The Subconscious Copying Doctrine Across the Legal System of the United States of America, United Kingdom and France

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Abstract

A person who copies the work of another infringes their copyright in that work. This absolute right was articulated in the seminal US case, Fred Fisher Inc., v. Dillingham,[3] which held that 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." [4] Thus, infringement may occur consciously or subconsciously. This article is a comparative analysis of the doctrine of subconscious copying across the legal systems of the United States of America, the United Kingdom and France. First, it explains the legal standard for proving copyright infringement namely proof of access and proof of substantial similarity. Second, it analyzes the doctrine of subconscious copying in the different legal systems. It concludes that a person may be held liable for copyright infringement by reason of subconscious copying.

Keywords: Subconscious Copying, Unconscious Copying, Copyrights, Copyright Infringement

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[3] 298 F.145 (S.D.N.Y. 1924)

[4] Ibid.

1. Introduction

In the book "Man and his Symbols,"[5] psychiatrist Carl Gustav Jung points out that the brain never forgets an impression, no matter how slight. He believed that one's mind, especially during a creative process, has an ability to recall old impressions and that what is perceived as a fresh idea can in fact be past memories subconsciously recalled.[6] This can give rise to subconscious plagiarism or what psychiatrists call cryptomnesia or concealed recollection.[7] Persons with left-brain creativity such as artists, composers or fashion designers can be particularly susceptible to subconscious copying.[8]

A person who copies the work of another without permission infringes their copyright in that work. Legal authorities of various countries hold that infringement will be found to exist regardless of whether the copying is intentional or unconscious.[9] According to Hastie,[10] "[T]he uncomfortable reality is that a finding of subconscious copying, however, is really a matter of inference and some conjecture from the evidence".[11]

This article will review the concept of copyright infringement. In addition, the paper will further explore proof of infringement which consists of proof of possibility of access coupled with proof of sufficient similarity. Then, it will analyse the concept of subconscious copying with reference to the American, United Kingdom and French decisions on the issues.

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[5] Carl G. Jung et al., *Man and his Symbols* (New York: Doubleday, 1964), 37-38.

[6] Ibid.; Andrew Brown, "Proof of Copying," last modified July 16, 2000, accessed September 2, 2019, https://andrewbrown.co.nz/media/1062/proof-of-copying.pdf.

[7] Ibid., 37; Brown, "Proof of Copying," 4; John Shiga, "Copying machines: Unconscious Musical Plagiarism and the Mediatisation of Listening and Memory," *Transposition* 6 (2016): 1, 1.

[8] Brown, "Proof of Copying," 4.

[9] Jay Sanderson and Leanne Wiseman, "Are Musicians Full of it? the Metaphorical and Figurative Power of Subconscious Copying in Copyright Infringement Cases," *Griffith Journal of Law & Human Dignity* 3 (2015): 53, 56; Andrew Stewart, *Intellectual Property in Australia*, 5th ed. (Chatswood, N.S.W.: LexisNexis Butterworths, 2014), 209.

[10] Peter Hastie, "The Concept of Subconscious Copying: Substantive Law and an Evidentiary Notion," *Australian Intellectual Property Journal* 6 (1995).

[11] Ibid, 16.

2. Legal Standard for Copyright Infringement

Where the plaintiff's and the defendant's works are similar, there are four possible explanations: (1) the defendant's work was copied from the plaintiff's work, (2) the plaintiff's work was copied from the defendant's, (3) both work were copied from a common source, or (4) it is mere chance or coincidence.[12] It is only in the first case that an infringement of the plaintiff's work can have occurred, whether it was done consciously or subconsciously. Although the concept of copying is expressed differently in relation to the different categories of work, the underlying principle is that there can be no infringement unless use has been made, directly or indirectly, of the copyright work.[13]

In dealing with the question of copying, however, there should be borne in mind the well-established principle that there is no copyright in mere ideas, concepts, schemes, systems or methods.[14] Rather the object of copyright is to prevent the copying of the particular form of expression in which these things are conveyed. If the expression is not copied, copyright is not infringed.[15]

Copyright infringement may be direct or indirect.[16] This article will examine direct infringement in the case of subconscious copying. Direct infringement occurs when, without permission, a person does, or authorises someone else to do, any act within the copyright owner's exclusive rights, including reproduction or "copying" of a work. In other words, the prohibition against reproduction does not extend to cases where an author independently produces a substantially similar result without copying.[17]

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[12] Kevin Garnett, *Copinger and Skone James on Copyright* (Vol. 1), eds. Kevin Garnett, Gillian Davies and Gwilym Harbottle, 16th ed. (London: Sweet & Maxwell, 2010), 7-11.

[13] Ibid.

[14] There are many statements in the cases to this effect. For example, L.B. (Plastics) Ltd v. Swish Product Ltd [1979] R.P.C. 551, 619 and 633.

