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Teating Fair Use as an Easement on Intellectual Property

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Treating Fair Use as an Easement on Intellectual Property

Copyright holders have run with the copyright-as-property analogy to strengthen their rights, to the detriment of the public. There are few barriers to copyright holders locking all content behind paywalls regardless of the mixed public domain nature of the content or the fair use intentions of the public. If fair use is treated as an easement, fair use applies even if a law doesn't explicitly invoke it, the public's fair use rights cannot be eliminated, and copyright holders may be enjoined if they completely block fair use rights. In his 2016 article "Copyright Easement," Jason Mazzone argues copyright easements are a way authors can reserve rights when assigning their works to publishers, but Mazzone does not equate fair use with an easement. Others have hinted at the possibility of fair use as an easement, but none has developed it.

Making fair use an easement rebalances the property analogy to strengthen the public's interest in copyrighted works and provides a theoretical and case-law foundation to push back against copyright holders' intellectual land grab. This Note is the first paper to fully advocate treating fair use as an easement on copyright.

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I. INTRODUCTION

Fair use should be interpreted, using property law analogies, as an easement to override any presumption that laws eliminate fair use. Fair use is a property interest conveyed by § 107 of the Copyright Act. Fair use balances the exclusive rights granted by § 106 but also creates rights that pervade all of copyright. In any copyright consideration, the easement-like rights reserved to the public must be balanced against the exclusive rights granted to the author.

Copyright owners strengthen control over their creations by equating copyright with property and taking advantage of the implications of this intellectual property analogy.[1] Opponents of an intellectual land grab have fought back with the strong statutory protections of fair use, which this Note argues work like an easement on intellectual property.[2] Copyright law incentivizes the creation of works that will eventually belong to the public.[3] Those

1. *See e.g.*, Brian L. Frye, *IP as Metaphor*, 18 CHAP. L. REV. 735, 736 (2015) ("The problem with intellectual property metaphors is that they obscure the welfarist justification for intellectual property and encourage the creation of intellectual property rights inconsistent with that justification."); Douglas Y'Barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643, 643–44 (1998) (arguing that copyright is more analogous to misappropriation law than to property law); Leigh Beadon, *The Copyright Lobotomy: How Intellectual Property Makes Us Pretend to Be Stupid*, TECHDIRT (Apr. 23, 2013, 7:28 AM), https://www.techdirt.com/articles/20130410/12051322665/copyright-lobotomy-how-intellectual-property-makes-us-pretend-to-be-stupid.shtml ("[T]he moment there might be any benefit to the consumer, the content companies toss the [property] analogy out the window, and suddenly want to talk about reality.").

2. Another strong property concept that diminishes owners' rights is the public's future interest in copyrighted works. A copyright owner does not have a fee simple interest in their work. The public owns a remainder interest following the end of the exclusive period of copyright protection. The property concept of waste could be applied to copyright, but that topic is not the subject of this Note.

3. *See e.g.*, Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1870 (2011) (presented at Notre Dame School of Law "Creativity and the Law" Symposium) (recognizing that copyright law intends to incentivize both creation and dissemination of creative works, thereby promoting the public interest); Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV.

future public interests are the objective of copyright law. The temporary exclusive rights offered to owners are bait, promising more than they really offer.

Even during copyright's temporary period of exclusivity, copyright law benefits the public by granting exceptions to the owners' exclusive rights. Most notable among the exceptions is fair use, statutorily recognized by § 107 of the Copyright Act. However, in the absence of an easement perspective, the wording of § 107 leaves room for judges to give greater weight to other laws, potentially ignoring fair use. The district court in *Universal City Studios v. Reimerdes* exemplified this when it held that fair use applied to copyright infringement but not to other statutorily created actions.[4]

> Section 107 of the Copyright Act provides in critical part that certain uses of copyrighted works that otherwise would be wrongful are "not . . . infringement[s] of copyright." Defendants, however, are not here sued for copyright infringement. They are sued for offering and providing technology designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.[5]

If fair use were treated as an easement it would strengthen the public's interests. Copyright already strongly analogizes with property law. Equating fair use with an easement rebalances copyright conflicts. The parties are competing owners of property interests whose rights must be balanced to maximize the usefulness of creative works.

613, 616 (2014) (presented at Institute for Intellectual Property & Information Law Symposium, "Recalibrating Copyright: Continuity, Contemporary Culture, and Change") (contending that exclusive statutory rights must be linked to encouraging creativity).

4. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000), *judgment entered*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

5. *Id.* (footnote omitted).

Thinking of fair use as an easement is not completely novel.[6] Some commentators have recognized the possible analogy between easements and fair use,[7] but none has developed the idea. Jason Mazzone's 2016 article, titled "Copyright Easements," analyzed the use of easements to convey copyright interests compared to licenses or assignments but did not equate fair use with an easement.[8] According to Mazzone, one beneficial use of such easements is reserving the right to evaluate the fair use of others after transferring copyright.[9] Reserving such a right avoids the conflict of interest when a copyright owner evaluates fair use.[10]

6. This very idea appears in a copyright treatise from 1996. MAVIS FOWLER, THE LAW OF COPYRIGHT 59 (1996) ("Fair Use is like an easement or a right of way through private property for the public's benefit."). In addition, Timothy Brennan concludes his article discussing fair use and the authority to exclude by comparing fair use to an easement:

> Fair use is nothing more than a zero-price compulsory license of copyrighted works for particular uses. From the perspective of the economic theory of property, such a license seems to preempt the market forces and negotiations that should tell us whether it is efficient to make the work available at a zero price. However, markets and negotiations can be costly, explaining why private parties allocate some transactions outside markets. More important in this context, these considerations can rationalize the allocation of property rights and the existence of "default" procedures in the law such as commercial codes, corporate organization, and bankruptcy. Such considerations can rationalize fair use as well, to the extent that it defines uses for which transaction costs are high and the expected negotiated price would be close to zero. An analogy to fair use in property law might be an easement created by zoning or other property regulation.

Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 712–13 (1993) (footnotes omitted).

7. L. RAY PATTERSON & STANLEY F. BIRCH, JR., *Chapter 10. A Unified Theory of Copyright*, *in* A UNIFIED THEORY OF COPYRIGHT 383, 388 (Craig Joyce ed., 2009), *printed in* 46 HOUS. L. REV. 215 (2009) (analyzing copyright law as a series of easements, including "the copyright owner's easement for marketing a copyrighted work, the author's fair use easement in creating a new work, and the user's easement for personal use of a copyrighted work for learning"); Brennan, *supra* note 6, at 712–13 ("An analogy to fair use in property law might be an easement created by zoning or other property regulation."); Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 73 n.195 (1997) (citing FOWLER, *supra* note 6, at 59) ("Fair Use is like an easement or a right of way through private property for the public's benefit."); L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS., Spring 1992, at 249, 266 (stating that fair use is "a limited easement" given to society "to benefit from [the author's] creative efforts"); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 157 n.122 (2011) (disputing Richard DeWolf's 1925 copyright treatise commentary on *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539 (1st Cir. 1905), by asserting that the *Sampson* court's "conceived fair use was analogous to the rights of an easement holder over a servient estate holder").

8. Jason Mazzone, *Copyright Easements*, 50 AKRON L. REV. 725, 725–27 (2016).

9. *Id.* at 727.

10. *See id.* at 736. Mazzone uses as an example a filmmaker who captured in a brief background shot some televised footage of a comedian the filmmaker thinks is fair use. *Id.*

Despite such tangential mentions of fair use and easements, neither Mazzone nor other scholars have developed the analogy.

As the world digitizes more and more copyrighted content, owners will have more control over access to and allowable uses of content. Given the choice, content owners will likely inhibit fair use as much as possible under the guise of preventing theft. By framing fair use as a property interest, courts can push back on owners' efforts to erode fair use rights. The fair use factors don't need to change nor does fair use case law. But application of the easement metaphor can help courts better balance public and private rights in copyright to maximize the utility of works incentivized by copyright protections for authors.

Fair users exercise their statutorily granted rights in copyrighted works. Although described as an affirmative defense,[11] fair

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> The depicted comedian is flattered to be included in the documentary even just in the background. The network, however, owns the copyright in the footage; it denies that fair use applies and threatens a lawsuit if the footage is used. The filmmaker deletes the scene.
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> . . . [In this scenario,] the author's transfer of the copyright prevents use of the work that the author considers beneficial. . . .
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> . . . .
>
> . . . The author, with a stronger stake in exposure of the work, might be delighted to see his or her work used by others in ways that fair use law allows. Publishers, however, see instead opportunities to extract a licensing fee, with the result that lawful fair uses are not made.

Id. at 736–37, 741. Reserving an easement could allow the author to determine fair uses of his work while assigning the copyright to a publisher. *Id.* at 753.

11. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("[F]air use is an affirmative defense . . . .") (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985)); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) ("Fair use traditionally has been treated as an affirmative defense to a charge of copyright infringement.") (citing *Campbell*, 510 U.S. at 590). *Bateman* further clarified that regardless of how fair use is viewed, "it is clear that the burden of proving fair use is always on the putative infringer." *Id.*; *see also* WEST'S ALR DIGEST *Copyrights and Intellectual Property* I(J)(1)(k53.2), ALRDG 99K53.2 (updated Dec. 2018) ("'Fair use' serves as affirmative defense to claim of copyright infringement, and thus party claiming that its secondary use of original copyrighted work constitutes fair use typically carries burden of proof as to all issues in dispute.").

Regarding the Digital Millennium Copyright Act (DMCA), fair use is different than traditional affirmative defenses because plaintiffs must consider fair use before acting. Lenz v. Universal Music Corp., 815 F.3d 1145, 1153 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 416 (2016), *and cert. denied*, 137 S. Ct. 2263 (2017) ("Even if, as Universal urges, fair use is classified as an '*affirmative* defense,' we hold—for the purposes of the DMCA—fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses. We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before

use is not an excused infringement but a justified noninfringement.[12] A fair user should not be "excused"[13] from infringing any more than an easement user is excused for trespassing.[14] In both cases the supposed infringer is justifiably exercising their nonpossessory interest in another's property.

In property terms, fair use is most analogous to an easement. Fair use gives third parties rights to use another's property for specific purposes not subject to revocation by the property owner. Fair use limits the rights of the owner,[15] which means fair use justifies[16] noninfringement rather than excusing[17] infringement.[18]

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sending a takedown notification under § 512(c)."). For comparison, an easement is an affirmative defense to trespass. CDC Pineville, LLC v. UDRT of N.C., LLC, 622 S.E.2d 512, 518 (N.C. Ct. App. 2005) ("As an affirmative defense to trespass, a defendant may assert that its entry onto plaintiff's land 'was lawful or under legal right.'").

12. *See Lenz*, 815 F.3d at 1151–52 ("Fair use is not just excused by the law, it is wholly authorized by the law. . . . [F]air use of a copyrighted work is permissible because it is a noninfringing use."); *Bateman*, 79 F.3d at 1542 n.22 ("[F]air use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.").

13. Excuse concedes the wrongness of an act but absolves liability. Linda A. Malone, *Is There Really a Difference Between Justification and Excuse, or Did We Academics Make It Up?*, 42 TEX. TECH L. REV. 321, 322–23 (2009) ("Excuse . . . began as a plea for mercy by those who lacked the culpability to be held responsible under criminal law. . . . [E]xcuse defenses are, on the whole, *ad hoc* and individual." (footnote omitted)).

14. An easement is an affirmative defense to trespass. *CDC Pineville*, 622 S.E.2d at 518 ("As an affirmative defense to trespass, a defendant may assert that its entry onto plaintiff's land 'was lawful or under legal right.'").

15. *See* Quality King Distribs. v. L'Anza Research Int'l, 523 U.S. 135, 136 (1998) ("[E]xclusive right[s] . . . under section 106 . . . [are] limited right[s]. The introductory language in § 106 expressly states that all of the exclusive rights granted by that section . . . are limited by the provisions of §§ 107 through 120.").

16. *Justification* refers to actions expected and condoned; they are not wrong. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1899 (1984) ("[Justified] behavior is not wrongful; it is warranted."). Society expects that a justified action would be repeated by other persons placed in the same position. *Id.*

17. *See* Malone, *supra* note 13.

