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Listen to *Cass County Music*: The Right to Jury Trials in Copyright Infringement Actions When Statutory Damages Are Elected

Megan E. Ward*

I. Introduction

The Seventh Amendment to the United States Constitution grants litigants the right to a jury trial in civil actions by providing that "[i]n suits at common law . . . the right of trial by jury shall be preserved."¹ The United States Supreme Court explained that the phrase "suits at common law" refers not only to causes of action that common law created and recognized as legal in 1791,² but also to "statutory rights, . . . if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."³ Thus, the Seventh Amendment right to a jury trial applies to a statutory right creating a legal, as opposed to an equitable, cause of action.⁴

Although the rule that the Seventh Amendment applies to legal causes of action may appear to be clear, its application proves more complex than

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1. U.S. CONST. amend. VII.

2. See *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (explaining that it is settled law that Seventh Amendment right to jury trial extends beyond legal actions existing in 1791).

3. *Id.* at 194. In *Curtis*, the Supreme Court stated that:

common law . . . meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

Id. at 193 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)). Therefore, the Court reasoned that the Seventh Amendment is applicable to new causes of action based on congressional enactments if the rights and remedies created can be characterized as legal. *Id.* at 193-94.

4. See William Patry, *The Right to a Jury in Copyright Cases*, 29 J. COPYRIGHT SOC'Y 139, 144 (1981) (explaining that right to jury trial under Seventh Amendment is limited to assertion of legal rights).

simply determining whether a case is an "action at law" or a "suit in equity." The 1938 merger of law and equity in the federal courts made the classification of some issues as legal or equitable difficult because it allowed litigants to bring both legal and equitable claims in one action.⁵ Because parties may now join both legal and equitable claims in one suit, the Supreme Court has explained that the right to a jury trial under the Seventh Amendment "depends on the nature of the issue to be tried rather than the character of the overall action."⁶ The Supreme Court proposed a three-prong test to determine if an issue is of a "legal" nature: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."⁷ Thus, the Court created a test that requires an in-depth, three-step analysis of each statutorily created right.⁸

Statutory damages elected pursuant to the federal copyright statute⁹ — granting the award based on the limits set by the statute and not by the actual damages demonstrated — exemplifies a statutorily created right.¹⁰ To ascertain whether a copyright infringement suit requesting statutory damages requires a jury trial, the court must determine: (1) whether Congress granted the right to a jury trial in such cases¹¹ or (2) whether the provision is "legal" in nature and would therefore fall within the Seventh Amendment guarantee.¹²

5. See David Phippen, Case Comment, *Fourth Circuit Review: Right to Jury Trial Under Copyright Act's Statutory Damage Provision*, 39 WASH. & LEE L. REV. 800, 800 n.1 (1982) (noting that merger of law and equity has complicated issue of whether Seventh Amendment applies to statutory right). Rule 18(a) of the Federal Rules of Civil Procedure provides that "[a] party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." FED. R. CIV. P. 18(a); see also Patry, *supra* note 4, at 144 (explaining differences in federal courts before and after 1938 merger).

6. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

7. *Id.* at 538 n.10 (citing Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963)).

8. See *infra* Part III.A (discussing development of test and its current application involving meaning of each prong).

9. Copyright Act of 1976 § 504(c)(1), 17 U.S.C. § 504(c)(1) (1994).

10. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834) (stating that right of copyright protection "does not exist at common law; it originated, if at all, under the acts of congress").

11. See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (recognizing "'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question may be avoided'" (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971))).

12. See Andrew W. Stumpff, Note, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 MICH. L. REV. 1950, 1951 (1985) (arguing that statutory damages provision escapes clear classification as either legal or equitable).

Although some courts that have addressed the question have based their decisions solely on the language of the copyright statute itself,¹³ most courts have found the statutory language ambiguous and therefore have focused on the constitutional issue and analysis.¹⁴ The complexity of the right to jury trial issue,¹⁵ the inherent difficulties of the Supreme Court's test,¹⁶ and the failure of some courts to analyze fully the problem¹⁷ have prevented federal courts of appeals from reaching a consensus on the constitutional issue. Consequently, the circuits are divided five-to-three, with the majority finding no right to a jury trial in copyright infringement actions when the plaintiff elects statutory damages.¹⁸

13. See *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) ("The determination of statutory damages . . . is assigned by statute to the judge rather than the jury."); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (explaining that denial of right to jury trial is based on 1909 statute's authorization for court to use its discretion in assessing statutory damages).

14. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 641-44 (8th Cir. 1996) (applying *Ross v. Bernhard* test after finding that statute does not resolve question); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-15 (7th Cir. 1991) (same); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852 (11th Cir. 1990) (following Fifth Circuit by stating that "no constitutional or statutory right to a jury trial" exists); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-20 (4th Cir. 1981) (finding that statute's language is ambiguous and applying constitutional analysis); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. May 1981) (stating that entire case is equitable under *Ross* and therefore no constitutional or statutory right to jury trial exists).

15. See *infra* notes 59-72 and accompanying text (discussing different formulations of constitutional test).

16. See *infra* Part III.B (discussing application of test to copyright cases).

17. See *infra* notes 205-11, 246-48 and accompanying text (summarizing criticism of circuit court decisions).

18. See *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852 (11th Cir. 1990) (following Fifth Circuit by stating that "no constitutional or statutory right to a jury trial" exists); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (finding that statute assigns determination of statutory damages to judge); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. May 1981) (finding no constitutional or statutory right to jury trial); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir.) (explaining that judge, not jury, should properly address "in lieu" damages); *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 81 (1st Cir. 1957) (finding that because statutory damages provision invoked equity jurisdiction, no right to jury trial existed); see also *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 292-93 (9th Cir. 1997) (finding no statutory or constitutional right to jury trial under 1976 Act), *cert. granted sub nom. Feltner v. Columbia Pictures Television*, 118 S. Ct. 30 (1997). But see *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996) (holding that either party to copyright infringement suit involving statutory damages is entitled to jury trial); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1017 (7th Cir. 1991) (holding that factual questions of infringement and willfulness should be submitted to jury, but judge should decide appropriate award of statutory damages); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981)

Recently, however, support for the minority view is increasing. In *Cass County Music Co. v. C.H.L.R., Inc.*,¹⁹ the United States Court of Appeals for the Eighth Circuit held that the Seventh Amendment entitles either party the right to a jury trial in a copyright infringement action involving a request for statutory damages.²⁰ In reaching its decision, the Eighth Circuit provided the most well-reasoned, thorough analysis of any circuit that has addressed this issue.²¹ *Cass County Music* demonstrates the existence of a Seventh Amendment right to a jury trial in copyright infringement suits when the plaintiff seeks statutory damages.²²

This Note addresses whether a right to a jury trial exists in copyright infringement cases when the plaintiff elects statutory damages. Part II surveys

(holding that Seventh Amendment mandates trial by jury in copyright infringement action for statutory damages).

19. 88 F.3d 635 (8th Cir. 1996).

20. *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996) (holding that "either party in a copyright infringement suit is entitled under the Seventh Amendment to a jury trial on demand"). In *Cass County Music*, the court considered whether the district court erred in refusing to allow the defendants' request for a jury trial in a copyright infringement suit demanding statutory damages under 17 U.S.C. § 504(c). *Id.* at 636-37. The court stated that it must consider whether the statute compels or the Seventh Amendment requires a jury trial when plaintiff seeks statutory damages. *Id.* at 638. The court found that, because of the diverse reasoning and conclusions of the other circuits, it must analyze the question itself. *Id.* at 639-40. The court determined that the statutory language and legislative history of 17 U.S.C. § 504(c) did not conclusively answer the question of whether Congress intended to provide for jury trials. *Id.* at 640-41. Turning to constitutional analysis, the *Cass County* court stated that the Seventh Amendment requires a jury trial for suits "in which legal rights are sought to be adjudicated and legal remedies are imposed, as compared with those suits where the rights and the remedies are equitable." *Id.* at 641 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989)). In order to determine whether a statutory right is legal or equitable, the court considered analogous eighteenth century actions brought before the merger of law and equity and determined that copyright infringement is a legal action. *Id.* at 641-42. Specifically, the court relied on the Supreme Court's recent holding that patent infringement actions must be tried to a jury. *Id.* at 641 (citing *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996)). Because copyright and patent infringement actions are derived from the same constitutional provision and require "functionally" the same elements to prove liability, the court reasoned that copyright and patent infringement actions are sufficiently analogous. *Id.* at 641-42. Moreover, the court determined that the remedy of statutory damages is legal in nature. *Id.* at 643. Specifically, the court stated that statutory damages have the "attributes" of a legal remedy because, although they have always had restitutional qualities, more recently they have been characterized as punitive damages, which are traditionally a jury matter. *Id.* Consequently, the *Cass County Music* court held that either party had a right to a jury trial in a copyright infringement case when statutory damages are requested. *Id.* at 644.

21. See *infra* notes 276-89 and accompanying text (arguing that *Cass County Music* decision contains best reasoned analysis).

22. See *infra* notes 276-88 and accompanying text (supporting conclusion that *Cass County Music* decision is correct).

the history of copyright statutes in the United States and examines the statutory damages provisions²³ of the Copyright Act of 1909 (1909 Act)²⁴ and the Copyright Act of 1976 (1976 Act).²⁵ Part III examines the Supreme Court's test for determining whether the Seventh Amendment requires a jury trial, applies the test to the Copyright Act's statutory damages section, and discusses some of the difficulties that have arisen in its application.²⁶ Part IV explores the majority and minority views on the issue by studying the courts of appeals' opinions and examining their strengths and weaknesses.²⁷ Part V analyzes the Eighth Circuit's *Cass County Music* opinion and concludes that the court's decision was correct.²⁸ Part V also argues that the court's well-reasoned analysis provides an excellent model for the Supreme Court to follow when it ultimately decides the issue of the right to a jury trial in copyright infringement statutory damages suits in the spring of 1998.²⁹

II. Historical Analysis and Statutory Construction of the Copyright Acts

In addressing the question of whether the right to a jury trial applies to a given statute, courts first look to the statutory language and its legislative history to determine if Congress provided for the right.³⁰ Courts proceed to the constitutional question only if the congressional intent is ambigu-

23. See *infra* notes 30-57 and accompanying text (concluding that statutory construction and historical analysis of copyright statutes does not clearly determine whether Congress intended to create right to jury trial).

24. Copyright Act of 1909, ch. 320, 35 Stat. 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

25. Copyright Act of 1976, 17 U.S.C. §§ 101-1101 (1994).

26. See *infra* notes 59-127 and accompanying text (explaining constitutional tests and discussing criticisms of and difficulties in applying them).

27. See *infra* notes 128-248 and accompanying text (discussing and criticizing circuit court decisions).

28. See *infra* notes 249-89 and accompanying text (analyzing *Cass County Music* decision).

29. The United States Supreme Court granted certiorari in the case of *Feltner v. Columbia Pictures Television* and will determine whether either § 504(c) permits or requires, or the Seventh Amendment guarantees, the right to a jury trial in copyright infringement actions for statutory damages. See *Feltner v. Columbia Pictures Television*, 118 S. Ct. 30 (1997) (granting certiorari); *Feltner v. Columbia Pictures Television*, 66 U.S.L.W. 3201 (U.S. Sept. 30, 1997) (presenting questions for review); see also *infra* notes 196-204 and accompanying text (discussing Ninth Circuit's decision of *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir.), *cert. granted sub nom. Feltner v. Columbia Pictures Television*, 118 S. Ct. 30 (1997)).

30. See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (noting "cardinal principle" of Supreme Court review is to begin with examination of statute to determine whether it answers question).

ous.³¹ A study of the statutory language requires: (1) a historical analysis of the evolution of copyright statutes to determine if any continuous congressional intent was transmitted to the present statute and (2) an examination of the actual language of the current statute.³² First, commentators have reached different conclusions as to whether the right to a jury trial existed in earlier enactments and was transmitted to the present statute, leaving historical analysis of past copyright statutes indeterminate. One commentator, William Patry, traces the history of copyright statutes³³ and determines that the 1909 Act's statutory damages provision³⁴ incorporates the right to a jury trial because that section adopted the terms of prior statutes which either provided or implied the right to a jury trial.³⁵ Specifically, Patry argues that Section 25(b)(4) is substantively identical to the 1856 amendments of a previous copyright statute.³⁶ The Supreme Court's recognition of a right to a jury in an adjudication under the 1856 amendments,³⁷ along with the legislative history of Section 25(b)(4) of the 1909 Act which states that it substantially reenacts existing law,³⁸ leads Patry to reason that subsection (4) implies the right to a jury trial.³⁹ He then argues that the right must exist for the entire statutory damages provision because the legislative history does not indicate that courts should treat subsection (4) differently from the rest of Section 25(b).⁴⁰ Patry

31. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (explaining that statutory construction analyzed first and constitutional question addressed only if needed).

32. See Patry, *supra* note 4, at 175, 193-94 (arguing that right to jury trials exists in 1909 and 1976 copyright acts because Congress incorporated language from previous acts, such as Supplementary Act of 1856, in which right to jury was implied).

33. See *id.* at 145-73 (analyzing copyright acts in seventeenth and eighteenth century England and in United States from 1783 through 1897).

34. Copyright Act of 1909 § 25(b), 35 Stat. 1075, 1081 (codified at 17 U.S.C. § 101(b) (1970)), *repealed by* Copyright Act of 1976, 90 Stat. 2541. Section 25(b) contained the first statutory, "in lieu," damages provision in a copyright act. See Stumpff, *supra* note 12, at 1959 (explaining that statutory damages for copyright infringement did not exist prior to 1909).

35. See Patry, *supra* note 4, at 175, 193-94 (arguing that right to jury trials exists in 1909 and 1976 Copyright Acts' statutory damages provisions because when 1909 Act created right to statutory damages it incorporated intact language of previous statutes which provided for right to jury trial).

36. See *id.* at 175 (highlighting that House Report on 1909 Act states that only modification from 1856 amendment was "fixing the damages for an infringing performance of a purely musical composition at \$10").

37. See *id.* (referring to *Brady v. Daly*, 175 U.S. 148, 160-61 (1899)).

38. See *id.* (stating that House Report indicates that 1909 Act is "substantial reenactment of existing law").

39. See *id.* ("Not one word is uttered in the House Report to suggest a change in that right.").

40. See *id.* ("[I]t would be ludicrous to assume that the right [to a jury trial] existed for

concludes that the consistent language used in the 1909 Act and prior statutes evidences in part the right to a jury trial in copyright infringement actions when the plaintiff elects statutory damages.⁴¹

At least one other commentator disagrees with Patry's reasoning. Andrew W. Stumpff reasons that, although all of the copyright acts prior to 1909 included damage provisions, the 1909 Act was the first to present the plaintiff with the option of choosing "statutory damages" in lieu of actual damages.⁴² Stumpff argues that Patry's use of a string of essentially unchanged statutes to demonstrate a statutory right to a jury trial under the 1909 Act ignores the fact that the statutory damages created by the 1909 Act differed substantially from those of earlier statutes.⁴³ Under this reasoning, Patry's argument is irrelevant.⁴⁴ These differing interpretations indicate that a historical analysis of the evolution of copyright statutes may not dispositively answer the question of whether Congress created a right to a jury trial for statutory damages in copyright infringement actions.

