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The Immorality Of Strict Liability In Copyright

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"Abhorred monster! Fiend that thou art! The tortures of hell are too mild a vengeance for thy crimes. Wretched devil! You reproach me with your creation; come on, then, that I may extinguish the spark which I so *negligently* bestowed."[1]

Mary Shelley, Frankenstein

I. INTRODUCTION

I will argue for a fundamental reconceptualization of liability for copyright infringement. Specifically, I will argue that the essentially unchallenged orthodoxy that copyright infringement is a strict liability tort is false. From the Supreme Court on down, it does not even appear to be questioned that copyright infringement applies a strict liability standard.[2] Upon reflection, this is peculiar, given that this is anything but

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1. MARY W. SHELLEY, FRANKENSTEIN 99 (James Kinsley ed., Oxford University Press 1969) (1818) (emphasis added).

2. Gener-Villar v. Adcom Grp., Inc., 509 F. Supp. 2d 117, 124–25 (D.P.R. 2007); A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technicological Tensions,* 64 NOTRE

an innocuous doctrine. It is just the opposite; it is a doctrine that strongly favors copyright owners who may more easily prevail in infringement suits, as it will always be easier to establish strict liability as compared to fault liability. Fault liability is strict liability with one additional showing—not just that the defendant injured the plaintiff, but that the defendant injured the plaintiff and did so in a faulty manner.

The lack of discussion is particularly puzzling in light of the pervasive view among copyright scholars that copyright law unduly favors copyright owners. Here is a fundamental rule that apparently favors owners and yet goes unquestioned by courts. Moreover, it is a peculiar rule that is out of step with modern tort law. Famously, there was historically a shift from strict liability to fault liability in tort. The transformational case most often cited is *Brown v. Kendall*. This naturally raises the question as to why this historical shift occurred in tort generally, but not in copyright. Why should copyright owners be favored in this manner when owners of physical goods are not? We are presented with a modern liability regime in which one can haul dangerous materials through a metropolitan area, such as Chicago, and be subject to a fault rule, but snap a photo of the label on a hazardous waste container and be strictly liable for large statutory damages.[3] It is hard to resist the conclusion that the strict liability rule is antiquated and out of step with modern tort law, which no longer supplies owners with the strongly favorable rule that is strict liability. Given this backdrop, my claim that indeed it is no longer the case that there is strict liability in copyright will not seem so strange. What is strange and in need of explanation, is the orthodox view that copyright infringement is strict liability.

I will argue that as a result of the emergence of the fair use doctrine, the liability standard for infringement in copyright is now a fault standard. Closer scrutiny will show the orthodoxy to be an anachronism; however, once true but no longer so. My argument is not a normative one—that copyright infringement *should* employ a fault standard, but an analytic or interpretive one—that due to the important role played by the fair use doctrine, *copyright infringement*, properly understood, *already employs a fault standard*.[4]

DAME L. REV. 47, 52 (1989) ("Liability for direct infringement is imposed on a strict liability basis.").

3. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990).

4. Elsewhere I have argued normatively against the application of strict liability in the context of non-commercial creative content, arguing instead for a fault standard. *See* Steven Hetcher, *The Kids Are Alright: Applying a Fault Liability Standard To Amateur Digital Remix*, 62 FLA. L. REV. 1275 (2010).

In this fundamental respect, U.S. copyright law is distinct both from that of civil law countries and other common law countries that have not adopted a fair use doctrine in copyright law. Fair use is sometimes compared to similar-sounding doctrines of other countries' copyright regimes.[5] There is a crucial distinction; however, which is that notions such as fair dealing are well-delineated, statutory carve-outs. By contrast, a fair use defense may always be introduced under any factual circumstances. It is never dispositive to establish the elements of strict liability. This is only sufficient to make out the *prima facie* case of infringement. If the plaintiff has no colorable fair use defense and thus fails to prevail, it is not because the standard is strict liability, but because it is fault liability where the defendant is at fault, that is, not a fair user. What makes this appear not to be the case is that the defendant bears the burden with respect to establishing fair use. But this does not mean that fair use does not introduce a fault standard into what had been strict liability; it just means that, as compared to the fault standard in tort generally, defendants are less well situated, as they bear the burden of establishing a lack of fault on their part. However, in a typical tort suit it is the plaintiff who bears the burden to establish fault. This puts copyright defendants in a less favorable position than negligence defendants in other tort contexts, because it will be easier for plaintiffs in infringement suits to make out a *prima facie* case and thus to prevail, if the defendant does not step forward to defend herself, or cannot make out her defense for reasons apart from the merits, such as an inability to

5. *See, e.g.*, International Copyright Law and Practice: JAP-45 (Paul Edward Geller & Melville B. Nimmer eds., 1993) ("First, the Copyright Act provides various types of fair use which are exempt from copyright liability and legal licenses conditioned upon payment of compensation in Articles 30 to 49, but makes clear that these provisions do not affect the moral rights of authors."); Teruo Doi, *Availability of the "Fair Use" Defense Under the Copyright Act Of Japan: Legislative and Case Law Developments for Better Adapting it to the Digital/Network Environment*, 57 J. COPYRIGHT SOC'Y OF THE U.S.A. 631, 634–36 (2010) (stating "In at least two copyright infringement actions filed with the Tokyo District Court and Nagoya District Court in 1994 and in 2004 respectively, the court denied the alleged infringer's defense of non-infringement based on the 'fair use' doctrine other than those instances of limitations and exceptions provided in the Copyright Act . . . . In *KK Gakushu Kenkyusha v. KK Daisan Shokan*, ... the court held that, the Copyright Act sets forth, in Article 30 to Article 49, various instances of limiting copyrights and conditions for such limitations in detail, for the purpose of balancing the private rights of authors, etc. and the public interest of allowing other persons to exploit works of authorship in fair and equitable terms, and, therefore, the Act does not contain a general provision equivalent to the 'fair use' doctrine with the legislative intention to provide limitations in instances provided in these provisions . . . . In *JASRAC v. K.K. Tsuge, et al.*, ... The Nagoya District Court held that, in view of the objective of the Copyright Act provided in Article 1, and a set of provisions, beginning from Article 30, to provide limitations on copyright in accordance with the objective of the Act, under the legal system of Japan limitations must be expressly provided in the statute, and there should be no instances of fair use of works aside from such express statutory provisions.").

proffer relevant evidence due to financial inability. But the fact that a defendant could in principle rebut an infringement allegation through a showing of fair use is what makes the cause of action a fault based one.

I will argue that there is an important policy implication of this doctrinal interpretation: that the burden of proof with regard to this fault standard should be shifted from defendant to plaintiff. In other words, I am proposing that alleging an absence of fair use, that is, an unfair use, should be added to the plaintiff's *prima facie* cause of action for infringement. Courts are well placed to shift this burden so that legislative change is not necessary. If this policy proposal is implemented, two important legal consequences are likely to follow. First, shifting the burden of proof with regard to fair use will result in fewer instances of default judgments against defendants in copyright infringement suits. Second and correlatively, fewer infringement suits will be brought in the first place. Before directly engaging in these main arguments, it will be helpful to first explore some general connections between tort and copyright.

II. THE TORT OF COPYRIGHT INFRINGEMENT

Copyright infringement is a tort.[6] That is orthodoxy.[7] What precisely this means or entails is less often discussed. Indeed, the opposite position might appear more intuitive, namely that copyright infringement is one aspect of a general carve-out from the state common law of tort for those wrongs specified in the Copyright Act.

