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Jury-Related Errors in Copyright

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Jury-Related Errors in Copyright

ZAHR K. SAID*

Copyright law is surprisingly hard. Copyright does not do what laypeople think it does, nor do its terms mean what laypeople expect. Copyright also possesses systemic indeterminacy about what it protects and the extent of that protection. For laypeople, copyright law is decidedly “user-unfriendly.” Nonetheless, copyright law reserves for lay jurors its most-litigated, most difficult, and most consequential question at trial: whether works are “substantially similar” and thus infringing.

Many have criticized this allocation because in the context of copyright law, juries effectively have the power to expand or contract owners’ rights with little oversight or correction. But blaming the jury obscures other systemic factors and overlooks mistakes made by judges and litigants (as well as juries). In short, don’t blame the jurors, blame the game. To evaluate and improve the jury’s role in copyright litigation, we must look at—but also beyond—the jury and consider systemic sources of error, starting with complexities built into copyright itself.

This Article focuses on copyright’s jury per se and begins to bridge the gap between copyright scholarship and the methodologically diverse generalist jury literature. Numerous high-profile jury trials underscore the jury’s importance for copyright policy, yet scholars have neglected to consider the jury’s role in light of existing generalist scholarship. Jury-Related Errors in Copyright profiles copyright’s user-unfriendliness and explores its impact by examining cases involving jury-related errors. It proposes a framework for considering reforms, arguing that copyright law must be attuned to what juries need to accomplish their tasks (via a “jury-centric” approach) as well as heeding how juries’ verdicts effectuate—or distort—copyright’s policy aims (using a “system-centric” approach). More scholarship is needed to develop future reforms but this Article provides a necessary starting point by acknowledging copyright law’s current user-unfriendliness and

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highlighting the significant impact of jury-related errors.

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INTRODUCTION

Copyright law holds that, in most cases, infringement determinations are the “exclusive province of the jury,”¹ and many believe that this is a problem.² The scope of copyright protection in a work is hard to know before trial, for reasons that are inherent in copyright and thus unlikely to change.³ This means that the jury wields

1. *Funky Films, Inc. v. Time Warner Ent. Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). The jury’s role is central in cases involving non-identical (or “substantially similar”) works, and these claims predominate at litigation. Clark D. Asay, *An Empirical Study of Copyright’s Substantial Similarity Test*, 13 UC IRVINE L. REV. (forthcoming 2022), <https://ssrn.com/abstract=4013095> [<https://perma.cc/G5AP-9UZP>]; see also Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 793 (2016); WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 9.86 (2022); *Armstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 878 (9th Cir. 2016).

2. See Balganes, *supra* note 1, at 791; Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 719–22 (2010); Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2236 (2016); Shyamkrishna Balganes, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 289 (2014); Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605, 608 (2017); Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright’s “Substantial Similarity” Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 580, 596 (2019); Wendy Gordon, *How the Jury in the ‘Blurred Lines’ Case Was Misled*, CONVERSATION (Mar. 17, 2015, 5:47 AM), <https://theconversation.com/how-the-jury-in-the-blurred-lines-case-was-misled-38751> [<https://perma.cc/28DH-VT4C>]. But see David Nimmer, *Juries and the Development of Fair Use Standards*, 31 HARV. J.L. & TECH. 563, 591–92 (2018) (reporting his concerns over the jury’s capacity for fair use allayed over time).

3. See Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in*

significant power: if it errs, or ignores its instructions, the jury can improperly expand or contract an owner's rights. For example, in *Op Art v. B.I.G.*, a little-known dispute over the designs hand-painted onto pre-purchased reading glasses, plaintiffs proposed the following instruction: "you the jury can decide the proper scope of any copyright protection."⁴ The court refused that instruction, but the jury nevertheless did just that, and its verdict feels like copyright gaslighting.⁵ The jury found infringement of plaintiff's "valid copyright . . . in eyeglasses"—which is an oxymoronic phrase because copyright explicitly withholds protection for "useful articles" like eyeglasses—and then awarded damages based on sales of the entire eyeglasses without apportioning the award to the infringement of the protected designs on the unprotected eyeglasses as the statute would require.⁶ Jury-related errors like these shift the dividing line between copyright and other domains (such as patentable subject matter, or indeed the public domain). Such errors improperly expand the scope of the owner's rights in contravention of longstanding rules and policies that structure copyright law.

Perhaps because of widespread awareness of the way the jury can calibrate and miscalibrate the scope of copyright protection, the jury's role and jury instructions have been fiercely contested in many recent controversies, including *Kirtsaeng v. John Wiley*,⁷ *Capitol Records v. Thomas*,⁸ *BMG Rights Management v. Cox Communications, Inc.*,⁹ *Williams v. Gaye*,¹⁰ *Skidmore v. Led Zeppelin*,¹¹ *Google LLC v. Oracle America, Inc.*,¹² and *Unicolors, Inc. v. H & M Hennes & Mauritz LP*.¹³ These and other cases have subjected the jury to strong critiques—that the jury was confused, biased, or incapable of deciding the issue—some of which are well-taken.¹⁴ Yet blaming the jury obscures the problems that allow infringement to be decided by a jury and underestimates how much judges and litigants contribute to errors in the jury system.¹⁵ In short, don't blame the jurors, blame the game. To evaluate and improve the jury's role in copyright litigation, we must look at—but

Information, 116 YALE L.J. 1742, 1755 (2007) (describing delineation of the entitlement "as a thing occurs largely ex post in negotiation and litigation, . . . [i]n the process of . . . specifying protectable expression in litigation, a claimant implicitly defines a thing from which the rights-holder can exclude others" (internal citation omitted)).

4. Plaintiffs' Objections to Defendants' Proposed Jury Charge at 3, No. 3:03 CV-0887, 2005 WL 2893652 (N.D. Tex. Oct. 11, 2005).

5. See *infra* Section II.C.

6. *Id.*

7. 579 U.S. 197, 197–99 (2016).

8. 692 F.3d 899, 901 (8th Cir. 2012).

9. 881 F.3d 293, 310 (4th Cir. 2018).

10. 895 F.3d 1106, 1123 (9th Cir. 2018).

11. 952 F.3d 1051, 1056 (9th Cir. 2020).

12. 141 S. Ct. 1183, 1194 (2021).

13. No. 16-cv-02322, 2018 WL 10307045, at *1 (C.D. Cal. Aug. 1, 2018), *rev'd and remanded*, 959 F.3d 1194 (9th Cir. 2020), *vacated and remanded*, 142 S. Ct. 941 (2022).

14. See Balganes, *supra* note 1, at 791; Lemley, *supra* note 2, at 739–40; Lemley & McKenna, *supra* note 2, at 2236; Said, *supra* note 2, at 639–42.

15. Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1873 (2018) ("Copyright policymakers should be far more focused on the regime that let the claim reach a jury to begin with than on what the jury did once it got there.")

also beyond—the jury and consider other systemic sources of error, starting with complexities built into copyright itself.

Copyright law is surprisingly hard.¹⁶ It seems as though it ought to be familiar—it governs enjoyable, familiar things like books, music, and movies, not complex patentable subject matter, for instance—but it is actually indeterminate, abstract, hyper-technical, and counterintuitive all at once.¹⁷ Its primary statute is extraordinarily complex, leading one scholar to call it “a swollen, barnacle-encrusted collection of incomprehensible prose.”¹⁸ And that is only one of two distinct statutory regimes in operation, which can add considerable difficulty even in contemporary disputes.¹⁹ Shaped by industry lobbying²⁰ rather than logic, both the Copyright Act of 1976²¹ and its predecessor, the Copyright Act of 1909,²² make little sense without their sociopolitical contexts as explanation.²³ Copyright’s subject matter has been extended over time to a wide range of works²⁴ that possess different kinds of complexity, from cinema to software, and different levels of creativity, from sculptures, operas, graffiti, and anime to organizational taxonomies, architectural blueprints, model building codes, and even (if controversially) jury instructions.²⁵ This great range of works raises diverse evidentiary questions at trial that in turn often require an understanding of different technologies, industry practices, aesthetic and cultural considerations, audience behaviors, or all of the above. These forms of complexity are further intensified by copyright’s dynamic nature: the law, and its subject matter, develop continually.

In addition to being unreasonably complex and fast-moving, copyright is also often counterintuitive for nonspecialists.²⁶ Copyright doesn’t *do* what many

16. See Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 458 (2014); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 88 (2004).

17. Copyright law may not be *uniquely* difficult among legal areas. But its *particular* difficulties have been overlooked and deserve attention in light of what copyright litigation routinely entrusts to its juries and expects of its judges.

18. Jessica D. Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010).

19. See, e.g., *Urbont v. Sony Music Ent.*, 831 F.3d 80, 85, 85 n.2 (2d Cir. 2016).

20. Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don’t)*, 55 Hous. L. REV. 451, 455 (2017); Smith, *supra* note 3, at 1814; Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 280–82 (1989).

21. 17 U.S.C. §§ 101–1401 (1976).

22. Copy Right Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

23. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869–70 (1987).

24. Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17, 21–28 (2016).

25. Public.Resource.Org Works w/Cyberlaw Clinic, Asks States to Increase Judicial Transparency and Facilitate Access to Model Jury Instructions, CYBERLAW CLINIC (Jan. 1, 2022), <https://clinic.cyber.harvard.edu/2022/01/01/public-resource-org-works-wcyberlaw-clinic-asks-states-to-increase-judicial-transparency-and-facilitate-access-to-model-jury-instructions/>.

26. Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 573 (1995).

laypeople think it does, nor do its terms *mean* what laypeople would reasonably expect them to mean. Copyright is often morally divergent from lay norms of right and wrong,²⁷ and linguistically divergent from lay communication norms.²⁸ To make matters worse, copyright possesses deep, systemic indeterminacy: the metes and bounds of the thing copyright protects, as well as the strength of protection, are not known (or maybe knowable) in advance. This ontological indeterminacy requires that judges confront “interpretive pressure points” that require them to decide the bounds of the work and their method of approaching it.²⁹ Thus, the *thing* to which copyright protection actually attaches may be among the most hotly debated issues at trial. If “ontological indeterminacy” seems like a question more fitting for classrooms than courtrooms, note that disputes over whether and how much protection copyright extends to the “thing” are routine, including in cases involving software,³⁰ fabric designs,³¹ popular music,³² high-end dolls’ heads,³³ decorative candle-holding baskets,³⁴ day planners,³⁵ architectural plans,³⁶ databases, respectively, for stock photos and yacht sales listings,³⁷ sex “sculptures,”³⁸ celebrity biographies,³⁹ and the Batmobile—specifically whether, although it is a car and a sculpture, it is also a character.⁴⁰ All of these cases were tried to a jury except (sadly for jurors everywhere) the Batmobile one. These disputes exemplify copyright’s user-unfriendliness, which creates recurring open-endedness that challenges decisionmakers, whether they are judges or juries.

Copyright’s systemic open-endedness is not an accident but a deliberate and often salutary part of copyright’s overall scheme of rights and limits.⁴¹ While its

27. See *infra* Section I.B.

28. See *infra* Section I.C.

29. Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469, 487–88, 523 (2015).

30. See, e.g., Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974 (N.D. Cal. 2012).

31. See, e.g., L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841 (9th Cir. 2012); Desire, LLC v. Manna Textiles, Inc., 986 F.3d 1253 (2021).

32. See, e.g., Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018); Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020); Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994).

33. Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries, 272 F.3d 441, 445 (7th Cir. 2001).

34. Design Ideas, Ltd. v. Things Remembered, Inc., No. 07-3077, 2009 WL 1259035, at *4 (C.D. Ill. May 6, 2009).

35. Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989).

36. Home Design Servs., Inc. v. Turner Heritage Homes Inc., 825 F.3d 1314, 1320 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1335, 197 L. Ed. 2d 543 (2017).

37. Yellow Pages Photos, Inc. v. Ziplocal, LP, 795 F.3d 1255, 1281 (11th Cir. 2015); BUC Int’l Corp. v. Int’l Yacht Council Ltd., 489 F.3d 1129 (11th Cir. 2007).

38. TSX Toys, Inc. v. 665, Inc., No. 5:14-cv-02400, 2015 WL 10738420 (C.D. Cal. Dec. 29, 2015).

39. Corbello v. DeVito, 262 F. Supp. 3d 1056 (D. Nev. 2017).

40. DC Comics v. Towle, 802 F.3d 1012, 1015 (9th Cir. 2015) (“Holy copyright law, Batman!”).

41. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 885 (2007) (“[E]veryone agrees that certain copyright doctrines are ambiguous, and this ambiguity can be advantageous because it allows courts to reach equitable results

indeterminacy is deliberate, the challenges it imposes on factfinders may not have been. In its wide-ranging, dynamic, technical, counterintuitive, and open-ended aspects, copyright law is unexpectedly “user-unfriendly” in ways that ought to raise red flags for policymakers. This user-unfriendliness poses policy-relevant risks of what I call “jury-related errors,” which include errors originating with judges, juries, and even sometimes litigants in jury trials. Jury-related errors reflect our system’s collective failure to minimize or eliminate the potential for predictable mistakes when “users” (judges, juries, and litigants) interact with the “system” (copyright law).

Copyright’s challenges are difficult even in bench trials, of course; judges may be just as perplexed, and litigants just as likely to err or behave strategically. But the jury adds an extra element of difficulty. Judges must manage a universe of evidence subject to different principles and rules; they must preside over a contentious process of determining jury instructions pre-trial, when the full range of issues has not yet been fully aired; and they must parse factual from legal questions in a domain—substantial similarity—in which the dividing line is often unclear.⁴² For their part, litigants are subject to particular procedural strictures during a jury trial.⁴³ Given the rarity of such trials, litigants almost certainly have less practice with jury-related trial procedures than with conventional litigation mechanisms. All in all, the jury’s role adds further challenge, whatever the benefits it also imparts.

Copyright law is not unique in allocating hard questions to the jury.⁴⁴ Yet the jury’s discretion to decide copyright infringement is particularly consequential in terms of copyright policy, which our scholarship has yet to fully rationalize.⁴⁵ In turn, because the scope of the entitlement in copyright law is left purposely undefined until trial, juries are effectively empowered to shape—or at least tinker with, and perhaps “undo”⁴⁶—the very contours of copyright protection.⁴⁷

This Article argues that it is imperative to consider copyright’s user-unfriendliness and evaluate its potential to undermine the policies at the heart of copyright law. Copyright is subject to a “carefully crafted bargain,”⁴⁸ involving a

despite substantial variation and complexity in the fact patterns they encounter.”).

42. Daryl Lim, *Saving Substantial Similarity*, 73 FLA. L. REV. 591, 655 (2021) (describing inconsistency between the treatment of substantial similarity as a matter of fact and judicial disposition of it as a matter of law).

43. For instance, several of the Federal Rules of Civil Procedure (such as 38, 39, 47–51) pertain to a jury trial only, while others (such as 52, 58 and 59) contain provisions that affect jury trials and bench trials differently. (Some, such as Rule 61, make no such differentiation.).

44. Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1728–29 (2013).

45. See *infra* notes 53–59 and accompanying text.

46. Some scholars argue that by allocating this critical infringement analysis to the jury, the court in the recent “Blurred Lines” litigation over Marvin Gaye’s music “undid whatever limits the rules of copyright placed on the scope of Gaye’s right.” Lemley & McKenna, *supra* note 2, at 2236.

47. Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 500 (2004) (“Creators of copyrighted materials do not need to define the boundaries or describe the attributes of their copyrighted goods; definition is postponed until a dispute arises or until parties negotiate over the rights.”).

48. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

congressionally orchestrated balancing scheme designed to effectuate the constitutional aims of the Progress Clause by incentivizing innovation and creativity without awarding excessive monopolies.⁴⁹ In consequence of this “bargain” or policy balance, the scope of copyright protection “requires careful calibration.”⁵⁰ The 1976 Act grants owners several exclusive rights but expressly limits them: “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”⁵¹ Those enumerated provisions, starting with § 107 (fair use), detail a significant set of exclusions designed to effectuate that balance, including the right to resell an item (§ 109(a)’s first sale doctrine). In addition, the 1976 Act elsewhere expressly excludes ideas, systems, methods, processes, and other potential innovations that are general, functional, or nonexpressive.⁵² Copyright’s extensive regime of limitations and exceptions requires close attention and serves significant policy goals, including the traditional goals of promoting authorship but also broader aims such as protecting access to information, fostering competition, addressing market failures, and supporting the work of courts and legislatures.⁵³

Copyright’s limitations and exceptions thus carry great significance for authors, competitors, publishers, audiences, and the public domain. And they can be undone by jury-related errors in the sweep of a verdict. Indeed, in important new empirical work, Clark Asay has shown that a key ingredient for prevailing on substantial similarity is the “extent courts engage with and apply any relevant copyright limitations” during the second phase of substantial similarity analysis.⁵⁴ Asay’s study shows that “defendants overwhelmingly win when courts discuss copyright limitations, whereas plaintiffs win at about the same rates when courts do not.”⁵⁵ One important policy intervention, therefore, would be targeting points in infringement analysis when these limitations might be evaded or undone, including by means of the jury system, where copyright’s user-unfriendliness makes such errors likely.

That copyright is user-unfriendly is hardly news to those in the field, as my footnotes throughout the Article attest.⁵⁶ But copyright’s particular challenges have not been aggregated in terms of the jury function, nor considered for their policy implications given the jury’s significant role. Copyright scholarship has largely neglected the jury per se. Some scholars have explored the right to a jury trial⁵⁷ or

49. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198–99 (2021); *see generally* U.S. CONST. art. I, § 8, cl. 8.

50. Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 147 (2020).

51. 17 U.S.C. § 106.

52. *Id.* § 102(b).

53. Pamela Samuelson, *Justifications for Copyright’s Limitations and Exceptions*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 1, 45 (Ruth L. Okediji ed., 2017).

54. Asay, *supra* note 1, at 5.

55. *Id.* at 5–6.

56. I build on the work of many, particularly Professor Jessica Litman whose longstanding lament that copyright is complex, user-unfriendly, and counterintuitive productively fastened our field’s attention on legislative idiosyncrasies produced by and reflective of this unfriendliness. *See generally* JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

57. *See, e.g.*, H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit*

focused on fair use.⁵⁸ Indeed, the jury was thrust into recent controversy by litigation that concluded with the Supreme Court's holding that there is no Seventh Amendment right to a jury trial on fair use.⁵⁹ Another subset of scholarship has focused primarily on infringement issues and offered many valuable interventions that are relevant but ancillary.⁶⁰ A fourth body of work has considered the jury inversely—that is, focusing on what the jury is not doing or cannot do—by suggesting various mechanisms and deliberative bodies that could do the jury's work better than the jury or compensate for its deficiencies if only allowed.⁶¹ Finally, a few scholars have studied jury decision-making, theoretically or empirically, without tackling the jury's role in the system per se.⁶²

Most prior legal scholarship, however valuable, is not on point for developing an affirmative understanding of the jury function in copyright law. Consequently, copyright's user-unfriendliness as a problematic input for jury outputs has gone unremarked. Relatedly, there is next to nothing in the literature about the best

Under the Statute of Anne in 1710, 25 BERKELEY TECH. L.J. 1247, 1250 (2010); William Patry, *The Right to a Jury in Copyright Cases*, 29 J. COPYRIGHT SOC'Y U.S.A. 139 (1981).

58. See, e.g., Justin Hughes, *A Seventh Amendment Right to Fair Use Determinations?*, 13 LANDSLIDE 42 (2020); Justin Hughes, *The Respective Roles of Judges and Juries in Copyright Fair Use*, 58 HOUS. L. REV. 327 (2020); Nimmer, *supra* note 2; Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275 (2019); Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483 (2010); Ned Snow, *Fair Use as A Matter of Law*, 89 DENV. U. L. REV. 1 (2011).

59. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1183 (2021).

60. See, e.g., Mark Bartholomew, *Copyright and the Brain*, 98 WASH. U.L. REV. 525, 574 (2020); Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1222–23 (2015); Joseph P. Fishman, *Tonal Concept and Feel*, 38 CARDOZO ARTS & ENT. L.J. 655, 665 (2020); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1268 (2014); Lemley, *supra* note 2, at 719–22; Lemley & McKenna, *supra* note 2, at 2226–39 (2016); Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012); Austin Padgett, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 PIERCE L. REV. 125, 149 (2008); Sprigman & Hedrick, *supra* note 2, at 580, 596. It seems a modest measure of the scholarly neglect that an excellent student note on the jury-related topic of remittitur, published in a top law and technology journal in 2013, has thus far not been cited once: Casey Hultin, *Remittitur and Copyright*, 28 BERKELEY TECH. L.J. 715 (2013).

61. See, e.g., Kevin Evers, *Stairway to Certainty: The Need for Special Masters in Music Copyright Litigation*, 90 UMKCL. REV. 173, 181 (2021); Eric M. Leventhal, *Would You Want William Hung as Your Trier of Fact? The Case for a Specialized Music Tribunal*, 90 TEX. L. REV. 1557 (2012); Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM'N & ENT. L.J. 717 (1998); Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q. 331, 360 (2007) (noting “[n]o matter how sophisticated [the technologies] . . . they cannot supplant the role of the jury.”).

62. See generally Balganes, Manta, & Wilkinson-Ryan, *supra* note 2; Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L. J. 137 (2011); see also Jamie Lund, *Fixing Music Copyright*, 79 BROOK. L. REV. 61, 64–65 (2013); Said, *supra* note 2, at 608–613, 635–44.

practices for instructing juries.⁶³ And as far as I am aware, none of the extant copyright scholarship that mentions the jury engages in any depth with the extensive generalist jury and jury instructions literature.

