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JUDGING EXPERTISE IN COPYRIGHT LAW

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I. INTRODUCTION

This Article examines the relative expertise of the United States courts of appeals in copyright law. While expertise may generate a variety of benefits, such as greater efficiency, the benefit of interest in this study is the quality of the courts' decisions. With a few exceptions, federal judges are generalists who have jurisdiction over an enormous range of legal disputes: copyright law one day, environmental law the next, antitrust the day after that. Judges, according to Judge Diane Wood of the Seventh Circuit, run the "risk of winding up 'a mile wide and an inch deep' when it comes to legal expertise—jack of all trades but master of none."[1] Intellectual property law includes one of the few exceptions. The regional courts of appeals have appellate jurisdiction over copyright and most trademark appeals,[2] but the Federal Circuit has appellate jurisdiction over most patent appeals.[3] Hence, generalist appellate courts resolve copyright and (most) trademark cases, but a specialized (or semi-specialized) appellate court resolves patent cases. Judge Henry Friendly thought patent cases go "beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort . . . and, in many instances, even with it."[4] Some commentators think copyright litigation—and perhaps even trademark litigation[5]—should also be concentrated in a single court. In their view, "copyright is a highly specialized and technical body of law, and some of its aspects . . . would be best handled by specialized judges."[6] Specialized courts allow judges to gain experience and therefore develop expertise. As one anonymous court of appeals judge put it, "[w]hat you get, you learn a lot about."[7] The question remains, however, as to whether courts produce better opinions in the area of copyright law when they possess greater experience.

In many areas of the law, including copyright, the courts of appeals are the most important producers of federal decisional law. The Supreme Court decides only a small number of appeals, which leaves the courts of appeals as "mini-

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[1] Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756 (1997).

[2] *See* 28 U.S.C. § 1291 (2000) (establishing the general appellate jurisdiction for courts of appeals); 28 U.S.C. § 1294 (2000) (identifying which circuits have appellate jurisdiction over a particular district court); 28 U.S.C. § 1295(a)(4)(B) (2000) (stating that decisions of the Trademark Trial and Appeal Board are reviewable by the Federal Circuit).

[3] 28 U.S.C. § 1295 (2000) ("Jurisdiction of the United States Court of Appeals for the Federal Circuit."). An exception is for patent disputes not raised in a plaintiff's well pleaded complaint. *See* Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 834 (2002).

[4] HENRY FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 156–57 (1973).

[5] Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 719 n.2 (1999).

[6] *Id.* at 719.

[7] DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 69 (2002).

Supreme Courts in the vast majority of their cases."[8] If expertise yields a special advantage to courts, as it may in the patent context, then perhaps concentrating copyright litigation in a specialized or semi-specialized court of appeals would be worthwhile. Given the tradition of generalist courts, however, this reform would likely make sense only if there is strong evidence that expertise yields significant benefits, one of which is higher quality decisions. Even without such a drastic reform, simply identifying expertise among courts under the present system may be beneficial. Cases are not necessarily distributed evenly across the circuits, making expertise possible in the courts without changing the jurisdictional rules. Some circuits have more opportunities to confront certain types of cases, and courts with less experience can benefit from the greater experience of other courts. Much as one court may give extra weight to the majority rule among the courts, sometimes preferring the majority rule over the minority rule *because* it is the majority rule,[9] a court may also give extra weight to the decisions of other courts perceived to possess the expertise that comes from greater experience.[10] This is not deference in any formal, rule-like sense, but deference in the informal sense frequently noted by courts when evaluating the weight of non-binding authorities.[11]

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[8] J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 58 (1981).

[9] *See, e.g.*, La Cienega Music Co. v. ZZ Top, 53 F.3d 950, 953 (9th Cir. 1995) (offering two reasons for its decision, the first being that its decision followed the majority rule among the courts). Courts do not of course always follow the majority rule, but failing to do so is sometimes offered as an argument against a decision. *See* United States v. Humphrey, 287 F.3d 422, 454 (6th Cir. 2002) (Rosen, J., dissenting) (arguing against the majority's opinion in part because the majority's interpretation conflicts with the ten other circuits to consider the question).

[10] *See, e.g.*, McMillian v. Monroe County, 520 U.S. 781, 786 (1997) ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); Verizon Cal., Inc. v. Peevey, 413 F.3d 1069, 1084 (9th Cir. 2005) (Bea, J., concurring) (remarking that "[t]he D.C. Circuit . . . has particular expertise in administrative law"); Peters v. Ashcroft, 383 F.3d 302, 306 (5th Cir. 2004) (noting that "sister circuits' experience construing the laws of the states within their jurisdiction may render their decisions persuasive"); CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 962 F.2d 77, 97 n.53 (1st Cir. 1992) ("[T]he fact that a federal judge has had experience on the state bench may reasonably be thought to enhance the weight to be accorded that federal judge's view of state law."). *See also* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 728 n.171 (1984) ("There may be situations in which a ruling by a court of appeals deemed to enjoy expertise in a particular subject matter—such as the Second Circuit in the securities field or the Ninth Circuit in cases presenting certain Indian rights or federal land management disputes—may have the effect of foreclosing further percolation because of the deference other courts will accord the ruling.").

[11] Formal deference to the expertise of other courts or judges is sometimes disallowed. *See* Salve Regina College v. Russell, 499 U.S. 225, 239–40 (1991) (holding that a court of appeals erred in deferring to the district court judge's expertise in state law). While *Salve* might be read broadly to

The hypothesis in this study is that the courts of appeals with greater copyright experience acquire expertise that results in higher quality decisions.[12] The test of this hypothesis is to compare each circuit's relative experience with copyright litigation to its representation in copyright and intellectual property casebooks, on the assumption that casebook editors generally prefer better decisions. Alone, however, casebook representation points more to varying levels of *influence* than to expertise. Courts with more influence in a particular area of the law should be more highly represented in the casebooks. For the Supreme Court, influence is automatic because of its nationwide jurisdiction, but for the courts of appeals, nationwide influence is not automatic. Where there is competition among courts, as there generally is among the courts of appeals, widespread influence should be heavily tied to the quality of the courts' decisions. Suppose, however, that the Second Circuit dominated the various copyright and intellectual property casebooks with about 40% of the principal cases. This would suggest that the Second Circuit, as compared to the other circuits, was more influential in the area of copyright than the other circuits, but this finding would not necessarily indicate that the Second Circuit possesses more competence in copyright law. The Second Circuit might have published about 40% of the copyright opinions. And if this pattern held across the circuits generally, it would suggest the circuits are of similar competence and are simply represented in the casebooks in proportion to their share of the published opinions.[13] In order to draw some (admittedly tentative) conclusions about the relative expertise of the circuits, we need to know more than just each circuit's share of the copyright opinions in the casebooks.

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prohibit even informal deference to the expertise or skill of other courts or judges, such a reading is at odds with common judicial practices. *See, e.g., CPC Int'l, Inc.*, 962 F.2d at 97 n.53 (distinguishing *Salve*). *Cf.* Donohoe v. Consol. Operating & Prod. Corp., 982 F.2d 1130, 1138 (7th Cir. 1992) (referring to "a distinguished district court judge, with a well-earned reputation for writing meticulous, scholarly opinions"); FMC Corp. v. Glouster Eng'g Co., 830 F.2d 770, 772 (7th Cir. 1987) (implying that, when known, an important factor in deciding an appeal is "the reputation of the district judge for care and skill in resolving factual disputes and making the many discretionary determinations confided to trial judges"). *Salve* is best understood as targeting a form of deference that is formal or rule-like, such as the form of deference described in *Magill v. Travelers Insurance Co.*, 133 F.2d 709, 713 (8th Cir. 1943) ("In deciding what the highest court of a state would probably hold the state law to be, great weight may properly be accorded by this court to the view of the trial court. This court would be justified in adopting a contrary view *only if convinced of error.*") (internal citation omitted) (emphasis added).

[12] *Cf.* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 378 (1990) ("Most important, [a specialized] court's expertise should enable it to craft better opinions, especially in fields where a small number of cases are now distributed rather thinly among the regional courts.").

[13] *See* Rodney L. Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295, 304 (1936) (suggesting that if influence was equal, courts would be represented in casebooks in proportion to the number of opinions produced).

While other factors are probably also important, we need to know, at a minimum, each circuit's share of the total copyright opinions published by the courts of appeals collectively. Evidence that more experienced circuits are *over*-represented in the casebooks relative to their caseloads would be evidence of experience leading to valuable expertise.

This Article is organized as follows: In Part II, I explain the estimation of each circuit's share of the copyright opinions (or caseloads) in the courts of appeals. These data provide a measure of each circuit's experience with copyright law. In Part III, I explain the calculation of each circuit's representation in the casebooks. These data provide a measure of influence. Since influence is more difficult to measure than experience, this Part is more detailed in terms of the justifications for using casebooks and the details for doing so. In Part IV of this Article, I combine the two sources of data, bringing experience and influence together to determine whether any courts show disproportionate influence relative to their experience.

II. EXPERIENCE: CALCULATING COPYRIGHT CASELOADS

In determining each circuit's share of the copyright opinions in the courts of appeals, the basic unit of analysis is an opinion, not a case. A single case can result in multiple opinions and multiple opportunities to resolve copyright issues. Measuring each circuit's share of the total copyright opinions is simply a matter of counting up the number of copyright opinions issued by each circuit and then dividing by the total number of copyright opinions issued by the circuits generally. The hard question is, which opinions should count? Put another way, how should copyright opinions be operationalized? Identifying the opinions of particular judges is usually simple. A close-to-definitive list of most judges' opinions can be generated in mere moments on LEXIS or Westlaw.[14] Identifying the opinions of a particular court is also simple. Identifying copyright opinions—or civil procedure opinions or contract opinions—is more difficult. While the upper limit of opinions is presumably the total number of opinions with at least a single reference to copyright, many opinions with one or more references to copyright do not actually confront any copyright issues.[15] The more

[14] It is slightly more difficult when there are multiple judges with the same last name, especially when they served on the same court and at the same time, such as Judge Learned Hand and Judge Augustus Hand, whose service on the Second Circuit overlapped from 1927 to 1954. *See* Federal Judges Biographical Database, http://air.fjc.gov/servlet/tGetInfo?jid=965 (last visited Oct. 28, 2006) (discussing Judge Learned Hand); Federal Judge Biographical Detabase, http://air.fjc.gov/servlet/tGetInfo?jid=964 (last visited Oct. 28, 2006) (discussing Judge Augustus Hand).

[15] *See, e.g.*, Graham v. John Deere Co., 383 U.S. 1, 5 n.1 (1966) ("The [patent] provision appears in the Constitution spliced together with the *copyright* provision, *which we omit* as *not relevant* here.")

references to copyright in the opinion, however, the more likely it is to contain a genuine copyright issue.

Electronic searches for opinions with some minimum number of references to copyright may generate reasonable estimates, but what should the minimum be? No matter the choice, the search will include some irrelevant cases and exclude some relevant ones. The goal is to minimize these errors, but the number that will do so is unknown. Rather than conduct only a single search and hope for the best, I used three searches. Together, the results provide a reasonably narrow range in which the "true" number of copyright opinions is likely to be found.

Using LEXIS, I operationalized copyright opinions with the following search terms, varying the minimum number of required copyright references from five to ten and then from ten to twenty:

> OPINIONS(atleast5(copyright!)) and DATE(geq (1/1/1891) and leq (12/31/2004)) and not COURT(bankruptcy) and not NOTICE(unpublished or "not recommended for full-text publication" or "without published" or "may not be cited" or "not binding precedent")

While I do not use data from years prior to 1920 later in the analysis, I searched every year from 1891, the beginning of the courts of appeals,[16] to 2004. Each search includes 1,261 circuit years' worth of data, 114 years apiece for the First through Ninth Circuits, 112 years for the D.C. Circuit (1893–2004),[17] seventy-six years for the Tenth Circuit (1929–2004),[18] twenty-four years for the Eleventh Circuit (1981–2004),[19] and twenty-three years for the Federal Circuit (1982–2004).[20] I omitted non-precedential opinions because in general, they do not pose difficult or novel questions of law[21] and often result in less thorough and

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(emphasis added).

[16] Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826 (1891).

[17] The history of the D.C. Circuit is somewhat more complicated than that of the other circuits. Although it formally joined the courts of appeals in 1948, its year of creation is best traced to 1893. *See* HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR 3 (1977). *See generally* Susan Low Block & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 549–64 (2002).

[18] Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346 (establishing the Tenth Circuit).

[19] Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (establishing the Eleventh Circuit).

[20] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (establishing the Federal Circuit).

[21] *See, e.g.*, Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999)

less careful opinions.[22] The parties to the litigation are the primary audience for unpublished decisions, not the legal community generally.[23] Judges on the panels probably read non-precedential opinions less carefully. Other judges on the court may not read them at all.[24] Thus, they likely contribute much less to the judges' experience. In addition to non-precedential opinions, I also omitted the decisions of the bankruptcy appellate panels in the First and Ninth Circuits. After obtaining the printed results from these searches, I examined them for errors, such as the same opinion listed twice, and although they are included within the United States Courts of Appeals databases in LEXIS, I manually excluded opinions of the now defunct United States Circuit Courts.[25]

The three searches provided varying estimates of each circuit's relative caseload. One check on the consequences of using different searches is the correlation between each pair of results in a particular year (i.e., between the results for five and ten references, ten and twenty references, and five and twenty references). If the correlations were perfect ($r = 1.0$), the relative caseload of each circuit would remain the same whether one searched for opinions with five, ten, or twenty references. The stronger the correlations, the less important the number of references searched for. In calculating these correlations, it is important to exclude any year in which a circuit issued no copyright opinions. FIGURE 1 shows the total number of published opinions in each year containing at least five references to copyright, illustrating the low levels of litigation prior to the 1970s. In numerous years, particularly in the early history of the courts of appeals, a circuit might decide no copyright cases. When there are no opinions with even five references to copyright, it is inevitable that there are no cases with ten or twenty references. Likewise, when there are no cases with ten references, there are no cases with twenty references. Including these many pairs of zeros would

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("Unpublished decisions tend to involve straightforward points of law. . . ."); Stephen L. Wasby, *Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIR. REV. 41, 117 (2005) ("Most assuredly there are unpublished dispositions the publication of which seems either necessary or at least strongly suggested . . . . However, when the great bulk of these rulings are examined, on the whole there seem quite few about which non-publication can be questioned.").

[22] *See, e.g.*, Cottrill v. Spears, 87 F. App'x. 803, 804 (3d Cir. 2004) (conflating copyrighting with copyright registration); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) ("It should come as no surprise that unpublished dispositions are also dreadful in quality.")

[23] *See* Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 96–98 (2004).

[24] An article authored by thirty-three Ninth Circuit judges implies they attempt to stay current only with the published opinions of the court. *See* Mary M. Schroeder et al., *A Court United: A Statement of a Number of Ninth Circuit Judges*, 7 ENGAGE 63, 63 (2006). Practices may vary across the circuits, especially in circuits with lighter caseloads.

[25] *See infra* note 108 and accompanying text.

affect the correlations in an unhelpful way. Imagine counting the number of opinions issued monthly rather than annually and then daily rather than monthly, adding more and more pairs of zeroes to the data set as the time frame narrows. The correlations would increase, but the informative value of the correlations would decrease.

