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The Questionable Origins of the Copyright Infringement Analysis

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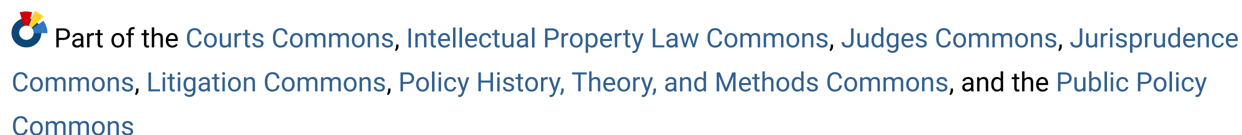
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ARTICLE

The Questionable Origins of the Copyright Infringement Analysis

Shyamkrishna Balganesh*

Abstract. Central to modern copyright law is the test for determining infringement, famously developed by Judge Jerome Frank in the landmark case of *Arnstein v. Porter*. The "*Arnstein* test," which courts continue to apply, demands that the analysis be divided into two components: actual copying—the question whether the defendant did in fact copy—and improper appropriation—the question whether such copying, if it did exist, was unlawful. Somewhat counterintuitively, though, the test treats both components as pure questions of fact, requiring that even the question of improper appropriation go to a jury. This jury-centric approach continues to influence modern copyright law and is responsible for the subjective and unpredictable nature of the infringement analysis in copyright infringement lawsuits. Examining the memoranda, correspondence, and extrajudicial writings of the three judges who decided the *Arnstein* case reveals that the court's decision to empower the jury was driven almost entirely by Judge Frank's unique legal philosophy—his skeptical views about judicial factfinding and his desire to control lower court decisionmaking. Characterizing the entire infringement analysis as a purely factual one provided him with a perfect mechanism for giving effect to his skepticism. The *Arnstein* test thus had very little to do with substantive copyright law and policy, a reality that copyright jurisprudence has thus far ignored altogether in its continuing affirmation of the opinion's framework. This Article disaggregates the complex issues that were at play in *Arnstein* to show how the opinion was rooted in a dystopian vision of the adjudicative process that has since come to be universally repudiated and argues that it may well be time for copyright jurisprudence to reconsider its dogmatic reliance on *Arnstein*, thereby freeing copyright law from one of its best-known malaises.

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Introduction

The U.S. Constitution guarantees to individuals the "right of trial by jury" in all civil suits at common law.[1] Lawsuits seeking damages for copyright infringement have been understood as "suits at law" that are subject to this right.[2] Demands for jury trials in copyright infringement lawsuits are today a staple in the world of copyright litigation. While a vast majority of these claims either settle prior to trial or are instead dismissed through motions, on the rare occasion that a jury is indeed empaneled to hear a case, courts continue to be confounded by a somewhat basic issue: the proper role of the jury in the copyright infringement analysis.

The copyright infringement analysis involves determining whether a defendant *copied* the plaintiff's protected work, a question that embodies elements of both fact and law. It entails ascertaining facts about the defendant's conduct and then making a normative judgment about the legality of such conduct.[3] Classifying these issues appropriately and dividing them up between judge and jury remains a complex undertaking—one that the parties routinely disagree about.[4] Indeed, the spate of criticism surrounding the jury verdict in the copyright infringement case involving the song "Blurred Lines" vividly illustrates the complexity of empaneling juries to determine the existence of copyright infringement.[5]

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1. U.S. CONST. amend. VII.
2. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 346 (1998); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1014 (7th Cir. 1991); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.10[A] (rev. ed. 2015) ("[I]t is beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial . . . ." (footnote omitted)).
3. For a general discussion of the copyright infringement test, see Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 214-33 (2012); Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1188-89 (1990); and Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 719-22 (2010).
4. Disagreement over the judge-jury divide is well known in other areas of law. *See, e.g.*, LEON GREEN, JUDGE AND JURY (1930) (discussing the role of the judge and jury in tort law); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949) (analyzing and comparing the functions of judge and jury in negligence cases). For a general discussion of the judge-jury divide, see Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966), which discusses the difference between "questions of law" and "questions of fact" as they relate to the judge-jury divide.
5. *See, e.g.*, Wendy Gordon, *The Jury in the 'Blurred Lines' Case Was Misled*, NEWSWEEK (Mar. 18, 2015, 2:30 PM), http://www.newsweek.com/jury-blurred-lines-case-was-misled-314856; Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity: What the "Blurred Lines" Team Copied Is Either Not Original or Not Relevant*, SLATE (Mar. 12, 2015, 12:27 PM), http://www.slate.com/articles/news_and_politics/jurisprudence

footnote continued on next page

The complexity of the modern copyright infringement analysis cannot be overstated. Often referred to as the "substantial similarity" requirement, its structure, scope, and purpose continue to confound courts and scholars—perhaps even more so (and more routinely) than the infamous fair use doctrine. Copyright's infringement analysis has been variously described as "bizarre,"[6] "mak[ing] no sense,"[7] "viscid,"[8] and "problematic."[9] Indeed, recently the Ninth Circuit chose to "withdraw" its model jury instructions on the analysis,[10] recognizing that no amount of abstract guidance could resolve the indelible complexity that the analysis routinely engenders. In short, despite the centrality of the infringement analysis to copyright law, its complexity renders it a virtual black hole in copyright jurisprudence.

Even though the Supreme Court has never weighed in on the matter, courts around the country take their guidance on the copyright infringement analysis from a landmark decision of the Second Circuit that is believed to have defined the structure of the infringement inquiry and the jury's role in it: *Arnstein v. Porter*.[11] Although the opinion was handed down nearly seven decades ago, courts, scholars, and lawyers consider the Second Circuit's infringement analysis to be part of the modern copyright law canon.[12] While a few circuits have made important modifications to its central approach, the "*Arnstein* test," as it has come to be known, remains the dominant approach to copyright infringement analysis today.[13]

The *Arnstein* test for copyright infringement involves two distinct steps. The first requires the decisionmaker to determine whether the defendant

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/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe _on.single.html; Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), http://www.newyorker.com/culture/culture -desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out.

6. Lemley, *supra* note 3, at 719 (capitalization altered).

7. *Id.*

8. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 48 (1967).

9. Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1823 (2013).

10. *See* NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 17.17 (2007) (withdrawn).

11. 154 F.2d 464 (2d Cir. 1946).

12. *See, e.g.*, Batiste v. Najm, 28 F. Supp. 3d 595, 599 (E.D. La. 2014) (noting that the *Arnstein* test "continues to be employed"); RONALD S. ROSEN, MUSIC AND COPYRIGHT 208 (2008) (noting that *Arnstein* "rises like a phoenix from the ashes" to influence infringement analysis); Samuelson, *supra* note 9, at 1827 (observing that the *Arnstein* "dictum lives on").

13. *See, e.g.*, Dawson v. Hinshaw Music Inc., 905 F.2d 731, 733 (4th Cir. 1990) (describing *Arnstein* as "the source of modern theory"); Lemley, *supra* note 3, at 719 (describing *Arnstein* as representing "the majority approach").

actually "copied" from the plaintiff's work, ordinarily a factual question for the jury. Without proof of copying, there can be no copyright infringement.[14] To prove copying, the decisionmaker looks to whether the defendant had access to the protected work and whether the two works are indeed similar such that copying may be inferred circumstantially.[15] These twin elements of proof are often referred to as the elements of "access" and "probative similarity."[16] Additionally, during this step the decisionmaker is permitted to rely on the testimony of experts in the field of the works under scrutiny (e.g., a musicologist or art expert) about the inferences that may be drawn given accepted practices in the field.[17] The decisionmaker may also break the work down into its component parts as part of the analysis, a process that is known as "dissection."[18]

Once the jury determines as a factual matter that the disputed work has been copied, the next step is to determine whether the copying was substantial enough to be deemed illicit or wrongful—and therefore legally actionable.[19] Somewhat counterintuitively, this second step is treated as a purely factual question and therefore within the purview of the jury.[20] This second step attempts to measure the subjective reaction of the jury to the copying.[21] Consequently, expert testimony and analytic dissection are treated as presumptively irrelevant and therefore inadmissible.[22] Almost all courts around the country adhere to this two-step formulation in one way or another

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14. *Arnstein*, 154 F.2d at 468.

15. *Id.*

16. *See* Latman, *supra* note 3, at 1204-09 (describing the use of these terms and arguing for greater precision). For an example of a case accepting this usage, see Repp v. Webber, 132 F.3d 882, 889 & n.1, 891 (2d Cir. 1997).

17. *Arnstein*, 154 F.2d at 468; *see also* MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 1.37 (West 2015) (describing "analytic dissection" as the process wherein a court "dissects the copyrighted work, disregards non-copyrightable elements, and compares only the protectable elements of the copyrighted work to the allegedly infringing work").

18. *Arnstein*, 154 F.2d at 468.

19. *Id.*

20. *Id.* at 469.

21. Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1398 n.4 (9th Cir. 1997) (describing the second step as entailing an evaluation of a "subjective, audience-response level" (quoting Dr. Seuss Enters. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1566 (S.D. Cal. 1996))). In the Ninth Circuit, this second step is characterized as a subjective test, building on the *Arnstein* test. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).

22. *Arnstein*, 154 F.2d at 468.

and continue to disallow any expert testimony or objective analysis of the works during this second step.[23]

The decision in *Arnstein* is thus to be credited with (or faulted for) giving juries significant control over the infringement analysis. In treating the question of "wrongful" or "illicit" copying as a pure question of fact, precluding expert testimony on it, and then requiring juries to base their decision on what an "ordinary lay hearer" or ordinary observer would conclude,[24] *Arnstein* in effect cabined trial courts' (i.e., judges') supervision over the question of copyright infringement. Over the years, *Arnstein*'s empowerment of the jury in this regard has come to be accepted as law.[25] In addition, *Arnstein*'s decision to hand the issue over to the jury has also come to be rationalized as comporting with the overall motivating utilitarian ideals of copyright law. *Arnstein*'s deference to juries is treated as a deliberate one, aimed at examining the potential market effects of the defendant's actions by assessing the reaction—to the copying—of the work's intended "audience."[26] And so the practice of allowing juries to decide the legality of a defendant's copying (i.e., its wrongfulness) continues unabated and enters into the public spotlight every few years when a jury finds a well-known work to be infringing.[27]

The *Arnstein* court's decision to give juries complete control over the question of improper appropriation in the infringement analysis has over time proven to be immensely problematic for copyright law. While juries are required to determine whether the copying was "improper," they are not given any discernible criteria for the investigation (other than terms such as "total-

23. *See* ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW 3-2 & n.1 (2015) (observing that most courts use one of two tests, both of which originate in *Arnstein*); *id.* § 17:1 ("[T]he majority rule is that expert testimony may not be considered with respect to substantial similarity . . . .").

24. *Arnstein*, 154 F.2d at 468. Some courts have applied *Arnstein* to develop the test into an "ordinary observer" test. *See* Boisson v. Banian, Ltd., 273 F.3d 262, 271-72 (2d Cir. 2001).

25. To the extent that a judge may grant summary judgment in some jurisdictions, it is only on the basis that no reasonable juror could have possibly arrived at a contrary decision. *See* OSTERBERG & OSTERBERG, *supra* note 23, § 3:1.4[A]-[B]. Thus, it is accepted as a jury question. In some jurisdictions, courts remain extremely reluctant to award summary judgment on the second question. *Id.* § 3:2.1[F].

26. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 734 (4th Cir. 1990) ("In light of the copyright law's purpose of protecting a creator's market, we think it sensible to embrace *Arnstein*'s command that the ultimate comparison of the works at issue be oriented towards the works' intended audience.").

27. *See* sources cited *supra* note 5 (discussing the "Blurred Lines" case); *see also Frustrated Michael Bolton Ready to Move On*, BILLBOARD (Jan. 30, 2001, 12:00 AM EST), http://www.billboard.com/articles/news/80666/frustrated-michael-bolton-ready-to-move-on (discussing the jury award against Michael Bolton for copyright infringement); Corey Moss, *Jury Orders Dr. Dre to Pay $1.5 Million for Copyright Infringement*, MTV NEWS (May 7, 2003), http://on.mtv.com/1tVAbjq (discussing jury award against Dr. Dre for copyright infringement).

concept-and-feel"[28]), effectively allowing them to use their own subjective intuitions during the evaluation. Disallowing all expert testimony on the question forbids the introduction of any relevant information relating to industry practice and the nature of creativity therein.[29] Lastly, and perhaps most importantly, discouraging summary judgment on the question in an effort to have juries make the determination has prevented copyright jurisprudence from developing a coherent set of rules and principles that might guide the decision, thereby producing a body of decisions that appears inextricably ad hoc and arbitrary.[30]

The *Arnstein* opinion itself says very little about its reasons for according juries such a central role in what is unquestionably a complex determination. What makes this omission in the opinion doubly perplexing is the reality that the author of the majority opinion, Judge Jerome Frank, was an outspoken and acerbic critic of the jury system.[31] A well-known legal realist, Judge Frank devoted many hours of his nonjudicial work to criticizing the jury system in various books and articles.[32] The practice of allowing a jury to decide what was in effect "its own 'law' in each case" was to Judge Frank among the greatest scourges of the American system of adjudication, since it contributed to unpredictable "jury-made law," which often bore no connection to actual rules of law.[33] Judge Frank's lifelong distaste for juries and his careful identification of the various malaises promoted by the jury system are therefore hard to reconcile with the overwhelming confidence in juries that he exudes in *Arnstein*, a confidence that continues to haunt copyright law and practice to this day.

This Article shows that the *Arnstein* court's decision to rely on juries for the infringement analysis had very little to do with copyright law or policy.

28. *See, e.g.*, Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003) ("[T]he total-concept-and-feel locution functions as a reminder that . . . infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation.").

29. *See* Lemley, *supra* note 3, at 738-40 (describing the problems with the ordinary observer framework).

30. *See id.* at 739-40 (noting how the test is impossible to scrutinize on appeal).

31. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 134 (1995) (observing how Judge Frank disbelieved in juries completely); Julius Paul, *Jerome Frank's Views on Trial by Jury*, 22 MO. L. REV. 28 (1957) (analyzing Judge Frank's critical views on the jury system).

32. *See, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 108 (1949) [hereinafter FRANK, COURTS ON TRIAL]; JEROME FRANK, LAW AND THE MODERN MIND 170-72 (6th prtg. 1949) [hereinafter FRANK, LAW AND THE MODERN MIND]; Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 30 (1951); Jerome N. Frank, *The Case for the Special Verdict*, 32 J. AM. JUDICATURE SOC'Y 142, 142 (1949) [hereinafter Frank, *Special Verdict*].

33. FRANK, COURTS ON TRIAL, *supra* note 32, at 120.

The *Arnstein* formulation was hardly a considered decision about the values at stake in the copyright infringement analysis but instead almost entirely the product of Judge Frank's well-developed legal philosophy, which led him to an approach that minimized the role of lower court judges in the infringement analysis and significantly curtailed their ability to rely on issues of law to decide cases. Considerations of copyright law were for the most part entirely secondary to the court's decision. While scholars[34] (and, on occasion, courts[35]) have criticized the *Arnstein* court's analytical framework, hardly anyone has examined exactly *why* the majority opinion chose to go down the road that it did.[36]

Understanding *Arnstein* and its legacy requires appreciating the unique worldview of the majority opinion's author, Judge Jerome Frank, who held strong views about legal rules and the centrality of facts to adjudication. A close reading of the opinions in the case; an examination of the archival memoranda, draft opinions, and correspondence between the judges; and an analysis of the judges' various contemporaneous extrajudicial writings tell a complex story about the framing of the court's opinion and its decision to rely on the jury to assess the legality of a defendant's copying. In the end, this story reveals that the *Arnstein* opinion remains a true epitome of legal realism, as famously and controversially articulated and advanced by Judge Frank. This reading even suggests that *Arnstein*'s canonical status in copyright jurisprudence may merit serious reconsideration.

Arnstein is today taken to have decided an important substantive rule relating to the elements of an actionable copyright infringement claim. In actuality, the majority opinion spends little time on copyright principles and devotes most of its attention to an important procedural question: the appropriate standard for summary judgment. This can be explained by the majority's discomfort with the lower court opinion. The district court in the case granted the defendant's motion for summary judgment because the judge refused to believe the plaintiff's account of the facts.[37] In his opinion finding

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34. *See, e.g.*, Lemley, *supra* note 3, at 719 (characterizing the *Arnstein* court's analytical framework as bizarre); Samuelson, *supra* note 9, at 1827 (characterizing the *Arnstein* test as "illogical" when applied to particular situations).

35. *See, e.g.*, Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258 n.5 (2d Cir. 1986); Denker v. Uhry, 820 F. Supp. 722, 729 (S.D.N.Y. 1992).

36. Some have alluded to the issue previously. *See* GARY A. ROSEN, UNFAIR TO GENIUS: THE STRANGE AND LITIGIOUS CAREER OF IRA B. ARNSTEIN 226-27 (2012) (observing that writing the opinion put Judge Frank in a "ticklish position" in light of his skepticism of juries).

37. Arnstein v. Porter, No. 29-754, 1945 WL 6897, at *2 (S.D.N.Y. July 27, 1945), *modified in part, rev'd in part*, 154 F.2d 464 (2d Cir. 1946). I use the term *Porter* in this Article to refer to the district court's opinion to distinguish it from *Arnstein*, the Second Circuit's opinion, and to emphasize that the defendant prevailed in the lower court.

for the defendant, the district court judge specifically alluded to the plaintiff's prior record of litigiousness and went on to characterize the plaintiff's claims as "fantastic."[38] To the majority in *Arnstein*, the district court's seeming reliance on the plaintiff's prior filings was highly problematic, since it suggested that the judge failed to fully consider the merits of the particular case at hand.[39] What was additionally troublesome to the majority, however, was its intuitive sense that the two works at issue shared some level of similarity, as revealed in the judges' private correspondence.[40] The majority further felt that this intuition necessitated something more than a summary disposal of the case.

Reversing the district court's grant of summary judgment to ensure that this intuition received due attention upon remand required a fair bit of guile. Without ever mentioning that his disagreement with the lower court was *on the facts*, Judge Frank devised an approach that would allow his version of the facts to be given due consideration. Instead of simply reversing the district court and remanding for another possible decision on summary judgment, Judge Frank sent the case back to the lower court with specific instructions, not only as to whom the factfinder was meant to be (i.e., the jury), but also as to the appropriate steps and standards to be employed during the factfinding process.[41] While the first of these may have been procedurally desirable to avoid summary judgment, the second was altogether unnecessary since the lower court had not even reached the issue of improper appropriation when it granted summary judgment on the question of copying (access).

Judge Frank thus deftly intermingled both substantive and procedural rules, thereby enabling the jury to test his interpretation of the factual record. Through such maneuvering, he effected a reversal that was, in the end, purely about the facts. But in so doing, he created an all-important copyright law rule: determining whether copying is improper is a subjective factual question for the jury, rather than a legal question with its own normative standard.

Arnstein is perhaps a prime example of a hard case making bad law.[42] Judge Frank's focus on the procedural aspects of the case in order to ensure the plaintiff received a fair hearing muddied the copyright issues at stake by suggesting that the decision to involve juries in the copyright infringement

38. *Id.* ("I feel warranted in characterizing as fantastic the story on the subject told in the plaintiff's behalf.").

39. *Arnstein*, 154 F.2d at 475.

40. Memorandum from Judge Jerome N. Frank to Judge Charles E. Clark and Judge Learned Hand (Jan. 11, 1946) (on file with the Yale Law School Library); Memorandum from Judge Learned Hand to Judge Charles E. Clark and Judge Jerome N. Frank 1 (Jan. 18, 1946) (on file with the Yale Law School Library).

41. *Arnstein*, 154 F.2d at 469-73.

42. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

analysis was a considered point of copyright law. Indeed, it is for this anomalous reason that even though the standard for summary judgment enunciated in *Arnstein* has since been overruled,[43] copyright law—relying on *Arnstein* and its rich lineage—continues to accord juries a primary role in the infringement analysis. Ironically, in an opinion handed down a mere five days after *Arnstein*, Judge Frank himself illustrated his comfort in making copyright infringement determinations without any jury at all, a reality that has gone largely unnoticed.[44] The court's procedural maneuverings in *Arnstein*—maneuverings designed to grant Ira Arnstein a jury trial—have instead assumed a life of their own.

