Essay

Freedom of Speech and Independent Judgment Review in Copyright Cases

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Copyright law restricts speech. It restricts what writers may write, what painters may paint, what musicians may compose. It prohibits not only slavish copying, but also creation of entirely new works, so long as those works use—even if only in part—another's expression.[1] Of course, the Supreme Court has held that copyright law is a valid speech restriction.[2] Because the law stimulates entry into the marketplace of ideas, and because the law prohibits only the use of others' expression, not their ideas or the facts they've uncovered, the Copyright Act[3] doesn't violate the First Amendment.

Nonetheless, as the Court has time and again held, certain procedural safeguards must accompany even substantively valid speech restrictions. One such safeguard is independent judicial review, by appellate courts when reviewing a verdict and by trial courts on motions for judgment notwithstanding the verdict or for summary judgment. Under *Bose Corp. v. Consumers Union of United States, Inc.*,[4] appellate courts may not just turn over vague phrases such as "actual malice," "incitement," or "expression, as opposed to idea" to factfinders, and then defer to the factfinders' conclusions

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1. Note that we speak here of copyright claims based on material that is "expression" for free speech purposes—books, movies, songs, paintings, and so on. Our argument doesn't cover copyrighted software, which (at least in object code) generally doesn't qualify as speech for First Amendment purposes. *Cf.* Texas v. Johnson, 491 U.S. 397, 406 (1989) (stating that, to be protected under the Free Speech Clause, activity must be "'sufficiently imbued with elements of communication'" (quoting Spence v. Washington, 418 U.S. 405, 409 (1974))).

2. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

3. 17 U.S.C. §§ 101-1101 (1994).

4. 466 U.S. 485 (1984).

about what constitutes libel, incitement, or copyright infringement. Instead, courts must "conduct[] an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."[5] Lower courts have properly accepted this principle for trial court review on motions for summary judgment and for judgment notwithstanding the verdict.[6]

In theory—a theory the Supreme Court has accepted as a principle of constitutional law—such independent review prevents prejudiced or erroneous deprivation of constitutional rights by factfinders.[7] If a factfinder erroneously concludes that your book infringes someone else's book, the factfinder hasn't just made a legal mistake: It has made a mistake of constitutional magnitude, and has deprived you of your First Amendment right to write your own expression, even when based on another's idea. Courts must, *Bose* holds, protect against such mistakes by policing factfinders' decisions.

Beyond this, independent review is also supposed to help prevent future mistakes by making the lines in free speech law clearer and more administrable. Judicial review is part of the "evolutionary process of common-law adjudication" that "give[s] meaning" to legal rules.[8] As courts see more cases of a particular type, they can refine the line between protected speech (such as non-obscene art, innocent error, or copying of ideas) and unprotected speech (such as obscenity, punishable libel, or copying of expression). They might create new subrules that clarify the meaning of the rules, for the benefit of both future courts and future speakers. Or they might provide benchmarks against which future courts can compare and contrast new fact patterns.

In Part I, we explain why *Bose* compels independent review of "substantial similarity of expression" determinations.[9] Though the great majority of circuits

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5. *Id.* at 505.

6. *See infra* Section I.E.

7. *See Bose*, 466 U.S. at 505.

8. *Id.* at 502.

9. We discuss here "substantial similarity" rather than "probative similarity." Copyright law prohibits (1) copying of (2) another's expression. Courts consider whether the plaintiff's and defendant's works are similar for both prongs of this inquiry. For the first prong, they ask whether the similarity is probative of the fact of copying; for the second, they ask whether the similarity is substantial enough to make the defendant's action into copying of the expression and not just of the idea. *See, e.g.*, 2 PAUL GOLDSTEIN, COPYRIGHT § 8.0 (2d ed. 1996); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13-28 n.3.2 (1997); Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1190 (1990). Probative similarity is relevant to a purely factual question: Did copying take place? Substantial similarity, on the other hand, is a question of degree and an application of law to fact.

We also don't discuss any glosses on substantial similarity that circuit courts have implemented, such as the Ninth Circuit's bifurcated intrinsic/extrinsic test. *See* Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990). Our points apply to substantial similarity of expression in all circuits.

Finally, we don't generally discuss independent review of fair use questions because courts already conduct such review, at least when the factfinder below is a trial judge. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); *see also* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258-59 (2d Cir. 1986) (holding that fair use is for the trial judge to determine at summary judgment, so long

have held, without considering free speech issues, that such determinations should be reviewed only for clear error,[10] we believe these circuits are mistaken. The doctrinal demands of *Bose* are quite clear. In Part II, we argue that there is nothing special about copyright cases that would justify departing from the independent judgment rule. In light of this, giving copyright law a free ride not given other speech restrictions is wrong and corrosive of people's respect for free speech generally.

In Part III, we ask whether this result—and *Bose* itself—makes sense. The Supreme Court's "First Amendment due process"[11] jurisprudence has been a pragmatic, largely seat-of-the-pants, judgment about the real world impact of various procedural devices, be they independent review, punitive damages, or what have you. Could *Bose* be mistaken, either as applied to copyright law or generally? Has the Court gone too far in constitutionalizing procedure as well as substance in free speech cases? Should it return to treating speech-based claims the same way that other claims—negligence claims, contract claims, and the like—are treated?

We believe that the Court's judgments are probably correct: The error-correcting and law-clarifying benefits of independent review exceed the costs imposed on the system and on litigants by the increased likelihood of appeals. Nonetheless, it is important to think skeptically about such broad but unproven judicial pronouncements regarding the likely effects of law (here rules of judicial review) on human action (here decisions by lower courts and by creators). If people believe that independent review is inappropriate in copyright cases, this might be an opportunity to rethink *Bose* generally.

Finally, in Part IV, we suggest that lawyers and scholars should consider whether other "First Amendment due process" rules—rules that, for instance, require proof by clear and convincing evidence or limit the availability of punitive damages—likewise apply to copyright cases. This issue deserves more attention than it has so far received.

I. WHY INDEPENDENT JUDGMENT REVIEW IS MANDATED

A. *Freedom of Speech and Copyright*

Copyright law restricts speech. It restricts you from writing, singing, painting, or otherwise communicating what you please.[12] If your speech copies ours, and if the copying uses our "expression," not merely our ideas or

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as the underlying historical facts are not in dispute); *infra* Subsection II.B.4. The points we make in this Essay are, however, relevant to fair use cases involving review of jury verdicts.

10. *See infra* note 52 and accompanying text.

11. *See* Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

12. *Cf.* Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (citing copyright law as an example of a speech restriction).

the facts we have uncovered, your speech can be enjoined and punished, civilly and sometimes criminally.[13] And copyright law applies to creative adaptation, not just to literal copying. Rap musicians are restricted from including "samples" of others' music in their own songs.[14] Artists are forbidden from creating artworks that are too similar to others' art.[15] Writers are barred from writing books—even books based on real events—whose plots are too similar to what others have done.[16] Copyright law is a serious restriction on speakers' ability to express themselves the way they want.

Harper & Row, Publishers, Inc. v. Nation Enterprises[17] made clear that speech infringing another's copyright is not constitutionally shielded from copyright law. Copyright's limitation on speech that uses others' expression is justified because that limitation is itself an "engine of free expression": It "supplies the economic incentive to create and disseminate ideas."[18] At the same time, the Court strongly implied that this rationale would not justify restrictions on speech copying facts or ideas. The Court characterized "the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas" as a "First Amendment protection[]."[19] It pointed out that "[n]o author may copyright his ideas or the facts he narrates,"[20] and cited Justice Brennan's statement in *New York Times Co. v. United States*[21] that copyright laws are constitutional because they "protect only the form of expression and not the ideas expressed."[22] And the Court stressed that it would be an "abuse of the copyright owner's monopoly" for copyright law to become "an instrument to suppress facts."[23]

Harper & Row thus suggests that the line between using others' expression and using their ideas is of First Amendment significance. Speech communicating facts and ideas using expression that is substantially similar to someone else's expression is constitutionally unprotected.[24] Speech

13. *See* 17 U.S.C. § 506 (1994) (criminalizing certain kinds of infringement).

14. *See, e.g.*, Tin Pan Apple Inc. v. Miller Brewing Co., 30 U.S.P.Q.2d (BNA) 1791 (S.D.N.Y. Feb. 23, 1994).

15. *See, e.g.*, Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987); Kisch v. Ammirati & Puris Inc., 657 F. Supp. 380 (S.D.N.Y. 1987); *cf.* Woods v. Universal City Studios, Inc., 920 F. Supp. 62 (S.D.N.Y. 1996) (enjoining distribution of the movie *12 Monkeys* because one scene infringed on a copyrighted drawing).

16. *See, e.g.*, Toksvig v. Bruce Publ'g Co., 181 F.2d 664 (7th Cir. 1950); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); *cf. Judge Refuses To Halt Release of 'Amistad,' Rejects Writer's Claim*, WALL ST. J., Dec. 9, 1997, at B16 (describing a lawsuit by a writer who claimed that Steven Spielberg's movie *Amistad* was based on her novel about the same historical incident, and the court's conclusion that there was likely no infringement).

17. 471 U.S. 539 (1985).

18. *Id.* at 558.

19. *Id.* at 560.

20. *Id.* at 556 (citing 17 U.S.C. § 102(b)).

21. 403 U.S. 713 (1971).

22. *Id.* at 726 n.* (Brennan, J., concurring), *cited in Harper & Row*, 471 U.S. at 556.

23. *Harper & Row*, 471 U.S. at 559.

24. We mean "unprotected" in the literal sense: The speech may be constitutionally punished by copyright law, despite the First Amendment, which means that the First Amendment doesn't protect the

communicating the same facts and ideas in other ways, however, is constitutionally protected.[25] And such a dividing line makes good constitutional sense: The free speech principle may tolerate certain limits on how someone expresses an idea or a fact, but—whether one sees the principle as primarily concerned with protecting self-expression, with fostering democratic discourse, or with guarding the marketplace of ideas—it cannot tolerate restrictions on communicating ideas and facts as such. When you express an idea someone else pioneered or discuss facts that others have uncovered, you might be free riding on their hard work, but it's a free ride we must allow.[26]

B. *Freedom of Speech and Appellate Review*

Speech that copies another's expression is not, of course, the only category of speech unprotected by the Free Speech Clause.[27] Fighting words, obscenity, and libel, for example, are also generally unprotected. For each

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speech against legal sanction. In this respect, infringing speech is just like the traditional exceptions to First Amendment protection, such as obscenity, defamation, fighting words, threats, child pornography, advocacy of unlawful conduct that's intended and likely to produce imminent lawlessness, publication of sailing dates of troop ships, and the like. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) (listing such exceptions).

We don't suggest that infringing speech is "valueless". Like advocacy of unlawful conduct, or revelation of extremely sensitive government secrets, it can often be an important contribution to public debate or, at least, public entertainment. It is punishable not because of its perceived lack of value, but because of its perceived harm and the supposedly ample alternative avenues for expression. But whatever the reason, the speech is unprotected by the First Amendment against the operation of copyright law.

Of course, speech that is unprotected against copyright law might still be protected against other laws: The government may not, for instance, constitutionally apply a ban on racist speech or blasphemous speech even to material that's infringing, just as it may not apply a ban on racist speech even to material that constitutes fighting words. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

25. *Cf.* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577-78 n.13 (1977). As the *Zacchini* Court wrote:

> We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint [has been] placed on the use of an idea or concept." . . . See also *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108, 115-116 (N.D. Cal. 1972) (citing Nimmer, Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180 (1970), who argues that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts) . . . .

Id. (some citations omitted) (alteration in original); *see* Lee v. Runge, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting from denial of certiorari) ("Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas."); Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1212 (8th Cir. 1986) (citing *Harper & Row* and stating that the idea-expression dichotomy is partly grounded "in the First Amendment interest in the free exchange of ideas"); *see also* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970) (stating that "the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests"). Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978) (similar); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (stating that the "idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment").

26. *See, e.g.*, Nimmer, *supra* note 25, at 1190-93.

27. Portions of the analysis in this section are borrowed from Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996).

category, the Court has set forth rules defining the category's boundaries: Defamatory statements about public figures, for instance, are actionable only if made with "actual malice"—knowledge or reckless disregard of their falsity.[28] But these rules are not self-explanatory, and it's not enough for appellate courts just to announce the rules and leave them to judges and juries to apply. As the *Bose* Court wrote:

> Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.[29]

Therefore, the Court has held, courts must independently review judgments that a certain statement is unprotected. In part, this simply prevents unconstitutional results: Because erroneous denial of constitutional protection is a violation of constitutional rights, courts must "exercise [independent] review in order to preserve the precious liberties established and ordained by the Constitution."[30]

But beyond that, independent review is also supposed to make the rule clearer for future cases. Independent review should help "confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."[31] The content of many Free Speech Clause rules "is not revealed simply by [their] literal text";[32] instead, the rules must be "given meaning through the evolutionary process of common-law adjudication."[33] Therefore, appellate judges, "as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold."[34]

If appellate courts review decisions only for clear error, not independently, the "evolutionary process of common-law adjudication" is substantially stunted. Instead of marking out two areas—speech copying ideas and speech copying expression—clear error review marks out three areas: (1) speech that any reasonable factfinder would conclude only copies ideas; (2) speech that any reasonable factfinder would conclude only copies expression; and (3) speech

28. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967).

29. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984). Professor Henry Monaghan describes this quote and the statement quoted *infra* in the text accompanying note 34 as the "core of the [*Bose*] opinion." Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 243 (1985).

30. *Bose*, 466 U.S. at 511; *see id.* at 505 ("The principle of viewpoint neutrality that underlies the First Amendment itself also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected." (citation omitted)).

31. *Id.* at 505.

32. *Id.* at 502.

33. *Id.*

34. *Id.* at 511.

for which reasonable factfinders could disagree about whether it copies ideas or expression. The third area is very big, and decisions that fall within this area give little guidance. A factfinder doesn't get much value from a precedent saying, "Reasonable factfinders could disagree whether speech x is substantially similar in expression to speech y."[35] Likewise, such a precedent gives little guidance to speakers who want to know what they can say and what they can't. As the Court has recognized, when the rules are so vague, many speakers will "steer far wider of the unlawful zone."[36]

Though *Bose* was a libel case, its justification for independent review applies equally to copyright law: In both cases, some speech is protected and some is not; in both cases, the factfinder may misclassify the speech as unprotected, erroneously concluding that it was said with actual malice or that it used another's expression; and in both cases, the rule's literal text provides little guidance without case-by-case elaboration. *Bose* made clear that its rule applies generally, beyond libel, to judgments that a certain kind of speech is unprotected.[37] More recent cases have faithfully applied *Bose* to alleged obscenity,[38] incitement,[39] negligent publication of criminal solicitation,[40] speech by lawyers supposedly interfering with the administration of justice,[41]

35. *Cf.* MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (concluding that the district court's copyright infringement holding was not clearly erroneous, but stating that a contrary holding would likewise not have been clearly erroneous).

36. Speiser v. Randall, 357 U.S. 513, 526 (1958); *cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 303-04 (1996) (arguing that "the copyright law safeguards that have made First Amendment defenses seem overly intrusive and unnecessary have in fact been only sporadically effective in protecting First Amendment values," in part because "while the idea/expression dichotomy makes sense in principle, it is notoriously malleable and indeterminate"); *id.* at 381 (describing how "prevailing uncertainties" in copyright law interfere with the creation of certain kinds of new works); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel,'* 38 EMORY L.J. 393, 395-97 (1989) (stressing how the vagueness of the idea-expression dichotomy can deter constitutionally protected speech); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods*, 33 WM. & MARY L. REV. 665, 709 (1992) (arguing that the "fuzzed line between idea and expression" creates "uncertainty [that] can cast a serious chill on communicative activities"). *See generally* Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 600-02 (1997).

37. *See Bose*, 466 U.S. at 504-08 (citing Supreme Court cases applying the independent review rule to fighting words, incitement, obscenity, and child pornography); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 567 (1995) (applying *Bose* to the question of whether conduct was expressive). The Court has used similar reasoning outside the speech context. *See* Ornelas v. United States, 116 S. Ct. 1657, 1662 (1996) (applying a *Bose*-like analysis to probable cause decisions in Fourth Amendment cases); Thompson v. Keohane, 516 U.S. 99, 112 (1995) (applying a similar analysis to in-custody determinations for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966)); Miller v. Fenton, 474 U.S. 104, 114 (1985) (applying *Bose* by analogy in the Fourteenth Amendment Due Process Clause context to the question of whether a confession was voluntary); *cf.* Murphy v. I.S.K.Con. of New England, Inc., 571 N.E.2d 340, 345 (Mass. 1991) (reading *Bose* as applicable to Free Exercise Clause issues); *see also* discussion *infra* Subsection II.B.3.

38. *See, e.g.*, Luke Records, Inc. v. Navarro, 960 F.2d 134, 138 (11th Cir. 1992).

39. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021 (5th Cir. 1987), Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989).

40. *See, e.g.*, Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1120-21 (11th Cir. 1992).

41. *See, e.g.*, Standing Comm. v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995).

government employee speech,[42] speech in a possibly nonpublic forum,[43] commercial speech,[44] and content-neutral speech restrictions.[45]

If anything, independent judgment review seems particularly proper in copyright cases.[46] "Substantial similarity of expression" is an amorphous term. It's at least as vague as "prurient interest"[47] and "patently offensive"[48]

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42. *See, e.g.*, Swineford v. Snyder County, 15 F.3d 1258, 1265 (3d Cir. 1994); Mekss v. Wyoming Girls' Sch., 813 P.2d 185, 194 (Wyo. 1991); *see also* Rankin v. McPherson, 483 U.S. 378, 385-86 & n.9 (1987).

43. *See, e.g.*, AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 7 (1st Cir. 1994); *see also* Brown v. Palmer, 915 F.2d 1435, 1441 (10th Cir. 1990) (independently reviewing factual findings underlying the determination of whether a forum is public), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991) (en banc).

44. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990) (plurality opinion); *id.* at 111-17 (Marshall, J., concurring) (engaging in independent review, but not citing *Bose* directly); Revo v. Disciplinary Bd., 106 F.3d 929, 932 (10th Cir.), *cert. denied*, 117 S. Ct. 2515 (1997); Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n, 24 F.3d 754, 755-56 (5th Cir. 1994); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053-54 & n.9 (11th Cir. 1987).

Some cases reviewing federal administrative agency findings seem not to have followed *Bose*, grounding their decisions on a deference-to-expert-agencies rationale. Two such cases involved review of Federal Trade Commission findings that ads were false or misleading. *See* Kraft, Inc. v. FTC, 970 F.2d 311, 316-17 (7th Cir. 1992); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 44 (D.C. Cir. 1985). In both cases, the courts also argued that *Bose* was inapplicable to commercial speech, but that seems to be in considerable tension with the Supreme Court's position in *Peel*, as well as the circuit decisions in *Joe Conte Toyota*, *Revo*, and *Don's Porta Signs*. *Cf.* Martin H. Redish, *Product Health Claims and the First Amendment*, 43 VAND. L. REV. 1433, 1459-60 & n.144 (1990) (criticizing *Brown & Williamson* on *Bose* grounds).

Another line of cases in which courts seem to have departed from *Bose* involves review of National Labor Relations Board findings that unionization-related speech by an employer or a union was impermissibly coercive. These cases follow *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969), which held that "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." Since *Gissel*, lower courts have not applied independent judgment in this area, but have instead reviewed NLRB findings for "substantial evidence." *E.g.*, DTR Indus., Inc. v. NLRB, 39 F.3d 106, 114 (6th Cir. 1994). *Gissel* came long before *Bose*, and no court has confronted the tension between them, though distinguished commentators have pointed to the discrepancy. *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 976, 990 (1988); Monaghan, *supra* note 29, at 244 & n.84, 258.

To our knowledge, no court or commentator has suggested that substantial evidence review be transplanted from the expert agency setting to the review of findings made by judges and juries, where *Bose* is firmly entrenched. Indeed, the only non-agency case we could find that declined to follow *Bose* in determining whether speech is unprotected, *Levine v. CMP Publications, Inc.*, 738 F.2d 660 (5th Cir. 1984), seems no longer to be good law. *Levine* involved a finding that defamatory statements about private figures were made negligently. The court reasoned that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "allow[ed] the states to regulate [private figure defamation] within much less restrictive bounds than those imposed [on public figure defamation]" and that therefore *Bose* was inapplicable. *Levine*, 738 F.2d at 672 n.19. But after *Levine* was decided, the Supreme Court made clear that *Bose* does indeed apply to negligence findings in private figure cases. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990); *see also* LeDoux v. Northwest Publ'g, Inc., 521 N.W.2d 59, 69 (Minn. App. 1994) (applying *Bose* in such a situation); Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 423 (N.J. 1994) (same).

45. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 666-67 (1994); Association of Community Orgs. for Reform Now v. St. Louis County, 930 F.2d 591, 595-96 (8th Cir. 1991).

46. In fact, refining the definition of "substantial similarity of expression" serves the goals of copyright law as well as of the First Amendment: "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

47. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 506 (1984).

48. *Id.*

(elements of the obscenity test), and probably vaguer than "reckless disregard"[49] (part of the libel test) and "likely to provoke the average person to retaliation"[50] (part of the fighting-words test). No longstanding social consensus tells us what is "idea" and what is "expression"; indeed, no intuitively obvious line divides the two categories. Under *Bose*, this is precisely the sort of test that courts must police and clarify through case-by-case adjudication, and not leave entirely to the ad hoc decisions of judges and jurors.[51]

C. *Appellate Review and Copyright*

Today, many circuit courts review substantial-similarity-of-expression findings made in bench trials for clear error,[52] though the Second Circuit, perhaps joined by the Eleventh, applies independent judgment (also known in this context as de novo review).[53] All circuits review copyright jury verdicts by asking whether any reasonable jury could have reached the verdict.[54]

Despite this practice, the de novo standard of review may often be proper even as a nonconstitutional matter. Most courts have reviewed substantial similarity of expression for clear error because they have treated it as a factual question.[55] The substantial-similarity-of-expression judgment, however, is really an application of law to fact, also known as a mixed question of law and fact. When one compares two works to see if they are substantially similar, the facts of their contents are uncontroverted; the issue is whether the expression in those contents passes the legal test of substantial similarity. Most circuits

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49. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

50. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

51. The *Bose* rule applies equally to jury trials and bench trials. *See Bose*, 466 U.S. at 508 & n.27 (citing New York Times Co. v. Sullivan, 376 U.S. at 285). *New York Times Co. v. Sullivan* specifically held that the Seventh Amendment's ban on reexamination of "fact[s] tried by a jury" didn't preclude independent review by appellate courts in constitutional cases. 376 U.S. at 285 & n.26.

52. *See* Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1233 (3d Cir. 1986); Hennon v. Kirkland's Inc., No. 94-2595, 1995 WL 490266, at *3 (4th Cir. Aug. 17, 1995); Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 534 (5th Cir. 1994); Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 506 (7th Cir. 1994); Williams v. Kaag Mfrs., Inc., 338 F.2d 949, 951 (9th Cir. 1964).

53. *See* Knitwares, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d Cir. 1995); Sherry Mfg. Co. v. Towel King of Fla., Inc., 753 F.2d 1565, 1569 n.6 (11th Cir. 1985). *But see* Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 825 & n.4 (11th Cir. 1982) (reviewing for clear error). In *MiTek Holdings, Inc. v. Arce Engineering Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996), the Eleventh Circuit identified the idea-expression determination as a mixed question of law and fact; the Eleventh Circuit generally reviews such questions de novo, *see* International Ins. Co. v. Johns, 874 F.2d 1447, 1453 (11th Cir. 1989), but *MiTek Holdings* did not clearly indicate the standard of review that it was applying.

54. *See, e.g.*, CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1525 (1st Cir. 1996) (reviewing a copyright case in the "light most favorable to the jury's verdict"); *see also, e.g.*, Gaste v. Kaiserman, 863 F.2d 1061, 1068-69 (2d Cir. 1988); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 290 (3d Cir. 1991); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1013-14 (9th Cir. 1985).

55. This is probably right for *probative* similarity, though not for substantial similarity. *Cf. supra* note 9 (distinguishing the two). The failure of many courts to distinguish clearly between these two kinds of similarity may help explain why they use clear error review for both.

hold that such mixed questions should generally be reviewed de novo, and that Rule 52(a)[56] dictates clear error review only for purely factual questions.[57] General jury verdicts, however, are always reviewed deferentially unless the Constitution commands otherwise.[58]

How would a de novo standard work in practice? Say a factfinder finds that a defendant's work is substantially similar in its expression to the plaintiff's work. And say the court of appeals, applying independent judgment, disagrees. This decision will then become a benchmark against which future courts—and, better yet, future creators and publishers—can compare and contrast their cases. Of course, no two fact patterns are identical, but the data points may add up. As the Supreme Court said when adopting an independent review standard for similarly vague Fourth Amendment probable cause determinations, "[E]ven where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject."[59] With each new binding decision, the rule becomes a little clearer.