18. The distinction between justification and excuse alters the generality of reasoning. Justifications have general validity while excuses only apply to individual circumstances. *See* Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH L. REV. 273, 277 (2009).

> A legal system that seeks to inform its citizens concerning right and wrong must explain why a particular defendant is acquitted of the charges. Is it because what he did was right in the circumstances, even though prima facie his conduct violated a legal norm? Or is he acquitted notwithstanding that he did wrong, because he has a personal excuse and the criminal law does not demand martyrdom? The failure to distinguish between justification and excuse would obscure the import of the law's rules of conduct and the way in which they differ from its rules of decision making.

Id.

Part II will address certain background principals of copyright and property law. Part III will then discuss how treating fair use as an easement furthers the purpose of the intellectual property clause. Part III will first discuss why treating fair use as an easement is a good analogy. Part III will then go on to discuss how treating fair use as an easement provides a clear framework for courts to work in and protects fair use rights. Finally, Part III will discuss the implication of fair use as an easement that fair use cannot be eliminated.

II. BACKGROUND FACTS AND DOCTRINES

The Constitution authorizes,[19] and the Copyright Act implements,[20] incentives to create for the benefit of the public.[21] Rewarding creators is not the goal but the means.[22] U.S. law explicitly

19. U.S. CONST. art. I, § 8, cl. 8 (allowing the legislature to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

20. Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908) ("[The Copyright Act] depends upon . . . the authority conferred under article I, § 8, of the Federal Constitution . . . .").

21. Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003).

> As we have explained, "[t]he economic philosophy behind the [C]opyright [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." Accordingly, "copyright 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." Rewarding authors for their creative labor and "promot[ing] . . . Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals."

Id. (citations omitted).

22. *See id. at* 214 ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights 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 in 'Science and useful Arts.'" (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954))).

favors a utilitarian[23] basis over a moral rights[24] or labor[25] basis. Any rights or benefits given to owners are tempered by the overall objective of the copyright system to provide the public with a greater volume and quality of publicly accessible works.[26] The

23. The casebook text *Copyright in a Global Information Economy* describes utilitarian and moral rights.

> [C]opyright's purpose is purely utilitarian. Copyright law exists to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination of new works. . . . [T]he Framers of the U.S. Constitution embraced this utilitarian rationale for copyright protection when they granted Congress the power to enact the copyright laws. Granting a limited monopoly to the authors of creative works provided a means for the fledgling country to encourage progress in knowledge and learning.

JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (4th ed. 2015).

24. *See* Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 36 (2005).

> Since the enactment of the Statute of Anne in 1709, the first modern copyright law, the justification for copyright has comprised *two* general normative theories. The first is utilitarianism, and the second is natural rights theory, particularly the labor theory of property and the social contract doctrine at the core of John Locke's political philosophy. The labor theory of property usually is given short shrift by modern copyright scholars, but it certainly played a justificatory role in the historical copyright debates. As Representative Gulian Verplanck stated in defense of a bill that became the Copyright Act of 1831: "[T]he work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made." State laws protecting intellectual property rights prior to the 1787 Federal Convention also reflected a Lockean influence. New Hampshire, to name but one example, enacted legislation to protect copyrights and other forms of intellectual property because "there being no property more peculiarly a man's own than that which is produced by the labour of his mind." Moreover, the evolution and creation of new types of intellectual property rights in the nineteenth century, such as trademarks and trade secrets, followed the contours of a labor theory of property. The initial definition and protection of trade secrets as property entitlements, for instance, derived its justification from the courts' belief that such rights were similar to other property rights born of valuable labor and already protected by the law.

Id. (footnotes omitted); s*ee also* COHEN, LOREN, OKEDIJI & O'ROURKE, *supra* note 23, at 11.

> The utilitarian justification for copyright protection is not the only possible rationale for granting exclusive rights to authors of creative works. Some argue that such rights are morally required. The countries of Continental Europe generally subscribe to the notion that an author's natural right in her creation is the principal justification for copyright protection.

Id.

25. *See* 1 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2017, at 23 (2017) ("One significant difference between the natural rights perspective and the utilitarian perspective relates to who is entitled to the fruits of productive labor. In the natural rights framework, the inventor or author is entitled to the social benefits produced by his or her efforts. In the utilitarian framework, reward to the inventor or author is a secondary consideration; the principal objective is to enrich the public at large.").

26. *See supra* note 21.

temporary monopoly control by the content creator is balanced against the public's current fair use rights and future interests.[27]

The common law on real property developed over centuries and provides a basis of comparison for the statutorily created rights of copyright, which are commonly lumped with other concepts in the term "intellectual property." To appreciate these arguments requires background information on the Copyright Act and certain principles of property law.

A. Copyright

The first background principle is copyright law. The Copyright Act implements the Constitution's authorization[28] to vest in authors certain exclusive rights for a "limited" duration and subject to exceptions benefiting the public.[29] The Copyright Act creates six exclusive rights: (1) to reproduce the work, (2) to prepare derivative works, (3) to distribute copies of the work, (4) to perform the work, (5) to display the work publicly, and (6) to digitally transmit audio works.[30] Copyright holders may prevent others from exercising the holders' exclusive rights, regardless of the copyright holders' choice to exercise those rights themselves.[31]

Fair use is one of several exceptions to a copyright holder's exclusive rights and was first articulated, although not named "fair use," by Judge Story in *Folsom v. Marsh*.[32] Judge Story described both the author's and the third party's rights as property.[33] The plaintiff in *Folsom*, Mr. Sparks, authored a twelve-volume

27. In real property law, future interest holders may claim "waste" when current property possessors inflict harm on future property interests. 19 MANUEL FARACH, FLORIDA REAL ESTATE—FLORIDA PRACTICE SERIES § 2:17 (2018 ed.). The consideration of the public's future interests and their rights to prevent loss or destruction of their future rights will not be dealt with in this Note. It is a valid concern that technological protections of copyrighted works may prevent those works from ever becoming fully accessible and part of the public domain.

28. U.S. CONST. art. I, § 8, cl. 8.

29. Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908) ("[The Copyright Act] depends upon . . . the authority conferred under article I, § 8, of the Federal Constitution . . . .").

30. 17 U.S.C. § 106 (2018).

31. 'The right of copyright holders to exclude others exists regardless of their own publication. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985). Not only may authors choose when to publish, they retain the right to choose not to publish while preserving their copyright remedies. *See id.*

32. Folsom v. Marsh, 9 F. Cas. 342 (D. Mass. 1841) (No. 4901).

33. *Id.* at 346.

anthology of the writings and correspondence of George Washington.[34] The defendant, Reverend Charles W. Upham, subsequently produced a biography of Washington that included extensive quotations of Washington's letters copied from Mr. Sparks' work.[35] In this context of publishing original letters, Judge Story balanced the competing rights of the author, the recipient, and third parties.[36]

Judge Story concluded that the letter's author had exclusive rights in the letter. Any attempt by a third party to publish the letters was "not a mere breach of confidence or contract, but [would be] a violation of the exclusive copyright of the writer."[37] Such a publication justified an injunction by a court of equity.[38]

The recipient of a letter deserved limited property rights outside the control of the letter's author.[39] In Judge Story's words, "the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters."[40] This contrasts with the "general property" rights which "belong to the writer."[41]

Third parties, unrelated to author or recipient, "are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."[42] With this reasoning, Judge Story concluded

34. *Id.* at 345.
35. *Id.*
36. *Id.* at 345-46.
37. *Id.* at 346.
38. *Id.* at 347 ("[T]he copyright act of 1831, . . . fully recognizes the doctrine for which I contend. It gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent.").
39. *Id.* at 346.

> [Recipients] possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.

Id. (citations omitted).
40. *Id.*
41. *Id.*
42. *Id.*

that Reverend Upham's publication of Washington's letters violated Mr. Sparks' exclusive rights.[43]

The term "fair use" represents Judge Story's equitable balancing of the legitimate needs of the public against the exclusive rights of a copyright holder. When courts consider the infringement asserted to be fair use, they balance the competing interests.[44] Notwithstanding the exclusive rights of copyright holders, a reproduction of a protected work for a "fair use" is not an infringement of copyright.[45]

Fair use was codified in 1976 by the Copyright Act.[46] According to the House report on the Copyright Act, the factors codified in § 107 were intended to "provide some gauge for balancing the equities" of copyright holder and fair user.[47]

> [T]he fair use of a copyrighted work . . . 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 of a work in any particular case is a fair use the factors to be considered shall include—
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> (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.[48]

43. *Id.* at 349.

44. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 553 (1985) (considering "the balance of equities" in a fair use case); Lamb v. Starks, 949 F. Supp. 753, 757 (N.D. Cal. 1996) ("[C]ourts must balance the statutory factors 'to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work.'" (citing Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986))).

45. 17 U.S.C. § 107 (2018).

46. Congress enacted the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, on October 19, 1976.

47. H.R. REP. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

48. 17 U.S.C. § 107.

B. Property

The second background principle required to understand the easement nature of fair use is real property law. While property is commonly thought of as ownership and control of a thing or place, "property is best understood as a 'bundle of rights.'"[49] These "rights" constitute the relations between the "owner" and all others, and form the normative basis for private ownership.[50] The right to exclude others is the dominant and most well understood of those rights.[51] The common law of trespass evolved from the right of real property owners to exclude others from their property.[52] The right to exclude is so strong it applies even when the trespasser does not cause any harm.[53]

Easements are third-party property interests that limit the exclusive rights of property owners in favor of the third-party interest holders.[54] A common example is the right to use a road crossing another person's land. Easements and covenants are non-possessory property interests often referred to as "servitudes."[55] Significantly, an easement is a property interest and not merely a creature of contract.[56] Easements are limitations of the rights attached to the ownership of land, meaning their limitations transfer

49. J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

50. *Id.*

51. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721 (1917). In academic literature other enumerated rights include liberties, claim-rights, powers, immunities, possession, use, the right to capital, the liability to execution, the immunity from expropriation, and others. Penner, *supra* note 48, at 712–13.

52. 7 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 23:5 (2018). "At common law, every person's land was deemed to be inclosed so that every unwarrantable entry on the land necessarily carried with it some damage for which the trespasser was liable." *Id.* Trespass emerged in the period 1250–1272. *Id.*

53. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997).

54. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1:1 (2018).

55. *Id.*

56. *Id.*; *see also, e.g.*, Magna, Inc. v. Catranis, 512 So. 2d 912, 913–14 (Ala. 1987) (emphasizing that easement is property right); Wilson v. Johnston, 990 S.W.2d 554, 556 (Ark. Ct. App. 1999) ("An easement is a property right and as such is entitled to all the constitutional safeguards afforded to other property rights."); Connole v. Babij, 59 A.3d 334, 336 (Conn. App. Ct. 2013) ("An easement is not a privilege, but rather is a property interest. . . . "); H & F Land, Inc. v. Panama City–Bay Cty. Airport & Indus. Dist., 736 So. 2d 1167, 1172 (Fla. 1999) ("[A]n easement is more than a mere personal privilege; it is an interest in land.").

to future owners even if future owners are unaware of them.[57] In contrast, contract-based transfers can have privity issues when rights are transferred to those not originally part of the contract.[58]

These fundamental principles pertaining to easements and property law are crucial to understand why and how copyright law should treat fair use as an easement.

III. THE PURPOSE OF THE INTELLECTUAL PROPERTY CLAUSE OF THE CONSTITUTION IS BEST SERVED BY TREATING FAIR USE AS AN EASEMENT

Treating fair use as an easement affirms the public rights and benefits the Constitution sought to promote. Congress promoted "the Progress of Science and useful Arts" by giving authors temporary exclusive rights to their works.[59] Amid the exclusive rights given to authors is a reservation of rights to the public.[60] Fair use rights are one of these reserved rights for the public.

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57. 7 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 60.07(a) (David A. Thomas ed., 2017).

> The very nature of an easement, and a major point justifying its existence, is to guarantee that an arrangement for the non-possessory use of land survives the transfer of that land into the hands of another. The basic rule is that "an easement, once created and recorded, runs with the land and is a burden or benefit for all successors in the chain of title."

