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# FAIR USE: AN AFFIRMATIVE DEFENSE?

Lydia Pallas Loren\*

*Abstract:* The Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.* solidified the treatment of fair use as an affirmative defense. However, treating fair use as an affirmative defense shifts the burden to the defendant while in most fair use cases plaintiffs are able to easily prove a prima facie case of infringement. This Article identifies that, despite its decision in *Campbell*, the Supreme Court has not yet undertaken a thorough analysis of whether Congress intended fair use, as codified in Section 107 of the Copyright Act, to be treated as an affirmative defense. In fact, as explored in this Article, the 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; a defense, yes, but not an affirmative defense. The negative consequences of labeling fair use an affirmative defense support shifting back to what Congress intended. Fair use should not be seen as an affirmative defense, but should instead be treated as a defense that shapes the scope of a copyright owner’s rights.

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## INTRODUCTION

No one doubts that the fair use doctrine is a critically important part of U.S. copyright law.<sup>1</sup> As the Supreme Court described in *Campbell v. Acuff-Rose Music, Inc.*,<sup>2</sup> fair use provides a guarantee of “breathing space within the confines of copyright.”<sup>3</sup> If the doctrine holds this critical place in the scheme of copyright, is the Supreme Court correct to label fair use an “affirmative defense”?

In *Campbell* the Supreme Court not only repeated the declaration it had first made less than ten years earlier, that fair use is an affirmative defense,<sup>4</sup> it went further to comment on the burden that it thought followed from that label. Specifically, in addressing the fourth factor courts should consider when evaluating whether a use is fair—the effect of the putative fair use on “the potential market for or value of the copyrighted work”<sup>5</sup>—the Court stated: “Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant

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1. Indeed, the academic literature on the subject is rich and deep. *See, e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

2. 510 U.S. 569 (1994).

3. *Id.* at 579.

4. *Id.* at 590; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985). *Harper & Row* was the first time the Supreme Court used the label “affirmative defense.” A few lower courts had used the label prior to the Supreme Court’s use of the term. *See* Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 160, 161 n.146 (2011) (citing cases).

5. 17 U.S.C. § 107(4) (2012). Section 107 provides four factors courts may consider in evaluating whether a use is a fair use:

- (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.*

markets.”<sup>6</sup> In this sentence the Supreme Court not only cemented the label “affirmative defense,” it also made clear the defendant should shoulder the “burden of demonstrating fair use.”<sup>7</sup>

Much has been written concerning the nature of fair use: Is it a right, or merely a privilege?<sup>8</sup> Some might claim that my focus here is on a much more mundane and procedural question:<sup>9</sup> Did Congress intend for courts to treat fair use as an affirmative defense, or was the fair use inquiry meant to be part of the prima facie inquiry into the question of infringement? Indeed, for many fair use cases, the issue of the burden of proof has not been a central component of the basis for the decision. The power of the procedural argument, however, may take on increased importance as courts begin more frequently to use the allocation of the burden as a reason to deny defendants’ assertions of fair use.<sup>10</sup> More fundamentally, “[s]ubstantive rights . . . are worth no more than the procedural mechanisms available for their realization and protection.”<sup>11</sup>

Part I of this Article provides background on the current approach to the prima facie case of copyright infringement and the difference between a defense and an affirmative defense. Part II explores the Supreme Court’s statements concerning the nature of fair use as an affirmative defense, taking the Court’s cases in reverse chronological order. This section shows that the Court has not yet undertaken a thorough analysis of whether Congress intended fair use, as codified in Section 107 of the Copyright Act, to be treated as an affirmative defense. After identifying the statutory language that cuts against treating fair use as an affirmative defense, Part III then turns to the legislative history of the 1976 Act. It describes the specific legislative history relied on by the Supreme Court as well as other statements in the legislative history

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6. *Campbell*, 510 U.S. at 590.

7. *Id.*

8. See, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985); Snow, *supra* note 4.

9. Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292–93 (2000). Professor Burbank notes that “neglecting the terrain of procedure is, as it always has been, a mistake. Fundamentally, that is because procedure is power, whether in the hands of lawyers or judges.” *Id.* Or as put more succinctly by Congressman John Dingell, “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.” *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John D. Dingell, Chairman, H. Comm. on Energy & Commerce).

10. See, for example, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), discussed below.

11. Burbank, *supra* note 9, at 1293.

concerning the nature of the fair use doctrine, including language contained in the final House and Senate Reports. The legislative history explicitly confirms what the statute clearly states: Congress did not intend fair use to be an affirmative defense—a defense, yes, but not an affirmative defense. Part IV explores some of the consequences of treating fair use as an affirmative defense and some of the legal maneuvers employed by defendants and the courts to soften the more serious problems. Finally, Part V argues that the Supreme Court should revisit its use of the affirmative defense label and should conclude that fair use is not an affirmative defense but is a mere defense that shapes the scope of a copyright owner's rights.

## I. BACKGROUND

### A. *The Prima Facie Case of Infringement: An Easy Burden*

Treating fair use as an affirmative defense shifts the burden 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.<sup>12</sup> For example, in a case alleging infringement of the reproduction right, the plaintiff must prove only ownership of a valid copyright (often demonstrated by presentation of the copyright registration certificate)<sup>13</sup> and “copying of constituent elements of the work that are original.”<sup>14</sup> Proving this actionable copying typically has two components. First, the plaintiff must establish actual copying—that the defendant *copied* from the plaintiff rather than having independently created a similar work. In fair use cases, this first component of actionable copying is almost always undisputed. The second component of actionable copying requires the plaintiff to establish that “the copying amounts to an improper or unlawful appropriation.”<sup>15</sup> This element is also, often, quite easily demonstrated.

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12. 17 U.S.C. §§ 502–505 (2012) (specifying the remedies available to include injunctive relief, seizure and impoundment, actual damages, statutory damages, costs, and attorney's fees). To be entitled to the statutory damages that the Copyright Act provides as well as the possibility of an award of attorney's fees, the plaintiff also will need to demonstrate that the copyright in the work had been timely registered. *Id.* § 412. The Supreme Court has noted the “potent arsenal of remedies” provided to copyright owners. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

13. Indeed, for works first published in the United States, copyright registration is a prerequisite to filing an infringement action. *Id.* § 411; *see also* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

14. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

15. *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir.

What copying amounts to an improper or unlawful appropriation is sometimes phrased as a showing that the defendant's work has "substantial similarity" to protected expression in the earlier work."<sup>16</sup> To prove substantial similarity, a plaintiff must show "(i) that it was protected expression in the earlier work that was copied and (ii) that the amount that was copied is 'more than de minimis.'"<sup>17</sup> To constitute "protected expression" it must satisfy the requirement of originality. However, the originality standard is exceedingly low, requiring only a "modicum of creativity," and again is often easily shown.<sup>18</sup>

The remaining criterion of the prima facie case of infringement requires only an evaluation of what the defendant copied: Was too much, i.e. more than a de minimis amount, of the plaintiff's copyrighted expression copied? The prima facie case does not require any examination of the reason that the defendant copied the expression or any proof of harm to the plaintiff, which makes the determination of how much copying is too much an abstract inquiry with no reference point. However, factors that help anchor the determination of how much is too much copying are embedded in the fair use inquiry. For example, when considering the fair use question, courts are directed to consider the purpose the copier seeks to achieve and the harm such copying causes the copyright owner, both helpful considerations when determining if defendant's copying was improper.<sup>19</sup> Indeed, fair use injects a much needed concept of harm to the copyright owner<sup>20</sup> to keep

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1998) (quoting *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992)).