On this view, the dividing line between common law torts and

6. Ted Browne Music Co. v. Fowler, 290 F. 751, 754 (2d Cir. 1923) ("Courts have long recognized that infringement of a copyright is a tort."); Sw. Bell Tel. Co. v. Nationwide Indep. Directory Serv., Inc., 371 F. Supp. 900, 907 (W.D. Ark. 1974) ("Copyright infringement is a tort."); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) ("Since infringement constitutes a tort, common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy, and the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor is applicable in suits arising under the Copyright Act."); Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869); Hetcher, *supra* note 4, at 1283 n.35 ("Courts have long recognized that infringement of a copyright is a tort, and all persons concerned therein are jointly and severally liable as such joint tort-feasors.").

7. Given this fact, it is an oddity that torts casebooks—the main means by which new lawyers are taught tort—typically make no mention of IP torts such as copyright, trademark, or patent infringement. For example, Goldberg, Sebok, and Zipursky give the following examples of torts in the introduction to their casebook: "[A]ssault, battery, conversion, defamation, defective product sales (products liability), false imprisonment, fraud, intentional infliction of emotional distress, intentional interference with contract or economic advantage, invasion of privacy, negligence, nuisance and trespass to land or chattel." JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2d ed. 2008).

copyright infringement would be the preemption clause of the Copyright Act, according to which there can be no common law torts that are duplicative of those wrongs specified in the Act.[8] Given the division, one might not think it unreasonable to inquire as to whether or not we can even denominate the sort of wrongs specified in the Copyright Statute as torts. After all, is not judge-made law often contrasted with statutory law as a distinctive species of a genus?[9] While this latter statement is true, upon closer inspection, it would appear not to gainsay the former legal proposition, namely, that not all torts are common law torts. There are common law torts and there are statutory torts.[10] To state the issue succinctly; why else call copyright infringement a tort unless it shares the features of a tort? [11] This raises the question as to what are the common features of torts and are these features of the common law or statutory origin? In other words, what features does copyright infringement share with its sibling, torts, from the tangible world?

III. FAIR USE AS A FAULT STANDARD

As noted above, it is an orthodoxy to describe the liability standard in

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8. 17 U.S.C. § 301(a) (2006).

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Id.

9. GOLDBERG ET AL., *supra* note 7, at 12 (stating "In most U.S. jurisdictions, torts such as negligence are *common law causes of action*. This means that the plaintiff's ability to sue in the first place, and the terms on which she can obtain redress, are established by *judicial decisions*, rather than by a statute passed by a legislature and authorized by the chief executive.") (emphasis added).

10. *Id*. at 14 ("Tort law need not be judicial in origin."); Taylor v. Meirick, 712 F.2d 1112, 1117 (7th Cir. 1983) ("This principle applies to a statutory tort such as copyright infringement"); Turton v. 212 F.2d 354 (6th Cir. 1954) ("Rather, it has always been held that infringement of copyright, whether common law, or statutory, constitutes a tort."); Glidden Co. v. Zdanok, 370 U.S. 530, 574 (1962) ("[T]o determine the liability of the United States for patent or copyright infringement and for other specifically designated torts.").

11. *See* Caroline E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617, 657 (1993) (citing Streenz v. Streenz, 471 P.2d 282, 286 (Ariz. 1970) (McFarland, J., dissenting)) ("Nevertheless, Justice McFarland of the Arizona Supreme Court said it best in proclaiming, 'a tort is a tort is a tort.'"); Jeffrey A. Van Detta, *"Le Roi est Mort; Vive Le Roi!": An Essay On the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case,* 52 DRAKE L. REV. 71, 81–82 (2003) ("[A] tort is a tort—no matter how well the legislative and judicial branches may have sought to disguise its nature.").

copyright law as strict liability. Established copyright doctrine provides no significant allowance for the notion of a fault-based liability standard. To the extent that fault enters the picture in the orthodox view, it is in the distinction between "intentional infringement," on the one hand, and "innocent infringement," on the other hand.[12] The distinction has an impact on the mitigation of damages but not on liability itself.[13] As will be seen in greater detail below, "innocent infringement" is a very limited fault principle.

By contrast, tort law is uniformly conceived of as having three liability standards, as is witnessed by the fact that tort casebooks are typically organized around the tripartite distinction of intentional torts, negligence or fault-based torts, and strict liability torts.[14] Note that while tort orthodoxy views the tripartite liability standards as pivotal to the organization of tort law, this distinction is not essential to tort itself. Goldberg, Sebok, and Zipursky characterize a tort as follows:

> In sum, to commit a tort is to act in a manner that is wrongful toward and injurious to another. Torts in turn refers to the collection of recognized legal claims that enable a person (or entity) to obtain redress from another on the ground that he (or it) has suffered injury by virtue of having been wronged by that other. Tort law consists of the rules and principles that determine right conduct, as well as the circumstances under which a victim can obtain redress, and the form that such redress may take. [T]ort law articulates legal responsibilities or duties that persons owe to one another and provides victims of conduct breaching

12. *Compare* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding former Beatle George Harrison to be an innocent infringer when he unintentionally and unconsciously copied the tune of another song), *and* N. Music Corp. v. Pacemaker Music Co., No. 64 Civ. 1956, 1965 U.S. Dist. LEXIS 6864, at *3 (S.D.N.Y. Nov. 5, 1965) ("[I]f copying did in fact occur; it cannot be defended on the ground that it was done unconsciously and without intent to appropriate plaintiff's work."), *with* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. 545 U.S. 913, 941 (2005) (vacating summary judgment and remanding for further proceedings on whether defendants were liable for intentionally inducing infringement).

13. New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 300 (S.D.N.Y. 2001); *see also* David Hricik, *Remedies of the Infringer: The Use by the Infringer of Implied and Common Law Federal Rights, State Law Claims, and Contract to Shift Liability for Infringement of Patents, Copyrights, and Trademarks*, 28 TEX. TECH L. REV. 1027, 1087 (1997) ("No scienter need be shown to prove infringement. Intent is relevant only to the decision whether or not to increase damages. A finding of willful infringement permits the court to increase statutory damages. Negligence or recklessness has no relevancy to determining whether copyright infringement has occurred.").

14. *See, e.g.*, MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS, chs. II, VII, and XII (6th ed. 1996).

> those duties with redress against those who have wronged them.[15]

Note that this definition does not mention liability standards at all, much less whether there should be some specific number of them. If some particular doctrine with regard to the correct number and type of liability standards is not part of an exemplary definition of a tort, the fact that copyright infringement has a different number than torts generally would appear not to disqualify infringement as a tort.

My dispute with the orthodoxy is not with regard to whether it is indeed accurate to understand copyright as containing a unified liability standard. My contention is that the unitary standard is a fault standard, not a strict liability standard. A strict liability tort requires mere causation: that the defendant caused a justiciable injury to the plaintiff. If causation is shown, intention or fault need not be shown. This is the case for saying that infringement is a strict liability tort, because the plaintiff need merely allege causation: namely, that the defendant caused a substantially similar copy of a protected work owned by the plaintiff to be made.

Despite these doctrinal features of copyright, infringement is best understood as a fault standard because it is in fact not enough to establish causation in order to establish infringement, *tout court*. Rather, a plaintiff must establish causation in circumstances in which the copy is not legally recognized as a fair use.[16] However, because fair use may potentially be interposed in any infringement dispute, it is always a contingent matter whether a showing of *prima facie* infringement is legally equivalent to actual infringement. This means that there are really only two kinds of potential infringement actions: those in which the use was fair, and those in which it was not. In either situation, it is fairness or fault that is dispositive—one consults the standard, and either determines that by its lights, the particular use is or is not fair, and thus, whether or not the use is infringing.

To fully appreciate the significance of this point, consider the fault standard in tort, generally speaking. It works by interposing a moral

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15. GOLDBERG ET AL., *supra* note 7, at 3.