Id. (footnote omitted).

58. PATRICK J. ROHAN, CURRENT LEASING LAW AND TECHNIQUES—FORMS § 5.02 (2018).

> The landlord and the original tenant are in privity of contract and privity of estate. In an assignment, the assignee steps into the lessee's shoes and acquires the lessee's rights in the lease. The assignment ends the privity of estate between the lessor and lessee. Instead, privity of estate is created between the lessor and the assignee. The assignee becomes bound by the covenants running with the land.
>
> Privity of contract between the lessor and lessee, however, does not end by the assignment and the lessee continues to be bound by the lease provisions. Privity of contract is based on an agreement that usually includes the promise to pay rent and honor other lease covenants. When the lessor and lessee sign a lease agreement there is privity of contract between them, even if the lessee assigns or sublets all or a portion of the premises, or vacates the premises before the end of the lease term. Thus, if the tenant assigns its lease, the tenant remains in privity of contract with the landlord and its liability continues even though the tenant has given up its right to possession. The only way privity of contract is created between the landlord and the assignee is if the latter assumes all of the original tenant's responsibilities under the lease.

Id. (footnotes omitted).

59. U.S. CONST. art. I, § 8, cl. 8; Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908) ("[The Copyright Act] depends upon . . . the authority conferred under article I, § 8, of the Federal Constitution . . . .").

60. 17 U.S.C. § 107 (2018).

Copyright ownership is more like a long-term lease. After the "limited period" is over, the works join the public domain and the public effectively owns the works.[61] The prolonged period of exclusivity causes people to forget that the public is the long-term owner and beneficiary of copyright through expansion of the public domain. The property interests of fair use are a limited current benefit to the public in anticipation of the full benefits the public will obtain when the author's exclusive rights expire. Considering fair use as an easement on the author's creation balances the current rights of the creator and the public.

In examining the treatment of fair use as an easement, section A of this Part will consider the reasons for making the comparison between fair use and easements. The reasoning will show that the comparison is not only reasonable but beneficial. This Note will then discuss two implications of the treatment of fair use as an easement. Section B will analyze how considering fair use as an easement alters the default presumptions about the role of fair use in statutory interpretation. Section C will show that considering fair use as an easement means other laws do not eliminate fair use rights. In fact, attempts to block fair use easement rights may be enjoined by a court.

A. Considering Fair Use an Easement Is a Natural Consequence of the Parallels Between Copyright Law and Property Law

Copyright works like property, and fair use looks like an easement. Whether copyright was created to be property or was created and happened to look like property, copyright has now been recognized as property for over 200 years.[62] The Statute of

61. The public owns the works in the sense that they may freely exploit them. Nobody has any exclusive rights to works in the public domain. Even if Congress removes items from the public domain, the effect is temporary, and the works will eventually return to the public domain. Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262, 1263 (D.C. Cir. 2005).

62. Justin Hughes, *Copyright and Incomplete Historiographies: of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1004 (2006).

Anne[63] of 1710 gave authors exclusive rights to their works.[64] Prior copying restrictions were authorized by the Licensing of the Press Act of 1662 and enforced by the Stationers' Company, a guild of printers given the exclusive power to print—and the responsibility to censor—literary works.[65]

The term "intellectual property," which may seem of recent origin, dates to the nineteenth century.[66] Internationally, the predecessor to the World Intellectual Property Organization (WIPO) was the United International Bureaus for the Protection of Intellectual Property, commonly known by its French acronym BIRPI.[67] BIRPI was formed in 1893 by combining two small agencies that administered the Berne and Paris Conventions.[68] "'[I]ntellectual property' was a conscious, nineteenth-century category created to subsume both 'literary property' (Berne) and 'industrial property' (Paris)."[69]

As embodied in the concept of copyright, courts have long considered "literary property" as the exclusive rights of an author.[70] The legal encyclopedia *American Jurisprudence* contains a section covering "the law of copyright and literary property."[71] In

63. The duration of copyright in the United States is historically related to the Statute of Anne, 8 Ann. c. 19, enacted in England in 1709. 13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT *Copyright Law Revision Study 30* § I, Lexis (Matthew Bender ed., rev. ed.).

> That statute granted to the author and his assigns an original term of 14 years from the date of publication plus a second term of 14 years should the author be living at the expiration of the first term. Of statutes enacted between 1783 and 1786 by 12 of the Original 13 States, 6 followed the pattern of the Statute of Anne as did the first Federal statute enacted by Congress in 1790.

Id. (footnotes omitted). Some references, including *Nimmer*, use 1709 rather than 1710 to refer to the statute. The Statute "was enacted in the regnal year 1709 to 1710, and entered into force on April 10, 1710." *The Statute of Anne: The First Copyright Statute, 1709*, JEREMY NORMAN'S HISTORYOFINFORMATION.COM, http://www.historyofinformation.com/expanded.php?id=3389.

64. Mark Rose, *The Public Sphere and the Emergence of Copyright:* Areopagitica, *the Stationers' Company, and the Statute of Anne*, 12 TUL. J. TECH. & INTELL. PROP. 123, 136–38 (2009).

65. *Id.*; *see also* Hughes, *supra* note 62, at 1009. Hughes extensively documents the historic origin of literary property and the misapprehension that considering copyright a form of property is a recent invention.

66. *Id.* at 1005–07.

67. *Id.* at 1005–06.

68. *Id.*

69. *Id.* at 1006.

70. *See* 15 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT *Copyright Law Revision*, Lexis (Matthew Bender ed., rev. ed.).

71. 18 AM. JUR. 2D *Copyright and Literary Property Summary* (2018).

the United States, the phrase "intellectual property" first appeared in the 1845 circuit court decision *Davoll v. Brown*.[72] Although this was the first use of the term in a court case, the concept was not novel.[73] Copyright had a long pedigree as property, with modifiers of "artistic," "literary," or "intellectual" describing the type of property.[74]

This section will consider five aspects of copyright and property law that justify treating fair use as an easement.[75] First, the right to exclude is fundamental but limited. Second, easements align with the limitations on copyright holders. Third, contract interpretation to identify easements applies to the fair use portion of the Copyright Act. Fourth, fair use controversies revolve around the scope of the fair use easement. Fifth, breakdowns in the copyright-property comparison obscure but do not negate the comparison of fair use as an easement. These breakdowns, however, suggest why fair use hasn't previously been associated with easements.

1. Right to exclude

The right to exclude others is the principle right of property ownership.[76] Third-party rights in property that limit the exclusive rights of the owner are easements.

72. Hughes, *supra* note 62, at 1006; Davoll v. Brown, 7 F. Cas. 197, 199 (D. Mass. 1845) (No. 3662) ("Only thus can ingenuity and perseverance be encouraged to exert themselves in this way usefully to the community; and only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.").

73. Hughes, *supra* note 62, at 1006.

74. *Id.*

75. Besides an easement analogy, other analogies are possible, but all fail in some aspects of comparison. Analogies of fair use include the following: Fair use as a principle of excuse to infringement. Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1787–88 (2010) ("[A]s an affirmative defense, fair use excuses a defendant from liability where the defendant's conduct is infringing . . . ."). Fair use as an implied license—based on the statutory exemption to the owner's rights—of which the owner and public are aware. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1257 (11th Cir. 2014) ("[T]he grant to an author of copyright in a work is predicated upon a reciprocal grant to the public by the work's author of an implied license for fair use of the work." (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985))). Fair use as a limitation on the exclusive rights in § 106 but without any other comparison. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994).

76. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

A copyright holder may "exclude others from using his property."[77] Further, "the Copyright Act provides that courts 'may' grant injunctive relief 'on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.'"[78] The Court's decision in *eBay Inc. v. MercExchange* tempered the prior presumption that injunctive relief should be a default response to infringement but reaffirmed that exclusion was a fundamental right in both copyright and patent infringement cases.[79] The right to exclude others granted by copyright aligns with the right to exclude others in real[80] property.

In neither copyright nor real property are exclusionary rights absolute. Despite the strong presumption of the right to exclude,[81] courts have expounded policy-based exceptions.[82] When property

77. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

78. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (citing 17 U.S.C. § 502(a)). The injunctive relief available in copyright cases has clear parallels to trespass in property law. In discussing an intentional trespass, the Wisconsin Supreme Court recognized that "the actual harm is not in the damage done to the land, which may be minimal, but in the loss of the individual's right to exclude others from his or her property . . . ." Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997). The court concluded that punitive damages were appropriate even when compensatory damages were nominal. *Id.* The right to exclude has no meaning unless the state supports the property owner's right with either an injunction or punitive damages against the violator. *Id.* at 160.

79. *eBay*, 547 U.S. at 392–93.

80. It is significant that the analogy of copyright leans more toward real property than personal property. Trespasses to real property support punitive damages even when no actual harm was done. For trespass to chattels, the *Restatement (Second) of Torts* makes clear that an actual injury is required for a possessor to bring an action. RESTATEMENT (SECOND) OF TORTS § 218(b)–(d) (AM. LAW INST. 1965). Copyright law is strict liability, and statutory damages apply without any showing of harm. On Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001), *as amended* (May 15, 2001) ("[P]unitive damages are not awarded in a statutory copyright infringement action"; punishment for willful infringement is accomplished with increases to statutory damages.).

81. *Jacque*, 563 N.W.2d at 156 ("[W]hen nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded.").

82. *See, e.g.*, State v. Shack, 277 A.2d 369, 371–72 (N.J. 1971) ("[O]wnership of real property does not include the right to bar access to governmental services available to migrant workers . . . ."). In *Shack* two men, who worked for government-funded organizations that provided legal and health services to migrant workers, were barred from accessing a farmer's property. *Id.* at 370. The farmer offered to bring the workers to his office for the visitors' consultation, but attorney Shack and his companion declined saying "they had the right to see the [workers] in the privacy of their living quarters and without [the farmer's] supervision." *Id.* at 370–71. The farmer's property right to exclude yielded to the rights of workers on his property to receive visitors.

rights conflict with others' rights, one of the rights must yield.[83] In the case of copyright, fair use is an express limitation on the exclusive rights of copyright holders.

Courts deal with exceptions to exclusive rights by balancing the rights of the respective parties. Fair use contrasts with copyright exclusiveness. Easements contrast with real property exclusiveness. For fair use, this balancing is illustrated by the third factor for equitable relief outlined in *eBay*, which is to consider "the balance of hardships between the plaintiff and defendant."[84] Courts similarly balance the equities in easement cases.[85]

In fair use, the character of the fair use and the impact on the market are the dominant considerations. In *Perfect 10 v. Amazon, Inc.*, the Ninth Circuit Court of Appeals balanced the fair use of Google's image search capability against the unauthorized use of Perfect 10's images.[86] The court recognized that fair use provides "a necessary counterbalance to the copyright law's goal of protecting creators' work product."[87] The court found Google's search met the first fair use factor by being "transformative" and of a "different

83. EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 23 (6th ed. 2011).

84. *eBay*, 547 U.S. at 391.

85. BRUCE & ELY, *supra* note 54, § 8:32 ("A court of equity, however, may balance the relative hardships of the parties and refuse an injunction when the expense of removing an innocent encroachment would be disproportionate to the injury suffered by the easement holder."); *see e.g.*, Vandeleigh Indus., LLC v. Storage Partners of Kirkwood, LLC, 901 A.2d 91, 96–102 (Del. 2006) (balancing equities, declining to order immediate removal of retaining wall built in easement area, but requiring servient owner to remove wall when easement holder demonstrated plan to use easement); Kitzinger v. Gulf Power Co., 432 So. 2d 188, 195 (Fla. Dist. Ct. App. 1983) (concluding that it would be inequitable to order removal of house that encroached 18 feet into a 100-foot easement and did not currently interfere with utility operations, but awarding nominal damages and stressing that easement holder's rights were superior if future expansion of utility services became necessary); Fettkether v. City of Readlyn, 595 N.W.2d 807, 812 (Iowa Ct. App. 1999) (balancing hardships and enjoining dominant owner from interfering with construction of home that mistakenly encroached 12 inches into 30-foot utility easement); Earl v. Pavex, Corp., 313 P.3d 154, 168 (Mont. 2013) (adopting balancing test to determine whether encroachments, including structures and cropland, must be removed and remanding case to decide if such encroachments constitute unreasonable interference with easement holder's rights); Marsh v. Hogan, 919 N.Y.S.2d 536, 538 (N.Y. 2011) (balancing equities and declining to order removal of house, which encroached 10 feet into 50-foot access easement); Vossen v. Forrester, 963 P.2d 157, 162 (Or. Ct. App. 1998) (balancing the hardships, declining to order removal of house which innocently encroached on easement to minimal extent, and directing relocation of easement over different portion of servient tract).

86. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007).

87. *Id.*

character."[88] Further, because Google's search engine did not harm the market for Perfect 10's full-size images, on balance, Google's overall actions were fair use.[89]

When balancing real property easements against the servient property's rights, courts focus on the nature of the easement and its impact on the servient property. In *Hayes v. Aquia Marina, Inc.*, a marina sought to expand from 84 to 280 boat slips.[90] Vehicle access to the marina used an easement roadway, and the property owner objected to the increased burden.[91] The court evaluated the nature of the easement in the original conveyance document and determined that the traffic to the marina was within the contemplated nature of the easement.[92] The increased traffic was reasonable and of the same type contemplated within the original grant.[93] The marina's expansion was a fair balance that did not unreasonably burden the servient property.[94]

The fair use and easement cases began by considering the nature of use. Google's use was transformative. The marina's use was within the scope of its easement. Neither fair user was overburdening the respective servient property. In each case, the respective court considered the impact of the proposed easement use and determined it was reasonable and allowable. For copyright, a transformative use that benefits the public is a proper balance to the owner's rights. The world would be a much worse place if

88. *Id.* at 1164–65 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (internal quotation omitted).

89. *Id.* at 1168.

90. Hayes v. Aquia Marina, Inc., 414 S.E.2d 820, 821 (Va. 1992).

91. *Id.*

92. *Id.* at 822.

93. *Id.*

> As a general rule, when an easement is created by grant or reservation and the instrument creating the easement does not limit the use to be made of it, the easement may be used for "any purpose to which the dominant estate may then, or in the future, reasonably be devoted." Stated differently, an easement created by a general grant or reservation, without words limiting it to any particular use of the dominant estate, is not affected by any reasonable change in the use of the dominant estate.

Id. (citations omitted).

94. *Id.* at 823.

search engines did not have the right to index information on the Internet.[95]

Copyright, as well as patents, secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[96]

> Congress' [sic] exercise of its authority, under [the Federal Constitution's intellectual property clause[97]], to grant copyrights and patents for limited times involves . . . a balance between (1) the interests of authors and inventors in their works; and (2) society's competing interest in the free flow of ideas, information, and commerce.[98]

This limited monopoly is a carrot to encourage creativity that will eventually belong to the public.[99]

The key difference when treating fair use as an easement is the parties are conflicting property owners rather than an owner and an alleged infringer. A distinguishing feature of property common law is balancing property-owner rights with easement-owner rights. The *Restatement (Third) of Property (Servitudes)* says the following:

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95. For example, although an image may have been created for other reasons, a search engine transforms an image into pointers to information in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

96. U.S. CONST. art. I, § 8, cl. 8. "[T]he Supreme Court has . . . concluded that the limited-times provision of Art I, § 8, cl 8 does not authorize Congress to create copyrights or patents of unlimited duration . . . ." Gary Knapp, Annotation, *Supreme Court's Construction and Application of Limited-Times Provision in Federal Constitution's Art I, § 8, cl 8, Authorizing Congress to Provide "for Limited Times" Copyright and Patent Protection*, 154 U.S. SUP. CT. LAW. ED. 2D 1185 (2012) (citation omitted).

97. U.S. CONST. art. I, § 8, cl. 8.

98. Knapp *supra* note 96, at 1185.

99. In a frequently cited case establishing the balance of private monopoly and eventual public benefit, the Supreme Court said,

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors." When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations omitted).

> In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. . . . Aggregate utility is generally produced by interpreting an easement to strike a balance that maximizes its utility while minimizing the impact on the servient estate.[100]

2. Easements limit the right to exclude

An easement is a right to use another's property for a defined purpose and not subject to revocation by the property owner.[101] The easement limits the property owner's right to exclude.

As with real property easements,[102] fair users do not need explicit permission to use their rights, and a denial of the right to fairly use a work does not negate fair use rights.[103] A fair use may significantly harm the market for a copyrighted work,[104] but the owner has exclusive rights over efforts to usurp their works rather

100. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (AM. LAW INST. 2000).

101. BRUCE & ELY, *supra* note 54, § 1:1.

102. Ludwig v. Spoklie, 930 P.2d 56, 59 (Mont. 1996) (stating that a valid easement holder is not required to obtain permission to use the easement from the servient estate owner).

103. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 (1994) ("If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use."). In *Campbell*, the copyright owner de-nied permission to create a derogatory musical parody. The music group 2 Live Crew created the song anyway, and the Supreme Court held that the musical parody was fair use. *Id.*

104. *Id.* at 591–92.

than degrade them.[105] Fair use conveys rights to third parties, which a property owner might wish to eliminate but cannot.[106]

Just as Congress struggled over the impact of technological change on copyright,[107] courts have struggled to balance rights when easements change utilization and owners claim the servient estate is overburdened.[108] In the copyright realm, Congress initially

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105. *Id.* In a case on parody, the Court outlined how fair use could degrade the value of a copyrighted work yet still be fair.

> Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," the role of the courts is to distinguish between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it."
>
> This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman," the court erred.

Id. (alteration in original) (citations omitted).

106. *See e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444 (1984) (holding that time shifting was fair use, despite owners efforts to enjoin home VCR taping; stating that "an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy"); *Campbell*, 510 U.S. at 571–72 (holding that parody was fair use despite potentially negative impact on the market for the original song and owner's effort to block song parody).

107. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680 (2000) [hereinafter *Riff on Fair Use*] ("The millennial hope underlying the Digital Millennium Copyright Act is to bring U.S. copyright law 'squarely into the digital age.'" (citing REPORT OF THE S. COMM. ON THE JUDICIARY, S. REP. NO. 105-190, at 2 (1998))); *id.* at 681–82 (saying Congress sought to balance the interests of copyright proprietors against the interests of the community of users, scholars, equipment manufacturers, and online service providers).

108. An easement is allowed to reasonably increase the burden on the servient estate through higher utilization. *See e.g.*, Clinger v. Hartshorn, 89 P.3d 462, 467 (Colo. App. 2003), *as modified on denial of reh'g*, (Dec. 11, 2003) (holding that increased use of prescriptive roadway easement by hunters in connection with outfitting business did not constitute overburden); Rehl v. Billetz, 963 N.E.2d 1, 5–8 (Ind. App. 2012) (holding that increased vehicle traffic using easement of ingress and egress to commercial campground on dominant estate did not overburden servient property); City of Charlotte v. BMJ of Charlotte, LLC, 675 S.E.2d 59, 70–72 (N.C. Ct. App. 2009) (holding that increased rail traffic did not amount to overburden of railroad easement); Logan v. Brodrick, 631 P.2d 429, 432 (Wash. Ct. App. 1981) (holding that increase in traffic over easement giving access to lake resort not unreasonable); *see also* BRUCE & ELY, *supra* note 54, § 8:13.

Changes in type of burden may be inappropriate. *See e.g.*, Wright v. Horse Creek Ranches, 697 P.2d 384, 390–91 (Colo. 1985) (holding that shift of dominant estate from agricultural enterprise to recreational area would subject servient estate to undue burden

focused on the rights of copyright holders when drafting the Digital Millennium Copyright Act (DMCA) out of concern that emerging technology would diminish the value of intellectual property.[109] A more balanced version emerged that recognized copyright owners but offered limitations as well as provisions for further rulemaking.[110]

Easement use may expand beyond the original usage but may not unreasonably increase the burden on the servient estate.[111] According to a property law treatise, "courts balance the dominant owner's right to enjoy the easement and take advantage of technological innovations with the servient owner's right to make all use of the servient land that does not interfere with the servitude."[112]

Fair use is a third party's right to use the copyrighted work of another. These fair use rights are expressly reserved by the same statute articulating the property right. The bounded fair use rights are at odds with the copyright holder and may financially interfere.

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because increased traffic would interfere with ranching); Schwob v. Green, 215 N.W.2d 240, 243 (Iowa 1974) (finding that where dominant estate was changed from private use to commercial campground, resulting traffic constituted additional burden on servient estate); Dennis v. French, 369 A.2d 1386, 1387–88 (Vt. 1977) (holding that use of prescriptive easement in roadway acquired by seasonal and agricultural use for access to newly erected home increased burden on servient estate); *see also* BRUCE & ELY, *supra* note 54, § 8:13.

109. David Nimmer reports that the Judiciary Committee's initial basic provision would have been absolute, with no solicitude for fair use. *Riff on Fair Use*, *supra* note 107, at 694.

> As reported by the House Judiciary Committee, the basic provision was intended to impose absolute liability against those who lack authorized access. It was only when the subject access was authorized that "the traditional defenses to copyright infringement, including fair use, would be fully applicable." The upshot is that fair use would apply only following lawful access, not as a basis for obtaining such access in the first instance. "[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully."

Id. at 716 (footnotes omitted) (citing H.R. REP. NO. 105-551, pt. 1, at 18 (1998)).

110. Significant opposition from private- and public-sector interests led Congress to expand potential protections. *Riff on Fair Use*, *supra* note 107, at 717 (citing H.R. REP. NO. 105-551, at 25, 35 (1998)).

> The House Commerce Committee devoted considerable attention to the perceived dangers in the approach of its sister committee. Its concern was that the basic provision of section 1201, as originally drafted by the Clinton administration and reported out by the Judiciary Committee, would threaten to "lock up" works falling within the scope of its protection.

Id. (footnotes omitted).

111. BRUCE & ELY, *supra* note 54, § 8:13.

112. *Id.*

Facing technological change, Congress directly addressed the balancing required with the emergence of modern technology that could facilitate infringement. Adopting the phrasing of the property law treatise, Congress sought to balance the fair users' right to enjoy their easement and take advantage of technological innovation with the copyright owners' right to make financial use of their exclusive rights.

Easements limit the right of property owners to exclude the easement holder from their authorized use of the servient property. The fair use limitations on copyright holder's exclusive rights follow that same pattern.

3. Inferring easements in a conveyance

The principles by which courts determine if a conveyance creates an easement suggest that fair use is an easement. Courts first look to see if an agreement explicitly creates an easement. When the language of an agreement granting rights in the property of another is not explicit in creating an easement, courts must determine if an easement was created based on the party's apparent intent.

Regarding easement language in agreements, the Supreme Court of Vermont said the "law requires no technical formula of words to create a servitude against one property in favor of another. The only essential is that the parties make clear their intention to establish an easement."[113] Such an intention is clear by an express granting of rights to a third party that limits the property owner's exclusive rights and is not revocable by the owner.[114] A common example of easement creation is when property owners convey land and reserve an easement for themselves.[115] In such a

113. Scanlan v. Hopkins, 270 A.2d 352, 355 (Vt. 1970).

114. *See, e.g.*, Kapp v. Norfolk S. Ry. Co., 350 F. Supp. 2d 597, 607 (M.D. Pa. 2004) ("Easements will be recognized only when the owner clearly intended to limit the rights of his or her estate. And they will have effect against subsequent purchasers of the servient estate only when those purchasers had notice, either actual or constructive, of the existence of the easement. Easements may be created by express agreement, by implication, by estoppel, or by operation of law." (citations omitted)); Skeen v. Boyles, 213 P.3d 531, 538 (N.M. Ct. App. 2009) ("[I]n *Martinez v. Martinez*, 604 P.2d 366, 368 (N.M. 1979), the intent to create an easement was inferred from language in a deed providing for 'rights of ingress and egress[,]' even though there was no express granting language. *Id.* . . . There, the court recognized that the term 'easement' is generic for a 'liberty, privilege, right or advantage which one has in the land of another.'" (citation standardized)).

