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The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment

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The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment

One of the objectives of the architects of modern pleading,[1] and an oft-expressed goal of legal scholars,[2] has been the elimination of the historical dichotomy between law and equity. The "merger" of the two ancient legal branches remains incomplete,[3] however, in large part because of the seventh amendment's mandate that "in suits at common law . . . the right of trial by jury shall be preserved."[4] The amendment has been construed as providing the right to a jury trial in all civil cases considered to be "at law" at the time of the Constitution's adoption, but as denying this right in all cases considered "in equity" at that time.[5] Thus, the equitable/legal distinction retains great importance in civil cases in which the right to jury trial is at issue.

The problems of characterization and historical analysis involved in deciding whether a particular cause of action is legal or equitable are compounded when the legislature creates new causes of action. Statutory remedies created *after* the adoption of the seventh amendment would seem to fall outside the amendment's stricture that the right to trial by jury shall be "preserved." However, the Supreme Court has held that a newly created statutory cause of action will carry with it the right to a jury trial if it can be properly characterized as "legal" in nature.[6] Thus, the question of whether a modern statutory cause of action entitles the parties to a jury trial often becomes one of whether the most closely analogous cause of action existing at the time of the Constitution's adoption in 1791 would have been char-

1. The first system of code pleading, New York's Field Code, eliminated "the distinction between actions at law, and suits in equity" and established one form of action, "which shall be denominated a civil action." E. STASON, B. SHARTEL, & J. REED, INTRODUCTION TO LAW AND EQUITY 89 (1953) [hereinafter cited as E. STASON]. This policy was adopted by the Federal Rules of Civil Procedure in 1938. *Id.*

2. *See* notes 132-35 *infra* and accompanying text.

3. E. STASON, *supra* note 1, at 90.

4. In its entirety, the amendment reads: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

5. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("The phrase 'common law,' found in [the seventh amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence.").

6. 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.").

acterized as "legal" or "equitable."[7]

Cases brought pursuant to the federal copyright statute[8] present current examples of the characterization problem posed by newly created causes of action. Because it is frequently difficult for the plaintiff in a copyright case to prove the exact amount of his or her loss,[9] the copyright statute gives the plaintiff the option of suing for "statutory" instead of "actual" damages.[10] Under the "statutory" damages provision, the plaintiff need not present any showing of actual loss;[11] the court is given authority to award as damages any amount it considers "just," between the limits of $250 and $10,000.[12] The copyright statute engenders little dispute when the plaintiff chooses to pursue actual damages, which are easily characterized as a legal remedy.[13] The statutory damages remedy, however, escapes such neat classification, for it combines elements characteristic of *both* legal and equitable remedies.[14]

This Note addresses the question of whether the statutory damages remedy provided by the federal copyright statute is properly characterized as equitable or as legal, and consequently whether the remedy falls within the seventh amendment's jury trial provision. Courts[15] and commentators[16] disagree about the answers to these questions. Those who describe the statutory relief as "legal" point out that section 504(c) monetary damages are analogous to other forms of monetary relief, such as debt, which are legal in nature,[17] and that the

7. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 490-91 (1975).

8. Copyrights Act of 1976, §§ 101-810, 17 U.S.C. §§ 101-810 (1982).

9. For example, how much money has a plaintiff "lost" if a band infringes his or her copyright in a musical work by playing the work as one of many pieces performed at a concert? *See generally* Brady v. Daly, 175 U.S. 148, 154-55 (1894) (noting difficulty of determining amount of loss caused by copyright infringement in many cases).

10. *See* text at note 25 *infra.*

11. Gnossos Music v. Mitken, Inc., 653 F.2d 117, 118 (4th Cir. 1981); Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979). *See also* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 161 (1976).

12. 17 U.S.C. § 504(c)(1) (1982). Section 504(c)(2) raises the damages ceiling for willful infringement and lowers the damages floor for unknowing infringement.

13. *See* note 79 *infra* and accompanying text.

14. *See* notes 86-115 *infra* and accompanying text.

15. *Compare* Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981) (section 504(c) relief held legal in nature), *with* Oboler v. Goldin, 714 F.2d 211 (2d Cir. 1983) (per curiam) (section 504(c) relief to be determined by judge), *and* Twentieth Century Music Corp. v. Frith, 645 F.2d 6 (5th Cir. 1981) (per curiam) (section 504(c) relief held to be equitable).

16. *Compare* Patry, *The Right to a Jury in Copyright Cases,* 29 J. COPYRIGHT SOCY. 139 (1981) (advancing the thesis that statutory copyright damages are legal), *with* 3 NIMMER, NIMMER ON COPYRIGHT § 14.04[C] (1985) (proposing as "perhaps the better view" that § 504(c) damages should be awarded by the judge). Other commentary on the question of jury trials in copyright cases includes: Breuninger, *Statutory Damages and Right to Jury Trial in Copyright Infringement Suits,* 24 IDEA 249 (1984); Note, *Right to a Jury Trial Under Copyright Act's Statutory Damage Provision,* 39 WASH. & LEE L. REV. 800 (1982).

17. Gnossos Music v. Mitken, Inc., 653 F.2d 117, 120 (4th Cir. 1981).

action's statutory predecessors have historically been considered legal.[18] Their opponents argue that the large amount of discretion allowed in fixing the level of damages[19] and the "calculation" of damages without regard to "facts" (the usual province of juries) indicate that the relief was intended to be and should be described as "equitable."[20]

This Note argues that statutory copyright damages are properly regarded as equitable and hence that no right to a jury trial exists in cases brought to recover such damages. More generally, the Note maintains that the seventh amendment's distinction between equitable and legal causes of action has produced irrational consequences, and proposes that "legal" issues be defined narrowly so as to limit the scope of the seventh amendment. Part I analyzes the debate over statutory copyright damages, concluding that historical and statutory construction arguments require these damages to be construed as legal. Part II examines some of the problems that have resulted from traditional interpretations of the seventh amendment, and argues that these problems would be ameliorated by classifying ambiguous causes of action, such as statutory copyright damages, as equitable relief.

I. Characterization of the Statutory Damages Remedy: Statutory Construction and Historical Analysis

In *Gnossos Music v. Mitken, Inc.*,[21] the Court of Appeals for the Fourth Circuit found that statutory damages under federal copyright law constituted legal damages, and thus that the defendant was within his rights in demanding a jury trial.[22] In so holding, the Fourth Circuit stands alone among the five circuits that have considered the issue.[23] The disagreement among the circuits extends to both issues

18. Gnossos Music v. Mitken, Inc., 653 F.2d 117, 120 (4th Cir. 1981); Patry, *supra* note 16, at 147-94.

19. *See, e.g.*, Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77, 82 (1st Cir. 1957).

20. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059 (N.D. Ind. 1979).

21. 653 F.2d 117 (4th Cir. 1981).

22. 653 F.2d at 120-21.

23. Reaching results opposite to that of *Gnossos* were Oboler v. Goldin, 714 F.2d 211 (2d Cir. 1983) (per curiam); Twentieth Century Music Corp. v. Frith, 645 F.2d 6 (5th Cir. 1981) (per curiam); Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); and Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77 (1st Cir. 1957). The last two cases interpreted the statutory damages provision of the 1909 Copyright Act, which was identical, for present purposes, to the statutory damages provision of the 1976 Act.