16. It might be retorted that, while this is true in theory, in practice the outcome will turn as well on unrelated and problematic factors such as the fact that large commercial entities are able to threaten and legally browbeat users into unfavorable default judgment outcomes, such that they are never allowed to vindicate the fair use status of their behavior. This is true and important, but a distinct issue and one that will receive attention below. Indeed, this state of affairs will, in part, serve as a predicate for the policy argument developed below that favors shifting the burden of proof to plaintiffs.

test—fault—between the bare test of one party causally acting in some way that injures another, and a finding of liability. Fair use functions in precisely this manner to interpose a moral test—fair use—between an act by the defendant and its causal impact upon the plaintiff as being sufficient for liability. Just as one is not liable in a negligence or intentional tort claim, if one is not at fault in copyright, one is not an infringer if one's act is fair.[17] A fair use is not an excused infringement, as plaintiffs sometimes claim, but rather a justified use, that is, not as infringement at all.[18]

A fairness test is by definition a normative test. Fairness is not only an inherently normative concept, but one that is crucial to the law.[19] This is prominently seen in John Rawls' famous phrase, "justice as fairness."[20] It is in this simple way that the common law emergence of the fair use test adds an additional moral element to what was previously a strict liability test for causation, regardless of fault. The fair use test is best viewed as a species of the genus fault standard, as tort law offers other fault standards as well, such as whether an injurious act passes the Hand

17. 17 U.S.C. § 107 (2006) provides:

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

Id.; Gaylord v. United States, 595 F.3d 1364, 1385 (Fed. Cir. 2010) (stating "Clear error has not been shown in the Court of Federal Claims' factual findings supporting the statutory factors of fair use. A transformative work is generally deemed a fair use of a copyrighted work. This finding of fair use of itself establishes the right of the United States to use a picture of the Memorial on a United States postage stamp, without liability for copyright infringement.") (internal citations omitted); A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 637 (4th Cir. 2009) (stating "Thus, the copyright owner's 'monopoly . . . is limited and subject to a list of statutory exceptions, including the exception for fair use provided in 17 U.S.C. § 107.' A person who makes fair use of a copyrighted work is not an infringer even if such use is otherwise inconsistent with the exclusive rights of the copyright owner.") (internal citations omitted); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); *see also* Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 433 (1984) (stating "Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute or who makes a fair use of the work is not an infringer of the copyright with respect to such use.").

18. On the notion of being authorized by the law, *see* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (stating "Here, the Court concludes that the plain meaning of 'authorized by law' is unambiguous. An activity or behavior 'authorized by law' is one permitted by law or not contrary to law. Though Congress did not expressly mention the fair use doctrine in the DMCA, the Copyright Act provides explicitly that 'the fair use of a copyrighted work . . . is not an infringement of copyright.'") (internal citations omitted).

19. Indeed, some justifications of the fault standard have been stated in terms of "fairness." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 77, 110–13 (Little, Brown and Company 1909).

20. JOHN RAWLS, A THEORY OF JUSTICE 11 (Harvard Univ. Press rev. ed. 1999).

Test, the Reasonable Person Standard, or the test for due care in the case of negligence torts;[21] or in the case of dignitary torts, whether the act was intentional and lacked consent.[22]

The moral intuition behind the fault standard generally is that it is unjust to hold someone liable for an injury that occurred through no fault of her own. So stated, this moral premise is broadly deontological in form. In this vein, Jules Coleman writes, "[i]n the received view, the substitution of fault for causation marked an abandonment of the immoral standard of strict liability under Trespass (which, after all, imposed liability without regard to fault) in favor of a moral foundation for tort liability based on the fault principle."[23] However, a consequentialist approach may arrive at the same result. Richard Posner writes, "Perhaps, then, the dominant function of the fault system is to

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21. United States v. Carroll Towing Co., Inc., 159 F.2d 169, 173 (2nd Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL."); DAN B. DOBBS, THE LAW OF TORTS 280 (2000) ("The reasonable person whose standards the defendant must meet is said to have these attributes: (1) Normal intelligence; (2) normal perception, memory, and at least a minimum of standard knowledge; (3) all the additional intelligence, skill, or knowledge actually possessed by the individual actor; and (4) the physical attributes of the actor himself.").

22. *See* DOBBS, *supra* note 21, at 54 ("The central core of the battery rules is simple. Subject only to the most limited exception, the defendant must respect the plaintiff's apparent wishes to avoid intentional bodily contact."); RESTATEMENT (SECOND) OF TORTS: BATTERY: HARMFUL CONTACT § 13 (1965) (stating "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results."); RESTATEMENT (SECOND) OF TORTS: BATTERY: HARMFUL CONTACT § 13 cmt. (stating "In particular, the plaintiff's consent to the contact with his person will prevent the liability. The absence of such consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment."); Nelson v. Carroll, 735 A.2d 1096, 1100 (Md. 1999) (citing PROSSER & KEETON, THE LAW OF TORTS § 8, at 36 (W. Page Keeton ed., 5th ed. 1984)) ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids."). Jurisdictions differ on whether consent is properly a burden for plaintiffs or for defendants, although most appear to place the burden on the plaintiff and not the defendant. *See* 6A CALIFORNIA JURISPRUDENCE: ASSAULTS: ASSAULT AND OTHER WILFUL TORTS 3D § 45 (Robert F. Koets ed., 2003) ("Since lack of consent is an essential element of assault and battery, the burden of proving lack of consent is on the plaintiff."); ILLINOIS JURISPRUDENCE: PERSONAL INJURY AND TORTS § 7:38 (Krystal Shifflett ed., 2009) ("A plaintiff in an assault or battery action has the burden of proving every element of the cause of action, including the absence of consent."); 6 AMERICAN JURISPRUDENCE 2D: ASSAULT AND BATTERY § 166 (Marie K. Pesando & Liz Miller eds., 2008) ("While the plaintiff need not negate any affirmative defense, the plaintiff's burden is to prove lack of consent when it is an essential element of the claim."). *But see* State Wash. v. Buzzell, 200 P.3d 287, 291–92 (Wash. Ct. App. 2009) ("Consent negates forcible compulsion; the burden to establish consent is on the defendant.").

23. Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part 1*, 1 L LAW & PHIL. 371, 374 (1982).

generate rules of liability that, if followed, will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[24]

Moreover, within the category of deontological approaches there are variations. Most famously, in *Palsgraf,* Judge Cardozo espouses a reasonable foreseeability of injury standard as a moral prerequisite to liability, while Judge Andrews espouses a multi-factor approach in which reasonable foreseeability may be a salient or even determinative factor in particular cases, but is not necessary for liability.[25] Contemporary tort theorists differ regarding the necessity of the foreseeability requirement in tort, generally.[26] Recent case law has been divided as well.[27] Within the copyright doctrine, foreseeability has neither been an element of *prima facie* infringement, nor an element of the four factor fair use test.[28]

It is instructive to consider the emergence of a fault standard in copyright in historical perspective. Consider first the manner in which the fault standard arose in tort. This tripartite scheme of liability, set out above, replaced the ancient tort schema of the writs of trespass and trespass on the case.[29] Trespass torts required injurious actions that were direct and forcible.[30] Trespass on the case, which developed later, allowed trespass actions for injuries of which the cause was less forcible or direct.[31] For our purposes, the key to the ancient torts is that fault was not an element in the cause of action.[32] The directness and force of an

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24. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

25. *See generally* Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

26. *See* John C. P. Goldberg & Benjamin C. Zipursky*, The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1812–24 (1998); W. Johnathan Cardi*, Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005).

27. *See* Cardi, *supra* note 26.

28. Recently, the foreseeability doctrine has been extended to copyright. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009).

29. GOLDBERG ET AL., *supra* note 7, at 47.

30. In the famous formulaic phrase from the old cases, acts of trespass were committed, "vi et armis," that is, with force of arms. *See, e.g.*, Rhodes v. Collins, 150 S.E. 492, 494 (N.C. 1929).