Second, the language of the 1909 and 1976 statutes does not conclusively reveal Congress's intent regarding the right to a jury trial. Although the statutory damages provisions of the copyright acts of 1909⁴⁵ and

only [subdivision (4)]. Such a tortured arrangement should be found to exist only with the clearest expression of Congressional intent.").

41. See *id.* at 194 (concluding that 1909 Act did not alter right to jury trial found in prior enactments and that present statute "does not change this either").

42. See Stumpff, *supra* note 12, at 1958-59 (arguing that minimum and maximum damage award provisions in earlier statutes "applied to actual, provable damages, not to a wholly discretionary amount set by the court" and citing statutes to demonstrate that none provided for "in lieu" damages); see also *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369, 370 & n.2 (D. Del. 1990) (noting disagreement between Patry and Stumpff and finding no right to jury trial when plaintiff seeks statutory damages); *Education Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1238 & n.5 (D.N.J. 1987) (noting conflict between Stumpff and Patry).

43. See Stumpff, *supra* note 12, at 1959 n.74 (explaining that Patry ignores fact that "in lieu" damages provided in 1909 Act removed determination of amount received from proof of factual loss which is substantially different from earlier statutes providing minimum and maximum range for damages).

44. See *id.* at 1959 (concluding that pre-1909 history of copyright statutes is of little relevance).

45. Section 25(b) provided, in pertinent part:

That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . [t]o pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . .

Copyright Act of 1909 § 25(b), 35 Stat. 1075, 1081 (codified at 17 U.S.C. § 101(b) (1970)),

1976⁴⁶ differ in organization and detail,⁴⁷ the language each act employs regarding the determination of damages contains two similarities. First, both statutes direct the "court" to award damages as it considers "just."⁴⁸ Some courts have relied on this language to determine that a judge, sitting without a jury, properly hears statutory damages claims.⁴⁹ However, commentators have debated the significance of the word "court" in these statutes and generally have determined this language to be indecisive.⁵⁰ Second, courts

repealed by Copyright Act of 1976, 90 Stat. 2541.

46. Section 504(c) provides, in pertinent part:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than \$500 or more than \$20,000 as the court considers just. . . .

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court if [n] its discretion may reduce the award of statutory damages to a sum of not less than \$200.

17 U.S.C. § 504(c) (1994). The original 1976 Act was identical to the current version except that the damage awards were exactly one-half of the present amounts. *See* Copyright Act of 1976 § 504, 90 Stat. 2541, 2585 (current version at 17 U.S.C. § 504(c) (1994)).

47. *Compare* § 25(b), 35 Stat. at 1081 *with* 17 U.S.C. § 504(b)-(c). The two acts differ in organization in that the 1909 Act provided for actual damages, profits, and statutory damages in one section while the 1976 Act provides for actual damages and profits in Section 504(b). *See supra* notes 45-46 (quoting Section 25(b) of the 1909 Act and Section 504(c) of the 1976 Act). Also, the 1909 Act furnished substantially more detail regarding the amount of statutory damages that courts might award for various types of copyrighted materials while the 1976 Act creates a monetary range applicable for all types of copyright infringements. *Id.*

48. *See supra* notes 45-46 (quoting statutory language).

49. *See* *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (noting that "determination of statutory damages . . . is assigned by statute to the judge rather than the jury"); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (stating that "the issue of 'in lieu' damages is properly addressed to the court, not the jury"). *But see* *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 129 (4th Cir. 1981) ("If anything, the language of section 504(c) enforces rather than detracts from an interpretation requiring a jury trial"); *Mail & Express Co. v. Life Publ'g Co.*, 192 F. 899, 901 (2d Cir. 1912) (finding that statutory language did not preclude jury trial). In *Mail & Express Co.*, the Second Circuit explained:

While the language of the provision quoted is somewhat obscure, we do not think that by the use of the word "court" it is required that the judge acting by himself shall assess the damages We think it the better view that the statute permits him to direct the jury to assess the damages within the prescribed limits.

Id.

50. *See, e.g.*, 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT

and commentators have debated the relevance of the use of the word "discretion" in reference to the "court" in both statutes.⁵¹ At least one court and one commentator have found this language persuasive because the use of discretion traditionally belonged to the judge and did not include the jury.⁵² However, other commentators have argued that the 1976 Act's use of the word "discretion" refers to the court's authority to raise or lower the damage award only upon a finding of willfulness or innocence — a factual determination usually left to the jury.⁵³ Thus, they also have concluded that this language is not dispositive of congressional intent regarding the right to a jury trial.⁵⁴ Therefore, the continuing conflict over the plain meaning of the statutory damages provision does not resolve whether Congress intended to provide for the right to a jury trial.

Because the statutory language does not clearly demonstrate Congress's intent regarding the right to a jury trial, one next must examine the legislative history to see whether it supplies the answer.⁵⁵ Unfortunately, the legislative history does little more than utilize the same confusing terms as the statute itself, without providing definitions for the words or a purpose for their use.⁵⁶

§ 14.04[C] (1997) (recognizing that "court" does not necessarily mean judge without jury, but stating that it is "perhaps the better view"); Patry, *supra* note 4, at 163 (pointing out that "as to the court . . . shall appear to be just" language was first used in 1856 copyright statute and that Supreme Court recognized right to jury trial for claims arising under this statute); Ted J. Feldman, Note, *An Examination of the Right to Jury Trial Where Copyright Statutory Damages are Elected*, 21 HOFSTRA L. REV. 261, 264-69 (1992) (discussing statutory language and concluding it is not dispositive of congressional intent); Nancy J. Niemeier, Comment, *The Right to Trial by Jury in Copyright Infringement Suits Seeking Statutory Damages*, 17 S. ILL. U. L.J. 135, 137, 139-40 (1992) (arguing that use of "court" in Section 504(c) of the 1976 Act leaves determination of right to jury trial unanswered, but suggesting that absence of word "court" in actual damages provision of 1976 Act may indicate congressional intent to treat statutory damages differently).

51. See *supra* notes 45-46 (quoting statutory language).

52. See *Broadcast Music, Inc. v. Papa John's, Inc.*, 201 U.S.P.Q. (BNA) 302, 305 (N.D. Ind. 1979) (finding "discretion" language suggests that judge rather than jury decides statutory damages issues); Niemeier, *supra* note 50, at 140 (explaining that use of "court" and "discretion" provides argument that statute does not provide right to jury trial as judges traditionally exercise discretion).

53. See Patry, *supra* note 4, at 190-91 (arguing that use of word "discretion" does not detract from jury determination of willfulness or innocence); Feldman, *supra* note 50, at 267-68 (arguing that jury decides key issues and judge sets damage amount within statutory range).

54. See Feldman, *supra* note 50, at 262 (arguing language is not dispositive); Niemeier, *supra* note 50, at 139-40 (same).

55. See *supra* note 30 and accompanying text (explaining that examination of statute includes studying its language and legislative history).

56. See H.R. REP. NO. 94-1476, at 161-62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5777-78 ("As a general rule, where the plaintiff elects to recover statutory damages, the court

Thus, it appears that the legislative history of the 1976 Act does not dispositively answer whether Congress intended to create a right to a trial by jury for cases arising under the statutory damages provision.⁵⁷ As a result, a constitutional analysis is necessary to determine whether the Seventh Amendment guarantees such a right.⁵⁸

III. Constitutional Analysis of the Seventh Amendment Right to a Jury Trial in Copyright Statutory Damages Actions

A. The Constitutional Test(s)

The Seventh Amendment preserves the right to a jury trial in federal civil "[s]uits at common law."⁵⁹ As noted, determining whether the Seventh Amendment applies to a given cause of action can be complicated because the merger of law and equity actions in federal courts can make it difficult to ascertain whether a cause of action is legal, and therefore a "sui[t] at common law," or equitable, and therefore beyond the scope of the Amendment.⁶⁰ In *Ross v. Bernhard*,⁶¹ the Supreme Court addressed the issue of whether the Seventh Amendment requires a jury trial in shareholder derivative suits and provided a test for determining whether the Amendment governs a particular cause of action.⁶² In *Ross*, the Court explained that "the nature of the issue to be tried

is obliged to award between \$250 and \$10,000. It can exercise *discretion* in awarding an amount within that range . . ." (emphasis added)).

57. See Wendy K. Breuninger, *Statutory Damages and Right to Jury Trial in Copyright Infringement Suits*, 24 IDEA 249, 250 (1984) (reviewing House and Senate reports and concluding that Congress provided no clear guidance as to its intent regarding this issue).

58. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (explaining that statutory construction analyzed first and constitutional question addressed only if needed).

59. U.S. CONST. amend. VII. Rule 38(a) of the Federal Rules of Civil Procedure reiterates this right by stating that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a).

60. See *supra* notes 4-5 and accompanying text (discussing application of Seventh Amendment as limited to "legal" actions and explaining difficulties created by merger of federal courts of law and equity under FED. R. CIV. P. 18(a)).

61. 396 U.S. 531 (1970).

62. *Ross v. Bernhard*, 396 U.S. 531, 532-33, 538 n.10 (1970) (holding that right to jury trial attaches to issues in derivative actions which would have entitled corporation suing in its own right to jury trial). In *Ross*, the Supreme Court considered whether the Seventh Amendment applies to stockholders' derivative actions. *Id.* at 531. The Court noted that it has construed the Amendment to apply to "suits in which *legal* rights were to be ascertained and determined." *Id.* at 533 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)). However, the Court recognized the difficulty that may sometimes arise in drawing the line between legal and equitable actions. *Id.* (citing *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)). Specifically, a shareholder's action contains two matters: (1) the plaintiff's right to sue on

rather than the character of the overall action" must be legal for the jury trial right to exist.⁶³ The Court provided three criteria that courts should consider in determining whether an issue is "legal" in nature: (1) the premerger custom, (2) the nature of the remedy sought, and (3) the practical limitations of juries.⁶⁴ Although the *Ross* Court examined both the history and the remedy associated with derivative suits, it did not explicitly apply this three-prong test.⁶⁵ As a result, the decision provides no guidance for determining how to utilize this test.

In *Tull v. United States*,⁶⁶ the Supreme Court explained and refined the three-prong *Ross* test.⁶⁷ The Court explained that the first prong requires a

behalf of the corporation (which was historically recognized as a derivative suit brought in equity); and (2) the merits of the corporation claim (which, if it had been a legal claim brought by the corporation itself, would have been recognized by the common law at the time the Seventh Amendment was adopted). *Id.* at 535, 538. Although derivative suits could deal with both equitable and legal issues, a court of equity had to determine the question of the shareholder's right to bring a claim on behalf of the corporation. *Id.* at 535. Therefore, before the merger of law and equity in the federal courts, the prevailing opinion was to hear the entire derivative suit, including legal claims, in equity because no remedy at law existed for the stockholder. *Id.* at 537, 539. However, the Court recognized that due to the merger of law and equity in federal practice, the right to a jury trial for legal claims could not be infringed because the action also contained equitable questions. *Id.* at 538. Instead, the Court declared that the focus of the Seventh Amendment right to a jury trial is the "nature of the issue to be tried rather than the character of the overall action." *Id.* Following this rule, the Court determined that "[t]he heart of the [derivative] action is the corporate claim." *Id.* at 539. The Court reasoned that if the corporate claim presents a legal issue for which the Seventh Amendment would entitle the corporation to a jury trial, this right is not lost merely because the court must first adjudicate the equitable issue of the stockholder's right to sue on behalf of the corporation. *Id.* Specifically, in determining that the underlying claims were legal in nature, the Court looked to the history of corporate claims and found that the common law recognized such claims brought by the corporation itself. *Id.* at 533-34. The Court also noted that the shareholders sought money damages. *Id.* at 542. Finally, the Court established that equity courts heard stockholder derivative suits due to standing in courts of law that the Federal Rules of Civil Procedure altered without affecting the legal nature of the underlying claim. *Id.* at 537-39. As a result, the Court decided that the right to a jury trial exists for those claims in a stockholder's derivative action that historically were considered legal if the corporation itself would have brought them. *Id.* at 542.

63. *Id.* at 538.

64. *See id.* at 538 n.10 (setting out three factors for courts to consider in determining "legal" nature of issue) (citing James, *supra* note 7, at 655). It is important to note that the Court listed these criteria in a footnote of the opinion as factors which it had considered in previous cases to determine the "legal" nature of an issue. *See infra* notes 73-92 and accompanying text (summarizing criticisms of *Ross* test).

65. *See Ross*, 396 U.S. at 533-37, 542 (analyzing history of derivative suits and implying legal nature of money damages).

66. 481 U.S. 412 (1987).

67. *Tull v. United States*, 481 U.S. 412, 417-18, 427 (1987) (concluding that Seventh

comparison of "the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."⁶⁸ Next, the Court stated that for the second prong of the analysis, "we examine the remedy sought and determine whether it is legal or equitable in nature."⁶⁹ Furthermore, the Court called this second prong the "more important" of the two parts of the historical analysis.⁷⁰ Finally, the Court noted that the third prong addressed the applicability of the Seventh Amendment in administrative proceedings and that courts should not use it as an independent basis for finding a right to a jury trial.⁷¹ Thus, after *Tull*, the *Ross* test consists of: (1) a determination of whether the issue or its closest historical analogy was considered "legal" when the Seventh Amendment was ratified in 1791; (2) a classification of the nature of the remedy as either legal or equitable; and, if the nature of the issue and the remedy are found to be historically "legal," (3) a decision of whether the proceeding has been entrusted to an administra-

Amendment guarantees right to jury trial for determination of liability but not for assessment of damages for cases brought under Clean Water Act). In *Tull*, the Supreme Court considered whether the Seventh Amendment applies to cases brought under the Clean Water Act. *Id.* at 414. The Court stated that the proper test is first, to examine the nature of the action by comparing the statutory action to eighteenth century actions in England, and second, to determine the nature of the remedy. *Id.* at 417-18. The Court found that the nature of the action was indeterminate. *Id.* at 420. Specifically, the Court analogized this civil penalty action to both the eighteenth century action in debt, a legal action, and the public nuisance action, an equity action. *Id.* However, the Court applied the second part of the test to conclude that the nature of the remedy was legal. *Id.* at 421, 423. That is, the Court recognized that this case involved a civil penalty that was designed for punishment and not determined by equitable considerations such as profit. *Id.* at 422-23. Such remedies were traditionally enforced in courts of law only. *Id.* However, the Court determined that the assessment of civil penalties by the jury was not constitutionally protected. *Id.* at 426 n.9. Consequently, the Court decided that the Seventh Amendment required a jury trial in this case on the issue of liability but not on the issue of damages. *Id.* at 427.

68. *Id.* at 417.

69. *Id.* at 417-18.

70. *See id.* at 421 (stating view "that characterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial" (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974))).