Unfortunately, none of the Courts of Appeals that held statutory copyright relief to be equitable devoted any appreciable analysis to the question. The *Oboler* court simply stated its conclusion without precedential support or elaboration. 714 F.2d at 213. The Fifth Circuit in *Frith* confined its analysis to a list of citations of cases on both sides, concluding simply that the "whole case is equitable." 645 F.2d at 7. The Ninth Circuit based its decision in *Sid & Marty Krofft* entirely on the statute's use of the word "court," 562 F.2d at 1177, which the Supreme Court has found, in another context, to be an improper basis for decision. *See* notes 27-30 *infra*

raised by the attempt to characterize statutory copyright damages: first, whether Congress meant to provide for trial by jury in statutory damage cases; and second, whether the seventh amendment *requires* that a jury be provided, irrespective of congressional intent.[24]

A. *Statutory Construction*

Section 504(c) of the 1976 Copyrights Act, which provides for "statutory" relief, reads in pertinent part:

> [T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than $250 or more than $10,000 as the court considers just.[25]

Courts and commentators on both sides of the legal/equitable debate have attempted to construe the language and intent of section 504(c) to their advantage. In the final analysis, however, the debate over statutory construction remains unresolved.

Several courts have focused on the use of the word "court" in section 504(c), concluding that Congress intended the issue of statutory relief to be tried before a judge.[26] In *Gnossos,* however, the Fourth Circuit found such reasoning unpersuasive. The *Gnossos* court cited a Supreme Court decision[27] in which a statutory remedy[28] directed by Congress to be administered by the "court" was nonetheless held legal in nature.[29] The Fourth Circuit thus concluded that the word "court" is a generic term that can denote *either* the judge or the jury.[30] The

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and accompanying text. The *Palermo* court reasoned simply that the remedy was not punitive, implying that its equitable character followed largely from that fact. 249 F.2d at 82.

24. In *Gnossos,* the Fourth Circuit found the evidence of congressional intent regarding the jury trial issue in § 504(c) cases to be inconclusive, but held that the seventh amendment provides a right to trial by jury. 653 F.2d at 119-21. The Ninth Circuit, on the other hand, relied on statutory construction in finding no right to jury trial, implicitly holding as well that the seventh amendment had no application to § 504(c) damages. Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1177 (9th Cir. 1977).

25. 17 U.S.C. § 504(c)(1) (1982).

26. *See, e.g.,* Glazier v. First Media Corp., 532 F. Supp. 63, 65 (D. Del. 1982); Rodgers v. Breckenridge Hotels Corp., 512 F. Supp. 1326 (E.D. Mo. 1981). *See also* Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1177 (9th Cir. 1977); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wis. 1975) (interpreting similar language in the 1909 copyright statute). *Cf.* BLACK'S LAW DICTIONARY 318 (5th ed. 1979) ("The words 'court' and 'judge' . . . are frequently used in statutes as synonymous.").

27. Curtis v. Loether, 415 U.S. 189 (1974), *cited in Gnossis,* 653 F.2d at 119.

28. 42 U.S.C. § 3612 (1982) allows a private plaintiff alleging a violation of his civil rights under the Fair Housing Act to bring an action for damages as well as for injunctive relief. Curtis v. Loether, 415 U.S. 189, 189-90 (1974).

29. Curtis v. Loether, 415 U.S. 189, 195 (1974).

30. *Gnossos,* 653 F.2d at 119. This contention is buttressed by the use of the word "court" in the discussion of *actual* damage awards in the House Report on the Copyrights Act of 1976. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 161 (1976). Since the award of actual damages has always been considered a legal remedy, Congress could not have meant to use the word "court" other than in its generic sense.

Gnossos court ignored, however, the statute's use of the word "discretion" in addition to the phrase "as the court considers just."[31] Discretion is generally considered to be within the province of the judge, not the jury,[32] and the use of the word "discretion" in a statute has been held to be important in characterizing the statute as one providing equitable relief.[33] Thus, while the *Gnossos* court was probably correct in asserting that use of the word "court" is not indicative of Congressional intent,[34] it ignored the plausible argument that other wording in the statutory damages provision supports the view that Congress intended to provide for equitable relief.[35]

A second area of dispute is whether Congress intended to alter the effect of prior copyright legislation. One commentator, William Patry, has traced the history of the various federal copyright statutes from the original copyright act of 1790 to the current statute.[36] Patry argues that since statutory copyright relief was demonstrably legal in nature in the nineteenth century,[37] and since subsequent enactments have left statutory damage provisions substantially unchanged,[38] one may infer that Congress intended such relief to be considered a legal

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31. "As the court considers just" appears in 17 U.S.C. § 504(c)(1), and the word "discretion" is used with reference to the "court" in § 504(c)(2), the punitive damages provision. In addition, the legislative history of § 504(c)(1) indicates that Congress intended the "court" to "exercise *discretion* in awarding an amount within" the prescribed range of statutory damages. H.R. REP. No. 1476, 94th Cong., 2d Sess. 162 (1976) (emphasis added).

32. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979) ("[J]uries are not normally thought of as exercising discretion. Their function is to find facts and to apply the law, as it is explained to them, to the facts."). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.1, at 28 (1973) (noting that equity has been *defined* in terms of "discretion"); Plater, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV. 524, 533 (1982) ("discretion . . . has always lain at the heart of equity jurisdiction"); Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions,* 9 ENVTL. L. 477, 480 (1979) ("In contrast to common law judges, chancellors acted with substantial discretion and rarely recorded the reasons for their opinions.").

33. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,310-11 (N.D. Ind. 1979).

34. *See* notes 27-30 *supra* and accompanying text.

35. *See* notes 99-104 & 106-07 *infra* and accompanying text.

36. *See* Patry, *supra* note 16, at 145-93. The history of the pre-1909 acts is also discussed in notes 62-74 *infra* and accompanying text.

37. Patry based this premise on the case of Brady v. Daly, 175 U.S. 148 (1899), *discussed in* Patry, *supra* note 16, at 169-72. The case involved an action for damages under an 1856 copyright statute that provided minimum damages for infringement of a copyright. Although the parties waived trial by jury, the report of the case specifically indicates that the action was at law. 175 U.S. at 148. However, it is important to note that the damages sought in *Brady* are not completely analogous to modern statutory copyright damages. The plaintiff in *Brady* sought actual damages, which required factual proof of loss. The statutory damages remedy, on the other hand, is discretionary and may be awarded absent any proof of loss. *See* text at notes 11-12 *supra.*

38. *See* Act of Mar. 2, 1895, 53d Cong., 2d Sess., 28 Stat. 956; Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909); Copyright Act of 1976, 17 U.S.C. §§ 101-804 (1982). Patry is incorrect, however, in his assertion that all subsequent enactments have left statutory damages unchanged. *See* notes 67-74 *infra* and accompanying text.

remedy under the latest copyright enactment.[39] Even if Patry's view is correct that statutory damages in the nineteenth century were thought of as legal,[40] by 1976 (the date of the most recent copyright enactment) the courts were in disagreement over whether subsequent copyright enactments provided for equitable or legal relief.[41] The three courts addressing the question in the two decades prior to 1976 held that statutory damages constituted equitable relief.[42] Considering the judicial confusion as to the nature of statutory copyright damage provisions from the nineteenth century to the present, it is not at all clear which view of the damage provisions Congress meant to adopt in its most recent enactment in 1976.[43] The history of federal copyright legislation is therefore inconclusive.

Patry further argues that since the statute allows plaintiffs to elect between actual and statutory damages at any time until judgment is rendered, the right to a jury trial, which undeniably exists in actions seeking actual damages,[44] must be afforded in suits for statutory damages as well.[45] Otherwise, he argues, the plaintiff would be forced to elect a remedy when he or she decides whether to demand a jury trial, a point in the proceedings well before trial.[46] This argument fails, however, because the statute only guarantees the plaintiff the right to a late election in switching *from* actual damages *to* statutory damages.[47]

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39. Patry, *supra* note 16, at 190.

