FAIR USE AS A COLLECTIVE USER RIGHT*

HAOCHEN SUN**

This Article puts forward a new theory that reconceptualizes fair use as a collective user right in copyright law. It first argues that the fair use doctrine has not yet unleashed its full potential in protecting the public interest. The failure is caused by a firmly ingrained notion in copyright law that treats fair use as an affirmative defense against allegations of copyright infringements. Such a fixed characterization of fair use has led legislators and judges to define it as merely an individual right enjoyed by each user of copyrighted works. This characterization has also lead to a wide range of harms to the public interest in the free flow of information and knowledge.

Against this backdrop, this Article explores the ways in which fair use can be revitalized to protect the public interest. It argues for repudiating the narrow-minded characterization of fair use as an individual right. It then proposes that fair use should instead be redefined as a collective right held by the public, which facilitates and enhances participation in communicative actions in what I call intangible public space. From this perspective, section 107 of the Copyright Act should be read as conferring a collective right to fair use upon members of the public. Moreover, this Article shows the power of the collective right to fair use in generating a new legal approach that will enrich copyright adjudication and policy-making discourse for protecting the public interest in the digital age.

** Assistant Professor of Law and Deputy Director of the Law and Technology Center, University of Hong Kong. I am grateful to James Boyle, Albert Chen, William Fisher, Gerald Frug, Laura Gasaway, Daniel Gervais, Mary LaFrance, David Fagundes, Holning Lau, Wee Loon Ng-Loy, Frank Pasquale, Jedediah Purdy, Laura Underkuffler, George Wei, Po Jen Yap, Peter Yu, and Diane Zimmerman for their help, support, or comments. I also want to thank participants in the Plenary Session of the Eleventh Intellectual Property Scholars Conference, the Fourth Annual Junior Scholars in Intellectual Property Workshop, the Third Global Forum on Intellectual Property, and the 2009 Intellectual Property Scholars Roundtable for their helpful comments on an earlier draft.

The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by [the] constricted reading of the fair use doctrine.

—Justice William Brennan[1]

As copyright continues its apparently unstoppable expansion in scope, duration, and strength, fair use seems unable to rise to the challenge of preserving a vibrant space in which people are free to "tinker" with or recode copyrighted works.

—Mark Lemley, Stanford Law School[2]

INTRODUCTION

As a limitation on copyright, fair use allows the public to make limited use of copyrighted works without permission from copyright holders. Fair use is of vital importance in a free and just society.[3] It not only accommodates but also encourages a wide range of freedom-promoting activities that involve using copyrighted works for purposes such as news reporting, criticism, teaching, and research.[4] As a result, fair use has been hailed as a "free speech safeguard"[5] in copyright law and the engine of social creativity.[6]

1. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 579 (1985) (Brennan, J., dissenting).

2. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, LAW & CONTEMP. PROBS., Spring 2007, at 185, 185 (internal citations omitted).

3. *See* Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008) (pointing out that the fair use doctrine defines "the contours of the private and public domains of human expression and, in doing so, directly impact[s] our capability for human flourishing"); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 43–47 (2001) (discussing the social functions of fair use); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1661 (1988) (arguing that the fair use doctrine "would contribute to the realization of a more just social order"); Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 977 (2002) (discussing the two competing public values in fair use cases); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009) ("A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners in controlling exploitations of their works and the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them.").

4. *See* 17 U.S.C. § 107 (2006).

5. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219, 221 (2003) (describing fair use as a "free speech safeguard[]" and a "First Amendment accommodation[]"); *Harper & Row*, 471 U.S. at 560 ("[T]he First Amendment protections already embodied in the Copyright Act's

Yet the recent unprecedented expansion of copyright protection may have jeopardized the positive role played by the fair use doctrine.[7] The Digital Millennium Copyright Act (DMCA),[8] for example, introduces a de facto elimination of fair use if copyright holders deploy technological measures to restrict access to and use of their works. Thus, the DMCA is widely believed to have undercut the public's fair use privilege.[9] Moreover, many courts have interpreted the fair use doctrine based on an individualistic vision of property rights, thereby turning a blind eye to the larger public interest in promoting the free flow of knowledge and information.[10] Commentators, therefore, have whimsically lamented that fair use has been treated as "the step-child of copyright law" in these copyright holder-centered rulings.[11] The combination of the legislative and judicial expansions of copyright protection, therefore, has made the fair use doctrine "an exceedingly feeble, inconstant check on copyright holders' proprietary control."[12]

distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.").

6. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .' " (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

7. *See, e.g.*, NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 54–80 (2008); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 412–46 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 37–49.

8. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

9. *See infra* text accompanying notes 146–59; *see also* Gideon Parchomovsky & Phillip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 94 (2010) (arguing that the DMCA "significantly limit[s] the scope of fair use for copyrighted works in digital media . . . [and does] not grant users fair use privileges").

10. *See infra* text accompanying notes 94–120; *see also* NETANEL, *supra* note 7, at 62–66 (discussing the Blackstonian property-centered view of fair use that has been widely used by courts); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 548 (2004) ("Unfortunately, courts' understanding of fair use has restricted both fair use and the First Amendment, so that each seems to serve a single overriding value of protecting criticism rather than promoting the multiple values served by different kinds of copying and different kinds of speech. In particular, a vision of free speech that finds copyright unobjectionable as long as a fair use defense is available ignores the value of participating by affirming or agreeing with someone else's words.").

11. Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 7 (1997) ("The overemphasis on monetary issues and permission systems by lower courts deciding fair use cases without full consideration of the external benefits of the use at issue has led judges to treat fair use as the step-child of copyright law.").

12. NETANEL, *supra* note 7, at 63; *see also* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 97 (2009) (arguing

Meanwhile, many copyright holders, especially entertainment conglomerates, have been aggressively enforcing their rights. They have stepped up their lobbying efforts in order to have more laws enacted in favor of stronger proprietary control of copyrighted works.[13]

Indeed, all these copyright holder-centered developments have brought about what I call a "legitimization crisis" for copyright law in general and fair use in particular. Debates have raged; outcries against copyright expansions have abounded.[14] Against this backdrop, this Article argues that the failure of the fair use doctrine to unleash its full potential in protecting the public interest lies in a firmly ingrained notion in copyright law that treats fair use as an affirmative defense against allegations of copyright infringements.[15] Such a fixed characterization of fair use has led legislators and judges to define fair use as merely an individual right enjoyed by each user of copyrighted works. This characterization has also lead to a wide range of harms to the public interest in the free flow of information and knowledge.[16]

This Article explores the ways in which fair use can be revitalized to protect the public interest. It first repudiates the narrow-minded characterization of fair use as a mere individual right. It then proposes

that "the fair use doctrine today is altogether inadequate"); Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 329 (2003) (noting a "shrinking doctrine of fair use"); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives—Access Paradigm*, 49 VAND. L. REV. 483, 546 (1996) ("As Congress and various courts have expanded the scope of the author's protected interest, so too have they narrowed the scope of the fair use doctrine.").

13. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 22–76 (2001) (explaining how larger entertainment corporations often exert substantial influence on copyright legislation); Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 65–67 (2002) (discussing several recent legislative efforts that have increased copyright protections for larger entertainment organizations); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 314–15 (1989) ("Much legislation advances the agendas of private interest groups .... Congress in effect agreed that if the industry representatives would invest the time and energy to develop a bill that all of them endorsed, Congress would refrain from exercising independent judgment on the substance of the legislation.").

14. For a succinct description of the debates, see generally JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 42–82 (2008); WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 134–72 (2004); Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313 (2009) [hereinafter Litman, *Politics*]; Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004).

15. *See infra* Part I; *see also* Samuelson, *supra* note 3, at 2539 ("Fair use has been invoked as a defense to claims of copyright infringement in a wide array of cases over the past thirty years.").

16. *See infra* text accompanying notes 121–41.

that fair use should instead be redefined as a collective right held by the public to facilitate and enhance participation in communicative actions in what I call "intangible public space."[17] From this perspective, section 107 of the Copyright Act should be read as conferring a collective right to fair use upon members of the public. This Article further shows the power of the collective right to fair use in generating a new legal approach that will enrich copyright adjudication and policy-making discourse for protecting the public interest in the digital age.

Moreover, this Article will show that the collective rights approach to protecting the public's fair use interests has the merit of addressing the following three dilemmas that have loomed large in copyright law in general and the fair use doctrine in particular. The first dilemma concerns why constitutional requirements have failed to deter an unprecedented expansion of copyright protection at the expense of the public interest. Indeed, many commentators and public interest activists are very enthusiastic and hopeful about the invocation of the Copyright Clause[18] or the First Amendment to counter and invalidate overly strong protection of copyright.[19] Yet *Eldred v. Ashcroft*[20] dealt a direct blow to these approaches. The Supreme Court adamantly denied the claim that either the Copyright Clause or the First Amendment was a bar to the recent twenty-year expansion of copyright terms.[21] Courts have reached similar holdings in a series of similar copyright cases in which the invocation of the Copyright Clause or the First Amendment failed to protect the public interest in fair use.[22]

Against this backdrop, this Article will demonstrate that a collective right-based theory of fair use, if introduced into copyright law, can become an effective tool to invalidate the socially unsound

17. *See infra* text accompanying notes 178–92.

18. The Copyright Clause grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

19. *See, e.g.*, NETANEL, *supra* note 7, at 169 (proposing that copyright law should be subject to First Amendment scrutiny); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2239 (2000) ("The point remains the same: in an age of increasing 'statutorification' in intellectual property law, the system needs a counterweight where the legislative process is skewed. The [Copyright] Clause of the [C]onstitution, long dormant, seems the best candidate.").

20. 537 U.S. 186 (2003).

21. *Id.* at 221. For a comprehensive critique of the Court's reasoning in *Eldred*, see Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 320–22, 327–28 (2007).

22. *See infra* Part II.B–C.

expansion of copyright protection. It would further function to revitalize the waning public interest-oriented tradition in copyright adjudication[23] and policymaking.[24] From this perspective, the collective right-based theory of fair use proposed in this Article goes beyond the reach of the Copyright Clause and the First Amendment. But it by no means follows that the theory would totally supplant those constitutional provisions. Instead, the theory acts to support the Copyright Clause and the First Amendment by creating a new legal approach for dealing with fair use cases. Put differently, the collective right-based theory of fair use would prompt courts to fulfill their judicial responsibilities to champion the cause of the Copyright Clause and the First Amendment, and, further, to avoid rendering *Eldred*-type decisions.

There exists a second dilemma in copyright law: how to define the nature of users' rights. Recently there has been a burgeoning of literature discussing this topic in the context of copyright's adaptation to advances in digital technology.[25] Commentators contend that

23. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)). Similar conclusions can be found in other cases. *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 711 (2d Cir. 1992).

24. *See* H.R. REP. NO. 60-2222, at 7 (1909) ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.").

25. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 373 (2005) ("[F]ailure to consider the user both legitimates judicially driven elision and encourages right holders and technology developers to ignore the user as a matter of practice."). *See generally* Abraham Drassinower, *Taking User Rights Seriously*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462 (Michael Geist ed., 2005) (discussing the integral role of the user in Canadian copyright law under a recent court decision); Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119 (2007) (proposing a consumer-as-participant perspective that addresses consumer interests in copyright analysis); Wendy J. Gordon & Daniel Bahls, *The Public's Rights to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619 (rejecting the notion that, because recent technology has lowered transaction-cost barriers between copyright owner and putative user, fair use is no longer necessary); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007) (noting that the zone of lawful personal use is shrinking); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (proposing a new image of the copyright consumer that takes into account multiple consumer interests).

copyright law needs to embrace the notion of users' rights and adopt an improved set of legal rules for protecting those rights. It seems that commentators still define those rights as individual rights that enable users to assert their own individual interests under copyright law. However, fair use, as this Article will show, has long been employed to afford and protect individual rights of fair users.[26] Thus, there has been no lack of recognition and accommodation of the notion of users' rights in copyright law.

This Article argues that what has been lacking in copyright law's embrace of users' rights is a vision that wholeheartedly treats users as the bearers of a dynamic set of collective rights. It considers why a collective right-based theory of fair use would function to help copyright law to deliver its potential to serve as the "engine of free expression."[27] The theory, moreover, would broaden our vision of the public interest in knowledge and information by regarding fair use as a collective user right. It therefore has the potential of offering a creative and dynamic interpretation of the nature and scope of the fair use doctrine for copyright adjudication and policy debate.

The third dilemma pertains to the ways in which the public's engagement can be mobilized at different stages of copyright discourse. The courts have become complacent in protecting user interests in copyright law. Judges typically regard certain conventional copyright doctrines, particularly the fair use doctrine, as effective legal tools that afford adequate protection of users' interests. That is, courts have assumed that copyright law itself contains adequate safeguards to protect and promote the public interest in the free flow of knowledge and information.[28] Such complacency, however, has led to the problem of public under-participation in the process of making copyright law and policy. Commentators have used ideas such as the public domain[29]

26. *See infra* Part II.A–B.

27. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1985) (Brennan, J., dissenting) (internal citation and quotation marks omitted).

28. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003) (concluding that fair use and idea/expression doctrines are "generally adequate" to establish a "definitional balance" between copyright and the First Amendment).

29. *See generally* Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 121 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (defining the term "public domain" and discussing the effect of commodification on the public domain); David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, at 147 (arguing for stronger recognition of individual rights in the public domain); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (exploring the history of the "public domain" concept and critiquing the current theoretical justifications of the term); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2003) (discussing the

and cultural ecosystems[30] as metaphors to demonstrate that there is in effect no room for complacency of this kind. Despite the existence of fair use, the recent unprecedented expansion of copyright protection has shrunk the public domain of information and knowledge and jeopardized our cultural ecosystems for innovation and creativity.

These metaphors are powerful in awakening the public. Yet they do not provide an appropriate status for the public as users in the framework of copyright law. In other words, what remains unanswered is the question of what kind of rights the public has with regard to the knowledge and information embodied in copyrighted works.[31] Without such an answer, fair use will remain feeble in defending the public interest.

Responding to this need, this Article shows that the collective right-based theory of fair use would create new ways to increase public awareness of the importance of protecting the free flow of knowledge and information. Moreover, the theory has the advantage of mobilizing more members of the public to actively engage in policy discourse regarding how the ownership of knowledge and information should be allocated.[32] A focus on collective rights has the potential to show the general public its stake in our intangible public space. In this sense, the theory would buttress the principles embedded in the First Amendment and the Copyright Clause by engaging more citizens to participate directly or indirectly in the making of copyright policies or laws.

history and development of the term "public domain"); Conference, *The Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1 (discussing the role of the public domain in intellectual property law); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006) (discussing various scholarly definitions of the term "public domain"). For further discussion of public domain theory, see *infra* text accompanying notes 191–92.

30. *See generally* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997) (explaining the idea of "cultural property" and how it can help strengthen public participation in the making of copyright law); James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS., Spring 2007, at 5 (introducing the concept of "cultural environmentalism" and explaining how it can help increase public participation in making copyright law).

31. For example, David Fagundes argues that "talking about shared IP entitlements using the language of ownership promises not only to access the deeply instinctive attachment to property we all share, but to redirect the emotional force of that attachment in the direction of public as well as private resources." David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 658 (2010).

32. For discussion on the importance of engaging more public participation in shaping and reshaping intellectual property laws, see Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 806 (2008) (discussing the role of the "access to knowledge" movement in developing "a shared identity and a common critique of the existing intellectual property system").

Part I of this Article first examines the major cases and legislative documents that have defined fair use as an affirmative defense against copyright infringement allegations. Part II reveals that such a characterization inevitably reduces fair use to an individual right for users under copyright law. It further discusses how and why this individual right-based approach has caused a variety of harms to the public interest in the free flow of knowledge and information. Part III puts forward a new theory reconceptualizing fair use as a collective user right. It discusses why users of copyrighted works should be conferred with the collective right to fair use. It demonstrates that users' collective right to participate in intangible public space provides the theoretical foundation to redefine fair use as a collective right. This Article further discusses how this new vision of fair use would generate a new legal approach that will protect the public interest. It also shows how the new vision would further lead to a more balanced approach to dealing with the many thorny issues that arise in the process of copyright adjudication or policymaking.

I. FAIR USE AS AN AFFIRMATIVE DEFENSE

The fair use doctrine stemmed from an array of judicial decisions on copyright disputes. Courts used the doctrine as a limitation on the exclusive rights conferred upon copyright holders, exempting users from being held liable for copyright infringement as long as they could prove the existence of fair use.[33] Drawing on past judicial decisions, Congress codified the fair use doctrine into the Copyright Act in 1976.[34] Section 107 of the Copyright Act defines the scope and nature of the doctrine as follows:

> § 107. Limitations on exclusive rights: Fair use.
>
> 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. In determining whether the use made

33. *See, e.g.*, Samuelson, *supra* note 3, at 2539 ("Fair use has been invoked as a defense to claims of copyright infringement in a wide array of cases . . . .").

34. *See, e.g.*, WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3 (2d ed. 1995) ("Fair use, as it presently exists, evolved by a process of accretion from holdings and dicta in a variety of contexts . . . .").

> 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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[35]

Section 107 defines the fair use doctrine as a limitation on the exclusive rights conferred upon copyright holders. This limitation allows the public to use copyrighted materials without obtaining permission or paying a fee to the copyright holder. Section 107 explains how the fair use doctrine should be applied in practice.[36] It first lists six illustrative types of uses of copyrighted materials that would potentially be deemed fair: criticism, comment, news reporting, teaching, scholarship, and research.

The second part of section 107 requires courts to decide fair use cases by using the four factors. These four factors for measuring whether an unauthorized use of a copyrighted work may be considered fair are widely recognized as the core of section 107.[37] The third part of section 107 was added in 1990. It made clear that an unauthorized use of an unpublished work would not necessarily amount to copyright infringement.[38]

35. 17 U.S.C. § 107 (2006).

36. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5109, 5679 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.").

37. *See, e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 582–621 (2008) (analyzing how courts have focused on and applied the four fair use factors).

38. H.R. REP. NO. 102-836, at 9 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553, 2561. ("This sentence has a narrow, but important purpose: to reiterate Congress's intention in codifying fair use that in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in Section 107, as well as any other factors deemed relevant in the court's discretion.").

The broad language used in section 107 of the Copyright Act only reveals that fair use functions as a limitation on the exclusive rights conferred upon copyright holders. It does not, however, clear away all the uncertainty. The legislative history of section 107 shows that Congress did not intend to shape the doctrine as a set of "bright-line rules"[39] for courts. In practice, courts have developed inconsistent, and even conflicting, approaches to applying the doctrine,[40] making the outcomes of fair use cases deeply unstable and unpredictable.[41] Despite the persistent uncertainty lingering around the fair use doctrine,[42] fair use has uniformly been treated as an affirmative defense. The fact that fair use is an affirmative defense has profoundly informed how the four factors listed in section 107 are applied in judicial practice.

