

DECIDING FAIR USE

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INTRODUCTION

Is copyright fair use a fact question for the jury or a legal question for the court? On appeal, are fair use decisions reviewed deferentially or de novo? In other words, is fair use a question of fact for the jury and off limits to appellate court second-guessing, or is fair use a question of law for which an appellate court can decide anew? In *Oracle America, Inc. v. Google LLC*, the Federal Circuit viewed the jury’s fair use verdict “as advisory only” and independently reweighed the fair use factors, concluding that “allowing Google to commercially exploit Oracle’s work will not advance the purposes of copyright in this case.”¹ The Federal Circuit’s handling of the jury’s fair use verdict raises important and timely questions about how to conceptualize and operationalize fair use. This Article is the first to lay bare the reality that who decides fair use—judge or jury—is a pure policy question.

To tackle thorny questions about deciding fair use, this Article proceeds in three parts. Part I explores the nature of fair use, including whether it is better understood as an affirmative defense or as an

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1. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1196, 1210 (Fed. Cir. 2018) (“Having undertaken a case-specific analysis of all four factors, we must weigh the factors together in light of the purposes of copyright. We conclude that allowing Google to commercially exploit Oracle’s work will not advance the purposes of copyright in this case.”) (internal quotation and citation omitted), *cert. granted*, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956).

affirmative right. Notwithstanding Supreme Court dicta that fair use is an affirmative defense, persuasive scholarly critiques suggest this characterization is a mistake.² Whether fair use is denominated simply a defense, or rather an affirmative defense, affects which party has the burden of proving fair use and which party will prevail if the evidence is in equipoise. On this point, I join the chorus of scholars arguing fair use needs a course correction.³ As a matter of statutory construction, fair use is better understood as a right and a definitional limit on a copyright holder's statutory rights. As a definitional limit on a copyright holder's statutory rights, fair use cannot logically be denominated an affirmative defense. Fair use should not be a user's burden to prove, rather it should be part of the copyright holder's prima facie case. And more than simply a statutory right, fair use is consigned a speech-protective function. The Supreme Court has emphasized that fair use, along with the idea-expression dichotomy, are "built-in First Amendment accommodations."⁴

If fair use is conceptualized as a statutory right and a speech-protective safeguard, the next question is how fair use questions are operationalized. Part II examines who decides fair use, including whether it is a fact question for the jury or a legal question for the court—and then whether such decisions are reviewed deferentially or de novo by an appellate court. But fair use questions do not fit neatly into the law/fact paradigm that typically guides decision-making authority.⁵ Fair use is denominated a "mixed" question of law and fact because it entails applying the law to the facts.⁶ Law-application-mixed questions that are deemed more fact-like are decided by a jury, whereas mixed questions that are deemed more law-like are decided by the court.⁷

2. See discussion *infra* Part I (discussing the arguments of scholars who suggest that considering fair use an affirmative defense is a mistake).

3. See, e.g., Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 698 (2015); see also Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 163 (2011); Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative*, 54 J. COPYRIGHT SOC'Y U.S.A. 139, 165–66 (2007).

4. See *Golan v. Holder*, 565 U.S. 302, 328 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003)).

5. See discussion *infra* Part II (discussing the standard of review for fair use decisions).

6. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact.").

7. See *U.S. Bank Nat. Ass'n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) ("Mixed questions are not all alike.").

Part III discusses why it matters who decides fair use.⁸ In brief, if fair use is an affirmative speech-protective right, then it matters if we entrust this decision to a judge or a jury. Rather than hiding behind the “slippery” distinction between fact and law,⁹ this Article explains how the allocation of decision-making authority in fair use determinations is a matter of judicial politics. In general, decision-making responsibility is allocated both horizontally and vertically within the court system.¹⁰ Horizontally, the allocative choice is between the trial judge and the jury—often under the influence of the Seventh Amendment.¹¹ Vertically, standards of appellate review allocate the center of gravity for decision-making authority between the trial court and the appellate court. A mixed question lacks an a priori guide to assigning decision-making authority. It often devolves to a matter of judicial preference. In other words, whether a judge or jury decides a mixed question risks being dictated by judicial preference—not the Seventh Amendment or other sound policy. Categorizing fair use as either more fact-like or more law-like reflects a normative allocative policy assessment about who should decide such questions. The pregnant policy question is whether we want speech-protective rights assessed by a judge or a jury. Who has the institutional capacity to do a better job? Who do we trust more?

I. CONCEPTUALIZING THE NATURE OF FAIR USE

The Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”¹² Congress enacted the first copyright act in 1790.¹³ While some measure of copyright protection has existed since the founding of our

8. See *infra* Part III (discussing fair use as determined by judges and juries).

9. *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995) (“[T]he proper characterization of a question as one of fact or law is sometimes slippery.”); see also *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (“[W]e [do not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”).

10. See discussion *infra* Part III. See generally Amanda Reid, *Fructifying the First Amendment: An Asymmetric Approach to Constitutional Fact Doctrine*, 11 FED. CTS. L. REV. 109 (2019) (conceptualizing the court system as having both a horizontal plane and a vertical plane, with the trial court level as a horizontal plane and the appellate court level as a vertical plane).

11. U.S. CONST. amend. VII.

12. U.S. CONST. art. I, § 8, cl. 8.

13. See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124.

republic, scholars have long pondered the existential nature of the right.¹⁴ In particular, is copyright purely a limited statutory creation, or do authors have a natural right to the fruits of their labor, independent of the statutory rights? The Supreme Court resoundingly resolved the nature-debate by concluding U.S. copyright is a limited statutory creation, rather than an unconstrained natural right.¹⁵ In *Wheaton v. Peters*, the Supreme Court rejected the natural law argument.¹⁶ Rather than legislating against the backdrop of a natural right, the *Wheaton* Court held that “Congress, then, by this [copyright] act, instead of sanctioning an existing right . . . created it.”¹⁷ Copyright, the Court explained, “does not exist at common law—it originated, if at all, under the acts of congress.”¹⁸

Copyright is entirely a statutory product, not a common law product.¹⁹ The Supreme Court recently clarified that patents—which flow from the same constitutional authority as copyrights—are also purely a statutory product, not a common law product.²⁰ Copyright,

14. See, e.g., Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945) (“What is it that the law of copyright is really trying to accomplish?”); see also Morris Ebenstein, *Introduction*, in COPYRIGHT LAW: BASIC AND RELATED MATERIALS XX (1956) (“What is the subject of copyright? What is the object of copyright? In short, what is copyright?”); Diane Leenheer Zimmerman, *The Statute of Anne and Its Progeny: Variations Without a Theme*, 47 HOUS. L. REV. 965, 1009 (2010) (“Copyright, to put the case bluntly, is an analytical mess.”).

15. See generally *Wheaton v. Peters*, 33 U.S. 591 (1834). See also Zimmerman, *supra* note 14, at 966, 978–79. U.S. copyright was modeled on the English Statute of Anne. See *id.* at 966 (citing Statute of Anne, 1710, 8 Ann., c. 19 (G.B.)). Under the Statute of Anne, a similar question arose whether the statute supplemented a preexisting natural right or whether it created a heretofore nonexistent right. See *id.* In 1774, the English House of Lords, in *Donaldson v. Beckett*, rejected the argument of a perpetual copyright and concluded that published works remained exclusive property only for the statutory term. See *id.* at 978–79 (citing *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 846–47 (rejecting perpetual common law right of authors in favor of the limited right of times set in the statute), *overruling* *Millar v. Taylor*, (1769) 98 Eng. Rep. 201).

16. See *Peters*, 33 U.S. at 661 (“That [C]ongress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear . . .”).

17. *Id.*

18. *Id.* at 663. See also Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1156–70 (1983).

19. See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 19 (1968) (“Copyright was not a product of the common law. It was a product of censorship, guild monopoly, trade-regulation statutes, and misunderstanding.”).

20. See *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1374 (2018) (“The franchise gives the patent owner the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.

more directly, is a statutory privilege, not a constitutional or natural right.²¹ Copyright is an instrument for achieving a utilitarian goal of promoting the “harvest of knowledge.”²² As the *Harper & Row* Court explained, “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”²³ Copyright is best understood as a limited-term intrusion upon the public domain, rather than a plenary property right.²⁴ Copyright is a government license, limited by the social goals of the copyright bargain. As the *Sony* Court noted, “the limited grant is a means by which an important public purpose may be achieved.”²⁵ Moreover, the Court explained, “It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”²⁶ Once copyright on a work ends, the work is free for all to use. And during the term of protection, the work is free for fair use.

Whether denominated fair abridgment or fair use, courts have long excluded certain uses from a copyright holder’s exclusive

That right did not exist at common law. Rather, it is a creature of statute law.”) (internal citations and quotation marks omitted).

21. See *Stewart v. Abend*, 495 U.S. 207, 251 (1990) (Stevens, J., dissenting) (noting that “copyright is a creature of statute”); see also Harry N. Rosenfield, *The Constitutional Dimension of “Fair Use” in Copyright Law*, 50 NOTRE DAME L. REV. 790, 791–92 (1975). Cf. *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1375 (2018) (“Patents convey only a specific form of property right—a public franchise. . . . As a public franchise, a patent can confer only the rights that the statute prescribes.”) (internal citations and quotation marks omitted).

22. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

23. *Id.* at 546.

24. See *Birch*, *supra* note 3, at 152 n.30 (“[C]opyright is less a subset of property law than a subset of public-domain law, which becomes clear when one realizes that all writings fall into one of two categories: those that are copyrightable and those that are not. Writings in this latter category are in the public domain.”). Patents are also an intrusion on the public domain. See *Oil States Energy Servs.*, 138 S. Ct. at 1373 (“By ‘issuing patents,’ the PTO ‘take[s] from the public rights of immense value, and bestow[s] them upon the patentee.’” (quoting *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888))).

25. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

26. *Id.*; see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) (“The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption.”).

domain.²⁷ Downstream creators and secondary users have perennially been allowed to make fair use of copyrighted works by transforming and reusing a work. Fair use is an essential part of the copyright design. At its core, the copyright schema needs fair use.²⁸ As the Supreme Court has emphasized, “from the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’”²⁹ And as Judge Pierre Leval explained, “[t]he objectives of fair use are the objectives of copyright.”³⁰ Copyright’s internal struggle is the inherent tension between protecting extant works and fostering new creations.³¹ Fair use helps mediate and balance these interests in protecting both the new and the old. At its core, fair use is a speech-protective safeguard that helps copyright achieve its constitutionally mandated purpose of promoting human progress.³²

Fair use is designed to be an adaptable doctrine. But fair use’s plasticity is both a virtue and a vice.³³ Courts have called the fair use doctrine “so flexible as virtually to defy definition”³⁴ and “one of the most unsettled areas of the law.”³⁵ The question of fair use is “the most

27. See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1410 (2011) (“As the prehistory of fair use makes plain, copyright owners’ rights have been subject to and defined by the public’s fair use rights since the beginnings of statutory copyright.”).

28. Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (“Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.”).

29. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST., art. I, § 8, cl. 8).

30. Pierre N. Leval, *Campbell As Fair Use Blueprint?*, 90 WASH. L. REV. 597, 602 (2015).

31. See *Campbell*, 510 U.S. at 575–76.

32. See *Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (“Given the ‘speech-protective purposes and safeguards’ embraced by copyright law [*i.e.*, the ‘idea/expression dichotomy’ and the ‘fair use’ defense], we concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case. We reach the same conclusion here.” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))).

33. See Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1857 (2007) (“The source of the meritorious flexibility of fair use—its open-ended and discretionary character—is also the main cause of its deficiencies.”).

34. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

35. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996).

troublesome in the whole law of copyright,” a distinguished panel of the Second Circuit once bemoaned.³⁶ Its fluctuant nature is illustrated by the fact that, on two occasions, fair use decisions were affirmed by an equally divided Supreme Court.³⁷ And of the three recent fair use cases to reach the High Court, each was overturned at successive levels of appellate review—and two of the cases divided the Court.³⁸ The consternation of courts and commentators is manifest.³⁹ Professor Paul Goldstein put it colorfully: “Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it.”⁴⁰

36. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (decided by judges Learned Hand, Augustus N. Hand, and Robert P. Patterson); see also EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 386–87 (1879) (“[T]o draw the line between a fair and an unlawful use, is often one of the most difficult problems in the law of copyright.”); Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. 43, 52 (1953) (“There is one proposition about fair use on which there is widespread agreement: it is not easy to decide what is and what is not a fair use.”).

37. See generally *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (per curiam) (Blackmun, J., abstained), *aff’g by an equally divided court* 487 F.2d 1345 (Ct. Cl. 1973); *Columbia Broad. Sys., Inc. v. Loew’s Inc.*, 356 U.S. 43, 43 (1958) (per curiam) (Douglas, J., abstained), *aff’g by an equally divided court* *Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956). See also Harvey S. Perlman & Laurens H. Rhinelander, *Williams & Wilkins Co. v. United States: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355, 404 (1975) (“A single doctrine that has forced the Court to divide equally twice can claim some measure of difficulty.”).

38. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (9-0 decision); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (6-3 decision); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (5-4 decision); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2018) [hereinafter NIMMER ON COPYRIGHT] (“The malleability of fair use emerges starkly from the fact that all three [Supreme Court] cases [in 1984, 1985, and 1994] were overturned at each level of review, two of them by split opinions at the Supreme Court level.”) (citations omitted).