40. In fact, statutory damages in their present form did not exist until 1909. *See* notes 67-74 *infra* and accompanying text. Patry makes much of the fact that two nineteenth century copyright cases, Backus v. Gould, 48 U.S. 798 (1849), and Brady v. Daly, 175 U.S. 148 (1899), were originally to have been tried before a jury. (In *Brady* the parties waived jury trial. 175 U.S. at 151.) But both cases were decided under statutes providing for *actual* damages, and are therefore not relevant to the characterization of statutory "in lieu" damages.

41. *Compare* Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77 (1st Cir. 1957) (no right to jury trial under the 1909 copyright act), *with* Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528 (D. Conn. 1977) (litigants have right to jury trial under 1909 statutory copyright provisions).

42. Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77, 81-82 (1st Cir. 1957); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794, 797 (W.D. Wis. 1975); Serra v. Matias Photo Shop, 21 F.R.D. 188, 190 (D.P.R. 1954). *See also* Maloney v. Stone, 171 F. Supp. 29, 31-32 (D. Mass. 1959) (reaching the remarkable conclusion that *all* copyright damages — both statutory and actual — are equitable in nature).

43. In interpreting a statutory amendment, it is generally presumed that the legislature that enacted the amendment was aware of how courts had construed the original act. SUTHERLAND STAT. CONST. § 22.35 (4th ed. 1972 & Supp. 1985).

44. *See* note 79 *infra* and accompanying text.

45. Patry, *supra* note 16, at 191. *See* 17 U.S.C. § 504(c)(1) (1982). The relevant statutory language is quoted in note 47 *infra*.

46. Patry, *supra* note 16, at 191.

47. The relevant portion of the statute reads: "[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages. . . ." 17 U.S.C. § 504(c)(1) (1982). The legislative history also suggests that the right to a late election of remedies works in only one direction: "Subsection (c) of section 504 makes clear that the plaintiff's election *to recover statutory damages* may take place at any time during the trial before the court has rendered its final judgment." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 162 (1976) (emphasis added).

This late election is not impeded by the disparity in jury trial rights between statutory and actual relief. If the plaintiff has brought an action for actual damages, he may at the last minute change his mind and ask the judge for statutory relief. The judge would then be justified in taking the case away from the jury.[48] It is only the reverse decision (from statutory damages to actual damages) that is prematurely forced by the necessity of demanding a jury trial.[49] The copyright act does not guarantee the plaintiff the right to make this reverse election as late as immediately before judgment.[50]

Patry's final statutory construction argument centers on the fact that section 504(c) establishes a separate set of damages, with a higher maximum, for willful copyright infringements.[51] Patry attacks the characterization of ordinary statutory damages as equitable, based on an assumption that such a characterization, once made, would necessarily apply to the willful infringement damages provision of section 504(c). Since the latter damages are clearly punitive, and since punitive damages have sometimes been regarded as legal,[52] Patry takes issue with the characterization of the entire section as equitable.[53] Aside from the possibility that the penal provisions may be applied separately from the other statutory damages,[54] this argument is unpersuasive since other remedies, clearly penal in nature, have been held properly tried before a judge.[55] Thus, statutory construction again

48. Such a procedure is not "wasteful." Allowing a plaintiff to exercise a late choice between judge and jury will present situations where a jury, having been impaneled and after viewing the entire trial, is dismissed without ever being called upon to decide the case. But such a system would consume no more judicial resources than a full right to jury trial, which Congress surely could provide. Viewed from the point at which the plaintiff makes his or her decision, it does not matter whether the judge or jury ultimately decides the case. The outlay of resources is a fixed cost, and will be the same regardless of the plaintiff's choice.

49. If the plaintiff were allowed to change his mind at the last minute after presenting his claim for statutory relief to the judge, the defendant would be denied the opportunity to make a timely motion for jury trial.

50. Nothing in the statute implies that a plaintiff may elect actual damages "at any time before final judgment is rendered." *See* note 47 *supra*.

51. If the "court" finds that the infringement was willful the maximum allowable damage award increases to $50,000. 17 U.S.C. § 504(c)(2) (1982).

52. *See* Curtis v. Loether, 415 U.S. 189, 196 (1974) ("[T]he relief sought here — actual and punitive damages — is the traditional form of relief offered in the courts of law."). However, some courts have held that punitive damages may be properly awarded in equity. *See* cases cited in note 55 *infra*.

53. Patry, *supra* note 16, at 191 ("It is simply incredible that a defendant may be held liable for $50,000 in damages, by a fact finding of willfulness, and have this considered an equitable proceeding.").

54. Even if Patry were correct that plaintiffs seeking damages greater than $10,000 must submit to a trial by jury if the defendant requests one, ordinary statutory damage claims under § 504(c)(1) could still be treated as equitable.

55. Charles v. Epperson & Co., 258 Iowa 409, 137 N.W.2d 605 (1965); Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454 (Miss. 1983), *discussed in Recent Decisions, Courts Are Empowered to Award Punitive Damages,* 53 MISS. L.J. 521 (1983); International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963).

fails to supply a definitive answer to the question whether federal copyright damages are properly considered legal or equitable, and therefore to whether a seventh amendment right to trial by jury exists in statutory damages cases.

B. *Constitutional Analysis: The Historical Test*

Regardless of whether Congress *intended* a remedy to be legal, the seventh amendment requires that a jury trial be made available to the parties if that remedy bears the indicia of legal relief.[56] In *Ross v. Bernhard,*[57] the Supreme Court enunciated the following three-part test for determining whether an issue should be characterized as "legal" or "equitable":[58] "[T]he 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."[59] The first two elements of this test are permutations of the traditional "historical test"[60] for characterizing cases under the seventh amendment. The third element — the abilities of juries — represents a possible departure from traditional analysis.[61]

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56. *See* Curtis v. Loether, 415 U.S. 189, 194 (1974).

57. 396 U.S. 531 (1970).

58. *Ross* is only one of a series of Supreme Court cases interpreting the seventh amendment. Two of the more famous of these, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Beacon Theatres v. Westover, 359 U.S. 500 (1959), are distinguishable for present purposes because they dealt not with characterizing a particular *issue* as legal or equitable, but with characterizing a *case* that combines both equitable and legal issues. These cases are discussed in more detail in Part II *infra*. *See* notes 140-47 *infra* and accompanying text.

59. 396 U.S. at 538 n.10. In Curtis v. Loether, 415 U.S. 189 (1974), the Court held that a new statutory cause of action falls within the scope of the seventh amendment "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194. The *Curtis* court used "nature of the remedy" reasoning to conclude that title VIII cases are legal. The court did not mention or apply the other two parts of the *Ross* test, perhaps because the second part — nature of the remedy — was so clearly dispositive of the case.

In finding that section 504(c) damages were legal in nature, the Fourth Circuit in Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981), applied its own unique formulation of the *Curtis* holding. This formulation, which had its genesis in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.), *cert. denied,* 439 U.S. 934 (1978), operated by dividing a cause of action into two components — the rights protected and the remedy granted — each to be examined separately and characterized as either legal or equitable. (In *Gnossos* the court concluded that both the rights and the remedy were legal.)

Aside from the fact that such a test is inconsistent with the *Ross* test, the split into "rights" and "remedies" adopted by the Fourth Circuit is as conclusory and unhelpful as attempts to characterize the case as a whole. (For examples of the latter difficulty see notes 75-80 *infra* and accompanying text.) Labelling an element of a cause of action a "right" or a "remedy" does little to advance the seventh amendment inquiry; what is needed is a method for *determining* if a right or a remedy is "legal." The *Ross* test, at least, provides a substantive answer to this question.

60. *See* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 COLUM. L. REV. 43, 44 (1980) ("The first two taken together are in effect the historical test; the third factor is sometimes referred to as the pragmatic test.").

61. *See* Devlin, *supra* note 60, at 44.