[15] Hollinrake v. Truswell [1894] 3 Ch. 420, 424 and 427.

[16] Anne Fitzgerald, *Intellectual Property Law* (NSW: LBC Information Services, 1999), 67.

[17] Ladbroke (Football) Ltd v. William Hill (Football) [1964] 1 WLR 273, 273, approved in S W Hart v. Edwards Hot Water Systems (1985) 159 CLR 466, 472.

2.1 Elements of Infringement

Proof of copyright infringement is often highly circumstantial, particularly in cases involving music.[18] To succeed on a copyright infringement claim, a plaintiff must establish (1) ownership of a valid copyright; and (2) infringement or copying – that the defendant copied protected elements of the plaintiff's work.[19]

Copying is an essential element of infringement. In order to establish infringement by copying, the plaintiff must prove that there is some "causal connection", which could be seen analogously as "access" in this context,[20] between the copyright work and the infringing work and that the copyright work must be the source from which the infringing work is derived.[21] It is rare for a defendant to admit he or she copied the work or to have an eyewitness to the act.[22] Direct evidence of copying a work is also rare – "people who are copying drawings do not normally do so in public".[23] Without direct evidence of copying, proof of infringement involves fact-based demonstration that, firstly, the defendant had "access" to the plaintiff's copyright work or reproduction of it; and secondly, that there are "substantial similarities" between the plaintiff's work and the defendant's work.[24]

If there are no similarities, evidence of access alone will not be sufficient to prove copying. If there is evidence of access and similarities do exist, the trier of fact must then determine whether the similarities are sufficient to prove copying.[25] It could thus be said that proof of sufficient similarity, coupled with proof of the possibility of access, raises a *prima facie* case or inference of copying for the defendant to answer.[26]

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[18] Three Boys Music v. Michael Bolton 212 F. 3rd 477 (9th Cir. 2000), 481.

[19] Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996).

[20] Carolyn Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of *Gondos v. Hardy*; *Gondos v. Toth,*" *Intellectual Property Journal* 1 (1984-85): 41; Stewart, *Intellectual Property in Australia*, 209.

[21] Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property Law*, 5th ed. (Oxford: Oxford University Press, 2018), 194

[22] Ibid., 195.

[23] Brown, "Proof of Copying," 1.

[24] Three Boys Music, 481; Jeffrey Cadwell, "Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement," *Santa Clara Law Review* 43, no. 1 (2005): 137, 140.

[25] Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Toth," 36.

[26] Francis Day & Hunter Ltd. v. Bron [1963] Ch. 587.

2.1.1 Proof of Access

Proof of access requires "an opportunity to view or to copy plaintiff's work."[27] This is often described as providing a "reasonable opportunity" or "reasonable possibility" of viewing the plaintiff's work.[28] Reasonable access has been defined as "more than a 'bare possibility.'"[29] Moreover, the US law commentator Nimmer has elaborated on the definition: "[O]f course, reasonable opportunity as here used, does not encompass any bare possibility in the sense that anything is possible. Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing the plaintiff's work – not a bare possibility."[30] In brief, the proof of access must extend beyond mere speculation or suspicion. Courts, therefore, attach great significance to evidence of access.[31]

The plaintiff must prove that the defendant had access to the plaintiff's work, otherwise he or she could not have copied. Circumstantial evidence of reasonable access is 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 that work (such as through dealings with a publisher or record company), or (2) the plaintiff's work has been widely disseminated.[32]

Goldstein remarked that in music cases the "typically more successful route to proving access requires the plaintiff to show that its work was widely disseminated through sales of sheet music, records, and radio performances."[33] Nimmer, however, cautioned that "concrete cases will pose difficult judgments as to where along the access spectrum a given exploitation falls."[34]

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[27] Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir.1977).

[28] Three Boys Music, 482.

[29] Ibid.

[30] Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (NY: Matthew Bender & Company, Multi-volume, Loose-leaf, 2013), Volume 4, § 13.02[A], 13-19.

[31] Selle v. Gibb 219 U.S.P.Q. 268, at 271-73 (D.C.N.D. Ill. 1983), as cited in Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Toth," 36.

[32] Three Boys Music, 482.

[33] Paul Goldstein, *Copyright: Principles, Law, and Practice* (Boston: Little, Brown & Co. 1989), § 8.3.1.1., 91; Debra Presti Brent, "The Successful Musical Copyright Infringement Suit: The Impossible Dream," *University of Miami Entertainment & Sports Law Review* 7 (1990): 229, 234.

[34] Nimmer, *Nimmer on Copyright*, 13-22.

Proof of widespread dissemination is sometimes accompanied by a theory that copyright infringement of a popular song was subconscious.[35] Subconscious copying has been accepted since Judge Learned Hand embraced it in a 1924 music infringement case where it was stated that no one can tell what might evoke anything that is registered in our memories and that once it appears that someone has in fact used another's copyright as the source of a production, he or she has invaded the author's rights, even if, in doing so, his or her memory has played him or her a trick.[36] In *Fred Fisher*[37], Hand J found that the similarities between the songs "amounted to identity" and that the infringement had occurred "probably unconsciously, [from] what he had certainly often heard only a short time before."

