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Life in the Fast Lane: Of Presumptions, Defenses, and Burdens

William McGeveran[†]

Some weeks later, reviewing my notes from the 2010 Trademark Scholars' Roundtable (and Rebecca Tushnet's invaluable contemporaneous blogging[1]), I am struck again by the rich and engaging discussion over a wide range of issues. I am also struck by the way we repeatedly circled, but in my opinion never quite pinned down, the related structural mechanisms of presumptions, defenses, and burdens. With all the big ideas flying around the room, there were times when many of us (myself included) talked past one another on these more mundane details of civil procedure—perhaps an inevitable outcome when 20 law professors gather around a table. But as Bob Bone emphasized in his prepared comments, the distribution of burdens and the mechanics of rules, while they come after the major normative decisions, embody those decisions and will determine whether the resulting reform functions as intended. In this very short comment I hope to build on our discussion to clarify the meaning and import of these three concepts, and show how they relate to the range of proposals we considered.

Late in the Roundtable, Eric Goldman aptly summarized one persistent strand of the discussion. He suggested that many of us want to build a "fast lane" for resolution of certain types of trademark cases, akin to the express line at the grocery store for customers with ten or fewer items. Like several of us, he pointed to 47 U.S.C. § 230 (exempting internet intermediaries from most liability arising from user-generated content) as an existing legal model of a reasonably effective fast lane.[2] Courts promptly dismiss cases that fall within the parameters of the

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† Associate Professor, University of Minnesota Law School. Many thanks to the participants in the Second Trademark Scholars' Roundtable at DePaul University College of Law in April 2010, and particularly to organizers Graeme Dinwoodie and Mark Janis, for a remarkably stimulating conference. I received valuable research assistance on this comment from Mikka Gee Conway.

1. Rebecca Tushnet, Second Trademark Scholars Roundtable, Rebecca Tushnet's 43(B)Log (April 16, 2010, 1:10 PM), http://tushnet.blogspot.com/2010/04/second-trademark-scholars-roundtable.html (containing the first of three detailed posts on the Roundtable).

2. Of course, some commentators argue that § 230 immunity is too generous, for normative reasons. *See, e.g.*, Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 Harv. J. L. & Gender 383, 417–19 (2009); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 116–17 & n.377 (2009). That is not my concern here; whatever one's views on the *merits* of the protection conferred by § 230, as a procedural matter it functions as a fast lane.

§ 230 exemption, often on Rule 12(b)(6) motions.[3] A fast lane for trademark law would allow similarly swift disposition of certain cases.

Building on Goldman's analogy, I think there are two salient features of the supermarket express lane that also hold true for trademark doctrine. First, the definition of eligibility for the fast lane must be quite clear. "Ten or fewer items" is a bright-line rule.[4] Like any rule, there will be difficult cases. One can imagine a disagreement over whether a bag of apples counts as one item or several. Even then, a simple heuristic can resolve most such disputes: perhaps an item could be defined as each unit the cashier must scan separately. Without such simplicity, the efficiency of a fast lane is lost in determining who belongs there. (As Goldman noted at the Roundtable, despite the poor drafting of § 230, courts developed a fairly sharp-edged understanding of its boundaries.) I think of this as an "if/then" statement, where both the "if" and the "then" must be clear. *If* you purchase 10 or fewer items, *then* you may check out in this lane. *If* you offer a defined "interactive computer service,"[5] *then* you will not be liable for statements made through that service by others[6] (except under certain defined types of claims, namely criminal law, intellectual property law, or the Electronic Communications Privacy Act[7]). For a trademark fast lane to function properly, it must have similarly clear criteria, both for eligibility and for the resulting outcome.

Second, many shoppers use the slow lanes instead of the fast one. They wish to buy more than 10 items and they accept the longer wait as a consequence. The supermarket manager needs these other lanes to move expeditiously too, and may institute various reforms to speed them up (perhaps new cash registers or better training for workers). If the manager concentrates only on improving the efficiency of the fast lane, other customers are condemned to grocery-store purgatory and may shop elsewhere, or purchase fewer items to speed their checkout. And if everyone starts crowding into the fast lane to escape, it will not remain fast. Some suggestions for reform of trademark law may suffer from a desire to fix every problem with just one tool. Comprehensive reform requires not only development of a fast lane, but also attention to the inefficiencies and inequalities in all the other lanes. These are distinct problems with largely distinct solutions. By combining different mechanisms, however, we can divide cases into different groups and apply different approaches to each one.

