shepard Fairey's painting of the Associated Press photograph of President Obama?[18] Transformation, which is a question of degree and which often weighs heavily in a court's fair-use analysis, may be too far buried in grey for a court to discern its presence with absolute clarity. Determining fairness requires a fact-finder to draw upon subjective experience and opinion, which makes predicting the outcome exceedingly difficult.[19]

Of course not every assertion of fair use raises uncertainty. Some infringers may assert the argument where it is not even arguable.[20] In such cases of blatant infringement, courts can easily dismiss bad-faith arguments of fair use.[21] But for those cases where fair use is at least arguable, courts and scholars alike recognize the inherent uncertainty surrounding the question.[22]

---

[15] 17 U.S.C. § 107(1)–(4).

[16] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990) ("Judges do not share a consensus on the meaning of fair use. . . . Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.").

[17] *See* Castle Rock Entm't v. Carol Publ'g Grp., Inc., 955 F. Supp. 260, 262 (S.D.N.Y. 1997) (discussing that situation and concluding that the defendant trivia producer's use of Seinfeld was not a fair use), *aff'd*, 150 F.3d 132, 135 (2d Cir. 1998).

[18] *See* Complaint for Declaratory Judgment at 11, Fairey v. Associated Press, No. 1:09–CV–01123–AKH (S.D.N.Y. Feb. 9, 2009), ECF No. 1 (arguing that Fairey's painting was transformative).

[19] *See* Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 497–501 (2010) ("Because fair use is a flexible doctrine, lacking a precise definition, it is an inherently vague and indeterminate doctrine.").

[20] *See id.* ("[T]he indeterminacy of fair use requires that the judge or juror who draws the fair use inferences inject her own view of what *should* be considered fair.").

[21] *See id.* at 498–99 n.90 (discussing a situation in which the defendant makes a commercial use of a copied expression, which does not require any inferences).

[22] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (requiring fair use determinations to be made on a "case-by-case" basis); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) ("[T]he issue of fair use . . . is the most troublesome in the whole law of copyright."); Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.) (describing application of fair use as "the metaphysics of the law"); Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 402 (2005) ("The substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can't manage in other areas."); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496 (2007) ("[S]cholars

The reason for the uncertainty that surrounds questions of fair use is that the doctrine is intended to contemplate all circumstances that could possibly justify protecting a use from copyright's suppression.[23] Fair use must be as flexible as circumstances are variant that would occasion its application. It is for this reason that fair use requires a case-by-case analysis.[24] Flexibility yields uncertainty in meaning, including the terms intended to offer clarity, e.g., transformation, substantial, commercial, and potential market. Uncertainty, then, is unavoidable—indeed, even intentional—in the doctrine of fair use, for uncertainty allows flexibility and a breadth of application.

B. A Dispositive Framework

Amidst uncertainty, presumption becomes dispositive. In the absence of clarity on a substantive question, a decision maker will favor the litigant whom the law presumes to be the winner.[25] So the uncertainty that accompanies fair-use questions increases the importance of the presumption that governs.[26] The presumption turns on the substantive view of fair use: fair use may be viewed as either a speech right that is superior to the copyright right or as an exception that excuses infringing conduct.[27] The former conception implies a presumption favoring fairness: as a right of speech, fair use would require that a copyright holder prove that the speech is not protected, i.e., that fair use should *not* apply. By contrast, the latter conception implies a presumption favoring copyright: as an excuse for

---

generally agree that it is now virtually impossible to predict the outcome of fair use cases."); R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 426 (2005) ("[T]here is little more that can be usefully said about the division between fair and unfair uses in practice: The 'know it when you see it' nature of the analytic approach in this context simply precludes such observations.").

[23] *See Campbell*, 510 U.S. at 577 (internal citation and quotations omitted) ("The fair use doctrine . . . permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

[24] *See id.* (citation omitted) ("[T]he statute, like the doctrine it recognizes, calls for case-by-case analysis.").

[25] *See e.g.*, Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 111 (2d Cir. 1998) ("On balance, we think the fourth factor is a very close question. . . . [C]onsidering that [the user] bears the burden of showing an absence of 'usurpation' harm to [the party holding the copyright], believe that it tips toward [the party holding the copyright].").

[26] This conclusion turns on the premise that issues of fair use are factual and subject to burden-of-proof presumptions. *See* Snow, *supra* note 19, at 497–506 (concluding that fair-use issues must be treated as factual).

[27] *Compare* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (noting in dicta that "fair use should be considered an affirmative *right*" but declining to treat it that way given a Supreme Court declaration that it is an affirmative defense), *with* Compaq Computer Corp. v. Ergonome Inc., 387 F.3d 403, 410 (5th Cir. 2004) ("[F]air use excuses otherwise actionable infringement.").

infringement, fair use would be an exception that justifies infringing conduct, i.e., the proponent must prove that it does apply. The substantive view of fair use—as a right of speech or as an exceptional excuse—determines the presumption. And that presumption provides a significant substantive advantage to whichever party it favors.

For over a century, the framework for viewing the role of fair use remained constant.[28] Fair use represented those principles for identifying speech that copyright could not suppress. In effect, it represented the superior right of speech over the inferior right of copyright. Accordingly, a burden to prove unfair use rested with copyright holders to prevail on a claim for infringement.[29] In recent years, however, the framework has shifted. Fair use now represents an excuse to justify infringement, or in other words, an exception to the norm of speech suppression through copyright.[30] And as an exception to copyright, fair use does not apply unless demonstrated. Fair users must now prove that their use is fair before the law will protect them from copyright.

An irony of this shift in the fair-use framework is that the uncertainty that originally strengthened the speech-protective function of fair use now weakens it. Under the framework of a right of speech, fair use drew upon uncertainty to be flexible and broad; uncertainty impeded copyright's rush to suppress expression. Courts were reluctant to enjoin a person from repeating expression if they were uncertain whether the repetition constituted a fair or unfair use.[31] Now, however, the framework of treating fair use as an exception to the norm of copyright has turned the role of uncertainty in fair use entirely upside down. Under the present framework, circumstances of fairness must be apparent and obvious for the doctrine to apply, so infringement is not excused where ambiguity and uncertainty exist.[32] Where a fair-use argument creates more questions than answers, it must fail. Thus, the shift in the fair-use framework has changed the role of uncertainty from protecting fair users to punishing them.

II. THE HISTORY OF FAIR USE: FROM RIGHT TO EXCUSE

From its inception, courts treated the fair-use doctrine as a right of speech, but modern courts have departed from this position. And despite Congress's attempt to return the doctrine to its original status,

[28] *See infra* Part II (discussing history of fair use).
[29] *See infra* Part II (analyzing burdens of proof in fair use).
[30] *See infra* Part III (interpreting modern day treatment of fair use).
[31] *See infra* Part II (comparing courts' prior treatment of fair use).
[32] *See infra* Part III (explaining the modern day approach to fair use).

the Supreme Court ultimately settled the issue against fair users. This Part recounts this history.

A. Judicial Treatment of Fair Use as a Right

1. English Case Law

Early fair-use jurisprudence recognized that fair use was a right that competed with the claim of copyright. Before fair use was introduced in the United States, English common law contemplated the doctrine.[33] Those early English cases described principles of fair use as defining infringement, or in other words, they describe those principles as defining the scope of the copyright holder's rights. By defining the scope of the copyright holder's rights, fair use represented that which was outside the scope of rights held by the copyright holder.

Examples are apparent of early English courts treating fair use in this manner.[34] In *Dodsley v. Kinnersley*,[35] the defendant-user had printed one-tenth of Samuel Johnson's fictional work, *The Prince of Abyssinia*.[36] The court contemplated whether this use constituted a fair abridgment:

> I shall determine this case upon the next question, which is, Whether there has been any infringement of property? . . . It was insisted for the defendant, that what was printed in the Magazine was a fair abridgment, and, as such, not a piracy. No certain line can be drawn, to distinguish a fair abridgment; but every case must depend on its own circumstances.[37]

---

[33] *See* PATRY, *supra* note 13, at 3–26 (tracing the English common law roots of the modern fair-use doctrine).

[34] The first recorded decision that articulates principles of fair use arose in *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 489 (Ch.). There, the defendant used portions of the copyright holder's work to create a legal treatise. *Id.* In contemplating the copyright holder's plea for an injunction, the court described abridgements:

> Where books are colourably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.

Id. at 490. Recognizing that a fair abridgement might be prejudicial against the original author, the court suggested that the fair abridgment would not lie "within the meaning of the act of Parliament," implying that the court viewed the fair abridgment as lying outside the scope of copyright. *Id.*

[35] (1761) 27 Eng. Rep. 270 (Ch.).

[36] *Id.* at 270–71.

[37] *Id.* at 271.

Defining infringement in terms of whether the use constituted a fair abridgment, the court held that the defendant's use was fair.[38]

In *Cary v. Kearsley*,[39] the defendant-user had employed the copyright holder's book of maps to create his own.[40] Contemplating whether the user had committed a piracy, the court stated:

> That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term *animus furandi*?[41]

This explanation demonstrates that the court viewed the issue of whether the user had fairly used the copyright holder's material as dispositive to the question of infringement. Specifically, that issue determined whether the user had committed a piracy, or in other words, whether the facts supported an action.[42] After this explanation, the copyright holder wisely dismissed his action voluntarily.[43]

Early English case law thus treated fair-use principles as determinative of whether infringement had occurred, which meant that fair use defined the scope of the copyright holder's rights.[44] A result of this treatment was that uncertainty surrounding whether a use was fair favored the defendant-user. Because a copyright holder bore the burden to demonstrate infringement, the copyright holder was required to show that the defendant's use was unfair. So if a court could not determine whether a use was fair or unfair, the court would rule that the copyright holder had not fulfilled his burden to show infringement. In short, doubt as to whether the use was fair would result in the court allowing the use. An example of this occurs in *Murray v. Bogue*.[45] There, the defendant-user had published travelers' guides based on the copyright holder's copyrighted work.[46] In

---

[38] *Id.* at 272.

[39] (1802) 170 Eng. Rep. 679 (K.B.).

[40] *Id.* at 679–80.

[41] *Id.* at 680.

[42] *See id.* ("That part of the work of one author is found in another, is not itself piracy, or sufficient to support an action.").

[43] *Id.*

[44] *See, e.g.*, Wilkins v. Aikin, (1810) 34 Eng. Rep. 163, 165 (Ch.) ("The question upon the whole is, whether this is a legitimate use of the Plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work.").

[45] (1852) 61 Eng. Rep. 487 (Ch.).

