THE JUDICIAL METHOD IN COPYRIGHT

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This Essay, delivered as the 2023 Brace lecture, examines the role of the real unsung heroes of the modern U.S. copyright system: the federal judiciary. For the longest time, discussions of copyright policy and reform in the U.S. have altogether neglected the role that courts are meant to play in working copyright's substantive and procedural rules. These discussions have instead assumed a norm of passivity from courts, who are presumed to either engage in a mechanical application of the statute's text to decide disputes or instead make the law incrementally in common law style. In this Essay, I argue that in copyright matters, courts do something altogether different from both statutory interpretation and common law rule development. The "judicial method" in copyright instead involves (i) a complex self-understanding of the judicial role, one that is combined with (ii) an appropriate exercise of judgment from the applicable sources as well as (iii) an assessment of the system-wide consequences of individual decisions, which is then (iv) translated into principled reasoning. The Essay unpacks the origins, core elements, and motivations of each of these four steps to show how courts have engaged the copyright system over the last half century in a manner that has been anything but mechanical and workmanlike, despite scholarly and policy accounts that have underplayed its uniqueness.

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INTRODUCTION

Thank you to the Copyright Society and the organizers for inviting me to give the 2023 Brace Lecture. I have followed the lectures closely for the last several decades and learned greatly from them. The topic of my lecture for today, *The Judicial Method in Copyright*, may well strike you as somewhat odd coming from someone who is not a member of the judicial branch. All the same, as those of you who know about my work will readily recognize, a great deal of my writing in copyright has tried to better understand and appreciate the role of courts in copyright and the ways in which they contribute to the working and development of the system.[1]

There is an important sense in which the thesis that I am going to frame and attempt to defend today is both intuitive and, at the same time, radical and controversial. It is the claim that when engaged in copyright adjudication, courts deploy a unique method of analysis, reasoning, and decision-making. The method is neither "statutory interpretation" nor "common law adjudication," as those terms are typically understood, and to describe it in either category is to miss its nuance, complexity, and situation-specificity that resulted in its very origins. The method is uniquely tailored to the nature of copyright law and its pluralist (and often-competing) normative ideals, as well as the institutional complexity of the modern U.S. copyright system, which boasts of multiple sources of law and law-makers.[2] It is instead best described and understood as a form of "principled elaboration" that attempts to balance two competing demands on courts in copyright cases: *faithful agency* with *creative necessity*.

The history of copyright abounds with stories about copyright reform. Accounts of these reforms, whether minor or major, almost always focus on the legislative side of copyright, which on this side of the pond is inevitably on the role of Congress in shaping and re-framing copyright doctrine in the statute. Reform and change in copyright have, over history, come to be associated in both the specialized and popular mindsets as a *legislative* exercise. A prominent example of this emphasis is to be found in Mark Twain's often-quoted line that "[w]henever a copyright law is to be made or altered, then the idiots assemble."[3] Lest there be any ambiguity about who he was referring to, Twain added for emphasis: "[r]eader, suppose you were an idiot. And suppose you were a member of Congress. But I repeat myself."[4] This focus on copyright reform as a legislative exercise is neither wrong nor misguided, but in my view, necessarily incomplete. It is incomplete because it assumes that regardless of the content or manner of the

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[1] *See* SHYAMKRISHNA BALGANESH, THE TRANSFORMATION OF AMERICAN COPYRIGHT LAW: FROM PRIVATE LAW TO LEGAL PROCESS (forthcoming 2025).

[2] *See* Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1113-23 (2020).

[3] MARK TWAIN, MARK TWAIN'S NOTEBOOK: THE COMPLETE WORKS OF MARK TWAIN 381 (1935).

[4] 2 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 724 (1912).

legislation that will emerge from the process, it will be applied unproblematically and perhaps mechanistically by courts.

Acknowledgment and conversation about the "judicial role" in the copyright system have never been sustained and direct. During the comprehensive reform of 1976, not one of the Copyright Office's 34 revision studies dealt directly with the role of the judiciary.[5] This is, of course not to say that courts were ignored; to be sure, the studies all discussed judicial decisions in specific areas. Yet they never thought it wise or worthy to ask what it is that courts do—and ought to do— in copyright cases. Instead, they seemed to assume that courts would simply do as told to in the statute. Indeed, these studies even examined the role of the Copyright Office and the discretion of the Register in the registration process.[6] But no similar study of courts emerged. This trend continues to this day. In 2013, when then-Register Maria Pallante made her infamous case for the next great Copyright Act, it was surprisingly bereft of any serious discussion of what the courts had been doing with the Act of 1976 for multiple decades.[7] Instead, it painted them as confused, lost, and in desperate need of guidance from Congress and experts.[8]

This neglect is unfortunately not limited to formal reform efforts alone, such as those advanced by Congress and the Copyright Office. The American Law Institute (ALI), a celebrated institution that I am proud to be a member of, has long been about aiding judges through its clarification and simplification of the common law.[9] And so, when it embarked on the project of restating federal copyright law, I saw great value in the initiative, hoping that it would bring greater attention to the role of the judiciary in the copyright system and the method that judges deploy therein. My hope was quickly dashed when it became abundantly clear that the project saw the judiciary as but a means to achieve its vision of what copyright should become, not problematic on its own.[10] If Congress in 1976 and the Copyright Office in 2013 wanted courts to mechanistically apply their directives in cases, the ALI's Restatement instead wanted courts to be creative and move the law in their chosen direction—but without a clear account of their method and role in the system. Repeated efforts to engage the judicial method as part of the restatement went unheard, and the project is almost done.[11]

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[5] *See generally* SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. OF THE JUDICIARY, 86TH CONG., S. RES. 53, NO. 1-34.

[6] *See, e.g.*, CARUTHERS BERGER, COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 18: AUTHORITY OF THE REGISTER OF COPYRIGHTS TO REJECT APPLICATIONS FOR REGISTRATION (1959); BENJAMIN KAPLAN, COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 17: THE REGISTRATION OF COPYRIGHT (1958).

[7] Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

[8] *Id.* at 322-23.

[9] *See generally* THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY (Andrew S. Gold & Robert W. Gordon eds., 2023).

[10] Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285 (2021).

[11] *Id.* at 308-24.

My point here is that neither approach is beneficial or accurate. Courts in copyright cases do not just apply the statute, nor indeed do they make up the law in the style of Justice Cardozo to give effect to their vision for copyright. They instead embark on a process of reasoning that involves four interrelated steps: (i) ascertaining their *role* within the copyright system as it relates to the question at hand, (ii) examining the guidance discernible from prior sources to engage in a form of *judgment* on the question, (iii) engaging in a predictive *assessment* of the consequences of a decision for copyright's creative ecosystem, and (iv) translating that judgment and assessment into *principled* reasoning.

This method—of principled elaboration—did not, of course, emerge overnight. Its seeds were planted in the statutory origins of the copyright system but cemented over time as copyright law grew more elaborate, detailed, and indelibly complex. Even prior to the passage of the Copyright Act of 1976, the method had begun to find acceptance among several prominent federal judges, most notably Learned Hand in the second half of his time on the bench.[12] Under the regime that emerged from the 1976 Act, the method of principled elaboration soon crystallized.

