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Ned Snow

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## WHO DECIDES FAIR USE—JUDGE OR JURY?

Ned Snow\*

*Abstract:* For more than two-hundred years, the issue of fair use has been the province of the jury. That recently changed when the Federal Circuit Court of Appeals decided *Oracle America, Inc. v. Google LLC*. At issue was whether Google fairly used portions of Oracle's computer software when Google created an operating system for smartphones. The jury found Google's use to be fair, but the Federal Circuit reversed. Importantly, the Federal Circuit applied a de novo standard of review to reach its conclusion, departing from centuries of precedent.

*Oracle* raises a fundamental question in jurisprudence: Who should decide an issue—judge or jury? For the issue of fair use, the Seventh Amendment dictates that the jury should decide. The Seventh Amendment guarantees a right to a jury where an issue would have been heard by English common-law courts in 1791. Fair use is such an issue: early copyright cases make clear that juries decided fair-use issues at common law. Furthermore, the recent Supreme Court case of *U.S. Bank National Ass'n v. Village at Lakeridge, LLC* instructs appellate courts to employ a deferential standard in reviewing mixed questions of law and fact that resist factual generalizations. The question of fair use resists factual generalizations, turning on circumstances and factual nuances specific to each case. *U.S. Bank* thus suggests a deferential review. Importantly, this conclusion is consistent with the Supreme Court's instruction in *Harper & Row Publishers, Inc. v. Nation Enterprises*, where the Court applied an independent review of a district court's finding on fair use. The context of the *Harper* Court's independent review was a bench trial, and at that time, courts treated the review of fair use at a bench trial differently from the review of fair use at a jury trial. Finally, juries are simply better positioned than judges to decide the sort of issues that arise in fair-use cases. Those issues call for subjective judgments that turn on cultural understandings and social norms, and the heterogeneous perspective of a jury is particularly valuable in making these judgments. Thus, the Federal Circuit in *Oracle* wrongly applied a de novo standard. The Constitution, precedent, and sound policy mandate deference to the jury.

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## INTRODUCTION

For over two centuries, courts have treated the issue of fair use in copyright law as a question for the jury.<sup>1</sup> And for good reason. The issue is often controversial, turning on whether specific circumstances should

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1. *E.g.*, *Sayre v. Moore* (1785) 102 Eng. Rep. 138, 139 n.(b); 1 East 358, 361–62 (“In all these [copyright cases,] the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”); *Cary v. Kearsley* (1803) 170 Eng. Rep. 679, 680; 4 Esp. 168, 171 (“I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff’s book, was fairly done . . . ?”); *Emerson v. Davies*, 8 F. Cas. 615, 623–24 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.) (describing fair use as a “question of fact to come to a jury” (quoting *Sayre* 102 Eng. Rep. at 139 n.(b))); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury.”); *N.Y. Univ. v. Planet Earth Found.*, 163 Fed. App’x 13, 14 (2d Cir. 2005) (“[T]he evidence also supports the jury’s finding of fair use . . .”).

excuse otherwise infringing activity.<sup>2</sup> Laden with value judgments, the issue calls for subjective opinion over which reasonable minds often disagree.<sup>3</sup> There are no easy answers.<sup>4</sup> Understandably, then, courts have deferred to juries on fair use.<sup>5</sup>

Recently, the Federal Circuit Court of Appeals departed from this well-settled practice in *Oracle America, Inc. v. Google LLC*.<sup>6</sup> There, Google used portions of Oracle’s software program as part of Google’s Android operating system for smartphones.<sup>7</sup> Oracle alleged that Google infringed its copyright in the software program; Google argued fair use.<sup>8</sup> After a jury found Google’s use to be fair, the Federal Circuit reviewed that finding de novo.<sup>9</sup> Applying the fair-use factors, the court concluded as a matter of law that Google’s use was not fair.<sup>10</sup> In reaching that conclusion, the court expressly held that fair-use findings by a jury are “advisory only.”<sup>11</sup> At the same time, the court explicitly recognized that its treatment of the jury’s finding was inconsistent with precedent.<sup>12</sup> *Oracle* thus calls attention to the question of who decides fair use: judge or jury?

Given that no other court has ever reviewed a jury’s finding of fair use under a de novo standard, the Federal Circuit’s reasoning is certain to be

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2. See 17 U.S.C. § 107 (2018); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (“[The fair-use inquiry] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The [statutory] text . . . provide[s] only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” (citations omitted)).

3. See discussion *infra* Part IV (observing subjectivity in fair-use analysis).

4. See generally *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (“[T]he issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright . . . .”); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.) (“Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent.”).

5. See discussion *infra* Section II.A (reciting common-law history of jury determinations of fair use).

6. *Oracle Am., Inc. v. Google LLC (Oracle IV)*, 886 F.3d 1179 (Fed. Cir. 2018).

7. *Id.* at 1186.

8. *Id.*

9. *Id.* at 1196 (“[W]e must assess all inferences to be drawn from the historical facts found by the jury and the ultimate question of fair use de novo . . . .”).

10. *Id.* at 1186 (“[W]e conclude that Google’s use of the Java API packages was not fair as a matter of law . . . .”).

11. *Id.* at 1196.

12. *Id.* at 1194 (“While some courts once treated the entire question of fair use as factual, and, thus, a question to be sent to the jury, that is not the modern view.”); *id.* at 1194 n.3.

questioned.<sup>13</sup> Yet the Federal Circuit's decision is not entirely without support. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>14</sup>—a bench-trial copyright case—the Supreme Court stated that in reviewing the issue of fair use, appellate courts may perform their own independent analysis without deferring to the analysis of the district court.<sup>15</sup> From this teaching in *Harper*, some courts have construed fair use to be a pure legal issue eligible for determination on summary judgment.<sup>16</sup> Furthermore, some courts have characterized fair use as an equitable doctrine, which, if true, would imply that judges rather than juries decide whether the doctrine applies.<sup>17</sup> Thus, although the Federal Circuit is the first court to have applied de novo review to a jury's finding of fair use, that review standard draws support from other courts' statements about, and treatment of, the fair-use issue.

Despite this apparent support for the Federal Circuit's reasoning, de novo review is legally problematic for three reasons. First, it violates the Seventh Amendment.<sup>18</sup> That Amendment guarantees a right to a jury

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13. See, e.g., *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (“Applying the statutory factors from 17 U.S.C. § 107, we conclude that the result reached by the jury was not unreasonable.”); *N.Y. Univ. v. Planet Earth Found.*, 163 Fed. App'x 13, 14 (2d Cir. 2005) (“[T]he evidence also supports the jury's finding of fair use, under the four-factored analysis prescribed by statute. While [the copyright owner] vehemently argues, for instance, that [the defendant's] display of copyrighted material at a fund-raiser was of a commercial nature, this issue is the jury's to decide.” (citations omitted)); *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 410–11 (5th Cir. 2004) (upholding jury's fair-use decision under substantial-evidence standard); *Fiset v. Sayles*, No. 90-16548, 1992 WL 110263, at \*4 (9th Cir. May 22, 1992) (same); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 408 (9th Cir. 1982) (same).

14. 471 U.S. 539 (1985).

15. See *id.* at 560 (“Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court ‘need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.’” (quoting *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984))).

16. See, e.g., *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008) (explaining that “it is well established that a court can resolve the issue of fair use on a motion for summary judgment when no material [historical] facts are in dispute” while treating the inferences that suggest whether a use is fair as a pure legal issues); *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 993, 997 (9th Cir. 1998) (interpreting case law as “rejecting argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently,” while affirming grant of summary judgment for copyright holder on issue of fair use); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (denying argument for jury to consider fair use on grounds that the “parties dispute only the ultimate conclusions to be drawn from the admitted facts” and further holding that “these judgments [in the fair-use analysis] are legal in nature” such that the court “can make them without usurping the function of the jury”).

17. E.g., *Fisher*, 794 F.2d at 435 (“The fair use doctrine was initially developed by courts as an equitable defense to copyright infringement.”).

18. See U.S. CONST. amend. VII; Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 528–35 (2010) [hereinafter

where an issue would have been heard by an English common-law court in 1791.<sup>19</sup> The early history of copyright law demonstrates that English common-law courts heard the issue of fair use, expressly reserving the issue for juries to determine.<sup>20</sup> Thus, the Seventh Amendment mandates deference to a jury in reviewing fair-use decisions.<sup>21</sup>

Second, the recent Supreme Court case of *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*<sup>22</sup> suggests a deferential review for issues like fair use.<sup>23</sup> *U.S. Bank* teaches general principles that determine the proper standard of review for mixed questions of law and fact.<sup>24</sup> In particular, *U.S. Bank* emphasizes that issues resisting factual generalizations should not be reviewed de novo.<sup>25</sup> Fair use is such an issue, turning on the specific factual circumstances surrounding a use of copyrighted material.<sup>26</sup> For this reason, the issue is always decided on a case-by-case basis—a tenet well established over centuries of jurisprudence and repeatedly articulated by the Supreme Court.<sup>27</sup> Hence, this simple principle of *U.S. Bank* suggests deferential review.<sup>28</sup>

Third, the Court's statement in *Harper*, which authorized independent review of a fair-use decision, occurred when the Court was reviewing a bench trial, so the statement should be limited to that context.<sup>29</sup> At the time of *Harper*, only two appellate courts had ever applied an independent review of a fair-use decision, and those two courts did so while reviewing

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Snow, *Judges Playing Jury*] (collecting and discussing cases demonstrating growing trend to decide fair use on summary judgment).

19. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–48 (1998) (setting forth historical test for analyzing jury right).

20. See discussion *infra* Section II.A (reciting common-law history of jury determinations of fair use); cases cited *supra* note 1.

21. See discussion *infra* Part II.

22. 583 U.S. \_\_\_, 138 S. Ct. 960 (2018).

23. See *id.* at 967–68.

24. See *id.*

25. See *id.*

26. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

27. *E.g., id.* (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” (citations omitted)); see also *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.) (“[Fair use] is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.”).

28. See discussion *infra* Section III.A.

29. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); discussion *infra* Section III.B.

bench trials.<sup>30</sup> No court had ever applied *de novo* review to a jury trial.<sup>31</sup> And, as discussed below, there is good reason for this distinction.<sup>32</sup> To construe *Harper*'s statement as changing the review standard for jury trials would effect a monumental change in the law of copyright, and that intent is patently absent in the *Harper* opinion.<sup>33</sup>

In addition to these three legal reasons, *de novo* review is inadvisable simply because juries are better positioned to decide whether a use is fair.<sup>34</sup> The fair-use analysis involves exercising judgments that draw from cultural norms and social values and that recognize subtle nuances in meaning. The judgments are inherently subjective. Such subjectivity is well suited for the heterogeneous perspective of jurors, who come from all walks of life and reflect a diversity of opinion, much more so than a panel of homogeneous judges.<sup>35</sup> Therefore, juries are better positioned to perform the sort of inquiry that fair use demands.

This Article examines whether courts should treat fair use as a matter for the jury subject to deferential review, or alternatively, as a matter for the judge subject to *de novo* review. Part I provides background on the law of fair use as well as information about *Oracle*—the facts, procedural history, and reasoning of the court. Part II contends that the Seventh Amendment applies to the fair-use issue, affording litigants a constitutional right to a jury trial. Part III examines Supreme Court case law that discusses the proper standard of review for mixed questions of law and fact, applying principles from the recent case of *U.S. Bank* to the fair-use issue, and analyzing the statement in *Harper* that specifically addresses appellate review of fair use. Part IV argues that a jury is better positioned than a judge to assess whether a use is fair.

## I. THE FAIR-USE TEST AND THE FEDERAL CIRCUIT'S REVIEW OF THE JURY FINDING

This Part provides background information about the doctrine of fair use and the Federal Circuit's application of *de novo* review to the jury

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30. See, e.g., *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984) (exercising *de novo* review in reversing a trial judge's denial of fair use); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (same).

31. See discussion *infra* Section III.B.

32. See discussion *infra* Parts III, IV.

33. See *Harper*, 471 U.S. at 560.

34. See discussion *infra* Part IV.

35. See generally *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999) ("Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations . . .").

finding of fair use in *Oracle*.<sup>36</sup> Section I.A sets forth the statutory test for fair use. Section I.B recites the history of *Oracle*, describing the relevant facts, the procedural history, and the Federal Circuit’s arguments for applying de novo review.

#### A. *Fair Use*

The doctrine of fair use excuses unauthorized uses of a copyrighted work.<sup>37</sup> It originally existed as a common-law doctrine.<sup>38</sup> In 1976, Congress codified that common-law doctrine into section 107 of the Copyright Act,<sup>39</sup> intending that the codification not alter the doctrine in any way.<sup>40</sup> Section 107 sets forth a four-factor test for determining whether the use of copyrighted work is fair:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>41</sup>

With respect to the first factor, a decision-maker must assess whether the character and the purpose of a defendant’s use suggests fairness or infringement.<sup>42</sup> The Copyright Act provides examples of fair purposes

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36. *See Oracle IV*, 886 F.3d 1179, 1196 (Fed. Cir. 2018).

37. 17 U.S.C. § 107 (2018).

38. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

39. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C., 18 U.S.C., 44 U.S.C.).

40. *Campbell*, 510 U.S. at 577 (“Congress meant § 107 ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication.” (citation omitted)).

41. 17 U.S.C. § 107.

42. *See id.* § 107(1).



(e.g., nonprofit education, criticism, comment, news reporting, teaching, scholarship, and research) and an unfair purpose (e.g., commerciality).<sup>43</sup> With respect to the second factor, a decision-maker must assess whether the nature of the copyrighted work suggests fairness or infringement.<sup>44</sup> If the copyrighted work reflects content that is either highly creative or yet unpublished, this factor suggests that the use is infringing, whereas if the copyrighted work reflects content that is historical, functional, or informational, this factor suggests that the use is fair.<sup>45</sup> With respect to the third factor, a decision-maker must assess whether the amount that a defendant used, as well as the substantiality of that amount, suggests fairness or infringement.<sup>46</sup> In other words, if a defendant uses a significant quantity, or alternatively uses content that is valuable in the original copyrighted work, this factor suggests infringement.<sup>47</sup> With respect to the fourth factor, a decision-maker must assess whether the defendant's use negatively affects the market for, or value of, a copyrighted work, including any potential markets.<sup>48</sup>

Congress intended this four-factor test to be a flexible doctrine.<sup>49</sup> The Supreme Court has repeatedly taught that the test should be applied on a

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43. *See id.* (stating examples of fair and infringing purposes). The Supreme Court has clarified that none of these purposes listed in the statute necessarily imply that particular uses made for those purposes are in fact fair or infringing. *See Campbell*, 510 U.S. at 578. They are simply weighed in the analysis. *See id.*

44. *See* 17 U.S.C. § 107(2); *Campbell*, 510 U.S. at 586 (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”).

45. *See Campbell*, 510 U.S. at 586 (citing creativity as element in determining fairness under second factor); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (second factor considers whether work concerns factual nature) (“The fact that a work is unpublished is a critical element of its ‘nature.’” (citation omitted)); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (“The second factor in the fair use analysis ‘recognizes that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.’” (citations omitted)).

46. *See* 17 U.S.C. § 107(3).

47. *See Campbell*, 510 U.S. at 586; *Harper*, 471 U.S. at 564–65.

48. *See* 17 U.S.C. § 107(4).

49. H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (recognizing that for the doctrine of fair use, “no generally applicable definition is possible, and each case raising the question must be decided on its own facts”); S. REP. NO. 94-473, at 62 (1975) (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”); *see also Campbell*, 510 U.S. at 577 (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” (citations omitted)).

case-by-case basis, without rigid application of bright-line rules.<sup>50</sup> The Court has further explained that the four factors are not intended to be exclusive or considered in isolation, but rather, they should be considered together.<sup>51</sup>

B. Oracle America, Inc. v. Google LLC

1. *Facts*

In 1996, a company called Sun Microsystems, Inc. (Sun) developed the Java programming platform.<sup>52</sup> That platform consists of software that enables computer programmers to create programs in the Java language that will run on various types of computers.<sup>53</sup> The platform includes a set of pre-written programs that aid in creating specific functions for any particular program.<sup>54</sup> That set of pre-written programs is called the Application Programming Interface (API).<sup>55</sup> The API is organized into 166 groups known as “packages.”<sup>56</sup> Hence, the API packages enable programmers to more easily create advanced programs in the Java computer language.<sup>57</sup> Oracle America, Inc. (Oracle) now holds the copyright in the Java API.<sup>58</sup>

Google created an operating system for smartphones called Android, which Google provides to its users free of charge under an open-source license.<sup>59</sup> In creating the Android system, Google sought to make Android interoperable with the Java programming language.<sup>60</sup> For that purpose, Google replicated 37 of the 166 packages from the Java API.<sup>61</sup> Importantly, Google programmed its own code within those 37 packages.<sup>62</sup> Nevertheless, that code performs the same function as the

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50. *Campbell*, 510 U.S. at 577.