[46] *Id.* at 493.

refusing the copyright holder's bill for an injunction, the court commented:

> I have felt great difficulty in coming to a conclusion whether . . . the use of the Plaintiff's materials and the benefit derived from his work by the Defendant, direct or indirectly, amount to such an extraction from it as comes up to an extraction of the *vital* part; *whether it comes up to an unfair use, or is only a fair use of it*. . . . On the whole, my conclusion is that I cannot say that the Defendant in his work makes an unfair use of the Plaintiff's. I am not absolutely satisfied that the use made of it might not by another Judge be looked at in a different light; but I cannot satisfy my mind that there is that unfair use which would justify me in restraining the publication of the Defendant's work.[47]

Repeatedly portraying the ultimate issue as whether the defendant-user made an unfair use, the *Murray* court here expressed its uncertainty on whether it should conclude that the use was fair or unfair. The court further admitted the possibility that a different judge might believe the use to be unfair, but this judge could not satisfy his mind that there had been an unfair use.[48] Uncertainty, then, compelled the court to rule for the user.[49]

2. Federal Case Law

Principles of fair use developed in the United States based on the English common law. Like their English counterparts, courts in the U.S. treated the principles of fair use as definitional to the issue of infringement: fair-use principles determined whether a copyright holder's rights had been invaded, or in other words, they determined the scope of a copyright holder's rights.[50] As definitional to infringement, fair use implied that the user held a presumptive right to use the copyrighted expression absent a showing otherwise.[51] The subsections below describe this treatment.

---

[47] *Id.* (second emphasis added).

[48] *See id.* ("I am not absolutely satisfied that the use made of [plaintiff's work] might not by another Judge be looked at in a different light.").

[49] *See id.* (holding that the defendant's use of plaintiff's work was not unfair).

[50] *See infra* Part II.A.2.a (discussing early American courts' use of fair-use principles as determinative of infringement).

[51] *See infra* Part II.A.2.b (discussing early American courts' presumption of a general privilege held by subsequent users to make use of a work, and copyright limiting that right).

a) Fair Use as a Test for Infringement

Archetypal fair-use law well establishes that courts treated principles of fair use as determining the issue of infringement. The first American case to articulate the principles of fair use, *Folsom v. Marsh*, [52] exemplifies this treatment.[53] There, Justice Joseph Story considered whether a defendant-user had infringed the copyright holder's rights in letters from President George Washington when the user employed them in a historical work.[54] While analyzing whether the user had infringed the copyright holder's work, Justice Story articulated principles that today constitute the four statutory factors of fair use.[55]

In articulating these principles, it is clear that Justice Story treated them as determining infringement. He framed the "question of piracy" regarding "what constitutes an infringement" as depending on, among other things, "a nice balance of the comparative use made in one of the materials of the other; [and] the nature, extent, and value of the materials thus used,"[56] citing a critical review as an example of a permissible use.[57] Later in the opinion, Justice Story succinctly stated the question that the facts presented as follows: "The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs."[58] To answer that question, he explained:

---

[52] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

[53] *See* L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431–32 (1998) (arguing that a misunderstanding of *Folsom v. Marsh* is that it "created fair use, when in fact it merely redefined infringement").

[54] *See Folsom*, 9 F. Cas. at 345 (describing "more than one third" of defendant-user's work as containing the letters of George Washington).

[55] *See id.* at 344, 348 ("[T]he question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) (crediting Justice Story's articulation of fair use as the basis for the modern doctrine as codified in the 1976 Copyright Act).

[56] *Folsom*, 9 F. Cas. at 344. This quotation reflects the Copyright Act's articulation of fair use: the Act cites criticism as an example of fair use; the first factor balances the comparative uses by examining the purpose of the use; the second factor examines the nature of the copyrighted work; and the third examines the extent of the work that was used. *See* 17 U.S.C. § 107 (2006) (setting forth the statutory factors of a fair-use defense).

[57] *See Folsom*, 9 F. Cas. at 344 ("[N]o one can doubt that a reviewer may fairly cite largely from the original work . . . for the purposes of fair and reasonable criticism."). As an opposing example, he cited a review that quoted from an original work simply to substitute for the work, reflecting the first fair-use factor's examination of the purpose and character of the use. *Compare id.* at 344–45 (citing a review that quotes from an original work simply to substitute or supersede the original work), *with* 17 U.S.C. § 107(1) (examining the purpose and character of the use).

[58] *Folsom*, 9 F. Cas at 348.

> [W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[59]

For Justice Story, then, determining whether the law would recognize the use as infringing turns on inquiries that today constitute the doctrine of fair use—here, specifically, the amount and substantiality of the amount taken and the market impact. Throughout *Folsom v. Marsh*, Justice Story set forth principles that guide today's fair-use doctrine as inquiries that determine infringement.[60]

Justice Story's portrayal of fair-use principles as determining infringement is not limited to *Folsom v. Marsh*. In *Gray v. Russell*,[61] he articulated the same principles, framing the ultimate question that those principles determined as: "what amounts to a piracy of a work?"[62] Examples of uses that turned this piracy inquiry into "a very nice question," Justice Story explained, included copying another's expression for purposes of writing a critical review or creating an abridgement.[63] These examples required "various considerations,"

---

[59] *Id.* at 348.

[60] Further language from *Folsom* demonstrates Justice Story treating principles of fair use as determinative of infringements:

> If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to *constitute a piracy* pro tanto. . . . In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and *cannot fairly be treated as a piracy*; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a *clear piracy*.

Id. (emphases added).

[61] 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728).

[62] *Id.* at 1038. Justice Story articulated the principles in *Gray v. Russell* as follows:

> In some cases, indeed, it may be a very nice question, what amounts to a piracy of a work, or not. Thus, if large extracts are made therefrom in a review, it might be a question, whether those extracts were designed bonâ fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such a case, must be compounded of various considerations; whether it be a bonâ fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may enter as elements, in ascertaining, whether there has been a piracy, or not.

Id.

[63] *Id.*

such as whether the use superseded the original work, was adapted to the same set of readers, omitted only unimportant parts—all of which "may enter as elements, in ascertaining, whether there has been a piracy, or not."[64] Thus, according to Justice Story, principles of fair use constituted "elements" of the copyright holder's claim.[65]

Also noteworthy about Justice Story's explanations is that he never identified the principles of fair use as a doctrine distinct from the infringement inquiry. Never once did he even employ the term fair use. Not until decades later did the term "fair use" develop as a descriptor of the principles that Story had set forth.[66] For Story, then, the principles of fair use did not represent a doctrine independent from the question of infringement that would merit a distinct label; those principles were part and parcel with the criteria for determining infringement.

This view is further exemplified in Story's treatise on equity jurisprudence, where he explained: "If there has been [a legitimate use of the copyright], although it may be prejudicial to the original author, it is not an invasion of his legal rights."[67] Determining whether a use is legitimate, then, determines whether a copyright holder's rights have been invaded. To be sure, Story viewed a fair use as a use not contemplated by the legal rights of the copyright holder.

According to Story, then, principles of fair use delineated the contours of infringement; they determined whether a user had invaded the copyright holder's right. Those principles did not simply excuse infringing conduct; they were not like the defenses of consent, expired limitations, or necessity in that they did not represent an exception to copyright. Rather, the principles represented the basis for determining the scope of copyright.[68] Story viewed the principles of fair use not as *subject to* the right of copyright, but rather as *definitional to* the right of copyright.[69]

---

[64] *Id.*

[65] *See id.* (stating that considerations parallel to those of the fair-use doctrine "may enter as elements, in ascertaining, whether there has been a piracy").

[66] *See* Lawrence v. Dana, 15 F. Cas. 26, 44 (C.C.D. Mass. 1869) (No. 8,136) (using the term "fair use").

[67] 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1269, at 617–18 (14th ed. 1918).

[68] Were fair use like the affirmative defenses listed above, then the principles of fair use articulated in *Folsom* would have been mere dicta to Justice Story's holding, for he found that the defendant had infringed. Yet most assuredly the principles of fair use in *Folsom* are not dicta: they represent the principles under which he found infringement. *See* Folsom v. Marsh, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4901) (relying on principles akin to the fair-use doctrine in finding that defendant-user infringed on plaintiff's copyright).

[69] *See, e.g.*, Emerson v. Davies, 8 F. Cas. 615, 625 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.) (emphasis added) ("[*T*]*o amount to an infringement*, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an

Like Justice Story, the other early American jurists that articulated the fair-use doctrine treated it as definitional to infringement.[70] For instance, in *Story v. Holcombe*,[71] the court described the inquiry into "[t]he infringement of a copyright" as a qualitative assessment into the user's copying, with the ultimate question turning on whether the use has superseded the original work.[72] Quoting Justice Story, the court repeated the view that "a fair and *bona fide* abridgment of an original work, is not a piracy of the copyright of the author."[73] The court therefore viewed fair abridgments as lying outside the scope of uses granted to the author in copyright. Interestingly, the court noted that it would have preferred that the common law had adopted a stricter doctrine of infringement rather than the liberal doctrine stated in fair use, yet the court nevertheless applied those fair-use principles, thereby indicating the strength of those principles in relation to copyright: they apparently were not applied at the mere discretion of

important and valuable portion which operates injuriously to the copy-right of the plaintiff.").

[70] *See, e.g.*, Falk v. Donaldson, 57 F. 32, 35 (C.C.S.D.N.Y. 1893) (relying on *Folsom* to describe the question of fair use as: "[T]o what is the artist or author entitled as his conception, and what of such original conception has been appropriated?"); Farmer v. Elstner, 33 F. 494, 496 (C.C.E.D. Mich. 1888) ("It is not only quantity, but value and quality, that are to be regarded in determining the question of piracy."); Chapman v. Ferry, 18 F. 539, 541 (C.C.D. Or. 1883) (relying on *Folsom* for the proposition that "[q]uestions of infringement of copyright are often very difficult to decide."); *Lawrence*, 15 F. Cas. at 60 (summarizing principles of fair use in *Folsom* as determining what "constitute[s] an invasion of copyright"); Greene v. Bishop, 10 F. Cas. 1128, 1134 (C.C.D. Mass. 1858) (No. 5,763) ("Great difficulties oftentimes surround the inquiry, whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or that the use made of the book or its contents does not exceed what the law permits to another engaged in composing a new work upon the same subject.").

[71] 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497).

[72] *Id.* at 173 ("[T]his privilege can not be so exercised as to supersede the original book."). That the court viewed principles of fair use as determinative of infringement, rather than as an excuse for infringement, is apparent from the following:

> [T]he special master comes to the conclusion that there is no infringement; but that the work of Holcombe is a fair abridgment . . . . The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege can not be so exercised as to supersede the original book. . . . The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use, in any degree, the right of the author is infringed: and it can be of no importance to know with what intent this was done.

Id. at 172–73.