71. *See id.* at 418 n.4 (discussing third prong of *Ross* test). In addressing the scope of the third prong, the Court stated that it

has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

Id. (citations omitted).

tive agency and thus falls outside of the Seventh Amendment.⁷²

In subsequent cases questioning the right to a jury trial on a particular issue, the Supreme Court has largely followed the basic formulation developed in *Ross* and explained in *Tull*.⁷³ However, both judges and commentators have criticized and challenged the *Ross-Tull* test on two grounds. First, commentators argue that the *Ross* test misinterprets the preservation language of the Seventh Amendment.⁷⁴ In asserting this argument, these commentators have reached different conclusions about the true meaning of the Seventh Amendment. Professor John C. McCoid, II argues that the preservation language of the Seventh Amendment guarantees the right to a jury trial on issues that courts recognized as legal in 1791.⁷⁵ However, he believes that the *Ross* Court did not intend footnote 10 to propose a constitutional test that separates remedy analysis from history, but simply to reflect an understanding of the difficulties involved in applying the historical test.⁷⁶ According to this analysis, the *Ross* test places undue weight on the nature of the remedy, and instead, the

72. See *id.* at 417-18 (discussing interpretation and analysis of Seventh Amendment's "[s]uits at common law" language).

73. See, e.g., *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991) (quoting *Tull* Court's formulation of analysis of applicability of Seventh Amendment to given issue); *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (same); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989) (same). In each of these cases the Court also reiterated the fact that the second inquiry regarding the nature of the remedy was the more important in the analysis. See *Wooddell*, 502 U.S. at 97 (stating that second prong is most important part of analysis); *Terry*, 494 U.S. at 565 (same); *Granfinanciera*, 492 U.S. at 42 (same).

In *Granfinanciera*, the Court also noted that, if the first two factors indicate that the Seventh Amendment entitles the party to a jury trial, the third prong is used to "decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder." *Granfinanciera*, 492 U.S. at 42; see also *Terry*, 494 U.S. at 565 n.4 (explaining that third prong is not independent basis for finding right to jury trial, but is used to determine "whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme." (quoting *Granfinanciera*, 492 U.S. at 42 n.4)); *supra* note 71 (quoting *Tull* Court explanation of third prong). Additionally, the Court noted that the Seventh Amendment applies only to "private rights." *Granfinanciera*, 492 U.S. at 42 n.4.

74. The Seventh Amendment declares that "the right of trial by jury shall be *preserved*." U.S. CONST. amend. VII (emphasis added).

75. See John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 19 (1991) (proposing that preservation language refers to actions tried at law in eighteenth century England).

76. See *id.* at 19 n.26 (discussing purpose of footnote in *Ross* that sets out three-prong test); see also *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (stating that premerger custom prong "requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply").

correct test should be a "comprehensive, but single, historical inquiry."⁷⁷ McCoid explains that the three-prong test only works when the central question focuses on the effect of the merger of law and equity, as it did in the derivative suit issue in *Ross*.⁷⁸ Otherwise, the test bifurcates the historical analysis and causes courts to place too much weight on the nature of the remedy.⁷⁹ Alternatively, McCoid proposes that the proper question should be whether eighteenth century English courts would have tried the matter in equity or at law and, in some cases, whether process changes justify a different result today.⁸⁰ McCoid explains that the law and equity jurisdictions in eighteenth century England differed in substance, remedy, and procedure.⁸¹ Therefore, the remedy question is also an aspect of the premerger custom.⁸² McCoid argues that the *Ross* test adds weight to the nature of the remedy, "obscur[ing] the significance of subject matter and procedure in the historical separation of law and equity," and therefore the test fails to apply the Seventh Amendment correctly.⁸³

In contrast, one commentator argues that the preservation language of the Seventh Amendment does not guarantee a jury trial at all, but merely provides for the possibility of a jury in civil matters by authorizing Congress to pass laws that require jury trials for certain cases.⁸⁴ This commentator argues that the

77. McCoid, *supra* note 75, at 19.

78. *See id.* (criticizing use of *Ross* test and suggesting that test is effective only in cases when effect of merger is at issue).

79. *See id.* (criticizing *Ross* test and suggesting that single historical analysis is correct Seventh Amendment test).

80. *See id.* (arguing that preservation language of Seventh Amendment advocates single historical test).

81. *See id.* at 20 (discussing substantive, remedial, and procedural difference in law and equity in eighteenth century). *But see* *Chaffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 578 (1990) (Brennan, J. concurring) (arguing for pure nature of remedy test and stating that "historically, '[j]urisdictional lines [between law and equity] were primarily a matter of remedy'" (quoting John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theaters, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967))).

82. *See* McCoid, *supra* note 75, at 20 (describing how *Ross* test gives nature of remedy added weight).

83. *See id.* at 20, 28 (concluding that *Ross* test is inappropriate under preservation language of Seventh Amendment). The Supreme Court's own statement that the remedy prong of the test is more important than the premerger custom prong demonstrates the weight placed on the remedy analysis. *See* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (stating that remedy is most important element of test); *Tull v. United States*, 481 U.S. 412, 421 (1987) (same). This statement by the Court demonstrates that the *Ross* test may apply inaccurately the Seventh Amendment guarantee if McCoid is correct in his assertion.

84. *See* Rachael E. Schwartz, "Everything Depends on How You Draw the Lines": *An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599, 603 (1996) (arguing alternative interpretation of Seventh Amendment preservation language).

framers proposed the Seventh Amendment to counter anti-Federalist arguments that the Constitution abolished civil jury trials because Article III provided for jury trials in criminal cases only.⁸⁵ Thus, the commentator claims that the *Ross* test engages in incorrect historical analysis and that the Seventh Amendment guarantees a right to a jury trial only when Congress authorizes it.⁸⁶

Second, certain Supreme Court justices have challenged the first prong's "historical analysis" as both unworkable and irrelevant. Justice Brennan considers the historical analysis unmanageable for three main reasons. First, the *Ross* test itself acknowledges the difficulties involved in performing the historical comparison.⁸⁷ Second, because the line between law and equity is not fixed, the determination of the nature of the issue can rest on differing interpretations.⁸⁸ Third, modern statutory rights often make drawing the historical analogy difficult.⁸⁹ Additionally, Justices Stewart and Brennan have deemed the historical analysis irrelevant because classification of the nature of the issue depends on how one presents it⁹⁰ and because the Supreme Court has stressed the greater importance of the remedy prong in the constitutional analysis.⁹¹ Thus, Justices and commentators still debate the adequacy of the *Ross* test.⁹² Nonetheless, because the Supreme Court has neither explicitly overturned nor inconsistently modified the *Ross* "historical analysis" test, as elaborated in *Tull*, courts must always apply it when determining whether the Seventh Amendment provides for a jury trial on a given issue.

85. See *id.* at 605-06 (discussing Anti-Federalist arguments concerning jury trials).

86. See *id.* at 603-04 (arguing that alternative interpretation provides for more coherent application of Seventh Amendment).

87. See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (stating that historical analysis prong "is obviously the most difficult to apply"); see also *Chaffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 576 (1990) (Brennan, J., concurring) (claiming it is better to leave comparisons between today's causes of action and past ones to legal historians).

88. See *Terry*, 494 U.S. at 576 (Brennan, J., concurring) (stating that "the line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one. There was a continual process of borrowing by one jurisdiction from the other. . . . This led to a very large overlap between law and equity" (quoting James, *supra* note 7, at 658-59)).

89. See *id.* at 577 (Brennan, J., concurring) (arguing difficulties in matching modern statutory rights to historical issues).

90. See *Ross v. Bernhard*, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting) (attacking majority's nature of issue approach by arguing that issues are neither inherently legal nor equitable, but are colored by surrounding circumstances and by way they are presented).

91. See *Terry*, 494 U.S. at 575 (Brennan, J., concurring) (claiming that historical test has little purpose as court has explained that remedy prong is more important).

92. See *id.* at 575 (Brennan, J., concurring) (suggesting that courts use only nature of remedy to perform constitutional analysis of right to jury trial). But see *id.* at 593 (Kennedy, J., dissenting) (arguing for historical test because it supports Seventh Amendment's preservation language); McCoid, *supra* note 75, at 19 (arguing that *Ross* test is incorrect in light of Seventh Amendment's preservation language and that purely historical test is required).

*B. Application of Constitutional Test to Copyright Infringement Actions
When Plaintiff Demands Statutory Damages*

Courts and commentators addressing the question of whether a constitutional right to a jury trial exists in a copyright infringement action when the plaintiff requests statutory damages have applied the *Ross-Tull* test with differing results. They disagree on the conclusion of the historical analysis,⁹³ the nature of the statutory damages remedy,⁹⁴ and the purpose and outcome of the "ability of juries" question.⁹⁵ Therefore, a review of the major arguments presented by each side for each prong of the test is useful in analyzing the Eighth Circuit's opinion and reasoning in *Cass County Music*.

The first prong of the *Ross* test requires a historical analysis of the legal or equitable nature of the issue (or an analogous issue) in the courts of England and the United States in 1791.⁹⁶ When applying this prong to the statutory damages copyright infringement action, proponents of the right to a jury trial have provided two reasons for determining that the nature of the issue is legal. First, commentators have relied on a survey of the history of copyright laws in England and the United States conducted by William Patry in which Patry argues that the current statutory damages provision essentially replicates the copyright cause of action existing in 1791 that litigants brought in courts of law.⁹⁷ Patry traces copyright statutes from English law in 1710 to the United States's present statute to demonstrate a continuous line of legal actions under statutory damages provisions.⁹⁸ Therefore, he argues that the historical test demonstrates the legal nature of the issue.

93. See *infra* notes 96-105 and accompanying text (discussing proponents' and opponents' historical prong analysis conclusions).

94. See *infra* notes 106-18 and accompanying text (providing arguments over legal or equitable nature of statutory damages).

95. See *infra* notes 119-27 and accompanying text (discussing purpose of "ability of juries" prong and commentators views regarding its persuasiveness in determining whether Seventh Amendment right to jury trial exists).

96. See *supra* notes 64, 68 and accompanying text (explaining first prong of *Ross* test).

97. See Patry, *supra* note 4, at 139-94 (tracing history of copyright statutes from eighteenth century England and United States through 1976 Act); see also Feldman, *supra* note 50, at 271-75 (incorporating Patry's research into analysis of first prong to demonstrate legal nature of issue); Niemeier, *supra* note 50, at 142 n.46 (explaining Patry's conclusion that copyright actions for both statutory and actual damages historically have been legal).

98. See Patry, *supra* note 4, at 145-94 (tracing history of copyright acts in United States and concluding that 1976 Act is derived from past copyright acts that were recognized as legal actions). Patry begins with the Statute of Anne of 1710 that provided for damages based on the number of copies and that courts of law hear the cases. *Id.* at 146. Next, Patry illustrates that seven state statutes enacted between 1783 and 1785 (before federal copyright law) provided for actions at law or actions of debt, and of them, two states provided for minimum and maximum damages levels. *Id.* at 150-51. He also demonstrates that the first federal copyright act, enacted

Second, the Fourth Circuit relied on an analogy to the action for tortious interference with a property right, recognized as legal in 1791, to conclude that the first prong of the *Ross* test favors the right to a jury trial.⁹⁹ One commentator defends this analogy as appropriate because "both [actions] protect a right of ownership."¹⁰⁰ Thus, the historical test worked both directly and analogously to label the issue legal.

Nevertheless, opponents of the right to a jury trial dispute both lines of historical analysis. First, Stumpff dismisses Patry's attempt to connect the 1976 Act's statutory damages provision to copyright acts existing in 1791. Stumpff argues that, unlike the present statute and the 1909 Act's "in lieu" damages, any statutorily set minimum and maximum damage measure in previous enactments "applied to actual, provable damages, not to a wholly discretionary amount set by the court."¹⁰¹ Because § 504(a) of the present statute does not correlate damages with factual loss, Stumpff argues that the nature of pre-1791 statutes is irrelevant to the inquiry under the first prong of the *Ross* test.¹⁰² Second, he disputes the significance of the analogy drawn to tortious interference with a property right.¹⁰³ Instead, Stumpff contends that tort actions involving property can be either legal or equitable.¹⁰⁴ Therefore, opponents find the proponents' arguments unpersuasive and, as a result, find the historical analysis prong of the test inconclusive.¹⁰⁵

The second prong of the test focuses on the nature of the remedy.¹⁰⁶ Proponents of the right to a jury trial offer three justifications for designating the remedy as legal. First, they argue that the monetary nature of the damage award makes the remedy quintessentially legal.¹⁰⁷ Second, proponents argue

in 1790 (before ratification of Seventh Amendment), provided for jurisdiction in the legal courts only. *Id.* at 156. Furthermore, Patry notes that equity jurisdiction for copyright actions was permitted in 1856 but that the legal jurisdiction was never repealed. *Id.* at 163-64. Finally, he argues that the 1909 act's "in lieu" damages provision was identical in concept to previous statutes dating back to the 1783 state statutes, which were legal actions, and that the 1976 Act also contained the same concept. *Id.* at 190. Therefore, Patry reasons that the historical analysis demonstrates that copyright infringement statutory damages actions are legal in nature. *Id.* at 194.

99. See *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 120 (4th Cir. 1981) (finding that copyright infringement is tortious interference with property right).

100. Phippen, *supra* note 5, at 806.

101. Stumpff, *supra* note 12, at 1959.

102. See *id.* at 1959 n.74 (explaining Patry's argument).

103. See *id.* at 1960 (finding analogy "unhelpful").

104. See *id.* (noting that copyright actions are example of problem with tort analogy because plaintiff can seek relief of injunction in equity or of damages at law).

105. See *id.* (concluding that "pre-merger history of copyright damages is inconclusive").

106. See *supra* notes 64, 69 and accompanying text (explaining second prong of *Ross* test).

107. See Niemeier, *supra* note 50, at 147 (stating that monetary remedy "smacks of the law

that statutory damages are either compensatory or punitive, both of which are traditionally legal types of remedies.¹⁰⁸ They explain that statutory damages are similar to actual damages, with a minimum amount of recovery provided.¹⁰⁹ Thus, Congress did not develop the statutory damages provision to change the substantive rights of parties in a copyright infringement suit, but created it only to substitute a surrogate damages measure for actual damages when uncertainty precludes proof of the latter.¹¹⁰ Furthermore, proponents argue that statutory damages are punitive in nature because, although the present provision eliminated criminal sanctions, § 504(c)(2) still evidences a punitive intent by providing increased liability for willful infringement.¹¹¹ Third, one court has found the statutory damages provision analogous to an action for debt, a traditional legal remedy.¹¹² As the Supreme Court explained, an action for debt involves "a sum which can readily be reduced to a certainty."¹¹³ Although statutory damages are, by definition, not an exact sum, proponents argue the persuasiveness of this analogy lies in the fact that the statute in question also prescribed limits for the damage award.¹¹⁴ Thus, proponents of the right to a jury trial have proposed several reasons for finding that the remedy involved is legal.

Opponents of the right to a jury trial argue that statutory damages are equitable for two reasons. First, the discretion provided in the statute supports a conclusion that the action is equitable in nature because "[t]he exercise of discretion in setting damages within prescribed limits is a hallmark of equity."¹¹⁵ Second, the statutory damages remedy is restitutionary instead of

side of the court . . . [because] money damages are the quintessential form of legal relief granted by a jury" (internal quotations omitted) (quoting *Educational Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1242 (D.N.J. 1987)); see also Feldman, *supra* note 50, at 277 (referring to *Katzman*); Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1645 (1992) (reviewing DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991)) (explaining that Seventh Amendment preservation of right to jury trial in legal actions includes actions for money damages).