51. *Id.* at 578 (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

52. *Oracle IV*, 886 F.3d 1179, 1186 (Fed. Cir. 2018).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Oracle Am., Inc. v. Google Inc. (Oracle II)*, 750 F.3d 1339, 1348–49 (Fed. Cir. 2014).

58. *Id.*

59. *See Oracle IV*, 886 F.3d at 1197.

60. *See Oracle II*, 750 F.3d at 1349–50.

61. *Id.*

62. *Oracle Am., Inc. v. Google Inc. (Oracle I)*, 872 F. Supp. 2d 974, 978 (N.D. Cal. 2012), *rev'd*, *Oracle II*, 750 F.3d 1339 (Fed. Cir. 2014).

code within the 37 packages of the Java API.<sup>63</sup> In short, Google created an operating system that was compatible with the Java programming language by copying structural groupings (the 37 packages) found in the Java API.

## 2. *Procedural History*

Oracle sued Google in the Northern District of California, alleging that Google's Android operating system infringed various copyrights and patents of Oracle.<sup>64</sup> Relevant to this Article was Oracle's claim that Google infringed Oracle's copyright in the Java API.<sup>65</sup> Google argued that the API was not copyrightable, and that even if the API were copyrightable, Google's use of the 37 API packages was a permissible fair use.<sup>66</sup> The issue of fair use was tried to a jury, which deadlocked.<sup>67</sup> After the trial, the district judge ruled that the APIs were not copyrightable.<sup>68</sup> Oracle appealed that ruling and also argued that the district court should have dismissed the fair-use defense as a matter of law.<sup>69</sup> Notably, Oracle's appeal was to the Federal Circuit rather than the Ninth Circuit Court of Appeals.<sup>70</sup> This was because the appeal also involved patent issues, and the Federal Circuit exercises exclusive jurisdiction over patent appeals.<sup>71</sup> On copyright issues, though, the Federal Circuit was obligated to apply Ninth Circuit law.<sup>72</sup>

On this first appeal to the Federal Circuit, the appellate court agreed with Oracle that the APIs were in fact copyrightable, reversing the district court on that issue.<sup>73</sup> However, the appellate court disagreed with Oracle on its argument that Google's fair-use defense should be dismissed as a matter of law.<sup>74</sup> The Federal Circuit thereby remanded the fair-use issue for a second jury trial.<sup>75</sup>

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63. *Id.*

64. *See Oracle II*, 750 F.3d at 1347.

65. *Id.*

66. *Oracle IV*, 886 F.3d 1179, 1185 (Fed. Cir. 2018).

67. *Id.*

68. *See Oracle I*, 872 F. Supp. 2d at 1001–02.

69. *See Oracle II*, 750 F.3d at 1353.

70. *See Oracle IV*, 886 F.3d at 1190.

71. *See id.*

72. *See id.*

73. *Oracle II*, 750 F.3d at 1353–54.

74. *Id.*

75. *Id.*

The second trial resulted in the jury finding that Google's use was fair.<sup>76</sup> Oracle then moved for judgment notwithstanding the verdict, but the district judge denied the motion in a lengthy opinion that explained how the jury could have reasonably concluded that each fair-use factor favored Google.<sup>77</sup> Oracle appealed that ruling, again to the Federal Circuit (although this time there were no patent issues).<sup>78</sup>

The Federal Circuit proceeded to reverse the jury's finding of fair use, holding Google's use to be infringing.<sup>79</sup> In doing so, the Federal Circuit applied two standards of review.<sup>80</sup> First, the court reviewed historical facts under a deferential standard.<sup>81</sup> Historical facts answer questions relating to events that have occurred, and in fair use, they concern the actual use that a defendant has made of the copyrighted work.<sup>82</sup> The parties in *Oracle* agreed to most of the historical facts relevant to the fair-use issue, including that Google copied 37 of the API packages to create the Android operating system.<sup>83</sup> Second, and more controversially, the Federal Circuit reviewed the jury's ultimate conclusion of fair use under a *de novo* standard.<sup>84</sup> The court's reasoning for applying this *de novo* standard is discussed in the Section below.

### 3. *Federal Circuit Reasoning*

The Federal Circuit was explicit in its application of a *de novo* standard of review. In the court's words:

All jury findings relating to fair use other than its implied findings of historical fact must . . . be viewed as *advisory only* . . . . [W]e must assess all inferences . . . to be drawn from the historical facts

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76. *Oracle IV*, 886 F.3d at 1185.

77. See *Oracle Am., Inc. v. Google Inc. (Oracle III)*, No. C 10-03561 WHA, 2016 WL 3181206, at \*6–11 (N.D. Cal. June 8, 2016), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018) (analyzing fair-use factors).

78. See *Oracle IV*, 886 F.3d at 1190. Though there were no patent issues on the second appeal, the Federal Circuit retained jurisdiction because the first appeal did have patent issues. See *id.*

79. *Id.* at 1186.

80. See *id.* at 1193. The Court also stated that it applied *de novo* review to the question of “whether the court applied the correct legal standard to the fair use inquiry.” *Id.*

81. See *id.* at 1193–94.

82. See *id.* (“The Supreme Court has described ‘historical facts’ as ‘a recital of external events.’” (quoting *Thompson v. Keohane*, 516 U.S. 99, 110 (1995))).

83. See *Oracle II*, 750 F.3d 1339, 1351 (Fed. Cir. 2014) (“Google conceded that it copied the declaring code used in the 37 packages verbatim.”).

84. See *Oracle IV*, 886 F.3d at 1193.

found by the jury and the ultimate question of fair use de novo . . . .<sup>85</sup>

When the court referred to the “inferences to be drawn from the historical facts,” the court was referring to the conclusions that the jury reached by applying legal principles (i.e., the four statutory factors) to the historical facts in order to answer a mixed question of law and fact.<sup>86</sup> The Federal Circuit reviewed this mixed question de novo, conducting its own independent analysis.<sup>87</sup>

The de novo standard of review was essential to the Federal Circuit’s reversal of the jury verdict. Jury findings are usually subject to the substantial-evidence standard of review, which requires appellate courts to defer to findings that substantial evidence supports; stated differently, an appellate court may reverse a finding only if the appellate court determines that no reasonable jury could have made the finding.<sup>88</sup> If in *Oracle* the Federal Circuit had employed this no-reasonable-jury standard, the Federal Circuit would not have been able to reverse the jury’s finding of fair use. This is because, as discussed in Part IV, the historical facts in fair-use cases often support competing inferences in the fair-use analysis.<sup>89</sup> Reasonable minds may disagree over which inferences to draw from the historical facts.<sup>90</sup> Indeed, the reasonableness of the jury’s finding in *Oracle* is evident from the district court’s opinion that denied Oracle’s motion for judgment notwithstanding the verdict,<sup>91</sup> as well as from the fact that no appellate court had ever reversed a jury finding on the issue of fair use.<sup>92</sup> To reverse the jury, the Federal Circuit needed to apply the de novo standard of review.

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85. *Id.* at 1196 (emphasis added).

86. *See id.* at 1192, 1195–1210.

87. *See id.* at 1193, 1196–1210.

88. *See* SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp., 225 F.3d 1349, 1354 (Fed. Cir. 2000) (“[W]e must leave [jury] findings undisturbed as long as they are supported by substantial evidence. A factual finding is supported by substantial evidence if a reasonable jury could have found in favor of the prevailing party in light of the evidence presented at trial.” (citations omitted)); Nat’l Presto Indus., Inc. v. West Bend Co., 76 F.3d 1185, 1192 (Fed. Cir. 1996) (“On appellate review, the evidence at trial must be viewed in the light most favorable to the party that secured the jury verdict. Our appellate role ends when there is shown to be substantial evidence, on the record as a whole, as could have been accepted by a reasonable jury as probative of the issue.” (citations omitted)).

89. *See* discussion *infra* Section IV.A.

90. *See* discussion *infra* Section IV.A.

91. *See Oracle III*, No. C 10-03561 WHA, 2016 WL 3181206, at \*6–11 (N.D. Cal. June 8, 2016).

92. *See infra* Section III.B.

The Federal Circuit devoted several pages of its opinion to justifying its application of a *de novo* standard.<sup>93</sup> In those pages, the court provided three distinct arguments. The first argument is based on a recent Supreme Court decision—*U.S. Bank National Ass’n v. Village at Lakeridge, LLC*.<sup>94</sup> *U.S. Bank* addresses the issue of which standard of review appellate courts should apply in reviewing mixed questions of law and fact.<sup>95</sup> The Federal Circuit recited principles from *U.S. Bank* relevant to the question of the review standard for fair use, stating:

Importantly, the [*U.S. Bank*] Court noted that “[m]ixed questions are not all alike.” The Court then held that “the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.” Where applying the law to the historical facts “involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*.” But where the mixed question requires immersion in case-specific factual issues that are so narrow as to “utterly resist generalization,” the mixed question review is to be deferential.<sup>96</sup>

Applying these principles to the fair-use question, the Federal Circuit reached three conclusions. First, the fair-use analysis constitutes “a primarily legal exercise” because that analysis “requires a court to assess the inferences to be drawn from the historical facts found in light of the legal standards outlined in the statute and relevant case law and to determine what conclusion those inferences dictate.”<sup>97</sup> Second, the fair-use analysis involves the development of “auxiliary legal principles” that “will help guide resolution of that question in all future cases.”<sup>98</sup> Third, fair-use cases do not require immersion in case-specific factual issues, but instead the historical facts are “generally few, generally similar from case to case, and rarely debated.”<sup>99</sup> Thus, the Federal Circuit applied *U.S. Bank* to conclude that *de novo* review was appropriate.

The *Oracle* Court’s second argument for *de novo* review is based on an interpretation of a Supreme Court statement in a 1985 copyright case,

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93. See *Oracle IV*, 886 F.3d 1179, 1191–96 (Fed. Cir. 2018).

94. *Id.* at 1192–93 (quoting *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 963 (2018)).

95. See *U.S. Bank*, 138 S. Ct. at 963.

96. *Oracle IV*, 886 F.3d at 1192 (citations omitted).

97. *Id.* at 1193.

98. *Id.* at 1192–93.

99. *Id.*

*Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>100</sup> The *Harper* Court made the following statement:

Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court “need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.”<sup>101</sup>

The Federal Circuit interpreted this statement as suggesting that a jury’s ultimate conclusion of fair use should be reviewed under a *de novo* standard.<sup>102</sup> As support for this interpretation, the Federal Circuit relied on Ninth Circuit precedent that interpreted the statement as requiring a *de novo* standard in reviewing summary judgments of fair use.<sup>103</sup> The Federal Circuit did recognize, however, that the *Harper* Court made this statement in the context of reviewing a bench trial without addressing whether its statement applied in reviewing a jury trial.<sup>104</sup> Additionally, the Federal Circuit noted that several circuits still deferred to jury findings, including the Ninth Circuit.<sup>105</sup> Nevertheless, the Federal Circuit interpreted the Ninth Circuit’s deference to jury fair-use findings as limited to “disputed ‘historical facts,’ not the inferences or conclusion to be drawn from those facts.”<sup>106</sup> Hence, the Federal Circuit relied on the *Harper* statement, in conjunction with Ninth Circuit precedent, to apply *de novo* review.

The Federal Circuit’s third argument for *de novo* review is based on judicial and legislative descriptions of fair use as an equitable doctrine. The Federal Circuit pointed to a description of fair use that both the *Harper* Court and the legislative history employed: both described fair use as an “equitable rule of reason.”<sup>107</sup> The Federal Circuit also cited a Ninth

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100. *Id.* (relying on *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

101. *Harper*, 471 U.S. at 560 (quoting *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984)).

102. *Oracle IV*, 886 F.3d at 1192.

103. *Id.* at 1193, 1195.

104. *Id.* at 1194.

105. *Id.* (recognizing the Ninth Circuit’s deference to jury finding in *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407–08 (9th Cir. 1982)).

106. *Oracle IV*, 886 F.3d at 1195. To reach this conclusion, the Federal Circuit relied on a Ninth Circuit case, *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), in which the court denied a defendant a jury trial in view of the *Harper* Court’s quoted statement and the fact that the parties did not dispute the historical facts. *Id.* at 436.

107. See *Oracle IV*, 886 F.3d at 1194 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)) (describing fair use as “an equitable rule of reason”); H.R. REP. NO. 94-1476, at 65 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5679–80.

Circuit description of fair use as an “equitable defense.”<sup>108</sup> After citing these characterizations of fair use as “equitable,” the Federal Circuit reasoned: “If fair use is equitable in nature, it would seem to be a question for the judge, not the jury, to decide, even when there are factual disputes regarding its application.”<sup>109</sup>

These three arguments falter for several reasons. First, the Seventh Amendment requires deferential review of a jury’s fair-use finding; fair use is a legal issue, not an equitable one, in the sense relevant to whether a judge or jury decides. Second, the Federal Circuit’s application of *U.S. Bank* is seriously flawed, as is its interpretation of the Court’s statement in *Harper*. Third, a jury is better positioned than a judge to determine whether a use is fair. These three reasons are discussed in Parts II–IV below.

## II. SEVENTH AMENDMENT RIGHT TO A JURY

The most apparent problem with applying de novo review to a jury finding of fair use is that it violates the Seventh Amendment.<sup>110</sup> The Seventh Amendment preserves the right of trial by jury:

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108. *Oracle IV*, 886 F.3d at 1194 (quoting *Fisher*, 794 F.2d at 435).

109. *Id.*

110. See David Nimmer, 31 HARV. J.L. & TECH. 563, 566 (2018) (reasoning that because copyright infringement falls within the “paradigm” of the Seventh Amendment, it follows that “when a plaintiff sues a defendant for copyright infringement and the latter defends the conduct as fair use, either party may demand that the case proceed to trial before a jury” (citation omitted)).

There also exists a potential First Amendment problem with applying de novo review. Because the fair-use doctrine enables fair users to speak new expression (using another’s copyrighted expression), the Supreme Court has recognized that the doctrine serves a free-speech purpose and represents a “First Amendment accommodation.” See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[]” and a “First Amendment accommodation[]”). This raises the question of whether, on free-speech grounds, the law should recognize procedural advantages for putative fair users over copyright holders. For instance, should free speech justify a judge ruling for a fair user as a matter of law (and only if the ruling would be for the fair-use argument), so as to rule expeditiously and avoid a chilling effect on the fair-use speaker who would otherwise face a great litigation costs in going to trial? Similarly, should an appellate court exercise de novo review of a jury verdict that favors a copyright holder over a putative fair user, on the basis that its finding against the fair-use argument is a constitutional fact subject to independent review? More broadly, should a fair user’s First Amendment interest take priority over a copyright holder’s Seventh Amendment interest? Or for that matter, should the First Amendment interest of incentivizing speech of the copyright holder into the marketplace of ideas balance out the First Amendment interest of a fair user, such that the law’s procedures should not favor the putative fair user? Some of these questions I begin to address in a previous article. See Ned Snow, *Fair Use as a Matter of Law*, 89 DENV. U. L. REV. 1 (2011) [hereinafter Snow, *Matter of Law*]. Another work is forthcoming that will further discuss the interplay between the First and Seventh Amendments with regard to copyright litigants’ rights to a jury on the issue of fair use.



In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>111</sup>

As the text of the Amendment makes clear, if the jury right applies to the issue of fair use, then the Federal Circuit should not have reversed the jury's finding unless warranted under common-law rules. Common-law rules warrant reversal only if substantial evidence does not support the jury's finding, or in other words, only if the court determines that no reasonable jury could have reached the conclusion.<sup>112</sup> Thus, if the Seventh Amendment applies to the issue of fair use, and if the jury's interpretation of Google's use was at least reasonable, the Federal Circuit has unconstitutionally re-examined the jury's finding of fairness.

The Supreme Court has clarified that the Seventh Amendment applies to issues arising in common-law causes of actions in the late 1700s and to issues arising in actions brought under a modern statute that are analogous to such common-law actions in the late 1700s.<sup>113</sup> The right does not apply to issues over which courts of equity or admiralty would have exercised jurisdiction.<sup>114</sup> Thus, the constitutional right to a jury depends on whether common-law courts at the time of the Seventh Amendment's ratification in 1791 would have heard the issue (or an issue akin to it).<sup>115</sup> In the context

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111. U.S. CONST. amend. VII.

112. *See* *SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp.*, 225 F.3d 1349, 1354–55 (Fed. Cir. 2000) (“[W]e must leave [jury] findings undisturbed as long as they are supported by substantial evidence. A factual finding is supported by substantial evidence if a reasonable jury could have found in favor of the prevailing party in light of the evidence presented at trial.” (citation omitted)); *Nat'l Presto Indus., Inc. v. West Bend Co.*, 76 F.3d 1185, 1192 (Fed. Cir. 1996) (“On appellate review, the evidence at trial must be viewed in the light most favorable to the party that secured the jury verdict. Our appellate role ends when there is shown to be substantial evidence, on the record as a whole, as could have been accepted by a reasonable jury as probative of the issue.” (citation omitted)).

