

2013

An Argument that Independent Creation is as likely as Subconscious Copying in Music Infringement Cases

Rebecca Skirpan
Seton Hall Law

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



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Skirpan, Rebecca, "An Argument that Independent Creation is as likely as Subconscious Copying in Music Infringement Cases" (2013). *Law School Student Scholarship*. Paper 112.
http://scholarship.shu.edu/student_scholarship/112

An Argument that Independent Creation is as likely as Subconscious Copying in Music
Infringement Cases

Rebecca Skirpan

I. Introduction

Throughout music history, composers have been limited by certain musical rules, such as the rules of voice leading for the four-part harmonies popular in Bach's time, or the rules of counterpoint used in Western classical music.¹ These rules typically encompass what is considered to sound musically pleasing for that time period or for that particular musical genre. Although formal rules have not been developed for modern-day genres, such as pop, hip-hop, or rock music, certain rules have been subliminally adopted that define the musical elements that fans crave. These rules are the building blocks of Western music theory: notes, scales, chords, song-structure and common rhythmical patterns.² Well known legal minds have agreed that in cases of striking similarity between two pieces, yet with no intentional copying, subconscious copying is the only explanation. This article argues that the potential for independent creation in music infringement cases is an alternative, and just as likely, explanation for two substantially similar musical pieces.

Given that assertion, how can courts correctly identify these cases, while preserving both the subconscious copying doctrine and the doctrine of independent creation? The solution lies in unveiling the mystery of musical composition rather than making unjustified assumptions that independent creation is unlikely. By understanding

¹ MICHAEL MILLER, *THE COMPLETE IDIOT'S GUIDE TO MUSIC THEORY* viii (2005). (Music theory defines the ways you can arrange music and without it all you have is noise).

² *Id.*

how music works, one can see that many musical elements are rules or guidelines, which warrant greater protection for musicians accused of subconscious copying. This article proposes to heighten the evidentiary threshold for finding that the musician had access to the original work and to strengthen the application of the independent creation defense.

Part II of this article summarizes the legal aspects of music infringement cases. It focuses on the topics of subconscious copying and independent creation. It will explain what a plaintiff must show to prove subconscious copying. This section will describe the legislative history and congressional intent behind the concept of independent creation, which is embodied in the statutory requirement of originality.

Part III explains the musical rules that limit the choices of songwriters. This section is meant to describe the reality of the songwriting process. Music is a commonly misunderstood art form. Understanding music is the only way for the law governing its ownership to be fair. Courts have held that some cases must be subconscious copying, simply because judges cannot image that anything else explains the similarity. By analyzing the limitations inherent in the songwriting process, one can see that there is potential for two composers to create the same thing. By explaining musical rules, one can gain an understanding of why songwriters make the choices they do. Given the same small musical idea, the study music theory can lead two composers to make similar musical decisions.

Part IV of this article will analyze the musical works from *Fisher, Inc. v. Dillingham*³ and *Bright Tunes Music v. Harrisongs Music, Ltd.*⁴ These are cases where the court found that the infringing work was subconsciously copied. The analysis in this

³ *Fisher, Inc. v. Dillingham* 298 F. 145, 147 (D.N.Y. 1924).

⁴ *Bright Tunes v. Harrisongs Music, Ltd.* 420 F. Supp. 177 (S.D.N.Y. 1976).

section will question how possible it is that the works were actually independently created. It will rely on the music theory discussed in part III when considering this question.

Part V will consider the difficulties in striking a balance between the subconscious copying doctrine and the potential for independent creation.

Part VI will propose procedural and evidentiary alterations in the adjudication of subconscious copying cases. It will suggest a new evidentiary standard specifically for cases where the plaintiff argues that subconscious copying occurred. This standard is meant to preserve the potential for independent creation in order to prevent music infringement cases from operating under a strict liability standard like that of patent law and trademark law. It will also propose making independent creation an affirmative defense to actual copying.

II. The Doctrines of Independent Creation and Subconscious Copying

In cases where a plaintiff alleges copyright infringement of an underlying musical work, the defendant is purported to have violated one or more of the plaintiff's exclusive rights under Section 106 of the Copyright Act of 1976 ("The Act").⁵ The cases in this article all involve violations of the reproduction right. The right of reproduction protects the exclusive right to reproduce a work in "copies or phonorecords."⁶ In these cases a copy is likely to be embodied in sheet music or other forms of music notation and a phonorecord is likely to be embodied in a recording.⁷ Congress provided a clear statutory

⁵ 17 U.S.C. 106 (2010).

⁶ *Id.*

⁷ 17 U.S.C. 101 (2010). (copies are defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or

framework in The Act. Section 501(a) specifically explains that a copyright is infringed when someone violates any of the exclusive rights set out under sections 106-122 of The Act.

To show that a defendant violated a songwriter's copyright, the songwriter must show actual copying and that the infringing work was substantially similar to the original.⁸ Copying may be proven by circumstantial evidence. Courts will look to whether there is striking similarity and a showing that the defendant had access to the original work.⁹ If proven by the defendant, independent creation serves as an absolute defense against copying.¹⁰ Once a plaintiff can show copying, he or she must show improper appropriation by showing that the works are substantially similar.¹¹

Copying can be shown when the copying was subconscious. Judge Learned Hand first developed the theory of subconscious copying in *Fred Fisher, Inc. v. Dillingham*.¹² When considering the similarity between the musical works at issue, Judge Hand concluded that there could be no other explanation for the similarity but that the defendant subconsciously copied the original composer's work.¹³ Because there is no official scienter requirement for the copying element, subconscious copying is still

with the aid of a machine or device." Phonorecords are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Both satisfy the fixation requirement for creating a copyrightable work.)