1. *Pre-merger Custom*

The first inquiry in the three-prong *Ross* test is a historical one: whether prior to the merger of law and equity, the cause of action was considered to be legal or equitable. Unfortunately, this historical analysis fails to yield a definitive answer to the question of whether statutory copyright damages are properly characterized as legal or equitable.[62] Originally, the copyright remedy was one at common law.[63] This traditional remedy was supplemented in England in the seventeenth century by statutory copyright remedies,[64] and in America in the eighteenth century by state statutes.[65] These remedies, too, were apparently legal in nature.[66] The first federal copyright legislation was enacted in 1790,[67] and was amended periodically throughout the nineteenth century.[68] The original federal statute explicitly provided for relief to be granted in actions at law;[69] a subsequent act extended jurisdiction to federal equity courts over suits in which an injunction was sought.[70]

None of the Anglo-American statutory copyright enactments prior

62. The federal courts have differed over whether copyright actions were historically legal or equitable. *Compare* Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981) (holding that statutory copyright damages were historically legal), *with* Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wis. 1975) (holding that statutory copyright damages were historically equitable.).

63. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 654-57 (1834); Millar v. Taylor, 4 Burrows 2303, 2312, 98 Eng. Rep. 201, 206 (K.B. 1769). One historian has concluded that common law copyright protection existed in England at least as early as 1662. B. BUGBEE, THE EARLY AMERICAN LAW OF INTELLECTUAL PROPERTY: THE HISTORICAL FOUNDATIONS OF THE UNITED STATES PATENT AND COPYRIGHT SYSTEMS 133 (1960) (unpublished dissertation).

64. Statute of Anne, 1710, 8 Anne, ch. 19. This statute provided a specified amount of damages for every infringing copy.

65. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, BULLETIN NO. 3 (REVISED), COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (1973) [hereinafter cited as COPYRIGHT ENACTMENTS], *cited in* Patry, *supra* note 16, at 148-51. These statutes generally provided for a fixed amount of damages per copy. COPYRIGHT ENACTMENTS, *supra*, at 1-21.

66. *See* Patry, *supra* note 16, at 151. Seven of the twelve states with copyright enactments specifically assigned them to a law court. Patry bases his inference that the remainder of the state statutes were also legal on (1) the statutes' failure to grant equity jurisdiction, (2) a general lack of equity courts in colonial America, and (3) a widespread contemporary hostility toward chancery courts.

67. Act of May 31, 1790, ch. 15, 1 Stat. 124. *See* Patry, *supra* note 16, at 155. The power to grant copyright protection had been ceded by the states to the federal government by the Constitution. U.S. CONST. art. I, § 8. The Supreme Court in Wheaton v. Peters, 33 U.S. (8 Pet.) 589 (1834), held that the federal copyright remedy was a new form of relief which supplanted the common law cause of action.

68. The most significant amendments were Act of Feb. 3, 1831, ch. 14, 4 Stat. 436; Act of Aug. 18, 1856, ch. 169, 11 Stat. 138; Act of July 8, 1870, ch. 230, 16 Stat. 198; and Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106. None of the 19th century amendments contained a provision for "in lieu" damages such as later appeared in the Copyright Act of 1909, ch. 320, 35 Stat. 1075. *See* COPYRIGHT ENACTMENTS, *supra* note 65, at 24-59.

69. Act of May 31, 1790, 1 Stat. 124.

70. Act of Feb. 15, 1819, ch. 19, 3 Stat. 481.

to 1909, however, provided plaintiffs with the option of an alternative form of relief *in lieu of* actual damages.[71] While prior federal (and colonial) statutes had placed minimums and maximums on the amount to be recovered in a copyright case, these limits applied to actual, provable damages, not to a wholly discretionary amount set by the court.[72] It was not until 1909 that statutory damages were added to the federal copyright statute.[73] Therefore, the pre-1909 history of copyright damages is of little relevance to the question of whether statutory damages are best characterized as legal or equitable.[74]

When a modern cause of action has no 1791 (pre-seventh-amendment) counterpart, courts often rely upon the closest 1791 *analogy* to

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71. *See* note 68 *supra.*

72. Statutory limits in the nineteenth century were applied to actual damages, under the Act of Aug. 18, 1856, ch. 169, 11 Stat. 138. In contrast, § 504(c) damages are not tied to factual loss. Indeed, statutory copyright damages may be recovered absent *any* showing of loss due to the infringement. *See* note 11 *supra* and accompanying text.

73. Copyright Act of 1909, ch. 320, § 25(b), 35 Stat. 1075, 1081, *repealed by* Copyrights Act of 1976, 17 U.S.C. §§ 101-804 (1982).

74. The characteristic that distinguishes the "in lieu" statutory relief introduced in 1909 from prior copyright relief is the former's complete reliance on the discretion of the court. It is this very feature of statutory relief that leads many observers to characterize it as an equitable remedy. *See* notes 102-07 *infra* and accompanying text.

Though Patry argues otherwise, *see* Patry, *supra* note 16, at 173-77, his attempt to show a string of essentially unchanged legal copyright statutes is disrupted by the 1909 act. Patry emphasizes the 1909 act's retention of several important features of the nineteenth century copyright acts, such as the provision for minimum and maximum damages and the words "as to the court shall appear to be just." He thereby concludes that the 1909 act did not constitute a substantial departure from earlier copyright enactments. However, Patry ignores the fact that the 1909 act was the first copyright legislation to award statutory damages "in lieu of actual damages," thereby removing from the amount recovered any necessary connection with factual loss.

In support of his argument that the 1909 act did not constitute a substantial departure from earlier copyright enactments, Patry further contends that the 1909 act merely reenacted the language of a prior statute governing damages for infringement of dramatic or musical compositions. *Id.* at 176. This prior statute read in pertinent part:

> Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, . . . shall be liable for damages therefor, such damages . . . to be assessed at such sum . . . as to the court shall appear to be just.

Act of July 8, 1870, ch. 230, § 101, 16 Stat. 198, 214 (1871) (repealed 1909).

The 1909 act, on the other hand, provided in pertinent part:

> [I]f any person shall infringe the copyright in any work protected under the copyright laws . . . such person shall be liable:
>
> . . . .
>
> . . . to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such *infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just* . . . .

Copyright Act of 1909, ch. 320, § 25(b), 35 Stat. 1075, 1081, *repealed by* Copyrights Act of 1976, 17 U.S.C. §§ 101-804 (1982) (emphasis added).

Although Patry argues that the above statutes are essentially the same, careful inspection of the two acts demonstrates that only one damage provision is created by the pre-1909 law, whereas *three* separate provisions are established by the 1909 act: actual damages, profits, and "in lieu" damages. The "in lieu" clause has no counterpart in the pre-1909 act. Furthermore, Patry makes the unsupported statement that the phrase "as to the court shall appear to be just" in the 1909 act was intended to modify the entire section, including the provisions relating to actual damages and profits. Patry, *supra* note 16, at 176. Again, careful inspection of the act

determine if the modern action is equitable or legal.[75] The *Gnossos* court, for example, analogized statutory copyright damages to two traditional common law actions: tortious interference with property rights and the common law action for debt.[76]

The court's analogy to tort law is unhelpful. Copyright actions protect property interests, and therefore sound in tort, but this fact does not aid in determining whether statutory copyright actions are "legal." Tort actions — particularly property-interference tort actions — can be either legal or equitable, depending on the relief sought.[77] Indeed, the copyright statute is a good example of this phenomenon. If the relief sought in a copyright case is an injunction, the cause of action is equitable;[78] if actual damages or profits are sought, it is legal.[79] The important question is how to categorize the *remedy* of statutory relief; categorization of the *right* protected is not useful.[80]

The analogy to an action for debt is more helpful — at least it characterizes the relief sought. The Supreme Court, however, has described the action for debt as lying "whenever a *sum certain* is due to the plaintiff, or a sum which can readily be reduced to a certainty. . . ."[81] But statutory damages are completely unlike a "sum certain" — they are determined entirely at the discretion of the court, within prescribed limits.[82] Thus, the action for debt is distinguishable from an action for statutory damages for precisely the reason that most strongly characterizes the latter as an equitable action — its highly discretionary nature.[83]

Since statutory damages did not exist prior to the twentieth century, and since no traditional form of relief is directly analogous to such damages,[84] the pre-merger history of copyright damages is inconclusive as to whether statutory damages should be regarded as legal or

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defeats Patry's contentions. The phrase "as to the court shall appear to be just" is intended to modify only "such damages" as may be awarded *in lieu of* actual damages and profits.