The notion of fair use as an affirmative defense was first recognized by the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[43] In that case, *The Nation* magazine published some 300 words of verbatim quotes from former President Ford's 500-page

39. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984) (noting that Congress "eschewed a rigid, bright-line approach to fair use"). The Supreme has consistently affirmed the *Sony* opinion in this respect. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (pointing out that "[t]he task [of section 107] is not to be simplified with bright-line rules"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 588 (1985); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-159 (Matthew Bender rev. ed. 2011) (1963) (arguing that nothing in section 107 provides "a rule that may automatically be applied in deciding whether any particular use is 'fair' ").

40. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) ("[T]he issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright.").

41. *See* NETANEL, *supra* note 7, at 66 (2008) ("Given the doctrine's open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify."); Beebe, *supra* note 37, at 574 (arguing that "fair use case law is especially unstable"); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 429 (2007) ("The fair use doctrine is, if anything, even more uncertain in scope. It is a multi-factor, equitable defense that gives much discretion to courts. Outcomes are often difficult to predict with any degree of certainty."); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496 (2007) ("[S]cholars generally agree that it is now virtually impossible to predict the outcome of fair use cases."); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 24 (2000) ("After decades of litigation, it is still difficult to tell when and whether one can photocopy copyrighted materials, even for scientific research.").

42. For a comprehensive discussion about the indeterminacy problem inherent in copyright law in general and fair use in particular, see James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887–906 (2007); Sun, *supra* note 21, at 303–11.

43. 471 U.S. 539 (1985); *see* PATRY, *supra* note 34, at 585 (pointing out that *Harper & Row* "definitively settled the issue" regarding whether or not fair use is an affirmative defense).

memoir. The Court said that Congress "structured [fair use] as an affirmative defense requiring a case-by-case analysis."[44] This definition of fair use, the Court held, stemmed from the fact that section 107 was not meant to provide any presumptive categories of fair use.[45] Simply by asserting use of a copyrighted work for the news reporting purpose, which is categorized as an example of fair use in section 107, does not automatically exempt the user from proving that his use can satisfy the four fair use factors listed in section 107. Thus, *Harper & Row* implied that it is incumbent on a user to prove that his use of copyrighted materials is fair within the ambit of section 107. Lower courts later cited *Harper & Row* as authority for settling the issue as to which party should bear the burden of proving fair use.[46]

However, in *College Entrance Examination Board v. Cuomo*,[47] the District Court for the Northern District of New York deviated from the Supreme Court's *Harper & Row* decision. It held that it is the copyright holder rather than the user who should have the burden of proving fair use:

> Section 107 states in pertinent part that "[t]he fair use of a copyrighted work . . . is not an infringement of copyright." Therefore, in order to demonstrate that it is likely to succeed on the merits of its copyright infringement claim, [the copyright holder] must show that the [user's] use of its test forms is not a fair use.[48]

The court based this opinion on the preamble of section 107, which starts with the statement that fair use is not an infringement of copyright. It seems that the court reasoned that since section 107 had excluded fair use as a non-infringement of copyright, there was no need for the user in that case to prove the existence of fair use. Therefore, the court said the copyright holder had the responsibility to prove that there was no fair use. Yet, the court added a footnote to make this opinion only applicable to cases in which the copyright holder seeks a preliminary injunction. The court stated in the footnote

44. *Harper & Row*, 471 U.S. at 561.

45. *Id.* ("[Section 107's] listing was not intended to be exhaustive . . . or to single out any particular use as presumptively a 'fair' use.").

46. *See, e.g.*, Ass'n of Am. Med. Colls. v. Carey, 728 F. Supp. 873, 881 (N.D.N.Y. 1990), *rev'd on other grounds*, 928 F.2d 519 (2d Cir. 1991) ("The drafters of Section 107 viewed the fair use exception to the Copyright Act as an affirmative defense; the party asserting the exception, therefore, bears the burden of production and persuasion to show that the exception applies.").

47. 788 F. Supp. 134 (N.D.N.Y. 1992).

48. *Id.* at 140 (quoting 17 U.S.C. § 107 (1988)).

that where the copyright holder seeks a preliminary injunction, he should bear the burden to demonstrate that the unauthorized use of his work does not constitute a fair use.[49]

Congress later repudiated the *College Entrance Examination Board* decision. In 1992, Congress explicitly affirmed the *Harper & Row* opinion by deciding that fair use only affords users with an affirmative defense when copyright holders establish a prima facie case of copyright infringement. For example, in elaborating on the reasons for inserting an additional provision in section 107, the House Judiciary Committee report explained as follows:

> Fair use is an affirmative defense, and as such is relevant only after a copyright owner has made out a prima facie case of infringement. A prima facie case of infringement consists of ownership of the right asserted and unauthorized appropriation by the defendant of a material amount of expression. The copying of facts or of a de minimis amount of expression will not support a prima facie case of infringement. Fair use thus excuses the copying of a material amount of expression, with the test of materiality involving both quantitative and qualitative inquiries.[50]

This passage of the report shows that as an affirmative defense, fair use only exempts users from liability if they can furnish evidence to convince courts that their unauthorized uses of copyrighted works amount to fair use. Moreover, the report further criticized the *College Entrance Examination Board* decision, objecting to the placement of the burden of proof on the copyright holder in fair use cases where the copyright holder seeks a preliminary injunction: "The *College Entrance Examination Board* opinion is contrary to the statute and the Supreme Court's *Harper & Row* opinion: 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."[51]

The notion of fair use as an affirmative defense was fully established after the *Harper & Row* opinion and Congress's legislative

49. *Id.* at 140 n.7 ("[The plaintiff] cites this court's decision in [*Ass'n of American Medical Colleges v. Carey*] to support its assertion that the party claiming fair use has 'the burden of production and persuasion to show that the exception applies.' However, the court made that statement in connection with a motion for summary judgment. In the present case, [the plaintiff] is seeking preliminary relief and therefore it bears the burden to demonstrate the likelihood that it will prevail on this claim." (quoting *Ass'n of Am. Med. Colls.*, 788 F. Supp. at 881)).

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

51. *Id.*

report, both of which were cited approvingly in *Campbell v. Acuff-Rose Music, Inc.*,[52] a seminal fair use decision issued by the Supreme Court in 1994. In *Campbell*, the Court ruled that the musical group 2 Live Crew's appropriation of certain elements of Roy Orbison's song "Pretty Woman" in its parody of the song constituted a fair use. The Court made it clear that "[s]ince fair use is an affirmative defense, its proponent would have . . . the burden of demonstrating fair use."[53]

Moreover, the Supreme Court reaffirmed the definition of fair use as an affirmative defense in *Eldred v. Ashcroft*. In *Eldred*, the Supreme Court addressed, among other things, whether the fair use doctrine could invalidate the twenty-year extension of the duration of copyright protection that was triggered by the passage of the Sonny Bono Copyright Term Extension Act.[54] Thus, the Court needed to interpret the nature of the fair use doctrine before it could proceed to make a decision regarding the extension of the copyright terms. By citing both *Harper & Row* and *Campbell*, the Court affirmed that fair use should be treated as an affirmative defense:

> [T]he "fair use" *defense* allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . The fair use *defense* affords considerable "latitude for scholarship and comment," and even for parody . . . .[55]

Although the *Eldred* decision was rendered after the *Harper & Row* and *Campbell* decisions, it clarified and reinforced the legal basis for holding fair use to be an affirmative defense. This is because *Eldred* further elevated fair use to a constitutionally required affirmative defense that must be made viable in copyright law.[56] Before *Eldred*, the constitutional status of fair use remained unsettled. For example, the Second Circuit in *Universal City Studios v. Corley*[57] questioned whether fair use had any constitutional basis by asserting that "the Supreme Court has never held that fair use is constitutionally required, although some isolated statements in its opinions might arguably be enlisted for

52. 510 U.S. 569 (1994).

53. *Id.* at 590.

54. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); Eldred v. Ashcroft, 537 U.S. 186, 192–93 (2003).

55. *Eldred*, 537 U.S. at 219–20 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 531, 560 (1985)) (emphases added).

56. *See id.* (explaining that copyright law contains "built-in First Amendment accommodations" including the affirmative defense of fair use); Stephen M. McJohn, Eldred's *Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95, 107 (2003).

57. 273 F.3d 429 (2d Cir. 2001).

such a requirement."[58] In contrast, *Eldred* made clear that it is a constitutional mandate to maintain fair use as an affirmative defense, since fair use is a "built-in First Amendment"[59] safeguard against undue restrictions on speech-related activities.

In *Suntrust Bank v. Houghton Mifflin Co.*,[60] however, the Eleventh Circuit departed from the conventional definition of fair use. In a footnote, it argued that fair use should be regarded as a user's right rather than a mere affirmative defense:

> [F]air use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. However, fair use is commonly referred to as an affirmative defense, and, as we are bound by Supreme Court precedent, we will apply it as such. Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes.[61]

Suntrust is an outlier, however. *Harper & Row* and *Campbell* are controlling authorities defining fair use,[62] and both decisions have been routinely cited by commentators as the authority for entrenching fair use as an affirmative defense in the American legal system.[63] Also, they

58. *Id.* at 458.

59. *Eldred*, 537 U.S. at 219 (explaining the First Amendment safeguards embedded in copyright law).

60. 268 F.3d 1257 (11th Cir. 2001).

61. *Id.* at 1260 n.3 (internal citations omitted). In this footnote, the judge cited *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996), which also defined fair use as a right:

> Although the traditional approach is to view "fair use" as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

Id. at 1542 n.22; *see also* NXIVM Corp. v. Ross Inst., 364 F.3d 471, 485 (2d Cir. 2004) (Jacobs, J., concurring) ("Fair use is not a doctrine that exists by sufferance, or that is earned by good works and clean morals; it is a right—codified in § 107 and recognized since shortly after the Statute of Anne—that is 'necessary to fulfill copyright's very purpose, "[t]o promote the Progress of science and the useful arts . . . ." ' " (alteration in original) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994))).

62. *See Suntrust*, 268 F.3d at 1260 n.3.

63. *See, e.g.*, 4 NIMMER & NIMMER, *supra* note 39, § 12.11[F] at 12-217 (explaining that a fair user bears the burden of proof to show that a use is fair).

have been consistently cited by lower courts as the authority for defining fair use and allocating burden of proof in fair use cases.[64] Both decisions were also cited approvingly by *Eldred*, a decision handed down by the Supreme Court after *Suntrust*.[65]

The acceptance of fair use as an affirmative defense also has gone beyond the legislature, the judiciary, and academia, and has extended to users at large, leading to an environment in which there is no active assertion of fair use as a user right by the public at large. The Stanford Copyright & Fair Use Center, a think tank well known for its fair use guidelines for the public, has defined fair use as an affirmative defense.[66] Many educational institutions have followed this approach. For instance, the Office of the General Counsel at Yale University educates its students and professors on fair use issues by informing them that fair use is an affirmative defense.[67] Therefore, the public at large has become accustomed to the affirmative defense approach and has not yet actively asserted the fair use right as suggested in *Suntrust*.

II. FAIR USE AS AN INDIVIDUAL RIGHT

The preceding Part showed that treating fair use as an affirmative defense has taken deep roots in American copyright law. However, questions still remain as to why fair use has been uniformly defined as an affirmative defense. Judicial decisions on fair use cases shed little light on this point. Nor do the legislative reports and academic treatises.[68]

64. *See, e.g.*, Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) ("The burden of proof is on the copier because fair use is an affirmative defense . . . ."); Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1118 (C.D. Cal. 1999), *rev'd on other grounds*, 336 F.3d 811 (9th Cir. 2003); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 412 (S.D.N.Y. 1997), *aff'd*, 147 F.3d 215 (2d Cir. 1998).

65. *See Eldred*, 537 U.S. at 219–20.

66. *See What is Fair Use?*, STANFORD U. LIBR. (2010), http://fairuse.stanford.edu /Copyright_and_Fair_Use_Overview/chapter9/9-a.html.
("[F]air use is a defense against infringement. If your use qualifies under the definition above, and as defined more specifically in this section, then your use would not be considered an illegal infringement.").

67. *See* YALE OFFICE OF THE GEN. COUNSEL, FAIR USE ANALYSIS TOOL 1 (2008), *available at* http://ogc.yale.edu/legal_reference/pdf/Fair-Use-Tool-Website.pdf; *see also Definitions of Words and Phrases Commonly Found in Licensing Agreements*, YALE U. LIBR., http://www.library.yale.edu/~llicense/definiti.shtml (last updated May 2008) (defining fair use as an affirmative defense).

68. *See* Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1788 (2010) ("Tellingly, in neither *Harper & Row*, the 1992 Judiciary Committee Report, nor *Campbell* does any substantive reason appear to support labeling fair use an affirmative defense.").

To address this quandary, this Part argues that underlying the characterization of fair use as an affirmative defense is a commitment to defining fair use as an individual right of users. The individual right-based approach has led courts to treat fair use cases as involving the conflict between two individual rights, namely the plaintiff's copyright and the defendant's right to fair use.

A. Individual Rights and Conflicts of Rights in Copyright Law

In the realm of rights discourse, individual rights are bestowed upon persons primarily for the purpose of promoting their dignity and self-worth as individual human beings. The recognition of individual rights represents an effort to afford an institutional protection of personal freedom enjoyed by individuals. From this perspective, individual rights protect personal freedom in making choices for self-actualization and individual life plans.[69]

The tradition of liberalism, especially its prioritizing of individual liberty and freedom,[70] lays the foundation for the legal protection of individual rights as forms of negative liberty[71] against undesirable interferences from other individuals or the government. Individual rights such as property rights[72] and privacy rights[73] carry the legal force to prevent or stop undesirable interference from others in order to safeguard what a person decides to do in his or her private space. They also act as a check on governmental power—individual rights

69. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 13 (2011) (emphasizing the importance of "the power and obligation to enforce all fundamental individual rights deemed essential to American liberty"); EDWARD J. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY 70 (2004) (noting that an "individual right, or aspect of individual liberty, like others such as the right of property, is protected by the [F]ifth [A]mendment").

70. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977) ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

71. When it comes to the relationship between the government and personal liberty, negative liberty refers to freedom without undue interference from the government. Positive liberty deals with freedom derived from governmental plans and actions. *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 169–81 (Henry Hardy ed., 2002).

72. The Fifth Amendment states, among other things, that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

73. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("Various guarantees [provided in the Constitution] create zones of privacy.").

protect against governmental abuse of power that is harmful to personal enjoyment of freedom.[74]

Copyright is an individual right conferred on the creators of copyrighted works. It gives creators moral rights to prevent or stop activities that damage the integrity of the creative process.[75] It also gives creators a bundle of economic rights by entitling them to have exclusive control over the exploitation of the economic value of their works.[76] By furnishing protection of the bundle of economic rights, modern copyright law relieves creators from financial reliance on individual or state patronage, which otherwise might unduly influence the ways in which they express their own ideas and opinions. With the securing of their economic independence, creators are supposed to produce and disseminate works that reflect their own independent thoughts.[77]

Copyright law, however, is not solely focused on protecting the rights of creators of copyrighted works. Rather, it is a balancing system that provides protection for exclusive rights but also imposes a set of limitations on those exclusive rights, such as fair use and compulsory licensing schemes.[78] These limitations are, by nature, designed to

74. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987) ("When we speak of constitutional protection for property rights, we think first of *keeping*, not *having*—of negative claims against interference with holdings, not positive claims to endowments or shares. Thus, we primarily understand property in its constitutional sense as an antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends."); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 218 (1984) ("Along with individual (personal) rights, such as those protected by the Bill of Rights, vested property rights were claims against government; they defined a zone of private action and uses of property into which governmental authority could not be allowed to penetrate."); *see also* David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 LAW & SOC. INQUIRY 1, 3 (1996) ("[B]y limiting political authority and the very scope of politics itself, the American system aims to allow maximum opportunity for individual flourishing.").

75. *See* 17 U.S.C. § 106A (2006) ("Rights of certain authors to attribution and integrity."); *see also* ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 6 (2010) ("[M]oral rights focus on inspirational motivations and the intrinsic dimension of creativity; attribution and integrity rights are protected because they are regarded as integral components of a work's meaning and message as conceived by the original author.").

76. *See* § 106 ("Exclusive rights in copyrighted works.").

77. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (arguing that copyright protection functions to support "a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy").

78. The Copyright Act contains various forms of compulsory licenses. For example, section 115 of the Copyright Act provides for the acquisition of a compulsory license from

ensure that users have access to copyrighted materials so they can exercise their rights to freedom of expression, education, and cultural participation.[79] For example, a parodist can affirmatively exercise the right to freedom of expression only if his or her parody can " 'conjure up' the original [work] in order to parody it."[80] By allowing parodies to constitute fair use, copyright law limits the copyright holder's exclusive rights in order to protect the parodist's right to freedom of expression.

Without copyright limitations, the promotion and protection of users' rights cannot be achieved. Users may not be able to get authorization for use because copyright holders may deem users' activities, such as criticizing or parodying their works, harmful to their interests. In other circumstances, even if copyright holders are willing to give authorization, they may rely upon the exclusive rights over their works to charge users prohibitively high fees for use. Either the lack of authorization for use or the imposition of an exorbitant license fee would make it impossible for users to have access to, or make use of, copyright materials.[81]

In copyright law, it is not easy to achieve a balanced protection of both creators' exclusive rights and users' access or use rights. Rather, copyright law is rife with conflicts between these two competing rights.[82] A copyright holder may assert that his exclusive rights are sufficiently broad to prevent any users from using his work, and therefore users should be held liable for their unauthorized uses. Meanwhile, a user may counter the copyright holder's claim by arguing

copyright holders for making and distributing phonorecords. *See* 17 U.S.C.A. § 115 (West Supp. 2011).

79. Sun, *supra* note 21, at 312–15 (discussing the range of users' rights that need to be protected by copyright law).

80. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573 (1994) (quoting Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1156–57 (M.D. Tenn. 1991)).

81. *See, e.g.*, Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982) (interpreting fair use as "a mode of judicial response to market failure in the copyright context").

82. For discussion regarding the conflict of rights in copyright law, see Sun, *supra* note 21, at 303–11; see also Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006) ("Copyright law . . . must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others, which must be protected up to a point."); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 207 (1991) ("[T]o serve the public welfare copyright must accommodate two often conflicting, private interests—the copyright owner's right to economic rewards for disseminating a work to the public, and the user's right to employ those copyrighted materials for the advancement of knowledge.").

that he has a right to use the work in a way that constitutes a fair use, and therefore he should be exempted from liability. In fair use cases, courts thus need to decide which party's claim carries more weight and prevails over the other party's claim.

B. Affirmative Defense as an Individual Right

As shown in the preceding Part, courts have used the affirmative defense approach to deal with the conflict of rights between a copyright holder and a user in a fair use case. This Section demonstrates that by treating fair use as an affirmative defense, courts have defined fair use as the user's individual right. In this way, fair use merely affords each user a right to raise the fair use defense in copyright disputes.