This “substantial evidence” standard—which governs jury findings—is more deferential than the “clear error” standard—which governs trial judge findings. *See* *Wu Lin v. Lynch*, 813 F.3d 122, 127 (2d Cir. 2016) (explaining that the “clear error” standard of review requires that “the error must be clear,” and also recognizing that the clear error standard “is less deferential to a factfinder than ‘substantial evidence’ review”).

113. *See* *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–48 (1998) (setting forth historical test for analyzing jury right); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted.”).

114. *Feltner*, 523 U.S. at 347–48.

115. *See* *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2302 (3d ed. 1998).

of fair use, the controlling question becomes whether English courts of the late 1700s would have viewed the issue of fair use as a doctrine arising at law (for the jury) or in equity (for the judge).

Modern Supreme Court precedent seems to answer this question. In *Feltner v. Columbia Pictures Television, Inc.*,<sup>116</sup> the Court considered whether the right to a jury applies on the issue of statutory damages in copyright law.<sup>117</sup> The Court traced the history of copyright law back to the middle of the seventeenth century, observing that copyright suits were tried in courts of law as actions on the case.<sup>118</sup> Based on this history, the Court concluded: “we hold that the Seventh Amendment provides a right to a jury trial on *all issues* pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.”<sup>119</sup> This language of *Feltner* makes clear that “all issues” that determine whether a defendant must pay statutory damages under the Copyright Act is subject to the Seventh Amendment. Fair use is an issue that determines whether a defendant must pay statutory damages under the Copyright Act. Under *Feltner*, then, the issue of fair use appears subject to the Seventh Amendment jury right.<sup>120</sup>

Despite the broad language of *Feltner*, the Federal Circuit in *Oracle* applied de novo review. Its basis for rejecting the Seventh Amendment argument was its apparent belief that fair use is “equitable in nature.”<sup>121</sup> If equitable, the issue would not have originated as a common-law doctrine. The two sections below refute this conclusion. Section II.A recites the history of early English courts’ treatment of fair use as a jury issue in legal

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116. 523 U.S. 340 (1998).

117. *Id.* at 342.

118. *Id.* at 349–51 (“Actions seeking damages for infringement of common-law copyright, like actions seeking damages for invasions of other property rights, were tried in courts of law in actions on the case.”).

119. *Id.* at 355 (emphasis added).

120. This interpretation of *Feltner* draws support from a Second Circuit case, *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001). In *Yurman*, the Second Circuit considered whether to apply either a de novo or substantial-evidence standard in reviewing a jury’s finding on the copyright issue of substantial similarity. The jury had found the defendant’s work to be substantially similar to the copyrighted work, and thereby found the defendant’s work to be infringing. On appeal, the defendant argued that this finding of substantial similarity was subject to de novo review. The appellate court disagreed, applying the standard of review set forth in Rule 50 of the Federal Rules of Civil Procedure, which amounts to a substantial-evidence standard. *Id.* at 108. Importantly, the appellate court reasoned that *Feltner* necessitates this more deferential standard because *Feltner* teaches that the Seventh Amendment applies to “*all issues*” pertinent to a statutory-damages award, which would include the issue of substantial similarity. *Id.* at 111 (quoting *Feltner*, 523 U.S. at 355).

121. See *Oracle IV*, 886 F.3d 1179, 1194 (Fed. Cir. 2018).

proceedings. Section II.B observes reasons that courts have mistakenly described fair use as an equitable doctrine.

### A. *History of Fair Use*

The doctrine known today as fair use evolved at early English common law.<sup>122</sup> Early English copyright cases contemplated the sort of use that a defendant made of a work, deciding whether the use was permissible or not.<sup>123</sup> Although those courts neither employed the term *fair use* nor engaged in the four-factor analysis that guides the inquiry today, the courts did examine whether “the matter so taken” from the original work was “fairly” done, such that the taking would “benefit the public.”<sup>124</sup> This sort of inquiry is closely akin to the four-factor inquiry of the modern doctrine. At a minimum, these early cases indicate a clear analogue to the modern fair-use doctrine. More likely, they indicate the actual origins of the modern doctrine.<sup>125</sup>

These early cases treated the issue of whether a use was fair as defining the rights of the copyright holder.<sup>126</sup> A copyright holder’s rights in expression would not extend to uses that were fair.<sup>127</sup> Hence, the early

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122. See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6–18 (2d ed. 1995) (tracing history of fair use).

123. See *Sayre v. Moore* (1785) 102 Eng. Rep. 138, 139 n.(b); 1 East 358, 361–62 (“In all these [copyright cases where defendant had altered underlying work] the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”); *Cary v. Kearsley* (1803) 170 Eng. Rep. 679, 680; 4 Esp. 168, 171 (“I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff’s book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?”).

124. See *Cary* 170 Eng. Rep. at 680.

125. See PATRY, *supra* note 122, at 6–18; Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373, 1379–93 (2011) (“[T]he fair use doctrine is better understood as the continuation of a long line of English fair abridgment cases, dating back to the beginning of statutory copyright law in 1710.”). *Id.* (arguing that English fair abridgment cases constitute origin of fair use in American jurisprudence).

126. See Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 142–50 (2011) [hereinafter Snow, *The Forgotten Right*] (discussing cases from eighteenth and nineteenth centuries in English and United States jurisdictions that treat the doctrine of fair use as a legal right that defines infringement).

127. See *id.*; see, e.g., *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (explaining that “a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author”); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8136) (“None of these rules of [copyright] decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication; but their effect undoubtedly is, to limit that privilege so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright.”).

doctrine of fair use did not *excuse* infringement, but rather, it *defined* infringement.<sup>128</sup> This distinction between excusing infringement and defining infringement may seem inconsequential, but it does shed light on the issue of whether fair use is an equitable or common-law doctrine. It is well established that in the late eighteenth century, courts tried actions for infringement of a copyright as actions for infringement of a property right, otherwise known as an action on the case.<sup>129</sup> Actions on the case were tried before juries in a court of law.<sup>130</sup> Therefore, a doctrine that defines infringement of a copyright—such as the early doctrine of fair use—would have been tried to a jury. The doctrine determines whether infringement occurred, and the issue of infringement lie with the jury.

Putting aside this point that the early doctrine of fair use defined infringement, case law expressly supports the view that law courts of the relevant time period treated fair use as a jury issue. A 1785 English common-law case is dispositive.<sup>131</sup> The case was *Sayre v. Moore*,<sup>132</sup> which has proven highly influential in American copyright jurisprudence and is still cited by modern courts, including the Supreme Court.<sup>133</sup> In *Sayre*, the

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128. *See, e.g.*, *Dodsley v. Kinnersley* (1761) 27 Eng. Rep. 270, 271; Amb. 403, 405 (“It was insisted for the defendant, that what was printed in the Magazine was a fair abridgment, and, as such, not a piracy.” (emphasis added)).

This interpretation of fair use as a doctrine that defines infringement is consistent with the statutory language of the Copyright Act. *See* 17 U.S.C. § 107 (2018) (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”). For many years, courts treated fair use as a defense, but in the past few decades, courts started treating it as an affirmative defense, which did not define infringement. *See* Snow, *The Forgotten Right*, *supra* note 126, at 155–61 (tracing history of fair use from defense to affirmative defense). Indeed, the text and legislative history of the 1976 Copyright Act make clear that fair use is not an affirmative defense. *See id.*; Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 696–704 (2015) (arguing that text and legislative history of Copyright Act indicate intent for fair use to be defense rather than affirmative defense). This fact, however, does not matter for purposes of a Seventh Amendment analysis, because even issues that arise in the context of affirmative defense may be eligible for a jury right.

129. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (“Actions seeking damages for infringement of common-law copyright, like actions seeking damages for invasions of other property rights, were tried in courts of law in actions on the case.” (citing *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 252; 4 Burr. 2303, 2398)).

130. *See id.*

131. *Sayre v. Moore* (1785) 102 Eng. Rep. 138, 139 n.(b); 1 East 358, 361–62.

132. (1785) 102 Eng. Rep. 138, 139 n.(b); 1 East 358, 361–62.

133. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 480 n.33 (1984) (Blackmun, J., dissenting) (relying on *Sayre* case for an explanation of copyright law); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 n.6 (1975) (same); *Wall Data Inc. v. L.A. Cty. Sheriff’s Dep’t*, 447 F.3d 769, 777 (9th Cir. 2006) (same); *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 597 (2d Cir. 1989) (Oakes, C.J., concurring) (same); *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986) (same); *Corbello v. Devito*, No. 2:08-cv-00867-R CJ-PAL, 2015 WL 5768531, at \*10 (D. Nev. Sept. 30, 2015) (same).

Chief Justice of the King's Bench, Lord Mansfield, sat as the trial judge in a copyright dispute over the defendant's use of the plaintiff's sea charts.<sup>134</sup> The plaintiff had expended great resource to create the charts, and the defendant had altered them to create his own.<sup>135</sup> On these simple facts, Lord Mansfield opined that the case raised "a matter of great consequence to the country."<sup>136</sup> He noted the competing policy considerations in play—rewarding ingenuity and labor versus encouraging improvement and progress.<sup>137</sup> He compared the facts to claims against copying of historical accounts and dictionaries.<sup>138</sup> Lord Mansfield then summarized these types of copyright disputes as follows: "In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not."<sup>139</sup> Indisputably, Lord Mansfield considered the issue of whether a defendant's use was permissibly fair or impermissibly infringing to be one for the jury.<sup>140</sup> As it turns out, the jury found for the defendant.<sup>141</sup>

Like Chief Justice Lord Mansfield in *Sayre*, Chief Justice Lord Ellenborough in *Cary v. Kearsley*<sup>142</sup> recognized the central role of the jury in deciding the issue of fair use.<sup>143</sup> *Cary* is an 1803 copyright case that arose in an English common-law court.<sup>144</sup> Like *Sayre*, *Cary* represents an important case on which modern courts (including the Supreme Court) continue to rely for guidance in applying the fair-use doctrine.<sup>145</sup> In *Cary*, the plaintiff, Mr. Cary, had created a book that detailed nine-hundred miles of roads, useful in taking surveys and estimating distances.<sup>146</sup>

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134. *See Sayre* 102 Eng. Rep. at 140.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *Id.*

142. (1803) 170 Eng. Rep. 679; 4 Esp. 168.

143. *See id.* at 680.

144. *Id.*

145. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting *Cary* 170 Eng. Rep. at 681, to delineate principles of fair use); Antioch Co. v. Scrapbook Borders, Inc., 291 F. Supp. 2d 980, 987 (D. Minn. 2003) (same); Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 10 (S.D.N.Y. 1992) (same), *aff'd*, 60 F.3d 913 (2d Cir. 1994); Hayden v. Chalfant Press, Inc., 177 F. Supp. 303, 312 n.17 (S.D. Cal. 1959) (same); *cf.* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 613 (1834) (relying on *Cary* to decide copyright dispute that did not raise issue of fair use).

146. *Cary* 170 Eng. Rep at 679.

Mr. Kearsley transcribed portions of Mr. Cary's book into his own.<sup>147</sup> At trial, Cary's attorney argued that this case was akin to copying a whole essay from the book, *Paley's Philosophy*, making observations and notes or additions at the end of the copied text.<sup>148</sup> Lord Ellenborough explained that such copying might not necessarily amount to piracy:

[Whether such copying would amount to piracy] would depend on the facts of, whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained. That part of the work of one author [*sic*] is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*?<sup>149</sup>

Lord Ellenborough thus recognized that individual facts surrounding such copying would dictate whether copied material was "used fairly," "for the promotion of science, and the benefit of the public."<sup>150</sup> He subsequently opined that failing to protect "additional observations" and "corrections" that a copier might make to another's work, would effectively "put manacles upon science."<sup>151</sup> These important policy considerations, however, did not persuade Lord Ellenborough to determine himself whether the use was fair.<sup>152</sup> He sent the issue to the jury, explaining:

I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?<sup>153</sup>

The weight of both *Sayre* and *Cary* cannot be overstated in assessing a litigant's right to a jury under the Seventh Amendment. They represent common-law courts expressly recognizing that the jury should decide

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147. *Id.* at 679–80.

148. *Id.* at 680.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

whether copyrighted material was used fairly by a defendant. And they occurred in the decade prior to and the decade following the ratification of the Seventh Amendment.

Another English common law case that considered whether a use was permissible was *Roworth v. Wilkes*<sup>154</sup>—a case arising in 1807. It involved a defendant using 75 pages of a 118-page treatise.<sup>155</sup> The issue was whether this was a permissible extraction of the original, much like a critical review.<sup>156</sup> A jury found for the plaintiff.<sup>157</sup> *Roworth* thus represents another English common-law case that, shortly after the Seventh Amendment, treated the issue of fair use as a question for the jury to decide.

Courts in the United States adopted these English courts' approach to fair use. Beginning with the case of *Folsom v. Marsh*<sup>158</sup> in 1841, Justice Joseph Story articulated the fair-use doctrine, relying on English common law, including *Roworth*.<sup>159</sup> Importantly, Justice Story framed the issue of fair use as a question that determined whether infringement had occurred—not as a question that excused infringement.<sup>160</sup> As discussed

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154. (1807) 170 Eng. Rep. 889; 1 Camp. 94.

155. *Id.* at 889–90.

156. *Id.* at 890.

157. *See* *Campbell v. Scott* (1842) 59 Eng. Rep. 784, 787; 11 Sim. 31, 40. Although *Roworth* mentions the jury's decision regarding the damages, the opinion does not specifically state that the jury decided the issue relating to whether the use was fair or infringing. *See* *Roworth* 170 Eng. Rep. at 891. ("His Lordship . . . directed the jury to find separate damages for the letter-press and the prints. The plaintiff had a verdict, with £70 for the former, and £30 for the latter."). A few years after *Roworth*, however, the court in *Campbell* provided this detail, stating:

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

*Campbell* 59 Eng. Rep. at 787.

158. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

159. *Id.* at 348–49 (Story, J.). Justice Story is arguably the most influential jurist on the doctrine of fair use. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("For as Justice Story explained . . ."); *Harper & Row, Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 550 (1985) (relying on Justice Story's teachings and suggesting that he was first to articulate modern principles of fair use doctrine).

160. *See* *Folsom*, 9 F. Cas. at 348 ("The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." (emphasis added)). Justice Story re-articulated this framing of fair use as a question that defines whether infringement has occurred in the case of *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728) (Story, J.). There he stated:

In some cases, indeed, it may be a very nice question, what amounts to a piracy of a work, or not. Thus, if large extracts are made therefrom in a review, it might be a question, whether those extracts were designed bonâ fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such

above, an issue that determines infringement would go to the jury. Four years after *Folsom*, Justice Story again articulated the doctrine of fair use in *Emerson v. Davies*,<sup>161</sup> again relying on English common-law cases that applied the doctrine, including both *Roworth* and *Sayre*.<sup>162</sup> Importantly, he quoted the portion of the *Sayre* opinion that dealt with the role of a jury: “[T]he question of fact to come to a jury, is, whether the alteration be colorable or not . . . . [A] question of this nature the jury will decide, whether it be a servile imitation or not.”<sup>163</sup> Notably, a few decades later, another early American copyright case quoted the same portion of *Sayre* in explaining fair use.<sup>164</sup>

History thus supports the conclusion that the Seventh Amendment’s right to a jury applies to the issue of fair use. Both before and after the ratification of the Seventh Amendment, English common-law courts heard the issue. Those courts explicitly opined that the question of whether copying was fairly done, so as to determine the issue of infringement, represented an issue for the jury to decide.

### B. *Equitable Interpretation*

Despite this history, a few courts, including the Ninth Circuit, have mistakenly viewed fair use as an equitable doctrine.<sup>165</sup> This view might exist because courts of equity did discuss principles of fair use in deciding copyright disputes.<sup>166</sup> When copyright owners brought suit in courts of

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a case, must be compounded of various considerations; whether it be a bonâ fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may enter as elements, in ascertaining, whether there has been a piracy, or not.

*Id.* at 1038.

161. 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

162. *Id.* at 623–24.

163. *Id.* (quoting *Sayre v. Moore* (1785) 102 Eng. Rep. 138, 139 n.(b); 1 East 358, 361–62).

164. See *Simms v. Stanton*, 75 F. 6, 9 (C.C.N.D. Cal. 1896). The *Simms* court also relied on the English common-law case discussed above, *Cary v. Kearsley*, in describing the fair use doctrine. *Id.* at 11.

165. See *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (“The fair-use doctrine was initially developed by courts as an equitable defense to copyright infringement.”); *Oracle IV*, 886 F.3d 1179, 1194 (Fed. Cir. 2018) (“If fair use is equitable in nature, it would seem to be a question for the judge, not the jury, even when there are factual disputes regarding its application.”); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (describing fair use as “entirely equitable” doctrine).

