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## Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment

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# Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment

Ned Snow\*

*Issues of fair use in copyright cases are today decided as pure issues of law on summary judgment. But it was not always so. For two centuries, juries routinely decided these issues in actions at law. The law recognized that fair use issues were highly subjective and thereby inherently factual — unfit for summary disposition by a judge. Today, however, all this has been forgotten. Judges are characterizing factual issues as purely legal so that fair use may be decided at summary judgment. Even while judges acknowledge that reasonable minds may disagree on these issues, they characterize the issues as legal, preventing them from ever reaching a jury. This practice contravenes a history of fair use that precedes and informs the Bill of Rights, suggesting that judges are now violating the Seventh Amendment right to a jury. And by removing the jury from the fair use analysis, judges have weakened the substantive doctrine, ultimately diluting the strength of fair use expression. That dilution is impinging on fair users' First Amendment right of free speech. This Article examines why courts have changed their characterization of fair use from issue of fact to issue of law and the constitutional conflicts that have resulted from that change. It proposes a return to the original conception of fair use: a fact-intensive inquiry that preserves the constitutional rights of free speech and the civil jury.*

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## INTRODUCTION

For nearly two centuries, judges at common law refrained from deciding issues of fair use in copyright cases, reserving these issues for the jury.<sup>1</sup> This was because issues of fair use raise subjective questions over which reasonable minds often disagree; the subjectivity of fair use placed these questions within the exclusive province of the jury.<sup>2</sup> Thus, it was once well established that issues of fair use were factual and that these issues should rarely, if ever, be decided on summary judgment.<sup>3</sup>

Today, fair use is nearly always decided on summary judgment.<sup>4</sup> Modern judges treat issues of fair use as pure issues of law, so that even where reasonable minds may disagree on whether a use is fair, the judge decides the issue rather than the jury.<sup>5</sup> The very same issues

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<sup>1</sup> *E.g.*, *Sayre v. Moore*, (1785) 102 Eng. Rep. 139 n.(b) (K.B.) 140 (Lord Mansfield) (“In all these [copyright cases where defendant had altered underlying work] the question of fact to come before a jury is, Whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”); *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679 (K.B.) 680 (Lord Ellenborough) (“I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff’s book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter, — or taken colourable, merely with a view to steal the copy-right of the plaintiff?”); *Emerson v. Davies*, 8 F. Cas. 615, 623-24 (D. Mass. 1845) (No. 4436) (Story, J.) (characterizing inquiry into whether use of copyrighted material is permissible as “question of fact to come to a jury”); *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (reversing district court’s grant of summary judgment for defendant on grounds that “the four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury”).

<sup>2</sup> *See Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1247 (9th Cir. 1999) (“Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations.”).

<sup>3</sup> *See, e.g.*, *Arnstein v. Porter*, 154 F.2d 464, 472-74 (2d Cir. 1946) (rejecting idea of deciding copyright issues on summary judgment).

<sup>4</sup> *See, e.g.*, *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008) (“[I]t is well established that a court can resolve the issue of fair use on a motion for summary judgment.”); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) (affirming grant of summary judgment for copyright holder on issue of fair use); *BMG Music v. Gonzalez*, 430 F.3d 888, 889-92 (7th Cir. 2005) (same); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 135 (2d Cir. 1998) (same).

<sup>5</sup> *See L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 993, 997 (9th Cir. 1998) (interpreting case law as “rejecting argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently,” while affirming grant of summary judgment for

which were once well established as factual for a jury are today purely legal for a judge.<sup>6</sup> The contradiction could not be more blatant. Curiously, nothing has been said to justify this change. Over the course of a few years, judges inadvertently adopted the present approach of judicial disposition on summary judgment over the historical approach of jury deliberation at trial.<sup>7</sup> The change occurred subtly and silently, going unnoticed both in court and in the academy.<sup>8</sup> Neither reasoned analysis nor thoughtful discussion accompanied the change.<sup>9</sup> This is troubling, especially because issues of fair use affect speech rights: fair use represents constitutionally protected speech.<sup>10</sup> Moreover, the history of courts sending fair use issues to the jury predates and informs the Bill of Rights, implying that the Seventh Amendment mandates jury consideration.<sup>11</sup> In short, judges today are routinely bypassing the jury to the detriment of the fair use doctrine, the defendants' right of free speech, and the litigants' right to a civil jury.

This Article calls for a return to the former classification of fair use issues as inherently factual for jury consideration. Part I briefly explains the fair use doctrine. Part II examines the question of whether fair use issues should be classified as factual or legal. It concludes that the nature of these issues demands their factual

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copyright holder on issue of fair use); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 267 (S.D.N.Y. 1997) (“[W]here the district court has ‘facts sufficient to evaluate each of the statutory factors,’ it may conclude as a matter of law that the challenged use is not a protected fair use.”), *aff'd*, 150 F.3d 132 (2d Cir. 1998); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (“It is appropriate to dispose of the issue of fair use on a motion for summary judgment because the Court has ‘found facts sufficient to evaluate each of the statutory factors.’”).

<sup>6</sup> See discussion *infra* Part III (discussing historical change in characterization of fair use from fact to law).

<sup>7</sup> See discussion *infra* Part III.A (examining initial case law that gave rise to changed characterization).

<sup>8</sup> One scholar did allude to the change: a two-sentence passing reference arises in a leading copyright treatise. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.10[B][4], at 12-193 & n.115 (2009) (“[T]he older view is that the issue whether similarity between two works is fair use presented a triable issue of fact. Under the modern view . . . the court may resolve the fair use defense as a matter of law on summary judgment.”).

<sup>9</sup> See discussion *infra* Part III.A.

<sup>10</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as “free speech safeguard[]” and “First Amendment accommodation[]”); see also discussion *infra* Part IV.B.

<sup>11</sup> See discussion *infra* Parts III.A, IV.A.1 (examining history of jury considering issues relating to fair use and implications of that history under Seventh Amendment).

classification. Part III recounts the history of juries deciding fair use issues at common law and the shift to judges deciding those issues. Part IV examines the constitutional implications of deciding these issues on summary judgment, questioning whether judges are denying litigants their Seventh Amendment right to a jury and whether judges are threatening defendants' First Amendment right of speech. The Article concludes that judges should refrain from deciding fair use issues on summary judgment.

#### I. GENERAL BACKGROUND OF FAIR USE

Copyright law provides an author of expression a right to exclude others from using that expression.<sup>12</sup> This general right of exclusion is not without limits, however.<sup>13</sup> The right ceases where the use in question is deemed to be fair.<sup>14</sup> Authors, or copyright holders,<sup>15</sup> may control all uses of their expression that are not fair uses.<sup>16</sup> Determining whether a use is fair may, therefore, be dispositive to a copyright holder's claim of copyright infringement.

As a limit on copyright, the doctrine of fair use protects those persons who use another's expression without permission but in a fair manner.<sup>17</sup> Deciding what is fair can be difficult and complex, often turning on circumstances unique to each case.<sup>18</sup> For this reason, there is no precise definition or test for fair use that will fit all situations.<sup>19</sup> Fair use is instead intended to contemplate all factual circumstances that could possibly justify a particular use of the expression.<sup>20</sup>

In the absence of a precise definition or test for fair use, the law sets forth general guidelines that may be considered in determining fairness.<sup>21</sup> Specifically, the Federal Copyright Act lists four factors to consider in determining whether a use is fair.<sup>22</sup> These factors are

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<sup>12</sup> See 17 U.S.C. § 106 (2006).

<sup>13</sup> See *id.* § 107.

<sup>14</sup> See *id.*

<sup>15</sup> Any distinction between authors and copyright holders is irrelevant for the purpose of this Article.

<sup>16</sup> See *id.* § 107.

<sup>17</sup> See *id.*

<sup>18</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (“The endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the [fair use] statute.”).

<sup>19</sup> *Id.*

<sup>20</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>21</sup> See *id.*

<sup>22</sup> See 17 U.S.C. § 107. The Act does not specify who is to make this determination

discretionary and non-exclusive: any of the factors might not be weighed, and other factors not listed in the Act may be weighed, in determining fairness.<sup>23</sup> In practice, though, usually only the four factors are considered.<sup>24</sup> The first factor examines the purpose and character of a defendant's use, which includes an examination into whether the use has transformed the original expression and whether the use serves a noncommercial purpose.<sup>25</sup> The second factor examines the nature of the copyrighted work, where works of a more creative nature tend against a finding of fairness and works of a more factual nature tend toward a finding of fairness.<sup>26</sup> The third factor examines the amount and substantiality of the work that the defendant has used.<sup>27</sup> The fourth factor examines the effect that the defendant's use has on the value of, or a potential market for, the copyrighted work.<sup>28</sup>

Applying these factors to any given factual situation produces inferences that speak to the extent that a defendant's use may be fair. For instance, applying the first factor to the situation where a person copies excerpts from an author's book for the purpose of critically reviewing the book yields a possible inference that the copying has transformed the copied expression: the copier's critical analysis potentially casts the copied expression in a new light and thereby potentially transforms the copied expression.<sup>29</sup> Such an inference that arises in the four-factor analysis must be weighed and viewed in the context of the other inferences that arise in that analysis.<sup>30</sup> Depending on the circumstances of a particular use, individual inferences may weigh more or less heavily than other inferences.<sup>31</sup> In the example of copying excerpts from a book for a critical review, although that circumstance might yield an inference that the use is transformative,

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— judge or jury.

<sup>23</sup> *Id.*; see, e.g., *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997) (recognizing public interest in receiving newsworthy event as possible factor in applying fair use); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (same).

<sup>24</sup> See I ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS* § 1:25, at 1-99 (3d ed. 2007); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990).

<sup>25</sup> 17 U.S.C. § 107; *Campbell*, 510 U.S. at 578-79.

<sup>26</sup> 17 U.S.C. § 107; *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

<sup>27</sup> 17 U.S.C. § 107.

<sup>28</sup> *Id.*; *Campbell*, 510 U.S. at 590.

<sup>29</sup> See 17 U.S.C. § 107 (listing criticism as example of fair use); *Campbell*, 510 U.S. at 591-92 (noting likely fairness of critical review).

<sup>30</sup> *Campbell*, 510 U.S. at 577-78.

<sup>31</sup> *Id.* at 590-91.

that inference might not weigh much in the overall analysis if, for instance, further inferences arose under the third and fourth factors that the copied portion constituted the most substantial portion of the book and that consumers purchased the critical review as a substitute for purchasing the original work.<sup>32</sup> The weight of each inference must be determined in relation to the other inferences drawn in the four-factor analysis. Traditionally, the inferences that arise under the first and fourth factors — the degree to which the use is transformative and the degree to which the use suggests a negative commercial effect — have weighed heaviest in the analysis.<sup>33</sup> Nevertheless, all inferences must ultimately be weighed together to produce an affirmative or negative answer to the question of fairness.<sup>34</sup>

## II. FAIR USE ON SUMMARY JUDGMENT

Today disputes over fair use are nearly always decided at summary judgment.<sup>35</sup> In prior years, they were always decided at trial.<sup>36</sup> The reason for this difference is that courts have changed their characterization of the inferences in the four-factor analysis — once factual, they are now purely legal.<sup>37</sup> Under Federal Rule of Civil

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<sup>32</sup> Cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-66 (1985) (rejecting argument that reporting newsworthy expression constituted fair use on grounds that defendant used “heart” of copyrighted work).

<sup>33</sup> See *Campbell*, 510 U.S. at 579 (explaining importance of first factor); *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (acknowledging importance of fourth factor).

<sup>34</sup> See *Campbell*, 510 U.S. at 578.

<sup>35</sup> See Electronic Order on Motion for Summary Judgment at 4 n.1, *Capitol Records, Inc. v. Alaujan*, No. 1:03-CV-11661-NG (D. Mass. July 14, 2009) (“[I]t is clear that a strikingly large number of courts decide fair use at summary judgment.”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 554 (2008) (noting empirical trend demonstrating “remarkable increase in the prevalence of fair use summary judgment opinions that began in the mid-1990s and has continued to the present”).

<sup>36</sup> E.g., cases cited *infra* note 190; see 3 NIMMER & NIMMER, *supra* note 8, § 12.10[B][4], at 12-193.

<sup>37</sup> See discussion *infra* Part III. Compare *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury.”), *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (“[T]he issue of fair use is one of fact.”), and *Eisenschiml v. Fawcette Publ’ns, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957) (“[T]he issue of fair use is a question of fact.”), with *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800-01 (9th Cir. 2003) (describing first-factor inquiry into transformation as legal issue), *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141-46 (2d Cir. 1998) (treating issues in four-factor analysis as legal, appropriate for summary judgment), and *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (pronouncing inferences in four-factor analysis as being “legal in nature”).



Procedure 56 (“Rule 56”), summary judgment is appropriate only if no genuine issue of material fact exists; issues of law, by contrast, may be resolved on summary judgment regardless of their complexity.<sup>38</sup> Despite Rule 56’s teaching on the appropriateness (and inappropriateness) of treating issues of law and issues of fact on summary judgment, Rule 56 never sets forth any criteria for classifying whether an issue is legal or factual.<sup>39</sup> The classification is left to the common law.

In the context of fair use, whether issues should be classified as legal or factual is an important question because the inferences in the four-factor analysis often raise issues that are close calls. Reasonable minds often disagree over which of competing inferences in the four-factor analysis should prevail and how much weight any particular inference merits.<sup>40</sup> In that analysis, choosing between competing inferences and assigning a weight to those inferences requires judgments over which reasonable minds often differ — judgments that are close calls.<sup>41</sup> And whereas issues of fact that raise close calls cannot be decided on summary judgment, issues of law that raise close calls can.<sup>42</sup> So when judges once classified the inferences in the four-factor analysis as factual, summary judgment was inappropriate under Rule 56 if reasonable minds could disagree on the question of fairness.<sup>43</sup> When judges changed their classification of the inferences from factual to

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<sup>38</sup> See FED. R. CIV. P. 56(c); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 410-12 (3d ed. 1998) (“The fact that difficult questions of law exist or that the parties differ on the legal conclusions to be drawn from the facts is not in and of itself a ground for denying summary judgment.”).

<sup>39</sup> See FED. R. CIV. P. 56.

<sup>40</sup> See generally Leval, *supra* note 24, at 1106-07 (observing great disparity among opinions on whether fair use applies).

<sup>41</sup> Cf. Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 402 (2005) (“The substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can’t manage in other areas.”); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496 (2007) (“[S]cholars generally agree that it is now virtually impossible to predict the outcome of fair use cases.”); R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 426-27 (2005) (“[T]here is little more that can be usefully said about the division between fair and unfair uses in practice: The ‘know it when you see it’ nature of the analytic approach in this context simply precludes such observations.”).

<sup>42</sup> See 10A WRIGHT, MILLER & KANE, *supra* note 38, § 2725, at 410-12.

<sup>43</sup> See, e.g., *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury.”).

legal, summary judgment became appropriate under Rule 56, regardless of whether reasonable minds would disagree.<sup>44</sup>

As discussed below in Part III, this change in the classification of the inferences arose without deliberation or reasoned analysis.<sup>45</sup> Neither courts nor scholars have ever provided any basis for changing the classification of these inferences from factual to legal.<sup>46</sup> The change simply occurred. Overnight and without consideration, courts discarded the centuries-old method for deciding fair use — the jury — as they relabeled factual inferences to be conclusions of law.<sup>47</sup>

The change in characterization raises the question of whether courts were correct to institute that change. This Part answers that question, examining whether the inferences in the fair use analysis should be classified as legal for a judge or factual for a jury. Section A provides the context of those inferences as they relate to a defendant's use of a plaintiff's work, briefly explaining the distinction between historical facts and the inferences that arise from those facts. After that explanation, Section B articulates arguments for classifying those inferences as factual.<sup>48</sup> It then addresses counterarguments purporting that the inferences should be classified as legal.<sup>49</sup> This Part ultimately concludes that these inferences must be deemed factual for jury consideration.

#### A. Historical Facts Underlying Inferences

Two types of issues exist in the fair use analysis.<sup>50</sup> The first type concerns what actually happened (e.g., what use the defendant actually made of the work).<sup>51</sup> The second type concerns whether what happened suggests fairness (e.g., whether the use should be considered transformative).<sup>52</sup> The first type of issues are indisputably fact issues for a jury.<sup>53</sup> The second type represent issues that require

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<sup>44</sup> See, e.g., *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008) (“[I]t is well established that a court can resolve the issue of fair use on a motion for summary judgment.”).

<sup>45</sup> See discussion *infra* Part III.

<sup>46</sup> See discussion *infra* Part III.

<sup>47</sup> See discussion *infra* Part III.

<sup>48</sup> See discussion *infra* Part II.B.1.

<sup>49</sup> See discussion *infra* Part II.B.2.

<sup>50</sup> See, e.g., *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 183-84 (D. Mass. 2007) (drawing distinction between historical facts and interpretation of those facts).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See 3 NIMMER & NIMMER, *supra* note 8, § 12.10[A], at 12-185.

the application of a legal principle to a factual circumstance.<sup>54</sup> It is these second type of issues over which disagreement lies regarding whether they should be characterized as factual for a jury or legal for a judge.<sup>55</sup> Nevertheless, a brief explanation of the first type of issues provides context for a discussion of the second type of issues.

As a general matter in every area of law, any issue is factual that examines whether an action or condition has happened or existed.<sup>56</sup> Such issues are often referred to as issues of historical fact in that they represent questions regarding what happened in the past.<sup>57</sup> In this sense, a historical fact is objectively verifiable.<sup>58</sup> Did the defendant pull the trigger? What speed was the car going? What day did the defendant enter onto the property? With sufficient evidence, reasonable minds will reach only one answer to these issues of historical fact.

Issues of historical fact arise in the fair use analysis. Consider the proposition that a defendant copied the plaintiff's work, that the defendant used the work in a certain manner, or that the copyrighted work appeals to a specific market of consumers — all these propositions represent historical facts.<sup>59</sup> Issues surrounding these verifiable propositions are well recognized as factual in nature, i.e., historical issues of fact.<sup>60</sup> In fair use, historical facts consist of the use that a defendant has made of the copyrighted work as well as the content, origin, and history of the copyrighted work.<sup>61</sup> Because

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<sup>54</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“Fair use is a mixed question of law and fact.”).

<sup>55</sup> Compare *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“[T]he four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury”), with *Fitzgerald*, 491 F. Supp. 2d at 183-84 (“As to fair use, the parties’ disagreements are over the interpretation of facts. As these are questions of law, I analyze them below.”).

<sup>56</sup> See *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995) (describing historical fact as “a recital of external events”); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924) (“The primary and popular meaning of the word ‘fact’ is something which has happened or existed.”); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1869-70 (1966) (describing question of fact as arising “[w]hen there is a dispute as to what acts or events have actually occurred, or what conditions have actually existed”).

<sup>57</sup> See *Thompson*, 516 U.S. at 109-10.

<sup>58</sup> See Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 668 (1949).

<sup>59</sup> See *Fitzgerald*, 491 F. Supp. 2d at 183-84 (characterizing “material historical facts” in fair use analysis as “the origin, history, content, and defendant’s use of plaintiff’s [copyrighted work]”).

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

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historical facts represent objectively verifiable conditions or events, a factfinder may draw only one conclusion as to the factual meaning of evidence with a sufficient amount of evidence. So if a defendant admits to copying a plaintiff's work and identifies the copyrighted work that belongs to the plaintiff, the factfinder may draw only one conclusion as to the historical fact that the defendant has copied the plaintiff's work. Likewise, if a plaintiff and defendant agree on how the defendant used the copy, the factfinder may draw only one conclusion as to this historical fact. Thus, courts uniformly recognize that certain issues in the fair use inquiry are factual in nature — issues of historical fact.

If historical facts are ever disputed, they represent questions for the jury.<sup>62</sup> But in fair use disputes, historical facts are not usually disputed.<sup>63</sup> Defendants either admit or assume *arguendo* that they have used the plaintiff's work, and there is rarely dispute over the history, content, or origin of the copyrighted work. But the inferences that are drawn from these historical facts are greatly disputed. These inferences arise in the four-factor analysis of fair use.<sup>64</sup> Specifically, the historical facts facilitate inferences as to the character and purpose of the use, including the extent to which the use is transformative; the nature of the copyrighted work (i.e., factual or creative); the significance of the amount that the defendant has used; the extent to which that amount constitutes a substantial portion of the work; and the potential market impact of the use.<sup>65</sup> Whereas historical facts are not usually disputed, the inferences arising from those facts are often disputed.

### B. Issues in the Four-Factor Analysis

As stated above, applying the four factors to the historical facts yields inferences in the fair use analysis. Another way of stating this is

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<sup>62</sup> See 3 NIMMER, *supra* note 8, § 12.10[A], at 12-185.

<sup>63</sup> See, e.g., *Fitzgerald*, 491 F. Supp. 2d at 183-84.

<sup>64</sup> See, e.g., discussion *supra* Part I (explaining inferences in four-factor analysis).

<sup>65</sup> The last inference — market impact — may be formed from the historical fact of the history of a copyrighted work, which history would include its past performance in the commercial market and the effect of the defendant's use on that performance. Although litigants may dispute the effect that has occurred, more often it would seem they dispute the potential effect of the use. See, e.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1317 (11th Cir. 2008) (observing that copyright holder conceded that defendant's use did not cause harmful effect on market, but that question remained as to whether widespread use like defendant's use would result in adverse harm to potential market). The potential use of the effect is not a historical fact, but rather an inference in the four-factor analysis.

that in applying the legal principles outlined in the statutory factors to the historical facts, inferences arise that affect the ultimate issue of whether the defendant's use is fair.<sup>66</sup> Choosing between competing inferences, and their weight in the overall analysis, raises issues that must be resolved. The appropriateness of resolving these issues on summary judgment depends on whether they represent genuine issues of material fact, or alternatively, issues of law.<sup>67</sup> It is therefore necessary to determine whether the inferences to be drawn from the historical facts are factual or legal in the four-factor analysis.