16. *Id.* (citations omitted).

17. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (citation omitted). While the Ninth Circuit employs a different terminology in the infringement inquiry, involving an evaluation of both "intrinsic" and "extrinsic" similarity, the ultimate elements the plaintiff must demonstrate to carry its prima facie case are the same. *See, e.g.*, *L.A. Printx Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012). Indeed, in fair use cases, often Ninth Circuit opinions do not even engage in the extrinsic and intrinsic inquiries. *See, e.g.*, *Seltzer v. Green Day*, 725 F.3d 1170 (9th Cir. 2013); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).

18. *Feist Publ'ns, Inc.*, 499 U.S. at 362. For an interesting discussion of how to change that standard and why raising the bar for copyrightable expression might be a good idea see Joseph Scott Miller, *Hoisting Originality*, 31 *CARDOZO L. REV.* 451 (2009).

19. *See, e.g.*, Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 *Nw. U. L. REV.* 1821, 1845 (2013) (arguing that in a case of nonliteral infringement it would be appropriate to require the plaintiff to prove that the defendant copied "a substantial enough quantum of expression from the plaintiff's work as to cause commercial harm to the plaintiff's actual or reasonably foreseeable markets or to her incentives to engage in creative work").

20. Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 *WASH. U. L. REV.* 969, 973 (2007) (defining the relevant copyright harm as "the uncompensated violation of an exclusive right that would be likely to have a material effect on a reasonable copyright owner's ex

the scope of copyright owner rights from interfering with the underlying constitutional objective of copyright law.<sup>21</sup> Instead of considering those factors in the context of making a determination of whether the plaintiff has demonstrated a prima facie case of infringement, courts hold the prima facie case satisfied<sup>22</sup> and then turn to the defendant's affirmative defense of fair use.

### B. *Defense Versus Affirmative Defense*

The difference between treating fair use as a defense and treating it as an affirmative defense is significant. Not only does the label "affirmative defense" trigger a pleading obligation,<sup>23</sup> but it also has an important consequence when it comes to the burden of proof. A defense is simply a "reason why the plaintiff . . . has no valid case."<sup>24</sup> For example, a defense could be that the copying engaged in by the defendant was not an "improper" or "unlawful" appropriation (perhaps we would call the defendant's copying fair).

In contrast, the defendant bears the burden of proof for an affirmative defense, although that obligation only becomes important after the plaintiff has demonstrated its prima facie case.<sup>25</sup> An affirmative defense stems from the common law pleading of "confession and avoidance" pursuant to which the defendant would admit the plaintiff's prima facie case and allege new material that would defeat the plaintiff's case and excuse the defendant's conduct.<sup>26</sup> As the Supreme Court has further

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ante decision to create or distribute the work").

21. The Constitution grants Congress the power to adopt a copyright act providing exclusive rights to authors, but it also states a goal for the grant of that authority: "To promote the Progress of Science . . ." U.S. CONST. art. I, § 8, cl. 8. At the time of the Constitution, "Science" meant broadly "knowledge and learning." See *Golan v. Holder*, \_\_ U.S. \_\_, 132 S. Ct. 873, 888 (2012). But see Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 259 (2013) (arguing that the word "Science" had a more narrow meaning at the time of the framing).

22. There are a few cases in which the court concludes that the copying engaged in by the defendant was de minimis, although those courts often note that such considerations could also be handled in the context of the fair use defense. See, e.g., *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, 953 F. Supp. 2d 701, 710–12 (N.D. Miss. 2013).

23. The Federal Rules of Civil Procedure require that "[i]n responding to a pleading, a party must affirmatively state any . . . affirmative defense . . ." FED. R. CIV. P. 8(c)(1).

24. BLACK'S LAW DICTIONARY 509 (10th ed. 2014) (defining "Defense").

25. *Id.*

26. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2004). The problem of how to treat aspects of a civil case is by no means unique to copyright law. For example, in basic tort law, a debate is just now surfacing concerning "whether consent is an affirmative defense or whether lack of consent is an element of the plaintiff's prima facie case . . ." See Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and*

explained, when the burden of proof is placed on one party, that means the burden of persuasion will remain with that party, even if the burden of production may shift depending on the nature of the evidence each party offers.<sup>27</sup>

Determining whether a particular defense should be treated as an affirmative defense is “not without some difficulty.”<sup>28</sup> The Fifth Circuit has indicated that at least three related considerations may help in this determination: “(1) whether the matter at issue fairly may be said to constitute a necessary or extrinsic element in the plaintiff’s cause of action; (2) which party, if either, has better access to relevant evidence; and (3) policy considerations: should the matter be indulged or disfavored?”<sup>29</sup> Given that the prima facie case of infringement already requires the plaintiff demonstrate that the copying by the defendant was “improper,”<sup>30</sup> 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, as discussed in more detail below, the copyright owner often has better access to relevant evidence on the fair use factors.<sup>31</sup> Finally, because of the important First Amendment role fair use plays in copyright law,<sup>32</sup> fair use should be indulged, or at least certainly not disfavored.

Placing the burden of proving or disproving fair use may play a significant role in the outcome of a litigated case at a variety of stages, from the issuance of a preliminary injunction<sup>33</sup> to the ultimate determination of infringement liability.<sup>34</sup> And, of course, who bears the burden of proving a use was (or was not) a fair use affects the settlement posture of the parties, as well as the behavior of potential fair users even prior to the filing or threat of litigation.<sup>35</sup>

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*Controversy*, 61 AM. U. L. REV. 1585, 1586 (2012).

27. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 331–33 (1986) (Brennan, J., dissenting) (discussing burdens of proof, persuasion, and production in the summary judgment context).

28. *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987).

29. *Id.* (citation omitted).

30. *See supra* notes 15–17 and accompanying text.

31. *See infra* Part IV.B.

32. *See infra* Part IV.C.

33. *See, for example, Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007), discussed below and *infra* notes 137–141 and accompanying text.

34. *See Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), discussed below, and *infra* notes 129–134 and accompanying text.

35. *See Ned Snow, Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781 (2010) (discussing the chilling effect on speech of treating fair use as an affirmative defense).



## II. THE SUPREME COURT AND THE EVOLUTION OF FAIR USE INTO AN “AFFIRMATIVE DEFENSE”

The Supreme Court has directly addressed arguments concerning whether a defendant’s use is a fair use in only three cases: *Sony Corporation of America v. Universal City Studios, Inc.*,<sup>36</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>37</sup> and *Campbell v. Acuff-Rose Music, Inc.*<sup>38</sup> Those three opinions, understandably, exert enormous influence on the treatment of an assertion of fair use. In the evolution of the doctrine of fair use into an affirmative defense carrying consequences for the assignment of the burden of proof, the *Campbell* opinion is, by far, the most significant. Of the many lower courts that reflexively identify the fair use doctrine as an affirmative defense, most cite *Campbell v. Acuff-Rose Music, Inc.*, for that proposition.<sup>39</sup>

### A. *Campbell v. Acuff-Rose Music, Inc.*

A significant part of the *Campbell* opinion concerns the consequences of employing presumptions in the fair use analysis—presumptions of unfairness<sup>40</sup> and of market harm<sup>41</sup> that may or may not flow from the defendant’s use being commercial. In the arguments concerning presumptions, both the plaintiff and the defendants used the label of affirmative defense.