Copyright scholarship's comparative silence on the jury's substantial role stands in stark contrast with the extensive jury literature beyond copyright law. Centuries of critiques of the jury, half a century of social science research on juries in criminal law,⁶⁴ and four decades of focus on the civil jury⁶⁵ attest to a mature and methodologically diverse scholarly conversation too voluminous even to summarize here.⁶⁶ Generalist jury scholarship has much to contribute to questions of jury comprehension, capacity, cooperation, and accountability, which are all relevant in assessing the possible impact of copyright's user-unfriendliness on nonspecialists. Regrettably, there is not just a scholarly gap but a gulf between that body of work and copyright scholarship.

Very few scholars have asked the following questions, let alone posed them in combination: How is the jury function working in copyright law? What challenges does the jury face and how could the system improve? What is the impact for copyright policy of allocating nearly all of the key questions at trial to the jury? Otherwise put, what is the optimal role for the jury in copyright law and what might we do to optimize jury performance in light of that? Of course, merely mentioning an "optimal role" begs the question. To discuss whether a jury can perform "optimally" presupposes some consensus on what a jury does and should do, and how to know those things as well as how to measure them. Copyright simply has not had a full-fledged scholarly conversation to that effect. Accordingly, this Article seeks to anchor a broader conversation about the jury function in copyright law and

63. Jury instructions have received next to no attention. *See, e.g.*, Lisa Field, Note, *Copyright Infringement and Musical Expression: Creating Specific Jury Instructions for Comparing Music*, 38 T. JEFFERSON L. REV. 152 (2016) (calling for a uniform instruction for music); Gordon, *supra* note 2; Said, *supra* note 2, at 640 (proposing instructional reforms for substantial similarity).

64. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH., PUB. POL'Y, & L. 788, 809 (2000) (surveying the literature and providing a valuable bibliography).

65. Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1501 (2003).

66. The following sources provide a few helpful points of entry: *See generally* Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012); Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH., PUB. POL'Y, & L. 622 (2001); David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407 (2013); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998); VALERIE P. HANS AND NEIL VIDMAR, *JUDGING THE JURY* (1986); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decision Making by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 137–80, (Robert E. Litan ed., 1993); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Nancy S. Marder, *Bringing Jury Instructions into the 21st Century*, 81 NOTRE DAME L. REV. 449 (2006).

its overlooked impact on copyright policy. It offers an answer to one of the above questions: what challenges does the jury face in copyright law? Its primary contributions are thus descriptive: copyright presents considerable difficulty for nonspecialists; in jury trials, these underrecognized complexities spread the risk of error well beyond the jury. By identifying potential points of error, the Article also tees up future research questions aimed at identifying potential reforms.

Copyright's user-unfriendliness counsels in favor of designing reforms with a focus on improving the jury's comprehension and capacity; these could be called "jury-centric" considerations.⁶⁷ Copyright's delicate policy balance, however, places significant power in the jury's hands. Potential reforms must therefore also adopt a "system-centric" approach that evaluates the jury's cooperation and accountability. From a system-focused perspective, foreseeable misperceptions and other threats to performance create the possibility that jury deliberation will be compromised along multiple axes, and that copyright's policy goals and constitutional protections will yield to jury-related errors. Any framework for jury-related reforms in copyright law must therefore reconcile jury-centric concerns with a larger system-centric approach.

Part I enumerates features that contribute to copyright's user-unfriendliness and posits that jury-related errors are likely because of the challenging and significant role the jury plays in copyright litigation. Part II explores copyright's user-unfriendliness in the context of cases in which jury-related errors were alleged. It demonstrates how judges and litigants play a role in creating jury-related errors. Part III offers justifications for studying the jury and sets forth considerations for continued scholarly engagement with the jury's role in copyright law, blending principles of copyright policy with insights from generalist jury scholarship. It proposes a framework from which to consider future reforms.

Finally, for some readers, the "vanishing" or "diminished" trial and the "disappearing" or "missing" jury in contemporary litigation may make such research seem pointless;⁶⁸ if so, they might begin with Part III.A, "So What?" before returning to the rest of the Article.

I. COPYRIGHT LAW IS USER-UNFRIENDLY

Copyright law creates intense and predictable challenges for juries and nonspecialist lawyers. Infringement doctrine, where the jury plays an outsized conceptual role, sets the stage for copyright's user-unfriendliness to wreak maximum havoc. Sections A through D respectively discuss copyright's technical complexity and dynamism; its morally counterintuitive rules; its confusing language and systemic indeterminacy; and the jury's role in infringement's "substantial similarity" analysis, decried as the hardest issue in copyright and—at least until recently⁶⁹—

67. See *infra* note 396 and accompanying text.

68. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. EMPIRICAL LEGAL STUD. 459, 459 (2004); Nora Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131 (2018); SUJA THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569–72.

69. Numerous recent decisions by courts in the Ninth Circuit have developed a laudably

widely acknowledged to be a doctrinal mess.

A. Complexity and Dynamism Make Copyright User-Unfriendly

Copyright legislation,⁷⁰ copyright's subject matter, and related business models and artistic practices⁷¹ all change frequently, thus continually raising questions about copyright's application and scope.⁷² The judiciary has long recognized copyright's particular complexity,⁷³ and scholarship acknowledges that copyright "repeatedly poses hard questions, likely unanswerable in any permanent way."⁷⁴ Legal controversies reach the Supreme Court on highly technical or metaphysical issues,⁷⁵ often reflecting aesthetically or technologically emergent situations and leaving a trail of divergent district court decisions in their wake.⁷⁶ In addition, the field is characterized by frequent legislative flux. In the past four years alone, Congress passed the sweeping and extremely complex Music Modernization Act⁷⁷ and amended the Copyright Act to create a small-claims tribunal⁷⁸ despite years of significant scholarly debate over the means and purposes of doing so.⁷⁹ The constant legal change alone presents challenges for lawyers and judges seeking to gain or maintain legal expertise. Moreover, copyright governs many forms of artistic and technological innovation which imparts specific complexities. Art is slippery and often intentionally provocative. It may resist the kinds of categories and definitions

coherent and principled substantial similarity framework that could provide a model for other courts. *See, e.g.,* *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018); *Skidmore ex rel. Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020); *Johannsongs-Publ'g, Ltd. v. Lovland*, No. 20-55552, 2021 WL 5564626, at *1 (9th Cir. Nov. 29, 2021); *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1156 (C.D. Cal. 2015); *Gray v. Perry*, No. 2:15-CV-05642, 2020 WL 1275221, at *1 (C.D. Cal. Mar. 16, 2020); *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 770 (9th Cir. 2018).

70. Marci A. Hamilton, *Copyright in the Twenty-First Century: Introduction*, 13 CARDOZO ARTS & ENT. L.J. 9, 11 (1994).

71. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 6–9, 28–32 (2003); Litman, *supra* note 18, at 3.

72. Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1105–06 (2017).

73. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

74. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 688 (2012) ("Copyright repeatedly poses hard questions, likely unanswerable in any permanent way, about what exactly an idea is and how it can be distinguished from the form (expression) in which it appears.").

75. Gibson, *supra* note 41, at 905–06.

76. Dallas T. Bullard, *The Revolution Was Not Televised: Examining Copyright Doctrine After Aereo*, 30 BERKELEY TECH. L.J. 899, 900 (2015).

77. Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2522 (2019).

78. Consolidated Appropriations Act, Pub. L. No. 116–260, § 212, 134 Stat. 2176 (2020) (adding small-claims tribunal sections to the Copyright Act at sections 1501 *et seq.*).

79. Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 690 (2018).

that courts need to apply throughout copyright law.⁸⁰ Changes in technology and consumer behavior, too, create regular uncertainty about the reach and efficacy of copyright law as well as the relative rights of artists, audiences, and technologists.⁸¹ One court noted copyright's dynamic complexity:

When the Copyright Act was amended in 1976, the words 'tweet,' 'viral,' and 'embed' invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day. That technology and terminology change means that, from time to time, questions of copyright law will not be altogether clear.⁸²

Perhaps inevitably, copyright law's disputes over cutting-edge subject matter and emerging business models present considerable technical challenges for the judges issuing instructions and the juries trying to make sense of their allotted work.

Indeed, in the words of an experienced appellate judge, it is downright "daunting" to instruct juries effectively in copyright law⁸³:

Instructing a jury in the application of the law of copyright, which is characterized by often subtle and contradictory distinctions, is indeed a daunting task. Thus, the need for proper guidance is accentuated and heightened in directing a jury in this area of the law, which may be *foreign* to many jurors, particularly in this *rapidly changing technological world*.⁸⁴

Judge Birch's opinion in *Bateman v. Mnemonics* suggests that judges may be mystified by aspects of copyright law as well. *Bateman* also illustrates a risk; the careful balancing of copyright stakeholders is vulnerable to manipulation or mistake in connection with copyright's "foreign" aspects in "this rapidly changing technological world."

Given how quickly copyright evolves and how specialized its subject matter can be, it presents recurring and overlapping challenges for judges and juries alike. Borrowing from Professor David Nimmer, it may make sense to consider copyright's challenges in terms of "specialist suspicion" rather than the more jury-critical approach of "elitist disdain."⁸⁵ That said, involving the jury does increase some aspects of the challenge for the system overall.

The need to translate the law accurately and coherently for juries to apply, in a context in which the facts are also complex and cutting-edge, makes a judge's task

80. Jasmine Abdel-Khalik, *Visual Appropriation Art, Transformativeness, and Fungibility*, 48 AIPLA Q.J. 171, 172 (2020).

81. Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1297–98 (2001).

82. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 585–86 (S.D.N.Y. 2018).

83. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996).

84. *Id.* (emphasis added).

85. Nimmer, *supra* note 2, at 588.

both more difficult and more vulnerable to error. Judicial error, at least, is more easily spotted and corrected than jury error.⁸⁶ Indeed, that may be part of the jury's appeal for some litigants. Copyright's user-unfriendliness might incentivize litigants to seek juries who will predictably fail to navigate it, thus relying on biases instead of facts or rules because "the less a jury understands about the technology, the more likely unrelated issues will influence decisionmaking."⁸⁷ Any bias introduced as a function of technological inscrutability may gain unfortunate traction because, as Section B explains, copyright law's morally counterintuitive rules pose significant risks of distorting biases.

B. Moral Divergence Makes Copyright User-Unfriendly

Copyright's first principles sometimes seem to defy common moral intuitions. Some actions that seem innocent enough may be liability-inducing while others that seem as though they surely must be infringing are not. Fault does not matter for liability; neither, for the most part, does intent since copyright infringement is a strict liability tort.⁸⁸ The lay public often carries mistaken ideas about what counts as copyright infringing. For example, blithely photocopying reams of still-in-copyright book chapters—a mainstay of my graduate (pre-legal!) education—was not necessarily fair use even though done in an educational context, for teaching and research (and even though I genuinely believed it was "fair" and I would never have bought such books, in the alternative). Conversely, copying something without attribution may count as "plagiarism" in everyday life but in copyright law, what makes it wrongful is not the lack of attribution but the copying (of protected material, without a defense).⁸⁹ To paraphrase a line from the cult classic film, *The Princess Bride*, the word "plagiarism" in copyright law "does not mean what you think it means."⁹⁰ This often strikes laypeople as surprising, or even flat out wrongheaded.

Partly on account of the utilitarian framework of U.S. Intellectual Property (IP) law, copyright's rules do not necessarily track everyday moral norms about copying, attribution, and proportionality, and they diverge to some extent from the academic

86. Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 738 (2010).

87. Kimberly A. Moore, *Jury Demands: Who's Asking?*, 17 BERKELEY TECH. L.J. 847, 852 n.15 (2002) ("This may explain both the preference for jury trials and the trend toward more jury demands. . . . As the complexity increases, the jury may be more inclined to allow nonmeritorious influence and prejudices to impact their decisionmaking.").

88. *United States v. Liu*, 731 F.3d 982, 988 (9th Cir. 2013); R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J. L. & ARTS 133, 175–83 (2007).

89. The "plagiarism fallacy" is one way lay and legal intuitions diverge throughout intellectual property regimes. In their experimental work studying lay perceptions of IP, Mandel, Fast, and Olson identified a widespread and mistaken belief that these laws existed to protect against and punish plagiarism, which they dub "the plagiarism fallacy." Gregory N. Mandel, Anne A. Fast, Kristina R. Olson, *Intellectual Property Law's Plagiarism Fallacy*, 2015 BYU. L. REV. 915, 923 (2015); see also Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 792 (2007) (referring to the "mismatch between morality and law" on the question of attribution of authorship).

90. *THE PRINCESS BRIDE* (Act III Commc'ns 1987).

honesty rules with which nonspecialists are likely to be familiar.⁹¹ I term this copyright's "moral divergence."

Consider the following statements, all of which are true of copyright law:

- Upon learning a colleague has spent hours of heroic effort methodically gathering information into a report organized in the most efficient way, if you maliciously and intentionally copy the report, even to sell it at a profit and purposely undercut your colleague, copyright law will not hold you liable,⁹² even if you falsely claim you created it yourself.⁹³
- Another colleague has shared a brilliant organizational system with you and spent time explaining to you the thoughtful design choices that structure the system, which they plan to market along with their life coaching services. If you copy their process, you will escape copyright liability.⁹⁴
- A good friend shares a wonderful idea for a screenplay with you. Inspired, you develop your own screenplay riffing on this idea in your own original words and images but with exactly the same idea. Your behavior will not give rise to a valid copyright lawsuit (even if it costs you a friendship).⁹⁵
- If you use someone else's copyrighted work without permission, even if only a small portion of it, your use still may not qualify as a fair use.⁹⁶ Conversely, sometimes your unauthorized use of an entire work is fair, even when you make a substantial profit.⁹⁷ This is so whether you celebrate, mock, mutilate, or completely reimagine the original work,

91. Most jurors have at least some high school education and many have college degrees or other professional and postgraduate training. Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 736 (2006).

92. Copyright will not judge you even if the rest of your colleagues do. Copyright does not protect "sweat of the brow," or laborious efforts that do not also include at least "a modicum of creativity." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 352 (1991).

93. U.S. copyright law, unlike many other regimes around the world, provides no general right of attribution with two narrow exceptions inapplicable here. This conduct may be unlawful as a matter of trademark law, and possibly state laws regulating unfair trade and deceptive practices, just not copyright. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 276 (2004). *But cf.* *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 935 (S.D. Tex. 2004), *aff'd*, 129 F. App'x 874 (5th Cir. 2005) ("[T]he Lanham Act does not create a cause of action for 'plagiarism,' that is, 'the use of otherwise unprotected works and inventions without attribution.'").

94. Copyright law does not protect processes or systems (which in some cases may be protected under patent or trade secret law or via contractual restrictions but never under copyright). 17 U.S.C. § 102.

95. Copyright law does not protect ideas, only their original expression. *Id.*

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

97. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2592 (2009); *see also* *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994).

- and in spite of the author's feelings about it.⁹⁸
- You probably do not "own" the book you paid for online,⁹⁹ and thus probably cannot loan it out or resell it (even though you may have paid the same price as you would pay for the physical copy in the store). While you do own the book you bought in the bookstore and can loan or resell it, you cannot make copies of it for your students, even if your purpose with those copies is educational and they cannot afford the book themselves.¹⁰⁰
 - It is lawful to create something exactly identical to someone else's work *if* you genuinely (perhaps "magically") came up with it independently.¹⁰¹
 - Whether or not you think you copied anybody, if someone can prove you did copy, even *by accident or subconsciously*, you may be liable: copyright is a strict liability tort with no mens rea requirement¹⁰² and it has long been that way.¹⁰³
 - That accidental copying could cost you tens of thousands of dollars, depending on a number of facts largely beyond your control (such as whether the work was registered), irrespective of whether or not you received any gains attributable to the use and whether or not the owner suffered any demonstrable losses.¹⁰⁴ Although it would be unlikely on these facts, you might even have to pay the plaintiff's legal bill,¹⁰⁵ regardless of whether you can afford it.¹⁰⁶

98. Again, U.S. copyright withholds protection for moral rights. Additionally, it is axiomatic that the circumstances in which licenses are likely to be denied are those most in need of shielding from liability under the fair use doctrine. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001); *Campbell*, 510 U.S. at 584.

99. Liu, *supra* note 81, at 1303.

100. *Id.* at 1301–02. Fair use may shield those actions from infringement, depending on the particular circumstances.

101. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) ("[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and if he copyrighted it, others might not copy that poem, though they might of course copy Keats's").

102. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976).

103. *United States v. Liu*, 731 F.3d 982, 988 (9th Cir. 2013); Reese, *supra* note 88, at 175–83.

104. 17 U.S.C. §§ 412, 504–05. 17 U.S.C. § 504(c) provides a range from \$750 to \$30,000 in damages per work, "as the court considers just."

105. If the copyright owner timely registered their work, you might have to pay not only your own attorney's fees and a monetary award of statutory damages, but you might also have to pay the plaintiff's attorney's fees and certain court costs. *Kirtsaeng v. John Wiley & Sons, Inc.*, 597 U.S. 197, 197–99 (2016).

106. *Oravec v. Sunny Isles Luxury Ventures L.C.*, No. 04–22780, 2010 WL 1302914, at *3 (S.D. Fla. Mar. 31, 2010) ("[A] trial court 'should not consider whether the losing party can afford to pay the fees, but whether imposition of fees will further the goals of the Copyright Act.'").

- Even if your copy was never seen once by a member of the public,¹⁰⁷ the mere fact of your having made the unauthorized copy is enough to trigger liability, potentially with significant financial penalties.¹⁰⁸

The foregoing statements illustrate how copyright law's subject-matter requirements, statutory provisions, and common law may feel unfair or even arbitrary. Copyright's rules, as described and illustrated above, cut against ingrained moral or institutional norms such as academic honesty, accurate attribution, permission-seeking, and fairness.¹⁰⁹ The statements above also suggest that copyright's liability and penalty provisions may run counter to basic intuitions about fairness, fault, intent,¹¹⁰ and proportionality.¹¹¹ In positing copyright's counterintuitiveness, I am evoking a general sense—perhaps underwritten by religious or ethical ideas—that one should not reap where one has not sown, and conversely, where one has sown, one has a strong interest in one's right to reap.¹¹² I am also echoing the Supreme Court's view of the issue in the context of efforts undertaken with regard to factual compilations displaying low creativity:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. . . . [H]owever, this is not "some unforeseen byproduct of a statutory scheme." It is, rather, "the essence of copyright," . . . and a constitutional requirement. . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.¹¹³

Copyright is not intuitively fair.¹¹⁴ On the one hand, common intuitions about creative labor may incline toward ownership and control of it,¹¹⁵ tapping into familiar

107. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir.1997).

108. In such circumstances, damages will be correspondingly lower. *VHT Inc. v. Zillow Grp., Inc.*, No. C15-1096, 2017 WL 2654583 (W.D. Wash. June 20, 2017).

109. Jane C. Ginsburg, *How Copyright Got A Bad Name for Itself*, 26 COLUM. J.L. & Arts 61, 63 (2002).

110. JULIE E. COHEN & LYDIA P. LOREN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 251 (4th ed. 2015). (Copyright law's "strict liability approach often comes as a surprise to law students, not to mention laypeople, particularly in light of the substantial copying that occurs in the course of using the Internet.").

111. Insofar as penalties associated with genuinely accidental infringement can still be substantial, even where harm cannot be demonstrated, they contravene basic notions of fault and fairness. See generally, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

112. GOLDSTEIN, *supra* note 71, at 11.

113. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (internal citation omitted).

114. See, e.g., Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1502 (2016); Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1119 (2003) (discussing the tension between intuitive morality and utilitarianism).

115. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 288 (1970) (referring to "an intuitive, unanalyzed feeling that an author's book is his 'property'").

but legally inapposite lay logic like “you own it, so you and only you can use it.”¹¹⁶ On the other hand, copyright law purposely excludes from protection many things that take effort and ingenuity to create but that do not result in copyrightable subject matter.¹¹⁷ Copyright rests on this fundamental contradiction between private reward and public benefit, between allowing authors to retain control, but also encouraging public disclosure and dissemination of works of authorship.¹¹⁸ Copyright law contravenes commonly held intuitions¹¹⁹ about creativity and ownership,¹²⁰ and at times, it does not necessarily track the real-life behavior of those whom it purports to protect and reward.¹²¹

Copyright’s contemporary framework in the United States is strongly utilitarian in substance and in rhetoric.¹²² Utilitarianism cuts against the intuitive grain for laypeople, which may be only natural: utilitarianism’s core premise is that individuals matter at times less than larger system-wide imperatives.¹²³ Copyright law’s utilitarian commitments reflect its distinctly industry-driven legislative framework.¹²⁴ They make sense (or rely on justifications familiar) to those with relevant training or policy experience.¹²⁵ From the standpoint of everyday morality, however, they suggest one of the reasons that copyright makes little sense to ordinary people, the intelligent nonexperts who are likely to serve on juries.¹²⁶

116. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037 (2005).

117. See Feist, 499 U.S. at 351.

118. Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 463 (1991).

119. See *Kelley v. Universal Music Grp.*, No. 14 Civ. 2968, 2015 WL 6143737, at *4–6 (S.D.N.Y. Oct. 19, 2015) (dismissing claims by pro se plaintiffs that defendants had violated their “right under the rule of poetic license to make creative changes in their copyrighted work” by sampling their song in a live performance without their authorization).

120. See, e.g., Bair, *supra* note 114, at 1506–08; Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2436, 2458–59 (2016) (describing the misalignment of copyright law with both creators’ behavior and plaintiffs’ wishes); Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 287 (2014).

121. See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2014); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2122 (2011) (describing a mismatch between what creators want and what intellectual property remedies they actually have available); Jessica Silbey, *We’re All Pirates Now: Making Do in a Precarious IP Ecosystem*, 39 CARDOZO ARTS & ENT. L.J. 691, 698 (2021) [hereinafter *We’re All Pirates Now*].

122. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property Law*, 98 VA. L. REV. 1745, 1746 (2012).

123. See Wegner & Hoffman, *supra* note 114, at 1119 (“Jurors, unlike some scholars and judges, privilege deontological, commonsense ideas of what is right over utilitarian, elite ideas of what is efficient.”).