Appreciating the interwoven factual, procedural, substantive, and theoretical issues that were at play in *Arnstein* sheds new light on its importance within the copyright canon. Indeed, it raises the distinct possibility that as a principled normative matter—driven by copyright's utilitarian and constitutional goals—there may be little reason to treat all aspects of the infringement analysis as purely factual questions for a lay jury. That position was driven in large measure by Judge Frank's legal philosophy, which he applied to the facts of the case before him and much of which has since been soundly repudiated in American legal thinking. There is thus good reason to question the wisdom of continuing to provide juries with primary control over the question of infringement in the manner suggested by *Arnstein*. Scholars have over the years voiced their skepticism of the *Arnstein* two-step test and its seemingly naive belief in the competence of lay juries to understand the complexities of copyright law.[45] Yet few have seriously investigated the reasons for this naiveté. A richer understanding of *Arnstein*'s mistaken legacy suggests that it might well be time for courts to seriously revisit and rationalize copyright law's infringement analysis.

The argument in this Article unfolds in four parts. Part I begins with a discussion of Ira Arnstein's copyright claim against the defendant, Cole Porter, and a close reading of the three principal opinions in the case—one from the district court and two (the majority and the dissent) from the Second Circuit. It closes with a brief discussion of how courts have interpreted and adopted *Arnstein* over the years, illustrating the case's canonical status in copyright law. Part II introduces the legal philosophies and views of the judges who heard the case. In it, we see how Judge Frank brought to the case his controversial views

43. *See, e.g.*, Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972) ("The rule of Arnstein v. Porter that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts no longer is good law." (citation omitted) (quoting *Arnstein*, 154 F.2d at 468)).

44. Heim v. Universal Pictures Co., 154 F.2d 480, 487-88 (2d Cir. 1946).

45. *See, e.g.*, Lemley, *supra* note 3, at 741 ("It is far from clear that juries can do that line-drawing justice, even with the aid of expert testimony and jury instructions telling them to do so.").

about the role of courts, rule skepticism, factfinding in trials, and the appropriate use of summary judgment, which played off of the views and opinions of the other judges in the case. Part III reconstructs the *Arnstein* opinion against the backdrop of these philosophies and the judges' own archival documents (draft opinions, conference memoranda, and private correspondence) to produce a more nuanced and textured image of the case and its contributions to copyright law. Part IV then moves to the prescriptive and argues that, with the rejection of Judge Frank's overarching philosophy in *Arnstein*, it may well be time for copyright law to abandon its doctrinaire conformity to the *Arnstein* formulation.

I. Unbundling *Arnstein v. Porter*

The standard for copyright infringement laid down in *Arnstein v. Porter* is today received and understood primarily through attempts by later courts and scholars to summarize the majority's opinion in the case.[46] While these summaries may be accurate portrayals of the standard itself, they shed little light on the precise reasons for the *Arnstein* majority's choice of that standard and its examination of alternatives. This Part examines the structure and reasoning of the different opinions in the case, as well as their interplay. It then provides an overview of *Arnstein*'s canonical status in copyright jurisprudence.

A. Three Different Opinions

While Judge Frank's majority opinion for the Second Circuit remains the primary opinion of *legal* significance in *Arnstein*, the case itself generated three separate opinions, one in the lower court and two on appeal. Besides adopting analytically different approaches to the question of copyright infringement, the two additional opinions are significant because of the role that each played in shaping the principal one.

1. Judge Caffey and the "fantastic" story

The story of *Arnstein* began many years before the plaintiff filed his complaint.[47] Ira Arnstein was a middle-aged musical composer who, between 1935 and 1943, commenced five different lawsuits for copyright infringement (and likely threatened others) against several well-known composers, music

46. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481-82, 484 (9th Cir. 2000); Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608 (1st Cir. 1988); Latman, *supra* note 3, at 1191-96.

47. For an extensive account of Arnstein's litigious career, see ROSEN, *supra* note 36.

publishers, and collection agencies.[48] In each of these lawsuits, Arnstein alleged that the defendant had plagiarized his work but was unable to prove that any of the defendants had copied from it.[49] His claims were seemingly motivated by what one biographer describes as a deep-seated "persecution complex."[50]

In early 1945, the renowned American composer and songwriter Cole Porter became the target of one of Arnstein's copyright infringement lawsuits.[51] In his complaint, Arnstein alleged that several of Porter's famous musical compositions had been plagiarized from his own musical works.[52] Appearing pro se, Arnstein sought a jury trial and claimed damages in the sum of one million dollars.[53] When deposed, Arnstein alleged that the defendant had hired stooges to follow him, watch him, ransack his apartment, and even live with him in the same apartment.[54] Yet he presented absolutely no proof of these allegations and, when questioned, maintained that, while he did not certainly "know that [Porter] had to do with it," he knew "that [Porter] could have."[55] Since his work had been performed publicly, Arnstein further claimed that the defendant had clear access to his music, despite the defendant's categorical denial that he even knew of Arnstein or his music.[56] Following depositions, the defendant moved for summary judgment. In a fairly short memorandum opinion, the district court—Judge Caffey—granted the motion.[57]

Despite being presented with evidence of the dissimilarity between the plaintiff's and defendant's works, Judge Caffey focused his opinion almost entirely on the factual question of actual copying (i.e., whether the defendant had actually taken/lifted material from the plaintiff's works).[58] Relying

48. These suits included: *Arnstein v. Twentieth Century Fox Film Corp.*, 52 F. Supp. 114 (S.D.N.Y. 1943); *Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58 (S.D.N.Y. 1943); *Arnstein v. Broadcast Music, Inc.*, 46 F. Supp. 379 (S.D.N.Y. 1942); *Arnstein v. American Soc. of Composers, Authors & Publishers*, 29 F. Supp. 388 (S.D.N.Y. 1939); and *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535 (S.D.N.Y. 1935).

49. *See Twentieth Century Fox*, 52 F. Supp. at 114-15; *Broad. Music*, 46 F. Supp. at 380; *Am. Soc. of Composers, Authors & Publishers*, 29 F. Supp. at 396, 399-401; *Edward B. Marks*, 11 F. Supp. at 535-36.

50. ROSEN, *supra* note 36, at xiii.

51. *Id.* at 218.

52. *Id.* at 218-19.

53. *Id.* at 219.

54. Arnstein v. Porter, 154 F.2d 464, 467 (2d Cir. 1946) ("Plaintiff said that defendant 'had stooges right along to follow me, watch me, and live in the same apartment with me,' and that plaintiff's room had been ransacked on several occasions.").

55. *Id.*

56. *Id.*

57. Arnstein v. Porter, No. 29-754, 1945 WL 6897, at *3 (S.D.N.Y. July 27, 1945), *modified in part, rev'd in part*, 154 F.2d 464 (2d Cir. 1946).

58. *Id.* at *1-2.

extensively on the parties' depositions, Judge Caffey concluded that, based on "the evidence at the end of the discussion of the principal phase of the pending motion, . . . access by the defendant to the plaintiff's compositions involved in [the] action ha[d] not been proved."[59] In addition, he observed that, based on the facts, he felt "warranted in characterizing as *fantastic* the story on the subject told in the plaintiff's behalf."[60]

It is important to note that Judge Caffey never reached the issue of improper appropriation in any way or form in his opinion. Given the plaintiff's outlandish allegations and the complete lack of any evidence to support them, he saw his focus on actual copying—and the absence of any access (by the defendant to the plaintiff's works)—to be on fairly solid footing. Indeed, he chose to end his opinion with a somewhat curious observation that would eventually unsettle Judge Frank on appeal:

> If time were available, I would deal with all the phases concerning each kind of relief sought. But my work growing out of the recent motion term is too pressing and voluminous to permit me to go further now. I have gathered all the files in five cases tried in this court wherein plaintiff sued for judgment in an action relating to music or copyrights on musical compositions. The size of the files warns me that several weeks would be needed in order to go through all the details. I feel bound to go to other cases in which decisions have been reserved.[61]

Even by the standards of *gratis dictum*,[62] this observation—in the opinion itself—was wholly out of place. It suggests that Judge Caffey was choosing the easiest and quickest way to dispose of the case without wanting "to go further." In addition, by referring to the plaintiff's prior copyright infringement lawsuits, the observation also seemed to suggest that the judge had prioritized other cases ahead of the plaintiff's principally because of the plaintiff's record of litigiousness. While every litigant is entitled to have his or her day in court, Judge Caffey was suggesting that the plaintiff had already had his, enabling the judge to focus on other litigants who were more deserving of the court's attention. Even if the record in this case might have supported Judge Caffey's logic, his reference to the plaintiff's prior lawsuits gave his opinion a distinctively personal—and therefore partial—dimension. Despite being legally sound and, indeed, well grounded in the facts of the case, the candor of the opinion unwittingly set in motion a whole series of events and arguments that would alter the very course of copyright law.

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59. *Id.* at *2.

60. *Id.* (emphasis added).

61. *Id.*

62. *See, e.g.*, Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 276 F.3d 876, 881 (6th Cir. 2002) (adopting the *Black's Law Dictionary* definition of *gratis dictum* as "a court's discussion of points or questions not raised by the record" (quoting *Gratis dictum*, BLACK'S LAW DICTIONARY (7th ed. 1999))).

2. Judge Frank's crafty reversal

Arnstein appealed from the district court's order to the Second Circuit Court of Appeals, and the case ended up before a panel consisting of Circuit Judges Jerome Frank, Learned Hand, and Charles Clark. Judge Frank authored the majority opinion, which Judge Hand joined. Most importantly, the majority opinion reversed the district court. Yet it did much more—and it remains the primary opinion of legal significance in the case. Its framing, emphasis, and reasoning are therefore worthy of serious scrutiny.

a. Holding

Fairly early on in his opinion, Judge Frank framed the principal issue in the case as a procedural one—"whether the lower court, under Rule 56 [summary judgment], properly deprived plaintiff of a trial of his copyright infringement action."[63] If there was "the slightest doubt as to the facts," such a denial was, to him, problematic.[64] The question then turned on whether there was indeed the slightest doubt as to the facts at issue. The effect of this framing is crucial to appreciate, since it indelibly merged the factual and legal issues involved in the case.

Quite independently of his dislike of juries, Judge Frank was an outspoken critic of the then-new summary judgment procedure, precisely because it undermined the centrality of facts.[65] The very year before *Arnstein*, he authored an opinion admonishing lower courts to "exercise great care in granting motions for summary judgment" since "[a] litigant has a right to a trial where there is the slightest doubt as to the facts."[66] *Arnstein* presented Judge Frank with a perfect opportunity to deploy the "slightest doubt" standard on reversal.

In the majority's opinion, answering the factual question (whether there was the slightest doubt) required separating out two different parts of the infringement analysis—(i) whether the defendant copied from the protected work; and (ii) whether such copying, if it were shown to exist, was sufficient to constitute improper appropriation.[67] On the question of actual copying (i.e., step one), the evidence could consist of direct evidence (i.e., the defendant's

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63. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (footnote omitted).

64. *Id.* (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945)).

65. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77 n.21 (1990) (describing Judge Frank as an opponent of summary judgment); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1899 (1998) (describing Judge Frank as one of the procedure's known critics).

66. *Doehler Metal Furniture*, 149 F.2d at 135.

67. *Arnstein*, 154 F.2d at 468.

"admission") or circumstantial evidence.[68] Such circumstantial evidence might consist of the defendant's "access" to the work and the extent of similarity between the works themselves (what has since come to be known as "probative similarity"[69]).[70] The opinion further details how this circumstantial evidence is to be weighted. When there are no similarities whatsoever between the works, mere evidence of access, however extensive, cannot be used to prove copying.[71] Conversely, when evidence of access is absent, copying may be presumed if the similarities are "striking" and rule out any possibility of independent creation.[72] When evidence of both (i.e., access and similarity) exists, the factfinder is to determine whether they together prove copying, and, for this, the finder may rely on expert testimony and a "dissection" of the work.[73] All of this, to reiterate, goes to the question of actual copying.

Judge Frank then turned to the second step of the analysis, improper appropriation. Improper appropriation is contingent on there being actual copying.[74] Therefore, if a plaintiff fails to prove actual copying, the jury will never reach an improper appropriation analysis. Such improper appropriation is to be analyzed based on the response of the "lay hearer," rendering expert testimony and dissection "irrelevant" to the determination.[75]

Despite treating the two steps as distinct, the opinion further notes that on occasion the same evidence (e.g., similarities) may be used to satisfy both elements, even though this is not required and may not always be the case.[76] Up until this point, Judge Frank's parsing of the infringement analysis seems to be principally in the nature of a digression, since by his own framing the principal question was whether there was any doubt as to the facts at issue. The opinion then returns to the question of facts and somewhat summarily declares that each step of the infringement analysis "is an issue of fact."[77] Nowhere in this part of the opinion does Judge Frank tell us why the second step of the analysis—improper appropriation—is to be treated as a question of fact, aside from the suggestion that this step looks to the response of a "lay hearer."[78]

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68. *Id.*

69. Latman, *supra* note 3, at 1188.

70. *Arnstein*, 154 F.2d at 468.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* ("If copying is established, *then only* does there arise the second issue, that of illicit copying (unlawful appropriation)." (emphasis added)).

75. *Id.*

76. *Id.* at 468-69.

77. *Id.* at 469.

78. *Id.* at 468.

Turning to the facts of the case at hand, the opinion then admits that "[a]fter listening" to the works involved, the judges signing it (i.e., Judge Frank and Judge Hand) found similarities between the works, even though the opinion concedes that these similarities would not on their own establish copying.[79] Yet "[t]he similarities . . . [we]re sufficient so that, *if there [were] enough evidence of access* to permit the case to go to the jury," the jury could "infer that the similarities did not result from coincidence."[80] The district court was therefore allowed to rely on summary judgment only if it found without doubt that the defendant had no access to the plaintiff's work. On the face of things, these initial factual observations seem to suggest that, while Judge Frank found similarities between the two works, it was still up to the district court to decide whether there was "enough" evidence of access to send the matter to a jury. However, it is here that the opinion shifts to dispel any notion of continued lower court discretion.

Noting that the lower court judge relied entirely on depositions to characterize the plaintiff's story as "fantastic," Judge Frank concluded that the judge should have turned the question over to a jury since it was ultimately an issue of witness credibility, which was in the end a question of fact.[81] The plaintiff was to be provided with the opportunity to cross-examine the defendant before a jury so as to allow the jury to determine the credibility of the defendant's denials.[82] Depositions were disfavored as substitutes for in-court examinations except when necessity demanded otherwise, which to Judge Frank was hardly the situation at hand.[83]

Having thus far effectively suggested that most—if not all—copyright infringement lawsuits needed to head to a jury, Judge Frank made an effort to reiterate that there could be instances where "a trial would be farcical" and summary judgment appropriate.[84] Since Judge Frank had already emphasized the slightest doubt standard, his example of these farcical cases each involved instances in which there was, by concession of the parties, no doubt whatsoever on the relevant facts, thus making a trial indeed "absurd."[85]

The opinion could have concluded here. It had successfully reversed the lower court's grant of summary judgment owing to the existence of factual doubts as to the issue of actual copying. Yet Judge Frank chose to proceed further to the issue of improper appropriation. This decision was not without

79. *Id.* at 469.

80. *Id.* (emphasis added).

81. *Id.*

82. *Id.* at 469-70.

83. *Id.* at 470.

84. *Id.*

85. *Id.* at 470-71.

reason, given that Judge Frank wanted to ensure that the case was readjudicated on the merits. And it is here that the *Arnstein* test was developed, principally as dicta in the opinion.[86]

b. Dicta

Reiterating that improper appropriation was an issue of fact, Judge Frank framed the question as "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."[87] Here, the suggestion is that, because copyright is about market protection rather than reputation protection, the test should focus on the market effect (i.e., the effect on the audience). To reiterate its point, the opinion goes on to note that "[s]urely, then, we have an issue of fact which a jury is peculiarly fitted to determine."[88]

But why precisely is this question an "issue of fact"? Whereas the question of actual copying is an attempt to ascertain *whether* an event actually occurred and is therefore premised on an epistemic reconstruction of the past, improper appropriation is indelibly a normative judgment, even when framed in the majority's own terms. Determining whether enough was taken or whether what was taken would be "pleasing" to lay audiences is not only intrinsically subjective but also deeply evaluative. Thus, improper appropriation was, in Judge Frank's reasoning, an issue of fact not because of its epistemic quality but because of its obvious consequence: adjudication on the merits, which in turn required sending it to a jury. In this subtle move, Judge Frank defined a category (issue of fact) by its consequence rather than by its underlying content, remaining true to his legal realist philosophy.

Having classified the question of improper appropriation as a factual matter, the opinion then makes the startling observation that "after listening to the playing of the respective compositions, we are, at this time, unable to conclude that the likenesses are so trifling that, on the issue of misappropriation, a trial judge could legitimately direct a verdict for defendant."[89] This is a somewhat puzzling observation on its face, but it makes perfect sense when one considers it in light of Judge Frank's motivation to have the case readjudicated. As a purely analytical matter, Judge Frank of course did not have to reach the appropriation question at all. Since the lower court had not decided this issue, a remand on the issue of actual copying—with

86. Samuelson, *supra* note 9, at 1827.

87. *Arnstein*, 154 F.2d at 473.

88. *Id.*

89. *Id.*

the observation that the court should allow a jury to decide that question—would likely have been sufficient to provide the plaintiff with a jury trial. All the same, this would not have ruled out the possibility that a lower court judge could subsequently decide the case at summary judgment on the basis of improper appropriation, thereby obviating the need for a jury trial on the first step as well, and effectively avoiding the readjudication altogether. Given the subjective nature of the inquiry, such a move might have been impossible to reverse (or scrutinize) on appeal.

To prevent this from happening, the opinion had to eliminate the possibility of summary judgment on the issue of improper appropriation. While the *Arnstein* court's statement likely was not meant to eliminate all use of summary judgment on the question of improper appropriation,[90] it almost certainly was aimed at preventing summary judgment on improper appropriation in the *Arnstein* case itself. In other words, the opinion was designed to guarantee the plaintiff a jury trial and remove the infringement analysis from the trial court judge entirely. By doing so, the court effectively entrenched its factual finding of some similarity between the parties' works.

Judge Frank then closed the majority opinion with a direct rebuke of Judge Caffey's reliance on the plaintiff's prior litigation history.[91] As noted previously, Judge Caffey used the plaintiff's litigation history to explain his reluctance to reach the *additional* issues pressed by the parties. By portraying the district court as having either used these records for its own judgment or having been improperly (and unconsciously) influenced by them, Judge Frank implied that the lower court judge had obviously been biased against the plaintiff. In combination, these factors added legitimacy to Judge Frank's desire for a jury trial in the case.

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The majority opinion in *Arnstein* is a complex mix of procedure, substance, and Judge Frank's perception of the facts of the case. In it, we see three strands of thought. First, its authors (Judges Frank and Hand) were clearly troubled by the existence of some musical similarity between the works. While they were unwilling to characterize it as striking, they nonetheless believed that the

90. Later courts have sequentially interpreted *Arnstein* in this way. The Ninth Circuit is a good example. The Ninth Circuit based its test for substantial similarity on *Arnstein*. Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977). A later decision of that court then interpreted the *Arnstein*-derived holding in *Krofft* to preclude summary judgment altogether on the second step, once the first step had been satisfied. *See* Shaw v. Lindheim, 919 F.2d 1353, 1359 (9th Cir. 1990) (holding that "satisfaction of the extrinsic test creates a triable issue of fact").

91. *Arnstein*, 154 F.2d at 474-75.

similarity might be enough to prove copying if coupled with proof of access. Second, it was critical that the case reach a jury for this theory to have any chance of producing a favorable outcome for Arnstein. Use of a jury would enable a "lay" audience to either confirm or deny the similarity that the majority perceived and spell out its legal consequences. Third, for the case to reach a jury, the lower court judge's ability to dispose of the matter either through summary judgment or directed verdict had to be minimized (if not eliminated). Each of these strands explains a different component of the opinion's reasoning, which together resulted in a reversal of the district court and the development of the famous two-part *Arnstein* test for infringement analysis.

