

A PROPOSAL TO REPLACE THE SUBCONSCIOUS COPYING DOCTRINE

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INTRODUCTION

On April 23, 2006, *The Harvard Crimson* broke the story that a recently-published novel written by a Harvard undergraduate had been found to contain substantial similarities to two existing books by another author.¹ During the ensuing days and months, the story spread rapidly through the world-wide press.² Numerous individuals also felt the need to comment on the situation online.³ In response, the student,

* Articles Editor, *Cardozo Law Review*. J.D. Candidate (2008) Benjamin N. Cardozo School of Law; A.B. (2000) Dartmouth College. I would like to thank Professor Justin Hughes for introducing me to the subconscious copying doctrine and Professor Stewart Sterk for guiding me through the process of writing this Note. The members of the *Cardozo Law Review* have helped me greatly in developing and revising my Note, and I would like to thank Michael Mellin in particular for his superb editing. Finally, I would like to express my love and gratitude to my family and friends, particularly my parents, Evelyn and Steven, and my brothers, Bram and Darym, who give me their constant encouragement, support, and praise in everything that I do.

¹ David Zhou, *Student's Novel Faces Plagiarism Controversy*, *HARVARD CRIMSON*, Apr. 23, 2006, available at <http://www.thecrimson.com/article.aspx?ref=512948>.

² See, e.g., Dinitia Smith, *Harvard Novelist Says Copying Was Unintentional*, *N.Y. TIMES*, Apr. 25, 2006, at A14; James Poniewozik, *An F for Originality*, *TIME*, Apr. 30, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1189282,00.html>; Marina Budhos, *Commentary: Scandal Points to Real Teenage Story of Mimicry*, *STAR TRIB.*, May 29, 2006, at 2E; Saritha Prabhu, *A Need to Achieve Overwhelms a Teen Caught in Scandal*, *TENNESSEAN*, May 29, 2006, at 17A; Aengus Collins, *A New Taste for Copy and Paste*, *IRISH TIMES*, May 26, 2006, at 15; Harun ur Rashid, *Column: Plagiarism and a Young Writer*, *DHAKA COURIER*, May 26, 2006.

³ Some of the comments were sympathetic to the student's plight. E.g., Posting of Bill Poser to *Language Log*, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003068.html> (Apr. 25, 2006, 18:18 EST) ("Could Viswanathan have unconsciously remembered such little snatches from another novel? Why not? This is easily within the range of human memory I find it entirely plausible that Viswanathan's use of a tiny bit of material from McCafferty's book was unconscious and blameless I'm writing [sic] about this partly because I think that an innocent young woman is being unfairly condemned . . ."). Most writers, however, used her situation to indulge in quite extensive displays of schadenfreude. E.g., Posting of Geoffrey K. Pullum to *Language Log*, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003066.html> (Apr. 25, 2006, 15:25 EST) ("This is a sorry case of fraud, lying, copyright infringement, and abdication of the writer's intellectual responsibility. It's sickening."); Posting of Abhi to *Sepia Mutiny*, <http://www.sepiamutiny.com/sepia/archives/003294.html> (Apr. 24, 2006, 12:35 EST) ("It appears VERY likely that young author Kaavya Viswanathan is a cheat Her literary

Kaavya Viswanathan, acknowledged having borrowed language from another writer's books, but called her copying "unintentional and unconscious."⁴

Although Viswanathan's claim that she neither intended to copy from another author nor was conscious of having done so may have bought her some sympathy from the American public,⁵ under United States copyright law, her argument does nothing to help her case. Copyright law in the United States dictates that an author's intention is irrelevant to a determination of whether she copied from an earlier author; subconscious copying is as actionable as conscious copying.⁶ This rule developed in the early twentieth century⁷ and is referred to in legal writing as "the subconscious copying rule" or "the subconscious copying doctrine."⁸

career is over."); Posting of Jessica2 to Gawker, <http://www.gawker.com/news/books/how-kaavya-viswanathan-got-a-spanking-169378.php> (Apr. 25, 2006, 9:14 EST) ("Oh, poor young Kaavya. These things do happen. It's just that they tend not to happen with precocious young authors who have been signed for half a million dollars. And one usually doesn't 'internalize' word-for-word, either."). Viswanathan's story caused such a stir that a search for "Kaavya Viswanathan" performed on Google on November 27, 2006 produced "about 149,000" results. There is an entry for her on Wikipedia, http://en.wikipedia.org/wiki/Kaavya_Viswanathan, and Harvard students have even coined the term "Kaavyarific" to refer to subsequent students accused of copying the work of others. See Rachel Aspden, *Observations: Ivy League Redemption*, NEW STATESMAN, Nov. 13, 2006, at 19.

⁴ Smith, *supra* note 2, at 14.

⁵ See *supra* note 3. The writer Malcolm Gladwell also defended Viswanathan, commenting on his blog:

This is teen-literature. It's genre fiction. These are novels based on novels based on novels, in which every convention of character and plot has been trotted out a thousand times before [W]e accept that within the category of genre fiction a certain amount of borrowing of themes and plots and ideas is acceptable—even laudable [O]nce we have conceded that in genre fiction its [sic] okay to borrow themes, why do we get so upset when genre novelists borrow something a good deal less substantial—namely phrases and sentences?

<http://gladwell.typepad.com/gladwellcom/2006/04/viswanathangate.html>.

In a recent book, Judge Richard A. Posner also suggested "a kindlier explanation" for Viswanathan's purported copying:

In an age of specialization . . . a creative person is apt to have a feeling of belatedness—a feeling that though just as creative as his predecessors he has appeared on the scene too late; the ship has sailed; the niche he might have filled has been filled already. Oh, the unfairness, Viswanathan might have thought, of McCafferty's having picked the low-hanging "chick-lit" fruit rather than leaving some of it for her.

THE LITTLE BOOK OF PLAGIARISM 6 (2007).

⁶ *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 17 (9th Cir. 1933) ("[A]n intentional copying is not a necessary element in the problem if there has been a subconscious but actual copying."); 4-13 DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (2006) ("In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.")

⁷ The rule originated in the 1924 case *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924). See further discussion at *infra* Part I.B.

⁸ See, e.g., Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1028-30 (1990); Joel S. Hollingsworth, *Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the*

This Note argues that the subconscious copying doctrine disturbs the precarious balance copyright law seeks to strike between protection of an artist's ability to benefit financially from his creative output and the public interest in having more artistic works available.⁹ When courts presume that an artist who creates a work that happens to look or sound substantially similar to a popular earlier-produced work has subconsciously copied the earlier work, they have overvalued protection of the earlier artist's rights and imposed an insurmountable cost on the later artist.¹⁰ Although few cases have been decided under the subconscious copying doctrine,¹¹ the trend in the limited case law available under the doctrine shows that courts have been willing to find a defendant liable for subconscious copying under circumstances when the possibility of the defendant's having access to the plaintiff's work was increasingly remote.¹² Furthermore, the damages awards given under the subconscious copying doctrine have increased tremendously since the doctrine's creation.¹³ Finally, because modern technologies have made it substantially easier for a plaintiff to establish a defendant's possible access to the plaintiff's work,¹⁴ it is reasonable to expect to see

Subconscious Copying Doctrine, 23 HASTINGS COMM. & ENT. L.J. 457 (2001); DAVID BOLLIER, BRAND NAME BULLIES 32 (2005).

⁹ The two interests copyright law seeks to balance are generally identified as an earlier author's financial interest in limiting the ability of others to use his work without payment and a later author's creative interest in having unlimited access to the work of earlier authors. These interests have been called, respectively, "incentives" and "access." See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). As other writers have recognized, the public interest underlying the goal of providing artists with access to the works of their predecessors is the desire to see more artistic works created. See BOLLIER, *supra* note 8, at 12. See *infra* Part II.A for further discussion of this difficult balance in United States copyright law.

¹⁰ See *infra* Part II.B.2 for further discussion of the difficulty later artists would encounter in trying to avoid the subconscious influences of earlier works.

¹¹ See *infra* Part I.C.

¹² In the first case decided under the doctrine, the defendant had composed his song just two years after the plaintiff had composed his song, and the court found that the defendant's song "appeared shortly after [the plaintiff's song] had faded out." *Fred Fisher*, 298 F. at 147. In the next musical case decided under the doctrine, the defendant had composed his song eight years after the plaintiffs had composed their song, which topped the Billboard charts. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976). In the most recent case decided under the doctrine, the defendants had composed their song twenty-seven years after the plaintiffs had composed their song, the plaintiffs' song never topped the Billboard charts, and the defendants claimed never to have heard the plaintiffs' song. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 484 (9th Cir. 2000).

¹³ In the first case decided under the doctrine, the court awarded the plaintiff \$250 in damages (the statutory minimum at that time) and called the award "a luxury to the winner." *Fred Fisher*, 298 F. at 152. In the next musical case, which involved the former Beatle George Harrison, the damages question became so complex that it led to fifteen years of further litigation, prompting a Second Circuit judge to joke that the case gave "true-meaning [sic] for those involved to the title of the Beatles' 'It's Been a Hard Day's Night.'" *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 974 (2d Cir. 1991). In the most recent case, the Ninth Circuit affirmed a jury's damages award of \$5.4 million. *Three Boys*, 212 F.3d at 477.

¹⁴ See Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement*

more plaintiffs invoke the subconscious copying doctrine in future cases.¹⁵

Part I of this Note provides some background on the elements a plaintiff must establish to prove infringement of copyright, describes the judicial creation of the subconscious copying doctrine, and examines the courts' attempts to apply the doctrine. Part II suggests reasons the doctrine is difficult to reconcile with the rationale behind copyright law, discusses some financial, moral, and conceptual problems caused by the doctrine, and examines the different way two countries with similar statutes have decided to adjudicate subconscious copying claims. Part III proposes a few approaches that United States courts might adopt to lessen the harsh effect of the subconscious copying doctrine.

I. THE ROLE OF THE SUBCONSCIOUS COPYING DOCTRINE IN AN ACTION ALLEGING INFRINGEMENT

A. *The Basic Framework for Proving Infringement*

Under federal copyright law,¹⁶ a plaintiff establishes a prima facie copyright infringement claim by proving two elements: 1) that the plaintiff owns a valid copyright in the material allegedly copied; and 2) that the defendant appears to have copied protected elements of the plaintiff's work.¹⁷ The second element may be shown by the defendant's admission,¹⁸ by direct evidence,¹⁹ or by circumstantial

Lost Its Probative Value?, 52 RUTGERS L. REV. 311 (1999). See also *infra* note 21 for a discussion of the declining importance of the access requirement.

¹⁵ As will be discussed further, proof of substantial similarity between the plaintiff's and the defendant's works plus proof of the defendant's access to the plaintiff's work leads to a presumption of copying. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); see *infra* Part I.A. Thus, the easier it is for a plaintiff to prove access, the easier it will be to establish a presumption of copying. If the defendant denies copying but cannot conclusively disprove it, the subconscious copying doctrine allows a court to infer that the defendant's copying was subconscious. See *infra* Part I.A.

¹⁶ At one time in United States history, copyright law was both federal and state-based. See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 3-4 (6th ed. 2002). Congress later enacted the Copyright Act of 1976, which established a single federal system of copyright and expressly preempted existing state copyright laws. *Id.* at 8. One need not register an "original work of authorship" to obtain a copyright; copyright subsists in original works of authorship "from the moment they are fixed in a tangible medium of expression." *Id.* See also 17 U.S.C. § 102 (2000).

¹⁷ See, e.g., *Arnstein*, 154 F.2d at 468.

¹⁸ See, for example, *Nash v. CBS*, 899 F.2d 1537, 1539 (7th Cir. 1990), in which CBS conceded having copied portions of Nash's earlier work but claimed not to have infringed on the grounds that the copied elements of Nash's work were factual and thus not copyrightable.

¹⁹ "Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 596 (8th ed. 2004). See, for example, *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991), in which the

evidence.²⁰ In general, a plaintiff employing circumstantial evidence to prove copying must show 1) that the plaintiff's and the defendant's works are "substantially similar;" and 2) that the defendant had "access" to the plaintiff's work.²¹

Once the plaintiff establishes a prima facie case of infringement through a showing of ownership of a valid copyright²² and apparent copying of the protected work by the defendant, the plaintiff has established a presumption of infringement.²³ The burden then shifts to the defendant, who may negate the inference of infringement by showing: 1) that the plaintiff's claimed "work" is, in fact, uncopyrightable;²⁴ 2) that the defendant's work was inspired, not by the

defendant's copying of the plaintiff's data (entries in a telephone directory) was established by the plaintiff's proof that the defendant had included four fictitious entries that the plaintiff had manufactured specifically to deter potential copiers.

²⁰ "1. Evidence based on inference and not on personal knowledge or observation. . . . 2. All evidence that is not given by eyewitness testimony." BLACK'S LAW DICTIONARY 595 (8th ed. 2004). See, e.g., *Arnstein*, 154 F.2d at 468.

