

## Copyright Law's Origin Stories

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Shyamkrishna Balganes, [The Questionable Origins of the Copyright Infringement Analysis](#), 68 **Stan. L. Rev.** 791 (2016).

One particularly engaging genre of legal scholarship is the deep historical dive into an appellate opinion that has become a classic in a field. In volumes such as *Torts Stories*, *Contracts Stories*, and *Intellectual Property Stories*, scholars resurrect the history leading to landmark cases: the cast of characters involved in the dispute, the lower court wrangling that led to the more famous appeal, the aftermath of the case, and the lasting impact of the court's opinion.

While we must constantly remind ourselves that each case we analyze or teach involves real individuals with real disputes that affected real lives, there is a certain fictional quality to these stories precisely because the judicial opinion is the lead character. Judicial opinions can never be more than an abstract, a description of events that then becomes the accepted narrative. Paul Robert Cohen's expletive-bearing [jacket](#) was expression serving an "emotive function," according to the Court, not an "absurd and immature antic," as the dissent would have it, and that made all the difference. Opinions have authors, and authors are necessarily engaged in a project of crafting narratives with a result in mind.

Yet knowing more about how an opinion came to be does give us a richer understanding of its context and, perhaps, some guidance on how to interpret the opinion going forward. This is the project that Shyamkrishna Balganes undertakes in his compelling and entertaining article *The Questionable Origins of the Copyright Infringement Analysis*.

The article tells the story of the landmark copyright case [Arnstein v. Porter](#), 154 F.2d 464 (2d Cir. 1946). Ira Arnstein, a frequent plaintiff in copyright infringement cases, representing himself pro se, brought suit against Cole Porter, alleging infringement of several musical compositions. Porter, through deposition, denied having any access to the plaintiff's works. The district court, relying only on the parties' depositions, concluded that the plaintiff's theory of copying was appropriately characterized as "fantastic" and so granted summary judgment for Porter. (P. 803.) On appeal, the U.S. Court of Appeals for the Second Circuit held that because copyright infringement is a question of fact for the jury, the lower court should have given Arnstein the opportunity to present evidence and cross-examine witnesses at trial. Summary judgment based on the judge's own view of the facts was inappropriate.

Under *Arnstein*, determining whether a defendant infringed a plaintiff's protected work requires resolution of two questions: (1) did the defendant copy from the plaintiff rather than independently create the work (since one must copy to infringe), and (2) did the defendant copy a legally relevant amount of what was covered by the plaintiff's copyright? The first of these inquiries is predominantly a question of fact, although, like all factual questions, it may be legally shown by circumstantial evidence. (For example, a plaintiff can show that the available evidence — the defendant's access to the work and the degree of similarity between the two works — would reasonably lead to the conclusion that the defendant did not independently create the work.) The second of these inquiries, usually phrased as whether the two works are "substantially similar," *should* be viewed as predominantly a question of law, since it asks whether the defendant's copying is legally significant. For example, it may be the case that the defendant copied from the plaintiff, but if all that was copied were elements of the plaintiff's work

that were drawn from the public domain, no legally cognizable harm under copyright law exists.

Despite the fact that the second question asks whether the copying is legally relevant, *Arnstein* holds — and subsequent courts have generally agreed — that this question is also one of fact, to be given to the jury, without the benefit of expert opinion. The rationale, ostensibly, is that because the harm caused by the defendant is presumed to be one of economic substitution, whether the two works are similar enough such that one is substantially the equivalent of the other should be determined via a lay audience's perspective.

Balganesh's project is to find out why the *Arnstein* court assigned this essentially legal question to the jury, and to do so, he looks back at how the opinion developed. Balganesh tells the story elegantly and deftly, taking the reader first through the majority and dissenting opinions; then providing descriptions of the philosophies and personalities of each of the judges involved (Jerome Frank, Learned Hand, and Charles Clark); then moving to a narrative, using judicial correspondence and memoranda, of how the judges' philosophies and personalities led to the opinions in *Arnstein*; and concluding by considering what this exegesis should tell us about the continuing influence of the case. Along the way, Balganesh demonstrates an admirable diligence in interrogating the historical record. For example, in recounting the nature of a memorandum that Frank distributed to his co-panelists outlining a series of cases supporting his view, Balganesh goes back to each of those authorities and notes that they do not provide the level of support that Frank suggests in his memo. (P. 843.)