FIGURE 1: OPINIONS WITH FIVE OR MORE REFERENCES TO COPYRIGHT (ALL CIRCUITS COMBINED)[26]

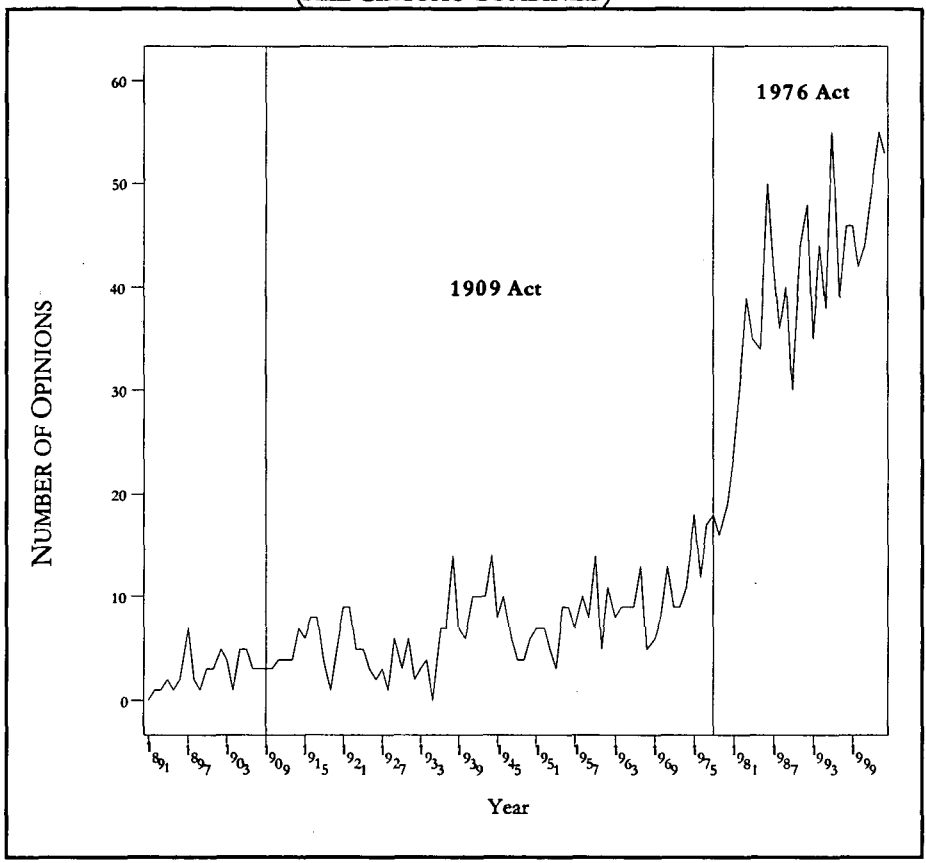

TABLE 1 reports the correlations for the results circuit-by-circuit and then for the courts of appeals as a whole. For the circuits combined, the correlations are quite strong, ranging from .896 to .961. For the individual circuits, they are also

[26] The vertical lines represent the years in which the Copyright Act of 1909 and the Copyright Act of 1976 went into effect, 1909 and 1978, respectively.

quite strong, but there are a few exceptions. For the Tenth Circuit and the Federal Circuit, the three searches yielded quite different results, but these two circuits have had the lightest copyright caseloads. With fewer observations, the results for these circuits are more susceptible to outliers. In general, however, these results suggest that searches for various numbers of references provide reasonable estimates of the relative copyright caseloads in each circuit—but they are only estimates.

TABLE 1: SEARCH RESULT CORRELATIONS (1891–2004)[27]

CIRCUIT	n	5/10	n	5/20	n	10/20
First	48	.818**	48	.678**	42	.700**
Second	103	.957**	103	.885**	97	.918**
Third	44	.842**	44	.718**	32	.852**
Fourth	29	.925**	29	.804**	26	.848**
Fifth	43	.914**	43	.786**	38	.865**
Sixth	47	.920**	47	.844**	36	.875**
Seventh	57	.925**	57	.854**	50	.885**
Eighth	41	.903**	41	.744**	37	.836**
Ninth	64	.981**	64	.940**	56	.967**
Tenth	21	.722**	21	.285	16	.539*
Eleventh	23	.939**	23	.880**	22	.928**
D.C.	35	.874**	35	.683**	28	.759**
Federal	18	.803**	18	.584*	9	.302
All Circuits Combined	573	.961**	573	.896**	489	.932**

Note: n = number of years included in the calculation. Excluded are years where both searches yielded no opinions. ***p*>.01**p*>.05*

[27] The data on which these correlations are based represent the entire population of interest—or close to it—which presents problems for the interpretation of tests of statistical significance. *See generally* Richard A. Berk, Bruce Western & Robert E. Weiss, *Statistical Inference for Apparent Populations*, 25 SOC. METHODOLOGY 421 (1995). The population, however, is dynamic—the basis for the "close to it." New cases and casebooks are continually published. For this reason, the tests of significance are perhaps of some value.

Unlike TABLE 1, TABLES 2A, 2B, and 2C provide information about the precision of the measures over time, with decade-by-decade results. TABLE 2A provides the total number of opinions found with each search. Although the raw numbers are not shown circuit-by-circuit, TABLE 2B provides the lowest and highest percentage of cases identified for each circuit. For example, using the results for the three searches from 2000–2004, the First Circuit issued 5.7%, 5.2%, or 5.3% of the opinions in the court of appeals. Thus, the table reports a low of 5.2% and a high of 5.7%. Using the low and high values in TABLE 2B, TABLE 2C reports the differences between these two values. Again using the example of the First Circuit from 2000–2004, the difference is a mere 0.5%. Not all of the differences are so small. Many of the differences are much higher, especially in the early history of the courts of appeals when there were fewer cases. As the overall caseloads have increased, however, the variation has decreased. The choice of measures is therefore less consequential as time goes on, but there is enough variation in the results to warrant using the estimates of the caseload *ranges* later in the analysis rather than estimates of the exact percentages.

TABLE 2A: CASELOAD ESTIMATES FOR ALL CIRCUITS COMBINED

YEAR	5 REFS	10 REFS	20 REFS
1890S	17	12	4
1900S	35	27	16
1910S	49	31	17
1920S	48	29	19
1930S	53	42	18
1940S	82	56	31
1950S	71	48	31
1960S	89	64	38
1970S	131	97	71
1980S	350	289	227
1990S	425	351	267
2000S	244	212	170
TOTALS	1594	1258	909

TABLE 2B: CASELOAD ESTIMATES BY CIRCUIT

	1st		2d		3d		4th		5th		6th		7th	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
1890s	8.3%	25.0%	50.0%	66.7%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	8.3%	0.0%	11.8%
1900s	17.1%	25.0%	31.3%	34.3%	6.3%	8.6%	0.0%	0.0%	0.0%	0.0%	7.4%	12.5%	18.8%	22.2%
1910s	2.0%	5.9%	51.0%	54.8%	11.8%	16.1%	0.0%	0.0%	0.0%	3.2%	9.7%	11.8%	0.0%	0.0%
1920s	0.0%	0.0%	56.3%	58.6%	0.0%	6.3%	4.2%	6.9%	4.2%	6.9%	3.4%	10.4%	10.3%	10.5%
1930s	9.4%	11.9%	38.9%	50.0%	4.8%	7.5%	0.0%	1.9%	3.8%	5.6%	0.0%	2.4%	0.0%	3.8%
1940s	3.7%	9.7%	38.7%	51.8%	1.8%	3.2%	3.6%	6.5%	1.2%	3.2%	0.0%	1.8%	12.5%	16.1%
1950s	5.6%	9.7%	45.2%	47.9%	3.2%	4.2%	2.8%	4.2%	0.0%	0.0%	2.1%	5.6%	9.7%	10.4%
1960s	0.0%	3.4%	44.9%	47.4%	3.1%	5.6%	0.0%	1.6%	4.7%	7.9%	2.6%	3.4%	2.6%	7.8%
1970s	2.8%	6.1%	33.8%	35.1%	3.8%	5.6%	0.8%	1.4%	8.5%	12.4%	5.2%	6.1%	4.1%	5.6%
1980s	2.6%	3.1%	22.5%	23.5%	4.0%	4.8%	3.5%	4.2%	4.9%	5.7%	3.4%	3.8%	9.4%	11.0%
1990s	3.7%	3.8%	23.8%	28.1%	2.2%	2.8%	4.9%	5.6%	6.0%	7.5%	3.4%	4.0%	9.4%	10.0%
2000s	5.2%	5.7%	17.1%	18.4%	3.5%	4.9%	5.2%	5.9%	6.6%	8.2%	6.5%	8.5%	9.9%	11.1%

TABLE 2B: CASELOAD ESTIMATES BY CIRCUIT (CON'T)

	8th		9th		10th		11th		D.C.		Fed.	
	Low	High	Low	High	Low	High	Low	High	Low	High	Low	High
1890s	0.0%	0.0%	0.0%	0.0%					5.9%	25.0%		
1900s	6.3%	8.6%	0.0%	0.0%					0.0%	3.7%		
1910s	9.7%	11.8%	3.2%	6.1%					0.0%	4.1%		
1920s	8.3%	15.8%	0.0%	0.0%	0.0%	0.0%			0.0%	0.0%		
1930s	7.5%	11.1%	7.5%	16.7%	2.4%	5.6%			2.4%	5.6%		
1940s	5.4%	6.5%	8.9%	11.0%	2.4%	3.6%			3.2%	3.7%		
1950s	3.2%	8.3%	14.6%	19.4%	0.0%	0.0%			2.1%	3.2%		
1960s	2.6%	3.4%	21.3%	31.6%	0.0%	0.0%			2.2%	3.1%		
1970s	1.4%	2.1%	21.4%	29.6%	1.4%	5.3%			3.1%	4.2%		
1980s	4.4%	5.2%	25.1%	25.6%	0.3%	0.6%	6.2%	7.4%	7.1%	8.4%	0.9%	2.6%
1990s	3.7%	5.9%	20.9%	22.5%	3.1%	3.4%	8.2%	8.6%	2.2%	2.6%	1.1%	3.3%
2000s	2.4%	2.5%	23.4%	27.1%	0.9%	1.2%	7.1%	7.4%	2.4%	2.8%	2.4%	3.3%

TABLE 2C: CASELOAD DIFFERENTIALS BY CIRCUIT (HIGH MINUS LOW)

	1st	2d	3d	4th	5th	6th	7th
1890s	16.7%	16.7%	0.0%	0.0%	0.0%	8.3%	11.8%
1900s	7.9%	3.0%	2.3%	0.0%	0.0%	5.1%	3.5%
1910s	3.8%	3.8%	4.4%	0.0%	3.2%	2.1%	0.0%
1920s	0.0%	2.4%	6.3%	2.7%	2.7%	7.0%	0.2%
1930s	2.5%	11.1%	2.8%	1.9%	1.8%	2.4%	3.8%
1940s	6.0%	13.1%	1.4%	2.9%	2.0%	1.8%	3.6%
1950s	4.0%	2.7%	1.0%	1.3%	0.0%	3.6%	0.7%
1960s	3.4%	2.4%	2.5%	1.6%	3.2%	0.7%	5.2%
1970s	3.3%	1.3%	1.8%	0.6%	3.9%	1.0%	1.5%
1980s	0.5%	1.1%	0.8%	0.6%	0.9%	0.4%	1.6%
1990s	0.1%	4.3%	0.6%	0.7%	1.5%	0.6%	0.6%
2000s	0.5%	1.3%	1.4%	0.7%	1.7%	2.0%	1.2%

TABLE 2C: CASELOAD DIFFERENTIALS BY CIRCUIT (HIGH MINUS LOW) (CONT)

	8th	9th	10th	11th	D.C.	Fed.
1890s	0.0%	0.0%			19.1%	
1900s	2.3%	0.0%			3.7%	
1910s	2.1%	2.9%			4.1%	
1920s	7.5%	0.0%	0.0%		0.0%	
1930s	3.6%	9.1%	3.2%		3.2%	
1940s	1.1%	2.0%	1.1%		0.4%	
1950s	5.1%	4.8%	0.0%		1.1%	
1960s	0.7%	10.2%	0.0%		0.9%	
1970s	0.7%	8.2%	3.9%		1.1%	
1980s	0.8%	0.5%	0.2%	1.2%	1.2%	1.7%
1990s	2.1%	1.5%	0.3%	0.4%	0.3%	2.2%
2000s	0.1%	3.7%	0.3%	0.3%	0.5%	0.9%

III. INFLUENCE: CALCULATING CASEBOOK REPRESENTATION

In 1871, Christopher Columbus Langdell published the first casebook, *A Selection of Cases on the Law of Contract.*[28] Langdell's goal was "to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of [the] essential doctrines" of contract law.[29] The cases he selected should therefore teach us more than just legal doctrines. The cases should tell us something about the courts and judges that most influenced the development of contract law prior to 1871. In his own contracts casebook, Arthur Corbin suggested it is overly optimistic to think that all of the important cases can be excerpted at any significant length in one casebook.[30] Corbin is probably right. Even in the early twentieth century, there were simply too many to include all of the important historical cases along with the contemporary ones.[31] Plus, whatever Langdell's preference, casebook authors often prefer more recent cases that present the current state of the law.[32] Some casebook selections are not even particularly noteworthy, except for their potential pedagogical value. The principal cases in a casebook are, on average, more likely to be important than the cases referenced only briefly in the notes, but there is room in every casebook for the author to make some idiosyncratic

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[28] It took decades for the case method to displace lecture- and textbook-based approaches to legal education, but in 1914, the dean of the University of Michigan Law School described the case method as "the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country." Henry M. Bates, *Recent Progress in Legal Education, in* I BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER OF EDUCATION 225, 235 (1914). *See also* Alfred Z. Reed, *Legal Education, in* OFFICE OF EDUCATION, DEP'T OF THE INTERIOR, BIENNIAL SURVEY OF EDUCATION 1926–1928, at 57, 63 (1930) (describing the prevalence of the case method). Two years later, he described the case method as "fully vindicated" and "the principal method in a large majority of the law schools." Henry M. Bates, *Legal Education, in* BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER OF EDUCATION 197, 201 (1916). *See also* Alfred Z. Reed, *Legal Education, in* OFFICE OF EDUCATION, DEP'T OF THE INTERIOR, BIENNIAL SURVEY OF EDUCATION 1926–1928, at 57, 63 (1930) (describing the prevalence of the case method).

[29] CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871).

[30] *See* ARTHUR L. CORBIN, CASES ON THE LAW OF CONTRACTS SELECTED FROM DECISIONS OF ENGLISH & AMERICAN COURTS ix (William R. Vance ed., 1921) ("It is hoped that enough of the earlier material has been included to indicate continuity of legal history and to prove that the future is influenced by the remote as well as by the recent past. But student and teacher must go elsewhere for knowledge of the earlier periods.").

[31] *See* Albert Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224, 225–26 (1944) ("The rapidly growing mass of case material soon compelled the abandonment of early experiments with casebooks offering 'complete' materials in systematic order with 'informational' summaries.").

[32] *See* Myron Moskovitz, *On Writing A Casebook*, 23 SEATTLE U. L. REV. 1019, 1028 (2000).

choices, to choose some cases that no other author includes. Thus, the selection of cases in a single casebook is a questionable guide for evaluating judicial influence. The selection of cases across multiple casebooks is more promising. As early as 1908, at least 171 casebooks had been published.[33] Today, the number is in the thousands.[34] With dozens of casebooks on a particular subject, produced over several decades by many experts in the field, casebooks can assist us in evaluating the influence of particular courts and judges on both the present state of the law and its historical development.

A. CASEBOOKS AND INFLUENCE

The sizable number of casebooks published since 1871 is a rich but largely untapped source of data. There are very few quantitative studies that rely on casebooks, perhaps only four.[35] Rodney Mott's notable 1936 study is the oldest.[36] Since his study, few others have been published. The reason casebooks are little used may simply be a lack of access. Casebooks are published at such a rapid clip and in so many subjects that many libraries maintain limited collections. And at least for measuring judicial influence, there is an alternative. The most common method for measuring the influence of particular courts and judges is to rely on citations in judicial opinions.[37] Many decades after Mott's study, Richard Posner

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[33] *See* Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 LAW LIBR. J. 95, 102 (2004); *see also* Albert Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224, 224 (1944) (suggesting that approximately one hundred casebooks were published annually in the years before World War II, but he is not precise about years or numbers).

[34] A title keyword search in the University of Chicago library catalog for "cases and materials" resulted in 1,964 items. A similar search in the Harvard University catalog yielded 1,986 items. Obviously, casebooks lacking the word "materials" are not included. On the other hand, casebook supplements with the words "cases and materials" in the title are included in these search results.

[35] *See* Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141 (2002); Jean Stefanic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 CHI.-KENT L. REV. 755 (1998); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 90–91 (1990). Paul Verkuil described a less systematic effort in a discussion of the D.C. Circuit's influence in administrative law:

> But how do we prove distinctiveness in roles of circuit courts? I started to count up the cases in the administrative law case books that involve the D.C. Circuit; after a while that got to be a pointless activity, since there were so many. So, I hope you will take it on faith that something like half the opinions in most of the major casebooks and treatises derive from this court. Its influence is profound for that reason alone.