166. *E.g.*, *Macklin v. Richardson* (1770) 27 Eng. Rep. 451, 453; *Amb. 694, 696* (rejecting principle that critical review may supplant work itself where defendant had transcribed play and published it in magazine); *Dodsley v. Kinnersley* (1761) 27 Eng. Rep. 270, 271; *Amb. 403, 405* (“No certain line can be drawn, to distinguish a fair abridgment; but every case must depend on its own circumstances.”); *Tonson v. Walker* (1752) 36 Eng. Rep. 1017, 1020; 3 Swans. 672, 681 (“A fair



equity, judges would decide all issues, whether legal or factual, because courts of equity need not employ a jury.<sup>167</sup> Indeed, the early American copyright cases that contemplated fair use all arose in courts of equity.<sup>168</sup> But this fact does not imply that fair use—and for that matter any issue of infringement—would be considered an equitable doctrine. The maxim of *equitas sequitur legem* (equity follows the law) applies,<sup>169</sup> meaning that courts of equity must construe legal rights to determine whether equity will furnish relief.<sup>170</sup> That a court of equity considers an issue does not imply that that issue does not invoke a legal doctrine subject to legal rights in a court of law.

An example of this principle is found in *Folsom v. Marsh*, the first American case to articulate the doctrine of fair use. In *Folsom*, Justice Story sat in a court of equity and heard a copyright holder's suit to enjoin the defendant from continued use of his copyrighted work.<sup>171</sup> In ruling for the copyright holder, Justice Story needed to construe the scope of the legal rights in the copyright.<sup>172</sup> To that end, Justice Story articulated the limits of copyright, which articulation has become the underpinnings for the modern doctrine of fair use.<sup>173</sup> Notably, Justice Story did not describe these fair-use limits as a doctrine independent of or distinct from the right

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abridgement would be entitled to protection [from copyright action of the plaintiff]."). In the early fair use case of *Gyles v. Wilcox* (1740) 26 Eng. Rep. 489; 2 Atk. 141, Lord Chancellor Hardwicke, sitting in equity, spoke out against using a jury at law to determine whether the defendant had infringed. *Id.* at 490–91. Nevertheless, he referred to the issue as one of fact. *See id.* at 490 ("The court is not under an indispensable obligation to send all facts to a jury . . ."); H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1222–23, 1273 (2008) (explaining copyright suits that arose in courts of chancery after 1660 and copyright suits in courts of law after mid 1700s).

167. *See, e.g.*, DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 104 (2d ed. 1993); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, § 31, at 21 (Arno Press 1972) (1836); 2 STORY, *supra*, §§ 930–933, at 209–11; cases cited *supra* note 166.

168. *See Folsom v. Marsh*, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4,901); *Emerson v. Davies*, 8 F. Cas. 615, 623–24 (C.C.D. Mass. 1845) (No. 4,436); *Simms v. Stanton*, 75 F. 6, 11 (C.C.N.D. Cal. 1896); *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136); 2 STORY, *supra* note 167, §§ 930–933, at 209–11 (explaining basis for ruling on copyright claim in equitable proceedings).

169. *See Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893) ("The established rule . . . is that equity follows the law.").

170. *See Saunders v. Smith* (1838) 40 Eng. Rep. 1100, 1107; 3 My. & Cr. 711, 728 ("In all cases of injunctions in aid of legal rights—whether it be copyright, patent right, or some other description of legal right which comes before the Court [of Equity]—the office of the Court is consequent upon the legal right . . .").

171. *See Folsom*, 9 F. Cas. at 344–45.

172. *See id.* at 348–49.

173. *See id.*

of copyright.<sup>174</sup> He did not even employ any distinct terminology to describe these limits, not even the label of “fair use.”<sup>175</sup> For Justice Story, considerations of fair use were integral to defining a copyright’s scope. Indeed, in his *Commentaries on Equity*, Justice Story explained that the question of whether a use is fair represents a question of whether a defendant has committed an infringement of a copyright holder’s “legal rights.”<sup>176</sup> Consistent with that explanation, Justice Story’s application of fair-use principles in *Folsom*—an equitable proceeding—did not transform the doctrine into a creature of equity any more than his explanation of copyright generally transformed the right of copyright into a creature of equity. So although American jurisprudence first articulated fair use in a court of equity, this fact does not imply that fair use arose as an equitable doctrine.

The immediate question that follows, then, is why these copyright disputes would ever arise in equitable proceedings rather than courts of law. The answer is simple. Equitable proceedings entertained the remedy of an accounting of profits that defendants had gained through their infringing uses.<sup>177</sup> That remedy could be greater than the sole remedy afforded by the Copyright Act of 1790—fifty cents in damages per infringing page.<sup>178</sup> For many copyright holders, a disgorgement of an infringer’s profits represented the better remedy, so they sought relief under a bill of equity rather than an action at law.<sup>179</sup> Moreover, damages

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174. *See id.*

175. *See id.*

176. *See* 2 STORY, *supra* note 167, § 939, at 214–15. Justice Story stated:

[W]hat constitutes a bonâ fide case of extracts, or a bonâ fide abridgment, or a bonâ fide use of common materials, is often a matter of most embarrassing inquiry. The question, in all cases of this sort, has been said to be, whether there has been a legitimate use of the copy-right publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, though it may be prejudicial to the original author, it is not an invasion of his legal rights.

*Id.*

177. *See* DOBBS, *supra* note 167, at 107–08.

178. *See* Copyright Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (1790) (repealed 1802) (providing remedy for infringement in “the sum of fifty cents for every sheet which shall be found in [the infringer’s] possession”).

179. *See* *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (explaining that in copyright suits, recovery of profits “had been given in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim ‘that which, *ex aequo et bono*, is theirs, and nothing beyond this’” (citation omitted)); *id.* at 402 (“Both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits ‘which the infringer shall have made from such infringement.’” (citation omitted)); *Nichols v. Universal Pictures Corp.*, 34 F.2d 145, 145 (S.D.N.Y. 1929) (“This is a suit for the alleged infringement of a copyright, and the

under the Copyright Act would likely have been secondary to the equitable remedy of enjoining continued infringement.<sup>180</sup> In short, equity provided a better remedy for copyright holders, so equitable courts would frequently decide the issue of fair use. Yet the issue itself remained legal in nature.

Another reason that some courts have mistakenly viewed fair use as an equitable doctrine is because the Supreme Court has on three occasions described it as an “*equitable* rule of reason.”<sup>181</sup> Indeed, the *Oracle* Court referred to this description when it suggested that fair use was an equitable doctrine.<sup>182</sup> But this reason is seriously flawed. As an initial matter, the test for whether the Seventh Amendment jury right applies to a doctrine has nothing to do with whether the Court has employed the word *equitable* to describe the doctrine.<sup>183</sup> For that matter, the Court has explicitly recognized that the “*equitable* rule of reason” label originated in a 1976 House Report for the Copyright Act.<sup>184</sup> A House Report does not determine whether a doctrine is equitable or legal. More to the point, by adopting the House Report’s label, the Court did not intend to declare that fair use was an equitable doctrine in the sense that it originated in a court of equity. Rather, the context of the Court’s use of *equitable* indicates that the Court was denoting the word’s ordinary meaning of fairness or reasonableness.<sup>185</sup> Specifically, in the three cases that the Supreme Court

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*usual* injunctive relief with an accounting is prayed for.” (emphasis added), *aff’d*, 45 F.2d 119 (2d Cir. 1930).

180. *See* West Pub. Co. v. Edward Thompson Co., 176 F. 833, 838–39 (2d Cir. 1910) (explaining circumstance wherein equitable court could award damages); 2 STORY, *supra* note 167, § 794, at 104–05.

181. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (emphasis added); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (emphasis added); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (emphasis added).

182. *Oracle IV*, 886 F.3d 1179, 1194 (Fed. Cir. 2018).

183. *See Feltner v. Columbia Pictures Television, Inc.* 523 U.S. 340, 347–48 (1998) (setting forth test for constitutional jury right).

184. *Sony*, 464 U.S. at 448 n.31. The *Sony* Court stated:

The House Report expressly stated that the fair use doctrine is an “*equitable* rule of reason” in its explanation of the fair use section:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an *equitable rule of reason*, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

*Id.* (emphasis added) (quoting H.R. REP. NO. 94-1476, at 65 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5679–80).

185. The Oxford English Dictionary recognizes two distinct meanings for *equitable*. *See* 5 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989). One meaning indicates the fairness and reasonableness of a decision or action. *See id.* (“1. Characterized by equity or fairness. a. Of actions, arrangements, decisions, etc.: That is in accordance with equity; fair, just, reasonable.”). Another meaning indicates

described fair use as an “equitable rule of reason,” it did so to explain that the doctrine should not be applied rigidly but rather that it should be applied based on the individual facts of each case.<sup>186</sup> Under the meaning of fairness or reasonable, the use of *equitable* in this explanation makes sense: because the fair-use doctrine calls for an assessment of whether a use is fair or reasonable, no general definition is possible and each case must be individually evaluated. The ordinary meaning of *equitable* fits the Court’s explanation. Thus, the Court’s description of fair use as an “equitable rule of reason” does not establish that the doctrine is equitable for the purpose of a Seventh Amendment analysis.

It is lastly worth noting that two well-recognized modern authorities on the doctrine of fair use entirely disagree with the view that fair-use is an equitable doctrine. Professor William Patry stated: “Fair use is not an equitable doctrine or an equitable defense. As history reveals, it is a legal defense which may be, and frequently is, decided by a jury.”<sup>187</sup> Judge Pierre Leval further explained:

A . . . misleading assumption is that fair use is a creature of equity. From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically

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a category of jurisprudence. *See id.* (“2. Pertaining to the department of jurisprudence called EQUITY. Of rights, claims, etc.: Valid in ‘equity’ as distinguished from ‘law’.”).

186. *See Stewart*, 495 U.S. at 236 (“The doctrine is an ‘equitable rule of reason,’ which ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (first quoting *Sony Corp. of Am.*, 464 U.S. at 488; and then quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)); *Harper*, 471 U.S. at 560 (“[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” (quoting H.R. REP. NO. 94-1476, at 65)); *Sony*, 464 U.S. at 448 n.31 (“Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts . . . .” (quoting H.R. REP. NO. 94-1476, at 65)). In *Sony*, the Court used the label in two other instances. *See id.*, 464 U.S. at 454–55 (“When these factors are all weighed in the ‘equitable rule of reason’ balance, we must conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.”); *id.* at 448 (“That section [of the Copyright Act] identifies various factors that enable a court to apply an ‘equitable rule of reason’ analysis to particular claims of infringement.”). Neither of these instances suggest that the Court intended to mean that fair use is an equitable doctrine in the sense of *equity* as a category of jurisprudence. Both suggest the ordinary meaning of fairness.

187. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:3, at 10–49 (2018) (footnotes omitted); *see also* William Patry, *Summary Judgment – Morning Mail + Motion to Strike Palfrey*, EON (July 19, 2009, 9:41 PM), <http://blogs.harvard.edu/nesson/2009/07/20/summary-judgment-morning-mail/> [<https://perma.cc/86XP-M68Z>] (“The occasional statements about fair use being an equitable defense are, in my opinion ahistorical (Jude Leval agrees).”).

this notion is incorrect. Litigation under the Statute of Anne<sup>188</sup> began in the law courts. Although plaintiffs who sought injunctions could sue, and did, in the courts of equity, which exercised parallel jurisdiction, the fair use doctrine did not arise out of equitable considerations.<sup>189</sup>

Thus, the conclusion that fair use stands as a doctrine originating in equity simply lacks support as a historical matter, and leading modern authorities have cast serious doubt on that conclusion.

### III. SUPREME COURT JURISPRUDENCE ON STANDARD OF REVIEW

Even assuming that the Seventh Amendment did not mandate a deferential review of fair use, Supreme Court jurisprudence dealing with the standard of review for such mixed questions of law and fact indicates that this standard of review should govern. Although the Court has provided only brief instruction about the standard of review for the fair-use issue specifically,<sup>190</sup> the Court has taught general principles about which standard of review should govern mixed questions of law and fact.<sup>191</sup> This Part examines the Court's guidance in these two contexts: Section III.A examines the Court's direction on reviewing mixed questions of law and fact in *U.S. Bank National Ass'n v. Village at Lakeridge, LLC*<sup>192</sup>; Section III.B examines brief statements in *Harper & Row, Publishers, Inc. v. Nation Enterprises* about appellate review of fair use.<sup>193</sup>

#### A. *U.S. Bank on Mixed Questions*

Recently, the Supreme Court in *U.S. Bank* addressed the standard of review for mixed questions of law and fact.<sup>194</sup> At issue in *U.S. Bank* was whether a particular creditor should be classified as an "insider" of a debtor.<sup>195</sup> The issue raised a mixed question of law and fact: it required the district court to apply a legal principle (i.e., a person is considered to

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188. The Statute of Anne was the first copyright statute in England, enacted by Parliament in 1710. See Act for the Encouragement of Learning (Statute of Anne) 1710, 8 Ann. c. 19 (Gr. Brit.).

189. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1127 (1990).

190. See *Harper*, 471 U.S. at 560.

191. See *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 966–68 (2018).

192. See *id.*

193. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985).

194. *U.S. Bank*, 138 S. Ct. at 963.

195. *Id.*

be a non-statutory insider where he or she conducts a business transaction as though the parties are not strangers) to the historical facts of the case (i.e., the particular creditor had a romantic relationship with the debtor) in order to deduce the creditor's proper classification.<sup>196</sup> The Supreme Court considered whether the Bankruptcy Court's ruling on this issue was subject to clear-error or *de novo* review.<sup>197</sup> Ultimately holding the mixed question to be subject to clear-error review, the Court taught principles that define the review standard for mixed questions.<sup>198</sup> It explained:

[S]ome [mixed questions] require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*. But as [Respondent] replies, other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called ‘multifarious, fleeting, special, narrow facts that utterly resist generalization.’ And when that is so, appellate courts should usually review a decision with deference.<sup>199</sup>

Thus, the Court outlined two general considerations for determining the standard of review for mixed questions. If the analysis involves development of auxiliary legal principles that would guide future cases, this suggests *de novo*.<sup>200</sup> By contrast, if the analysis involves fact-specific issues, addressing a set of diverse and narrow facts that “resist generalization,” this suggests a deferential standard.<sup>201</sup>

This guidance may suggest contradictory conclusions for the review standard of fair use. On the one hand, application of the four fair-use factors has resulted in the development of auxiliary legal principles that guide future cases. For instance, in *Campbell v. Acuff-Rose Music, Inc.*,<sup>202</sup> the Supreme Court developed several legal principles under the first factor's inquiry into the purpose of the use—namely, the doctrine of transformative use, parody, and its effect on the other statutory factors.<sup>203</sup>

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196. *Id.* at 967.

197. *Id.* at 963.

198. *Id.* at 967–68.

199. *Id.* at 967 (citations omitted).

200. *See id.*

201. *See id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1988)).

202. 510 U.S. 569 (1994).

203. *See id.* at 579–85.

In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>204</sup> the Court taught legal principles that guide the fourth factor's inquiry into the potential market effect of the use, such as the requirement that a copyright holder demonstrate some likelihood of harm where a use is noncommercial.<sup>205</sup> In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court articulated a legal principle under the second factor's inquiry into the nature of the copyrighted work: the relevancy of a work's unpublished nature.<sup>206</sup> To be sure, appellate courts often develop legal principles that guide the fair-use analysis in future cases. According to *U.S. Bank*, this suggests de novo review.<sup>207</sup>

On the other hand, it is well established that the facts of fair-use cases resist generalization. The Court has repeatedly taught that fair use calls for a "case-by-case analysis," and that that analysis "is not to be simplified with bright-line rules."<sup>208</sup> As the Court explained in *Sony*:

[T]he endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute . . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.<sup>209</sup>

Justice Blackmun put it simply: "The inquiry is necessarily a flexible one."<sup>210</sup> A flexible, case-by-case doctrine means that courts must not determine whether a use is fair based on a generalization of historical facts.<sup>211</sup>

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204. 464 U.S. 417 (1984).

205. *See id.* at 451.

206. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

207. *See U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 967 (2018).

208. *See Campbell*, 510 U.S. at 577; *Harper*, 471 U.S. at 560; Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1093 (2007) ("Concerns about the problem of fair use uncertainty have intensified recently because fair use has been called upon in a variety of new situations. Wide distribution of digital technologies has greatly increased copyright law's domain while also giving rise to a significantly larger pool of potential fair users attracted to the remarkable reproductive and adaptive power of these new technologies.").

209. *See Sony Corp.*, 464 U.S. at 448–49 n.31 (quoting H.R. REP. NO. 94-1476, at 66 (1976)).

210. *See id.* at 479–80 (Blackmun, J., dissenting).

211. The question of whether a use is fair in copyright law is akin to the question of whether a person has acted reasonably in negligence law. Both questions call for an examination of the circumstances surrounding the action in question, and whether a defendant acted according to social norms. Both resist factual generalizations. *See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 173, 237 (5th ed. 1984) (recognizing that the question of reasonableness in negligence cases is factual in nature).

