

January 2011

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Recommended Citation

Ned Snow, Fair Use as a Matter of Law, 89 Denv. U. L. Rev. 1 (2011).

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Fair Use as a Matter of Law

FAIR USE AS A MATTER OF LAW

NED SNOW[†]

Courts have recently abandoned the centuries-old practice of construing fair use as an issue of fact for the jury. Fair use now stands as an issue of law for the judge. This change is threatening traditional contours of copyright law that protect fair-use speech. Courts, then, must reform their current construction of fair use by returning to its origins—fair use as a factual matter for the jury. Yet even if courts do construe fair use as a matter of fact, the question remains whether courts should ever decide fair use as a matter of law. To answer this question, I examine whether appellate courts should ever review fair use under a de novo standard and whether trial courts should ever decide fair use on summary judgment. I conclude that both appellate and trial courts should decide fair use as a matter of law under specific circumstances: appellate courts should review constitutional findings under a de novo standard only where a bench trial occurs or where a jury verdict favors the copyright holder; trial courts should rule on summary judgment only in favor of fair users. In short, ruling as a matter of law must serve the speech-protective function of fair use. Fair use as a matter of law must favor fair users.

INTRODUCTION

A few decades ago, courts rarely determined the issue of fair use as a matter of law.¹ Upholding two centuries of common-law precedent, courts recognized that the issue of fair use “raise[s] essentially factual issues and . . . are normally questions for the jury.”² Even the “slightest doubt” as to whether a use was fair precluded trial courts from ruling summarily on the issue.³ Likewise, appellate courts always deferred to

[†] Associate Professor of Law, University of Arkansas. I appreciate the helpful comments on a previous draft of this article from Professors Eugene Volokh, Stephen Sheppard, Edward Lee, and Laura Gasaway. I further acknowledge helpful comments by the participants at the Fourth Annual Junior Scholars in Intellectual Property Workshop, held at Michigan State University College of Law. Finally, I am grateful for the excellent work of my research assistant, Michael Thompson.

1. *E.g.*, *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (reversing district court’s grant of summary judgment on the grounds that fair use raises “essentially factual issues and . . . are normally questions for the jury”); *see also* Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 518–28 (2010).

2. *DC Comics*, 696 F.2d at 28; *Sayre v. Moore*, (1785) 1 East 361, 362 (K.B.) (Lord Mansfield, C.J.) (“In all these [copyright cases where defendant had altered underlying work], the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”); Snow, *supra* note 1, at 518–22 (tracing history of common law courts placing issue of fair use with jury).

3. *See Arnstein v. Porter*, 154 F.2d 464, 468, 472–73 (2d Cir. 1946).

trial findings on fair use, employing a clear error standard of review.⁴ Fair use represented an issue of fact for the jury, not an issue of law for the judge.⁵

Today everything has changed. Most trial courts treat fair use as a pure issue of law, so even where reasonable minds might disagree, the judge determines the issue on summary judgment.⁶ Rarely does the issue ever see a jury.⁷ And in reviewing a trial court's ruling on fair use, appellate courts usually rule as a matter of law, applying a *de novo* standard.⁸ For all practical purposes, fair use now stands as an issue of law for judges to decide.⁹ The change could not have been more blatant. It was unnecessary, unsubstantiated, and unconstitutional.¹⁰

In previous work, I argued that fair use should be construed as a fact issue for the jury.¹¹ Both the Constitution and sound policy, I argued, mandate that fair use return to its factual origins.¹² Unsurprisingly, my argument was met with skepticism.¹³ Commentators raised questions about the seeming implications of denying judges the opportunity to decide fair use as a matter of law: Doesn't my argument imply that I am also proposing to do away with *de novo* review?¹⁴ Wouldn't this mean

4. See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) ("Since the issue of fair use is one of fact, the clearly erroneous standard of review is appropriate." (citations omitted)); *Eisenschiml v. Fawcett Publ'ns, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957).

5. See Snow, *supra* note 1, at 518–28.

6. E.g., *Castle Rock Ent'mt v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (deciding fair use on summary judgment despite recognizing that the reasonableness of contrary inferences which made the court's "decision a difficult one"), *aff'd*, 150 F.3d 132 (2d Cir. 1998); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (rejecting argument that fair use may not be decided on motion for summary judgment); see also Snow, *supra* note 1, at 532–35.

7. See, e.g., *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 410–11 (5th Cir. 2004) (upholding jury verdict on issue of fair use).

8. See, e.g., *Wall Data Inc. v. L.A. Cnty. Sheriff's Dept.*, 447 F.3d 769, 777 (9th Cir. 2006) ("We also review *de novo* the district court's finding of fair use under the Copyright Act"); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (declaring that a district court's finding of fair use is reviewed under a *de novo* standard, and that this review entails balancing the four fair-use factors); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) ("[W]e review the district court's rejection of a fair-use defense *de novo*, although we will uphold its subsidiary findings of fact unless they are clearly erroneous."). However, in a relatively few instances, some appellate decisions have continued to apply a clear error standard where a jury has determined the issue. See, e.g., *Compaq*, 387 F.3d at 410–11; *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 277–78 (6th Cir. 2009).

9. See *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998) (interpreting caselaw as "rejecting [the] argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently" (citing *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986)); see also Snow, *supra* note 1, at 532–35.

10. In another article, I explain the constitutional and policy reasons that demand judicial construction of fair use as an issue of fact. See Snow, *supra* note 1, at 497–518, 544–55.

11. *Id.* at 493–518.

12. *Id.* at 497–518, 544–55.

13. E.g., Ben Sheffner, *Article Criticizes Deciding Fair Use on Summary Judgment; Gertner Exhibited 'Class Favoritism' Toward 'Large Corporations' in Fair Use Ruling*, COPYRIGHTS & CAMPAIGNS BLOG (Aug. 29, 2009, 9:55 AM), <http://copyrightsandcampaigns.blogspot.com/2009/08/article-criticizes-deciding-fair-use-on.html>.

14. See *id.*

that appellate courts could no longer teach principles to clarify the ever-muddled doctrine of fair use?¹⁵ Wouldn't my proposal hurt fair users—the party I'm trying to help—because it would deny them the ability to prevail quickly on summary judgment, without incurring the cost of a jury trial?¹⁶ These and other genuine questions seemed to plague the argument that fair use should be construed as it had been for two centuries—as a factual matter for the jury.

In this Article, I take up these questions surrounding whether fair use may ever be decided as a matter of law, even while construing it as a matter of fact. I discuss the implications of classifying fair use in the context of appellate review and motions for summary judgment, considering the effect on speech interests of fair users and copyright holders, along with policy considerations regarding certainty and fairness. I ultimately conclude that the factual classification of fair use for a jury does not preclude a court from deciding the issue as a matter of law under *de novo* review or on summary judgment, but only in specific circumstances. I propose that the standard of review should always favor fair users, such that *de novo* should govern where copyright holders prevail at trial, whereas clear error should govern where fair users prevail. I further propose that at trial, judges should rule on summary judgment only in favor of fair users; they should rule for copyright holders on summary judgment in the rarest of circumstances, if at all. I thus propose a double standard of review and a one-sided application of summary judgment—all favoring the defendant fair user.

Part I briefly provides a background of fair use and defines the issues under consideration in the fair-use analysis—inferences that arise from applying legal principles to historical facts. Part II sets forth the history that both contravenes and resulted in the present mistaken state of the law. Parts III and IV set forth my proposal to undo this mistake. Both Parts rely on the fundamental premise that fair use should be a factual matter, and this premise I examine in my previous article.¹⁷ Part III addresses the implications of that premise for appellate courts and Part IV for trial courts.

I. GENERAL BACKGROUND OF FAIR USE

As a limit on copyright, the doctrine of fair use protects those persons who use another's expression without permission but in a fair man-

15. See email from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of Law, to Ned Snow, Assoc. Professor of Law, University of Ark. Sch. of Law (April 16, 2010, 18:39 CST) (on file with author) (questioning whether it is wise to construe fair use as a factual jury issue given that it would result in less predictability in the law).

16. I thank Professor Ed Lee, Director of the Program in Intellectual Property Law at Chicago-Kent College of Law, for this good question, which he brought to my attention at the Fourth Annual Junior Scholars in Intellectual Property Workshop.

17. Snow, *supra* note 1, at 497–554.

ner.¹⁸ Deciding what is fair can be difficult and complex, often turning on circumstances unique to each case.¹⁹ Fair use thus lacks a precise definition or test that would fit all situations: it is instead intended to be flexible, able to contemplate all factual circumstances that could possibly justify a particular use of the expression.²⁰

Owing to the absence of a precise definition or test, the doctrine of fair use follows general principles that guide the analysis of determining fairness.²¹ The Federal Copyright Act sets forth four factors that reflect common law principles of fair use that have arisen over two hundred years of judicial consideration.²² The four factors are non-exhaustive and discretionary in application: any one factor may weigh more heavily than another, and other factors not listed in the Act may be considered as well.²³ The first factor examines the purpose and character of the use, which usually includes an examination into whether the use has transformed the original work and whether the use serves a non-commercial purpose.²⁴ The second factor examines the nature of the copyrighted work:²⁵ works of a more creative nature tend against a finding of fairness and works of a more factual nature tend toward a finding of fairness.²⁶ The third factor examines the amount and substantiality of the work used.²⁷ The fourth factor examines the effect that the use has on the value of, or a potential market for, the copyrighted work.²⁸

The legal principles underlying these four factors must be applied to the factual circumstances of a case. Those factual circumstances courts often label as historical facts, also called subsidiary or evidentiary facts.²⁹ Applying the four factors to the historical facts produces inferences that suggest whether a use is fair.³⁰ All inferences must be weighed against

18. See 17 U.S.C. § 107 (2006).

19. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (“The endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the [fair-use] statute.”).

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

21. See *Campbell*, 510 U.S. at 576–78.

22. See 17 U.S.C. § 107. The Act does not specify who is to make this determination—judge or jury.

23. *Id.*

24. *Id.* § 107(1); *Campbell*, 510 U.S. at 578–79.

25. 17 U.S.C. § 107(2).

26. *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

27. 17 U.S.C. § 107(3).

28. *Id.* § 107(4).

29. See, e.g., *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (explaining that “subsidiary findings of fact” in fair-use analysis are to be reviewed for clear error); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 183–84 (D. Mass. 2007) (drawing distinction between “historical facts” and interpretation of those facts in fair use analysis).

30. For instance, applying the first factor to the situation where a person copies excerpts from an author’s book for the purpose of critically reviewing the book yields a possible inference that the copying has transformed the copied expression: the copier’s critical analysis potentially casts the copied expression in a new light, and thereby potentially transforms the copied expression. See 17 U.S.C. § 107 (listing criticism as example of fair use); *Campbell*, 510 U.S. at 592 (noting likely fairness of critical review).

each other, with the weight of any one inference depending on all other inferences drawn.³¹ Together, these inferences must produce an affirmative or negative answer to the question of fairness. The question of whether a use is fair thus requires a person to apply legal principles to factual circumstances, weigh the resultant inferences, and arrive at a singular determination.

II. HISTORY: FROM FACT TO LAW

The judicial change in classification of fair use from an issue of fact to an issue of law is apparent only with a correct understanding of the three-step process involved in the fair-use analysis. The first step is ascertaining the evidentiary facts.³² Those evidentiary facts—also called historical facts—comprise facts that speak to what actually happened.³³ They may be objectively determined directly from the evidence.³⁴ For instance, the following question raises an issue of evidentiary fact: *What use did the defendant make of the copyrighted expression?*³⁵ Such questions indisputably lie within the domain of the jury as an issue of fact.³⁶ On this point, judges agree.³⁷

The second step in the fair-use analysis occurs when a person draws inferences from the evidentiary facts.³⁸ When I refer to drawing inferences, I mean the process of applying legal principles to evidentiary facts, or in other words, making judgments that have legal significance.³⁹ In the fair-use analysis, such inferences suggest the fairness or unfairness of a use.⁴⁰ For instance, the following questions require a person to draw inferences from the underlying facts: *Is the defendant's use of the copyrighted expression transformative?*; *What is the nature of the copyrighted work?*⁴¹ Both of these questions require the drawing of inferences based on the evidentiary facts, as does each of the fair-use factors. This

31. *Campbell*, 510 U.S. at 577–78, 590–91. In the example of copying excerpts from a book for a critical review, see *supra* note 30, although that circumstance might yield an inference that the use is transformative, that inference might not weigh much in the overall analysis if, for instance, further inferences arose under the third and fourth factors that the copied portion constituted the most substantial portion of the book and that consumers purchased the critical review as a substitute for purchasing the original work. Cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985) (rejecting argument that reporting newsworthy expression constituted fair use on grounds that defendant used “heart” of copyrighted work).

32. See *Snow*, *supra* note 1, at 491–92.

33. See *id.*; see also *Nihon Keizai Shimbun, Inc.*, 166 F.3d at 72; *Fitzgerald*, 491 F. Supp. 2d at 183–84.

34. See *Snow*, *supra* note 1, at 492 (suggesting that fair use be judged based on the degree to which it adds something new to the original work).

35. See *id.*

36. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.10[A] (2011). (supporting the proposition that issues of historical fact are questions of fact for the jury).

37. See *Snow*, *supra* note 1, at 492–93.

38. See *id.* at 493–94 (discussing the resolution of inferences that arise during a fair-use analysis).

39. See *id.* at 494.

40. See *id.*

41. See *id.* at 493.

process of inference drawing constitutes the second step of the fair-use analysis.⁴²

The third step occurs when a person weighs the inferences so as to arrive at a negative or affirmative conclusion regarding whether the use is fair.⁴³ For instance, *How much should the transformative nature of the use weigh in the conclusion of fairness?* Each situation requires weighing each inference on its own merits against all other inferences in the analysis to reach a singular conclusion.⁴⁴ Hence, the fairness (or unfairness) of a particular use does not necessarily reflect the same weighing of inferences as any other analysis.

Courts have treated the latter two steps in the analysis—the inferences and their weighing—as raising the same sort of issues. Some courts have treated both these steps as raising only issues of fact for the jury, whereas other courts have treated both these steps as raising only issues of law for the judge.⁴⁵ The history of this disparate treatment of the fair-use inferences and their weight I discuss in the sections below.⁴⁶ For the sake of simplicity and brevity, in delineating this history I refer to the inferences and their weighing as merely the issue of fair use. Technically, however, my reference to fair use goes to the process of drawing inferences and the weighing of those inferences. I point this out only to avoid potential confusion regarding the precise issues to which I am referring.

With this in mind, I turn to the history. Section A briefly discusses the initial period where courts construed fair use as raising a factual issue. Section B examines a pivotal point in the judicial change of construing fair use: two sentences from a Supreme Court opinion, *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁴⁷ In Section B, I conclude that courts misinterpreted these sentences to arrive at the present characterization of fair use as raising an issue of law.

A. Judicial Treatment over Two Hundred Years

Principles of fair use in copyright law trace back to English case law that is over two-hundred years old.⁴⁸ At that time, in copyright ac-

42. See *id.* at 491–94 (discussing the factual and legal nature of fair-use inferences).

43. See *id.* at 493–94 (explaining that fair-use inferences and the weight apportioned to each determine whether a use is fair).

44. See *id.*

45. See *id.* at 518–35 (comparing the judicial treatment of fair-use inferences as a questions of fact or law by various courts).

46. See discussion *infra* Part II (tracing the history of fair-use inferences and their effect on the fair-use analysis).