39. See, e.g., Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 457 (2013) (“Copyrights are really complicated.”); see also Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 278 (2015) (“[F]air use has been bestowed with epithets such as ‘disarray,’ ‘in bad shape,’ ‘notoriously vague,’ ‘nobody knows,’ ‘great white whale of American copyright law,’ ‘protean,’ ‘difficult—some say impossible—to define,’ ‘confusion,’ ‘guess and pray,’ ‘mysterious,’ ‘disorderly basket of exceptions,’ ‘precarious,’ ‘nearly impossible to predict,’ ‘as vague as possible,’ ‘more fickle than fair,’ and ‘astonishingly bad.’”) (citations omitted).

40. Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008).

Modern fair use is often traced to the 1841 case *Folsom v. Marsh*.⁴¹ Justice Joseph Story, while sitting as a circuit court judge, famously articulated the considerations that would later inform the statutory fair use factors.⁴² In deciding whether a defendant—who published a two-volume work containing material from plaintiff’s twelve-volume work—infringed plaintiff’s copyright, Justice Story stated:

[W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.⁴³

Justice Story’s considerations are often credited as the progenitor of the U.S. fair use doctrine.⁴⁴

The 1976 Copyright Act codified the judicially-created fair use considerations.⁴⁵ Section 107 does not define fair use, rather it lists four “factors to be considered.”⁴⁶ These four statutory factors, echoing *Folsom v. Marsh*, are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁷ The statute also expressly provides that fair use of a copyrighted work “is not an

41. See *Folsom v. Marsh*, 9 F. Cas. 342, 342 (C.C.D. Mass. 1841) (No. 4,901).

42. See *id.* at 347–48.

43. *Id.* at 348.

44. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 229 (2008) (“In *Folsom*, Justice Story introduced into American copyright law the concept of fair use. Ironically, the fair use doctrine is commonly celebrated today as one of the major safeguards against overexpansion of copyright protection. At the time it was introduced by Justice Story, however, it was a vehicle for a radical enlargement of the scope of copyright. The introduction of fair use fundamentally changed copyright’s baseline. Formerly, infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate. In the new fair use environment, all subsequent uses became presumptively infringing unless found to be fair use.”).

45. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (“The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.”).

46. 17 U.S.C. § 107 (2018).

47. See *id.*; see also NIMMER ON COPYRIGHT, *supra* note 38, at § 13.05[A] (“[T]he four factors enumerated in the statute are sometimes augmented by extra-statutory interlopers.”).

infringement of copyright.”⁴⁸ The legislative history suggests that by including a statutory provision for fair use, Congress sought to codify the judicial doctrine but not alter it. The House Report accompanying the law indicated Congress’s intent in enacting Section 107 was “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”⁴⁹ The statute was thus intended to codify, but not ossify or alter, fair use.⁵⁰

This codification of fair use left open some important questions about the nature of fair use. Perhaps, as some scholars have suggested, fair use is little more than a variant of the Golden Rule: “Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.”⁵¹ Other scholars have urged that fair use is “allowed as reasonable and customary, on the theory that the author must have foreseen it and tacitly consented to it.”⁵² This tacit consent can give rise to an “implied license” to use a copyrighted work.⁵³ On this theory, commentators have urged that “custom or public policy defines what is reasonable.”⁵⁴ Courts have also endorsed this view: “As we balance these [fair use] factors, we bear in mind that fair use is appropriate where a ‘reasonable copyright owner’ would have consented to the use, i.e., where the ‘custom or public policy’ at

48. 17 U.S.C. § 107.

49. H.R. REP. NO. 94-1476, at 66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

50. See Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 259 (1988) (“The views of Congress as expressed in the House Report therefore can be boiled down to three propositions: first, no exact rules are possible; second, the statute does not freeze the law; and third, the statute does not change the law.”).

51. Joseph McDonald, *Non-Infringing Uses*, 9 BULL. COPYRIGHT SOC’Y 466, 467 (1962); see also John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 837 (1968) (“The doctrine of fair use is even simpler to apply since it is based on good faith, and most problems may be answered by recourse to the Golden Rule: ‘Do unto others as you would have them do unto you.’”).

52. RICHARD CROSBY DE WOLF, AN OUTLINE OF COPYRIGHT LAW 143 (1925).

53. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1257 (11th Cir. 2014) (“[I]n order to promote the creation of new works, our laws contemplate that some secondary users—those implied licensees making fair use of copyrighted works—will be allowed to make use of original authors’ works.”).

54. *Fair Use of Copyrighted Works, Subcomm. on Patents, Trademarks & Copyrights of the Sen. Comm. on the Judiciary*, 86th Cong. 15 (1960), <https://www.copyright.gov/history/studies/study14.pdf> [https://perma.cc/8DSC-TQZW] (Study No. 14, 15).

the time would have defined the use as reasonable.”⁵⁵ While it may be a tempting way to conceptualize fair use, custom and the Golden Rule are ultimately inadequate standards.

Custom does not delimit fair use; a novel use can be a fair use.⁵⁶ Moreover, an implied license can be extinguished by routine express denial of use.⁵⁷ Blanket prohibitions against unconsented use vitiate tacit consent or custom as a basis for fair use. The Golden Rule also cannot be a reliable touchstone because some copyright holders have capacious views of their rights. Some rightsholders have urged for perpetual copyright protection⁵⁸—notwithstanding the clear constitutional directive that protection endure for “limited Times.”⁵⁹ Broad copyright notices stating “[n]o part of this publication may be reproduced without permission in writing from the publisher” or “[a]ny use of this telecast or any pictures, descriptions, or accounts of the game without the NFL’s consent is prohibited”⁶⁰ also illustrate this perspective.⁶¹ Some copyright holders have an expansive view of the zone they think they can control.⁶² The Golden Rule rests on a notion of resentment, but resentment starts to look like an expectation. And as expectations grow, fair use shrinks.

55. *Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006) (quoting *Fair Use of Copyrighted Works, Subcomm. on Patents, Trademarks & Copyrights of the Sen. Comm. on the Judiciary*, 86th Cong. 15 (1960)).

56. *See* Cohen, *supra* note 36, at 52 (“An entirely new use may be held to be a fair use if it meets the tests which the courts have laid down. Although fair use has been defined as a use which is reasonable and customary, no court has said that a use must be customary in order to be fair.”) (citation omitted).

57. *See id.* at 51.

58. *See* *Eldred v. Ashcroft*, 537 U.S. 186, 206 n.11 (2003) (noting there have been “proponents of perpetual copyright,” including the Songwriters Guild).

59. U.S. CONST. art. I, § 8, cl. 8.

60. *See* Eric Gebert, *The Long Arm of the National Football League: Is the NFL’s Copyright Policy Violating the Rights of Its Fans and Franchises?*, B.C. INT. PROP. & TECH. F. (Feb. 6, 2017), <http://bciptf.org/wp-content/uploads/2017/02/Blog-The-Long-Arm-of-the-National-Football-League-Gebert.pdf> [<https://perma.cc/MJ6U-BUWF>].

61. *Cf.* Haochen Sun, *Fair Use As A Collective User Right*, 90 N.C. L. REV. 125, 158 (2011) (“[M]any copyright holders have routinely exaggerated the scope of their economic rights as a way to prevent the public from making a fair use of their works. For example, the cautionary notice—‘No part of this book can be reproduced without the permission of the publisher’—appears in almost every book published, copyrighted or not.”).

62. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 3 (1991) (“Not surprisingly, copyright owners tend to give the fair-use doctrine a narrow reading, while users naturally take a broader view.”).

Fair use cannot depend on custom or the Golden Rule.⁶³ Copyright is a goal-oriented statutory privilege fashioned to promote the progress of science and learning.⁶⁴ And fair use is a user's right that helps the copyright schema achieve its goals.⁶⁵

Copyright is a shared right of use between the rightsholder and the public.⁶⁶ Fair use, much like the freedom of the press, is a right of the people, not wholly a right of the publishers.⁶⁷ As the Supreme Court explained, the First Amendment "guarantees are not for the benefit of the press so much as for the benefit of all of us" because "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society."⁶⁸ Similarly, the Supreme Court observed that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"⁶⁹ The Court emphasized that reward to the copyright holder is a "secondary consideration" to that of the public weal.⁷⁰

Granting copyright holders certain exclusive rights is a means to an enlightened public. Similarly, protecting a free press is a means to

63. Cf. Leon R. Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 214 (1954) ("What is 'fair use' is to be determined by judicial criteria, not by the copyright owner's fiat.")

64. See, e.g., Leval, *supra* note 28, at 1107 ("The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts."); see also Ebenstein, *supra* note 14, at xx ("Another fact, which, although well known, is frequently 'lost in the shuffle,' [sic] is that statutory copyright is solely the product of a fixed principle of public policy and consequently is governed and dominated by that principle. That principle is that it is desirable 'to promote the progress of science and useful arts.' [sic] Consequently, copyright protection is granted when to do so accords with that principle and is withheld when it is inconsistent with that principle.")

65. See PATTERSON & LINDBERG, *supra* note 62, at 11; see also Sun, *supra* note 61, at 132.

66. See Birch, *supra* note 3, at 147 n.22 ("The real difference between copyright as property and other types of property, then, is that copyright is primarily a right of use shared by the owner with others, but for different purposes. The owner's right of use is to sell copies of the work, the user's right is to use the copy for learning.")

67. See Rosenfield, *supra* note 21, at 794–95.

68. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

69. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

70. *Id.*

promoting an informed public. The public must be informed in order to make rational choices, and the public must be able to make rational choices in order to maintain a free society.⁷¹ Publishers and the press are thus a conduit to inform, educate, and entertain the public. The right of the listener and the user—both as a consumer and a citizen—should not be subordinated to the means of promoting the progress of learning.⁷² But users’ rights have long lacked an effective champion.⁷³ Copyright is a classic public-choice tragedy.⁷⁴ Public-choice theory teaches that small, organized groups are more effective at lobbying for favorable legislation than larger, more heterogeneous groups.⁷⁵ Incumbent rightsholders have exerted a preternatural influence on the legislative process—to the detriment of the public interest.⁷⁶ One way to reinvigorate the public interest is to stop labeling fair use as an affirmative defense.⁷⁷ Instead, it should simply be denominated a

71. See BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (1928) (“There is no freedom without choice, and there is no choice without knowledge Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget. . . . At the root of all liberty is the liberty to know.”).

72. Cf. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“It would be a barren marketplace of ideas that had only sellers and no buyers.”).

73. See Chafee, *supra* note 14, at 517 (“In short, everybody is organized except the readers and consumers, who have more at stake than anybody else. Congress ought to speak for them, but it is subjected to tremendous pressure from the groups which are organized.”).

74. See, e.g., Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 291–92 (2004); Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 786 (2001); L. Ray Patterson, *Copyright and the “Exclusive Right” of Authors*, 1 J. INTEL. PROP. L. 1, 27 (1993); Jessica Litman, *Copyright and Information Policy*, 55 L. & CONTEMP. PROBS. 185, 187–95 (1992); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 312 (1989).

75. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

76. See, e.g., William F. Patry, *A Few Observations About the State of Copyright Law*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 88 (Ruth L. Okediji ed., 2017) (suggesting an unhealthy addition to “[a]mending our copyright laws by making them stronger and stronger” such that “copyright law has become a serious threat to culture and the production of new works”); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) (detailing how incumbents have proposed and drafted various amendments to the Copyright Act).

77. See Sun, *supra* note 61, at 129.

defense. As discussed below, the copyright holder should carry the burden of proof that the use is not fair.⁷⁸

The statute expressly states fair use is not an infringement: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”⁷⁹ But is fair use not an infringement because it is an affirmative defense?⁸⁰ Or is fair use not an infringement because it is an affirmative right—beyond the scope of the copyright owner’s exclusive domain? Simply denominating fair use as a non-infringing use does not answer this inquiry. And this inquiry is significant because (1) it affects burdens of proof and (2) it directs who decides the question.

Contrary to the legislative history of the 1976 Copyright Act, the plain language of the statute, and sound public policy, the Supreme Court has denominated fair use as an affirmative defense.⁸¹ In *Harper & Row*, the Court stated, “The drafters [of the 1976 Copyright Act] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an *affirmative defense* requiring a case-by-case analysis.”⁸² This label was picked up by Congress seven years later when it amended the Copyright Act in

78. See *Coll. Entrance Examination Bd. v. Cuomo*, 788 F. Supp. 134, 140 (N.D.N.Y. 1992) (“Section 107 states in pertinent part that ‘[t]he fair use of a copyrighted work . . . is not an infringement of copyright.’ Therefore, in order to demonstrate that it is likely to succeed on the merits of its copyright infringement claim, [plaintiff] must show that the [defendant’s] use of its [copyrighted work] is not a fair use.”) (citation omitted), *abrogated by* H.R. REP. NO. 102-836, at 3 n.3 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 2553.

79. 17 U.S.C. § 107.

80. Cf. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (“The burden of proof is on the copier because fair use is an affirmative defense, and [defendant] has presented no evidence sufficient to withstand summary judgment.”) (citations omitted).

81. See Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 675 (2019) (arguing “fair use is part of the inquiry into what constitutes infringement” and that “the legislative history of the 1976 Act does not support treating fair use as an affirmative defense”).

82. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (emphasis added). *But see* Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 989 (2002) (positing that language from *Harper & Row* could be read to “suggest[] that the burden of proof is on the plaintiff ‘[t]o negate fair use’”); *Harper & Row*, 471 U.S. at 568 (“[T]o negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984))).