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3. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Gibson v. Craigslist, Inc., No. 08 Civ. 7735 (RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 564 F. Supp. 2d 544, 550 (E.D. Va. 2008); DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006); Blumenthal v. Drudge, 992 F. Supp. 44, 52–53 (D.D.C. 1998).
4. This is so even when it is expressed ungrammatically as "10 items or less."
5. *See* 47 U.S.C. § 230(f)(2) for a definition. Courts have since developed this definition so that it can be applied unambiguously in almost all cases, as the cases cited in note 3 demonstrate.
6. *Id.* § 230(c).
7. *Id.* § 230(e).

Earlier in the Roundtable, I offered another (and probably less effective) analogy, comparing this task to service on a law school admissions committee. The committee divides applicants into three piles: admit, reject, and consider. Obviously qualified and obviously unqualified students both present easy cases that require little attention, freeing up the committee's time for more careful consideration of the borderline candidates placed in the middle pile. This "three piles" analogy does add one useful complication to the "fast lane" analogy, because it emphasizes that heuristics can speed consideration of cases in both directions—with shortcuts on one side favoring the markholder and on the other side favoring the alleged infringer. Cases in the middle take longer (but hopefully not *too* long) because we do not use shortcuts favoring either side.[8] This analogy also underscores two conditions under which the system does not work: if it is too difficult to decide in which pile to put an application, or if consideration of the middle pile is excessively burdensome.

Several Roundtable participants, in their own ways, propose comparable sorting of trademark cases. For instance, a number of participants are drawn to the idea of a "materiality" requirement for some trademark cases. Mark Lemley and Mark McKenna recently argued for "anchor[ing] once again to the core case of confusion regarding the actual source of a defendant's product or service, the type of confusion most obviously related to consumer decision making."[9] In those traditional cases (along with ones where consumers believe the markholder guarantees the quality of a defendant's goods and services), they say, courts should continue to presume materiality without requiring proof from a markholder. In a wide range of other cases, however, markholders would need to demonstrate that the alleged consumer confusion is likely to affect consumers' purchasing decisions.[10] These cases would proceed in a manner more akin to false advertising law, where materiality is an element that the plaintiff must prove to prevail. Even in these nontraditional cases, however, courts might sometimes relieve markholders of the duty to prove harm. As Tushnet, another materiality proponent, points out in her forthcoming work, false advertising doctrines have developed over time which presume materiality in certain kinds of cases, such as those involving outright falsity or bad intent.[11] Even though proposals like Lemley and McKenna's and Tushnet's would demand proof of materiality in many more trademark infringement

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8. One further refinement that does not need to clutter the text but should be noted: real litigation involves multiple issues, and we really sort cases one issue at a time. So, suppose a case presents a knotty issue over whether a mark is generic, but the alleged infringer has used an identical mark on identical goods. The case would be routed to the middle pile for genericism, but then might move faster to resolve the subsequent cut-and-dried issues. Once the mark is valid, there is no need for a dozen Methodist bishops to testify individually that they were confused by an identical usage.

9. Mark A. Lemley & Mark P. McKenna, *Irrelevant Confusion*, 62 Stan. L. Rev. 413, 414–15 (2010).

10. *Id*. at 450–52.

11. *See* Rebecca Tushnet, *Running the Gamut From A to B: Federal Trademark and False Advertising Law*, 159 Pa. L. Rev. (forthcoming 2010); *see also* Lemley & McKenna, *supra* note 9, at 453 (mentioning briefly the same possibility of presumptions).

cases than under present doctrine, they still would relieve markholders of this duty in certain categorically defined situations.

Like materiality, other reform proposals also engage in this sorting exercise. Margreth Barrett suggested after the Roundtable that four categories of trademark claims could be reframed as "associational marketing" claims under § 43(a), requiring a broader and more context-sensitive analysis.[12] Proponents of a robust "trademark use" requirement likewise have said that it could serve a "gatekeeper" function, shunting some cases onto a different (and faster) track.[13] And I have argued for defined categorical exemptions from liability for certain unlicensed uses of trademarks.[14]

All these models define certain categories for specialized treatment. But few actually create any fast lanes. A number of them, on closer examination, would improve the functioning of the other lanes instead. Or, returning to the image of the three piles, many of these proposals would move cases from the markholder-friendly pile to the middle pile, where they would receive more searching analysis. Requiring proof of materiality, for instance, adds additional empirical issues that must be resolved. In general, cases where materiality must be proven will require more time and more resources for adjudication, because another complex and fact-intensive question has been added to the mix.[15] If false advertising is the model, materiality inquiries may require competing consumer surveys and a battle of expert witnesses. While the shift to a materiality requirement benefits alleged infringers, it does not do so primarily by making cases more predictable, easier, or cheaper to adjudicate. Rather, it increases careful analysis and judicial involvement in some cases where we now assume facts that point toward infringement.