Independent judgment review need not—and cannot—reexamine all the factual findings involved in the lower court's decision. The appellate court may, for instance, defer to the factfinder's judgments about witness credibility.[60] In jury cases, the court will generally have to assume that the jurors believed the winning side's factual claims. But even if this is done, the question will remain: Accepting the winner's story about the historical facts, are the two works substantially similar in their expression? The appellate court can make this decision at least as well as a jury or a trial judge.[61]

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56. FED R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

57. *See, e.g.*, Carter v. Bennett, 840 F.2d 63, 64-65 (D.C. Cir. 1988); American Geophysical Union v. Texaco Inc., 37 F.3d 881, 886 (2d Cir. 1994); North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995); Estate of Waters v. Commissioner, 48 F.3d 838, 842 (4th Cir. 1995); Davis v. Odeco, Inc., 18 F.3d 1237, 1245 n.30 (5th Cir. 1994); United States v. Clark, 982 F.2d 965, 968 (6th Cir. 1993); Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co., 48 F.3d 365, 369 (8th Cir. 1995); Jordan v. Clark, 847 F.2d 1368, 1375 & n.7 (9th Cir. 1988); *International Ins. Co.*, 874 F.2d at 1453. *But see* Williams v. Poulos, 11 F.3d 271, 278 & n.11 (1st Cir. 1993) (stating that mixed questions of law and fact should be reviewed with varying degrees of deference, depending on how "fact dominated" the question is); Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 933 (7th Cir. 1989) (en banc) (stating that "fact-bound" mixed questions of law and fact should be reviewed for clear error); Ershick v. United Mo. Bank, 948 F.2d 660, 666 (10th Cir. 1991) (noting that "mixed questions of fact and law are reviewed under either the clearly erroneous or de novo standards, depending on whether the mixed question involves primarily a question of fact or the considering of legal principles"). The Supreme Court has not resolved this question. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

58. *See, e.g.*, MacArthur v. University of Tex. Health Ctr., 45 F.3d 890, 896 (5th Cir. 1995); Ingram v. Acands, Inc., 977 F.2d 1332, 1340 (9th Cir. 1992); Quick v. Peoples Bank, 993 F.2d 793, 797 (11th Cir. 1993); Therma-Tru Corp. v. Peachtree Doors Inc., 44 F.3d 988, 991 (Fed. Cir. 1995); Meyers v. Chapman Printing Co., 840 S.W.2d 814, 822-23 (Ky. 1992).

59. Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996).

60. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688-89 (1989); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499-500 (1984).

61. Indeed, this is the rationale underlying the Second Circuit's de novo review for substantial similarity findings. *See* Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1317 (2d Cir. 1969) ("As we have before us the same record, and as no part of the decision below turned on credibility, we are in as good a position to determine the question as is the district court.").

Skeptics may suggest that, in practice, the standard of review matters little—that judges will manipulate the standard to reach the results they want. We disagree. Doubtless such manipulation sometimes happens, but in our experience courts generally do take the standard of review seriously. Courts certainly say that standards of review matter,[62] and it seems that standards of review must sometimes make a difference.[63]

Without independent judgment review, binding precedents are set only when a court concludes that no reasonable factfinder could find liability or fail to find liability. By definition, this happens only in rather extreme cases—cases in which a court could find that a jury would have to be, in one judge's words, "drunk or crazy" to conclude that the defendant's speech was substantially similar in its expression to the plaintiff's,[64] a hard standard to meet. Thus, unless courts use independent judgment review, the line between what's allowed and what's forbidden will rarely be made clearer for future cases.

D. *Appellate Review in Cases Won by Defendants*

Bose did leave a significant question unresolved: Is independent judgment review proper if the defendant wins at trial? The lower courts are split on this.

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62. *See, e.g.*, *Bose*, 466 U.S. at 499-500; United States v. D'Ambrosio, No. 92-10526, 1993 WL 410454, at *2 (9th Cir. Oct. 14, 1993) (stating that "the standard of review controls the outcome of this case"); United States v. Conley, 4 F.3d 1200, 1204 (3d Cir. 1993) (stating that "the standard of review can be outcome determinative"); Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case."); United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) (stating that "the standard chosen often affects the outcome of the case").

63. *See, e.g.*, Paul R. Michel, *Advocacy in the Federal Circuit*, C961 A.L.I.-A.B.A. 5, 8 (1994) ("One of my main messages to you [as a circuit judge of the Court of Appeals for the Federal Circuit] is that standards of review influence dispositions in the Federal Circuit far more than many advocates realize."); *see also* Sally Baumler, *Appellate Review Under the Bail Reform Act*, 1992 U. ILL. L. REV. 483, 486 ("Because the standard of review can affect the outcome of a case, one of the first issues in any appeal is the proper standard of appellate review to be applied."); W. Wendell Hall, *Standards of Appellate Review in Civil Cases*, 21 ST. MARY'S L.J. 865, 867-68 (1990) ("Because the appropriate standard of review will control the outcome of an appeal, appellate practitioners must consider the standard of review with the same thoughtful consideration that they give to the facts and the substantive law."); William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 582, 586 (1995) ("The applicable standard of review determines the outcome of many appellate decisions."); *cf.* FED. R. APP. P. 28(a)(6) (requiring appellants to brief the standard of review); United States v. McConney, 728 F.2d 1195, 1199-204 (9th Cir. 1984) (en banc) (discussing standards of review at length); Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1189 n.112 (1995) ("As an extreme example, one practitioner told me that in many years of practice representing professional licensees . . . he had never lost an independent judgment case and never won a substantial evidence case.").

64. Layman v. Combs, 994 F.2d 1344, 1355 (9th Cir. 1992) (Kozinski, J., dissenting in part) (discussing the nature of review under a "no rational trier of fact" standard in a similar context). Of course, this does sometimes happen. *See, e.g.*, Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042 (9th Cir. 1994) (holding that the movie *Honey, I Shrunk the Kids* did not infringe a screenplay called *The Formula*); Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985) (holding that the movie *Coma* did not infringe a screen treatment called *Reincarnation, Inc.*); Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984) (holding that the movie *E.T.* did not infringe a musical play called *Lokey from Maldemar*). Summary judgment in favor of the plaintiff seems rarer, but does happen occasionally. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (holding that the sculpture *String of Puppies* infringed a photograph called *Puppies*).

Some courts stress that independent judgment review aims at developing and refining the constitutional rules.[65] This development would happen regardless of who won below, which suggests that independent judgment review should apply symmetrically. Other courts stress *Bose*'s other rationale: that appellate review decreases the chances that constitutionally protected speech would be erroneously punished. Under this view, when the free speech claimant wins below, there's no risk that the factfinder has erroneously abridged a constitutional right.[66] Indeed, independent appellate review in this situation *increases* the chance of erroneously punishing protected speech (though it decreases the chance of erroneously protecting unprotected speech). Moreover, the argument goes, courts can't adopt independent judgment review just for prudential reasons. Under Federal Rule of Civil Procedure 52(a) for bench trials, and the Seventh Amendment for jury trials, appellate courts *must* review factual findings for clear error.

In our view, independent judgment review of the idea-expression decision is valuable even when the defendant won at trial: Whoever won, independent review should produce more refinement of the legal standard, something *Bose* says is constitutionally valuable. Moreover, a symmetric rule is fairer to plaintiffs. Copyright plaintiffs' claims are not claims of constitutional right, but they are certainly important; as *Harper & Row* pointed out, copyright law itself serves First Amendment goals.[67]

For review of bench trials, the symmetric approach can be used whether or not one concludes that *Bose* requires it as a constitutional matter; as we mentioned above, most circuits hold that decisions involving application of law to fact may be reviewed de novo without running afoul of Rule 52(a).[68] And the rationale for reviewing mixed questions de novo—that questions that involve "strik[ing] a balance between two sometimes conflicting societal values" and that are therefore "of clear precedential importance"[69] should be decided by appellate courts—applies well in the copyright context.

Independent judgment review probably can't work, regardless of how one reads *Bose*, when the court is reviewing a jury's general verdict for a defendant. Copyright claims involve subsidiary factual inquiries. When the

65. *See* Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053-54 n.9 (11th Cir. 1987); Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 897 (5th Cir. 1985); Lewis v. Colorado Rockies Baseball Club, Ltd., 941 P.2d 266, 270-71 (Colo. 1997); *see also* Lindsay v. City of San Antonio, 821 F.2d 1103, 1107-08 (5th Cir. 1987) (applying independent judgment review even though the free speech claimant won below, though not discussing whether the standard should be symmetrical); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323 (10th Cir. 1984) (same).

66. *See* Multimedia Publ'g Co. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 160 (4th Cir. 1993); Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985); Brown v. K.N.D. Corp., 529 A.2d 1292, 1295-96 (Conn. 1987); *see also* Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981, 981-82 (1988) (White, J., dissenting from denial of certiorari) (noting a split among the lower courts).

67. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

68. *See supra* note 57 and accompanying text.

69. United States v. McConney, 728 F.2d 1195, 1205 (9th Cir. 1984) (en banc).

defendant wins, it might be either because the jury concludes that there was no substantial similarity of expression or, for instance, because the jury concludes that there was independent creation and thus no copying at all. The court of appeals has no way of knowing the real reason, and thus can't reverse even if it thinks there was substantial similarity of expression. Review of special verdicts, however, is practically possible, and the Seventh Amendment, which bars reexamination only of "fact[s] tried by a jury,"[70] probably doesn't prevent appellate courts from reviewing mixed questions of law and fact.[71]

E. *Applying These Principles to Summary Judgment and Motions for Judgment Notwithstanding the Verdict (J.N.O.V.)*

The same principles apply when trial courts review motions for summary judgment and for judgment notwithstanding the verdict. In such cases, our analysis suggests that the court must independently decide whether the two works are indeed substantially similar in their expression, and not just whether a reasonable jury could so find.

This makes sense, doctrinally, practically, and theoretically. Doctrinally, federal courts have held that the *Bose* reasoning applies to decisions on summary judgment[72] and motion for j.n.o.v.[73] Practically, for j.n.o.v.

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70. U.S. CONST. amend. VII.

71. *See* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 32, 56-57 (1990); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 749 (1993). *But see* Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 502-03 (1965).

72. *See, e.g.*, Andersen v. McCotter, 100 F.3d 723, 725 (10th Cir. 1996); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989); Secrist v. Harkin, 874 F.2d 1244, 1251 (8th Cir. 1989), Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 598 (D.C. Cir. 1988); *see also* Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1293 (D.C. Cir. 1988) (applying *Bose* on appellate review of a summary judgment decision and stating that "[f]irst amendment concerns also affect a court's posture in reviewing the evidence presented on summary judgment"); Herbert v. Lando, 781 F.2d 298, 308 (2d Cir. 1986) (applying *Bose* on appellate review of a summary judgment decision); Coughlin v. Westinghouse Broad. & Cable Inc., 780 F.2d 340, 352 n.17 (3d Cir. 1986) (Becker, J., concurring); Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 895-98 (5th Cir. 1985); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984); Foretich v. American Broad. Co., Nos. Civ.A.93-2620 & Civ.A.94-0037(HHG), 1997 WL 669644 (D.D.C. Oct. 17, 1997) (applying *Bose* at summary judgment); Davidson v. Time Warner, Inc., No. Civ.A.V-94-006, 1997 WL 405907, at *16 (S.D. Tex. Mar. 31, 1997); Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 844 (D. Md. 1996), *rev'd on other grounds*, 128 F.3d 233 (4th Cir. 1997); Brown & Williamson Tobacco Corp. v. Jacobson, 644 F. Supp. 1240, 1245 (N.D. Ill. 1986), *aff'd in part and rev'd in part on other grounds*, 827 F.2d 1119 (7th Cir. 1987). *But see* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1571 (D.C. Cir. 1984) (holding the *Bose* requirement inapplicable to appellate review of a grant of summary judgment), *rev'd on other, related grounds*, 477 U.S. 242 (1986), *and since abandoned*, Liberty Lobby Inc., v. Dow Jones & Co., 838 F.2d at 1293; Coughlin v. Westinghouse Broad. & Cable, Inc., 603 F. Supp. 377, 389 (E.D. Pa. 1985) (same), *aff'd on other grounds*, 780 F.2d 340 (3d Cir. 1986).

Some of these cases apply *Bose* on appellate review of a trial court's summary judgment decision. For the reasons we give in this subsection, it would make no sense to apply a different standard to the trial court's decision itself.

73. *See, e.g.*, Crowder v. Housing Auth., 990 F.2d 586, 594 n.15 (11th Cir. 1993) (stating that the "plaintiff was entitled—under ordinary Federal Rules standards (and even more in the light of *Bose*'s admonition to judges about mixed questions of law and fact)—to a judgment as a matter of law on most

motions, the court of appeals would review the matter independently in any event, assuming an appeal were filed. There's no reason to deny the losing party this independent review until the appellate court rules; and providing this review up front might be more likely to reach the right result even when no appeal is filed.[74] The same goes for summary judgment: If, resolving all the underlying factual claims in the movant's favor, the court still concludes that there's no sufficient similarity of expression, there's no reason to delay this judgment until the j.n.o.v. motion or until review by the court of appeals. In fact, having trial courts review the evidence deferentially and then having appellate courts review it independently would lead to needless reversals, reversals which might have been avoided if the trial courts reviewed the evidence independently to begin with.