Patry's statutory construction arguments are thus unpersuasive. The 1909 act's "in lieu" damages did not represent a reenactment of traditional legal copyright relief, but rather a wholly novel discretionary remedy.

75. *See, e.g., In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982) (analogizing ERISA actions to ancient actions for abuse of trust); Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981) (analogizing copyright damages to the ancient action for debt). *See also* Redish, *supra* note 7, at 491.

76. *See* Gnossos Music v. Mitken, Inc., 653 F.2d 117, 120 (4th Cir. 1981).

77. *See* Ross v. Bernhard, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting).

78. *See* Twentieth Century Music Corp. v. Frith, 645 F.2d 6, 7 (5th Cir. 1981).

79. *See* Oboler v. Goldin, 714 F.2d 211, 212-13 (2d Cir. 1983).

80. An action for nuisance, for example, can be brought in equity if the plaintiff seeks an injunction, and at law if the plaintiff seeks damages. PROSSER AND KEETON ON THE LAW OF TORTS § 89 (W. Keeton 5th ed. 1984); D. DOBBS, *supra* note 32, § 2.5, at 59.

81. Stockwell v. United States, 80 U.S. (13 Wall.) 531, 542 (1871) (emphasis added).

82. *See* 17 U.S.C. § 504(c) (1982); text at note 25 *supra*.

83. *See* note 32 *supra*.

84. *See* notes 63-74 *supra* and accompanying text.

equitable. Guidance must therefore be sought in the second and third prongs of the test enunciated in *Ross v. Bernhard.*[85]

2. *Nature of the Remedy*

The second prong of the *Ross* test inquires whether the remedy sought is fundamentally equitable or legal in nature.[86] This inquiry presupposes, of course, that specific factors can be identified as "fundamentally" characteristic of equitable or legal remedies. Although the validity of this assumption is disputed,[87] courts have adopted generalizations that purport to identify the primary characteristics of equitable and legal relief.[88] In the context of statutory damages, the two most important characterizations are the general associations of monetary relief with legal jurisdiction,[89] and of "discretionary" relief with equitable jurisdiction.[90] An analysis of these factors leads to the conclusion that statutory copyright damages are best characterized as equitable.

The strongest factor weighing in favor of characterizing statutory copyright damages as "legal" is that they provide for monetary relief. Money damages have generally been associated with legal jurisdiction,[91] unlike specific performance, which has typically been associ-

85. 396 U.S. 531, 538 n.10 (1970). *See* text at notes 57-61 *supra.*

86. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

87. *See, e.g.,* 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 639 (London 1869) ("It is impossible to give any idea of [English equity], in general or abstract expressions. . . . In order to explain to a foreigner the nature of English equity, it would be necessary to enumerate all the cases in which the Chancellor had interposed to supply or correct the defects of the law administered by the Common Law Courts. The notion that there is any essential or necessary distinction is the merest absurdity.").

88. *See* notes 102-07 *infra* and accompanying text.

89. *See* note 91 *infra* and accompanying text.

90. *See* note 32 *supra.* The objection might be raised that associating "discretion" with equity jurisdiction is as formalistic a distinction as that between equity and law, a distinction criticized elsewhere in this Note. *See* notes 123-35 *infra* and accompanying text. That is, juries necessarily exercise great discretion in inferring "facts" from evidence and in other areas, and judges in practice apply their own versions of facts in making necessary determinations from the bench.

Nevertheless, jurors were historically thought of as deciding rigidly defined issues of fact, which would then be "plugged into" legal formulae explained by the judge. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979). Since the prevailing interpretation of the seventh amendment demands an inquiry into how a modern cause of action would have been characterized historically, *see* notes 50-54 *supra* and accompanying text, the modern jurist must apply distinctions recognized historically, whether those distinctions now seem formal or not. As defined by the historical approach, analysis under the seventh amendment must be limited to modes of thought accepted at the time of the amendment's adoption. That those modes of thought may not have been rational is irrelevant to this analysis.

For purposes of this Part of the Note — that is, for purposes of characterizing statutory copyright relief as legal or equitable — the historical test is accepted as the appropriate standard in spite of its inadequacies. For a proposal to minimize the pernicious effects of the historical test, see Part II *infra.*

91. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH)

ated with equitable jurisdiction.[92] The force of this argument is limited, however, by two historical characteristics of equity and legal courts. First, equity courts were traditionally authorized to grant monetary relief, provided such relief was "restitutionary."[93] Second, traditional legal relief, though monetary, was never associated with the degree of discretion conferred by section 504(c).[94]

Two courts have held that statutory copyright damages, which seek to restore (albeit roughly)[95] the copyright owner to the position he or she occupied prior to the infringement, can be regarded as "restitutionary."[96] Indeed, statutory damages have been likened to the backpay remedy of Title VII of the Civil Rights Act of 1964,[97] which lower courts have consistently held to be restitutionary and therefore

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¶ 25,059, at 15,310 (N.D. Ind. 1979) ("Monetary relief is generally provided by courts of law."). *See also* Curtis v. Loether, 415 U.S. 189, 196 (1974) ("The relief sought here — actual and punitive damages — is the traditional form of relief offered in the courts of law."); E. STASON, *supra* note 1, at 88 (noting that a decree at law was an award of money, or, in some cases, possession of property).

92. H. MCCLINTOCK, PRINCIPLES OF EQUITY 126-27 (1948). Indeed, a *requirement* for granting equitable relief is that legal (monetary) relief be inadequate. D. DOBBS, *supra* note 32, § 2.5, at 57.

93. Curtis v. Loether, 415 U.S. 189, 196-97 (1974); D. DOBBS, *supra* note 32, § 4.1, at 222-23 (observing that restitution may be appropriate in either a legal or equitable proceeding); Davidson, *The Equitable Remedy of Compensation,* 13 MELB. U. L. REV. 349 (1982) (arguing that restitution — or "compensation," as the author terms such relief — has always been available at equity). *See also* notes 96-98 *infra* and accompanying text.

94. *See* notes 99-107 *infra* and accompanying text.

95. *See* note 97 *infra.*

96. *See* Glazier v. First Media Corp., 532 F. Supp. 63 (D. Del. 1982); Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979). "Restitution" has historically been defined as that measure of damages that will restore the plaintiff to the position he or she would have occupied had it not been for the defendant's actions. BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). *See* D. DOBBS, *supra* note 32, § 4.1 at 222. Alternatively, "restitution" has been used to describe the measure of damages owed by a defendant who has been unjustly enriched at the expense of the plaintiff. BLACK'S LAW DICTIONARY at 1180; RESTATEMENT OF RESTITUTION §§ 1-2 (1937). Both definitions — particularly the latter — aptly describe the purpose and effect of copyright damages.

97. 42 U.S.C. § 2000e-5(g) (1982). This comparison is made, for example, in Broadcast Music, Inc., v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979).

