

4-2010

# Proving Fair Use: Burden of Proof as Burden of Speech

Ned Snow

University of South Carolina - Columbia, [snownt@law.sc.edu](mailto:snownt@law.sc.edu)

Follow this and additional works at: [https://scholarcommons.sc.edu/law\\_facpub](https://scholarcommons.sc.edu/law_facpub)



Part of the [First Amendment Commons](#), and the [Intellectual Property Law Commons](#)

---

## Recommended Citation

Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 *Cardozo L. Rev.* 1781 (2010).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact [dillarda@mailbox.sc.edu](mailto:dillarda@mailbox.sc.edu).

# PROVING FAIR USE: BURDEN OF PROOF AS BURDEN OF SPEECH

*Ned Snow\**

## ABSTRACT

*Courts have created a burden of proof in copyright that chills protected speech. The doctrine of fair use purports to ensure that copyright law does not trample rights of speakers whose expression employs copyrighted material. Yet those speakers face a burden of proof that weighs heavily in the fair use analysis, where factual inquiries are often subjective and speculative. Failure to satisfy the burden means severe penalties, which prospect quickly chills the free exercise of speech that constitutes a fair use. The fair-use burden of proof is repugnant to the fair use purpose. Today, copyright holders are exploiting the burden with Internet efficiency against individual fair users. This Article therefore proposes that the burden of proof should lie with copyright holders.*

## INTRODUCTION

With great reluctance does the law recognize the power to silence another. Only if the government satisfies a heavy burden of proving that expression is obscene,<sup>1</sup> a clear and present danger,<sup>2</sup> a true threat,<sup>3</sup> or fighting words<sup>4</sup> does silence prevail; only if the defamed plaintiff can

---

\* Associate Professor of Law, University of Arkansas School of Law. The author expresses appreciation to professors Carl Circo, Mark Killenbeck, Thomas Lee, Rob Leflar, Mark Lemley, Joseph Liu, Michael Mullane, Gideon Parchomovsky, David Schwartz, Lawrence Solum, Stephen Sheppard, and Rebecca Tushnet for their helpful comments on earlier drafts of this Article. The author also acknowledges the insightful comments provided by participants of the 2008 Works in Progress Intellectual Property Colloquium. Finally, the author extends his thanks to Michael Thompson, Ben Pollitzer, and Buckley Bridges for their diligent research assistance.

<sup>1</sup> See *McKinney v. Alabama*, 424 U.S. 669, 683 (1976) (“There can be no question that uncertainty inheres in the definition of obscenity. . . . [T]he burden is on the State to prove obscenity . . .”).

<sup>2</sup> See *Hirschkop v. Snead*, 594 F.2d 356, 379 (4th Cir. 1979).

<sup>3</sup> See *United States v. Jongewaard*, 567 F.3d 336, 339 n.2 (8th Cir. 2009).

<sup>4</sup> See *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001) (“To characterize

prove that the defendant's expression is false will the law choose silence over speech.<sup>5</sup> Indeed, it seems a truism that before speech may be silenced, the party seeking that silence must prove the unprotected nature of the speech. But not in copyright. Copyright law enables a plaintiff to silence a defendant's expression without proving that the defendant's expression is unprotected: In copyright, the defendant bears the burden of proof.<sup>6</sup> Under the doctrine of fair use, a defendant bears the burden of proving that her use of copyrighted material merits protection as speech. Although the Supreme Court has recognized that a defendant's fair-use expression should receive constitutional protection as speech,<sup>7</sup> the Court has failed to recognize that the burden of proving the *unfairness* of a defendant's use should rest with the party seeking to suppress that expression—the copyright holder.<sup>8</sup> So, unlike in other speech contexts, in copyright the burden of proving the protected nature of expression lies with the speaker.

This burden of proof is chilling fair-use expression.<sup>9</sup> Consider a few examples. During a former election, a website of a political enthusiast related satirical stories about George W. Bush, mimicking the appearance of the Bush campaign's website.<sup>10</sup> Unhappy with these stories, the Bush campaign threatened a copyright suit, so the political enthusiast quickly removed the material.<sup>11</sup> More recently, a news blog

---

speech as actionable 'fighting words,' the government must prove that there existed 'a likelihood that the person addressed would make an immediate violent response.'").

<sup>5</sup> See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("[I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.").

<sup>6</sup> 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 . . ."); 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.11[F] (2009) [hereinafter *NIMMER*] (explaining that a fair user bears the burden of proof to show that a use is fair).

<sup>7</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a "free speech safeguard[]" and a "First Amendment accommodation[]").

<sup>8</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 & n.20 (1994) (declaring fair use to be an affirmative defense).

<sup>9</sup> See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *HOUS. L. REV.* 697, 721 (2003) (positing that many would-be fair users may be considerably deterred by the risk of failing to satisfy the fair-use burden of proof).

<sup>10</sup> Alfred C. Yen, *Eldred, the First Amendment, and Aggressive Copyright Claims*, 40 *HOUS. L. REV.* 673, 673-74 (2003).

<sup>11</sup> *Id.* at 674; *The George W. Bush Presidential Campaign*, THE THOMAS JEFFERSON CENTER: JEFFERSON MUZZLES, <http://www.tjcenter.org/muzzles/muzzle-archive-2000> (last visited Apr. 1, 2010) (recounting self censorship of website owner in reaction to Bush campaign litigation threat); *W Says There Should Be Limits to Freedom*, CHILLING EFFECTS CLEARING HOUSE, <http://www.chillingeffects.org/notice.cgi?NoticeID=265> (last visited Apr. 1, 2010) (reciting letter of Bush campaign to website owner, Zack Exley). In a different campaign, the same political party appears to have adopted a contrary view of copyright infringement and fair use. See Letter from Trevor Potter, Gen. Counsel of McCain-Palin Campaign, to Chad Hurley, CEO of YouTube, Zahavah Levine, Gen. Counsel of YouTube, and William Patry, Senior Copyright Counsel of Google (Oct. 13, 2008) (on file with author).

quoted and commented on a few sentences from an Associated Press (AP) news story.<sup>12</sup> The AP alleged copyright infringement, so the blog immediately withdrew its quotation and commentary.<sup>13</sup> In another instance, an amateur music group created a music video that included a half-second display of a popular photograph.<sup>14</sup> The photographer cried infringement, so the music group swiftly removed the photograph.<sup>15</sup> Although each of the uses in these examples likely constituted a permissible fair use, each instance ended in self-censorship.<sup>16</sup> And although several factors may have led to the self-censorship, two factors were likely common to each: the burden of proof and the parties' economic disparity.

As to the burden of proof, it likely causes self-censorship because it plays such a significant role in the judicial analysis of whether a use is fair.<sup>17</sup> That analysis centers around issues of fact,<sup>18</sup> and those issues

---

<sup>12</sup> See Rogers Cadenhead, *AP Files 7 DMCA Takedowns Against Drudge Retort*, WORKBENCH, June, 12, 2008, <http://www.cadenhead.org/workbench/news/3368/ap-files-7-dmca-takedowns-against-drudge>. The blog entry reproduced eighteen words that the AP originated, along with a thirty-two-word quotation from Senator Hillary Clinton. *Id.* That entry spurred 108 comments in the ensuing discussion. *Id.* The AP challenged five other blog entries as well. *Id.* One commentator has provided a persuasive argument that the use was fair. See Posting of David Ardia to Citizen Media Law Project, <http://www.citmedialaw.org/blog/2008/associated-press-sends-dmca-takedown-drudge-retort-backpedals-and-now-seeks-define-fair-us> (June 16, 2008).

<sup>13</sup> See *supra* note 12 and accompanying text.

<sup>14</sup> See Richter Scales, <http://www.richterscales.com/>.

<sup>15</sup> See Jessica Guynn, *Silicon Valley's Tech Bubble Goes Pop*, L.A. TIMES, Dec. 24, 2007, at C1.

<sup>16</sup> For a fair-use analysis of the website criticizing the Bush campaign, see Yen, *supra* note 10, at 673-74 (opining that cited use was fair). For a fair-use analysis of the blog using the AP excerpts, see Ardia, *supra* note 12 (same). With respect to the amateur music group's use, the fact that the group employed the copyrighted photograph for a minimal time period in its video display, the fact that the use served to communicate a message that was distinct from the message underlying the photograph, and the fact that the use was not commercial all suggest that the use was fair. See generally 17 U.S.C. § 107 (2006).

<sup>17</sup> See 3 NIMMER, *supra* note 6, § 12.11[F] (“[T]he burden of proof in copyright cases can, thus, often be dispositive.”); Volokh, *supra* note 9, at 720 (arguing that the burden greatly effects the fair-use analysis because of the speculative nature of the evidence).

<sup>18</sup> See *Shady Records, Inc. v. Source Enters., Inc.*, 371 F. Supp. 2d 394, 397 (S.D.N.Y. 2005) (“Determinations of fair use are highly fact-intensive decisions.”); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 88 (S.D.N.Y. 2003) (“Courts ‘should be especially wary of granting summary judgment’ in cases involving copyright infringement, because they often are highly fact-dependent. This is especially true in fair use cases, as the viability of the defense rests on the particular circumstances of each case and the balancing of various factual considerations.” (citation omitted)); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 294-95 (S.D.N.Y. 1991) (describing fair use as a “fact-intensive inquiry”); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2461-62 (1998) (“Fair use . . . has generally been seen as extremely fact-intensive . . .”). In another article, this Author has argued that the inferences in the four-factor analysis must be construed as factual, as many courts of the past have so declared. See Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1457352>, at 11-34. Although some courts have considered them to be legal for purposes of disposing on summary judgment, those courts have mischaracterized the issues that for over two centuries courts have treated as factual.

breed uncertainty because of their subjective and speculative natures.<sup>19</sup> For instance, in the above examples, to what extent does the website that satirizes George W. Bush transform the expression that it copied from the Bush campaign website? How might the news blog's commentary on the AP story affect any potential market for that story? Does the music group utilize a substantial portion of the copyrighted photograph, given that the group displayed it for only a half second? Reasonable minds differ on the answers to such questions.<sup>20</sup> Nevertheless, the fair user bears the burden of establishing the factual answers.<sup>21</sup> Establishing the answers requires the fair user both to produce the necessary evidence (even where the inquiry is speculative) and to persuade the court that her interpretation of the evidence reflects fact (even where the inquiry is subjective).<sup>22</sup> Although a use may be fair, the fair user loses if she cannot produce evidence of the fairness or cannot persuade the court that her opinion of the evidence reflects fact.<sup>23</sup> The burden of proof assigns a loser by default, and, for fair users, overcoming the default position represents a practical impossibility where the very definition of fairness is vague. Where there is uncertainty—which is always—the burden weighs heavily against fair users.

Facing an uphill battle to satisfy their burden of proof, fair users do well to self-censor.<sup>24</sup> In counseling with their attorneys, fair users will be advised of the costly legal fees that accompany any attempt to satisfy that burden. And because the likelihood of satisfying the burden is low, fair users must also contemplate potential damages for infringement—

---

*See id.*; *see also infra* Part I.B. (discussing factual nature of issues in fair-use analysis).

<sup>19</sup> *See* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258, 1263 (2d Cir. 1986) (“The four factors listed in Section 107 raise essentially factual issues . . . . Questions of fair use [subject to a jury] may turn on qualitative assessments.”); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 443-44 (2007) (explaining that the fourth fair-use factor often turns on speculative claims of market harm); Volokh, *supra* note 9, at 720 (observing the speculative nature of the factual inquiry in fair use); *see also* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 24 (2000) (“After decades of litigation, it is still difficult to tell when and whether one can photocopy copyrighted materials, even for scientific research.”).

<sup>20</sup> *See* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 338, 338-50 (2002).

<sup>21</sup> *See* 3 NIMMER, *supra* note 6, § 12.11[F].

<sup>22</sup> *See infra* Part II.B.1. *See generally* 2 MCCORMICK ON EVIDENCE § 336, at 471 (Kenneth S. Broun ed., 6th ed. 2006) (explaining burdens of production and persuasion within the burden of proof).

<sup>23</sup> *See generally* 3 NIMMER, *supra* note 6, § 12.11[F].

<sup>24</sup> *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990) (describing the uncertainty surrounding fair use and the resulting reluctance to employ it); Liu, *supra* note 19, at 434 (“The chilling effect on creative [fair-use] expression has been well-documented. This is exacerbated by the tendency of copyright owners to take advantage of the uncertainty to pursue aggressive copyright claims.”); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1497-98 (2007) (pointing out that the vagueness of fair use overdeters permissible uses).

damages that often exceed the value of fair-use expression tens of thousands of times over.<sup>25</sup> Add to this the fact that fair users often lack economic means to defend their expression, the fact that copyright holders often realize economies of scale in bringing copyright suits,<sup>26</sup> and the fact that the Internet has made individual fair users subject to the scrutiny of overzealous copyright holders,<sup>27</sup> and the decision to self-censor becomes automatic.<sup>28</sup>

In view of the tension that the present burden of proof creates with speech rights of the fair user, that burden should rest with the copyright holder.<sup>29</sup> Where uncertainty surrounds questions of fact over whether a use is fair—such as whether a use is sufficiently transformative or whether a use might affect a potential market for the underlying work—INFRINGEMENT should not lie.<sup>30</sup> The burden of proof should require copyright holders to resolve such factual uncertainties as part of their burden of showing infringement.<sup>31</sup> Rather than punishing fair users, factual uncertainty should protect them. The burden of proof should reduce, rather than magnify, the self-censorship of fair users.