124. See Litman, *supra* note 18, at 3; LITMAN, *supra* note 56, at 22–24.

125. “Make sense to” is a bit of a stretch. See Liu, *supra* note 81, at 1299 (“[G]iven the numerous legislative compromises that gave rise to the Copyright Act, the existence of a coherent overall framework would be a miraculous accident.”).

126. See Mandel, *supra* note 120, at 263–64.

Professor Wendy Gordon has identified “popular unease regarding intellectual property” and attributes it in part to the fact that “one need climb no fences to make copies of intellectual products.”¹²⁷ While breaking and entering requires crossing a physical barrier that gives notice of one’s wrongdoing, “it may not seem so obviously wrong to tape a musical recording or duplicate a computer program that is already in hand.”¹²⁸ The lack of visible harm underscores the way in which intellectual property infringements might be construed as victimless offenses: “There is no perceptible loss, no shattered lock or broken fencepost, no blood, not even a psychological sensation of trespass.”¹²⁹ As a result, Gordon argues, “ordinary citizens may perceive a copyright owner’s intangible interest as imposing an ‘extra’ restriction, limiting their liberty in a way that ordinary property does not.” Professor Irina Manta considers copyright unique in its capacity to differ from lay expectations and she asserts that many nonspecialists are confused or apathetic about the law’s reach.¹³⁰ This may be because copyright law’s complexity has not improved over time, yet the law’s increasingly expansive reach means that its effect on our lives is considerable,¹³¹ and thus, the divergence between lay and legal perceptions is more pronounced. Relatedly, Professor Jessica Silbey has mused that the mismatch between copyright law and everyday life has never seemed so puzzling as it does in our present moment:

How do we explain that, simultaneously with stronger and broader IP laws, we are all pirates, skirting infringement liability while remaining stubbornly ignorant of the IP laws that could restrain our everyday copying, sharing, re-making, and remixing practices that are essential to creativity and innovation today?¹³²

Revisiting copyright’s first principles and their divergence from everyday notions of right and wrong is a worthwhile philosophical exercise, especially if owners’ rights depend on lay juries. These same juries may be “stubbornly ignorant” of IP laws as well as generally not complying with them, as Silbey’s point—“we are all pirates”—suggests.

It has been asserted that juries are likelier to apply the law accurately and faithfully when the law seems legitimate to them.¹³³ The moral divergence can cut both ways, in other words. Whichever way it cuts, however, it is foreseeable that

127. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1346 (1989).

128. *Id.*

129. *Id.*

130. *Id.*; Irina D. Manta, *Keeping IP Real*, 57 HOUS. L. REV. 349, 369 (2019).

131. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34 (1994) (“At the turn of the century, U.S. copyright law was technical, inconsistent, and difficult to understand. . . . Ninety years later, the U.S. copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything. In the intervening years, copyright has reached out to embrace much of the paraphernalia of modern society.”).

132. *We’re All Pirates Now*, *supra* note 121, at 694.

133. *Cf.* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 892–99 (1999).

copyright's moral divergence will cause user-related errors that allow litigants to exploit predictable misperceptions of the availability and scope of copyright law. Indeed, we know some best practices instruct them to do so.¹³⁴ There is no reason to suspect that judges are obviously better than juries at resisting moral intuitions of which they are not aware; if they have been dutifully warned about such a divergence, however, that may change.¹³⁵ Judges have more practice in applying models such as utilitarianism to particular problems and thus that aspect of the moral divergence, at least, is likely to pose less challenge for judges than for juries. For both entities, however, copyright remains stubbornly user-unfriendly in multiple ways.

C. Confusing Terms and Indeterminacy Make Copyright User-Unfriendly

Copyright is counterintuitive with respect to the language it uses, which introduces "semantic complexity" for judges and juries. It is further complicated due to system-wide indeterminacy: copyright features both "semiotic indeterminacy" (open-endedness with respect to the terms it uses to signify its concepts) and ontological indeterminacy (open-endedness about the things it protects and the nature and scope of their protection). This part explores how, in combination, these semantic, semiotic, and ontological challenges add to copyright's user-unfriendliness.

First, copyright's terminology is semantically challenging in that it looks deceptively familiar, not technical or abstruse. Copyright law uses many ordinary words in specialized ways, creating the risk of what linguists call "calques" or "false friends."¹³⁶ For example, copyright's fee-shifting provision uses the term "full costs."¹³⁷ The adjective "full" conveys the idea that the provision permits recovery of *all* costs incurred in litigation but in *Rimini Street v. Oracle*, the Supreme Court recently held that "full costs" includes only the six enumerated categories of costs listed in the 1976 Act.¹³⁸ Thus, the district court's award of the prevailing plaintiff's costs was erroneous for including the \$12.8 million Oracle spent during its jury trial on non-enumerated expenses such as payments for "expert witnesses, e-discovery and jury consulting."¹³⁹ "Full" here did not mean "all"; it meant "all those enumerated." While it was certainly costly for Oracle to discover this via trial, there

134. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 56 (2001); Charles J. Faruki, *The Preparation and Trial of Intellectual Property and Other Complex Cases*, 34 U. DAYTON L. REV. 125, 128–129 (2009) (advocating that "the themes, psychological anchors in the case, should be those emotive concepts that will appeal to jurors and which form the thematic umbrella for the proof" including, among others, "ownership," "theft," "poaching or trespass," "sweat equity," "copying," and "cheating or overreaching").

135. See Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 199 (2005).

136. Cf. JEAN-PAUL VINAY & JEAN DARBELNET, *A METHODOLOGY FOR TRANSLATION* 84–86 (Juan C. Sager & M.-J. Hamel eds. & trans., 1995). One scholar of jury instructions has called these "legal homonyms." PETER M. TIERSMA, *LEGAL LANGUAGE* 111 (1999).

137. 17 U.S.C.A. § 505 (1976).

138. 139 S. Ct. 873, 876 (2019).

139. See *id.* at 873–76.

was at least an answer to be found, and the mistaken understanding of “full” meaning “only as enumerated” need not be a future source of confusion or uncertainty. When a phrase like “full costs” means one thing in everyday language and another in copyright law, it (“falsely”) appears to be a known word (“friend”). Calques—from the French verb, *calquer*, to copy—are words or phrases typically “copied” from one language and translated literally into another language in a way that produces a mismatch in meaning.¹⁴⁰

Copyright is not unique with respect to having calques: law is full of terms fraught with possibility that juries or nonspecialist lawyers will apply everyday definitions rather than legal ones because some familiar terms do not “announce” their “technicality.”¹⁴¹ Legal terms of art may “mean little to laypeople”¹⁴² and may possess multiple kinds of complexity—factual, legal, semantic—that must be managed to ensure accuracy and fairness.¹⁴³ Generalist jury scholarship has in fact studied the potentially distorting influence of terms like calques.¹⁴⁴

Copyright scholarship has not taken stock of copyright law’s calques despite their ubiquity in law and doctrine. Every single one of the five main exclusive rights enumerated in the 1976 Act is a calque that has prompted or centered litigation: the rights of “reproduction,”¹⁴⁵ creation of “derivative” “works,”¹⁴⁶ “distribution,”¹⁴⁷ “public”¹⁴⁸ “performance,”¹⁴⁹ and “display.”¹⁵⁰ Calques characterize all of copyright’s subject-matter requirements: copyright subsists in “original,”¹⁵¹ “works”

140. VINAY & DARBELNET, *supra* note 136, at 84–86.

141. See Fredrick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 501–02 (2015) (“[L]aw is replete with technical terms. Some of them announce their technicality by being in Latin . . . [o]ther terms are equally obviously technical because, although existing in something that looks like English, they have no ordinary uses. . . . And still other terms resemble ordinary words, but have meanings in law that appear to diverge sharply from at least some of their ordinary meanings, as with *contract*, *party*, *witness*, and even *speech*.”).

142. David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 652 (2010).

143. The tort of battery, for instance, sounds like several different common nouns (the battery that powers a car or flashlight, a physical beating, and a set of things coming rapidly together, like a battery of questions). More problematically, “battery” sounds like its criminal counterpart whose meanings and legal standards are quite different. Consequently, I make no claim to copyright being unique in having calques.

144. Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1102 (2001).

145. Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 633 (2019).

146. For example, there is an active split between the influential Ninth and Seventh Circuits regarding whether remounted artwork (by the same defendant, in fact) counts as “derivative” and constitutes violation. See Landau & Biederman, *supra* note 61, at 746.

147. Capitol Recs., Inc. v. Thomas-Rasset, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

148. Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7th Cir. 1991); Columbia Pictures Indus., Inc. v. Redd Home, Inc., 749 F.2d 154, 158 (3d Cir. 1984).

149. Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 432 (2014).

150. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160 (9th Cir. 2007).

151. Kelley v. Chicago Park Dist., 635 F.3d 290, 303 (7th Cir. 2011).

of “authorship,”¹⁵² “fixed”¹⁵³ in a “tangible medium”¹⁵⁴ of “expression.”¹⁵⁵ Remedies in copyright use inherently counterintuitive language in that statutory “damages” provide remuneration even though there is no need for the plaintiff to prove they have suffered demonstrable harm and even in cases in which no harm beyond a technical violation has been alleged.¹⁵⁶

It is conceivable that copyright’s calques could be anticipated and managed by “translation” or clear communication with judges and juries about the disjunct between lay understanding and copyright’s technical use of a given term.¹⁵⁷ A commonly given jury instruction on “originality,” for instance, anticipates a likely gap in lay and legal meanings of “original” and seeks to preempt juror error by explaining the mismatching meanings.¹⁵⁸ Jurors might reasonably think “originality” means something like “novelty,” which in the lay understanding would signify aspects of a work that are either *new in an absolute sense* or *new relative to what has come before*.¹⁵⁹ In copyright law, by contrast, “originality” means *something which is something not copied* and which also displays *a modicum of creativity* (“a dash of it will do”).¹⁶⁰ A work’s newness relative to either any prior work or to an independent evaluation of absolute newness is not evaluated, and mistakenly, invalidating a copyrightable work for failure to possess *novelty* would be improperly elevating the required amount of *originality*.

Moreover, in many cases, copyright’s calques do not have a fixed definition (such as “enumerated costs” for “full costs”) but rather mean something unclear or indeterminate. For example, “idea,” “expression,” and “work” do not carry their ordinary lay meanings but also do not have a clearly fixed definition in copyright law.¹⁶¹ As courts have long noted, the determination of terms like “idea” and “expression” is “ad hoc.”¹⁶² They are “semiotically indeterminate” terms whose construction depends on doctrinal and contextual factors that vary by case. Semiotics

152. *Id.*

153. *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 517–18 (9th Cir.1993).

154. *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 873 (3d Cir. 1982).

155. 17 U.S.C. § 102(a).

156. *See VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096, 2017 WL 2654583 (W.D. Wash. June 20, 2017).

157. The vast literature on jury instructions does not suggest that it is easy, but debiasing is plausible. *See* Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Instructions*, 10 *SCRIBES J. LEGAL WRITING* 1 (2005–2006).

158. “In copyright law, the ‘original element’ of a work may not necessarily be new or novel.” *See* Pl. Proposed Jury Instructions at 36, *Dream Games of Ariz., Inc. v. PC Onsite, L.L.C.*, No. CIV 03-0433 (D. Ariz. Feb. 8, 2006), 2006 WL 814741.

159. Carys J. Craig, *Transforming “Total Concept and Feel”: Dialogic Creativity and Copyright’s Substantial Similarity Doctrine*, 38 *CARDOZO ARTS & ENT. L.J.* 603, 607 (2021).

160. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

161. Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 *COLUM. L. REV.* 338, 346 (1992) (“[I]dea’ is not an epistemological concept, but a legal conclusion prompted by notions—often unarticulated and unproven—of appropriate competition.”).

162. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.”).

is the study of signs as representations comprising a “signifier” (such as a word) and a “signified” (the thing to which the word refers).¹⁶³ Semiotics provides a helpful set of tools for dealing with issues of intangible property, especially where, as in copyright law, there is a dynamic and uncertain set of possible meanings for the concepts (“signifieds”) associated with its terminology (“signifiers”).

For copyright’s calques that are also semiotically indeterminate, “translation” alone is not enough; further guidance must be provided on how to interpret the indeterminate term keeping in mind the sorts of outcomes that divergent interpretations could yield.¹⁶⁴ To be sure, copyright possesses some “garden-variety” open-ended terms, such as “knowledge,”¹⁶⁵ and “willfulness;” these operate in copyright law more as standards than rules, just as they do in other areas of law.¹⁶⁶ Many other areas of law rely on standards, like “reasonableness,” whose meaning must be construed by the jury not purely through semantics but with reference to various factors, often extrinsic.¹⁶⁷ This interpretive open-endedness is thus a familiar characteristic of standards beyond copyright law. Depending on one’s jurisprudential inclinations, standards, with their capacity for open-ended construction, may seem to create mischief through invitations to tailor and thus manipulate the law, or they may provide greater fairness through such customization, to achieve a bespoke fit for this body of facts.¹⁶⁸ Either way, copyright’s reliance on such standards creates gaps. In many instances, these gaps overlap with concepts and terms likely to be morally and linguistically counterintuitive for juries. The source of these challenges is not only in the terms copyright uses to express its legal concepts but also in the concepts and rules copyright’s terminology seeks to capture. These referents are also “ontologically indeterminate” or indeterminate with respect to the things copyright protects and the uses against which it protects them.

Infringement claims against nonidentical works require defining and assessing the

163. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLAL. REV. 621, 633–34 (2004).

164. See Schauer, *supra* note 141, at 511 (2015) (“If we understand all of legal language as incorporating law’s goals, law’s values, and law’s purposes, then the very act of determining meaning . . . must take account not only of the fact that such words exist in legal rules or legal documents, and not only that they are being interpreted by a court, but also of the outcomes that one or another interpretation would produce.”).

165. *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 308–11 (4th Cir. 2018).

166. See Samuelson & Wheatland, *supra* note 111, at 441 (“Although Congress intended this designation to apply only in ‘exceptional cases,’ courts have interpreted willfulness so broadly that those who merely should have known their conduct was infringing are often treated as willful infringers.”).

167. I mean “extrinsic” in the evidentiary, not copyright sense. (The Court of Appeals for the Ninth Circuit has developed its infringement jurisprudence to include the terms intrinsic and extrinsic. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)).

168. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–90, 1702–09, 1712 (1976) (“[P]ro-rules and pro-standards positions are more than an invitation to a positivist investigation of reality. They are also an invitation to choose between sets of values and visions of the universe.”).

similarities between the works at issue.¹⁶⁹ The analysis thus invites problems of measurement and baseline-setting: to make a comparison presumes some definitional or ontological consensus about what those works are, or at least, what things to compare. Yet the Copyright Act does not define the “work,”¹⁷⁰ and this is a deliberate choice of the legal regime, not some sort of legislative error.¹⁷¹ As Professor Paul Goldstein observed, the Copyright Act provides no “methodology for locating a work’s boundaries,” and “in one important place, the statute expressly directs courts to ignore every legal and commonsensical understanding of what a copyrighted work might be.”¹⁷²

The conceptual indeterminacy around the “work’s” outer boundaries exists also with respect to its contents or constitutive elements.¹⁷³ To determine the scope of copyrightable protection in a work, one must filter out the unprotected elements, such as facts and ideas. Yet the distinction between ideas and expression is “notoriously malleable and indeterminate.”¹⁷⁴ The scope of protection is not just indeterminate; it is also not static. Courts often rely on evidence of industry practices. As those change, the strength of copyright protection in a work can change, too.¹⁷⁵

Copyright’s ontological indeterminacy is predictably confusing about the *value* of any infringement case, too. Under the 1909 Copyright Act, damages were keyed to the infringement, not the work infringed.¹⁷⁶ But under the 1976 Act, damages are keyed to the work or number of works, not the infringement.¹⁷⁷ As a result, the ontological indeterminacy of the term “work” wreaks particular havoc in the context of copyright’s statutory damages regime. The statute specifies that the standard award may range from \$750 to \$30,000, “as the court considers just,” per work

169. Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605, 610–11 (2017) (“[F]inding copyright infringement when two works are not identical requires a determination of the works’ similarity. If the works are not identical, and not similar, there is no plausible infringement case. Since not all similarities are actionable under copyright law, determining whether two works are similar requires drawing some legal conclusions about what to count as protected and unprotected. This determination, in turn, requires some basic non-legal decisions about how to define the boundaries of the work, what methods to use to determine similarities, and what evidence to use to inform both of those judgments.”).

170. Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. L. 325, 326 (2012) (“The concept of the work appears to have little or no fixed meaning or meanings in the law, despite decades of inclusion of both term and concept in relevant statutes and treaties.”).

171. See Michael J. Madison, *IP Things as Boundary Objects: The Case of the Copyright Work 2* (Pitt. L. Working Paper, No. 2013-12, 2013), <http://ssrn.com/abstract=2256255> [<https://perma.cc/SF2K-GK6C>].

172. Paul Goldstein, *What Is a Copyrighted Work? Why Does it Matter?*, 58 UCLA L. REV. 1175, 1175–76 (2011).

173. Kaminski & Rub, *supra* note 72, at 1118.

174. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304 (1996) (describing copyright’s idea/expression distinction as “notoriously malleable and indeterminate”).

175. See, e.g., Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1906–07 (2007); Gibson, *supra* note 41, at 899–900.

176. *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993).

177. *Id.*

infringed.¹⁷⁸ The term “willfulness” permits a factfinder to ratchet statutory damages up to \$150,000 per work, in the court’s discretion, and “willfulness” is a term likely to involve both moral and linguistic divergence.¹⁷⁹ Courts’ willingness to interpret the term “willfulness” broadly underscores the potentially harmful impact caused by this moral and linguistic divergence between lay and legal misunderstanding.¹⁸⁰

These “boundary issues”¹⁸¹ are well known, both in terms of what is actually protected by a copyright registration (“what is the work”) and what is protected within it (“what are its protected elements”). The malleability of the “work” during infringement analysis is so widely recognized¹⁸² that the descriptions of copyright’s indeterminacy as a “feature,” not a “bug,” seem themselves like a scholarly feature, not a bug.¹⁸³ Even where it raises concerns, however, copyright’s indeterminacy is considered good for the system overall.¹⁸⁴ This is probably a good thing because this indeterminacy will likely persist due to copyright’s dynamism.¹⁸⁵

D. Substantial Similarity Analysis Compounds Copyright’s Difficulties

The jury plays a special conceptual role in determinations of infringement in cases of nonidentical copying, in which its “lay ear” is prized in the assessment of “substantial similarity.”¹⁸⁶ “Substantial similarity” is a legal standard whose articulation is contested and potentially variable, dependent on the subject matter at issue and the jurisdiction.¹⁸⁷ Boiled down, it amounts to a two-part inquiry: (1)

178. 17 U.S.C. § 504(c)(1).

179. *Id.* § 504(c)(2).

180. Samuelson & Wheatland, *supra* note 111, at 442.

181. Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216, 1235 (2019).

182. See, e.g., Jani McCutcheon, *Shape Shifters: Searching for the Copyright Work in Kinetic Living Art*, 64 J. COPYRIGHT SOC’Y U.S.A. 309, 316 (2017) (“It is very difficult to pinpoint what actually constitutes a ‘work’ in copyright law.”); see also Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 575–76 (2005); Lemley & McKenna, *supra* note 2, at 2215.

183. Kaminski & Rub, *supra* note 72, at 1113 (“[W]e believe that the missing definition of the term ‘work’ is a feature and not a bug in our copyright law. It can allow courts the flexibility they need to promote socially desirable copyright policy.”); Madison, *supra* note 171, at 2 (“[T]he absence of consistent, clear boundaries for the copyright work is a feature of that system of law, rather than a bug.”); Bartholomew, *supra* note 60, at 573 (“[F]or some, this lack of specificity should be considered a feature, not a bug.”).

184. Kaminski & Rub, *supra* note 72, at 1113; Gibson, *supra* note 41, at 885. *But see* Bartholomew, *supra* note 60, at 574.

185. Kaminski & Rub, *supra* note 72, at 1111, 1116 (“[A]s technology and its social adoption rapidly change, judges will encounter the question of how to frame a copyrighted work with increasing frequency while the guidelines they have used for framing in the past will become less helpful” and “[c]opyright’s pervasive framing problem is exacerbated by features of the digital age.”).

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

187. Lemley, *supra* note 2, at 719–22; Asay, *supra* note 1, at 4–5; Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1823 (2013).

whether the defendant *did copy* or *could have* copied from the plaintiff's work; and (2) whether the copied elements were the *kinds of elements copyright protects* in the first place.¹⁸⁸ In many respects, infringement—with its substantial similarity standard—is the most uncertain and difficult question to resolve in copyright law.¹⁸⁹

Multiple forms of copyright's user-unfriendliness come to a head in substantial similarity analysis. First, copyright's dynamic and technical nature mean that disputes may arise at the boundaries of copyright and patent law, or in the context of emerging technologies whose functionalities are not yet well understood by non-experts.¹⁹⁰ Substantial similarity frequently applies to works of varying levels of "thickness" of copyright protection and thus, may require difficult, outcome-determinative boundary-drawing analyses made more difficult in the policy vacuum that is often created for the jury's case-sensitive, intentionally myopic determinations.¹⁹¹ Second, accurate substantial similarity analysis requires that judges and juries overcome any prior moral intuitions about the defendant's copying.¹⁹² Otherwise, the moral divergence threatens to eviscerate the entire second step and the "substantiality" inquiry by allowing any copying that produces similarities to constitute infringement. Third, copyright's semiotic indeterminacy challenges the analysis: both "substantial" and "similar" are calques with indeterminate referents, as are other aspects of the inquiry (including "access," "copying," and many others). Even the term, "independent creation"—which would seem to mean a work created without reliance on other works, that is, generated independently—effectively carries another meaning since a creator can be held liable for subconscious copying even if they genuinely believe that they created a work independently.¹⁹³ Fourth, copyright's ontological indeterminacy makes the comparison of works particularly fraught: the parties typically disagree about the boundaries of the things to be assessed for similarity,¹⁹⁴ as well as the proper focus level or framing with which to consider those things.¹⁹⁵

Each of these challenges might independently make little difference, but when combined, they pose considerable challenges for judges, juries, and even litigants. There are many unanswered empirical questions. For instance, which challenges

188. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003); *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137–38 (2d Cir. 1998).