Patry rejects the analogy between statutory damages and the backpay provisions of title VII. Patry, *supra* note 16, at 189. He distinguishes the two forms of relief on the grounds that (1) unlike copyright claims, claims of racial discrimination under title VII can often evoke racial prejudice among jurors; and (2) unlike backpay, "statutory copyright damages are not in the nature of restitution" because they are imprecise. *Id.*

Patry's first point of differentiation is well taken. It is likely that courts holding title VII cases to be equitable have been influenced by the risk of racial prejudice among potential jurors. Patry fails to show, however, why statutory copyright damages and backpay are not both "restitutionary." The mere fact that § 504(c) damages are not a precise measure of a plaintiff's loss does not mean that they are not restitutionary. The very purpose of such relief is to provide restoration of a plaintiff's loss when the actual loss is difficult to prove. *See* note 96 *supra.* Backpay damages may be more precise than § 504(c) damages, but precision is not a necessary element of "restitution."

equitable.[98]

More important, traditional legal damages were either tied to a specific factual loss (the "facts" to be determined by the jury) or were punitive in nature.[99] Statutory copyright damages are not punitive unless brought under the provisions of section 504(d).[100] Moreover, they are not tied to any factual loss, but rather depend solely on the court's determination of a "just" level of damages within the statutory limits.[101]

This degree of discretion is an element foreign to actions at law,[102] and is one of the features seized on by both courts and commentators as especially characteristic of equity jurisdiction.[103] Several courts, labelling particular forms of statutory relief as equitable, have based their decisions in large part on the appearance of the word "discretion" in the statute.[104] To be sure, some commentators have argued against associating discretion solely with equity jurisdiction, asserting that law judges were also historically invested with a certain amount of discretion.[105] As a general proposition, however, "discretion" is certainly more closely associated with equity than with law.[106] Further, it appears settled that discretion is an appropriate factor to be taken into account in characterizing a cause of action for purposes of the seventh amendment.[107]

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98. *See* Curtis v. Loether, 415 U.S. 189, 196-97 (1974), and cases cited therein; *see also* Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).

99. *See* note 91 *supra;* D. DOBBS, *supra* note 32, § 3.2, at 138-39 (pointing out that legal damages are generally measured by reference to some value). That legal damages are intended to be tied to factual loss is evidenced by the legal rule that damages not proved with reasonable certainty are not recoverable. *See* Fera v. Village Plaza, Inc., 396 Mich. 639, 643-44, 242 N.W.2d 372, 373-74 (1976).

100. Statutory damages have been held not punitive in nature. L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100, 107-08 (1919). In any event, even damages that are concededly punitive may be regarded as equitable. *See* note 55 *supra* and accompanying text.

101. It may be argued that the court must still find the "fact" of infringement. However, this kind of "fact" (liability) must be found in *all* equitable (and legal) cases. What distinguishes legal cases is the "factual" nature of the *remedy,* as contrasted with the "discretionary" nature of equitable remedies. See Ross v. Bernhard, 396 U.S. 531, 549-50 (1970) (Stewart, J., dissenting), for a similar argument.

102. J. POMEROY, POMEROY'S EQUITY JURISPRUDENCE § 109 (4th ed. 1918) ("The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use.").

103. *See* note 32 *supra.*

104. *See, e.g.,* Chappell & Co. v. Palermo Cafe Co., 249 F.2d 77, 82 (1st Cir. 1957); Glazier v. First Media Corp., 532 F. Supp. 63, 65 (D. Del. 1982); Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,311 (N.D. Ind. 1979).

105. *See* Redish, *supra* note 7, at 529; Comment, *The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts,* 44 U. CHI. L. REV. 365, 374 n.57 (1977) [hereinafter cited as CHICAGO Comment]; Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom,* 68 NW. U.L. REV. 503, 523-24 (1973).

106. *See* Curtis v. Loether, 415 U.S. 189, 197 (1974); *see also* note 32 *supra.* For a response to the argument that the association of discretion with equity is formalistic, see note 90 *supra.*

107. The Supreme Court in Curtis v. Loether, 415 U.S. 189, 197 (1974), implied that the discretion permitted in granting relief is relevant in characterizing the relief as equitable.

The 1974 Supreme Court holding in *Curtis v. Loether*[108] lends support to the foregoing analysis. *Curtis* involved a plaintiff's suit for damages and injunctive relief pursuant to Title VIII (the Fair Housing provision) of the Civil Rights Act of 1968.[109] The Court held that the damages sought, described by the plaintiff as actual and punitive, were "legal" in nature and hence within the purview of the seventh amendment.[110] However, Justice Marshall, writing for the majority, carefully distinguished the plaintiff's cause of action from title VII suits for job reinstatement and backpay, which lower courts had consistently held to be equitable.[111] Not all monetary statutory relief was "legal," he noted. Title VII backpay was restitutionary in nature, and the authorizing statutory language ("as the court deems appropriate") invested the factfinder with greater discretion than did title VIII provisions.[112]

Section 504(c) copyright relief, like title VII relief, has been characterized as "restitutionary" in nature.[113] In addition, the copyright statute invests the fact-finder with great discretion in determining section 504(c) damages.[114] Applying the reasoning of *Curtis v. Loether,* statutory copyright damages are analogous to title VII backpay damages.[115] Characterization of statutory damages as "equitable" is therefore entirely consistent with *Curtis,* and is the correct result under the second prong of the *Ross* test.

3. *Abilities of Juries*

The third prong of the *Ross* test concerns the "abilities and limitations of juries."[116] Under this leg of the test, a cause of action is more likely to be considered equitable if it typically raises issues too complex for the average juror to comprehend and decide fairly.[117]

This final leg of the *Ross* test does not aid in determining whether statutory copyright damages are properly considered legal or equitable. Admittedly, the issues involved in determining whether an infringement has occurred and what damages are appropriate are not

108. 415 U.S. 189 (1974).

109. Civil Rights Act of 1968, § 812, 42 U.S.C. § 3612 (1982).

110. *Curtis,* 415 U.S. at 195-96.

111. *Curtis,* 415 U.S. at 196-97.

112. *Curtis,* 415 U.S. at 197.

113. *See* notes 96-98 *supra* and accompanying text.

114. *See* notes 31-32 *supra* and accompanying text.

115. *See* note 97 *supra.*

116. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *See also* notes 58-61 *supra* and accompanying text.

117. *See* Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 529-30 (D. Conn. 1977) (holding case to be "legal" since, *inter alia,* issues were not overly complicated for jury). See also Redish, *supra* note 7, at 523-25, concerning the impact of the third prong.

generally of a prohibitively complex nature,[118] suggesting that copyright damages should always be regarded as legal. However, the third prong of the *Ross* test, as it has been applied, works in only one direction. That is, if a case is too complex for a jury, it is considered equitable; but if it is within the grasp of a jury, it is considered also to be within the grasp of a judge, and the test is inconclusive.[119]

On the other hand, even if statutory copyright issues were very complicated, the same issues would be raised in suits for actual damages, which have always been considered legal.[120] Therefore, the complexity factor cannot operate to make statutory damages equitable, without operating to make *all* copyright damages equitable. The third prong of the *Ross* test has not received a sufficiently positive response by lower courts to justify a change in the accepted characterization of actual damages.[121] This prong of the *Ross* test is thus not helpful in determining whether issues within the competence of *both* judge and jury should be characterized as legal or equitable, and is therefore not determinative in the context of statutory copyright damages.

In sum, neither the first nor the third element of the *Ross* inquiry answers the question of whether statutory damages are legal or equitable.[122] Therefore, the second element of the test — the nature of the remedy — is determinative. Statutory damages are highly discretionary and do not bear any necessary relationship to factual loss. These characteristics are more consistent with equitable than with legal jurisdiction and suggest that statutory damages are best characterized as equitable. Accordingly, no right to a jury trial should exist in cases brought to recover statutory copyright damages.

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118. *See* Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 530 (D. Conn. 1977).