1992.⁸³ The Judiciary Committee cited *Harper & Row* when it declared “[f]air use is an affirmative defense” and the “the burden of proving fair use is always on the party asserting the defense.”⁸⁴ Two years later, the Court reiterated that fair use is an affirmative defense in *Campbell v. Acuff-Rose Music*: “Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”⁸⁵ In support of its assertion, the *Campbell* Court relied upon both *Harper & Row* and the 1992 legislative history.⁸⁶ Scholars have criticized the woefully thin analysis of these conclusory statements.⁸⁷

Labeling fair use as an affirmative defense, rather than simply a defense, is consequential.⁸⁸ An affirmative defense places the burden on the defendant to prove and persuade fair use.⁸⁹ Carrying the burden

83. See H.R. REP. NO. 102-836, at 3 n.3 (1992), as reprinted in 1992 U.S.C.C.A.N. 2553.

84. *Id.* (“Fair use is an affirmative defense, and as such is relevant only after a copyright owner has made out a prima facie case of infringement. A prima facie case of infringement consists of ownership of the right asserted and unauthorized appropriation by the defendant of a material amount of expression. The copying of facts or of a de minimis amount of expression will not support a prima facie case of infringement. Fair use thus excuses the copying of a material amount of expression, with the test of materiality involving both quantitative and qualitative inquiries.”).

85. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); see also Sun, *supra* note 61, at 150–51 (“[B]y treating fair use as an affirmative defense, courts have placed too much emphasis on examining the impact of the use on the copyright holder’s market, which is required by the fourth factor of the fair use analysis.”).

86. See *Campbell*, 510 U.S. at 590 n.20.

87. See, e.g., Sun, *supra* note 61, at 142 (“[Q]uestions still remain as to why fair use has been uniformly defined as an affirmative defense. Judicial decisions on fair use cases shed little light on this point. Nor do the legislative reports and academic treatises.”); Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1788 (2010) (“Tellingly, in neither *Harper & Row*, the 1992 Judiciary Committee Report, nor *Campbell* does any substantive reason appear to support labeling fair use an affirmative defense.”); see also Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 854 n.259 (2015) (“[T]he Court in *Campbell* erred in this assertion about fair use, and this error should be corrected.”).

88. See Loren, *supra* note 3, at 712 (“The difference between a ‘defense’ and an ‘affirmative defense’ may seem to be one of degree, but in the context of fair use, it is an important distinction with significant consequences. When a defendant asserts that the reason he is not an infringer is that his activity is a fair use, the court should consider the question of infringement holistically.”); see also Sun, *supra* note 61, at 155 (“Treating fair use as merely an affirmative defense has also caused indirect harms to users. Placing the burden of proof on users causes them to bear extra litigation costs.”).

89. See, e.g., *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1187 (C.D. Cal. 1998) (“Because fair use is an affirmative defense, Defendants bear the burden of proof on all of its factors.”); see also Loren, *supra* note

of proof means the defendant (1) must bring forward evidence to support fair use (the burden of production) and (2) must convince the factfinder that the particular use is indeed fair (the burden of persuasion).⁹⁰ If a defendant fails to carry the burden of proof on an affirmative defense, defendant cannot prevail on that basis.⁹¹

Allocating burdens of proof often revolves around considerations of policy and practicality.⁹² Policy considerations look at the substantive law, and burden allocations are often driven by an interest to either favor or disfavor a litigant based on the underlying goals of the substantive law. As scholars note, “[s]ometimes courts put a finger on the scales to favor the party who seeks to vindicate the policy of the substantive law. In other cases, courts place hurdles in the path of the litigant who seeks to advance a position disfavored by the substantive law.”⁹³ Beyond policy questions, courts consider practicality—particularly with regard to the question of possession of proof, which inquires whether one litigant has superior access to the evidence that proves a particular fact.⁹⁴ As Jeremy Bentham noted long ago, the burden of proof should rest “on whom it would sit lightest”

3, at 694 (“[B]y labeling fair use an affirmative defense, the Court had created a presumption: without proof of the affirmative defense of fair use, the plaintiff would prevail on its infringement claim due to the plaintiff’s demonstration of its prima facie case of infringement.”).

90. See, e.g., James B. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45, 48 (1890); see also ROBERT E. JONES ET AL., FEDERAL CIVIL TRIALS & EVIDENCE, § 8:4800 (2019) (“Whether a party has met its burden of production is something the judge decides (e.g., on a motion for judgment as a matter of law). Whether a party has met its burden of persuasion is something the jury decides.”).

91. See Loren, *supra* note 3, at 690 (“The difference between treating fair use as a defense and treating it as an affirmative defense is significant. Not only does the label ‘affirmative defense’ trigger a pleading obligation, but it also has an important consequence when it comes to the burden of proof. A defense is simply a ‘reason why the plaintiff . . . has no valid case.’”) (citations omitted); see also Snow, *supra* note 87, at 1784 (“The burden of proof assigns a loser by default, and, for fair users, overcoming the default position represents a practical impossibility where the very definition of fairness is vague.”).

92. See 21B WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5122 (2d ed. 2005) (“One popular way of categorizing the relevant considers in allocating the burdens of proof is The Three Ps—Policy, Probability, and Possession of Proof.”); see also Loren & Reese, *supra* note 81, at 626–27.

93. See WRIGHT & GRAHAM, *supra* note 92, at § 5122.

94. See *id.*; see also Adobe Sys. Inc. v. Christenson, 809 F.3d 1071, 1079 (9th Cir. 2015) (“The copyright holder is in a superior position to produce documentation of any license and, without the burden shift, the first sale defense would require a proponent to prove a negative, *i.e.*, that the software was not licensed.”).

and on the party who could fulfill the requirements with the least “vexation, delay, and expense.”⁹⁵

Labeling fair use an affirmative defense places the burden of proof on the defendant, which ultimately chills permissible and socially valuable uses.⁹⁶ In particular, defendants have the difficulty of proving that a use does not cause market harm.⁹⁷ In *Harper & Row*, the Court emphasized that the effect on the market is “undoubtedly the single most important element of fair use.”⁹⁸ And defendants cannot carry the burden of proof on the affirmative defense without “favorable evidence about relevant markets,” as the *Campbell* Court noted.⁹⁹ A defendant’s difficulty in carrying the burden of proof was crystalized by one scholar:

First, it may be virtually impossible for a user to produce evidence that there is no market for the infringing use: what evidence can a user produce beyond a bald assertion? Second, the owner is better suited to produce evidence about the existence of a market—the facts may be particularly within the control of the owner.¹⁰⁰

95. Thayer, *supra* note 90, at 59 (quoting Jeremy Bentham); *see also* United States v. N.Y., New Haven & Hartford R.R. Co., 355 U.S. 253, 256–57 n.5 (1957) (“The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.”).

96. *See, e.g.*, Haochen Sun, *Copyright and Responsibility*, 4 HARV. J. SPORTS & ENT. L. 263, 312 (2013) (“This asymmetry between copyright holders and users concerning the burden of proof may deter users from making fair uses of works even though they are harmless to copyright holders.”); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 721 (2003) (“Many would-be commentators, critics, and parodists may be considerably deterred by the risk that they’ll be erroneously held legally liable if the fair use case is close. Very few potential creators would be considerably deterred by the risk that some people will be erroneously allowed to engage in commentary, criticism, and parody when the fair use question is close.”).

97. *See, e.g.*, Sun, *supra* note 96, at 312 (“The burden of proving the absence of market harm is troublesome for users, as it is not easy for them to obtain data about copyright holders’ market and examine the market impact of their uses on copyright holders.”).

98. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

99. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”).

100. Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1178 (2000).

Thus, the current assignment of the burden of proof tilts the scales in favor of the copyright holder.¹⁰¹ These tilted scales effectively expand the zone of the copyright holder's exclusive control and, correspondingly, constrict fair use.¹⁰² These tilted scales, in turn, permit copyright overreach.¹⁰³

A growing chorus of scholars criticize the Court's labeling of fair use as an affirmative defense. Fair use is a defense, but it should not be an *affirmative* defense.¹⁰⁴ As Professor Lydia Pallas Loren has argued, such labeling is "an error of statutory interpretation with seriously problematic First Amendment consequences."¹⁰⁵ Professor Loren offers a persuasive accounting of the legislative record, which by her review does not reflect an intent to treat fair use as an affirmative defense.¹⁰⁶

As a matter of statutory construction, fair use (codified in Section 107) is both a statutory right and a definitional limit on a copyright holder's statutory rights (codified in Section 106).¹⁰⁷ Section 108 of the Copyright Act expressly acknowledges the "*right* of fair

101. See Sun, *supra* note 61, at 157 ("Many copyright holders have adopted an aggressive litigation strategy in order to deter the public from actively asserting its fair use right. By taking advantage of the user's burden to prove fair use, many copyright holders have frequently made claims of infringement even in circumstances where the fair use defense would likely succeed.").

102. See Snow, *supra* note 87, at 1791 ("The effect of assigning the burden of proof to fair users is to expand the scope of expression that copyright suppresses into protected fair-use expression. This is so because the burden penalizes the fair user when fact-finders face uncertainty over issues in the fair-use analysis: Although a use may in actuality be fair, if the fact-finder is uncertain on this point, the burden requires the copyright holder to win by default.").

103. See, e.g., Lauren Gorab, *A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation*, 87 *FORDHAM L. REV.* 703, 705 (2018) ("Currently, the application of fair use as an affirmative defense magnifies the doctrine's inherent problems and makes copyright law hospitable to abusive copyright litigation.").

104. See Loren, *supra* note 3, at 701 ("[C]alling fair use a 'defense' is entirely consistent with fair use being a component part of what shapes the rights of a copyright owner. Labeling something a 'defense' does not necessarily carry with it an obligation of proving the elements of the defense. It is the label of 'affirmative defense' that indicates the shift of the burden to the defendant.").

105. *Id.* at 710.

106. See *id.* at 696–704; see also Snow, *supra* note 87, at 1788 ("[T]he Copyright Act never labels fair use an affirmative defense.").

107. Compare 17 U.S.C. § 107, with 17 U.S.C. § 106; see also Snow, *supra* note 3, at 163 ("Section 107 articulates the doctrine as the original fair-use jurisprudence portrays it—a doctrine that defines infringement: '[T]he fair use of a copyrighted work . . . is not an infringement of copyright.'" (quoting 17 U.S.C. § 107)).

use as provided by section 107.”¹⁰⁸ The statute provides that Section 106 rights are “[s]ubject to” Section 107 fair use.¹⁰⁹ And the statute clarifies that Section 107 fair use “is not an infringement.”¹¹⁰ As Professor Loren argued, these “statutory sections seem to clearly support viewing fair use not as an affirmative defense but rather as part and parcel of what defines the rights of a copyright owner.”¹¹¹ In other words, fair use defines the limits of infringement.¹¹² And, as discussed above, fair use is not an infringing act to be tolerated or excused, but rather it is a use advancing the very purpose of copyright: promoting the progress of learning.¹¹³ Put differently, fair use is not an exception to infringement; rather, it is a use beyond the reach of the copyright holder’s exclusive zone of control.¹¹⁴ And by extension, as Professor Loren argued, “[i]f fair use is ‘not an infringement,’ then the plaintiff has not met its burden to demonstrate a *prima facie* case of *infringement* without overcoming the argument that the use is a fair use.”¹¹⁵ Judge Stanley Birch echoed this point: “Logically then, how can it be said that fair use, which by definition is not an infringement,

108. 17 U.S.C. § 108(f)(4) (“Nothing in this section in any way affects the *right* of fair use as provided by section 107”) (emphasis added).

109. § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following”).

110. § 107 (“Notwithstanding the provisions of sections 106 and 106A, *the fair use of a copyrighted work*, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright.*”) (emphasis added).

111. Loren, *supra* note 3, at 697.

112. See Snow, *supra* note 3, at 164 (“As the same sort of right held by a copyright holder, the fair-use right must compete with the copyright right. So by describing fair use as a competing right, Congress intimated its intent that fair use define the scope of the copyright right, rather than excuse an infringement of the copyright right.”).

113. See PATTERSON & LINDBERG, *supra* note 62, at 11 (“To employ the fair-use provisions of the copyright act is not to abuse the rights of the author or copyright owner; indeed, the very purpose of copyright is to advance knowledge and thus benefit the public welfare, which is exactly what fair use—properly employed—does.”).

114. See NXIVM Corp. v. Ross Inst., 364 F.3d 471, 486 (2d Cir. 2004) (Jacobs, J., concurring) (“Fair use is not a permitted infringement; it lies wholly outside the domain protected by the author’s copyright.”); see also Loren, *supra* note 3, at 698 (“The statutory language contradicts treating fair use as an exception: It is, ‘not an infringement,’ instead a limitation on the scope of the rights granted to copyright owners.”).

