

2019

Copyright Law: A Historical and Moral Analysis of the Confusion Surrounding Substantial Similarity Between Musical Works

Stephanie C. Grigorescu

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Grigorescu, Stephanie C., "Copyright Law: A Historical and Moral Analysis of the Confusion Surrounding Substantial Similarity Between Musical Works" (2019). *Law School Student Scholarship*. 955.
https://scholarship.shu.edu/student_scholarship/955

I. INTRODUCTION

Over the years, courts across the country have differed in their interpretations of what constitutes a copyright infringement of musical works. While some courts have demonstrated a willingness to give plaintiffs as great protection as possible for their musical works, others have interpreted copyright protection more narrowly and as offering a lesser degree of protection. What constitutes a copyright infringement in relation to musical creations can be especially confusing for courts because often there is no obvious, direct evidence of copying. Additionally, many musicians are inspired by other musicians' work and tend to let this influence show in their own creations. This raises the issue of where the line between influence and thievery should be drawn. Very extensive copyright protection for musical works may pose the risk of placing artists in fear that by allowing any form of musical influence to be even slightly discernable in their own artwork, they will subject themselves to the possibility of suit.

According to today's prevailing standard, announced by the Supreme Court in the case of *Feist Publications, Inc. v. Rural Telephone Service Co.*, in order for a plaintiff to establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.¹ It is this second element of a copyright infringement case that has been subject to a range of court interpretation and will, therefore, be the focus of analysis.

The second element of proving copying as a factual matter has been confusing for courts because it consists of subparts and a variety of ways in which it can be proven. The Fifth Circuit in the case of *Ferguson v. NBC* succinctly stated how it can be established. It explained that because there is rarely direct evidence of copying, the plaintiff will usually have to prove this

¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

element by showing that the defendant had access to the plaintiff's work and that the defendant's work is substantially similar to that of plaintiff's.² However, copying may also be proven without a showing of access if the two works are so strikingly similar as to preclude the possibility that defendant independently created his work.³ Although many courts are in agreement with this general standard, what actually constitutes access and substantial similarity or striking similarity has been an area of confusion and disagreement.

II. THE ELEMENTS OF A COPYRIGHT INFRINGEMENT CASE

Nimmer on Copyright has been one of the most influential sources on copyright law for decades and is frequently cited by many courts. In his treatise, Melville Nimmer provides an overview of how the elements have come to be analyzed by courts.

He explains that it is rare that direct evidence will be available to establish copying as a factual matter.⁴ This is because the plaintiff will generally have no witness to the physical act of copying, and because copying can occur without physical manifestation.⁵ Copying without any physical manifestation is what tends to occur in the case of copying of musical works, which is why it can be an especially complicated issue for courts. Due to the lack of direct evidence, copying must usually be established by the plaintiff's proof of access and showing of substantial similarity between the two works at issue.⁶ Simply put, proof of access and substantial similarity act as substitutes for direct proof of copying. It is this analysis that has been of particular confusion for courts.

² *Ferguson v. NBC*, 584 F.2d 111, 113 (5th Cir. 1978).

³ *Id.*

⁴ 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01 (2017).

⁵ *Id.*

⁶ *Id.*

**A. “PROOF OF ACCESS” AND SUBSTANTIAL SIMILARITY:
INTERPRETATIONS AND CRITICISMS**

Some courts have adopted a very narrow definition of “access” by focusing on direct evidence of access.⁷ These courts defined access as the actual viewing and knowledge of plaintiff’s work by defendant.⁸ Nimmer criticizes this definition of access because he claims it ignores the underlying policy considerations that allow proof of access and substantial similarity to act as substitutes for direct proof of copying in the first place.⁹ The policy consideration is based on the fact that direct evidence will rarely be available to show that defendant viewed or had knowledge of the plaintiff’s work.¹⁰ However, the more commonly used definition of access by courts is “the opportunity to copy”.¹¹ This means that even if there is no direct evidence of access, it may be inferred if there was a *reasonable* opportunity to copy.¹² There is an emphasis on “reasonable” because access cannot be inferred through simple speculation or conjecture.¹³ What constitutes a reasonable opportunity, however, has been analyzed in a variety of ways.