So, the proposals are similar in their reliance on categorizing and rerouting certain classes of cases for different treatment. But they differ, crucially, in the amount of friction they create in individual cases. While using many of the same civil procedure mechanisms named at

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12. Margreth Barrett, *A Cause of Action for "Passing Off/Associational Marketing*," 1 IP Theory 1, 13–15 (2010) [manuscript at 13-15].
13. *See* Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 Hous. L. Rev. 777, 805 (2004); Uli Widmaier, *Use, Liability, and the Structure of Trademark Law*, 33 Hofstra L. Rev. 603, 621–24 (2004). As several of us have argued elsewhere, the trademark use requirement may not function as a good fast lane because it does not have clear enough eligibility criteria. Instead of a bright-line rule (10 items or fewer), determining whether a use qualifies as non-trademark use often implicates many of the same fact-intensive inquiries explored under the likelihood of confusion test, which are just the ones we are trying to avoid. *See* Graeme B. Dinwoodie & Mark D. Janis, *Confusion Over Use: Contextualism in Trademark Law*, 92 Iowa L. Rev. 1597, 1645 (2007); William McGeveran, *Rethinking Trademark Fair Use*, 94 Iowa L. Rev. 49, 79-80 (2008); Mark P. McKenna, *Trademark Use and the Problem of Source*, 2009 U. Ill. L. Rev. 773, 821-24 (2009).
14. *See* William McGeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. Rev. (forthcoming 2010).
15. Several of us raised this concern at the Roundtable, and Barrett laid it out in her essay afterwards. *See* Barrett, *supra* note 12, at 19–20.

the outset—presumptions, defenses, and burdens—the various proposals assemble these into quite different combinations. I certainly do not advocate choosing between reforms; most of these ideas complement one another. Talking about the same mechanisms in different ways, however, can cause confusion. I want to touch on each of these concepts as they relate to the Roundtable topic: analyzing defensive doctrines in trademark law.

Presumptions infuse all of these proposals. At their simplest, presumptions are shortcuts that replace particularized factual analysis with general situation-based rules. Lawyers use the word in so many contexts, however, that it can become misleading. (Rebuttable, irrebuttable, and bursting-bubble presumptions share the name but function quite differently.) The relevant point for our Roundtable discussion is simpler: as Bone has explained, trademark law already employs many presumptions, which represent classic tradeoffs between administrative costs and error costs.[16] These presumptions reduce administrative costs, but may reduce accuracy as well. Sometimes they effectively determine ultimate liability, but often they resolve only preliminary or intermediate issues. If we are sorting properly, we will devote the most decisionmaking resources to difficult questions that deserve such attention. In easier cases the administrative costs are not worth any marginally increased accuracy. Instead, we can rely on presumptions favoring the side that a court probably (though perhaps not definitely) would favor on that point if it examined the question more closely. In other words, we will use presumptions in the two side piles but not in the middle pile.

Lemley, McKenna, and Tushnet want to discard an existing presumption (materiality) in some defined cases, and move those cases from the markholder-friendly pile to the middle pile. Generally speaking, this will increase administrative costs for those cases, but should also increase precision in results. That greater precision favors unlicensed users. However, in real-world disputes between heavily invested markholders and unlicensed users, administrative costs almost always disadvantage the latter. Even where trademark law clearly allows a use, the mere threat of lengthy, complex, and expensive litigation scares unlicensed users. This is how cease and desist letters achieve their in terrorem power. My project complements theirs, by creating cost-reducing presumptions immediately, moving some cases directly into the pile where presumptions favor the user. In those cases, we would accept less precision to create a fast lane.

