

THE QUESTIONABLE ORIGINS OF THE COPYRIGHT INFRINGEMENT ANALYSIS

Shyamkrishna Balganesh[†]

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

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[†] Professor of Law, University of Pennsylvania Law School.

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INTRODUCTION

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

While undoubtedly *the* central issue in an infringement lawsuit, determining whether a defendant infringed the plaintiff’s protected work involves both elements of fact and of law. It entails ascertaining facts about the defendant’s conduct and then making a normative judgment about the legality of such conduct.³ Classifying these issues appropriately, and dividing them up between judge and jury remains a complex undertaking, and one that the

¹ U.S. CONST. amend. VII.

² See *Feltner v. Colum. Pics. Tel., Inc.*, 523 U.S. 340, 346 (1998); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F. 2d 1010, 1014 (7th Cir. 1991); 3 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT §12.10 (2015) (“[I]t is beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial.”).

³ For a general discussion, see: Alan Latman, “*Probative Similarity*” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1188-89 (1990); Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 214-233 (2012); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719 (2009).

parties routinely disagree over.⁴ Indeed, the spate of criticism surrounding the jury verdict in the copyright infringement case involving the song “Blurred Lines,” vividly illustrates the complexity of empanelling juries to determine the existence of copyright infringement.⁵

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

Even though the Supreme Court has never weighed in on the matter, courts around the country take their guidance on the copyright infringement analysis from a landmark decision of the Second Circuit that is believed to have defined the structure of the inquiry and the jury’s role in it: *Arnstein v. Porter*.¹¹ Handed down nearly seven decades ago, courts, scholars, and lawyers consider the Second Circuit’s approach to the infringement analysis in the case to be part of the modern copyright law canon.¹² While a few circuits have

⁴ As it is in a variety of other areas. See, e.g., LEON GREEN, JUDGE AND JURY (1930); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

⁵ See, e.g., Wendy Gordon, *The Jury in the ‘Blurred Lines’ Case was Misled*, NEWSWEEK, March 18, 2015, <http://www.newsweek.com/jury-blurred-lines-case-was-misled-314856>; Tim Wu, *Why the “Blurred Lines” Copyright Verdict Should be Thrown Out*, NEW YORKER, March 12, 2015, <http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out>; Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity: What the “Blurred Lines” Team Copied is Either Not Original or Not Relevant*, SLATE, March 12, 2015, http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.single.html.

⁶ Lemley, *supra* note __, at 719.

⁷ *Id.*

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

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

¹⁰ See GEORGE H. KING ET AL., NINTH CIRCUIT JURY INSTRUCTIONS COMM., NINTH CIRCUIT, MANUAL OF MODEL JURY INSTRUCTIONS § 17.17 (2007) (withdrawn).

¹¹ *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946) (hereinafter “*Arnstein*”).

¹² See, e.g., *Batiste v. Najm*, No. CIV.A. 13-5463, 2014 WL 2883019 (E.D. La. June 25, 2014) (noting how the *Arnstein* test “continues to be employed”); RONALD S. ROSEN, MUSIC AND COPYRIGHT 208 (2008)

made important modifications to its central approach, the “*Arnstein* test” as it has come to be known, remains the dominant approach to copyright infringement analysis today.¹³

The *Arnstein* test for copyright infringement involves two distinct steps. In the first, the decision-maker is to determine whether the defendant actually “copied” from the plaintiff’s work, since without proof of copying there can be no copyright infringement.¹⁴ As a purely factual issue, this question is ordinarily one for a jury. Once copying as a factual matter is found to exist, the next step is to determine whether the copying was substantial enough to be deemed illicit or wrongful—and therefore legally actionable.¹⁵ Somewhat counter-intuitively, this second step is also treated as a purely factual question and therefore within the purview of the jury.¹⁶ This second step attempts to measure the subjective reaction of the jury to the copying.¹⁷ Consequently, expert testimony and other objective evidence are treated as presumptively irrelevant and therefore inadmissible.¹⁸ Almost all courts around the country adhere to this two-step formulation in one way or another and continue to disallow any expert testimony or objective analysis of the works during the second step.¹⁹

The decision in *Arnstein* is thus to be credited with (or faulted for!) giving juries significant control over the infringement analysis. In treating the question of “wrongful” or “illicit” copying as a pure question of fact, precluding expert testimony on it, and then requiring juries to base their decision on what an “ordinary lay hearer” or “ordinary observer” would conclude,²⁰ *Arnstein* in effect cabined courts’ (i.e., judges’) supervision over the question of copyright infringement. Over the years, *Arnstein*’s

(noting how *Arnstein* “rises like a phoenix from the ashes” to influence the analysis); Samuelson, *supra* note __, at 1827 (observing that the *Arnstein* dictum “lives on”).

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

¹⁴ *Arnstein*, 154 F. 2d at 468.

¹⁵ *Id.*

¹⁶ *Id.* at 469.

¹⁷ Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1398 n.4 (9th Cir. 1997) (describing the second step as entailing a subjective audience level response). In the Ninth Circuit, this second step is characterized as a subjective test, building on the *Arnstein* test. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).

¹⁸ *Arnstein*, 154 F. 2d at 468.

¹⁹ See ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW §3 (2014) (observing how most courts use one of two tests, both of which originate in *Arnstein*).

²⁰ *Arnstein*, 154 F. 2d at 468. Some courts have applied *Arnstein* to develop the test into an “ordinary observer” test. See Boisson v. Banian, Ltd., 273 F. 3d 262, 271-72 (2d Cir. 2001).

empowerment of the jury in this regard has come to be accepted as law.²¹ In addition, *Arnstein*'s decision to hand the issue over to the jury has also come to be rationalized as comporting with the overall motivating utilitarian ideals of copyright law. *Arnstein*'s deference to juries is treated as a deliberate one, aimed at examining the potential market effects of the defendant's actions by assessing the reaction—to the copying—of the work's intended "audience."²² And so the practice of allowing juries to decide the legality of a defendant's copying, i.e., its wrongfulness, continues unabated, and enters into the public spotlight every few years when a jury finds a well-known work to be infringing.²³

The *Arnstein* opinion itself says very little about its reasons for according juries such a central role in what is unquestionably a complex determination. What makes this omission in the opinion doubly perplexing is the reality that the author of the majority opinion, Judge Jerome Frank, was an outspoken and acerbic critic of the jury system.²⁴ A well-known Legal Realist, during his time as a federal judge Frank had devoted many hours of his non-judicial work to criticizing the jury system in various books and articles.²⁵ The practice of allowing juries to decide what was in effect "the law of the particular case" was to Frank among the greatest scourges of the American system of adjudication, since it contributed to unpredictable "jury-made law," which often bore no connection to actual rules of law.²⁶ Frank's life-long dislike of juries and his careful identification of the various malaises promoted by the jury system are therefore hard to reconcile with the overwhelming

²¹ To the extent that a judge may grant summary judgment in some jurisdictions, it is only on the basis that no reasonable juror could have possibly arrived at a contrary decision. See OSTERBERG & OSTERBERG, *supra* note __, at §3.1. Thus, it is accepted as a jury question. In some jurisdictions, courts remain extremely reluctant to award summary judgment on the second question. *Id.* at § 3.2.1[F].

²² *Dawson*, 905 F.2d at 734 ("In light of the copyright law's purpose of protecting a creator's market, we think it sensible to embrace *Arnstein*'s command that the ultimate comparison of the works at issue be oriented towards the works' intended audience.").

²³ See *supra* note __ (relating to the "Blurred Lines" case); *Frustrated Michael Bolton Ready To Move On*, BILLBOARD, Jan. 30, 2001, <http://www.billboard.com/articles/news/80666/frustrated-michael-bolton-ready-to-move-on> (discussing the jury award against Michael Bolton for copyright infringement); Corey Moss, *Jury Orders Dr. Dre To Pay \$1.5 Million For Copyright Infringement*, MTV NEWS, May 7, 2003, <http://www.mtv.com/news/1471763/jury-orders-dr-dre-to-pay-15-million-for-copyright-infringement/> (discussing jury award against Dr. Dre for copyright infringement).

²⁴ See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 134 (1995) (observing how Frank disbelieved in juries completely); Julius Paul, *Jerome Frank's Views on Trial by Jury*, 22 MO. L. REV. 28 (1957).

²⁵ See, e.g., JEROME FRANK, LAW AND THE MODERN MIND 170 (rev. ed. 1949) (1930); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 109-47 (1949); Jerome Frank, *Both Ends Against a Middle*, 100 U. PA. L. REV. 20, 30 (1951); Jerome N. Frank, *The Case for the Special Verdict*, 32 J. AM. JUD. SOC. 142 (1949).

²⁶ FRANK, COURTS ON TRIAL, *supra* note __, at 120.

confidence in juries that he exudes in *Arnstein*, a confidence that continues to haunt copyright law and practice to this day.

This Article argues that *Arnstein*'s decision to rely on juries for the infringement analysis had very little to do with copyright law or policy. It was hardly a considered decision about the values at stake in the copyright infringement analysis, but instead almost entirely the product of Frank's well-developed philosophy of fact-skepticism, which led him to develop an approach that minimized the role of lower court judges in the infringement analysis and controlled their ability to rely on issues of law to decide cases. Considerations of copyright law were for the most part entirely secondary to the court's decision. While scholars (and on occasion courts) have criticized the *Arnstein* court's analytical framework,²⁷ hardly anyone has examined why exactly it was that the majority opinion chose to go down the road that it did, and despite its author's own predispositions to the contrary.²⁸

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

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

²⁷ Lemley, *supra* note __, at 719 (characterizing it as bizarre); Samuelson, *supra* note __, at 1827; Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258 n.5 (2d Cir. 1986); Denker v. Uhry, 820 F. Supp. 722, 729 (S.D.N.Y. 1992).

²⁸ Some have alluded to the issue previously. See GARY ROSEN, UNFAIR TO GENIUS: THE STRANGE AND LITIGIOUS CAREER OF IRA B. ARNSTEIN 226-27 (2012) (observing that this put Frank in a "ticklish" position).

facts.²⁹ In support of his opinion, the district court judge had placed reliance on the plaintiff's prior record of litigiousness and gone on to characterize his claims as "fantastic."³⁰ To the majority in *Arnstein*, the district court's reliance on the plaintiff's prior filings was highly problematic since it suggested that the judge had failed to fully consider the merits of the plaintiff's particular case at hand.³¹ What was additionally troublesome to them however—as revealed in their private correspondence—was their own intuitive detection of some similarity between the two works at issue,³² which to them necessitated something more than a summary disposal of the case.

Reversing the district court's grant of summary judgment to ensure that their—i.e., the appellate court majority's—intuition received due attention upon remand required a fair bit of guile. Without ever mentioning that his disagreement with the lower court was *on the facts*, Frank devised an approach that would allow his version of the facts to be given due consideration. Instead of simply reversing the district court and remanding it back for another possible decision on summary judgment, Frank's opinion chose to send the case back to the lower court with specific instructions, not only as to who the fact-finder was meant to be (i.e., the jury) but also about the appropriate steps and standards to be employed in that process. While the first of these may have been procedurally desirable to avoid summary judgment, the second was altogether unnecessary since the lower court hadn't even reached the issue of improper appropriation when it granted summary judgment on the question of copying (access). Frank thus deftly intermingled both substantive and procedural rules to enable the majority's interpretation of the facts to be tested by a jury. Through such maneuvering, he effected a reversal that was in the end purely about the facts. This move was perfectly in keeping with Frank's fundamental belief in the importance of facts. To him "[l]egal rights turn on the facts as 'proved'" and since "facts are guesses," legal rights are "often guess-y, if-y."³³ Given the importance of facts, getting to prove them multiple times was imminently justifiable.

To ensure that Ira Arnstein's case actually reached a jury, the opinion needed to make sure that the claim survived a renewed motion for summary

²⁹ *Arnstein v. Porter*, 1945 WL 6897, at *2 (S.D.N.Y. 1945) (hereinafter "*Porter*"). I use the term *Porter* to refer to the district court's opinion to distinguish it from *Arnstein*, the Second Circuit's opinion and to emphasize that in the lower court, the defendant had prevailed.

³⁰ *Id.* ("I feel warranted in characterizing as fantastic the story on the subject told in the plaintiff's behalf.")

³¹ *Arnstein*, 154 F. 2d at 469.

³² Memorandum of Jerome N. Frank, Jan. 11, 1946 (on file with the Yale Law Library); Memorandum of Learned Hand, Feb. 18, 1946 (on file with the Yale Law Library).

³³ FRANK, COURTS ON TRIAL, *supra* note ___, at 14-15, 27.

judgment. Quite independent of his dislike of juries, Frank was an outspoken critic of the then-new summary judgment procedure, precisely because it undermined the centrality of facts.³⁴ The very year before *Arnstein*, he had authored an opinion admonishing lower courts to “exercise great care in granting motions for summary judgment” since “[a] litigant has a right to a trial where there is the ‘slightest doubt’ as to the facts.”³⁵ *Arnstein* presented Frank with a perfect opportunity to deploy the ‘slightest doubt’ standard on reversal, and thereby ensure that the plaintiff’s case reached a jury. In an ideal world, Frank might have wanted the plaintiff’s factual case to have received an adequate and unbiased hearing by a judge, but given that this was unlikely, he was in effect choosing between two next-best options: summary judgment or jury trial. In the interests of eliciting a fair hearing for the plaintiff, he chose a jury trial; but in so doing created an all-important copyright law rule: the classification of improper copying as a subjective factual question for the jury, rather than as a legal question with its own normative standard.

Arnstein is perhaps a prime example of a hard case making bad law.³⁶ Frank’s focus on the procedural aspects of the case in order to afford the plaintiff a fair hearing before a jury muddied up the copyright issues at stake by suggesting that the decision to involve juries in the copyright infringement analysis was a considered point of copyright law. Indeed, it is for this anomalous reason that even though the standard for summary judgment as enunciated in *Arnstein* has since been overruled,³⁷ copyright law—relying on *Arnstein* and its rich lineage—continue to accord juries a primary role in the infringement analysis. Ironically, in an opinion handed down a mere five days after *Arnstein* Frank himself remained comfortable with deciding copyright infringement without a jury at all, a reality that not too many have noticed.³⁸ The court’s procedural maneuverings in *Arnstein*—to grant Ira Arnstein a jury trial—have thus over time assumed a life of their own.

The salience of the procedural arguments in *Arnstein* is best explained by the composition of the panel that decided the case on appeal. The panel consisted of three doyens of the federal judiciary, whose unique personalities,

³⁴ Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 119 n.21 (1990) (describing Frank as an opponent of summary judgment); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1899 (1998) (describing Frank as one of the procedure’s known “critics”).

³⁵ *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945).

³⁶ *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (“Great cases like hard cases make bad law.”).

³⁷ See, e.g., *Beal v. Lindsay*, 468 F. 2d 287, 292 (2d Cir. 1972) (“The rule of *Arnstein v. Porter*... that summary judgment may not be rendered when there is the ‘slightest doubt’ as to the facts no longer is good law.”) (citations omitted).

³⁸ *Heim v. Universal Pictures Co.*, 154 F. 2d 480 (2d Cir. 1946).

scholarly contributions, and worldviews played no small part in shaping the peculiarities of the final opinions in the case. Joining Frank in the majority opinion was none other than Judge Learned Hand, considered by many to be the greatest copyright judge to have ever served on the judiciary.³⁹ Despite having authored a significant number of landmark copyright opinions that had defined the area, Hand deliberately chose not to author the opinion in *Arnstein*.⁴⁰ Hand's decision to not write the opinion may have influenced (or been influenced by) the direction that Frank wanted the opinion to take. The third judge on the panel, whose dissent in *Arnstein* unquestionably influenced the tone and tenor of the majority, was Judge Charles Clark.⁴¹ A former Dean of the Yale Law School before being elevated to the court, Clark is perhaps best-known as one of the architects of the Federal Rules of Civil Procedure, responsible for Rule 56 therein, which introduced the procedure of summary judgment to federal courts for the first time.⁴² As an unabashed champion for lower courts' use of summary judgment,⁴³ he therefore took strong exception to the majority's apparent willingness to prefer a jury trial to an efficacious disposal of the matter, which only enabled the majority opinion to focus more sharply on the procedural question.

The opinion in *Arnstein* was therefore principally about the facts of that case, as perceived by the majority. It represents a perfect application of Frank's own famous belief that a judge "begins...with a conclusion...and afterwards tries to find premises which will substantiate it."⁴⁴ Judges' "hunches make[] the law,"⁴⁵ shape their determinations of what is "fair or just," and indeed of what the facts in a case are.⁴⁶ While *Arnstein* may have forced Frank to suppress his dislike of juries, it was nonetheless constructed as a whole in the image of his overall worldview, a reality that copyright jurisprudence has scarcely acknowledged over the years. As a self-identified fact-skeptic, Frank firmly believed that legal rules rarely ever the determined outcomes in

³⁹ See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 268 ("No area displays Hand's superlative traits as a judge more richly than his work in copyright law.").

⁴⁰ *Id.* at 269 ("Hand's copyright opinions and memoranda convey the sense that he enjoyed writing them.").

⁴¹ *Arnstein*, 154 F. 2d at 475 (Clark, J. dissenting).