189. See Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 215 (2012) (calling substantial similarity "in many ways more open-ended than the fair-use doctrine").

190. Pamela Samuelson, *Strategies for Discerning the Boundaries of Copyright and Patent Protection*, 92 NOTRE DAME L. REV. 1493, 1494–95 (2017).

191. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1120–21 (9th Cir. 2018).

192. Recall that copying is a necessary precondition to moving to any normative assessment of the copying, and that first step of determining copying risks distorting the inquiry into the actionability of copying.

193. I thank Jessica Litman for this observation.

194. See, e.g., *Antonick v. Elec. Arts Inc.*, No. C 11–1543, 2014 WL 245018, at *1 (N.D. Cal. Jan. 22, 2014), *aff'd*, 841 F.3d 1062 (9th Cir. 2016); *Positive Black Talk, Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357 (5th Cir. 2004), *abrogated by* *Reed Elsevier v. Muchnick*, 559 U.S. 154 (2010).

195. See *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983 (9th Cir. 2009).

exert the most force on decision-making? Do judges and juries process these various challenges differently? To what extent does litigant behavior reflect error as opposed to strategic exploitation of the system's user-unfriendliness? As a theoretical proposition, however, it appears that the very area likeliest to be reserved for the jury—substantial similarity analysis—may also be the most vulnerable to jury-related errors due to copyright's user-unfriendliness.

Part I has shown how copyright uses counterintuitive terms and language, maintains deliberate gaps in its protection, and regularly features hard questions of first impression due to the rapid changes in technology, art, business, and law itself that produce copyright litigation. At trial, the jury plays a central role in infringement analysis, whose doctrine is widely acknowledged for its illogical characteristics.¹⁹⁶ In light of copyright's user-unfriendliness as well as the significant responsibility accorded to the jury, the likelihood of jury-related error seems high. The next Part turns to case law that features jury-related errors to align this descriptive account of copyright's challenges with litigation on the ground.

II. ERRORS REFLECT COPYRIGHT'S USER-UNFRIENDLINESS

If copyright's user-unfriendliness routinely troubles jury instructions or verdicts, litigated cases should bear some witness to that. And (with a few caveats) they do. Accordingly, Part II considers cases in which appellants litigated some form of jury-related error or courts, for various reasons, reconsidered their jury-related rulings for possible error.

Concededly, this sampling of case law is both underinclusive and overinclusive relative to copyright disputes overall. Few cases empanel a jury and go to trial;¹⁹⁷ fewer still feature appeals (although this number is harder to pin down); and though most appeals from a jury trial include allegations of jury-related error, not all do. Moreover, in some cases, errors found on appeal are deemed waived or harmless or, even if "corrected" on remand, do not ultimately yield a different substantive outcome. In other words, there is a limit to the power of any inferences we can responsibly draw from litigated errors alone, including whether the "corrections" are normatively better than uncorrected errors would have been.¹⁹⁸

Still, there is a body of copyright case law that is rarely centered in casebooks and law review articles, despite the clear financial and legal significance of the issues for the parties, the industries, third parties not involved in the litigation, and the public domain. Jury trials take years to resolve, and they play a role in the sociology of copyright practice that is little understood given copyright scholars' comparative neglect of this body of law. These cases display errors (under many definitions of that word) in connection with the jury, and there is merit in studying and learning from them, even if doing so presents only a partial view of the jury's role. With those

196. See Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139, 144 (2018).

197. Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 2001 (2014). "Empirical studies of copyright litigation are almost completely nonexistent." *Id.* at 1982.

198. Joshua B. Fischman, *Reuniting "Is" and "Ought" in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 141 (2013).

considerations in mind, let us turn to the cases.

A. Moral Divergence

Copyright's divergent moral norms threaten to skew outcomes. If judges fail to anticipate the moral divergence or if juries, regardless of instructions to the contrary, allow everyday intuitions to override copyright principles, copyright's policy balance will be askew.

Miller v. Universal City Studios, Inc. provides an example of this sort of moral bias.¹⁹⁹ Miller, a journalist, sued defendants alleging their made-for-television dramatization infringed the copyright in his book based on a sensational kidnapping a decade prior.²⁰⁰ After jurors watched the movie twice and were given copies of the book, the jury found defendants liable for infringement and awarded Miller \$185,000 in damages and \$31,750 in actual profits.²⁰¹ Universal moved for a new trial on the basis of the court's erroneous jury instruction that "research is copyrightable."²⁰² Facts are not copyrightable, however, and research, which generally concerns itself with facts, is thus generally not copyrightable as such; only the original expression communicating research findings would be copyrightable, and only via a thin copyright if so.²⁰³ The Court of Appeals for the Fifth Circuit reversed and remanded on the basis of a single inaccurate sentence in twelve pages of otherwise correct jury instructions.²⁰⁴ The court underscored that this error had "permeated the entire liability phase of the trial," noting that the plaintiff's opening and closing statements had emphasized Miller's efforts and included the misleading statement that "everything Miller did in his research for eighteen to twenty months and put in his book was copyrightable."²⁰⁵ Note the appellate court's curious reference to the lower court's "reluctance" in issuing the erroneous instruction: "This instruction, at best confusing, at worst wrong, was given with some *reluctance* by the trial court over the strenuous objection of defendants on the urging by plaintiff, 'That's the heart of the case.'"²⁰⁶

Miller had been allowed to testify—over defendant's objections—to describe his

199. 650 F.2d 1365 (5th Cir. 1981).

200. *Id.* at 1367.

201. *Id.* at 1375.

202. *Id.* at 1368–69.

203. See, e.g., Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 535 (1981) ("[T]here can be 'no copyright of facts, news or history.'"); *Vallejo v. Narcos Prods. LLC*, 833 F. App'x 250, 257 n.2 (11th Cir. 2020) ("[W]orks that are considered non-fiction or a compilation of facts receive only thin copyright protection. See *Feist*, 499 U.S. at 349, 111 S. Ct. 1282. Although it is true that fictional works based on historical research may receive more copyright protection than a pure non-fiction work or a compilation of facts, the historical facts contained within the fictional work remain unprotected. See *Miller*, 650 F.2d at 1368."); *Corbello v. Valli*, 974 F.3d 965, 973 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021) ("It is thus a feature of copyright law, not a bug or anomaly, that an author who deals in fact rather than fiction receives incomplete copyright protection for the results of his labor.").

204. *Miller*, 650 F.2d at 1372, 1376.

205. *Id.* at 1372.

206. *Id.* at 1368 (emphasis added).

research methods and he must have come across as both credible and wronged, to both judge and jury.²⁰⁷ Viewed cynically, the “heart” of the case involved expanding the scope of copyright law to include uncopyrightable facts. Here, the ploy worked; it was only the appeal that caught and corrected the error.

Amplifying the concerns *Miller* raises, recent empirical scholarship suggests that juries may hold “distortionary intuitions” when assessing similarity.²⁰⁸ The study describes a pair of experiments its authors conducted to assess the jury’s ability to cabin the infringement inquiry in the ways copyright requires.²⁰⁹ The authors found that, in an experimental setting, laypeople serving as proxies for jurors failed to filter out copyright-irrelevant factors (like labor). The study concludes that jurors’ “distortionary intuitions” with respect to copying may make an unbiased assessment of substantial similarity impossible. Because “[c]opying is commonly perceived as a form of free-riding,” laypeople may discount the rules in copyright that limit liability for copying under many circumstances, including when the material copied is not protected because it is factual or contains only ideas or methods, or when the copying constitutes fair use.²¹⁰ The study concludes that “[c]opyright law and policy have done a poor job of cabining labor-based considerations.”²¹¹ What the study cannot tell us is whether experiment participants as a proxy for “laypeople” are sufficiently like juries to base policies on its findings, or, indeed, whether nonspecialist judges are like laypeople on this point. Copyright’s moral divergence makes it tempting for litigants to distort copyright law, and it is an open question whether judges can and do resist the divergent moral suasion any better than juries.

On the basis of common moral intuitions, nonspecialists are likely to incline towards parties making labor-based claims, which suggests that on this issue, jury-related errors may be more likely to incline towards the plaintiff, at least in infringement cases.²¹² The order of inquiries in infringement analysis makes this bias even likelier: if a jury learns that the second work had *access* to the first work, it is primed to find infringement if similarity exists, even where that similarity is based on unprotected elements.²¹³ In other words, once the jury knows a work was copied, the likelihood of error rises because it will now be harder to disincline a jury from finding infringement (regardless of whether the copied material is excluded from copyright protection, as factual research is).

It ought to be noted that *Miller* was decided before the Supreme Court clarified in *Feist* that there was no copyright protection for “low authorship”²¹⁴ or “sweat of the brow” work without at least “a modicum of creativity.”²¹⁵ But even post-*Feist* cases continue to offer evidence that copyright’s moral divergence invites strategic

207. *Id.* at 1372.

208. See Balganes, Manta & Wilkinson-Ryan, *supra* note 2, at 289.

209. *Id.* at 286.

210. *Id.* at 288.

211. *Id.*

212. On other issues, such as joint authorship, independent creation, or fair use, the distribution of likely errors may be more balanced, depending on the particular facts.

213. Bartholomew, *supra* note 60, at 584 (proposing reversal of the inquiries to minimize bias).

214. Ginsburg, *supra* note 161, at 339–40.

215. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

behavior by litigants.

In *Skidmore v. Led Zeppelin*, the plaintiff's attorney told the jury in his opening statement: "This case can also be summed up in six words: Give credit where credit is due."²¹⁶ By reciting a common idiom, he was activating a cultural reference and a belief system that misalign with copyright's rules, and doing so precisely in order to engender sympathy for his client.²¹⁷ Attribution may be the thing authors or owners seek most yet cannot achieve through copyright.²¹⁸ It is reasonable to expect therefore that juries will hear about it, if courts so permit. Mere exposure to such language does not doom the jury's ability to understand the legal and factual issues. Indeed, in *Skidmore*, the jury found for the defendant after a single day of trial. (The plaintiff probably did not serve his own cause very well by inventing a goofy theory of liability: "Right of Attribution—Equitable Relief—Falsification of Rock n' Roll History.")²¹⁹ In cases with more compelling facts for the plaintiff, however, a distorting jury instruction helpful to the plaintiff need not result in an outcome that favors them. A limiting instruction could correct for a statement like the one in *Skidmore* (although the jury instructions here, which were unusually thorough, did not do so).²²⁰ Ordinarily, however, if jurors' everyday moral intuitions stand uncorrected, their verdicts may reflect errors and could distort the scope of copyright law to include things that copyright, on its own uncontroversial terms, excludes from protection. Of course, if juries do err in this way, it will be judges, to at least some extent, who have allowed the trial's evidence and instructions to permit the moral divergence to matter to jury decision-making, as well as litigants who have maximized opportunities to exploit the predictable bias.

While the moral divergence in *Miller* and *Skidmore* skewed towards the plaintiff, it could cut in favor of the defendant in certain circumstances as well. Recall that copyright's strict liability rule means that fault and intent are unnecessary for liability.²²¹ A nonspecialist might find it intuitively unfair that a defendant could be penalized for unintended acts, such as in cases involving "unconscious" copying in which defendants assert that they lack knowledge or memory of a song (or other earlier-created work).²²² For example, in *Three Boys Music Corp. v. Bolton*, even

216. Daniel Siegal, *Led Zeppelin Stole 'Stairway' Intro, Jury Told*, LAW360 (June 14, 2016, 11:31 PM), <http://www.law360.com/articles/797014> [<https://perma.cc/C52K-ANWJ>].

217. The plaintiff asserted an equitable right of attribution under common law, but it was not accorded any weight. See Kory Grow, *Led Zeppelin Win in 'Stairway to Heaven' Trial*, ROLLING STONE (June 23, 2016), <https://www.rollingstone.com/music/music-news/led-zeppelin-win-in-stairway-to-heaven-trial-70565/> [<https://perma.cc/CY3Y-3RXV>].

218. See Mandel, Fast & Olson, *supra* note 89, at 923–24; Tushnet, *supra* note 89, at 791–92; Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 59–60 (2007); Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 58, 67 (2006); SILBEY, *supra* note 121, at 166–67.

219. *Skidmore ex rel. v. Led Zeppelin*, 952 F.3d 1051, 1057 (9th Cir. 2020).

220. See Jury Instructions, *Skidmore v. Led Zeppelin*, No. 2:15-CV-03462 (C.D. Cal. June 23, 2016), 2016 WL 3647484.

221. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:5 (2022); see *supra* Section II.A (describing ways in which copyright law is morally divergent).

222. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976).

though the plaintiff prevailed,²²³ the moral divergence arguably could have presented a hurdle. A jury found Michael Bolton's "Love Is a Wonderful Thing," infringing a song with the same name by the lesser-known Isley Brothers.²²⁴ On appeal, the court noted the "attenuated" theory of access based on a "twenty-five-years-after-the-fact-subconscious copying claim."²²⁵ As though with a judicial shrug, the court found it possible that the teenaged Bolton might have heard the Isley Brothers' song; after all, "[t]eenagers are generally avid music listeners."²²⁶ Moreover, the court reasoned, it was not attempting to fashion "a new standard for access in copyright cases" but simply opting not to displace the jury's factfinding and credibility assessment.²²⁷ This highly attenuated theory of access might have made it difficult, from a lay perspective, to find that Bolton had copied, let alone was blameworthy for doing so.

The moral divergence need not be outcome determinative to raise concern about its influence. Moreover, the moral divergence does not necessarily involve a single clear force in favor of one party (although it could). There are often multiple moral currents running in different directions. Bolton, for instance, was a wildly successful musician (and white); the Isley Brothers on the other hand, were respected musicians who had achieved less financial success (and Black, which is relevant under the growing view that copyright's entitlements reflect and reinforce structural racism).²²⁸ For his part, Bolton pointed out at trial that there were 129 other songs registered with the Copyright Office bearing this same title, which he offered in order to try to undercut the inference that he had copied the plaintiff's title.²²⁹ Titles and short phrases are not subject to copyright protection, anyway, so the titles alone could lawfully have been copied.²³⁰ Perhaps the jury properly filtered and determined infringement on the basis of protectable elements alone. But in light of what some studies have shown about how mock jurors approach copying, it seems at least plausible that the moral divergence could have played a role in the jury's finding that Bolton improperly copied the Isley Brothers' song, despite the attenuated evidence of copying, the fact that titles are not protected under copyright law, and the proliferation of other songs bearing the same name.²³¹

Moral bias may skew outcomes by offering protection for elements copyright

223. 212 F.3d 477, 480 (9th Cir. 2000).

224. *Id.*

225. *Id.* at 484.

226. *Id.*

227. *Id.* at 485.

228. See Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 625–26 (2022); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 603 n.177 (2010); *Recent Cases, Intellectual Property—Copyright in Musical Compositions—Ninth Circuit Confines the Scope of Copyright in Compositions Under the 1909 Act to the Deposit Copy*.—Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020), 134 HARV. L. REV. 1543, 1543–44, 1547 (2021) (referring to the "the music industry's historical failure to fairly compensate black musicians[]" writing" and the disadvantage conferred, "particularly [on] black blues songwriters composing under the 1909 Act, who historically struggled to secure adequate compensation in the music industry").

229. See *Three Boys Music Corp.*, 212 F.3d at 484.

230. 37 C.F.R. § 202.1(a) (2022).

231. See *supra* Section I.B.

expressly excludes (such as research or song titles). Regardless of whether moral divergence provably affects outcomes, the bias it injects is problematic. Biases threaten the legitimacy and fairness of the legal process overall.²³² The moral divergence may introduce irrelevant issues (such as fault or unfair surprise) or cause damages to be inappropriately low or high.

Litigants certainly seem aware that mistaken fault-based intuitions could affect decision-making in one way or another. In some cases, plaintiffs' counsel request instructions on "unconscious" "plagiarism" even where it is not on point, suggesting that tapping into the moral divergence presents an appealing strategy.²³³ Plaintiffs may propose instructions that underscore the lack of fault, such as in one music downloading case in which the defendant, Jammie Thomas-Rasset, was a single mother who came across to many as the sympathetic victim of an overly aggressive copyright enforcement campaign.²³⁴ Courts are correct to withhold a strategically offered instruction (such as on subconscious copying) when the facts do not support that theory of access, of course. But permitting defendants who have accidentally harmed the market for plaintiffs' work to evade liability simply because they deny copying or claim not to have intended to copy would undo the longstanding policies that structure copyright law as a strict liability tort.²³⁵

Likewise, the empirical work on whether juries can cabin labor-based intuitions needs replication and expansion for it to take full root in copyright policy.²³⁶ But paired with cases like *Miller*, *Skidmore*, and *Three Boys*, it seems clear that everyday moral intuitions could force errors, imperil a trial's perceived legitimacy, and skew outcomes in copyright law. In generalist jury terms, the moral divergence threatens juror comprehension to some extent as well as juror cooperation. If the law seems irreducibly unfair, there are reasons to suspect the jury may not cooperate but simply work around the law (known in the criminal context as jury nullification, a term which only some scholars apply in the civil context).²³⁷

This Section has shown how moral intuitions may appear in the foreground of litigation, providing grounds for later reversal (*Miller* and *Skidmore*) as well as in the background (*Three Boys*). Potential bias errors attributable to the moral divergence might run in favor of either party and they do not uniformly suggest jury error alone. In most such instances, the court mis-instructed the jury or permitted litigants to engage in distracting behavior or outright misrepresentations of the scope of copyright protection. Tackling only jury-focused reforms would, accordingly, fail

232. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 862 (1984).

233. See *Goldberg v. Parton*, 924 F.2d 1062 (9th Cir. 1991); *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004, 2015 WL 4479500, at *15 n.11 (C.D. Cal. July 14, 2015), *aff'd sub nom.* *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (proposing unsuccessfully that jury be instructed that "[u]nconscious plagiarism is just as actionable as deliberate").

234. See Plaintiff's Proposed Jury Instructions No. 15, *Capitol Recs., Inc. v. Thomas*, No. 06cv1497 (D. Minn. 2009), 2009 WL 1683922 ("To prove infringement, the plaintiffs need not prove that the defendant intended to infringe. The defendant's intent is not relevant to prove infringement."). I discuss *Capitol Records* *infra* notes 238–59 and accompanying text.

235. Cf. Balganes, *Manta & Wilkinson-Ryan*, *supra* note 2, at 289–90 (suggesting that rethinking the allegedly "strict" nature of copyright liability might be a good idea).

236. *Id.*

237. See *infra* note 368 and accompanying text.

to address important contributing factors that lead to errors in the jury trial ecosystem. Yet failing to consider the possible impact of the moral divergence on the jury seems like willfully looking the other way to avoid evidence of legally meaningful bias.

B. Linguistic Confusion and Semiotic Indeterminacy

It is not unusual for litigation to hinge on a disputed phrase or word. But in copyright, the hardest cases may hinge on calques with indeterminate meanings whose construction is embroiled in controversy as a function of technological change. Courts understandably struggle to apply analog-era terms in digital domains. Juries certainly struggle, but so do judges, and courts cannot effectively instruct juries on issues by which they themselves may be mystified.

Capitol Records, Inc. v. Thomas-Rasset is a well-aired case that centered on the meaning of the word “distribution” in the digital era and dramatized the concerns and uncertainty around peer-to-peer “sharing.”²³⁸ In light of new consumer behaviors, technologies, and platforms, the law was unclear on whether an owner’s § 106(3) right of “distribution” constituted a “making available” right.²³⁹ Put another way, courts were divided on whether the distribution right was violated if, after downloading an unauthorized copy of a song, a person participated in a peer-to-peer music sharing site, that is, merely “ma[de] [a file] available” to others without also affirmatively transferring it to anyone.²⁴⁰ In many instances, the peer-to-peer software had merely made a copy of local files but had not also sent that copy to a third party. Prior courts were divided on whether “distribution” meant making something available for “possible” distribution or disseminating the work in “actual” distribution.²⁴¹ In *Capitol Records*, the district court waffled. During the first trial in this epic litigation, the court instructed the jury on “distribution” as follows:

The act of *making copyrighted sound recordings available* for electronic distribution on a peer-to-peer network without license from the copyright owners, violates the copyright owners’ exclusive right of distribution, regardless of whether *actual* distribution has been shown.²⁴²

The jury returned a verdict finding liability and awarded over \$222,000 in damages.²⁴³ Several months after the trial, the court sua sponte announced that it was considering granting a new trial based on possible error in the “distribution” jury instruction.²⁴⁴ The verdict had not specified whether the jury had found liability for reproduction or distribution or both, so there was no way of assessing the jury

238. 692 F.3d 899, 904 (8th Cir. 2012).

239. *Id.* (“The issue whether making copyrighted works available to the public is a right protected by § 106(3) has divided the district courts.”).

240. *Id.*

241. *Id.*

242. Judge’s Instructions/Charge to Jury at 614–15, *Capitol Recs., Inc. v. Thomas-Rasset*, No. CV-06-1497 (D. Minn. 2007), 2007 WL 7731631 (emphasis added).