Panel Discussion, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 532 (1988) (comments of Paul Verkuil).

[36] *See* Mott, *supra* note 13.

[37] Mott actually included citation counts in his study and found a very strong correlation

used citation counts in his studies of Judges Benjamin Cardozo and Learned Hand.[38] William Landes, Lawrence Lessig, and Michael Solimine similarly relied on citations to study the influence of courts of appeals judges and the courts of appeals generally.[39] Posner's study of Cardozo is also one of the few studies to make some use of casebooks as a measure of influence.[40] But counting citations in opinions is the norm, not counting principal cases in casebooks. Why turn to casebooks to measure influence?

Before answering this question, the concept of judicial influence needs to be defined. An influential case is one that is relevant for resolving subsequent disputes or cases. An influential case can also be one that clearly resolves certain questions and therefore prevents disputes or litigation from even arising. A case may be influential because it is binding on lower courts or other decisionmakers or because the opinion's reasoning is persuasive and often considered, if not followed. Influence is not quite what Posner described as reputation, by which he meant, "widely regarded in a good light."[41] An opinion may be regarded in a *bad* light and still be influential. A poorly regarded Supreme Court case is still authoritative nationwide. Lower court judges no doubt maneuver around disliked authorities from time to time, but the maneuvering itself is evidence of influence. A poorly regarded court of appeals decision, however, is not authoritative nationwide and will likely be influential only within its defined region. Influence is therefore a function of authority and persuasive ability. It is also a function of a court's docket. A court cannot influence an area of the law unless it has an opportunity to decide relevant cases. The more cases it decides, the more likely it is to influence the law's development.

For the principal cases selected by casebook authors to serve as valid indicators of judicial influence, one or both of the following needs to be true: either casebook authors tend to choose influential cases or they tend to choose cases that later become influential. Not every case needs to be influential or destined to be influential, but there must be a strong tendency for casebook authors to select the influential cases of the past, present, or future. Although

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between casebook representation and citations by other courts. Although Mott actually reported a correlation of .89, *id.* at 310 n.24, this result appears to be an error. I recalculated the correlation coefficient as .86. I discovered a few other errors in Mott's calculations, most probably due to rounding. Calculating correlation coefficients in the 1930s was of course much more labor intensive than today.

[38] Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 534–40 (1994) ("A Citation Study of Learned Hand"); POSNER, *supra* note 35, at 74–91.

[39] William M. Landes, Lawrence Lessig, & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998).

[40] POSNER, *supra* note 35, at 90–91.

[41] *Id.* at 58.

casebooks have evolved from Langdell's original design and typically devote substantial space to "materials," the principal cases are still "the guts of the casebook"[42] or the "main events."[43] The process of selecting these cases is a critical part of writing a casebook, a process that authors take seriously.[44] As evidenced by reviews of casebooks, the professors who choose casebooks for their courses are also quite interested in the cases selected.[45] Authors therefore have both a scholarly and a market incentive to select "good" cases.

While there are multiple factors that make a case "good," one of the factors is whether the case is influential or not. In many fields of legal study, there are a few cases that are practically essential, cases that will be included at length in all or nearly all casebooks. Although it would be unthinkable to omit *Miranda v. Arizona* from a criminal procedure casebook entirely, it would also be surprising to omit *Miranda* as a principal case.[46] Other cases, though not as essential as *Miranda* in a criminal procedure casebook, will be chosen from a short list of leading candidates for a particular issue. In a discussion of copyrights in useful articles, for example, the short list includes several cases, such as *Mazer v. Stein* (involving a lamp base),[47] *Kieselstein-Cord v. Accessories by Pearl, Inc.* (a belt buckle),[48] *Carol Barnhart, Inc. v. Economy Cover Corp.* (mannequin torsos),[49] *Brandir International, Inc. v. Cascade Pacific Lumber Co.* (a bicycle rack)[50] and a few others.[51] Students could learn about copyright protection for useful articles—or any other topic—by reading nothing but recent district court opinions. After all, district court opinions often discuss influential appellate cases,[52] and casebook authors could supplement district court opinions as necessary with notes and other materials. In practice, however, casebook authors are unlikely to produce casebooks filled

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[42] Moskovitz, *supra* note 32, at 1025–26.

[43] STANLEY D. HENDERSON, LABOR LAW iv (2d ed. 2005).

[44] *See* E. Allan Farnsworth & W.F. Young, *A Casebook for All Seasons?–Another Casebook Review*, 21 SEATTLE U. L. REV. 725, 728 (1998).

[45] *See* Geoffrey R. Watson, *A Casebook for All Seasons?*, 20 SEATTLE U. L. REV. 277 (1997) (reviewing E. ALLEN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (5th ed. 1995)); Clarke B. Whittier, Book Review, 31 YALE L.J. 220, 221 (1921) (reviewing ARTHUR L. CORBIN, CASES ON CONTRACTS (1921)).

[46] *See* Moskovitz, *supra* note 32, at 1026.

[47] 347 U.S. 201 (1954).

[48] 632 F.2d 989 (2d Cir. 1980).

[49] 773 F.2d 411 (2d Cir. 1985).

[50] 834 F.2d 1142 (2d Cir. 1987).

[51] *See, e.g.*, Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913 (7th Cir. 2004) (discussing the copyrightability of a mannequin head); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) (evaluating the copyrightability of outdoor lighting fixtures). *Pivot Point* is very recent and has not yet been included in a casebook, but it would be an entirely serviceable choice.

[52] *See, e.g.*, Bonazoli v. R.S.V.P. Int'l, Inc., 353 F. Supp. 2d 218, 222 (D.R.I. 2005) (reviewing the caselaw dealing with copyrights in useful articles).

only with district court opinions. Instead, authors are likely to prefer cases from more prominent and more influential courts.[53] Professors want students to be familiar with the leading appellate cases, and students are more likely to remember the cases they have actually read rather than the cases they have only read about.

When the choices for principal cases are not predetermined or limited to a few leading cases, casebook authors have more freedom to select the remaining cases. Myron Moskovitz, the author of several casebooks, identified several criteria for making these selections, ones that largely support the value of casebooks as a measure of influence.[54] First, the cases should deal with fundamental rather than marginal issues.[55] Presumably, cases dealing with marginal issues are less influential. Marginal cases, along with marginal issues, can be handled in a casebook's notes. Second, Moskovitz prefers to include cases from a variety of jurisdictions.[56] This consideration could result in some less influential cases being selected in the interest of diversity, but it should also prevent a small number of courts from dominating a casebook, unless those courts truly dominate a particular area of law. Third, Moskovitz prefers recent cases.[57] Recent opinions are more likely to contain current statements of the law, and they are more likely to include facts or issues familiar to the students. Other casebook authors have revealed a similar preference.[58] For casebooks to be a useful indicator of judicial influence over time, particularly when multiple editions of the same casebooks are used, it is important that the authors reevaluate the selection of cases for each new edition, retaining cases that remain important and discarding those that have been eclipsed by more recent decisions. The market may exert some helpful pressure here as well. If new editions contained only trivial changes, then students might be more likely to purchase used copies of previous editions rather than new copies of the latest edition. Authors therefore have a variety of incentives to update their casebooks. APPENDIX A indicates just how often they do so. Of Moskovitz's remaining criteria, one probably works against selecting influential cases. He prefers cases with "bizarre facts—especially facts involving sex."[59] There is little reason to think that cases involving strange goings on, whether about sex or otherwise, are more influential. But no one thinks every case

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[53] *See* Moskovitz, *supra* note 32, at 1028–29.

[54] *Id.* at 1026.

[55] *Id.* at 1026–27.

[56] *Id.* at 1029.

[57] *Id.* at 1028.

[58] *See, e.g.*, Farnsworth & Young, *supra* note 44, at 729; HAROLD SHEPHERD, CONTRACTS AND CONTRACT REMEDIES viii (3d ed. 1952); ARTHUR L. CORBIN, CASES ON THE LAW OF CONTRACTS ix (1921).

[59] Moskovotz, *supra* note 32, at 1027. *See* Mott, *supra* note 13, at 304 (noting the preference of casebook editors for cases with "interesting or unique facts").

chosen for a casebook is a landmark or even a leading case. Some cases are bound to be included more because they are entertaining than influential. Of course, influence and titillation are not mutually exclusive.[60]

Even when authors select less influential cases, they may subsequently acquire influence as a result of being included in a casebook. While no casebook is needed to make some cases influential, other cases need a bit of promotion, and the more often a case is read, the more likely it is to become influential. Mott noted the importance of influencing "the next generation of lawyers" in his study.[61] And Judge Kozinski occasionally writes an opinion with the goal of getting it into the casebooks—and in front of thousands of law students.[62] According to Kozinski, clerks offer a route through which casebooks can effectively influence judges.[63] To the extent judges delegate much of the opinion writing to clerks, their exposure to the opinions in casebooks is all the more important. Casebooks must influence professors too. Professors are repeatedly exposed to the same cases as students. Presumably, this exposure impacts their academic work, another possible avenue for influencing judges and the law generally, at least to the extent judges read legal scholarship.[64] Not every previously unknown case included in a casebook will subsequently become a hit,

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[60] *See, e.g.*, Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979) (affirming the grant of a preliminary injunction prohibiting the distribution and exhibition of *Debbie Does Dallas* due to the use of a uniform in the movie similar to the Dallas Cowboys Cheerleaders' trademark uniform).

[61] Mott, *supra* note 13, at 303–04.

[62] *Id.* at 298–302. Judge Kozinksi provides the example of his opinion in *Trident Center v. Connecticut General Life Ins.*, 847 F.2d 564 (9th Cir. 1988). He drafted *Trident Center* as an explicit attack on *Pacific Gas and Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968), in which Chief Justice Traynor, writing for the California Supreme Court, took a very broad view of the legitimate use of extrinsic evidence in contract interpretation. Judge Kozinski was successful in his goal of getting *Trident Center* into several contracts casebooks as a counterpoint to *Pacific Gas*. *See, e.g.*, ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 660 (rev. 3d ed. 2002); LON L. FULLER AND MELVIN ARON EISENBERG, BASIC CONTRACT LAW 622 (7th ed. 2001) (digested at substantial length); ROBERT S. SUMMERS AND ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION 688 (4th ed. 2001) (principal case); JOHN D. CALIMARI, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS 343 (4th ed. 2000) (principal case).

[63] *See* Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 298 (2000).

[64] *Id.* at 302–20. *But see* Richard G. Kopf, *Do Judges Read the Review? A Citation-Counting Study of the Nebraska Law Review and the Nebraska Supreme Court, 1972–1996*, 76 NEB. L. REV. 708, 714 (1997) ("[T]he research consistently proves that judges seldom cite law review articles."); Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986) ("My experience teaches also that too few law review articles prove helpful in appellate decision making.").

but casebooks are probably one of the more effective vehicles in the law for getting people to notice a particular case.

Admittedly, these considerations about casebooks and influence are somewhat speculative. Although there is substantial similarity between the casebook selection criteria noted by Mott in the 1930s and those noted by Moskovitz a few years ago, there is no systematic evidence, such as survey data, on how casebook authors select cases, what factors they consider, or how they weigh these factors. Nor are there any data available about the likelihood of students purchasing used casebooks when professors make only minor updates in a new edition. It would be helpful to know, for example, how merely "revised" editions sell as compared to new editions. As in all research, whether empirical or otherwise, some assumptions must be made, but it is a reasonable assumption that casebook authors generally favor more influential cases and that casebooks may contribute to the influence of the selected cases. These assumptions are also supported by what empirical evidence is available. In addition to relying on the fifty-nine casebooks in use at the time to measure the influence of state supreme courts, Mott also surveyed the 600 law professors at member schools of the Association of American Law Schools, receiving responses from 259 or 43.2% of them.[65] He found a moderately strong correlation of .70 between the "esteem" in which the different states' high courts were held by the respondents and the courts' representation in the casebooks.[66] Mott's questions were about the courts' reputations in general, however.[67] Perhaps a study focused on particular subjects and the experts in these subjects would have yielded even stronger correlations.

Assuming casebooks offer a valid method of identifying influential opinions, they offer some advantages over counting citations in opinions. As noted earlier in estimating the circuits' caseloads, one difficulty for evaluating influence in particular subject areas is defining the relevant universe of cases.[68] Dealing with the subsequent history of each case adds to the difficulty. Even if an opinion is fairly designated as a copyright opinion, most opinions contain propositions of law on multiple issues. A case largely about copyright might be cited for reasons unrelated to copyright. The copyright portion of an opinion might be ignored in subsequent cases while another portion of the opinion might be heavily cited. A team of research assistants could solve this problem by carefully coding each citation to the original case to determine why it was cited, but this method is costly. Casebooks partially address both of these problems, first by identifying a group of cases especially relevant to a topic, and second by eliminating the need

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[65] Mott, *supra* note 13, at 295–96.

[66] *Id.* at 305 n.15.

[67] *Id.* at 296.

[68] *See supra* note 14 and accompanying text.

to code subsequent histories. Even with casebooks devoted to copyright, however, some consideration must be given to the relevance of individual cases. Copyright casebooks do *not* contain only copyright cases.[69]

Another advantage of casebooks is that there are more constraints on including principal cases in a casebook than there are on including citations in a judicial opinion. The cost to add additional citations to an opinion is very low, making it somewhat difficult to distinguish between the important citations and, in the words of Landes, Lessig, and Solimine, the "decorative" ones.[70] Again, this problem could be alleviated through the careful coding of opinions to determine which cases are actually being discussed and which are being added to string cites without comment, but casebooks offer another way around this problem. While there are few limitations on citing cases in the notes of a casebook, the principal cases take up valuable real estate. Professors rarely want or need four or five or six cases on the same issue, and students do not want to buy books so thick and costly that they can accommodate superfluous principal cases. On most issues, professors and students probably want only one or two good cases, perhaps three or maybe even four if an issue has generated significant conflict in the courts. Thus, there is a greater incentive to make careful choices when selecting opinions for a casebook than when selecting cases for a string cite.

Nevertheless, casebooks come with some limitations. Casebooks by necessity must focus on the core issues of a particular subject. On the one hand, it is desirable to focus on the central problems in a particular area of the law. On the other hand, the sum total of all the "marginal" issues is likely significant. Relying on the citations in opinions would allow one to include a more complete universe of issues. Casebooks also involve the perspectives of fewer individuals. The number of casebook authors in any one subject is much lower than the number of judges who must deal with the subject. The number of authors producing copyright or intellectual property casebooks at any one time also varies widely. The same is likely true in many subjects. For these reasons, measures of influence based on both casebooks *and* judicial opinions are useful. Each approach offers its own advantages. As with the measurement of many abstract concepts, including judicial influence, multiple methods are desirable. One of the arguments of this paper, however, is that a measure based on casebooks is worth adding to the methodological mix.

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[69] *See, e.g.*, SHELDON W. HALPERN, DAVID E. SHIPLEY & HOWARD B. ABRAMS, COPYRIGHT 13–18 (1992) (including the patent case *Graham v. John Deere Co.*); ALAN LATMAN, ROBERT GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE EIGHTIES 40–45 (2d ed. 1985).

[70] Landes, Lessig & Solimine, *supra* note 39, at 275.

B. COPYRIGHT AND INTELLECTUAL PROPERTY CASEBOOKS

The primary sources of data for this study are fifty-two casebooks, comprising every copyright and general intellectual property casebook I could identify through 2005. Of the fifty-two, thirty-one are copyright casebooks and twenty-one are general intellectual property casebooks. I did not include four intellectual property casebooks designated as only "revised" rather than new editions, on the assumption that a mere revision is a less thorough reevaluation of the case selections.[71] Nor did I include more specialized intellectual property casebooks, such as ones on entertainment, Internet law, or international intellectual property. Most of the fifty-two casebooks belong to a multi-edition series, ranging from two to nine editions.[72] Only six of the casebooks stand alone as a single edition. The authors are a distinguished group of thirty-nine experts on copyright and intellectual property law, including six of the ten currently most cited intellectual property professors: Paul Goldstein, Robert Merges, Mark Lemley, Jane Ginsburg, Rochelle Dreyfuss, and Edmund Kitch.[73] Also included are Melville Nimmer and David Nimmer, the authors of the most cited treatise on copyright law and one of the most cited treatises generally.[74] APPENDIX D provides a complete list of the casebooks.

