Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law

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A wide variety of empirical studies of federal case law have shown that judges' general ideological or partisan preferences may affect how they adjudicate specific legal issues before them.[1] As Matthew Sag, Tonja Jacobi, and Maxim Stych have recently pointed out,[2] much of this work has focused on such ideologically-charged areas as civil rights,[3] civil liberties,[4] criminal,[5] and environmental law,[6] where evidence of the influence of judicial ideology on outcomes has proven to be

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1. *See generally* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219 (1999); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 88 JUDICATURE 20 (2004); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1471-82 (2003); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1465-70 (1998); Michael A. Perino, *Strategic Statutory Interpretation in Federal District Courts: Evidence from Securities Fraud Actions*, J. EMPIRICAL LEGAL STUD. (forthcoming). *But see generally* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA L. REV. 1335 (1998) (arguing that judicial decisionmaking in the D.C. Circuit is facilitated by congeniality among judges and not principally by ideology).

2. *See* Matthew Sag, Tonja Jacobi & Maxim Stych, *The Effect of Judicial Ideology in Intellectual Property Cases* (Jan. 21, 2008) (working paper, on file with authors).

3. *See, e.g.*, Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655 (2004-05); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995).

4. *See, e.g.*, Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81 (2006); S. Sidney Ulmer, *Government Litigants, Underdogs, and Civil Liberties in the Supreme Court: 1903-1968 Terms*, 47 J. POL. 899 (1985).

5. *See, e.g.*, Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67 (2005); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 748 (2000).

6. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175-76 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

especially strong. Empirical work in other areas of the law, however, such as tax[7] and securities[8] law, has less commonly found evidence that judges' ideological preferences affect outcomes.[9] As Sag, Jacobi, and Stych note, this has led to speculation that in these primarily economic areas of the law, judges' (and our own) underlying ideological beliefs—regarding, for example, the proper relation between liberty and equality or between the state and society—simply do not clearly favor one outcome over another.[10]

Consider, then, Figure 1. Since the passage into law of the Copyright Act of 1976, the Supreme Court has heard four cases involving section 107 of the act, which establishes the affirmative defense of copyright fair use.[11] For each of these cases, Figure 1 arranges along a liberal-conservative continuum each justice's Martin-Quinn ideal point estimate[12] (a leading quantitative measure of Supreme Court justices' underlying ideological preferences) for the term in which he or she voted in the case; a greater ideal point estimate value indicates a more conservative ideology. The figure also shows whether the justice voted in favor of or against a finding of fair use—or otherwise did not address the fair use issue in his or her vote. Clearly, there is no relation in these cases between the justice's ideological position and his or her votes. In *Sony v. Universal City Studios, Inc.*,[13] for example, Justices Marshall and Rehnquist voted together in dissent (something which, according to the Spaeth database,[14] they did exactly 31 times out 6,058 opportunities to do so), while in *Campbell v. Acuff-Rose Music, Inc.*,[15] Justices Stevens and Thomas voted together along with the rest of the unanimous court (the Spaeth database suggests that the two vote together either in the majority or in dissent about 51% of the time).[16] Even in *Harper & Row Publishers, Inc. v. Nation Enterprises*, a case with highly politicized facts involving *The Nation* magazine's unauthorized publication of excerpts from President Ford's forthcoming memoirs,

7. *See, e.g.*, Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473, 513 (2002); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001). *But see* Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797 (2006).

8. *See, e.g.*, E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1578-88 (2004).

9. *See* Staudt et al., *supra* note 7, at 1799 ("Study after study confirms a strong correlation between judges' political preferences and their behavior in civil rights and liberties cases, but researchers have only rarely identified an association between politics and decisions in economic cases.").

10. *See id*. at 1799 (discussing, but not themselves making, this proposition), and Sag, Jacobi & Stych, *supra* note 2.

11. Pub. L. No. 94-553, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 107 (2000 & Supp. IV 2004)).

12. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

13. 464 U.S. 417 (1984).

14. *See* HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-2006 TERMS, http://web.as.uky.edu/polisci/ulmerproject/sctdata.htm.

15. 510 U.S. 569 (1994).

