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A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation

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A FAIR USE TO REMEMBER: RESTORING APPLICATION OF THE FAIR USE DOCTRINE TO STRENGTHEN COPYRIGHT LAW AND DISARM ABUSIVE COPYRIGHT LITIGATION

Lauren Gorab*

The primary goal of copyright law is to benefit the public. By rewarding authors with exclusive rights, such as the power to enforce copyright infringement, copyright protection is the means through which copyright law accomplishes this goal. Another way that copyright law pursues its goal is through the fair use doctrine—an invaluable utilitarian limit on copyright protection. However, fair use is, among other things, vague. The current application of fair use as an affirmative defense magnifies the doctrine’s problems and makes copyright law hospitable to abusive copyright litigation.

Current proposals in this area of reform target either fair use or abusive copyright litigation. This Note targets both problems with a single solution: applying fair use as a right. Applying fair use as a right alleviates some of the doctrine’s inherent problems and is the best long-term solution for eliminating abusive litigation from copyright law. As a right, fair use protects copyright’s core values and goals, alleviates the burden on courts, and cultivates creation. A review of the motivation behind fair use reveals that as a right, fair use is best able to serve the purpose for which it was designed.

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INTRODUCTION

Copyright law’s *raison d’être* is to promote the creation of new works to benefit the public because creative activity “is vital to the well-being of society.”¹ To secure the benefit of creative works for the public and incentivize future creation, copyright protection provides authors² with limited monopoly rights over their creations.³ Copyright law also pursues its goal through the fair use doctrine, which states that certain secondary uses⁴ qualifying as “fair use” are not copyright infringement.⁵

1. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990).

2. This Note uses the terms “author” or “creator” to describe the original maker of a copyrightable work.

3. See U.S. CONST. art. I, § 8, cl. 8; Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 AM. U. INT’L L. REV. 1, 16 (2016); see also Leval, *supra* note 1, at 1109 (calling copyright protection “a pragmatic measure”).

4. A “secondary use” is an unauthorized use of part or whole of a copyrighted work. For example, a news article quoting from a published book is a secondary use of the copyrighted work. A modern-art collage including a reproduction of a famous painting still under copyright is also a secondary use.

5. 17 U.S.C. § 107 (2012); see Elkin-Koren, *supra* note 3, at 16; Leval, *supra* note 1, at 1127; Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 276–77 (2015).

Fair use limits the exclusive rights of copyright owners.⁶ It embodies the balance between private ownership and public access, and it applies across copyright law.⁷ Currently, the application of fair use as an affirmative defense magnifies the doctrine's inherent problems and makes copyright law hospitable to abusive copyright litigation.⁸ The prevalence of abusive copyright litigation also illuminates weaknesses in copyright law.⁹ Abusive copyright litigation exploits the courts, frustrates copyright protection, weakens copyright law, and chills free speech.¹⁰

Commentators have offered proposals targeting either the fair use doctrine or abusive copyright litigation, but these solutions approach the problems separately.¹¹ This Note argues that the problems are connected and therefore proposes a single solution: applying fair use as a right. This proposal simply changes the procedural application of fair use. Applying fair use as a right will fix some of the problems within the doctrine itself and is also the best long-term solution for mitigating abusive copyright litigation. In addition, when compared to other proposals, this proposal requires the least change by the fewest parties. As a right, fair use protects copyright's fundamental values and goals, alleviates the burden on courts, and cultivates creation.

Applying fair use as an affirmative defense misplaces the burden on the defendant and makes copyright law legally and procedurally hospitable to abusive copyright litigation.¹² Instead, fair use should be applied as a right held by users making fair use of a copyrighted work. Thus, fair use must be considered during pleading, when the initial determination of copyright infringement is made. Applying fair use as a right is the best approach to the problems caused by the inherent uncertainty in the fair use doctrine and by abusive copyright litigation because this solution reduces the potential for abuse in copyright enforcement.

6. 17 U.S.C. § 107 (“Limitations on exclusive rights: Fair use.”).

7. See Elkin-Koren, *supra* note 3, at 16; Leval, *supra* note 1, at 1127 (describing fair use as a “judge-made utilitarian limit” on statutory copyright); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1495 (2007) (calling fair use “perhaps the most crucial policy tool for maintaining copyright’s intended balance”); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001) (“[T]he fair use right was codified to maintain the constitutionally mandated balance to ensure that the public has access to knowledge.”).

8. See LAWRENCE LESSIG, *FREE CULTURE* 99 (2004); see also Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 169 (2011).

9. See Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 780 (2013).

10. See Elif Sonmez, *Copyright Troll or Ugly Rights Holder? The Spread of Troll-Tactics and Solutions to the Abuse of the Courts and Degradation of the Copyright Protection Scheme*, 19 INTELL. PROP. L. BULL. 137, 138 (2015).

11. See Luke S. Curran, Note, *Copyright Trolls, Defining the Line Between Legal Ransom Letters and Defending Digital Rights: Turning Piracy into a Business Model or Protecting Creative from Internet Lawlessness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 170, 194 (2013); see also *infra* Part II.

12. See *infra* Part I.D.3 (explaining how abusive copyright litigation capitalizes on the vagueness of fair use).

I. COPYRIGHT LAW: PAST, PRESENT, AND THE PLACE OF THE FAIR USE DOCTRINE

The goal of copyright law is to provide the public with intellectual and artistic creation. Copyright protection incentivizes creation by granting authors limited monopoly rights over their work.¹³ The fair use doctrine is also essential to the copyright mechanism because it increases access to copyrighted works and limits the scope of copyright protection.¹⁴ Yet weaknesses in these two features of the copyright design—the copyright monopoly and the fair use doctrine—allow disingenuous copyright owners to exploit copyright law.¹⁵

A. *The Copyright Design*

In 1790, the constitutional framers canonized the principle of copyright protection in the Copyright Clause of the U.S. Constitution.¹⁶ The Clause's statement of purpose communicates copyright's primary goals: "To promote the Progress of Science and useful Arts."¹⁷ This statement of purpose embodies the idea that public benefits are generated "through the creation and publication of free expression."¹⁸ The Clause then grants Congress the power to achieve this goal "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁹ Providing authors with copyright protection, and thus economic rights, is an incentive to create and produce, which in turn generates activity and progress in the arts and sciences for the public's intellectual enrichment.²⁰

The economic philosophy underlying copyright law is that the "best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'" is by encouraging individual creation through personal gain.²¹ Therefore, copyright law protects authors to incentivize future creation, which then benefits the public.²² The U.S. Supreme Court has consistently stated that copyright's fundamental goal is securing public benefit.²³ Accordingly, copyright protection is neither an individual nor a natural right; it derives solely from statutes and applies only when certain

13. See U.S. CONST. art. I, § 8, cl. 8; Elkin-Koren, *supra* note 3, at 16.

14. Leval, *supra* note 1, at 1110.

15. See *infra* Parts I.C–D.

16. See U.S. CONST. art. I, § 8, cl. 8.

17. *Id.*

18. Curran, *supra* note 11, at 173; see also Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

19. U.S. CONST. art. I, § 8, cl. 8.

20. Leval, *supra* note 1, at 1107.

21. Mazer v. Stein, 347 U.S. 201, 219 (1954).

22. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). Copyright's immediate impact is rewarding authors for their creative labor, but copyright's ultimate goal, through the reward-incentive, is to encourage "[the creation of useful works] for the general public good." *Id.* (alteration in original) (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

23. See, e.g., Aiken, 422 U.S. at 156.

conditions are met.²⁴ Moreover, copyright protection is limited;²⁵ an author's control over his work is not absolute or perpetual.²⁶

B. Modern Copyright Law: Protection, Rights, Remedies

The modern copyright statute is the Copyright Act of 1976 (the "1976 Act").²⁷ The 1976 Act changed several aspects of copyright law and added § 107, which codified the fair use doctrine.²⁸ To be eligible for copyright protection, a work must be original.²⁹ Neither facts nor ideas are eligible for copyright protection.³⁰ Once a work receives copyright protection, the owner has a bundle of exclusive rights concerning the work.³¹ An owner can also sell or license these exclusive rights individually or collectively.³²

With rights come remedies, and copyright law provides owners with remedies for infringement of their copyrights.³³ Owners may bring infringement actions against anyone who violates any of their exclusive rights.³⁴ The Act provides two damages remedies: actual damages³⁵ and statutory damages.³⁶ If an owner establishes that their copyright was willfully infringed, the court may award additional statutory damages of up

24. See Leval, *supra* note 1, at 1108.

25. See U.S. CONST. art. I, § 8, cl. 8.

26. See Leval, *supra* note 1, at 1107.

27. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.). The Act was the product of "a major legislative reexamination of copyright doctrine." *Harper & Row*, 471 U.S. at 552.

28. 17 U.S.C. § 107 (2012).

29. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) ("[O]riginality requires independent creation plus a modicum of creativity . . ." (citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879))).

30. See 17 U.S.C. § 102(b). The idea-expression distinction—expressions of ideas are copyrightable while ideas themselves are not—respects the First Amendment and copyright law by allowing facts to be freely communicated "while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556.

31. See *Sonmez*, *supra* note 10, at 139. The bundle includes the right to publish, reproduce, adapt, distribute, display, or perform the work. 17 U.S.C. § 106.

32. See *id.* §§ 106, 201(d)(2). The divisibility of the bundle confers standing on any owner or licensee of a right, allowing them to enforce infringement of that right. See *id.* "Standing" or "standing to sue" under federal law means that a party has the "right to make a legal claim or seek judicial enforcement of a duty or right." *Standing*, BLACK'S LAW DICTIONARY (10th ed. 2014). Standing requires a plaintiff to show: "(1) that the challenged conduct has caused [him] actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question." *Id.* Here, standing means the right to bring copyright infringement claims.

33. See 17 U.S.C. § 501.

34. See *id.*

35. *Id.* § 504(b). Actual damages are any damages the copyright owner incurs due to the infringement plus any profits the infringer earned. See *Curran*, *supra* note 11, at 174–75.