Copyright and intellectual property casebooks are not, of course, published on a uniform and regular schedule. Ideally, one would like an equal number of casebooks from each author, with new editions regularly published at the same time. Obviously, these ideal longitudinal data cannot be created with these or any other casebooks. Many of these authors were not even alive when the first of these fifty-two casebooks was published. The earliest casebook, authored by Francis Deák and Frederick Chait, dates back to 1940.[75] Benjamin Kaplan and

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[71] *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES (rev. 5th ed. 2004); PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES (rev. 4th ed. 1999); PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES (rev. 3d ed. 1993); EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS (rev. 4th ed. 1991).

[72] Two casebooks, one by Sheldon Halpern alone, and one by Sheldon Halpern, David Shipley, and Howard Abrams, are treated as separate series.

[73] These rankings are based on Most Cited Law Faculty, 2002–2003. Brian Leiter, Welcome to the New Leiter's Law School Rankings Website, http://www.utexas.edu/law/faculty/bleiter/rankings02/top10_most_cited.html.

[74] *See* Fred R. Shapiro, The Twenty Most Cited Legal Texts and Treatises (1978–1999), http://lib.law.washington.edu/ref/mostcited.html.

[75] Francis Deák and some of his early course offerings in intellectual property are briefly discussed in FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW COLUMBIA UNIVERSITY 329, 361 (1955). *See also* ASSOCIATION OF AMERICAN LAW SCHOOLS,

Ralph S. Brown's casebook, the second oldest, did not appear until twenty years later. Indeed, a majority of the fifty-two casebooks were published within the past fifteen years. TABLE 3 summarizes the publication rates by decade. Perspectives from the 1970s, 1980s, and especially the 1990s and 2000s are well represented. Earlier perspectives are not. Conclusions about these earlier periods are therefore more tentative. While the casebooks offer considerable information about which cases from the 1960s and earlier decades remain influential today, they provide less information about which cases were most influential *from the perspective* of these earlier decades.

TABLE 3: CASEBOOK PUBLICATION RATES

DECADE	COPYRIGHT CASEBOOKS	GENERAL IP CASEBOOKS	TOTAL
1940s	1	0	1
1950s	0	1	1
1960s	1	0	1
1970s	4	3	7
1980s	6	3	9
1990s	11	7	18
2000s	8	7	15
TOTAL	31	21	52

While the pre-1970 perspectives are very limited in number, the pace of change in the law of copyright was much less rapid prior to the 1970s. For example, although there were several legislative enactments,[76] there was no general revision to the copyright law between 1909 and 1976. Indeed, by one recent count, "More pages of copyright law have been added to the U.S. Code in the past decade than in the prior 200 years of the republic[.]"[77] In addition to the low level of legislative activity, the level of litigation was relatively low and stable until the 1970s.[78] It was not until the early 1970s that the pace of litigation began to trend

DIRECTORY OF TEACHERS IN MEMBER SCHOOLS 1942–1943, at 59 (1942). I have located very little information on Frederick Chait beyond that he was a 1935 graduate of Columbia Law School. *See* COLUMBIA LAW SCHOOL ALUMNI ASSOCIATION, COLUMBIA LAW REGISTER 197 (1965).

[76] For a short overview, see United States Copyright Office, Notable Dates in United States Copyright, Circular 1a, http://www.copyright.gov/circs/circ1a.html.

[77] Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 65 (2002–2003).

[78] *See supra* FIGURE 1.

decisively upwards. It is surely no coincidence that the copyright and intellectual property casebook business started to take off in the 1970s. Although stable and modest levels of litigation are no guarantee of doctrinal stability, they suggest that, prior to the 1970s, fewer casebooks could capture the developments of longer periods of time.

While Deák and Chait's 1940 casebook offers a much desired early perspective on copyright law, its validity as an indicator of national judicial influence is open to question. Their *Cases and Material on Copyright Protection* was officially unpublished. It was "prepared for the exclusive, private and confidential uses of Classes in the Columbia University School of Law" in 1940.[79] But it was not a mere course packet. It was a carefully edited two-volume casebook, one used in Columbia's copyright course for many years,[80] and one that might have been published had there been more demand for copyright casebooks in the 1940s. While Columbia's course was not the first university level course on copyright—Richard De Wolf offered a course at American University's School of Diplomacy, Jurisprudence, and Citizenship as early as 1920[81]—it may have been the first of its kind in a law school.[82] Hence, Deák and Chait probably did not prepare their casebook with a national market in mind—they prepared it for students at Columbia. In terms of the principal cases in the casebook (and without excluding any cases for subject matter reasons), the most highly represented courts by far are the Southern District of New York (24.7%), the Second Circuit (21.1%), and the U.S. Supreme Court (11.1%).[83] All three courts may be highly represented because of their great influence in the field of copyright, but the Southern District and the Second Circuit may be highly represented because Deák and Chait prepared the casebook for students in New York. Presumably, Columbia students in the 1940s most often practiced in New York City after law school. Deák and Chait may have favored the caselaw binding in New York City for this reason.

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[79] 1 Francis Deák & Frederick Chait, Cases and Materials on Copyright Protection title page (unpublished casebook 1940).

[80] *See, e.g.*, Columbia University, 48 *Columbia University Bulletin of Information* No. 30 at 42 (July 17, 1948) (listing Deák & Chait's casebook for the course on copyright).

[81] *See* Richard Crosby De Wolf, Biographies of Registers of Copyrights, www.copyright.gov/history/index.html; RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW (1925).

[82] Tracking down the history of copyright education is difficult. The earliest comprehensive study on this topic may be the one started by the World Intellectual Property Organization in 1969 and later updated in the early 1970s. *See* INTERNATIONAL BUREAU OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, TEACHING OF THE LAW OF INTELLECTUAL PROPERTY THROUGHOUT THE WORLD (3d ed. 1972); INTERNATIONAL BUREAU OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, TEACHING OF THE LAW OF INTELLECTUAL PROPERTY THROUGHOUT THE WORLD (2d ed. 1971). I could not locate the first edition.

[83] *See infra* TABLE 4.

Despite the initial concerns about this casebook, there are two reasons for concluding that Deák and Chait were not biased by local considerations in their case selections. First, the casebook contains numerous French and even a few Dutch cases, which suggests the authors took a broad view of the law.[84] Second, the distribution of principal cases is similar to the distribution of cases cited in Herbert A. Howell's *The Copyright Law*,[85] the first edition of a popular treatise later revised by Alan Latman and William Patry.[86] When Howell published it in 1942, he was a former Assistant Register of Copyrights and based in Washington, D.C.[87] Unlike Deák and Chait, Howell published his book (with the Bureau of National Affairs). Since there is nothing in a treatise analogous to a principal case in a casebook, the comparison between the two books is not perfect, but there is no obvious reason why Howell would have favored caselaw binding in New York, unless New York was actually the center of copyright litigation.

Although the two books were intended for very different audiences and for very different uses, the similarities in the case selections are striking. TABLE 4 presents the distribution of cases in both books. The top four courts are the same and the percentages are quite close, though the Supreme Court fares better in Howell's treatise than in Deák and Chait's casebook. At most, there is a slight bias in favor of the Southern District of New York and the Second Circuit in Deák and Chait, perhaps at the expense of the Supreme Court. A bias in favor of controlling authorities in New York, however, would not adversely affect the Supreme Court. Supreme Court case law is controlling nationwide. This suggests the Supreme Court fared worse in Deák and Chait's casebook for some reason other than a desire for locally relevant caselaw. Whatever the reason, their casebook appears to be a reasonably valid indicator of the national importance of the New York courts from the perspective of the early 1940s.

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[84] Deák & Chait, *supra* note 79.

[85] HERBERT A. HOWELL, THE COPYRIGHT LAW (1942).

[86] *See* ALAN LATMAN, HOWELL'S COPYRIGHT LAW (rev. ed. 1979); WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW (6th ed. 1986); 2 Francis Deák & Frederick Chait, Cases and Materials on Copyright Protection 627–38 (unpublished casebook 1940).

[87] Howell's preface is signed from Washington, D.C. *See* HOWELL, *supra* note 85, at iii.

TABLE 4: DISTRIBUTION OF CASES IN DEÁK & CHAIT AND HOWELL (RANK ORDER)[88]

DEÁK & CHAIT (1940)		HOWELL (1942)	
S.D.N.Y.	24.7%	S.D.N.Y.	23.2%
Second Circuit	21.1%	Second Circuit	18.6%
U.S. Sup. Ct.	11.1%	U.S. Sup. Ct.	15.3%
D. Mass.	4.2%	D. Mass.	5.5%
E.D. Pa.	3.2%	N.Y. Sup. Ct.	2.7%
N.Y.	2.1%	E.D. Pa.	2.5%
S.D. Cal.	2.1%	First Circuit	2.2%
First Circuit	2.1%	E.D.N.Y.	2.2%
E.D.N.Y.	2.1%	Seventh Circuit	1.6%
N.Y. Sup. Ct.	2.1%	Eighth Circuit	1.6%
Seventh Circuit	1.6%	S.D. Cal.	1.6%
Ninth Circuit	1.6%	D.C. Circuit	1.6%
W.D. Pa.	1.6%	Third Circuit	1.4%
Mass.	1.6%	Fifth Circuit	1.4%
Other courts	18.9%	Ninth Circuit	1.4%
		Other courts	17.2%

C. IDENTIFYING THE PRINCIPAL CASES

As before, the unit of analysis is an opinion, but I will continue to refer to "principal cases," which is the more common terminology. To identify these cases in the fifty-two casebooks, I did not rely on each casebook's table of cases. There are two problems with these tables. First, many of the tables contain

[88] These percentages are based on 190 principal opinions identified in the text of Deák and Chait and 366 cases listed in the table of cases in Howell. Only the decisions of American courts are included in these numbers, but no cases were excluded due to their subject matter. Cases decided by the now defunct circuit courts are credited to the local district courts (e.g., C.C.S.D.N.Y. is treated as S.D.N.Y.).

errors, sometimes quite a few. Occasionally, a principal case is missing entirely.[89] More often, cases that are formatted as principal cases in the main text are not italicized, bold-faced, or otherwise formatted as principal cases in the tables. Second, principal cases are not defined consistently in the tables. In some tables, cases digested at length are counted as principal cases.[90] In other tables, digested cases are not counted as principal cases.[91] Moreover, the definition of a principal case sometimes varies across multiple editions of the same casebook.[92]

Regardless of how the cases are defined in the tables of cases, every casebook adopts some unique and prominent formatting for what we might call the "top-level" cases. For example, in the first edition of Melville Nimmer's casebook, the top-level cases include the name of the case centered and bold-faced on the first line, the court and year of decision on the second line, and the citation on the third line. The author of the opinion follows, sometimes preceded by the entire panel.[93] These top-level cases generally receive the most space and attention in the casebooks, but once in a while, a case is digested and discussed at greater length than some principal cases.[94] One could define the cases of interest in terms of the space devoted to them, regardless of how they are formatted. A relevant case could be defined as one that takes up at least some predetermined amount of space, an inch, a page, or some other unit of measure.[95] Words could even be

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[89] *See, e.g.*, ALAN LATMAN, ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE EIGHTIES 91, 618 (2d ed. 1985) (omitting Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981), from the table of cases).

[90] *See, e.g.*, ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHTS: CASES AND MATERIALS 17, 905 (5th ed. 1999) (classifying *Mazer v. Stein*, 347 U.S. 201 (1954), as a principal case).

[91] *See, e.g.*, ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT XXXII 79–80 (6th ed. 2002) (digesting *Sebastian Int'l, Inc. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909 (D.N.J. 1987), but not counting it as a principal case).

[92] *Compare* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES xxxii, 669–70 (2d ed. 1981) (identifying *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), as a principal case), *with* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES xxii, 588–89 (4th ed. 1997) (identifying the same case and excerpt as a non-principal case). The difference is not due to an error in the table of cases. In examining other entries in the table, it is clear that the definition of a principal case differs in the two casebooks.

[93] *See, e.g.*, MELVILLE B. NIMMER, COPYRIGHT AND OTHER ASPECTS OF LAW PERTAINING TO LITERARY, MUSICAL AND ARTISTIC WORKS 1, 15 (1971). In Gorman and Ginsburg's sixth edition, as a second example, the top-level cases include the name of the case left-justified, bold-faced, and printed in a larger font on the first line, the citation and court on the second line, and a darkened square followed by the author of the opinion on the third line. *See, e.g.*, ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 29 (6th ed. 2002).

[94] *See, e.g.*, CRAIG JOYCE ET AL., COPYRIGHT LAW 741–48 (6th ed. 2003) (discussing and excerpting *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807 (1st Cir. 1995)).

[95] In their study of casebooks, Gulati and Sanchez counted opinions of at least one page in length. Gulati & Sanchez, *supra* note 35, at 1154.

counted. But as a practical matter, these approaches are complex and costly. The reasonable alternative is to record the cases the authors themselves chose to highlight through the most prominent formatting option in the casebook. These top-level cases are the ones I define as principal cases, regardless of whether the author of a particular casebook defined the principal cases more broadly in the table of cases. This definition allows for easy identification of the relevant cases and probably tracks the most common understanding of what counts as a principal case.

While the principal cases can be reliably identified, not all of the principal cases in these casebooks are relevant to a study about copyright law. Even the casebooks primarily about copyright contain cases that are clearly not about copyright, such as a patent or trademark case provided as an example of other forms of intellectual property.[96] And of course, the general intellectual property casebooks cover patents and trademarks in detail.[97] Patent and trademark cases might be fairly easy to classify as non-copyright cases, but other types of cases are more difficult. Cases dealing with misappropriation are a good example.[98] The difficult question is, which cases should count as copyright cases? In a trivial sense, all cases are relevant. Cases about patents offer some insight into what copyright *is not*. The boundaries between different areas of the law, however, need not be perfectly defined. The boundaries are practical in nature, and workable distinctions can be made. The casebooks themselves are evidence of this. Thus, some cases must be strained out of the data set, even if the definition of a copyright case is somewhat arbitrary at the margins, but they need to be strained out in a consistent and reliable manner.

I compiled the initial list of principal cases according to the following rules. In the copyright casebooks, I recorded every principal case, regardless of topic, with two exceptions. I omitted completely all non-American cases and all cases in the chapters on defamation and privacy torts in the Nimmer series.[99] These tort cases are too far afield from the present inquiry and no other copyright casebooks include chapters on these topics. In the intellectual property casebooks, I counted the cases from each section focusing on copyright, meaning the word "copyright"

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[96] *See, e.g.*, SHELDON W. HALPERN, DAVID E. SHIPLEY & HOWARD B. ABRAMS, COPYRIGHT: CASES AND MATERIALS 13–18 (West 1992) (including Graham v. John Deere Co., 338 U.S. 1 (1966), as a principal case).

[97] *See, e.g.*, EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 165–363, 801–1085 (5th ed. 1998).

[98] *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

[99] In the first edition of the Nimmer series, I excluded only chapter eleven. In the subsequent editions, this material is divided up among chapters thirteen, fourteen, and fifteen; therefore, I excluded these three chapters in all subsequent editions.

appeared in the chapter or section heading.[100] Where the topic of preemption was treated in its own section, as it often is in intellectual property casebooks, I counted all cases from these sections. Where there was one, I also included any cases included in a general introductory chapter. I excluded the chapters on patents, trademarks, or other topics. APPENDIX D lists the exact pages included from each of these casebooks. As I did not count every case in the intellectual property casebooks, I sometimes counted the same case in one casebook but not in another. I always counted misappropriation cases in a copyright casebook (provided it was not in one of the omitted Nimmer chapters), but I did not count the same case in an intellectual property casebook, unless it appeared in one of the included sections, i.e., a general introduction, a general preemption section, or a copyright section. While this approach may seem odd, it produces a desirable effect: cases on the borderline of copyright law are counted less often. Also, as the intellectual property casebooks devote less space to copyright issues than a copyright casebook, they must focus on the core issues. Thus, by including the intellectual property casebooks in the study, the cases dealing with the most important issues are counted more often.