108. See Phippen, *supra* note 5, at 807 (explaining that compensatory damages are legal remedies).

109. See *id.* (discussing legal nature of statutory damages remedy).

110. *Id.*

111. See Niemeier, *supra* note 50, at 148 (discussing punitive nature of statutory damages).

112. See *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 120 (4th Cir. 1981) (finding that remedy is legal).

113. Feldman, *supra* note 50, at 278 (internal quotations omitted) (quoting *Stockwell v. United States*, 80 U.S. 531, 542 (1871)).

114. See *id.* (discussing criticism of analogy based on fact that copyright statutory damages are not "sum certain," but are discretionary).

115. Niemeier, *supra* note 50, at 144 (internal quotations omitted) (quoting *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369, 376 (D. Del. 1990); see also Stumpff, *supra*

punitive or compensatory because it is based on fairness within set statutory limits rather than actual injury.¹¹⁶ Furthermore, even if statutory damages have a punitive element, a judge may determine punitive remedies.¹¹⁷ Stumpff contends that the proponents' argument that § 504(c)(2) demonstrates the punitive nature of statutory damages is logically flawed because, even if subsection (c)(2) has punitive qualities, subsection (c)(1) awards damages without considering any of the punitive quality elements of subsection (c)(2).¹¹⁸

The third prong of the test requires an examination of the complexity of the issue and the jury's ability to understand it.¹¹⁹ The rationale behind this

note 12, at 1962 (arguing that, although statutory damages are monetary, degree of discretion provided in § 504(c) suggests that statutory damages are not legal).

116. See Niemeier, *supra* note 50, at 145 (describing statutory damages as equitable); *cf.* *United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491, 1497 (E.D. Ark. 1997) (stating that CERCLA cost recovery action is restitution and, because restitution is equitable, no right to jury trial exists; assuming restitution is equitable without explanation or analysis). *But see* 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 556 (2d ed. 1993) (explaining that restitution may be either legal or equitable); Rendleman, *supra* note 107, at 1644 ("Restitution wears both legal and equitable garb."). Dobbs explains that restitution claims for money damages are usually legal, while restitution claims requiring some "equitable" judicial action, such as "coercive intervention," are equitable. 1 DOBBS, *supra*, at 556; *see also* Rendleman, *supra* note 107, at 1644-45 (explaining that legal remedies include money judgments and provide for jury factfinding). Thus, simply because damages are not based on actual injury does not mean that they are equitable. Instead, the monetary damage range the statute provides may merely be a legislative estimate of the average plaintiff's damages predetermined for administrative convenience to save the plaintiff from having to prove actual damages at trial.

Furthermore, courts traditionally granted equitable remedies only when legal remedies were inadequate. 1 DOBBS, *supra*, at 58. As a result, if commentators argue that statutory damages are equitable, they must first demonstrate that the legal remedies would have been inadequate (instead of just less convenient or more burdensome for the plaintiff to prove). They cannot simply declare that the restitutionary character of statutory damages makes these damages equitable because restitution may be either legal or equitable. Thus, the argument that statutory damages are restitution and therefore equitable assumes the conclusion that the type of restitution copyright statutory damages grants is equitable, as opposed to legal, without providing the proper support.

117. See Stumpff, *supra* note 12, at 1956 n.55 (citing cases in which punitive remedies were within judge's domain).

118. See *id.* at 1956 (discussing subsections (c)(1)-(2)).

119. See *supra* notes 64, 71 and accompanying text (discussing third prong of test as explained in *Ross* and *Tull*). The purpose of the third prong is unclear. See *supra* note 64 and accompanying text (explaining *Ross* test in which Supreme Court noted that courts should consider practical limitations of juries to understand complex issues in determining whether Seventh Amendment entitles parties to jury trial for specific issue); *see also* Niemeier, *supra* note 50, at 149 n.95 (explaining that Supreme Court apparently created "complexity exception" with third prong but noting that Ninth Circuit has refused to acknowledge such exception to Seventh Amendment because it would be impossible to draw meaningful line between cases that are and are not too complex for jury). *But see* Niemeier, *supra* note 50, at 150 n.100 (noting

prong is that if the issues and facts are too complicated for the jury to understand, the judge is in a better position to guarantee fairness to the parties by trying the case himself.¹²⁰ Courts and commentators, however, have found this prong inconclusive in determining whether a constitutional right to a jury trial exists for copyright infringement actions when the plaintiff seeks statutory damages.¹²¹ Both courts and commentators have decided that copyright infringement issues are not prohibitively complex.¹²² Commentators explain

that complexity issue can only take away right to jury trial, but cannot grant it); Stumpff, *supra* note 12, at 1965 (explaining that third prong works only to limit right to jury trial; court may find no right to jury trial if case is too complex, but if jury can manage issues then issues are also within "grasp" of judge and test is inconclusive); *supra* note 71 and accompanying text (quoting *Tull* Court that Supreme Court has not used third prong as independent basis for finding Seventh Amendment right to jury trial). Furthermore, the Supreme Court has implied that the third prong is relevant only when a dispute exists regarding whether a non-Article III tribunal should properly hear the issue in question. *See Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 565 n.4 (1990) (finding that third prong did not affect analysis of whether Seventh Amendment provided right to jury trial in action for breach of duty of fair representation because no party disputed that Article III court may properly hear such actions). In *Terry*, the Supreme Court explained that the "[third] consideration is relevant only to the determination 'whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.'" *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989)); *see also Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that Supreme Court has used third prong to hold that Seventh Amendment does not apply to administrative proceedings). However, because the Supreme Court has not stated that courts should no longer use the "abilities of juries" consideration in analyzing a Seventh Amendment applicability question, and because other courts and commentators have provided analyses of this prong in addressing the Seventh Amendment issue, this Note would not be complete without a discussion of the third prong as it applies to the Copyright Act's statutory damages provision. *See Educational Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1243 (D.N.J. 1987) (applying third prong in constitutional analysis); *Broadcast Music, Inc. v. Papa John's*, 201 U.S.P.Q. (BNA) 302, 305 (N.D. Ind. 1979) (same); *Feldman, supra* note 50, at 282 (discussing practical limitations and abilities of juries in copyright statutory damages cases); *Niemeier, supra* note 50, at 149-51 (same); *Stumpff, supra* note 12, at 1964-65 (same).

120. *See Feldman, supra* note 50, at 282 (explaining rationale for consideration of ability of juries in Seventh Amendment analysis).

121. *See Educational Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1243 (D.N.J. 1987) (finding that third prong is inconclusive); *Broadcast Music, Inc. v. Papa John's*, 201 U.S.P.Q. (BNA) 302, 305 (N.D. Ind. 1979) (same); *Feldman, supra* note 50, at 282 (same); *Stumpff, supra* note 12, at 1965 (same).

122. *See Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 n.6 (8th Cir. 1996) (noting that issues of liability and damage assessment are within jury's ability in ordinary copyright case); *Katzman*, 670 F. Supp. at 1243 (declaring that copyright infringement issues are no more complex than other issues juries decide); *Papa John's*, 201 U.S.P.Q. (BNA) at 305 (stating that, in instant case, issues are not too complicated for jury); *Feldman, supra* note 50, at 282 (arguing that infringement and damages issues in copyright cases are not prohibitively complex); *Niemeier, supra* note 50, at 150 (noting that although copyright suits involve complex issues, juries decide more complicated issues including hearing securities and antitrust

that juries make factual determinations on infringement issues in cases when the plaintiff seeks actual damages.¹²³ Therefore, one cannot argue that such issues are too complex for juries in statutory damages cases without also affecting the characterization of actual damages cases.¹²⁴ However, finding that an issue is not prohibitively complex does not necessarily make it legal in nature.¹²⁵ Because the complexity prong works only to exclude overly complicated issues, it is not helpful in determining whether noncomplex issues are legal or equitable.¹²⁶ Thus, the third prong is inconclusive in the context of statutory copyright damages.¹²⁷

IV. Courts of Appeals Disagree on the Right to a Jury Trial

A. The Majority View

The federal courts of appeals in five circuits have decided that the parties in a copyright infringement action involving a statutory damages claim have no right to a jury trial.¹²⁸ Two courts have based this decision solely on the

cases and inflicting death penalties and concluding that, in comparison, determining damages within statutory limits does not seem prohibitively complex); Stumpff, *supra* note 12, at 1964-65 (admitting that copyright infringement issues are generally not prohibitively complex). *But see* Niemeier, *supra* note 50, at 150 (suggesting that statutory damages determination may be too complicated for juries because, unlike actual damages cases, when copyright owner elects statutory damages, parties do not offer proof of injury and profits that decision-maker can use as guidance to set damage award).

123. *See* Feldman, *supra* note 50, at 268 (noting that juries properly decide critical infringement issues in copyright cases involving actual damages); Stumpff, *supra* note 12, at 1965 (stating that courts have always considered suits for actual damages legal).

124. *See* Stumpff, *supra* note 12, at 1965 (arguing that one cannot use third prong to determine that statutory damages are equitable without also deciding that actual damages are equitable).

125. *See* Feldman, *supra* note 50, at 282 (explaining that third prong is unclear as to whether issues within competence of both judge and jury are legal or equitable); Stumpff, *supra* note 12, at 1965 (explaining that third prong works only to limit right to jury trial – if issue is too complex for jury, third prong requires that issue is equitable, but if issue is within competence of jury, third prong does not affirmatively make issue legal).

126. *See* Feldman, *supra* note 50, at 282 (explaining that third prong is unclear as to whether issues within competence of both judge and jury are legal or equitable); Stumpff, *supra* note 12, at 1965 (same).

127. *See* Feldman, *supra* note 50, at 282 (arguing that third prong of *Ross* test is inconclusive); Stumpff, *supra* note 12, at 1965 (same).

128. *See* *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852 (11th Cir. 1990) (following Fifth Circuit by stating that "no constitutional or statutory right to a jury trial" exists); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (finding that statute assigns determination of statutory damages to judge); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. May 1981) (finding no constitutional or statutory right to jury trial); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (explaining that judge, not jury, properly addressed "in lieu" damages); *Chappell & Co.*

statutory language of either the 1909 Act or the 1976 Act.¹²⁹ In *Sid & Marty Krofft Products Television Prods. v. McDonald's Corp.*,¹³⁰ the Ninth Circuit held that, under the 1909 Act, once the plaintiffs have had an opportunity to prove actual profits, both the decision to award "in lieu" damages and the amount of such a damages award is within the court's discretion.¹³¹ Because the Act directed the court to use its discretion in determining whether statutory damages should be awarded "in lieu" of actual damages and profits, the Ninth Circuit determined that the decision to award statutory damages belongs to the judge and not the jury.¹³² Thus, the court based its decision that the parties were not entitled to a jury determination of the statutory damages issue solely on an interpretation of the plain language of the 1909 Act.¹³³

Two criticisms of the *Krofft* decision are (1) that the court's statutory language analysis is not applicable to the 1976 Act¹³⁴ and (2) that the case is

v. Palermo Cafe Co., 249 F.2d 77, 81 (1st Cir. 1957) (finding that because statutory damages provision invoked equity jurisdiction, no right to jury trial existed); *see also* Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 292-93 (9th Cir.) (finding no statutory or constitutional right to jury trial), *cert. granted sub nom.* Feltner v. Columbia Pictures Television, 118 S. Ct. 30 (1997).

129. *See* *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (declaring that 1976 Act assigns determination of all statutory damages, including increased penalties for willful infringement, to judge and not to jury); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (holding that 1909 Act provides that judge determines statutory damages).

130. 562 F.2d 1157 (9th Cir. 1977).

131. *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (holding that, under 1909 Act, once plaintiffs have had opportunity to prove actual profits, court should determine propriety of awarding "in lieu" damages in instant situation and that statutory damages award is within court's discretion). In *Krofft*, the court considered whether the district court erred in refusing to exercise its discretion to hear testimony on the issue of the applicability of statutory, "in lieu," damages after the dismissal of the jury. *Id.* The *Krofft* court reversed the district court on the basis that "in lieu" damages are within the judge's domain and thus not properly addressed to the jury. *Id.* The *Krofft* court reasoned that Section 101(b) expressly stated that the court should use its discretion to award statutory damages within the prescribed limits. *Id.* Furthermore, the statute directed the court, not the jury, to use its judgment to determine a "just" measure of damages in a given case. *Id.* (quoting *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)). Thus, the *Krofft* court found that the language of Section 101(b) placed the decision to award statutory damages in a given case in the judge's discretion. *Id.*

132. *See id.* (finding that statutory language calls for judicial discretion in determining whether given situation warrants statutory damages award).

133. *See id.* at 1177 n.5 (quoting Section 101 and relying on statute's "discretion" and "just" language to find that jury plays no role in determining whether statutory damages should be awarded "in lieu" of actual damages).

134. *See* *Feldman*, *supra* note 50, at 261-62 & n.6 (noting differences in statutory language of 1909 and 1976 Acts); *Niemeier*, *supra* note 50, at 136 (noting that decisions based solely on statutory language are complicated because of differences in 1909 and 1976 Acts).

not authoritative because it failed to provide a constitutional analysis of the issue.¹³⁵ First, because the language and meaning of 1976 Act differ from the 1909 Act, the *Krofft* court's decision does not apply to the 1976 Act. The *Krofft* court based its decision that the statute did not provide for the right to a jury trial on the explicit use of the word "discretion" in Section 101(b) of the 1909 Act.¹³⁶ However, Section 504(c)(1) does not contain any reference to the court's discretion.¹³⁷ Furthermore, Section 101(b) gave the court the power to use its discretion to determine whether the facts of the case required an award of statutory damages instead of actual damages and profits, but Section 504(c) clearly states that the copyright owner may elect statutory damages instead of actual damages.¹³⁸ Thus, because the 1976 Act no longer places the decision to seek statutory damages in the court's discretion, the reasons for the *Krofft* court's finding that the judge must decide issues of statutory damages are inapplicable to the 1976 Act.¹³⁹

Second, although the *Krofft* court determined that the statute did not provide for a jury trial, the court failed to address whether the Seventh Amendment guarantees this right.¹⁴⁰ Regardless of whether a statute does or does not

135. See 2 PAUL GOLDSTEIN, COPYRIGHT § 14.6 (2d. ed. 1996) (noting that early cases are not dispositive because they failed to consider constitutional question of whether statutory damages are legal or equitable); Patry, *supra* note 4, at 188 (criticizing *Krofft* decision for its "sparse analysis" and questioning whether it even addressed constitutional issue).

136. See *Krofft*, 562 F.2d at 1177 (deciding that 1909 Act's explicit direction of court's use of discretion to determine propriety of "in lieu" damages in individual case takes issue from jury).

137. See Phippen, *supra* note 5, at 805 (distinguishing *Krofft* from *Gnossos* on basis that *Krofft* court decided that 1909 Act's "discretion" language required "court" to use equitable powers so therefore judge decides statutory damages issue but explaining that 1976 Act does not contain same "discretion" language); *supra* note 46 (quoting Section 504(c)(1) of 1976 Act). *But see* Feldman, *supra* note 50, at 261 n.6 (noting that § 504(c)(2) does refer to court's discretion but explaining that reference pertains to court's authority to increase or decrease statutory limits based on finding of willfulness or innocence).

138. Compare *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231-32 (1952) (explaining that Section 101(b) gives court discretion to choose between computed (actual) damages and imputed (statutory) damages based on situation presented in individual case) with *supra* note 46 (quoting Section 504(c) of 1976 Act: "the copyright owner may elect, at any time before judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages").

