SAFEGUARDING FAIR USE THROUGH FIRST AMENDMENT'S ASYMMETRIC CONSTITUTIONAL FACT REVIEW

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INTRODUCTION

This Article proposes a novel procedural safeguard for copyright fair use. Two courts recently overturned jury verdicts on the question of fair use.[1] In *Corbello v. DeVito*, the trial court overturned a jury verdict that had rejected a fair use defense.[2] In *Oracle America, Inc. v. Google LLC*, the Federal Circuit reversed a jury verdict that had found in favor of a defendant's fair use defense.[3] While this Article offers a new perspective on these cases, the main goal is more ambitious: a theoretical framework to heighten protection for the free expression interests of users of copyrighted works. Specifically, appellate courts should apply an asymmetric review of fair use

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[1] Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1211 (Fed. Cir. 2018); Corbello v. DeVito, 262 F. Supp. 3d 1056, 1079 (D. Nev. 2017).

[2] 262 F. Supp. 3d at 1068 ("The Court has closely examined the evidence under the relevant standards and concludes Defendants are entitled to a judgment as a matter of law on the fair use issue."). The trial judge granted defendant's renewed motion for judgment as a matter of law after a fifteen-day jury trial. *Id.*

[3] 886 F.3d at 1194 ("If fair use is equitable in nature, it would seem to be a question for the judge, not the jury, to decide . . . ."). The jury returned a verdict finding Google's use of Oracle's software was fair use, but the Federal Circuit independently re-weighed the fair use factors and disagreed. *Id.* at 1210 ("Having undertaken a case-specific analysis of all four factors, we must weigh the factors together in light of the purposes of copyright. We conclude that allowing Google to commercially exploit Oracle's work will not advance the purposes of copyright in this case.") (internal quotation marks and citation omitted).

determinations as a constitutional fact.[4] And as a constitutional fact, fair use determinations should be reviewed de novo only when the free-speech-claimant does not prevail in the lower court.

This is the first work to (1) offer a theoretical justification and limiting principle for constitutional fact review and (2) extend this framework to copyright fair use. The thesis relies on the following three propositions. First, constitutional fact review should be a one-way, asymmetric review, rather than a two-way, symmetric review.[5] De novo review of constitutional facts should only apply when the free-speech-claimant does not prevail in the lower court.[6] The circuit courts of appeals are split on this issue,[7] and for over three decades the Supreme Court has declined to resolve the split.[8] Second, the copyright fair use analysis embeds First Amendment interests.[9] By embedding First Amendment issues within copyright fair use and denying independent First Amendment scrutiny,[10] the Court has de facto constitutionalized the fair use inquiry.[11] Fair use is thus a constitutional fact.[12] And lastly, as a proxy for First Amendment interests, fair use should receive added protections of independent appellate review—like other speech-implicating cases.[13]

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[4] Professor John Dickinson is credited with coining the term "constitutional fact." *E.g.*, Arthur Larson, *The Doctrine of "Constitutional Fact,"* 15 TEMP. L.Q. 185, 186 & n.4 (1941) (citing John Dickinson, Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055, 1072–82 (1932) (suggesting term originated with John Dickinson)); *see also* George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 26 (1992).

[5] *See* Amanda Reid, *Fructifying the First Amendment: An Asymmetric Approach to Constitutional Fact Doctrine*, 11 FED. CTS. L. REV. (forthcoming 2019).

[6] *Cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 245 (1985) ("Initially, the Court must decide whether both parties, or only the free speech claimant, can demand independent appellate review; that is, can the party opposing the free speech claim demand independent appellate judgment on the first amendment law application point?").

[7] *E.g.*, United States v. Friday, 525 F.3d 938, 950 (10th Cir. 2008) (noting "circuits have long been split" on whether a "more searching review . . . applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant").

[8] *E.g.*, Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981, 981–82 (1988) (White, J., dissenting) (noting circuit split and dissenting from the Court's denial of certiorari).

[9] *See* Eldred v. Ashcroft, 537 U.S. 186, 218–19 (2003) ("We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.").

[10] *Id.* at 221 ("[W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.").

[11] Golan v. Holder, 565 U.S. 302, 328 (2012) ("[T]he 'traditional contours' of copyright protection, *i.e.*, the 'idea/expression dichotomy' and the 'fair use' defense [are both] recognized in our jurisprudence as 'built-in First Amendment accommodations.'") (citation omitted); *Eldred,* 537 U.S. at 219 ("In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.").

[12] *See, e.g.*, Christie, *supra* note 4, at 19.

[13] *See, e.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 499 (1984).

Specifically, this Article argues copyright fair use determinations should receive asymmetric, independent appellate review of fair use as a constitutional fact.

The question of the appropriate standard of appellate review for fair use decisions is underexplored and undertheorized. Other scholars have debated whether independent, constitutional fact review should be applied symmetrically or asymmetrically.[14] Others have recognized that fair use protects core free speech interests.[15] And others have recognized that standards of review in copyright cases matter.[16] But no one has put all of the aforementioned pieces together to propose the heightened procedural protection of constitutional fact review in fair use cases to protect users' First Amendment interests.[17] This Article fills that gap.

I. ASYMMETRIC REVIEW OF CONSTITUTIONAL FACTS

The Supreme Court has long recognized the importance of scrupulously safeguarding the line between protected and unprotected speech.[18] To that end, the

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[14] *Compare* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2442 (1998) ("[A] symmetric rule is fairer to plaintiffs. Copyright plaintiffs' claims are not claims of constitutional right, but they are certainly important; as *Harper & Row* pointed out, copyright law itself serves First Amendment goals."), *with* Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1238 (1996) ("[V]irulently symmetrical application of the [independent] review doctrine" is undesirable because it "effectively reverses a pro-speech finding . . . .").

[15] *Compare* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 5 (1991), Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 284 (1979), *and* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 1 (1997), *with* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970), *and* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970).

[16] *E.g.*, Ned Snow, *Fair Use as a Matter of Law*, 89 DENV. U. L. REV. 1, 1 (2011) [hereinafter Snow, *Fair Use as a Matter of Law*]; Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 483 (2010) [hereinafter Snow, *Judges Playing Jury*]; Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1781–82 (2010).