From this initial list of 839 cases, the next step was to remove the cases not dealing with copyright. This screening process was tied to the number of references to copyright in the opinions. In determining the number of references in the opinions, I relied on the original text, not the excerpts of the opinions in the casebooks. Where a decision was not unanimous, I added up the references in the separate opinions. I did not count references in any headnotes or other materials outside of the opinion text. I automatically removed all cases without at least one reference to copyright. This eliminated thirty-three cases.[101] I automatically retained all cases with at least five references to copyright, on the assumption—tested against a small number of cases—that cases with at least five references typically contain a significant copyright issue.[102] This preserved 713

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[100] A slight exception is E. Ernest Goldtein's 1959 casebook. *See* E. ERNEST GOLDSTEIN, CASES AND OTHER MATERIALS ON THE FUNDAMENTALS OF PATENT, TRADE-MARK, AND COPYRIGHT LAW (Foundation 1959). Except for one very short chapter, each chapter is organized into three distinct parts: Part A covers patents, Part B covers trademarks, and Part C covers copyright. Only in Chapter 8 is the word "copyright" missing from the title of Part C, yet it is clearly the part devoted to copyright. *Id.* I therefore included all cases from Chapter 8, Part C.

[101] Some examples of notable cases eliminated under this rule are the following: *Two Pesos v. Taco Cabana*, 505 U.S. 763 (1992); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961); *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938); and *State St. Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1368 (Fed. Cir. 1998).

[102] As a practical matter, this test is most easily conducted with a browser that will highlight particular words, such as Mozilla's Firefox browser. In this case, the word was "copyright." The browser will highlight "copyright" even if it is part of a larger word, such as "copyrightability." Some older cases use "copy-right" with the hyphen. *See, e.g.*, Bartlette v. Crittenden, 2 F. Cas. 981,

cases. Left over were sixty-three cases, each having from one to four references to copyright. These cases required closer scrutiny.

In examining each of these sixty-three "ambiguous" cases, the basic question was whether a case could plausibly be cited for some proposition of copyright law, even if copyright issues did not dominate the opinion. As an example, a right of publicity case with even a short discussion of preemption under federal copyright law would qualify as a copyright case. This standard is fairly generous, but these cases do, after all, come from copyright and intellectual property casebooks. After reviewing these cases, I eliminated twenty-eight and retained thirty-five.[103] The judgment about whether a case met the standard was inherently subjective, and some cases were harder to evaluate than others. I therefore asked a colleague to recode half of the cases, randomly chosen.[104] Our judgments were in agreement in twenty-nine of the thirty-one cases for an agreement rate of 93.4%. Cohen's kappa, a more conservative measure of inter-coder agreement, is .868.[105] As a rule of thumb, this level of agreement is considered "almost

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981 (C.C.D. Ohio 1847). I counted these references as well.

[103] As a few examples, I retained the following notable cases: *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Trade-Mark Cases*, 100 U.S. 82 (1879); and *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67 (N.Y. Sup. Ct. 1948). A hard case that I eliminated was *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395 (9th Cir. 1992). The latent copyright issues in this case were not made explicit until *White v. Samsung Elecs. America, Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting), which I easily retained under the five-reference rule.

[104] I discovered the 1959 casebook by E. Ernest Goldstein after this recoding process was completed. As a result, one case with only two references to copyright, *Thompson v. Gernsback*, 94 F. Supp. 453 (S.D.N.Y. 1950), was not among those that could be randomly chosen for recoding. I retained this case as a copyright case. The complete coding instructions were as follows:

> Attached are 31 opinions, randomly selected from a set of 62 opinions. Each opinion contains at least one reference to the word "copyright" or a variation on the word, such as "copyrightability" or "uncopyrighted." The question for each of these opinions is whether it can reasonably count as a "copyright case," broadly understood. The copyright issue or issues need not dominate the opinion, but the opinion should contain some statement about copyright, one dealing with an issue of common law copyright, statutory copyright, or the constitutional dimensions of the copyright. The copyright issue(s) need not dominate the opinion; the discussion(s) of copyright could even be very brief. One way to approach each opinion is to consider whether you could plausibly cite it for a proposition of copyright law.
>
> On each opinion, please write "yes" if you think it can fairly count as a copyright case as defined above or "no" if you think it should not count.

[105] A certain amount of agreement can be attributed to chance. Cohen's kappa reflects this possibility and a kappa of 0 is possible even with some agreement, but it would be a level of agreement that could be due to chance alone. *See* J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

perfect."[106] As the sample of thirty-one cases is small, the standard error is relatively large (.09), but the lower limit of the 95% confidence interval is a kappa of .69, which is still considered "substantial" agreement under the standard rule of thumb.[107] After the elimination of the 91 (63 + 28 = 91) "non-copyright" cases, 748 (839 – 63 – 28 = 748) copyright cases remained in the data set.

Before turning to the analysis of these cases, one coding issue remains. It is not obvious how best to classify twenty-one opinions of the now defunct circuit courts.[108] Eleven of these decisions are from the Circuit Court, Southern District of New York; three from the Circuit Court, District of Massachusetts, including Justice Story's decisions in *Folsom v. Marsh*[109] and *Emerson v. Davies*;[110] and two from the Circuit Court, Eastern District of Pennsylvania. The remaining five decisions are from five other courts.[111] The question is whether to classify these decisions as decisions of the circuit courts or as decisions of the local district courts.

Although four of the twenty-one cases are more problematic, classifying all of them as district court decisions makes sense. In 1912, the circuit courts were merged with the district courts, but they ceased to function as truly separate courts well before 1912.[112] Fifteen of these twenty-one cases were decided after 1869, by which time "the circuit courts were predominantly mere replicas of the district courts, more often than not presided over by the same district judge."[113] Of the remaining six cases decided prior to 1869, district court judges actually decided two. This leaves four cases that present a real classification difficulty. As little turns on how these four cases are classified, I also credit them to the local

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[106] *Id.*

[107] *Id.*

[108] *See generally* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 35–64 (2d ed. 2002).

[109] 9 F. Cas. 342 (C.C.D. Mass. 1841).

[110] 8 F. Cas. 615 (C.C.D. Mass. 1845).

[111] Fonotipia, Ltd. v. Bradley, 171 F. 951 (C.C.E.D.N.Y. 1909); Am. Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262 (C.C.D.N.J. 1905); Reed v. Holliday, 19 F. 325 (C.C.W.D. Pa. 1884); Osgood v. Allen, 18 F. Cas. 871 (C.C.D. Maine 1872); Bartlette v. Crittenden, 2 F. Cas. 981 (C.C.D. Ohio 1847).

[112] *See* 36 Stat. 1087, 1167 (1911) ("The circuit courts of the United States, upon the taking effect of this Act [i.e., January 1, 1912], shall be, and hereby are, abolished .... All suits and proceedings pending in said circuit courts on the date of the taking effect of this Act ... shall thereupon and thereafter be proceeded with and disposed of in the district courts ...."). For reasons unclear to me, a few opinions were issued by the circuit courts even after their January 1, 1912 abolition. *See, e.g.*, New York Times Co. v. Star Co., 195 F. 110 (C.C.S.D.N.Y. 1912).

[113] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 128 (1928). *See also* SURRENCY, *supra* note 108, at 63 ("Between 1869 and 1891, any advantage of having two separate courts slowly disappeared ....").

district courts, which at least maintains the consistency in how these cases are handled.[114]

TABLES 5 and 6 summarize the results for the courts generally and for the courts of appeals specifically. In APPENDIX B, TABLE 5 is reproduced in greater detail, providing the breakdown for each casebook. Because the number of principal cases in the casebooks varies widely, all of the results in these tables are provided in terms of percentages. In comparing the courts, the important issue is how much space is allocated to each circuit *relative* to the other courts. Using the raw numbers would make comparisons between casebooks more difficult.

[114] A similar problem was how to classify the court in *Martin Luther King Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983). After certifying several questions about Georgia's right of publicity to the Georgia Supreme Court, the Eleventh Circuit reversed the district court in a short per curiam opinion, attaching the Georgia court's opinion as an exhibit. *Id.* at 674. Formally, this is an Eleventh Circuit opinion, but the Georgia Supreme Court did the real work. Therefore, I treated this opinion as *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 296 S.E.2d 697 (Ga. 1982).

TABLE 5: CASEBOOK REPRESENTATION – ALL COURTS

	S. Ct.	2d	9th	SDNY	Sub-T	1st	3d	4th	5th
AVG All Casebooks (52)	24.6%	26.0%	12.1%	8.0%	70.6%	3.3%	3.0%	0.7%	2.7%
AVG Copyright (31)	21.6%	25.9%	11.0%	9.7%	68.3%	3.3%	3.3%	0.9%	2.4%
AVG IP (21)	28.9%	26.0%	13.8%	5.5%	74.2%	3.4%	2.6%	0.4%	3.1%
AVG Pre-70s (3)	15.4%	25.8%	5.0%	21.7%	68.0%	1.7%	1.4%	0.5%	0.4%
AVG 70s (7)	23.6%	29.4%	5.9%	12.4%	71.3%	3.4%	2.3%	0.4%	1.4%
AVG 80s (9)	22.1%	26.2%	10.4%	8.2%	66.9%	3.3%	2.5%	0.3%	5.1%
AVG 90s (18)	25.3%	26.0%	13.5%	6.3%	71.0%	3.3%	4.3%	0.6%	3.1%
AVG 2000s (15)	27.5%	24.2%	15.9%	5.2%	72.7%	3.6%	2.6%	1.1%	1.7%
AVG D&C (1)	11.5%	21.4%	1.6%	24.7%	59.3%	2.2%	1.1%	0.0%	1.1%
AVG EGG (1)	15.7%	24.3%	8.6%	21.4%	70.0%	1.4%	1.4%	0.0%	0.0%
AVG KBD (9)	23.3%	29.3%	5.7%	10.6%	68.9%	6.1%	5.1%	1.4%	1.9%
AVG NMM (6)	27.0%	23.0%	11.7%	10.2%	71.8%	1.6%	1.4%	0.2%	0.2%
AVG K&P (5)	24.4%	36.5%	12.2%	5.9%	77.0%	4.8%	2.3%	0.0%	5.0%
AVG GLD (5)	29.1%	23.7%	10.6%	8.3%	71.8%	1.4%	2.8%	0.0%	6.4%
AVG LGG (6)	17.5%	24.4%	13.1%	11.7%	66.7%	3.8%	5.2%	0.2%	3.8%
AVG JPL (6)	21.0%	24.9%	14.0%	7.0%	67.0%	1.4%	3.6%	1.0%	3.9%
AVG HSA (1)	20.0%	30.6%	12.9%	3.5%	67.1%	1.2%	5.9%	1.2%	1.2%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

TABLE 5: CASEBOOK REPRESENTATION – ALL COURTS (CON'T)

	6th	7th	8th	10th	11th	DC	Fed	Other
AVG All Casebooks (52)	0.5%	3.6%	1.0%	0.2%	0.9%	1.3%	0.0%	12.0%
AVG Copyright (31)	0.6%	3.1%	1.2%	0.3%	0.7%	1.6%	0.0%	14.5%
AVG IP (21)	0.5%	4.3%	0.8%	0.1%	1.2%	0.9%	0.1%	8.4%
AVG Pre-70s (3)	0.4%	2.5%	1.8%	0.0%	N/A	2.6%	N/A	20.7%
AVG 70s (7)	0.6%	0.8%	0.7%	0.0%	N/A	1.7%	N/A	17.4%
AVG 80s (9)	0.0%	1.4%	0.9%	0.1%	1.3%	1.9%	0.0%	16.1%
AVG 90s (18)	0.4%	4.4%	1.2%	0.2%	0.8%	1.0%	0.0%	9.6%
AVG 2000s (15)	1.0%	5.4%	1.0%	0.3%	1.2%	1.0%	0.2%	8.3%
AVG D&C (1)	1.1%	1.6%	1.1%	0.0%	N/A	0.5%	N/A	31.9%
AVG EGG (1)	0.0%	5.7%	2.9%	0.0%	N/A	5.7%	N/A	12.9%
AVG KBD (9)	0.7%	2.0%	0.2%	0.0%	0.3%	2.3%	0.0%	13.0%
AVG NMM (6)	0.4%	1.7%	1.6%	0.4%	0.0%	1.5%	0.0%	19.1%
AVG K&P (5)	0.4%	1.1%	0.8%	0.0%	2.5%	0.0%	0.0%	6.0%
AVG GLD (5)	0.0%	4.9%	0.0%	0.0%	0.0%	2.2%	0.0%	10.5%
AVG LGG (6)	0.7%	2.4%	1.6%	0.9%	1.0%	1.0%	0.0%	12.6%
AVG JPL (6)	0.5%	4.9%	1.4%	0.0%	0.7%	1.9%	0.0%	13.7%
AVG HSA (1)	0.0%	7.1%	3.5%	0.0%	3.5%	0.0%	0.0%	9.4%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

TABLE 5: CASEBOOK REPRESENTATION – ALL COURTS (CON'T)

	S. Ct.	2d	9th	SDNY	Sub-T	1st	3d	4th	5th
AVG BAR (2)	38.5%	21.1%	15.8%	5.3%	80.7%	3.5%	3.5%	0.0%	0.0%
AVG D&K (2)	35.8%	23.2%	12.6%	3.6%	73.1%	0.0%	1.9%	0.0%	0.0%
AVG NML (5)	32.8%	21.1%	21.3%	2.7%	77.9%	7.9%	3.8%	0.0%	0.0%
AVG LLM (2)	27.1%	26.4%	16.9%	0.8%	73.5%	1.8%	1.8%	2.6%	3.6%
AVG CLO (1)	16.8%	21.2%	20.4%	3.5%	61.9%	1.8%	2.7%	1.8%	4.4%
AVG HAL (1)	19.3%	33.0%	20.5%	1.1%	73.9%	0.0%	4.5%	3.4%	2.3%
AVG FLD (1)	25.0%	12.5%	12.5%	5.0%	55.0%	5.0%	2.5%	2.5%	0.0%
AVG All Series (16)	24.0%	24.9%	13.2%	2.7%	69.7%	2.7%	3.0%	0.9%	2.1%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

TABLE 5: CASEBOOK REPRESENTATION – ALL COURTS (CON'T)

	6th	7th	8th	10th	11th	DC	Fed	Other
AVG BAR (2)	0.0%	10.5%	0.0%	0.0%	1.8%	0.0%	0.0%	0.0%
AVG D&K (2)	1.7%	3.7%	0.0%	0.0%	1.7%	0.0%	0.0%	17.9%
AVG MML (3)	0.0%	4.0%	2.5%	0.0%	0.0%	0.0%	0.0%	4.0%
AVG LDM (2)	0.8%	3.6%	1.8%	0.8%	1.6%	0.8%	0.0%	8.1%
AVG CLO (6)	0.9%	8.0%	0.9%	0.0%	1.8%	0.0%	0.0%	15.9%
AVG HAL (1)	0.0%	8.0%	1.1%	0.0%	2.3%	2.3%	0.0%	2.3%
AVG PID (1)	2.5%	7.5%	0.0%	0.0%	2.5%	2.5%	2.5%	17.5%
AVG All Series (16)	0.0%	4.8%	1.2%	0.1%	1.2%	1.2%	0.2%	12.2%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