This Article examines the fair-use burden of proof. Part I outlines the doctrine of fair use and the burden of proof that presently rests with fair users.<sup>32</sup> It explains the substantive effect of this burden in the fair-use analysis.<sup>33</sup> Part II discusses the First Amendment implications of assigning the burden to fair users. It examines the extent to which the First Amendment should protect fair-use expression and the threat that a burden of proof poses to such constitutionally protected speech.<sup>34</sup> Part

---

<sup>25</sup> See 17 U.S.C. § 504 (2006) (setting statutory damages for infringement at anywhere from \$750 to \$30,000 per infringing copy); Parchomovsky & Goldman, *supra* note 24, at 1497-98 (arguing that would-be fair users are unlikely to engage in fair use because of excessive damages for infringement that follow an unpredictable fair-use doctrine).

<sup>26</sup> See Ned Snow, *Copytraps*, 84 INDIANA L.J. 285, 317-18 (2009) (observing the economic disparity that is often present between fair users and copyright holders, along with the economies of scale that copyright holders realize in bringing suit).

<sup>27</sup> See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1873 (2007) (“Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public.”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 584 (2004) (observing that copyright holders did not target past practices of innocuous copying whereas now those copiers are becoming subject to suit owing to online technology).

<sup>28</sup> See generally Liu, *supra* note 19, at 434-35 (observing chilling effect of uncertainty in fair use).

<sup>29</sup> See Liu, *supra* note 19, at 443; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 83-84 (2001) (proposing that defendants bear the burden of proof upon making colorable claim); Volokh & McDonnell, *supra* note 18, at 2468 (raising the question of whether the constitutional protection due to fair-use expression should require copyright holders to bear the burden of proof).

<sup>30</sup> See *infra* Part III.A.

<sup>31</sup> See *infra* Part III.A.

<sup>32</sup> See *infra* Part I.A.

<sup>33</sup> See *infra* Part I.B.

<sup>34</sup> See *infra* Part II.A.

II further examines the likelihood that the burden of proof may chill fair-use expression and the constitutional tension that follows.<sup>35</sup> Part III proposes that copyright holders should bear the burden of proof. It explains both the theoretical and practical effects of this proposal.<sup>36</sup> It also responds to the objection that burdening copyright holders would diminish incentives for creativity, especially in cases of blatant infringement.<sup>37</sup>

### I. THE PRESENT STATE: FAIR USE AND ITS BURDEN OF PROOF

Copyright law enables an author of expression to prohibit others from copying her expression.<sup>38</sup> This general prohibition is subject to an exception for fair use that has existed for hundreds of years at common law and is today codified in the Federal Copyright Act.<sup>39</sup> The fair-use exception arises when a person uses copyrighted expression in a way that the law deems to be fair.<sup>40</sup> But exactly what “fair” means is uncertain.<sup>41</sup> No precise definition or test exists to determine whether a defendant’s use of copyrighted expression merits the legal pronouncement of fairness.<sup>42</sup> By design, fair use is an indeterminate concept that allows flexibility in application.<sup>43</sup> Its definitional flexibility enables it to contemplate all possible circumstances that might justify the unauthorized use of copyrighted expression. So, for the simple reason that fair use has no definitional boundaries, fair use fits all situations that could ever warrant its application. Its definition changes according to circumstances that justify, and indeed require, its application.

Despite the apparent flexibility of fair use, courts usually consider only four specific factors in assessing whether the doctrine applies. Courts developed these factors at common law, and Congress codified

---

<sup>35</sup> See *infra* Part II.B.

<sup>36</sup> See *infra* Part III.A.

<sup>37</sup> See *infra* Part III.B.

<sup>38</sup> See generally 17 U.S.C. §§ 106, 501(a) (2006).

<sup>39</sup> See *id.* § 107; WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 3-26 (2d ed. 1995) (tracing the origins of the fair-use doctrine back to English cases in 1700s).

<sup>40</sup> See 17 U.S.C. § 107; *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901).

<sup>41</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (“The endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the [fair use] statute.” (quoting H.R. REP. NO. 94-176, at 66 (1976))); Leval, *supra* note 24, at 1106-07 (observing confusion among judges as to meaning of fair use).

<sup>42</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (rejecting idea that fair use consists of bright-line rules, and commenting that the doctrine calls for a case-by-case analysis).

<sup>43</sup> See *id.*

them in the Copyright Act.<sup>44</sup> They are not exhaustive, nor necessarily controlling: In accordance with the flexibility of the doctrine, courts may consider any number of other factors and assign any weight to each one as circumstances require.<sup>45</sup> Yet, in practice, modern courts usually consider only these four factors.<sup>46</sup> The first factor examines the character and purpose of the defendant's use, assessing the extent to which the use transforms the copyrighted work and the extent to which the use serves a commercial purpose.<sup>47</sup> The second factor examines the nature of the copyrighted work, assessing whether it is factual or creative, with the latter meriting stronger proprietary protection than the former.<sup>48</sup> The third factor examines the quantity of the work that the defendant has used and the substantiality of that portion used, assessing the extent to which the defendant has taken the heart of the copyrighted work.<sup>49</sup> The fourth factor examines the market effect of the defendant's use, assessing whether that use has significantly affected the value of, or might yet affect a potential market for, the copyrighted work.<sup>50</sup>

#### A. *Fair Use as an Affirmative Defense*

The ability of a fair user to avoid prosecution for copyright infringement turns in large part on the procedural mechanism for invoking fair use. Specifically, this Article posits that the burden of proof affects the ability of fair users to seek protection from copyright holders who allege infringement. That burden of proof has fallen on fair users because courts of today treat fair use as an affirmative defense.<sup>51</sup> As an affirmative defense, fair use places the burden of proof on its proponent.<sup>52</sup> More generally, as an affirmative defense, fair use excuses a defendant from liability where the defendant's conduct is infringing; if certain facts are present, the affirmative defense excuses

---

<sup>44</sup> See 17 U.S.C. § 107; *Folsom*, 9 F. Cas. at 349.

<sup>45</sup> See 17 U.S.C. § 107.

<sup>46</sup> See 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:25 (3d ed. 2007) (“[M]ost courts consider only the four factors in the statute.”); Leval, *supra* note 24, at 1125.

<sup>47</sup> See 17 U.S.C. § 107(1); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) (explaining that the first fair-use factor examines “whether and to what extent the new work is ‘transformative’”).

<sup>48</sup> See 17 U.S.C. § 107(2); *Campbell*, 510 U.S. at 586.

<sup>49</sup> See 17 U.S.C. § 107(3); *Campbell*, 510 U.S. at 586-87.

<sup>50</sup> See 17 U.S.C. § 107(4); *Campbell*, 510 U.S. at 590.

<sup>51</sup> See, e.g., *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 . . .”).

<sup>52</sup> See 3 NIMMER, *supra* note 6, § 12.11[F] (“[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 . . .”).

infringement.<sup>53</sup> Tellingly, the Copyright Act never labels fair use an affirmative defense.<sup>54</sup> Rather, it sets forth the doctrine as one that defines the scope of copyright—just as early case law conceived it.<sup>55</sup> Nevertheless, courts today uniformly treat fair use as an affirmative defense—a doctrine that excuses, rather than defines, infringement; thereby it is a doctrine that places the burden of proof on its proponent.

Uniform treatment of fair use as an affirmative defense stems from a 1985 declaration by the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*.<sup>56</sup> There, the Court considered whether the fair use doctrine protected a defendant who had published for the first time presidential memoirs in a news magazine.<sup>57</sup> Relevant to the burden-of-proof discussion, the defendant argued that uses of copyrighted material for news purposes should be presumptively fair.<sup>58</sup> The Court rejected this argument by declaring fair use to be an affirmative defense that requires a case-by-case analysis.<sup>59</sup> Following this declaration in *Harper & Row*, Congress in 1992 amended the Copyright Act. In the legislative history of that amendment, the Judiciary Committee relied on the cited *Harper & Row* 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.”<sup>60</sup> Two years later, the Court in *Campbell v. Acuff-Rose Music, Inc.* again declared fair use to be an affirmative defense, relying on its prior statement in *Harper & Row* and the cited 1992 legislative history.<sup>61</sup> Tellingly, in neither *Harper & Row*, the 1992 Judiciary Committee Report, nor *Campbell* does any substantive reason appear to support labeling fair use an affirmative defense.<sup>62</sup>

---

<sup>53</sup> See BLACK'S LAW DICTIONARY 451 (8th ed. 2004) [hereinafter BLACK'S] (defining affirmative defense to be “[a] 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”); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2009) (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 go on and allege additional new material that would defeat the plaintiff’s otherwise valid cause of action, thereby excusing the defendant’s conduct).

<sup>54</sup> See 17 U.S.C. § 107.

<sup>55</sup> See *id.* (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8136) (explaining that the effect of copyright is to limit the general right to speak).

<sup>56</sup> 471 U.S. 539, 561 (1985).

<sup>57</sup> *Id.* at 541-42.

<sup>58</sup> *Id.* at 561.

<sup>59</sup> *Id.*

<sup>60</sup> See H.R. REP. NO. 102-836, at 3 & n.3 (1992), reprinted in 1992 U.S.C.C.A.N. 2553.

<sup>61</sup> See 510 U.S. 569, 590 & n.20 (1994).

<sup>62</sup> Cf. PATRY, *supra* note 39, at 585 (describing how fair use came to be an affirmative defense in five sentences, ultimately pointing to bald statements by the Supreme Court that lack any reasoned analysis).

### B. *The Effect of the Burden of Proof*

The extent to which the burden of proof affects the outcome in any context depends on the extent to which the question raises issues of fact that are subject to that burden.<sup>63</sup> Fair use is no different: The extent to which the burden of proof affects the fair-use analysis depends on the extent to which that analysis turns on factual determinations. Yet there is controversy over the extent to which that analysis does turn on factual determinations.<sup>64</sup> For centuries courts have held that issues arising in the fair-use analysis should be treated as factual: Determining whether a factor weighs in favor of fairness has historically been viewed as raising an issue of fact.<sup>65</sup> The past couple of decades, however, courts have treated these issues as purely legal on summary judgment, seemingly unaffected by the burden of proof.<sup>66</sup> This change in characterization from fact to law is puzzling.<sup>67</sup> No court or legislative body has ever provided reasoned support for the change.<sup>68</sup> Whereas factual classification finds support in two centuries of precedent, legal classification finds support in only two decades' worth.<sup>69</sup> Moreover, the Constitution suggests fair-use issues should be classified as factual in order to best protect speech and maintain the civil right to a jury trial as it existed in 1791.<sup>70</sup> At best, the present state of the law is muddled as to whether the issues that arise in the fair-use analysis should be classified as factual or legal. Some courts continue to reserve these

---

<sup>63</sup> See generally 2 MCCORMICK ON EVIDENCE, *supra* note 22, § 336, at 471-72.

<sup>64</sup> See Snow, *supra* note 18, at 29-38 (discussing judicial change in characterization of issues in fair-use analysis).

<sup>65</sup> See, e.g., DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) (reversing district court's grant of summary judgment for defendant on grounds that the "four factors listed in § 107 raise essentially factual issues and . . . are normally questions for the jury"); Cary v. Kearsley, 170 Eng. Rep. 679, 681 (1803) (K.B.) (Lord Ellenborough, C.J.) ("I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?").

<sup>66</sup> See, e.g., Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 530 (9th Cir. 2008) ("[I]t is well established that a court can resolve the issue of fair use on a motion for summary judgment . . ."); Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 183-84 (D. Mass. 2007) (characterizing "the interpretation of facts" in the fair-use analysis as raising "questions of law"); see also Snow, *supra* note 18, at 29-38 (tracing history of change in characterization of issues from factual to legal in fair-use analysis).

<sup>67</sup> In an article entitled, *Judge Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, this Author has argued that this change constituted an inadvertent mistake, lacking substantive justification. See Snow, *supra* note 18, at 34-42.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 47-58.

issues for the jury, subjecting them to the burden of proof.<sup>71</sup> Other courts treat them as purely legal, withholding them from the jury at summary judgment, seemingly unaffected by any burden of proof.<sup>72</sup>

This Article relies on the premise that the issues in the fair-use analysis are factual in nature. Specifically, applying the fair-use factors to the historical facts of a case yields inferences of fact for a jury, and those inferences are subject to the burden of proof.<sup>73</sup> Under this premise, the burden of proof plays an important, if not dispositive, role in the fair-use analysis.<sup>74</sup> For instance, consider the following questions that have arisen in fair-use analyses: To what extent does a painting transform a photograph from which the painting derives?<sup>75</sup> To what extent does downloading a song for personal use constitute a commercial use of that song?<sup>76</sup> To what extent might a trivia book about a popular television show negatively affect the market for that show?<sup>77</sup> To what extent does a copied song serve a parodic purpose?<sup>78</sup> By raising issues of fact, these questions require a defendant to establish, with greater than fifty percent certainty, that the answers favor a finding of fairness.<sup>79</sup> If the trier of fact is not persuaded, the burden of proof dictates that the corresponding factors favor the copyright holder. That is, if the questions raised by the factors in the fair-use analysis create uncertainty in the minds of the fact-finders, the burden of proof requires those fact-finders to reject fair use as an affirmative defense.<sup>80</sup> With the defendant bearing the burden of proof, uncertainty in the fair-use analysis requires a finding of infringement.

---

<sup>71</sup> See, e.g., *N.Y. Univ. v. Planet Earth Found.*, 163 F. App'x. 13, 13 (2d Cir. 2005) (categorizing the fair-use inquiries under the four-factor test as jury issues); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 408 (5th Cir. 2004) (approving of jury findings on four factors and their ultimate finding on the issue of fair use).