1. Assertion of Personal Interests by Users

Affirmative defenses, either in criminal or civil procedure, are designed to protect the personal interests of those who appear before courts as defendants. Self-defense, for instance, is a typical affirmative defense in criminal or civil cases. A defendant may be exonerated if he can demonstrate that he had an honest and reasonable belief that another's use of force was unlawful and that his own conduct was necessary to protect himself.[83] For this purpose, the defendant needs to produce sufficient evidence to demonstrate that his conduct was necessitated by the need to safeguard his body or life when he was attacked or to ward off trespass of his property.[84] The justification for self-defense on these occasions is the need to safeguard individual rights such as the right to life and the right to private property.[85]

83. *See, e.g.*, People v. Mathews, 154 Cal. Rptr. 628, 631–32 (Cal. Ct. App. 1979) ("[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander.").

84. *See, e.g.*, People v. Kane, 29 N.E. 1015, 1016 (N.Y. 1892) ("The ownership and possession of property confer a certain right to defend that possession, [including] a defense of it which results in an assault and battery, and that which results in the destruction of the means used to invade and interfere with that possession.").

85. *See, e.g.*, Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661, 668–69 (2000) ("Self-defense allows one to do whatever is necessary to defend one's own physical integrity and life against serious infractions by third parties."); Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of the Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 198 (1994) ("A killing in self-defense is justified because the benefit gained by affirming the defendant's rights to life and protection against aggression outweighs the harm caused by the death of the aggressor, producing a net benefit to society.").

The same applies to fair use as an affirmative defense. It enables a user to safeguard his individual rights by asserting that his personal interest in using copyrighted materials should be shielded by fair use.[86] In a fair use case, a copyright holder (usually the plaintiff) first establishes a prima facie case for copyright infringement. A user (typically the defendant) then invokes fair use as an affirmative defense. To sustain his defense, he needs to demonstrate that his use of the copyrighted material concerned purposes such as learning, teaching, research, news reporting, or criticism, and can fall within the scope of fair use. What undergirds the fair use defense, therefore, is the need to protect the user's own individual rights, such as the rights of education and freedom of expression.

2. Burden of Proof on Users

By treating fair use as an affirmative defense, courts place the burden of proving fair use on the allegedly infringing users in copyright disputes. Fair use cases are seen by courts as involving conflicts of individual rights enjoyed by copyright holders and users, respectively. By placing the burden of proof on users, courts address conflicts of rights on the basis of the procedural as well as substantive mechanisms for protecting copyright as an individual right.

First of all, many fair use decisions show that, as a matter of procedure, the user's right as an individual right merits an equal treatment with the copyright holder's right. Courts have justified the placing of the burden to prove fair use on users based on the procedural need to give an equal treatment of both parties' individual rights in a fair use case. For example, in *Perfect 10 v. Amazon.com*,[87] the Ninth Circuit explained:

> At trial, the defendant in an infringement action bears the burden of proving fair use. . . . Because "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.[88]

86. *See, e.g.*, BLACK'S LAW DICTIONARY 482 (9th ed. 2009) (defining "affirmative defense" as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true").

87. 508 F.3d 1146 (9th Cir. 2007).

88. *Id.* at 1158 (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006)).

The shift of the burden of proof, in this context, indicates that both the copyright holder's and the user's rights carry equal weight in terms of their positions in the litigation procedure. When the copyright holder first fulfills the burden of establishing a prima facie case of copyright infringement, the burden of proof is shifted to the user to demonstrate fair use.[89] Regardless of the merits of their claims, the procedural rule will not lead the user's right to gain primacy over the copyright holder's right, relieving the user of his burden of proof. Both parties with individual rights, therefore, need to bear an equal burden of proof if they intend to capitalize on procedural rules to protect their own individual interests.

Moreover, courts have laid great importance on the substantive value of protecting copyright as an individual right. For instance, courts have come to the conclusion that the exercise of users' rights, such as the right to freedom of expression, should not necessarily gain primacy over copyrights. Implied in such a decision is the courts' inclination to treat fair use cases as involving conflicts between the two types of individual rights held by the copyright holder and the user. They are both individual rights and therefore should have equal weight in terms of the substantive value of individual rights protection. Following this line of argument, courts have reasoned in fair use cases that neither type of individual right should necessarily be given greater weight without adequate evidential support.

The Supreme Court's *Eldred v. Ashcroft* decision clearly illustrates this line of reasoning. The majority opinion declined to examine whether the expansion of copyright protection at issue would impinge upon users' right to freedom of expression. However, it made clear how the potential conflict between copyright and users' rights to freedom of expression should be addressed. The Court stated that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; *it bears less heavily* when speakers assert the right to make other people's speeches."[90]

89. *See, e.g.*, Peter Letterese & Assocs. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1307 n.21 (11th Cir. 2008) ("The affirmative defense of fair use is a mixed question of law and fact as to which the proponent carries the burden of proof."); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 918 (2d Cir. 1995) ("Fair use serves as an affirmative defense to a claim of copyright infringement, and thus the party claiming that its secondary use of the original copyrighted work constitutes a fair use typically carries the burden of proof as to all issues in the dispute."); Columbia Pictures Indus. v. Miramax Films Corp., 11 F. Supp. 2d 1179, 1187 (C.D. Cal. 1998) (holding that "because fair use is an affirmative defense, Defendants bear the burden of proof on all of its factors").

90. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (emphasis added).

Based on the substantive value of rights protection, the above statement has two implications for the rule regarding the burden of proof in fair use cases. On the one hand, it implies that the copyright and the free speech right should both be regarded as individual rights.[91] This makes it impossible for the free speech right to gain primacy over copyright.[92] Therefore, it follows that in protecting users' free speech rights through the fair use doctrine, both the legislative and judicial branches of government should not presumptively give primacy to the substantive value of free speech protection over the substantive value of copyright protection.

On the other hand, the above statement from *Eldred* also shows that in fair use cases, copyright can even have temporary trumping power over the free speech right where the copyright holder successfully establishes a prima facie case of copyright infringement. In treating copyrighted works as the embodiment of creators' speeches, *Eldred* held that the free speech principle "bears less heavily when speakers assert the right to make other people's speeches."[93] Therefore, the temporary trumping power wielded by copyright as an individual right requires the user to bear the burden of proving fair use. Even if the user claims to have a free speech right to use copyrighted works, courts should still place the burden of proving fair use on the user.

3. Judicial Failure to Consider the Public Interest

By treating fair use as an affirmative defense, courts make only limited inquiry into the value of the use of copyrighted works for the public when weighing the four fair use factors. Courts instead mediate the conflict of rights between a copyright holder and a user based largely on the evidence submitted by the individual user. The judicial

91. *See, e.g.*, Carys J. Craig, *Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright*, 56 U. TORONTO L.J. 75, 75 (2006) ("Freedom of expression protects an individual's right to express herself without limitations imposed upon the content of her speech, while copyright law prevents an individual from expressing herself through another's copyrightable expression.").

92. The conflicting judicial opinions regarding shopping mall cases clearly demonstrate this point. In some cases, courts ruled against private owners of shopping malls and ordered opening of malls for free speech activities. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (ruling that the property right of a privately owned shopping center was not "infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property"). Yet, courts also have ruled to the contrary on the basis that "property [does not] lose its private character [even though] the public is generally invited to use it for designated purposes." Lloyd Corp. v. Tanner, 407 U.S. 551, 571 (1972).

93. *Eldred*, 537 U.S. at 221.

decision is centered on a judgment of which party's rights should prevail when the court weighs competing claims raised by both parties. Therefore, the affirmative defense mode triggers a judicial process that determines every fair use case as involving the conflict of rights between an individual copyright holder and an individual user. Even when a fair use case has a far-reaching impact on other users who do not participate in the litigation, courts tend to focus solely on the conduct of the individual user as the accused infringer when weighing the fair use factors.

For example, in a case in which a photocopy shop was sued for copying coursepacks for college students at the request of their professors, the court simply considered whether or not the copyshop's conduct constituted fair use.[94] The coursepacks that contained excerpts from copyrighted works were assembled by professors for their students as course reading materials. The court did not consider whether teachers' and students' interests in fair use would be jeopardized if the copyshop's reproduction of coursepacks was not fair use.[95] Put differently, the court needed to examine the extent to which the copying service provided by the copyshop had functioned to protect teachers' and students' fair use interests in copying for educational or learning purposes. This is because, as the court acknowledged, "[t]he physical production of coursepacks is typically handled by a commercial copyshop."[96] The teachers' and students' fair use interests, in this context, were closely intertwined with the copyshop's service. Despite this, the court focused on the extent to which the copyright holders' interest was affected by the unauthorized copying of their materials by the copyshop.[97]

94. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1383 (6th Cir. 1996) (holding that "the defendants' commercial exploitation of the copyrighted materials did not constitute fair use").

95. *See, e.g.*, Amy E. Groves, Princeton University Press v. Michigan Document Services, Inc.*: The Sixth Circuit Frustrates the Constitutional Purpose of Copyright and the Fair Use Doctrine*, 31 GA. L. REV. 325, 364 (1996) ("Unfortunately, the implications of the Sixth Circuit's decision reach beyond the particular facts of this case. Determining educational fair use by looking at who pushes the button on the copier severely limits the use of copyrighted materials in academic settings.").

96. *Princeton Univ. Press*, 99 F.3d at 1384.

97. *Id.* at 1385 ("The four statutory factors may not have been created equal. In determining whether a use is 'fair,' the Supreme Court has said that the most important factor is the fourth, the one contained in 17 U.S.C. § 107(4). . . . We take it that this factor, 'the effect of the use upon the potential market for or value of the copyrighted work,' is at least *primus inter pares*, figuratively speaking, and we shall turn to it first." (quoting 17 U.S.C. § 107(4) (2006)) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

Courts following this approach examine only whether the interest of an individual user involved in the dispute should be protected by the fair use doctrine. Courts consider the extent to which that individual's interest has anything to do with the interests of the relevant members of the public. There are a few cases in which courts briefly considered the public interest.[98] Yet a recent empirical study on fair use shows that courts have not yet comprehensively examined the public interest when weighing the four fair use factors.[99] Moreover, commentators have pointed out that, by treating fair use as an affirmative defense, courts have placed too much emphasis on examining the impact of the use on the copyright holder's market, which is required by the fourth factor of the fair use analysis.[100]

The Supreme Court's *Harper & Row* decision epitomizes this mode of judicial decision-making. In *Harper & Row* the Court held *The Nation*'s unauthorized publication of approximately 300 words of direct quotation from the unpublished 500-page manuscript of former President Gerald Ford's memoir did not constitute a fair use.[101] The quotations concerned the Watergate scandal, an historical event of undoubted significance for the public interest.[102]

98. *See, e.g.*, Perfect 10 v. Amazon.com, 508 F.3d 1146, 1168 (9th Cir. 2007) ("Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google's thumbnails for cell phone downloads, and considering the other fair use factors, all in light of the purpose of copyright, we conclude that Google's use of Perfect 10's thumbnails is a fair use."); Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006) ("[T]he public exhibition of art is widely and we think properly considered to 'have value that benefits the broader public interest.' " (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994))); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1283 (11th Cir. 2001) (Marcus, J., concurring) (pointing out that if copyright holders had the right to prevent others from making parody of their works, such right would create "a policy that would extend intellectual property protection into the precincts of censorship" (internal citation and quotation marks omitted)); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding in favor of fair use in part because "[t]here is a public interest in having the fullest information available on the murder of President Kennedy").

99. *See* Beebe, *supra* note 37, at 561–64 (discussing courts' mechanical application of the four fair use factors); Matthew Sag, Predicting Fair Use 29–30 (Mar. 15, 2011) (unpublished manuscript) (on file with the North Carolina Law Review), *available at* http://ssrn.com/ abstract=1769130 (examining the core fair use factors); *cf.* Samuelson, *supra* note 3, at 2541–42 (discussing the "policies underlying modern fair use law").

100. *See, e.g.*, Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 579–81 (2008) (explaining the harmful effects of judicial overemphasis on market impact and proposing a two-factor fair use analysis); Lunney, *supra* note 3, at 999, 1023 (arguing that the current four-factor test is not balanced for users).

101. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542, 569 (1985).

102. *Id.* at 542.

In rendering the decision, the Court did not examine whether the quotations would produce any public benefits, such as promoting democracy through protecting the free flow of information and the freedom of expression. Instead, the Court denied the need to consider the defendant's implication that the unauthorized use of the quotations was for the protection of the public interest.[103] This is because such a need was outweighed by the fact that the copyright holder had a potential market in licensing others to use the work, and magazine publishers could afford to pay for its use. Had fair use been allowed on the basis of protecting the public interest, the market value of the copyrighted work would very likely be harmed.[104] Moreover, the Court neglected the fact that "scooping" as a news reporting method, which prompted the early disclosure of the information about the Watergate scandal, strongly incentivizes the publication and circulation of news by media. As Justice Brennan pointed out in his dissenting opinion, "[a] news business earns its reputation, and therefore its readership, through consistent prompt publication of news—and often through 'scooping' rivals."[105] In sum, the Court did not consider the extent to which the release of first-hand information would promote the public debate about this historical event or public interest in prompt publication and circulation of the news.

C. Problems in Fair Use as an Individual Right

The preceding Section revealed how and why the individual right-based approach has been adopted by courts to define fair use as an affirmative defense. This Section will show that the individual right-based approach, in fact, has caused direct and indirect harms to public interests in free speech, democratic participation, and cultural development.

103. *Id.* at 569 ("The Nation's use of the copyrighted material was [not] excused by the public's interest in the subject matter.").

104. *Id.* at 559 (" '[To] propose that fair use be imposed whenever the social value [of dissemination] . . . outweighs any detriment to the artist, would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.' " (quoting Gordon, *supra* note 81, at 1615) (internal quotation marks omitted)).

105. *Id.* at 593 (Brennan, J., dissenting).

1. Harming the Public Interest in Judicial Proceedings

a. Direct Harms

As shown in the preceding Section, courts treat fair use cases as involving conflicts between the copyright holder's and the user's individual rights. To resolve these conflicts of rights, courts routinely focus on whether a user's personal interest can gain primacy, through a showing of fair use, over the copyright holder's personal interest in the exclusive control of the copyrighted work concerned. Meanwhile, they do not adequately consider the extent to which the public interest should be protected in fair use cases. This judicial practice, however, has gone too far in protecting the interest of the copyright holder.

Again, take the Supreme Court's *Harper & Row* decision as an example. By hailing the "market value" factor as "undoubtedly the single most important element of fair use,"[106] *Harper & Row* foreclosed fair use by primarily weighing the individual interest in accessing and using works against the copyright holder's economic interest. Through this emphasis on the protection of the copyright holder's economic interest, the Court applied "an exceedingly narrow definition of the scope of fair use."[107] Therefore, the *Harper & Row* decision ignored the fact that the defendant's quoting 300 to 400 words of the former president's manuscript was vital to lending authenticity to its news reporting of the historical event of the resignation and pardon of former president Richard Nixon. Keeping the public informed of the details of that historical event undoubtedly "furthered the public interest"[108] in "[a] broad dissemination of principles, ideas, and factual information [that] is crucial to the robust public debate and informed citizenry."[109]

Harper & Row is based upon the notion that fair use is an individual right.[110] The central problem caused by this notion concerns the likelihood that courts will prioritize the protection of copyright rather than the public's right to fair use. This likelihood may translate into judicial decisions that inadequately consider the extent to which

106. *Id.* at 566 (majority opinion).
107. *Id.* at 579 (Brennan, J., dissenting).
108. *Id.* at 591.
109. *Id.* at 582.
110. *See* Sun, *supra* note 21, at 321 (pointing out that the *Harper & Row*-type judicial practice of treating fair use as an affirmative defense "would give rise to the problem that [the public's] rights are automatically 'ranked' lower than copyrights" and that "courts actually water down the importance of protecting public interest").

the public interest should be protected.[111] Justice Brennan argued that "[t]he progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine."[112]

Copyright as a form of property rights carries the right to exclude non-owners from using copyrighted works.[113] It is the right to exclude that empowers copyright holders to receive economic benefits by charging license fees. The opinions rendered by *Harper & Row* and its progeny,[114] however, overly protected the right to exclude without due regard to its impact on the public interest. In this way, they share the same "property-centered view"[115] with *Lucas v. South Carolina Coastal Council*,[116] in which the Supreme Court invalidated a regulatory taking of a landowner's property on the ground that it "denie[d] all economically beneficial or productive use" of the property.[117] Yet such

111. *Id.*

112. *Harper & Row*, 471 U.S. at 579 (Brennan, J., dissenting).

113. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring) ("The notion of property . . . consists in the right to exclude others from interference with the more or less free doing with it as one wills."); Christopher Kalanje, *Leveraging Intellectual Property: Beyond the 'Right to Exclude'*, WORLD INTELL. PROP. ORG., http://www.wipo.int/sme/en/documents /leveraging_ip.html (last visited Nov. 12, 2011) (arguing that the core of real property and intellectual property is the right to exclude).

114. *See, e.g.*, Castle Rock Entm't v. Carol Publ'g Grp., 150 F.3d 132, 145 (2d Cir. 1998) ("In considering the fourth [fair use] factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps or substitutes for the market of the original work."); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930–31 (2d Cir. 1994) ("It is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. . . . An unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use."); *see also* NETANEL, *supra* note 7, at 64–65 ("Courts have repeatedly invoked the bare possibility of licensing in potential markets for the copyright holder's work to deny fair use and have insisted that while evidence of market harm generally dooms a fair use claim, the absence of such evidence in no way guarantees that the use will be deemed fair."); Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 618 (2001) ("Courts have increasingly favored copyright holders' rights, relying on economic models and potential licensing opportunities.").

115. NETANEL, *supra* note 7, at 64–65 ("Since *Harper & Row*, the Blackstonian property-centered view of fair use has steadily gained ground.").

116. 505 U.S. 1003 (1992).

117. *Id.* at 1015. In this case, David H. Lucas purchased two residential lots on the Isle of Palms in Charleston County, South Carolina. *Id.* at 1006–07. However, South Carolina enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his two parcels. *Id.* at 1006. Thus, the central question the Court

a justification was based purely on the "market value" factor or the economic injury to the property owner. The Court did not scrutinize the fact that the regulatory taking in question served a strong public interest in preserving the natural ecosystem of the beachfront areas.[118] Private property protection was prioritized by *Lucas* at the expense of the public interest in environmental protection. The same is true for *Harper & Row* and its progeny.[119] Those cases prioritized private property protection for copyright holders at the expense of the public interest in the free flow of information and knowledge. As Professor Lemley bluntly pointed out, "[c]opying is less likely to be excused as a fair use of the copyright than ever before, particularly if the licensor can show that some money could have been squeezed out of the user."[120]

b. Indirect Harms

Treating fair use as merely an affirmative defense has also caused indirect harms to users. Placing the burden of proof on users causes them to bear extra litigation costs. Fair use analysis is a mixed question of law and fact.[121] All claims of fair use must be judged on the totality of the facts together with the fair use factors. To prove the existence of fair use, a user is required to "produce the necessary evidence (even where the inquiry is speculative) and to persuade the court that her interpretation of the evidence reflects fact (even where the inquiry is subjective)."[122] Therefore, the user has to hire attorneys to fulfill the

dealt with in *Lucas* was whether ecologically-based shoreline regulations that prohibit further development constitute a taking of the landowner's property. *Id.* at 1009.