TABLE 6: CASEBOOK REPRESENTATION—UNITED STATES COURTS OF APPEALS

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	Fed
AVG All Casebooks (52)	5.9%	47.9%	5.2%	1.2%	4.6%	1.0%	6.2%	1.9%	21.3%	0.3%	1.5%	2.8%	0.1%
AVG Copyright (31)	6.1%	49.0%	5.9%	1.6%	4.2%	1.1%	5.3%	2.3%	19.9%	0.3%	1.1%	1.1%	0.0%
AVG IP (21)	5.6%	46.4%	4.3%	0.6%	5.2%	0.9%	7.4%	1.4%	23.4%	0.1%	2.1%	2.4%	0.2%
AVG Pre-70s (3)	4.4%	62.4%	3.3%	1.2%	1.1%	1.1%	5.5%	4.2%	11.0%	0.0%	N/A	5.6%	N/A
AVG 70s (7)	6.9%	62.6%	4.2%	0.9%	3.2%	1.3%	1.3%	1.8%	12.7%	0.0%	N/A	5.0%	N/A
AVG 80s (9)	6.0%	49.9%	4.5%	0.6%	9.2%	0.0%	2.9%	1.5%	18.9%	0.3%	2.1%	4.1%	0.0%
AVG 90s (18)	5.5%	44.3%	7.2%	1.1%	5.1%	0.7%	7.6%	2.1%	22.9%	0.4%	1.3%	1.7%	0.0%
AVG 2000s (15)	6.2%	41.4%	4.1%	1.8%	2.6%	1.9%	8.9%	1.6%	26.8%	0.5%	2.2%	1.6%	0.3%
AVG D&C (1)	6.9%	67.2%	3.4%	0.0%	3.4%	3.4%	5.2%	3.4%	5.2%	0.0%	N/A	1.7%	N/A
AVG EGG (1)	2.9%	48.6%	2.9%	0.0%	0.0%	0.0%	11.4%	5.7%	17.1%	0.0%	N/A	11.4%	N/A
AVG KBD (9)	11.3%	56.1%	5.6%	2.8%	3.5%	1.3%	3.4%	0.4%	10.7%	0.0%	0.5%	4.4%	0.0%
AVG NMM (6)	3.9%	52.6%	3.3%	0.4%	0.4%	0.9%	3.7%	3.9%	26.7%	0.9%	0.0%	3.4%	0.0%
AVG K&P (5)	7.4%	56.1%	3.1%	0.0%	7.4%	0.8%	1.8%	1.1%	18.6%	0.0%	3.8%	0.0%	0.0%
AVG GLD (5)	2.2%	49.6%	4.4%	0.0%	12.1%	0.0%	7.6%	0.0%	17.5%	0.0%	0.0%	6.7%	0.0%
AVG LGG (6)	6.5%	42.0%	8.8%	0.4%	6.7%	1.1%	4.1%	2.7%	22.5%	1.5%	1.7%	1.9%	0.0%
AVG JPL (6)	2.5%	42.9%	6.1%	1.6%	6.9%	0.8%	8.2%	2.8%	23.6%	0.0%	1.2%	3.2%	0.0%
AVG HSA (1)	1.8%	45.6%	8.8%	1.8%	1.8%	0.0%	10.5%	5.3%	19.3%	0.0%	5.3%	0.0%	0.0%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

TABLE 6: CASEBOOK REPRESENTATION—UNITED STATES COURTS OF APPEALS (CON'T)

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC	Fed
AVG BAR (2)	6.3%	37.5%	6.3%	0.0%	0.0%	0.0%	18.8%	0.0%	28.1%	0.0%	3.1%	0.0%	0.0%
AVG D&K (2)	0.0%	52.2%	3.8%	0.0%	0.0%	4.2%	7.7%	0.0%	27.9%	0.0%	4.2%	0.0%	0.0%
AVG MAL (3)	13.1%	34.8%	6.1%	0.0%	0.0%	0.0%	6.6%	4.2%	35.2%	0.0%	0.0%	0.0%	0.0%
AVG LLM (2)	2.8%	44.7%	2.8%	4.1%	3.6%	1.3%	5.6%	2.8%	26.6%	1.3%	2.7%	0.0%	0.0%
AVG CLO (1)	2.8%	33.3%	4.2%	2.8%	6.9%	1.4%	12.5%	1.4%	31.9%	0.0%	2.8%	0.0%	0.0%
AVG HAL (1)	0.0%	42.6%	5.9%	4.4%	2.9%	0.0%	10.3%	1.5%	26.5%	0.0%	2.9%	2.9%	0.0%
AVG FED (1)	9.5%	23.8%	4.8%	4.8%	0.0%	4.8%	14.3%	0.0%	23.8%	0.0%	4.8%	4.8%	4.8%
AVG All Series (10)	5.0%	45.6%	5.0%	1.4%	3.6%	1.2%	8.2%	2.2%	22.6%	0.2%	2.1%	2.5%	0.3%

Note: See APPENDIX B for the breakdown by individual edition. In calculating the various averages, the Eleventh and Federal Circuits are credited with zero cases even in years prior to their creation rather than excluding them from the calculation.

IV. ANALYSIS

The data presented thus far provide estimates of each circuit's relative experience and influence in terms of copyright law. These data clearly show that experience and influence are not evenly distributed across the courts. The data also provide an opportunity to measure the potential expertise of those circuits with much greater experience than the other circuits. The assumption is that disproportionate influence relative to experience is a sign of expertise. Only two circuits, the Second and the Ninth, plausibly possess sufficient experience with copyright litigation to acquire substantially greater expertise relative to the other circuits. Overall, the Second Circuit is the clear leader in terms of experience and influence. While data for the district courts is not provided in the caseload estimates, the Southern District of New York is in fact the busiest copyright court in the country, which translates into the Second Circuit being the busiest court of appeals. For much of the Twentieth Century, the Ninth Circuit lagged far behind the Second Circuit. California, despite being a center of intellectual property creation, has not hosted nearly as much copyright litigation as New York City. As shown in TABLE 2B, the Second Circuit consistently published at least 31.3% of the copyright opinions from the 1890s through the 1970s, more than any other circuit by wide margins. In the 1980s, however, the Second Circuit published only 22.5% to 23.5% of the opinions, its lowest share of the century. The Ninth Circuit overtook the Second Circuit in the 1980s, publishing a little over 25% of the opinions. While the Second Circuit moved back into the lead in the 1990s, its share of the opinions remained under 30%. From 2000 to 2004, the Ninth Circuit again overtook the Second Circuit, with the Second Circuit's share dropping below 20% for the first time.

Despite the recent slippage in the Second Circuit's relative caseload, the Second and the Ninth Circuits remain the most plausible circuits to have developed expertise in copyright. With the exception of the past five years, the Second Circuit has consistently published more than 20% of the copyright opinions, and the Ninth Circuit has consistently published more than 20% of the opinions since the 1960s. No other circuit approaches the Second and the Ninth in terms of experience. While the First Circuit possibly published a fifth or more of the opinions in the 1890s and 1900s and the Seventh Circuit may have published a fifth or more in the 1900s, the total number of opinions published in these decades was quite low. Small numbers can produce large percentages in these periods. If there is expertise to be found in the circuits, at least expertise due to the judges' experience with appellate decisionmaking, then it will be found in the Second and Ninth Circuits.

As can be seen in TABLE 5, and in more detail in APPENDIX B, the Second and Ninth Circuits, along with the Supreme Court and the Southern District of New

York, are the most influential courts in the development of copyright law. Together, these four courts account for at least two-thirds of the principal cases in every casebook. The Supreme Court's share of the cases, however, cannot be very illuminating in terms of expertise. The Supreme Court does not need to produce a good opinion to make it into the casebooks. Since it is automatically influential, it simply needs to produce an opinion on an important issue to earn a spot in the casebooks. It is much more remarkable that a district court is so well represented. Unlike the Supreme Court and the courts of appeals, the Southern District of New York's opinions are not binding on any courts. Over time, however, the Southern District's influence has declined, probably as a result of appellate opinions displacing district court opinions. When appellate opinions are not available on a particular issue, casebook editors must turn to the district courts. As appellate opinions become available, they should usually be preferred since appellate opinions typically carry more weight.

Focusing on the distribution of cases only within the courts of appeals, TABLE 6 also makes clear that the circuits are not equal in terms of influence. If the courts of appeals were equally represented, then, at least from 1983 to the present, about 7.7% of the principal cases would come from each circuit. Prior to the creation of the Eleventh Circuit and the Federal Circuit in the early 1980s,[115] the percentage would be 9.1%. Prior to the creation of the Tenth Circuit in 1929,[116] the percentage would be 10%. But the Fourth, Eighth, Tenth, Eleventh, D.C. and Federal Circuits never achieve 7.7% of the principal cases in even a single one of the fifty-two casebooks. The Sixth Circuit exceeds this minimum in only one casebook. While the First, Third, Fifth, and Seventh Circuits occasionally break 7.7% in a single casebook, casebook series, or decade, these circuits regularly fail to do so. Only the Second and Ninth Circuits regularly exceed this minimal percentage. Of course, they also decide more of the cases. The important question is whether they perform even better than their share of the cases would suggest.

There are multiple ways in which the caseload and casebook data might be compared to determine which circuits, if any, are more influential than their share of the caseloads would suggest. The results of the three searches for determining caseloads might be averaged and then compared to the casebook data. These caseload numbers, however, are inevitably imprecise. It therefore makes more sense to use caseload ranges of the sort contained in TABLE 2B. Using these ranges, comparisons might be made using the entire period of time up to the publication of each casebook, rather than the decade-by-decade approach of TABLE 2B. In other words, for a casebook published in 1986, one might compare

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[115] *See supra* notes 19–20 and accompanying text.

[116] *See supra* note 18 and accompanying text.

the distribution of principal cases in it to the caseload distribution from 1891 to 1986. This approach would mean considering classic copyright cases in the analysis even when they are much older than the casebook. Although Judge Learned Hand is not very relevant to whether the Second Circuit currently possesses expertise in copyright, the practical effect of using all the data up to the point of a casebook's publication year would be that Judge Learned Hand's opinions would contribute to the measure of the Second Circuit's expertise even today. To avoid a "Hand effect," it makes more sense to compare the cases in each casebook to a more confined period of caseload data. While the choice is somewhat arbitrary, I use the twenty years prior to the publication of each casebook, not including the year of publication. By excluding the year of publication, there is no need to determine the exact dates of publication for both the casebooks and for the cases represented in the caseload data.

What of relevant control variables? As noted in the discussion of the casebook data, casebook editors do not choose opinions based on only one factor. Unfortunately, potentially relevant control variables are not easily operationalized. For example, while casebook editors may prefer some cases because the subject matter of the litigation is more interesting than the subject matter of higher quality opinions, there is no practical way to operationalize the "sex appeal" of each circuit's cases to determine whether there is any variation among the circuits. Nor is there any practical way to measure the pedagogical value of each circuit's cases. The present analysis is therefore limited to only two variables: caseloads and casebook representation. The omission of control variables makes the findings tentative, but even if measures of these other variables were available, there would still be problems with using multivariate regression. The least of these problems is that the relationship is by hypothesis nonlinear. The hypothesis is that the representation of circuits in casebooks is disproportionately greater for the circuits with heavier caseloads, which would mean determining whether the slope of the regression line for circuits with lighter caseloads is different than the slope for circuits with heavier caseloads. While this problem could be solved with dummy variables, other problems are not so easily dealt with. The data are time-series-cross-sectional data (TSCS), with casebooks being the units repeatedly observed over time, but there are different numbers of editions of each casebook, ranging from one to nine editions. In any given year since 1940, from zero to five casebooks were published. There are simply too few observations per unit and too little balance in the annual observations for a TSCS regression analysis to make much sense.[117] As Lon Fuller once noted, a "method cannot intelligently be selected merely because it is 'sophisticated' .... It can only

[117] *See* Nathaniel Beck, *Time-Series—Cross-Section Data: What Have We Learned in the Past Few Years?*, 4 ANN. REV. POL. SCI. 271, 272 (2001).

be wisely chosen because it fits the thing it tests."[118] Sometimes, a rudimentary method is a better fit.

In analyzing the two sets of data, I compared each circuit's casebook representation with its share of the overall copyright caseload, where the caseload shares are based on the ranges generated by the three searches described in Part II. Where a circuit's casebook representation is within its caseload range, the circuit's representation is scored as zero for that casebook. In this situation, we cannot be confident that the circuit's share of the principal cases is any different than its share of the caseload. Where a circuit's casebook representation exceeds its caseload range, the circuit's representation is scored as a positive number, equal to its casebook representation minus the higher value of the caseload range. Where a circuit's casebook representation falls below its caseload range, the circuit's representation is scored as a negative number, equal to its casebook representation minus the lower value of its caseload range. For example, 38.9% of the principal cases in Brown and Denicola (9th ed. 2005) are Second Circuit cases. The Second Circuit's share of the overall caseload from 1985 to 2004 is between 21% and 22.4%. Hence, the Second Circuit's casebook representation exceeds its share of the cases by at least 16.5% (38.9% – 22.4% = 16.5%). TABLE 7 summarizes the results of this analysis.

[118] Lon L. Fuller, *An Afterward: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1616 (1965–1966).

TABLE 7: COMPARISON OF CASEBOOK REPRESENTATION TO CASELOAD SHARES

Casebooks	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	Fed
AVG All Casebooks (52)	1.7%	9.9%	2.6%	-2.4%	-0.1%	-2.4%	-0.4%	-1.8%	0.8%	-0.9%	-3.9%	-0.9%	-1.1%
AVG Copyright (31)	2.3%	9.7%	2.9%	-2.1%	-0.9%	-2.3%	-1.0%	-1.6%	0.6%	-0.6%	-4.4%	-0.7%	-1.0%
AVG IP (21)	0.9%	10.1%	2.1%	-2.8%	1.0%	-2.5%	0.5%	-2.1%	1.1%	-1.2%	-3.2%	-1.2%	-1.1%
AVG Pre-70s (3)	-1.5%	7.2%	-0.1%	-1.9%	-0.4%	-1.1%	-3.5%	-0.7%	1.5%	-1.3%	N/A	3.0%	N/A
AVG 70s (7)	7.4%	9.7%	1.0%	-0.8%	-0.6%	-2.8%	-2.7%	-1.4%	-7.5%	-0.4%	N/A	-2.7%	N/A
AVG 80s (9)	3.1%	6.6%	1.2%	-1.1%	6.2%	-4.1%	-4.1%	-0.5%	-3.1%	-0.6%	-0.7%	-0.6%	-1.0%
AVG 90s (18)	0.0%	11.6%	4.7%	-3.2%	0.1%	-2.6%	0.4%	-2.2%	2.2%	-0.9%	-4.5%	-2.0%	-0.9%
AVG 2000s (15)	1.0%	10.3%	2.2%	-3.1%	-4.0%	-1.1%	2.5%	-2.4%	5.3%	-1.2%	-4.8%	0.2%	-1.4%
AVG KBD (9)	6.8%	10.1%	2.1%	-2.5%	-0.8%	-1.3%	-1.8%	-3.1%	-4.5%	-1.2%	-4.3%	1.6%	-1.1%
AVG NMM (6)	0.8%	14.3%	0.6%	-2.1%	-5.1%	-3.2%	-0.8%	-1.4%	3.8%	0.7%	-5.8%	-2.0%	-0.9%
AVG K&P (5)	3.7%	9.9%	0.6%	-2.1%	4.9%	-3.0%	-4.9%	-1.5%	-2.8%	-0.9%	3.4%	-5.4%	-0.9%
AVG GLD (5)	-0.4%	9.3%	1.5%	-2.8%	9.0%	-3.8%	1.6%	-3.3%	-4.8%	-1.0%	-6.3%	1.9%	-1.0%
AVG LGG (6)	2.3%	3.9%	7.2%	-2.4%	1.3%	-2.5%	-3.5%	-0.3%	2.2%	0.4%	-3.7%	-2.5%	-1.0%
AVG JPL (6)	-0.6%	10.2%	2.9%	-1.9%	1.1%	-2.5%	0.2%	-0.8%	1.9%	-1.5%	-4.9%	-0.4%	-1.1%
AVG BAR (2)	-3.2%	14.0%	3.9%	-4.5%	-6.0%	-3.3%	13.2%	-4.0%	2.4%	-1.5%	-3.3%	-4.3%	-1.2%
AVG D&K (2)	-3.4%	24.7%	0.5%	-4.7%	-6.2%	0.7%	-1.4%	-4.2%	4.8%	-1.6%	-2.3%	-2.3%	-1.3%
AVG MML (3)	4.9%	7.2%	7.3%	-4.6%	-6.0%	-3.5%	-0.6%	0.3%	10.6%	-1.8%	-7.1%	-2.6%	-1.1%
AVG LLM (2)	-0.1%	8.6%	0.2%	0.2%	0.7%	-1.8%	-2.2%	-0.6%	6.6%	-0.4%	-3.9%	-1.9%	-1.2%
AVG All Series (16)	0.4%	9.5%	2.2%	-2.2%	-1.2%	-2.1%	1.1%	-1.7%	2.2%	-1.2%	-3.6%	-0.6%	-1.1%

The results in TABLE 7 are mixed. On the one hand, the Second Circuit is consistently overrepresented in the casebooks, no matter how the data are averaged. Whether based on casebooks in general, copyright casebooks, intellectual property casebooks, casebooks published within certain decades, or even casebook series (where an opinion is counted only once per series), the Second Circuit always performs substantially better than the other circuits. The Ninth Circuit, on the other hand, performs much less well. Across all casebooks generally or only across all copyright casebooks, the Ninth Circuit's representation is less than one percentage point greater than its share of the cases. In the face of measurement error, this slight over-performance is unimpressive. Across all casebook series, the Ninth Circuit performs no better than the Third Circuit. Only in the casebooks from the 2000s is the Ninth Circuit both over-represented and outperforming all of the other circuits, save the Second Circuit. The results for those casebooks published in 2000 and beyond take into account caseloads only back to the 1980s, a time period in which the Second Circuit and the Ninth Circuits achieved a rough parity of experience, yet the Ninth Circuit's casebook representation still exceeds its highest caseload estimates by only 5.4%, whereas the Second Circuit's does so by 10.3%.