<sup>72</sup> See, e.g., *Los Angeles Time v. Free Republic*, No. CV98-7840-MMM(AJWx), 1999 WL 33644483, at \*6 (C.D. Cal. Nov. 8, 1999) ("Fair use is a mixed question of law and fact. It is nonetheless appropriate to resolve the issue at the summary judgment stage where the historical facts are undisputed and the only question is the proper legal conclusion to be drawn from those facts." (citation omitted)).

<sup>73</sup> See Snow, *supra* note 18, at 9-33 (articulating reasons for construing the issues as factual).

<sup>74</sup> See 3 NIMMER, *supra* note 6, § 12.11[F] ("[T]he burden of proof in copyright cases can, thus, often be dispositive.").

<sup>75</sup> Cf. Complaint for Declaratory Judgment at 11, *Fairey v. The Associated Press*, No. 09 Civ. 1123 (S.D.N.Y. Feb. 9, 2009).

<sup>76</sup> Cf. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (upholding district court inference that downloading MP3 music files was commercial use because users "get for free something they would ordinarily have to buy").

<sup>77</sup> Cf. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998).

<sup>78</sup> Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588-89 (1994) (remanding for factual consideration of whether bass riffs of song furthered parodic purpose of defendant's use).

<sup>79</sup> See generally *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992) (articulating preponderance standard of proof in copyright).

<sup>80</sup> See generally *supra* note 24 and accompanying text.

Because uncertainty pervades the fair-use analysis, the role of the burden of proof in that analysis is also pervasive. As stated above, fair use lacks any precise definition so that it can afford greater flexibility in application; a cost of that flexibility is uncertainty. The uncertainty that is inherent in determining whether a use is fair—or, for that matter, determining whether the use is transformative, commercial, substantial, or potentially harmful to a market—translates into a greater burden for the party charged with establishing its fairness. Establishing with greater than fifty percent certainty that a use is fair creates difficulty for any fair user given that the definitional elements of fairness are themselves indeterminate. The inherent uncertainty of fair use magnifies a defendant's burden of proof, ultimately dictating that the defendant loses.

## II. THE PROBLEM: A CHILLING OF SPEECH

The fair user's burden of proof lies in tension with the Free Speech Clause of the First Amendment. This is so because fair use is a doctrine that negotiates a peace between copyright and free speech.<sup>81</sup> Copyright *condones* suppression of copyrighted expression; free speech *condemns* suppression of any expression, copyrighted or otherwise. Fair use facilitates an accord between these two contrary principles: Free speech yields to copyright insofar as copyright does not suppress fair-use expression.<sup>82</sup> Fair use thus represents a means by which the law identifies expression that merits constitutional protection as speech in its own right.<sup>83</sup> Fair-use expression represents protected speech that copyright cannot suppress.

The effect of assigning the burden of proof to fair users is to expand the scope of expression that copyright suppresses into protected fair-use expression. This is so because the burden penalizes the fair user when fact-finders face uncertainty over issues in the fair-use analysis: Although a use may in actuality be fair, if the fact-finder is uncertain on this point, the burden requires the copyright holder to win by default. And given the qualitative opinion that issues of fair use often call for, uncertainty may frequently cloud a fact-finder's

---

<sup>81</sup> See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Netanel, *supra* note 29, at 1; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

<sup>82</sup> See generally *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (explaining that because copyright is an engine of free expression, free speech principles allow for copyright's suppression of copied material, and observing that copyright law contains built-in speech accommodations to ensure First Amendment compliance).

<sup>83</sup> See *id.*

discernment of fairness. The burden of proof dictates that uncertainty implies infringement. Thus, where a fair user fails to persuade a fact-finder, copyright holders may suppress fair-use expression and thereby obstruct protected speech.

Because fair use is an inherently uncertain doctrine, fair users must contemplate a real possibility that their burden of proof will be insurmountable. Even before a suit is filed, fair users must entertain the possibility of liability for infringement, and that liability often takes the form of punitive-like damages.<sup>84</sup> Enacted for deterrence purposes, infringement penalties deter more than just blatantly infringing activities: They may also deter good-faith attempts at creating fair-use expression, regardless of whether those attempts would result in successful fair uses.<sup>85</sup> Ironically, then, the characteristic of the fair-use doctrine that was most intended to promote fair use—its flexibility of application—has become its greatest handicap: The burden of proof has turned flexibility that promotes into uncertainty that deters.<sup>86</sup>

The Subparts below discuss this argument. Part I.A analyzes the theoretical tension between the principle of free speech in fair use and the procedure of burdening fair users. Part I.B describes the practical chilling that results from this tension.

### A. *Tension with the First Amendment*

The tension between the burden of proof and free speech exists because fair-use expression should receive full constitutional protection as speech but the burden of proof inhibits such expression.<sup>87</sup> Part I.A.1 explains the premise that fair-use expression should receive full constitutional protection. Part I.A.2 explains the premise that the burden of proof inhibits fair-use expression.

---

<sup>84</sup> See *supra* note 25 and accompanying text.

<sup>85</sup> See 17 U.S.C. § 504 (2006) (Historical and Statutory Notes) (“[B]y establishing a realistic floor for liability, [copyright’s strict liability] provision preserves its intended deterrent effect . . .”).

<sup>86</sup> The landmark article by Professors Mark Lemley and Eugene Volokh argues well that copying another’s expression is a form of speech meriting the same procedural speech protection afforded to other types of speech. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165-66 (1998); see also Volokh & McDonnell, *supra* note 18, at 2433-34, 2466-70 (arguing that procedural protections for protected speech should apply in copyright).

<sup>87</sup> See *infra* Part II.A.1-2.

## 1. Fair Use as Protected Speech

Courts and scholars have recognized that the First Amendment should protect fair-use expression.<sup>88</sup> In certain circumstances, the act of repeating another's expression receives constitutional protection as its own act of speech and, where those circumstances exist, the First Amendment restrains congressional authority to suppress copying.<sup>89</sup> This constitutional restraint is manifested through the doctrine of fair use.<sup>90</sup> To satisfy constitutional speech concerns, courts have crafted fair use as a doctrine that identifies those circumstances in which copied expression should receive its own speech protection.<sup>91</sup> Courts have uniformly held that fair use encompasses any speech interests of a copier, so that any First Amendment challenge to copyright's suppression of copied expression must invoke fair use.<sup>92</sup> If a copier believes that her interest in free speech justifies her copying, she must rely on the fair-use doctrine to assert that interest.<sup>93</sup> In short, fair use is intended to satisfy the restraints that free speech places on copyright.

The scope of First Amendment protection that fair-use expression receives should be broad. Fair use encompasses expressions that criticize and comment on others' ideas, which is necessary for a robust marketplace of ideas.<sup>94</sup> The fair-use doctrine gives rise to a broader and deeper pool of thought such that it allows for an enriching exchange of ideas (as distinct from an unproductive copying of ideas).<sup>95</sup> This does

---

<sup>88</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[.]” and a “First Amendment accommodation[.]”); Lemley & Volokh, *supra* note 86, at 165-66 (arguing that copying another person's expression constitutes protected speech); Liu, *supra* note 19, at 429 (arguing that the speech nature of fair use requires a presumption favoring fair use).

<sup>89</sup> See *Eldred*, 537 U.S. at 219, 221.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* But see Tushnet, *supra* note 27 (arguing that fair use does not provide sufficient support for free speech).

<sup>92</sup> See, e.g., *Eldred*, 186 U.S. at 219, 221; *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment concerns in copyright cases are subsumed within the fair use inquiry.”).

<sup>93</sup> See *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”).

<sup>94</sup> See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”); Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1301 (2003) (“Anointing the author's relationship with his work as essential and unrestricted stands in diametric opposition to the open marketplace of ideas idealized in the United States.”).

<sup>95</sup> See Tushnet, *supra* note 27, at 549 (“Critical, transformative uses of copyrighted works against their owners' wills are analogous to the speech of political protesters attacking received wisdom, whose actions are generally thought to be at the heart of the First Amendment's protections.”); cf. *Golan v. Gonzales*, 501 F.3d 1179, 1195 (10th Cir. 2007) (commenting in

not mean, of course, that all fair-use expression involves valuable thought exchange.<sup>96</sup> Yet even if such expression is seemingly worthless, all fair-use expression should receive equal speech protection: Just as courts are ill-equipped to determine whether the value of original expression merits protection *of* copyright, they are ill-equipped to determine whether the value of fair-use expression merits protection *from* copyright.<sup>97</sup> A fair use's potential to create an exchange of enriching ideas should be sufficient reason to offer the expression full constitutional protection.

At first glance, this conclusion seems to contravene the Supreme Court's recent statement in *Eldred v. Ashcroft* that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches."<sup>98</sup> On closer examination, it is apparent that this statement does not reject the conclusion that fair-use expression should receive full First Amendment protection. The petitioner in *Eldred* argued—independent of the fair-use doctrine—that Congress had violated the First Amendment by extending the copyright term.<sup>99</sup> In that context, the Court stated that the First Amendment bears less heavily when copying another's expression (as quoted above), and then immediately stated the following: "To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards [which include fair use] are generally adequate to address them."<sup>100</sup> Read together, the two statements mean that, because the fair-use doctrine addresses First Amendment concerns with regard to copyright, the First Amendment bears less heavily when speakers assert the right to make other people's speeches *where those speeches fall outside the scope of fair use*.<sup>101</sup> That is, the Court's language suggests that, because fair use subsumes a speaker's constitutional right to speak copyrighted

---

context of copyright law that "the democratic dialogue—a self-governing people's participation in the marketplace of ideas—is adequately served if the public has access to an author's ideas" (citing 4 NIMMER, *supra* note 6, § 19E.03 [A][2])).

<sup>96</sup> The video of a dancing baby with a short excerpt of Prince's copyrighted song arguably does not offer valuable commentary on the ideas underlying that song. *E.g.*, *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-53 (N.D. Cal. 2008). On the other hand, the stated example of the dancing baby may provide valuable thought from an aesthetic standpoint.

<sup>97</sup> *Cf.* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

<sup>98</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>99</sup> *Id.* at 193.

<sup>100</sup> *Id.* at 221.

<sup>101</sup> See *id.* ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'"). Professor Rebecca Tushnet has argued that the cited statement by the Court—"The First Amendment bears less heavily when speakers assert the right to make other people's speeches"—is simply false as a matter of doctrine. Tushnet, *supra* note 27, at 563.

expression, a First Amendment challenge to copyright that arises independent of fair use (like the petitioner's challenge) will be accorded little weight.<sup>102</sup> Thus, the Court's statement that the First Amendment bears less heavily when copying another's expression appears to be directed toward copying that falls outside the scope of fair use. The statement appears consistent with the argument that the First Amendment should offer full protection to fair use expression.<sup>103</sup>

## 2. Chilling Speech Through Burden of Proof

Supreme Court jurisprudence in the *New York Times v. Sullivan* line of case law supports the view that a burden of proof may unconstitutionally chill protected speech.<sup>104</sup> The Court has recognized the importance of ensuring not only the soundness of substantive speech standards, but also the reliability of the procedures for applying those standards.<sup>105</sup> To that end, the Court has been sensitive to the fact that burden-of-proof assignments may penalize protected speech, opining that the law should not require a speaker to bear the burden of proving the legitimacy of her speech.<sup>106</sup>

The Court has applied this principle in the context of defamation law, and that application is instructive in the context of fair use.<sup>107</sup> In

---

<sup>102</sup> See *Eldred*, 537 U.S. at 221.

<sup>103</sup> Moreover, the *Eldred* Court's reference to fair use as a "safeguard" of free speech implies that fair use must ensure free-speech interests. See *id.* at 219-20.

<sup>104</sup> See *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>105</sup> Of particular relevance is the Court's statement in *Waters v. Churchill*, 511 U.S. 661, 669 (1994):

[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held . . . a particular allocation of the burden of proof . . . to be constitutionally required in proceedings that may penalize protected speech.

<sup>106</sup> *Id.*; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("[T]he burden of proving that the film is unprotected expression must rest on the censor."); see also *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("[I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.")

<sup>107</sup> As Professor Joseph Liu has argued, the procedural protection that the Court has afforded speech in defamation cases should apply in the copyright context. Liu, *supra* note 19, at 430 & n.7; accord Lemley & Volokh, *supra* note 86, at 182-99 (arguing that procedural safeguards that are applied in defamation law to ensure free speech should apply in copyright context so that courts should not preliminarily enjoin copied speech); Volokh & McDonnell, *supra* note 18, at 2468 (arguing that the same procedural protection of free speech in defamation law should apply in copyright law); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression*

*Philadelphia Newspapers, Inc. v. Hepps*, a private figure brought a libel claim against a newspaper that had published stories alleging the private figure was associated with organized crime.<sup>108</sup> After a jury verdict for the newspaper, the Pennsylvania Supreme Court reversed on the grounds that the trial court had incorrectly placed the burden of proof on the private-figure plaintiff to show that the statement at issue was false.<sup>109</sup> That decision was overturned by the Supreme Court of the United States, which held that the burden of proof in a libel action must rest with the private-figure plaintiff in matters of public concern.<sup>110</sup>

The Court's holding on this burden-of-proof issue reversed over a century of common law precedent. For over a century at common law, it was not necessary for a plaintiff in a libel action to establish the falsity of a libelous publication.<sup>111</sup> Instead, the defendant could assert truth as an affirmative defense and would bear the burden of establishing that truth.<sup>112</sup> This common law rule, however, stood in tension with principles of free speech.<sup>113</sup> Because the fact-finding process cannot always conclusively resolve factual uncertainties, some truth-speaking defendants would fall short of satisfying their burden; in light of this possibility, some truth-speaking defendants would self-censor.<sup>114</sup> According to the Court, the burden would cause some defendants to steer far wider of the unlawful zone than necessary, refraining from speaking altogether.<sup>115</sup> For this reason, the Court placed the burden on the plaintiff, even though that placement would likely cause plaintiffs to lose some meritorious suits.<sup>116</sup> Between protecting true speech and compensating victims of libelous defamation, the Court chose to protect true speech.<sup>117</sup>

*Hepps* suggests that fair users should not bear a burden of proof. As in the libel context, the fact-finding process in the fair-use context cannot always conclusively resolve factual uncertainties surrounding the fair-use factors.<sup>118</sup> This deficiency in the fact-finding process implies that by placing the burden of proof with defendants, the law might punish some fair users; furthermore, it suggests that some would-be fair

---

*Dichotomy and Copyright in a Work's 'Total Concept and Feel,'* 38 EMORY L.J. 393, 424-26 (1989) (drawing on First Amendment jurisprudence in defamation law to suggest that uncertainty surrounding copyright's doctrine of idea-expression dichotomy creates an unacceptable chilling effect).