118. In its "takings" jurisprudence, the Supreme Court has parted with the so-called categorical rule that regulatory takings are always considered takings. *See generally* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (holding that whether a temporary moratorium effects a taking "depends upon the particular circumstances of the case" and rejecting the categorical rule asserted by petitioner); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (holding that a taking did not occur by the designation of the petitioner's property as protected wetlands because the land retained significant developmental value). For a detailed discussion about the Court's regulatory takings jurisprudence, see generally Laura S. Underkuffler, Tahoe's *Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004).

119. *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1043 (2005) ("Courts applying the property theory of intellectual property are seeking out and eliminating uses of a right they perceive to be free riding.").

120. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 900 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)).

121. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact.").

122. Snow, *supra* note 68, at 1814.

onerous procedural and evidentiary requirements required by the affirmative defense mode. The whole process of proving fair use, therefore, can easily reach six figures in attorney's fees on the user's side.[123]

Additionally, the possibility of being assessed statutory damages and attorney's fees may further exacerbate the financial burden that the user will bear if he fails to prove the existence of fair use. Statutory damages range from $750 to $30,000 per work infringed and can be increased to $150,000 per work infringed if a willful copyright infringement is found.[124] This means that even if a user asserted fair use, being adjudged to have infringed the work may still lead him to be assessed thousands of dollars of penalties per work infringed.[125] Worse still, the user may also be required to pay the copyright holder's attorney's fees because the successful party in a copyright dispute can be awarded the amount of reasonable attorney's fees as part of his costs.[126]

Thus, the combination of all these costs simply reduces users' right to fair use[127] to "the right to hire a lawyer to defend [one's] right to create."[128] To make the matter worse, potential fair users are vulnerable to the indirect harm caused by their adoption of *self-censorship* practices. This *self-censorship* practice leads users to give up their fair use right. As shown above, treating fair use as an affirmative defense has raised the costs significantly for the public to exercise its fair use right. Consequently, users may face the problem that the increased cost incurred by their assertion of the fair use defense would far exceed the benefit they can derive from fair use. Being aware of this

123. *See, e.g.*, Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 311 (2004) ("Intellectual property litigation typically spans several years with total costs commonly exceeding hundreds of thousands or even millions of dollars. A 2001 survey . . . calculated the average cost through trial of typical patent disputes . . . at $1,499,000; $699,000 for similar trade secret disputes; $502,000 for trademark disputes; and $400,000 for copyright disputes." (footnotes omitted)).

124. 17 U.S.C.A §§ 504(c)(1)–(2) (West Supp. 2011).

125. *See* L.A. Times v. Free Republic, No. 98-7840, 2000 WL 1863566, at *3 (C.D. Cal. Nov. 16, 2000) (holding the defendant liable for a statutory damages award of one million dollars); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009) ("Even a defendant who presents a plausible fair use defense at trial may find itself subject to large statutory damage awards.").

126. 17 U.S.C. § 505 (2006).

127. *See, e.g.*, Lemley, *supra* note 2, at 165 ("Part of the problem [that has caused harm to the public interest] is procedural—fair use is a defense that the accused infringer must prove.").

128. LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 187 (2004).

cost-benefit analysis, any risk-averse users would have to opt out of the fair use option. Therefore, users may avoid using copyrighted works or may agree to overly restrictive terms imposed by copyright holders.[129] Surprisingly, the Copyright Office has even encouraged risk-averse users to automatically give up their fair use right and obtain authorization from copyright holders on these occasions.[130] Hence, treating fair use merely as an affirmative defense may raise questions as to whether a user's fair use right can still be adequately protected. This is simply because defending fair use as an individual right "costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law."[131]

2. How Copyright Holders Harm the Public Interest

Generally speaking, copyright law confers upon creators the market right to exclusive benefits from the production and dissemination of their works. At the heart of copyright law lies its dedication to protecting economic rights as the most direct and important means of ensuring monetary returns to creators.[132] Yet this

129. *See, e.g.*, JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 98 (2004) ("As an affirmative defense, whether a use is 'fair' can be determined only within the context of infringement litigation, and the defendant bears the burden of proof. Thus . . . users with limited resources may be silenced by the mere threat of litigation long before a fair use analysis is brought to bear on any First Amendment interests." (footnote omitted)); Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 133, 180 (2007) (arguing that high litigation costs deter users from asserting their legitimate fair use claims).

130. *Fair Use*, U. S. COPYRIGHT OFF. (Nov. 2009), http://www.copyright.gov/fls/fl102.html (noting "[t]he safest course is always to get permission from the copyright owner before using copyrighted material").

131. LESSIG, *supra* note 128, at 187; *see also* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 721 (2003) (arguing that many would-be fair users may be considerably deterred by the risk of failing to satisfy the fair-use burden of proof).

132. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."); Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *quoted in* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) ("[C]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.").

mode of protection, if not checked by strong limitations on economic rights, may result in the exploitation of those who seek to use the works controlled by copyright holders and especially copyright-based conglomerates. Treating fair use as an individual right, however, by no means imposes limitations on copyright strong enough to deter copyright-based conglomerates from committing manipulative actions against users. Rather, it makes it hard for individual fair users to combat manipulative actions.

Many copyright holders have adopted an aggressive litigation strategy in order to deter the public from actively asserting its fair use right. By taking advantage of the user's burden to prove fair use, many copyright holders have frequently made claims of infringement even in circumstances where the fair use defense would likely succeed. They did so in hopes that the user would refrain from the use rather than spend resources in his defense.[133] Under many circumstances, users are, however, not sure whether their uses of works can be deemed fair because the fair use doctrine is too vague and indeterminate for them to rely on to predict what a court or jury would decide.[134] Users become afraid of being sued because of the significant time, energy, and financial cost of litigation. Faced with this kind of hidden coercion that may be exerted by the copyright holder, many individuals or entities may simply refrain from making fair uses of copyrighted works.[135] Many educational institutions in particular have already adopted overly restrictive fair use policies.[136]

133. *See, e.g.*, Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1052 (2006) ("When de minimis copying and fair use are routinely discouraged, a copyright notice comes to signal not merely that the work is protected, but that every reproduction is prohibited."); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 233–34 (2007) (arguing that cease and desist notices discourage fair uses of works); Alfred C. Yen, Eldred, *The First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 677 (2003) ("[A]ggressive copyright claims are often made against defendants who have done more than simply 'parrot' a copyrighted work. These defendants have generally added meaningful work of their own, whether in the form of comment and criticism, significant reworking of the plaintiff's material, or new material unrelated to the copyrighted work. At their most extreme, aggressive copyright claims assert that almost any borrowing from a copyrighted work constitutes actionable infringement.").

134. *See, e.g.*, Gibson, *supra* note 42, at 887–95 (explaining that the indeterminancy of the fair use doctrine coupled with the high penalties associated with copyright infringement decrease user reliance on fair use); Liu, *supra* note 41, at 451 ("[P]rotecting free speech interests requires us not to be content with the mere existence of [free speech] safeguards, but to think seriously about mechanisms for reducing the chilling effect of uncertainty . . . .").

135. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990) (describing the uncertainty surrounding fair use and the resulting reluctance to employ it); Liu, *supra* note 41, at 434 ("The chilling effect on creative [fair-use] expression has been well documented. This is exacerbated by the tendency of copyright owners to take advantage of the uncertainty to pursue aggressive copyright claims."); Parchomovsky &

The public at large is also faced with the visible coercion that the copyright holder may exert against them. First, many copyright holders have routinely exaggerated the scope of their economic rights as a way to prevent the public from making a fair use of their works. For example, the cautionary notice—"No part of this book can be reproduced without the permission of the publisher"—appears in almost every book published, copyrighted or not. Publishers also routinely limit users by stating they may quote no more than a specified limited number of words, lines, or paragraphs from the book.[137] It seems that all publishers accustomed to using exaggerations of this kind have turned a blind eye to the fair use doctrine, which sets no fixed limit on the amount users can copy and in fact allows the public to reproduce portions, or even the entire content, of the work.[138] These all exemplify what commentators call "aggressive copyright claims."[139] Moreover, copyright holders may leverage their economic

Goldman, *supra* note 41, at 1497–98 (pointing out that the vagueness of the fair use doctrine overdeters fair uses); Tushnet, *supra* note 10, at 545 ("Even a successful fair use defense is expensive, and the risk of such a lawsuit deters publishers from investing in potentially infringing works . . . .").

136. WILLIAM W. FISHER & WILLIAM MCGEVERAN, THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIALS IN THE DIGITAL AGE 85–87 (2006), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/BerkmanWhitePaper_08-10-2006.pdf (explaining the presence of "[u]nduly [c]autious [g]atekeepers" of fair use in universities); Fisher, *supra* note 3, at 1694 ("[A]s almost any college teacher can attest, the information presently being given faculty by university counsel regarding how much copyrighted material they may reproduce for classroom use is distinctly unhelpful."); Gibson, *supra* note 42, at 892 & n.27 (citing examples of "overly restrictive and reductive fair use policies" in institutions of higher education) Robert A. Gorman, Lecture, *Copyright Conflicts on the University Campus*, 47 J. COPYRIGHT SOC'Y U.S.A. 297, 313 n.36 (2000) (describing New York University's settlement arrangement with several publishers regarding copyright infringement, and the University's subsequent implementation of severely restrictive fair use guidelines).

137. STEPHEN FISHMAN, THE COPYRIGHT HANDBOOK: HOW TO PROTECT & USE WRITTEN WORKS 11/10 (8th ed. 2005) ("[A]lthough there is no legally established word limit for fair use, many publishers act as if there were one and require their authors to obtain permission to quote more [than] a specified number of words (ranging from 100 to 1,000 words).").

138. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that extensive copying for the purpose of parody is fair use); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984) (holding that verbatim copying for time-shifting purpose is fair use).

139. Yen, *supra* note 133, at 677 ("The practice of ignoring the First Amendment in copyright cases has . . . made possible the problematic assertion of what I call 'aggressive copyright claims.' As the label implies, these claims aggressively test the boundaries of copyright by urging courts to adopt unconventional or novel readings of doctrine that would extend copyright well beyond its core of preventing individuals from reproducing the copyrighted works of others."); *see also* William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1440 (2010) (arguing that some copyright holders "seem uninterested in license fees" and "seek to prevent modifications" of their works);

rights to impose prohibitively high license fees on users. Practices of this kind are still legal because holders charge fees in accordance with their business practices.

The following case epitomizes manipulative actions committed by some big media corporations and the inability of the individual right-based fair use policy to empower users to combat them. Jon Else, a documentary filmmaker, spent almost nine years raising funds and producing a noncommercial documentary. Fox News insisted on charging a license fee of $10,000 for him to use "a 4.5-second, out-of-focus, no-sound background shot" in that documentary. Else was advised by his attorney that his use of that shot might be fair use, but he might be embroiled in litigation if Fox News decided to sue him. Because the license fee was prohibitively high for him, he had to cut that shot from his documentary.[140] Jon Else's story is not an isolated case. Many other documentary filmmakers, researchers, and students in educational institutions are faced with similar situations.[141]

3. Harming the Public Interest in the Legislative Process

Copyright legislation is intended to promote and protect the public welfare.[142] However, the individual right-based approach to fair use gives legislators the leeway to alter the public welfare-oriented nature of copyright legislation into a copyright holder-centric lawmaking process. Heavily promoted by copyright-based conglomerates, the recent broad expansion of copyright protection largely catered to corporate interests in strengthening proprietary control over knowledge and information at the expense of the public interest.[143] Indeed, the public at large has failed to have its concerns

Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 406 (2009) (contending that copyright holders make overly-broad claims to their works and often fail to accommodate any possible fair uses).

140. *See* NETANEL, *supra* note 7, at 15–17.

141. *See, e.g.*, PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 7–10 (2005), *available at* http://www.acsil.org
/resources/rights-clearances-1/nps240.tmp.pdf; FISHER & MCGEVERAN, *supra* note 136, at 77–85; Lawrence Lessig, *Copyright and Politics Don't Mix*, N.Y. TIMES, Oct. 21, 2008, at A29 (giving examples of speech-suppressing copyright claims asserted as to political ads in recent campaigns).

142. *See* H.R. REP. NO. 60-2222, at 7 (1909) ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.").

143. LITMAN, *supra* note 13, at 22–76 (describing the problems with the recent expansion of copyright laws, including how copyright law tends to cater to larger corporate interests);

voiced in the copyright legislative process or to have them seriously scrutinized by legislators.[144] One of the primary reasons is that too many legislators are focused on protecting copyright holders' individual interests. They pay little attention to the need for defending the public's collective interests in knowledge and information contained in copyrighted works.[145]

The copyright holder-centered lawmaking process has caused a massive private enclosure of digital information.[146] The Digital Millenium Copyright Act ("DCMA"), adopted by Congress in 1998, is proof of this privatization movement.[147] The DMCA prohibits circumvention of technological measures that are employed by copyright holders to lock up works in digital form.[148] It further bars manufacture and distribution of devices that are capable of circumventing these technological measures.[149]

By combining these two measures, the DMCA has disrupted the traditional balance between copyright holders and users that had been mediated largely by the fair use doctrine. The DMCA accords

NETANEL, *supra* note 7, at 184 (arguing that the legislative expansions of copyright "often consist of outright congressional rubber-stamping of industry-drafted legislative and committee reports").

144. NETANEL, *supra* note 7, at 184 ("In contrast to well-heeled interest groups, the public consists of a large number of discrete individuals, each with a small, highly diffuse stake in the regulation at issue. As a result, the general public faces serious organizational obstacles to countering industry lobbying, and when industries lobby for speech entitlements, the underrepresented public interest in free speech is likely to be shortchanged.").

145. *See* Aaron K. Perzanowski, *In Defense of Intellectual Property Anxiety: A Response to Professor Fagundes*, 94 MINN. L. REV. HEADNOTES 85, 88 (2010), http://review.law.umn.edu/wp-content/uploads/2011/04/Perzanowski_MLR.pdf. ("Congress faces strong incentives, in the form of well-funded and well-organized lobbies, to remain persuaded by the private property rhetoric of rights holders.").

146. *See generally* DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH (2002) (pointing out the need in the United States for a return to a stronger balance between public and private ownership of ideas and knowledge and making suggestions for how this can be done politically); PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002) (discussing the development of international copyright and patent law and the danger it poses to competition in the market and to liberty); CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES? (2000) (discussing the political construction of intellectual property and whether the current global legal arrangements governing intellectual property are just or sustainable); Benkler, *supra* note 7 (explaining how the Digital Millennium Copyright Act, the proposed Article 2B of the Uniform Commercial Code, and the Collections of Information Antipiracy Act are at the center of a movement toward privatizing information); Boyle, *supra* note 7 (discussing the "Second Enclosure Movement" and how it is privatizing ever increasing amounts of intellectual property).

147. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

148. 17 U.S.C. § 1201(a)(1)(A) (2006).

149. § 1201(2)(a).

paracopyright[150] to right holders, allowing them to legally lock up any information with technological measures. In this way, it entitles copyright holders to control access to their works,[151] making it harder or even impossible for the public to make fair use of works under many circumstances. The DMCA does create a few exceptions to anti-circumvention regulations, such as reverse engineering, security testing, good faith encryption research, and certain uses by nonprofit libraries, archives, and educational institutions.[152] The rulemaking proceeding shepherded by the Librarian of Congress created only a few additional exemptions to the ban on circumventing access controls.[153] But these exceptions in fact all but eliminate traditional fair use under the DMCA by excluding the open-ended and flexible nature of fair use.[154] Section 107 of the Copyright Act does not provide an exhaustive list of what constitutes fair use. Instead, it captures the open-ended and flexible nature of fair use by providing a few fair use examples and requiring all cases to be examined using the four fair use factors.

In the conventional copyright system, the public can enjoy fair use only when is has free and unimpeded access to works in the first place. Fair use presupposes that the public first has free access to works and then makes decisions regarding whether it needs to make fair uses.[155]

150. Paracopyright means that legal protection of technological measures and contractual restrictions used by copyright holders would give them proprietary control over their works far beyond the scope of traditional copyright. For example, the DMCA allows copyright holders to control access to their works protected by effective technological measures. However, traditional copyright does not give copyright holders such a control. *See* NETANEL, *supra* note 7, at 66–70; Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1096–1110 (2003).

151. LITMAN, *supra* note 13, at 176 ("At no time, however, until the enactment of the access-control anticircumvention provisions of the DMCA, did Congress or the courts cede to copyright owners' control over looking at, listening to, learning from, or *using* copyrighted works.").

152. §§ 1201(d), (f), (g), (j).

153. *See Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works*, U.S. COPYRIGHT OFF., http://www.copyright.gov/1201/anticirc.html (last visited Nov. 18, 2011).

154. *See, e.g.*, Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 908–09 (2010) (arguing the rulemaking proceedings produced "only extremely narrow exemptions" and "[r]epeated requests for general 'fair use' exemptions have been rejected").

155. Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium"*, 23 COLUM.-VLA J.L. & ARTS 137, 140 (1999) (observing that "it may be fair use to make nonprofit research photocopies of pages from a lawfully acquired book; it is not fair use to steal the book in order to make the photocopies"); Lawrence Lessig, *Copyright Thugs*, INDUS. STANDARD, May 04, 2001, http://www.lessig.org/content/standard/0,1902,24208,00.html ("Under copyright law, a user has the right of fair use. Under the DMCA, the user has a right to fair use only if the code of the copyright protection scheme permits it. If the code does not

Now, however, free access to works is no longer available for users because technological measures deployed by copyright holders simply fence them off from access to works and the DMCA provides penalties against circumvention of these "digital fences."[156]

The DMCA's exclusion of fair use is reinforced by judicial decisions that interpreted the DMCA as a statute that "fundamentally altered the landscape" of copyright.[157] For example, *Universal City Studios, Inc. v. Reimerdes*[158] held that there is no general fair use defense under the DMCA: "If Congress had meant the fair use defense to apply to [anti-circumvention] actions, it would have said so. . . . [T]he decision not to make fair use a defense to a claim under [the DMCA] was quite deliberate."[159]

The individual right-based conception of fair use foreshadowed the demise of fair use under the DMCA. When weighing the competing demands between the copyright-based industries and users at large, Congress opted to stand with the former. Commentators documented the legislative history of the DMCA as follows:

> A coalition of organizations, including libraries, educational institutions, and other nonprofit organizations, raised concerns about the direct impact such a ban would have on fair and other non-infringing uses of copyrighted works in digital form, on access to public domain materials, and on user privacy interests. These concerns did not, however, arouse Congressional interest

permit fair use, then the user commits a crime if he makes and distributes tools that would enable others to crack the copyright protection system, even for purposes of fair use. The law thus gives industry coders more control over copyrighted material than the Constitution gives Congress.").

156. *See, e.g.*, David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 684–92 (2000) (analyzing various circumvention violations articulated under the DMCA); Parchomovsky & Weiser, *supra* note 9, at 93–94 (pointing out that there is a lack of fair use protection under the DMCA and that the DMCA prohibits circumvention of technological controls designed to limit access to copyright holders' works).

157. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).