While the data point in two different directions, one circuit apparently benefitting from experience and one apparently not, there are two plausible explanations for these data. One explanation is that the Ninth Circuit might be an anomaly due to its unusual size or some other systemic characteristic.[119] The Ninth Circuit does have a problem with its reputation. Although not at the bottom, the Ninth Circuit performed poorly in one citation study of national influence.[120] It has also had some very bad years in the Supreme Court.[121] The size of the circuit could be a contributing factor. Where a circuit's workload is higher and the judges do not work together as closely, the opportunities to learn from the collective work of the circuit may be reduced. And although there is much disagreement among the Ninth Circuit judges on this point, at least one judge claims it is a "daunting task" to keep up with the court's opinions.[122] Perhaps if copyright cases were concentrated in some other circuit than the

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[119] Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000).

[120] Landes, Lessig & Solimine, *supra* note 39, at 304.

[121] The Ninth Circuit's reversal rate during the 1983 and 1996 terms was very high. *See* Stephen L. Wasby, *How the Ninth Circuit Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 SETON HALL CIR. REV. 119, 120 (2005) ("Receiving particular recent attention was the 1996 Term, where 27 of 28 Ninth Circuit cases were reversed or vacated, and the 1983 Term, in which the reversal rate for the Ninth Circuit was similar.") (footnote omitted).

[122] Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6 ENGAGE 58, 60 (2005). *But see* Schroeder et al., *supra* note 24, at 63.

Ninth, the results would be similar to those for the Second Circuit. Unfortunately, there is no way to know with these data. It would be helpful to know if the Ninth Circuit performs less well than other circuits in other subject areas, even when it is more experienced.

Another explanation is that the Second Circuit over-performs in copyright not because of the collective expertise of the circuit, but because of the individual expertise of a few judges who happen to have served on the court. After all, even the Second Circuit can struggle with copyright issues[123] and produce poor decisions.[124] The two most highly represented courts of appeals judges in the casebooks by far are Judge Learned Hand and Judge Jon Newman, both of the Second Circuit. Judge Hand is actually *the* most highly represented judge, regardless of whether one counts unique opinions in the casebooks or weights the opinions by the number of times they are reproduced. Weighting can ensure that one casebook or casebook series does not unduly influence the results. The two most plausible weights are the number of times the opinions are reprinted in a casebook and the number of times the opinions are reprinted at least once in a casebook series, where each series is treated as a single unit. When weighting by casebook, the maximum multiplier is fifty-two. When weighting by series, it is sixteen.

The casebooks reproduce nineteen of Judge Hand's majority opinions 141 times when weighting by casebook and fifty-two times when weighting by casebook series. Judge Newman is immediately behind Judge Hand in two of these three categories, with fourteen unique opinions reproduced seventy-seven times by casebook and forty-six times by series. When weighting by casebook, Justice O'Connor and Judge Jerome Frank are ahead of Judge Newman's seventy-seven reproductions. As the author of *Feist Publications, Inc. v. Rural Telephone Service Co.*,[125] *Stewart v. Abend*,[126] *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,[127] and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[128] Justice O'Connor's opinions are reproduced 107 times by casebook. Judge Frank's five majority opinions are

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[123] *See* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1150 (2d Cir. 1987) (Winter, J., concurring in part and dissenting in part) (arguing that the majority's results are inconsistent with other Second Circuit copyright cases).

[124] *See* Shaul v. Cherry Valley-Springfield Cent. Sch. Dist., 363 F.3d 177 (2d Cir. 2004). According to Nimmer, the court "engaged in a wholly unnecessary inquiry, at both the trial and appellate levels, into the work-for-hire status of public school teachers, inasmuch as the cause of action there related solely to personal property." MELVILLE NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03 n.95.1 (2006).

[125] 499 U.S. 340 (1991).

[126] 495 U.S. 207 (1990).

[127] 489 U.S. 141 (1989).

[128] 471 U.S. 539 (1985).

reproduced eighty times by casebook, just slightly ahead of Judge Newman. Unlike judges of the courts of appeals, Supreme Court Justices like Justice O'Connor can ensure a high representation in the casebooks with very few opinions. Lower court judges, however, must earn their way into the casebooks, except on those occasions when there is only one plausible opinion to choose from. Judges Hand and Newman have clearly earned their way into the casebooks. Although Judges Hand and Newman are well above other courts of appeals judges in terms of casebook representation, several of the other top performers are also Second Circuit judges.

In many areas of the law, viewing expertise in terms of individual judges rather than courts as a whole may make sense. While judges do sometimes speak of courts possessing collective expertise, they often speak of expertise in terms of individual judges. The comparative advantage of some courts in certain areas of the law could be so strong that the court is plausibly seen as having collective expertise. The Federal Circuit is a good example. It handles so much more patent litigation than any other circuit that all the judges should possess patent expertise.[129] The Eighth Circuit recently adopted Federal Circuit precedent on substantive issues of patent law *in toto*, perhaps in part because of the Federal Circuit's expertise.[130] But in most areas of the law, there are no such obvious leaders.

In interviews with judges on the courts of appeals, David Klein concluded, "Judges typically do not think of whole circuits in evaluative terms and so do not weight precedents according to the circuit they come from."[131] Much like Mott, Klein asked about circuits with reputations for *general* excellence.[132] Klein also asked the judges whether their own circuits possess special expertise.[133] Apparently, he did not ask the judges whether other circuits have reputations in specific subject areas, which, as suggested earlier, might have provoked different responses. Interestingly, there was one exception to the judges' general reluctance to ascribe reputations to circuits as a whole: the Ninth Circuit. One judge said, "I'm thinking of those circuits we tend to look at for precedent. Maybe it's easier to tell where we don't look. . . . [W]e don't look to the Ninth; it's in a category by itself."[134] Another judge said, "The only time I weight [a precedent according to the circuit it came from] is if I hear the Ninth Circuit did something, I usually do the opposite. The sign of the Ninth Circuit is negative."[135] Klein's research offers

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[129] *See supra* note 3 and accompanying text.

[130] Schinzing v. Mid-States Stainless, Inc., 415 F.3d 807, 811 (8th Cir. 2005).

[131] DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 93 (2002).

[132] *Id.* at 92.

[133] *Id.* at 168.

[134] *Id.* at 93.

[135] *Id.* (alterations in original).

some insight into likely explanations for the present results in which only one of the two most experienced circuits shows evidence of expertise, but the results must ultimately remain inconclusive without additional evidence. However, even if circuit-wide expertise is more doubtful, the present data do support thinking about expertise at least in terms of individual judges.

V. CONCLUSION

Along with efficiency in decisionmaking, the other probable benefits of specialized courts are uniformity in the law and expertise in decisionmaking.[136] This paper deals only with the benefits of expertise, but it is worth noting that the Federal Circuit has not ensured uniformity in patent law; panel splits within the Federal Circuit remain a significant problem.[137] The Federal Circuit may bring needed expertise to patent law, but I have found little evidence that such expertise is also needed in copyright law. In *The Federal Courts: Challenge and Reform*, Judge Posner noted, "In most areas of federal law at present, there cannot be any assurance that a specialized court, merely by virtue of specializing, would produce better decisions."[138] While the evidence is not decisive, this study suggests that specialization does not improve copyright decisions. The Second Circuit, the most experienced and influential circuit in the area of copyright, is much more influential than its experience alone would suggest. The Ninth Circuit's influence, however, is only slightly disproportionate to its experience. While the Ninth Circuit's lesser performance might be due to its unusual size or other factors, additional data is needed to determine if the Ninth Circuit is systematically

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[136] *See* Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 217 (1991); David Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 63–68 (1975).

[137] *Compare* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 909 F.2d 1464, 1469 (Fed. Cir. 1990), *with* Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 553 (Fed. Cir. 1990). These two cases provide conflicting standards for the level of intent required to show inducement to infringe under 35 U.S.C. § 271(b). Panel splits are not limited to opinions by different judges. *Compare* Dynacore Holdings Corp. v. U.S. Philips Corp., 363 F.3d 1263, 1274 n.5 (Fed. Cir. 2004) (opinion by Gajarsa, J.) (citing the *Hewlett-Packard* standard and then *Manville* as a contrary authority), *with* Minn. Mining & Mfg. v. Chemque, Inc., 303 F.3d 1294, 1305 (Fed. Cir. 2002) (opinion by Gajarsa, J.) (citing the *Manville* standard and then *Hewlett-Packard* as a contrary authority). The Federal Circuit has repeatedly acknowledged this conflict without resolving it. *See* MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp., 420 F.3d 1369, 1378 n.4 (Fed. Cir. 2005) (noting the "lack of clarity"); MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1332 (Fed. Cir. 2005), *vacated* 126 S. Ct. 1837 (2006); Insituform Techs., Inc. v. CAT Contracting, Inc., 385 F.3d 1360, 1378 (Fed. Cir. 2004). *See also* Federal Circuit Bar Association Patent and Trademark Appeals Committee, *Conflicts in Federal Circuit Patent Law Decisions*, 11 FED. CIR. B.J. 723 (2001) (reviewing Federal Circuit conflicts generally).

[138] RICHARD A POSNER, THE FEDERAL COURTS 254 (1996).

performing poorly as compared to other experienced circuits. In evaluating the present data, it would be helpful to know whether similar patterns hold in other subject areas, preferably ones where the most experienced circuits vary. This study could be replicated in any area where there is competition among the courts of appeals for space in the casebooks. This excludes some areas of the law, such as patent law, which is dominated by the Federal Circuit, and constitutional law, which is dominated by the Supreme Court. If the most experienced circuits vary across subjects and, excepting the Ninth Circuit, the most experienced circuits are disproportionately influential relative to their caseloads, there would then be less worry that something special about the Second Circuit is responsible for its high performance in this study. David Nimmer playfully referred to the Second Circuit as the "Copyright Specialists."[139] He's right, but without more evidence to explain the Ninth Circuit's lower performance, it is premature to attribute the Second Circuit's higher performance to its expertise in copyright relative to the other circuits, at least to expertise in the Second Circuit *as a whole.* Instead, copyright law seems quite safe in the hands of generalist courts—and the occasional copyright experts who are members of these courts.

[139] David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 263 (2003); *see also* James H. Carter, *They Know It When They See It: Copyright and Aesthetics in the Second Circuit*, 65 ST. JOHN'S L. REV. 773, 773 (1991) ("The Second Circuit is widely recognized as the nation's most important copyright court.").

APPENDIX A
PRINCIPAL CASE REPETITION RATES FOR MULTI-EDITION CASEBOOK SERIES

Freq.	KBD		NMM		LGG		JPL		K&P		GLD		MML		BAR		D&K		LLM	
1	29	19.6%	47	32.2%	71	41.8%	62	39.0%	56	65.9%	37	50.7%	12	33.3%	11	31.4%	18	48.6%	17	26.2%
2	26	17.6%	23	15.8%	39	22.9%	26	16.4%	11	12.9%	16	21.9%	8	22.2%	24	68.6%	19	51.4%	48	73.8%
3	18	12.2%	8	5.5%	23	13.5%	26	16.4%	7	8.2%	14	19.2%	16	44.4%						
4	14	9.5%	12	8.2%	16	9.4%	15	9.4%	4	4.7%	1	1.4%								
5	10	6.8%	14	9.6%	3	1.8%	11	6.9%	7	8.2%	5	6.8%								
6	14	9.5%	42	28.8%	18	10.6%	19	11.9%												
7	4	2.7%																		
8	15	10.1%																		
9	18	12.2%																		
TOTAL	148	100%	146	100%	170	100%	159	100%	85	100%	73	100%	36	100%	35	100%	37	100%	65	100%

Note: This table indicates how often the principal cases are repeated across editions in the same series. Hence, twenty-nine or 19.6% of the cases appear in only one of the nine editions of KBD, whereas eighteen or 12.2% of the cases appear in all nine editions. Across all nine editions of KBD, there are 148 unique cases. Only the 748 cases used in the analysis are represented in this table.

APPENDIX B

CASEBOOK REPRESENTATION—ALL COURTS (FULL RESULTS)

Casebook	Ed.	Year	N	S. Ct.	2d	9th	SDNY	Sole-T	1st	3d	4th	5th	6th	7th	8th	10th	11th	DC	Fed	Other
D&C	1	1940	182	11.5%	21.4%	1.6%	24.7%	59.3%	2.2%	1.1%	0.0%	1.1%	1.1%	1.6%	1.1%	0.0%	N/A	0.5%	N/A	31.9%
EGG	1	1959	70	15.7%	24.3%	8.6%	21.4%	70.0%	1.4%	1.4%	0.0%	0.0%	0.0%	5.7%	2.9%	0.0%	N/A	5.7%	N/A	12.9%
KBD	1	1960	63	19.0%	31.7%	4.8%	19.0%	74.6%	1.6%	1.6%	1.6%	0.0%	0.0%	0.0%	1.6%	0.0%	N/A	1.6%	N/A	17.5%
NMM	1	1971	90	22.2%	26.7%	7.8%	11.1%	67.8%	2.2%	1.1%	0.0%	0.0%	2.2%	0.0%	2.2%	0.0%	N/A	1.1%	N/A	23.3%
K&P	1	1972	51	23.5%	35.3%	7.8%	11.8%	78.4%	3.9%	0.0%	0.0%	0.0%	2.0%	2.0%	0.0%	0.0%	N/A	0.0%	N/A	13.7%
GLD	1	1973	31	29.0%	19.4%	0.0%	22.6%	71.0%	0.0%	0.0%	0.0%	3.2%	0.0%	0.0%	0.0%	0.0%	N/A	6.5%	N/A	19.4%
KBD	2	1974	76	22.4%	28.9%	3.9%	13.2%	68.4%	3.9%	2.6%	1.3%	1.3%	0.0%	0.0%	0.0%	0.0%	N/A	1.3%	N/A	21.1%
KBD	3	1978	57	24.6%	29.8%	3.5%	12.3%	70.2%	7.0%	3.5%	1.8%	1.8%	0.0%	0.0%	0.0%	0.0%	N/A	1.8%	N/A	14.0%
K&P	2	1979	27	14.8%	48.1%	7.4%	3.7%	74.1%	3.7%	7.4%	0.0%	3.7%	0.0%	3.7%	0.0%	0.0%	N/A	0.0%	N/A	7.4%
NMM	2	1979	74	28.4%	17.6%	10.8%	12.2%	68.9%	2.7%	1.4%	0.0%	0.0%	0.0%	0.0%	2.7%	0.0%	N/A	1.4%	N/A	23.0%
GLD	2	1981	23	26.1%	26.1%	4.3%	8.7%	65.2%	0.0%	0.0%	0.0%	4.3%	0.0%	0.0%	0.0%	0.0%	0.0%	4.3%	N/A	26.1%
LGG	1	1981	58	19.0%	32.8%	10.3%	12.1%	74.1%	5.2%	0.0%	0.0%	3.4%	0.0%	1.7%	0.0%	0.0%	0.0%	1.7%	0.0%	13.8%
KBD	4	1985	68	20.6%	26.5%	4.4%	11.8%	63.2%	5.9%	2.9%	1.5%	4.4%	0.0%	1.5%	0.0%	0.0%	0.0%	2.9%	0.0%	17.6%
LGG	2	1985	55	20.0%	25.5%	10.9%	9.1%	65.5%	3.6%	3.6%	0.0%	7.3%	0.0%	1.8%	0.0%	0.0%	1.8%	1.8%	0.0%	14.5%
NMM	3	1985	72	26.4%	22.2%	9.7%	12.5%	70.8%	1.4%	1.4%	0.0%	0.0%	0.0%	2.8%	1.4%	0.0%	0.0%	2.8%	0.0%	19.4%