First, the defendants as petitioners asserted in their opening brief: “The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.”<sup>42</sup> Plaintiff-respondent Acuff-Rose was far more forceful in its characterization. After noting that in drafting the fair use provision of the statute Congress had “resisted pressures from special interest groups to create presumptive categories of fair use,” and had instead “structured the provision as an affirmative defense requiring a case-by-case

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36. 464 U.S. 417 (1984).

37. 471 U.S. 539 (1985).

38. 510 U.S. 569 (1994).

39. See, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275 n.31 (11th Cir. 2001); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998).

40. *Campbell*, 510 U.S. at 583–84.

41. *Id.* at 591.

42. Brief on the Merits for Petitioners at 8, *Campbell*, 510 U.S. 569 (No. 92-1292), 1993 WL 391046.

analysis,”<sup>43</sup> respondent then turned to the resulting burden on the defendants:

In assessing the evidence under [the § 107] factors, it bears emphasis that fair use is an affirmative defense, *see Harper & Row*, 471 U.S. at 561, and that, accordingly, the burden of proving fair use lies with the proponent of the defense. H.R. Rep. No. 836, 102d Cong., 2d Sess. at 3 n.3 (1992) . . . .<sup>44</sup>

Responding to that assertion, the defendants failed to attack the characterization of fair use as an affirmative defense<sup>45</sup> but instead highlighted that the Supreme Court had also identified the doctrine as “a mixed question of law and fact,” and that therefore the burden on the defendant was “at best uncertain.”<sup>46</sup> At oral argument, Chief Justice Rehnquist directly asked counsel for defendants, Bruce S. Rogow, if fair use was an affirmative defense and counsel’s response was unequivocal:

QUESTION: Is fair use an affirmative defense?

MR. ROGOW: It is.

QUESTION: So the burden of negating fair use in a motion for summary judgment, then, is on the person claiming the fair use?

MR. ROGOW: The ultimate burden is to show fair use as the affirmative defense as these factors unfold . . . .<sup>47</sup>

Defendants’ lawyer was not focused on the significance of that concession. Instead, he was far more focused on undoing the consequences of the presumptions that the Court of Appeals had employed. The Court of Appeals had held that those presumptions, stemming from language the Supreme Court had used in *Sony Corporation of America v. Universal City Studios, Inc.*, made a use “presumptively unfair” if a defendant’s use was commercial in nature.<sup>48</sup> This presumption shifted the burden onto the defendant to disprove the “unfairness” of the use. Ultimately, the Supreme Court reversed the

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43. Brief on the Merits for Respondent at 10–11, *Campbell*, 510 U.S. 569 (No. 92-1292), 1993 WL 391058 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985))

44. *Id.* at 21. The statements contained in the 1992 House Report concerning a bill that sought to add a new sentence to the end of § 107 are discussed below. *See infra* notes 104–111 and accompanying text.

45. This failure was understandable given the Supreme Court’s use of the label in *Harper & Row*.

46. Reply Brief on the Merits for Petitioners at 4 n.2, *Campbell*, 510 U.S. 569 (No. 92-1292), 1993 WL 638228. For this assertion, defendants cited *Harper & Row*, 471 U.S. at 561.

47. Transcript of Oral Argument at 19, *Campbell*, 510 U.S. 569 (No. 92-1292), 1993 WL 757656, at \*19.

48. *Campbell*, 510 U.S. at 594.

Court of Appeals and held that no such presumption was warranted.<sup>49</sup> Yet, by labeling fair use an affirmative defense, the Court had created a presumption: without proof of the affirmative defense of fair use, the plaintiff would prevail on its infringement claim due to the plaintiff's demonstration of its prima facie case of infringement.

In its opinion in *Campbell* the Supreme Court cited two sources identifying fair use as an affirmative defense: its own opinion, from less than a decade prior, in *Harper & Row* and a statement contained in a 1992 House Report.<sup>50</sup> The legislative history is explored in Part II, below. The next section examines the treatment of fair use as a defense in the Court's *Harper & Row* decision.

### B. *Harper & Row, Publishers, Inc. v. Nation Enterprises*

In *Harper & Row* the Court refers to fair use as a defense six times.<sup>51</sup> Only once, while discussing the first fair use factor, does the Court add the adjective "affirmative."<sup>52</sup> The distinction between a mere *defense* and an *affirmative defense* is significant.<sup>53</sup> Importantly, while the plaintiffs in *Harper & Row* referred to fair use as a defense in their briefs,<sup>54</sup> they never once used the significantly different label of affirmative defense. The defendants never even used the label "defense" in their brief<sup>55</sup> and neither term was uttered during the oral argument of the case.<sup>56</sup>

The paragraph from *Harper & Row* which contains the only reference to fair use as an "affirmative defense" reads in full:

*Purpose of the Use.* The Second Circuit correctly identified news reporting as the general purpose of The Nation's use. News reporting is one of the examples enumerated in § 107 to "give some idea of the sort of activities the courts might regard

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49. *Id.*

50. *Id.* at 590 n.20 (citing *Harper & Row*, 471 U.S. at 561; H.R. REP. NO. 102-836, at 3 n.3 (1992)). These two sources were cited to the Court in Respondent's Brief. See *supra* note 44 and accompanying text.

51. *Harper & Row*, 471 U.S. at 549, 550, 551, 554, 561 (1985).

52. *Id.* at 561.

53. See *supra* notes 23-24 and accompanying text. Part III explores the significance of this distinction.

54. Brief for the Petitioners at 19 n.3, 29, 30, 31, 33, 37, 38, *Harper & Row*, 471 U.S. 539 (No. 83-1632), 1984 WL 565760; Reply Brief for the Petitioners at ii, 9, 13, 14 n.7, 15, 16, *Harper & Row*, 471 U.S. 539 (No. 83-1632), 1984 WL 565762.

55. See Brief for Respondents, *Harper & Row*, 471 U.S. 539 (No. 83-1632), 1984 WL 565761.

56. See Transcript of Oral Argument, *Harper & Row*, 471 U.S. 539 (No. 83-1632).

as fair use under the circumstances.” Senate Report, at 61. This listing was not intended to be exhaustive, see *ibid.*; § 101 (definition of “including” and “such as”), or to single out any particular use as presumptively a “fair” use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis. See H.R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967); Patry 477, n.4. “[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.” Senate Report, at 62. The fact that an article arguably is “news” and therefore a product use is simply one factor in a fair use analysis.<sup>57</sup>

It is this page to which the *Campbell* opinion refers. However, in context, it is clear that in *Harper & Row* the Court was not concerned with the consequences of labeling fair use an “affirmative defense” but rather was concerned with rejecting the defendant’s argument that use of copyrighted material as “news” meant the use was *presumptively* a fair use. In fact, as discussed more fully below, the legislative history to which the Court cites does not use the label affirmative defense and instead provides: “The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.”<sup>58</sup>

### C. Sony Corporation of America v. Universal City Studios, Inc.

The first time the Court addressed the fair use doctrine after the enactment of the 1976 Copyright Act was in *Sony Corporation of America v. Universal City Studios, Inc.*<sup>59</sup> Tellingly, the *Sony* opinion never refers to fair use as an affirmative defense, or even as a defense for that matter. Instead, the Court focused on the statutory language, noting that Section 106 prefaces the grant of rights to copyright owners as “subject to sections 107 through 118” and that “[t]hose sections describe a variety of uses of copyrighted material that ‘are not infringements of copyright notwithstanding the provisions of § 106.’”<sup>60</sup>

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57. *Harper & Row*, 471 U.S. at 561 (citing S. REP. NO. 94-473).

58. H.R. REP. NO. 90-83, at 37 (1967). While this House Report is from 1967, the general revision of the Copyright Act was not adopted until 1976.