⁴² 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2727, at 173 (2d ed. 1983).

⁴³ See Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 579 (1952) ("Properly and responsibly applied, therefore, the summary judgment procedure is an important and necessary part of the series of devices designed for the swift uncovering of the merits and either their effective immediate disposition or their advancement toward prompt resolution by trial.").

⁴⁴ FRANK, *LAW AND THE MODERN MIND*, *supra* note ___, at 100.

⁴⁵ *Id.* at 104.

⁴⁶ *Id.* at 110-11.

individual cases given the uncertainty and subjective nature of fact-finding. *Arnstein*'s two-step formulation and its treatment of improper appropriation represent a near-perfect instantiation of Frank's beliefs.

Appreciating the interwoven factual, procedural, substantive and theoretical issues that were at play in *Arnstein* sheds new light on its importance within the copyright canon. Indeed, it raises the distinct possibility that as a principled normative matter—driven by copyright's utilitarian and Constitutional goals—there may be little reason to treat all aspects of the infringement analysis as purely factual questions for a lay jury. That position was driven in large measure by Frank's own philosophy of skepticism that he applied to the facts of the case before him, and which has since come to be repudiated all around in American legal thinking. There may thus be good reason to question the continuing need for juries to exercise primary control over the question of infringement, and in the manner suggested by *Arnstein*. Scholars have over the years voiced their skepticism of the *Arnstein* two step test and its seemingly naïve belief in the competence of lay juries to understand the complexities of copyright law.⁴⁷ Yet few have seriously investigated the reasons for this naiveté. A richer understanding of its mistaken legacy suggests that it might well be time for courts—or perhaps Congress—to seriously revisit and rationalize copyright's infringement analysis.

The argument in this Article unfolds in four parts. Part I begins with a discussion of Ira Arnstein's claim against Cole Porter, and a close reading of the three principal opinions in the case, one from the district court and two (i.e., the majority and dissent) in the Second Circuit. It closes with a brief discussion of how courts have interpreted and adopted *Arnstein* over the years, illustrating its canonical status in copyright law. Part II introduces the legal philosophies and views of the judges who heard the case. In it, we see how Judge Frank brought to the case his controversial views about the role of courts, rule-skepticism, fact-finding in trials, and the appropriate use of summary judgment, which played off of the views and opinions of the other judges in the case. Part III reconstructs the *Arnstein* opinion against the backdrop of these philosophies and the judges' own archival documents (draft opinions, conference memoranda, and private correspondence) to produce a more nuanced and textured image of the case and its contributions to copyright law. Part IV then moves to the normative and argues that with Frank's overarching philosophy in *Arnstein* coming to be rejected, it may well be time for copyright law to abandon its doctrinaire conformity to the *Arnstein* formulation.

⁴⁷ Lemley, *supra* note __, at 741 (“It is far from clear that juries can do that line-drawing justice, even with the aid of expert testimony and jury instructions telling them to do so.”).

I. UNBUNDLING *ARNSTEIN V. PORTER*

The standard for copyright infringement that was laid down in *Arnstein v. Porter* is today received and understood primarily through attempts by later courts and scholars to summarize the majority's opinion in the case.⁴⁸ While these summaries may be accurate portrayals of the standard itself, they shed little light on the precise reasons for the *Arnstein* court's choice of that standard and its examination of alternatives. This Part examines the structure and reasoning of the different opinions in the case as well as their interplay, an issue that played no insignificant part in their final structure and content. It then provides an overview of *Arnstein*'s canonical status in copyright jurisprudence.

A. Three Different Opinions

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

1. Caffey and the "Fantastic" Story

The story of *Arnstein* begins many years before the plaintiff's actual filing of the complaint in the case.⁴⁹ Ira Arnstein was a middle-aged musical composer, who between 1935 and 1943 had commenced five different lawsuits (and likely threatened several others) for copyright infringement against several well-known composers, music publishers, and collection agencies.⁵⁰ In each of these lawsuits, Arnstein alleged that the defendant had plagiarized his work, but was unable to provide any evidence that each of the defendants had ever known of his work, let alone copied from it.⁵¹ His claims were seemingly

⁴⁸ See, e.g., *Latman*, *supra* note __, at 1191-97; *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F. 2d 693, 713 (2d Cir. 1992); *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F. 2d 600, 608 (1st Cir. 1988); *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 485 (9th Cir. 2000).

⁴⁹ For an extensive account of Arnstein's litigious career, see: GARY A. ROSEN, *UNFAIR TO GENIUS: THE STRANGE AND LITIGIOUS CAREER OF IRA B. ARNSTEIN* (2012).

⁵⁰ They were: *Arnstein v. Twentieth Century Fox Film Corp.*, 52 F. Supp. 114 (S.D.N.Y. 1943); *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535 (S.D.N.Y. 1935); *Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58 (S.D.N.Y. 1943); *Arnstein v. Broad. Music*, 46 F. Supp. 379 (S.D.N.Y. 1942); *Arnstein v. Am. Soc. of Composers, Authors & Publishers*, 29 F. Supp. 388 (S.D.N.Y. 1939).

⁵¹ See *id.*

motivated by what one biographer describes as a deep-seated “persecution complex.”⁵²

In early 1945, the renowned American composer and songwriter, Cole Porter, became the target of one of Arnstein’s copyright infringement lawsuits.⁵³ In his complaint, Arnstein alleged that several of Porter’s famous musical compositions had all been plagiarized from his own musical works.⁵⁴ Appearing *pro se*, Arnstein sought a jury trial and claimed damages of one million.⁵⁵ When deposed, Arnstein alleged that the defendant had hired stooges to follow him, watch him, ransack his apartment, and even live with him in the same apartment.⁵⁶ Yet, he presented absolutely no proof of these allegations, and merely responded when questioned: “I don’t know that he had to do with it, but I only know that he could have.”⁵⁷ Since his own work had been performed publicly, Arnstein further claimed that the defendant had clear access to his music, despite the defendant’s own categorical denial that he even knew of Arnstein or his music.⁵⁸ Following depositions, the defendant moved for summary judgment. In a fairly short memorandum opinion, the district court—Judge Caffey—granted the motion.⁵⁹

Despite being presented with evidence of dissimilarity between the plaintiff’s and defendant’s works, Caffey focused his opinion almost entirely on the factual question of actual copying, i.e., whether the defendant had actually taken/lifted material from the plaintiff’s works.⁶⁰ Placing extensive reliance on the parties’ depositions, Caffey concluded that based on “the evidence at the end of the discussion of the principal phase of the pending motion...access by the defendant to the plaintiff’s compositions involved in [the] action ha[d] not been proved.”⁶¹ In addition he observed that based on the facts, he felt “warranted in characterizing as *fantastic* the story on the subject told in the plaintiff’s behalf.”⁶²

⁵² ROSEN, *supra* note __, at xiii.

⁵³ *Id.* at 218.

⁵⁴ *Id.* at 218.

⁵⁵ *Id.* at 219.

⁵⁶ *Arnstein*, 154 F. 2d at 467 (“Plaintiff said that defendant ‘had stooges right along to follow me, watch me, and live in the same apartment with me,’ and that plaintiff’s room had been ransacked on several occasions.”).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Porter*, 1945 WL 6897 (S.D.N.Y. 1945).

⁶⁰ *Id.* at 1-2.

⁶¹ *Id.* at 2.

⁶² *Id.*

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

If time were available, I would deal with all the phases concerning each kind of relief sought. But my work growing out of the recent motion term is too pressing and voluminous to permit me to go further now. I have gathered all the files in five cases tried in this court wherein plaintiff sued for judgment in an action relating to music or copyrights on musical compositions. The size of the files warns me that several weeks would be needed in order to go through all the details. I feel bound to go to other cases in which decisions have been reserved.⁶³

Even by the standards of *gratis dictum*,⁶⁴ this observation—in the opinion itself—was wholly out of place. It suggests that Caffey was choosing the easiest and quickest way to dispose of the case without wanting “to go further.” In addition, by referring to the plaintiff's prior copyright infringement lawsuits, the observation also seemed to suggest that the judge had prioritized other cases ahead of the plaintiff's, principally because of the plaintiff's record of litigiousness. While every litigant was entitled to have his/her day in court, Caffey was suggesting that the plaintiff had already had his, enabling him to focus on other litigants who were more deserving of the court's attention. Even if the record in this case might have supported Caffey's logic, his reference to the plaintiff's prior lawsuits gave his opinion a distinctively personal—and therefore partial—dimension. Despite being legally sound and indeed well-grounded in the facts of the case, its extreme candor unwittingly set in motion a whole series of events and arguments that would alter the very course of copyright law.

2. Frank's Crafty Reversal

⁶³ *Id.*

⁶⁴ *See, e.g.,* Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd., 276 F. 3d 876, 881 (6th Cir. 2002) (adopting the *Black's Law Dictionary* definition of *gratis dictum* as a “court's discussion of points or questions not raised by the record”).

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

Fairly early on in the opinion, Judge Frank framed the principal issue in the case as a procedural one—“whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action.”⁶⁵ If there was “the slightest doubt” as to the facts, such a denial was to him problematic.⁶⁶ The question then turned on whether there was indeed the slightest doubt as to the facts at issue. The effect of this framing is crucial to appreciate, since it indelibly merged the factual and legal issues involved in the case.

In the majority's opinion, answering the factual question (of slightest doubt) required separating out two different parts of the infringement analysis—(i) whether the defendant copied from the protected work, and (ii) whether such copying, if it were shown to exist, was sufficient to constitute improper appropriation.⁶⁷ On the question of actual copying (i.e., step one), the evidence could consist of the defendant's “admission” (i.e., direct evidence) or circumstantial evidence.⁶⁸ Such circumstantial evidence might consist of the defendant's “access” to the work and the extent of similarity between the works themselves (what has since come to be known as “probative similarity⁶⁹”).⁷⁰ The opinion further details how this circumstantial evidence is to be weighted. When there are no similarities whatsoever between the works, mere evidence of access, however extensive, cannot be used to prove copying.⁷¹ Conversely, when evidence of access is absent, copying may be presumed if the similarities are “striking” and rule out any possibility of independent creation.⁷² When evidence of both (i.e., access and similarity) exists, the fact-finder is to determine whether they together prove copying, and

⁶⁵ *Arnstein*, 154 F. 2d at 468.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Latman, *supra* note __.

⁷⁰ *Arnstein*, 154 F. 2d at 468.

⁷¹ *Id.*

⁷² *Id.*

for this the finder may rely on expert testimony and a “dissection” of the work.⁷³ All of this, to reiterate, goes to the question of actual copying.

Frank’s reasoning then turned to the second step of the analysis, improper appropriation. As a preliminary, improper appropriation is contingent on there being actual copying (“then only⁷⁴”). By implication therefore, if a plaintiff fails to prove actual copying, improper appropriation is not reached. Such improper appropriation is to be analyzed based on the response of the “lay” hearer, rendering expert testimony and dissection “irrelevant” to the determination.⁷⁵ Despite treating the two steps of the analysis as distinct, the opinion further notes that on occasion the same evidence (e.g., similarities) may be used to satisfy both elements, although this is not required in every case.⁷⁶

Up until this point, Frank’s parsing of the infringement analysis seems to be principally in the nature of a digression, since by his own framing the principal question in the case was whether there was any doubt at all about the facts involved. The opinion then returns to the question of facts and somewhat summarily declares that each step of the infringement analysis “is an issue of fact.”⁷⁷ Nowhere in this part of the opinion does it tell us why the second step of the analysis—improper appropriation—is to be treated as a question of fact, beyond the suggestion that it is to look to the response of a lay hearer.

Turning to the facts of the case at hand, the opinion then admits that “after listening” to the works involved, the judges signing it (i.e., Frank and Hand) had found similarities between them, even though they concede that these similarities would not on their own show copying.⁷⁸ Yet, “[t]he similarities...[we]re sufficient so that, *if there is enough evidence of access* to permit the case to go to the jury,” it could “infer that the similarities did not result from coincidence.”⁷⁹ The district court was therefore allowed to rely on summary judgment if without doubt the defendant had no access. On the face of things, these initial observations about the facts seem to suggest that while he found there to be similarities, it was still up to the district court to decide whether there was “enough” evidence of access so as to send the matter to a jury. And it is here that the opinion changes gears and adopts a more heavy-handed approach.

⁷³ *Id.*

⁷⁴ *Id.* (“If copying is established, *then only* does there arise the second issue, that of illicit copying.”).

⁷⁵ *Id.*

⁷⁶ *Id.* at 469.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (emphasis supplied).

Noting that the lower court judge had relied entirely on depositions to characterize the plaintiff's story as "fantastic," Frank concluded that the judge should have turned the question over to a jury since it was ultimately an issue of witness credibility, which was in the end a question of fact.⁸⁰ The plaintiff was to be allowed the opportunity to cross-examine the defendant before a jury, so as to have them (i.e., the jury) determine the credibility of the defendant's denials.⁸¹ Depositions were to be disfavored as substitutes for in-court examinations except when necessity demanded otherwise, which to Frank was hardly the situation in the case at hand.⁸²

Having thus far effectively suggested that most—if not all—copyright infringement lawsuits needed to head to a jury, the opinion at this point makes an effort to reiterate the there could be instances where "a trial would be farcical" and summary judgment appropriate.⁸³ Since he had already emphasized the slightest doubt standard previously, Frank's examples of such farcical cases each involved instances where there was by concession of the parties, no doubt whatsoever on the facts at hand, making a trial "absurd."⁸⁴ To illustrate the dangers of allowing summary judgment all too quickly, the opinion then describes an incident in the "court below" where a judge had refused summary judgment despite numerous affidavits pointing to the absence of any factual doubts, only to discover a host of dispositive facts during cross-examination at trial, which caused the case to be decided for the other side.⁸⁵ Somewhat intriguingly Frank nowhere mentions the name, citation, or judge for this "recent case."⁸⁶

The opinion could have ended at this point, since it had successfully reversed the lower court's grant of summary judgment owing to existence of some doubt as to the facts related to actual copying. Yet Frank chose to proceed further and discuss the issue of improper appropriation as well and for good reason, given what he wanted to achieve upon remand. Reiterating that improper appropriation was an issue of fact, Frank framed the question as "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed."⁸⁷ Here, the suggestion is that since copyright is about

⁸⁰ *Id.* at 469.

⁸¹ *Id.* at 469-70.

⁸² *Id.* at 470.

⁸³ *Id.*

⁸⁴ *Id.* at 471.

⁸⁵ *Id.*

⁸⁶ *Id.* (describing a "recent case in the court below").

⁸⁷ *Id.* at 473.

market-protection rather than reputation-protection, the test is to focus on examining the effect of the copying on the market (i.e., the audience). And to reiterate its point, the opinion notes that “[s]urely, then, we have an issue of fact which a jury is peculiarly fitted to determine.”⁸⁸ But why precisely is this question an “issue of fact”? Whereas the question of actual copying is an attempt to ascertain *whether* an event actually occurred and is therefore premised on an epistemic reconstruction of the past, improper appropriation is indelibly a normative judgment, even in the majority’s own terms. Determining whether enough was taken or whether what was taken would be “pleasing” to lay audiences is not only intrinsically subjective but also in addition deeply evaluative. Thus while improper appropriation was, in Frank’s reasoning, an issue of fact; it was so not because of its epistemic quality, but because of its obvious consequence: allowing it to go to the jury. In this subtle move, Judge Frank was being a true Legal Realist and defining a category (issue of fact) by its consequence rather than by its underlying content.

Having classified the question of improper appropriation as a factual one for the jury, the opinion then makes the startling observation that “after listening to the playing of the respective compositions, we are, at this time, unable to conclude that the likenesses are so trifling, that on the issue of misappropriation, a trial judge could legitimately direct a verdict for the defendant.”⁸⁹ This is a somewhat puzzling observation, which makes sense only when one considers it in light of Frank’s overwhelming desire to have the case go before a jury. As a purely analytical matter, Frank of course did not have to do this. Since the lower court had not decided the question of improper appropriation, remanding it to the lower court on the issue of actual copying—with the observation that it should reach a jury on that question, and proceed to the next step *if* the jury did find actual copying—might have given the plaintiff a jury trial. All the same, this would not have ruled out the possibility that a lower court judge could now decide the second step of the analysis (i.e., improper appropriation) on summary judgment, thereby obviating the need for a jury trial on the first step as well. On remand, a deft judge could have simply concluded that *even if* there was some copying by the defendant Porter, there was not the slightest doubt that it was insufficient to be treated as improper. Given the subjective nature of the inquiry, such a move might have been impossible to reverse (or scrutinize) on appeal. Were this to happen, all of Frank’s maneuvering on the first step in order to get the plaintiff a jury trial would have been altogether futile.

⁸⁸ *Id.*

⁸⁹ *Id.*

To prevent this from happening, the opinion had to eliminate the possibility of summary judgment on the issue of improper appropriation in the case at hand. And this it chose to do with the observation just quoted. While it isn't clear that the statement was meant to eliminate all use of summary judgment on the question of improper appropriation,⁹⁰ it almost certainly was aimed at preventing summary judgment on improper appropriation in the case before the court. By so doing, the opinion was effectively guaranteeing the plaintiff a jury trial, and taking the infringement analysis entirely out of the hands of the trial court judge (on remand). In short, the move effectively entrenched the majority's factual finding of some similarity between the parties' works.