115. THOMPSON ON REAL PROPERTY, *supra* note 57, § 60.03.

case, the conveyance document itself is the written instrument which creates the easement.[116]

For copyright, the document that grants an owner exclusive rights is the Copyright Act.[117] That same document, in § 107, expressly limits the exclusive rights of copyright holders by reserving fair use rights to the public.[118] While typical property terms such as "grant" or "convey" are absent, the limitation of property-holder rights is clear, and there is no provision for a copyright holder to revoke those rights.[119]

When courts do not find explicit easement language in a conveyance document, they must evaluate intent to see if an easement was inferred. Several elements are important in ascertaining an intent to create an easement: (1) the use of words ordinarily used in the conveyances of real estate is a non-dispositive factor; (2) the creation of a defined right in a particular portion of the servient estate indicates that an easement was intended; and (3) the lack of power to revoke suggests an easement, whereas power to revoke would suggest a license.[120]

First, the intent of the parties is more important than the words used.[121] In an early Massachusetts case,[122] the owner of a building executed a written document to an advertiser that granted

> the exclusive right and privilege to maintain [an] advertising sign . . . ten feet by twenty-five feet on [the] wall of [the] building . . . for a period of one year with the privilege of a

116. *See id.*

117. 17 U.S.C. § 106 (2018).

118. 17 U.S.C. § 107 (2018). ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright."). The section title is "Limitations on exclusive rights: Fair use." *Id.*

119. While copyright holders do not have any power to revoke the rights of fair users, Congress may be able to. A recent Supreme Court case held patents were public rights and Congress had "significant latitude to assign adjudication of public rights to entities other than Article III courts." Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018). *Oil States Energy* dealt with the right of the government to revoke property rights previously granted. Because of the public-right nature of patents, the revocation was lawful. Copyrights may also be construed as public rights. As a public right, Congress may be able to change the formulation for assigning and adjudicating copyright rights.

120. *See* BRUCE & ELY, *supra* note 54, § 1:5.

121. *See generally* Baseball Pub. Co. v. Bruton, 18 N.E.2d 362 (Mass. 1938).

122. *Id.*

> renewal from year to year for four years more at the same consideration.[123]

The advertiser mailed consideration, which the owner returned.[124] The advertiser placed the agreed-upon sign, which the owner removed.[125] The advertiser claimed a lease, but the owner claimed a revocable license.[126] The Supreme Judicial Court of Massachusetts concluded the advertiser owned an easement in gross[127] and affirmed a trial court decree for specific performance.[128] The appearance of an easement overpowered the terminology used in the agreement.[129] The use of the term "lease" in the document was not dispositive.[130]

Second, rights must be created on land owned by another.[131] In the Massachusetts case already mentioned, the contract granted more than permission to perform an act on the land; the advertiser received the "exclusive right and privilege to maintain" a sign on a particular portion of the landowner's property.[132] This interest fell short of a lease because the landowner retained possession of the wall.[133] However, the right was for a year with optional extensions—a situation more consistent with the concept of a lease or easement than with the concept of a license.[134]

Third, when the owner lacks power to revoke third-party rights, an easement is created. In an Iowa case, a farmer sold a large

123. *Id.* at 363 (internal quotation marks omitted); *see also* BRUCE & ELY, *supra* note 54, § 1:6.

124. *Baseball*, 18 N.E.2d at 363.

125. *Id.*

126. *Id.*

127. BRUCE & ELY, *supra* note 54, § 2:2 ("An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate. Hence, an easement in gross may be described as an irrevocable personal interest in the land of another." (footnote omitted)).

128. *Baseball*, 18 N.E.2d at 365.

129. *Id.* at 364. For a case applying the *Baseball Pub. Co.* analysis and reaching a similar conclusion, see *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 74 (Mass. 1990) (finding that retained parking rights were an easement, not lease, license, or management contract).

130. *Baseball*, 18 N.E.2d at 364; *see also* Millbrook Hunt, Inc. v. Smith, 670 N.Y.S.2d 907, 908–09 (1998).

131. BRUCE & ELY, *supra* note 54, § 11:1 ("A license is the permission to do something on the land of another . . . .").

132. *Baseball*, 18 N.E.2d at 362–64.

133. *Id.* at 363–64.

134. *See id.* at 364–65; *see also* BRUCE & ELY, *supra* note 54, § 1:6.

parcel of land to the buyer under an installment land contract.[135] The farmer agreed in the contract that the buyer would "have [the] privilege of driving thru [sic] the south boundary forty feet of her farm so long as gates [were] kept locked."[136] The contract also gave the buyer the right of first refusal to purchase the driveway area if the farmer decided to sell the farm.[137] The buyer assigned the land contract, but the farmer refused to allow the assignee to cross the farm.[138] The assignee brought suit for specific performance, claiming an easement.[139] The farmer defended, claiming the contract provided only for a non-assignable and revocable license.[140] The trial court granted specific performance.[141] The Supreme Court of Iowa affirmed, concluding that an easement was created.[142] In reaching its decision, the court focused on the nature and the expected duration of the right, a roadway of convenience that the buyer and the buyer's successors would find useful for a considerable period of time.[143] The inability of a servient estate owner to terminate rights is the most important feature of an easement compared to a license.[144]

135. Paul v. Blakely, 51 N.W.2d 405, 406 (Iowa 1952).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *See id.* at 408
142. *Id.*
143. *Id.* at 407. This case is an example in the treatise *The Law of Easements and Licenses in Land*. *See* BRUCE & ELY, *supra* note 54, § 1:6.
144. *See* SOP, Inc. v. State, Dept. of Nat. Res., Div. of Parks & Outdoor Recreation, 310 P.3d 962, 967 (Alaska 2013). The Massachusetts case previously discussed, *Baseball Pub. Co. v. Bruton*, outlined some of the differences between a lease, a license, and an easement.

> The distinction between a lease and a license is plain, although at times it is hard to classify a particular instrument. A lease of land conveys an interest in land . . . and transfers possession. A license merely excuses acts done by one on land in possession of another that without the license would be trespasses, conveys no interest in land, and may be contracted for or given orally. . . .
>
> Subject to the right of a licensee to be on the land of another for a reasonable time after the revocation of a license, for the purpose of removing his chattels, it is of the essence of a license that it is revocable at the will of the possessor of the land. The revocation of a license may constitute a breach of contract, and give rise to an action for damages. But it is none the less effective to deprive the licensee of all justification for entering or remaining upon the land.

Baseball Pub. Co. v. Bruton, 18 N.E.2d 362, 363–64 (Mass. 1938) (citations omitted). The Massachusetts court concluded the agreement created an easement. *Id.*

Although § 107 does not use express easement creation language, an easement may be inferred from the language and intent of the statute.[145] Section 107 both creates and limits the exclusive rights of the property holder. The absence of conveyance language is not dispositive, and each of the other two elements courts evaluate to infer an easement are found in the fair use section of the Copyright Act. For the second point, requiring rights in another's property, § 107 provides specific bounds to third-party rights in the copyright property owned by another. For the third point, that easements are non-terminable, these fair use rights of third parties to act on the copyright property of the owner have no provision for revocation or termination. The inability of property owners to revoke or limit the fair use rights is significant and suggests creation of an easement on the owner's property. Each of these points deserves elaboration.

The second element courts use to infer an easement is the creation of a defined right in a particular portion of a servient estate.[146] Fair use defines the bounds of these third-party rights in the copyright owner's property.

Fair use differs from other copyright limitations because it defines allowable use of another's property as opposed to limitations defining the scope of the owner's property.[147] Copyright limitations protecting facts, ideas, or information already in the public domain limit the scope of what an author may copyright.[148] Fair use grants the public rights to use copyrightable expression in

145. Legislatively created easements are commonly challenged as takings. *See* BRUCE & ELY, *supra* note 54, § 12:10. However, in the case of the Copyright Act, the same legislation that grants property rights creates the limitation of fair use that this Note advocates should be considered an easement. 17 U.S.C. §§ 106–07 (2018).

146. *See* BRUCE & ELY, *supra* note 54, § 1:5.

147. *See, e.g.*, 17 U.S.C. §§ 102–05, 113–15 (2018), which define the scope of copyrightable material. Separate arguments could be made for why other limitations to exclusive rights (e.g., §§ 108–12) could be considered easements.

148. Copyright protection covers works of authorship in the categories "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.* § 102. The same section explicitly limits copyrightable works saying, "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.*

limited ways despite the otherwise exclusive rights of the copyright holder. [149]

Fair use defines the scope of allowable actions with another person's property. In comparison, the fair use factors enumerated in § 107 may reasonably be rephrased in more traditional property terms as follows. Courts consider (1) the nature of third-party use, (2) the nature of the property, (3) the significance of third-party use of the property in proportion to the property as a whole, and (4) the impact of the third-party use upon the value of the property.[150] In copyright cases, courts have emphasized factors one[151] and four[152] and minimized two[153] and three.[154] Similarly, in easement cases,

149. Section 107 presupposes the "use of a copyrighted work" but carves out allowable fair uses as outside of the owner's exclusive rights. *Id.* § 107.

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

151. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 ("[T]he outcome of factor one coincided with the outcome of the overall test in 81.5% of these same opinions."); *see also, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]ransformative use is not absolutely necessary for a finding of fair use . . . . [but s]uch works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors . . . ." (citations omitted)).

152. Beebe, *supra* note 151, at 584. ("[T]he outcome of factor four coincided with the outcome of the overall test in 83.8% of the 297 dispositive opinions . . . .").

> As for the combined influence of factors one and four, in 214 (or 72.1%) of the opinions, factors one and four either both favored or both disfavored fair use. In all but one of these opinions, the outcome of the fair use test followed the outcome of these two factors. What happened when, if ever, factor one favored (or disfavored) fair use while factor four disfavored (or favored) fair use? Did one of these leading factors consistently trump the other? Factors one and four pointed in opposite directions in only 20 of the opinions. In 14 of these opinions, the outcome of the test followed the outcome of factor four, while in 6, the outcome of the test followed the outcome of factor one. Though hardly conclusive, this breakdown is consistent with the conventional view that factor four exerts the stronger influence on the outcome of the test.

Id. at 584–85.

153. *Id.* at 584 ("[T]he outcome of factor two coincided with the outcome of the overall test in 50.2% of these opinions. . . .").

154. *Id.* at 583 ("As for factors two and three . . . , commentators tend to regard these, if they regard them at all, as peripheral to the outcome of the test."); *see also, e.g.*, Field v. Google Inc., 412 F. Supp. 2d 1120 (D. Nev. 2006) ("[E]ven copying of entire works should not weigh against a fair use finding where the new use serves a different function from the original, and the original work can be viewed by anyone free of charge."); C.T. Drechsler, Annotation, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R. 3d 139 (1969).

courts are concerned with the nature of an easement use[155]—like fair use factor one—and the impact of that use[156]—like fair use factor four—on the servient property.

The third element courts use to infer an easement is the inability of the owner to revoke the easement.[157] The inability to revoke is considered the most dispositive element in easement cases.[158] In the case of fair use, the simple fact is that the inability to revoke fair use is so obvious to copyright owners that revoking fair use has never been asserted by a copyright owner. In one of the seminal cases on copyright, *Campbell v. Acuff-Rose Music*,[159] the Supreme Court acknowledged the negative impact a musical parody could have on an original song.[160] Yet despite the potentially negative impact, parody is a fair use.[161] Copyright owners do not have power to prevent fair use of their works.[162]

While explicit easement terms are missing from § 107, the language and intent strongly infer an easement. Common law reasoning may infer an easement even without a conveyance document.[163] However, § 107 provides a written document that

155. "The grant of an unrestricted easement, not specifically defined as to the burden imposed on the servient land, entitles the easement holder to a use limited only by the requirement that it be reasonably necessary and consistent with the purposes for which the easement was granted." WEST'S ALR DIGEST *Easements* II.k51, ALRDG 141K51 (updated Dec. 2018) (citing City of Pasadena v. California-Michigan Land & Water Co., 110 P.2d 983 (Cal. 1941)).