The Federal Circuit concluded otherwise. It opined that fair-use cases do not turn on case-specific factual issues. The Federal Circuit reasoned that because “historical facts in a fair use inquiry are generally few, generally similar from case to case, and rarely debated, resolution of what any set of facts means to the fair use determination definitely does not ‘resist generalization.’”<sup>212</sup> This reasoning is problematic. It is true that historical facts in a fair-use inquiry are generally few: the history, content, and origin of a copyrighted work are usually undisputed, for a defendant’s use of the work is either undisputed or assumed *arguendo*.<sup>213</sup> Nevertheless, this undisputed nature of the historical facts does not in any way suggest that those facts will be similar from case to case. Moreover, even if general patterns emerge in fair-use decisions,<sup>214</sup> the specific circumstances of each use must be evaluated for distinctive nuances.<sup>215</sup> For instance, uses of copyrighted material that are for news reporting are likely to be fair.<sup>216</sup> Yet if the author of an original photograph is a freelance photographer in the business of selling images to news organizations, that factual nuance would likely represent an exception to the usual generalization that news-reporting uses are fair.<sup>217</sup> That nuance affects the target market for the copyrighted work under the fourth factor.<sup>218</sup> Similarly, if a news

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212. *Oracle IV*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) (quoting *U.S. Bank*, 138 S. Ct. at 966).

213. See Snow, *Judges Playing Jury*, *supra* note 18, at 493.

214. Several scholars have well observed and analyzed general patterns emerging in fair-use decisions. See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 79–81 (2012) (statistically analyzing fair-use decisions to identify favorable factors, such as a use’s employment of new creative content in a work, that make fair-use determinations more predictable); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540–46 (2009) (recognizing patterns in the form of “policy-relevant clusters” that provide insight for predicting fair-use decisions); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1531–32, 1586–1676 (2004) (observing social and cultural patterns and practices that suggest a general context that can develop frameworks for analyzing fair use). Those patterns may be the basis for judges developing additional auxiliary legal principles that will guide the decision-makers who are responsible for reaching fair-use determinations—be they jurors or judges.

215. Consider, for instance, a critical review of a copyrighted work. Quoting lengthy passages from the work seems permissible to substantiate a reviewer’s critical opinion. Yet if the reviewer quotes the most salient parts of the work (or even summarizes them in great detail), the review may actually substitute for the work. The line between criticism and substitution will depend on specific circumstances in any given case concerning a critical review. On this point, Justice Story explained that discerning between genuine criticism and substitution raises a question “calling for great caution and involving great difficulty.” *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.).

216. See 17 U.S.C. § 107 (2018) (listing news reporting as example of fair-use purpose).

217. *E.g.*, *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189–90 (D. Mass. 2013) (denying fair use for news organization that used photograph of freelance photographer); see also Samuelson, *supra* note 214, at 2558–65 (outlining factual patterns in fair-use cases concerning news).

218. See *Fitzgerald*, 491 F. Supp. 2d at 189–90.



organization published excerpts of a memoir without permission—say, for instance, a president’s memoir about why he issued a controversial pardon—the use may not necessarily be deemed a newsworthy purpose.<sup>219</sup> The commercial purpose of publishing the story prior to the copyright holder’s publication of the memoir might outweigh the seeming news purpose of the use.<sup>220</sup> Specific factual nuances must be considered, even in applying general patterns that demonstrably suggest fairness or infringement. Therefore, flexibility in application is necessary, and according to *U.S. Bank*, this characteristic suggests a deferential review.<sup>221</sup>

Thus, two characteristics of the fair-use analysis suggest different standards of review. It both involves the development of legal principles that guide future cases and calls for a case-by-case evaluation. In the face of these competing characteristics, which standard of review should govern? The answer, it appears, depends on which institution—judge or jury—is better positioned to decide the issue. The *U.S. Bank* Court has noted as much, explaining: “When an ‘issue falls somewhere between a pristine legal standard and a simple historical fact,’ the standard of review often reflects which ‘judicial actor is better positioned’ to make the decision.”<sup>222</sup> That principle suggests that the jury should decide the issue, for the jury appears better positioned to draw the inferences that determine fairness.<sup>223</sup> As discussed below in Part IV, the diversity of life experiences in a jury brings a cultural perspective to the fair-use analysis that appellate judges frequently lack, and that perspective is valuable in defining the fairness of a use.<sup>224</sup> As the better positioned actor, a jury deserves deference.<sup>225</sup>

Importantly, a deferential standard for jury findings on fair use would not prevent courts from developing legal principles in the doctrine. Even under the deferential standard, appellate judges could teach legal principles that would guide jurors or judges as they analyze certain factual

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219. *E.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (“The Nation went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a ‘news event’ out of its unauthorized first publication of a noted figure’s copyrighted expression.”).

220. *See id.* at 561–63.

221. *See* *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 967 (2018).

222. *See id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

223. *See* discussion *supra* Part IV.

224. *See* discussion *supra* Section IV.A.

225. *See* discussion *supra* Section IV.B.

circumstances. *U.S. Bank* expressly establishes this point.<sup>226</sup> Hence, appellate courts need not upset a jury finding merely to explain how to apply legal principles in future cases involving similar factual circumstances.<sup>227</sup> The need for development of auxiliary legal principles does not mandate de novo review.

In sum, *U.S. Bank*'s mandate for a deferential review of mixed questions that call for a case-specific factual analysis applies to the doctrine of fair use. Courts may still develop legal principles to guide future fair-use decisions while deferring to jury findings.

### B. Harper on Fair Use

In 1985, the Supreme Court decided *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>228</sup> The facts concerned a news organization that published an article containing excerpts of President Gerald Ford's memoirs.<sup>229</sup> The district court held a bench trial and determined that the news organization, *The Nation*, had infringed the copyright in Ford's memoirs.<sup>230</sup> In reaching that holding, the district court rejected The

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226. See *U.S. Bank*, 138 S. Ct. at 968 n.7 (explaining that under the clear-error standard, "if an appellate court someday finds that further refinement of the . . . [substantive-law] standard is necessary to maintain uniformity among bankruptcy courts, it may step in to perform that legal function"). Recall that in *U.S. Bank*, the Court held that appellate courts should apply a clear-error standard of review on the issue of whether a person is a "non-statutory insider." *Id.* at 963. In support of this holding, Justice Kennedy emphasized that even under this deferential standard, appellate courts could continue to develop the legal standards that govern that issue. *Id.* at 969 (Kennedy, J., concurring). He stated:

As the Court's opinion makes clear, courts of appeals may continue to elaborate in more detail the legal standards that will govern whether a person or entity is a non-statutory insider under the Bankruptcy Code. At this stage of the doctrine's evolution, this ongoing elaboration of the principles that underlie non-statutory insider status seems necessary to ensure uniform and accurate adjudications in this area.

*Id.* (Kennedy, J., concurring); see also Snow, *Judges Playing Jury*, *supra* note 18, at 511–17 (explaining that a deferential standard of review does not preclude a court from declaring legal principles that should guide similar situations in the future).

227. An example of such continued development of fair use is the Supreme Court's teaching in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). There the Court explained legal principles that led to the conclusion that recording a television show through home-use VCR technology must be fair, even after the district court had held a bench trial and granted fair use for the defendants. See *id.* at 447–55. Sony established a legal rule in the fair-use analysis that would apply only in a specific set of facts—VCR recordings of off-the-air broadcasts.

228. 471 U.S. 539 (1985).

229. *Id.* at 541–42.

230. *Id.* at 543.

Nation's argument of fair use.<sup>231</sup> On appeal, the Supreme Court affirmed the district court.<sup>232</sup>

In affirming the district court's denial of fair use, the *Harper* Court made two statements concerning the procedure for reviewing fair use.<sup>233</sup> Those statements consist of the following two sentences (quoted without adding, omitting, or otherwise altering any language of the Court):

Fair use is a mixed question of law and fact. *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495, n. 8 (CA11 1984). Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . , [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.' *Id.* at 1495.<sup>234</sup>

The *Harper* statements make clear that if a district court has found historical facts sufficient to perform an analysis under the factors, an appellate court may perform its own analysis, thus applying a de novo standard to the district court's analysis.<sup>235</sup> It would seem to follow that only the historical facts require deference and that findings under the four-factor analysis do not. And given that the *Harper* Court never distinguished between reviewing a trial judge and a jury, it is further arguable that an appellate court need not defer to a jury in reviewing its finding of fairness.<sup>236</sup>

This interpretation of *Harper*, which I criticize below, has found favor with some courts.<sup>237</sup> Courts applying this interpretation (prior to *Oracle*)

231. *Id.* at 543, 569.

232. *Id.* at 569.

233. *See id.* at 560.

234. *Id.* I refer to these statements as "the *Harper* statements."

235. *Id.*

236. The *Oracle* Court interpreted the *Harper* statements to mean: "so long as the record is 'sufficient to evaluate each of the statutory factors,' we may reweigh on appeal the inferences to be drawn from that record." *Oracle IV*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) (quoting *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003)).

237. *See, e.g., Mattel Inc.*, 353 F.3d at 800–06 (relying on *Harper* to treat the issue of fair use as a pure legal question on summary judgment); *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 993 (9th Cir. 1998) (same); *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137, 141–46 (2d Cir. 1998) ("Although '[f]air use is a mixed question of law and fact,' this court has on a number of occasions 'resolved fair use determinations at the summary judgment stage' where, as here, there are no genuine issues of material fact." (citation omitted)) (engaging in four-factor analysis); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (relying on *Harper* to treat the issue of fair use as a pure legal question on summary judgment); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 855 F. Supp. 905, 909 (E.D. Mich. 1994) (same), *aff'd*, 99 F.3d 1381 (6th Cir. 1996); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (same); *Acuff-Rose Music, Inc. v.*

have all done so in the context of resolving whether to decide the fair-use issue as a matter of law on summary judgment.<sup>238</sup> Case in point—and relevant to the Federal Circuit’s reasoning—is *Fisher v. Dees*,<sup>239</sup> where the Ninth Circuit considered whether a defendant was entitled to a jury trial on the issue of fair use.<sup>240</sup> The *Fisher* Court interpreted the *Harper* statements to mean that the “ultimate conclusions to be drawn from the admitted facts” constitute “judgments [that] are legal in nature,” such that judges can analyze the historical facts “without usurping the function of the jury.”<sup>241</sup> Other Ninth Circuit opinions followed *Fisher*’s lead in deciding the fair-use issue on summary judgment, interpreting the *Harper* statements as providing a basis for courts to treat the fair-use analysis as raising pure legal issues for a judge to decide.<sup>242</sup>

In *Oracle*, the Federal Circuit relied on *Fisher* and the other Ninth Circuit cases to conclude that the court should treat the fair-use analysis as an issue of law subject to de novo review.<sup>243</sup> Notably, though, neither the Ninth Circuit nor any other circuit has ever held the standard of review to be de novo for a jury finding on the fair-use issue. Indeed, Ninth Circuit precedent (along with precedent of other circuits)<sup>244</sup> applies a deferential standard of review to jury findings on this issue.<sup>245</sup> Nevertheless, the

Campbell, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991) (same), *rev’d on other grounds*, 972 F.3d 1429 (6th Cir. 1992), *rev’d*, 510 U.S. 569 (1994).

238. See cases cited *supra* note 237.

239. 794 F.2d 432 (9th Cir. 1986).

240. *Id.* at 436.

241. *Id.* (noting also that the *Harper* statements “completely undercut” the argument that a jury should decide the fair-use issue).

242. See, e.g., *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (relying on the *Harper* statements as justification for deciding the issue of fair use where the historical facts are decided); *L.A. News*, 149 F.3d at 993 (same); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1468 (9th Cir. 1988) (same).

243. See *Oracle IV*, 886 F.3d 1179, 1193 (Fed. Cir. 2018).

244. See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (“Applying the statutory factors from 17 U.S.C. § 107, we conclude that the result reached by the jury was not unreasonable.”); *N.Y. Univ. v. Planet Earth Found.*, 163 F. App’x 13, 14 (2d Cir. 2005) (“[T]he evidence also supports the jury’s finding of fair use, under the four-factored analysis prescribed by statute. While [the copyright owner] vehemently argues, for instance, that [the defendant’s] display of copyrighted material at a fund-raiser was of a commercial nature, this issue is the jury’s to decide.” (citations omitted)); *Compaq Comput. Corp. v. Ergonome Inc.*, 387 F.3d 403, 410–11 (5th Cir. 2004) (“The evidence presented at trial and the reasonable inferences therefrom, when viewed through the lens of the statutory fair use factors, support the jury’s fair use finding.”).

245. See *Fiset v. Sayles*, No. 90-16548, 1992 WL 110263, at \*4 (9th Cir. May 22, 1992) (applying substantial-evidence standard to uphold jury verdict on copyright claim involving fair use). Since *Harper*, the Ninth Circuit has never held that *Harper* requires a de novo standard in reviewing a jury verdict on fair use, suggesting that its precedent prior to *Harper* (applying a deferential standard) would govern the issue. See *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984)

Federal Circuit interpreted *Fisher* as having “clarified” that the jury role is only with respect to historical facts and not the analysis of those facts—even though Ninth Circuit precedent expressly defers to the jury’s ultimate finding of fairness.<sup>246</sup> Regardless of this fact, the *Harper* statements have served as justification for treating the fair-use analysis as raising only legal issues for judges to decide.

On reflection, this interpretation of the *Harper* statements appears too broad for the simple reason that the *Harper* Court was reviewing a judge’s finding at a bench trial—not a jury finding.<sup>247</sup> To impute the *Harper* statements to a jury finding would read into the statements a proposition that goes beyond what the Court actually did. Such a reading would step well outside of established copyright precedent at the time of *Harper*.<sup>248</sup> For instance, three years prior to *Harper*, the Second Circuit had reversed a trial judge’s application of the fair-use doctrine on summary judgment, remanding the case for jury consideration.<sup>249</sup> The Second Circuit specifically declared that fair use “raise[s] essentially factual issues . . . [that] are normally questions for the jury.”<sup>250</sup> If the *Harper* statements mean that the fair-use analysis represents pure legal issues for

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(“We conclude that there was sufficient evidence from which a jury could have found that Hustler’s publication of the photograph was not a fair use.”); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407–08 (9th Cir. 1982) (“While the statutory standards [of fair use] are not precisely applicable to the facts at bar, because there was evidence that the . . . [defendant’s] use was neither commercially exploitive of the copyright, nor commercially exploitive of the copyright holder’s market, the jury’s verdict is certainly supported by substantial evidence.”).

246. *Compare Oracle IV*, 886 F.3d at 1194–95 (relying on *Fisher* to conclude that a jury only finds historical facts in fair-use cases, in response to Ninth Circuit precedent deferring to a jury finding), with *Jartech*, 666 F.2d at 407–08 (deferring to the jury’s ultimate finding of fair use).

247. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 543 (1985).

248. *E.g.*, *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (“Since the issue of fair use is one of fact, the clearly erroneous standard of review is appropriate.” (citation omitted)); *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977) (“It was error to hold that as a matter of law the fair use defense was available to defendants . . . . The determination whether the use under these circumstances was substantial should have been made by the trier of fact in the light of all relevant facts.”); *Eisenschiml v. Fawcett Publ’ns, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957) (“[T]he issue of fair use is a question of fact. We cannot say that the Master’s finding in this respect is clearly erroneous.” (citation omitted)); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943) (“As fair use is to be determined by a consideration of all the evidence in the case, so, likewise, is the question of infringement one of fact to be solved by a study of the evidence.”); see also *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 936 (7th Cir. 1984) (Posner, J., concurring) (“[C]lear error has been held to be the proper standard for reviewing determinations of most mixed questions of law and fact in intellectual-property cases—such questions as similarity, copying, access, and fair use in copyright cases . . . .”).

249. See *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982).

250. *Id.*

judges to determine, *Harper* would have overruled this Second Circuit holding.

Given the established and active history of courts treating fair use as a question for the jury that appellate courts review deferentially, it seems highly unlikely that the *Harper* Court would effect a monumental change in the law of fair use through its brief statements about appellate review.<sup>251</sup> Did the *Harper* Court intend to change the four-factor analysis in fair use from a jury issue (reviewed for substantial evidence) to a judge issue (reviewed de novo)? The question was not even before the Court.<sup>252</sup> Neither party had briefed it.<sup>253</sup> The proposition that the Court intended this change in the law ignores the context of the opinion, especially considering that the author of the opinion, Justice O'Connor, is well known for her adherence to precedent.<sup>254</sup> Hence, to interpret the *Harper* statements as changing fair use from a jury issue to a judge issue would ignore history—history that precedes the Constitution and continues right up to *Harper*. An intent to effect such a change in the law of fair use is patently absent in *Harper*.

Further support for this view arises from the case on which the *Harper* Court relied for its quoted statements—*Pacific & Southern Co. v.*

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251. In the year prior to *Harper*, the Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, the Court reviewed a trial court's decision that applied the fair-use doctrine to home recordings of copyrighted television broadcasts. *Id.* at 425–26. In upholding the bench-trial decision, the *Sony* Court appears to have applied a deferential standard, although the Court was not explicit in the standard that it applied: “[T]his record amply supports the District Court’s conclusion that home time-shifting is fair use.” *Id.* at 456. At the same time, the *Sony* Court did articulate new legal principles to guide the fair-use analysis, *see id.* at 447–55, exemplifying *U.S. Bank’s* admonition that appellate courts can teach legal principles even while deferring to a district court. *See U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 968 n.7 (2018); discussion *supra* Section III.A.

