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REASONABLE COPYRIGHT

IRINA D. MANTA*

Abstract: Using the lens of the cognitive bias literature, this Article examines and critiques the “reasonable man” standard, focusing on the use of the standard in an extremely fuzzy area of the law: copyright. In copyright, the test for infringement is whether a “reasonable observer” would believe that two works—often involving media that do not lend themselves to precise measurement—are substantially similar. I begin by casting doubt on the usefulness of the reasonable man standard in such a setting. Are judges and juries truly able to determine what an abstract reasonable actor would find substantially similar? What types of cognitive biases will likely cloud this determination? And are biases likely to have a stronger or weaker effect when infringement questions are subjected to group deliberation as opposed to the individual decision making of judges? Next, I address the problems that I uncover in the copyright context by first reviewing some potential solutions, including both a proposal to reduce the role of juries in substantial similarity determinations and the possibility of trial bifurcation. Ultimately, I show that an openly subjective standard that focuses on the works’ intended audience and uses social science surveys as evidence of infringement should replace the prevalent

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"objective" reasonable observer standard. Implementing such a solution would at least partially acknowledge that we are dealing not with perfectly reasonable, but rather boundedly rational, actors.

The test for infringement of a copyright is of necessity vague.

—Learned Hand¹

INTRODUCTION

He does not act irrationally. He does not kill, steal, or intentionally inflict emotional distress, unless he has exceptional grounds for doing so. He is never reckless or negligent. He may not quite leap tall buildings in a single bound, but he knows his place in human society and does not step outside the bounds of legal behavior. Scholars, attorneys, and law students spend substantial portions of their lives unmasking who he is and what he does. He is probably the single most ubiquitous character in American case law, but his exact nature has managed to elude us for hundreds of years. "So may I introduce to you / The act you've known for all these years,"² he who goes by *the reasonable man*.

Across areas of the law, and especially in criminal and torts matters, the judicial system measures human behavior against the reasonableness yardstick to determine its legality.³ We expect judges to be reasonable, and to determine (for summary judgment purposes or on appeal) what a reasonable jury would do. In other areas, such as copyright, it is the opinion of the reasonable man that interests us—an infringement case can rise or fall depending on whether he finds substantial similarity between two works.⁴

This reasonableness model relies on the idea that most people in society act roughly in accordance with rationality most of the time, or at least enough so that they do not significantly hurt others. The law holds individuals liable when they depart from a certain range of behaviors one would expect based on either a system of social norms or a utilitarian cost-benefit analysis.⁵ Two types of problems may chip away at this framework. First, people of different social and cultural backgrounds

¹ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

² *THE BEATLES, Sgt. Pepper's Lonely Hearts Club Band*, on *SGT. PEPPER'S LONELY HEARTS CLUB BAND* (Capitol Records 2002) (1967).

³ See generally Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000) (providing a philosophical analysis of the role of reasonableness in tort law).

⁴ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

⁵ See *infra* notes 38–63 and accompanying text.

may not all agree on the limits of appropriate behavior in a number of situations, and several scholars contend that the majoritarian, dominant group may simply get its way due to hierarchical reasons.⁶ Second, cognitive biases complicate all the layers of this model. For a variety of reasons, as social science and behavioral law and economics have taught us, even well-meaning individuals may not always act as ironclad logic would dictate and may display pervasive patterns of skewed reasoning.⁷ Judges and juries are not immune from such biases,⁸ which may compound the existing elusiveness of the reasonable man's nature.

Although issues of bounded rationality raise concerns in every area of the law, copyright law adds further complications when it asks jurors to evaluate whether copying of vague subject matters (such as art, music, or literature) took place, and if so, whether the new work is so "substantially similar" as to be unlawful.⁹ This is problematic because it requires imperfect jurors to judge imperfectly rational individuals by making decisions that are permeated with the risk of cultural and cognitive biases at every level. To top it off, as in other types of cases, imperfect judges must determine whether a potential juror is "too biased" to sit on a jury (during voir dire), whether a "reasonable" jury could find the defendant liable (on a motion for summary judgment),¹⁰ and whether a jury's verdict went against the great weight of the evidence (on a motion for new trial) or was entirely unreasonable (on appellate review).¹¹ Even in the large percentage of cases that are submitted only

⁶ See *infra* notes 54–61 and accompanying text.

⁷ A number of scholars offer foundational work in this area. See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (making broad recommendations for the economic and behavioral analysis of law); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (discussing the ways in which decision-making trends can inform an understanding of legal behavior and advocating for law-and-behavioral science research).

⁸ See *infra* notes 64–118 and accompanying text.

⁹ See *infra* notes 145–252 and accompanying text; see also Korobkin & Ulen, *supra* note 7, at 1069 (defining "bounded rationality" as when actors "make suboptimal choices among competing options given a set of preferences and use a range of heuristics—rules of thumb—rather than complex cost-benefit analysis").

¹⁰ One scholar has argued that "[o]n summary judgment, the judge is effectively sitting as a juror and deciding whether he or she could find for the plaintiff." Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 719 (2007).

¹¹ See Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 164–65 (2008).

to a judge rather than to a jury,¹² the law's expectations of judges may be impossibly high. Judges are asked to dispassionately delineate legal rights despite being faced with the exact kinds of ambiguous materials that elicit the greatest risk of distortions caused by cognitive bias. The evidence for the proposition that judges are necessarily less biased than juries is slim, but so is the evidence that jury dynamics can cure the problems of bias.¹³

In this context, copyright is particularly intriguing in two respects. The first, as mentioned, relates to the materials that copyright covers, which are greatly subject to individual interpretation. Based on the research about decision making in the face of ambiguous questions, this suggests that legal decisions in copyright cases will be subject to an increased degree of heuristic (biased), as opposed to systematic, reasoning.¹⁴ The second stems from the dangers inherent in the seductively direct relationship between the judge or jurors and the alleged legal offense. Most litigation deals with past offenses that impose a degree of distance between legal decisionmakers and the events in question. In most cases, judges and jurors have to listen to testimony about past events from third parties and weigh conflicting accounts of what took place. Copyright infringement cases are among a small percentage of legal contests where the key question is one supposedly ascertainable purely *in the present*.¹⁵ Once access to a work has been established, a judge or jury examines songs, written materials, or pictorial representations of two works to determine substantial similarity.¹⁶ Decisionmakers in a variety of contexts traditionally suffer from cognitive overconfidence; as this Article discusses, direct experiences with the disputed materials are likely to exacerbate this trend.¹⁷ Combining these points, the result is that copyright cases may produce outcomes that are espe-

¹² See *infra* note 28 and accompanying text (discussing the ratio of judge versus jury trials in copyright cases).

¹³ See *infra* notes 64–118 and accompanying text.

¹⁴ See *infra* notes 193–203 and accompanying text.

¹⁵ Another scholar has remarked on a parallel note that this fixation in time is one of the features that distinguishes substantial similarity from the more dynamic fair use analysis. Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. (forthcoming 2012) (manuscript at 53), available at <http://ssrn.com/abstract=2014395>.

¹⁶ See *infra* notes 151–192 and accompanying text. Patent law suffers from some analogous difficulties when courts have to determine violations under the doctrine of equivalents, which declares a device to be infringing “if it performs substantially the same function in substantially the same way to obtain the same result.” *Graver Tank & Mfg. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950) (quoting *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 42 (1929)).

¹⁷ See *infra* notes 204–251 and accompanying text.

cially biased because overconfidence will be particularly likely to minimize the degree of self-questioning by legal decisionmakers. If this is true, it could create the perfect storm of mediocre decisions with poor immediate corrective mechanisms.

One can already observe hints of such heightened confidence in non-copyright cases, such as the 2007 U.S. Supreme Court case *Scott v. Harris*, in which video evidence showed a car chase that concluded with a police officer hitting the fleeing suspect's car with his own (and thereby rendering the suspect a quadriplegic).¹⁸ During oral argument, Justice Stephen Breyer explained the strength of his conviction that the police officer was not liable, stating, "I see with my eyes that is what happened."¹⁹ Similarly, Justice Antonin Scalia wrote in the majority opinion, "We are happy to allow the videotape to speak for itself."²⁰ Subsequent empirical work, however, showed that the tape did not quite speak for itself in that its interpretation depended significantly on the viewer's own background.²¹ This is a problem also likely to arise in the copyright context.

Understanding the cognitive underpinnings of courts' analyses of copyright infringement offers a clue as to why the related doctrines and tests are widely considered unpredictable,²² vague, and confusing, and why they can result in uneven outcomes.²³ Several problems result from this state of affairs, one of the most significant of which is the chilling

¹⁸ 550 U.S. 372, 375, 378 (2007).

¹⁹ Transcript of Oral Argument at 45, *Scott*, 550 U.S. 372 (No. 05-1631).

²⁰ *Scott*, 550 U.S. at 378 n.5.

²¹ See Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

²² See generally Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (discussing outcome inequality in civil litigation).

²³ See, e.g., Ann Bartow, *Copyrights and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75, 93-102 (2003) (providing examples of problematic applications of the substantial similarity doctrine); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 732 (1987) (criticizing the substantial similarity doctrine, which asks courts "to determine infringement on an unpredictable, impressionistic basis"); Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 746-49 (2009) (critiquing the current standard and pointing out the fact- and context-driven nature of copyright claims); Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 185 (1994) (noting a "lack of any substance to the concept of substantial similarity as used to make the value judgment whether the defendant's copying warrants liability"); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 719 (2010) (stating that the current tests for infringement "make no sense"); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687-88 (2012) (suggesting that the current test "makes impossible and self-contradictory demands on factfinders").

effect on the creative process if even generally careful artists risk becoming liable for large sums of money.²⁴ Unfortunately, there is a dearth of empirical research in the area of the substantial similarity test, which makes conclusive determinations about judges' and juries' decision making more speculative. Recent work by Jamie Lund in the area of composition copyrights represents an exception, and serves as a further wake-up call that we must probe into the way that courts handle infringement litigation.²⁵ Lund shows that mock jurors, when asked to judge the similarity of two musical compositions, found them to be substantially similar over 86% of the time when they were performed similarly, and *not* substantially similar over 84% of the time when they were performed differently, even though performance is supposed to be irrelevant in this context.²⁶ This type of variability is disconcerting and raises questions as to how juries (and judges) process information in the copyright litigation context and whether the current standards increase the odds that plaintiffs can present the evidence such as to make excessive claims for copyright protection. William Landes has suggested that plaintiffs win a significant majority of copyright cases that make it to trial, and that between 1978 and 2000, plaintiffs were successful about 73% of the time.²⁷ This figure included a win rate of 70% in jury trials, which made up 27.7% of all copyright trials during the study period, and a win rate of 74% in judge trials.²⁸ Though a multitude of fac-

²⁴ See, e.g., Bartow, *supra* note 23, at 89 ("This fear is created in part by the creativity quantum paradox: it takes very little creativity to engender an entitlement to copyright protection, but, at least rhetorically, seems to take much more creativity, effort and ingenuity to avoid infringing another work."). This tension is exacerbated by a number of factors, including what one scholar has termed "copyfraud": claims of copyright protection for materials where no such rights truly exist. See JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* 2 (2011).

²⁵ See Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 171 (2011).

²⁶ *Id.* See generally Norbert L. Kerr & Robert M. Bray, *Simulation, Realism, and the Study of the Jury*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 322 (Neil Brewer & Kipling D. Williams eds., 2005) (discussing the use of mock juries to draw conclusions about actual juries).

²⁷ William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 Hous. L. Rev. 749, 774 tbl.5 (2004). These figures were calculated using data from the Administrative Office of the United States Courts, and some scholars have expressed concerns about the overall accuracy of that data set. See, e.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1652-53 (2006).

²⁸ Landes, *supra* note 27, at 772, 774 tbl.5. Landes indicates that cost considerations are likely to drive parties toward judge trials rather than jury trials. *Id.* at 772.

tors contribute to these types of figures, this Article explores the role that cognitively skewed legal decision making may play.

In addition to the number of copyright issues raised by the explosion of user-generated creative content, two recent developments increase the urgency of clarifying and possibly changing the standard for copyright infringement. First, the U.S. Supreme Court's 2012 decision in *Golan v. Holder* retroactively lifted potentially millions of foreign-created works out of the public domain, thus significantly increasing the universe of works whose owners could become plaintiffs in a wide variety of copyright infringement lawsuits.²⁹ Second, Congress, scholars, and the media have recently engaged in a spirited debate about the Stop Online Piracy Act (SOPA), the PROTECT IP Act (PIPA), and related legislation designed to combat online copyright infringement and other offenses.³⁰ Although the public backlash against these bills may have succeeded in preventing their passage, their proponents continue with advocacy efforts, and more moderate legislation with similar basic goals is already on the table.³¹ Increased copyright enforcement, whether through the possible rise in the number of plaintiffs or the growth of legal tools available to pursue infringers, deepens the need to examine critically the current doctrine of substantial similarity.

Part I of this Article begins by exploring the role that the reasonable man standard has traditionally played in the law and the main criti-

²⁹ See 132 S. Ct. 873, 905 (2012) (Breyer, J., dissenting).

³⁰ See Stop Online Privacy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011). A number of scholars have analyzed and commented on these proposed pieces of legislation. See, e.g., Bruce E. Boyden, *What's up with SOPA?*, MARQUETTE U. L. SCH. FAC. BLOG (Nov. 17, 2011), <http://law.marquette.edu/facultyblog/2011/11/17/whats-up-with-sopa/>; Eric Goldman, *SOPA/PROTECT-IP/OPEN Linkwrap #2*, TECH. & MARKETING L. BLOG (Jan. 5, 2012), <http://blog.ericgoldman.org/archives/2012/01/sopaprotectipop.htm>; Mark Lemley et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011); David G. Post, *SOPA and the Future of Internet Governance*, VERDICT (Feb. 13, 2012), <http://verdict.justia.com/2012/02/13/sopa-and-the-future-of-internet-governance>; Laurence H. Tribe, *The "Stop Online Piracy Act" (SOPA) Violates the First Amendment* (Dec. 6, 2011), <http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1>. One of the more controversial aspects of SOPA is its prescription of criminal penalties; I have comprehensively explored the debate over the role of such sanctions in intellectual property in my previous work. See generally Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469 (2011) (discussing criminal sanctions for intellectual property infringement and exploring various theories for the disparity between the criminal treatments for different types of infringement).

