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THE UNCONSCIOUS EROSION OF COPYRIGHT LEGITIMACY BY THE UNCONSCIOUS COPYING DOCTRINE

By: Kimberly Shane[1]

INTRODUCTION

"[O]ur unconscious existence is the real one and our conscious world [is] a kind of illusion, an apparent reality constructed for a specific purpose, like a dream which seems a reality as long as we are in it."[2] Modern copyright law has latched onto this illusionary state, creating the now accepted fiction that individuals are capable of originality, separate from the influences and interactions of society, and then due exclusive rights over these "original" creations. This fallacy has indirectly led to the establishment of the unconscious copying doctrine, a basis for which courts are holding artistic defendants liable for copyright infringement when they have zero awareness that the so-called "copying" has occurred.[3] An artist thinks he is contributing to society and culture with new art, the very accomplishment the Copyright Act incentivizes,[4] merely to be sued later on and ordered to pay millions.

This Note argues that the unconscious copying doctrine is unfairly holding sporadic artists liable for the subconscious workings of their mind, while disregarding the fact that all artists are creating from those same unknown realms. By allowing the unconscious copying doctrine as a basis for infringement, courts are eroding away at the legitimacy of copyright as a

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[2] C. G. JUNG, MEMORIES, DREAMS, REFLECTIONS, 324 (Aniela Jaffé ed., Richard & Clara Winston trans., Vintage Books ed. 1989).
[3] See *Fred Fisher*, *Bright Tunes Music*, and *Three Boys Music*, *infra* notes 21, 30-40, for examples.
[4] U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

whole, punishing some individuals for doing the same exact acts as the rest of society. Some analysts have suggested reform of the doctrine to make it more in sync with copyright law. However, to truly fulfill the purposes and goals of copyright, this Note concludes that the unconscious copying doctrine needs to be completely abandoned.

Part I of this Note overviews the foundations that copyright is built, the requirement of originality and creativity, and the purposes for which copyright protection is granted. Part II gives a summary of the establishment of the unconscious copying doctrine and provides examples of when courts have relied on the doctrine for findings of infringement. Part III explains the arguments against use of the doctrine and suggestions by academia for reform. Finally, Part IV critiques those suggestions. In concluding that the doctrine should be discarded entirely, it is recommended that re-adopting the stricter requirement of actual copying for infringement claims will best fix the eroding foundation of copyright law.

I. THE FOUNDATIONS OF COPYRIGHT LAW: THE ORIGINALITY REQUIREMENT & CREATIVITY

Copyright protection is only granted to "original works of authorship."[5] This has been understood as requiring a work be an independent creation with some minimal degree of creativity in order to be eligible to receive copyright.[6] For over a century, courts have attempted to define what exactly constitutes an "original" work of art. The bar for the creativity requirement has been set quite low. In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the Second Circuit stated that the originality requirement amounted to "little more than a prohibition of actual copying. No matter how poor artistically the 'author's' addition, it is enough if it be his

[5] Copyright Act, 17 U.S.C. § 102(a) (1976) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression[.]").
[6] 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[B] (Matthew Bender rev. ed.) (2012).

own."[7] The United States Supreme Court addressed originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*, concluding that a phone book is merely a compilation of facts and, thus, is so devoid of originality that it is not deserving of copyright protection.[8] Even with this low threshold for creativity, the telephone book at issue failed to meet the standard.[9] From these cases, the boundaries of what constitutes original, and thus entitled to copyright protection, have been loosely drawn.

The two main purposes for granting copyright in America are incentivizing creativity[10] and rewarding an author's labor.[11] Many argue that copyright protection is necessary to make the creative process economically worthwhile.[12] However, the balance between awarding copyright protection and maintaining a rich public domain, in which creative expression can flourish, is crucial.[13] If too many protections are granted to copyright holders, the public domain suffers, stifling rather than incentivizing creativity.[14] The unconscious copying doctrine shows how delicate this balance is and how blurred the line between the creative and copying has gotten.