243. *See Capitol Recs., Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

244. *Id.* at 1212.

instruction's impact on the damages awarded.²⁴⁵

After considering supplemental briefs the parties had been ordered to file, the court granted Thomas a new trial and adopted the "actual distribution" view, holding that the right of "distribution" is not violated merely by making a work available.²⁴⁶ Newly determined to clarify—and narrow—the scope of the distribution right, the court instructed the jury thus:

The *act of distributing* copyrighted sound recordings to other[] [users] on a peer-to-peer network without license from the copyright owners violates the copyright owners' exclusive distribution right.²⁴⁷

The distinctions between "making available" and "actual" forms of distribution are gone; newly added is the phrase "to other users," which does not add any clarification to the distinction between *making something available* to other users or *actually distributing* it to them. On its face, the instruction is tautological: if the jury finds that the defendant did the "act of distributing copyrighted sound recordings to other users" then the right of distribution will be violated. However, the court withholds guidance on how to determine if an act constitutes "the act of distributing." Armed with this ostensibly narrowing jury instruction, the second jury awarded damages of \$1,920,000, an amount nearly ten times higher.²⁴⁸

The second jury's verdict of liability is at odds either with the court's adoption of the "actual distribution" view of distribution or with the factual record.²⁴⁹ The jury might have interpreted the revised instruction correctly to require "actual distribution" but misapplied it because, as a factual matter, there had been no *actual* distribution by Thomas-Rasset. Or the jury might have mistakenly understood the instruction to permit a broader "making available" view of distribution which contravened the court's ruling, if so, but at least could have led to liability on these facts. Either way, something is fishy.

In correcting its own understanding of the distribution right, the court noted that actual distribution could be proven through circumstantial evidence.²⁵⁰ That reasoning has been cited and approved since copyright often relies on circumstantial evidence in copyright litigation.²⁵¹ Given this settled practice, one wonders why the record companies did not use it to prove "actual distribution" during the first trial. That they could not do so seems plain given how hard they fought for a "making available" instruction. Indeed, there was no evidence that Thomas-Rasset's files had been accessed by other users, and thus, no actual distribution "to other users."²⁵² It

245. *Id.* at 1214.

246. *Id.* at 1218–19.

247. Judge's Instructions/Charge to the Jury at 685–86, *Capitol Recs., Inc. v. Thomas-Rasset*, No. 06-cv-01497 (D. Minn. 2009), 2009 WL 8706671 (emphasis added).

248. *Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899, 904 (8th Cir. 2012).

249. *See id.* at 904.

250. *Capitol Recs.*, 579 F. Supp. 2d at 1218–19.

251. *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, No. A-17-CA-365, 2018 WL 1096871, at *5 (W.D. Tex. Feb. 28, 2018).

252. *Capitol Recs.*, 692 F.3d at 902, 904. When Thomas-Rasset installed the relevant software, *it* made copies of the music files on her computer. Peer-to-peer software in that era

is of course possible that the jury based its verdict of infringement on the reproduction right alone, but the inability to confirm that it had not inappropriately held Thomas-Rasset liable *also* for distribution under a fault instruction resulted in meaningful error.

Perhaps a better way to drive this point home is by reference to the plaintiffs' own position after the third trial. A third jury, tasked only with calculating damages, issued an award of \$1,500,000 (reduced on remittitur to \$54,000).²⁵³ The record companies did not seek to reinstate the damages awarded by the second or third juries (\$1,920,000 and \$1,500,000, respectively). Instead, they sought reversal, a new trial, and a ruling that mere "making available" violates the distribution right. In return, they would graciously accept the first jury's award (\$222,000) and a broader injunction against Thomas-Rasset alone.²⁵⁴ The appellate court saw through this gambit and appropriately limited its ruling to the request for damages and a broadened injunction, writing:

Important though the "making available" legal issue may be to the recording companies, they are not entitled to an opinion on an issue of law that is unnecessary for the remedies sought or to a freestanding decision on whether Thomas-Rasset violated the law by making recordings available.²⁵⁵

The court's use of "whether" underscores the uncertainty around "distribution" that remained after three trials, in the eyes of the court and even plaintiffs.

Professor and noted practitioner, Rick Sanders, has stated that securing an expansive "making available" right was central to the legal enforcement campaign mounted in the early 2000s by the Recording Industry Association of America (RIAA) when it "sued tens of thousands of alleged file sharers" caught using peer-to-peer file-sharing services.²⁵⁶ "The RIAA needed a legal theory that was easy and cheap to establish and . . . sufficiently watertight to force early settlements," and as a bonus, because the 1976 Act measures damages by work, not infringement, it held the potential for very high statutory damages awards.²⁵⁷ Ultimately, the "making available" theory of distribution has been rejected by most courts.²⁵⁸ But its slippery use in the Jammie Thomas-Rasset litigation exemplifies how copyright's dynamic subject matter and jurisprudential churn can challenge courts and factfinders. Further, this example demonstrates the role litigants may play in strategically exploiting copyright's indeterminacy.

worked by shifting users' copies to "share" directories on individual computers. Other users could, in turn, access the share directories and thus the music files. That *making available in the share directory* is factually distinct from making a copy and distributing it or sending it to another user.

253. *Id.* at 901–02.

254. *Id.* at 902.

255. *Id.*

256. Rick Sanders, *Will Professor Nimmer's Change of Heart on File Sharing Matter?*, 15 VAND. J. ENT. & TECH. L. 857, 860 (2013).

257. *Id.* at 863.

258. *Id.* at 864.

Like all litigation sagas, *Capitol Records* is an outlier. However, it is not uncommon for copyright litigation to hinge on a calque, like “distribution,” whose meaning is indeterminate and whose construction is complicated by copyright’s technicality and dynamism.

Antonick v. Electronic Arts Inc., for example, featured a dispute over similar video games and required that juries apply the “virtual identity” standard in considering whether a “derivative work,” when considered “as a whole,” had been infringed.²⁵⁹ These phrases—all calques—presented challenges. For one thing, how could Antonick’s *one* individual game, as compared with Electronic Arts’ series of games, be “virtually identical” in any “ordinary” sense (because the jury was instructed to apply the perspective of “the ordinary observer” invoked in the instruction)? For another, the term “derivative work” was not defined in the jury instructions other than by reference to the statute.²⁶⁰ The jury was not debiased through an explanation that the tension between “original” and “derivative” is one part of what makes the term confusing.

Predictably, the lack of clear instructional guidance on these terms—virtual identity, derivative work, “as a whole”—left the main development of their meaning open to exploitative advocacy regarding what was to be compared and what was purportedly violated. In closing, Antonick’s counsel was all too happy to help the jury understand the meaning of “virtually identical” through a self-serving lens that captured the defendant’s behavior as anticompetitive:

So is it virtually identical? Think about this. If this was a competitor doing this, would you have any trouble saying, yeah, that’s the same. It’s the same product. And “virtually” means for all intents and purposes. For all practical purposes, is it the same? Not . . . is that identical? If it was identical, the judge would tell you: Check and see if it’s identical. Virtually identical. For the practical points that matter, is it the same thing?²⁶¹

Antonick’s attorney implicitly distinguished the *legal* meaning of “identical” from the *lay* meaning of “identical” and noted the judge would have clearly told the jury to find something “identical” if that applied. In so doing, he implicitly anticipated and empathized with their confusion over the term. He appealed to their common sense (“if this were a competitor”) before suggesting that the common-sense way to understand “virtual identity” also happened to be the one on offer for his client (“it’s the same product”).

The jury found virtual identity and returned a verdict of infringement for each of the games as derivative works.²⁶² The court granted defendants’ motion for judgment

259. No. C 11-1543, 2014 WL 245018, at *1 (N.D. Cal. Jan. 22, 2014).

260. Judge’s Instructions/Charge to the Jury at 2055, *Antonick v. Elec. Arts Inc.*, No. C 11-1543 (N.D. Cal. 2013), 2013 WL 12183218 (emphasis added) (“The term derivative work means any computer software program or electronic game *which constitutes a derivative work of Apple II Madden within the meaning of the United States copyright law.*”).

261. Plaintiff Robin Antonick’s Closing Statement at 2079, *Antonick v. Elec. Arts Inc.*, No. C 11-1543 (N.D. Cal. 2013), 2013 WL 12183219.

262. *Antonick*, 2014 WL 245018, at *1 (“[T]he jury found that the Sega Madden games

as a matter of law because there was “no legally sufficient basis for the jury’s verdict that any of the Sega Madden games as a whole are virtually identical to Apple II Madden as a whole.”²⁶³ The deficient instructions provide possible insight into the erroneous verdict (whose erroneous status was upheld on appeal).²⁶⁴ It is difficult not to wonder what the jury understood the infringement standard to mean since the trial court clearly believed it meant something else, but what that something else was, it failed to convey and the jury failed to intuit.

As *Antonick* reveals, the problem posed by copyright’s language is intricately connected with other aspects of copyright’s user-unfriendliness such as the ontological indeterminacy of “the work” and the doctrinal confusion that continues to challenge the factfinder’s assessment of improper appropriation. Confusion attendant on the many gaps the jury is tasked with filling creates opportunities for strategic lawyering and puts pressures on the court to guide the jury carefully, by properly managing the evidence and instructions that reach the jury. The challenges for the court are especially significant when ontological determinacy takes center stage.

C. Ontological Indeterminacy

What makes ontological indeterminacy not just difficult for users but consequential for copyright policy is the way that it affects the scope and availability of copyright protection (during infringement analysis) and the size of awards (during damages calculations). Courts often struggle to define the *thing*, to locate its outer boundaries, or to apply the filtering that is necessary in all substantial similarity litigation; recall that copyright deliberately leaves its rights indeterminate until trial.²⁶⁵

In two recent disputes over musical works in the Ninth Circuit, copyright’s ontological indeterminacy permeated the entire jury trial and appeal. In both *Williams v. Gaye*²⁶⁶ and *Skidmore v. Led Zeppelin*,²⁶⁷ the deposit copy (which consisted solely of sheet music and was used to secure copyright registration) lacked later-added elements of the popular, performed versions of the plaintiffs’ songs. Plaintiffs argued that the jury’s baseline for assessing similarity should be the performed recording rather than the deposit copy, and defendants disagreed.²⁶⁸ The already ontologically complex question was complicated by the technicality of the

are derivative works. . . .”).

263. *Id.* at *7.

264. *See Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062 (9th Cir. 2016).

265. *See supra* Section I.C (describing ways in which copyright law’s terminology and indeterminacy create complexity); Smith, *supra* note 3, at 1755; Long, *supra* note 47, at 500.

266. 885 F.3d 1150, 1165–66 (9th Cir. 2018).

267. 952 F.3d 1051, 1057 (9th Cir. 2020).

268. *See Williams*, 885 F.3d at 1165. (“The Gayes assert that Marvin Gaye’s studio recording may establish the scope of a compositional copyright, despite the 1909 Act’s lack of protection for sound recordings. The Thicke Parties, on the other hand, elevate the deposit copy as the quintessential measure of the scope of copyright protection.”); *Skidmore*, 952 F.3d at 1062–64 (providing lengthy analysis of why the plaintiff’s theory of the deposit requirement was inaccurate and affirming the district court’s ruling for the defendant on this issue).

“web of music copyright[s]” that defines legal rights in these forms of copyrightable works.²⁶⁹ Congress had not protected sound recordings at the time of plaintiffs’ registration and while it now protects them, extending protection to elements beyond the deposit copy would have expanded the scope of protectable subject matter in ways Congress had previously declined to do.²⁷⁰

Both trial courts ruled that the deposit copy would serve as the baseline for the jury’s assessment, and these rulings were upheld (on appeal and en banc, respectively). *Williams* and *Skidmore* were not aligned with earlier Ninth Circuit precedent, *Three Boys v. Bolton*, discussed in Section II.B.²⁷¹ *Three Boys* permitted the Isley Brothers to treat as their “work” for infringement purposes a recorded version of their song, “Love is a Wonderful Thing,” because “all of the . . . essential elements” were present in the deposit copy as well as the song as performed and recorded.²⁷²

This jurisprudential discrepancy underscores that copyright’s ontological indeterminacy is not just a difficult issue juries face but often a highly technical legal question on which esteemed jurists may disagree.²⁷³ Nonetheless, courts must make decisions about the scope of protection in the work, and when they fail to do so, handing assessment of the works to the jury without sufficient guidance about the “works” as such, the results are predictably unfortunate.

In *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, sellers of reading glasses (“readers”) hand-painted by painter Charles Opheim sued several defendants for importing and selling readers with allegedly infringing designs.²⁷⁴ Opheim had registered as a three-dimensional collective work a set of designs consisting of dots and swirls applied to preexisting glasses frames he had purchased.²⁷⁵ After three years of trial, the jury

269. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003).

270. See *Skidmore*, 952 F.3d at 1057, 1061–64.

271. See *Williams*, 885 F.3d at 1165 n.10 (“To our knowledge, the Thicke Parties’ position had not found support in case law until the district court’s ruling.”); *Three Boys Music*, 212 F.3d at 486 (observing, in the context of subject matter jurisdiction, that “[a]lthough the 1909 Copyright Act requires the owner to deposit a “complete copy” of the work with the copyright office, our definition of a “complete copy” is broad and deferential”); see also *Skidmore*, 952 F.3d at 1063 (distinguishing *Three Boys* by limiting the relevance of its deposit copy ruling to subject matter jurisdiction).

272. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

273. See Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 501–23 (2014) (discussing copyright’s inclination to define music in terms of textual or notational indicia and to downplay or ignore many of music’s perceptual and cultural characteristics); see also Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 7 (2014) (chronicling the evolution of copyright protection for music before and after the advent of recording technologies and exploring their implication for copyright in music).

274. No. Civ. A. 3:03-CV-0887, 2005 WL 415142, at *1 (N.D. Tex. Feb. 18, 2005).

275. Plaintiffs’ First Amended Original Complaint at 5, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Mar. 25, 2004), 2004 WL 2656217 (“On or prior to March 1998, Plaintiff Charles M. Opheim designed and created in a tangible medium of expression within the United States a collection of original 3-Dimensional sculptures and 2-

found infringement and awarded \$366,870 in damages.²⁷⁶

From the start of litigation, the parties disputed the scope of plaintiff's copyright. Op Art insisted the defendant's "eyeglasses" infringed its "valid copyright . . . [on] . . . eye-glasses" despite conceding at trial that Opheim had not designed the eyeglasses but merely painted designs on them; in this light, it is clear that Op Art was nakedly attempting to expand its copyright from the (potentially) original painted designs to include the useful article on which they were painted.²⁷⁷ Despite defendant's attempts to characterize the items accurately as designs placed on glasses, the trial court repeatedly referred to the plaintiff's works as "glasses," including in some portions of the jury instructions.²⁷⁸

Useful articles are items whose useful or functional aspects are not protected under copyright law.²⁷⁹ Generally, "items of clothing" are not copyrightable because they are useful.²⁸⁰ Elements of creative design incorporated into clothing may be protectable so long as they can be identified separately from and exist independently of the item's utilitarian aspects.²⁸¹

Eyeglasses are uncopyrightable "useful articles," used to shield eyes from the sun or to correct vision. When "glasses" in copyright litigation contain features that are potentially the proper subject of copyright law (such as when they possess elements that are expressive and non-functional), courts and litigants call them something else,

Dimensional artworks of paint designs on eyeglass frames."'). During the trial, the plaintiff conceded that the frames for the eyeglasses were both functional (i.e., not protected by copyright) and also preexisting; his artwork was added to frames he purchased. *See* Defendants' Reply Brief in Support of Their Rule 50(a) Motions for Judgment as a Matter of Law at 6, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. May 31, 2006), 2006 WL 1856844.

276. *See* Plaintiffs' Response to Defendants' Renewed Motion for Judgment as a Matter of Law and Further Response to Defendants' Supplemental Brief in Support of Defendants' Renewed Motion for Judgment as a Matter of Law, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. May 16, 2006), 2006 WL 1856844.

277. Defendants' Objections to Plaintiffs' Proposed Jury Instructions and Questions at 3, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Oct. 11, 2005), 2005 WL 2893653 ("The jury must be informed of the validity of a copyright because that issue is in dispute in this case. Plaintiff Charles Opheim has admitted that he did not author any original frames or eye-glasses.

Q: Mr. Opheim, you didn't design the frames, did you?

A: I did not design the frames.

Q: Okay. You just designed the painting patterns and colors that went on the frames. Correct?

A: Yes.

(10/26/04 Opheim Dep. Tr. 139).")

278. Court's Charge to the Jury at 7, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Apr. 13, 2006), 2006 WL 1386932.

279. The Copyright Act defines a useful article as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C.A. § 101. This definition "includes articles that are normally a part of a useful article." *Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 921 (11th Cir. 1983).

280. *Express, L.L.C. v. Fetish Grp., Inc.*, 424 F. Supp. 2d 1211, 1224 (C.D. Cal. 2006) (collecting cases).

281. *See* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 413 (2017).

like “eyewear,” “sculptured metallic ornamental wearable art,” or “nonfunctional jewelry worn over the eyes in the manner of eyeglasses.”²⁸² These circumlocutions may not trip off the tongue, but the distinction matters.

Diving into the trial record, what emerges is a clear picture of parties unclear on copyright law. Defendants requested instructions—accurately quoting language from the 1976 Act—on (1) the limits of protecting utilitarian features (such as frames and lenses); (2) pre-existing features (such as the frames Opheim had bought); (3) the limited scope of protection for “commonplace” features like dots and swirls; and (4) apportionment of damages to ensure that the jury would count only defendant’s profits “attributable” to the infringement, as the statute requires.²⁸³ Fairness demands that I include defendant’s (misguided) request for an instruction that characterized originality using a higher standard more like novelty, which the court properly rejected.²⁸⁴ But for that one, defendants’ requests were consonant with copyright law.

The plaintiff consumed a lot of docket air fighting these requests. For instance, the plaintiff argued that calling the pre-purchased frames “pre-existing” would confuse the jury:

Defendants’ Proposed Final Jury Instruction No. 2 - Copyright - Validity and Scope of Protection should be modified to remove the suggestion that copyright protection for a work employing pre-existing material in which the copyright subsists does not extend to the pre-existing material. This confusing instruction suggests that *the copyright protection in the Plaintiffs’ work cannot extend to the eyeglasses themselves because eyeglasses pre-exist*. Such is not the proper analysis because *the jury must believe they are free to examine the “total concept and feel” of the copyrighted subject matter, including the eyeglasses themselves*.²⁸⁵

Tellingly, Op Art wanted the court to use the “total concept and feel” test to wave away the pesky statutory language that limits protection for a collective work to the author’s original contributions added to any “preexisting” materials within the collective work.²⁸⁶ It similarly wanted to wave away the statutory exclusion from copyright of any utilitarian features, such as the frames Opheim had bought and decorated. Op Art conceded that the instruction should explain the useful articles doctrine, but its strategy was to focus the jury on a holistic approach by which the unprotectable glasses would be subsumed by the “total concept” (and thus protected).²⁸⁷ This holistic, fuzzy way of looking at the readers would circumscribe the clear statutory mandate to separate protectable expressive elements from unprotectable

282. On *Davis v. Gap, Inc.*, 246 F.3d 152, 156 (2d Cir. 2001).

283. 17 U.S.C. § 504(c).

284. See Court’s Charge to the Jury at 7–8, *Opheim v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Apr. 13, 2006), 2006 WL 1386932.

285. Plaintiffs’ Objection to Defendants’ Proposed Jury Charge at 3, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Oct. 11, 2005), 2005 WL 2893652 (emphasis added).

286. 17 U.S.C. § 103.

287. See Plaintiffs’ Objection to Defendants’ Proposed Jury Charge, *supra* note 285, at 3–4 (proposing this instructional language: “For useful articles, such as reading glasses, copyright protection extends only to the artistic portion of the useful article.”).

utilitarian aspects (as defendants pointed out, in vain).²⁸⁸

On the “preexisting” argument, the court agreed with the defendant since the plain language of the 1976 Act defines collective works using the word “preexisting,” and Opheim’s work was registered as a collective work.²⁸⁹ Otherwise, the court refused all of defendant’s requested instructions and, posttrial, defended these refusals in conclusory fashion.²⁹⁰ Further, the jury failed to apportion its damages award to infringement of the protected designs painted on the glasses and instead awarded profits based on sales of the readers. This is manifest error. The reason defendants’ glasses sold was not only because of their copyrightable designs but because of their uncopyrightable utility as reading glasses. Defendants’ arguments correctly stressing that the statute requires apportionment were unavailing. The court found that the jury could “elect” whether or not to conduct such apportionment based on whether it found the defendant credible.²⁹¹ While credibility is the jury’s province, undoing clear statutory provisions like the apportionment rule is not.

To recap: with one copyright registration for fourteen designs consisting of “dots and swirls,” Op Art enforced its “valid copyright . . . [on] eyeglasses”; the court refused to filter for *scènes à faire* or other limiting principles that would have calibrated the scope of protection properly, as the system anticipates will happen at trial since it happens nowhere else in copyright; and the jury instructions shifted attention to include unprotected “eyeglasses” during its assessments of validity, infringement, and damages.²⁹²

The plaintiff’s strategic behavior is unsurprising. Professor Jeanne Fromer has noted that in cases like these, in which the rightsholder’s unauthorized contribution represents only a portion of the defendant’s profits, “[i]t goes without saying that some copyright plaintiffs might seek to recover disproportionately from a defendant’s work, well beyond the infringing use, even though copyright law disallows such recovery.”²⁹³ Overprotecting intellectual property, as *Op Art* does,

288. See Defendants’ Objections to Plaintiffs’ Proposed Jury Instructions and Questions at 2, *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Oct. 11, 2005), 2005 WL 3137567.

289. See Court’s Charge to the Jury, *supra* note 284, at 9 (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”).

290. See *Op Art, Inc. v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887, 2006 WL 3347911, at *6 (N.D. Tex. Nov. 17, 2006) (rejecting defendants’ Rule 59 motion for a new trial).

291. *Id.* at *5 (“[T]he jury was given the opportunity to apportion damages and it *elect*ed not to due to Defendants’ failure to convince it that certain elements of the profit were not attributable to the copyrighted design.”) (emphasis added).