The classification of issues that arise from applying a legal principle to a historical fact is uncertain in the law as a general matter. If a choice must be made among inferences that arise in applying law to fact, that choice may be viewed as raising either a legal issue, a factual issue, or an issue of mixed law and fact.<sup>68</sup> In some instances, that choice among inferences is referred to as an issue of fact for a jury; in other instances as an issue of law for a judge; and in still other instances as a mixed issue of law and fact for jury or judge depending on the area of law.<sup>69</sup> For example, consider the application of the legal principle of reasonableness to factual circumstances in different contexts: in the context of negligence, it is a question of fact as to

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<sup>66</sup> See 17 U.S.C. § 107 (2006); *Compaq Computer Corp. v. Ergonome, Inc.*, 387 F.3d 403, 411 (5th Cir. 2004) ("The evidence presented at trial and the reasonable inferences therefrom, when viewed through the lens of the statutory fair use factors, support the jury's fair use finding.").

<sup>67</sup> See FED. R. CIV. P. 56(c).

<sup>68</sup> See *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961) (Friendly, J.) ("The controversy whether application of established legal standards to raw evidentiary material is a question of law or of fact is an old one."); 9 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2550, at 640 (1981) (opining that it is "possible only to indicate the trend of some of the main subjects of controversy or difficulty" when contemplating whether interpretation of evidence falls to judge or jury); Weiner, *supra* note 56, at 1872 (pointing out "constant difficulty" that courts encounter in allocating decision-making between judge and jury). Compare James B. Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147, 169-70 (1890) (declaring that mixed questions of law and fact constitute matters of fact for jury consideration), with OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 97-99 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (arguing that experienced judges should determine issues that require application of law to fact where facts under consideration arise frequently). Compare 10A WRIGHT, MILLER & KANE, *supra* note 38, § 2729, at 533-36 (outlining cases discussing factual nature of issues applying legal principle of reasonableness to factual situation), and *id.* § 2730 (discussing actions where application of law to fact in order to determine whether defendant has particular state of mind is factual issue for jury), with *id.* § 2730.1 (discussing disparity in whether issues treated as law or fact for summary judgment purposes in context of contract interpretation).

<sup>69</sup> See sources cited *supra* note 68.

whether a defendant has acted reasonably where his action (or failure to act) has injured a plaintiff;<sup>70</sup> in the context of the Fourth Amendment, it is a question of law as to whether police officers have acted reasonably where their actions resulted in a seizure;<sup>71</sup> in the context of contract, it is a mixed question of law and fact as to whether a defendant insurer has acted reasonably where it has refused to pay a claim.<sup>72</sup>

The reason for the variance in classifying such issues is that the fact-law distinction ultimately depends on which institution — judge or jury — is best able to decide the issue.<sup>73</sup> In some areas of law, a judge is better situated to resolve the issue; in other areas, the jury is better suited to do so.<sup>74</sup> The institution that is better able to apply law to fact in a particular area of law determines whether the issues in that area of law are deemed factual or legal.<sup>75</sup> Thus, classification as factual or legal turns entirely on whether the judge or the jury is the better institution for resolving the type of issue.<sup>76</sup>

At this point it is well to pause and point out that lawyers generally do not think of the fact-law distinction as turning on which institution

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<sup>70</sup> See W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 32, at 237 (5th ed. 1984) (“The question [of reasonableness in negligence] usually is said to be one of fact.”).

<sup>71</sup> See *Scott v. Harris*, 550 U.S. 372, 381 & n.8 (2007) (rejecting idea that question of reasonableness in Fourth Amendment context is question of fact).

<sup>72</sup> See, e.g., *Ross v. Auto Club Grp.*, 748 N.W.2d 552, 555 (Mich. 2008) (“The trial court’s decision about whether the insurer acted reasonably involves a mixed question of law and fact.”).

<sup>73</sup> See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (“[W]hen an issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”); *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (“[T]he decision to label an issue a ‘question of law,’ a ‘question of fact,’ or a ‘mixed question of law and fact’ is sometimes as much a matter of allocation as it is of analysis.”).

<sup>74</sup> See 10A-B WRIGHT, MILLER & KANE, *supra* note 38, §§ 2729–33 (outlining different types of actions in which courts may or may not entertain summary judgment owing to which institution, judge or jury, is charged with applying law to fact).

<sup>75</sup> See *Markman*, 517 U.S. at 388-90; *Miller*, 474 U.S. at 114.

<sup>76</sup> In some areas of law, courts disagree over which institution is best at resolving a particular issue. For instance, in the probate context, courts disagree over the issue of whether a defendant’s influence over a testator is undue. Some courts view this as an issue of fact for the jury, others as an issue of law for the judge. Compare *Bermke v. Sec. First Nat’l Bank of Sheboygan*, 179 N.W.2d 881, 884 (Wis. 1970) (rejecting argument that jury should consider undue influence), with *In re Estate of Opsahl*, 448 N.W.2d 96, 100 (Minn. Ct. App. 1989) (explaining that undue influence is question of fact for jury).

— judge or jury — is better able to resolve the issue at hand.<sup>77</sup> In fact, it seems a truism that whether the judge or the jury decides an issue depends on whether that issue is legal or factual — not the other way around.<sup>78</sup> Nevertheless, in the context of issues that arise in applying legal principles to historical facts, courts and scholars alike recognize that the preference for judge or jury is the basis for the classification as legal or factual.<sup>79</sup> For instance, judges are thought to be a superior institution to jurors in construing written instruments: a judge is trained in meanings of words more so than ordinary citizens.<sup>80</sup> Accordingly, contract issues surrounding the interpretation of particular words are construed as legal.<sup>81</sup> On the other hand, a jury is thought to be a superior institution to a judge in understanding how a reasonable person would act in everyday life because the jury comprises more life experiences than does the judge.<sup>82</sup> Accordingly, issues that arise in applying the legal principle of reasonableness to specific facts in a negligence suit are construed as factual.<sup>83</sup> The same can be said of conversion. The issue of whether possession is wrongful requires life experiences to formulate a judgment of wrongfulness, and collectively, the jury has more life experiences than does the judge: the

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<sup>77</sup> See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 1.7, at 7 (3d ed. 1996); Thayer, *supra* note 68, at 147.

<sup>78</sup> See Thayer, *supra* note 68, at 147.

<sup>79</sup> See *Markman*, 517 U.S. at 384, 388-90 (comparing interpretive skills of judge and jury in analyzing which institution should decide claim-construction issues of patent law); DAN B. DOBBS, THE LAW OF TORTS § 148, at 354-55 (2000) [hereinafter TORTS]; KEETON ET AL., *supra* note 70, § 32, at 237; LILLY, *supra* note 77, § 1.6, at 7; 10A-B WRIGHT, MILLER & KANE, *supra* note 38, §§ 2729-33; Bohlen, *supra* note 56, at 116; Weiner, *supra* note 56, at 1876 (“[I]t is meaningless to assign the task in a specific case to judge or jury simply by use of the law and fact jargon, as courts have done. A far preferable solution would be to . . . deal with it as such, not on the basis of terminology, but on the basis of policy.”).

<sup>80</sup> See *Markman*, 517 U.S. at 388 (“The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis.”).

<sup>81</sup> See, e.g., *Elec. Cable Compounds, Inc. v. Town of Seymour*, 897 A.2d 146, 150 (Conn. App. Ct. 2006) (“[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.”). Where it is necessary to look outside the contractual language to determine the parties’ intent, the issue becomes one of fact for a jury. See *id.*

<sup>82</sup> See 10A WRIGHT, MILLER & KANE, *supra* note 38, § 2729, at 533 (noting particular deference that courts accord jury in deciding issue of reasonableness in negligence actions “in light of its supposedly unique competence in applying the reasonable person standard to a given fact situation”).

<sup>83</sup> See *id.*

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issue of wrongful possession in a conversion suit is therefore classified as factual for the jury.<sup>84</sup>

It thus follows that because the issues arising in the four-factor analysis of fair use represent issues that require the application of legal principles to historical facts, those issues should be regarded as either legal or factual based on which institution — judge or jury — is best able to resolve them. The sections below examine arguments for both institutions. Section 1 examines the arguments for the jury, and section 2 examines those for the judge. Both sections ultimately conclude that the jury is the better institution for resolving these issues.

### 1. Issues as Factual Matters for Jury

This section explains why the jury should decide the issues in the four-factor analysis, thereby implying the factual classification of those issues. The section sets forth three reasons: the first and chief reason is that the characteristic of plurality among jurors is preferable to the singularity of the judge in determining whether a use is fair; the second is that the Seventh Amendment mandates these issues be resolved by a jury; and the third is that the public appears to prefer the jury to the judge.

#### a. Jury Plurality

Issues of fair use should lie with the jury for the simple reason that a jury comprises a plurality of individuals. The characteristic of plurality is paramount in deciding fair use issues because of the nature of those issues. As this section discusses, those issues require discretionary judgment that is best exercised by an institution with a plurality of life experiences.

Because fair use is a flexible doctrine, lacking a precise definition, it is an inherently vague and indeterminate doctrine.<sup>85</sup> The broad

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<sup>84</sup> See, e.g., *McClendon v. DeVoll* (*In re DeVoll*), 266 B.R. 81, 96 n.18 (Bankr. N.D. Tex. 2001) (reciting definition of conversion given to jury as “the unlawful or wrongful exercise of the rights of possession, dominion, ownership or control by one person over the property of another”); *Tarrant v. Capstone Oil & Gas Co.*, 178 P.3d 866, 871 (Okla. Civ. App. 2007) (recounting that trial court, in requiring jury to determine whether facts constituted unlawful conversion, defined conversion for jury as “any distinct act of dominion *wrongfully* exerted over another’s personal property . . .”) (emphasis added); 90 C.J.S. *Trover & Conversion* § 115 (2010) (“[T]he question of whether the facts adduced in evidence establish an unlawful conversion is usually a question to be determined by the jury.”).

<sup>85</sup> See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1149 (2007) (recognizing that certainty in rules of fair use would cost flexibility of its application);



language that describes both the underlying legal standard of fairness and its characteristics (e.g., transformative and substantial) requires that the institution charged with applying these legal principles to the historical facts exercise a good deal of discretionary judgment.<sup>86</sup> Stated another way, the indeterminacy of fair use requires that the judge or juror who draws the fair use inferences inject her own view of what *should* be considered fair.<sup>87</sup> The inquiry becomes a normative question of characterization, where the criteria employed to reach the correct characterization consists of flexible, broad terms.<sup>88</sup> Should the defendant's painting of the plaintiff's photograph be considered transformative?<sup>89</sup> Should the amount that the defendant used be considered substantial? These and other inquiries in the fair use analysis require the decisionmaker to exercise discretionary judgment and opinion.<sup>90</sup>

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Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1604 (1982) (“[T]he ambiguity of the fair use doctrine and its statutory formulation obscure the underlying issues and make consistency and predictability difficult to achieve.”); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 338-50 (2002) (“[T]he question whether individuals are liable for copyright infringement when they make unauthorized uses of copyrighted works has no clear answer.”).

<sup>86</sup> See generally Leval, *supra* note 24, at 1105-07 (noting vagueness of fair use doctrine resulting in individualized judgments).

<sup>87</sup> See Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 UC DAVIS L. REV. 477, 526-27 (2007) (“What constitutes a transformative use is potentially highly subjective.”); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, BYU L. REV. 1201, 1252 (2005) (“[D]rawing the line between transformative and non-transformative uses is laden with subjectivity.”).

<sup>88</sup> One evidentiary scholar has observed this phenomenon as a general matter in applying legal principles to historical facts:

In these cases involving a broadly stated legal rule, the jury's application of law to fact involves a *characterization* of the [historical] facts in the light of the jury's collective experience and its interpretation of the indeterminate language that constitutes the legal standard. In a sense, the jury is giving the legal principles involved the necessary contextual precision to resolve the case before them.

LILLY, *supra* note 77, § 1.7, at 8.

<sup>89</sup> See Complaint for Declaratory Judgment at 11, *Fairey v. Associated Press*, No. 1:09-CV-01123-AKH (S.D.N.Y. Feb. 9, 2009) (alleging that *Hope* painting of then-Senator Obama transforms Associated Press photograph of same image).

<sup>90</sup> Depending on the historical facts of a case, at least some of the inferences in the four-factor analysis usually turn on discretionary judgment and opinion. Of course not every instance of applying legal principle to historical fact in the four-factor analysis will yield an issue that is vague and indeterminate. Applying the legal principle of commerciality to the factual situation where a defendant has sold copied

The decisionmaker's discretionary judgment and opinion will depend on the decisionmaker's social values, and social values vary as greatly across society as do life experiences.<sup>91</sup> Consider a defendant who creates a sculpture that replicates a plaintiff's copyrighted photograph. Life experiences dictate whether a person recognizes social value in the sculpted expression independent of the copyrighted photograph: perhaps for those whose life experiences teach them the significance of details and symbols, the sculpture begets a meaning distinct from the copyrighted photograph; perhaps for those whose life experiences teach them the principle that reward comes only by independent work, the sculpture begets the same meaning of the photograph.<sup>92</sup> Accordingly, the choice among competing inferences in the fair use analysis depends upon the life experiences of the decisionmaker. Life experiences affect social values, social values affect discretionary judgments, and discretionary judgments affect fair use inferences.<sup>93</sup> In short, the indeterminate nature of fair use requires judgments that turn on individual social values and life experiences.

This insight suggests that a jury would better draw fair use inferences than would a judge.<sup>94</sup> Presumably, those inferences should reflect as near a consensus of values and opinions across society, for the ultimate judgment of fairness is accorded the respect and deference of the entire society.<sup>95</sup> The disparity of values and opinions

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expression for profit in a retail store certainly does not result in a choice of competing inferences with respect to the legal principle of commerciality: only one reasonable inference may be drawn, i.e., that the defendant has made a commercial use. Some factual circumstances give rise to inferences that most (if not all) reasonable persons would draw under the governing legal principles. In those factual situations the application of law to fact would appear to be straightforward.

<sup>91</sup> See generally DOBBS, TORTS, *supra* note 79, § 18, at 33-34 (“[Juries] bring their own knowledge of ‘social facts’ to bear on the case.”).

<sup>92</sup> See, e.g., *Rogers v. Koons*, 960 F.2d 301, 304-05, 309-10 (2d Cir. 1992) (rejecting view that purpose-and-character-of-use factor (transformation) suggested fairness where defendant had created sculpture of puppies based on copyrighted picture of puppies on postcard).

<sup>93</sup> Cf. 1 JOHN BOUVIER, A LAW DICTIONARY 636 (4th ed. 1853) (defining “common law” as “that which derives its force and authority from the universal consent and immemorial practice of the people”).

<sup>94</sup> Cf. 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 15.2, at 351-52 (2d ed. 1986) (discussing fact-finding process of jury and noting room for consideration of policy to choose between equally indemonstrable generalizations); Bohlen, *supra* note 56, at 113 (observing that mixed questions of law and fact regarding whether defendant's conduct was reasonable in negligence context raise social value judgments of normative nature).

<sup>95</sup> In *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946), the Second Circuit suggested a similar reason for jury consideration of copyright issues:

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in society is most likely to be reflected in a jury with its several members than in a judge.<sup>96</sup> Together, members of a jury represent a greater breadth of unique life experiences than does a judge. Moreover, any one juror's opinion may not prevail without adequate consideration of all other opinions — the host of life experiences collectively producing a single opinion on fairness. If an opinion is extreme in the view of the collective body, the jury divorces it, stripping it of influence in its ultimate collective opinion. By contrast, the judge need not reach a collective consensus as he derives values and opinions from only his single set of life experiences. If his opinions are extreme when compared to those of society, they nevertheless remain reasonable to him. Hence, the diversity of life experiences among several jurors, coupled with the process of collectively reaching a consensus, is more likely to represent a mainstream view of society's diverse cultural norms and social values than is the set of personal life experiences of any single judge. If a judge resolves fair use issues as a matter of law on summary judgment, one person's life experiences control the relevant cultural standard of fairness; if a jury resolves those issues at trial, a plurality of life experience controls that standard, and such a plurality more likely reflects the views of society.<sup>97</sup> A jury's plurality view better captures the correct standard for fairness than a judge's singular view.

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The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff. Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine.

<sup>96</sup> See generally DOBBS, TORTS, *supra* note 79, § 18, at 33-34.

<sup>97</sup> The Supreme Court's comment in *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664-65 (1873), is instructive on this point:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

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... [W]hen the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

Other areas of law further suggest the superiority of the jury over the judge at deciding issues involving discretionary judgments that turn on value and norm assessments.<sup>98</sup> Consider the issue of whether a defendant breached his duty of care in negligence: the jury determines whether the defendant's conduct is reasonable, or in other words, whether the defendant should have acted differently.<sup>99</sup> Or consider the issue of whether a defendant converted another's property: the jury determines whether the defendant's possession was wrongful.<sup>100</sup> Or consider the issue of whether a defendant acted in good faith: the jury determines whether the defendant's thoughts were appropriate when he committed an act.<sup>101</sup> Jurors routinely resolve issues that require discretionary judgment based on social values and cultural norms.<sup>102</sup> Fair use should not be any different.

An example of the problems that arise where a judge, rather than a jury, decides the issue of fair use arises in the case of *Clean Flicks of Colorado v. Soderbergh*.<sup>103</sup> There, the defendants edited content of movies that consumers found objectionable, deleting incidents of sex, nudity, profanity, and violence, in order to produce — from the defendants' viewpoint — a more socially acceptable version of the movies.<sup>104</sup> To edit the content, the defendants made an edited copy of an original authorized copy, and then they bundled both the original copy and the edited copy together for sale to the consumer.<sup>105</sup> The copyright holders sued for infringement; the defendants argued fair use.<sup>106</sup> On summary judgment, Judge Richard Matsch ruled for the plaintiffs despite the defendants' argument that factual disputes required a jury trial.<sup>107</sup> On the issue of transformation, Judge Matsch found there to be “nothing transformative about the edited copies”

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<sup>98</sup> See DOBBS, TORTS, *supra* note 79, § 148, at 355 (“Because part of the jury's role is to make normative decisions or value judgments, courts do not normally grant summary judgment on negligence issues, even if the facts are undisputed.”).

<sup>99</sup> *Id.* § 148, at 354-55; Bohlen, *supra* note 56, at 113 (describing controlling question for jury in deciding issue of reasonableness in negligence case as “not what is, but what ought to be”).

<sup>100</sup> See sources cited *supra* note 84.

<sup>101</sup> Weiner, *supra* note 56, at 1871; *e.g.*, Galbreath v. Scott, 433 So. 2d 454, 457 (Ala. 1983) (identifying question of whether expenditures were made in good faith as question of fact).

<sup>102</sup> See *supra* notes 84, 99, 101.

<sup>103</sup> *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

<sup>104</sup> *Id.* at 1238.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1237, 1239.

<sup>107</sup> *Id.* at 1237-38.

that the defendants had created.<sup>108</sup> For Judge Matsch, the defendants' use was equivalent to creating a verbatim copy of the entire movie and then deleting only a few random blips in that copy.<sup>109</sup>

Judge Matsch's life experiences apparently fell short of teaching him the reasonableness of the inference that the defendants' use was transformative.<sup>110</sup> It appears reasonable that by deleting objectionable content, the defendants had created something new — a more socially desirable version. For a juror whose life experiences include those of a parent who protects his children from morally offensive content, the defendant's use may have transformed the original expression; the use would have permitted children to view movies that their parents would not have otherwise allowed them to view.<sup>111</sup> Judge Matsch,

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<sup>108</sup> *Id.* at 1241.

<sup>109</sup> *See id.*

<sup>110</sup> One can only speculate as to which life experiences may have influenced Judge Matsch's conception of whether the use was transformative. Prior to his appointment to the bench by President Nixon, Judge Matsch served as a federal prosecutor, a city attorney, and a member of the U.S. Army in its counter-intelligence unit in Korea. 1 ALMANAC OF THE FEDERAL JUDICIARY 11-13 (2009) [hereinafter ALMANAC]. One newspaper has noted that Judge Matsch's upbringing was strict: his parents expected him to work two hours in the family store each day following school, and after the store work, his mother held daily homework sessions at the kitchen table. *See* Virginia Culver, *Trial Judge Mixes Seriousness and Wit*, DENVER POST, Apr. 15, 1997, at A-01. These experiences could have shaped Judge Matsch's view of life so that he adopted the following principle: legal and proper conduct must rigidly adhere to a governing rule. This principle Judge Matsch lives. He runs a tight courtroom, starting court at precisely 9:00 a.m., entering the room at 8:59 a.m. *See* Patrick E. Cole, *Don't Mess With Richard Matsch*, TIME, May 26, 1997, at 35. No one is allowed in after he enters. *Id.* He has been described as an intolerant curmudgeon with quirky rules. *See* 1 ALMANAC, *supra*, Tenth Circuit, at 13. He keeps in shape by running every day — for the past several years. *See* Culver, *supra*, at A-01. He eats alone at law conventions to avoid any potential conflict of interest. Cole, *supra*, at 35; Culver, *supra*, at A-01.

Judge Matsch's analysis on the fair use issue of transformation is consistent with his apparent view that proper conduct requires rigid adherence to rules. Rigid application of the Supreme Court's definition of transformation — as something that “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message” — suggests that the defendant's use of the movies lacked any degree of transformation, for although by presenting a more socially acceptable version of the original work the defendants' use suggested a further purpose, different character, and new message, that use did not *add* anything to the original work because it only *deleted* content — so reasoned Judge Matsch. *See Clean Flicks*, 433 F. Supp. 2d at 1241 (relying on *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). Rigid rule application — a principle in opposition to fair use and one that Judge Matsch experiences, lives, and applies — blinded Judge Matsch from seeing the reasonableness of a contrary inference.

<sup>111</sup> *See Clean Flicks*, 433 F. Supp. 2d at 1240 (labeling as “inconsequential” argument that parents value defendants' editing of content because use allows families

however, failed to comprehend that deleting certain content could ever transform a work because of his rigid application of the Supreme Court's definition of a transformative work — namely, a work is transformative if it “adds something new” to the original work; Judge Matsch reasoned that by *deleting* content the defendants had failed to add something new to the original work.<sup>112</sup> He failed to appreciate the view that the defendants had exercised valuable judgment in deciding which portions to delete, judgment that distinguishes their use from arbitrary content deletion.<sup>113</sup> From his standpoint, content editing was not even minimally transformative.<sup>114</sup> From a juror's standpoint, the use may well have been entirely reasonable.<sup>115</sup>

An implication of this basis for choosing jury over judge — jury plurality — is worth noting. The weight of each inference in the fair

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to watch movies together that they otherwise could not).