³¹ The most prominent of these is the Online Protection and Enforcement of Digital Trade Act (the OPEN Act). Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012); see, e.g., Goldman, *supra* note 30 (discussing the OPEN Act).

cisms that have been levied against the standard.³² It then discusses the extent to which judges and jurors themselves tend to act reasonably in their decision-making processes.³³ Part II analyzes the role of reasonableness and bias in the copyright context and discloses flaws in the current standard for infringement and its application.³⁴ Part III addresses these defects through a model that embraces the subjective nature of copyright infringement determinations. Specifically, I propose that courts should shift their focus toward the reaction of the intended audience of works and begin allowing related evidence drawn from social science into copyright trials.³⁵

I. THE REASONABLE MAN THROUGH THE LENS OF THE LAW

The reasonable man has played a key role in the law but has also been the subject of many criticisms. Section A explores the use of the reasonable man as a legal standard.³⁶ Section B then identifies how bias can play a role in determining what is reasonable for both juries and judges.³⁷

A. *The Reasonable Man as a Legal Standard*

What constitutes reasonable conduct in the law defies precise and uniform formulations and often comes down to an approximation of whether the benefits of a specific set of actions exceed the costs.³⁸ This issue arose in 1947 in the classic torts case *United States v. Carroll Towing Co.*, in which the U.S. Court of Appeals for the Second Circuit faced the question of when a barge owner should be liable for damage to other vessels if his barge breaks away from its moorings.³⁹ Judge Learned Hand, eschewing any bright-line rule, stated that the duty of the barge owner to prevent such damage depends on the probability that the barge will break away, the seriousness of the likely damage, and the burden of providing preventative measures.⁴⁰ It is thus a utilitarian cal-

³² See *infra* notes 38–63 and accompanying text.

³³ See *infra* notes 64–144 and accompanying text.

³⁴ See *infra* notes 145–252 and accompanying text.

³⁵ See *infra* notes 253–288 and accompanying text.

³⁶ See *infra* notes 38–63 and accompanying text.

³⁷ See *infra* notes 64–144 and accompanying text.

³⁸ See *infra* notes 39–63 and accompanying text.

³⁹ 159 F.2d 169, 173 (2d Cir. 1947).

⁴⁰ *Id.* The idea of imposing liability on the cheapest cost avoider in a number of tort settings and other contexts arises from a similar calculation. See generally GUIDO CALABRESI,

culus, with some difficulties arising when not all the values that must enter the calculus are of a monetary nature and when a degree of subjective valuation inevitably clouds the analysis.⁴¹ Despite its difficulties, this calculus has become one of the most famous in legal history and was nicknamed the “Learned Hand Test,” despite some evidence suggesting that Judge Hand may not have been its first proponent.⁴²

Be that as it may, the concept of the reasonable man itself undoubtedly possesses a long trail in Anglo-Saxon legal history. For instance, in his 1881 magnum opus, *The Common Law*, Oliver Wendell Holmes expounded the virtues of using “the average man, the man of ordinary intelligence and reasonable prudence”⁴³ as the proper legal yardstick to determine many forms of liability. Holmes explained that the reasons the law seeks to be generally applicable, without considering individual variations in personality or background, are twofold.⁴⁴ First, measuring a person’s abilities is much more difficult than judging his “knowledge of law,” since it is presumed “that every man knows the law.”⁴⁵ Second, and more importantly, Holmes gave a utilitarian explanation for why a general, objective standard should prevail over a subjective one:

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt

THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (developing a theory of accident law using an economic lens).

⁴¹ GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 161–62 n.218 (1985). Of course, conceptions of utilitarianism and its precise goals have varied greatly over time. See, e.g., MARTIN J. WIENER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830–1914, at 53 (1990) (stating that “in early Victorian England . . . utilitarians themselves usually held an implicit moral agenda rather distinct from the more permissive modern-day utilitarian philosophies”).

⁴² CALABRESI, *supra* note 40, at 159 n.199 (comparing the test to one previously proposed by Henry Terry and noting that Judge Hand had most likely read Terry’s work on the subject) (citing Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42–43 (1915)).

⁴³ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 51 (1881). Despite its fame, the Learned Hand Test has not found universal acceptance in American case law, and some scholars believe that most judges in negligence cases interpret due care as “reasonable care, not rational care.” See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 361 (1996); see also Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1018 (1994) (summarizing the scholarly critiques). These scholars view Judge Hand as a proponent of the latter and see the former as more strongly grounded in social contract theory. Keating, *supra*, at 360–61; see Gilles, *supra*, at 1018 (noting that some scholars claim that the existing “reasonable person standard . . . marginalizes or even supplants the Hand Formula”).

⁴⁴ HOLMES, *supra* note 43, at 108.

⁴⁵ *Id.*

his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.⁴⁶

The only departures from this model that Holmes found justifiable were those in which manifest defects like blindness or infancy truly prevented an individual from following usual legal norms, and in which other members of society would be able to see these defects and take additional precautions when dealing with such an impaired individual.⁴⁷ The reality on the ground looked more complex, especially when it came to mentally ill individuals. One scholar who specializes in the period in which Holmes wrote has noted that “[t]he legal borderland between competence and incompetence was indeed a broad and porous one in nineteenth-century America.”⁴⁸ Rather than taking a rigid view, judges fashioned pragmatic treatments that balanced Enlightenment notions of pure individual responsibility with the human behavior that they encountered in the courtroom.⁴⁹

In summary, the image emerges that the concept of reasonableness in the law uses utilitarian notions as both its foundation and its guide. As to the first point, according to Holmes, we require reasonable behavior from everyone because doing otherwise would harm society.⁵⁰ As to the second matter, reasonable behavior is behavior whose benefits exceed the costs.⁵¹ Of course, these propositions open an entire pantry of cans of worms. How do we calculate the benefits? What are the costs? And what do we do with actors that, due to their own fault or other fac-

⁴⁶ *Id.* Indeed, a completely subjective legal standard has never been adopted and is an inherently problematic idea given that legal fault is normally based precisely on deviations from community norms. Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 4 (1927).

⁴⁷ HOLMES, *supra* note 43, at 109–10. One scholar explains that the “paradigm of objective-ideal-tempered-by-subjective-deviation” does not always lower the burden for groups such as the disabled; rather, at times it places greater obligations on them (such as having to use special glasses and other devices to increase general safety). Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 747–48 (2002).

⁴⁸ Susanna L. Blumenthal, *The Default Legal Person*, 54 UCLA L. REV. 1135, 1203 (2007).

⁴⁹ *Id.* at 1264. At the same time, criminal law was viewed as a tool to correct dangerous personal flaws. MICHAEL MERANZE, *PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA: 1760–1835*, at 260 (1996). For example, the use of solitary confinement “promised to create a space where the reconstruction of individuals’ subjectivity could occur.” *Id.*

⁵⁰ See HOLMES, *supra* note 43, at 108.

⁵¹ See *supra* notes 39–42 and accompanying text.

tors, were unaware of some of the benefits or costs, or were unable to complete this type of calculation altogether? This suggests the possibility that, in some situations, we are actually likely to turn to what the average person would do (à la Holmes), whether that turns out to satisfy a grander utilitarian scheme or not. One of the possible assumptions behind the decision to use the average person is the belief that if everyone acts roughly according to that standard, the utilitarian calculus will be served about as well as pragmatically possible. Alan Miller and Ronen Perry have teased apart positive versus normative theories of the reasonable man, and their work, rooted in social theory, suggests that “any statistical methodology used to study the reasonable person is necessarily invalid. Any judge or juror who claims to understand the nature of the reasonable person from his or her familiarity with society is mistaken.”⁵² Hence, trying to use the average man as a welfare-maximizing tool may be doomed on a fundamental level.

Even leaving aside Miller and Perry’s concerns and adopting a softer standard that tolerates some degree of measurement imperfections, if judges and juries take into account individual factors of defendants in some circumstances but not others, how can we know if the utilitarian scheme is in fact being served?⁵³ After all, looking at individual factors means that conflicting values may or may not even each other out (e.g., punishing criminals for their deeds despite respecting that their backgrounds may have contributed to their behavior), because jurors may have tended to be skewed in one direction or another. The Holmes model therefore largely comes across as aspirational rather than actual. Indeed, at least one scholar has gone as far as asking why “the [Learned Hand] test is still seen as the prototypical expression of the law’s fairness and objectivity rather than, for example, as a mechanism for facilitating the coercive exercise of social power.”⁵⁴

⁵² Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 328 (2012). The authors posit a set of five axioms necessary to any coherent theory of the reasonable man, and they show how any attempt to measure his nature is bound to violate some segment of this set. *Id.*

⁵³ These types of questions, among others, arise in the context of the debate between rule and act utilitarianism. See, e.g., David O. Brink, *Mill’s Ambivalence About Rights*, 90 B.U. L. REV. 1669, 1671–72 (2010) (discussing the distinctions between the two).

⁵⁴ Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990). This scholar argues that reasonableness serves as a mediator for the tension between the freedom of the individual and the safety of society, and it thus serves as “a vehicle for importing a cost/benefit analysis into the law, a method for distinguishing risk-creating conduct that social groups are free to engage in from conduct that, because it threatens collective security, requires [legal] regulation.” *Id.* at 1183. Some scholars believe that even contract law, a realm supposedly

Historically, some of the most significant attacks against the use of the reasonable man standard have arisen from concerns about gender and racial bias in the courtroom or even in the initial formulation of legal rules.⁵⁵ A number of scholars have argued that the word “man” in the reasonable man standard did not simply include both sexes but was rather developed at a time when “virtually all judges, jurors, lawyers, legislators, and law professors were men, and women had virtually no independent public, economic, or legal identity.”⁵⁶ Later, when courts tried to reformulate the standard to become more gender neutral, such as by referring to the “reasonable person,” they still often incorporated preexisting notions of the content of reasonableness that were largely based on the average middle-class man.⁵⁷ One scholar argues that the notion of reason has historically been used to disparage women, minorities, and individuals of limited education.⁵⁸ At least one other scholar agrees, pointing out that often more powerful parties advocate for an objective approach because “these standards always, and already, reflect them and their culture.”⁵⁹

driven by individual agreements free from societal pressures, is “a reflection of collective determination, and thus inherently regulatory and coercive.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 50 (1992) (discussing Arthur Corbin’s work and his influences).

⁵⁵ See, e.g., CALABRESI, *supra* note 41, at 23. Judge Guido Calabresi explains how, in England, the reasonable man was “the man on the Clapham Omnibus—a definition which . . . always left [Calabresi] utterly cold since [he has] never met the Clapham Omnibus or any man on it, and [he has] no idea why reasonableness should attach especially to those who ride that line.” *Id.* See generally BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 1865–1920* (2001) (describing the transformation of the law in response to a cultural shift away from purely “male” values).

⁵⁶ CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 6 (2000). See Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773, 807 (1993) (“The term ‘reasonable man’ is burdened by an enormous amount of historical baggage. Dating back at least two hundred years, the term undeniably evolved from extremely male-oriented legal and cultural roots.”).

⁵⁷ *Id.* at 6–7. Judge Calabresi has questioned the “reasonable person” standard, explaining that if “women are now expected to act as reasonable *men* did before . . . rather than men being expected to act, at least in part, as reasonable women did, then equality may be there—but at the cost of cultural subjugation!” CALABRESI, *supra* note 40, at 29.

⁵⁸ Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *HARV. L. REV.* 445, 456 (1997). Bernstein calls the reasonable person standard “hollow” and argues that the idea of a genderless victim of sexual harassment minimizes gender differences in the perception of sexual behavior in employment settings. *Id.* at 465. She proposes the introduction of a “respectful person” standard to address the flaws of the reasonable person standard in sexual harassment law. *Id.* at 483–506.

⁵⁹ Richard Delgado, *Shadowboxing: An Essay on Power*, 77 *CORNELL L. REV.* 813, 818 (1992). This objective versus subjective distinction parallels, in part, the tension between

A number of approaches have tried to maintain a reasonableness standard while lending more credence to victims of offenses such as sexual crimes and torts. One proposal suggests flipping the analysis in such cases away from a focus on the perpetrator's perspective (in other words, how men would view the behavior of the usually male offenders and their usually female victims) and toward a focus on "whether a reasonable woman would have acted as the perpetrator acted, as well as whether a reasonable woman would have responded with behavior similar to the target's."⁶⁰ One scholar has attacked such "reasonable woman" standards as being sexist and stereotyping against both men and women, impossible to apply, and therefore unlikely to make a difference in real cases.⁶¹ Whereas areas such as gender and race prove particularly contentious in discussions about the reasonable man, the number of characteristics that can influence one's conception of what is reasonable or that can be used to tweak the standard is nearly infinite.

The remainder of this Article makes reference to three types of reasonableness analyses. The first type, which is critiqued in this Section, deals with the question of whether a defendant's actions conform to those of the reasonable man. The second type is employed when judges have to decide on appeal whether a jury or a judge below them was reasonable (which includes the question of whether any reasonable jury could reach a certain conclusion, such as in *Scott*). To shed light on such decision making on the part of judges and juries, the next Section

the view that criminal behavior is caused by the individual due to faults of his own and the view that crime is a product of social forces over which the individual has little control. See generally MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003) (describing this tension and explaining how the rhetoric of social responsibility for crime brought about the creation of new services through the welfare state but also an erosion of civil liberties, such as through eugenics and coerced medical treatment). Of course, the question of causality in this context is complex and difficult to resolve. See Thomas L. Haskell, *Persons as Uncaused Causes: John Stuart Mill, the Spirit of Capitalism, and the "Invention" of Formalism*, in *THE CULTURE OF THE MARKET: HISTORICAL ESSAYS* 441, 441–45 (Thomas L. Haskell & Richard F. Teichgraeber III eds., 1993).

⁶⁰ FORELL & MATTHEWS, *supra* note 56, at 17.

⁶¹ Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 621–22 (1993). Specifically, Johnson argues that the reasonable woman standard is impossible to apply in sexual harassment contexts when it asks

that male triers of fact understand and apply the perspective of a reasonable woman, even though men are, by definition, presumed unable to do so because of the allegedly characteristic male view that sexual harassment is harmless amusement and the supposed male bias that systematically ignores the experiences of women.

Id. at 642.

discusses some of the research on cognitive bias and how it delineates the contours of these actors' ability to make optimal determinations.⁶² The third type of reasonableness analysis enters the picture when a judge or jury has to deduce what a reasonable man would *think*, and Part II illuminates the boundaries of this process.⁶³ These three types of analyses, as will become apparent, exhibit more commonalities than differences in the kinds and levels of biases that infiltrate them, and hence—after having classified them here—this Article at times alternates in their discussion without referring back to this taxonomy.

B. *The Reasonable Jury and Judge*

1. Juries and Bias

The question of whether American law should provide for the guaranteed right to be tried by a jury became an important point of contention during the debates surrounding the adoption of the United States Constitution, with the Anti-Federalists refusing to approve any draft that did not include such a right.⁶⁴ They believed that “the jury was the best available means of thwarting unpopular laws enacted by an insensitive national legislature[,] provided a method of protecting debtors from inflexible rules in the regulation of commerce[, and] could rein in corrupt or overactive judges.”⁶⁵ When it comes to the issue of bias, many in the legal community operate under the idea that jury deliberations will minimize individual biases and lead to fairer outcomes.⁶⁶ Indeed, this belief seems to be at the very foundation of our jury system.

The concern about the influence of individual biases, whether based in jurors' backgrounds or particular idiosyncrasies, is not far-fetched. An empirical study by Dan Kahan, David Hoffman, and Donald Braman about individuals' perceptions of the infamous car chase video from the 2007 case, *Scott v. Harris*, proves illustrative.⁶⁷ In *Scott*, the U.S. Supreme Court held that a police officer had not violated the

⁶² See *infra* notes 64–144 and accompanying text.

⁶³ See *infra* notes 145–252 and accompanying text.

⁶⁴ Stephan Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22 (Robert E. Litan ed., 1993).

⁶⁵ *Id.* at 38.