292. Court’s Charge to the Jury at 9, 11, 18, *Opheim v. B.I.G. Wholesalers, Inc.*, No. Civ. A. 3:03-CV-0887 (N.D. Tex. Apr. 13, 2006), 2006 WL 1386932 (“Validity[:] Do you find that Plaintiffs own a valid copyright in the collection of decorative eyeglasses? . . . [Infringement:] To determine whether there is a substantial similarity between Defendants’ accused infringing eyeglasses and Plaintiffs’ copyrighted eyeglasses . . . Damages[:] [D]amages measured by the profits of the Defendants from the importation and/or sale of the infringing glasses . . .”).

293. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been*

exacts a “greater cost on society than the [law] had anticipated without concomitant benefit.”²⁹⁴ Combine an inexperienced judge and a manipulative, rent-seeking plaintiff with a jury and you have a recipe for a normatively awful copyright outcome.

As *Op Art* demonstrates, unpacking jury-related errors requires an assessment of judicial choices and litigant behaviors in addition to jury decision-making. Copyright’s ontological indeterminacy invites predictable uncertainty over the boundaries and scope of copyright protection in a given work. Judges confront “interpretive pressure points” or interpretive choices about how to locate or “define” the works and how to measure the similarities between the works at issue.²⁹⁵ These choices will bear directly on how the judge instructs the jury and on how and whether she reins in unscrupulous litigants. The interpretive gatekeeping embedded in the judicial role is often overlooked and must be acknowledged, especially with respect to the potential for jury-related errors.²⁹⁶

D. Substantial Similarity

Copyright’s user-unfriendliness comes to a head in substantial similarity analysis, where judges, juries, and litigants all at times display outcome-relevant confusion. The terminology involved in the test’s many subparts is a prime candidate for error. For our purposes, substantial similarity can be understood as consisting of two phases with multiple sub-inquiries: Phase 1, proof of copying, and Phase 2, evaluation of the copying to determine whether it is the kind of copying that copyright considers actionable. (I will refer to these phases as the “copying” and “actionability” steps since the names more commonly used to describe them are part of the problem, as discussed below.)

In many respects, the case law is as confusing and wrongheaded as it is due to the judiciary, not the jury alone. The first challenge arises in the hidden interpretive scaffolding that structures infringement analysis.²⁹⁷ Approaching substantial similarity analysis, judges make choices along two axes about the “things” whose comparison will determine the inquiry’s outcome.

First, judges decide *what* the “work” in question is (which implicates copyright’s ontological indeterminacy).²⁹⁸ In construing the work, judges must decide what evidence will “count” or what justifications it will adopt: text, context, authorial intention, audience reception, expert testimony, or some combination thereof?²⁹⁹ For

Asserted?, 53 HOUS. L. REV. 549, 570 (2015).

294. *Id.* at 587.

295. Said, *supra* note 29, at 523.

296. *See id.*

297. *See* Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 544 (2016).

298. Said, *supra* note 29, at 470 (“Judges must determine *what* they should use as the sources of their interpretation, and *how* they should interpret the works being litigated. These competing interpretive methods require judges to choose among different sources: the work itself, and the context around the work, including its reception, the author’s intentions, or expert opinions.”).

299. *Id.*

instance, in *Op Art*, the “text” consisted of the painted designs (only) despite the painter’s self-interested testimony that he considered the works to include both the painted designs and the pre-purchased frames. In *Williams v. Gaye*, once the court chose to treat the deposit copy as the “text,” there were still inevitable questions about how experts would interpret the sheet music once the work had been delimited in this way as well as how to represent the work and the scope of the copyright protection in the “text” to the jury.³⁰⁰ By contrast, a different approach (and the one sought by the plaintiff) could have considered context-based (rather than text-based) ways of determining the “work,” such as how Marvin Gaye performed it, what audiences would have been familiar with in that era, or how contemporary audiences understood what the song “was.” These judicial choices can be simplified as the Text/Context axis.³⁰¹

Second, judges must decide *how* they will approach the works they have defined for their (or the jury’s) comparison: through analysis (a formalist methodology), or through intuition (perhaps without acknowledging any methodology at all).³⁰² This can be simplified as the Analysis/Intuition axis. Courts use many names and variations to distinguish the two modes: dissective, analytical, extrinsic, or objective versus holistic, intuitive, intrinsic, or subjective.³⁰³ Generally, judges deploy the analytic approach as a matter of law in disposing of pre-trial motions on the grounds that no reasonable juror could disagree.³⁰⁴ But the boundaries are not as neat as the judge/extrinsic + jury/intrinsic formula might suggest. Sometimes judges import intuitive reasoning into the analytic parts of their decisions via the “total concept and feel” “test,”³⁰⁵ or by adopting the “ordinary observer” perspective.³⁰⁶ Conversely, often the jury determines similarity based on the “extrinsic” test as well as the intrinsic test, with neither test receiving effective explanation or guidance.³⁰⁷

These interpretive choices carry implications for the admissibility of evidence, the availability of expert testimony, and the fact/law distinction that tracks whether a jury must be empaneled in the first place. In sum, they can be outcome determinative yet are not usually announced as analytic choices, let alone dispositive ones.³⁰⁸ Judicial error at this stage, besides risking reversal, could generate

300. For instance, on appeal, the parties argued over whether the jury had been properly instructed. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir. 2020). In particular, the plaintiff sought a ruling that the jury had been insufficiently instructed on the issue of the plaintiff’s work’s originality as well as defendant’s possible copying of the plaintiff’s selection and arrangement of original elements (both of which arguments the court ultimately denied). *Id.* at 1073.

301. See *Williams v. Gaye*, 885 F.3d 1150, 1184 (9th Cir. 2018) (Nguyen, J., dissenting).

302. *Id.*

303. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977), *overruled by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); see also *Litchfield v. Spielberg*, 736 F.2d 1352, 1356–57 (9th Cir. 1984) (intrinsic or subjective).

304. See *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004).

305. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). As Lemley has noted, *Roth* was decided by a judge, not jury. Lemley, *supra* note 2, at 725, n.24.

306. Said, *supra* note 29, at 487.

307. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir. 2020).

308. Said, *supra* note 29, at 470, 515.

significant waste by unnecessarily requiring a jury trial. Jury trials are extremely costly in all senses, for all participants, and the decision to construe a close question as an issue of fact that requires jury resolution may be the costliest jury-related error of all. A countervailing concern is that judicial error could work constitutional injury by depriving parties of their right to a jury. The stakes are high and the tendency for interpretive decisions to take place “unacknowledged” and virtually “unconstrained” increases the chances of error.³⁰⁹

In addition to the interpretive complexities baked into substantial similarity, the terminology is confusing. Both the “copying” and “actionability” phases consider the works’ “similarity.”³¹⁰ However, similarity arises under two different inquiries that ought to be kept distinct but which some courts conflate.³¹¹ First, courts must consider whether the works are similar enough to provide evidence of copying (if the plaintiff is using circumstantial evidence rather than direct evidence to prove copying). Second, courts must consider whether the works are similar with respect to the amount and nature of the protected material that has been copied.

One scholar has helpfully called the first inquiry “*probative* similarity” since its purpose is to *prove* copying, and “substantial similarity” in the second phase since its “substantiality” justifies finding the copying was actionably improper,³¹² and some courts have followed suit.³¹³ But even those courts may conflate the two kinds of similarity.³¹⁴ Perhaps the perfect demonstration of the doctrine’s quasi-Dadaist character is that even though these two phases have different purposes, substantive sub-tests, procedural requirements, availability of expert testimony, and fact/law profiles,³¹⁵ many courts refer to both phases, and their overall outcome, using the same name.

In an unsuccessful lawsuit against Lady Gaga, the court noted:

Substantial similarity also has dual usages. When *substantial similarity* is used to determine copying as factual matter, it “can refer to the likeness between two works sufficient to give rise to an inference, when supported by evidence of access, that the defendant took ideas from the

309. *Id.* at 471.

310. This is assuming proof of copying is otherwise unavailable; where copying is conceded or proven through direct evidence, only the second step is necessary. *See id.* at 476–77.

311. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (“Unfortunately, we have used the same term—‘substantial similarity’—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation. The term means different things in those two contexts.”), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

312. Alan Latman, “*Probative Similarity*” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189–1190 (1990).

313. *See, e.g., Positive Black Talk, Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 368 (5th Cir. 2004); *see also Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 841 (10th Cir. 1993); *Laureysens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992).

314. *See Engenium Sols., Inc. v. Symphonic Techs., Inc.*, 924 F. Supp. 2d 757, 787 (S.D. Tex. 2013) (“[T]he Court finds that, in this case, the analysis for probative similarity and substantial similarity is essentially the same.”).

315. *See Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975).

plaintiff's work." . . . When *substantial similarity* is used to determine copying in the legal sense we inquire whether the defendant's work is substantially similar to the original elements of the plaintiff's work, such that there has been unlawful appropriation. . . . *Substantial similarity* thus relates to both the copying and unlawful appropriation prongs necessary to prove a copyright infringement.³¹⁶

In fact, *Francescatti* reveals that "substantial similarity" gets repurposed a third time in the legal conclusion the steps help produce: "substantial similarity" is what ultimately "prove[s] a copyright infringement."³¹⁷ The test could be paraphrased as follows (and the reader is invited to add "air quotes" of frustration each time they read the italicized language below):

First, to detect copying, the judge examines the works for "*substantial similarity*."

Second, to assess whether the copying was improper appropriation, the factfinder considers the works seeking "*substantial similarity*."

Third, assuming the plaintiff's success in both phases, the court will hold that there is "*substantial similarity*," a legal conclusion.

The phrase means three different things but gives no sign of that on its face.

Adding to the semantic misnaming are issues of semiotic indeterminacy: how do we know what similarity means when the term is indeterminate? In the alternative, is it simply reducible to a malleable, "I-know-it-when-I-see-it" assessment?³¹⁸ Multiple different tests are used to determine actionability in phase two, and their features and flaws are thoroughly recited in prior scholarship.³¹⁹ I do not revisit them fully here lest they swallow the paper whole. Instead, what matters here is that in assessing actionability, courts sometimes impose a higher standard than "substantial similarity" as measured by an ordinary observer.

For instance, the Second Circuit has done so with respect to works containing many public domain elements.³²⁰ Instead of having the factfinder consider the works from the "ordinary observer's" perspective, a "more discerning observer" standard should be applied so as to calibrate the scope of protection more narrowly, ensuring that unprotected elements are not inadvertently protected. The locution is confusing, however; it sounds as though the court may tap an expert, an observer "more discerning" than the ordinary one. Yet that is not the case; it only means that the jury must more carefully attend to filtering out public domain elements. However, the only copying considered actionable is copying in which protected elements have been appropriated. Hence all "actionability" tests ought to be filtering out

316. *Francescatti v. Germanotta*, No. 11 CV 5270, 2014 WL 2767231, at *7 (N.D. Ill. June 17, 2014) (emphasis added) (internal citations omitted).

317. *Id.*

318. Tushnet, *supra* note 74, at 724.

319. See, e.g., Lemley, *supra* note 2; Samuelson & Wheatland, *supra* note 111; Tushnet, *supra* note 74.

320. *Accord Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991) (imposing a "more discerning" observer standard to compare works with many public domain elements); *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 130 (2d Cir. 2003) (same); see, e.g., *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) ("[W]here we compare products that contain both protectible and unprotectible elements, our inspection must be 'more discerning . . .'").

unprotected elements, thus obviating the need for a special standard to filter out public domain elements. The “more discerning observer” standard’s very existence is perplexing and seems to concede, or at least anticipate, systematic failures to filter elements that copyright law is committed to excluding from protection.

Disputes that center on substantial similarity—as the majority of infringement cases do³²¹—are vulnerable to errors of scope because of these failures to filter. Doctrinal confusion adds to copyright’s user-unfriendliness and increases the likelihood of jury-related errors.

For example, in *Harper House, Inc. v. Thomas Nelson, Inc.*, the appellate court identified the filtering problem and implicitly acknowledged copyright’s user unfriendliness:

We reject [plaintiff] Harper House’s claim that Instruction Nos. 6 and 8 adequately cautioned the jury to limit its review to protectable material. Instruction Nos. 6 and 8 both required that Harper House make a showing of “substantial similarity” between “*protectable expressions*” [sic] in the organizers. Though the instructions cautioned that the jury limit its review to protectable material, this caution was of little value because *these instructions did not adequately explain to the jury which material was, in fact, protectable*. In a case such as this, *given the negative connotations to “copying,”* there was an obvious risk of an improper verdict for plaintiffs, and a need for further instructions to protect legitimate activity and avoid the suffocation of competition.³²²

By foreseeing the “obvious risk of an improper verdict,” the court recognizes the risks of erring in calibrations of the scope of protection, which can occur from improper filtering. The court wisely notes that merely knowing that it must focus on protectable expression does not tell the jury how to find it. Generalist jury literature emphasizes that telling the jury to do something is not the same as telling jurors how.³²³ In the background lurks the moral divergence (“the negative connotations to ‘copying.’”) In a footnote, the court elaborates on the risks of this moral bias:

In closing argument, Harper House’s counsel *fully* exploited the negative connotation to copying, urging the jury to use their basic sense that when given a homework assignment at school, one should not copy the work of another student—“change a word here, change a word there, put it on a different size paper and hand it in as your own.”³²⁴

Harper House’s attorneys urged jurors to “use their basic sense,” and evoked principles learned in childhood (note references to “homework,” “school,” and “another student”) intentionally³²⁵ to trigger the moral divergence. Emphasizing the negativity of copying is a stratagem designed to circumvent analysis of scope.

321. Asay, *supra* note 1, at 2.

322. 889 F.2d 197, 207 (9th Cir. 1989) (emphasis added).

323. TERSMA, *supra* note 136, at 1082.

324. Harper House, 889 F.2d at 207.

325. Given the court’s characterization that the plaintiff’s attorneys “fully exploited” this divergence, we may assume attorneys’ conduct was “intentional.”

Training the jury's attention on the earnest research efforts of a journalist (recall *Miller*, discussed in Section I.B) or the careful work of Harper House's designers, diverts attention away from the harder questions of scope. What is protectable in a docudrama about a real-life kidnapping? What are the expressive elements, if any, in a bestselling desktop organizer that sells well because it organizes well? Harper House's organizers are subject to discounting because of their functional, factual nature; they merit only "thin" protection (and only for their expressive elements or creative selection and arrangement). The limited monopoly copyright offers to functionality-forward works ought not to be expanded to encompass functional elements simply because the plaintiff's efforts were laudable, the defendant unlikeable, or the filtering hard to explain to the jury. Those three ingredients are frequently present in copyright litigation, especially in cases with an unfair competition angle.

Strategic exploitation of copyright's lay-unfriendly features holds the well-known potential to undermine copyright's balance by overprotecting functional works.³²⁶ Unfortunately, not all judges possess an understanding of the policy implications of substantial similarity assessments, as the juxtaposition of *Op Art* and *Harper House* makes clear. Substantial similarity poses the risk that copyright's user-unfriendliness will be manipulated in diverse ways that should be recognized so that parties' outcomes do not depend on the luck of the judicial draw. If judges do not understand the importance of filtering, they are likely to mis-instruct juries on how to filter. Thus judicial understanding of copyright policy could play an important, if indirect, role in improving juror capacity with respect to their allocated work in substantial similarity analysis.

A more surprising way to consider improving the jury's performance in substantial similarity determinations might be harnessing the moral currents identified in Section II.A. John Fogerty, of Creedence Clearwater Revival (CCR), "one of the greatest American rock and roll bands," was sued in 1985 for releasing, as an independent artist, music that allegedly copied the music of CCR, that is, music that Fogerty had performed for years (and composed almost entirely by himself before exiting his contract and the band).³²⁷ Rights to CCR's music were now controlled by Fantasy, Inc., a record company, which alleged that Fogerty had changed the lyrics to a CCR song, "Run Through the Jungle," and repackaged it in a new solo hit, "The Old Man Down the Road."³²⁸ The court's formalistic analysis of "access" as a proxy for copying hints at the case's absurdity:

The court finds that Fogerty had access to Jungle prior to the creation of Old Man. Fogerty admits that at the time he wrote Old Man, he had knowledge of Jungle. . . . In any event, the court finds it self-evident that

326. Kevin Emerson Collins, *Patent Law's Authorship Screen*, 84 U. CHI. L. REV. 1603, 1613 (2017) ("The policy consequences of failures in copyright's functionality screen are well known . . .").

327. *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 555 (9th Cir. 1996).

328. *Id.* at 556.

Fogerty had access to Jungle prior to the creation of Old Man. Fogerty composed Jungle prior to his composing Old Man.³²⁹

Having “found” access, the court called for a jury trial, because “reasonable minds could differ” on the songs’ substantial similarity.³³⁰ During a two-week trial in 1988, the winsome Fogerty took the stand with his guitar.³³¹ Playing recognizable fan favorites, he explained—in folksy terms that contrasted with the trial’s legalese and the plaintiff’s computer-generated versions of the songs, created to emphasize common elements—how similarities in his songs were attributable to his “swamp rock” style:

I explained that there is a certain chord I play that’s really kind of swampy. . . . This gives the chord a chimey, sustaining sound with a bit of dissonance or mystery to it. Then if you kind of smash or slur your fingers over to the next strings, you get sort of a sustained A chord with elements of the E still there. You don’t hold it there, you just accent it there. It gives the music an eerie feeling. My colors, kind of my invention. At least I feel that way about it.³³²

The week prior to Fogerty’s testimony, Fantasy had a music expert play “Rudolph the Red-Nosed Reindeer” and “Rock of Ages” on the piano to teach the jury how timing could affect similarity and demonstrate that Fogerty’s songs used the same notes with different timing.³³³ The following week, Fogerty easily rebutted the music expert: “when I was on the stand, I sang a little bit of both of my songs” and another song by Bo Diddley “that had the same notes as my two. We’re talking about the blues. You’ve only got five notes anyway, so somewhere in your blues song you’re going to have those notes.”³³⁴

The jury returned a verdict for Fogerty.³³⁵ It is easy to imagine a jury’s sympathy toward a musician sued on the basis of music he himself had composed and performed but no longer technically owned. Here was a hardworking, popular rock star manipulated by an exploitative contract formed with a powerful corporate entity back when he lacked stardom and bargaining power, and who was now, via litigation, being targeted by his former boss through vindictive corporate lawyering tactics after he painstakingly terminated the relationship. During the trial, when Fogerty was “being grilled by Fantasy’s longtime lawyer, Malcolm Bernstein,” Bernstein brandished Fogerty’s private songwriting notebook, seized during discovery.³³⁶ Fogerty describes feeling “completely disgusted” as “this creep was thumbing

329. *Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345, 1350 (N.D. Cal. 1987) (emphasis added).

330. *Id.*

331. Ethan Trex, *The Time John Fogerty Was Sued for Ripping Off John Fogerty*, MENTAL FLOSS (Apr. 13, 2011), <https://www.mentalfloss.com/article/27501/time-john-fogerty-was-sued-ripping-john-fogerty> [https://perma.cc/UPM7-MP9S].

332. JOHN FOGERTY WITH JIMMY McDONOUGH, *FORTUNATE SON: MY LIFE, MY MUSIC* 304–05 (2015).

333. *Id.* at 305.

334. *Id.*

335. *Fantasy, Inc.*, 94 F.3d at 555–56.

336. FOGERTY, *supra* note 332, at 305.

through my personal songbook like it's nothing and talking about me like I'm nothing . . . that is my soul.”³³⁷ But Fogerty also relays how a juror sent him a Christmas card after the trial, with an annotated picture of Rudolph the Red-Nosed Reindeer and a note that, for that juror, “the most telling moment of the trial was Malcolm Bernstein standing there berating me with my songbook in his hand.”³³⁸

The moral bias may have inclined the jury in Fogerty's favor though the infringement theory against Fogerty was also weak. The similarity assessment implicated ontological indeterminacy: were the songs similar as *songs* or were the songs similar due to a shared *style*? Similarities due to a common genre—so long as they are identifiable as necessary or customary aspects of the genre—are not protectible.³³⁹ Fantasy apparently first planned to claim that “Green River,” another CCR song, had been copied, but switched its focus to “Running Through the Jungle,” apparently for legal reasons.³⁴⁰ This change highlights how the similarities belonged to the shared style, not the particular songs in question. Fantasy's claim was weak and the case inartfully mounted, to boot, if Fogerty's account of it is accurate:

There were so many ridiculous moments during the trial. I had used the word “thunder” in both . . . [songs]. So of course they wanted to claim ownership of the word “thunder” – “John, you can't write another song with that word. That's unique to our song. And it appears in no other songs anywhere ever in your whole career –just ‘Old Man,’ which obviously came from ‘Run Through the Jungle.’”³⁴¹

Fogerty's sarcastic account of it, of course, exaggerates and editorializes, but his point reflects tactics common to most substantial similarity disputes. The parties try to identify actionable similarities and emphasize them or explain them away. “Thunder” is not protectable as such, and the attempt to suggest that it offered dispositive evidence of copying was a blunder by Fantasy's counsel. Fogerty describes a scene in which Fantasy's lawyers, trying to prove a different issue, played another song by Fogerty, “The Wall,” and accidentally undercut its own theory of similarity: “[T]he very first line references “thunder.” I could see the whole jury going, ‘What the . . . ?!’”³⁴²

Let us assume *Fogerty's* noninfringement ruling was correct on the merits (an assumption bolstered by Fogerty's eight years of successful appeals and award of attorneys' fees).³⁴³ If so, the case aligned with the everyday moral intuitions a layperson might form on facts like these.

Fogerty nonetheless illustrates the potential for moral bias to exert influence.

337. *Id.* at 306.

338. *Id.*

339. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (internal citations omitted) (copyright does not extend protection to “‘common or trite’ musical elements . . . or ‘commonplace elements that are firmly rooted in the genre's tradition’”); *accord Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 437–39 (S.D.N.Y. 1985).

340. *See FOGERTY*, *supra* note 332, at 305.

341. *Id.* at 302–03.