In what follows, I will attempt to elaborate on the method: its origins, core elements, and motivations. Before doing so, three important qualifications are in order. First, my claim is obviously not that the method is universal (or, indeed, near-universal) within copyright law. It is instead that when viewed holistically, the jurisprudence of copyright law emerging from our federal courts—as a whole—reveals a significant commitment to the core ideals of the method, even if courts and judges do not always exhibit strict adherence to it. Second, and relatedly, it is also not that judges always consciously follow the steps that I outline in the method; much of its acceptance and adherence is obviously confounded and aided by other variables such as precedent and judicial norms, which, in my account have only served to entrench the working of the method, albeit in sub-conscious form at times. And third, yes, there is a normative aspect to my descriptive account. My claim is both that the pattern I describe is embedded in the copyright jurisprudence of the federal judiciary and that courts would do well (and better) to recognize it and embrace it with all its limitations rather than resist its very existence in the name of other accepted techniques such as "statutory interpretation", "purposivism", "textualism" and "plain meaning".

The principal foil for my argument here is the view that appears to be emerging from the Supreme Court (or at least some members of it) that the judicial role in copyright cases is a decidedly narrow one. The majority's opinion in *Star Athletica v. Varsity Brands* highlights this view, where the Court, in answering a crucial copyright question, emphasized that its approach was "not a free-ranging search for the best copyright policy" but that it was all about interpreting the statute where the inquiry "begin[s] and end[s] … with the text" and its "clear

[12] *See generally* Shyamkrishna Balganesh, *Learned Hand's Copyright Law*, 70 J. COPYRIGHT SOC'Y U.S.A. 17 (2023).

meaning." [13] While Justice Thomas wrote the opinion, it was joined by four other members of the Court. He repeated this view in his dissent in *P.R.O. v. Georgia* a few years later, where he criticized the majority for "meddling" in copyright policy and noted that it had thereby "strayed from its proper role." [14] I think these observations, which are shared by a few other justices, reveal a lack of appreciation for the role that the lower judiciary has long played in copyright and the method that they have deployed in that process. That is my launching point.

I. ORIGINS OF THE METHOD: A BRIEF HISTORY

Judicial involvement in the copyright system is at least as old as copyright law itself. Even prior to the passage of the Statute of Anne, courts played a crucial role in developing the law relating to a recovery for the unauthorized publication of a work.[15] Under the Statute of Anne, and later under the Act of 1790 on this side of the Atlantic, that practice largely continued. Indeed, it continued through much of the nineteenth century, despite the recognition that copyright was statutory and that Congress was defining the subject matter, nature, and form of protection being afforded to creative works. All the same, courts approached the subject as just another branch of the common law. The mere fact that Congress had initiated the law of copyright and played a role in its development had little effect on courts' reasoning, for which first principle and precedent dominated as sources of authority.[16]

While this emphasis on treating the subject as common law—despite the presence of the statute—may seem odd by modern standards, it is crucial to appreciate that statutes were barely seen as sources of law at the time. Christopher Columbus Langdell, famous for the case-law method, saw legislation as "haphazard" and books on legislation as "in no sense … law book[s]".[17] Unsurprisingly, this view made its way to copyright law as well at the time. Eaton Drone, the author of the leading copyright treatise of the era, *Drone on Copyright*, began his treatise by noting the existence of "statutory provisions" that were "[m]eaningless, inconsistent, and inadequate" in the field, which he attributed to their having "been often drawn by incompetent persons."[18] The law of copyright was thus about juridical principles drawn from the common law, and courts were

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[13] Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 408 (2017).

[14] Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 292 (2020) (Thomas, J., dissenting).

[15] *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 349 (1998) ("By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript.").

[16] Balganesh, *Transformation*, *supra* note 2, at 1125-34.

[17] Christopher Columbus Langdell, *Dominant Opinions in England during the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, during That Period*, 19 HARV. L. REV. 151, 153 (1906).

[18] EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS v (Boston, Little, Brown & Co., 1879).

to do just what they had long been doing in property, torts, and elsewhere in developing the field.

This tendency continued into the early twenty-first century. Writing in 1908, Roscoe Pound famously complained about the "contempt" that lawyers and courts had come to develop towards legislation.[19] He noted how courts "inclined[d] to ignore important legislation; not merely deciding it to be declaratory, but sometimes silently assuming that it is declaratory without adducing any reasons, citing prior judicial decisions and making no mention of the statute."[20] Consequently, the enactment of the Copyright Act of 1909 on its own produced no major change in courts' approach to the subject. Foundational principles emanated from prior precedent and the reasoning therein. Indeed, we see this even in the early opinions of arguably the greatest copyright judge to have served on the federal bench, Learned Hand, who took the bench barely a year after the enactment of the new statute.[21]

All the same, it was not the enactment of the Copyright Act of 1976 that triggered the judiciary's self-conscious adoption of a "method" in adjudicating copyright cases. The seeds of that process were instead sown a good two decades before the passage of the new statute. What spurred this was a post-New Deal (and post-*Lochner*) mindset that forced judges to reflect on their appropriate "role" in a democratic legal system with multiple sources of legitimacy and expertise. An early advocate of this vision was Justice Felix Frankfurter, a progressive New Deal insider who consistently advanced a vision of judicial conservatism.[22] Copyright law did not escape Frankfurter's vision. In a decision written in 1943, barely a few years after he joined the Court, *Fred Fisher Music Co. v. M. Witmark & Sons*, he made his vision of the judicial role in copyright fairly clear.[23] The question before the Court was a seemingly straightforward one: did the provisions of the 1909 Act permitting an author to contractually assign their copyright term allow such authors to assign their renewal terms even before such renewal was sought and obtained? On its face, the question was one of statutory interpretation. Upon undertaking an elaborate and detailed review of the legislative history behind the relevant provisions, Frankfurter—writing for the majority—found Congress to have intended no discernible restriction on authors' powers to assign their renewal terms to others pre-renewal. Yet, the defendants in the case pushed a further argument: that such a limitation was inherent in copyright "policy," which was about protecting the author against irresponsible assignment to third parties, which might, in turn, impact their heirs in the long run.[24] This invited Frankfurter to turn to his views on the judicial role:

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[19] Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908).
[20] *Id.*
[21] *See generally* Balganesh, *Learned Hand's Copyright Law*, *supra* note 12.
[22] Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973).
[23] 318 U.S. 643 (1943).
[24] *Id.* at 656.

> It is not *for courts* to judge whether the interests of authors clearly lie upon one side of this question rather than the other. … *We* do not have such assured knowledge about authorship, and particularly about song writing, or the psychology of gifted writers and composers, as to justify us *as judges* in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others.[25]

As should be obvious, Frankfurter's concern was not that the question was irrelevant to the issue before the court or indeed, that it was incapable of being ascertained. It was instead that it was not the *court's* role to do so. Frankfurter, of course, had little direct influence on copyright doctrine during his time on the Court. Yet, his vision of the judicial role came to be translated rather directly into copyright jurisprudence by his close confidante and ideological ally, Judge Billings Learned Hand.