Theoretically, at least one of the underlying principles of *Bose* applies fully to trial court review: Trial courts as well as courts of appeals have a duty to prevent erroneous denials of constitutional protection. The other principle—the notion that judicial decisions can help clarify the law—is somewhat less applicable, but still retains considerable force. In copyright practice, district court decisions, if published, are often quite influential:[75] Because copyright lawsuits are mainly about money, losing parties often settle or just give up rather than appeal. District court decisions that something is or is not, as a matter of law, infringement can thus be important benchmarks that help "give[] meaning [to the rules] through the evolutionary process of common-law adjudication."[76]

In any event, as the cases cited above show, the principle that *Bose* generally applies on summary judgment and motion for j.n.o.v. is well entrenched in the case law. The burden is on those who would carve out a special copyright exception. For the reasons we discuss in the next part, we are skeptical that this burden can be met.

F. *Lawyers Should at Least Ask for Independent Review*

Whether or not the above claims are sure winners, they are at least colorable enough that lawyers who lose at trial ought to raise them. Stare decisis doesn't prevent courts from adopting this approach, even if they have

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of his constitutional claims"); Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1355 (N.D. Cal. 1993), *aff'd*, 85 F.3d 1394 (9th Cir. 1996); Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313, 317 (S.D.N.Y. 1986), *rev'd on other grounds*, 800 F.2d 298 (2d Cir. 1986).

74. It is, of course, possible that the district court's independent review would reach one result and the court of appeals's independent review would reach another; in retrospect, then, one might say that the district court's independent review was a waste of time. But unless the substantial-similarity-of-expression test is indeed entirely indeterminate, we would assume that by and large the district court and the court of appeals would come to the same, one hopes correct, conclusion.

75. Those skeptical about this might check out any copyright casebook or treatise, and see how many of the leading cases discussed there are district court cases.

76. Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 502 (1984).

in the past reviewed substantial-similarity-of-expression findings only for clear error; none of the cases adopting a clear error standard considered *Bose*. When a new argument is raised that wasn't considered in a prior case, a court isn't bound by the prior decision.[77] And our proposal is hardly radical: As we discuss below, in Subsection II.B.4, some circuits have indeed accepted independent review—though not on constitutional grounds—with no obvious ill effects.

II. IS COPYRIGHT DIFFERENT?

So far, we have argued: (1) that copyright law restricts speech, but speech that copies another's expression is constitutionally unprotected; (2) that the Court in *Bose* mandated independent review of judgments that a particular instance of speech falls into a constitutionally unprotected category; and (3) that independent review is therefore required for judgments that a particular instance of speech copies another's expression.

But might copyright law somehow differ from other speech restrictions (libel law, obscenity law, and the like), and thus deserve different treatment? We have certainly heard this view from many, and especially from copyright lawyers. Though copyright law is clearly a speech restriction, to many it lacks that speech restriction flavor. It doesn't sound like censorship, only private people lawfully enforcing their property rights. Still, while many have this intuition, the question remains: Is there some specific reason underlying it, some reason that can justify setting aside the normal First Amendment procedural guarantees?

A. *The First Amendment Interest*

1. *Property Rights*

The argument that copyright law should be immune from standard First Amendment procedural rules because it protects property rights strikes us as a non sequitur.[78] Free speech guarantees can't be avoided simply by characterizing a speech restriction as an "intellectual property law." After all, one could plausibly view libel law as protecting a person's property interest

77. *See* Waters v. Churchill, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); Miller v. California Pac. Med. Ctr., 991 F.2d 536, 541 (9th Cir. 1993).

78. *Compare* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) (concluding that prior restraint doctrine doesn't apply to copyright and trademark cases because "[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property"), *with* L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987) (disagreeing with this in the trademark context and stating that "the constitutional issue raised here cannot be dispensed with by simply asserting that Bean's property right need not yield to the exercise of first amendment rights").

in his reputation, or a company's property interest in its product's reputation;[79] yet the First Amendment clearly limits libel law.[80] One still has to ask—as the Supreme Court has asked in its free speech-intellectual property cases[81]—whether these intellectual property laws are unconstitutional speech restrictions, and, if they are substantively constitutional, what procedural protections the First Amendment nonetheless requires.

Of course, we don't deny that property laws are sometimes relevant to analyzing free speech claims: The First Amendment does not, for instance, license people to trespass on private real estate in order to speak.[82] But trespass laws are generally applicable to all conduct, speech or not, and operate without regard to the communicative impact of the speech; it makes sense not to view them as general speech restrictions for purposes of the independent review doctrine. But content-based laws, specifically targeted at speech, must be seen as speech restrictions, whether or not one frames them as "property" rules. They may be substantively valid speech restrictions, but our calling them property rules doesn't justify exempting them from the normal First Amendment procedural principles. This is especially so when they ban people from saying a particular thing anywhere, at any time, and not just on others' private property.

2. *Private Enforcement*

Copyright law is largely enforced by private litigation, not government prosecution, so one might argue that it is much less likely to turn into an engine of censorship. But of course libel law is also enforced almost entirely by private litigation. Despite this, libel law is understood to be a government-imposed restriction,[83] even if the regime of private enforcement makes it a little harder for the government to use the restriction as part of a coherent censorship campaign.[84] *Bose* itself involved a private company suing over a

79. Reputation is generally not a property interest for purposes of the U.S. Constitution's Due Process Clause, *see* Paul v. Davis, 424 U.S. 693 (1976), but it may be a property right for other purposes, *see, e.g.*, Marrero v. City of Hialeah, 625 F.2d 499, 514 (5th Cir. 1980) (holding that Florida law recognizes business reputation as a property interest, at least to the extent that it approximates goodwill); Nossen v. Hoy, 750 F. Supp. 740, 743 (E.D. Va. 1990) (holding that "an individual holds a . . . property interest in his or her reputation" for purposes of Washington and Virginia conversion law).

80. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

81. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (quasi-trademark); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (copyright); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (right of publicity).

82. *See* Hudgens v. NLRB, 424 U.S. 507 (1976).

83. *See* New York Times Co. v. Sullivan, 376 U.S. at 265 ("Although [a libel suit] is a civil lawsuit between private parties, the [state] courts have applied a state rule of law . . . . It matters not that that law has been applied in a civil action . . . .").

84. Query whether privately enforced laws might actually prove to be *more* restrictive than government-enforced ones. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumen, 117 S. Ct. 1871, 1877 (1997) (suggesting that private, self-interested enforcement of legal rules may be more zealous and more thorough than direct government enforcement).

statement that the government cared little about; nonetheless, the Court held that the First Amendment's procedural protections applied. The same should be true for copyright law.

3. *Content Neutrality*

Nor is intellectual property law content neutral and therefore (as some have argued)[85] subject to laxer rules. To begin with, independent review is still required in cases involving content-neutral restrictions.[86] But beyond this, copyright liability turns on the content of what is published. True, the law draws no ideological distinctions; just like libel laws, obscenity laws, and fighting-words laws, copyright law applies equally to speech advocating democracy, speech advocating communism, and speech with no ideological message at all. But while this might make the law viewpoint neutral, it doesn't make it content neutral,[87] and doesn't warrant ignoring the *Bose* rule.

4. *Subject Matter of the Jeopardized Speech*

One might suggest that copyright lawsuits pose little threat to free speech because they typically involve nonpolitical matters; after all, if a court erroneously concludes that *Battlestar Galactica* infringes the plot of *Star Wars*,[88] will the Republic really fall? When the risk of error or chill falls only on such pedestrian material, the argument might go, there's no need for special procedural protections.

Bose itself, however, was a trade libel case, involving nothing more significant than a product review of a stereo speaker system. The Court likewise applies independent review in obscenity and fighting-words cases,[89] even though the risk of error or chill in such cases is typically borne by nonpolitical speech.[90] The same is true for commercial speech

85. *See, e.g.*, Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 n.11 (9th Cir.) (citing Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) (holding that trademark law is content neutral)), *cert. dismissed*, 118 S. Ct. 27 (1997).

86. *See* Turner Broad. System, Inc. v. FCC (Turner I), 512 U.S. 622, 665 (1994); Association of Community Orgs. for Reform Now v. St. Louis County, 930 F.2d 591, 595-96 (8th Cir. 1991).

87. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion) (holding that all content-based restrictions, even viewpoint-neutral ones, are constitutionally suspect); Boos v. Barry, 485 U.S. 312, 321 (1988) (same); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (same); Carey v. Brown, 447 U.S. 455, 462 n.6 (1980) (same); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-38 (1980) (same).

88. *See* Twentieth-Century Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983).

89. *See supra* notes 38-39 and accompanying text.

90. In fact, in obscenity and fighting-words cases, the risk of error is borne by speech that at least some Justices have claimed is of low constitutional value. *Compare* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-73 (1976) (plurality opinion) (suggesting that pornography is of low constitutional value), *and* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (plurality opinion) (suggesting that profanity is of low constitutional value), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 n.6 (1992) (stressing that this view has never commanded a majority of the Court). Entertainment, even nonpolitical entertainment,

cases.[91] And, of course, quite a few copyright cases do involve political speech (consider *Harper & Row* itself), and quite a few libel cases involve material that seems to be as much "entertainment" as a typical movie or novel.[92]

5. *It's All the Cost of Doing Business*

Many copyrights—especially those that actually end up in litigation—are exploited by fairly large businesses. One might argue that the chilling effect of legal uncertainty is less of a problem when lawsuits are just a cost of doing business; Twentieth-Century Fox, the argument might go, just isn't going to be very chilled by the risk of copyright litigation.[93]

But this in no way differentiates copyright from libel law. Most libel defendants are also large businesses, whose job is reporting and whose business interests in many respects counteract any chilling effect the law could have. Still, we worry that libel lawsuits might lead even the richest newspapers to soft-pedal certain issues: Even wealthy entities that can afford a lawsuit might still be reluctant to face one; businesses try hard to minimize their costs of doing business.

The same goes for copyright cases. A movie studio may be able to bear the costs of litigation over, say, a docudrama that's similar to another story based on the same set of facts, but this doesn't mean that the studio will be willing to bear this cost. It might decide to do another story instead—perhaps no great loss to the world, but no less a loss than in the typical libel situation.

6. *Copyright Law Furthers Free Speech Values*

Nor can copyright law be exempted from the general *Bose* rule because "copyright itself [can] be the engine of free expression."[94] Copyright law's speech-enhancing effect, coupled with its specific constitutional authorization,[95] justifies holding copyright law to be a substantively valid speech restriction.[96] But procedural rules, such as the independent review

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has always been held to be of high constitutional value. *See* Winters v. New York, 333 U.S. 507, 510 (1948).

91. *See supra* note 44 and accompanying text.

92. *Cf.* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (involving a libel action based on a story about the divorce of a wealthy socialite); Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974) (involving a false light privacy action based on a sensational crime story more akin to a modern docudrama than to political speech); Time, Inc. v. Hill, 385 U.S. 374 (1967) (same).

93. *Cf.* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1329-34 (1992) (suggesting that the chilling effect of libel law on media businesses is less than one might think).

94. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

95. *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

96. *See Harper & Row*, 471 U.S. at 558-60.

requirement, exist to make sure that even substantively valid speech restrictions don't end up restricting speech that should remain protected.

Moreover, independent appellate review would not in any event greatly diminish the incentive provided by copyright law, just as such review does not greatly diminish the force of libel law or obscenity law. Refining the substantial-similarity-of-expression test actually fits well with copyright policy as well as with First Amendment law: "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."[97] If anything, the premise that copyright law furthers free speech values makes it especially important that copyright cases be accurately decided, since error in either direction (too much protection or too little) implicates a First Amendment interest. If *Bose* is correct—if independent appellate review is important to correct unconstitutional results and to refine the rules, thus reducing the risk of such errors in the future—then independent review is doubly valuable for copyright cases.

We are also generally skeptical of distinguishing supposedly speech-furthering restrictions from other restrictions. Many kinds of speech restrictions may be seen as furthering speech in some way. Justice White made this argument about libel law, claiming that "virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems."[98] Some have likewise argued that pornography tends to "silence" women, which might suggest that obscenity law may serve First Amendment values.[99] Similarly, Justice Jackson argued that bans on strident public denunciations of a religion may serve First Amendment religious freedom values.[100]

Some contend that these arguments justify substantive speech restrictions and some contend the opposite.[101] Regardless of how one comes down on this question, however, the arguments do not justify exemption from the normal procedural rules that make sure the substantive rules are accurately applied. And in any event, copyright law's supposed speech-enhancing effects cannot justify a special exemption for copyright law alone.

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97. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

98. Gertz v. Robert Welch, Inc., 418 U.S. 323, 400 (1974) (White, J., dissenting); *see also id.* (endorsing the view that "fascists' effective use of defamatory attacks on their opponents" suggests that "the law of libel . . . [may be] important for modern democratic survival" (internal quotation marks omitted)).

99. *See, e.g.*, ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 47-48 (1988); Paul E. McGreal, *Constitutional Illiteracy*, 30 IND. L. REV. 693, 697 n.30 (1997) (book review) (discussing this argument).