[17] Note that although Professor Snow has argued for independent appellate review of fair use, he stated whether "fair use merits protection under the Free Speech Clause . . . raises its own discussion outside the scope of this Article." Snow, *Fair Use as a Matter of Law*, *supra* note 16, at 18. Constitutional fact review requires a constitutional question. *See* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 701 (2013) ("Many bytes have been burned on the subject of constitutional fact review, but at least one feature of the doctrine seems settled and uncontroversial: The 'independent appellate review' rule does not generally extend to nonconstitutional cases."). Fair use must raise a constitutional question to warrant constitutional fact review.

[18] *See, e.g.*, *Bose Corp.*, 466 U.S. at 505 ("[T]he limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance.").

Supreme Court has crafted a number of protections unique to First Amendment cases.[19] Independent appellate review of constitutional facts is one of these unique protections.[20] In speech-implicating cases, the Court emphasized its "obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"[21] Whether speech falls into an unprotected class is a matter of constitutional judgment; it is not simply a question of fact.[22]

The de novo review given to constitutional facts is a marked departure from the deferential review usually accorded factual determinations.[23] Typically, appellate courts give deference to fact-finding in the lower court.[24] This deference applies to findings made either by a jury or the trial court. The Seventh Amendment limits a court's authority to re-examine facts tried by juries,[25] and Federal Rule of Civil Procedure (FRCP) 52(a) mandates that trial court's "[f]indings of fact . . . [shall] not be set aside unless clearly erroneous."[26] "Plausible" factual determinations based on the evidence are entitled to deference.[27] The Supreme Court no longer distinguishes between ultimate facts and subsidiary facts,[28] thus all fact-finding is entitled to

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

[20] *See* Reid, *supra* note 5, at 5.

[21] *Bose Corp.*, 466 U.S. at 499 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 11 (1970); St. Amant v. Thompson, 390 U.S. 727, 732–33 (1968)). It is worth noting the Court also performs de novo, independent review in criminal procedure contexts, like probable cause determinations and the voluntariness of confessions. *E.g.*, Ornelas v. United States, 517 U.S. 690, 696–98 (1996) (probable cause); Miller v. Fenton, 474 U.S. 104, 109–11 (1985) (confession).

[22] *E.g.*, Roth v. United States, 354 U.S. 476, 497–98 (1957) (Harlan, J., concurring in part an dissenting in part) ("[W]hether a particular work is of that [obscene] character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.").

[23] *See* Reid, *supra* note 5.

[24] This Article indulges in the fiction that appellate court deference is a binary question: a determination is either given deference or plenary review. *Accord* United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (acknowledging different labels of appellate review, but suggesting "heretically" there are "operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential"). The gradations of appellate deference—de novo, clear error, abuse of discretion, substantial evidence, etc.—are irrelevant to the present analysis.

[25] U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

[26] FED. R. CIV. P. 52(a).

[27] Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985).

[28] Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

deference unless clearly erroneous. In other words, unless the facts are so facially implausible that a reasonable fact-finder would not credit them, the resulting determinations based on those facts are entitled to deference.[29]

The justification for deferential review of factual findings involve questions of allocative efficiency and policy decisions.[30] The benefits of traditional deference to lower court fact-findings are well-known, so they will be recounted in brief.[31] Deference accords greater finality to fact-finding, and enhances judicial economy by reducing the frequency of appeals.[32] Deference promotes efficiency and stability by recognizing the superior institutional competence of the lower court to engage in fact-finding.[33] It is inefficient to relitigate and reassess facts on appeal.[34] Lack of deference undermines the legitimacy and finality of the trial process.[35] Lack of deference raises distributive concerns because often only the wealthy can afford two bites of the apple.[36] And de novo review ultimately renders the jury a nullity because, without deference, the jury's role is little more than a dry run.[37]

Notwithstanding the advantages of appellate court deference to fact-finding, the traditional deference does not apply in speech-implicating cases.[38] Under the constitutional fact doctrine, the Supreme Court applies plenary appellate review to factual

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[29] *Anderson*, 470 U.S. at 575.

[30] *E.g.*, Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 998 (1986); Amanda Reid, *Deciding Fair Use*, MICH. ST. L. REV. (forthcoming 2019).

[31] *E.g.*, Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study,* 2012 UTAH L. REV. 1, 3 (2012); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008).

[32] *E.g.*, Ann Zobrosky, Note, *Constitutional Fact Review: An Essential Exception to* Anderson v. Bessemer, 62 IND. L.J. 1209, 1236 (1987); *see also* Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 261 (2000).

[33] *E.g.*, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1202 (2013); *see also* Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 630 (2004); Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957).

[34] *E.g.*, Borgmann, *supra* note 33, at 1201; *see also* Hon. John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409, 426 (1981).

[35] *E.g.*, Borgmann, *supra* note 33, at 1211; Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1080 (2007).

[36] Wright, *supra* note 33, at 780.

[37] *See* United States v. Virginia, 518 U.S. 515, 585 (1996) (Scalia, J., dissenting) (remarking that the majority's apparent disregard for trial court findings "makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial"); *see also* Borgmann, *supra* note 33, at 1211; Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 206 (2015); Christie, *supra* note 4, at 56.

[38] *E.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

findings underlying defamation judgments,[39] obscenity prosecutions,[40] and other judicial proceedings implicating free speech.[41] The Court notably embraced this practice in *New York Times Co. v. Sullivan* when it crafted the actual malice standard—and then applied it, rather than remand the case with instructions on the new standard.[42] Professor Harry Kalven noted that *Sullivan*'s approach "reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected."[43]

The justification for departing from typical fact-review deference centers on the Court's role in safeguarding constitutional liberties.[44] The Court has often emphasized its responsibility to maintain "the Constitution inviolate" and guard against constitutional deprivations.[45] Fact-finding is inherently fallible.[46] To mitigate the risk of constitutional deprivations through erroneous fact-finding, the Court employs constitutional fact review to safeguard the line between protected and unprotected speech.[47] To ensure the line has been drawn correctly, the *Sullivan* Court said it must "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."[48] Indeed, the Court asserted that it "must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[49]

Sullivan and its progeny make clear that independent review is limited to the speech-implicating constitutional inquiry.[50] Only the constitutional inquiry is reviewed de novo; credibility determinations are reviewed for clear error.[51] The Court clarified that "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the

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[39] *E.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 514 (1984).

[40] *E.g.*, Jacobellis v. Ohio, 378 U.S. 184, 190 (1964).

[41] *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 567 (1995); Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

[42] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1786–87 (2003); Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 220 (1964).

[43] Kalven, Jr., *supra* note 42, at 213; *accord* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

[44] *E.g.*, Napue v. Illinois, 360 U.S. 264, 271 (1959).