115. Loren, *supra* note 3, at 698.

can be considered properly an affirmative defense in a copyright infringement action.”¹¹⁶

Supreme Court dicta mischaracterizes fair use as technical infringement to be excused rather than recognizing it as an affirmative right of the user.¹¹⁷ And more than simply an affirmative statutory right, fair use is also a speech-protective doctrine.¹¹⁸ In *Golan* and *Eldred*, the Supreme Court emphasized that fair use, along with the idea/expression dichotomy, are “built-in First Amendment accommodations.”¹¹⁹ The Court in *Harper & Row* also noted that “the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use” are First Amendment protections.¹²⁰ Fair use thus serves an important speech-protective function within copyright.¹²¹ The statutory privilege of copyright therefore should not overshadow constitutionally protected fair use.¹²² Categorizing fair use as an affirmative defense weakens the speech-protective shield.¹²³ Denominating fair use as an affirmative defense devalues it as a First Amendment safeguard.¹²⁴ This approach both

116. Birch, *supra* note 3, at 165–66.

117. See Snow, *supra* note 3, at 168; see also Birch, *supra* note 3, at 165 (arguing “it should be manifest that to denominate ‘fair use’ as merely an affirmative defense is a mischaracterization of constitutional dimensions”).

118. See Snow, *supra* note 87, at 1782 (“Although the Supreme Court has recognized that a defendant’s fair-use expression should receive constitutional protection as speech, the Court has failed to recognize that the burden of proving the unfairness of a defendant’s use should rest with the party seeking to suppress that expression—the copyright holder.”).

119. *Golan v. Holder*, 565 U.S. 302, 328 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

120. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

121. See *Golan*, 565 U.S. at 329 (rejecting heightened scrutiny “[g]iven the ‘speech-protective purposes and safeguards’ embraced by copyright law” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003))); see also Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 548 (2004) (“Indeed, one can read *Eldred* and other cases to hold that fair use is constitutionally required.”).

122. See Rosenfield, *supra* note 21, at 807 (“[C]onstitutionally protected fair use has priority over the mere statutory privilege accorded to the copyright owner by the permissive and non-mandatory action of the Congress in enacting copyright legislation under the copyright clause.”).

123. See Snow, *supra* note 3, at 173 (“[T]he burden of proof matters. It has weakened the strength of fair use.”).

124. See Gorab, *supra* note 103, at 705 (“Applying fair use as an affirmative defense misplaces the burden on the defendant and makes copyright law legally and procedurally hospitable to abusive copyright litigation.”); Loren, *supra* note 3, at 696

undermines the constitutional dimensions of fair use as a speech-protective safeguard and the statutory dimensions of fair use as a right.¹²⁵ Consonant with the Supreme Court's First Amendment jurisprudence, the burden of proof should be on the party seeking to restrict speech.¹²⁶

Fair use thus needs a course correction.¹²⁷ Fair use should be reclassified as simply a defense. Reanimated as a speech-protective doctrine, a defendant would be required to plead and assert the defense of fair use but need not carry the burden of proving fair use.¹²⁸ The burden of proving a prima facie case of infringement would remain with the copyright holder. As Judge Birch suggested:

[A] defendant in an infringement action should have the initial burden of stating in its defensive pleadings that it was asserting its right of fair use, thereby placing the plaintiff copyright owner on notice. After satisfying that initial burden of coming forward, the burden to establish infringement upon

("As an important balance in copyright that the Court has repeatedly pointed to when considering separate First Amendment challenges to copyright law, relegating fair use to the status of an affirmative defense weakens its significant balancing role."); Sun, *supra* note 61, at 156 ("[T]reating fair use merely as an affirmative defense may raise questions as to whether a user's fair use right can still be adequately protected.").

125. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (Birch, J.) ("I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright."); see also *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) (Birch, J.) ("Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.").

126. Cf. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("[T]he burden of proving that the film is unprotected expression must rest on the censor.").

127. Cf. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016) ("Even if, as Universal urges, fair use is classified as an 'affirmative defense,' we hold—for the purposes of the DMCA—fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses. We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).").

128. See Birch, *supra* note 3, at 166.

the plaintiff would include the burden to negate fair use—since a fair use, by statutory definition, is not an infringement.¹²⁹

Where reasonable minds differ on a particular question, allocating burdens of proof can profoundly affect the outcome of the case.¹³⁰ As the Supreme Court observed over half a century ago, “[i]n all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.”¹³¹ Burdens of proof assign a winner if the evidence is in equipoise. The Court has recognized that requiring a speaker to prove the protected nature of the speech can be unduly burdensome.¹³² The speaker’s “difficulties of adducing legal proofs,” the Court opined, risks “self-censorship” and “dampens the vigor and limits the variety of public debate.”¹³³ Copyright is a goal-oriented statutory product. Fair use is a statutory right¹³⁴ and a speech-protective safeguard.¹³⁵ The policy of fair use suggests the scales should favor the fair user.¹³⁶ The burden should rest on the party attempting to suppress speech.¹³⁷ As a matter of statutory construction

129. *Id.*; see also Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 83 (2001) (proposing “once the defendant shows a colorable claim of fair use, the burden should pass to the copyright holder to prove that the defendant has copied more than necessary for effective speech and that the defendant’s use is likely to harm the actual or potential market for the copyright holder’s work”); Volokh, *supra* note 96, at 721 (suggesting the copyright holder should “have to bear the burden of proving that the speaker’s use was nontransformative”).

130. See Snow, *supra* note 87, at 1803 (“The inherent uncertainty of fair-use facts implies that the burden more often than not determines the loser in a fair-use fight.”).

131. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

132. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

133. *Id.*

134. See 17 U.S.C. § 108(f)(4) (“Nothing in this section . . . in any way affects the *right of fair use* as provided by section 107 . . .”) (emphasis added).

135. See *Golan v. Holder*, 565 U.S. 302, 329 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

136. *Cf. Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986) (“[W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”); see also Volokh, *supra* note 96, at 721 (“Placing the burden of proving fair use on the defendant is thus likely to deter considerably more speech than would placing the burden of proving unfair use on the plaintiff.”).

137. See Snow, *supra* note 87, at 1782 (“Although the Supreme Court has recognized that a defendant’s fair-use expression should receive constitutional protection as speech, the Court has failed to recognize that the burden of proving the

and sound public policy, the copyright holder should have the burden to prove that a use is unfair.¹³⁸

II. OPERATIONALIZING FAIR USE DECISIONS

Procedurally, fair use questions can be decided at a number of different stages during the life cycle of a case. Courts can consider questions of fair use on a motion to dismiss, on a motion for summary judgment, on a motion for judgment as a matter of law, and on appeal.¹³⁹ And because fair use presents a factual question, it also may be decided by a jury.¹⁴⁰

Under modern procedural rules, fair use can be decided by the court in ruling on dispositive motions. The district court sometimes considers fair use on a motion to dismiss. (Technically, if fair use is denominated an affirmative defense, the proper motion is a 12(c) motion for judgment on the pleadings, rather than a 12(b)(6) motion to dismiss for failure to state a claim.¹⁴¹ But in either case, it is a dispositive motion before discovery.¹⁴²) As the Seventh Circuit explained, “[w]hen a defendant raises a fair use defense claiming his

unfairness of a defendant’s use should rest with the party seeking to suppress that expression—the copyright holder.”)

138. See Rosenfield, *supra* note 21, at 804 (“Once fair use has been properly vested with its appropriate constitutional status, the burden of proof shifts to the copyright proprietor to prove that an alleged infringement is not protected as a fair use under the first and ninth amendments. This allocation of the burden of proof is an appropriate adjustment between a statutory privilege (copyright) and a constitutionally guaranteed right (fair use).”).

139. See discussion *infra* notes 217–219.

140. See, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 480 (1985) (“The question of whether fair use is available has consistently been held to be one of fact, thus entitling one to a jury or, where there are no genuine issues of material fact at issue, summary judgment.”) (citations omitted).

141. See *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1192 n.1 (N.D. Ill. 2015) (cautioning that “the proper heading for motions on the basis of affirmative defenses [like fair use] is Rule 12(c) because an affirmative defense is external to the complaint,” rather than a Rule 12(b)(6)); see also *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n.1 (7th Cir. 2012) (“Though district courts have granted Rule 12(b)(6) motions on the basis of affirmative defenses and this court has affirmed those dismissals, we have repeatedly cautioned that the proper heading for such motions is Rule 12(c), since an affirmative defense is external to the complaint.”).

142. See *Effie Film, LLC v. Murphy*, 932 F. Supp. 2d 538, 552 (S.D.N.Y. 2013) (“In deciding a Fed. R. Civ. P. 12(c) motion the court applies the same standard as it would in deciding a Rule 12(b) motion—a plaintiff must plead sufficient facts to state a claim for relief that is plausible on its face.”), *aff’d*, 564 F. App’x 631 (2d Cir. 2014).

or her work is a parody, a court can often decide the merits of the claim without discovery or a trial.”¹⁴³ But courts are often reluctant to grant such relief, which would dismiss a copyright suit before the discovery phase.¹⁴⁴ The *Harper & Row* Court instructed lower courts to have “facts sufficient to evaluate each of the statutory factors.”¹⁴⁵ Fair use is a case-by-case, fact-intensive inquiry. And to complete a fair use analysis, the court usually must rely on undisputed facts or make factual findings.¹⁴⁶

Pre-discovery dispositive motions are often limited to those instances where the evidence needed to decide fair use is already in the record.¹⁴⁷ A case is ripe for resolution on a motion to dismiss if additional discovery of facts to support a claim is unnecessary. Additional discovery is often unnecessary when the court is able to conduct a side-by-side comparison of the works at issue.¹⁴⁸ The Seventh Circuit, for instance, instructs that a trial court may decide fair use, thereby “avoiding the burdens of discovery and trial,” when “the only two pieces of evidence needed to decide the question of fair use” are already before the court.¹⁴⁹

In *Lombardo v. Dr. Seuss Enterprises, L.P.*, the district court adopted this approach to fair use and resolved the case before

143. *Brownmark Films*, 682 F.3d at 692.

144. *See Nichols v. Club for Growth Action*, 235 F. Supp. 3d 289, 295 (D.D.C. 2017) (“‘Fair use is a mixed question of law and fact,’ and determinations of fair use involve a fact-intensive review of the record. Therefore, fair use is not traditionally decided on a motion to dismiss.” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985))); *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008) (“The posture of this case is unusual because the district court decided the fair use issue on a motion to dismiss. However, the district court’s resolution of the fair use issue at the motion to dismiss stage was proper.”).

145. *Harper*, 471 U.S. at 560.

146. *See, e.g., Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (“[I]n light of a court’s narrow inquiry [on a motion to dismiss] . . . and limited access to all potentially relevant and material facts needed to undertake the [fair use] analysis, courts rarely analyze fair use on a 12(b)(6) motion.”).

147. *Brownmark Films*, 682 F.3d at 690.

148. *See, e.g., Adjmi v. DLT Entm’t Ltd.*, 97 F. Supp. 3d 512, 527 (S.D.N.Y. 2015) (deciding fair use on a 12(c) motion because “[c]ourts in this Circuit have resolved motions to dismiss on fair use grounds in this way: comparing the original work to an alleged parody, in light of applicable law”); *Arrow Prods., LTD. v. Weinstein Co.*, 44 F. Supp. 3d 359, 368 (S.D.N.Y. 2014) (concluding “discovery would not provide any additional relevant information in this inquiry” because “[a]ll that is necessary for the court to make a determination as to fair use are the two films at issue”).

149. *Brownmark Films*, 682 F.3d at 689–90.

discovery.¹⁵⁰ Plaintiff Matthew Lombardo was the author of *Who's Holiday!*, a comedic, off-Broadway play that used the characters, plot, and setting of the Dr. Seuss book *How the Grinch Stole Christmas!*¹⁵¹ In the fall of 2016, Dr. Seuss Enterprises sent a series of cease and desist letters alleging that Lombardo's play infringed Dr. Seuss's *Grinch*.¹⁵² In December 2016, Lombardo sought a declaratory judgment that his play was a fair use and did not infringe the Dr. Seuss book.¹⁵³ The trial court agreed: "the Play is a parody of *Grinch*, and thus transformative."¹⁵⁴ The court concluded that discovery was unnecessary in this case: "although discovery might yield additional information about [Lombardo's] intent, such information is unnecessary to resolve the fair use issue; all that is needed is the parties' pleadings, copies of *Grinch* and the Play, and the relevant case law."¹⁵⁵ The court concluded that the record abundantly demonstrated fair use, thus it was proper to resolve the question before discovery.¹⁵⁶ But deciding fair use before discovery is the exception, not the rule.¹⁵⁷ If the case is not resolved on a pre-discovery dispositive motion, the parties then engage in the discovery phase.¹⁵⁸

150. See *Lombardo v. Dr. Seuss Enterprises, L.P.*, 279 F. Supp. 3d 497, 504 (S.D.N.Y. 2017) ("No such discovery is necessary in this case. Numerous courts in this district have resolved the issue of fair use on a motion for judgment on the pleadings by conducting a side-by-side comparison of the works at issue."), *aff'd*, 729 F. App'x 131 (2d Cir. 2018).

151. *Lombardo*, 279 F. Supp. 3d at 502.

152. *Id.* at 504.

153. *Id.*

154. *Id.* at 507. *Cf.* *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 256 F. Supp. 3d 1099, 1102, 1114 (S.D. Cal. 2017) (denying defendant's motion to dismiss a "mashup" of Star Trek and Dr. Seuss, titled *Oh, the Places You'll Boldly Go!*, as a fair use parody), 372 F. Supp. 3d 1101, 1125 (S.D. Cal. 2019) (granting defendant's motion for summary judgment on the affirmative defense of fair use), *appeal docketed*, No. 19-55348 (9th Cir. Mar. 28, 2019); *see also* *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (affirming preliminary injunction on the basis that a book about the O.J. Simpson murder trial, written and illustrated in the style of Dr. Seuss and titled *The Cat NOT in the Hat!*, was not a parody or a fair use).