⁶⁶ David Schkade, Cass R. Sunstein, & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1157 (2000).

⁶⁷ See generally Kahan, Hoffman & Braman, *supra* note 21 (describing the methodology of the study and its results”).

Fourth Amendment when he intentionally hit the car of a driver who refused to comply with police orders to pull over and instead led the officers on a car chase; this collision left the driver a quadriplegic.⁶⁸ The Court concluded that “no reasonable jury” would disagree with the contention that the car chase presented “a substantial and immediate risk of serious physical injury to others,” which meant that the officer’s efforts to interrupt the chase were reasonable and that he should win on summary judgment.⁶⁹ In the study, Kahan and his coauthors showed a diverse group of 1350 individuals the video of the car chase (which the Supreme Court had placed on its website) and examined the individuals’ views of the facts.⁷⁰ The study found that although the majority of subjects did indeed agree with the Court, members of some specific subgroups did not; “African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats.”⁷¹ This echoes earlier research, such as a study that found that preexisting attitudes toward the criminal justice system and the police influenced the size of damage awards that mock jurors were willing to give in a hypothetical case.⁷²

The search for an explanation of the dissonance between the Court’s “no reasonable jury” pronouncement and the outcome of Kahan’s study yields problematic results. First, it is surely not plausible that the racial or political groups that Kahan identified contain a lower percentage of reasonable people than other groups do. Another explanation is that although some study subjects would have reached a different conclusion based on their isolated judgment, no representative jury would have disagreed with the Court. This could be true only if the views of persons from certain groups are routinely steamrolled in the jury deliberation process⁷³ (or if these individuals could never consti-

⁶⁸ *Scott*, 550 U.S. at 381.

⁶⁹ *Id.*

⁷⁰ Kahan, Hoffman & Braman, *supra* note 21, at 854–55.

⁷¹ *Id.* at 841.

⁷² Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291, 307 (1989).

⁷³ Studying these matters empirically remains a complex task. A recent study suggests that individuals of lower socioeconomic or educational status or from some specific backgrounds (e.g., Asian American women) report a lower level of participation in jury deliberations. Erin York Cornwall & Valerie P. Hans, *Representation Through Participation: A Multi-level Analysis of Jury Deliberations*, 45 LAW & SOC’Y REV. 667, 681–86 (2011). African American individuals, however, reported higher levels of participation than Caucasian or Hispanic jurors. *Id.* at 681–82. Some limitations of this research include that the data was based on self-reports and that “[a]ll participation is not equally relevant, meaningful, or

tute the majority in any given jury).⁷⁴ Indeed, there is actually some evidence that—unlike in the movie *Twelve Angry Men* in which one man convinces his eleven fellow jurors that their initial conclusion in favor of conviction was wrong—“the verdict favored by a majority of the jury at the onset of deliberation usually prevails.”⁷⁵ Other explanations exist as well, but they begin to erode our understanding of the legal test as it is currently stated. For instance, when the Court spoke of “no reasonable jury,” it may have actually meant “very few reasonable juries.” Taking this a step further, the possibility arises that (1) there is no such thing as a reasonable jury, or (2) even if there is, courts are hard-pressed to discern what such a jury would do.⁷⁶

One related problem with objective standards is that they may make it more likely that jurors, who view themselves as reasonable, will ask themselves if they would have acted the same way as the defen-

persuasive for the task of deliberating toward a verdict, so an important question for further research is how participation relates to other outcomes, such as influence, verdicts, and juror satisfaction.” *Id.* at 693.

⁷⁴ In fact, minorities tend to be statistically underrepresented in jury pools. See, e.g., HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 65 (1993) (showing that minorities and individuals of low educational status are underrepresented on juries); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 803–04 (1977) (finding significant disparities between the statistically expected and the actual representation of minorities on juries); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design* 79 JUDICATURE 273, 273–74 (1996) (discussing the gravity of the problem). A number of scholars have expressed concern that the impact of unrepresentative jury composition on litigation outcomes might be to the disfavor of minorities. See, e.g., Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 579 (1998) (“[H]istory is littered with ugly incidents of juries using their powers to disadvantage minorities.”) (citation omitted). In one study of mock jurors, juror-defendant similarity led to in-group favorability when pro-conviction evidence was weak or moderately strong, which increased the likelihood of a “not guilty” verdict for in-group, as compared to out-group defendants. Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545, 561 (1995). In a follow-up study, however, evidence that overwhelmingly pointed to guilt influenced both African American and Caucasian jurors to judge in-group, same-race defendants as more guilty than out-group, other-race ones if the jurors anticipated being placed in a group decision-making situation in which their own race would constitute a minority. *Id.*

⁷⁵ Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decision-making by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 64, at 137, 159; see *TWELVE ANGRY MEN* (MetroGoldwynMayer Studios 1957). See generally REID HASTIE ET AL., *INSIDE THE JURY* (1983) (studying jury decision making); Garold Stasser et al., *The Social Psychology of Jury Deliberations: Structure, Process, and Product*, in THE PSYCHOLOGY OF THE COURTROOM 221 (Norbert L. Kerr & Robert M. Bray eds., 1982) (discussing the process of jury deliberations from foreman selection to the final decision).

⁷⁶ See Miller & Perry, *supra* note 52, at 387 (discussing why any positive, rather than normative, reasonable standard may be inherently bound to fail).

dant.⁷⁷ Jurors may thus implicitly view a defendant as similar to themselves with respect to gender, race, sexual orientation, and other attributes.⁷⁸ The solution is not as simple as moving to a subjective standard of reasonableness, in the sense of assigning the defendant's attributes to the reasonable person (including personality features), because then all outside constraints disappear and "the reasonableness standard simply collapses."⁷⁹ In the end, various forms of distortions have been found to enter juror decision making, regardless of whether defendants are similar to or different from jurors. The remainder of this Section discusses some of the relevant research on this topic and also shows that judges remain far from immune to some of the same problems.⁸⁰

In the 1970s, Harry Kalven and Hans Zeisel argued that the American jury system "represents a deep commitment to the use of laymen in the administration of justice."⁸¹ Their seminal work for the University of Chicago Jury Project sought to provide the empirical backing to support the continued survival of the institution of the American jury.⁸² George Priest credits these scholars' efforts for the long-term trust that the United States has placed in juries because their project's findings suggested "that the civil jury was a superior institution for adjudicating disputes involving complex societal values, that the jury served as an important instrument of popular control over law enforcement, and that the jury brought a superior sense of social equity to the decisionmaking process."⁸³ Priest criticizes the wholesale endorsement of the Kalven-Zeisel view, however, and produces evidence to show that few jury trials truly involve important societal values.⁸⁴ He concludes that the delays and costs of such trials weigh against the indiscriminate use of juries in civil litigation.⁸⁵

Though the hope for juries is that their group deliberation processes will bring extreme positions into the fold of an acceptable average range, the phenomenon of group polarization can play a magnifying rather than smoothing role. A number of studies involving mock juries

⁷⁷ CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 206 (2003).

⁷⁸ *See id.*

⁷⁹ *Id.* at 207.

⁸⁰ *See infra* notes 81–144 and accompanying text.

⁸¹ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3 (1971).

⁸² *See id.* at 10.

⁸³ George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 162 (citation omitted).

⁸⁴ *Id.* at 172–81.

⁸⁵ *Id.* at 165.

have found that juries tend to award amounts that exceed the average of the amounts that individual jurors would have awarded prior to deliberations.⁸⁶ One large study designed by David Schkade, Cass Sunstein, and Daniel Kahneman that involved 500 mock juries with a total of 3000 mock jurors confirmed this finding: group deliberations consistently produce dollar verdicts that exceed the median of jurors' pre-deliberation determinations.⁸⁷ The study's authors identified a number of phenomena that may have contributed to this outcome, the key one being a rhetorical asymmetry that leads jurors who have decided to give a nonzero monetary award to perceive arguments in favor of increased awards as more persuasive.⁸⁸ Another proposed explanation related to social comparison and the possibility that mock jurors did not want to appear overly cautious compared to other individuals in the group, which influenced their position.⁸⁹ In any case, the authors' overall conclusion is sobering: "Among many in the legal community there is the hope, and indeed the conviction, that deliberation by a group of jurors will overcome individual biases and produce more just and more predictable verdicts [O]ur findings lend no support to this view."⁹⁰ Of particular concern was that although the rhetorical asymmetry could theoretically be counteracting other biases in the system (such as one against personal injury plaintiffs or lawsuits), the asymmetry had a

⁸⁶ MacCoun, *supra* note 75, at 160 (summarizing the findings of several mock jury studies in this context). *But see* James H. Davis et al., *Effects of Group Size and Procedural Influence on Consensual Judgments of Quantity: The Example of Damage Awards and Mock Civil Juries*, 73 J. PERSONALITY & SOC. PSYCHOL. 703, 713-14 (1997) (finding a reduction of mock civil jury awards from a single mock juror to a group of six, and from a group of six to a group of twelve in a setting involving a defendant with "deep pockets"). Davis and his coauthors noted that their study conflicted with their own earlier findings (in which six-member juries awarded higher amounts than single jurors), which they attributed to changing societal norms and a possible backlash against excessive tort awards in the years between their two studies. *Id.* at 714 (citing James H. Davis et al., *Quantitative Decisions by Groups and Individuals: Voting Procedures and Monetary Awards by Mock Civil Juries*, 29 J. EXPERIMENTAL SOC. PSYCHOL. 326 (1993)).

⁸⁷ Schkade, Sunstein, & Kahneman, *supra* note 66, at 1140-41.

⁸⁸ *Id.* at 1161. The authors confirmed this result in a follow-up study, which found that a sample of law students found it more difficult to argue for a lower, rather than a higher, award when a (hypothetical) jury had already decided that liability existed and some amount of damages would have to be paid. *Id.* at 1161-62.

⁸⁹ *Id.* at 1166.

⁹⁰ *Id.* at 1157. A different study found some reduction of variability among mock juries as opposed to individual jurors, but there was still a great amount of unexplained variability. Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 317 (1998).

“mechanical, case-independent quality.”⁹¹ Other studies of group deliberations also found a similar award-increasing effect.⁹²

Among the potential other mechanisms that introduce distortions into the legal system, individual hindsight bias has been one of the most seriously studied in the legal context.⁹³ For example, in a study of 277 mock jurors and 95 judges, Reid Hastie and Kip Viscusi presented subjects with a scenario in which a railroad company had a choice whether to stop its operations until its tracks were improved or to continue running before repairs took place.⁹⁴ The study included both foresight conditions (subjects had to decide whether the railroad should halt operations or keep working) and hindsight conditions (subjects had to decide, upon learning that the railroad had continued to operate legally and an accident took place that damaged a number of parties, whether the railroad owed punitive damages in addition to pre-existing compensatory ones).⁹⁵ Subjects were told that only reckless conduct would suffice for an award of punitive damages, and that such conduct had to entail “a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.”⁹⁶ Mock jurors displayed significant hindsight bias on all related measures, whereas judges showed a lower and often statistically insignificant tendency toward such bias.⁹⁷ Further, Hastie and Viscusi compared the economically optimal outcome with jurors’ and judges’ decisions, and their results suggested that judges

⁹¹ Schkade, Sunstein, & Kahneman, *supra* note 66, at 1172.

⁹² See, e.g., Diamond et al., *supra* note 90, at 316. In an earlier review of the literature on individual versus group judgments, Norbert Kerr and his coauthors concluded that there was no simple answer to the question of who exhibits more bias. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 713 (1996). The scholars identified several factors that determined whether an individual or group would be more or less likely to fall victim to various biases, including the size of a group, the magnitude of individual bias, the location of the bias, the definition of the bias, the normative ideal, and the nature of the group process. *Id.* In a later study, Kerr and other scholars showed that mock juries were more biased than jurors in settings in which a defendant had a moderate probability of conviction in the absence of biasing information, but that the trend was reversed in situations in which the probability of conviction was very high or very low. Norbert L. Kerr et al., *Bias in Jurors vs. Bias in Juries: New Evidence from the SDS Perspective*, 80 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 70, 79–81 (1999).

⁹³ See *infra* notes 94–118 and accompanying text.

⁹⁴ Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 905 (1998).

⁹⁵ *Id.*

⁹⁶ *Id.* at 904–05.

⁹⁷ *Id.* at 906.

were able to act rationally “in situations believed to create the most irrationality. In contrast, the citizen, mock-jurors do not appear to be sensitive to benefit-cost relationships.”⁹⁸ These findings suggest that in some settings, jurors struggle with the application of a standard that involves determinations of what the reasonable man would do.

As with all studies, however, the Hastie-Viscusi study had a number of limitations, including that it examined the decision making of individual jurors rather than their operations within a group.⁹⁹ Picking up on this and other issues, some alternative explanations for the Hastie-Viscusi findings have been proposed, most vocally by Richard Lempert.¹⁰⁰ Lempert contends that (1) to the extent punitive damage awards failed to act as a helpful risk management device, the reason was not jury hindsight bias, and (2) there is no reason to believe that judges fall prey to hindsight bias less frequently than jurors.¹⁰¹ Lempert constructs a vigorous methodological attack against the Hastie-Viscusi study. Among numerous other criticisms, Lempert argues that Hastie and Viscusi did not consider the possibility of debiasing jurors, that their figures do not actually demonstrate that judges are less likely than jurors to be affected by hindsight bias, and that their baseline of what would constitute a rational cost-benefit outcome was arbitrary.¹⁰² Lempert concludes that “neither their empirical study nor their review of the psychological literature . . . show that judges are cognitively superior to juries.”¹⁰³

⁹⁸ *Id.* at 908.

⁹⁹ *See id.* at 905.

¹⁰⁰ *See* Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 874, 892 (1999).

¹⁰¹ *Id.*

¹⁰² *Id.* at 870, 882–84, 886. Lempert also questions the use of hindsight bias terminology in this context given that he believes that “ex post risk estimates are likely to be more accurate than ex ante estimates.” *Id.* at 874. This inquiry parallels the argument that hindsight “represents fully rational Bayesian updating.” Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577, 1584 (1998); *see also* Mark Kelman et al., *Decomposing Hindsight Bias*, 16 J. RISK & UNCERTAINTY 251, 258 (1998) (defending some forms of hindsight bias as helpful). Critics have replied, however, that “Kelman does not say anything to undermine the central empirical work on hindsight bias.” Christine Jolls et al., *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593, 1606 (1998).

¹⁰³ Lempert, *supra* note 100, at 892. As a general matter, some recent brain imaging work has also suggested that a number of individuals experience an actual decrease in intelligence and cognitive functioning in group contexts. Kenneth T. Kishida et al., *Implicit Signals in Small Group Settings and Their Impact on the Expression of Cognitive Capacity and Associated Brain Responses*, 367 PHIL. TRANSACTIONS ROYAL SOC’Y B 704, 713–14 (2012).