2.1.2 Proof of Substantial Similarity

Substantial similarity is inextricably linked to the issue of access. When a high degree of access is shown, a lower standard of proof of substantial similarity is required.[38] In the absence of any proof of access, however, a copyright plaintiff can still build a case of infringement by showing that the copyright work and the infringing work are "strikingly similar".[39] In order to prove that the defendant copied, the plaintiff must be able to show that there are similarities between the two compositions since "there may be similarity without copying, [but] there cannot be copying without similarity."[40] Thus, the plaintiff must show that there exists the sort of similarities that *cannot* be explained as coincidence, independent creation, prior common source, or as any theory other than that of copying.[41]

There is a two-part test of extrinsic or objective similarity and intrinsic or subjective similarity to satisfy proof of substantial similarity.[42] The extrinsic test requires

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[35] Three Boys Music, 482.

[36] Fred Fisher Inc. v. Dillingham [1924] 298 F.145, 147-148.

[37] Ibid., 147.

[38] This is known as the "inverse ratio rule." Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1361-1362.

[39] Three Boys Music, 485.

[40] Hirsch v. Paramount Pictures Inc., 17 F. Supp. 816 (1937), 818, as cited in Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Toth," 46.

[41] Ibid., 47-48.

[42] Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir.1977), 1164;

that the plaintiff identify concrete elements based on objective criteria and often requires analytical dissection of a work and expert testimony.[43] A jury may find a combination of unprotectible elements to be protectible expression capable of being infringed under the extrinsic test where "the over-all impact and effect indicate substantial appropriation."[44] Further, "even if a copied portion be relatively small in proportion to the entire word, if qualitatively important, the finder of fact may find substantial similarity."[45] Once the extrinsic test is satisfied, the factfinder applies the intrinsic test. The intrinsic test is subjective and asks "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar".[46]

3. Subconscious Copying Doctrine

Although very different in nature from "knowing infringement", it appears that the possibility of reproduction taking place in an unconscious or unknowing fashion has long been recognized by courts.[47] The terms unconsciously or subconsciously are used synonymously in different legal systems. In the US, the term "subconscious copying" prevails ever since it was introduced in the *Fred Fisher v. Dillingham*[48] case. The British Court of Appeals in *Francis Day & Hunter Ltd. v. Bron*[49], however, used the term "unconscious copying", which still prevails in Britain. This article will also use these terms as synonyms.

Courts in various countries have established that direct infringement may occur consciously or subconsciously.[50] Subconscious copying usually arises in relation to musical

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Three Boys Music, 485; Iyar Stav, "Musical Plagiarism: A True Challenge for the Copyright Law," *DePaul Journal of Art, Technology & Intellectual Property Law* 25 (2014): 1, 16.

[43] Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir.1994), 1442; Three Boys Music, 485.

[44] Three Boys Music, 478.

[45] Baxter v. MCA., Inc., 812 F.2d 421 (9th Cir. 1987), 425.

[46] Three Boys Music, 478.

[47] Francis Day & Hunter Ltd., 587; Staniforth Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, 2nd ed. (Sydney: LBC Information Services, Loose-leaf, 1999), para 9.95; Bently, *Intellectual Property Law*, 197-199.

[48] 298 F.145 (S.D.N.Y. 1924).

[49] [1963] Ch. 587.

[50] Ibid., 614; Sanderson, "Are musicians full of it? The metaphorical and figurative power of subconscious copying in copyright infringement cases," 56.

works, where a songwriter may have been exposed to many melodies and other musical devices over the years, upon which he or she may subconsciously call on when writing a work.[51] In other words, "subconscious copying results when a prior work so impresses itself on the mind of a subsequent author that, quite unwittingly and forgetting where he or she had seen or heard the prior work, he or she produces his or her work under the submerged influence of that prior work acting on his or her mind."[52]

The subconscious copying doctrine works differently, depending on whether evidence of access has been presented. In case where reliable evidence of access to the plaintiff's work has been presented, the fact that the defendant may believe and have reasonable grounds for believing there was no causal connection is no defence.[53] Intention or knowledge has never been a requirement for this primary act of infringement. The fact that a defendant was not conscious or directly aware of the plaintiff's work is not a defence.[54] Moreover, it is suggested that if the reason for the substantial similarity between two works is that the maker of the defendant's work unconsciously or subconsciously drew on the plaintiff's work as his or her source, then copying will still have occurred.[55]

In cases where no real evidence of copying in the form of access to or use of the plaintiff's work has been presented, a plaintiff may often raise a claim of subconscious copying as a means of meeting the need to show a causal link to the copyright work. But a plaintiff's claim that there has been unconscious or subconscious copying does not prove infringement where there is no evidence of access to the plaintiff's work.[56]

Notwithstanding the possibility that in cases lacking proof of access the similarity could be explained by the fact that both works came from a common source, however, it is probable that there is room for an additional argument that the copying occurred or must have occurred subconsciously. In fact, Courts in the United States of America,

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[51] Fitzgerald, *Intellectual Property Law*, 68.