<sup>108</sup> *Hepps*, 475 U.S. at 769-70.

<sup>109</sup> *See id.* at 770-71.

<sup>110</sup> *See id.* at 771.

<sup>111</sup> *Hepps v. Phila. Newspapers, Inc.*, 485 A.2d 374, 378 (Pa. 1984), *rev'd*, 475 U.S. 767.

<sup>112</sup> *Id.*

<sup>113</sup> *Hepps*, 475 U.S. at 777.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; *accord* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>116</sup> *Hepps*, 475 U.S. at 776.

<sup>117</sup> *Id.* at 777-78.

<sup>118</sup> The magnitude of this deficiency in the fact-finding process is discussed *infra* Part II.B.

users will steer far wider of infringement than necessary by refraining from speaking fair-use expressions.<sup>119</sup> On the other hand, placing the burden of proof on copyright holders would imply that the law would fail to compensate some victims of copyright infringement. The burden-of-proof issue therefore introduces a choice between protecting speakers of fair-use expression and compensating victims of infringement. *Hepps* may be read to suggest that the interest in protecting the expression should outweigh the interest in upholding copyright.

Such a reading of *Hepps*, however, must be qualified. The level of protection that the First Amendment affords speech depends on the type of speech at issue,<sup>120</sup> and speech that constitutes truth about a matter of public concern is not the same as speech that constitutes fair use of copyrighted expression.<sup>121</sup> The former speech may be more worthy of protection than the latter. In that regard, the *Hepps* Court confined its holding to media defendants who speak on matters of public concern, leaving open the possibility that the common law presumption was still good law with respect to speech that did not focus on matters of public concern.<sup>122</sup> The Court seemed to acknowledge, then, that burdening defendants in other speech contexts might be permissible.<sup>123</sup> The *Hepps* holding can therefore be distinguished from the speech interests that are at issue in the fair-use context.

Yet, although the *Hepps* Court expressly restricted its holding, that restriction does not appear relevant in the context of fair use. In *Hepps*, the Court was overturning a common law exception to the usual burden-of-proof assignment.<sup>124</sup> Courts usually assign the burden to the party with better access to evidence of relevant facts.<sup>125</sup> In the defamation

---

<sup>119</sup> See Liu, *supra* note 19, at 433-34 (explaining possibility that artists will refrain from engaging in fair-use expression to a much greater degree than necessary in order to avoid potential infringement).

<sup>120</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“[N]ot all speech is of equal First Amendment importance.”).

<sup>121</sup> Compare *Hepps*, 475 U.S. at 776-77 (protecting true speech by media defendants that constituted a matter of public concern owing to a constitutional directive), with *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (opining that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches”).

<sup>122</sup> See *Hepps*, 475 U.S. at 775 (“When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.”); *Medure v. Vindicator Printing Co.*, 273 F. Supp. 2d 588, 613 (W.D. Pa. 2002) (“[W]hen private figure plaintiffs bring suit regarding speech of private concern, a state may allocate the burden to prove the truth of the statement to the defendant.”).

<sup>123</sup> *Hepps*, 475 U.S. at 775.

<sup>124</sup> See *id.*

<sup>125</sup> According to Wright and Graham, courts place the burden with the party who “has superior access to the evidence needed to prove the fact,” in the absence of a substantive policy reason otherwise. 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5122 (2d ed. 2009).

context, a defamed plaintiff has better access to evidence that establishes the falsity of the defamatory statement, so the burden would seem to rest on the plaintiff.<sup>126</sup> But the common law created an exception to this usual burden assignment because it placed greater importance on protecting the plaintiff's reputation than on ensuring access to evidence.<sup>127</sup> Specifically, the substantive principle that any person accused of wrongdoing is presumed innocent until proven guilty suggested that a defamed plaintiff should be presumed innocent of the defamatory accusation until a defendant could prove otherwise.<sup>128</sup> At common law, then, the burden of proof in defamation rested with a defendant because of a substantive principle mandating an exception to the usual grounds for placing the burden on the plaintiff.<sup>129</sup> In light of this substantive principle, the *Hepps* Court required that speech interests be sufficiently strong to place the burden on the plaintiff.<sup>130</sup> Hence, the Court required that the defamatory speech relate to matters of public concern before it would disregard the substantive principle of innocent until proven guilty, which would have placed the burden on the defendant.<sup>131</sup>

In the copyright context, this substantive principle is entirely irrelevant. Copyright holders have not been accused of wrongdoing, so the innocent-until-proven-guilty principle is no reason to burden defendants, as it was at common law in the defamation context. Indeed, the current burden on defendants does not appear to have arisen from any reasoned principle.<sup>132</sup> There thus does not seem to be any reason that the speech interests of fair users must be sufficiently strong to justify assigning the burden to copyright holders.<sup>133</sup> Nevertheless, as discussed above, a strong speech interest does exist.<sup>134</sup> Fair-use speech facilitates the free trade of ideas and engenders creative thought.<sup>135</sup> The strong speech interest in protecting fair-use speech outweighs the apparently unjustified burden on defendants.

---

<sup>126</sup> See generally *id.* (discussing presumptions in general).

<sup>127</sup> See *Hepps*, 475 U.S. at 775.

<sup>128</sup> See *Hepps v. Phila. Newspapers, Inc.*, 485 A.2d 374, 378 (Pa. 1984).

<sup>129</sup> See *id.*

<sup>130</sup> See *Hepps*, 475 U.S. at 775.

<sup>131</sup> See *id.*

<sup>132</sup> See *infra* Part III (recounting that early caselaw indicated that burden of proof originally was on copyright holder); cf. PATRY, *supra* note 39, at 585 (describing how fair use came to be an affirmative defense in five sentences, ultimately pointing to bald statements by the Supreme Court that lack any reasoned analysis).

<sup>133</sup> For a discussion of a counterargument that contemplates interests of copyright holders, see *infra* Part III.B.

<sup>134</sup> See discussion *supra* Part II.A.1 (positing a strong speech interest in upholding fair-use expression).

<sup>135</sup> See discussion *supra* Part II.A.1.

## B. *Magnitude of Chilling*

To the extent that copyright potentially chills protected speech, copyright lies in tension with the First Amendment.<sup>136</sup> This sub-Part therefore discusses the extent of the burden's potential to chill fair-use expression. It first addresses the potential chilling that results from the factual uncertainty inherent in fair-use inquiries.<sup>137</sup> It next addresses the potential chilling that results from the burden's effect on individual fair users, who, prior to the Internet, were not usually subject to copyright suit.<sup>138</sup>

### 1. Chilling from Factual Uncertainty

It is of course true that much of the chilling that results from the fair-use burden of proof may never be known. As an empirical matter, it is impossible to reach any certain conclusion about whether the burden of proof causes people to refrain from creating fair-use expression. No practical means exist to learn of a decision not to create, much less the reason for the decision. Reaching a conclusion regarding the extent of chilling caused by the burden of proof would require omniscience. Yet the fact that the extent of chilling cannot be known should not detract from the conclusion that the problem of chilling is a serious one. The inability to ascertain a chilling magnifies its seriousness: If the law must wait for evidence of the problem before the law will change, and if the evidence cannot be known, then the problem could be rampant without any change in sight. To be sure, an inability to know whether chilling may be occurring does not imply that it is not occurring. The law should therefore treat a potential threat as an actual threat, especially where the actuality can never be known. As it has in other speech contexts, the law should guard against a chilling even in the absence of any evidence that it is occurring.<sup>139</sup>

---

<sup>136</sup> See generally *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004) (observing that technologies that diminish "potential chilling" of a restriction on protected speech reduce the First Amendment tension that the restriction would otherwise create).

<sup>137</sup> See *infra* Part II.B.1.

<sup>138</sup> See *infra* Part II.B.2.

<sup>139</sup> See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004) (striking down Internet pornography statute on grounds that its overbreadth created potential for chilling of protected speech); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 (1987) (Brennan, J., concurring) ("This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities.").

The potential chilling of fair-use expression derives from the nature of the burden of proof that a defendant faces. Generally speaking, a burden of proof denotes both a burden of production and a burden of persuasion: The party bearing the burden of proof must both produce evidence of an alleged fact and persuade the fact-finder that the evidence must be interpreted to support that alleged fact.<sup>140</sup> Depending on the nature of the fact to be established, either the burden of production or the burden of persuasion may be more difficult to satisfy. Specifically, either burden may pose difficulty depending on whether evidence is scant or whether the evidence is open to various interpretations.<sup>141</sup>

With respect to the burden of production in the fair-use context, a fair user does not usually encounter difficulty producing evidence of the first three fair-use factors.<sup>142</sup> Evidence of these factors consists of the original work and the use that a defendant has made of that work. Either party may produce that evidence at little to no cost. By contrast, it may be difficult for a fair user to satisfy her burden of production with regard to the fourth factor—market impact.<sup>143</sup> That factor contemplates potential markets for the original work; where the relevant market does not yet exist, it becomes difficult to produce evidence of a use's market impact.<sup>144</sup> And even if a court were to focus only on the existent market, ascertaining how a use affects consumer behavior for the original work may be impracticable in some circumstances. For instance, a fair user who has posted a YouTube video of a child dancing to twenty-nine seconds of a copyrighted song may encounter difficulty producing evidence of how that video posting affects market demand for the copyrighted song.<sup>145</sup> The market impact inquiry encompasses facts that are speculative in nature, and therefore it is difficult for a fair user to satisfy her burden of production.

With respect to the burden of persuasion, all four factors may create difficulty because of their qualitative natures.<sup>146</sup> The qualitative nature of a factor requires the fact-finder to inject her unique personal opinion into the fact-finding process, such that the interpretation of evidence turns on subjective opinion and the evidence is thereby more

---

<sup>140</sup> 2 MCCORMICK ON EVIDENCE, *supra* note 22, § 336, at 471-72 (discussing the burden of production and the burden of persuasion in the burden of proof).

<sup>141</sup> *See id.*

<sup>142</sup> *Cf. Volokh, supra* note 9, at 720 (arguing that the speculative nature of the fair-use analysis arises in the inquiry surrounding a use's market effect).

<sup>143</sup> *See id.*

<sup>144</sup> *See* 17 U.S.C. § 107(4) (2006).

<sup>145</sup> *See Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-53 (N.D. Cal. 2008).

<sup>146</sup> *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258, 1263 (2d Cir. 1986) (opining that questions in the fair-use analysis may turn on "qualitative assessments"); *Fournier v. Erickson*, 242 F. Supp. 2d 318, 336 (S.D.N.Y. 2008) (observing the qualitative nature of factual inquiries in the fair-use analysis).

likely to give rise to disparate interpretations.<sup>147</sup> The greater likelihood that the evidence may be reasonably interpreted in different ways creates a greater burden on the defendant to persuade the fact-finder that the evidence must be interpreted her way. One juror's opinion of the evidence may not be the same as another juror's opinion, so qualitative factfinding enhances the defendant's burden of persuasion.

Perhaps the most opinion-based inquiry in the fair-use analysis surrounds the factual examination of whether a use is transformative.<sup>148</sup> This inquiry often matters the most in the fair-use analysis.<sup>149</sup> In the Supreme Court's words, a use is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>150</sup> Despite this definition, the question remains as to whether a particular use does in fact add something new; the question of transformation is one on which reasonable minds disagree, and it often calls for subjective opinion.<sup>151</sup> The subjective, open-ended nature of the inquiry lends strength to competing interpretations, for a disparity of viewpoints inheres in subjective inquiries. The reasonableness of competing interpretations makes the burden of persuasion much greater because the fair user must persuade the fact-finder that her interpretation is superior to all other reasonable interpretations.

For example, consider the case of *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, which raised the issue of whether a trivia book about the popular television show *Seinfeld* transformed the copyrighted expression in the show.<sup>152</sup> The book incorporated less than four percent of the expression from any episode.<sup>153</sup> On these facts, a district court judge deemed the use to be transformative;<sup>154</sup> the appellate judges did not.<sup>155</sup> Reasonable minds disagreed on the extent to which

---

<sup>147</sup> See Snow, *supra* note 18, at 9-20. See generally 2 MCCORMICK ON EVIDENCE, *supra* note 22, § 339, at 484 (explaining the role experience may play in an individual's reaching a conclusion).

<sup>148</sup> See Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 526-27 (2007) ("What constitutes a transformative use is potentially highly subjective."); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1252 ("[D]rawing the line between transformative and non-transformative uses is laden with subjectivity.").