158. *Id.*

159. *Id.* at 322. For the same conclusion, see Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001). *But see* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1200 (Fed. Cir. 2004) (regarding section 1201(c)(1) of the DMCA as a fair use savings clause). The Copyright Office has suggested that the fair use defense to traditional copyright infringement does not apply to violations of section 1201(a)(1) of the DMCA. U.S. COPYRIGHT OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 4 (1998), *available at* http://www.copyright.gov/legislation
/dmca.pdf ("Since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.").

> as much as concerns about overbroad [Internet Service Provider ("ISP")] liability. This relative indifference may be explained in part perhaps because the lobbying clout of these nonprofits was minute in comparison with the heft of the copyright, telecom, and technology industries that lobbied about ISP liability.[160]

Therefore, the DMCA's legislative history shows the individual right-based conception of fair use did not arouse much interest among legislators—examining the need to accommodate a viable fair use system under the DMCA for the public at large. Legislators also did not consider whether the absence of a general fair use right for those who intend to circumvent technological measures would cause extensive harm to the public interest.[161]

III. FAIR USE AS A COLLECTIVE RIGHT

The preceding Part discussed how and why treating fair use as an affirmative defense has shaped fair use as an individual right. Moreover, it also revealed the core problem stemming from treating fair use as an individual right by showing that it has caused serious harms to the protection of public interests.

To overcome the problems caused by the individual right-based mode of fair use, this Part puts forward a new theory that reconceptualizes fair use as a collective user right. It also explains why users of copyrighted works should be conferred with a collective right to fair use.

160. Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1004 (2007); *see also* Parchomovsky & Weiser, *supra* note 9, at 104 ("In enacting the DMCA, Congress moved quickly to address the concerns of the content industry and did not focus on the potential for cases like *Corley* to restrict the scope of the fair use doctrine in the digital age. Fearful that broad exceptions might allow increased circumvention to occur, Congress provided only limited exceptions to the DMCA. Thus, to those in the content industry, the fair use claim advanced in *Corley* underscored the need for the DMCA in the first place.").

161. *See* Litman, *Politics*, *supra* note 14, at 314–15 ("One might naively expect that our elected senators and representatives are giving proposed legislation a careful look to make sure it advances the public interest, but they don't seem to see that as their role; rather, they seem to think that their job is to ensure that the important stakeholders have had an opportunity to sit down at the table and work things out with each other.").

A. The Collective Right to Participate in Intangible Public Space

1. The Idea of Collective Rights

As discussed in Part II, individual rights are held by individuals for the purpose of promoting their personal freedom and dignity.[162] In contrast, collective rights are held by human beings who share common identities as members of certain societies, communities, or groups.[163]

By bestowing upon individuals an identity-based entitlement, collective rights protect human interests in membership in society as a whole, or a relevant community or group. A shared identity of membership held by individuals entails each member's relationship with participatory goods. Participatory goods are collective interests whose enjoyment by an individual depends upon their also being enjoyed by others.[164] For example, a well-functioning society has participatory goods because each individual's enjoyment of his environment depends upon how other individuals participate in various aspects of social life. It is the efforts made by individuals that first form a well-functioning society and then sustain and improve the enjoyment of that well-functioning society by each individual who lives in it. Nobody can create a well-functioning society and enjoy it entirely by himself. From this perspective, participatory goods are both produced and enjoyed collectively by those who participate in them. Therefore, the participatory nature of membership in society or a relevant community or group bestows upon each individual member collective rights.[165] Collective rights allow members to participate in the creation and enjoyment of goods that are integral to society, or a relevant community or group. Individual rights are different from collective rights. Individual right-holders do not share the collective identity to create and enjoy interests in participatory goods. Rather, they each create and enjoy their own interests. For example, a private

162. *See supra* text accompanying notes 69–74.

163. *See, e.g.*, SEUMAS MILLER, SOCIAL ACTION: A TELEOLOGICAL ACCOUNT 211 (2001) (defining collective rights as "joint rights to collective goods possessed in part in virtue of membership of a social group").

164. *See* James Morauta, *Rights and Participatory Goods*, 22 OXFORD J. LEGAL STUD. 91, 94 (2002) ("[A] good G is a participatory good if and only if G is constituted by an activity which requires the participation of more than one individual.").

165. *See* GEORGE W. RAINBOLT, THE CONCEPT OF RIGHTS 206 (2006) ("Many group rights seem to be rights to participatory goods."); Denise Réaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1, 1 (1988) (arguing that "any rights to participatory goods must be held by groups rather than individuals").

property subject to protection as an individual right is created and enjoyed by an individual for his own interest.

While individual rights promote personal development and growth of individuals, collective rights promote human beings as social members and enhance their interests in communal development. As Joseph Raz has pointed out, collective rights protect "interests of individuals as members of a group in a public good and the [collective] right is a right to that public good because it serves their interest as members of the group."[166] Take a well-functioning society again as an example. Individuals collectively create a good society. They create a good social environment for themselves to live in. For example, the reduction of air pollution would create a better environment for each individual to enjoy the bounty of nature afforded by forests, rivers, lakes, and the like. The improvement of public safety would benefit each individual when he walks in public streets late at night. From this perspective, the realization of the collective right to a good society entitles each individual member of a group to claim the collective interest in participating in activities that take place in public spaces of the group to which he belongs. Meanwhile, the enjoyment of collective rights may produce positive effects on the ways in which individual rights can be enjoyed by individual right holders.[167] For example, the reduction of air pollution and improvement of public safety facilitate the protection and enjoyment of an individual's health, life, or private property. Thus, collective rights promote the protection and enjoyment of individual rights.

At the international level, collective rights have been used to protect a variety of resources that are of critical importance for furthering social membership and communal development. Cultural heritage is a typical example. Cultural heritage promotes the shared identities of the inhabitants of a particular village, region, or country, or of the members of a social, cultural, or religious group, and facilitates communication of shared beliefs, customs, language, status within a society, and historical experiences.[168] This idea of an

166. JOSEPH RAZ, THE MORALITY OF FREEDOM 208 (1986); *see also* Leslie Green, *Two Views of Collective Rights*, 4 CANADIAN J.L. & JURIS. 315, 320–21 (1991) (explaining why collective rights should be viewed as rights to collective interests).

167. *See* Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 141 (2004) ("The collective interests of a particular collectivity . . . are not unrelated to members' individual interests, for the collectivity's moral existence depends on its ability to provide a collective interest that improves the lives of its individual members.").

168. *See, e.g.*, Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009) (arguing that cultural heritage is "integral to the group identity and cultural survival of indigenous peoples").

intangible cultural heritage further reinforces collective rights in our shared interests in improving communal development. For example, the Convention for the Safeguarding of the Intangible Cultural Heritage states:

> "[I]ntangible cultural heritage" means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.[169]

At the national level, collective rights have also played a pivotal role in promoting social membership and communal development. In the United States, the public trust doctrine embodies a dynamic vision of protecting the public's collective rights to public spaces that are central to human development. Rooted in Roman law concepts of public property, the public trust doctrine, in its original form, prescribed that the air, rivers, sea, and seashore should be treated as public properties, open for the public to use. For instance, the *Institutes of Justinian* states:

> By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the sea-shore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.[170]

The scope of the public trust doctrine has been vastly expanded in the American legal system. It has become a mechanism for protecting the public's collective interests in maintaining and enhancing the vitality of public spaces.[171] In *Illinois Central Railroad v. Illinois*,[172] the Supreme Court drew on the collective right approach to establish a new way to protect the public interest in submerged lands:

169. Convention for the Safeguarding of the Intangible Cultural Heritage art. II, Oct. 17, 2003, 2368 U.N.T.S. 35.

170. J. INST. 2.1.1 (Thomas Collett Sandars trans., 1853).

171. *See* Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine*, 35 VT. L. REV. 563, 581 (2011) (arguing that the public trust doctrine is "a solid legal mandate for protecting public space and promoting public freedom").

172. 146 U.S. 387 (1892).

> [The title to submerged lands] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for *the people of the State* that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[173]

Accordingly, the public trust doctrine performs the collective rights-conferring function (to "the people of the State") primarily by holding certain resources in trust for the general public as a whole and thereby making them open for all. These resources are by nature regarded as "inherent public property"[174] and every member of the public has free and unimpeded access to them. Placing ownership in the general public makes the boundaries of the public trust resources constantly open to everyone on equal terms. Since *Illinois Central* was decided in 1892, the public trust doctrine has conferred four kinds of collective rights upon individuals as members of the public: the right to participate in economic activities in public space, the right to ecological protection of public space, the right to cultural participation in public space, and the right to political participation in public space.[175]

2. Defining the Collective Right to Participate in Intangible Public Space

Certain resources such as public streets, roads, parks, and squares are crucial elements of dynamic and robust public spaces. Since these resources exist in tangible form, they constitute the tangible public space where people engage physically in interactions with other human beings. Tangible public space has two core attributes: publicity and commonality. First, public space is the open arena where "everything that appears in public can be seen and heard by everybody and has the widest possible publicity."[176] Once individuals enter into public spaces, it is inevitable that they expose themselves to others though the means and degree of self-exposure vary depending on circumstances.

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173. *Id.* at 452 (emphasis added).

174. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986).

175. *See* Sun, *supra* note 171, at 588–93 .

176. HANNAH ARENDT, THE HUMAN CONDITION 50 (2d ed. 1998). A similar notion of publicity is offered by Iris Young. *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 168–70 (2000) (describing the public forum as "in principle accessible to anyone").

Second, tangible public space is the open arena where people share common resources that are not held in exclusive possession by any single person.[177] A public park, for example, is a place where all people, regardless of their income or residency, can enter and enjoy because the public park is a common resource, and everyone is entitled to have access to and make use of it.

While public space can be comprised of tangible resources, it can also be formed by resources that exist in intangible form. These resources are primarily knowledge and information. They constitute the resource that forms what I call intangible public space.[178] In intangible public space, people use knowledge and information as public resources to communicate with one another. According to Michel Foucault, "knowledge is also the space in which the subject may take up a position and speak of the objects with which he deals in his discourse . . . ."[179] Based upon the knowledge and information they obtain, people talk and write not only about their personal matters but also the larger economic, cultural, and political issues in society at large. In addition to talking and writing, people also use knowledge and information in other forms of communicative actions,[180] such as painting and dancing.

Moreover, people perform communicative actions in intangible public space based upon public use of their reason.[181] To make public

177. ARENDT, *supra* note 176, at 52.

178. Henri Lefebvre advocates that there are three types of public space: physical space, social space, and mental space (also called symbolic space). HENRI LEFEBVRE, THE PRODUCTION OF SPACE 11–12 (Donald Nicholson-Smith trans., Blackwell Publishers 1991) (1974). Physical public space is described as the physical environment and evokes images such as streets, plazas, picnic areas, and beaches. *See id.* Abstract space, according to Lefebvre, is the space of instrumental rationality, fragmentation, homogenization, and, most importantly, commodification. *See id.* at 49–59. In contrast, social space is the space of everyday lived experience, an environment that is a place to live and to call home. *See id.* at 16.

179. MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 201 (A. M. Sheridan Smith trans., Routledge Classics 2002) (1969).

180. For Habermas, communicative action plays an essential role in shaping human beings and human society in the following three ways: "Under the functional aspect of mutual understanding, communicative action serves to transmit and renew cultural knowledge; under the aspect of coordinating action, it serves social integration and the establishment of solidarity; finally, under the aspect of socialization, communicative action serves the formation of personal identities." 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 137 (Thomas McCarthy trans., Beacon Press 1987) (1981).

181. For the idea of the public use of reason, see IMMANUEL KANT, AN ANSWER TO THE QUESTION: 'WHAT IS ENLIGHTENMENT?' (1784), *reprinted in* KANT: POLITICAL WRITINGS 54, 55 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) ("The *public* use of man's reason must always be free, and it alone can bring about enlightenment among men . . . ."); *see also* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 27 (Thomas Burger trans., First MIT Press paperback ed., Mass. Inst. of Tech. 1991) (1962) (arguing that

use of reason, one first selects knowledge and information available in intangible public space and then uses it to communicate with others about one's own inner world of reasoning. Thus, our public use of reason entails a combination of two interconnected processes. On the one hand, people need to *internalize* knowledge and information to trigger their thinking and reasoning abilities.[182] Once people enter into public space, they are observing and interacting with others in public space as well. The process of observation and interaction generates the necessary knowledge and information for individuals to think and reason about matters in intangible public space.[183]

On the other hand, individuals also need to *externalize* knowledge and information resulting from their thinking and reasoning abilities in order to sustain and enhance their activities of observing and interacting with others in intangible public space.[184] When people speak, write, or act, they impart to others knowledge and information such that others perceive what they are thinking. The performers of these actions use knowledge and information to dictate and organize the movements of their bodies to reveal their inner feelings to the audiences in the outer world. The process of writing for the purpose of publication, for example, clearly entails the combination of these two processes. Authors write based upon knowledge and information acquired through their experience of the environment in which they live. In particular, they write by drawing on materials written by others.[185] Moreover, authors write for the purpose of communicating

"people's public use of their reason" was central to the formation of the public sphere in 18th century Europe).

182. This process of internalizing knowledge and information can be found in Habermas's following discussion about the nature of the public sphere:

> However exclusive the public might be in any given instance, it could never close itself off entirely and become consolidated as a clique; for it always understood and found itself immersed within a more inclusive public of all private people, persons who—insofar they were propertied and educated—as *readers, listeners, and spectators* could avail themselves via the market of the objects that were subject to discussion.

HABERMAS, *supra* note 181, at 37 (emphasis added).

183. *See id.* at 40 (arguing that "discussion became the medium through which people appropriated art").

184. *See* KANT, *supra* note 181, at 57 ("[A]s a scholar addressing the real public (i.e. the world at large) through his writings, the clergyman making *public use* of this reason enjoys unlimited freedom to use his own reason and to speak in his own person.").

185. *See, e.g.*, Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1177–98 (2007). Widely recognized as the judge who decided the first fair use case, Justice Story straightforwardly commented that "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new

their thoughts to the external world by later disseminating their works to the public. From this perspective, writing is a process of revealing and displaying authors' inner minds to their audiences.[186]

Therefore, the need for individuals to both internalize and externalize knowledge and information makes communicative actions and public use of reason inextricably intertwined with those of others. This entitles us to *a collective right* to participate in intangible public space. This collective right is necessary in that people perform communicative actions through the cultural exchange of knowledge and information in intangible public space.[187] Intangible public space cannot be divided into separated bits and pieces. This would block either internalizing or externalizing of knowledge and information when individuals perform communicative actions. Maintaining the openness of intangible public space therefore has intrinsic value for each member of the public.

The collective right to participate in intangible public space embodies a legal recognition of knowledge and information as an essential resource that empowers people to engage in communicative actions in intangible public space. It protects the collective human interest in access to and use of informational resources in order to keep intangible public space open for all. For example, Jefferson emphatically stated that "[i]f nature has made one thing less susceptible than all others of exclusive property, it is the action of thinking called an idea . . . and like the air in which we breathe, move, and have our physical being [it is] incapable of confinement or exclusive appropriation."[188] Similarly, Justice Brandeis's famous opinion in *International News Service v. Associated Press*[189] contains a classic defense of the nature of knowledge and information as an essential intangible resource for all: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained,

and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Emerson v. Davies, 8 F. Cas. 615, 619 (C.D. Mass. 1845) (No. 4436).

186. For example, Habermas portrays novelists' writing activities as revealing "the innermost core of the private . . . oriented to an audience (Publickum)." *See* HABERMAS, *supra* note 181, at 49.

187. *See id.* at 27.

188. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THOMAS JEFFERSON: WRITINGS 1291 (Merrill D. Peterson ed., 1984).

189. 248 U.S. 215 (1918).

conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[190]

It is worth noting that intangible public space is different from the public domain. Copyright lawyers designate the public domain as an aggregation of information that is not subject to copyright protection and is thus free for the public to use.[191] Therefore, they have used the idea of the public domain to draw the boundary between anything that falls within copyright holders' proprietary control and anything that remains free for the public to use. For example, Professor Jessica Litman defines the public domain as "a commons that includes those aspects of copyrighted works which copyright does not protect."[192] The scope of intangible public space is broader than that of the public domain. Intangible public space exists in the world of communicative actions. The need to make public use of reason through activating the externalization and internalization of knowledge and information makes it necessary to preserve the openness of intangible public space for different communicative actions. Intangible public space covers information flowing in the public domain. But it may cover information under copyright protection, if use of such kind of information is necessary for enabling one to perform a communicative action for public use of reason. For instance, although information contained in copyrightable works is under the copyright holders' proprietary control, members of the public can still invoke the fair use doctrine to use it without the copyright holder's permission. The discussion in the

190. *Id.* at 250 (Brandeis, J., dissenting); *see also* Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 89, 91 (arguing that information should be treated as "nonexclusive property" under Roman law doctrines).

191. *See generally* BOYLE, *supra* note 120 (explaining the distinction between public and private property); THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (compiling works by authors seeking to identify the boundaries of the public domain); Benkler, *supra* note 7 (explaining the concept of public domain and arguing for less restrictions on the public domain); Lange, *supra* note 29, at 147 (defining the public domain and arguing that growth in the realm of intellectual property has become "reckless" over time); Litman, *supra* note 29 (describing the role of the public domain in copyright law); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004) (examining private economic reasons for adding to the public domain); Ochoa, *supra* note 29 (surveying the history of the public domain); Pamela Samuelson, Lecture, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006) (advocating for a more concrete consensus amongst scholars as to what constitutes the public domain); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004) (discussing whether some aspects of intellectual property are permanently beyond the scope of property law).

192. Litman, *supra* note 29, at 968.

Section that follows explains why fair use of information under copyright protection is essential for people to make public use of reason in intangible public space.

B. Nature of the Collective Right to Fair Use

This Section considers why fair use should be reconceptualized as a collective right regarding access to and use of copyrighted materials. Moreover, it discusses the nature of the collective right to fair use in copyright law and argues that a two-tier system should be created to protect this right.

1. Fair Use in Copyright Law

Fair use should be recognized as a collective right enjoyed by the public. By nature, it should be regarded as an integral part of copyright law that functions to defend the public's collective right to participate in intangible public space. Copyright law regulates communicative actions and the ways in which people can legally make public use of their reason. By enacting copyright law, the government accords exclusive ownership in expressive forms of communicative actions that are fixed in a tangible medium of expression. These express forms mainly include literature, art, film, audio/visual performances, and television broadcasts that are original under copyright law.[193] Meanwhile, it imposes legal penalties on those who commit copyright infringement. Consequently, copyright law intends to encourage people to produce and disseminate more knowledge and information, which in turn enriches communicative actions in intangible public space.[194]

Given that private ownership inherently carries the power to exclude, copyright law inevitably acts as a filter that determines the extent to which knowledge and information should be subject to

193. 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . ."). The Supreme Court held that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

194. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Tushnet, *supra* note 10, at 540–41 ("Copyright is undoubtedly an engine of free expression, as it supports both large corporations and individual artists so that they can afford to be in the business of speaking." (footnote omitted)).

private control or remain free for all to use.[195] If a person wants to use knowledge and information under copyright protection, in general he first needs to obtain permission from the relevant copyright holder. Therefore, it follows that only those who can obtain permission from the copyright holder—for example through paying a license fee—are allowed to use the material. By operating a legal system that affords copyright protection, the government inevitably makes a series of decisions regarding the availability of knowledge and information that can remain open and free in intangible public space. Therefore, copyright law by nature functions to determine the degree of the openness of intangible public space.