[52] Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Toth," 56-57.

[53] Brown, "Proof of Copying," 4.

[54] Ibid; Stewart, *Intellectual Property in Australia*, 207; Sanderson, "Are Musicians Full of it? the Metaphorical and Figurative Power of Subconscious Copying in Copyright Infringement Cases," 56.

[55] Garnett, *Copinger and Skone James on Copyright*, 7-23.

[56] Brown, "Proof of Copying," 5.

the United Kingdom and France have indicated an acceptance of this argument by the judiciaries, and also showed that it does not matter whether the copying was conscious or subconscious, as long as the two elements indicated, similarity and access, are present.

3.1 Subconscious Copying Doctrine in The United States

In the United States, allegations of subconscious copying have been successful, particularly in cases involving musical works. The subconscious copying doctrine in the US originated in 1924 in the *Fred Fisher Inc., v. Dillingham*[57] case, where the plaintiff had composed a song entitled "Dardanella."[58] The rhyme of this song was accompanied by an "ostinato," described by the court as a "constantly repeated figure, which produces the effect of a rolling underphrase for the melody, something like the beat of a drum or tom-tom, except that it has a very simply melodic character of its own."[59] The court found that the sequence of notes making up the ostinato had previously existed in several classical works, but that the sequence had not been used as an ostinato prior to composition of Dardanella.[60]

A song entitled "Kalua," which was a song in the light opera "Good Morning, Dearie," was composed by Jerome Kern, the defendant, soon after Dardanella had faded from popularity.[61] The plaintiff sued the defendant for copyright infringement, claiming that the ostinato used to accompany the chorus of Kalua was copied from the ostinato accompanying the rhyme of Dardanella.[62] The judge found that the plaintiff had offered sufficient circumstantial evidence of copying to prove infringement.[63] Access was found based on the fact that Dardanella had "gained an enormous vogue, and was sung or played all over the country,"[64] and that Mr. Kern "had necessarily known it, as a musician

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[57] 298 F.145 (S.D.N.Y. 1924).

[58] Ibid., 146.

[59] Ibid.

[60] Ibid; Joel S. Hollingsworth, "Stop me if I've heard this already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," *Hastings Communications and Entertainment Law Journal* 23 (2001): 457, 461.

[61] Fred Fisher, 146-147.

[62] Ibid., 146.

[63] Ibid., 147-148; Hollingsworth, "Stop Me if I've Heard this Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," 462.

[64] Fred Fisher, 146.

knew it."[65] In term of similarity, the court found that the similarity of the two ostinatoes "amounted to identity."[66] Therefore, the partial identity of an ostinato was sufficient to hold a whole song to be a copy of another.[67]

Responding to the defendant's argument that he was unconscious of any plagiarism, the court held that 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", even if the defendant's "memory has played him a trick".[68]

Consequently, the court's adoption of the subconscious copying doctrine was predicated upon its findings that (1) the fact of access was certain (the defendant had "certainly often heard" the plaintiff's work); (2) the works were practically identical (the similarity of the two works "amounted to identity"); and (3) the degree of temporal remoteness – the time between the access and the subsequent creation of the infringement work – was low (the defendant had certainly heard the plaintiff's work "only a short time before").[69] While the court found no reason to doubt Mr. Kern's testimony that he had created his song independently of the plaintiff's work, the court concluded that, with such degree of similarity of two pieces, it could stem only from a subconscious copying of the work.[70] Thus, the plaintiff succeeded on his claim of infringement.[71] American Courts have recognized the subconscious copying doctrine ever since.

For the first five decades following the *Fred Fisher* case, courts in the US were hesitant to apply the subconscious copying doctrine except under circumstances similar to those in the *Fred Fisher* case. However since the 1970s, two cases have not only applied the doctrine, but have applied it to situations where the circumstantial evidence of infringement was much weaker than it was in the *Fred Fisher* case.[72]

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[65] Ibid., 147.

[66] Ibid.

[67] Ibid.

[68] Ibid., 148.

[69] Hollingsworth, "Stop Me if I've Heard this Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," 461-474.

[70] Robin Feldman, "The Role of the Subconscious in Intellectual Property Law," *Hastings Science and Technology Law Journal* 2, no.1 (2010): 6.

[71] Fred Fisher, 148.

[72] Hollingsworth, "Stop me if I've heard this already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," 470-471.