139. See *supra* note 131 and accompanying text (explaining *Krofft* court's justification for finding that judge must decide statutory damages issues because statute directs judge to use discretion to choose between actual and "in lieu" damages). *But see* *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 293 (9th Cir.) (finding *Krofft* rationale applicable to Section 504 because both statutes provide for damages "as the court considers just," but not addressing differences in statutes regarding who elects statutory damages or how "discretion" language relied on in *Krofft* may apply to 1976 Act), *cert. granted sub nom. Feltner v. Columbia Pictures Television*, 118 S. Ct. 30 (1997).

140. See Stumpff, *supra* note 12, at 1953 n.24 (arguing that because *Krofft* was purely stat-

grant a jury trial, the Supreme Court has stated that the Seventh Amendment requires a jury trial on demand for statutorily created legal rights and remedies.¹⁴¹ Congress cannot take away a constitutional right by statutory enactment.¹⁴² Therefore, the *Krofft* court's analysis is faulty and incomplete because it decided the jury trial issue solely on the language of the statute, without addressing the legal or equitable nature of the action. The *Krofft* court denied the constitutional right to a jury trial based not on constitutional analysis but on congressional intent as evidenced by statutory language.¹⁴³

In *Oboler v. Goldin*,¹⁴⁴ the Second Circuit found that the 1976 Act assigns the determination of statutory damages to the judge.¹⁴⁵ In dicta, the court presented the different remedies for infringement under the 1976 Act.¹⁴⁶ Without any explanation, the court declared that Section 504(c) assigns the determination of statutory damages to the judge.¹⁴⁷ Therefore, the court expressed its opinion that the statutory language of the 1976 Act precluded a jury trial for the statutory damages issue.¹⁴⁸

utory decision, court implicitly held that Seventh Amendment has no application to statutory damages).

141. See *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (applying Seventh Amendment to statutorily created rights and remedies that are legal and enforceable in ordinary courts of law); see also *Feldman*, *supra* note 50, at 269 (explaining that irrespective of congressional intent, Seventh Amendment requires jury trial for legal actions).

142. See *Niemeier*, *supra* note 50, at 140 (stating that Congress cannot take away right to jury trial for legal rights by statutory enactment).

143. See *supra* notes 130-33 and accompanying text (discussing *Krofft* court's reasoning for denying right to jury trial); see also *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1177 (9th Cir. 1977) (analyzing issue and failing to discuss its legal or equitable nature); *Patry*, *supra* note 4, at 188 (criticizing *Krofft* and implying that court failed to address Seventh Amendment claim).

144. 715 F.2d 211 (2d Cir. 1983).

145. *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (declaring that statute assigns determination of all statutory damages, including increased penalties for willful infringement, to judge and not to jury). In *Oboler*, the Second Circuit addressed an appeal from a district court's directed verdict on liability and the award of damages. *Id.* at 212. After affirming the directed verdict as to liability, the court vacated the directed verdict on damages because it determined that this decision should not have been taken from the jury. *Id.* In remanding the damages issue, the court explained that the plaintiffs could either elect statutory damages or have a new trial on the issue of actual damages. *Id.* at 212-13. The *Oboler* court summarily stated that § 504(c) assigned the determination of statutory damages to the judge and not to the jury. *Id.* at 213. Thus, the Second Circuit determined that if the plaintiffs elected statutory damages, a new trial would not be necessary because the statutory construction does not provide for a right to a jury trial. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

The *Oboler* rationale is weak because (1) the finding that the judge decides statutory damages is conclusory and without reasoning or precedential support¹⁴⁹ and because (2) the court found the statute definitive and failed to perform a constitutional analysis.¹⁵⁰ First, the Second Circuit simply declared, without even pointing to the exact language that supports its finding, that the statute authorized the judge to determine statutory damages.¹⁵¹ Instead, the court merely cited Sections 504(c)(1) and (2).¹⁵² Apparently, the court believed that the statutory language was clear on this point.¹⁵³ Because Section 504(c)(1) does not explicitly state that the judge decides statutory damages, the Second Circuit's lack of explanation is remarkable.¹⁵⁴ Furthermore, the court failed even to mention an earlier Second Circuit case, *Mail & Express Co. v. Life Publishing Co.*,¹⁵⁵ which held that the jury determined the statutory damages issue.¹⁵⁶

149. See Stumpff, *supra* note 12, at 1952 n.23 (criticizing *Oboler* court for failing to analyze question adequately and for providing no explanation or support for its finding).

150. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 639 (8th Cir. 1996) (discussing *Oboler* decision and noting court's failure to perform constitutional analysis); see also 2 GOLDSTEIN, *supra* note 135, § 14.6 (noting that early cases are not dispositive because they failed to consider constitutional question of whether statutory damages are legal or equitable).

151. See *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (deciding statute provides for judge to determine statutory damages but failing to cite any specific language that supports conclusion).

152. See *id.* (citing entire Section 504 as support for decision that Section 504 assigns determination to judge without explaining citation). Because the statute does not explicitly state that the judge decides the statutory damages issue, the court's failure to explain its statutory language analysis makes it difficult to understand the basis for its conclusion. See *supra* note 46 (quoting Section 504(c)). Furthermore, although the court also cited *Nimmer On Copyright* for additional support that this decision was "the better view," this citation still does not explain how the statutory language places the decision in the hands of the judge instead of the jury. See *id.*; see also 4 NIMMER & NIMMER, *supra* note 50, § 14.04[C] (recognizing that "court" does not necessarily mean judge without jury, but stating that it is "perhaps the better view" without providing textual support for conclusion). Therefore, not only does the court fail to provide the analysis to explain its decision, the sources it cites also add little to our understanding of the statutory construction of Section 504(c).

153. See *Oboler*, 714 F.2d at 213 (providing no discussion of alternative interpretations of statutory language); see also *Cass County Music*, 88 F.3d at 639 (determining that *Oboler* court apparently found statutory construction determinative of issue).

154. See *supra* note 46 (quoting Section 504(c)).

155. 192 F. 899 (2d Cir. 1912).

156. *Mail & Express Co. v. Life Publ'g Co.*, 192 F. 899, 901 (2d Cir. 1912) (finding that 1909 Act permits jury assessment of statutory damages is "better view"). In *Mail & Express*, the Second Circuit considered whether, under the 1909 Act, the judge had the authority to direct the jury to award at least \$250 (the statutory minimum) in damages. *Id.* at 900. In analyzing the statute, the *Mail & Express* court determined that the language was "somewhat obscure." *Id.* at 901. However, in focusing on the word "court" in the provision, the *Mail & Express* court found that this language did not require the judge without the jury to assess statutory damages. *Id.* Instead, the court determined that the statute permitted jury assessment of such damages and stated that this was the "better view." *Id.*

In *Mail & Express*, the Second Circuit determined that, although the statutory language was somewhat unclear, the statute's reference to the "court" did not require the judge to assess the statutory damages.¹⁵⁷ Although the *Mail & Express* court made its finding based on the 1909 Act, the 1976 Act incorporated the statutory language referring to the word "court."¹⁵⁸ Therefore, based on the Second Circuit's earlier interpretation, the language of Section 504(c) is, at the least, ambiguous. In light of this earlier ruling, the *Oboler* court's failure to cite the exact language in the statute that it relied upon and its failure to discuss and to distinguish *Mail & Express* demonstrates the weakness of the opinion. Finally, although the *Oboler* court cited a Fourth Circuit case that had reached the opposite decision, it failed to provide a detailed analysis of the issue to explain why its decision, and not the Fourth Circuit's, was correct.¹⁵⁹ Thus, the *Oboler* court's cursory treatment of the issue renders its statutory language analysis unpersuasive.

Second, the *Oboler* court failed to address the question of whether a Seventh Amendment right to a jury trial exists for a statutory damages claim in copyright infringement actions independent of any statutorily created right.¹⁶⁰ Instead, the court based its decision that no right exists entirely on the statutory language.¹⁶¹ Therefore, like the *Krofft* decision, *Oboler* is not definitive law because the Second Circuit did not perform a separate constitutional analysis of the issue.¹⁶²

The three other circuits that have found no right to a jury trial have based their decisions on both the statutory language and the Seventh Amendment.¹⁶³

157. See *id.* (asserting belief that "court" does not necessarily mean judge acting by himself).

158. Compare *supra* note 45 (quoting Section 25(b) of 1909 Act which states that damages shall be determined "as to the court shall appear to be just") with *supra* note 46 (quoting Section 504(c) of 1976 Act which provides that damages shall be awarded within statutory limits "as the court considers just").

159. See *infra* notes 213-28 and accompanying text (discussing Fourth Circuit case dealing with statutory damages under Section 504(c) and right to jury trial).

160. See *Oboler v. Goldin*, 714 F.2d 211, 212-13 (2d Cir. 1983) (determining that no right to jury trial exists for statutory damages issue but failing even to mention Seventh Amendment); see also *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 639 (8th Cir. 1996) (discussing *Oboler* decision and noting failure to perform constitutional analysis).

161. See *Oboler*, 714 F.2d at 213 (deciding that statute assigns determination of statutory damages to judge and not to jury); see also *Cass County Music*, 88 F.3d at 639 (concluding that *Oboler* court found statute definitive on issue of right to jury).

162. See *supra* notes 140-43 and accompanying text (explaining that Congress cannot take away constitutional right to jury trial by statutory enactment and arguing that *Krofft* analysis is faulty and incomplete because court ruled that no right to jury trial exists based only on statute's language only).

163. See *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852 (11th Cir. 1990) (following Fifth Circuit by finding no constitutional or statutory right to jury

In *Chappell & Co. v. Palermo Cafe Co.*,¹⁶⁴ the First Circuit found that neither the 1909 Act nor the Seventh Amendment guaranteed the right to a jury trial on the statutory damages issue.¹⁶⁵ The court first stated that it believed the statute clearly did not provide for a jury trial for statutory damages.¹⁶⁶ Second, the court recognized that the statute alone could not deny a jury trial when the Seventh Amendment guarantees one.¹⁶⁷ However, in *Palermo* the court determined that no distinction existed between actual and statutory damages because both were "incidental" to the equitable relief requested, and as a result, the entire case was equitable and triable by a judge.¹⁶⁸ Furthermore, the court found that a subsequent Supreme Court decision implied that only judicial discretion could achieve the flexibility necessary to award statutory damages.¹⁶⁹

trial); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. May 1981) (stating that entire case is equitable under *Ross* and therefore no constitutional or statutory right to jury trial exists); *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 81 (1st Cir. 1957) (finding that because statutory damages provision invoked equity jurisdiction no constitutional or statutory right to jury trial exists).

164. 249 F.2d 77 (1st Cir. 1957).

165. *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 80-81 (1st Cir. 1957) (finding that statute does not provide for right and determining that no constitutional right exists because Section 101(b) creates equitable claim). In *Palermo*, the court considered whether the defendant had the right to request a jury trial in a copyright infringement case when the plaintiff sought both an injunction and the statutory damages minimum. *Id.* at 79-80. First, the court quoted Section 101(b) and concluded, without explanation, that based on the statute, the defendant had no right to a jury trial. *Id.* at 80. However, the court recognized that this reasoning was incomplete because it still must consider whether the Seventh Amendment guarantees the right to a jury trial when the plaintiff requests statutory damages. *Id.* Turning to the constitutional issue, the *Palermo* court explained that the right to a jury trial exists only for actions at law and not for suits in equity. *Id.* Furthermore, the court recognized that, if damages are "incidental" to the equitable relief requested, the judge may decide the entire complaint using his equity jurisdiction. *Id.* at 81. In this case, the court explained that the statutory damages were "incidental" to the prayer for injunction and as a result the judge could determine both issues. *Id.* at 81-82. Specifically, the court reasoned that a claim for damages that are by nature a penalty is not incidental to an equitable claim. *Id.* at 82. However, because Section 101(b) specifically states that statutory damages are not punitive, the court determined that they were incidental to the injunction request. *Id.* Consequently, the court found that the complaint invoked equity jurisdiction and thus no constitutional right to a jury trial exists. *Id.* at 81.

166. *See id.* at 80 (declaring that if statute was only source at issue, defendant would have no right to jury trial).

167. *See id.* (explaining that FED. R. CIV. P. 38(a) protects Seventh Amendment right to jury trial and also requires constitutional test on issue).

168. *See id.* at 81-82 (finding that statutory damages are not punitive and therefore are incidental to injunction request so that entire case could be heard by court sitting in equity without jury); *see also* Niemeier, *supra* note 50, at 147 n.81 (discussing "incidental" rationale).

169. *See id.* at 82 (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) in which Supreme Court discussed need for judicial discretion in determining issues under Section 101(b)).

Thus, the court concluded that no right to a jury trial existed for statutory damages in copyright cases.¹⁷⁰

Both the incidental relief and the flexibility rationale of *Palermo* are unpersuasive in answering the question of whether a right to a jury trial exists. First, although the court's characterization of statutory damages as incidental was sufficient to find that no constitutional right existed when it decided *Palermo*, a subsequent Supreme Court ruling found that courts cannot impinge upon the right to a jury trial for legal issues by characterizing the issue as "incidental" to an equitable claim.¹⁷¹ As a result of this ruling, another court argued that the *Palermo* decision now actually supports the position that all copyright damages, including statutory, are legal and require a jury trial.¹⁷² Second, the *Palermo* court misread the Supreme Court decision on which it relied to find that awarding statutory damages required judicial and not jury discretion.¹⁷³ The Supreme Court decision did not address the issue of the right to jury trial, but instead considered the judge's authority to hear evidence by the defendant regarding profits when the plaintiff sought only statutory damages.¹⁷⁴ Furthermore, the Supreme Court's discussion of flexibility and discretion related to the court's right under Section 101(b) to choose between statutory and actual damages in a given case.¹⁷⁵ The 1976 Act, however, expressly gives this election to the copyright owner instead of the court. Thus, one cannot apply the *Palermo* court's reasoning to the 1976 Act.¹⁷⁶ Therefore, subsequent court decisions and statutory revisions preclude the *Palermo* decision from being dispositive on the issue of a constitutional or statutory right to a jury trial.

In *Twentieth Century Music Corp. v. Frith*,¹⁷⁷ the Fifth Circuit determined that no constitutional or statutory right to a jury trial exists for damages sought

170. See *id.* at 81-82 (finding that claims fall within court's equity jurisdiction).

171. See *Dairy Queen v. Wood*, 369 U.S. 469, 472-73 (1962) (finding that court cannot deny Seventh Amendment right to jury trial for legal claims by finding that they are "incidental" to equitable claims joined in same complaint); see also 2 GOLDSTEIN, *supra* note 135, § 14.6 (arguing that cases relying on "incidental" rationale are no longer dispositive as result of *Dairy Queen* decision); Patry, *supra* note 4, at 183-84 (discussing *Dairy Queen* decision).

172. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 639 (8th Cir. 1996) (pointing out that *Palermo* court refused to recognize distinction between actual and statutory damages and arguing that because actual damages are legal, statutory damages must be legal also).

173. See Patry, *supra* note 4, at 181 (challenging *Palermo* court's reading of *Woolworth*).

174. See *id.* (claiming that part of *Woolworth* on which *Palermo* court relied dealt with presentation of evidence of profits and not right to jury trial).