<sup>149</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>150</sup> *Id.*

<sup>151</sup> See Snow, *supra* note 18, at 10-12.

<sup>152</sup> 955 F. Supp. 260, 268 (S.D.N.Y. 1997), *aff'd*, 150 F.3d 132 (2d Cir. 1998).

<sup>153</sup> *Id.* at 269.

<sup>154</sup> *Id.* at 268.

<sup>155</sup> See 150 F.3d at 142-43. The courts considered this issue on a summary-judgment motion by the copyright holder. *Id.* at 135. This means that the appellate court impliedly found that there existed no genuine issue as to the material fact of transformation. See *id.* at 142-43. Stated another way, the appellate court found that no reasonable jury could have been persuaded by the defendant's interpretation given the copyright holder's competing interpretation.

the trivia book transformed the television show. Where two interpretations of evidence are both reasonable and there is no compelling reason to favor one over the other, the burden of proof dictates that the fact-finder favor the copyright holder. In short, competing interpretations as to whether a use is transformative usually exist because of the open-ended nature of the transformative inquiry, giving rise to great uncertainty that fuels the role of the burden of proof.

The other inquiries in the fair-use analysis may also raise factual issues on which reasonable minds may disagree, thereby enhancing a fair user's burden of proof. The first-factor inquiry, whether a use serves a commercial purpose, may appear objectively straightforward, but it is not always so.<sup>156</sup> Copying coursework for distribution to students in an educational setting arguably does not serve a commercial purpose, yet courts have found otherwise.<sup>157</sup> The second-factor inquiry, whether the copyrighted work should be viewed as factual or creative so as to receive weaker or stronger protection, may be controversial, for instance, when the copied expression is a documentary.<sup>158</sup> The third-factor inquiry, into the amount and substantiality of the material copied, raises the question of whether the copying represents a qualitatively substantial part of the underlying work. Disagreement arises, for example, over whether referring to plot and character elements in a copyrighted novel constitutes substantial copying.<sup>159</sup> The fourth-factor inquiry into a use's market impact examines the potential for future market harm. Reasonable minds can easily disagree over future events: For instance, courts disagree over whether a use that requires the copier to purchase the original work might possibly harm a future market of the copyright holder.<sup>160</sup> Therefore, the reasonableness of variant

---

<sup>156</sup> See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) (noting that "the commercial nature of a use is a matter of degree, not an absolute," and determining that defendant's copying of object code in order to produce a competing product constituted a commercial use that was merely "indirect or derivative" (internal quotation marks and citations omitted)).

<sup>157</sup> See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386-87 (6th Cir. 1996).

<sup>158</sup> See *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629-30 (9th Cir. 2003) (observing difficulty in deciding whether nature of clips of musician's television show appearances and recorded concerts merits strong copyright protection).

<sup>159</sup> *Compare Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1380-81 (N.D. Ga. 2001), with 268 F.3d 1257, 1271-72 (8th Cir. 2001); see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (observing that the inquiry into the amount and substantiality of the copying "is somewhat difficult"). Accordingly, "[s]ince [the defendant] has the burden of proof on fair use, this seems to cut against [the defendant]." *Id.*

<sup>160</sup> *Compare Gulfstream Aerospace Corp. v. Camp Systems Int'l, Inc.*, 428 F. Supp. 2d 1369, 1379 (S.D. Ga. 2006) (finding that because defendants required consumers to purchase original copyrighted works before defendants would use them, the fourth factor favored fair use), with *CleanFlicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1241-42 (D. Col. 2006) (finding that fourth factor did not favor fair use despite fact that defendants required consumers to purchase original copyrighted works before defendants would use them).

interpretations of undisputed evidence creates difficulty for a fair user who seeks to persuade the fact-finder that her interpretation reflects fact. Inquiries turning on qualitative opinion magnify the fair user's burden of persuasion.

Burdens of production and persuasion thus handicap the fair user. In the absence of the required production or persuasion, the burden of proof requires fact-finders to find for the copyright holder: The burden assigns a loser by default. Hence, the close questions of fact that arise in the fair-use analysis require either speculative evidence or subjective opinion; where fact-finders cannot reach agreement on the factual inquiry, the burden of proof dooms the fair user. The inherent uncertainty of fair-use facts implies that the burden more often than not determines the loser in a fair-use fight.

This uncertainty places the fair user at a further disadvantage when copyright holders move for summary judgment. When moving for summary judgment, a movant bears the burden of showing that she is entitled to judgment as a matter of law, i.e., that no genuine issue of material fact exists.<sup>161</sup> Usually this burden on the movant requires her to disprove any affirmative defense that the opposing party has pleaded.<sup>162</sup> But not so with fair use. As courts presently apply the doctrine, they require defendants to prove fair use even when copyright holders move for summary judgment.<sup>163</sup> This burden is problematic for the fair user. Because qualitative fair-use facts raise issues that turn on subjective opinion, judges are more likely to view that evidence only one way.<sup>164</sup> Specifically, a judge views those subjective issues through a lens that draws upon her unique and personal experiences, which often cause the judge to view the issues as clear-cut and definite, admitting no alternative interpretations.<sup>165</sup> In the subjective mind of the judge, a use is either transformative or it is not; she perceives any contrary interpretations as unreasonable.<sup>166</sup> Therefore, a fair user's summary-judgment burden of persuading a judge of a reasonable possibility that a

---

<sup>161</sup> FED. R. CIV. P. 56(c).

<sup>162</sup> See *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986) (explaining that if a summary judgment movant usually does not bear a burden to disprove an affirmative defense that has been pleaded, that movant must nevertheless disprove that affirmative defense to prevail at summary judgment).

<sup>163</sup> H.R. REP. NO. 102-836, at 3 & n.3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553 (rejecting argument that "[w]hen the copyright owner seeks summary judgment, the burden of proving the defense . . . is with the defendant"); e.g., *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581, 583 (6th Cir. 2007) (concluding that defendant had failed to sustain its burden of proving fair use where plaintiff copyright holder had moved for summary judgment). *But see* *College Entrance Examination Bd. v. Cuomo*, 788 F. Supp. 134, 140 n.7 (N.D.N.Y. 1992) (placing burden to disprove fair use with copyright holder who moved for summary judgment).

<sup>164</sup> See *Snow*, *supra* note 18, at 26-29 (explaining that judges likely to fail to recognize reasonableness of contrary inferences in fair-use analysis).

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

jury could reach a factual finding turns out in practice to be a burden of persuading the judge of the very fact itself. A fair user's burden of proof on summary judgment often denies the fair user the opportunity to bring material fact issues to a jury.<sup>167</sup>

Given the difficulty that a fair user faces in satisfying the fair-use burden of proof, the fair user must contemplate penalties for infringement. Regardless of whether a use may be fair, the fair user who cannot produce the evidence or persuade the fact-finder must pay a fine for her speech. That fine is not cheap—anywhere from \$750 to \$30,000 per infringing copy.<sup>168</sup> And, where a copyright holder alleges a fair user planned to use the copyrighted material without permission knowing or having reason to believe it would constitute infringement, the fair user must contemplate damages for willful infringement—up to \$150,000 per infringing copy.<sup>169</sup> In view of these penalties, a risk-averse fair user would do well to purchase from the copyright holder a right to engage in a use that would actually be a fair use.<sup>170</sup> Yet this possibility is not always practicable: Financial limitations on the fair user often preclude licensing options;<sup>171</sup> similarly, ideological differences may bar economic exchange between copyright holders and users.<sup>172</sup> Silence, then, becomes the only practical option for the risk-averse fair user who is unable to purchase a right that she already holds. Speech through fair use is simply not an option.<sup>173</sup> The burden of resolving highly contested issues of fact, coupled with the penalties that follow what is likely to be a failed attempt, chills fair-use expression.

---

<sup>167</sup> And this denial of a jury trial where material fact issues exist of course creates a tension with the fair user's constitutional right to a jury. *See id.* at 48-55.

<sup>168</sup> *See* 17 U.S.C. § 504 (2006) (stating statutory damages for infringement); Parchomovsky & Goldman, *supra* note 24, at 1497-98 (arguing that would-be fair users are unlikely to engage in fair use because of excessive damages for infringement that follow an unpredictable fair-use doctrine).

<sup>169</sup> *See* 17 U.S.C. § 504.

<sup>170</sup> *See* Parchomovsky & Goldman, *supra* note 24, at 1498-1502 (explaining how vagueness surrounding fair use requires fair users to contemplate licensing).

<sup>171</sup> *See id.*; Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1608, 1614-15 (1982) (describing the high transaction cost that inheres in a finding of fair use).

<sup>172</sup> *See* Parchomovsky & Goldman, *supra* note 24, at 1501; Tushnet, *supra* note 27, at 585.

<sup>173</sup> Ironically, the fair user whose argument for fair use is strongest—i.e., she creates a transformative work that does not affect the market for the underlying work, and she lacks economic incentive for distributing the work—is more likely to be deterred by the fair-use burden. The lack of economic incentive suggests that she lacks a reason to speak in the face of a burden to show fair use. The fair user who creates for the inherent fulfillment and satisfaction that she finds in creating, or the fair user who creates solely to communicate a new message, is less likely to have a reason sufficiently compelling to overcome the burden of fair use. The greater the likelihood of fair use, the greater the likelihood of self-censorship.

## 2. Chilling on the Internet

The problem of chilling caused by the burden of proof is further exacerbated by Internet technology. Prior to the Internet, the likelihood that fair users who were individuals would self-censor seemed relatively low: Copyright holders did not sue individuals for the simple reason that copyright holders lacked notice of individual uses.<sup>174</sup> Individuals lacked means to project their fair uses to large audiences, and without such projection, copyright holders lacked notice.<sup>175</sup> Because copyright holders could not know of the teenager who created a parody of a copyrighted song to share with her high-school friends, copyright holders could not bring suit.<sup>176</sup> This lack of notice quashed any possibility for copyright holders to sue individual fair users, so individual fair users did not contemplate penalties of infringement and, accordingly, individual fair users did not self-censor.<sup>177</sup>

With the rise of the Internet, individual fair users can now reach large audiences at no cost.<sup>178</sup> Anyone with access to a public library can distribute fair-use expression to the world.<sup>179</sup> As a result, copyright holders now receive notice of individuals' unauthorized uses; copyright holders can and do track individuals' copying activities, and they threaten suits against individuals.<sup>180</sup> From the standpoint of the copyright holders, these suits seem necessary to protect their rights: The larger Internet audience creates a greater potential for individual web posters to cause excessive damage to copyright value.<sup>181</sup> But, in

---

<sup>174</sup> See Litman, *supra* note 27, at 1873 (“Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public.”).

<sup>175</sup> See Tushnet, *supra* note 27, at 584 (articulating that copyright holders did not target past practices of innocuous copying whereas now those copiers are becoming subject to suit owing to online technology).

<sup>176</sup> See *id.*

<sup>177</sup> Cf. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 357-61 (1989) (arguing that where costs of copyright enforcement exceed potential gain from bringing suit, fair use doctrine is unnecessary).

<sup>178</sup> See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995) (foreseeing that the Internet dramatically reduces the costs of distributing speech).

<sup>179</sup> See *Ashcroft v. ACLU*, 535 U.S. 564, 567 (2002) (“[A]ccess to the Internet is widely available in homes, schools, and libraries across the country.”).

<sup>180</sup> See Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 606, 602-13 (1997) (“[T]he Internet has made it simpler to prevent, detect and avenge unauthorized copying.”); cf. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 549, 552-54 (1997) (arguing that copyright law is expanding onto the Internet in a way that is leading to dangerous consequences).

<sup>181</sup> E.g., Posting of Angela Charlton to denverpost.com, *Bootleg “Potter” Lands Teen Translator in Jail*, [http://www.denverpost.com/nationworld/ci\\_6575436](http://www.denverpost.com/nationworld/ci_6575436) (Aug. 8, 2007, 23:49:41 MST) (describing sixteen-year old teen’s translating into French the latest edition of the popular Harry Potter book and then posting the translated copy onto the Internet, all in violation of copyright); see Litman, *supra* note 27, at 1872 (“The proliferation of digital technology has made

bringing suits against individuals, copyright holders often fail to discriminate between infringers and fair users.<sup>182</sup> Although individual fair users post expressions that, by definition, do not substitute for the copyright holder's original work, this fact is not relevant for a copyright holder who may potentially reap statutory damages for the posting.<sup>183</sup> Furthermore, the fact that no substitution occurs is not relevant to a copyright holder where a fair user has cast the original work in an unfavorable light. A copyright holder has every incentive to silence a scathing criticism of her work, even if that criticism is a fair use, and Internet technology makes pursuit of that silence possible.<sup>184</sup>

A copyright holder who pursues an individual fair user will nearly always be successful at achieving the desired silence. The burden of proof imposes a high financial cost on the fair user to gather evidence and persuade a fact-finder of its correct interpretation. This cost becomes prohibitive as individual fair users often lack economic means to defend their speech.<sup>185</sup> In the absence of any promised reward or financial backing for fair-use speech, the costliness of the burden quickly drowns out protected speech. In short, individuals who blog for fun will not even contemplate a fair-use fight given the expensive cost of prevailing.<sup>186</sup> Facing a large corporate copyright holder who enjoys economies of scale in pursuing copyright suits, the individual fair user immediately ceases her conversation.<sup>187</sup> This disparity between individual fair users and copyright holders suggests that if an individual engages in fair use and a copyright holder even threatens to sue, the individual will immediately censor her own expression because of the cost of proving fair use.<sup>188</sup> Self-censorship follows from economic disparity.