3. Judge Clark's disbelief

"[W]e are reversing our own precedents to substitute chaos, judicial as well as musical."[92] This observation captures the tone and sentiment of Judge Clark's dissenting opinion in *Arnstein*. Judge Clark first took issue with the majority's interpretation of the facts in its framing of the appropriate standard for copyright infringement.[93] His opinion thus notes that "after repeated hearings of the records, [he] could not find" the similarity that had caused the majority to decide for the plaintiff "to the exclusion of all else, including the real issues in the case."[94] According to Judge Clark, while precluding dissection and technical analysis on the question of similarity in the second step was justifiable, turning that question over to the jury without any guidance on how to carry out the analysis made little sense, since "[m]usic is a matter of the intellect as well as the emotions."[95] To him, the majority's standard effectively "abolish[ed]" the use of intellect during the analysis insofar as it asked the jury to undertake a comparison of the works without any instruction on the appropriate manner in which the melodies were to be analyzed.[96]

Baffled by the majority's insistence on a trial even when they themselves appeared unconvinced that the plaintiff would succeed, Judge Clark further noted that the court's opinion was "one of those procedural mountains which develop where it is thought that justice must be temporarily sacrificed, lest a mistaken precedent be set at large."[97] In the dissent's view, this mistaken precedent involved two separate elements: juries and summary judgment.[98] On

92. *Id.* at 480 (Clark, J., dissenting).
93. *Id.* at 475-76.
94. *Id.*
95. *Id.* at 476.
96. *Id.* at 476-77.
97. *Id.* at 479.
98. *Id.*

the use of juries, Judge Clark highlighted an important irony: that while he—unlike Judge Frank (citing to the latter's extrajudicial writing[99])—was not opposed to the use of juries, he did not think the jury was "pre-eminently fitted to decide questions of musical values," which was different from the process of ordinary factfinding.[100] Characterizing the majority's insistence on juries for the issue of improper appropriation as "premature obiter dictum," he then excoriated the majority for failing to see that it was a mere appellate court, "not an administrative or judicial director of the trial courts."[101] Clearly then, Judge Clark also saw little rationale for Judge Frank's characterization of the second part of the infringement analysis as a pure question of fact.

On the issue of summary judgment, Judge Clark's criticism was even more trenchant. Noting that Rule 56 does not make an exception for copyright infringement cases, he points out that the slightest doubt standard was mere dictum in prior cases and was being surreptitiously converted into a binding rule without justification.[102] Describing this as a "novel method of amending rules of procedure" and as "ad hoc legislation," the dissent notes that it "subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules which shall be uniform throughout the country."[103] Coming from Judge Clark, one of the architects of the Federal Rules of Civil Procedure,[104] this critique was hardly unexpected. What is surprising, however, is that it had little effect on the majority's own discussion or its defense of the standard the court was adopting.

Judge Clark could not have been more emphatic in his dissent, noting that it was ultimately the majority's perception of some similarity between the works that was motivating its entire analysis—procedural and substantive.[105] The dissent ranks among the most acerbic and direct attacks seen in the Second Circuit at the time. Somewhat surprisingly, though, it had no influence on the majority opinion, which does not even reference the disagreement.

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99. *Id.* (citing JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY 80-101 (1942) [hereinafter FRANK, IF MEN WERE ANGELS]; and JEROME FRANK, LAW AND THE MODERN MIND 170-85, 302-09, 344-48 (1930)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976) (noting that Judge Clark was "principally responsible" for the drafting of the Federal Rules of Civil Procedure).

105. *Arnstein*, 154 F.2d at 475 (Clark, J., dissenting) ("[T]he tinny tintinnabulations of the music thus canned resounded through the United States Courthouse to the exclusion of all else, including the real issues in the case.").

B. Canonical Status Through Influence

Despite the majority's procedural framing of the opinion as revolving around the application of Rule 56 to copyright infringement claims,[106] it is the decision's substantive analysis of infringement that continues to influence modern copyright law. The bifurcation of the analysis into two separate steps—actual copying and improper appropriation—and their treatment as questions of fact for the jury are today attributed to *Arnstein*.[107] What is crucial to appreciate, however, is that *Arnstein*'s influence on copyright law has had little do with its status as binding precedent, especially since its position on the availability of summary judgment—i.e., that a slightest doubt on the facts necessitated denying a motion for summary judgment—has since been expressly overturned.[108] Its prominence is instead attributable to the belief that the majority's construction of the infringement analysis represents a workable, fair, efficient, and constitutionally compliant process for dealing with infringement claims—one that recognizes the "necessarily vague" nature of the inquiry involved.[109]

A particularly good example of this influence is to be found in the Ninth Circuit, which chose to develop its own standard for infringement analysis in 1977.[110] Despite the fact that the *Arnstein* opinion's views on summary judgment had since been abrogated by later opinions of the Supreme Court as well as the Second Circuit,[111] the Ninth Circuit nonetheless relied heavily on Judge Frank's logic in developing its "bifurcated test," basing its own framework on the *Arnstein* doctrine.[112] Responding to the defendant's argument that *Arnstein*'s holding had been overruled, the Ninth Circuit nonetheless confidently asserted that *Arnstein*'s "tests for infringement" were

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106. *Id.* at 468 (majority opinion).

107. *See* OSTERBERG & OSTERBERG, *supra* note 23, 3-2 & n.1, § 3:2.1[A] (stating that the dominant tests for the analysis stem from the Second and Ninth Circuits, both of which based their tests on *Arnstein*).

108. *See* Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972) ("The rule of Arnstein v. Porter that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts no longer is good law." (citation omitted) (quoting *Arnstein*, 154 F.2d at 468)).

109. The phrase comes from Judge Learned Hand's description of the test for copyright infringement. *See* Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 538 (2d Cir. 1938) (Hand, J., concurring) ("The test is necessarily vague and nothing more definite can be said about it.").

110. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164-65 (9th Cir. 1977).

111. *See* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-90 (1968); *Beal*, 468 F.2d at 291. Indeed, the Ninth Circuit itself recognized that *Arnstein*'s position on the standard for summary judgment had since been "disapproved." *Krofft*, 562 F.2d at 1165.

112. *See Krofft*, 562 F.2d at 1164.

"still good law" and followed by courts around the country.[113] Much like the *Arnstein* court, the Ninth Circuit—without any reasoning—proceeded to treat both steps of the analysis as questions for the jury, even disallowing summary judgment on the second step.[114] In a largely similar vein, most circuits around the country have followed the *Arnstein* bifurcation model and its reliance on juries, albeit with some modifications (none of which touch on these two fundamental premises).[115]

While courts have on occasion disagreed with the *Arnstein* framework, they have done so primarily within the context of specialized subject matter such as computer software, leaving the basic framework largely untouched.[116] Consequently, *Arnstein* continues to exert a tremendous amount of influence on copyright law, limiting the trial judge's role in the infringement analysis.

The precise reasons for the endurance of the *Arnstein* framework—despite its nonbinding nature as precedent—remain somewhat unclear. One explanation is of course sheer path dependence and the general unwillingness of courts to think of a better framework.[117] Yet this explanation remains somewhat of an oversimplification, given how the framework has proliferated among different circuits in the years since. A possible explanation that builds on the path dependence story might be found in the fact that the framework was developed shortly after the promulgation of the Federal Rules of Civil Procedure in 1938. As noted previously, the Federal Rules introduced the summary judgment procedure to federal judicial practice for the first time, which in turn required courts to begin thinking seriously about bifurcating issues before them into questions of fact for juries and questions of law, on which they could decide a case entirely on the basis of motions presented to them.[118] In the midst of this ongoing conversation, i.e., about the separation of issues, the *Arnstein* framework might have had an intuitive appeal, given its ready sequencing of the inquiry into two independent steps: one for the jury and one for the judge. In this sense, the framework might have come across as *crafted for* the newly reimagined federal judicial practice. In this explanation, the path dependence of the framework is exacerbated by its perceived

113. *Id.* at 1165.

114. *Id.* at 1164.

115. *See id.* at 1165.

116. *See, e.g.*, Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713-15 (2d Cir. 1992).

117. For an account of path dependence in the law as an explanation for legal change (and nonchange), see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

118. For an early discussion of how courts had to confront the law/fact distinction under the Federal Rules, see Note, *The Law of Fact: Findings of Fact Under the Federal Rules*, 61 HARV. L. REV. 1434 (1948).

procedural legitimacy under the new Federal Rules. Nonetheless, the endurance of the framework over time remains an unsolved puzzle.

Despite its endurance, scholars have routinely criticized elements of this framework,[119] and yet *Arnstein* continues to direct the structure, shape, and tone of the infringement analysis. Indeed, the jury continues to occupy an exalted place in copyright litigation—prolonging disputes, rendering outcomes uncertain, and preventing any rationalization of the law relating to substantial similarity—because of *Arnstein*. Despite *Arnstein*'s exalted place in copyright jurisprudence, scholars have paid little attention to the majority's reasons for favoring the jury in the infringement analysis.

II. The Legal Philosophies (and Personalities) Involved

Although the *Arnstein* dispute involved a complex interplay of procedural, substantive, and institutional considerations, the majority opinion says very little about why the court chose to treat the entire infringement inquiry as a purely factual question, requiring a judge to send the issue to the jury. In addition, it provides little justification for treating improper appropriation as a purely subjective determination for the jury, where all expert testimony and objective evidence is deemed presumptively irrelevant—or, to use Judge Clark's colorful language, as a process which "abolish[es] the use of the intellect."[120]

Understanding these crucial aspects of the *Arnstein* opinion necessitates looking beyond the opinions themselves to the views, personalities, and judicial philosophies of the judges involved in the case. The appellate court panel that heard and decided the appeal in *Arnstein* consisted of three very prominent judges—Jerome Frank, Learned Hand, and Charles Clark—each of whom held strong and well-developed views on certain substantive, procedural, and structural questions. These views became embedded in the opinion's philosophy. Appreciating the opinion therefore requires an understanding of each judge's contribution to the case. Of course, as the author of the majority opinion, Judge Frank certainly brought his own legal philosophy to bear most heavily on the reasoning in the opinion. All the same,

119. *See, e.g.*, Lemley, *supra* note 3, at 738-40 (criticizing the *Arnstein-Krofft* framework for its exclusion of expert testimony from the second step of the analysis; for its use of the ordinary observer standard for the comparison with little guidance; and for the inability to subject a jury's decision on the question to judicial review, either on appeal or by the trial court judge); Samuelson, *supra* note 9, at 1825-27 (taking issue with the *Arnstein* framework for its unclear reliance on similarity during both steps of the analysis, for putting defendants at an unfair disadvantage by allowing the first step to cover proper appropriation, and for failing to recognize that some element of copying—i.e., non-independent creation—exists in most new works of expression).

120. Arnstein v. Porter, 154 F.2d 464, 477 (2d Cir. 1946) (Clark, J., dissenting).

Judge Hand's decision to support Judge Frank's opinion, as well as Judge Clark's extensive (and acrimonious) pushback, played no small role in influencing the tone and certitude exuded by the majority.

Using the extensive writings of the three judges on the *Arnstein* panel, this Part provides an overview of their legal philosophies and ideals. In it, we begin to see how large swaths of the opinion were determined by Judge Frank's unique worldview, which was only strengthened by Judge Hand's endorsement of its application to the case and Judge Clark's strident disagreement.

A. The Legal Realist: Jerome Frank

Even prior to his appointment to the Second Circuit in 1941, Jerome Frank had risen to prominence as a legal thinker, principally for his contributions to American legal realism.[121] His book *Law and the Modern Mind*,[122] originally published in 1930, created ripples through the American legal establishment for its contrarian and controversial arguments.[123] Described by Walter Wheeler Cook as "excit[ing]," "keen, cogent," and "unique," the book set out to meticulously attack the "basic myth" of certainty that Judge Frank believed plagued the American legal system, relying on contemporary advances in psychological research.[124] Between 1930 and 1953, Judge Frank published a large number of additional books and articles developing his critiques of the legal and judicial systems even further.[125] Towards the latter part of his judicial

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121. *See* Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 181 (1991). Originating in the 1930s, legal realism represented a broad movement in the American legal academy wherein scholars came to accept the idea that judicial and legal reasoning were rarely ever the exclusive product of legal doctrine and other formal legal materials. Legal rules and reasoning were instead seen to originate in a variety of other sources. For an overview of the core skepticism towards doctrine that characterized the movement, see Shyamkrishna Balganesh, *Foreword: The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843 (2015). For an early account of the movement by some of its champions, see L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934), describing the movement and criticizes some of its tenets; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), setting out the core tenets of legal realism and developing a prescriptive agenda for it; and Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), developing an account of legal realism.

122. FRANK, LAW AND THE MODERN MIND, *supra* note 32.

123. *See* Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817, 817 (1957) (noting that the book "fell like a bomb on the legal world").

124. Walter Wheeler Cook, Law and the Modern Mind*: A Symposium*, 31 COLUM. L. REV. 82, 82-83 (1931).

125. For a sample, see FRANK, COURTS ON TRIAL, *supra* note 32; FRANK, IF MEN WERE ANGELS, *supra* note 99; Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Frank, *Special Verdict*, *supra* note 32; Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953); Jerome Frank, *Legal Thinking in Three Dimensions*, 1 SYRACUSE L. REV. 9 (1949); Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921 (1948)

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career, Judge Frank brought together his work and thinking on the peculiarities and failings of the judicial process in a book entitled *Courts on Trial*, in which he gave much of his prior realist thinking a distinctively judicial dimension.[126]

What is perhaps most interesting in Judge Frank's body of work is his articulation of a comprehensive and well-developed account of the litigation process, with particular emphasis on judging. His account has both descriptive (critical) and prescriptive (constructive) aspects. By the time of his opinion in *Arnstein*, Judge Frank had therefore developed and articulated a particular approach to judicial decisionmaking and reasoning, one that he attempted to instantiate in that case.

As with any body of work that spans twenty years, Judge Frank's writing does contain its share of contradictions, inconsistencies, and equivocations.[127] Indeed, in later editions of his early books, Judge Frank himself disavowed certain prior positions in an effort to clarify his overall position.[128] In addition, Judge Frank's thinking came to focus on different aspects of the legal system during the course of his legal career. His work as a scholar differed from his writing as a government official, which in turn varied significantly from his writing as a Second Circuit judge. Judge Frank's legal philosophy is therefore fairly hard to categorize under any one overarching label. Scholars have even tended to treat his views as outliers within legal realism, given how unique and distinctive they are in comparison to the work of others ordinarily found in that category.[129] Without parsing the labels, Judge Frank's legal philosophy may fruitfully be understood as embodying three core ideas, all of which he articulated and none of which he repudiated at any point: indeterminacy, hunches, and fact skepticism.[130]

1. Indeterminacy

Judge Frank's identification with other legal realists in the first half of the twentieth century is largely attributable to his work on the indeterminacy of legal rules in legal and judicial thinking. In *Law and the Modern Mind*, Judge

[hereinafter Frank, *Say It with Music*]; Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); and Jerome Frank, *Cardozo and the Upper-Court Myth*, 13 LAW & CONTEMP. PROBS. 369 (1948) (book review).

126. *See* FRANK, COURTS ON TRIAL, *supra* note 32, at vii.

127. *See, e.g.*, Duxbury, *supra* note 121, at 182, 188.

128. *Id.* at 185.

129. *See, e.g.*, HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 3 (2013); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997).

130. Duxbury classifies Judge Frank's dominant ideas along similar lines. *See* Duxbury, *supra* note 121, at 181-86.

Frank set out what he believed to be the "basic myth" plaguing the legal system: certainty in legal reasoning.[131] According to Judge Frank, lawyers, "like the laymen, fail to recognize fully the essentially plastic and mutable character of law" and mistakenly believe that "rules either are or can be made essentially immutable."[132] While he was quick to acknowledge that lawyers are not being "*consciously* deceptive" when they articulate this belief, he took it to be pervasive throughout the legal system.[133] The consequence of this myth is that "demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary,"[134] which in turn brings the entire legal system into disrepute.

The primary analytical lesson of the "basic myth" was the recognition that legal rules do not, on their own, determine individual cases.[135] The process of "judging" was not just a rote or mechanistic application of a rule to a set of facts, but instead involved actual lawmaking as well. In an effort to avoid engaging "incompatible beliefs," lawyers and judges were seen as routinely engaging in the practice of "rationalization," where they manufactured principles to reconcile these beliefs after arriving at a decision.[136] Legal rules—and principles—were, in this understanding, rarely ever a hard constraint on legal and judicial thinking.

Judge Frank's account of indeterminacy in his early work was fairly extreme in its claims that judicial discretion was altogether "unavoidab[le]" and at play "in almost all cases."[137] In this, he is commonly seen to have believed in what theorists call "global legal indeterminacy," the idea that law is *never* capable of providing determinate answers.[138] While scholars disagree about the scope and reach of Judge Frank's beliefs in indeterminacy,[139] it remains undisputed that he adhered to a core skepticism about the determinacy of legal rules. While this did not mean that judges needed to abandon any and all

131. FRANK, LAW AND THE MODERN MIND, *supra* note 32, at 3-12.

132. *Id.* at 9.

133. *Id.*

134. *Id.* at 11.

135. *Id.* at 130.

136. *Id.* at 30-31.

137. *Id.* at 362.

138. *See generally* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 10-11 (2007) (classifying and describing the various forms of indeterminacy and global indeterminacy).

139. *Compare* Michael Steven Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381, 393 (2011) (arguing that Judge Frank was not an adherent of global indeterminacy in the sense identified by Leiter), *with* Leiter, *supra* note 129, at 268-70, 273-74 (making the opposite claim and discussing how legal realists were concerned with the indeterminacy of litigated cases).

reliance on legal rules, it required an understanding and acknowledgement of the additional influences on judicial decisions.

2. Hunches

Since legal rules were *not* the primary determinants of judicial reasoning, Judge Frank needed to provide an account of how courts do in fact decide individual cases. For this he relied on an idea first introduced by Judge Joseph Hutcheson around the same time as his own book: the hunch.[140] Drawing on his experience as a judge, Hutcheson claimed that in deciding a case, a judge "wait[s] for the feeling, the *hunch*—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way."[141] Hutcheson further posited that "the judge really decides by feeling, and not by judgment; by 'hunching' and not by ratiocination."[142] Judge Frank built this notion into his account of indeterminacy. Courts "beg[in] with the results they desire[] to accomplish" and "work back from conclusions to principles."[143] Consequently, determining the source of these hunches was, to him, "the key to the judicial process."[144] Here we first see Judge Frank disavowing the global indeterminacy traditionally attributed to him, for he "concede[s]" that legal rules and principles play some role in decisionmaking by suggesting hunches and enabling the "judge to check up on the propriety of the hunches."[145]

In Judge Frank's account, a hunch represents no more than a judge's idiosyncratic and subjective reaction to the facts, circumstances, and context of the dispute at hand. Or, as he put it:

> The judge, in arriving at his hunch, does not nicely separate his belief as to the "facts" from his conclusion as to the "law"; his general hunch is more integral and composite, and affects his report—both to himself and to the public—concerning the facts. . . . The judge's decision is determined by a hunch arrived at long after the event on the basis of his reaction to fallible testimony.[146]

While the facts of the case usually generate the hunch, those facts are then filtered through the judge's impulsive reactions to them and the judge's

140. *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929) (detailing the theory of the hunch as the "judgment intuiti[on]").

141. *Id.* at 278 (emphasis added).

142. *Id.* at 285.

143. *See* FRANK, LAW AND THE MODERN MIND, *supra* note 32, at 102.

144. *Id.* at 104.

145. *Id.* at 104 n.†.

146. *Id.* at 116.

subconscious predispositions to the witnesses and lawyers who present them to the court.[147] Consequently, hunches are usually hard to determine ex ante.[148]

What is important to appreciate, though, is that Judge Frank was at all times overtly neutral on the legitimacy of the hunch in judicial decisionmaking. Nowhere did he exhort judges to abandon such hunches, nor did he seem to believe that their influence might be curbed in any significant manner. His only prescription was for lawyers and judges to openly acknowledge the influence of such hunches on their thinking, rather than hide behind the superficial rationality of legal doctrine.[149]

3. Fact skepticism

Based on his belief in the indeterminacy of legal rules and principles, one might readily conclude that Judge Frank was a hardened rule skeptic. Indeed many, including the legal philosopher H.L.A. Hart, characterized him as one.[150] Yet the reality remains that Judge Frank's version of skepticism was far more nuanced and indeed fairly unique among his peers. In his version of skepticism, we see perhaps the single most distinguishing feature of Judge Frank's philosophy, one that he developed during the latter part of his career from his experiences as a judge: fact skepticism. His 1949 book, *Courts on Trial*, was devoted principally to the idea of fact skepticism,[151] though we see traces of it in his prior work. As we shall see, it was this part of his philosophy that influenced his opinion most directly in *Arnstein*.