Not only are the two reforms consistent, the one can lead to the other. After taking away the presumption of materiality, other presumptions might develop. Some of these new ones probably would favor the alleged infringer. For example, courts applying a materiality requirement to the middle pile may observe over time that markholders can never prove material harm from fleeting glimpses of a brand name in a movie or television program.[17] They might

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16. *See* Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 Va. L. Rev. 2099, 2123–2124 (2004).
17. *See, e.g.*, Caterpillar, Inc. v. Walt Disney Co., 287 F. Supp. 2d 913 (C.D. Ill. 2003); Wham-O, Inc v. Paramount Pictures Corp., 286 F. Supp. 2d. 1254 (N.D. Cal. 2003); *see also* Lemley & McKenna, supra note 9, at 416–22 (suggesting other examples).

then begin to impose a presumption *against* materiality in such cases. This eventually could become robust enough to establish something approaching a categorical liability exemption for filmmakers using brand names. That is the type of fair use presumption I have advocated, and a materiality requirement might be one route to get there (after a lot of cases wound their way through the judiciary). Barrett makes the same point in her new essay, arguing that certain "limitations and defenses" could be applied to the middle-pile cases she groups together as associational marketing, effectively moving them not only to the middle pile but to the pile on the other end of the table.[18] In this way, a defined subset of cases eventually could become entitled to use a fast lane. That said, the primary doctrinal innovation in these proposals is not to create new shortcuts that favor the users of marks, it is to eliminate old shortcuts that favor markholders. They would increase, not reduce, administrative costs for the foreseeable future. A reform agenda that did not address those costs in some other way would be incomplete.

Defenses were, loosely speaking, the topic of the Roundtable. More precisely, however, we convened to discuss defensive doctrines, which might include mechanisms other than formal affirmative defenses.[19] Graeme Dinwoodie recently expanded on this broader understanding of trademark "defenses."[20] He defined them as "rules permitting unauthorized uses of marks even where such uses implicate the affirmative concerns of trademark law."[21] At the Roundtable, our language was not always as careful. At first, for example, some comments (including mine) distinguished "internal" requirements from "external" ones—meaning that the former were integrated in the prima facie infringement case while the latter were not. This distinction, while perhaps useful in some contexts, was not necessarily relevant to the creation of fast lanes. Obviously, formal affirmative defenses are not a defendant's only path to victory, and they need not be the only route for a fast lane. As the Supreme Court summed up a defendant's varied options in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*:

> If a plaintiff succeeds in making out a prima facie case of trademark infringement, including the element of likelihood of consumer confusion, the defendant may offer rebutting evidence to undercut the force of the plaintiff's evidence on this (or any) element, or raise an affirmative defense to bar relief even if the prima facie case is sound, or do both.[22]

If the defendant can use any of these means to prevail quickly and simply, then broadly they can be called defensive doctrines and they can serve as fast lanes.

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18. *See* Barrett, *supra* note 12, at 18–23.
19. For an exemplary list of long-established affirmative defenses, see Fed. R. Civ. P. 8(c)(1) (listing, inter alia, laches, res judicata, and statute of limitations defenses).
20. *See* Graeme B. Dinwoodie, *Lewis & Clark Law School Ninth Distinguished IP Lecture: Developing Defenses in Trademark Law*, 13 Lewis & Clark L. Rev. 99, 144–152 (2009).
21. *Id.* at 100.
22. 543 U.S. 111, 118 (2004).

Modern courts pay relatively little attention to the difference between formal affirmative defenses and other defensive doctrines. The *Federal Rules of Civil Procedure* specify that courts generally should disregard a defendant's failure to label defenses properly in a responsive pleading.[23] Whether one calls a particular doctrine a "defense" (or "external" to the prima facie case) may not matter very much. The term can refer to a formal affirmative defense, but also for our purposes to any doctrine that allows the defendant to prevail notwithstanding the existence of some key indicia of liability. And the most common usage of the word is the least precise of all: a simple denial of the plaintiff's accusation ("I didn't do it") is a "defense" too, though it speaks only to the prima facie case. If bolstered by presumptions, such denials can function as fast lanes.

At times it can be difficult even to classify a defensive doctrine as internal or external in the sense used at the Roundtable. Although the statutory language of § 230 is expressed as an exclusion from potential liability rather than in the form of an independent affirmative defense, there has been some judicial confusion about its precise status.[24] Whether or not it is part of the prima facie case or a formal defense, an argument that a litigant qualifies for § 230 immunity should be seen as a *defensive doctrine*. Defendants can (and do) invoke this argument early in litigation, destroying the case against them. This is a fast lane. The same ambiguity also can be seen in the evolution of defamation law. Traditionally, proving the truth of an allegedly defamatory statement gave rise to an affirmative defense to defamation liability. The falsity of the statement later evolved into a required element of the prima facie case in the large majority of states. In the actual functioning of litigation, however, little changed. Courts still refer to truth informally as a "defense," epitomized by one 2009 state appellate decision which declared, "Because falsity is an essential element of both libel and slander, truth is a perfect defense to a defamation action."[25] The ambiguity (and perhaps even irrelevance) of the formal status of truth as an element or a defense—as "internal" or "external"—demonstrates that this is not the crucial question. Of course, truth is such a fact-intensive issue in defamation cases that it rarely allows for fast-lane disposition, regardless of whether it is an element or a defense. Here, as usual, the defensive doctrine's complexity matters more than its official status under civil procedure.