155. *Lombardo*, 279 F. Supp. 3d at 505.

156. See *id.* at 513 ("[T]he fourth factor weighs strongly in favor of a finding of fair use, and in considering all of the four factors together, I hold that the Play constitutes fair use.").

157. See, e.g., *Roe v. Bernabei & Wachtel PLLC*, 85 F. Supp. 3d 89, 99 n.8 (D.D.C. 2015) ("This [fair use] defense is premature and the Court will not address it on a Rule 12(b)(6) motion."); *Katz v. Chevaldina*, 900 F. Supp. 2d 1314, 1316 (S.D. Fla. 2012) ("[T]he general rule [is] that fair use defenses are not ripe for determination before the summary judgment stage.").

158. See *FED. R. CIV. P.* 26–37.

After the close of discovery, summary judgment is proper if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law.”¹⁵⁹ In other words, when there is no genuine issue of material fact, fair use may be decided by courts on a motion for summary judgment.¹⁶⁰ In *Mattel, Inc. v. Walking Mountain Productions*, for example, the district court concluded defendant’s “reproduction of Mattel’s copyrighted Barbie was fair use” and granted defendant’s motion for summary judgment.¹⁶¹ The trial court concluded that no triable issues of fact existed on whether defendant’s use of Mattel’s Barbie doll constitutes fair use and no reasonable jury would disagree.¹⁶² The trial court reasoned that the jury could only conclude that defendant’s works were fair use because (1) his use was a parody meant to criticize Barbie, (2) he only copied what was necessary for his parodic purpose, and (3) his photographs could not affect the market demand for Barbie products.¹⁶³ The Ninth Circuit agreed.¹⁶⁴

But if there are genuine issues of material fact, a jury can be empaneled to decide questions of fair use.¹⁶⁵ The Seventh Amendment

159. See FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Once the moving party has met its burden under Rule 56, the opposing party must establish that there is a triable issue of material fact. To carry its burden, the opposing party “must do more than simply show that there is some metaphysical doubt as to the material facts [in question].” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

160. See, e.g., *N.J. Media Grp. v. Pirro*, 74 F. Supp. 3d 605, 614 (S.D.N.Y. 2015) (“Although fair use is a mixed question of law and fact, courts in the Second Circuit have ‘on a number of occasions’ resolved fair use determinations at the summary judgment stage where there are no genuine issues of material fact.” (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 137 (2d Cir. 1998))); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (“[T]he court may resolve issues of fair use at the summary judgment stage where there are no genuine issues of material fact as to such issues.”); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (“Where material facts are not in dispute, fair use is appropriately decided on summary judgment.”).

161. *Mattel*, 353 F.3d at 800.

162. See *id.*

163. *Id.*

164. See *id.* (“We conclude that Forsythe’s use of Mattel’s copyrighted Barbie constitutes fair use and affirm the district court’s grant of summary judgment.”).

165. See FED. R. CIV. P. 38. The right to jury trial is preserved by the Seventh Amendment to the Constitution and embodied in Rule 38 of the Federal Rules of Civil Procedure. A party who wants a trial by jury must file and serve a timely written

provides, in part, that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”¹⁶⁶ The Supreme Court has long emphasized that “[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.”¹⁶⁷ Fair use is frequently characterized as an “equitable rule of reason.”¹⁶⁸ But fair use is not an equitable doctrine, rather it is a legal doctrine.¹⁶⁹ As Judge Pierre Leval has noted, “Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship.”¹⁷⁰ In response to the often-repeated refrain that fair use is a creature of equity, Judge Leval flatly stated, “Historically this notion is incorrect.”¹⁷¹ Historically, common law courts enlisted juries to decide

demand for a jury trial. FED. R. CIV. P. 38(b). And failure to make the required demand results in a waiver of the jury trial right. FED. R. CIV. P. 38(d).

166. U.S. CONST. amend. VII.

167. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (quoting *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

168. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984) (“[S]ince the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” (quoting H.R. REP. NO. 94-1476, at 65–66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680)).

169. See, e.g., PATRY, *supra* note 140, at 5 (1985) (“It is therefore incorrect to characterize fair use as a child of equity. Rather, it was the child of an English jurisprudence that sought to accommodate a *statutory* scheme, the goal of which was to ‘encourage . . . learned men to compose and write useful books,’ by allowing a second author to use, under certain conditions, a portion of a prior author’s work, where that second author would himself produce a work promoting the expressed goal.” (quoting 8 Anne c.19 § 1 (1710))).

170. Leval, *supra* note 28, at 1127.

171. *Id.* See also Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1456–58 (1997) (discussing the “‘equitable rule of reason’ canard”).

questions of fair use.¹⁷² As a legal defense, fair use may be—and often is—decided by a jury.¹⁷³

After a jury trial, the losing party may file a Rule 50 motion to have the jury verdict overturned.¹⁷⁴ The court may grant a motion for judgment as a matter of law if no “reasonable jury” could find for a party on a given issue.¹⁷⁵ The Supreme Court has confirmed that the trial court may “remove cases or issues from the jury’s consideration ‘when the facts are sufficiently clear that the law requires a particular result.’”¹⁷⁶ Thus the verdict-loser would argue that, as a matter of law, there was insufficient evidence to support the verdict.¹⁷⁷

In ruling on a Rule 50 motion, the court must consider the entire record and must draw all reasonable inferences in favor of the verdict-

172. See, e.g., *Sayre v. Moore*, (1785) 102 Eng. Rep. 139, 140 (K.B.) (Lord Mansfield, C.J.) (“In all these [copyright] cases [where defendant had altered underlying work] the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”); *Emerson v. Davies*, 8 F. Cas. 615, 623–24 (D. Mass. 1845) (No. 4436) (Story, J.) (characterizing inquiry into whether use of copyrighted material is permissible as “question of fact to come to a jury” (quoting Lord Mansfield, C.J., in *Sayre*, 102 Eng. Rep. 139)). See generally William Patry, *The Right to a Jury in Copyright Cases*, 29 J. COPYRIGHT SOC’Y U.S.A. 139 (1981).

173. See, e.g., *Keeling v. Hars*, 809 F.3d 43, 46 (2d Cir. 2015) (“[T]he first question the jury would be asked to answer: ‘whether [*Point Break Live!*] was a fair use by way of a parody of the original movie *Point Break*.”); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 273 (6th Cir. 2009) (reviewing the propriety of the jury instructions in three respects: substantial similarity, fair use, and willfulness).

174. See FED. R. CIV. P. 50(a)–(b). Rule 50(a) establishes the procedure for an initial motion for judgment as a matter of law—formerly called a motion for a directed verdict—made during the trial and prior to submission of the case to the jury. Rule 50(b) establishes the procedure for a renewed motion for judgment as a matter of law—formerly called a motion for judgment notwithstanding the verdict (judgment n.o.v.)—made after the case has been submitted to the jury.

175. Under Rule 50, a trial court should grant a judgment as a matter of law only when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” FED. R. CIV. P. 50(a).

176. *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) (citation omitted).

177. The Supreme Court has long held that whether the evidence is sufficient to support submitting an issue to the jury is a legal determination, and that entry of judgment under Rule 50(b) does not contravene the Seventh Amendment. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322, 330 (1967); see also *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978) (“Rule 50(b) serves the important purpose of ensuring that a motion for judgment n.o.v. is used only to invite the district court to reexamine its decision not to direct a verdict as a matter of law, and not, in contravention of the Seventh Amendment, to reexamine facts found by the jury.”).

winner.¹⁷⁸ The court may not, however, make credibility determinations, re-weigh the evidence, or draw inferences from the facts.¹⁷⁹ As the Supreme Court explained, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.”¹⁸⁰ In ruling on a motion for summary judgment or a motion for judgment as a matter of law, the question is whether a reasonable jury could reach only one conclusion based on the evidence. In other words, the question is whether the evidence is so one-sided that one party must win as a matter of law.¹⁸¹

In *Corbello v. DeVito*, the district court granted defendants’ Rule 50(b) renewed motion for judgment as a matter of law on the question of fair use.¹⁸² Rex Woodard was an attorney and avid fan of The Four Seasons band; Tommy DeVito is a founding member of The Four Seasons.¹⁸³ Woodard assisted DeVito in writing his unpublished autobiography *Tommy DeVito—Then and Now*.¹⁸⁴ Plaintiff Donna Corbello, the widow and heir of Rex Woodard, sued DeVito and others when they used the unpublished autobiography to develop the screenplay for *Jersey Boys*, a hit musical based on The Four Seasons.¹⁸⁵ After a fifteen-day trial, the jury found the play *Jersey Boys* infringed the autobiography and was not a fair use.¹⁸⁶ The court

178. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (“[T]he standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that ‘the inquiry under each is the same.’ It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.”) (citations omitted).

179. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

180. *Id.*

181. See *id.* at 252–53.

182. See *Corbello v. DeVito*, 262 F. Supp. 3d 1056, 1068 (D. Nev. 2017) (“The Court has closely examined the evidence under the relevant standards and concludes Defendants are entitled to a judgment as a matter of law on the fair use issue.”).

183. *Id.* at 1059.

184. See *id.*

185. See *id.*

186. See *id.* at 1068 (“The jury found: (1) Tommy DeVito did not grant Defendants an implied nonexclusive license to use the Work to create the Play; (2) the Play infringed the Work; (3) the use of the Work in the Play did not constitute fair use; (4) 10% of the success of the Play was attributable to infringement of the Work; and (5) the remaining Defendants were liable for direct infringement (as opposed to vicarious or contributory infringement).”).

disagreed: “A finding of no fair use, where such a tiny part of the creative elements of a biographical work with little to no market value were copied, and where the use was significantly transformative, would hinder rather than further the purposes of copyright.”¹⁸⁷ Thus, the trial court granted defendants’ renewed motion for judgment as a matter of law and overturned the jury verdict.¹⁸⁸

A losing party has the right to appeal an adverse judgment to the court of appeals.¹⁸⁹ The standard of review on appeal turns on whether the appellate court is reviewing a question of law or a question of fact. The old legal saw is that purely legal questions are reviewed *de novo* and purely factual questions are reviewed deferentially.¹⁹⁰ And for mixed questions of law and fact—it depends.¹⁹¹

Questions of fact, as Professor Henry Monaghan noted, “respond to inquiries about who, when, what, and where.”¹⁹² Historical facts involve questions that are answered or proved “at least to some

187. *Id.* at 1077.

188. *See id.* In an amicus brief filed in *Oracle America v. Google*, a group of law professors note that the *Corbello* decision is unusual in that *Corbello* is the only “other case . . . [in which] a court overturned a jury verdict of fair use.” Brief for Copyright Law Professors Pamela Samuelson & Clark Asay as Amici Curiae Supporting Defendant-Cross Appellant at 6 n.4, *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018) (Nos. 2017-1118, 2017-1202), 2018 WL 3031679. The *Corbello* case is currently on appeal to the United States Court of Appeals for the Ninth Circuit. *Corbello v. DeVito*, 262 F. Supp. 3d 1056 (D. Nev. 2017), *appeal docketed*, No. 17-16337 (9th Cir. Jun. 29, 2017).

189. A notice of appeal generally must be filed in district court within 30 days after entry of judgment, or within 14 days after filing of a timely notice of appeal by any other party. *See* FED. R. APP. P. 4. And, note that without a renewed judgment as a matter of law, an appellate court is barred from considering challenges to the sufficiency of the evidence supporting a jury verdict. *See* *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006) (“[W]e hold that since respondent failed to renew its *preverdict* motion as specified in Rule 50(b), there was no basis for review of respondent’s sufficiency of the evidence challenge in the Court of Appeals.”).

190. *See* U.S. Bank Nat. Ass’n *ex rel.* CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 965 (2018) (noting minimal deference for questions of law).

191. *See* *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions of law and fact as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated”).

192. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985); *see also* James B. Thayer, “*Law and Fact*” in *Jury Trials*, 4 HARV. L. REV. 147, 151–52 (1890) (“The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All inquiries into the truth, the reality, the actuality of things are inquiries into the fact about them.”).

significant degree of probability, by inferences from evidence.”¹⁹³ Factual findings do not require judicial determination of broad, generalized governing principles and instead apply laymen’s “logic and human experience to the received physical, documentary, and testimonial evidence.”¹⁹⁴ A finding of fact is “independent of or anterior to any assertion as to its legal effect.”¹⁹⁵

Declarations of law, on the other hand, are, as Professor Martin Louis noted, “fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*.”¹⁹⁶ “Law” is usually defined as a statement of the general principle or rule, conceived in advance, awaiting application to particular facts as they may arise.¹⁹⁷ Law consists of “those rules and standards of general application by which the state regulates human affairs.”¹⁹⁸ Law is a general proposition, whereas fact is a case-specific inquiry.

Questions of fact call for proof, whereas matters of law are established not by evidentiary showing but by intellectual abstraction.¹⁹⁹ Facts are “descriptive,” rather than “dispositive.”²⁰⁰ Facts answer the *is* question, whereas laws answer the *ought* question. But facts and laws are not hermetically distinct concepts. Facts and laws are better understood as ends of a spectrum.²⁰¹ Between the ends of the continuum are questions that present a mix of law and fact.²⁰² Mixed questions involve “the application-of-legal-standard-to-

193. HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW* 7 (3d ed. 2018).

194. *Id.* at 7–8.