252. *See* Brief for Petitioners, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (No. 83-1632), 1984 WL 565994, at \*i (stating questions presented by appeal).

253. *See id.*; Brief for Respondents, *Harper*, 471 U.S. 539 (No. 83-1632), 1984 WL 565761, at \*i (stating questions presented by appeal).

254. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (O’Connor, J.) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” (citation omitted)).

Since *Harper*, Judge Posner has observed in passing that he sees no reason why courts have instituted “plenary review” (de novo review) in copyright cases dealing with fair use. *See United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (“[I]t is easy to cite a string of cases in which a court describes the standard of review for a mixed question of nonconstitutional law and fact, such as fair use in a copyright case . . . as being plenary; but we are not aware of any case which explains *why* such an issue requires plenary review . . .”).

*Duncan*.<sup>255</sup> Like *Harper*, *Pacific* was a bench trial.<sup>256</sup> There, the trial judge refused to recognize fair use unless the use was inherently productive or creative.<sup>257</sup> On appeal, the Eleventh Circuit rejected this per se rule.<sup>258</sup> The per se rule appears to have constituted a clear error in the trial judge's application of the four factors. So rather than remanding the case for the trial judge to correctly perform the four-factor analysis, the Eleventh Circuit went ahead and analyzed the factors itself, applying a non-deferential review.<sup>259</sup> This made sense, for the Eleventh Circuit could draw inferences from the historical facts just as well as the trial judge could. Notably, in applying its independent review of the four-factor analysis, the Eleventh Circuit relied on a Second Circuit case, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*<sup>260</sup> In *Triangle*, the Second Circuit reversed a trial judge's decision that a use was infringing on a motion for a permanent injunction.<sup>261</sup> The Second Circuit expressly recognized that in most instances a trial judge's finding on the issue of fair use is subject to a clearly erroneous standard.<sup>262</sup> Yet because the trial judge in that instance had failed to consider three of the four factors, the Second Circuit believed that it was "more free" to determine the question of fair use.<sup>263</sup> In both *Pacific* and *Triangle*, the trial judge had decided the issue of fair use, and in doing so, appears to have committed a clear error in applying the four factors.

*Harper* relied on *Pacific* for its proposition that an appellate court can apply an independent review, which relied on *Triangle* for the same proposition. Importantly, though, *Pacific* and *Triangle* were unusual for their time.<sup>264</sup> Given their unusualness, *Harper*'s proposition, which stems

255. 744 F.2d 1490 (11th Cir. 1984); see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (relying on *Pac. & S. Co.*, 744 F.2d at 1495).

256. *Pac. & S. Co.*, 744 F.2d at 1494.

257. *Id.* at 1495.

258. *Id.*

259. *Id.*

260. *Id.* (relying on *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980)).

261. *Triangle*, 626 F.2d at 1178 (affirming judgment on fair use grounds, which the district court had denied). The court of appeals reviewed the trial court's ruling on motions for preliminary and permanent injunctions. *Id.* at 1171. The district court explained that its ruling on the permanent injunction followed its adjudication on the merits. See *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980).

262. *Triangle*, 626 F.2d at 1175 ("We assume without deciding that a lower Court's finding that there was or was not fair use is normally a finding of fact subject to the clearly erroneous rule of F.R.Civ.P. 52(a).").

263. *Id.*

264. See cases cited *supra* note 248 and accompanying text.

from *Pacific* and *Triangle*, would appear applicable only in the circumstance common to all three cases. The only circumstance common to all three cases is that appellate judges are reviewing a trial judge (and not in the context of summary judgment), so that appears to be the circumstance for applying the *Harper* statements.<sup>265</sup> Indeed, prior to and since *Harper*, in every instance that an appellate court has applied de novo review to a district court's four-factor analysis, a judge has performed that analysis at the district-court level—with the exception of *Oracle*.<sup>266</sup> Other than in *Oracle*, no appellate court has ever applied a de novo standard in reviewing a jury finding on the issue of fair use—either before or after *Harper*.<sup>267</sup>

Although the case law supports limiting the *Harper* statements to a review of a trial judge, this conclusion raises a simple question: Why would the Court apply a different standard of review for a trial judge than for a jury? The answer is twofold. First, as discussed below, a jury deserves deference because its diversity of life experiences and values gives it a perspective that is valuable in deciding whether a use is fair.<sup>268</sup> Trial judges lack that perspective. Second, the fair-use analysis does not call for credibility judgments.<sup>269</sup> Credibility judgments are usually

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265. Deciding fair use on summary judgment would imply that the four-factor analysis involves judges deciding legal issues. See FED. R. CIV. P. 56(c); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 410–12 (3d ed. 1998) (“The fact that difficult questions of law exist or that the parties differ on the legal conclusions to be drawn from the facts is not in and of itself a ground for denying summary judgment . . .”). The Supreme Court has never ruled whether courts may decide fair use on summary judgment. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court did analyze the issue of fair use in the context of a defendant's motion for summary judgment. However, the copyright owner did not raise the issue about whether the fair-use analysis raises issues of fact inappropriate for summary judgment. See Brief on the Merits for Respondent, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292), 1993 WL 391058, at \*i (articulating question presented on appeal). The *Campbell* Court therefore did not consider the issue of whether courts may decide fair use on summary judgment.

266. See Snow, *Judges Playing Jury*, *supra* note 18, at 522–34 (reciting cases of district and appellate courts treating fair use as an issue of law).

267. See *id.*

268. See discussion *infra* Section IV.B.

269. One might argue that *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), precludes a distinction in review standards that is based on the absence of credibility assessment. In *Anderson*, the Court made a statement rejecting an argument that appellate courts “may exercise *de novo* review over findings not based on credibility determinations.” *Id.* at 574. Such a distinction, the Court explained, is not present in Rule 52(a), which states that “findings of fact shall not be set aside unless clearly erroneous.” *Id.*

The statement in *Anderson* does not govern the issue of which review standard applies to fair use. First, the *Anderson* statement was dicta—a point explicitly recognized by Justice Blackmun in his concurrence. See *id.* at 581–82 (Blackmun, J., concurring). Specifically, the Court reversed the appellate court for failing to give deference to the district court's discernment of witness credibility.



exclusive to the trial level, where a trial judge or jury can observe verbal and nonverbal behavior.<sup>270</sup> Yet determining the fairness of a use does not require judgments about witness credibility. The determination involves assessing whether the purpose of a use suggests fairness, whether the nature of a copyrighted work suggests strong protection, whether the amount and substantiality of the use is significant, and whether the use could negatively affect a potential market. Given the absence of credibility judgments, a trial judge is no more qualified to make the fair-use value judgments than is an appellate judge.<sup>271</sup> Therefore, good reason exists to distinguish between the standards that apply in reviewing a jury's decision and a trial judge's decision on the issue of fair use.<sup>272</sup>

#### IV. SUPERIORITY OF JURIES IN DECIDING FAIR USE

Consider the claim that juries are better positioned than judges to decide fair use. This claim may seem untenable in view of the highly-educated, legally-trained, and well-experienced backgrounds of federal judges, as compared to the often minimal education level and legal experience in an average jury.<sup>273</sup> To be sure, if the fair-use analysis

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*See id.* at 577. Hence, the Court's statement about a review standard for an issue on which the district court does not make credibility assessments does not address the actual issue that the *Anderson* Court was considering. Its statement was therefore dicta. Second, the *Anderson* Court made this statement in the context of reviewing a question of fact—not a mixed question of law and fact. *See id.* at 573. Unlike questions of fact, mixed questions do not always fall within the ambit of Rule 52(a). *See U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960, 966–67 (2018) (recognizing distinction in appellate review of well-settled issues of fact, which are subject to clearly-erroneous standard under Rule 52, and mixed questions of law and fact). According to the *U.S. Bank* Court, determining the standard of review for mixed questions may require asking, among other things, whether there are credibility assessments. *See id.* at 967 (“[O]ther mixed questions immerse courts in case-specific factual issues—compelling them to . . . make credibility judgments . . .”). Thus, the *Anderson* Court's admonition (in dicta) against the absence of credibility assessments serving as a basis for the standard of review for questions of fact does not imply that the absence of credibility assessments may not serve as a basis for distinguishing between the standard of review for a bench trial and the standard of review for a jury trial on the mixed question of fair use.

270. *See United States v. Smith*, 576 F.3d 681, 687 (7th Cir. 2009) (discussing reasons for deferring to a trial judge on credibility determinations).

271. *Cf. Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991) (“In considering substantial similarity between two items [under a claim of copyright infringement], we review the district court's findings *de novo*—not on the clearly erroneous standard—because what is required is only a visual comparison of the works, rather than credibility, which we are in as good a position to decide as was the district court.”).

272. *Cf. Yurman Design, Inc. v. Paj, Inc.*, 262 F.3d 101, 110–11 (2d Cir. 2001) (recognizing distinction between standard of review on the issue of substantial similarity as between a jury finding (substantial evidence) and a bench trial (*de novo*)).

273. *See Douglas G. Smith, Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 505 (1997) (“The modern juror is often relatively

represented an exercise for the highly educated, benefiting from rigorous legal thinking and expertise, judges would be much more qualified to make the assessment. For that matter, one might expect agreement among judges as to whether uses were fair. But, of course, judges do not agree on this issue.<sup>274</sup> Apparently, education, judicial experience, and legal training do not necessarily result in consistent outcomes.<sup>275</sup> This is because fair use is not an exercise that necessarily benefits from these characteristics of judges.<sup>276</sup> As discussed below, the question of whether a use is fair depends on the social values, norms, and perspectives of the decision-maker. As highly educated and legally trained as judges may be, they

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uneducated compared to the general population. The modern selection process is skewed in favor of selection from the less well-educated and experienced segment of society.”).

274. Judge Pierre Leval of the Second Circuit explained the inconsistency of judges on this issue:

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

Leval, *supra* note 189, at 1106–07; *see also* NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 66 (2008) (recognizing “inconsistent application” of fair-use doctrine). *But see* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 575 (2008) (conducting statistical analysis of fair-use cases and concluding that “our fair use case law, at least outside of the cases that reached the Supreme Court (and our casebooks), has not been marked by especially high reversal, dissent, or appeal rates”).

The case histories of the Supreme Court’s three fair-use decisions all consist of the Court reversing an appeals court that had reversed a district court. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), *rev’g* 972 F.2d 1429 (6th Cir. 1992), *rev’g* 754 F. Supp. 1150 (M.D. Tenn. 1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), *rev’g* 723 F.2d 195 (2d Cir. 1983), *rev’g* 557 F. Supp. 1067 (S.D.N.Y. 1983); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *rev’g* 659 F.2d 963 (9th Cir. 1981), *rev’g* 480 F. Supp. 429 (C.D. Cal. 1979). In two of these decisions, the Court itself was fractured: 6-3 and 5-4. *See Harper*, 471 U.S. at 539 (voting 6-3); *Sony*, 464 U.S. at 417 (voting 5-4). Tellingly, in the 5-4 *Sony* decision, Justice O’Connor switched her vote, originally believing that the defendant’s use was infringing, but ultimately concluding it to be fair. *See* Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 933–41 (2005).

275. Perhaps this is the reason that Professors David Nimmer and Peter Menell have observed judges consistently voicing a preference to send the issue of fair use to the jury. *See* Nimmer, *supra* note 110, at 590–91. They made this observation based on annual Intellectual Property Seminars held at the Federal Judicial Center in Berkeley, California, where forty judges gather each year to discuss intellectual property topics, with a large segment devoted to fair use. *Id.* Professor Nimmer explained:

Prof. Menell and I have experienced a fascinating give-and-take with the assembled appellate judges, district judges, and magistrate judges. Our concern with the purity of copyright doctrine and its incremental development in a precedential system initially led us to resist jury determinations of fair use, apart from their role in pinpointing areas in which dispute has arisen as to historical facts. When we articulated that proposition over the course of years, we consistently met an implacable wall of resistance. If there are issues in the case that require a jury to be impaneled, the judges have told us countless times, then that jury must be meaningfully empowered.

*Id.* at 591.

276. *See* discussion *infra* Section IV.A.

appear no more qualified than juries to make the sort of value judgments that define fair use. Indeed, judges appear less qualified. Whereas a judge draws from only one set of views and life experiences, a jury draws from a pool of citizens, which yields a multiplicity of life experiences that shape value judgments and cultural understandings.<sup>277</sup> The diversity of viewpoints in a jury well suits the sort of subjective judgment that determines fair use.

The argument that juries are better at deciding fair use thus relies on two premises: first, the fair-use analysis often raises issues that hinge on social values and societal perspectives, turning on subjective opinion; and second, a jury's diverse life experiences are valuable in deciding those issues. This Part examines these premises. Section IV.A examines the issues that the fair-use doctrine raises. It illustrates the subjective nature of these issues by explaining the questions that a decision-maker must consider in *Oracle*. Section IV.B argues that the diversity of juries makes them better positioned than judges to decide these subjective issues. It also observes that the subjectivity of the issues can give rise to external biases affecting judgment, and that judges are more likely to be affected by those biases than are juries.

#### A. *Subjectivity in Fair Use*

Recall the four statutory factors that guide the fair-use analysis.<sup>278</sup> In applying those factors, a decision-maker must draw inferences to conclude whether a use is fair.<sup>279</sup> As discussed below, those inferences call for judgments that often involve subjective opinion, which is based on social values and societal perspectives. The sections below describe these sorts of judgments that arise under each of the four factors and consider them specifically in *Oracle*.

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277. The Supreme Court's observation in *Sioux City & Pac. R.R. v. Stout* is instructive on this point:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge . . . . [W]hen the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

84 U.S. (17 Wall.) 657, 664–65 (1873).

278. See 17 U.S.C. § 107 (2018).

279. *Id.*

### 1. *Character and Purpose*

A decision-maker must assess whether the character and the purpose of a defendant's use suggests fairness.<sup>280</sup> Although the Copyright Act provides examples of fair purposes (i.e., nonprofit education, criticism, comment, news reporting, teaching, scholarship, and research), the Act fails to provide any guidance about the process for determining whether a purpose suggests fairness.<sup>281</sup> Nor does it provide any examples or guidance about what constitutes a fair "character." The Supreme Court, however, has given some instruction on this factor.<sup>282</sup> The Court has explained that a purpose suggests fairness where a defendant alters copyrighted expression for a purpose that "transforms" the original work by imparting a new meaning, expression, or message.<sup>283</sup> Furthermore, the Court has taught that other factors become less significant where a defendant's use is highly transformative, such as in a parody of a copyrighted work.<sup>284</sup> With respect to the character of a use, the Court has clarified that the propriety of the defendant's conduct is relevant, and that fair use presumes "good faith and fair dealing."<sup>285</sup>

Although this instruction is helpful, the decision-maker must still exercise broad discretion in deciding whether the first factor favors fair use. The decision-maker must determine whether a use is sufficiently distinctive from the original copyrighted work to constitute a transformative purpose. And even if the purpose is transformative, the decision-maker must determine whether the defendant used more expression than was necessary to accomplish the transformative purpose.<sup>286</sup> With respect to a use's character, a decision-maker must determine whether a defendant's conduct suggests impropriety. These types of judgments call for a decision-maker to comprehend and compare

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280. *See id.* § 107(1).

281. *See id.*

282. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561–62 (1985).

283. *See Campbell*, 510 U.S. at 578–79.

284. *See id.* at 579–81.

285. *Harper*, 471 U.S. at 562 (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)).

286. *Campbell*, 510 U.S. at 581, 589 ("The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line . . . . [P]arody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.").

meaning and nuance in expression.<sup>287</sup> They require an application of social norms.

Turning to Google's use of the API packages, the first fair-use factor may reasonably be construed as suggesting either fairness or infringement. As an initial matter, a decision-maker must determine whether Google's use is commercial<sup>288</sup> (without having any definition of "commercial" from Congress or the Court).<sup>289</sup> On the one hand, Google provides Android to its users free of charge, distributing the operating system through an open-source license.<sup>290</sup> From this perspective, the use would not seem to be commercial. On the other hand, Google used the 37 packages in order to make the Android platform more attractive to smartphone-app developers.<sup>291</sup> More developers programming Android apps means more apps available for consumption, and more apps consumed means more revenue for Google.<sup>292</sup> The first factor thus raises the question: Does Google use the 37 packages for a commercial purpose? Tellingly, this question does not call for a vigorous exercise of the intellect as much as a normative judgment about the meaning of commercial in this specific context.

Even if the use is commercial, the first factor requires further consideration of whether Google transformed the 37 packages that it copied. On the one hand, by employing the 37 packages in the new context of smartphones, Google added new code, instructions, and other new packages to the Android operating system. Arguably this use gives the 37 packages a new meaning.<sup>293</sup> This argument draws strength from the fact

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287. See generally STEPHEN C. LEVINSON, PRAGMATICS 226–78 (W. Sidney Allen et al. eds., 1983) (explaining that meaning in language derives from social conventions and that meanings of language change as conventions change).