36. 17 U.S.C. § 504(c)(1). An owner can seek statutory damages between \$750 and \$30,000 per infringed work. *Id.*

to \$150,000.³⁷ Copyright owners may also seek injunctions³⁸ or request the impounding and destruction of infringing works.³⁹

Because authors can sell any of their exclusive rights, it is common that the party alleging copyright infringement—enforcing infringement of an exclusive right and seeking a remedy—is not the original author of the work.⁴⁰ An owner’s motivation for enforcing infringement of their right does not matter.⁴¹ What does matter is that the owner’s rights “extend only to the limits of the copyright.”⁴²

C. *The Fair Use Doctrine*

The fair use doctrine limits the exclusive rights of copyright holders⁴³ by exempting users from copyright infringement if the user can show that their unauthorized use of a copyrighted work is sufficiently fair to avoid liability.⁴⁴ Technically, a secondary user making “fair use” of a copyrighted work need not obtain the owner’s permission to use the work.⁴⁵ Limiting authors’ exclusive rights ensures that secondary users have access to copyrighted materials.⁴⁶ Access to copyrighted materials furthers copyright’s fundamental goal of public enrichment by allowing users to “exercise their rights to freedom of expression, education, and cultural participation.”⁴⁷ Fair use is intentionally flexible and highly case specific, which allows it to adapt to a variety of copyright cases.⁴⁸

37. *Id.* § 504(c)(2). But the court also has discretion to reduce a statutory damages award if the infringer proves that he was not aware nor had any reason to believe that his conduct was copyright infringement. *See id.*

38. *Id.* § 502.

39. *Id.* § 503.

40. *See* Sonmez, *supra* note 10, at 139–40.

41. Leval, *supra* note 1, at 1128 (“[T]he copyright owner may sue to protect what he owns, regardless of his motivation.”).

42. *Id.*

43. 17 U.S.C. § 107; *see* Leval, *supra* note 1, at 1128 (“As fair use is not an infringement, [the owner] has no power over it.”).

44. *See* Haochen Sun, *Fair Use as a Collective User Right*, 90 N.C. L. REV. 125, 144 (2011).

45. *See* Ned Snow, *Fair Use as a Matter of Law*, 89 DENV. U. L. REV. 1, 3 (2011).

46. *See* Elkin-Koren, *supra* note 3, at 6; Sun, *supra* note 44, at 144.

47. Sun, *supra* note 44, at 144.

48. Snow, *supra* note 45, at 4.

1. History and Doctrine

Although the fair use doctrine was not codified until 1976, it was first introduced into American copyright law in 1841.⁴⁹ In *Folsom v. Marsh*,⁵⁰ Justice Joseph Story explained that certain secondary uses of copyrighted materials displayed such independent creation that they did not constitute infringement.⁵¹ To evaluate this type of use, Justice Story articulated an oft-cited approach to questions of fair use: “[W]e must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”⁵² The fair use doctrine continued as exclusively judge-made law until the Copyright Act of 1976.⁵³ Both the House and Senate reports stated that § 107 was designed to track the preexisting judge-created fair use doctrine, “not to change, narrow, or enlarge [fair use] in any way.”⁵⁴ In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵⁵ the Supreme Court cited Professor Alan Latman’s commentary of common-law fair use to help explain the analysis, which asks, “would the reasonable copyright owner have consented to the use?”⁵⁶

The fair use doctrine is critically important to copyright law.⁵⁷ Fair use is a fundamental policy of copyright law because it represents copyright’s central balance between monopoly protection and public benefit.⁵⁸ The

49. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); see Shahshahani, *supra* note 5, at 276. Fair use appeared a century earlier in English courts of equity. See *Gyles v. Wilcox* (1740) 26 Eng. Rep. 489, 490 (proposing “fair abridgement”). The principle of fair use is said to be as old as copyright itself. See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1410 (2011). The Supreme Court has described fair use as an “equitable rule of reason” developed by judges. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984)). But see Leval, *supra* note 1, at 1127 (countering that fair use is a judge-made limit on statutory copyright, not the product of equity).

50. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

51. *Id.* at 345.

52. *Id.*

53. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); Leval, *supra* note 1, at 1105; see also Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 92 (2014).

54. H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975).

55. 417 U.S. 539 (1985).

56. *Id.* at 550 (citing ALAN LATMAN, STUDY NO. 14 FAIR USE OF COPYRIGHTED WORKS (March 1958), in SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, 86TH CONG., COPYRIGHT LAW REVISION 1, 15 (Comm. Print 1960)).

57. Scholars unanimously agree. See, e.g., Shahshahani, *supra* note 5, at 273 (calling fair use “possibly the most important doctrine in all of copyright”); Sun, *supra* note 44, at 127 (“Fair use is of vital importance in a free and just society.”); see also Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 392 (2005) (“The world is a better place in some small measure because fair use enables it to be so.”).

58. See Leval, *supra* note 1, at 1135–36; see also Madison, *supra* note 57, at 392 (explaining that “fair use matters to copyright law” because it prevents copyright protection from becoming limitless).

doctrine protects overbroad grants of monopoly rights,⁵⁹ safeguards access to knowledge,⁶⁰ has “built-in First Amendment accommodations,”⁶¹ and is highly adaptable.⁶²

2. 17 U.S.C. § 107: The Fair Use Factors

Fair use’s flexibility is a well-recognized strength.⁶³ First, § 107 labels fair use as a limitation on exclusive rights.⁶⁴ It then explains that fair use of a copyrighted work can be made for “criticism, comment, news reporting, teaching . . . , scholarship, or research.”⁶⁵ Each fair use analysis is highly case specific and is determined by evaluating the four factors listed in § 107.⁶⁶ These four enumerated factors require courts to look at fair use from all relevant angles and ask whether a finding of fair use furthers copyright’s goals.⁶⁷ Each factor represents a different consideration pertaining to the determination of fairness, and the factors collectively help determine whether the secondary use at issue constitutes infringement.⁶⁸ The factors represent the common-law principles that judges established to evaluate necessary limitations on copyright infringement.⁶⁹ No single factor is dispositive, and the factors need not be weighted equally.⁷⁰

59. See Leval, *supra* note 1, at 1109. Excessive copyright protections are problematic because they strangle the creative process, impede referential analysis, and stifle the development of new ideas from old ideas. See *id.*

60. Elkin-Koren, *supra* note 3, at 16–17; see, e.g., Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95, 101 (2d Cir. 2014).

61. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); see Sun, *supra* note 44, at 127. Fair use “accommodates [and] encourages a wide range of freedom-promoting activities that involve using copyrighted works for purposes such as news reporting, criticism, teaching, and research.” Sun, *supra* note 44, at 127.

62. See *id.* at 202 (“History [shows] that fair use is a highly dynamic legal tool.”). Fair use has evolved over time by adapting to changing technologies and social conditions. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 46–47 (2001); Sun, *supra* note 44, at 202 (“No matter how fair use changes, what remains unchanged is its capacity to generate active responses and adaptations to new public needs.”).

63. See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009).

64. See 17 U.S.C. § 107 (2012); see also *id.* § 106 (“Exclusive rights in copyrighted works.”).

65. *Id.* § 107.

66. *Id.*; see Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985); Snow, *supra* note 45, at 4.

67. Leval, *supra* note 1, at 1110–11.

68. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”); see Snow, *supra* note 45, at 4 (explaining that the fair use doctrine “follows general principles that guide the analysis of determining fairness”). The statutory factors reflect Justice Story’s articulation. Compare Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901), with 17 U.S.C. § 107. For further discussion, see Leval, *supra* note 1, at 1110–25 (comparing § 107 to *Folsom*).

69. Snow, *supra* note 45, at 4 (stating that the factors represent fair use principles developed over two hundred years).

70. See Harper & Row, 471 U.S. at 560; see also Snow, *supra* note 45, at 4.

“Factor One is the soul of fair use.”⁷¹ This first factor examines “the purpose and character of the [secondary] use”: the degree to which the secondary use transforms the original work, the justification for the use, and whether the secondary use is for a commercial purpose or a nonprofit educational purpose.⁷² A finding of fair use turns, in part, on the degree to which the secondary use is “transformative,”⁷³ how productive the use is, and whether it uses the copyrighted material in a different way or for a different purpose than the original.⁷⁴ Compared to a nonprofit purpose, a commercial secondary use is more likely to weigh against a finding of fair use, although a commercial purpose alone does not defeat fair use.⁷⁵

Factor two examines the nature of the copyrighted work.⁷⁶ This factor reviews the purpose of the original work and aims to protect “the incentives of authorship” by suggesting “that certain types of copyrighted material are more amenable to fair use than others.”⁷⁷ The fair use analysis differentiates between creative works intended for publication and private documents never intended for publication.⁷⁸ Factor two protects reasonable expectations of creators and authors of the type of works that “copyright seeks to encourage.”⁷⁹ Thus, works intended for publication are more deserving of protection against a finding of fair use than works intended only for private purposes.⁸⁰

The third factor examines “the amount and substantiality of the portion [of the work] used in relation to the copyrighted work as a whole.”⁸¹ Factor three bears directly on the analysis under factor one because the portion used must correspond to the proffered justification; the means (the selection and quantity) must match the ends (the transformative justification).⁸² First, the portion used must correspond to the justification articulated under factor one; the means (the selection and quantity) must match the ends (the

71. Leval, *supra* note 1, at 1116.

72. 17 U.S.C. § 107(1); *see* Snow, *supra* note 45, at 4.

73. Judge Pierre N. Leval of the Second Circuit Court of Appeals developed the “transformative” requirement, finding support in early judicial opinions. *See* Leval, *supra* note 1, at 1111 (discussing *Gyles v. Wilcox* and *Folsom v. Marsh*). Judge Leval’s contribution to the fair use analysis was a critical development in fair use jurisprudence. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (endorsing Judge Leval’s position and emphasizing the importance of “transformativeness”).