59. 464 U.S. 417 (1984).

60. *Id.* at 448.

Even the dissenters, who would have found the use at issue to be infringing, speak of fair use as one of “a number of exemptions and limitations on the copyright owner’s rights.”<sup>61</sup> In other words, the first time the Court addressed the codification of the fair use doctrine it viewed fair use as part of what shapes the scope of a copyright owner’s rights. As part of that overall inquiry, the *Sony* Court indicated some presumptions could aid in the determination of whether a use was fair.<sup>62</sup> But *Sony* never assigned the burden of proof on any aspect of fair use to the defendant.

Other Supreme Court opinions confirm a conception of fair use not as an affirmative defense, but rather as an integral part of shaping the rights of a copyright owner and even keeping copyright from transgressing the First Amendment.<sup>63</sup> For example, in *Eldred v. Ashcroft*<sup>64</sup> the Court relied heavily on fair use as one of “copyright’s built-in free speech safeguards”<sup>65</sup> that significantly reduces the pressure to employ heightened First Amendment scrutiny to congressional action relating to copyright.<sup>66</sup> In *Harper & Row*, the Court rejected a separate First Amendment defense to copyright infringement, relying instead on fair use to safeguard the First Amendment interests at stake.<sup>67</sup> As an important balance in copyright that the Court has repeatedly pointed to when considering separate First Amendment challenges to copyright law, relegating fair use to the status of an affirmative defense weakens its significant balancing role.

### III. THE TEXT AND LEGISLATIVE HISTORY OF THE 1976 ACT

The first time the Supreme Court used the label “affirmative defense”<sup>68</sup> it cited two sources as support: a 1967 House Report and a treatise on copyright law.<sup>69</sup> Textualists assert that resort to legislative

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61. *Id.* at 462 (Blackmun, J., dissenting).

62. *Id.* at 449 (majority opinion).

63. *See, e.g.*, *Golan v. Holder*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 873 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

64. 537 U.S. 186 (2003).

65. *Id.* at 221.

66. The Court holds that so long as Congress “has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” *Id.*

67. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–60 (1985).

68. *Id.* at 561.

69. The treatise, written by William Patry, asserts that fair use is an affirmative defense and cites for support two circuit court opinions and four district court opinions. PATRY, *supra* note 8. The specific footnote of this treatise cited by the Supreme Court, footnote 4, cites the final House and

history is only appropriate if the language of the statute is unclear.<sup>70</sup> On the question whether fair use is an affirmative defense, one can view the statute as quite clear: fair use is not an affirmative defense. The legislative history of the 1976 Copyright Act also supports this reading of the statute by never once referring to fair use as an “affirmative defense.” It is only in legislative material concerning later amendments to the statute that the label of affirmative defense is used. These later legislative materials do not provide adequate support for treating fair use as an affirmative defense.

#### A. *Statutory Language*

Section 106 conditions the rights granted to a copyright owner as “subject to Sections 107 through 122.”<sup>71</sup> Additionally, Section 107 provides that “[n]otwithstanding the provisions of section[] 106 . . . the fair use of a copyrighted work . . . is not an infringement of copyright.”<sup>72</sup> Combined, these two statutory sections seem to clearly support viewing fair use not as an affirmative defense but rather as part and parcel of what defines the rights of a copyright owner.<sup>73</sup> “Absent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief.”<sup>74</sup> It seems appropriate that the plaintiff who seeks relief in a copyright infringement

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Senate Reports, H.R. REP. NO. 94-1476, at 66 (1976) and S. REP. NO. 94-473, at 62 (1975), yet neither of those Reports use the label “affirmative defense,” nor make any statement concerning the burden of proof. PATRY, *supra* note 8, at 477 n.4. The footnote provides a “see also” citation to a 1984 House Report concerning proposed amendments to other sections of the Act that does use the label “affirmative defense” when referring to fair use. *Id.* The footnote then discusses how, after statements on early revision efforts in the legislative history indicated the burden of proof should not be assigned to either party, the legislative history is then silent on the issue of who should bear the burden of proof on fair use. *Id.*

70. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (finding that where “[t]here are . . . contrary indications in the statute’s legislative history . . . we do not resort to legislative history to cloud a statutory text that is clear”); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 395 (1999) (noting the “clear and unmistakable pattern of decline in the use of legislative history by the Supreme Court”).

71. 17 U.S.C. § 106 (2012).

72. *Id.* § 107.

73. Judge Birch has indicated his belief that the characterization of fair use as an affirmative defense does not comport with the statutory language. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

74. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005).

lawsuit must prove infringement including that a use is not a fair use. The language of Section 108, identifying the “right of fair use,”<sup>75</sup> furthers the textual argument that the statute does not treat fair use as an affirmative defense in the style of “confession and avoidance.”<sup>76</sup> A defense is any reason that the plaintiff should not prevail.<sup>77</sup> On the other hand, an affirmative defense is relevant only once the plaintiff’s prima facie case has been proven.<sup>78</sup> If fair use is “not an infringement,” then the plaintiff has not met its burden to demonstrate a prima facie case of *infringement* without overcoming the argument that the use is a fair use.

Some may argue that fair use is an “exception” and that when one seeks to rely on an exception or an exemption from a statutory prohibition, the burden of proving a “special exception to the prohibitions of a statute generally rests on one who claims its benefits.”<sup>79</sup> The statutory language contradicts treating fair use as an exception: It is, “not an infringement,” instead a limitation on the scope of the rights granted to copyright owners.

The phrasing of Section 107 can be contrasted with other limitations placed on the rights that the Copyright Act grants to copyright owners. For example, Section 109 provides that an owner of a lawfully made copy of a copyrighted work “is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”<sup>80</sup> This is a codification of the first sale doctrine, an affirmative defense against the claim of infringement of the copyright owner’s right to distribute copies of the copyrighted work to the public.<sup>81</sup> Tellingly, Section 109 does not refer to such a resale as “not an infringement of copyright”; rather, it provides an “entitlement” to the owner of a lawfully made copy.<sup>82</sup> Another example is Section 1008, specifying that “[n]o action may be brought under this title” for certain noncommercial

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75. 17 U.S.C. § 108(f)(4) (providing that “[n]othing in this section . . . in any way affects the right of fair use as provided by section 107”).

76. *See supra* note 26.

77. *See supra* note 24.

78. *See supra* note 25.

79. *Fed. Trade Comm’n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948); *see also* *Javierre v. Cent. Altigracia*, 217 U.S. 502, 508 (1910) (opinion for the Court by Holmes, J.).

80. 17 U.S.C. § 109(a). Similarly, subsection (c) of Section 109 provides that the owner of a lawfully made copy “is entitled . . . to display that copy publicly.” *Id.* § 109(c).

81. *See Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010).

82. For an argument that the right protected by 109 and the first sale doctrine is not an affirmative defense see Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual & Personal Property*, 90 NOTRE DAME L. REV. (2015) (forthcoming), available at <http://ssrn.com/abstract=2399983> (exploring the first sale doctrine and the requirement of ownership in a digital transactions).

uses by a consumer of a digital audio recording device or medium.<sup>83</sup> Again, the statute does not identify this noncommercial use as “not an infringement”; rather, it prohibits suit against such users.