In a case concerning George Harrison's "My Sweet Lord,"[73] the plaintiff, Bright Tunes Music Corporation owned the copyright to the song "He's So Fine," written by Ronald Mack and recorded by the Chiffons. The plaintiff alleged that Harrison's song infringed by way of copying the plaintiff's song, which was released six years earlier.[74] The court found copying based on a strong inference arising out of wide-dissemination access[75] as well as Harrison's concession that he had heard the plaintiff's work at least a few times,[76] and that the two works were "strikingly similar."[77] The implication so created was strong enough to overcome Harrison's assertion of independent creation, and the court held that Harrison had subconsciously infringed the plaintiff's work, stating that "My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copying, and is no less so even though subconsciously accomplished."[78] Furthermore, "the mere lapse of a considerable period of time between the moment of access and the creation of the defendant's work does not preclude a finding of copying."[79]

Thus, the US Court of Appeals for the Second Circuit confirmed that it "is well settled that copying may be inferred where a plaintiff establishes that the defendant had access to the copyrighted work and that the two works are substantially similar."[80] Thus, proof of access and sufficient similarity have become criteria in US music copyright infringement cases.[81] However, the subconscious copying doctrine affects how courts decide whether these elements are met by sometimes giving the plaintiff a presumption of infringement and sometimes denying the defendant a defence, depending on whether access has been established.

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[73] Bright Tunes Music Corp. v. Harrisongs Music LTD [1976] 420 F.Supp 177; ABKCO Music Inc. v. Harrisongs Music LTD [1983] 722 F.2d 98.8.

[74] Bright Tunes Music, 178.

[75] In 1963, "He's So Fine" was number one on the Billboard Charts in the US for five weeks and one of the top 30 hits in England for seven weeks. See ABKCO Music, 998.

[76] Ibid.

[77] Bright Tunes Music, 180.

[78] Ibid., 179-81.

[79] ABKCO Music, 997- 998.

[80] Ibid., 997.

[81] See eg. Warner Brothers v. American Broadcasting Companies, 654 F.2d 204, 207; Ronald H. Selle v. Barry Gibb, [1984] 741 F.2d 896; Scott E. Fruehwald, "Copyright Infringement of Musical Compositions: 'A Systematic Approach'," *Akron Law Review* 26 (1992): 15, 16.

In addition, the subconscious copying doctrine also reduces the requirement to establish access,[82] *Three Boys Music v. Michael Bolton*[83] concerned two songs, both entitled "Love is a Wonderful Thing." One was written and recorded by the Isley Brothers in 1964 and the other was written by the defendant, Michael Bolton and Andrew Goldmark, in 1990 and recorded by Bolton in 1991.[84] Whereas in the previous cases the infringing works were composed only a few years after the originals, Bolton's "Love is a Wonderful Thing" was written more than 25 years after the original version of the Isley Brothers had been released. Further "Love is a Wonderful Thing" by the Isley Brothers was never released on an album and the single was not a hit.[85] After trial, a jury found that the defendants had infringed the plaintiff's copyright. Even though proof of access was said to require more than a "bare possibility",[86] in practice, the mere release of the song coupled with the fact that Bolton was interested in music since he was a child was sufficient to prove access.[87] Furthermore, the US circuit court was stated that "although this may be a weak case of access and a circumstantial case of substantial similarity, neither issue warrants reversal of the jury's verdict."[88] Thus, since the requirements for proof of access are so low, copyright infringement basically depends on a test of sufficient similarity.

Cases of unconscious copying are legally just as actionable as intended copyright infringements. All conventional remedies are available, and in no cases have damages been reduced because of the lack of consciousness of the defendants.[89]

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[82] Hollingsworth, "Stop me if I've Heard this Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," 457 and 472.

[83] Three Boys Music v. Michael Bolton [2000] 212 F.3d 477, 481

[84] Ibid, 480-481.

[85] In 1963, 'He's so Fine' was number one in the American Billboard charts for five weeks and in the English Top Thirty for seven weeks; the Isley Brother's 'Love Is a Wonderful Thing' was only once listed as number 110 of the US Billboard charts, on September 17, 1966. See ABKCO Music, 998; Three Boys Music, 480.

[86] Three Boys Music, 482.

[87] Moreover, a statement made by Bolton during composition of his and Goldmark's song, wondering whether they were creating a song that had already been written, was further evidence to support the plaintiff's case. See Hollingsworth, "Stop me if I've heard this already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine," 472-473.

[88] Three Boys Music, 486.

[89] See eg. Bright Tunes Music, 181; Three Boys Music, 481.