175. See *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233-34 (1952) (finding that statute empowers court to use discretion to determine if proven profits and damages or estimated damages within statutory limits are more just in given case).

176. See *supra* note 46 (quoting Section 504(c) of 1976 Act); *supra* note 138 and accompanying text (demonstrating that 1976 Act affects authoritative value of *Woolworth* findings).

177. 645 F.2d 6 (5th Cir. May 1981).

under Section 504(c) of the 1976 Act.¹⁷⁸ In this very brief opinion, the court did not find the right to a jury trial question difficult to address.¹⁷⁹ Referring entirely to case citations for support of its conclusion, the court simply declared that the entire case was equitable, and thus, the defendants did not have a right to a jury trial.¹⁸⁰

The *Twentieth Century* opinion contains flaws both because the court fails to provide any analysis¹⁸¹ and because the cases the court cites for support have weaknesses and application problems.¹⁸² The *Twentieth Century* court disposed of the question of the right to a jury trial in a single paragraph.¹⁸³ This paragraph merely asserts that the answer to the question is simple and contains only the conclusion that the court reaches.¹⁸⁴ The court provided no analysis of either the statutory construction or the constitutional issue in its strictly conclusory decision.¹⁸⁵ Instead, it simply cited cases to support the conclusion that no right to a jury trial exists.¹⁸⁶ If one assumes that the Fifth Circuit adopted the analyses presented in these cases as its own, the *Twentieth Century* decision

178. *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. May 1981) (per curiam) (concluding that entire case is equitable and thus defendant had no statutory or constitutional right to jury trial). In *Twentieth Century*, the court considered whether a defendant could request a jury trial in a copyright infringement case when the plaintiff sought an injunction and minimum statutory damages. *Id.* at 7. The court stated that the question was a simple one. *Id.* Specifically, providing merely case citations for support, the court simply declared that the whole case was equitable without explaining its analysis of the issue. *Id.* Consequently, the court found that no constitutional right to a jury trial exists for a statutory damages claim. *Id.*

179. *See id.* ("This appeal seems to present very simple questions.").

180. *See id.* (providing no analysis of issues but citing *Ross v. Bernhard*, 396 U.S. 531 (1970); *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957); and *Broadcast Music, Inc. v. Papa John's Inc.*, 201 U.S.P.Q. (BNA) 302 (N.D. Ind. 1979) to support its conclusion).

181. *See Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 640 (8th Cir. 1996) (arguing that Fifth Circuit reached conclusion without real analysis); Breuninger, *supra* note 57, at 254-55 (noting that *Twentieth Century* court simply cited cases decided under 1909 Act and found them to be adequate precedent); Patry, *supra* note 4, at 191 (criticizing *Twentieth Century* for its sparse decision); Stumpff, *supra* note 12, at 1952 n.23 (noting that *Twentieth Century* confined analysis to list of case citations).

182. *See Twentieth Century*, 645 F.2d at 7 (citing *Palermo*, 249 F.2d at 78); *supra* notes 166-76 and accompanying text (discussing problems with *Palermo* opinion).

183. *See Twentieth Century*, 645 F.2d at 7 (addressing issue and stating conclusion in one short paragraph).

184. *See id.* at 7 (asserting simplicity of question presented and declaring conclusion that no constitutional or statutory right to jury trial exists).

185. *See id.* (citing *Ross v. Bernhard*, 396 U.S. 531 (1970), but failing to apply any constitutional analysis); *see also Cass County Music*, 88 F.3d at 640 (arguing that Fifth Circuit reached conclusion without real analysis)

186. *See Twentieth Century*, 645 F.2d at 7 (citing *Ross v. Bernhard*, 396 U.S. 531 (1970); *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 78 (1st Cir. 1957); and *Broadcast Music, Inc. v. Papa John's, Inc.*, 201 U.S.P.Q. (BNA) 302 (N.D. Ind. 1979) to support conclusion).

also incorporates the weaknesses of these other cases. In other words, in citing *Palermo* as authority, the *Twentieth Century* decision faces the same criticisms as the First Circuit's opinion.¹⁸⁷ Additionally, the *Twentieth Century* court relied on a district court decision. This district court opinion provided limited support because it involved the 1909 Act, not the 1976 Act which governed the *Twentieth Century* case.¹⁸⁸ The district court opinion relied on the finding that Section 101(b) created an equitable remedy because the statute gave the court discretion to decide whether to award actual or statutory damages, which the court saw as a codification of traditional equitable powers.¹⁸⁹ However, as discussed previously, the 1976 Act gives the plaintiff, not the court, the power to elect statutory damages.¹⁹⁰ Therefore, the district court's analysis does not apply to the 1976 Act, and the Fifth Circuit should have independently analyzed the relevant issues instead of simply citing other courts' opinions.

In *Cable/Home Communication Corp. v. Network Products, Inc.*,¹⁹¹ the Eleventh Circuit held that defendants are entitled to neither a jury nor a bench trial on the statutory damages issue, provided that the court permits the parties to submit supporting evidence.¹⁹² In reaching this holding, the court followed the former Fifth Circuit's decision in *Twentieth Century* which found no statutory or constitutional right to a jury trial.¹⁹³ Although it was reasonable for the Eleventh Circuit to follow the former Fifth Circuit,¹⁹⁴ in so doing, the criti-

187. See *supra* notes 171-76 and accompanying text (discussing weaknesses of *Palermo*).

188. See *Twentieth Century*, 645 F.2d at 6 (citing 1976 Act); *Papa John's*, 201 U.S.P.Q. (BNA) at 303, 306 (deciding no right to jury trial for statutory damages case brought pursuant to 1909 Act).

189. See *Papa John's*, 201 U.S.P.Q. (BNA) at 305-06 (finding that nature of remedy was equitable because § 101(b) gives court authority to award either actual or statutory damages at its discretion).

190. See *supra* notes 138, 176 and accompanying text (comparing differences in 1909 and 1976 Act as to who elects statutory damages); see also notes 45-46 (providing text of 1909 and 1976 Acts).

191. 902 F.2d 829 (11th Cir. 1990).

192. *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852-53 (11th Cir. 1990) (holding that defendants are not entitled to either jury or bench trial in copyright infringement case seeking statutory damages provided that parties submit evidence to court). In *Cable/Home*, the court considered whether the defendants were entitled to a jury trial on the issue of statutory damages. *Id.* at 852. The court quickly dispensed with this question by relying on *Twentieth Century's* holding that there is neither a statutory nor constitutional right to a jury trial on this matter (which the former Fifth Circuit decided before it split into the present Fifth and Eleventh Circuits). *Id.* at 852-53. Consequently, the *Cable/Home* court held that, if the parties were entitled to submit all their supporting evidence to the court, neither the statute nor the Seventh Amendment allows the defendants either a bench or jury trial. *Id.* at 853.

193. See *id.* at 852 (following *Twentieth Century* decision).

194. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 640 (8th Cir. 1996) (noting that Eleventh Circuit would follow former Fifth Circuit).

cisms of *Twentieth Century* necessarily apply to *Cable/Home*.¹⁹⁵

The Ninth Circuit addressed the right to a jury trial under the 1976 Act¹⁹⁶ in *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*¹⁹⁷ The court performed a constitutional analysis and found no Seventh Amendment right to a jury trial because the award of statutory damages is equitable in nature.¹⁹⁸ In *Columbia Pictures*, the court found the 1976 Act sufficiently analogous to the 1909 Act to rely on the *Krofft* decision to determine that the statute did not provide for the right to a jury trial.¹⁹⁹ However, unlike *Krofft*, the *Columbia Pictures* court also considered whether the Seventh Amendment required a jury trial on the statutory damages issue.²⁰⁰ The court's constitutional analysis of this question relied exclusively on citations of decisions of other courts which concluded that no statutory or constitutional right exists because statutory damages are equitable.²⁰¹ However, the *Columbia Pictures* decision adds little to the debate concerning whether the nature of the remedy is equitable or legal; the court's analysis of this question consists merely of its conclusion.²⁰² The court simply cites cases both for and against its decision that

195. See *supra* notes 181-90 (discussing weaknesses of *Twentieth Century*).

196. The Ninth Circuit had previously determined that no right to a jury trial existed for copyright infringement actions involving statutory damages under the 1909 Act. See *supra* notes 130-43 and accompanying text (discussing *Krofft* in which Ninth Circuit rested its decision that no right to jury trial existed solely on statutory construction of 1909 Act).

197. 106 F.3d 284 (9th Cir. 1997).

198. *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 293 (9th Cir.) (finding no Seventh Amendment right to jury trial because statutory damages are equitable), *cert. granted sub nom. Feltner v. Columbia Pictures Television*, 118 S. Ct. 30 (1997). In *Columbia Pictures*, the court considered whether either the statute or the Seventh Amendment provided for a jury trial on the statutory damages issue. *Id.* at 292-93. First, in deciding the statutory question, the *Columbia Pictures* court relied on the circuit's past findings in *Krofft*. *Id.* Specifically, the *Columbia Pictures* court found that although the *Krofft* decision was made under the 1909 Act, its analysis applied to the 1976 Act because the relevant language was the same. *Id.* at 293. The court determined that, although the 1976 Act assigned the election of statutory damages to the plaintiff, the *Krofft* court's rationale on the statutory construction still applied. *Id.* The *Columbia Pictures* court reasoned that had Congress wished to overrule the *Krofft* court's decision, it would have changed the statutory language in the 1976 Act. *Id.* Second, in addressing the constitutional question, the court determined that the statutory damages remedy was equitable. *Id.* However, the court did not explain this finding, but merely cited other court cases both for and against its position. *Id.* Consequently, the *Columbia Pictures* court found that the Seventh Amendment was not applicable to copyright statutory damages issues. *Id.*

199. *Id.* at 292-93.

200. *Id.* at 293.

201. *Id.* (stating that court agrees with cases finding no constitutional right to jury trial because remedy is equitable and citing cases both for and against position).

202. See *id.* (failing to provide explanation for conclusion that statutory damages are equitable remedy); see also *supra* notes 106-18 and accompanying text (discussing debate over nature of statutory damages remedy).

statutory damages are equitable, without explaining the merits of its position or the problems with the opposition's view.²⁰³ Therefore, like the *Twentieth Century* decision, the constitutional analysis provided by the *Columbia Pictures* court is conclusory.²⁰⁴

In conclusion, five circuits have decided that neither a statutory nor constitutional right to a jury trial exists in a copyright infringement suit when the plaintiff elects statutory damages.²⁰⁵ Yet, as the above discussion demonstrates, five major criticisms undermine the persuasiveness and validity of those courts of appeals' decisions. First, two courts decided their cases under the 1909 Act, rendering the application of these analyses to the 1976 Act questionable because, although the 1909 Act gave the court discretion to decide whether to award actual or statutory damages, the 1976 Act assigns the election of statutory damages to the copyright owner.²⁰⁶ Second, two courts failed to conduct a constitutional analysis and instead denied the right to a jury trial solely on the basis of the statutory language.²⁰⁷ As argued above, Congress cannot take away the constitutional right to a jury trial through statutory enactment, and thus, if a court finds that the statute does not provide for the right, it still must decide whether the Seventh Amendment applies.²⁰⁸ Third, several circuit court decisions were conclusory. By failing to provide their own analyses and merely citing other courts of appeals and district court cases as authority, these courts relied on the other cases' analyses and opinions and, consequently, also adopted those cases' flaws.²⁰⁹ Fourth, the Supreme Court has since overruled one

203. See *Columbia Pictures*, 106 F.3d at 293 (citing cases finding statutory damages are equitable but also citing cases finding statutory damages are legal without any explanation as to why *Columbia Pictures* court agreed with former decisions).

204. See *supra* note 185 and accompanying text (arguing that *Twentieth Century* decision is conclusory because court merely cited authority and failed to perform its own analysis of issues).

205. See *supra* notes 128-204 and accompanying text (discussing and criticizing cases finding no right to jury trial).

206. See *supra* notes 134, 136-39 and accompanying text (discussing *Krofft* decision's finding of equity jurisdiction through discretion given to court by 1909 Act to decide whether to award statutory damages and questioning application to 1976 Act, which assigns election of statutory damages to owner); *supra* notes 165, 175-76 and accompanying text (arguing that *Palermo* decision is not authoritative because it is based on 1909 Act).

207. See *supra* note 129 (listing cases basing decision on statutory language only); *supra* note 131 (summarizing *Krofft* court's analysis); *supra* note 145 (providing summary of *Oboler* court decision).

208. See *supra* notes 135, 140-43 and accompanying text (arguing that *Krofft* opinion is not authoritative because it fails to consider constitutional right to jury trial); *supra* notes 150, 160-62 and accompanying text (criticizing *Oboler* court's failure to provide constitutional analysis of question).

209. See *supra* notes 149, 151-59 and accompanying text (arguing that *Oboler* decision is conclusory and incomplete because it failed to perform its own analysis even in light of prior

court's rationale for analyzing whether there was a constitutional right to a jury trial.²¹⁰ Fifth, one court misinterpreted the decision it cited as authority for its position.²¹¹ Although these cases represent the majority view, the foregoing discussion demonstrates the weaknesses of these precedents.

B. The Minority View

Prior to the *Cass County Music* decision, only two circuit courts of appeals had found that the Seventh Amendment guarantees a jury trial for copyright infringement statutory damages issues.²¹² In *Gnossos Music v. Mitken, Inc.*,²¹³ the Fourth Circuit became the first circuit court to reach such a conclusion.²¹⁴

Second Circuit decision finding right to jury trial); *supra* notes 184-87 and accompanying text (arguing that *Twentieth Century* decision is conclusory and demonstrating difficulties that arise when decision is based solely on case citations as authority); *supra* notes 200-04 and accompanying text (criticizing *Columbia Pictures* court's reliance on other cases and arguing that decision does not help reach definitive answer on question because court does not provide analysis).

210. See *supra* notes 171-72 and accompanying text (explaining that Supreme Court's *Dairy Queen* decision overruled *Palermo's* "incidental" analysis).

211. See *supra* notes 173-74 and accompanying text (arguing that *Palermo* misread *Woolworth* decision and used *Woolworth* incorrectly to support conclusion that no right to jury trial exists).

212. See *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1015-16, 1017 (7th Cir. 1991) (performing Seventh Amendment analysis and holding that judge should submit to jury factual questions of infringement and willfulness, but should reserve for himself decision of appropriate award of statutory damages); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981) (holding that Seventh Amendment mandates trial by jury in copyright infringement action for statutory damages).