Further, this approach to the fair use inquiry comports with the statement of the prima facie case of infringement. As described earlier,<sup>84</sup> as part of its prima facie case of infringement a plaintiff must establish that the copying amounts to an improper or unlawful appropriation. How is a court to determine if the copying is “improper” or “unlawful” without a reference to something? In some cases the threshold becomes one of “more than de minimis” copying, examining the quantitative and qualitative aspects of what has been copied.<sup>85</sup> Yet that inquiry, concerning the amount that the defendant has copied, is a specific factor in the fair use inquiry.<sup>86</sup> Indeed, determinations of the “propriety” of the copying at issue would seem to call out for an inquiry into the fuller context of the copying engaged in by the defendant. The language of Sections 106 and 107 support such an approach.

#### B. *Legislative History of the 1976 Act*

As just described, a strong case can be made that the statute is clear and unambiguous concerning the nature of the fair use doctrine as being part of the inquiry into the prima facie question of infringement. When a statute is clear and unambiguous, one should not typically resort to legislative history.<sup>87</sup> However, the Supreme Court cited legislative history as support for labeling fair use as an affirmative defense. Specifically, the *Harper & Row* decision cited page thirty-seven of a 1967 House Report.<sup>88</sup> Yet neither on page thirty-seven nor any other page in that House report (or any other House or Senate Report leading up to the Copyright Act of 1976), is the doctrine referred to as an affirmative defense.

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83. 17 U.S.C. § 1008. It is important to note that a digital audio recording device and medium are specifically defined in the Act and exclude general-purpose computers. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024–25 (9th Cir. 2001).

84. See *supra* notes 14–17 and accompanying text.

85. See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004).

86. 17 U.S.C. § 107(3) (directing courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” when considering whether the use is a fair use).

87. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Even where “[t]here are . . . contrary indications in the statute’s legislative history . . . we do not resort to legislative history to cloud a statutory text that is clear.” *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).

88. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (citing H.R. REP. NO. 90-83, at 37 (1967)).



The 1967 House Report specifically cited by the Supreme Court contains eight pages addressing fair use. The second sentence of that discussion identifies fair use as a “defense” to infringement: “The claim that a defendant’s acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it.”<sup>89</sup> In the ensuing nine-page discussion, the 1967 House Report never uses the word “defense” again.

In fact, the Court’s label of “affirmative defense” is contradicted by the very report to which the Court cited. A significant difference exists between a defense and an affirmative defense.<sup>90</sup> Most importantly, an affirmative defense is one on which the defendant bears the burden of proof. Yet on the page of the House Report to which the Supreme Court cites the first time it uses the label “affirmative defense,” the House Report not only does not use the label, it expressly characterizes fair use as *not* an affirmative defense: “The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable.”<sup>91</sup> This is an express disavowal of an intent to treat fair use as an affirmative defense.

The intent that the statute not be read to place the burden of proving fair use on the defendant is a theme found in much of the legislative history of the 1976 Act. In 1965 the head of the U.S. Copyright Office issued a Supplementary Report explaining the modifications to the previous bill made by new bills introduced in February 1965.<sup>92</sup> In that Report, the Register describes the debate over treating fair use as an affirmative defense and concludes that the draft bill refuses to adopt the position of treating fair use as an affirmative defense:

The author-publisher interests have suggested that fair use should be treated as a defense, with the statute placing the burden of proof on the user. The educational group has urged just the opposite, that the statute should provide that any nonprofit use for educational purposes is presumed to be a fair use, with the copyright owner having the burden of proving otherwise. We believe it would be undesirable to adopt a special rule placing the burden of proof on one side or the other. When

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89. H.R. REP. NO. 90-83, at 29 (1967).

90. See *supra* notes 24–25 and accompanying text.

91. H.R. REP. NO. 90-83, at 37 (1967).

92. SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, at foreword (Comm. Print 1965) (explaining the report’s purpose to describe in detail the 1965 bills, H.R. 4347 and S. 1006, 89th Cong.).

the facts as to what use was made of the work have been presented, the issue as to whether it is a “fair use” is a question of law. Statutory presumptions or burden-of-proof provisions could work a radical change in the meaning and effect of the doctrine of fair use. The intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it.<sup>93</sup>

Instead, *Harper & Row*’s single use of the label “affirmative defense” set in motion the “radical change” the Register of Copyrights feared, citing as support legislative history that did not, in fact, support such a marked departure from the traditional fair use doctrine. And *Campbell*, for all of the positive influence that decision has had on the doctrine of fair use,<sup>94</sup> provided the cement that locked in treatment of fair use as an affirmative defense.

While *Harper & Row* relied on a 1967 House Report, the general revision of the Copyright Act was not adopted until 1976.<sup>95</sup> The final House and Senate Reports also do not contain any reference to fair use as an “affirmative defense” nor do they provide any statements concerning the assignment of the burden of proof. Both reports use the label “defense.” However, calling fair use a “defense” is entirely consistent with fair use being a component part of what shapes the rights of a copyright owner. Labeling something a “defense” does not necessarily carry with it an obligation of proving the elements of the defense.<sup>96</sup> It is the label of “affirmative defense” that indicates the shift of the burden to the defendant.<sup>97</sup>

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93. *Id.* at 28.

94. See e.g., Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015) (reviewing the laudable analytical framework *Campbell* created for considering the bearing of market effects on the fair use determination); Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 WASH. L. REV. 597 (2015) (describing *Campbell* as a “beautifully reasoned opinion, which has demonstrated in its twenty-one years that it provides a healthy framework for fair use analysis”); R. Anthony Reese, *How Much Is Too Much?: Campbell and the Third Fair Use Factor*, 90 WASH. L. REV. 755 (2015) (analyzing the important and beneficial change *Campbell* brought to the third factor of the fair use analysis); Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869 (2015) (exploring the evolution of the “transformative” inquiry in fair use case law following *Campbell*).

95. The path to the Copyright Act of 1976 is a complicated one that began in the 1950s. “The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years.” Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987).

96. See *supra* notes 24–26 and accompanying text.

97. *Id.*

Several of the statements made by the Register in his 1965 Supplementary Report are echoed in the final House and Senate Reports, including the desire to affirm the fair use doctrine but not to change it.<sup>98</sup> Giving affirmation to the extant judicial doctrine meant treating fair use as part of the inquiry of infringement, not as an affirmative defense.<sup>99</sup> Indeed, in the case that is most often credited as the fountainhead of the fair use doctrine, *Folsom v. Marsh*,<sup>100</sup> Justice Story did not cast his inquiry as one based on a “defense”; rather, the factor-based evaluation that we now call fair use was the central inquiry into whether the defendant’s use invaded the right of copyright.<sup>101</sup> Justice Story described the evaluation of the quantity of copying as “the real hinge of the whole controversy, and involves the entire merits of the suit.”<sup>102</sup> While he did not use the phrase “fair use,” he also never viewed the inquiry into the magnitude of the copying, the reasons for it, or the harm to the plaintiff’s market as anything other than the central question of infringement. As described by Professor Ned Snow, for Justice Story “the principles of fair use did not represent a doctrine independent from the question of infringement that would merit a distinct label; those principles were part and parcel with the criteria for determining infringement.”<sup>103</sup>

Thus, if a court is interested in relying on the legislative history of the 1976 Copyright Act, rather than the clear statutory language, the repeated discussion of *not* assigning the burden of proof to the defendant and *not* changing extant fair use law indicates that it would be error to conclude that Congress intended fair use to be treated as an affirmative

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98. H.R. REP. NO. 94-1476, at 66 (1976) (“Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”); S. REP. NO. 94-473, at 62 (1975) (same).

99. See Snow, *supra* note 4, at 159–61 (2011) (discussing the state of the law at the time leading up to the enactment of the 1976 Copyright Act).

100. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

101. Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1131 (2010) (“[B]ecause *Folsom* did not create a fair use defense as such, but rather redefined the test of infringement, *Folsom* arguably would have required the copyright holder to bear the burden of proof on the issue of harm as part of the burden to prove infringement.”).

102. *Folsom*, 9 F. Cas. at 347.

103. Snow, *supra* note 4, at 147 (footnotes omitted). Professor Snow attributes the shift in thinking of fair use as a defense first to a treatise published in 1925 by Richard DeWolf, *id.* at 155–56 (citing RICHARD C. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925)), asserting that fair use was based on a tacit consent. If based on tacit consent, then it would make sense to require the defendant to prove the existence of such consent. The DeWolf treatise was then cited in a subsequent copyright treatise in 1944 by a well-known commentator, Horace Ball. *Id.* at 157 (citing HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)). DeWolf cited no support for his description of fair use as stemming from a theory of implied consent, and the cases Ball cited, when examined closely, do not support that conception of fair use. *Id.* at 155–57.

defense.

### C. *Later Legislative History*

While *Campbell* relied on *Harper & Row* for its characterization of fair use as an affirmative defense and *Harper & Row* had relied on a House Report that did not label fair use an affirmative defense, *Campbell* also cited a later 1992 House Report.<sup>104</sup> This House Report concerned a bill, H.R. 4412, that proposed adding a final sentence to the end of Section 107 relating to the fair use of unpublished works.<sup>105</sup> The addition of that final sentence to Section 107, as spelled out in the House Report, was meant “to clarify the intent of Congress that there be no per se rule barring claims of fair use of published works.”<sup>106</sup> That amendment, itself, had nothing to do with the fundamental nature of the doctrine of fair use. “Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”<sup>107</sup> *Campbell*, however, cites this 1992 House Report as support for the characterization of fair use as an affirmative defense. The “Summary and Purpose” Section of the 1992 House Report provides:

The purpose of H.R. 4412 is to clarify the intent of Congress that there be no per se rule barring claims of fair use of published works. Instead, consistent with Congress’s codification of fair use in the 1976 Copyright Act, the courts are to determine the affirmative defense of fair use of unpublished works on a case-by-case basis, after consideration of all the factors set forth in Section 107, title 17 United States Code, as well as any other factors a court may find relevant. The purpose of this legislation is thus to direct the courts to give proper weight to all factors; it is not the committee’s intention to direct the courts how much weight to give to any factor in a particular case.<sup>108</sup>

The 1992 Report later repeats the affirmative defense statement, adding that as an affirmative defense, fair use “is relevant only after a copyright owner has made out a prima facie case of infringement.”<sup>109</sup>

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104. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 n.20 (1994) (citing H.R. REP. NO. 102-836, at 3 n.3 (1992)).

105. H.R. REP. NO. 102-836, at 1.

106. *Id.*

107. *Bruesewitz v. Wyeth LLC*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1068, 1081 (2011).

108. H.R. REP. NO. 102-836, at 1.

109. *Id.* at 3.

The only authority cited by this House Report to support this assertion is *Harper & Row*.<sup>110</sup> This 1992 House Report should not be accorded the weight of contemporary legislative history; it is dubious support for congressional intent concerning a law passed over fifteen years earlier, in 1976.<sup>111</sup>

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In the end, the support for concluding that Congress intended the codification of fair use in the 1976 Copyright Act to signal a shift from treating fair use as a *defense* to treating it as an *affirmative defense* is non-existent. Describing fair use as an affirmative defense has gone largely without question since the time of *Harper & Row*.<sup>112</sup> However, the Supreme Court is not foreclosed from ruling on the nature of fair use. As the Court has noted, “cases cannot be read as foreclosing an argument that they never dealt with.”<sup>113</sup> Given the consequences that flow from treating fair use as an affirmative defense, the Court should examine the statute, the legislative history, and the policy behind fair use and conclude that fair use is part of the inquiry into the *prima facie* question of infringement.

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110. *Id.* at 3 n.3. The Report also criticizes as contrary to *Harper & Row* an unpublished district court opinion that “erroneously held that where the copyright owner seeks a preliminary injunction, the copyright owner bears the burden of disproving the defense.” *Id.* (citing *Coll. Entrance Examination Bd. v. Cuomo*, 90-CV-437, at \*11 n.7 (N.D.N.Y. Mar. 23, 1992)). This footnote goes on to specify that “the burden of proving fair use is always on the party asserting the defense, regardless of the type of relief sought by the copyright owner” citing only *Harper & Row* for support. *Id.*

111. Post-enactment legislative history has “little probative value because a post-enactment legislative body has no special insight regarding the intent of a past legislative body.” *Laborers’ Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 409 (6th Cir. 2014). The Supreme Court has noted that “even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

112. Judge Birch of the Eleventh Circuit, while acknowledging that the Supreme Court has indicated that fair use is an affirmative defense, nonetheless has articulated that as a matter of first principles, fair use should not be seen as an affirmative defense. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).

113. *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)); *see also* *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 541 (9th Cir. 1993) (“It is a venerable principle that a court isn’t bound by a prior decision that failed to consider an argument or issue the later court finds persuasive.”).

#### IV. CONSEQUENCES OF TREATING FAIR USE AS AN AFFIRMATIVE DEFENSE

*Campbell's* use of the affirmative defense label, with its further statement concerning the burden that follows from that label, has led to certain consequences relating to the fair use doctrine. From pleading to proof, from settlement to chilling creative activity and speech, treating fair use not as a mere defense but as an affirmative defense impacts both litigation and behavior.

##### A. *Pleading*

As an affirmative defense, fair use is subject to the pleading requirement of Rule 8 of the Federal Rules of Civil Procedure, mandating a statement of affirmative defenses in the defendant's answer.<sup>114</sup> Failure to plead an affirmative defense generally results in a waiver of that defense.<sup>115</sup> Also, courts generally lack the ability to raise an affirmative defense *sua sponte*.<sup>116</sup>

Courts do not always strictly adhere to this pleading requirement. For example, courts have granted dismissals on the basis of a clear fair use without waiting for an answer pleading the affirmative defense.<sup>117</sup> Particularly in light of the Supreme Court's more recent articulation of a heightened pleading standard in *Ashcroft v. Iqbal*<sup>118</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>119</sup> if fair use were not treated strictly as an affirmative defense, we could see more pre-answer dismissals in cases of clear fair use because the plaintiff's claim of infringement is not plausible.<sup>120</sup>

More recently however, *Iqbal* and *Twombly*, may in fact be having

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114. FED. R. CIV. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."); see also *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239–40 (11th Cir. 2010).

115. *Latimer*, 601 F.3d at 1239 (citing *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1012 (11th Cir. 1982)).

116. *Id.* (quoting *Hutcherson v. Lauderdale Cnty., Tenn.*, 326 F.3d 747, 757 (6th Cir. 2003)).

117. See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (rejecting the argument "that an unpleaded affirmative defense of fair use is an improper basis for granting a motion to dismiss under Rule 12(b)(6)" and affirming dismissal of copyright infringement claim on fair use grounds under Rule 12(c)).

118. 556 U.S. 662 (2009).

119. 550 U.S. 544 (2007).

