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Paper Information

Title:	Uniform Jury Instructions in Copyright Law
Abstract:	<p>Copyright contains many substantive challenges that make it hard to instruct juries effectively. Existing instructions used in some circuits (as well as other instructions circulated as pattern instructions) rarely tackle the foreseeable ways in which copyright might confuse or mislead juries. Juries aren't the only ones confused. Trial transcripts often reveal judicial uncertainty over how to provide guidance adequate to the juries' tasks, and that's when the court understands copyright law, which isn't always the case (per judges' own remarks about it). Courts can and do struggle over how to instruct juries, and parties litigate over alleged instructional errors, as significant recent cases show. Because of the potential importance of the jury's role in copyright litigation, and the corresponding potential for confusion and error by both judge and jury, jury instructions in copyright law deserve scholarly attention, and they need practical reforms. This Article argues that uniform instructions could improve litigation for litigants, the judiciary, and the jury. Adoption of uniform instructions would help at least some litigants by leveling the litigation playing field to some extent, flattening distributive advantages that often seem to arise in copyright litigation when one party has resources to expend on multiple rounds of drafting jury instructions, and the other may not. It would save all parties at least some of the expense associated with instructional drafting and tinkering. Jury instructions would help many judges, most of whom are not copyright-experienced, and who would benefit from statements of law that are accurate, as non-partisan as possible, linguistically and psychologically effective, and—ideally—empirically tested for efficacy. Such instructions would also address a central reason judges often issue ineffective instructions that simply copy statutory language: risks of reversal. Judges' understandable inclination towards caution and towards fairness to the parties make innovations risky, thus unfortunately also entrenching instructional deficiencies. Offering uniform instructions carefully created—and, again, ideally, empirically tested—would introduce innovative reforms that judges could adopt with less risk of reversal on the basis of the instructional novelty, or departure from pattern instructions or statutory language. Uniform instructions could help juries if actually drafted to increase their comprehension rather than being written either to avoid reversal or to achieve one of the parties' desired outcomes. Uniformity would also increase the likelihood of compliance with copyright's larger policy objectives, such as respecting federally mandated exclusions for certain subject matter (like ideas, useful articles, and public domain elements). Reforming instructions matters especially because instructional mistakes are easy to make, but hard to detect and harder still to correct. Furthermore, the stakes of such errors are high, such as when instructions risk steering juries toward outcomes that distort copyright policy through improper calibration of the scope of copyright. The Article provides suggested instructions in key areas including: originality, substantial similarity, the derivative work right, works made for hire, and fair use. It suggests that these instructions are facially clearer, more accurate, and more compliant with copyright's policy imperatives, and it urges further work testing these instructions for efficacy.</p>