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"Does That Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement

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"Does That Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement

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I. INTRODUCTION

In 1953, a twenty-seven year old man underwent brain surgery to treat the severe epilepsy that had plagued him during his youth.[1] The surgeon, Dr. William Scoville, removed portions of the young man's brain that were involved in memory processing. Most notably, Dr. Scoville removed most of his patient's hippocampus.[2] The surgery left the young man, now known to psychologists as H.M., with anterograde amnesia: he still had a short-term memory, but he was unable to convert any of his short-term memories into new long-term memories.[3] Although H.M. could not form new long-term memories, psychologists found that he still could learn some new skills. For instance, researchers had H.M. complete repeated trials of the Tower of Hanoi puzzle, which challenges participants to rearrange three to five blocks of increasing size on vertical pegs according to certain rules.[4] H.M. had no conscious recollection of completing the Tower of Hanoi puzzle in earlier trials, but his performance nevertheless improved with practice.[5] H.M.'s mystifying improvement can be explained by the influence of "implicit memory," and a wealth of subsequent research with nonamnesiac participants demonstrates that implicit memory influences the actions of everyday people.[6]

Implicit memories are memories that influence an individual's behavior even though the individual is not aware of their influence.[7]

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1. William Beecher Scoville & Brenda Milner, *Loss of Recent Memory After Bilateral Hippocampal Lesions*, 20 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 11, 16 (1957).

2. *Id.*

3. *Id.* at 17.

4. Neal J. Cohen et al., *Different Memory Systems Underlying Acquisition of Procedural and Declarative Knowledge*, *in* MEMORY DYSFUNCTIONS: AN INTEGRATION OF ANIMAL AND HUMAN RESEARCH FROM PRECLINICAL AND CLINICAL PERSPECTIVES 57, 61 (David S. Olton, Elkan Gamzu, & Suzanne Corkin eds., 1985). The tower of Hanoi task consists of three vertical pegs and three to five blocks of increasing size that fit over the pegs. "In the initial configuration, all of the blocks are on the leftmost peg with the largest block on the bottom and the smallest one on the top. The goal . . . is to move all the blocks . . . to the rightmost peg . . . in the same order . . . . [P]articipants can move only one block at a time, and they can never place a larger block on top of a smaller one." Yaoda Xu & Suzanne Corkin, *H.M. Revisits the Tower of Hanoi Puzzle*, 15 NEUROPSYCHOLOGY 69, 69–70 (2001).

5. Xu & Corkin, *supra* note 4, at 70 ("After several days of testing, all the amnesic participants, including H.M., were reported to be able to learn the recursive strategy and to solve the puzzle consistently in the near minimum number of moves, like the [normal control patients.]"). Studies with other amnesics and later studies with H.M. produced mixed results. *Id.* at 70, 72.

6. *See infra* Part III.

7. Xu & Corkin, *supra* note 4, at 69 ("[N]ondeclarative or implicit memory refers to the influence of previous experience on task performance without conscious referral to stored information, that is, learning without awareness.").

For example, imagine that you attend a summer camp as a child and develop a secret handshake with your roommate at the camp. The next summer, you return to the camp. When you see your roommate from the previous summer, he extends his hand. At this point, you may consciously recognize that he wants to do the secret handshake, recall when and how you developed the handshake, and then perform the handshake step by step with reference to your memory. This is an example of explicit memory: you are aware that you are reconstructing the handshake with reference to an episodic memory from the previous summer. However, you may reach out and perform the handshake without thinking about the previous summer at all. This is an example of implicit memory: you are able to perform the handshake correctly, but you do not consciously refer to any memory of the previous summer. Implicit memory is relevant to copyright law because, just as an implicit memory of a handshake might influence future handshakes, implicit memories of songs, pictures, and phrases might influence a creator as she produces her own music, painting, or story.

Implicit memory "is likely involved in instances of unintentional plagiarism,"[8] or unconscious copying. Unconscious copying[9] occurs when a creator is familiar with an original, copyrighted work, and this familiarity leads the creator to produce a work similar to the original without ever recognizing the influence or its source.[10] Presently, copyright law treats unconscious copying no differently than conscious copying—both deliberate and inadvertent copiers are liable for copyright infringement. This Note argues that, in light of the empirical research establishing that implicit memory influences human behavior, the present approach to unconscious copying is at odds with psychological realities and is inconsistent with the fundamental purposes of copyright law.

Copyright law generally protects creative works from unwanted plagiarism. In cases of conscious copying, the application of copyright law is straightforward and well-grounded because it makes

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8. DANIEL L. SCHACTER, SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST 171 (1996).

9. Courts often use the term "subconscious" to describe this sort of copying, while psychologists researching implicit memory and processes favor the term "unconscious." Modern experimental psychologists have largely discarded the concept of the subconscious, favoring the view that there is a singular unconscious system. In the context of this Note these terms are interchangeable—both subconscious and unconscious refer to those memories and processes that influence people below the level of awarenes—but I use the more widely accepted "unconscious."

10. *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) ("On the whole, my belief is that, in composing the accompaniment to the refrain of 'Kalua,' Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before.").

sense for the law to discourage deliberate misappropriation of the works of others. However, the appropriate application of copyright law is less clear in the context of unconscious copying. Unconscious copiers cannot be discouraged or deterred, as by definition they are not aware that they are copying. Because the risk of liability for unconscious copying is out of authors' conscious control, it creates a disincentive for creative expression. Furthermore, truly unconscious copiers also are not morally accountable in the same sense as conscious copiers, as unconscious copiers do not intend to misappropriate and must labor to create their works in the same way that independent creators do. However, independent creators are fully protected from liability for copyright infringement, whereas unconscious copiers are liable.[11] Courts in their discretion may "reduce the amount of damages, especially statutory damages" due to "innocent intent," but, nevertheless, the unconscious copier is potentially liable in full for infringement.[12]

This approach leaves creators in a potentially precarious position. For example, imagine that you are a painter having a difficult time deciding what to paint. Over several months, you start a variety of different paintings but never get far before deciding to abandon the work and start a new project. Finally, an idea comes to you, a complete vision for you to pursue. You paint frantically, each stroke leading smoothly into the next, until the whole of your ideas is expressed on the canvas. You are proud of the fruits of your labor and you end up selling your work for a nice sum. Months later, though, you are blindsided by a copyright infringement suit that another artist files against you; this artist briefly displayed a similar painting at a local gallery a year earlier. If you never saw the other artist's painting in the gallery, copyright law does not hold you liable because you are an independent creator. But, if you took one glimpse at the other artist's painting over a year ago[13] and never gave it another conscious thought, you may be fully liable for copyright infringement.[14] Unfortunately, in the latter scenario you are a victim of implicit

11. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (holding Michael Bolton liable on the theory of subconscious copying for infringement on an Isley Brothers song released over twenty years earlier and finding that "[s]ubconscious copying has been accepted since Learned Hand embraced it").

12. Susan Somers Neal & Lisa A. Iverson, *Copyright Litigation and Strategies*, *in* UNDERSTANDING BASIC COPYRIGHT LAW 287 305 (2002) (citing Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976)).

13. As will be discussed *infra* Part III, the strength of implicit memories may not vary with changes in depth of processing or divided attention as the strength of explicit memories does.

14. Liability will depend on the extent of the similarity, *infra* Section II.B.

memory, or more precisely, of the application of copyright law to implicit memory situations.

Part II of this Note describes the elements of a successful copyright infringement suit and identifies the elements most pertinent to the issue of unconscious copying. Part II also discusses the two primary aims of copyright law: promoting creative expression and protecting creators' moral rights in their work. Part III surveys psychological research on implicit memory, examines some of the contexts in which its influences can be observed, and considers the implications for copyright law. Together, Parts II and III provide the tools used to evaluate legal approaches to unconscious copying later in the Note.