120. For an example of a court's willingness to do this, see *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, 953 F. Supp. 2d 701, 712 (N.D. Miss. 2013) (combining an inquiry into substantial similarity, de minimis copying, and fair use to conclude the plaintiff's claim of copyright infringement should be dismissed under Federal Rule of Civil Procedure 12(b)(6)).

the opposite effect. Specifically, lower courts have held that the plausibility standard articulated in *Iqbal* and *Twombly* applies to affirmative defenses.<sup>121</sup> Thus, treating fair use as an affirmative defense means that not only must a defendant assert fair use in the answer to the complaint, but the defendant must also allege sufficient facts that make fair use plausible. Without such facts, a court may grant a motion to strike the defense of fair use, removing consideration of the defense from the case early in the proceedings.<sup>122</sup>

### B. *Burdens of Proof*

Who bears the burden of proof in a civil case, provides a “winner” in the case of a tie. When the evidence is in equipoise, the party on whom the burden of proof rests loses.<sup>123</sup> Thus, treating fair use as an affirmative defense requires the defendant to produce sufficient evidence<sup>124</sup> on which a court could find in favor of the defense. The *Campbell* Court made that clear in the penultimate paragraph of the opinion:

[I]t is impossible to deal with the fourth factor [of the fair use analysis] except by recognizing that a silent record on an important factor bearing on fair use disintitiled the proponent of the defense, [the defendant] 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand.<sup>125</sup>

Clearly the court placed the burden of producing evidence to support fair use on the defendant.

Presenting sufficient evidence often is identified as the burden of production. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court commented on the nature of the burden that it thought the defendant bore. Specifically addressing the fourth factor of fair use, market harm, the court stated: “Since fair use is an affirmative defense, its proponent

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121. *See, e.g.*, *Barnes v. AT & T Pension Benefit Plan–Nonbargained Program*, 718 F. Supp. 2d 1167, 1171–72 (N.D. Cal. 2010).

122. *See* *Erickson Prods., Inc. v. Kast*, No. 5:13-CV-05472 HRL, 2014 WL 1652478, at \*4 (N.D. Cal. Apr. 23, 2014) (granting motion to strike defendant’s fair use defense, albeit with leave to amend).

123. *Schaffer ex rel. Schaffer, v. Weast*, 546 U.S. 49, 56 (2005) (noting that the burden of persuasion answers “which party loses if the evidence is closely balanced”). The Court has noted that, “[i]n truth, however, very few cases will be in evidentiary equipoise.” *Id.* at 58.

124. That evidence would need to meet the standard applicable in a civil case: a preponderance of the evidence.

125. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994). On remand, the parties agreed to a settlement that gave 2 Live Crew a license to use “Oh, Pretty Woman.” *See* STAN SOOCHER, *THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT* 189–90 (1999).

would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”<sup>126</sup> For a defendant, such favorable evidence would mean proving the lack of harm to relevant markets. Yet evidence of the presence of something (harm), rather than evidence of the absence of something (lack of harm), is often far easier evidence to provide, and “a determination . . . which party, if either has better access to relevant evidence” is a relevant consideration when considering whether a defense should be treated as an “affirmative defense.”<sup>127</sup> In the context of a copyright infringement lawsuit, the plaintiff typically is in a better position to provide evidence of the presence of harm to relevant markets if such harm exists.<sup>128</sup> Thus characterizing fair use as an affirmative defense places the burden on the wrong party.

At least one recent fair use case has endorsed the appropriateness of shifting the burden of production in just this context. The Eleventh Circuit has held that in some circumstances, it is “reasonable to place on Plaintiffs the burden of going forward” with evidence on the fourth factor.<sup>129</sup> The court looked to employment discrimination law as an example of this burden shifting approach.<sup>130</sup> It noted that it was adopting this burden shifting approach because of the facts of the case at bar: “This approach merely recognizes that this is a case wherein one party

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126. *Campbell*, 510 U.S. at 590.

127. *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987).

128. Requiring the plaintiff to demonstrate some harm caused by the defendant’s conduct is consistent with copyright law’s historical roots in tort doctrine. *See* Bohannon, *supra* note 20, at 974–81 (exploring the historical approach to harm in copyright law). In addition to the fourth factor and its inquiry into the harm to the copyright owner’s markets, Section 107 directs courts to consider the purpose of the use. 17 U.S.C. §107(1) (2012). In general, courts have focused on the objective manifestations of that purpose rather than the putative fair user’s subjectively intended purposes. *See, e.g.*, *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (noting what matters is not the “stated intention” of the creator of the alleged infringing work, but rather how the work “appears to the reasonable observer”). For a further discussion of the role of intent in a fair use analysis, see Eva Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935 (2014). A focus on objective manifestations of the purpose of the work does not rely on evidence to which the defendant has better access.

129. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1279 (11th Cir. 2014).

130. *Id.* Specifically the Eleventh Circuit cited *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989): “[I]n a case brought pursuant to the Age Discrimination in Employment Act, ‘the plaintiff bears the ultimate burden of proving that age was a determinative factor in the employer’s decision to terminate his employment,’ but that after the plaintiff establishes a prima facie case of discrimination, this creates a presumption that age was a determinative factor and the defendant then has the burden to go forward with evidence of ‘a legitimate, non-discriminatory rationale for the discharge,’ after which the plaintiff must prove that the employer’s purported reason was merely a pretext.” *Cambridge Univ. Press*, 769 F.3d at 1279 (quoting *Verbraeken*, 881 F.2d at 1045).



has all the evidence on a particular issue, and so it is equitable to require that party to go forward with the evidence.”<sup>131</sup>

Even the Eleventh Circuit, however, notes that while the burden of production may shift, because fair use is an affirmative defense, the burden of persuasion remains with the defendant.<sup>132</sup> At common law, the burden of proving “affirmative defenses—indeed, ‘all . . . circumstances of justification, excuse or alleviation’—rested on the defendant.”<sup>133</sup> This common law rule accords with the general evidentiary rule that “the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.”<sup>134</sup> The need to shift the burden of production is an indication that the burden of persuasion on fair use has not been properly allocated.

One tactic to meet the burden of production that defendants asserting fair use have successfully employed is to use various discovery tools to force the copyright owner to acknowledge a lack of any evidence of harm. For example, when the Authors Guild sued HathiTrust, asserting that its use of the corpus of scanned books from the collection of HathiTrust member libraries constituted infringement, HathiTrust claimed there was no evidence of harm to any relevant markets. In interrogatories, defendant HathiTrust requested the Authors Guide “identify ‘any specific, quantifiable past harm, or any documents relating to any such past harm,’ resulting from any of the Libraries’ uses of their works.”<sup>135</sup> When the Authors Guild identified none, both the district court and the Second Circuit accepted this as evidence favorable to the defendant in ruling that the use was fair.<sup>136</sup>

In addition to having consequences for pleading requirements and for the burden of production, treating fair use strictly as an affirmative defense makes resisting motions for preliminary injunctions more difficult. When a copyright owner moves for a preliminary injunction the owner must prove a likelihood of success on the merits.<sup>137</sup> When the defendant raises the defense of fair use, because the burden of proving

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131. *Cambridge Univ. Press*, 769 F.3d at 1279 n.34.

132. *Id.* at 1280.

133. *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*201).

134. 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 337 (5th ed. 1999).

135. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (citing Brief for Appellee at 38 (citing Pls.’ Resps. to Interrogs.)).

136. *Id.*

137. *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

that defense has not been placed on the copyright owner, demonstrating a likely lack of fair use is not required.<sup>138</sup> Instead, defendant must show that the defense of fair use is likely to succeed.<sup>139</sup> The relative ease of granting a preliminary injunction in a copyright infringement case has serious consequences for freedom of speech. Copyright, by its nature, concerns creative expression.<sup>140</sup> When copyright is used to enjoin the defendant's activity, it is often being used to prevent the defendant from speaking in the defendant's desired way.<sup>141</sup> By placing the burden on the defendant, treating fair use as an affirmative defense makes it easier for the plaintiff to obtain a requested preliminary injunction.