²¹ See, e.g., *Arnstein*, 154 F.2d at 468. An exception to this general rule is the possibility of proving copying without conclusively proving access. In such a case, the plaintiff must prove "striking similarity" rather than "substantial similarity," as the *Arnstein* court articulated: "If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result." *Id.* Some courts have been willing to recognize the "striking similarity" exception; others have not. Compare *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (holding that even "striking similarity" is, standing alone, insufficient to prove copying; a plaintiff must establish a reasonable possibility of access) with *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988) (holding that copying may be proved without evidence of access if the two works at issue are exceptionally close in appearance). The Seventh Circuit subsequently moved toward the Second Circuit's position when it allowed a plaintiff to base its proof of copying solely on striking similarity in a case in which it was clear that the defendant's work had been inspired by the plaintiff's work, not by an earlier exemplar in the public domain. *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997). In a 2000 decision, the Fourth Circuit took the view that a plaintiff must prove access even in the face of evidence of striking similarity. *Bouchat v. Baltimore Ravens, Inc.*, 228 F.3d 489 (4th Cir. 2000); see also Henry J. Lanzalotti, Casenote, *Is Proof of Access Still Required? Proving Copyright Infringement Using the "Strikingly Similar" Doctrine: An Analysis of the Fourth Circuit's Decision in Bouchat v. Baltimore Ravens, Inc.*, 9 VILL. SPORTS & ENT. L.J. 97 (2002); Sean Robert Higgins, Note, *Proving Copyright Infringement: Will Striking Similarity Make Your Case?*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 157 (2003); Michael Fecik, Recent Development, *Bouchat v. Baltimore Ravens, Inc., et al.: Strikingly Similar: The Fourth Circuit Court of Appeals Retains the Essential Element of Access*, 10 U. BALT. INTELL. PROP. L.J. 49 (2001). Further discussion of the "striking similarity" exception, about which the legal debate continues, is beyond the scope of this Note. For an interesting argument that the access requirement should be eliminated from judicial analysis entirely, see Bevill, *supra* note 14.

²² A certificate of registration from the Copyright Office establishes prima facie proof of the validity of a copyright. 17 U.S.C. § 410(c) (2000). Because registration is generally a prerequisite to an infringement suit, see 17 U.S.C. § 411(a) (2000), satisfaction of this prong is generally automatic.

²³ See, e.g., *Arnstein*, 154 F.2d 464 (reversing a grant of summary judgment for the defendant on the grounds that the plaintiff had established sufficient evidence of some similarities and possible access to allow the case to go to trial).

²⁴ There are various reasons that a work in which a plaintiff had registered a copyright later might be deemed uncopyrightable. See, e.g., *Feist Publ'ns, Inc.*, 499 U.S. at 340 (holding that the portions of the plaintiff's work that the defendant copied were factual and thus not

plaintiff's work, but instead by an antecedent of both the plaintiff's and the defendant's works that is now in the public domain;²⁵ or 3) that the defendant independently created the allegedly infringing work.²⁶ If the defendant is unable to negate the presumption of infringement established by the plaintiff, a court may find infringement even if it believes the defendant's claim not to have copied intentionally—this is the subconscious copying doctrine.²⁷

B. *The Origin of the Subconscious Copying Doctrine: Fred Fisher, Inc. v. Dillingham*

The subconscious copying doctrine originated in *Fred Fisher, Inc. v. Dillingham*.²⁸ In that case, the plaintiff owned the copyright in a composition entitled "Dardanella."²⁹ The defendant, the well-known composer Jerome Kern, had composed a piece entitled "Kalua," which

copyrightable); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971) (holding that to the extent that the defendant copied any material from the plaintiff, the only copied material was the idea of creating a pin in the shape of a bee, which was not copyrightable); *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) (holding that any artistic value in the plaintiff's "display forms" (mannequins for department stores) was inseparable from the mannequins' utilitarian value; thus, they were not copyrightable).

²⁵ *See Ty, Inc.*, 132 F.3d at 1170 ("[T]wo works may be strikingly similar—may in fact be identical—not because one is copied from the other but because both are copies of the same thing in the public domain.").

²⁶ *See, e.g., Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (stating that "the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted"). The classic hypothetical to illustrate the concept of independent creation was given by Judge Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936): "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author', and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." For a further discussion of this hypothetical see *infra* Part II.B.2. Through this logic, the defense of independent creation became valid law, and it continues to be included in the casebooks. *See GORMAN & GINSBURG, supra* note 16, at 457. However, as will be discussed further, it appears that, for most courts, the subconscious copying doctrine has rendered this defense purely theoretical. *See infra* Part II.B.2.

²⁷ *See Fred Fisher*, 298 F. at 147; *see infra* Part I.B.

²⁸ 298 F. 145. This suggestion was made by the court in *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482-83 (9th Cir. 2000) ("Subconscious copying has been accepted since Learned Hand embraced it in [the *Fred Fisher* case].") and is confirmed by David Bollier in his book *Brand Name Bullies*. BOLLIER, *supra* note 8, at 32. Judge Hand also hints at it himself in his opinion in the *Fred Fisher* case, when he states, "The point is a new one, but I think it is plain. The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith." 298 F. at 148 (emphasis added).

²⁹ 298 F. at 146. The plaintiff had written only the lyrics to "Dardanella"; he had acquired the rights to the music from two different musicians, both of whom claimed to have written it. *See* ARNOLD SHAW, *THE JAZZ AGE: POPULAR MUSIC IN THE 1920S 95-98* (1987) (noting the two lawsuits involving "Dardanella" and telling the story of the song's "curious history" that "involved two strange and eccentric people"). *Id.* at 96.

he used in one of his short operas.³⁰ Both compositions contained an ostinato,³¹ and the court found the substantial similarity test met in part on this basis.³² The access test was deemed met on the grounds that “Dardanella” was a popular enough composition that the defendant, being in the music industry, would have known it.³³ The court considered but rejected the possibility that the defendant was inspired to include an ostinato in “Kalua” by an earlier work that also included an ostinato³⁴ and found in favor of the plaintiff, despite its determination that the defendant’s copying must have been subconscious.³⁵ In determining that the defendant’s unawareness of his copying had no bearing on the court’s finding of infringement, Judge Hand articulated the principle which would become known as the subconscious copying doctrine: “Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick.”³⁶ Despite its finding of infringement, the court suggested that it was “absurd to suggest” that the plaintiff had “suffered any injury” because of the defendant’s copying.³⁷ Accordingly, the court awarded the plaintiff only \$250 in damages—the minimum amount required under the Copyright Act at that time.³⁸

³⁰ 298 F. at 146. The court noted that the defendant’s song, which was composed in 1921, see Hapa Haole Songs, <http://www.squareone.org/Hapa/jk.html> (last visited Jan. 5, 2008), “appeared shortly after ‘Dardanella’ had faded out.” 298 F. at 147.

³¹ “A musical figure repeated persistently at the same pitch throughout a composition.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 823 (10th ed. 1993).

³² See 298 F. at 147 (“Not only is the figure in each piece exactly alike, but it is used in the same way; that is, as an ‘ostinato’ accompaniment.”).

³³ See *id.* (referring to the defendant as “one who had necessarily known [Dardanella], as a musician knew it . . .”).

³⁴ The court noted the existence of an ostinato in Landon’s adaptation of Weber’s “Mermaid Song” (an earlier work by then in the public domain) but determined that the existence of this earlier ostinato did not invalidate the plaintiff’s copyright in his ostinato as used in “Dardanella” because “there [was] no evidence to sustain the assertion that the Dardanella ‘ostinato’ was in fact taken from Landon or from any other composition.” *Id.* at 148-49, 152. One might wonder why the court was willing to presume the plaintiff’s innocence with regard to having copied from Landon while simultaneously presuming the defendant’s guilt with regard to having copied from the plaintiff. If the court had determined that the plaintiff was inspired to create his ostinato because of Landon’s earlier use of an ostinato, the court might have found no infringement on the defendant’s part. See *supra* note 25.

³⁵ *Fred Fisher*, 298 F. at 147 (“Mr. Kern swears that he was quite unconscious of any plagiarism, and on the whole I am disposed to give him the benefit of the doubt.”) Judge Hand further notes that for a composer of Mr. Kern’s stature to have copied knowingly would be illogical, given the damage his reputation likely would suffer were he discovered. *Id.*

³⁶ *Id.* at 148.

³⁷ *Id.* at 152.

³⁸ *Id.* The plaintiff also received costs, to which he was “entitled” but did not receive legal fees as those were “discretionary.” Judge Hand made this award grudgingly, stating, “[s]uch victories I may properly enough make a luxury to the winner.”

C. *Subsequent Applications of the Subconscious Copying Doctrine*

In the more than eighty years that have passed since the *Fred Fisher* case, only three other cases have been decided under the subconscious copying doctrine.³⁹ The first of these was *Edwards & Deutsch Lithographing Co. v. Boorman*,⁴⁰ a 1926 case in which the Seventh Circuit reversed a trial court's finding of no infringement and determined that the defendants had infringed the plaintiff's copyright in a particular type of calendar used in banking.⁴¹ A key factor in the court's decision was that the defendants had long been sellers of the plaintiff's publication; thus, their access to it was apparent.⁴² Because the court found that the similarity between the plaintiff's and the defendants' publications "amount[ed] to identity," it held the defendants liable for infringement based on subconscious copying.⁴³

The next case after *Fred Fisher* that made clear reference to and

³⁹ Joel S. Hollingsworth suggests that *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936) provides an additional example of a court's applying the subconscious copying doctrine. Hollingsworth, *supra* note 8, at 463-65. As the defendants in *Sheldon* had sought to purchase the film rights to the plaintiffs' play just over a year before they made the movie they claimed was based solely on factual events and a novel, the film rights to which they had purchased, it seems unlikely that their copying was "unconscious" in the way that George Harrison's or Michael Bolton's clearly was, despite the *Sheldon* court's comment that they "might quite honestly forget what they took." *Sheldon*, 81 F.2d at 54. See also GORMAN & GINSBURG, *supra* note 16, at 460 (hinting that the defendants' possibly untruthful claims may have affected the outcome of this case).

⁴⁰ 15 F.2d 35 (7th Cir. 1926). As will be shown, although this court makes no reference to *Fred Fisher*, this case applies precisely the logic of the subconscious copying doctrine. See *infra* note 43. Nonetheless, it has been overlooked by both courts and legal scholars in the United States who have examined the subconscious copying doctrine. E.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000); *Gordon*, *supra* note 8; *Hollingsworth*, *supra* note 8; *Jessica Litman, The Public Domain*, 39 EMORY L.J. 965 (1990). An English court identified this case and *Fred Fisher* as the "two American cases in which the plaintiff succeeded on the ground of subconscious copying." *Francis Day & Hunter, Ltd. v. Bron*, [1963] 2 All E.R. 16, 21 (Eng. C.A.).

⁴¹ 15 F.2d at 36-37.

⁴² *Id.* at 37 (noting that the defendants "had sold and handled [the plaintiff's] publication for several years").

⁴³ *Id.* The court noted the substantial similarity of the defendants' work and the plaintiff's work: "The copyrightable feature of [the plaintiff's] production being a particular plan, arrangement, and combination of materials, the identity of such plan, arrangement, and combination of similar materials found in [the defendants'] production, not only suggests, but establishes, the claim of copying." *Id.* at 36. The defendants claimed not to have copied the plaintiff's work consciously, and the court stated:

It is not necessary, in order to hold against this contention, that [the defendants] swore falsely, or that they consciously followed [the plaintiff's] work. . . . One may copy from memory. . . . Impressions register in our memories, and it is difficult at times to tell what calls them up. If the thing covered by a copyright has become familiar to the mind's eye, and one produces it from memory and writes it down, he copies just the same, and this may be done without conscious plagiarism.

Id. at 37.

applied the subconscious copying doctrine as articulated by Judge Hand was *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,⁴⁴ a 1976 case in which a New York federal court determined that George Harrison's "My Sweet Lord" was "the very same song" as the Chiffons' "He's So Fine."⁴⁵ The court found substantial similarity between the two songs on the basis of two musical motifs.⁴⁶ The plaintiff's song contained four repetitions of the first motif followed by four repetitions of the second motif, which the court deemed a "highly unique [sic] pattern."⁴⁷ The defendant's song contained four repetitions of the first motif followed by three repetitions of the second motif.⁴⁸ The court further determined that the two songs also contained additional musical similarities.⁴⁹ The court found that Harrison had had access to the Chiffons' song on the basis of the song's popularity and wide distribution.⁵⁰ Harrison claimed that he and a co-writer had written "My Sweet Lord" independently, not knowingly copying from the Chiffons' song, and the court believed him.⁵¹ Nonetheless, based on its combined

⁴⁴ 420 F. Supp at 177.

⁴⁵ *Id.* at 181.

⁴⁶ *Id.* at 178.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* ("My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length [as the plaintiff's song], with the identical grace note in the identical second repetition. The harmonies of both songs are identical."). Ordinarily, to meet the substantial similarity prong of the test for proving copying via circumstantial evidence, a plaintiff must demonstrate "that a *lay listener* would find the works substantially similar." 2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 8.3.2.2 (1996) (emphasis added). The language used by the *Bright Tunes* court in its analysis of substantial similarity does not seem to reflect this lay listener standard. For example, the court deems the plaintiff's song "a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, 'sol-mi-re,' . . . followed by four repetitions of another short basic musical phrase, 'sol-la-do-la-do.'" *Bright Tunes*, 420 F. Supp. at 178. Indeed, at least one noted copyright scholar has suggested that the two songs at issue in *Bright Tunes* "sound entirely different to the casual listener as performed." 4-13 NIMMER, *supra* note 6, § 13.02. As it happened, Judge Owen, the judge hearing *Bright Tunes*, had significant formal musical training and composed musical works in his spare time. See William E. Geist, *Judge Juggles 2 Theater Forms: Opera and Law*, N.Y. TIMES, Mar. 14, 1987, at 29. Indeed, Judge Owen has compiled reviews of his many compositions, including an opera he wrote with his wife, an accomplished soprano, on his website. See <http://www.lynnandrichardowen.com> (last visited Jan. 5, 2008). One might wonder if *Bright Tunes* was in fact decided on the appropriate "lay listener" standard. Perhaps Judge Owen was influenced by the fact that "Harrison himself acknowledged on the stand that the two songs were substantially similar." *Bright Tunes*, 420 F. Supp. at 181.

