BAD FAITH AND FAIR USE

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ABSTRACT

The fair use doctrine plays a critical role in copyright law, protecting certain socially valuable uses of a copyrighted work against claims of infringement so as to maintain the balance between the author’s limited monopoly and the general public good. This article examines a relatively recent and increasingly problematic trend in fair use jurisprudence: courts’ tendency to decide whether a defendant has made a fair use of the plaintiff’s work based in part on whether the defendant has acted in “bad faith.”

Courts use the term “bad faith” to encompass a wide range of conduct weighing against a finding of fair use. In some cases, the term refers to the fact that the defendant obtained an unauthorized copy of the copyrighted work. Elsewhere, it refers to the fact that the defendant did not first request permission from the plaintiff to use the copyrighted work. In yet other cases, the defendant’s bad faith is premised on a failure to acknowledge the plaintiff as the original author. Some courts have even suggested that a defendant acts in bad faith when she could not have “reasonably believed” that her use of the copyrighted work was fair.

As the article explains, there is no historical, legal, or logical reason that these or any other supposed measures of bad faith should play a role in the fair use analysis. The bad faith inquiry does not serve the central goal of copyright — to increase public access to new works — and in fact does much to impede this goal. It also needlessly confuses fair use with other areas of law, makes copyright litigation more costly and less predictable, and undermines copyright’s built-in First Amendment protections. Yet bad faith has persisted as an element of fair use for the past several decades, largely because of a failure to appreciate either the lack of historical or legal basis for this doctrinal mistake or its consequences. In an effort to correct this misunderstanding, the article offers the first in-depth exploration of both the historical origins of the bad faith inquiry and the many reasons courts should drop all considerations of bad faith from fair use.

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INTRODUCTION

In the United States, copyright law is primarily economic in purpose. To encourage the creation and dissemination of original works of authorship — for the benefit of the public at large — the government grants authors a limited monopoly in their works. The exchange is solely instrumental. Authors are not rewarded on the basis of how hard they have worked,¹ nor are they entitled to assert their “moral rights” except in narrowly defined contexts.² Likewise, an infringer’s state of mind is irrelevant to whether there is infringement, no matter how innocent the act of infringement.³ What matters is whether someone has encroached on the statutory rights of the author. If so, the law provides for certain penalties, in substantial part to compensate the author and thus maintain the author’s incentive to create additional works in the future.

The fair use doctrine is part and parcel of this instrumentalist framework. Fair use acts as a safety valve for situations where the public interest trumps the author’s copyright. Fair use protects those secondary uses of a copyrighted work — such as criticism, commentary, news reporting, and research — that “transform” the original without taking too much

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from it or usurping its market. A fair use is one that, while it borrows from the original without authorization, does so to create a new and different work, thereby benefiting the public. To qualify as “fair” and thus non-infringing, a secondary use must pass muster under the statutory analysis, which begins (and usually ends) with a list of four factors aimed at comparing the works at issue. Historically, fair use was not concerned with the conduct or motives of either party, including whether they acted in good or bad faith.

In the quarter-century since the Supreme Court’s decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, however, courts have embraced a new presumption that fair use necessarily entails the defendant’s “good faith and fair dealing.” Where courts perceive that the defendant has engaged in some kind of objectionable behavior, particularly related to the borrowing at issue, they weigh it against a finding of fair use. This might include the fact that the defendant used a copy of the copyrighted work that was obtained without authorization (or in breach of the confidentiality obligations of the defendant or of some other party), or that the defendant did not request permission to use the copyrighted material, or failed to acknowledge the original author. Over time, the “bad faith” inquiry has made increasingly frequent and prominent appearances in fair use decisions, even as some lower courts have tried to minimize its analytical significance — and even after the Supreme Court’s 1994 decision in *Campbell v. Acuff-Rose Music, Inc.* suggested that the defendant’s state of mind should not play any role in assessing fair use.

This article contends that considering a defendant’s “bad faith” in the fair use analysis is poor law and poor practice. Fair use has historically focused on the *use*, not the user — as it should. The defendant’s lack of virtue does not tell courts anything about the value of the defendant’s use or its effect on the market, and thus should be immaterial to copyright’s overall goal of maintaining the desired balance between the author’s economic interests and the interests of society. Indeed, the bad faith inquiry undermines that very goal by favoring the denial of socially valuable secondary uses for reasons unrelated to the purposes of copyright law. Consideration of bad faith as part of the fair use inquiry also increases uncertainty, raises the costs of copyright litigation for both plaintiffs and defendants, and unnecessarily entangles copyright with other areas of law.

Our analysis takes as its starting point the wisdom of two Second Circuit judges: Judge Pierre Leval, in his 1990 article *Toward a Fair Use Stan-

4 Journal, Copyright Society of the U.S.A.

dard, and Judge Dennis Jacobs, in his 2004 concurrence in *NXIVM v. Ross Institute.* Both argued persuasively, in terms similar to those outlined above, that questions of intent are entirely inappropriate in the context of fair use. We expand on their critiques by tracing the development of the bad faith inquiry back to its origins and by examining in greater depth the problems that courts face but rarely acknowledge in cases where bad faith is invoked as part of the fair use analysis. The results of this evaluation, we believe, demonstrate why courts should drop all considerations of faith, good or bad, from the fair use analysis.

Turning to the customary roadmap, Part I of this article sets out some well-worn material concerning the economic bargain at the heart of copyright law, including the fair use doctrine, and reviews the limited and purposeful role that intent plays in helping to decide infringement cases. Part II follows the trajectory of the bad faith inquiry from its first appearance in the 1960s to its adoption by the Supreme Court in *Harper & Row,* the Court’s subsequent (but hardly forceful) retreat in *Campbell,* and the resulting confusion among lower courts ever since. Part III digs deeper into this history and explains that at the heart of the bad faith inquiry is a fundamental misunderstanding of the language of fair use, particularly the terms “fair” and “equitable.” Part IV examines the three main types of conduct that courts have considered under the rubric of “bad faith” — access, permission, and use — and highlights the practical difficulties in considering each in the fair use inquiry. Finally, Part V urges courts to renounce the bad faith inquiry because of its tendency to impede, not promote, progress, and because of the dangers of abetting the suppression of free speech and complicating and prolonging copyright litigation.

I. COPYRIGHT’S UTILITARIAN FOUNDATIONS

To understand why bad faith should play no part in the fair use analysis, it is first necessary to review the economic basis of copyright law in the United States. With few exceptions, the Copyright Act seeks to encourage the production of new works, leaving to the side matters of intent, morality, and equity — all of which threaten to distract from the statute’s underlying purpose. We begin, then, with a brief examination of the traditional justifications for copyright generally and fair use in particular. Later, we turn to a more detailed account of the historical development of fair use.

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8 364 F.3d 471, 483-87 (2d Cir. 2004) (Jacobs, J., concurring).
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A. An Economic Bargain

The Constitution gives copyright its purpose: “to promote the Progress of Science and useful Arts.” On one side of the exchange, authors receive a temporary monopoly that includes the rights to reproduce, distribute, make derivative works based on, and publicly display and perform their works. On the other side, the public benefits from the steady flow of new works, which, once the copyright term expires, are free for anyone to use. Copyright law is in this sense utilitarian, a means to the end of “assuring contributors to the store of knowledge.”

The Supreme Court has consistently acknowledged the importance of this bargain between author and society when considering how far the rights of a copyright owner extend:

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.”

Thus, in copyright law, all roads lead to the government’s “sole interest” in stimulating production of socially valuable works. The statutory monopoly granted to authors functions as a means to this end, not as an end in itself.

Fair use, a judge-made exception later codified at Section 107 of the 1976 Copyright Act, plays a critical role in maintaining the balance between granting a “fair return” to authors and ensuring “the general public good.” One early commentator, writing in 1879, described fair use as “essential to the growth of knowledge as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors.”

Here, again, the overarching concern is the public benefit. A fair use does

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9 U.S. Const. art. I, § 8, cl. 8.
12 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).
13 17 U.S.C. § 107 (2006); see H.R. Rep. No. 94-1476, at 66 (“Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).
not interfere with the author’s reasonable economic expectations under copyright;\textsuperscript{15} indeed, it exists wholly outside such rights.\textsuperscript{16}

Section 107 offers several examples of the kinds of productive uses that give rise to fair use, including “criticism, comment, news reporting, teaching . . . , scholarship, [and] research.”\textsuperscript{17} To determine whether or not a particular use qualifies for the defense, courts apply the four statutory factors:

(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.\textsuperscript{18}

A side-by-side comparison of the two works is usually sufficient to conduct the bulk of this analysis.\textsuperscript{19} Although the statutory list is explicitly non-exhaustive, nothing in the text of Section 107 suggests that courts need look beyond the works and examine the motivations and other conduct of the parties.

Because fair use helps to further copyright’s economic goals, raising the defense implicates not only the defendant’s interests but also the larger public interest in gaining access to new works. Recognizing that “it is particularly important that the boundaries of copyright law be demarcated as clearly as possible,” the Supreme Court has instructed courts that

\textsuperscript{15} \textit{Id.} (“[T]his liberty is consistent with the true purpose of the law to give to the earlier author adequate protection for the results of his labor.”).
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.} (“[T]he factors to be considered shall include . . . .”).
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“defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.”

