

THE QUESTIONABLE ORIGINS OF THE COPYRIGHT INFRINGEMENT ANALYSIS

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Central to modern copyright law is its test for determining infringement, famously developed by Judge Jerome Frank in the landmark case of Arnstein v. Porter. The “Arnstein test,” which courts continue to apply, demands that the analysis be divided into two components, actual copying—the question whether the defendant did in fact copy, and improper appropriation—the question whether such copying, if it did exist, was unlawful. Somewhat counter-intuitively though, the test treats both components as pure questions of fact, requiring that even the question of improper appropriation go to a jury. This jury-centric approach continues to influence modern copyright law and is responsible for the subjective and unpredictable nature of the infringement analysis in a wide range of copyright infringement lawsuits (e.g., the “Blurred Lines” verdict). Looking to the judges’ memoranda and correspondence in the case, as well as their extensive extra-judicial writing around the time, reveals that the court’s decision to empower the jury was driven almost entirely by Judge Frank’s unique legal philosophy—his skeptical views about judicial fact-finding and his desire to control lower court decision-making. Characterizing the entire infringement analysis as a purely factual one provided him with a perfect mechanism for giving effect to this skepticism. The Arnstein test thus had very little to do with substantive copyright law and policy, a reality that copyright jurisprudence has thus far ignored altogether in its continuing affirmation of the opinion’s framework. This Article disaggregates the complex issues that were at play in Arnstein to show how it was rooted in a dystopian vision of the adjudicative process that has since come to be universally repudiated, and argues that it may well be time for copyright jurisprudence to reconsider its dogmatic reliance on Arnstein, thereby freeing copyright law from one of its best-known malaises.

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