3.2 Subconscious Copying Doctrine in The United Kingdom

In the UK, the type of factual situation taken into account in this doctrine is one where the owner of the rights (the plaintiff) in one piece of music claims that another has heard the plaintiff's music and that this music has formed the basis of a work the defendant subsequently composed, thereby taking from the plaintiff the benefit of the rights owned in the original melody.[90] It was stated that the *Copyright Act* of 1956 did not refer to "copying" as an infringement act. Thus, if it cannot be proved that the defendant sat down with the plaintiff's music in front of him or her and that he or she systematically altered that work to make his or her own – which may be regarded as an arrangement or transcription contrary to section 2(6)(b) of the Act, the plaintiff will have to rely on allegations of reproducing the work in any material form, contrary to section 2(5)(a).[91] This is now covered, in effectively the same wording, by section 16(1)(a) as amplified by section 17(2) of the *Copyright, Designs and Patents Act* 1988 (CDPA).[92]

The landmark case of *Francis Day & Hunter Ltd. v. Bron*[93] involved two popular songs: "In a Little Spanish Town" and "Why." The plaintiffs owned the copyright for "In a Little Spanish Town," which was written by Mabel Wayne, with lyrics by Samuel Lewis and Joseph Young, first published in 1926, and had been extensively exploited in the US and elsewhere ever since.[94] The plaintiffs complained that their copyright had been infringed by the 1959 publication of the song "Why" that was composed by Peter de Angelis whom the plaintiffs alleged reproduced a substantial part of the plaintiff's work.[95] It was alleged that the defendants had either consciously or unconsciously reproduced the first eight bars of the chorus of the plaintiffs' song in the first eight bars of "Why".[96]

The Lord Justices (Willmer LJ, Upjohn LJ and Diplock LJ) disagreed about the matter of unconscious copying. Whereas Diplock LJ, who was supported by Willmer LJ,

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[90] Isobel Brown, "Sound Familiar? The "Chariots of Fire" Case," *European Intellectual Property Review* 8 (1987): 244, 244-245.

[91] Ibid., 245.

[92] Reuben Stone, "Name that tune," *New Law Journal* 142(6544) (1992): 378, 378.

[93] Francis Day & Hunter Ltd. v. Bron [1963] 1 Ch 587.

[94] Ibid.

[95] Ibid.

[96] Ibid.

clearly stated that "neither intention to infringe, nor knowledge that he is infringing on the part of the defendant, is a necessary ingredient in the cause of action for infringement of copyright,"[97] Upjohn LJ was not convinced of this. For him, this question "remains entirely open."[98] However, according to the majority opinion, in the words of Diplock LJ, for a copyright infringement action two elements are required: Firstly, there must be objective similarity between the two works, and secondly, there must be a causal connection between the works: the copyright work must be the source from which the infringing work is derived.[99] In *Francis Day & Hunter,* the UK Court of Appeal required a high standard for proving the causal connection between the works.[100] Mere proof of access was not a sufficient proof of copying.[101] Moreover, it was accepted that the defendant had not consciously copied Spanish Town. Thus, the district court's dismissal of the copyright infringement claim was affirmed. Although he accepted the possibility of unconscious copying, Diplock LJ in an *obiter dictum* indicated that in the case of unconscious copying the remedy of damages may be excluded.[102]

In a later case, *EMI Music Publishing v. Evangelos Papathanassiou,*[103] the High Court Chancery Division seemed reluctant to hold the defendant, famous composer Vangelis, liable for using subconsciously copied material for his theme music for the film "Chariots of Fire." In this case, the plaintiff, Stavros Logarides, who owned the copyright in the music "City of Violets", sued the defendant Vangelis (whose real name is Evangelos Papathanassiou) for infringement of copyright in composing the famous theme to the film "Chariots of Fire." Close attention was paid by the court to a particular four-note sequence common to both pieces of music which was crucial to the plaintiff's argument. However, Whitford J agreed with the defendant's experts who were of the view that this sequence which Vangelis had used in earlier works, was a "tiny and common phrase" and merely a development of the initial ascending fifth in the horns. It was held that the

97 Diplock LJ in Francis Day & Hunter, 624.

98 Upjohn LJ in Francis Day & Hunter, 622.

99 Ibid., 623.

100 Ibid., 588.

101 Ibid..

102 Ibid., 624-625.

103 [1993] E.M.L.R. 306; [1987] 2 WLUK 229 (Ch D); Brown, "Sound Familiar? The Chariots of Fire Case," 244-246; Stone, "Name that tune," 378.

four-note sequence was not sufficient to establish an objective similarity. Furthermore, the judge felt that whilst "City of Violets" had an atmosphere of nostalgia, "Chariots of Fire" was clearly a "striving" theme.[104]

The court, nevertheless, considered whether it was possible for the defendant to have heard and thereby copied the plaintiff's work which had been referred to as the "causal connection" in the *Francis Day & Hunter* case. The plaintiff claimed that the defendant had heard "City of Violets" on occasions in 1975 and 1976 when the defendant met the composer of the piece (the plaintiff) and a friend of his. Although the defendant admitted his presence at some of these meetings, he did not recall the music itself and, although the judge did not rule out the possibility that the defendant had at some point heard the plaintiff's work, he concluded that the defendant's evidence was stronger than the uncorroborated evidence of the plaintiff and his friend. The court held that it could not therefore infer conscious copying since the defendant could not be said to have a sufficient familiarity with the plaintiff's work. Furthermore, it was not possible to infer unconscious copying since the extent of the similarity was small.[105]