Surely, fair use stands at the top of any such list of defenses. Copyright law therefore requires that the fair use factors be applied faithfully and with an eye toward the constitutional objective to promote progress.

B. The Limited Role of Intent in Copyright Law

A related feature of copyright law is that courts do not need to determine the intent of either party to resolve the majority of cases. This fits with the economic focus of the law, which is more concerned with encouraging new works than it is with punishing bad acts.

The irrelevance of intent is most apparent when deciding the basic question of infringement. Courts will not excuse an act of infringement because the defendant honestly believed his use was lawful, or even because the defendant was unaware he had copied from the plaintiff’s work in the first place. Likewise, that a defendant affirmatively intended to infringe the plaintiff’s work has no bearing if, for instance, the defendant took only the plaintiff’s ideas and not her expression. Seen from this

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21 This may be especially true where the inherent immorality of the proscribed act is uncertain. See Stanley Fish, Plagiarism Is Not a Big Moral Deal, N.Y. Times, Aug. 9, 2010, http://opinionator.blogs.nytimes.com/2010/08/09/plagiarism-is-not-a-big-moral-deal/ (arguing that plagiarism is “a breach of disciplinary decorum, not a breach of the moral universe”).
22 Folsom v. Marsh, 9 Fed. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) (“The intention to pirate is not necessary in an action of this sort; it is enough, that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced.”) (quoting Roworth v. Wilkes, (1807) 1 Camp. 94, 170 Eng. Rep. 889 (K.B.)).
23 Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976) (“Did [George] Harrison deliberately use the music of He’s So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He’s So Fine with different words, and Harrison had access to He’s So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.”).
24 See 17 U.S.C. § 102(b) (2006) (“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.”).
perspective, modern copyright law functions as an essentially strict-liability regime.  

Still, Congress has directed courts to consider the intent of the accused copyright infringer in certain specific circumstances. A finding of willfulness can increase the maximum statutory damages award in civil cases from $30,000 to $150,000 and is also a prerequisite for criminal infringement. Infringement that is innocent can also affect the outcome of a case, as courts have discretion to reduce the minimum statutory damages award from $750 to $200 where the defendant “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.”

Courts have also taken it upon themselves to adapt certain doctrines to account for the intent of the accused infringer or, in some cases, the copyright owner. Though the Copyright Act makes no mention of intent in the context of attorney’s fees, courts tend to award fees to plaintiffs where the defendant acted willfully and to defendants where the plaintiff brought the infringement claim in bad faith. The “inducement” standard for secondary liability depends in part on whether the defendant intended to promote the infringing acts of others. And defendants may claim as a defense to infringement the fact that the plaintiff has engaged in copyright misuse or fraud on the Copyright Office.

In most of these examples, however, intent has been introduced mainly to protect copyright’s economic bargain. Regarding statutory damages, the willfulness or innocence of an infringer is considered in order to adjust the legal penalties so as to maximize the effectiveness of copyright’s incentive structure. The rationale behind awarding attorney’s fees fol-

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27 Id. § 506(a).
29 See id. § 505.
30 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 14.3.2.2 (3d ed. 2005).
33 See Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d 1140, 1145-47 (9th Cir. 2003).
34 See H.R. REP. NO. 94-1476 (“The ‘innocent infringer’ provision . . . is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to
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allows a similar logic.\(^{35}\) Even the “equitable” defenses of copyright misuse and fraud on the Copyright Office exist primarily to discourage abuses of the copyright system, not to compensate defendants for a plaintiff’s unjust behavior.\(^ {36}\) Copyright law thereby remains true to its utilitarian roots even where Congress or the courts have assigned intent a role in the legal analysis.

II. HISTORY OF A MISTAKE

The bad faith inquiry in fair use dates back fewer than fifty years and has been in wide practice for only about twenty-five years. During this time, the scope of the inquiry has not changed significantly: if the defendant’s behavior in connection with the copying was somehow morally suspect, courts tend to weigh this against a finding of fair use. Many courts accept this as a first principle of fair use doctrine, yet its pedigree is far more ambiguous and problematic. The result has been a bad faith inquiry that is at once firmly entrenched and poorly understood. Here, we trace the development of this mistake in U.S. case law over the past fifty years and then, in Part III, double back to consider the theoretical underpinnings of this doctrinal error.

A. A New Subfactor Appears

The first reported opinion to introduce the issue of bad faith into fair use was *Time Inc. v. Bernard Geis Associates*, a 1968 decision from the Southern District of New York.\(^ {37}\) The case involved still-frame images of the famous Zapruder film of the Kennedy assassination, which the defendants reproduced in the book *Six Seconds in Dallas*. In addition to the standard infringement claim, the plaintiff alleged that copies of the film

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\(^{35}\) See Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1997); see also Goldstein, *supra* note 30, § 14.3.2.2.

\(^{36}\) See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 204 (3d Cir. 2003) (“The misuse doctrine extends from the equitable principle that courts ‘may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.’” (quoting Morton Salt Co. v. G.S. Suppiger, 314 U.S. 488, 492 (1942))).

\(^{37}\) 293 F. Supp. 130 (S.D.N.Y. 1968). A few earlier decisions used terms like “bad faith” and “good faith” but only as euphemisms to describe whether — using modern parlance — a use transformed the original work or merely superseded it. See, e.g., Berlin v. E.C. Publ’ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964); Loew’s, Inc. v. Columbia Broad. Sys. Inc., 131 F. Supp. 165, 181 (S.D. Cal. 1955).
had been “stolen surreptitiously” and that the defendants had used the images after being denied permission.\footnote{293 F. Supp. at 132.}

The court noted its “initial reluctance to find any fair use by defendants because of the conduct of [the author of the accused book] in making his copies and because of the deliberate appropriation in the Book, in defiance of the copyright owner.”\footnote{Id. at 146.} The defendants’ conduct, the court suggested, failed to comply with the principle that “[f]air use presupposes ‘good faith and fair dealing.’”\footnote{Id. (quoting John Schulman, \textit{Fair Use and the Revision of the Copyright Act}, 53 \textit{IOWA L. REV.} 832, 832-33 (1968)).} This conduct did not weigh heavily against the defendants, however, as the court found they could have acquired the Zapruder frames any number of ways — including by legally purchasing a copy of the issue of \textit{Life} in which the images appeared.\footnote{Id.}

Ultimately, the court ruled the book a fair use, based on the “public interest in having the fullest information available on the murder of President Kennedy,” the “serious” nature of the book, and the lack of any real economic harm to the plaintiff.\footnote{Id.}

In the years following \textit{Geis}, few courts adopted its approach. In one 1983 decision, the Ninth Circuit echoed \textit{Geis} in holding that “because fair use presupposes that the defendant has acted fairly and in good faith, the propriety of the defendant’s conduct should also be weighed in analyzing the purpose and character of the use.”\footnote{Marcus v. Rowley, 695 F.2d 1171, 1175-76 (9th Cir. 1983) (citing 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1], at 13-61 (1982)). A year earlier, the Second Circuit considered whether a defendant had acted “in the good faith belief that such use was fair,” but this question arose in the context of a state-law claim of unfair competition, not copyright infringement. \textit{Roy Export Co. v. Columbia Broad. Sys., Inc.}, 672 F.2d 1095, 1106 (2d Cir. 1982).} Largely, however, bad faith lay dormant.

This all changed with the Supreme Court’s decision in \textit{Harper & Row, Publishers, Inc. v. Nation Enterprises.}\footnote{471 U.S. 559 (1985).} Harper & Row, the publishers of Gerald Ford’s autobiography, \textit{A Time to Heal}, brought an infringement claim against defendant news magazine The Nation for excerpting 300 words of Ford’s book in advance of the official first-serial publication by Time, which Time then cancelled along with the remaining $12,500 of its fee. The Second Circuit had ruled for the defendant, but the Supreme Court reversed. The Court found that each fair use factor favored the
plaintiff. The use was commercial in nature. Because it took from an unpublished work, the scope of fair use protection was narrower than if it had taken from a published work. The defendant had appropriated “the heart of the book.” And the market effect — “undoubtedly the single most important element of fair use” — was to usurp the value of the plaintiff’s first-serialization rights.

Based on this analysis, Harper & Row appeared to be an open-and-shut case for the plaintiff. Yet when addressing the first factor, the purpose and character of the use, the Court found it necessary to look beyond the statutory language and also examine the culpability of the defendant’s motives and conduct. The Court quoted Geis as settled law, rather than the dictum of a seventeen-year-old district court decision: “Also relevant to the ‘character’ of the use is ‘the propriety of the defendant’s conduct.’ ‘Fair use presupposes good faith and fair dealing.’” Specifically, the Court condemned the defendant for “knowingly exploit[ing] a purloined manuscript,” which it had received from an unnamed source. Similarly blameworthy was the defendant’s failure to secure permission from the plaintiff; instead, the defendant acted with the “stated purpose of scooping the forthcoming hard-cover and Time abstracts.” Fair use, the Court concluded, “distinguishes between a true scholar and a chiseler who infringes a work for personal profit.”