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[7] 191 F.2d 99, 103 (2d Cir. 1951).
[8] 499 U.S. 340, 363-64 (1991).
[9] *Id.* at 362.
[10] In the 2003 Supreme Court case *Elder v. Ashcroft*, the Court specifically acknowledged that a major justification for copyright is to incentivize creators to add to the public good and dissemination of knowledge. 537 U.S. 186, 212 n.18 ("[C]opyright law celebrates the profit motive . . . [and] serves public ends by providing individuals with an incentive to pursue private ones."). *But see* Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN LAW 29 (2011).
[11] In the first main copyright case in 1834, *Wheaton v. Peters*, the Supreme Court viewed the issue of copyright as an author's right to enjoy the benefits of his creative labor. 33 U.S. 591, 658 ("[E]very man is entitled to the fruits of his own labour . . . but he can enjoy them only . . . under the rules of property[.]"); *see also* EDWARD W. PLOMAN & L. CLARK HAMILTON, *COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 16-17 (1980).
[12] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).
[13] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1019 (1990).
[14] *Id.*

II. THE COURTS & A HISTORY OF UNCONSCIOUS INFRINGEMENT

Copyright infringement requires proof of two basic elements: 1) a valid copyright in the material allegedly copied, and 2) actual copying, in a significant amount.[15] Courts have recognized that copying can be shown in three ways: direct evidence; access to the infringed work, plus substantial similarity in the works; or such a striking similarity between two works that no other explanation is plausible.[16] There is no strict requirement of intent for copyright infringement to occur.[17] Understandably, direct evidence that a work was actually copied is the quickest way to prove copyright infringement, although not often the easiest. The most common method for proving infringement balances the requirements that: 1) the works are similar enough that copying could have occurred, and 2) that the alleged infringer had the ability to copy through access to the protected work.[18] The courts have recognized the "Inverse Ratio Rule" for this method, finding that the more access a defendant had to a work, the lower degree of similarity required to prove infringement, and vice versa.[19]

The last and more rare way a plaintiff may prove infringement is a claim of striking similarity. This presupposes that two complex works are so similar that there is no other explanation than that copying occurred.[20] The doctrine of unconscious copying largely falls somewhere between the second and third methods of proving copying: courts often assume access, based on the popularity of the plaintiff's material, and rely heavily on the extreme similarity of two works to find infringement. There are three widely cited unconscious copying

[15] *See* 4-13 NIMMER, *supra* note 6, at § 13.01.
[16] *Id.* at § 13.02.
[17] *See* NIMMER, *supra* note 6, at § 13.08 (listing three types of "innocent intent" where infringement liability may still be found).
[18] *Id.* at §13.03[D].
[19] *Id.*
[20] *Id.*

cases, all involving musical compositions,[21] and a smattering of other lesser recognized cases, that extend the doctrine to other copyrightable materials.

A. THE ORIGIN OF THE UNCONSCIOUS COPYING DOCTRINE

Judge Learned Hand established the doctrine of unconscious copying in the 1924 case, *Fred Fisher, Inc. v. Dillingham*.[22] The honorable judge stated: "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."[23] *Fisher* involved the songs "Dardanella" and, the supposed infringer, "Kalua," which were held to be substantially similar. The court noted that "the composer [of Kalua] swears that he did not use the copyrighted song in any way, so far as he is conscious, but arrived at the accompaniment independently, as an appropriate foil or counterpoise . . . Whether he was unconsciously using the copyrighted accompaniment, with which he was in fact familiar, he does not and cannot say."[24] Although the court found that the plaintiff did not suffer any real injury due to the infringement, Fisher was still victorious in his claim and awarded $250 (the minimum amount per the copyright statute, at that time).[25] Beyond the damages, the larger affect of this case is Judge Hand's creation of a brand new doctrine for copyright holders to bring claims.

The Seventh Circuit recognized the doctrine of unconscious copying two years later in the case, *Edwards & Deutsch Lithographing Co. v. Boorman*,[26] which involved the copyrighted "Heinz Interest and Discount Time Teller" calendar. The court held:

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[21] 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).
[22] 298 F. 145 (S.D.N.Y. 1924).
[23] *Id.* at 148.
[24] *Id.* at 146.
[25] *Id.*
[26] 15 F.2d 35 (7th Cir. 1926).

> It is not necessary . . . that [the defendants] consciously followed [the] appellant's work[.] One may copy from memory . . . [since] [i]mpressions register in our memories[.] 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.[27]

Notably in *Edwards*, the defendants had been longtime sellers of the plaintiff's calendar, so access was evident.[28] The defendants attempted to mitigate the damage their accessibility had on their defense by arguing that they did not consciously copy the plaintiff's work.[29] The court then noted the unconscious copying doctrine to hold in favor of the plaintiffs.[30]

B. MODERN CASES OF UNCONSCIOUS COPYING & SETTLED SUITS

It was not until fifty years later, in 1976, that the courts decided another suit based on the unconscious copying doctrine. In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,[31] the Southern District of New York addressed the claimed plagiarism by George Harrison's song "My Sweet Lord" of the copyrighted work "He's So Fine." The court found that while "[i]t [was] apparent . . . that neither Harrison nor Preston [the joint writer of 'My Sweet Lord'] were conscious of the fact they were utilizing the 'He's So Fine' theme . . . they were."[32] The district judge further concluded that Harrison's "subconscious knew it already had worked in a song his conscious mind did not remember."[33] Based on the extensive success of "He's So Fine" on the Billboard Charts,[34] the court found that Harrison surely had heard it prior to his writing "My

[27] *Id.* at 37.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 420 F. Supp. 177 (S.D.N.Y. 1976).
[32] *Id.* at 180.
[33] *Id.*
[34] *Id.* at 179 (noting that "He's So Fine" was No. 1 on the billboard charts for five weeks in the U.S. and No. 12 on the billboard charts in England in the year 1963).