Judge Frank reserved the term "rule skeptics" for scholars who had shown that formal legal rules were inaccurate predictors of legal outcomes but who nonetheless believed in "greater legal certainty."[152] These rule skeptics, such as fellow legal realist Karl Llewellyn, were seen to be looking for some "real rules" behind the "paper rules" in their quest for certainty and patterns in the law that render it predictable.[153] Fact skeptics, on the other hand, begin with a belief in the indeterminacy of legal rules but take it one step further on the assumption that

147. *Id.* at 109-11.

148. *Id.* at 116.

149. *Id.* at 117.

150. H.L.A. HART, THE CONCEPT OF LAW 298 n.4 (3d ed. 2012).

151. *See* FRANK, COURTS ON TRIAL, *supra* note 32, at 1-156.

152. FRANK, LAW AND THE MODERN MIND, *supra* note 32, at viii.

153. *Id.* For an account of Karl Llewellyn's version of legal realism, see Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 749-51 (2013), which describes Llewellyn's belief that "[j]udges do follow rules, . . . but the rules they follow are often not the ones found in standard legal sources."

> [n]o matter how precise or definite may be the formal legal rules, . . . no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part, futile—and that its pursuit, indeed, may well work injustice—aim rather at increased judicial justice.[154]

The fallibility, subjectivity, and structural weaknesses of factfinding in trial courts thus motivated Judge Frank's fact skepticism. In his writing, he took the implications of this idea to rather extreme lengths. The intrinsic subjectivity of factfinding, to him, meant that to speak of a "legal right" was meaningless because, until a court actually ruled on the underlying facts, the very existence of such a right was an uninformed guess.[155] Since

> [m]ost legal rights turn on the facts as "proved" in a future lawsuit, and proof of those facts, in "contested" cases, is at the mercy of such matters as mistaken witnesses, perjured witnesses, missing or dead witnesses, mistaken judges, inattentive judges, biased judges, inattentive juries, and biased juries. . . . [,] a legal right is usually a bet, a wager, on the chancy outcome of a possible future lawsuit.[156]

Factfinding in trial courts was thus, to Judge Frank, little more than guesswork, given the subjectivity inherent in the process.

As an analytical matter, Judge Frank's fact skepticism was a natural corollary to his belief in legal indeterminacy. Whereas his commitment to legal indeterminacy entailed admitting that doctrine rarely ever determined outcomes, fact skepticism offered an account of why that was so. Since doctrinal propositions rely on findings of fact for their determinacy in individual cases, when those facts are themselves subjective and intrinsically manipulable, legal doctrine is incapable of ever producing determinate outcomes.

Judge Frank's fact skepticism drew from structural forces that were well engrained in the working of the legal system. The first cause was the adversarial system of justice, which to him focused on ensuring a fair "fight" between the parties rather than on determining the truth of the matter.[157] Contentious litigation had produced lawyering tactics and strategies that he saw as denigrating the value of actual factfinding in courts.[158] Second was the reality that judges were rarely ever seen as subjective decisionmakers.[159] The

154. FRANK, LAW AND THE MODERN MIND, *supra* note 32, at ix.

155. FRANK, COURTS ON TRIAL, *supra* note 32, at 26-27.

156. *Id.* at 27.

157. *Id.* at 80.

158. *Id.* at 82-85.

159. *Id.* at 146.

legal system had refused to see "[t]hat judges are human and share the virtues and weaknesses of mortals," which had in turn produced a belief in the objectivity of judicial factfinding.[160] Yet, Judge Frank argued, judges too were driven by innumerable "unconscious" and personality-driven influences that caused them to rarely "'find' the 'facts' identically."[161] Judges, much like historians, were always engaged in the "unconscious involuntary distortion" of facts, even just by virtue of being observers.[162]

The third source of Judge Frank's fact skepticism was also the subject of his most trenchant criticism: the jury system.[163] Relying on what he dubbed "[t]he 'realistic' theory" of the jury's function, Judge Frank argued that juries very often ignored all legal rules and "determine[d], not the 'facts', but the respective legal rights and duties of the parties to the suit."[164] Since they were indelibly influenced by their own conceptions of justice in the case, juries routinely paid little attention to the "law" as such and exercised their "incorrectible power."[165] All the same, Judge Frank did not believe that the juries were in any sense deceptive or malicious. The reason for their functioning in this way was, to him, a product of the system's overarching naiveté: "[C]ourts are obligated to make the unrealistic assumption that the often incomprehensible words, uttered in the physical presence of the jurors, have some real effect on their thought processes."[166] In addition, he saw evidence as routinely presented to a jury in a disorderly manner that was "confusing" and produced its own set of "obstacles."[167] The net result was that neither the rules of evidence, nor the substantive rules of an area, operated as constraints on the jury's finding of facts. This in turn produced what Judge Frank described as "jury-made law," where "each jury makes its own 'law' in each case with little or no knowledge of, or reference to, what has been done before, or regard to what will be done thereafter, in similar cases."[168]

To Judge Frank, the jury system was clearly "undesirab[le]."[169] Nevertheless, he recognized that, as a judge committed to protecting the Constitution and enforcing statutory provisions, he was obligated to preserve

160. *Id.*

161. *Id.* at 150-52.

162. *Id.* at 156 (quoting Henri Berr & Lucien Febvre, *History*, *in* 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 357, 367 (Edwin R.A. Seligman ed., 1932)).

163. *Id.* at 108.

164. *Id.* at 111.

165. *Id.* at 113.

166. *Id.* at 117.

167. *Id.* at 118.

168. *Id.* at 120.

169. *Id.* at 145.

the jury's role in the adjudicative process.[170] This obviously put him in an awkward position when advocating for juries in different contexts. He therefore made a somewhat halfhearted effort to offer suggestions for reforming the jury system, recognizing that it was unlikely to go away any time soon.[171] All the same, if one understands his dislike for juries as forming but *one part* of his overall philosophy of fact skepticism, it begins to allow for some leeway in evaluating his occasionally favorable treatment of juries. As we shall see, this became an issue in *Arnstein*.

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While Judge Frank is commonly labeled a legal realist, this characterization is at best imperfect. What really characterized his thinking was his belief that it was in the vicissitudes of the factfinding process that the legal system actually functioned and served to realize justice. His fact skepticism was more than just an abstract philosophy. It informed much of his judicial reasoning on what appeared to be core substantive and procedural issues, often giving them an underappreciated gloss. As we shall see, Judge Frank's commitment to fact skepticism coupled with his general distrust of factfinding by lower court judges were in the end principally responsible for the copyright infringement analysis that he formulated in *Arnstein*.

B. The Copyright Expert: Learned Hand

The second member of the panel in *Arnstein* was none other than Judge Billings Learned Hand, described by some as "the greatest judge to never sit on the Supreme Court."[172] While on paper his primary contribution to the opinion was in joining Judge Frank's majority opinion, his very presence on the panel that decided the case is of some significance. Some of his most significant contributions to copyright jurisprudence in the decades preceding the case came to influence the *Arnstein* formulation. During his time on the bench—both as a district court judge and later as a circuit court judge—Judge Hand authored innumerable opinions on a wide variety of critical copyright law issues. Gerald Gunther, in his biography of Judge Hand, observed that "[n]o area displays Hand's superlative traits as a judge more richly than his work in copyright law."[173] Understanding Judge Hand's judicial philosophy, and indeed

170. *Id.*

171. *Id.* at 141-45.

172. Ari L. Goldman, *Gerald Gunther, Legal Scholar, Dies at 75*, N.Y. TIMES (Aug. 1, 2002), http://nyti.ms/1RbDbl4.

173. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 268 (2d ed. 2011).

his overall approach to copyright law, is largely orthogonal to our inquiry here except for one important area where he had a lasting impact: the test for copyright infringement.

Even as a district court judge, Judge Hand came to recognize the imprecise and subjective nature of the copyright infringement inquiry. Especially in relation to musical works, his opinions often focused on the melodic component of a work, which he believed endowed the work with its commercial and popular significance.[174] Consequently, for copying to be actionable, the melody itself needed to be copied, regardless of how extensive other copying was. In *Hein v. Harris*, which he decided in 1910, Judge Hand found that the defendant infringed the plaintiff's musical score, even though there were differences of some significance between the works.[175] He observed that even though "the keys [we]re different . . . this [wa]s a distinction which [wa]s of no consequence to the ears of all but those especially skilled in music."[176] In *Hein*, Judge Hand also set out his basic approach to balancing creativity and copying in the world of musical copyright:

> [T]he right of the author of a musical composition is not affected by the fact that he has borrowed in general from the style of his predecessors. The collocation of notes, which constitutes the composition, becomes his own, even though strongly suggestive of what has preceded, and it ceases to be an invention, and becomes an infringement, only when the similarity is substantially a copy, so that to the ear of the average person the two melodies sound to be the same. Therefore the lack of originality and musical merit in both songs, upon which the defendant insists, is of no consequence in law. While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created. Certainly the qualifications of judges would have to be very different from what they are if they were to be constituted censors of the arts.[177]

In this paragraph, we observe three points of significance. The first is Judge Hand's observation that even a work of low artistic (i.e., musical) excellence can qualify for copyright protection. Here we see an echo of Justice Holmes's famous observations in *Bleistein v. Donaldson Lithographing Co.*[178] Second is the idea that something is a copy only when it is "substantially" the same as the original, measured by the average listener's reaction to the melodies in the two works. Third is his rationalization that this method most accurately measures the public taste in music, which gives the work its pecuniary value.

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174. *See* ALFRED M. SHAFTER, MUSICAL COPYRIGHT 204-05 (2d ed. 1939).

175. 175 F. 875, 876 (C.C.S.D.N.Y. 1910).

176. *Id.*

177. *Id.* at 877.

178. 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

Judge Hand's focus on the melody came to be called the "comparative method" of analysis and was soon applied widely.[179] A few years later, it was Judge Hand who also introduced the requirement of "access" into the first step of the infringement analysis, i.e., that the availability of the protected work was a sine qua non for copying to be proved as a factual matter.[180] In *Haas v. Leo Feist, Inc.*, he was willing to find such access based on the testimony of the parties and upon his personal "musical sense," which he employed to detect similarities.[181] "[D]erivation" needed to be independently proved.[182] In subsequent unreported decisions, he even went one step further, observing that mere similarity without access could not amount to an infringement.[183]

As a district court judge, Judge Hand also applied his approach to the comparison of literary works, specifically to plays and motion pictures. In *Stodart v. Mutual Film Corp.*, the plaintiff alleged that two motion picture companies had plagiarized his play in their movies.[184] Working through the plot, incident, characters, storyline, and scenes of the work, Judge Hand concluded that there was indeed an infringement. Echoing his observation in *Hein*, he went on to note:

> A man may take an old story and work it over, and if another copies, not only what is old, but what the author has added to it when he worked it up, the copyright is infringed. It cannot be a good copyright, in the broader sense that all features of the plot or the bare outlines of the plot can be protected; but it is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright.[185]

In this observation, we see the early outline of what would come to be understood as analytic "dissection" during the infringement analysis—the idea that a protected work might contain both protected and unprotected material, which a judge or jury would be required to parse.

Judge Hand's lasting impact on copyright jurisprudence, however, came during his tenure on the Second Circuit, by which time he had already spent several years developing his judicial philosophy on copyright. His 1930 opinion in *Nichols v. Universal Pictures Corp.*[186] is credited with explaining the logic behind copyright's test for infringement. The case involved a plaintiff who alleged that her play had been infringed by the defendant's "motion picture

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179. SHAFTER, *supra* note 174, at 205.

180. *Id.* at 222-23.

181. 234 F. 105, 107 (S.D.N.Y. 1916).

182. *Id.*

183. SHAFTER, *supra* note 174, at 222.

184. 249 F. 507, 508 (S.D.N.Y. 1917).

185. *Id.* at 510.

186. 45 F.2d 119 (2d Cir. 1930).

play," which had a similar storyline and setup.[187] Judge Hand began his analysis with the observation that for "any protection of literary property, whether at common-law or under the statute, . . . the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."[188] This in turn meant that "when the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome."[189] He then went on to describe the approach in a paragraph that has since been quoted innumerable times and has acquired iconic status as the "abstractions" principle in copyright law:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.[190]

In the end, after a detailed analysis of the plays, he went on to conclude that the defendant's copying was "no more . . . than the law allowed," rendering it noninfringing.[191] Judge Hand's reasoning in *Nichols* is special, not merely because of its "brilliant"[192] analysis but also because of its candid admission that the infringement analysis in copyright law is necessarily imprecise and heavily contextual. Perhaps more importantly, in applying the test to the facts before him, Judge Hand vividly illustrated how courts were to look past strong similarities between the works when they related to unprotectable elements.

A few years after *Nichols*, Judge Hand applied the same logic to a different set of facts and came to the exact opposite conclusion. In *Sheldon v. Metro-Goldwyn Pictures Corp.*, Judge Hand noted that "others may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression'" and emphasized that "unconscious plagiarism is actionable quite as much as deliberate" plagiarism even if creators "might quite honestly forget what they took."[193] Judge Hand's recognition of the contextual nature of the infringement inquiry was thus more than just rhetoric, as revealed in his own application of its reasoning to future cases. *Nichols* continues to influence copyright law to this day, with

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187. *Id.* at 120.
188. *Id.* at 121.
189. *Id.*
190. *Id.* (citations omitted).
191. *Id.*
192. GUNTHER, *supra* note 173, at 276.
193. 81 F.2d 49, 54 (2d Cir. 1936).

courts most recently extending its application to the realm of computer software,[194] which copyright law treats as a literary work.

By 1946, when *Arnstein* was argued before the Second Circuit, Judge Hand had therefore established himself as the nation's leading judge on copyright law. Indeed, it would only be a slight exaggeration to say that the basic approach to copyright infringement, including the concepts of "substantial" similarity, access, and dissection, were essentially his very creations, since he had by then "creatively shaped the law."[195] Additionally, as some scholars have noted, Judge Hand's copyright opinions reveal a rhetorical flourish and "virtuos[ity]" that "convey the sense that he enjoyed deciding them."[196] His decision to allow Judge Frank to author the majority opinion in *Arnstein* and to lend his imprimatur to it was therefore of some considerable significance in the case.

C. The Procedural Reformer: Charles Clark

The final member of the *Arnstein* panel, who authored the powerful dissent in the case, was Judge Charles E. Clark. A prominent scholar of civil procedure, Judge Clark was a tenured member of the Yale Law School faculty who went on to serve as the law school's dean.[197] Before being appointed to the bench, Judge Clark had also held an important reform-related position that would come to color much of his judicial writing: Reporter to the Supreme Court's Advisory Committee on Rules for Civil Procedure.[198] In that position, he was "principally responsible for the drafting of the Federal Rules," which came into effect in 1938,[199] and many of his contemporaries noted how the Rules bear the indelible imprint of his core philosophy.[200] Scholars have long observed how his judicial opinions were greatly influenced by his work on the Advisory Committee and that they were characterized by a "passion[ate] and fervent devotion" to the Federal Rules, to the work of the Committee, and in particular to Rule 56 dealing with summary judgment, which Judge Clark had personally helped draft.[201]

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194. *See, e.g.*, Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992).

195. GUNTHER, *supra* note 173, at 268.

196. *Id.* at 269, 278 (quoting KAPLAN, *supra* note 8, at 49).

197. *See* Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965); Eugene V. Rostow, *Judge Charles E. Clark*, 73 YALE L.J. 1, 1 (1963).

198. *See* Smith, *supra* note 104, at 915; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961 (1987).

199. Smith, *supra* note 104, at 915.

200. *See, e.g.*, Elmo Hunter, *One Year of Our Federal Rules*, 5 MO. L. REV. 1, 6-7 (1940).

201. MARVIN SCHICK, LEARNED HAND'S COURT 127, 241 (1970); Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959)

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As a scholar of civil procedure, Judge Clark articulated his basic philosophy in that area in an article published a few years before he became a judge: *The Handmaid of Justice*.[202] In it, he emphasized that procedure was meant to have a subordinate position to substantive rules of law, as a handmaid rather than a mistress, and that procedural rules were to be characterized by efficiency, simplicity, regularity, and flexibility (adaptability to new circumstances).[203] As some have noted, Judge Clark failed to fully appreciate how these ideals might themselves compete with one another on occasion in practice.[204] Judge Clark's belief that procedure should not dictate outcomes in individual cases was more than just lofty rhetoric, however; it represented a worldview that was decidedly antiformalist and anticonceptualist. In an illuminating work that draws on Judge Clark's papers, David Marcus argues that this strand of Judge Clark's thinking was distinctively pragmatic in outlook and content, insofar as it associated the legal system with goals derived from individual substantive areas and abjured any reliance on procedural foundationalism.[205]

Judge Clark was an early and influential legal realist who recognized that there was an important role for legal rules in the processes of legal and judicial reasoning.[206] Some of his early work openly criticized the American Law Institute's first round of restatements, arguing that they were attempting to mechanically restate the law in "black letter" terms, without appreciating the unique contexts and circumstances from which the law itself emerged.[207] In Judge Clark's view, procedural legal rules needed to be "stated in the terms of the functions they are to perform, or the results they are to achieve, rather than as arbitrary mandates" or principles.[208] They were useful insofar as they

(describing how he had specifically "commission[ed]" the preparation of a draft set of rules that would become Rule 56 in the Federal Rules).

202. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) (articulating a theory of procedural justice).

203. *Id.* at 297-300.

204. *See, e.g.*, Smith, *supra* note 104, at 916 ("[Clark] never analyzed systematically the potential clash of these values in particular cases, but was much more interested in working out their implications for lawmaking.").

205. David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 486-88 (2010).

206. *Id.* at 459.

207. *See, e.g.*, Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 647 (1933) (describing how the *Restatement* chose "to press the fruitful activities of its scholars into the dry pulp of the pontifical and vague black letter generalities").

208. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 499 (1950).

worked as "guiding principle[s]" that were workable in practice.[209] Judge Clark was thus decidedly functionalist about procedural rules and very willing to recognize that in the hands of a good judge, procedure facilitated a genuine focus on the substantive issues at stake in an efficient and speedy manner.

Despite being responsible for the entirety of the Federal Rules, Judge Clark undoubtedly felt most strongly about Rule 56—summary judgment.[210] As a scholar and later Reporter for the Federal Rules, Judge Clark believed that summary judgment was an "effective remedy" for the problem of the "law's delay."[211] He believed that its virtues were in its "simplicity" and in its "prompt disposition of bona fide issues of law as well as of sham defenses" when there were no material disputes of fact.[212] To Judge Clark, summary judgment enabled litigants to avoid the perils of a full trial merely to establish that the case had no merit. He thus viewed trials as arduous mechanisms that needed to be reserved primarily for situations where facts—and not the law—formed the principal locus of disagreement. As he put it, midway into his judicial career, by which time scholars had highlighted several problems with courts' use of the summary judgment procedure:

> It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact. Just as obvious is the obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all. The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. . . . Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal, as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.[213]

In Judge Clark's view, an erroneous denial of summary judgment was perhaps worse than an erroneous grant, since the denial was nonappealable and obligated the parties to undergo a prolonged trial. Minimizing the judicial system's use of trials was, to him, an obvious way of reducing delays and ensuring speedy justice in civil cases.

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209. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 548 (1925) (italics omitted).

210. *See* Smith, *supra* note 104, at 927.

211. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929).

212. *Id.*

213. Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952) (footnote omitted).