<sup>112</sup> *Id.* at 1241 (relying on *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). By Judge Matsch's reasoning, then, deleting one word from a sentence would neither transform the expressional content nor communicate a different meaning. “This sentence is *not* false” would be no different from “This sentence is false.”

<sup>113</sup> The value of deleting only blips from a movie lies not in the quantum of deleted content, but rather in the judgment to appreciate which blips to delete so as to make the expression more socially acceptable while preserving the underlying idea and theme.

<sup>114</sup> Another case illustrating the danger of relying on judicial views of reasonableness is *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). There, the defendant created a sculpture of puppies based on a postcard picture of puppies in which the plaintiff held a copyright. *Id.* at 304-05. The defendant argued that the purpose of the sculpture was to comment on the commonplace of life, which would suggest fairness. *Id.* at 309-10. Both the trial and appellate courts, however, concluded that no reasonable jury would view the first factor of fair use, which speaks to the element of transformation, as favoring fairness, ultimately finding infringement. *Rogers v. Koons*, 751 F. Supp. 474, 479-80 (S.D.N.Y. 1990), *aff'd*, 960 F.2d 301, 310-12 (2d Cir. 1992). Yet a picture on a postcard and a sculpture of the same picture seem transformative from the fact that the form of the expression has changed. Further, the distinction between a common postcard and an expensive sculpture, which sold for over a hundred thousand dollars, suggests a distinction in meaning, i.e., transformation. It therefore seems entirely possible that a reasonable jury could have considered the defendant's use as transformative, suggesting fairness.

<sup>115</sup> In addition to the first factor, the fourth factor — market impact — Judge Matsch held as not favoring fair use. *Clean Flicks*, 433 F. Supp. 2d at 1242. He reached this conclusion on the basis that the studios were targeting an audience that was distinct from the one Clean Flicks was targeting. *Id.* This reasoning is curious. That the studios were withholding their expression from a sort of audience suggests that a flaw existed in the market for the expression — indeed a complete market failure — which fact usually suggests a finding of fairness, especially in view of the fact that Clean Flicks's use provided the studios market value for the copies used. *See generally* Gordon, *supra* note 85, at 1615, 1618 (concluding that fair use is appropriate where market failure exists, especially where harm to copyright holder is small).

use analysis should also be construed as a factual matter for jury consideration.<sup>116</sup> Factor weight determines the degree of importance of each inference in the ultimate decision of whether a use is fair. Like the inference itself, the importance of the inference is subject to discretionary judgment. That discretionary nature of the issue raises a normative question: how important *ought* this inference be in the overall analysis? The answer turns on discretionary judgment and opinion, which are formed by life experiences. Consequently, the institution with greater life experiences is more likely to reflect society's view of factor weight. The jury, with its plurality of life experiences, is thus preferable to the judge in deciding issues related to how to weigh each inference in the analysis.

*b. Seventh Amendment*

The Seventh Amendment provides that “the right of trial by jury shall be preserved.”<sup>117</sup> The Supreme Court has interpreted this Amendment to mandate a civil jury today only if at the time of the Seventh Amendment, a civil jury resolved disputes over similar rights existing at common law.<sup>118</sup> At the time of the Seventh Amendment, courts recognized that issues of fair use were definitional to the common-law right of copyright, and so courts reserved these issues for the jury.<sup>119</sup> Part III.A below discusses this history, and it recounts that in the late twentieth century, when judges began deciding these issues as a matter of law, they departed from the original practice of sending the issues to the jury.<sup>120</sup> Hence, to preserve the right of trial by jury as it existed in 1791, judges must recognize the historical mandate of the Seventh Amendment that juries decide fair use issues. And by

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<sup>116</sup> See WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:60 (2009) [hereinafter COPYRIGHT] (“The trier of fact hears all evidence, makes factual determinations about the credibility and weight to be given to that evidence, weighs all four factors in light of those factual findings, and comes up with a judgment based on applying the law to the facts found.”); see, e.g., *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997) (“Our own viewing of the episode would incline us to weight the third factor less strongly toward the defendants than did Judge Martin, but we are not the fact-finders . . .”).

<sup>117</sup> U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

<sup>118</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999).

<sup>119</sup> See discussion *infra* Parts III.A, IV.A.1.

<sup>120</sup> See discussion *infra* Part III.A (observing that fair use existed as principle that was definitional to legal right of copyright in 1769, implying its eligibility for jury consideration).

requiring that the jury decide these issues, the Seventh Amendment requires them to be considered issues of fact.

Moreover, by requiring the right of trial by jury to be preserved, the Seventh Amendment appears to articulate a preference for juries where uncertainty exists as to whether judge or jury should decide an issue.<sup>121</sup> Preservation of a right requires that in situations where it is unclear whether the right applies, the right should apply.<sup>122</sup> That is, preservation requires that uncertainty favor application. Hence, the right of trial by jury shall be preserved only if that right is presumed in cases where it is unclear which institution should decide an issue.<sup>123</sup> Preservation implies presumption. The Seventh Amendment, therefore, intimates a preference for jury over judge where ambiguity surrounds which institution should decide an issue. Even assuming that it were uncertain whether juries or judges decided issues of fair use in 1791, the Constitution mandates that that uncertainty favor juries.

*c. Public Preference*

A final reason for preferring jury to judge is that the public seems to prefer the jury in fair use cases. Public preference is likely in favor of a jury in fair use because a juror, unlike a lawyer or judge, represents the ordinary person off the street.<sup>124</sup> As in other areas of tort law, it seems that the public would prefer one of its own — a layperson — to make the subjective determination of whether a member of the public, in attempting to create something new, has appropriated expression of another. Judges' continuous treatment of such issues creates a potential for rigidity and bias that is oblivious to the human element

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<sup>121</sup> See U.S. CONST. amend. VII; cf. Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 400 (1995) (noting presumption in favor of juries that Seventh Amendment creates in context of examining issue of whether juries should assess damages).

<sup>122</sup> See, e.g., *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (noting that usual discretion of judges to determine whether to try legal or equitable causes first is "very narrowly limited" because of constitutional right to jury trial, such that "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims").

<sup>123</sup> Cf. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 148-60 (2007) (contrasting summary procedures of 1791 to present-day summary judgment and concluding that present-day summary judgment is unconstitutional).

<sup>124</sup> Cf. KEETON ET AL., *supra* note 70, § 37, at 237 (explaining that normative judgment of reasonableness in negligence law "is to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man in the street rather than by lawyers").



of the conduct at issue.<sup>125</sup> Such rigidity and bias carries harsh consequences in the form of statutory damages that are punitive-like in nature.<sup>126</sup> Unsuccessful attempts at fair use become very costly for members of the public, so the public preference for a jury would seem strong.<sup>127</sup> The jury serves as a sort of shock absorber to cushion the impact of copyright's unforgiving and severe nature.<sup>128</sup> The judge represents justice where the public prefers understanding.

## 2. Issues as Legal Matters for Judge

This section considers arguments in favor of construing the issues in the four-factor analysis as legal in nature for a judge to decide. Three general arguments are considered: first, that judges are especially qualified to decide these issues because of their experience in deciding policy matters; second, that judges would provide consistency and certainty in the law; and third, that jurors are especially ill qualified because of both their likely partiality toward defendants and their general inexperience dealing with the complexities of fair use.

### a. Policy Implications

Fair use issues often raise policy considerations, and a role of judges is to consider the policy implications of their decisions.<sup>129</sup> In fair use,

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<sup>125</sup> Cf. Bohlen, *supra* note 56, at 116 (explaining reason that juries determine standard of reasonableness in negligence actions is because of “the public’s desire to have its conduct judged by the layman . . . rather than by the more sophisticated and expert judgment of the trained lawyer, whose judicial experience may have given him a biased point of view”).

<sup>126</sup> See 17 U.S.C. § 504(c) (2006) (contemplating penalty for each act of infringement from anywhere between \$750 to \$30,000, and up to \$150,000 if willful); 17 U.S.C. § 504 (Historical and Statutory Notes) (“[B]y establishing a realistic floor for liability, the provision preserves its intended deterrent effect.”); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (“[A]wards of statutory damages serve . . . punitive purposes.”).

<sup>127</sup> Cf. KEETON ET AL., *supra* note 70, § 37, at 237 (citing this reason as basis for jury determination in negligence context).

<sup>128</sup> See *id.* (“[T]he jury serves as a shock-absorber to cushion the impact of the law.”). Some uses must be deemed fair, although they do not fit nicely into the statutory four-factor analysis. See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1903 (2007) (arguing that zone of personal use is uncontroversially noninfringing — such as downloading programs on TiVo and forwarding email — and that these uses do not fit well within statutory fair use analysis). The jury, it would seem, is the mechanism that provides the necessary zone of safety for such fair uses that do not fit nicely into the four-factor analysis.

<sup>129</sup> See Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 948-49 (2009) (observing that social policy should affect determinations that

policy questions arise regarding whether a finding of fairness will promote further creative expression.<sup>130</sup> The policies underlying copyright — providing incentives to original authors and fostering creativity that builds on prior expression — must be balanced in reaching a determination of fairness.<sup>131</sup> Because judges routinely consider policy implications of their rulings, and because the inferences in the four-factor analysis contemplate policy, it might be argued that judges are better equipped than juries to draw those inferences.

This argument is questionable. As an initial matter, it is unclear that judges are inherently better at deciding policy than are jurors.<sup>132</sup> As between citizens and judges, the democratic system of government values the popular opinion of its citizens (i.e., through the legislature) over the opinion of its judges when social policy decisions are necessary.<sup>133</sup> Although judges may consider policy matters more often than citizens, this fact does not imply that judges are better at deciding policy matters: ordinary citizens may enjoy a perspective on a policy issue that a judge lacks.

Yet even assuming that judges are better than juries at contemplating the policy implications of a fair use decision, policy implications are secondary to the central consideration in determining fairness — a constitutional mandate to protect fair use as speech under the First Amendment. The central consideration in the fair use analysis is whether the use should be protected as speech.<sup>134</sup> In some circumstances, the act of repeating another's expression should be

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judges make); cf. Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1160 (2003) (arguing that inferences should be classified as legal if they raise questions relating to likely actions of persons made aware of litigation outcome).

<sup>130</sup> See William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 667-68 (1993) (noting “fundamental public policies at stake” in determining fair use).

<sup>131</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (explaining that policy underlying copyright is to provide incentives for authors to create and disseminate ideas).

<sup>132</sup> Cf. *McCoy v. Thorn*, 451 F. Supp. 351, 352 (W.D. La. 1978) (“Independent policy determination by a court violates the principle, embodied in the Constitution and proclaimed in the Declaration of Independence, that a political sovereign derives its power solely from the people.”).

<sup>133</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (recognizing that courts must defer to legislative view where legislature has spoken, and where legislature has not spoken, Court must defer to agency's view because of agency's “greater familiarity with the ever-changing facts and circumstances”).

<sup>134</sup> See *Eldred*, 537 U.S. at 219, 221 (describing fair use as “free speech safeguard[]” and “First Amendment accommodation[]”).

protected as its own act of speech, and fair use is the doctrine that allows for an identification of those circumstances.<sup>135</sup> Fair use subsumes speech interests that may restrain copyright's ability to suppress a defendant from repeating copyrighted expression.<sup>136</sup> If the fair user has a speech interest in repeating copyrighted expression, fair use is the doctrine through which she may realize that interest.<sup>137</sup> To be sure, fair use represents a speech-protective doctrine.<sup>138</sup>

Because fair use is a speech-protective doctrine, the jury should determine whether a use is fair.<sup>139</sup> The jury is better suited than the judge to identify the speech value underlying fair use expression because the ability to identify speech values turns on the ability to identify social values and cultural norms of society;<sup>140</sup> it does not turn on the ability to assess policy implications of particular expression.<sup>141</sup>

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<sup>135</sup> See *id.*; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165-66 (1998) (arguing that copying another person's expression constitutes speech); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2433-34, 2466-70 (1998) (arguing for speech procedural protections to apply to fair use expression).

<sup>136</sup> See *Eldred*, 537 U.S. at 219, 221; *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) ("The First Amendment adds nothing to the fair use defense."); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) ("First Amendment concerns in copyright cases are subsumed within the fair use inquiry.").

<sup>137</sup> See *Chi. Bd.*, 354 F.3d at 631 ("The First Amendment adds nothing to the fair use defense."); *Elvis*, 349 F.3d at 626 ("First Amendment concerns in copyright cases are subsumed within the fair use inquiry.").

<sup>138</sup> See *Eldred*, 537 U.S. at 219, 221.

<sup>139</sup> *Cf. Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring and dissenting) ("It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.").

<sup>140</sup> The role of cultural norms and social values in speech theory and doctrine is pervasive. The marketplace-of-ideas theory reflects the social value that society has placed on truth. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating marketplace-of-ideas speech theory as "best test of truth"). The speech theory of human dignity represents the social values that society places on personhood. See 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.5 (2010) (outlining human dignity theory of free speech). The speech theory of democratic self-governance represents the social value that society places on a form of government. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (explaining democratic self-governance theory of free speech). Similarly, exceptions to an absolute speech protective doctrine reflect cultural norms as to the types of expression that merit protection (e.g., fighting words, obscenity, false defamation).

<sup>141</sup> Leaving the decision with judges to assess whether a defendant's use should be

Consider expression in another speech context — indecency.<sup>142</sup> Protecting a particular indecent expression may reflect bad policy if that particular expression will likely result in undesirable effects: showing an adult movie might attract persons who are more likely to engage in criminal activity.<sup>143</sup> Yet this policy implication is irrelevant in determining whether the *particular* indecent expression merits protection as speech.<sup>144</sup> The particular indecent expression merits protection regardless of its negative policy implication. Its protected status derives from its value as speech, which value is based on social values and cultural norms.<sup>145</sup> Social values and cultural norms distinguish indecent expression from obscene expression — the former protected and the latter unprotected. Tellingly, the institution that the law entrusts to draw this indecent-obscene distinction is the jury: the jury identifies whether expression is protected as indecent or unprotected as obscene.<sup>146</sup> Thus, the jury is better able to identify the cultural norms and social values that speak to the presence or absence of value in such expression.<sup>147</sup>

Just like the distinction between obscene and indecent expression, in copyright the distinction between an infringing use and a fair use

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protected as speech would place the government in control of a fundamental cultural institution for exchanging ideas — the institution of criticism and comment of another's ideas. Such an outcome the law disfavors. See *Hammer v. Ashcroft*, 570 F.3d 798, 806 (7th Cir. 2009) (Easterbrook, J.) (“[T]he government may not pass speech restrictions in an effort to preserve its own notions of valued American culture.”). Judges deciding whether to protect expression based on policy considerations would seem to represent the government acting as “the great censor and director of which thoughts are good for us.” See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985).

<sup>142</sup> See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by the First Amendment.”).

<sup>143</sup> See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (recognizing reasonableness of city ordinance restricting adult movie theater locations based on, in relevant part, intent to prevent crime).

<sup>144</sup> The fact that policy considerations are irrelevant in deciding whether a *particular* expression should be protected as indecent does not imply that policy considerations cannot affect the time, place, or manner of protection generally extended to indecent speech. See *Renton*, 475 U.S. at 47, 54 (permitting zoning regulation of adult theaters based on their “secondary effects,” as permissible time, place, or manner restriction).

<sup>145</sup> See generally *Miller v. California*, 413 U.S. 15, 30 (1973) (looking to social values and cultural standards of lay jurors to determine whether expression constitutes unprotected obscenity or mere indecency).

<sup>146</sup> See *Smith v. United States*, 431 U.S. 291, 300-01 (1977) (requiring jury to determine community standards for judging whether expression merits speech protection in obscenity context); *Miller*, 413 U.S. at 30.

<sup>147</sup> See sources cited *supra* note 146.

turns on whether the use has value as speech.<sup>148</sup> And like indecent speech, the speech value of fair use expression is determined by social values and cultural norms.<sup>149</sup> With its broader array of life experiences, the jury includes the views of several jurors, reflecting social values and cultural norms of society better than the singular nature of a judge's views — in the contexts of both indecent and fair use speech.<sup>150</sup>

Thus, the fact that a judge may, and a jury may not, recognize policy implications of inferences in the four-factor analysis should not be the basis for choosing between judge and jury. That a judge is best able to assess the policy implications of providing incentives to authors does not imply that a judge is best able to identify the speech value underlying fair use expression. In the fair use analysis, an ability to assess social values and cultural norms is more valuable than an ability to assess policy implications. Speech protection matters more than policy consideration.<sup>151</sup> As the institution best able to identify relevant social values and cultural norms, the jury should decide the issues in the four-factor analysis.

*b. Legal Consistency*

A second argument for judges to decide fair use issues is that judges would provide consistency and certainty in the law of fair use.<sup>152</sup>

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<sup>148</sup> See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (“First Amendment concerns are protected by and coextensive with the fair use doctrine.”).

<sup>149</sup> See discussion *supra* Part II.B.1.a.

<sup>150</sup> It is of course possible that the speech nature of fair use might require a judge to protect a defendant's use *from* the jury. A role of judges is to protect unpopular views from majority censorship. Where jurors discriminate against fair use expression based on their disagreement with the expression's content — rather than considerations of fairness, i.e., the four factors — the jurors represent a majority seeking to silence unpopular speech. In that circumstance, the constitutional obligation of the judge to protect a minority's constitutional right of free speech should enable the judge to rule for the defendant as a matter of law. This Article, however, addresses only the general question of whether fair use represents a question of fact or law for the jury or judge, *absent extraordinary circumstances*. In a forthcoming article, the Author will explore such circumstances where judges may decide fair use as a matter of law.

<sup>151</sup> *Cf. District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”).

<sup>152</sup> *Cf. Volokh & McDonnell*, *supra* note 135, at 2442-44 (arguing that issues of substantial similarity in copyright law should be determined as matter of law at trial and on appellate review based on “refinement of the legal standard”).

Rulings on issues of law create binding precedent.<sup>153</sup> Consequently, if fair use issues were issues of law, their resolution by judges would create precedent, ensuring certainty with regard to subsequent conduct. By contrast, if these issues were deemed factual for a jury, one jury could deem a certain use fair, whereas another jury could find the same use to be infringing.<sup>154</sup> The state of fair use law would seem to lie in disarray: whether a use was fair could be anyone's guess. For the sake of consistency and certainty, then, these issues should arguably be legal, and thus, reserved for judges to decide.<sup>155</sup>

This basis for favoring judges over juries is not altogether persuasive. With regard to novel uses of copyrighted expression, uncertainty will continue to abound regardless of which institution decides the issue.<sup>156</sup> Judges bring no greater certainty to yet-undecided, novel questions of fair use than do juries. Indeed, during the last few decades in which judges have treated fair use as a legal question, the doctrine has become ever more uncertain and unpredictable.<sup>157</sup> Simply put, judges do not share a consensus view on

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<sup>153</sup> See generally BLACK'S LAW DICTIONARY 1214-15 (8th ed. 2004) (defining both precedent and binding precedent).

<sup>154</sup> Elementary notions of justice suggest that if society deems a type of behavior as permissible today, then absent notice otherwise, society should deem that same type of behavior as permissible tomorrow. See HOLMES, *supra* note 68, at 123-24 (arguing that similar facts should give rise to same normative judgment, suggesting legality of issue).

<sup>155</sup> This argument draws support from another intellectual property area — patent law. The Supreme Court has recognized that issues of claim construction in patent law should lie with the judge for the sake of legal consistency. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390-91 (1996). By placing claim-construction issues with a judge, the law provides certainty to future inventors as to whether a similar product constitutes a non-infringing advancement or an infringing equivalent. The legal nature of the issues demarcates certain boundaries of inventions, ultimately giving rise to increased productivity in the marketplace of inventions.

<sup>156</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that fair use requires case-by-case analysis); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (describing process of determining whether use is fair as “the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent”); Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A. 133, 134 (2003) (discussing “indeterminacy” of fair use judgments); Leval, *supra* note 24, at 1106-07; David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 278-84 (2003) (demonstrating unpredictable nature of fair use doctrine through means of statistical analysis).

<sup>157</sup> See Parchomovsky & Goldman, *supra* note 41, at 1496 (observing that judicial attempts to define fair use “have failed unconditionally” and that “hope that a common understanding would emerge over time did not materialize”).

the meaning of fairness.<sup>158</sup> Fair use as an issue of law begs for as much clarity as fair use as an issue of fact.

With regard to uses that are not novel, the certainty argument is stronger. Assuming a sufficiently similar use, a litigant could predict whether her use was fair based on past judicial decisions. For instance, case law has well established that recording a television show on a VCR<sup>159</sup> and displaying thumbnail images on a search-engine site are fair uses;<sup>160</sup> likewise, case law has well established that sharing music files through peer-to-peer networks is not a fair use.<sup>161</sup> Treating the issues as a matter of law would, therefore, seem to provide certainty to future users as to the fairness of the use.

The primary function of the fair use doctrine protection of speech — protection of speech — diminishes the strength of the above argument. The speech-protective function of fair use requires that each particular use under consideration be decided on its own merits.<sup>162</sup> Indeed, it is a fundamental tenet of fair use that each use in question raises its own consideration of fairness; each use potentially raises circumstances that might raise an element of speech requiring protection as a fair use. Case-by-case consideration ensures that no circumstance is overlooked that might justify characterizing a defendant's repetition of expression as the defendant's own act of speech.<sup>163</sup> Through this case-by-case application, inferences drawn in the four-factor analysis necessarily lack precedential value.<sup>164</sup> Thus,

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<sup>158</sup> As Judge Leval observed in his landmark law review article, *Toward a Fair Use Standard*:

Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.

Leval, *supra* note 24, at 1105-07.

<sup>159</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-55 (1984).

<sup>160</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719-25 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817-22 (9th Cir. 2003).

<sup>161</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001).

<sup>162</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>163</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as “free speech safeguard[]” and “First Amendment accommodation”).