---

personal use both easier to track, trace, and charge for, and a more formidable threat to conventional commercial exploitation of copyrights.”)

<sup>182</sup> See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-54 (N.D. Cal. 2008) (reciting copyright holder's contention that copyright holder will lose ability to respond rapidly to potential infringements if court were to require copyright holder to evaluate fair use claim prior to issuing infringement notices).

<sup>183</sup> Cf. Snow, *supra* note 26, at 303-05 (describing copyright holders' incentive to pursue lawsuits against innocent infringers).

<sup>184</sup> See Litman, *supra* note 20, at 337 (“The copyright law is in the midst of revolutionary change. . . . What we have come to call the conventional entertainment industries—movie studios, music publishers, record companies—have declared war on the new digital media, and the courtrooms are battlefields.”).

<sup>185</sup> See Snow, *supra* note 26, at 295.

<sup>186</sup> See Tushnet, *supra* note 27, at 585 (contending that many would-be fair users lack resources to challenge copyright claims).

<sup>187</sup> E.g., *supra* note 12 and accompanying text (discussing chilling effect on blogger who quoted from AP story); see also Snow, *supra* note 26, at 295 (noting disparity of economic power between copyright holders and individual copiers on the Internet and how it affects outcomes in court).

<sup>188</sup> See Litman, *supra* note 20, at 365 (“[C]ontent owners have invested heavily in a strategy based on ruinous litigation. . . . Enough litigation may enable content owners to prevent

### III. THE SOLUTION: A RESTORATION OF THE PLAINTIFF'S BURDEN

The solution to the problem of chilling is to assign the burden of proof to copyright holders. Noteworthy is that such an assignment would not represent a novel procedural change in copyright law: Case law indicates that, at the inception of fair use, the burden rested with copyright holders because fair use was a doctrine that defined the scope of copyright.<sup>189</sup> Over the years, however, courts mistakenly conceived of fair use as a doctrine that excused, rather than defined, copyright infringement;<sup>190</sup> this mistaken conception led to the mistaken burdening of defendants rather than copyright holders.<sup>191</sup> Hence, presently assigning the burden to copyright holders would represent a *re-assignment*, or in other words, a restoration of their burden.

Thus, fair use should once again define the scope of rights held by copyright holders. A copyright holder's general burden of demonstrating that a defendant's use falls within the scope of the

inconvenient consumer behaviors by making it too expensive to help them to do what they want to do, without ever addressing whether what consumers want to do is legitimate.”). For example, one website displayed the following: “If any images here are in some form of violation of copyright infringement please forward us the valid proof and we will happily remove them as requested. Please don't bother with threats of lawyers and fines, just show us the evidence and we will happily oblige.” PopSugar, <http://web.archive.org/web/20060203223912/popsugar.com/disclaimer/>.

<sup>189</sup> See, e.g., *Simms v. Stanton*, 75 F. 6, 13 (C.C.N.D. Cal. 1896) (“[I]n several instances [the defendant] 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, upon whom the burden of proof lies, has failed to show such substantial piracy on the part of respondent as would entitle him to relief . . .” (emphasis added)); *Lawrence v. Dana*, 15 F. Cas. 26, 56, 61 (C.C.D. Mass. 1869) (No. 8136) (“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.”); *id.* (explaining that copyright limits fair use privilege); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (setting forth doctrine of fair use as a “question of piracy” regarding “what constitutes an infringement”).

<sup>190</sup> See, e.g., *Shapiro, Bernstein, & Co. v. P.F. Collier & Son Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934) (describing fair use as “a use technically forbidden by the law, but allowed as reasonable and customary” (internal quotation marks omitted)); HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944) (describing fair use as a doctrine that excuses an otherwise technical infringement of copyright).

<sup>191</sup> Courts did not begin labeling fair use as an affirmative defense until one did in 1955. *Loew's Inc. v. Columbia Broad. Sys.*, 131 F. Supp. 165, 167, 174 (S.D. Cal. 1955), *aff'd on other grounds*, 239 F.2d 532 (9th Cir. 1956), *aff'd on other grounds*, 356 U.S. 43 (1958). Following that one decision, two more courts did so in the 1960s, *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339, 341 (N.D. Ohio 1969); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 132 (S.D.N.Y. 1968), and three more during the 1970s, *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op. Prods., Inc.*, 479 F. Supp. 351, 355 (N.D. Ga. 1979); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 689 (S.D.N.Y. 1974); *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 730, 732 (S.D.N.Y. 1974), *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 . . .”).

holder's rights should require the copyright holder to demonstrate that the defendant's use is not fair.<sup>192</sup> To prevail on any claim of infringement, a copyright holder should be required to prove the absence of fair use, or in other words, to prove that the use is unfair.<sup>193</sup> Fair use, then, should be a right of expression that competes with copyright's right of exclusion.<sup>194</sup> Fair use should be restored to its original status so that fair use defines, rather than excuses, infringement.

Such a restoration may come about through either Congress or the courts. Ideally, Congress would amend the Copyright Act so that the Act expressly stated that a copyright holder must prove that a defendant's use is not fair in order to prevail on a claim for infringement. Alternatively, the Supreme Court could act. The Court could undo what it did in *Harper and Campbell* without overturning its holdings in these cases.<sup>195</sup> The Court could simply clarify its prior

---

<sup>192</sup> The argument to restore the burden of proof to copyright holders appears to be consistent with other academic positions on this issue. Professor Eugene Volokh has expressly called for the Court to place the fair use burden of proof on copyright holders. See Volokh, *supra* note 9, at 719-20. Professors Joseph Liu and Neil Netanel have advocated imposing a fair-use presumption that arises once a defendant raises a colorable speech claim. See Liu, *supra* note 19, at 443-44; Netanel, *supra* note 29, at 83-84. Professors Gideon Parchomovsky and Kevin Goldman have argued for clearly defined, nonexclusive fair use safe harbors. Parchomovsky & Goldman, *supra* note 24, at 119-46. Professors David Lange and Jennifer Anderson have proposed a fair-use presumption in all cases of transformative critical appropriation. David Lange & Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Appropriation 130-31 (unpublished manuscript, presented at the Conference on the Public Domain at Duke Law School, Nov. 9-11, 2001), available at <http://www.law.duke.edu/pd/papers/langeand.pdf>. Professor Kenneth Crews outlined a burden-shifting regime for fair use where the work is unpublished. Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 68-69 (1999).

<sup>193</sup> Courts often place the burden of proof on the party who asserts the affirmative proposition on an issue. See, e.g., *Aetna Ins. Co. v. Taylor*, 86 F.2d 225, 226 (5th Cir. 1936) ("As a general rule, the burden of proof lies on the party who substantially asserts the affirmative of the issue . . ."). This basis, however, has been criticized because any proposition can be stated in the affirmative or the negative. See 21B WRIGHT & GRAHAM, *supra* note 125, § 5122. For instance, proving the absence of fair use can be stated as proving the presence of unfair use. E.g., *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (C.C.E.D.N.Y. 1909) (referring to the fair use question as whether a use is unfair). Moreover, scholars have recognized that with regard to producing evidence for the purpose of demonstrating whether a use is fair, the defendant must prove a negative proposition in that no evidence would be sufficient to support the fourth factor. See 4 NIMMER, *supra* note 6, § 13.05[A][4]; Netanel, *supra* note 29, at 83 ("Today's market-centered fair use doctrine places the defendant in the onerous position of proving a negative: that the allegedly infringing use and other possible uses like it will not even harm a market, including a market for derivative works, that the copyright holder has no concrete plans to exploit.").

<sup>194</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) ("[F]air 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) ("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. . . . [F]air use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.").

<sup>195</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 & n.20 (1994); *Harper & Row*,

statements in these cases that refer to fair use as an affirmative defense by explaining that, although it is an affirmative defense, a defendant may invoke it merely by pleading it as opposed to proving it.<sup>196</sup> Finally, lower courts could also restore the burden to copyright holders without Supreme Court instruction to this effect.<sup>197</sup> Where the Supreme Court has not addressed a constitutional issue in an opinion, the language of that opinion does not foreclose a lower court from considering the issue.<sup>198</sup> In neither *Harper* nor *Campbell* did the Court consider the issue of whether imposing a burden on defendants would raise First Amendment concerns.<sup>199</sup> Instead, the Court declared fair use to be an affirmative defense as a matter of statutory construction.<sup>200</sup> Thus, on constitutional grounds, lower courts could re-assign the burden to copyright holders without Supreme Court permission.<sup>201</sup>

---

Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

<sup>196</sup> The federal rules require only that a defendant plead an affirmative defense; they are silent as to the burden of proof of an affirmative defense. See FED. R. CIV. P. 8(c). Indeed, affirmative defenses already exist in copyright wherein courts have not required a defendant to bear the burden of persuasion. See, e.g., *Moore v. Kulicke & Soffa Indus.*, 318 F.3d 561, 573 (3d Cir. 2003) (assigning burden of persuasion on copyright holder for affirmative defense of independent creation); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988) (same); *United States v. Goss*, 803 F.2d 638, 644 (11th Cir. 1986) (assigning burden of persuasion on copyright holder for affirmative defense of first-sale doctrine).

After the Supreme Court first declared fair use to be an affirmative defense in 1985, Congress in 1992 amended the fair-use provision of the Copyright Act, and in so doing, chose not to alter the Court's interpretation of fair use as an affirmative defense. See Pub. L. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2006)). Congress's choice to remain silent on this issue while amending the fair-use provision of the Act might be construed to suggest its approval of the Court's interpretation. See generally *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 & n.7 (2004) (adopting statutory interpretation on the basis that "congressional silence after years of judicial interpretation supports adherence to the traditional view," and in that regard, noting that "Congress has not been shy in revising other judicial constructions"). Moreover, the legislative history of the 1992 Amendment expressly relies on the Court's earlier declaration to state that "fair use is an affirmative defense," and it further notes that "the burden of proving fair use is always on the party asserting the defense." See H.R. REP. NO. 102-836, at 3 & n.3 (1992), reprinted in 1992 U.S.C.C.A.N. 2553. It might be argued, then, that Congress has acted to place the burden of proof with defendants. Yet none of this evidence—a statement in legislative history and Congress's failure to correct the Court's characterization—conclusively establishes that Congress has so acted. Therefore, to uphold the constitutionality of the Act, a lower court would be well within its authority to interpret the Act as assigning the burden to copyright holders. Cf. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (reciting doctrine of constitutional avoidance to mean that when deciding between two plausible statutory constructions, a court should choose the one that, if applicable, does not raise constitutional problems).

<sup>197</sup> See Volokh, *supra* note 9, at 721-22 (advocating this proposition with respect to First Amendment due process procedures in copyright, such as the fair-use burden of proof).

<sup>198</sup> See *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 541 (9th Cir. 1993) ("It is a venerable principle that a court isn't bound by a prior decision that failed to consider an argument or issue the later court finds persuasive.").

<sup>199</sup> See *Campbell*, 510 U.S. at 590 & n.20; *Harper*, 471 U.S. at 561.

<sup>200</sup> See *Harper*, 471 U.S. at 561.

<sup>201</sup> Compare *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 214 (1983)

### A. *Speech Promotion*

Restoring the burden of proof to copyright holders would reduce the potential chilling of fair-use expression.<sup>202</sup> By re-assigning the burden to copyright holders, courts would recognize that fair-use expression should receive more protection than copyrighted expression. Courts would acknowledge anew that fair use and copyright are competing rights, and they would again treat the fair-use right of speech as superior to the copyright right of exclusion. The superiority of the fair-use right would be manifested where courts encounter factual uncertainty in determining whether a use is fair: In the absence of certainty, the burden of proof would require courts to find the use to be fair. Fair use would again be a right of speech rather than an excuse for infringement.

By treating fair use as a right of speech, courts would alleviate the chilling that results from fair users contemplating their burden both to produce evidence of speculative prediction and to persuade the court of subjective opinion. In practice, that reassignment would bear out in pre-trial negotiations: No longer would defense attorneys counsel fair users to settle immediately where copyright holders had alleged infringement.<sup>203</sup> Defending fair-use speech would become a feasible possibility. As a result, re-assigning the burden to copyright holders would affect the balance of power in pre-trial negotiations, providing fair users room to breathe when copyright holders allege infringement.<sup>204</sup> Conceding infringement would no longer be automatic for fair users, so they would be less likely to self-censor.

---

(ruling that preference for residents in city construction contracts was permissible under Commerce Clause), *with* *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221-22 (1984) (ruling that preference for residents in city construction contracts violated Privileges and Immunities Clause); *compare* *Gannett Co. v. DePasquale*, 443 U.S. 368, 382-86 (1979) (holding that exclusion of public from criminal trial, with defendant's consent, did not violate Public Trial Clause), *with* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578-81 (1980) (holding that exclusion of public from criminal trial violated the First Amendment).

<sup>202</sup> See Netanel, *supra* note 29, at 83-84 (proposing shift in burden of proof to alleviate self-censorship that arises from burdening fair users).

<sup>203</sup> Cf. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 565 n.66 (2008) (observing that much fair-use expression may be chilled before any complaint is even filed given the unpredictability of the doctrine).

<sup>204</sup> See Liu, *supra* note 19, at 442-43 (advocating breathing space for fair-use expression in the form of a burden-shifting regime).