288. The Federal Circuit characterized the question of whether Google's use was commercial in nature as a question of historical fact. See *Oracle IV*, 886 F.3d 1179, 1196 (Fed. Cir. 2018). But that characterization does not appear correct. Reasonable minds may disagree over whether a use's purpose is to serve a commercial end. Cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (conducting first-factor fair-use analysis and describing purpose of article under consideration as "arguably [] news," without making an absolute determination as to whether the article did in fact serve a purpose of providing news (emphasis added)).

289. See 17 U.S.C. § 107(1) (2018). Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (recognizing that recording television programs "for private home use must be characterized as a noncommercial, nonprofit activity"), with *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (finding private copying of music from website to be commercial use—even in the absence of "direct economic benefit"—on grounds that copies were "made to save the expense of purchasing authorized copies").

290. See *Oracle IV*, 886 F.3d at 1197.

291. *Id.* at 1198.

292. See *id.*

293. See *id.* at 1197, 1199.

that the Java API has a utilitarian *function* (as contrasted with creative expression),<sup>294</sup> and functional aspects of expression do not receive copyright protection.<sup>295</sup> So in promoting the function of the Java API, Google appears to have transformed the minimally expressive element of Java API so that it could be used in a new sort of platform—smartphones.<sup>296</sup>

On the other hand, Google failed to change the expression of the 37 Java API packages.<sup>297</sup> Copying expression into a new platform (smartphones) without any alteration arguably does not seem transformative.<sup>298</sup> For instance, copying music from an analogue record into an MP3 format so that it may be downloaded for free on a website does not appear to transform the original song.<sup>299</sup> It merely changes the format of the expression and the platform on which the expression is offered.<sup>300</sup> In the same way, it is arguable that Google has not transformed the Java API by merely moving it into the smartphone platform.<sup>301</sup>

Google's use might also reflect either a good-faith or a bad-faith character. Google decided to use the Java API without seeking permission

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294. *See id.* at 1199.

295. *See* 17 U.S.C. § 102(b) (2018) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . .”); *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995) (holding that a menu command hierarchy in software constituted an uncopyrightable “method of operation”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524–26 (9th Cir. 1992) (recognizing that functional aspects of computer programs are not protectable and that based in part on this reason, copying some software may constitute a fair use).

296. *See Oracle IV*, 886 F.3d at 1199–201. Ninth Circuit precedent well establishes the reasonableness of this conclusion. *See Sony Comput. Entm’t v. Connectix Corp.*, 203 F.3d 596, 606–08 (9th Cir. 2000) (recognizing, in fair-use analysis, the transformative nature of using an existing operating system’s functional aspects for the purpose of making a video-game platform interoperable with the personal computer); *Sega Enters.*, 977 F.2d at 1523 (“Accolade’s identification of the functional requirements for Genesis compatibility has led to an increase in the number of independently designed video game programs offered for use with the Genesis console. It is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote.”). Professors Pamela Samuelson and Clark Asay have voiced strong arguments in support of the transformative nature of Google’s use. *See Pamela Samuelson & Clark D. Asay, Saving Software’s Fair Use Future*, 31 HARV. J.L. & TECH. 535, 553–57 (2018) (interpreting *Connectix* and *Accolade* as supporting the conclusion that “reusing APIs can serve innovative technological purposes”).

297. *See Oracle IV*, 886 F.3d at 1201.

298. *Id.*

299. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (upholding district court’s conclusion that “downloading MP3 files does not transform the copyrighted work”).

300. *See id.* (“Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.”).

301. *See id.*

from Oracle, apparently realizing that Oracle might object.<sup>302</sup> Yet Google believed that the customary practice of the software industry would allow it to use the API packages.<sup>303</sup> In view of these facts, does the character of Google's use reflect good or bad faith? And if so, how should this factor weigh in the analysis of the first factor? It seems unquestionable that this first factor raises issues over which reasonable minds might disagree.<sup>304</sup>

## 2. *Nature of the Copyrighted Work*

A decision-maker must assess whether the nature of the copyrighted work suggests fairness or infringement.<sup>305</sup> As already stated, if the copyrighted work consists of content that is either highly creative or yet unpublished, the second factor suggests that the use is infringing, whereas if the copyrighted work consists of content that is historical, functional, or informational, this factor suggests that the use is fair.<sup>306</sup> Although the inquiry into whether a work is unpublished appears objective, the inquiry into whether content reflects more creativity than factual or functional information can introduce subjective judgment.<sup>307</sup>

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302. See Opening Brief and Addendum for Oracle America, Inc. at 10–13, *Oracle IV*, 886 F.3d 1179, 1197 (Fed. Cir. 2018) (No. 17-1118), 2017 WL 679347, at \*10–13.

303. See *Oracle III*, No. 10-03561, 2016 WL 3181206, at \*3 (N.D. Cal. June 6, 2018), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018).

304. Prior to the jury trial, the Federal Circuit entertained an argument from Oracle that no reasonable jury could find Google's use to be fair. See *Oracle II*, 750 F.3d 1339, 1372 (Fed. Cir. 2014). The Federal Circuit rejected that argument. See *id.* at 1377. Interestingly, the Federal Circuit explained: “[W]e find that due respect for the limit of our appellate function requires that we remand the fair use question for a new trial. First, although it is undisputed that Google's use of the API packages is commercial, the parties disagree on whether its use is ‘transformative.’” *Id.* at 1376.

305. See 17 U.S.C. § 107(2) (2018); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”).

306. See *Campbell*, 510 U.S. at 586 (citing creativity as element in determining fairness under second factor); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (second factor considers whether work concerns factual nature); *id.* (“The fact that a work is unpublished is a critical element of its ‘nature.’”); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (“The second factor in the fair use analysis ‘recognizes that creative works are ‘closer to the core of intended copyright protection’ than informational and functional works.’” (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) (quoting *Campbell*, 510 U.S. at 586)).

307. Consider the memoirs of President Gerald Ford, which described events in his presidency, including his pardon of former President Richard Nixon. On the one hand, this work seems like a historical account that merits less protection under factor two. See *Harper*, 471 U.S. at 594 (Brennan, J., dissenting) (characterizing manuscript of President Ford as “informational work” worthy of less copyright protection under factor two (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 497 (1984) (Blackmun, J., dissenting))). On the other hand, the manuscript contains

Applied to *Oracle*, the second factor raises the question of whether the Java API reflects creative expression. On the one hand, the original creator of the Java API made choices that organized the pre-written programs into specific groupings, known as the packages.<sup>308</sup> Those choices were not dictated solely by functional considerations, suggesting an element of creativity in the grouping of packages.<sup>309</sup> Given that Oracle could have organized the packages in any number of ways, the particular organization of Java API arguably reflects a “highly creative” choice.<sup>310</sup> On the other hand, the functional aspect of the packages suggests minimal creativity.<sup>311</sup> Specifically, the Java programming structure represents a functional operating system, and the Copyright Act specifically exempts a “system” from receiving copyright protection.<sup>312</sup> Although courts have held that a computer operating system is not per se uncopyrightable,<sup>313</sup> courts have also recognized that operational functions of a computer program receive thin protection.<sup>314</sup> The evidence can thus be reasonably interpreted to support contrasting views.

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“subjective descriptions” and “individualized expression,” suggesting creativity, and thereby greater protection under factor two. *See Harper*, 471 U.S. at 564 (recognizing that President Ford’s manuscript contains subjective expression deserving strong copyright protection under factor two).

308. *Oracle IV*, 886 F.3d 1179, 1186 (Fed. Cir. 2018).

309. *Id.* at 1204.

310. *Oracle III*, No. 10-03561, 2016 WL 3181206, at \*9–10 (N.D. Cal. June 6, 2018), *rev’d*, 886 F.3d 1179 (Fed. Cir. 2018). The district court explained the reasonableness of a jury’s view that Google’s use was transformative as follows:

Android did not merely adopt the Java platform wholesale as part of a broader software platform without any changes. Instead, it integrated selected elements, namely declarations from 37 packages to interface with all new implementing code optimized for mobile smartphones and added entirely new Java packages written by Google itself. This enabled a purpose distinct from the desktop purpose of the copyrighted works—or so our jury could reasonably have found.

*Id.* at \*9.

311. *Id.* at \*10 (“Our jury could reasonably have found that, while the declaring code and SSO were creative enough to qualify for copyright protection, functional considerations predominated in their design, and thus Factor Two was not a strong factor in favor of Oracle after all.”); *see also Samuelson & Asay, supra* note 296, at 558–61 (arguing that because computer-program APIs are functional, they should be subject to broader fair uses).

312. *See* 17 U.S.C. § 102(b) (2018) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, *system*, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” (emphasis added)).

313. *See, e.g., Apple Comput. Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1252 (3d Cir. 1983) (rejecting argument that computer operating system cannot be copyrighted).

314. *See Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446–47 (9th Cir. 1994) (recognizing that graphical user interface of Apple operating system receives only “thin” copyright protection, such that infringement could occur “only if the works as a whole are virtually identical”); *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 704 (2d Cir. 1992) (“The essentially utilitarian nature of a computer program further complicates the task of distilling its idea from its expression.”).



### 3. *Amount and Substantiality of Portion Used*

A decision-maker must assess whether the amount that a defendant used, as well as the substantiality of that amount, suggests fairness or infringement.<sup>315</sup> If a defendant uses a significant quantity, or alternatively uses content that is valuable in the original copyrighted work, this factor suggests infringement.<sup>316</sup> Importantly, this inquiry must consider whether the amount and substantiality that a defendant uses may be justified in view of the purpose of that use.<sup>317</sup> Whether the quantity of content used reflects a significant amount may be debatable.<sup>318</sup> Whether that content reflects a valuable portion of the copyrighted work calls for a judgment about content value, which seems inherently subjective. And whether this amount and value may be justified because of the use's purpose introduces further subjectivity into the analysis.<sup>319</sup>

Applied to *Oracle*, the third factor raises the question of whether the 37 packages constitute a significant portion of the 166 packages in the Java API. This translates to Google having copied over 20% of the Java API packages. Yet at the same time, the actual code that Google copied consisted of only “a tiny fraction of one percent of the [Java API].”<sup>320</sup> So, has Google copied a significant amount? As to substantiality, the 37 packages represent an organizational characteristic of Java API that would ensure interoperability between Android and the Java programming, attractive for Android app developers. Consequently, the 37 packages seem qualitatively substantial. On the other hand, Google seems to have copied only so much as was necessary to accomplish its purpose of preserving the interoperability. Arguably Google used no more than was

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As mentioned in Section I.B.2, the district court in *Oracle* held that the Java API is not copyrightable. *See Oracle IV*, 886 F.3d at 1185. The Federal Circuit then reversed that holding. *See Oracle II*, 750 F.3d 1339, 1353–54 (Fed. Cir. 2014).

315. *See* 17 U.S.C. § 107(3).

316. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985).

317. *See Campbell*, 510 U.S. at 586.

318. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986) (“There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”).

319. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (“For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use.”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (“If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.”).

320. *See Oracle III*, No. 10-03561, 2016 WL 3181206, at \*9–10 (N.D. Cal. June 6, 2018), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018).

necessary to transform the work.<sup>321</sup> How substantial are the 37 packages in the Java API? The evidence can be reasonably interpreted to support either view.

#### 4. *Potential Market Effect*

A decision-maker must assess whether the defendant's use negatively affects the market for, or value of, a copyrighted work, including any potential markets.<sup>322</sup> In assessing this factor, the decision-maker must contemplate the hypothetical situation of the defendant's use becoming widespread.<sup>323</sup> If the use would result in either actual or potential market harm, the decision-maker must then determine whether that harm results from substitution with the original work or, alternatively, from criticism of the original work—the former threat suggesting infringement and the latter threat suggesting fairness.<sup>324</sup> In considering a use that threatens a *potential* market, the decision-maker must determine whether that potential market reflects a traditional, reasonable, or likely-to-be-developed market.<sup>325</sup> Furthermore, a decision-maker must decide whether an established licensing market actually comprises a market for others to make fair uses of the work, such that a negative effect on the licensing market would not suggest infringement.<sup>326</sup> Hence, this factor calls for

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321. *Cf. Campbell*, 510 U.S. at 589 (“[W]e think the Court of Appeals correctly suggested that ‘no more was taken than necessary,’ but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original’s ‘heart.’” (citation omitted)).

322. *See* 17 U.S.C. § 107(4) (2018). The Federal Circuit viewed the question of whether Google caused harm to “potential markets” of Oracle as a question of historical fact. *Oracle IV*, 886 F.3d 1179, 1196 (Fed. Cir. 2018). But that does not seem correct. Whether a potential market even exists is based on inferences of what the actual market is. Whether a defendant harms that market is further removed from an actual, verifiable state of affairs. Professor David Nimmer aptly describes this inquiry as raising “[q]uestions of *what might have been*.” Nimmer, *supra* note 110, at 569.

323. *See Campbell*, 510 U.S. at 590.

324. *See id.* at 591–92 (“[T]he role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’” (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986))).

325. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994) (“Only an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use’s ‘effect upon the potential market for or value of the copyrighted work.’” (citation omitted)).

326. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (“[A] copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work . . . [A] publisher’s willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images.” (quoting *Castle Rock Entm’t, Inc. v. Caro Publ’g Grp.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998))).

decision-makers to draw inferences about actual and potential markets for the copyrighted work and actual and potential effects of the use on those markets. It involves subjective judgment.

Applied to *Oracle*, the fourth factor raises the question of whether Google has caused market harm to an actual or potential market for Java API. The actual market for the Java API did not appear to include smartphones: Oracle had licensed the Java API for programming on only desktops and laptops.<sup>327</sup> Yet some phone companies (prior to the advent of the smartphone) had employed Java as an operating system, and, furthermore, Oracle had planned to license Java API for use in smartphones.<sup>328</sup> Nevertheless, even prior to Android, Oracle's predecessor, Sun, had made all of the relevant Java design code available for free to programmers under an open-source license, with only a lenient "give-back" provision.<sup>329</sup> Given these facts, the questions arise: Is the smartphone market a traditional, reasonable, or likely-to-be-developed market for the Java API? If it is, does Google's use of the 37 packages detrimentally affect that market? Reasonable minds may disagree.

Although much more could be said about each factor, relevant to the discussion here is the simple fact that reasonable minds often differ as to whether each of these factors—and their sub-issues—suggests fairness in any given case. And even assuming that decision-makers agree on each factor, reasonable minds may disagree on the weight that each factor receives in the analysis.<sup>330</sup> Hence, a decision-maker can reasonably construe a defendant's use as supporting contrary views about whether the use is fair. The factors require subjective opinion about the specific facts under consideration. As a flexible, case-by-case doctrine, fair use inherently involves discretionary judgment of a decision-maker, which invites subjective assessments. That is by design.

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327. See *Oracle IV*, 886 F.3d at 1208.

328. See *id.* at 1209.

329. See *Oracle III*, No. 10-03561, 2016 WL 3181206, at \*10 (N.D. Cal. June 6, 2018), *rev'd*, 886 F.3d 1179 (Fed. Cir. 2018).

330. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 584 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.") (explaining that the statutory examples of fair and infringing purposes do not necessarily imply that particular uses made for those purposes are in fact fair or infringing).

## B. *Suitability of a Jury*

### 1. *Diversity*

Given the sort of questions that arise in the fair-use analysis, the institution of a jury brings a valuable perspective to that analysis as compared to the institution of a judge. This perspective derives from a jury's diversity of life experiences. Life experiences shape value judgments, perspectives, and opinions.<sup>331</sup> Diversity brings a divergence of cultural understandings, practices, and norms.<sup>332</sup> This characteristic of diversity is especially relevant in deciding whether a use is fair, for an assessment of fairness demands an understanding of cultural norms and social values.<sup>333</sup> As one commentator has observed: "The reference to *fairness* in the doctrine of fair use imparts to the copyright scheme a bounded normative element that . . . gives effect to the community's established practices and understandings . . ."<sup>334</sup> The established practices and understandings of a community define whether a use's purpose is socially beneficial, whether the content of the original work merits strong protection, whether the defendant used a significant quantity or a qualitatively substantial amount of the original work, and whether the use could plausibly cause harm to a potential market of the copyrighted

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331. See Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 856–57 (2014) (arguing that differences in income, unemployment, educational attainment, and homeownership—within distinct racial groups—informs a juror's "attitudes, beliefs, and assumptions about the world," thereby creating "differences in viewpoints [that] could affect a juror's approach to a case," including a juror's "interpretation of subjective and vague standards commonly found in civil cases, such as 'reasonable,' 'substantial,' and 'due care'").