In dissent, Justice Brennan objected to the Court’s reliance on bad faith. There was no indication, he argued, that the defendant had acted illegally in obtaining the manuscript; in fact, he noted, “all common-law causes of action have been abandoned or dismissed in this case.” Further, whether the defendant had requested permission to publish the excerpt was immaterial to the determination of fair use: “If the Copyright Act were held not to prohibit the use, then the copyright owner would have had no basis in law of objecting.” Even these arguments, however, appeared to accept to some extent the basic premise that the defendant’s faith, whether good or bad, may be relevant in some cases, though not this one. Neither the majority nor the dissent addressed the basic question of

45 Id. at 562.
46 Id. at 564.
47 Id. at 564-65.
48 Id. at 566-67.
49 Id. at 562.
50 Id. at 563.
51 Id. at 562.
52 Id. at 563.
53 Id. at 593 (Brennan, J., dissenting).
54 Id. at 594 (Brennan, J., dissenting).
whether a defendant's bad faith should have any role at all in the fair use inquiry.

B. Adding to the Confusion

In the following years, lower courts applied Harper & Row’s discussion of bad faith in inconsistent ways. Some understood Harper & Row to require them to take into account the defendant’s intent in all claims of fair use. Others treated the Court’s bad faith inquiry as dicta and therefore optional. In one decision, the Second Circuit dutifully considered “the propriety of the defendant’s conduct” but seemed troubled by the same permission/infringement circularity that Justice Brennan had identified — that is, if a use is permissible as a fair one, there would be no need for the defendant to ask permission in the first place, and thus no negative implication should arise from the failure to ask first. Meanwhile, in Atari Games Corp. v. Nintendo of Am. Inc., the Federal Circuit read Harper & Row to establish a bright-line rule that “[t]o invoke the fair use exception, an individual must possess an authorized copy of a literary work.”

The Supreme Court’s next fair use decision did little to clarify the issue of bad faith. Campbell v. Acuff-Rose Music, Inc., decided in 1994, considered whether 2 Live Crew’s song “Pretty Woman” was a fair use of Roy Orbison’s song “Oh, Pretty Woman.” The Court’s discussion of the first factor focused on the distinction between secondary uses that are “transformative” and those that “merely supersedes” the original. In this regard, “[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may be reasonably perceived.”

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55 See, e.g., Weissmann v. Freeman, 868 F.2d 1313, 1323-24 (2d Cir. 1989) (“In short, to make use of another’s copyright material fairly presupposes that the actor acted fairly and in good faith. Hence, before undertaking a discussion of fair use, we consider the equitable considerations that exist in the case at bar.”).

56 See, e.g., Fisher v. Dees, 794 F.2d 432, 436-37 (9th Cir. 1986) (“Because ‘fair use presupposes good faith and fair dealing,’ courts may weigh ‘the propriety of the defendant’s conduct’ in the equitable balance of a fair use determination.” (emphasis added.)).

57 Wright v. Warner Books, Inc., 953 F.2d 731, 737 (2d Cir. 1991) (“Equally meritless is plaintiff’s claim that Dr. Walker’s failure to get plaintiff’s permission to use the letters affects this analysis. As the district court aptly observed, the lack of permission is ‘beside the point’ as long as Dr. Walker’s use meets the standards of fair use . . . .”).

58 975 F.2d 832, 834 (Fed. Cir. 1992).


60 Id. at 578-79.

61 Id. at 582.
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damning, was now beside the point. Instead, the Court treated the first factor — as it treated pretty much the entire fair use analysis — as an objective inquiry into the works and what could be “reasonably perceived” about them.

In contrast to Harper & Row, Campbell relegated the issue of bad faith to a four-sentence footnote. The Court’s discussion began by calling into question the significance of intent as an element of fair use: “Finally, regardless of the weight one might place on the alleged infringer’s state of mind, we reject Acuff-Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use.” Here, the Court contrasted Harper & Row’s emphasis on bad faith with two sources suggesting that bad faith serves no purpose in the fair use analysis: Justice Joseph Story’s 1841 decision in Folsom v. Marsh, which the Court characterized as holding that “good faith does not bar a finding of infringement,” and Judge Leval’s pioneering 1990 article, Toward a Fair Use Standard, which the Court described as arguing that “good faith [is] irrelevant to fair use analysis.” The Court’s use of the word “regardless” appeared to leave ambiguous whether the Court agreed more with Harper & Row or with Judge Leval — although elsewhere, of course, the Campbell decision reflected a wholesale adoption of the “transformative” analysis for the first fair use factor that Judge Leval’s article had advanced.

The next sentence in the footnote, however, suggested that, in at least one respect, bad faith should not be relevant to the fair use analysis: “Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation.” As the Court next explained, “[i]f 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.” Of course, the use of the subjunctive — “even if good faith were central to fair use . . .” — further reflects the ambiguity of the Court’s treatment of Harper & Row. Yet the Court’s language could also be read as skepticism that bad faith should play any role in the fair use analysis.

62 See id. at 583 n.17 (“We note in passing that 2 Live Crew need not label their whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).”).
63 Id. at 585 n.18.
64 Id.
65 Id.
66 Id.
Campbell’s observation that fair uses need not be preceded by requests for permission hit on the same problem that Justice Brennan had pointed to and that had worried courts in the years following Harper & Row. The Court’s conclusion in Campbell made logical and practical sense, as a copyright owner is likely to insist on permission (and the licensing fee that goes along with it) whenever approached by a secondary author, whether or not the proposed use would otherwise be fair. Thus, although the law on bad faith remained generally in flux, at least the question of permission seemed to be settled after Campbell.

C. Bad Faith’s Continued Prevalence

Alas, like Harper & Row before it, Campbell proved to be mostly a source of confusion. Uncertainty remained as to whether the Court’s cryptic statements on bad faith “betoken[ed] that an inquiry into the defendant’s state of mind does not necessarily belong in the fair use analysis,” or whether Harper & Row’s statements on the subject remained controlling.

For example, the Ninth Circuit’s decision in Los Angeles News Service v. KCAL-TV Channel 9, which involved videotapes of the 1992 Los Angeles riots, all but ignored Campbell’s warning that “no permission need be sought or granted” to succeed on fair use. Treating Campbell as having merely stated that a denied request for permission is “not dispositive” of the fair use analysis, the Ninth Circuit found that, under Harper & Row, “the propriety of the defendant’s conduct is relevant to the character of the use at least to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee.”

Another troubling reading of Campbell appeared in the Second Circuit’s 2004 decision in NXIVM Corp. v. The Ross Institute. In that case, the plaintiffs produced business seminars on “Executive Success” and required attendees to sign non-disclosure agreements to attend the seminars and receive course materials. The defendants, self-described “cult de-programmer[s],” published critical reports about the plaintiffs’ seminars. The defendants’ reports included excerpts from the seminar materials, which they had received from a former seminar attendee (who had passed them on in violation of her non-disclosure agreement). After the district

68 108 F.3d 1119 (9th Cir. 1997).
69 Id. at 1122. For a critical analysis of L.A. News Service, see 3 NIMMER & NIMMER, supra note 67, § 13.05[A][1][D].
70 364 F.3d 471 (2d Cir. 2004).
71 Id. at 475.
72 Id.
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court denied the plaintiff's motion for a preliminary injunction, the plaintiff argued on appeal that, among other errors, the district court had not "fully and explicitly" considered the defendant's bad faith. The Second Circuit agreed, at least to that extent.\footnote{Id. at 478.}

Remarkably, the \textit{NXIVM} decision held that courts\textit{ must} consider the defendant's intent in the context of fair use and yet also went to great lengths to minimize the analytical significance of such an inquiry. The majority treated \textit{Harper & Row} as the controlling precedent, which it understood to "direct[ ] courts to consider a defendant's bad faith in applying the first statutory factor."\footnote{Id.} The majority disposed of \textit{Campbell} in a footnote, saying that the Supreme Court's decision in that case simply "provides further support for the proposition that while the good or bad faith of a defendant should be considered, it generally contributes little to fair use analysis."\footnote{Id. at 479 n.2.}

Accordingly, the \textit{NXIVM} majority found it relevant under the first factor that the defendants knew that their "access to the manuscript was unauthorized or was derived from a violation of law" — namely, their source's breach of her non-disclosure agreement.\footnote{Id. at 478.} At the same time, the majority rejected the Federal Circuit's bright-line rule from \textit{Atari}, which would have required the defendants to possess an "authorized" copy of the work in order to claim fair use.\footnote{Id.} Accordingly, because intent was not dispositive, the fair use analysis continued, with the balance of the factors weighing heavily in the defendants' favor.\footnote{Id. at 482.} So, as in the original bad faith case, \textit{Geis}, the \textit{NXIVM} defendants had acted in bad faith but their use was nonetheless fair.\footnote{Id.}