Sweet Lord."[35] The judge held that, under the law of copyright, infringement "is no less so even though subconsciously accomplished."[36] The Second Circuit affirmed the *Harrison* case in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.,*[37] fifteen years later, while the damages were still being disputed. The court noted in affirming the decision that "where the similarity was so striking and where access was found, the remoteness of that access provide[ed] no basis for reversal,"[38] meaning that "the mere lapse…of time between the moment of access and the creation" of the infringing work did not preclude copying.[39]

In a more recent unconscious copying case, the Ninth Circuit affirmed copyright infringement in the 1994 suit *Three Boys Music Corp. v. Bolton*.[40] Bolton's song "Love is a Wonderful Thing" was claimed to be copied from the Isley Brothers' 1964 song with the same name.[41] The court noted that the finding of Bolton's infringement "was based on a theory of widespread dissemination and subconscious copying."[42] Bolton admitted to being a big Isley Brothers fan and to actually have worried he copied the song from Marvin Gaye's "Some Kind of Wonderful" while writing his 1990s hit.[43] The court found that Bolton's intuition about having had copied the song was correct; he just had copied someone else.[44] In finding in favor of the plaintiff, $5.4 million was awarded.[45]

There are other modern allegations of unconscious copying that were never decided by a court of law. Renowned guitarist, Joe Satriani, filed suit against Chris Martin of the band

[35] *Id.*
[36] *Id.* at 181.
[37] 722 F.2d 988 (2d. Cir. 1983).
[38] *Id.* at 998.
[39] 4-13 NIMMER, *supra* note 6, at § 13.02[A] (citing *ABKCO*, 722 F.2d at 997-98).
[40] 212 F.3d 477, 489 (9th Cir. 2000).
[41] *Id.*
[42] *Id.* at 483.
[43] *Id.* at 484.
[44] *Id.*
[45] *Id.*

Coldplay whose very successful song "Viva La Vida" was allegedly copied from Satriani's "If I Could Fly."[46] Although the original 2008 complaint did not specifically mention unconscious copying, many legal academics quickly cited *Bright Tunes Music* in their projection of the case's future, since Martin had already denied copying.[47] The parties settled outside of court for an undisclosed sum of money,[48] so the unconscious copying doctrine did not face a new legal evaluation.

In 2006, Kaavya Viswanathan, a Harvard student who wrote the novel "How Opal Mehta Got Kissed, Got Wild, and Got a Life," claimed the twenty-nine different instances of copying from another author, Megan McCafferty, were "unintentional and unconscious."[49] Viswanathan admitted to being an avid fan of McCafferty's books and concluded that she did not realize how much she had truly internalized them.[50] The infringing "author" lost her half million dollar publishing deal and her Dreamworks movie rights deal,[51] but reportedly faced no repercussions from Harvard and never went to court.[52] Whether or not it truly was unconscious copying or just an easy excuse for a plagiarizing student, a court never decided.[53]

[46] Complaint for Copyright Infringement, Constructive Trust, and for an Accounting at 4, Satriani v. Martin, No. 08-07987 (C.D. Cal. Dec. 4, 2008).
[47] For example, see *Music Fans May Help Settle the Score in Satriani v. Coldplay Infringement Suit*, L. J. NEWSL.: ENT. L. & FIN. (ALM, Phila., P.A.), Apr. 2009, *available at* http://www.kilpatricktownsend.com/~/media/Files/articles/MusicFansMayHelpSettletheScoreinSatrianivColdplayInfringementSuit.ashx, for a discussion by Joseph M. Beck, Christopher P. Bussert, & James A. Trigg, partners at Kilpatrick Townsend & Stockton LLP.
[48] Daniel Kreps, *Satriani's "Viva La Vida" Copyright Suit Against Coldplay Dismissed*, ROLLING STONE, Sept. 16, 2005, *available at* http://www.rollingstone.com/music/news/satrianis-viva-la-vida-copyright-suit-against-coldplay-dismissed-20090916.
[49] Dinitia Smith, *Harvard Novelist Says Copying was Unintentional*, N.Y. TIMES (Apr. 25, 2006), *available at* www.nytimes.com/2006/04/25/books/25book.html.
[50] *Id.*
[51] RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 3 (2007).
[52] David Zhou, *Student's Novel Faces Plagiarism Controversy*, THE HARV. CRIMSON, Apr. 23, 2006, *available at* http://www.thecrimson.com/article/2006/4/23/sophomores-new-book-contains-passages-strikingly.
[53] Interestingly, Viswanathan graduated law school in 2011.