100. *See* Kunz v. New York, 340 U.S. 290, 302 (1951) (Jackson, J., dissenting).

101. *See generally* Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223 (1996).

7. *The Copyright and Patent Clause*

The Constitution specifically refers to the government interest underlying copyright law: Article I, Section 8 authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[102] *Harper & Row* mentioned this as one reason that copyright law is a constitutionally permissible speech restriction.[103]

But the existence of congressional power under the Copyright and Patent Clause can't exempt copyright law from all First Amendment scrutiny. The point of the Bill of Rights is to restrain the federal government in the exercise of its enumerated powers: For instance, the government has the enumerated power to run the post office, but this doesn't mean it can refuse to carry communist propaganda.[104] Likewise, in exercising its copyright power, Congress is bound by the Fourth, Fifth, and Sixth Amendments.[105] Copyright law must likewise be bound by the First Amendment.

We agree that it would be unsound to read the First Amendment as entirely eliminating the copyright power created by the Framers only two years earlier.[106] The Copyright and Patent Clause does represent the Framers' judgment that "copyright itself [can] be the engine of free expression,"[107] so courts ought not, in their zeal to protect speech, eviscerate the incentive that copyright law provides. This was good reason for *Harper & Row* to conclude that copyright law is substantively constitutional. But it hardly shows that copyright law ought to be free of the traditional procedural protections available in all other First Amendment cases.[108] Independent appellate review

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102. U.S. CONST. art I, § 8, cl. 8.

103. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); *cf.* Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 849 (11th Cir. 1990) ("Since the Copyright Act is the congressional implementation of a constitutional directive to encourage inventors by protecting their exclusive rights in their discoveries, copyright interests also must be guarded under the Constitution, and injunctive relief is a common judicial response to infringement of a valid copyright [despite the normal First Amendment due process rule against prior restraints]."); 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15:58, at 15-88 (3d ed. 1996) (stating that "the fact that copyright protection is itself a value of constitutional dimension, vindicating the directive of the Constitution's Copyright Clause" justifies the issuance of injunctions).

104. *See, e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (striking down a restriction on mailing of communist advocacy); *see also, e.g.*, United States v. Grace, 461 U.S. 171, 179-80 (1983) (striking down on First Amendment grounds a law enacted pursuant to the Federal District Clause power); Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1649-50 (1993).

105. *See, e.g.*, Time Warner Entertainment Co. v. Does, 876 F. Supp. 407, 414 (E.D.N.Y. 1994) (holding that ex parte seizure of supposedly infringing materials, though authorized by the Copyright Act, was impermissible under the Fourth Amendment).

106. *Cf.* Patton v. United States, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*.").

107. *Harper & Row*, 471 U.S. at 558.

108. *But see* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) (concluding that *Harper & Row* implicitly validated all the provisions of the Copyright Act, including those providing for preliminary injunctions, even though preliminary injunctions against speech are generally prohibited by the prior restraint doctrine).

would not eviscerate or even greatly diminish the incentive provided by copyright law, just as it does not eviscerate libel law or obscenity law. It would merely require that the law be enforced in a slightly different way.

8. *Importance of the Government Interest*

Finally, one might correctly point out that the interest upheld by copyright law—the interest in providing an incentive for disseminating ideas—is, even without regard to its constitutional status, quite important. We do not doubt that this is so, but lots of speech restrictions are justified by important interests. Preventing incitement to imminent violence is surely an important interest, too, as are protecting individual reputation[109] and combatting child pornography.[110] Yet independent review applies in each of these cases.[111] Independent review doesn't prevent these interests from being served; it just requires that they be served through a certain set of procedures.

B. *Is Trying To Refine the Idea-Expression Dichotomy Pointless?*

The first foundation for *Bose* review—the normative obligation to protect speech from erroneous restriction—thus applies to copyright law as well as it does to libel law, obscenity law, and all the other areas where *Bose* review is required. The heart of any assertion that *Bose* ought not apply to copyright cases must be a claim that the second justification—that independent review will help the rule evolve through case-by-case adjudication—is simply factually incorrect for copyright cases: that, as Judge Learned Hand suggested, decisions about substantial similarity of expression "must . . . inevitably be *ad hoc*," and the test must therefore be "of necessity vague."[112] Perhaps common law adjudication *cannot* give the line more meaning than the words themselves offer. Perhaps ultimately each factfinder must draw the line anew, based on its own notions of what is an "idea" and what is "expression." Perhaps new subrules and benchmark decisions are useless.

We think there is a kernel of truth to this argument, but not enough to justify departing from *Bose*. True, the idea-expression dichotomy is necessarily vague, and additional refinement by appellate decisions will not make it vastly clearer. Still, the appellate decisionmaking that independent review makes possible will probably provide *some* extra clarity, some extra guidance for litigants and lower courts. This, coupled with the normative argument we have presented above, is enough to warrant following *Bose* even in copyright cases.

109. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990).
110. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 949 (1982).
111. *See* Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 504-05 (1984)
112. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

We come to this conclusion based on four sources of evidence, which we discuss in succeeding subsections:

(1) Copyright decisions often do compare and contrast the facts in a case with the facts in prior cases. Decisions that determine whether two items are substantially similar in their expression—rather than just deciding whether such a conclusion is clearly erroneous—are thus of significant precedential value.

(2) Lawyers likewise seem to rely somewhat on prior case law.

(3) The Supreme Court has accepted that independent review is valuable even where, as here, the substantive rule is fact-intensive and the precedent-building benefits of independent review are not likely to be very large. While the Court may have erred on this—or perhaps even generally erred in *Bose*—the Court's considered judgment in these cases deserves respect.

(4) While there may be some costs to independent review, some circuits have adopted it (for reasons other than the ones we suggest) with no obvious ill effects. Likewise, all circuits generally independently review fair use findings, again with little trouble.

Points one and two suggest that independent review may be practically beneficial. Point three suggests that even a small benefit may be adequate to justify it. Point four suggests that independent review is unlikely to be harmful. This evidence is tentative, and we are not sure how one could get more definitive evidence. Still, given the Court's ruling in *Bose*, the burden of proof should be on those who want to carve out a copyright exception. Absent such a showing, fidelity to the rules requires that *Bose* be followed; independent appellate review is therefore the sounder result.

1. *Lower Courts' Use of Prior Cases as Benchmarks*

Despite the supposedly ad hoc nature of each idea-expression decision, courts do look to benchmark cases in deciding whether two works are substantially similar in their expression. *Durham Industries, Inc. v. Tomy Corp.*,[113] a case dealing with alleged infringement of copyrights in games, dolls, and toys, is a good example. The *Durham* court acknowledged that "'[g]ood eyes and common sense may be as useful as deep study of . . . cases, which themselves are tied to highly particularized facts.'"[114] But the court went on to say: "[W]e have nevertheless consulted the cases dealing with toys and dolls in order to check both our eyes and our sense."[115] Indeed, the court cited eleven cases on similar subjects, briefly noting degrees of similarity. The court acknowledged that the plaintiff's and defendant's dolls were similar in that they walked or crawled, were small and made of plastic, and had "full

113. 630 F.2d 905 (2d Cir. 1980).

114. *Id.* at 917 (quoting Couleur Int'l Ltd. v. Opulent Fabrics Inc., 330 F. Supp. 152, 153 (S.D.N.Y. 1971)).

115. *Id.*

faces, pert noses, bow lips, and large, widely spaced eyes,"[116] but cited cases holding that these sorts of combinations of features are standard doll features and hence ideas, not expressions.[117]

Likewise, *Conan Properties, Inc. v. Mattel, Inc.*[118] relied on comparisons with earlier case law in holding that He-Man (a *Masters of the Universe* character) did not infringe the Conan the Barbarian character. *Saban Entertainment, Inc. v. 222 World Corp.*[119] similarly quoted extensively from an earlier case in concluding that the Mega Rangers Power Bike set was substantially similar in its expression to the Mighty Morphin Power Rangers dolls.

Moving from toys to compilations, in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*,[120] the Second Circuit reversed a lower court opinion and held that, while the plaintiff's "Chinese Business Guide & Directory" was copyrightable, the defendant's "Chinese American-Life Guide" did not copy the Business Guide's copyright-protected selection and arrangement. Judge Winter noted that the Business Guide selected 9000 businesses and arranged them in 260 categories, while the Life Guide selected only 2000 businesses and arranged them in twenty-eight categories.[121] The selections and arrangements were not similar enough to constitute infringement. The opinion drew on two earlier compilation cases, *Eckes v. Card Prices Update*[122] and *Kregos v. Associated Press*,[123] as well as on the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,[124] in deciding where to draw the line.

Collectively, *Eckes*, *Kregos*, and *Key Publications* show the Second Circuit erecting fairly detailed guideposts to help draw the idea-expression line in factual compilation cases. Selecting 5000 out of 18,000 baseball cards as being of premium value is copyrightable expression.[125] Choosing 9000 businesses for a business guide and arranging them into categories is expression, but creating another business guide with substantially different selections and arrangements takes only the idea, not the expression.[126] Putting together nine kinds of statistics on pitchers is just enough to qualify for protection, but that protection is limited to near exact copying.[127] Together these cases give

116. *Id.* at 916.

117. *See id.*; *cf.* Past Pluto Prods. Corp. v. Dana, 627 F. Supp. 1435 (S.D.N.Y. 1986) (similarly relying on several cases in determining copyrightability, as opposed to substantial similarity).

118. 712 F. Supp. 353 (S.D.N.Y. 1989).

119. 865 F. Supp. 1047 (S.D.N.Y. 1994).

120. 945 F.2d 509 (2d Cir. 1991).

121. *See id.* at 515.

122. 736 F.2d 859 (2d Cir. 1984).

123. 937 F.2d 700 (2d Cir. 1991).

124. 499 U.S. 340 (1991).

125. *See Eckes*, 736 F.2d at 863.

126. *See Key Publications*, 945 F.2d at 515-16.

127. *See Kregos*, 937 F.2d at 702, 709-10.

considerable guidance to how much protection a compilation will likely receive.

Even with literary works, courts use previous cases as guides and instruction (though this may at first glance seem harder, since literary works are much more complex than compilations or toys). Consider *Nash v. CBS, Inc.*[128] Jay Robert Nash published many books claiming that John Dillinger was not actually killed in a shootout with FBI agents; instead, Nash's theory went, a look-alike was shot in his place, and Dillinger laid low and survived for many decades. An episode of the TV show *Simon and Simon* was based on this idea, and Nash sued for copyright infringement. The district court granted summary judgment for CBS, and the Seventh Circuit affirmed.

In his opinion, Judge Easterbrook pointed out that the existing tests for distinguishing ideas from expression "do[] little to help resolve a given case,"[129] and observed that "[a]fter 200 years of wrestling with copyright questions, it is unlikely that courts will come up with the answer any time soon, if indeed there is 'an' answer, which we doubt."[130] Easterbrook analyzed how providing either too little or too much protection might discourage production of new works, then wrote that courts "must muddle through, using not a fixed rule but a sense of the consequences of moving dramatically in either direction."[131] Despite these concerns, the *Nash* court did look to earlier cases as benchmarks: It compared the fact pattern to that in *Hoehling v. Universal City Studios, Inc.*,[132] which found no infringement because there was substantial similarity only of facts and not of expression, and to that in *Toksvig v. Bruce Publishing Co.*,[133] which found infringement because the expression was substantially similar. The prior cases did create law that gave some guidance in a future case.

Of course, these cases, and others like them,[134] are hardly conclusive proof that independent appellate review is worth the candle. Courts might just be citing the precedents as post hoc rationalizations of whatever view they held to begin with. Or perhaps the precedents do provide useful benchmarks—and are therefore useful predictors—but only to a small degree; perhaps each new precedent is helpful only in a few cases, and even then only to set a mood rather than to provide a definite answer.

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128. 899 F.2d 1537 (7th Cir. 1990).

129. *Id.* at 1540.

130. *Id.*

131. *Id.* at 1541.

132. 618 F.2d 972 (2d Cir. 1980).

133. 181 F.2d 664 (7th Cir. 1950).

134. *See, e.g.*, Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995) (engaging in an extensive comparison with *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991)); Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64 (2d Cir. 1974) (drawing on *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971)); Uneeda Doll Co. v. Regent Baby Prods. Corp., 355 F. Supp. 438 (E.D.N.Y. 1972) (drawing on *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966)).

Nonetheless, the cases do undercut the strong claim that each copyright case is sui generis. Judges at least assert that past decisions are helpful in deciding future ones. Precedents do seem to "confine the perimeters"[135] of the idea-expression dichotomy, to "mark[] out the limits of the standard through the process of case-by-case adjudication,"[136] to "give[] meaning" to the rule "through the evolutionary process of common-law adjudication."[137] And the Court itself accepts the notion that litigation may help "the boundaries of copyright law [to] be demarcated as clearly as possible."[138]

The magnitude of this clarifying effect is unclear. If *Bose* had never existed, and if the Court were deciding solely on pragmatic grounds whether to adopt independent appellate review in copyright cases, we might conclude that the clarifying effect is too speculative to justify independent review. But the Court has mandated independent review, because of both the supposed law-clarifying benefits of such review and the perceived constitutional value of an extra look in cases involving free speech rights. Given this, *Bose* must be followed unless there is strong reason to believe that its reasoning is mistaken in copyright cases. The cases we discuss in this subsection suggest that there is no such strong reason.