Concurring in the result, Judge Jacobs argued that a defendant's intent had no place at all in the fair use analysis. Jacobs disagreed about the precedential value of \textit{Harper & Row'}s discussion of bad faith, describing it as a "make-weight wholly unnecessary to the outcome" of the case, which was already "compelled by the essential statutory considerations" of substantiality and market harm.\footnote{Id. at 483 (Jacobs, J., concurring).} By contrast, in \textit{Campbell} "the pertinence of bad faith was treated as an open question, not as a point settled by \textit{Harper & Row},"\footnote{Id.} In Jacobs' view, there was no need to "await from the Supreme Court a clearer renunciation than the \textit{Campbell} footnote of bad
faith’s relevance (however attenuated) to the fair use inquiry,” as the major-
ity urged.82 Rather, Campbell encouraged courts “to assess whether
bad faith on the part of a secondary user plays a productive role in the fair
use inquiry.”83

Had the majority made such an assessment, Jacobs argued, it would
have seen that bad faith does not fit within copyright law. “Fair use is not
a doctrine that exists by sufferance, or that is earned by good works and
clear morals,” Jacobs insisted, but is instead a codified right “that is neces-
sary to fulfill copyright’s very purpose, [t]o promote the Progress of sci-
ence and the useful arts . . . .”84 For this reason, the defendant’s intent
has “no rational bearing” on the two key inquiries of fair use — whether
the secondary work is transformative and whether it usurps the market of
the original — and therefore should not divert courts from the real task at
hand.85 A bad faith inquiry unnecessarily entangles copyright with other
areas of the law like contracts and torts,86 and it is at odds with the rule
that “[f]air play is no defense to infringement.”87 Finally, Jacobs warned
that consideration of bad faith could have more serious consequences if it
were to go unchecked, most notably the “suppression of transformative
works that are valuable to the expansion of public knowledge” such as
commentary and criticism.88

III. MISREADING FAIR USE

Not all courts have followed the NXIVM majority in treating the bad
faith inquiry as a mandatory component of fair use,89 but it appears that
no court has adopted a rule declining to apply the subfactor either. De-
spite widespread acceptance today, however, there is a notable absence of
historical support for the role of bad faith in today’s fair use doctrine. This
aberration, originating with the Geis decision and amplified by Harper &

82 Id. at 479 n.2.
83 Id. at 483.
84 Id. at 485.
85 Id.
86 Id.
87 Id. at 486 (citing Folsom v. Marsh, 9 Fed. Cas. 342, 348 (C.C.D. Mass. 1841)
(No. 4,901)).
88 Id.
89 See, e.g., Peter Letterese & Assocs., Inc. v. World Inst. Scientology Enters.,
Int'l, 533 F.3d 1287, 1312 n.27 (11th Cir. 2008) (“Evidence of bad faith may be a relevant, but not necessarily dispositive, aspect of the first factor.” (em-
phasis added)); Bill Graham Archives, LLC v. Dorling Kindersley, Ltd., 386
F. Supp. 2d 324, 333 (S.D.N.Y. 2005) (“Although not listed among the fac-
tors, courts occasionally consider whether the defendant exercised good
faith.” (emphasis added)).
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Row, can be traced back to courts' confusion regarding the morally charged terminology of copyright law.

A use protected under Section 107 is described as “fair”; an act of infringement is sometimes called “piracy”; and fair use in general is frequently referred to as an “equitable” doctrine. The last of these — the invocation of equity — implicates a truly equitable doctrine, that of unclean hands. From there, it is no great leap to assume that a fair use proponent must have clean hands — that is, manifest “good faith and fair dealing,” in the language of Geis.

In fact, however, fair use is not an equitable doctrine, and the application of the language of unclean hands to copyright law has only a short and undistinguished lineage. By failing to recognize this, courts and commentators unwittingly imported into fair use a doctrine that does not serve copyright’s basic goals.

A. Historical Roots of the “Fairness” of Fair Use

Scholars trace the origins of fair use to the English concept of “fair abridgement,”90 the legality of which was first announced in 1740 in Gyles v. Wilcox.91 Decided thirty years after the passage of the Statute of Anne, Gyles involved a claim by the publishers of Sir Matthew Hale’s Pleas of the Crown seeking an injunction against the publication of A Treatise of Modern Crown Law, which, the plaintiffs claimed, “borrowed verbatim” from their work with only minimal changes.

Lord Chancellor Hardwicke explained that “where books are colourably shortened only,” the creator of the secondary work would be liable for infringement. There were limits to the principle, however:

But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful . . . .92

For Hardwicke, an abridgement was “fair” in the sense that the secondary work was a “new book,” one that exhibited the secondary author’s “invention, learning, and judgment.” Morality had nothing to do with it. In fact, authors of the era loudly protested that such abridgements were “monstrous, idiotic, heartless, illegal, and iniquitous,” but their complaints fell on deaf ears.93

91 (1740) 26 Eng. Rep. 489 (Ch.).
92 Id. at 491 (emphasis added).
93 CHARLES READE, THE EIGHTH COMMANDMENT 116, 152 (Boston, Ticknor & Fields 1860), cited in Deazley, supra note 90, at 797.
According to Gyles, to decide whether an accused work was a “mere evasion of the statute” or a fair abridgement required one to “sit and hear both books read over, which is absolutely necessary, to judge between them.” For this reason, Hardwicke decided that the individuals most qualified to perform the task were not the jury or judge, but “two persons of learning and abilities in the profession of the law, who would accurately and carefully compare [the two works], and report their opinion to the court.” Hence, there was no need to consider the conduct or intent of either party — all that the court needed to know was contained within the works themselves.

Subsequent English decisions confirmed that the idea of a “fair abridgment” referred to the fairness of the use, not the fairness of the user or his conduct. In Strahan v. Newbery, Lord Chancellor Apsley held that a fair abridgement is one “employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader.” If the abridgment succeeded on these counts, it was “not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.” In the case before him, Apsley found the defendant’s work a fair abridgement, as it “might be read in the fourth part of the time” in comparison to the plaintiff’s work, with “all the substance preserved, and conveyed in language as good or better than in the original, and in a more agreeable and useful manner.”

As fair abridgement evolved into fair use, the doctrine retained its utilitarian nature, focusing on whether the secondary work yielded public benefit. The seminal fair use decision in the United States, Folsom v. Marsh, drew a similar distinction to that observed by Gyles between a “colourably shortened” work and a “real and fair abridgement.” Justice Story observed that “a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.” If, however, the defendant “cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it,” this would not qualify as a fair use.

95 Id. at 492.
96 (1774) 98 Eng. Rep. 913, 914 (Ch).
97 Id.
98 It did not hurt the defendant’s case that “he had consulted Mr. Justice Blackstone, whose knowledge and skill in his profession was universally known, and who as an author himself had done honour to his country,” and that Blackstone agreed the abridgement was non-infringing. Id.
100 Id.
Though the language of *Folsom* might suggest that the defendant’s “design” and “purposes” — apart from the resulting work — were relevant to the fair use analysis, the real question was whether the secondary work transformed the original or merely superseded it, a formulation that would find full expression in Judge Leval’s 1990 article and that the Supreme Court would later adopt in *Campbell*. Uses like “fair and reasonable criticism” were valuable to society, more valuable than the original author’s interest in preventing such uses, which is why copyright law not only tolerated but encouraged them. This rationale, equating “fair” use with publicly beneficial use, has been a constant in U.S. copyright law, from the time of *Folsom* in 1841 up through the present day.

B. Judicial Echo Chambers

As explained above, courts over the past several decades have departed from this utilitarian concept of fair use towards a moralistic one. This shift has been grounded in the related notions that fair use is an “equitable” doctrine and that the defense presupposes “good faith and fair dealing” on the part of the defendant. However, it turns out that both these notions have no real basis in history or law, other than through constant repetition in recent court decisions.

The doctrine of fair use is not actually, in any historical sense, an equitable doctrine. While some early cases, including *Gyles*, were decided by courts of equity, several others were decided at law, where the defense had its roots. As Judge Leval has explained:

> Litigation under the Statute of Anne began in the law courts. Although plaintiffs who sought injunctions could sue, and did, in the courts of equity, which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations. Fair use was a judge-made utilitarian limit on a statutory right.

That fair use continues to be a *legal* and not equitable doctrine is demonstrated by the fact that the defense can be an issue for the jury, not the

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101 *See Campbell*, 510 U.S. at 578-79.
102 *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 198 (3d Cir. 2003) (“[A]s we apply copyright law, and the fair use doctrine in particular, we bear in mind its purpose to encourage ‘creative activity’ for the public good.” (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984))).
judge, at least where there are factual disputes at issue. Fair use is therefore “not some open-ended referendum on ‘fairness,’ . . . but an effort to measure the purpose and effects of a particular use against the incentives for literary and artistic creation that drive copyright protections.”

Why then do recent courts so frequently refer to fair use as equitable? It appears the confusion can be traced back to the House Report on the 1976 Copyright Act, which stated:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

The Report did not cite any authority for this point, but, taken in context, the term “equitable” here appears to refer to how the statutory factors should be applied — that is, flexibly — and not to some overriding principle of natural rights, let alone a notion that fair use was historically a doctrine of courts of equity. Fair use is continually evolving, Congress recognized, and so the Copyright Act must not “freeze the doctrine in the statute, especially during a period of rapid technological change.” In making this statement, the House Report was concerned with the decisions of the courts, not the actions of the parties.