156. BRUCE & ELY, *supra* note 54, § 8:13; s*ee also, e.g.*, Scruby v. Vintage Grapevine, Inc., 43 Cal. Rptr. 2d 810, 813 (Cal. Ct. App. 1995), *as modified on denial of reh'g*, (Sept. 6, 1995) ("The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement."); Brock v. B & M Moster Farms, Inc., 481 N.E.2d 1106, 1109 (Ind. Ct. App. 1985) ("An easement cannot be changed to subject the servient estate to a greater burden than was originally agreed upon without the consent of the owner of the servient estate."); C & M Prop. Mgmt. Co. v. Bluffs U.P. Emps. Credit Union, 486 N.W.2d 596, 597 (Iowa Ct. App. 1992) ("Generally, the servient estate is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement."); Commonwealth, Dep't of Fish & Wildlife Res. v. Garner, 896 S.W.2d 10, 14 (Ky. 1995); Thies v. Howland, 380 N.W.2d 463, 471 (Mich. 1985); Dennis v. French, 369 A.2d 1386, 1388 (Vt. 1977) ("[T]he owner of an easement cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon.").

157. *See* BRUCE & ELY, *supra* note 54, § 1:5.

158. *See supra* note 144.

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

160. *Id.* at 592–93.

161. *Id.*

162. See *id.*

163. BRUCE & ELY, *supra* note 54, § 1:1 ("Easements are created expressly, implied in certain circumstances, established by prescriptive use, or obtained by estoppel, custom,

outlines the scope of third-party rights in copyright owner's property that cannot be revoked by owners. *Patry on Copyright* notes the increasing tendency of courts to statutorily interpret fair use "codified" in § 107 as opposed to using common law reasoning to balance the rights of the parties.[164] Evaluating the terms of fair use with a common law perspective shows the strong parallels between fair use and an easement.

4. Fair use controversies regard the scope of a fair use easement

The dispute in most fair use litigation hinges on the scope of fair use and if the defendant's actions qualify as fair use.[165] While the legal parallels between easements and fair use still apply, the typical fact patterns are much different.[166]

The fair use qualifications are not bright lines, and litigants argue if a use is indeed fair.[167] The fair use factors must each be considered.[168] No factor is dispositive, and courts have not

public trust, condemnation or equity."); *see also id.* § 6:2 (describing the common law reasoning the Oregon Supreme Court used to imply easements for public access to beaches).

164. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:8 (2018).

> The constitutional balance between sufficient incentives to authors and reasonable, unconsented-to and uncompensated uses by the public can be maintained only if courts fully and comfortably don their common-law hats. Failure to do so is likely to result in formulaic decisions reciting phrases from the statute and case law, instead of meaningful opinions that engage in the sensitive balancing of policy decisions that are the essence of fair use.

Id. In a footnote, Patry further expounds the point. "In a study of fair use opinions over a 27-year period, Professor Barton has argued that courts abdicate their responsibilities in favor of a robot-like run through the factors." *Id.* n.7 (citing Beebe, *supra* note 151, at 561–62) ("[C]ourts often acknowledged that the four-factor test should not be applied formulaically; . . . Yet the data show that after an initial period of flexibility, judges shifted in the late 1980s toward a rhetorically quite formal and explicit treatment of the Section 107 factors.")).

165. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, Lexis (Matthew Bender ed., rev. ed.). ("Fair use is said to constitute a mixed issue of law and fact, but what facts will be sufficient to raise this defense in any given case is not easily answered. One case calls this obscure doctrine of fair use 'the most troublesome in the whole law of copyright.' Another notes that the 'doctrine is entirely equitable and is so flexible as virtually to defy definition.'" (footnotes omitted)).

166. *Id.*

167. Even though cases fleshing out the contours of fair use are not rare, there is still great debate about what qualifies as fair use. *Id.* ("[M]ore law review articles are published about fair use than cases actually adjudicating the subject!").

168. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) ("Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered.").

provided any consistent methodology for weighing the factors.[169] Under these circumstances, fair use outcomes are case-by-case, fact dependent, and hard to predict.[170]

Express easements are specified contractually, and drafters presumably seek clarity to avoid uncertainty in litigation.[171] Easements may also inferentially arise through need or consistent use.[172] Once courts determine an action is within the scope of an easement, they balance the rights of the parties in dispute.[173]

Treating fair use as an easement would not alter the difficulty of determining if use of a copyrighted work is fair but would provide a better framework to analyze the scope of fair use and then balance the respective rights. Some of the existing fair use factors are more about balancing the needs of the public and the copyright owner than determining if a use is fair.[174] An easement-based framework would more clearly delineate elements defining uses that are fair from elements that balance the respective positions. It would still be the case that when an easement holder exceeds the scope of their easement they are trespassing and are subject to the

169. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) ("In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred."); Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1171 (9th Cir. 2012) ("We acknowledge the porous nature of the factors . . . . Over time, there has been a shift in analytical emphasis in the fair use factors . . . . [emphasizing t]he relative importance of factor one—'the purpose and character' of the use—and factor four—'the effect of the use upon the potential market' . . . .").

170. 4 NIMMER, *supra* note 165, § 13.05.

171. Preseault v. United States, 100 F.3d 1525, 1542 (Fed. Cir. 1996) ("'The extent of an easement created by a conveyance is fixed by the conveyance.' . . . '[W]hen precise language is employed to create an easement, such terminology governs the extent of usage.'" (quoting 5 RESTATEMENT OF PROPERTY § 482 (AM. LAW INST. 1944))).

172. BRUCE & ELY, *supra* note 54, § 8:12 ("The scope of a prescriptive easement is determined by the adverse usage through which it was acquired."); *see also id.* § 4:5 (easements of necessity presume that grants of landlocked property include an implied easement to access the landlocked parcel by crossing the servient property).

173. Herndon v. McKinley, 586 S.W.2d 294, 296 (Ky. Ct. App. 1979) (stressing need to balance interests of parties and finding that erection of third gate across passageway was unreasonable burden absent evidence showing third gate was essential); *see also* BRUCE & ELY, *supra* note 54, § 8:25.

174. *Campbell*, 510 U.S. at 591 (weighing the transformative nature of the fair use compared with the market harm). Cases balance and weigh the factors in describing the fair use. The courts are conflating the scope of the fair use easement with the balance of harms considerations. Courts simply call what is allowed "fair use" and what is infringing "not fair use." It is no wonder that fair use analysis is hard to predict.

consequences of violation.[175] When a person's use of a copyrighted work is not fair, they are infringing the copyright and are subject to the Copyright Act's consequences. Fair use as an easement is consistent with current fair use litigation outcomes, and an easement perspective could provide a helpful framework for understanding the significance of the fair use factors.

5. Breakdowns in the copyright property analogy

The intangible nature of copyright causes a breakdown in this Note's proposed real property analogy.[176] This breakdown does not negate the parallel of fair use to easements, but it makes it less obvious and explains why fair use has not already been analogized to an easement.[177] Copyright holders do not possess property in the

175. Conatser v. Johnson, 194 P.3d 897 (Utah 2008) (defendants charged with criminal trespass for exceeding the scope of a public easement).

176. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1545–46 (1989) (discussing the breakdown between copyright and property analogies); Molly H. Sherden, *Book Review:* The Commercial Law of Intellectual Property, 39 BOSTON B.J., Mar./Apr. 1995, at 27, 27–28 (reviewing PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY (1994)) (recognizing the difficulty of applying the Uniform Commercial Code (UCC) to intellectual property because of its intangible nature and explaining, thus, "it is more difficult to identify the location and actual possession of these assets than it is for tangible goods," which are concepts inherent in many aspects of the UCC).

177. *See, e.g.*, Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 532–33 (2000).

> [T]he Romans recognized that, technically speaking, intangibles could not be possessed in the same manner as tangibles. Because they could not be held in hand like physical objects, discrete rules regarding the sale and transfer of *res incorporales* developed. The first *res incorporales* recognized by Roman law were the "praedial servitudes." These servitudes—analogous in many respects to modern easements—were four in number: *iter* (the right to travel over another's land); *actus* (the right to drive animals over another's land); *via* (the right to have a road over another's land); and, *aquaeductus* (the right to draw water over another's land). Eventually, in addition to servitudes like these (intangible rights dependent upon an association with land—similar to our easements appurtenant), Roman law also recognized personal servitudes (somewhat similar to the modern easements in gross) that were not tied to real property. For example, *operae servorum* was a kind of personal servitude (*usus*) that entitled a third party to use another's slave's services. In any event, copyright—as an intangible property—is similar in some respects to the praedial servitudes. Although a copyright is not tied directly to land, it is linked in some fashion to a material object, since, to be copyrightable, a work must be "fixed in any tangible medium of expression."

Id. (footnotes omitted). Because copyright itself is immaterial, the analogies to easements created by limitations on exclusive rights were not obvious. Easements are associated with third-party rights in tangible objects. Mazzone's recent article "Copyright Easements" is an exception; it recognized creating limitations on copyright using easements but did not directly equate fair use to an easement. S*upra* note 8.

same sense that landowners possess property, because copyright is intangible.[178] Embodiments of copyright are tangibly possessed and their relationship to copyright is authorized by the copyright holder; therefore copyright frequently uses license and lease analogies.[179] Despite this, an easement is the better analogy for fair use.

An easement is a better analogy for various reasons. First, possession of property is not synonymous with ownership.[180] A "bundle of sticks" analogy has long been used to describe the rights that make up property ownership.[181] An owner may delegate the right to use property while retaining ownership.[182] In a lease, the tenant possesses the property subject to the lease terms but does not own the property.[183] In the case of real property there is no tangible distinction between the property owned by the owner and the property possessed by the tenant.

Furthermore, copyright ownership is separate from ownership of an embodiment of the copyright.[184] Copyright owners may

178. *See* 17 U.S.C. § 202 (2018); *see also* Lacey, *supra* note 176, at 1545–46.

179. The Copyright Act itself contemplates the rental, lease, or licensing of copyrighted works. 17 U.S.C. § 106(3) (2018) (providing the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending").

180. For real property, leases are a common example of the difference between ownership and possession. For the case of copyright, see 17 U.S.C. § 202 (2018):

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

181. United States v. Craft, 535 U.S. 274, 278 (2002).

182. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.02, Lexis (Matthew Bender ed., rev. ed.).

183. Historically, tenants could potentially recover damages from landlords who improperly entered the property. Warren v. Wagner, 75 Ala. 188, 202 (1883) ("A mere trespass by the landlord upon the premises . . . may entitle the tenant to recover damages, but it will not amount to an eviction.").

184. Section 202 of the Copyright Act explicitly states this. 17 U.S.C. § 202. The principle is further expounded in the House report discussing this section of the copyright law.

> The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord—the original manuscript, the photographic negative,

disseminate selected rights from their bundle of sticks regardless of the materiality of copyright.[185] Copyright holders may license to either exclusive or nonexclusive licensees.[186] They may separately authorize the making, distributing, and importing of their products.

Real property easements are non-possessory rights to material property.[187] Despite the traditional distinction between an easement and its corresponding tangible property, the easement definition does not require tangible property. Mazzone's article, "Copyright Easements,"[188] argues that easements could apply to copyright.[189] Although not stated in Mazzone's article, fair use itself could qualify as an easement.

Although fair use is not a possessory interest, it is still a property right. Fair use is neither ownership of copyright nor a license.[190] The rights enumerated in § 106[191] belong to the copyright owners or their authorized assignees. Fair use belongs to the public and,

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> the unique painting or statue, the master tape recording, etc.—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

H.R. REP. NO. 94-1476, at 124 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5739.

185. Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 288 (2002) ("[T]he transformation of the United States economy beginning in the nineteenth century and continuing into the twentieth century from agrarian to industrial to information-based required an understanding of property that could encompass complex legal and financial relationships, disaggregate ownership into a variety of interests held by a variety of stakeholders, and accommodate rights in intangibles.").

186. Section 201 of the Copyright Act provides for division of rights. 17 U.S.C. § 201(d)(2) (2018); *see also* 3 NIMMER, *supra* note 182, § 10.02 ("Section 201(d)(2) of the Copyright Act is said to constitute an 'explicit statutory recognition of the principle of divisibility of copyright.'"). It is important to distinguish between the rights granted to exclusive and nonexclusive licensees. Only exclusive licensees receive exclusive rights potentially recognized as copyright interests. *See id.* ("An exclusive license, even if it is 'limited in time or place of effect,' is equated with an assignment, and each is considered to be a 'transfer' of copyright ownership." (footnote omitted)); 17 U.S.C. § 501(b) (2018).