195. Louis Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 241 (1955).

196. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993–94 n.3 (1986).

197. See Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924).

198. Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 901 (1943) (footnote omitted).

199. See Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1304 (1942) (“A question of fact usually calls for proof. A question of law usually calls for argument.”).

200. *Id.* at 1329.

201. See Jaffe, *supra* note 195, at 239–40.

202. See EDWARDS & ELLIOTT, *supra* note 193, at 13 (“Legal principles that result in . . . mixed questions on appeal are generally broad, often fluid, sometimes common sense concepts that cannot be ‘reduced to a neat set of legal rules.’” (quoting *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996))).

fact.”²⁰³ Questions of negligence or reasonableness of conduct are often denominated mixed questions of law and fact.²⁰⁴

The Supreme Court recently emphasized that “[m]ixed questions are not all alike.”²⁰⁵ And hence mixed questions are not all subject to the same standard of review.²⁰⁶ Some questions require “courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard,” and in such instances, the Court teaches that “appellate courts should typically review a decision *de novo*.”²⁰⁷ But in other instances “mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments,” for which “appellate courts should usually review a decision with deference.”²⁰⁸ The Court has emphasized the original factfinder’s “superiority” in resolving such issues.²⁰⁹

Mixed questions thus present a policy question about which decider is better. As the Supreme Court acknowledged, when an “issue falls somewhere between a pristine legal standard and a simple historical fact,” the standard of appellate review often reflects which “judicial actor is better positioned” to make the decision.²¹⁰ Here, the relative competencies of judge and jury are a functional consideration.²¹¹ In considering the relative skills of judge and jury,

203. *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015) (quoting *United States v. Gaudin*, 515 U.S. 506, 512 (1995)).

204. *See, e.g.*, Frederick Green, *Mixed Questions of Law and Fact*, 15 HARV. L. REV. 271, 271 (1902) (noting how the legal community often refers to these questions).

205. *U.S. Bank Nat’l Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) (noting that mixed questions sometimes require more legal analysis).

206. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1192 (Fed. Cir. 2018) (“Merely characterizing an issue as a mixed question of law and fact does not dictate the applicable standard of review.”), *cert. granted*, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956).

207. *U.S. Bank Nat’l Ass’n*, 138 S. Ct. at 967 (discussing the standard of review for mixed questions that contains significant legal questions).

208. *Id.* (noting that other mixed questions depend heavily on the individual facts of a case as found by the factfinders).

209. *Anderson v. Bessemer City*, 470 U.S. 564, 574–76 (1985) (discussing the reasons why a trial court’s determination of facts should be given deference on appeal).

210. *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (explaining how the Supreme Court decides what standard of review it will apply to a particular case).

211. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (finding judges better suited to interpret patent claims based on the “relative

the Court reminds us that the standard of review for a mixed question turns on “whether answering it entails primarily legal or factual work.”²¹² Factual work typically receives deferential review, whereas primarily legal analyses are reviewed *de novo*.

Courts must analyze the nature of a “mixed” question to determine whether it is one in which legal questions predominate or one in which factual questions predominate—and therefore what standard of review should apply.²¹³ When a mixed question “involves developing auxiliary legal principles of use in other cases,” the Court teaches that such decisions typically warrant *de novo* review.²¹⁴ On the other hand, when the mixed question “immerse[s] courts in case-specific factual issues,” which involve weighing evidence and addressing “multifarious, fleeting, special, narrow facts that utterly resist generalization,” such decisions call for deference.²¹⁵ In other words, when a mixed question of fact and law weighs heavily on “case-specific factual issues,” deferential review is appropriate.²¹⁶

So how is fair use reviewed on appeal? Dispositive motions are reviewed *de novo*. This means that on appeal fair use decisions made by the trial court—either on a motion to dismiss,²¹⁷ a motion for summary judgment,²¹⁸ or a motion for judgment as a matter of law²¹⁹—will be reviewed *de novo*. But what about a jury verdict on fair use?²²⁰

interpretive skills of judges and juries” and the statutory policies “furthered by the allocation”).

212. *U.S. Bank Nat’l Ass’n*, 138 S. Ct. at 967 (restating the test that courts use to determine the standard for reviewing mixed questions).

213. *See id.* at 968 (affirming “clear error” review because the inquiry under consideration “is about as factual sounding as any mixed question gets”).

214. *Id.* at 967.

215. *Id.* (stating courts should apply a deferential standard of review for issues that turn heavily case-specific facts).

216. *Id.* (discussing the standard of review appellate courts use for mixed questions that are fact-dependent).

217. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 526 (9th Cir. 2008) (“We review a district court’s grant of a motion to dismiss *de novo*.”).

218. *See Cariou v. Prince*, 714 F.3d 694, 704 (2d Cir. 2013) (“We review a grant of summary judgment *de novo*.”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (“As there are no genuine issues of material fact here, we review the district court’s legal conclusions *de novo*.”).

219. *See Balsley v. LFP, Inc.*, 691 F.3d 747, 757 (6th Cir. 2012) (“We review *de novo* a renewed motion for judgment as a matter of law filed pursuant to Federal Rule of Civil Procedure 50(b).”).

220. *Cf.* 4 PATRY ON COPYRIGHT § 10:160 (2019) (“Fair use determinations, whether after a bench or jury trial, must be reviewed under the clearly erroneous standard, or where there is a general jury verdict, not reviewed at all under the Reexamination Clause.”).

The *Harper & Row* Court denominated fair use a mixed question of law and fact.²²¹ Fair use is a mixed question because it is a law-application question. Applying the law to the facts, the factfinder is asked to decide if the defendant's use of the work is fair or not.²²² If fair use requires a "neat comparison of fact to law,"²²³ deference should apply because such factual determinations are best made by the factfinder. On the other hand, de novo review is appropriate if fair use is not answered by the facts of the individual case but rather by reference to the objectives and examples in the statute—specifically, if the legal analysis can be applied to multiple disputes "and not simply to the one *sub judice*."²²⁴ The open question is whether fair use, as a mixed question, should be reviewed deferentially or de novo.²²⁵

In *Oracle America, Inc. v. Google LLC*, the Federal Circuit concluded that because "fair use is equitable in nature, it would seem to be a question for the judge, not the jury, to decide."²²⁶ The circuit court noted the lack of clear guidance on the question: "[T]he Supreme Court has never clarified whether and to what extent the jury is to play a role in the fair use analysis."²²⁷ Recognizing the mixed nature of the fair use inquiry, the Federal Circuit deferred to the jury's "historical

221. See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact."); see also NIMMER ON COPYRIGHT, *supra* note 38, at § 13.05 ("Fair use is said to constitute a mixed issue of law and fact, but what facts will be sufficient to raise this defense in any given case is not easily answered.")

222. See *Harper & Row*, 471 U.S. at 560.

223. Cf. EDWARDS & ELLIOTT, *supra* note 193, at 8.

224. Louis, *supra* note 196, at 993–94 n.3.

225. Scholars, like Professor Ned Snow, argue that fair use should be a question of fact for the jury and reviewed deferentially on appeal. See Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 280 (2019) [hereinafter Snow, *Who Decides*] (arguing "juries are better positioned to decide whether a use is fair" because these decisions "draw from cultural norms and social values" and "[s]uch subjectivity is well suited for the heterogeneous perspective of jurors, who come from all walks of life and reflect a diversity of opinion, much more so than a panel of homogeneous judges"); Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 497 (2010) [hereinafter Snow, *Judges Playing Jury*] (articulating three reasons why a jury should decide fair use: "[t]he first and chief reason is that the characteristic of plurality among jurors is preferable to the singularity of the judge in determining whether a use is fair; the second is that the Seventh Amendment mandates these issues be resolved by a jury; and the third is that the public appears to prefer the jury to the judge").

226. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1194 (Fed. Cir. 2018), cert. granted, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956).

227. *Id.*

facts” but reviewed de novo the “ultimate question of fair use” on the ground that it is “legal in nature.”²²⁸ Viewing the jury verdict “as advisory only,” the Federal Circuit independently weighed the fair use factors and “conclude[d] that allowing Google to commercially exploit Oracle’s work will not advance the purposes of copyright in this case.”²²⁹

Fair use is contestable. Reasonable minds can—and often do—differ on questions of fair use.²³⁰ There is little shared consensus on the nature of fair use.²³¹ That the fair use factors “do not speak with univocal clarity,” according to David Nimmer, “can be appreciated simply from the fact” that the fair use cases that made it to the Supreme Court have “produced divergent responses from the judges and justices at each level.”²³² Reasonable minds often differ over the

228. *Id.* at 1194–96.

229. *Id.* at 1196, 1210. Google’s petition for rehearing en banc before the Federal Circuit was denied on August 28, 2018. *See generally* Order Denying Defendant-Cross Appellant Google, Inc. Petition for Rehearing En Banc, Oracle Am., 886 F.3d 1179. On November 15, 2019, Google’s petition for writ of certiorari to the Supreme Court was granted. Petition for Writ of Certiorari, Oracle Am., 886 F.3d 1179, *cert. granted*, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956).

230. *See* PATTERSON & LINDBERG, *supra* note 62, at 3 (“In short, one cannot expect universal agreement concerning what is and what is not fair use—even by the courts, where rulings on fair use are often overturned on appeal and decisions frequently have strong dissenting opinions.”); *see also* Snow, *Who Decides*, *supra* note 225, at 331 (“[F]air use raises questions over which reasonable minds often disagree—normative questions that concern whether a use should be permissible.”); Snow, *Judges Playing Jury*, *supra* note 225, at 499 (“[T]he indeterminate nature of fair use requires judgments that turn on individual social values and life experiences.”).

231. *See* Leval, *supra* note 28, at 1106–07 (“Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use.”) (citations omitted); *see also* Ned Snow, *Fair Use as a Matter of Law*, 89 DENV. U. L. REV. 1, 42 (2011) (“Views of fairness often are held in the extremity. Fairness turns on social value judgments that vary with extremity from person to person, so opinions on whether a use is fair may vary as widely as the disparity of life experiences between very different people.”). *But see* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009) (“The copyright fair use caselaw is more coherent and more predictable than many commentators seem to believe. Fair use cases tend to fall into common patterns, or what this Article calls policy-relevant clusters.”); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012) (“This Article demonstrates that the uncertainty critique is somewhat overblown: an empirical analysis of the case law shows that, while there are many shades of gray in fair use litigation, there are also consistent patterns that can assist individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection.”).

232. NIMMER ON COPYRIGHT, *supra* note 38, at § 13.05 n.25.2.

fairness quotient of a particular use.²³³ If fair use is a question of fact, judicial minds should defer to the jury's factfinding. But if fair use is a question of law, judicial minds can decide anew and need not defer to the jury's factfinding. As explored below, the fact/law distinction is but a smokescreen that obscures the policy question underneath: for a question of fair use—on which reasonable minds can (and often) differ—who should decide? Part III explores why it matters who decides such questions.

III. EVALUATING WHY IT MATTERS WHO DECIDES

The influence—if not the command—of the Seventh Amendment has long guided the allocation of decision-making authority within the court system.²³⁴ The Seventh Amendment reflects a federal policy that favors juries as arbiters of fact and courts as arbiters of law.²³⁵ Notwithstanding this preference, the allocation of decision-making authority is ultimately a political question of power allocation.²³⁶ This policy question is obscured by the fact/law distinction.

The right to a jury reflects the core values of the Framers: a government of the people, by the people, and for the people.²³⁷ As

233. See, e.g., Bracha, *supra* note 33, at 1859 (“Fair use cases that make it up the judicial hierarchy are often reversed and sometimes re-reversed.”).

234. See *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958) (“An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.”).

235. The Seventh Amendment states that 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 a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

236. See Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 60 (1977) (suggesting “the right to a civil jury trial in the federal courts has, from its inception, represented an issue of power allocation”).

237. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) (“The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”); AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 55 (1998) (“It is almost impossible to exaggerate the jury’s importance in the constitutional design. No idea was more central to the Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people.”).

Alexis de Tocqueville observed, “[t]he system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people, as universal suffrage.”²³⁸ The right to a jury has been lauded as the “most stunning and successful experiment in direct popular sovereignty in all history.”²³⁹

While there are those who view the jury as the common sense of the community,²⁴⁰ the jury has long been a controversial institution.²⁴¹ Professor John Guinther remarked that “for each advocate of the jury throughout its long history in America, there seems to have been a matching opponent.”²⁴² Some view the jury as a cornerstone of democratic self-government, a safeguard against incompetent or oppressive judges, and a way for the people to have an active role in the process of justice.²⁴³ Others view the jury as capricious, irrational, inefficient, emotional, and incompetent to decide complex cases.²⁴⁴

Such criticisms of the jury system were known to the Framers.²⁴⁵ Notwithstanding the jury’s imperfections, the Framers depended upon the jury to be an important check on government.²⁴⁶ The Framers were

238. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 310 (Francis Bower trans., Alfred A. Knopf 1976) (1840).

239. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *SUFFOLK U. L. REV.* 67, 69 (2006). Judge Young also observed: “Properly constrained by its duty to follow the law, the requirement of jury unanimity, and evidentiary rules, the American jury has served the republic well for over two hundred years.” *Id.*

240. See Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 435–36, 466 (1999).

241. See Michael D. Green & Ashley DiMuzio, *Cardozo and the Civil Jury*, 34 *TOURO L. REV.* 183, 186 (2018). Mark Twain is quoted as saying, “The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago.” *Id.* at 186–87 n.18 (quoting MARK TWAIN, *ROUGHING IT* 247 (Am. Pub. & F.G. Gilman & Co. 1872)).