⁵⁰ *Id.* at 179. Judge Owen noted:

George Harrison, a former member of The Beatles, was aware of He's So Fine. In the United States, it was No. 1 on the billboard charts for five weeks; in England, Harrison's home country, it was No. 12 on the charts on June 1, 1963, a date upon which one of the Beatle songs was, in fact, in first position. For seven weeks in 1963, He's So Fine was one of the top hits in England.

Id.

⁵¹ *Id.* at 180. Judge Owen explained:

I conclude that the composer, in seeking musical materials to clothe his thoughts, was

findings of substantial similarity and access, the court determined that Harrison had infringed the Chiffons' copyright.⁵²

In a similar but more recent case, a California jury in 1994 found that Michael Bolton's 1991 hit "Love Is a Wonderful Thing" infringed the copyright of a 1964 Isley Brothers' song with the same name.⁵³ The jury found substantial similarity between the two works on the basis of expert musicologists' testimony.⁵⁴ The plaintiffs presented "four principal ways"⁵⁵ that the defendants could have had access to their work, one or more of which the jury accepted.⁵⁶ Again, as the court noted, the plaintiffs' argument "was based on a theory of widespread dissemination and subconscious copying."⁵⁷ Despite its acknowledgement that "this is a more attenuated case of reasonable

working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember.

Id.

⁵² *Id.* at 181.

⁵³ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000). Although most copyright infringement claims are adjudicated by judges, the Supreme Court has held that a party's constitutional right to have his case heard by a jury applies to all issues in a copyright infringement case—even the amount of a statutory damages award. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). Thus, one argument against switching to the English or Canadian framework discussed *infra* Part II.C might be the fear of needlessly confusing a jury by adding more factors to an already multi-factor test. It is unclear whether the plaintiff or the defendant requested the jury in *Three Boys*; in any case, the sympathies of the jury members apparently did not lie with Michael Bolton.

⁵⁴ The plaintiffs' expert testified that:

[T]he two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.

Three Boys, 212 F.3d at 485.

The defendants' expert "conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the Isley Brothers' song 'anywhere in the prior art.'" *Id.* Copyright law allows a plaintiff to prove substantial similarity by means of evidence that the two works at issue share a *combination* of unprotectible elements even though each of those elements is itself unprotectible. See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) (finding that the defendant had infringed the plaintiff's greeting cards, the various elements of which were not copyrightable, on the grounds that "proper analysis of the problem requires that all elements of each card, including text, arrangement of text, art work, and association between art work and text, be considered as a whole").

⁵⁵ *Three Boys*, 212 F.3d at 483. The ways the plaintiffs suggested include: 1) Bolton frequently listened to music in the genre of which the Isley Brothers were a part; 2) as three disc jockeys testified, the Isley Brothers' song was frequently played on radio and television stations where the defendants grew up; 3) Bolton confessed to being "a huge fan" of the Isley Brothers and a collector of their music; and 4) while Bolton and Goldmark were composing their work, Bolton wondered to Goldmark whether they were copying an already existing song.

⁵⁶ See *id.* at 484 (noting that "[t]he Isley Brothers' reasonable access arguments are not without merit" and citing an earlier case for the determination that "plaintiff's credibility, even as to those improbabilities [of access and copying], should be left to the jury").

⁵⁷ *Id.* at 483.

access and subconscious copying than [*Bright Tunes Music*],⁵⁸ the Ninth Circuit affirmed the district court's finding of infringement—along with its award of \$5.4 million to the plaintiffs.⁵⁹

D. *Other References to the Doctrine in United States Case Law*⁶⁰

Other courts that have referred to the subconscious copying doctrine have found it inapplicable to their particular circumstances for a variety of reasons. One such court determined that the plaintiff had failed to prove substantial similarity between his work (a story) and the defendant's work (a silent movie).⁶¹ A second court also ruled out the

⁵⁸ *Id.* at 484. The court noted that:

[T]he appellants never admitted hearing the Isley Brothers' 'Love is a Wonderful Thing.' That song never topped the Billboard charts or even made the top 100 for a single week. The song was not released on an album or compact disc until 1991, a year after Bolton and Goldmark wrote their song.

Id.

⁵⁹ *Id.* at 480.

⁶⁰ The suggestion that *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933), *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946), *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751 (S.D.N.Y. 1960), and *United Artists Corp. v. Ford Motor Co.*, 483 F. Supp. 89 (S.D.N.Y. 1980), are all examples of cases in which courts recognized the subconscious copying doctrine but sought to avoid its application is also made in Hollingsworth, *supra* note 8, at 465-70. Hollingsworth argues that a court's decision to apply the subconscious copying doctrine is related to three elements: 1) the degree of similarity between the two works; 2) the likelihood of access by defendant to plaintiff's work; and 3) the degree of "temporal remoteness," i.e. the time between the defendant's access (or purported access) to the plaintiff's work and the defendant's creation of his allegedly infringing work. *See id.* at 462-63. Historically, Hollingsworth suggests, courts were more likely to apply the subconscious copying doctrine when proof of copying—made through the standard similarity plus access test discussed in Part I.A—was strong and the degree of temporal remoteness was low, i.e. there was a short time between the defendant's proved access to the plaintiff's work and the defendant's creation of his own infringing work. *Id.* Thus, for example, in *Fred Fisher*, the court applied the subconscious copying doctrine because it found "that 1) the fact of access was certain . . . ; 2) the works were practically identical . . . ; and 3) the degree of temporal remoteness . . . was low." *Id.* Viewed through Hollingsworth's analytical framework, *Three Boys* presents a particularly unusual application of the doctrine of subconscious copying because "1) the question of access was 'weak,' resting upon a mere showing of moderate dissemination; 2) the jury's finding of substantial similarity was questionable . . . ; and 3) the temporal remoteness was an unprecedented twenty-year period of time." *Id.* at 474.

⁶¹ *Harold Lloyd Corp.*, 65 F. 2d. Both works involved a protagonist who was a football-playing college freshman, and the court analyzed the many similarities and differences of the two works at length. *Id.* at 19-22. In the course of its analysis, having found some similarities between the two works and a possibility of access by the defendants to the plaintiff's story (despite the defendants' assertion that they did not view plaintiff's story), the court briefly discussed the possibility of subconscious copying but found "inherent difficulties" in applying the new doctrine to this case. *Id.* at 16. The court cited evidence of the laborious efforts defendants put into the making of their film and noted some of the differences between plaintiff's story and defendants' film. Although it acknowledged the subconscious copying doctrine's validity, the court sought to partially avoid it by including the question of intent to copy in its determination of whether the plaintiff had presented sufficient circumstantial evidence of copying. *Id.* at 17 ("In

possibility of subconscious copying because of a lack of substantial similarity between the two works.⁶² In a third case, the appellate court reversed a trial court's application of the subconscious copying doctrine based in part on its belief that the copied elements the trial court identified were in the public domain and in part on its determination that "there was no rational possibility of access" by the defendant.⁶³ A fourth court also deemed the subconscious copying doctrine inapplicable and found no infringement in the context of a musical property infringement claim that involved an allegation of the copying of lyrics, not music.⁶⁴ Two factors were particularly influential in leading this court to its decision: 1) that the similarity between the plaintiffs' and the defendants' works was relatively small and could have been the result of the existence of a public domain antecedent,⁶⁵ and 2) that the plaintiffs' evidence of the defendants' possible access to

considering the weight of the circumstantial evidence of copying derived from an analysis of similarities between the play and the story, the question of intent to copy is an important factor . . .").

⁶² *Kerr v. New Yorker Magazine, Inc.*, 63 F. Supp. 2d 320 (S.D.N.Y. 1999). Plaintiff Kerr alleged that Defendant Kunz's drawing "Manhattan Mohawk," published as the July 10, 1995 cover of *The New Yorker*, infringed his 1989 drawing "New York Hairline." *Id.* at 321. Both drawings depicted male figures with Mohawk haircuts in the shape of the Manhattan skyline, and the court concluded that a reasonable jury might find that the defendant had access to the plaintiff's drawing. *Id.* at 324. Nonetheless, the court determined that "there [was] not 'substantial similarity' between the images as a matter of law" and granted summary judgment to the defendant. *Id.* at 326.

⁶³ *Twentieth Century-Fox Film Corp.*, 153 F.2d at 897. Despite the plaintiff's failure to prove conclusively that the defendant had access to her book "Love Girl" when he created his film "Alexander's Ragtime Band," the trial court reasoned that "access may be inferred from similarity," found substantial similarities between the two works, and determined that those similarities "established defendant's 'conscious or unconscious' plagiarism of specified parts of the book." *Id.* at 894. In reversing the trial court's decision, the Eighth Circuit noted that "[t]he only cases we find in which [the subconscious copying doctrine] has been applied are cases in which access has been established actually or in consequence of copyright registration." *Id.* at 898. The court went on to declare: "we are equally convinced that the [subconscious copying doctrine] has never been declared to sanction a determination of access upon a finding of mere similarities like those here involved in the face of such probative evidence of *independent origination* and of non-access as appears in this record." *Id.* (emphasis added). The court seemed particularly persuaded by the good character of the many witnesses who testified that they had participated in the defendant's independent creation of the film. *Id.* at 897. Unfortunately for George Harrison, the court hearing his case did not appear to accord his similar testimony about the efforts that went into writing "My Sweet Lord" similar weight as evidence of independent creation. *See Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp 177, 179-80 (S.D.N.Y. 1976).

⁶⁴ *Whitney*, 179 F. Supp. 751. The plaintiffs claimed that the first two lines of the defendants' song "No Man Is An Island" were copied from the first two lines of the plaintiffs' song of the same name, which was published three years before the defendants'. *Id.* at 752.

⁶⁵ The plaintiffs' allegation was that the lyrics "No man is an island/ No man can stand alone" in the defendants' song were copied from the lyrics "No man is an island/ No man stands alone" in the plaintiffs' song. *Whitney*, 179 F. Supp. at 752-53. Both the plaintiffs and the defendants claimed to have taken the first line from a John Donne poem, which was in the public domain and had also been quoted by Ernest Hemingway in his novel *For Whom The Bell Tolls*. *Id.* at 752-53.

the plaintiffs' song was relatively weak.⁶⁶ In a fifth case, a New York state court faced with a claim of wrongful appropriation of musical property was asked to apply the subconscious copying doctrine to this tort grounded in common-law copyright.⁶⁷ The court declined this invitation to extend the subconscious copying doctrine and instead upheld the existing New York state law rule that a determination of tortious appropriation of musical property required the finding of a "felonious intention" on the part of the defendant.⁶⁸

One of the few cases in which the court had some difficulty avoiding the subconscious copying doctrine was *United Artists Corp. v. Ford Motor Co.*⁶⁹ The plaintiffs in that case claimed that the defendants' use of "an animated humanoid feline character" in advertisements for their Lincoln-Mercury Division infringed on the plaintiffs' character known as "the Pink Panther."⁷⁰ The plaintiffs produced a memorandum written by an employee of one of the defendants that specifically stated the defendants' intention to copy the character of the Pink Panther, thus suggesting that the defendants had

⁶⁶ See *id.* at 754 (finding that compared with sales figures for other popular songs at this time, the sales figures for a recording of the plaintiffs' song showed that it "made a minor impact at best, had a relatively limited appeal and circulation, and cannot be said to have been widely or generally known"). In rejecting the plaintiffs' claim that the subconscious copying doctrine should apply under these circumstances, the court determined that although the possibility of the defendants' having heard the plaintiffs' song could not be completely excluded, the "[p]laintiffs' evidence as to access is wholly insufficient to . . . justify the inference that there was unconscious copying." *Id.* at 755. Faced with the competing possible inference of independent creation, the court preferred the latter. See *id.* (stating that "[t]he ideas involved are not so unique or unusual as to make it unlikely that they were created independently").

⁶⁷ *Navara v. M. Witmark & Sons*, 185 N.Y.S.2d 563 (N.Y. Sup. Ct. 1959). The plaintiff had composed a melody known as "Enchanted Cello" and requested that one of the defendants, Washington, write lyrics for his melody. *Id.* at 564. Washington wrote the lyrics, and when the plaintiff was unable to sell his song, Washington released all his rights in the song to the plaintiff. *Id.* Washington was later hired to write lyrics for a melody composed by another defendant, Tiomkin, and that melody, entitled "The High and the Mighty," was copyrighted and published by defendant Witmark and became part of a movie of the same name. *Id.* The plaintiff contended that, because he had previously collaborated with both Washington and Tiomkin, both of these defendants clearly had access to his melody, which they had copied "consciously or unconsciously." *Id.*

⁶⁸ *Id.* at 566. The Special and Trial Term court reviewing the original proceeding approved of the trial judge's response to the jury's question, "Will the Court please define what he means by 'conscious copying?': "By 'conscious copying' I mean that Tiomkin being aware of plaintiff's melody proceeded, wilfully [sic] and intentionally to imitate and copy it and adopt it as his own." *Id.* at 565. Professor Nimmer suggests that this case and *Malkin v. Dubinsky*, 203 N.Y.S.2d 501 (N.Y. Sup. Ct. 1960), a case decided one year later by another New York State court, rest on "erroneous readings of prior cases." 4-13 NIMMER, *supra* note 6, § 13.08. According to Professor Nimmer, the *Malkin* court erred by interpreting "accidental similarity" referred to in earlier cases to mean unintentional or unconscious copying when, in actuality, those earlier courts had meant the term to refer to coincidental independent creation. *Id.* See *infra* Part II.B.2 for an argument that a distinction between "coincidental independent creation" and "unconscious copying" is meaningless.

⁶⁹ 483 F. Supp. 89 (S.D.N.Y. 1980).