The author of the majority opinion, Jerome Frank, was “an outspoken and acerbic critic of the jury system” who believed that it was inappropriate to allow juries to determine the rule of law. (P. 797.) Nevertheless, as a legal realist, Frank also believed that legal results were indeterminate and factfinding inherently subjective. Given the choice between having a district court judge rule on an issue as a matter of law (and possibly shading his or her factual conclusions to do so) and a lay jury deciding questions as a matter of fact, Frank preferred to send such decisions to the jury. Balganesh contends that *Arnstein* therefore became less about the copyright issues in the case and more about the opportunity the case presented Frank to put his fact skepticism into practice.

Thus, Frank emphasized that to his ears — and those of his secretary, “who improvise[d] music” (P. 832) — *Arnstein's* and *Porter's* compositions could be found to be similar enough. Charles Clark, in dissent, bolstered his conclusion that no copying had occurred, and that there was no need for a trial, by citing the opinion of his friend, “a Yale University organist,” who had played each of the pieces for him. (*Id.*) (It was no coincidence that Clark was a drafter of the Federal Rules of Civil Procedure and so had a personal investment in the procedure for summary judgment.)

This dispute proved Frank's point: the issue needed to be resolved by a jury, without reliance on expert opinion, and so the case was remanded. (As Balganesh notes, the district court's opinion focused only on copying, not on substantial similarity, but that seems not to have mattered to Frank's agenda.) Frank did not waver from this view even when the jury, on remand, reached the same result as had the district court, finding in favor of *Porter*. (P. 841-42.) Thus, Balganesh suggests persuasively, what could have been a narrow opinion focusing only on the decision of the district court as to copying became a more sweeping opinion on the nature of decisionmaking regarding copyright infringement more generally, motivated by Frank's desire to leave as much of the decisionmaking as possible to the jury.

Subsequent courts have generally accepted *Arnstein's* structure without question (although it has been the target of considerable [scholarly critique](#)), holding that both the question of copying and the question of substantial similarity are questions of fact, the latter to be decided by the jury without the benefit of expert advice. As some [modern cases](#) have demonstrated, however, this is a difficult and highly unpredictable approach. Whether the defendant copied from the plaintiff or created independently is a

factual question that juries can more easily decide; whether one work holds the legal status of “infringing” is a question rife with interpretative and analytical complexities more properly considered questions of law. Indeed, as Frank suggested in an [earlier work](#) with respect to legal rights and duties generally, one might say that copyright infringement cannot even exist prior to a judicial ruling; infringement, as a legal status, comes into being only when a court declares it thus.

Having revealed that *Arnstein* was driven more by procedure than by copyright doctrine, Balganesch concludes by suggesting that this new understanding of *Arnstein*’s origin story can free courts from its influence, giving way to new approaches to infringement cases. He proposes one such approach as an example: that the infringement analysis start with the legal question of “whether there is sufficient similarity between the two works at issue to render the claim cognizable for copyright infringement purposes,” which, he argues, will result in more highly developed copyright jurisprudence than the current jury-focused system. (P. 859.)

But the judge-made nature of much of copyright law means, of course, that many courts have always been free to do this. *Arnstein*’s holding was derived from, but is no longer dependent on, its ostensible factual history. If it now turns out that Ira Arnstein wasn’t the troubled individual the district court believed him to be, or Cole Porter really did copy Arnstein’s work when he composed “Night and Day,” that matters not to the authority of the Second Circuit’s opinion or the nature of its influence on other courts. The revelation that Frank was motivated not by what was best for copyright law but rather by his legal realist views on factfinding more generally doesn’t itself free courts to challenge *Arnstein*; rather, it starkly reveals the influence of the appellate narrative as truth.

None of this, of course, is to diminish one bit the significant contributions of Balganesch’s wonderfully engaging article. Rather, it is simply a reminder that appellate opinions are often a narrative means to an analytical end, even when they are not as strategically authored as Balganesch has shown *Arnstein v. Porter* to be. We should be prepared to deploy our own fact skepticism as we interpret them.

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