Some courts have used what they call “subconscious copying” to find access through a reasonable opportunity to copy. These courts have found that that even though there has been a significant lapse of time between the moment when a work was accessed and the time when defendant created his or her work, it did not mean copying had not occurred.¹⁴ In other cases, courts have found access if the plaintiff’s work had been widely disseminated.¹⁵

⁷ 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.02[A] (2017).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

ABKCO Music, Inc. v. Harrisongs Music, Ltd. is a prominent case in the area of musical copyright infringement because of the court's far reaching decision, which said that even subconscious copying can be accepted as music infringement.¹⁶ In that case, Bright Tunes Music Corporation, copyright holder of a song called "He's So Fine", had brought a copyright infringement action against George Harrison of "The Beatles", alleging that Harrison's song infringed "He's So Fine".¹⁷ Although the Court acknowledged that Harrison's access to "He's So Fine" occurred six years before he composed his own song, it said that this temporal remoteness did not mean there could be no finding of access.¹⁸ It linked this reasoning with the fact that "He's So Fine" had been widely disseminated at the time because the song had been "Number One on the Billboard Charts" in the United States for five weeks and included in the "Top Thirty Hits" in England for seven weeks.¹⁹ The Second Circuit then explained that even if the defendant had in good faith forgotten that plaintiff's work was the source of his own, even this "innocent copying" can constitute an infringement.²⁰ It appears that even though there had been a considerable lapse of time between the moment the original work was accessed and the time when the subsequent work was created, this was enough to infer access because there had been a sufficient opportunity for Harrison to have copied, even though subconsciously.

Years later in *Three Boys Music Corp. v. Bolton*, the Ninth Circuit upheld the notion of subconscious copying as a valid infringement, while stretching the idea even further. In this case, the Isley Brothers, a well known rhythm and blues group, released a song in 1964 called "Love

¹⁶ *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997 (2d. Cir. 1983).

¹⁷ *Id.* at 990.

¹⁸ *Id.* at 997.

¹⁹ *Id.* at 998.

²⁰ *Id.*

Is A Wonderful Thing”, which it had copyrighted.²¹ In early 1990, Michael Bolton wrote a song with the same title and released it in April 1991.²² The Isley Brothers then filed a copyright infringement action against Bolton.²³ The Court began its analysis by noting that proof of copyright infringement is often highly circumstantial, especially in cases involving music.²⁴ Proof of access requires a reasonable opportunity to view or to copy the plaintiff’s work.²⁵ The Court then stated that circumstantial evidence of reasonable access can be proven in one of two ways: (1) a particular chain of events is established between the plaintiff’s work and the defendant’s access to it; or (2) the plaintiff’s work has been widely disseminated.²⁶ The Court here also connected widespread dissemination with subconscious copying, as the Court in *ABKCO Music* did. The Ninth Circuit, here, connected the two by saying that proof of widespread dissemination may sometimes be accompanied by a theory that infringement of a popular song was subconscious.²⁷

Although the Court in *Bolton* appeared to have been following the reasoning of the Court in *ABKCO Music*, the Ninth Circuit seemed to have stretched the theory too far in its actual application. Here, the theory of access rested on a “twenty-five-years-after-the-fact-subconscious copying claim”.²⁸ Twenty-five years is far more remote in time than was six years in the *ABKCO Music* case. Nimmer seems to be critical of the Court’s reasoning in *Bolton*, explaining that the Ninth Circuit affirmed the jury’s finding for plaintiffs although the Court itself

²¹ *Three Boys Music Corp v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000).

²² *Id.* at 481.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 482.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 483.

recognized “the weaknesses of the Isley Brothers’ theory of reasonable access”.²⁹ Nimmer emphasizes that the only support the Court was able to provide for its decision was the presumption that teenagers “are generally avid music listeners” (because defendants had first heard the song as teenagers), so it is entirely plausible that the teenagers, obsessed with rhythm and blues music, could remember the Isley Brothers’ song played on the television and radio for a few weeks, and then subconsciously copy it twenty years later.³⁰ The Court’s reasoning seemed to rest on mere speculation, which is exactly what copyright law aims to discourage.

What is also troubling to Nimmer is that in a subsequent case, the Ninth Circuit cited its *Bolton* decision, yet it reached a result that seemed completely opposed to the *Bolton* one.³¹ In this later case, the defendant was sued for copying a vocal melody from a song that had won awards from both MTV and Billboard Magazine.³² For a period, the song was extremely popular in Santa Barbara and during this same time period, defendant had spent ten days in the city composing the allegedly infringing song.³³ The Court decided that the opportunity to hear plaintiff’s song amounted to only a “bare possibility” of access, which seemed incongruous with its decision in *Bolton*, where the Court found Bolton liable on the basis of much weaker evidence.³⁴ This surely highlights the confusion surrounding the element of access. Not only do different courts vary in their interpretations, but even the same court has proven to have issues with applying its very own analysis from previous cases to subsequent ones.