213. 653 F.2d 117 (4th Cir. 1981)

214. *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981) (finding constitutional right to trial by jury in copyright infringement action for statutory damages). In *Gnossos*, the Fourth Circuit considered whether either the statute or the Seventh Amendment provided for a jury trial when the copyright owner seeks only an injunction and minimum statutory damages. *Id.* at 118. First, the court stated that it must consider the statutory construction because the court must decide the matter on these grounds instead of constitutional grounds whenever possible. *Id.* at 118-19. The *Gnossos* court determined that the statutory language is ambiguous and thus neither provided for nor denied the right to a jury trial. *Id.* at 119. However, the court suggested that the language favored granting the right over denying it. *Id.* Specifically, the court noted that, like the Copyright Act, the Truth in Lending Statute and the fair housing statute both refer to the "court" and in both cases courts have held that Congress meant to require a jury trial. *Id.* Second, the *Gnossos* court addressed the constitutional issue. *Id.* The court provided a two-part test, developed by the circuit in a prior case, that consisted of: (1) considering whether the statutory rights and duties are analogous to rights and duties historically recognized at common law and (2) determining whether the remedies are legal rather than equitable in nature. *Id.* at 120. The court compared the statutorily created right to the common law tort actions, specifically, tortious interference with a property right. *Id.* Furthermore, the court found that minimum statutory damages are analogous to the ancient civil action for debt. *Id.* Finally, the court determined that the statutory damages award limitations

The *Gnossos* court first determined that the statutory construction of the 1976 Act did not provide clearly for the right to a jury trial. However, it found that the language enforced rather than detracted from the interpretation that the statute granted this right.²¹⁵ Second, the court found that the Seventh Amendment applies to statutory damages by analogizing the statutory rights and remedies to legal rights and remedies recognized by the common law.²¹⁶ Thus, the court found a constitutional right to a jury trial both for the issues of infringement and for the determination of the amount of the statutory damages award.²¹⁷

Three criticisms of the *Gnossos* decision are (1) that the constitutional analysis was weak because the analogies drawn are arguable,²¹⁸ (2) that the court misread and misapplied cases it used as support,²¹⁹ and (3) that the constitutional test utilized was conclusory and inconsistent with the *Ross* test.²²⁰ First, although the *Gnossos* court may be correct to claim that the Copyright Act creates rights similar to tort actions, this argument is unhelpful in determining whether statutory damages are legal because tort actions can be equitable or legal depending on the relief sought.²²¹ The court's analogy to an action for debt is equally troubling because the Supreme Court has explained that such an action requires that the sum sought can be reduced to a certainty.²²² How-

did not affect the analysis because statutory limits set by Congress in other contexts have not affected the right to a jury trial. *Id.* Consequently, the court determined that the Seventh Amendment applied to copyright statutory damages. *Id.* at 121.

215. *See id.* at 119 (suggesting that language could be read to imply right to jury trial).

216. *See id.* at 120 (applying Fourth Circuit test developed in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), comparing recovery for breach of rights and duties created by Copyright Act to common law tort actions, and analogizing statutory damages remedy to ancient civil action for debt).

217. *See id.* at 120-21 (finding that Seventh Amendment applies to statutory damages under Copyright Act and determining that fact-finder (jury) decides not only issues of infringement but also sets amount of damage award within statutory limits).

218. *See Stumpff, supra* note 12, at 1960 (criticizing *Gnossos* court's analogies to common law rights and remedies); *see also* Feldman, *supra* note 50, at 276 n.97, 278 (same).

219. *See* Breuninger, *supra* note 57, at 256 (arguing that *Gnossos* court misapplied *Curtis* and *Barber* principles); *see also* Niemeier, *supra* note 50, at 145 (comparing *Curtis* findings of Title VII and VIII to Sections 504(c) and (b) respectively).

220. *See Stumpff, supra* note 12, at 1957 n.59 (criticizing *Gnossos* formulation of *Curtis* test as "unique," conclusory, and inconsistent with *Ross* test).

221. *See id.* at 1960 (arguing that copyright is good example of tort action that is both legal (when owner seeks actual damages) and equitable (when plaintiff requests injunction only)); *see also* Feldman, *supra* note 50, at 276 n.97 (pointing out that cases cited to support tort analogy for copyright infringement used analogy not in Seventh Amendment context but to determine if joint and several liability applied). *But see* Phippen, *supra* note 5, at 805-06 (arguing correctness of analogy because both copyright infringement actions and tortious interference with property actions are actions to protect right of ownership).

222. *See* *Stockwell v. United States*, 80 U.S. 531, 542 (1871) (describing action for debt as being "sum certain").

ever, statutory damages are not certain when the plaintiff seeks more than the minimum award, making the actual amount granted discretionary within the statutory limits.²²³ Second, the *Gnossos* court misinterpreted cases it used as authority because, although the cases found certain statutory damages legal, these statutory provisions are not analogous to copyright law.²²⁴ The statutory damages involved in the other cases were actual and punitive, but § 504(c) damages are neither actual nor punitive and thus do not fall in the same category.²²⁵ Third, the constitutional test applied by the Fourth Circuit is conclusory and unhelpful in characterizing the case as a whole.²²⁶ Specifically, the court labeled the rights and remedies as "legal" through analogy, without substantively answering the question of how to determine the legal nature of the analogous right and remedy.²²⁷ Instead, unlike the *Gnossos* court's test, the *Ross* Court's historical analysis test provides a substantive answer to this inquiry and should have been applied.²²⁸ Thus, because of these criticisms, the *Gnossos* decision is not dispositive with respect to the issue of the right to a jury trial.

In *Video Views, Inc. v. Studio 21, Ltd.*,²²⁹ the Seventh Circuit determined that the Seventh Amendment guarantees the right to a jury trial on the issues of infringement and willfulness when the plaintiff seeks statutory damages.²³⁰

223. See Stumpff, *supra* note 12, at 1960 (arguing that court, using its discretion, determines statutory damages award within limits set in statute and thus statutory damages are unlike action for debt which Supreme Court has defined as "sum certain"); see also Feldman, *supra* note 50, at 278 (characterizing analogy as unpersuasive when plaintiff seeks more than statutory minimum because sum is no longer certain). But see Phippen, *supra* note 5, at 806 (arguing that analogy to action for debt is proper because Copyright Act creates debt to compensate wrongful use of work).

224. See Breuninger, *supra* note 57, at 256 (criticizing *Gnossos* analogy to *Curtis* and *Barber* because those cases dealt with actual and punitive damages).

225. See *id.* (arguing that analogy does not apply because copyright statutory damages are neither actual nor punitive); see also Niemeier, *supra* note 50, at 145 (comparing *Curtis* decision that remedies provided under Title VIII of Civil Rights Act are legal to § 504(b) and decision that Title VII remedies are equitable to § 504(c)). But see Phippen, *supra* note 5, at 805 (arguing that analogy to *Curtis* and *Barber* was correct).

226. See Stumpff, *supra* note 12, at 1957 n.59 (arguing that *Gnossos* court's formulation of test merely splits elements of cause of action into rights and remedies without attempting to determine nature of underlying case as whole).

227. See *id.* (arguing that labels placed on elements does little to advance constitutional inquiry).

228. See *id.* (arguing that *Gnossos* formulation of test is inconsistent with *Ross* and does not answer substantive question). But see Feldman, *supra* note 50, at 275 (arguing that *Gnossos* test is functional equivalent of first two prongs of *Ross*).

229. 925 F.2d 1010 (7th Cir. 1991).

230. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1016 (7th Cir. 1991) (concluding that jury decides issues of infringement and willfulness in every copyright infringement action in which plaintiff seeks monetary damages of any sort). In *Video Views*, the Seventh Circuit addressed the question of the right to a jury trial in copyright infringement suits brought

However, the *Video Views* court stated that the judge and not the jury determines the appropriate award of damages, within statutory limits.²³¹ In deciding the constitutional issue, the court applied the *Ross* test.²³² First, the court concluded that the factual issues were not beyond the practical abilities of juries.²³³ Second, by drawing an analogy to tort and trademark actions, the court found that the copyright statute created a legal cause of action.²³⁴ Third, the court studied the remedy and found that any discretion given to determine the amount of the award is simply congressionally provided flexibility and is not intended to deny the right to a jury trial.²³⁵ Thus, the *Video Views* court found that the Seventh Amendment applies to the factual issues involved in a copyright statutory damages suit.²³⁶

Although the *Video Views* decision appeared to go through all of the steps for a thorough analysis of this issue, some of its statements and findings were conclusory and lack support, thereby undermining the authority of the opinion. First, the *Video Views* court stated that the statutory language did not resolve

under § 504(c). *Id.* at 1014. First, the court simply stated that the statutory language does not resolve this question. *Id.* Second, the court announced that "[i]t is . . . clear" that the judge determines the appropriate amount of the award, within the statutory limits. *Id.* Third, the court applied the *Ross* test to analyze the constitutional question. *Id.* at 1015. Finding that the issues involved were not beyond the practical abilities of juries, the court determined that the first two prongs of the *Ross* test were the important parts of the analysis. *Id.* Specifically, the court compared the nature of the right created by the copyright statute to the legal actions of tort and trademark infringement, which it viewed as an action at law to vindicate the tortious interference with an intellectual property right. *Id.* Thus, the court concluded that the right created was legal. *Id.* Furthermore, the court stated that the remedy defied blanket characterization as legal or equitable, but presented an analysis to support its finding that copyright infringement involves legal remedies. *Id.* 1015-16. Specifically, the court explained that the plaintiff can elect statutory damages for any reason and does not have to meet the equity standard that no adequate remedy at law exists. *Id.* Moreover, the court reasoned that the discretion given to the district court in determining the amount of the award is not the level of discretion the Supreme Court has termed "equitable." *Id.* at 1016. Instead, the court explained, this discretion is merely flexibility within statutory limits and thus is not a reason for denying the right to a jury trial on the substantive issues of the case. *Id.* Consequently, the *Video Views* court found a constitutional right to jury determination of the issues of infringement and willfulness even when the plaintiff seeks statutory damages only. *Id.*

231. *See id.*, at 1014 (declaring that judge sets award amount without providing explanation for statement).

232. *See id.* at 1015 (quoting *Ross* footnote containing three-part analysis).

233. *See id.* (deciding factual issues of infringement are not too complicated for jury and relying on first two prongs of *Ross* test to settle question).

234. *See id.* (determining that nature of rights created by statute are legal).

235. *See id.* at 1016 (deciding that Congress did not intend level of discretion given in § 504(c) to divest parties of right to jury trial but merely granted judge flexibility in setting exact award of damages).

236. *See id.* (concluding that jury decides issues of infringement and willfulness in every copyright suit in which plaintiff seeks monetary award).

the question, without explaining its reasons for reaching such a conclusion.²³⁷ Although the conclusion may be correct, the court's failure to support its finding is a mistake because of the Supreme Court's determination that the courts should analyze statutory construction for a resolution of the issue before considering the constitutional issue²³⁸ and because of the fact that other circuits have based their decisions solely on the statutory language.²³⁹ Second, the *Video Views* court declared that the right to a jury trial does not extend to the determination of the amount of statutory damages without citing any support for this decision.²⁴⁰ The court's failure to address this issue completely is odd considering that it decided that the Seventh Amendment guarantees a jury trial for the substantive issues involved in a statutory damages claim.²⁴¹ Furthermore, the court cited the *Gnossos* decision as contrary authority, without distinguishing or criticizing its conclusion that the jury should decide the damage award.²⁴² Moreover, the *Video Views* court used part of the *Gnossos* court's analysis to support its finding that the jury determines the factual issues involved in the case without explaining the basis for its agreement with this part of the *Gnossos* decision, but disagreed with the finding that the jury also

237. See *id.* at 1014 (dismissing statutory construction analysis with statement that it simply does not answer question).

238. See *supra* note 11 (quoting *Curtis v. Loether*, in which Supreme Court explained that statutory language analysis may allow court to resolve question without addressing constitutional issue).

239. See *supra* note 129 (citing cases using statutory language to answer question).

240. See *Video Views*, 925 F.2d at 1014 (stating its conclusion is "clear" without providing any supporting authority).

241. See *id.* at 1016 (reaching this conclusion); see also Niemeier, *supra* note 50, at 151 (explaining that Supreme Court has noted that any curtailment of right to jury trial "should be scrutinized with utmost care" (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959))). One can certainly argue that the *Video Views* court did not meet this standard because it failed to provide any meaningful consideration of this issue. See *supra* note 237 and accompanying text (arguing that court's statement that judge decides amount of damages was conclusory).

One commentator has argued that *Tull* supports the bifurcation of infringement and damages issues. See Niemeier, *supra* note 50, at 152 (arguing that *Tull* reasoning applies to copyright statutory damages). However, the *Tull* decision rested on a finding that the legislative history demonstrated that Congress intended judges to perform "the highly discretionary calculations necessary to award civil penalties." *Tull v. United States*, 481 U.S. 412, 425 (1987). Neither the *Video Views* court nor the commentator made any such findings regarding the Copyright Act's legislative history. Furthermore, the *Video Views* court's finding that the discretion granted in § 504(c) is merely a grant of flexibility belies an argument that these statutory damages involve "highly discretionary calculations." See *Video Views*, 925 F.2d at 1016 (finding that discretion in § 504(c) is not of level to characterize remedy as equitable). Therefore, neither the court nor this commentator offers valid support for this bifurcation.

242. See *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014 (7th Cir. 1991) (noting *Gnossos* decision is contrary authority).

determines the amount of the statutory damages award.²⁴³ Third, in addressing the second prong of the *Ross* test, the *Video Views* court drew an analogy to trademark infringement without adequately explaining the similarities of the two causes of action.²⁴⁴ Additionally, like the *Gnossos* court, the *Video Views* court analogized the copyright cause of action to a tort action and thus inherited the same criticisms concerning this analogy as discussed above.²⁴⁵ Thus, like all the other circuit court decisions, *Video Views* is flawed.

In conclusion, prior to *Cass County Music*, two circuit courts of appeals decided that a constitutional right to a jury trial exists in a copyright infringement suit when the plaintiff elects statutory damages.²⁴⁶ However, these decisions suffer from two of the same shortcomings as the majority view decisions. First, one court misread the authority it used to support its findings.²⁴⁷ Second, both decisions included conclusory statements that provide little assistance in resolving the dispute between the circuits.²⁴⁸ Thus, before *Cass County Music*, no court had provided a thorough analysis that definitively answered the question of whether a right to a jury trial in a copyright infringement suit exists when the plaintiff seeks statutory damages.

V. The Cass County Music Decision

In *Cass County Music Co. v. C.H.L.R., Inc.*,²⁴⁹ the Eighth Circuit finally addressed the question of whether either the statute provides or the Seventh Amendment guarantees a right to a jury trial in a copyright infringement suit when the plaintiff elects statutory damages.²⁵⁰ In addressing this issue, the *Cass County Music* court briefly discussed and criticized the prior circuit court decisions.²⁵¹ Recognizing that none of the prevailing opinions adequately

243. See *id.* at 1015 (relying on *Gnossos* analogy between copyright and tort).

244. See *id.* (noting only that trademark and copyright infringement actions both may be viewed as actions for tortious interference with intellectual property right).

245. See *supra* notes 218, 221-23 and accompanying text (arguing that *Gnossos* opinion's analysis of nature of action is weak).

246. See *Video Views*, 925 F.2d at 1016 (concluding that jury decides issues of infringement and willfulness in every copyright infringement action in which plaintiff seeks monetary damages of any sort); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981) (concluding that jury decides both substantive issues and amount of statutory damages award).

247. See *supra* notes 224-25 and accompanying text (arguing that *Gnossos* court misinterpreted cases cited as authority).

248. See *supra* notes 218, 221-22, 226-28 and accompanying text (arguing that *Gnossos* court based decision on conclusory statements); *supra* notes 237-44 and accompanying text (arguing that *Video Views* court based decision on conclusory statements).

249. 88 F.3d 635 (8th Cir. 1996).