⁷⁰ *Id.* at 90.

copied the plaintiffs' character intentionally and consciously.⁷¹ Nonetheless, the court believed the defendants' argument that the statement in the memorandum was merely the employee's "way of explaining what an animated cat campaign would be like," and it reached a verdict of no infringement.⁷²

Many individuals were involved in the creation of the defendants' animated cat, and all had conceded access to the Pink Panther.⁷³ Thus, the question of whether the defendants had copied subconsciously was more difficult, as the court acknowledged.⁷⁴ Like the court in *Twentieth Century-Fox Film Corp. v. Dieckhaus*,⁷⁵ this court seemed to find the defendants' testimonies about their good faith and the lengthy process of designing their animated cat character to be strong evidence suggestive of independent creation.⁷⁶ In the end, however, the only way that the court was able to rule out the possibility of subconscious copying by the defendants was through its determination that substantial similarity was lacking—a conclusion that the court deemed "not entirely free from doubt" even as it reached it.⁷⁷

⁷¹ *Id.* at 94. The employee's memorandum, written in conjunction with his dissemination of the defendants' animated cat character to executives in the Lincoln-Mercury Dealers Association, stated: "Attached is a colorstat of the animated cat and I am sure you will agree that there is a very close resemblance to the Pink Panther of movie fame. That was our intention." *Id.*

⁷² *Id.* The court further suggested that "the Pink Panther is undoubtedly the preeminent animated large feline character. In any discussion or consideration of such characters, the Pink Panther provides an important point of reference." *Id.* In this passage, the court seems to hint at an aspect of copyright law known as the "scènes à faire doctrine," which holds that forms of expression that are necessary to describe a particular concept or evoke a particular setting are uncopyrightable. *See* *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (holding that similarities in scenes depicting certain German greetings, singing of German songs, and representations of German beer halls were not copyrightable because they were "indispensable, or at least standard, in the treatment of" life in Nazi Germany). Malcolm Gladwell's and Judge Richard Posner's comments about Kaavya Viswanathan's situation suggest that Viswanathan might have a successful scènes à faire argument if a case were brought against her. *See supra* note 5.

⁷³ 483 F. Supp. at 93.

⁷⁴ *Id.* at 95 ("The question which we find far more difficult to resolve is whether the creative people . . . , all of whom concededly had access to the Pink Panther, subconsciously, as the character evolved, incorporated the attributes of the Pink Panther in the character which they were creating to such an extent as to render it an infringement, albeit an innocent infringement."). For further discussion of the concept of "innocent infringement" and its effect on the remedy in a copyright infringement claim, see *infra* Part III.B. For an argument that if subconscious copying is to be treated as infringement, it should at least be treated as innocent infringement, see *infra* Part III.C.

⁷⁵ *See supra* note 63.

⁷⁶ *See supra* note 63; 483 F. Supp. at 92-93 (describing the defendants' process of creating their animated cat character and noting that "[e]veryone involved in the creation and development of defendants' animated cat expressed the view that they [sic] had created a character distinct from any other, including the Pink Panther. [One particular individual] testified that he was not asked to imitate or copy the Pink Panther, and that he did not on his own try to do so").

⁷⁷ *See United Artists Corp.*, 483 F. Supp. at 95-96 (moving directly into an examination of whether the two works were substantially similar "to help with a resolution of" the subconscious copying question).

II. THE PROBLEM OF APPLYING THE SUBCONSCIOUS COPYING DOCTRINE

A. *The Subconscious Copying Doctrine Does Not Fit the Economic Rationale of Copyright Law*

As many scholars have emphasized, intellectual property law differs from traditional property law because rather than simply granting an author of a work the right to unconditional, perpetual ownership of a work he creates, intellectual property law also considers the public interest in having access to the work of others.⁷⁸ Because the cost of creating a copyrightable work is often high, but the cost of reproducing the work is often low, copyright law grants an author certain exclusive rights in his work for a limited time to enable him to recover his cost of creating the work—despite the fact that granting such exclusive rights means limiting the ability of others to use that author’s work.⁷⁹ Since authors frequently use elements of earlier works in creating new works,⁸⁰ granting copyright protection for any single work imposes costs on the creation of other works.⁸¹ If too much copyright protection

⁷⁸ See, e.g., Landes & Posner, *supra* note 9, at 326: “A distinguishing characteristic of intellectual property is its ‘public good’ aspect” Professor Lawrence Lessig notes that the difference between real property law and intellectual property law is enshrined in the Constitution: while the “Takings Clause” of the Fifth Amendment requires the government to pay a real property owner if it takes his property, the clause in Article I, § 8 giving Congress the power to create intellectual property rights “requires that after a ‘limited time,’ Congress take back the rights that it has granted and set the ‘creative property’ free to the public domain.” LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 19 (2004).

⁷⁹ Landes & Posner, *supra* note 9, at 326 (“Copyright protection—the right of the copyright’s owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing the incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.”). Professor Lessig suggests that, in recent years, our society has overemphasized what Landes and Posner would call the “incentives” side to the detriment of the “access” side. He argues that many people take a view of “creative work” along these lines:

Creative work has value; whenever I use, or take, or build upon the creative work of others, I am taking from them something of value. Whenever I take something of value from someone else, I should have their permission. The taking of something of value from someone else without permission is wrong. It is a form of piracy.

LESSIG, *supra* note 78, at 18.

Lessig suggests that this perspective is incorrect because “the ‘if value, then right’ theory of creative property has never been America’s theory of creative property Instead, in our tradition, intellectual property is an instrument . . . [that] sets the groundwork for a richly creative society but remains subservient to the value of creativity.” *Id.* at 19.

⁸⁰ Landes & Posner, *supra*, note 9, at 332.

⁸¹ *Id.* (“[B]eyond some level copyright protection may actually be counterproductive by raising the cost of expression The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work.”).

is granted, there will be a chilling effect: the higher cost imposed on the creation of new works will result in the existence of fewer new works.⁸²

An examination of the case law involving the subconscious copying doctrine reveals that courts have applied the doctrine sparingly, and almost exclusively in cases involving musical works.⁸³ The nature of music is such that musicians borrow very frequently from those who preceded them, perhaps more frequently than authors in other media borrow from others in their fields.⁸⁴ This greater occurrence of

⁸² *Id.* (“[I]f copyright protection effectively prevented all unauthorized copying from a copyrighted work . . . [t]he effect would be to raise the cost of creating new works . . . and thus, paradoxically, perhaps lower the number of works created.”) *See also* BOLLIER, *supra* note 8, at 12 (“What is not appreciated . . . is how overly broad copyright and trademark laws can sabotage creative production Artists necessarily must draw upon works of the past They also must be able to modify and transform prior works and collaborate and share with fellow artists.”). Landes and Posner suggest that:

[V]arious doctrines of copyright law, such as the distinction between idea and expression and the fair use doctrine, can be understood as attempts to promote economic efficiency by balancing the effect of greater copyright protection—in encouraging the creation of new works by reducing copying—against the effect of less protection—in encouraging the creation of new works by reducing the cost of creating them.

Landes & Posner, *supra* note 9, at 333.

⁸³ As discussed *supra* Part I.D, courts that considered the subconscious copying doctrine but rejected its application to their particular circumstances include *Harold Lloyd Corp. v. Witwer*, 65 F. 2d 1 (9th Cir. 1933) (plaintiff’s work was a written story and the defendants’ work was a silent film); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946) (plaintiff’s work was a book and the defendant’s work was a film); *United Artists Corp. v. Ford Motor Co.*, 483 F. Supp. 89 (S.D.N.Y. 1980) (plaintiff’s work and the defendants’ work were both animated characters); and *Kerr v. New Yorker Magazine, Inc.*, 63 F. Supp. 2d 320 (S.D.N.Y. 1999) (plaintiff’s work and the defendant’s work were both drawings). Three of the four cases in United States history in which the defendants were found liable for infringement based on a finding that they had subconsciously copied the plaintiffs’ works are *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), and *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000). In all of these cases, both the plaintiff’s and the defendant’s works were musical compositions. The two cases involving musical works in which courts specifically held that the defendant had *not* subconsciously copied the plaintiff’s work are distinguishable from these three cases based on particular procedural or factual details. The plaintiff in *Navara v. Witmark*, 185 N.Y.S.2d 563 (N.Y. Sup. Ct. 1959) brought a claim for wrongful appropriation of musical property, a tort grounded in common-law copyright, rather than for copyright infringement under federal law. The plaintiffs in *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp 751 (S.D.N.Y. 1960) claimed that the defendant had copied the *lyrics*, not the *music*, of the plaintiffs’ work. *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir. 1926) is the single case in which the subconscious copying doctrine was applied to a non-musical work. *See supra* Part I.C. As discussed *infra* Part II.C, two foreign courts declined to find two composers liable for subconscious copying under circumstances similar to those in *Three Boys*. *Francis Day & Hunter, Ltd. v. Bron*, [1963] 2 All E.R. 16 (Eng. C.A.); *Gondos v. Hardy*, [1982] 38 O.R.2d 555 (Can.).

⁸⁴ James V. DeLong, *ASCAP vs. GIRL SCOUTS: The Best Things in Life Aren’t Free, or, Why You Might Be Better Off If You Wind Up Paying for Those Campfire Singalongs*, NAT’L L.J., Mar. 10, 1997, available at <http://jamesvdelong.com/articles/ip/best-things.html> (“Song writers draw heavily on the efforts of other people, such as those who invented the musical notation used to put songs into marketable form, a rich tradition of folk music written without the benefit of copyright, and old works no longer covered.”); BOLLIER, *supra* note 8, at 17:

borrowing in musical works is at least partly due to the limited repertoire with which an artist may work,⁸⁵ and it has led at least one scholar to conclude that “[m]usical compositions pose distinctively difficult problems for copyright infringement determinations.”⁸⁶

Because of the prevalence of borrowing in music, one might think instinctively that all musicians would find it in their interest to impose certain limits on copyright protection in this area.⁸⁷ Indeed, it has been suggested that courts do impose some additional burdens on the plaintiff

One of the most persistent difficulties in applying copyright law to music is determining what is original—and therefore deserving of copyright protection—and what is deemed illicit ‘copying’ Copyright law presumes that the originality of a new work—and thus its ‘authorship’—can be identified and legally defined as property But in actual practice, no one creates a new song out of thin air Virtually every new creation draws in varying degrees upon musical tradition and the larger culture, sometimes in highly specific ways The history of music is a story of originality combining with creative derivation.

Bollier gives examples of popular songs based on classical themes (“‘Good Night Sweetheart’ (1931) is based on themes from Schubert’s Symphony in C and Liszt’s preludes”); popular songs based on non-Western melodies (“‘The Lion Sleeps Tonight,’ also known as ‘Wimoweh’—recorded by the Weavers in 1952 and the Tokens in 1961—is based on a traditional African song”); and folk songs based on religious tunes (“[T]he melody of [Bob] Dylan’s first big hit, ‘Blowin’ in the Wind,’ was based on an antislavery spiritual, ‘No More Auction Block’”). *Id.* at 17-19. Paul Goldstein also cites a brief from a musical infringement case which noted that “the following well-known compositions all contain five to seven consecutive pitches in common with each other: *As Time Goes By*; *The Star Spangled Banner*; *O Holy Night*; *Three Blind Mice*; *God Save the Queen*; and *Stranger in Paradise*.” 2 GOLDSTEIN, *supra* note 49, § 8.3. Modern musicians at times lament the effect of modern copyright law and modern notions of plagiarism on their craft. See Steven Fox, Program Notes to “Gemütlichkeit von Salzburg” (Oct. 23, 2007) (on file with the author) (detailing Michael Haydn’s clear borrowing from Mozart in Haydn’s piece *Requiem pro defuncto Archiepiscopo Sigismundo*, MH155 and noting “how different the times were, when what might be considered plagiarism today was nothing but the greatest honor one composer could pay to another in the 18th century”). (For a distinction between “plagiarism” and “copyright infringement,” see POSNER, *supra* note 5, at 11-39.)

⁸⁵ See 2 GOLDSTEIN, *supra* note 49, § 8.3 (“Mathematically the twelve notes of the musical scale can be arranged and rearranged almost endlessly; but only a small number of these combinations will be aesthetically pleasing Aesthetic convention and the limits of the human ear impose substantial constraints on invention and variety in musical composition.”).

⁸⁶ *Id.* Goldstein further suggests that:

The difficulty of applying standard infringement measures to musical compositions in a way that will properly protect both the plaintiff’s original expression and the defendant’s freedom to create original expression of his own may explain why courts have occasionally swerved from one pole to another and why even the most experienced judges have committed fundamental errors in these cases.

Id.

Among the “experienced judges” erring in the field of musical infringement cases was Judge Learned Hand, who both changed his position on what constitutes infringement in the musical context and “sometimes decided for the plaintiff in cases in which there was no real possibility that defendant’s work would have displaced plaintiff’s in the marketplace.” *Id.* at n.11.