Part IV examines three noteworthy cases[15] to illustrate how courts presently approach unconscious copying. A close examination of case law reveals that courts hold both unconscious and conscious copiers fully liable. This Part also outlines the development of the current approach and highlights some of the reasoning courts use to justify it. Part V then proposes a new approach to unconscious copying, which is referred to as the "rebuttable presumption approach." Under this approach, unconscious copying functions as a defense to copyright liability, but courts may rely on a rebuttable presumption that the copying was conscious. This Part proceeds to compare the rebuttable presumption approach to the current approach and evaluates each in terms of how well it comports with the overarching purposes of copyright law discussed in Part II, how well it comports with the psychological understanding of implicit memory discussed in Part III, and how practical it is for courts to administer. Finally, Part VI offers some concluding remarks on the way copyright law should deal with unconscious copiers.

II. COPYRIGHT LAW & UNCONSCIOUS COPYING

A. *The Two Aims of Copyright Law*

When evaluating how copyright law treats unconscious copying, it is important to keep in mind the overarching objectives of copyright law. Roughly speaking, copyright law has two primary aims: to incentivize people to create and to ensure that creators get the rights to their works that they (morally) deserve for the labor they

15. *Three Boys Music Corp.*, 212 F.3d 477; *Bright Tunes Music Corp.* 420 F. Supp. 177; *Fred Fisher, Inc.*, 298 F. 145.

expend.[16] In the United States, the purposes of copyright law typically are described in economic terms:[17] Copyright law is a tool used by the government to incentivize individual citizens to be creative, securing for society the benefit of these creators' works.[18]

In a world without copyright protection, pirates are free to make and distribute copies of authors' original works. Pirates in this world consistently undercut the authors' prices because pirates do not have to recoup invested labor as the original authors do.[19] If authors, songwriters, and other creative individuals must expend time and resources to create new works but cannot count on a reasonable return for their efforts because of copiers, then authors have little incentive to continue in their creative endeavors.[20] By legally protecting the rights of original authors of creative expressions[21] from infringement, copyright law gives would-be creators a reason to persist in their creative efforts.[22] Using copyright law primarily to incentivize creators comports with the language of the Intellectual Property Clause of the Constitution, which grants Congress authority to "promote the progress of Science and the Useful Arts."[23]

Using copyright law to promote creativity is a balancing act. To make the creative process economically worthwhile, authors need

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16. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 554–55 (2006). While the American system of copyright law emphasizes economic incentives, the French system places emphasis on moral rights in addition to economic ones. *Id.*

17. *Id.* at 554.

18. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' ").

19. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988) (finding that the nature of ideas as "public goods" will "create a risk that inventions and works of art that would be worth more to consumers than the costs of creating them will not be created because the monetary incentives for doing so are inadequate"); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) (finding that without copyright protections, "[t]here would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being first in the market for such works would be likely to exceed the losses from absence of copyright protection").

20. *See* Landes & Posner, *supra* note 19, at 327 ("For a new work to be created, the expected return . . . must exceed the expected cost.").

21. This includes the right of the author to distribute his creative work for profit.

22. *See* Landes & Posner, *supra* note 19, at 332 (describing the consequences to expression due to lack of copyright protection); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 493–94 (1996) (describing the controls that copyright protection impose on later authors).

23. U.S. CONST. art. I, § 8, cl. 8.

legal rights in their creative expressions.[24] However, if copyright protection were granted too broadly, the terms of copyright protection were too strict, or the duration of copyright protection were too long, then copyright protection could have a chilling effect on creative expression.[25] As more creative expressions fall within the scope of copyright protection, there are fewer creative expressions from which a creator may freely draw.[26] Potential authors, fearing copyright liability, may reduce their creative output.[27] Copyright law must limit the sorts of expression that can be copyrighted and the terms and duration of these copyrights.[28] The concept of "public domain,"[29] for instance, limits the term for which a creative work is copyrighted to seventy years after the death of the author.[30]

While American courts tend to describe copyright law in terms of its economic function, there is an important alternative justification grounded in moral rights.[31] The notion underlying the moral account of copyright is that the one who invested the labor to create a work is its rightful owner.[32] The argument runs as follows:

> Labor is mine and when I appropriate objects from the common I join my labor to them. If you take objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in these objects. Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well . . . .[33]

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24. *See* Landes & Posner, *supra* note 19, at 328 (finding that in the absence of copyright protections, the work "probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work"); Lunney, *supra* note 22, at 494–95 (finding that copyright law can "insulate an author's work from effective price competition, provide the author with a degree of market power with respect to copies of her work, and increase the price the author can profitably charge for access to her work").

25. COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 7 (Julie E. Cohen et al. eds., 2002).

26. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975–77 (1990) (arguing that a large public domain is necessary for artists to thrive).

27. *Id.* at 1018 (arguing that, in the absence of public domain, "[a]uthors could no longer safely give free rein to their subconscious minds, and their muses would need to be available for deposition").

28. COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, *supra* note 25, at 7.

29. The public domain is the class of existing creative works from which authors are free to draw in creating their own works, as opposed to the class of existing creative works protected by copyrights.

30. 17 U.S.C. § 302 (2000).

31. Piotraut, *supra* note 16, at 554–55.

32. *Id.* at 555.

33. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–45 (1993).

European countries, particularly France, generally favor the idea that copyright protection is a moral requirement rather than simply a useful tool for stimulating creativity.[34] The moral justification has some relevance in the American legal system.[35] For instance, the Visual Artists Rights Act (V.A.R.A.) recognizes certain moral rights of visual artists, including a right of attribution and a right to "prevent the use of his or her name as the author . . . in the event of a distortion, mutilation, or other modification . . . which would be prejudicial to his or her honor or reputation."[36]

Both the economic and moral justifications of copyright law are useful for the purposes of this Note. Any changes made to copyright law as it exists now ideally would incentivize more creative expression and comport with notions of fairness regarding authors' rights to their works.

B. The Anatomy of a Copyright Infringement Claim

The Intellectual Property Clause, Article I, Section 8 of the U.S. Constitution, grants Congress the 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."[37] Congress codified copyright law in Title 17 of the U.S. Code pursuant to the power expressly granted in the Intellectual Property Clause.[38] Whenever an author creates a work that is entitled to copyright protection under the statute, a bundle of rights akin to property rights vests in the author.[39] If someone infringes on an author's rights, the author can file a copyright infringement action against the infringer.

To establish a prima facie case of copyright infringement, a plaintiff must show that (1) she owns a valid copyright for the work

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34. *See* COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, *supra* note 25, at 11; Piotraut, *supra* note 16, at 554–55 ("[I]n civil law countries such as France, the more individual-centered *droit d'auteur* system gives special importance to the principles of natural justice.").

35. *See* Piotraut, *supra* note 16, at 558 ("Notwithstanding a more materialistically-oriented copyright system, authors hold a central place in American copyright law as well.").

36. 17 U.S.C. § 106A (2000).

37. U.S. CONST. art. I, § 8, cl. 8.

38. COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, *supra* note 25, at 3.

39. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 970 (1990). The Copyright Act grants all protected authors exclusive rights to (1) reproduce the work, (2) prepare derivative works based on the work, and (3) publicly distribute the work. 17 U.S.C. § 106 (2000). For some categories of works, authors also have exclusive rights to publicly display or perform the work. *Id.*

and (2) the defendant copied protected elements of the work.[40] It often is difficult to find direct evidence of copying because the works at issue in copyright cases typically come from internal creative processes, and a judge cannot peer into the thoughts of a creator to discern her inspiration.[41] In the absence of direct evidence of copying, courts typically infer that the defendant copied the plaintiff's work if the plaintiff sufficiently demonstrates that (1) the defendant had reasonable access to the copyrighted work and (2) the two works are "substantially similar."[42]

Courts do not treat the requirements of reasonable access and substantial similarity as independent and conjunctive. Rather, access and similarity are evaluated relative to one another under an "inverse ratio rule."[43] That is, the higher the degree of access to the material the plaintiff demonstrates, the lower the degree of similarity the plaintiff must demonstrate to persuade the court to infer copying.[44] Likewise, the lower the degree of access present, the higher the degree of similarity courts require.[45] Furthermore, even if a plaintiff offers no proof at all that the defendant had access to the copyrighted work, courts still may infer copying if the plaintiff demonstrates that the two works at issue are "strikingly similar" and the defendant has no satisfactory explanation for why the works are so similar.[46]

The plaintiff can show that the defendant had reasonable access to the copyrighted work in one of two ways. First, the plaintiff may present evidence specifically establishing "a particular chain of events . . . between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company)."[47] Alternatively and more frequently, the plaintiff may present evidence that the work was widely disseminated to the public; for instance, in the musical context, a plaintiff may show that her

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40. Neal & Iverson, *supra* note 12, at 302 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); BellSouth Adver. & Publ'g Corp. v. Donnelly Info. Pub'g, Inc. 999 F.2d 1436, 1440 (11th Cir. 1993) (en banc)).