This would seem uncontroversial enough. But then the Supreme Court’s 1984 decision in Sony Corp. of America v. Universal City Studios, Inc. quoted the House Report, stating that Section 107 “identifies various factors that enable a court to apply an ‘equitable rule of reason’ analysis to particular claims of infringement.” Divorced from its original context, the idea that fair use is somehow “equitable” now looked like support for considering the equities in the fair use analysis. At least, courts took it that way. For example, the Second Circuit’s decision in Weissmann v. Freeman, decided just a few years later, relied on Sony for the proposition that the fair use analysis “begins not by elevating the statutory guides into inflexible rules, but with a review of the underlying equities.”

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105 PATRY, supra note 103, § 1:4 n.4 (COLLECTING CASES).
108 Id.
110 868 F.2d 1313, 1323 (2d Cir. 1989); see also Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992) (“Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use. And — because it is an equitable doctrine — wrongful denial of exploitative conduct towards the work of another may bar an otherwise legitimate fair use claim.”).
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Justice Blackmun anticipated this problem in his dissent in Sony, in which he argued that describing fair use as “equitable” “mischaracterizes the doctrine, and simply ignores the language of the statute.” Because the provisions of Section 107 are limited to “productive uses” like criticism, commentary, and research, fair use “must be applied flexibly on a case-by-case basis, but . . . only in the context of productive uses.” The limited scope of fair use, Blackmun reasoned, “comports with its purpose, which is to facilitate the creation of new works.” But, of course, he was dissenting. A year after Sony, the Harper & Row decision repeated the statement that fair use is an “equitable rule of reason.”

One outgrowth of the “equitable” trope was the idea that fair use “presupposes good faith and fair dealing.” This purported principle seems to have had its origins in the writings of John Schulman, a copyright lawyer and scholar who played an active role in the adoption of the 1976 Copyright Act. Serving as a member of the Panel of Experts for the Revision of the United States Copyright Law, Schulman testified before Congress in 1965 regarding the proposed revised statute. It was during these hearings that Schulman described fair use as distinguishing “between a true scholar and a chisler [sic] who infringes a work for personal profit.” Three years later, in a 1968 law review article, he asserted that “[t]his flexibility in the concept necessarily flows from the fact that the ‘fair use’ privilege is predicated upon good faith and fair dealing.” He cited no cases or commentary in support of either proposition.

111 464 U.S. at 495 (Blackmun, J., dissenting).
112 Id.
113 Id.
116 Hearings on H.R. 4347 Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., at 1694-719 (1965).
117 Id. at 1704.
118 Schulman, Fair Use, supra note 40, at 832.
119 Schulman also amplified his points through self-reference, as he did when he quoted several paragraphs of his congressional testimony. See Schulman, Fair Use, supra note 40, at 837-38. Occasionally, he repeated entire arguments without citation. Compare Schulman, Battle of the Books, supra note 115, at 408 (“The doctrine of ‘fair use’ as a balance wheel and safety valve for the copyright system, was promulgated more than one hundred thirty years ago, as a judicial rule of public policy. Without statutory basis or definition it has become and remains firmly established as a basic tenet of our copyright system.”), with Schulman, Fair Use, supra note 40, at 832 (same).
Nonetheless, the same year that Schulman’s article was published, the
*Geis* decision from the Southern District of New York quoted his article
nearly word for word, stating that “[f]air use presupposes ‘good faith and
fair dealing.’”120 Then, in 1984, *Harper & Row* adopted both the idea of
“good faith and fair dealing” and the “true scholar”/“chiseler” distinction
that had appeared in Schulman’s congressional testimony, giving Schul-
man’s work a profound influence on the development of copyright law in
the matter of just a few years. One could fairly describe him as the father
of the bad faith inquiry in fair use.

It is unclear, however, that Schulman understood or intended the ef-
tects that his work would have. Rhetorical flourishes aside, Schulman’s
vision of fair use was decisively utilitarian, not moral. For example, in
unpacking why fair use should rest on “good faith and fair dealing,” he
explained:

> It serves the purpose of maintaining a proper balance between the exclu-
sive rights secured to authors under the Copyright Statute, and the correlative
right of the public to benefit from those contributions to literature, science,
and the arts for which protection is provided for authors and other creators.

The “fair use” doctrine as developed by the judicial process recognizes
that not all copyrighted works serve the same function, or
are entitled to the same measure of exclusivity, or enjoy the same
market.121

This passage emphasizes the classic economic justifications of fair use, as
well as the need for courts to conduct an objective analysis of the “func-
tion” of the two works. Schulman similarly argued that the “distinction
between a true scholar and a chiseler [*sic*] who infringes for personal profit”
turns not on the defendant’s unlawful intent but on the difference between
“a mere quotation and the theft of an essential portion of a literary
work.”122 The tone is didactic, but the reasoning is utilitarian.

Even Schulman’s most moralistic statement of fair use — that the
doctrine builds upon the Golden Rule, “Do unto others as you would have
them do unto you”123 — appears to have been simply a garbled transla-
tion. He did not include a citation, but it is likely Schulman was thinking
of what Professor Nimmer has described as “Joseph McDonald’s clever
paraphrase of the Golden Rule: ‘Take not from others to such an extent
and in such a manner that you would be resentful if they so took from
you.’”124 In McDonald’s model, the “extent” and “manner” mirror the

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122 Id. at 837 (quoting *Hearings on H.R. 4347 Before Subcommittee No. 3 of the
House Committee on the Judiciary*, 89th Cong., at 1694-719 (1965)).
123 Id.
124 3 NIMMER & NIMMER, * supra note 67, § 13.05[A], at 13-66 (1984) (quoting Jo-
seph McDonald, *Non-Infringing Uses*, 9 BULL. COPYRIGHT SOC’Y. 466, 467
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third and first fair use factors, respectively. But when Schulman reformu-
lated the Golden Rule idea as his own, much of the cleverness, and thus
the precision, was lost.

And so, while Schulman’s vision was largely a utilitarian one, consis-
tent with copyright law’s history, his morally charged phrases are what
have made a lasting impact. As time passed and the basic phrases were
repeated — in Geis, Harper & Row, and beyond — they became detached
from their original meaning and context. In particular, the notion of
“good faith and fair dealing” took on a life of its own, and courts quickly
accepted it, likely because it seemed to fit within the moral idiom of copy-
right law. Courts did not pause to evaluate whether bad faith had a
proper role in the fair use analysis — perhaps because they each assumed
someone else had already done so. That is unfortunate, because such an
evaluation confirms that bad faith has no proper place in the fair use
analysis.

IV. PROBLEMS WITH BAD FAITH IN PRACTICE

The fact that the bad faith inquiry lacks historical grounding is, on its
own, not reason to reject it outright. It might be worth departing from
precedent if the subfactor provided courts with a useful new tool for serv-
ing the purposes of copyright or addressing difficult legal issues. As dis-
cussed above, however, considering the defendant’s bad faith does not
serve the underlying rationale of copyright law, as it does nothing to en-
courage the production of new and valuable works. Rather, it merely casts
doubt on the legality of a new work based solely on the motives or conduct
of the author, and not the content of work itself or the audience it serves.
Moreover, including bad faith as part of the fair use inquiry has pernicious
effects on copyright law and copyright litigation. Thus, in practice, it has
proven distracting at best and potentially destructive at worst.

There are three main contexts in which courts have considered the
bad faith of the defendant advancing a fair use defense: (a) where the
plaintiff contests whether the defendant’s access to the copyrighted work
was proper; (b) where the defendant failed to seek permission before using
the plaintiff’s work or did seek such permission but was refused; and (c)
where the plaintiff challenges the propriety of the use itself (that is, not the

539, 550 n.3 (1985).

125 After all, this is a field where unauthorized copying is often referred to as
“piracy,” with its connotations of unethical behavior. In practice, of course,
outside the context of widescale copying of copyrighted works, to describe a
work that borrows from another as “pirated” is simply to state the legal
conclusion that the second work does not qualify as a fair use. See Leval,
supra note 7, at 1126-27.
content of the work, but the use to which it is put). In each of these categories, the bad faith inquiry does little or nothing to help decide the case at hand in keeping with copyright’s goals and, in many circumstances, points in the opposite direction from established law.

A. Access

When courts have invoked bad faith as part of the first fair use factor, they often consider whether the defendant had proper access to the copyrighted work or whether, in the words of Harper & Row, the defendant was working from a “purloined manuscript.”

The most immediate problem with this application of bad faith is that it muddies the line between copyright and other areas of law. As several enlightened judges have observed, the defendant in a copyright suit might also face civil penalties under contract or tort law, or even criminal liability. Any of these legal regimes is better suited to assess the blameworthiness of the defendant’s actions. For example, trade secret law typically requires a plaintiff to establish that it has taken adequate measures to maintain the secrecy of the allegedly protected information and that the defendant has acquired the information by “improper means” such as theft, misrepresentation, or breach of a confidentiality agreement. Copyright law has no equivalent safeguards to ensure that the plaintiff’s claim of misappropriation is valid. Courts should be reluctant to improvise this sort of complex analysis in the context of fair use.