⁸⁷ Landes and Posner suggest that all “[c]opyright holders might . . . find it in their self-interest, *ex ante*, to limit copyright protection. To the extent that a later author is free to borrow material from an earlier one, the later author’s cost of expression is reduced; and, from an *ex ante* viewpoint, every author is both an earlier author from whom a later author might want to borrow material and the later author himself.” Landes & Posner, *supra* note 9, at 333. Presumably, the more an author’s field relies on borrowing, the more this logic applies to him.

in a musical infringement case.⁸⁸ The application of the subconscious copying doctrine, however, contradicts this view. Rather than imposing additional burdens on the plaintiff, courts make a presumption in the plaintiff's favor: as long as the plaintiff establishes that the defendant's work is substantially similar to the plaintiff's and that the defendant had access to the plaintiff's work, courts are willing to presume that a defendant who claims not to have been influenced by the plaintiff's work subconsciously copied the plaintiff's work.⁸⁹ Furthermore, instead of requiring that the plaintiff establish access by proving the defendant's *actual* contact with the plaintiff's work, many courts have allowed a plaintiff to establish access merely by proving that the defendant had an *opportunity* to be in contact with the plaintiff's work.⁹⁰

One scholar has suggested that there are two typical routes plaintiffs use to prove access in musical infringement cases: either the plaintiff seeks to establish that the defendant gained access to the plaintiff's work through dealings with a record company or publisher to which the plaintiff had submitted the work, or the plaintiff attempts to show that the defendant had access to the plaintiff's work because the work was widely disseminated.⁹¹ This second method is deemed the "typically more successful route,"⁹² and, indeed, it was the means of proving access in each of the three musical infringement cases decided under the subconscious copying doctrine.⁹³

⁸⁸ 2 GOLDSTEIN, *supra* note 49, § 8.3 (suggesting that "courts in musical infringement cases have generally increased the plaintiff's burdens of proof with respect to both copying and improper appropriation in order not to inhibit the production of competing compositions").

⁸⁹ See *supra* Part I.A.

⁹⁰ The Ninth Circuit has held that "proof of access requires 'an opportunity to view or to copy plaintiff's work.'" *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting *Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)). A preeminent scholar in the field of copyright has suggested that although "[s]ome courts have defined access as the actual viewing and knowledge of plaintiff's work by the person who composed defendant's work," the proper view is "to regard a reasonable opportunity to view as access . . ." 4 NIMMER, *supra* note 6, § 13.02[A]. Nimmer goes on to clarify what he means by "reasonable opportunity": "[R]easonable opportunity, as here used, does not encompass any bare possibility in the sense that anything is possible Access may not be inferred through mere speculation or conjecture There must be a reasonable possibility of viewing plaintiff's work—not a bare possibility." *Id.* Nimmer further suggests that "[a]t times, distinguishing a 'bare' possibility from a 'reasonable' possibility will present a close question." *Id.* The *Three Boys* case provides a good example of a court's willingness to find a reasonable possibility of access on very little evidence: "In [that] case, the [defendants] never admitted hearing the [plaintiffs'] song, which] . . . never topped the Billboard charts or even made the top 100 for a single week. The [plaintiff's] song was not released on an album or compact disc until 1991, a year after [the defendants] wrote their song." *Three Boys*, 212 F.3d at 484.

⁹¹ 2 GOLDSTEIN, *supra* note 49, § 8.3.1.1.

⁹² *Id.*

⁹³ See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (suggesting that because of the prevalence of the plaintiff's musical composition only a short time before the defendant's composition appeared, the defendant "had certainly often heard [the plaintiff's composition] only a short time before"); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976) ("George Harrison, a former member of The Beatles, was

Courts occasionally have determined that the plaintiff's work was not disseminated widely enough to establish access through this method.⁹⁴ However, as newer technologies make "widespread dissemination" easier to achieve, under the current framework, one can imagine more courts determining that a plaintiff has met his burden to prove access and finding infringement via the subconscious copying doctrine.⁹⁵ It would seem, therefore, that the subconscious copying doctrine means that authors of musical works are actually granted more, not less, protection under copyright: all they need do is widely disseminate their works (not difficult in the Internet age), and they should be able to prove that any later musician who produces a work that is substantially similar to theirs has infringed their copyright.⁹⁶ This result hardly seems in keeping with the American tradition that intellectual property "sets the groundwork for a richly creative society but remains subservient to the value of creativity."⁹⁷

aware of He's So Fine. In the United States, it was No. 1 on the billboard charts for five weeks. . . . For seven weeks in 1963, He's So Fine was one of the top hits in [Harrison's home country,] England."); *Three Boys*, 212 F.3d at 483-84 (stating that "[t]he Isley Brothers' access argument was based on a theory of widespread dissemination and subconscious copying").

⁹⁴ E.g., *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

⁹⁵ The plaintiff's expert in *Selle* testified that the plaintiff's and the defendant's songs "had such striking similarities that they could not have been written independent [sic] of one another." *Id.* at 899. Furthermore, as Professor Goldstein notes, the court in *Selle* appears not to have considered the possibility that the defendant had subconsciously copied the plaintiff's work. 2 GOLDSTEIN, *supra* note 49, § 8.3.1 ("Neither the testimony nor the exhibit excluded the possibility that defendants had copied plaintiff's song subconsciously."). The court's decision not to consider the subconscious copying doctrine appears to stem solely from its determination that dissemination of the plaintiff's song was insufficiently widespread. *Selle*, 741 F.2d at 898 (noting that the plaintiff "played his song with his small band two or three times in the Chicago area and sent a tape and lead sheet of the music to eleven music recording and publishing companies. Eight of the companies returned the materials to [the plaintiff]; three did not respond. This was the extent of the public dissemination of [the plaintiff's] song"). Thus, the sole distinguishing factor between *Selle* (no infringement) and *Bright Tunes* or *Three Boys* (infringement) is the court's finding that the plaintiff's work in *Selle* was not widely disseminated. As widespread dissemination becomes easier to achieve, it is thus likely that more cases will be decided along the lines of *Bright Tunes* or *Three Boys* rather than *Selle*.

⁹⁶ See BOLLIER, *supra* note 8, at 34 ("Now that old films, music, visual images, advertising, and ephemera are being resurrected and made available to contemporary consumers on all sorts of media, including the Internet, one can only imagine the train wreck of competing copyright claims that may be justified in the future by the subconscious copying doctrine.").

⁹⁷ LESSIG, *supra* note 78, at 19. See also BOLLIER, *supra* note 8, at 34:

In the wake of [*Three Boys*], artists are understandably wary about the mere possibility of a subconscious copying lawsuit. Rather than risk huge legal fees and the personal anguish and publicity of such a suit, artists and their labels are more likely to just decline to release a song One trembles to contemplate the effects on creativity.

B. *An Analysis of the Subconscious Copying Doctrine Reveals the Additional Financial, Moral, and Logical Problems It Presents*

1. Some Basic Financial and Moral Objections to the Subconscious Copying Doctrine

As many scholars have noted, the subconscious copying doctrine also presents financial, moral, and logical problems. One scholar notes both the financial and moral unfairness the doctrine may cause for an author of a later work who, acting in good faith, accidentally replicates something he has seen or heard earlier but does not remember.⁹⁸ Financially, not only may the later author be required to pay damages to the earlier author, he also may have no copyright in his work, and his accuser may be able to obtain an injunction against his work, preventing him from profiting from both the portions of his work that have been found to be copied and those portions that are original.⁹⁹ Morally, the doctrine may seem problematic because sometimes there has been no copying—not even subconsciously—so the later author in fact owes no debt to the earlier one.¹⁰⁰ The problem is that “the law at present cannot distinguish such cases.”¹⁰¹

Another scholar stresses the moral problem with the subconscious copying doctrine even more pointedly.¹⁰² After discussing the court’s application of the doctrine in *Bright Tunes*, he asserts that “cases like this make a difference to our image of the copier.”¹⁰³ Further, as he notes, the subconscious copying doctrine makes unreasonable, creativity-stifling demands on an artist for the sake of the property rights of another artist, which again may seem like an irrational skewing of the precarious balance copyright law seeks to protect.¹⁰⁴

⁹⁸ Gordon, *supra* note 8, at 1029-30.

⁹⁹ *Id.* at 1029. Gordon further suggests that the parties may negotiate a license, but if they choose to do so, the prior author already has “an extraordinarily powerful bargaining position.” *Id.*

¹⁰⁰ *Id.* at 1029-30 (“It is possible that sometimes even an artist’s subconscious forgets a composition encountered years earlier, and the similarity of form is merely coincidence.”).

¹⁰¹ *Id.* at 1030.

¹⁰² Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 842, 882 (1993).

¹⁰³ *Id.* Waldron continues:

All of us—not just those in the entertainment industry—live in a world alive with song; snatches and phrases of this and that tune wander through our minds, more or less continually. One who fails to trace the particular provenance of a combination of notes that happens to “work” for him can hardly be regarded as a thief.

Id.

¹⁰⁴ *Id.* (stating that “avoiding the sort of subconscious influence that the judge traced in [*Bright Tunes*] would require the most rigorous and stultifying self-scrutiny. In this sense, the intellectual property rights of the Chiffons impose a duty of respect on other musicians—a duty to ensure that

2. The Particular Problem of Distinguishing Subconscious Copying from Independent Creation

Judge Hand's classic example of the re-creator of Keats's *Ode on a Grecian Urn* as a means of illustrating the defense of independent creation to an allegation of copyright infringement remains valid law and continues to be included in copyright law casebooks.¹⁰⁵ Revisiting this hypothetical, one scholar has proposed a slight variation involving two re-creators of Keats' ode: one who composes the poem anew having entirely forgotten that he once heard it before,¹⁰⁶ and one whose subconscious memory, but not his conscious one, remembers the poem that he recreates.¹⁰⁷ Because of the subconscious copying doctrine, the

one is avoiding subconscious imitation in a world resonating with 'original' tunes—that is in fact very burdensome.”). See also Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351 (2002). Ciolino and Donelon discuss the inapplicability of the “loss avoidance” rationale behind tort law's strict liability framework in the context of copyright law and point out the consequent flaws inherent in Congress's adoption of a strict liability framework for federal copyright law. They suggest that:

The theoretical and practical failings of the “loss avoidance” rationale are perhaps most glaring in the context of unconscious infringement. . . . In theory, loss avoidance expects the impossible: that in the midst of the “creative process” an author can successfully distill from his subconscious the portion of his work that is derived from other works from that which is truly “original.” In practice, this theory further assumes that an author can avoid infringement by undertaking the Herculean task of locating, and presumably receiving a license from, each of his “muses.”

Id. at 379-80.

¹⁰⁵ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); see *supra* note 26. See, e.g., GORMAN & GINSBURG, *supra* note 16, at 457. That independent creation is a complete defense to an infringement claim long has been and still continues to be a key principle of copyright law. Judge Hand recognized this principle—even as he created the subconscious copying doctrine—in a lengthy discussion during which he quoted numerous authorities on the topic, including one who suggested that:

Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner or for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been unlawful copying. In many cases the natural or necessary resemblance between two productions which are the result of independent labor will amount to substantial identity. . . . But, notwithstanding their likeness to one another, any number of productions of the same kind may be original within the meaning of the law, and no conditions as to originality are imposed upon the makers, except that each shall be the producer of that for which he claims protection.

Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151 (S.D.N.Y. 1924) (quoting Eaton S. Drone, the author of a treatise on copyright that was popular at the time).

¹⁰⁶ In Professor Litman's hypothetical, which she proposed in 1990, both boys have indeed heard the poem before. See *infra* note 107. In light of the recent decision in *Three Boys*, a court could presumably find that *both* of her hypothetical boys had sufficient access to the poem to be liable for subconscious copying. See *supra* Part I.C; *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 483-84 (9th Cir. 2000). Her hypothetical would be strengthened if the first boy had never heard Keats' *Ode* before.

¹⁰⁷ Litman, *supra* note 40, at 1000-01:

first author would be entitled to copyright his poem; the second would not.¹⁰⁸ This result, she suggests, is particularly unjust because there is no way to determine into which of those two categories (independent creator or subconscious copier) an author who coincidentally recreates another's work falls.¹⁰⁹ The injustice is only exacerbated by the procedure of an infringement case: since the burden of persuasion is shifted to the defendant once the plaintiff establishes substantial similarity and access,¹¹⁰ the defendant will have to persuade the trier of fact that the similarities between the two works are the result of neither conscious nor subconscious copying.¹¹¹ As she points out, this task is "difficult—to say the least."¹¹²

What the hypothetical of the two schoolboys suggests is that, from the perspective of the second author, what the law currently calls "subconscious copying" is, in fact, "independent creation." Studies about the workings of the subconscious mind support this view. In the world of psychology, what copyright law calls "subconscious copying" is referred to as "cryptomnesia."¹¹³ Many well-known authors have

[T]wo schoolboys encounter Keats' *Ode* when their teacher reads it aloud to them in class. Neither pays close attention. The first of the boys forgets the *Ode* utterly; the second has no conscious memory of the poem, but Keats' turns of phrase stick in his subconscious mind. Both boys grow up to be poets with no further contact with the works of Keats, and each composes the *Ode on a Grecian Urn* with no awareness that Keats has anticipated him. The similarities of the first poet's poem to that of Keats are sheer coincidence, and he is entitled to copyright his poem. The second poet, of course, relied unknowingly on his subconscious memory, and he is not entitled to a copyright because he copied his poem, albeit subconsciously, from Keats.

¹⁰⁸ *Id.* Again, this conclusion is debatable since both boys have heard the poem before. See *supra* note 106. Professor Litman's logic remains correct, however, if the hypothetical is modified such that the first boy never heard the poem before. This modification is in keeping with the wording of Judge Hand's original hypothetical, in which the re-creator of Keats' *Ode* "had never known" the poem. *Sheldon*, 81 F.2d at 54.

¹⁰⁹ Litman, *supra* note 40, at 1002 (noting that "the law purports to draw lines on the basis of 'facts' that cannot be ascertained. While our two fictitious authors may call for opposite legal conclusions in the world of black-letter law, we have no way of telling them apart in the real world.").

¹¹⁰ See *supra* Part I.A.

¹¹¹ Litman, *supra* note 40, at 1002.