Hand and Frankfurter were longtime correspondents and shared many views. The most notable among them was a commitment to "judicial restraint," which Hand adhered to more steadfastly than did Frankfurter.[26] Hand served for two decades on the Second Circuit before becoming its chief judge in 1948. During this time, as many have observed, Hand effectively developed the core of American copyright law through his innumerable opinions on the subject (about 60 in total, excluding opinions where he was on the panel but did not author an opinion). While scholars have paid significant attention to Hand's substantive views on copyright questions, ranging from the idea/expression dichotomy to the infringement analysis, what is often missed is that in so expounding on copyright doctrine, Hand developed the outline of what would become the accepted judicial method of deciding copyright cases. Taking a step back and examining his overall collection of opinions in the field, we notice a few key moves that Hand committed himself to – which would become the mainstay of the modern judicial method in the field.

II. HAND'S JUDICIAL METHOD IN COPYRIGHT

Much has been written about Learned Hand's judicial method more generally, and I do not want to repeat that. I have elsewhere described his method as that of "empowered incertitude." [27] My goal here is to lay out what was unique about his judicial method when applied to the domain of copyright law and which has stood the test of time.

The first—and most obvious—element of his method was a recognition that the judicial role in copyright cases was neither unlimited (as it was in the common law) nor fully constrained (as it was in ordinary statutory interpretation). It was

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[25] *Id.* at 657 (emphasis supplied).
[26] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xii, 42 (2010).
[27] Balganesh, *Learned Hand's Copyright*, *supra* note 12, at 21.

instead contextual and tailored to the nature of the question before the court, which confounded copyright law in important ways. Copyright was built on general foundational principles, many of which were informed by other areas of the law, and the judge's role was not to ignore this reality in the banal search for a legislative intent. All the same, when Congress had a very specific directive in mind and had given due consideration to a question, it was not for the court to second-guess that thinking but instead to harmonize it with the working of the rest of the copyright system. It is this pragmatic (rather than dogmatic) view of the judicial role in copyright that explains why Hand was at once able to exhibit the judicial creativity we today extoll in *Nichols v. Universal Pictures Corp.*[28] and at the same time remain adamant that the misappropriation doctrine had no role whatsoever to play at the peripheries of the copyright system because of its suspect origins. The judicial role in copyright was neither defined nor fluid, but instead situational and itself an important judgment call that Hand saw judges as needing to make.[29]

The second element of Hand's method of adjudicating copyright cases involved a willingness to appreciate and calibrate the level of guidance on a question that could be obtained from prior sources. He was very clear at times that the literal text of the statute could not be blindly followed since judges needed to engage the goals (or "policy") of copyright law as captured in the statute.[30] At other times, he refused to read an unstated intent into the words of the statute when he felt that Congress had something in mind. But the statute was not his only—even main—source of guidance, nor was it precedent, in the strict sense of applicable case law. Those sources needed something that was often difficult to articulate but nevertheless crucial: *judgment* in *elaboration*. Often, such judgment was little more than an application of the judge's commonsense intuitions. Yet, it was an unquestionably individual, personal, and an integral part of the judicial task. In his engagement with the multiplicity of formal sources, what is readily evident in Hand's oeuvre is his unwillingness to treat any/all of them as dispositive in the mechanical sense of the term.

A third component of Hand's approach, which followed somewhat naturally from the calibration of the judicial role as well as his recognition of the need for judgment, was a belief that judging required paying attention to consequences. Not consequences in the broad and open-ended sense of the term, but the consequences of the decision and rule on the working of copyright. It is crucial to appreciate what this commitment was and was not. It was not some simple examination of how lower (and future) courts would apply a decision in subsequent cases. Instead, it was a systemic view to try to appreciate and assess how the rule of decision involved might interact with other parts of the copyright system and, in that process, with the system's goals. Hand's lesser-known

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[28] 45 F.2d 119 (2d Cir. 1930).
[29] Balganesh, *Learned Hand's Copyright*, *supra* note 12, at 25.
[30] *Id.* at 50.

decision in *RCA Manufacturing v. Whiteman* typifies this approach.[31] The case involved a common law copyright claim brought by an orchestra conductor against a broadcaster. Recognizing that the statute was of no use in protecting the sound recording at issue, the plaintiff sought protection under a common law copyright claim for a public performance. Hand denied the claim but, in doing so, did not just rely on the formal logic of what we today call statutory preemption. Instead, it was interwoven with the concern that to recognize the plaintiff's claim would set up an obvious end-run around the statute's delicate balance and allow for a "perpetual though partial, monopoly" which he saw as contrary to the "policy" of the statute and the goals of copyright derived from the "Constitution."[32]

Finally, Hand's copyright opinions paid particularly acute attention to translating these ideas of judicial role, judgment, and consequence-sensitivity into workable legal principles. To be sure, this was much more than just a form of ex-post rationalization, or window-dressing, as the Legal Realists would call it.[33] It was instead a firm commitment to what might be best described as the basic intelligibility of law from an internal perspective: a belief that legal reasoning—through the language, concepts, ideas, and devices of the law—brought something important to bear on the vitality and continuity of the legal system. In an important way, Hand's much-cited opinion in *Nichols v. Universal Pictures* epitomizes this aspect of his judicial method. Hand therein famously developed what would come to be called the "abstractions" test for working the idea/expression dichotomy in individual cases.[34] All the same, it is crucial to note his commitment to each of the aforementioned ideals. He undoubtedly saw it was the judicial role to police the line between idea and expression, noting that courts "have to decide how much, and while we are as aware as anyone 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."[35] The principle that he relied on was drawn from the interstices of prior precedent, yet developed through Hand's judgment of how it should work in practice. Indeed, this was what caused him to famously observe that "[n]obody has ever been able to fix that boundary [between idea and expression], and nobody ever can."[36] That observation was neither self- evident nor obvious and involved acknowledging the role of judgment in applying the principle. And Hand's whole basis for developing the abstractions test was his recognition that without it, defendant-plagiarists might be able to avoid liability

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[31] 114 F.2d 86 (2d Cir. 1940).
[32] *Id.* at 89.
[33] Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997) (describing that from the realist perspective, judges "rationalize [decisions based on their personal values] after-the-fact with appropriate legal rules and reasons").
[34] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992).
[35] Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).
[36] *Id.* at 121.

by making minor changes to their work, which would, in turn defeat the very purposes of copyright—an undeniable engagement with the consequences of the decision.

But in doing all of this, Hand's reasoning was decidedly internalist, couched in the language of principle. This is most obvious when Hand turns to applying the abstractions test to the factual record, where the discussion is couched in terms of "originality" and the lack thereof, "ideas," the dangers of a "monopoly," and the role of the "public domain." [37] Hand thus felt it important that the basis of his judgment be couched in terms of copyright principles so that it could be seen not just as rational and coherent but more importantly, as workable in the future. Reasoning through principle, in addition to imbuing the analysis with an internal intelligibility, also rendered it replicable in similar situations. And this was an overbearing concern that formed the fourth element of Hand's judicial method in copyright cases.