74. Leval, *supra* note 1, at 1111. Examples of transformative uses include parody, symbolism, and criticism. *Id.*

75. *Harper & Row*, 471 U.S. at 562.

76. 17 U.S.C. § 107(2).

77. Leval, *supra* note 1, at 1116; *see* Snow, *supra* note 45, at 4.

78. Leval, *supra* note 1, at 1116–17.

79. *Id.* at 1122.

80. *Id.*

81. 17 U.S.C. § 107(3). The amount used depends on the context. For example, a secondary use of one line from a haiku differs from a secondary use of one sentence from a novel. Similarly, a secondary use of a single, crucial sentence from a novel differs from a secondary use of multiple pages of inconsequential text. Leval, *supra* note 1, at 1123; *accord* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565–66 (1985).

82. Leval, *supra* note 1, at 1123.

transformative justification).⁸³ In addition, factor three can help determine the secondary use's market impact under factor four.⁸⁴ The amount of the copyrighted work used aids in determining market impact because as the amount of the copyrighted work taken increases, so too does the likely impact on the owner's market.⁸⁵ Judge Pierre Leval has urged courts to determine the importance of factor three by considering copyright's goals by asking: What is the use's justification, and will it negatively impact the benefits of authorship?⁸⁶

Finally, factor four examines whether the secondary use impacts the potential market for, or the actual value of, the original work.⁸⁷ Factor four protects the benefits of authorship in order to incentivize future creation. A secondary use that materially interferes with the market for the original work weighs strongly against fair use.⁸⁸ However, a secondary use that does not substantially impact the original work's market does not automatically favor fair use.⁸⁹ Market impact must weigh against the secondary user when it considerably weakens the incentive to create works for publication.⁹⁰ Above all else, a secondary use must be justified.⁹¹

In sum, the secondary use must stimulate productive thought and public education without impairing the incentives for future creation.⁹² Most importantly, analysis of each factor, and additional questions relevant to the fair use inquiry, must be answered by reference to the central principles of copyright law.⁹³

3. Applying the Fair Use Factors

The application of fair use is a highly fact-specific process.⁹⁴ Analyzing fair use requires identifying the evidentiary facts, applying the four factors to

83. *See id.*

84. *Id.*

85. *Id.*

86. *See id.* at 1124.

87. 17 U.S.C. § 107(4) (2012). The Supreme Court has called factor four the most important fair use factor. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). Judge Leval, on the other hand, suggests that the Court might have overstated the importance of factor four. Leval, *supra* note 1, at 1124.

88. *Id.* For example, in *Harper & Row, The Nation* magazine published only about 300 copyrighted words from President Ford's unpublished memoirs. 471 U.S. at 539. Yet those words constituted "the heart of the [memoir]," *id.* at 565, and *The Nation's* secondary use substantially impacted the market for the original memoir and the market for the *Time* article which had a contract for first publication, and therefore weighed heavily against a finding of fair use, *id.* at 566–69.

89. Leval, *supra* note 1, at 1124 (explaining that lack of market harm does not assure "that the secondary use is justified").

90. *Id.* at 1125.

91. *Id.* at 1124.

92. *Id.* at 1110.

93. *Id.*

94. *See id.*; *see also* *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (describing the distinctions in copyright as "very subtle and refined, and, sometimes, almost evanescent"). Likewise, § 107 merely guides fair use, it does not attempt to define it and it does not offer a rule that can be mechanically applied to decide whether a particular use is fair.

those facts, producing inferences weighing for or against the fairness of the secondary use, and weighing the inferences to determine whether the use is fair.⁹⁵ Consequently, no weighing of inferences in any two fair use cases will be alike.⁹⁶ Each fair use analysis is fact dependent. For example, in 2008 a video designer photographed *Scream Icon*, a street-art drawing, and used a slightly altered version in a video backdrop at several concerts for the band Green Day.⁹⁷ The court rejected the artist's infringement claims, holding that the video backdrop was fair use because it was transformative and did not impact the value of *Scream Icon* or the artist's work in general.⁹⁸

Currently, courts apply fair use as an affirmative defense, as dictated by Supreme Court precedent.⁹⁹ The Court first labeled fair use an affirmative defense in 1985,¹⁰⁰ reaffirmed the label in 1994,¹⁰¹ and solidified its position in 2003.¹⁰² In 1992, when Congress amended § 107, it adopted the Court's 1985 opinion by calling fair use an affirmative defense and adding that defendants always bear the burden of proving fair use.¹⁰³ Some scholars argue that the application of fair use as an affirmative defense has profoundly impacted how the § 107 factors are applied in practice.¹⁰⁴

Fair use operates as an affirmative defense as follows: First, the plaintiff must plead a prima facie case of copyright infringement, which only requires the plaintiff to show that he owns a valid copyright and that the defendant exercised one of the plaintiff's exclusive rights.¹⁰⁵ The current federal pleading standard was articulated in *Bell Atlantic Corp. v. Twombly*¹⁰⁶ and *Ashcroft v. Iqbal*,¹⁰⁷ which heightened the pleading burden on plaintiffs who

See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (Matthew Bender & Co. rev. ed. 2018). This is also exactly what Congress intended. See H.R. REP. NO. 94-1476, at 66 (1976) (explaining that the infinite number of situations and circumstances that can arise in a case precludes establishing exact rules in § 107); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 n.31 (1984) (“[Congress] eschewed a rigid, bright-line approach to fair use.”). The Court has consistently affirmed that § 107 is “not to be simplified with bright-line rules.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

95. Snow, *supra* note 45, at 4–5.

96. *Id.* at 6.

97. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1174 (9th Cir. 2013).

98. *Id.* at 1177–79.

99. See Sun, *supra* note 44, at 141.

100. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (finding that the drafters of § 107 structured the statute “as an affirmative defense requiring a case-by-case analysis”).

101. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572, 590 n.20 (1994) (citing *Harper & Row*, 471 U.S. at 561, to support the proposition that “fair use is an affirmative defense”).

102. *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (calling fair use a constitutionally required affirmative defense).

103. See H.R. REP. NO. 102-836, at 3 & n.3 (1992).

104. See Sun, *supra* note 44, at 136–37.

105. See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1099 (2007).

106. 550 U.S. 544 (2007).

107. 556 U.S. 662 (2009).

must now show that their claims are “plausible.”¹⁰⁸ Next, the defendant must prove, as an affirmative defense, that his use was fair use. Under *Twombly* and *Iqbal*, defendants, who are already required to raise and plead fair use in their answers,¹⁰⁹ must raise fair use in their answers and allege sufficient facts to make fair use plausible.¹¹⁰ Failing to do so may cause the court to grant a motion to strike the fair use defense.¹¹¹ Judges can (and do) decide fair use as a matter of law, which ends the case before trial.¹¹² Allowing judges to decide fair use as a matter of law comports with the fact that judges invented and developed fair use.¹¹³

4. Problems in Fair Use

Because the fair use doctrine is a highly fact-specific factor test, it is primarily criticized for offering little to no guidance in practical application. Due to this lack of guidance, fair use is also criticized for producing varied outcomes across cases. Another niche line of criticism identifies the problems specifically caused by applying fair use as an affirmative defense.

The fair use doctrine’s flexibility is both a strength and a weakness.¹¹⁴ The primary criticism of fair use is that it is too vague¹¹⁵ and, therefore, that the

108. Compare *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 570, with FED. R. CIV. P. 8(a). See generally *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) (“There is a ‘new sheriff in town’ now policing [the Federal Rules of Civil Procedure], and his name is ‘*Twiqbal*.’”). Many lower courts apply the standard of *Twombly* and *Iqbal* to affirmative defenses. See Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 705–06 (2015).

109. A party must raise any claims or affirmative defenses in a responsive pleading (e.g., complaints, answers, or amended versions thereof). FED. R. CIV. P. 8(c)(1), 12(b).

110. See Loren, *supra* note 108, at 706; see also Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1784 (2010) (“Establishing the answers [to the fair use inquiries] 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).”).

111. FED. R. CIV. P. 12(f).

112. See Snow, *supra* note 45, at 9. In 2010 the Second Circuit explained that issues of substantial similarity typically do not require discovery or fact finding because the court need only visually compare the works. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010); see Robert T. Sherwin, *Clones, Thugs, ‘n (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe from Copyright Bullies*, 64 DEPAUL L. REV. 823, 858 (2015).

113. See *supra* Part I.C.1 (discussing fair use’s common-law roots).

114. See Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1857 (2007) (describing the “open-ended and discretionary character” of fair use as both “meritorious flexibility” and a “main cause of its deficiencies”). In *Folsom*, Justice Story explained that the fact-specific fair use inquiry could not generate “general principles applicable to all cases.” *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

115. See Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 400 (2009) (calling § 107 “notoriously vague”); Shahshahani, *supra* note 5, at 277. Section 107 is flexible (or vague) by design. See 17 U.S.C. § 107 (2012); see also Sun, *supra* note 44, at 136 (explaining the legislative intent that courts were not to apply § 107 as a bright-line rule).

factors offer little guidance in practice.¹¹⁶ This vagueness manifests in a disconnect between fair use in theory and in practice.¹¹⁷ As a result, fair use outcomes are unpredictable.¹¹⁸ Accordingly, fair use has earned some unflattering epithets: “‘disarray,’ ‘in bad shape,’ ‘notoriously vague,’ ‘nobody knows,’ ‘great white whale of American copyright law,’ ‘protean,’ ‘difficult—some say impossible—to define,’ ‘confusion,’ ‘guess and pray,’ ‘mysterious,’ ‘disorderly basket of exceptions,’ ‘precarious,’ ‘nearly impossible to predict,’ ‘as vague as possible,’ ‘more fickle than fair,’ and ‘astonishingly bad.’”¹¹⁹

The doctrine’s unpredictability and uncertainty potentially chill creativity because, without guidance, potential secondary users contemplating using copyrighted works are unable to assess their liability.¹²⁰ Previous fair use cases also offer no reliable guidance to secondary users.¹²¹ The doctrine’s ambiguity also causes risk aversion among copiers, who would prefer to license, settle, or refrain from using a work at all to avoid litigation.¹²² Because of the prohibitive costs and uncertain outcomes, potential secondary users are vulnerable to their own self-censorship.¹²³ In essence, potential secondary users might refrain from creating at all, rather than risk liability.¹²⁴

Commentators argue that the doctrine’s unpredictability and uncertainty are anathema to copyright’s purpose, which is to promote the progress of

116. See, e.g., Madison, *supra* note 57, at 391 (“[G]enerations of scholars, judges, and lawyers have struggled since [1939] to make sense of fair use, with little success.”); Mazzone, *supra* note 115, at 395 (“Fair use is not working.”).