Greater reliance on the summary judgment procedure by trial courts, however, required a good degree of confidence in the facts of the case. As Judge Clark himself acknowledged, summary judgment was appropriate only when there was no "genuine" issue of material fact. To many at the time, the distance between *no* issue of material fact and a *clear* dispute of fact was rather significant. Judge Clark's support for summary judgment—as articulated in his writing—appeared to advocate denials of summary judgment only when there was a clear issue of fact, enabling judges to summarily dispose of cases in situations involving the rest of the spectrum. His logic was that in such "cases where no sharp dispute on the facts is uncovered, determination of the case may well turn upon adjudication of a serious issue of law."[214] In other words, when the factual disputes were not "sharp" or distinctive, the dispute usually involved an issue of law.[215] Judge Clark's approach was therefore premised on instilling an approach of factual certitude in lower court judges, enabling them to retake their place in the development of the law. Judge Clark's views on summary judgment therefore went hand in hand with his realist belief that judges are primarily engaged in "the creative job of making new law."[216] All the same, his views were premised on a degree of confidence about the factfinding process and the ability of judges to discern factual disputes (and nondisputes) that was, as a logical matter, radically opposed to Judge Frank's fact skepticism.

Judge Clark's support for summary judgment both drew from and augmented his lack of confidence in juries. In this respect, he shared Judge Frank's views, except that, as a pragmatic thinker, his views were driven less by theory and rhetoric and more by a reformer's outlook. In a 1934 empirical study of civil juries in Connecticut, he carefully reviewed the working of jury trials in the state—casting to the side his own views on the subject.[217] When evaluating the data, he offered the following observation:

> Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules.[218]

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214. *Id.* at 570.

215. *Id.*

216. Judge Charles E. Clark, Federal Procedural Reform and States' Rights; to a More Perfect Union, Address at the University of Texas Law Day (Apr. 7, 1961), *in* 40 TEX. L. REV. 211, 223-24 (1961). For further exploration of this account by Judge Clark, see Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

217. Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867, 869, 884 (1934).

218. *Id.* at 884.

Besides being a hardened legal realist and a pragmatic thinker, there was a third—and perhaps more visible—component to Judge Clark's worldview. This was his longstanding professional animosity towards his colleague Jerome Frank. The precise source (and psychological roots) of this conflict has baffled scholars for many years now.[219] Both individuals were prominent, published legal scholars prior to their judicial appointments, and both were "New Dealers" and legal realists who shared similar political and institutional values.[220] Yet their disagreement on the court was legendary. The historian Marvin Schick describes "the virtually uninterrupted friction" between the two as one of the "outstanding feature[s] of the court's work" during the decade.[221] Judge Frank would openly acknowledge this acrimony in his letters,[222] but neither was able to dispense with it in any significant form. In multiple legal opinions, Judge Frank mocked Judge Clark's views on the Federal Rules by making witty references to Judge Clark's characterization of procedure as "the 'hand-maid' of justice."[223] This only caused Judge Clark to become more defensive in both his writing and his positions.

The Clark-Frank feud was sufficiently public and well known that other judges at the court (and beyond) were often aware of it.[224] In one memorandum, Judge Hand chided them, stating, "After you and Jerry [Judge Frank] . . . stop shouting, for God's sake file the opinions."[225] In other writings, Judge Hand was even more overt in his identification (and criticism) of this feud.[226] Whatever may have caused this animosity—whether it was the reality that Judge Clark commuted from New Haven and was not a permanent presence in New York (unlike Judge Frank),[227] Judge Clark's own intellectual insecurities,[228] Judge Frank's style of argumentation,[229] Judge Hand's seeming

219. *See* SCHICK, *supra* note 201, at 219-47 (detailing the animosity and identifying its potential sources).

220. *See, e.g.*, *id.* at 247.

221. *Id.* at 219.

222. *Id.* at 219-20.

223. *See, e.g.*, Clark v. Taylor, 163 F.2d 940, 951 (2d Cir. 1947) (Frank, J., dissenting). For an account of these exchanges, see SCHICK, *supra* note 201, at 225 n.11.

224. Indeed, even Justice Frankfurter seems to have known about it, and he even referred to it. *See* SCHICK, *supra* note 201, at 238-40.

225. *Id.* at 241 (quoting Memorandum from Judge Learned Hand to Judge Charles E. Clark (Nov. 26, 1943)).

226. *See id.*

227. *Id.* at 74-75.

228. *Id.* at 245 (showing that Judge Clark referred to himself as a "slowpoke[]" (quoting Memorandum from Judge Charles E. Clark to Judge Jerome N. Frank (Nov. 17, 1948))).

229. *Id.* at 242 ("Frank was clearly far better equipped than Clark . . . to communicate with people orally and to get across, in a spirit of friendliness and enthusiasm, ideas which the listener was hostile to.").

endorsement of Judge Frank on most issues,[230] or Judge Clark's own pugnaciousness[231]—the fact of the matter remains that it influenced both the jurisprudence of the court and Judge Clark's philosophy and outlook on a number of issues. When Judge Frank authored a majority opinion, Judge Clark invariably felt the need to dissent and vice-versa. In the ten-year period between 1941 and 1951, the two were on opposite sides in fifty-eight appeals.[232] *Arnstein* fell into this category.

In a tribute to Judge Frank wherein Judge Clark described this conflict, Judge Clark described their confrontations as "glorious battles" and characterized Judge Frank as "a gladiator of unusual power and adroitness."[233] In the end, though, Judge Clark attributed the disagreements to his own views on procedural reform, noting:

> If we differed, he and I, it tended to be here, where he felt that my aspirations for a uniform procedure, impartial as to all, were likely to rest heavily on some poor person not prepared therefor, and that such a person must be protected, whatever future inconsistencies might come back to trouble us.[234]

In summary, then, much of Judge Clark's legal and judicial thinking was heavily influenced by his work on the Advisory Committee and his commitment to the Federal Rules. In this role, he felt fairly sanguine about a lower court's ability to manage the issues involved, once presented with the right procedural mechanisms. To Judge Clark, the overarching ideal of the judicial system was the administration of justice, for which the systematization and streamlining of the process were essential steps in order to facilitate the court's focus on substance. Indeed, Judge Clark felt so strongly about his commitment to the Federal Rules that in a letter to Judge Hand he candidly recognized the conflict:

> The truth of the matter is that I sometimes find difficulty in my two capacities of judge and of reporter for the rules. It is hard to know where to draw the lines. . . . Maybe the two jobs will become more and more fundamentally incompatible. . . . Maybe I ought to resign from the Committee . . . .[235]

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230. *Id.* at 244-45.

231. Rodell, *supra* note 197, at 1328 (noting "in a tough fight against long odds and rough opposition," the author would prefer to have Judge Clark rather than Judge Frank on his side).

232. SCHICK, *supra* note 201, at 247.

233. Clark, *supra* note 123, at 818.

234. *Id.*

235. SCHICK, *supra* note 201, at 246 (first alteration in original) (quoting Letter from Judge Charles E. Clark to Judge Learned Hand (Aug. 4, 1947)).

Whether or not Judge Clark's position compromised his judicial role, the fact remains that the Federal Rules represented his professional "bab[y]."[236]

III. Orchestrating the Reversal

Having examined the actual opinions in *Arnstein* as well as the background legal philosophies and beliefs of the panel members that heard the case, this Part aims to reconstruct how—and perhaps more importantly *why*—Judge Frank structured the opinion in the way he did and, in the process, produced new copyright doctrine: the *Arnstein* test. To this end, this Part relies not only on the judges' extrajudicial writings, but also on their relevant correspondence, memoranda, and draft opinions in the case, which, together with the published opinions, provide a richer account of the motivations for the *Arnstein* formulation. This reading indelibly confirms that despite Judge Frank's extensive efforts to avoid creating "bad precedent," his opinion succeeded in doing just that, owing to the rationalized and iconoclastic way in which it was constructed.

Understanding *Arnstein* through the judges' correspondence and memoranda provides a unique window into the way in which the judges in the case conceived of the workings of the copyright system and the role of litigation therein. Indeed, their memoranda in the case are more than just ex post explanations for their views and decisions. The memoranda represent the very process through which they reasoned to arrive at their votes and conclusions in *Arnstein*. At the time, the Second Circuit adhered to a rather unique practice. The judges who heard a case met in conference to discuss their views *an entire week* after the oral arguments, during which time they were expected to indicate how they planned to vote through the mutual exchange of written memoranda.[237] While the process was no doubt laborious for the judges themselves (and often criticized[238]), it nonetheless ensured that their memoranda were candid instruments of persuasion and reasoning that today contain a wealth of hidden detail about the disposition of a case. This was indeed true of *Arnstein*, where the judges generated a rich paper trail that sheds light on what Judge Frank intended to achieve with his opinion, in contrast to what actually became of it over time.

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236. *Id.* at 224 n.8 (quoting Letter from Judge Charles E. Clark to Judge Learned Hand (Feb. 2, 1944)).

237. *See* SCHICK, *supra* note 201, at 96 (describing the practice as the Second Circuit's "hallowed," in Judge Clark's opinion, "memorandum system" and noting how this traditional practice was unique among circuit courts of appeal (quoting Letter from Judge Charles E. Clark to Judge Harry Edgerton (May 9, 1941))).

238. *See id.* at 97-98.

A. Divergent Musical Hunches and Procedural Sensibilities

Arnstein was argued before the Second Circuit in the week of January 7, 1946,[239] and in keeping with the court's protocols at the time, the judges scheduled their conference for the following week. A few days after oral argument, on January 11, Judge Frank was the first to weigh in.[240] Noting that there were good occasions for summary judgment in copyright infringement cases, he argued that this was "not such a case."[241] The crux of the matter, in his view, boiled down to this: "I have listened to [both musical compositions]. I am relatively unversed in this field. But I think that . . . Porter's [composition] has some marked resemblances to . . . Arnstein's . . . . So, too, does my secretary who improvises music."[242]

His own auditory sensibilities therefore urged him to conclude that the plaintiff, Ira Arnstein, was "entitled to a trial."[243] Judge Frank then sought to underplay the plaintiff's seemingly fantastical allegations, noting how "partly crazy men" could still be victims of plagiarism, especially since the plaintiff's works "show considerable ability."[244] He concluded his initial memo with a jibe at the district court, noting that the size of the case files appeared to "have induced [Judge Caffey] not to study with care the facts in this case."[245]

Three days later, Judge Clark responded with his own memorandum—significantly longer than Judge Frank's.[246] In it, he noted that he "first went over the sheet music" to study the plaintiff's "dissection-analysis" and concluded that there was no copying.[247] He then claimed to have met with his friend Luther Noss, a "Yale University organist" who "played and sang all the pieces."[248] Noss concluded that the plaintiff's claims were "fantastic" and that the defendant's comparison (which showed the extensive differences) was more accurate.[249] Judge Clark's point was simple: as a composer of simple "musical idioms," the plaintiff had been able to find similarities with much of the

239. *See* Cases Heard Week of January 7, 1946 (on file with the Yale Law School Library).

240. Memorandum from Judge Jerome N. Frank to Judge Charles E. Clark and Judge Learned Hand, *supra* note 40.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. Memorandum from Judge Charles E. Clark to Judge Learned Hand and Judge Jerome N. Frank (Jan. 14, 1946) (on file with the Yale Law School Library).

247. *Id.* at 1.

248. *Id.*

249. *Id.*

defendant's work, disregarding "the melodies which impress the public."[250] Arnstein could never, in Judge Clark's view, "get any expert to support his thesis."[251] Judge Clark appears to have genuinely believed that he could persuade Judge Frank with his analysis, noting "had you been with me or if you now do the same thing with a really good musician you will not have the slightest doubt that there is nothing to this at all."[252] His use of the phrase "slightest doubt" is interesting here, since he might have been implying that *even* under Judge Frank's preferred standard for summary judgment (the slightest doubt standard[253]), the plaintiff simply had no case.

Yet Judge Clark could not bring himself to stop there. His commitment to the Federal Rules got the better of him, and he chose to point out that Judge Frank was reversing the lower court's grant of summary judgment, which was quite independently a bad thing. Expressing his "considerable dismay" at the court's tendency to "do damage to the rule of summary judgment against its wording and its spirit," he believed that it would do no more than "redouble the energies of the lawyers to go back to the old system" of pleading.[254] This was a reference to the system of code pleading that existed prior to the introduction of the Federal Rules, a topic that Judge Clark had written about previously.[255] Judge Frank seems to have found no merit in this allegation, for in his version of the memo he merely underlined this observation and inserted by its side in pencil: "Why?"[256]

The only benefit of a full trial, in Judge Clark's view, was to elicit expert testimony, which could have been obtained by affidavit or by the court consulting a musical expert of its own. He then brought the point home rather forcefully:

> I don't believe one of us thinks for a moment that there is one chance out of a hundred of Arnstein's ever succeeding here; and I think we cast doubt on the process of justice and our own standing as a court if we simply postpone decision and have not the backbone to stop it when we should. . . . I think it brings the whole process of justice and our own court in particular into disrepute.[257]

250. *Id.* at 2.

251. *Id.*

252. *Id.* at 4.

253. Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945) ("A litigant has a right to a trial where there is the slightest doubt as to the facts . . . .").

254. Memorandum from Judge Charles E. Clark to Judge Learned Hand and Judge Jerome N. Frank, *supra* note 246, at 4.

255. Clark, *supra* note 209, at 518 (describing the idea of code pleading).

256. Memorandum from Judge Charles E. Clark to Judge Learned Hand and Judge Jerome N. Frank, *supra* note 246, at 4.

257. *Id.* at 5.

Judge Clark's memo was simultaneously powerful and distracting. While it forcefully presented the virtues of expert analysis, his emphasis on the procedural issue at stake, i.e., summary judgment, gave the case an unduly personal dimension—and took the exchange in a new direction. Indeed, in its reference to the court's lack of "backbone," the memo suggested to Judge Frank that the entire basis of his reversal was borne out of a dislike for summary judgment and the "weakness" of indecision. An acrimonious back-and-forth was thus inevitable. And while the judges continued to vocalize their procedural disagreement, they never again explored their factual (i.e., musical) disagreement, which was the real root cause of their disagreement in the case.

In his rejoinder, produced the very next day, Judge Frank took Judge Clark's cue and shifted his focus almost entirely to the procedural issue, noting that Judge Clark's memo seemed to be driven by his belief that inroads into summary judgment "offend[ed] against the basic principles of enlightenment in procedure."[258] He claimed to be "impressed" by the plaintiff's pro se representation, noting that summary judgment would put him "at a disadvantage."[259] Judge Frank also asserted that a trial would have been quick:

> The defendant would have introduced the very evidence it has put in by way of affidavits; the defendant would have testified; then the trial judge would have done the work which he obviously didn't do here, and, on appeal, we would have been obliged to do far less work than defendant asks us to do on this appeal.[260]

The next sentence in the memo is quite telling, for it clearly reveals that Judge Frank's real discomfort with the lower court decision arose from his uncertainty about the facts involved. In this sentence, Judge Frank poignantly observed that "[t]o say that plaintiff's case will be no stronger on a trial is to guess."[261] To Judge Frank, this was simply unacceptable.[262]

Somewhat interestingly, in a version of the memo circulated internally, Judge Frank scribbled a few handwritten thoughts in the side margin. In one, he asks the question, "Would we sustain a directed verdict here, if this had been a jury trial?"; in the other, he appears to make an observation about how copying might be inferred when he writes: "(1) If no direct proof of access whatsoever, still marked similarity may be proof of it[;] (2) If no such marked similarity, then there must be some direct proof of copying."[263] It is not clear if these thoughts represent Judge Frank's efforts to muddle through the standard

258. Memorandum from Judge Jerome N. Frank to Judge Learned Hand and Judge Charles E. Clark (Jan. 15, 1946) (on file with the Yale Law School Library).

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.*

263. *Id.*

or if they were put in later. Neither made its way into the memo sent out, though the latter became the *Arnstein* standard for proof of copying in the opinion itself. Judge Frank concluded his memo with the claim that he was opposed to "creating a bad precedent" merely because "Arnstein is nutty."[264]

Much as Judge Frank's second memo shifted gears towards a critique of summary judgment, so too did Judge Clark's next salvo, dated the same day as Judge Frank's missive.[265] Indeed, Judge Clark's memo took the disagreement in a more ad hominem direction. Claiming that Judge Frank had sidestepped his "musical analysis," Judge Clark chided Judge Frank for suggesting that the court should do "less work," quipping that he thought they "were here to work."[266] Judge Clark then interpreted Judge Frank's reference to "bad precedent" as suggesting a precedent where summary judgment was allowed in an infringement trial and reiterated that it was the court's "duty to apply the rule [i.e., summary judgment], and let the precedents fall as they may."[267] It is not clear that Judge Frank's reference to "precedent" was singularly connected to summary judgment, but Judge Clark certainly took it to be.

Judge Frank responded the next day, this time with his own ad hominem critique of Judge Clark.[268] He first clarified that his reference to less work was merely a reference to the appellate court "doing the job of the trial court."[269] His memo then went on the offensive, accusing Judge Clark of secretly "call[ing] in an expert witness" and of asking the court to decide the case based on "that witness' testimony."[270] Explaining why it would be improper and unfair to do so, Judge Frank even argued that "judicial notice" of the matter was inappropriate for such analysis when the party against whom it was being used was not given the opportunity to rebut it.[271] The memo then referred back to the "bad precedent" claim, and here—in what appears to be a direct taunt—consciously affirmed Judge Clark's interpretation of it. Judge Frank thus unequivocally claimed that summary judgment was "'bad' here" and that nothing was wrong with the desire to avoid a bad precedent.[272] Referring to

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264. *Id.*

265. Memorandum from Judge Charles E. Clark to Judge Learned Hand and Judge Jerome N. Frank (Jan. 15, 1946) (on file with the Yale Law School Library).

266. *Id.*

267. *Id.*

268. Memorandum from Judge Jerome N. Frank to Judge Charles E. Clark and Judge Learned Hand (Jan. 16, 1946) (on file with the Yale Law School Library).

269. *Id.*

270. *Id.* (emphasis omitted).

271. *Id.*

272. *Id.*

Judge Clark's "fondness for summary judgments" as potentially "infect[ious]," the memo insisted that the procedure be "carefully restricted."[273]

Note that Judge Hand had yet to weigh in with his views on the case, even though Judge Frank and Judge Clark had by this time circulated five memoranda. On January 18, a whole week after Judge Frank's first memo in the case, Judge Hand finally weighed in and sided with Judge Frank.[274] Judge Hand began his memo with the observation that the case had "troubled [him] more than anything else of the week's batch."[275] Arguing that the "main question is of infringement," he concluded that there "ought to be a trial."[276] His reason: "[S]o far as my ear is the test, I cannot say that, if the defendant did use the plaintiff's songs, it was not actionable," especially since "we ought not to substitute ourselves as a jury on such an issue" because in the end "[t]he test is the impression made upon the ear of the ordinary hearer," an issue which should be "exclusively for a jury."[277] What is ironic in Judge Hand's observation here is that, in the preceding paragraph, he had observed that "it is extremely improbable that the defendant could ever have heard [the plaintiff's music], or that, if he had, he should have copied it."[278] "[N]o jury is likely to . . . believe that the defendant got any benefit from it, if it happened."[279] Judge Hand was therefore willing to send the case to a jury hoping to get to illicit copying *even though* he had little doubt that there was no actual copying at all.

Much like Judge Frank, Judge Hand too appears to have been moved by the musical similarities that he perceived. Despite Judge Hand's own admission that actual copying was "extremely improbable" and that "no jury" could ever find for the plaintiff, he chose to order a jury trial—almost as if to suggest that access to a full adversarial process was a right on its own. "[A]dvocacy in a jury-room is a black art, but our country exhibits great, and perhaps increasing, passion for it, and we must not invade it."[280]

Judge Hand then weighed in on the summary judgment question as well, prophetically noting that courts "have constantly to resist the disposition of many of the district judges to be rid of the burden of long trials like these."[281] The observation is interesting and should be contrasted with Judge Frank's

273. *Id.*

274. Memorandum from Judge Learned Hand to Judge Charles E. Clark and Judge Jerome N. Frank, *supra* note 40, at 1.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 2.