2. *Lawyers' Use of Prior Cases as Benchmarks*

Another possible check on whether the Supreme Court's intuitions apply to copyright cases is the view of experienced lawyers. Theory that sounds good in the ivory tower, or to the Justices, may nevertheless end up failing on the streets.

We are conscious of the great difficulty, perhaps even impossibility, of any scientific empirical work in this area. Even if we could ask a large enough sample of lawyers their views on the question, we would get only a general sense of lawyers' beliefs (as filtered through the particular text of the questions we asked). These beliefs might not quite match reality; they might not even reveal the lawyers' likely actions; in fact, because many lawyers do not often consciously think about standards of review, they may not have any settled beliefs on the subject at all.

Nonetheless, we thought it worthwhile to talk to a handful of experienced lawyers to get a sense of their views—a reality check against the judgment of several expert practitioners. If, for instance, all of them had firmly told us that prior case law was useless in predicting future cases, this would have led us to think twice about our conclusions.

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135. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502-04 (1984).
136. *Id.* at 503.
137. *Id.* at 502.
138. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

We asked six copyright lawyers how they advise clients whether one work may have infringed another.[139] We started with general questions about how the lawyers predict what a court would do if presented with a specific fact pattern, and then focused on questions about appellate review.[140] This is obviously not a scientific survey of any sort—the sample size is laughably small, and the questions are open-ended—but it may provide some insight into how at least some lawyers react to cases.

When we asked the lawyers generally how they would predict what a court would do—without specifically raising the possibility of comparing a case against precedents[141]—we got a range of answers. Some lawyers mentioned case law, among other things.[142] Others initially stressed that it is a matter of judgment.[143] Blaine Greenberg reported that he presents nonlawyers in his office with the two items and asks for their reactions.

When asked explicitly whether they would look to prior cases,[144] those who didn't initially mention them split on their usefulness. Bob Osterberg stated that he would turn to those cases he knows and do research on cases outside his core field (music). Herb Schwartz reported that he would look to cases, but "cases only take you so far in this area." Greenberg would look to cases "only if we had a very specific area where I thought it had case law that goes to it," stressing the fact-specific nature of the question.

The lawyers could think of few ways to make it easier to predict likely results.[145] Schwartz remarked that "it's like pornography, unfortunately."[146] They split over whether having more benchmark cases would help.[147] Tom Hemnes thought that benchmark cases help in more established media, but that courts have trouble in more unusual areas. Greenberg said that "the more

139. Telephone Interview with Blaine Greenberg, Partner, Troop, Meisinger, Steuber and Pasich, Los Angeles, Cal. (Apr. 10, 1997); Telephone Interview with Tom Hemnes, Partner, Foley, Hoag & Eliot, Boston, Mass. (Apr. 21, 1997); Telephone Interview with David Nimmer, Of Counsel, Irell & Manella, Los Angeles, Cal. (Mar. 5, 1997); Telephone Interview with Peter Nolan, Assistant General Counsel, Walt Disney Company, Los Angeles, Cal. (Mar. 11, 1997); Telephone Interview with Bob Osterberg, Of Counsel, Abelman, Frayne and Schwab, New York, N.Y. (Mar. 25, 1997); Telephone Interview with Herb Schwartz, Partner, Fish & Neave, New York, N.Y. (Apr. 16, 1997). In the succeeding discussion, we provide a reference only if it is unclear from the text to which interview we are referring.

140. For the full questionnaire, see *infra* Appendix.

141. See *infra* Appendix, Question 1.

142. Telephone Interview with Tom Hemnes, *supra* note 139; Telephone Interview with David Nimmer, *supra* note 139; Telephone Interview with Peter Nolan, *supra* note 139.

143. Telephone Interview with Bob Osterberg, *supra* note 139; Telephone Interview with Herb Schwartz, *supra* note 139.

144. *See infra* Appendix, Question 2.

145. *See infra* Appendix, Question 4. Greenberg had the interesting suggestion of a database that would not only list appellate decisions by area, but would also provide side-by-side comparisons of the material being litigated.

146. Schwartz's remark was an allusion to Justice Stewart's famous statement in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), that "I shall not today attempt further to define [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."

147. *See infra* Appendix, Question 5.

information that exists and the more published opinions there are, the better off you are. But the more cases decided, the more likely it is that you can find a rationale for your argument because not all courts are going to agree." Peter Nolan agreed that courts sometimes disagree and noted that benchmark cases only help "if you have something very akin to your situation." Osterberg thought more benchmarks might be useful in some areas, though he believed that in his area (literary property) there were plenty. On the other hand, Schwartz doubted that more benchmark cases would increase predictability. David Nimmer, meanwhile, thought there were plenty of cases; indeed, he said, "maybe it would make life easier if there were fewer benchmark cases."

These responses reflect, sometimes simultaneously, two conflicting views on the accumulation of precedent. One view holds that the buildup of precedent makes the law clearer, more detailed, and more predictable. The other view sees case law becoming more chaotic, as courts with different outlooks find ways to distinguish cases with close facts.

Most of the lawyers distinguished how they use district court and circuit court precedents.[148] This is partly because circuit cases are mandatory precedent, but there are other reasons as well. Greenberg felt that district courts were less predictable than circuit courts.[149] As for using cases from the other circuits, the lawyers differed. Osterberg said that even cases from other circuit courts "get more attention and respect" than do district court cases. Nolan had a similar opinion, noting that, among other things, circuit cases involve three judges, thereby pooling the accumulated legal experience and wisdom of more people. Nimmer and Schwartz were less inclined to pay attention to cases from other circuits.

When asked whether they treat circuit court cases reviewing summary judgments differently from those reviewing the results of trials,[150] the lawyers gave varying answers. Nimmer said he treats them differently "only to predict if this is a case that's right for summary judgment." Greenberg agreed, saying that if a case survives summary judgment and gets to trial, "then I would advise the client that I think the equitable appeal of the case will be a stronger determinant than the case law." Schwartz endorsed a view closer to ours, saying "denials of summary judgment don't tell you a lot. Granting summary judgment is a pretty extreme case. So trials tell you more."

On the points most closely tied to this Essay, most of the lawyers do not pay attention to whether circuit court cases used de novo review or clear error

148. *See infra* Appendix, Question 6.

149. As he put it, "Trial judges are such strong personalities that they don't care what their brethren will do. It wouldn't surprise me if some cases would go ten different ways depending on who you draw. . . . But if the case can go to the Ninth Circuit, and if the circuit is consistent, I may anticipate winning at the appellate level."

150. *See infra* Appendix, Question 7.

review.[151] Hemnes, however, said that "if the court holds a decision is not clearly erroneous but has dicta saying it is questionable and it might hold differently under a different posture, then I treat clear error cases differently. Usually the court will make that clear." And Osterberg did say that he "would tend to give greater weight to decisions using de novo review." When asked whether they were aware of differences among circuits in the standard of review,[152] a few had some sense of differences, but none had any detailed awareness. When asked about general differences among circuits,[153] Hemnes said the following:

> [T]he circuits that address this comparatively infrequently are harder to predict than those which have a long track record. At the most extreme, the Second Circuit is pretty predictable. . . . On the other hand, the Ninth Circuit is a puzzle to me. You'd think they would have a lot of experience, but they are less predictable to me. It may be that they are struggling with less traditional media.

Some of the lawyers did think that the standard of review a court employs might affect their decision whether or not to appeal a trial court's holding.[154] De novo review should make losing parties more likely to appeal.[155] Not all, however, thought the standard of review would affect their decision whether to appeal.[156]

Our informal inquiry therefore suggests that these practicing lawyers have not particularly considered the effects of appellate review standards on copyright litigation, the issue on which we focus in this Essay. Some of them share the view that copyright cases are quite fact-specific and that good judgment rather than specific case law is a lawyer's most important guide. But at least a few of them think that more benchmark cases, particularly on close fact patterns, would make outcomes more predictable. Moreover, the lawyers generally agree that circuit court opinions are more useful than trial court opinions. The judgments of these expert practitioners thus reinforce our view that devices that force circuit courts to produce more detailed, useful opinions could be of some help. De novo appellate review is one such device.

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151. *See infra* Appendix, Question 8.

152. *See infra* Appendix, Question 11.

153. *See infra* Appendix, Question 10.

154. *See infra* Appendix, Question 9.

155. Greenberg, for example, said that "if there is de novo review, you've got a much better chance of winning. If there is de novo review, we'd be more likely to appeal, and more likely to be interested in what the court of appeals had done on these cases." Nimmer said he "should be" influenced by the standard of review: "If the standard is de novo, and I think it's a good case for my client, I should appeal. If it is clear error and the judge preserved the record, then I'm sunk."

156. Schwartz denied that the standard of review would have an effect. Nolan said that "if it were de novo I'm more likely to go up. But unless a pile of money is involved we would not appeal, we would settle. It's too costly to appeal." He said he uses appeals mainly to establish legal principles.

3. *The Supreme Court's Views in Other Areas*

Case law and interviews with lawyers thus suggest that extra precedents may be of some, albeit limited, value. Is this limited benefit sufficient to justify independent review? The Supreme Court has recently confronted this question in other constitutional contexts, and has generally come down in favor of independent review even when the law-clarifying benefits of such review are modest.

The most recent case, *Ornelas v. United States*,[157] involved review of reasonable suspicion and probable cause conclusions in Fourth Amendment cases. These are fact-intensive, totality-of-the-circumstances inquiries, and the Court began by stressing the complexity of the issues involved:

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, non-technical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." . . . They are . . . fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.[158]

Despite this, the Court held that independent appellate review was required:

> [T]he legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify[,] the legal principles. . . . [W]here the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law" . . . .
>
> Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" . . . "[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law . . . ."
>
> It is true that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, "one determination will seldom be a useful 'precedent' for another." But there are exceptions . . . . And even where one case may not squarely

157. 116 S. Ct. 1657 (1996).
158. *Id.* at 1661 (citations omitted).

> control another one, the two decisions when viewed together may usefully add to the body of law on the subject.[159]

The Court took a similar approach in *Thompson v. Keohane*,[160] where it confronted the proper standard of review on habeas corpus of state court determinations regarding whether a person was "in custody" for *Miranda v. Arizona*[161] purposes. The *Thompson* Court acknowledged that the inquiry had a "'totality of the circumstances' cast,"[162] and that appellate decisions might not be able to "supply 'a definite rule.'"[163] It concluded, however, that "'in custody' determinations do guide future decisions";[164] that though such determinations cannot create definite rules, "they nonetheless can reduce the area of uncertainty";[165] and that they may "unify precedent[] and stabilize the law."[166]

When no constitutional values are at stake,[167] or when the application of a test is generally interwoven with witness credibility determinations[168]—usually not the case in idea-expression judgments, which often require only the comparison of physical items[169]—deferential review may be proper. But as *Ornelas* and *Thompson* suggest, where constitutional principles presumptively require independent judgment review, courts should not be deterred by the fact that the test "'[can]not readily, or even usefully, [be] reduced to a neat set of legal rules.'"[170]

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159. *Id.* at 1662-63 (citations omitted).

160. 516 U.S. 99 (1995).

161. 384 U.S. 436 (1966).

162. *Thompson*, 516 U.S. at 112 n.11.

163. *Id.* at 113 n.13.

164. *Id.* at 114.

165. *Id.* at 113 n.13.

166. *Id.* at 115.

167. See, for example, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), which dealt with the question of whether a lawyer engaged in reasonable investigation for purposes of Rule 11 of the Federal Rules of Civil Procedure; and *Pierce v. Underwood*, 487 U.S. 552 (1988), which dealt with whether the government's position in litigation was substantially justified for purposes of determining Equal Access to Justice Act fee awards. In both cases, the Court held that deferential review was required because the fact patterns involved "'"multifarious, fleeting, special, narrow facts that utterly resist generalization"'" and that independent appellate review could not "clarify the underlying principles of law." *Cooter & Gell*, 496 U.S. at 404-05 (quoting *Pierce*, 487 U.S. at 560-62 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1965))). Unfortunately, the Court has not explained exactly why it treated *Ornelas* and *Thompson* differently from *Cooter & Gell* and *Pierce*; the best explanation seems to be that the latter cases involved nonconstitutional matters that were peripheral to the merits.

168. *See Miller*, 474 U.S. at 114, 116-17 (citing cases that mandate deferential review in certain habeas corpus contexts).