If regarded as a collective right, fair use would keep intangible public space open to the public and allow for individual or group participation in communicative actions through the public use of reason. The exclusive rights vested in copyright holders place certain pools of knowledge and information under their proprietary control. The collective right to fair use held by the public under copyright law, by contrast, causes copyrighted information and knowledge to remain in intangible public space. It therefore keeps copyrighted materials open and free to the public to access and use within the ambit of fair use.[196] The collective right to fair use prevents information and knowledge under copyright protection from being absolutely controlled by copyright holders. To this end, fair use allows the public to use copyrighted works not only without a copyright holder's permission but also without paying him remuneration for unauthorized uses.

With the embrace of the collective right to fair use, copyright law would be built on the principle that knowledge and information form an essential resource that empowers people to engage in communicative actions in intangible public space. The principles of copyright law would be further reinforced with the necessary mechanisms to prevent copyright holders from monopolizing certain

195. *See* NETANEL, *supra* note 7, at 118 ("Copyright is speech regulation. . . . [C]opyright is heavily involved in allocating speech entitlements among various speakers and categories of speech."); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1546 (2005) ("Copyright regulates expressive activity. It controls the extent to which creators can build upon existing works in order to make commentary, collage, and other types of iterative creativity. Copyright also influences the availability and cost of expressive works that can be experienced by readers and other consumers of creativity.").

196. Professor Benkler argues that information subject to fair use remains in the public domain. *See* Benkler, *supra* note 7, at 362 ("The *public domain* is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged.").

pools of information and knowledge by excluding others from accessing and using them. More importantly, copyright law would not only accommodate but would also encourage a wide range of human activities that involve the public use of reason. For example, people make unauthorized use of copyrighted materials to engage in research activities, news reporting of current events, or to criticize publicly-circulating opinions. These activities are of essential importance for people to realize their collective right to participate in intangible public space. As Judge Dennis Jacobs cogently puts it, "[f]air use is not a permitted infringement; it lies wholly outside the domain protected by the author's copyright."[197]

Entitling the public with the collective right to fair use would institutionalize users' collective status in copyright law. From this perspective, it aims to reform the copyright holder-centered mode of copyright law that is prevalent in contemporary society. The conventional mode of copyright protection remains largely silent on the legal status of the general public (users of copyrighted works) with regard to their collective interest in intangible public space. The Copyright Act contains explicit itemizations of the economic rights enjoyed by creators of works: (1) reproduction,[198] (2) preparation of derivative works, [199] (3) public distribution, [200] (4) public performance,[201] and (5) the right of public display.[202] Yet the Copyright Act does not expressly itemize the rights that ought to be conferred upon members of the public for them to assert collective interests in using copyrighted works. Not surprisingly, the conventional mode of copyright protection has given rise to a widely-held mentality that sees securing adequate protection of economic rights enjoyed by creators as the highest priority of copyright law.[203]

The role played by fair use is of pivotal importance to the public, because copyright law, as shown above, restricts the free flow of knowledge and information and thereby affects the openness of intangible public space. The recognition of fair use as a collective right consolidates the status of users in copyright law. It not only creates a mandate to mainstream the protection of users' interests into

197. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring).
198. 17 U.S.C. § 106(1) (2006).
199. § 106(2).
200. § 106(3).
201. §§ 106(4), (6).
202. § 106(5). While the first three of these rights extend to all types of works, the last three extend only to selected categories of works.
203. *See, e.g.*, Cohen, *supra* note 25, at 347 ("Copyright doctrine, however, is characterized by the absence of the user.").

copyright law, but also transforms such a mandate into a common platform where legislators and judges endeavor to enhance users' collective interests in knowledge and information. Based on this mandate, copyright law should be a legal system designed to achieve twin objectives: to grant creators exclusive rights over their works (individual rights) and to protect users' rights (collective rights) in accessing and using works within the scope of the limitations imposed on creators' exclusive rights.[204]

2. Nature of Fair Use as a Collective Right

As noted above, fair use as the public's collective right is an effective legal tool to prevent copyright protection from stifling the free flow of knowledge and information in intangible public space. To perform this function, the public's collective right to fair use should be imbued with three major attributes. First, the collective right is *indivisible*. The indivisibility of the collective right to fair use stems from the public's collective interest in participating in intangible public space. As a member of the public, each user has a stake in the flow of knowledge and information, which promotes economic and cultural development in a free and just society. When it comes to uses of copyrighted works to make communicative actions in intangible public space, every member of the public is equally entitled to have access to and make use of copyrighted works within fair use limits. Put differently, knowledge and information contained in copyrighted works are by nature a resource accessible as an integral whole for members of the public rather than divisible and discrete parts available to be used only by certain members of the public.

Second, the enjoyment of the collective right to fair use is *relational*. One person's exercise of the fair use right promotes not only his own interests but also others' interests as well. By making fair uses

204. For a similar view, see *Fair Use Frequently Asked Questions (and Answers): An EFF FAQ*, ELECTRONIC FRONTIER FOUND., http://w2.eff.org/IP/eff_fair_use_faq.php (last updated Mar. 21, 2002, 6:00 PM) ("If fair use is viewed as a limitation on the exclusive rights of copyright holders, fair use can be seen as a scope of positive freedom available to users of copyrighted material. On this view, fair use is the space which the U.S. copyright system recognizes between the rights granted to copyright holders and the rights reserved to the public, where uses of works may or may not be subject to copyright protection."); Peter Friedman, *Why Shepard Fairey's Deceit Should Not Stop the Court from Finding that the Obama Hope Poster Did Not Infringe the Copyright in the Photo It was Based on*, GENIOCITY.COM (Aug. 12, 2010), http://blogs.geniocity.com/friedman/2010/08/why-shepard-faireys-deceit-should-not-stop-the-court-from-finding-that-the-obama-hope-poster-did-not-infringe-the-copyright-in-the-photo-it-was-based-on/ ("[F]air use is central to the copyright regime; it is not a tolerated exception to the copyright holder's domain.").

of copyrighted materials, one disseminates knowledge and information about economic, political, or cultural aspects of society in intangible public space. The reception and subsequent uses of knowledge and information help others to engage in an enriched and vibrant network of communicative actions in intangible public space. If a person is not allowed to exercise his fair use rights under a certain circumstance, this would produce a negative effect that may affect many others. When others want to exercise their fair use rights in the same or similar manner, their uses of copyrighted materials would be deemed infringements of copyrights as well.[205]

Third, the collective right to fair use is *inalienable*. The government must provide adequate protection of the public's collective right to fair use. It should not opt to lower the level of protection of this collective right as a tradeoff to strengthen the protection of the exclusive rights granted to creators of copyrighted works. From this perspective, the government is responsible for guaranteeing that there is "no room for a statutory monopoly over information and ideas."[206] It is unfair for the government to grant over-protection of copyright while leaving the public's collective right to fair use under-protected. Furthermore, the government's action in allocating the ownership of informational resources through copyright law must be made only for the protection and promotion of the public interest. This public interest-oriented requirement fully comports with James Madison's opinion that copyright is an instance in which "public good fully coincides . . . with the claims of individuals."[207] Moreover, this requirement has been recognized by those courts that proclaimed copyrights "are limited in nature and must ultimately serve the public good."[208]

205. *See, e.g.*, Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1837 (2009) ("[U]sers of that technology are no longer neutral bystanders [in the digital age because] [i]ndividuals internalize the use of a new technology and therefore experience loss when a previously 'free' use is banned.").

206. Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539, 582 (1985) (Brennan, J., dissenting).

207. THE FEDERALIST NO. 43 (James Madison).

208. Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994); *see also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."); Kenneth Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 607 (2001) ("The framers of the U.S. Constitution clearly intended that the law of copyright . . . would be tailored to serve the advancement of knowledge.").

C. Realization of the Collective Right to Fair Use

The collective right to fair use necessitates a two-tier system that adequately accommodates public interests. In this two-tier system, the collective right to fair use falls into two categories: the identity-based collective right and the society-based collective right. Both types of collective rights allow the public to enjoy freedom in asserting collective interests in utilizing copyrighted works. By imposing a check on the ability of copyright holders to interfere with users' copying acts, the collective right to fair use helps users not only lower the economic cost of making communicative actions but also to expand their political and cultural liberty to engage in such activities. The introduction of fair use collective rights into copyright law would first help counter the copyright holder-centered mentality in copyright practice. It would further help in thinking about the scope of rights that the general public ought to enjoy. This would guarantee that copyright law is fully capable of accommodating the public's collective interests in participating in intangible public space.

1. The Identity-Based Collective Right to Fair Use

First of all, fair users can assert their collective right based on the identities of the groups in which they take part in a variety of social and cultural activities. Examples of identity-based groups for fair use include groups of researchers, educators, and journalists. Each group of fair users shares collective interests in making use of copyrighted works to engage in dynamic and capable communicative actions in intangible public space.

For instance, researchers as a group of fair users may assert the collective right to fair use in order to facilitate their research-related activities. Nowadays many kinds of research activities necessitate the use of various data and arguments contained in copyrighted works that embody the results of earlier research conducted by other researchers. Scientific researchers draw on the discoveries or findings made by their fellow researchers. Social science and humanities researchers draw on the arguments or viewpoints made by their fellow researchers. Moreover, educators may assert the collective right to fair use to enhance their teaching activities. Fair use helps them lower costs for both students and educational institutions. No extra expenditure would be needed for students and educational institutions to negotiate for licenses to use copyrighted works if educators' uses of them for teaching fall within the ambit of fair use. Similarly, journalists may assert the collective right to fair use based on the need to report

or evaluate past and current events by drawing appropriately on copyrighted materials.[209]

This identity-based approach has been used by the Supreme Court of Canada to interpret the nature of the fair dealing exception, the Canadian counterpart to the fair use doctrine. In *CCH Canadian Ltd. v. Law Society of Upper Canada*,[210] the Court defined research-oriented fair dealing as follows:

> "Research" must be given *a large and liberal interpretation* in order to ensure that users' rights are not unduly constrained. . . .
>
> . . . .
>
> . . . "Dealing" connotes not individual acts, but *a practice or system*. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works.[211]

The idea of a group under identity-based fair use rights is by nature open-ended. The scope of groups may expand or shrink with technological changes or the relevant economic and social conditions. The recent controversy over the jailbreaking of smart-phones illustrates the need to keep the open-ended nature of identity-based groups for fair use. Jailbreaking a smart-phone, such as the iPhone, allows individuals to run unapproved applications. To jailbreak, the user replaces the firmware (the operating system software controlling basic phone functions) with a modified version. The modified versions of the code remove any requirement that third-party applications have completed the approval process. The benefits of jailbreaking include the capability to utilize additional unapproved applications and customizations.[212] For some iPhone hobbyists, jailbreaking "is akin to customizing a fancy car—it simply allows owners to personalize the look of their devices, turning their phones into a brag-worthy

209. For a similar view, see NXIVM Corp. v. Ross Inst., 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring):

> Thus a hotelier who stocks each room with photocopies of a newly copyrighted translation of the Bible is not saved from infringement by his piety; similarly, a movie reviewer who critiques—and reveals—a surprise ending is not deprived of the fair use defense by his malice or spite. Nor should a book critic be denied the fair use protection because she gained access to a prepublication manuscript by deceit.

210. [2004] 1 S.C.R. 399 (Can.), *available at* http://scc.lexum.org/en/2004/2004scc13/2004scc13.pdf.

211. *Id.* ¶¶ 51, 63 (emphases added).

212. Jenna Wortham, *The Great Break-In: A Software Battle over Little Apps Entangles iPhone*, N.Y. TIMES, May 12, 2009, at B1.

accessory and status symbol."[213] In 2009, there existed about 2.3 million jailbroken iPhones.[214]

However, Apple claimed the practice of jailbreaking infringed its copyrights. Apple argued the DMCA contains an anti-circumvention provision that prohibits the act of circumventing a technological protection measure utilized by a copyright holder to control access to a copyrighted work.[215] In July 2010, the Copyright Office, however, announced that jailbreaking a mobile device was not a DMCA violation:

> When one jailbreaks a smartphone in order to make the operating system on that phone interoperable with an independently created application that has not been approved by the maker of the smartphone or the maker of its operating system, the modifications that are made purely for the purpose of such interoperability are fair uses.[216]

Therefore, a new group of fair users, namely smartphone users who want to jailbreak their smartphones, was recognized by the Copyright Office.

2. The Society-Based Collective Right to Fair Use

In addition to the identity-based collective right to fair use, the public also enjoys a society-based collective right to make fair uses of copyrighted materials. This type of fair use right is designed to ensure that the public as a whole can live in a *free* and *just* society. It is based on the overall economic, political, and cultural needs of the society to which people belong.[217] With such a vision, the collective right to fair

213. *Id.*

214. *Id.*

215. *See* 17 U.S.C. § 1201(a)(1) (2006); Responsive Comment of Apple Inc. in Opposition to Proposed Exemption 5A and 11A (Class #1) at 11–13, *In re* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, NO. RM 2008-8 (U.S. Copyright Office Feb. 2, 2009), *available at* http://www .copyright.gov/1201/2008/responses/apple-inc-31.pdf.

216. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,830 (July 27, 2010) (codified at 37 C.F.R. pt. 201), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-07-27/pdf/2010-18339 .pdf.

217. *See* Fisher, *supra* note 3, at 1770–71 (advocating for "preferential treatment in the fair use calculus to activities that facilitate education—either by enhancing access to information and argument on matters of public importance or by increasing the ability of teachers to design and deliver to students the packages of materials they deem most effective. The more a particular use would advance that end, the more of a boost it should get."); Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A 133, 138 (2003) (discussing the social benefit of educational use where "people other than the

use would be reinforced by the following two categories of rights in regard to protecting the public's collective interests in the openness of intangible public space.

First, the right to cultural participation undergirds the society-based collective right to fair use. The public has the right to fully participate in cultural life by allowing its members to freely express opinions and engage in innovative and creative activities.[218] Culture is a product of collective human efforts in creating the behavioral modes in a society.[219] Any cultural development stems first from socialization in public space, through which human beings exchange ideas in a variety of ways. The very freedom to take part in cultural life enhances the human ability to think. Thus, the right to cultural participation nurtures human functional capabilities of "[b]eing able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice, religious, literary, musical, and so forth."[220]

For the protection of this right, the State should facilitate, rather than impede, individuals' freedom of cultural participation. In this regard, free speech is the core of a vibrant cultural participation by the public. The protection of free speech rights further promotes the realization of positive freedom for all human beings, providing them with legal protection for expressing their own ideas. It shapes a public culture in which people can engage in a dynamic discourse of all social and political issues. For example, Justice Brennan has pointed out that the free speech right focuses "not only on [its] role of . . . fostering

immediate user will benefit from the use, and if the value of these benefits is aggregated the sum may well exceed the value of alternative uses to the copyright owner").

218. This right has a strong grounding in human rights law. For example, the Universal Declaration of Human Rights (UDHR) places much emphasis on the requirement that states allow citizens to enjoy full latitude in "freely [participating] in the cultural life of the community." *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 27(1) (Dec. 10, 1948). In this sense, cultural participation must be free of unreasonable state surveillance, interference, and coercion. Moreover, under the International Covenant on Economic, Social and Cultural Rights (CESCR), states shall adopt various measures to "achieve the full realization of [the] right [to cultural participation]." The measures include "those necessary for the conservation, the development and the diffusion of science and culture." Moreover, states shall "respect the freedom indispensable for scientific research and creative activity." International Covenant on Economic, Social and Cultural Rights arts. 15.2–.3, Dec. 19, 1966, 993 U.N.T.S. 3.

219. *See, e.g.*, JERRY D. MOORE, VISIONS OF CULTURE: AN INTRODUCTION TO ANTHROPOLOGICAL THEORIES AND THEORISTS 54 (2004) ("[C]ulture consisted of learned and shared knowledge and behavior, expressed in such different ways as technology, social organization, or language.").

220. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 79 (2000).

individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[221]

Recognized as a fair use of copyrighted works, parody is a classic example of how individuals can assert their collective interest in fair use for the purpose of defending their right to cultural participation. The Supreme Court stated that parody "is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[222] Although parody generally draws on a copyrighted work, it is by nature a "cultural practice which provides a relatively polemical allusive imitation of another cultural production or practice."[223] A series of judicial judgments have recognized parody as a paradigmatic fair use of copyrighted materials.[224] It promotes the cultural dynamics of a society. In particular, it is an important vehicle for people to convey their critiques of cultural phenomena. Consider parodies of Lady Gaga's songs. YouTube users have made at least ten parodies of each of her blockbuster songs. By using her songs as background music, these parodies either poke fun at Lady Gaga's provocative costumes or criticize her allegedly unhealthy influence on adolescents.

Second, the right to benefit from technological development also provides an important justification for viewing the collective right to fair use as society-based. As the benefits afforded by science and technology have become an indispensable part of human life, the right "to share in scientific advancement and its benefits" has been enshrined in human rights treaties.[225] The public has the right to enjoy the benefits of technological advances in the creation and dissemination of knowledge and information. This right guarantees that technological advances of that type will be encouraged and

221. Bd. of Educ., Island Trees Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (Brennan, J., plurality opinion) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

222. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

223. SIMON DENTITH, PARODY 9 (2000).

224. *Campbell*, 510 U.S. at 579 (holding that a "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one"); Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 800 (9th Cir. 2003) ("[P]arodic works, like other works that comment and criticize, are by their nature often sufficiently transformative to fit clearly under the fair use exception" (citing *Campbell*, 510 U.S. at 579)); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268 (11th Cir. 2001) (explaining that the parody will typically fall within the statutory examples of fair use codified in section 107).

225. Universal Declaration of Human Rights, *supra* note 218, at art. 27(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 218, at art. 15.1(b).

protected, and further requires that the State should ensure that the public has adequate access to these technologies.

For example, reverse engineering for software interoperability is deemed to be fair use that contributes to developing a free and just society. Computer programs are generally distributed in machine-readable object code form.[226] Their human-readable source code form, however, is locked by the software developer. This gives rise to the problem that computer programs may not be able to work together in a digital environment if software engineers cannot get access to their object codes to achieve software interoperability for relevant computer programs. Reverse engineering of computer programs for software interoperability enables different software developers to decompile or disassemble object code contained in copyrighted computer programs.[227] This type of unauthorized copying activity facilitates the development of new computer programs.[228] It further protects consumer welfare by guaranteeing the efficient use of various computer programs in the digital age.

In the above two examples of parody and reverse engineering, copying works is crucial for members of the general public to participate in the cultural life of a society and to enjoy the benefits of technological development.[229] By providing legal protection of these activities, the collective right to fair use would foster a vibrant culture of civic participation in public affairs, thus enriching human socialization and promoting democratic governance.

226. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1525 (9th Cir. 1992) ("Computer programs, however, are typically distributed for public use in object code form, embedded in a silicon chip or on a floppy disk.").

227. Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1608–09 (2002) ("From this approximation of source code, reverse engineers can discern or deduce internal design details of the program, such as information necessary to develop a program that will interoperate with the decompiled or disassembled program.").

228. *See Sega*, 977 F.2d at 1523 (holding that reverse engineering "has led to an increase in the number of independently designed video game programs offered for use with the [plaintiff's] console").

229. For further discussion of the importance of information exchange to cultural development, see, for example, ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 248–99 (1998); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550 (2006) ("Musical borrowing, which includes a range of practices from copying to more subtle influences, is a pervasive aspect of musical production."); Tushnet, *supra* note 10, at 562–81.

IV. ENFORCING FAIR USE AS A COLLECTIVE RIGHT

The preceding Part put forward a new theory that shows how and why fair use, conventionally defined as an individual right to raise an affirmative defense in copyright infringement cases, should be reconceptualized as a collective user right. This Part considers the extent to which treating fair use as a collective right will help defend the public interest. For this purpose, I argue that two sets of new legal frameworks should be used in the adjudication of fair use cases: (1) an introduction of the public interest test in applying the four-factor fair use analysis; and (2) a limited reversal of the burden of proof to copyright holders.

A. The Public Interest Test

As demonstrated in Part II, the treatment of fair use as an individual right has led judges and legislators to ignore the need to weigh the broader social values of using copyrighted works for the public interest.[230] Instead, they have treated fair use cases as involving the competing claims of the individual copyright holder and the individual user. In consequence, analysis of the public interest has generally been absent in the judicial application of the fair use doctrine, although a very limited number of cases have used a narrower idea of the public interest.[231]

By contrast, protecting fair use as a collective right would require an introduction of a public interest test in the adjudication of fair use cases. The three major attributes of the enjoyment of the collective right to fair use, namely that it is indivisible, relational, and inalienable,[232] indicate that fair use produces far-reaching effects on the interests of different groups of users or society at large. From this perspective, the collective right approach would reshape fair use cases by protecting not only the individual fair user but also other potential fair users who might use the copyrighted work as well. In this sense,

230. *See supra* text accompanying notes 94–105.

231. *See* Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006) (noting that "the [wide] public exhibition of art . . . 'benefits the broader public interest' " (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994) (Jacobs, J., dissenting))); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1283 (11th Cir. 2001) (Marcus, J., concurring) (pointing out that if copyright holders had the right to prevent others from making parody of their works, that would have made "a policy that would extend intellectual property protection into the precincts of censorship" (internal quotation marks omitted)); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding in favor of fair use in part because "[t]here is a public interest in having the fullest information available on the murder of President Kennedy").

232. *See supra* Part III.B.2.

fair use protects the public's group interest or social interest in using a copyrighted work without the copyright holder's authorization.[233]

The public interest test would require courts to use a broad-based approach to interpret the fair use doctrine and further to sufficiently consider the public interest in rendering judicial decisions. Rather than focusing only on individual interests, courts should look broadly to the spectrum of public interests and consider whether an individual act of copying works has any bearing on public access to and use of knowledge and information flowing in intangible public space.[234]

Courts can apply the public interest test in two ways. First, they may use the public interest test as an additional factor to supplement the four fair use factors. Both Congress and the Supreme Court have admitted that section 107 "notes four nonexclusive factors to be considered."[235] Section 107's factors are nonexclusive because the fair use doctrine "is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[236] Therefore, it is permissible for courts to go beyond the four fair use factors as listed in section 107. Additionally, treating fair use as a collective user right also necessitates the use of the public interest test. The four fair use factors do not contain built-in measures to enforce fair use as a collective user right. As shown in Parts I and II, directed by the four factor analysis, courts have shaped fair use as an individual right enjoyed by each user.[237] Even though some courts have relied on the transformativeness test as part of first

233. *See supra* Part III.C (dividing fair use collective rights into group identity-based rights and society-based rights).

234. *See, e.g.*, ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 280 (2005) (proposing that the limitations on copyright should be seen as users' rights and that it "can be objected that different users' rights are justified by very different societal interests"); Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 53 (2004) ("To make intellectual property consistent with the idea of free speech as democratic culture, there must be a robust and ever expanding public domain with generous fair use rights. Intellectual property also must not be permitted to create chokepoints or bottlenecks in the spread of knowledge and the distribution of culture."); Samuelson, *supra* note 3, at 2566–67 ("Courts should give greater weight to the public's interest in access to the information the defendant's use would make available. . . . Particularly in cases involving free speech and free expression values, courts can and should give more consideration to the public interest in access to the defendants' expression."); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 331 (2006) (arguing that "[i]ntellectual property is about social relations and should serve human values").

235. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

236. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

237. *See supra* Parts I–II.

factor to protect the public interest,[238] this judicial practice has long been overshadowed by other courts' emphasizing the fourth factor as the core of the fair use analysis.[239] The fourth factor, as the statutory language shows, is intended to protect the market value of copyrighted works.[240] Therefore, courts have applied the four-factor fair use analysis with implied favoritism for copyright holders. The use of the public interest test, therefore, would function to neutralize this favoritism.

Second, courts should examine the extent to which identity-based and society-based public interests are affected in fair use cases.[241] Courts may first identify the identity-based group to which users of copyrighted works belong, or the larger social benefits that may be generated by the unauthorized use of copyrighted works. In this way, courts may place themselves in a better position to consider the extent to which the unauthorized use of copyrighted works affects the protection of the larger group members' interests or promotes the creation of social benefits.

This broad-based interpretive method has been adopted in Canada. In construing the nature of the fair dealing exception, the counterpart of the United States fair use doctrine in Commonwealth jurisdictions, the Supreme Court of Canada characterized the public interest test as follows:

> The fair dealing exception, like other exceptions in the *Copyright Act*, is a *user's right*. In order to maintain the proper balance

238. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (holding that "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one"); Perfect 10 v. Amazon.com, 508 F.3d 1146, 1165 (9th Cir. 2007) (ruling that "a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.").

239. *Harper & Row*, 471 U.S. at 566 ("This last factor is undoubtedly the single most important element of fair use."); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) ("The four statutory factors may not have been created equal. In determining whether a use is 'fair,' the Supreme Court has said that the most important factor is the fourth, the one contained in 17 U.S.C. § 107(4). . . . We take it that this factor, 'the effect of the use upon the potential market for or value of the copyrighted work,' is at least *primus inter pares*, figuratively speaking, and we shall turn to it first."); *see also* Beebe, *supra* note 37, at 617 (showing that "59.0% of the opinions following *Harper & Row* (but preceding *Campbell*) explicitly cited this proposition. . . . [*Campbell's*] intervention had a modest effect on the lower courts. . . . Of the opinions following *Campbell*, 26.5% continued explicitly to state that factor four was the most important factor.").

240. *See supra* text accompanying note 35.

241. *See supra* Part III.C.

> between the rights of a copyright owner and users' interests, it must not be *interpreted restrictively*. . . .
>
> . . . .
>
> . . . "Research" must be given *a large and liberal interpretation* in order to ensure that users' rights are not unduly constrained. . . .
>
> . . . .
>
> . . . "Dealing" connotes not individual acts, but *a practice or system*. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works.[242]

By giving judicial recognition to the idea of fair dealing as a user's right, rather than a defense, the Supreme Court of Canada expressly embraced a broad-based approach to interpreting the scope of the fair dealing doctrine in order to protect the public interest. For instance, the Court noted that research as a permitted fair dealing in Canadian copyright law encompasses not only an individual research activity but also "a practice or system"[243] of doing research, which is a collective activity in which others participate as a group of researchers. From this perspective, the public interest requirement used in this decision comports with the group identity-based collective right to fair use discussed in Part III.[244]

The introduction of the public interest test in American copyright law would further transform the judicial protection of fair use rights in the following three major ways. First, it would change the way in which courts deal with the role of the transformativeness element in the fair use doctrine. In determining the outcome of a fair use case, courts have increasingly emphasized the role of transformative use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[245] For example, the Supreme Court in *Campbell* said that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[246] With a series of later judgments following *Campbell*, it has become common for courts to see transformative use of a work as presumptively fair

242. CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 399 (Can.), ¶¶ 48, 51, 63 (emphases added), *available at* http://scc.lexum.org/en/2004/2004scc13/2004scc13.pdf.

243. *Id.*

244. *See supra* Part III.C.1.

245. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

246. *Id*.

use.[247] While transformative uses deserve heightened judicial protection, many courts have taken it for granted that a nontransformative use of a work may amount to an infringement of copyright.[248] The justification is that, unlike transformative uses, nontransformative uses simply copy the original copyrighted works and thereby make no new contributions to enrich culture. Against this backdrop, courts have repeatedly ruled that nontransformative uses, including simple photocopying even in scientific or educational settings, could potentially militate against a finding of fair use.[249]

247. *See* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 800 (9th Cir. 2003) ("The Supreme Court has recognized that parodic works, like other works that comment and criticize, are by their nature often sufficiently transformative to fit clearly under the fair use exception."); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) ("The more transformative the new work, the less important the other factors, including commercialism, become."); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271–74 (11th Cir. 2001) ("[C]onsideration of [the transformative nature of the parody] certainly militates in favor of a finding of fair use, and, informs our analysis of the other factors.").

248. *See, e.g.*, Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 715 (2011) ("[S]ince 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine [in the courts], bringing to fruition a shift towards the transformative use doctrine that began a decade earlier."); Tushnet, *supra* note 10, at 555 ("While extrajudicial and structural limits to copyright are under attack, fair use law has been realigned around transformative use, in which the user does more than simply copy the original work." (footnote omitted)).

249. *See, e.g.*, Nihon Keizai Shimbun, Inc. v. Comline Bus. Data., Inc., 166 F.3d 65, 72 (2d Cir. 1999) (finding that absence of transformative use in a case involving translation of news items weighed heavily against fair use); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1389 (6th Cir. 1996) (holding that a for-profit copyshop may not claim fair use where the copies were made under contract with an educational institution); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 923 (2d Cir. 1994) ("Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use."); Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989) (explaining that when a work possesses the "same intrinsic purpose" as a preexisting work, that in turn "moves the balance of the calibration of the first factor" against the copier and "seriously weakens a claimed fair use"); L.A. Times v. Free Republic, No. 98-7840, 2000 U.S. Dist. LEXIS 55669, at *75 (C.D. Cal. Apr. 5, 2000) ("Conversely, the amount and substantiality of the copying and the lack of any significant transformation of the articles weigh heavily in favor of plaintiffs . . . ."). Moreover, courts have repeatedly held that nontransformative uses should be presumed to cause market harm. This makes it unlikely for courts to rule that such nontransformative uses are non-infringing. *See, e.g.*, Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) ("Because, on the facts presented, [defendants'] use of *The Cat in the Hat* original was nontransformative, and admittedly commercial, we conclude that market substitution is at least more certain, and market harm may be more readily inferred."); Oasis Publ'g Co. v. West Publ'g Co., 924 F. Supp. 918, 929 (D. Minn. 1996) ("Because Oasis' proposed CD-ROM product is nontransformative, the Court presumes market harm to West."); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 716–17 (1995) (explaining how courts "import"

Courts have even ruled that any sampling from a sound recording infringed the copyright in the sampled recording.[250]

The use of the public interest test would reverse the trend of affording weak protection to nontransformative uses, and it would require courts to protect more nontransformative uses. For cases involving nontransformative uses such as copying for educational and research purposes, courts need to examine the social implications of such uses, as they do for transformative uses. Nontransformative uses, in many cases, carry strong positive implications for promoting the users' group-based or society-based values as discussed in Part III.[251] Commentators have contended that "[pure] copying is of value to audiences who have access through copying to otherwise unavailable speech. It also enhances copiers' ability to express themselves; to persuade others; and to participate in cultural, religious, and political institutions."[252] Therefore, courts should also consider the extent to which the public interest should be protected when dealing with cases involving nontransformative uses of copyrighted works.[253] For this purpose, they should consider whether nontransformative uses may produce benefits for any specific group of users or protect larger social interests.

Second, the use of the public interest test would require courts to give an equal treatment to parody and satire. Starting with the *Campbell* decision, courts have extended greater fair use protection to parody than satire, because "[p]arody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[254] This dichotomous approach triggers a judicial inquiry that gives diametrically different treatments to parody and satire. If a use arguably criticized or commented on the original work and a parodic character reasonably can be perceived, a court could easily conclude

market considerations into the transformative analysis under the first factor and more readily find market harm when use is nontransformative).

250. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) ("If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole[?] Our answer to that question is in the negative.").

251. *See supra* Part III.C.

252. Tushnet, *supra* note 10, at 562.

253. Professor Boon argues that copying is an essential part of being human, because "many of the most vibrant aspects of contemporary culture indicate an obsession with the act of copying and the production of copies, and it seems that we find real insight into what human beings and the universe are like through thinking about how and what we copy." MARCUS BOON, IN PRAISE OF COPYING 4 (2010).

254. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994).

the use was fair. By contrast, if the original work is used only as a vehicle to criticize something else, for example society in general, the new work is a satire rather than a parody and therefore could potentially militate against a finding of fair use.[255] Informed by this parody/satire distinction, the Ninth Circuit denied a fair use defense in *Dr. Seuss Enterprises v. Penguin Books*.[256] In this case, the defendant's book mimicked the style of *The Cat in the Hat* while retelling the facts of the O.J. Simpson murder trial.[257] The court ruled that the defendant's book was a satire, not a parody, because it did not poke fun at or ridicule *The Cat in the Hat*.[258] Instead, it merely used the characters and style of *The Cat in the Hat* to tell the story of the O.J. Simpson murder trial. Therefore, the book was not deemed fair use.[259]

The use of the public interest test would eliminate the parody/satire distinction. It would suggest that courts should give equal treatment to parody and satire. Rather than treating satire unfavorably, courts should broadly examine the political or artistic values that may underlie a satirical use of a copyrighted work. It has been recognized that satire is a powerful form of social criticism that uses wit and ridicule as its weapon.[260] From this perspective, satire comports with the society-based values that are intended to be promoted by the collective right to fair use for a free and just society.

The Second Circuit took the lead in breaking the parody/satire distinction by integrating a public interest test to examine whether satirical uses of copyrighted materials can produce any larger social benefits. In *Blanch v. Koons*,[261] the court held that the satirical use of a portion of a photo in a collage, by the acclaimed visual artist Jeff Koons, qualified as fair use. The court explained that the copyright holder's photo was "fodder for [the user's] commentary on social and aesthetic consequences of mass media,"[262] for which "the use of an existing image advanced his artistic purposes."[263] The court further reinforced

255. *See* Maureen McCrann, Note, *A Modest Proposal: Granting Presumptive Fair Use Protection for Musical Parodies*, 14 ROGER WILLIAMS U. L. REV. 96, 106 (2009) ("In failing to clearly address the issues surrounding satirical expression, the *Campbell* decision created the potential for lower courts to exclude protection for *all* forms of satire, regardless of the amount of parodic material present.").

256. 109 F.3d 1394 (9th Cir. 1997).

257. *Id.* at 1396.

258. *Id.* at 1401.

259. *Id.* at 1402–03.

260. *See* DUSTIN GRIFFIN, SATIRE: A CRITICAL REINTRODUCTION 1 (1994) ("A work of satire is designed to attack vice or folly. To this end it uses wit or ridicule.").

261. 467 F.3d 244 (2d Cir. 2006).

262. *Id.* at 253.

263. *Id.* at 255.

its fair use ruling by noting that "the public exhibition of art [through satirical use] is widely . . . considered to 'have value that benefits the broader public interest.' "[264]

Third, the public interest test would also help courts provide adequate judicial protection of fair use rights that have been undercut by the passage of the DMCA. As noted in Part II, the DMCA restricts the exercise of fair use rights by foreclosing the invocation of fair use as the legal basis to circumvent technological measures that digitally lock up copyrighted works. However, the recent controversy over jailbreaking the iPhone and especially the report issued by the Copyright Office on this matter, indicate that it is necessary to accommodate fair uses in the anti-circumvention regulations.[265] The copyright office felt that jailbreaking would promote consumer welfare by allowing iPhone users to enjoy greater freedom in using the iPhone.[266] Moreover, the Federal Circuit Court of Appeals ruled in 2004 that the DMCA never "rescinded the basic bargain granting the public noninfringing and fair uses of copyrighted materials."[267] In rendering this decision, the court emphasized that "[c]opyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software."[268]

The public interest test would help courts buttress their policy-based rulings to preserve fair use rights under the DMCA. The test would help courts examine whether the protection of fair use rights is

264. *Id.* at 254 (citing Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994)). The court also noted the need to give full deference to the artist's justification for making satirical use of the copyrighted work by stating that "[a]lthough it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities." *Id.* at 255. In this case, Koons asserted his justification for the satirical use of the copyrighted photo as follows:

> "To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to."

Id. (quoting Koons Aff. ¶ 5, 396 F. Supp. 2d 476 S.D.N.Y. (2006)).

265. *See supra* text accompanying notes 212–16.

266. Wortham, *supra* note 212.

267. Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004).

268. *Id.*

needed in DMCA-related cases. Courts may first identify the group of users that section 107 of the Copyright Act is intended to protect. Had the iPhone jailbreaking case been petitioned to a court first, the court could have identified users of smartphones who want to jailbreak them as a group of people. They could have further considered that their collective interest in jailbreaking smartphones is strong enough to deserve fair use protection. With respect to the issue concerning the compatibility of fair use and the DMCA, courts may inquire into whether a sheer prohibition of circumvention activities would lead to a blanket denial of fair use rights. They may further examine whether this sweeping exclusion of fair use protection from the DMCA may harm the general public interest by allowing copyright holders to impede public access to works protected by technological measures.

B. Limited Reversal of the Burden of Proof

As pointed out in Part II, when treated as an individual right, fair use only entitles a user to raise an affirmative defense to a claim of copyright infringement. It thus follows that the burden to prove fair use is placed on the user after the copyright owner establishes a prima facie case of copyright infringement. But this procedural rule has harmed the public interest in various ways. For instance, it has simply reduced fair use to a right to hire a lawyer. The rule has also made it increasingly difficult for users to defend their interests, as it increases litigation costs and breeds aggressive copyright claims by content owners.[269]

Treating fair use as a collective right would necessitate a limited reversal of the burden of proof in fair use cases.[270] It would relieve users of their burden of proof if their uses are made for noncommercial purposes. Against this backdrop, the burden of proof should instead be

269. *See supra* text accompanying notes 121–31, 132–39.

270. My proposal on the limited reversal of the burden of proof is different from the call for a general reversal of the burden of proof. For example, Pamela Samuelson argues that in fair use cases the burden of proof should in general be placed on the copyright holders:

> Given the important role that fair use plays in mediating tensions between copyright law and the First Amendment and other constitutional values, it would be appropriate for the burden of showing unfairness to be on the copyright owner. When deciding whether to challenge a use as infringement, rights holders often anticipate that fair use will be at issue in the case, and they are typically in a better position than defendants to offer proof on key issues pertinent to fair use, such as the likelihood of harm to the market.