Further, a defendant may be in breach of confidentiality obligations, but such potential liability should not be relevant to whether the use made of the work is fair. Notably, Congress appears to have assumed similar reasoning in enacting the anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”) in 1998. Although circumventing a

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126 This last category includes circumstances such as a lack of attribution to the original author or a misleading or critical portrayal of the copyrighted work.

127 Courts have sometimes addressed bad faith instead under the third or fourth factors, see Blanch v. Koons, 467 F.3d 244, 257 (2d Cir. 2006), or entirely separate from the enumerated factors, see Weissmann v. Freeman, 868 F.2d 1313, 1323 (2d Cir. 1989). Most, however, treat it as part of the first factor.


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copyright owner’s technological measures can give rise to liability under Section 1201 of the DMCA, the same act cannot be evidence against a claim of fair use.\textsuperscript{131} The legislative history is explicit that a plaintiff “should not be able ‘to defeat a fair use defense by pointing to the fact that the defendant had circumvented a technological protection measure.’”\textsuperscript{132}

Sometimes, courts invoke the bad faith subfactor on the basis that the plaintiff’s work was unpublished.\textsuperscript{133} This improperly overlaps with the second fair use factor, which already takes into account whether the copyrighted work is published or unpublished. Publication status is relevant, the Supreme Court said in \textit{Harper & Row}, because of “the author’s right to control the first public appearance of his expression,” including “the choice whether to publish at all” as well as “the choices of when, where, and in what form first to publish a work.”\textsuperscript{134} The rationale is, once again, economic: quoting an unpublished work uniquely harms an author’s incentive to create new works and thus tips the scales away from a finding of fair use.\textsuperscript{135} However, as Congress clarified in 1992, the Copyright Act does not permit courts to treat the fact that the copyrighted work is unpublished as dispositive of the fair use analysis.\textsuperscript{136} So when courts consider the propriety of the defendant’s access in light of whether the plaintiff’s work was unpublished, they risk disobeying Congress’s instruc-

\textsuperscript{131} 17 U.S.C. § 1201(c)(1) (2006) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”).

\textsuperscript{132} 3 \textsc{Nimmer & Nimmer},supra note 67, § 13.05[F][6] (quoting 1997 Hearings at 50 (statement of Register Peters)).

\textsuperscript{133} See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231, 1245 (N.D. Cal. 1995) (“[Defendant] Erlich’s copies of Exhibit B works were more likely unauthorized than not; plaintiffs have proved substantial evidence that the Advanced Technology works are kept confidential, and that Erlich would not have been given permission to keep a copy of those works. For most of the disputed works, the fact that Erlich may have obtained his copies in an unauthorized manner tends to weigh in plaintiffs’ favor.”); cf. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478-80 (2d Cir. 2004) (weighing defendants’ “bad faith” against finding of fair use where plaintiff alleged its “first publication rights” had been “scooped”).

\textsuperscript{134} 471 U.S. at 564.

\textsuperscript{135} The source of this harm is the likelihood that a secondary author will usurp the market for important uses like first serialization, a concern weighed under the fourth factor. \textit{See Harper & Row}, 471 U.S. at 566-69.

\textsuperscript{136} 17 U.S.C. § 107 (2006) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.”); see Pub. L. No. 102-492, 106 Stat. 3145 (1992) (amending Section 107 of the Copyright Act regarding unpublished works).
Some might argue that weighing improper access under the first factor (as part of “the purpose and character of the use”) is necessary to protect the plaintiff’s privacy in a closely guarded work. For example, *Harper & Row* found that, because the manuscript was unpublished and treated as secret, the defendant’s use “clearly infringes the copyright holder’s interests in confidentiality and creative control.” But there is no historical or logical basis for asking copyright law to play a role in the realm of privacy. And to whatever extent copyright does recognize such interests, they are already embodied in the published/unpublished distinction. In a case such as *NXIVM*, where the parties agree that the copyrighted work was “unpublished in the sense that it is not available to the general public,” there is no need to consider also whether the defendant acquired the work by improper means. The work’s unpublished status should count against the defendant — but only to some extent, and certainly only once.

Beyond the published/unpublished distinction, how a defendant accesses a copyrighted work reveals little about the fundamental balance between author incentive and public interest. If a work is published, a secondary use of the copyrighted material harms the plaintiff’s copyright-related interests in the same way and to the same degree regardless of whether the work has been obtained legally or illegally. Likewise, the benefit that society gains from a secondary use, such as the creation of a new work or criticism of the copyrighted work, is independent from the behavior of the defendant. To weigh access too heavily in the fair use analysis could unnecessarily deny society these beneficial uses. Courts occasionally seem to recognize this fact, at least implicitly, when they treat improper access as “insufficient proof” of bad faith where the copyrighted

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137 Moreover, the second factor, “the nature of the copyrighted work,” requires courts to consider only the copyrighted work and its publication history, without delving into the actions or intent of either party.


139 *Leval, supra* note 7, at 1130 (arguing that copyright is “grotesquely inappropriate to protect privacy and obviously not suited to do so”).

140 *Stern v. Does*, 2011 U.S. Dist. LEXIS 37735, at *30 (C.D. Cal. Feb. 10, 2011) (“Concerns about confidentiality and creative control, however, lie primarily if not exclusively in the context of unpublished works. Plaintiff asserts publication at the time his e-mail was posted on the listserv. Any confidentiality concerns based on post-publication copying from the listserv are greatly attenuated.”).

141 *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 475 (2d Cir. 2004).

142 Any additional, non-copyright harm — the exposure of a trade secret, or embarrassment, for example — may be dealt with according to the proper legal regime and need not enter the fair use analysis.
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work is published. But they should go one step further and refuse to consider access altogether.

B. Permission

If it accomplished nothing else, the Campbell footnote on bad faith appeared to settle — or at least should have settled — the debate over the relevance to the fair use analysis of whether the defendant first asked permission. The Court’s reasoning was simple, and sound: “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.” Any argument for considering permission fails because it assumes the legal conclusion that the secondary use is infringing; as Professor Nimmer explained, “were fair use held to exist, then no permission would have been needed.” This realization is especially important in cases where permission is likely impossible to secure even for reasonable uses, as with works of parody.

Nonetheless, some courts since Campbell have continued to examine whether the defendant sought permission from the plaintiff. The only apparent difference is that such courts now weigh such attempts in favor of the defendant — that is, as a sign of the defendant’s “good faith.”

143 Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (“Vander Ark’s use of unauthorized electronic copies of Rowling’s works, obtained by improperly scanning each of those works, in preparing the Lexicon manuscript is insufficient proof for the Court to make a finding of bad faith, particularly because Vander Ark did not obtain any material that was not already available to the public.”); see also Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (noting that the defendant could have just as easily accessed the Zapruder film by legitimate means).


145 3 NIMMER & NIMMER, supra note 67, § 13.05[A][1][D] at n.133.9.

146 See Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986) (“Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.”).

147 See, e.g., Bill Graham Archives, LLC v. Dorling Kindersley, Ltd., 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005) (“The fact that defendants’ [sic] informed plaintiff of their intentions to use their images and made an effort to license the images where there might be question as to whether a license was needed, shows a good faith effort by defendants.”); Kane v. Comedy Partners, 2003 U.S. Dist. LEXIS 18513, at *19-20 (S.D.N.Y. Oct. 15, 2003) (“[D]efendants’ efforts to contact plaintiff and inform her of their plan to use her show are evidence of defendants’ good faith effort to initially seek her informed consent.”).
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_Campbell_ addressed only the “evidentiary matter” of how to prove bad faith and not the more basic problem of whether bad (or good) faith is ever relevant.\(^{148}\) Others, however, have read the Supreme Court’s decision more broadly, as making irrelevant whether or not the defendant acted with good faith.\(^ {149}\)

Whichever approach is the better reading of _Campbell_, there are serious practical problems with weighing requests for permission in favor of the defendant and against the plaintiff. By this logic, a secondary use that supersedes the copyrighted work and usurps its market will nonetheless be more likely to succeed as a fair use simply because the defendant thought to contact the plaintiff ahead of time. But the request for permission reveals nothing about the economic balance of interests at stake.