242. JOHN GUINThER, *THE JURY IN AMERICA* xiii (Facts on File Publ’ns, 1988).

243. See, e.g., *id.* at xiii–xxviii; Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *VA. L. REV.* 1055, 1062, 1067, 1072 (1964).

244. See, e.g., STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 4, 9–10, 12 (1995); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 *NOTRE DAME L. REV.* 1497, 1498–99 (2003); see also Benjamin Landis, *Jury Trials and the Delay of Justice*, 56 *A.B.A. J.* 950, 950–51 (1970) (proposing abolition of jury trial in civil cases).

245. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *WIS. L. REV.* 377, 399 (1999).

246. See, e.g., *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.”).

wary of accumulations of power in the same hands—including within the judiciary.²⁴⁷ Thomas Jefferson considered trial by a jury “as the only anchor . . . yet imagined by man, by which a government can be held to the principles of its constitution.”²⁴⁸ John Adams highlighted the “important boundary between the power of the court and that of the jury.”²⁴⁹ And Alexander Hamilton envisioned the jury as “a security against corruption” of judges.²⁵⁰

The Framers, as Justice William Rehnquist noted, considered the jury a vital “bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”²⁵¹ The abrogation of the right to trial by jury—one of the colonists’ principal grievances against the Crown—was specifically included among the indictments against George III in the Declaration of Independence.²⁵² The jury was seen as an essential protection against government abuses.²⁵³ And a prominent objection to the proposed Constitution—“well-nigh preventing its ratification”²⁵⁴—was the omission of a guarantee of the right to trial by jury in civil cases.²⁵⁵ Hamilton spoke to this objection in *The*

247. See THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001).

248. 3 THE WRITINGS OF THOMAS JEFFERSON 71 (H.A. Washington ed., 1861).

249. 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253 (Charles Francis Adams ed., 1850) (noting the “important boundary between the power of the court and that of the jury”).

250. THE FEDERALIST NO. 83, at 434 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

251. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). See also Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 709 (1973).

252. See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (“For depriving us in many cases, of the Benefits of Trial by Jury . . .”); see also Harrington, *supra* note 245, at 395 (“The denial of jury trials became a major source of friction between the colonists and the English government in the years leading to the Revolution.”).

253. See Harrington, *supra* note 245, at 393 (stating that the jury in England was key to protecting against government abuse); *id.* at 396 (“For the colonists, the jury had become an important weapon in combating royal oppression. Unable to fight unpopular laws in Parliament, Americans used the jury to nullify legislation. ‘Victimless’ crimes, like sedition and smuggling, were essentially unenforceable because they lacked public support.”).

254. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1763, at 540 (5th ed. 1891).

255. *Chi. Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 243 (1897) (“One of the objections made to the acceptance of the constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that, under it, facts tried by a jury could be

Federalist, observing the only disagreement regarding the role of juries was that “the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”²⁵⁶ The Supreme Court has long touted the Seventh Amendment right to trial by jury as a “fundamental guarantee of the rights and liberties of the people.”²⁵⁷ The Court has cautioned that “any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care”²⁵⁸ and “every encroachment upon it has been watched with great jealousy.”²⁵⁹

In deciding whether the Seventh Amendment guarantees a right to a jury, the Court adopts a two-step inquiry. The first question is whether the claim was “tried at law at the time of the founding or is at least analogous to one that was.”²⁶⁰ And if it was, the second question is “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”²⁶¹ Stated plainly, if the case had been filed in 1792, would it have been filed in the common law courts or in the equity courts?²⁶² At the time the Seventh Amendment was adopted, legal and equitable suits were adjudicated in separate forums. But in 1938, the systems were unified such that legal and equitable actions are now adjudicated in the same forum.²⁶³ Notwithstanding this merger, the Supreme Court

reexamined by the courts of the United States otherwise than according to the rules of the common law. The seventh amendment was intended to meet these objections, and to deprive the courts of the United States of any such authority.”). *Accord* Wolfram, *supra* note 251, at 657.

256. THE FEDERALIST NO. 83, at 521 (Alexander Hamilton) (Henry Lodge ed., 1888).

257. *Parsons v. Bedford*, 28 U.S. 433, 446 (1830).

258. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

259. *Parsons*, 28 U.S. at 446 (quoted in *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 378 (1913)).

260. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996)); *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”).

261. *City of Monterey*, 526 U.S. at 708.

262. *See* *Tull v. United States*, 481 U.S. 412, 417 (1987) (“[W]e compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity.”); *see also* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1020–30 (1992).

263. *See* FED. R. CIV. P. 2 (“There is one form of action—the civil action.”); *see also* *City of Monterey*, 526 U.S. at 708.

“has carefully preserved the right to trial by jury where legal rights are at stake.”²⁶⁴ Thus, if the nature and remedy would historically have required a jury trial, then the Seventh Amendment preserves a jury right.²⁶⁵

By its terms, the Seventh Amendment not only preserves a right to a jury trial in “[s]uits at common law,” but it also limits the courts’ authority to re-examine facts tried by juries.²⁶⁶ Conceptually, the Seventh Amendment affords two dimensions on which it protects the right to a jury: horizontally and vertically. The label “horizontal” is used to reflect the choice between two factfinders in the same setting. In other words, on a horizontal plane, the allocation is between the trial judge and the jury. On the other hand, the label “vertical” is used to reflect the standard of review applied to the original factfinder—either trial judge or jury. On a vertical plane, the standard of review (deference or *de novo*) allocates decision-making authority between the original factfinder and an appellate body.²⁶⁷

Horizontally, the first clause of the Seventh Amendment provides that the “the right of trial by jury shall be preserved” in cases that traditionally arose at common law, as opposed to equity cases that were heard by the chancery court. This first clause allocates decision-making authority between the trial judge and the jury. This horizontal allocation decides (1) which civil actions trigger the right to a jury and (2) which questions must be decided by the jury once the right is triggered.²⁶⁸

Vertically, the second clause of the Seventh Amendment allocates decision-making authority between the appellate court and the jury.²⁶⁹ The second clause provides that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than

264. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

265. *See* U.S. CONST. amend. VII.

266. *Id.*

267. This Article adopts the fiction that appellate court deference is a binary question: either a determination is given deference or it is not. Gradations of appellate deference—while acknowledged—are ignored in the present analysis.

268. *See City of Monterey*, 526 U.S. at 687, 708–09; *see also* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1126 (2003).

269. *Cf. Higginbotham, supra* note 236, at 50 (“The substance and fervor of the political debate [surrounding the enactment of the Seventh Amendment] suggest the concern that elimination of the jury would result in a shift of power, not to the trial judge, but to the appellate courts.”); *id.* at 58 (“[T]he risk of expanded appellate power increases with every encroachment on the jury; jury use and the scope of appellate power appear locked in a tandem relationship.”).

according to the rules of the common law.”²⁷⁰ This Reexamination Clause thus shields jury-found facts from reevaluation,²⁷¹ and the Federal Rules of Civil Procedure extend a similar shield to trial-judge-found facts.²⁷² While there are technical distinctions between reviewing jury trial findings for substantial evidence and bench trial findings for clear error, both original factfinders are generally reviewed deferentially.²⁷³

Appellate court deference to the original factfinder is, in the words of the Court, “the rule, not the exception.”²⁷⁴ The Court’s explanation for this deference includes both functional and prudential concerns:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge’s position to make determinations of credibility. The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge’s efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be “the ‘main event’ . . . rather than a ‘tryout on the road.’”²⁷⁵

In articulating appellate standards of review, the Court has often noted the “respective institutional advantages of trial and appellate courts.”²⁷⁶ And as a court of appeals once admonished, “we are not

270. U.S. CONST. amend. VII.

271. *See* *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358–59 (1962) (“[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.”).

272. *See* FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

273. *See* *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) (acknowledging different labels of appellate review but suggesting “heretically” there are “operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential”); *see also supra* note 267.

274. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

275. *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

276. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). *Accord* *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (focusing on when “one judicial actor is better positioned than another to decide the issue in question”).

some kind of superjury, from whom losing parties can get a second bite at the apple.”²⁷⁷

As noted above, the fact/law classification is important because the label affects *who* can decide an issue.²⁷⁸ The fact/law distinction drives both the horizontal and vertical allocation of decision-making authority. Horizontally, the Supreme Court has long recognized the “good old rule” that generally questions of fact are entrusted to the jury and questions of law are the province of the courts to decide.²⁷⁹ On appeal, findings of fact—from a bench trial or a jury trial—are given deference, whereas conclusions of law are given non-deferential, plenary review.²⁸⁰ When an appellate court reviews a matter deferentially, the center of gravity of that decision rests with the lower court.²⁸¹ Deference to the original fact finder is appropriate because, as the Court explained, the trial should be the “main event” rather than a “tryout on the road.”²⁸² On the other hand, if an appellate court can decide the matter anew, finality of that question does not rest

277. *Knox v. Indiana*, 93 F.3d 1327, 1336 (7th Cir. 1996) (quoted in *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1047 (7th Cir. 1999)).

278. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001) (“[A]rguing that the law-fact divide is a shibboleth, something that the Court invokes to justify a conclusion about whether it or Congress should settle an issue, not something with independent analytical force.”); see also J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 486–87 (1985) (“The question of citizen control versus judicial control embodies the significance of the law/fact distinction.”).

279. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

280. See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (“The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”). But see *U.S. Bank Nat’l Ass’n ex rel. CW Capital Asset Mgmt., LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018) (“Usually but not always: In the constitutional realm, for example, the calculus changes. There, we have often held that the role of appellate courts ‘in marking out the limits of [a] standard through the process of case-by-case adjudication’ favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record.”) (citations omitted).

281. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (“Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous The Rule does not apply to conclusions of law.”); see also Bryan Adamson, *Critical Error: Courts’ Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1, 10 (2009) (“As a general proposition, standards of review confine appellate inquiry and judgments within a discrete decisional framework. For example, by directing that facts found by a trial court be reviewed only for clear error, Rule 52(a) binds the appellate judge to respond to the facts in a particular way and not to engage in a more active inquiry.”).

282. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

with the lower court.²⁸³ Vertically, standards of appellate review channel decision-making authority between trial and appellate court levels.²⁸⁴ Thus the fact/law shibboleth dictates (1) who will be the decisionmaker at the trial court level and (2) the scope of appellate review of that decision.²⁸⁵

But questions of fact and questions of law are not hermetically distinct.²⁸⁶ Mixed questions of law and fact—such as fair use—are those that fall “somewhere between a pristine legal standard and a simple historical fact.”²⁸⁷ The chimerical category of “mixed questions of law and fact” has long bedeviled courts and commentators.²⁸⁸ Part of the difficulty is that denominating a question “mixed” is descriptive but not predictive. There is no analytical way to predict the standard of review for law-application-mixed-questions.²⁸⁹ As Professor Stephen Weiner remarked, “[s]ince law application cannot be meaningfully described as either lawmaking or factfinding, such terminology is not a useful analytical tool in answering the question

283. See *Louis*, *supra* note 196, at 997.

284. See Ronald R. Hofer, *Standards of Review-Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991) (“[S]tandards [of appellate review] define the allocation of power between the trial and appellate courts.”); *Louis*, *supra* note 196, at 997 (“Scope of review, therefore, is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.”).

285. See Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) (arguing the “decision to label an issue ‘law’ or ‘fact’ is a functional one based on who should decide it under what standard, and is not based on the nature of the issue”); Parker, *supra* note 278, at 485 (“[T]he labeling of a ‘mixed question’ as either ‘law’ or ‘fact’ traditionally has been important because that labeling dictates (1) the allocation of the fact application task to judge or jury at trial, and (2) the scope of the subsequent appellate review.”).

286. See *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995) (“[T]he proper characterization of a question as one of fact or law is sometimes slippery.”); see also Allen & Pardo, *supra* note 285, at 1790 (rejecting the notion “that legal and factual issues constitute discrete ontological categories”).

287. *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

288. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 236 (1991) (noting the blended nature of mixed questions seems “to sit precisely at the midpoint between the Scylla of allowing errors to go uncorrected and the Charybdis of judicial inefficiency”).

289. See Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 129 (2005) (“What is confusing about evaluative determinations, however, is that they are sometimes reviewed deferentially, as in the case of negligence, and sometimes de novo, as in the case of probable cause. Yet there is no analytical way to distinguish between these categories.”).

confronting the court.”²⁹⁰ Thus, the fact/law distinction is a conclusion; it is not a guide for coming to a conclusion.²⁹¹

In categorizing a mixed question as either law-like or fact-like, the Supreme Court has noted that “the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”²⁹² But law-application can be done either by the judge or jury; it is not necessarily clear which original factfinder is “better positioned” to do it.²⁹³ Abstract concepts, like negligence or community standards, are often decided by juries.²⁹⁴ Indeed, the Supreme Court has reiterated that “the application-of-legal-standard-to-fact sort of question . . . commonly called a ‘mixed question of law and fact,’ has typically been resolved by juries.”²⁹⁵ Thus, whether the judge or the jury is entrusted with deciding a particular question is, at base, a policy question.²⁹⁶ But this policy question of “better position” should not ignore the Seventh Amendment.