III. THE JUDICIAL METHOD AND THE COPYRIGHT ACT OF 1976

By all accounts, the enactment of the Copyright Act of 1976 was a watershed moment in the story of U.S. copyright law. While the process through which it was finalized took over two decades, its substantive content was equally revolutionary. Describing this feature, then-Register Barbara Ringer famously remarked that it represented an altogether "new philosophy" in the development of U.S. copyright law.[38] This *new philosophy* came to be captured in a few discernible changes: *first,* the level of detail contained in the statute: whereas prior statutes were sparse in the recognition that judge-made law was to co-exist side-by-side with the legislation, the new Act was detailed, complex, and regulatory in design; *second*, in it, Congress was undeniably making a statement: that it was the primary lawmaker in the field, that legislation was the principal source of copyright law in the federal system, and that even for areas best left to courts, its imprimatur and acquiescence were desirable attributes; and *third*, that the Copyright Office was to play a new and invigorated role in managing and administering the complexity of the new system.

Congress even did something unique in enacting the statute in that it produced a detailed report that would form a part of the Act's expository legislative history. This document, clearly designed by Congress to form an interpretive guide to the statute, was intended to assist any reliance on the wording of the statute by reference to what Congress had "intended" behind the language of individual provisions. Intentionalist interpretation was thus a core component of the Congress's design philosophy in this new enactment.[39]

There was nevertheless a simplicity and naïveté built into the design of the statute, for all its novelty and complexity. And this was its vision of the judicial

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[37] *Id.*

[38] Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L.S. L. REV. 477, 479 (1977).

[39] H.R. REP. No. 94-1476 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659.

role. In all the voluminous legislative history accompanying the statute: the Congressional reports, the Revision Studies, the Register's multiple reports, and the like, missing altogether was any discussion—however nascent or undeveloped it might be—of the role that courts were to play in the system envisioned by the new Act. What were courts to do in copyright cases under the new Act? Were they to continue doing what they had been all along under the prior regime, or something new and different in the changed legislative and administrative landscape? Such limited discussion of courts as there was in the legislative history simplistically assumed that they would find a way to adapt to the new landscape. Nowhere was this naïveté more obvious than in the fair use section of the statute. Recognizing that the doctrine had been judicially created and managed for over a century, Congress concluded that it was best left as a common law doctrine for courts to develop incrementally.[40] All the same, Congress could not resist saying something about the doctrine to guide courts: distilling the prior judge-made law into four factors before exhorting them to do what they had been doing before.[41] Yet, the irony was obvious: telling courts to continue doing what they had been doing before was one thing; telling them *how* to continue doing what they had been doing before was another. It was tantamount to a parent telling a child in a candy store to pick whatever candy the child desired, as long as it was in yellow packaging and orange-flavored, which the child was known to have chosen before. In being told both *what* and *how* to do something, were courts to prioritize the what over the how, or vice versa?

Yet, this is where the method originally developed by Hand revealed its resilience. Each of its elements was readily adaptable to the new regime and its shifting balance between judge-made and statutory law. By incorporating institutional questions into its very working and at the same time preserving the centrality of "judgment" to the process of adjudication and reasoning therein, the method would prove to be an excellent starting point for courts looking to re-calibrate their role in the new regime, where Congress had unquestionably altered the status quo without elaborating on its vision for their role therein.

A. A. Judicial Role Agility

It has long been recognized that no two statutes are ever created the same, even when they embody identical verbiage. Less commonly realized, however, is the fact that even within a single statute, different provisions often call for different judicial roles. Sometimes, this variation can emerge from a conscious design choice made by the drafters of the statute. At other times, it can come about through necessity in light of the nature of the issue being dealt with. Much as Congress strove hard to make the Act of 1976 comprehensive, it nevertheless spoke to different issues and topics in different registers, often not by design but simply out of necessity. Consequently, when courts confronted these variations,

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[40] *Id.* at 66 ("[C]ourts must be free to adapt the doctrine to particular situations on a case-by-case basis").
[41] *See* 17 U.S.C. §107 (2020).

they were forced to address a preliminary question: what, indeed was their role within the copyright system—as it pertained to the issue before them? Even if "faithful agency" required them to recognize the dominance of the statute within the field, the precise contours of that agency were hardly pre-determined.[42] Under the new regime put in place by the 1976 Act, courts, therefore, recognized that there were domains where their role demanded more than just parsing the language of the statutory text. At times, indeed where the statute was singularly unhelpful, even if it purported to address the issue, it necessitated ignoring the statute.

This produced the first dominant feature of the judicial method that courts came to adopt in copyright matters—a nimbleness and agility in the self-conception of their role. Courts came to understand their role within the copyright system as being far from unidimensional. At times, it required them to do no more than search for Congressional intent as manifested in the text and the legislative history; at other times, it required them to find a way of integrating elements of the statute with foundational first principles, and at yet other times it allowed and necessitated their wholesale abandonment of the statute in favor of such principles. In each iteration, though, their role was markedly different. Judicial engagement with copyright questions under the new regime thus involved courts ascertaining what role they were to adopt for the copyright question before them. Or, put simplistically, it involved their figuring out what "hat" to wear while addressing the issue.

Invocations of the fair use doctrine elicited this agility early on. Recall that the structural dilemma underlying the fair use provision was that Congress had purported to leave the development of the law to courts while specifying *how* they were to go about that task. In a few early cases, courts had to choose between the how and the what. And here, they embraced the role of lawmaker, recognizing not just that Congress had identified that role for them but that it was a role that was naturally theirs in light of the past. An early—and particularly good—example of this was to be found in the district courts in the Southern District of New York, where one judge in particular readily embraced this judicial role. That judge was Pierre Leval. *Salinger v. Random House* was a case that was decided by the district court in 1986.[43] And while it is today remembered for having been reversed by the Second Circuit, it was nevertheless bold. And this boldness was not in its application of the fair use doctrine to the facts, which the Second Circuit (perhaps rightly) disagreed with. It was instead in its willingness to pay minimal attention to the statute, recognizing it to have been "distilled from the common law" and therefore presumptively affording courts significant leeway to develop and apply the fair use doctrine situationally.[44] Despite the reversal, Judge Leval's boldness never receded. Less than two years later, he repeated the approach again in *New*

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[42] For an overview of the faithful agency idea in statutory interpretation, *see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112-17 (2010).
[43] 650 F. Supp. 413 (S.D.N.Y. 1986).
[44] *Id.* at 420.