16. *See* SPAETH, *supra* note 14.

Justice Stevens voted with Justice Rehnquist while Justice Marshall voted with Justice White.[17]

Is copyright fair use, then, a non-ideological or at least "ideologically ambiguous"[18] area of American law? Notwithstanding its importance to freedom of expression and the viability of the public domain, is fair use, as a matter of ideological judging, more akin to securities or bankruptcy law than to civil liberties or environmental law? Sag, Jacobi, and Stych have applied rigorous statistical analysis to Supreme Court intellectual property case law to show that judicial ideology does in fact affect outcomes in that case law.[19] But is copyright fair use an exception to this general finding, not only at the level of the Supreme Court but across the circuit and district courts? This brief paper seeks to answer that question empirically.

Part I describes the data set used for the study. Part II reports the study's results. It shows that judges' ideological preferences have no significant effect on their adjudication of the fair use defense.

I. BACKGROUND

A. THE DATA SET

In establishing the affirmative defense of fair use, section 107 of the Copyright Act sets forth four factors that judges "shall" consider in determining whether to find fair use.[20] For a previous study,[21] I developed a data set describing all 306 reported federal court opinions that made substantial use[22] of the section 107 four-factor test in adjudicating a defense of fair use from the January 1, 1978 effective date of the Copyright Act through 2005.[23] For this study, I have excluded from that dataset four opinions written by magistrate judges and an additional nine opinions that found outstanding issues of fact on the fair use issue or issued mixed rulings in which some uses were found to constitute fair use while others were found not to constitute fair use. This left a total of 293 opinions. Overall, including votes cast by judges who joined an opinion, these 293 opinions yielded a total of 454 votes either in support of a finding of fair use or in support of a finding of no fair use. Two of these votes were excluded from consideration because they were cast by International Court of Trade judges sitting by designation. This left a total of 452 votes.

17. 471 U.S. 539, 542 (1985).

18. Sag, Jacobi & Stych, *supra* note 2.

19. *See id*.

20. 17 U.S.C. § 107(1) - (4) (2000 & Supp. IV 2004).

21. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008).

22. The data set included all opinions from the period sampled that cited to the § 107 test and referenced at least two factors from the test. *See id*. at 623.

23. The data set in its present form does not yet include data for opinions filed in 2006 and 2007. However, there is nothing in the data set to suggest that these years would change the results described below.

For each judge casting at least one of these votes, I included in the new data set his or her values from various widely-accepted—but by no means non-controversial[24]—indices of judicial ideology. Specifically, I included where possible: (1) the political party of the judge's appointing president,[25] (2) the Poole Common Space score of the judge's appointing president, as developed by Keith Poole and Howard Rosenthal,[26] (3) the judge's Judicial Common Space score, as developed by Lee Epstein, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland,[27] building on work by Michael Giles, Virginia Hettinger, and Todd Peppers,[28] and (4) the judge's NIXONI score, as developed by Robert Howard and David Nixon.[29]

B. SUMMARY STATISTICS

The previous study reviewed various summary statistics relating to the original data set of 306 opinions.[30] I provide here only those details about the revised data set that may help the reader to evaluate the findings reported below.

Table 1 reports that of the 452 votes studied, 32 were cast by Supreme Court judges, 218 by circuit court judges, and the remaining 202 by district court judges. Of these 452 votes, 193 (42.7%) were cast in support of a finding of fair use, while 259 (57.3%) were cast in support of a finding of no fair use. These proportions do not vary significantly among the three levels of courts being studied.

As for the overall ideological distribution of the 452 votes studied, 260 (57.5%) were cast by judges appointed by a Republican president, while 192 (42.5%) were cast by judges appointed by a Democratic president. Figure 2 provides a more nuanced profile of the ideological distribution of the votes. For the 441 votes cast by judges whose NIXONI score is available, the figure shows the distribution of those votes by their judge's score. As with the Martin-Quinn ideal point estimate, a greater NIXONI score indicates a more conservative judge. Consistent with the distribution of votes by the party of their judge's appointing president, the mean

24. For a discussion of the controversy surrounding the measurement of judicial ideology, *see* Sisk & Heise, *supra* note 1.