119. *See* Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,310 (N.D. Ind. 1979); Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 530 (D. Conn. 1977). This analysis is to be distinguished from a second test, used when the *remedy* is clearly legal. In such a case, if the issues are not overly complex, the jury will try the case (since the remedy is a legal one). The present discussion seeks to identify the statutory *cause of action* as legal or equitable, a different inquiry.

120. The question of liability is the same in suits for actual and statutory damages. The issue of calculating damages, however, is *more* complicated in actual damages cases than in statutory damages cases. Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 530 (D. Conn. 1977). Thus, if a statutory damages case is too complex to be presented to a jury, the same is true of an actual damages case brought on identical facts.

121. For example, only one of the cases considering the seventh amendment's application to § 504(c) relief has even acknowledged the third prong of the *Ross* test. In Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059, at 15,310 (N.D. Ind. 1979), the court concluded that the issue was within the competence of both judge and jury, so that the test was inconclusive.

122. The same conclusion was reached in Broadcast Music, Inc. v. Papa John's, Inc., 1978-81 COPYRIGHT L. DEC. (CCH) ¶ 25,059 (N.D. Ind. 1979).

II. Policy Considerations for Limiting the Seventh Amendment's Scope

The problem of characterizing section 504(c) damages is merely one example of the difficulties faced by federal courts under the prevailing interpretation of the seventh amendment.[123] Related problems of allocating jury trials and classifying causes of action have led many observers to decry the antiquated practice of granting the right to jury trial only in cases that would have been characterized as "legal" in 1791.[124] Due to the clear language of the seventh amendment, the historical approach is largely unavoidable.[125] Courts retain greater latitude, however, in classifying *new* causes of action such as section 504(c) damages. When confronted with causes of action that did not exist in 1791, courts may define "law" narrowly, and "equity" broadly, without doing violence to either the Constitution or settled Supreme Court doctrine.[126] Such an approach would minimize the number of cases in which the seventh amendment mandates an absolute right to a jury trial, and maximize the number of cases in which rational, utilitarian decisions could be made about whether to provide a jury trial.

That the seventh amendment produces interpretative problems and leads to an irrational allocation of the right to jury trials has been widely recognized.[127] Were it not for the seventh amendment, the antiquated distinction between law and equity would have greatly declined in significance.[128] Today, the most important reason for the continued existence of an equity/law distinction is the allocation of jury trials. Unfortunately, cases are assigned the "legal" or "equitable" label for reasons wholly unrelated to the jury question.

As the situation now stands, a party's right to a jury trial in a civil case depends upon whether the cause of action would have been characterized as "legal" or "equitable" in 1791. Perhaps the most dis-

123. Other examples include seventh amendment law/equity questions arising out of ERISA actions, *In re* Vorpahl, 695 F.2d 318 (8th Cir. 1982); employment discrimination cases, Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969); and fair housing cases, Curtis v. Loether, 415 U.S. 189 (1974).

124. *See* Devlin, *Equity, Due Process and the Seventh Amendment,* 81 MICH. L. REV. 1571, 1575 (1983); James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 664 (1963); Redish, *supra* note 7, at 486-87.

125. *See* James, *supra* note 124, at 664 (conceding that the historical test is a necessary result of the seventh amendment's language, but arguing that courts should exercise greater flexibility in applying that test).

126. Such an approach would not be inconsistent with recent Supreme Court rulings. *See* notes 140-47 *infra* and accompanying text.

127. *See* note 124 *supra* and accompanying text.

128. *See* E. STASON, *supra* note 1, at 90. The distinction remains in two other areas of the law. First, the right to "equitable" relief (an injunction) is still based on the inadequacy of "legal" relief (money damages). Second, the scope of appellate review is still affected by whether the issue is legal or equitable. *Id.*

turbing aspect of this method of allocating jury trials is that, historically, the suitability of a case for jury trial was not an important factor in determining whether an emerging cause of action fell within equitable or legal jurisdiction.[129] As Professor James has noted, whether a case came to be equitable rather than legal frequently had more to do with the evidentiary, procedural, or relief-granting capabilities of equity than with the appropriateness of the case for judicial determination.[130] In some instances, equity's jurisdiction over a case depended simply on the Chancellor's political influence at a particular time.[131]

Even if it were rational to allocate civil jury trials according to whether a case was historically "legal" or "equitable," deciding into which category a case fits is difficult.[132] Authorities have remarked on more than one occasion that "equity" is impossible to define descriptively.[133] An attempt to categorize a case according to whether its closest 1791 analogue was considered equitable or legal may prove equally fruitless, since no guidelines for choosing the "closest" analogue are satisfactory. As the discussion of section 504(c) damages suggests, the "closest" analogue may be equitable or legal, depending on whether it is chosen according to the type of *right* being protected, the type of *relief* being provided, or any number of other factors.[134] The seventh amendment as it is now interpreted thus perpetuates an irrational and unworkable system for allocating jury trials.[135]

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129. James, *supra* note 124, at 661 ("At no time in history was the line dividing equity from law altogether — or even largely — the product of a rational choice between issues which were better suited to court or to jury trial.").

130. James, *supra* note 124, at 661-63. One English writer has expressed dismay at how the historic dichotomy is used in America: "There seemed to me to be something surprisingly obsolete about deciding upon the mode of trial, not as the Supreme Court had hinted in 1970 by reference to 'the practical abilities and limitations of juries' but by reference to a line reached in another country . . . nearly two centuries before." Devlin, *supra* note 124, at 1575. Lord Devlin has urged that some of the more unfortunate consequences of the seventh amendment can be avoided by applying the doctrine, known to English equity in 1791, that even clearly legal cases are to be tried in equity if the case is too complex for a jury to comprehend. *Id.* at 1599-605.

131. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-63 (1922), *quoted in* E. STASON, *supra* note 1, at 77-81 (relating the highlights of the long-running struggle between the Chancellor and the King's Bench).

132. James, *supra* note 124, at 668 ("[H]istory is sometimes equivocal."). *See also* note 87 *supra*.

133. The words of Professor Maitland are particularly apt:

> [W]e are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.
>
> This, you may well say, is but a poor thing to call a definition. . . . Still I fear that nothing better than this is possible.

F. MAITLAND, EQUITY 1 (1936), *quoted in* E. STASON, *supra* note 1, at 72. *See also* note 87 *supra*.

134. *See* text at notes 75-80 *supra*.

135. The problems caused by the seventh amendment's historical approach to jury allocation have led to numerous proposals for reform more extreme than that proposed in this Note. *See, e.g.*, James, *supra* note 124, at 690 (proposal to take post-1791 trends into account); Redish,

The constitutional mandate that "the right of trial by jury shall be preserved"[136] requires a principled allocation of that right to new causes of action, not a rigid historical inquiry. To that end, this Note proposes a straightforward solution that should prove effective: courts should interpret "equity" more broadly when defining newly created statutory causes of action. When a new statutory cause of action is neither clearly legal nor clearly equitable, and no pre-1791 analogy seems determinative, that cause of action should be regarded as equitable. Such a policy would limit the cases in which the seventh amendment *requires* a jury trial, thus leaving more cases free for legislative determination of the *appropriateness* of jury trial.[137]

This approach does not do violence to the constitutional guarantee of the right to a jury trial in civil cases.[138] A broadened definition of equity would affect only those few causes of action that have been newly created by Congress, and that seem to fit neither the "legal" nor the "equitable" definition. The historical argument that the framers "intended" to guarantee the right to a jury trial is weakest in a case of this type. A broad judicial definition of equity would simply allow

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supra note 7, at 517 (proposal to interpret seventh amendment strictly); CHICAGO Comment, *supra* note 105, at 365 (proposal to take the abilities of juries into account to a greater extent). Perhaps the most striking suggestion was Professor Redish's proposal to interpret the seventh amendment quite narrowly: "One possible means of employing the historical approach to achieve much the same flexibility would be to reject *all* forms of the rational approach. . . . [A] rigid historical approach would . . . dictate that, unless the actual substantive cause of action existed in 1791, the seventh amendment does not guarantee a right to jury trial.").