## 1. Theoretical Underpinnings

Despite the seemingly strong protection that burdening copyright holders would offer fair users, an argument could be made that the burden would do little in the fair-use analysis. Many courts have treated the issues in the fair-use analysis as legal in nature, suggesting that the burden of proof does not affect the outcome of these issues.<sup>205</sup> In that situation, re-assigning the burden of proof would amount to a burden of proving only the historical facts—i.e., the content of the copyrighted expression and the use that the defendant actually made of that expression—and those facts are not usually disputed in the context of a fair use dispute.<sup>206</sup> Because the issues in the analysis would be determined as a matter of law, they would be determined independent of any factual burden of proof. Re-assigning the burden of proof would have little, if any, effect on speech protection for fair users.

Although it may be true that many courts treat issues in the fair-use analysis as legal in nature, this does not mean that the burden should not lie with the copyright holder. It simply means that courts need to recognize the factual nature of those issues. That courts have mistakenly begun to characterize issues as legal should not be the basis to commit another mistake, i.e., misplacing the burden. Two wrongs don't make a right. In another article, the Author has considered the question of whether the issues in the four-factor analysis should be characterized as factual or legal.<sup>207</sup> As that article observes, for over two centuries at common law, courts characterized those issues as factual so as to place them with the institution best able to draw inferences that turn on subjective opinion and qualitative assessment—i.e., the jury—and this characterization has ensured broader speech protection for fair users. Moreover, the Constitution mandates factual characterization as it requires the preservation of the civil jury right in fair-use cases that existed in 1791.<sup>208</sup> Although case law suggests a recent judicial trend toward characterizing these issues as legal, such a characterization is not well founded.<sup>209</sup> There is no basis in fact, law, or

---

<sup>205</sup> *E.g.*, *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 183-84 (D. Mass. 2007) (characterizing “the interpretation of facts” in the fair-use analysis as raising “questions of law”); *Los Angeles Time v. Free Republic*, No. CV98-7840-MMM(AJWx), 1999 WL 33644483, at \*6 (C.D. Cal. Nov. 8, 1999) (“Fair use is a mixed question of law and fact. It is nonetheless appropriate to resolve the issue at the summary judgment stage where the historical facts are undisputed and the only question is the proper legal conclusion to be drawn from those facts.” (citations omitted)).

<sup>206</sup> *See* Snow, *supra* note 18, at 8-9 (explaining historical facts in fair-use analysis).

<sup>207</sup> *Id.* at 9-26.

<sup>208</sup> *Id.* at 10-21, 33-34.

<sup>209</sup> *Id.* at 33-46.

reason to characterize the issues in the four-factor analysis as legal.<sup>210</sup> For these reasons, courts should classify them as factual, subjecting them to the burden of proof. As issues of fact, the issues that inhere in uncertainty will turn on the burden of proof, in a way that will affect a noticeable disadvantage for the party bearing it. That party should be the copyright holder rather than the fair user.

It might be argued that the burden of proof should not affect the fair-use analysis so as not to create a disadvantage for either party. On this ground, issues in the fair-use analysis arguably should be characterized as legal, in line with the trend in many modern courts.<sup>211</sup> Judges today decide fair-use issues as legal issues, implying that the burden of proof does not affect their decision-making process.<sup>212</sup> To ensure equal treatment for both fair users and copyright holders, it might be argued that the burden should not affect the decision-making process in the context of fair use. Re-assigning the burden would therefore seem unnecessary.

This argument, however, is superficial, ignoring an important aspect of the fair-use burden of proof. The burden affects judicial conception of fair use, and that conception affects the substantive outcome of decisions. With the burden resting on fair users, judges conceive of fair use as a doctrine that excuses infringement. Although early case law originally set forth fair use as a doctrine that defined infringement, judges changed their conception from a doctrine that defines to a doctrine that excuses when they began labeling fair use as an affirmative defense.<sup>213</sup> Affirmative defenses excuse infringing conduct.<sup>214</sup> And as a doctrine that excuses infringement, fair use reflects an exception to a norm, applying only where clearly warranted.<sup>215</sup> Thus, the characterization of fair use as an affirmative defense, which has given rise to the current burden of proof, suggests to

---

<sup>210</sup> *Id.*

<sup>211</sup> See, e.g., cases cited *supra* note 205.

<sup>212</sup> See Snow, *supra* note 18, at 33-45 (explaining judicial trend of deciding issues in the fair-use analysis as legal issues).

<sup>213</sup> See *supra* notes 189-191 and accompanying text.

<sup>214</sup> See BLACK'S, *supra* note 53, at 451; 5 WRIGHT & GRAHAM, *supra* note 53, § 1270 (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 go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action, thereby excusing the defendant's conduct).

<sup>215</sup> See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111-12 (2d Cir. 1998) (reversing district court's grant of summary judgment for defendant to pronounce summary judgment for plaintiff where influential fourth factor—market impact—posed "a very close question" such that the plaintiff prevailed merely because the defendant failed to demonstrate "an absence" of a "potential" for market harm); *Castle Rock Entm't v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (rejecting fair use to find for copyright holder on summary judgment, despite recognizing the close calls that the issues in the fair-use analysis raised), *aff'd*, 150 F.3d 132 (2d Cir. 1998).

judges that fair use is an exceptional doctrine, applicable only where clearly warranted.

This conceptual effect of the burden of proof is reason to reject the argument that, if issues in the fair-use analysis were construed as legal, the burden of proof would not affect that analysis. That the issues would not turn on the evidentiary burden does not imply that the burden does not affect judicial conception of the doctrine. It is entirely possible for the burden to affect judicial conception and application of the doctrine, even where judges characterize issues in the fair-use analysis as legal. Indeed, it must and in fact it does. By contrast, were judges to re-assign the burden of proof to copyright holders, judges could no longer conceive of fair use as an affirmative defense. No longer would fair use be a doctrine that excuses infringement. Burdening copyright holders to demonstrate the absence of fairness as part of their prima facie case of infringement would necessitate that fair use be conceived of as a doctrine that defines infringement. And as a doctrine that defines infringement, fair use would be the norm. Infringement would be the exception. Speech would be protected.

## 2. Practical Effect

Re-assigning the burden of proof may in theory better protect fair users, but the question still remains as to the practical effect of that re-assignment. In practice, how will re-assigning the burden to copyright holders affect the outcome of fair-use cases?

The short answer to the above question is that fact-finders will favor defendants where uncertainty surrounds the question of whether a use is fair. Despite the fact that the standard of proof for a copyright litigant is merely a preponderance,<sup>216</sup> the burden of persuading the fact-finder that the use is at least more likely than not a fair one (or an unfair one) presents a difficult challenge. The difficulty arises because the definition of fairness, along with the definition of the four factors, is intended to be flexible, and that flexibility yields great uncertainty.<sup>217</sup> Facing great uncertainty as to the definition, the fact-finder is uncertain as to whether it is appropriate to draw an inference of fairness (or unfairness).<sup>218</sup> The vague definition of “fair” makes it difficult to conclude that a use more likely than not fits that definition. Unable to draw a conclusion, the fact-finder must rule against the party charged with bearing the burden of proof.<sup>219</sup> So, reassigning the burden of proof

---

<sup>216</sup> See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992).

<sup>217</sup> See discussion *supra* Part I.B (explaining uncertainty surrounding fair use definition).

<sup>218</sup> See discussion *supra* Part I.B.

<sup>219</sup> See discussion *supra* Part I.B.

to the copyright holder would favor the defendant in cases where a fact-finder is not convinced that the copyright holder has established the likelihood that a use is not fair. And those situations arise where the facts present a close call, which often occurs in fair use.

Reassigning the burden of proof would affect summary judgments of fair use. This is significant because many, if not most, questions of fair use are decided on summary judgment.<sup>220</sup> Summary judgment standards require a court to deny a fair-use argument where no reasonable juror could find the use to be fair.<sup>221</sup> Under this standard, it might seem that a defendant could easily defeat a plaintiff's summary judgment motion because the defendant would need to merely provide a reasonable interpretation of the evidence that suggests fairness. The defendant need not persuade the court on summary judgment that the use is in fact fair; he need merely persuade the court that a reasonable jury could find the use to be fair.

In practice, however, the burden of proof on summary judgment presents great difficulty for a defendant. As at trial, at summary judgment the uncertainty surrounding the issues in the four-factor analysis creates difficulty for the defendant to satisfy her burden of showing that a reasonable jury could resolve those issues in her favor. A case that illustrates this point is *Infinity Broadcast Corp. v. Kirkwood*.<sup>222</sup> There, the defendant, Kirkwood, transmitted radio broadcasts from various cities over the telephone to its customers.<sup>223</sup> The plaintiff, Infinity, held the copyrights to many of those radio broadcasts, and Infinity never authorized Kirkwood's transmissions.<sup>224</sup> The district court concluded on summary judgment that the use was fair.<sup>225</sup> The Second Circuit reversed, holding the use unfair, thereby precluding the jury from deciding the issue.<sup>226</sup>

Pivotal to the Second Circuit's holding in this case was Kirkwood's burden of proof.<sup>227</sup> The Second Circuit viewed the fourth factor—market impact—as central to its conclusion as to whether Kirkwood's use was fair.<sup>228</sup> Kirkwood produced evidence that Infinity was not in the same business as Kirkwood—operating commercial listen lines—and that Infinity had never attempted to license the

---

<sup>220</sup> See Beebe, *supra* note 203, at 554 (noting dramatic empirical increase in judicial treatment of fair use at summary judgment during the 1990s and continuing to present).

<sup>221</sup> See generally *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

<sup>222</sup> 150 F.3d 104 (2d Cir. 1998).

<sup>223</sup> *Id.* at 106.

<sup>224</sup> *Id.* at 107.

<sup>225</sup> See 965 F. Supp. 553, 561 (S.D.N.Y. 1997).

<sup>226</sup> See 150 F.3d at 106, 111-12.

<sup>227</sup> See *id.* at 111-12.

<sup>228</sup> See *id.* at 110-11.

retransmission of its broadcasts for purposes such as Kirkwood's use.<sup>229</sup> The court, however, was not persuaded that the fourth factor favored Kirkwood because Kirkwood had failed to show that the use would not affect Infinity's *potential* to exploit that market.<sup>230</sup> Although the court admitted that "the fourth factor is a very close question," the court reasoned that "considering that Kirkwood bears the burden of showing an absence of 'usurpation' harm to Infinity," the fourth factor "tips toward Infinity."<sup>231</sup> In other words, the court believed that Kirkwood's burden of proof would preclude any reasonable juror from finding that the fourth factor suggested a fair use—despite the district court's holding that this factor "strongly favors" Kirkwood.<sup>232</sup> Pointing out Kirkwood's burden of proof four times in its opinion, the Second Circuit ruled that no reasonable jury could find Kirkwood's use to be fair.<sup>233</sup>

The *Kirkwood* case exemplifies the judicial practice of looking to the burden of proof to determine fairness where an inference is not clear—or, more specifically, to determine the reasonableness of an inference suggesting fairness. That practice damns the fair user. By contrast, if the burden of proof were to lie with the copyright holder, the burden would protect the fair user. If the burden had required Infinity to prove that the fourth factor favored it, Infinity would have had to show market harm. Infinity would have needed to show more than a mere potential that it might someday enter the same telephone market that Kirkwood was exploiting; Infinity would have needed to persuade the court that such a potential would likely become a reality.<sup>234</sup> Likewise, Infinity would have needed to show that Kirkwood's conduct would likely prove harmful in such a situation. Infinity, however, failed to make that showing, which resulted in the court calling the fourth factor "a very close question."<sup>235</sup> Coupled with placing the burden of proof on Infinity, then, the uncertainty surrounding the potential effect of Kirkwood's use on Infinity's potential market would have compelled the court to view the fourth factor as favoring Kirkwood.<sup>236</sup>

---

<sup>229</sup> *See id.*

<sup>230</sup> *Id.* at 111.

<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at 109 ("Since Kirkwood has the burden of proof on fair use, this seems to cut against Kirkwood." (citation omitted)); *id.* at 110 ("As always, Kirkwood bears the burden of showing that his use does not cause this type of harm to Infinity's interests, including Infinity's own listen lines."); *id.* at 111 ("[C]onsidering that Kirkwood bears the burden of showing an absence of 'usurpation' harm to Infinity, believe that it tips toward Infinity."), 112 ("Kirkwood has not met his burden of showing that his use of Infinity's broadcasts does not infringe Infinity's copyrights.").

<sup>234</sup> *Cf. id.* at 111 (observing that Infinity had demonstrated "the potential" for entering such a market).

<sup>235</sup> *Id.*

<sup>236</sup> That other courts similarly decide close calls of fair use on summary judgment cannot be

## B. *Objections to Restoring the Burden*

Two objections could be raised to reassigning the burden of proof to copyright holders. First, it could be argued that the burden would diminish incentives to create copyrighted expression. Second, it could be argued that the burden is unjustified where infringement is blatant. These objections are discussed below.

### 1. Decreased Creativity

Burdening copyright holders would weaken copyright protection, and weaker protection would seem to lessen incentives for authors to create expression. With respect to speech values in copyright, the Supreme Court has recognized that copyright is intended to be “the engine of free expression”:<sup>237</sup> Strong copyright protection enables the copyright holder to profit from demand for her expression, ultimately providing incentive to create expression that the market will reward.<sup>237</sup> Facing a burden of proof, copyright holders would receive less protection for their copyrighted expressions; as a result, they might invest less in creating expressions.<sup>238</sup> Their burden of proof would seem

---

doubted. *See, e.g.,* Castle Rock Entm’t v. Carol Publ’g Group, Inc., 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (recognizing that the four-factor analysis raised “numerous competing considerations” that made her “decision a difficult one,” and then deciding that “on balance” the defendant’s use was not fair), *aff’d*, 150 F.3d 132 (2d Cir. 1998). And like *Kirkwood*, these other courts may be deciding the close calls based on who is charged with proving fair use.