III. OBJECTIONS TO THE UNCONSCIOUS COPYING DOCTRINE

The unconscious copying doctrine allows for a finding of copyright infringement even when a defendant lacks the intent, knowledge, and awareness of committing such an action.[54] The courts have treated unconscious copying the same way as conscious copying and, no matter the intent, findings of infringement have led to hefty damages.[55] This all rests on the foundational copyright principle that there is such a thing as originality, disregarding the fact that all human creation stems from some unknown neurological processes. "[C]opyright law is based on the charming notion that authors create something from nothing[.]"[56]

It is well established that "the present approach to unconscious copying is at odds with psychological realities."[57] Our subconscious mind works in ways we cannot fully understand; all human art is created through the influence from the outside world. Even in *Fred Fisher* from the 1920s, Judge Hand remarked, "Whether [the defendant] unconsciously copied the figure, he cannot say . . . Everything registers somewhere in our memories, and no one can tell what may evoke it."[58] "The idea that subconscious copying occurs rarely and only at the margin springs from a fancy, term[ed] the 'romantic model of authorship.'"[59] This legal and social acceptance of a fallacy has led to a doctrine that erodes at the law it was created to protect.

A. INSPIRED ARTIST V. LIABLE INFRINGER: THE UNCERTAINTY OF UNCONSCIOUS COPYING

Copyright law has no problem acknowledging that authors and artists get inspiration from other works, but the line between inspiration and copying has become blurry with the

[54] *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).
[55] *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482-83 (9th Cir. 2000).
[56] Litman, *supra* note 13, at 966.
[57] Christopher Brett Jaeger, *"Does That Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement,* 61 VAND. L. REV. 1903, 1905 (2008).
[58] Fred Fisher, Inc. v. Dillingham, 298 F. 147, 147 (S.D.N.Y. 1924).
[59] Litman, *supra* note 13, at 1008.

introduction of the unconscious copying doctrine, especially when involving music. James Boyle explores the inspiration-based music industry in his book *The Public Domain: Enclosing the Commons of the Mind.*[60] Boyle notes that "the image of individual creativity . . . fits very poorly in music where so much creativity is recognizably more collective and additive."[61] Through his sequential following of one song, "George Bush Doesn't Care About Black People," whose title was inspired by Kanye West's famous quote, Boyle shows how music is openly created from other music.

The Hurricane Katrina rap is built on top of Kanye West's hit song "Gold Digger."[62] However, West's number one song includes a chorus that is clearly imitative of Ray Charles's "I Got a Woman," using an eight-bar loop of the melody. It was in 1955 that Ray Charles released the now-famous song. Interestingly, "I Got a Woman" is extensively recognized as being overtly "inspired" by the Christian hymn "My Jesus Is All the World to Me" and the gospel song "I've Got a Savior."[63] Boyle's "chain of borrowing" review shows the flaws in believing a "romantic, iconoclastic creator" exists with the creativity copyright claims to award and protect. It is not that the recognized authors of these works do not have creative talent – they certainly do – it is that the concept of originality as the law and society has accepted it, is not the reality of how creation works.

Boyle's solution to copyright law's failure in understanding the creative process is a new system of extensive licensing.[64] If an artist borrows from another artist's copyrighted work, a flat fee license or a percentage of profits would be paid, but an injunction or huge damages

[60] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).
[61] *Id.* at 123-24.
[62] THE LEGENDARY K.O., GEORGE BUSH DOESN'T CARE ABOUT BLACK PEOPLE (released under the Creative Commons Attribution-NonCommercial-ShareAlike 2.5 License) (Sept. 2005).
[63] MICHAEL LYDON, RAY CHARLES: MAN AND MUSIC 419 (2004); MIKE EVANS, RAY CHARLES: THE BIRTH OF SOUL ch. 6 (2009).
[64] *See* Boyle, *supra* note 60.

would not.[65] Alternatively, Boyle suggests a second possible reform of changing the current copyright terms and expanding fair use rights.[66] He acknowledges that neither of these solutions would be easy to implement, but Boyle believes that to best promote creativity, as copyright law aims, such measures need to be taken.[67]