²⁹ 4 Nimmer, § 13.02[A].

³⁰ *Id.*

³¹ 4 Nimmer, § 13.02[A].

³² *Id.*

³³ *Id.*

³⁴ *Id.*

The second piece essential to a plaintiff's case of copying is proving that the two works at issue are substantially similar. Although most courts, in their opinions, list substantial similarity as separate from proof of access in establishing copying, Alan Latman, explains in his article that courts frequently use the term "substantial similarity" to describe the requirement of access.³⁵ Indeed, in reading court opinions, it appears that frequently access and substantial similarity are analyzed as one. Latman writes that this is a great source of confusion—the borrowing from one requirement for use in another.³⁶ Substantial similarity is said to be required when there is no direct evidence of copying, but Latman explains that it is actually required only after copying has been established to show that *enough* copying has taken place.³⁷ He writes that a similarity, whether or not substantial, is probative of copying if it is one that under all the circumstances justifies an inference of copying.³⁸ To avoid confusion, Latman suggests that the term "probative similarity" be used instead of "substantial similarity".³⁹

The focal point of Latman's article is to demonstrate why the incorrect use of substantial similarity leads to troubling results. He lists an example to illustrate why similarity probative of copying may or may not be substantial. There is clearly probative similarity when a defendant's work contains a plaintiff's signature or a copyright notice.⁴⁰ However, this does not mean there has been a taking of copyrighted material at all, especially not a substantial amount of such

³⁵ Alan Latman, "*Probative Similarity*" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement., 90 Colum. L. Rev. 1187, 1189 (1990).

³⁶ *Id.*

³⁷ *Id.* at 1189-1190.

³⁸ *Id.* at 1190.

³⁹ *Id.*

⁴⁰ *Id.* at 1204.

material.⁴¹ It is not substantial, but it is probative because it is almost certain that the plaintiff's name or notice did not appear on defendant's work due to mere coincidence.⁴²

Another downfall of the incorrect application of substantial similarity is that many courts, including the United States Supreme Court, have considered the appearance of common errors in works of plaintiff and defendant as "one of the most significant evidences of infringement".⁴³ He observes that this statement fails to recognize that common errors can sometimes be traced back to a common source, or have some other justification.⁴⁴ Additionally, placing so much emphasis on the factor of common errors ignores the fact that certain types of works do not allow for the identification of errors, or agreement of what the errors are.⁴⁵ Music, especially, is an example of a type of work to which the application of this analysis would appear useless.

Latman also makes an important observation regarding the evidence that may be used to prove copying. As is apparent, much of the confusion concerning the elements of copying involves cases in which there is no direct evidence of copying. The proposition that direct evidence is rarely available is not one on which there has been much disagreement. It has not only been regularly cited by courts, but it has also been unanimously supported by commentators.⁴⁶ He cautions, however, that courts and commentators have overlooked the importance that direct evidence can serve.⁴⁷ He suggests that courts and commentators have dismissed this method of proving copying without making a true effort to ascertain that there is in fact no direct evidence available. Therefore, Latman's piece of advice for litigators is: "prove

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1205.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1194.

⁴⁷ *Id.* at 1206.

(or disprove) every element of copyright infringement with the same ingenuity you would employ for any other tort. For example, there may collaborators, coworkers and others who have in fact observed the producer of defendant’s material at work.”⁴⁸

B. STRIKING SIMILARITY: INTERPRETATIONS AND CRITICISMS

To establish copying it is usually necessary for the plaintiff to establish access together with substantial similarity. However, proof of access will not be needed when there is a “striking similarity” between the plaintiff’s and defendant’s works.⁴⁹ For the similarities to be “striking”, they must be so similar as to make it impossible that the defendant was able to create his work independently of the plaintiff’s.⁵⁰ The similarities must be so great that the only plausible explanation for them would be that the defendant copied the plaintiff.⁵¹ In order to conduct this analysis, one must apply logic, experience, and common sense.⁵² Because human experience is what governs here, an analysis of striking similarity may be especially susceptible to a variety of judicial interpretation.

Selle v. Gibb was a highly important case in which the Seventh Circuit provided a lengthy analysis of striking similarity. It is especially noteworthy because the Court dedicates a considerable portion of its opinion to discuss the great difficulty and confusion that has accompanied analysis of striking similarity. In this case, Ronald Selle brought suit against the popular group known as the “Bee Gees”.⁵³ Selle claimed that the Bee Gees, in one of their hit songs, infringed the copyright of his song.⁵⁴ In the absence of evidence of access, an inference

⁴⁸ *Id.* at 1194.