41. Litman, *supra* note 39, at 1015 ("It is difficult to ascertain the source of an idea and impossible to prove its provenance in any meaningful sense. A court cannot unzip an author's head in order to trace the genealogy of her motifs; indeed, the author herself usually cannot pin down the root of her inspiration.").

42. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000); Neal & Iverson, *supra* note 12, at 303–04.

43. *Three Boys Music Corp.*, 212 F.3d at 485.

44. *Id.*

45. *Id.*

46. *Id.*; Neal & Iverson, *supra* note 12, at 304 (citing Selle v. Gibb, 741 F.2d 896, 903 (7th Cir. 1984)).

47. *Three Boys Music Corp.*, 212 F.3d at 482.

"work was widely disseminated through sales of sheet music, records, and radio performances."[48] If a work was sufficiently disseminated, then it is likely that the defendant encountered the work at some point and later, either consciously or unconsciously, copied it from memory. The defendant's access to the plaintiff's work must be "reasonable," meaning that the mere possibility of access is not sufficient.[49] The "reasonable access" analysis is one of two components of a copyright case in which the issue of unconscious copying may arise.[50] Unconscious copiers will contest the access issue because they often do not recall having access to the original work.[51] If the defendant does not recall accessing the work, the case turns upon how widely the work was disseminated. If the work was disseminated widely, then the defendant likely was exposed to it, and unconscious copying becomes the most likely explanation for the similarity.

If the plaintiff shows that he has a valid copyright and that the defendant copied the protected material, either with direct evidence of the defendant's copying or by proving a sufficient combination of reasonable access and substantial similarity, the defendant faces liability unless he successfully invokes one of several defenses. The relevant defense for the purposes of this Note is "independent creation."[52]

C. The Independent Creation Defense

Independent creation is a complete defense against liability for copyright infringement.[53] Once a plaintiff proves reasonable access and substantial similarity, the defendant has an opportunity to demonstrate that she independently created the work at issue, free from the influence of the plaintiff's work.[54] Unconscious copiers are

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48. *Id.* (quoting 2 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 8.3.1.1., at 91 (1989)).

49. Neal & Iverson, *supra* note 12, at 304 (citing Selle v. Gibb, 741 F.2d 896, 903 (7th Cir. 1984)).

50. The other is the independent creation defense, discussed in Section II.C.

51. See Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) (discussed in Section IV.A), and *Three Boys Music Corp.*, 212 F.3d at 483–84 (discussed in Section IV.C), for examples of cases where parties accused of copyright infringement claimed that they never had access to the original work. A defendant, however, may recall accessing the original work after the similarities are pointed out to them or suit is filed. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 179 (S.D.N.Y. 1976); *infra* Section IV.B).

52. Neal & Iverson, *supra* note 12, at 306.

53. *Id.*; *see* Repp v. Webber, 858 F. Supp. 1292, 1303–04 (S.D.N.Y. 1994) (granting summary judgment to defendant Andrew Lloyd Webber based on evidence of independent creation).

54. *See Repp*, 858 F. Supp. at 1303 (noting that a defendant accused of copyright infringement can "rebut the inference of copying" by showing that his product was independently

likely to raise the independent creation defense because, by definition, an unconscious copier will believe that she has created her expression independently.[55]

The independent creation defense furthers the aims of copyright law under both economic and moral requirement accounts. First, copyright law should incentivize creators to produce creative works.[56] If a defendant's creation truly is independent of the plaintiff's copyrighted work, then at the time of creation the defendant was not aware that the plaintiff's copyrighted work existed, or at least was not familiar with the contents of the copyrighted work. Holding independent creators liable likely would have a chilling effect on creative output, as creators potentially would be liable for similarities to any other copyrighted work in the world, even those the creator never encountered. Thanks to the independent creation defense, creators theoretically can be confident that if they create their works independently, they are safe from liability for infringement and actually are entitled to their own copyrights for the works.[57] Copyright protection can be available to two separate authors for two identical works if in fact they were independently created.[58]

Second, the independent creation defense is consistent with the moral justification of copyright law. According to the moral justification of copyright law, creators are entitled to both pecuniary and moral rights in their creations because the creations are the product of their labor.[59] If a creator does not copy another work, but creates her work independently, then the labor she invests in creating a work is the same regardless of whether a substantially similar copyrighted work already exists. Therefore, independent creators are entitled to the same degree of copyright protection as original authors.

Unconscious copying is closely related to the independent creation defense, as unconscious copying arguably resembles, and is perhaps indistinguishable from,[60] independent creation. Unconscious copiers generally attempt to defend themselves from copyright liability by refuting the "access" element in the plaintiff's prima facie

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created); Gund, Inc., v. Applause, Inc., 809 F. Supp. 304, 308 (S.D.N.Y. 1993) (finding that defendants can "rebut the inference of copying by showing that its product was independently created despite its similarity to plaintiff's work.").

55. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000).

56. Landes & Posner, *supra* note 19, at 327; Lunney, *supra* note 22, at 494–95.

57. Neal & Iverson, *supra* note 12, at 304–05.

58. *Id.*

59. Piotraut, *supra* note 16, at 555.

60. Professor Jessica Litman advances an argument along these lines in Litman, *supra* note 39, at 1008–12.

case or by raising the independent creation defense.[61] So far, courts have refused to give effect to the independent creation defense in cases of unconscious copying.[62] On a literal level, this makes sense. Unconscious copying does not result in "independent creations" because unconscious copiers, by definition, pull from existing works. However, drawing a distinction between unconscious copiers and independent creators implicates an underlying assumption of American copyright law: the law employs what one scholar terms a "romantic model of authorship," attributing all of the creative efforts to the individual author and minimizing the role of external or unconscious influences.[63] Scientific research suggests that this model of authorship may be flawed.

III. IMPLICIT MEMORY & COPYRIGHT

It is "well established in the field of cognitive neuroscience" that implicit and explicit memories are stored by "two functionally and anatomically separable long-term memory systems."[64] Explicit memory includes semantic memory (memories of one's knowledge[65]) and episodic memory (memories of one's experiences[66]). Implicit memory includes motor skills, priming, and both associative and nonassociative learning. Implicit memories are part of the "unconscious" in that they are able to affect behavior while remaining outside of awareness.[67]

The most shocking demonstrations of the influence of implicit memory come from cases involving amnesia, epilepsy, and intellectual

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61. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 484–86 (9th Cir. 2000) (analyzing the defendant's claims that he did not have access to the copyright material and that he independently created the work).

62. *See* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 479–80 (stating that the courts in the George Harrison and Michael Bolton cases and courts more generally rely on "incomplete theories of creativity and processes of creation" when using the theory of unconscious copying to impose liability).

63. "The idea that subconscious copying occurs rarely and only at the margin springs from a fancy that I term the 'romantic model of authorship.' According to the romantic model, creative processes are . . . likely to produce unique expression. . . . [T]he real author is using words, musical notes, shapes, or colors to clothe impulses that come from within her singular inner being. . . . What the unconscious disgorges is no mere recasting of preexisting material, but something wholly new." Litman, *supra* note 39, at 1008–09.