281. *Id.*

belief that the trial would be "quick." It suggests that, whereas Judge Frank believed that the lower court was a little too sure about the facts involved in the case, Judge Hand believed that the lower court was avoiding work in order to dispose of more cases. Unlike Judge Frank, though, Judge Hand left open the possibility that a judge might "direct a verdict for the defendant" after trial.[282]

We learn from later correspondence between Judge Frank and Judge Clark that, at the end of the initial conference, Judge Hand had initially decided to author the opinion in the case himself.[283] Yet, the very next day, he changed his mind and asked Judge Frank to write it, at which time Judge Hand "outlined his views as to details."[284] Judge Hand's decision to side with Judge Frank ended the confrontation leading up to the opinions, with Judge Frank and Judge Clark then producing their respective opinions—in turn emphasizing different issues.

* * *

The early and heated exchange between the judges right after the oral argument in *Arnstein* reveals two important things. First, Judge Frank and Judge Hand were motivated in their decision to afford the plaintiff a trial in large part by their own musical sensibilities, i.e., their identification of some nonnegligible musical similarity between the works, which in each of their individual views deserved further examination. While they recognized themselves as untrained "lay" listeners, they remained altogether unwilling to entrust the explanation of this similarity to a musical expert, preferring instead to let the plaintiff have a trial before a lay jury. Second, Judge Frank's decision in the case does not appear to have been motivated—at least initially—by his dislike of summary judgment. As we see, it was only when Judge Clark chose to emphasize the issue and attribute their disagreement to it that Judge Frank found a useful procedural outlet to give effect to his initial intuitive hunch. Indeed, this explains why, despite the fact that Judge Frank's other opinions around the same time criticized summary judgment, his initial memo in *Arnstein* said almost nothing about the vices of summary judgment. This is hardly to suggest that Judge Frank was driven by copyright doctrine in any significant way. Copyright law and policy were silent participants in the judges' formulation of their views in the case.

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282. *Id.*

283. Letter from Judge Jerome N. Frank to Judge Charles E. Clark (Apr. 3, 1946) (on file with the Yale Law School Library) ("[O]riginally, immediately after our conference, [Judge Hand] assigned the opinion to himself, and only the next day asked me to write it . . . .").

284. *Id.*

B. Rationalizing the Hunch

During the actual drafting of the opinion, there appears to have been very little correspondence between the judges. When the judges did communicate, it was largely over their respective interpretations of a few technical procedural rules that were at issue in the case.[285] The correspondence also reveals that, during the drafting, Judge Frank telephoned Judge Clark in an effort to explain the true basis of their disagreement, characterizing it as a difference of opinion on "degrees of copying and of use of musical expertness."[286] Upon seeing Judge Frank's draft opinion, Judge Clark found this explanation useless, noting in a letter to Judge Frank that he could not "see anything in it at all and that it merely adds to the confusion into which this whole subject will go with the appearance of [Judge Frank's] opinion."[287] He further observed that an "attempted distinction of this kind in the hands of the jury can add only to the other confusion."[288]

With this, the judges came to produce their opinions. Several weeks after the case was decided and the opinions were filed, Judge Frank and Judge Clark continued to squabble about the majority opinion in *Arnstein* and its implications. On one occasion, Judge Clark wrote that the majority opinion signaled Judge Frank's belief that the plaintiff should recover.[289] This observation prompted Judge Frank to produce two new letters explaining what he had intended to achieve in the majority opinion. His observations in these documents are quite telling, for in them we see his first (and only) effort to explain—albeit post hoc—his actual reasoning. When read together with his overall legal philosophy, these documents reveal a great deal about the logic of *Arnstein*.

As the discussion below details, these memos reveal that—as previously insinuated—Judge Frank's real reason for formulating improper appropriation as a question for the jury was to allow his hunch in the case to be tested by a collection of lay individuals (rather than a solitary judge). His peculiar sequencing of the analysis (i.e., into two steps) was crafted in an effort to enable this testing to occur.

285. *See, e.g.*, Letter from Judge Jerome N. Frank to Judge Charles E. Clark (Feb. 2, 1946) (on file with the Yale Law School Library) [hereinafter February 2 Letter]; Letter from Judge Charles E. Clark to Judge Jerome N. Frank (Feb. 4, 1946) (on file with the Yale Law School Library); Letter from Judge Jerome N. Frank to Judge Charles E. Clark (Feb. 4, 1946) (on file with the Yale Law School Library); Letter from Judge Jerome N. Frank to Judge Learned Hand (Feb. 5, 1946) (on file with the Yale Law School Library).

286. Letter from Judge Charles E. Clark to Judge Jerome N. Frank, *supra* note 285, at 1.

287. *Id.*

288. *Id.*

289. *See* Letter from Judge Jerome N. Frank to Judge Charles E. Clark (Mar. 20, 1946) (on file with the Yale Law School Library).

1. A jury trial to test a hunch

In his postdecision letter to Judge Clark on the case, Judge Frank continued to insist that the majority's (i.e., his opinion's) rationale for sending the case back to the lower court was not premised on the belief that Arnstein should in fact recover, but instead on the notion that Arnstein deserved a chance to adduce additional evidence in support of his claims. In particular, Judge Frank believed that even if a trial might result in a verdict for the defendant, deciding the case on summary judgment was "prejudging the merits of the case."[290] As noted previously, Judge Hand too seems to have adopted a similar position when he observed that it was "extremely improbable" that the defendant had access to the plaintiff's work, let alone that he actually copied from it.

Judge Frank also believed that Judge Clark's "jibe" at him (in his dissenting opinion) for insisting on a jury trial was totally "unjustified" given Judge Frank's known dislike for juries.[291] He insisted that, "as a judge," he had a duty to follow the law and ensure that the jury worked "according to the accepted rules" until an amendment rendered the jury system moot.[292] In one important respect then, Judge Clark appears to have been grossly incorrect: Judge Frank's decision had less to do with his belief that the plaintiff should win and more to do with his lack of confidence that the plaintiff should lose. In other words, the majority's insistence on a jury was borne out of an obvious lack of confidence that emanated from the majority's own musical sensibilities, which had detected some similarity between the works. Yet being unwilling to base a decision for the plaintiff on his and Judge Hand's sense of similarity between the works, Judge Frank chose to have their hunch *tested* by a lay jury.

Judge Frank's emphasis on sending the case to a jury to test this hunch is discernible not just in his discussion of improper appropriation, but also in his discussion of access. Whereas he was unwilling to find proof of copying without any similarity even when there was extensive proof of access, he was nonetheless perfectly comfortable inferring copying when there was no proof of access but an extensive amount of similarity between the works.[293] In other words, even in the assessment of actual copying, the similarity between the works was to play a far more important role than proof of access. This formulation was in a real sense tailor-made for Ira Arnstein. Given Arnstein's inability to offer any evidence of access, proof of actual copying seemed to be altogether missing. By allowing the absence of such evidence to be overcome

290. Arnstein v. Porter, 154 F.2d 464, 475 (2d Cir. 1946).

291. Letter from Judge Jerome N. Frank to Judge Charles E. Clark (Mar. 22, 1946) (on file with the Yale Law School Library).

292. *Id.*

293. *Arnstein*, 154 F.2d at 468.

by "similarities"—which needed to be striking, or "marked"—Judge Frank gave Arnstein a chance to have his case move forward.

In the end then, Judge Frank's willingness (and desire) to allow the jury to test his hunch can be explained by his extreme fact skepticism, which in turn motivated much of his thinking by the time of *Arnstein*. Recall that in Judge Frank's view, factfinding in lower courts was the single most difficult and troubling part of the judicial system. The subjectivity and imperfections of the factfinding process rendered the very idea of legal rights and rules altogether unpredictable and flimsy in his account.[294] Consequently, the lower court's extreme confidence in the "fantastical" nature of the plaintiff's case troubled Judge Frank greatly. In his view, the lower court had insufficient evidence to make that determination. In particular, he believed that the pro se plaintiff's lack of familiarity with the specialized rules of evidence and motion practice likely meant that the court did not obtain a full picture of the factual record.[295]

While Judge Frank certainly did not believe that handing the case over to a jury would produce a perfect account of the facts (nor did he likely believe that such a thing was ever possible), he was nonetheless willing to trust a jury of "lay" listeners over an overburdened and likely prejudiced trial court judge in order to test the viability of his hunch. And this, of course, put him in an awkward position, given his otherwise well-known dislike of juries. Yet, as between a decision on summary judgment—which would have skirted the similarity question altogether—and one left to a jury's intuitions, he was willing to countenance the latter, *given the facts of the case* and his hunch.

Indeed, while Judge Frank was otherwise skeptical of juries insofar as they sought to apply rules, he nevertheless considered them viable arbiters of hunches. Speaking of hunches, he once observed that juries reach their decisions through "an unanalyzed, undifferentiated, composite reaction—a 'hunch' or unanalytic 'gestalt' (a 'whole')" and that "[t]here is very considerable reason to believe that juries often do not go beyond such composite (or gestalt) reactions in arriving at their verdicts."[296] Juries thus hunched their way to decisions too. And to the extent that a hunch was a legitimate basis for a decision (in the fact skeptic's account), using a jury (or an "advisory jury"[297]) to this end was altogether unproblematic. As a fact skeptic, Judge Frank's real concerns were when a judge chose to rationalize this hunch by "fudging" the subjective nature of the factfinding process in the analytic logic of the law,

294. *See* FRANK, COURTS ON TRIAL, *supra* note 32, at 10-27.

295. Memorandum from Judge Jerome N. Frank to Judge Learned Hand and Judge Charles E. Clark, *supra* note 258.

296. Jerome Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U. L. REV. 545, 595 (1951).

297. *Arnstein*, 154 F.2d at 473.

because in doing this, the judge would avoid appellate scrutiny and mask the real reasons for decision.[298] This posed an obvious problem:

> A trial judge, seeking to effectuate his gestalt, may make and publish an unconsciously "fudged" finding which, in terms of a legal rule as he interprets it, justifies his decision in favor of the plaintiff. Suppose that the upper court interprets that rule differently. The upper court, accepting the trial judge's finding (because the testimony was oral), applies to the finding that rule so interpreted—with the result that the upper court decides for the defendant. Had the trial court correctly anticipated the upper court's interpretation of the rule, he might have made a different finding—indeed one that would have necessitated no "fudging"—which would have led to an affirmance of his decision for the plaintiff.[299]

This was precisely what Judge Frank was avoiding in *Arnstein*. For Judge Frank, a hardened fact skeptic, accepting the factual subjectivity of supposedly legal questions meant that a subjective but unfudged and fact-based jury verdict was preferable to an objective but fudged judicial decision. Even though juries do not ever write reasoned opinions for their findings, Judge Frank seems to have believed that relegating their role to the subjective components of the inquiry acknowledged the subjectivity of the determination, instead of masking it in the false rationality of legal doctrine. To be sure, jury verdicts were hardly reasoned orders that could be subject to appellate scrutiny. Yet, unlike fudged opinions, they were designed to be inscrutable owing to their subjectivity, a reality reflected in the "no reasonable jury" standard of scrutiny that appellate courts continue to apply when reviewing jury verdicts. The actual availability of appellate scrutiny was, to Judge Frank, far less important than its farcical nature when so made available as a structural matter.

When the case was sent back to the lower court following the Second Circuit's admonition in *Arnstein* that the case be sent to a jury, the district court did in fact conduct a jury trial. Amid much fanfare, the jury—as predicted—disbelieved Arnstein's story and found for the defendant.[300] Of course, Arnstein appealed the verdict to the Second Circuit again, and the matter reached a panel consisting of Judges Frank, Hand, and Harrie Chase. In a per curiam opinion, the court affirmed the verdict.[301] Yet the panel chose to emphasize that the court's prior decision—to remand it for a jury trial—had been correct, even though the jury thought the case meritless. In a three-sentence unsigned opinion, the panel went out of its way to observe that "[t]here can be no doubt that the evidence upon the trial presented a disputed issue as to whether the

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298. Frank, *supra* note 296, at 596.

299. *Id.* at 596-97 (footnote omitted).

300. For an account of the trial, see ROSEN, *supra* note 36, at 231-36.

301. Arnstein v. Porter, 158 F.2d 795, 795 (2d Cir. 1946) (per curiam).

defendant had in fact copied the plaintiff's music; and that it was not so clearly in the plaintiff's favor that the judge could properly have directed a verdict."[302]

Clearly defensive of the decision to order a jury trial, the panel's authors—two of whom had constituted the majority in the prior decision—continued to believe that the previous decision had been the right choice, result aside. The jury trial was therefore in the end little more than an effort to test a hunch.

2. Two-step copying

Arnstein's best-known and most enduring contribution to copyright law—one that continues to influence courts to this day—is its bifurcation of the infringement analysis into two steps: actual copying and improper appropriation. All the same, the opinion itself says very little about its reasons for the bifurcation and the various embellishments that it introduces into each step. In addition, in the opinion, Judge Frank describes the test in declaratory and prophetic terms.[303] The post-opinion correspondence between Judges Frank and Clark, as well as Judge Frank's own writing on the utility of subjective (i.e., unrationalized) judgments, sheds important light on a possible rationale for this construction.

a. Weak precedent

In their post-opinion correspondence, Judge Clark wrote a detailed response to Judge Frank's first postdecision letter in which Judge Frank had attempted to explain the basis of his decision in the case. In his letter, Judge Clark ridiculed Judge Frank's two-step approach as "highly novel and devastating," since it required that a decision on "the really important issue must be made without expert help of any kind," rendering it "a matter of chance with the jury."[304] To Judge Clark, "[t]here was nothing in the cases even to suggest this," meaning that it was no more than "a way of getting rid of the prior authority in favor of expert evidence."[305] He thus warned Judge Frank that it was "going to haunt us in plagiarism cases from now on."[306]

Judge Frank fired off a spirited defense of his position the very next day. His defensiveness came out in the early lines of this second letter, where he

302. *Id.*

303. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) ("If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.").

304. Letter from Judge Charles E. Clark to Judge Jerome N. Frank 1-2 (Mar. 21, 1946) (on file with the Yale Law School Library).

305. *Id.* at 2.

306. *Id.*

made the somewhat childish points that Judge Hand was "in every sense, the co-author of [the] Arnstein opinion" and that an author of a leading book on musical copyright had characterized Judge Hand as having "made the 'law of copyright.'"[307]

In the letter, Judge Frank outlined a series of cases—from the same circuit as well as from others[308]—that he believed supported both the bifurcated inquiry and the exclusion of expert evidence. All of Judge Frank's authorities on the bifurcated inquiry are, however, less direct than he declares in this letter. First, while they do hint at the general idea that copying is not automatically copyright infringement,[309] none of them attempt to separate out the different dimensions of copying into independent analytical steps. Second, and perhaps more importantly, some of the authorities that he references had made the distinction within the context of "fair use,"[310] which had been in existence for a while by the time of *Arnstein* and which Judge Frank overlooked altogether.[311] Judge Frank's citation to cases of "abridgement," "compilations," and "quotations in works of criticism"—three forms of copying that offer the copier a defense to an infringement claim—suggest that he conflated the standard for infringement with defenses to infringement.[312]

Judge Frank's discussion of expert evidence was equally unpersuasive. In the letter, he cited to cases that described the test as that of the "ordinary observer," as "ingenuous," and as based on a "complex of . . . impressions."[313] Yet none of these descriptions seemed to render expert evidence ipso facto "irrelevant" as *Arnstein* did.[314] Surely to the extent that melody was the core element in the "comparative method" noted earlier, even a lay jury needed

307. Letter from Judge Jerome N. Frank to Judge Charles E. Clark, *supra* note 291.

308. The cases cited were: *Arnstein v. Broadcast Music, Inc.*, 137 F.2d 410 (2d Cir. 1943); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941); *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938); *Wilkie v. Santly Bros.*, 91 F.2d 978 (2d Cir. 1937); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926); *Eggers v. Sun Sales Corp.*, 263 F. 373 (2d Cir. 1920); *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914); *Hoffman v. Le Traunik*, 209 F. 375 (N.D.N.Y. 1913); and *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

309. The Supreme Court would eventually come to affirm this proposition most explicitly in its landmark decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

310. For instance, he referred to *Folsom*, 9 F. Cas. 342, and *Macmillan*, 223 F. 862. In the memo, Judge Frank acknowledged as much by describing them as "'abridgement' cases" and as involving "quotations in works of criticism." Letter from Judge Jerome N. Frank to Judge Charles E. Clark, *supra* note 291.

311. Letter from Judge Jerome N. Frank to Judge Charles E. Clark, *supra* note 291.

312. *Id.*

313. *Id.* (quoting *Witwer*, 65 F.2d at 28; and *Nichols*, 45 F.2d at 123).

314. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

some guidance on the difference between melody, rhythm, and other parts of a musical work.

Judge Clark all too easily recognized the weakness of Judge Frank's defense. In what would be the last piece of correspondence between them on the case, Judge Clark wrote a short response in which he observed that "[t]he cases you cite show how hard you must grub for not even a faint suggestion of what you have done" and ended the debate by noting that there "[wa]sn't much use in going on."[315] Judge Frank was certainly scouring for some support for his analytical moves, but the cases offered none. All the same, if we take a step back and reconsider Judge Frank's judicial philosophy and writing, his analytical moves in *Arnstein* paint a different picture—one whose palette borrows colors from beyond copyright law.

b. Minimizing fudging through subjective judgments

Analytics and evidence aside, the core distinction between the two steps of the bifurcated inquiry is that, in theory, summary judgment is available on the step of actual copying but almost never on illicit copying, since the illicit copying analysis is to operate as an impressionistic test for a lay jury. Why might this matter? Since the two steps are cumulative, allowing summary judgment on the latter could in practice destabilize the first by enabling a judge to "fudge" the existence of sufficient similarity/dissimilarity between the works in order to avoid a trial. In other words, a judge could simply say that *despite* the presence of access and similarity, the similarity was insubstantial, meriting a dismissal of the case. And this was most likely to happen in cases where the judge disbelieved a plaintiff's theory of access, as in *Arnstein.* The bifurcated inquiry thus ensured that the similarity between the works became the dispositive element of the test on both prongs. Whenever there was some similarity between the works, the jury—and not the judge—had to decide whether the similarity proved copying (with or without access) *and* was sufficiently illicit so as to be actionable. The only circumstance under which a summary disposal of the case was permitted under this formulation was therefore when there was absolutely *no* similarity between the works at all.

Unlike latent similarities or dissimilarities, which could operate as perfect fodder for the lower court to give play to its various biases—be they sociological, reputational, or individual to the case—such "patent" dissimilarity would be hard for a trial judge to mask.[316] Writing a few years after *Arnstein*, Judge Frank thus noted:

315. Letter from Judge Charles E. Clark to Judge Jerome N. Frank (Apr. 2, 1946) (on file with the Yale Law School Library).

316. *Arnstein*, 154 F.2d at 473.

> When a trial judge does publish "findings", they are but a report of his belief about the facts. He may (intentionally or unintentionally) misreport what he believes, in order to circumvent the precedents—in the interest of what he deems just, or very occasionally out of other less praiseworthy motives (induced by bribery or "pull"). No one except the trial judge knows whether, in his published "findings", he accurately reports or "fudges" (*i.e.*, distorts) his belief, for no one else can disprove the accuracy of such a report of an inner "state of mind". . . .
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> . . . .
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> . . . [I]n the mine-run of law suits—that is, the great bulk of law suits—the prejudices of judges and jurors for or against particular individual witnesses, have no "large-scale social" character, and lack uniformity. They are distinctively individual, unconscious, un-get-at-able.[317]

Recall that the *Arnstein* opinion reiterated Judge Frank's famed concern with unconscious biases in decisionmaking.[318] Judge Frank thus held a rather pessimistic view of trial court judging, borne of his extreme fact skepticism. The bifurcated test in *Arnstein* was meant to guard against the possibility of a judge's "fudging" the intrinsically subjective inquiry of improper appropriation in order to avoid a trial on copying. It appears that Judge Clark scarcely understood (let alone approved of) this rationale for the test.

Judge Frank's disallowance of expert testimony for illicit copying had similar roots. Judge Frank strongly believed that certain categories of decisions were more intuitive than analytical in that they defied being broken down into component parts. Indeed, insisting that such decisions be made in parts was likely to confuse the analysis merely for the sake of nominal analytical coherence.[319] This was an offshoot of his theory about hunches. Rather interestingly, though, Judge Frank's prime example of a hunch that was intrinsically incapable of disaggregation was music:

> The gestaltist's favorite illustration is a melody: a melody does not result from the summation of its parts; *thus to analyze a melody is to destroy it*. It is a basic, primary unit. The melody, a pattern, determines the function of the notes, its parts; the notes, the parts, do not determine the melody. Just so, say the gestaltists, no analysis of a pattern of thought, of a response to a situation, can account for the pattern.[320]

Relying extensively on work in the field of linguistics, Judge Frank came to believe that some judicial decisional processes, "like the artistic process, involve[d] feelings that words cannot ensnare" because they contained "overtones inexpressible in words."[321] While he made this observation

317. Frank, *supra* note 296, at 572-73.

318. *Arnstein*, 154 F.2d at 475 n.33.