Era Publications v. Henry Holt, noting rather explicitly that the statute "provides no real instruction" beyond recognizing the need for a balance between the justification for copying and the creator's exclusivity.[45] He was, of course, reversed again. But that embrace of the creative judicial role left an imprint on fair use, and as we in the copyright world know, the rest is history.[46]

On the other hand, when the copyright question reflected a delicate compromise between competing interests that had been put into a statutory bargain, courts recognized the need for them to act in preservation of that bargain. A prime example here is the opinion of the D.C. Circuit in *CCNV v. Reid*.[47] When presented with the question of how to determine if a creator was an employee or an independent contractor for the statutory work made for hire doctrine, the court chose what it called a "literal" interpretation of the terms, "as most consistent with the language, history, and policies" of the statute.[48] Of course, this literalism did not mean some commitment to plain meaning since there simply was none. The court was expounding on the statute but adopting a conception of its role that was limited to explicating Congress's vision in the bargain. A clear contrast to its role in fair use. It should probably come as no surprise that the circuit judge in the case would soon become one of the most influential copyright justices on the Supreme Court: then-Judge Ruth Bader Ginsburg.

In contrast to fair use and the work made for hire doctrines, both of which found mention in the statute, were copyright questions with *no* statutory guidance. Here, courts embraced their lawmaking role in full measure, evincing the kind of creativity seen in the common law. The Second Circuit's decision in *Computer Associates v. Altai* exemplifies this approach.[49] Seeing the test for copyright infringement as entirely judge-made, the court meticulously adapted the doctrine for the world of computer software and developed the abstraction-filtration-comparison test somewhat out of whole cloth in order to achieve "the necessary balance between creative incentive and industrial competition".[50] *Altai* is in an important sense a continuation of *Nichols*, and represents an altogether different judicial role *avatar*.

What makes this judicial role ascertainment in copyright somewhat unique is that courts arrived at their conception of the appropriate role *inductively*, i.e., from the context of the dispute, the applicable law, and elements of inter-branch diplomacy that they could discern from the legislative history of the copyright statute. And I want to emphasize how this approach is in stark contrast to some

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[45] 695 F. Supp. 1493, 1500 (S.D.N.Y. 1988).

[46] This was through Judge Leval's influential article, which formed the basis of the Supreme Court's decision developing the idea of a transformative use. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[47] Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988).

[48] *Id.* at 1494.

[49] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

[50] *Id.* at 696.

recent efforts by the Supreme Court to identify a unified "judicial role" for courts in copyright cases, which is unsurprisingly narrow and inflexible. Unlike the modern Court, they did not arrive at a conception of the role-based exclusively on an *a priori* view of their institutional role within the legal system. It was instead driven by a seeming recognition that courts had always played *multiple roles* in the development and working of the copyright system.

Rarely ever do courts openly acknowledge this role variation in their opinions. A notable exception is the Second Circuit's opinion in *Capitol Records v. Redigi*, which had the following to say about the judicial role:

> The copyright statute is a patchwork, sometimes varying from clause to clause, as between provisions for which Congress has taken control, dictating both policy and the details of its execution, and provisions in which Congress approximately summarized common law developments, implicitly leaving further such development to the courts. The paradigm of the latter category is § 107 on fair use… [In §109(a)], Congress dictated the terms of the statutory entitlements.[51]

The author of that observation was once again Judge Leval, for whom the judicial role in fair use cases was therefore markedly different from what it was in other areas where the statute had to be "interpreted".

B. Balancing Guidance and Judgment through Elaboration

Of course, identifying the appropriate judicial role required for a question did not in itself specify the manner in which that role was to be exercised. And this is where courts in copyright matters exhibited a somewhat unique approach. The appropriate judicial role obviously required identifying the relevant set of sources/authorities that a court was to utilize (precedent, statutory text, legislative history), but more than that, it necessitated courts, according to those authorities, the requisite level of deference in their decision-making. Here, courts abandoned a pedantic or formulaic approach to the issue and, in its place, adopted one that emphasized a continuing role for their judgment in deriving an answer to a question. Lest the idea be thought of as self-evident, it deserves some elaboration.

The notion that judges exercise judgment is often seen as little more than a syllogism. Yet, it is rarely acknowledged or indeed analyzed. Judgment involves bringing to bear on a question that presents competing options to choose from, an ability to exercise one's rational will. We don't need to get into the philosophy or metaphysics of judgment to understand that, at its core, it is a commitment to the agency of the actor making a decision. Judging is, therefore, much more than just doing what one is told, even when given detailed instructions. And it is this function that the federal courts have executed with real aplomb in all varieties of copyright adjudication. Regardless of the amount of guidance and instruction available to them on a copyright question, courts have invariably recognized the

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[51] Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 664 (2d Cir. 2018).

need for them to apply common sense, experience, and trans-substantive ideas from other domains to their copyright decision-making. Most importantly, though, they have owned their exercise of judgment and never hesitated to acknowledge it as part of their legitimate adjudication function.

An early example where courts came to recognize the need for their exercise of judgment, despite all that the statute and its legislative history said, was in the area of designs of useful articles and the vexing issue of "separability."[52] As is well known, the Act of 1976 offered up an elaborate definition of when the artistic elements of such designs were protectable, as well as a two-step test for operationalizing the definition. In the accompanying legislative history to the provision, Congress added further guidance to the statutory definition by emphasizing that its intention was to identify two forms of separability: physical and conceptual.[53] Despite this seemingly extensive guidance on the question, courts applying it recognized that their engagement with the law needed more. Now, courts could have done one of two things. On the one hand, they could have identified the "plain" or "clear" meaning of the statute and applied their intuitions in the pretense of merely interpreting and construing the statute. On the other hand, they could candidly acknowledge that the application of the available guidance needed more and set out what the more was. And thankfully, they chose the latter path.

In a series of early decisions on the questions, circuit courts sought to frame the law using their vision of how one might go about differentiating between the useful and artistic aspects of the design of a useful article. To be sure, they were not uniform and produced a good deal of substantive disagreement. Yet, whether it was Judge Alarcon in *Poe*,[54] Judge Oakes in *Keiselstein-Cord* and *Brandir*,[55] or Judge Newman in *Carol Barnhart*,[56] one overarching theme was unmistakable and is often missed: elaborating the law entailed more than just adhering to the guidance offered by authority. Instead, it additionally required their exercise of judgment in trying to develop a framework to operationalize the guidance, an elaboration that they had to make and own. To describe what they were doing here as statutory interpretation misses the mark completely, yet to call it common law (even if interstitial) is equally deceptive since it accepted the primacy of the statute but attempted to balance the judge's exercise of judgment against the constraint of the statutory guidance.

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[52] *See generally* Robert C. Deniola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1982).
[53] H.R. REP. NO. 94-1476, at 55.
[54] Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984).
[55] Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987).
[56] Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985).

Some have called this "statutory common law" or "delegated lawmaking", terms that miss an important nuance when applied to copyright adjudication.[57] These phrases adopt something of an *intentionalist* stance on the assumption that the legislature "specifically *intended* that the relevant legal norms in a specific area are to be developed by the federal courts in accordance with the incremental decision-making process of the common law."[58] Yet even a cursory scrutiny of what the courts were doing on separability reveals this to be a clear myth. With an elaborate definition and accompanying expository guidance, Congress surely did not foresee—let alone intend—that courts would have to develop the law applying their independent judgment. Nor did courts purport to speak in terms of either a Congressional intent or of a delegated common law approach. They were merely working the law and elaborating on it as needed for this task, making a set of intermediate choices to serve that purpose.