31. DOBBS, *supra* note 21, at 25–26.

> The defendant throws a log in the plaintiff's path and he trips over it after it has come to rest. A claim on those facts does not justify the use of the writ of *trespass*. Nevertheless, the claim might appeal to one's sense of justice and in the late 14th century the Chancellor began to issue writs to cover such indirect injuries. The new kind of writ was called *trespass on the case*.

Id.

32. This is not to say that fault-based injuries could not be trespasses, however, just that it was not the fault but instead the force and directness that formally mattered.

injurious act, per se, says nothing regarding whether the act was the result of faulty behavior. Accordingly, the ancient torts were strict liability in the sense of liability without fault—all that was required was causation of an injury by the tortfeasor to the victim, so long as the injury was sufficiently forcible and direct.[33]

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33. In modern tort generally, strict liability is the exception to the rule—it is applied to "unreasonably dangerous activities," such as using explosives, or keeping wild animals. RESTATEMENT (SECOND) OF TORTS: ABNORMALLY DANGEROUS ACTIVITIES § 520 (1977) (stating "In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land[,] or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. e (2010) ("Courts frequently state that blasting is a paradigm of an abnormally dangerous activity."); *e.g.*, Hargrove v. Billings & Garrett, Inc., 529 S.E.2d 693, 694–95 (N.C. App. 2000) ("Blasting is recognized as an ultra-hazardous activity in North Carolina and parties whose blasting causes injury are held strictly liable for damages, regardless of negligence."); RESTATEMENT (SECOND) OF THE LAW: TORTS 2D: LIABILITY OF POSSESSOR OF WILD ANIMAL § 507 (1977) (stating "(1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land[,] or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm. (2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know."); *e.g.*, Scorza v. Martinez, 683 So. 2d 1115, 1117 (Fla. Dist. Ct. App. 1996) ("The owner, keeper, or possessor of a wild animal is strictly liable if the animal injures another.").

It is also applied in product liability cases. RESTATEMENT (SECOND) OF TORTS: SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER § 402A (1965) (stating "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."); RESTATEMENT (SECOND) OF TORTS: SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER § 402A cmt. a (1965) ("The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.").

Once one considers this list, it seems obvious that copyright infringement is nothing like these activities as it would seem far-fetched to call copyright infringement unreasonably dangerous. Perhaps there are some infringement activities that are unreasonably dangerous, but clearly most are not. Just as other types of property may be injured in different ways—namely, a person can be hurt by dynamite, a punch in the nose, or a banana peel left on the floor, such that the first might be an unreasonably dangerous activity calling for the application of a strict liability standard, the second may be a purposeful injury calling for an intentional tort standard, and the third might be best seen as a negligent harm calling for a fault standard, so too, it makes sense to conceptualize copyrightable content as capable of being injured in different ways. Ironically, despite the fact that the orthodox infringement standard is seen to be a strict liability standard, it is hardest to imagine how the requirement standard of

The fault standard emerged in case law, perhaps most famously, in *Brown v. Kendall*. There, the court wrote: "[W]hat constitutes ordinary care will vary with the circumstances of cases. In general, it means that the kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."[34]

My suggestion is that a parallel sort of historical shift in liability standards away from strict liability has occurred in copyright, as well as in tort generally. The difference is that there is no general awareness of this shift in the domain of copyright infringement—the orthodox understanding has not caught up with the new reality marshaled in by the blossoming of fair use.[35]

One feature of infringement adjudication that may make fair use not seem to be a fault standard, is the procedural posture in which it arises, namely, as an affirmative defense. But this fact does not mean fair use is not a fault standard, but instead that it is one for which the burden of proof lies with defendants who carry the burden to establish lack of fault due to the fairness of the copying. Doing so does not have the implication

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"unreasonably dangerous" behavior can be met; it is not as if one can use dynamite to blow up copyright-protected works, as they are intangible, nor can such works be torn apart by domestically kept wild animals for the same reason. Nor can defective products easily harm copyrights; a defectively designed ski hill might lead to Sonny Bono's demise, but his songs will live forever. If one is creative, one can come up with an example, such as a defective photocopy machine that, as a result, creates unauthorized copies. This hypothetical of infringement through a defective product is best viewed as the exception that proves the rule; however, for as a rule, infringements do not result from unreasonably dangerous behavior.

34. Brown v. Kendall, 60 Mass. 292, 296 (1850); *see also* Brown v. Collins, 53 N.H. 442, 451 (1873) (rejecting strict liability in favor of the negligence rule); Losee v. Buchanan 51 N.Y. 476, 488 (1873) (stating "No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person."); *see also* Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (holding that strict liability is only imposed when the high degree of risk associated with an activity cannot be eliminated through due care). LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005) ("The old common law had very little to say about personal injuries caused by careless behavior. A good many basic doctrines of tort law first appeared before 1850; but it was in the late nineteenth century that this area of law (and life) experienced its biggest spurt of growth.").

35. Indeed, from its humble beginnings in case law from the Nineteenth Century, fault has passed from being the upstart, to being the ascendant liability principle, to arguably being the leading one currently. This leap to predominance can be seen, for example, in the organization of a more recent and more theoretically-oriented casebook such as the one authored by Goldberg, Sebok, and Zipursky, which begins with fault liability, in contrast to established tradition whereby torts casebooks started with the intentional torts. The fact that fault has come to assume this pivotal role in tort generally, but barely appears to merit mention in copyright doctrine, cannot but cause any copyright theorist to, at a minimum, seek to better understand how this odd state of affairs came to pass.

that these are no longer fault liability cases; however, it is apparent from the fact that courts that shift evidentiary burdens in other sorts of tort cases do not, in consequence, shift liability standards. As will be discussed in greater detail in the next section, in tort, courts sometimes shift some burdens onto the defendant, including the burden regarding fault.[36]

One of the distinctive features of fair use is that while Congress codified the doctrine in the '76 Act, it went out of its way to note that, in doing so, it did not mean to freeze the fair use doctrine from further evolution as a result of judicial interpretation.[37] This can be seen as an invitation to courts to expand or curtail the fair use doctrine when they deem it appropriate to do so. Indeed, courts often quote the statutory history for the proposition that it provides the court with greater latitude with regard to fair use.[38] This explicit invitation to courts to continue adapting the fair use doctrine is an unusual provision in a statute. It is worth highlighting that fact in the present context, because the policy prescription that I endorse comes within the doctrinal penumbra of fair use—which party has the burden of proof with regard to its establishment—and thus, I claim, is a beneficiary of Congress's invitation to innovate.[39] Consider next the argument in favor of the burden-shifting

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36. *See* Summers v. Tice, 199 P.2d 1, 33 (Cal. 1948) (shifting the burden of proof to the defendants who needed to show which of them caused the harm); *see also* Byrne v. Boadle, 159 Eng. Rep. 299, 300 (1865) (where *res ipsa loquitur* shifts the burden to the defendant to prove that the injury would have otherwise occurred in some manner other than through his negligence.).

37. Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107 (2006)); *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–78 (1994). In his hornbook, Marshall Leaffer states:

> The doctrine of fair use is codified in § 107 of the 1976 Act. The statute, however, does not provide a tight definition of the doctrine. Instead, it sets forth in its preamble the kinds of uses that usually prompt the defense, followed by four criteria that must *all* be applied to determine whether the defense succeeds. The legislative history of § 107 indicates no intent to freeze the doctrine, but rather to allow its continuing development through the case law and its adaptation to changing times and technology.

MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 429 (Matthew Bender & Co., Inc. eds., 3d ed. 1999) (citing H.R. REP. NO. 94-1476, at 66 at (1976)).

38. *See, e.g.*, Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 843 (Fed. Cir. 1992) ("The legislative history of section 107 suggests that courts should adapt the fair use exception to accommodate new technological innovations.").