Moreover, counting such requests _for_ the defendant makes it more likely that courts will return to a pre-_Campbell_ analysis where a failure to request permission counts _against_ the defendant — as, indeed, some lower courts (often inspired by the _NXIVM_ decision) have recently done.\(^ {150}\) One of the more striking recent examples is the Southern District of New York’s decision in _Cariou v. Prince_.\(^ {151}\) The court in _Cariou_, relying on _NXIVM_’s reference to “the propriety of a defendant’s conduct,” faulted artist Richard Prince for never seeking permission to use the plaintiff’s works or even attempting to contact him to ask “about usage rights to the Photos, even though [the plaintiff’s work] clearly identified [the plaintiff] as the sole copyright holder” and the plaintiff’s email address was readily available.\(^ {152}\) The court then simply concluded that, “[u]nder these circumstances, Prince’s bad faith is evident.”\(^ {153}\) Yet the court in _Cariou_ never

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\(^{148}\) See _NXIVM Corp. v. Ross Inst._, 364 F.3d 471, 479 n.2 (2d Cir. 2004) (“In _Campbell_ the Court found, in the context of a parody made by the defendants, that the defendants’ request for permission to use the original copyrighted work and the plaintiffs’ denial of that permission could not — as an evidentiary matter — be used to show that the defendants believed that their use was not fair.”).

\(^{149}\) See _Warren Publ’g Co. v. Spurlock_, 645 F. Supp. 2d 402, 417 (E.D. Pa. 2009) (“While the Supreme Court in _Harper & Row_ stated that good faith and fair dealing were required for a finding of fair use, the Court’s later decision in _Campbell_ appeared to suggest, though not directly holding, that this was no longer true.”).

\(^{150}\) See, e.g., _Reyes v. Wyeth Pharm., Inc._, 603 F. Supp. 2d 289, 297-98 (D.P.R. 2009) (“On the record before the Court, Cordero knew that the sculpture belonged to Reyes . . . . Nonetheless, Cordero utilized the sculpture in the ‘naci para crear’ campaign without first seeking Reyes’ permission. . . . These actions do not exhibit good faith.”).

\(^{151}\) 784 F. Supp. 2d 337 (S.D.N.Y. 2011). At the time of this writing, _Cariou_ is currently on appeal to the Second Circuit.

\(^{152}\) _Id._ at 351.

\(^{153}\) _Id._
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considered the critical point made by Campbell: “If the use is otherwise fair, then no permission need be sought or granted.” To avoid such outcomes in the future, the only logical approach is to remove from the fair use analysis entirely the question of whether permission has or has not been sought.

C. Use

Outside the relatively narrow issues of access and permission, more and more courts are now willing to consider the propriety of the secondary use itself, extending far beyond considerations appropriate under the first factor. This inquiry can take several forms. Sometimes the conduct in question is the defendant’s failure to give credit to the original author.154 Sometimes, it is the defendant’s alleged distortion or mischaracterization of the copyrighted work.155 In still other cases, it is whether the defendant actually intended to make the transformative use claimed under the first factor.156

What is troubling about the first two — lack of attribution and distortion of the copyrighted work — is that they closely resemble the moral rights of paternity and integrity, respectively. Whether and to what extent the Copyright Act protects moral rights has been a source of much controversy, especially since 1988, when the United States became a party to the Berne Convention.157 With the Visual Artists Rights Act of 1990, Congress expressly granted a limited set of moral rights in works of fine art158 but otherwise has done little to recognize authors’ interests in paternity and integrity.159 The choice of whether to take any additional steps to

154 See, e.g., Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989) (“Finally, this factor weighs heavily against [the defendant] because she did not acknowledge in her work that she had consulted [the plaintiff’s work] in writing Illusions, although such an acknowledgment does not in itself excuse infringement.”).

155 See Lish v. Harper’s Magazine Found., 807 F. Supp. 1090, 1097 (S.D.N.Y. 1992) (stating that “[f]airness of the treatment or editing of the material is an element of good faith” under the first fair use factor, though ultimately finding that plaintiff “failed to prove that [the copyrighted work] was substantially distorted”).

156 See, e.g., Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006).


159 This job has instead been left to a hodgepodge of existing laws. See S. REP. NO. 100-352, at 9-10 (1988) (accompanying Pub. L. No. 100-568, Berne Convention Implementation Act of 1988) (“However, protection is provided under existing U.S. law for the rights of authors listed in Article 6bis . . . . This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as li-
protect moral rights under U.S. copyright law should be made consciously and carefully — and by Congress, not the courts.\textsuperscript{160}

Put simply, the right of paternity has no place in the fair use analysis. A lack of attribution does not reflect whether the secondary use is transformative or whether it usurps the market for the original, or shed light on any other issue relevant to fair use. Moreover, penalizing the defendant for failing to acknowledge the original author assumes that he or she is entitled to such acknowledgment. The Supreme Court’s decision in \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.} rejected the notion that authors have a right to demand attribution under the Lanham Act for copyrighted works.\textsuperscript{161} While \textit{Dastar} concerned a work that had fallen into the public domain, the same rule has since been applied equally to works still under copyright.\textsuperscript{162} It would contravene at least the spirit of \textit{Dastar} to allow authors to raise the same basic claim — that lack of attribution is a legally cognizable harm supporting a finding of infringement — under the guise of the first fair use factor.

Protecting the author’s right of integrity through the bad faith sub-factor is similarly inappropriate. A work that qualifies as transformative under the first factor is more likely to be a fair use. That a transformed work can often be re-characterized as a “distortion” should not weigh against the defendant. Of course, the fact that the defendant “distorted” or “mischaracterized” the plaintiff’s work may be relevant in the fair use analysis if the focus is on how the defendant altered the earlier work and whether, as a result, the new work serves a different purpose. But using “distortion” and “mischaracterization” as moral descriptions of the defendant’s purpose and conduct should have no place in the fair use analysis.\textsuperscript{163}

\textsuperscript{160} See Leval, \textit{supra} note 7, at 1128-29 (“If we wish to create such [moral] rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of art. These difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.”).

\textsuperscript{161} 539 U.S. 23, 38 (2003).


\textsuperscript{163} See Savage v. Council on Am.-Islamic Relations, Inc., 2008 U.S. Dist. LEXIS 60545, at *11 (N.D. Cal. July 25, 2008) (“Plaintiff tries to conflate ‘motive’ with the purpose and character of the use, which is not permitted by the case law. Rather, even assuming the truth of plaintiff’s allegations about...”)
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The last way in which some courts have considered the defendant’s intent as to use is in determining whether the secondary use is sufficiently transformative. As we have discussed, *Campbell* directed courts to conduct an objective analysis under the first factor: what purpose and character “may reasonably be perceived”? Such an analysis might incorporate the defendant’s stated purpose in making the work, as it will often provide helpful evidence of the actual purpose. It would be a mistake, however, to take the defendant entirely at his or her word. Ultimately, what the defendant intended and what the defendant achieved are two different things, and it is the latter that courts must discover. That is, the defendant’s asserted intent and subjective perception of his or her work will be relevant to the fair use inquiry, but only to the extent such intent is reflected in — can “reasonably be perceived” in — the actual work that the defendant created.

As the bad faith inquiry has become more accepted in the case law, some courts have effectively combined the three categories just discussed — access, permission, and use — to create a kind of super-subfactor that

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164 See Henley v. Devore, 2010 U.S. Dist. LEXIS 67987, at *25-26 (C.D. Cal. 2010) ("[T]he parties dispute whether the parodist’s subjective contemporaneous intent in making the work is relevant to the parody inquiry. The answer is clearly yes, at least as evidence of whether the work actually contains parodic character. In *Campbell*, Justice Kennedy cautioned courts to be wary of post hoc rationalizations of parody, and courts have consistently looked to contemporaneous evidence of defendants’ intent in making the alleged parody.").

165 For an apparent example of conflating stated purpose and actual purpose, see Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006) ("Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch’s ‘Silk Sandals,’ but to employ it in the creation of new information, new aesthetics, new insights and understandings.” (citations omitted)).

166 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 n.17 ("We note in passing that 2 Live Crew need not label their whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).”).

167 This can be seen as the flip side of the conclusion that the subjective perceptions of members of the public who see a defendant’s work are also not relevant to determining whether it is sufficiently parodic and therefore transformative to qualify as a fair use. See Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003) ("We decline to consider Mattel’s survey in assessing whether Forsythe’s work can be reasonably perceived as a parody. Parody is an objectively defined rhetorical device.").
asks whether the defendant “reasonably believed” the secondary use was fair.\(^{168}\) Intent is treated as a balancing test, in which good faith and bad faith may cancel each other out.\(^{169}\) In addition to the many problems we identify above, this approach raises the further possibility of introducing a negligence standard into fair use doctrine. Defendants would have to prove not only that the accused work satisfies the criteria of Section 107 but also that, under the circumstances, a yet-to-be-defined “reasonable person” would have believed the work met these criteria. This would greatly increase the evidentiary burden placed on defendants and, with it, the uncertainty of succeeding on fair use.\(^{170}\)

V. BROADER IMPLICATIONS

A recent empirical study revealed that approximately one-sixth of the fair use opinions issued between 1978 and 2005 considered the issue of bad faith.\(^{171}\) In those cases, courts found that the defendant had acted in bad faith about a quarter of the time, and nearly all findings of bad faith coincided with a finding of no fair use.\(^{172}\) Still, the data proved to be of somewhat limited significance. As the author of the study, Barton Beebe, observed, the bad faith inquiry more than any other subfactor “appears to be susceptible to a basic circularity: did the court find the defendant’s use to be unfair because the defendant’s conduct was improper, or did the court find the defendant’s conduct to be improper because its use was unfair?”\(^{173}\)

The study suggests two important aspects of bad faith in fair use. One is how little is understood about the role that bad faith plays — and should play — in the fair use analysis. The other is that the subfactor has become

\(^{168}\) See, e.g., Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (“This subfactor weighs only slightly in favor of Plaintiffs, as the Court finds that Defendant reasonably believed its use was ultimately fair.”); cf. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1164 n.8 (9th Cir. 2007) (“Unlike the alleged infringers in Video Pipeline and Atari Games, who intentionally misappropriated the copyright owners’ works for the purpose of commercial exploitation, Google is operating a comprehensive search engine that only incidentally indexes infringing websites. This incidental impact does not amount to an abuse of the good faith and fair dealing underpinnings of the fair use doctrine.”).