Although I similarly question the superiority of judges when it comes to matters of cognitive bias, the studies that show distinct risks from bias on the part of juries do not end with the Hastie-Viscusi findings. For example, one study assessed mock jurors for their foresight versus hindsight assessments of whether a municipality should take or have taken measures to prevent against flood damage imposed on riparian property owners.¹⁰⁴ In the foresight condition, only 24% of subjects recommended a particular safety measure, whereas in the hindsight condition, 56.9% of subjects stated that the measure should have been taken.¹⁰⁵ Of the subjects in the hindsight condition, half were exposed to materials tailored to debias them by specifically warning them against hindsight bias, but this measure made no difference in the subjects' determinations.¹⁰⁶

A different study had mock jurors (consisting of adults from an actual jury pool and students) determine whether a plaintiff should receive compensatory and punitive damages for the behavior that policemen had inflicted upon him during a search of his home that potentially violated his civil rights.¹⁰⁷ The researchers found fairly consistent hindsight bias in mock jurors' determinations; mock jurors tended to find for police liability and give increased compensatory and punitive damages at a greater rate when they believed that the search inculpated rather than exculpated the plaintiff.¹⁰⁸ In this study, subjects were asked to determine whether "a reasonable person, knowing what the officers knew prior to entering the apartment, [would believe that the plaintiff] was guilty of committing a crime."¹⁰⁹ The answer to this question was not supposed to be based on subsequent events, but the data suggests the opposite.¹¹⁰

This finding is consistent with those of other studies, such as one that examined mock jurors' impressions of a therapist's actions in light of the possibility that the therapist's patient may pose a harm to other

¹⁰⁴ Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 93 (1995).

¹⁰⁵ *Id.* at 98.

¹⁰⁶ *Id.* Two of the major limitations of the Kamin-Rachlinski study are that the sample size was small and that no deliberations took place. *See id.* at 94–98.

¹⁰⁷ Casper et al., *supra* note 72, at 294–97.

¹⁰⁸ *Id.* at 298–99. The reverse halo effect, defined later in this Article, may have played a role in that determination as well. *See infra* note 214 and accompanying text.

¹⁰⁹ Casper et al., *supra* note 72, at 296.

¹¹⁰ *See supra* note 108 and accompanying text.

people.¹¹¹ As predicted, subjects rated the therapist's actions as less reasonable and more negligent when told that the patient later became violent toward others, and they viewed the violence as more foreseeable when they believed that it had actually occurred.¹¹² Though many of the mock juror studies on hindsight bias examined only individuals rather than groups, group deliberations do not eliminate the risk of hindsight bias because the problem of group polarization reduces the potential debiasing effects that might arise from open debate.¹¹³

In the intellectual property arena, one of the key studies of mock jurors and hindsight bias was performed by Gregory Mandel, whose empirical work focused on individuals' interpretations of the non-obviousness requirement of patent law.¹¹⁴ The study examined this particular requirement because of its central importance in patent cases, in which it is the most frequently litigated issue related to the validity of patents and the one most likely to cause a patent to be invalidated.¹¹⁵ The law student subjects in Mandel's study each received one of two hypothetical fact patterns, as well as (1) data about the field of an invention, (2) a set of prior art information, and (3) details about a problem on which an inventor was working.¹¹⁶ In the hindsight condition, subjects also received a one-sentence addition stating that the inventor had come up with a solution and explaining what that solution was; in the third condition (the so-called "debiasing" one), the study explained the issue of hindsight to subjects and advised them not to fall prey to

¹¹¹ See Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501, 507 (1996).

¹¹² *Id.* at 507, 509–10.

¹¹³ See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 587 n.76 (1998). One obstacle to debiasing which remains is that "[e]ven when people understand the existence of cognitive biases on a theoretical level, they still tend to believe that their own judgment remains unaffected." Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 11 (2009) (citing Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 161–63 (2006) (failing to correct a bias in judgment toward character profiles the subjects indicated they personally liked)). Some scholars have hypothesized that hindsight bias is related to both a need for predictability and the desire to protect self-presentation. See, e.g., Jennifer D. Campbell & Abraham Tesser, *Motivational Interpretations of Hindsight Bias: An Individual Difference Analysis*, 51 J. PERSONALITY 605, 607 (1983).

¹¹⁴ Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration That the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1406–20 (2006).

¹¹⁵ *Id.* at 1398 (citing John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 208–09 (1998)).

¹¹⁶ Mandel, *supra* note 114, at 1406.

it.¹¹⁷ There was a wide chasm between the foresight and hindsight conditions for each of the two fact patterns (24% versus 76%, and 23% versus 59%, respectively), and the debiasing condition had only a marginal effect on skewed reasoning.¹¹⁸

2. Judges and Bias

Judges face their own set of challenges in decision making,¹¹⁹ including the hindsight bias discussed for juries. In a study of 167 judges, one team of researchers examined judicial behavior along five cognitive biases (anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases) and found that although judges were a bit less likely to fall prey to two of them (framing effects and the representativeness heuristic, which means “ignoring important background statistical information in favor of individuating information”), all five cognitive biases had a strong impact on their decision making.¹²⁰ The research on hindsight bias and judges has not been replicated in every setting. Whereas some scholars view the general evidence as indicating the existence of hindsight bias in judicial determinations of probable cause,¹²¹ at least one study found no bias between foresight and hindsight conditions in that particular context.¹²² Specifically, the study’s authors found that although hindsight did affect judges’ performance in predicting the probable outcome of a search, it did not sway their legal determinations.¹²³ This work potentially suggests that the degree of

¹¹⁷ *Id.* at 1407–08.

¹¹⁸ *Id.* at 1409. Mandel also discusses a number of reasons why his study may actually underestimate the true amount of hindsight bias. *Id.*

¹¹⁹ See generally Anthony Champagne & Stuart Nagel, *The Psychology of Judging*, in *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 75, at 257 (discussing judges’ cognitive processing).

¹²⁰ Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784, 816 (2001). The same authors also examined the effect of specialization in a study of bankruptcy judges and found that these judges do at least as well as generalist judges, but that their political views are more strongly linked to some case outcomes; the authors concluded that specialization may engender a side effect of politicization. Jeffrey Rachlinski et al., *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1230–31 (2006).

¹²¹ See Andrew E. Taslitz & James Coleman, *Foreword: The Death of Probable Cause*, LAW & CONTEMP. PROBS., Summer 2010, at i, viii.

¹²² Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight* 5 (Vanderbilt Pub. Law Research Paper, Paper No. 11-25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877125. The authors “suspect that in actual cases, judges would find it much more difficult to suppress damning evidence against a defendant that they strongly believe to be guilty than they would in [the] hypothetical scenarios.” *Id.* at 26.

¹²³ *Id.* at 24; see also Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) (discussing a

hindsight bias that judges (and perhaps juries) exhibit could be somewhat context-dependent, although the weight of the empirical evidence does suggest that the likelihood of finding differences between foresight and hindsight conditions is fairly large.¹²⁴

Judges also struggle when trying to live up to or impose standards of reasonableness. For instance, for the most significant dispositive motions of summary judgment, judges are supposed to dismiss cases if no reasonable jury would be able to find for the plaintiff.¹²⁵ Suja Thomas argues, however, that what judges do is in fact—impermissibly—substitute their own judgment of the facts for any genuine analysis of what a reasonable jury would do.¹²⁶ Thomas bases this conclusion on numerous factors, including that judges frequently disagree about what juries would find and that judges seem to interchangeably analyze what a single juror—as opposed to an actual *jury*—would find, which may lead to a different outcome due to group decision-making dynamics.¹²⁷ In the end, Thomas believes that the entire enterprise of deciding dispositive motions based on the reasonable jury standard is fatally flawed.¹²⁸

If a party appeals the decision of a trial court judge, the appellate court will at times examine the judge's behavior for abuse of discretion and ask "if no reasonable judge could logically make that decision."¹²⁹ Of course, appellate judges at any level are subject to similar biases as trial court judges. At every level of decision making, there is thus a tension between, on the one hand, the mandate to act reasonably and assess the actors below based on objective criteria, and, on the other hand, the pervasive cognitive biases that permeate attempts to engage

previous study by the same authors that suggested a lack of hindsight bias in some settings, but also a general inability on the part of judges to disregard relevant inadmissible evidence).

¹²⁴ See *supra* notes 93–121 and accompanying text (discussing the prevalence of hindsight bias in a wide variety of scenarios).

¹²⁵ Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 759 (2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

¹²⁶ *Id.* at 769. This is somewhat analogous to the criticism in the patent context that the Federal Circuit at times substitutes its own judgment for that of district courts, which results in problems such as inconsistent and panel-specific decisions. See, e.g., Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1026–27 (2007); Lauren Maida, Note, *Patent Claim Construction: It's Not a Pure Matter of Law, So Why Isn't the Federal Circuit Giving the District Courts the Deference They Deserve?*, 30 CARDOZO L. REV. 1773, 1773–74 (2009).

¹²⁷ Thomas, *supra* note 125, at 770–73.

¹²⁸ See *id.* at 784.

¹²⁹ Richard M. Markus, *A Better Standard for Reviewing Discretion*, 2004 UTAH L. REV. 1279, 1279. This has, in turn, been interpreted to mean that the outcome must blatantly violate fact and logic for the standard to be met. *Id.* at n.3.

in either of these actions. The hope of the judicial system is that the biases of different actors will be eliminated or at least sufficiently reduced as a case makes its way through the appellate process. For a variety of reasons, however, many cases are never appealed.¹³⁰ Further, numerous decisions (such as a jury's determination about a set of facts) are subject to such a high standard of review—and setting aside decisions below increases the strain on limited judicial resources by such a large amount—that they are effectively likely to be set aside only a small percentage of the time whether they are “reasonable” or not.¹³¹ Appellate decisions that set aside judicial decisions below can be equally problematic; after all, disagreements between a higher and a lower court result in an outcome in which the lower court judge or judges are declared unreasonable, but “[o]utside of some finding of impropriety or mental disability . . . judges should be considered reasonable fact-finders.”¹³² One could argue that even a reasonable fact finder can have an unreasonable moment or make a poor decision in a case without being globally “unreasonable.” At the same time, another possibility presents itself: that different reasonable decisionmakers could arrive at different outcomes. This possibility will fail to be acknowledged in a universe in which an appellate judge actually asks herself, explicitly or implicitly, only what *she* thinks about the evidence. Kahan and his coauthors have advocated for humility on the part of each judge:

[Before a judge decides] that no reasonable juror could find such facts, the judge should try to imagine who those potential jurors might be. If, as will usually be true, she cannot identify them, or can conjure only the random faces of imaginary statistical outliers, she should proceed to decide the case summarily. But if instead she can form a concrete picture of the dissenting jurors, and they are people who bear recognizable identity-defining characteristics—demographic, cultural, political, or otherwise—she should stop and think hard. Due humility obliges her to consider whether privileging her own view of the facts risks conveying a denigrating and exclusion-

¹³⁰ One study estimates both the appeals rate and the reversal rate for federal civil trials (for both judge and jury trials) to be about twenty-one percent. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 130 (2001).

¹³¹ Markus, *supra* note 129, at 1282.

¹³² Thomas, *supra* note 125, at 781.

ary message to members of such subcommunities. If it does, she should choose a different path.¹³³

This approach raises the question of why individual (rather than group-based) idiosyncrasies should necessarily be equated with a higher likelihood of unreasonableness—lest we simply define reasonableness as the average or median view. Moreover, even if one was willing to completely embrace Kahan and his coauthors' framework, there are significant reasons to question whether and how judges could engage in the complex mental exercise that they propose.¹³⁴ Despite these difficulties, the proposal deserves respect for attempting to grapple with one of society's oldest and most complex problems: how to bridge the intersubjective gap.

Indeed, in the end, judges and juries likely struggle with more similar problems than different ones. The high rate of judge-jury agreement in both the criminal and civil jury literatures provides some possible evidence that a number of the difficulties in decision making arise from causes unrelated to the dyads of professional versus amateur judging and of individual versus group decision making.¹³⁵ For instance, in Kalven and Zeisel's research for the University of Chicago Jury Project, judges disagreed with the findings of criminal juries only about 20% of the time.¹³⁶ The differences generally arose from greater leniency on the part of juries,¹³⁷ and Kalven remarked separately that the observed degree of difference was such as to confirm the quality of the jury's work but still allowed it "to perform a distinctive function."¹³⁸ Another team of researchers partially replicated the Kalven-Zeisel study based on data from 300 criminal trials in four locales and found over 70%

¹³³ Kahan, Hoffman & Braman, *supra* note 21, at 898–99.

¹³⁴ One scholar argues that Kahan asks judges for the impossible, and that "there is no evidence that judges have the ability to put aside their views and assess evidence based on another person's or group's viewpoint." Thomas, *supra* note 125, at 780. Related proposals are similarly problematic. For instance, one scholar has proposed jury instructions that would have jurors switch in their heads the genders, races, and/or sexual orientations of defendants and victims to identify whether bias is entering their determinations. LEE, *supra* note 77, at 252–53. This proposal would create a number of complications: it would be difficult to apply and would increase the risk that jurors would engage in various forms of stereotyping. Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 613–14 (2004) (reviewing LEE, *supra* note 77).

¹³⁵ See *infra* notes 136–140 and accompanying text.

¹³⁶ KALVEN & ZEISEL, *supra* note 81, at 59.

¹³⁷ Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 30 (1988) (identifying group deliberations as a factor in the increased leniency of juries over judges).

¹³⁸ Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964).

judge-jury agreement.¹³⁹ Further, another study found a rate of agreement of just over 71% for criminal cases (with the vast majority of the disagreement stemming from jury acquittals) and nearly 63% for civil cases (with an even split in the direction of the disagreement).¹⁴⁰

In a broad review of the empirical literature that compares judges and juries across different settings, one scholar concluded that

the decisionmaking of judges and jurors is strikingly similar. While there is evidence of some differences, there is a high degree of agreement between the groups, they appear to decide real cases quite similarly, and they show a great deal of similarity in responding to simulated cases designed to examine a variety of legal decisionmaking processes.¹⁴¹

She cautioned, however, that the high rates of agreement between the two groups were not guarantees of the accuracy of legal decisions by judges and juries.¹⁴² Indeed, we know that they both at times make similar types of errors that could result in agreement, including in matters such as the proper interpretation of scientific and statistical information or as attempts to ignore inadmissible evidence.¹⁴³ The next Part shows how the characteristics of copyrightable materials and related laws are such that both judges and juries are likely to struggle with applying copyright's version of the reasonable man standard.¹⁴⁴ The hazards of cognitive bias reach dangerous heights in the context of ambiguous subject matters, and the attempt to cling to an officially objective standard may lead to the least objective outcome of them all.

¹³⁹ Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 173 (2005).

¹⁴⁰ Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effect*, 18 LAW & HUM. BEHAV. 29, 48 (1994).

¹⁴¹ Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 502 (2005).

¹⁴² *Id.* at 505.

¹⁴³ *Id.* Other scholars have suggested that "[j]udges are likely to make better decisions in certain circumstances because their training and experience will enable them to avoid the more pernicious effects of such cognitive decision-making phenomena as the representativeness heuristic." Guthrie et al., *supra* note 118, at 827. They have recognized, however, that "group decision making or the insulation afforded by a judicial gatekeeper may enable juries to make better decisions than judges in other circumstances." *Id.*; see also Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 159-60 (1994) (finding that mock juries followed judicial instructions to ignore inadmissible testimony better than individual mock jurors).

¹⁴⁴ See *infra* notes 145-252 and accompanying text.