While the majority opinion's engagement with improper appropriation may have been almost entirely as part of its "dictum,"⁹¹ it nonetheless played a crucial role in preventing the district court from relying on summary procedures by viewing the facts of the case differently. It is thus worth emphasizing that much of the opinion's maneuvering was motivated by the majority's belief that there was some basis for the plaintiff's allegations, but not enough (on the record that existed then) to find infringement. A jury trial was therefore seen as critical to elicit further factual information. The majority could not have put the point any more directly when it observed that until corrected by the Supreme Court, it would "adhere to the view[]...that generally there should be trials in plagiarism suits."⁹²

Frank then closed the majority opinion with a direct rebuke to Caffey for his reliance on the plaintiff's prior litigation history. Exaggerating the matter a little, the opinion notes that "in his order for final judgment [Judge Caffey] specifically referred to the 'records' of the court in the five cases, naming them, as constituting in part the basis of the judgment."⁹³ It is far from clear that the district court was "bas[ing]" its judgment—which was limited to the question of actual copying—on these records. Frank appears to be conscious of his own hyperbole, when he observes a few lines later that although Caffey "in his opinion...did not say that he rested his decision on those other suits, the language of his final judgment order indicates that he was probably affected by them."⁹⁴ In support of this, Frank makes reference in a footnote to the idea of "extraneous" factors affecting a judge

⁹⁰ Though later courts have interpreted it in this way. *See, e.g.,* *Shaw v. Lindheim*, 919 F. 2d 1353, 13559 (9th Cir. 1990).

⁹¹ Samuelson, *supra* note __, at 1827.

⁹² *Arnstein*, 154 F. 2d at 474.

⁹³ *Id.*

⁹⁴ *Id.* at 475.

“unconscious[ly].”⁹⁵ As noted previously, Caffey was using the plaintiff’s litigation history to explain his reluctance to reach the *additional* issues pressed by the parties. But by portraying the district court as having either used these “records” for its own judgment or instead been improperly (and unconsciously) influenced by them, Frank was rather starkly implying that the lower court judge had been biased/prejudiced against the plaintiff; all of which only supported his push for a jury trial in the case.

* * *

The majority opinion in *Arnstein* is a complex mix of procedure, substance, and its author’s view on the facts of the case. In it, we see three strands of thought. First, its authors (Judges Frank and Hand) were clearly troubled by the existence of some similarity between the works. While they were unwilling to characterize it as striking, they nonetheless believed that if access could be proven, the similarity might be enough to prove copying. Second, for this theory to have any chance, it was critical that the case reach a jury and not be disposed of by a judge summarily. This would enable a “lay” audience to either confirm or deny the similarity that the majority perceived, and spell out its legal consequences. Third, for the case to reach a jury, the judge’s ability to dispose of the matter at hand either by summary judgment or directed verdict had to be minimized (even if not eliminated). Each of these strands explains a different part of the opinion’s reasoning, which together resulted in reversing the district court and in developing the famous two-part “*Arnstein* test” for the infringement analysis.

3. Clark’s Disbelief

“[W]e are reversing our own precedents to substitute chaos, judicial as well as musical.”⁹⁶ This observation just about captures the tone and sentiment of Judge Clark’s dissenting opinion in the case. Clark begins his dissent by alluding to the majority’s interpretation of the facts—and the similarity between the works—in their framing of the appropriate standard for copyright infringement.⁹⁷ He thus notes that “after repeated hearings of the records, [he] could not find” the similarity that the majority opinion did, and which made them decide for the plaintiff “to the exclusion of all else, including the real

⁹⁵ *Id.* at 475 n.33.

⁹⁶ *Id.* at 480 (Clark, J. dissenting).

⁹⁷ *Id.* at 475-76.

issues in the case.”⁹⁸ While precluding dissection and technical analysis on the question of similarity was justifiable, turning the question over the jury to decide without any guidance on how to carry out the analysis made little sense, since “[m]usic is a matter of the intellect as well as emotions.”⁹⁹ To him, the majority’s standard effectively “abolish[ed]” the use of intellect during the analysis.¹⁰⁰

Baffled by the majority’s insistence on a trial even when they themselves appeared unconvinced that the plaintiff would succeed, the dissent further notes that the court’s opinion is “one of those procedural mountains which develop where it is thought that justice must be temporarily sacrificed, lest a mistaken precedent be set.”¹⁰¹ In the dissent’s view, this mistaken precedent involved two separate elements: juries and summary judgment.¹⁰² On the use of juries, Clark then highlights an important irony. Noting that while he—unlike Frank (citing to the latter’s extra-judicial writing¹⁰³)—was not opposed to the use of juries, he did not think the jury was “pre-eminently fitted to decide questions of musical values” which was different from an ordinary fact-finding exercise.¹⁰⁴ Characterizing the majority’s insistence on juries for the issue of improper appropriation as “premature obiter dictum” he then excoriated the majority for failing to see that it was a mere appellate court, “not an administrative or judicial director of trial courts.”¹⁰⁵ Clearly then, Clark too saw little rationale for Frank’s characterization of the second part of the infringement analysis as a pure question of fact.

On the issue of summary judgment, Clark’s criticism was even more trenchant. Noting that Rule 56 does not make an exception for copyright infringement cases, he points out that the “slightest doubt” standard that the majority relies on for its reversal was mere dictum in prior cases, and was now being converted into a binding rule surreptitiously.¹⁰⁶ Describing this as a “novel method of amending” the rules of procedure and as “ad hoc legislation”, the dissent notes that it “subverts the plans and hopes of the profession for careful, informed study leading to the adoption and the amendment of simple rules which shall be uniform throughout the country.”¹⁰⁷

⁹⁸ *Id.* at 476, 475.

⁹⁹ *Id.* at 476.

¹⁰⁰ *Id.* at 477.

¹⁰¹ *Id.* at 479.

¹⁰² *Id.*

¹⁰³ *Id.* (citing Judge Frank’s two monographs, *Law and the Modern Mind* and *If Men Were Angels*).

¹⁰⁴ *Id.* at 479.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Coming from Clark, one of the architects of the Federal Rules of Civil Procedure,¹⁰⁸ this critique was hardly unexpected. What is however surprising is that it had little effect on the majority's own discussion and/or defense of the standard it was adopting.

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

B. Canonical Status Through Influence

Despite the majority's framing of the opinion in procedural terms, i.e., as revolving around the application of Rule 56 to copyright infringement claims,¹⁰⁹ it is the decision's substantive analysis of infringement that continues to influence copyright law. The division of the analysis into the bifurcated steps of actual copying and improper appropriation, and their treatment as questions of fact for the jury is today attributed to *Arnstein*.¹¹⁰ What is crucial to appreciate however, is that *Arnstein*'s influence on copyright law has little to do with its status as binding precedent, especially since its views on summary judgment have come to be expressly overturned.¹¹¹ Its prominence is instead attributable to the belief that the majority's parsing of the infringement analysis represents a workable, fair, efficient, and constitutionally compliant process for dealing with infringement claims; one that recognizes the “necessarily vague¹¹²” nature of the inquiry that is heavily context-dependent.

A particularly good example of this influence is to be found in the Ninth Circuit, which chose to develop its own standard for the infringement analysis in 1977.¹¹³ Despite the fact that the *Arnstein* opinion's views on summary judgment had since been abrogated the Supreme Court, the Ninth

¹⁰⁸ See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976) (noting that Judge Clark was “principally responsible” for the drafting of the Federal Rules of Civil Procedure).

¹⁰⁹ *Arnstein*, 154 F. 2d at 468.

¹¹⁰ See OSTERBERG, *supra* note __, at §3.

¹¹¹ *Beal v. Lindsay*, 468 F. 2d 287, 292 (2d Cir. 1972).

¹¹² The phrase originates Judge Learned Hand's description of the test for copyright infringement. See *Shipman v. R.K.O. Radio Pics.*, 100 F. 2d 533, 538 (1938) (Hand, J. concurring) (“The test is necessarily vague and nothing more definite can be said about it.”).

¹¹³ *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F. 2d 1157 (9th Cir. 1977).

Circuit nonetheless relied heavily on Frank’s logic in developing its “bifurcated” two part test, claiming to base it on the “*Arnstein* doctrine.”¹¹⁴ Responding to the defendant’s argument that *Arnstein* had been overruled on its holding in the case, the Ninth Circuit nonetheless confidently asserted that *Arnstein*’s “tests for infringement” are “still good law” and have been followed by courts around the country.¹¹⁵ Much like *Arnstein*, the Ninth Circuit too—without any reasoning—proceeded to treat both steps of the analysis as questions for the jury, disallowing even summary judgment on the second step.¹¹⁶ In a largely similar vein, most circuits around the country have followed the *Arnstein* bifurcation and its reliance on juries, albeit with some modifications (none of which touch on these two fundamental premises).¹¹⁷

While courts have on occasion disagreed with the *Arnstein* framework, they have done so largely within the context of specialized subject matter, leaving the opinion’s basic framework largely untouched.¹¹⁸ Consequently, *Arnstein* continues to exert a tremendous amount of influence on copyright law around the country, by continuing to limit the judge’s role in the infringement analysis. The opinion is firmly ensconced within the copyright canon (every copyright law casebook in the country discusses it¹¹⁹) and accepted as establishing American copyright law’s jury-driven approach to the infringement analysis.

Scholars have routinely criticized elements of its framework,¹²⁰ and yet the case continues to endure and direct the structure, shape, and tone of the infringement analysis, either explicitly or implicitly. The jury continues to occupy an exalted place in copyright litigation—prolonging disputes, rendering outcomes uncertain, and preventing any rationalization of the law relating substantial similarity—all because of *Arnstein*; when ironically, the majority opinion’s reasons for favoring the jury continue to remain largely unexplored.

II. THE LEGAL PHILOSOPHIES (AND PERSONALITIES) INVOLVED

A close reading of the opinions in the case reveals that the dispute involved a complex interplay of procedural, substantive and institutional

¹¹⁴ *Id.* at 1164.

¹¹⁵ *Id.* at 1165.

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 1166.

¹¹⁸ *See, e.g.,* Computer Associates Int’l., Inc. v. Altai, Inc., 982 F. 2d 693, 713-15 (2d Cir. 1992).

¹¹⁹ *See, e.g.,* JULE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 306 (3d ed. 2013); ROBERT A. GORMAN ET AL., COPYRIGHT: CASES AND MATERIALS 583 (8th ed. 2011); CRAIG JOYCE ET AL., COPYRIGHT LAW 658 (9th ed. 2013).

¹²⁰ *See, e.g.,* Lemley, *supra* note __; Samuelson, *supra* note __.

considerations. All the same, Frank’s majority opinion itself—which is the opinion of legal significance in *Arnstein*—says very little about why the court chose to treat the entire infringement inquiry as a purely factual question, requiring a judge to send it over to the jury at every possible instance. In addition, it provides scantily little justification for treating the improper appropriation as a purely subjective determination for the jury where all expert testimony and objective evidence is deemed presumptively irrelevant—or, to use Clark’s colorful language, as a process which “abolish[es] the use of the intellect.”¹²¹

Understanding these crucial aspects of the *Arnstein* opinion requires looking beyond the opinions themselves, to the views, personalities and judicial philosophies of the judges involved in the case. The appellate court panel that heard and decided the appeal in *Arnstein* consisted of three very prominent judges, Jerome Frank, Learned Hand and Charles Clark, each of who held strong—and well-developed—views on certain substantive, procedural, and structural questions. These questions in turn became intertwined in the case, producing the rather intriguing majority opinion. Appreciating the opinion therefore necessitates understanding what each of the judges on the panel brought to the case. As the author of the majority opinion, Frank certainly brought most of his own legal philosophy to bear on the reasoning in the opinion. All the same, Hand’s decision to support Frank’s opinion, as well as Clark’s extensive (and acrimonious) pushback, played no small role in influencing the tone and certitude exuded by Frank in the opinion.

Using their extensive writing, this Part provides an overview of the legal philosophies and ideals of the three judges on the *Arnstein* panel. In it, we begin to see how large swaths of the opinion were determined by Frank’s unique worldview, which was only strengthened by Hand’s endorsement of their application to the case, and Clark’s disagreement with them. The next Part then reconstructs *Arnstein* using these insights and the judges’ correspondence and deliberations during the drafting of the opinions.

A. *The Legal Realist: Jerome Frank*

Even prior to his appointment to the Second Circuit (in 1941), Jerome Frank had risen to prominence as a legal thinker, principally for his contributions to American Legal Realism.¹²² His 1930 book, *Law and the Modern Mind*,¹²³ created ripples through the American legal establishment for

¹²¹ *Arnstein*, 154 F. 2d at 477.

¹²² See Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & Soc’y 175, 181 (1991).

¹²³ FRANK, *LAW AND THE MODERN MIND*, *supra* note __.

its contrarian and controversial arguments.¹²⁴ Described by Karl Llewellyn as “excit[ing],” “keen, cogent” and unique, the book set out to meticulously attack the “basic myth” of certainty that Frank believed plagued the American legal system, relying on advances at the time in psychological research.¹²⁵ Between 1930 and 1950, Frank published a large number of additional books and articles, in which he developed his critiques of the legal and judicial systems even further.¹²⁶ Towards the later part of his judicial career, Frank brought together his work and thinking on the peculiarities and failings of the judicial process in a book titled *Courts on Trial*,¹²⁷ in which he gave much of his prior (Realist) thinking a distinctively judicial dimension.

What is perhaps most interesting (certainly for our purposes) in his body of work, is that in it Frank articulated a comprehensive and well-developed account of the litigation process, with particular emphasis on judging. This account has both descriptive (critical) and prescriptive (constructive) aspects. By the time of his opinion in *Arnstein*, Frank had therefore developed and articulated a particular approach to judicial decision-making and reasoning, one that he attempted to instantiate in that case.

As with any body of work that spans twenty years, Frank’s writing does contain its share of contradictions, inconsistencies, and equivocations.¹²⁸ Indeed, in later editions of his own early books Frank himself disavowed certain prior positions in an effort to clarify them.¹²⁹ In addition, Frank’s own thinking came to focus on different aspects of the legal system, during the course of his legal career. His work as a scholar differed from his writing as a government official, which in turn varied significantly from his writing as a Second Circuit judge. Frank’s legal philosophy is therefore fairly hard to categorize under any one overarching label. Scholars have even tended to treat his views as being an outlier within Legal Realism, given how unique and distinctive it is in comparison to the work of others who are ordinarily put in

¹²⁴ See Charles E. Clark, *Jerome Frank*, 66 YALE L.J. 817, 817 (1957) (noting that the book “fell like a bomb on the legal world”).

¹²⁵ Karl N. Llewellyn, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 82-83 (1931).

¹²⁶ For a sample, see: JEROME N. FRANK, *SAVE AMERICA FIRST* (1938); JEROME N. FRANK, *IF MEN WERE ANGELS* (1942); JEROME N. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); Jerome N. Frank, *Are Judges Human*, 80 U. PA. L. REV. 17 (1931); Jerome N. Frank, *Words and Music: Some Reflections on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Jerome N. Frank, *Say it With Music*, 61 HARV. L. REV. 921 (1948); Jerome N. Frank, *Cardozo and the Upper Court Myth*, 13 LAW & CONTEMP. PROBS. 369 (1948); Jerome N. Frank, *The Case for the Special Verdict*, 32 J. AM. JUD. SOC’Y 142 (1949); Jerome N. Frank, *Legal Thinking in Three Dimensions*, 1 SYR. L. REV. 9 (1949); Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953).

¹²⁷ FRANK, *COURTS ON TRIAL*, *supra* note ___, at vii.

¹²⁸ See, e.g., Duxbury, *supra* note ___, at 182, 188.

¹²⁹ *Id.* at 185.

that category.¹³⁰ Without getting into the category question though, Frank’s legal philosophy may fruitfully be understood as embodying three core ideas, all of which he articulated and none of which he repudiated at any point: indeterminacy, hunches, and fact-skepticism.¹³¹

(a) *Indeterminacy*. — Frank’s identification with other Legal Realists in the first half of the twentieth century is largely attributable to his work on the indeterminacy of legal rules in legal and judicial thinking. In *Law and the Modern Mind*, Frank sets out what he took to be the “basic myth” plaguing the legal system: certainty in legal reasoning.¹³² According to Frank, lawyers “like the laymen, fail to recognize the essentially plastic and mutable character of law” and believe that “rules either are or can be made essentially immutable.”¹³³ While he was quick to acknowledge that lawyers were not being “consciously deceptive” when they articulate this belief, he took it to be pervasive in the legal system.¹³⁴ The consequence of the myth was that “demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary,”¹³⁵ in turn bringing the entire legal system into disrepute.

The primary analytical lesson of the basic myth was the recognition that legal rules do not determine individual cases.¹³⁶ The process of “judging” was more than just a rote or mechanistic application of a rule to fact, but instead involves actual law-making as well. In an effort to avoid engaging “incompatible beliefs,” lawyers and judges were seen as routinely engaging in the practice of “rationalization,” where they manufactured principles to reconcile these beliefs after arriving at a decision.¹³⁷ Legal rules—and principles—were in this understanding rarely ever a hard constraint on legal and judicial thinking.