⁴⁹ 4 Nimmer, § 13.02[B].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Selle v. Gibb*, 741 F.2d 896, 898 (7th Cir. 1984).

⁵⁴ *Id.*

of access may still be established circumstantially if the plaintiff can provide proof that the similarities between the two works are so striking that “the possibilities of independent creation, coincidence and prior common source are, as a practical matter precluded”.⁵⁵ It is based on this theory that Selle tried to establish copying in this case. The Court explained that striking similarity should not be considered in isolation, but rather it must be considered together with other circumstantial evidence which would tend to show access.⁵⁶ For example, the similarity may be considered in light of the nature of the works or the musical genre at issue.⁵⁷

Before even discussing the similarities between the two works, the Court states that there first has to be some other evidence which would establish a reasonable possibility that the allegedly infringed work was available to the defendant.⁵⁸ This is because even if two works are identical, but the defendant had created his work independently, or if both works were derived from a common source, there would be no infringement.⁵⁹ It is primarily because Selle was unable to establish this threshold matter of the possibility of access that he lost the case.⁶⁰

The Seventh Circuit acknowledges that even if the analysis did not include the threshold matter of a reasonable inference of access, simply establishing proof of striking similarity is a complex issue. The Court says, “...formulating a meaningful definition of ‘striking similarity’ is no simple task, and the term is often used in a conclusory or circular fashion”.⁶¹ To illustrate its point, the Seventh Circuit provides various examples of how different courts, in various cases,

⁵⁵ *Id.* at 901.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 903.

have defined and analyzed the term.⁶² The Southern District of New York in a 1935 case said that striking similarity does not simply depend on the number of identical notes that appear in both compositions.⁶³ Rather, an important consideration in deciding whether striking similarity is present is the uniqueness of the sections which are claimed to be similar.⁶⁴ The Colorado District Court explained in a 1965 case that if the infringed piece contains an unusual deviation from the standard metric structure, or if it contains an error, and the allegedly infringing work repeats either the unusual deviation or error, then this increases the support for a finding of striking similarity.⁶⁵ Yet another mode of analysis advanced by the Second Circuit in 1956 explained that if two sections are especially intricate, it would also increase the support for a finding of striking similarity.⁶⁶ Finally, the Second Circuit in 1936 said that the similarities should appear in a sufficiently unique or complex context, that would make it unlikely that the works were copied from a common source, or that the defendant could have composed his work independently.⁶⁷ These varying analyses highlight the great uncertainty of what truly is sufficient for a plaintiff to demonstrate in order to establish striking similarity between two works, so much that it can be said plaintiff has proven copying.

In *Selle*, the Seventh Circuit had said that in order to find striking similarity, there must be some other circumstantial evidence present that would show there was a reasonable possibility that the plaintiff's work was available to the alleged infringer.⁶⁸ A few years later, in the Second Circuit case, *Gaste v. Kaiserman*, the plaintiff relied on this proposition from *Selle* to

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 904.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 901.

make the case that his song has been copied.⁶⁹ However, the Second Circuit rejected plaintiff's argument claiming that in this circuit, the test for proof of access in cases of striking similarity is less rigorous.⁷⁰ In fact, the Court in this case referenced Nimmer's criticism of the *Selle* requirement.⁷¹ Nimmer found issue with the *Selle* Court's requirement that there be a "reasonable possibility" of access and not just a "bare possibility" of access in cases of striking similarity.⁷² The Nimmer criticism is an understandable one because the purpose of the striking similarity test is to make it so that plaintiff need not establish proof of access in extreme cases. Therefore, requiring showing of a reasonable possibility of access in a case of striking similarity would seem to undermine the entire rationale behind striking similarity.

Although confusion certainly continues to surround copyright law and the necessary elements needed to prove that a copying has occurred, the current form of the copyright infringement elements can be stated as requiring a showing of: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.⁷³ In order to prove the copying of the constituent elements, plaintiff will usually have to prove that the defendant had access to the plaintiff's work and that the defendant's work is substantially similar to that of plaintiff's.⁷⁴ Whether a more definite test will be established in order to prove access and substantial similarity, only time will tell.

⁶⁹ *Gaste v. Kaiserman*, 863 F.2d 1061, 1067 (2d Cir. 1988).

⁷⁰ *Id.* at 1068.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Feist Publ'ns, Inc.*, 499 U.S. at 361.

⁷⁴ *Ferguson*, 584 F.2d at 113.