332. See *id.*

333. Cf. 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 15.2, at 351–52 (2d ed. 1986) (discussing fact-finding process of jury and noting room for consideration of policy to choose between equally indemonstrable generalizations); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 113 (1924) (observing that mixed questions of law and fact regarding whether defendant's conduct was reasonable in negligence context raise social value judgments of normative nature). See generally Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 526–27 (2007) ("What constitutes a transformative use is potentially highly subjective."); Leval, *supra* note 189, at 1105–07 (noting vagueness of fair use doctrine results in individualized judgments); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, BYU L. REV. 1201, 1252 (2005) ("[D]rawing the line between transformative and non-transformative uses is laden with subjectivity.").

334. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1161 (1990) (emphasis added) ("The reference to fairness in the doctrine of fair use imparts to the copyright scheme a bounded normative element that is desirable in itself. It gives effect to the community's established practices and understandings and allows the location of copyright within the framework of property generally.").

work. In short, the heterogeneous composition of a jury provides a collective perspective that is more likely to reflect the norms and values of a community and culture, and that perspective is especially valuable to the process of assessing whether a use is fair.<sup>335</sup>

The institution of a judge, by contrast, lacks such a heterogeneous perspective.<sup>336</sup> A trial judge has only one set of life experience from which to form opinions. Even an appellate review panel, consisting of multiple judges, often comprises homogeneous life experiences (highly educated,<sup>337</sup> high incomes,<sup>338</sup> older in age,<sup>339</sup> usually white,<sup>340</sup> and usually trained only in the law<sup>341</sup>). And if their life experiences happen to be diverse, they are only three in number (or two for a majority). Absent in an appellate panel is the jury's diverse reservoir of cultural values and life experiences.<sup>342</sup> Hence, the possibility that fair use presents a close call

335. See *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999) (“Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations between two works.”).

336. See Snow, *Judges Playing Jury*, *supra* note 18, at 500 (discussing superiority of jury at deciding fair use over judges).

337. An overwhelming majority of sitting federal judges have attended top-tier law schools. See Adam Feldman, *Law Schools, Judges, and Government Attorneys*, EMPIRICAL SCOTUS (Sept. 10, 2017), <https://empiricalsctus.com/2017/09/10/law-schools/> [<https://perma.cc/2RG9-5WMZ>].

338. As of 2018, a federal district judge receives \$208,000 as an annual salary. See *Judicial Compensation*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/L4MU-AAT3>]. A federal appellate judge receives \$220,600 as an annual salary. See *id.* This amount places a federal judge in the top 6-7% of household incomes in the United States—not counting any income that a judge's spouse might receive. See *United States Household Income Brackets and Percentiles in 2018*, DQYDJ (Dec. 29, 2018), <https://dqydj.com/united-states-household-income-brackets-percentiles/> [<https://perma.cc/3EET-79BB>].

339. Since 2000, the average age of Article III federal judges has been increasing from 65, approaching 70. See *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR. (2017), [https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges#\\_ftnref7](https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges#_ftnref7) [<https://perma.cc/U3EY-PHKL>].

340. Based on data from the years of 1940 to 2017, Article III federal judges reflect an overwhelming majority of the white Caucasian race. See *id.*

341. Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for *persons trained only to the law* to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” (emphasis added)).

342. Juries, of course, are not always entirely diverse. See Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. B. ASS'N (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/> [<https://perma.cc/KT27-GLQ8>]. Studies relative to individual areas show that the white race may be overrepresented. See, e.g., MAUREEN BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B, at 9 (2016), [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2016-10-05%2020150100%20REPORT%20Jury%20Pool\\_Berner.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2016-10-05%2020150100%20REPORT%20Jury%20Pool_Berner.pdf) [<https://perma.cc/LZ6V-48GU>] (“Our survey analysis indicated a small but persistent pattern of overrepresentation of whites and underrepresentation of African

does not mean that judges should step in. Just the opposite: it means that judges should refrain from upsetting the consensus that a diversity of jurors has reached.

One might argue that the complexities of technology should diminish the role of a jury in deciding lawsuits, where billions of dollars may be at stake.<sup>343</sup> Often jurors lack higher educational backgrounds, which might suggest that they lack the legal sophistication to draw and weigh inferences about complex technologies.<sup>344</sup> The argument, then, is that the complexity of the technologies in dispute reduces the effectiveness of juries at deciding the issue of fair use in certain cases.<sup>345</sup>

This argument is not persuasive for two reasons. First, the complexity of a technology does not usually determine the issues of fair use. In *Oracle*, the computer-programming language certainly represents a complex technology. But understanding the issues does not require a deep understanding of the technology. For instance, a juror must decide whether Google's provision of Android for free, which increases its sales of Android apps, suggests that Google's use of the Java API is not commercial. The juror, then, must decide whether Google's use of the API falls within the meaning of commercial enterprise in the gig economy of this culture. The process for making this decision is not complex; it requires a simple judgment that benefits from a well-diversified perspective.

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Americans among jury pool survey respondents in Chatham and Orange counties [of North Carolina], but we did not find a similar pattern for Hispanics. There are additional disparities among the survey results with respect to sex and household size when compared to census data.”). The Author is not aware of any comprehensive study of federal jury demographics across the country, or more specifically, those demographics in copyright cases (given that attorneys may exercise strikes differently according to the type of case being tried). Nevertheless, even assuming that jury compositions do not reflect the actual diversity of citizens within our country, there is still a greater likelihood for diversity of viewpoint in a jury as compared to a judge: the institution of the jury draws from a much more diverse pool of potential candidates than does the institution of the judge. Specifically, the jury institution draws from most citizens of a community, whereas the judge institution draws from only citizens who are highly educated, high-income, and usually older in age. *Compare Juror Qualifications*, U.S. CTS., <http://www.uscourts.gov/services-forms/jury-service/juror-qualifications> [<https://perma.cc/6DJT-WVLD>] (reciting requirements for federal juror eligibility), with sources cited *supra* notes 338–339.

343. See Susan Decker, *Google Could Owe Oracle \$8.8 Billion in Android Fight*, BLOOMBERG (Mar. 27, 2018, 6:44 AM), <https://www.bloomberg.com/news/articles/2018-03-27/oracle-wins-revival-of-billion-dollar-case-against-google> [<https://perma.cc/M5HQ-WQZ4>].

344. See Nimmer, *supra* note 110, at 587–89 (recognizing belief that “laymen were not fit to discharge the duties [of deciding the fair-use issue] that were challenging even to specialists in the field,” and arguing against that belief).

345. See *Samara Bros., Inc. v. Wal-Mart Stores*, 165 F.3d 120, 136 n.5 (2d Cir. 1998) (Newman, J., dissenting in part), *rev'd*, 529 U.S. 205 (2000) (“[J]uries have a difficult time understanding the principles of such unfamiliar fields of law as copyright and trademark . . .”).

Second, juries regularly consider complex factual issues. Antitrust cases, for instance, require juries to consider complicated economic issues, such as the impact of anti-competitive activities on the competitive market.<sup>346</sup> Antitrust cases present issues related to sophisticated economic transactions to a jury. Similarly, products-liabilities cases require juries to weigh the safety benefits of an omitted design feature against the costs of including it, accounting for any reduction in utility of the product.<sup>347</sup> Product designs, omissions, and their potential effects pose intricate complexities for juries to consider. To be sure, complexity alone does not mandate that a judge decide an issue.

## 2. *Impartiality*

A jury is more likely to be impartial in assessing whether a use is fair. Factors irrelevant to the fair-use inquiry may affect the subjective judgment that fair use demands. Such factors may be influential only on a subconscious level, perhaps affecting only the framework through which the decision-maker views an issue.<sup>348</sup> Subtle but significant, such a perspective bias is possible with any jurist—judge or juror alike. Yet the institution of a jury requires consensus from many more members than a

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346. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 497–98 (1988) (upholding jury’s “findings that petitioner’s actions had an adverse impact on competition, were not the least restrictive means of expressing petitioner’s opposition to the use of polyvinyl chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws”).

347. *See, e.g.*, *Casey v. Toyota Motor Eng’g & Mfg. N. Am., Inc.*, 770 F.3d 322, 333–34 (5th Cir. 2014) (“To prove safer alternative design, a plaintiff must show the safety benefits from [the] proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety . . . . ‘[T]here was sufficient evidence for a jury to find [that the witness]’s testimony satisfied the requisite risk-utility test.” (quoting *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 197 (5th Cir. 2006))).

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

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

STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 249 (1992). *See generally* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987) (“Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims.”).

panel of appellate judges, and those members have a greater likelihood of disparate life experiences, each subject to different biases. In effect, the likelihood of diversity is greater with a jury, and that introduces a likelihood of diversity of biases, such that a particular external bias is less likely to prevail in a jury's view of fairness. Judges, by contrast, lack this likelihood of diversity, so their homogeneous composition is more likely to effectuate implicit bias.<sup>349</sup>

An example of this form of bias may have occurred in *Oracle*. The Federal Circuit exercises exclusive jurisdiction for appeals of patent cases.<sup>350</sup> Arguably, this exclusive jurisdiction has influenced its rulings in a way that are more agreeable to the patent bar.<sup>351</sup> Some commentators have argued that the Federal Circuit may be viewing issues in a light that is more conducive to upholding patent rights.<sup>352</sup> How is this relevant to the *Oracle* Court's treatment of fair use? Although patent law is not copyright law, the differences between their regimes do not necessarily erase (and indeed may exacerbate) the likelihood of partiality in framing issues. Consider that patent law lacks any fair-use doctrine.<sup>353</sup> As a result, a Federal Circuit judge, who most often is viewing intellectual property issues through the lens of patent law, might not recognize the importance of the fair-use doctrine to the same degree that a jury might.<sup>354</sup>

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349. See *supra* note 342 (discussing diversity of jury pool).

350. See 28 U.S.C. § 1295(a)(1) (2018) (providing exclusive jurisdiction of patent appeals to Federal Circuit).

351. See Paul R. Gugliuzza, *Saving the Federal Circuit*, 13 CHI.-KENT J. INTELL. PROP. 350, 351 n.7 (2014) (“Exclusive jurisdiction may also make the court too responsive to the desires of the patent bar.” (relying on LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 99 (2006) (arguing that judges on courts with subject-matter jurisdiction “are likely to orient themselves toward the legal fields on which they concentrate and toward the lawyers in those fields”))).

352. See Clark D. Asay, *Patenting Elasticities*, 91 S. CAL. L. REV. 1, 61 (2017) (“Some have suggested that the court may have been motivated to take this expansive view in order to counteract the weakening of patent rights it had witnessed over the last several years. Indeed, as the exclusive court of appeals for patent cases, the Federal Circuit has had a front-row seat to the last decade’s general weakening of patent rights by the Supreme Court and Congress.”); Pamela Samuelson, *Functionality and Expression in Computer Programs: Refining the Tests for Software Copyright Infringement*, 31 BERKELEY TECH. L.J. 1215, 1291 (2017) (“The [Federal Circuit]’s *Oracle* opinion may reflect that court’s anxiety that software would be underprotected by IP law if it ruled in Google’s favor so soon after the Supreme Court’s *Alice* decision substantially cut back on the availability of patent protection for software-related inventions.”).

353. Cf. Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177 (2000) (proposing fair use for patent law).

354. See Krista A. Cox, *Oracle v. Google Is More Evidence that the Federal Circuit Has No Business Deciding Copyright Cases*, ABOVE THE L. (Mar. 29, 2018), <https://abovethelaw.com/2018/03/oracle-v-google-is-more-evidence-that-the-federal-circuit-has-no-business-deciding-copyright-cases/> [https://perma.cc/C2UD-JMFJ] (suggesting “the Federal



Furthermore, consider that Google seems sufficiently wealthy to license the intellectual property at issue, suggesting that fair use is not necessary for the copyright regime to work efficiently. Such reasoning might make sense to a judge who most often hears patent issues, as contrasted with a regular jury.

Similar to this bias of viewing the fair-use issue through a general framework of patent law, the Federal Circuit might view the fair-use issue through a specific doctrinal framework within patent law. The *Oracle* opinion suggests that the Federal Circuit did exactly this, explicitly comparing the standard of review for fair use to the standard of review for obviousness in patent law.<sup>355</sup> The Federal Circuit stated in its *Oracle* opinion:

[T]his is similar to the standard we apply in obviousness cases [of patent law]. Because obviousness is a mixed question of law and fact, we “first presume that the jury resolved the underlying factual disputes in favor of the verdict and leave those presumed findings undisturbed if they are supported by substantial evidence. Then we examine the ultimate legal conclusion of obviousness de novo to see whether it is correct in light of the presumed jury fact findings.”<sup>356</sup>

As noted here, for the issue of obviousness in patent law, the Federal Circuit applies deferential review only with respect to underlying historical facts. The inferences to be drawn from those facts, and thereby the ultimate conclusion of obviousness, are subject to de novo review. And to a certain extent, this reasoning makes sense (at least more so than the reasoning does for the issue of fair use)<sup>357</sup>: there seems to be a degree of objectivity in the obviousness inquiry, which compares the invention with the knowledge of someone in the field as well as the prior art.<sup>358</sup> Absent is the sort of highly subjective inquiry that fair use requires. In this way, the two inquiries are distinct.<sup>359</sup> Nevertheless, the Federal Circuit

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Circuit’s bias in favor of strong intellectual property rights” and that “the Federal Circuit predetermined what it wanted the outcome of the case to be”).

355. *Oracle IV*, 886 F.3d 1179, 1195 n.4 (Fed. Cir. 2018).

356. *Id.* (internal brackets omitted) (quoting *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012)).

357. *But see* Brief of Law Professors as Amicus Curiae in Support of Petitioner, *Soverain Software v. Newegg, Inc.*, 571 U.S. 1127 (2014) (No. 13-477), 2013 WL 6115818 (arguing that Seventh Amendment precludes the Federal Circuit from reviewing jury finding of obviousness under a de novo standard).

358. *See Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 17–18 (1966).

359. *But see id.* at 18 (recognizing that “difficulties in applying the nonobviousness test” are likely to arise and that “[w]hat is obvious is not a question upon which there is likely to be uniformity of

appears to have viewed fair use through its patent lens of obviousness. Its patent-oriented framework could have unduly influenced its treatment of fair use.

Thus, juries appear better suited than judges to decide the fair-use issue. As explained above, fair use raises questions over which reasonable minds often disagree—normative questions that concern whether a use should be permissible.<sup>360</sup> In the face of these questions, a heterogeneous jury pool offers a more diversified perspective that informs the meaning and implications of a defendant’s use. The jury also is less likely to suffer from viewpoint bias than is a homogeneous judicial panel, as exemplified by the Federal Circuit treating fair use like a patent issue. Juries provide a degree of diversity and impartiality that better fits the open-ended determination of whether a use is fair.

## CONCLUSION

The Constitution requires that appellate courts defer to jury findings on the issue of fair use. English common-law courts have recognized a litigant’s right to a jury in copyright disputes—and specifically on fair-use issues—dating back to 1785.<sup>361</sup> History dispositively establishes a Seventh Amendment right to a jury.<sup>362</sup> So in the absence of an unreasonable interpretation of evidence, appellate courts may not interfere with a jury’s finding of fair use.

This conclusion is supported by the Court’s recent holding in *U.S. Bank*, where the Court taught principles that determine the proper review standard for mixed questions of law and fact.<sup>363</sup> Specifically, the fact-specific nature of fair use depends largely on value judgments, which juries are well positioned to make, and that suggests a deferential review.<sup>364</sup> Furthermore, this conclusion is consistent with the Supreme Court’s statement in *Harper* that a reviewing court may independently analyze the fair-use factors: that statement must apply only in the context of reviewing a bench trial.<sup>365</sup>

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thought in every given factual context” such that the obviousness inquiry “should be amenable to a case-by-case development”).

360. See discussion *supra* Section IV.A.

361. See discussion *supra* Section II.A.

362. See discussion *supra* Section II.A.

363. See *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC*, 583 U.S. \_\_\_, 138 S. Ct. 960 (2018).

364. See discussion *supra* Section III.A.

365. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); discussion *supra* Section III.B.

The law prefers a jury to decide whether a use is fair because the issue raises questions that call for subjective judgments.<sup>366</sup> Those questions demand a comprehension of subtle nuances in expression, as well as an application of social values and norms of society.<sup>367</sup> The jury is in the best position to make these judgments.<sup>368</sup> A jury offers a diversity of life experiences that informs a judgment of fairness.<sup>369</sup> Additionally, the plurality of jurors protects against biases that could otherwise affect the analytical framework through which jurists decide the fair-use issue.<sup>370</sup>

Thus, the *Oracle* Court was wrong to treat the jury determination of fair use as “advisory only.”<sup>371</sup> The jury concluded that Google’s use was fair, and that should decide the issue. The Constitution, Supreme Court jurisprudence, and sound policy all mandate that the Federal Circuit should have deferred to the judgment of the jury.

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366. See discussion *supra* Part IV.

367. See discussion *supra* Section IV.A.

368. See discussion *supra* Section IV.B.

369. See discussion *supra* Section IV.B.1.

370. See discussion *supra* Section IV.B.2.

371. See *Oracle IV*, 886 F.3d 1179, 1196 (Fed. Cir. 2018).