Scholars warn that subjecting jury verdicts to *de novo* review risks undermining the Seventh Amendment.²⁹⁷ There are some who worry that denominating an issue a “mixed question” is simply a

290. Stephen A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1022 (1967).

291. See EDWARDS & ELLIOTT, *supra* note 193, at 8–9 (“[T]he fact/law paradigm falters as a method for determining whether appellate review should be *de novo* or deferential.”).

292. *Miller*, 474 U.S. at 114.

293. See Parker, *supra* note 278, at 486 (“A ‘mixed question of law and fact’ is not, as the phrase might suggest, an issue which is simply part law and part fact to which Coke’s axiom can be mechanically applied. Rather, it is a term that describes the situation in which facts must be applied to legal principles, a task that can be done by either judge or jury.”).

294. See *id.* (“It is wrong to conclude that all ideas or abstract concepts are automatically questions of law and thus solely for the judge to decide. Courts have traditionally recognized that some issues of this nature, especially those concerning community standards, ought to be decided by a jury.”).

295. *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015) (quoting *United States v. Gaudin*, 515 U.S. 506, 512 (1995)).

296. See Gergen, *supra* note 240, at 423 (“Ultimately, the balance one strikes between judge and jury may depend upon whether one thinks of law as social engineering or as a civil religion. The social engineer wants to limit the jury’s role because of its unpredictability (it is no surprise that Holmes wanted to reduce the role of the jury); the civil priest celebrates the jury’s role if he is of truly Protestant disposition.”) (citation omitted).

297. See Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 804–05 (2005) (noting that the Seventh Amendment “right to a jury trial can become illusory if the judiciary is free to prevent the jury from hearing cases or is free to eliminate jury verdicts”).

backdoor method to reassess the outcome.²⁹⁸ The worry is that appellate courts may recast questions of fact into questions of law in order to impose the court's policy viewpoint on the decision. Scholars criticize the fact/law distinction as merely a "camouflage for the normative conclusion that a question should go to the judge or to the jury."²⁹⁹ Pressing beyond the fact/law distinction reveals that the allocation may reflect little more than appellate preference. The fact/law distinction is too malleable to be a reliable predictor for allocating decision-making authority for jury findings.³⁰⁰ When a jury verdict can simply be reclassified as a question of law, the classification is little more than a policy question—which appellate courts get to decide.³⁰¹

Whether the focus is on the fact/law distinction, the superiority of institutional actors, or the nature of the right at stake,³⁰² horizontal and vertical allocation of decision-making authority risks being unhinged and independent of the Seventh Amendment. Scholars have

298. See, e.g., Kirgis, *supra* note 268, at 1180 (noting "the ease with which courts can manipulate the jury right by adopting rules of law that call for 'legal' rather than 'factual' questions"); Louis, *supra* note 196, at 1018, 1028 (warning of "a direct judicial assault on the prerogatives of fact finders[]" by classifying "ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review").

299. Kirgis, *supra* note 268, at 1128; see also Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 574 (2003) ("It has been suggested that the law/fact distinction is nothing but a mask for a policy decision about which questions should be given to the judge and which to the jury.").

300. See William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1734 (2001) ("This 'question of law' approach to reconciliation of weight of the evidence review with the reexamination clause is an unsatisfactory one because it provides no principled restraints on the judicial review of jury findings and gives the wrong guidance to the courts of appeals."); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 256 (2000) ("If the Seventh Amendment guarantee is so malleable that any desired result can be obtained by changing methodology, then the Amendment's usefulness is diminished.").

301. See Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 357 (2009) ("[B]ased on the less than clearly defined line between law and fact, an appellate court can easily review and decide a factual issue by simply recasting it as a question of law and applying a de novo standard of review instead of the more stringent clearly erroneous standard.").

302. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984) (drawing the line between fact and law "varies according to the nature of the substantive law at issue").

observed a steady erosion of the jury right.³⁰³ One source of erosion is the removal of questions from juries by converting factual questions into legal questions.³⁰⁴

No coordinate branch of government has the power to protect the right to a jury. While the separation of powers influences the allocation of authority among the legislative, executive, and judicial branches, no analogous body polices the division of power between the judiciary and the jury.³⁰⁵ The judiciary is relied upon to police itself. As Justice Felix Frankfurter once counseled, “[t]he attitude of judicial humility . . . is not an abdication of the judicial function. It is a due observance of its limits.”³⁰⁶ Only judicial self-restraint governs the preservation of a right to a jury.³⁰⁷

As discussed above, fair use is a mixed question of law and fact.³⁰⁸ The fact/law distinction thus begs the question whether fair use is more like a question of fact, for which an appellate court should apply deferential review, or whether fair use is more like a question of

303. See Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 816 (2014) (tracing “a steady decline in the importance of civil juries”); Moses, *supra* note 300, at 183 (“[T]he parameters of the jury trial right have changed over time, generally, although not exclusively, in the direction of restricting the jury’s role.”); Robert A. Patterson, Comment, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 BYU L. REV. 951, 951 (2014) (“The civil jury trial is losing its place in America’s justice system.”); see also Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (noting “the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment”).

304. See Sward, *supra* note 299, at 638 (“For well over one hundred years, courts have found procedural excuses for taking questions of fact away from juries.”); *id.* at 639 (“Fact has become law, and as it becomes law, it is withdrawn from the jury.”).

305. See Thomas, *supra* note 297, at 771–72.

306. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting).

307. See Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357, 358 (1957) (“There is nothing to prevent [an] invasion of the jury’s province except the self-restraint of the judges themselves. It is simply an institutional risk. Where impulses are so strong to do ultimate justice, and where the jury and what its members heard, observed and considered are so far removed from the chambers of the court, the brakes of self-restraint are severely taxed. The supreme power in a court system as in any other hierarchy inevitably increases with its exercise.”).

308. See NIMMER ON COPYRIGHT, *supra* note 38, at § 13.05 (“Fair use is said to constitute a mixed issue of law and fact, but what facts will be sufficient to raise this defense in any given case is not easily answered.”).

law, for which an appellate court can decide anew.³⁰⁹ If an appellate court concludes fair use is more law-like than fact-like, the court can decide fair use de novo, without deference to the original factfinder.³¹⁰ This would undermine the well-established roles of trial and appellate courts and would reallocate adjudicative authority to a federal appellate court. If, like in *Oracle v. Google*,³¹¹ an appellate court can simply reexamine the question and redraw its own inference on the question of fair use, the jury right is a hollow shell.³¹²

The real question is whether we take seriously the notion that the jury has a constitutional role in deciding important matters.³¹³ Some scholars argue that the jury should be able to decide constitutional issues,³¹⁴ whereas others are more circumspect.³¹⁵ Some argue juries serve as populist protectors that possess a better sense of community values and norms,³¹⁶ whereas others worry the jury reflects the

309. Cf. *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 913 (2015) (holding that trademark tacking is a question for the jury); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390–91 (1996) (holding that patent construction is a question for a judge); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (holding a right to a jury trial to determine the amount of statutory damages).

310. See *U.S. Bank Nat'l Ass'n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 968 (2018).

311. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1211 (Fed. Cir. 2018), cert. granted, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956).

312. See *Dorsaneo*, *supra* note 300, at 1699 (“If the inferences drawn by the jury could be cast aside by trial judges or appellate courts merely because the judges regard the jury’s inferences, as reflected in the verdict form, as less convincing or reasonable than competing inferences, the right to trial by jury would be rendered considerably less meaningful.”).

313. Cf. *Hana Fin., Inc.*, 135 S. Ct. at 911 (“[W]e have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.”); see also Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1199 n.99 (2013) (“Whether appellate courts should defer to jury factfinding in constitutional rights cases is a complicated question. Scholars have made compelling arguments both for and against appellate deference in such cases.”).

314. See, e.g., Nathan S. Chapman, *The Jury’s Constitutional Judgment*, 67 ALA. L. REV. 189, 193–94 (2015) (“[T]rial judges should ordinarily allow the jury to apply constitutional doctrine to the facts of a case; and . . . courts of appeals should review the jury’s application of constitutional law for reasonableness.”).

315. See, e.g., DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 123 (2008) (“Because the jury represents values associated with the political majority, it cannot fully be entrusted with protection of the values inherent in the Bill of Rights.”).

316. See *Amar*, *supra* note 237, at 1183 (“Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights. The Fifth safeguarded the role of the grand jury; the Sixth, the criminal petit jury; and the Seventh, the civil

political majority that cannot be trusted to protect unpopular minorities.³¹⁷ While not directly addressing this question, the Court has at times recognized the jury's role in drawing "legitimate inferences from the facts,"³¹⁸ rather than simply finding the who-what-when historical facts. Relegating juries to finding only historical facts denies the long-standing tradition of having citizen jurors decide important speech questions like obscenity³¹⁹ and libel.³²⁰ As noted above, fair use raises similarly delicate speech questions. The Supreme Court long ago remarked, "It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."³²¹ Citizen jurors have long been relied upon to decide questions like defamation and obscenity. Similarly, citizen jurors are competent and capable of deciding fair use.³²²

jury."); Chapman, *supra* note 314, at 195 (arguing the jury has a "uniquely popular voice," and "[w]hen the jury brings that voice to bear on constitutional questions, it serves as a popular structural check on government officers"); Louis, *supra* note 196, at 1010 (suggesting juries have a "greater sense of community values, customs, practices, and standards").

317. See Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) ("One reason for independent factfinding is to assure adequate enforcement of constitutional guarantees toward which there is majority antagonism that could seep into jury factfinding."); see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276–77 (1971) (applying heightened standards in cases involving the First Amendment because there may be times when the jury is "unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). See generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969).

318. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))); see also *United States v. Gaudin*, 515 U.S. 506, 506 (1995) ("[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion . . .").

319. See *Miller v. California*, 413 U.S. 15, 24 (1973).

320. See *Sullivan*, 376 U.S. at 262.

321. *R.R. Co. v. Stout*, 17 Wall. 657, 664 (1874) (quoted in *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015)).

322. See generally Amanda Reid, *Safeguarding Fair Use Through First Amendment's Asymmetric Constitutional Fact Review*, 28 WM. & MARY BILL RTS. J. 23 (2019) (arguing that fair use is a constitutional fact for which appellate courts

The fact/law methodology for allocating decision-making responsibility occludes the plainly political question: who do we want to make this particular decision? Resolving the allocative question on who should be the decisionmaker turns on who, as a matter of policy, should decide the question.³²³ Such allocation is a normative decision, not a purely analytic one.³²⁴ Without a reliable guide to allocating decision-making authority, the question becomes one of expedience and preference. Prudential concerns prevail over constitutional concerns. Laying bear this pure policy question reveals a weakness of the Seventh Amendment: courts are able to (unaccountably) elide the Seventh Amendment at will.³²⁵

CONCLUSION

An often-overlooked question is *who* should decide the important questions of the day. This Article has taken up the inquiry as it relates to copyright fair use. Conceptually, fair use is a public policy question. The better policy view is that fair use is a statutory right, a speech-protective safeguard, and a defense—but not an affirmative defense. Operationally, who decides fair use is a judicial policy question. Who decides a particular question is informed by the nature of the question.

Courts are arbiters of law, and juries are arbiters of facts. For a mixed question of law and fact, who decides is driven by whether the question is more fact-like or more law-like. Categorizing such questions is, at its core, an allocative policy question. The policy answer is driven by the nature of the question, relative institutional skills, and the importance of the interest at stake. Properly seen as an affirmative right, and not an affirmative defense, the interests at stake

should engage in a one-way, asymmetric review of jury determinations adverse to the fair-use-claimant in order to guard against Type 1 errors).

323. Cf. Monaghan, *supra* note 192, at 237 (“The real issue is not analytic, but allocative: what decisionmaker should decide the issue?”) (citations omitted).

324. Cf. EDWARDS & ELLIOTT, *supra* note 193, at 8–9 (“The fact/law paradigm thus functions as an accurate proxy for ascertaining whether the trial or appellate court would better perform the decisionmaking task implicated on appeal.”).

325. Compare THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing the judiciary would be the “least dangerous branch” because it lacks the power of either the purse or the sword) with ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (disputing the “least dangerous branch” and arguing the “counter-majoritarian difficulty” of judicial review).

in fair use cases are a user's right to free expression balanced against a copyright holder's statutory privilege.

This Article contributes to the scholarly conversations by laying bare the reality that who decides the question of copyright fair use is nakedly political.³²⁶ Courts are actively wrestling with this unresolved policy question.³²⁷ The Seventh Amendment fashions a policy preference for juries to decide questions of fact. Moreover, history confirms a long tradition of relying on juries to make fair use determinations. But it is unclear if this tradition will continue. Without Supreme Court guidance, categorizing fair use as more law-like or more fact-like is so slippery and malleable that the Seventh Amendment ceases to be an influence—much less a command.

326. Cf. Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 54 (2017) (observing that in the American Legal Realist movement, “[s]imply put, all law is policy”); Marouf Hasian, Jr., *Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies Toward Rhetorical Consciousness*, 17 LEGAL STUD. F. 347, 348 (1994) (noting the “elusive quest for a middle ground between self-evident or discovered constitutional truths and nihilistic relativism”).

327. See *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), cert. granted, 2019 WL 6042317 (U.S. Nov. 15, 2019) (No. 18-956); *Corbello v. DeVito*, 262 F. Supp. 3d 1056 (D. Nev. 2017), appeal docketed, No. 17-16337 (9th Cir. Jun. 29, 2017).