Another prominent example of this elaborated judgment is to be found in the area of the joint works doctrine. The Second Circuit's often-cited opinion in *Childress v. Taylor* was the earliest effort by a court to engage with the doctrine.[59] While copyright's rules pertaining to joint authorship have existed for over a century, it was only in the 1976 Act that Congress first addressed it by providing a definition of a "joint work" and allowing for ownership rules to be calibrated to joint authorship.[60] It, however, went one step further and, much like it did with separability, included additional guidance in the legislative history. In *Childress*, Judge Newman was presented with the question of whether a collaboration between a playwright and a producer had produced a joint work, which the playwright vehemently denied.[61] The case thus revolved around the nature and manner of the collaboration between the parties and the issue of whether the parties possessed the necessary "intention" to be joint authors at the time of such collaboration.

The legislative history purporting to explain the definition of a joint work suggested that a "collaboration" between authors, if shown, could eliminate the need for an independent showing of intention/knowledge when an author had produced their contribution in isolation and then merged it.[62] The House Report's careful use of the disjunctive "or" between the two categories made this readily apparent. A simplistic reading of the Report would have accepted this dichotomy. Yet, to Judge Newman, this was problematic. Acknowledging that the legislative history "appear[ed] to state two alternative criteria," he nevertheless noted that "it is hard to imagine activity that would constitute meaningful 'collaboration'

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[57] Thomas W. Merrill, *The Common Law Powers of Federal Court*, 52 U. CHI. L. REV. 1 (1985).
[58] *Id.* at 40.
[59] Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991).
[60] 17 U.S.C. §§101, 201 (2020).
[61] *Childress*, 945 F.2d at 502-04.
[62] H.R. REP. NO. 94-1476, at 120.

unaccompanied by the requisite intent on the part of both participants."[63] Intention was thus essential to all joint works since, without it, policing a collaboration would be complicated. And then, *Childress* proceeded to set forth "standards" for assessing such intention, which have since been developed into what courts around the country described as the "objective indicia." [64]

Many, including myself, have criticized the substance of Judge Newman's analysis in *Childress*.[65] But if we leave that to one side and examine his method – it is truly deserving of special commendation. The court had enough and more guidance on the question before it. He could have simply ignored the legislative history and focused on the text of the statute, thereby avoiding all controversy. (Theories for ignoring the legislative history abound today). Instead, he engaged it and brought the centrality of common sense to bear on the expository task. The guidance was thus tempered by his judgment, which he did not hesitate to acknowledge. Was Judge Newman simply interpreting the text in this elaboration? Clearly not. Nor was he ignoring the constraints around him. He was instead doing something simple yet important: being a good copyright judge.

C. System Awareness

A third, and arguably always overlooked, aspect of the judicial method in copyright adjudication is a court's attention to the consequences of its decision on aspects of the copyright system not immediately before the court. It partakes of a form of holism, wherein the copyright system is seen as an integrated whole such that modifications in one domain – however minor they be – turn out to exert an influence on other parts of the system.

To be sure, such systemic holism in copyright does not require a deep familiarity with all aspects of copyright doctrine. In other words, it is not that judges are somehow automatically copyright experts. Some of the engagement that holism requires is often simply a matter of thinking through the medium- and long-term doctrinal consequences of a particular position of law being adopted in case and looking around to closely connected and interrelated doctrinal questions. And having done so, instead of attempting to narrowly and surgically engage a small question, it involves zooming out to see the overall system-wide implications of the move just entailed.

Let's begin with a decision that some have criticized, and in my view, unfairly: the Seventh Circuit's 1985 decision in *Rockford Map Pubs., Inc. v. Directory Service Co. of Colorado, Inc.*, authored by Judge Frank Easterbrook.[66] The dispute involved an infringement claim brought by a publisher of plat maps against a competitor that produced its own maps but used the plaintiff's maps as

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[63] *Childress*, 945 F.2d at 505-06.

[64] Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1702 (2014).

[65] *Id.* at 1699.

[66] Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, 768 F.2d 145 (7th Cir. 1985).

its templates. The copying was undeniable since the plaintiff had put "trap initials" in its maps, which the defendant ended up reproducing in its own maps.[67] The defendant's primary defense to the infringement claim was a challenge to the copyrightability of the plaintiff's maps. In finding for the plaintiff, Judge Easterbrook readily dismissed this argument, noting that the maps were protectable as compilations under the statute for which the plaintiff could obtain protection in its arrangement of information, which the defendant had copied.[68]

Yet, Judge Easterbrook did not stop there. He proceeded to analyze how that conclusion would interact with an equally foundational precept of copyright: originality. It is worth noting that *Rockford* was well before the Supreme Court had decided *Feist*. In Judge Easterbrook's view, the mere fact that the plaintiff's maps were produced "with so little effort" was irrelevant to the question because copyright was not about industriousness; it was about the work.[69] If the minimal effort produced a minimal contribution, it was equally unproblematic because the scope of copyright protection tracked the extent of the contribution. In this finding, the plaintiff's maps were protected as compilations, and the defendant to have infringed them. *Rockford* also showed how such protection for compilations was in keeping with the requirement of originality as well as the core idea that facts were ineligible for protection under copyright, which the opinion could have skipped over if it had wanted to.

One scholar faults *Rockford* for failing to address the 1976 Act's supposed provision on the "copyrightability of information" in its analysis and thus claims that Judge Easterbrook was reluctant to abandon prior doctrine because of the complexity of the new statute.[70] This criticism has always struck me as misplaced. For one, the 1976 Act says nothing about "information" in its text; there simply is no provision in the statute to that effect. But more importantly, barely eighteen months before writing the opinion in *Rockford*, Judge Easterbrook was a law professor and, in that capacity, wrote a well-known and often cited article titled *Statutes' Domains*, wherein he argued that courts would do well to recognize that sometimes statutes simply don't apply and that looking beyond the statute (for instance, to first principles) was a non-interpretive task that was nevertheless an essential part of what federal courts do.[71] There is a certain irony in wrongly faulting Judge Easterbrook for doing just that in *Rockford*.

Another of Judge Easterbrook's opinions that evinced this same system awareness was *Lee v. A.R.T.,* where the question was whether the defendant had infringed the plaintiff's derivative works right when it purchased lawful copies of the plaintiff's photographs (contained in a book) and then cut them out to laminate on individual kitchen and bathroom tiles using a resin, which it then sold

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[67] *Id.* at 147.
[68] *Id.* at 148-50.
[69] *Id.* at 148.
[70] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859-60 (1987).
[71] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983).

commercially.[72] The plaintiff argued that this process involved recasting and transforming the original work, such that it produced an unauthorized derivative work—violating §106(2) of the statute, a position that the Ninth Circuit had endorsed, relying on the plain text of the statute.[73] Judge Easterbrook not only disagreed with this reading of the statute, which would have rendered any physical alteration of a lawful copy as a violation – e.g., a framing of a lawfully purchased poster. But the bigger problem, in his view, was that it was inconsistent with the narrow vision of moral rights protection that the U.S. had adopted in the Visual Artists Rights Act, enacted into §106A of the statute. That regime gave artists a very limited right to prevent an intentional distortion or mutilation of their works. The plaintiff's reading in *Lee* would have created "through the back door an extraordinarily broad version of authors' moral rights," which was simply inconsistent with the rest of the copyright regime.[74] The system as a whole would not cohere.