<sup>164</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (explaining that each fair use case “must be decided on its own facts”); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.) (“[A]s soon as literal appropriation ceases to be the test [for copyright infringement], the whole matter is necessarily at large, so that, as what recently well said by a distinguished judge, the decisions cannot help much in a new case.”).

the case-by-case nature of the fair use inquiry necessarily limits the implication of inferences drawn in any particular case: inferences drawn in one case are not binding on a subsequent case.<sup>165</sup> In short, the speech nature of fair use implies that the doctrine necessarily should be somewhat limited in its precedential effect; it is intended to be somewhat unpredictable.<sup>166</sup>

Of course this case-by-case principle does not imply that previous fair use opinions are entirely irrelevant in future fair use cases. For instance, the Supreme Court's teaching in *Sony Corp. of America v. Universal City Studios, Inc.* on the fairness of recording a television show through home-use VCR technology must be relevant in deciding similar cases.<sup>167</sup> Fair use opinions may establish principles as a matter of law to guide the fair use analysis, and at the same time, the issue of fair use may remain an issue of fact for a jury. Appellate courts may lay down general principles to teach future factfinders the correct methodology for finding facts in similar situations, and trial courts may provide legal instructions that guide juries.

In this manner, the relationship between judge and jury in fair use is akin to the same relationship in takings law in that both the inquiry into whether a use is fair and the inquiry into whether a government act amounts to a taking represent ad hoc factual inquiries.<sup>168</sup> Appellate opinions are not binding on decisions of lower courts with regard to the particular findings of future factfinders; yet appellate opinions may provide binding legal instruction as to the methodology for the

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<sup>165</sup> Just as yelling "fire" is permissible in some circumstances but not in others, so also is copying an expression of a copyright holder permissible in some circumstances but not in others. *Compare* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."), *with* *Simms v. Stanton*, 75 F. 6, 10 (C.C.N.D. Cal. 1896) ("What would be a 'fair use' in one case might not be in another.")

<sup>166</sup> *Cf.* *Miller v. California*, 413 U.S. 15, 26 n.9 (1973) (noting that even if juries may reach different conclusions as to whether expression merits speech protection in obscenity context, constitutional rights are not abridged because "one of the consequences we accept under our jury system" is that "different juries may reach different results").

<sup>167</sup> *See* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-55 (1984). Would the holding of *Sony* apply to recording television shows on a Digital Video Recorder? *See* Ned Snow, *The Tivo Question: Does Skipping Commercials Violate Copyright Law*, 56 SYRACUSE L. REV. 27, 81-83 (2005) (contemplating distinction between recording television show on DVR and VCR that suggests copyright infringement despite *Sony* holding).

<sup>168</sup> *See infra* note 169.



factfinding process.<sup>169</sup> In this regard, the verbiage of legal instruction — in either an appellate opinion or a trial jury instruction — may suggest the fairness of a use in question. For example, the Supreme Court declared in *Campbell v. Acuff-Rose Music, Inc.* that to the extent a use transforms its underlying work, other factors in the analysis that suggest against fairness should be considered less significant than they otherwise might be considered.<sup>170</sup> Based on this declaration, a trial judge might instruct the jury as follows: “The extent to which the defendant’s use is deemed transformative of the plaintiff’s work will decrease the significance of factors tending to suggest infringement.” Such an instruction would provide a general guideline for the jury, but it would not bind the jury to find a particular expression to be fair, nor would it even bind them to weigh heavily the transformative factor.<sup>171</sup>

On the other hand, an appellate court’s opinion may provide much more specific teaching on how a factfinder should weigh factors in the analysis under specific circumstances. Consider the Ninth Circuit’s

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<sup>169</sup> The fair use analysis represents an ad hoc inquiry. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (analysis of fair use claim must be made on case-by-case basis); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (test for infringement of copyright is necessarily “vague” and determinations must be made “ad hoc”); H.R. REP. NO. 101-735, at 20 (1990), reprinted in U.S.C.C.A.N. 6935, 6953 (“[T]he doctrine of fair use . . . requires ad hoc determinations.”). The takings analysis also represents an ad hoc inquiry, where appellate decisions are not binding on decisions of lower courts with regard to the particular findings that are made, but they do provide binding legal instruction as to the methodology for making the findings. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (“The inquiry into whether a taking has occurred is essentially an ‘ad hoc, factual’ inquiry. The Court, however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond ‘regulation’ and effects a ‘taking.’”).

<sup>170</sup> *Campbell*, 510 U.S. at 579:

The central purpose of this investigation is to see . . . whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

(citations and footnotes omitted).

<sup>171</sup> See PATRY, COPYRIGHT, *supra* note 116, § 10:60. Even after *Campbell*, judges themselves (without reserving the issue for a jury) have found a use to be transformative yet reached a conclusion that the use was not fair. *E.g.*, *Castle Rock Entm’t v. Carol Publ’g Grp., Inc.*, 955 F. Supp. 260, 268, 272 (S.D.N.Y. 1997), *aff’d*, 150 F.3d 132 (2d Cir. 1998) (admitting transformative nature of defendant’s use, but finding use to be unfair).

decisions in *Kelly v. Arriba* and *Perfect 10 v. Amazon.com*, both of which provided legal instruction as to how to perform the factfinding process in the four-factor analysis where a defendant has produced a copyrighted work on a search engine.<sup>172</sup> In both cases, the court held that the transformative nature of the thumbnail image required a finding of fairness.<sup>173</sup> Consequently, in a future thumbnail-image case, a court might find that a reasonable jury could reach no other finding but that the use is fair. For on two occasions, the Ninth Circuit's specific instruction about the proper methodology for interpreting and weighing the fair use factors in the particular situation where a defendant displays thumbnail images through a search engine seemed to leave no room for a reasonable factfinder to reach any conclusion other than that such a use of thumbnail images must be fair.<sup>174</sup> In such an instance, where an appellate court's legal instruction is specific with regard to a particular situation, summary judgment would be appropriate: no reasonable jury could find otherwise given the legal instruction from an appellate court.

Certainty for future uses that resemble past uses may, therefore, be achieved where an appellate court chooses to articulate specific instruction that should guide a particular situation. Where the appellate court determines that specific circumstances should trigger a finding of fairness as a matter of law, or perhaps determines merely that those circumstances should trigger an interpretation and weight of a particular factor, trial courts become bound to make the appropriate finding of fact.<sup>175</sup> But absent such legal instruction, the finding of fact remains an open question. The certainty that appellate courts may provide to future uses will depend, ultimately, on the language that those courts employ to define the scope of the use and to articulate the methodology of the analysis. For instance, the language of *Sony* appears to leave no room to interpret recording a television show on a VCR for home use as anything but a fair use,<sup>176</sup>

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<sup>172</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719-25 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817-22 (9th Cir. 2003).

<sup>173</sup> *Perfect 10*, 487 F.3d at 719-25; *Kelly*, 336 F.3d at 817-22.

<sup>174</sup> Perhaps, however, there is room for a finding of infringement. In both cases, the court left open the possibility that commercial harm to the plaintiff might result in a different finding. *Perfect 10*, 487 F.3d at 719-25; *Kelly*, 336 F.3d at 817-22.

<sup>175</sup> See, e.g., *Campbell*, 510 U.S. at 580-85, 588, 592-93 (establishing that circumstances suggesting parodic nature of use should weigh heavily in favor of finding fairness); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-55 (1984) (establishing that recording television shows for home use is fair as matter of law).

<sup>176</sup> See *Sony*, 464 U.S. at 447-55.

whereas the language of *Campbell* appears to leave ample room to interpret the reproduction of lyrics in a song as either fair or infringing.<sup>177</sup> The jury decides questions left open by the legal principles that appellate courts set forth.

It should further be noted that treating fair use as a factual issue does not limit the ability of appellate courts to provide legal instruction. Consider again appellate cases in takings law: they demonstrate that appellate courts have ample opportunity to articulate principles that should guide the ad hoc factual inquiries of the trial courts.<sup>178</sup> Moreover, the doctrine of independent review obligates appellate courts to employ de novo review of factual findings that affect litigants' constitutional rights,<sup>179</sup> and fair use affects defendants' right of speech.<sup>180</sup> So a verdict that denies fair use affects the defendant's speech rights, thereby obligating appellate courts to apply independent de novo review to ensure that those rights are not violated.<sup>181</sup> Hence, construing fair use as an issue of fact for a jury does not imply any less certainty in the judge-made law of fair use.

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<sup>177</sup> See *Campbell*, 510 U.S. at 583 (“While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree.”). Compare *id.* (recognizing potential for fair use of rap artist’s use of plaintiff’s song, *Pretty Woman*), with *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009) (upholding jury verdict finding infringement, rejecting fair use, despite “small elements of [plaintiff’s funk] song” being used in defendant’s hip hop song and distinction between song markets of plaintiff and defendant).

<sup>178</sup> See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

<sup>179</sup> See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984) (requiring judges to perform independent review where constitutional liberty, such as speech, turns on ultimate finding of fact).

<sup>180</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as “free speech safeguard[]” and “First Amendment accommodation[],” and suggesting First Amendment violation if Congress altered “traditional contours” of copyright law).

<sup>181</sup> Professor Eugene Volokh and Brett McDonnell argue that the trial court should perform independent review in copyright cases on summary judgment. See Volokh & McDonnell, *supra* note 135, at 2443-44. They argue in the context of the substantial-similarity issue that the trial judge should decide the issue at summary judgment under the principle of independent review. See *id.* Why wait for the appellate court to review if the trial court already observes a constitutional liberty that needs protecting? This argument seems to have merit in the fair use context, but only insofar as a constitutional right needs protecting — the very basis for applying independent review. In fair use, the only constitutional right that needs protecting is the defendant’s right to speak, for the copyright holder’s right to speak is not threatened by removing an incentive. Hence, it seems plausible for trial courts to perform independent review on summary judgment, but only to protect the speech right of the defendant. Under this reasoning, it would seem permissible to treat fair use issues as legal for a judge to decide only where the defendants’ constitutional right of speech

c. *Jury Incompetency*

It might be argued that judges, rather than juries, should decide these issues on the ground that juries are incompetent at deciding fair use issues. The incompetency argument is twofold: first, the jury may lack experience in analyzing fair use issues; second, the jury may be partial to defendants. With respect to the first incompetency argument, the average juror likely has no experience in applying legal principles of the fair use doctrine. That inexperience might deprive the juror of insight necessary to perform the intellectual rigors of the fair use analysis. With respect to the second incompetency argument, it is possible that jurors may be partial to defendants because the jurors might benefit from a finding of fair use. For instance, if jurors were to find that uploading music files onto a peer-to-peer file-sharing network was a fair use, those very jurors would benefit from their own finding because such a verdict would allow them to download the very files at issue. Relatedly, a juror may be unable to appreciate the social value of protecting monopoly rights of copyright holders who are large corporations, especially where those corporations are suing common individuals. The average juror, then, may lack competency from the standpoint of experience and impartiality.

These two criticisms against jurors do not appear sufficient to prefer judge over jury. With regard to experiential competency, it is questionable whether experience or familiarity with the law of fair use provides any advantage in drawing the inferences.<sup>182</sup> In assessing an expression's meaning, life experiences seem more valuable than legal experiences.<sup>183</sup> Moreover, the history of reversals and dissents in judicial opinions on fair use suggests that jurors could not be any less capable than judges at drawing the inferences.<sup>184</sup> With regard to

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merits protection: only then would summary judgment be appropriate for defendants as a matter of law. It would not be appropriate for the plaintiff, however. Such an outcome would be analogous to the procedure employed in defamation law, where courts never entertain a motion for summary judgment *for* a defamation plaintiff, but do recognize the importance of summary judgments *for* defamation defendants. See, e.g., *DeAngelis v. Hill*, 847 A.2d 1261, 1267 (N.J. 2004) (recognizing appropriateness of summary judgment for plaintiff). This possibility will be developed further in another article by the Author. See discussion *infra* note 150.

<sup>182</sup> See discussion and authorities cited *supra* notes 157, 158.

<sup>183</sup> See discussion *supra* Part II.B.1.a.

<sup>184</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (reversing appellate court's reversal of district court's finding of fair use on summary judgment); *On Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001) (reversing district court's summary judgment ruling that defendant's use was fair); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117-21 (9th Cir. 2000) (same).

impartiality, it is a dubitable assumption that judges are any less influenced by personal biases and habits than are jurors.<sup>185</sup> Furthermore, the contention that juries will impartially favor individuals over corporations is, as an empirical matter, simply unsupported.<sup>186</sup> As a general matter, juries appear to rule just as favorably for large corporations as they do for individuals.<sup>187</sup> Thus, jury incompetency does not seem a reasonable basis for preferring judge over jury.

### III. THE HISTORY OF JURIES IN FAIR USE

For over two centuries, fair use was an issue of fact for the jury when cases arose in common-law courts.<sup>188</sup> As far back as the mid 1700s, the issue in a common-law court consistently rested with juries — not judges.<sup>189</sup> And for two hundred years that followed, those common-law courts consistently upheld the tenet that juries decide issues of fair use.<sup>190</sup> In the recent past, however, courts have begun to

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<sup>185</sup> That judges' personal habits might create a conflict of interest that influences their judgment, even if unintentionally so, seems a practical reality — even for the most respected of judges. See also discussion *infra* Part IV.A.2.b (positing that personal biases of judges may influence their judgment in fair use cases). Compare *United States v. U.S. District Court*, 858 F.2d 534, 542-43 (9th Cir. 1988) (Kozinski, J.) (recognizing mistake-of-fact defense for producer of obscenity where federal statute required strict-liability punishment), with Scott Glover, *Judge Alex Kozinski Recuses Himself from Obscenity Trial*, L.A. TIMES, June 14, 2008, at B-1 (explaining Judge Kozinski's admission that he views and posts pornographic material to Internet and reporting that this fact caused Judge Kozinski to recuse himself from considering obscenity appeal).

<sup>186</sup> See, e.g., *Jury Verdict Form at 17-20, Capital Records, Inc. v. Thomas*, No. 06-cv-1497 (MJD/RLE) (D. Minn. June 18, 2009) (expressing jury verdict of \$1.92 million fine for defendant's copyright infringement by downloading twenty-four songs); see also Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 352-53 (1998) (concluding through empirical study that jurors do not disproportionately favor individuals over corporations).

<sup>187</sup> See sources cited *supra* note 186.

<sup>188</sup> Of course this is not to say that copyright suits, along with the issue of fairness, arose only in actions at law. As Professor Gómez-Arostegui aptly points out, copyright suits arose in equity before they arose at law. See H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1222-23, 1273 (2008) (explaining copyright suits that arose in courts of chancery after 1660 and copyright suits in courts of law after mid 1700s).

<sup>189</sup> See cases cited *supra* note 1; discussion *infra* Part III.A.

<sup>190</sup> E.g., *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (reversing district court's grant of summary judgment for defendant on grounds that "[t]he four factors listed in Section 107 raise essentially factual issues and . . . are

ignore this tenet, ultimately leading to judges now treating fair use as a pure issue of law: judges now decide fair use on summary judgment regardless of whether reasonable minds may disagree on the inferences to be drawn in the four-factor analysis.<sup>191</sup>

### A. The First Two Hundred Years

#### 1. English Common Law

Fair use traces its roots to the inception of copyright. As early English courts of law shaped the contours of the copyright doctrine, they necessarily shaped the contours of non-infringing copyright uses, what today is fair use.<sup>192</sup> As early as 1769, those early English cases indicate that the issue of whether a use infringes a copyright, or alternatively whether the use is fair, should lie with a jury.<sup>193</sup> One early

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normally questions for the jury”); *Meeropol v. Nizer*, 560 F.2d 1061, 1070-71 (2d Cir. 1977) (reversing district court’s grant of summary judgment for defendant on grounds that “determination whether the use under these circumstances was substantial should have been made by the trier of fact in the light of all relevant facts”); *Arnstein v. Porter*, 154 F.2d 464, 472-74 (2d Cir. 1946) (rejecting idea of deciding fair use on summary judgment); *Roy Export Co. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (denying summary judgment on grounds that “the applicability of the fair use defense is ordinarily a factual question for the jury to determine”), *aff’d*, 672 F.2d 1095 (2d Cir. 1982); *Higgins v. Baker*, 309 F. Supp. 635, 637-38 (S.D.N.Y. 1970) (deciding that treating fair use on summary judgment would be premature); *see also* *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1247 (9th Cir. 1999) (“Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations . . . .”); 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 138, at 599-600 (1976) (opining that issue of fair use presents questions of fact and, thus, should not be determined on summary judgment).

<sup>191</sup> See cases cited *supra* note 4.

<sup>192</sup> See WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-18 (2d ed. 1995) [hereinafter FAIR USE PRIVILEGE] (tracing history of fair use).

<sup>193</sup> In *Millar v. Taylor*, Justice Aston described “many circumstances” that could defeat a copyright action, and explained that the jury would consider those circumstances. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 225. No other judge in the case took issue with this explanation from Justice Aston. *See id.* at 201-66. In *Campbell v. Scott*, the court described the jury’s role in an earlier case, *Roworth v. Wilkes*, (1807) 170 Eng. Rep. 889 (K.B.) — although the *Roworth* court did not describe that role:

*Roworth v. Wilkes* was a case in which 75 pages of a treatise consisting 118 pages were taken and inserted in a very voluminous work . . . and although the matter taken formed but a very small proportion of the work into which it was introduced, *the jury* found for the Plaintiff, who was the author of the treatise.

*Campbell v. Scott*, (1842) 59 Eng. Rep. 784 (K.B.) 787 (emphasis added).

case that articulates this principle is *Sayre v. Moore*, an action at law in 1785.<sup>194</sup> There, the Chief Justice of the King's Bench, Lord Mansfield, sat as the trial judge in a copyright dispute over the defendant's use of the plaintiff's sea charts.<sup>195</sup> The plaintiff had expended great resource to create the charts, and the defendant had altered them to create his own.<sup>196</sup> On these simple facts, Lord Mansfield opined that the case raised "a matter of great consequence to the country."<sup>197</sup> He noted competing policy considerations in rewarding ingenuity and labor and encouraging improvement and progress.<sup>198</sup> Then, citing other copyright actions (e.g., histories and dictionaries), he summarized the general sort of dispute as follows: "In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not."<sup>199</sup> Indisputably then, Lord Mansfield considered the issue of whether a defendant's use was permissibly fair or impermissibly infringing to be one of fact for the jury.<sup>200</sup> After expressing this, he informed the jury that if they believed the defendant's alterations to be "various and material," they should find for the defendant, but if they believed the use to be "a mere servile imitation," they should find for the plaintiff.<sup>201</sup> The jury then found for the defendant.<sup>202</sup>

Like Chief Justice Lord Mansfield in *Sayre*, Chief Justice Lord Ellenborough in *Cary v. Kearsley*, an 1803 English copyright case, recognized the central role of the jury in deciding the issue of fair use:

I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of

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<sup>194</sup> *Sayre v. Moore*, (1785) 102 Eng. Rep. 139 (K.B.) 138 n.b, 140. *Sayre v. Moore* has well influenced copyright jurisprudence in the United States. Many cases have either quoted or relied on *Sayre v. Moore* to teach principles of fair use or copyright generally. See e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 480 n.33 (1984) (Blackmun, J., dissenting); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 n.6 (1975); *Wall Data Inc. v. L.A. Cnty. Sherriff's Dep't*, 447 F.3d 769, 777 (9th Cir. 2006); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 597 (2d Cir. 1989) (Oaks, J., concurring); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

<sup>195</sup> See *Sayre*, 102 Eng. Rep. at 140.

<sup>196</sup> See *id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See *id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter, — or taken colourable, merely with a view to steal the copy-right of the plaintiff?<sup>203</sup>

Here, it seems undeniable that Lord Ellenborough was contemplating principles underpinning the modern doctrine of fair use. Nor can it be doubted that he believed the jury to be the appropriate institution for deciding that issue.

But of course not all judges of that era sent the fair use issue to the jury.<sup>204</sup> Where copyright disputes arose in courts of equity, judges would decide all issues, whether legal or factual, because courts of equity need not employ a jury to decide issues of fact.<sup>205</sup> The right to a jury is relevant only where the proceeding arises in a court of law, and the test for whether a proceeding arises at law or in equity usually turns on the remedy sought — damages or an injunction.<sup>206</sup> The

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<sup>203</sup> *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679 (K.B.) 680. Modern federal jurisprudence continues to rely on *Cary v. Kearsley* for teaching principles of fair use. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Cary v. Kearsley* (Lord Ellenborough) to delineate principles of fair use); *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 987 (D. Minn. 2003) (same); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 10 (S.D.N.Y. 1992) (relying on *Cary v. Kearsley* to articulate fair use), *affd*, 60 F.3d 913 (2d Cir. 1994); *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 312 n.17 (S.D. Cal. 1959) (same). And in American copyright jurisprudence generally (outside of fair use), *Cary v. Kearsley* has further proven influential. See, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 613 (1834) (relying on *Cary v. Kearsley* in copyright suit).

<sup>204</sup> Examples of early English courts deciding the issue of fair use without sending it to the jury are the following: *Macklin v. Richardson*, (1770) 27 Eng. Rep. 451 (Ch.) 453; *Amb. 694, 696* (No. 341) (rejecting principle that critical review may supplant work itself where defendant had transcribed play and published it in magazine); *Dodsley v. Kinnersley*, (1761) 27 Eng. Rep. 270 (Ch.) 271; *Amb. 403, 405* (No. 212) (“No certain line can be drawn, to distinguish a fair abridgment; but every case must depend on its own circumstances.”); *Tonson v. Walker*, (1752) 36 Eng. Rep. 1017 (Ch.) 1020; 3 Swans. 672, 681 (“A fair abridgement would be entitled to protection [from copyright action of the plaintiff].”).

<sup>205</sup> See, e.g., DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION*, § 2.6(2) at 104 (1993) [hereinafter *REMEDIES*]; 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA* § 31, at 21 (Little, Brown & Co., 12th ed. 1877); *id.* §§ 930–933, at 120–21; cases cited *supra* note 205. In the early fair use case of *Gyles v. Wilcox*, Lord Chancellor Hardwicke, sitting in equity, spoke out against using a jury at law to determine whether the defendant had infringed. *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.) 490–91. Tellingly, he referred to the issue as one of fact. See *id.* (“The court is not under an indispensable obligation to send all facts to a jury . . .”).