319. Frank, *Say It with Music*, *supra* note 125, at 929, 932-33.

320. *Id.* at 929 (emphasis added).

321. *Id.* at 931-33.

primarily in relation to judicial factfinding,[322] the logic carries over to jury-based decisions as well. The comparison of two works was meant to be a "subjective" determination, which he embraced.[323] Yet an expert's interposition of an objective structure on that subjective determination risked skewing the determination.

Indeed, we see this preference for subjectivity in the early correspondence between the judges in *Arnstein.* Judge Clark had used his conversations with musical expert Luther Noss to contradict Judge Frank's musical hunch and detection of some patent similarity between the works in the case. As Judge Clark (channeling Noss) put it, the similarity was "the repetitious high E . . . meaningless in terms of music."[324] Judge Frank's simple strategy for overcoming this musicological objection to the similarity was to render all expert testimony on the question presumptively irrelevant as a legal matter. While it was hardly the only strategy available to him, it was certainly the easiest. And this he successfully achieved through a prohibition on expert testimony that he rooted in a theory about intuitive lay decisionmaking.[325] The exclusion of expert testimony on illicit copying was as much about precluding any reliance on Noss's views as it was about giving effect to Judge Frank's (and Judge Hand's) "inexpressible" detection of musical similarity between the works. In Judge Frank's view, such similarity had to be intuitively assessed, and not through the use of analysis, reasoning, or expertise, because an evaluation of the similarity, much like other subjective, intuitive inquiries, was inexpressible in words. This process rendered the comparison in infringement cases palpably "unintelligent," in turn raising the specter of a host of subjective decisional biases.[326] This is the legacy that copyright law has had to live with for decades.

* * *

Judge Frank's ex post rationalization of *Arnstein*, as well as his writing on connected issues, reveals that the opinion's most important legal moves were driven in large measure by his subjective reaction to the facts of the particular case and by his desire to ensure that the plaintiff obtained a jury trial so that

322. *Id.* at 922.

323. *See id.* at 924 (observing that a factfinder's "notion of the facts comes from his subjective, fallible reaction to the subjective, fallible reactions of the witness to the actual, objective facts").

324. Letter from Judge Charles E. Clark to Judge Jerome N. Frank, *supra* note 304, at 1.

325. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).

326. For a recent account of these subject biases in the working of the infringement analysis, see Shyamkrishna Balganesh et al., *Judging Similarity*, 100 IOWA L. REV. 267 (2014).

Judge Frank's own initial reaction would be tested. Judge Frank's views on summary judgment and substantive copyright law and policy became mere vehicles on the path to this goal. The irony is, of course, that Judge Frank claimed to be driven by a desire to avoid creating a "bad precedent" in *Arnstein*, when by most accounts his actual opinion in the case unequivocally did just that.

C. Five Days Later . . .

Perhaps the best evidence we have that *Arnstein* was a product of Judge Frank's skeptical reaction to the unique facts of the case, rather than a concerted decision to direct the structure of the infringement analysis in the abstract, comes from a copyright infringement case that the same panel decided a mere five days after *Arnstein*: *Heim v. Universal Pictures Co.*[327] Much like *Arnstein*, *Heim* also involved the standard for copyright infringement, and yet hardly any copyright scholarship references or cites to it.

In *Heim*, the plaintiff was a Hungarian composer who claimed that his musical composition had been plagiarized by the defendants through their use of a substantially similar musical work in a movie that they produced.[328] The plaintiff based his claim of access on the fact that his music was popularized in a Hungarian movie that played in the United States on several occasions. The plaintiff had also attempted to have his music used by the defendant studio and sent the studio his compositions for this purpose.[329] The lower court conducted a bench trial on the case, during which the plaintiff's expert testified that he was able to detect a "substantial similarity" between the works and that the plaintiff's work did not show any similarity to Antonin Dvorak's "Humoresque."[330] The defendant in turn introduced its own expert who claimed that, while there was similarity to the "average ear," both works drew on Dvorak's "Humoresque," a prominent work in the field.[331] The similarity, according to the defendant's expert, resulted from this common source.

Based on all of this evidence, the district court found for the defendant—reasoning that while the similarity was obvious and clear, the evidence of access was "contradictory and untrustworthy."[332] On appeal, the court—in an opinion again authored by Judge Frank and joined by Judge Hand—affirmed.

327. 154 F.2d 480 (2d Cir. 1946).

328. *Id.* at 481.

329. *Id.* at 482.

330. *Id.* at 482-83.

331. *Id.* at 484.

332. Heim v. Universal Pictures Co., 51 F. Supp. 233, 233-34 (S.D.N.Y. 1943), *aff'd*, 154 F.2d 480.

While Judge Frank found the two works to be similar and concluded that the plaintiff's work was "distinguishable from Dvorak's," he nonetheless found that the district court's ruling, that the plaintiff's work "did not possess enough originality, raising it above the level of the banal, to preclude coincidence as an adequate explanation of the identity," was not error.[333] He was quick to add that this did "not mean that such originality is essential to the validity of a copyright."[334] In essence, then, Judge Frank was using the *banality* of the plaintiff's work to infer the absence of copying as a matter of circumstantial evidence—even though the work itself was sufficiently original. The contradiction is obvious. If the work is sufficiently original to merit protection, then even if proof of access was low, the "identity" (in Judge Frank's own words) should have allowed an inference of copying with the question of illicit appropriation then going to a jury.

In addition, the opinion seemed completely unconcerned with the fact that a judge had conducted the trial and made findings of fact on the record. In their communications, Judge Clark pointed this out to Judge Frank[335]—whose only explanation (which he attributed to Judge Hand) was that "in Heim we have a lower court decision with findings *af[t]er a trial*" and that the appellate court did not reach "the question of illicit appropriation."[336] The trial in *Heim* did not go to a jury, much as it did not in *Arnstein*. The principal difference was, of course, that in *Arnstein*, the factfinding had been undertaken as part of a summary judgment motion rather than as part of a formal trial. Yet, in *Heim* too—much like in *Arnstein*—the judge had relied on depositions (rather than open testimony) from several key witnesses, including the plaintiff. The judge's factfinding in *Heim* was thus no more or less tainted than that in *Arnstein*, especially since both lower courts had limited themselves to the issue of actual copying and had never reached improper appropriation. To Judge Clark, the contradiction in treating like cases differently was obvious, and he chose to write an opinion concurring only in the result. He nonetheless disagreed with the majority on the question of infringement and stated:

> That results at once so divergent and so musically astonishing as the decisions in these two cases can occur simultaneously I can attribute only to the novel conceptions of legal plagiarism first announced in the Arnstein case and now repeated here. By these the issue is no longer one of musical similarity or identity to justify the conclusion of copying—an issue to be decided with all the intelligence, musical as well as legal, we can bring to bear upon it—but is one, first, of copying, to be decided more or less intelligently, and, second, of illicit

333. *Heim*, 154 F.2d at 488 (footnote omitted).

334. *Id.* at 488 n.17.

335. February 2 Letter, *supra* note 285.

336. *Id.* (alteration in original) (emphasis added).

> copying, to be decided blindly on a mere cacophony of sounds. Just at which stage decision here has occurred, I am not sure.[337]

Judge Clark was in effect accusing Judge Frank of fudging the analysis of copying to give effect to his views on "illicit copying." Judge Frank had no response, despite being the architect of the *Arnstein* test.

Judge Frank's poorly reasoned majority opinion in *Heim* and the obvious contradiction in its logic underscore an important point: *Arnstein* was entirely about the facts of the particular case and Judge Frank's burning desire to afford the plaintiff a nominal victory on appeal so as to enable a jury trial on his claim. *Heim* reveals how completely unwedded in principle Judge Frank was to (i) jury trials, (ii) summary/expedited disposals in copyright cases, and sadly enough, (iii) the fundamental analytical basis of copyright law.

IV. Exorcising the Ghost of *Arnstein*

Having examined how the infamous *Arnstein* test came to be and the myriad philosophical and contextual influences that caused its author to structure it in the way that he did, this Part moves to the prescriptive. It begins by arguing that the *Arnstein* opinion (or test) originates in a philosophical worldview that distrusts trial court decisionmaking (Part IV.A) and then describes how this attitude has since come to be openly rejected (Part IV.B). It then describes the downsides of *Arnstein*'s trial court skepticism for copyright law (Part IV.C) and provides the outline of an alternative approach, one that eschews this skeptical outlook in favor of a nonskeptical one while retaining some of the useful analytical lessons of *Arnstein*, which Judge Frank drew from Judge Hand's prior jurisprudence (Part IV.D).

An important caveat is in order here. While Part IV.D offers an alternative approach to the infringement analysis, its objective is hardly to suggest that this alternative is in any sense ideal for copyright law. It merely intends to show what a nonskeptical approach to the copyright infringement analysis might look like *if* it were to rid itself of *Arnstein*'s skeptical influence.

A. The Ghost of *Arnstein*: Trial Court Skepticism

As we saw in the previous Part, the majority opinion in *Arnstein*—which continues to influence copyright jurisprudence to this day—was almost entirely a product of its author's unique perspective on legal and judicial decisionmaking.[338] This outlook is best described as a philosophy of skepticism: a belief that legal rules are intrinsically manipulable in the hands of judges, that factfinding in lower courts is structurally problematic, and that

337. *Heim*, 154 F.2d at 491 (Clark, J., concurring in the result).

338. *See supra* Part III.

lower court decisions routinely attempt to "fudge" their reasoning to conform to rules and precedents.

Judge Frank therefore structured his opinion in *Arnstein*—and with it the test for copyright infringement—to give effect to his intense fact skepticism. The unquestionable hallmark of the test remains its deep distrust of trial court decisionmaking and factfinding. As we saw, the bifurcation of the inquiry into "actual" (step 1) and "illicit" (step 2) copying, the allowance of expert testimony in one but not the other, and the impermissibility of summary judgment on the latter and often on the former were moves driven by Judge Frank's efforts to allow the musical similarity that he perceived in the case to be tested before a lay jury.[339] He had little faith that a trial court judge would have given Arnstein a fair hearing, and cabining the trial court's powers in significant fashion was therefore a necessary means to the end that he sought. In *Arnstein*, we find resonances of his overall philosophy towards trial court decisionmaking, which he elaborated on elsewhere:

> You cannot control [trial] courts unless you can also control their fact-finding. But that you usually can't do. For the process of fact-finding is altogether too subjective and, consequently, too elusive. It is "un-ruly." The refusal to recognize such unruliness constitutes modern legal magic. It stems from a "desire to be deceived."[340]

Judge Frank's skepticism therefore manifested itself in a desire to "control" the vicissitudes of trial court decisionmaking, for he recognized that no amount of procedural reform could eliminate the subjectivity about which he was complaining.[341] No amount of practical reform was, to him, sufficient to remedy this.

The *Arnstein* test was therefore very much a product of Judge Frank's extreme skepticism about trial courts and their ability to adjudicate factual disputes through legal rules and guidelines. The structure of its inquiry as well as the several embellishments superimposed on that structure were in large part a concerted effort to minimize trial court "fudg[ing]"[342] and to ensure that factfinding in plagiarism (i.e., nonliteral copyright infringement) cases did not hide behind abstract doctrinal rules that were open to latent manipulation. While Judge Frank never made this explicit in the opinion (for obvious

339. *See id.*

340. FRANK, COURTS ON TRIAL, *supra* note 32, at 61 (quoting sermon of Bishop Joseph Butler).

341. *See* JULIUS PAUL, THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS 80-81 (1959).

342. *Cf.* Frank, *Say It with Music*, *supra* note 125, at 928 (describing trial courts' "concealed disregard of evidence" but noting that this was "usually unconscious or only semiconscious").

reasons), the backstory to its development as well as his extensive writings confirm this reality.

Given the *Arnstein* test's origins in Judge Frank's idiosyncratic philosophy, it is somewhat surprising and perhaps disturbing that its lessons—structural as well as substantive—continue to influence copyright jurisprudence. While scholars have critiqued elements of the test over the years[343] and proposed reforming it to introduce some measure of rationality into its functioning, unless its fundamental premise of skepticism is jettisoned in its entirety, its influence is unlikely to diminish. The logical structure of Judge Frank's reasoning and its interconnected parts have ensured that unless its edifice is reevaluated *as a whole*, its skeptical ideals will inform every aspect of the infringement inquiry. As an illustration of this, consider a recent opinion of the Fourth Circuit, reversing a trial court's finding of noninfringement on a motion to dismiss.

In *Copeland v. Bieber*, the plaintiff claimed that the well-known musicians Justin Bieber and Usher had copied his song in their song of the same name, "Somebody to Love."[344] Much like other circuits, the Fourth Circuit has adopted a two-step test based on *Arnstein*. In the first step, known as the "extrinsic" test, the court is to undertake an objective comparison of the two works to assess their similarity, using expert testimony and analytic dissection.[345] The second step, the "intrinsic" test, is then treated as a question exclusively for the jury, to be decided without any expert input or dissection.[346] In *Copeland*, the district court granted the defendants' motion to dismiss, concluding that the copying did not meet the intrinsic similarity test since the "general public" was unlikely to see the works as substantially similar, despite the existence of some similarities.[347] Recognizing that the test was ordinarily one for a jury, the court concluded that no reasonable jury could find such similarity, which merited a dismissal.[348]

On appeal, the Fourth Circuit disagreed.[349] Reaffirming the no reasonable jury standard for the analysis when there was no jury trial, Judge Harris

343. *See, e.g.*, Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 735 (1987); Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 182-85 (1993); Lemley, *supra* note 3, at 738-40.

344. 789 F.3d 484, 487 (4th Cir. 2015).

345. *See* Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 801-02 (4th Cir. 2001); Towler v. Sayles, 76 F.3d 579, 583-84 (4th Cir. 1996).

346. *Cf. Lyons*, 243 F.3d at 801 (emphasizing that the test involves the similarity between the works "*only* as seen through the eyes of the ordinary observer"); *Towler*, 76 F.3d at 583-84 (suggesting that the test is applied "usually without the aid of expert testimony").

347. *See Copeland*, 789 F.3d at 488.

348. *See id.*

349. *Id.* at 495.

proceeded to compare the two songs "side by side" and "in their entirety."[350] Abjuring any expert testimony, dissection, or analysis, and based entirely on her own auditory sensibility in comparing the two songs, she concluded that the "choruses are similar enough and also significant enough that a reasonable jury could find the songs intrinsically similar."[351] In both decisions, the judges were attempting to predict the reaction of the "lay audience" to the music, without the aid of any expert evidence—under the garb of the no reasonable jury standard. The appellate court's only reason to reverse was because the district court judge had made the decision on his own without sending it to a jury. In other words, had the decision in the lower court come from a jury verdict, Judge Harris would have found little reason to reverse, especially given the subjective nature of the "intrinsic test." What triggered the skepticism was simply that the district court judge had substituted his opinion for the jury's.

But why should an appellate court prefer a jury's finding of similarity (or nonsimilarity) to a trial court judge's when neither is aided by expert testimony? The no reasonable jury standard that Judge Harris relied on is but a mechanism that *requires* heightened deference to a jury on the question at issue and thus does little normative work of its own without an underlying reason for treating the question as one for the jury to begin with.

The answer to the question posed above is at once both obvious and strikingly gloomy. The preference for a jury determination derives from an unwillingness to trust a trial court's (i.e., judge's) factfinding ability, a mistrust that is structurally entrenched in the two-step test's division of labor between the judge and jury. The Fourth Circuit's decision is but a relic of the skeptical approach propounded in *Arnstein*, where the lower court is forbidden from allowing the introduction of expert testimony and/or relying on its own assessment of the second step of the infringement analysis. The desire to control the lower court's own factfinding remains at the heart of the framework, however it is articulated. Handing the core question of similarity to a jury is therefore not the result of any belief in the jury's superior competence on the subjective assessment but a product of the belief—engrained in the *Arnstein* framework—that a judge should neither make that assessment nor indeed control it by allowing the jury to hear expert evidence. *Arnstein*'s ghost thus continues to haunt the copyright infringement analysis.

B. The Abandonment of Trial Court Skepticism

The deep irony here is of course that this philosophy of trial court skepticism has since come to be openly repudiated by the federal judiciary. Recall that the principal manifestation of Judge Frank's skepticism was marked

350. *Id.* at 491-92.

351. *Id.* at 494.

reluctance to task trial judges (rather than juries) with factfinding, which in turn manifested itself in an unwillingness to decide cases on summary judgment. Yet the Supreme Court has *encouraged* trial judges to engage with facts in the years since *Arnstein*, most palpably in its standards for summary judgment and motions to dismiss. Judicial factfinding in the federal system is a reality not begrudgingly accepted but actively praised.[352]

The first overt move signaling the system's acceptance of judicial factfinding came in the Supreme Court's endorsement of district courts' use of summary judgment. In its well-known "trilogy" of cases on the appropriate standard for summary judgment, the Court in 1986 not only relaxed the standard for a trial court's use of summary judgment to dispose of cases but also exhorted courts to use the mechanism.[353] Indeed, scholars have pointed out that the basic philosophy underlying the trilogy was "skepticism, if not a downright distrust, of juries," which implied district judges taking more control over proceedings in order to avoid wasteful trials when the factual allegations were flimsy.[354] A greater reliance on summary judgment obviously requires judges to base their decisions on an early evaluation of the factual allegations (at the close of discovery) to determine whether there are "genuine" issues of material facts that remain. In other words, it contemplates a more significant role for judges in evaluating the parties' factual claims. As one scholar puts it, in deciding a case on summary judgment, the judge "decides whether factual inferences from the evidence are reasonable, applies the law to any 'reasonable' factual inferences, and as a result makes the determination as

352. Many district court judges have defended judicial factfinding. *See, e.g.*, Judge Shira A. Scheindlin, Judicial Fact-Finding and the Trial Court Judge, Remarks at the University of Miami Law Review Symposium: Leading from Below (Feb. 15, 2014), *in* 69 U. MIAMI L. REV. 367, 376 (2015) ("[J]udicial fact-finding is a common and important duty of a trial judge."); Judge Vaughn R. Walker, The Most Efficient Finder of Fact: The Federal District Judge, Remarks at the University of Miami Law Review Symposium: Leading from Below (Feb. 15, 2014), *in* 69 U. MIAMI L. REV. 385, 392 (2015) ("[T]he most efficient fact finder for many of the kinds of social and economic issues that we confront, and the kinds of cases that we are looking at today, are the federal district judges who day in and day out look witnesses in the eye and listen to their often highly contradictory testimony to decide or help a lay jury of their fellow citizens decide where in fact the truth lies.").

353. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

354. STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 170 (2006); *see also* Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 561 (2012) (observing how the cases are understood as "telegraphing a message to federal judges to make enhanced usage of summary judgment to expedite legal proceedings and to intercept and dismiss factually deficient litigation before trial").

to whether a claim could exist."[355] Indeed, the Supreme Court's own standard for summary judgment insists that the court examine whether the evidence (i.e., facts) was "sufficient" to support the claim under consideration.[356]

Even though it remains unclear whether the trilogy itself produced a discernible change in trial court behavior, the evidence does point to the fact that, since at least the 1960s, district courts around the country have become more willing to dispose of cases using summary judgment.[357] While this may have been the product of other changes in substantive law, the composition of courts' dockets, or case management techniques, it remains unquestionably true that summary judgment and, with it, district court judges' appraisal of the factual strengths of the claim have both become a mainstay of federal court practice.

This trend towards endorsing judicial factfinding at the trial court level has continued most recently in the Court's modified standard for motions to dismiss. In its twin decisions on the standard, the Court concluded that, in deciding whether to grant a motion to dismiss, a district court had to do no more than ascertain if there were "enough facts to state a claim to relief that is plausible on its face."[358] Plausibility, rather than "conceivab[ility]" was thus to be the driving standard, which in turn requires determining whether the "factual matter" was "sufficient" to state a claim.[359] The standard itself thus leaves little doubt that it requires judges to make a determination on the facts of the case, even before deciding whether to proceed to discovery and/or to send it to a jury for a trial.