Samuelson, *supra* note 3, at 2617; *see also* Liu, *supra* note 41, at 443 (arguing the case for shifting the burden of proof to plaintiffs in fair use cases based on the fact that the burden of proof is generally placed on plaintiffs in defamation-related free speech cases).

placed on the copyright holder. Thus, the new general rule would require the copyright holder to establish the existence of a prima facie case of copyright infringement as well as the non-existence of fair use if the use was made for a noncommercial purpose. If the copyright holder can prove that his copyrighted work was used for a commercial purpose, the burden of proof on fair use would be shifted to the user. In sum, whether the use of the copyrighted work is for a commercial purpose should determine who bears the burden of proof. A commercial use would leave the burden of proof for fair use on the user; a noncommercial use would place the burden of proof on the copyright holder.

The limited reversal of the burden of proof is grounded in the collective right to fair use enjoyed by the public. Fair use as a collective right can carry such a weight because case law indicates that a fair use, as demonstrated in Part III,[271] involves the need to protect not only the interest of an individual fair user but also other potential fair users who might use the copyrighted work. From this perspective, the prioritization of protecting the fair use right is designed to protect the public interest. Judge Posner's observation succinctly captures why it is important to prioritize the public interest:

> If there is an asymmetry in copyright, it is one that actually favors defendants. The successful assertion of a copyright confirms the plaintiff's possession of an exclusive, and sometimes very valuable, right, and thus gives it an incentive to spend heavily on litigation. In contrast, a successful defense *against* a copyright claim, when it throws the copyrighted work into the public domain, benefits all users of the public domain, not just the defendant; he obtains no exclusive right and so his incentive to spend on defense is reduced and he may be forced into an unfavorable settlement.[272]

The above observation shows that the limited shifting of the burden of proof in fair use cases would protect users who may have contributed to the protection of the public interest. It relieves them of an extra burden for their public interest-benefiting activities. In this way, this procedural rule would pave the way for courts to engage in more expansive scrutiny of the subtleties and nuances of the public interest that they should promote and protect in fair use cases.

Moreover, the limited shift of the burden of proof would significantly reduce users' litigation costs. This would encourage

271. *See supra* text accompanying notes 222–28.

272. Eagle Servs. Corp. v. H20 Indus. Servs., Inc., 532 F.3d 620, 625 (7th Cir. 2008).

members of the public to assert their rights more actively and spontaneously rather than simply succumb to copyright holders' demands for license fees. First, it would enable users to pay lower attorney's fees for, and to spend less time in, gathering, processing, and presenting evidence in litigation. Commentators have pointed out that courts can use burden of proof rules to reduce or even minimize litigation costs for one of the parties involved in a dispute. This is because "the burden of proof, by giving one party the task of producing evidence, relieves his opponent to some extent of that task—thereby saving expenditures that might otherwise be incurred by the opponent."[273] Moreover, the limited shift of the burden of proof would require copyright holders to submit evidence to support their claims against putative fair users in cases involving noncommercial uses of works. Thus, it would create hurdles for copyright holders to overclaim their rights in this type of fair use case.[274] Additionally, it would deter copyright holders' aggressive litigation strategy to sue innocent fair users for the purpose of preventing or stopping them from using their copyrighted works.[275] These functions of the limited shift of the burden of proof would ensure fair users' activities are not unduly hampered by the exceedingly complex, lengthy, and costly litigation process.

In fact, the limited reversal of the burden of proof has been used by courts before. The Supreme Court in its *Sony* decision suggested that, at least where noncommercial uses are concerned, the defendant may enjoy a presumption that the use does not harm the market for the original work.[276] This presumption arises because noncommercial uses are less likely to reduce economic incentives for the copyright holder to create and disseminate a new work. Nor are they likely to

273. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 413 (1997) (emphasis omitted).

274. Professor Samuelson points out that

> the current legal structure makes it possible for an aggressive copyright owner to overclaim rights and to force good faith users or follow-on creators to defend a use as falling within the complex web of existing limitations and exceptions. Overclaiming can impose high litigation costs, including risks of statutory damage awards, and thereby chill some uses that if challenged would ultimately be found non-infringing.

Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1210 (2010).

275. For discussion of this strategic litigation behavior, see *supra* text accompanying notes 133–36.

276. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984) ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.").

cause market substitution of their works.[277] Therefore, it follows that noncommercial users do not need to bear the burden of proving that their use would not cause harm to the market value of copied work.[278] In this context, the burden of proof should instead rest on the copyright holder. According to the Supreme Court's *Sony* decision, "[a copyright holder's] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[279]

Several earlier cases used similar reasoning. The copyright holder was required to assume the burden to prove that noncommercial uses would cause harm to its market.[280] Yet, such a limited reversal of the burden of proof was abandoned by courts as they gradually shifted to embrace a fixed characterization of fair use as an affirmative defense.[281] Against this backdrop, courts altered the procedural rule to have fair use function as an affirmative defense in copyright disputes.[282] The re-establishment of the limited reversal of the burden of proof—a rule utilized in earlier cases—is thus both a practically feasible and theoretically viable option for handling fair use cases.

C. Responses to Criticisms

The following Section responds to potential criticisms that are likely to be leveled at the reconceptualization of fair use as a collective

277. In *Sony*, the copyright owner failed to provide any empirical evidence that noncommerical use had either reduced its viewership or negatively impacted its business. *See id*.

278. *See, e.g.*, Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 974 (2007) ("[F]air use doctrine's role historically was to excuse uses that cause no foreseeable harm to the copyright owner.").

279. *Sony*, 464 U.S. at 451.

280. *See, e.g.*, Simms v. Stanton, 75 F. 6, 13 (N.D. Cal. 1896) (ruling in favor of the defendant on grounds that the plaintiff, "on whom the burden of proof lies," had failed to show that the defendant's use of the copyrighted material concerned was unfair). For discussion of earlier cases in which the courts put the burden of proof on plaintiffs, see Ned Snow, The Forgotten Right of Fair Use 18–21 (Aug. 18, 2010) (unpublished manuscript) (on file with the North Carolina Law Review), *available at* http://ssrn.com /abstract=1659855 (discussing the earlier cases in which courts placed the burden of proof on copyright holders in fair use cases).

281. *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 672 F. Supp. 2d 217, 226–27 (D. Mass. 2009) (concluding that the subsequent Supreme Court *Campbell* decision dispelled the notion that noncommercial use is presumptively fair use, which was suggested in its *Sony* decision, and therefore the defendant needs to bear the burden of proof in fair use cases).

282. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("No 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.").

right. In particular, it shows why the use of the new legal approaches discussed in the preceding two sections would not cause the problems that critics may envisage.

1. Problems in Asserting the Collective Right to Fair Use

If the public at large is bestowed with a collective right to fair use under section 107 of the Copyright Act, does it follow that any member of the public has standing to bring suit against a party who has infringed this collective right? Critics may argue that the collective right mode of fair use protection would contravene the traditional notion of standing, which requires that a party must have suffered a "concrete and particularized" injury to bring suit.[283] Central to this rule is the requirement that a plaintiff must have been affected in a "personal and individual way"[284] and the relief he seeks would "directly and tangibly benefit[] him"[285] in a manner distinct from its impact on "the public at large."[286] If a user of copyrighted works sues solely on the grounds of the collective right to fair use, it is unlikely that he can demonstrate that this requirement has been satisfied. Fair use as a collective right protects group or social interests in utilizing works. Entitling any user of copyrighted works to have standing to sue, in this context, would violate the aforementioned requirement. Worse still, it would further alter the conventional mode of fair use cases by opening the door to allow the user of copyrighted works to sue the copyright holder. In a typical fair use case decided on the basis of section 107 of the Copyright Act, it is the copyright holder who brings suit against the user, claiming that he has suffered injuries caused by unauthorized use of his copyrighted works.

Criticism of this kind, however, does not capture the dynamics of protecting users' interests under section 107. If defined as the legal basis for creating a collective right to fair use, section 107 would entitle any user of copyrighted works to have standing to bring two kinds of lawsuits. First, any individual user can bring suit against a party who has harmed his own individual interest regarding fair use of relevant copyrighted works. The party whom a user has standing to sue includes a copyright holder or a third party who may have unduly restricted his ability to exercise a fair use right. For example, under the DMCA, users can circumvent the technological measures deployed by

283. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
284. *Id.* at 560 n.1.
285. *Id.* at 574.
286. *Id.*

copyright holders for making limited fair uses[287] such as jailbreaking smartphones.[288] But if a copyright holder utilizes additional technological measures intentionally designed to disable the smartphones that are jailbroken or a particular device that prevents users from jailbreaking their smartphones, a user can sue the copyright holder for infringing his fair use right. The collective right of fair use would entitle the user to do so, because he has suffered "a concrete and particularized" injury to his enjoyment of the fair use right.

The second type of lawsuit a user can bring on the basis of the collective right to fair use would target the actions taken by the government or copyright holders that may affect the fair use interests of all users. For example, a user can bring suit to challenge the validity of the DMCA on the grounds that it may have severely undercut the enjoyment of the fair use right by all users in the digital age. Similarly, a user can even bring suit to challenge the validity of the notices commonly used by publishers, such as "No part of this book can be reproduced without the permission of the publisher." He can argue that notices of this kind would negatively affect the fair use rights of all users, because the publishers intentionally exaggerated the scope of their copyrights and threatened users to give up their fair use right. As one scholar has argued, "In creating a civil liability scheme to deal with [false copyright claims made by holders], Congress should grant broad standing to bring legal claims. . . . [L]imiting standing to parties who can demonstrate personal injury will likely be insufficient to respond to the broad problem of [false copyright claims]."[289]

Under these scenarios, a user also has standing to bring suit because the adverse impacts on other users are fairly traceable. A valid fair use interest enjoyed by a particular user has intrinsic value for any other members of a group who have group-based fair use rights or members of the public who have society-based fair use rights. If the user is prohibited from, or faces threats of alleged infringement, others would be treated in the same manner. Because a chain of causation exists between the government's or copyright holder's action and the

287. *See* 17 U.S.C. §§ 1201(d), (f), (g), (j) (2006); *see also* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001) ("[Congress] created a series of exceptions to aspects of Section 1201(a) [of the DMCA] for certain uses that Congress thought 'fair,' including reverse engineering, security testing, good faith encryption research, and certain uses by nonprofit libraries, archives and educational institutions.").

288. *See supra* text accompanying note 216.

289. Mazzone, *supra* note 133, at 1078.

users' injuries, a user therefore would have standing to bring suit against the government or the copyright holder. The collective right to fair use, in this context, entitles a user to have standing to sue. As shown in Parts II and III, fair use entails that users' interests in making fair uses are interdependent and relational. Thus, fair use requires judges to examine broadly the impact of use restrictions on a user of copyrighted works.

This liberal interpretation of the injury requirement in the standing doctrine has been adopted by the Supreme Court in its recent *Massachusetts v. Environmental Protection Agency* (EPA)[290] decision. In this case, the Court upheld a plaintiff's standing to sue for injury caused by the EPA's failure to regulate greenhouse gas emissions that were alleged to have caused global warming. The Court stated that a particularized injury as a basis for entitling a plaintiff to sue should include not only an "actual"[291] injury but also an "imminent"[292] injury.

Moreover, the Supreme Court has emphasized that standing does not require a showing of economic injury. Rather, injuries can "reflect 'aesthetic, conservational, and recreational' as well as economic values" and can be widely shared among the population.[293] The collective right to fair use comports with this broad interpretation of the nature of injury. It protects the aesthetic value of fair uses such as the use of copyrighted works in arts schools for educational purposes. It also protects the recreational value of fair uses such as the use of copyrighted works for making parodies. Fair uses protected by the collective right mode also include broader political and social uses, such as the protection of freedom of expression and the promotion of cultural participation.

2. Under-Protection of Copyright Holders' Interests

Another potential criticism is that the broad fair use protection generated by the collective right approach would tip the balance in copyright law toward users at large. This would result in an inadequate and ineffective protection of copyright holders, decreasing the output of copyrighted material that could be circulated to the public. Moreover, critics may worry that courts would give too much power to users' collective rights. This would also result in the judicial imposition

290. 549 U.S. 497 (2007).

291. *Id.* at 521 (quoting *Lujan*, 504 U.S. at 560).

292. *Id.* at 542–43.

293. Sierra Club v. Morton, 405 U.S. 727, 738 (1972) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970)).

of too onerous a burden on copyright holders to accommodate fair uses.

These are legitimate concerns. Yet the protection of the collective right to fair use would not necessarily lead to an under-protection of copyright holders' interests. Instead, the reconceptualization of fair use as a collective right and its corresponding legal protections for fair use rights contain safeguards designed to prevent the under-protection of copyright holders' interests.

First of all, courts would still be required to engage in the four-factor analysis to determine the outcome of a fair use case.[294] As discussed above, the public interest test is a supplementary factor to the conventional four-factor fair use analysis.[295] Thus, courts would still examine the extent to which the use of a work may affect the copyright holder's market. This inquiry, as courts have pointed out, ensures that fair uses would not cause market substitution of copyright holders' works.[296]

Second, the public interest test cannot be used in a manner that would eliminate the need for conducting the market effect inquiry that constitutes the fourth factor of the fair use analysis. Rather, the test is intended to be used as an additional weighing factor that prevents courts from giving an undue weight to the market effect factor or interpreting too broad a scope of the potential market for the copyright holder's work.[297] The overemphasis on the fourth factor, especially the harm to the potential market, as commentators have pointed out, "can inappropriately skew the fair use analysis to favor the rights of copyright owners."[298] Professor Lemley's groundbreaking article has demonstrated that all "[e]fforts to permit intellectual property owners to fully internalize the benefits of their creativity [through their proprietary control] will inevitably get the balance [of intellectual property protection] wrong."[299] From this perspective, the

294. For the four fair use factors, see 17 U.S.C. § 107 (2006).

295. *See supra* Part IV.A.

296. Folsom v. Marsh, 9 F. Cas. 342, 344–45 (D. Mass. 1841) (No. 4901) ("[I]t is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy."). The Supreme Court followed this approach in its *Sony*, *Harper & Row*, and *Campbell* decisions.

297. In *Perfect 10 v. Amazon.com*, the court interpreted the scope of the copyright holder's market and the concept of harm to the market restrictively. It held that the plaintiff's claim of "the potential market for the downloading of [its] reduced-size images onto cell phones" was hypothetical and therefore ruled that the ascertained harm to the plaintiff's market remained hypothetical as well. *See* 508 F.3d 1146, 1168 (9th Cir. 2007).

298. Loren, *supra* note 11, at 30.

299. Lemley, *supra* note 119, at 1032.

public interest test is a bar to providing overprotection of copyright holders' interests.

Third, the limited reversal of the burden of proof in fair use cases only shifts the burden of proof to the copyright holder when the work is used for noncommercial purposes. Therefore, it has very limited impact on the copyright holder because noncommercial users are not likely to cause harm to the market for their works.[300]

3. Pitfalls of Protecting Privacy and Personal Uses

Critics may also cast doubt on whether defining fair use as a collective right can comport with all varieties of the existing categories of fair use. In particular, they may point to personal uses of copyrighted works that are traditionally recognized as fair uses. Examples of personal uses include copying works for time-shifting purposes such as using a video tape recorder to record a television show the user will watch at a later time,[301] and for space-shifting purposes such as using a device to download MP3 audio files from a computer and to listen to them elsewhere.[302] Personally uses preserve users' anonymity, which "permits these activities to go forward, and allows fair users to decide later whether to reveal their identities when releasing their work."[303] Therefore, personal uses protect users' right to privacy, a right that has been long regarded as an individual right.

The collective right of fair use, however, would not necessarily wipe out personal uses from its ambit of protection. In fact, personal uses are compatible with the collective right of fair use. The need to protect privacy as a "right to be let alone"[304] should not necessarily be reduced to an individual right alone. The right of privacy carries a

300. *See supra* text accompanying notes 277–79.

301. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 454–55 (1984) (holding that verbatim copying for time-shifting purposes is fair use). In *Sony*, the Supreme Court ruled that "time-shifting" of copyrighted television shows with video tape recorders (VTR) constituted fair use primarily because it did not have negative effects on the current as well as the potential market for the copyrighted works. *Id.* at 456.

302. Relying upon *Sony*, the court in *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.* held that copying for space-shifting purposes is "paradigmatic noncommercial personal use entirely consistent with the purposes of the [Copyright] Act." 180 F.3d 1072, 1079 (9th Cir. 1999); *cf.* A & M Records, Inc. v. Napster, 239 F.3d 1004, 1019 (9th Cir. 2001) (rejecting the ruling that space shifting was fair use); UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (same).

303. Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575, 598 (2003); *see also* Litman, *supra* note 25, at 1872–74 (discussing the relationship between fair use and personal use of copyrighted words).

304. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

social dimension in its theoretical and policy underpinnings: when privacy protects individuals, it does so not only for their benefit, but for the common good of society as well. Understood in this way, the protection of privacy is a central feature integrated into our social structure, one that "is valuable not only for our personal lives, but for our lives as citizens—our participation in public and community life."[305]

Protecting personal users under the framework of collective rights of fair use reflects this broad, pragmatic understanding of the right of privacy. Fair users can claim their interests in making personal uses either on group-based or society-based fair use rights. The relevant group of users can still assert their group interest in preserving their privacy while copying works for time-shifting purposes. Moreover, fair users can also assert their social interest in protecting privacy as a central need for maintaining a free and just society.

CONCLUSION

Fair use is one of the greatest mechanisms for enriching human society. It sustains and enhances both cultural dynamics and political democracy in a free and just society. Fair use can only perform its freedom-promoting function if it is implemented so as to "serve[] the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."[306]

While fair use is of crucial importance in protecting the public interest, many courts, as this Article has shown, have interpreted it as merely an individual right vested in users of copyrighted works. This individual right-based approach has led the courts to uniformly treat fair use as an affirmative defense.

This Article argues against the individual right-based approach to fair use. It asserts that fair use should be reconceptualized as the public's collective right. In doing so, it introduces a new theoretical basis for the fair use doctrine by drawing on the ideas of collective rights and intangible public space. It shows how we can capitalize on the collective right theory of fair use to come up with a set of new legal approaches to defend the public interest.

History has shown that fair use is a highly dynamic legal tool. It has evolved over time and transformed with ever-changing social

305. DANIEL J. SOLOVE, UNDERSTAND PRIVACY 93 (2008).
306. Leval, *supra* note 135, at 1110.

conditions.[307] No matter how fair use changes, what remains unchanged is its capacity to generate active responses and adaptations to new public needs. Fair use as a collective right not only comports with the public-oriented dynamism in its spirit but also reinforces its commitment to the shared pursuit of enhanced civilization and freedom for all humankind.

307. *See, e.g.*, Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1855–60 (2007) (exploring the role of the fair use doctrine in accommodating the Google Book Print Library); Burk & Cohen, *supra* note 3, at 43–47 (discussing the role of fair use in accommodating advances in technology).