39. There is precedent with regard to secondary liability. *See* Craig A. Grossman, *The Evolutionary Drift of Vicarious Liability and Contributory Infringement: From Interstitial Gap Filler to Arbiter of the Content Wars*, 58 SMU L. REV. 357 (2005); Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 993 (2007) ("The question of secondary liability fits into its own niche in the law, which the legislative history specifically declined to alter from established case law."). *See also* Peter S. Menell & David Nimmer, *Legal Realism in*

proposal.

IV. SHIFTING THE BURDEN OF PROOF

My initial argument for shifting the burden with regard to fault onto plaintiffs is simple: if one buys the argument that fair use introduces a fault standard into copyright, then other things equal (and to the extent that there is a unity to tort), one should expect that the same burden of proof should prevail in copytort, if you will, as in tort generally. In other words, if in tort plaintiffs must allege fault, why not in copytort as well? [40]

As noted above, currently, copyright infringement plaintiffs are able to establish a *prima facie* cause of action simply by establishing copying and substantial similarity of protected expression.[41] Note that such a showing goes only to establishing causation, namely, that the defendant caused a copy of the plaintiff's protected expression to be made. This is strict liability. If the gravamen of an action for infringement is a rights violation, and a fair use is not a rights violation because it is not an infringement,[42] then it certainly would seem sensible to make it an

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Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise, 55 UCLA L. REV. 143, 167, 203 (2007).

> Prior to the Supreme Court's *Sony* case, copyright law had already developed an elaborate jurisprudence for determining secondary liability. To prove vicarious liability, the plaintiff had to demonstrate that the defendant possesses (1) an obvious and direct financial interest in the exploitation of the copyrighted materials; and (2) the right and ability to supervise the infringing conduct. To prove contributory infringement, the plaintiff had to demonstrate that the defendant, with knowledge of the infringing activity, induced, caused, or materially contributed to the infringing conduct of another. The innovation of *Sony*, of course, was to depart from the framework by adopting patent law's staple article of commerce doctrine . . . . Although *Sony* nominally crowned patent law's staple article of commerce doctrine as the decisor for copyright cases, as a practical matter, the ancien[t] régime reigns sovereign. The inherent logic of the tort framework still dominates actual analysis, as opposed to the nominal fealty to *Sony* that courts outwardly profess. As shown above, various jurists have gravitated away from the *Sony* test and toward a tort-based analysis over the years since the case was decided.

Id.

40. Grenier v. Med. Eng'g Corp. 243 F.3d 200, 203 (5th Cir. 2001) ("Under Louisiana law, 'A cause of action accrues when a plaintiff may bring a lawsuit. In a negligence action, for instance, the claimant must be able to allege fault, causation, and damages.'") (internal citations omitted); Clark-Aiken Co. v. Cromwell-Right Co., 323 N.E.2d 876, 877 (Mass. 1975).

41. Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350, 353 (4th Cir. 2001) ("To prove copyright infringement, a plaintiff must show first that he owned the copyright to the work that was allegedly copied, and second, that the defendant copied protected elements of the work.").

42. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) ("[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect

element of an infringement action that the allegedly infringing act was not a fair use; that is, a rights violation.

Another way to look at the suggested proposal is to imagine how strange and unwelcome it would seem to put the burden on defendants, in tort suits generally, to establish an absence of fault instead of placing the burden on plaintiffs, as is currently done in all U.S. jurisdictions. Arguably, it once may have made sense for the burden to rest with defendants in copyright. Fair use grew up in the case law and one of the hallmarks of common law processes is that value is placed on incremental change.[43] Early on, there was no fair use doctrine in copyright law. And when it appeared, the doctrine started life as a small limited exception to infringement.[44] The conventional starting point is *Folsom v. Marsh*, although the opinion does not explicitly mention "fair use."[45] The explicit test for "fair use" first appears in *Lawrence v. Dana*.[46] From there, the doctrine evolved in case law for more than a century before being codified in the '76 Act. It is plausibly seen as more incremental for this doctrine to have begun life as a defense, as it did in these cases, in as much as doing so does not entail a change in the

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to such use.").

43. *See* Dennis J. Sweeney, *The Common Law Process: A New Look at an Ancient Value Delivery System*, 79 WASH. L. REV. 251, 268 (2004).

> Rather, it is the common law process of making law by arriving at principled decisions in real cases, based not upon a single rule or statute, but upon a whole tradition of looking at and thinking about law and legal problems that both yields a decision and incrementally adds to the body of common law. The common law approach remains the single most effective mechanism for adapting the law incrementally to society's changing values.

Id. *See also* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1545 (2010).

> Additionally, the common law method that [courts] employ develops the law incrementally, recognizing the need for caution in a rapidly changing social and technological environment, and allowing future courts to extend, limit, or at times altogether deny protection when circumstance and context change. I call this method of adjudication and rule development "pragmatic incrementalism," in that it exhibits the characteristics of both legal pragmatism and common law incrementalism.

Id.

44. LYMAN RAY PATTERSON, COPYRIGHT: IN HISTORICAL PERSPECTIVE 227 (1968) ("And only the nebulous and uncertain doctrine of fair use, the idea that one may reproduce a small part of a copyrighted work for a limited purpose, protects the individual who wishes to extend his use of the work beyond the reading of it.").

45. Folsom v. Marsh, 9 F. Cas. 342 (Mass. 1841) (No. 4,901).

46. Lawrence v. Dana, 15 F. Cas. 26, 58, 61 (C.C.D. Mass. 1869) (No. 8,136) (A date-based search on WestlawNext for the term "fair use" returned *Lawrence* as the earliest case using the term of art in relation to copyright; this fact is also noted in Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 560 n.42 (2008) ("The term of art apparently first appeared in reported federal case law in *Lawrence v. Dana*.")).

elements of the *prima facie* cause of action. This sort of small, incremental step may seem particularly appropriate given that early on fair use was a difficult test to satisfy, and thus can be aptly characterized as a small exception to a general rule of strict liability. Indeed, some commentators have viewed *Folsom* as a *de facto* strengthening of owners' rights.[47]

While copyright scholars are fond of noting that the modern four factors of the fair use test each bear its correlate in Justice Story's landmark elucidation of the test in *Folsom v. Marsh*,[48] this superficial similarity hides a fundamentally more important dissimilarity, namely, that the scope of fair use has grown dramatically over time.[49] A few choice examples easily demonstrate this point.

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47. Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 16 (1997) (stating "Because the first Copyright Act in the United States gave a copyright owner *only* the right of 'printing, reprinting, publishing and vending' the copyrighted work, the judicially created fair use doctrine actually created an expansion of the rights given to the copyright owner. If the new work was found not to be a fair use, the copyright owner could prohibit its publication, despite the fact that it was not a verbatim printing of the copyrighted work. In other words, by showing that a particular publication was not a 'fair use,' the copyright owner could prohibit uses that were not otherwise within the grant of exclusive rights."); Patterson, *supra* note 44 (stating "Given that a bona fide abridgment of a copyrighted work was not considered an infringement, [Justice] Story could not summarily hold that the defendant's use was piratical. Instead, he did the next best thing by narrowing the principles applicable to abridgment and making those principles applicable to a use of the copyrighted work generally. He repeated in Folsom what he had said in Gray and, without acknowledging it, reinforced his earlier narrowing of the fair abridgment doctrine. The result of Story's opinion in Folsom was to enlarge protection for the copyright owner.").

48. *See* LEAFFER, *supra* note 37, at 429 n.10.

49. *See* BEEBE, *supra* note 46, at 560, 622 (stating "The language of section 107's factors was largely drawn from Justice Joseph Story's 1841 circuit court opinion in *Folsom v. Marsh*, an opinion whose influence on American fair use case law up to the 1976 Act we have probably overestimated, or so the data suggest, but whose influence since is quite clear. Where the non-leading cases declined to follow the leading cases, they repeatedly—and systematically—did so in ways that expanded the scope of the fair use defense.") *But see* Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93–94 (2010).