III. COPYRIGHT INFRINGEMENT FROM A MORAL PERSPECTIVE: JOHN FINNIS'S SEVEN BASIC GOODS AND METHODOLOGICAL REQUIREMENTS OF PRACTICAL REASON

John Finnis's "Natural Law and Natural Rights" is a seminal work explaining the natural law doctrine. The focus of the work is on seven basic goods which provide an explanation for why humans do the things they do.⁷⁵ The seven goods are: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.⁷⁶ Of these, practical reasonableness is the most important and will provide the focus of analysis in understanding how this good applies to today's copyright protection law.

A. THE SEVEN BASIC GOODS

First, an explanation must be provided as to what each of the seven basic goods mentioned above means to Finnis. Each of the goods will be briefly described here, except for that of practical reasonableness, which as stated, will be the focus of analysis and thereby described in greater detail in the next section.

The first good Finnis mentions is life.⁷⁷ This has to do with the drive for self-preservation.⁷⁸ It stands for every aspect of life, including bodily health and freedom from injury, which puts a human being in good shape for self-determination.⁷⁹ Second, there is the good of knowledge.⁸⁰ More specifically, though, Finnis is referring to what he calls "knowledge as

⁷⁵ Hugh McCarthy, *A Summary of John Finnis's Theory of Natural Law*, WORDPRESS (Jan. 3, 2015), <https://hughmccarthylawscienceasc.wordpress.com/2015/01/03/a-summary-of-john-finnis-theory-of-natural-law/>.

⁷⁶ John Finnis, *Natural Law & Natural Rights* 86-89 (2d ed. 2011).

⁷⁷ *Id.* at 86.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 60.

sought for its own sake”, which concerns truth.⁸¹ This is distinguishable from knowledge as sought only instrumentally, meaning as useful in order to pursue some other objective, such as survival or power, for example.⁸² Therefore, the type of knowledge to which Finnis refers to as a basic good is one that is pursued out of curiosity, due to the pure desire to find out the truth about a certain subject, or due to an interest in truth and a desire to avoid ignorance.⁸³ In regard to knowledge, there are a few common misconceptions which Finnis deems important to rebut. One is that not every true proposition is equally worth knowing, and that not every subject is equally valuable or worth learning.⁸⁴ Another is that knowledge is not necessarily equally valuable for each individual.⁸⁵ Finally, knowledge is not something that should be pursued by everybody in all circumstances, and it is also not a supreme form of good.⁸⁶

The third basic good mentioned by Finnis is play.⁸⁷ This has to do with engaging in performances which have no point beyond the performance itself, enjoyed for its own sake.⁸⁸ It does not matter whether the performance is done alone or in a social setting, whether it is intellectual or physical, stressful or relaxing, or informal or structured.⁸⁹ The fundamental aspect of the good of play is that it is not done in a serious context.⁹⁰ An element of play can enter into any human activity as long as the activity can be distinguished from its serious context.⁹¹

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 62.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 87.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Fourth, there is the good of aesthetic experience.⁹² Finnis explains that aesthetic experience is interrelated with the good of play because many forms of play shape aesthetic experience.⁹³ However, unlike play, aesthetic experience does not need to involve an action of one's own.⁹⁴ He writes that, "what is sought after and valued for its own sake may simply be the beautiful form 'outside' one, and the 'inner' experience of appreciation of its beauty".⁹⁵ Often, though, the valued experience is the creation and active appreciation of some significant work that is satisfying to one.⁹⁶

The fifth basic good is sociability, meaning friendship.⁹⁷ This good comes in different forms ranging from weak ones to strong ones, depending on the form of the human community.⁹⁸ The weakest form involves a minimum amount of peace and harmony among people.⁹⁹ The strongest form is that of full friendship.¹⁰⁰ True friendship, to Finnis, involves acting for the sake of a friend's purposes and well-being, not simply collaborating with another in order for each individual to realize his own purpose.¹⁰¹ Finally, the sixth basic good is that of religion.¹⁰²

Of these six basic goods (excluding practical reasonableness), the ones that perhaps can be argued to have relevance to copyright law are those of knowledge and play. In terms of knowledge, Finnis may view it as relevant to copyright law because in copyright law knowledge is pursued out of curiosity, and due to the pure desire to find out the truth about whether one

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 88.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 89.

musical work truly copied and infringed upon a previously composed musical work. The law can be viewed as created for the purpose of avoiding ignorance when there has been an infringement because ignorance would cause a harm to the creator of the original work which has been copied.