[73] *Id.* at 173 (emphasis added) (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901)).

the court; rather, the principles of fair use represented the defining line of copyright that the law required courts to apply.[74]

b) Fair Use as a Right

Consistent with the view that infringement requires unfair use is the view that use of another's expression constitutes the norm and suppression of that use through copyright constitutes the exception. The eminent case of *Lawrence v. Dana*[75] is illustrative. In *Lawrence*, the copyright holder had published a legal treatise that included extensive annotations; the user-defendant later published an edition of the same work in which he allegedly copied these annotations.[76] The court held that the use was not fair, explaining fair use as a more general privilege of the user:

> None of these rules of [copyright] decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication; but their effect undoubtedly is, to limit that privilege so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright.[77]

The *Lawrence* court thus viewed subsequent authors as holding a privilege to exercise fair use and copyright holders as limiting that privilege.[78] Privilege here means an immunity that the law grants to a specific class of persons, namely, to creators of expression.[79] Merely by being an author does a person enjoy a general privilege that exempts her from legal liability for her writings—so the court taught.[80] This privilege, the court pointed out, is not absolute: copyright limits the privilege where the subsequent expression supersedes the original author's work, substantially injuring the

---

[74] *See id.* ("[I]n this country the [fair-use] doctrine has prevailed. I am, therefore, bound by precedent; and I yield to it in this instance, more as a principle of law, than a rule of reason or justice.").

[75] 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136).

[76] *Id.* at 31–32.

[77] Id. at 61.

[78] *See id.* (discussing the interplay between fair use and infringement).

[79] *See id.* ("[C]ases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use . . . ."); *see also generally* THOMAS WALTER WILLIAMS, A COMPENDIOUS AND COMPREHENSIVE LAW DICTIONARY (1816) (unpaginated) (defining privilege to be "either *personal* or *real*," with a "*personal* privilege" meaning "that which is granted to any person, either against or beyond the course of the common law: as, for example, a member of parliament may not be arrested").

[80] *See Lawrence*, 15 F. Cas. at 61 (speaking generally about the "privilege of a subsequent writer to make what is called a fair use of a prior publication").

original author.[81] Stated another way, copyright limits the general privilege to its core—fair use. Key is that copyright limits the privilege, rather than the privilege limiting copyright. According to *Lawrence*, then, fair use does not exist as an exception to copyright, but rather, copyright exists as an exception to fair use.

An early copyright treatise further indicates this relationship between copyright and fair use. In his influential copyright treatise, George Ticknor Curtis expressly labeled fair use as a "right."[82] Curtis explained that in view of the right of fair use, the inquiry into copyright infringement must first

> assum[e] the general principle, that every writer is at liberty to treat of any subject whatever, whether it has been previously written upon by others or not; and then [that inquiry] resolves itself into the question . . . whether he has made a lawful use of the particular work which he is alleged to have infringed.[83]

This excerpt suggests that Curtis viewed the general right of speech in every author as foundational to the inquiry into whether a user had infringed copyright. The general right constitutes the norm. Only after recognizing that general right does the inquiry turn to whether the speech by the subsequent author is unlawful, or in other words, whether the use infringes copyright. According to Curtis, then, the right of authors to create and speak is the norm and copyright's suppression of that right is the limitation, or exception, to that right.

c) Fair Use as a Presumption

Viewing copyright as an exception to a subsequent author's general right to speak suggests a presumption in favor of fair use. If the norm is speech and the exception is suppression, then it would seem that the proponent of the exception, copyright holders, must

---

[81] *See id.* ("[T]he privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication.").

[82] GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 237 (1847). Mr. Curtis stated:

> To administer the law in such a manner as not to curtail the fair use of existing materials, in any department of letters, is one of the great tasks of jurisprudence. It proposes to itself, first, the vindication of rights acquired by genius, discovery, invention, and labor, in the productions of the mind; secondly, the acknowledgment upon motives of public policy, of the right to a fair use by any writer of all that has been recorded by previous authors.

Id.

[83] *Id.* at 254.

prove that the exception applies; otherwise the use is presumptively fair. Stated differently, as a test for infringement, the principles of fair use require the litigant bearing the burden to prove infringement—the copyright holder—to incorporate those principles in satisfying that burden. The early view of fair use, then, suggests a presumption of fair use, and this would have required copyright holders to prove that the use was not fair, or in other words, that the use was *un*fair.[84]

On this point, *Lawrence v. Dana* is again instructive.[85] The *Lawrence* court explained the issue of determining "an invasion of copyright" (or in other words, determining infringement) by reciting Justice Story's articulation of the fair-use doctrine.[86] Stating this same issue of infringement "in brief terms," the court formulated it as follows: "was that use allowable, or was it of a character and to such an extent that it infringed the complainant's rights?"[87] The word *allowable* here turns on whether the use was fair, for the defendant-user was arguing that his use was "allowable as fair quotations."[88] Hence, the question the court posed was essentially: Was the use fair, or was it of a character that it infringed the copyright holder's rights? This formulation suggests that fairness and infringement are mutually exclusive, each representing the absence of the other. After formulating the issue in this manner, the court observed: "Difficult though it be to make proof, still the complainant is not entitled to any decree, *unless he proves infringement*, as alleged, to the satisfaction of the court, as the burden in that issue is always upon the party making the charge."[89] The fact that the court pointed out that the burden of proving infringement lies with the copyright holder immediately after suggesting that infringement is the absence of fairness further suggests that the burden to prove infringement consists of showing the absence of fairness.[90] Thus, the court's reference to fair use as the opposite of infringement and then its

[84] *See* Christina Bohannan, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1131 (2010) (footnote omitted) ("[B]ecause *Folsom* did not create a fair use *defense* as such, but rather redefined the test of infringement, *Folsom* arguably would have required the copyright holder to bear the burden of proof on the issue of harm as part of the burden to prove infringement."). *But see* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 483 (2005) ("Under *Folsom* and its progeny, once the copyright holder made a *prima facie* showing that the alleged infringer borrowed the protected work, the burden then shifted to the alleged infringer to demonstrate that his use was excusable.").

[85] *Lawrence*, 15 F. Cas. at 56, 60 (stating that the burden is on the charging party).

[86] *Id.* at 60 (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)).

[87] *Id.* at 56.

[88] *Id.* at 59.

[89] *Id.* at 56 (emphasis added).

[90] *See id.* (implying that such use is either fair or infringing on a copyright holder's right, and then placing the burden on the copyright holder to prove an infringement).

immediate statement that the copyright holder always bears a burden to prove infringement suggests that the *Lawrence* court viewed the copyright holder as bearing a burden to prove that a use was not fair.[91]

Simms v. Stanton[92] is another early fair-use case that indicates that copyright holders had a burden to prove that the use was unfair.[93] After opining that Justice Story best articulated the test for piracy, the court acknowledged the uncertainty that surrounds some questions of fair use.[94] The court then stated that although the copyright holder had made a strong showing against the user, he had failed to satisfy his burden of proof. In the court's words:

> While the respondent candidly admits that she consulted complainant's works in preparing and writing her own, and while the excerpts or parallelisms tend to show that she borrowed from complainant's books, and in several instances certainly approached very closely to the line that marks the boundary between a fair and an illegitimate use, still I think, upon the whole of the case, that the complainant, *on whom the burden of proof lies*, has failed to show such substantial piracy on the part of respondent as would entitle him to relief in a court of equity.[95]

In no uncertain terms, the court ruled for the defendant-user on the basis that the copyright holder had failed to satisfy his burden of proving that the use was unfair.

---

[91] A review of the pleadings of such early American cases does not shed light on which litigant bore the burden of proof. The early fair-use cases in the United States all arose in equitable proceedings, and to prevail in equity, a copyright holder must have pleaded that the defendant's act has caused harm. *See generally* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.1(1), at 50 (2 ed. 1993) ("[E]quity would not grant a remedy for a legal right unless, without the equitable remedy, the plaintiff would suffer irreparable harm."). So the fact that a copyright holder pleaded that a defendant's use of the copyrighted material caused harm by substituting for the copyright holder's work does not imply that as an action at law the copyright holder would bear a burden to make that showing in order to prevail on a claim for infringement. *See, e.g.*, Bill in Equity at 18–19, Lawrence v. Dana, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136) (alleging harm caused by defendant's use of the copyright holder's material to supersede copyright holder's work). That said, language that the copyright holder used in his bill in equity in *Lawrence* suggests that he needed to demonstrate that the use was not fair according to the principles outlined in *Folsom*. *See id.* at 18 (alleging that defendant's book "is and was intended to be a competing book with [the books of the copyright holder] . . . [and intended] to supersede and take the place of said books").

[92] 75 F. 6 (C.C.N.D. Cal. 1896).

[93] *See id.* at 13 (holding that complainant failed to meet his burden of proof).

[94] *See id.* at 9–10 ("Probably the most accurate, and at the same time concise, statement of the test of piracy is that laid down by Mr. Circuit Justice Story . . . . What constitutes a 'fair use' is often a very difficult question to answer. What would be a 'fair use' in one case might not be in another.").

[95] *Id.* at 13 (emphasis added).

Additional language suggesting that copyright holders bear a burden of proof on the issue of fair use arises in *Greene v. Bishop*.[96] There, the court noted that "[g]reat difficulties" surround the inquiry into whether copying from an original author "amounts to piracy", or alternatively, whether the use "does not exceed what the law permits."[97] The court then explained that "if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another . . . such taking or appropriation is sufficient in point of law to maintain the suit."[98] The court therefore framed the infringement issue in terms of the use being *un*fair, and pointed out that it is from that standpoint that the copyright holder maintains the suit.

It seems clear, then, that the early cases indicate a burden on the copyright holder to demonstrate an unfair use in order to show infringement. But it is not immediately clear whether that burden would give much advantage to users. It may be questioned whether a burden of proof affects the fair-use analysis at all: today courts treat the issue of fair use as a pure matter of law where the underlying historical facts are undisputed.[99] As an issue of law that judges usually decide at summary judgment, a litigant's burden of proof would not seem to affect how a court chooses to apply or not apply fair use. But this was not always so. In years previous, fair use was not an issue of law unaffected by any burden of proof; it was instead an issue of fact subject to that burden.[100] Only in recent years have some courts changed their treatment of fair use from issue of fact to issue of law.[101] So in the past, when the issue of fairness was an issue of fact, the burden was very relevant.[102] Moreover, some modern

---

[96] 10 F. Cas. 1128 (C.C.D. Mass. 1858) (No. 5,763).

[97] *Id.* at 1134.

[98] *Id.*

[99] *See, e.g.*, L.A. News Serv. v. Reuters Television Int'l Ltd., 149 F.3d 987, 993 (9th Cir. 1998) (affirming the district court's grant of summary judgment to the copyright holder on the issue of fair use where no "genuine issues of material fact" existed); Snow, *supra* 19, at 539–42 (criticizing courts for treating issues of fair use as pure issues of law).

[100] *See* Snow, *supra* 19, at 518–27 (arguing fair use was always a question of fact unless the suit was in courts of equity).

[101] *See id.* at 528–34 (noting the frequency of courts since 1980 disregarding the common law concerns against deciding fair use issues on summary judgment).