Burdens, as Bone pointed out in his Roundtable remarks, are fundamental to the design of these decisionmaking structures. Here again, though, we should introduce greater precision. First, in our discussion we often spoke of burdens without specifying their exact

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23. Fed. R. Civ. P. 8(c)(2), 8(e).

24. *See* Eric Goldman, *Ninth Circuit Helpfully Amends* Barnes v. Yahoo *Opinion*, Tech. & Marketing Law Blog (June 22, 2009), http://blog.ericgoldman.org/archives/2009/06/ninth_circuit_h.htm (discussing amendment of opinion in Barnes v. Yahoo! Inc., 570 F.3d 1096 (9th Cir. 2009) that eliminated characterization of § 230 immunity as an affirmative defense).

25. Cmty. Newspaper Holdings, Inc. v. King, 682 S.E.2d 346, 348 (Ga. Ct. App. 2009); *see also, e.g.*, Ladd v. Uecker, 780 N.W.2d 216, 219 (Wis. Ct. App. 2010).

nature. There are many kinds of burdens, including burdens of pleading, production, and persuasion. In the normal civil case, all these burdens are assigned to the plaintiff, who must plead the necessary elements of the prima facie case, produce evidence in support of those elements, and persuade a finder of fact that a preponderance of the evidence supports the defendant's liability. Courts depart from this default rule in special situations, most famously in employment discrimination,[26] but also in circumstances such as the application of res ipsa loquitur.[27]

More important, participants often took it for granted that all burdens are—well, burdensome. In practice, this is not always so. As noted above, burdens of pleading are seldom dispositive in modern litigation.[28] Burdens of production can impose difficulties if evidence is especially difficult to procure, but generally they just assign the party who must make the first move to back up a claim. Burdens of persuasion—proof—have the most bite. Even here, however, the allocation of the burden matters only in close cases. When the body of evidence points significantly one way or the other, that side prevails, no matter which one carries the burden. In other words, burdens of persuasion serve as tiebreakers. If a case is not already in equipoise, they do not have much weight. The cases where burdens of persuasion matter are precisely the close ones that belong in the middle pile. By contrast, the cases eligible for the fast lane should be those where the outcome was fairly predictable from the beginning, far from equipoise. Applying presumptions to those cases, as discussed above, further lightens any burden of persuasion.

Formal burdens of pleading, persuasion, and proof do not necessarily align with *actual* burdens of cost, difficulty, or possible defeat. At times, discussion at the Roundtable focused on relieving fair uses (or other beneficial third-party uses of a mark) from formal burdens rather than from actual ones. The plaintiff carries all the formal burdens to demonstrate likelihood of confusion, but no sensible defendant sits idly on the sidelines hoping to win by the weakness of the plaintiff's evidence. Defendants naturally must hire their own experts, commission their own surveys, and brief their own interpretation of the convoluted multifactor

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26. *See* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (discussing burden-shifting structure of federal employment discrimination litigation); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (same).

27. *See* Restatement (Second) of Torts § 328D (1965) (explaining allocation of burdens in situations where a harm is the sort normally presumed to derive from negligence).

28. The Supreme Court's recent significant changes in pleading standards and introduction of "plausibility" requirements may make burdens of pleading more important for plaintiffs. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); *see also* Rebecca Tushnet, *Unfair Competition and Uncommon Sense*, 95 Iowa L. Rev. Bull. 17, 18-20 (2009), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Tushnet.pdf (analyzing possible impact of *Twombly* and *Iqbal* in trademark litigation). It is not yet clear how these developments will affect *defendants* as opposed to plaintiffs. Moreover, as noted below, in straightforward cases it should be easy to plead the existence of fair use, even under the newer standard.

test.[29] In reality, they escape only the feather-light pleading burden on the confusion point (and many defendants choose to insert boilerplate denials of confusion in their answers anyway). They still carry actual burdens of production and persuasion. The same would be true of any element of the prima facie case placing a burden on the plaintiff to produce evidence that proves a complex factual claim—it imposes an actual, if not a formal, burden on the defendant as well. Demanding that the plaintiff prove materiality, for example, necessarily demands that the defendant rebut that proof, probably with its own evidence. I do nott mean to say that formal burdens are unimportant, only that they tell just part of the story.