342. *Id.* at 303.

343. Fogerty was ultimately awarded \$1,347,519.15 in fees. *Fantasy, Inc.*, 94 F.3d at 555–56.

Adding to the asymmetric corporate power dynamic that slanted in favor of Fogerty, jury scholarship has shown that juries favor attractive defendants.³⁴⁴ While not a copyright-specific bias, this preference could have contributed substantively here if Fogerty's overall appeal helped him teach the jury how to filter out swamp rock's *scènes à faire* and the songs' other unprotected elements.

In *Fogerty*, the other side's alternatives were ineffective compared with Fogerty's ability to take the stand and fill the courtroom with energy. Besides the piano-playing music expert, Fantasy had "a couple of nerds" use computer programming to convey the songs' similarity and the effects were unpersuasive, again in Fogerty's retelling, anyway.³⁴⁵

First[,] they played the two songs separately, with all their parts. (They never played the actual records for the jury—just crappy, computerized, beeping versions.) Next, they stripped the songs down to just their melodies and played snippets of them separately. Then they announced that they were going to play the melodies together and instructed us that the places where you're just hearing one note means the songs are the same, and anytime you hear two notes means the melodies have diverged and are separate, different. After about three of these awful computerized notes—*beep beep boop*—the melodies started separating. To put it mildly, it didn't help their case. I'm thinking, *Didn't they test this before they did it? Because they are making the case that these are two distinctly different songs. I spent years of my life to get here?* I'm watching the jury, and everybody's squirming in their seats.³⁴⁶

Technologies for filtering have grown more sophisticated since *Fogerty*, but the challenges of managing this dynamic and mapping the similarity accurately despite copyright's ontological indeterminacy have remained the same, fully on display in the "Blurred Lines," "Stairway to Heaven," and "Dark Horse" music trials.³⁴⁷ If moral and other biases demonstrably improve jurors' cognitive assessment of similarities, this would be a significant insight for scholars of copyright litigation.

It is easy to imagine a trial in which a less likable musician does not find favor with the jury in ways that might have affected the substantial similarity determination.³⁴⁸ From a common-sense perspective (and unfortunately), "likeable," "good-looking" people do better at trials³⁴⁹ and contingency-fee lawyers have long

344. Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 653 (2009).

345. FOGERTY, *supra* note 332, at 303–04.

346. *Id.*

347. See Jon Blistein, *Katy Perry Wins Appeal in 'Dark Horse' Infringement Case*, ROLLING STONE (Mar. 18, 2020), <https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-copyright-win-appeal-969009/> [<https://perma.cc/F49W-SK9P>].

348. No need to imagine. See *Williams v. Gaye*, 895 F.3d 1106, 1118 (9th Cir. 2018), for a litigant whose legendary unpopularity with the jury caused speculation about the effects of juror antipathy on the merits. See Cronin, *supra* note 60, at 1231. See also Lemley & McKenna, *supra* note 2, at 2236.

349. At least some research suggests there is truth behind the truism: Ruth Lee Johnson, *Do Attractive People Fare Better in the Courtroom?*, PSYCH. TODAY (Aug. 18, 2014),

been frank about the need to select for appealing plaintiffs as much as for meritoriously winnable cases. Truisms like these might not hold under a more exacting empirical scrutiny, however.

It is unclear, in the first instance, whether the “lay ear” so prized by copyright law has the capacity to do what is asked of it. What little work exists on this question casts doubt—empirically³⁵⁰ and theoretically³⁵¹—on the lay listener’s ability to detect similarities accurately, let alone the kind of similarities copyright deems actionable. In the context of copyright law, in which the party’s testimony may go not only to their credibility but also to the cognitive work of filtering protected from unprotected material, the impact of moral and emotional bias poses an important question for our collective future research agenda.

III. MOVING FROM SO WHAT TO WHAT NEXT

Most of copyright’s user-unfriendly features are likely entrenched. Its dynamic and complex nature will remain so, and its indeterminacy is there for crucial policy-effectuating reasons that are likewise not going to change (a feature, recall, not a bug).³⁵² But there is some room for reform: perhaps copyright’s counterintuitive aspects (such as its moral divergence and linguistic calques) can be managed through training judges, disciplining litigants, and improving jury instructions. Likewise, substantial similarity analysis could adopt various changes that would minimize the way it seems to compound copyright’s user-unfriendliness. But are such reforms worth undertaking? First, one might ask, so what? Even if copyright’s asserted unfriendliness causes jury-related errors, do they matter sufficiently to bother with reform, given the diminished number of such trials in our era? Relatedly, we do not know the size of the posited problem which makes any assessment of the costs of jury-related errors necessarily theoretical. In spite of these cautionary inquiries and limits, it is reasonable to ask what ought to follow next from this work. These two inquiries—so what, and what next?—structure Section III.

A. So What? (A Call for Scholarship)

There are many plausible reasons that scholars have largely overlooked the jury’s role in copyright law, not the least of which is that based on the reduced number of trials nationally and the increase in adjudications by non-trial means, the jury is “vanishing” in civil litigation, generally, or at least “diminished”; thus, the number of cases fully litigated before a jury make it not worth the scholarly candle.³⁵³ Litigation behavior and statistics with respect to copyright law suggest that neglect is somewhat misguided. The jury has not vanished from copyright; if anything, it may have reappeared. First, prominent jury trials in recent years have been widely

<https://www.psychologytoday.com/us/blog/so-sue-me/201408/do-attractive-people-fare-better-in-the-courtroom> [<https://perma.cc/F2DE-CWGB>].

350. See Lund, *supra* note 62, at 138–40.

351. See, e.g., Lemley, *supra* note 2, at 739; Said, *supra* note 2, at 623; Sprigman & Hedrick, *supra* note 2, at 596.

352. See *supra* note 183 and accompanying text.

353. See *supra* note 66 (citing sources).

followed and hotly debated in the sphere of public opinion.³⁵⁴ Second, the percentage of full trials that empanel a jury is high (and has remained high, or risen, for the past two decades), as discussed below. Third, the diversity of subject matter and the broad range of factual questions involved in jury trials underscore the jury's potentially comprehensive role in copyright litigation.

There is very little empirical research on copyright litigation,³⁵⁵ and many questions remain tantalizingly unanswered³⁵⁶ despite a pair of landmark studies in the field and a methodologically robust, hot-off-the-presses but still-unpublished [as of this draft] study.³⁵⁷ Overall, however, the evidence available supports the jury's continued relevance in this field. As with most other areas of law, in copyright, most cases settle rather than going to trial. In a recent study of disputes terminating from 2009–2016 Q3, around two-thirds of the (17,994) cases terminated in settlement, and just under a quarter terminated on the merits.³⁵⁸ Statistically speaking, it is thus accurate to call jury trials in copyright “rare.”³⁵⁹ For instance, according to publicly available statistics, of the 5,066 disputes that terminated during 2018, only 0.6% went to trial.³⁶⁰

It is worth noting, however, that the number of trials itself is likely undercounted in all studies that rely (as most do) on the statistics provided by the federal district courts. These numbers undercount the actual disputes first because they capture only the cases filed under one Nature of Suit (NOS) code, which is to say cases filed using the NOS *for copyright only*. In fact, some cases may be filed under trademark or patent but also centrally involve a copyright issue. Professor Matthew Sag has reported that the federal district court records, because they are based on the NOS code, likely represent only 80% of the written opinions featuring copyright law in a given period.³⁶¹

Furthermore, the percentage of trials that feature a jury in copyright is unusually high. For instance, of the thirty-one full copyright trials terminating in 2018, twenty-three of those empaneled a jury (or 74%). That year was slightly anomalous (in the prior twenty-one years, by my analysis of the publicly available tables, only two were higher), but the rate is consistently in the high sixties throughout the past decade, which is to say, well over half of all full trials in copyright. Of the twenty-six cases

354. See *supra*, p. 3.

355. Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 IOWA L. REV. 1065, 1069 (2016); Cotropia & Gibson, *supra* note 197, at 1982 (“Empirical studies of copyright litigation are almost completely nonexistent.”).

356. Cotropia & Gibson, *supra* note 197, at 1983 (“Who files copyright cases? What kinds of works are involved—software, books, music, film? What claims are made? How many cases go to trial? What remedies are awarded? Are some courts more favorable to claimants? No one knows the answer to these and other fundamental questions about the workings of our copyright system.”).

357. Asay, *supra* note 1.

358. *Id.* at 2002.

359. *Id.*

360. Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary, U.S. CTS. (Dec. 31, 2018), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2018/12/31> [<https://perma.cc/88V8-M7ZG>] (the entry for copyright law).

361. Sag, *supra* note 355, at 1071.

that went to a full trial in 2019, eighteen were jury trials (or 69%).³⁶² The numbers tend to hover in the high sixties and low seventies, with one or two outlier years in the past two decades, with recent dips likely attributable to the pandemic.

Of course, it is uncommon for parties to litigate all the way through a full trial unless they do so especially because they *desire* a jury, and thus this high percentage may not be surprising. But copyright's percentage is higher than many other areas, which underscores the possibility that the jury remains especially important in copyright law.

The threat of a jury trial cannot be perfectly measured in terms of its impact on earlier stages of litigation. However, even in many cases that never reach trial, a flurry of jury-related pre-trial motion practice conveys the jury's importance.³⁶³ Copyright is known for its contentiousness, as measured by the comparatively higher number of docket entries in copyright litigation.³⁶⁴ Many of these entries relate to the jury, whether they are motions in limine, multiple drafts of jury instructions, or verdict-related motions.³⁶⁵ Post-trial motions may be discounted to some extent as reflecting sunk costs, but they likewise reflect the time and energy litigants invest in jury-related motion practice.

Perhaps most importantly, litigants routinely demand a jury in copyright disputes.³⁶⁶ While all the parties presumably understand that most disputes will not reach trial, most nonetheless begin with the premise that a jury will be involved unless the scorched-earth scenario of a full-dress trial can be avoided.³⁶⁷ The parties may be planning on empaneling a jury, drafting proposed instructions, and setting the ground rules for experts and evidence to present to the jury if settlement efforts

362. Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary, U.S. CTS. (Dec. 31, 2019), <https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/12/31> [<https://perma.cc/B65D-52TD>].

363. For example, a dispute over bikini patterns never led to a jury trial, but its pre-trial conference report reveals plans for a jury trial lasting 4–6 days and an enumeration of issues the jury might hear along with indications of the need for expert assistance on some of those. Joint Report Rule 26(f) Conference & Discovery Plan at 4–6, 9, *Kiini LLC v. Victoria's Secret Stores Brand Mgmt., Inc.*, No. 2:15-CV-8433 (C.D. Cal. Jan. 28, 2016), 2016 WL 3574859. Curiously, the defendant's proposed jury instructions, which are not available as part of the docket on Westlaw, were posted online and may be accessed here: <https://static1.squarespace.com/static/59387ce446c3c49df979d0c2/t/59f79c7324a69437aff46bd4/1509399667862/2+2017-02-03+Plaintiff%27s+Proposed+Jury+Instructions.pdf> [<https://perma.cc/AE6X-HBRW>]. The case concluded with a stipulation of dismissal with prejudice. *Kiini LLC v. Victoria's Secret Stores Brand Mgmt., Inc.*, No. CV 15-8433, 2016 WL 7647685 (C.D. Cal. Sept. 9, 2016).

364. *Cotropia & Gibson*, *supra* note 197, at 2011 (“[C]opyright cases are more contentious than other civil litigation.”).

365. See, e.g., Jury Instructions, *L.A. Printex Industries, Inc. v. William Carter Co.*, No. 09-2449 (C.D. Cal. Jan. 23, 2013), 2013 WL 979309, in which four versions of the jury instructions were published to the docket as the instructions were being negotiated and amended. A fifth version was ultimately used.

366. *Balganesh*, *supra* note 1, at 793 (“Demands for jury trials in copyright infringement lawsuits are today a staple.”).

367. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLAL. REV. 1, 4 (1996).

fail (or as a shared pretense to force settlement to succeed).

When trial does occur, the jury's decision-making role is significant, ranging from validity and ownership to infringement, defenses, and damages: in short, the jury in copyright can decide the alpha and the omega and nearly everything in between, so long as the question sounds in law rather than equity, and is a question of fact rather than law.

Generally, juries are associated with unpredictability and higher damages.³⁶⁸ In a report produced by Lex Machina covering the period from 2009–2016,³⁶⁹ default judgments during this period represented a significant piece of the overall damages awarded in copyright litigation (\$608 million, or 41.8% of damages awarded).³⁷⁰ However, excluding default judgments, jury trials featured damages awards considerably higher than non-jury copyright trials. Moreover, juries were responsible for more of these non-default damages awarded at trial.³⁷¹ In an updated report, Lex Machina surveyed copyright litigation that took place 2018–2020 and offered insights about the decade starting in 2011.³⁷² The statistics are somewhat distorted by one very large award, the jury verdict for \$1 billion in *Sony Music Entertainment v. Cox Communications*, which is clearly an outlier and still under appeal.³⁷³ However, of the \$3.4 billion in statutory damages awarded from 2018–2020, almost \$2.3 billion was awarded on default.³⁷⁴ Accordingly, juries continued to play a role in overall damages, but the size of their impact is harder to parse on this data than it was in the prior report.

In sum, multiple observable features of the litigation landscape underscore the jury's importance in contemporary copyright litigation. While the number of jury trials is small, the number only partially captures the role the jury plays in litigation.

It is often noted that jury verdicts themselves are non-binding beyond the parties³⁷⁵ and this is sometimes used to downplay the jury's importance. However, this reductionist view understates the impact of the public visibility of trials. The copyright cases that do go to trial are frequently vivid and closely watched, often by communities whose constituents copyright greatly affects, such as artists, fans, scholars, teachers, documentary filmmakers, and software developers; in short, lay bystanders. It is commonly understood that the verdict will matter to the way things

368. See Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996).

369. BRIAN C. HOWARD, LEX MACHINA COPYRIGHT LITIGATION REPORT 2016 ii (2017).

370. *Id.*

371. *Id.* at iii (juries awarded \$252 million—in 86 cases—versus judicial awards of \$92 million—in 184 cases—in the period of time studied.)

372. RACHEL BAILEY, LEX MACHINA COPYRIGHT AND TRADEMARK LITIGATION REPORT 2021 (Gloria Huang & Jason Maples eds., 2021).

373. *Id.* at 28. The award is stayed, and appeal is pending as of this writing. *Id.* It is noteworthy that some have called the verdict “by far the largest amount ever awarded in a copyright case”; whether or not that is accurate, it is clear that the award is highly unusual and statistically aberrant. Mitch Stoltz, *If Not Overturned, a Bad Copyright Decision Will Lead Many Americans to Lose Internet Access*, <https://www.eff.org/deeplinks/2021/06/if-not-overturned-bad-copyright-decision-will-lead-many-americans-lose-internet> [https://perma.cc/LV5E-928T] (June 3, 2021)

374. BAILEY, *supra* note 372, at 28.

375. Nimmer, *supra* note 2, at 599.

are done in their domains; what is gripping about copyright trials is not just the justice or injustice between the parties at bar but the ripple effects for copyright policy more broadly. Within the legal profession, dramatic jury trials can have an impact on litigation behavior generally, whether encouraging quicker settlement or spurring further litigiousness. Significant verdicts, even if infrequent, change business practices³⁷⁶ and may affect the underlying norms and practices of creative or technological industries.³⁷⁷ There are thus important cultural and sociological reasons to study the jury, apart from its precedential effects.

Even there, however, the jury-minimizing claim fails. While jury *verdicts* do not bind people beyond the parties, the *instructions* used in given cases can be tailored and reused in other cases. Jury instructions serve as court-approved statements of law in their own right and thus carry significance beyond the disputes in which they were deployed.³⁷⁸ Practitioners have relayed their importance or stated that consulting the substantive jury instructions is a necessary starting point for litigation.³⁷⁹ The jury instructions provide the framework for the theory of the case even when, as in the great majority of cases, and per everybody's hopes and expectations, the dispute settles long before a full trial.

Thus jury instructions, like verdicts, serve as a powerful transmitter of legal rules regardless of their direct precedential effect. Like verdicts, instructions may reflect errors that may never be corrected because of the difficulty of proving error on appeal.³⁸⁰ But unlike jury verdicts, instructions bearing errors may continue to be used, thus causing undetected (or unlitigated) errors to proliferate. If later courts adopt erroneous instructions as accurate, instructional errors are amplified and difficult to identify, let alone to correct, which has occurred in at least one copyright case.³⁸¹ Litigators use jury instructions as parties frame their arguments in pre-trial motions.³⁸² Statistically, disputes are settled much more often than not, thus leaving no published record and thus no outcomes (or instructions) observable by scholars of the system. Indeed, copyright litigation that terminated in the three-year period from 2018–2020 featured an 82% settlement rate, a settlement rate that is proportionally higher than most other practice areas.³⁸³ Ironically, the impact of erroneous, uncorrected instructions may be even more significant because of the

376. See Goldstein, *supra* note 71, at 2–4.

377. See Samuelson, *supra* note 97, at 2621.

378. Faruki, *supra* note 134, at 145.

379. See, e.g., *id.*; Peter R. Duchesneau, *Initial Preparation and Strategies for Defending Against Contamination Claims*, ASPATORE (2011), 2011 WL 2941022, at *4.

380. Faruki, *supra* note 134, at 145–46.

381. In *Muhammad-Ali v. Final Call, Inc.*, the court traced an error to *Hobbs v. John*, 722 F.3d 1089 (7th Cir. 2013), which erroneously stated that the plaintiff bore the burden of proving “unauthorized” copying. In fact, the plaintiff need only prove “copying” and the defendant bears the burden of proving if it was authorized. *Hobbs* had drawn the language from the Seventh Circuit’s Pattern Instructions, which caused the court to conclude its opinion taking some responsibility for what it called a “transcription error.” 832 F.3d 755, 760 (7th Cir. 2016)

382. See Faruki, *supra* note 134, at 143–46 (noting the particular importance of jury instructions in the early stages of intellectual property litigation).

383 Bailey, *supra* note 372, at 3.

rarity of the jury trial; if erroneous instructions are only used once in the visible forum of a trial, and never appealed (as will be the case for most trials), the statements in the jury charge are never directly tested again in public. If erroneous instructions are reused in a subsequent jury trial, the different interests, parties, and judge increase the likelihood that an error will be identified and corrected.

Ordinarily, once it has identified a problem, legal scholarship proposes reforms or offers a way forward in light of some new understanding it has illuminated. Without more evidence of how and to what extent copyright's unfriendliness causes jury-related errors, it is hard to tailor most reforms, let alone champion them. Many aspects of the problem cannot be fully diagnosed without further data, which limits responsible attempts at a prognosis. Without knowing the size of the problem, it is impossible to calculate its costs. To that end, any reform agenda for copyright's jury must start with a call for more scholarship.

Part I's profile of copyright law is descriptive but also theoretical (if informed by a decade of lived experience teaching and working in the field). My methodology is largely textualist, hewing closely to questions of language and gleaning insights from published opinions, dockets, trial transcripts, and jury instructions. Diverse methodologies should be brought to bear on future studies of the jury in copyright litigation. Experiments and empirical research designed to test lay, legal, and judicial experiences of copyright law would be helpful, as would testing different aspects of copyright's user-unfriendliness. A quantitative empirical approach to studying the jury could cover broader (and different) ground, as could a datamining approach that sought, for instance, particular words or phrases and mapped them against data about the parties, claims, and outcomes. Studies could focus on damage awards, infringement claims, or particular mechanisms to remove an issue from the jury before or after deliberations. More experimental work on biases and juror comprehension would be invaluable, as would experiments studying the effects of instructional innovations. The field is wide open.

Studying the jury involves obstacles and difficulties. Some are practical: it can be hard to locate materials related to trials, especially as compared with simply studying published appellate opinions.³⁸⁴ It is also resource-intensive to obtain and process the sheer amounts of information that may accrete over the long spans of time in litigation that proceeds to full trial.³⁸⁵ In my own experience as a scholar, jury instructions are also sometimes lost or hard to find, and whole trial transcripts may disappear as though a trial never actually occurred, despite evidence that it did. Some of these difficulties are also epistemological: When we can identify "errors" as such, to what extent are these a function of judges', juries', or litigants' behaviors? How are we to know?

Jury scholars have long identified the many challenges to assessing jury performance with any accuracy.³⁸⁶ While there are proxies for measuring what the

384. See Asay, *supra* note 1, at 30.

385. See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1982 (2016); *SCO Grp., Inc. v. Novell, Inc.*, No. 2:04-CV-139, 2010 WL 2426018, at *1 (D. Utah June 10, 2010), *aff'd*, 439 F. App'x 688 (10th Cir. 2011).

386. See Hans & Albertson, *supra* note 65, at 1500–03 (surveying different empirical methods).

jury might do, or might have done, these are all imperfect in some fashion.³⁸⁷ Some experimental studies test jurors' performance through use of mock jurors.³⁸⁸ These are helpful but subject to limitations: the time limits are usually not the same as those of trial; the deliberative component is usually missing; the mock jurors are not usually selected in a fashion that models voir dire; and some have suggested that the lack of actual stakes may cause mock jurors to process their tasks differently.³⁸⁹ Still, mock juror experiments can produce some insights, whatever caveats attach to their results. To my knowledge, there are two experimental studies in this vein in copyright law; more are needed.³⁹⁰

Another means of studying jury decision-making is through jury projects such as those undertaken in the past in Chicago, Arizona, and Michigan, among others.³⁹¹ If one of the copyright-rich circuits were willing to permit such a study of one of its district courts, the results could provide profound insights for a generation of jurists. Such studies are complex and resource-intensive, however, requiring extensive preparation and coordination. They also involve a level of intra-field commitment to studying the jury that copyright has not yet displayed. Yet the evidence and arguments in this article are offered up in the hopes that greater interest within and outside copyright circles could arise. Copyright law may be an unfamiliar area for generalist jury scholars. Given the unusual work substantial similarity analysis requires of juries, whose tasks often involve experiencing and evaluating art through a legal lens,³⁹² such a study could contribute to the larger study of the civil jury system overall.