On the other hand, it can also be argued that knowledge in terms of copyright is not knowledge as sought for its own sake. This argument would be one claiming that knowledge having to do with copyright law is knowledge sought only instrumentally, as useful in establishing that one's work has been infringed by another, in order to be provided relief from a court. If viewed in this respect, this type of knowledge would not be the kind that Finnis envisioned because it would not be pursued simply to discover the truth about the nature of the musical works at issue.

Although play is the only other basic good for which there may be merit to argue its application to copyright law, Finnis would probably be much quicker to discount its relevance as compared to the relevance of knowledge. Copyright law concerns activities, such as the creation of music, which are originally engaged in as enjoyment for their own sake. However, once copyright law is used as a mechanism to accuse another person of copying and litigation, which by nature is an adversarial process, commences, the element of play is no longer present. This is because copyright law, at this point, has been transformed into its serious context. According to Finnis, an element of play can only enter into human activity as long as the activity is *distinguished* from its serious context.¹⁰³ Therefore, the application of play to copyright law can be considered questionable.

¹⁰³ *Id.* at 87.

B. INTRODUCTION TO PRACTICAL REASONABLENESS

It is important to focus on practical reasonableness because it is used as a basis for analyzing the other six basic goods. This is because one participates in the good of practical reasonableness by making rational decisions that maximize participation in the other goods.¹⁰⁴ To make specific decisions in life, one must think reasonably, in accordance with the nine requirements, and then decide how to participate in the basic goods.¹⁰⁵ This consideration is important in specifying an overarching structure and goals, but not to determine small details of every day life.¹⁰⁶

To participate in practical reasonableness, the way Finnis envisions, nine sub requirements must be fulfilled.¹⁰⁷ These nine requirements are: (1) to view life as a whole, and not to live moment to moment; (2) not to leave out of account, arbitrarily discount, or exaggerate any of the basic goods; (3) the basic goods can be pursued, realized, and participated in by any human being; (4) detachment, meaning not to obsess with one particular project; (5) to look creatively for new and better ways to carry out commitments, rather than repeat old habits; (6) to bring good in the world (in one's own life and the lives of others) by actions that are the most efficient; (7) to refrain from choosing to do an act that directly harms a basic good, even if it will indirectly benefit a different basic good; (8) to favor and foster the common good of one's communities; and (9) to act according to one's own conscience and not the authority of someone else.¹⁰⁸ When making a decision in life, one must think reasonably in accordance with the nine

¹⁰⁴ McCarthy, *supra* note 69.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Finnis, *supra* note 70, at 103-125.

requirements, and decide how to participate in the basic goods.¹⁰⁹ Finnis writes that, “each of these requirements concerns what one *must* do, or think, or be if one is to participate in the basic value of practical reasonableness”.¹¹⁰ Therefore, the good of practical reasonableness and the accompanying requirements will be considered in conjunction with the other applicable goods when analyzing copyright protection from a natural law perspective. Each of the nine requirements will be analyzed in turn.

Before conducting this analysis, it is also important to establish at the outset that the relevant community at issue with respect to the law for copyright protection is the national community. In conducting an analysis of each of the nine requirements of practical reasonableness from the perspective of Finnis, the question will, therefore, be to decide if copyright protection for music will promote the good of the national community.

C. THE NINE REQUIREMENTS OF PRACTICAL REASONABLENESS AND THEIR RELATIONSHIP TO THE CURRENT COPYRIGHT PROTECTION LAW

The first requirement of practical reasonableness is a rational plan of life.¹¹¹ Finnis explains that this requires one to have a “harmonious set of purposes and orientations...as effective commitments”.¹¹² He says it is unreasonable to simply live moment to moment and follow short-term cravings.¹¹³ On the other hand, it is also unreasonable to choose specific projects and devote too much attention to those.¹¹⁴ Overall, Finnis says, that this first requirement asks that

¹⁰⁹ McCarthy, *supra* note 69.

¹¹⁰ Finnis, *supra* note 70, at 102.

¹¹¹ *Id.* at 103.

¹¹² *Id.* at 103-104.

¹¹³ *Id.* at 104.

¹¹⁴ *Id.*

we “see our life as one whole, the activities of one rational subject spread out in time”.¹¹⁵ In order to be able to see life as one whole, though, one must be able to do so while engaging in general commitments and harmonizing them.¹¹⁶

In terms of this first requirement, Finnis would probably be of the opinion that copyright law does not provide for a rational plan of life. First of all, as is evident from the analysis of the evolution of copyright law that has been outlined, it appears that the law does not have a “harmonious set of purposes and orientations...as effective commitments”.¹¹⁷ This is because of the vast array of interpretations and applications that have accompanied the law through its development over the years. Finnis wrote that it is unreasonable to live moment to moment and follow short-term cravings.¹¹⁸ However, this is exactly what copyright law seems to be doing. It is changing moment to moment on the basis of how those applying it desire for the outcome of a particular case to be. For example, if one strongly believes that there has been an infringement of a musical work in a particular case, the law will be used flexibly in that particular instance in order to arrive at the conclusion that the musical work has indeed been infringed. It seems, overall, that there are no general commitments and harmonizing of them with relation to the copyright protection for music.