25. On the efficacy of this measure of judicial ideology, *see id.* *But see* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 260 (1995) (arguing that presidential politics do not explain outcomes).

26. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL-CALL VOTING 233 (1997); *see also* Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954, 958-966 (1998). Poole's common space scores are available at http://voteview.com/readmeb.htm.

27. *See* Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

28. *See* Michael Giles, Virginia Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

29. *See* Robert M. Howard & David C. Nixon, *Local Control of the Bureaucracy: Federal Appeals Courts, Ideology, and the Internal Revenue Service*, 13 WASH. U. J.L. & POL'Y 233 (2003); David C. Nixon, *Separation of Powers Constraints on Appointee Ideology*, 20 J.L. ECON. & ORG. 438 (2004).

30. *See* Beebe, *supra* note 21, at 564-81.

NIXONI score of these 441 votes was a slightly conservative 0.073 (std. dev.=0.255).[31]

Thus, though the votes studied are slightly skewed towards a finding of no fair use and their judges towards a conservative ideology, the data set is sufficiently balanced to allow for a relatively straightforward statistical analysis of the effect of judicial ideology on fair use outcomes.

II. FINDINGS

Regardless of which measure of judicial ideology is used, the data show no significant relation between a judge's ideology and her adjudication of the fair use defense. Specifically, there is no relation between judicial ideology and a judge's likelihood of finding fair use or no fair use, nor is there any relation between judicial ideology and how judges treated various factor and subfactor considerations that, as the previous study showed,[32] typically drive the fair use analysis.

As an initial matter, Table 2 sets forth pairwise correlation coefficients for the relations among five variables in the data set: the four measures of a judge's ideological preferences and a binary variable indicating whether or not the judge found fair use. As expected, the various measures of judicial ideology correlated very strongly with each other. However, none show a significant correlation with judges' fair use findings.

Of course, correlation analysis does not control for the facts of the cases. Table 3 reports the results of logistic regression of the outcome of each of the 441 votes for which their judge's NIXONI score is available on various factual findings made by the judge (or the opinion the judge joined) and the NIXONI score of the judge casting the vote. Here again, judicial ideology appears to exert no significant influence over judges' willingness to find fair use or no fair use. Each of the other three indices of judicial ideology included in the data set similarly show no significant influence.

With respect to the 18 votes cast in dissent, of which 11 were cast in favor of a finding of fair use, none support the proposition that the court was split along ideological lines. Each of these 18 dissenting votes was cast by a judge who shared his or her ideological sign (-/+), as established by his or her NIXONI score, with at least one judge in the majority.

Finally, judicial ideology showed no significant relation with any of the numerous factor and subfactor findings made in the opinions studied. For example, judicial ideology did not help to explain whether a judge was likely to conduct a commercial use inquiry or whether a lower court judge was likely to ignore relevant Supreme Court precedent—a phenomenon explored in detail in the

31. For the 449 votes cast by judges for whom the Poole Common Space Score of their appointing president was available, the mean Poole Common Space Score was 0.094 (std. dev.=0.494). The comparable mean for the Judicial Common Space score was 0.013 (n=227, std. dev.=0.350).

32. *See* Beebe, *supra* note 21, at 594-621.

previous study.[33]

III. CONCLUSION

It may be encouraging to learn that copyright fair use is not an area of the law in which judicial ideology appears to influence adjudication—and thus that copyright fair use is an exception to Sag, Jacobi, and Stych's more general findings that judicial ideology affects intellectual property outcomes, at least before the Supreme Court.[34] Yet one might tentatively observe that there is also something disturbing about these results. They are disturbing because copyright fair use *should* be ideological. As intellectual property scholars have long recognized, the stakes involved in fair use adjudication are immense. Fair use outcomes define the contours of the private and public domains of human expression and, in doing so, directly impact our capability for human flourishing.[35] Fair use is far more than an economic area of the law calling for the post-ideological balancing of costs and benefits; it goes to the core of what constitutes a good society.[36] Thus, while the "politics of intellectual property"[37] that James Boyle and others called for many years ago apparently has yet to make itself felt among the ranks of the federal judiciary, one might tentatively hope that some future study of this nature may yield different results.