> The second problem plaguing the fair use doctrine is that, sadly, the best of times are long gone. The golden era of fair use—if one ever existed—ended about a decade ago with the enactment of the Digital Millennium Copyright Act (DMCA). This legislation prohibited users from circumventing technological protection measures (TPMs) employed by rights holders to control access to their works. Furthermore, the legislation famously banned the production and provision of circumvention technologies. Taken together, these two prohibitions changed the traditional balance between rights holders and users. As is clear from the legislative history, Congress made a conscious decision not to recognize fair use as a defense in circumvention cases. In so doing, Congress significantly limited the scope of fair use for copyrighted works in digital media; notably, Congress did not grant users fair use privileges for TPM-protected content.

Id.

In a few important recent cases, courts have upheld the functioning of search engines such as Arriba Soft's image search engine and Google's search engine, as fair uses.[50] This is true despite the fact that in their normal functioning, these search engines cause thousands or even millions of unauthorized copies to be made.[51] Google Books is a project that raises the level of unauthorized copying to world-historic proportions. First, Google engaged in the digitization of 15 million books, an indeterminate, but clearly large number of which were still protected by copyright.[52] Next these books were copied onto Google's proprietary servers and portions of these texts were displayed millions of times per day, pursuant to user search requests. A group of leading copyright scholars convened to discuss this issue and concluded that the use of Google Books was fair use.[53] I will assume, for purposes of argument,

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50. Kelly v. Arriba Soft Corp., 336 F.3d 811, 819–20 (9th Cir. 2003); Field v. Google Inc., 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006) ("Based on the balancing of the relevant fair use factors, the Court finds that to the extent that Google itself copied or distributed Field's copyrighted works by allowing access to them through 'Cached' links, Google engaged in a 'fair use' of those copyrighted works.").

51. Perfect 10, Inc. v. Amazon, 487 F.3d 701, 713 (9th Cir. 2007).

> Some website publishers republish Perfect 10's images on the Internet without authorization. Once this occurs, Google's search engine may automatically index the webpages containing these images and provide thumbnail versions of images in response to user inquiries. When a user clicks on the thumbnail image returned by Google's search engine, the user's browser accesses the third-party webpage and in-line links to the full-sized infringing image stored on the website publisher's computer. This image appears, in its original context, on the lower portion of the window on the user's computer screen framed by information from Google's webpage.

Id.; Perfect 10 v. Google, 416 F. Supp. 2d 828, 831 (C.D. Cal. 2006).

52. Miguel Helft, *Judge Rejects Google's Deal to Digitize Books*, N.Y. TIMES, Mar. 22, 2011, at B1 ("Google's ambition to create the world's largest digital library and bookstore has run into the reality of a 300-year-old legal concept: copyright.").

53. *See* Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1314, 1374 n.33 (2010) ("In February 2006, I hosted a workshop of about fifteen copyright professors to discuss Google's fair use defense in the *Authors Guild* case. The general consensus at that meeting was that this fair use defense was likely to succeed. Scholarly commentary has generally been supportive of Google's fair use defense."). *See also* Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91 (2006).

> This Article maintains that the courts will best serve intellectual property and antitrust policy by concluding that Google is making fair and permissible uses of copyrighted works when it enhances the efficiency with which they are marketed and sold. The key fact for purposes of a fair use analysis, I will argue, is that there is no evidence, and it is unlikely that there will ever be any evidence, that Google Book Search is causing a decline in sales of either printed books or e-books. Indeed, if there were any justifiable criticism of Google Book Search, it would be that copyright law has unduly hampered its development and utility.

Id.

that this distinguished group is right. The implication of making this assumption is that an extraordinary number of uses unauthorized by owners are fair uses. A third large category of fair uses is user-generated content. I have argued elsewhere that a great deal of user-generated content that incorporates elements of commercial works in an even, mildly transformative manner, will be considered fair use as long as the use is not commercial; there is no, or marginal, real harm; and not much is taken quantity-wise. While these conditions may sound exacting, I argue that, in fact, a great deal of user-generated content fits the bill.[54]

These instances together bear evidence of the fact that fair use now numbers in the millions per day. Moreover, there is good reason to think that uses of these general sorts will continue to grow dramatically, as new business models that are functionally analogous to search engines, Google Books, and UGC-aggregation sites are likely to continue to emerge, given the apparent green light given by courts.

As fair use becomes increasingly common, it is increasingly unfair to place the burden of proof on defendants, as that rule unduly favors plaintiffs who are smaller in number and often large corporate entities, willing and able to pursue scorched-earth legal strategies that put everyday users, with little or no realistic ability to defend themselves, at an unfair disadvantage.[55] As fair use becomes more common, the likelihood that a plaintiff's being able to satisfy the elements of a *prima facie* case of infringement will predict or correlate with an actual instance of infringement goes down. Under such general uncertainty and with

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My own view all along has been that this activity constituted infringement on a never-before seen scale. Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICH. TELECOMM. & TECH. L. REV. 1, 10 (2006).

54. Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1900–28 (2009).

55. Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1806 (2010).

> A copyright holder who pursues an individual fair user will nearly always be successful at achieving the desired silence. The burden of proof imposes a high financial cost on the fair user to gather evidence and persuade a fact-finder of its correct interpretation. This cost becomes prohibitive as individual fair users often lack economic means to defend their speech. In the absence of any promised reward or financial backing for fair-use speech, the costliness of the burden quickly drowns out protected speech. In short, individuals who blog for fun will not even contemplate a fair-use fight given the expensive cost of prevailing.

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

large numbers of fair users, the burden should rest with the party seeking to assert the wrong of another.

The placement of the burden goes philosophically deep. If one considers the preservation and promotion of liberty as a core virtue of a regulatory regime, this arguably implies that a defendant would have her liberty unduly constrained if she is required to take the first step to prove whether her use is fair. This is true seeing as this rule impinges on her liberty to copy, despite the fact that her act may very well be a fair use and thus, not an infringement. Switching the burden would count against plaintiffs' interests; yet between the two parties it is more legally appropriate to place this burden on plaintiffs. This situation is the private law equivalent of innocent until proven guilty, not civilly wrong until proven so.

Apart from this basic fairness argument, there is a distinct economic argument for shifting the burden as instances of fair use become more prevalent. The greater the percentage of instances of fair use, the greater the social costs. This subsequently increases the average percentage of defendants that have to be sued and defend themselves, rather than making it harder to bring suit in the first place. After all, having the burden of proof is a form of cost to the user.[56] Thus, on efficiency grounds, there is greater reason to shift the burden of proof as the percentage of fair instances of use grows, reducing overall social costs.

Despite the above arguments, in this early stage of inquiry we should be open to the idea that there are, nevertheless, other arguments as to why the burden of proof should be with defendants. I want to consider one possibility: the argument that defendants are better situated to bear the burden with regard to producing evidence.[57] For instance, in the well-known case *Summers v. Tice*, the court shifted the burden of proof regarding causation to the defendant.[58] In the doctrine of *res ipsa*

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56. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.").

57. M.B.W. Sinclair, *Fair Use Old and New: The Betamax Case and its Forebears*, 33 BUFF. L. REV. 269, 325–26 (1984).

> Thus, fair use arises in litigation as an affirmative defense. Common sense and procedure permit no other stance. It would appear to follow that "[i]f fair use is viewed as a defense, or a form of excused infringement, the burden of proof lies with the defendant." But one should not reach hasty conclusions on mere appearances. As Congress noted, "any special statutory provision placing the burden of proving fair use on one side or other would be unfair and undesirable."

Id.