¹¹² *Id.*

¹¹³ "[R]ecall of events not part of one's conscious experience; subliminal memories . . ." CHRIS ALDRICH, THE ALDRICH DICTIONARY OF PHOBIAS AND OTHER WORD FAMILIES 183 (2006). See also LEONARD ZUSNE & WARREN H. JONES, ANOMALISTIC PSYCHOLOGY: A STUDY OF MAGICAL THINKING 138 (1989) (stating that "[c]ryptomnesia usually involves seemingly original ideas that are not or the telling of old stories as if they were new"). Carl Jung, who wrote at length about the workings of the subconscious, described the phenomenon of cryptomnesia:

An author may be writing steadily to a preconceived plan, working out an argument or developing the line of a story, when he suddenly runs off at a tangent. Perhaps a fresh idea has occurred to him, or a different image, or a whole new sub-plot. If you ask him what prompted the digression, he will not be able to tell you. He may not even have noticed the change, though he has now produced material that is entirely fresh and apparently unknown to him before. Yet it can sometimes be shown convincingly that what he has written bears a striking similarity to the work of another author—a work

been victims of cryptomnesia, among them Friedrich Nietzsche.¹¹⁴ Psychologists suggest that the material an author might draw upon from his subconscious has “become unconscious because . . . there is no room for it in the conscious mind.”¹¹⁵ It is “normal and necessary” for some material to move to the subconscious to prevent the mind from becoming “impossibly cluttered.”¹¹⁶

One can see from these explanations that some of the material that an author draws on will thus be material that he learned from others that moved to his subconscious and has subsequently reemerged. However, not all material that the subconscious produces is unoriginal.¹¹⁷ Indeed, some of the most creative and original works that authors have produced have begun in their subconscious minds.¹¹⁸ Because an author is unable to distinguish between the original and the unoriginal material produced by his subconscious,¹¹⁹ to penalize him for his use of the latter also dissuades him from using the former.¹²⁰ Thus, when copyright law

that he believes he has never seen.

CARL G. JUNG, *Approaching The Unconscious*, in MAN AND HIS SYMBOLS 23 (1964).

¹¹⁴ As Jung relates:

I myself found a fascinating example of [cryptomnesia] in Nietzsche’s book *Thus Spake Zarathustra*, where the author reproduces almost word for word an incident reported in a ship’s log for the year of 1686. By sheer chance I had read this seaman’s yarn in a book published about 1835 (half a century before Nietzsche wrote); and when I found the similar passage in *Thus Spake Zarathustra*, I was struck by its peculiar style, which was different from Nietzsche’s usual language. I was convinced that Nietzsche must also have seen the old book, though he made no reference to it. I wrote to his sister, who was still alive, and she confirmed that she and her brother had in fact read the book together when he was 11 years old. I think, from the context, it is inconceivable that Nietzsche had any idea that he was plagiarizing this story. I believe that fifty years later it had unexpectedly slipped into focus in his conscious mind.

Id. at 24.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 24-25. Jung further suggests that knowledge of this process is widespread among psychologists. *Id.* at 25.

¹¹⁷ *Id.* (“[J]ust as conscious contents can vanish into the unconscious, new contents, which have never yet been conscious, can *arise* from it.”).

¹¹⁸ Jung lists the mathematician Poincaré, the chemist Kekulé, the philosopher Descartes, and the author Robert Louis Stevenson as examples of authors who acknowledged the contribution of their subconscious minds to some of their most creative works. *Id.* He further notes the creative talent required to shape one’s subconscious ideas into artistic products. *Id.* (“The ability to reach a rich vein of such material and to translate it effectively into philosophy, literature, music, or scientific discovery is one of the hallmarks of what is commonly called genius.”).

¹¹⁹ See Litman, *supra* note 40, at 1010-11. Professor Litman argues that:

An author . . . seeks to communicate her own expression of the world. Her views of the world are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles entitled “things that happened to me,” “things I read once,” and “things I thought up in a vacuum” to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely.

Id. at 1010.

¹²⁰ Professor Litman suggests that the ability to draw from one’s subconscious is essential to the process of artistic creation:

fails to recognize subconscious copying as the form of independent creation it is (at least to the creator), it stifles the very creativity it is intended to protect and promote.¹²¹

C. *Countries with Copyright Laws Similar to the United States' Have Incorporated the Author's Lack of Intent to Copy into Their Infringement Analysis*

In the United States, courts have long deemed copyright infringement to be a strict liability offense.¹²² Although some scholars have argued against the strict liability framework, particularly in the context of subconscious copying,¹²³ supporters of the subconscious copying doctrine continue to insist that, in order to grant a copyright owner sufficient legal protection, intent to copy must remain irrelevant in analyzing a copyright infringement claim.¹²⁴ Yet at least two countries with copyright laws similar to the statute in the United States, England and Canada, have allowed a defendant's testimony regarding his own lack of intent to play a role in their analysis of a copyright infringement claim—and both have found the defendant not liable under circumstances in which a United States court likely would have determined that he copied subconsciously.

Like the Copyright Act of the United States, the Copyright Act of the United Kingdom sets out certain rights that belong exclusively to the

The author will often not recognize the antecedents that she has absorbed in the past and recasts and recombines as she works. Such amnesia about the sources of one's diction is a blessing that enables the work to proceed without the paralysis that would follow from examining each accretion for echoes of prior works.

Id. at 1011.

¹²¹ See *id.* at 1008-11 (arguing that the "mixture [of 'absorption, astigmatism, and amnesia'] is precisely the process that yields the works of authorship we wish to encourage through the copyright law" and suggesting that the "romantic model of authorship," which views creative processes as producing only material that is entirely original, is partly to blame for errors like the subconscious copying doctrine in American copyright law). See also POSNER, *supra* note 5, at 73-74 (suggesting that "it is possible that by limiting the scope for free creative imitation, copyright has encouraged rather than simply mirrored a growing belief that literary, artistic, and other intellectual goods are not really 'creative' unless they are 'original.' That belief rests on the absurd idea that copying is inherently bad").

¹²² See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) (noting that "[i]ntention to infringe is not essential under the [Copyright] Act").

¹²³ See *supra* note 104.

¹²⁴ See Landes & Posner, *supra* note 9, at 347 ("If proof of intentional duplication were required for infringement, composers of popular songs would have little copyright protection and social welfare would fall."); 4 NIMMER, *supra* note 6, § 13.08 ("[A] plea of innocence in a copyright action may often be easy to claim and difficult to disprove."); *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983) ("[T]he problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders.").

author of a work.¹²⁵ Both countries' statutes specify that an author's copyright is infringed when another person or entity, acting without a license, takes for himself one of the rights that belongs exclusively to the work's author.¹²⁶ The English courts were first compelled to consider the possibility of copyright infringement by subconscious copying in *Francis Day & Hunter, Ltd. v. Bron*,¹²⁷ a 1963 case with a fact-pattern very similar to *Three Boys Music*.¹²⁸ Despite finding substantial similarity between the two works at issue¹²⁹ and a reasonable possibility that the composer of the defendant's work had access to the plaintiff's work,¹³⁰ Lord Wilberforce, the trial judge in that case, declined to apply the American version of the subconscious copying doctrine and find the defendant liable for infringement.¹³¹ He reasoned

¹²⁵ Compare 17 U.S.C. § 106 (2000) with Copyright, Designs and Patents Act, 1988, c. 48, § 16 (Eng.).

¹²⁶ See 17 U.S.C. § 501 (referring to "anyone who violates any of the exclusive rights of the copyright owner" as "an infringer of copyright"); Copyright, Designs and Patents Act, 1988, c. 48 § 16 (stating that "[c]opyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright").

¹²⁷ [1963] 2 All E.R. 16 (Eng. C.A.).

¹²⁸ The plaintiff, Francis Day & Hunter, Ltd., owned the copyright in a song composed in 1926 and called "In a Little Spanish Town." *Id.* at 16. The defendant was the publisher and copyright owner of a song called "Why," which was composed in 1959 by Peter de Angelis. *Id.* at 18. On the basis of certain musical similarities between the two songs and the fact that the plaintiff's song was widely distributed, the plaintiff alleged that the defendant had subconsciously copied its song. *Id.* at 17.

¹²⁹ Although the trial judge noted some musical differences between the two songs, including a difference in rhythm, he concluded that there was an "undoubted degree of similarity" between them, and further determined that "'definite' or 'considerable' is the right weight to put on the degree of similarity; it is such that an ordinary reasonably experienced listener might think that perhaps one had come from the other." *Id.* at 19.

¹³⁰ As the defendant admitted, the plaintiff's song "was extensively exploited in the United States of America and elsewhere by the publication of sheet music, by the distribution of gramophone records and by broadcasting." *Id.* at 16. Indeed, one judge on the three-judge panel of the appellate court (which affirmed the trial judge's finding of no infringement) noted, "I was readily able to recognise the tune as a familiar one which I had heard on frequent previous occasions." *Id.* at 18. De Angelis, the composer of the defendant's song, had spent most of his life in the United States and "admitted that at a younger age he might have heard [the plaintiff's song], because he had heard a lot of music." *Id.* at 19.

¹³¹ As noted by Lord Willmer, one of the three judges on the panel of the appellate court reviewing this case, the subconscious copying doctrine virtually did not exist in English law at this time; no secondary sources had discussed it, and the single case that mentioned it had done so in dicta. *Id.* at 21 (quoting Ricordi & Co. (London), Ltd. V. Clayton and Waller, Ltd., in which Lord Luxmoore had commented, "If there has been any infringement it must have been subconsciously, because the persons responsible knew the air complained of so well that they have taken it because they knew it."). Accordingly, the plaintiff's lawyers had directed the English courts' attention to United States law, and in particular to the *Fred Fisher* and *Boorman* cases (discussed *supra* Parts I.B and I.C), which, the English appellate court said, "must be regarded as of high persuasive authority." *Id.* Despite this statement, the English judges did not appear to find the United States' subconscious copying doctrine persuasive at all. *Id.* at 21-30. Indeed, one appellate judge called the doctrine "remarkable" and "startling," and all three appellate judges were troubled by the fact that application of the subconscious copying doctrine both ruled out the possibility of independent creation by the composer of the defendant's song and allowed a court to find infringement by a defendant without compelling a plaintiff to prove

that a determination of whether the defendant had subconsciously copied the plaintiff's work could:

only be reached by a judgment of fact on a number of composite elements: [1] The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, [2] the character of the work, particularly its qualities of impressing the mind and memory, [3] the objective similarity of the defendants' work, [4] the inherent probability that such similarity as is found could be due to coincidence, [5] the existence of other influences on the defendant composer, and . . . [6] the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiff's work.¹³²

With these words, Lord Wilberforce created the English version of the subconscious copying doctrine, a version that differed significantly from its American counterpart, as one commentator was quick to note.¹³³

the "causal connexion [sic] between the copyright work and the infringing work"—i.e. that the similarities between the two works were in fact due to the defendant's copying and not to another cause, perhaps coincidence. *Id.* Lord Diplock, another member of the appellate court, summed up the subconscious copying doctrine and stated his objection to it:

Faced with the difficulty that 'unconscious copying' is by definition not susceptible of direct proof in the present state of psychological techniques, it must always be a matter of inference from other facts, the first bold submission of counsel for the plaintiffs was that, if the plaintiff proves (i) the presence of the necessary element of objective similarity between the copyright work and the alleged infringing work; and (ii) the mere possibility of access to the copyright work by the author of the alleged infringing work, there is an irrebuttable presumption (i.e., a presumption of law) that the author of the alleged infringing work unconsciously copied the copyright work; or, put more briefly, what cannot be proved must be presumed. With all respect, this is bad logic as well as bad law.

Id. at 29.

In the end, all three appellate judges deferred to Lord Wilberforce's determination that "it does not seem to me that the degree of similarity shown, coupled with the fact, which I think it is as far as it is possible to go by inference, that at some time and in some circumstances [the composer of the defendant's song] must have heard [the plaintiff's song], is enough to make good the plaintiffs' case." *Id.* at 22.

¹³² *Id.* One scholar who has suggested that Lord Wilberforce's composite elements provide "one of the most helpful checklists" for assessing a case of subconscious copying has chosen to merge the fourth and fifth elements into a single element: "The inherent probability that such familiarity, as is found, could be due to the existence of other influences on the defendant." Andrew Brown, Queen's Counsel, Proof of Copying (July 14-16, 2000) (paper delivered to 14th Annual IPSANZ Conference, Queensland), available at <http://www.andrewbrown.co.nz/papers/copying.asp>. Lord Wilberforce's original list, however, preserves the possibility of coincidence as a discrete consideration. As will be discussed further, including the possibility of coincidence as a factor seems particularly appropriate in light of American copyright law's recognition of independent creation as a defense to infringement.

¹³³ The new doctrine was included in a compilation of all new laws created in England in 1963, which summarized it and noted how it differed from the similar doctrine in the United States:

Unconscious copying could amount to an infringement, but in order to bring it home to the defendant it must be shown that he was familiar with the original work and that some causal connection links that familiarity to the work complained of. Mere proof of

Given the similarities between the British and the American statutes, Lord Wilberforce might have adopted the American subconscious copying doctrine wholesale. Instead, he chose to replace the “access” prong of the American method for proving copying through circumstantial evidence with a more complex prong: causal connection.¹³⁴ The six-factor analysis proposed by Lord Wilberforce, which the appellate panel accepted, suggests that the first of these elements is more straightforward than the second: sufficient similarity is covered by his third factor alone, while the remaining five factors taken together seek to establish the causal connection.¹³⁵ The three judges on the appellate panel reviewing Lord Wilberforce’s opinion emphasized why proof of a causal connection would suffice where mere proof of access (the second factor under United States copyright law) would not: only proof of a causal connection would establish that the defendant actually had reproduced the plaintiff’s work; mere proof of access would leave open the possibility that the works, though substantially similar, had been created independently by the two parties.¹³⁶ So keen were the English courts to give a defendant the benefit of the doubt that

similarity between the works and proof of access does not necessarily prove this, as it is a question of fact whether the similarity taken with the other facts is enough to prove the causal connection.