B. ACADEMIC ACKNOWLEDGMENT OF THE FAULTS OF THE UNCONSCIOUS COPYING DOCTRINE

A number of legal academics have specifically reviewed the doctrine of unconscious copying and suggested various types of reform. Robin Feldman, in the *Hastings Science & Technology Law Journal*, suggested that reformation can be inspired by "[c]onnecting [the] thread throughout the various areas of Intellectual Property law [to] lead to more equitable and effective doctrinal choices."[68] Professor Feldman looked at examples from trade secret and patent laws that acknowledge subconscious influence (such as general skills learned in prior work not being trade secrets and the required disclosure of prior art with patent applications) in juxtaposition to copyright law's liability for infringement by an artist's subconscious.[69] Professor Feldman concluded that change is necessary to create a more "equitable and effective" intellectual property system, best completed by balancing moral stance with understanding of how the conscious and subconscious work.[70]

Jessica Litman's article in the *Emory Law Journal* about the public domain is read as a recommendation that the unconscious copying doctrine be used as a potential *defense* to

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Robin Feldman, *The Role of the Subconscious in Intellectual Property Law*, 2 HASTINGS SCI. & TECH. L.J. 1, 2 (Winter 2010).
[69] *Id.* at 2.
[70] *Id.* at 24.

copyright infringement claims, connected to the independent creation doctrine.[71] Professor Litman exclaims that "[w]hether [a work] infringes the copyrights in the prior works depends upon the conscious and subconscious processes within the author's mind. We cannot verify them; neither can she."[72] It is with this that Professor Litman finds issue with the doctrine and concludes that "originality is an apparition; [that] does not, and cannot, provide a basis for deciding copyright cases."[73]

In the article "*Does that Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement* in the *Vanderbilt Law Review*, Christopher Brett Jaeger also recognizes that use of the unconscious copying as a defense to copyright infringement claims serves the aims of copyright law better than current law.[74] This so-called "rebuttable presumption approach," which gives a presumption of conscious copying that defendants must rebut by proving subconscious independent creation, is argued to: 1) increase the incentive for creativity, by eliminating the risk of unknowingly copying; 2) be more morally fair to unintentional copiers; and 3) do a better job of recognizing the science behind implicit memory and the subconscious.[75] The burden would be on the defendant to prove unconscious copying, supposedly through evidence of her creative processes and lack of awareness of potential copying.[76]

Lastly, an alternative framework has also been suggested in the *Cardozo Law Review* that would enhance the access requirement of proving infringement.[77] Carissa Alden suggested in *A Proposal to Replace the Subconscious Copying Doctrine* that the test for circumstantial copying should have a more narrow definition of what constitutes access, thus creating a more stringent

[71] Litman, *supra* note 13, at 1002-03.
[72] *Id.* at 1008.
[73] *Id.* at 1023.
[74] Jaeger, *supra* note 57, at 1928.
[75] *Id.* at 1929-31.
[76] *Id.*
[77] Carissa L. Alden, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729 (2008).

standard for infringement claims.[78] Even if the courts decline to alter the unconscious copying doctrine, Alden concludes that a change in awardable damages should occur by limiting awards in unconscious copying cases to only minimum statutory damages.[79] Although it has been acknowledged that "[l]iability for unconscious copying creates an inconsistency between copyright law in practice and its theoretical underpinnings,"[80] this Note argues that the recommendation previously set forth would not completely fix the problem and the doctrine of unconscious copying is more than a mere legal inconsistency; it is an incompatible doctrine that is depreciating copyright law and that needs to be discarded completely.

IV. THE ACCELERATING EROSION OF COPYRIGHT LEGITIMACY

By allowing the idea of unconscious copying as a basis for copyright infringement, the courts have created a potentially unstoppable erosion of copyright law. The founding purposes of copyright protection are to incentivize creation and to award those whose labor has culturally benefited society.[81] The Act states, "Copyright protection subsists . . . in original works of authorship,"[82] and the courts have interpreted this clause to require only a minimum degree of creativity.[83] When courts rely on the unconscious copying doctrine in claims of infringement, the court is ultimately punishing some individuals for creating. Neurological science recognizes that the human brain functions with a subconscious working in ways none of us can fully explain. By using the unconscious copying doctrine as a basis for successful infringement claims, the courts are actually punishing artists for creating, while illogically holding a defendant

[78] *Id.* at 1764.
[79] *Id.* at 1762.
[80] Jaeger, *supra* note 57, at 1934.
[81] *See supra* notes 10 & 11 and accompanying text.
[82] Copyright Act, 17 U.S.C. § 102(a) (1976).
[83] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

liable for the workings of his subconscious and disregarding the plaintiff's subconscious in the creation of her work. Plus, the courts then proceed to unjustly enrich an artist who reaps the rewards from the defendant's labor and creativity. These results blatantly go against the intent and purpose of the Copyright Act.