The second requirement of practical reasonableness is that there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.¹¹⁹ Finnis acknowledges that any commitment to a plan of life is going to inevitably involve some

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 103-104.

¹¹⁸ *Id.* at 104.

¹¹⁹ *Id.* at 105.

concentration on at least one of the basic forms of good at the expense of the other goods.¹²⁰ However, for the commitment to a plan of life to be rational, it has to be based on a person's assessment of their own capacities and circumstances.¹²¹

The law of copyright protection is most probably in accord with Finnis's second requirement of practical reasonableness. It does not appear that the law has left out of account, or arbitrarily discounted, any of the basic forms of good. It is true that, as identified earlier, copyright law implicates knowledge and play, but not so much the other goods. Given the circumstances that copyright law involves, though, it seems that it is inevitable that the other goods do not play as large of a role. It is, therefore, not an arbitrary discounting or exaggeration, of the other values when there simply is no place for them.

The third requirement of practical reasonableness is that the basic goods can be pursued, realized, and participated in by any human being.¹²² Finnis says that there is a fundamental impartiality among the humans who partake in the goods.¹²³ Unfortunately, many times it happens that humans will prefer their own well-being because it is through their own participation in the basic goods that they can do what reasonableness requires.¹²⁴ The consequences of this are hypocrisy and indifference to the good of others whom one could have easily helped.¹²⁵ Therefore, one's moral judgments and preferences must be "universalizable", meaning that they follow the Golden Rule.¹²⁶

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 106.

¹²³ *Id.* at 107.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (Although Finnis describes it in different terminology, the Golden Rule is essentially what is known today as, "treat others the way you wanted to be treated".)

With respect to this third requirement, the goods of knowledge and play can be pursued and participated in by any human being. Any human being wishing to discover the truth about whether one musical work has infringed on another can undertake a search to discover the reality of the matter. The person may do so either through litigation or possibly through his own efforts. Similarly, if we assume that play is a good a stake in the law of copyright protection, any human is able to engage in the creation of music as enjoyment for its own sake, but must also be cautious not to copy previously created material. Remaining careful as to not infringe upon the work of others relates to the Golden Rule, which Finnis mentions. If one who engages in the creation of music were to place himself in the shoes of another who previously created a musical work, surely he would not want his own creation to be copied. This principle must be kept in mind in order to avoid indifference to the good of others.

Finnis groups the fourth and fifth requirements of practical reasonableness together because he says that they are complementary to each other, but also to the first requirement of a rational plan of life.¹²⁷ The fourth requirement is one he calls detachment.¹²⁸ What Finnis means by this is that one must have a certain kind of detachment from all the limited projects one undertakes.¹²⁹ Finnis says this is important due to the changing circumstances people encounter in their lives, in their relationships with other people, and in all things that may affect one's well-being.¹³⁰ In order to adapt to these changes, people must remain open to all the basic forms of good.¹³¹ He warns that failing to keep a certain detachment from particular projects may cause a

¹²⁷ *Id.* at 109.

¹²⁸ *Id.* at 110.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

person to feel that his life is “drained of meaning” if his project were to fail.¹³² This, according to Finnis, would provide “evil consequences” similar to those of fanaticism.¹³³ The fifth requirement, therefore, is related to this concept and has to do with maintaining a balance between fanaticism and apathy.¹³⁴ This means that when one has made commitments, he should be creative and search for new and better ways of fulfilling those commitments, rather than restricting his methods to ones with which he is already familiar.¹³⁵ Doing so is highly important because it requires the use of reason instead of merely conforming to usual habits.¹³⁶

Taking the fourth and fifth requirements into consideration simultaneously, Finnis would probably find that the law of copyright is at the risk of turning into a state of fanaticism. Certainly, the law is not apathetic to issues of copyright infringement with respect to music due to the never-ending attempts to establish clear, easy to follow guidelines in deciding whether two works are “substantially similar”. However, there have been *so* many efforts, criticisms, and cases dealing with the test for substantial similarity, that the law is beginning to evolve into fanaticism. On the other hand, perhaps Finnis may actually believe that there has been a proper balance struck between apathy and fanaticism with respect to the test for substantial similarity, due to the constant flow of creative, and possibly better, mechanisms and tests for fulfilling the test of substantial similarity. If Finnis were to find this praise-worthy, he would say it is because it provides proof of the use of reason.