58. *See* Summers v. Tice, 199 P.2d 1 (Cal. 1948) (shifting the burden of proof to the defendants who needed to show which of them caused the harm); *see also* Byrne v. Boadle, 159

loquitur, courts shift the burden with respect to fault for evidentiary reasons.[59] These cases involve fact patterns in which it is hard to imagine how the injury could have occurred absent negligence on the part of the defendant. An analogous claim does not appear to hold true for copyright infringement generally, and yet the burden is generally shifted to defendants nevertheless. Courts do not simply find for plaintiffs in such cases; instead courts shift the burden of proof to the defendant to show that she was not negligent. In other words, courts shift the burden due to an informational asymmetry between plaintiffs and defendants.

In *Ybarra v. Spangard*, famously, the plaintiff was injured during a medical procedure while he was unconscious.[60] Due to his unconscious state, the plaintiff was not in a position to possess knowledge regarding the cause of the injury, while the defendants were especially well-positioned in this regard, having been in the operating room when the injury occurred. Under these circumstances, the court shifted the burden of proof to the defendants.

For present purposes, it is important to note that when courts invoke *res ipsa loqitor*, they continue to treat the case as involving a fault standard. For example, in *Ybarra*, the court did not shift away from a fault liability standard upon shifting the burden of proof. In other words, the question of whether a fault standard is operative is logically distinct from the issue of who carries the burden of proof with respect to fault, that is, whether the burden on the plaintiff is to show fault or on the defendant to show lack of fault.

The question of who is best suited to carry the burden regarding fault in a copyright infringement context came before a court in a recent case, *Lenz v. Universal*.[61] While the specific issue arose with regard to a court's

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Eng. Rep. 299 (1865).

59. GOLDBERG, ET AL., *supra* note 7, at 210–11.

> *Res ipsa loquitur* is an evidentiary doctrine applicable to certain tort causes of action, including negligence. When applicable in negligence actions, it permits a jury to infer that the plaintiff's injury was caused by defendant's carelessness even when the plaintiff presents no evidence of particular acts or omissions on the part of the defendant that might constitute carelessness.

Id. at 210. Notice the effect of *res ipsa*, once successfully invoked:

> [*R*]*es ipsa* relieves the plaintiff of the burden of producing evidence as to what exactly the defendant did wrong. As *Byrne* notes . . . it is still open to the defendant to introduce evidence to rebut the inference of carelessness that *res ipsa* permits. In this way, *res ipsa* can be understood in part as an information-forcing rule. It asks the party in the better position to identify what happened to come forth with evidence as to what really did happen.

Id. at 211.

60. Ybarra v. Spangard, 154 P.2d 687, 689 (Cal. 1945).

61. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008).

interpretation of certain language in the DMCA Section 512 safe harbor provisions, the manner in which the court treats the issue can plausibly be seen to give the decision broader import. The issue involved the interpretation of the statutory language that called for the plaintiff to have a good faith belief that there was an infringement when instigating a Notice of Takedown against an online service provider.[62] The defendant argued that the plaintiff could not have had such a belief, as the defendant's use was clearly fair.[63] Plaintiff argued that the defendant was better suited to carry the burden as it was better placed with regard to the key facts relevant to fair use.[64] The court said little directly in response to plaintiff's claim but rejected the argument by placing the burden with the plaintiff to allege lack of fair use.[65] Doing so implicitly states that there is no principled reason why the plaintiff cannot be made to carry this burden. Moreover, the court admonishes that, in the future, it will be inclined to view a failure to do so as "misrepresentation."[66]

A rejoinder might be to observe that the court's analysis is restricted to the particular context of the DMCA's provisions concerning the meaning of "authorized" by law.[67] There is an effective response to this

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62. *Id*. ("Thus the question in this case is whether 17 U.S.C. § 512(c)(3)(A)(v) requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that 'use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'"); 17 U.S.C. § 512(c)(3)(A)(v) (2006) Lexis, Current 74 ("A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.").

63. *Lenz*, 572 F. Supp. 2d at 1152 ("Lenz asserted that her video constituted fair use of 'Let's Go Crazy' and thus did not infringe Universal's copyrights.").

64. *Id*. at 1154.

> Universal contends that copyright owners cannot be required to evaluate the question of fair use prior to sending a takedown notice because fair use is merely an *excused* infringement of a copyright rather than a use *authorized* by the copyright owner or by law. Universal emphasizes that Section 512(c)(3)(A) does not even mention fair use, let alone require a good faith belief that a given use of copyrighted material is not fair use. Universal also contends that even if a copyright owner were required by the DMCA to evaluate fair use with respect to allegedly infringing material, any such duty would arise only *after* a copyright owner receives a counter-notice and considers filing suit.

Id.

65. *Id*. at 1156 ("A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute.").

66. *See id*. at 1154–55 ("An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA."). On the need for fair use safe harbors generally, *see* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1502–03 (2007) (suggesting that because of over-deterrence and uncertainty, fair use should be reformed to recognize certain types of copying as *per se* fair).

67. *See Lenz*, 572 F. Supp. 2d. at 1154 ("Whether fair use qualifies as a use 'authorized by

rejoinder; however, which is that, as noted above, the Copyright Act does not require that a defendant carry the burden with respect to fair use.[68] In other words, the status quo placement of the burden of proof is not grounded in the Copyright Act, and is open to common lawmaking. It is a canon of the relationship between the common law and statutory law, that judges will feel freer to move the law when doing so does not require overtly contravening statutory text.[69] In addition, as noted earlier, the statutory history of Section 107 makes it clear that fair use should continue to evolve through its traditional common law roots. Shifting the burden of proof would indeed be an apparent step in the development of the fair use doctrine and there is no reason that courts cannot mandate this shift by requiring plaintiffs to allege lack of fair use in their *prima facie* case.[70]

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law' in connection with a takedown notice pursuant to the DMCA appears to be an issue of first impression.").

68. The language of Section 501 gives leeway for a court. It simply states, "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer." 17 U.S.C. § 501(a) (2006). Similarly, Section 107 is silent as to which party carries the burden. 17 U.S.C. § 107 (2006). *See also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434, 451–52, 483–84 (1984); Karen Bevill, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?*, 52 RUTGERS L. REV. 311, 336 (1999–2000) (quoting Overman v. Loesser, 205 F.2d 521 (9th Cir. 1953)) (discussing the independent creation burden born by the defendant and the Copyright Act: "The general rule is that '[t]he burden of proof . . . remains on the plaintiff throughout the presentation of the case, unless it is declared to be elsewhere by statute or practice.' Since the statute does not announce a burden-shifting effect, if there is one, it must be established through practice. The practices in the circuits differ.").

69. Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 9–10.

> The "avoidance canon" is one of a large group of techniques used to avoid "unnecessary" constitutional questions, as explicitly set out in Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*. These techniques, constituting the "general avoidance doctrine," are closely related to other doctrines of justiciability and jurisdictional limitations.

Id.