64. Xu & Corkin, *supra* note 4, at 70.

65. For example, trivia facts (i.e. the capital of Australia is Canberra) are semantic memories.

66. For example, remembering seeing a kangaroo during a trip to Australia is an episodic memory.

67. Howard Shevrin & Scott Dickman, *The Psychological Unconscious: A Necessary Assumption for All Psychological Theory?*, 35 AM. PSYCHOLOGIST 421, 423 (1980).

disabilities,[68] as these disorders provide researchers with a unique dissociation of explicit and implicit memory.[69] For instance, although amnesiacs do not perform as well as nonamnesiacs on standard, explicit memory tests, they perform equally well in implicit tasks, such as word stem completion.[70]

The influence of implicit memory is not limited to those with memory disorders. Implicit memory also influences ordinary people with fully functional memories. Philosophers such as Descartes have described unconscious mental processes for centuries, and in the context of modern psychological research, implicit memory is but one of many manifestations of the active, unconscious mind.[71] Cognitive psychologists recently have begun to study and explain the unconscious processes associated with memory.[72] The results tend to confirm that implicit memory influences behavior in a variety of settings.

The distinction between implicit and explicit memory can be observed by examining the different procedures used to test each. In one paradigm for researching explicit memory, researchers tell participants to study a list of words, making it clear that they will be asked to remember those words after some interval of time has passed.[73] Then, researchers measure participants' explicit memory by measuring the number of words the participants can recall or by providing a new list of words and measuring how many of them the participants correctly recognize from the first list. The key is that

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68. *E.g.*, Janet Fletcher & Clare Roberts, *Intellectual Disabilities*, *in* IMPLICIT AND EXPLICIT MENTAL PROCESSES 343, 343–56 (Kirsner et al. eds., 1998); Elizabeth C. Leritz et.al., *Temporal Lobe Epilepsy As a Model to Understand Human Memory: The Distinction Between Explicit and Implicit Memory*, 9 EPILEPSY & BEHAVIOR 1 (2006); Schacter, *supra* note 8, at 167–69.

69. For instance, Amir and Selvig report patients diagnosed with diverse illnesses, such as schizophrenia or Korsakoff's syndrome, show intact implicit memory when compared to control groups while their explicit memory systems are substantially degraded. Nader Amir & Amy Selvig, *Implicit Memory Tasks in Clinical Research*, *in* COGNITIVE METHODS AND THEIR APPLICATION TO CLINICAL RESEARCH 153, 153–71 (David C. Rubin & Amy Wenzel eds., 2005).

70. Dawn M. McBride, *Methods for Measuring Conscious and Automatic Memory: A Brief Review*, 14 J. CONSCIOUSNESS STUD. 198, 200 (2007). Word stem completion tasks are discussed *infra*.

71. Perceptual psychologists, for instance, have routinely described unconscious processes such as depth cue scaling, Richard L. Gregory, *Distortion of Visual Space as Inappropriate Constancy Scaling*, 199 NATURE 678 (1963), and assimilation, Alexander W. Pressey, *An Extension of Assimilation Theory to Illusions of Size, Area, and Direction*, 9 PERCEPTION & PSYCHOPHYSICS 172 (1971). Moreover, these unconscious mental processes appear linked to normal brain activity. Theodore B. Jaeger, *Assimilation and Contrast in Geometrical Illusions: A Theoretical Analysis*, 89 PERCEPTUAL & MOTOR SKILLS 249 (1999).

72. Daniel Schacter, *Implicit Memory History and Current Status*, 13 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 501, 503 (1987).

73. McBride, *supra* note 70, at 200.

subjects "are instructed to *intentionally* retrieve items from the study episode to complete the test."[74]

In implicit memory research, researchers also expose participants to a list of words, but generally the researchers do not tell participants that they will be tested later on their recollection of the words.[75] For example, assume a word list includes the words banana, monster, and carriage. After some interval of time passes, researchers often will administer both an explicit memory test and an implicit memory test. For the implicit memory test, subjects complete a task "with no reference made to the study episode."[76] A common task in implicit memory tests is word completion: participants are given word fragments, such as "b a _ _ _ _," "_ o _ s t _ _," or "_ a r _ _ a g e," and the researchers ask them to complete these fragments with whatever word comes to mind.[77] The word stems can be completed in multiple ways: "barges," "lobster," and "marriage" are alternatives in our example. Participants, however, complete the fragments with words from the original list more frequently than chance predicts, even if the participants do not recall or even recognize the words in the explicit memory test.[78] Amazingly, results on explicit memory tests and implicit memory tests are unrelated across a variety of experimental paradigms.[79] This has tremendous import to copyright, as it means that human behavior can actually be influenced by memories of which we are not even aware.

Implicit memory affects pictures as well as words.[80] That is, when researchers conduct an implicit memory test and ask participants to complete picture fragments rather than word fragments, participants still demonstrate priming effects.[81] Imagine that Gary is a sketch artist who has recently examined the work of another artist, Henry. If Henry's work is relatively simple and the first few lines of Gary's sketch resemble part of it, then Gary may be inclined to complete his sketch such that it resembles that of Henry because of the influence of implicit memory.

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See, e.g.*, Yael M. Cycowicz et al., *A Developmental Trajectory in Implicit Memory is Revealed by Picture Fragment Completion*, 8 MEMORY 19 (2000) (finding priming effects when participants were asked to complete picture fragments rather than word fragments).

81. *Id.*

Implicit memory of words and pictures can impact an individual's behavior even if she is not consciously aware of the words and pictures when they are originally presented to her. Researchers have found that surgical patients under some types of anesthesia are influenced by words presented to them while they are unconscious.[82] For instance, in 2004, a group of researchers played a repeating series of fourteen words through headphones to surgical patients under a certain type of anesthesia.[83] The patients were not conscious during anesthesia and did not explicitly recall the words upon recovery.[84] Yet when the researchers used stem completion tasks to assess implicit memory on recovery, they found that the patients completed fragments with the fourteen words from the list more frequently than chance predicts.[85]

Relevant for the creative arts, implicit memory also plays a role in the learning and arranging of abstract sequential structures. A study by Professors Thomas Goschke and Annette Bolte illustrates this point with respect to semantic sequences.[86] Goschke and Bolte asked participants to name individual objects, like a table or a shirt.[87] The semantic categories of the objects (e.g. furniture or clothing) were organized in a repeating sequence.[88] Participants were slower at naming objects when the pattern of presentation varied from the repeating sequence, whether or not the participants were informed of or recognized the sequence. This result suggests that participants had implicitly learned and adapted to an abstract sequential structure.[89]

The relevance of this implicit influence to copyright law becomes clearer when the experiment focuses on musical, rather than semantic, sequences. In a similar type of study, researchers Gustav Kuhn and Zoltan Dienes had participants listen to series of tunes. Some of the tunes were "grammatical," meaning that they were arranged according to grammatical rules like inverting and repeating

82. *See, e.g.*, C. Deeprose et al., *Learning During Surgery with Propofol Anaesthesia*, 92 BRIT. J. ANAESTHESIA 171 (2004) (documenting the influence of words on anaesthetized patients in surgery).

83. *Id.*

84. *Id.*

85. *Id.*

86. Thomas Goschke & Annette Bolte, *Implicit Learning of Semantic Category Sequences: Response-Independent Acquisition of Abstract Sequential Regularities*, 33 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 394 (2007).

87. *Id.*

88. *Id.*

89. *Id.*

notes, and some were not.[90] Participants in the experimental group listened to "training" tunes, all of which followed grammatical rules, whereas participants in the control group did not hear any "training" tunes.[91] In a series of experiments, participants listened to various tunes, grammatical and nongrammatical, and were asked about their preferences.[92] The researchers found that the participants in the experimental group implicitly acquired knowledge of their grammatical structure, as exposure to the grammatical training tunes influenced their subsequent preferences in nontraining trials.[93] This result suggests that preferences among musical structures may be influenced by implicit learning and memory. If the creative choices of people selecting, arranging, or composing music are influenced by implicit memory, then resulting similarities may lead to liability for copyright infringement under current copyright law.