CURRENT LAW YEAR BOOK, [1963] C.L.Y.B. 2416 § 566.

The summary of *Francis Day & Hunter v. Bron* included in this source further emphasized that infringement was not found in this case, despite the plaintiff’s having proved the elements necessary for a court in the United States to find infringement:

In [*Francis Day & Hunter v. Bron*] it was proved that the song published by the defendant was very similar to that published by the plaintiff and that the writer of the former had access to the plaintiff’s song, but the trial judge held that there was no sufficient evidence of copying.

Id.

¹³⁴ See *Francis Day & Hunter*, 2 All E.R. at 28 (identifying the two key elements for proving infringement as “sufficient objective similarity” and “causal connexion [sic]”).

¹³⁵ *Id.* at 22.

¹³⁶ Lord Diplock noted the importance of proving a causal connection to establish that the defendant had actually reproduced the plaintiff’s work:

First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived. . . . the copyright work must be shown to be a *causa sine qua non* of the infringing work.

Id. at 27.

Lord Upjohn stressed the insufficiency of proof of access for disproving the alternate possibility that the defendant’s work was an independent creation:

[I]t does seem to me that where . . . there is evidence from the music itself that there is a real practical possibility of independent composition by the defendant, it requires quite strong evidence to support the view that there may have been unconscious [sic] copying. To my mind, the possibility that the defendant had heard it, or even played it in his early youth, is a quite insufficient ground on which it would be proper to draw the inference of unconscious [sic] copying.

Id. at 25.

two of the factors in the six-prong test they adopted directed a court to consider the possibility that something other than the plaintiff's work influenced the defendant in creating his work.¹³⁷ Another of those factors specifically instructed a court to give weight to the defendant's own testimony about his innocence and independent creation of his work during its infringement analysis¹³⁸—something that American courts have consistently refused to do, even as they believed defendants who claimed innocence.¹³⁹ It is worth noting that giving some consideration to a defendant's testimony regarding his own innocence does not necessarily lead to a finding of no infringement: subsequent English courts applying Lord Wilberforce's framework have upheld the requirement of a causal connection that was established in *Francis Day & Hunter v. Bron*,¹⁴⁰ yet not all defendants have been found not liable.¹⁴¹

In Canada, which follows a statutory scheme for copyright law that is similar to those in the United States and the United Kingdom,¹⁴² the first court to hear a subconscious copying claim cited both American

¹³⁷ See *Francis Day & Hunter*, [1963] 2 All E.R. at 22. Lord Wilberforce's fourth and fifth factors ask a court to consider the possibilities of, respectively, "coincidence" and "other influences" on the defendant. *Id.*

¹³⁸ See *id.* (identifying Lord Wilberforce's sixth factor as "the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiff's work").

¹³⁹ Courts invoking the subconscious copying doctrine to find defendants liable for infringement generally appear to believe the defendants' claims that they have not copied the plaintiffs' works consciously. See, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976) ("Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately."); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) ("[T]o hold [the defendant guilty of infringement of the plaintiff's copyright] I need not reject his testimony that he was unaware of such a borrowing.").

¹⁴⁰ See, e.g., *Mood Music Publ'g Co. Ltd. v. De Wolfe Ltd.*, [1976] Ch. 119, 123 (Eng.) (citing *Francis Day* as "authority for saying that the causal connection has to be established by the plaintiffs"); *L.B. (Plastics) Ltd. v. Swish Prods. Ltd.*, [1979] Ch. 305, 310 (Eng.) (noting that "unless the allegation in a copyright case is one of direct copying from the alleged copyright [sic] material, then a chain of causation must be established"); *Jones v. Mayor of Tower Hamlets*, [2000] Ch. 1, 22 (Eng.).

¹⁴¹ In *Jones*, Ch. 1 (Eng.), the court found that the defendant had subconsciously copied one of the plaintiff's architectural designs. *Id.* at 91-92. The court specifically reiterated the general importance of demonstrating a defendant's high degree of familiarity with the plaintiff's work (Lord Wilberforce's first factor) in proving subconscious copying. *Id.* at 91 (noting that in prior cases "the concept of subconscious copying was predicated upon a high degree of familiarity with the [plaintiff's work] as the threshold for such a claim"). In addition, the court indicated that other key reasons for its decision were the similarity between the two works (Lord Wilberforce's third factor), *id.* at 88, and the court's view that the defendant's evidence of independent creation was unconvincing (Lord Wilberforce's sixth factor). *Id.* at 93 (stating that "I was not convinced by Mr. Baker's explanations, and I was unimpressed by [a] . . . critical piece of his evidence").

¹⁴² See Copyright Act, R.S.C., ch. C 42 § 3 (1985) (Can.) (granting certain exclusive rights to the author of a work); Copyright Act, R.S.C., ch. C 42 § 27(1) (specifying that infringement of copyright occurs when another person "do[es], without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do"). Compare 17 U.S.C. §§ 106, 501 (2000) with Copyright, Designs and Patents Act, 1988, c. 48, § 16 (Eng.).

and English cases on the subject.¹⁴³ The court attempted to adopt both the American and the English versions of the subconscious copying doctrine.¹⁴⁴ In reality, however, the court's ruling accords better with the English rule, since the court deemed insufficient evidence presented by the plaintiff that likely would have been enough to prove access in a court in the United States.¹⁴⁵ Instead, the court's reasoning sounds in the language of Lord Wilberforce's six-factor test; the court based its determination of no infringement on: (1) the absence of evidence suggesting that the defendant was at all familiar with the plaintiff's work;¹⁴⁶ (2) the possible other influences on the defendant that were suggested by an expert witness;¹⁴⁷ and (3) its determination that the similarities it found between the two works were due to coincidence.¹⁴⁸

Two more recent Canadian cases further show that Canada has adopted the English, not the American, version of the subconscious copying doctrine.¹⁴⁹ In both of these cases, the defendants were found liable for infringement.¹⁵⁰ In the first, *Grignon v. Roussel*, the key factors that influenced the court's decision were: (1) the testimony of a

¹⁴³ See *Gondos v. Hardy*, [1982] 38 O.R.2d 555, 568-70 (Can.).

¹⁴⁴ See *id.* at 575 ("The law is clear that in order to substantiate a finding of infringement on the basis of unconscious copying, there must be evidence of access *or* a causal connection between the works.") (emphasis added).

¹⁴⁵ See *id.* at 576 ("To support unconscious copying on the part of the defendants . . . , plaintiff's counsel referred me to the fact that they, like the plaintiff, worked extensively in and about Toronto and that, accordingly, I should infer that at some time, at some place, they heard the plaintiff's work. This I will not do in this case."). *Contra* *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (assuming the defendant's familiarity with the plaintiff's song on the grounds that he was in the music business and the plaintiff's song had recently been popular); *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp 177, 179 (S.D.N.Y. 1976) (assuming the defendant's familiarity with the plaintiffs' song on the basis of its position at the top of the Billboard charts seven years before the defendant wrote his song); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 483-84 (9th Cir. 2000) (assuming the defendant's familiarity with the plaintiffs' song because the defendant was a fan of the plaintiffs' music in general, and despite the fact that the plaintiffs' song was written twenty-five years before the defendant's song, had never topped the Billboard charts, and was not released on album or compact disc until one year *after* the defendant released his song).

¹⁴⁶ See *Gondos*, 38 O.R.2d at 576 (accepting the defendant's evidence that he had never heard of the plaintiff's work prior to writing his own work). This reasoning fits the language of Lord Wilberforce's first and sixth factors.

¹⁴⁷ See *id.* at 573. This reasoning fits the language of Lord Wilberforce's fifth factor.

¹⁴⁸ *Id.* at 576 (noting that "the similarity which I have found to exist between [the two works] must, of necessity, be the result of coincidence"). This reasoning fits the language of Lord Wilberforce's fourth factor.

¹⁴⁹ *Grignon v. Roussel*, [1991] 38 C.P.R.3d 4 (Can.) (citing *Francis Day & Hunter* and noting that "[i]t is well established that to constitute infringement of copyright . . . there must be present two elements: [f]irst, there must be sufficient objective similarity between the infringing work and the copyright [sic] work . . . [s]econdly [sic], the copyright [sic] work must be the source from which the infringing work is derived . . . [t]here must be a causal connection between the copyright [sic] work and the infringing work"); *Drynan v. Rostad*, No. 25192-93, 53 A.C.W.S (3d) (O.S.C.C. Oct. 21, 1994), available at 1994 A.C.W.S.J. LEXIS 78340, at *20 (quoting the above cited language from *Grignon*).

¹⁵⁰ See *Grignon*, 38 C.P.R.3d at 41; *Drynan*, 1994 A.C.W.S.J. LEXIS 78340, at *32.

witness who claimed to have played the plaintiff's work for the defendant before the defendant composed his work;¹⁵¹ (2) the similarity between the works;¹⁵² and (3) the weakness of the defendant's evidence about his independent creation of his work.¹⁵³ These three elements address, respectively, the first, third, and sixth of Lord Wilberforce's factors. The second case, *Drynan v. Rostad*, largely hinged on the sixth of Lord Wilberforce's factors: the court found the defendant's credibility lacking and instead believed the plaintiff's testimony that he played his work at a party which the defendant attended just nine months before the defendant composed the infringing work.¹⁵⁴ Indeed, the court found that the defendant had copied the plaintiff's work consciously.¹⁵⁵ Moreover, the court found the very notion of the subconscious copying doctrine to be problematic and explicitly rejected consideration of the subconscious in a copyright infringement analysis without medical evidence to provide justification for its inclusion.¹⁵⁶

III. THE SUBCONSCIOUS COPYING DOCTRINE SHOULD BE REPLACED: SUGGESTIONS FOR AN ALTERNATE FRAMEWORK

In light of the financial, moral, and logical problems the subconscious copying doctrine presents and the role it plays in inhibiting rather than encouraging creativity, the subconscious copying doctrine should be replaced with an alternate framework. As discussed earlier, many scholars have raised objections to the subconscious copying doctrine that suggest that subconscious copying should be treated as a complete defense to a copyright infringement claim.¹⁵⁷ If

¹⁵¹ See *Grignon*, 38 C.P.R.3d at 36-37.

¹⁵² See *id.* at 41 (noting the "striking resemblance in an important part of the parties' works").

¹⁵³ See *id.* (stating that "the defendant did try to show without success that creation of the music for [his work] antedated" the plaintiff's work).

¹⁵⁴ See *Drynan*, 1994 A.C.W.S.J. LEXIS 78340, at *29-32.

¹⁵⁵ *Id.* at *31.

¹⁵⁶ See *id.* at *24 (concluding after examining *Francis Day & Hunter* that two cautions could be drawn from the English court's opinion: "1. that the theory of unconscious copying has inherent practical problems in its application; and 2. that for its application, there will be the requirement of acceptable medical evidence as a foundation for its consideration").

¹⁵⁷ See *supra* Part II.B. Professor Litman's arguments and the hypothetical that she poses particularly support this point, since one can read her arguments as amounting to a suggestion that subconscious copying be treated as part of the existing independent creation defense. Other scholars, however, have made arguments tending to suggest that a more logical way to reconcile the law's unequal treatment of subconscious copying and independent creation would be to eliminate the independent creation defense. See 4 NIMMER, *supra* note 6, § 13.02[B] (suggesting that Judge Hand's example is useless to the real world of copyright law because "only in the realm of magic does someone independently re-produce [sic] anew great romantic poems to the letter"). Indeed, recent cases that have considered the independent creation defense and returned findings of no infringement generally have based their holdings on some other factor. See, e.g., *Corwin v. Walt Disney Co.*, 468 F.3d 1329, 1337, 1347 (11th Cir. 2006) (noting the defendant's

courts are unwilling to take the (admittedly extreme) step of recognizing a defense of subconscious copying that would result in a finding of no liability for the defendant, they at least should be willing to give some weight to the defendant's testimony and evidence about his own innocent intent in a copyright infringement suit. Courts in England and Canada have done so by replacing the American "access" prong in the test for circumstantial copying with a more robust "causal connection" prong.¹⁵⁸ This framework is one approach that United States courts might adopt to replace the subconscious copying doctrine.

Yet even if United States courts are unwilling to take the bold step of switching their framework for proving circumstantial copying, there is another way that they might reduce the number of cases in which a defendant is found to have copied a plaintiff's work subconsciously. As a second option, courts might make the access prong of the test for circumstantial copying more meaningful by narrowing their definition of what constitutes "access": more factual situations might be deemed "a bare possibility to view" (no access), and fewer factual situations would be deemed "a reasonable possibility to view" (access).¹⁵⁹ With a more stringent standard for access, a case like *Three Boys* likely would have been decided differently.¹⁶⁰

Finally, courts might uphold the current subconscious copying doctrine but nonetheless soften its harsh effect by limiting the damages awards made in cases in which any copying that occurred on the defendant's part was subconscious. In a way, Congress already sanctioned such an approach when it provided for an automatic reduction in statutory damages upon a finding of innocent infringement.

presentation of evidence of independent creation but ultimately finding for the defendant because of the plaintiff's failure to prove access or striking similarity); *Seals-McClellan v. Dreamworks, Inc.*, 120 F. App'x 3, 4-5 (9th Cir. 2004) (suggesting that a plaintiff who fails to prove access has the burden of proving "that the accused work *could not possibly* have been the result of independent creation" as part of the proof of striking similarity and noting that the plaintiff's expert "acknowledged that the accused work *could have been* the result of independent creation" (emphasis in original), but finding for the defendant on the grounds that the plaintiff failed to prove either access or even substantial similarity). Some courts have simply rejected a defendant's independent creation defense on the basis that the defendant's witnesses lacked sufficient credibility. *See, e.g., Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967 (8th Cir. 2005). *But see Maharam v. Patterson*, No. 04 9569, 2007 U.S. Dist. LEXIS 68285, at *6-9 (S.D.N.Y. Sept. 14, 2007) (accepting the defendant's independent creation defense and distinguishing *Bright Tunes* and *Three Boys* on the basis of the "volumes of evidence" the defendant produced to prove that he was never exposed to the plaintiff's work).