[45] *See id.*; *accord* Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

[46] *See* Reid, *supra* note 5, at 24.

[47] *N.Y. Times Co.*, 376 U.S. at 285.

[48] *Id.* (alteration in original) (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)).

[49] *Id.* (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

[50] *E.g.*, *id.*

[51] *Id.* at 285 & n.26.

witnesses.'"[52] On appeal, credibility determinations are reviewed deferentially, but the inferences drawn from such determinations are reviewed de novo.[53] Independent review applies regardless if the trier of fact is a jury or a trial judge; the Court confirmed that constitutional facts are not insulated from plenary review by either the Seventh Amendment or FRCP 52(a).[54] The Court has concluded the Seventh Amendment does not bar independent review of juries' findings.[55] The Seventh Amendment has often exerted an influence, but not a command.[56] Thus, in both bench trials and jury trials, the Court instructs that appellate courts must independently decide "whether a given course of conduct falls on the near or far side of the line of constitutional protection."[57]

Independent, nondeferential review of lower court fact-finding in speech-implicating cases is often premised on the gravity of the constitutional issue at stake.[58] Thus the degree of danger to civil liberties fuels the need for independent judicial review.[59] One notable source of danger is the likelihood of error or bias on the part of the fact-finder.[60] Fact-finders risk erring when the line between protected and proscribed speech is guided by an unclear standard.[61] Fact-finders also risk hostility and bias against unpopular, but protected, speech.[62] When speech interests are at risk

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[52] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 499–500 (1984)).

[53] *See id.* at 689 n.35.

[54] *Compare Bose Corp.*, 466 U.S. at 514, *with Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 688–89.

[55] *E.g.*, Jenkins v. Georgia, 418 U.S. 153, 159–61 (1974) (reviewing de novo and reversing a unanimous jury determination that the movie *Carnal Knowledge* was patently offensive while recognizing that the "patently offensive" determination was one of fact).

[56] *Cf.* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958) (noting "under the influence—if not the command—of the Seventh Amendment" disputed questions of fact are assigned to the jury).

[57] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 567 (1995).

[58] *E.g.*, Christie, *supra* note 4, at 55.

[59] *E.g.*, Frank R. Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C.L. REV. 223, 283 (1968).

[60] *E.g.*, Monaghan, *supra* note 6, at 272 ("The need to guard against systemic bias brought about or threatened by other actors in the judicial system appears to be an important force behind the Supreme Court's exercise of constitutional fact review.").

[61] *E.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 505 (1984) ("Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.").

[62] *E.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971) (cautioning that a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks'"(quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

because of erroneous or biased fact-finding, the Court has concluded that a heightened level of appellate review is warranted.[63]

The constitutional fact doctrine is not without criticism.[64] A long-standing critique has centered on the lack of a unified, coherent justification for plenary review.[65] The worry is that there would be no limit to the facts that might be eligible for independent re-examination.[66] Scholars recognize the importance of the doctrine but caution that undisciplined, "wandering" use is dangerous to the values of our countermajoritarian Constitution.[67] Another concern centers on the burden to appellate court dockets.[68] Appellate courts risk being drawn into a full-time job of reviewing facts.[69] Expansive use of independent review threatens an appellate court's ability to meet other judicial responsibilities.[70] Increasing the appellate court caseload risks diminishing its institutional capacity to meet its core responsibilities.[71] Without some way to cabin the doctrine, the worry is that independent review will swallow the entire appellate docket—or else be abandoned altogether.[72] A limiting principle is thus needed because indiscriminate application of plenary appellate review is normatively undesirable and practically unworkable.[73]

This Article proposes a one-way, asymmetric review of constitutional facts in speech-implicating cases, which has been further elaborated elsewhere.[74] An asymmetric review restricts scrutiny to fact-findings that disfavor the free-speech-claimant, whereas symmetric review applies equally to findings that favor, as well as disfavor, the free-speech-claimant.[75] The circuit courts of appeals are split on whether constitutional fact review applies symmetrically or asymmetrically.[76] The

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[63] *N.Y. Times Co.*, 376 U.S. at 285.

[64] *E.g.*, Allen & Pardo, *supra* note 42, at 1786; A. Christopher Bryant, *Foreign Law as Legislative Fact in Constitutional Cases*, 2011 BYU L. REV. 1005, 1011 (2011); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 72 (2008); Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 278 (2016).

[65] This criticism has led some scholars to urge that the practice of constitutional fact review should be abandoned. *See* Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 329 (2017).

[66] *E.g.*, Christie, *supra* note 4, at 21; Dickinson, *supra* note 4, at 1072–82; Monaghan, *supra* note 6, at 263–76.

[67] Redish & Gohl, *supra* note 65, at 291.

[68] *E.g.*, Louis, *supra* note 30, at 998.

[69] *E.g.*, Dickinson, *supra* note 4, at 1077.

[70] *E.g.*, Louis, *supra* note 30, at 1037.

[71] *See* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 311 (2009).

[72] *See* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1459 (2001).

[73] *See* Louis, *supra* note 30, at 1038 & n.334.

[74] Reid, *supra* note 5, at 2.

[75] *See infra* note 80 and accompanying text.

[76] *See infra* note 84 and accompanying text.

Fourth,[77] Seventh,[78] and Ninth[79] Circuits apply independent review only as an asymmetric, one-way street. The Ninth Circuit explained the one-way street:

> When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. When the government challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for clear error.[80]

By contrast, the First,[81] Fifth,[82] Tenth,[83] and Eleventh[84] Circuits apply independent review symmetrically as a two-way street and apply de novo review even when the lower court makes a determination friendly to the speaker. The Supreme Court has thus far declined to resolve the split.[85]

This Article's proposal would limit fair use review to a one-way, asymmetric review of Type 1 errors and adopt a speech-protective approach.[86] To borrow the statistician's labels, there are errors of the first kind (Type 1) and errors of the second kind (Type 2). The Supreme Court recognizes the inherent risk of erroneous fact-finding: "There is always in litigation a margin of error, representing error in factfinding . . . ."[87] But not all errors are equivalent. A Type 1 error incorrectly finds permissible speech to be proscribable, and the speaker is incorrectly denied the freedom to speak. A Type 2 error incorrectly finds proscribable speech to be permissible, and a speaker is incorrectly given the freedom to speak. The cost of a Type 1 error is an erroneous deprivation of a speaker's constitutionally protected speech right. The Supreme Court has long recognized that such errors also risk chilling others' lawful expression.[88] The cost of a Type 2 error, on the other hand, is the erroneous protection of unprotected speech. In a libel or outrage case, for example,

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[77] Multimedia Publ'g Co., Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 160 (4th Cir. 1993).