<sup>206</sup> See DOBBS, *REMEDIES*, *supra* note 205, § 2.6(3), at 106; 1 STORY, *supra* note 205, § 31, at 21; 2 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN*



upshot is that because the right to a jury existed only at common law, not in equity, juries did not decide all fair uses cases during this era.<sup>207</sup>

## 2. Federal Common Law

In the United States, the fair use doctrine flourished as courts adopted English common law.<sup>208</sup> As part of that adoption, early fair use jurisprudence in the States — the foundation for the present fair use doctrine — relied on,<sup>209</sup> and indeed quoted from, the portions of English case law that mandated jury consideration of fair use.<sup>210</sup> For instance, in *Emerson v. Davies*, Justice Joseph Story<sup>211</sup> articulated principles of fair use by quoting Lord Mansfield's admonition in *Sayre v. Moore*: "In all these cases the question of fact to come to a jury, is, whether the alteration be colorable or not. . . . [U]pon a question of this nature the jury will decide, whether it be a servile imitation or not."<sup>212</sup> Likewise, in *Simms v. Stanton*, the court quoted the same declaration from *Sayre v. Moore*, i.e., that the issue of fair use represented a "question of fact to come before a jury."<sup>213</sup> Early fair use jurisprudence

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ENGLAND AND AMERICA § 794, at 122 (Little, Brown & Co., 12th ed. 1877) ("[I]t is far better that [a damages remedy] should be ascertained by a jury than by the conscience of an equity judge."). This makes just as much sense today as it did centuries ago. Consider the present Copyright Act, which contemplates both injunctive and damages remedies: the silence brought about by an injunction does not seem as extreme or as punitive as the thousands (or even millions) of dollars of debt that a defendant may face under the statutory damages provision. See 17 U.S.C. §§ 502(a), 504(a) (2006). And where the remedy represents such an extreme financial penalty, a jury seems preferable. See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 220-22 (D. Mass. 2009) (denying defendant's fair use argument on summary judgment); Jury Verdict Form, *Tenenbaum*, 672 F. Supp. 2d 217 (No. 03CV11661-NG) (awarding \$22,500 per Internet use for thirty files downloaded).

<sup>207</sup> See DOBBS, REMEDIES, *supra* note 205, § 2.6(2), at 104.

<sup>208</sup> See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 348-49 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (relying on English case law in articulating principles of fair use).

<sup>209</sup> Two early American fair use cases that relied on the English case of *Cary v. Kearsley* were *Simms v. Stanton*, 75 F. 6, 11 (C.C.N.D. Cal. 1896), and *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136).

<sup>210</sup> See, e.g., *Simms*, 75 F. at 9 (quoting relevant portion of *Sayre v. Moore*); *Emerson v. Davies*, 8 F. Cas. 615, 623-24 (C.C.D. Mass. 1845) (No. 4436) (Story, J.) (same).

<sup>211</sup> Justice Joseph Story is arguably the jurist who has most influenced the doctrine of fair use in the United States. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("For as Justice Story explained . . ."); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985) (relying on Justice Story's teachings and suggesting that he was first to articulate modern principles of fair use doctrine); Leval, *supra* note 24, at 1105 (quoting Justice Story in order to explain doctrine of fair use).

<sup>212</sup> *Emerson*, 8 F. Cas. at 623-24.

<sup>213</sup> *Simms*, 75 F. at 9.

in the United States expressly adopted the English common law's approach to reserving the question of fair use for the jury.

Despite this express adoption of English common law, courts in the United States usually did not employ a jury in deciding copyright cases involving fair use.<sup>214</sup> Although federal case law contemplating fair use endorsed juries in written opinion,<sup>215</sup> juries in the United States were absent in early fair use cases. The reason for their absence was simple: early fair use cases, and indeed most copyright cases generally, arose in equitable proceedings.<sup>216</sup> Any damages under the Act at that time were seen as incidental to the equitable remedy of an injunction that would prevent continued infringement, and so equity was most common.<sup>217</sup> Under the now-abolished rule that equitable courts may determine legal issues that are incidental to equitable issues, courts of equity could determine fair use issues.<sup>218</sup> Moreover, equity entertained the remedy of an accounting of profits that defendants had gained through their infringing use,<sup>219</sup> which could be greater than the sole remedy afforded by the Copyright Act of 1790 — fifty cents in damages per infringing page.<sup>220</sup> For many copyright holders, lost profits represented the better remedy, so they sought relief under a bill of equity rather than an action at law.<sup>221</sup> The

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<sup>214</sup> *But see Emerson*, 8 F. Cas. at 625 (giving defendant option of having case tried by jury).

<sup>215</sup> *See Simms*, 75 F. at 9; *Emerson*, 8 F. Cas. at 623-24; *cf. West Publ'g Co. v. Edward Thompson Co.*, 176 F. 833, 838-39 (2d Cir. 1910) (opining that given extent of testimony already taken in equitable proceeding before court, it would make no sense to transfer case to court of law with jury for plaintiffs to pursue their damages remedy, regardless of fact that court of equity has decided to deny injunctive relief).

<sup>216</sup> *See* 1 STORY, *supra* note 205, §§ 930-933, at 120-21 (explaining basis for ruling on copyright claim in equitable proceeding).

<sup>217</sup> *See West Publ'g*, 176 F. at 838-39 (explaining circumstance wherein equitable court could award damages); 2 STORY, *supra* note 206, § 794, at 122.

<sup>218</sup> The Supreme Court abolished this rule in *Dairy Queen v. Wood*, 369 U.S. 469, 470 (1962). After *Dairy Queen*, federal courts were required to submit all legal issues to a jury. *Id.* at 472-73. If an injunction (an equitable remedy) and statutory damages (a legal remedy) are sought, the present Copyright Act requires courts to submit the issue to the jury. *See id.* at 472-73 (“[W]here both legal and equitable issues are presented in a single case, ‘only under the most imperative circumstances [such as a timely need for adjudication or an improper demand], circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.’”).

<sup>219</sup> *See* DOBBS, REMEDIES, *supra* note 205, § 2.6(3), at 107-08.

<sup>220</sup> *See* Copyright Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124 (providing remedy for infringement in “the sum of fifty cents for every sheet which shall be found in [the infringer's] possession”).

<sup>221</sup> *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940)

equitable nature of the desired remedy precluded any jury consideration.

Actions at law that contemplated fair use, which would call into play jury consideration, did not arise in the United States until the 1940s.<sup>222</sup> The reason that copyright holders began to sue at law rather than in equity at this time may have reflected a procedural change introduced by the first version of the Federal Rules of Civil Procedure, promulgated in 1938. With the Rules of 1938 came the new, efficient means for copyright holders to prevail on their claims — summary judgment.<sup>223</sup> Summary judgment provided a speedy method for adjudication without a plaintiff incurring the expense of the usual equitable proceedings.<sup>224</sup> According to the 1938 Advisory Committee Notes, summary judgment was available for actions at law, suggesting that it was not available for bills in equity.<sup>225</sup> As a result, in the early 1940s, three copyright cases involving fair use are recorded in which the plaintiffs brought their claims as actions at law.<sup>226</sup>

In none of these three 1940s cases did the court employ a jury.<sup>227</sup> In one case, *American Institute of Architects v. Fenichel*, the court dismissed the case through summary judgment.<sup>228</sup> It is unclear,

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(explaining that in copyright suits, recovery of profits “had been given in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim ‘that which, *ex aequo et bono*, is theirs, and nothing beyond this’ ”); *id.* at 402 (“Both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits ‘which the infringer shall have made from such infringement.’”); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145, 145 (S.D.N.Y. 1929) (emphasis added) (“This is a suit for the alleged infringement of a copyright, and the *usual* injunctive relief with an accounting is prayed for.”), *aff’d*, 45 F.2d 119 (2d Cir. 1930).

<sup>222</sup> See *Am. Inst. of Architects v. Fenichel*, 41 F. Supp. 146, 147-48 (S.D.N.Y. 1941); *Karll v. Curtix Publ’g Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941); *Broadway Music Corp. v. F-R Publ’g Corp.*, 31 F. Supp. 817, 818 (S.D.N.Y. 1940).

<sup>223</sup> See FED. R. CIV. P. 56; *Rand v. Rowland*, 154 F.3d 952, 956 (9th Cir. 1998) (“The promulgation of the Federal Rules of Civil Procedure in 1938 marked the first time in the United States that use of the summary judgment procedure was authorized in all civil actions.”).

<sup>224</sup> See generally 1 STORY, *supra* note 205, § 31, at 21 (explaining process of judicial discovery in equitable proceedings).

<sup>225</sup> FED. R. CIV. P. 56 advisory committee note (“[Summary judgment] is now used in actions to recover land or chattels and in *all other actions at law.*”) (emphasis added).

<sup>226</sup> See *Fenichel*, 41 F. Supp. at 147; *Karll*, 39 F. Supp. at 836; *Broadway Music*, 31 F. Supp. at 817.

<sup>227</sup> See *Karll*, 39 F. Supp. at 837-38 (finding fair use of plaintiff’s song lyrics on motion to dismiss, where defendant magazine published them as part of historical commentary); *Broadway Music*, 31 F. Supp. at 818-19 (same).

<sup>228</sup> See *Fenichel*, 41 F. Supp. at 147.

however, whether the court considered the issue of fair use as a pure issue of law or alternatively, as an issue of fact that a reasonable jury could decide only one way.<sup>229</sup> In the two other cases, the courts did not grant the defendants summary judgment under Rule 56; rather, both courts granted the defendants a dismissal under Rule 12(b)(6).<sup>230</sup> This is significant because previous to the Federal Rules of 1938, courts could grant motions to dismiss only in equitable proceedings.<sup>231</sup> And the Advisory Committee Notes to Rule 12(b) suggest that that the 1938 Rules adopted the motion to dismiss for its equitable nature rather than the legal proceeding of demurrer.<sup>232</sup> This suggestion that 12(b)(6) involved an equitable proceeding might have further mistakenly<sup>233</sup> suggested to a judge that Congress intended to curtail plaintiffs' right to a jury.

Other courts contemplating the issue of fair use during the 1940s continued to openly recognize the factual nature of the issue.<sup>234</sup> In the 1944 case of *MacDonald v. DuMaurier*, the plaintiff alleged infringement of her copyrighted story and novel, and the defendant moved for judgment on the pleadings.<sup>235</sup> The only issue on the motion was whether the defendant's borrowing of expression constituted a fair use.<sup>236</sup> The district court granted the motion, holding that it did indeed constitute a fair use; on appeal, the Second Circuit reversed.<sup>237</sup>

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<sup>229</sup> *See id.*

<sup>230</sup> *See Karll*, 39 F. Supp. at 837-38; *Broadway Music*, 31 F. Supp. at 817.

<sup>231</sup> *See* FED. R. CIV. P. 56 advisory committee note (expressing preference for equitable procedure of motion to dismiss rather than legal procedure of demurrer); 1912 Equity Rules R.29, reprinted in JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 189 (6th ed. 1929).

<sup>232</sup> *See supra* note 231.

<sup>233</sup> Such a suggestion would have been mistaken because the distinction between equity and law continued to turn on the remedy that a plaintiff sought rather than the procedure for summary dismissal that a defendant employed. *See generally* DOBBS, REMEDIES, *supra* note 205, § 2.6(3), at 106; 1 STORY, *supra* note 205, § 31, at 21.

<sup>234</sup> *See, e.g., Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943) ("As fair use is to be determined by a consideration of all the evidence in the case, so, likewise, is the question of infringement one of fact to be solved by a study of the evidence."); *N.Y. Tribune v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941) (denying defendant's motion for summary judgment on grounds that "[i]f and when 'fair use' constitutes a defense is to be determined by consideration of all the evidence in the case"); *cf. Towle v. Ross*, 32 F. Supp. 125, 127 (D. Or. 1940) ("A jury trial was waived by the parties . . . . Whether the trail [sic] was at law or in equity is thus extremely technical, since the procedure of the new rules was used in all other matters and the judge heard the evidence by consent of all parties.").

<sup>235</sup> *MacDonald v. DuMaurier*, 144 F.2d 696, 700 (2d Cir. 1944).

<sup>236</sup> *Id.* at 700-01.

<sup>237</sup> *See id.*

The majority panel of the Second Circuit (Judge Learned Hand and Judge Swan) expressed concern that unconscious influences might affect a judge's view of the fair use issue, which would deny litigants their right to a jury.<sup>238</sup>

The 1946 decision of *Arnstein v. Porter* is also notable.<sup>239</sup> There, the pro se plaintiff alleged that the defendant had infringed his copyrighted song.<sup>240</sup> The district court found his allegations to be "fantastic," and so it granted the defendant's motion for summary judgment.<sup>241</sup> The Second Circuit reversed, reasoning that because the plaintiff had sought for damages, the suit constituted an action at law, and so the litigants were entitled to a jury.<sup>242</sup> The majority panel of the Second Circuit (Judge Learned Hand and Judge Frank) examined whether summary judgment was appropriate to determine whether the defendant had engaged in "permissible copying," or alternatively, "unlawful appropriation."<sup>243</sup> The majority explained that the issue turned on whether the defendant had taken from the plaintiff's work that which was pleasing to lay listeners — an inquiry identical to the third fair use factor examining the substantiality of the defendant's copying.<sup>244</sup> Because of the nature of this inquiry, the majority articulated that the case raised "an issue of fact which a jury is peculiarly fitted to determine."<sup>245</sup>

Although the *Arnstein* court did not employ the term "fair use" to describe this issue of "permissible copying," the two doctrines appear similar in substance, if not distinct in name only.<sup>246</sup> Yet regardless of any distinction between the two doctrines, courts eventually construed *Arnstein* as prohibiting summary judgment in copyright cases

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<sup>238</sup> See *id.* at 701.

<sup>239</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>240</sup> *Id.* at 467. Plaintiff, Ira Arnstein, is characterized as an eccentric and deranged songwriter. Although his songs never found popular fame, he filed five separate lawsuits against popular recording studios and composers, alleging plagiarism of his musical work. All were unsuccessful. Arnstein struggled financially during this time. See Cary Ginell, *The Strange Case(s) of Ira Arnstein, Serial Litigator*, MUSIC REPORTS, [http://accounting.musicreports.com/smart\\_licensing/content\\_article.php?article\\_id=76&title=The+Strange+Case\(s\)+of+Ira+Arnstein%2C+Serial+Litigator](http://accounting.musicreports.com/smart_licensing/content_article.php?article_id=76&title=The+Strange+Case(s)+of+Ira+Arnstein%2C+Serial+Litigator) (last visited Nov. 12, 2010).

<sup>241</sup> *Arnstein*, 154 F.2d at 469.

<sup>242</sup> *Id.* at 468.

<sup>243</sup> *Id.* at 472-73.

<sup>244</sup> *Id.* at 473.

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 468, 472-73. The majority did, however, rely on the landmark fair use case of *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (Story, J.), in its analysis. See *Arnstein*, 154 F.2d at 472 n.18.

generally. Indeed, courts — even outside of copyright — came to see *Arnstein* as forbidding summary judgment except in only the most extraordinary circumstances, those where there was not even “the slightest doubt as to the facts.”<sup>247</sup> Several years later, the influence of *Arnstein*’s summary judgment prohibition weakened: subsequent courts rejected *Arnstein*’s prohibition to the extent that it precluded even the usual standard that allows summary judgment where no reasonable jury could find otherwise.<sup>248</sup> Nevertheless, despite this curtailment of *Arnstein*’s forceful prohibition of summary judgment, *Arnstein*’s general proposition remains intact, i.e., that copyright raises issues of fact peculiarly fitted to a jury.<sup>249</sup>

In the decade following *Arnstein*, there are no recorded opinions of courts employing summary means to decide copyright cases that involved fair use. Only two recorded cases arose where litigants moved for summary judgment in actions involving fair use.<sup>250</sup> In both cases, the courts quickly dismissed the motion.<sup>251</sup> Not until 1963<sup>252</sup> did the first decision arise in which a court granted a motion for summary

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<sup>247</sup> See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 677 (1st Cir. 1967) (relying on *Arnstein* for quoted proposition in copyright suit); *Armco Steel Corp. v. Realty Inv. Co.*, 273 F.2d 483, 484 (8th Cir. 1960) (relying on *Arnstein* for quoted proposition in breach-of-contract suit); *Arnstein*, 154 F.2d at 468 (framing summary judgment as turning on whether “there is the slightest doubt as to the facts”).

<sup>248</sup> See *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111, 114 (5th Cir. 1978) (discussing copyright infringement suit) (“*Arnstein*, which held that a grant of summary judgment is improper whenever there is the slightest doubt as to the facts, is no longer good law.”); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975) (discussing insurance settlement agreement dispute) (“Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most extraordinary circumstances, see, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), that trend has long since been jettisoned in favor of an approach more in keeping with the spirit of Rule 56 . . .”).

<sup>249</sup> See *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1247 (11th Cir. 1999) (granting summary judgment for defendants in copyright suit yet citing *Arnstein* for proposition that “[s]ummary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations . . .”).

<sup>250</sup> See *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950); *Winwar v. Time, Inc.*, 83 F. Supp. 629, 629 (S.D.N.Y. 1949).

<sup>251</sup> See *Thompson*, 94 F. Supp. at 454 (relying on *Arnstein* to deny plaintiff’s motion for summary judgment on grounds that “the defendant may possibly have raised triable issues by this defense of fair use”); *Winwar*, 83 F. Supp. at 629 (relying on *MacDonald v. DuMaurier* and *Arnstein* for proposition that “the facts relating to the alleged ‘fair use’ should be determined upon trial of these issues”).

<sup>252</sup> Cf. *Consumers Union of U.S., Inc. v. Hobart Mfg. Co.*, 199 F. Supp. 860, 861 (S.D.N.Y. 1961) (concluding, on summary judgment, that plaintiff’s expression was not copyrightable, and so disposing “of what would, on the issue of infringement, be questions of fact, viz., whether the defendant’s use was ‘fair use’”).

judgment that involved fair use: *Berlin v. E.C. Publications, Inc.*<sup>253</sup> There, the court's description of the plaintiffs' infringement arguments suggests that the court viewed those arguments as entirely unreasonable, which is consistent with the summary judgment standard that judges may decide issues of fact if no reasonable jury would find otherwise.<sup>254</sup> The court, therefore, granted summary judgment for the defendant on most of the plaintiffs' claims.<sup>255</sup> Notably, though, the court did find triable issues of fact where the use of the work was not clearly fair.<sup>256</sup>

Thus, from the outset of the fair use doctrine in the mid-1700s to the mid-1900s, fair use represented a triable issue of fact for a jury.<sup>257</sup> In actions at law, courts routinely described and treated fair use as raising an issue of fact for a jury rather than a pure issue of law for a judge.<sup>258</sup>

#### B. *Decades of Disarray: 1970s and 1980s*

In 1968, the first recorded case arose where fair use was treated as a pure issue of law: *Time Inc. v. Bernard Geis Associates*.<sup>259</sup> There, District Judge Wyatt ruled for the defendant on summary judgment.<sup>260</sup> The plaintiff, Time Inc., held copyrights in the Zapruder film of President Kennedy's assassination; the defendant had copied frames from the film to produce a book about the event.<sup>261</sup> In ruling for the defendant, Judge Wyatt did not find that a reasonable jury could only

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<sup>253</sup> *Berlin v. E.C. Publ'ns, Inc.*, 219 F. Supp. 911, 915 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 541 (2d Cir. 1964). In *Berlin*, copyright holders of popular songs argued that the publishers of *Mad Magazine* infringed their copyrights by publishing parodies of their songs.

<sup>254</sup> *See id.* at 913 ("It is obvious that defendants' lyrics have little in common with plaintiffs' but meter and a few words, except in two instances which will be discussed below. Defendants have created original, ingenious lyrics on subjects completely dissimilar from those of plaintiffs' songs.").

<sup>255</sup> *See id.* at 915.

<sup>256</sup> *See id.*

<sup>257</sup> *See discussion supra* Part III.A.2.

<sup>258</sup> *See discussion supra* Part III.A.2.

<sup>259</sup> *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144-46 (S.D.N.Y. 1968) (finding fair use of plaintiff's film frames of President Kennedy's assassination).

<sup>260</sup> Interestingly, the defendant did not move for summary judgment; the plaintiff did; yet the court entered a judgment for the defendant. *See id.* at 131, 133, 146. That this case was eligible for a jury as an action at law is evident from the fact that the plaintiff sought damages and that a jury was requested. *Id.* at 132-33.

<sup>261</sup> *Id.* at 131-32.

find that the use was fair.<sup>262</sup> To the contrary, he characterized fair use as a “difficult issue,” describing the process of applying the fair use factors to the circumstances at hand as a “difficult job.”<sup>263</sup> He admitted an “initial reluctance” to find fair use, but then ultimately held that “the balance seems to be in favor of defendants.”<sup>264</sup> On the issue of market impact, he commented that rather than inferring harm, “[i]t seems more reasonable to speculate” market enhancement for the plaintiff’s work.<sup>265</sup> Hence, Judge Wyatt’s language in his fair use analysis demonstrated that he did not apply the usual summary judgment standard that permits judicial ruling where a reasonable jury could reach only one inference from the evidence.

Despite his difficulty in reaching a fair use conclusion, Judge Wyatt defended his decision to treat fair use on summary judgment.<sup>266</sup> A trial was not necessary, he explained, because the facts were undisputed.<sup>267</sup> He therefore considered the only factual issues to be those that surrounded historical facts, those which were undisputed.<sup>268</sup> Impliedly, Judge Wyatt considered the application-of-law-to-fact issues as pure issues of law for a judge to decide.<sup>269</sup> And so, in contrast to all judges before him, Judge Wyatt decided fair use as a pure issue of law.

Following Judge Wyatt, some courts during the 1970s and 1980s treated fair use as a pure issue of law.<sup>270</sup> Others granted summary

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<sup>262</sup> See *id.* at 144.

<sup>263</sup> *Id.* at 144, 146.

<sup>264</sup> *Id.* at 146.