Interestingly, implicit memory differs from explicit memory in that there do not appear to be level-of-processing or divided-attention effects associated with implicit memory.[94] "Level-of-processing effects" refers to the tendency of people to remember items that they study deeply better than items that they study at only a superficial level.[95] "Divided-attention effects" refers to the tendency of people to remember items upon which they focus all of their attention better than items that they observe while multitasking.[96] Neither of these effects is consistently present in the implicit memory context.[97] Returning to the example of the painting, it may be the case that one is equally prone to unconsciously copy another artist's painting whether one glimpsed it briefly or studied it for an hour.

Implicit memory is a relatively new but exciting area of psychological research that has real implications for the law. Although the research reviewed does not address the temporal scope of implicit influence—that is, how long after exposure to a stimulus implicit

90. Gustav Kuhn & Zoltan Dienes, *Implicit Learning of Nonlocal Musical Rules: Implicitly Learning More Than Chunks*, 31 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 1417 (2005).

91. *Id.*

92. *Id.*

93. *Id.*

94. McBride, *supra* note 70, at 201.

95. *See, e.g.*, Anjali Thapar & Robert L. Greene, *Effects of Level of Processing on Implicit and Explicit Tasks*, 20 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 671 (1994) (describing level-of-processing effects).

96. *See, e.g.*, Angela K. Troyer & Fergus I.M. Craik, *The Effect of Divided Attention on Memory for Items and Their Context*, 54 CANADIAN J. EXPERIMENTAL PSYCHOL. 161 (2000) (describing how multi-tasking negatively affects memory).

97. McBride, *supra* note 70, at 202.

memories continue to impact behavior[98]—it does demonstrate that words, images, and musical patterns can influence an individual's behavior even if she is not aware of the influence. Professor Daniel Schacter, a leading researcher in implicit memory at Harvard, has connected the influence of implicit memory to inadvertent copyright infringement.[99] As psychologists continue to research implicit memory, the scope and significance of the relationship between implicit memory and copyright law will only become clearer.

IV. THREE CASES OF UNCONSCIOUS COPYING

A. The Beginning: Fred Fisher, Inc. v. Dillingham

The first case to address expressly the issue of unconscious copying was *Fred Fisher, Inc. v. Dillingham* in 1924.[100] A popular song called "Dardanella" was frequently sung and played until its popularity faded around the end of 1920.[101] "Dardanella" opened with a repeating eight-note sequence of accompaniment known as an *ostinato*.[102] Shortly after "Dardanella" faded from popularity, a light opera number titled "Kalua" became tremendously popular.[103] "Kalua" used precisely the same eight-note sequence from "Dardanella" as an *ostinato* accompanying the chorus.[104] The composer of "Kalua" swore that he did not engage in conscious plagiarism, and Judge Learned Hand was "on the whole . . . disposed to give him the benefit of the doubt."[105] Judge Hand noted that the composer of "Kalua" already was established in opera, so it would make little sense for him to gamble his reputation on deliberate piracy.[106]

98. Concededly, experimental research does not yet, to my knowledge, demonstrate implicit influences years after exposure to stimuli. Conducting research to this end may be impracticable because of the time period the research would have to span. However, Professor Schacter reports a finding of "just as much priming on [a] word-fragment completion test after a week as there was after an hour," and suggests that implicit influence may occur long after exposure to a stimulus. Schacter, *supra* note 8, at 167, 171.

99. Schacter, *supra* note 8, at 171.

100. 298 F. 145, 147 (S.D.N.Y. 1924).

101. Robert Rogoyski, *The Melody Machine: How to Kill Copyright, and Other Problems with Protecting Discrete Musical Elements*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 403, 418 (2006).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Fred Fisher, Inc.*, 298 F. at 147.

106. *Id.*

Judge Hand began his opinion by framing the issue in terms of the independent creation defense.[107] He observed that "the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which [sic] have been copyrighted."[108] Therefore, for the court to hold the composer of "Kalua" liable for infringement, it had to find that "Dardanella" was the source of the *ostinato* accompaniment.[109]

Judge Hand reasoned that "everything registers somewhere in our memories, and no one can tell what may evoke it."[110] He explained that, in composing "Kalua," the composer probably unconsciously "followed what he had certainly often heard only a short time before." However, Judge Hand concluded that the fact that the composer unconsciously followed the pattern from "Dardanella" was enough to find the composer liable for infringement:

> 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. 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.[111]

Judge Hand therefore held the composer of "Kalua" liable for copyright infringement and established the foundation for copyright law's current approach to unconscious copying.

B. *Extending Liability for Unconscious Copying:* Bright Tunes Music Corp. v. Harrisongs Music, Ltd.

Fifty-two years after *Fisher*, the Southern District of New York handled another case dealing with the issue of unconscious copying: *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*[112] Former Beatle George Harrison recorded "My Sweet Lord" in 1970.[113] He was sued because of the song's uncanny resemblance to the Chiffons' 1962 hit song "He's So Fine."[114] "He's So Fine" consists of two musical motifs with a grace note added in one repetition of the second motif.[115] While neither motif is novel by itself, testifying experts agreed that the

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 148.
112. 420 F. Supp. 177, 180 (S.D.N.Y. 1976).
113. *Id.* at 178.
114. *Id.*
115. *Id.*

combination of the two motifs is unique.[116] Harrison's "My Sweet Lord" consists primarily of the same two motifs. In addition, the identical grace note from "He's So Fine" is in one repetition of the second motif.[117] Harrison acknowledged that he had heard the Chiffons' song.[118] "He's So Fine" had, after all, been widely disseminated: it had reached number one on the Billboard charts in the United States and had been one of the top hits in England.[119]

While Harrison acknowledged his familiarity with "He's So Fine," he denied any deliberate plagiarism. In fact, Harrison offered a detailed description of how he and gospel singer Billy Preston developed "My Sweet Lord" independently and organically.[120] Harrison testified that, while in Denmark, he began writing "My Sweet Lord" by singing the phrases "Hallelujah" and "Hare Krishna" over some improvised strums of the guitar.[121] Harrison conferred with the rest of his tour group that included Preston, developed the idea while on tour, and finalized all of the relevant aspects of the song (the two motifs and the grace note) in a London studio.[122]

The court found that neither Harrison nor Preston consciously plagiarized the theme of "He's So Fine."[123] The court recognized, however, that the two songs are musically identical except for one phrase.[124] The court concluded that, as the composer was playing with multiple possible combinations of notes, "there came to . . . his mind a particular combination that pleased him . . . Why? Because his unconscious knew it already had worked in a song his conscious mind did not remember."[125] After stating that it did not believe Harrison deliberately copied the Chiffons' song, the court held Harrison liable for copyright infringement, reasoning that "[t]his is . . . infringement of copyright, and is no less so even though unconsciously accomplished."[126] As a legal matter, Harrison copied the Chiffons' song and was liable for it, just as if he had done so deliberately. The court affirmed the principle that Judge Hand announced in *Fisher* fifty-two

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116. *Id.* at 178 n.3.
117. *Id.* at 178.
118. *Id.* at 179.
119. *Id.*
120. *Id.* at 179–80.
121. *Id.* at 179.
122. *Id.* at 179–80.
123. *Id.* at 180.
124. *Id.* at 180–81.
125. *Id.* at 180.
126. *Id.* at 180–181.

years before, extending it to cover a six-year period between the original song and the unconscious copy.[127]

C. *The Modern Approach:* Three Boys Music Corp. v. Bolton[128]

Three Boys Music Corp. v. Bolton "goes even farther down the road of unconscious copying," rendering findings of unconscious copyright infringements more likely.[129] The Isley Brothers wrote, recorded, and received a copyright for "Love is a Wonderful Thing" in 1964.[130] The song was released in 1966, never reached the Top 100,[131] and had limited radio play and success.[132] In 1991, singer Michael Bolton released a similar pop song with the same title.[133] At trial, the jury found that Bolton had infringed on the Isley Brothers' copyright for the original "Love is a Wonderful Thing".[134]

The Isley Brothers based their access argument on widespread dissemination.[135] Unlike George Harrison in *Bright Tunes*, Bolton did not concede his familiarity with the original song.[136] In contrast with *Fisher*, in which the unconsciously copied work appeared shortly after the original, in this case the allegedly copied work came out twenty-five years after the original.[137]

The Isley Brothers offered four ways in which Bolton could have accessed their version of "Love is a Wonderful Thing".[138] First, the Isley Brothers argued that Bolton grew up listening to and singing the songs of black rhythm-and-blues singers like the Isley Brothers, and specifically pointed to Bolton's testimony that his brother had a "pretty good record collection."[139] Second, three radio disc jockeys testified that the Isley Brothers' "Love is a Wonderful Thing" was widely disseminated in the time and area in which Bolton was growing up.[140] Third, Bolton conceded that he was a fan of the Isley

127. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924).