Frank’s account of indeterminacy in his early work was fairly extreme in its claims that judicial discretion was altogether “unavoidable” and at play “in almost all cases.”¹³⁸ In this, he is commonly seen to have believed in what

¹³⁰ See, e.g., HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 3 (2013); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997).

¹³¹ Duxbury classifies Frank’s dominant ideas along similar lines. See Duxbury, *supra* note ___, at 181.

¹³² FRANK, LAW AND THE MODERN MIND, *supra* note ___, at 3-12.

¹³³ *Id.* at 9.

¹³⁴ *Id.* (emphasis in original).

¹³⁵ *Id.* at 11.

¹³⁶ *Id.* at 130.

¹³⁷ *Id.* at 30-31.

¹³⁸ *Id.* at 362.

theorists call global legal indeterminacy,¹³⁹ the idea that law is *never* capable of providing determinate answers. While scholars disagree about the scope and reach of Frank's beliefs in indeterminacy,¹⁴⁰ it remains undisputed that he adhered to a core skepticism about the determinacy of legal rules. While this did not mean that judges were to abandon any and all reliance on legal rules, it required an understanding and acknowledgement of the additional influences on judicial decisions.

Relying on then-recent work in the field of psychology, Frank attributed this “basic myth” and the quest for certainty in the law, to lawyers’ (and judges’) unconscious child-like desire to seek a replacement “father-figure” in their professional lives in order to support their intuitive decision-making.¹⁴¹ This part of his work, which involved analyzing the symptoms that he had identified, proved to be the most controversial. While Frank came to distance himself from this analysis somewhat in later years,¹⁴² he remained steadfast in his commitment to the idea that the quest for certainty in the law was a futile exercise.

(b) *Hunches*. — If legal rules were not the primary determinants of judicial reasoning, then how do courts decide individual cases? In developing an answer to this question, Frank relied on an idea first introduced by Judge John Hutcheson around the same time: the hunch.¹⁴³ According to Hutcheson, in deciding a case a judge “waits for the feeling, the *hunch*—that intuitive flash of understanding that makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way.¹⁴⁴” Hutcheson further posited that “[t]he judge really decides by feeling and not by judgment, by hunching and not by ratiocination.¹⁴⁵” Frank built this into his account of indeterminacy. Courts “beg[i]n with the results they desire[] to accomplish” and “work back from conclusions to principles.”¹⁴⁶ Consequently, determining the source of these hunches was to him “the key to the judicial process.”¹⁴⁷ Here we first see Frank

¹³⁹ See generally Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995).

¹⁴⁰ See Michael Steven Green, *Leiter on the Legal Realists*, 30 LAW & PHIL. 381, 393 (2011) (arguing that Frank was not an adherent of global indeterminacy); Leiter, *supra* note __, at 269 (making the opposite claim).

¹⁴¹ FRANK, LAW AND THE MODERN MIND, *supra* note __, at 69-83.

¹⁴² *Id.* at xxii.

¹⁴³ Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

¹⁴⁴ *Id.* at 278.

¹⁴⁵ *Id.* at 285.

¹⁴⁶ FRANK, LAW AND THE MODERN MIND, *supra* note __, at 102.

¹⁴⁷ *Id.* at 104.

disavowing the global indeterminacy traditionally attributed to him, for he “concede[s]” that legal rules and principles play some role in decision-making, by suggesting hunches and by allowing the “judge to check up on the propriety of the hunches.”¹⁴⁸

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

The judge in arriving at his hunch, does not nicely separate his belief as to the “facts” from his conclusion as to the “law”; his general hunch is more integral and composite, and affects his report—both to himself and to the public—concerning the facts. The judge’s decision is determined by a hunch arrived at long after the event on the basis of his reaction to fallible testimony.¹⁴⁹

While the facts of the case usually generate the hunch, those facts are then filtered through the judge’s impulsive reactions to them, and the judge’s subconscious predispositions to the witnesses and lawyers who present them to the court.¹⁵⁰ Consequently, hunches are usually hard to determine *ex ante*.¹⁵¹ What is important to appreciate though is that Frank was at all times overtly neutral on the legitimacy of the hunch in judicial decision-making. Nowhere did he exhort judges to abandon such hunches, nor did he seem to believe that their influence might be curbed in any significant manner. His only prescription then, was for lawyers and judges to openly acknowledge the influence of such hunches on their thinking rather than hide behind the rationality of legal doctrine.¹⁵²

(c) *Fact-Skepticism*. — Based on his belief in the indeterminacy of legal rules and principles, one might readily conclude that Frank was a hardened rule skeptic. Indeed many, including H.L.A. Hart, characterized him as one.¹⁵³ Yet, the reality remains that Frank’s version of skepticism was far more nuanced, and indeed fairly unique among his peers. In it, we perhaps see the single-most distinguishing feature of Frank’s philosophy; one, that he developed during the later part of his career drawing from his experiences as a judge. His 1949 book *Courts on Trial* was devoted almost entirely to the

¹⁴⁸ *Id.* at 104 n.†.

¹⁴⁹ *Id.* at 116.

¹⁵⁰ *Id.* at 109-11.

¹⁵¹ *Id.* at 116.

¹⁵² *Id.* at 117.

¹⁵³ H.L.A. HART, *THE CONCEPT OF LAW* 250 n.4 (OUP 2012).

idea,¹⁵⁴ even though we see traces of it in his prior work. As we shall see, it was this part of his philosophy that influenced the opinion most directly in *Arnstein*.

Frank reserved the term “rule skeptics” for scholars who had shown that formal legal rules were inaccurate predictors of legal outcomes, but who nonetheless believed in “greater legal certainty.”¹⁵⁵ These skeptics, such as Karl Llewellyn, were seen to be looking for some “real rules” behind the “paper rules” in their quest for certainty and patterns in the law that render it predictable.¹⁵⁶ Fact skeptics on the other hand begin with a belief in the indeterminacy of legal rules, but take it one step further and believe that

No matter how precise or definite may be the formal legal rules...no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits, not yet begun or not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part, futile—and that its pursuit, indeed, may well work injustice—aim rather at increased judicial justice.¹⁵⁷

The fallibility, subjectivity, and structural weaknesses of fact finding in trial courts thus motivated Frank’s fact-skepticism. In his writing he took the idea to rather extreme lengths in laying out its implications. The intrinsic subjectivity of fact finding meant that, to him, to speak of a “legal right” was meaningless; for, until a court actually ruled on the underlying facts, the very existence of such a right was an uninformed guess.¹⁵⁸ Since “[m]ost legal rights turn on the facts as ‘proved’ in a future lawsuit, and proof of those facts, in ‘contested’ cases, is at the mercy of such matters as [mistaken, inattentive, or biased, judges and juries, or perjured, missing or dead witnesses]...a legal right is usually a bet, a wager, on the chancy outcome of a possible future lawsuit.”¹⁵⁹ It is important to appreciate the unstated implication of this observation, which feeds right into the idea of indeterminacy. If rights are indeed probabilistic and highly uncertain, by implication they seem to merit less respect and less constraint as determinants of individual decisions and

¹⁵⁴ See FRANK, COURTS ON TRIAL, *supra* note ___, at 1-156.

¹⁵⁵ FRANK, LAW AND THE MODERN MIND, *supra* note ___, at viii.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at ix.

¹⁵⁸ FRANK, COURTS ON TRIAL, *supra* note ___, at 5-36.

¹⁵⁹ *Id.* at 27.

outcomes. Fact-finding in trial courts was then, to Frank, little more than guesswork, given the subjectivity inherent in the process.

Frank's fact-skepticism drew from structural forces that were taken to be well engrained in the working of the legal system. The first cause was the adversarial system of justice, which to him focused on ensuring a fair "fight" between the parties rather than on determining the truth of the matter.¹⁶⁰ Contentious litigation had produced lawyering tactics and strategies that he saw as denigrating the value of actual fact-finding in courts.¹⁶¹ Second was the reality that judges were rarely ever seen as subjective decision-makers.¹⁶² The legal system had refused to see that "judges are human and share the virtues and weakness of mortals," which had in turn produced a belief in the objectivity of judicial fact-finding.¹⁶³ Yet, Frank argued, judges too were influenced by innumerable "unconscious" and personality-driven influences that caused them to rarely ever "'find' the 'facts' identically."¹⁶⁴ Judges, much like historians, were always engaged in the "unconscious involuntary distortion" of facts, even by being mere observers.¹⁶⁵ The third source for Frank's fact-skepticism was also the subject of his most trenchant criticism: the jury system.¹⁶⁶

Relying on what he dubbed the "realistic theory" of the jury's function, Frank argued that juries very often ignore all legal rules and "determine, not the 'facts,' but the respective legal rights and duties of the parties to the suit."¹⁶⁷ Since they were indelibly influenced by their own conceptions of justice in the case, juries routinely paid little attention to the "law" as such and exercised their "incorrectible power."¹⁶⁸ All the same, Frank didn't believe that the juries were in any sense deceptive or malicious. The reason for their functioning in this way, was to him, a product of the system's overarching naiveté. "[C]ourts are obligated to make the unrealistic assumption that the often incomprehensible words, uttered in the physical presence of the jurors, have some real effect on their thought process."¹⁶⁹ In addition, evidence was seen as routinely presented to a jury in a disorderly manner that was

¹⁶⁰ *Id.* at 80.

¹⁶¹ *Id.* at 82-85.

¹⁶² *Id.* at 146.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 150, 152.

¹⁶⁵ *Id.* at 156.

¹⁶⁶ *Id.* at 108.

¹⁶⁷ *Id.* at 111.

¹⁶⁸ *Id.* at 113.

¹⁶⁹ *Id.* at 117.

“confusing” and produced its own set of “obstacles.”¹⁷⁰ The net result was that neither the rules of evidence, nor the substantive rules of an area, operated as constraints on the jury’s finding of facts. This in turn produced what Frank described as “jury-made law” where “each jury makes its own ‘law’ in each case with little or no knowledge of, or reference to, what has been done before, or regard to what will be done thereafter, in similar cases.”¹⁷¹

To Frank, the jury system was clearly “undesirab[le].”¹⁷² Nevertheless, he recognized that as a judge committed to protecting the Constitution and enforcing statutory provisions, he was obligated to preserve the jury’s role in the adjudicative process.¹⁷³ This obviously put him in an awkward position when advocating for juries in different contexts. He therefore made a somewhat half-hearted effort to offer suggestions for reforming the jury system, recognizing that it was unlikely to go away any time soon.¹⁷⁴ All the same, if one understands his dislike for juries as forming but *a part* of his overall philosophy of fact-skepticism, it begins to allow for some leeway in evaluating his occasionally favorable treatment of juries. As we shall see, this became an issue in *Arnstein*.

Describing fact-skepticism as the single most pervasive element of Frank’s legal philosophy, Edmond Cahn identifies three distinctive strands in it, all of which are drawn from supposedly Aristotelian traditions: a criticism of “our capacity to ascertain the transactions of the past”, a “distrust[] [of] our capacity to predict the concrete fact-findings and value judgments of the future,” and lastly, an emphasis on the “importance of the personal element in all processes of choice and decision.”¹⁷⁵ Whether or not it had true Aristotelian roots, fact-skepticism certainly remained the most dominant feature of Frank’s legal and judicial philosophies.

* * *

While Frank is commonly labeled a “Legal Realist,” this characterization is at best imperfect. What really characterized his thinking was his belief that it was in the vicissitudes of the fact-finding process that the legal system actually functioned and served to realize justice. His fact-skepticism was more than just an abstract philosophy, and informed much of his judicial reasoning on what

¹⁷⁰ *Id.* at 118.

¹⁷¹ *Id.* at 120.

¹⁷² *Id.* at 145.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 141-45.

¹⁷⁵ Edmond Cahn, *Jerome Frank’s Fact-Skepticism and Our Future*, 66 YALE L.J. 824, 828 (1957).

appeared to be core substantive issues and procedural, often giving them an unappreciated facet.

B. The Copyright Expert: Learned Hand

The second member of the panel in *Arnstein* was none other than Judge Billings Learned Hand, described by some as “the greatest judge to never sit on the Supreme Court.”¹⁷⁶ While on paper his primary contribution to the opinion was in joining Frank’s majority opinion, his very presence on the panel that decided the case is of some significance owing to his significant contributions to copyright jurisprudence in the decades preceding the case, much of which influenced the *Arnstein* formulation. During his time on the bench—both as a district court judge and later as a circuit court judge—Hand authored innumerable opinions on a wide variety of critical copyright law issues. Gerald Gunther, in his biography of Hand observes that “[n]o area displays Hand’s superlative traits as a judge more richly than his work in copyright law.”¹⁷⁷ Understanding Hand’s judicial philosophy, or indeed his overall approach to copyright law, is largely orthogonal to our inquiry here except for one important area of copyright law where he had a lasting impact: the test for copyright infringement.

Even as a district court judge, Hand came to recognize the imprecise and subjective nature of the copyright infringement inquiry. Especially in relation to musical works, his opinions often focused on the melodic component of a work, which he believed endowed the work with its commercial and popular significance.¹⁷⁸ Consequently, for copying to be actionable it needed to be of the melody, regardless of how extensive it was. In *Hein v. Harris*,¹⁷⁹ which he decided in 1910, Hand found the plaintiff’s musical score to have been infringed by the defendant, even though there were differences of some significance between the works. He thus observed, that even though “the keys [we]re different...this is a distinction which is of no consequence to the ears of all but those especially skilled in music.”¹⁸⁰ In *Hein*, Judge Hand also set out his basic approach to balancing creativity and copying in the world of musical copyright:

¹⁷⁶ See Ari L. Goldman, *Gerald Gunther, Legal Scholar, Dies at 75*, N.Y. TIMES, Aug. 1, 2002, <http://www.nytimes.com/2002/08/01/us/gerald-gunther-legal-scholar-dies-at-75.html>.

¹⁷⁷ GUNTHER, *supra* note __, at 268.

¹⁷⁸ See ALFRED M. SHAFTER, MUSICAL COPYRIGHT 204-05 (1939).

¹⁷⁹ 175 F. 875 (C.C.S.D.N.Y. 1910).

¹⁸⁰ *Id.* at 876.

[T]he right of the author of a musical composition is not affected by the fact that he has borrowed in general from the style of his predecessors. The collocation of notes, which constitutes the composition, becomes his own, even though strongly suggestive of what has preceded, and it ceases to be an invention, and becomes an infringement, only when the similarity is substantially a copy, so that to the ear of the average person the two melodies sound to be the same. Therefore the lack of originality and musical merit in both songs, upon which the defendant insists, is of no consequence in law. While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created. Certainly the qualifications of judges would have to be very different from what they are if they were to be constituted censors of the arts.¹⁸¹

In this paragraph, we observe three points of significance. The first is Hand's observation that even a work of low artistic (i.e., musical) excellence can qualify for copyright protection. Here we see an echo of Justice Holmes's famous observations in *Bleistein*.¹⁸² Second is the idea that something is a copy only when it "substantially" the same as the original, measured by the average listener's reaction to the melodies in the two works. Third is his rationalization that this method most accurately measures the public taste in music, which gives the work its pecuniary value.

Hand's focus on the melody came to be called the "comparative method" of analysis, and was soon widely applied.¹⁸³ A few years later, it was Judge Hand who also introduced the requirement of "access" into the infringement analysis, i.e., that copying needed to be proved as a factual matter.¹⁸⁴ In *Haas v. Leo Feist*,¹⁸⁵ he was thus willing to find such access based on the testimony of the parties and upon his personal "musical sense," which he employed to detect similarities.¹⁸⁶ "[D]erivation" needed to be independently proved. In subsequent unreported decisions, he even went one step further, observing that mere similarity without access, could not amount to an infringement.¹⁸⁷ As a district court judge, Hand also applied his approach to

¹⁸¹ *Id.* at 877.

¹⁸² *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.").

¹⁸³ SHAFER, *supra* note __, at 205.

¹⁸⁴ *Id.* at 222-23.

¹⁸⁵ 234 F. 105, 107 (S.D.N.Y. 1916).

¹⁸⁶ *Id.*

¹⁸⁷ SHAFER, *supra* note __, at 223.

the comparison of literary works, specifically to plays and motion pictures. In *Stodart v. Mutual Film*, the plaintiff alleged that his play had been plagiarized by two motion picture companies in their movies.¹⁸⁸ Working through the plot, incident, characters, story line, and scenes of the work—Hand concluded that there was indeed an infringement. Echoing his observation in *Hein*, he thus went on to note:

A man may take an old story and work it over, and if another copies, not only what is old, but what the author has added to it when he worked it up, the copyright is infringed. It cannot be a good copyright, in the broader sense that all features of the plot or the bare outlines of the plot can be protected; but it is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright.¹⁸⁹

In this observation, we see the early outline of what would come to be understood as analytic “dissection” during the infringement analysis—the idea that a protected work might contain both protected and unprotected material, which needed to be sifted through during the comparison.