117. See Carroll, *supra* note 105, at 1122 (calling fair use critical “in brokering expressive freedoms among first-generation authors and their successors,” but undermined in practice by its uncertainty because “those who produce works for public consumption” are unwilling to rely on fair use due to the high costs of “interpreting standards and the financial risks associated with relying on fair use”); see also Parchomovsky & Goldman, *supra* note 7, at 1485 (arguing that, in theory, fair use should significantly limit authors’ rights because fair use “sanctions private takings of intellectual property without requiring the payment of compensation,” but that, in reality, fair use is “more bark than bite” because its “ability to shield unauthorized users is greatly undermined by the uncertainty that has become the hallmark of the doctrine”).

118. Sun, *supra* note 44, at 136. The U.S. Copyright Office has an online fair use index: a searchable database of court opinions which attempts to make the principles and applications of fair use more accessible and comprehensible. See *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/> [<https://perma.cc/P9TE-AGTC>] (last updated July 2018).

119. Shahshahani, *supra* note 5, at 278–79 (footnotes omitted) (collecting quotations from scholarship); see David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) (suggesting that Congress could have “legislated a dartboard rather than” the § 107 factors and the result would be the same).

120. See Balganes, *supra* note 9, at 742–43; Carroll, *supra* note 105, at 1106; Shahshahani, *supra* note 5, at 277–78.

121. See Carroll, *supra* note 105, at 1102.

122. Balganes, *supra* note 9, at 743.

123. Sun, *supra* note 44, at 156. Self-censorship means that users give up their right to fair use. *Id.*

124. Shahshahani, *supra* note 5, at 278. The costs and burdens associated with the uncertainty in defending fair use are demonstrated in the story of documentary filmmaker John Else. See *infra* Part I.D.2.

knowledge, because uncertainty chills creative activity.¹²⁵ Consequently, many scholars offer proposals to combat fair use's vagueness and uncertainty; these proposals attempt to add guidance to the doctrine by either adjusting the fair use analysis or through more drastic changes like taking the doctrine away from the courts.¹²⁶

Another category of fair use criticism takes issue with the doctrine's treatment as an affirmative defense. For example, Professor Lydia Pallas Loren argues that the placement of the burden to prove or disprove fair use may greatly impact the outcome of litigation at various stages and that it is misguided to place the burden of production on the defendant.¹²⁷ For example, even the Supreme Court, in *Campbell v. Acuff-Rose Music, Inc.*,¹²⁸ noted that a party raising fair use would have difficulty meeting its burden without evidence about relevant markets.¹²⁹ Because it is more difficult to prove the absence of something than it is to prove the presence of the same thing, the plaintiff is generally better positioned to supply relevant evidence of market harm.¹³⁰ Moreover, when raised as an affirmative defense, fair use deters and chills free speech and expression.¹³¹ Finally, which party bears the burden of proving or disproving fair use impacts the parties' settlement positions and the behavior of other potential users even before the threat of litigation.¹³² The uncertainty in fair use exaggerates a defendant's burden of proof to the point of "ultimately dictating that the defendant loses."¹³³

D. Understanding Abusive Copyright Litigation

This Note examines two types of copyright-infringement enforcement, defined together as "abusive copyright litigation."¹³⁴ The first type of abusive enforcement behavior comes from "nonproducing entities," while the second type comes from "producing entities." Both of these harm users, the courts, and copyright law through their abusive enforcement of copyright infringement.¹³⁵ These entities are not Professor Latman's "reasonable copyright owner[s]" because both nonproducing and producing entities have

125. Shahshahani, *supra* note 5, at 277–78.

126. *See infra* Part II.A (reviewing proposals to reform fair use).

127. Loren, *supra* note 108, at 691, 706–07.

128. 510 U.S. 569 (1994).

129. *Id.* at 590; *see* Loren, *supra* note 108, at 707.

130. Loren, *supra* note 108, at 707.

131. *Id.* at 709–10 (arguing that the burden to prove fair use, and knowledge of the burden to prove the defense, might "deter speech that would otherwise occur if the burden were allocated differently"); *see* Snow, *supra* note 110, at 1791–92 (arguing that fair use chills speech when treated as an affirmative defense). Furthermore, when a secondary use involves speech, fair use essentially requires the speaker to prove he has a right to speak. *See* Loren, *supra* note 108, at 709 ("Many fair uses involve speech activities."); *see also* Snow, *supra* note 110, at 1793–95.

132. *See* Loren, *supra* note 108, at 691; Snow, *supra* note 110, at 1791–92.

133. Snow, *supra* note 110, at 1791.

134. This Note examines the two types of abusive copyright litigation together because they have similar relationships to the fair use doctrine and because they cause similar harms.

135. Sonmez, *supra* note 10, at 138.

the capability and means to enforce copyrights that the “reasonable copyright owner” might not.¹³⁶

1. Nonproducing Entities

The first type of abusive copyright litigation comes from nonproducing entities.¹³⁷ Nonproducing entities can afford to unreasonably enforce copyright infringement because it is their sole source of revenue. Nonproducing entities intentionally abuse copyright’s enforcement mechanisms by acquiring copyright ownership solely to enforce infringement and threaten litigation to extract damages or force settlement.¹³⁸ These entities are “nonproducing” because they do not produce copyrightable content.¹³⁹ For example, Righthaven LLC, an “enforcement firm,” partnered with newspapers to enforce copyrights against online users, usually “unsophisticated individuals and nonprofits,” who either fully or partially copied news articles or photos.¹⁴⁰ Righthaven threatened litigation but offered to settle with infringers for an amount between \$1,000 and \$5,000.¹⁴¹

Nonproducing entities are increasingly problematic.¹⁴² Their strategies are technically legal under the current law, but they seek damages for copyright infringement to generate revenue, not to deter future infringement.¹⁴³ By simply filing an action in federal court, nonproducing

136. See *supra* note 56 and accompanying text; see also LATMAN, *supra* note 56, at 15.

137. Nonproducing entities are also called nonpracticing or nonperforming entities. See Balganes, *supra* note 9, at 732. Colloquially, they are usually called “copyright trolls.” See *Copyright Troll*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “copyright troll” as “[a] person, usu[ally] an entity, that acquires . . . the right to sue infringers of [a copyright]”). The term copyright troll follows from patent law, where “nonpracticing entity” refers to “patent trolls.” See *Nonpracticing Entity*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A person or company that acquires patents with no intent to use, further develop, produce, or market the patented invention. When a nonpracticing entity focuses on aggressively or opportunistically enforcing the patent against alleged infringers, it is also termed (pejoratively) a *patent troll*.”). This Note only discusses “nonproducing entities” in copyright.

138. See Greenberg, *supra* note 53, at 58–59. A nonproducing entity either threatens “litigation to force a large monetary settlement or instead proceeds to litigate its rights with the sole objective of obtaining damages from a defendant.” Balganes, *supra* note 9, at 732.

139. Nonproducing entities do not create, distribute, or use creative expression (i.e., copyrightable material). See *id.*

140. See Greenberg, *supra* note 53, at 55–56.

141. *Id.* at 56. Scholars have investigated the potential benefits of nonproducing entities. See, e.g., *id.* at 71–72, 75 (concluding, however, that the costs of the nonproducing-entity business model will outweigh any potential benefits).

142. See Brad A. Greenberg, *Copyright Trolls and the Common Law*, 100 IOWA L. REV. BULL. 77, 77 (2015); Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1145 (2015). But abusive copyright litigation from nonproducing entities is also not a new problem. In the 1870s, Thomas Wall, the world’s “first copyright troll,” obtained power of attorney, often for deceased composers, and extracted the statutory penalty of two pounds by threatening infringement actions for unauthorized performances of songs. Greenberg, *supra* note 53, at 63.

143. See Balganes, *supra* note 9, at 732; Sonmez, *supra* note 10, at 140. Enforcing copyright infringement solely to extract damages is diametrically antithetical to the purpose of copyright protection. See *supra* Part I.A.

entities can force internet service providers to reveal the names and addresses of alleged infringers. The nonproducing entities then send letters threatening to pursue statutory damages or offering to settle.¹⁴⁴ Even defendants with strong fair use defenses are wise to settle given the time, cost, and uncertainty of litigation and of defending fair use.¹⁴⁵

2. Producing Entities

The second type of abusive copyright litigation comes from producing entities.¹⁴⁶ Producing entities can afford to unreasonably enforce copyright infringement because they are wealthy, smart, and influential.¹⁴⁷ Producing entities are very different from nonproducing entities because they create, produce, or obtain copyrighted content for purposes other than extorting litigation settlements.¹⁴⁸ Producing entities aggressively enforce copyright infringement and chill free speech by claiming excessive protection and threatening liability.¹⁴⁹ These entities are legitimate copyright owners, such as record labels, mass-media companies, and television networks, with reputations for aggressively monitoring, threatening, and enforcing both

144. Greenberg, *supra* note 142, at 78 (“The letter includes, or is followed with, an offer to settle the dispute for somewhere between \$1,000 and \$5,000, with a frequently used \$4,000 figure ‘calculated to be just below the cost of a bare-bones defense.’” (quoting *Ingenuity 13 LLC v. John Doe*, No. 2:12-CV-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013))); Curran, *supra* note 11, at 180.