47. See 471 U.S. 539, 560 (1985).

48. *E.g.*, *Cary v. Kearsley*, (1802) 170 Eng. Rep. 679, 681 (K.B.) (“I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff’s book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff?”). Many English cases involving

tions arising in courts of law, judges would reserve for juries the question of whether these principles applied.⁴⁹ That is, early English courts at common law reserved the question of fairness for juries. In the United States, early fair use cases arose only in equitable proceedings rather than as actions at law.⁵⁰ As a result, judges could decide the issue of fair use without thought as to whether it existed as an issue of law or fact.⁵¹ Yet even during those equitable proceedings,⁵² influential jurists such as Justice Joseph Story expressly recognized that, at common law, fair use existed as a factual issue for the jury.⁵³

Once the Federal Rules of Civil Procedures came into effect in 1938, fair use started arising in cases brought as actions at law.⁵⁴ On the heels of those first few cases, the Second Circuit clarified the factual nature of the fair use issue.⁵⁵ In *Arnstein v. Porter*,⁵⁶ Judges Hand and Frank held that cases involving issues about whether a defendant had unlawfully appropriated a copyrighted work were especially inappropriate to decide on summary judgment other than in the most extraordinary circumstances, namely, those where there was not even “the slightest doubt.”⁵⁷ Decided in 1946, *Arnstein* influenced judicial treatment of copyright issues, including fair use, for decades to follow.⁵⁸ Through the 1960s, fair use remained a factual question for which the jury was particularly well suited, and judges were particularly ill suited, to decide.⁵⁹ Fair

principles of fair use arose in courts of equity. WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 3–26 (2d ed. 1995) (tracing the history of fair use). In equity, however, juries do not decide issues of fact. 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA* § 31, at 21 (12th ed. 1877); 2 *id.* §§ 930–33, at 120–21. So, those cases are not relevant in deciding whether English copyright cases treated the issue of fairness as factual for a jury to determine.

49. Snow, *supra* note 1, at 518–22; *see, e.g.*, Sayre v. Moore, (1785) 1 East 361, 362 (K.B.) (Lord Mansfield, C.J.) (“In all these [copyright cases where defendant had altered underlying work], the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”).

50. *See, e.g.*, Nichols v. Universal Pictures Corp., 34 F.2d 145, 145 (S.D.N.Y. 1929) (“This is a suit for the alleged infringement of a copyright, and the usual injunctive relief with an accounting is prayed for.” (emphasis added)), *aff’d*, 45 F.2d 199 (2d Cir. 1929); Snow, *supra* note 1, at 523–24 (explaining reasons that American copyright holders brought copyright suits in equity through mid twentieth century).

51. *See* DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 2.6(2) (1993).

52. *See* 2 STORY, *supra* note 48, §§ 930–33 at 120–21.

53. *E.g.*, Emerson v. Davies, 8 F. Cas. 615, 623–24, (D. Mass. 1845) (No. 4,436) (Story, J.) (deciding fair use in equitable proceeding, but characterizing the question of fair use as a “question of fact to come to a jury”).

54. *See* Snow, *supra* note 1, at 524.

55. *See* *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). Although the *Arnstein* court did not specifically employ the words “fair use” to describe the issue of “permissible copying,” the two doctrines appear similar in substance, if not distinct in name only. *See id.* at 472–73. Furthermore, the majority relied on the landmark fair use case of *Folsom v. Marsh* in its analysis. *See id.* at 472 n.18.

56. 154 F.2d 464 (2d Cir. 1946).

57. *See id.* at 468.

58. *See* Snow, *supra* note 1, at 526–28 (reciting the influence of *Arnstein* on fair-use caselaw).

59. *See, e.g.*, Morrissey v. Procter & Gamble Co., 379 F.2d 675, 677 (1st Cir. 1967) (relying on *Arnstein* for the quoted proposition in a copyright suit); *Armco Steel Corp. v. Realty Inv. Co.*,

use existed as a fact-intensive inquiry, where inferences in the analysis raised issues of fact. Correspondingly, appellate courts applied a clear error standard of review, deferring to trial court findings.⁶⁰

During the 1970s and 1980s, some courts continued to adhere to the *Arnstein* approach of refraining from deciding questions of fair use: trial courts refrained from ruling as a matter of law on summary judgment, and appellate courts continued to apply a clear error standard of review.⁶¹ Other courts, however, departed from the *Arnstein* approach: some trial courts began deciding fair use as a matter of law on summary judgment

273 F.2d 483, 484 (8th Cir. 1960) (relying on *Arnstein* for the quoted proposition in a breach-of-contract suit).

There were two exceptions recorded to this usual treatment during the 1960s. In *Berlin v. E.C. Publ'ns, Inc.*, the copyright holders of popular songs argued that the publishers of Mad Magazine infringed their copyrights by publishing parodies of their songs. 219 F. Supp. 911, 913 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 541 (2d Cir. 1964). The court determined that the defendant's use was fair as a matter of law, apparently because it believed that no reasonable jury could find otherwise. *Id.* ("It is obvious that defendants' lyrics have little in common with plaintiffs' but meter and a few words, except in two instances which will be discussed below. Defendants have created original, ingenious lyrics on subjects completely dissimilar from those of plaintiffs' songs."). In *Time Inc. v. Bernard Geis Assocs.*, the copyright holder argued infringement based on the defendant's use of film frames portraying President Kennedy's assassination. 293 F. Supp. 130, 144-46 (S.D.N.Y. 1968). The court determined that the defendant's use was fair as a matter of law. *Id.* In that instance, however, the court treated the issue as a pure matter of law, uninfluenced by the fact reasonable minds might disagree. *See id.*

60. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) ("[W]e may now review the evidence to determine whether the district court's rejection of the fair-use defense was clearly erroneous. Since the issue of fair use is one of fact, the clearly erroneous standard of review is appropriate." (citation omitted)); *Eisenschiml v. Fawcett Publ'ns, Inc.*, 246 F.2d 598, 604 (7th Cir. 1957) ("[T]he issue of fair use is a question of fact. We cannot say that the Master's finding in this respect is clearly erroneous." (citation omitted)); *see also Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 936 (7th Cir. 1984) (Posner, J., concurring) ("[C]lear error has been held to be the proper standard for reviewing determinations of most mixed questions of law and fact in intellectual-property cases—such questions as similarity, copying, access, and fair use in copyright cases . . ." (citations omitted)). In at least one situation, an appellate court characterized the weighing of inferences as raising a legal question, and so the court purported to apply a standard of review that was freer than clear error. *See Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 n.11 (5th Cir. 1980). The language of that appellate court implies that clear error is the appropriate standard of review in fair use cases:

We assume without deciding that a lower Court's finding that there was or was not fair use is normally a finding of fact subject to the clearly erroneous rule of F.R.Civ.P. 52(a). However, this Circuit has repeatedly made clear that the clearly erroneous rule does not apply to findings made under an erroneous view of controlling legal principles. We believe that in viewing commercial motive as conclusive on the question of fair use, the District Court incorrectly applied s 107. Accordingly, its finding of no fair use defense is not subject to a clearly erroneous standard. Rather, we are more free to determine the question of fair use. . . . [And e]ven assuming the clearly erroneous standard is the appropriate one, we believe that the District Court's conclusion on the fair use question is indeed clearly erroneous.

Id. at 1175 & n.11 (citations omitted).

61. *See, e.g., DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) ("The four factors listed in Section 107 raise essentially factual issues and . . . are normally questions for the jury."); *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977) (reversing district court's grant of summary judgment for defendants; stating that "whether or not there has been substantial use which would deprive appellees of the fair use defense is a decision which must be made by the trier of fact after all the evidence has been introduced"); *Higgins v. Baker*, 309 F. Supp. 635, 637 (S.D.N.Y. 1969) (relying on Professor Melville Nimmer's position that "the issue of 'fair use' presents questions of fact and thus should not be determined on a motion for summary judgment").

where no reasonable juror could find otherwise.⁶² Notably, several of those courts admitted that summary judgment was usually inappropriate for deciding fair use.⁶³ Still other courts treated fair use as a pure issue of law: in deciding fair use on summary judgment, some trial courts completely disregarded whether a reasonable jury could find otherwise;⁶⁴ on appeal, some appellate courts applied a *de novo* standard.⁶⁵

By the 1990s, trial courts were routinely deciding fair use as a matter of law, and appellate courts were applying *de novo* review.⁶⁶ No longer did courts heed *Arnstein's* strong admonition that issues in copyright cases were particularly ill suited for judges to decide.⁶⁷ And no longer did courts rule as a matter of law only where they believed that no reasonable jury could find otherwise.⁶⁸ Fair use became a pure issue of law for judges.⁶⁹ It remains so today.⁷⁰

62. See, e.g., *Amana Refrigeration, Inc. v. Consumers Union of U. S., Inc.*, 431 F. Supp. 324, 326 (D. Iowa 1977) (finding on summary judgment that fair use could not apply, and noting that evidence of fair use could lead to only one reasonable interpretation). Some courts were not always clear on whether they were applying the no-reasonable-jury standard of summary judgment, or alternatively, are treating the issue as a pure matter of law. See, e.g., *Gardner v. Nizer*, 391 F. Supp. 940, 944 (S.D.N.Y. 1975).

63. In *Steinberg v. Columbia Pictures Industries, Inc.*, a district court granted a plaintiff's motion for summary judgment where the defendant argued fair use. 663 F. Supp. 706, 709 (S.D.N.Y. 1987). Recognizing the law's preference for a jury to decide the issue, the *Steinberg* court explained that because both parties had expressly waived their right to a jury and because none of the evidence required assessing witness credibility, summary judgment was appropriate. *Id.* Under those circumstances, summary judgment would be indistinguishable from a bench trial. See also *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554, 563 (D.D.C. 1981) (granting summary judgment for plaintiff and in so doing, noting that "[a]lthough courts are highly reluctant to grant motions for summary judgment in copyright cases, this is an exceptional case in which summary judgment is appropriate" (citation omitted)).

64. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753–54, 757–58 (9th Cir. 1978) (affirming summary judgment that denied fair use on grounds that substantiality of copying outweighed parodic nature of use, and reciting district court's view that issues for consideration on summary judgment were "purely legal"); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1531–32 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986) (holding that summary judgment of fair use is appropriate where parties do not dispute historical facts); *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (contemplating fair use on summary judgment; stating that "[a]s no dispute exists as to the facts giving rise to this action, but only as to the legal consequences, the Court believes this case to be appropriate for summary disposition").

65. See, e.g., *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) ("The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because these judgments are legal in nature, we can make them without usurping the function of the jury." (citation omitted)).

66. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 554 (2008) (noting empirical trend demonstrating a "remarkable increase in the prevalence of fair use summary judgment opinions that began in the mid-1990s and has continued to the present"); Snow, *supra* note 1, at 532–33.

67. See Snow, *supra* note 1, at 532–33.

68. See *id.*

69. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111–12 (2d Cir. 1998) (ruling for plaintiff on summary judgment, thereby reversing district court's grant of summary judgment for defendant, and commenting that one of the factors in the fair-use analysis—the weighty factor of market impact—posed "a very close question" but that "[o]n balance" that factor "tips" toward the plaintiff on grounds that defendant failed to demonstrate "an absence" of a "potential" for market harm); *Television Digest, Inc. v. U.S. Tele. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (expressly rejecting defendant's argument that a fair-use decision is improper on a motion for summary judgment); see also Snow, *supra* note 1, at 531–33.

B. The Misinterpretation of Harper

Instrumental in the change of judicial treatment toward fair use were two sentences in a 1985 Supreme Court decision, *Harper & Row, Publishers, Inc. v. Nation Enterprises*.⁷¹ There the defendant had published the copyright holder's memoirs of President Ford in a news magazine.⁷² The Supreme Court affirmed the district court's bench trial judgment that denied defendants' argument of fair use.⁷³

Two sentences in the *Harper* Court's opinion have been misinterpreted by appellate courts as suggesting a de novo standard of review. The first sentence that led to confusion among courts was the following: "Fair use is a mixed question of law and fact."⁷⁴ On the one hand, it is understandable that the *Harper* Court labeled fair use as a mixed question of law and fact: the inquiry necessitates applying legal principles to factual circumstances.⁷⁵ On the other hand, courts had up to that point usually labeled fair use as a question of fact.⁷⁶ By employing the label of "mixed question," the Court had departed from the usual label that courts had employed to describe fair use. The Court had created an ambiguity. Unlike the prior label of "question of fact,"⁷⁷ "mixed question" left open the issue of whether the inferences that arise in applying the legal principles of fair use to the factual circumstances of a case should be treated as

70. See Snow, *supra* note 1, at 531. At least one court, however, has retained the factual characteristic of fair use. In *Harris v. San Jose Mercury News*, the trial court explained:

Because the underlying facts are not in dispute, defendant contends that the Court should weigh the fair use factors and determine whether the defense applies as a matter of law. While the Court may analyze the factors and make a determination on this mixed question of law and fact, the Court believes that inferences to be drawn from undisputed facts are questions more appropriately resolved by a jury than a judge. Moreover, the Ninth Circuit Model Jury Instructions includes an instruction for a fair use defense, which further supports this conclusion.

No. C 04-05262 CRB, 2006 WL 995151, at *2 (N.D. Cal. April 10, 2006).

71. See 471 U.S. 539, 561 (1985).

72. *Id.* at 541-42.

73. *Id.* at 543, 569.

74. *Id.* at 560.

75. See *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977).

76. Prior to *Harper*, few courts had characterized fair use as presenting a mixed question of fact and law. See *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984); *Meeropol*, 417 F. Supp. at 1213, *rev'd*, 560 F.2d 1061 (2d Cir. 1977). Notably, in 1984 Judge Posner stated in dicta that fair use presents a mixed question of fact and law for which clear error is the proper standard of review. See *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 936 (7th Cir. 1984); see also William Patry, Comment to *Who is the Proper Decisionmaker on Questions of Fair Use—The Judge or a Jury*, EON (July 19, 2009, 9:41 PM), ("The characterization about fair use being a mixed question of law and fact . . . originated I believe with the 11th [C]ircuit in one of its early *Pacific & Southern v. Duncan* cases."), <http://blogs.law.harvard.edu/nesson/2009/07/20/summary-judgment-morning-mail/>.

77. See, e.g., *Mathews Conveyor Co. v. PalmerBee Co.*, 135 F.2d 73, 85 (6th Cir. 1943) ("As fair use is to be determined by a consideration of all the evidence in the case, so, likewise, is the question of infringement one of fact to be solved by a study of the evidence.").

factual for the jury or legal for the judge, subject to clear error or de novo review.⁷⁸

In resolving this ambiguity, lower courts looked to the next sentence of *Harper*:⁷⁹ “Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] [does] not qualify as a fair use of the copyrighted work.”⁸⁰

This sentence—which I refer to as the *further-factfinding sentence*—became central in the judicial shift from classifying the inferences in the fair-use analysis as raising questions of fact to questions of law. As I discuss in the subsections below, the further-factfinding sentence led courts to mistakenly interpret *Harper* as declaring that fair use was a pure issue of law for judges to decide.

1. The Ninth Circuit’s Mistaken Interpretation

One year after *Harper*, the Ninth Circuit in *Fisher v. Dees*⁸¹ misinterpreted the further-factfinding sentence to mean that the only elements of the fair-use analysis that are treated as factual are the historical facts—those which are evaluated under the legal principles of fair use.⁸² In *Fisher*, the trial court had granted summary judgment for the fair user, and on appeal, the copyright holder argued that the jury should have decided the question of fair use, absent a finding that no reasonable jury could have found otherwise.⁸³ The Ninth Circuit immediately rejected this argument.⁸⁴ It interpreted the further-factfinding sentence in *Harper*

78. 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589, (3d ed. 1998) (“There is no uniform standard for reviewing mixed questions of law and fact.”). Often courts examine whether the inquiry is primarily factual or legal. *See id.*; *see also, e.g.*, *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 143 (2d Cir. 2005) (“[M]ixed questions of law and fact [are reviewed] either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual.” (citation omitted) (internal quotation marks omitted)); *Armstrong v. Comm’r*, 15 F.3d 970, 973 (10th Cir. 1995) (“We review mixed questions under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.”); *Woods v. Bourne Co.*, 60 F.3d 978, 991 (2d Cir. 1995) (explaining that in reviewing the mixed question of substantial similarity in the copyright context, the court reviews for clear error).

79. *E.g.*, *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998) (interpreting the quoted two sentences of *Harper* as requiring de novo review); *New Era Publ’ns Int’l., ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 155 (2d Cir. 1990) (relying on the quoted two sentences of *Harper* to freely review issue of fair use).

80. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (alteration in original) (internal quotation marks omitted). Although the internal quotations are omitted in the above text, the Court quoted a portion of this sentence from *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984). For a discussion of how that decision employed the relevant language, *see infra* note 99.

81. 794 F.2d 432 (9th Cir. 1986).

82. *Id.* at 436.

83. *Id.* The defendant had composed a song entitled, “When Sonny Sniffs Glue,” as a comedic version of the copyright holder’s song, “When Sunny Gets Blue.” *Id.* at 434.

84. *Id.*

to mean that the inferences in the analysis are legal in nature.⁸⁵ According to the Ninth Circuit's interpretation, trial courts determine those inferences as a matter of law⁸⁶ and appellate courts review them de novo.⁸⁷ That interpretation other courts soon adopted.⁸⁸

The flawed nature of the Ninth Circuit's interpretation is evident from the fact that the sentence refers to the process of drawing fair-use inferences as a process of "further factfinding."⁸⁹ The instruction that courts "need not remand for further factfinding" means that appellate courts could remand for further factfinding, but that they are not required to do so.⁹⁰ That is, the phrase "need not remand" implies that courts in fact could remand, but that it is not necessary, and the phrase "for further factfinding" demonstrates that if courts were to remand, the remand would be "for further factfinding." That further factfinding on remand, then, could not represent a finding of historical facts, i.e., facts "sufficient to evaluate each of the statutory factors," for in the situation that the Court posed, the trial court had already found the historical facts neces-

85. *Id.* at 436 ("The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury.")

86. *Id.* at 434; *see also* *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) ("We recently noted as fair use is a mixed question of fact and law, so long as the record is sufficient to evaluate each of the statutory factors, we may reweigh on appeal the inferences to be drawn from that record." (internal quotation marks omitted)); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998) (interpreting caselaw as "rejecting [the] argument that fair use is appropriate for determination by summary judgment only when no reasonable jury could have decided the question differently"); *Snow*, *supra* note 1, at 531–33 (discussing cases where courts treat fair use as pure question of law for judge). *But see* *Ty, Inc. v. Publ'ns Int'l. Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (Posner, J.) ("Fair use is a mixed question of law and fact, which means that it may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion—but not otherwise." (citation omitted) (internal quotation marks omitted)).

87. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006) (reviewing de novo fair-use finding); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dept.*, 447 F.3d 769, 777 (9th Cir. 2006) ("We also review de novo the district court's finding of fair use under the Copyright Act, a mixed question of law and fact."); *Mattel*, 353 F.3d at 799 ("We also review the district court's finding of fair use under the Copyright Act, a mixed question of law and fact, by the same de novo standard."); *Castle Rock Entm't v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (reviewing de novo the four-factor analysis); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994) (relying on *Harper* for de novo review of fair use).

88. *See, e.g.*, *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 855 F. Supp. 905, 909 (E.D. Mich. 1994) (relying on *Harper*, 471 U.S. at 560, to deny fair use as a matter of law at summary judgment), *aff'd*, 99 F.3d 1381 (6th Cir. 1996); *Am. Geophysical Union*, 60 F.3d 913, 918–32 (2d Cir. 1994) (relying on *Harper*, 471 U.S. at 560, to engage in de novo review of fair-use analysis, denying fair use); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 181, 183–84 (D. Mass. 2007) (deciding issue of fair use on summary judgment for copyright holder on grounds that, according to *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986), court may perform the fair-use analysis); *see also* sources cited *supra* notes 86–87.

89. Despite the faulty reasoning of the Ninth Circuit in *Fisher*, its holding is consistent with the proposal of this Article. The Article proposes that trial courts should decide summary judgment in favor of fair users, which the trial court did in *Fisher*, 794 F.2d at 434. *See* discussion *infra* Part IV.A. The Article further proposes that an appellate court may affirm such a grant of summary judgment under a clear error standard, yet in doing so, the appellate court may, if it so chooses, articulate legal principles that guide the fair-use analysis as a matter of law. *See* discussion *infra* Part III.C.2.b(1). The Ninth Circuit's ruling as a matter of law in *Fisher*, therefore, is consistent with the proposal herein. Its reasoning for doing so, on the other hand, is not.

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

sary to perform the analysis.⁹¹ Further factfinding must correspond to something other than the historical facts. And other than the historical facts, the only determinations to be made in the analysis are the inferences, so the further factfinding must correspond to the drawing of inferences. Implicit in the further-factfinding sentence of *Harper*, then, is the conclusion that the inferences in the analysis constitute a process of factfinding.

In addition to the further-factfinding sentence of *Harper*, the context of *Harper* also indicates that the Court did not intend for this sentence to mean that fair-use inferences are legal in nature. Two centuries of common law precedent had treated these inferences as questions of fact for the jury.⁹² Just two years before *Harper*, the Second Circuit had reversed a summary judgment decision on the grounds that fair use “raise[s] essentially factual issues . . . [that] are normally questions for the jury.”⁹³ Given the entrenched and active history of courts treating fair use as a question of fact, it is unlikely that the *Harper* Court intended through one sentence to affect the monumental change of treating fair use as a question of law. The point was not even directly before the Court. And the author of *Harper*, Justice O’Connor, is well known for her adherence to common law precedent absent a showing of necessity.⁹⁴ Hence, to interpret the further-factfinding sentence in *Harper* as suggesting that the fair-use inferences should become legal in nature would be to impute to the Court an intent to re-draw the line between fact and law, which was patently absent.

Thus, the Ninth Circuit was simply wrong to interpret *Harper* as holding that the inferences in the fair-use analysis represented pure issues of law. Doing so affected an unintentional and historical change.

2. Possible Meanings of the Ambiguous Further-Factfinding Sentence

The further-factfinding sentence in *Harper*, which the Ninth Circuit erroneously interpreted, may connote one of two meanings. The first meaning is that appellate courts may affirm a trial court’s denial of fair use without knowing the factual findings that the trial court relied on to reach its judgment.⁹⁵ According to usual appellate procedure, appellate

91. *See id.*

92. *See, e.g.,* Sayre v. Moore, (1785) 1 East 361, 362 (K.B.) (Lord Mansfield, C.J.) (“In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be servile imitation or not.”); Emerson v. Davies, 8 F. Cas. 615, 623–24 (D. Mass. 1845) (No. 4,436) (Story, J.); *see also* Snow, *supra* note 1, at 518–28 (outlining two-hundred year history of courts treating fair use as factual issue for the jury).

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

94. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” (citation omitted)).

95. *See* Snow, *supra* note 1, at 538–39.

courts must vacate a trial judgment that fails to specify the factual findings that support the trial court's judgment, remanding the case for the trial court to articulate those findings.⁹⁶ In *Harper*, the trial court had failed to specify relevant factual findings in the fair-use analysis, so under usual appellate procedure, it is arguable that the appellate court should have remanded the case for the trial court to specify those findings.⁹⁷ It is possible, then, that through the further-factfinding sentence, the *Harper* Court was instructing appellate courts merely not to apply the usual procedure.⁹⁸ The Court could have been instructing appellate courts to affirm the trial judgment as a matter of law if the appellate court is able to draw factual inferences supporting the judgment, despite the fact that the trial court failed to specify those inferences as findings.⁹⁹ Stated another way, if inferences exist that reasonably support the trial judgment, an appellate court should affirm the judgment as a matter of law. Under this interpretation, the Court's "as a matter of law" phrase would apply only to the trial court's ultimate judgment. This interpretation further suggests that appellate courts are to defer to the trial court's possible findings of fact—a clear error standard of review.

The second possible meaning of the further-factfinding sentence is that although the inferences in the fair-use analysis constitute findings of fact, appellate courts may review those inferences *de novo*. As I explain above, the Court's language implies that it was treating those inferences as factual in nature when it referred to the process of drawing those in-

96. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292 n.22 (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made." (citation omitted) (internal quotation marks omitted)).

97. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983). The extent of the trial court's fair-use analysis consisted of the following three sentences:

Assessing the "fair use" factors, I conclude here, too, that none of them provide The Nation with the absolution it seeks. First, the article was published for profit. Second, the infringing work was soon-to-be published. Third, The Nation took what was essentially the heart of the book, and fourth, the effect of The Nation's extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright.

Id. (footnotes omitted). These statements may or may not be an adequate analysis of the four factors to support its ultimate judgment. This is a borderline case. By contrast, in *Pacific & Southern Co. v. Duncan*—the case from which the *Harper* Court quoted the further fact-finding sentence—the trial court had failed to engage in any analysis of the facts under the four factors. 744 F.2d 1490, 1495 (11th Cir. 1984).

98. See *Snow*, *supra* note 1, at 537–39.

99. This interpretation is consistent with the appellate decision from which the *Harper* Court quoted the further fact-finding sentence. *Pacific*, 744 F.2d at 1495 ("Despite the district court's erroneous interpretation of the law, we need not remand this case for further fact-finding. The district court resolved all the issues of fact necessary for us to conclude as a matter of law that TV News Clips' activities do not qualify as a fair use of the copyrighted work."). In *Pacific*, the district court had failed to analyze any of the historical facts under the statutory factors. *Id.* The district court had erroneously interpreted the Copyright Act as not requiring it to analyze the factual circumstances under these factors. *Id.* In light of that erroneous interpretation, the district court failed to perform "further fact-finding" that was necessary to support its judgment. See *id.* Nevertheless, the appellate court appeared to believe that if it could draw inferences that supported the judgment, it could go ahead and affirm as a matter of law. See *id.*

ferences as a process of “further factfinding.”¹⁰⁰ At the same time, the Court’s language could further mean that appellate courts need not remand for the trial court to perform that factfinding because the appellate court may draw those inferences itself as a matter of law.¹⁰¹ In other words, the trial court judgment *and its factual findings* are to be reviewed as a matter of law. Under this interpretation, the Court’s “as a matter of law” phrase would apply to the trial court’s process of drawing the factual inferences. This suggests a de novo standard of review.

At first glance, this second interpretation seems incorrect because it suggests that courts may review factual findings de novo. Under Rule 52, factual findings are to be reviewed for clear error.¹⁰² Even on mixed questions, the factual portion of the mixed question is reviewed for clear error,¹⁰³ and the inferences in the fair-use analysis are factual in nature for jury consideration.¹⁰⁴ There is, however, an exception to the mandate of Rule 52: independent review of a constitutional fact.¹⁰⁵ Where a factual finding determines the constitutional rights of a litigant, appellate courts refer to that finding as a constitutional fact.¹⁰⁶ Constitutional facts raise factual questions that are subject to de novo review to ensure protection of the litigant’s constitutional right.¹⁰⁷ I discuss this doctrine as applied to fair use more fully below in Part III. For now, it suffices to note that this second interpretation of the further-factfinding sentence is consistent with the doctrine of independent review.

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

101. See *id.*

102. See FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . .”).

103. See *United States v. Wright*, 582 F.3d 199, 205 (1st Cir. 2009) (“[T]he factual component of this ‘mixed question of law and fact’ remains subject to clear error review.” (citation omitted)); *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 235 Fed. Appx. 776, 780 n.5 (2d Cir. 2007) (“Of course, even if apparent authority were a mixed question of law and fact, we would still review *factual components* for clear error.”); see also cases cited *supra* note 8.

104. See *Snow*, *supra* note 1, at 556.

105. The Supreme Court articulated this doctrine of independent review as follows in *Bose Corp. v. Consumers Union of U.S., Inc.*:

The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”

466 U.S. 485, 510–11 (1984).

106. See, e.g., *id.* at 508 n.27.

107. See *id.* at 499 (“[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” (internal quotations omitted)).

As between the two possible meanings of the further-factfinding sentence, the *Harper* Court did not provide any clue as to which one is correct. On the one hand, the Court's fair-use analysis in *Harper* appears entirely unfettered, without any regard or deference to the trial court opinion.¹⁰⁸ This is consistent with the interpretation that appellate courts should apply de novo review to the process of finding facts that support an ultimate judgment. On the other hand, the trial court in *Harper* had failed to make relevant findings in the fair-use analysis, such that the Court had scant, if any, findings to defer to.¹⁰⁹ This is consistent with the interpretation that appellate courts should apply de novo review only to the ultimate judgment, deferring to any factual findings that support that judgment.

Thus, the meaning of the further-factfinding sentence is unclear. What is clear, though, is that the sentence does not mean that the inferences in the fair-use analysis should be construed as pure issues of law for a trial judge to adjudicate. Under either of the two possible interpretations of the further-factfinding sentence, fair use would still be a question of fact. Specifically, as a sentence suggesting that it is unnecessary to remand for factual findings that go further than mere historical facts, the sentence would imply that fair use raises inferences of *fact*. Alternatively, as a sentence suggesting that de novo review is appropriate under the doctrine of independent review, the sentence would imply that fair use raises inferences of constitutional *fact*. Under either interpretation, it would be incorrect to construe the sentence as meaning that the inferences in the fair-use analysis must be legal. But as I discuss in Part I.A above, courts did just that.

Hence, the present state of the law is that courts have adopted a mistaken meaning of the further-factfinding sentence, construing it to mean that fair use constitutes an issue of law, contrary to the well established history of courts treating it as an issue of fact. This historical departure from precedent occurred without reasoned deliberation. It simply occurred, seemingly unintentionally.

In another article, I argue for a return to fair use's original construction as a question of fact.¹¹⁰ In short, I argue that the Seventh Amendment mandates that fair use be construed as a fact issue for jury consideration.¹¹¹ Yet even assuming that courts return to the original construction of fair use as a factual matter, the question remains as to whether courts may *ever* decide fair use as a matter of law—without running afoul of the Seventh Amendment. That question I address in the two parts below.

108. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-69 (1985).

109. See *id.*

110. See *Snow*, *supra* note 1, at 486.

111. See *id.* at 544-54.

III. APPELLATE COURT REVIEW

My proposal in another article that fair use be treated as a fact issue for the jury leaves open the question of appellate review.¹¹² I now address that question. I ultimately propose a double standard of review for fair use questions. Specifically, for jury verdicts that favor a fair user, the clear error standard should govern appellate review. For everything else, de novo should govern. My reason for proposing this double standard stems from the judicial obligation to protect speech interests that underlie fair use. Supreme Court precedent dictates an independent review—or in other words, de novo review—of facts that determine constitutional rights.¹¹³ And as I explain below, fair use represents such a right.

A. Fair Use Under Bose

The proposal that a de novo standard, rather than a clear error standard, should govern review of fair use cases turns on the constitutional doctrine of independent review.¹¹⁴ Most instructive on this doctrine is the case of *Bose Corp. v. Consumers Union of United States*.¹¹⁵ There, a manufacturer of loud speakers, Bose, sued the defendant for libel when the defendant published a critical review of the Bose speakers in its magazine, *Consumer Reports*.¹¹⁶ After a bench trial, the district court made factual findings that the defendants had made a disparaging, false statement of fact and that the defendant made it without regard for its truth or falsity.¹¹⁷ The Supreme Court ultimately held that as a matter of law Bose had failed to prove that the defendant had made the defamatory statement without regard for its truth or falsity.¹¹⁸ In reaching this holding, the Court conducted an independent review of the record, applying a de novo standard rather than clear error. The doctrine of independent review, the Court explained, imposes a constitutional obligation on appellate courts to review allegations of constitutional fact independent of the trial court finding.¹¹⁹ The Court defined constitutional facts to mean “special facts that have been deemed to have constitutional signifi-

112. Snow, *supra* note 1, at 510 n.150 (“This [a]rticle . . . addresses only the general question of whether fair use represents a question of fact or law for the jury or judge, absent extraordinary circumstances. In a forthcoming article, the Author will explore such circumstances where judges may decide fair use as a matter of law.”).

113. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984).

114. See Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2433–35, 2468 (1998) (arguing for speech procedural protection of proof burden to apply in fair-use context based on speech nature of copied expression); see also Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1795–804, 1807–10 (2010) (same); cf. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 209–10 (1998) (advocating ban on preliminary injunctions in copyright context).

115. 466 U.S. 485, 510–11 (1984).

116. *Id.* at 487–88.

117. *Id.* at 490–91.

118. *Id.* at 511.

119. *Id.* at 505, 510–11. See *supra* note 105.

cance.”¹²⁰ Hence, a judge’s obligation to uphold constitutional rights demands that she perform an independent review of alleged facts to determine whether a claimed constitutional right is upheld.¹²¹

Courts have employed *Bose*’s approach of independent review in various speech contexts—obscenity,¹²² fighting words,¹²³ public-employee speech,¹²⁴ and campaign finance to name a few.¹²⁵ Fair use should be no different. This conclusion presumes, of course, that fair use merits protection under the Free Speech Clause. This premise raises its own discussion outside the scope of this Article. I will not argue this premise here, except to note that a few courts—including the Supreme Court in dicta—and several scholars have recognized fair use as a constitutional requirement in copyright.¹²⁶ Yet the premise is by no means well established. I therefore only briefly explain the argument for constitutional speech protection and direct readers to other more extensive authorities that argue for this premise.¹²⁷ In short, fair use eases the harsh speech-suppressive nature of copyright; it communicates thought distinct from the underlying work.¹²⁸ The critical review of another’s work, the reporting of news, the scholarly demonstration of truth—each of these activities may require copying expression and each may merit protection *from* copyright as independent speech.¹²⁹ Inferences in the fair-use analysis ultimately determine the scope of a fair user’s First Amendment right of speech. On the premise that fair use constitutes a speech-protective

120. *Bose*, 466 U.S. at 505.

121. *Id.* at 510–11 (“The requirement of independent appellate review . . . is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”).

122. *See id.* at 506–08. (citing precedent to establish established practice of applying independent review in various speech contexts).

123. *See id.* at 505–06.

124. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 384–86, 386 n.9 (1987).

125. *See, e.g.*, *Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) (campaign finance reform); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567–68 (1995) (expressive association).

126. The tension between the First Amendment and copyright has been well recognized in judicial opinion and scholarship alike. *See Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[]” and a “First Amendment accommodation[]”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60 (1985); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (Posner, J.) (“The First Amendment adds nothing to the fair use defense.”); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 3–12 (2008); *see generally* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Lemley & Volokh, *supra* note 114; Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 5–7 (2002); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697 (2003).

127. *See, e.g.*, sources cited *supra* note 126.

128. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–12 (1990) (opining that the fair-use inquiry turns primarily on whether use transforms original expression).

129. *See* 17 U.S.C. § 107 (2006); *see also Eldred*, 537 U.S. at 219–21.

doctrine, then, fair use merits the constitutional safeguards of free speech.¹³⁰

Because the factual inferences in the fair-use analysis determine whether the First Amendment protects a fair user's expression, those inferences fit the definition of constitutional facts.¹³¹ Independent review should therefore apply in the fair-use context. Indeed, in their article, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, Professors Eugene Volokh and Brett McDonnell have argued that the doctrine of independent review should be just as applicable in the copyright context as it is in the libel context contemplated by *Bose*.¹³² As they point out, copyright is much like libel law in that both define unprotected speech; and like the factfinding process in libel, the factfinding process in copyright "may misclassify . . . speech as unprotected."¹³³ Because *Bose* makes clear that its holding applies wherever judgments might classify speech as unprotected,¹³⁴ a fair-use decision must be subject to independent review.¹³⁵

B. Decisions Favoring Copyright Holders: De Novo Review

The conclusion that independent review should apply in the fair-use context does not speak to whether *all* fair-use decisions should be subject to such review. Despite *Bose*'s clarity on explaining the necessity for independent review, *Bose* leaves unanswered whether independent review should occur even where the speaker prevails at trial.¹³⁶ When the speaker prevails, de novo review would not benefit the speaker's interests, so arguably it should not apply.¹³⁷ On the other hand, de novo review in that situation would allow appellate courts to better refine and clarify the law, so arguably it should apply.¹³⁸

These arguments are considered in the section below.¹³⁹ At a minimum, though, it can be said that *Bose* mandates de novo review where a trial outcome favors the litigant seeking to suppress speech—i.e., the

130. I address the argument that First Amendment interests serve not only fair users, but also copyright holders. See discussion *infra* Part III.C.2.a.ii.

131. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984).

132. See Volokh & McDonnell, *supra* note 114, at 2437–39.

133. See *id.* at 2437.

134. *Bose*, 466 U.S. at 505–09 (outlining various speech contexts where independent review has been applied).

135. See Volokh & McDonnell, *supra* note 114, at 2437 (arguing that *Bose* should apply to copyright cases).

136. See *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (“[T]he *Bose* opinion does not make clear whether its more searching review—whose purpose was to avoid ‘a forbidden intrusion’ on First Amendment rights—applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant.” (citation omitted)).

137. See *Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993) (explaining rationale for refraining from independently reviewing constitutional facts where speaker prevails at trial level).

138. See Volokh & McDonnell, *supra* note 114, at 2442.

139. See discussion *infra* Part III.C.

copyright holder.¹⁴⁰ This would be consistent with the Court's treatment of fair use in *Harper*.¹⁴¹ Recall that the copyright holder in *Harper* prevailed at a bench trial.¹⁴² On appeal, the Supreme Court performed its own analysis of whether the use was fair, ultimately affirming the trial court's verdict.¹⁴³ The Court did not employ any language in deference to the trial court's analysis, thereby suggesting that it performed an independent review.¹⁴⁴

Although courts have not yet expressly recognized that fair use demands independent review, for many courts this proposal would not change present practices.¹⁴⁵ Under the proposal, courts would continue to apply de novo review, but they would do so because of a constitutional obligation rather than because of the Ninth Circuit's erroneous construction of fair-use inferences as being purely legal in nature. Consider the Eleventh Circuit's treatment of fair use in *SunTrust Bank v. Houghton Mifflin Co.*¹⁴⁶ The trial court had granted a preliminary injunction in favor of the copyright holder where the fair user had created a story, *The Wind Done Gone*, that appropriated characters, plot, and scenes, from the copyright holder's story, *Gone with the Wind*.¹⁴⁷ In reviewing the trial court decision, the appellate court's analysis of whether the use was fair was anything but a review for clear error.¹⁴⁸ The appellate court's language suggested it was not deferring to any inferences of the trial court in the least.¹⁴⁹ And rather tellingly, the appellate court relied heavily on the First Amendment as a basis for applying fair use.¹⁵⁰ *SunTrust*, then, serves as a model for constitutional independent review of fair use. Thus, where the copyright holder prevails at the trial level, courts should continue their present practice of applying de novo review, but they should do so out of their constitutional obligation to ensure speech protection rather than a mistaken belief that fair-use inferences are purely legal in nature.

140. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 491-92 (1984) (instituting independent review where defendant-speaker had lost at trial).

141. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560-61 (1985).

142. See *id.* at 543.

143. See *id.* at 561-69.

144. See *id.*

145. Professor Volokh points out that all circuits practice independent review of fair use, and to the extent that this means a simple application of de novo review, that is correct. See Volokh & McDonnell, *supra* note 114, at 2461; see also discussion *supra* Part III.B (observing that for many courts the proposal to apply de novo review will not change their present practice). That said, no appellate court has purported to conduct independent review of fair use decisions based on the constitutional duty as outlined in *Bose*.

146. 268 F.3d 1257 (11th Cir. 2001).

147. *Id.* at 1259.

148. See *id.* at 1269-76.

149. See *id.* (analyzing fair use with minimal reference to district court analysis).

150. See *id.* at 1264 ("First Amendment privileges are also preserved through the doctrine of fair use. Until codification of the fair-use doctrine in the 1976 Act, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values." (footnotes omitted)).

Some appellate courts, on the other hand, have employed clear error review on the issue of fair use.¹⁵¹ Such instances usually arise while reviewing a jury verdict. And this is incorrect. These appellate courts must instead adopt the *de novo* standard to review decisions where the copyright holder has prevailed at trial: even though a jury has made findings, the appellate court must independently review whether a fair user's constitutional right of speech demands a finding of fairness. Consider the case of *Bridgeport Music, Inc. v. UMG Recordings, Inc.*,¹⁵² where the putative fair user had created a song that employed elements of the copyright holder's rap song.¹⁵³ The Sixth Circuit deferred to jury findings in favor of the copyright holder despite the court's recognition of competing inferences of fairness that cast significant doubt on those findings.¹⁵⁴ It is plausible to conclude that had the court applied *de novo* review, it would have reached a different outcome, especially in view of the fact that the court recognized that the use was "certainly transformative"—a characteristic that the Supreme Court had suggested could be dispositive under similar facts in *Campbell v. Acuff-Rose Music, Inc.*¹⁵⁵

Hence, where the trial outcome favors the copyright holder, even on a jury verdict, *de novo* should govern the review. The independent review would serve to protect the speech nature of fair use.

151. See, e.g., *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009).

152. 585 F.3d 267 (6th Cir. 2009).

153. See *id.* at 272–74.

154. *Id.* In *Bridgeport*, the defendant had created a song that employed three elements of the plaintiff's song: (1) the phrase, "Bow wow wow, yippie yo, yippie yea"; (2) a repetition of the word, "dog" using a low tone; and (3) rhythmic panting. *Id.* at 272. The jury found that this use was not fair. *Id.* at 277–78. On appeal, the Sixth Circuit affirmed the verdict, deferring to the jury's finding. *Id.* Significantly, the Sixth Circuit acknowledged that the defendant's use was "certainly transformative (first factor), having a different theme, mood, and tone from [the plaintiff's song]." *Id.* This admission is significant, for it is well established that the transformation factor should weigh heavily in the fair-use analysis. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); Leval, *supra* note 128, at 1111–12. The Sixth Circuit further recognized that the amount used constituted a "relatively small" portion of the plaintiff's song. *Bridgeport*, 585 F.3d at 278. And it acknowledged the argument that the two songs targeted different markets. *Id.* Yet, despite these inferences that suggest fairness, the Sixth Circuit upheld the jury verdict: it cited competing inferences suggesting infringement and then concluded that the verdict reached by the jury "was not unreasonable." *Id.*

155. 510 U.S. 569, 574–94 (1994). Had the *Bridgeport* court fulfilled its constitutional obligation to perform an independent review, the court likely would have reached a different outcome based on the similarity of its facts to those of *Campbell v. Acuff-Rose Music, Inc.*, where the Supreme Court recognized that a defendant's use of lyrics and rhythm from another song in the defendant's rap song likely constituted a fair use. See *Campbell*, 510 U.S. at 574–94 (recognizing likely fairness of defendant's use of identifiable phrases from plaintiff's popular song in defendant's rap song). This conclusion is supported by the fact that the *Bridgeport* court recognized the transformative nature of the use, which was an influential factor in *Campbell*. Compare *Bridgeport*, 585 F.3d at 277–78, with *Campbell*, 510 U.S. at 574–94.

C. Decisions Favoring Fair Users: Mixed Review

1. Bench Trials: De Novo Review

No court has addressed whether independent review should apply where a fair user has prevailed at trial for the simple reason that courts do not rely on *Bose* in reviewing fair-use decisions. *Bose* itself is silent on whether independent review applies where the speaker prevails at trial.¹⁵⁶ In the wake of *Bose*'s silence, courts have considered the issue in contexts other than copyright.¹⁵⁷ They are split on the issue. Some courts have read *Bose* to apply symmetrically, meaning that independent review applies wherever constitutional facts are disputed, regardless of which litigant has prevailed at trial.¹⁵⁸ Their argument is that de novo review better enables appellate courts to clarify the boundaries of the constitutional right.¹⁵⁹ By contrast, other courts have read *Bose* to apply asymmetrically, meaning that independent review should apply only where the speaker loses at trial.¹⁶⁰ Their argument is that the authority for *Bose* to disregard Rule 52(a)'s mandate for clear error review comes from the judicial obligation to protect a constitutional right; and where the speaker prevails at trial, a review that defers to the trial court's finding offers more protection to the right than does a de novo review.¹⁶¹

Independent review where the fair user has prevailed at the trial level makes sense if the trial occurred before a judge. The decision of fair use rarely turns on witness credibility; rather, it turns on discretionary judgment and opinion regarding whether an admitted use is fair.¹⁶² Fairness is determined by the subjective views of the factfinder.¹⁶³ This insight suggests that the process of determining fairness on appellate review would closely imitate that process at a bench trial: on appeal, judges exercise discretionary judgment and opinion in the same way that the judge did at trial. It would seem that the discretionary judgment and opinion of three appellate judges would likely be more reliable and accurate than that of a single trial judge. Three heads are better than one.

156. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 490–91 (1984); *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (recognizing silence of *Bose* on this issue).

157. See, e.g., *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981, 981–82 (1988) (White, J., dissenting from denial of certiorari) (noting split among circuits on *Bose*-application issue and desire to resolve issue).

158. See *Friday*, 525 F.3d at 950; *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107 (5th Cir. 1987).

159. See *Volokh & McDonnell*, *supra* note 114, at 2441–43 (explaining reasons for their endorsement of symmetric approach).

160. See *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988); *Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225, 1228–29 (7th Cir. 1985).

161. See *Multimedia*, 991 F.2d at 160.

162. See *Snow*, *supra* note 1, at 497–500; cf. *United States v. Quaintance*, 608 F.3d 717, 721 n.3 (10th Cir. 2010) (“Even when the constitutional fact doctrine [of *Bose*] applies, credibility determinations remain subject to clear error review.”).

163. See *Snow*, *supra* note 1, at 497–501.

Thus, a bench trial result merits independent review regardless of which litigant prevails.¹⁶⁴

This position is supported by Professor Volokh, who has argued that courts should apply *Bose* symmetrically in the copyright context of deciding the issue of substantial similarity.¹⁶⁵ Presumably, Professor Volokh holds this same belief in the context of fair use.¹⁶⁶ And this position is consistent with the present practice of courts.¹⁶⁷ Indeed, the Supreme Court seems to have implicitly endorsed *de novo* review even where a fair user has prevailed at trial, insofar as the trial was before a judge. In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁶⁸ the district court conducted a lengthy trial over whether defendants were contributorily liable for producing video tape recorders, and the district court ruled for the defendants on the grounds that the VCR users were making a fair use of the copyrighted television broadcasts.¹⁶⁹ On appeal, the Supreme Court engaged in its own fair-use analysis, which suggests that the Court was performing an independent review.¹⁷⁰ Although the Court deferred to the district court's findings of historical fact, the Court appeared to draw the inferences in the fair-use analysis independent of the district court's analysis, even though the defendant had prevailed at trial.¹⁷¹ The analysis of the district court—i.e., the process of drawing inferences by applying the legal principles of fair use—seems to have

164. In addition to bench trials, preliminary injunctions and summary judgments would be subject to an independent review under this proposal for the same reason that the decision maker in those proceedings is a single judge. See discussion *infra* Part III.D (discussing scope of review in summary judgment proceeding).

165. See Volokh & McDonnell, *supra* note 114, at 2442.

166. See *id.* at 2461–62 (citing fact that appellate courts examine fair use under independent appellate review to support argument that independent appellate review should apply in substantial similarity context, and relying on *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1434 (6th Cir. 1992), *rev'd on other grounds*, 510 U.S. 569 (1994), for this position, wherein the Sixth Circuit reviewed *de novo* the district court's finding of fairness for the defendant); e-mail from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of Law, to Ned Snow, Assoc. Professor of Law, Univ. of Arkansas Sch. of Law (Apr. 16, 2010, 18:39 CST) (on file with author) (advocating independent review in context of fair use).

167. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719–25 (9th Cir. 2007), *amended by* 504 F.3d 1146 (reviewing *de novo* district court's grant of preliminary injunction for copyright holder); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 72–74 (2d Cir. 1999) (applying *de novo* review of four-factor analysis where defendant had lost at bench trial).

168. 464 U.S. 417 (1984), *superseded by statute*, Digital Millennium Copyright Act of 1998, Pub. L. 105–304, 115 Stat. 2860, *as recognized in* *Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

169. *Id.* at 420–21.

170. See *id.* at 448–55.

171. See *id.* at 449 (“[T]he District Court’s findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.”); *id.* at 450 (relying on district court’s finding of historical fact that market harm was speculative, and at best, minimal); *id.* at 456 (relying on the “findings of the District Court” to arrive at conclusion that use was fair). The Court did, however, employ other language suggesting that it deferred to the district court’s finding of fairness. See *id.* at 454–55 (“[W]e must conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.”).

been subject to independent review. De novo review of bench trials would thus be consistent with precedent.

2. Jury Verdicts: Clear Error Review

I propose that where a jury determines that a use is fair, appellate courts should not employ de novo review. They should instead defer to the factual inferences that the jury reached in the fair-use analysis, employing clear error as the standard of review. I therefore propose a double standard: when a jury finds in favor of the copyright holder, the appellate court should review de novo, but when a jury finds in favor of the fair user, the appellate court should follow Rule 52(a)'s requirement of clear error review.¹⁷²

My proposal for clear error review of jury verdicts is consistent with the practice and rhetoric of some courts.¹⁷³ For instance, in *Compaq Computer Corp. v. Ergonome Inc.*,¹⁷⁴ the Fifth Circuit applied a clear

172. See FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . .").

I address the issue of whether fair use is properly characterized as an issue of fact, an issue of law, or a mixed question of fact and law in *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*. Snow, *supra* note 1, at 492–518. Therein I conclude that it should be characterized as a question of fact. For the sake of argument, however, assuming that it was proper to characterize fair use as a mixed question of law and fact, this conclusion would not preclude my proposal for a clear error standard of review. As Professors Wright and Miller note:

There is no uniform standard for reviewing mixed questions of law and fact. . . . It does not appear to be the case that mixed questions of law and fact are entirely outside the "clearly erroneous" rule. In a long line of cases courts have held that this rule limited appellate review of matters that certainly seem to contain both legal and factual elements. Thus the Supreme Court has treated as a question of fact, governed by Rule 52(a), an issue whether a payment to a taxpayer was a "gift," and lower federal courts have applied that principle to many other determinations relating to the tax laws. Other courts have applied the "clearly erroneous" rule to a tremendous variety of matters including: whether a party was guilty of laches; the existence and scope of an agency or fiduciary relationship; questions involving contracts, including the existence of a contract or its validity or applicability, whether the parties had been under a mutual mistake, the nature or character of an instrument, and even in some instances the interpretation of a written contract; the eligibility of an alien for naturalization; the danger of consumer confusion with regard to trademarks and tradenames; whether a transaction was fraudulent; the existence of subject matter or personal jurisdiction; and many other matters, as is exemplified by the citations in the note below. [Other matters "note[d] below" include: abandonment of trademark; adequacy of records; apparent authority; attractive nuisance; buyer in ordinary course; clear and present danger; common-law marriage; conservation and endangerment; damages; discrimination; employee relationship; holder in due course; indigency; intent; foreseeability; land use and tribal rights; mental competency; motivation; nature of goods; privity; refusal to bargain collectively; Rule 11; satisfaction of burden of proof; seaworthiness; secured creditor; status of corporation; voting rights; willful statutory violation.]

9C WRIGHT & MILLER, *supra* note 78, at 484, 486–98.

173. See, e.g., *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 410–11 (5th Cir. 2004) (upholding jury verdict under clear error standard). In dicta, Judge Posner has pointed out that he sees no reason that courts have instituted "plenary review" (de novo review) in copyright cases dealing with fair use. *United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999). Cf. *Anderson v. City of Bessemer*, 470 U.S. 564, 580 (1985) (applying clear error review in context of reviewing mixed question of whether employer discriminated based on sex of employee—a question which turns on divergent discretionary opinion).

174. 387 F.3d 403 (5th Cir. 2004).

error standard to uphold a jury verdict that found a use to be fair.¹⁷⁵ There, Compaq Computer Corp. had allegedly copied portions of the copyright holder's book regarding correct hand positions for typing.¹⁷⁶ The appellate court reviewed the jury verdict that had found Compaq's use to be fair.¹⁷⁷ In that review, Judge Jones of the Fifth Circuit explained that the standard of review required reversal only where "the [c]ourt believes that reasonable men could not arrive at a contrary verdict."¹⁷⁸ Throughout her review, Judge Jones considered whether inferences in the fair-use analysis, which would favor Compaq, were reasonable inferences for a jury to draw.¹⁷⁹ Concluding that jurors could have drawn reasonable inferences in favor of Compaq, Judge Jones upheld the finding of fairness.¹⁸⁰

It is further noteworthy that Judge Posner has articulated a preference for clear error review of fair use, albeit in dicta.¹⁸¹ While considering whether to implement *de novo* review of a trial judge's ruling on the mixed question of whether evidence was inadmissibly privileged, Judge Posner noted that courts often refer to mixed questions—"such as fair use in a copyright case"—as applying *de novo* (or plenary) review.¹⁸² Yet, he continued, such courts never explain why the issue merits *de novo* review.¹⁸³ Judge Posner concluded that in the Seventh Circuit "the clear-error standard is the proper standard for appellate review of determinations of mixed questions of fact and law."¹⁸⁴ This statement suggests, then, that Judge Posner believes that fair use should be reviewed under a clear error standard.¹⁸⁵

A contrary position to this view is not immediately evident in case law. In reviewing fair use opinions, I have not found any cases where an appellate court overturned a jury's verdict of fairness under a *de novo*

175. *Compaq*, 387 F.3d at 410–11.

176. *Id.* at 406.

177. *Id.*

178. *Id.* at 409 (alteration in original) (citing *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 401 (5th Cir. 2000)).

179. *Id.* at 410–11.

180. *Id.* at 411 ("The evidence presented at trial and the reasonable inferences therefrom, when viewed through the lens of the statutory fair use factors, support the jury's fair use finding.")

181. *See United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999).

182. *See id.*

183. *Id.*

184. *Id.*

185. *See id.* Judge Posner's characterization of the review standard for fair use is consistent with his view of when courts should decide fair use on summary judgment—only where a reasonable trier of fact could reach only one conclusion. *See Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) ("Fair use is a mixed question of law and fact," which means that it "may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion—but not otherwise.") (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)). That said, in the *Frederick* case where Judge Posner suggested that fair use should be reviewed for clear error, he also referred to fair use as "a mixed question of *nonconstitutional* law and fact"—a characterization that I entirely disagree with. *Compare* 182 F.3d at 499 (emphasis added), *with* discussion *supra* Part III.B (arguing for *de novo* review of fair-use decisions favoring copyright holders).

standard. But this is unsurprising. The issue of the jury role begins long before the jury reaches its verdict. It begins with summary judgment proceedings where litigants might argue that fair use constitutes an issue of law for the judge. As I discuss in Part II, most trial courts treat fair use as a matter appropriate for judicial decision at summary judgment.¹⁸⁶

My proposal to apply a clear error standard to jury verdicts favoring fair users would appear to gain support from Professor Volokh, insofar as the jury verdict is a general one. In discussing independent review on the issue of substantial similarity, he recognizes that independent review will not work where the jury issues a general verdict of no infringement.¹⁸⁷ There are so many subsidiary factual issues in a copyright claim (e.g., independent creation and substantial similarity) that the court of appeals has no way to know the reason that a jury has decided against infringement.¹⁸⁸ So even if the appellate court believes that a use should not be fair, it must defer to the jury's general finding because other factual findings, which are subject to clear error review, could have influenced the decision.

Of course this reasoning would not apply where the jury has found a use to be fair as a special verdict.¹⁸⁹ The question thus arises as to whether special verdicts of fairness should be reviewed *de novo* or for clear error. Professor Volokh argues for *de novo* review.¹⁹⁰ On this point we disagree. Presumably Professor Volokh relies on the same arguments that he cites for independent review of bench trials: clarity of the law; fairness to copyright holders; and serving the First Amendment purpose of encouraging speech.¹⁹¹ For reasons explained below, however, I find these arguments unpersuasive.¹⁹² The subsections below discuss reasons that independent review should not apply symmetrically where a fair user prevails at a jury trial.

186. *E.g.*, *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (deciding fair use on summary judgment despite recognizing that the reasonableness of contrary inferences which made her "decision a difficult one"), *aff'd*, 150 F.3d 132 (2d Cir. 1998); *Television Digest, Inc. v. U.S. Tel. Ass'n*, 841 F. Supp. 5, 9 (D.D.C. 1993) (expressly rejecting defendant's argument that a fair use decision is improper on a motion for summary judgment). *But see Harris v. San Jose Mercury News*, No. C 04-05262 CRB, 2006 WL 995151, at *1 n.2 (N.D. Cal. Apr. 10, 2006) ("[T]he Court believes that inferences to be drawn [in the fair-use analysis] from undisputed facts are questions more appropriately resolved by a jury than a judge.")

187. *See* Volokh & McDonnell, *supra* note 114, at 2442-43.

188. *See id.*

189. The same would be true under a general verdict if the only issue at trial surrounded fair use or if the other factual issues clearly could not have favored the defendant.

190. *See* Volokh & McDonnell, *supra* note 114, at 2442-43. Presumably, Professor Volokh makes no qualification for fair use. *See supra* note 166.

191. *See* Volokh & McDonnell, *supra* note 114, at 2442.

192. *See* discussion *infra* Part III.C.2.a-b.

a. Constitutional Considerations

i. Speech Rights of Fair Users

Under *Bose*, the justification for performing de novo review of a factual finding is to ensure protection of speech.¹⁹³ In condemning a defendant, a jury or judge could have overlooked the defendant's right of speech, and so the appellate court is justified to review that finding without deference. Yet when the defendant has prevailed at trial, a review that is broader than clear error would not seem to benefit the defendant speaker; plenary review would seem to create only a disadvantage for the defendant. Replacing the usual clear error standard with de novo would serve only to threaten the jury verdict that favored the defendant speaker. The justification, then, for *Bose*'s de novo exception to Rule 52(a) seems lacking: imposing de novo over the statutory mandate of clearly erroneous does not seem to better protect speech where the speaker has already prevailed at trial. It would seem, then, that clear error should govern in the situation where a jury finds for the fair user.¹⁹⁴

It might be argued, however, that independent review should govern even where the putative fair user has prevailed for the simple reason that judges better recognize speech than do juries.¹⁹⁵ If the role of judges is to protect the constitutional right of speech, it would seem that judges should be better able to identify speech. And even if appellate judges reverse a jury finding favoring a defendant, the reversal will better define speech for future fair users.

This argument is unpersuasive for two reasons.¹⁹⁶ First, as a preliminary matter, it is doubtful that judges can in fact better identify the speech nature of fair use than can juries. Second, clear error review represents a procedural form of breathing space that the speech nature of fair use requires. I discuss these reasons in greater detail below.

193. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505, 510–11 (1984).

194. Although *Bose* never expressly states that independent review applies only if the speaker loses at trial, its language suggests this application. *See id.* at 505, 509. The language describes independent review as applying “[i]n cases in which there is a *claim of denial of rights* under the Federal Constitution.” *Id.* at 509 (alteration in original) (emphasis added) (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971)). It describes its past practices of independent review as ensuring “that the speech in question actually falls within the *unprotected* category.” *Id.* at 505 (emphasis added). Also, it explains that independent review “imposes a special responsibility on judges whenever it is claimed that a particular communication is *unprotected*.” *Id.* (emphasis added). *Cf. Hustler Magazine v. Fallwell*, 485 U.S. 46, 57 (1988) (accepting jury finding without any analysis that defendant's publication did not constitute a fact in test for libel); 2 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 12:85 (2010) (interpreting *Hustler* as lending implicit support for view that independent review applies only where speaker does not prevail at the trial level).

195. *See* Volokh & McDonnell, *supra* note 114, at 2440 (arguing that an appellate court can determine whether two works are substantially similar just as well as a jury can).

196. *See* Snow, *supra* note 1, at 497–504. Analogously, a parent's role to ensure the health and safety of children does not imply that the parent is better than a doctor at identifying a child's state of health. To ensure protection of health, the parent facilitates an opportunity for the doctor to examine the sick child. Likewise, to ensure protection of speech, the judge facilitates an opportunity for the jury to examine the disputed use.

The first reason that judges should not review jury verdicts favoring defendants is that judges are not necessarily any better at identifying fair uses than are juries.¹⁹⁷ Determining fairness rests on an understanding of cultural norms and social values. As Professor Lloyd Weinreb observes in his article, *Fair's Fair: A Comment on the Fair Use Doctrine*, the reference to fairness suggests a normative element in the analysis, and that element is desirable.¹⁹⁸ That element, Professor Weinreb continues, gives effect to the community's established practices and understandings.¹⁹⁹ If this is true, it would seem that the diversity of life experiences in a jury would better reflect the established practices and understandings of the community than would the single life experience of a judge.²⁰⁰ In identifying the independent speech nature of repeated expression, the collective opinion of a disparate group of ordinary citizens would appear to be worth more than the collective opinion of the homogeneous judicial monastery.²⁰¹

Admittedly, my intuition on this point may not be accurate. It could be that, at least in some situations, judges are better at determining fairness than are juries. Any empirical attempt to prove that the jury is a better institution at identifying fairness would be unavailing, for such a study would require an omniscient knowledge of whether the judge or jury was in fact correct or incorrect. Even if a survey of copyright attorneys were to establish that defendants prefer juries to judges, this fact would suggest merely that juries are perceived to be more likely to find a use to be fair. It would not suggest that a jury would be more likely to actually make an accurate finding. Because 'fairness' is an inherently

197. See *id.*

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

199. *Id.*

200. See *id.* The Court's comment in *Sioux City & Pacific Railroad v. Stout* is instructive on this point:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge . . .

. . . .

. . . [W]hen the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

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

201. Cf. WRIGHT & MILLER, *supra* note 78, at § 2585 ("This respect for the findings of fact by the trial court should not be pressed too far. It is simply wrong to say . . . that the 'findings will be given the force and effect of a jury verdict.'" (quoting *Stoody Co. v. Royer*, 347 F.2d 672, 680 (10th Cir. 1967))).

subjective concept, it is not possible to empirically demonstrate my intuition—that juries are the better institution at judging fairness.

Yet my inability to produce evidence on this point should not be fatal to my argument. My argument here is that proponents of *de novo* review cannot establish that judges are better than juries. That is, I argue that the proponents must bear the burden to demonstrate the superiority of judges at determining fair use. And this makes sense: for two hundred years fair use was a jury issue,²⁰² and furthermore, the Constitution articulates a preference for the jury.²⁰³ Any deviation from the well-established practice of jury determination must be justified. It is therefore the proponents of *de novo* review who must justify that judges are better than juries at identifying fair uses. And they have not.

Even assuming that judges are better able to identify fair-use speech, they should still not employ *de novo* review of jury verdicts that favor fair users. As I state above, a second reason supports clear error review: breathing space necessary to protect fair-use speech.²⁰⁴ To ensure the actual protection of speech that merits protection, the law must protect more than that which merits protection.²⁰⁵ It must protect *unprotected* speech at the margins to give the protected speech breathing space necessary for its exercise. Given the inherent uncertainty surrounding most—if not all—uses that are in fact fair, most fair-use expression lies at the margins of protected speech.²⁰⁶ So to protect fair-use speech at the margins, the law must protect speech that crosses the line; it must protect

202. *E.g.*, *Sayre v. Moore*, (1785) 1 East 361, 362, (K.B.) (Lord Mansfield, C.J.) (“In all these [copyright cases where defendant had altered underlying work] the question of fact to come before a jury is, whether the alteration be colourable or not . . . ? [T]he jury will decide whether it be a servile imitation or not.”); *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (reversing district court’s grant of summary judgment on the grounds that fair use raises “essentially factual issues and . . . are normally questions for the jury”); *see also* Snow, *supra* note 1, at 518.

203. *See* U.S. CONST. amend. VII; *see also* Snow, *supra* note 1, at 504–05.

204. A third reason may be cited as well. *De novo* review of jury findings of fairness (or unfairness) could possibly abolish any burden of proof. If appellate courts could decide fair use without any deference to a jury, so also could trial courts. *See* discussion *infra* Part IV.A. Trial courts have the same obligation as appellate courts to uphold constitutional rights (without deference to a jury), so trial courts could rule against fair users without deference to a jury in the same way that appellate courts could rule against fair users without deference to a jury. Fair use, then, would effectively become a constitutional issue solely for judges, much like the issue of whether an officer’s conduct was reasonable under the Fourth Amendment. Issues that rest with the sole decision-making authority of judges are legal issues. And legal issues usually do not entail a burden of proof: judges most often decide them without applying a presumption for either party. In the context of fair use, if the burden of proof were to rest with the party seeking to suppress fair-use speech—the copyright holder—this could prove a formidable challenge in close cases. Although courts have recently departed from the historical judicial practice of placing that burden with copyright holders, First Amendment principles dictate that the burden should rest with copyright holders. *See* Snow, *supra* note 1 14, at 1791–1807. Assuming that courts correctly place that burden with copyright holders, it would serve to provide procedural breathing space to fair users. *See id.* at 1807–14.

205. *See generally* Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 468–69 (2007) (“First Amendment freedoms need breathing space to survive.”) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

206. *See* Snow, *supra* note 114, at 1784, 1799–1804.

some instances of infringement.²⁰⁷ It must provide breathing space to the protected fair uses.²⁰⁸

This principle of breathing space suggests a clear error standard of review.²⁰⁹ It seems indisputable that neither jury nor judge will in every case correctly decide whether a use is fair. Even assuming, for the sake of argument, that judges are better than juries at identifying fairness, no one would believe that judges are perfect.²¹⁰ Indeed, it is well accepted that sometimes judges get it wrong.²¹¹ The possibility exists, then, that appellate judges might incorrectly label a fair use as infringing where a jury has found otherwise. This possibility the law must protect against, and the standard of review will offer that protection. Clear error would favor a finding of fair use over infringement, so that even if judges believed a jury incorrectly found a use to be fair, they could not reverse the finding without a compelling reason. On the other hand, clear error would result in some instances of infringement being upheld as fair. Clear error would serve to protect fair use at the cost of protecting some infringement. It would provide breathing space.

This conclusion does not imply that an appellate court that must affirm a jury finding of fairness under the clear error standard could not provide guidance to future speakers. Certainly judges could still set forth legal principles to guide trial courts in formulating legal instructions to future juries, all while upholding a jury verdict of fairness under clear

207. *Cf. id.* at 1819–21 (discussing possibility that shifting burden of proof in fair use decisions could result in greater instances of infringement).

208. *See id.*; *see also Wis. Right to Life*, 551 U.S. at 468–69.

209. Perhaps most illustrative of this principle is the Court's explanation in *Waters v. Churchill*:

[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held . . . a particular allocation of the burden of proof . . . to be constitutionally required in proceedings that may penalize protected speech.

511 U.S. 661, 669 (1994). *Cf. Snow, supra* note 114, at 1781–82 (observing burden-of-proof procedural protection to speakers in all speech contexts except fair use); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 438 (2007) (arguing that the Court should employ procedural rules to create First Amendment breathing space in copyright).

210. The mistaken nature of judges at assessing fair use (or the lack thereof) is perhaps best illustrated by the case histories of some of the most celebrated fair use decisions by the Supreme Court. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), *rev'g* 972 F.2d 1429 (6th Cir. 1992), *rev'g* 754 F. Supp. 1150 (M.D. Tenn. 1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), *rev'g* 723 F.2d 195 (2d Cir. 1983), *rev'g* 557 F. Supp. 1067 (S.D.N.Y. 1983); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *rev'g* 659 F.2d 963 (9th Cir. 1981), *rev'g* 480 F. Supp. 429 (C.D. Cal. 1979).

211. Judge Pierre Leval observes:

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

Leval, *supra* note 128, at 1106–07.

error.²¹² Judges could still opine in dicta that the use at issue is—in the judge’s view—infringing, teaching future speakers about the contours of copyright.²¹³ Clear error would not preclude appellate judges from articulating principles that identify the presence or absence of fair use. In effect, judges could change the boundaries—just not the breathing space around those boundaries.

Thus, the standard of review in fair use should exist to minimize the possibility of erroneously denying protected speech—not to minimize the possibility of erroneously deciding the issue either way. The goal of clarifying the law to aid a fact-finder in correctly identifying speech should not diminish the ultimate goal of protecting that speech. And to protect speech, the standard of review should facilitate a finding of fair use whenever either the jury or the judge favors that finding. Accordingly, appellate courts should both defer to a jury’s finding of fairness and ignore a jury’s finding of infringement. Stated another way, clear error review should govern where a fair user has prevailed; de novo review should govern where a copyright holder has prevailed.

Paradoxically, my argument up to this point relies on the same free speech principle to reach seemingly contrary conclusions: I argue that free speech requires both de novo and clear error review. It may seem, then, that I employ the First Amendment opportunistically, only when it serves my seemingly biased interest in furthering fair use. It should be asked, then, whether I have ignored speech considerations in favor of copyright holders. Yes, I have—up to this point. In the section below, however, I consider speech interests that support copyright holders.²¹⁴

ii. Speech Rights of Copyright Holders

This proposal to asymmetrically perform independent review to the benefit of fair users over copyright holders seems to ignore the principle that copyright serves First Amendment values as much as, if not more than, fair use. As the Supreme Court pointed out in *Eldred v. Ashcroft*,²¹⁵ “[C]opyright supplies the economic incentive to create and disseminate ideas,” its very purpose being “to promote the creation and publication of free expression.”²¹⁶ Denying copyright holders the benefit of independent

212. See discussion *supra* Part III.C.2.a.1 (explaining that error does not preclude a court from declaring legal principles that should guide similar situations in the future).

213. See discussion *infra* Part III.C.2.b (explaining that judges can declare legal principle to guide future decision even while affirming under a clear error standard).

214. I thank Professor Dotan Oliar for this consideration that he raised while commenting on a previous draft of my article at the Fourth Annual Junior Scholars in Intellectual Property Workshop, held at Michigan State University College of Law.

215. 537 U.S. 186 (2003).

216. The Court rejected the argument that copyright is subject to a speech restrictive analysis based on the following:

The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to promote the creation and publi-

review might increase the cost of protecting their protected speech, i.e., copyrighted expression. It is therefore arguable that independent review should apply where fair users prevail to protect the speech of copyright holders.

This argument seems to draw strength from First Amendment theory. If the purpose of freedom of speech is to give rise to a robust marketplace of ideas that ultimately produces human enlightenment, then the role of the Free Speech Clause should be to engender ideas and their expression.²¹⁷ Independent review of decisions favoring fair users would seem to serve that end: it would offer greater protection to copyright holders, which would facilitate an increase in the production of copyrighted expression. Similarly, it is thought that copyright facilitates a means for realizing individual autonomy²¹⁸ and exercising freedom of imagination.²¹⁹ Thus, asymmetric application of independent review seems inconsistent with these theoretical purposes underlying the Free Speech Clause.

It is true that the proposal for asymmetric application of independent review might reduce production of copyrighted expression, which would disserve the goals of First Amendment speech theories. But this fact suggests only that a tension exists between over-enforcement of fair use and the Free Speech Clause. It does not suggest that the tension between fair use and the Free Speech Clause is greater than, or even comparable to, the tension between copyright and the Free Speech Clause.²²⁰ And in fact, the copyright tension appears much greater than the fair-use tension: copyright appears to pose a greater threat to free speech than does fair use. Two reasons support this conclusion. First, the stakes are much higher for fair users who contemplate an erroneous judgment than they are for copyright holders.²²¹ Fair users face a penalty that both en-

cation of free expression. As *Harper & Row* observed: “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”

Id. at 219 (alteration in original) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

217. See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas”); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT §2:20 (2011) (articulating marketplace theory).

218. See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

219. See Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *YALE L.J.* 1, 37–48 (2002).

220. Nor does this fact suggest that any sort of abridgment has occurred. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech” (emphasis added)). Weakening the incentive of copyright holders to speak should not constitute an abridgment, for otherwise, so would repealing the Copyright Act itself, as would repealing a law requiring the filing of income-tax returns.

221. See Snow, *supra* note 114, at 1817 (concluding that disparity in outcomes that fair users and copyright holders respectively face when each contemplates an erroneous judgment distin-

joins their speech and inflicts financial punishment;²²² copyright holders face a denial of rent due for the use of their property.²²³ Second, the procedural landscape already favors copyright holders.²²⁴ A fair user must demonstrate the legitimacy of his use: an admitted use is an infringing use unless the fair user can persuade the fact-finder otherwise.²²⁵ Where uncertainty prevents that persuasion, copyright holders automatically win.²²⁶ And uncertainty always accompanies the question of fairness.²²⁷ Procedurally, free speech in the form of copyrighted expression enjoys a great advantage over free speech in the form of fair-use expression.

Accordingly, the fact that a tension may exist between fair use and the Free Speech Clause does not suggest that courts should apply independent review symmetrically. In practice, the tension that exists between copyright and the Free Speech Clause is much greater. This disparity between tensions suggests that independent review should apply asymmetrically so as to disfavor the copyright holder—the litigant whose interest lies in greatest tension with the Free Speech Clause.

It should further be noted that a fallacy exists in the argument that copyright as speech merits as much protection as fair use. The fallacy becomes apparent when considering the meaning of protection. Protection of what? Copyright holders seek protection of their rights to exclude others from using expression. Fair users seek protection of their rights to express themselves by using another's expression. Stated differently, copyright holders seek protection of property; fair users seek protection of speech. This understanding implies that an argument that copyright holders should be protected by strengthening their ability to enforce copyright is a property argument. It is not a speech argument. The argument is fallacious that purports that speech rights of copyright holders demand the same protection as speech rights of fair users: copyright holders claim protection of property rights, which are subservient to the speech rights of fair users. Independent review applies asymmetrically to protect the speech rights at issue—those, and only those, of the fair user.

guishes the chilling effects of those respective outcomes on the production of fair-use material and copyrighted material).

222. See 17 U.S.C. § 504 (2006).

223. See *Snow*, *supra* note 114, at 1817.

224. See *id.* at 1781.

225. See *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (“The burden of proof is on the copier because fair use is an affirmative defense . . .” (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994))); *Snow*, *supra* note 114, at 1787–91 (discussing effect of placing burden of proof on fair user).

226. See *Snow*, *supra* note 114, at 1790–91.

227. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588 (1985) (“[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the [fair use] statute.” (quoting H.R. REP. NO. 94-176, at 66 (1976))); see also *Leval*, *supra* note 128, at 1106–07 (observing confusion among judges as to the meaning of fair use); *Snow*, *supra* note 114, at 1790–91.

A final argument for symmetric application based on the speech rights of the copyright holder is that an erroneous finding of fair use might force the copyright holder to speak when he prefers to remain silent.²²⁸ This argument, however, is unavailing.²²⁹ It is questionable whether copyright holders are speaking when others use their expression. Likewise, it is questionable that using their already-published expression *forces* them to speak given that they have already chosen to speak it. Finally, constitutional jurisprudence calls into question a law that forces speech only if a threat of punishment is present (e.g., imprisonment, fines, taxes, or an injunction); copyright holders do not face such a threat when someone uses their expression.²³⁰

b. Policy Consideration of Certainty

Aside from constitutional considerations, the policy reason of providing greater certainty for litigants should be considered in contemplating the standard of review. It may seem that symmetric application would facilitate greater certainty in fair use. After all, symmetric application would allow an appellate court to rule as a matter of law regardless of whether a fair user prevailed at trial, and more opportunities to rule as a matter of law would seem to bring more clarity to the doctrine.²³¹ By contrast, if appellate courts may perform independent review only asymmetrically, the cases in which they may rule as a matter of law seem limited. Under clear error review, an affirmance would mean merely that the jury drew reasonable inferences; the appellate court's holding would not speak to whether the same conduct in the future would be considered fair. The possibility of inconsistency would give rise to uncertainty.

This possibility appears unlikely because, as noted above, the asymmetric proposal would not require courts to cease ruling as a matter of law on appellate review when affirming under clear error (or, of course, when reversing under clear error).²³² In affirming a jury finding, an appellate court may articulate legal principles to guide future fact-finders. Indeed, if the court so chooses, the basis for its conclusion that there is no clear error may be that the use is fair as a matter of law.²³³ The standard of review speaks only to the floor for affirming a judgment; it

228. See *Harper*, 471 U.S. at 559–60 (recognizing that copyright serves “the right to refrain from speaking at all” (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977))).

229. The Court's comment in *Harper* recognizing that copyright serves the First Amendment value of refraining from speaking was made in the context of examining the right of first publication—not the right of subsequent uses. See *id.*

230. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291 (10th Cir. 2004).

231. Cf. *Volokh & McDonnell*, *supra* note 114, at 2442 (citing certainty as a reason for applying independent review in the context of the substantial-similarity inquiry).

232. See discussion *supra* Part III.C.2.a.i (explaining that clear error does not preclude a court from declaring legal principles that should guide similar situations in the future).

233. See, e.g., *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 n.11 (5th Cir. 1980) (ruling as a matter of law that defendant's use was fair, and contemplating that applicable standard could be clearly erroneous).

does not speak to the ceiling.²³⁴ Courts could still rule as a matter of law under a clear error standard.

The argument against the proposal for asymmetry is also questionable for the simple reason that uncertainty, to an extent, should be preserved in fair use. Uncertainty allows flexibility.²³⁵ To preserve flexibility, courts have always preached that a fundamental tenant of fair use is that each use raises its own considerations of fairness.²³⁶ Each use potentially raises circumstances that could represent an element of speech requiring protection.²³⁷ Through case-by-case analyses, fair use necessarily limits the precedential value of any inferences drawn in a particular analysis.²³⁸ Inferences drawn in one case are not binding on a subsequent case.²³⁹ Procedures governing fair use, then, should not assay to eradicate the doctrine of uncertainty.

234. See FED. R. CIV. P. 52(a)(6) (stating standard for reversal of factual finding in terms of *necessary* circumstance, i.e., clearly erroneous findings). Of course the technical holding of an affirmance under a clear error standard is that the evidence supports the jury's finding, and nothing more than that. See generally WRIGHT & MILLER, *supra* note 78 § 2585 at 405–06 (explaining the meaning of the clearly erroneous standard and the mistake of inferring anything beyond that meaning). But it seems improbable that future courts would ignore language that declares legal principles in an affirming opinion. *E.g.*, Sony Computer Entm't Am., Inc. v. Bleem, LLC, 214 F.3d 1022, 1027 (9th Cir. 2000) (relying on *Triangle Publ'ns*, 626 F.2d at 1175 n.11, for propositions of law that the *Triangle* court articulated in affirming fair use finding, despite fact that the *Triangle* court stated that the governing legal standard might be clear error); Pro Arts, Inc. v. Hustler Magazine, Inc., No. 85-3022, 1986 WL 16647 at *1 (6th Cir. March 25, 1986) (same). If the appellate court makes clear in its opinion that the use must be viewed as fair as a matter of law, a future court contemplating similar facts would know that a finding of infringement would result in clear error. As a practical matter, an appellate affirmance under a clear error standard may still give license to future trial courts to conclude that a use is fair as a matter of law.

235. See Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1659855>, at 5 (“Uncertainty, then, is unavoidable—indeed, even intentional—in the doctrine of fair use, for uncertainty allows flexibility and a breadth of application.”).

236. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that fair use requires a case-by-case analysis); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (describing the process of determining whether an unauthorized copy constitutes fair use as “the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent”).

237. Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[]” and a “First Amendment accommodation[]”); *Campbell*, 510 U.S. at 577.

238. See *Campbell*, 510 U.S. at 577 (explaining that fair use calls for case-by-case analysis); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (explaining that each fair use case “must be decided on its own facts” (citation omitted)).

239. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.) (“[A]s soon as literal appropriation ceases to be the test [for copyright infringement], the whole matter is necessarily at large, so that, as what recently well said by a distinguished judge, the decisions cannot help much in a new case.” (citation omitted)). Compare *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” (citing *Aikens v. Wisconsin*, 195 U.S. 194, 205–06 (1904))), with *Simms v. Stanton*, 75 F. 6, 10 (C.C.N.D. Cal. 1896) (“What would be a ‘fair use’ in one case might not be in another.”). Cf. *Miller v. California*, 413 U.S. 15, 26 n.9 (1973) (noting that even if juries may reach different conclusions as to whether expression merits speech protection in the obscenity context, constitutional rights are not abridged because “one of the consequences we accept under our jury system” is that “different juries may reach different results” (quoting *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957))).

The point at which flexibility should be sacrificed for certainty by ruling as a matter of law is an issue for appellate courts to discern. Thus far, for instance, appellate courts have chosen to establish as a matter of law the process for determining fairness when a user records a television show on a VCR for subsequent home use;²⁴⁰ however, they have chosen to leave open the question of fairness when musicians employ portions of another artist's song in a seemingly parodic style.²⁴¹ An asymmetric standard of review would not preclude courts from continuing to discern when it is appropriate to rule as a matter of law. Except in one situation—where judge and jury disagree. Specifically, where an appellate court believes that a use should be infringing, but it views a jury's finding of fairness as not clearly erroneous, the clear error standard would prevent the court from ruling as a matter of law that the use is infringing.²⁴² And this is as it should be.²⁴³ Uses over which reasonable minds disagree should lie in the grey.²⁴⁴ It gives breathing space to those uses that lie at the margins of fairness.²⁴⁵ Hence, those uses that a jury would recognize as fair but an appellate court would rebuke as infringing should be spared the condemnation of endless banishment as a matter of law.

D. Decisions on Summary Judgment

Up to this point, I have addressed appellate review of bench trials and jury trials. The question remains regarding the standard to apply in reviewing the factual inferences of fair use at summary judgment. The answer to this question is *de novo*—the same standard that applies in reviewing any matter decided on summary judgment.²⁴⁶ For the same reason that appellate courts should review bench trials *de novo*, appellate courts should review summary judgments *de novo*: a single trial judge is

240. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–55 (1984). Likewise, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 709 (9th Cir. 2007), and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817–22 (9th Cir. 2003), must be relevant for future cases that contemplate the fairness of posting thumbnail images on a search engine.

241. See *Campbell*, 510 U.S. at 589 (“In parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original.” (citation omitted)).

242. The Seventh Circuit well defined the process of finding clear error as follows: “To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

243. See Weinreb, *supra* note 198, at 1161 (criticizing the approach of providing a more definite and manageable doctrine of fair use).

244. See Snow, *supra* note 235, at 5.

245. Cf. *Campbell*, 510 U.S. at 579 (1994) (explaining that fair use must guarantee “breathing space within the confines of copyright”).

246. E.g., *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000) (“We review a grant of summary judgment *de novo* applying the same standard as the district court.” (citing *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999))). Because witness credibility is not at issue on summary judgment, three judges on appeal are three times as qualified to offer their opinion of fairness as is one judge on summary judgment. For the same reason, then, that *de novo* should govern a bench trial, *de novo* should govern summary judgment. See discussion *supra* Part III.C.1.

in no better position to determine a use's fairness than are three appellate judges.

Yet in reviewing summary judgment decisions *de novo*, appellate courts must be careful not to rule as they otherwise might in other matters before them on summary judgment. Specifically, they should not reverse the summary judgment and rule as a matter of law for the copyright holder—as they have at times done in the past.²⁴⁷ In Part IV below, I explain that trial courts should employ summary judgment only in favor of fair users.²⁴⁸ Assuming that trial courts follow my proposal in Part IV, an appellate court's review of summary judgments will be limited to those that favor fair users. In reviewing those decisions, if the appellate court reverses the summary judgment for the fair user, it should not rule as a matter of law that the use is infringing. For the reasons that trial courts should refrain from ruling on summary judgment for copyright holders, which I detail in Part IV below, appellate courts should also so refrain. A reversal of summary judgment, then, should only deny the fair user the opportunity to prevail as a matter of law before a judge; it should not deny the fair user the right to prevail as a matter of fact before a jury.

IV. TRIAL COURT ADJUDICATION

As a general matter, the law recognizes some circumstances that allow judges to decide factual issues as a matter of law.²⁴⁹ For instance, a judge may decide a factual issue on summary judgment where the judge believes that a reasonable jury could reach only one finding.²⁵⁰ The question that follows is whether fair use, as a factual issue normally for the jury to decide, may be decided as a matter of law by a trial judge. I answer this question in the affirmative by explaining the particular circumstances that should or should not allow for judges to decide fair use as a matter of law. Specifically, I propose that judges should rule on summary judgment whenever they believe that a use is fair. I further propose that judges should refrain from ruling—except in the most blatant of circumstances—on summary judgment in favor of copyright holders. In short, I

247. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111–12 (2d Cir. 1998) (ruling for copyright holder on summary judgment, thereby reversing district court's grant of summary judgment for defendant on fair use, and foreclosing opportunity for jury to find fair use); *Marcus v. Rowley*, 695 F.2d 1171, 1174–79 (9th Cir. 1983) (reversing district court's dismissal of the copyright holder's infringement claim, and in so doing, rejecting fair user's argument by entering summary judgment for copyright holder).

248. The Article contemplates summary judgment for copyright holders in only the most obvious of circumstances, i.e., where fair use is not even arguable. See discussion *infra* Part IV.B.2.

249. See, e.g., *Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1223 (11th Cir. 2008) (“[N]on-infringement may be determined as a matter of law on a motion for summary judgment [on grounds that] no reasonable jury, properly instructed, could find that the two works are substantially similar.” (quoting *Herzong v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999) (per curiam) (internal quotation marks omitted))); *Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at *8 (S.D. Ind. March 26, 2009) (applying *Bose* standard of constitutional speech protection on summary judgment).

250. See *Oravec*, 527 F.3d at 1223.

argue for an extraordinary practice of summary judgment: an asymmetric application that favors fair users.

A. Summary Judgment for Fair Users

It would seem that the constitutional obligation underlying the doctrine of independent review should apply as much to trial judges as it does to appellate judges.²⁵¹ If an appellate court is constitutionally obligated to conduct an independent review of facts, it would seem that a trial court must also, for trial courts are as obligated to protect constitutional rights as appellate courts are.²⁵² Therefore, a trial court's obligation to protect a fair user's constitutional right of speech suggests that the trial court may rule for a fair user as a matter of law. A trial court that believes that a factual finding of infringement would encroach on a constitutional right of a fair user should be obligated to uphold that constitutional right by overturning, or preventing, that finding. Accordingly, trial courts should rule as a matter of law on the issue of fair use where doing so would serve to protect the fair user's right of speech. Where a trial court believes that a use is fair, a fair user's constitutional right to speak requires the court to rule as a matter of law that the use is fair.

Because independent review calls for a *de novo* standard—where appellate courts determine fairness without any deference to the reasonableness of jury findings—it would seem that trial courts examining the issue of fairness under the doctrine of independent review also would perform that examination without any deference to the reasonableness of jury findings. That is, the rationale for independent review suggests that a trial court's conclusion that a use is fair should be realized even if the court recognizes that reasonable jurors might disagree. If the court believes the use should be fair, even where it recognizes that reasonable minds might differ, the court's obligation to protect the fair user's speech should allow the court to rule as a matter of law that the use is fair.²⁵³

Under the constitutional obligation to protect fair-use speech, then, the fairness of a use could be found at summary judgment as a pure issue of law. But this constitutional justification supports only a summary judgment ruling that favors fair users.²⁵⁴ As I discuss above in Part III, the constitutional rationale for independent review suggests an asymmetric application of *de novo* review; therefore, in the trial context, that rationale suggests that summary judgment based on a judge's constitution-

251. See Volokh & McDonnell, *supra* note 114, at 2443–44.

252. See, e.g., *Quantum Elecs. Corp. v. Consumers Union of U.S., Inc.*, 881 F. Supp. 753, 767–69 (D.R.I. 1995) (applying *Bose* standard of constitutional speech protection on summary judgment); *Containment Techs.*, 2009 WL 838549, at *18 (S.D. Ind. 2009) (same).

253. See, e.g., *Containment Techs.*, 2009 WL 838549, at *18 (granting summary judgment under *Bose* on grounds that reasonable jury *could* find for speaker).

254. E.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 327–33 (S.D.N.Y. 2005) (granting defendant summary judgment based on fair use of copyright holder's rock music posters in biographical book), *aff'd*, 448 F.3d 605 (2d Cir. 2006).

al obligation only applies to summary judgment decisions that favor fair users.

This is not to say, though, that ruling for copyright holders on summary judgment—under the usual summary judgment standard—is inappropriate. That question I examine in the next section. The extent of the argument in this section is that summary judgment based on the constitutional obligation to protect speech, which would justify a judge in ruling summarily even where she recognized that reasonable minds might disagree, should only be employed in favor of fair users. This one-sided application of the constitutional obligation appears justified for the same reason that it is justified in the appellate context: independent judicial review at both the trial and appellate levels protects a fair user's speech right to the extent that it avoids an erroneous jury finding against the fair user.²⁵⁵ By contrast, summary judgment favoring a copyright holder would deny the fair user an opportunity for the jury to recognize the speech nature of the use. In short, the speech right of the fair user gives her two bites at the apple (the judge and the jury); the property right of the copyright holder gives her one bite at the apple (the jury).

The Seventh Amendment strengthens this argument for asymmetric application of summary judgment in favor of fair users.²⁵⁶ I have argued elsewhere that the Seventh Amendment demands that the issue of fair use be decided by a jury: either litigant has a Seventh Amendment argument that fair use should go to a jury.²⁵⁷ The only justification that would excuse a court in ignoring this Seventh Amendment argument would be that a more important constitutional right needs protection.²⁵⁸ Disregarding a copyright holder's demand *for* a jury may be constitutionally justified on the grounds that the more important constitutional right of speech needs protection *from* a jury. That is, protecting the fair user's right of speech would justify a trial court ignoring a copyright holder's constitutional right to a jury. Only because the First Amendment requires independent review may the trial court ignore the copyright holder's Seventh Amendment right by deciding as a matter of law that the use is fair. Yet

255. See discussion, *supra* Part III.C.2.a.i.

256. See U.S. CONST. amend. VII (“[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States.”).

257. Snow, *supra* note 1, at 544–53.

258. I thank Professor Mark Lemley for this consideration that he raised while commenting on a previous draft of my article at the Fourth Annual Junior Scholars in Intellectual Property Workshop, held at Michigan State University College of Law. Professor Lemley keenly noted a constitutional tension in my argument that is based on both the First and Seventh Amendments; i.e., the Seventh Amendment usually serves as a basis for directing an issue to the jury whereas the First Amendment usually serves as the basis for removing an issue from the jury. Although this tension exists, it is not fatal to my argument. On the one hand, as I explain in the passage above, the Seventh Amendment constitutional interest of a copyright holder is less important than the First Amendment interest of a fair user. On the other hand, the Seventh Amendment interest of the fair user is more important than the First Amendment interest of a copyright holder. See Part III.C.2.a.ii (discussing speech interests of copyright holder). In other words, I resolve the tension by prioritizing the constitutional rights at issue under the distinct circumstances contemplated.

ignoring the Seventh Amendment right is not so justified if the trial court believes that a use is *not* fair. A denial of a defendant's Seventh Amendment right where the judge believed the use to be infringing cannot be justified on the grounds that the judge is protecting the fair user's right of speech, for ruling against a fair user does not protect his speech. Therefore, to decide against a fair user on summary judgment would be to deny the constitutional right to a jury without any justifiable reason.²⁵⁹

Thus, the obligation of courts to protect constitutional rights, which gives rise to the doctrine of independent review, implies that trial courts may rule as a matter of law that a use is fair, independent of whether a reasonable jury would disagree. It appears that a trial court may, under specific circumstances, treat fair use as a pure issue of law appropriate for summary judgment. Fair use decided on summary judgment—as a pure issue of law—is appropriate where the court would rule *for* fair users, but it is not appropriate where the court would rule *against* fair users.

B. Prohibition of Summary Judgment for Copyright Holders

Although I argue that a trial court may not rule as a matter of law for a copyright holder under the doctrine of independent review, this argument does not imply that a trial court may not rule as a matter of law for a copyright holder in any situation.²⁶⁰ Absent reason otherwise, the usual standards for judgment as a matter of law and summary judgment should apply,²⁶¹ and both doctrines allow a trial court to rule for a litigant as a matter of law where the court concludes that a reasonable jury would reach only one finding.²⁶² Arguably, then, it would seem that a trial court may rule as a matter of law for copyright holders where, in the court's view, no reasonable jury could find the use to be fair.

It is true that the no-reasonable-jury standard for ruling as a matter of law is entrenched in American jurisprudence.²⁶³ But there is good reason to depart from that standard in the context of deciding fair use cases. When the Supreme Court explained the no-reasonable-jury standard on summary judgment in *Anderson v. Liberty Lobby*,²⁶⁴ the Court qualified that standard as applying in the “run-of-the-mill civil case.”²⁶⁵ Fair use is

259. The denial of the defendant's jury right cannot be justified on the grounds that the court is protecting the copyright holder's right of speech, for the copyright holder's right of speech is not threatened in a copyright suit. See discussion *supra* Part III.C.2.a.ii.

260. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–53 (1986).

261. See FED. R. CIV. P. 50(a), 56.

262. See *Anderson*, 477 U.S. at 250–53 (explaining that inquiry under the “genuine issue” standard of summary judgment is the same for the “reasonable jury” standard of a directed verdict, and that one “mirrors” the other); WRIGHT & MILLER, *supra* note 78, at § 2532, at 484–85 (recognizing judicial popularity of equating the reasonableness standard for ruling as a matter of law under Rule 50(a) with standard for summary judgment under Rule 56).

263. See generally WRIGHT & MILLER, *supra* note 78, at § 2532.

264. 477 U.S. 242 (1986).

265. The *Anderson* Court qualified its reasonable-jury standard for ruling on summary judgment as follows:

not a run-of-the-mill civil case. Fair use represents an especially difficult subject matter to ascertain, and, as a result, it may be difficult for judges to accurately assess whether a jury would find inferences of fairness to be reasonable.²⁶⁶ Add to this the fact that the jury determination is integral to determining a speech right, and fair use stands apart from the run-of-the-mill civil cases for which the no-reasonable-jury inquiry applies.²⁶⁷

1. Uncertainty of Judicial Adequacy at Assessing Fairness

Even accepting the fact that fair use is not the run-of-the-mill civil case, it is arguable that judges should still be able to apply the no-reasonable-jury standard in favor of copyright holders. If fair use in truth represents an issue that is especially difficult for judges to predict whether a reasonable jury could find a use to be fair, this would seem to suggest merely that judges should not apply the no-reasonable-jury standard when they are not sure whether a jury would find the use to be fair; it does not seem to suggest that they should not apply the standard when they are sure. Judges, it is arguable, are at least sufficiently competent to assess when no reasonable jury would find a use to be fair.

This argument assumes that a judge's view of what a reasonable jury would find is accurate. But this assumption is questionable. The inferences in the fair-use analysis often turn on social value judgments that vary with extremity from one person to another.²⁶⁸ Simply put, subjectivity may color not only a judge's perception of whether an inference is the *most* reasonable, but also her perception of whether an inference is *at all* reasonable. The likelihood of an inaccurate perception of the reasonable jury varies according to the degree of subjectivity involved in the judgment itself. And fair use often appears to raise subjective questions.²⁶⁹

For instance, in *Clean Flicks of Colorado v. Soderbergh*,²⁷⁰ the judge believed that no reasonable jury could find that the defendant's editing service of movies, which entailed removing indecent conduct from movies without causing any harm to the market for the copyrighted

If the defendant in a *run-of-the-mill* civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict

477 U.S. at 250–53 (emphasis added).

266. See discussion, *supra* Part III.C.2.a.i.

267. See *Anderson*, 477 U.S. at 252.

268. See, e.g., *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108–12 (2d Cir. 1998) (reversing district court's grant of summary judgment for defendant and precluding defendant from trying issue of fair use to jury).

269. See *Snow*, *supra* note 1, at 497–501.

270. 433 F. Supp. 2d 1236 (D. Colo. 2006).

movies, would constitute a fair use.²⁷¹ Although the question of fairness there was apparently highly subjective, the judge believed that no reasonable jury could find otherwise.²⁷² I believe that a reasonable jury could have: the defendants were encouraging the sale of the copyrighted works by editing them, and the defendant's editing was, in a sense, a criticism of the underlying moral content.²⁷³

Or consider *Infinity Broadcast Corp. v. Kirkwood*.²⁷⁴ The defendant, Kirkwood, transmitted radio broadcasts over the phone to its customers without the permission of the copyright holder of those broadcasts, Infinity.²⁷⁵ At summary judgment, the district court held the use to be fair.²⁷⁶ The Second Circuit disagreed, holding the use to be infringing.²⁷⁷ Tellingly, the Second Circuit both analyzed fair use as an issue of fact and denied the defendant the opportunity to try the issue to a jury.²⁷⁸ In effect, then, the Second Circuit held that its view of fairness was not only a reasonable view that the trial judge did not recognize, but also one that a reasonable jury could not disagree with.²⁷⁹ Putting aside the merits of the question of fairness, the procedural implication of the court's denial of the jury trial is that the trial judge's view was entirely unreasonable. So whether we believe the appellate court (and accordingly doubt the trial) or believe the trial court (and accordingly doubt the appellate court), we can infer from the procedural holding that judges are not always accurate at assessing the views of a reasonable jury. *Kirkwood* demonstrates judicial incompetence at determining what a jury would consider to be an unreasonable view.

In the face of uncertainty surrounding the competency of judges at deciding fair use, it is advisable to preserve the opportunity for defendants to have a jury decide the issue. So even when a judge believes that no reasonable jury could find a defendant's use to be fair, the subjectively and socially contested nature of the issue merits jury consideration. Especially in the context of fair use does the necessity for jury consideration become evident. Views of fairness often are held in the extremity. Fairness turns on social value judgments that vary with extremity from person to person, so opinions on whether a use is fair may vary as widely as the disparity of life experiences between very different people. It ap-

271. *Id.* at 1241–44.

272. *See* Snow, *supra* note 1, at 501–03 (analyzing *Clean Flicks*).

273. *Id.* at 502–03.

274. 150 F.3d 104 (2d Cir. 1998).

275. *Id.* at 106.

276. *Infinity Broad. Corp. v. Kirkwood*, 965 F. Supp. 553, 561 (S.D.N.Y. 1997).

277. *Infinity*, 150 F.3d at 104.

278. *Id.* at 106, 111–12 (implicitly recognizing the factual nature of the fair-use question by relying on the burden of proof as a basis to determine the issue).

279. *See id.*

pears ill advisable, then, for a trial judge to rule as a matter of law on the basis that no reasonable jury would find a use to be fair.²⁸⁰

2. A Narrow Exception to the Prohibition

This one-sided application of summary judgment in favor of fair users is not without qualification. An absolute prohibition of summary judgment to copyright holders would result in defendants asserting fair use, even where it was not arguable, simply as a litigation strategy to prolong a final verdict. And where the facts indicate infringement to the extent that a fair use claim is not even colorable, prolonging the obvious verdict would not seem to serve any interests of a protected speaker.²⁸¹ It would seem, then, that those instances of infringement that are blatantly obvious should not inhibit a copyright holder's ability to enforce his property rights to the same extent as instances where fair use is at least arguable. Copyright holders should incur a lower cost to enforce rights against blatant infringers than against arguable fair users.²⁸²

Yet because subjective views of a judge color the framework through which she views the fair-use inferences, the standard for determining blatant infringement must be high—something more than reasonableness. It should be requisite, then, that a judge deem a defendant's fair-use argument to be frivolous—not merely unreasonable—before granting a copyright holder's motion for summary judgment. Such a

280. Removing fair-use issues from summary judgment consideration would not be unfamiliar to the law. *See Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1247 (11th Cir. 1999) (“Summary judgment historically has been withheld in copyright cases because courts have been reluctant to make subjective determinations . . .”). Other areas of the law deny the application of Rule 50(a) and Rule 56 owing to the subjectivity of a particular issue. For instance, issues relating to a defendant's state of mind or the reasonableness of a defendant's conduct are often held to be inappropriate for summary judgment. *See Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir.1985) (“Questions involving a person's state of mind . . . are generally factual issues inappropriate for resolution by summary judgment.” (citation omitted)); *Gauck v. Meleski*, 346 F.2d 433, 437 (5th Cir. 1965) (“Because of the peculiarly elusive nature of the term ‘negligence’ and the necessity that the trier of facts pass upon the reasonableness of the conduct in all the circumstances in determining whether it constitutes negligence, it is the rare personal injury case which can be disposed of by summary judgment, even where the historical facts are concededly undisputed.”).

Of course this position does not imply that a trial court should not rule as a matter of law based on the doctrine of independent review—for fair users. *See discussion supra* Part III.A. That the court is ill equipped to opine on the views of a reasonable jury does not imply that the court is ill equipped to opine its own views on a constitutional fact. For ruling as a matter of law on the basis of its obligation to protect a constitutional right enables a court to rule for a fair user independent of whether the court believes that a reasonable jury could rule otherwise. Hence, precluding a court from ruling as a matter of law under the no-reasonable jury standard should not preclude that court from ruling as a matter of law under the independent-review standard. Courts, then, should refrain from entertaining motions for summary judgment by copyright holders, whereas they should entertain those motions by fair users.

281. Consider a defendant who has copied verbatim a plaintiff's creative work of fiction for the sole purpose of selling unauthorized copies in competition with the author's work, where no difference exists between the copyrighted work and the unauthorized copies. In such a situation, it appears that no inferences can in good faith be drawn to support a finding of fairness.

282. *See Armstein v. Porter*, 154 F.2d 464, 468, 470 (2d Cir. 1946) (rejecting summary judgment where there is “the slightest doubt as to the facts” but recognizing that “there are cases in which a trial would be farcical.” (citations omitted)).

standard would mean that a defendant could defeat a copyright holder's motion for summary judgment merely by making a fair use argument in good faith. The good-faith standard would protect fair users from the subjective views of judges.

C. Precedent for One-Sided Summary Judgment

This proposal that summary judgment be available for only fair users merely restores the law to its proper state. Indeed, one-sided application of summary judgment for fair users is not without precedent. When the Second Circuit initially began treating fair use cases on summary judgment, it employed language suggesting this: "Admittedly, the fair use determination often requires a complex and subtle evaluation of numerous mixed issues of fact and law. When the law requires a judgment *for defendant*, however, the difficulty of the fair use question is not a valid reason to shy away from summary judgment."²⁸³

The reason that summary judgment was proper, according to the court, was because the law required judgment for the fair user. This suggests, then, that if the law seemed to require judgment for the copyright holder, summary judgment would not be proper.

Relatedly, on the issue of substantial similarity in copyright suits, courts will rule for defendants but are reluctant to rule for copyright holders.²⁸⁴ Like fair use, the issue of whether two works are substantially

283. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258–59 (2d Cir. 1986) ("This court, however, has never suggested the adoption of a *per se* rule granting a plaintiff in a copyright infringement case immunity from the perils of Rule 56 when a *defendant* interposes the defense of fair use.") (emphasis added). See also *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 709 (S.D.N.Y. 1987) (deciding fair use for fair user on summary judgment on grounds that "this circuit has 'recognized that a court may determine non-infringement as a matter of law on a motion for summary judgment.'" (quoting *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 905, 918 (2d Cir. 1980))).

284. The Second Circuit recently explained that a trial court may determine the factual question of substantial similarity on a defendant's motion to dismiss:

[B]ecause the question of substantial similarity typically presents an extremely close question of fact, questions of non-infringement have traditionally been reserved for the trier of fact. . . . The question of substantial similarity is by no means exclusively reserved for resolution by a jury, however, and we have repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve that question as a matter of law, "either because the similarity between two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar."

Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010) (citations omitted); see also, e.g., *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) ("When the issue is whether two works are substantially similar, summary judgment is appropriate if no reasonable juror could find substantial similarity of ideas and expression. Substantial similarity is a fact-specific inquiry, but it may often be decided as a matter of law. Indeed, we have frequently affirmed summary judgment *in favor of copyright defendants* on the issue of substantial similarity." (emphasis added) (internal quotation marks omitted)); *Jones v. Blige*, 558 F.3d 485, 490 (6th Cir. 2009) ("In copyright infringement cases, . . . 'a court may compare the two works and render a judgment *for the defendant* on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity.'" (quoting *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003)) (emphasis added)); cf. *Segrets, Inc. v. Gillman Kintwear Co.*, 207 F.3d 56, 61–62 (1st Cir. 2000)

similar raises questions over which reasonable minds often disagree (even as to whether a contrary view is reasonable).²⁸⁵ Only where two works are “virtually identical” do courts summarily rule for a copyright holder on the issue of substantial similarity;²⁸⁶ by contrast, on the same issue courts summarily rule for defendants under the no-reasonable-jury standard.²⁸⁷

Other speech contexts outside of copyright that involve subjective fact determinations employ summary judgment only for the defendant-speaker.²⁸⁸ Consider defamation. As in the doctrine of fair use, in defamation, a defendant’s speech rights turn on a subjective factfinding process: the fact-finder must determine a defamation defendant’s intent.²⁸⁹ In view of this subjective factfinding process, in defamation suits courts have recognized the threat of summary judgment to speech.²⁹⁰ As a result, courts rarely, if ever, entertain motions for summary judgment *against* a defamation defendant: the obviousness of the conclusion that such issues are best left to a jury has resulted in a dearth of summary judgment motions by plaintiffs. Nevertheless, given the speech at issue in defamation actions, courts have recognized the importance of summary judgments *for* defamation defendants.²⁹¹ Never willing to entertain sum-

(affirming grant of summary judgment for copyright holder on issue of substantial similarity given that the defendant’s work constituted “a virtually identical copy”).

285. See *Baby Buddies, Inc. v. Toys “R” Us, Inc.*, 611 F.3d 1308, 1316 (11th Cir. 2010) (affirming grant of summary judgment for defendant in copyright suit, but recognizing that on the issue of substantial similarity “lists of similarities are inherently subjective and unreliable, particularly where the lists contain random similarities, and many such similarities could be found in very dissimilar works.” (quoting *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1251 (11th Cir. 2007))).

286. See *Segrets*, 602 F.3d at 61–62.

287. See, e.g., *Snow*, *supra* note 1, at 502.

288. Compare *Jartech, Inc. v. Clancy*, 666 F.2d 403, 408 (9th Cir. 1982) (“[T]he [City] Council’s request that the movies be found obscene as a matter of law flies in the face of settled Supreme Court case law which unquestionably establishes this as a factual determination.”), with *Jacobellis v. Ohio*, 378 U.S. 184, 187–88 (1964) (ruling for defendant as a matter of law, and rejecting argument that “the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury’s verdict is all but conclusive” on grounds that “the question whether a particular work is obscene necessarily implicates an issue of constitutional law”).

289. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

290. See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (questioning whether deciding defamation on summary judgment is appropriate, given that decision requires ruling on actual malice).

291. See, e.g., *DeAngelis v. Hill*, 847 A.2d 1261, 1267 (N.J. 2004) (“This Court has recognized that ‘summary judgment practice is particularly well-suited for the determination of libel [and defamation] actions’ because those actions tend to inhibit comment on matters of public concern.” (alteration in original) (quoting *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 516 A.2d 220, 236 (1986))); see also *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 673 (Cal. Ct. App. 1984) (“[A] motion for summary judgment in First Amendment cases is an approved procedure because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights and because speedy resolution of cases involving free speech is desirable.”). The court in *Oliver v. Village Voice, Inc.*, declared in a defamation suit that “the granting of summary judgment may well be the ‘rule’ rather than the ‘exception.’” 417 F. Supp. 235, 237 (S.D.N.Y. 1976) (quoting *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975)). Later, however, Justice Rehnquist questioned this position, although he did not expressly overrule it. See *Hutchinson*, 443 U.S. at 120 n.9.

mary judgment motions *against* defendants, courts are willing to rule on summary judgment *for* defendants.

V. CONCLUSION

As an issue of fact, fair use may be decided as a matter of law, but only where doing so serves its speech-protective function. On appeal, courts should defer to a jury finding that favors the fair user. Everything else courts should review *de novo*. This double standard of review is necessary to protect speech interests of the fair user from the already imbalanced landscape of the law that favors copyright holders. Adequate speech protection should ensure that fair users have an opportunity for both judge and jury to recognize the fairness of their use. For this reason, trial courts should decide fair use on summary judgment only if their ruling would find the use to be fair. The proposed double standard of review and one-sided application of summary judgment are necessary to uphold the speech protective function of fair use.