[102] *See, e.g.*, Lillard v. Sun Printing & Publ'g Ass'n, 87 F. 213, 213–14 (C.C.S.D.N.Y. 1898) (noting apparent impossibility for rights-holder to show market harm and thereby concluding that use is fair); Farmer v. Elstner, 33 F. 494, 497 (C.C.E.D. Mich. 1888) (analyzing whether defendant's use is fair and noting "the absence of testimony showing that plaintiff has been, or is likely to be, injured by defendants' publication"). In *Emerson v. Davis*, 8 F. Cas. 615 (D. Mass. 1845) (No. 4,436), Justice Story examined whether a defendant had pirated the copyright holder's work in imitating that work. His opinion sheds light on the issue of burden of proof:

courts—although not all—still treat fair use as raising a factual issue for the jury.[103] And it is possible that courts will yet recognize the error in treating fair use as a pure matter of law.[104]

This history of courts treating fair use as definitional to infringement, with a burden on the copyright holder to show an unfair use, continued into the 1900s. Language from *West Publishing Co. v. Edward Thompson Co.*[105] is illustrative:

> If infringement and unfair use of such a [work] be shown, an injunction would be the only appropriate remedy . . . .
>
> . . . .
>
> The complainant has raised the question of unfair use; that is, of infringement . . . .
>
> . . . .
>
> In addition to copying, *it must be shown* that this has been done to an unfair extent. It is only after copying has been shown that the question of fair or unfair use arises, and then it is controlling.[106]

The court thus viewed fair use as determining infringement, thereby requiring the copyright holder to make a showing that the use was unfair.[107] Similarly, the court in *Solomon v. R. K. O. Radio Pictures, Inc.*[108] expressed the copyright holder's burden: "[T]here was no

---

> It is not sufficient to show, that [Defendant's work] may have been suggested by [the copyright holder's work], or that some parts and pages of it have resemblances, in method and details and illustrations, to [the copyright holder's]. It must be further shown, that the resemblances in those parts and pages are so close, so full, so uniform, so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it.

Id. at 622.

[103] *See, e.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 277–78 (6th Cir. 2009) (finding that the jury's verdict was not against the great weight of the evidence); DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) ("The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury.").

[104] *See generally* Snow, *supra* note 19 (arguing that courts should treat fair use as an issue of fact).

[105] 169 F. 833 (C.C.E.D.N.Y. 1909).

[106] *Id.* at 844, 861 (emphasis added). The quoted language constitutes a statement of the relevant law by the defendant's lawyer, regarding "What Constitutes Infringement of Copyright." *Id.* at 861. The court characterized the quoted language as "a correct deduction of the law." *Id.* at 862.

[107] *See id.* (noting that "the determination of the questions of fact raised by [fair use] will substantially determine the [infringement] questions at issue").

[108] 44 F. Supp. 780, 782 (S.D.N.Y. 1942).

substantial copying which would warrant a holding of unfair use or actionable infringement. The plaintiff having failed to sustain the burden of proof, judgment is rendered in favor of the defendants."[109] Into the middle of the twentieth century, fair use determined whether a copyright holder's rights had been infringed, defining the scope of a copyright holder's rights.[110]

B. Judicial Departure from Precedent

1. A Mistake by Two Commentators

Despite the fact that courts framed fair use as a doctrine that defined copyright, one early commentator suggested that fair use was a doctrine that excused infringement that had already occurred.[111] In his 1925 treatise on copyright, Richard DeWolf opined that fair use exists because copyright holders tacitly consent to those uses.[112] DeWolf argued that the copyright holder's creation of a work implied his tacit consent to foreseen uses of the work, which meant that those uses would be infringing without the tacit consent.[113] And, according to DeWolf, copyright restricted even fair uses absent the tacit consent

[109] *Id.* at 782; *see also* Greenbie v. Noble, 151 F. Supp. 45, 64, 67 (S.D.N.Y. 1957) (discussing fair use as a doctrine of infringement, as distinct from the affirmative defenses that the defendant pleaded).

[110] Early fair-use cases often combined what today are the distinct doctrines of substantial similarity, improper appropriation, and fair use. Treatment of any of these terms in an earlier case suggests that courts viewed that treatment as applicable to all such doctrines. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 468, 472–73 (2d Cir. 1946) (declaring an essential element of copyright holder's case to be establishing that defendant's copying constitutes improper appropriation, in contrast to permissible copying, and relying on *Folsom* to support a doctrine of permissible copying, i.e., fair use); Heim v. Universal Pictures Co., 154 F.2d 480, 487 (2d Cir. 1946) ("[P]laintiff, to make out his case, must establish . . . that, if copying is proved, it . . . constitute[s] unlawful appropriation.").

Although cases did not always speak to a burden, they often indicated that fair use determined whether the defendant had infringed a copyright, which implied that the copyright holder had the burden because the general burden to show infringement rests with the copyright holder. *See, e.g.*, Am. Inst. of Architects v. Fenichel, 41 F. Supp. 146, 147–48 (S.D.N.Y. 1941) ("[T]he defendant's use was not the kind of use intended to be forbidden by the statute and does not constitute an infringement."); Broadway Music Corp. v. F-R Publ'g Corp., 31 F. Supp. 817, 818 (S.D.N.Y. 1940) ("I have come to the conclusion that in publishing the portion of the song 'Poor Pauline', there was no infringement, and that the publication was a 'fair use' and permissible and not contrary to law.").

[111] *See* RICHARD C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925) (arguing fair use merely excuses a copyright infringement).

[112] *Id.* ("'[F]air use' strictly speaking . . . is a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have foreseen it and tacitly consented to it.").

[113] *See id.* (suggesting that the copyright holder anticipates a degree of copying pre-publication).

of copyright holders.[114] Under DeWolf's conception, fair use does not represent a right of speech that competes with the right of copyright; rather, fair use represents a copyright holder's tacit choice to forbear the exercise of his rights.[115] In contrast to earlier fair-use decisions, DeWolf's conception of the fair-use doctrine did not define infringement; it excused it.[116]

Tellingly, DeWolf did not cite any legal commentators or courts for his conception of fair use.[117] And a search of relevant authority at the time of DeWolf reveals little to no support for his conception of the doctrine. Only one case could support DeWolf's proposition that fair use arises from tacit or implied consent of a copyright holder.[118] The court in *Sampson & Murdock Co. v. Seaver-Radford Co.* explained, in dicta, that unauthorized uses may be permissible based on the "implied consent" of a copyright holder, which arises from the customary practice of his trade.[119] The court further explained, however, that society as a whole—through common consent—compels copyright holders' consent.[120] Thus, even *Sampson* does not appear consistent with DeWolf's conception that in the absence of consent, fair users infringe. Rather, the *Sampson* court's reference to fair use by common consent suggests that in the absence of consent, a

---

[114] *See id.* (arguing that fair use was "technically forbidden by law").

[115] *See id.* (claiming that a part of publication is an understanding others may appropriate work in some instancing without prior approval).

[116] *See id.* (describing fair use as technically forbidden, yet customary and acceptable).

[117] *Id.*

[118] *See* Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 540–41 (1st Cir. 1905) (raising a similar argument to DeWolf's).

[119] *Id.* The *Sampson* court considered whether a defendant who had published portions of the copyright holder's city directory made a fair use of that directory. *Id.* at 539. Although the court found infringement, the court explained (in dicta) that under some circumstances a subsequent publisher may use identical expression of an earlier publication based on the prior publisher's implied consent. *Id.* at 540–41. Prior publishers, according to the court, impliedly consented to uses of their expression where the subsequent use advanced the subject of their expression. *Id*. The court inferred that implied consent from the fact that all publishers gave their common consent to such usage: customary practice dictated consent to build upon the original expression. *Id.*

Sampson's description of implied consent based on customary practice is dubitable. At that time, several courts and at least one commentator expressly rejected the idea that fair use arose from implied consent of a rights-holder through customary practice of a trade. *See* Walter v. Steinkopff, (1892) 3 Ch. 489, 499 (rejecting defendant's argument that custom of quotation justified copying); Maxwell v. Somerton, (1874) 22 W.L.R. 313 at 314 (recognizing infringement despite general customary practice of provincial papers); Wyatt v. Barnard, (1814) 35 Eng. Rep. 408, 408 (Ch.) (rejecting argument that usual practices among publishers could control the law); E.J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT IN THE UNITED KINGDOM AND THE DOMINIONS OF THE CROWN, AND IN THE UNITED STATES OF AMERICA 102–03 (1902) ("Custom of Trade has been pleaded in defence of what was otherwise clearly a piracy. . . . It is clear that no such customs can be admitted.").

[120] *See Sampson*, 140 F. at 541 ("[B]y the common consent . . . subsequent authors are sometimes entitled, and indeed, required, to make use of what precedes them in the precise form in which last exhibited . . . .").

rights-holder would hold no rights, so no one could infringe.[121] DeWolf's conception of fair use does not appear to accurately portray how courts of his time treated the doctrine.[122]

Albeit mistaken, DeWolf's interpretation of fair use—as a technically infringing use that is based on the implied consent of a rights-holder—found its way into a 1944 copyright treatise by a well known commentator, Horace Ball.[123] Relying on the only case that had adopted DeWolf's faulty characterization (in dicta),[124] Ball proclaimed: "Fair use is technically an infringement of copyright."[125] Like DeWolf, Ball described fair use as a privilege that arises from the implied consent of a copyright holder:[126]

> Although the Copyright Law makes no provision for 'fair use' of another's work, the author's consent to a reasonable use of his copyrighted works has always been implied . . . .

As a doctrine that arises from the implied consent of copyright holders, fair use—according to Ball—excuses, rather than defines, infringing conduct. Only because the author impliedly consents does the infringing conduct go unpunished; hence, Ball preached that "[f]air use is technically an infringement of copyright."[127]

That Ball's description is mistaken becomes evident when examining the caselaw that he relied on for it—*Lawrence v. Dana*.[128]

---

[121] *See id.* at 544–45 (discussing the implied consent that a copyright holder gives to users and its limitations).

[122] DeWolf's understanding of fair use was analogous to the affirmative defense of implied consent in a real-property trespass case. *Cf.* Shiffman v. Empire Blue Cross & Blue Shield, 256 A.D.2d 131, 131 (N.Y. Ct. App. 1998) (stating that implied consent in an affirmative defense to an action for real property trespass). By contrast, the way that the *Sampson* court conceived fair use was analogous to the rights of an easement holder over a servient estate holder, where the servient estate holder has received the estate subject to an existing fair-use easement. *Cf.* Shooting Point, LLC v. Wescoat, 576 S.E.2d 497, 502 (Va. 2003) ("A party alleging that a particular use of an easement is unreasonably burdensome has the burden of proving his allegation.").

[123] *See* HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) ("Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary.").

[124] *See* Shapiro, Bernstein, & Co. v. P.F. Collier & Son Co., 26 U.S. Pat. Q. 40, 42 (S.D.N.Y. 1934) (citing DeWolf's claim that authors implicitly consent to all use that were reasonably foreseeable at the time of production).

[125] BALL, *supra* note 123, at 240.