[78] Planned Parenthood Ass'n/Chi. Area v. Chi. Transit Auth., 767 F.2d 1225, 1228–29 (7th Cir. 1985).

[79] Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988).

[80] *Id.* (citing Planned Parenthood Ass'n/Chi. Area, 767 F.2d at 1228–29).

[81] IMS Health Inc. v. Ayotte, 550 F.3d 42, 48 (1st Cir. 2008), *abrogated on other grounds by* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

[82] Lindsay v. San Antonio, 821 F.2d 1103, 1107–08 (5th Cir. 1987).

[83] Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984).

[84] Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 & n.9 (11th Cir. 1987).

[85] *See, e.g.*, *id.* at 1281 (White, J., dissenting) (noting circuit split).

[86] *Cf.* Reid, *supra* note 5, at 2.

[87] Speiser v. Randall, 357 U.S. 513, 525 (1958).

[88] *See id.* at 526.

a Type 2 error could result in erroneous deprivation of a plaintiff's reputation or dignitary interests.[89]

The Court has largely, but not faithfully,[90] applied constitutional fact review asymmetrically to guard against Type 1 errors. I argue that constitutional fact review should be applied asymmetrically and reserved only to review for erroneous deprivation (i.e., Type 1 errors) in speech-implicating cases.[91] Limited judicial resources and respect for the judicial process counsel against duplicative efforts, thus plenary review of fact-finding should be reserved for instances of heightened concern.[92] Type 1 errors raise such concerns, but Type 2 errors do not. If the fact-finder decides in favor of the free-speech-claimant, then the appellate court should defer to the fact-finder.[93] But if the fact-finder decides against the free-speech-claimant, then the appellate court should independently review the record to ensure no error was made.[94]

Asymmetric review serves a speech-protective function by ensuring that appellate courts are only allowed to *correct* Type 1 errors, and are not allowed to *create* them on appeal.[95] As evidenced by Supreme Court reversals, even appellate courts can err.[96] The inherent risk of erroneous fact-finding means appellate courts, applying plenary review, could erroneously reverse a pro-speech verdict by applying symmetric review to speech-implicating cases.[97] An asymmetric, one-way street, limited to reviewing for Type 1 errors, eliminates the risk that an appellate court could create a Type 1 error. To guard against rights-unfriendly rulings, appellate courts should take an independent look at the facts *only* when the fact-finder decides against the free-speech-claimant. Appellate review of fact-finding should only be used to ensure that protected speech is not improperly punished—i.e., review for Type 1 errors. An

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[89] *Cf.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (protecting outrageous speech against a public figure–plaintiff unless the plaintiff can prove actual malice).

[90] Connick v. Myers, 461 U.S. 138, 147–48 (1983) (applying independent review of record when the lower court found in favor of the speech-claimant).

[91] Reid, *supra* note 5, at 2.

[92] Gary Anthony Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of* Bose Corp. v. Consumers Union of United States, Inc., 71 CORNELL L. REV. 477, 492 & n.99 (1986) (urging independent appellate review should be reserved for "extraordinary circumstances").

[93] J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 557 (1985).

[94] *See id.*

[95] *See id.*

[96] *E.g.*, 4 NIMMER ON COPYRIGHT § 13.05 (2018) ("The malleability of fair use emerges starkly from the fact that all three [Supreme Court] cases [in 1984, 1985, and 1994] were overturned at each level of review, two of them by split opinions at the Supreme Court level."). *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[97] Childress, *supra* note 14, at 1238–39.

asymmetric, rights-protective approach offers a bulwark against impermissible majoritarian encroachment on free expression.[98] Only in instances of speech-unfriendly rulings should appellate courts double check to ensure that speech interests have not been unfairly suppressed.[99]

II. FAIR USE AS AN AFFIRMATIVE STATUTORY RIGHT AND A SPEECH-PROTECTIVE SAFEGUARD

The ontological nature of fair use is often misunderstood. Judge Pierre Leval has observed that "[j]udges do not share a consensus on the meaning of fair use."[100] In fact, judicial opinions "reflect widely differing notions of the meaning of fair use."[101] As argued elsewhere, fair use is best understood as an affirmative statutory right that also has a speech-protective function.[102] Fair use is an affirmative right; it should not merely be an affirmative defense to infringement.[103] As discussed below, fair use is a permissible, non-infringing use; it is not an exception simply to be tolerated.[104]

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[98] Dan M. Kahan et al., *Whose Eyes are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) ("One reason for independent factfinding is to assure adequate enforcement of constitutional guarantees toward which there is majority antagonism that could seep into jury factfinding.").

[99] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276–77 (1971) (applying heightened standards in cases involving the First Amendment because there may be times when the jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

[100] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990).

[101] *Id.* at 1107. Whether fair use is better understood as a defense or a right is contested within the scholarly circles as well. *See* Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 13 n.2 (Ruth L. Okediji ed., 2017) ("Whether L&Es [copyright's limitations and exceptions] should be understood as creating defenses to infringement claims or legal rights to engage in specified conduct is contested.").

[102] *See* Reid, *supra* note 30, at 16; *see also* 17 U.S.C. § 108(f)(4) (2012) ("Nothing in this section . . . in any way affects the *right of fair use* as provided by section 107. . . .") (emphasis added); Golan v. Holder, 565 U.S. 302, 329 (2012); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[103] *See* Hon. Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative*, 54 J. COPYRIGHT SOC'Y U.S.A. 139, 166 (2007); Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 696 (2015); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 168 (2011).

[104] *E.g.*, PATTERSON & LINDBERG, *supra* note 15, at 11 ("To employ the fair-use provisions of the copyright act is not to abuse the rights of the author or copyright owner; indeed, the very purpose of copyright is to advance knowledge and thus benefit the public welfare, which is exactly what fair use—properly employed—does."); Leval, *supra* note 100, at 1110 ("Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.").