128. 212 F.3d 477 (9th Cir. 2000).

129. Rogoyski, *supra* note 101, at 420.

130. *Three Boys Music Corp.*, 212 F.3d at 480.

131. *Id.* The song did, however, appear in Billboard's "Bubbling Under the Top 100" at number 110. *Id.*

132. *Id.*

133. *Id.* at 481.

134. *Id.*

135. *Id.* at 482–83.

136. *Id.* at 483.

137. *Id.* at 484.

138. *Id.* at 483.

139. *Id.*

140. *Id.*

Brothers and had collected their music, though he never admitted hearing "Love is a Wonderful Thing".[141] Finally, when recording his version of "Love is a Wonderful Thing," Bolton was recorded wondering aloud if he was composing Marvin Gaye's "Some Kind of Wonderful," demonstrating Bolton's awareness that part of his work may have drawn from some other source.[142]

Bolton's counsel contended that "the Isley Brothers' theory of access amounts to a 'twenty-five-years-after-the-fact-unconscious copying claim,' " and the court conceded that the case for reasonable access and unconscious copying was more attenuated than in previous cases.[143] However, the court held Bolton liable on the theory of unconscious copying. [144]

V. AN ALTERNATIVE: THE REBUTTABLE PRESUMPTION APPROACH

Courts treat unconscious copying the same as deliberate copying, holding unconscious copiers liable for copyright infringement.[145] Courts allow evidence of the defendant's access to the plaintiff's work and the degree of similarity between the two works to substitute for evidence of copying in fact.[146] If a defendant had access and the works are similar, it is immaterial whether the copying author was aware of the copying.[147] Furthermore, courts may be increasingly willing to hold unconscious copiers liable despite long delays between the alleged access and the copying.[148] In *Fred Fisher*, the copied work was produced shortly after the original.[149] In *Bright Tunes*, six years passed between the widespread dissemination of "He's So Fine" and Harrison's composition of "My Sweet Lord," but

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141. *Id.* at 483–84.

142. *Id.* at 484.

143. *Id.*

144. *Id.* at 484–85.

145. Arewa, *supra* note 62, at 479–81; Stephen E. Roth, *Get A Grip on Intellectual Property Litigation: Learning the Fundamentals Through Song, Stage and Screen: Part I: Copyright*, 39 TENN. B.J. 16, 18 (2003); *see, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482–83 (9th Cir. 2000) (finding the theory of subconscious copying "embraced" since 1924 is still "applied" in "modern cases"); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 181 (S.D.N.Y. 1976) ("[I]nfringement of copyright . . . is no less so even though subconsciously accomplished."); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147–48 (S.D.N.Y. 1924) ("[A]uthor's copyright is an absolute right to prevent others from copying . . . and does not depend upon the infringer's good faith.").

146. *Three Boys Music Corp.*, 212 F.3d at 481; Neal & Iverson, *supra* note 12, at 303–05.

147. *Fred Fisher, Inc.*, 298 F. at 148.

148. *Three Boys Music Corp.*, 212 F.3d at 483.

149. *Fred Fisher, Inc.*, 298 F. at 147.

Harrison conceded access, and the court still found Harrison liable.[150] In *Three Boys*, the United States Court of Appeals for the Ninth Circuit applied the theory of unconscious copying to a work that was written twenty-five years after the original, which allowed the theory of unconscious copying to do most of the work in establishing Bolton's liability despite the fact that Bolton never admitted to hearing the original Isley Brothers' song.[151] This trend increases the number of existing copyrighted works that creators must check in order to be certain of avoiding liability for unconscious copying. Under *Fred Fisher,* a modern musician could feel confident he would not be held liable for unconscious copying if he reviewed recent radio hits and heard nothing similar; to be confident of avoiding liability under *Three Boys*, a musician today would need to review songs released in the 1980s that did not even crack the Top 100.

Is this the direction in which copyright law should be moving? Should the law hold authors liable for copyright infringement on the grounds that they may have been unconsciously influenced by another work they had perceived a quarter century before? In light of the twin goals of copyright law—to incentivize creative expression and to enable authors to protect the fruits of their labor—and the growing body of research on implicit memory, the current approach to unconscious plagiarism is less than ideal.[152]

It would be more consistent with the purposes of copyright law and empirical research on implicit memory for unconscious copying to function as a defense to liability for copyright infringement. Given the modern understanding of implicit memory, recognizing an unconscious copying defense does not render copyright infringement any less of a strict liability offense than recognizing an independent creation defense. Affording unconscious copiers protection from liability does *not* require inserting a *mens rea* requirement, or even the good faith notion Judge Hand addressed in the *Fred Fisher* opinion, into strict-liability copyright law. Rather, it simply requires courts to recognize that an author who creates a work similar to an existing one due purely to unconscious influence is like an independent creator and has

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150. *Bright Tunes Music Corp.*, 420 F. Supp. at 178–79, 181. This case is significantly different in that Harrison acknowledged his familiarity with the original work, unlike the composer of "Kalua" in *Fred Fisher, Inc.*, and Michael Bolton in *Three Boys Music Corp.*

151. *Three Boys Music Corp.*, 212 F.3d at 480–81, 484. The evidence of "reasonable access" in *Three Boys Music Corp.* was far more remote than the evidence of "reasonable access" in *Fred Fisher, Inc.*, and *Bright Tunes Music Corp.* It appears in this case that both the trial court and the Court of Appeals may have discretely lightened the plaintiff's burden to demonstrate reasonable access because the plaintiff argued essentially that the copying was unconscious.

152. I expand on this point in Section V.A *infra*.

not actually created a "copy" at all. Recognition of an unconscious copying defense not only accommodates the modern understanding of implicit memory, but the analysis below reveals that it also comports with the economic and moral aims of copyright law. Of course, allowing an unconscious copying defense creates the potential for abuse by defendants in infringement suits. Therefore, courts should allow unconscious copying as a full defense but employ a rebuttable presumption that all copying is conscious.

An unconscious copying defense could be treated either as a subset of the independent creation defense or as an entirely separate, new defense to copyright liability. It would operate as follows: A defendant in a copyright infringement suit is free to raise the defense just like an independent creation defense. If a defendant invokes the defense, then she must prove that the copying was unconscious by providing evidence of her independent, creative processes, like that provided by George Harrison in *Bright Tunes*, and evidence of particular comments or discussions during creation that demonstrate a lack of awareness of copying. The rebuttable presumption protects the defense from potential abuse: If a defendant can offer no proof that she copied unconsciously, then she is liable as a conscious copier. The goal is to deter excessive use of the defense as a time-consuming and resource-wasting "Hail Mary" by copyright defendants. Courts should require an extensive account of the defendant's creative process, perhaps along the lines of the forty-plus pages of transcripts the court described in *Bright Tunes*, accompanied by the corroboration of others, to establish sufficiently that copying is unconscious. If the defendant produces enough evidence to overcome the presumption that she consciously copied the plaintiff's work, the defendant is not liable for copyright infringement.