145. Greenberg, *supra* note 53, at 56.

146. This Note refers to “producing entities” as entities that actually produce, create, or distribute copyrightable content. In other words, the exact opposite of nonproducing entities. See *supra* note 139 and accompanying text. Some commentators call this type of copyright enforcement “aggressive copyright claims.” See Alfred C. Yen, Eldred, *the First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 677 (2003) (explaining that these claims “aggressively test the boundaries of copyright” by pursuing claims premised on interpreting copyright law to stretch copyright protection beyond the central goal of prohibiting reproductions of copyrighted works and that, as a result, these claims are often brought against secondary users who added meaningfully to the copyrighted work because “[a]t their most extreme, aggressive copyright claims assert that almost any borrowing from a copyrighted work constitutes actionable infringement”).

147. See Sherwin, *supra* note 112, at 826–31; see also Sun, *supra* note 44, at 160 (arguing that copyright law is meant to “promote and protect the public welfare,” but that the legislature is able to alter copyright law from the “public welfare-oriented” approach “into a copyright holder-centric lawmaking process,” offering the recent expansion in copyright protection—which catered to corporate interests by increasing control over knowledge and information—as an example of the heavy influence of “copyright-based conglomerates”). Thus, Haochen Sun argues that “the public at large has failed to have its concerns voiced in the copyright legislative process or to have them seriously scrutinized by legislators,” partially because legislatures focus on individual interests of copyright holders and “pay little attention to the need for defending the public’s collective interests in knowledge and information contained in copyrighted works.” Sun, *supra* note 44, at 160.

148. See Sherwin, *supra* note 112, at 832; see also Greenberg, *supra* note 53, at 59.

149. See Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 434 (2007) (describing the chilling effect on fair use expression as “well-documented” and “exacerbated by the tendency of copyright owners to take advantage of the uncertainty to pursue aggressive copyright claims”).

legitimate and nominal copyright infringement.¹⁵⁰ Producing entities frequently demand large payments “for conduct that either constitutes fair use or, even if infringing, does no harm to (and in many cases benefits) the value of” the producing entity’s copyrights.¹⁵¹ Producing entities use litigation or the threat of litigation to “snuff out . . . fair use.”¹⁵² This type of abusive copyright litigation harms successful operation of the fair use doctrine because even clear fair uses (and therefore future creations) are discouraged by threat of heavy enforcement by big companies.¹⁵³

For example, in 1990, documentary filmmaker John Else shot a scene backstage at the San Francisco Opera, which included a four-and-a-half-second clip of *The Simpsons* playing on a television in the corner.¹⁵⁴ When Else requested approval to include the scene in his film, Fox, the parent company, sought a \$10,000 licensing fee to use *The Simpsons* clip.¹⁵⁵ Else could not afford the fee and replaced the clip in his film.¹⁵⁶ But why did Else not assert fair use? Else consulted a lawyer who told him that his use was fair use but advised him that asserting fair use was futile because Fox would “depose and litigate [him] within an inch of [his] life.”¹⁵⁷

3. The Causes and Effects of Abusive Copyright Litigation

Several weaknesses in copyright law facilitate both types of abusive copyright litigation.¹⁵⁸ First, the divisibility of exclusive rights under the

150. See Sherwin, *supra* note 112, at 825, 832, 864 (calling these sophisticated entities “copyright thugs” and bullies with track records of using the courts and the threat of litigation to get their way).

151. *Id.* at 832 (associating this behavior with Professor Rochelle Dreyfuss’s “if value, then right” theory of intellectual property: [i]f value exists, then someone must have a right to that value, and that value will be extracted no matter what” (quoting Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405 (1990))).

152. Sherwin, *supra* note 112, at 864.

153. See *id.* at 826–32 (describing stories of people bullied out of fair uses); see also Sun, *supra* note 44, at 157–58 (explaining that many copyright owners use aggressive litigation strategies to deter the public from asserting its fair use right and that many copyright holders take advantage of the user’s burden to prove fair use by bringing infringement actions even in cases of strong fair use, doing so hoping “that the user would refrain from the use rather than spend resources in his defense”).

154. LESSIG, *supra* note 8, at 95–96.

155. *Id.* at 96–97. Fox is a producing entity because it owns the copyright to *The Simpsons* for reasons other than to generate revenue by enforcing infringement.

156. *Id.* at 97 (describing the situation as Else not having the “money to buy the right to replay what was playing on the television backstage at the San Francisco Opera”).

157. *Id.* at 98–99. Professor Lessig explains that when lawyers hear Else’s story their immediate response is “fair use.” *Id.* at 97. Else gave four reasons why he could not “rely on [fair use] in any concrete way”: network-mandated insurance, the uncertainty of defending fair use, the futility of opposing Fox, and film deadlines and budget. *Id.* at 98–99.

158. Balganesch, *supra* note 9, at 738 (finding it “surprising” that it took almost thirty years for copyright trolls to emerge, and unsurprising that when they did, “courts and defendants had few mechanisms” to curb them); see *id.* at 726 (“[C]opyright law has long enabled behavior that is only today pejoratively described as ‘trolling.’”); see also Greenberg, *supra* note 53, at 61 (noting that nonproducing entities rely “on several provisions of copyright law that are vulnerable to exploitation”).

Copyright Act of 1976 confers standing to enforce infringement on any owner or licensee.¹⁵⁹ Second, exploitative revenue-driven copyright enforcement is possible because copyright law functions on economic incentives.¹⁶⁰ Nonproducing entities take advantage of the monopoly but are not incentivized to create—in fact, they do not create at all.¹⁶¹ Finally, abusive copyright litigation is possible in part because of the uncertainty in the fair use doctrine.¹⁶² The inherent uncertainty causes many would-be users—unable to determine whether their use would qualify as fair use—to refrain from creating at all.¹⁶³ Thus, fair use’s vagueness facilitates abusive litigation strategies from entities who are aware of the impact of this vagueness on risk-averse users.¹⁶⁴ These strategies harm copyright law.

Abusive copyright litigation contravenes copyright’s central goals, deters future creation, chills free speech, and burdens courts.¹⁶⁵ Many users decide to not make fair use of copyrighted works because of the “visible coercion” that a copyright owner might enforce infringement against them, which is, in part, the result of many copyright owners who exaggerate the scope of their rights to prevent users from making fair uses of their works.¹⁶⁶ When the costs attending the incentive to create are detached from the costs to enforce against infringement, copyright’s balance is disrupted.¹⁶⁷ This coercion also extends to the public at large.¹⁶⁸

159. Balganes, *supra* note 9, at 726–27 (explaining that the Act recognized multiple ownerships of a single work, which allows “each owner to hold a narrowly defined and limited set of rights”).

160. Sonmez, *supra* note 10, at 138.

161. *See* Curran, *supra* note 11, at 175–76. In addition, the sheer volume of copyrights lacking any commercial value, and the fact that statutory damages for infringement can overcompensate owners of valueless copyrights, further exacerbates the potential for abuse. *See* Greenberg, *supra* note 53, at 62.

162. *See* Sun, *supra* note 44, at 158.

163. *See id.* (“Users become afraid of being sued because of the significant time, energy, and financial cost of litigation.”)

164. *See* Balganes, *supra* note 9, at 742 (illustrating how the fair use doctrine was useless to defendants sued by Righthaven, and how the doctrine facilitated Righthaven’s strategy); *see also* Sun, *supra* note 44, at 157 (explaining the opportunity for abusive litigation strategy because copyright holders take “advantage of the user’s burden to prove fair use” and often bring claims against users with strong fair use defenses).

165. *See* Greenberg, *supra* note 53, at 55 (explaining that abusive copyright litigation “threatens to impose heavy costs on society, particularly by chilling speech and discouraging innovation”); Sonmez, *supra* note 10, at 149–50. Nonproducing entities disrupt the copyright mechanism by exploiting the incentives for authorship without actually “contributing to the creative works market.” Greenberg, *supra* note 53, at 57 n.15. This practice also discourages future creators. *See id.*

166. *See* Sun, *supra* note 44, at 157–59 (explaining that publishers often do this through notices in books, or by stating that users may only use a certain limited number of lines, and that publishers “have turned a blind eye to the fair use doctrine”).

167. Sonmez, *supra* note 10, at 140 (“[W]hen the incentive and the cost to create a work are separated from the right to prosecute infringement of the work, there is no counterbalance to whether a copyright holder should prosecute the infringement. If exacting statutory penalties for infringement comes with little cost . . . then prosecuting every instance of infringement, even every *potential* infringement, becomes highly rewarding for the entity that holds the right to sue for it.”); *see also supra* note 151 and accompanying text.

168. *See* Sun, *supra* note 44, at 158–59.

II. ISOLATED SOLUTIONS TO CONNECTED PROBLEMS: REFORMS TARGET EITHER FAIR USE OR ABUSIVE COPYRIGHT LITIGATION

This Note highlights two distinct but connected problems facing modern copyright law: the fair use doctrine and abusive copyright litigation. Thus far, proposals for reform separately target one or the other. A review of these proposals reveals that both approaches recommend significant changes or involve new parties. This Part first discusses a variety of proposed reforms to fair use and then explains some of the proposed approaches to dealing with abusive copyright litigation.

A. *The Current State of Fair Use Reform*

In 1939, the Second Circuit called the fair use doctrine “the most troublesome in the whole law of copyright.”¹⁶⁹ Current scholarship suggests that fair use is not any less troublesome today.¹⁷⁰ The wealth of scholarship targeted at strengthening the doctrine is unsurprising given the importance of fair use to copyright law.¹⁷¹ A common trend among reform proposals is the disconnect between fair use in theory and in practice.¹⁷² The first category of fair use reform focuses on reform through judges and the courts by targeting the way judges apply the doctrine. This category is standards driven.¹⁷³ The second category focuses on reform in the legislative or administrative realm. This category is rules driven.¹⁷⁴ There is also a third category of reform which argues that the problem is the characterization of fair use as an affirmative defense.