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[105] Copyright is an instrument for achieving a utilitarian goal of promoting the "harvest of knowledge."[106] As the *Harper & Row* Court explained: "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[107] The *Sony* Court reinforced this view:

> [T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[108]

Copyright is not a common law product; rather it is entirely a statutory creation.[109] Copyright is a statutory privilege, constrained by the social goals of the copyright bargain.[110] The Constitution prescribes that copyright may only be secured for "limited Times."[111] Copyright is not a plenary property right.[112] Once the copyright's statutory term of protection ends, the work is free for all uses.[113]

During the limited term of protection, the statute provides that a copyrighted work is free for "fair use."[114] Whether a use is fair or not is assessed by considering four statutory factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the

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[105] U.S. CONST. art. I, § 8, cl. 8.

[106] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985).

[107] *Id.* at 546.

[108] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015) ("The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption.").

[109] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 591 (1834); *see also* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 19 (1968); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1185 (1983).

[110] *E.g.*, Harry N. Rosenfield, *Constitutional Dimension of Fair Use in Copyright Law*, 50 NOTRE DAME LAW. 790, 791–92 (1975); Diane Leenheer Zimmerman, *Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 704 (1992).

[111] U.S. CONST. art. I, § 8, cl. 8.

[112] Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Speech*, 68 CATH. U. L. REV. 33, 38 (2018) ("Copyright is not an absolute right. The limits on the enumerated statutory rights—like fair use, first sale exhaustion, and compulsory licenses—dispel a vision of copyright as an absolute right.").

[113] 17 U.S.C. § 303 (2012).

[114] *Id.* § 107.

nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[115]

As a matter of statutory construction, fair use is a user's statutory right and a definitional limit on a copyright holder's statutory right.[116] The Copyright Act acknowledges the "*right* of fair use."[117] In addition to recognizing the right of fair use, the statute expressly states that fair use "is not an infringement."[118] As Professor Ned Snow noted, "What is fair is not infringing, and what is infringing is not fair."[119] And by extension, as Professor Lydia Loren argued, "If fair use is 'not an infringement,' then the plaintiff has not met its burden to demonstrate a prima facie case *of infringement* without overcoming the argument that the use is a fair use."[120] Moreover, the statute provides that a copyright holder's rights are "[s]ubject to" fair use.[121] Fair use, as Professor Loren argued, is thus "part and parcel of what defines the rights of a copyright owner."[122] In other words, fair use delimits copyright infringement.[123]

Fair use is not an infringing act to be tolerated or excused, but rather it is part and parcel of the very purpose of copyright, namely promoting the progress of learning.[124] Fair use is as old as copyright.[125] The copyright schema cannot have one without the other; the two forces are the yin and yang of copyright.[126] As Judge

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[115] *Id.*

[116] *E.g.*, Snow, *supra* note 103, at 164 ("[B]y describing fair use as a competing right, Congress intimated its intent that fair use define the scope of the copyright right, rather than excuse an infringement of the copyright right.").

[117] 17 U.S.C. § 108(f)(4) (noting that nothing in this section "in any way affects the *right* of fair use as provided by section 107 . . . .") (emphasis added).

[118] *Id.* § 107 ("Notwithstanding the provisions of sections 106 and 106A, *the fair use of a copyrighted work*, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright*.") (emphasis added).

[119] Snow, *supra* note 103, at 163.

[120] Loren, *supra* note 103, at 698; *accord* Birch, *supra* note 103, at 165–66 ("Logically then, how can it be said that fair use, which by definition is not an infringement, can be considered properly an affirmative defense in a copyright infringement action.").

[121] 17 U.S.C. § 106 ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . .").

[122] Loren, *supra* note 103, at 697.

[123] *E.g.*, Loren, *supra* note 103, at 698; Snow, *supra* note 103, at 164. *Contra* David R. Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC'Y U.S.A. 345, 349 (2005) (arguing "under U.S. copyright law, fair use we have, and rights we have, but we have no fair use rights").

[124] PATTERSON & LINDBERG, *supra* note 15, at 11.

[125] *See, e.g.*, Farmer v. Calvert Lithographing, Engraving & Map Publ'g Co., 8 F. Cas. 1022, 1026 (C.C.E.D. Mich. 1872); *see also* Elizabeth Filcher Miller, Comment, *Copyrights—"Fair Use*,*"* 15 S. CALI. L. REV. 249, 249–50 (1942).

[126] *Cf.* Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing*

Leval explained, "[T]he objectives of fair use are the objectives of copyright."[127] To achieve those constitutional objectives, copyright needs fair use.[128] The Supreme Court in *Campbell* emphasized, "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'"[129] To deny fair use is to deny the progress of science and learning.[130]

The fair use analysis balances two statutory rights: the author's limited right to exclude and the user's affirmative right to fair use.[131] The fair use analysis is not a natural right balanced against a begrudgingly abided use, rather the analysis balances two statutory rights that are mutually necessary to achieve the constitutional mandate to promote progress.[132] We should not lose sight of the mutuality of these push-and-pull forces.

More than simply a statutory right, fair use is also vested with a speech-protective function.[133] Fair use is empowered as a speech-protective counterbalance in the copyright schema because the Supreme Court embeds free expression interests within the fair use analysis.[134] The Court in *Harper & Row* noted, "the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use" are First Amendment protections.[135] In *Golan* and *Eldred*, the Supreme Court emphasized that fair use, along with the idea/expression dichotomy, are in fact "built-in First Amendment accommodations."[136] And the *Eldred* Court clarified that while copyright is not "categorically immune" from First Amendment scrutiny, so long as the built-in accommodations are not altered, independent constitutional scrutiny is "unnecessary."[137] The right to fair use insulates copyright law from independent First Amendment scrutiny.[138]

By embedding First Amendment interests within the fair use analysis and denying independent First Amendment scrutiny, the Court has de facto constitutionalized the

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Copyright and the First Amendment, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2015) (describing fair use as the "ying and yang of copyright and the First Amendment").

[127] Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 602 (2015).

[128] Leval, *supra* note 100, at 1110 ("Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.").

[129] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

[130] *See* PATTERSON & LINDBERG, *supra* note 15, at 11.

[131] *See* Reid, *supra* note 30, at 41.

[132] *See supra* notes 109–15 and accompanying text.

[133] *See supra* notes 115–17 and accompanying text.

[134] *See id.*

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

[136] Golan v. Holder, 565 U.S. 302, 328 (2012) (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)).

[137] *Eldred*, 537 U.S. at 221 (quoting Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001)).