### C. *Amplifying the Burden on Speech*

The First Amendment ramifications of treating fair use as an affirmative defense extend beyond the preliminary injunction context. Because fair use is fundamental to protecting free speech rights and to keeping copyright from requiring "further First Amendment scrutiny,"<sup>142</sup> placing the burden of proof on the defendant is problematic.<sup>143</sup> Many fair uses involve speech activities.<sup>144</sup> Yet characterizing the fair use doctrine as an affirmative defense places a burden on the speaker to prove an entitlement to speak. Contrast that with requiring one who seeks to silence particular speech to prove a clear entitlement to prevent that speech. Treating fair use as an affirmative defense places an unnecessary

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138. In 2007 a panel of the Ninth Circuit directly addressed this issue, first ruling that the copyright owner "had the burden of demonstrating a likelihood of overcoming [the defendant's] fair use defense under 17 U.S.C. § 107." *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 714 (9th Cir. 2007), *amended and superseded on reh'g*, 508 F.3d 1146 (9th Cir. 2007). However, upon rehearing the panel held "[b]ecause 'the burdens at the preliminary injunction stage track the burdens at trial,' once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the non-moving party to show a likelihood that its affirmative defense will succeed." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006)).

139. *Perfect 10, Inc.*, 508 F.3d at 1158.

140. 17 U.S.C. § 102 (2012) (identifying that copyright protection exists in "original works of authorship").

141. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–69, 182–89 (1998) (exploring copyright as a restraint on speech and the particular problems with preliminary injunctions in copyright infringement cases).

142. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

143. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 719–22 (2003) (arguing that placing the burden of proof on the defendant violates due process first amendment rights).

144. Snow, *supra* note 35, at 1793–95.

and inappropriate burden on free speech.<sup>145</sup>

Even prior to the filing of any lawsuit, treating fair use as a defense chills more speech than if fair use were considered part of the analysis of infringement.<sup>146</sup> Knowing that entitlement to rely on fair use requires one to *prove* that defense may deter speech that would otherwise occur if the burden were allocated differently.

The case-by-case nature of fair use<sup>147</sup> amplifies the chilling effect of treating fair use as an affirmative defense.<sup>148</sup> Because the Supreme Court has held that fair use determinations are not to be simplified by bright line rules, the exact contours of what constitutes fair use are ill-defined.<sup>149</sup> This lack of definition makes reliance on fair use troubling from a free speech perspective. The burdens imposed by vague statutes directed at speech heighten the First Amendment concerns.<sup>150</sup> “The inherent uncertainty of fair use magnifies a defendant’s burden of proof . . . .”<sup>151</sup> These significant First Amendment consequences further bolster the approach to treating fair use as part of the inquiry into infringement, not as a separate inquiry to be undertaken after the plaintiff has demonstrated more than de minimis copying.<sup>152</sup>

## V. TREATING FAIR USE DIFFERENTLY—AS A DEFENSE

*Campbell’s* embrace of the notion that fair use is an affirmative defense was not simply part of the evolution of the fair use doctrine. Rather, it was an error of statutory interpretation with seriously problematic First Amendment consequences. Twenty years have passed since the *Campbell* decision. Is it too late to reconsider this fundamental aspect of fair use?

In codifying the doctrine of fair use there is indication in the

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145. *See id.*

146. *Id.* at 1795–98.

147. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

148. Some have also noted that the exceedingly long duration of copyright makes the burden on speech even more significant. *See, e.g.,* Kate O’Neill, *The Content of Their Characters: J.D. Salinger, Holden Caulfield, Fredrik Colting*, 59 J. COPYRIGHT SOC’Y U.S.A. 291, 333–34 (2012).

149. Professor Pamela Samuelson argues that fair use cases fall into predictable patterns that make anticipating the boundaries of fair use easier to discern than many fear. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2541–43 (2009).

150. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *STAN. L. REV.* 1 (2001).

151. Snow, *supra* note 35, at 1791.

152. *See supra* Part I.A (discussing the ease of proving the elements of the prima facie case of infringement).

legislative history that Congress did not intend

to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.<sup>153</sup>

This legislative history envisions the fair use doctrine evolving to address new uses on a case-by-case basis. It does not appear to endorse a blank check approach, allowing the Supreme Court to fundamentally alter the nature of the doctrine of fair use. There is an important difference between treating fair use as addressing the appropriate scope of a copyright owner's rights and the propriety or impropriety of a defendant's use of copyrighted expression, and requiring the defendant bear the burden of proof concerning important factors that inform a careful case-by-case evaluation of the unlawfulness of defendant's conduct.

Given the negative consequences of treating fair use as an affirmative defense identified in Part IV, what would happen if courts approached fair use as merely a defense, not an affirmative defense? The pleading requirement would fall away, although certainly many defendants would raise the defense in their answers. If fair use were not an affirmative defense, an omission of the defense from the answer would not preclude consideration of the doctrine by the court. More significantly, as directed by the statutory language, considerations of the four factors identified in Section 107 would become part of the analysis of whether or not the defendant's actions constitute an infringement.<sup>154</sup> And with the plaintiff bearing the burden of proving *infringement*, which would encompass proof that the use was not fair, when the evidence was in equipoise, when the question of fair use was a close one, the plaintiff's *prima facie* case would fail.

While Congress could act to clarify that fair use should not be treated as an affirmative defense, it is also possible for the courts to re-examine

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153. H.R. REP. NO. 94-1476, at 66 (1976).

154. *See* 17 U.S.C. § 107 (2012). Section 107 provides that a fair use "is not an infringement." *See supra* Part II.A. As the Eleventh Circuit has done with the "affirmative defense" of fair use, courts could employ a careful shifting of the burden of production in appropriate cases. *See supra* notes 129–132 and accompanying text. For example, where the defendant might have better access to relevant information concerning an element of fair use, it would be appropriate to shift the burden of production to the defendant. However, the burden of persuasion as to whether the use is or is not infringement would remain with the plaintiff.

what Congress intended when it first codified the fair use doctrine. The Supreme Court has not engaged in a detailed examination the statute, the legislative history, and the policy arguments. If it did so, it should conclude that fair use should be treated as a defense, but not an affirmative defense.

## CONCLUSION

In *Campbell* the Court reversed the Sixth Circuit in part because the lower court had read one sentence in *Sony* to mean that there was a presumption of unfairness when the defendant's use was commercial. *Sony*, however, had said just that.<sup>155</sup> But in *Campbell*, the Court held it was not just error, but *reversible error* to employ such a presumption. The Court expressly cautioned the lower courts to not take one isolated statement out of context. Unfortunately, in *Campbell*, the court took one isolated word, "affirmative," used in *Harper & Row* and gave it more heft than it deserved given the text of the statute and the legislative history.

The difference between a "defense" and an "affirmative defense" may seem to be one of degree, but in the context of fair use, it is an important distinction with significant consequences. When a defendant asserts that the reason he is not an infringer is that his activity is a fair use, the court should consider the question of infringement holistically. The factors that Congress provide in Section 107 are designed to help a court make the assessment whether the use should be treated as an infringement within the scope of the copyright owner's rights or should, instead, be classified as a fair use and be permitted without interference from the copyright owner. Removing the modifier "affirmative" from our understanding of the fair use doctrine, will make clear the appropriate approach to fair use that Congress intended.

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155. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (stating that "[i]f the [defendant's product] were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair").