LEARNED HAND'S COPYRIGHT LAW

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Learned Hand is often described as the greatest copyright judge to have ever sat on the bench. By the 1950s, the most important parts of U.S. copyright law had been his creation, all from his time as a judge on the Second Circuit Court of Appeals. Despite all of this, there has been little systematic analysis of Hand's approach to copyright and of the reasons why his jurisprudence in multiple areas of copyright law have survived the test of time. This Article argues that the longevity, influence and canonical status of Hand's contributions to copyright are closely tied to his judicial method — best described as that of "empowered incertitude" — which he brought to bear rather directly on the area. Despite being governed by a federal statute, copyright law demands commitments to both judicial creativity and institutional deference. In addition, it requires judges to balance these opposing commitments, which Hand's judicial method was particularly well-suited to. In the process, Hand developed a rich and nuanced institutional theory of copyright law, which foreshadowed the turn that copyright law would take after his time on the bench. Understanding Hand's approach to copyright law embodies underappreciated lessons for how judges ought to approach copyright adjudication and lawmaking in the modern context.

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INTRODUCTION

Judge Billings Learned Hand figures rather prominently in any list of the greatest American judges who have influenced the course of American jurisprudence. As Judge Friendly, himself credited by some as the "greatest of his era"[1] once noted, "when the history of American law in the first half of [the twentieth] century comes to be written, four judges will tower above the rest — Holmes, Brandeis, Cardozo and Learned Hand."[2] Of the four, all except Hand went on to serve as justices of the Supreme Court.[3]

Hand, by contrast, spent the entirety of his judicial career as a district court and later court of appeals judge in the federal system, but was never nominated to the Supreme Court. Despite this, his opinions earned the reverence of the Court, and Hand soon earned the reputation of being the "Tenth Justice" of the time and as the greatest judge to have never served on the Supreme Court.[4] Further, unlike both Holmes and Cardozo, who had storied careers as state court judges and thus had access to the traditional areas of the common law in their opinions, Hand's entire body of judicial writing was limited to federal law. That his reputation and stature is at all comparable to the others (on Friendly's list of greats) is therefore doubly impressive.[5]

The literature on Hand's greatness is voluminous. Scholars have written extensively about his judicial temperament, commitments to liberty and democracy, his managerial wisdom, and multiple other related topics.[6]

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[1] David M. Dorsen, Henry Friendly, Greatest Judge of His Era (2012).

[2] Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 Brook. L. Rev. 6, 6 (1962).

[3] *Id*. at 7.

[4] Gerald Gunther, Learned Hand: The Man and the Judge ix (1994); James L. Oakes, *The Tenth Justice (Learned Hand: The Man and the Judge by Gerald Gunther)*, 60 Brook. L. Rev. 831, 832 (1994); Michael A. Kahn, *An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 Stan. L. Rev. 251 (1973).

[5] On the other hand, some have argued that his reputation and stature were augmented by his not being on the Supreme Court, which allowed him to engage a significantly wider array of substantive areas in his opinions. *See* Felix Frankfurter, *Learned Hand*, 75 Harv. L. Rev. 1, 4 (1961); Kahn, *supra* note 4, at 251 n.6.

[6] *See, e.g.*, Gunther, *supra* note 4; Marvin Schick, Learned Hand's Court (1970); Hershel Schanks, the Art and Craft of Judging (1968); Kathryn Griffith, Judge Learned Hand and the Role of the Federal Judiciary (1973); Richard A. Posner, *The Hand Biography and the Question of Judicial Greatness (reviewing Gerald Gunther, Learned Hand: The Man and the Judge)*, 104

Yet, few have fully explored a theme that has found intermittent and passing mention in this literature: Hand's judicial approach to copyright law. Gerald Gunther's magisterial biography of Hand notes in no uncertain terms that "[n]o area displays Hand's superlative traits as a judge more richly than his work in copyright law."[7] He further observes that the opinions themselves "convey the sense that [Hand] enjoyed deciding them."[8] Gunther does little more than examine a few noteworthy opinions that Hand authored on the subject, without much additional analysis.[9] Another scholar similarly observes in passing that Hand's copyright infringement opinions were always written in "his self-assured voice."[10] The one focused (but incomplete) analysis of Hand's copyright opinions that there is offers but a descriptive summary of his approach to different areas of copyright doctrine, in an effort to catalogue them.[11]

Missing from all of this are two inter-related questions that one might have considered obvious to ask. First, what was it about Hand's judicial method and temperament that fit so well with the area of copyright law? And second, what indeed was Hand's theory and philosophy of copyright law that he brought to his decisions on the subject? In this Article, I attempt to answer both questions.

Answering these questions is more than just an academic curiosity. In addition to being considered a great judge with superlative judicial skills, Hand is also an important transitional figure in the evolution of American legal thinking, something that is often overlooked. Despite being on the bench during the heyday of Legal Realism, and being surrounded by

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YALE L.J. 511 (1994); Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873 (1995); Charles C. Burlingham, *Judge Learned Hand*, 60 HARV. L. REV. 330 (1947); George Wharton Pepper, *The Literary Style of Learned Hand*, 60 HARV. L. REV. 333 (1947); Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOK. L. REV. 6 (1962); Thomas W. Merrill, *Learned Hand on Statutory Interpretation: Theory and Practice*, 87 FORDHAM L. REV. 1 (2018); Wallace Mendelson, *Learned Hand: Patient Democrat*, 76 HARV. L. REV. 322 (1962); Robert S. Lancaster, *Judge Learned Hand and the Limits of Judicial Discretion*, 9 VAND. L. REV. 427 (1955); Leonard P. Moore, *Learned Hand: An Appreciation*, 29 BROOK. L. REV. 2 (1962); John G. Hervey, *Learned Hand: Law Teacher Unsurpassed*, 29 BROOK. L. REV. 16 (1962); Irving Younger, *The Art of Learned Hand*, 73 A.B.A. J. 96 (1987).

[7] GUNTHER, *supra* note 4, at 268.

[8] *Id.* at 269.

[9] *Id.* at 268-80.

[10] Carl Landauer, *Scholar, Craftsman, and Priest: Learned Hand's Self-Imaging*, 3 YALE J.L. & HUMAN. 231, 233 (1991).

[11] Ronald Cracas, *Judge Learned Hand and the Law of Copyright*, 7 COPYRIGHT L. SYMP. 55 (1954). Notably, this description was produced before Hand had retired from the bench, and is therefore incomplete. *See also* Stephen H. Philbin, *Judge Learned Hand and the Law of Patents and Copyrights*, 60 HARV. L. REV. 394, 400-04 (1947).

prominent advocates of the school on the bench, Hand never openly subscribed to the central tenets of the school. Indeed, he often saw Legal Realism as something of a heretical project and tried to distance himself from it.[12] Additionally, despite his approach to judging revolving around the ideal of "judicial restraint," his copyright opinions routinely exhibited a form of law-making zeal and creativity that is usually associated with the common law, where anything but restraint remains the norm.[13] And while some might see this as a contradiction in Hand's own philosophy,[14] I argue that it instead presciently foreshadowed the institutionalist turn in legal thinking that would come to be seen under the influence of Legal Process, where judicial creativity and restraint were meant to be in a symbiotic equipoise rather than in conflict. In this respect then, as in others, Hand was ahead of his time.

The Article is divided into three Parts. Part I looks at key aspects of Hand's judicial philosophy, method and resultant stature, much of which has been well-documented in the existing literature. The goal of this exercise is not to recapitulate or synthesize what has already been said, but instead to distill from Hand's *oeuvre* elements that help explain his engagement with copyright law. Part II offers an analytical account of Hand's copyright jurisprudence during his time on the federal bench, showcasing his oscillation between restraint and creativity, as well as between Realism and institutionalism. Part III then puts these pieces together to suggest that Hand's jurisprudence actually embodies an unstated theory of copyright law, one that anticipates many of the core ideas of the Legal Process approach to the field.

I. ELEMENTS OF HAND'S JUDICIAL METHOD

In the innumerable accounts of Hand's greatness and his judicial temperament, one core theme stands out above all others: his unwillingness to embrace absolutes, what some have described as the approach of pragmatism.[15] Yet, the term pragmatism does not do justice to Hand's resolute embrace of relativist positions, since it suggests something of a unified philosophy underlying that embrace, which Hand also did not adopt.[16] In-

[12] Posner, *supra* note 6, at 526.
[13] *See, e.g.*, Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Sheldon v. Metro- Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915).
[14] Merrill, *supra* note 6, at 9-10.
[15] Posner, *supra* note 6, at 530; Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. Chi. L. Rev. 666, 670 (1957) (describing Hand as a "trimmer"); Cass R. Sunstein, *Trimming*, 122 Harv. L. Rev. 1051 (2009) (describing "trimming").
[16] Posner, *supra* note 6, at 530.

deed, this is what sets Hand apart from others such as Holmes and Cardozo, who advanced accounts of their own judicial philosophy and method during their lifetimes.[17]

Hand's judicial approach is therefore best described as one of *empowered incertitude*. Uncertainty — of outcome and ethical value — was omnipresent in the adjudicative process; and yet, something of a virtue that ought to fuel action, rather than stoke a disabling despondency. Human engagement and institutions were complex, and the judge's task was to make sense of that complexity as best as was possible under the circumstances. And this required a nimbleness in method that emerged from the incertitude.[18] Some have traced this feature of Hand's philosophy to his training under the philosopher George Santayana, who advanced similar views.[19]

Hand's incertitude might well be mistaken for an embrace of contradictions, or worse still, an opportunistic hypocrisy. The key to understanding his philosophy lies in recognizing that they were instead neither. The incertitude was instead a product of Hand's very philosophy of what it meant to be a judge. Not a scholar, not a lawyer, not a lawmaker, but a principled arbiter of a man-made disputes that needed reasoned — and at times imaginative — intervention.

Related to Hand's conception of the judge was of course his own self-imagery, and his management of his own reputation.[20] These variables exerted no small influence on his judicial method, especially as he advanced in his judicial career from district court judge to appellate court judge and then to chief judge of the court of appeals. While Hand's entire judicial career is characterized by his embrace of non-absolutes, the precise nature of that embrace varied over the course of his career.

Hand's overall philosophy of empowered incertitude is best understood through his oscillated engagement with competing attributes of the judicial process over the course of his judicial career. Three interrelated ones in particular typify his approach. The first was his overt disdain, yet unstated embrace of some of the ideas of Legal Realism. The second was his turn towards the institutionalist ideal of judicial restraint, which some have described as the dominant "motif" of his career. His outward calls for restraint were nevertheless interspersed with domains with heightened judicial creativity, often paralleling the role of the common law judge. Finally, the third was his effort to balance the judicial task of adjudicating

[17] *See* Oliver Wendell Holmes, Jr., The Common Law (Boston, Little Brown 1881); Benjamin N. Cardozo, The Nature of the Judicial Process (1921).
[18] Frank, *supra* note 15, at 670.
[19] Landauer, *supra* note 10, at 259.
[20] *See generally id.*, *supra* note 10.

the dispute at hand with the need to develop a principled rule of reason. I consider each of these in turn.

A. *Legal Realism with Faith in the Law*

Hand's engagement with Legal Realism was complicated. By the heyday of the movement, several of his younger colleagues had actively embraced the core tenets of the movement, and had indeed assumed leadership positions within it. Prominent among them were Jerome Frank and Charles Clark.[21] Frank, in particular, positioned himself as a champion of the idea that rules were incapable of constraining legal reasoning, a theory that he characterized as "rule skepticism."[22] Despite siding with Frank on innumerable occasions, Hand had little tolerance for Legal Realism, especially in its self-understanding as a new approach to legal analysis.[23]

Gunther describes an episode where Hand made a disparaging comment about the movement in a public setting. When called out by someone, he retracted the comment with something of an apology:

> What I said was really the outburst of an irritated person who I suppose had got tired of trying to digest new notions, who had put too much capital into the old to want to see them scrapped. In other words, I am afraid it is a typical old man's point of view.[24]

In other correspondence, he was equally dubious of his colleagues' claims that Legal Realism was in any sense "realistic."[25]

Hand's skepticism of Legal Realism seems to have had its roots in the movement's efforts to undermine the neutrality and dispassionate nature of judging.[26] Recall that as a theory of adjudication, Legal Realism em-

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21 Julius Paul, *Jerome Frank's Contributions to the Philosophy of American Legal Realism*, 11 Vand. L. Rev. 753 (1958); Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.Law. & Soc'y 175 (1991); Edward McWhinney, *Judge Jerome Frank and Legal Realism: An Appraisal*, 3 N.Y.L. Sch. L. Rev. 113 (1957); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 Ga. L. Rev. 433 (2010); Charles Clark, *The Limits of Judicial Objectivity*, 12 Am. U. L. Rev. 1 (1963).

22 Jerome Frank, Law And The Modern Mind (1930); Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. Pa. L. Rev. 635 (1958); Paul, *supra* note 21.

23 Reason and Imagination: The Selected Correspondence of Learned Hand 228 (Constance Jordan ed., 2012).

24 Gunther, *supra* note 4, at 450.

25 Reason and Imagination, *supra* note 23.

26 Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931); Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931); Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 Colum. L. Rev. 431; N.E.H. Hull, *Some Realism about the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Corre-*

phasized that judges made law and were influenced by considerations that were not purely doctrinal in that process. In other words, at its heart Legal Realism sought to undermine the presumptive determinacy not just of the law, but also of the judicial function.[27] If rules were indeterminate, and judges made law, it effectively meant that judges were exercising their power in unconstrained ways. As "guardian of the flame,"[28] this idea was simply unacceptable to Hand. One recently uncovered episode sheds further light on this aspect of Hand's thinking.

In 1929, a federal judge from Texas, Joseph Hutcheson published his now well-known article about the role of the "hunch" in judicial decision-making.[29] Hutcheson's point was that much of the judicial function involved the exercise of vast amounts of unstated discretion, which needed to be acknowledged and embraced, in keeping with the central tenets of Legal Realism.[30] Hutcheson sent Hand a copy of the article, and Hand responded with a rather critical letter.[31] Hand's writing reveals a marked ambivalence towards the topic: recognizing it as true on the one hand, yet refusing to own it for fear of consequences.

> It is undeniable that the common law has been built up by generations of judges who have proceeded on what you very well call their "hunch," although all along they have professed to do no more than apply pre-existing rules. . . . I should be the last to deny that any of our conclusions were based upon reasons of which we were not fully aware. . ..
>
> What I am afraid of is that too great insistence by able and penetrative minds like your own on this judicial function will lead us to forget that law is something more majestic and authoritative than can proceed out of the mouth of any single living man. . . . In practice, I share your views. It may be that I do this so much as to be especially fearful myself of the result.[32]

Hand's unwillingness to endorse Legal Realism did not automatically translate into an embrace of Legal Formalism either, in the sense of a mechanistic approach to adjudication. Instead, it morphed into his well-known philosophy of judicial restraint. Whereas Legal Formalism denied

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spondence, 1927-1931, 1987 WISC. L. REV. 921 (1987).

27 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

28 Landauer, *supra* note 10, at 240.

29 Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274 (1929).

30 *Id.* at 279-83.

31 REASON AND IMAGINATION, *supra* note 23, at 161 n.102.

32 *Id.* at 161-62.

that judges made law,[33] Hand's judicial restraint argued that judges were disempowered from doing so. While subtle, the difference is nevertheless significant, in that Hand's position acknowledged that judges *do* make law, but simply de-legitimized that function as a normative matter. Nowhere was this more obvious than in Hand's approach to statutory interpretation, where despite alluding to the idea of an "imaginative reconstruction," his opinions themselves were structured as calls to remain faithful to Congressional intent.[34]

Despite his overt unwillingness to embrace Legal Realism by name or as a "movement,"[35] several of Hand's opinions themselves adopted much of the Realist credo, and are thus substantively indistinguishable from those of Frank and Clark, both of who openly embraced Legal Realism. Nowhere is this clearer than in his opinion in *T.J. Hooper*, an admiralty case involving the standard of care for loss of goods.[36] The losses at issue in the case had been caused by inclement weather conditions that had been forecast and relayed over the radio in advance. The shipowners however did not make sure that their private radios aboard the ships were in working order. Hand acknowledged — upon evidence — that there was not "a general custom" among shipowners to equip them with radios at the time.[37] To him that was not enough. In finding there to be liability, he was unequivocal about his role in the case:

> *Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.* . . . But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack.[38]

This observation is hardly that of a judge unwilling to recognize the role of the court in making the law based on common sense. We see a similar sensibility at play in his more famous opinion in *Carrol Towing*, where he is credited with having developed the "Hand Formula" for the standard of care in negligence law.[39] In these, and other non-statutory cases, there appears to have been little separating Hand's jurisprudence from that of

[33] Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 387 (2013).
[34] Merrill, *supra* note 6, at 12-13.
[35] REASON AND IMAGINATION, *supra* note 23, at 161.
[36] The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).
[37] *Id.* at 739.
[38] *Id.* at 740.
[39] United States v. Carrol Towing Co., 159 F.2d 169 (2d Cir. 1947). *See also* RICHARD W. WRIGHT, TORT LAW: BASIC PRINCIPLES OF LIABILITY (2003) (dispelling the myth of its actual influence on tort law jurisprudence).

his more overtly Realist-learning peers. Indeed, in his tribute to Hand towards the end of his judicial career, Jerome Frank, a card-bearing Legal Realist honestly acknowledged in no uncertain terms that he saw Hand's judicial writings as having embraced the central ideas of Legal Realism: "[d]iscarding the myth, i.e., the Columbus-law-discovery-myth."[40]

But if Hand had internalized *some* of the core ideas of Legal Realism, either consciously or through osmosis, what set his jurisprudence apart from others was his willingness to reason through the traditional arsenal of lawyers: "legal rules, principles, doctrines, legal generalizations" to arrive at his conclusions.[41] Keeping — and perhaps more importantly, showcasing — his faith in legal reasoning and thus the law was central to Hand in his judicial function. The legitimacy of the judicial function was a concern that he emphasized and worried about throughout his career, and was a concern that was only exacerbated by the Lochner-era courts and their efforts to engage in politics.[42] Indeed, the concern grew stronger over the duration of Hand's career, and was at its strongest during his time as Chief Judge of the Second Circuit.[43] Embracing Legal Realism would have fed into the Lochner-era narrative of courts as political actors. These concerns explain why Hand saw himself as the "guardian of the flame,"[44] where the flame was an enduring faith in the law. He thus kept Legal Realism at arm's length for the entire duration of his time on the bench.

B. Judicial Restraint with Creativity

If there was one overarching idea that Hand emphasized in his own accounts of the judicial role, it was that of "judicial restraint."[45] Scholars and historians have since devoted significant attention to unpacking Hand's notion of judicial restraint, which he appears to have derived from James Bradley Thayer, his law school professor.[46] Towards the later part of his judicial career, Hand grew more vocal about the meaning and virtues of this restraint, especially in relation to the Warren Court's civil

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40 Frank, *supra* note 15, at 684.
41 *Id*.
42 For Hand's early views on *Lochner*, published before his appointment to the bench, see: Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495 (1907).
43 Reason And Imagination, *supra* note 23, at xvi.
44 Landauer, *supra* note 10, at 240.
45 Learned Hand, The Spirit of Liberty (May 21, 1944), *in* The Spirit Of Liberty: Papers Addresses Of Learned Hand 189 (Irving Dillard ed., 1952).
46 For its origins, see Gunther, *supra* note 4, at 40-43. *See also* Jak Allen, *Political Judging and Judicial Restraint: The Case of Learned and Augustus Hand*, 60 Am. J. Legal Hist. 169 (2020); John T. Noonan, Jr., *Master of Restraint*, N.Y. TIMES, May 1, 1994; Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. 519 (2012).

rights jurisprudence.[47] All the same, it formed a leitmotif for the duration of his career. Nevertheless, outside of the Constitutional law context, Hand's overt embrace of judicial restraint as a virtue embodied a notable paradox, indeed one of special significance to copyright law.

To begin with, Hand's notion of judicial restraint was both substantive and temperamental, and the two were of course inter-related. As to the latter, it originated in Hand's belief in liberalism and the recognition that truth and dogmas (as rules of decision) were contextual and fallible.[48] Seeing judges as needing to be open-minded to different arguments, he eschewed the idea that judicial reasoning could ever be infallible. Closely related, however, was the substantive dimension of the restraint. Here, Hand's vision of the judicial role was infused with a strong adherence to the separation of powers idea, and manifested itself most strongly in areas covered by statutes.[49] Hand was therefore not only a skeptic of an extensive judicial review power, but in addition decried courts' willingness to second-guess legislatures even independent of their exercising that power, i.e., in the domain of interpretation.[50]

It was in Hand's approach to statutory interpretation that others have detected an ambiguity. Flowing directly from his Thayerian irreverence for judicial review, Hand circumscribed the judicial power to interpret statutes rather starkly. Visualizing statutory text as "formal expressions" of public opinion,[51] his opinions insisted on limits to "the power of courts to mould the language of a statute" and that courts needed to be cautious in imputing views to the legislature.[52] And while he emphasized beginning with the actual "words used, even in their literal sense," he was cautious to emphasize that "the dictionary" was not to be made into a "fortress" during the process.[53] Indeed, it was Hand who famously said "there is no surer way to misread any document than to read it literally."[54]

In one oft-cited address, Hand suggested that in interpreting statutes, judges need to exercise what he termed "imaginative reconstruction" and try to understand what the legislature might have done under similar circumstances.[55] Yet, as has been pointed out, Hand's own opinions rarely

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47 Frank, *supra* note 15, at 703.
48 *Id*. at 684.
49 Landauer, *supra* note 10, at 237-38.
50 Learned Hand, How Far Is a Judge Free in Rendering a Decision? (1933), *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 103 (Irving Dillard ed., 3d ed. 1963).
51 Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 617 (1916).
52 Anglo-Continentale Treuhand, AG v. St. Louis Sw. Ry. Co., 81 F.2d 11, 13 (2d Cir. 1936).
53 Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
54 Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J. concurring).
55 Hand, *supra* note 50, at 105-06.

ever engaged in such imaginative reconstruction when he engaged in interpreting the words of a statute. And this was because he saw such reconstruction as perilous:

> When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. Let him beware, however, or he will usurp the office of government.
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> . . . Still, they had to leave him scope in which he in a limited sense does act as if he were the government, because, as we have seen, he cannot otherwise do what he is required to do. +So far they had to confuse law-making with law-interpreting.[56]

Herein we see Hand's recognition of the overlap between interpretation and law- making, but an admonition to be aware of that overlap and guard against its perils. What this translated into, in his own jurisprudence though, was particularly interesting.

When dealing with the words of an actual statute, Hand rarely ever overtly employed the imagination that his comment suggested. His opinions nevertheless emphasized the importance of discerning a "legislative intent" and identifying a Congressional purpose behind the statute and its scheme when one existed.[57] One of Hand's famous law clerks, Archibald Cox, noted that "[o]ne of the striking characteristics of Judge Hand's opinions construing federal legislation is the regularity with which he first reasons out what disposition of the controversy would best conform to the apparent purposes of Congress and only then turns to the legislative history to verify his conclusions."[58] Leaving aside the question of whether this exhibited a form of interpretive ex post rationalization, it nevertheless reveals something important about Hand's ideal of restraint. And this was the fact that there *could* be instances, even within statutory domains, where Congress *did not* have an intent. And it was here that Hand's jurisprudence actually flourished, in Hand's production of what Frank honestly described as judicial legislation:

> [N]o other single judge has invented so many new rules, modified so many old ones. In every legal province — contracts, torts, equity, conflict of laws, criminal law, evidence, admiralty, patents, copyrights, trade-names, taxations, statutory interpretation — he has shaped or reshaped the important doctrines. Everywhere in the judicial domain you can trace his handiwork.[59]

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56 *Id.* at 108.

57 *See, e.g.,* Rogers v. Ballenberg, 68 F.2d 730, 731 (2d Cir. 1934).

58 Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 382 n.32 (1947).

59 Frank, *supra* note 15, at 681.

Indeed, most first-year law students know Hand as an exceptionally creative judge who developed legal rules from principles and reasoning, which seems hard to square with his emphasis on judicial restraint. The reconciliation lies in recognizing that while Hand viewed Congress and its statutory directives as formal expressions of the collective will, he also saw courts as vehicles of social will in their own way. Judges were members of society, even if not formally representing it politically. In one of his earliest accounts, he thus noted:

> [T]he judge has, by custom, his own proper representative character as a complementary organ of the social will, and in so far as conservative sentiment, in the excess of caution that he shall be obedient, frustrates his free power by interpretation to manifest the half-framed purposes of his time, it misconceived the historical significance of his position and will in the end render him incompetent to perform the very duties upon which it lays so much emphasis. The profession of the law of which he is a part . . . must feel the circulation of the communal blood or it will wither and drop off, a useless member.[60]

Consequently, in situations where a statute was silent or where a Congressional purpose was incompletely evidenced ("half-framed purpose[61]"), Hand's opinions exhibited the creativity seen of a common law judge. They developed new rules, principles, and did not hesitate to modify or update prior precedent. Hand of course made sure the statute — or its incidents — did not stand in his way. Exemplary of this approach, is a passing observation in the previously discussed *T.J. Hooper* decision, where he made sure to note that "[t]he statute. . . does not bear on this situation at all" even though neither the lower court nor the parties had referenced it in any way.[62]

Judicial creativity was therefore neither a vice nor an inferior modality of law-making. It was instead a fully legitimate part of the enterprise, when exercised appropriately. The context and the particular domain were therefore both crucial in assessing the legitimacy of judicial creativity. In an important sense therefore, Hand's approach to balancing judicial restraint and creativity suggests something of a symbiotic relationship between Congress and courts, wherein courts were of course for the most part agents of the legislature when dealing with statutes, but under appropriate circumstances could themselves operate as principals when required to. Or put another way, they were faithful agents of Congress *only when* the agency relationship applied.

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[60] Hand, *supra* note 51, at 617-18.
[61] *Id.* at 618.
[62] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

C. *Adjudication with Exposition*

Closely related to Hand's efforts to balance his creative impulse against the need for judicial restraint was his recognition that the law-making function of a judge was intertwined with, and often secondary to, the court's task of adjudicating the dispute at hand. The court's reasoning therefore had to serve two tasks at one. On the one hand, it needed to persuade the parties that their arguments had been fairly considered; and on the other, it needed to serve as guidance for future parties — and courts — when faced with similar situations.

A rather striking feature of Hand's opinions for the entire duration of his judicial career is their engagement with the factual record, even when on appeal.[63] He took great pains to both understand and distill the material facts at issue in the dispute, before proceeding to examine the relevant statutes and precedents. Yet there was nothing mechanistic about this exercise. Hand's detailing of the factual record was usually filled with an effort to slant it towards the relevant legal analysis that he would eventually undertake in an effort to reach a conclusion, but at the same time gave readers the sense that he had reviewed it with a fine-toothed comb. Hand's approach in this regard remained consistent regardless of the subject matter involved: patent law and tort law received the same treatment.[64]

The elaborate factual detailing was to Hand, in service of the basic need for every case to be *decided*. Courts were tasked with arriving at a conclusion and determining right and wrong, even if from within the context of extreme uncertainty. Nothing was to Hand more problematic than a court vacillating on this core function when presented with arguments from both sides. "Courts must in the end say what is required," Hand once emphatically observed in an opinion with strong arguments on both sides.[65] In one well-known copyright case, Hand admitted that the court's line-drawing and thus ultimate decision may seem arbitrary: "[W]hile we are aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases."[66]

One might speculate that this impulse — to ensure that every case was clearly decided— came from Hand's time as a district court judge. In that role, he was presented with subject areas that he knew very little about, and often had no interest in.[67] Yet, as has been pointed out, he

[63] GUNTHER, *supra* note 4, at 261-65 (describing Hand's "thoroughness" and "attention to detail" in his opinions, across a wide range of subject matter).
[64] *Id.*
[65] *T.J. Hooper*, 60 F.2d at 740.
[66] Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).
[67] GUNTHER, *supra* note 4, at 114.

worked zealously to ensure that this lack of interest or expertise in those matters did not impede his role as decision-maker.[68] And key to this was an awareness of the factual record. It is worth contrasting Hand's approach to offering a detailed exegesis of the factual record with the approach adopted by a few other "great" judges such as Cardozo and Holmes. Both kept their engagement with the facts of the dispute to a minimum, often times to allow them to focus more directly on developing the common law rule at issue, which they saw as significantly more important.[69] Perhaps some of this was simply that neither Holmes nor Cardozo had served as a trial judge, in either federal or state systems.

Hand retained this emphasis on factual explication even as an appellate court judge. And his time as a district court judge had made him especially aware of the complexities involved in constructing and distilling an elaborate factual record. He was thus known to be critical of factual records that were filled with unhelpful testimony, where counsel for either side had merely introduced evidence in an effort to confuse the court or obfuscate the issue.[70] As an appellate judge, he therefore exuded in his opinions the same ethic that he had cultivated as a trial judge.

The genius of Hand's approach to opinion writing was that the factual elaboration did not compromise his ability and willingness to expound on the law and develop an appropriate rule for decision for the case. As has been noted, Hand's opinions are today cited for their creativity and common law flourish, even though developed in the federal context that is dominated by statutes. The factual record was, in Hand's opinions, a means to developing an appropriate rule through the synthesis of precedents, statutory text, and simple common sense. In an important sense though, the factual record was also a mechanism of restraint and limited a court's law-making to what was needed to decide the case and possibly like ones.

In so developing the law, Hand's approach is also worth contrasting with that of someone like Cardozo. As has been written about extensively, Cardozo's approach to rule development was often "clever," strategic, and took cover under the declaratory theory of the law, wherein Cardozo was almost always denying (or underplaying) the novelty of his

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[68] Friendly, *supra* note 2, at 13 (noting how Hand's greatest contribution lay in the multiple minor cases that he decided over the course of his career).

[69] *See, e.g.*, Macpherson v. Buick Motor Co., 11 N.E. 1050 (N.Y. 1916); Allegheny College v. Nat'l Chautauqua Cnty. Bank of Jamestown, 159 N.E. 173 (N.Y. 1927); Marrone v. Washington Jockey Club, 227 U.S. 633 (1913). *See also* G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633 (1982).

[70] *Nichols*, 45 F.2d at 123; GUNTHER, *supra* note 4, at 123-25.

lawmaking.[71] Hand made few such presence of a statute. Either he was therefore engaged in the task of interpretation, or if the statute did not cover the issue, he was developing the law with an eye towards having the rule remain compatible with the rest of the statute. Further, Hand abhorred lengthy judicial opinions — itself a reflection of his view that the task of the judge was primarily to decide the case at hand. The incremental threading of precedents would have certainly been inconsistent with his impulse in this regard. .[72] Finally, and perhaps most importantly, Hand made no pretense of speaking in the declaratory tone when expounding on the law. To him, judicial legislation was a reality of the process of adjudication; and hardly worth denying.

As an illustration consider two of Hand's best known tort law decisions: *Carroll Towing* and *T.J. Hooper*. Both are common law decisions and therefore comparable in subject matter to Cardozo's opinions; and both are today seen as having made new law. In *Carroll Towing*, where Hand famously developed a formula that would come to be known as the "Hand Formula," Hand made no effort to locate the formula or its outlines in prior precedent, which he openly acknowledged as not embodying a "general rule" that could be applied.[73] Instead his account of the formula was as follows:

> It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B > PL$.[74]

This paragraph has assumed great substantive significance in the years since. Yet, it is equally significant stylistically, since in it we see Hand overtly recognizing that he is *making* (rather than finding) new law, by employing common sense. This is in contrast to Cardozo's approach in a case like *MacPherson v. Buick Motor Co.*,[75] which attempted a synthesis

[71] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 14 (1993) (noting how Cardozo's opinion in *Allegheny College* "is generally and rightly considered too clever by half"); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 515 (1948) (describing Cardozo's use of the declaratory theory in tort law).
[72] GUNTHER, *supra* note 4, at 452.
[73] United States v. Carrol Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
[74] *Id.*
[75] 111 N.E. 1050 (N.Y. 1916).

of precedents through a common "principle" (analogous to Hand's notion of a "general rule").[76] Similar in form to *Carrol Towing* is Hand's opinion in *T.J. Hooper*, discussed before. Despite finding not just the absence of precedent but also an applicable custom, Hand did not hold back in developing a new rule based on common sense. Courts needed to "say" what was required and "need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack."[77]

This balance between the adjudicative function of the court and its expository/lawmaking function was therefore a crucial element of Hand's judicial approach and corresponded well with his general views about the judicial role and the balance between restraint and creativity. To be sure, the balance between adjudication and exposition shifted somewhat over the course of Hand's judicial career, especially after his appointment to the appellate bench, where he saw his opinions as directly guiding lower courts — and thus often times speaking directly to future courts. Yet, the variation over time is strikingly minimal, revealing how entrenched it was in Hand's overall judicial method.

II. HAND'S COPYRIGHT JURISPRUDENCE

Learned Hand was appointed to the federal bench as a district judge in the Southern District of New York in 1909 and served in that position until the final months of 1924, when he took his position as a judge of the Second Circuit. He remained in that position until his death in 1961. From 1948 to 1951, he served as Chief Judge of the circuit, after which he took senior status for the final decade of his service.[78]

Over the course of his judicial career, Hand authored about sixty copyright opinions. This number does not include the cases where he was on the panel, but chose not to write an opinion himself. If this latter category is included, the number almost doubles and includes decisions such as the celebrated case of *Arnstein v. Porter*,[79] which is credited with establishing the modern test for copyright infringement, and *Shipman v. RKO Radio Pictures*,[80] which developed the controversial inverse ratio rule. In other words, his *indirect* role in the development of the court's copyright jurisprudence during his time is likely as significant as his direct role, measured by his authored opinions in the field.

[76] *Id.* at 385

[77] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

[78] SCHICK, *supra* note 6, at 13.

[79] 154 F.2d 464 (2d Cir. 1946); Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791 (2016).

[80] 100 F.2d 533 (2d Cir. 1938); Shyamkrishna Balganesh & Peter S. Menell, *Proving Copying*, 64 WM. & MARY L. REV. 299 (2022).

Most discussions of Hand's contributions to copyright to date have focused primarily on his opinions as an appellate court judge. And while it is certainly true that his contributions while on the Second Circuit have had a more lasting effect — given their formal authoritative status as circuit precedent — than his opinions as a district court judge have, viewing them together paints a more complete (and interesting) story about Hand's approach to the subject. Hand's copyright jurisprudence over the course of his judicial career reveals an astonishing level of consistency and coherence reflective of his overall approach to the judicial function. It also suggests a considered approach to copyright law, undergirded by subject-specific precepts and ideas. This Part focuses on the former, while the next looks at the latter.

A. *Hand and Copyright in the Southern District*

Less than a year after his appointment, Hand was presented with two copyright lawsuits. The first involved a procedural issue, specifically whether the statute's requirement of "publication" as a pre-requisite for protection was satisfied when the work was deposited with the Library of Congress.[81] The plaintiff had made a token sale of the work to satisfy the requirement, and the defendant challenged the sufficiency of this sale. Canvasing courts and treatises, Hand concluded that the sale satisfied the publication requirement.[82] It was in the next case, which he decided less than two weeks later that Hand began to leave his imprint on the field.[83]

The case was *Hein v. Harris,* filed as a case in equity — i.e., for an injunction — by a songwriter who claimed that the defendant had copied and infringed his work in its own song.[84] The defendant admitted the existence of some similarity between the works, but sought to argue that both songs were "in the lowest grades of the musical art" and thus lacked originality to qualify for protection, which Hand accepted as factually true.[85] Nevertheless, to Hand this was "of no consequence in law."[86] The protectability of the plaintiff's work was not affected by the mere borrowing of "the style of his predecessors"; it would be denied protection only when "substantially a copy" of prior works.[87]

As Gunther points out, Hand had no background in copyright law.[88] The opinion is surprisingly devoid of citation, in contrast to his prior one.

[81] Stern v. Jerome H. Remick, 175 F. 282, 283 (C.C.S.D.N.Y. 1910).
[82] *Id.* at 284.
[83] Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910).
[84] *Id.* at 876.
[85] *Id.* at 876.
[86] *Id.*
[87] *Id.*
[88] Gunther, *supra* note 4, at 114.

In a sense, the opinion was therefore *intuitive*, and Hand appears to have treated the matter as a case of first impression. Some of those intuitions would eventually become law. This lack of familiarity and impressionistic sensibility is borne out in a rather fundamental error that Hand made in the opinion, which he would later indirectly acknowledge many years later from the appellate bench. After reciting the facts and noting the musical similarity between the works, he went on to note: "whether or not the defendant, as he alleges, had never heard the complainant's song, when he wrote his chorus, the chorus certainly is an infringement."[89] Hand was effectively suggesting that copyright infringement could arise even without actual copying — a rather elementary mistake about copyright that sets it apart from patent law! To be fair to Hand though, his opinion on this very point was considered and affirmed by the Second Circuit a few months after, perpetuating the error and making it circuit precedent.[90] Yet, it confirms Hand's lack of copyright expertise at the time.

This lack of expertise did not undermine Hand's confidence, even in *Hein.* Particularly telling is Hand's formulation of the principle that judges should not be in the business of judging the merit of a work as a precondition to copyright protection:

> [T]he lack of originality and musical merit in both songs, upon which the defendant insists, is of no consequence in law. While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created. Certainly the qualifications of judges would have to be very different from what they are if they were to be constituted censors of the arts.[91]

Here, we see Hand arriving at the principle that on its face seems similar to that of "aesthetic neutrality," which Holmes had articulated a few years prior.[92] Yet, on closer scrutiny one needs to ask whether Hand was indeed articulating anything similar.

Holmes had poignantly observed that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth" of art, an observation that has come to be understood as embodying the principle of aesthetic neutrality in copyright, i.e., the idea that judges should not judge the merit of a work, but must instead remain aesthetically neutral about the work in applying copyright doctrines to it.[93] In recent work, Barton Beebe has argued that Holmes's

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[89] *Hein*, 175 F. at 876.
[90] Hein v. Harris, 183 F. 107 (2d Cir. 1910).
[91] Hein v. Harris, 175 F. 875, 877 (C.C.S.D.N.Y. 1910).
[92] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 200 (2008).
[93] *Bleistein*, 188 U.S. at 251.

comment was driven by a commitment to American literary pragmatism, which influenced his idea of both personality and aesthetic judgment.[94] By contrast, Hand's seemingly independently developed statement appears to be rooted in a vision of the judicial role. Unlike Holmes, Hand did not share the same pragmatic philosophy of aesthetics, a philosophy which largely abhorred gradations of art and the distinction between the useful and the aesthetic. Hand did not shy away from judging merit in a creative work, and he routinely characterized works as lacking "merit," being at times "trivial," "trite and conventional" or as "cheap and vulgar," even when offering them copyright protection.[95] His approach was instead to render that judgment irrelevant to the legal standard for protection, but nevertheless relevant to the question of infringement and similarity. This last point bears elaboration.

The lack of creative merit was to Hand of no relevance to the ability of the work to obtain copyright protection. All the same, it was important in measuring the similarity between two works during an infringement claim — an issue that Hand cared deeply about, but which Holmes never once confronted. The opinion in *Hein* tellingly begins with a comparison of the works, and Hand goes on to note:

> The vogue which for a number of years that style of composition has obtained, which is popularly known as "rag-time," has resulted in the production of numberless songs, all of the same general character. It has been a fact that they each bear strong resemblance to each other, and to any expert ear they have a monotonous similarity, which only adds to the general degradation of the style of music which they represent.[96]

The monotonous similarity was thus problematic *both* aesthetically and legally, a proposition that Holmes would not have dared advance. Aesthetically, because it degraded the quality of the whole genre and suggested a low level of musical creativity, and legally, because it made the assessment of plagiarism (i.e., copying) particularly difficult. The two were of course related to each other. Artistic (or musical) merit was therefore closely tied to the judge's ability to assess problematic similarity between the works because less creative works drew heavily from the public domain and other works. And while this did not as such require denying them protection, it pointed to the need for more nuance in assessing similarity. This aspect of Hand's "censors of arts"[97] comment has gone unnoticed, and presaged how the issues of copying and similarity came to

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[94] Barton Beebe, Bleistein, *The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 357 (2017).

[95] Stodart v. Mutual Film Corp., 249 F. 507, 508-09 (S.D.N.Y. 1917); Fitch v. Young, 230 F. 743, 745 (S.D.N.Y. 1916).

[96] *Hein*, 175 F. at 876.

[97] *Id.* at 877.

dominate a large number of Hand's copyright opinions.

Hand's approach to the comparison of the two works in *Hein* is also credited with having laid the foundations for what came to be called the "comparative method" of musical analysis in comparing the similarity between two works.[98] It consisted in "transposing the melodies of the compositions in question to the same key, assigning equal values to the notes, and comparing the notes one after another."[99] While hardly fool-proof, Hand came to employ the method in other musical copyright infringement cases as well, often with great success.[100] Again, in developing this approach, he employed little more than his own musical sensibilities. In one notable case, he prefaced his analysis by noting that: "[f]or the remaining part of the inference, I rely upon such musical sense as I have. I am aware that in such simple and trivial themes as these it is dangerous to go too far upon suggestions of similarity.[101]"

Comparing the elements of two works in an infringement lawsuit in exquisite factual detail while deploying his own sense of their creative merit, was a recurrent theme in several of Hand's cases as a district court judge, whether under the rubric of the comparative method (in music) or otherwise . In *Stodart v. Mutual Film Co.*, he considered an infringement claim brought by the author of a play against a movie company.[102] Hand employed a detailed scrutiny of the two works — breaking them down into their components, and concluding that the defendant's work was "beyond question a direct copy."[103] P resented with the argument that the plaintiff's play had been copied from a prior work, Hand noted: "There is nothing between the two but a similarity of incident, already mentioned. Now, incident is different from plot. It may be said that the incidents here are like those in the plaintiff's play, but that the plots are quite different, and the question here is of plot."[104] Despite all of this, he characterized the play as being of a "very trifling character" to lower his initial award of damages in the case.[105]

It was also while on the district court that Hand effectively developed U.S. copyright law relating to joint authorship. Presented with an opera

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[98] *See* ALFRED M. SHAFTER, MUSICAL COPYRIGHT 165 (1932) (coining the phrase and attributing it to Hand's jurisprudence).
[99] Raphael Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 5 LOY. L.A. ENT. L. REV. 61, 77 (1985).
[100] *Hein*, 175 F. at 875; Fred Fisher, Inc. v. Dillingham, 298 F. 145, 146 (S.D.N.Y. 1924); Haas v. Leo Feist, Inc. 234 F. 105, 105 (S.D.N.Y. 1916). *See also* Metzger, *supra* note 99, at 77-78.
[101] *Haas*, 234 F. at 107.
[102] *Stodart*, 249 F. at 508-09.
[103] *Id.* at 509.
[104] *Id.*
[105] *Id.*

that had been collaboratively produced by the parties in *Maurel v. Smith*,[106] Hand expressed surprise that he had "been able to find strangely little law regarding the rights of joint authors."[107] The statute—the Act of 1909 — said nothing about the issue. Looking to English law on the subject, he absorbed — with subtle modification — the English doctrine into U.S. law.[108] Later, when on the Second Circuit, Hand resurrected this opinion, which eventually made its way into modern copyright law nationwide.[109]

A common feature of Hand's jurisprudence on the question of infringement, similarity, and joint authorship was a rather glaring neglect of the statute. In a sense, this was perfectly understandable since the statute said nothing directly about these questions. Hand treated the issues then as effectively common law questions that Congress had not only chosen not to expressly address, but had instead delegated to courts to develop. The distinction is subtle, yet important. It was not just the statutory silence that Hand found enabling; it was the very nature of the particular question. So, when there was an issue that Hand felt Congress might have conceptually contemplated, even if not expressly in the text of the statute, he treated them as semi-statutory and adopted a more overtly restrained approach.

Exemplary of this approach was the question of copyrightable subject-matter. In *Reiss v. National Quotation Bureau*, Hand was presented with an interesting set of facts.[110] The plaintiff had produced a code book consisting of 6,325 coined five-letter words, numbered sequentially. They had "no meaning, but were all susceptible of pronunciation."[111] The purpose behind the book was to offer cable operators a language with which to make a private code. The question that Hand had to address was the copyrightability of the book.

Hand's opinion begins with the relevant section of the statute, which offered protection to "all the writings of an author."[112] Hand's approach to understanding the provision was to treat as a congressionally-intended limit on protectable matter; yet, to give it meaning, he read it against the backdrop of the Constitutional power granted to Congress to make copyright law:

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106 *Id.* at 512.
107 Maurel v. Smith, 220 F. 195, 197-98 (S.D.N.Y. 1915).
108 *Id.* at 199; *id.* at 512.
109 Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 140 F.2d 266, 267 (2d Cir. 1944). For a subsequent extension, see: Childress v. Taylor, 945 F.2d 500, 504 (2d Cir. 1991).
110 Reiss v. Nat'l Quotation Bureau, 276 F. 717, 717 (1921).
111 *Id.*
112 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at 17 U.S.C. § 4).

> Not all words communicate ideas; some are mere spontaneous ejaculations. Some are used for their sound alone, like nursery jingles, or the rhymes of children in their play. Might not some one, with a gift for catching syllables, devise others? There has of late been prose written, avowedly senseless, but designed by its sound alone to produce an emotion. Conceivably there may arise a poet who strings together words without rational sequence — perhaps even coined syllables — through whose beauty, cadence, meter, and rhyme he may seek to make poetry. Music is not normally a representative art, yet it is a "writing." . . .
>
> Therefore, on principle, there appears to me no reason to limit the Constitution in any such way as the defendants require. . . .
>
> [The Constitutional] grants of power to Congress comprise, not only what was then known, but what the ingenuity of men should devise thereafter. Of course, the new subject-matter must have some relation to the grant; but we interpret it by the general practices of civilized peoples in similar fields, for it is not a strait-jacket, but a charter for a living people.[113]

There is a boldness, creativity, and institutional modesty that this observation exudes. And it is hard to imagine that it came from a district court judge. It evokes Hand's emphasis on restraint by approaching the question as an interpretation of the statute through the Constitution (rather than mere common sense), but at the same time develops a crucial rule for subject-matter that continues to this day: namely, that the statutorily delineated subject-matter of copyright is an open, rather than closed, set. Hand's opinion in *Reiss* is of course a statutory interpretation opinion only in the loosest sense, since the statute was silent about its own coverage. Yet, noticeably even there, Hand did not treat it as an open-ended common law question along the lines of joint authorship, since Congress had at least in principle contemplated the question conceptually by addressing the question of subject matter.

In contrast, when the question was directly statutory, in the sense of having been covered by a statutory directive, Hand's approach was even more restrained. In *Leibowitz v. Columbia Graphophone*,[114] he was asked to interpret the provisions of 1909 Act dealing with the newly created mechanical reproduction license and its applicability to undomiciled aliens. The plaintiff sought to argue that the literal language of the statute needed to be ignored, which required treating published and unpublished works differently.[115] Hand found this attempted extension problematic, noting that "[i]t is always unsafe to attribute a given intent to Congress."[116] In another instance, this time a case involving the celebrated

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113 *Reiss*, 276 F. at 719.
114 Leibowitz v. Columbia Graphophone Co., 298 F. 342, 342 (S.D.N.Y. 1923).
115 *Id.*
116 *Id.* at 343.

composer Irving Berlin as defendant, the question involved an interpretation of a provision of the Act of 1909 that required authors to deposit two copies of the work with the Copyright Office "after" copyright had been secured.[117] The plaintiff in the case had made this deposit two weeks before publication, which the defendant argued was insufficient and contrary to the text. To Hand, this was absurd, especially since another provision of the statute allowed an author to remedy the requirement of a timely deposit without forfeiting copyright. Recognizing the absurdity of the defendant's literal reading of the provision, which emphasized the word "after" in the text, he concluded:

> [I]n my judgment the time of deposit in section 12 is permissive, and a deposit before publication is enough. The purpose of the act of 1909 was to open a path for authors beside and not through the quagmire which had been created under the old act. I have no disposition to open another. Of course, the policy of the act must be enforced, but it does not lie in purposeless technicality.[118]

A reading of Hand's copyright opinions while on the district court reveals a fairly rapid and confident engagement with the technicalities of the area. They evidence Hand's "self-assured" tone and style, no less than is seen in his other jurisprudence.[119] Indeed, given their tone, expository confidence, and nuanced creativity one might readily mistake them for the opinions of an appellate court judge. They were therefore undoubtedly a harbinger of the approach Hand would adopt to the subject when elevated to the Second Circuit.

B. Hand and Copyright on the Second Circuit

It was of course during his time on the Second Circuit that Hand came into his own on matter of copyright law. In this body of jurisprudence, spanning an entire quarter century, we see Hand deploying each of the characteristic elements of his judicial method with the facility and competence of a seasoned copyright expert. Looking more closely at the roughly forty-five opinions that Hand authored during this period, we may usefully characterize his engagement with copyright in as entailing four inter-related moves. To be sure, this classification is hardly watertight and individual cases often relied on more than just one move. This Section considers each of them in turn.

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117 Joe Mittenthal, Inc. v. Irving Berlin, 2991 F.2d 714. 714-15 (S.D.N.Y. 1923).
118 *Id*. at 715.
119 *Landauer*, s*upra* note 10, 233.

1. *Critical Similarity Comparisons*

In an approach that he first developed as a district court judge in *Hein*, Hand continued his approach to engaging the nature and creativity of individual works involved in a lawsuit through his musical and literary sensibility. More so than in his opinions while on the district court, his opinions deploying this method as an appellate court judge were often interspersed with directives describing his process and connecting it to copyright doctrine, presumably in an effort to provide additional guidance to lower courts.

Nowhere is this approach more apparent than in his much-quoted decision in *Nichols v. Universal Pictures Corp.*, involving the alleged infringement of copyright in a play by a movie company's screenplay.[120] After examining each of the two works in detail — reviewing their plot, theme, character development, and story line — he then proceeded to set out a framework for separating idea from expression, what has since come to be known as the "abstractions" test, exhorting courts that "[n]obody has ever been able to fix that boundary, and nobody ever can."[121] Even there, Hand's approach was not devoid of the question of merit, and he observed that "[i]t follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[122] This observation from *Nichols* has failed to receive the attention it deserves. Yet in it, Hand was signaling that: (i) he is in fact engaging the question of copyrightability, (ii) copyright protection is a matter of degree ("less"), and (iii) that this assessment occurs through the infringement analysis. Applying this to the comparison, he concluded that any copying was legally per halted: consisting of abstract ideas and "the low comedy" common to the genre.[123]

Noteworthy in *Nichols* was also Hand's disdain for the plaintiff's attempt to deploy a "test" for assessing the similarity, which relied on using the plaintiff's own lawyer as an expert witness. Hand rejected the superficial objectivity of any such test, noting that it was "not the proper approach to a solution. . . [which] must be more ingenuous, more like that of a spectator."[124] He ended his opinion by reprimanding the plaintiff for its use of experts, which enhanced "the length of the record" unnecessa-

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[120] Nichols v. Universal Pictures Corp., 45 F.2d 119, 120 (2d Cir. 1930).
[121] *Id.* at 121.
[122] *Id.*
[123] *Id.* at 122
[124] *Id.* at 123. For a full discussion of the trial proceedings and how the plaintiff's lawyer had attempted to develop a test based on his own manuscript, see: Mark Rose, Authors in Court: Scenes from the Theater of Copyright 91 (2016).

rily.[125] And again, we see Hand switching into guidance mode here, asking district courts to exclude such testimony in the future.[126]

In *Sheldon v. MGM*, decided a few years after, Hand deployed the same approach but arrived at the opposite conclusion to find infringement.[127] Here, his description of the two works was even more elaborate and directed at refuting the relevance of the defendant's claim that elements of the plaintiff's work were already contained in prior works. Noting that copyright law embodied no doctrine of "anticipat[ion]," he emphasized that this did not matter. Such anticipation, while irrelevant to the question of protectability and originality, was nevertheless "important only on the issue of infringement" relating to "the inference to be drawn from likenesses between the work[s.].[128] *Sheldon* is surprisingly devoid of Hand's characteristic critical assessments, perhaps because he thought highly of the protected work. All the same, it is interspersed with innumerable observations to the effect that the defendant had copied the "essence" and "substantial parts" of the work.[129]

While *Nichols* and *Sheldon* are often used to illustrate Hand's engagement with the facts of the works being compared, they were hardly the only two such cases. Hand deployed the same approach in cases involving musical copyrights. In *Arnstein v. Edward Marks Music*, he encountered a lawsuit brought by the infamous copyright litigant Ira Arnstein.[130] As with most of Arnstein's cases the plaintiff had little basis on which to show actual copying, and based his argument on access on a story that lacked much credibility. He instead sought to rely on some similarity between the works to supplement this weak account. Hand saw right through this, and went to some length to show that the similarity was at once too simple to be evidence of plagiarism, and at the same time in keeping with the defendant's low musical sensibility:

> When the two songs are played the phrases show no resemblance, at least to the untrained ear. To a mind already set to find piracy, this of course seems proof strong as Holy Writ, but it is really of no significance. A plagiarist might of course work in that way, seizing a sequence from the middle of a phrase in an accompaniment as a happy theme; but [the defendant composer] was scarcely the man for that; his gifts were very limited, and to attribute to him the ingenuity and penetration so to truncate and modify, and thus really to create a melody out of other elements, is harder than to suppose that the extremely simple them should have oc-

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125 *Nichols*, 45 F.2d at 123.
126 *Id.* ("We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues.").
127 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).
128 *Id.* at 53.
129 *Id.* at 55-56.
130 Arnstein v. Edward Marks Music, 82 F.2d 275, 275 (2d Cir. 1936).

curred to him out of his own mind.[131]

The defendant's work was not an instance of "musical genius," which further evidenced the commonality in the genre and thus disproved copying. This was a recurring theme in several of Hand's opinions: explaining how a minimal degree of musical similarity was not probative of actual copying when the level of creativity evinced therein was minimal.[132] And arriving at this conclusion required an assessment of the degree of creativity seen in the work.

Gunther, in his noted biography of Hand, identifies Hand's predilection for judging the merits of a work but attributes it to little more than Hand's dislike of low-brow art forms.[133] Gunther's argument misses something critical in Hand's copyright jurisprudence, which connects back to his judicial method. While "aesthetic neutrality" asks judges to refrain from imposing their biases on the copyrightability of the work, it speaks to a somewhat pre-Realist mindset wherein judges are deemed fully *capable* of such objective assessment. By the time of Legal Realism, the notion that judges were objective and neutral in the strict sense of those terms, was seen as something of a myth.[134] Recognizing this did not require abandoning the notion of aesthetic neutrality and what Hand did with his frameworks of comparison was an approach that balanced the two.

Instead of denying the reality that judges had artistic, literary or musical sensibilities that they could fairly draw upon when presented with infringement claims, his approach found a way for those sensibilities to be worked into the analysis, without giving them dispositive significance, i.e., as forms of censorship. Moving such critical assessments of merit from the realm of copyrightability to infringement was a brilliant analytical move that achieved this end. The low- or high- level of creativity involved allowed the judge to credit any similarities seen between the works with the appropriate level of inferential value in drawing a conclusion of copying and infringement. And in this move, we see Hand thus both embracing and disavowing aspects of Legal Realism.

Instead of hiding behind the façade of neutrality, Hand's approach was instead to embrace the subjectivity of the comparison, but cabin it with extreme candor and transparency.[135] Judges, this approach acknowl-

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[131] *Id.* at 277.
[132] *Arnstein*, 82 F.2d at 278; Brodsky v. Universal Pictures Co., 149 F.2d 600, 600 (2d Cir. 1945); Rosen v. Loew's, Inc., 162 F.2d 785, 788 (2d Cir. 1947); *Sheldon*, 81 F.2d at 55; Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940); Nat'l Comics Pub. v. Fawcett Pub., 191 F.2d 594, 600 (2d Cir. 1951).
[133] GUNTHER, *supra* note 4, at 271.
[134] *See, e.g.*, Jerome Frank, Courts On Trial (1949).
[135] There is an important sense in which Hand's approach here is reminiscent of the approach that Hutcheson had controversially articulated, in defending the

edged, brought their sensibilities to bear on the adjudication, which was inevitable. All the same, this did not render the process arbitrary and meaningless, as the extreme forms of Legal Realism might have been taken to suggest.[136] It did not, in other words, render the law (of copyright, here) devoid of determinacy in the adjudicative process. Instead, it built judicial subjectivity into the doctrine — of copyright infringement — and thus gave it both a floor and a ceiling.

2. Judicial Limits in Copyright

No area of copyright law better captured Hand's approach towards judicial restraint than those cases where he was called upon to expand the domain of copyright law and enter into territory that he saw as properly legislative. Several such cases involved invocations of the Supreme Court's controversial decision in *International News Service v. Associated Press*, wherein a majority of the Court had afforded newspapers a form of property-like ("quasi property") protection in factual news against direct competitors for such time as the news retained economic value.[137] Hand appears to have seen this decision as deeply problematic in that it entered into an area that was properly legislative — i.e., the creation of new forms of intellectual property. Indeed, this had formed the essence of Justice Brandeis's blistering dissent in the case.[138]

In *Cheney Bros v. Doris Silk Corp.*, the plaintiff fabric designer sought to have the Second Circuit extend the quasi-property logic of the *International News* case to fabric designs, during the fashion season and no more.[139] Hand found this attempted extension troubling. Speaking of the Court's decision, he sought to limit its application:

> While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of common-

"hunch" in judicial decisions. As previously noted, Hand had grave reservations about Hutcheson's account being made into a principled defense for judicial discretion, even though he admitted to agreeing with Hutcheson's basic intuition about the subjective feel that judges brought to bear on the adjudication process. *See supra* note 32.

136 *See generally* Cohen, *supra* note 27.

137 Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918). For a general account, see: Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011); Richard A. Epstein, *International News Service. v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992).

138 *Int'l News Serv.*, 248 U.S. at 267 (Brandeis, J., dissenting).

139 Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929).

> law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter. . .
>
> To exclude others from the enjoyment of a chattel is one thing; to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over his fellows vastly greater, a power which the Constitution allows only Congress to create.[140]

Hand was thus willing to read his notion of judicial restraint *into* the opinion in *International News* in order to explain the appropriate role of the Court. To Hand, since Congress had been empowered by the Constitution to enact intellectual property law, its decision to avoid protection in other domains was to be treated as a considered one. Any judicial intervention into this omission risked undermining Congress's "scheme" for the field, which deserved deference.[141] Hand's restraint in this domain was thus principally structural, since he saw the judicial function as incapable of creating new exclusive rights, which was instead a legislative prerogative. All the same, it is quite telling in *Cheney Bros* that Hand went out of his way to explain to the parties why his restraint was more than just about the adjudication of the individual dispute:

> It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. . . . Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount, we have no means of saying; it is not for us to decide.[142]

Adjudicating an individual dispute inevitably involved lawmaking. And since restraint dictated cabining judicial lawmaking, it involved a failure to remedy a clear injury, which to Hand might have been perceived as "lame."

The *International News* decision earned Hand's indignation time and time again during his time on the Second Circuit.[143] Each time, he refused to treat the decision as having set out a general principle that was capable of extension beyond the facts of the case, instead seeking to confine it to

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140 *Id.* at 280.
141 *Id. See Also* Benjamin Kaplan, An Unhurried View Of Copyright 89 (1967).
142 *Cheney Bros.*, 35 F.2d at 281.
143 RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 90 (2d Cir. 1940); Kleinman v. Betty Dain Creations, Inc., 189 F.2d 546, 553 (2d Cir. 1951); Nat'l Comics Publ'ns. v. Fawcett Publ'ns., 191 F.2d 594, 603 (2d Cir. 1951); G. Ricordi Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952).

the narrow circumstances of news publishing.[144] There is admittedly a sense of disingenuity in Hand's dogmatic disaffection for the opinion. Yet, he was unwavering in this approach.

A question that must be asked is if Hand's extreme emphasis on judicial restraint here compromised his ability to follow Supreme Court precedent, equally perhaps a component of the appropriate judicial function. To Hand, it did no such thing. In each instance where he was called to address *International News*, Hand characterized the effort as an attempted extension of the rule to a new circumstance rather than just an application of it.[145] And this, in principle, allowed him to limit its reach, an approach that the Second Circuit would eventually disregard.[146]

Closely tied to Hand's emphasis on judicial restraint within copyright law was his approach to state common law copyright, an issue that he was called upon to address in *RCA Manufacturing v. Whiteman.*[147] The case involved a claim by the conductor of an orchestra who had recorded various musical performances onto phonographs, seeking an injunction to restrain a broadcasting company from publicly performing and broadcasting those performances once rightfully in possession and ownership of those phonograph records.[148] The copyright statute did not at the time afford protection to such sound recordings. The basis for the claim was instead argued to be a common law property interest in performances: extra-statutory in nature, and thus excepted from the statute's limits and requirements for protection.[149] Once again, Hand saw the claim as a misguided effort to generate a judicial end-run around Congress's scheme.

All the same, his approach to ensuring the restraint was not to deride the logic of common law copyright. It was instead to emphasize the logical parallelism between statutory and common law protection, such that the mechanisms of losing one carried over to the other. And this was a matter of judicial restraint:

> [W]e see no reason why the same acts that unconditionally dedicate the common-law copyright in works copyrightable under the act, should not do the same in the case of works not copyrightable. Otherwise it would be possible, at least pro tanto, to have the advantage of dissemination of the work at large, and to retain a perpetual though partial, monopoly in it. That is contrary to the whole policy of the Copyright Act and of the Constitution. Any relief which justice demands must be found in ex-

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144 *See, e.g., G. Ricordi*, 194 F.2d at 916 ("[A]s we have several times declared, that decision is to be strictly confined to the facts then at bar.").
145 *See, e.g., Cheney Bros.*, 35 F.2d at 281.
146 *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (noting *International News Service* claim "surviv[es]" in New York law).
147 *RCA Mfg.*, 114 F.2d at 90.
148 *Id.* at 87.
149 *Id.* at 89.

> tending statutory copyright to such works, not in recognizing perpetual monopolies, however limited their scope.[150]

Unlike with *International News*, Hand's approach to common law copyright was not to deny the existence of a general principle. It was instead to suggest a parallelism between statutory and common law protection, which allowed him to draw limits from the former into the latter, recognizing that in the end "copyright in any form, whether statutory or at common-law, is a monopoly."[151] The logic was in the end the same: avoiding a judicial end-run around a limit (non-protection) that Congress had put in place. The court — certainly the Second Circuit — was not to second-guess the Congressional scheme underlying copyright. Whether for the majority or the dissent, Hand rather steadfastly stuck to this position.[152]

3. Faithful Agency and the Copyright Statute

Hand's philosophy of judicial restraint was of course at its most robust when the copyright question before him involved the terms of the statute. Unlike with areas and domains where the concern was with interfering with Congress's *unstated* scheme, in these statutory domains, Hand saw his task as interpreting the meaning of Congressional directives on a point. And since Congress had directly addressed the question — and was thus endowed with an intention — Hand's logic for restraint grew even stronger.

In engaging statutes, Hand largely adhered to a faithful agency approach to interpretation.[153] Under this approach, a court is to envision its task as interpreter to lie in acting as a faithful agent of Congress's intent and attempting to discern Congress's intent behind a directive, either generally or specifically, as applied to the question at hand.[154] The theory of faithful agency effectively attempted to curb judicial lawmaking in the name of interpretation.

Central to the faithful agency approach is the recognition that Congress may well have had its reasons for a particular directive, which are worthy of being respected even when those reasons are not obvious or convincing. In *Shapiro, Bernstein & Co. v. Bryan*, Hand had to make sense of authorship under the work made for hire doctrine, which Con-

150 *Id.*
151 *Id.* at 88.
152 For his views when in dissent, see: Capitol Recs. v. Mercury Recs. Corp., 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J. dissenting).
153 Merrill, *supra* note 6, at 5; Cox, *supra* note 58, at 378-79.
154 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 112 (2010).

gress chose to include in the text of the Act of 1909.[155] The case involved a dispute over renewal rights under the statute, which were vested with "an employer for whom [a] work is made for hire."[156] The defendants sought to argue that they had independent renewal rights on the basis that the work made for hire doctrine did not include "works of which employees are the real authors."[157] The problem with this argument was of course that Congress had made clear in another provision that the definition of an "author" included an employer in a work made for hire arrangement.[158] Supporting their argument, the defendants claimed that there was no obvious reason why Congress would have wanted renewal rights to vest in an employer, rather than the real author, a point that the plaintiffs were unable to refute. To Hand, this was irrelevant. Dismissing the argument, and sticking to the express terms of the statute, he concluded:

> It is idle to try to speculate why Congress should have so provided in order to create out of whole cloth an exception of which there is not the slightest intimation in the statute. The "work" intended is clearly any "work" which, but for the employment, the employee could have himself copyrighted; not a work in which his rights would have given him only a joint interest in the copyright. The defendants do not suggest that any court has taken or even intimated any acceptance of their view; it seems to us the merest invention, fabricated in the teeth of the statute.[159]

Even if a Congressional purpose was unclear, a court was obligated to give effect to a clear directive. All the same, faithful agency did not mean a literal or mechanistic reading of the copyright statute. This was especially true of the statute's procedural provisions, dealing with the various formalities that authors needed to comply with as a condition of obtaining protection. Here, Hand's approach to the statute — while faithful to Congressional intent — recognized that workability and efficiency were implicit in any Congressional policy, which courts needed to integrate into their interpretive logic within this domain.

This was particularly true in relation to the statute's provisions relating to notice and its omission from copies of the work. In one case, Hand was called upon to interpret the Act's provision excusing a party's failure to affix notice on a copy of the work.[160] That provision applied when the failure was "by accident or mistake" and on a "particular copy or copies," and emphasized that such failure would not "invalidate the copyright or

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155 Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 701 (2d Cir. 1941).
156 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at 17 U.S.C. § 21).
157 *Shapiro*, 123 F.2d at 701.
158 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at 17 U.S.C. § 62).
159 *Shapiro*, 123 F.2d at 701.
160 Nat'l Comics Publ'ns. v. Fawcett Publ'ns., 191 F.2d 594, 601 (2d Cir. 1951).

prevent recovery for infringement."[161] At issue was the question whether the exemption (for omissions) applied to the work more generally, i.e., to all copies, or only to the particular copy where the omission had occurred. Courts had been split on this: some emphasized the word "particular," while others read into the statute an implicit limit that the number of copies had to be "few."[162] Hand's approach was to avoid addressing the controversy while emphasizing the language of the provision. Noting that "[t]he question may not arise in the case at bar," he limited his interpretation to all that was needed in the case:

> [A]lthough the first newspaper to publish a "strip" affixes the "prescribed" notice on all copies then published, the failure to affix proper notices upon all copies of a later issue of the same "strip" by that, or another newspaper, is an "omission" upon more than "particular copies"; and section 21 [i.e., the remedial provision] may not be invoked.[163]

Congress's use of "particular" could not be ignored; yet Hand chose to do no more than was needed to decide the case, and thus avoid engaging in unnecessary interpretive lawmaking.

While he took the text of the statute seriously, Hand was at the same time not averse to injecting pragmatic considerations into his interpretation to avoid the absurd results that a plain reading of the text pointed to. His approach in *Peter Pan Fabrics v. Martin Weiner Corp.* was one such instance.[164] The case involved copyright protection for design fabrics, and while the plaintiff had affixed a copy of the copyright notice to the fabric selvage, that notice was missing when the fabric was converted into items of clothing.[165] This was more than just an accidental or mistaken omission, rendering the remedial provision inapplicable. The question was therefore whether copyright in the fabric was forfeited as a result of the plaintiff having sold dresses made with them without sufficient notice attached. Hand began by noting that a literal reading of the text would result in a denial of protection:

> [I]f we construe the words of § 10 with relentless literalism, dresses made out of the "converted" cloth may be said to be "offered for sale" without any effective notice. In support of such an interpretation it may be argued that the doctrine, *expressio unius, exclusio alterius*, would apply: that is to say, since Congress made only "omission by accident or mistake" an excuse we must not enlarge the exemption.[166]

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161 Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified at 17 U.S.C. § 21).

162 *Nat'l Comics*, 191 F.2d at 601.

163 *Id.* at 601-02.

164 Peter Pan Fabrics v. Martin Weiner, 274 F.2d 487 (2d Cir. 1960).

165 *Id.* at 488-89.

166 *Id.* at 489.

Yet this seemed odd to Hand, since the only change at issue was the conversion of the fabric into clothing. Invoking precedent where the Supreme Court had refused to let the text of the statute override its purpose,[167] he adopted a pragmatic approach to the question instead:

> [I]t is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine has been carried so far that language inescapably covering the occasion has been disregarded when it defeats the manifest purpose of the statute as a whole. . . .
>
> [I]t is hard to see how "notice" can said to be "affixed" to a "design" when it is incorporated into it; the copyrighted "work" will itself be changed, even though the change be so immaterial as not to impair the aesthetic appeal of the "design." Be that as it may, we do not hold that in no circumstances will it be possible to "affix notice" upon a "design" which will be still visible when the cloth has been made up into a garment. We do hold that at least in the case of a deliberate copyist, as in the case at bar, the absence of "notice" is a defense that the copyist must prove, and that the burden is on him to show that "notice" could have been embodied in the design without impairing its market value.[168]

Hand's opinion for the court proved to be controversial and generated a dissent from Judge Friendly, who found Hand's interpretation contrary to Congress's intention to make notice a critical precondition to protection.[169] In Friendly's view, the majority's interpretation undermined "an important public purpose" in that notice warned potential infringers of potential liability. To him, whether the omission was mistaken or deliberate was secondary to the very basic requirement that no notice had been provided at all.[170]

To Hand, here as elsewhere, the object of the interpretive exercise was to remain faithful to Congress's intent. That faithfulness — which was driven by his commitment to judicial restraint—was however a matter of principle, meaning that while it usually emphasized the text and wording of the statute, on occasion it required looking at the overall design and purpose in order to avoid the absurdities of literalism. Hand's emphasis on restraint did not therefore render him a wooden textualist, nor did it make him an abject purposivist. His approach was instead deliberately

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167 *Id.* at 489-90. This included the case of *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) that has since become controversial. *See* William N. Eskridge, Jr., Dynamic Statutory Interpretation 209 (1994) (describing it as a "sensation"); Anita S. Krishnakumar, *The Hidden Legal of* Holy Trinity Church: *The Unique National Institution Canon*, 51 Wm. & Mary L. Rev. 1053, 1055-56 (2009) (describing it as a "turning point" in the statutory interpretation debate and as occupying a "contentious place in legal history").

168 *Peter Pan Fabrics*, 274 F.2d at 489-90.

169 *Id.* at 490 (Friendly, J. dissenting).

170 *Id.* at 491.

pragmatic, measured, and driven by the dictates of the dispute at hand.

4. Delegated Copyright Lawmaking

Hand's embrace of judicial restraint as his overarching philosophy did not mean a complete abandonment of his common law mindset and judicial creativity, when permitted or required. Indeed, most simplistic accounts of Hand's copyright jurisprudence focus on this part of his judicial *oeuvre*.[171] The areas where Hand resorted to common law-style judicial lawmaking within copyright were not the areas where the statute was ambiguous or even silent, but seemingly unintentionally so. In those domains, as we have seen, his approach was to exhibit some fidelity to an unstated Congressional "scheme," which he then sought to discern in order to render his rule of decision compatible with it.[172] His lawmaking jurisprudence was instead in domains that the statute had intentionally chosen not to address, where such omission could be legitimately understood as a delegation of lawmaking to courts.

A prime area within this category is one that we have already discussed: the test for copyright infringement. Despite its centrality to the working of the copyright system, the copyright statute — amended and updated multiple times over its history — never once dealt with the appropriate test and standard for infringement, which was instead entirely a creation of the courts over time.[173] To Hand, it therefore represented fertile territory for judicial lawmaking, which he readily embraced.

Nichols is clearly the best-known case within this category, famous for Hand's creation of the abstractions framework, attempting to create a mechanism for courts to draw the line between idea and expression.[174] That he was proud of this framework is evidenced by the number of times he cited to it and reaffirmed it in his subsequent opinions, including in correcting lower courts' imprecise use its language.[175] One on occasion when the opinion (authored by another judge) of the panel that he was on attempted to clarify/modify it, he wrote a concurring opinion defending its clarity and continuing utility; and in subsequent opinions emphasized the absence of any modification.[176]

[171] Stephen H. Philbin, *Judge Learned Hand and the Law of Patents and Copyrights*, 60 Harv. L. Rev. 394, 400 (1947).
[172] *See, e.g.,* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929).
[173] *See generally* Balganesh, *supra* note 79, at 793-94.
[174] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[175] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 661 (2d Cir. 1939); Nat'l Comics Publ'ns. v. Fawcett Publ'ns., 191 F.2d 594, 600 (2d Cir. 1951).
[176] Shipman v. R.K.O. Radio Pictures, 100 F.2d 533, 538 (2d Cir. 1938) (Hand, J. concurring); *Dellar*, 104 F.2d at 661 ("So far as the defendants understand that *Shipman* . . . changes the doctrine of those cases, they are in error.").

This did not imply that Hand was unwilling to correct himself when needed. As was previously noted, he had adopted the erroneous position in *Hein* that proof of an infringement did not need a showing of actual copying, which the Second Circuit had affirmed prior to his arrival on that court.[177] In a later case, Hand admitted the error (though, not acknowledging his opinion on the district court, and seemingly referencing the prior second circuit opinion as the "we") and changed course.[178] And in so doing, went through an elaborate explanation for the prior error, instead of merely correcting it. Interestingly though, he located the erroneous approach and its correction in a misreading and re-reading of the copyright statute, despite it saying absolutely nothing about the issue directly:

> Our reasoning in Hein v. Harris . . . cannot therefore be confined to musical copyrights, for the same language covers all copyrighted productions; it can be defended only in case copyrights, like patents, are monopolies of the contents of the work, as well as of the right to manifold the work itself. That is contrary to the very foundation of copyright law, and was plainly an inadvertence which we now take this occasion to correct. . ..
>
> Verbally our error arose from not reading the words, "the same," in Rev. St. Sec. 4952, as referring back to the words, "the work." The "sole liberty of printing, publishing and vending "the work" means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean "the sole liberty" to create other "works," even though they are identical. Were it not so the man who first made and copyrighted a photograph under section 5(j) of title 17 U.S. Code, 17 U.S.C. § 5(j), could prevent everyone else from publishing photographs of the same object.[179]

In this observation, we see Hand invoking the language of the statute. Yet he does so in order to show that a "foundation[al]" principle of copyright was more than just a naturalistic precept that required correction.[180] Such correction from naturalistic premise would have been closer to the common law method, yet it would have had to carry the burden of a reason for the changed position. By instead premising the change on a misreading, Hand was in essence lowering that burden (for a reason), directly acknowledging the error, and noting that it was a correction — something that the process of common law change, wedded as it usually is to the declaratory theory, is rarely able to do.

The effort to justify the change as a misreading rather than as a simple common law correction also reveals how Hand viewed any judicial law-

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177 Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910); Hein v. Harris, 183 F. 107 (2d Cir. 1910).
178 Arnstein v. Edward Marks Music, 82 F.2d 275, 275 (2d Cir. 1936).
179 *Id.*
180 *Id.*

making within the area of copyright law as limited and potentially circumscribed by the terms of the statute. Even if the principle that he identified was one relating to the "foundation" of copyright, the question that the opinion consciously leaves open is whether that foundational character emanates, albeit implicitly, from the statute or was instead qualitatively independent.

Another area where Hand saw himself as having created the law was copyright's doctrine of joint authorship. As previously noted, his opinion as a district judge in *Maurel v. Smith* had adopted the English rule of "joint laboring in furtherance of a common design" as the core idea behind a joint work, and had been affirmed by the Second Circuit prior to his arrival.[181] When called upon to apply the doctrine to a musical composition that had merged the music and its lyrics, he chose to expand on his initial holding from the district court. Acknowledging that he had laid the foundation for the law in his earlier opinion, Hand proceeded to embellish it, noting that "it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are embodied in a single work to be performed as such."[182] For this proposition though, he cited nothing, again evincing a willingness to make law when tasked with that function.[183]

Hand therefore did not shy away from lawmaking within copyright law. To the contrary, he was exceptionally adept at it, and seemed to revel in the process, which echoes Gunther's observation that he "enjoyed" these cases.[184] All the same, he had to assure himself that the issue at hand was indeed one that Congress had intended to delegate to courts to develop incrementally. And in this process, he embraced the recognition not just that courts made law ("judicial legislation")[185] but that it was fully in keeping with the ideal of judicial restraint that was his overarching guiding principle, since when Congress had intended courts to freely expound on an issue, there simply was no overbearing need for such restraint.

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181 Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915); Edward B. Marks Music v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944).

182 *Edward B. Marks Music*, 140 F.2d at 267.

183 And to do so based on his own sense of what the law should be. Indeed, this observation was at odds with English law on the same point. *See* Levy v. Rutley, (1871) L.R. 6 C.P. 523 (Eng.) (noting that co-authorship needed "two or more acquainted persons working at the approximately same time.").

184 Gunther, *supra* note 4, at 269.

185 Frank, *supra* note 15, at 681 (noting how Hand held strong views on the topic). *See also* Fred V. Cahill, *Judicial Legislation*, 28 Ind. L. Rev. 282 (1952) (discussing the idea more generally at the time).

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In many ways, copyright law proved to be the perfect doctrinal area for Hand to give effect to the different elements of his judicial method and approach. The existence of a new statute (the Act of 1909) wherein Congress had intended to develop a scheme for the system, the statute's incompleteness — both deliberate and unintentional, and the persistence of foundational extra-statutory principles and ideas underlying the working of the statutory system, all allowed Hand to instantiate the central components of his approach into the development of a fairly extensive body of copyright opinions. And while it is true that judicial restraint and institutional deference formed the overarching themes of his worldview, he came to operationalize them in a fairly nuanced manner within copyright. It however remains to be seen whether this is capable of being translated into a coherent vision (or theory) of copyright and its functioning, a question to which the next Part turns.

III. HAND'S INSTITUTIONAL THEORY OF COPYRIGHT

Taking a step back from the details of Hand's copyright jurisprudence, it is worth asking if Hand did in fact embrace a unified/coherent account of copyright, one that might be characterized as his *philosophy* or *theory* of the area. It is today common to think of such theories/justifications are being heavily laced with ideological or normative positions on the subject.[186] Such accounts tend to favor either copyright plaintiffs (e.g., authors) or defendants in their justification for the system, or instead emphasize the roles of particular conceptual ideals such as utilitarianism, incentives, or autonomy.[187] In this narrow normative sense, Hand certainly did not have a dogmatic philosophical orientation towards the subject. He routinely sided with both plaintiffs and defendants, even on individual issues such as infringement.[188]

All the same, Hand did develop a coherent account of copyright over the course of his judicial career; one that crystallized relatively early on in his time on the bench and drew from his overall judicial mindset and approach, which he applied fairly seamlessly to copyright doctrine. This account is best described as an *institutional* one in as much as it took shape from the institutional dimensions of copyright[189]

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186 *See generally* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE (2014); WILLIAM F. PATRY, MORAL PANICS AND THE COPYRIGHT WARS 61 (2009).
187 *Id.*
188 *Compare* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) *with* Sheldon v. Metro- Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936).
189 For a general overview of institutionalism in copyright thinking more recently, see: Shyamkrishna Balganesh, *The Institutionalist Turn in Supreme Court Copy-*

To Hand, copyright was a "monopoly," a term and framing that he however did not associate with any pejorative connotation as such.[190] That monopoly was limited and lay "*only* in the power to prevent others from Copying the work.[191] The use of the term monopoly — instead of property or right — was seemingly deliberate. Whereas the terms "property" or "right" might have implied a naturalistic origin for the entitlement, a monopoly signaled a positivist genesis for the entitlement. Hand would note that in copyright "Congress ha[d] *created* the monopoly in exchange for a dedication."[192] Copyright was in the main then, a creation of Congress. All the same, this did not mean that Congress had exhausted the domain of specifying and regulating the nature and working of the monopoly. To the extent that the content of that monopoly was built from foundational principles, and Congress had chosen to carry them forward, those principles needed to be preserved. Consequently, as a functional matter this translated into two seemingly contradictory impulses. On the one hand, it was the courts' task to give effect to Congress's creation and thus glean its intent behind the complex "scheme" that Congress had attempted to put in place. Yet on the other, it was also the courts' role to safeguard the basic principles undergirding that monopoly, which Congress had chosen to retain as constant.

These twin impulses informed Hand's approach to copyright, with the former often dominating. Hand's default steered him in the direction of restraint — wherein he strove hard to glean a Congressional intent, or when ambivalent, worried about unsettling some unstated plan that Congress might have had in mind. Only when unequivocally within a domain where that risk was minimal (or non-existent), did he adopt a common law mindset that was expository and creative. Despite his default approach lying with the model of restraint, it is in the latter — i.e., the creative — domain of cases that his real "strengths" as a developer of the "system" came through, and is remembered to this day.

When he deployed the common law approach to developing copyright doctrine, his approach was hardly dogmatic or driven by a unified normative framework. Almost never did Hand speak of copyright as a mechanism of incentives, or as driven by an economic logic. Nor did he justify the system in terms of authorial autonomy or property rights. His doctrinal developments — on closer scrutiny — were instead driven by a generalist and trans-substantive emphasis.[193] His expositions of doctrine

right Jurisprudence, 2021 SUP. CT. REV. 417.

190 RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940).

191 *Id.*

192 *Id.* at 89 (emphasis supplied).

193 *See generally* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

routinely applied common sense judicial intuitions to complex doctrines in order to render them workable. The "abstractions" framework is a perfect example here, wherein he sought to highlight the arbitrary nature all line-drawing that copyrightability necessarily entailed, and exhorted judges to embrace that subjectivity.[194] Equally telling is his engagement with the process of establishing actual copying in infringement cases, where the rules and principles of circumstantial evidence often played a crucial role.[195] Similarly, he often analogized copyright infringement to a "tort," not necessarily in the sense of any particular tort doctrine, but instead to showcase how the understanding of wrongdoing was a core aspect of the system and it measure of recovery.[196]

Hand's theory of copyright was in many ways a clear precursor to the Legal Process approach to copyright, which began to take shape in the last decade of Hand's time on the bench.[197] Hand was therefore something of a transitional figure in the evolution of the area: accepting some of the premises of Legal Realism as they applied to copyright while recognizing its deficiencies and attempting to compensate for them through institutional measures. In the juricentrism that is often associated with a few of Hand's copyright opinions, his overarching (and dominating) emphasis on judicial restraint, deference to Congress, and a willingness to defer to democratically elected institutions is often missed — values that he brought to bear on copyright doctrine.

Unquestionably, Hand saw in copyright an area that fit rather well with his judicial instincts as well as his overarching views about the role of courts in the constitutional system. Despite of all of this, Hand appears to have approached the subject as an area of private law, an important respect in which he deviated from the Legal Process approach that would succeed his own. While it was true that Congress had "created" the copyright system and in the process had put in place a grand scheme for its operation, this fact on its own did not in his view render the normative content of the subject altogether different — or collectivist. Copyright was in the end an individual right — albeit one that took shape as a monopoly — and operated through the identification of a distinct wrongdoing (a "tort") in the nature of an infringement.[198] The private nature of the recourse underlying copyright was to Hand an integral part of the system, and one that he closely protected by often times awarding prevailing plain-

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194 *Nichols*, 45 F.2d at 122.
195 Arnstein v. Edward Marks Music, 82 F.2d 275, 277 (2d Cir. 1936).
196 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 52 (2d Cir. 1936); *RCA Manuf.*, 114 F.2d at 89.
197 *See* Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. Pa. L. Rev. 1101 (2020).
198 *See Sheldon*, 81 F.2d at 52; *RCA Manuf.*, 114 F.2d at 89.

tiffs and defendants attorney's fees.[199] Accepting the statutory dominance of copyright did not eviscerate the field of its private law orientation altogether nor of its private law driven normative content, a premise that the Legal Process approach would reject.

CONCLUSION

Hand's role in developing the canon of modern American copyright law is well-accepted. All the same, the reasons for his presence therein have received surprisingly little scrutiny. Most scholars outside the field have assumed, in keeping with Gunther, that it was Hand's fondness for the creative arts — literary, musical, and otherwise — that drew him to copyright, revealing why he "enjoyed" deciding them. Even if true, this explanation is at best partial and incomplete. It conceals and simplifies the complexity of Hand's judicial personality, philosophy and self-imagery, and their unique connection to copyright.

As I have argued, Hand's prominence within the copyright canon instead derives from an underappreciated affinity between the central tenets of his judicial method and the legal landscape of the copyright system. His lifelong commitment to judicial restraint and democratic legitimacy in lawmaking, coupled with a creative common law impulse to expound on the law, both found room for ventilation and development within copyright law. In first approaching the field as a confident non-expert, Hand saw within it self-contained similarities to other substantive areas of law, which allowed him to deploy his instincts in a robust and self-assured manner that served not only his conception of the judicial role but also the very content of copyright doctrine.

The legal philosopher Ronald Dworkin observed of Hand, who he had clerked for, as always preferring to "judg[e] a life by the *way* it is lived. . .not by what it has produced."[200] This observation rings just as true of Hand's greatness within the landscape of copyright law. His contributions therein are less — or not just — in the substantive doctrinal content of the opinions and decisions that he produced in individual cases. They are instead—and perhaps more importantly—in the *way* that he approached and reasoned through them, bringing to bear on them the full force of his judicial mindset and philosophy. And therein lies a crucial lesson that modern copyright judging and thinking would do well not to forget.

199 *Nichols*, 45 F.2d at 123; *Sheldon*, 81 F.2d at 56.
200 Ronald Dworkin, *Foreword*, *in* Reason and Imagination, *supra* note 23, at xi.