Taking Boyle's "chain of borrowing" links of the gospel song "I've Got a Savior" to the political rap "George Bush Don't Like Black People," we can see how art works as inspiration for future art, sometimes consciously and sometimes subconsciously. The goal of the Copyright Act is to encourage this creation, not inhibit it. However, by allowing the unconscious copying doctrine as a basis for infringement claims, the courts are punishing artists for producing new creations – the exact thing the law is encouraging them to do.

It is illogical for courts to punish a random artist here and there for the workings of his subconscious in the creation of art, while acting as if all other artists who are awarded copyright protection have created completely on their own, without any influence or borrowing or subconscious copying of others. In fact, the plaintiff's certificate of copyright registration acts as prima facie evidence, so even if a defendant attempted to challenge the originality of the plaintiff's work, based on subconscious copying, the defendant's argument would become null, lacking direct evidence.[84] This myth of a single, original author is referred to as the "Romantic authorship construction."[85] Historically, an author was viewed as a "craftsman applying and perfecting an existing body," [86] not an individual artist producing purely from his own creativity and originality, entitled to protection from others. The idea of the author as a single genius is a

[84] Litman, *supra* note 13, at 1003.
[85] ANDREAS RAHMATIAN, UNIV. OF GLASGOW, COPYRIGHT AND CREATIVITY: THE MAKING OF PROPERTY RIGHTS IN CREATIVE WORKS 151 (2011).
[86] *Id.*

phenomenon of the eighteenth century.[87] This shift in what constitutes an author or artist stifles creativity, especially in the context of the unconscious copying doctrine, because it establishes a false recognition of one person as the exclusive creator of a work, preventing and discouraging others from fully being able to create. "[E]very new work is in some sense based on the works that preceded it,"[88] and modern copyright law needs to fully recognize this truth. Courts are "aggressively applying" this ideal of a romantic author, viewing copyright holders as "almighty creators while denying the contributions of external sources and the rights and interests of the general public."[89]

Some may argue that copyright law is already established in a way to allow for the freedoms of a public domain, thus not halting creativity. It is well established that facts, ideas, and methods are not copyrightable,[90] so space exists in the public domain for creation to flourish, along side copyright-lapsed works. Plus, fair use allows for *de minimis* copying,[91] so artists are already allegedly given the freedom to create from inspiration. However, the unconscious copying doctrine relies on punishing the subconscious, causing artists to be in the position of not knowing where they are creating from – the public domain or protected works. "The law cannot deter truly unconscious copying because it is, by definition, unknown to the copying author."[92] With greater restrictions on creations and the slow deterioration of what is up for grabs while creating, the ability for society to culturally expand is lessened and the purpose of the Copyright Act is insulted. Although "Congress assures us that the many increases in copyright protection

[87] *Id.* at 154.
[88] Litman, *supra* note 13, at 966.
[89] LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 73 (2007).
[90] Copyright Act, 17 U.S.C. § 102(b) (1976) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work."); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 449 U.S. 340 (1991) (reaffirming that facts are not protectable by copyright).
[91] See 2-8 NIMMER, *supra* note 6, at § 8.01[G], for further explanation on *de minimis* copying.
[92] Jaeger, *supra* note 57, at 1926.

have been in the name of encouraging creativity . . . do we really think we are more likely to get a twenty-first-century Ray Charles . . . in the world we have made?"[93]

English and Canadian courts have both reviewed similar versions of the unconscious copying doctrine and found substantial issues, deciding against adoption. In *Francis Day & Hunter, Ltd. v. Bron,*[94] a case was brought in the United Kingdom with very similar facts as the United States case *Three Boys Music*. In his decision, Lord Wilberforce acknowledged a similar doctrine as the American unconscious copying doctrine, but found that proof of a causal connection to establish the defendant reproduced the plaintiff's work was required, and, ultimately, found the defendant not liable.[95] Even though there was considerable similarity between the two works, just like the songs in *Three Boys Music*, the court declined to hold the defendant liable because there was insufficient evidence to prove unconscious copying occurred.[96] In Canada, the English *Francis Day* case was reviewed as part of a 1994 music infringement suit, and the court concluded that "the theory of unconscious copying has inherent practical problems in its application; and that for its application, there will be the requirement of acceptable medical evidence as a foundation for its consideration."[97] Even with similar copyright systems as the United States, England and Canada are very obviously weary of holding defendants liable for the workings of their unconscious, and rightfully so.