Proponents of judge- and court-focused reform argue that the courts “are the most natural venue for fair use reform” because judges created and developed fair use.¹⁷⁵ One commentator says, put simply, that fair use is safer in judges’ hands because they are most likely to guard it.¹⁷⁶ Judge- and court-focused proposals also argue that the federal courts are the best place

169. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

170. *See Sun*, *supra* note 44, at 136.

171. *See Samuelson*, *supra* note 63, at 2540 (noting the common criticisms of fair use, including the unpredictability accompanying the “fact-intensive, case-by-case nature” of the analysis and the lack of consensus among judges on fair use’s underlying principles).

172. *See LESSIG*, *supra* note 8, at 99. Professor Lessig argues that fair use “has the right aim” but that “practice has defeated the aim” because fair use cannot function properly. *Id.* The theory—“fair use means you need no permission”—“supports free culture and insulates against a permission culture.” *Id.* The practice—a combination of fair use’s “fuzzy lines” and “the extraordinary liability if [the] lines are crossed”—“means that the effective fair use for many types of creators is slight.” *Id.*

173. *See Shahshahani*, *supra* note 5, at 280–82.

174. *See id.* at 282. However, Michael Carroll’s proposal to create a “Fair Use Board” is an exception to the rule-driven categorization because Carroll rejects a “rule-like” approach to fair use. Carroll, *supra* note 105, at 1090–92.

175. Shahshahani, *supra* note 5, at 322 (noting that judges “gave us fair use in the first place”); *see supra* Part I.C.1 (discussing fair use’s common-law history).

176. Shahshahani, *supra* note 5, at 341 (“At the very least, [judges] will not do any worse than Congress.”).

to reform copyright law.¹⁷⁷ They note that courts are a better place to reform fair use because legislative reform through Congress is unrealistic.¹⁷⁸ Congress, they argue, will not welcome fair use reform.¹⁷⁹ Judicial proposals to reform fair use include using “policy-relevant clusters” to supplement the four-factor analysis;¹⁸⁰ applying a double standard of review and one-sided application on summary judgment favoring defendants;¹⁸¹ and encouraging courts to consider additional factors beyond the four listed in § 107.¹⁸²

The second set of reforms require congressional action.¹⁸³ These proposals argue that rules and administrative agencies can better guide secondary users.¹⁸⁴ They also argue that courts are slow to change whereas Congress can make changes in response to specific problems.¹⁸⁵ Legislative and administrative proposals include rewriting § 107;¹⁸⁶ creating a new administrative agency to handle fair use;¹⁸⁷ establishing fair use harbors;¹⁸⁸

177. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (interpreting copyright law to accomplish copyright reform); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740, 766 (2013) (book review) (explaining that copyright reform is possible without congressional input and that fair use reform “would involve judicial interpretation of rules that the copyright statute either does not address or that Congress has seemingly chosen to leave to common law interpretation”); Shahshahani, *supra* note 5, at 274 (“[F]ederal courts are more hospitable than Congress to pro-user fair use reform, and that doctrinal scholarship is more fruitful than proposing ideal-type legislation.”).

178. Shahshahani, *supra* note 5, at 274, 319 (analyzing the political economy of copyright legislation and calling proposals requiring congressional action to limit copyright owners’ power “unrealistic”); see *id.* at 312–13 (arguing that recent fair use legislation demonstrates that “Congress is in no way inclined to support legislation that would strengthen fair use or otherwise improve the position of users and second-generation creators vis-à-vis content owners”).

179. *Id.* at 319 (arguing that evidence shows “that if Congress acts at all, it would likely be to increase the power of copyrightholders vis-à-vis users and second-generation creators,” and that any congressional reform of fair use would be “either nonexistent or counterproductive”).

180. See Samuelson, *supra* note 63, at 2541–43 (proposing to complement the fair use analysis with common patterns in fair use case law which will help predict whether a particular use is likely to be fair use).

181. See Snow, *supra* note 45, at 2–3, 46 (urging courts to construe fair use as a question of fact for the jury, to grant fair use as a matter of law in limited circumstances, and to grant summary judgment only in favor of fair users).

182. See Samuelson, *supra* note 63, at 2540–41 (listing proposed additional factors, such as “the likelihood of market failure, the plaintiff’s rationale for insisting [on a license], chilling effects on free speech, chilling effects on innovation, the impact of network effects, whether the defendant’s use was reasonable and customary in her field of endeavor, [the age of the work], distributive values, and even the fairness of the use” (footnotes omitted)).

183. See Shahshahani, *supra* note 5, at 274.

184. See *id.* at 274, 280.

185. See Madison, *supra* note 57, at 395.

186. See *id.* at 396–97 (proposing to rewrite § 107 to address its “emptiness”).

187. See Mazzone, *supra* note 115, at 399, 412–37 (proposing to regulate fair use through an administrative agency which would enforce legislation, issue regulations, bring enforcement actions, and adjudicate fair use disputes through administrative law judges).

188. See Parchomovsky & Goldman, *supra* note 7, at 1488, 1508–18 (proposing the replacement of the fair use standard with rules called “fair use harbors,” which declare certain uses presumptively legal, providing users with certainty). For example, any literary work containing more than one hundred words could be copied without permission. *Id.* at 1511.

and creating a “Fair Use Board” within the U.S. Copyright Office and granting it the power to declare a particular use fair use.¹⁸⁹

The third category of fair use reform proposes removing fair use’s affirmative defense label. This category argues that fair use should neither be labeled nor applied as an affirmative defense. Instead, these proposals argue that fair use should be considered either a mere defense,¹⁹⁰ or as an individual,¹⁹¹ user,¹⁹² or collective user right.¹⁹³

In support, proponents of this approach argue that treating fair use as an affirmative defense “reduces users’ right to fair use to ‘the right to hire a lawyer to defend [one’s] right to create.’”¹⁹⁴ First, because the plaintiff’s initial burden is minimal, fair use as an affirmative defense prematurely shifts the burden to the defendant.¹⁹⁵ Second, the application of fair use as an affirmative defense increases the costs “for the public to exercise its fair use right.”¹⁹⁶ Third, the modern pleading standard intensifies defendants’ burden, making a fair use defense procedurally and financially prohibitive, easily costing six figures in attorney’s fees.¹⁹⁷ Because of the uncertainty, costs, and time needed to defend fair use, many defendants, even those with strong fair use claims, are essentially forced to settle.¹⁹⁸ This reality calls into question “whether a user’s fair use right can still be adequately protected.”¹⁹⁹ Finally, the heightened First Amendment concerns associated with treating fair use as an affirmative defense further support “treating fair use as part of the inquiry into infringement [and] not as a separate inquiry to be undertaken after the plaintiff has demonstrated more than de minimis copying.”²⁰⁰

189. See Carroll, *supra* note 105, at 1090–91, 1123, 1148 (proposing a Fair Use Board within the U.S. Copyright Office to decide fair use petitions).

190. See Loren, *supra* note 108, at 688, 699 (advocating for fair use as “a mere defense that shapes the scope of a copyright owner’s rights” and advising the Supreme Court to reconsider and reject treating fair use as an affirmative defense). Under this approach, the pleading requirement disappears, “an omission of the defense from the answer would not preclude consideration of the doctrine by the court,” and, most significantly, the four factors in § 107 “would become part of the analysis of whether or not the defendant’s actions constitute[d] an infringement.” *Id.* at 711.

191. See generally Snow, *supra* note 45 (advocating fair use as a right).

192. See Elkin-Koren, *supra* note 3, at 4, 36–39 (following examples in Israel and Canada and advocating a user-rights approach to fair use).

193. See Sun, *supra* note 44, at 130 (defining fair use as a “collective right held by the public to facilitate and enhance participation in communicative actions”).

194. *Id.* at 156 (alteration in original) (footnote omitted) (quoting LESSIG, *supra* note 8, at 187).

195. See Loren, *supra* note 108, at 688 (explaining that the burden shifts to the defendant “with little needed from the plaintiff to demonstrate a prima facie case of infringement, thus opening the door to the wide range of remedies permissible under the Copyright Act”).

196. Sun, *supra* note 44, at 156.

197. Loren, *supra* note 108, at 688; Sun, *supra* note 44, at 155.

198. See Sun, *supra* note 44, at 156; see also LESSIG, *supra* note 8, at 187.

199. Sun, *supra* note 44, at 156.

200. Loren, *supra* note 108, at 710; see Snow, *supra* note 8, at 137 (tracing the history of fair use “from a speech right that defined the contours of copyright to an exception that excuses infringement”); Sun, *supra* note 44, at 156.

Advocates of considering fair use as a right, or as a mere, nonaffirmative defense, offer several sources of support. First, scholars argue that this conception is supported by fair use's history and that fair use has long been used to protect the rights of fair users.²⁰¹ Second, they highlight the interaction between § 107 and § 106 (which sets forth the exclusive rights of copyright owners) to suggest that fair use should not operate as an affirmative defense; § 106 explains that a copyright owner's rights are subject to § 107 and § 107 specifies that it applies notwithstanding § 106.²⁰² Furthermore, reading fair use as a right also makes sense procedurally both from a historical perspective (as this reflects how judges applied fair use²⁰³) and currently because the party seeking relief typically bears the burden of persuasion.²⁰⁴ Third, the legislative history of the 1976 Act did not label fair use as an affirmative defense and did not intend to place the burden of proving fair use on the defendant.²⁰⁵ Commentators argue that the *Campbell* Court was wrong to cite the House report on the 1992 amendments to the Copyright Act to support labeling fair use an affirmative defense because the report is not authoritative with respect to the 1976 Act.²⁰⁶ Finally, there is procedural support against treating fair use as an affirmative defense.²⁰⁷

Judges have also opined on the proper treatment of fair use. For example, in 2001 the Eleventh Circuit began a fair use analysis by arguing in a footnote that fair use should be considered an affirmative right under the 1976 Act, and not a mere affirmative defense, pointing out that this view comported with the Act's definition of fair use because fair use is "not a violation of copyright."²⁰⁸ In 2004, Judge Dennis Jacobs on the Second Circuit explained

201. Snow, *supra* note 8, at 137, 169 ("Treating fair use as an affirmative defense, courts require fair users to demonstrate that their use should be protected. . . . Compared to its past status as a right, fair use has weakened significantly." (footnotes omitted)); Sun, *supra* note 44, at 156.