¹⁵⁸ *See supra* Part II.C.

¹⁵⁹ These two categories and the divergent results to which they lead were suggested by Professor Nimmer. *See supra* note 90.

¹⁶⁰ *See id.*

A. *The Damages Framework of the Copyright Act and the Logic Behind an Award of Statutory Damages*

Section 504 of the Copyright Act addresses the issue of damages that may be owed as a remedy for copyright infringement.¹⁶¹ The first part of that section specifies that an infringer of copyright will be liable for either actual damages suffered by the copyright owner plus any profits made by the infringer (as discussed further in section 504(b)), or statutory damages (as detailed in section 504(c)).¹⁶² If a copyright owner seeks to recover actual damages and profits, he must present proof of the infringer's gross revenue; the infringer then has the burden to prove his expenses and "the elements of profit attributable to factors other than the copyrighted work," both of which may be deducted in calculating the award.¹⁶³ If a copyright owner instead seeks to recover statutory damages, the trial court must determine a just sum, within the guidelines set by the statute.¹⁶⁴

Generally speaking, whether to seek actual damages or statutory damages in a copyright infringement action is a choice left to the plaintiff.¹⁶⁵ But a plaintiff seeking actual damages must not only present proof of the infringer's gross revenue, as required by the statute, he also must establish that the defendant's infringement was the cause of a loss on his own part.¹⁶⁶ The Ninth Circuit has reasoned that Congress provided the statutory damages alternative because it may be difficult for the plaintiff to prove either the amount of the infringer's profits or the actual damage he suffered as a result of the infringement.¹⁶⁷ The Second Circuit has emphasized that the statutory

¹⁶¹ 17 U.S.C. § 504 (2000).

¹⁶² 17 U.S.C. § 504(a) (2000).

¹⁶³ 17 U.S.C. § 504(b) (2000).

¹⁶⁴ 17 U.S.C. § 504(c)(1) (2000). The statute specifies that the sum must be "not less than \$750 or more than \$30,000 as the court considers just." *Id.* Statutory damages have long been a part of copyright laws in the United States. *See generally* Priscilla Ferch, Note, *Statutory Damages Under the Copyright Act of 1976*, 15 LOY. U. CHI. L.J. 485 (1984) (discussing the history of and reasons for the statutory damages framework in United States copyright law). Ferch notes that the statutory damages provision included in the 1909 Copyright Act "was essentially a restatement of existing law." *Id.* at 490. Congress undertook a long revision process before it reached the statutory damages provision incorporated into the Copyright Act of 1976. *See id.* at 500-03.

¹⁶⁵ Indeed, the statute specifies that "the copyright owner may *elect* . . . to recover, instead of actual damages and profits, an award of statutory damages . . ." 17 U.S.C. § 504(c)(1) (2000) (emphasis added). *See also* Infotext, Inc. v. Liberty Fin. Credit, No. 98-55649, 2000 U.S. App. LEXIS 31183 (9th Cir. Dec. 4, 2000) (vacating an award of statutory damages because the trial court granted a statutory damages award when the plaintiff wanted to seek actual damages).

¹⁶⁶ *See* Thoroughbred Software Int'l, Inc. v. Dice Corp., 488 F.3d 352, 358 (6th Cir. 2007) ("A plaintiff seeking actual damages 'must prove the existence of a causal connection between the . . . alleged infringement and some loss of anticipated revenue.'" (citing *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 751 (E.D. Mich. 1998)).

¹⁶⁷ *See* Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 520 (9th Cir. 1985)

damages option serves a compensatory and a deterrent function.¹⁶⁸

B. *Reductions in Statutory Damages Awards upon a Finding of “Innocent Infringement”*

A notable subsection of the portion of the Copyright Act covering damages awards is 504(c)(2), which is one of the few sections of the Copyright Act that allows a court to consider a defendant’s intent in the context of a copyright infringement claim. That section allows a court to increase a statutory damages award if it finds that the infringement was willful or to reduce a statutory damages award if it finds that the infringement was innocent.¹⁶⁹ Thus, one could argue that section 504(c)(2) contains an exception to the usual rule that whether to seek either actual damages or statutory damages is the plaintiff’s choice: if the court finds that the infringement is innocent, it has the discretion to mandate an award of statutory damages—and only the statutory minimum.¹⁷⁰

(“Statutory damages are intended as a substitute for profits or actual damage. When injury is proved but neither the infringer’s profits nor the copyright holder’s actual damages can be ascertained, an award of statutory ‘in lieu’ damages is mandatory.”) (citing *Russell v. Price*, 612 F.2d 1123, 1131-32 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1178-79 (9th Cir. 1977)).

¹⁶⁸ See *Arthur A. Kaplan Co. v. Panaria Int’l, Inc.*, 48 U.S.P.Q.2d (BNA) 1315, 1317 (S.D.N.Y. 1998) (citing *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 657 (2d Cir. 1978) for the proposition that “[s]tatutory damages serve to compensate copyright owners and to provide a deterrent for potential infringers”).

¹⁶⁹ Section 504(c)(2) of the 1976 Copyright Act specifies:

In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

17 U.S.C. § 504(c)(2) (2000).

¹⁷⁰ Under the scheme of the 1909 Copyright Act, the Supreme Court had suggested that a trial court had broad discretion to determine whether an award of actual damages or an award of statutory damages was more appropriate under the circumstances. *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 234 (1952) (stating that “[w]e think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just”). The harsh effect of any damages award—including a statutory damages award—on innocent infringers was a prime concern raised repeatedly during the revision of the Copyright Act that ultimately led to the 1976 enactment of the current version. See Ferch, *supra* note 164, at 497-503 (noting that the Register of Copyrights had recommended a *reduction* in the statutory minimum amount for a damages award against an innocent infringer and discussing Congress’s attempts to “reflect concern for the impact of statutory damages on innocent infringers” in its various revisions of the bill that eventually became the Copyright Act of 1976). As Ferch indicates, the idea that a plaintiff should be entitled to elect between actual and statutory damages

Yet even one who holds the more traditional view that whether to seek actual damages or statutory damages is always the plaintiff's choice must realize that the inclusion of section 504(c)(2) in the Copyright Act of 1976 demonstrates that Congress was concerned about the harsh effect the strict liability framework of United States copyright law would have on defendants who had copied another artist's work unintentionally. The legislative history of the 1909 Copyright Act (the version in effect when the subconscious copying doctrine was created) sheds some light on the reasons for the provision. Prior to enactment of the 1909 Copyright Act, a panel of practitioners in the artistic industries was convened to give input on what they thought should be incorporated into the new Act.¹⁷¹ A few members of the panel expressed concern for the person who unknowingly infringes another's copyright.¹⁷² In the end, a compromise was struck: although unknowingly copying another's work would be considered infringement, the damages award for innocent infringement would be significantly smaller.¹⁷³ When Congress revised the Copyright Act in 1976, it preserved the compromise, providing courts with the option to award only minimal damages in a case of innocent infringement.¹⁷⁴

C. *Subconscious Copying: An Ideal Area for Mandating an Award of the Statutory Minimum*

Judge Hand was aware of Congress' view on innocent infringement and hinted at it even as he created the subconscious

was a later addition to the bill. *See id.* at 501 n.105 ("This right to elect statutory damages was never contemplated by Congress during the discussions held on the preliminary draft and the bill submitted to Congress for comment."). Furthermore, the notion that Congress intended situations of innocent infringement to be an exception to the plaintiff's right to elect the damages scheme finds support in the statute itself. Section 504(c)(1), which grants the plaintiff the right of election, begins, "Except as provided by clause (2) of this subsection . . ." 17 U.S.C. § 504(c)(1) (2000) (emphasis added). Clause (2), which contains no reference to a plaintiff's right of election, contains directions to courts on damages awards for innocent infringement claims. 17 U.S.C. § 504(c)(2) (2000). Indeed, courts are told that they *must* remit statutory damages in certain cases of innocent infringement. *See* 17 U.S.C. § 504(c)(2) (2000) ("The court *shall* remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives . . . ; or (ii) a public broadcasting entity") (emphasis added).

¹⁷¹ *See* LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski and Abe Goldman eds., 1976).

¹⁷² *Id.* at 71-72.

¹⁷³ *See id.* at 72.

¹⁷⁴ *See* Ferch, *supra* note 164, at 497-503. *See also* Alan Latman & William S. Tager, *Study No. 25: Liability of Innocent Infringers of Copyrights*, in 2 *STUDIES ON COPYRIGHT* 1045 (1963) for a comprehensive discussion of the various attempts to modify copyright law to lessen the penalty for innocent infringement.

copying doctrine.¹⁷⁵ Indeed, he awarded only the statutory minimum in damages to the plaintiff in *Fred Fisher*.¹⁷⁶ Subsequent cases decided under the subconscious copying doctrine resulted in substantially higher damages awards¹⁷⁷—apparently without reason. Thus, a simple way to correct some of the problems caused by the subconscious copying doctrine would be for courts to use the compromise Congress built into the Copyright Act long ago: to provide that if a defendant is able to convince the trier of fact that any copying that occurred on his part was not done consciously, the defendant is liable for only the statutory minimum in damages.¹⁷⁸

Treating subconscious copying as an innocent infringement subject to a statutory minimum damages award finds support both in the precedent set by Judge Hand and in the prior cases mandating damages awards of the statutory minimum because of innocent infringement. There are few cases in which damages awards have been so limited, perhaps because innocent infringement is difficult for a defendant to prove.¹⁷⁹ One court granting such an award noted that the analysis of innocent infringement must focus on the defendant's lack of awareness of his own infringing conduct.¹⁸⁰ This court stressed the value of a reduced damages award for innocent infringement as “an equitable remedy that affords the district court discretion to award damages commensurate with the defendant's culpability.”¹⁸¹ Another court noted

¹⁷⁵ *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 148 (S.D.N.Y. 1924) (“In an indictment under Copyright Act, § 28 (Comp. St. § 9549), the excuse [that the author's ‘memory has played him a trick’] might be a defense, since the infringement would not be willful.”).

¹⁷⁶ *Id.* at 152 (awarding only \$250 in damages and declaring the award “a luxury to the winner”).

¹⁷⁷ *See supra* note 13.

¹⁷⁸ Even assuming that section 504 does not give a court the ability to override a plaintiff's decision to seek actual damages, a court nonetheless would be justified in granting a lesser *actual* damages award upon a finding that any copying that occurred was subconscious. First, in a subconscious copying case, the defendant's infringement is unlikely to be the cause of a loss on the plaintiff's part, particularly when the plaintiff's work was popular many years earlier, as was true in both *Bright Tunes* and *Three Boys*. *See supra* note 12. Second, the defendant likely will have a strong argument that many elements of his profit are attributable to factors other than the plaintiff's work—particularly if the defendant is a celebrity, as defendants often are in cases where plaintiffs opt to seek actual damages—and that these elements therefore should be deducted from an award of actual damages.

¹⁷⁹ *See Little Mole Music v. Bengimina*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) (stating that “mere non-deliberate infringement is not ‘innocent’; rather, defendants must have ‘acted in complete ignorance of the fact that [their] conduct might somehow infringe upon the rights of another party’”) (citing *Original Appalachian Artworks v. J.F. Reichert, Inc.*, 658 F. Supp. 458, 464 (E.D. Pa. 1987)).

¹⁸⁰ *D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29, 35 (2d Cir. 1990) (“The reduction of statutory damages for innocent infringement requires an inquiry into the defendant's state of mind to determine whether he or she ‘was not aware and had no reason to believe that his or her acts constituted an infringement.’”) (citing 17 U.S.C. § 504(c)(2) (2000) and *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986)).

¹⁸¹ *Id.*

the relevance of “the attitude and conduct of the parties” in determining whether the infringement was innocent.¹⁸² Thus, in a typical subconscious copying case, where the court believes a defendant’s claim to innocence even as it finds him liable for infringement,¹⁸³ the court certainly should take advantage of the existing statutory framework and mandate a damages award of no more than the statutory minimum.

CONCLUSION

The subconscious copying doctrine, although applied sparingly, has unduly harsh effects on defendants and disturbs the balance copyright law seeks to strike between protection of earlier artists’ rights and promotion of artistic freedom to draw on earlier works. Many scholars have noted the financial, moral, and logical problems presented by the subconscious copying doctrine. Countries with statutory copyright law schemes similar to that found in the United States have eschewed the American subconscious copying doctrine in favor of a more complex framework that gives greater weight to the defendant’s evidence of his innocent intent. If courts in the United States are unwilling to take the bold step of adopting this alternative framework, they at least should seek to reduce the number of cases in which infringement is found under the subconscious copying doctrine by narrowing their definition of what constitutes “access” in the test for proof of copying through circumstantial evidence. In the alternative (or in addition), courts should attempt to soften the harsh effect the subconscious copying doctrine has on defendants by reducing actual damages awards to account for the fact that any copying that occurred was subconscious and by adhering to the provision already included in the Copyright Act of 1976 that suggests they mandate statutory damages awards of no more than the statutory minimum for the innocent infringement that is subconscious copying.

¹⁸² Warner Bros., Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1126 (2d Cir. 1989).

¹⁸³ See *supra* note 139.