187. BRUCE & ELY, *supra* note 54, § 1:1.

188. Mazzone, *Copyright Easements*, *supra* note 8.

189. *Id.* at 726 (suggesting authors assign publishers a significant interest, but not the entire interest, and retain an easement for themselves "to ensure future productive uses of the work without any need to obtain permission from the assignee publisher" (parenthesis omitted)).

190. If fair use were a license, copyright owners would revoke it. The statutory right of fair use and the inability for it to be revoked by property owners is one of the strongest indications that fair use is not like a license.

191. 17 U.S.C. § 106 (2018) ((1) to reproduce the work; (2) to prepare derivative works; (3) to distribute copies; (4) to perform the work publicly; (5) to display the work publicly; and (6) to perform by digital audio transmission).

although constrained and balanced by the rights belonging to the copyright holder, cannot be extinguished.

The copyright-property comparison further breaks down when considering the transition of exclusive rights from the owner to the public. When formerly copyrighted works enter the public domain, exclusive rights expire.[192] The non-rivalrous nature of intellectual property ensures that public access is truly open once exclusive rights dissolve.[193]

Additionally, the term "public property" may mean "owned by the government" or it may mean "dedicated to public use."[194] For real property, public land must be owned by the government because of the rivalrous nature of land. For non-rivalrous intellectual property, no one owns the public domain, and the non-rivalrous nature and lack of exclusive rights are simply a hopeful means to ensure fair public access.[195]

Despite these differences, copyright is analogous to property. Despite copyright being intangible, it may have easements that limit an owner's exclusive rights. Strengthened property interests

192. Golan v. Holder, 565 U.S. 302 (2012).

> To copyright lawyers, the 'vested rights' formulation might sound exactly backwards: Rights typically vest at the *outset* of copyright protection, in an author or rightholder. Once the term of protection ends, the works do not revest in any rightholder. Instead, the works simply lapse into the public domain. Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.

Id. at 331–32 (internal citations omitted).

193. Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1033 (2006) ("Once the copyright expires, the work falls into the public domain, where anybody is free to use it."). Despite the intent of the public domain, Mazzone discusses the prevalence of, and lack of remedies for, people claiming copyright in public domain works. *See id.*

194. "[P]ublic property: n. property owned by the government or one of its agencies, divisions, or entities. Commonly a reference to parks, playgrounds, streets, sidewalks, schools, libraries and other property regularly used by the general public." *Public property*, FREE DICTIONARY, LEGAL DICTIONARY, https://legal-dictionary.thefreedictionary.com/public+property (last visited Dec. 31, 2018).

195. *See* Mazzone, *Copyfraud*, *supra* note 193, at 1037.

> [N]o federal agency is specially charged with safeguarding the public domain. There is no Public Domain Infringement Unit of the FBI and no Copyright Abuse Section in the Department of Justice. Protecting the public domain is the work of the government, but no one in government is specially charged with the task.
>
> To summarize, federal copyright law provides strong protections for works that fall within the scope of the Copyright Act, but the law only very weakly safeguards the public's interest in accessing and using works that are not copyrighted or copyrightable.

Id.

in fair use rights would also pave the way for stronger public rights in public domain works. In any case, a property analogy can strengthen the public rights.

B. Making Fair Use an Easement Clarifies Default Outcomes in Fair Use Considerations and Strengthens Public Benefits

The previous section showed the ways fair use already works as, and is treated like, an easement. This section shows two ways that treating fair use as an easement would alter current court behavior. First, the easement rights granted to the public in the form of fair use are independent of the exclusive rights of owners. Fair use rights may therefore be asserted even outside of infringement accusations. Second, as a corollary of the first point, fair use is a default right, and statutory interpretation should presume fair use's applicability unless explicitly exempted by legislation.

To the first point, the fair use easement created by § 107 does not depend on the owner's exclusive rights. The language used in § 107, "[n]otwithstanding the provisions of section[] 106[,]"[196] creates a relation to, but not a dependence on, § 106. This independence is reiterated in § 1201: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."[197] If fair use is an easement, the property interest applies to the property, and fair uses are allowed in any context in relation to the property unless another exception applies.

Easement holders have the right to use property within the scope of their easement. Fair use, as an easement, should be authorized in any context unless explicitly excepted.

Easement rights are independent of the property owner's rights, and easement holders may enjoin others from inhibiting their rights.[198] In a Wisconsin case, a business ejected union protestors from its storefront.[199] The business had "a nonexclusive

196. 17 U.S.C. § 107 (2018).

197. *Id.* § 1201(c)(1). Although this statement seems to make fair use operable despite any indications to the contrary in § 1201, some courts have read this provision to only apply to copyright actions arising under § 106 and not to those arising under § 1201. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).

198. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.17 (2018) (stating that an easement owner can bring an action to enjoin interference with easement by third parties).

199. Roundy's Inc. v. Nat'l Labor Relations Bd., 674 F.3d 638, 642–43 (7th Cir. 2012).

easement" to access the store.[200] In analyzing the business's rights under the easement, the court held the store could "enjoin third parties [that] unreasonably interfere" with its easement.[201] However, the easement interference qualified as a nuisance and not a trespass, since the business had a non-possessory interest and did not have the right to exclude.[202] Because the union protestors were not unreasonably interfering with the business's easement, and because they had no exclusionary capability, the store's expulsion of the protestors was improper.[203]

As an easement, fair use is independent of the copyright holder's rights. Fair users should have a cause of action over any parties interfering with their exercise of fair use rights, including non–copyright holders involved in interference. As an easement, fair use is subject to expanded actions for unreasonable interference, including when others exercise otherwise lawful rights.[204] Additionally, there is room for expanded declaratory judgements against copyright holders that unreasonably interfere with fair use rights, as will be discussed in the following section.

On the second point, there are no laws that explicitly negate fair use rights.[205] Since the default fair use rights created by § 107 create a property interest easement, they cannot be eliminated by implication. Elimination must be explicit. Although laws that negate private property rights are subject to action for regulatory taking,[206]

200. *Id.* at 643.

201. *Id.* at 653.

202. *Id.*

203. *Id.* at 655.

204. Just because the DMCA offers actions against those circumventing technological protections does not imply that those protections are lawful. *See* Baseball Pub. Co. v. Bruton, 18 N.E.2d 362, 364 (Mass. 1938) ("The revocation of a license may constitute a breach of contract, and give rise to an action for damages. But it is none the less effective to deprive the licensee of all justification [for their licensed activity].").

205. As an example, the DMCA has been interpreted to negate fair use defenses but not held to explicitly do so. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000) (determining that fair use was not a defense to circumvention based on statutory analysis of §§ 107 and 1201).

206. *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (identifying several factors to evaluate a legislative taking: (1) the economic impact of the regulation on the claimant, (2) interference with investment-backed expectations, and (3) the character of the governmental action, specifically any physical invasion by government). The *Penn* case noted that, in determining the character of the action, it is significant when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* Changes to copyright protection could likely fall under that

copyright may be exempt. If copyright, like patents,[207] are public rights, then the public has granted rights to the owner and reserved a fair use easement to itself. Congress has authority to alter the scope of public rights and has done so in the past by removing works from the public domain,[208] altering the length of copyright protection retroactively,[209] and allowing patent rights to be adjudicated in Article I courts.[210] If a future law explicitly negates or alters fair use rights it will likely be litigated in part on these principles.

As an easement, fair use has a stronger role in copyright conflicts. Fair use rights are independent of owner's rights and form a default basis for the public to use copyrighted works.

C. As an Easement, Fair Use Cannot Be Eliminated

Fair use, as an easement, is a property right and cannot be casually taken away. Property owners cannot completely block fair use rights.[211] This changes the default presumption about the role of fair use in defenses tangentially related to copyright. In property law, servient property holders cannot block easement access.

A salient feature of easements is the inability of the property owner to terminate them.[212] When property owners try to impede lawful easement access, often with gates, courts step in to enjoin or otherwise remedy the violation.[213] For the DMCA's anti-circumvention provisions, technological protections act as a gate blocking fair use access.

Courts have invalidated all cases where a property owner locks a gate and does not provide the easement holder a key.[214] A

category. There is no clear path for copyright owners, or fair-use easement owners, to object to legislative changes in their rights.

207. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373–75 (2018).

208. Golan v. Holder, 565 U.S. 302, 318 (2012) (holding Congress may grant copyright protection to items previously in the public domain).

209. Eldred v. Ashcroft, 537 U.S. 186, 217 (2003) (holding Congress may expand copyright terms of both existing and future copyrights).

210. *Oil States Energy*, 138 S. Ct. at 1373–75 (allowing patent considerations in an IPR to be adjudicated in an Article I court).

211. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592–93 (1994).

212. *See, e.g.*, SOP, Inc. v. State, Dept. of Nat. Res., Div. of Parks & Outdoor Recreation, 310 P.3d 962, 967 (Alaska 2013).

213. BRUCE & ELY, *supra* note 54, § 8:28.

214. *Id.*; *see also, e.g.*, Shors v. Branch, 720 P.2d 239, 243 (Mont. 1986) (concluding that erecting locked gates to prevent easement holders from enjoying access to river beach was

locked gate unreasonably interferes with the easement holder's use and enjoyment of the easement.[215] For locked gates where the owner furnishes a key, outcomes are fact dependent and courts have been reluctant to craft clear rules, preferring to use a reasonableness standard.[216]

One justification of locked gates is to protect the property against trespassers.[217] In one New York case,[218] an unfinished street led to the beach.[219] The owners put up a locked gate to keep out the public who often littered and disturbed the peace.[220] Neighbors who needed access to the throughway objected to the gate because of their easement.[221] New York's appellate court held the gate was lawful to keep out vandals and trespassers as long as the neighbors were furnished a key.[222]

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unreasonable); Sabella v. 927 Fifth Ave. Corp., 672 N.Y.S.2d 870, 871 (N.Y. 1998) (directing that servient owner provide easement holder key to locked gate, and holding that locking gate at nights and Sundays without giving key constituted unreasonable interference); Ferrara v. Moore, 318 S.W.3d 487, 493 (Tex. App. 2010), *reh'g overruled*, (Aug. 24, 2010), *and review denied*, (Nov. 19, 2010) (finding that servient owner failed to provide easement holder key to locked gate, thereby blocking access).

215. BRUCE & ELY, *supra* note 54, § 8:28.

216. *Id.*; *see, e.g.*, Schluemer v. Elrod, 916 S.W.2d 371, 378–79 (Mo. Ct. App. 1996) (considering circumstances in which locks should be placed on gates to roadway easement); Carleton v. Dierks, 195 S.W.2d 834, 837 (Tex. Civ. App. 1946); *see also* Calvert v. Griggs, 992 So. 2d 627, 633–34 (Miss. 2008) (remanding case to determine whether two proposed locked gates unreasonably interfered with easement holder's right of passage and whether such gates were necessary for use of servient estate).

217. BRUCE & ELY, *supra* note 54, § 8:28; *see, e.g.*, Commonwealth v. Garner, 896 S.W.2d 10, 15 (Ky. 1995) (permitting maintenance of locked gates to prevent vandalism and dumping in wildlife area); Flaherty v. Muther, 17 A.3d 640, 658–59 (Me. 2011) (weighing "legitimate desire to exclude trespassers" against "slight physical impediment" created by locked gate, and finding that locked gate did not unreasonably interfere with use of beach access easement); Mester v. Roman, 809 N.Y.S.2d 226, 227 (N.Y. 2006) (upholding locked gate to bar trespassers and deter potential criminal activity); Wilson v. Palmer, 622 N.Y.S.2d 882, 884 (N.Y. 1995), *judgment aff'd*, 644 N.Y.S.2d 872 (N.Y. 1996) (recognizing that landowner can maintain locked gate on foot path easement to prevent trespassing); Shingleton v. State, 133 S.E.2d 183, 188 (N.C. 1963) (holding that "the maintenance of a gate, even a locked gate, would not necessarily be inconsistent" with dominant owner's use of roadway easement within a state wildlife area); Judy v. Kennedy, 728 S.E.2d 484, 487 (S.C. Ct. App. 2012) (upholding erection of locked gate to protect servient property from trespassers, but requiring landowner to furnish easement holder current numeric code as well as two remote opening devices).