Consequently, it is no exaggeration to suggest that Judge Frank's intrinsically skeptical attitude towards judicial factfinding and the role of judges in engaging the facts of a dispute are for the most part—and certainly as a doctrinal matter—a relic of the past. The distrust of lower court "fudging" finds little resonance or validation in today's legal standards for federal motion practice, all of which seem to envisage a greater role for the judicial management of facts. Given that the *Arnstein* test was driven entirely by this skeptical attitude, copyright law's continuing adherence to it even after the wholesale abandonment of its attitudinal assumptions remains somewhat embarrassing.

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355. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007).

356. *Anderson*, 477 U.S. at 249 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

357. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004).

358. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

359. *Twombly*, 550 U.S. at 556, 561, 570.

C. The Downside of Skepticism: An Example

Despite the fact that the rest of the legal system has since repudiated Judge Frank's extreme trial court skepticism, it remains firmly entrenched in the structure and design of the infringement analysis. As discussed previously, much of that "analysis" is treated as a question for the jury, which is then asked to assess whether the similarity between the works is sufficient so as to be characterized as "improper," in order to be rendered legally actionable.[360] In making this assessment, the jury is not only denied access to any expert testimony but also given surprisingly little guidance on what it should be looking for.[361]

In an extended effort to take the question away from the trial court judge, the infringement analysis classifies the question of improper appropriation—a palpably normative determination—as a pure question of fact and operates under the legal fiction that the jury's normative determination is epistemically verifiable, just like any other fact about the world. In short, through its use of juries, the *Arnstein*-driven infringement inquiry oversimplifies the complexity and normativity of the analysis. Leaving aside the multitude of problems that others have identified with the use of juries in civil trials,[362] and with the *Arnstein* framework more generally,[363] it is this presumptive factual rationality that is in many ways the enduring downside of trial court skepticism in the infringement analysis.

The jury's decision on when a defendant's copying is improper is treated as a finding of fact, one that is inscrutable not because juries are infallible as such but instead because that finding is incapable of falsification. In essence, the infringement analysis therefore equates a jury's *belief* and *opinion*, under the single category of a finding of fact. Whereas a belief involves the acceptance of something as "true" and is premised on an assumed objective reality, an opinion is intrinsically subjective and by nature beyond verification.[364] Yet, the law's

360. Arnstein v. Porter, 154 F.2d 464, 468-69, 472-73 (2d Cir. 1946).

361. *See id.* at 468. Judge Clark was most explicit about the unguided nature of the majority's formulation in *Arnstein* when he observed that it required having the jury approach the question with "complete ignorance." *Id.* at 476 n.1 (Clark, J., dissenting).

362. *See, e.g.*, FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 111 (1994) (describing some of the problems in using civil juries); Clark & Shulman, *supra* note 217, at 867 (detailing the criticism of jury trials); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 850-51 (1998) (providing an empirical assessment of jury trials).

363. *See* Lemley, *supra* note 3, at 737-38; Samuelson, *supra* note 9, at 1827-28, 1828 n.39; *see also supra* note 119.

364. *Compare* Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 132 (1932) (detailing the common understanding of opinions as capable of "yield[ing] only subjective" results), *with* Eric Schwitzgebel, *Belief*, STAN. ENCYCLOPEDIA PHIL. (Mar. 24,

footnote continued on next page

reasons for deferring to a jury's belief are vastly different from any plausible reason for trusting its opinion. With beliefs, these reasons derive from the idea that collective decisionmaking and deliberation are likely to iron out any individual biases and idiosyncratic biases that an individual decisionmaker (e.g., a judge) might have, rendering it more objective.[365] With opinions, however, collective decisionmaking remains no less subjective than with individual decisionmaking. For instance, a group of ten individuals who are asked to make an aesthetic judgment about a work of art are unlikely to produce a judgment that someone who was not a part of that group will intuitively endorse as objectively correct. And if that is true, the mere fact of it being made by ten makes it no less subjective than if made by one individual, other than to render it collective. Collective/group decisionmaking is therefore hardly synonymous on its own with objectivity. It is the conflation of the two that the skeptical infringement analysis hides.

The controversy surrounding the jury verdict in the recent case involving the song "Blurred Lines"[366] is illustrative. The case involved the question whether a song composed by the musicians Pharrell Williams, Robin Thicke, and Clifford Harris, Jr., entitled "Blurred Lines," infringed the musical composition in Marvin Gaye's song "Got to Give It Up." A jury was empaneled in the case and, after a weeklong trial, concluded that there was indeed an infringement and awarded the defendant's (Gaye's) family damages in the amount of $7.4 million.[367]

The complexity of the case was such that the allegedly infringed work contained innumerable elements that were on their own not protectable subject matter (under copyright law), and yet the judge's instructions to the jury were couched in abjectly vague language. Simplifying the two-step test for the jury, the instructions thus asked the jury to determine "if an ordinary, reasonable listener would conclude that the total concept and feel" of the works were substantially similar.[368] In addition, the jury was told that they were to determine if the portions of similarities were either "qualitatively or quantitatively important" to the protected work at issue.[369] As should be

2015), http://plato.stanford.edu/entries/belief (defining belief as "the attitude we have, roughly, whenever we take something to be the case or regard it as true").

365. *See* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) ("The distinctive strength and safeguard of the jury system is that the jury operates as a group.").

366. Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014).

367. July 14, 2015 Civil Minutes—General at 2, *Williams*, 2014 WL 7877773 (No. LA CV13-06004 JAK (AGRx)).

368. Jury Instructions at 46, *Williams*, 2014 WL 7877773 (No. LA CV13-06004 JAK (AGRx)).

369. *Id.*

apparent, these instructions provide very little guidance to the jury; instead, they suggest to the jury—and perhaps rightly so—that copyright law has no objective basis for reaching this decision and that the jury is therefore to formulate its own opinion, relying on the necessarily vague language in these instructions. As scholars have pointed out, with these instructions, there was little doubt that the jury chose to embark on a sojourn of its own to eventually find for the defendants.[370] When later challenged before the judge in the case, the jury's verdict was upheld as "reasonable" and defensible under available evidence, and the palpably ambiguous instructions were characterized as neither "erroneous [n]or misleading."[371]

The problem with the outcome in this case is hardly that the jury made an obvious mistake. The case produced room for reasonable disagreement about the legal actionability of the copying. The real problem is instead that the legal system will never be able to derive a workable standard from the jury's finding of improper appropriation. While the jury's finding that the plaintiffs had copied from the defendant's work in the case was premised on objectively verifiable evidence (such as the plaintiffs' testimony and admission), its conclusion that this copying was improper was an entirely subjective opinion, for which just about any factual basis lends some support. Without a reasoned decision, the jury's opinion on the matter remains a mystery.

And herein lies the real downside of *Arnstein*'s skeptical framework. By disallowing any judicial involvement in the infringement analysis and requiring judicial deference to just about any decision reached by a jury, the *Arnstein* framework effectively freezes the development of a rational jurisprudence of copyright infringement. Despite the near-universal agreement that the infringement analysis is more than just a factual inquiry[372] and that it involves important normative considerations about the purposes of copyright law and its underlying conceptions of right and wrong, the treatment of the analysis as a simple factual one deprives copyright law of an important analytical lever that courts can use to balance the competing values at stake in the system.

Recall that trial court skepticism grew out of a concern that district court judges would manipulate legal doctrine to mask the subjectivity of their factfinding. *Arnstein*'s infringement analysis was thus constructed in an effort to avoid having the analysis treated as a question of law in any way or form. Yet the deep irony today is that in treating the analysis as a pure question of

370. *See* Gordon, *supra* note 5 (describing the instructions as "[i]nconsistent and misleading").

371. July 14, 2015 Civil Minutes—General, *supra* note 367, at 22, 26, 28.

372. *See, e.g.*, Balganesh, *supra* note 3, at 227-28; Wendy J. Gordon, *The Concept of "Harm" in Copyright*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 452, 453 (Shyamkrishna Balganesh ed., 2013).

fact—for the jury—copyright has deprived itself of a real legal standard for treating certain kinds of copying as improper, beyond the reality in any given case that twelve randomly chosen individuals deem it to be so.

D. Reconstructing the Infringement Analysis

Over the years, scholars have suggested multiple alternatives to the *Arnstein* formulation—none of which have found affirmation by courts. This Subpart therefore does not attempt to simplistically add to these proposals. Having seen the pernicious effects of trial court fact skepticism on the *Arnstein* test, this Subpart instead attempts to reformulate the infringement analysis by seeking to eliminate its core commitment to trial court skepticism. Rather than reworking the entirety of the analysis, the alternative framework here retains certain elements of the original formulation, recognizing that they represent sound *copyright* logic and need not be jettisoned altogether.[373] Principal among these is the recognition that (i) not all copying amounts to copyright infringement, (ii) copyright infringement is predicated upon proof of copying, and (iii) juries should have an important role to play in the purely *factual* aspects of the infringement analysis. With these precepts in mind, this Subpart offers an outline of what a nonskeptical, rationally constructed infringement analysis might look like, once *Arnstein*'s skeptical influence on the inquiry has been cleansed.[374]

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373. Each of these precepts holds independent analytical value to the working of the copyright system. The allowance for some kinds of copying recognizes the reality that use and copying of protected expression can under certain circumstances generate social welfare of its own, given that large amounts of creativity are downstream and derivative. Copyright's emphasis on copying is essential to maintain its structure as a nonmonopoly right, one where its exclusivity is maintained through the threat of litigation rather than through property signals. And lastly, the role of the jury is a requirement of the Seventh Amendment, regardless of what one thinks of jury trials generally. Additionally, these precepts have each been indirectly affirmed by the Supreme Court over the years.

374. In recent work, Lemley offers his own proposed reform of the two-step test for copyright infringement and suggests the development of "a rule that gives to the jury the basic question of whether the defendant copied, which might or might not involve expert testimony, but reserves the question of whether the copying was unlawful for the court." Lemley, *supra* note 3, at 741. The proposal offered here is similar in many respects to Lemley's suggestion that the normative determination be left to the court and the factual one left to the juries—and that expert evidence be allowed for both. However, it differs in one crucial respect. Lemley appears to remain comfortable working with the *ordering* of the steps along the lines suggested by *Arnstein*, which in itself is a product of Judge Frank's skepticism and structurally disfavors decision by summary judgment. The proposal here, by contrast, jettisons almost all of *Arnstein*'s extreme skepticism.

1. Cognizable similarity

Arnstein's bifurcated inquiry was directed at ensuring that judges feel compelled to send cases to juries in infringement disputes on a fairly regular basis. A revised version that trusts trial court judges would in effect do just the opposite. All the same, bifurcation helps separate out pure questions of fact from those of law or those of both fact and law. Accordingly, a reformulated test would adopt the bifurcated inquiry but instead begin with a question that *judges* should decide as a matter of law, on summary judgment: "cognizable similarity." This would require a judge to assess, at the close of discovery, whether there is sufficient similarity between the two works at issue to render the claim cognizable for copyright infringement purposes. The question is a modified version of the "improper appropriation" step of *Arnstein* (step 2), except that it is now a question of law and abjures any reliance on a "lay" listener or audience standard.

Cognizable similarity would operate as a mixed question of law and fact. It would begin with courts having to set out the particular conditions and criteria that go into the idea of copying being "improper" or "illicit," terms that the current framework takes for granted. Judges would be expected to decide the issue by reference to copyright's underlying goals and purposes, by asking whether the type/form of copying is likely to affect the market for the work, or indeed whether it involved freeriding on the creator's authorial contribution to the work, rendering it questionable as a moral matter. Having grappled with this question, the judge would then apply the criteria to the specific work. It would thereby require the judge to engage in a reasoned analysis of the works to decide whether they are similar enough, under the normative standards seen to be appropriate for actionability. And surely enough, this would require (and allow for) the introduction of expert testimony and for the judge to engage in an analytical dissection of the works in comparing them, similar to Judge Hand's famous "comparative method." Such testimony and dissection would guide the judge's development of the appropriate normative criteria for cognizability by ensuring that it comports with accepted practices and norms within an area of creativity. Such a reasoned approach would also serve the all-important purpose of allowing an actual jurisprudence to develop in this area of copyright in common law fashion—something that copyright law has badly lacked for decades now, owing to the anti-intellectual (i.e., intuitive) nature of the question and owing to its overreliance on the jury. By taking the question away from juries and requiring judges to articulate their findings on this issue, copyright law is likely to develop a body of usable precedent that grapples with the question of when an instance of copying, even if shown to exist, should be deemed cognizable.

In addition to producing a measure of consistency and uniformity, such jurisprudence would have two other immediate benefits. First, it would create patterns of analysis for different categories of works that are protected under copyright law, allowing them to each be analyzed and broken down according to the prevailing norms of artistic production and cultural consumption that exist at any given point in time. Second, it would add content to the nature of judges' intuitions as to when similarity between works rises to the level of being wrongful, i.e., cognizable, under copyright law. This latter question is crucial because it would force judges to confront their reliance on contextual factors, while eliminating the myriad cognitive biases that today hide within the black box of the similarity analysis.[375] It would also allow judges to articulate copyright's various—and often conflicting—goals and objectives and to build these goals into the analysis of legal cognizability, something that the current framework altogether disregards.

Having a judge decide the issue of cognizable similarity at the very outset would also align the infringement analysis with courts' use of summary judgment and allow judges to play more of a gatekeeper role in copyright lawsuits, thereby avoiding needless trials merely because *some* similarity between the works is detected. In this regard, it would build on all of the efficiencies represented in modern-day motion practice.

2. Appropriation of protected expression

Once a judge finds the similarity between two works to be cognizable as a matter of law, "only then" does the matter go to a jury, which decides whether the similarity was the result of the defendant appropriating (i.e., copying) protected expression from the work or the result of independent creation. As a purely factual question, appropriation remains a perfect question for the jury and thereby allows the analysis to comply with the constitutional mandate of a jury trial in copyright infringement lawsuits.[376]

However, since the question is whether the defendant copied "protected expression" and not just unprotectable material from the protected work, the jury would be allowed to hear *any* evidence that bears on the question. This might include evidence on the protectability of elements such as expert testimony on stock expression (i.e., *scenes-a-faire*) and originality in any area/genre, an expert's assessment of the similarity between the works and its

375. *See* Balganesh et al., *supra* note 326, at 284-88.

376. *See* U.S. CONST. amend. VII; Curtis v. Loether, 415 U.S. 189, 194 (1974) ("The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.").

probative significance, and the judge's own dissection of the work from the prior step.

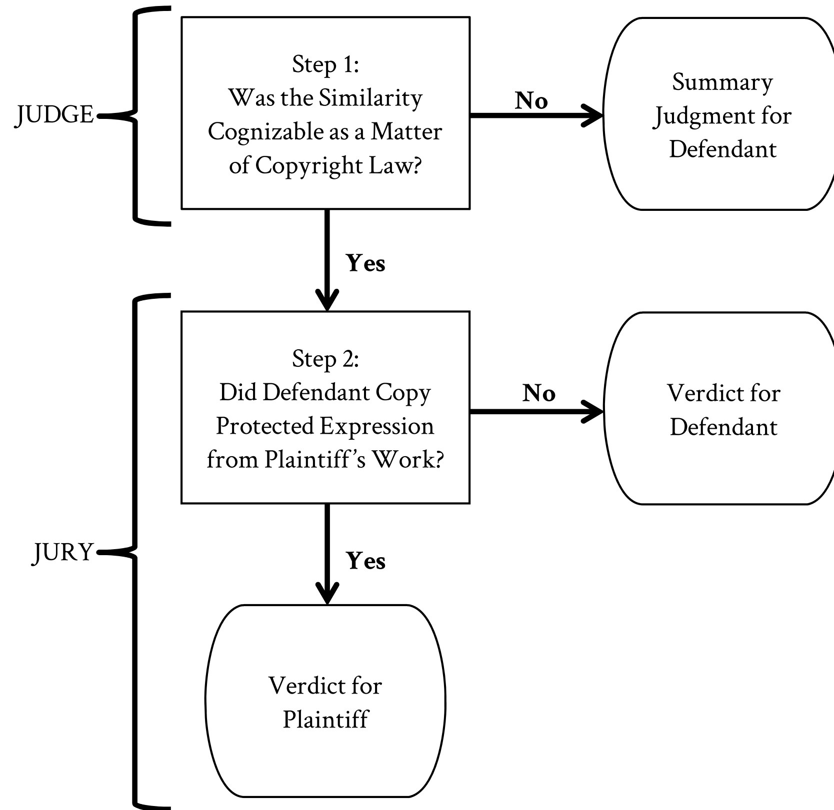
The effect of moving the factual question exclusively to the second step would, as a structural matter, allow judges to filter out what they are required to send to a jury. In addition, it would prevent a court's conclusion on the question of copying/appropriation from improperly influencing the similarity analysis, as it currently does. While giving this question over to the jury would of course mean that a reasoned jurisprudence is partially stifled, this is likely to matter very little, given that the issue is ultimately one of circumstantial evidence, which will indelibly vary from one case to another.

* * *

This alternative framework is certainly open to manipulation of the kind that Judge Frank seems to have feared. In the hands of Judge Frank, indeed it might have hardly precluded a jury trial, given that he would likely have found the similarity to be cognizable (though concededly, he did express some reservations about that[377]), and sent Arnstein's fantastical story to a jury for determination on the appropriation question. Yet it would require the judge to explicate his or her analysis of the similarity in clear terms, based on expert evidence, and thereby allow for a rational jurisprudence of similarity to develop contextually over time. The following table illustrates the key elements of the revised infringement analysis proposed here.

377. *See supra* text accompanying notes 304-15 (discussing the correspondence between Judge Frank and Judge Clark on the meaning of the *Arnstein* opinion).

Table 1
A Reformulated Infringement Analysis



Conclusion

The existing test for copyright infringement is entirely a creation of the courts, developed incrementally in true common law fashion. While prior opinions set out the contours of the test, *Arnstein* crystallized the analysis into a seemingly workable formula that has won the acceptance of American copyright jurisprudence in the decades since. Even when Congress chose to comprehensively codify copyright law in 1976, it left this area of law altogether untouched, thereby seemingly acquiescing to *Arnstein*'s formulation.[378] While *Arnstein* may no longer be binding on courts as

378. H.R. REP. NO. 94-1476, at 61 (1976) (containing the only reference to the infringement analysis and noting that "a copyrighted work would be infringed by reproducing it in *footnote continued on next page*

precedent, its basic framework continues to exert an enormous influence on courts and copyright jurisprudence across the country.

As this Article has shown, *Arnstein*'s entire analytical framework was built on a philosophical outlook—of *skepticism* towards rules, judges, and the law—that Judge Frank developed over the course of his career, which has since been discredited by both courts and scholars. Driven by a mistrust of lower courts, rule-based decisionmaking, and the factfinding process, the *Arnstein* formulation was directed at ensuring little more than that Ira Arnstein, the infamous plaintiff in the case, obtained a jury trial merely because there appeared to be some similarity between his work and the defendant's. Neither Judge Frank nor Judge Hand (who constituted the majority in the case) seems to have paid much attention to what the formulation meant for copyright law adjudication or indeed to the institution's myriad goals and purposes.

In the years since *Arnstein*, almost all of its underlying skeptical assumptions have come to be openly repudiated. Somewhat surprisingly though, its avowedly nonintellectual framework continues to endure, a reality that is perhaps best explained by the sheer path dependence of court-created doctrine. Nonetheless, as a product of the common law of copyright, courts should see little problem in comprehensively reformulating it so as to retain its adherence to some of copyright's core ideals while abandoning its skeptical premises. Given that Congress played no role whatsoever in the development of the infringement analysis and indeed chose not to, courts—and not Congress—will need to assume primary responsibility for such reform. Until this occurs, *Arnstein* will, to use Judge Clark's famous words, continue to "haunt" copyright jurisprudence with the "chaos" that it has engendered over the last seven decades.

whole or in any substantial part, and by duplicating it exactly or by imitation or simulation").