[138] *Id.*

fair use inquiry.[139] Fair use is a proxy for First Amendment interests.[140] Fair use delineates the boundary between constitutionally protected speech and proscribable speech.[141] Whether a particular use is deemed fair or not is a constitutional fact, much like actual malice[142] or obscenity.[143] As a constitutional fact, fair use decisions should receive the same procedural protections that the Court has extended to other speech-implicating cases.[144] Specifically, as argued in the next section, fair use decisions should receive asymmetric constitutional fact review.

III. ASYMMETRIC REVIEW OF FAIR USE AS A CONSTITUTIONAL FACT

Fair use determinations divide constitutionally protected uses from unprotected infringement.[145] Speech policy generally strives to clearly demark the boundaries of protected and unprotected expression.[146] As the Supreme Court noted, "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."[147] But the flexibility of the fair use analysis means that it lacks clear boundaries.[148] The adaptability of the fair use doctrine is both its strength and its weakness. Such fuzziness may be acceptable as a matter of copyright policy, but it is not acceptable as a matter of speech policy.[149] There is a danger that fact-finders may err with such flexible guidance. The Court's First Amendment jurisprudence recognizes the danger of imprecise standards:

> Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not,

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[139] *E.g.*, Stephen M. McJohn, Eldred*'s Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95, 130 (2003) ("After *Eldred* . . . fair use attains constitutional status. Under the *Eldred* analysis, the availability of fair use is central to the constitutional basis of copyright protection."); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 548 (2004) ("Indeed, one can read *Eldred* and other cases to hold that fair use is constitutionally required.").

[140] *See* Tushnet, *supra* note 139, at 560.

[141] *See* McJohn, *supra* note 139, at 108–10.

[142] *E.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 514 (1984); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964).

[143] *E.g.*, Jenkins v. Georgia, 418 U.S. 153, 159–61 (1974); Jacobellis v. Ohio, 378 U.S. 184, 190 (1964).

[144] *See infra* note 148 and accompanying text.

[145] *See* Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).

[146] *See* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

[147] *Id.*

[148] *E.g.*, Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1859 (2007) ("[T]he fair use defense is highly unpredictable and a shaky ex ante support to users.").

[149] Zimmerman, *supra* note 110, at 709.

> in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.[150]

In light of the risk to protected expression, fair use fact-finding needs greater procedural safeguards.

This Article argues that fair use findings should receive the speech-protective safeguards that are afforded in other speech-implicating cases.[151] Copyright targets speech as speech.[152] It prohibits expression as expression. Therefore it is appropriate to give fair use determinations traditional First Amendment procedural protections. Asymmetric, constitutional fact review of fair use determinations is appropriate to ensure that speech interests are not harmed and to safeguard the line between protected and unprotected speech.[153]

As noted above, fact-finding errors can be categorized either of the first kind (Type 1) or of the second kind (Type 2).[154] In fair use cases, a Type 1 error finds that protected speech is infringing.[155] A Type 1 error denies the user's speech rights, threatens our constitutional norms and values, and risks chilling the speech of others.[156] A Type 2 error, on the other hand, finds that an infringing use is protected.[157] A Type 2 error denies a rightsholder rents.[158] A Type 1 error risks constitutional deprivation, whereas a Type 2 error risks economic harm.[159]

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[150] Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 505 (1984).

[151] *Accord* Volokh & McDonnell, *supra* note 14, at 2450 ("[C]opyright law is substantively constitutional[,] [b]ut it hardly shows that copyright law ought to be free of the traditional procedural protections available in all other First Amendment cases.").

[152] *Id.* at 2433–34.

[153] *Cf. id.* at 2433 ("[W]e argue that there is nothing special about copyright cases that would justify departing from the independent judgment rule. In light of this, giving copyright law a free ride not given other speech restrictions is wrong and corrosive of people's respect for free speech generally.").

[154] *See supra* notes 77–88 and accompanying text.

[155] *See supra* notes 77–80 and accompanying text.

[156] *See* Louis, *supra* note 30, at 1035; *see also* Samuelson, *supra* note 101, at 30 ("Whenever an author forgoes the opportunity to reuse portions of another author's work out of fear that the use might be challenged as infringing, there is a loss not only to that author, but also to the public. The public cannot benefit from the insights that the second author's reuse of a first author's work would have enabled. There is, moreover, some loss to freedom of expression and to access to information when lawful reuses are forgone. Losses to the public may be more substantial when news is not reported or publications on matters of public concern are suppressed because of copyright concerns.").

[157] *See supra* note 80 and accompanying text.

[158] There is a possibility that some Type 2 errors may impair the copyright incentives to create. To the extent this occurs it is an economic injury, not a speech injury. A rights-protective approach favors speech rights over economic interests.

[159] *Cf.* Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1311 (2008) ("[I]n cases involving transformative uses, the cost of fair use false positives

Fair use determinations are often given plenary review on the basis that the inquiry is a "mixed question of law and fact."[160] Applying the law to the facts, the fact-finder is asked to decide if the use is fair or not.[161] The Supreme Court recently emphasized, "Mixed questions are not all alike."[162] And, by extension, mixed questions are not all subject to the same standard of appellate review.[163] Some questions "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," and in such instances, the Court teaches that "appellate courts should typically review a decision *de novo*."[164] But in other instances, "mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence[ ] [and] make credibility judgments" for which "appellate courts should usually review a decision with deference."[165]

Denominating fair use as "mixed question" obscures the purely political nature of the inquiry.[166] Some "mixed questions" are reviewed de novo and some with deference.[167] Denominating an inquiry as a law-like question or a fact-like question is a conclusion about the allocative decision-making between the jury and the court.[168] The fact/law distinction merely camouflages the reality that the allocation of decision-making authority is a normative conclusion about institutional competence.[169] As the Supreme Court acknowledged, "The fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[170] The fact/law distinction is too malleable to be a reliable guide for allocating the center of gravity for a particular decision.[171] Manipulation of fact/law typology can undermine decisional

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is less than the cost of false negatives, insofar as the latter threaten to undermine important free-speech values.").

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

[161] *Id.* at 543, 545.

[162] U.S. Bank Nat. Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

[163] Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1192 (Fed. Cir. 2018) ("Merely characterizing an issue as a mixed question of law and fact does not dictate the applicable standard of review . . . .").

[164] *U.S. Bank Nat. Ass'n*, 138 S. Ct. at 967.

[165] *Id.*

[166] Reid, *supra* note 30, at 38–39.

[167] *See U.S. Bank Nat. Ass'n*, 138 S. Ct. at 967.