[126] *Id.*

[127] *Id.*

[128] *See id.* at 260 nn.1–2 (citing Lawrence v. Dana, 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8,136)). In addition to *Lawrence v. Dana*, Ball cited five other cases to support his definition of fair use as a technical infringement predicated on the implied consent of the rights-holder. *See id.* at 260 nn.2–3, 5. Of those five, only one supports his view, *Shapiro*, 26 U.S. Pat. Q. at 42, where the court quoted DeWolf's description of fair use in dicta. Three of the others do not, *see* Eichel v. Marcin, 241 F. 404, 410–11 (S.D.N.Y. 1913) (finding that copyright does not protect "common property" such as plotlines but protects literary elements added to the plotline); Story

In *Lawrence*, the court repeatedly referred to fair use as a privilege.[129] Ball appears to have seized upon that privilege language to describe fair use as a sort of implied-consent privilege,[130] analogous to the implied-consent privilege in real property law.[131] The *Lawrence* court, however, attached a broader meaning to privilege than did Ball.[132] According to the *Lawrence* court, the fair-use privilege arose because a fair user created expression—not because the copyright holder had consented to the use.[133] More precisely, the *Lawrence* court explained that a general privilege protects creators of expression, but copyright limits the privilege where the copied expression substitutes for the original. That is, copyright limits the general privilege of expression to its core, i.e., fair use. So *Lawrence* represents copyright as an exception to the general privilege of expression, and fair use as the core of that privilege which copyright may not restrict.[134] Ball, on the other hand, employed the word

---

v. Holcombe, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (relying upon *Folsom v. Marsh* to declare fair use is not an infringement if it does not supersede the purpose of or act as a substitute for the original work); Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270, 271–72 (Ch.) (relying upon plaintiff's absence of damage to the plaintiff to deny preliminary injunction), and, as discussed *infra* in this section, one is questionable, *see* Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 539–40 (1st Cir. 1905) (holding "it clearly was not the implied intention" of the plaintiff to allow the defendant to copy portions of the plaintiff's directory).

Further evidence that the DeWolf-Ball conception of fair use was mistaken is apparent from another commentator's opinion at about the same time as Horace Ball. Professor Melville Nimmer stated: "It is sometimes suggested that fair use is predicated on the implied or tacit consent of the author. This is manifestly a fiction, for a restrictive legend on a work prohibiting coping in whole or in part gives no greater protection than the copyright notice standing alone." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13–157 (Matthew Bender rev. ed. 2011) (footnotes and citations omitted).

[129] *See* Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136) (describing the "privilege conceded to subsequent authors").

[130] *See* BALL, *supra* note 123, at 260 (emphasis added) ("Fair use may be defined as a *privilege* in others than the owner of a copyright to use the copyrighted material *in a reasonable manner* without his consent.").

[131] *Cf.* St. Louis Cnty. v. Stone, 776 S.W.2d 885, 888 (Mo. Ct. App. 1989) (emphases added) ("[A] person who enters an area open to the public at a reasonable time and *in a reasonable manner*, has the implied consent of the owner to enter the premises under a limited *privilege*, and as long as the privilege, based upon implied consent, is within the conditional or restricted consent of the owner to enter, the implied consent remains.").

[132] *See Lawrence*, 15 F. Cas. at 61 (referring to copyright law as limiting the "privilege of fair use accorded to a subsequent writer").

[133] *See id.* (noting a book review is a fair use of the original work as long as the review does not function as a substitute for the original work).

[134] Early fair use jurisprudence reveals only three other cases where the court employed the term "privilege" in describing the doctrine. *See* Simms v. Stanton, 75 F. 6, 10–11 (C.C.N.D. Cal. 1896) (quoting EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN THE GREAT BRITAIN AND THE UNITED STATES 394 (1879)) ("She was, therefore, privileged to make a 'fair use' . . . . 'The fair uses . . . which an author is privileged to make of a copyrighted work . . . .'"); Greene v. Bishop, 10 F. Cas. 1128, 1134

privilege to suggest that fair use exists as an exception to the otherwise superior right of copyright, where the exception is based on a copyright holder's implied consent to excuse infringing conduct. This was not the meaning of privilege that the *Lawrence* court articulated.

The DeWolf-Ball conception of fair use suggests that uncertainty disfavors the application of fair use. Under their conception of fair use as a technical infringement of copyright, fair use constitutes an exception to a norm. And that characteristic of exceptionality suggests that it should not apply unless warranted. So the norm becomes copyright enforcement; the exception becomes fair use as an excuse of infringement. Given that a proponent of an exception must demonstrate that the exception should apply, fair users—under the DeWolf-Ball conception of fair use—must demonstrate that fair use applies. And uncertainty inhibits that demonstration. Subtle but distinct, a new paradigm of fair use arose out of two commentators' mistake.

2. Judicial Adoption of the Mistake

A consequence of this paradigm shift was that courts ceased treating fair use as an element of infringement, instead treating it as an affirmative defense. Once courts accepted the paradigm shift, the change to affirmative defense was only natural: an affirmative defense excuses a defendant from liability where the defendant's conduct would otherwise be infringing; if certain facts have occurred, the affirmative defense excuses liability.[135] The DeWolf-Ball conception of fair use as a doctrine that excuses infringement based on the implied consent of copyright holders thus implicitly suggests

---

(C.C.D. Mass. 1858) (No. 5,763) ("[N]or can the privilege be so exercised as to supersede the original [work]."); Story v. Holcombe, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) ("[T]his privilege can not be so exercised as to supersede the original [work]."). All are consistent with the broad meaning that the court employed in *Lawrence v. Dana*, 15 F. Cas. at 61.

[135] CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270, at 558 (3d ed. 2004) (explaining that an affirmative defense derives from the common law plea of "confession and avoidance," which permitted a defendant who was willing to admit the plaintiff's declaration of the prima facie case and then allege additional new material that would defeat the plaintiff's otherwise valid cause of action and excuse the defendant's conduct); *see e.g.*, Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 514 (4th Cir. 2002) ("The existence of an implied nonexclusive license . . . constitutes an affirmative defense to an allegation of copyright infringement."); *see also* BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining affirmative defense as the "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.").

that fair use is an affirmative defense, much like the affirmative defense of consent in real property law.[136] One practical consequence of treating fair use as an affirmative defense is that the fair user must prove all facts necessary to prevail on the affirmative defense.[137] Unlike a defense, which does not require defendants to bear a burden of proof,[138] an affirmative defense usually places the proof burden on the defendant.[139] So prior to Ball, if a court ever referred to fair use as a defense, the court was not suggesting that the burden of proof lie with the defendant.[140] Courts that relied on Ball's treatise, however, treated fair use as a doctrine that excused infringing conduct, and so they viewed it as an *affirmative* defense—one that placed the burden of proof on the defendant.[141] They accordingly placed the burden of proof on the fair user. Now bearing the burden of proof, fair users faced a formidable challenge given the inherent uncertainty surrounding whether any particular use is fair. Uncertainty now favored copyright rather than fair use. Thus, as courts bought into the DeWolf-Ball conception of fair use, they implicitly began treating fair use as inferior to copyright.[142]

---

[136] *Cf.* Stukes v. Bachmeyer, 249 S.W.3d 461, 465 n.1 (Tex. App. 2007) (commenting in real property action that a "defendant has the burden of proof to show consent or authorized use and must plead consent as an affirmative defense"); RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965) (noting that party relying on possessor's consent to entry upon real property bears the burden of proving that fact).

[137] *See* Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) ("The burden of proof is on the copier because fair use is an affirmative defense.").

[138] A defense is simply an asserted reason for which the plaintiff has no valid case. *See* BLACK'S LAW DICTIONARY, *supra* note 1355, at 482 (referring to a doctrine as a defense does not necessarily indicate that the defendant bears the burden of proof); *see also, e.g.*, Duke v. Duckworth, 236 F. App'x. 86, 88 (5th Cir. 2007) (referring to qualified immunity as defense and then specifying that the plaintiff bears the burden of proof once the defendant has pleaded it in good faith); Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 928 (9th Cir. 2005) ("[W]hen a defendant raises the defense of genericness in an infringement case involving an unregistered mark, the plaintiff has the burden of proof to show that the mark is valid and not generic."); Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 101 n.6 (3d Cir. 2004) ("Once the defense has been raised, then the plaintiff must sustain its burden of proof . . . ."); Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense."); Cowen Co. v. Houck Mfg. Co., 249 F. 285, 287 (2d Cir. 1918) ("It sometimes happens that a positive defense may properly be introduced under a general denial, in which case the burden of proof is still upon the plaintiff . . . .").

[139] *See, e.g.*, *Chi. Bd. of Educ.*, 354 F.3d at 629.

[140] *See, e.g.*, Thompson v. Gernsback, 94 F. Supp. 453, 454 (S.D.N.Y. 1950) (referring to fair use as a defense).

[141] *See, e.g.*, Loew's Inc. v. Columbia Broad. Sys., Inc., 131 F. Supp. 165, 167, 174 (S.D. Cal. 1955) (quoting from Ball's treatise and referring to fair use as an affirmative defense), *aff'd sub nom.*, Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. by an equally divided court*, Columbia Broad. Sys., Inc. v. Loew's, Inc. 356 U.S. 43 (1958).

[142] *See, e.g.*, *id.* and cases cited *infra* note 148 (noting courts that treated fair use as an affirmative defense).

Further history on fair use's development into an affirmative defense is revealing. The first court to label fair use as an affirmative defense—a California district court—did so in 1955, a decade after Ball published his treatise.[143] Tellingly, that first court quoted from Ball's treatise, characterizing fair use as "technically an infringement of copyright."[144] Two more courts labeled fair use an affirmative defense during the 1960s,[145] and three during the 1970s.[146] All were district courts, and none of those district courts—or for that matter any court ever—provided any reasoned support or analysis for their labeling fair use as an affirmative defense. They did not indicate that they were breaking from the judicial practice of treating fair use as definitional to infringement. Instead, they merely noted its availability as an affirmative defense in passing when introducing the fair-use argument. It was as though the courts did not realize that they were departing from historical precedent. And likely they did not. All were likely viewing fair use through the framework of Ball, most citing to the very page of Ball's treatise on which he described fair use as a privilege excusing infringement.[147] Assuming that those courts believed that Ball—a well-respected commentator—correctly stated the law of fair use, they would not have realized that they were departing from the original conception of fair use by labeling it an affirmative defense. The judicial creation of fair use as an affirmative defense was a natural consequence of Ball's faulty characterization, and as a result, that judicial creation appears to have been an unintentional mistake.

---

[143] *See Loew's*, 131 F. Supp. at 167 (listing fair use as one of the affirmative defenses the defendant set forth).

[144] *Id.* at 174.

[145] *See* Trebonik v. Grossman Music Corp., 305 F. Supp. 339, 341 (N.D. Ohio 1969) (listing fair use as one of the defendant's affirmative defenses); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 132 (S.D.N.Y. 1968) (same).