In recent years, American courts have cited the unconscious copying doctrine in awarding millions of dollars in damages against artists of creative works.[98] The courts have far extended the doctrine beyond Judge Learned Hand's first establishment, in which he awarded

[93] Boyle, *supra* note 60, at 156.
[94] Francis Day & Hunter, Ltd. v. Bron, [1963] Ch. 587 (Eng.).
[95] *Id.* at 602-03.
[96] Tayna Aplin, *Reflections on Measuring Text Reuse From a Copyright Law Perspective*, *in* COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 263 (Lionel Bently et al. eds., Cambridge Univ. Press 2010).
[97] *Drynan v. Rostad*, (1994) 59 CPR (3d) 8.
[98] *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 489 (9th Cir. 2000).

$250 dollars to the infringed plaintiff.[99] It has been noted that Judge Hand took into account the innocence of the infringement in deciding to award only the minimum statutory requirement, and that the later courts, in awarding substantially higher damages, are where the true problem with the doctrine arise.[100] However, the suggestion of treating unconscious copying as innocent infringement, with only minimum statutory damages allowed (as Alden suggests), or as a potential mitigating defense (as Litman and Jaeger suggest), do not fully solve the injustice that the unconscious copying doctrine has produced.

A. THE PROBLEMS WITH UNCONSCIOUS COPYING AS A *DEFENSE*

In attempting to solve the issues of the unconscious copying doctrine, it has been recommended to switch from use of the doctrine as a basis for finding infringement, to allowing the doctrine as a defense from liability and extensive damages.[101] Although this change would make the doctrine more symmetrical with Copyright Law, it would not fully solve the problems that arise with a court of law relying on an unprovable human subconscious. Allowing the unconscious copying doctrine as a defense would merely switch the side in which the problem of relying on unsustainable claims lies, which, ultimately, does not truly stop the damage to copyright. As Professor Litman succinctly stated, "Originality [and thus creativity] is an apparition" and it should not be used as a basis for deciding a copyright case.[102]

On the positive, accepting unconscious copying as a defense would realign the doctrine with the copyright law intention of incentivizing creation, rather than inhibiting it. The lone artist would no longer have to worry that his subconscious has caused him to unknowingly create the art from someone else and later face potential litigation. The disincentive that the

[99] Fred Fisher, Inc. v. Dillingham, 298 F. 145, 152 (S.D.N.Y. 1924).
[100] Alden, *supra* note 77, at 1763.
[101] *See supra* notes 13 & 57.
[102] Litman, *supra* note 13, at 1023.

unconscious copying doctrine has produced would be eliminated. Unconscious copying as a defense would also make for a more just system in which an artist who has unknowingly and innocently "infringed" another's work has a defense to mitigate damages and avoid having to pay millions of dollars for an unconscious act.

There are certainly benefits from changing the unconscious copying doctrine from a basis for infringement to a defense from such, but use of the unconscious copying doctrine as a defense would still ignore the neurological realities of human creativity. As the Canadian court noted, use of an unconscious-based legal doctrine requires "acceptable medical evidence as a foundation for its consideration."[103] The same issue with use of the unconscious copying doctrine as a basis for infringement exists with the use of the doctrine as a defense: there is no way to actually prove the truth that infringement existed. Unconscious copying as a defense still leaves the court in a position to unjustly enrich the plaintiff for the defendant's art, while again ignoring the reality that the plaintiff's work was also created in a way that is unidentifiable by law or science.

Finally, since literally all defendants in copyright infringement claims could blame any similarities between two works on the functions of their subconscious, the doctrine would be so frequently used that it would create a presumption for defendants, and plaintiffs would need to introduce evidence of actual copying to be successful – ultimately rendering the doctrine useless. Defendants may then also turn to the independent creation defense, arguing that their work, although similar to another, was made independently and without copying.[104] This too would ultimately render the unconscious copying defense as useless and unnecessary, since other doctrines would be required for a decision in the case to be rendered.

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[103] *Drynan*, 59 CPR (3d) 8.
[104] See 4-13 NIMMER, *supra* note 6, at § 13.01[B], for more explanation on the independent creation defense.

B. RECOMMENDATIONS FOR PROTECTING COPYRIGHT'S LEGITIMACY

In order to keep copyright protection from continuing to erode away while deterring creativity, the unconscious copying doctrine should be completely discarded. Furthermore, infringement claims should be limited to the direct copying of works, as originally established with the Copyright Act of 1790. To best encourage creativity and the proliferation of the arts, artists need to be able to be inspired by the world around them and create freely, without the fear of their subconscious playing tricks on them and huge lawsuits ensuing. The law deciding infringement claims is based on a false belief in originality and creativity, causing the legitimacy of copyright to weaken.