II. THE REASONABLE MAN AND COPYRIGHT LAW

As Part I shows, legal decision making by both judges and juries can suffer from some degree of cognitive bias and related distortions.¹⁴⁵ These effects, however, take on a special significance in copyright law. First, the old adage “*de gustibus et coloribus non est disputandum*” (“there is no arguing about tastes and colors”) is nowhere more recognized than in areas such as art, music, and literature. Nevertheless, copyright lawsuits leave attorneys and legal decisionmakers with no choice but to argue about matters usually left to personal taste. One of the goals of this Article is to issue a call to remind ourselves of the inherent subjectivity of the decision-making enterprise. Indeed, though copyright law has made repeated attempts to remain value-neutral, the boundary between aesthetic and legal determinations is elusive.¹⁴⁶ This Part shows how most courts have decided to handle the various complex elements of copyright infringement, and then discusses the problems that ambiguity and cognitive biases raise in this context.¹⁴⁷ Section A explores the various tests for copyright infringement used by different U.S. Courts of Appeals.¹⁴⁸ Section B argues that the ambiguity of copyright law prevents judges and juries from applying these tests consistently.¹⁴⁹ Section C discusses how cognitive biases are likely to affect judges’ and juries’ analyses of copyright infringement.¹⁵⁰

A. *The Tests for Copyright Infringement*

1. Establishing a Prima Facie Case of Infringement

A plaintiff can establish a prima facie case of copyright infringement by proving ownership of a valid copyright and a violation of one or more of the plaintiff’s exclusive rights listed under 17 U.S.C. § 106.¹⁵¹

¹⁴⁵ See *supra* notes 36–144 and accompanying text.

¹⁴⁶ See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249 (1998); see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 808 (2005) (arguing that courts are regularly forced to confront the question of “what is art?”); Barton Beebe, *Bleistein*; or, Intellectual Property Law and the Problem of Aesthetic Progress (unpublished manuscript) (on file with author) (arguing that “intellectual property law has refused to reconcile the law’s fundamental purpose, the promotion of progress, with the aesthetic”).

¹⁴⁷ See *infra* notes 151–252 and accompanying text.

¹⁴⁸ See *infra* notes 151–192 and accompanying text.

¹⁴⁹ See *infra* notes 193–203 and accompanying text.

¹⁵⁰ See *infra* notes 204–252 and accompanying text.

¹⁵¹ The statute provides:

Unless the defendant challenges the validity of the plaintiff's copyright, typically by arguing that the work is not one that is protectable under copyright law, the issue will be whether or not the defendant violated one or more of the plaintiff's exclusive rights. In cases in which the plaintiff alleges that the defendant made an unlawful reproduction of the plaintiff's work, the plaintiff must show proof of copying.¹⁵² Such copying can be proven either by direct or, more frequently, indirect (circumstantial) evidence.¹⁵³ "[W]here there are striking similarities probative of copying, proof of access may be inferred."¹⁵⁴ Proving copying through evidence of access and/or similarities establishes so-called "probative similarity."¹⁵⁵ The understanding is that "if the defendant had access to the plaintiff's work and the defendant's work is similar enough to the plaintiff's, the most plausible inference is that the defendant actually copied from the plaintiff."¹⁵⁶ Copying itself, however, is not necessarily illegal, and replicating de minimis amounts of copyrightable materials is not actionable.¹⁵⁷ Rather, the copying must have been "substantial" to be infringing; this represents "one of the most difficult

Subject to sections 107 through 122, the owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2006).

¹⁵² See, e.g., *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) (citing *Laureysens v. Idea Grp, Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992)).

¹⁵³ See Lemley, *supra* note 23, at 719.

¹⁵⁴ *Repp*, 132 F.3d at 889 (citing *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995)).

¹⁵⁵ *Id.* at n.1. The term "probative similarity" is often attributed to Alan Latman. See generally Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990) (urging the adoption of the term "probative similarity" as a term separate from "substantial similarity" in the proof-of-copying step of copyright infringement).

¹⁵⁶ Lemley, *supra* note 23, at 720.

¹⁵⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 n.34 (1984).

questions in copyright law, and one that is the least susceptible of helpful generalizations.”¹⁵⁸

2. The Traditional Test—*Arnstein v. Porter*

To determine whether substantial similarity is present, the U.S. Court of Appeals for the Second Circuit developed a two-step test for copyright infringement that most other circuits have followed in some form.¹⁵⁹ The Second Circuit created this test in the 1946 case *Arnstein v. Porter*, in which Ira Arnstein accused his fellow songwriter Cole Porter of ripping off Arnstein’s compositions for several successful songs.¹⁶⁰ The court held that, as a first step, “[i]f there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis (‘dissection’) is relevant, and the testimony of experts may be received to aid the trier of the facts.”¹⁶¹ Some scholars have remarked that the first step of this analysis has lost much of its weight since the advent of the Internet because now most materials are easily available, and hence access can virtually be assumed.¹⁶² If the first prong of the test is no longer a barrier in many cases, this only emphasizes the need to employ a proper analysis under the second prong.

Under *Arnstein*, if the court establishes that copying took place, it must next decide whether the copying was illicit and thus constituted unlawful appropriation.¹⁶³ The answer to this question is determined by examining the response of the ordinary observer, so neither dissection nor expert testimony is considered relevant.¹⁶⁴ The essential inquiry for the second step in *Arnstein* was “whether defendant took from plain-

¹⁵⁸ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (2011).

¹⁵⁹ This Subsection and those that follow present a basic overview of the key tests that courts have used to determine copyright infringement. See generally ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW ch. 3 (2011) (providing a more detailed discussion of the specific tests used in each circuit).

¹⁶⁰ 154 F.2d 464, 467–68 (2d Cir. 1946).

¹⁶¹ *Id.* at 468.

¹⁶² See, e.g., Bartow, *supra* note 23, at 84 (citing Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 311–12 (1999)).

¹⁶³ *Arnstein*, 154 F.2d at 468.

¹⁶⁴ *Id.* There is some disagreement as to what the *Arnstein* court meant to state on this subject, but this is how *Arnstein* has historically been interpreted. See Lemley, *supra* note 23, at 722; see also Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 285–90 (1993) (providing more information on this subject).

tiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."¹⁶⁵ It is telling that the test was not without controversy from the start, with the dissenting judge in *Arnstein* stating that "after repeated hearings of the records, I could not find therein what my brothers found."¹⁶⁶

3. The *Krofft* Approach

The U.S. Court of Appeals for the Ninth Circuit also took a two-step approach in 1977 in its leading case *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*¹⁶⁷ The first step, which establishes probative similarity, is the "extrinsic" step through which courts examine a list of particular criteria to determine the substantial similarity of *ideas* with the aid of expert testimony and analytic dissection.¹⁶⁸ For the determination of unlawful appropriation, the court refers to an "intrinsic" step, which looks at "the response of the ordinary reasonable person" to determine the substantial similarity of *expression*; at this stage, the court prohibits the use of expert testimony or dissection.¹⁶⁹

The primary difference between the Ninth Circuit's two-step analysis and the Second Circuit's test, aside from the Ninth Circuit's "focus on the comparison of ideas as well as expression,"¹⁷⁰ is "that the Ninth Circuit puts more emphasis than the Second on the ordinary observer side of the analysis—what it calls the 'intrinsic' inquiry."¹⁷¹ Additionally, "courts that follow *Krofft* are more willing to treat as the 'ordinary observer' the likely customer of the copyrighted products, which may or may not be a member of the jury."¹⁷² As a result, when the intended au-

¹⁶⁵ *Arnstein*, 154 F.2d at 473.

¹⁶⁶ *Id.* at 476 (Clark, J., dissenting).

¹⁶⁷ 562 F.2d 1157, 1164 (9th Cir. 1977), *superseded by statute on other grounds*, 17 U.S.C. § 504(b) (2006).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The District of Oregon offers a recent application of the *Krofft* test. See *Erickson v. Blake*, 839 F. Supp. 2d 1132, 1135–40 (D. Or. 2012) (dismissing a copyright infringement case—in which the plaintiff-owner of the work "Pi Symphony" argued that the defendant's work, "What Pi Sounds Like," infringed when both transposed the digits of the number pi to music—by holding that pi was a non-copyrightable fact and that the idea to transpose its digits to music was also non-copyrightable).

¹⁷⁰ Lemley, *supra* note 23, at 724.

¹⁷¹ *Id.* at 725.

¹⁷² *Id.* at 729; see also Austin Padgett, Note, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 PIERCE L. REV. 125, 132 (2008) (discussing

dience is an "extraordinary observer," courts may allow expert testimony, although generally prohibited under the intrinsic test, to help legal decisionmakers understand specialists' perspectives.¹⁷³

4. Other Methods

Although most circuits have adopted either the *Arnstein* or the *Krofft* test, courts have occasionally changed or modified these approaches under certain circumstances.

a. *The Shaw v. Lindheim Modification of the Krofft Approach*

In 1990, in *Shaw v. Lindheim*, the Ninth Circuit tried to clarify the relationship between substantial similarity and the idea-expression dichotomy by changing the two-step test from *Krofft*.¹⁷⁴ In the years after *Krofft*, district courts began to refer to a standardized list of elements when they applied *Krofft*'s extrinsic step to literary works.¹⁷⁵ As a result of this "checklist of elements" approach, the *Shaw* court felt that the extrinsic test was "more sensibly described as an objective . . . analysis of expression, having strayed from *Krofft*'s division between expression and ideas."¹⁷⁶ With respect to the intrinsic test, the court viewed it as a subjective test of expression, leaving the original *Krofft* conception unchanged.¹⁷⁷ One observer concluded that "*Shaw*'s emphasis on comparing copied expression, not ideas, is thoroughly consistent with the idea-expression distinction and the constitutional principles of copyright law."¹⁷⁸

The *Shaw* court also held that, when it comes to summary judgment, "satisfaction of the extrinsic test creates a triable issue of fact in a [literary] copyright action."¹⁷⁹ Thus, once the plaintiff meets the extrinsic test, proving an objective similarity of expression, "it is improper

the Fourth Circuit's analysis of the ordinary observer in *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 734 (4th Cir. 1990)).

¹⁷³ *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003).

¹⁷⁴ 919 F.2d 1353, 1357 (9th Cir. 1990); Thomas M. Cunningham, Note, *Extending Shaw v. Lindheim: Substantial Similarity and the Idea-Expression Distinction in Copyright of Non-Literary Subject Matter*, 55 U. PRR. L. REV. 239, 242, 248 (1993).

¹⁷⁵ Cunningham, *supra* note 174, at 248.

¹⁷⁶ *Shaw*, 919 F.2d at 1357.

¹⁷⁷ *Id.* Although the *Shaw* court's holding was limited to literary works, the Ninth Circuit applied it to a computer program copyright as well because of the parallels it drew between some such programs and literary works. See *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1476 (9th Cir. 1992).

¹⁷⁸ Cunningham, *supra* note 174, at 249.

¹⁷⁹ *Shaw*, 919 F.2d at 1359.

for a court to find . . . that there is no substantial similarity as a matter of law.”¹⁸⁰ This part of the test is supposed to ensure that the plaintiff will get to the jury once an objective showing of similarity has been made and to prevent judges from “arbitrarily decid[ing] the infringement question on the basis of their own subjective opinions.”¹⁸¹ The terminology gets rather confusing here because the court talks about the second step of *Krofft*, which seeks to determine “the response of the ordinary reasonable person”¹⁸² (normally considered an objective test), as a subjective determination that is “no more suitable for a judge than for a jury.”¹⁸³ The tension in terminology is rather telling because the court is conflating what the jury subjectively experiences with what the hypothetical ordinary observer himself would perceive.

The jury instructions used in various circuits prove illuminating on this last point. Some of them ask jurors to determine what an “ordinary reasonable person” would find substantially similar,¹⁸⁴ whereas others make no reference to the reasonable person and tell jurors to determine whether two works are substantially similar in the abstract,¹⁸⁵ and yet others speak of the “average lay observer” but equate that concept with the jurors themselves.¹⁸⁶ The current approaches to substantial similarity de-

¹⁸⁰ *Id.*

¹⁸¹ Cunningham, *supra* note 174, at 251.

¹⁸² Shaw, 919 F.2d at 1358 (citing *Krofft*, 562 F.2d at 1164).

¹⁸³ *Id.* at 1360.

¹⁸⁴ See, e.g., Susan Wakeen Doll Co. v. Ashton-Drake Galleries, 272 F.3d 441, 453 n.1 (7th Cir. 2001) (“Defendant’s sculpture is ‘substantially similar’ to plaintiff’s copyright if an ordinary reasonable person, unless he or she set out to detect disparities between the plaintiff’s and defendant’s sculptures, would be disposed to overlook the disparities and regard their aesthetic appeal as the same.”); Cartier v. Jackson, 59 F.3d 1046, 1049–50 (10th Cir. 1995) (“In applying [the subjective or intrinsic] test, you must decide or determine whether an ordinary, reasonable, non-expert person would conclude that the total concept and feel of [the defendant’s song] is substantially similar to the total concept and feel of [the plaintiff’s song].”); see also OSTERBERG & OSTERBERG, *supra* note 159, app. B (collecting these and other jury instructions).

¹⁸⁵ See, e.g., Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1564 (Fed. Cir. 1992) (“Substantial similarity may exist where an important part of the mask work is copied, even though the percentage of the entire chip which is copied may be relatively small.”).

¹⁸⁶ See, e.g., OSTERBERG & OSTERBERG, *supra* note 159, app. B, at B-3 (citing *Gaste v. Kaiserman*, 683 F. Supp. 53 (S.D.N.Y. 1988), *aff’d* 863 F.2d 1061 (2d Cir. 1988)) (“Substantial similarity means that the average lay observer would recognize the alleged infringing work as having been derived from the copyrighted work. . . . [W]hat it requires . . . as lay listeners, that is as non-professional listeners, [is that] you would recognize the one as having been derived from the other.”). Though one must exercise caution in generalizing, some previous research indicates that juries spend little time discussing standards of proof, which may affect how they process these types of instructions in the copyright context as well. HASTIE ET AL., *supra* note 75, at 86–87. The research on jurors’ general comprehen-

veloped in *Arnstein* and *Krofft* thus not only are problematic from a cognitive perspective in the ways described in this Article,¹⁸⁷ but also are applied inconsistently as evidenced by the jury instructions we see.¹⁸⁸

b. *Software Cases*

One clear exception to the two-step analyses in *Arnstein* and *Krofft* are software cases, in which courts usually allow expert testimony not only on the question of copying, but also on misappropriation.¹⁸⁹ In 1992, in *Computer Associates International v. Altai, Inc.*, the Second Circuit stated that it would “leave it to the discretion of the district court to decide to what extent, if any, expert opinion, regarding the highly technical nature of computer programs, is warranted in a given case.”¹⁹⁰ The *Altai* court also adopted an “abstraction-filtration-comparison” framework for evaluating substantial similarity.¹⁹¹ I mention the software doctrine here because, as I will discuss below, Mark Lemley has proposed that courts adopt a similar framework for non-software copyright infringement cases.¹⁹²

B. *The Problem of Ambiguity in Copyright Infringement Cases*

The subject matters that copyright law covers inherently involve complex human responses before litigation even enters the picture. Having jurors and judges apply difficult and at times confusing tests to already vague materials means that they will often have to make deci-

sion of jury instructions raises concerns in its own right, with many jurors failing to completely understand instructions despite expressing great confidence in their own understanding but diminished confidence in their fellow jurors’. See Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 64, at 282, 295–97; see also James R.P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 407, 425–26, 434–38 (Neil Brewer & Kipling D. Williams eds., 2005) (noting similar problems and suggesting solutions to improve jurors’ understanding of instructions).