In sum, there is no shortage of avenues for our research to explore, and many reasons to think that jury-related errors pose significant risks of miscalibrating the scope of protection.

Theoretically, jury-related errors could present either false positives (Type 1 errors)—protecting subject matter that copyright excludes or protecting an owner's work against non-infringing uses—or false negatives (Type 2 errors)—failing to find liability with respect to uses that harm the author's market or otherwise disincentivize innovation.³⁹³ If the error types fall disproportionately into one or the other of the two categories, they will be disrupting copyright's careful balancing act. More scholarship is therefore needed to understand the extent, nature, and distribution of jury-related errors, as well as to clarify their origins. Any preliminary account of these errors' costs is necessarily theoretical.

As an initial matter, however, the potential to systematically overprotect works is clear. First, the moral divergence favors labor and attribution, which we may

387. *Id.*

388. See Daniel R. Cahoy & Min Ding, *Using Experimental Economics to Peek into the "Black Box" of Jury Behavior: A Proposal for Jury Research Reform*, 14 S. CAL. INTERDISC. L.J. 31, 52 (2004) (describing methodological benefits and challenges).

389. *Id.*

390. Balganes, Manta, & Wilkinson-Ryan, *supra* note 2; Lund, *Fixing Music Copyright*, *supra* note 62.

391. Devine, et al., *supra* note 66, at 627 (surveying studies, including seventy with actual juries).

392. See Said, *supra* note 2, at 640.

393. See Joseph Scott Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 182 (2014).

hypothesize will more often produce Type 1 errors. Copyright's calques and semiotic indeterminacy could go either way depending on the context; they do not doom questions of scope, but they complexify and confuse them. Here we might hypothesize that due to the potential confusion posed by copyright's many homonymic terms, the party with the better lawyer will prevail. Alternatively, perhaps cases adjudicated by copyright-savvy judges will succeed in defusing these potentially error-inducing terms. Copyright's ontological indeterminacy requires normative analysis to evaluate. One subset of likely errors will overprotect ideas or unregistered, unregistrable elements like eyeglasses, organizational systems, or sound recordings under the 1909 Act. Another subset of errors could provide insufficient protection for certain materials, say by overly dissecting works ad absurdum and thus erasing telltale similarities, or by discounting the subparts registered within a collection for purposes of infringement and damages. These errors in both directions will have ripple effects on jury determinations of damages as well. Finally, substantial similarity creates cascading risks of error, and here Type 1 errors are foreseeable, apart from the other aspects of copyright's user-unfriendliness.

Courts instructing the jury to determine substantial similarity must instruct them to consider whether a reasonable lay observer would find the works to be substantially similar, which is sometimes glossed as recognizing the alleged copy as having been appropriated.³⁹⁴ In turn, this means instructing the jury to consider the works via a gestalt or intrinsic sense.³⁹⁵ Being told to apply a subjective test attunes jurors to *generally* finding, or not finding, similarity at a high level. Careful calibration requires moving beyond that high level, however, lest copyright's statutory and constitutional limitations be undone. The order of the inquiries matters, too; if accurate dissection is followed by a holistic approach that blurs or erases the contours established by the filtering, then the filtering, however accurate, may as well not have occurred. Consequently, a "total concept and feel" approach of the sort most courts use will more often overprotect works unless balanced with proper filtering.

It is also not how copyright protection is intended to work; recall that the 1976 Act explicitly grants its rights subject to a slew of exceptions and limitations and limits the scope of protection with meaningful doctrinal and constitutional limits.³⁹⁶ Its infringement analysis must do the same, whether its inquiries are entrusted to a jury or determined by a judge.

Because of what we know thus far about the likelihood of overprotection due to inadequate filtering out of unprotected elements during substantial similarity analysis, we can reasonably predict that Type 1 errors seem likelier, at least as a theoretical matter, even if Type 2 errors may also exist.³⁹⁷ Professor Joseph Miller has argued that where uncertainty in interpreting intellectual property statutes could be resolved one of two ways, courts should opt for the direction less likely to yield

394. See *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092–93 (2d Cir. 1977).

395. See Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605, 619 (2017).

396. Samuelson, *supra* note 53, at 46.

397. See Lemley & McKenna, *supra* note 2, at 2238.

Type 1 errors, given the magnitude of harm caused by improperly broadening the scope of IP rights.³⁹⁸ The likelihood of what Professor Paul Goldstein has called “copyright leakage” should be considered as a countervailing concern in assessing the impact of any likely jury-related errors. Goldstein has posited that the difficulty of discovering infringements and the costs of enforcing rights has been overlooked by advocates of the public domain concerned with the impact of copyright owners’ bullying. He speculates that “the incidence of unrequited infringing uses outnumbers the incidence of unjustified demands by no less than a thousand to one.”³⁹⁹ Copyright’s unusually high settlement rate, as noted *supra*, page 52, makes the actual enforcement rate hard to measure, given the secrecy of many settlements and the in terrorem effects they may exert. But Goldstein’s concerns are well taken in that anecdotal claims about the challenges for both claimants and defendants are significant, divergent, and difficult to measure.

Another data point for jury reformers to consider in assessing foreseeable jury-related errors, then, is that of those claimants who do manage to enforce their rights at trial, the odds reflect disproportionately high success rights: claimants are four times as likely as defendants to win trials on the merits.⁴⁰⁰ Certainly, other causes may be at work here, including that it is only the most confident claimants and the most meritorious claims that endure all the way through a trial. But since it would presumably hold true for all areas of litigation, that explanation would fail to explain why copyright’s litigation outcomes at trial are so much higher for claimants. Attending to the jury’s role in these determinations could contribute to increasing the fairness in copyright litigation overall. While the costs of jury-related errors require more work to assess, applying Miller’s theory of error costs suggests that jury-related errors in copyright may generate systematic harm worth addressing through a variety of reforms.

B. What Next? (A Framework for the Jury’s Role in Copyright Law)

In light of the continued prominence of the jury trial in copyright litigation and the prized role of the jury therein, copyright needs a framework for defining and assessing the performance of its jury. The jury must be understood in a larger ecosystem of contributors (or co-contributors) to jury-related error, but it must also be framed within the delicate and dynamic balancing act that characterizes copyright policy. Jury-related reforms could focus on judges, litigants, doctrines, instructions, or the jury itself. While I have emphasized the need to understand both the challenges the jury faces and the way errors related to the jury system may not be attributable to the jury’s decision-making alone, it is helpful for our purposes to bracket the way errors arise as a function of multiple actors and to consider copyright’s user-unfriendliness with respect to the jury alone, however artificially, to develop a framework. Plenty of scholarship already proposes reforms relative to judges, litigants, and doctrines.⁴⁰¹ The scholarly silence on the jury’s role, by contrast, makes

398. See Miller, *supra* note 393, at 181–82.

399. Paul Goldstein, *Copyright’s Commons*, 29 COLUM. J.L. & ARTS 1, 5–6 (2005).

400. Bailey, *supra* note 372, at 25.

401. See, e.g., Bartholomew, *supra* note 60, at 579–87; Lemley, *supra* note 2, at 739; Samuelson, *supra* note 187, at 1840–49; Said, *supra* note 2, at 615; Tushnet, *supra* note 74, at

present focus on the jury fitting. Moreover, generalist jury scholarship offers overlooked guidance that future work could mine in evaluating the jury's role.

To that end, copyright's particular jury-related challenges can be productively explored through four central questions, each of which correlates with areas of the generalist scholarship: (1) Does the jury understand what it has been told and what it has been asked to do? (2) Can it do it? (3) Will it choose to do it? (4) And—after the fact—did it do it?⁴⁰² The questions implicate jury comprehension, jury capacity, jury cooperation, and jury accountability, respectively. To work for copyright law, a framework for considering the jury's role must balance what Professor Nancy Marder has called jury-centric⁴⁰³ concerns (focusing on *the jury's needs*) with system-focused concerns (focusing on *what the law needs of juries*). The former is jury-generous: What can the jury do, in light of copyright's particular profile and challenges? The latter is more jury-skeptical: What should the jury be permitted to do in light of copyright's policy imperatives?⁴⁰⁴

Copyright law challenges jury *comprehension* because of its substantive and terminological difficulties. The immense scholarship on jury instructions, psycholinguistics, and cognitive processing of complex issues and terminology would be instructive in our domain.⁴⁰⁵

Copyright law challenges jury *capacity* when it asks juries to perform work that would be challenging even for experts and judges, and all the more so when the underlying doctrine is incoherent and abstract, as is the case with substantial similarity. Further, it challenges jury capacity when legal issues are unresolved yet embedded in factual determinations and unacknowledged. For instance, when juries encounter copyright's indeterminacy—both semiotic and ontological—they may be asked to determine what was protected, how much of it, against what, and with what resulting damages. This kind of screening and filtering may be beyond nonspecialist capacity; indeed, it often challenges specialists and experts. The scholarship on juror capacity could be helpful, in that it theorizes how jurors process information, such as via “stories,”⁴⁰⁶ “heuristics,”⁴⁰⁷ and schemas.⁴⁰⁸ A related vein of cognitive

685.

402. Other questions could frame the inquiry slightly differently, perhaps depending on one's view of the jury. A jury-expansionist might ask, for instance, whether the jury has been given the latitude and discretion needed to preserve its full autonomy under the constitutional imperative. A jury-restrictivist might ask whether sufficient controls have limited the potential mischief the jury could cause. There is broad consensus about the value of comprehension.

403. Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 918 (2003); cf. Balganes, *Questionable Origins*, *supra* note 1, at 791 (using the term “jury-centric” in a negative way not intended here).

404. See Ellsworth & Reifman, *supra* note 64, at 792 (discussing social science research leading some scholars to express skepticism about jury performance).

405. See generally Tiersma, *supra* note 144, at 1102; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988); Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 198 (2004).

406. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519–33 (1991).

407. Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 313 (2013).

408. Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of*

psychology scholarship explores the process and timing of juror decision-making at trial, which informs how and when to provide instructions.⁴⁰⁹ Other scholarship has studied jury deliberation styles and categorized “verdict-driven” versus “evidence-driven” juries, which likewise could be explored in connection with improving jury capacity in copyright litigation.⁴¹⁰

Copyright risks juror *noncooperation* when it asks juries to decide questions in which legal rules run counter to moral norms, without explaining to juries why that might be so, or proffering the justifications for and purposes served by those sometimes morally counterintuitive rules. To be clear, if a jury understands its role and can fulfill it, but a given juror chooses to disregard it, that constitutes noncooperation or resistance in civil law (criminal law considers this jury nullification).⁴¹¹ When juries do not understand their charge, or understand it but cannot perform, the problem is one of miscomprehension or incapacity, respectively, not noncooperation.⁴¹² For example, the comparative fault regime in negligence law may challenge lay intuitions and introduce “resistance errors,” in cases in which an injured victim squares off against a culpable defendant, but the victim is still held partially accountable for her own injuries.⁴¹³ Work that explores the interplay between conflicting ethics and legal rules to understand juror responses to such conflicts could likewise be useful.

Lastly, copyright would benefit from jury *accountability* measures given the foreseeable and overlapping ways juries might misunderstand copyright terminology or misapply copyright’s rules. The generalist literature offers many novel interventions that copyright policymakers could consider, including jury opinion writing (limited to questions of fact); extended special verdicts; post-verdict interviews, and public deliberations.⁴¹⁴ Using special verdict forms and interrogatories could help track jury decision-making to some extent, thus also providing a check on jury comprehension, capacity, and cooperation. In many copyright cases, especially in areas of overlapping IP claims, these verdict forms are often already in use,⁴¹⁵ but copyright’s need for policy balancing underscores the

“Plain-Language” Jury Instructions, 64 HASTINGS L.J. 643, 649 (2013).

409. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 550–51 (2004).

410. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163 (1983).

411. Marder, *supra* note 133, at 881–82. In criminal law, juror noncooperation may be considered nullification, though the term’s use in civil law is a matter of debate. See, e.g., Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 n.3 (1997); Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1386 (1994).

412. Tiersma, *supra* note 144, at 1082 (“A jury that acts in ignorance of the law has not engaged in nullification.”).

413. Diamond, Murphy & Rose, *supra* note 66, at 1557–69.

414. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 527–537 (1997).

415. For example, special verdict forms were used in cases in the Second, Fifth, Eighth, and Ninth Circuits. See, e.g., *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 461–62 (S.D.N.Y. 2000); *Zenimax Media, Inc. v. Oculus VR, LLC*, No. 14-CV-1849, 2017 WL

importance of their continued and expanded use.

These four inquiries—comprehension, capacity, cooperation, and accountability—orient the inquiry in different directions at times, however. To the extent the focus is on comprehension and capacity, that may lend itself to a jury-centric approach: What does the jury need to understand to accomplish its work? This approach would focus on increasing the jury's ability to engage in independent and reasoned decision-making. To the extent the focus is on cooperation and accountability, the inquiry shifts to a "system-focused" perspective whose concern is not primarily empowering the jury but rather ensuring that the jury has complied with its charge, for reasons having to do with fairness to the parties, the purposes of copyright law, and the integrity of legal proceedings. There are, of course, overlaps between jury-centric and system-centric approaches. They share an interest in ensuring the jury has what it needs to accomplish its tasks, including a basic understanding of the law and those tasks, at the outset. If juries lack capacity to filter protected from unprotected expression but remain tasked with doing so anyway, both the system and the jury suffer; it is a waste of resources likely to yield poor policy outcomes. The uncomprehending juror's cooperative spirit will only take him so far, and his miscomprehension will affect the other measures for jury performance, too. Still, without overly investing in the stability (or independence) of any of these organizing inquiries, we can use them to orient our evaluation of the jury.

Approaching jury performance in this way requires grappling with two final jurisprudential issues: the normative value of jury accountability and the comparative performance of judge and jury.

First, describing jury accountability as a value, and linking it to assessing and evaluating performance, presupposes a particular view of the jury—namely, that the jury's function is not to engage in hidden "lawlessness."⁴¹⁶ If the value of the jury is precisely its black-box decision-making—the ability to make unpopular or difficult decisions under cover—then framing accountability as a virtue undercuts that value, and suggests normative ordering vulnerable to critique on ideological grounds.

My normative view is that it is desirable to know what a civil jury⁴¹⁷ does, to ensure that it has adequately understood the law and to assess its capacity for accomplishing its allocated tasks, whether or not observers "like" the way the jury ultimately applies the law (perhaps especially when observers do not like it). The jury's role is not to ease the burden on the judiciary of making hard or unpopular choices, nor to accept the judicially passed buck,⁴¹⁸ and it diminishes both judges

3493903 (N.D. Tex. Jan. 26, 2017) (Trial Transcript) (Reading of the Verdict); *Capitol Records, Inc. v. Thomas-Rasset*, No. CV-06-1497, 2010 WL 9007646 (D. Minn. Nov. 3, 2010); *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983 (9th Cir. 2009); *Skidmore v. Warner/Chappell Music, Inc.*, 952 F.3d 1051, 1122 (9th Cir. 2020). It appears to be a fairly common practice.

416. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) ("Jury lawlessness is the great corrective of law in its actual administration.").

417. Whether that view of the jury is normatively good for criminal law is a question that can be bracketed here, since the contexts, punishments, and ethical questions involved create material differences.

418. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 136–37 (1949) (calling the jury "buffers to judges" making "unpopular decisions," and "an insulator

and juries to characterize the civil jury system in that way. Copyright's juries are almost always deciding civil issues, not criminal ones.⁴¹⁹ Hence the justifications sometimes offered for the opaqueness of a general verdict in criminal law do not apply here. Copyright law's user-unfriendliness means opaqueness will hinder, not improve overall jury performance, under either jury-centric or system-centric approaches. That copyright law is a federal regime whose scope is national and whose rights are intended to be uniformly enforced further counsels in favor of building accountability into the system.

Endorsing jury accountability does not mean that the civil jury is a "mechanical" jury that merely and mindlessly applies rules. Tracking whether juries did more or less than asked, or whether and how they erred, is not tantamount to determining *ex ante* the qualitative nature of what they can be doing, but rather asking *ex post* what they did do. Fairness to the parties demands that jury decisions be discernibly on target, or at least firing on the proper range. Constitutional provisions and values are at stake when juries play a role in effectuating copyright's "carefully crafted bargain," and having some means of checking juries' work is thus advisable.

Second, when evaluating jury performance, one must always ask whether a judge would necessarily perform any better. Evaluating the jury in isolated rather than comparative fashion may unfairly skew analysis in one direction or another.⁴²⁰ If, for instance, no human is capable of some task, then both judges and juries will be squarely affected. To be sure, more can and should be done to assess the differences in capacity and actual performance of judges and juries. If differences in judge and jury decision-making reveal the jury's greater capacity for diverse thinking and group deliberation, then measuring the jury's flaws or vulnerabilities without also accounting for its comparative strengths unfairly stacks the deck.⁴²¹ Nonetheless, treating the jury on its own first has the virtue of training attention on what the jury can do and may be likely to do, independently of whether an alternative decisionmaker *should* decide the question, and how both entities might perform.

Both of these issues—the value of jury accountability and the comparative performance of judge versus jury—reflect potential vulnerabilities in the four-question proposed framework. Insofar as the first issue requires some normative consensus about the nature of the jury in effectuating copyright policy, and the second (jury-vs-judge) issue treats the judge as an afterthought, rather than a meaningful alternative to jury decision-making (or cause of jury-related error), these are issues reformers will confront. Reform proposals will inevitably reflect some ideological commitments about both judge and jury, and some further consensus-building around the appropriate contours of copyright law. Yet empirical research

for the judge, a buck-passing device.").

419. This is primarily because there is so much more copyright litigation brought civilly rather than criminally. Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 IOWA L. REV. 1065, 1071 nn.19–20 (2016) (characterizing the bulk of litigation as centered on civil cases, with a small residuary amount of criminal filings).

420. See Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 503–04 (2005).

421. See Hans & Albertson, *supra* note 65, at 1502 (describing flaws in studies of judge-jury agreement rates and noting such work "often assumes either implicitly or explicitly that the judge's verdict or assessment is the 'right' one").

could ground reform efforts and minimize the extent to which ideology, rather than communicative efficacy and sound adherence to copyright policy goals, shape the jury's future role. Moreover, copyright-specific jury data collection could improve the jury function significantly, even without reaching second-order questions about the political role of the jury and its accountability.

CONCLUSION

Copyright's user-unfriendliness can distort copyright policy and delegitimize copyright litigation in ways that have not been thoroughly considered in prior scholarship, especially in connection with the jury's role in the system. Case law illustrates the potential impact of this user-unfriendliness, whether it leads to improper protection for research or eyeglasses, or accurately inculcates an individual for downloading songs but mistakenly also penalizes her for "distributing" them when she never "actually" did so under the law's definition.

More work is needed to shed light on jury trials and to theorize and document the nature of jury decision-making in copyright law. This focus on the jury need not mean blaming the jury. On the contrary, to understand its role will require exploring judicial errors as well as unwitting errors and strategic ploys by litigants. All in all, the jury deserves a closer look, from a jury-centric perspective given copyright's unfriendliness, and from a system-centric perspective given the jury's capacity to honor or disrupt the carefully crafted balance at the heart of a functioning copyright system.

Relatedly, jury instructions merit our collective attention, given the role they play, visibly in trials, and invisibly in shaping pre-trial litigation behavior. Instructing the jury is always a challenge, no matter the area of law. Copyright's user-unfriendliness adds further difficulties with which scholars have not yet grappled, and this user-unfriendliness provides a good starting premise for potential reforms. Because copyright is unexpectedly intricate, fast-moving, and counterintuitive, its difficulties are especially likely to cause surprise and concomitant errors. Perhaps such errors are not distributed unevenly or are insufficiently costly to warrant reforms; future work will offer more clarity. Based on available evidence, however, the risks associated with jury-related errors appear potentially significant and seem likely to skew in the direction of over-protection.

Jury-related errors are costlier than judicial errors for litigants, in that jury trials take much more time and money both to try and to appeal.⁴²² This is true even when a party prevails. If evidence suggests the level or distribution of jury-related errors is unacceptable, copyright policymakers might consider a more radical reform than those imagined herein: revisiting the very allocation to the jury in the first place.

422. Michael L. Stern, *Advocacy in an Era of Declining Jury Trials*, L.A. LAW., April 2014, at 15, 16 (describing the costs associated with jury trials); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1822 (1986) (describing the time delays associated with jury trials). See also Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 207 (2005) ("Hundreds of years ago, trial by jury was cheaper than hiring a professional corps of judges. But today some argue it has become a system that it is simply too expensive to use.") (citation omitted).

Copyright affects many stakeholders in the creative ecosystem and beyond, and its capacity to promote—or stifle—innovation is profound. Perhaps copyright ought to try to preempt certain jury-related errors before they occur. After “John Fogerty was sued for ripping off John Fogerty,” he left his guitars “untouched for years” and could not bring himself to play.⁴²³ Even though he had prevailed, Fogerty struggled to compose new music “because some part of me down deep inside worried that I was going to get sued again.”⁴²⁴

Consider an alternative ending to *Fantasy v. Fogerty*: if the court had decided, as a matter of law, that the two songs were not substantially similar, the parties’ appeals would still have been costly but considerably less so, as well as much more quickly resolved. Future reforms ought to consider the extent to which reallocation of aspects of substantial similarity analysis is possible and desirable. Fogerty’s reflection on the trial aptly captures what is at stake in copyright’s jury-related errors: “if one guy can own another person’s artistic style for the rest of his life, it would be a horrible thing-for every artist.”⁴²⁵

423. Trex, *supra* note 331; FOGERTY, *supra* note 332, at 326.

424. FOGERTY, *supra* note 332, at 307.

425. *Id.*