202. See 17 U.S.C. §§ 106–07 (2012); Loren, *supra* note 108, at 697–98; see also Snow, *supra* note 8, at 164.

203. See Snow, *supra* note 8, at 142–55.

204. See Loren, *supra* note 108, at 691, 697, 705–09; see also Snow, *supra* note 8, at 164.

205. See Loren, *supra* note 108, at 688, 699–702, 711; see also *id.* at 685 ("[T]he legislative history cuts against viewing fair use as an affirmative defense, and the legislative history explicitly confirms what the statute clearly states: Congress did not intend fair use to be an affirmative defense."); Snow, *supra* note 8, at 162, 165–66.

206. See, e.g., Loren, *supra* note 108, at 703–04, 711 (arguing that the legislative history intended fair use to evolve to "address new uses on a case-by-case basis," and that it did not permit the Court to "fundamentally alter the nature" of the fair use doctrine because it was improper to treat fair use as "requiring the defendant [to] bear the burden of proof concerning important factors that inform" fair use (i.e., the evaluation of whether the defendant's conduct was unlawful)).

207. See Snow, *supra* note 8, at 165–66 (arguing that, because it is easier for the copyright holder to satisfy the burden of production, that burden should lie with the plaintiff and not the defendant); see also Loren, *supra* note 108, at 691 ("Given that the prima facie case of infringement already requires the plaintiff demonstrate that the copying by the defendant was 'improper,' it seems that whether a use is fair or not would constitute a necessary or extrinsic element of the plaintiff's cause of action. Further, . . . the copyright owner often has better access to relevant evidence on the fair use factors.").

208. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (citing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996)). In *Bateman*,

that fair use does not exist by tolerance; instead it is “a right—codified in § 107 and recognized since shortly after the Statute of Anne [of 1709].”²⁰⁹

B. Solutions to Abusive Copyright Litigation

To combat abusive copyright litigation, scholars and judges have offered solutions to thwart the “disingenuous efforts of various trolls by promoting accountability in copyright enforcement while restoring the framers’ original intent to the Copyright Act.”²¹⁰ Like proposals to reform fair use, proposals to quell abusive copyright litigation focus on either judicial solutions or legislative solutions.²¹¹

Proponents of targeting abusive copyright litigation through legislation argue that Congress is best positioned for a long-term solution and that congressional action provides uniform and systematic legal change to wholly disrupt the nonproducing entity business model.²¹² These proposals also note that Congress has other constitutional powers regarding copyright²¹³ and that the Supreme Court is deferential to Congress’s copyright decisions.²¹⁴ Two common approaches are limiting statutory damages²¹⁵ and denying joinder.²¹⁶

In the courts, one popular procedural tactic against abusive copyright litigation is Rule 11 sanctions.²¹⁷ Defendants and courts can use sanctions to threaten nonproducing entities and ensure that they only file claims against actual infringement, or not at all.²¹⁸ Because litigation is a nonproducing entity’s sole source of revenue, the threat and use of sanctions is likely to have a meaningful impact on nonproducing entities.²¹⁹ Increasing the use of sanctions can also deter other copyright owners from using abusive tactics.²²⁰ Courts are increasingly open to punishing nonproducing entities’ litigation

Judge Stanley Birch stated that, in his opinion, fair use is better and more logically viewed as a right granted by the 1976 Act because under the Act fair use is never infringement, so it need not be excused. 79 F.3d at 1542 n.22.

209. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 485 (2d Cir. 2004) (Jacobs, J., concurring).

210. Curran, *supra* note 11, at 194.

211. Most proposals target copyright “trolling.” *See supra* note 137 and accompanying text.

212. Sonmez, *supra* note 10, at 156–57 (“[C]ourts should not be responsible for tracking and managing trolling’s future incarnations.”).

213. *See* U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

214. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (stating that the Court was not at liberty to second-guess Congress in matters of copyright policy); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

215. *See, e.g.*, Balganes, *supra* note 9, at 736–39.

216. *See, e.g., id.* at 733; Sag, *supra* note 142, at 1141; Curran, *supra* note 11, at 201.

217. Sonmez, *supra* note 10, at 156; *see* FED. R. CIV. P. 11. An attorney can be sanctioned for violating the pleading requirements under Rule 11. *See* FED. R. CIV. P. 11(b)–(c).

218. *See* Sonmez, *supra* note 10, at 155–56.

219. *See id.*

220. Gregory S. Mortenson, Note, *BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem*, 43 SETON HALL L. REV. 1105, 1134 (2013). Sanctions also generate revenue for courts. Sonmez, *supra* note 10, at 156.

tactics.²²¹ For example, the court in *Malibu Media, LLC v. John Does 1–16*,²²² warned that if the plaintiff could not sustain their claims, the defendants would have adequate remedies to recover their litigation expenses or damages like Rule 11 sanctions.²²³ Importantly, the Supreme Court has upheld Rule 11 sanctions in a copyright infringement case.²²⁴ In *Business Guides, Inc. v. Chromatic Communications Enterprises*,²²⁵ the Court upheld the district court's award of sanctions against the plaintiff and its attorney, whose claim lacked any evidentiary support of copyright infringement.²²⁶ In upholding the sanctions, the Court held that “Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings.”²²⁷

The several examples of judges crafting their own solutions to abusive copyright litigation further support targeting the problem through courts. In 2010, a Nevada district court granted a Rule 12(b)(6) motion to dismiss—alleging fair use—against Righthaven.²²⁸ After analyzing the fair use factors, the court concluded that the defendant's use was fair use because it was informational, used “only the first eight sentences of a thirty sentence news article,” and that the use was unlikely to impact the market for the original work.²²⁹ In 2011, thanks again to the District of Nevada, Righthaven was ordered to show cause why it should not be sanctioned for its flagrant misrepresentation to the court.²³⁰

III. KILL TWO COPYWRONGS WITH ONE RIGHT

Thus far, scholars have separately targeted the two problems outlined in Part II—the fair use doctrine's uncertainty and abusive copyright litigation. This Note argues, however, that the problems are connected and should be solved together. John Else's story demonstrates why. Despite knowing that his clip was likely fair use, Else also knew he could not actually rely on the fair use doctrine to quickly excuse him from liability.²³¹ Thus, Else's story demonstrates how even secondary users who are confident that their use is fair use are still deterred from creating because of the uncertainty of asserting the affirmative defense. Moreover, Fox's ability to request a \$10,000 licensing fee for the clip is related to the fair use burden because if Else needed the scene or had \$10,000 to spare, the abusive outcome in his story

221. See COPYRIGHT LITIGATION HANDBOOK § 3:15 (2d ed. 2017) (“[C]ourts are losing patience with ‘copyright trolls.’”).

222. 902 F. Supp. 2d 690 (E.D. Pa. 2012).

223. *Id.* at 702–03.

224. See *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 534–35 (1991).

225. 498 U.S. 533.

226. *Id.* at 554.

227. *Id.*

228. *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413, at *3 (D. Nev. Oct. 19, 2010).

229. *Id.* at *2.

230. *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 978–79 (D. Nev. 2011).

231. LESSIG, *supra* note 8, at 98–99; see *supra* note 157 and accompanying text.

would have been an extracted settlement rather than what it was—the chilling and discouraging of creative activity.

Fair use reform has a long history but no conclusive solution. Instead of targeting the analysis, a solution should focus on the application. This proposal substantially and positively impacts defendants and fair users and minimally impacts legitimate copyright owners. Placing a higher burden on bringing infringement actions decreases the incentive to litigate abusively. There are several benefits of this proposal. First, it requires less change than other proposals and primarily impacts the party first pleading fair use. Other solutions propose drastic change or require government and congressional action, or ask judges to modify their approach to fair use.²³² Second, this proposal still allows other proposals to be tested within the fair use analysis. This Note’s proposal does not fix every problem, and although other solutions may still be necessary, this proposal targets the problem at its core while still enabling other proposals to be tested simultaneously.

This Note suggests that the best way to kill two “copywrongs”—the fair use doctrine and abusive copyright litigation—is with the one “right” of fair use. Applying fair use as a right will alleviate some of the doctrine’s problems and mitigate abusive litigation all while simultaneously protecting the courts and users by eliminating many of the major legal and procedural barriers. Under this proposal, abusive copyright litigation will decline and hopefully cease. Part III.A explains the historical and practical feasibility of this solution. Then Part III.B discusses the practical impact of the solution and why applying fair use as a right can have the specific and desirable impact of decreasing abusive copyright litigation.

A. *Fair Use Is, and Must Be, a Right*

Treating fair use as a right is the best way to limit using the doctrine for abusive copyright litigation. Several of the criticisms and problems currently attributed to fair use are minimized or eliminated by treating fair use as a right. So far, fair use is the best way to carry out copyright’s goals, which is why the doctrine itself should not be changed. In other words, this proposal seeks to merely change fair use’s label from “affirmative defense” to “right.”

Treating fair use as a right is supported both historically and conceptually.²³³ The legislative history, text of § 107, and actual practice point to conceptualizing fair use as a right or, at the very least, not an affirmative defense.²³⁴ Unlike other proposals, this Note offers a solution that requires the least change and preserves judges’ control over fair use. This proposal also maintains fair use’s flexibility and applicability across copyright cases. Fair use should remain in the hands of judges because judges invented, developed, and know how to apply the doctrine.²³⁵ This proposal does not increase judges’ tasks, and they might even appreciate

232. *See generally supra* Part II.