¹⁸⁷ See *infra* notes 204–251 and accompanying text.

¹⁸⁸ The American Bar Association (ABA) has sought to remedy some of the issues directly related to jury instructions by publishing a book of model instructions. See generally ABA INTELLECTUAL PROP. LITIG. COMM., MODEL JURY INSTRUCTIONS: COPYRIGHT, TRADE-MARK AND TRADE DRESS LITIGATION (Todd S. Holbrook & Alan Nathan Harris eds., 2009) (providing model jury instructions for a variety of intellectual property issues).

¹⁸⁹ Lemley, *supra* note 23, at 740.

¹⁹⁰ 982 F.2d 693, 713 (2d Cir. 1992).

¹⁹¹ *Id.* at 706.

¹⁹² See *infra* notes 253–288 and accompanying text.

sions permeated by ambiguity.¹⁹³ Judge Learned Hand's pronouncement quoted at the beginning of this Article, stating that copyright infringement tests are bound to be vague,¹⁹⁴ continues to reverberate after over fifty years.¹⁹⁵ One notable indication of the fact-specific nature of substantial similarity inquiries is courts' explicit reluctance to grant summary judgment in these cases. In copyright infringement cases, courts have stated that "granting summary judgment, particularly in favor of the defendant, is a practice to be used sparingly."¹⁹⁶ The main reason for this is that "substantial similarity is customarily an extremely close question of fact."¹⁹⁷ One scholar has argued that the concept of substantial similarity itself has become more, rather than less, ambiguous as it has been subjected to judicial interpretation over the years.¹⁹⁸ The psychology literature on ambiguous decisions may shed some light as to the problems that judges and jurors face in copyright cases and may help to explain the outcomes of related litigation.

Ambiguity has long presented special problems in the context of cognitive bias and the law.¹⁹⁹ "[O]bserver effects are most potent where ambiguity is greatest, when an observer's judgment is most likely to succumb to expectation, subjective preference, or external utility."²⁰⁰ For instance, individuals tend to act with an overabundance of caution in ambiguous situations, even when they can fairly accurately assess

¹⁹³ Of course, vagueness is a problem in a number of areas of the law, including statutory interpretation. See generally Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in OXFORD HANDBOOK ON LANGUAGE AND LAW 128 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (discussing the role of vagueness in the legal system).

¹⁹⁴ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

¹⁹⁵ According to a Westlaw search that I conducted, Judge Hand's pronouncement was later quoted by twenty other cases. As a related matter, when Judge Jon Newman on the Second Circuit suggested that an "ordinary observer" test be adopted to determine the copyrightability of a utilitarian article, Judge Walter Mansfield wrote in a majority opinion that the proposed test would be so vague as to constitute a "bottomless pit." *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 419 n.5 (2d Cir. 1985) (holding that mannequins of partial human torsos used to showcase clothing were utilitarian articles lacking artistic or aesthetic attributes that could be physically or conceptually separated from their utilitarian features and thus were not copyrightable).

¹⁹⁶ *Kohus*, 328 F.3d at 853 (quoting *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984)).

¹⁹⁷ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980) (citing *Arnstein*, 154 F.2d at 468, 474).

¹⁹⁸ Cohen, *supra* note 23, at 722–23.

¹⁹⁹ See *infra* notes 200–203 and accompanying text.

²⁰⁰ D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 16 (2002).

risk.²⁰¹ As a result, juries act in a biased manner and place exaggerated demands on parties that face uncertainty; indeed, jurors will see the risks that a defendant took as greater than they were and will view them as *more* reckless if the risks were uncertain.²⁰² This leads to a conundrum: “[S]ituations of ambiguity, in which precautionary behavior will be especially difficult because of the ill-defined character of the risks, should be judged by more lenient liability standards. But, to the contrary, juries will be inclined to be particularly harsh in situations of ambiguity and uncertainty.”²⁰³ The question of substantial similarity can become confusing for even experienced attorneys and judges; this likely translates into even greater confusion for artists who have to make decisions as to how to craft their works such as not to infringe. The empirical research casts concerns as to how judges and juries may adjudicate such situations of artistic uncertainty.

C. Cognitive Bias and Copyright Infringement

This Section discusses how a number of cognitive biases are likely to affect judges’ and juries’ analyses of copyright infringement.²⁰⁴ It fo-

²⁰¹ Hastie & Viscusi, *supra* note 94, at 912–13. Some scholars have distinguished situations involving ambiguity and those involving risk such that “under ambiguity, the agent is unable to assign probabilities to states with absolute precision (as would be the case under risk) but is able to assign ‘best-guess’ probabilities to such states.” Ian M. Dobbs, *A Bayesian Approach to Decision-Making Under Ambiguity*, 58 *ECONOMICA* 417, 417 (1991). As one scholar explains, “The essence of the distinction between situations involving pure risk and those involving ambiguity is that in the latter case new information may modify an individual’s estimation of best-guess probabilities, whereas in the former case it will not.” *Id.* That model shows that the anticipation of finding out an outcome that could produce a feeling of having previously “mis-evaluated may influence an individual’s *ex ante* assessment of a given action.” *Id.* at 418. This further illustrates the type of difference in decision-making strategies that ambiguity can produce.

²⁰² To some extent, this may parallel individuals’ and juries’ general distaste for particular types of cost-benefit calculations when physical harm is involved. For instance, law students were unwilling to accept a manufacturer’s failure to recall a car model as reasonable even though the cost of the recall would have outweighed the expected costs in consumers’ lives; the students’ discomfort was rooted in the deontological theory that there is a limit to the physical harm that individuals should ever have to suffer in exchange for private profit. Heidi M. Hurd, *The Deontology of Negligence*, 76 *B.U. L. REV.* 249, 255 (1996); see also Christopher H. Schroeder, *Rights Against Risks*, 86 *COLUM. L. REV.* 495, 505–06 (1986) (noting that jurors were outraged when they learned that the same car manufacturer had performed a cost-benefit analysis in this context).

²⁰³ Hastie & Viscusi, *supra* note 94, at 913. In some situations, such as in a number of tort-like settings, a party may be able “to reduce the ambiguity of a risk it is creating through monitoring, research, and experience.” Lempert, *supra* note 100, at 891. This is a more problematic proposition for the copyright context.

²⁰⁴ See *infra* notes 206–252 and accompanying text.

cuses on the biases that are of particular relevance to this legal context, but the list is not exhaustive—if anything, the issues caused by cognitive bias in copyright litigation are greater than what this Section indicates. Part III of this Article then lays out some solutions that will hopefully alleviate the problem of cognitive bias in this area of the law.²⁰⁵

1. Hindsight Bias

First, decisionmakers in copyright cases are at an elevated risk of falling prey to hindsight bias. As one scholar has cogently explained:

As a structural matter, copyright lends itself almost perfectly to the possibility of hindsight bias. Since the existence and scope of the entitlement in a work are only ever decided when the defendant copies parts of it, the presence of actual copying (appropriation) tends to hurt the defendant's case. Indeed, as a historical matter, courts seem to have acknowledged their reliance on hindsight with observations like "what is worth copying is *prima facie* worth protecting."²⁰⁶

To some extent, as several scholars have noted, "hindsight bias is indeed an inevitable consequence of any *ex post* liability and entitlement delineation process."²⁰⁷ At the same time, other factors, such as the elusive quest for the reasonable man²⁰⁸ and the emphasis on the two-step test for copyright infringement, may further exacerbate hindsight bias in this context. As previously discussed, judges and juries first determine whether copying took place before reaching the question of

²⁰⁵ See *infra* notes 253–288 and accompanying text.

²⁰⁶ Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1631 (2009) (quoting *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.*, [1916] 2 Ch. 601 at 610 (Eng.)). As Balganesh indicates, although U.S. courts have departed from this understanding, it remains illustrative of the *ex post* structural framework that underlies copyright law. *Id.* at 1631 n.236. A plaintiff and defendant are, on the other hand, likely to overemphasize mentally their unique contributions to their own works. See generally Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979) (demonstrating across several experiments that subject populations as diverse as naturally occurring discussion groups, married couples, basketball teams, and groups assembled in a laboratory more easily recalled their own contributions to joint products and accepted more responsibility for a collective product than the rest of the respective group attributed to them). In the area of patent law, Mark Lemley has criticized the exaggerated role that society assigns to the contributions of "lone genius" inventors and has emphasized the nature of invention as a social rather than individual phenomenon. See Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 710–11 (2012).

²⁰⁷ Balganesh, *supra* note 206, at 1631 (citing Rachlinski, *supra* note 113, at 571).

²⁰⁸ See *id.*; *supra* notes 33–144 and accompanying text.

whether the copying constituted misappropriation.²⁰⁹ Unlike trademark infringement tests, which balance multiple factors to determine liability,²¹⁰ copyright tests consist of a series of binary questions. Although the law no longer officially accepts the idea mentioned above that something of value must have been taken if copying took place, a legal decisionmaker may draw conscious or subconscious conclusions from a determination of copying, which will increase the chance that he or she will make a finding of substantial similarity.

For one, believing that a defendant copied may also lead to the implicit assumption that the copied material was not in the public domain (otherwise, it would not have needed to be copied from the plaintiff). Relatedly, if the assumption prevails that what was taken was somehow unique to the plaintiff's work, any use of that material is likely to elicit impressions of free riding. Indeed, Lemley has shown that the use of free riding rhetoric has dramatically increased in intellectual property decisions over time,²¹¹ and he criticizes the "assumption on the part of courts that all enrichment derived from use of an intellectual property right is necessarily unjust."²¹² Olufunmilayo Arewa echoes this sentiment by noting a general misunderstanding of the concept of free riding in the copyright context and emphasizing that some degree of free riding in the form of borrowing is inevitable in musical expression.²¹³ Problematic understandings of free riding that do not conform to the spirit of copyright law may be overcome in litigation, but we must take them seriously nonetheless because they can tip the balance in some cases if left unmonitored. On average, if the analysis in this Article proves correct, it appears that hindsight bias will result in pro-plaintiff effects.

Relatedly, hindsight bias may be exacerbated by a version of the so-called "reverse halo effect," which refers to the issue that "once observers (including jurors) hear of an isolated act of misconduct, they trans-

²⁰⁹ See *supra* notes 151–192 and accompanying text.

²¹⁰ See, e.g., *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (delineating what has become the best-known trademark infringement test).

²¹¹ Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1039 (2005) (showing that variations of the term "free riding" were used in over 50% of all cases between 1983 and 2003, as compared to figures below 25% between 1943 and 1973).

²¹² *Id.* at 1044.

²¹³ Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 341 (2006). This also dovetails with Jeanne Fromer's description of the creative process and the fact that people want to see and hear works that are new but not overly so. Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1479–83 (2010).

mute that act into a generally bad character, which deflects the jurors from fairly assessing the evidence.”²¹⁴ Just as legal decisionmakers may infer that what was taken was worth taking, they may conclude that the type of person who is willing to copy from others is also the type who is willing to do so in a way that is unlawful. Some of this is rooted in what Arewa considers a misunderstanding of the creative process, as mentioned above.²¹⁵ Further, as Ann Bartow has indicated, “[a]ccusations related to acts of copying carry a surfeit of negative connotations. If one copies answers from the exam of the student sitting in the next chair, one is a cheater; if one copies the words of others into one’s essay without appropriate attribution, one is a plagiarist.”²¹⁶ She also states that people believe “that the very act of copying exudes an aura of actionable evil.”²¹⁷ Although most scholars would draw numerous distinctions between the act of copyright infringement and that of plagiarism,²¹⁸ not all would.²¹⁹ Additionally, the lay jury is more likely to lump some of these actions together, especially if directly encouraged to do so by plaintiffs’ attorneys. Bartow’s recommendation that legal decisionmakers “repress any visceral negative emotional reactions that acts of copying provoke in them”²²⁰ is thus unlikely to overcome the reverse halo effect given that the bias largely operates at the subconscious level.

2. Anchoring

Another bias that likely enters the equation in copyright-related decision making is a type of anchoring. Anchoring generally “refers to the tendency for arbitrary set points to influence judgment.”²²¹ In the case of copyrighted materials, jurors or judges are asked to compare an allegedly infringing piece to the original, which may turn the original

²¹⁴ David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence*, 57 GEO. WASH. L. REV. 279, 297 (1988) (citation omitted).

²¹⁵ See Arewa, *supra* note 213, at 341.

²¹⁶ Bartow, *supra* note 23, at 84 (citation omitted).

²¹⁷ *Id.* at 93.

²¹⁸ See, e.g., Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 202 (2002); Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues*, 2009 B.Y.U. EDUC. & L.J. 245, 261.

²¹⁹ See, e.g., Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1290 (2003) (designating plagiarism and copyright piracy as “conceptual cousin[s]”).

²²⁰ Bartow, *supra* note 23, at 102.

²²¹ Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 751 n.60 (2000).

into an anchor. At least at the margins, decisionmakers are likely to overfocus on similarities to the original and gravitate toward a finding of liability, which again favors plaintiffs.²²² Under the current test, and due to the way that materials are presented to decisionmakers, as long as the two pieces bear some degree of similarity (which they usually do to make it to this stage of litigation) they may be perceived as more strikingly similar as a result of anchoring than they ever would have if they had been encountered by observers outside the courtroom. This effect may be even stronger where the original work is displayed *first* in court, which is likely to take place the vast majority of the time.

3. Confirmation Bias

Confirmation bias may also play a relevant role in the copyright infringement context, either in conjunction with anchoring or on its own. Confirmation bias has been defined as “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”²²³ This bias has been observed in a number of legal contexts, including fingerprinting identification.²²⁴ In one study, most of the experts used as study subjects misidentified a set of fingerprints as a nonmatch after being given erroneous contextual information even though they were asked to regard that information as irrelevant.²²⁵ In copyright cases, legal decisionmakers tasked with examining the existence of substantial similarity may draw conclusions based on some similar traits between the original and allegedly infringing works and then interpret other traits as more similar than they would have but for these initial conclusions. The fact that the plaintiff presents his case first may exacerbate the pro-plaintiff effect that this bias potentially already has in copyright litigation. The so-called “irrational primacy effect” has been observed in other contexts in which subjects develop a working hypothesis based on initial information that influences how

²²² Anchoring may also play a role in the determination of damages once there is a finding of liability.

²²³ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

²²⁴ Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT'L 74, 76 (2006).