250. See *supra* note 20 (discussing *Cass County Music*).

251. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 639-40 (8th Cir. 1996) (summarizing other circuit court decisions).

answered the question, the court concluded that it must analyze the issues itself.²⁵² The *Cass County Music* court first studied the statutory language of § 504(c).²⁵³ The court considered the statute's use of the words "court" and "discretion," but noted that the Supreme Court has found that statutory language providing for the court to use its discretion does not automatically imply judicial decision-making.²⁵⁴ The court also found that although the statute provides for monetary relief, the Supreme Court has never stated that all monetary relief is legal in nature.²⁵⁵ As a result, the *Cass County Music* court concluded that the statute does not dispositively answer the question.²⁵⁶

Next, the *Cass County Music* court performed a constitutional analysis and focused on the first two prongs of the *Ross* test.²⁵⁷ In characterizing the nature of the action, the court turned to a recent Supreme Court patent decision to aid in the historical analysis.²⁵⁸ The Supreme Court recently found that the modern patent infringement actions derive from eighteenth century legal actions and that "there is no dispute" that the jury must decide the factual issues of patent infringement.²⁵⁹ The *Cass County Music* court then drew an analogy between copyright and patent infringement actions and, based on the recent patent decision, found that copyright infringement actions are legal.²⁶⁰ The court's

252. See *id.* at 640 (finding that it must consider question itself because of differing opinions by circuits); see also *supra* notes 205-11, 246-48 and accompanying text (summarizing criticisms of other circuit court decisions).

253. See *id.* at 640-41 (explaining that, in right to jury trial context, court must first determine if Congress provided for right to jury trial in statute before considering constitutional issue); see also *supra* note 30 and accompanying text (explaining that first step in analysis is to consider statutory language).

254. See *Cass County Music*, 88 F.3d at 641 (reasoning that references to court's discretion do not automatically vest decision in judge's hand and citing *Curtis v. Loether*, 415 U.S. 189 (1974) for support); see also *supra* notes 45-54 and accompanying text (discussing debate over use of "court" and "discretion").

255. See *Cass County Music*, 88 F.3d at 641 (explaining that Supreme Court has not determined that all monetary damages are necessarily legal in nature).

256. See *id.* (determining that statute does not answer question); see also *supra* note 54 and accompanying text (explaining that commentators have also found statutory language unclear).

257. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 641 (8th Cir. 1996) (citing *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991) and *Chaffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) for constitutional test which is same as *Ross* premerger custom and nature of remedy analysis); *supra* notes 61-65 and accompanying text (discussing *Ross* test).

258. See *Cass County Music*, 88 F.3d at 641 (discussing Supreme Court holding in *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996) that modern patent infringement derive from legal eighteenth century infringement cases and must be tried to jury).

259. See *id.* (quoting *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996) (finding that patent infringement actions are legal)).

260. See *id.* at 641-42 (explaining that copyright and patent infringement actions are

analogy considered that both actions are derived from the same constitutional provision,²⁶¹ that the Supreme Court has treated patent and copyright similarly when examining the purposes behind the constitutional provision and enacted laws,²⁶² and that the elements of infringement in both cases are "functionally the same."²⁶³ Thus, the *Cass County Music* court concluded that copyright infringement actions are legal actions triable by a jury.²⁶⁴

In addressing the nature of the remedy, the *Cass County Music* court followed the *Tull* decision.²⁶⁵ The court determined that because the jury's assessment of money damages is a fundamental component of the common-law trial by jury, it must allow the jury to set the amount of the damages award unless these statutory damages have equitable "attributes."²⁶⁶ The court then demonstrated that the nature of the statutory damages relief is both restitutionary and punitive.²⁶⁷ Thus, it has both equitable and legal attributes. However, the court explained that the punitive, or legal, nature outweighs the restitutionary, or equitable, nature of these statutory damages in many cases.²⁶⁸ The court also asserted that the monetary award is neither incidental to nor intertwined with the injunctive relief, and therefore copyright statutory damages do not

analogous).

261. *See id.* at 641 (noting that Congress derives its power over patent and copyright from U.S. CONST. art. I, § 8, cl. 8).

262. *See id.* at 641-42 (demonstrating that Supreme Court treats copyright and patent similarly when studying purposes of enactments and citing cases to support conclusion).

263. *See Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 642 (8th Cir. 1996) (noting elements of liability for copyright and patent are same).

264. *See id.* (finding that copyright actions are legal actions to be tried to jury).

265. *See id.* (using *Tull* decision's principles for test to determine if remedy is legal and should be assessed by jury). The *Cass County Music* court explains that *Tull* teaches that a jury trial is constitutionally required if the jury must award the statutory damages in order to "preserve the 'substance of the common-law right of trial by jury.'" *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 426 (1987)). The court then stated that statutory damages are money damages and that the jury assessment of money damages is fundamental to common-law trial by jury. *See id.* (making findings about nature of statutory damages). Finally, the court explained that it would create an exception to this rule only if the damages have equitable attributes. *See id.* (quoting *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)).

266. *See id.* (explaining reasoning and case law authority for analysis).

267. *See id.* at 642-43 (explaining that damages are restitutionary in that they are awarded "in lieu" of actual damages and also may be invoked when legal remedy is inadequate but also demonstrating that damages are punitive, especially in situations where damage suffered and profits earned is much lower than statutory minimum). *But see supra* note 116 (discussing problems with assumption that statutory damages restitutionary character demonstrates that it is equitable remedy because restitution can be either legal or equitable).

268. *See id.* at 643 (noting that statutory damages do not merely put plaintiff in position he should have been in but also, and perhaps preeminently, punish wrongdoer).

have a second equitable attribute.²⁶⁹ The court concluded that statutory damages are a legal remedy because they do not display equitable attributes.²⁷⁰ As a result of this analysis, the court found that the Seventh Amendment guarantees the right to a jury trial on both the factual issues of infringement and the assessment of statutory damages.²⁷¹

Additionally, the *Cass County Music* court briefly considered whether Congress intended to forego fact-finding for the assessment of damages when it set statutory limits on the awards.²⁷² The court rejected this consideration because it demonstrated that, even if neither actual damage nor profit is the basis of statutory damages, the parties will wish to present evidence to influence the decision-maker's assessment of the damages within these limits.²⁷³ Furthermore, the court explained that the Supreme Court has stressed the importance of the maintenance of the jury as fact-finder and has cautioned that courts should scrutinize closely any curtailment of the role of the jury.²⁷⁴ Thus, the court reasoned that the jury properly assesses the award of statutory damages.²⁷⁵

269. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (providing practical explanation that amount of statutory minimum cannot be seen as "incidental" and that injunction and statutory damages are not intertwined because each can be awarded without considering other).

270. See *id.* (weighing legal and equitable attributes and determining that statutory damages for copyright infringement are legal remedy).

271. See *id.* at 644 (holding that either party has constitutional right to jury trial on factual issues and damages assessment). However, it is important to note that the *Cass County Music* court did not analyze the third prong of *Ross* but merely stated in a footnote its conclusion that the issues involved are not too complicated for juries. See *id.* at 643 n.6 (noting that court is satisfied that no problems with jury ability exist). Although one might believe that this footnote undermines the effectiveness of the *Cass County Music* opinion, in fact, the court may have been correct in summarily dismissing this problem. Because the court had found that the issue and remedy were legal, the third prong could not affect the analysis either way as the Supreme Court has stated that the third prong cannot be used as an independent basis for denying the right to a jury trial. See *supra* note 119 and accompanying text (discussing *Ross* and progeny's third prong). Therefore, even without an explanation to support this conclusion, the constitutional analysis is complete.

272. See *Cass County Music*, 88 F.3d at 643-44 (finding fact that statutory damages are awarded within set range neither means that no fact-finding is necessary nor makes fact-finding so difficult as to require judge to assess award).

273. See *id.* (reasoning that when plaintiff seeks damages greater than statutory minimum, both parties will present evidence to help fact-finder narrow range of damage award).

274. See *id.* at 644 (noting that jury is fact-finding body and any change in this function "should be scrutinized with the utmost care") (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)); see also *supra* note 241 and accompanying text (arguing that *Video Views* failed to meet *Beacon* standard).

275. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996) (concluding that fact-finder limitations argument is not persuasive).

Based on the above summary, it is clear that *Cass County Music* provides the best reasoned, most thorough handling of the issue. First, the Eighth Circuit conducted its own analysis of the issue, did not rely on any of the prior circuit decisions, and therefore did not adopt the problems with other circuits' reasoning and conclusions.²⁷⁶ Moreover, *Cass County Music* presented a complete analysis of the issue and provided an explanation of its reasoning, in addition to stating its conclusions.²⁷⁷ The court recognized that in answering the question it must begin with an analysis of the statutory construction.²⁷⁸ Instead of merely asserting its conclusion that the language is not dispositive,²⁷⁹ the court presented the major arguments for both the equitable and legal nature of the statute and demonstrated that the Supreme Court has not found these arguments dispositive in other areas.²⁸⁰ Thus, the *Cass County Music* court provided support for its conclusion that the statutory language does not answer the question.²⁸¹ Second, the court's constitutional analysis was thorough and compelling. In addressing the nature of the action, the court avoided the problems that other courts faced in drawing weak analogies to actions such as tort.²⁸² The Supreme Court's patent decision allowed the *Cass County Music* court to draw a very persuasive analogy. The analogy is strong because Congress draws its power over both patent and copyright from the same constitutional provision—a provision enacted prior to the Seventh Amendment. Also, the Supreme Court's decision leaves no question about the historically legal nature of the patent action and, by analogy, of the copyright infringement action.²⁸³ Moreover, in analyzing the nature of the remedy, the Eighth Circuit

276. See *supra* notes 205-11, 246-48 and accompanying text (summarizing problems of other circuit courts' decisions).

277. See *supra* notes 207-09, 218, 226-28 and accompanying text (criticizing both majority and minority view court decisions for failure to completely analyze issue and for reliance on conclusory statements instead of explaining reasoning).

278. See *supra* note 253-56 and accompanying text (demonstrating that *Cass County Music* decision properly recognized importance of statutory construction analysis).

279. See *supra* notes 166, 183-86, 237 and accompanying text (arguing that *Palermo*, *Twentieth Century*, and *Video Views* courts concluded that statutory language was not dispositive on issue without providing any explanation).

280. See *Cass County Music*, 88 F.3d at 641 (analyzing statutory language and then finding it is not conclusive).

281. As a result, the *Cass County Music* court avoids the criticism of other circuit courts' decisions that the opinions do not aid in determining the answer to this question because they fail to provide any support for the conclusory statements that are at the heart of their opinions. See *supra* notes 209, 218, 221-22, 226-28 and accompanying text (criticizing conclusory nature of past circuit court opinions).

282. See *supra* notes 221, 245 and accompanying text (criticizing *Gnosso* and *Video Views* use of analogy to tort actions).

283. See *supra* notes 221-23 and accompanying text (discussing problems involved in

was the only court that applied the teachings of the *Tull* case to weigh the legal and equitable attributes to support its conclusion that the jury must assess the statutory damage award as well as decide the factual issues.²⁸⁴ To demonstrate its finding that statutory damages are more punitive than restitutionary, the court showed that in many statutory damages cases, including *Cass County Music*, the damage award represents more punishment than actual loss.²⁸⁵ Furthermore, the court gave a practical explanation for why these statutory damages are not incidental to or intertwined with injunctive relief.²⁸⁶ Thus, the *Cass County Music* court provided a thorough constitutional analysis, supported by both case law and practical examples.

Furthermore, the *Cass County Music* decision surpasses the decisions of other circuits because it presented both new arguments and additional support for its conclusions. For example, *Cass County Music* was able to use both the Supreme Court's patent opinion and the *Tull* teachings to avoid problems other courts have faced in their constitutional analyses.²⁸⁷ The court also supported its findings with other case authority and examples, thereby avoiding criticism that the analysis was conclusory.²⁸⁸ Therefore, the *Cass County Music* decision is the most well-reasoned and comprehensive disposition of this question because it provided a complete statutory and constitutional analysis of the issue, incorporating Supreme Court tests, supporting authority, practical considerations, and examples, while avoiding the problems created by the other circuits' opinions. Thus, the Eighth Circuit dispositively found a constitutional right to a jury trial for both factual issues and damage assessment in copyright infringement actions when the plaintiff elects statutory damages. The Supreme

drawing analogy between tort and copyright, including question of whether tort actions can all be characterized as legal).

284. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 642 (8th Cir. 1996) (finding that jury performs damages assessment). But see *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014 (7th Cir. 1991) (concluding that jury does not assess damage award); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 121 (4th Cir. 1981) (concluding that jury decides both factual and assessment issues).

285. See *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (explaining that in instant case statutory damages will be predominantly punitive because plaintiff suffered little actual loss and defendant reaped few profits). To be sure, the nature of statutory damages, unlike actual damages, guarantee that the award amount will not be entirely compatible to any reimbursement for damages and profits.

286. See *id.* at 643 (explaining that statutory damages are neither incidental to nor intertwined with injunctive relief because statutory award is not nominal and plaintiff can bring action for damages without seeking injunction).

287. See *supra* 210-11, 224 and accompanying text (discussing misinterpretation and analogy problems that *Cass County Music* avoided).

288. See *supra* notes 209, 218, 221-22, 226-28 and accompanying text (criticizing conclusory nature of past circuit court opinions).

Court should follow the *Cass County Music* opinion when it ultimately decides this issue in the spring of 1998.²⁸⁹

VI. Conclusion

At present, the United States Courts of Appeals are split over the right to a jury trial in a copyright infringement action when the plaintiff seeks statutory damages.²⁹⁰ Even within the majority and minority divisions, the courts cannot agree on the analysis and reasoning used to reach their conclusions.²⁹¹ The lack of consensus among the circuits demonstrates the difficulties and complexities involved in the statutory and constitutional analysis of the issue.²⁹² However, the Supreme Court has granted certiorari on this issue and will finally resolve the circuit split.

Cass County Music provides a useful resolution to this controversy. The Eighth Circuit has examined fully this complex legal issue and has provided a complete statutory and constitutional analysis.²⁹³ Moreover, the *Cass County Music* decision succeeded in avoiding the problems the other circuits faced in their analyses of this issue.²⁹⁴ Finally, the *Cass County Music* court reached the correct decision in a complicated area of the law. Therefore, the Supreme Court should take note of the *Cass County Music* opinion as well as the following sentiment expressed by one district court judge: "If I have erred, and I do not believe that I have, then I have erred on the side of protecting an important constitutional right, fundamental to the fair administration of justice."²⁹⁵

289. See *supra* note 29 and accompanying text (explaining that Supreme Court will decide issue of right to jury trial in copyright infringement action when plaintiff elects statutory damages in case of *Feltner v. Columbia Pictures Television*).

290. See *supra* note 18 and accompanying text (citing circuit court decisions).

291. See *supra* Parts IV & V (analyzing circuit split).

292. See *supra* notes 205-11, 246-48 and accompanying text (summarizing criticisms of circuit court opinions).

293. See *supra* Part V (reviewing *Cass County Music* decision).

294. See *supra* notes 205-11, 246-48, 276-86 and accompanying text (summarizing criticisms of circuit court opinions and determining that *Cass County Music* does not have same problems).

295. *Educational Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1243 (D.N.J. 1987).