218. *Mester*, 809 N.Y.S.2d at 227.

219. *Id.*

220. *Id.*

221. *Id.* at 226.

222. *Id.* at 227.

Similar to locked gates in real property cases, Digital Rights Management (DRM) controls are justified by preventing theft of copyright—a trespass on copyright holder's rights.[223] To the extent DRM blocks all legitimate easement access for fair use, it is unlawful, just as the locked gate to keep out vandals could not fully block legitimate neighbors. The form of key allowable to access fair use rights may be debated.[224] But easement law prevents complete denial of access rights.

Courts balance the needs of the property owners against the needs of and inconvenience to the easement holders. In a Pennsylvania case, an easement holder refused to accept keys and removed a locked gate across an easement.[225] The trial judge was justified in requiring the easement holder to replace the gate.[226] "The erection of a gate should not be restrained unless it is an unreasonable interference with an easement, or completely denies the rights of the user."[227] In this case, the gate was a minimal inconvenience and provided protection for the owners and the easement holders.[228]

Just because fair users have an easement does not mean they can vandalize copyright. The voices warning that fair use rights could be turned to infringing use are valid. But the reality of the extreme does not absolve searching for a fair middle ground. Copyright holders cannot completely block fair use. Neither can fair use methodologies be allowed to destroy the value of copyrighted works.

223. *See, e.g.*, Ryan Roemer, *Locking Down Loose Bits: Trusted Computing, Digital Rights Management, and the Fight for Copyright Control on Your Computer*, UCLA J.L. & TECH., Fall 2003, at art. 8, p. 1 ("Conscious of the . . . widespread distribution of unauthorized copyrighted works . . . the content industry is desperate for . . . protection. Most eyes are currently turned to advances in 'digital rights management' ('DRM') technologies, which offer an unprecedented level of control over digital content."); *see also* C.J. Alice Chen & Aaron Burstein, *Foreword*, 18 BERKELEY TECH. L.J. 487, 487 (2003) (introduction to issue covering "Symposium: The Law & Technology of Digital Rights Management").

224. Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 65–70 (2001) (proposing a mixed fair use infrastructure that includes automatic fair use defaults and a key escrow system that provides would-be fair users with the needed encryption keys to obtain access to protected works).

225. Matakitis v. Woodmansee, 667 A.2d 228, 232–33 (Pa. Super. Ct. 1995).

226. *Id.*

227. *Id.*

228. *Id.*

DRM and the corresponding DMCA causes of action protect copyrighted material from theft. The DMCA's anti-circumvention provisions outlaw tools that circumvent access protections on copyrighted content.[229] Such tools may enable fair uses of copyrighted works, but they are still prohibited. Although considered by many commentators to be an extreme position on DMCA rights,[230] the court in *Universal City Studios, Inc. v. Corley*[231] stated that fair use does not require "copying by the optimum method or in the identical format of the original."[232] The appellants wanted to digitally record on a computer and objected to any "'horse and buggy' technique."[233] The court rejected their plea and suggested

229. *See The Anti-circumvention Rules of the Digital Millennium Copyright Act*, STOEL RIVES LLP (Mar. 1, 2002), https://www.stoel.com/the-anti-circumvention-rules-of-the-digital-millennium.

230. *See, e.g.*, Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 13–15 (2008).

> The persuasive force of *Reimerdes* is occasionally impaired by the heated—at times, borderline intemperate—rhetoric of the court's opinion. . . . The effect is to make it difficult to tell whether, and to what extent, the court's sweeping reading of the DMCA's liability provisions, and its denial that copyright's fair use doctrine was relevant to the reach of the DMCA, truly rest upon a careful construction of the statute rather than on the judge's manifest visceral dislike of the defendants.
>
> . . . *Reimerdes* articulates a facially dubious construction of the statutory text. . . .
>
> . . . Although the *Reimerdes* court recognized that its interpretation of the DMCA "le[ft] technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so," it declared that this problem was "a matter for Congress." A court less animated by hostility to the defendants in the case at bar might more readily have perceived such an absurd consequence as evidence of error in its interpretation of the statute.

Id. (footnotes omitted).

231. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). Note that *Universal City Studios, Inc. v. Corley* is the appellate court continuation of *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 342 (S.D.N.Y.), *judgment entered*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

232. *Corley*, 273 F.3d at 459.

233. *Id.* A fuller quotation demonstrates the extreme position that leaves many commentators opposed to the logic of the case.

> Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. Their examples of the fair uses that they believe others will be prevented from making all involve copying in a digital format those portions of a DVD movie amenable to fair use, a copying that would enable the fair user to manipulate the digitally copied portions. One example is that of a school child who wishes to copy images from a DVD movie to insert into the student's documentary film. We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. Although the Appellants insisted at oral argument that they should not be relegated to a "horse and buggy"

using allowable tools to make a fair use recording by "pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie."[234] While such analog fallback options currently exist,[235] what happens in a future world where there are no analog content options?[236]

> technique in making fair use of DVD movies, the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use. A film critic making fair use of a movie by quoting selected lines of dialogue has no constitutionally valid claim that the review (in print or on television) would be technologically superior if the reviewer had not been prevented from using a movie camera in the theater, nor has an art student a valid constitutional claim to fair use of a painting by photographing it in a museum. Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.

Id.

234. *Id.*

235. June M. Besek, *Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 390 (2004) ("[T]echnological protections are not yet as pervasive or as intrusive as critics have feared. A host of legal, technological and market factors work together to counter digital lockup and provide a safety valve to accommodate legitimate uses.").

236. *See* Part C, "Reacting to a 'Pay-Per-Use' World," in Nimmer's "Riff on Fair Use" for a relevant discussion. *Riff on Fair Use*, *supra* note 107, at 710.

> If access to works via electronic or photo-optical means becomes the universal norm, and if the only way that the pertinent network allows users to view any instantiation of [a work] is through payment of a fee, then royalties to the publisher . . . would become essentially mandatory. By the same token, if in tomorrow's world only antiquarians maintain phonographs and CD players, the sole effective way to hear an old recording of music might be through the same network service. To the extent that the service charged the same access fee for early 1920s jazz recordings as for new recordings subject to copyright protection, the effective result would be to convert public domain works into royalty-generating items.
>
> In short, depending on how the future unfolds, concern about fair use in the digital environment could range from pointless to vital. The latter scenario requires payment to gain access even to works that nominally lie in the public domain, such as works from centuries past, even if the purpose of the access is for one that the law favors, such as to quote a few sentences for scholarly purposes. Under that scenario, the work itself is effectively placed under lock and key, and the proprietor can charge simply for the initial act of access. Thus arises what one senator calls "the specter of moving our Nation towards a 'pay-per-use' society."

Id. at 713–14 (footnotes omitted).

With fair use treated as an easement, copyright holders may not fully eliminate fair use rights. According to the extreme logic of *Corley*, any possible access to a work for fair use purposes is enough.[237] But reasonableness is the easement standard, and courts balance the rights of the property holder with the rights of the easement holder.[238] Some DMCA cases have been cautious of allowing the DMCA to go beyond the copyright protecting roots,[239] but *MDY Industries v. Blizzard Entertainment, Inc.*[240] may have reversed that for at least the Ninth Circuit.[241] *MDY* was not raising any fair use issues, and the court did not directly address fair use as a defense.[242] But the court held that the anti-circumvention provisions of § 1201(a) were independent of exclusive rights.[243] In a footnote, the court cited the Copyright Office's view that "the fair

237. *Corley*, 273 F.3d at 459.

238. RESTATEMENT (FIRST) OF PROPERTY § 450 (AM. LAW INST. 1944) (citing cases evaluating the reasonable use of the servient property); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.9 (AM. LAW INST. 2000) ("[T]he holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.").

239. Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1203 (Fed. Cir. 2004) ("[Section 1201] lays out broad categories of liability and broad exemptions from liability. It also instructs the courts explicitly *not* to construe the anticircumvention provisions in ways that would effectively repeal longstanding principles of copyright law.").

240. MDY Indus. v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010), *as amended on denial of reh'g*, (Feb. 17, 2011), *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011).

241. Armstrong, *supra* note 230, at 15 (2008) ("[T]wo federal courts of appeals refused to apply the DMCA to prevent circumvention of access control mechanisms embedded in durable goods."). Armstrong discusses three cases: *Chamberlain Grp.*, 381 F.3d at 1182 (holding that Chamberlain failed to prove a connection between Skylink's accused circumvention device and the protections that the copyright laws afford); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 529 (6th Cir. 2004) (vacating injunction because duplication of toner access program in printer did not violate the DMCA); and *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1309 (Fed. Cir. 2005) (rejecting a DMCA claim where software authenticated computer tapes used for backup and a competitor duplicated functionality to provide support). A fourth case post-dating Armstrong's article is *MDY Industries*. *MDY*, 629 F.3d at 948–49. *MDY* rejected the *Chamberlain* court's requirement of a copyright infringement nexus and asserted § 1201 created a new anti-circumvention right. *Id.*

242. *MDY*, 629 F.3d at 950 n.12 ("[W]e need not and do not reach the relationship between fair use under § 107 of the Copyright Act and violations of § 1201. MDY has not claimed that Glider use is a 'fair use' of WoW's dynamic non-literal elements. Accordingly, we too leave open the question whether fair use might serve as an affirmative defense to a prima facie violation of § 1201." (citations omitted)).

243. *Id.* at 946.

use defense to traditional copyright infringement does not apply to violations of § 1201(a)(1)."[244]

When easement access is unfairly blocked by property owners, easement holders may obtain judicial relief in equity or damages. For example, in a neighborhood dispute over an access path to a lake, the owner unreasonably interfered with easement access.[245] The Supreme Court of Montana upheld financial compensation for lost use of the road, punitive damages for obstruction of the access road, attorney's fees, and court costs.[246] The court also ordered the land owner not to interfere with the easement owner's repair of the road.[247]

If fair use were treated as an easement, people unreasonably denied their fair use rights could obtain injunctive relief and, potentially, damages from the property owners even if the property owners were only exercising their DMCA rights to implement technology barriers. In the current world, there are alternate ways of exercising fair use rights unimpeded by DRM restrictions. If that changes, then DRM may unreasonably interfere with fair use rights. Even when gates are reasonable, easement holders must receive a key. If copyright holders unreasonably interfere with fair use and don't provide a key, it should be within a court's power to grant appropriate relief.

The fair use easement rights created for the public by the Copyright Act are as valid as the exclusive rights created for the owner. Even the text of § 1201 specifies that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."[248] The meaning of this provision is key to interpreting the DMCA's anti-circumvention provisions. The *Reimerdes* court espoused, "If Congress had meant the fair use defense to apply to such actions, it would have said so."[249] It is just as valid to presume that if Congress meant to exclude a fair use defense it would have said so.

244. *See id*. at 948 n.10 (citing U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 4 (Dec. 1998), https://www.copyright.gov/legislation/dmca.pdf).

245. Shors v. Branch, 720 P.2d 239, 243 (Mont. 1986).

246. *Id*. at 245–46.

247. *Id*. at 243.

248. 17 U.S.C. § 1201(c)(1) (2018).

249. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).

Treating fair use as an easement would not necessarily eliminate all fair use–related objections to the DMCA. But it would draw a line in the sand affirming that fair use could not be eliminated.

IV. CONCLUSION

Fair uses are explicit exceptions to copyright holders' exclusive rights and should be treated as an easement. The statute governing fair use seems intended to convey rights in the copyright holders' property that are not revocable and resemble an easement. If copyright is considered property, fair use is an easement.

As an easement, fair use is a property right that must be considered when interpreting other statutes. Considering fair use an easement thus supports a default presumption that fair use rights apply. Courts should carefully evaluate all copyright laws with the recognition that fair users and copyright owners have competing property interests that must be balanced in an equitable way.

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