²²⁵ *Id.*

they view subsequent pieces of evidence;²²⁶ this effect may play a role here as well.²²⁷

4. The Overconfidence Effect

One phenomenon has the potential to worsen all the biases described above: the overconfidence effect. It causes individuals to exhibit greater confidence in their decision-making abilities than their actual accuracy warrants.²²⁸ We know that “[c]ognitive psychological research indicates that one of the best mechanisms for reducing overconfident judgments is forcing oneself to consider alternatives and carefully re-view arguments against one’s position.”²²⁹ Though, as in all litigation, judges and jurors in copyright cases hear arguments from both sides, this issue remains particularly challenging in contexts in which decisionmakers encounter the key evidence in a direct manner. As mentioned in the Introduction,²³⁰ in the 2007 U.S. Supreme Court case *Scott v. Harris*, the justices showed such great confidence in their judgment because the relevant car chase was captured on video and they could see the evidence with their own eyes. When that is the case, individuals are likely to be less open-minded about counter-arguments, as one can surmise from some of the justices’ belief that anyone who watched the tape would draw the same conclusion as they did.²³¹ As we know from Dan Kahan’s work, the justices’ confidence proved excessive, and individuals from specific groups did disagree.²³²

²²⁶ Nickerson, *supra* note 223, at 187.

²²⁷ The relationship between primacy and recency effects is complex, and the respective strengths of each are the subject of some debate; it is noteworthy, however, that in many jurisdictions, plaintiffs enjoy the benefits of both because they not only speak first when trials begin, but they also proceed first and last during the closing arguments phase. See John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 157 n.42 (2000) (citing Michael F. Colby, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, 17 TRIAL 42, 46 (1981)); see also E. Allan Lind, *The Psychology of Courtroom Procedure*, in THE PSYCHOLOGY OF THE COURTROOM, *supra* note 75, at 13, 24–27 (discussing the issue of the order of presentation of evidence).

²²⁸ See, e.g., Gerry Pallier et al., *The Role of Individual Differences in the Accuracy of Confidence Judgments*, 129 J. GEN. PSYCHOL. 257, 258–59 (2002).

²²⁹ Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588 (2002); see also Derek J. Koehler, *Hypothesis Generation and Confidence in Judgment*, 20 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 461, 466 (1994) (showing that subjects asked to generate hypotheses about an event were more likely to question a prespecified hypothesis).

²³⁰ See *supra* notes 20–21 and accompanying text.

²³¹ See *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007).

²³² See *supra* notes 67–72 and accompanying text (describing Kahan’s research).

The overconfidence effect—which is “[o]ne of the most robust findings in the literature of individual decision making”²³³—has been shown across a variety of settings, and groups can exacerbate this type of bias.²³⁴ Overconfidence is particularly great when accurate judgments are hard to make.²³⁵ This raises concerns in the copyright context where, as discussed, much decision making takes place in the face of ambiguity.²³⁶ Overconfidence can serve as a compounding element for other cognitive biases and “magnifies the undesirable consequences of erroneous judgment.”²³⁷ Some research also shows that self-serving biases like overconfidence are actually exacerbated in decisionmakers who have some level of expertise.²³⁸ Indeed, this bias has been observed in doctors, psychologists, lawyers, negotiators, engineers, and security analysts.²³⁹

Judges appear to fall prey to the overconfidence effect in a number of settings. When asked where they would place themselves in a ranking of judges across three dimensions (ability to assess the credibility of a witness, ability to avoid bias, and ability to facilitate settlement), over 83% of administrative law judges placed themselves in the top half, and none placed themselves in the bottom quartile.²⁴⁰ Similarly, in a study of magistrate judges which asked how high the judges’ appeal rate was, over 87% of subjects believed that their peers had higher re-

²³³ Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, in *BEHAVIORAL LAW AND ECONOMICS* 144, 149 (Cass R. Sunstein ed., 2000).

²³⁴ *Id.* at 150 (citing Chip Heath & Forest J. Jourden, *Illusions, Disillusions and the Buffering Effects of Groups*, 69 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 103, 104–06 (1997)). Overconfidence, like other cognitive biases, can be adaptive in some situations, which is likely why the effect persists despite its drawbacks. See Heath & Jourden, *supra*, at 114.

²³⁵ SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 219 (1993).

²³⁶ See *supra* notes 193–203 and accompanying text.

²³⁷ Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 *Nw. U. L. REV.* 1165, 1173 (2003).

²³⁸ *Id.* at 1172–73.

²³⁹ Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 *COGNITIVE PSYCHOL.* 411, 414 (1992) (explaining that overconfidence is established by the balance of arguments for and against the competing hypothesis without sufficient attention to the weight of the evidence). Two critics have quipped that the decision making of experts is “often wrong but rarely in doubt.” *Id.*; see Nathanael Fast et al., *Power and Overconfident Decision-Making*, *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* (forthcoming 2012), available at http://www-bcf.usc.edu/~nathanaf/power_and_overconfident_decision_making.pdf (discussing a set of studies on the relationship between subjects’ perception of their own power and their level of overconfidence).

²⁴⁰ Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 *DUKE L.J.* 1477, 1519 (2009).

versal rates than themselves.²⁴¹ This overconfidence likely permeates a wide variety of decision-making processes, and at least one scholar, Jeffrey Rachlinski, has expressed concern that the new pleading standards set forth by the U.S. Supreme Court in 2009 in *Ashcroft v. Iqbal* will require judges to exhibit a level of humility “that likely exists in no professional decision maker.”²⁴² In particular, judges will have to evaluate at that early stage the degree of confidence that they possess in their own thoughts about how the case should continue; in light of the existing research, Rachlinski concludes that this will likely result in overconfidence.²⁴³ The same effect extends to judges’ views of their own abilities to minimize racial bias, with 97% of judges rating their ability to avoid racially motivated decision making as better than that of their peers’.²⁴⁴ Based on the weight of the evidence in these contexts, it is not a stretch to suspect strongly that judges view themselves as good or at least decent decisionmakers in the copyright context and that their ability to view directly the most relevant evidence leaves little room for second-guessing their skill level for making definitive judgments.²⁴⁵

5. The Role of Other Attributes

In addition to the problems of cognitive bias that may be described as “heuristics gone wrong,” there are indications that cognitive processing of the subject matters covered by copyright law can take place differently on a number of characteristic axes, such as gender.²⁴⁶ Scholars have long written about gender differences in the perception of art objects.²⁴⁷ A brain imaging study showed differences between men and women in the cerebral processing of beautiful images such as paint-

²⁴¹ Guthrie et al., *supra* note 120, at 813–14.

²⁴² Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 427 (2011); see Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 140–44 (2010) (calling for judicial humility); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (articulating new pleading standards).

²⁴³ Rachlinski, *supra* note 242, at 427–28.

²⁴⁴ Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009).

²⁴⁵ See PLOUS, *supra* note 235, at 227–30 (offering general suggestions on how to reduce the overconfidence bias).

²⁴⁶ See *infra* notes 247–251 and accompanying text.

²⁴⁷ See, e.g., F. Graeme Chalmers, *Women as Art Viewers: Sex Differences and Aesthetic Preference*, 18 STUD. ART EDUC. 49, 49 (1977). For example, a study of children showed that girls prefer pictures of women and children whereas boys have a strong preference for pictures of men. *Id.* at 51 (citation omitted).

ings.²⁴⁸ The researchers suggested that this may correspond to different strategies that men and women use to make aesthetic judgments.²⁴⁹ Gender differences also, for instance, extend to perceptions of and aesthetic preferences for specific colors.²⁵⁰ In listening studies, both gender and level of musical expertise influenced patterns of brain activation.²⁵¹

Although copyright trials involve many more elements than will fit into a magnetic resonance imaging (MRI) machine, the cognitive processes and differences observed in prior studies are likely to play a role in legal decision making. Hence, the effects of particular attributes of judges or juries, combined with (1) copyright's emphasis on the decisionmaker's direct perception of the allegedly illegal subject matter, and (2) the bias-increasing ambiguity of the subject matter, may create a dangerously unreliable black box, the ill effects of which are undone only with great difficulty in any given trial. Although none of the problems articulated in this Section lend themselves to simple fixes, the next Part describes some ways that may improve decision making in the copyright context.²⁵²

III. COPYRIGHT FOR THE BOUNDEDLY RATIONAL MAN: PAVING THE WAY FOR A SOLUTION

This Part critiques some of the changes that have been suggested to improve the copyright infringement test—such as giving a greater role to judges over juries or increasing the use of experts—and proposes a new model.²⁵³ It discusses the possibility of implementing direct debiasing mechanisms but focuses especially on openly embracing the subjective nature of decision making in the copyright infringement context.²⁵⁴ I argue for the adoption of social science tools that are modeled on those in the trademark area, which would honor this inherent subjectivity, help to draw the proper distinction between ideas

²⁴⁸ Camilo J. Cela-Conde et al., *Sex-Related Similarities and Differences in the Neural Correlates of Beauty*, 106 *PROC. NAT'L ACAD. SCI.* 3847, 3851 (2009).

²⁴⁹ *Id.*

²⁵⁰ See, e.g., Anya C. Hurlbert & Yazhu Ling, *Biological Components of Sex Differences in Color Preference*, 17 *CURRENT BIOLOGY* R623, R624 (2007); see also Natalia Khouw, *The Meaning of Color for Gender*, <http://www.colormatters.com/color-symbolism/gender-differences> (last visited Aug. 13, 2012) (reviewing some of the empirical research on gender-related perceptions of color).

²⁵¹ Stefan Evers et al., *The Cerebral Haemodynamics of Music Perception: A Transcranial Doppler Sonography Study*, 122 *BRAIN* 75, 80–83 (1999).

²⁵² See *infra* notes 253–288 and accompanying text.

²⁵³ See *infra* notes 255–288 and accompanying text.

²⁵⁴ See *infra* notes 255–266 and accompanying text.

and expressions, and indirectly but critically minimize the biases discussed in this Article.

Mark Lemley has proposed leaving the wrongful copying step to judges rather than jurors, using expert testimony for that step, and potentially adopting an “abstraction-filtration-dissection” approach similar to the one used in the software context.²⁵⁵ As this Article has shown, however, judges are not necessarily better decisionmakers than juries, especially with regard to some of the cognitive biases relevant to copyright considerations.²⁵⁶ Furthermore, it is unclear what effect experts themselves would have. If each side marshals opposing experts, decisionmakers may go back to trusting their own eyes and ears because they have direct access to the key evidence. As to dissecting works of a literary or musical nature, Lemley’s concerns about juries’ inability to distinguish between protectable and unprotectable elements are well-taken,²⁵⁷ but a dilemma arises in adopting his proposal because, at the end of the day, the intended audience of the works will be confronted with and will be comparing the works as wholes. I hold the view that the intended audience should be our main focus in this context given that the potential harm that infringement causes to copyright owners, both financial and non-financial, results from the perceptions of those members of the public who will encounter the works rather than from the views of society at large.²⁵⁸ As an additional matter, Shyam Balganesha has argued recently that the substantial similarity analysis invites important normative—rather than only utilitarian—values to receive consideration when courts allow for “subjective evaluation of wrongdoing.”²⁵⁹ Later in this Part, this Article proposes changes to the copyright

²⁵⁵ See Lemley, *supra* note 23, at 741. Jamie Lund has also called for the increased use of experts in the music composition copyright area. Lund, *supra* note 25, at 174.

²⁵⁶ In addition, there are compelling reasons for preserving a role for American juries. For instance, serving on a jury can better enable citizens to participate in democratic government, and possible reductions in the role of the jury deserve a critical eye from that perspective. See Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 37–38 (2006) (analyzing Justice Harry Blackmun’s views on the jury system).

²⁵⁷ See Lemley, *supra* note 23, at 739.

²⁵⁸ To some extent, this also parallels what we ask patent juries to do when they have to determine the views of the “person having ordinary skill in the art” (“PHOSITA”). See 35 U.S.C. § 103(a) (2006).

²⁵⁹ Balganesha, *supra* note 15, at 24. As Balganesha acknowledges, “None of this is to suggest of course, that courts have developed a unified, coherent framework for the wrongful copying analysis.” *Id.*

infringement doctrine that take into account some of Lemley's points and attempt to mediate these other concerns.²⁶⁰

A second possibility worth considering is increasing the use of direct debiasing tools by judges and attorneys via admonishments or particular written instructions to the jury. Though the idea of debiasing has been studied a number of times in the psychology literature, "empirical findings about these forms of debiasing have made only limited appearances in the legal literature."²⁶¹ One of the great frustrations for researchers in the area of debiasing is that many biases tend to be so powerfully entrenched that experiments have often failed to produce significant improvements.²⁶² There are, however, some exceptions to

²⁶⁰ See *infra* notes 267–288 and accompanying text. There have been some other interesting proposals in the context of solving the legal puzzles surrounding copyright infringement. Jeanne Fromer has explored the idea of using written claims to describe the key elements of copyrighted works but ultimately considered that model problematic as well. Fromer, *supra* note 23, at 781–94. Rebecca Tushnet has proposed a complete rejection of the substantial similarity analysis in favor of a modified version of the standard used to determine the legitimacy of derivative works. Tushnet, *supra* note 23, at 738–40. In that framework, "a reproduction right would cover only pure copying and copying so nearly exact that observers would be inclined to see two works as the same." *Id.* at 739.

Although Tushnet describes her model fairly briefly, I will delineate a few preliminary responses. She states that she is leaving out "problems of implementation," including "how much reprographic copying would be enough to constitute infringement of the reproduction right." *Id.* at 740 n.258. First, I would be interested to see a model in action that achieves these distinctions without running into the same problems as those we see in the substantial similarity analysis. Second, her model is, by her own admission, "radical," and "does anticipate a contraction in the scope of rights conferred by a copyright over subsequent works." *Id.* at 738, 740 n.258. There is nothing inherently wrong with either of these facts, but they will require a reconceptualization of copyright law of a different sort than that proposed in this Article. The goal of my argument is to address an issue that will exist no matter where we draw the boundaries of copyright protection: what makes two works too similar to each other. This problem persists whether we allow minimal, moderate, or generous copying, and whether we analyze it as part of the reproduction right or derivative right. I agree with Tushnet on the tension between analytic dissection and gestalt evaluation in the substantial similarity analysis, but I hope that my proposal in this Part helps us tease apart protectable from unprotectable elements in creative works, which is one of Tushnet's main concerns. See *id.* at 740.

²⁶¹ Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 201 (2006); see Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOL. 1443, 1449–50 (1978) (presenting debiasing methods that increase the salience of information relevant in decision making).

²⁶² See, e.g., Kamin & Rachlinski, *supra* note 104, 99–100 (failing to reduce hindsight bias). See generally Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (Daniel Kahneman et al. eds., 1982) (finding that three debiasing techniques yielded limited success and a fourth, involving intensive personalized feedback and training, yielded only moderate, short-term improvements). Some scholars have noted that for debiasing to take place, an individual must be aware of the unwanted processing, motivated to correct the bias, conscious of the direction and magnitude of the bias, and able to

this trend, such as a partial reduction of hindsight bias in one study.²⁶³ In that experiment, a defense attorney's closing argument admonished mock jurors in a torts case not to use hindsight, to consider the time before the negative outcome occurred, and not to let the plaintiff rope them into playing "Monday-morning quarterback."²⁶⁴ The possibilities for direct debiasing in the copyright context are worth exploring further, though the empirical research so far reveals many obstacles despite the fact that the studies tended to focus on one bias at a time and several would potentially need to be addressed for copyright infringement.²⁶⁵

One fairly dramatic proposal that some scholars have made in other areas to reduce biases is trial bifurcation.²⁶⁶ For copyright cases, this would mean having two different juries (and/or judges) for the two parts of the test. The decisionmakers for the second prong, however, would likely know or could guess that the first prong was met or they would have never been convened, which could reinsert the same biases one would have had with a unified trial. Another possibility would be to alternate which prong gets decided first, so that the decisionmakers deciding the second prong would not necessarily know that the first prong had been met. Even so, there remain several problems with this

adjust her response. *E.g.*, Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119 (1994). "Since only the first condition can be guaranteed in many situations, including juror judgments, it is difficult to imagine a generally effective debiasing method." Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002). Some judges have individually begun efforts to debias juries by informing them of the issue of implicit biases, but the success or failure of these attempts has not been empirically confirmed at this stage. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. (forthcoming 2012) (manuscript at 55–58) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026540.