Hand’s lasting impact on copyright jurisprudence however came about during his time on the Second Circuit, by which time he had spent several years developing his judicial philosophy of copyright. His 1930 opinion in *Nichols v. Universal Pictures* is credited with explaining the logic behind copyright’s test for infringement.¹⁹⁰ The case involved a plaintiff who alleged that his play had been infringed by the defendant’s “motion picture play,” which had a similar story line and set up.¹⁹¹ Hand thus began his analysis with the observation that for “any protection of literary property, whether at common-law or under the statute...the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations” which in turn meant that “when the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome.”¹⁹² He then went on to describe the approach in a paragraph that has since been quoted innumerable times, and has since acquired iconic status as the “abstractions” principle in copyright law:

¹⁸⁸ 249 F. 507 (S.D.N.Y. 1917).

¹⁸⁹ *Id.* at 510.

¹⁹⁰ 45 F. 2d 119 (2d Cir. 1930).

¹⁹¹ *Id.* at 120.

¹⁹² *Id.* at 121.

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.... Nobody has ever been able to fix that boundary, and nobody ever can.¹⁹³

In the end, after a detailed analysis of the plays, he went on to conclude that the defendant’s copying was no more “than the law allowed,” rendering it non-infringing.¹⁹⁴ Hand’s reasoning in *Nichols* is special, not merely because of its “brilliant¹⁹⁵” factual analysis, but also because of its candid admission that the infringement analysis in copyright law is necessarily imprecise and heavily contextual. Perhaps more importantly, in applying the test to the facts before him, Hand vividly illustrated how courts were to look past strong similarities between the works when they related to unprotectable elements. A few years after *Nichols*, Hand applied the same logic to a different set of facts to come to the exact opposite conclusion, noting that “others may ‘copy’ the ‘theme,’ or ‘ideas,’ or the like, of a work, though not its ‘expression’” and emphasizing that “unconscious plagiarism is actionable quite as much as deliberate” since creators “might quite honestly forget what they took.”¹⁹⁶ Hand’s recognition of the contextual nature of the infringement inquiry was thus more than just rhetoric, as revealed in his own application of its reasoning to future cases. *Nichols* continues to influence copyright law to this day, with courts most recently extending its application to the realm of computer software, which copyright law treats as a literary work.¹⁹⁷

By 1946, when *Arnstein* was argued before the Second Circuit, Hand had therefore established himself as the nation’s leading judge on copyright law. Indeed, it would only be a slight exaggeration to say that the basic approach to copyright infringement, including the concepts of “substantial” similarity, access, and dissection, were essentially his very creation, since he had by then “creatively shaped the law.”¹⁹⁸ Additionally, as some scholars have noted, Hand’s copyright opinions reveal a rhetorical flourish and

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ GUNTHER, *supra* note __, at 276.

¹⁹⁶ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 54 (2d Cir. 1936).

¹⁹⁷ *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F. 2d 693, 704 (2d Cir. 1992).

¹⁹⁸ GUNTHER, *supra* note __, at 268.

“virtuos[ity]” that “convey the sense that he enjoyed writing them.”¹⁹⁹ His decision to allow Frank to author the majority opinion in *Arnstein* and to lend his imprimatur to it was therefore of some considerable significance in the case.

C. The Procedural Reformer: Charles Clark

The final member of the *Arnstein* panel, who authored the powerful dissent in the case, was Judge Charles E. Clark. A prominent scholar of civil procedure, Clark was a tenured member of the Yale Law faculty who went on to serve as the law school’s dean.²⁰⁰ Before being appointed to the bench, Clark had however also held an important reform-related position that would come to color much of this judicial writing: Reporter to the Supreme Court’s Advisory Committee on the Federal Rules of Civil Procedure.²⁰¹ In that position, he was “principally responsible” for the drafting of the Federal Rules, which came into effect in 1938,²⁰² and many of his contemporaries have noted how the Rules bear the indelible imprint of his core philosophy.²⁰³ Scholars have long observed how his judicial opinions were greatly influenced by his work on the Advisory Committee, and that they were characterized by a “passionate and fervent devotion to the” Federal Rules and the work of the committee, and in particular to Rule 56 dealing with summary judgment, which Clark had personally been involved in drafting.²⁰⁴

As a scholar of civil procedure, Clark articulated his basic philosophy to the area in an article published a few years before he became a judge: *The Handmaid of Justice*.²⁰⁵ In it, he emphasized that procedure was meant to have a subordinate position to substantive rules of law, as a handmaid rather than a mistress, and that procedural rules were to be characterized by efficiency, simplicity, regularity, and flexibility (adaptability to new circumstances).²⁰⁶ As some have noted, Clark failed to fully appreciate how these ideals might

¹⁹⁹ *Id.* at 269.

²⁰⁰ See Eugene V. Rostow, *Judge Charles E. Clark*, 73 YALE L.J. iv (1963); Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323 (1965).

²⁰¹ Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976); Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Context*, 135 U. PA. L. REV. 909, 961 (1987).

²⁰² Smith, *supra* note __, at 915.

²⁰³ See, e.g., Elmo Hunter, *One Year of Our Federal Rules*, 5 MO. L. REV. 1, 6-7 (1940); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 908 (1952).

²⁰⁴ SCHICK, *supra* note __, at 241.

²⁰⁵ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297 (1938).

²⁰⁶ *Id.* at 297-300.

themselves compete with each other on occasion, when applied.²⁰⁷ Clark's belief that procedure should not dictate outcomes in individual cases was however more than just lofty rhetoric; it represented a worldview that was decidedly anti-formalist and anti-conceptualist. In illuminating work that draws on Clark's papers, David Marcus argues that this strand of Clark's thinking was distinctively pragmatic in outlook and content, in so far as it associated the legal system with goals derived from individual substantive areas and abjured any reliance on procedural foundationalism.²⁰⁸

Clark was an early and influential Legal Realist, who recognized there to be an important role for legal rules in the processes of legal and judicial reasoning.²⁰⁹ Some of his early work openly criticized the American Law Institute's first round of restatements, arguing that they were attempting to mechanically restate the law in "black letter" terms, without appreciating the unique contexts and circumstances from which the law itself emerged.²¹⁰ In Clark's view, procedural legal rules needed to be "stated in the terms of the functions they are to perform, or the results they are to achieve" rather than as "arbitrary mandates" or principles.²¹¹ They were useful in so far as they worked as "guiding principle[s]" that were workable in practice.²¹² Clark was thus decidedly functionalist about procedural rules, and very willing to recognize that in the hands of a good judge, procedure facilitated a genuine focus on the substantive issues at stake, in an efficient and speedy manner.

Despite being responsible for the entirety of the Federal Rules, Clark undoubtedly felt most strongly about Rule 56—summary judgment—during the course of his judicial career.²¹³ As a scholar and later Reporter for the Federal Rules, Clark believed that summary judgment was an "effective remedy" for the problem of the "law's delay."²¹⁴ Its virtues were seen to lie in its "simplicity" and in its allowing for the "prompt disposition of bona fide issues of law as well as of sham defenses" when there were no disputes of fact.²¹⁵ To Clark, summary judgment enabled litigants to avoid the perils of a

²⁰⁷ Smith, *supra* note __, at 916.

²⁰⁸ David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 434, 486-88 (2010).

²⁰⁹ *Id.* at 459.

²¹⁰ Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 647 (1933) (describing how the restatement chose "to press the fruitful activities of its scholars into the dry pulp of the pontifical and vague black letter generalities")

²¹¹ Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 499 (1950).

²¹² Charles E. Clark, *History, Systems, and Functions of Pleading*, 11 VA. L. REV. 517, 548 (1925).

²¹³ See Smith, *supra* note __, at 927.

²¹⁴ Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929).

²¹⁵ *Id.*

full trial merely to establish that the case had no merit to begin with. He thus viewed trials as arduous mechanisms that needed to be reserved primarily for situations where facts—and not the law—was the principal locus of disagreement. As he put it, mid-way into his judicial career, by which time scholars had highlighted several problems with courts' use of the summary judgment procedure:

It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact. Just as obvious is the obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all. The very freedom permitted by the simplified pleadings of the modern practice is subject to abuse unless it is checked by the devices looking to the summary disclosure of the merits if the case is to continue to trial. ... Refusal of summary disposal of the case may be a real hardship on the more deserving of the litigants; since appeal does not lie from refusal as it does from the grant, the penalties may be the severer. A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.²¹⁶

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

Greater reliance on the summary judgment procedure by trial courts however required a good degree of confidence in the facts of the case. As Clark himself acknowledged, summary judgment was appropriate only when there was no "genuine" issue of material fact. To many at the time, the distance between *no* issue of material fact and a *clear* dispute of fact was rather significant. Clark's support for summary judgment—as articulated in his writing—appeared to advocate denials of summary judgment only when there was a clear issue of fact, enabling judges to summarily dispose of cases in situations involving the rest of the spectrum. His logic was that in such "cases where no sharp dispute on the facts is uncovered, determination of the case may well turn upon adjudication of a serious issue of law."²¹⁷ In other words, when the factual disputes were not "sharp" or distinctive, the dispute usually

²¹⁶ Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578 (1952).

²¹⁷ *Id.* at 570.

involved an issue of law. It was therefore premised on instilling an approach of factual certitude in lower court judges, enabling them to retake their place in the development of the law. Clark's views on summary judgment therefore went hand in hand with his Realist-belief that judges are always engaged in the "creative job of making new law."²¹⁸ All the same, they were premised on a degree of confidence about the fact-finding process and the ability of judges to discern factual disputes (and non-disputes) that was as a logical matter radically opposed to Frank's fact-skepticism.

Clark's support for summary judgment both drew from and augmented his lack of confidence in juries. In this respect, he shared Frank's views, except that as a pragmatic thinker his views were driven less by theory and rhetoric and more by a reformer's outlook. In a 1934 empirical study of civil juries in Connecticut, he carefully reviewed the working of jury trials in the state—casting to the side his own views on the subject.²¹⁹ Finally, when evaluating the data he offered the following observation:

Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is certainly not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules.²²⁰

Besides being a hardened Legal Realist and a pragmatic thinker, there was in addition a third—and perhaps more visible—component to Clark's worldview. This was his long-standing professional animosity while on the bench towards his colleague Jerome Frank. The precise source (and psychological roots) of this conflict has baffled scholars for many years now.²²¹ Both individuals were prominent, published legal scholars prior to their judicial appointments, and both were "New Dealers" and Legal Realists who shared similar political and institutional values.²²² Yet their disagreement while on the court was legendary. Schick describes "the virtually uninterrupted friction" between the two as one of the two "outstanding feature[s] of the

²¹⁸ Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 223-24 (1961). For a fuller exploration of this account by Clark, see: Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

²¹⁹ Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867, 884 (1934).

²²⁰ *Id.*

²²¹ SCHICK, *supra* note ___, at 219-47 (detailing the animosity and identifying potential sources for it).

²²² *Id.*

court's work" during the decade.²²³ Frank would openly acknowledge this acrimony,²²⁴ but neither was able to dispense with it in any significant form. In multiple legal opinions, Frank taunted Clark's views on the Federal Rules by making witty references to Clark's characterization of procedure as a "handmaid" of justice.²²⁵ This only caused Clark to become more defensive in *both* his writing and in his positions.

The Clark-Frank feuding was sufficiently public and well-known among the other judges of the court at the time.²²⁶ In one memorandum, Hand as Chief Judge chided them, noting: "After you and Jerry [i.e., Frank]...stop shouting, for God's sake file the opinions."²²⁷ In other correspondence, Hand was even more flowery in his identification (and criticism) of this feud.²²⁸ Whatever may have been the source of this animosity—whether it was the reality that Clark was the only judge who commuted from New Haven,²²⁹ Clark's own intellectual insecurities,²³⁰ Frank's style of argumentation,²³¹ Hand's seeming endorsement of Frank on most issues,²³² or instead Clark's own pugnaciousness²³³—the fact of the matter remains that it influenced the jurisprudence of the court, and Clark's philosophy and outlook on issues. When Frank authored a majority opinion, Clark invariably felt the need to dissent, and vice-versa. In the ten-year period between 1941 and 1951, the two were on opposite sides in 58 appeals, of about 200 where they sat together.²³⁴ *Arnstein* fell into this category.

In his own description of their conflicts in a tribute to Frank, Clark described their confrontations as "glorious battles" and characterized Frank as "a gladiator of unusual power and adroitness."²³⁵ In the end though, Clark attributed the disagreements to his own views on procedural reform, noting

²²³ *Id.* at 219.

²²⁴ *Id.* at 219-20.

²²⁵ See *In re Barnett*, 124 F. 2d 1005, 1011 n.15 (2d Cir. 1942); *Clark v. Taylor*, 163 F. 2d 940, 951 (2d Cir. 1947) (Frank, J. dissenting). For an overview, see: SCHICK, *supra* note __, at 25.

²²⁶ Indeed, even Justice Frankfurter seems to have known about it, and intervened on one occasion. See SCHICK, *supra* note __, at 240.

²²⁷ Memorandum from Learned Hand to Charles E. Clark, November 26, 1943.

²²⁸ SCHICK, *supra* note __, at 241.

²²⁹ *Id.* at 74-75.

²³⁰ *Id.* at 245 (quoting a memorandum where Clark refers to himself as a "slowpoke").

²³¹ *Id.* at 242 (noting how Frank was "far better equipped than Clark...to communicate with people orally and to get across, in a spirit of friendliness and enthusiasm, ideas which the listener was hostile to").

²³² *Id.* at 244-45.

²³³ Rodell, *supra* note __, at 1328 (noting how in a "a tough fight against long odds and rough opposition" he would prefer to have Clark rather than Frank on his side).

²³⁴ SCHICK, *supra* note __, at 247.

²³⁵ Charles E. Clark, *Jerome N. Frank*, 66 YALE L.J. 817, 818 (1957).

that “[i]f we differed, he and I, it tended to be here, where he felt that my aspirations for a uniform procedure, impartial as to all, were likely to rest heavily on some poor person not prepared therefor, and that such a person must be protected, whatever future inconsistencies might come back to trouble us.”²³⁶

In summary then, much of Clark’s legal and judicial thinking was heavily influenced by his work on the Advisory Committee and his commitment to the Federal Rules. In this role, he felt fairly sanguine about a lower court’s ability to manage the issues involved, once presented with the right procedural mechanisms. The administration of justice was to him the overarching ideal of the judicial system, and for which the systematization and streamlining of the process—so as to enable a more direct focus on substance—was critical. Indeed, Clark felt so strongly about his commitment to the Federal Rules that in a personal memorandum to Hand (chief judge at the time) he candidly recognized the conflict:

The truth of the matter is that I sometimes find difficulty in my two capacities of judge and of reporter for the rules. It is hard to know where to draw the lines...Maybe the two jobs will become more and more fundamentally incompatible...Maybe I ought to resign from the Committee.²³⁷

Whether or not Clark’s position compromised his judicial role, the fact remains that the Federal Rules represented his professional “bab[y]”²³⁸.

III. ORCHESTRATING THE REVERSAL

Having examined the actual opinions in *Arnstein* as well as the background legal philosophies and beliefs of the panel that heard the case, this Part moves to reconstructing how—and perhaps more importantly *why*—Judge Frank structured the opinion in the way in which he did, and in the process produced new copyright doctrine: the *Arnstein* test. To this end, it relies not only on the judges’ extra-judicial writing, but also their relevant correspondence, memoranda, and draft opinions in the case, which together with the published opinions provide a richer account of the motivations for the *Arnstein* formulation. This reading indelibly confirms that despite Frank’s extensive efforts to avoid creating a “bad precedent” through the case, his

²³⁶ *Id.*

²³⁷ Letter from Charles E. Clark to Learned Hand, Aug. 4, 1947, quoted in SCHICK, *supra* note ___, at 246.

²³⁸ Letter from Charles E. Clark to Learned Hand, Feb. 2, 1944, quoted in *id.* at 224 n.8.

opinion succeeded in doing just that, owing to the rationalized and iconoclastic way in which it was constructed.

Understanding *Arnstein* through the judges' correspondence and memoranda provides a unique window into the way in which the judges in the case conceived of the workings of the copyright system and the role of litigation therein. Indeed, their memoranda in the case are more than just their ex post explanations for their views/decisions. The memoranda instead represent the very process through which they reasoned to their votes and conclusions in the case. This is because at the time, the Second Circuit adhered to a rather unique practice. The judges who heard a case were to meet in conference to discuss their views on it *an entire week* after the oral arguments, during which time they were expected to indicate how they planned to vote through the exchange of written memoranda with each other.²³⁹ While the process was no doubt laborious for the judges themselves (and often criticized²⁴⁰), it nonetheless ensured that their memoranda became candid instruments of persuasion and reasoning that today hold a wealth of detail about a case that the final opinion simply does not reflect. This was indeed the case with *Arnstein*, where the judges generated a rich paper trail that helps shed light on what Frank intended to achieve with his opinion, in contrast with what actually became of it over time.

A. Divergent Musical Hunches and Procedural Sensibilities

Arnstein was argued before the Second Circuit in the week of January 7, 1946,²⁴¹ and in keeping with the court's protocols at the time, the judges' conference was scheduled for the following week. A few days after oral argument, on January 11, Frank was the first to weigh in.²⁴² Noting that while there were good occasions for summary judgment in copyright infringement cases, he argued that this was "not such a case."²⁴³ The crux of the matter, in his view, boiled down to this:

I have listened to [both musical compositions.] I am relatively unversed in this field. But I think that... [Porter's compositions have]

²³⁹ See SCHICK, *supra* note __, at 96-98 (describing it as the Second Circuit's hallowed "memorandum system" and noting how this traditional practice was unique among circuit courts of appeal).

²⁴⁰ *Id.* at 98.

²⁴¹ See Cases Heard week of January 7, 1946 (Jerome N. Frank Papers) (on file with the Yale Law Library).

²⁴² Memorandum of Jerome N. Frank in *Arnstein v. Porter*, Jan. 11, 1946.

²⁴³ *Id.* at 1.

some marked resemblance to... [Arnstein's]... . So, too, does my secretary who improvises music.²⁴⁴

His own auditory sensibilities therefore urged him to conclude that the plaintiff was “entitled to a trial.”²⁴⁵ Frank then sought to underplay the plaintiff’s seemingly fantastical allegations, noting how “partly crazy men” could still be victims of plagiarism, especially since the plaintiff’s works “show considerable ability.”²⁴⁶ He concluded his initial memo with a jibe at the district court, noting that the size of the case files appeared to “have induced [Judge Caffey] not to study with care the facts of this case.”²⁴⁷

Three days later, Clark responded with his own memorandum—significantly longer than Frank’s.²⁴⁸ In it, he noted that he first “went over the sheet music” to study the plaintiff’s “dissection-analysis” and concluded that there was no copying.²⁴⁹ He then claimed to have met with his friend, Professor Luther Noss, a “Yale University organist” who simply “played and sang all the pieces.” Noss concluded that the plaintiff’s claims were “fantastic” and that the defendant’s comparison (which showed the extensive differences) was more accurate.²⁵⁰ Clark’s point was simple: as a composer of simple “musical idioms,” the plaintiff had been able to find similarities with much of the defendant’s work, disregarding “the melodies which impress the public.”²⁵¹ Arnstein could never, in Clark’s view, “get any expert to support his thesis.”²⁵² Clark appears to have genuinely believed that he could persuade Frank in his analysis, noting “had you been with me or if you now do the same thing with a really good musician you will not have the same slightest doubt that there is nothing to this at all.”²⁵³ His use of the phrase “slightest doubt” is interesting here, since it suggests that he might have been implying that *even* under Frank’s preferred standard for summary judgment (the slightest doubt standard²⁵⁴), Arnstein simply had no case.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1-2.

²⁴⁶ *Id.* at 2.

²⁴⁷ *Id.*

²⁴⁸ Memorandum of Charles E. Clark in *Arnstein v. Porter*, Jan. 14, 1946.

²⁴⁹ *Id.* at 1.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 2.

²⁵² *Id.*

²⁵³ *Id.* at 4.

²⁵⁴ *Doehler*, 149 F. 2d at 135 (“A litigant has a right to a trial where there is the slightest doubt as to the facts.”) (*Frank, J.*).

Yet, Clark could not bring himself to stop there. His commitment to the Federal Rules got the better of him, and he chose to point out that Frank was reversing the lower court's grant of summary judgment, which was quite independently a bad thing. Expressing his "considerable dismay" at the court's tendency to "do damage to the rule of summary judgment against its wording and spirit," he believed that it would do no more than "redouble the energies of the lawyers to go back to the old system" of pleading.²⁵⁵ Frank seems to have found no merit in this allegation, for in his version of the memo he merely underlined the observation and inserted by its side in pencil: "Why?" The only benefit of a full trial, in Clark's view was to elicit expert testimony, which could have been obtained by affidavit, and the court could have consulted a musical expert on of its own. He then brought the point home rather forcefully:

I don't believe one of us thinks for a moment that there is one chance out of a hundred of Arnstein's ever succeeding here; and I think we cast doubt on the process of justice and our own standing as a court if we simply postpone decision and have not the backbone to stop it when we should....I think it brings the whole process of justice and our court in particular into disrepute.²⁵⁶

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

In his rejoinder that he produced the very next day, Frank took Clark's cue and shifted his focus almost entirely to the procedural issue, noting that Clark's memo seemed to adhere to some vision of "enlightenment in procedure."²⁵⁷ He then relayed the anecdote about summary judgment that would make its way into the final opinion, except that in this version he expressly referenced the judge involved (Judge Leibell) and the case where it

²⁵⁵ Memorandum of Charles E. Clark in *Arnstein v. Porter*, Jan. 14, 1946, at 4.

²⁵⁶ *Id.* at 5.

²⁵⁷ *Arnstein v. Porter*—Supplemental Memo of Jerome N. Frank, Jan. 15, 1946, at 1.

occurred (the “General Motors bonus case”). Frank then claimed to be “impressed” by the plaintiff not being a lawyer, such that summary judgment would put him “at a disadvantage”,²⁵⁸ and by the fact that a trial would have been quick, since

The defendant would have introduced the very evidence it has put in by way of affidavits; the defendant would have testified; then the trial judge would have done the work which he obviously didn’t do here, and, on appeal we would have been obliged to do far less work than the defendant asks us to do on this appeal.²⁵⁹

The next sentence in the memo is quite telling, for it clearly reveals that Frank’s real discomfort with the lower court decision arose from his inability to be certain about the facts involved. In this sentence, Frank poignantly observed that “[t]o say that plaintiff’s case will be no stronger on a trial is to guess,” which was simply unacceptable.²⁶⁰

Somewhat interestingly, in his own copy of the memo he circulated, Frank scribbled a few handwritten thoughts on the side margin.²⁶¹ In one, he asks the question “Would we entertain a directed verdict here, if this had been a jury trial?” In the other, he appears to make an observation about how copying might be inferred: “(1) If no direct proof of access whatsoever, still marked similarity may be proof of it[;] (2) If no such marked similarity, then there must be direct proof of copying.” It isn’t clear if these thoughts represent Frank’s efforts to muddle through the standard or if they were put in after. Neither made its way into the memo sent out, though the latter became the *Arnstein* standard for proof of copying in the opinion itself. Frank concluded his memo with the claim that he was opposed to “creating a bad precedent” just because “Arnstein is nutty.”²⁶²

Much as Frank’s memo shifted gears in its move to critiquing summary judgment, so too did Clark’s next salvo, dated the same day as Frank’s missive!²⁶³ Indeed, it took the disagreement in a more ad hominem direction as well. Claiming that Frank had sidestepped his “musical analysis,” Clark chided Frank for suggesting that the court should do “less work,” quipping that he thought they “were here to work.”²⁶⁴ He (Clark) then interpreted Frank’s

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 2.

²⁶¹ *Id.* at 1.

²⁶² *Id.* at 2.

²⁶³ *Arnstein v. Porter* (Supplemental Memo of Charles E. Clark), Jan. 15, 1946.

²⁶⁴ *Id.*

reference to “bad precedent” as suggesting a precedent where summary judgment was allowed in an infringement trial, and reiterated that it was the court’s “duty to apply the rule [i.e., summary judgment] and let the precedents fall as they may.”²⁶⁵ It isn’t clear that Frank’s reference to “precedent” was singularly connected to summary judgment; yet Clark took it to be.

Frank responded the next day, this time with his own ad hominem critique of Clark.²⁶⁶ He first clarified that his reference to less work was merely a reference to the appellate court “doing the job of the trial court.”²⁶⁷ His memo then went on the offensive, accusing Clark of secretly calling “in an expert witness” and of asking the court to decide the case based on that witness’s “testimony.”²⁶⁸ Explaining why it would be improper and unfair to do so, Frank even argued that “judicial notice” was inappropriate for such analysis. The memo then referred back to the “bad precedent” claim, and here—in what appears to be a direct taunt—consciously affirmed Clark’s interpretation of it. Frank thus unequivocally claimed that summary judgment was “‘bad’ here” and that nothing was wrong with the desire to avoid a bad precedent.²⁶⁹ Referring to Clark’s “fondness for summary judgments” as potentially “infect[ious],” the memo insisted that the procedure be “carefully restricted.”²⁷⁰

Note that Hand was yet to weigh in with his views on the case, even though Frank and Clark had by this time circulated five memoranda. On January 18, a whole week after Frank’s first memo in the case, Hand finally weighed in and sided with Frank.²⁷¹ Hand began his memo with the observation that the case had “troubled [him] more than anything else of the week’s batch.”²⁷² Arguing that the “main question is one of infringement,” he concluded that there “ought to be a trial.” His reason: “[S]o far as my ear is the test, I cannot say that, if the defendant did use the plaintiff’s songs, it was not actionable” especially since “we ought not to substitute ourselves as a jury on such an issue” because in the end “[t]he test is the impression made upon the ear of the ordinary hearer,” an issue which should be “exclusively for a jury.”²⁷³ What is ironic in Hand’s observation here is that in the very preceding

²⁶⁵ *Id.*

²⁶⁶ Memorandum of Jerome N. Frank in *Arnstein v. Porter*, Jan. 16, 1946.

²⁶⁷ *Id.* at 1.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 2.

²⁷⁰ *Id.* at 2-3.

²⁷¹ Memorandum of Learned Hand in *Arnstein v. Porter*, Jan. 18, 1946.

²⁷² *Id.* at 1.

²⁷³ *Id.*

paragraph, he had observed that “it is extremely improbable that the defendant could ever have heard [the plaintiff’s music], or that, if he did, he should have copied it.”²⁷⁴ “[N]o jury is likely to . . . believe that the defendant got any benefit from it, if it happened.”²⁷⁵ He was therefore willing to send it to a jury hoping to get to illicit copying *even though* he had little doubt that there was no actual copying at all.

Much like Frank, Hand too appears to have been moved by the musical similarities that he perceived. Despite his own admission that actual copying was “extremely improbable” and that “no jury” could ever find it, he chose to order a jury trial—almost as if to suggest that access to a full adversarial process was a right on its own. “[A]dvocacy in a jury-room is a black art, but our country exhibits great, and perhaps increasing, passion for it, and we must not invade it.”²⁷⁶

Hand then weighed in on the summary judgment question as well, prophetically noting that courts “have constantly to resist the disposition of many of the district judges to be rid of the burden of long trials like these.”²⁷⁷ The observation is interesting, and should be contrasted with Frank’s belief that the trial would be “quick.” It suggests that whereas Frank believed that the lower court was a little too sure about the facts involved in the case, Hand believed that the lower court was avoiding work in order to dispose of more cases. Unlike Frank though, Hand left open the possibility that after trial a judge could “direct a verdict for the defendant.”²⁷⁸

We learn from later correspondence between Frank and Clark that at the end of the initial conference, Hand had decided to author the opinion in the case himself.²⁷⁹ Yet, the very next day he changed his mind and asked Frank to write it, outlining his “views as to details.”²⁸⁰ Hand’s decision to side with Frank ended the confrontation leading up the opinions, with Frank and Clark then producing their respective opinions—in turn emphasizing different issues.

* * *

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Letter from Jerome N. Frank to Charles E. Clark, April 3, 1946 (“[O]riginally, immediately after our conference, he assigned the opinion to himself, and only the next day asked me to write it.”).

²⁸⁰ *Id.*

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

B. Rationalizing the Hunch

During the actual drafting of the opinion, there appears to have been very little correspondence between the judges. When the judges did communicate, it was largely over their respective interpretations of a few technical procedural rules that were at issue in the case.²⁸¹ The correspondence also reveals that during the writing of the opinions, Frank telephoned Clark in an effort to describe to him the true basis of their disagreement and characterized the difference as relating to “degrees of copying and of use of musical expertness.”²⁸² Upon seeing Frank’s draft opinion, Clark found this explanation to be useless, noting in a letter to the former that he could not “see anything in it at all and that it merely adds to the confusion into which this whole subject will go with the appearance of [Frank’s] opinion.”²⁸³ He further observed that an “attempted distinction of this kind in the hands of the jury can add only to the other confusion.”²⁸⁴

²⁸¹ See, e.g., Letter from Jerome N. Frank to Charles E. Clark, Feb. 2, 1946; Letter from Charles E. Clark to Jerome N. Frank, Feb. 4, 1946; Letter from Jerome N. Frank to Charles E. Clark, Feb. 4, 1946; Letter from Jerome N. Frank to Learned Hand, Feb. 5, 1946.

²⁸² Letter from Charles E. Clark to Jerome N. Frank, Feb. 4, 1946.

²⁸³ *Id.*

²⁸⁴ *Id.*

With this, the judges came to produce their opinions. Several weeks after the case was decided and the opinions were filed, Frank and Clark continued to squabble about the majority opinion in *Arnstein* and its implications. On one occasion, Clark appears to have suggested that in the majority opinion Frank and Hand believed that the plaintiff “should recover.”²⁸⁵ This observation prompted Frank to produce two new memos explaining what he had intended to achieve in the majority opinion. His observations in these documents are quite telling, for in it we see his first (and only) effort to explain—albeit post hoc—his actual reasoning in the majority opinion. When read together with his overall legal philosophy, they reveal a lot about the logic of the *Arnstein* opinion.

1. A Jury Trial to Test a Hunch

Frank continued to insist that the majority’s (i.e., his opinion’s) rationale for sending the case back to the lower court was not premised on the belief that *Arnstein* should in fact recover, but instead in order to afford him a chance to adduce additional evidence in support of his claims. In particular, he believed that the opinion’s observations that court “cannot now say...that at the close of a trial the judge could properly direct a verdict” and that doing otherwise was “prejudging the merits of the case” affirmed this interpretation.²⁸⁶ As noted previously, Hand too seems to have adopted a similar position when he observed that it was “extremely improbable” that the defendant had access to the plaintiff’s work, let alone copied from it.

Frank also believed that Clark’s “jibe” at him for insisting on a jury trial in the opinion was totally “unjustified” given his known dislike for juries.²⁸⁷ He insisted that “as a judge” he had a duty to follow the law and ensure that the jury worked “according to the accepted rules” until an amendment rendered the jury system moot.²⁸⁸ In one important respect then, Clark appears to have been grossly incorrect. Frank’s decision had less to do with believing that the plaintiff should win and more to do with his lack of confidence that the plaintiff should lose. In other words, the majority’s insistence on a jury was borne out of an obvious lack of confidence that emanated from their own musical sensibilities, using which they had detected some similarity between the works. Yet being unwilling to base a decision—

²⁸⁵ Letter from Jerome N. Frank to Charles E. Clark, In re: *Arnstein v. Porter*, Mar. 20, 1946.

²⁸⁶ *Id.*

²⁸⁷ Letter from Jerome N. Frank to Charles E. Clark Re: *Arnstein v. Porter*, Mar. 22, 1946, at 4.

²⁸⁸ *Id.*

for the plaintiff—on that sensibility, they simply chose to have it *tested* by a lay jury.

Frank’s emphasis on wanting the jury to test his hunch, i.e., the musical similarity that he had discerned, comes through not just in his discussion of improper appropriation, but even in his discussion of access. Whereas his analysis was unwilling to find proof of copying without any similarity even when there was extensive proof of access; it was nonetheless perfectly comfortable inferring copying when there was no proof of access but an extensive amount of similarity between the works.²⁸⁹ In other words, even in the assessment of actual copying, the similarity between the works was to play a far more important role than proof of access. This formulation was in a real sense tailor-made for Arnstein. Given the plaintiff’s inability to offer any evidence of access, proof of actual copying seemed to be altogether missing. By allowing the absence of such evidence to be overcome by “similarities”—which needed to be striking, or “marked”—Arnstein would however still have a chance to have his case move forward.

In the end then, Frank’s willingness to enable his hunch to be tested by a jury can be explained by his extreme fact-skepticism, which in turn motivated much of his thinking by the time of *Arnstein*. Recall that in Frank’s view, fact-finding in lower courts was the single most difficult and troubling part of the court system.²⁹⁰ The subjectivity and imperfections of the fact-finding process rendered the very idea of legal “rights” and rules altogether unpredictable and flimsy in his account.²⁹¹ Consequently, the lower court’s extreme confidence in the “fantastical” nature of the plaintiff’s case troubled Frank greatly. In his view, the lower court had insufficient evidence to make that determination. In addition, he believed that the *pro se* plaintiff’s lack of familiarity with the specialized rules of evidence and motion practice meant that the court very likely did not obtain a full picture of the factual record. Thus his claim that he was “impressed” by Arnstein’s status as a non-lawyer.²⁹²

While Frank certainly didn’t believe that handing the case over to a jury would produce a perfect account of the facts (nor did he likely believe that such a thing was ever possible), he was nonetheless willing to trust a jury of “lay” listeners over an over-burdened and likely prejudiced trial court judge in order to test the viability of his hunch. And this of course put him in an awkward position, given his otherwise well-known dislike of juries. Yet, as

²⁸⁹ *Arnstein*, 154 F. 2d at 468.

²⁹⁰ See *supra* text accompanying notes ___-___.

²⁹¹ See FRANK, COURTS OF TRIAL, *supra* note ___, at 5-36.

²⁹² *Arnstein v. Porer—Supplemental Memo of Jerome N. Frank*, Jan. 15, 1946, at 1.

between a decision on summary judgment—which would have skirted the similarity question altogether—and one left to a jury’s intuitions, he was willing to consider the latter, *given the facts of the case*, and his hunch.