70. Note that in contrast to the situation with the burden of proof, regarding damages, the Copyright Act contains specific doctrine, distinguishing willful infringement and innocent infringement. This distinction serves as a different basis for damages than is the case in tort generally, where damage awards turn on the distinctions between simple negligence versus some higher form of negligence such as reckless disregard, versus torts that are intentional. The Copyright Act, thus, is in tension with the general damages doctrine in copyright, as "innocent" infringers are liable, as the tripartite punctuated continuum of culpability found in tort generally has no "innocent" slot. It is evident that copyright has not taken tort seriously when the very notion of innocent infringement is found in copyright doctrine. Infringement is a tort and a tort is a wrong. A wrong cannot be innocent; that would be a contradiction of terms. Thus, from the perspective of tort generally, it is incoherent to talk about innocent infringement. Nevertheless, a court cannot simply disregard the distinctions related to damages drawn in the Act, even if they are in tension with the goal of following through on the normative implications of the recognition of a fault standard. Hence, common law courts will not have the same freedom to change the damages rules so as to preclude damages for

The fair use test is sometimes derided for being uncertain in its application and in its results.[71] An opponent of my position might argue that this vagueness ill suits fairness to serve as an element in the infringement cause of action. But when one sees that the same claims are made regarding the vagueness of the Hand Test and the Reasonable Person Standard in tort generally, one may reasonably conclude that vagueness of this sort comes with the territory for variants of the fault standard and is not dispositive concerning the determination of which party should carry the burden of proof for establishing fault or lack thereof.[72]

Moreover, fair use is plausibly seen as more uniformly applied across jurisdictions than is the case for fault in tort generally. All federal circuits apply the four-factor test for infringement, with two of these factors each containing two sub-factors.[73] By contrast, in tort generally, some courts apply a Reasonable Person Standard, the Hand Test, or appear to utilize a seemingly inchoate amalgam of the two. Plausibly, the greater degree of specificity and uniformity of the fair use test is due to the fact that the fair use test was codified in the '76 Act. While codification is plausibly part of the explanation of the uniformity of the fair use doctrine across jurisdictions, it cannot be the whole story, because the fair use doctrine has continued to evolve through case law in the many years since its codification. This is vividly seen by contrasting the fair use test as applied by the Supreme Court in *Sony v. Universal* with how the Court applied the test years later in *Campbell v. Acuff-Rose*. Significant changes

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innocent copiers, preclude statutory damages for negligent infringers, or for that matter, to preclude disproportionately large statutory damages for willful and unfair infringers.

71. *See, e.g.*, Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 612–13 (1996–97) (stating that the uncertainty of the application of the fair use doctrine as a defense may result in a substantial chilling effect).

72. Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 864 (2001) ("The reasonable person standard is an empty vessel that jurors fill with community norms."); *see also* John Cirace, *A Theory of Negligence and Products Liability*, 66 ST. JOHN'S L. REV. 1, 39 ("But in the real world of uncertain knowledge, it is difficult to quantify the Hand test.").

73. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541–42 (2009).

> [F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters. The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.

Id.

in substantive doctrines of the sort seen in *Campbell* are the result of common law processes. [74] One of the features of common law, often referred to cited as a virtue, is its ability to adapt to changing circumstances in a morally nuanced manner as Congress recognized in its commentary on Section 107. Allowing wider scope for this sort of moral nuance is particularly appropriate in the context of an equitable doctrine such as fair use.[75]

Relatedly, Judge Posner argues that the legislative process is more subject to industry capture than is common law rulemaking. Along with his co-author, he makes explicit the implication for copyright law: we should not expect statutes governing intellectual property to be efficient to the same degree as rules produced by courts.[76] This is yet another reason to think courts should be emboldened with respect to taking a proactive role in ensuring that the fair use doctrine continues to evolve by shifting the burden of proof to plaintiffs.

Finally, it is significant that shifting the burden is practically feasible. In cases in which infringement is clear cut, the plaintiff will be able to simply allege the absence of the factors necessary for fair use: that the use was not sufficiently transformative if transformative at all, that what

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74. For instance, in *Sony*, the Court noted that a commercial use was presumptively unfair, and that the fourth factor was the most important factor. By contrast, in *Campbell*, the Court stated that the first factor was the most important factor and in addition did away with the presumptions from earlier cases. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."). *But see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–85 (1994) ("In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.").

75. *See* PATTERSON, *supra* note 44, at 220 (1968) ("The problem of the author's creative interest is a delicate subject which, by its very nature, can best be developed by judges in the case-by-case method of the common law, for its development will require perceptive analysis and careful distinction."). *See also* Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 20 B.U. L. REV. 51, 56–58 (2010).

> The common law compares favorably to punctuated and, potentially more distortive, congressional action. The judge, in the Hayekian sense, is closer to the "inside baseball" dynamic that is unique to each of the divergent industries that participate in the patent system. Each industry has its own norms and customs, each relies on the patent system to varying degrees, and the common law is more likely to develop doctrine that reflects an industry's legitimate expectations. As Lon Fuller wrote, the common law "projects its roots more deeply and intimately into human interaction than does statutory law." Relatedly, the common law demands that the judge look backward in the interest of individual fairness (namely, the parties before the court), but also requires a prospective mindset that is more inclusive in its deliberations. Moreover, judicial primacy acts as a bulwark against the more politicized legislative process or capture-prone administrative rulemaking.

Id. (internal citations omitted).

76. *See* WILLIAM M. LANDES AND RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 25–26 (The AEI Press, 2004).

was taken was creative or not published, that too much was taken, or that market harm has occurred or is occurring.[77] By contrast, with respect to fact patterns in which fair use is not so straightforward—is it not a good thing that plaintiffs are put to their proof?

Shifting the burden of proof has an important practical implication. An owner can no longer win an infringement lawsuit by default judgment. This holds true where a defendant cannot afford to dispute on a simple *prima facie* showing of strict liability, as is now the case. Copyright scholars have often commented on the unfairness of the situation of losing, or potentially losing, by default.[78] Thus, the diminution of situations in which defendants might lose simply by default judgment after a showing of *prima facie* case for infringement presumably will be welcome to many.

V. CONCLUSION

Copyright case law has numerous instances in which appeals courts explicitly draw from common law principles as a source of law. My normative claim is that courts *should* do this with respect to copyright law, for fault principles in particular. First, courts should recognize that the fair use doctrine means that the operative liability standard in copyright law is not strict liability, but instead a type of fault standard. Second, courts should recognize that this legal finding has policy implications. As the above discussion indicated, when arguing from a general tort principle perspective, there appears to be sufficient reason to shift the burden of proof of fault to plaintiffs in copyright infringement cases. Since, in tort generally, the burden of proof with regard to fault lies with plaintiffs, the presumption should be that copyright infringement should have the same burden of proof unless a sufficient reason is provided otherwise. Such a reason appears to be lacking, or at any rate, in need of establishment. In light of these considerations, courts handling copyright cases *should* seek to change the burden of proof with respect to fair use. They should do this both because it is the equitable thing to do in substantive legal terms, and because they are empowered to do so, as

77. 17 U.S.C.S. § 107 (2006 Lexis, Current 74).

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

78. *See* Hetcher, *supra* note 54, at 1914–15.

is the common law of tort that courts can, and do shift burdens of proof.

As the above discussion indicated, it is relevant as well that shifting the burden regarding fair use is an aspect of fair use doctrine and so squarely within the ambit of Congress's intended scope of meaning for its stated desire not to freeze the fair use doctrine but instead let it continue to evolve. Typically, when the statutory text regarding the desire to not freeze fair use is evoked, it is done so in the context of a discussion of some doctrinal element within the four-factor test.[79] But there is no reason that the Congressional invitation to innovate should be limited to this context. If innovation with regard to the fair use burden of proof would serve the goals of copyright, then it is reasonable to assume that Congress's invitation to common law innovation, with regard to fair use, would countenance this aspect of fair use as well.

The discussion in the body of the text concluded by noting that this legal change provides an important practical benefit, that a plaintiff will not be able to win by default without having had to allege a lack of fair use and hence, an infringement. Unless a shift in the burden of proof is made, plaintiffs will continue to prevail by default without even having had to allege facts sufficient to rule out non-infringement due to fair use and hence, authorized use.

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79. Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146, 1166 (9th Cir. 2007) (specifically analyzing the "transformative" element of the first factor and noting "the importance of analyzing fair use flexibly"); Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) (discussing the desire not to "freeze" the doctrine immediately before discussing the four factors); Triangle Publ'n, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1174 (5th Cir. 1980) (same as *Fisher*); SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1371 n.6 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001) (noting the four-factor list is not exhaustive and that courts have applied different tests to reach different conclusions); Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 780 F. Supp. 1283, 1292 (N.D. Cal. 1991) (stating the four factors "are intended to guide but not to limit analysis"); DC Comics, Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp.110, 119 n.2 (N.D. Ga. 1984).