<sup>265</sup> *Id.*

<sup>266</sup> See *id.* at 133.

<sup>267</sup> *Id.* The court also relied on the fact that both the plaintiff and the defendant agreed that summary judgment was proper. *Id.* This reason, which other courts have employed to justify summary judgment of fair use, is faulty. See discussion *infra* Part III.D.2.

<sup>268</sup> See *Time*, 293 F. Supp. at 133.

<sup>269</sup> See *id.*

<sup>270</sup> For example, in *Marcus v. Rowley*, 695 F.2d 1171, 1174-79 (9th Cir. 1983), the Ninth Circuit reversed a district court’s dismissal of the plaintiff’s copyright infringement claim and, in so doing, rejected the defendant’s argument that fair use applied and entered judgment for the plaintiff on summary judgment. The defendant had reproduced eleven pages of the plaintiff’s thirty-five-page recipe book for the purpose of creating a booklet to be used in her cake-decorating classes. *Id.* at 1173. In its six pages of fair use analysis, the Ninth Circuit never considered whether summary judgment was appropriate to draw inferences — inferences on which the reasonable mind of the district judge had disagreed. See *id.* at 1174-79.

In *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986), the Ninth Circuit expressly adopted the view that the role of the jury is with respect to only the historical facts — not the inferences to be drawn from those facts: “No material historical facts are at



judgment under the usual standard that no reasonable jury would find otherwise.<sup>271</sup> Some did so with seeming reluctance, noting that summary judgment was usually not appropriate for deciding fair

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issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because . . . these judgments are legal in nature, we can make them without usurping the function of the jury.”

In *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1531-32 (C.D. Cal. 1985), a district court considered whether analyzing the four factors was appropriate on summary judgment. The court reasoned that because the parties did not dispute the historical facts, the only disagreement arose over the conclusions that should be drawn from those facts, so summary judgment was appropriate. *Id.* at 1532. The *Hustler* district court thereby implicitly held the issues in the four-factor analysis to be purely legal. The Ninth Circuit proceeded to affirm the district court's holding. *See Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1149 (9th Cir. 1986); *see also* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753-54, 757-58 (9th Cir. 1978) (affirming summary judgment that denied fair use on grounds that substantiality of copying outweighed parodic nature of use and reciting district court's view that issues for consideration on summary judgment were “purely legal”); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (contemplating fair use on summary judgment stating “[a]s no dispute exists as to the facts giving rise to this action, but only as to the legal consequences, the Court believes this case to be appropriate for summary disposition”).

Other decisions suggest that courts treat fair use as a pure legal issue rather than one of fact based solely on the substance of issue under consideration, where it appears that reasonable minds could disagree over the outcome. *See Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408-09 (9th Cir. 1986) (affirming district court's grant of summary judgment for plaintiff, rejecting fair use where defendant had employed plaintiff's real estate listings in its advertising); *Schumann v. Albuquerque Corp.*, 664 F. Supp. 473, 477 (D.N.M. 1987) (granting plaintiff summary judgment, denying fair use where defendants broadcasted news information while copyrighted songs played in background of on-the-spot reporting); *Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc.*, 663 F. Supp. 214, 219-20 (D. Kan. 1987) (granting plaintiff summary judgment, denying fair use where defendant used plaintiff's telephone directory to create another telephone directory), *rev'd on other grounds*, 499 U.S. 340 (1991); *Radji v. Khakbaz*, 607 F. Supp. 1296, 1300-03 (D.D.C. 1985) (granting plaintiff's motion for summary judgment despite fair use argument where defendant quoted excerpts of already-published diary entries of plaintiff); *DC Comics, Inc. v. Unlimited Monkey Bus, Inc.*, 598 F. Supp. 110, 117-19 (N.D. Ga. 1984) (denying fair use on summary judgment where defendant employed references to plaintiff's copyrighted characters, Superman and Wonder Woman, in skits for singing telegrams).

<sup>271</sup> *See, e.g., Amana Refrigeration, Inc. v. Consumers Union of U.S., Inc.*, 431 F. Supp. 324, 326 (D. Iowa 1977) (finding on summary judgment that fair use could not apply and noting that evidence of fair use could lead to only one reasonable interpretation). Of course, courts are not always clear on whether they are applying the no-reasonable-jury standard of summary judgment, or alternatively, are treating the issue as a pure matter of law. *See, e.g., Gardner v. Nizer*, 391 F. Supp. 940, 944 (S.D.N.Y. 1975) (applying fair use to dismiss plaintiff's claim on summary judgment, but failing to specify whether it did so as pure matter of law or under no-reasonable-jury standard).

use.<sup>272</sup> Still others followed the traditional view expressed in *Arnstein* that, absent extraordinary circumstances, fair use was inappropriate for summary judgment.<sup>273</sup>

During this time period, it is worth noting the positions of the two circuits where the majority of fair use issues arise, the Second and the Ninth Circuits. In 1978, the Ninth Circuit appeared to have adopted the view that the issue of fair use was legal for judges to decide.<sup>274</sup> That Circuit again appeared to have affirmed that position in 1983 and in 1986.<sup>275</sup> By contrast, the Second Circuit in 1977 and again in 1982 intimated that summary judgment was especially ill suited for deciding fair use.<sup>276</sup> Then in 1986, the Second Circuit approved of summary judgment for deciding fair use, and in so doing, expressly recognized its departure from its own past precedent on this matter.<sup>277</sup>

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<sup>272</sup> In *Steinberg*, a district court granted a plaintiff's motion for summary judgment where the defendant argued fair use. *Steinberg v. Columbia Pictures*, 663 F. Supp. 706, 709 (S.D.N.Y. 1987). Recognizing the law's preference for a jury to decide the issue, the court in *Steinberg* explained that because both parties had expressly waived their right to a jury and because none of the evidence required assessing witness credibility, summary judgment was appropriate. *Id.* Under those circumstances, summary judgment would be indistinguishable from a bench trial. See also *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 563 (D.D.C. 1981) (granting summary judgment for plaintiff and in so doing, noting that "[a]lthough courts are highly reluctant to grant motions for summary judgment in copyright cases, this is an exceptional case in which summary judgment is appropriate").

<sup>273</sup> See, e.g., *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) ("The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury."); *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977) (reversing district court's grant of summary judgment for defendants and stating "[w]hether or not there has been substantial use which would deprive appellees of the fair use defense is a decision which must be made by the trier of fact after all the evidence has been introduced"); *Higgins v. Baker*, 309 F. Supp. 635, 637 (S.D.N.Y. 1970) (relying on Professor Melville Nimmer's position that "the issue of 'fair use' presents questions of fact and thus should not be determined on a motion for summary judgment"); NIMMER, *supra* note 190, at 600 (describing fair use as "triable issue of fact" inappropriate for summary judgment).

<sup>274</sup> See *Walt Disney*, 581 F.2d at 753-54, 757-58.

<sup>275</sup> See cases cited *supra* note 270. The Ninth Circuit did affirm a jury finding denying fair use in 1984. See *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984).

<sup>276</sup> See cases cited *supra* note 273.

<sup>277</sup> See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 & n.5 (2d Cir. 1986). Interestingly, in that 1986 case, the Second Circuit narrowed its holding to summary judgments for defendants. *Id.* at 1258.

*C. Fair Use as a Matter of Law: 1990s and Beyond*

By the 1990s, judges were becoming quite comfortable deciding fair use on summary judgment.<sup>278</sup> This trend has continued to the present.<sup>279</sup> Despite past warnings against this practice in the common law, judges now treat the issue as entirely appropriate for summary judgment, regardless of whether reasonable minds would disagree over inferences in the fair use analysis.<sup>280</sup> Only a few relics remain of

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<sup>278</sup> See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111-12 (2d Cir. 1998) (ruling for plaintiff on summary judgment, thereby reversing district court's grant of summary judgment for defendant, and commenting that one of factors in fair use analysis — weighty factor of market impact — posed “a very close question,” but that “[o]n balance,” that factor “tips” toward plaintiff on grounds that defendant failed to demonstrate “an absence” of “potential” for market harm); *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 993 (9th Cir. 1998) (interpreting case law as “rejecting argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently,” while affirming grant of summary judgment for copyright holder on issue of fair use); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (rejecting defendant's argument that fair use decision is improper on motion for summary judgment); see also Beebe, *supra* note 35, at 554 (noting “remarkable increase in the prevalence of fair use summary judgment opinions that began in the mid-1990s and has continued to the present”). At least two cases in 1991, however, reflected the prior treatment of courts towards the issue of fair use: *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2d Cir. 1991) (“The fact-driven nature of the fair use determination suggests that a district court should be cautious in granting Rule 56 motions in this area . . . .”); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 294-95 (S.D.N.Y. 1991) (denying motion for summary judgment of fair use issue on grounds that fair use “requires a fact-intensive inquiry,” which made it “ill-suited for summary judgment”).

<sup>279</sup> See cases cited *infra* note 280.

<sup>280</sup> See *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (“The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury.”); see, e.g., *Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, LLC*, No. 08-2103, 2010 WL 1804135, at \*5 (4th Cir. May 6, 2010) (upholding summary judgment for copyright holder where defendant had altered architectural designs to construct building); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008) (analyzing fair use on summary judgment despite parties' dispute over four factors and noting that “it is well established that a court can resolve the issue of fair use on a motion for summary judgment”); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 578 (6th Cir. 2007) (affirming summary judgment for copyright holder on issue of fair use where defendant used copyrighted songs in karaoke discs); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 773-74, 782 (9th Cir. 2006) (affirming summary judgment for copyright holder where defendant had installed more copies of plaintiff's computer program onto its computers than it had licenses for, despite evidence that number of computers running program at any one time never exceeded number of licenses); *BMG Music v. Gonzalez*, 430 F.3d 888, 889-91 (7th Cir. 2005) (affirming summary judgment for copyright holder where defendant had downloaded copyrighted music in order to

the idea that the doctrine is unsuitable for summary consideration: occasionally judges will recite a throwaway line in their opinion to the effect that courts should be careful in deciding fair use on summary judgment given its fact-intensive nature, only to engage in controversial factfinding during their summary analysis of the four factors.<sup>281</sup> On summary judgment, judges treat the four-factor analysis as raising pure legal issues, construing the historical facts as raising the only factual matters in the fair use analysis.<sup>282</sup>

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sample songs and determine whether she desired to buy them from retailer, despite evidence that her use effected greater profits for plaintiff than plaintiff otherwise would have made had she not committed use); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000) (reversing district court's grant of summary judgment for defendant and, in so doing, foreclosing defendant from arguing fair use to jury, concluding that "[o]n balance, the defense of fair use of [the plaintiff's work] fails" where defendant copied religious text of plaintiff, which was no longer in print, and distributed copies to religious followers); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141-46 (2d Cir. 1998) (affirming summary judgment for copyright holder where defendant created trivia book about plaintiff's copyrighted television show); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 181, 184-90 (D. Mass. 2007) (granting summary judgment for copyright holder where defendant displayed in broadcast portion of photograph of police arrest, despite evidence suggesting that use "was for news reporting" purposes, that "the photographs [were] factual works," that plaintiff exercised "minimal authorial decision-making to make [the] work," and that defendant "did edit the photo in a way that was arguably more than superficial"); *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238-42 (D. Colo. 2006) (granting summary judgment for copyright holder where defendant copied movies to edit out morally offensive content and then required consumer to purchase both authorized and edited copies of movie); see also cases cited *supra* note 278.

<sup>281</sup> See, e.g., *Rogers v. Koons*, 960 F.2d 301, 308-09 (2d Cir. 1992) ("The fact that the test envisioned by the [Copyright] Act is dependent on the circumstances of each case might suggest summary judgment is unavailable when fair use is the issue, but such relief may be granted when appropriate."); *Television Digest*, 841 F. Supp. at 9 (same); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 88-95 (S.D.N.Y. 2003) (deciding fair use issue on summary judgment despite its recognition that "[c]ourts 'should be especially wary of granting summary judgment' in cases involving copyright infringement, because they often are highly fact-dependent"); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (noting that fair use "is ordinarily a factual question for the jury to determine" and then justifying its summary judgment analysis on grounds that facts existed whereby it could engage in four-factor analysis), *aff'd*, 150 F.3d 132 (2d Cir. 1998).

<sup>282</sup> E.g., *Fitzgerald*, 491 F. Supp. 2d at 183 (rejecting defendant's fair use argument on summary judgment and, in so doing, noting that as to "material historical facts . . . the parties are in substantial agreement" and that "the parties' disagreements are over the interpretation of facts," which "are questions of law" appropriate for summary judgment analysis); *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 677 (D. Minn. 1995) ("[W]hen parties do not dispute the relevant historical facts underlying each of the [fair use] factors, courts have not hesitated to grant summary judgment on the basis of the fair use defense"); *L.A. Time v. Free Republic*, No. CV98-7840-

An example of a case that typifies this judicial treatment of fair use on summary judgment is the 1997 case of *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*<sup>283</sup> There, the defendant had used expressions from the popular television show, *Seinfeld*, in which the plaintiff held a copyright, to create a trivia book about the show.<sup>284</sup> On the plaintiff's motion for summary judgment, the district judge, now-Supreme Court Justice Sonia Sotomayor, rejected the defendant's fair use argument.<sup>285</sup> She began her analysis by reciting a line of case law stating that fair use is ordinarily a jury question, but then justified her treatment of fair use on summary judgment on the grounds that because the historical facts allowed her to evaluate the statutory factors, she could determine the issue as a matter of law.<sup>286</sup> She then noted the difficulty that the competing inferences presented, suggesting the reasonableness of those competing inferences.<sup>287</sup> After discussing reasons for and against finding fair use in the first factor of transformation and the third factor of amount and substantiality, then-Judge Sotomayor paused to admit that although those factors tipped in favor of the plaintiff, she found the plaintiff's position "hardly compelling."<sup>288</sup> On the fourth factor — market impact — Judge Sotomayor recognized that the plaintiff's behavior suggested drawing an inference towards fairness: she noted that the plaintiff's alleged plans to create a book like defendant's amounted to nothing more than "a remote possibility" and that the book may have actually increased demand for the show;<sup>289</sup> she expressly inferred that the book did not

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MMM(AJWx), 1999 WL 33644483, at \*6 (C.D. Cal. Nov. 8, 1999) ("Fair use is a mixed question of law and fact. It is nonetheless appropriate to resolve the issue at the summary judgment stage where the historical facts are undisputed and the only question is the proper legal conclusion to be drawn from those facts.").

<sup>283</sup> *Castle Rock Entm't*, 955 F. Supp. at 261-62.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 272.

<sup>286</sup> *Id.* at 267.

<sup>287</sup> *See id.* at 272 ("[T]here are numerous competing considerations which make this decision a difficult one . . ."). *Compare id.* at 268 (describing transformative inquiry as "central purpose" of first factor, declaring defendant's use to be transformative, and stating that "[i]t may even be said that defendants have identified a rather creative and original way in which to capitalize upon the development of a 'T.V. culture' in our society"), *with id.* at 272 (opining that first factor favors plaintiff only by giving meaning of transformation "a generous understanding"). *Compare id.* at 269 (noting that defendants used less than four percent of expression from any one television episode), *with id.* at 269-70 (reasoning that amount used was substantial on grounds that wherever defendant's use is sufficiently similar to infer copying, defendant will have always taken substantial portion of plaintiff's work).

<sup>288</sup> *Id.* at 270.

<sup>289</sup> *Id.* at 271 ("[T]hough plaintiff proclaims plans to enter derivative markets with

substitute for, but rather complemented, the show.<sup>290</sup> Nevertheless, despite these contrary inferences, Judge Sotomayor inferred that the fourth factor favored the plaintiff, and thereby ultimately concluded that “on balance” the use was not fair.<sup>291</sup> In no uncertain terms, Judge Sotomayor treated the inferences to be drawn in the fair use analysis as close calls. She openly admitted that the “numerous competing considerations” made her “decision a difficult one.”<sup>292</sup> And close calls can be decided on summary judgment only if they arise as pure issues of law, not fact.<sup>293</sup> Thus, Judge Sotomayor treated the inferences in the four-factor analysis as legal rather than factual.

Noteworthy is the fact that in affirming her opinion, the Second Circuit also appears to have treated those inferences as legal.<sup>294</sup> Their analysis did not defer to any of Judge Sotomayor’s conclusions of unfairness.<sup>295</sup> Rather, the appellate court merely performed its own independent review, implying that fair use was a pure issue of law.<sup>296</sup>

#### D. Reasons for the Present Treatment

The difference in past and present treatment of fair use on summary judgment could not be more blatant. Yesterday, fair use was an issue of fact especially suited for juries; today, fair use is a pure issue of law especially suited for judges.<sup>297</sup> This blatant distinction in treatment raises the question of why judges have taken the issue away from juries. Several reasons might exist. The most obvious is that judges are following a now-widespread practice.<sup>298</sup> More subtle, but just as controlling, are three other reasons. This section contemplates these

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books about *Seinfeld*, there is little suggestion — and certainly not enough to remove all material doubt — that such projects are anything more than a remote possibility. . . . [I]f past practice provides any indication, plaintiff will be slow to develop any such works [like defendant’s book.]”).

<sup>290</sup> *Id.* (“The Court agrees; [the book] compliments *Seinfeld*. The book is only of value to a regular viewer of the program.”).

<sup>291</sup> *Id.* at 272.

<sup>292</sup> *Id.* (“Though there are numerous competing considerations which make this decision a difficult one, the Court is persuaded that, on balance, [the defendant’s trivia book] does not represent a fair use of *Seinfeld*.”).

<sup>293</sup> See 10A WRIGHT, MILLER & KANE, *supra* note 38, § 2725, at 410-12.

<sup>294</sup> See *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141-46 (2d Cir. 1998).

<sup>295</sup> See *id.*

<sup>296</sup> See *id.*

<sup>297</sup> See discussion *supra* Part I.A–C.

<sup>298</sup> For a list of cases establishing precedent for deciding fair use on summary judgment, see *supra* notes 278, 280.

three reasons: (1) a simple misinterpretation of precedent; (2) faulty judicial reasoning; and (3) judicial distrust of juries.

### 1. A Misinterpreted Sentence

Of particular importance to cases that treat fair use as a pure issue of law is one sentence in the 1985 Supreme Court decision, *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>299</sup> Judges in the 1990s seized upon one sentence from this case to justify their summary treatment of fair use.<sup>300</sup> The sentence states: “Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court need not remand for further factfinding but may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work.”<sup>301</sup> Taking this sentence out of context, judges interpreted it to mean that the issues arising in the evaluation of the statutory factors constitute issues of law.<sup>302</sup> As issues of law, these issues could be decided on summary judgment, so reasoned district

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<sup>299</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Although not expressly noted in fair use cases, the Supreme Court trilogy of summary judgment decisions in 1986 may also have played a role in the increased rate of summary judgment decisions during the 1990s. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

<sup>300</sup> See, e.g., *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (relying on portion of reasoning from *Harper & Row*); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (same); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 855 F. Supp. 905, 909 (E.D. Mich. 1994) (same), *aff'd*, 99 F.3d 1381 (6th Cir. 1996); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (same); *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991) (same), *rev'd on other grounds*, 972 F.3d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

<sup>301</sup> See *Harper*, 471 U.S. at 560.

<sup>302</sup> An example of this interpretation occurs in *Fisher v. Dees*, 794 F.3d at 436. There, the plaintiff argued that the jury should decide the issue of fair use. Rejecting this argument, the Ninth Circuit quoted the sentence from *Harper* to declare that the Supreme Court had “completely undercut” the plaintiff’s argument. *Id.* The court then opined that under *Harper*, conclusions in the fair use analysis that must be drawn from admitted facts constituted judgments that were “legal in nature” so, therefore, where “no material historical facts are at issue,” a judge can determine these conclusions “without usurping the function of the jury.” *Id.* The Ninth Circuit has since interpreted its *Fisher v. Dees* decision as “rejecting [the] argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently.” *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 993 (9th Cir. 1998). *But see Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (Posner, J.) (“Fair use is a mixed question of law and fact, which means that it may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion — but not otherwise.”).

court judges. Thus, where historical facts were undisputed, judges interpreted the cited sentence from *Harper & Row* as allowing them — rather than the jury — to perform an evaluation of the statutory factors.<sup>303</sup> This interpretation has today become common.<sup>304</sup>

This interpretation is incorrect. The context of *Harper & Row* demonstrates an entirely different meaning. At the district court level, the parties waived their right to a jury by electing a bench trial.<sup>305</sup> At the conclusion of that trial, the court denied the defendant's fair use argument, but in its opinion, the court provided only minimal fair use analysis.<sup>306</sup> Specifically, the district court failed to draw inferences on several factual issues that are material in the analysis: namely, whether the defendant's use was transformative; whether the nature of the copyrighted work merited more or less protection as a creative or factual work; and whether the amount of the work that the defendant had used suggested fairness.<sup>307</sup> The few inferences that the district court did draw lacked substantive analysis.<sup>308</sup>

In such a situation as occurred in the district court's bench-trial opinion of *Harper & Row* — a failure to articulate factual inferences material to the court's judgment — an appellate court would normally vacate the judgment and remand for the district court to articulate those factual inferences.<sup>309</sup> This rule the Supreme Court had recited just a few years prior to *Harper & Row*, stating: "Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and

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<sup>303</sup> See cases cited *supra* note 300.

<sup>304</sup> See 3 NIMMER & NIMMER, *supra* note 8, § 12.10[B][4], at 12-190 (contrasting older view of factual nature of fair use inquiry with modern view where inferences may be determined as matter of law).

<sup>305</sup> See *Harper*, 471 U.S. at 543.

<sup>306</sup> See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983). The extent of the district court's fair use analysis consisted of the following three sentences:

Assessing the "fair use" factors, I conclude here, too, that none of them provide The Nation with the absolution it seeks. First, the article was published for profit. Second, the infringed work was soon-to-be published. Third, The Nation took what was essentially the heart of the book, and fourth, the effect of The Nation's extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright.

*Id.* (footnotes omitted).