169. Of course, decisions about whether the defendant used the plaintiff's work or whether the defendant's work is an entirely independent creation often turn on credibility judgments. This, however, is an analytically separate inquiry from the decision whether a plaintiff's expression is substantially similar to a defendant's expression.

170. Ornelas v. United States, 116 S. Ct. 1657, 1661 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

4. *Independent Appellate Review in Those Circuits That Already Practice It*

The Second Circuit already independently reviews findings of substantial similarity of expression,[171] and there is little sign of this causing any great problems. We know of no commentary or cases pointing to specific bad results of such review, or even generally bemoaning its presence. In fact, our tentative impression is that the Second Circuit has on the whole produced a more helpful body of case law than the other big copyright circuit, the Ninth.[172] This is only a tentative impression, and even if it is correct, there may be other explanations: The Ninth Circuit has more judges and may thus produce less consistent case law, and the West Coast seems to have more cutting-edge new media cases, which might make it harder to create clear, settled precedent. Nonetheless, so long as the Second Circuit does no worse than the Ninth, the main argument against following *Bose*—that the practical costs are so great that we should carve out an exception to the Court's pronouncement—falls away.

Moreover, all circuits are already familiar with independent appellate review in at least one area of copyright law: fair use.[173] Fair use, like substantial similarity of expression, has generally been seen as extremely fact-intensive, "requir[ing] a difficult case-by-case balancing of complex factors."[174] Despite this, however, appellate decisions have created some greater predictability. In the words of Justice Kennedy, "The common-law method instated by the fair use provision of the copyright statute . . . presumes that rules will emerge from the course of decisions,"[175] and it seems that they

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171. *See* Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1316 (2d Cir. 1969).

172. *Compare, e.g.*, Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984) (providing, in a factual compilation case, fairly detailed guidance on drawing the idea-expression line), *discussed supra* text accompanying notes 122-127, *and* Key Publications, Inc. v. Chinatown Today Publ'g Enters., 945 F.2d 509 (2d Cir. 1991) (same), *discussed supra* text accompanying notes 120-127, *with* Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir. 1984) (providing much less guidance on the idea-expression line), Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485 (9th Cir. 1985) (same), *and* Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985) (same). In addition, contrast *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980), which goes through a rather detailed and reasoned comparison of the cases, with *Williams v. Kaag Manufacturers, Inc.*, 338 F.2d 949 (9th Cir. 1964), which concludes only that "an ordinary reasonable person, here represented in the person of the trial judge," found a lack of substantial similarity in deferring to the lower court's finding under a clear error standard.

173. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); New Era Publications v. Carol Publ'g Group, 904 F.2d 152, 155 (2d Cir. 1990); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1434 (6th Cir. 1992), *rev'd on other grounds*, 510 U.S. 569 (1994); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984).

174. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1255 (2d Cir. 1986); *see also Triangle Publications*, 626 F.2d at 1174.

175. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 596 (1994) (Kennedy, J., concurring) (citations omitted).

have. Following *Sony Corp. v. Universal City Studios*,[176] we know that certain sorts of private noncommercial copying of entire works are generally permissible. Following *Campbell v. Acuff-Rose Music*,[177] we know that parodies commenting on the works from which they borrow are favored uses akin to commentary or news reporting. Other cases refine the test further. "[T]he evolutionary process of common-law adjudication"[178] seems to work for fair use, which leads us to suspect that it might also work (or at least not cause enough harm to justify disregarding *Bose*) for substantial similarity of expression.

C. *Against Special Pleading for Copyright*

We thus see no compelling normative reason to treat copyright differently from other speech restrictions, restrictions that are likewise substantively valid, but nonetheless require certain procedural safeguards. There is some practical reason to be skeptical of *Bose*'s utility, but the arguments against applying *Bose* aren't enough to avoid its precedential force.

And we see good reason not to treat copyright more favorably than other speech restrictions. The First Amendment demands sacrifices from many who earnestly believe in the legitimacy of their favorite speech restrictions. This burden is always heavy, but it seems heavier still when others' speech restrictions—especially restrictions that, like copyright law, are identified with the relatively rich and powerful—are given a free ride.[179] Partisans of hate speech restrictions have already begun to point this out;[180] while we disagree with their substantive proposals, they are right to demand that people who

176. 464 U.S. 417 (1984).

177. 510 U.S. 569 (1994); *see also* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 112-17 (2d Cir. 1998) (comparing and contrasting facts with the facts of *Campbell*).

178. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502 (1984).

179. *Cf.* Martin E. Lee, *Free Speech in Moral Joust with Hate Speech*, NAT'L CATH. REP., Oct. 4, 1996, at 17, 17 (reviewing THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995)) ("Noting routine exceptions to free speech absolutism (copyright, trademark and such) that hew to business interests, the essays cite studies that document the heavy toll inflicted by the multibillion dollar porn industry, as it profits from a kind of hate speech that degrades women and children. . . . This book provides a sober rejoinder to cliché-ridden thinking by highlighting the profound power imbalance and social inequities that dim the luster of the First Amendment.").

180. *See, e.g.*, Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 484 (1996) ("Powerful actors like government agencies, the writers' lobby, industries, and so on have always been successful at coining free speech 'exceptions' to suit their interest—copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus."); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 892 (1994) ("Perhaps . . . in twenty or fifty years we will look upon hate speech rules with the same equanimity with which we now view defamation, forgery, obscenity, copyright, and dozens of other exceptions to the free speech principle, and wonder why in the late twentieth century we resisted them so strongly.").

oppose suggested new exceptions to the First Amendment defend their support for the old exceptions.

Any special preference for copyright law must thus be justified by some substantial difference between copyright and other speech restrictions. Where, as here, no such difference exists, favoritism for a particular kind of speech restriction risks corroding public respect for First Amendment law more generally. And, ironically, publishers and producers—the very people who often benefit from the way copyright law now ignores First Amendment protections—have the most to lose from any corrosion of First Amendment protection outside copyright.[181]

III. RECONSIDERING *BOSE*?

Thus, *Bose* constitutionally requires independent judgment review of idea-expression conclusions. There is simply no good justification for carving out a special exception for copyright cases. And yet, we suspect that quite a few readers, especially copyright lawyers, may still conclude that the majority of circuits is right and that independent review is wrong. Independent review would impose a burden, both on litigants and the appellate system: It would require appellate courts to spend more time on each appeal[182] and might encourage more litigants to appeal,[183] thus delaying final decisions and consuming more court time and litigant money. In contrast, the benefits that independent review would provide seem somewhat speculative.

These arguments, however, would apply not just to independent review in copyright cases, but to the *Bose* rule generally, which makes this a good opportunity to ask whether *Bose* might be mistaken. We won't engage in a complete analysis here, but we will briefly sketch how such an argument might go and what it would mean for First Amendment law more broadly.

Any system of justice administered by humans has imperfections. Factfinders might be biased or simply wrong. Rules will not be perfectly well defined, which increases the risk of factfinder bias in applying the rules and leads cautious people to "steer far wider of the unlawful zone."[184]

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181. We are indebted to Doug Laycock for this point.

182. *See* United States v. McConney, 728 F.2d 1195, 1201 n.7 (9th Cir. 1984) (en banc) ("It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources than does application of the clearly erroneous standard. Appellate courts could do their work more quickly if they applied the clearly erroneous standard in most circumstances, because the courts then need only determine if the lower court's decision is a reasonable one, not substitute their own judgment for that of the trial judge.").

183. We suspect that plaintiffs and defendants will differ more in their estimates of success under independent review than in their estimates of success under deferential review. If this is so, then settlement will be less likely. *See* FED. R. CIV. P. 52(a) advisory committee note to 1985 amendments (stating that independent appellate review "tend[s] to . . . multiply appeals by encouraging appellate retrial of some factual issues").

184. Speiser v. Randall, 357 U.S. 513, 526 (1958).

Normal, nonconstitutional law reacts with some equanimity to these imperfections. Sure, judges and juries sometimes get matters wrong, but that's life. Sure, the law is vague, but we can't demand perfect clarity in our complex world. Perhaps the vagueness creates something of a chilling effect, but that effect is unavoidable, tolerable, and not really too great; people are, after all, used to uncertainty and risk, and they are unlikely to overreact to it. Life is uncertain, and the law, to use a phrase one of us has often heard from his father, "is as vague as life itself."[185] We might as well deal with it.

One could easily imagine a constitutional jurisprudence that imposed some substantive restraints—for instance, a requirement that libel law allow truth as a defense,[186] or even a requirement that public figures suing over statements of public concern prove "actual malice"[187]—but then left the law largely alone. Such a system wouldn't trouble itself over independent review; mistakes happen, rules are vague, but that's just too bad. Nor would such a system put restrictions on preliminary injunctions, quanta of proof, burdens of proof, or what have you.

This approach appears in some of Justice White's libel opinions. White consistently endorsed *New York Times Co. v. Sullivan*,[188] but he was skeptical of further constitutionalizing libel law. He was, for instance, unpersuaded that strict liability for falsehoods about private citizens was a "realistic threat to the press and its service to the public."[189] This risk was, to him, subordinate to the normal tort law principle of compensating innocent victims for the deliberate, even if honestly mistaken, actions of a publisher.[190] He did not "fear[] uncontrolled awards of damages by juries" because of his confidence in "the good sense of most jurors" and in the (quite limited) nonconstitutional appellate review mechanisms that would set aside obviously unreasonable verdicts.[191] As to independent review, Justice White largely joined Justice Rehnquist's dissent in *Bose*, which suggested, among other things, that "the need to shield protected speech from the risk of erroneous fact-finding" does not require independent review of certain issues.[192]

The alternative to this view is the "pervasive constitutional concern" approach: a mistrust of the normal-law system and a concern that its

185. Frequent communication from Vladimir Volokh to Eugene Volokh.

186. *Cf., e.g.*, N.Y. CONST. art. VII, § 8 (1821) ("In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted . . . .").

187. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

188. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 60 (1971) (White, J., concurring in the judgment).

189. Gertz v. Robert Welch, Inc., 418 U.S. 323, 390 (1974) (White, J., dissenting).

190. *See id.*

191. *Id.* at 394 & n.31.

192. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 519 (1984) (Rehnquist, J., dissenting).

imperfections are intolerable in the First Amendment context. Under this view, the risk of factfinder errors, as errors of constitutional dimension, necessitates extra review procedures. The risk of constitutional violations must be minimized, even at the expense of increasing the risk of uncompensated harm. The chilling effects of substantial liability and of vague laws are presumed, even without empirical evidence of their magnitude. Constitutional freedoms are seen as "fragile"[193] and in need of special procedural protection; "rigorous procedural safeguards" are needed because "the freedoms of expression must be ringed about with adequate bulwarks."[194]

The tension between these views is clearly visible in First Amendment jurisprudence, especially libel jurisprudence. It is likewise visible in other areas, such as the death penalty case law, where the Court, not content with just deciding whether the death penalty is substantively constitutional, has concluded that the danger of normal law's imperfections is so great as to justify additional procedural requirements.[195]

The *Bose* rule rejects the normal-law model. Under most circumstances, *Bose* acknowledges, Rule 52(a) requires deference to lower courts (at least as to pure questions of fact),[196] and the Seventh Amendment requires similar deference to juries;[197] but where constitutional liberties are involved, the rule must be different.[198] The judgment behind this is partly empirical—courts of appeals will correct factfinder mistakes and refine vague rules through case-by-case adjudication—but primarily normative: Courts of appeals have a constitutional duty to try to correct factfinder mistakes and to try to refine vague rules. The normative value of such attempts at correction and refinement, even if they aren't always practically very helpful, justifies the tangible costs to the judicial system and the litigants.

The Court's arguments for adopting the pervasive constitutional concern model strike us as persuasive. Writers who ask, "What may I lawfully write?"

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193. Bates v. State Bar, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute."); *see also, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable . . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

194. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963), *quoted in* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990), Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975), *and* Blount v. Rizzi, 400 U.S. 410, 416-17 (1971).

Another alternative, proposed by Professor Monaghan, is for courts to use independent review until they believe they have refined the test as much as they can and then shift to reviewing only for clear error. *See* Monaghan, *supra* note 29, at 275-76. We are not sure this approach will ultimately work, because it's hard for courts to tell when enough is enough. The standard of review will essentially be up in the air for a long time, with the appellant in each case insisting that there is more refinement possible and thus asking for de novo review, and the appellee arguing that it is now time to switch to clear error review. Still, we agree with Professor Monaghan that *Bose* might bear some reexamination.

195. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

196. *See supra* note 56 and accompanying text.

197. *See Bose*, 466 U.S. at 508 n.27.

198. *See id.*

deserve a clearer and better policed standard than manufacturers who ask, "What safety devices does the duty of 'reasonableness' require me to implement?"[199] Free speech, as a constitutional right, deserves special protection.