Indeed, while Frank was otherwise skeptical of juries in so far as they sought to apply rules, he nevertheless considered them viable arbiters of hunches. Speaking of hunches, he once observed that courts reach their decisions through “an unanalyzed, undifferentiated, composite reaction—a ‘hunch’ or unanalytic ‘gestalt’ (a ‘whole’)” and that “[t]here [wa]s very considerable reason to believe that juries often do not go beyond such composite (or gestalt) reactions in arriving at their verdicts.”²⁹³ Juries thus hunched their way to decisions too; and to the extent that a hunch was a legitimate basis for a decision (in the fact-skeptic’s account), using a jury (or an “advisory jury”²⁹⁴) to this end was altogether unproblematic. As a fact-skeptic, Frank’s real concerns were when a judge chose to rationalize this hunch by “fudging” the subjective nature of the fact-finding process in the analytic logic of the law, since it would thereby avoid appellate scrutiny and mask the real reasons for decision.²⁹⁵ This posed an obvious problem:

A trial judge, seeking to effectuate his gestalt, may make and publish an unconsciously “fudged” finding which, in terms of a legal rule as he interprets it, justifies his decision in favor of the plaintiff. Suppose that the upper court interprets that rule differently. The upper court, accepting the trial judge’s finding (because the testimony was oral), applies to the finding that rule so interpreted—with the result that the upper court decides for the defendant. Had the trial court correctly anticipated the upper court’s interpretation of the rule, he might have made a different finding—indeed one that would have necessitated no “fudging”—which would have led to an affirmance of his decision for the plaintiff.²⁹⁶

This was precisely what Frank was avoiding in *Arnstein*. As a hardened fact-skeptic, accepting the factual subjectivity of supposedly legal questions meant that a subjective but un-fudged and fact-based jury verdict was preferable to an objective, but fudged judicial decision.

When the case was sent back to the lower court, following *Arnstein*’s admonition the district court did in fact conduct a jury trial. Amid much

²⁹³ Jerome Frank, “*Short of Sickness and Death*”: *A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U. L. REV. 546, 595 (1951).

²⁹⁴ *Arnstein*, 154 F. 2d at 473.

²⁹⁵ Frank, *Moral Responsibility*, *supra* note ___, at 596.

²⁹⁶ *Id.* at 596-97.

fanfare, the jury—as predicted—disbelieved Arnstein’s story and found for the defendant.²⁹⁷ Of course, Arnstein appealed the verdict to the Second Circuit again, and the matter reached a panel consisting of Frank, Hand, and Harrie Chase. In a per curiam opinion authored by Frank, the court affirmed the verdict.²⁹⁸ Yet, Frank chose to emphasize that the court’s prior decision—to remand it for a jury trial—had been correct, even though the jury thought the case meritless. In a three-sentence opinion, Frank went out of his way to observe:

There can be no doubt that the evidence upon the trial presented a disputed issue as to whether the defendant had in fact copied the plaintiff’s music; and that it was not so clearly in the plaintiff’s favor that the judge could properly have directed a verdict.²⁹⁹

Clearly defensive of the decision to order a jury trial, Frank continued to believe that he made the right choice, result aside. The jury trial was therefore in the end little more than an effort to test Frank’s hunch.

2. Two-Step Copying

Arnstein’s best known and most-enduring contribution to copyright law—one that continues to influence courts to this day—remains its bifurcation of the infringement analysis into two steps: actual copying and improper appropriation. All the same, the opinion itself says very little about its reasons for the bifurcation and the various embellishments that it introduces onto to each step. In addition, Frank describes the test in declaratory and prophetic terms.³⁰⁰ In their post-opinion correspondence, Clark ridiculed the two-step approach as “highly novel and devastating” since it required that a decision on “the really important issue must be made without expert help of any kind” rendering it “a matter of chance with the jury.”³⁰¹ To Clark “[t]here was nothing in the cases even to suggest this,” meaning that it was no more than “a way of getting rid of the prior authority in favor of expert evidence.”³⁰² He then warned Frank that it was “going to haunt us in plagiarism cases from now on.”³⁰³

²⁹⁷ For an account of the trial, see: ROSEN, *supra* note ___, at 231-36.

²⁹⁸ *Arnstein v. Porter*, 158 F. 2d 795 (2d Cir. 1946).

²⁹⁹ *Id.*

³⁰⁰ *See Arnstein*, 154 F. 2d at 468-72.

³⁰¹ Letter from Charles E. Clark to Jerome N. Frank, Mar. 21, 1946.

³⁰² *Id.* at 2.

³⁰³ *Id.*

Frank fired off a spirited defense of his position the very next day. His defensiveness came out in the early lines of the memo, where he made the somewhat childish point that Hand was “in every sense, the co-author of [the] *Arnstein* opinion” and that Hand “had made the ‘law of copyright.’”³⁰⁴ Frank was thereby implying that by criticizing the opinion, Clark was questioning Hand’s reasoning and authority as the leading copyright judge of the time.

In the memo, Frank outlined a series of cases—from the same circuit as well as others—that he believed supported both (i) the bifurcated inquiry, and (ii) the exclusion of expert evidence. All of Frank’s authorities on the bifurcated inquiry are however less direct than he makes them out to be in his memo. First, while they do hint at the general idea that “not all copying is copyright infringement,” none of them attempt to separate out the different dimensions of copying into independent analytical steps. Second, and perhaps more importantly, some of the authorities that he references were making the distinction within the context of a defense to infringement, i.e., under the rubric of the “fair use” doctrine, which had been in existence for a while by the time of *Arnstein*, and which he overlooks altogether. Frank’s references to “abridgements,” “compilations,” “quotations” and “works of criticism” underscore the point that he conflated fair use and infringement.³⁰⁵ Indeed, the *Arnstein* opinion doesn’t even so much as mention fair use!

His discussion of expert evidence was equally unpersuasive. In the memo, he cited to cases that described the test as that of the the “ordinary observer,” as “ingenuous,” and as based on a “complex of...impressions.”³⁰⁶ Yet, none of these descriptions seemed to render expert evidence *ipso facto* “irrelevant” as *Arnstein* did.³⁰⁷ Surely to the extent that melody was the core element in the “comparative method” noted earlier, even a lay jury needed some guidance on the difference between melody, rhythm and other parts of a musical work.

Clark all too easily recognized the weakness of Frank’s defense, and in what would be the last piece of correspondence between them on the case, observed that “[t]he cases you cite show how hard you must grub for not even a faint suggestion of what you have done” and ended the debate by noting that there wasn’t “much use in going on.”³⁰⁸ Frank was certainly scouring for some support for his analytical moves, but the cases offered none. All the same, if we take a step back, and retreat again into Frank’s judicial philosophy and

³⁰⁴ Letter from Jerome N. Frank to Charles E. Clark re *Arnstein*, Mar. 22, 1946.

³⁰⁵ *Id.* at 2.

³⁰⁶ *Id.* at 3.

³⁰⁷ *Arnstein*, 154 F. 2d at 468.

³⁰⁸ Letter from Charles E. Clark to Jerome N. Frank, Apr. 2, 1946.

writing, his analytical moves in *Arnstein* paint a different picture—one far removed from both copyright law.

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

Such “patent” dissimilarity would be hard for a trial judge to mask, unlike latent similarities or dissimilarities, which could operate as perfect fodder for the lower court to give play to its various biases—be they sociological, reputational, or individual to the case.³⁰⁹ Writing a few years after *Arnstein*, Frank thus noted:

When a trial judge does publish “findings,” they are but a report of his belief about the facts. He may (intentionally or unintentionally) misreport what he believes, in order to circumvent the precedents in the interest of what he deems just, or very occasionally out of other less praiseworthy motives (induced by bribery or “pull”). No one except the trial judge knows whether, in his published “findings,” he accurately reports or “fudges” (i.e., distorts) his belief, for no one else can disprove the accuracy of such a report of an inner “state of mind.”

...

[I]n the mine-run of law suits—that is, the great bulk of law suits—the prejudices of judges and jurors for or against particular individual witnesses, have no “large- scale social” character, and lack

³⁰⁹ *Arnstein*, 154 F. 2d at 473.

uniformity. They are distinctively individual, unconscious, un-get-at-able.³¹⁰

Recall that the *Arnstein* opinion reiterated Frank's famed concern with "unconscious" biases in decision-making.³¹¹ Frank thus held a rather dour view of trial court judging, borne out of his extreme fact-skepticism. The bifurcated test in *Arnstein* was meant to guard against the possibility of "fudging" the intrinsically subjective test of improper appropriation in order to avoid a trial on copying. It appears that Clark scarcely understood (let alone approved of) this motivation of Frank at the time.

Frank's disallowance of expert testimony for illicit copying had similar roots. Frank strongly believed that certain categories of decisions were more intuitive than analytical, in that they defied being broken down into component parts. Indeed, breaking them down into such parts was likely to introduce an element of illogicality into the decision, merely for the sake of analytical coherence.³¹² This was an off-shoot of his theory about "hunches." Rather interestingly though, Frank's prime example of a hunch that was intrinsically incapable of disaggregation was "music":

The gestaltist's favorite illustration is a melody: a melody does not result from the summation of its parts; *thus to analyze a melody is to destroy it*. It is a basic, primary unit. The melody, a pattern, determines the function of the notes, its parts; the notes, the parts, do not determine the melody. Just so, say the gestaltists, no analysis of a pattern of thought, of a response to a situation, can account for the pattern.³¹³

Relying extensively on work in the field of linguistics, Frank came to believe that some judicial decisional processes "like the artistic process, involve[] feelings that words cannot ensnare" since they contained "overtones that were inexpressible in words."³¹⁴ While he made these observations primarily in relation to judicial fact-finding,³¹⁵ the logic carries over to jury-based decisions as well. The comparison of two works was meant to be a "subjective"

³¹⁰ Frank, *Moral Responsibility*, *supra* note ___, at 572-73.

³¹¹ *Arnstein*, 154 F. 2d at 475 n.33.

³¹² Jerome N. Frank, *Say It With Music*, 61 HARV. L. REV. 921, 928-92 (1948).

³¹³ *Id.* at 929.

³¹⁴ *Id.* at 932-33.

³¹⁵ *Id.* at 922.

determination, which he embraced.³¹⁶ Yet the interposition of an objective structure on that subjective determination risked skewing it.

Indeed, we see this preference for subjectivity in the early correspondence between the judges in *Arnstein*. Clark had used his conversations with musical expert Luther Noss to contradict Frank's musical hunch in the case and his detection of some patent similarity between the works. As Clark (channeling Noss) put it, the similarity was "the repetitious high E...meaningless in terms of music."³¹⁷ Frank's only way of rendering this supposed meaningless-ness irrelevant, was by rendering all expert testimony on the question presumptively irrelevant as a legal matter. And this he successfully achieved, rooting it in a theory about intuitive decision-making.³¹⁸ The exclusion of expert testimony on illicit copying was as much about precluding any reliance on Noss's views as it was about giving effect to Frank's (and Hand's) "inexpressible" detection of musical similarity between the works. In Frank's view, such similarity had to be intuitively assessed, and not through the use of analysis, reasoning, or expertise; since an evaluation of the similarity, much like other subjective, intuitive inquiries was inexpressible in words. It rendered the comparison in infringement cases palpably "unintelligent," in turn raising the specter of a host of subjective decisional biases improperly influencing the determination, which copyright law has had to deal with for decades.³¹⁹

* * *

Frank's own ex post rationalization of *Arnstein* as well as his writing on connected issues reveal that the opinion's most important legal moves were driven in large measure by his subjective reaction to the facts of the particular case, and as a fact-skeptic, his desire to ensure that the plaintiff obtained a jury trial to have that reaction tested. His views on summary judgment and indeed substantive copyright law and policy became mere vehicles in the process. The irony is of course that Frank claimed to be driven by a desire to avoid creating a "bad precedent" in *Arnstein*, when by most accounts his actual opinion in the case unequivocally did just that.

³¹⁶ *Id.* at 924.

³¹⁷ Letter from Charles E. Clark to Jerome N. Frank, Mar. 21, 1946.

³¹⁸ *Arnstein*, 154 F. 2d at 473.

³¹⁹ For a recent account, see: Shyamkrishna Balganes, Irina Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267 (2014).

C. Five Days Later...

Perhaps the best evidence we have that *Arnstein* was a product of Frank's skeptical reaction to the unique facts of the case rather than a concerted decision to direct the structure of the infringement analysis in the abstract, comes from a copyright infringement case that the same panel decided a mere five days after *Arnstein*: *Heim v. Universal Pictures*.³²⁰ Much like *Arnstein*, *Heim* too involved the standard for copyright infringement; and yet, hardly any copyright scholarship references or cites to it.

In *Heim*, the plaintiff was a Hungarian composer who claimed that his musical composition had been plagiarized by the defendants through their use of a substantially similar musical work in a movie that they produced.³²¹ The plaintiff's claim of access was based on the fact that his own music was popularized in a Hungarian movie that played in the U.S. on several occasions. The lower court decided to conduct a summary trial on the case during which the plaintiff introduced expert testimony that claimed there to be "substantial similarity" between the works, and that the plaintiff's work was not similar to any prior work.³²² The defendant in turn introduced its own expert who claimed that while there was similarity to the "average ear," both works drew on Dvorak's *Humoresque*, a prominent work in the field. The similarity, according to the defendant's expert, was because of this common source. The plaintiff also introduced evidence of access based on prior depositions of the defendant's composer.³²³

Based on all of this evidence, the district judge found for the defendant—reasoning that while the similarity was obvious and clear, the evidence of access was "contradictory and untrustworthy."³²⁴ On appeal, the court—in an opinion again authored by Frank and joined by Hand—affirmed. While Frank found the two works to be similar and concluded that the plaintiff's work was "distinguishable from Dvorak's," he nonetheless concluded that the plaintiff's work "did not possess enough originality, raising it above the level of the banal, to preclude coincidence as an adequate explanation of the identity."³²⁵ He was quick to add that this did "not mean that such originality is essential to the validity of a copyright."³²⁶ In essence then,

³²⁰ 154 F. 2d 480 (2d Cir. 1946).

³²¹ *Id.* at 481.

³²² *Id.* at 482-83.

³²³ *Id.* at 483-84.

³²⁴ 51 F. Supp. 233, 233-34 (S.D.N.Y. 1943).

³²⁵ *Heim*, 154 F. 2d at 488.

³²⁶ *Id.* at 488 n.17.

Frank was using the *banality* of the plaintiff's work to infer the absence of copying as a matter of circumstantial evidence—even though the work itself was sufficiently original. The contradiction is but obvious. If the work is sufficiently original to merit protection, then even if proof of access was low, the “identity” (in Frank's own words) should have allowed an inference of copying, with the question of illicit appropriation then going to a jury.

In addition, the opinion seemed not to care one bit about the absence of a jury to the decide the issues at stake. In their correspondence, Clark pointed this out to Frank—whose only explanation for it was that “in *Heim* we have a lower court decision with findings *after a trial*” and that in *Heim* the court does not reach “the question of illicit appropriation.”³²⁷ Yet, the trial in *Heim* was not before a jury. In addition, as we noted previously the district court decision in *Arnstein* did not reach the question of improper appropriation either. To Clark, the contradiction was obvious and he chose to write an opinion, concurring only in the result. He nonetheless disagreed with the majority on the question of infringement, and observed:

That results at once so divergent and so musically astonishing as the decisions in these two cases can occur simultaneously I can attribute only to the novel conceptions of legal plagiarism first announced in the *Arnstein* case and now repeated here. By these the issue is no longer one of musical similarity or identity to justify the conclusion of copying — an issue to be decided with all the intelligence, musical as well as legal, we can bring to bear upon it — but is one, first, of copying, to be decided more or less intelligently, and, second, of illicit copying, to be decided blindly on a mere cacophony of sounds. Just at which stage decision here has occurred, I am not sure.³²⁸

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

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

³²⁷ Letter from Jerome N. Frank to Charles E. Clark on *Heim v. Universal*, Feb. 2, 1946 (emphasis added).

³²⁸ *Heim*, 154 F. 2d at 492 (Clark, J. concurring).

IV. EXORCISING THE GHOST OF *ARNSTEIN*

Having examined how the infamous *Arnstein* test came to be, and the myriad philosophical and contextual influences that caused its author to structure in the way that he did, this Part moves to the normative. It begins by arguing that the *Arnstein* opinion (or test) originates in a philosophical worldview that distrusts trial court decision-making, and which has since come to be all but openly rejected (IV.A). It then provides the outline of an alternative approach, one that eschews this skeptical outlook in favor of a non-skeptical one; but retains some of the useful analytical lessons of *Arnstein*, which Frank drew from Hand’s prior jurisprudence (IV.B).

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

As we saw in the previous Part, the opinion in *Arnstein*—which continues to influence copyright jurisprudence to this day—was almost entirely a product of its author’s unique perspective on legal and judicial decision-making.³²⁹ This outlook is best described as a philosophy of skepticism: a belief that legal rules are intrinsically manipulable in the hands of judges, that fact-finding in lower courts is structurally problematic, and that lower court decisions routinely attempt to “fudge” their reasoning to conform to rules and precedents.