The law would benefit from the recognition of an unconscious copying defense subject to a rebuttable presumption that copying is conscious. A careful comparison of the rebuttable presumption approach to the current approach supports this claim. This Part evaluates both the way copyright law currently treats unconscious plagiarism and the proposed alternative according to four criteria: how well each system (1) advances the economic objectives of copyright law, (2) advances the moral objectives of copyright law, (3) comports with a thorough understanding of implicit memory, and (4) copes with administrative burden. This evaluation reveals that, if the rebuttable presumption approach is sufficiently administrable, it is a move in the right direction in addressing the problem of unconscious copying.

A. Evaluating the Current Approach

The current approach to unconscious copying is to treat it exactly like conscious copying.[153] Unconscious copiers are liable for copyright infringement, and the independent creation defense does not offer protection.[154] This approach undercuts the economic and, arguably, moral objectives of copyright law. This approach also seems to sell short (if not dismiss outright) the influence of implicit memory on creative processes. The advantage of the current approach, however, is that it creates a bright-line rule that is easy to understand and easy to administer.

1. Incentivizing Creativity

The practice of holding unconscious copiers liable for copyright infringment creates a disincentive for authors engaging in creative expression. The law cannot deter truly unconscious copying because it is, by definition, unknown to the copying author. Therefore, every time an author produces a creative expression, that author assumes some risk of copyright liability. This risk, for practical purposes, is beyond the author's control. The author cannot know whether she has been influenced unconsciously by another work and cannot be aware of the extent of any unconscious influence. For example, assume that twenty percent of creative expressions in a given author's field are the result of unconscious copying.[155] Further, assume that five percent of all instances of unconscious copying are significant enough that the plaintiff holding the copyright notices the similarities, brings an infringement claim, and wins the suit. This means that each time a creator produces a new work she exposes herself to a one-percent chance of copyright liability. If average liability for copyright infringement in the author's field is $100,000, then the author has to factor in an expected loss of $1,000[156] for copyright liability each time she decides whether to create. Precise numbers aside, each time an author decides whether to create a work, the author must weigh some negative value against her expected return on creation as the result of the current approach to unconscious copying. This negative value will have a chilling effect on creative expression.

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153. Arewa, *supra* note 62, at 479–81.

154. *Supra* note 145.

155. The twenty percent figure is debatable. Again, it is purely for the sake of an example, and the actual percentage could be drastically higher or lower.

156. If an author has a one percent chance of losing $100,000 in an infringement suit, then the author's expected loss due to copyright infringement is $1,000 (0.01 x $100,000).

2. Moral Fairness

Holding unconscious copiers liable as though they are conscious, deliberate copiers is not morally fair. According to the moral justification of copyright law, an author's rights arise as the result of her labor. While the current approach clearly protects the moral rights of original, independent authors, unconscious copiers arguably put the same creative efforts into their creations as the original authors,[157] and therefore ought to have comparable rights from a moral perspective. The current approach simply does not account for this.

Additionally, the moral justification of copyright law emphasizes that copying causes harm to original authors.[158] People generally are more forgiving of inadvertent harmful behavior, as is reflected in everyday situations (if John knocks Tory over as she walks on the sidewalk, one of the first things she will want to know is whether John's action was deliberate), in sports (intentional fouls are punished more severely in basketball, for instance), and in the law (*mens rea* requirements in criminal law take account of defendants' mental states). Similarly, it may be appropriate for copyright law to treat deliberate copiers differently than unconscious copiers. Arguably, courts already acknowledge this principle, as courts sometimes use their discretion to reduce statutory damages due to a copier's innocent intent. It is important to note, though, that the recognition of this distinction under the current approach is entirely in courts' discretion.

3. Recognizing Implicit Memory

The core of the current approach to unconscious copying was established before psychologists were conducting sophisticated research on implicit memory.[159] While judges have acknowledged the possibility that copiers may copy only unconsciously, the practice of treating unconscious copiers no differently than deliberate copiers does not truly respect the problem of unconscious copying. Now that substantial empirical research suggests that implicit memories may influence our behavior in a wide variety of settings, the current approach does not seem to comport with the empirical realities of

157. Unless the process of creating via unconscious plagiarism takes less time or mental energy than something more akin to creation "from scratch."

158. Gordon, *supra* note 33, at 1544–45.

159. *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147–48 (S.D.N.Y. 1924) (Hand, J.) (treating unconscious copying as the legal equivalent of deliberate copying).

memory. In fact, to square the imposition of liability on unconscious copiers with the goals of copyright, it seems that one must discount or completely dismiss any impact implicit memory may have on authors. If cases of truly unconscious copying driven by processes like implicit memory exist, holding such copiers liable is inconsistent with the purposes of copyright. The current approach either suffers from this inconsistency or does not consider that such cases may exist.

4. Administrative Burden

The biggest advantage to treating unconscious plagiarism in the same manner as deliberate plagiarism is that it results in easily administrable law. As the law exists now, judges can apply a bright-line rule. If a plaintiff demonstrates that the defendant copied his work, either by direct evidence or by convincing a court to infer copying based on reasonable access and substantial similarity, then the defendant is liable for copyright infringement regardless of whether the act was conscious. A bright-line rule is particularly appealing in the context of distinguishing conscious from unconscious copying; it would be extremely difficult for a court to credibly and authoritatively decide this question in a given case. Any attempt to make such a determination likely would require an extensive record regarding the defendant's creative processes. If unconscious copying were grounds for a defense, it would inflate the record in cases in which it was raised, although it is important to remember that much of the evidence of unconscious copying may already be raised in regard to access or independent creation. Critics may argue that, if unconscious copying stood as a defense, it would be raised in virtually all copyright infringement cases. However, the rebuttable presumption approach attempts to address this problem.

B. Evaluating the Rebuttable Presumption Approach

Recognizing unconscious copying as a defense to copyright infringement liability serves the incentivizing and, arguably, the moral aims of copyright better than the current law. Further, this approach comports with research demonstrating the influences of implicit memory. The potential tradeoff comes in the form of increased administrative burden, although the likely extent of this burden is debatable. The use of the rebuttable presumption that copying is conscious may decrease the administrative burden of recognizing the defense.

1. Incentivizing Creativity

The rebuttable presumption approach to unconscious copying eliminates the disincentive to create that exists under the current approach. The current approach to unconscious plagiarism creates an uncontrollable risk of copyright liability for an author each time she creates a new work.[160] This risk of losing money through copyright liability decreases the expected value associated with creative expression and may, therefore, have a chilling effect on creative expression.[161] If courts instead employ the rebuttable presumption approach to unconscious copying, the chilling effect resulting from risk of liability decreases and the incentive to create increases. That unconscious copiers face no liability ideally would assure any creator that, barring conscious copying, she will not face liability for copyright infringement. Because the conscious decision whether to copy is within the discretion and control of the creator, creators could know with certainty whether, and control the risk that, they will infringe. There is still, of course, some risk: the fact that an author's copying truly is unconscious does not protect the author from a (potentially expensive) copyright suit in the first place, and there is always the risk that an unconscious copier will be found liable erroneously. Because of these considerations, there remains some risk of infringement associated with any creative expression; however, this risk in the rebuttable presumption regime is less than that in the current regime.

Lastly, critics may argue that preventing authors from recovering for unconscious infringement may weaken original authors' incentive to create in the first place. However, it is unlikely that such a minimal risk will deter authors: copyright defendants already have reason to bring up the sort of evidence necessary for an unconscious copying defense when arguing for independent creation or innocent infringement, yet the issue rarely comes up. Furthermore, the rebuttable presumption that copying is conscious is targeted at keeping the number of cases where an unconscious copying defense succeeds relatively small, so any impact on the incentives of original authors likewise should be small. Overall, under the rebuttable presumption approach, an original author gains more in terms of expected value (through her reduced risk of liability for unconscious copying) than she loses (through the risk of others unconsciously copying her work without liability).

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160. *See infra* Section V.A.