233. *See supra* Part II.A.

234. *See supra* Part II.A.

235. *See supra* Part II.A.

analyzing fair use in fewer cases.²³⁶ Many of the common criticisms of and problems with the fair use doctrine are minimized or eliminated by treating fair use as a right: it offers users and defendants more certainty and thus chills free speech less often;²³⁷ the burden is on the party in the better position to plead;²³⁸ and there will be fewer forced settlements.²³⁹ In addition, other proposals, for example judicial solutions to abusive copyright litigation, solve only one aspect of what is clearly a connected problem.²⁴⁰

This proposal cannot eliminate every inherent uncertainty accompanying fair use, but it can provide secondary users and defendants with more certainty because plaintiffs must plead that the use was not fair, which gives defendants an idea of their liability. Potential secondary users will be less deterred when deciding to create given the increased certainty of not being found liable if they have a strong fair use case, because plaintiffs' minimal burden will deter filing claims against strong cases of fair use. The current conception of fair use makes it too difficult for defendants asserting fair use to successfully defend it or, more specifically, to show fair use early in the litigation process.²⁴¹ By its very nature, fair use necessitates a fact-intensive inquiry. Yet not every case deserves the time required to apply fair use. Under this proposal, part of the time and expense pleading fair use is now transferred to the party bringing the claim. Defendants with stronger fair use claims have greater certainty that the case will not be brought or can be dismissed earlier, so defendants will not be forced to incur the costs of litigation and will not be forced to settle or be deterred from creating.

B. Litigating—or Hopefully Not—the Right of Fair Use

Fair use should be considered and decided as early as possible in litigation and should not be used as a catalyst for abusive copyright litigation. This section will demonstrate the positive impact and lack of downsides of this proposal. First, it is worth noting the different desired outcomes for nonproducing and producing entities. This proposal seeks to eliminate claims brought by nonproducing entities entirely because they are wholly antithetical to copyright law. But eliminating claims brought by producing entities would be neither a realistic nor a desirable outcome. Producing entities are essential to copyright law; they often protect authors who could not create commercially or distribute without the assistance of a large producing entity. For example, the Recording Industry Association of America (RIAA) can still protect artists by helping them monitor and enforce

236. *See supra* Part II.A.

237. *See* Snow, *supra* note 110, at 1798 (arguing that placing the burden of proving fair use on the defendant makes no legal sense, especially compared with the strong interest in protecting speech).

238. *See id.*

239. *See supra* Part I.C.4.

240. *See supra* Part II.B.

241. *See supra* Part II.A.

legitimate copyright claims.²⁴² This proposal seeks only to remove or decrease the incentive for producing entities to file abusive copyright litigation by slightly increasing their burden. The impact on producing entities should be minimal because infringement actions against strong fair use cases should almost never be brought. More importantly, would-be secondary users should neither be deterred from creating nor fear the overly litigious power of producing entities.

Treating fair use as a right will minimize abusive copyright litigation at several stages. First, abusive copyright litigation will decrease at the pleading stage. Second, treating fair use as a right makes other procedural devices available during litigation, like Rule 11 sanctions, and summary judgment. Finally, even before a case is filed, treating fair use as a right removes the incentive to file cases where the alleged infringement has a strong fair use argument. Taken together, treating fair use as a right will help foster a culture where would-be secondary users are not deterred from creating by uncertain fears of liability or the threat of abusive enforcement.

1. Pleading Fair Use

This proposal positively impacts three main aspects of pleading fair use: the party who must plead the fair use analysis, the standard by which they must plead it, and the consequences for failing to state a claim. Even minimal burdens deter abusive copyright litigation. For example, a complaint cannot use boilerplate language.²⁴³ If fair use is a right, then the burden to plead that a secondary use is not fair use should fall on the plaintiff bringing the alleged infringement claim. To plead a plausible infringement claim, the plaintiff must show that the defendant's use is plausibly not fair use. Thus, fair use is treated as part of the initial inquiry into infringement because it is an aspect of the overall consideration of whether the defendant infringed the plaintiff's copyright. For example, the threat of a potential infringement action by Fox would not have had the same deterrent effect on John Else, because Fox, not Else, would have borne the initial burden of plausibly pleading that there was not fair use to state its claim of infringement.²⁴⁴

This proposal does not prohibit legitimate copyright owners from enforcing infringement of their work because the owner need only plausibly plead that the infringing work is not fair use. The stakes for not considering fair use at the pleading stage will hopefully be high enough to deter abusive claims because the risks of failing to do so include sanctions and a loss of

242. See *supra* Part I.D.2. The RIAA qualifies as a producing entity because it represents recording industry distributors whose business is copyright licensing, not generating revenue primarily from litigation. See Greenberg, *supra* note 53, at 60; see also *About RIAA*, RIAA, <http://www.riaa.com/aboutus.php> [<https://perma.cc/3JY3-BCKE>] (last visited Oct. 4, 2018).

243. See *supra* notes 106–08 and accompanying text.

244. See *supra* note 157 and accompanying text.

credibility with the judge. It is in the claimant's and his lawyer's best interests to make a good-faith showing of the fair use factors.²⁴⁵

Because pleading copyright infringement was already a low bar, *Twombly* and *Iqbal*'s heightened pleading standard currently puts an increased burden on defendants asserting fair use, while the rationale for the pleading standard does not have the same positive impact on plaintiffs in copyright infringement cases.²⁴⁶ This is especially true in fair use cases because the burden to plead prima facie copyright infringement is low.²⁴⁷ However, by applying fair use as a right, the heightened pleading standard can function fairly. The plaintiff must still make a prima facie showing of copyright infringement and must plausibly plead that the defendant's alleged infringement is not fair use; the plaintiff is already in the best position to make the initial showing that a defendant's use is not fair.²⁴⁸ And even if an abusive copyright litigation case is filed, it will still be easier to dismiss earlier using a Rule 12(b)(6) motion.²⁴⁹ Motions to dismiss for failure to state a copyright infringement claim—for failure to plausibly plead that defendant's use was not fair use—would not unduly burden legitimate plaintiffs.²⁵⁰

2. Rule 11 Sanctions

Under the conception of fair use as a right, when an attorney must affirm that he has filed a legitimate claim, he can only do so after considering whether the use was fair use. Courts and defendants should use Rule 11 sanctions to threaten known nonproducing entities because sanctions will be most effective against the nonproducing-entity business model.²⁵¹ Because nonproducing entities derive revenue solely from litigation or threatening litigation, the risk of Rule 11 sanctions for failure to disprove fair use would

245. For an example of a judge barring any cases from being filed, see Ernesto, *Judge Threatens to Bar 'Copyright Troll' Cases over Lacking IP-Location Evidence*, TORRENT FREAK (May 12, 2017), <https://torrentfreak.com/judge-threatens-to-bar-copyright-troll-cases-over-lacking-ip-location-evidence-170212/> [<https://perma.cc/WPG4-GZT7>].

246. See *supra* notes 107–10 and accompanying text.

247. See *supra* Part I.C.3.

248. See Loren, *supra* note 108, at 705–06 (arguing that there could be more “pre-answer dismissals in cases of clear fair use” if it were not treated as an affirmative defense because the plaintiff's claim would not be plausible).

249. See David M. Jacobson, *The Plausibility Standard Under Twombly and Ashcroft*, DORSEY & WHITNEY LLP (Summer 2009), http://files.dorsey.com/files/upload/jacobson_wdtl_article.pdf [<https://perma.cc/PWN6-H9J4>] (“District courts now have significant tools for enforcing Rule 12(b)(6), and defense counsel have a basis to litigate motions to dismiss more aggressively.”).

250. When assessing a 12(b)(6) motion to dismiss for failure to state a claim, that is, “[i]n evaluating whether a claim has facial plausibility,” district court judges must still “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Weiler v. Draper Chevrolet Co.*, No. 12-12402, 2013 WL 388585, at *1 (E.D. Mich. Jan. 31, 2013) (quoting *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008)).

251. See Sonmez, *supra* note 10, at 156.

neutralize the nonproducing entity's one-sided economic incentive.²⁵² Moreover, increasing the use and threat of Rule 11 sanctions would also deter producing entities and individual owners from using nonproducing-entity-like tactics.²⁵³

3. Before Litigation

Under this proposal, potential secondary users will become aware of the burdens facing plaintiffs who wish to bring infringement actions. Secondary users with stronger fair use arguments will be less deterred by the threat of liability because frivolous infringement actions will become less common. For example, someone like John Else would actually be able to rely on fair use.²⁵⁴ A culture which embraces fair use, and rejects enforcement in the face of strong fair use, will cultivate more secondary uses. Finally, because the initial fair use pleading burden would fall on producing and nonproducing entities, such entities would be deterred from filing claims in cases with stronger fair use arguments. Both types of entities should decide, when faced with strong cases of fair use, that pursuing an enforcement action is not worth it. Would-be secondary users should no longer have to choose between creation or liability.²⁵⁵

CONCLUSION

This proposal neither attempts nor desires to change the analysis under the fair use doctrine. This Note agrees with those who believe that the fair use factors are the best way to produce determinations which are as close as possible to an outcome based on the fairness contemplated by § 107. To ensure that the fair use doctrine lives up to its full potential and purpose, it should be applied as a right. Applying fair use as a right is also a long-term solution to abusive copyright litigation. Under this proposal, stronger cases of fair secondary uses can be decided earlier or never brought at all. As the barriers to abusive copyright litigation increase, the incentives for abusive copyright litigation will decrease.

252. See *supra* Part II.B.

253. See Sonmez, *supra* note 10, at 156.

254. See LESSIG, *supra* note 8, at 98. Else said he “never had any doubt that it was ‘clearly fair use’ in an absolute legal sense.” *Id.*

255. The public would no longer be faced with “the visible coercion that the copyright holder may exert against them.” Sun, *supra* note 44, at 157–58.