Briefly, since degrees of musical similarity are so complex, plagiarism or copying actions will clearly turn on their own particular facts. However, as a result of the *Francis Day & Hunter* and the *Chariots of Fire* case, it would seem that a plaintiff must show that a unique and not commonplace musical passage has been copied by the defendant consisting of probably more than merely a few notes and that there is a "causal link" between the works of the defendant and the plaintiff.[106]

In the UK, the current Copyright, Designs and Patents Act 1988 (CDPA) does not deal with unconscious copying. Generally, there are no exceptions for innocent infringements whatsoever. Only on the level of remedies, section 97 (1) CDPA excludes damages where the "defendant did not know or had no reason to believe, that copyright subsisted in the work." This exception is considered to apply only in "very limited circumstances."[107] The wording does not appear to cover cases of unconscious copying.

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[104] Stone, "Name that tune," 379.

[105] Ibid., 379-380.

[106] Brown, "Sound Familiar? The "Chariots of Fire" Case," 246.

[107] Garnett, *Copinger and Skone James on Copyright*, 7-23.

However, it remains to be seen whether, based on an *argumentum a fortiori,* the courts are willing to apply this provision where the defendant was not even conscious of using another's work. Interim and final injunctions, however, as well as accounts of profits would still be available.[108]

3.3 Subconscious Copying Doctrine in France

France's *Droits d'auteur* or "author's rights" system is an intellectual property regime that, since its inception, regards a broad species of works of authorship as a property of the mind (*une œuvre de l'esprit*).[109] The concept of originality under the French copyright law emphasises the personality aspect of authorial endeavours.[110] Each creative effort results in a protected work of authorship as soon as it constitutes an "imprint of personality" (l'empreinte de la personalité) of its author.[111]

Like the Anglo-American copyright system, the French law recognises that a work can be original and, at the same time, appears identical to a work created beforehand, provided that the author is ignorant of the older work's existence – a principle known as "double independent creation."[112] Subconscious copying (*la réminiscence involontaire*) is also recognised as a potentially infringing act under the French copyright law, but only when the author of the second work has had adequate access to the first work.[113] What distinguishes the French doctrine of *la réminiscence involontaire* from the Anglo-American doctrine of subconscious copying is that a French author is always entitled to bring an infringement suit against a counterfeiter on the sole basis of similarity between the two works.[114] Where similarities between the works of the parties concerned have been

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[108] Section 96 (2) CDPA; on remedies for copyright infringements, see Bently, *Intellectual Property Law*, 1008, and see also Aaron Keyt, "An Improved Framework for Music Plagiarism Litigation," *California Law Review* 76 (1988): 421, 443.

[109] Nadia Walravens, *L'œuvre d'art en droit d'auteur: Forme et originalité des œuvres d'art contemporaines* (Paris: Economica, 2005), 12.

[110] Claude Colombet, *Propriété littéraire et artistique at droits voisins* (Paris: Edition Dalloz, 1997), 27.

[111] Ibid.

[112] André Lucas, Agnes Lucas-Schloetter, and Carine Bernault, *Traité de la propriété littéraire et artistique,* 5th ed. (Paris: LexisNexis SA., 2017), 338.

[113] Ibid., 338-339.

[114] See, *e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1re civ., 16 mai 2006,

established, the defendant shall bear the entire burden of persuading the court that he or she has not had access to the plaintiff's work.[115]

Nevertheless, the French courts have further identified another scenario in which an imitation of someone else's work is deemed non-culpable. This hypothetical scenario is reflected in the concept of "chance encounter" (*la rencontre fortuite*).[116] Contrary to subconscious copying (*la réminiscence involontaire*), the notion of *rencontre fortuite* refers to an imitation that came about by pure chance where the author of the allegedly infringing work could not possibly gain access to the work from which he is accused to have plagiarised.[117] Thus, *rencontre fortuite* seems to differ from the classical notion of "double independent creation" only in the sense that the latter is a conclusion based on the second author's ignorance of a work that predates his own, whereas the former argues – regardless of the imitator's actual knowledge of the existing work – that the defendant could not have infringed the plaintiff's work since he has already proved that he never had access to that work.