Another underappreciated example of such system awareness in the judicial method comes from a case that is otherwise celebrated: *Lotus v. Borland*.[75] The First Circuit, in that case, had to consider the copyrightability of the plaintiff's command menu hierarchy, and as is well-known, it concluded that the hierarchy was unprotectable as a "method of operation" under §102(b) of the statute.[76] Judge Stahl famously set out what a method of operation was and how one was to go about ascertaining its ineligibility for copyright. As part of that analysis, he drew an analogy between the command menu elements and the buttons of a VCR, arguing that their positioning on a VCR was the same as the hierarchy, a method of operation. Yet, in making this comparison, he noted that a VCR—unlike a computer program—would qualify as a sculptural work and only ever obtain protection in its design, which would, in turn trigger the useful article exception and require asking whether the design elements of the VCR were separable from its utilitarian aspects. The design of the VCR needed to satisfy the separability hurdle to be protectable. Because computer programs were literary works, they were not subject to the separability requirement. All the same, in his view, the "method of operation" exclusion performed the same role outside the domain of where the useful article exception applied and thus paralleled the logic of the statute.[77]

Judge Stahl's system awareness in *Lotus* was not the same as that of Judge Easterbrook in *Rockford* and *Lee*. In those cases, the courts examined the implications of their decision on other parts of the system, like a hydraulic stress test. In *Lotus*, the systemic holism was motivated by an effort to parallel a

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[72] Lee v. A.R.T. Co., 125 F.3d 580, 580 (7th Cir. 1997).
[73] *Id.* at 581; Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988).
[74] *Lee*, 125 F.3d at 582.
[75] Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995).
[76] *Id.* at 815-17.
[77] *Id.* at 817.

foundational principle in the statute, which the court saw as representing a common thread through different parts. And this was copyright's effort to minimize protection for the useful, a principle common to the method of operation exclusion and the separability rule. At their core, though, both approaches underlined and highlighted the need for treating copyright rules as necessarily interrelated.

D. Principle as Enablement

The final element of the judicial method in copyright is likely its most important one as it ties together the prior elements and, in so doing, legitimizes them into the future. And this is the process through which courts have explained their calibration of the judicial role, their balancing of judgment against guidance, and their ability to see the copyright system as a whole – in terms of *reasoned principles*. To understand the full implications of this element, we must make a brief detour to unpack what it is I mean by the idea of principles.

First, principle-based reasons are often contrasted with reasons driven by policy. The principle/policy dichotomy is longstanding, but at its core, recognizes the idea that a policy-based rationale (or argument) appeals to the consequences of a position and is thus openly instrumental.[78] Thus, designing a rule in order to achieve a particular end in mind—e.g., greater creativity in a particular domain or greater protection for the heirs of an author—is openly policy-based. By contrast, an argument from principle sticks more closely to formal rules but then generalizes from them into statements of broader pattern that are justified not based on the outcomes that they produce but instead based on the coherence that they interject into the working of myriad rules of law. A principled rationale then "justifies an outcome on the basis that it conforms to a generali[z]ation of a particular set of legal rules."[79] Second, and thus relatedly, reasoning (or arguing) from principle is "internalist" in that unlike appeals to policy, it does not look outside the law for its guidance and justification. Policy reasons are, therefore, the normative bases on which the law is constructed but are unequivocally outside the domain of the law itself.

Why does this matter? Since at least the middle of the twentieth century, the principle/policy division has come to be understood as embodying a critical institutional dimension: Congress alone makes policy, and courts do not. Copyright was no exception to this general trend.[80] All the same, this identification of a constraint on courts did not fully explain what courts were meant to do. That void was filled by the notion of "principles," where courts were to do more than just examine the letter of the law. They were instead to understand how and why the law existed in a particular structure in order to mold it to new

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78 The seminal account is by Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1978). *See also* James Plunkett, *Principle and Policy in Private Law Reasoning*, 75 CAMB. L.J. 366 (2016).

79 *Id*. at 370.

80 *See* Balganesh, *Transformation*, *supra* note 2, at 1150.

situations as needed. Of course, principles could often be informed by an overarching policy; nevertheless, there was meant to be a bright-line between them.

Principles, therefore, operate to enable courts to shape copyright law by staying internal to the legal system and abjuring a direct engagement with the goals of the copyright system, except to reaffirm the goals instantiated by Congress. In an important sense, they formed the core vocabulary and grammar of the judicial method in copyright. Under the regime put in place by the 1976 Act, wherein Congress had openly reasserted its policy-making role, reliance on principle proved to be a crucial arsenal for courts deciding copyright cases. It allowed them to be more than just "interpreters" and inject change and adaptation into the law when needed without treading on the legislature's territory.

Reasoning by principle in copyright is not just about translating an outcome into concepts. It is an analytical method that looks at generalizable rules but by paying attention to the other parts of the judicial method. And this is why it is so important. Courts readily recognized this following the Act of 1976. Again, some scholars have mistakenly described this as the courts failing to recognize how the new statute had changed their role such that they continued to "ignore" the statute.[81] I think the opposite is true. The new statute reinvigorated the role of principled reasoning and forced courts to highlight the reality that copyright law was more than just the letter of the statute. Copyright, instead, courts implied, also embodied certain longstanding and ephemeral principles that make it what it is. Some of these principles, they further reasoned, found recognition in the Constitution and thus rendered them, in a sense, foundational.

A good example is the Second Circuit's early decision in *Hoehling v. Universal City Studios*, written by Judge Irving Kaufman.[82] The case involved the alleged copying of a work of historical fiction by the defendant in its movie production. The plaintiff's work was a work of historical interpretation and thus relied on facts for its narrative, characters, and themes. The defendant's movie revealed important similarities to the plaintiff's work, but those similarities were largely attributable to the factual (and unprotectable) content the plaintiff had relied on. Any copyright that the plaintiff had in his work was therefore narrow, thin and limited, such that only a verbatim reproduction would count as an infringement. But why? Because of an important principle: "[i]n works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another."[83] That principle emerged from a balance between two seemingly antagonistic policy goals that Congress and the Constitution had delineated: encouraging not just creativity but also the production of knowledge, which for

[81] Litman, *supra* note 4, at 860.
[82] Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980).
[83] *Id.* at 980.