[146] *See* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351, 355 (N.D. Ga. 1979) (noting that the defendants raised the affirmative defense of fair use); Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 689 (S.D.N.Y. 1974) (noting that "fair use has been recognized as a valid affirmative defense"); Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723, 730, 732 (S.D.N.Y. 1974) (citing Ball and deeming fair use an affirmative defense), *rev'd*, 551 F.2d 484, (2d Cir. 1977); *see also* Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243, 251 (W.D.N.Y. 1978) ("[T]he burden of establishing fair use is on the defendant . . . .").

[147] *See Meredith*, 378 F. Supp. at 689 n.11 (relying on Ball's treatise for its conception of fair use); *Rohauer*, 379 F. Supp. at 732 (same); *Loew's*, 131 F. Supp. at 174 (same).

C. Congressional Intent as Speech Right

1. Legislative History Prior to the Copyright Act

After the first court (the 1955 California district court) labeled fair use an affirmative defense—but before any other courts did—Congress considered the issue of whether fair use was a presumptive right or an affirmative defense. In 1967, a House Judiciary Committee considered legislation that eventually became the 1976 Copyright Act.[148] The 1967 House Report stated only the following sentence regarding which litigant should bear the fair-use burden of proof: "The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable."[149] The Committee thus considered it undesirable for Congress to speak on the issue, suggesting that the Committee saw no reason to alter the status quo.[150] That fact is significant because at the time of this statement in 1967, only the California district court had labeled fair use an affirmative defense—hardly sufficient to constitute a status quo.[151] The Committee's advice to remain silent suggests that in 1967, the Committee did not recognize any need to depart from the then-existent judicial practice of presuming fair use by placing the burden with copyright holders.

Nine years after that 1967 Report, Congress enacted the 1976 Copyright Act.[152] By that time, the law surrounding the status of fair use as a presumptive right and the burden-of-proof issue had become unsettled.[153] So the Committee's advice that Congress should remain silent on the issue became obsolete by the time Congress acted. It was therefore necessary for Congress to break its silence on the issue, and so Congress did. Through several provisions of the Act, Congress expressed a clear intent on the issue.[154]

---

[148] H.R. REP. NO. 90–83 (1967).

[149] *Id.* at 37.

[150] *See id.* (stating no statutory provision related to the fair-use burden of proof is necessary).

[151] *See Loew's*, 131 F. Supp. at 167.

[152] Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1301 (2006)).

[153] *See* cases cited *supra* notes 141, 145 and 146 (discussing courts treating fair use as an affirmative defense).

[154] *See* Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative*, 54 J. COPYRIGHT. SOC'Y 139, 139–40 (2007) ("[W]ith the passage of the 1976 Copyright Act the right of fair use cannot be considered an affirmative defense—either logically or doctrinally.").

2. Language of the Copyright Act

The most apparent indication of congressional intent on the issue appears in the Act's fair-use provision, section 107.[155] Section 107 articulates the doctrine as the original fair-use jurisprudence portrays it—a doctrine that defines infringement:[156] "[T]he fair use of a copyrighted work . . . is not an infringement of copyright."[157] Expressly, then, Congress rejected the DeWolf-Ball conception of fair use as a doctrine that excused technically infringing uses.[158] Fair use cannot be "technically an infringement"[159] if it "is not an infringement."[160] Congress cast aside the DeWolf-Ball conception that had caused courts to depart from the original conception of fair use as a right.

The quoted language of the Act—"the fair use of a copyrighted work . . . is not an infringement of copyright"—draws a distinct line between fair and infringing uses. What is fair is not infringing, and what is infringing is not fair. Under the Act, then, fair use is definitional to infringement.[161] To satisfy his burden to show infringement, then, a copyright holder must satisfy the definition of infringement—i.e., a use that is not fair.

Other provisions in the Copyright Act manifest congressional intent to treat fair use as a right. Section 108 expressly refers to fair

---

[155] 17 U.S.C. § 107; *see* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (emphasis in original) (noting in dicta that "fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright").

[156] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) ("[F]air use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary [that he articulated in *Folsom v. Marsh*] is discernible").

[157] 17 U.S.C. § 107. The full sentence of the quotation reads:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id.

[158] *See* discussion *supra* Part II.B.1 (exploring and critiquing the DeWolf-Ball conception of fair use).

[159] *See* BALL, *supra* note 123, at 260 ("Fair use is technically an infringement of copyright . . . .").

[160] 17 U.S.C. § 107.

[161] *See* PATRY, *supra* note 13, at 585 (describing language of fair use provision in Copyright Act as "backward phrasing" in view of the fact that fair use is an affirmative defense); David Nimmer, *InacCSSibility*, *in* BENJAMIN KAPLAN ET AL., AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) Nimmer–8 (Iris C. Geik et al. eds., 2005) ("Congress defined the fair use of a copyrighted work to lie outside the rights of the copyright owner . . . . [T]his [fair-use] limitation is every bit as integral as, for example, are those section 106 grants.").

use as a right.[162] The purpose of that section is to limit the scope of copyright as enforced against public libraries and archives that reproduce non-commercial copies.[163] Within that section, Congress stated: "Nothing in this section . . . in any way affects *the right of fair use* as provided by section 107."[164] Noteworthy is that Congress employed the word "right" to describe fair use rather than "affirmative defense."[165] Also noteworthy is that Congress employed the same word, "right," to describe that which is held by a copyright holder, without providing any indication that the meaning of right is any different in any context.[166] As the same sort of right held by a copyright holder, the fair-use right must compete with the copyright right. So by describing fair use as a competing right, Congress intimated its intent that fair use define the scope of the copyright right, rather than excuse an infringement of the copyright right.[167]

3. Organization of the Copyright Act

Congressional intent is further apparent when viewing the Copyright Act as an entire code. The purpose of Chapter 1 is to define the subject matter and scope of copyright.[168] Individual sections within that chapter state the subject matter, the exclusive rights, and limitations on those exclusive rights.[169] The sections within Chapter 1 thus serve to define the scope of rights by both setting forth the rights and demarcating the limits of those rights. To that end, the sections are integral to one other. Indeed, the section that lists copyright's exclusive rights, section 106, qualifies those rights by making them "[s]ubject to" all sections within Chapter 1 which provide limitations on the rights.[170] All sections within Chapter 1 serve to define the scope of the copyright rights.

This structure implies that when Congress placed the fair-use provision in section 107 of Chapter 1, Congress intended that the fair-

---

[162] 17 U.S.C. § 108.

[163] *See id.* (providing a section entitled "Limitations on exclusive rights: Reproduction by libraries and archives").

[164] *Id.* (emphasis added).

[165] *See id.* at (f)(4) (noting that fair use is a right).

[166] *See* 17 U.S.C. § 101 ("'Copyright owner', with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.").

[167] *Compare* 17 U.S.C. § 108 (noting that fair use is a right), *with* 17 U.S.C. § 101 (defining copyright owner as holding a right).

[168] *See* 17 U.S.C. § 101 ("Chapter 1 Subject Matter and Scope of Copyright").

[169] 17 U.S.C. §§ 102–18.

[170] 17 U.S.C. § 106; *see* Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 69 n.363 (1999) (arguing that the Copyright Act can be interpreted as providing that fair use is a definitional element of copyright's scope based on "subject to" language of 17 U.S.C. § 106).

use provision be an integral part of the rights of copyright holders. Congress must have therefore intended that the fair-use provision define the scope of a copyright holder's rights.[171] That fair use defines the scope of copyright implies that fair use defines infringement, for the scope of copyright must be ascertained to determine infringement; and by defining infringement, fair use requires the litigant charged with demonstrating infringement—the copyright holder—to demonstrate that the use is not fair.[172] The placement of the fair-use provision in Chapter 1 suggests a presumption of fair use.

4. 1976 Legislative History

Legislative history also indicates congressional intent to place the burden of proof with copyright holders. In a 1976 House Report, the Judiciary Committee noted the "established legal principle" that a "burden of proof should *not* be placed upon a litigant to establish facts particularly within the knowledge of his adversary."[173] This principle is well recognized in the law: as stated by Wright and Miller, the burden should lie with the party who "has superior access to the evidence needed to prove the fact," in the absence of a substantive policy reason otherwise.[174] In other words, where the burden of production is easier for one of the parties to satisfy because of that party's unique access to evidence, the burden of proof should lie with that party.[175]

This principle suggests that the burden of proving fair use should lie with the copyright holder rather than with the fair user. The principle is less relevant for the first three statutory fair-use factors

---

[171] *See* Nimmer, *supra* note 161, at Nimmer–8 ("Congress delineated the rights of copyright owners in all of sections 106 through 121. . . . Attention blinkered on section 106 fails to discern that [fair use] is every bit as integral as, for example, are those section 106 grants."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1099 (2007) (inferring from the fact that the Copyright Act sets forth fair use as a limitation on copyright that the Act "require[s] the copyright owner to prove that the defendant's use exceeded the bounds of fair use in order to show infringement").

[172] Congress did not intend that all sections of Chapter 1 require copyright holders to bear the burden of proving their application or non-application. In a 1976 House Report, the Judiciary Committee acknowledged that "the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary." H.R. REP. NO. 94–1476, at 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5695. Tellingly, evidence suggesting the fairness or unfairness of a use is uniquely within the knowledge of the copyright holder. *See infra* Part II.C.4 (explaining rights-holders possess superior access to evidence concerning the fourth, and most crucial, factor taken into consideration in infringement cases).

[173] H.R. REP. NO. 94–1476, at 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5695 (emphasis added). The Committee noted this principle in the context of advising courts how to apply the first-sale doctrine, as codified in 17 U.S.C. § 109. *Id.*

[174] WRIGHT & MILLER, *supra* note 135, § 5122, at 399–403.

[175] *See id.* (inferring the burden of proof should rest directly on the party with superior access to the required evidence).

because evidence is often undisputed relating to those factors.[176] But the principle is highly relevant to the fourth factor—market impact—which often weighs heavily in the fair-use analysis.[177] The copyright holder encounters less difficulty producing evidence of market impact than does a fair user.[178] The copyright holder has unique access to evidence of a use's effect on the value of, or potential market for, the original work.[179] As the litigant who owns the work, the copyright holder experiences the effects of the defendant's use. Thus, the copyright holder is in the best position to gain access to evidence about the market impact of the defendant's use, i.e., the fourth factor.[180] The evidentiary principle that the Judiciary Committee directed courts to apply in assigning burdens of proof in copyright cases suggests that the copyright holder should bear the burden in the context of fair use.[181] It suggests a presumption of fair use.