In a case that came to the attention of France's highest court in 2013, *Plus belle la vie* case,[118] the author of a detective novel called *L'héritage du lobotomisé* (The legacy of the lobotomized) sued the producers and the broadcaster of a popular French television series *"Plus belle la vie"* for making an unauthorised adaptation of his novel.[119] The court of appeals rejected the plaintiff's claims on the grounds that the plaintiff was unable to establish that the producers and the broadcaster of the series "*Plus belle a*

No.05-11.780, Bull. civ. I, No. 246 (Fr.) ("la contrefaçon d'une oeuvre de l'esprit résulte de sa seule reproduction et ne peut être écartée que lorsque celui qui la conteste démontre que les similitudes existant entre les deux oeuvres procèdent d'une rencontre fortuite ou de réminiscences résultant notamment d'une source d'inspiration commune.") ("a counterfeit of a work of the mind may result from its reproduction alone and cannot be dismissed except when the person who contests it demonstrates that the similarities existing between the two works are the results of a chance encounter or of reminiscences resulting notably from a common source of inspiration.") (my translation).

[115] Ibid.

[116] Lucas, *Traité de la propriété littéraire et artistique*, 338.

[117] Ibid., 339.

[118] Cour de cassation [Cass.] [supreme court for judicial matters] 1re civ., 2 oct. 2013, No.12-25.941, Bull. civ. I, No. 197 (Fr.) [hereinafter *Plus belle la vie*].

[119] Ibid.

vie" had knowledge of the novel *"L' inheritance du lobotomisé"* before the writing of the script.[120]

The Court of Cassation (Cour de cassation), however, reversed the appellate court's ruling. The French High Court began by restating the central tenets of the French copyright law: that the author of a work of the mind is always entitled to enforce his rights against anyone "independently of any public disclosure" of his work, and that "the counterfeit of this work …. cannot be dismissed except when the person who contests it demonstrates that the similarities existing between the two works proceed from a fortuitous encounter *(la rencontre fortuite)* or reminiscences coming from a common source of inspiration."[121] The Court then noted that the court of appeals erred by imposing the burden of demonstrating access on the claimant rather than on the defendant, reasoning that such assignment of burden was not allowed in the light of the plain texts of Articles L. 111-1, L. 111-2 and L. 122-4 of the French Intellectual Property Code.[122]

4. Conclusion

Under US, UK, and France law, when a work is copied, even if the person making the copy does not know or have reason to know that the work is copyrighted, an infringement may still be found. Importantly, even subconscious copying has been held to be an infringement in all three countries. As can be seen from cases discussed earlier, the defendant's innocent intent is irrelevant to a finding of liability in an infringement case. This may at first seem strict, but a plea of innocence in a copyright action will often be easy to claim and difficult to disprove. If the position were otherwise, copyrights would lose their value.[123] Therefore, the possibility of subconscious copying as an infringement reinforces the absence of intent as an element of a copyright action, and to that extent makes this avenue of protection of intellectual property easier to establish.[124]

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[120] Ibid.

[121] Ibid.

[122] Ibid.

[123] Crowe, "The Song You Write May Not Be Your Own!: Proving Musical Copyright Infringement: A Review of Gondos v. Hardy; Gondos v. Toth," 59-60.

[124] Hastie, "The Concept of Subconscious Copying: Substantive Law and an Evidentiary Notion," 26.

As commentators pointed out "Any other conclusion would make it even more difficult for the copyright owner to protect his invisible estate than it is at present."[125] The notion that a person may be held liable for infringement of copyright by reason of subconscious copying also protects intellectual endeavour in those cases where the defendant happens to present well as a witness.[126]

While all three countries uphold this basic principle, there are differences in application. In the case of French law, although the creator of a work may bring a copyright infringement suit against a defendant as a matter of right, regardless of whether the creator has released or divulged his work to the public before alleged infringement, the defendant may use the fact that the plaintiff has withheld or deliberately shielded his work from the public's awareness as a defense that any similarity existing between the works is a result of nothing more than a chance encounter (*rencontre fortuite*) of the most innocent kind and not an unlawful imitation by unwitting reminiscences.

In all the countries, when assessing cases of subconscious copying, courts must make a judgment of the veracity of the parties and the evidence. One of the most helpful checklists was provided by Wilberforce J at first instance in *Francis Day & Hunter*.[127] According to this checklist, whether there is copying is a judgment of fact to be assessed upon a number of composite elements: (1) The defendant's degree of familiarity (if proved at all or properly inferred) with the plaintiff's work, (2) the character of the work – particularly its qualities of impressing the mind and the memory, (3) the objective similarity of the defendant's work, (4) the inherent probability that such familiarity, as is found, could be due to the existence of other influences on the defendant, and (5) the quality of the defendant's own evidence on the presence or otherwise in his mind of the plaintiff's work.[128]

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[125] Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 4th ed. (London: Oxford University Press, 2001), 152; See also ABKCO Music, 999.

[126] Hastie, "The Concept of Subconscious Copying: Substantive Law and an Evidentiary Notion," 26.

[127] [1963] Ch 587.

[128] *Francis Day & Hunter* [1963] Ch 587, [1963] 2 All ER 16, per Willmer LJ at 614, adopting the words of Wilberforce J at first instance.

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