Some court decisions contribute to a misguided focus on formal rather than actual burdens. *KP Permanent* has been read, appropriately, as a case about allocating burdens of proof, but some observers forget that the Court there analyzed those burdens as a means of statutory construction (to determine whether the affirmative defense of descriptive use under § 33(b)(4) was vitiated by the existence of a likelihood of confusion).[30] The main thrust of the decision was to interpret the text, not to rescue defendants from formal burdens.[31] In *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, the Third Circuit overreacted to *KP Permanent* when it strictly confined the nominative use doctrine to a role as an affirmative defense.[32] This rigid structure may have distributed formal burdens fairly, but in reality it limited the defendant's options and increased actual burdens. A defendant with a strong nominative use claim would be forced nonetheless to refute evidence of confusion under the multifactor test first, before any consideration of the defense. Judge Kozinski (the original creator of the nominative use test) presented a much more sensible structure for burdens in nominative use in a very recent Ninth Circuit decision, *Toyota Motor Sales, U.S.A., Inc. v. Tabari*.[33] In *Tabari*, the Ninth Circuit maintained its precedent that makes nominative use a substitute confusion test (that is, a defensive doctrine but not a true formal defense). As to burdens, the court held:

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29. *See, e.g.*, Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008); McGeveran, *supra* note 13, at 70–71 (discussing the length and cost of *Wal-Mart* litigation).
30. The Court wisely concluded that the design of the statute contemplated a distinct inquiry into descriptiveness, however the confusion inquiry came out. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. 543 U.S. 111, 112 (2004) ("[I]t would make no sense to give the defendant a defense of showing affirmatively that the plaintiff cannot succeed in proving some element (like confusion); all the defendant needs to do is to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point."). As noted above, however, the Court also emphasized that the defendant has multiple options for prevailing, and the affirmative defense under § 33(b)(4) is only one of them. *See supra* note 22 and accompanying text.
31. Of course, the Ninth Circuit's previous practice of requiring defendants to disprove likelihood of confusion did increase their actual burdens significantly. Yet the Supreme Court's decision changed the situation less than might have been expected, because defendants continue to face a significant actual burden—as shown by the Ninth Circuit's decision on remand. *See* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 408 F.3d 596, 607–09 (9th Cir. 2005).
32. 425 F.3d 211 (3d. Cir. 2005).
33. 610 F.3d 1171 (9th Cir. 2010).

> A defendant seeking to assert nominative fair use as a defense need only show that it used the mark to refer to the trademarked good, as the Tabaris undoubtedly have here. The burden then reverts to the plaintiff to show a likelihood of confusion.[34]

The defendant must raise the issue (essentially a burden of pleading), but then the formal burdens shift. More importantly, Judge Kozinski's structure spares the defendant the actual burden of mounting a full confusion defense. Certainly, this qualifies as a fast lane.

In sum, effective reform of defensive doctrines in trademark law will require precise thinking about the related concepts of presumptions, defenses, and burdens. That reform should include fast lanes. In my view, some identifiable categories of easy cases should whiz through the courthouse at top speed. Uses in those categories ought to enjoy a presumption against liability. Where such presumptions arise, we could say that a "defense" exists, though it need not share all the characteristics of a formal affirmative defense. The resulting doctrinal structure may assign formal burdens in a variety of ways, but it creates effective fast lanes only if actual burdens on the defendant remain minimal.[35]

For the cases that do not qualify for a fast lane, we will have to turn to other approaches. Some of these other reforms might be called "defenses" too, and they may use presumptions and burdens as tools. Where they increase actual burdens, however, these other ideas do not create fast lanes. The resulting administrative costs created by these reforms will make some fair uses legal in theory but hazardous in reality. That may be unavoidable for complex disputes that require fact-intensive analysis, but trademark fair use ought to strive for fast-lane treatment in categories where the damage to free speech predictably outweighs the threat to trademarks' economic functions.

Dialogue at the Roundtable helped force these important issues of procedural design, and their accompanying normative consequences, to the surface. As we continue to debate the best ways to improve trademark law, and particularly its defensive doctrines, I know I will pay greater attention to the complexity of presumptions, defenses, and burdens. ■

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34. *Id*. at 1183.
35. I describe these ideas in detail in a forthcoming article. *See* McGeveran, *supra* note 14.