<sup>307</sup> See *id.*

<sup>308</sup> See *id.*

<sup>309</sup> *Pullman-Standard v. Swint*, 456 U.S. 273, 292 n.22 (1982).



remand the action for appropriate findings to be made.”<sup>310</sup> Under normal procedure, then, the appellate court in *Harper & Row* should have vacated the judgment and remanded for the district court to articulate its factual inferences that constituted material facts in the bench-trial judgment. But normal procedure does not apply to an appeal of a fair use trial.<sup>311</sup> In fair use, if the historical facts are such that an appellate court may draw factual inferences that support the ultimate finding of the factfinder (be it jury or judge), the appellate court may simply affirm the judgment as a matter of law, without remanding for further factfinding as to the inferences that the district court failed to articulate.<sup>312</sup> Stated another way: “Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court need not remand for further factfinding but may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work.”<sup>313</sup>

Thus, the misinterpreted sentence in *Harper & Row* merely points out that the usual appellate procedure of vacating and remanding a judgment where a district court failed to articulate its material factual inferences does not apply in fair use.<sup>314</sup> If the district court has found historical facts sufficient to evaluate the statutory factors, and if it is possible to draw factual inferences in that evaluation which support the district court’s ultimate decision (i.e., a denial of fair use), then the appellate court may affirm that decision as a matter of law.<sup>315</sup> Even if the district court never expressly stated its factual inferences that supported its bench-trial decision, the appellate court can affirm the district court’s decision without remanding for factual findings as to those specific inferences.<sup>316</sup>

It therefore appears evident that the quoted sentence from *Harper & Row* does not mean that the inferences in the four-factor analysis are legal. Nevertheless, because this mistaken interpretation has become so prevalent among judges as a basis to justify analyzing fair use issues on summary judgment — even where those issues present close calls — additional comment should be made to dispel any doubt that the mistaken interpretation is indeed mistaken. To this end, two specific portions of the quoted sentence merit further explication. The first is:

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<sup>310</sup> *Id.*

<sup>311</sup> *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

<sup>312</sup> *See id.*

<sup>313</sup> *Id.*

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*

<sup>316</sup> *See id.*

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“Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court need not remand for further factfinding.”<sup>317</sup> Here the words “need not” and “further factfinding” are instructive. They suggest that an appellate court *could* remand for the district court to conduct further factfinding on the statutory factors, although the appellate court *need not* do so. Moreover, the quoted portion implies that the evaluation of the statutory factors must entail factfinding — and not merely factfinding that makes the evaluation possible, i.e., the historical facts — but *further factfinding*. An implication of the quoted sentence, then, is that an evaluation of the statutory factors produces further factfinding.

The second noteworthy portion is: “conclude as a matter of law.”<sup>318</sup> This phrase denotes a process of drawing a legal conclusion. That process cannot correspond to the evaluation of the statutory factors, for that evaluation involves “further factfinding.” It must instead correspond to the process of evaluating whether the district court’s decision is sustainable. More specifically, the phrase “conclude as a matter of law” refers to the process by which an appellate court concludes that the inferences that a district court may have drawn during a bench trial are reasonable. “[C]onclude as a matter of law” allows appellate courts to assess whether the district court’s inferences that it drew in the four-factor analysis are reasonable, and nothing more than that.

Thus, the quoted sentence in *Harper & Row* does not support the current judicial trend of evaluating fair use arguments on summary judgment. Contrary to widespread interpretation, the sentence does not mean that an evaluation of the fair use factors raises purely legal issues. The sentence implies just the opposite — that the evaluation raises factual issues. The sentence does not promote, and indeed it preaches against, judicial treatment of fair use issues on summary judgment.

## 2. Faulty Reasoning

In addition to the misinterpreted sentence from *Harper & Row* discussed above, judges have also employed mistaken reasoning to justify summary judgment of fair use. Judges have reasoned that if parties do not submit conflicting evidence, the conclusions to be drawn from that evidence must be legal.<sup>319</sup> That reasoning is flawed

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<sup>317</sup> See *id.*

<sup>318</sup> See *id.*

<sup>319</sup> See, e.g., *Abilene Music, Inc. v. Sony Music Entm’t, Inc.*, 320 F. Supp. 2d 84, 88

because the interpretation of undisputed evidence often constitutes an issue of fact: that evidence is undisputed does not imply that its interpretation is undisputed, thus giving rise to a burden of persuasion in the general burden to prove a fact.<sup>320</sup> Consider other areas of law: in tort, whether undisputed statements constitute defamatory remarks is a factual issue;<sup>321</sup> in contract, whether undisputed conduct constitutes a material breach is a factual issue;<sup>322</sup> in property, whether undisputed land conditions constitute a nuisance is a factual issue.<sup>323</sup> In the context of fair use, then, judges are mistaken to believe that only issues that admit conflicting evidence may be considered factual issues. That historical facts are undisputed does not imply that the interpretation of those facts raises legal issues.<sup>324</sup>

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(S.D.N.Y. 2003) (justifying summary judgment decision of fair use on grounds that “the likelihood that additional, non-cumulative evidence will be presented at trial is slight”); *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1217 (S.D.N.Y. 1996) (labeling historical facts as material facts, and concluding that although parties disputed conclusion to be drawn from those facts, no dispute existed as to any material facts — especially given unlikelihood that parties would produce any additional evidence at trial); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1532 (C.D. Cal. 1985) (justifying summary disposal of fair use issue on ground that “the basic, historical facts upon which the fair use issue depends are undisputed; the only disagreement is over what conclusion should be drawn”), *affd.*, 796 F.2d 1148 (9th Cir. 1986).

<sup>320</sup> See generally 2 MCCORMICK ON EVIDENCE § 337, at 563 (Kenneth S. Broun ed., 6th ed. 2006) (explaining factual burden of persuasion as burden to interpret evidence).

<sup>321</sup> See *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 746 n.12 (1983) (commenting on defendant’s right to jury on “the proper factual inferences to be drawn from undisputed facts” in libel suit); *Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305, 1306 (11th Cir. 2001) (“[I]f an allegedly defamatory publication is reasonably susceptible of two meanings, one of which is defamatory and one of which is not, it is for the trier of fact to determine the meaning understood by the average reader.”).

<sup>322</sup> See *DiPietro v. Sipex Corp.*, 865 N.E.2d 1190, 1197 (Mass. App. Ct. 2007) (“A breach of contract is material when the breach is of an essential and inducing feature of the contract . . . . Whether a material breach has occurred is a question of fact ordinarily to be decided by a jury.”) (citations omitted).

<sup>323</sup> See *Jackson v. City of Blue Springs*, 904 S.W.2d 322, 329 (Mo. Ct. App. 1995) (“[T]he issue as to whether the condition of their land constituted a nuisance becomes a question of fact for the jury.”).

<sup>324</sup> See *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873). In *Sioux City*, the plaintiff sued the defendant railroad company on behalf of a six-year-old who had sustained injuries on a turntable belonging to the defendant. Although the underlying facts were undisputed, the trial judge submitted to the jury the issue of whether the defendant acted negligently. *Id.* at 657-58. The defendant argued that the issue should not have gone to the jury because the underlying facts were undisputed, so the issue must have been legal for the judge. *Id.* at 659. The Court rejected this

Judges have also reasoned that where both litigants move for summary judgment, summary judgment must be appropriate.<sup>325</sup> That is simply not true.<sup>326</sup> Even if both litigants move for summary judgment, this fact does not imply that either litigant has waived his right to a jury trial in the event that he loses the motion. In moving for summary judgment, a litigant waives his right to a jury trial on the condition that he win the motion.<sup>327</sup> So although both litigants waive their respective rights to a jury trial where both litigants have moved for summary judgment, both their waivers are conditional on winning the motion. The prevailing litigant's motion for summary judgment cannot effect a waiver of the losing party's right to a jury trial. Judges, then, may not infer that both parties have unconditionally waived

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argument:

Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury.

*Id.* at 663-64.

<sup>325</sup> *E.g.*, *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 88 (S.D.N.Y. 2003) (citing fact that "each party 'has contended that its case is complete' by moving for summary judgment" as reason to decide fair use on summary judgment); *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1217 (S.D.N.Y. 1996) ("[O]ne critical fact distinguishes this case from most copyright infringement actions, in which it is preferable to leave the determination of the issue to a jury: each party has contended that its case is complete by moving for summary judgment."); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1532 (C.D. Cal. 1985) (justifying summary disposal of fair use issue on ground that "[b]oth parties have moved the court for summary judgment"); *see also Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106 (2d Cir. 1998) (reciting district court's decision to decide fair use on summary judgment based on fact that "both parties moved for summary judgment, [and] they stipulated that the case be tried on a record consisting of their summary judgment submissions and other stipulated and submitted facts").

<sup>326</sup> *See Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 483 (2d Cir. 2007) ("While both parties urge this court to resolve the issue of fair use [on summary judgment], the record before us is insufficient to determine fair use as a matter of law.").

<sup>327</sup> Rule 56 precludes a court from entering a summary judgment if there exists a material issue of fact. *See* FED. R. CIV. P. 56(c). By moving for summary judgment, a litigant is representing that no material fact exists that would preclude the court from ruling *for him*. The litigant is not representing that no material fact exists that would preclude the court from ruling for the opposing party. Thus, the litigant's motion for summary judgment is conditional upon winning the motion.

their jury right where both parties have moved for summary judgment. Both parties moving for summary judgment is different from both parties agreeing to a bench trial.

### 3. Judicial Distrust of Juries

Another possible reason that judges have taken the fair use issue away from juries is that judges simply distrust the jury. One case illustrates this possibility. In *Capitol Records, Inc. v. Alaujan*, Judge Nancy Gertner denied the defendants' motion for a jury trial on their fair use defense, dismissing the defense on summary judgment.

One sentence from her opinion is revealing: "[Defendants'] demand for a jury determination on this issue appears all but standardless; 'fair use' would, in effect, be any use whatsoever that a jury deemed fair."<sup>328</sup>

Judge Gertner was wrong. Fair use is indeed any use that a jury deems to be fair.<sup>329</sup> Although the judge may provide instruction and guidance, ultimately the jury's view of fairness carries the day.<sup>330</sup> The jury draws and weighs the inferences that determine whether a use is fair.<sup>331</sup> But Judge Gertner could not accept this possibility. She denied defendants a jury because if the jury were to find the use to be fair, this would constitute a standardless finding, or in other words, a finding that was based on incorrect inferences.<sup>332</sup> The jury could have reached a finding that was contrary to the finding that she believed to be correct, and that possibility she could not allow.<sup>333</sup> Simply put, she

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<sup>328</sup> See Electronic Order on Motion for Summary Judgment at 1, *Capital Records, Inc. v. Alaujan*, No. 1:03-CV-11661 (D. Mass. July 27, 2009) [hereinafter Gertner Order].

<sup>329</sup> *E.g.*, *N.Y. Univ. v. Planet Earth Found.*, 163 Fed. App'x 13, 14 (2d Cir. 2005) ("As to the copyright infringement claim, the evidence also supports the jury's finding of fair use, under the four-factored analysis prescribed by statute. While [plaintiff] vehemently argues, for instance, that [defendant]'s display of copyrighted material at a fund-raiser was of a commercial nature, this issue is the jury's to decide."); see also PATRY, COPYRIGHT, *supra* note 116, § 10:60 ("The trier of fact hears all evidence, makes factual determinations about the credibility and weight to be given to that evidence, weighs all four factors in light of those factual findings, and comes up with a judgment based on applying the law to the facts found.").

<sup>330</sup> See *supra* note 329 and accompanying text.

<sup>331</sup> See *supra* note 329 and accompanying text.

<sup>332</sup> Tellingly, Judge Gertner's quoted statement implies that she did not deny a jury on the grounds that any reasonable jury would find the use to be infringing; nor on the grounds that these issues were pure issues of law; rather, she denied a jury on the grounds that a jury *could* find a use to be fair. See Gertner Order, *supra* note 328, at 1.

<sup>333</sup> See *id.*

did not trust the jury to decide the case the way that she believed it should have been decided.<sup>334</sup>

Such distrust of the jury may arise as a general matter or in the specific context of fair use. As a general matter, juries tax a court's schedule and resources. Jury trials are lengthy and expensive for all involved, so it is possible that in some instances, judges view juries as not worth their cost.<sup>335</sup> Juries also represent a significant concession of power for a judge.<sup>336</sup> Once a jury enters the courtroom, the judge has ceded a substantial amount of control in determining the case's outcome. It is possible that some judges would prefer to retain that control.

In the context of fair use, it is possible that judges distrust juries because they believe that juries might subscribe to incorrect social norms relevant to copyright infringement. It is possible that a judge may perceive popular opinion as spurning copyright protection, especially with the advent of the Internet.<sup>337</sup> From this perspective, it

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<sup>334</sup> This quoted statement is not the first instance where Judge Gertner has demonstrated her distrust of the jury in the fair use context. In an earlier court filing of the same case, Judge Gertner "found cause to consider who is the proper decisionmaker on questions of fair use — the judge or a jury." Order at 1, *Capital Records, Inc. v. Alaujan*, No. 1:03-CV-11661 (D. Mass. July 14, 2009). In that filing, she hinted that she believed fair use is a question "more appropriately decided by a judge than a jury." *Id.* at 4 n.1. In another case, *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 181, 184-90 (D. Mass. 2007), Judge Gertner granted summary judgment for a plaintiff copyright holder where the defendant had displayed in a television news broadcast a portion of a photograph of a police arrest. Despite her recognition that the use "was for news reporting" purposes, that "the photographs [were] factual works," that the plaintiff exercised "minimal authorial decision-making to make [the] work," and that the defendant "did edit the photo in a way that was arguably more than superficial," Judge Gertner found that the "balance" of the factors favored the plaintiff, awarding summary judgment to the plaintiff, denying defendants a jury. *Id.*

<sup>335</sup> See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 658 (2010) (noting time-consuming, expensive nature of jury trial amidst system of limited resources).

<sup>336</sup> See Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 208-09 (1998) (observing power struggle between judge and jury in context of tort law).

<sup>337</sup> That judges perceive a change in social norms toward copyright infringement, as a result of the Internet, is evident in case law. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000) (finding peer-to-peer downloading to be infringing and noting that by end of year, there may be seventy-five million peer-to-peer users), *rev'd on other grounds*, 239 F.3d 1004 (9th Cir. 2001). Scholars also are alluding to this perception of changing norm. See, e.g., Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 41 (2000) (observing popular norm that number of peer-to-peer file-sharers makes conduct permissible and further observing that courts are momentarily holding with

may be unwise to place fair use issues with ordinary members of society, who are themselves subject to the pervasive influence of Internet norms, because fair use calls for discretionary judgment. A judge may believe that the changing norms toward copyright would introduce too much wiggle room into fair use, if fair use ever reached the jury room.

These reasons for distrusting the jury are of course only possibilities. Whether they actually influence a judge cannot be known, especially because that influence may be so subtle that it may seem entirely irrelevant to a judge, even while coloring her perception of the subjectivity-laden issues. Yet regardless of whether these reasons actually do influence the judge, the reasons are an insufficient basis for withholding fair use issues from a jury. Distrust of a jury, if it occurs for any of the cited reasons, threatens the integrity of the judicial system.

#### IV. CONSTITUTIONAL TENSIONS

The present practice of treating fair use as a pure matter of law for a judge to decide raises constitutional concern on two fronts.<sup>338</sup> It denies litigants' constitutional right to a jury, and it threatens fair users' constitutional right of free speech.

##### A. Right to a Jury

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." <sup>339</sup> Although as a general matter summary judgment deprives a litigant of a jury, the Supreme Court has articulated that summary judgment is constitutional because it merely examines whether an issue exists for a jury to decide.<sup>340</sup> But

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traditional norms of copyright, rejecting new popular norm).

<sup>338</sup> See generally *Associated Press v. NLRB*, 301 U.S. 103, 135-36 (1937) (Sutherland, J., dissenting) ("[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . A little water, trickling here and there through a dam, is a small matter in itself; but it may be a sinister menace to the security of the dam, which those living in the valley below will do well to heed.").

<sup>339</sup> See U.S. CONST. amend. VII.

<sup>340</sup> See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1972) (relying on *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902), for proposition that "summary judgment does not violate the Seventh Amendment"); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902) (upholding summary judgment process on grounds that it merely "prescribes the means of making an issue"

Seventh Amendment concerns arise when courts do not follow the rules of summary judgment — namely, when courts declare that no issues exist for a jury to determine when in fact such issues do exist.<sup>341</sup> More specifically, because the inferences in the four-factor analysis constitute genuine issues of material fact rather than pure issues of law, drawing those inferences on summary judgment raises constitutional concern.<sup>342</sup>

### 1. Fair Use Under *Feltner*

In 1998, Justice Clarence Thomas wrote for an eight-member majority (with a concurrence by Justice Scalia) in which the Court found that courts were violating the Seventh Amendment in determining damages awards in copyright cases.<sup>343</sup> That case, *Feltner v. Columbia Pictures Television, Inc.*, is instructive in the similar copyright context of fair use. In *Feltner*, the plaintiff, Columbia Pictures, owned the copyright to television shows that the defendant, Feltner, broadcasted on its television station.<sup>344</sup> At summary judgment, Columbia prevailed as to liability,<sup>345</sup> and so Feltner moved for a jury trial on the issue of statutory damages.<sup>346</sup> The district court denied Feltner's jury demand, awarding statutory damages after a bench trial.<sup>347</sup> On appeal to the Supreme Court, Feltner argued that the denial violated his Seventh Amendment right to a jury.

In considering Feltner's argument, the Supreme Court recited the general guidelines for determining whether a Seventh Amendment

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for jury to determine). *But see* Thomas, *supra* note 123, at 139 (arguing that summary judgment is unconstitutional).

<sup>341</sup> See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1074-1132 (2003) (acknowledging constitutional problems on summary judgment that arise in certain circumstances and declaring that "if no 'genuine issue of material fact' exists and the movant is entitled to judgment 'as a matter of law,' pretrial disposition does not raise questions of constitutional dimensions").

<sup>342</sup> See generally 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1762, at 633 (1833) (describing right to jury as "privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty").

<sup>343</sup> *Feltner v. Columbia Pictures Television, Inc.* 523 U.S. 340, 342, 353, 355 (1998). Interestingly, now-Chief Justice John Roberts represented the prevailing petitioner, Feltner, before the Supreme Court. *Id.* at 341.

<sup>344</sup> *Id.* at 342-43.

<sup>345</sup> Fair use was not an issue in any part of the case. *See id.*

<sup>346</sup> *Id.* at 343.

<sup>347</sup> *Id.* at 344.



violation exists.<sup>348</sup> In short, a violation exists where a court denies a jury demand as to issues that determine legal rights recognized by the common law when the Seventh Amendment was framed.<sup>349</sup> The disputed rights need not trace their history back to 1791, but they must at least be akin to legal rights that existed during that period.<sup>350</sup>

The *Feltner* Court ultimately concluded that the Seventh Amendment required a jury trial on the issue of statutory damages.<sup>351</sup> In reaching that conclusion, the Court held that during the relevant time period, copyright holders would pursue their legal rights through actions at law.<sup>352</sup> The Court pointed out that in pursuing the specific right to damages, copyright holders would try the issue of damages to a jury.<sup>353</sup> This history compelled the Court to pronounce that copyright holders today must also try the issue of statutory damages to a jury — this despite language in the Copyright Act placing the issue with the court.<sup>354</sup>

*Feltner*'s holding as to statutory damages in copyright actions strongly suggests that the Seventh Amendment also requires jury consideration of the fair use issue. Like the issue of statutory damages, fair use represents an issue that determines whether copyright holders may exercise their legal rights.<sup>355</sup> But unlike the issue of statutory damages, fair use is more fundamental to the legal right of copyright.<sup>356</sup> That is, the issue of statutory damages arises only after the scope of a copyright holder's right has been determined, or in

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<sup>348</sup> *Id.* at 347-48.

<sup>349</sup> *Id.*; see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999).

<sup>350</sup> *Monterey*, 526 U.S. at 708-09; *Feltner*, 523 U.S. at 348.

<sup>351</sup> *Feltner*, 523 U.S. at 355.

<sup>352</sup> See *id.* at 348-54.

<sup>353</sup> See *id.*

<sup>354</sup> See *id.* at 345, 355.

<sup>355</sup> Justice Story explained the role of fair use in determining the legal rights of the copyright holder as follows:

The true question in all cases of this sort [fair use cases] is (it has been said) whether there has been a legitimate use of the copyright publication in the fair exercise of a mental operation, deserving the character of a new work. If there has been, although it may be prejudicial to the original author, it is not an invasion of his legal rights.

2 STORY, *supra* note 206, § 939, at 242.

<sup>356</sup> During the relevant time period, courts viewed fair use as a doctrine that defined the scope of rights held by a copyright holder. See Ned Snow, *The Forgotten Right of Fair Use* (Aug. 16, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1659855>.

other words, only after a defendant's liability has been determined. By contrast, the issue of fair use arises during the very process of determining the scope of a copyright holder's right, or in other words, it is the very basis for determining liability.<sup>357</sup> Therefore, if the Supreme Court views the issue of statutory damages as subject to a jury trial under the Seventh Amendment, then certainly the Supreme Court must view the issue of fair use likewise, for the latter issue is more fundamental to the exercise of a copyright holder's legal rights.

Like the history of statutory damages in copyright law, the history of the common law in copyright actions well establishes that during the relevant time period, courts recognized fair use as an issue that determines legal rights. Part III.A above has set forth this history. To recap, as early as 1769, in the famous case of *Millar v. Taylor*, English common law began teaching that the jury shall consider circumstances that would justify copying in order to determine whether a plaintiff may prevail on an infringement claim.<sup>358</sup> In 1785, the Chief Justice of the King's Bench, Lord Mansfield, presided over an action at law for copyright infringement, and in doing so, he explained that in deciding whether infringement had occurred, the jury would weigh those principles that today underlie the doctrine of fair use.<sup>359</sup> In 1803, Chief Justice Lord Ellenborough also presided over an action at law for copyright infringement, and he described the role of the jury as deciding whether the defendant's copying "was fairly done" so as to admit no liability.<sup>360</sup> Thus, at the time of the Seventh Amendment, fair use existed as a jury issue that determined the legal rights of copyright holders.<sup>361</sup>

Despite this history, a mistaken view of fair use has arisen that fair use is a creature of equity and, therefore, not a legal right that existed at common law.<sup>362</sup> This view stems from the fact that other early

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<sup>357</sup> See *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (explaining doctrine of fair use as circumstances that determine whether infringement lies).