161. *Id.*

2. Moral Fairness

Lessened liability for unconscious copiers is consistent with principles of moral fairness, at least with respect to the unconscious copier. The reasons the current approach is not morally fair work in the opposite direction if courts treat unconscious copying as a valid defense. According to the moral justification of copyright law, authors earn rights in their works through the labor they invest in them. Truly unconscious copiers go through essentially the same creative process to produce their works as independent creators.[162] Therefore, it follows that they should be entitled to rights in the products of their labor, or at least to protection from liability for infringement.[163] The rebuttable presumption approach to unconscious copying accounts for this, and the current approach does not.

Again, the moral justification of copyright law emphasizes that copying causes harm to original authors,[164] and people are generally more forgiving of those who cause harm unintentionally. Truly unconscious copying falls into the class of inadvertent or accidental conduct, so it may be appropriate to reduce liability of unconscious copiers relative to deliberate copiers. In fact, courts already sometimes use their discretion to reduce statutory damages due to copiers' innocent intent, and this practice suggests that moral blameworthiness has at least some relevance to copyright law.[165] By addressing the effect of unconscious copying on damages through a standard defense rather than leaving it in courts' discretion, the rebuttable presumption approach provides a more formal and permanent embodiment of these moral principles in copyright. This approach also may lead to more uniform application of the law.

Critics of the rebuttable presumption approach may object, expressing concern for the moral rights of the original author. The original author did, after all, do something to inspire the copier's work in an unconscious copying scenario; therefore, the original author should be reimbursed. This is a strong criticism. One response is that, since the copying is not deliberate conduct and the copier is the one

162. This assumes that creation resulting from implicit memory of unconscious copying is not any quicker or easier than standard creative processes.

163. Even if unconscious copying provides some advantage—is somewhat quicker and easier than standard creation—the proposed treatment of unconscious copying does not provide identical treatment for unconscious copiers and independent creators. Independent creators are entitled to copyright protection for their original work. Unconscious copiers, in the approach I've proposed, are merely avoiding liability for infringement.

164. Gordon, *supra* note 33, at 1544–45.

165. Neal & Iverson, *supra* note 12, at 305.

facing liability, the interests of the copier should trump the interests of the copyright holder. Another response is that unconscious copying is completely equivalent to (or part of) independent creation,[166] and original authors do not receive any damages based on their moral rights in the independent creation context. Others may disagree with these responses. Even so, in the big picture, this criticism should not defeat the rebuttable presumption approach. Even if, because of the moral rights of the original author, the "moral fairness" factor favors the current approach, the copyright system of the United States focuses far more heavily on incentivizing creativity than on authors' moral rights.[167] Thus, the "incentivizing creativity" factor, which demonstrably favors the rebuttable presumption approach, outweighs the closer "moral fairness" factor in the context of American copyright law. Alternatively, perhaps the defense of unconscious copying could operate as a partial and not a full defense, such that the original author receives something for his influence without placing too much of a burden on the unconscious copier.

3. Recognizes Implicit Memory

The rebuttable presumption approach does a better job of recognizing and comporting with the reality of implicit memory. Allowing unconscious copying as a defense respects the bulk of the research on implicit memory, giving proper weight to the proposition that sometimes people may be influenced by works without being aware of the source of the influence. The use of a rebuttable presumption limits the number of cases in which a theory of unconscious copying is advanced, which undercuts some of the credibility of implicit memory research. If no presumption is employed, however, then the psychological realities of implicit memory may be disregarded in the opposite way: everyone facing a copyright infringement claim simply will claim unconscious copying, even if they have no plausible claim or significant evidence to support them. So, while it may be the case that some truly unconscious copiers are held liable for want of evidence sufficient to overcome the rebuttable presumption, this approach still affords more weight to implicit memory research than the current regime while also offering more consistency with the purposes of copyright.

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166. That is, perhaps unconscious influence is sufficiently widespread in creative processes that it cannot be meaningfully distinguished from "independent creation."

167. Piotraut, *supra* note 16, at 554. This point is also made and emphasized above, *see supra* Section II.A.

4. Administrative Burden

The strongest objections to the rebuttable presumption approach highlight the potentially sizeable administrative burden it may create. Specifically, critics may argue that the negative impact resulting from abandoning the administrable, bright-line rule of the current approach outweighs the advantages of this approach with respect to incentivizing creativity and moral fairness. First, the rebuttable presumption approach requires courts to weigh evidence about whether an act of copying was conscious or unconscious. This distinction is not easy to make. The additional evidence necessary for this determination may create excessively lengthy records, and defendants may use bogus testimony or evidence to support their unconscious copying claims. Also problematic is the possibility that almost *all* copyright defendants may attempt to use the unconscious copying defense (most of them disingenuously), such that the extra litigation over the conscious/unconscious distinction drains judicial resources and lessens efficiency.

While these concerns are legitimate, there is also good reason to believe that the rebuttable presumption approach would not cause severe administrative problems. First, the use of the rebuttable presumption that copying is conscious will take care of some cases by itself. The rebuttable presumption eliminates the need to litigate unconsciousness of copying in a subset of infringement cases: the presumption will prove too much for defendants who can offer no evidence at all that their copying occurred unconsciously and will deter those who do not want to waste their money and resources on a long shot. It seems patently unlikely that conscious copiers will go to great lengths to document an elaborate farce of a "creative process" to create evidence in support of an unconscious copying defense in an eventual copyright infringement suit. Furthermore, defendants already have some reason to introduce evidence that their copying was unconscious: while courts have held that unconscious infringement still is infringement, "innocent intent . . . can reduce the amount of damages, especially statutory damages."[168] Additionally, the evidence introduced to support the defense of unconscious copying would overlap almost entirely with the evidence currently necessary to support the independent creation defense.[169] Thus, in cases where

168. Neal & Iverson, *supra* note 12, at 305.

169. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000) (discussing the independent creation defense); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (listing the elements of subconscious copying).

defendants argue independent creation, the record would not be significantly inflated if defendants also raise unconscious copying as a defense. Evidence of unconscious copying may also overlap with evidence introduced regarding access. The degree to which the rebuttable presumption approach would render the law less administrable is open for debate and will not be known unless there is empirical evidence of the way defendants actually react to the change.

VI. CONCLUSION

While the imposition of liability for copyright infringement on deliberate copiers makes intuitive sense and is consistent with the economic and moral principles underlying copyright law, the picture is less clear with respect to unconscious copying. Currently, the law treats unconscious copying no differently from deliberate copying; both subject the copier to liability for copyright infringement. On the whole, this approach to unconscious copying works against copyright law's primary objective of incentivizing creative expression and, arguably, its secondary aim of protecting authors' moral rights.

This Note proposes an alternative approach to unconscious copying: Allow unconscious copying to function as a defense to copyright infringement, but require defendants to overcome a rebuttable presumption of consciousness. This approach does not require the use of *mens rea* or good faith requirements, but it is analogous to the independent creation defense in that it recognizes that defendants that fall within its scope have not created a "copy" at all. This approach does a better job of furthering the economic and moral objectives of copyright law.

The rebuttable presumption approach is, however, just one possible way to resolve the inconsistency between the aims of copyright law and its treatment of unconscious copying. Other solutions can be devised.[170] The risk of liability for unconscious copying could be influenced through changes to other elements of copyright law. For instance, increasing the size of the public domain would result in less potential for unconscious copyright infringement, as it would be more probable that the unconsciously copied work would fall in the public domain. Another approach is to provide authors an opportunity to examine other copyrighted sources before their own copyrights vest, which may allow them to review their influences and note their own unconscious copying before incurring

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170. *See* Arewa, *supra* note 62, at 544–56 (discussing a variety of potential changes to copyright law to allow artists to create with less fear of infringement liability).

liability. This Note does not endorse these alternatives but highlights that there is a variety of tools that can be used to limit the cases in which unconscious copiers face liability for infringement.

Liability for unconscious copying creates an inconsistency between copyright law in practice and its theoretical underpinnings. The less often unconscious copiers face liability for infringement, the closer copyright law adheres to its guiding utilitarian and moral principles, and the better copyright law is for it.

*Christopher Brett Jaeger**

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