The sixth requirement of practical reasonableness is that one bring about good in the world, which includes one’s own life and the lives of others, by actions that are efficient for their

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

reasonable purpose.¹³⁷ To judge whether one's actions and methods truly are efficient, Finnis writes that they are to be judged by their effectiveness, their fitness for their purpose, their utility, and by their consequences.¹³⁸ Finnis claims that it is this requirement which brings about problems, for practical reason, that go to the heart of morality.¹³⁹

Finnis would likely find that the law of copyright protection is not very efficient. Although it has proven to be effective in certain cases, in other cases the law has proven the complete opposite of effective because of the high uncertainty surrounding it. Sometimes the law proves extremely low in utility, leaving both judges and lawyers confused about its proper application. Other times, the consequences are worrisome for the defendant who is left perplexed that he has been found guilty of infringing a work when, in reality, he may not have done so at all. Surely this does go to the heart of morality because the unstable state of the law results in injustice for innocent defendants that are found to be guilty.

The seventh requirement of practical reasonableness is that one should not do an act which does nothing but damage or impede a realization or participation of any one or more of the basic forms of good.¹⁴⁰ This often happens because people act according to their feelings and sympathies, and it can never be justified in reason.¹⁴¹ Finnis says we must use reason, though, and reason requires that every basic value be at least respected in each action.¹⁴² Finnis admits, however, that in acting intelligently, one will inevitably choose to participate in certain values over others, and this will interfere with the realization of the other values that were not chosen.¹⁴³

¹³⁷ *Id.* at 111.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 118.

¹⁴¹ *Id.* at 120.

¹⁴² *Id.* at 120.

¹⁴³ *Id.* at 119-120.

He ends his explanation of this seventh requirement by summarizing it as meaning, “do not choose directly against a basic value”.¹⁴⁴

Again, Finnis would find that that copyright law does not accord with this seventh requirement of practical reasonableness. This is particularly because the law works directly against the basic good of play. As stated earlier, an element of play can only enter into human activity as long as the activity is distinguished from its serious context.¹⁴⁵ Once copyright law is used to accuse another person of copying and litigation, an adversarial process, ensues, the element of play is removed from the picture. The creation of music no longer is an activity engaged in as enjoyment for its own sake. It is now taken into a serious context, harming the basic value of play.

Finnis stated the eighth requirement of practical reasonableness very succinctly and without much explanation. It is that of favoring and fostering the common good of one’s communities.¹⁴⁶ All Finnis has to write about this requirement is that many, or even most, of people’s moral responsibilities, obligations, and duties have their basis in this requirement.¹⁴⁷

In view of this eighth requirement, copyright protection law can probably be said to satisfy it. Obviously, the goal of the law is to foster the common good of the national community by instilling in people the obligation not to copy works of others and claim them as their own. This a moral responsibility and duty because doing otherwise would simply be stealing which most can agree is not something “moral”.

¹⁴⁴ *Id.* at 123.

¹⁴⁵ *Id.* at 87.

¹⁴⁶ *Id.* at 125.

¹⁴⁷ *Id.*

Finally, the ninth and last requirement of practical reasonableness can be regarded as a summary of all the other eight requirements.¹⁴⁸ It is that one should not do what one judges, thinks, or feels should not be done.¹⁴⁹ Basically, this means that one should act “in accordance with one’s conscience”.¹⁵⁰ Finnis refers to Thomas Aquinas, who was the first to formulate this ninth requirement, and had explained that if one chooses to do what one judges to be unreasonable, or if one chooses *not* to do what he does judge to be required by reason, then one’s choice is unreasonable, even if one’s judgments turn out to be wrong.¹⁵¹

This ninth requirement is most likely satisfied due to similar reasons as those that support the eighth requirement. The entire essence of the copyright law relates to acting in accordance with one’s conscience. One’s conscience should allow him to judge that it is unreasonable to copy the work of someone else. If one does end up ignoring his conscience and making an unreasonable choice, then the law of copyright is there to address the problem that arises.

To conclude, it is probable that some of the nine requirements are satisfied by the copyright protection law, while others remain more questionable. The requirements that are satisfied relate to the purpose behind the law and the good for the community that it aims to foster, so Finnis would probably approve of the purpose behind the law. It is the way in which the law is enforced, and its current state of instability, with which Finnis would be likely to find issue.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 125-126.