<sup>237</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

<sup>238</sup> This argument may be stated in terms of magnitude-of-error costs. Courts attempt to place the burden of proof according to where an error judgment would result in a lower magnitude of error cost. *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 20-21. That is, the copyright holder might argue that the magnitude of error of a false ruling would be greater where a court errs in favor of defendants when in truth the use is infringing rather than where a court errs in favor of a copyright holder when in truth the use is fair. The error of labeling an infringing use as a fair use would be to forever deny the copyright holder of any compensation for the particular use, impinging on the copyright holder’s incentive to create: The magnitude of error thus seems high; in contrast, the error of labeling a fair use as infringing would be to require a fair user to pay a fee to engage in the speech. This former magnitude of error arguably seems less than the latter because the copyright holder altogether ceases speaking copyrighted expression whereas the fair user still engages in fair-use speech, albeit at a cost. This argument, however, is fallacious. It is dubitable that the copyright holder would cease speaking as much as a fair user who faces litigation or licensing fees. Just as the prospect of litigation chills speech, so also does the cost of licensing. *See* Gordon, *supra* note 171, at 1608, 1614-15. It is therefore doubtful that the reduction in incentive that results from denying copyright holders compensation represents a greater magnitude of error than the cost of inhibiting speech.

to burden creativity, contrary to copyright's speech values.<sup>239</sup> Stronger copyright protection, with the burden on defendants rather than copyright holders, thereby seems necessary for greater speech production.<sup>240</sup>

As a practical matter, this conclusion may not always be true. Some copyright holders would keep creating regardless of a burden of proof of showing that defendants are not fair users.<sup>241</sup> For some copyright holders, neither an increase in litigation costs to satisfy their burden nor a decrease in their ability to satisfy that burden would diminish production of creative works. Many copyright holders would continue to invest the same amount of resources into creating expression, regardless of whether they incur an increase in litigation expenses to enforce their rights, and regardless of whether they believe that they would be able to prevail against infringers who are arguably, although not actually, fair users.<sup>242</sup> For those copyright holders, the potential decrease in financial returns would not deter creative output.<sup>243</sup>

Assuming, though, that some copyright holders would cease creating were they to bear the burden of proof, that decrease in original works would likely be less than the decrease in fair-use expression that results from burdening fair users.<sup>244</sup> The inhibition that follows from the possibility of a severe penalty is likely greater than the inhibition that follows from the possibility of a reduced reward. That is, the presence of a severe penalty appears more threatening to speech than does the absence of marginal returns. In the context of the fair-use burden, this principle suggests that a fair user who contemplates a severe penalty for mistaking whether her use is fair would be more likely to self-censor than a copyright holder who contemplates reduced profits from a weakened ability to enforce her rights.<sup>245</sup> Placing the burden on fair users, then, is likely to reduce more expressional output than would placing the burden on copyright holders. From the

---

<sup>239</sup> *Eldred*, 537 U.S. at 219 (“[C]opyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression.”).

<sup>240</sup> See generally Gordon, *supra* note 171, at 1610-12.

<sup>241</sup> See Volokh, *supra* note 9, at 721 (“Very few potential creators would be considerably deterred by the risk that some people will be erroneously allowed to engage in commentary, criticism, and parody when the fair use question is close.”).

<sup>242</sup> See *id.*

<sup>243</sup> Cf. Symposium, *Copyright & Privacy—Through the Wide-Angle Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 285, 291-92 (2005) (R. Anthony Reese) (positing that copyright law need not provide authors full control over their works to preserve incentives for creation and dissemination).

<sup>244</sup> Volokh, *supra* note 9, at 721 (“Placing the burden of proving fair use on the defendant is thus likely to deter considerably more speech than would placing the burden of proving unfair use on the plaintiff.”).

<sup>245</sup> *Id.*

perspective of producing as much expressional output as possible, burdening a copyright holder would likely yield greater output.

The argument that copyright holders should not bear the burden of proof because that burden would decrease output of copyrighted expression is also faulty because the argument fails to account for the fact that the policy underlying copyright involves more than simply expressional output.<sup>246</sup> Copyright policy is to further the progress of science, or in other words, to facilitate valuable knowledge.<sup>247</sup> Fair use appears essential to that end.<sup>248</sup> A fair use may produce synthesis and creativity that is more valuable than the expression that underlies it. For this reason, the Supreme Court has warned against a “rigid application” of copyright law that would “stifle the very creativity which that law is designed to foster.”<sup>249</sup> The principle is simple: Fair use fosters valuable knowledge, so its exercise must be protected by avoiding a rigid application of copyright. This principle suggests that the law should not condone copyright holders investing in creativity based on an expectation of prevailing against gray-area fair users, i.e., those defendants who are at least arguably fair users, although perhaps not actually. Such an expectation would necessarily reflect an expectation of prevailing against actual fair users who also lie in the gray area, which means that the expectation, if realized, would inhibit actual fair uses, thereby inhibiting valuable knowledge. Such an expectation necessarily assumes that defendants in the gray area of fair use are unlikely to succeed, and it therefore hinges on a rigid application of copyright law. It follows that the law should not impose the burden of proof on defendants: Burdening defendants would encourage copyright holders to invest in a level of creativity that is based on an expectation of prevailing in gray-area fair-use cases, and that expectation reduces valuable knowledge. The short answer, then, to an argument that burdening copyright holders would reduce output of copyrighted expression is simple: If there was a reduction, it would be necessary to avoid stifling creativity.

It should lastly be noted that the argument against burdening copyright holders based on decreased output of expression must be secondary to the fair user’s constitutional argument. The copyright holder’s argument is a policy argument that addresses the extent of

---

<sup>246</sup> See U.S. CONST. art I, § 8, cl. 8 (expressing the purpose of copyright to be “[t]o promote the Progress of Science”).

<sup>247</sup> See *id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 219 n.18.

<sup>248</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The fair use doctrine . . . 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.” (internal quotation marks omitted)).

<sup>249</sup> *Id.*; *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1985).

incentive that copyright holders should receive to create expression.<sup>250</sup> It is not a constitutional argument: An unconstitutional chilling of speech does not occur when speakers become reluctant to speak out of greed.<sup>251</sup> Indeed, Congress could revoke the Copyright Act in its entirety without abridging speech under the First Amendment.<sup>252</sup> The copyright holder's argument is based on policy, not the Constitution. So even assuming that the copyright holder's policy argument was strong, policy must yield to a constitutional right of speech.<sup>253</sup>

## 2. Blatant Infringement

Although a reduction of copyrighted expression appears justified where a use is potentially fair,<sup>254</sup> such a reduction does not seem justified where the use constitutes a blatant infringement. Where fair use is at least arguable, burdening copyright holders ensures that fair users who fall within that gray area receive breathing space to create their fair-use expression. But where infringement is blatant, such that it is not even arguable, burdening copyright holders would seem to provide breathing space for conduct that is unquestionably infringing, conduct that the law should deter. There thus seems no reason to burden copyright holders in cases of blatant infringement. And absent any reason, the increased cost of enforcement that a burden would pose for copyright holders does not seem justified. That increased cost would tax resources of copyright holders, which could potentially slow enforcement, reducing incentives for copyright holders to create copyrighted expression. So, although the cost of demonstrating the absence of fair use appears justified in close calls, it does not seem justified where infringement is blatant. In cases of blatant infringement, it might be argued that burdening copyright holders is unjustified.

This argument assumes a premise that may not be true, namely, that in cases of blatant infringement, the cost of proving the absence of fair use would be high. Where infringement is blatant, such that fair use is not even arguable, only minimal resources would likely be required to

---

<sup>250</sup> Cf. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1695-1795 (1988) (discussing policy reasons that influence judicial determination of fair use).

<sup>251</sup> See Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 160 (2000) (“[C]opyright provides economic incentives that generate expression to feed the First Amendment. . . . The text of the First Amendment, however, is scarcely self-executing when applied to copyright questions.”).

<sup>252</sup> See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

<sup>253</sup> Cf. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008) (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”).

<sup>254</sup> Liu, *supra* note 19, at 442-43 (arguing for burden to lie with copyright holder in fair use cases to provide breathing space for fair-use expression); see also discussion *supra* Part III.B.1.

prove that a blatantly infringing use is not fair. A copyright holder likely could easily demonstrate the relevant facts that the use is not transformative, the use constitutes substantial copying, and the nature of the copyrighted work merits strong protection. Further, in light of those established facts, a copyright holder would likely need to produce only minimal evidence to establish a detrimental effect on the market for the work: The copyright holder would only need to produce evidence that the copyright holder targets, or is at least contemplating, the same consumer market that the defendant has targeted. For example, to show unfair use where a defendant sells verbatim copies of copyrighted music through an unauthorized website, a copyright holder would incur minimal cost. That the use is non-transformative and substantial, and that the copyright holder's music merits strong protection, would be the only plausible interpretation of the evidence. The copyright holder would need merely to demonstrate that she targets—or even may potentially target—the same consumer downloaders that the defendant targets. The cost of the burden would be minimal.

Even assuming, however, that the cost for copyright holders would be non-negligible, that cost would be justified. Unlike blatant infringement, blatant fair use does not exist.<sup>255</sup> Where infringement is blatant, the copyright holder who bears the burden of proof will not incur any cost of uncertainty in judgment. By contrast, the fair user who bears the burden of proof will always incur the cost of uncertainty in judgment, for the strength of a colorable fair-use claim is always

---

<sup>255</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that fair use requires a case-by-case analysis); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (describing the process of determining whether an unauthorized copy constitutes fair use as “the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent”); Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A. 133, 134 (2003) (discussing the “indeterminacy” of fair use judgments); Leval, *supra* note 24, at 1106-07; David Nimmer, “*Fairest of Them All*” and Other *Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 278-84 (2003) (demonstrating unpredictable nature of fair-use doctrine through means of statistical analysis); Parchomovsky & Goldman, *supra* note 24, at 1496 (“The judicial path of fair use is paved with split courts, reversed decisions, and inconsistent opinions.”); Tehranian, *supra* note 148, at 1215-16 (describing fair-use cases as encompassing “[w]ildly disparate outcomes on similar fact patterns”); Tushnet, *supra* note 27, at 554 (positing that the virtue of fair use's flexibility carries with it the horrendous defect of unpredictability); R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 426-27 (2005) (arguing that the “know it when you see it” nature of fair use precludes any meaningful comment about the division between fair and unfair uses, even at a high level of generality). Tellingly, in three relatively recent Supreme Court cases dealing with fair use, the Court reversed the appellate court, and the appellate court reversed the district court. See *Campbell*, 510 U.S. at 569, *rev'g* 972 F.2d 1429 (6th Cir. 1992), *rev'g* 754 F. Supp. 1150 (D. Tenn. 1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), *rev'g* 723 F.2d 195 (2d Cir. 1983), *rev'g* 557 F. Supp. 1067 (S.D.N.Y. 1983); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *rev'g* 659 F.2d 963 (9th Cir. 1981), *rev'g in part, aff'g in part* 480 F. Supp. 429 (C.D. Cal. 1977); see also *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), *vacating* 380 F.3d 1154 (9th Cir. 2004), *aff'g* 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

uncertain.<sup>256</sup> This means that burdened fair users always incur the cost of contemplating an adverse judgment whereas burdened copyright holders do not. In other words, the possibility of blatant infringement, coupled with the impossibility of blatant fair use, makes the cost of enforcing copyright rights less than the cost of enforcing fair-use speech rights. And, where two competing rights are equally important under the law, the burden of proof should lie with the right that incurs a lesser cost to be realized.<sup>257</sup> Assuming, then, that the right of fair use is at least as important as the right of copyright, the burden should lie with the copyright holder.

Further justification for burdening copyright holders, even in cases of blatant infringement, is that the proprietary right of copyright is less important than the speech right of fair use. As between protecting copyright incentives and protecting free speech, the law should favor the latter. Upholding the right to speak is more important than creating incentives to speak.<sup>258</sup> The First Amendment bests copyright. So, if fair-use speech cannot be protected without weakening incentives for copyrighted expression, the incentives should be weakened.<sup>259</sup> Any possible slowing of copyright enforcement would be a justified cost in view of the alternative—slowing of protected speech, i.e., fair-use expression.

### CONCLUSION

Requiring fair users to prove the fairness of their expressions threatens fair use's very purpose—to protect speech. Questions surrounding the issue of fair use are always close, and, where a question is close, the burden of proof assigns a loser. Facing a hefty punishment for losing the uphill battle of proof, fair users self-censor. The burden chills the speech that fair use is intended to protect.

Judicial placement of the burden on fair users represents an attempt to foster expression by safeguarding copyright. The attempt has failed miserably. The burden represents heavy-handed patrolling in the marketplace of ideas. Trying to punish those who steal, courts are punishing those who share. They have turned an open emporium of exchange into a highbrow boutique for the wealthy. It is therefore time

---

<sup>256</sup> See Snow, *supra* note 18, at 10-20 (observing that unpredictability of fair use stems from individually formed social values and norms).

<sup>257</sup> See generally 21B WRIGHT & GRAHAM, *supra* note 53, § 5122.

<sup>258</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (suggesting that First Amendment scrutiny of copyright's suppression of copied expression is necessary where "traditional contours" of copyright law have been altered).

<sup>259</sup> Cf. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

to construe fair use as it was originally intended—a doctrine that defines the scope of copyright's rights. It is time to restore the burden of proof to plaintiffs. It is time to return to the traditional contours of copyright that will cultivate creativity.