33. *See id*. at 572.

34. *See generally* Sag, Jacobi & Stych, *supra* note 2.

35. *See generally* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS. L. REV. 1151 (2007); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

36. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-1794 (1988).

37. *See* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997).

Figure 1
Ideological Distribution of Supreme Court Votes in Four Fair Use Cases

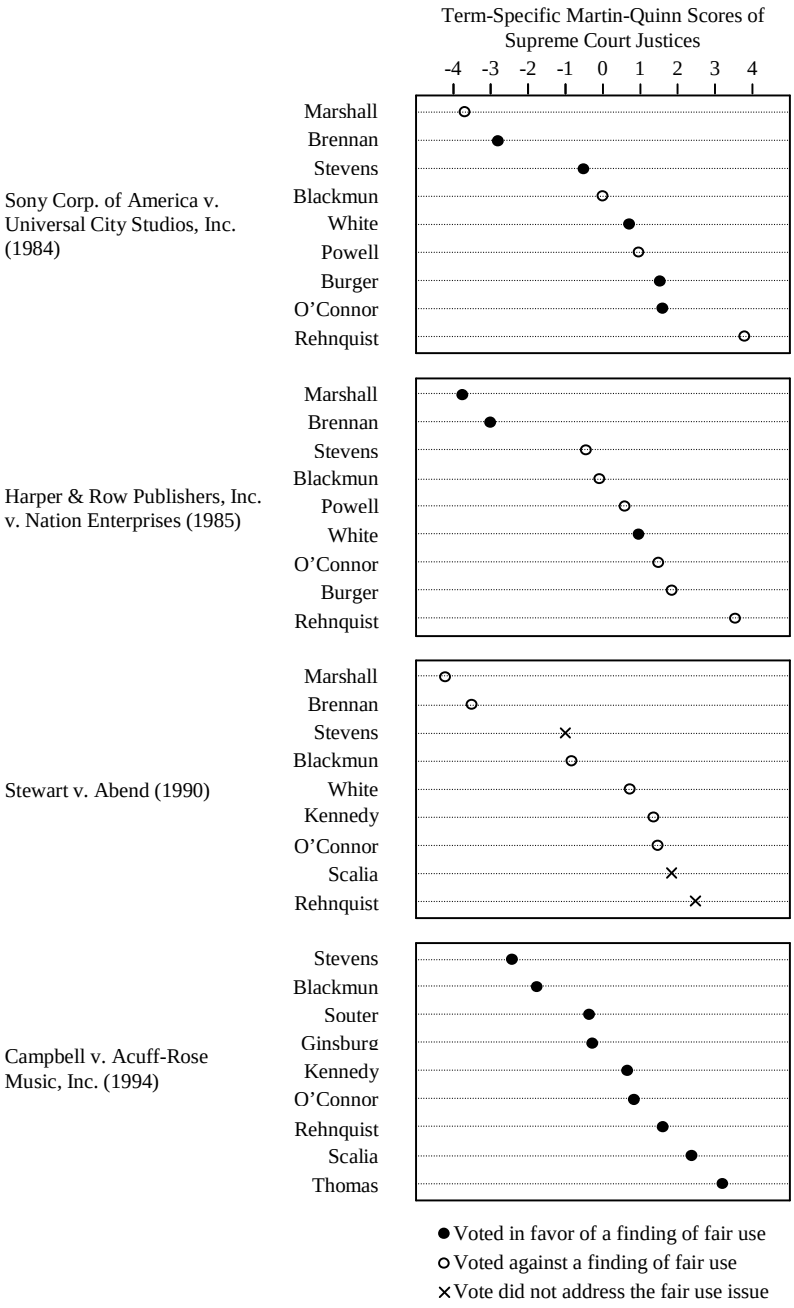

Figure 2
Distribution of 441 Votes by their Judges' NIXONI Scores

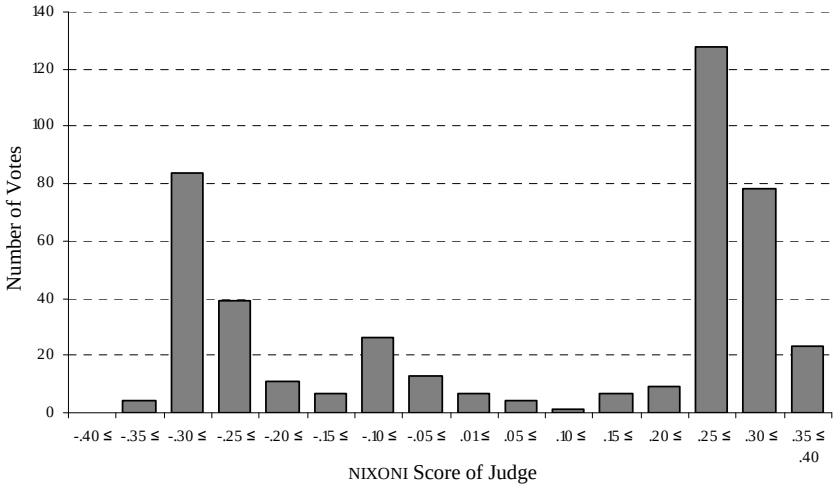

Table 1
Crosstabulation of Votes by Court and Outcome

	Found No Fair Use	Found Fair Use	Total
Supreme Court Votes	15 46.9%	17 53.1%	32 100.0%
Circuit Court Votes	123 56.4%	95 43.6%	218 100.0%
District Court Votes	121 59.9%	81 40.1%	202 100.0%
N Row %	259 57.3%	193 42.7%	452 100.0%

Table 2
Pairwise Correlation Coefficients Among Four Measures of Judicial Ideology and Fair Use Outcomes

	Party of Appointing President (0=Dem., 1=Rep.)	Poole Common Space Score of Appointing President	Judicial Common Space Score	NIXONI Score	Finding of Fair Use (0=No FU, 1= FU)
Party of Appointing President	1.000 -- (452)				
Poole Common Space Score of Appointing President	0.986 <0.001 (449)	1.000 -- (449)		Coefficient Statistical Sig. (N)	
Judicial Common Space Score	0.716 <0.001 (227)	0.744 <0.001 (227)	1.000 -- (227)		