Frank therefore structured his opinion in *Arnstein*—and with it the test for copyright infringement—to give effect to his intense fact-skepticism. The unquestionable hallmark of the test remains its deep distrust of trial court decision-making and fact-finding. As we saw, the bifurcation of the inquiry into “actual” and “illicit” copying, the allowance for expert testimony in one but not the other, and the impermissibility of summary judgment on the latter and very rarely on the former, were moves that were driven by Frank’s efforts to allow the musical similarity that he perceived in the case to be tested before a lay jury.³³⁰ He had little faith that a trial court judge would have given *Arnstein* a fair hearing, and cabining the trial court’s powers in significant fashion was therefore a necessary means to the end that he sought. In *Arnstein*, we find resonances of his overall philosophy towards trial court decision-making:

You cannot control [trial] courts unless you can also control their fact-finding. But that you usually can’t do. For the process of fact-

³²⁹ See *supra* Part III.

³³⁰ *Id.*

finding is altogether too subjective and, consequently, too elusive. It is “un-ruly.” The refusal to recognize such unruliness constitutes modern legal magic. It stems from a “desire to be deceived.”³³¹

Frank’s skepticism therefore manifested itself in a desire to “control” the vicissitudes of trial court decision-making, for he recognized that no amount of procedural reform could eliminate the subjectivity about which he was complaining.³³² No amount of practical reform was to him sufficient to remedy this.

The “*Arnstein* test” was therefore very much a product of Frank’s extreme skepticism about trial courts and their ability to adjudicate factual disputes through legal rules and guidelines. The structure of its inquiry as well as the several embellishments superimposed on that structure were in large part a concerted effort to minimize trial court “fudg[ing]”³³³ and to ensure that fact-finding in plagiarism (i.e., non-literal copyright infringement) cases did not hide behind abstract doctrinal rules that were open to latent manipulation. While Frank never made this explicit in the opinion (for obvious reasons), the backstory to its development as well as his extensive writing confirm this reality.

Given this reality, it is somewhat surprising and perhaps disturbing that its lessons—structural as well as substantive—continue to influence copyright jurisprudence. While scholars have critiqued elements of the test over the years,³³⁴ and proposed reforming it to introduce some measure of rationality into its functioning, unless its fundamental premise of skepticism is jettisoned in its entirety, its influence is unlikely to diminish. The logical structure of Frank’s reasoning and its interconnected parts have ensured that unless its edifice is re-evaluated *as a whole*, its skeptical ideals will inform every aspect of the infringement inquiry. As an illustration of this, consider a recent opinion of the Fourth Circuit, reversing a trial court’s finding of non-infringement on a motion to dismiss.

In *Copeland v. Bieber*,³³⁵ the plaintiff claimed that the well-known musicians Justin Bieber and Usher had copied his song, which he had publicly

³³¹ FRANK, COURTS ON TRIAL, *supra* note ___, at 61.

³³² See JULIUS PAUL, THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS 81 (1959).

³³³ Frank, *Say It With Music*, *supra* note ___, at 928.

³³⁴ See, e.g., Lemley, *supra* note ___; Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1986); Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity down to Earth*, 98 DICK. L. REV. 181 (1993); Jeannette Rene Busek, *Copyright Infringement: A Proposal for a New Standard for Substantial Similarity Based on the Degree of Possible Expressive Variation*, 44 UCLA L. REV. 1777 (1997).

³³⁵ *Copeland v. Bieber*, No. 14-1427, 2015 WL 3775657 (4th Cir. June 18, 2015).

distributed on an online service, in their own song of the same name. Much like other circuits, the Fourth Circuit too has adopted a bifurcated two-step test based on *Arnstein*. In the first step, known as the “extrinsic” test, the court is to undertake an objective comparison of the two works to assess their similarity, using expert testimony and analytic dissection.³³⁶ The second step, the “intrinsic” test, is then treated as a question exclusively for the jury, to be made without any expert input or dissection.³³⁷ In *Copeland*, the district court granted the defendants’ motion to dismiss, concluding that the copying did not meet the intrinsic similarity test since the “general public” was unlikely to see the works as substantially similar, despite the existence of some similarities.³³⁸ Recognizing that the test was ordinarily one for a jury, the court concluded that “no reasonable jury” could find such similarity, which merited a dismissal.³³⁹

On appeal, the Fourth Circuit came to the exact opposite conclusion.³⁴⁰ Reaffirming the “no reasonable jury” standard for the analysis when there was no jury trial, Judge Harris proceeded to compare the two songs “side by side” and “in their entirety.”³⁴¹ Abjuring any expert testimony, dissection, or analysis, and based entirely on her own auditory sensibility in comparing the two songs, she concluded that the “choruses are similar enough and also significant enough that a reasonable jury could find the songs intrinsically similar.”³⁴² In both decisions the judges were attempting to predict the reaction of the “lay audience” to the music, without the aid of any expert evidence—under the garb of the “no reasonable jury” standard. The appellate court’s only reason to reverse was because the judge had made the decision on his own without sending it to a jury. In other words, had the decision in the lower court come from a jury verdict, Judge Harris would have found little reason to reverse, especially given the subjective nature of the “intrinsic test”. What triggered the skepticism was simply that the district court judge had substituted his opinion for the jury’s.

The Fourth Circuit’s decision is but a relic of the skeptical approach propounded in *Arnstein*, where the lower court is forbidden from allowing the introduction of expert testimony and/or relying on its own assessment on the second step of the infringement analysis. Controlling the lower court’s own

³³⁶ See *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F. 3d 789, 801 (4th Cir. 2001); *Towler v. Sayles*, 76 F. 3d 579, 581 (4th Cir. 1996).

³³⁷ *Lyons*, 243 F. 3d at 801; *Towler*, 76 F. 3d at 583-84.

³³⁸ *Copeland*, 2015 WL 3775657 at 3.

³³⁹ *Id.*

³⁴⁰ *Id.* at 8-9.

³⁴¹ *Id.* at 6.

³⁴² *Id.* at 8.

fact-finding remains at the heart of the framework, however articulated. Handing the core question of similarity to a jury is therefore not out of any belief in the jury's superior competence on the subjective assessment, but instead owing to the framework's enduring belief that a judge should neither make that assessment, nor indeed control it by allowing the jury to hear expert evidence. Indirectly then, *Arnstein's* ghost continues to haunt the copyright infringement analysis.

The deep irony here is of course that this philosophy of trial court skepticism has since come to be openly repudiated by the federal judiciary. Recall that the twin manifestations of Frank's vision skepticism were a reluctance to allow summary judgment to be used to decide cases, and a corresponding unwillingness to task trial judges (rather than juries) with fact-finding.

In its well-known "trilogy" of cases on the appropriate standard for summary judgment, the Supreme Court in 1986 not only relaxed the standard for a trial court's use of summary judgment to dispose of cases, but in addition seemed to directly exhort courts to make more use of the mechanism.³⁴³ Indeed, scholars have pointed out that the basic philosophy underlying the trilogy was "skepticism, if not a downright distrust, of juries," which implied district judges taking more control over proceedings in order to avoid wasteful trials when the factual allegations were flimsy.³⁴⁴ A greater reliance on summary judgment obviously requires judges to base their decisions on an early evaluation of the factual allegations (at the close of discovery), to determine whether there are "genuine" issues of material facts that remain. In other words, it contemplates a more significant role for judges in evaluating the parties' factual claims. Even though it remains unclear whether the trilogy itself produced a discernible change in trial court behavior, the evidence does point to the fact that since at least the 1960s, district courts around the country have become more willing to dispose of cases using summary judgment.³⁴⁵ While this may have been the product of other changes in substantive law, the composition of courts' dockets, or case management techniques, it remains unquestionably true that summary judgment and with it, district court judges'

³⁴³ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

³⁴⁴ STEPHEN SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 170 (2006); Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 *LOY. U. CHI. L.J.* 561, 561 (2012) (observing how the cases are understood as "telegraphing a message to federal judges to make enhanced use of summary judgment to expedite legal proceedings and to intercept and dismiss factually deficient litigation before trial.").

³⁴⁵ See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 *J. EMP. LEGAL STUDS.* 591, 592 (2004).

appraisal of the factual strengths of the claim, have both become a mainstay of federal court practice.

Consequently, it isn't just that *Arnstein's* "standard" for summary judgment has come to be reversed (or widened) as a formal legal matter. The fundamentally skeptical attitude towards the judicial management of fact-finding at an early stage, driven by a deep distrust of lower court "fudging" finds little resonance or validation in the federal legal system today. Given that the *Arnstein* test was driven entirely by this attitude, copyright law's continuing adherence to it even after the wholesale abandonment of its attitudinal assumptions, remains somewhat embarrassing.

B. *Reconstructing the Infringement Analysis*

Reformulating copyright law's infringement analysis will thus require more than just tinkering around with elements of the *Arnstein* formulation. All the same, certain elements of that formulation—to the extent that they represent sound *copyright* logic—need not be jettisoned in the process.³⁴⁶ Principal among these are the recognition that (i) not all copying amounts to copyright infringement, (ii) copyright infringement is predicated upon proof of copying, and (iii) juries should have an important role to play in the factual aspects of the infringement analysis. With these precepts in mind, this Section offers an outline of what a non-skeptical, rationally constructed, infringement analysis might look like, once *Arnstein's* skeptical influence on the inquiry on it has been cleansed.³⁴⁷

³⁴⁶ Each of these precepts holds independent analytical value to the working of the copyright system. The allowance for some kinds of copying recognizes the reality that use and copying of protected expression can under certain circumstances generate social welfare of its own, given that large amounts of creativity are downstream and derivative. Copyright's emphasis on copying is essential to maintain its structure as a non-monopoly right, one where its exclusivity is maintained through the threat of litigation rather than through property signals. And lastly, the role of the jury is a requirement of the Seventh Amendment, regardless of what one thinks of jury trials generally. In addition is of course the reality that these precepts have each been indirectly affirmed by the Supreme Court over the years.

³⁴⁷ In recent work, Lemley offers his own proposed reform of the two step test for copyright infringement, and suggests the development of "a rule that gives to the jury the basic question of whether the defendant copied, which might or might not involve expert testimony, but reserves the question of whether the copying was unlawful for the court." Lemley, *supra* note __, at 741. The proposal offered here is similar in many respects to Lemley's suggestion that the normative determination be left to the court, and the factual one for juries; and that expert evidence be allowed for both. However, it differs in one crucial respect. Lemley appears to remain comfortable working with the *ordering* of the steps along the lines suggested by *Arnstein*, which in itself is a product of Frank's skepticism and structurally disfavors decision by summary judgment. The proposal here, by contrast, jettisons almost all of *Arnstein's* extreme skepticism.

1. Cognizable Similarity

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

Since cognizable similarity is a mixed question of law and fact for the judge, it would require the judge to engage in a reasoned analysis of the works in deciding whether they are similar enough. And surely enough, this would require (and allow) for the introduction of expert testimony, and for the judge to engage in an analytical dissection of the works in comparing them, much as Hand's famous "comparative method" allowed for. The reasoned approach to the analysis would also serve the all-important purpose of allowing an actual jurisprudence to develop in this area of copyright in common law fashion; something that copyright law has badly lacked for decades now, owing to the anti-intellectual (i.e., intuitive) nature of the question and owing to its being one exclusively for the jury.

In addition to producing a measure of consistency, such a jurisprudence would also have two other immediate benefits. First, it would create patterns of analysis for different categories of works that are protected under copyright law, allowing them to each be analyzed and broken down according to the prevailing norms of artistic production and cultural consumption that exist at any given point in time. Second, it would add content to what exactly judges' intuitions are about when the similarity between works rises to the level of being wrongful, i.e., cognizable, under copyright law. This latter question is crucial, since it would force judges to confront their reliance on contextual factors, while eliminating the myriad cognitive biases that today hide within the black-box of the similarity analysis.³⁴⁸ It would also in the process allow for copyright's various—and often conflicting—goals and objectives to be

³⁴⁸ See Balganesch et al., *supra* note __.

articulated and built into the analysis of legal cognizability, something that the current framework altogether disregards.

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

2. Appropriation of Protected Expression

Once a judge finds the similarity between the works to be cognizable as a matter of law relying on his/her analysis of the works and on any expert testimony, "only then" does the matter go to a jury who will then have to decide whether the similarity was the result of the defendant appropriating (i.e., copying) protected expression from the work, or owing to independent creation. As a purely factual question, appropriation remains a perfect question for the jury; and thereby allows the analysis to comply with the Constitutional mandate of a jury trial in copyright infringement lawsuits.³⁴⁹

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

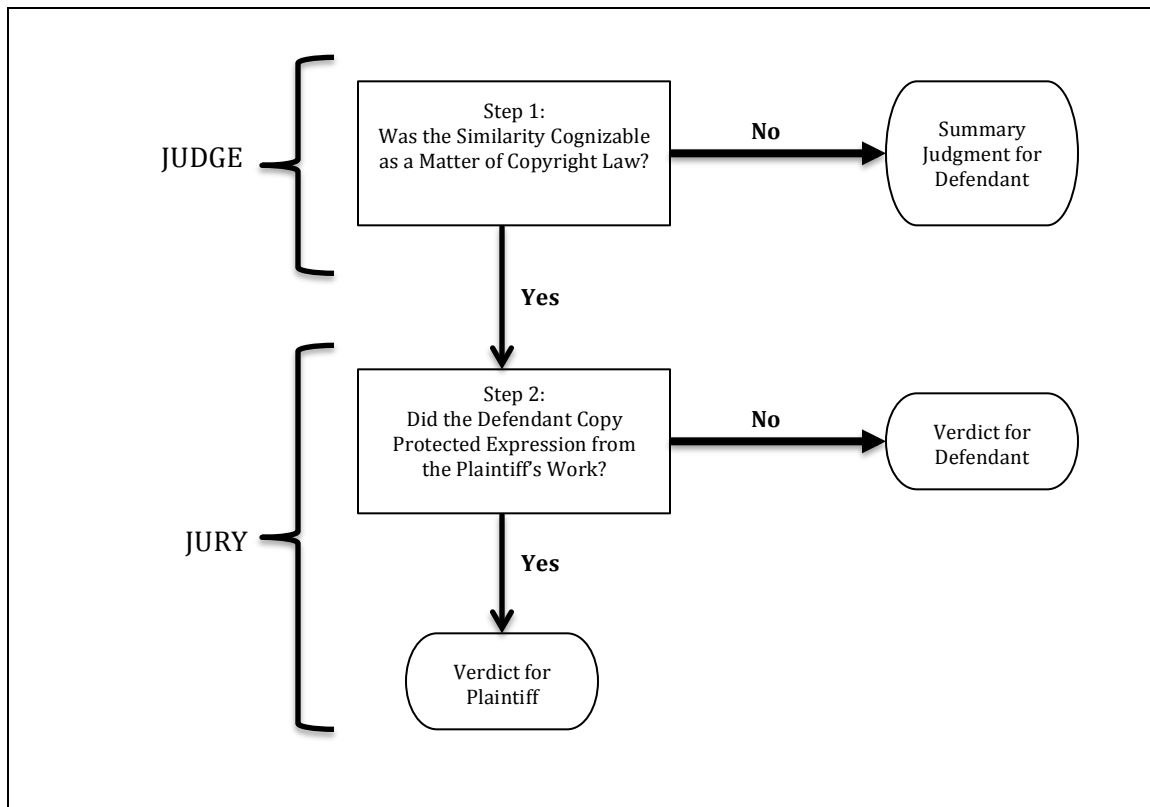
The effect of moving the factual question exclusively to the second step would as a structural matter now allow judges to filter out what they are required to send to a jury. In addition, it would prevent a court's conclusion on the question of copying/appropriation from improperly influencing the similarity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

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³⁴⁹ U.S. CONST., amend. VII.

This alternative framework is certainly open to manipulation of the kind that Frank seems to have feared. In the hands of Frank, indeed it might have hardly precluded a jury trial, given that he would likely have found the similarity to be cognizable (though concededly, he did express some reservations about that³⁵⁰), sending Arnstein’s fantastical story to a jury for determination on the appropriation question. Yet, it would require the judge to explicate his/her analysis of the similarity in clear terms, based on expert evidence, and thereby allow for a rational jurisprudence of similarity to develop contextually over time. The following table illustrates the key elements of the revised infringement analysis proposed here.

Table: Reformulated Infringement Analysis



³⁵⁰ See *supra* text accompanying notes __ - __ (correspondence between Frank and Clark on the meaning of the *Arnstein* opinion).

CONCLUSION

The test for copyright infringement is entirely a creation of courts, developed incrementally in true common law fashion. While prior opinions set out the contours of the test, *Arnstein* crystallized the analysis into a seemingly workable formula that has since won the acceptance of American copyright jurisprudence in the decades since. Even when Congress chose to comprehensively codify copyright law in 1976,³⁵¹ it left this area of law altogether untouched, thereby seemingly acquiescing in *Arnstein*'s formulation. While *Arnstein* may no longer be binding on courts as precedent, its basic framework continues to exert an enormous influence on courts and copyright jurisprudence across the country.

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

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

³⁵¹ H.R. REP. 94-1476, 94th Cong., 1976 U.S.C.C.A.N. 5659, 5675 (containing the only reference to the infringement analysis noting that “a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation”).