D. Judicial Departure from Congressional Intent

Nine years after Congress had spoken on the burden of proof, the Supreme Court spoke on the issue.[182] In *Harper & Row Publishers*,

---

[176] *See* Snow, *supra* note 19, at 492–93 (explaining that historical facts, which give rise to the inferences that determine the first three factors, are usually not disputed). With respect to the first three fair-use factors, the burden of production is usually not difficult for either party to satisfy. Specifically, the purpose and character of the use, the nature of the copyrighted work, and the amount and substantiality of the copying all derive from evidence of the defendant's use and from evidence of the original work: evidence of the defendant's use is not uniquely within a defendant's knowledge, for that evidence led the copyright holder to bring suit; likewise, evidence of the original copyrighted work is not uniquely within either party's knowledge. *See* 17 U.S.C. § 107 (providing the four factors to be taken into consideration in determining "fair use").

[177] Supreme Court precedent establishes that the fourth factor weighs heavily in the fair-use analysis. *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 238 (1990) (internal quotations and citation omitted) ("The fourth factor is the most important, and indeed, central fair use factor."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–55 (1984) (relying almost exclusively on fourth factor to determine that use is fair); *see also* Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1800–01 (2010) (discussing the relative inability for fair users to demonstrate the absence of market harm in fair-use analysis).

[178] See 4 NIMMER, *supra* note 128, § 13.05[A][4], at 13–198.7 ("[S]evere problems of proof can attend evidence on the fourth factor . . . .").

[179] *Cf.* Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1309 (2008) ("[D]efendants may lack access, at reasonable cost, to evidence relevant to some of the fair use factors, and therefore would tend to lose if they bore the burden of proof.").

[180] *See* 4 NIMMER, *supra* note 128, at § 13.05[A][4] (noting comparative advantage of copyright holder over defendant to gain information relating to the market-impact factor).

[181] *See* H.R. REP. NO. 94–1476, at 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5695 ("[T]he burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary.").

[182] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (requiring a case-by-case analysis that precluded categorical presumptions of fairness, thus placing the burden of proof on fair users).

Inc. v. Nation Enterprises,[183] the Court considered whether the fair-use doctrine protected the defendant-user who had published an article revealing portions of President Ford's memoirs before his memoirs were released.[184] Relevant to the burden-of-proof discussion, the defendant-user argued that uses of copyrighted material for news purposes should be presumptively fair.[185] The Court rejected this argument by explaining that each case requires case-by-case analysis, which precludes categorical presumptions of fairness.[186]

But the Court did not stop there. In the same sentence, the Court declared fair use to be an affirmative defense, which would require its proponent—the user—to prove its application.[187] In one sentence, then, fair use became an affirmative defense.[188] Immediately thereafter, all fair users were required to prove their fair use. And fair use's inherent ambiguity served to prosecute rather than protect fair users. Through a single sentence, the Court stripped fair use of its centuries-old status as a doctrine that represented the speech rights of subsequent authors.

The *Harper* Court's declaration that fair use constitutes an affirmative defense is especially troubling because the Court represented that this was Congress's intent.[189] But as the above section demonstrates, that is simply not true.[190] Rather tellingly, the only citation that the Court provided for its declaration that Congress "structured the [fair-use] provision as an affirmative defense" was to a page in a 1967 House Report—drafted nearly a decade before the Copyright Act was enacted—that contained only one statement regarding the burden of proof.[191] That statement was the following: "any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable."[192] Certainly this does not mean that Congress intended fair use to be an

[183] 471 U.S. 539 (1985).

[184] *Id.* at 542.

[185] *Id.* at 561.

[186] *Id.*

[187] *Id.*

[188] *See id.* ("The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").

[189] *Id.* In addition to the cited sentence, the Court relied on one commentator, William Patry, who pointed out that prior to the enactment of the Copyright Act, some courts had placed the burden of proof on the defendant. *See* PATRY, *supra* note 13, at 585 (stating fair use was an affirmative defense under the 1909 Copyright Act). For a discussion of these prior courts that had placed the burden on defendants, see *supra* Part II.B.

[190] *See supra* Part II.C (explaining the Judiciary Committee's advocated evidentiary principle suggested that copyright holders should bear the burden of proof in fair use cases).

[191] *Harper*, 471 U.S. at 561 (citing H.R. REP. NO. 90–83, at 37 (1967)).

[192] H.R. REP. NO. 90–83, at 37 (1967).

affirmative defense when it passed the Copyright Act. Conspicuously absent from *Harper*, then, is any support for construing fair use as an affirmative defense.

Why, then, did the *Harper* Court portray fair use as an affirmative defense? The answer may lie in the framework through which the Court viewed fair use—that of Horace Ball. The Court quoted Ball's definition of fair use—a technical infringement that is excused because of the implied consent of a copyright holder.[193] As discussed above, Ball's framework suggests that fair use is an affirmative defense rather than a right.[194] So Ball's faulty definition appears to have influenced the *Harper* Court's conception of fair use, similar to prior decisions where courts first began labeling fair use as an affirmative defense.[195] The Court's conclusion that fair use is an affirmative defense is thus not surprising: the conclusion inheres in the very framework through which the Court was viewing fair use—that of Ball.

The *Harper* Court's terse declaration that fair use was an affirmative defense soon settled the burden-of-proof issue. In 1992, Congress amended the Copyright Act and in the legislative history of that amendment, the Judiciary Committee relied on the *Harper* Court's declaration to pronounce that "fair use is an affirmative defense," such that "the burden of proving fair use is always on the party asserting the defense."[196] Two years later, the Court in *Campbell v. Acuff-Rose Music, Inc*,[197] again tersely declared fair use to be an affirmative defense, relying on its prior statement from *Harper* and the cited 1992 legislative history.[198] As in *Harper*, the 1992 Judiciary Committee and the *Campbell* Court both failed to provide any substantive analysis in labeling fair use an affirmative defense.[199] Despite the historical underpinnings of the fair-use doctrine and the language of the Copyright Act, courts could no longer treat fair use as a right.

---

[193] *See Harper*, 471 U.S. at 548–50 (relying on Ball to define fair use and stating that the copying at issue "would constitute infringement unless excused as fair use" and that "the fair use doctrine was predicated on the author's implied consent").

[194] *See supra* Part II.B (indicating Ball's characterization of fair use was a misconception).

[195] *See supra* notes 141–47 and accompanying text (discussing the judicial adoption of Ball's formulation of fair use).

[196] H.R. REP. NO. 102–836, at 3 & n.3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2554 & n.3.

[197] 510 U.S. 569 (1994).

[198] *Id.* at 590 & n.20.

[199] *Cf.* PATRY, *supra* note 13, at 585 (describing in five sentences how fair use came to be an affirmative defense, ultimately pointing to bald statements by the Supreme Court that lack any reasoned analysis).

III. THE PRESENT TREATMENT

Courts today presume infringement rather than fairness. Treating fair use as an affirmative defense, courts require fair users to demonstrate that their use should be protected.[200] There is neither discussion nor analysis about whether fair use should be either a presumptive right or an exceptional excuse—it is always the latter.[201] Compared to its past status as a right, fair use has weakened significantly. This weakness is manifest in judicial reasoning that is based on the DeWolf-Ball conception of fair use, in the failure of courts to recognize the speech nature of fair use, and in the procedural burden that fair users face to prove their non-infringement. Each of these manifestations of weakness is illustrated below.

A. Judicial Reasoning Under the DeWolf-Ball Conception

As discussed above, the Copyright Act expressly rejects the DeWolf-Ball conception of fair use as a technically infringing right.[202] Yet courts continue to employ that conception, which has given rise to judicial reasoning that would nearly always prevent any fair uses. Consider *Clean Flicks of Colorado, LLC v. Soderbergh*.[203] There, the defendant-user, Clean Flicks, purchased copies of movies, edited the content by removing sex, nudity, profanity, and violence, and then sold the edited copies to consumers.[204] Clean Flicks always purchased an authorized copy for every edited copy that it sold.[205]

---

[200] *See, e.g.*, Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1239 (11th Cir. 2010) (rejecting defendant's argument that fair use is "a denial of copyright infringement" on grounds that fair use is well established as an affirmative defense); Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) (citations omitted) ("The burden of proof is on the copier because fair use is an affirmative defense . . . ."); 4 NIMMER, *supra* note 128, § 12.11[F], at 12–217 (footnote omitted) ("[A]s a matter of definition, the defendant bears the burden of proof as to all affirmative defenses, which are discussed throughout this treatise. The affirmative defense that is most distinctive to the copyright sphere is fair use . . . .").

[201] It appears that one commentator has noted the change. *See* Bohannan, *supra* note 8484, at 1131–32 (noting that historically fair use was not construed as an affirmative defense). And only one jurist has expressed discomfort with this treatment of fair use, Judge Stanley Birch. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (Birch, J.) ("I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright."); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976.").

[202] *See supra* Part II.C.2 (explaining fair use is not technically an infringement and thus cannot be an infringing right).

[203] 433 F. Supp. 2d 1236 (D. Col. 2006).

[204] *Id*. at 1238.

[205] *Id.*

Arguing fair use at summary judgment, Clean Flicks did not prevail.[206] Influential in the court's analysis was the market-impact factor.[207] The evidence showed that for every edited copy that Clean Flicks distributed to a consumer, an authorized copy of the Studios' movie was purchased on behalf of that consumer, suggesting that Clean Flicks's use resulted in a positive effect on the market for the copyrighted material.[208]

The court disagreed.[209] It interpreted the evidence to infer that Clean Flicks' use did not strengthen the market for the copyrighted movies.[210] The court based this interpretation on the mistaken conception of fair use as articulated by Horace Ball—that fair use represents a technically infringing use that is permissible because of the copyright holder's implied consent.[211] From this definition, the court reasoned that the Studios would never have impliedly consented to Clean Flicks' use: the Studios apparently desired that certain persons *not* consume their movies (i.e., persons who found their movies to be morally objectionable), and Clean Flicks' use enabled those persons to consume the movies.[212]

Under the court's reasoning, the additional consumers that Clean Flicks introduced into the market for the Studios' movies did not actually have a positive effect on the market for the Studios' movies. For, according to the court, the Studios could determine which consumers should be counted in assessing whether Clean Flicks strengthened the market.[213] That is, the court's reasoning suggests that copyright holders define the relevant consumer pool, such that the fourth factor will always militate against a finding of fair use.[214] Moreover, the court's logic implies that any time a copyright holder objects to a use, implied consent would automatically be disproven.[215]

---

[206] *Id.* at 1243.

[207] *See id.* at 1241–42 (evaluating the market impact factor and stating that "[t]he primary argument on the fair use defense is the fourth statutory factor").

[208] *Id.* at 1239.

[209] *See id*. at 1242 (noting that Clean Flicks's argument was "superficial" because it "ignore[d] the intrinsic value of the right to control the content of the copyrighted work").

[210] *Id.*

[211] *See id.* (noting that fair use "is predicated on a theory of an author's implied consent").

[212] *Id*. ("[Fair use] is not applicable here because the infringing parties are exploiting a market for movies that is different from what the Studios have released into and for an audience the Studios have not sought to reach.").

[213] *See id.* (noting that the author's implied consent was required and thus basing the relevant market on the author's intended market).