\(^{169}\) Gulfstream Aerospace Corp. v. Camp Sys’l, Inc., 428 F. Supp. 2d 1369, 1377 n.5 (S.D. Ga. 2006) (“[A]ny bad faith inference that might be drawn is negated by other evidence demonstrating [defendant’s] good faith belief that it was using the manuals appropriately.”).

\(^{170}\) See infra Part V.B.


\(^{172}\) Id.

\(^{173}\) Id.
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a fixture in the law. To the first point, we have tried to demonstrate that the bad faith inquiry is an historical and doctrinal anomaly and that it has no practical or theoretical value in deciding fair use cases. To the second point, we now briefly consider some of the most pressing reasons to eradicate the bad faith inquiry from fair use once and for all, including its effects on the central goals of copyright and the danger it poses to free speech.

A. Bad Faith or Social Value?

As we have seen, fair use plays a critical role in maintaining copyright’s economic bargain between authors and the public.174 By allowing a defendant to make transformative, non-competitive uses of the copyrighted work, fair use follows the constitutional mandate to promote progress while still protecting the core rights of the original author, which in turn maintains the incentive to create. Congress has decided that where a use satisfies the criteria of Section 107, the benefit to the public outweighs the original author’s interests in preventing such uses.

Because society’s interests are at stake, courts have for the most part been careful to evaluate fair use based on the works themselves. After all, the only way to verify that society will benefit from a claimed fair use is by reference to the secondary use and its relationship to the copyrighted work. The actions and intent of either party, beyond what is reflected in the works themselves, are at best tangential to the analysis. Certainly, society might be harmed by the defendant’s bad acts, such as breach of a duty to maintain secrecy or theft of another’s property, but, as we have suggested, these harms are already adequately addressed outside the realm of copyright law.175 Society does not gain in any way by making such conduct subject to scrutiny under the auspices of fair use doctrine.

Instead, the bad faith inquiry threatens to override copyright law’s goal of serving the public interest. The harm caused by a defendant’s bad behavior rarely has anything to do with the social value created by the secondary use. As Professor Nimmer observes, investigative journalism offers an instructive example:

Imagine an undercover reporter who obtains access to a public figure’s private writings under false pretenses — should the socially valuable revelations contained in those writings be lost to the public based on the circumstances of a lie having been told? Presumably, sound public policy counsels against such a result.176

174 See supra Part I.A.
175 See supra Part IV.A.
To ensure that fair use effectively protects this policy interest and others like it, courts must refuse to consider bad faith. A devious and deceptive investigative reporter (or biographer or satirist) may be liable for trespass, invasion of privacy, or some other civil wrong. But such conduct should not be relevant to whether or not that author’s works are deemed a fair use.

B. Increased Uncertainty and Cost

Another way in which bad faith impairs the goals of copyright law is by making fair use less predictable and more costly. Whether a fair use defense will succeed is already notoriously difficult to predict. But such prediction becomes considerably more difficult if the relevant inquiry goes beyond a side-by-side comparison of the two works and consideration of potential market effects. Publishers and other content providers will likely be more reluctant to distribute a work without assurances of the propriety of the author (or of the author’s source, who may be the one who obtained a “purloined manuscript”), whether or not the work otherwise has a strong claim to fair use.

Considering bad faith also raises the costs of litigating fair use. Where the court must consider a party’s actions and state of mind, more discovery will be necessary to litigate fully whether a use is fair. Cases will more often involve messy factual disputes unrelated to the question of infringement. When discovery is complete, there are more likely to be

177 See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 889 (2007) (“From the ex post perspective of the defendant already embroiled in expensive litigation, an adaptable, equitable defense is useful. But for the prospective defendant wondering whether a given act will prove to be infringing, fair use is too ambiguous to provide much ex ante guidance.”).


179 See, e.g., Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1173 n.6 (9th Cir. 2012) (“[Plaintiffs] claim[] that [defendant Maya Magazines] acted in bad faith by failing to: seek permission from them; confirm that the copyrights in the images belonged to Viqueira; and seek any documentation as to ownership. Maya presents evidence, however, that it procured a written copyright assignment from Viqueira, and argues that it had no reason to believe that the known paparazzo did not have rights to the photos.”); Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231,
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genuine issues of material fact, such as the question of how the defendant obtained a copy of the plaintiff’s work or whether the defendant first sought permission, so decreasing the chances of resolving fair use on summary judgment. And because fair use is an affirmative defense, the increased litigation burden will fall disproportionately on defendants, especially in courts that look for proof of a reasonable belief that the use was fair. The effect will be to drive up the cost of discovery and prolong litigation, all while doing nothing to resolve the critical issue: whether the defendant’s work lies outside the proper reach of plaintiff’s copyright.

C. First Amendment Concerns

Finally, it is important to note that accusations of bad faith often arise in disputes over news reporting, critical commentary, and other secondary uses vital to the free flow of information and ideas. The Supreme Court in *Eldred v. Ashcroft* held that fair use, along with the idea/expression dichotomy, serves as one of copyright’s built-in First Amendment protections. After *Eldred*, courts will be unwilling to scrutinize copyright law under the First Amendment except in extraordinary circumstances. This places enormous pressure on fair use to prevent the statutory monopoly of copyright from being used to obstruct free speech.

Keeping bad faith part of the fair use analysis jeopardizes First Amendment protection for public speakers of all kinds. As one court noted in a recent decision finding fair use despite the fact that the defendant news organization obtained the copyrighted work through allegedly surreptitious means, “[t]he robust quality of the First Amendment would be compromised if the news media were confined to authorized sources for its reporting.” And the media are not the only ones affected, as the bad faith inquiry also creates an opening for plaintiffs to try to suppress

1244-45 (N.D. Cal. 1995) (analyzing at length whether defendant’s access to various works was unauthorized).

180 See supra Part IV.C.


182 See, e.g., Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).


184 Id. at 221 (“[W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”); see Golan v. Holder, 132 S. Ct. 873, 889-94 (2012) (declining to apply heightened First Amendment scrutiny to Section 514 of the Uruguay Rounds Agreements Act, in large part because “Section 514 leaves undisturbed the ‘idea/expression’ distinction and the ‘fair use’ defense”).

the speech of those who oppose them on political, religious or other grounds. Even if courts ultimately reject such attempts, the increased uncertainty and cost already noted could be enough to intimidate some defendants to recant rather than risk litigation. Together with the many problems addressed above, this threat to free speech is a further reason to discard bad faith from fair use.

CONCLUSION

The Supreme Court’s footnote in Campbell appeared to invite serious reevaluation of the role of bad faith in the fair use analysis. Having conducted such an examination, we find many reasons to leave behind the bad faith inquiry and no reasons to keep it. It is rooted in a misunderstanding of the “equitable” nature of fair use. It is inconsistent with a traditional analysis of fair use, which centers on the works and not their makers. It tends to confuse fair use with other areas of law like contracts, torts, and criminal law and to introduce new considerations like moral rights without careful inspection. It makes fair use more costly and less predictable for both defendants and plaintiffs and raises concerns about copyright’s built-in First Amendment protections. And, perhaps most important, it does not further and often frustrates the basic goal of the fair use doctrine, and of copyright generally, to increase public access to new, socially valuable works. The time has come for the bad faith inquiry to go.

186 See Savage v. Council on Am.-Islamic Relations, Inc., 2008 U.S. Dist. LEXIS 60545, at *11 (N.D. Cal. July 25, 2008) (“Plaintiff argues that the fair use defense is inapplicable to defendants’ usage of, and comment on, segments of the copyrighted audio work because defendants’ ‘infringement was not done for genuine criticism or comment,’ but instead misrepresented plaintiff’s views with the intention to raise funds for their own political purposes as ‘a foreign agent for international terror’ under the guise of a non-profit, civil rights group.”).


188 See NXIVM Corp. v. Ross Inst., 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring) (“Dr. Ross and his co-defendants quoted from NXIVM’s manual to show that it is the pretentious nonsense of a cult.”).

189 See Pierre N. Leval, California Bar Copyright Lecture (Mar 3. 2008) (on file with authors) (“The Court’s use of the subjunctive — ‘Even if it were’ — strongly suggests that [good faith] is not [central to fair use]. Justice Souter appears to have found a diplomatic way of retracting from the earlier assertion without requiring Justices who joined in both to acknowledge error.”).