136. U.S. CONST. amend. VII.

137. The seventh amendment only "preserves" the right to jury trial in legal cases. Since the amendment makes no provision for cases not considered legal, Congress is free to decide whether or not to provide jury trials in such cases. Thus, defining "equity" broadly increases the number of actions for which Congress may decide the appropriateness of providing a jury trial, and decreases the number of actions in which a right to jury trial is rigidly required by the Constitution.

The legislature could make the jury trial requirement in a given type of case depend upon, for example, the nature and complexity of the issues to be decided, whether a need exists for uniform case-by-case results, and whether the remedy is to be applied so as to fit consistently within a broader legislative scheme. Professor Redish has made a similar, albeit more extreme proposal. *See* note 135 *supra*.

138. Robert Patry, in his discussion of copyright damages, has expressed concern over suggestions that the scope of the seventh amendment be narrowed:

> The right to a jury is one of our most cherished rights. It cannot be denied on the grounds of expediency, or on the ground that judges are allegedly more flexible or just than juries. The reasons our forefathers fought for the right to a jury are as valid today as they ever were.

Patry, *supra* note 16, at 194.

It appears, however, that the institution of civil jury trial is not considered quite the prized tradition it once was. Attacks on the efficacy and fairness of the civil jury have been heard from several quarters in the last half-century. The most famous of these attacks was unleashed by Judge Frank, who complained that "a better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of the [rules], and unpredictability of decisions." J. FRANK, COURTS ON TRIAL 123 (1949). Jury trials also have been blamed for much of the delay plaguing the modern federal court system. Hazard, Book Review, 48 CALIF. L. REV. 360 (1960), *cited in* Redish, *supra* note 7, at 506 n.84; Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956).

Congress to allocate jury trials on a more rational basis than does the present equitable/legal distinction.[139]

The proposed approach is also not inconsistent with established Supreme Court policy. At first glance, a restrictive interpretation of the seventh amendment would appear to run counter to the Supreme Court's opinions in *Beacon Theatres v. Westover,*[140] *Dairy Queen, Inc. v. Wood,*[141] and *Ross v. Bernhard,*[142] which support *expansion* of the right to trial by jury.[143] However, these three cases dealt not with the characterization of a new cause of action as equitable or legal, but with the jury trial consequences when recognizable equitable and legal issues were presented in the same case.[144] The very most that can be said for the applicability of these cases to the characterization of *new* causes of action is that they reflect a general bias on the Court's part in favor of expanding the seventh amendment's scope. Such an interpre-

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139. *See* notes 127-37 *supra* and accompanying text.

140. 359 U.S. 500 (1959).

141. 369 U.S. 469 (1962).

142. 396 U.S. 531 (1970).

143. *See generally* Patry, *supra* note 16, at 181-85 (relating *Beacon Theatres* and *Dairy Queen* to the statutory copyright damages dispute).

144. In *Beacon Theatres,* the plaintiff sought an injunction to prevent the defendant's filing of an antitrust claim. The defendant responded by counterclaiming with an antitrust count. 359 U.S. at 502-03. The Court held that the legal claim (the antitrust count) had to be tried to the jury before the equitable claim (the injunction) could be decided by the judge. Otherwise, reasoned the Court, the judge's ruling on the injunction might bar the defendant's antitrust claim by *res judicata,* thereby depriving defendant of his right to a jury trial on that claim. 359 U.S. at 507-08. *Beacon Theatres* is directly applicable, therefore, only to the issue of deciding the order of trial when recognizable equitable and legal claims are found in the same action. It does not speak to the issue of defining a new cause of action as "equitable" or "legal."

The same may be said for *Dairy Queen,* decided three years later. The plaintiff corporation in that case had sought a judgment for money damages, but had characterized its plea as one for an "accounting." The Court held that this characterization did not alter the legal nature of the claim. 369 U.S. at 477-78. The Court also ruled that the defendant retained its right to have legal issues tried to a jury despite the lower court's characterization of those issues as "incidental" to equitable ones present in the same case. 369 U.S. at 473.

In *Ross,* the Court held that a shareholders' derivative suit carried the right to a jury trial in certain instances. 396 U.S. at 539. Though shareholders' derivative suits had traditionally been considered equitable, the Court reasoned that with the advent of the Federal Rules, these cases could be divided into two subdivisions: (1) the stockholders' right to sue on behalf of the corporation, and (2) the corporation's claim against the defendants. The Court held that in those cases in which the latter claim could properly be described as "legal" the parties would be entitled to trial by jury. 396 U.S. at 539.

The dissenting opinion in *Ross* argued that the majority was not truly determining the disposition of two separate causes of action, but rather redefining one general cause of action: the shareholders' derivative suit. 396 U.S. at 549 (Stewart, J., dissenting). If this description of the majority's reasoning were accurate, the case would stand as authority for defining "legal" causes of action broadly. But the majority in *Ross* saw itself as allocating the factfinding function between several *distinct* causes of action. 396 U.S. at 539.

Therefore *Ross,* like *Beacon Theatres* and *Dairy Queen,* is not applicable to the classification of a new cause of action such as the statutory copyright remedy. The latter problem, in fact, is fundamentally different from that presented in those three cases. The question of whether a single new cause of action is equitable or legal cannot be resolved simply by splitting the case up. This question, rather, involves a determination of how to categorize *one* issue that may possess both equitable and legal characteristics.

tation would, however, read too much into the Court's opinions.[145] As various other Supreme Court opinions illustrate, the Court has been willing to narrow the scope of the seventh amendment in appropriate situations.[146] Moreover, even if a pro-jury bias has colored the Court's decisions in cases involving both legal and equitable issues, that bias would not necessarily extend to the separate issue of classifying new causes of action.

In this limited area — categorization of new causes of action — the Court has been all but silent.[147] Thus, a policy of defining "equity" broadly in such cases would violate no settled constitutional interpretation. Indeed, such a policy would lend coherence to seventh amendment doctrine by ameliorating some of the problems caused by the perpetuation of the antiquated equitable/legal distinction.

CONCLUSION

Parties in dispute over whether statutory copyright damages are legal or equitable have burdened the federal courts with numerous cases and many appeals.[148] As in other instances of litigation engendered by the seventh amendment, however, the underlying issue is not really whether the cases are legal or equitable, but whether the parties have the right to a jury trial.

The available evidence indicates that the statutory copyright damages remedy is properly considered equitable. But even if this result were not so clear, a policy of defining this and other ambiguous causes of action as equitable would help reduce the irrelevant arguments, and the irrational results, produced by an unduly broad interpretation of the seventh amendment.

— Andrew W. Stumpff

145. The Court has not argued from the premise that the seventh amendment is to be interpreted broadly. Rather, in these cases the Court has found that procedural barriers that had prevented *application* of the amendment have been removed by the Federal Rules of Civil Procedure. The Court has not extended the definition of what cases are to be called "legal," but instead has merely recognized the rules' potential for separating concededly legal claims from concededly equitable ones.

146. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Commn., 430 U.S. 442 (1977) (denying right to jury trial in OSHA hearing); Katchen v. Landy, 382 U.S. 323 (1966) (denying right to jury trial in bankruptcy case).

147. Only Ross v. Bernhard, 396 U.S. 531 (1970), and Curtis v. Loether, 415 U.S. 189 (1974), have touched on this issue. In passing, *Ross* mentioned a three-part test that deviates only slightly from the historical test. *See* notes 57-61 *supra* and accompanying text. *Curtis* stands as authority for characterizing statutory copyright damages as equitable. *See* notes 108-15 *supra* and accompanying text.

148. *See, e.g.*, note 23 *supra.*