[214] *Id; see also* 4 NIMMER, *supra* note 128, at § 13.05[A][4], 13–198.4–198.5 (noting that a court could define the potential market in a way that would always militate against a finding of fair use).

[215] *Cf.* Castle Rock Entm't v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145–46 (2d Cir. 1998) (acknowledging that producers of copyrighted work did not intend to enter market for use at issue, but finding infringement based on fact that copyright law should "respect" the copyright

It would be difficult, if not logically impossible, to prevail on a fair-use argument under the reasoning of the *Clean Flicks* court, which followed Ball's conception of fair use.

B. Failure to Recognize Speech

If courts treated fair use as a right of speech, they would favor defendant-users whenever close calls arose, namely, when one of any number of circumstances could tip the balance either way.[216] At a minimum, close-call cases would never be decided summarily, without a factual hearing, in favor of the speech suppressor—the copyright holder.[217] Yet they are, and routinely so.[218]

Consider *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,[219] where the Ninth Circuit affirmed the district court's preliminary injunction enjoining defendant-users from publishing a book about the O.J. Simpson double-murder trial.[220] The book was entitled *The Cat NOT in the Hat*, and it mimicked the famous Dr. Seuss story, *The Cat in the Hat*.[221] The Ninth Circuit framed the fair-use issue as whether the users' "taking would be excused."[222] The court ultimately rejected the fair-use argument, despite the fact that the use appeared to make fun of the original Dr. Seuss story (in addition to making fun of the O.J. trial).[223] Such ridicule suggests that

---

holder's choice not to enter that market).

[216] One might argue that copyrighted speech should be afforded the same speech protection as fair-use speech. *See* Ned Snow, *Fair Use as a Matter of Law*, 88 DENV. U. L. REV. (forthcoming 2011) (manuscript at 36–37) (on file with author) (concluding that the tension between the Free Speech Clause and copyright is much greater than the tension between the Free Speech Clause and fair use). In short, the threat that an erroneous finding of fairness poses to the production of copyrighted material is much less than the threat that an erroneous finding of infringement poses to the production of fair uses. *See id.*

[217] *See generally* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (placing burden of proof on party seeking to suppress expression); Snow, *supra* note 177, at 1781 (noting precedent in various speech contexts requires speech suppressor to satisfy burden to show that speech is unprotected).

[218] *See, e.g.*, Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (deciding against fair use on summary judgment, yet admitting that "there are numerous competing considerations which make this decision a difficult one"), *aff'd*, 150 F.3d 132 (2d Cir. 1998).

[219] 109 F.3d 1394 (9th Cir. 1997).

[220] *Id.* at 1406.

[221] Dr. Seuss Enters. Inc. v. Penguin Books USA, Inc. (*Dr. Seuss I*), 924 F. Supp. 1559, 1561 (S.D. Cal. 1996) (finding that the rhymes, the illustrations, and the book's packaging all mimicked the distinctive style of Dr. Seuss), *aff'd*, 109 F.3d 1394 (9th Cir. 1997).

[222] *Dr. Seuss II*, 109 F.3d at 1399.

[223] *See id.* at 1403 (citation omitted) ("Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold *his style* up to ridicule. . . . Katz and Wrinn merely use the Cat's stove-pipe hat, the narrator ("Dr.Juice"), and the title (*The Cat NOT in the Hat!*) 'to get attention' or maybe even 'to avoid the drudgery in working up something

the use is a parody, which is usually protected as speech.[224] But the court was blind to this nature of the use, refusing to acknowledge the humor and criticism that resulted from that use.[225]

Noteworthy in *Dr. Seuss* was the appellate court's consideration of the market-impact factor.[226] The court stated: "Since fair use is an affirmative defense, [defendant-users] must bring forward favorable evidence about relevant markets."[227] And the users did, as best they could, arguing that there would be no effect on the copyright holder's market because the content of the two books differed dramatically.[228] Yet the defendant-users could only conjecture about the effect, for their book had not yet been published. Conjecture was insufficient. The use was inexcusable for the court because the defendant-users could not prove that no harm would result.[229] The court, then, appeared to construe fair use as a doctrine excusing harmless infringement—a doctrine analogous to an excused trespass in property law.[230] The court could not have been construing fair use as a doctrine of speech, for if it had, the uncertainty surrounding the fourth factor should have favored the defendant-users.

C. Reliance on the Burden of Proof

Like the court in *Dr. Seuss*, other courts reject users' fair-use arguments because of uncertainty surrounding the market-impact factor.[231] This fact shows not only that courts fail to treat fair use as a

---

fresh.'").

[224] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–82 (1994) ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination. . . . [P]arody can claim legitimacy for some appropriation . . . .).

[225] *See Dr. Seuss II*, 109 F.3d at 1401 ("While [O.J.] Simpson is depicted 13 times in the Cat's distinctively scrunched and somewhat shabby red and white stove-pipe hat, the substance and content of *The Cat in the Hat* is not conjured up by the focus on the Brown-Goldman murders or the O.J. Simpson trial.").

[226] *See id.* at 1403 (quotations and citations omitted) ("The fourth fair use factor is the effect of the use upon the potential market for or value of the copyrighted work.").

[227] *Id.*

[228] *Id.*

[229] *See id.* (citation omitted) (concluding that since the defendant-users failed to submit evidence about relevant markets by "confining 'themselves to uncontroverted submissions that there was no likely effect on the market for the original,'" they were not entitled to fair use as an affirmative defense).

[230] *See* Biosafe-One, Inc. v. Hawks, 639 F. Supp. 2d 358, 368 (S.D.N.Y. 2009) (setting forth harm as an element that must be shown to prevail on a claim for trespass to chattel).

[231] *See, e.g.*, Infinity Broad. Corp. v. Kirkwood (*Infinity Broad. II*), 150 F.3d 104, 111 (2d Cir. 1998) (finding the fourth factor to be "a very close question" but ultimately deciding that it tipped toward the copyright holder's favor because it "has demonstrated at least the potential for interference [by the defendant-user] with its inclusion of listen lines as part of its advertising package").

doctrine of speech (as in *Dr. Seuss*), it also shows that courts rely on the procedural burden of proof as a means to reject fair use—a burden that courts created without justification. That is, the tendency for courts to infer infringement from uncertainty, which may surround any of the factors, implies that they are relying on a presumption against fair use.[232] And in view of the uncertain nature of fair use, rebutting that presumption often poses a practical impossibility for fair users.

An example of this reliance on the burden of proof arises in *Infinity Broadcasting Corporation v. Kirkwood*.[233] The defendant, Kirkwood, broadcasted radio programs from different cities via the telephone to its telephone customers.[234] The copyright holder, Infinity, held the copyrights to the broadcasts.[235] On summary judgment, the district court found Kirkwood's use to be fair.[236] On appeal, the Second Circuit reversed the district court, holding that the use constituted infringement.[237]

Central to the Second Circuit's holding was the fourth factor of market impact.[238] Although Kirkwood had produced evidence that Infinity was not in the business of operating commercial telephone lines, the Second Circuit was not persuaded that the fourth factor favored Kirkwood.[239] The Second Circuit expressly pointed out that Kirkwood had failed to prove that its use would not affect Infinity's potential to exploit that market.[240] Admitting that "the fourth factor is a very close question," the Second Circuit held for Infinity because, "considering that Kirkwood bears the burden of showing an absence of 'usurpation' harm to Infinity," the fourth factor "tips toward Infinity."[241] Kirkwood's burden of proof, which the court expressly pointed out four times, proved to be dispositive in favor of the copyright holder.[242] Thus, the burden of proof matters. It has weakened the strength of fair use.

---

[232] *See generally* Snow, *supra* note 177, at 1800–01 (describing effect of burden of proof in judicial decisions with regard to the four-factor analysis).

[233] *Infinity Broad. II*, 150 F.3d at 111.

[234] *Id.* at 106.

[235] *Id.* at 107.

[236] Infinity Broad. Corp. v. Kirkwood (*Infinity I*), 965 F. Supp. 553, 561 (S.D.N.Y. 1997).

[237] *Infinity Broad. II*, 150 F.3d at 111–12.

[238] *See id.* at 110–11 (citation omitted) ("Historically, the fourth factor has been seen as central to the fair use analysis . . . .").

[239] *Id.* at 111.

[240] *Id.*

[241] *Id.*

[242] *See id.* at 109–12 (finding that the first, second, third, and fourth factors of the fair use test leans in Infinity's favor, rather than Kirkwood's).

CONCLUSION

This Article has explained what fair use was, what it has become, and the lack of reason for its change. Fair use once existed as doctrine through which a right of speech was realized. As the means for realizing a subsequent speaker's right of speech, fair use defined the scope of a copyright holder's rights. It was inseparable from the examination for copyright infringement, and as a result, a burden of proof rested with the copyright holder to show that the use in question was unfair. In short, fair use presumptively applied: fair-use speech was permissible unless a copyright holder could prove that censorship was appropriate.[243] Courts treated fair use with as much weight as any right of speech, both from a conceptual and procedural standpoint.

Courts today treat fair use as an excuse for infringing conduct. Silence through copyright has become the norm; speech through fair use has become the exception.[244] As an exception, fair use applies only in extraordinary circumstances. It presumptively does not apply: the fair user must prove that his speech merits protection.[245] Courts treat fair use with as much weight as any excuse for trespassory conduct in property law—as exceptional and burdensome.[246]

The change in the treatment of fair use occurred without any reasoned support. Jurisprudence and scholarship are devoid of any explanation of why fair use is now an affirmative defense.[247] The change from right to excuse happened subtly and mistakenly—tracing back to two commentators' misconception.[248] In accepting this misconception, courts re-framed the issue of fair use merely because someone said so.[249] The change lacked any foundation in the law.

---

[243] *See supra* Part II.A.

[244] *See supra* Part III.

[245] *See supra* Part II.B.

[246] *Compare* Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) ("The general standard, however, is clear enough: the fair use copier must copy no more than is reasonably necessary . . . . The burden of proof is on the copier because fair use is an affirmative defense."), *and* BALL, *supra* note 123, at 260 ("Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary. . . . [T]he author's consent to a reasonable use of his copyrighted works has always been implied . . . ."), *with* St. Louis Cnty v. Stone, 776 S.W.2d 885, 888 (Mo. Ct. App. 1989) ("[A] person who enters an area open to the public at a reasonable time and in a reasonable manner, has the implied consent of the owner to enter the premises under a limited privilege, and as long as the privilege, based upon implied consent, is within the conditional or restricted consent of the owner to enter, the implied consent remains."), *and* 75 AM. JUR. 2D *Trespass* § 73 (2007) ("Consent sufficient to constitute a defense to trespass may be implied from custom, usage, or conduct. . . . Consent, as an affirmative defense to a trespass claim, will be implied . . . .").

[247] *See supra* Part II.B.

[248] *See supra* Part II.B.

[249] *See supra* Part II.B, D.