NIXONI Score	0.849 <0.001 (441)	0.836 <0.001 (438)	0.699 <0.001 (224)	1.000 -- (441)	
Finding of Fair Use	-0.045 0.336 (452)	-0.052 0.269 (449)	-0.104 0.118 (227)	-0.091 0.057 (441)	1.000 -- (452)

Table 3
Logistic Regression of 441 Fair Use Votes on Various Factual Findings and the NIXONI Score of the Judge Casting the Vote

	Factual Finding	Odds Ratio	Standard Error	P>|Z|	95% C.I.	
Factor One	D's use is for commercial purpose	0.935	0.337	0.853	0.462	1.894
	D's use is for non-commercial use	10.100	4.928	0.000	3.877	26.282
	D's use is transformative use	68.798	55.562	0.000	14.130	334.972
	D's use is for parodic purpose	22.947	17.656	0.000	5.079	103.670
	D's use is for educational purpose	0.648	0.384	0.464	0.203	2.069
	D's use is for research purpose	1.338	0.769	0.613	0.434	4.128
	D's use is for critical purpose	2.416	1.503	0.156	0.713	8.180
	D accessed P's work improperly	3.002	2.310	0.153	0.664	13.569
	D's use is bad faith use	0.313	0.276	0.188	0.056	1.760
Factor Two	P's work is a creative work	0.331	0.113	0.001	0.170	0.646
	P's work is a factual work	3.053	1.113	0.002	1.494	6.240
	P's work is unpublished	1.018	0.589	0.975	0.327	3.167
	P's work is published	4.464	2.248	0.003	1.663	11.978
Factor Three	D took entirety of P's work	0.296	0.099	0.000	0.154	0.570
	D took heart of P's work	0.031	0.021	0.000	0.008	0.121
	NIXONI	0.995	0.549	0.993	0.338	2.931
	Log likelihood	-170.662				
	Pseudo-R^2	0.43				