[168] *E.g.*, Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1127–28 (2003); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 574 (2003).

[169] *E.g.*, Miller v. Fenton, 474 U.S. 104, 113–14 (1985) ("[T]he decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis.").

[170] *Id.*

[171] *See* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 256 (2000); *see also* Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1196 (Fed. Cir. 2018) ("All jury findings relating

legitimacy, judicial efficiency, and intracourt comity.[172] Without a principled basis on which to decide the standard of review for "mixed questions," it simply becomes a matter of judicial preference.[173] When a jury verdict can simply be reclassified as a question of law, the fact/law classification is little more than a policy question—which appellate courts get to decide.[174]

I argue that a fair use determination should get plenary appellate review, not because it is a mixed question of law and fact, but rather it should receive plenary review because fair use is a constitutional fact. Fair use is a constitutional fact because of its speech-protective function.[175] Fair use is the dividing line between constitutionally protected speech and unprotected speech. And because fair use is a speech-implicating constitutional fact, I argue that independent appellate review should be an asymmetric, one-way street rather than a symmetric, two-way street.[176]

Symmetrical review of mixed questions of law and fact invites the opportunity for an appellate court to error-create rather than just error-correct.[177] In *Oracle America, Inc. v. Google LLC*, the Federal Circuit reviewed de novo the "ultimate question of fair use" on the ground that the mixed nature of the fair use inquiry was "legal in nature."[178] I believe this was in error. As discussed below, the Federal Circuit overturned a jury's finding of fair use—potentially creating a Type 1 error.[179]

In *Oracle America, Inc. v. Google LLC*, the jury question was whether Google's use "of Oracle's Java application programming interface . . . in its Android operating system infringed Oracle's . . . copyrights."[180] After a week of evidence and three days of deliberation, the ten-person jury returned a unanimous verdict, finding Google had carried its burden on the defense of fair use.[181] The district court denied Oracle's FRCP 50 motions for judgment as a matter of law and FRCP 59 motion for a new trial.[182] In denying Oracle's motions for a new trial, the district court observed, "It deserves to be said, in favor of our jury, that the ten who served were as punctual,

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to fair use other than its implied findings of historical fact must, under governing Supreme Court and Ninth Circuit case law, be viewed as advisory only.").

[172] *See* Adamson, *supra* note 35, at 1025; Nangle, *supra* note 34, at 426.

[173] *See* William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1734 (2001).

[174] Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 357 (2009).

[175] *Cf.* Childress, *supra* note 14, at 1240.

[176] *Cf. id.* at 1239 (arguing "constitutional fact doctrine . . . must rest on the unique constitutional interests at stake rather than on a circular mixed law-fact rationale.").

[177] *Id.* at 1248–49.

[178] 886 F.3d 1179, 1194–96 (Fed. Cir. 2018) (quoting Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1956)).

[179] *Id.* at 1211.

[180] *Id.* at 1185.

[181] Oracle Am., Inc. v. Google Inc., No. C 10-03561 WHA, 2016 WL 5393938, at *1, *15 (N.D. Cal. Sept. 27, 2016), *rev'd and remanded sub nom.* 886 F.3d 1179 (Fed. Cir. 2018).

[182] *Oracle Am., Inc.*, 886 F.3d at 1185–86.

attentive, and diligent in note-taking as any jury this district judge has seen in seventeen years of service."[183] And in denying Oracle's judgment as a matter of law, the district court concluded, "Oracle is wrong in saying that no reasonable jury could find against it."[184] The district court explained: "[O]ur jury could reasonably have found for either side on the fair use issue. Our trial presented a series of credibility calls for our jury. Both sides are wrong in saying that all reasonable balancings of the statutory factors favor their side only."[185]

Oracle appealed, and the Federal Circuit reversed, concluding, "Google's use of the Java API packages was not fair as a matter of law."[186] Fair use is mixed question, yet the Federal Circuit acknowledged that "[m]erely characterizing an issue as a mixed question of law and fact does not dictate the applicable standard of review, however."[187] The court resolved that "whether the use at issue is ultimately a fair one" is reviewed de novo because the inquiry is "a primarily legal exercise."[188] After concluding that the ultimate question of fair use is more law-like, the jury's finding of fair use was "viewed as advisory only."[189] The court then undertook "a case-specific analysis of all four factors" and concluded that "allowing Google to commercially exploit Oracle's work will not advance the purposes of copyright in this case."[190]

This Article submits that the Federal Circuit erroneously applied de novo review to the jury verdict finding fair use.[191] Fair use is a fact-specific, case-by-case assessment.

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[183] *Oracle Am., Inc.*, 2016 WL 5393938, at *15.

[184] Oracle Am., Inc. v. Google Inc., No. C 10-03561 WHA, 2016 WL 3181206, at *1 (N.D. Cal. June 8, 2016), *rev'd and remanded sub nom.* Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018).

[185] *Id.* at *1. In emphasizing the credibility assessments, the district court noted that "in our trial mental state was much contested" and "[w]itness credibility was much challenged." *Id.* at *6, *11.

[186] *Oracle Am., Inc.*, 886 F.3d at 1186.

[187] *Id.* at 1192 (citing U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960 (2018)); *see also id.* at 1194 ("[T]he Supreme Court has never clarified whether and to what extent the jury is to play a role in the fair use analysis.").

[188] *Id.* at 1193. The court explained:

> [The fair use inquiry] requires a court to assess the inferences to be drawn from the historical facts found in light of the legal standards outlined in the statute and relevant case law and to determine what conclusion those inferences dictate. Because, as noted below, the historical facts in a fair use inquiry are generally few, generally similar from case to case, and rarely debated, resolution of what any set of facts means to the fair use determination definitely does not "resist generalization." Instead, the exercise of assessing whether a use is fair in one case will help guide resolution of that question in all future cases.

Id. (internal citation omitted).

[189] *Id.* at 1196.

[190] *Id.* at 1210.

[191] The Federal Circuit has long been criticized for insufficient deference to fact-finders.