Nevertheless, we confess that the experience of copyright law tests those arguments. Copyright law has led a largely normal-law existence, unencumbered with the various procedures the Court has demanded in libel cases, but the sky has not fallen. There might be a chilling effect here and there, with some people steering "far wider of the unlawful zone"[200] than they otherwise would have and the occasional (or even frequent) unjust verdict, but writers keep writing, and the marketplace of ideas doesn't seem strikingly impoverished. As Part II explains, we believe that none of this justifies treating copyright law differently from other restrictions. Still, it does provoke some skepticism about the Court's insistence on the pervasive constitutional concern model in free speech cases generally.

One purpose of our Essay has been to show that if one believes that independent review ought not be required in copyright cases, the only principled way to avoid this requirement is to reconsider it on a general basis. If the Court has indeed gone too far in its distrust of the normal-law adjudication process, all those harmed by speech—whether speech that infringes on a copyright, speech that unjustifiably defames, or speech that counsels violence—should be entitled to the benefits of any retrenchment that might be proper.

IV. First Amendment Due Process and Copyright Law

Finally, we also hope to lead people to think more generally about "First Amendment due process" in copyright cases. *Harper & Row* upheld copyright law substantively, but that itself tells us little: Libel law, for instance, is also substantively constitutional, but the Court has imposed many procedural requirements for libel cases. While these need not necessarily apply equally to all other speech restrictions, one can credibly argue that they should be so applied. With that in mind, we suggest the following several areas for future research—and litigation.

A. *Prior Restraint*

Temporary restrictions on speech justified merely by the possibility that the speech *might* be unprotected—as opposed to a judicial finding that the

199. Perhaps the manufacturers also deserve clearer guidelines than the law currently provides; nonetheless, while a considerable amount of uncertainty might have to be tolerated for the manufacturers, less should be tolerated for speakers.

200. Speiser v. Randall, 357 U.S. 513, 526 (1958).

speech *is* unprotected—are generally considered unconstitutional prior restraints.[201] Are preliminary injunctions in copyright cases, which can be based merely on a finding of likelihood of success on the merits, similarly unconstitutional?[202] If not, what does this tell us about the propriety of similar preliminary injunctions in libel cases and other cases where important private rights may be jeopardized by continued misbehavior pending final judgment?[203]

B. *Strict Liability*

Laws that impose strict liability for certain kinds of speech have generally been struck down because they would lead to too much self-censorship on the part of cautious speakers and distributors. Thus, even private figure plaintiffs in public concern libel cases must prove at least that the defendant was negligent;[204] similarly, in obscenity cases the government must prove that the defendant knew or should have known the content of the material he was distributing,[205] and reasonable mistake as to the age of a subject is a defense in child pornography cases.[206] Is copyright law's imposition of strict liability for infringement thus wholly or partly unconstitutional?[207]

C. *Punitive and Presumed Damages*

In public concern libel cases, punitive damages and presumed damages may only be awarded against defendants who told falsehoods knowingly or recklessly.[208] In copyright cases, though, statutory damages—which are the rough equivalent of libel's presumed (and perhaps even punitive) damages—

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201. *See* Vance v. Universal Amusement Co., 445 U.S. 308, 316-17 (1980)

202. *See id.* (suggesting that the answer to this is "yes," at least for preliminary injunctions in general)

203. *Cf.* Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. (forthcoming Nov. 1998) (arguing that preliminary injunctions in copyright cases are often, but not always, unconstitutional).

204. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). Strict liability might be available in private concern libel cases, though that question is unsettled. *See* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective*, 1996 U. CHI. LEGAL F. 377, 402.

205. *See* Manual Enters., Inc. v. Day, 370 U.S. 478 (1962) (civil cases); Smith v. California, 361 U.S. 147 (1959) (criminal cases).

206. *See* New York v. Ferber, 458 U.S. 747, 765 (1982). Of course, some statutes allow any mistake as a defense, even an unreasonable one. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (interpreting the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252 (1988 ed. & Supp. V)). It is unclear, though, whether any mens rea beyond negligence is constitutionally required.

207. *Cf.* De Acosta v. Brown, 146 F.2d 408, 412 (2d Cir. 1944) (Hand, J., dissenting) (arguing that holding a magazine publisher strictly liable for infringement by a contributing author "is likely to prove an appreciable and very undesirable burden upon the freedom of the press"), Edward M. Di Cato, *Operator Liability Associated with Maintaining a Computer Bulletin Board*, 4 SOFTWARE L.J. 147, 155-56 (1990) (discussing this question); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1844 n.130 (1995) (briefly touching on this question).

208. *See Gertz*, 418 U.S. at 348-50.

may be awarded even against negligent or innocent defendants.[209] Is this unconstitutional? Does the cap of $20,000 per work infringed[210] save the law from unconstitutionality? If so, does this suggest that similarly modest presumed damages in libel cases should be allowed even without a finding of "actual malice"?

D. *Burden of Proof*

In public concern libel cases, the Court has on constitutional grounds required that the plaintiff bear the burden of proving falsehood, though under the common law the defendant had the burden of proving truth.[211] *Harper & Row* strongly suggested that speech constituting fair use, like speech that is defamatory but true, is constitutionally protected.[212] Does it follow that the burden of proving unfair use must likewise be put on the plaintiff?[213]

E. *Quantum of Proof*

In public figure libel cases, the plaintiff must prove actual malice by clear and convincing evidence, not just by a preponderance of the evidence.[214] Some lower courts impose a similar standard for proof of obscenity in civil obscenity injunction cases.[215] Should such a standard be required for proof of substantial similarity of expression, or of unfair use?[216]

F. *Vagueness and Jury Instructions*

Independent appellate review, as we have argued, may make clearer copyright law's otherwise vague dividing lines. In particular, independent

209. *See* 17 U.S.C. § 504(a)(2), (c) (1994). Statutory damages are conventionally seen more as presumed damages than punitive, but some cases suggest that they also have a punitive component. *See, e.g.*, Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (stating that "it is plain that another role has emerged for statutory damages in copyright infringement cases: that of a punitive sanction on infringers" akin to "the award of punitive damages"); Evans Newton Inc. v. Chicago Sys. Software, 793 F.2d 889, 897 (7th Cir. 1986) ("Under copyright law, punitive damages could come from an award of statutory damages for willful infringement."); Video Cafe, Inc. v. De Tal, 961 F. Supp. 23, 26 (D.P.R. 1997) ("The Court would also note that statutory damages awards under § 504(c) serve both compensatory and punitive purposes.").

210. *See* 17 U.S.C. § 504(c).

211. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-77 (1986).

212. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (describing "the latitude for scholarship and comment traditionally afforded by fair use" as a "First Amendment protection[]").

213. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (holding, without considering the First Amendment, that fair use is an affirmative defense and that the burden of proving it is on the defendant).

214. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

215. *See, e.g.*, People v. Mitchell Brothers' Santa Ana Theater, 180 Cal. Rptr. 728, 730 (Ct. App. 1982).

216. *See* Yen, *supra* note 36, at 434-35 (raising this question in passing).

appellate review of fair use determinations has produced some principles that are clearer than the otherwise fairly indefinite standard set forth in 17 U.S.C. § 107.[217] Unfortunately, jury instructions sometimes fail to incorporate these clarifying principles. For instance, the Ninth Circuit Model Jury Instructions say the following:

> Defendant contends that defendant made fair use of the copyrighted work for the purpose of (criticism,) (comment,) (news reporting,) (teaching,) (scholarship,) (research,) (other). The defendant has the burden of proving this defense by a preponderance of the evidence. In determining whether the use made of the work was fair, you shall consider the following factors:
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2. the nature of the copyrighted work;
>
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
>
> 4. the effect of the use upon the potential market for or value of the copyrighted work; and
>
> 5. any other factors that bear upon the issue of fair use.[218]

Nothing in these instructions captures the gloss placed on these factors by the case law. For example, the instructions nowhere mention the principle that the power of a parody or a review to "impair the market for [the work] by the very effectiveness of its critical commentary" should be ignored under the fourth factor;[219] or that the second factor generally deserves little weight in parody cases;[220] or that it is permissible for a parody to use even "the original's 'heart,'" so long as the parody then "depart[s] markedly" from this heart.[221] Nor do the instructions give juries any sense for how the factors must be weighed, a sense that judges can get by comparing and contrasting the relative weight of the factors against factors present in previously decided cases. Finally, the fifth factor seems to invite the jury to apply its entirely unguided discretion, perhaps even considering factors—such as the ideology expressed in defendant's work—that it would be unconstitutional to consider.[222]

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217. *See supra* text accompanying notes 173-178.

218. MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 17.4.1 (1997).

219. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994).

220. *See id.* at 586.

221. *Id.* at 588-89.

222. *Cf.* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (condemning vague laws for "impermissibly delegat[ing] basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (holding that rules that are "so vague and standardless that [they] leave[] . . . jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," even when all that's at stake is a money judgment, violate due process).

Juries given these instructions may decide cases entirely differently than judges, who are familiar with the precedents. The fair use doctrine, the Supreme Court tells us, is a "First Amendment protection[],"[223] so the principles developed in the fair use cases are of constitutional significance; but the jury can't apply these principles if it doesn't hear about them.[224]

Courts should, of course, use the model instructions only as starting points, and then add custom instructions that embody whatever principles are relevant to the particular fact pattern. But we're afraid that, in many instances, courts may just stick with the model instructions.[225] Circuits may want to consider creating more detailed instructions, or at least instructions that specifically direct trial courts to add appropriate details. At the very least, circuits should probably discourage instructions containing entirely subjective factors such as the fifth factor in the instruction above.

The answer to all these questions may be that copyright is different, and that all First Amendment bets are therefore off. But we doubt that this is so, and we believe that the issues are certainly contestable enough to merit further investigation and assertion by lawyers.

V. CONCLUSION

If the *Bose* reasoning is right—and we think it probably is—then independent appellate review should help make copyright law somewhat clearer and more predictable. The "substantial similarity" test cries out for the elaboration that independent appellate review is generally thought to provide. We cannot promise dramatic improvements, but we think that, where speech restrictions are concerned, even modest clarification will help.

In any event, whether or not the *Bose* reasoning is right (and we agree that the matter is not free from doubt), *Bose* is the law, and we see no good justification for courts to ignore *Bose*'s command in the copyright context.[226] Copyright law may be a permissible speech restriction, but it cannot claim a categorical exemption from all free speech concerns. The same First Amendment due process rules that apply to other substantively valid restrictions must, absent a very good reason, apply equally to copyright.

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223. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

224. *Cf.* Gregory v. City of Chicago, 394 U.S. 111, 122-24 (1969) (Black, J., concurring) (arguing that a rule was unconstitutionally vague, despite clarifying and narrowing constructions developed by appellate courts, when the jury instructions were based on the vague statutory language rather than on the clarifying construction); *id.* at 112-13 (majority opinion) (seeming to take a similar view); Walton v. Arizona, 497 U.S. 639, 653 (1990) (holding that, in the Eighth Amendment context, where the vagueness doctrine is as toothy as in the free speech context, it is essential that the jurors be properly instructed regarding all facets of the sentencing process," and stating that "[i]t is not enough to instruct the jury in the bare terms of [a test] that is unconstitutionally vague on its face").

225. This is just our suspicion. We hope that others will investigate the matter more fully.

226. Stare decisis does not prevent courts from adopting this approach, even if in the past they have reviewed substantial similarity findings only for clear error. *See supra* Section I.F.

APPENDIX: PRACTITIONER SURVEY[227]

Say a client comes to you and says he wants to publish something, but he's afraid of a copyright lawsuit. It might be a book or a song or a movie or a factual compilation. He knows he's been influenced by a preexisting work; he thinks he's only taken the idea, but he doesn't know how a court would see things.

1. How do you decide whether he's borrowed only the idea or the expression? How do you predict what a court would do if it came to court?

2. *If the subject does not mention cases*: Do you also look at the cases and compare your situation against cases that have found substantial similarity and cases that haven't found it?

3. *If the subject answers no*: How do you give a relatively precise answer?

4. What, if anything, do you think might be done to make it easier for you to decide what's likely an infringement and what isn't?

5. Do you think it would be easier for you to predict how courts will behave if there were more benchmark cases against which to compare your situation?

6. In using past cases to predict results, do you distinguish between how you use circuit and district court cases? If so, how?

7. In using past cases to predict results, do you distinguish circuit court cases reviewing summary judgments from circuit court cases reviewing the results of trials?

8. In using past cases to predict results, do you distinguish circuit court cases that have reached a decision using de novo review from cases that have reached a decision using clear error review?

9. Say that, in a bench trial, the judge concludes that your client's work was substantially similar to the plaintiff's. Would your decision about whether to appeal be influenced by the standard of review on appeal (de novo as opposed to clear error)?

10. Have you noticed any differences among circuits in the way they deal with cases? *If the subject answers yes*: What differences?

11. Are you aware of different standards of review—reviewing findings of substantial similarity de novo as opposed to for clear error—among circuits? *If the subject answers yes*: Do the different standards of review affect the overall case law?

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227. For results of this survey, see *supra* Subsection II.B.2.