²⁶³ Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 LAW & HUM. BEHAV. 671, 679–80 (1998).

²⁶⁴ *Id.* at 675. Some scholars have also suggested ways to reduce confirmation bias, including by presenting the debiasing information in a graphical layout. *See* Maia B. Cook & Harvey S. Smallman, *Human Factors of the Confirmation Bias in Intelligence Analysis: Decision Support from Graphical Evidence Landscapes*, 50 HUM. FACTORS: J. HUM. FACTORS & ERGONOMICS SOC'Y 745, 751–52 (2008).

²⁶⁵ *See* Fischhoff, *supra* note 262, at 440–41.

²⁶⁶ *See, e.g.*, LaBine & LaBine, *supra* note 111, at 514 (suggesting bifurcation in determinations of liability for mental health providers); Gregory Mandel, *Patently Non-Obvious II: Experimental Study on the Hindsight Issue Before the Supreme Court in KSR v. Teleflex*, 9 YALE J.L. & TECH. 1, 35–37 (2007) (discussing bifurcation in the patent area); John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15, 31–32 (2006) (proposing bifurcation for torts cases).

idea. One of the most significant is the financial and logistical cost associated with empanelling two juries, thereby duplicating attorney time spent explaining certain issues and increasing other trial costs. Another is the risk that plaintiffs' attorneys will, intentionally or not, transmit cues to the decisionmakers of the second prong as to the first prong having been decided in their favor. Lastly, although the bifurcated approach could help with issues like the reverse halo effect and hindsight bias, the many other problems that exist during the evaluation of the second prong on its own—such as confirmation bias, cultural biases, general difficulties with the reasonable man standard, and other obstacles—would remain.

Here, I propose a different kind of solution to address the multi-layered complications that the current test engenders. The first step is to accept that despite the general designation of the reasonable man standard as an objective test, copyright infringement litigation actually seeks to determine subjective responses to the materials. If that is the case, then the question is *whose* response matters. As alluded to above, this Article takes the position that the relevant determination with regards to harm to the plaintiff is the response of the intended audience.²⁶⁷ The courts have not always taken a consistent approach to the relevant universe, but some cases emphasize the importance of this concept. For instance, the Fourth Circuit Court of Appeals remanded a case for determination of whether the spiritual music in question was mainly purchased by choral directors with specialized expertise.²⁶⁸ Although the court emphasized that “‘intended audience’ should supplant ‘ordinary observer’ as the label for the appropriate test,”²⁶⁹ it did so with the view that its holding was consistent with the Second Circuit Court of Appeals’ test in *Arnstein v. Porter*.²⁷⁰ Indeed, the Fourth Circuit explained:

Consistent with its economic incentive view of copyright law, the *Arnstein* court concluded that “the question, therefore, is whether defendant took from plaintiff’s works so much of

²⁶⁷ Balganesh remarks that the intended audience test carries some risks, particularly in situations in which “[t]he value of a work to the copyright-holder might, for instance, be diminished by the creation of complementary, rather than substitutive copies.” Balganesh, *supra* note 15, at 14–15. He adds, however, that it is not necessarily the case that when focusing on the intended audience “instead of the default ordinary observer one actually alters the underlying content of the inquiry in any significant manner.” *Id.* at 15.

²⁶⁸ *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 737 (4th Cir. 1990).

²⁶⁹ *Id.*

²⁷⁰ *See id.* at 734.

what is pleasing to the ears of lay listeners, *who comprise the audience for whom such popular music is composed*, that defendant wrongfully appropriated something which belongs to plaintiff.”²⁷¹

Lemley agrees with this understanding of *Arnstein* and argues that the *Arnstein* court’s use of the term “lay listeners” may have caused some of the subsequent confusion.²⁷² At this time, the Fourth Circuit is the only Circuit to have adopted definitively an intended audience test across copyright subject matters.²⁷³

Robert and Eric Osterberg comment in their treatise that “to apply the intended audience test, a court must both identify the intended audience, and either select only members of that audience for its jury or accept expert testimony concerning the intended audience’s reaction.”²⁷⁴ My proposal, which goes a step further and dovetails with the inherent subjectivity of substantial similarity determinations, is to introduce survey evidence about the intended audience into copyright infringement litigation. This parallels the use of surveys in trademark infringement litigation²⁷⁵ but has not yet been the norm, or even permitted, for copyright cases.²⁷⁶

Courts have spent little time discussing why copyright surveys would be problematic, and their arguments so far do not appear particularly convincing. For instance, the Second Circuit explained that survey questions would run the risk of being either too open-ended

²⁷¹ *Id.* (quoting *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)). The Fourth Circuit reaffirmed its focus on the intended audience in a case involving dinosaur costumes marketed to children, in which it stated that the court needs to consider the perspective of children accordingly. *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802–03 (4th Cir. 2001).

²⁷² Lemley, *supra* note 23, at 729. The Ninth Circuit has faced this issue as well, based on its reading of *Krofft*; the court reiterated in a later case that “the test of substantial similarity depends upon the response of the ordinary lay listener.” *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n.2 (9th Cir. 1987) (citing *Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp.* 562 F.2d 1157, 1164 (9th Cir. 1977)).

²⁷³ See OSTERBERG & OSTERBERG, *supra* note 159, § 3:2.2[D].

²⁷⁴ *Id.* § 3:2.2[E].

²⁷⁵ See, e.g., Irina D. Manta, *In Search of Validity: A New Model for the Content and Procedural Treatment of Trademark Infringement Surveys*, 24 CARDOZO ARTS & ENT. L.J. 1027, 1036–41 (2007) (offering a description of the use of such surveys). Scholars have emphasized the need for surveys in the trademark context precisely for the reason that, otherwise, a judge or jury will be asked to perform an impossible “Vulcan mind meld” with the consumers of a good when instructed to determine their thoughts and impressions. William E. Gallagher & Ronald C. Goodstein, *Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld*, 94 TRADEMARK REP. 1229, 1232–36 (2004).

²⁷⁶ OSTERBERG & OSTERBERG, *supra* note 159, § 17:3 (citations omitted).

and general or too specific (citing as an improper example, “Do you think [one] is substantially similar to [the other]?”).²⁷⁷ Another, related concern is the difficulty of explaining substantial similarity to study subjects.²⁷⁸ This assumes, however, that copyright survey subjects would be confronted with direct legal questions, which is not how admissible trademark surveys function.²⁷⁹ Rather, subjects in the latter setting generally have to answer open-ended questions such as “Who do you think made this product?”²⁸⁰ These surveys take place in a number of environments, including at malls or on the Internet.²⁸¹ The measure of trademark confusion is the differential between the percentage of subjects who, for example, name the plaintiff as the manufacturer of the allegedly infringing product, versus those who name the plaintiff as the manufacturer of a control product.²⁸² Although further study and experiments are needed before comparable surveys could be implemented in the substantial similarity setting,²⁸³ there may be ways to adapt the trademark experience to the needs of copyright.

Of interest in this context, one of the scale measures that Jamie Lund used in her empirical research on music composition copyrights was one of so-called ordinal similarity, where subjects were asked to rate pieces on a scale of one to five (with one standing for “not at all similar” and five for “very similar”).²⁸⁴ One could use this type of measure to assess the degree of similarity that the relevant audience perceives between two works. My main answer to the courts concerned about the vagaries of copyright surveys, however, is that we are effectively already

²⁷⁷ Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231, 244, 244–45 (2d Cir. 1983).

²⁷⁸ OSTERBERG & OSTERBERG, *supra* note 159, § 17:3 (citing Aaron Basha Corp. v. Felix B. Vollman, Inc., 88 F. Supp. 2d 226, 231–32 (S.D.N.Y. 2000)).

²⁷⁹ See Manta, *supra* note 275, at 1036–37.

²⁸⁰ See *id.* at 1068–69.

²⁸¹ See *id.* at 1070.

²⁸² See *id.* at 1068 (discussing control stimuli in trademark surveys). The percentage differential that courts consider to be evidence of infringement varies, but it has generally been above 20%, with some exceptions of 15% and below. See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:188 (4th ed. 2012).

²⁸³ Some of the questions that one would need to answer are how to select the proper subjects (how to define the so-called “survey universe”), how to present the works to subjects, what conditions the control stimuli need to fulfill, what exact questions to ask, and what threshold to set as the required level of perceived similarity. Allowing for significant amounts of judicial discretion on these matters risks reintroducing some of the biases that surveys seek to eliminate, so a broadly applicable floor for what is considered appropriate evidence could prove helpful. See Manta, *supra* note 275, at 1066–71 (proposing general standards for trademark surveys). I would like to thank Jake Linford for our conversation on this subject.

²⁸⁴ Lund, *supra* note 25, at 155.

conducting surveys, but of the most unscientific kind—ones with a sample size of twelve (jury) or one (judge). Even if we adopt the intended audience test, and even if we include experts, it will be very difficult for juries or judges to separate their own direct perceptions of the materials without the help of surveys. Just as Dan Kahan's research findings on the *Scott v. Harris* video probably gave pause to the Supreme Court justices who initially trusted their "own eyes" above all and did not realize how many others might disagree with them, jurors and judges are likely to respond to evidence about what large groups of relevant individuals believe.²⁸⁵ If presented with the perceptions of numerous members of the intended audience, jurors and judges are more likely to reach the optimal result than if they are told that their own perceptions are the relevant ones or that they need to deduce what an abstract, average, reasonable observer would perceive.²⁸⁶

Given that study subjects would not know about the context of the litigation, surveys would achieve what the bifurcation proposals attempt to do—they would reduce hindsight bias and the reverse halo effect. Surveys would further provide valuable information through the inclusion of a control stimulus, as can be seen in trademark surveys and in Lund's study through her use of comparison materials.²⁸⁷ This would require plaintiffs to delineate the scope of the protection they are

²⁸⁵ We know from different settings that individuals at times adjust their beliefs based on others' beliefs. See generally Jan Lorenz et al., *How Social Influence Can Undermine the Wisdom of Crowd Effect*, PROCEEDINGS NAT'L ACAD. SCI. U.S.A. (forthcoming), available at <http://www.pnas.org/content/early/2011/05/10/1008636108.abstract> (describing both the positive and negative repercussions of this effect). Of course, the risk remains that jurors or judges would still give too much credence to their own eyes and ears, which suggests the possibility that the decisionmakers themselves should not be confronted with the direct evidence at all. See Albert E. Mannes, *Are We Wise About the Wisdom of Crowds?*, *The Use of Group Judgments in Belief Revision*, 55 MGMT. SCI. 1267, 1277 (2009) (suggesting that individuals still tend to overweigh their initial beliefs and underweigh the more valid judgment of groups). This more radical version of my proposal remains open to examination and certainly has a number of drawbacks. But see Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 64, at 341, 365–68 (advocating for greater use of visual and videotape evidence in trials).

²⁸⁶ There will certainly be exceptions to this trend. In a series of interviews with Dutch judges involved in intellectual property cases, one judge said about survey data: "If it corroborates with our own perception, then we are grateful and use it. If we want to go the other way, then it is just a nuisance, because then we have to argue it away." Dirk J.G. Visser, *How Do Judges Decide Intellectual Property Cases?* [Introduction], 31st Annual Cong. of the Int'l Ass'n for the Advancement of Teaching & Research in Intellectual Prop. (ATRIP), 3, http://www.atrip2012.com/docs/Visser_JudgesDecideIPCases.pdf (last visited Aug. 22, 2012). This "arguing away," however, would likely still yield more information during the appellate process than currently exists in the absence of surveys.

²⁸⁷ Lund, *supra* note 25, at 158.

claiming because the amount of infringement would be determined by the differential between (1) the level of similarity between the original work and the allegedly infringing work, and (2) the level of similarity between the original work and that used as a control stimulus.²⁸⁸ It would facilitate the legal decisionmakers' task of determining whether plaintiffs are respecting the idea-expression dichotomy because, as with trademarks, a proper survey would have to use a control stimulus that uses *the same ideas but a different expression*. Hence, this would give courts better information as to whether it is the protectable or the unprotectable elements of a work that are leading to perceptions of similarity on the part of the intended audience. The inclusion of a control stimulus would also allow for anchoring effects to wash out because both the allegedly infringing and the control work would be compared to the original, so the original would serve as the potential anchor for both, and that effect would be deducted during the calculation of the final "similarity differential." The same is likely true for the confirmation bias; both comparisons would suffer from that bias to some extent, and its eventual effect would either partially or entirely disappear during that same calculation.

Defendants would have the opportunity to present their own surveys as well. The costs of copyright litigation would change, but it is unclear whether they would increase. Plaintiffs may indeed be more reluctant to bring a copyright claim if they feel the need to commission a survey, but to the extent that we worry about deterrence of rightful plaintiffs, we could adjust damages calculations accordingly if liability is found. The burden on defendants could increase if they have to conduct surveys to counter plaintiffs' surveys, though we may be able to shift this by awarding greater costs to defendants if they are successful in litigation. It is entirely possible that this will reduce the overall amount of copyright litigation, thus lowering the burden on courts and hence ultimately on society at large. Many would welcome this development, especially if—along with the improvement of copyright doctrine that it would provide—it ended up encouraging greater creativity due to partial relief from the fear of litigation.

CONCLUSION

The ideas delineated in this Article are a beginning rather than a final conclusion. More empirical work would prove beneficial both for

²⁸⁸ See generally Fromer, *supra* note 23 (offering a more extensive discussion of claiming issues in copyright and patent law).

measuring the precise extent of some of the problems described here and for developing solutions tailored to the specific issues of copyright litigation.²⁸⁹ This Article has attempted to show the complex relationship between copyright law's version of the reasonable man standard, cognitive and cultural bias, and ambiguity. It has demonstrated why and how we should reconcile with the subjective nature of the substantial similarity analysis, and it has sketched out possible paths guided by insights from social science. The future remains open, and we will hopefully one day develop better tools to measure directly the intended audience's perceptions of similarity, be it through listening studies or perhaps even brain imaging technology when its cost is significantly reduced and its precision enhanced.²⁹⁰ The road will be made of incremental steps, but the goal is clear: a more objective approach to human subjectivity.

²⁸⁹ See generally Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008) (discussing the dangers of using social science tools with insufficient empirical backing in the context of intellectual property infringement, and specifically trademark dilution).

²⁹⁰ See generally Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585 (2011) (discussing the potential of new technologies to assess subjective experiences).