Professor R. Anthony Reese reviews the expansion of copyright protection over the past couple centuries in *Innocent Infringement in U.S. Copyright Law: A History*, printed in the Columbia Journal of Law & the Arts.[105] He notes that, in the past, the copyright law in America "limit[ed] the risk of innocent infringement, either by providing mechanisms to make it easy to avoid unknowingly committing infringement or by simply limiting some acts of infringement to situations where the defendant knew . . . her conduct was prohibited."[106] The modern regime of "unmitigated liability for unknowing infringement" is a fairly recent shift in the law.[107] Professor Reese explains that this was partially due to the much more limited scope of copyrightable materials when the first copyright law was instituted in the United States in 1790, which was based off the 1709 Statue of Anne of England.[108] Naturally, with the expansion of the scope of copyright came the expansion of potential infringement, even to the unconscious. Since

[105] R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J. L. & ARTS 133, 183 (2007).
[106] *Id.*
[107] *Id.* at 133.
[108] *Id.* at 136.

"[t]he legal changes were mostly gradual and cumulative, [they were] therefore never really considered as a coherent whole,"[109] and the affects of the expansion were not fully released with each subsequent alteration.

The Copyright Act of 1790 simply made it illegal to "print, reprint, publish, or import" the copyrighted material of another and to do so "knowing the same to be so printed, [etc.] . . . " without consent of the owner.[110] The expansion of derivative work rights, the variety of materials, and, of course, protection from unconscious copying, are all aspects of the law that were not established until much later. The 1790 law much better balanced granting protection to authors while leaving others completely free to create, so long as they were not directly copying and distributing a protected work. Reversion back to this limited copyright would better fulfill the 1976 Copyright Act's purpose to "promote the Progress of Science and useful Arts,"[111] by encouraging a robust public domain and freedom to create.

As it is quite unlikely that Congress will up and throw away the many provisions that now make up modern copyright law, at the very least, the unconscious copying doctrine should be abandoned. The courts have continued to cite the doctrine in an expansive manner, moving from Judge Hand's $250 in damages for infringement to the $5.4 million in damages in the *Three Boys Music* case. The dramatic increase in punishment of an artist that unknowingly "copied" while attempting to contribute to the culture of society is extremely unjust. Continuing to allow the courts to use the doctrine in this manner will only further the assault on creativity and hurt the legitimacy of copyright protection. Along with the unconscious copying doctrine,

[109] *Id.* at 175.
[110] Copyright Act of 1790 § 2, *available at* http://www.copyright.gov/history/1790act.pdf, (current version at 17 U.S.C. § 102).
[111] U.S. CONST. art. I, § 8, cl. 8.

copyright has gone from being a benefit incentive for authors and artists, to an intimidation tool benefiting publishers and record companies.[112]

V. CONCLUSION

While the unconscious copyright doctrine may immediately protect a single copyrighted work when applied in an infringement suit, it ultimately harms the greater whole of copyright protection as a legal entity. "When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship."[113] The unconscious copying doctrine punishes artists for doing the very action copyright law is meant to incentivize: creating. By holding defendants liable for the actions of their subconscious, the courts are ignoring the fact that the plaintiffs created in the same way, drawing from our experiences, influences, and social impressions, all in a way that even neuroscience has yet to understand. The unconscious copying doctrine then unjustly enriches the plaintiffs who bring suits against the innocent creators of like works, thus deterring artists from creating in the future, with fear their artistic subconscious will lead them to lose millions.

Abandonment of the unconscious copying doctrine is the first step in halting the erosion of copyright legitimacy that the modern expansion of copyright law has started. To best encourage the purpose and intent of copyright, a reinstatement of a strict actual copying standard for infringement claims should be considered. "[A]uthors and copyrighted works are socially constructed and historically contingent,"[114] and the law is failing to recognize this reality. As the

[112] BOYLE, *supra* note 60, at 137 ("[W]hatever [copy]rights there were moved quickly away from the actual creators toward the agents, record companies, and distributors. They still do.").
[113] Litman, *supra* note 13, at 969.
[114] ZEMER, *supra* note 89, at 229.

courts and Congress continue to expand copyright protection, the freedoms of creativity are correlatively hindered, and the law begins to erode away at its own foundation. Holding individuals accountable for the inner workings of their subconscious is detrimental to the authenticity of copyright law and a realignment of the law with the realities of artistic creation must occur.