Fair use determinations do not "[amplify] or elaborat[e] on a broad legal standard," rather they often "immerse courts in case-specific factual issues."[192] As such, fair use findings—made either by jury trial or bench trial—should usually be reviewed with deference. But fair use is not simply a question of fact; it is a question of constitutional fact because it divides constitutionally protected speech from unprotected speech. In light of the speech-protective interests embedded within the fair use analysis, appellate courts should only independently review fair use findings made against fair use. To that end, the Ninth Circuit should apply de novo review of the jury's finding against fair use in *Corbello v. DeVito*.[193]

In *Corbello v. DeVito*, Donna Corbello, the widow and heir of Rex Woodard, sued Tommy DeVito and others when they "develop[ed] the screenplay for *Jersey Boys* . . . a hit musical based on the band The Four Seasons."[194] Rex Woodard was an avid Four Seasons fan; Tommy DeVito is a founding member of The Four Seasons.[195] Woodard assisted "DeVito in writing his unpublished autobiography *Tommy DeVito—Then and Now*."[196] Corbello alleged that DeVito's screenplay was an infringing derivative work of the unpublished autobiography, which "had 'inspired the form, structure, and content of the musical.'"[197]

After a fifteen-day trial, the jury found the *Jersey Boys* play infringed the autobiography and was not fair use.[198] The district court then granted the defendants' FRCP 50(b) renewed motion for judgment as a matter of law on the question of fair use.[199] After reviewing the evidence for each of the fair use factors,[200] the district court

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E.g., Ted L. Field, *Obviousness as Fact: The Issue of Obviousness in Patent Law Should be a Question of Fact Reviewed with Appropriate Deference*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555, 559–60 (2017) (footnote omitted) ("Commentators have accused the Federal Circuit of generally exercising too much power relative to that of the district courts in patent cases. One particular way in which the Federal Circuit has been accused of exercising such excessive power is by applying standards of review that are not sufficiently deferential.").

[192] *U.S. Bank Nat. Ass'n*, 138 S. Ct. at 967.

[193] 262 F. Supp. 3d 1056 (D. Nev. 2017).

[194] *Id.* at 1059.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 1062 (quoting Third Amended Complaint, *Corbello v. DeVito*, No. 08CV00867, 2011 WL 2533129, ¶ 51 (D. Nev. Mar. 18, 2011)).

[198] *Id.* at 1068 ("The jury found: (1) Tommy DeVito did not grant Defendants an implied nonexclusive license to use the Work to create the Play; (2) the Play infringed the Work; (3) the use of the Work in the Play did not constitute fair use; (4) 10% of the success of the Play was attributable to infringement of the Work; and (5) the remaining Defendants were liable for direct infringement (as opposed to vicarious or contributory infringement).").

[199] *Id.* ("The Court has closely examined the evidence under the relevant standards and concludes Defendants are entitled to a judgment as a matter of law on the fair use issue.").

[200] *Id.* at 1076 ("In summary, the first factor weighs against fair use as in any typical case of commercial use, the second factor weighs in favor of fair use, the third factor weighs heavily in favor of fair use, the fourth (most important) factor weighs heavily in favor of fair

explained: "A finding of no fair use, where such a tiny part of the creative elements of a biographical work with little to no market value were copied, and where the use was significantly transformative, would hinder rather than further the purposes of copyright."[201] This case is currently on appeal to the Ninth Circuit, and I urge the court to apply de novo review to the jury finding against fair use.[202]

Appellate courts should not routinely engage in de novo review of fair use findings. Fair use determinations are more fact-like than law-like, but fair use is speech-implicating fact—a constitutional fact. To prevent the risk of an appellate court erroneously reversing a finding made in favor of fair use, appellate courts should only independently review determinations adverse to the fair-use-claimant. Applying plenary review as a one-way street serves to guard against Type 1 errors.[203] In other words, to fully protect fair use and the speech-implicating interests therein, fair use findings should receive asymmetric, constitutional fact review.[204]

Asymmetric review of fair use findings is consistent with Supreme Court practice. In *Harper & Row*, the Supreme Court gave a searching review of the bench trial determination that *The Nation*'s use of Nixon's memoirs was not fair use.[205] On the other hand, the *Sony* Court gave deferential review to the bench trial's fair use determination: "we must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use."[206] The Court implicitly has applied de novo review as a one-way street to fair use determinations. This Article offers a justification for such practices and invites the Court to make its explanation explicit. Under such a rationale, the *Oracle* jury's finding of fair use should be reviewed with deference. Conversely, the *Corbello* jury's finding against fair use should be reviewed de novo.

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use, and the transformative nature of the use diminishes the significance of the sole factor weighing against fair use.").

[201] *Id.* at 1077.

[202] *See generally id.*, *appeal docketed*, No. 17-16337 (9th Cir. June 29, 2017).

[203] This approach has the added benefit of reducing the burden on appellate court dockets. Rather than reviewing all fair use determinations symmetrically, fair use determinations should be reviewed asymmetrically, thus fewer cases would receive plenary review.

[204] *Cf.* Snow, *Judges Playing Jury*, *supra* note 16, at 516 ("[T]he doctrine of independent review obligates appellate courts to employ de novo review of factual findings that affect litigants' constitutional rights, and fair use affects defendants' right of speech. So a verdict that denies fair use affects the defendant's speech rights, thereby obligating appellate courts to apply independent de novo review to ensure that those rights are not violated.").

[205] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985) ("On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a 'fair use' of the copyrighted material. . . . [W]e now reverse."); *accord* Pac. & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984) (applying de novo review to a bench trial finding against fair use); Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980) (same).

[206] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984).

CONCLUSION

To achieve its constitutional objectives, the copyright bargain fundamentally needs fair use accommodations. Lest the "engine of free expression"[207] serve to thwart free expression, fair use needs more robust procedural safeguards. I seek to resuscitate fair use from its withered status.[208] It should be viewed as an affirmative right, not an affirmative defense for which the user bears the burden of proof.[209] Fair use is not a marginal use to be meagerly tolerated. Fair use is part and parcel of the very purpose of copyright, namely promoting the progress of science and learning.[210] To ensure that the right to fair use is performing its proper function within the copyright schema, the Supreme Court should resolve the circuit split and clarify that appellate courts should only engage in a one-way, constitutional fact review of determinations adverse to free-speech-claimants—including determinations adverse to fair-use-claimants.

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[207] *Harper & Row*, 471 U.S. at 558 ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

[208] *See, e.g.*, Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 329 (2003); Mark A. Lemley, *Should a Licensing Market Require Licensing?*, L. & CONTEMP. PROBS. 185, 185; Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 546 (1996).

[209] *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (rejecting speaker's burden to prove the protected nature of the speech); Speiser v. Randall, 357 U.S. 513, 525–26 (1958) (same).

[210] PATTERSON & LINDBERG, *supra* note 15, at 11.