APPENDIX B

CASEBOOK REPRESENTATION—ALL COURTS (FULL RESULTS) (CON'T)

Casebook	Ed.	Year	N	S. Ct.	2d	9th	SDNY	Sub-T	1st	3d	4th	5th	6th	7th	8th	10th	11th	DC	Fed	Other
JPL	1	1986	80	17.5%	25.0%	10.0%	5.0%	57.5%	2.5%	2.5%	0.0%	5.0%	0.0%	3.8%	0.0%	0.0%	0.0%	1.3%	0.0%	27.5%
K&P	3	1986	20	30.0%	30.0%	15.0%	0.0%	75.0%	5.0%	0.0%	0.0%	10.0%	0.0%	0.0%	0.0%	0.0%	5.0%	0.0%	0.0%	5.0%
K&P	4	1989	26	23.1%	30.8%	15.4%	3.8%	73.1%	3.8%	3.8%	0.0%	7.7%	0.0%	0.0%	3.8%	0.0%	3.8%	0.0%	0.0%	3.8%
LGG	3	1989	75	16.0%	17.3%	13.3%	10.7%	57.3%	2.7%	8.0%	1.3%	4.0%	0.0%	1.3%	2.7%	1.3%	1.3%	2.7%	0.0%	17.3%
GLD	3	1990	28	25.0%	21.4%	17.9%	3.6%	67.9%	0.0%	7.1%	0.0%	14.3%	0.0%	3.6%	0.0%	0.0%	0.0%	0.0%	0.0%	7.1%
KBD	5	1990	73	20.5%	30.1%	6.8%	11.0%	68.5%	5.5%	5.5%	1.4%	2.7%	1.4%	1.4%	0.0%	0.0%	0.0%	2.7%	0.0%	11.0%
JPL	2	1991	73	20.5%	23.3%	9.6%	6.8%	60.3%	1.4%	5.5%	1.4%	6.8%	0.0%	2.7%	1.4%	0.0%	1.4%	2.7%	0.0%	16.4%
NMM	4	1991	83	25.3%	24.1%	13.3%	10.8%	73.5%	1.2%	2.4%	1.2%	1.2%	0.0%	2.4%	1.2%	0.0%	0.0%	1.2%	0.0%	15.7%
HSA	1	1992	85	20.0%	30.6%	12.9%	3.5%	67.1%	1.2%	5.9%	1.2%	1.2%	0.0%	7.1%	3.5%	0.0%	3.5%	0.0%	0.0%	9.4%
LGG	4	1993	73	15.1%	19.2%	15.1%	13.7%	63.0%	2.7%	9.6%	0.0%	2.7%	0.0%	1.4%	5.5%	1.4%	1.4%	0.0%	0.0%	12.3%
JPL	3	1994	75	21.3%	26.7%	13.3%	6.7%	68.0%	0.0%	4.0%	0.0%	4.0%	0.0%	2.7%	2.7%	0.0%	1.3%	2.7%	0.0%	14.7%
BAR	1	1995	28	35.7%	21.4%	14.3%	7.1%	78.6%	3.6%	3.6%	0.0%	0.0%	0.0%	10.7%	0.0%	0.0%	3.6%	0.0%	0.0%	0.0%
KBD	6	1995	74	24.3%	28.4%	5.4%	9.5%	67.6%	6.8%	4.1%	1.4%	2.7%	1.4%	4.1%	0.0%	0.0%	0.0%	2.7%	0.0%	9.5%
D&K	1	1996	27	29.6%	22.2%	14.8%	3.7%	70.4%	0.0%	3.7%	0.0%	0.0%	0.0%	7.4%	0.0%	0.0%	0.0%	0.0%	0.0%	18.5%

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CASEBOOK REPRESENTATION—ALL COURTS (FULL RESULTS) (CON'T)

Casebook	Ed.	Year	N	S. Ct.	2d	9th	SDNY	Sub-T	1st	3d	4th	5th	6th	7th	8th	10th	11th	DC	Fed	Other
D&K	1	1996	27	29.6%	22.2%	14.8%	3.7%	70.4%	0.0%	3.7%	0.0%	0.0%	0.0%	7.4%	0.0%	0.0%	0.0%	0.0%	0.0%	18.5%
GLD	4	1997	29	31.0%	24.1%	17.2%	3.4%	75.9%	3.4%	3.4%	0.0%	6.9%	0.0%	10.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
MML	1	1997	27	33.3%	22.2%	18.5%	0.0%	74.1%	7.4%	7.4%	0.0%	0.0%	0.0%	3.7%	3.7%	0.0%	0.0%	0.0%	0.0%	3.7%
JPL	4	1998	64	21.9%	25.0%	14.1%	7.8%	68.8%	3.1%	3.1%	1.6%	1.6%	1.6%	6.3%	0.0%	0.0%	0.0%	1.6%	0.0%	12.5%
K&P	5	1998	26	30.8%	38.5%	15.4%	0.0%	84.6%	7.7%	0.0%	0.0%	3.8%	0.0%	0.0%	0.0%	0.0%	3.8%	0.0%	0.0%	0.0%
KBD	7	1998	75	25.3%	29.3%	6.7%	8.0%	69.3%	8.0%	2.7%	1.3%	1.3%	1.3%	5.3%	0.0%	0.0%	0.0%	2.7%	0.0%	8.0%
LLM	1	1998	51	27.5%	29.4%	17.6%	0.0%	74.5%	2.0%	2.0%	2.0%	3.9%	0.0%	3.9%	2.0%	0.0%	0.0%	0.0%	0.0%	9.8%
NMM	5	1998	84	29.8%	23.8%	14.3%	7.1%	75.0%	1.2%	1.2%	0.0%	0.0%	0.0%	2.4%	1.2%	1.2%	0.0%	1.2%	0.0%	16.7%
LGG	5	1999	67	17.9%	28.4%	14.9%	10.4%	71.6%	4.5%	6.0%	0.0%	3.0%	1.5%	4.5%	0.0%	1.5%	0.0%	0.0%	0.0%	7.5%
MML	2	2000	26	34.6%	19.2%	19.2%	3.8%	76.9%	7.7%	3.8%	0.0%	0.0%	0.0%	3.8%	3.8%	0.0%	0.0%	0.0%	0.0%	3.8%
NMM	6	2000	84	29.8%	23.8%	14.3%	7.1%	75.0%	1.2%	1.2%	0.0%	0.0%	0.0%	2.4%	1.2%	1.2%	0.0%	1.2%	0.0%	16.7%
BAR	2	2001	29	41.4%	20.7%	17.2%	3.4%	82.8%	3.4%	3.4%	0.0%	0.0%	0.0%	10.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
JPL	5	2001	65	21.5%	24.6%	16.9%	9.2%	72.3%	1.5%	3.1%	1.5%	3.1%	1.5%	6.2%	3.1%	0.0%	0.0%	1.5%	0.0%	6.2%
CLO	1	2002	113	16.8%	21.2%	20.4%	3.5%	61.9%	1.8%	2.7%	1.8%	4.4%	0.9%	8.0%	0.9%	0.0%	1.8%	0.0%	0.0%	15.9%

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Casebook	Ed.	Year	N	S. Ct.	2d	8th	SDNY	Sub-T	1st	3d	4th	5th	6th	7th	9th	10th	11th	DC	Fed	Other
GLD	5	2002	29	34.5%	27.6%	13.8%	3.4%	79.3%	3.4%	3.4%	0.0%	3.4%	0.0%	10.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
HAL	1	2002	88	19.3%	33.0%	20.5%	1.1%	73.9%	0.0%	4.5%	3.4%	2.3%	0.0%	8.0%	1.1%	0.0%	2.3%	2.3%	0.0%	2.3%
KBD	8	2002	77	26.0%	29.9%	7.8%	6.5%	70.1%	7.8%	2.6%	1.3%	1.3%	1.3%	2.6%	0.0%	0.0%	1.3%	2.6%	0.0%	9.1%
LGG	6	2002	77	16.9%	23.4%	14.3%	14.3%	68.8%	3.9%	3.9%	0.0%	2.6%	2.6%	3.9%	1.3%	1.3%	1.3%	0.0%	0.0%	10.4%
FLD	1	2003	40	25.0%	12.5%	12.5%	5.0%	55.0%	5.0%	2.5%	2.5%	0.0%	2.5%	7.5%	0.0%	0.0%	2.5%	2.5%	2.5%	17.5%
JPL	6	2003	64	23.4%	25.0%	20.3%	6.3%	75.0%	0.0%	3.1%	1.6%	3.1%	0.0%	7.8%	1.6%	0.0%	1.6%	1.6%	0.0%	4.7%
LLM	2	2003	62	27.4%	27.4%	16.1%	1.6%	72.6%	1.6%	1.6%	3.2%	3.2%	1.6%	3.2%	1.6%	1.6%	3.2%	0.0%	0.0%	6.5%
MML	3	2003	23	30.4%	21.7%	26.1%	4.3%	82.6%	8.7%	0.0%	0.0%	0.0%	0.0%	4.3%	0.0%	0.0%	0.0%	0.0%	0.0%	4.3%
D&K	2	2004	29	37.9%	24.1%	10.3%	3.4%	75.9%	0.0%	0.0%	0.0%	0.0%	3.4%	0.0%	0.0%	0.0%	3.4%	0.0%	0.0%	17.2%
KBD	9	2005	73	27.4%	28.8%	8.2%	4.1%	68.5%	8.2%	2.7%	1.4%	1.4%	1.4%	2.7%	0.0%	0.0%	1.4%	2.7%	0.0%	9.6%
AVG All Casebooks (32)				24.6%	26.6%	12.1%	5.0%	70.6%	3.3%	3.0%	0.7%	1.7%	0.5%	3.6%	0.5%	0.2%	1.1%	1.3%	0.1%	12.1%
AVG Copyright (31)				21.7%	25.8%	11.1%	9.7%	68.2%	3.2%	3.3%	0.0%	2.4%	0.6%	3.2%	1.2%	0.3%	0.8%	1.6%	0.0%	14.6%
AVG IP (21)				28.9%	26.1%	14.1%	4.7%	74.4%	3.5%	2.7%	0.4%	3.2%	0.5%	4.2%	0.7%	0.1%	1.5%	0.7%	0.2%	8.2%
AVG 1yr–7yr (5)				15.4%	23.9%	5.0%	21.7%	66.0%	1.7%	1.4%	0.5%	0.4%	0.4%	2.5%	1.9%	0.0%	N/A	2.6%	N/A	20.7%

APPENDIX B

CASEBOOK REPRESENTATION—ALL COURTS (FULL RESULTS) (CON'T)

Casebook	Ed.	Year	N	8, Cir.	2d	9th	SDNY	Sub-T	1st	3d	4th	5th	6th	7th	8th	10th	11th	DC	Fed	Other
AVG Pat (7)				23.6%	29.4%	5.9%	12.4%	71.3%	5.4%	2.3%	0.4%	1.4%	0.6%	0.8%	0.7%	0.0%	N/A	1.7%	N/A	17.4%
AVG Bus (9)				22.1%	26.2%	10.4%	8.2%	66.9%	3.5%	2.5%	0.5%	3.1%	0.0%	1.4%	0.5%	0.1%	1.5%	1.9%	0.0%	31.1%
AVG 90s (15)				25.3%	26.0%	15.5%	6.1%	71.0%	1.5%	4.3%	0.65%	3.1%	0.45%	4.4%	1.2%	0.2%	0.8%	1.0%	0.05%	9.6%
AVG 2000s (15)				27.5%	24.2%	15.0%	5.2%	72.7%	3.6%	2.6%	1.1%	1.7%	1.0%	5.4%	1.0%	0.3%	1.2%	1.0%	0.2%	8.5%
AVG KBD (9)				23.3%	29.3%	5.7%	10.6%	68.9%	6.1%	3.1%	1.4%	1.9%	0.7%	2.0%	0.2%	0.0%	0.4%	2.3%	0.0%	13.0%
AVG NMM (6)				27.0%	23.0%	11.7%	10.2%	71.8%	1.6%	1.4%	0.2%	0.2%	0.4%	1.7%	1.6%	0.4%	0.0%	1.5%	0.0%	19.1%
AVG K&P (5)				24.4%	36.5%	12.2%	3.9%	77.0%	4.8%	2.3%	0.0%	5.0%	0.4%	1.1%	0.8%	0.0%	4.2%	0.0%	0.0%	6.0%
AVG GLD (5)				29.1%	23.7%	10.6%	8.3%	71.8%	1.4%	2.8%	0.0%	6.4%	0.0%	4.9%	0.0%	0.0%	0.0%	2.2%	0.0%	10.5%
AVG LGG (6)				17.5%	24.4%	13.1%	11.7%	66.7%	3.8%	5.2%	0.2%	3.8%	0.7%	2.4%	1.6%	0.9%	1.0%	1.0%	0.0%	12.6%
AVG JPL (6)				21.0%	24.9%	14.0%	7.0%	67.0%	1.4%	3.6%	1.0%	3.9%	0.5%	4.9%	1.4%	0.0%	0.7%	1.9%	0.0%	13.7%
AVG BAR (2)				38.5%	21.1%	15.8%	5.3%	80.7%	3.5%	3.5%	0.0%	0.0%	0.0%	10.5%	0.0%	0.0%	1.8%	0.0%	0.0%	0.0%
AVG D&K (2)				33.8%	23.2%	12.6%	3.6%	73.1%	0.0%	1.9%	0.0%	0.0%	1.7%	3.7%	0.0%	0.0%	1.7%	0.0%	0.0%	17.9%
AVG MML (3)				32.8%	21.1%	21.3%	2.7%	77.9%	7.9%	3.8%	0.0%	0.0%	0.0%	4.0%	2.5%	0.0%	0.0%	0.0%	0.0%	4.0%
AVG LLM (2)				27.4%	28.4%	16.9%	0.8%	73.5%	1.8%	1.8%	2.6%	3.6%	0.8%	3.6%	1.8%	0.8%	1.6%	0.0%	0.0%	8.1%
AVG All Series (16)				24.0%	24.9%	13.2%	7.7%	69.7%	2.7%	3.0%	0.9%	2.1%	0.6%	4.8%	1.2%	0.1%	1.5%	1.2%	0.2%	12.2%

APPENDIX C
PRINCIPAL CASES APPEARING IN TEN OR MORE COPYRIGHT CASEBOOKS[140]

CASEBOOKS	CASE
31	Baker v. Selden, 101 U.S. 99 (1880) (Bradley).
31	Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (Holmes).
31	Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (Miller).
31	Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (L. Hand).
28	Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951) (Frank).
27	Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) (Pitney).
25	Mazer v. Stein, 347 U.S. 201 (1954) (Reed).
24	Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14 (2d Cir. 1976) (Lumbard).
24	Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) (L. Hand).
22	Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (O'Connor).
22	Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967) (Aldrich).
22	Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (Stevens).
21	Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943) (Frankfurter).
20	Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (Sloviter).
19	Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (Frank).
19	Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (Black).

[140] Because I recorded all cases in the thirty-one copyright casebooks but not all of the cases in the intellectual property casebooks, only the former are represented in this table. Three cases in this table are excluded from the analysis in the paper for not qualifying as copyright opinions under the definition used in this Article, *Murray v. National Broadcasting Co.*, 844 F.2d 988 (2d Cir. 1988); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981); and *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

18	Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (T. Marshall).
18	Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) (Black).
18	Goldstein v. California, 412 U.S. 546 (1973) (Burger).
18	Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (Oakes).
17	Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968) (Friendly).
17	Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985) (Mansfield).
17	Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340 (1991) (O'Connor).
17	Stewart v. Abend, 495 U.S. 207 (1990) (O'Connor).
16	Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (Frank).
16	Herbert v. Shanley Co., 242 U.S. 591 (1917) (Holmes).
16	Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (L. Hand).
15	G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951) (Swan).
15	Pushman v. New York Graphic Soc., Inc., 287 N.Y. 302 (N.Y. 1942) (Desmond).
15	Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) (Wyatt).

APPENDIX D
COPYRIGHT AND GENERAL INTELLECTUAL PROPERTY CASEBOOKS

COPYRIGHT CASEBOOKS

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1 FRANCIS DEÁK & FREDERICK CHAIT, CASES AND MATERIALS ON COPYRIGHT PROTECTION (unpublished casebook 1940).

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