<sup>358</sup> See *Miller v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 224.

<sup>359</sup> See *Sayre v. Moore*, (1785) 102 Eng. Rep. 139 n.(b) (K.B.) 140 ("In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.").

<sup>360</sup> *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679 (K.B.) 680.

<sup>361</sup> See PATRY, *FAIR USE PRIVILEGE*, *supra* note 192, at 3-26.

<sup>362</sup> Compare *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (treating fair use as "equitable doctrine"), *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) ("The fair use doctrine was initially developed by courts as an equitable defense to copyright infringement."), and *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (describing fair use as "entirely equitable" doctrine), with PATRY, *COPYRIGHT*, *supra* note 116 § 10:3 ("Fair use is not an equitable doctrine or an

judges who articulated the doctrine of fair use sat in courts of equity as opposed to courts of law.<sup>363</sup> The incorrectness of this view is evident from the well-established maxim of *equitas sequitur legem* (i.e., equity follows the law).<sup>364</sup> courts of equity must construe legal rights to determine whether equity will furnish relief.<sup>365</sup> A good example of this principle is found in the first American case to articulate the doctrine of fair use, *Folsom v. Marsh*, where Justice Story sat in a court of equity and granted the plaintiff's plea for an injunction against the defendants from using the plaintiff's expression.<sup>366</sup> It was necessary for Justice Story to construe the scope of the legal right of copyright to decide whether to grant the equitable relief desired.<sup>367</sup> For that purpose, Justice Story articulated the limits of copyright, and that articulation has become the current doctrine of fair use.<sup>368</sup> Noteworthy is that Justice Story did not describe these limits as a doctrine independent of or distinct from the right of copyright.<sup>369</sup> Indeed, he did not even employ any terminology to describe these limits, not even the label of "fair use."<sup>370</sup> For Justice Story, considerations of fair use were part and parcel with the definition of the legal right of copyright.<sup>371</sup> Indeed, in

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equitable defense. As history reveals, it is a legal defense which may, and frequently is, decided by a jury."), and *Leval*, *supra* note 24, at 1127 (arguing that historically, fair use is not creature of equity).

<sup>363</sup> See, e.g., *Lawrence v. Dana*, 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8136) (considering fair use question in equitable proceeding); *Folsom v. Marsh*, 9 F. Cas. 342, 342, 344-45 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (same). Further confusion has arisen by the Supreme Court labeling fair use as an "equitable rule of reason" — lifting this description from a House Committee Report — in order to emphasize that the fair use analysis requires a "sensitive balancing of interests." See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-50 & n.31, 454-55 & n.40 (1984) (emphasis added). The Court never suggested, however, that this label implied that the doctrine arose as an equitable doctrine. See *id.* To the contrary, the Court expressly pronounced that fair use represented a "common-law doctrine," one that Congress intended to codify when it legislated the doctrine into the Copyright Act. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

<sup>364</sup> See *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893) ("The established rule . . . is that equity follows the law.").

<sup>365</sup> See *Saunders v. Smith*, (1838) 40 Eng. Rep. 1100, 1107 (Lord Chancellor Cottenham) ("In all cases of injunctions in aid of legal rights — whether it be copyright, patent right, or some other description of legal right which comes before the Court [of Equity] — the office of the Court is consequent upon the legal right.").

<sup>366</sup> See *Folsom*, 9 F. Cas. at 344-45, 348-49.

<sup>367</sup> See *id.*

<sup>368</sup> See *id.*

<sup>369</sup> See *id.*

<sup>370</sup> See *id.*

<sup>371</sup> See *id.*; *Snow*, *supra* note 356.

his commentaries on equity, Justice Story explained: “If there has been [a legitimate use of the copyright], although it may be prejudicial to the original author, it is not an invasion of his *legal* rights.”<sup>372</sup> Justice Story’s articulation of fair use principles in an equitable proceeding did not transform the fair use doctrine into a creature of equity any more than his articulation of copyright transformed the right of copyright into a creature of equity. Ultimately, fair use did not arise as an equitable doctrine.<sup>373</sup>

Thus, principles of fair use determined legal rights at common law in 1791. As a result, issues of fair use fell to the jury. The Seventh Amendment requires that they fall to the jury today.

## 2. Problems of Denying a Jury

In 1791, there was good reason for mandating a civil jury. The right to a jury was already well established at that time,<sup>374</sup> and the Founders considered it “essential in every free country.”<sup>375</sup> The jury right reflects the view that society trusts several citizens to decide a matter admitting discretionary judgment more than society trusts a single aristocratic judge.<sup>376</sup> For like any other position of power, the office of judge exposes its officer to subtle but weighty influences that may affect impartiality.<sup>377</sup> Influences attend the position of judge that are less likely to attend the position of juror. The right to a jury guards against those influences. Influences on judges that the Seventh Amendment was intended to guard against apply as much in fair use

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<sup>372</sup> 2 STORY, *supra* note 206, § 939, at 242 (emphasis added).

<sup>373</sup> See PATRY, FAIR USE PRIVILEGE, *supra* note 192, at 5 (“It is therefore incorrect to characterize fair use as a child of equity.”).

<sup>374</sup> See generally LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 212 (1999) (“By the time of Magna Carta the inquest in civil cases was becoming fairly well established as the trial jury, although not in criminal cases.”).

<sup>375</sup> *Letters from the Federal Farmer* (IV) (Oct. 12, 1787), reprinted in 5 THE FOUNDERS’ CONSTITUTION 354, 354 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *Federal Farmer*]; see also Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON 69, 71 (Henry A. Washington ed., 1853) (“I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”).

<sup>376</sup> See Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 375, at 363, 364 [hereinafter Jefferson Letter] (observing that jury system “is the only way to ensure a long-continued and honest administration of its powers”).

<sup>377</sup> See *id.*; STEPHEN MICHAEL SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS 119-20 (2009) (explaining immoral behavior that results from position of government power).

today as they did in 1791. Two of these influences, improper devotion and personal bias, are discussed below.

*a. Influence of Improper Devotion*

Thomas Jefferson advocated the right to a jury because judges might otherwise pay improper devotion to separate branches of government.<sup>378</sup> Certainly neither the executive nor the legislative branches may adjudicate a specific legal dispute between two private litigants, and so in specific disputes, neither branch should influence a judge's decision.<sup>379</sup> For this reason, a devotion to either branch threatens judicial impartiality. This devotion becomes especially dangerous where the issue raises a constitutional question. Because the judiciary (through judge or jury)<sup>380</sup> has exclusive authority, and indeed an obligation, to decide constitutional questions independent of the executive or legislature, a devotion to either of these other branches would compromise the judiciary's duty to decide constitutional issues.<sup>381</sup>

Fair use exemplifies the potential danger of this improper devotion. Fair use raises the constitutional question of whether a defendant's use merits protection as speech under the First Amendment.<sup>382</sup> The role

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<sup>378</sup> Jefferson Letter, *supra* note 376, at 364. (“[W]e all know that permanent judges acquire an Esprit de corps, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by a spirit of party, by a *devotion to the Executive or Legislative*; that it is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side; and that the opinion of 12 honest jurymen gives still a better hope of right, than cross and pile does.”) (emphasis added).

<sup>379</sup> See U.S. CONST. art. III, § 1, cl. 1 (vesting “judicial power” with Supreme Court and courts created by Congress); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 134 (1973) (observing that “judicial power” of Article III is activated when dispute arises between adverse parties). Justice James Wilson, one of the Framers, articulated this view as follows: “The independency of each power consists in this, that its proceedings . . . should be free from the remotest influence, direct or indirect, of either of the other two powers.” JAMES WILSON, *1 WORKS* 299 (R.G. McCloskey ed., Harvard Univ. Press 1967).

<sup>380</sup> An example of both the judge and the jury determining whether expression merits constitutional protection arises in the obscenity context. The jury receives legal instruction from the judge to determine whether expression is obscene, i.e., whether it appeals to the prurient interest and is patently offensive based on community standards. See *Smith v. United States*, 431 U.S. 291, 300-01 (1977) (explaining role of jury in obscenity case).

<sup>381</sup> See *generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) (setting forth judiciary's role of deciding constitutional questions).

<sup>382</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as “free speech safeguard[]” and “First Amendment accommodations” and suggesting First

that fair use plays in upholding a defendant's First Amendment rights thereby restricts congressional and executive authority to determine fairness in any particular copyright case.<sup>383</sup> Were a judge to defer to executive or legislative suggestion that a certain defendant's conduct was infringing, that deference would compromise her constitutional duty to determine whether a defendant's use constitutes speech.

An example of such an improper devotion arises in the *Clean Flicks* case discussed above.<sup>384</sup> Recall that in *Clean Flicks*, Judge Matsch seemed not to comprehend the reasonableness of a contrary inference in the four-factor analysis, ultimately concluding on summary judgment that the defendants' use was not fair.<sup>385</sup> During that analysis, Judge Matsch relied on a House Committee Report, which was drafted two years after the *Clean Flicks* suit had commenced, and that Report indicated a congressional belief that the defendants were committing infringing acts.<sup>386</sup> Judge Matsch did not conceal the fact that this Report influenced his decision.<sup>387</sup>

This influence of the legislature on Judge Matsch's determination of fairness is most troubling because that determination represents a decision of constitutional import: the judicial system (through judge and jury) should have decided whether the defendant's use merited protection as an act of speech. And this decision should have been made independent of congressional opinion on the particular facts at issue. Judge Matsch's devotion to the House Committee's opinion about the defendants appears to have affected his impartiality in deciding the constitutional issue of fairness.<sup>388</sup>

*b. Influence of Personal Bias*

The Framers recognized the possibility that a judge's personal bias may influence his decision.<sup>389</sup> As the Federal Farmer wrote, where a

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Amendment violation were Congress to alter "traditional contours" of copyright law).

<sup>383</sup> See *id.*

<sup>384</sup> See *Clean Flicks of Colo. v. Soderbergh*, 433 F. Supp. 2d 1236, 1239-41 (D. Colo. 2006); discussion *supra* Part II.B.1.a.

<sup>385</sup> See *Clean Flicks*, 433 F. Supp. 2d at 1239-41.

<sup>386</sup> *Id.* at 1240 (citing H.R. REP. NO. 109-33(I), at 6-7 (2005), *reprinted in* 2005 U.S.C.C.A.N. 220, 225) (explaining that House Committee is aware of services and companies that create fixed copies of movies that make imperceptible limited portions of audio and video content and that Committee believes such practices to be illegal under Copyright Act).

<sup>387</sup> See *id.*

<sup>388</sup> See *id.*

<sup>389</sup> *Federal Farmer*, *supra* note 375, at 354; see also *Jefferson Letter*, *supra* note 376, at 364.

few hold offices of power, the few are generally disposed to favor “those of their own description.”<sup>390</sup> Even the most ethical of judges may suffer from this failing: indirectly, perhaps even subconsciously, the possibility for personal bias exists where one of the parties is similar to the judge.<sup>391</sup> Without realizing it, the judge may consider that party’s view as the most reasonable view because that party seems most like the judge.<sup>392</sup>

Although this bias is difficult to identify in any given case, the circumstance that creates the potential for the bias is not: one party looks like the judge.<sup>393</sup> That circumstance frequently arises in fair use cases. Judges are in many ways similar to corporate copyright holders: both represent the educated elite; both stand in positions of power; both are sophisticated.<sup>394</sup> Compared to a college drop-out or teenage

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<sup>390</sup> See *Federal Farmer*, *supra* note 375, at 354.

<sup>391</sup> Scholarship recognizes the presence of implicit or unconscious bias that can affect a decisionmaker’s judgment. See Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 477 (2007) (questioning whether presence of unconscious bias based on race, gender, and other legally protected characteristics — pervasiveness of which psychological studies have demonstrated — affects legally relevant behavior); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1200-01 (2009) (noting white preference among white Americans and observing that scientific studies “reveal implicit or unconscious bias”). Professor Steven Burton has articulated the general problem as follows:

[T]he problem of improper bias can arise also when judges characterize the facts in a case. . . . The sifting of evidence is guided at many points by one’s general beliefs about how the world works, including beliefs about various classes of people. Stereotypical beliefs can generate inferences from the evidence to the finding of fact and thereby introduce improper bias in adjudication.

STEVEN J. BURTON, JUDGING IN GOOD FAITH 249-50 (1992).

<sup>392</sup> See generally Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987) (“Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims.”).

<sup>393</sup> See *supra* note 391 and accompanying text.

<sup>394</sup> Judge Nancy Gertner aptly observed the disparity between the parties of copyright suits during a pretrial hearing involving pro se defendants (who argued fair use) and corporate copyright holders: “There is a huge imbalance in these cases. The record companies are represented by large law firms with substantial resources. . . . They bring cases against individuals, individuals who don’t have lawyers and don’t have access to lawyers and who don’t understand their legal rights.” Transcript of Motion Hearing at 8, *Capital Records, Inc. v. Alaujan*, No. 1:03-CV-11661 (D. Mass. June 17, 2008). Noteworthy is the fact that in that case, the copyright holders retained the law firm where the judge formerly practiced. An attempt to invoke an unconscious bias? See Plaintiffs’ Supplemental Memorandum of Law at 5, *Capital Records, Inc. v.*

defendant, the corporate copyright holder looks strikingly similar to the judge. Their life similarities of age, education, power, social status, and relative wealth become starkly apparent when lined up against fair use defendants. These similarities present a danger for bias to influence the discretionary judgments pervasive in the fair use analysis. The possibility that similarities between copyright holder and judge might play into the discretionary nature of fair use cannot be denied.

It should be noted that the danger of personal bias outlined above is with respect to the thought process of judges, not the outcomes that judges reach. Assuming an ethical judiciary, there is no danger that a judge is consciously favoring the copyright holder in order to ensure that they prevail.<sup>395</sup> Rather, the danger is the temptation to construe issues from one party's point of view, or more specifically, to defer, even if implicitly, to a party's subjective values that control the inferences in the four-factor analysis. If a judge must make a discretionary determination that admits a wide array of opinion, her thought process may tend to mirror those who are most like her. The danger here is not that judges are trying to favor one party over the other. It is that judges are being persuaded to form opinions and exercise discretion for the party that is most similar in circumstance. Party similarity in intellect, prestige, or power may subtly influence judicial thought processes and discretionary opinions.

Thus, by withholding issues in the four-factor analysis from juries, judges are upending a process for determining fairness that the law has developed and maintained since the inception of fair use centuries ago.<sup>396</sup> The histories of both the fair use doctrine and the right to a jury trial demonstrate that the law has carefully and deliberately developed a system for balancing interests of free speech against interests of creativity incentives, interests of individuals against interests of corporations, and interests of objective judgment against interests of subjective opinion. This system has been a communal assessment by peers. The dangers of deciding fair use on summary judgment illustrate the dangers of ignoring the constitutional right to a jury.

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Alaujan, No. 1:03-CV-11661 (D. Mass. Feb. 27, 2009) (stating that Dwyer & Collora, LLP represents plaintiff copyright holders); 1 ALMANAC, *supra* note 110, First Circuit, at 11 (stating former law firm of Judge Gertner as Dwyer, Collora and Gertner).

<sup>395</sup> The fact that large corporations may win more cases than poor individuals in the fair use context does not by itself raise concern; favoring a party because the law mandates that outcome is not the danger here.

<sup>396</sup> See, e.g., *Cary v. Kearsley*, (1803) 170 Eng. Rep. 679 (K.B.) 680 (Lord Ellenborough, C.J.) (submitting issue of fair use to jury).



### B. Right of Speech

The failure of judges to commit fair use issues to a jury creates another constitutional problem. It threatens a defendant's speech rights under the First Amendment. Scholars and courts recognize that fair use merits constitutional protection: in some circumstances, repeating another's expression should be protected as an act of speech, and where those circumstances exist, the First Amendment — through the doctrine of fair use — restrains congressional authority to suppress that repetition.<sup>397</sup> Courts have uniformly held that the doctrine of fair use contemplates speech interests of defendants, so a First Amendment challenge to copyright's suppression of copied expression must invoke fair use.<sup>398</sup> If a copier believes that her interest in free speech justifies her copying, she must rely on the fair use doctrine to assert that interest.<sup>399</sup> In short, fair use is intended to satisfy the demands that free speech places on copyright.

In view of the speech nature of fair use, summary judgment is a particularly inappropriate means to dispose of a fair use argument. As discussed above, one judge's opinion on an inference in the fair use analysis may not reflect the consensus opinion of a jury.<sup>400</sup> A risk therefore exists that summary judgment will foreclose a fair user from realizing an otherwise meritorious defense. Given the speech nature of fair use, this risk represents a threat to constitutionally protected speech.<sup>401</sup> By failing to recognize an inference in the fair use analysis, a judge fails to recognize the possibility that speech is protected. A judge who disposes of a fair use argument on summary judgment necessarily ignores the wide disparity of opinion that arises in the factfinding process of the fair use analysis, and in so doing, the judge may impose liability on protected speech.

The threat of summary judgment to speech has been recognized in a speech context similar to fair use — defamation.<sup>402</sup> As in fair use, in

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<sup>397</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as “free speech safeguard[]” and “First Amendment accommodation[]”); Lemley & Volokh, *supra* note 135, at 165-66 (arguing that copying another person's expression constitutes speech); Volokh & McDonnell, *supra* note 135, at 2433-34, 2466-70 (arguing for procedural protections of free speech to apply to fair use expression).

<sup>398</sup> See *Eldred*, 186 U.S. at 219, 221; see, e.g., *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment concerns in copyright cases are subsumed within the fair use inquiry.”).

<sup>399</sup> See *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”).

<sup>400</sup> See discussion *supra* Part II.B.1.

<sup>401</sup> See discussion *supra* Part II.B.2.

<sup>402</sup> See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (questioning

defamation a defendant's speech rights turn on a subjective factfinding process: the factfinder must determine a defamation defendant's intent.<sup>403</sup> For this reason, courts never entertain a motion for summary judgment *against* a defamation defendant. Interestingly, though, courts have recognized the importance of summary judgments *for* defamation defendants on the grounds that the litigation cost of establishing facts to a jury might force a defendant to self-censor, introducing a potential for chilling of protected speech.<sup>404</sup> By contrast, where the speech at issue is fair use expression, courts are ready and willing to rule against a defendant on summary judgment as a pure matter of law.<sup>405</sup>

#### CONCLUSION

Treating fair use as a pure issue of law violates the Seventh Amendment right to a civil jury and threatens the First Amendment right of free speech. It sacrifices truth for brevity.<sup>406</sup> It destroys the delicate balance of power between judges and the people.<sup>407</sup> It upends centuries of precedent.<sup>408</sup> It thwarts due process.<sup>409</sup>

These dangers have reached a zenith. Judges have invaded the constitutional province of the jury, stripping away ordinary citizens from the process due in cases where the law deprives individual members of its public of all their property.<sup>410</sup> To disguise the invasion,

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whether deciding defamation on summary judgment is appropriate, given that decision requires ruling on actual malice).

<sup>403</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>404</sup> See, e.g., *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 668 (Ct. App. 1984) (“[A] motion for summary judgment in First Amendment cases is an approved procedure because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights and because speedy resolution of cases involving free speech is desirable.”); *DeAngelis v. Hill*, 847 A.2d 1261, 1267 (N.J. 2004) (justifying summary judgment for defendant in defamation action on grounds that “threat of prolonged and expensive litigation has a real potential for chilling . . . criticism and comment”).

<sup>405</sup> See discussion *supra* Part III.C.

<sup>406</sup> Or perhaps it sacrifices truth *and* brevity. See SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE (IN PRAISE OF THE LAWS OF ENGLAND)* 77 (Cambridge Univ. Press 1949) (1468) (“[A] jury of twelve citizens is the most powerful and efficient method for eliciting truth.”).

<sup>407</sup> See discussion *supra* Part IV.A.2.b.

<sup>408</sup> See discussion *supra* Part III.A.

<sup>409</sup> See discussion *supra* Part IV.A.

<sup>410</sup> See, e.g., Ashby Jones, *A Loss for Nesson: BU Student Hit with \$675,000 Fine*, WALL ST. J. L. BLOG (Aug. 3, 2009, 8:55 EST), <http://blogs.wsj.com/law/2009/08/03/a-loss-for-nesson-bu-student-hit-with-675000-fine/> (describing college student's fine of

judges have labeled issues of fact as issues of law, altering a traditional contour of copyright.<sup>411</sup> The trend has become so common that judges are now questioning why in the past the jury was ever involved in the fair use analysis; they are now calling for the jury's demise to be express and unqualified.<sup>412</sup> And this rewriting of the jury's role has left fair use speech unprotected. The abolition of the jury in fair use has begotten a constitutional crisis.

It is time, then, to return to the original conception of fair use — as a fact-intensive inquiry most appropriate for the jury. Judges must recognize anew the factual nature of the fair use inquiry.<sup>413</sup> They must appreciate that fair use inferences are laden with social value judgments that are best left to juries.<sup>414</sup> Even where inferences seem obvious, judges must recognize that their own biases and values shape the framework through which they form opinions of fairness.<sup>415</sup> They must recognize that juries are particularly well suited to form those opinions. The power of process must be recognized and respected. Fair use must be an issue of fact for the jury.<sup>416</sup>

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\$675,000 where judge denied student opportunity to argue fair use to jury).

<sup>411</sup> Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (implying that alteration of “traditional contours” in copyright law would raise constitutional concern).

<sup>412</sup> See Order at 4, *Capital Records, Inc. v. Alaujan*, No. 1:03-CV-11661-NG (D. Mass. July 14, 2009) (Gertner, J.) (calling for examination of which institution — judge or jury — should decide questions of fair use and suggesting that that institution should be judge).

<sup>413</sup> See discussion *supra* Part IV.

<sup>414</sup> See discussion *supra* Part II.B.1.a.

<sup>415</sup> See discussion *supra* Part II.B.1.a.

<sup>416</sup> Cf. *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 321 (6th Cir. 2004) (recognizing that summary judgment should be employed “sparingly” in copyright cases that raise issue of substantial similarity).