"historical works [meant] a relatively free hand to build upon the work of their predecessors."[84]

The principle in *Hoehling* soon took on a life of its own. Moving to the Seventh Circuit, again in the hands of Judge Frank Easterbrook in *Nash v. CBS*, its origins had to be unpacked.[85] *Nash* involved a work of non-fiction that the defendant was alleged to have infringed in its television series on the same theme. Finding the series to be non-infringing, Judge Easterbrook relied on the principle of *Hoehling* despite concluding that some of the observations in that case went a little too far. Yet, what is noteworthy is that Judge Easterbrook recognized that *Hoehling* rested on a *principle* that was law despite it not being in the statute as such:

> Decisions such as *Hoehling* do not come straight from first principles. They depend, rather, on the language of what is now 17 U.S.C. § 102(b)… Long before the 1976 revision of the statute, courts had decided that historical facts are among the "ideas" and "discoveries" that the statute does not cover. … This is not a natural law; Congress could have made copyright broader (as patent law is). But it is *law*.[86]

Principles were a part of the positive law of copyright, even if they were judge-made and not found directly in the statute.

Another fine example of the principle-based reasoning that I am describing here comes from the Second Circuit in *Kregos v. Associated Press*, a decision by Judge Jon Newman.[87] Presented with the question whether a baseball pitching form where its creator had chosen specific information for each column was copyrightable, the court confronted the "merger" doctrine. As is well-known, the merger doctrine denies protection to expression embodying an idea that can be expressed only in one or a very few ways. In reasoning his way to the conclusion that the doctrine did not apply, Judge Newman's opinion on this point touched on every last one of the elements previously identified. But it did so in a manner that generalized from the idea/expression dichotomy in copyright, the "fundamental copyright principle that only the expression of an idea and not the idea itself is protectable," to explain how a merger was to be construed.[88] Consider the observation:

> In one sense, every compilation of facts can be considered to represent a merger of an idea with its expression. Every compiler of facts has the idea that his particular selection of facts is useful. If the compiler's idea is identified at that low level of abstraction, then the idea would always

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[84] *Id.*
[85] Nash v. CBS, Inc., 899 F.2d 1537 (7th Cir. 1990).
[86] *Id.* at 1542.
[87] Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991).
[88] *Id.* at 705.

> merge into the compiler's expression of it. Under that approach, there could never be a copyrightable compilation of facts. However, if the idea is formulated at a level of abstraction above the particular selection of facts the compiler has made, then the merger of idea and expression is not automatic. Even with an idea formulated at a somewhat high level of abstraction, circumstances might occur where the realistic availability of differing expressions is so drastically limited that the idea can be said to have merged in its expression.[89]

This observation embraces a view of the judicial role, recognizes the need for judgment, and appreciates the connection between the merger doctrine and protection for a compilation. All the same, it translates those steps into a mode of reasoning that isn't just about the law or, indeed, about policy. It wasn't about how those doctrines served copyright's goals of fostering creativity. Instead, it was in the language of the principle underlying merger and the idea/expression dichotomy.

A final example of this principle-driven approach comes again from the Second Circuit, and this time from the case of *Mattel v. Goldberger Doll Manufacturing*,[90] where the question was whether the defendant could copy the standard features of the plaintiff's Barbie doll design. Relying on prior precedent, the district court concluded that such features were ineligible for protection altogether. The Second Circuit disagreed but offered up an elaborate lesson—all couched in the language of principles: (i) "standard" did not mean unoriginal since copyright law did not embody a conception of novelty or prior art, (ii) it simply meant, in keeping with the idea/expression dichotomy that the range of copying was more permissive.[91] The judge in that case, once again, was Judge Pierre Leval, who concluded that the design of dolls with "upturned noses" was certainly not ineligible for copyright even if it was possible that the copying was not substantially similar—the essence of thin protection.[92]

The difference between the two—copyrightability and the scope of protection—was a matter of principle and an important one. There may well have been other far-reaching reasons for the outcome: that the designers of life-like dolls needed less of an incentive to create than did the creators of fictional beings, or that they needed some incentive to arrange otherwise unprotectable components, or indeed that verbatim copying of even a minimally creative design was abhorrent. Those were policy reasons beyond the court's purview, which the opinion's method merely hinted at without engaging. That is the line between policy and principle.

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[89] *Id.* at 706.
[90] Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d 133 (2d Cir. 2004).
[91] *Id.* at 135.
[92] *Id.* at 136.

CONCLUSION: IS COPYRIGHT ADJUDICATION UNIQUE?

My core claim has been that in adjudicating copyright cases in the modern era, courts are doing much more than just interpreting the text of the statute or making the law incrementally. This is, of course, not to say that, on occasion, they are not doing either. Yet, the bulk of what constitutes copyright adjudication employs a method that has its own nuances and essentially derives from the complexity and nature of copyright law itself. Now, an obvious question that must be asked is whether the method that I have described (and defended) here is indeed unique to copyright or whether it is merely an account of how courts adjudicate claims in a set of different areas. I think this deserves a measured response.

I do believe that the method I have described here is generalizable to other areas; after all these federal judges are deciding cases in a vast variety of substantive areas covered by federal law. All the same, I can think of hardly any other area of federal law that exhibits the unique characteristics of the modern copyright landscape. A few, in particular, are meaningful. First, is the reality that while copyright law is today predominantly statutory, much of that statutory edifice is built on foundational (one might even say naturalistic) principles about what copyright is. When the Supreme Court says that "[o]riginality remains the *sine qua non* of copyright" or that copyright has "traditional contours" that are unalterable, those are trenchant observations about the true source of copyright law.[93] In them, the Court is telling us that there are aspects of copyright law that originate independent of the statute such that if Congress were to eliminate/modify them, the result—even if valid—would cease to be copyright law. Policing those contours to delineate what we might call the "essential" features of copyright is a judicial task since it very obviously involves the interplay between the statute and these principles, often by interpreting the Constitution.[94]

Second, copyright law is innately adaptive. Its rules are all designed not just as neutral to technological change and other developments in the domain of creative progress but in some ways anticipatory of such change. And it is to be expected that such change influences our understanding of the rules themselves. Figuring out what an unprotected "idea" is in an accounting book is different from figuring out what that means in computer software; indeed, doing the latter necessitates unpacking the very notion of an idea in copyright law. The agents of that adaptation were always meant to be courts.

Third, copyright disputes embody a natural polycentrism.[95] While a copyright dispute is formally between a creator and a copier, each individual dispute affects many parties not before the court and does so on a fluid basis since it results in behavioral modification each time. There is a sense in which copyright

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[93] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Eldred v. Ashcroft, 537 U.S. 186 (2003).

[94] *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356 (1978).

[95] *Id.* at 371.

decision-making is about managing the marketplace for creativity. That task, as any managerial role goes, requires an iterative engagement with the rules at play, which in turn relies on courts regularly intervening. The fair use doctrine—for instance—cannot work through one-off decisions; the current doctrinal landscape is the culmination of a cascade of opinions that come together to manage the borrowing of content from creative works.

Courts, in short, are indispensable to the copyright system; not just an afterthought for enforcing the system of rules when parties don't follow them. In the modern era, as copyright law (and indeed the very understanding of what *law* means in the system) has gotten complicated, our lower federal courts have held the system together in a meaningful way. And their ability to do so has, I have argued here, comes in large part from their deployment of a disciplined method: one that has successfully navigated (and avoided) debates about interpretation, activism, and the like. They remain the real unsung heroes of our copyright system. The system today does not give them sufficient credit for all that they do. But it very well should.