⁸ MATTHEW BENDER & COMPANY, INC. 3-2 NIMMER ON COPYRIGHTS, § 12.10 (2005) (sometimes substantial similarity is referred to as improper appropriation.)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. N.Y. 1946).

¹² *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (D.N.Y. 1924).

¹³ *Id.*

considered to be copying under The Act.¹⁴ Although it is a highly criticized standard, it has been applied to cases like *Bright Tunes Music v. Harrisongs Music, Ltd.* and *Three Boys Music Corp. v. Bolton*.¹⁵

The defense of independent creation is founded in the originality requirement of the Copyright Act and is used to defend against alleged copying.¹⁶ “In theory, the originality requirement tests the putative author’s state of mind: Did he have an earlier work in mind when he created his own?”¹⁷ If two authors create substantially the same work independently, both enjoy rights to their work.¹⁸ The originality requirement does not exist in the other intellectual property areas, trademark law and patent law. As Judge Hand points out in *Fisher*, “One may infringe a patent by the innocent reproduction of the machine patented, but the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted.”¹⁹ Similarly, the ability to register a trademark does not depend on its originality.²⁰ However, because of the significant probative value given to the “striking similarity” element of proving copying, courts have made proving independent creation a tremendous feat.²¹

¹⁴ *Id.*

¹⁵ *Three Boys Music Corp. v. Bolton* 212 F.3d 477 (2001).

¹⁶ MATTHEW BENDER & COMPANY, INC. 4-3 NIMMER ON COPYRIGHTS, §13.01 (2005).

¹⁷ PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.2.1.1., *see also* *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.* 528 F.3d 1258, 1262 (10th Cir. 2008).

¹⁸ *Id.*

¹⁹ *Fisher*, 298 F. at 147.

²⁰ 3-10A GILSON ON TRADEMARKS § 10A.09 (“The mark need not express an original thought to be registrable.”)

²¹ NIMMER, *supra* note 16 “Where the similarities between the two programs are not overwhelming, and the subject matter of the program naturally limits the variety of available approaches, claims of independent creation may have merit and warrant serious consideration.”

Despite its difficulty to prove, independent creation is important to copyright jurisprudence and is established in the concept of originality. The requirement for an “original work of authorship” is codified in Section 102 of The Act. Interestingly enough, the 1976 Act does not specifically define this terminology. Instead, the legislative history explains that it “is intended to incorporate without change the standard of originality established by the courts under the [1909 Act].”²² Thus, Congress has directly approved the requirement of originality and the potential for independent creation.

Although subconscious copying was not implied or mentioned in The Copyright Act of 1976, the lack of inclusion may be viewed as Congress’ acceptance of the doctrine. Although Judge Hand did not coin the phrase, “subconscious copying,” in *Fisher*, the concept was clearly conveyed.²³ That opinion was written in 1924. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.* was written in 1976, when today’s Copyright Act was proposed. The Act was applicable in 1978. By that time, courts must have understood the doctrine of subconscious copying. In addition, there have been subsequent amendments, and none seem to question the doctrine.²⁴

²² H.R. REP. NO. 94-1476 at 51-52, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65, 5670.

²³ *Fisher*, 298 F. at 147. (“Whether he unconsciously copied the figure, he cannot say, and does not try to. Everything registers somewhere in our memories, and no one can tell what may evoke it. 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. I cannot really see how else to account for a similarity, which amounts to identity. So to hold I need not reject his testimony that he was unaware of such a borrowing.”)

²⁴ For a comprehensive list of all amendments and revisions to 17 U.S.C., *See* Cornell University, CONNELL UNIVERSITY LAW SCHOOL’S LEGAL INFORMATION INSTITUTE (LII), (March 4, 2012 at 5:00 PM), <http://www.law.cornell.edu/uscode/text/17>.

Left with both the doctrine of subconscious copying and that of independent creation, the question remains as to whether these two doctrines create legal inconsistencies. When finding copying, the intent of the songwriter is not considered. However, when considering originality, a building block for establishing the copyrightability, intent of the creator is considered.²⁵ This seems very similar to showing intent. If the idea of a musical work was neurologically conceived in the brain because of exposure to another work, then it is subconscious copying. If it came about because of a musical process, perhaps from an artist with a similar musical background to the original songwriter, then it is considered independent creation. However, in both cases the defendant has the exact same state of mind: he or she is unaware of the origins of the idea. Actually finding the right answer seems impossible. How can courts know if a thought is subconscious when a person is not aware of their subconscious? How should courts reconcile both doctrines in order to maintain the existence of both?

III. The Limitations of Songwriting

Songwriting is a process involving the use of musical rules. In Judge Owen's opinion in *Bright Tunes*, he asserts, "Seeking the wellsprings of musical composition – why a composer chooses the succession of notes and harmonies he does –whether George Harrison or Richard Wagner –is a fascinating inquiry."²⁶ If it were as fascinating an inquiry as Judge Owen claims, then perhaps he would have considered the music theory behind the musical pattern. Instead he quickly jumps to the conclusion that Harrison subconsciously knew that the "particular combination" would appeal commercially to

²⁵ GOLDSTEIN, *supra* note 17.

²⁶ *Bright Tunes*, 420 F. Supp. 177 at 180.

listeners.²⁷ Aside from the fact that he seems to assume Harrison had an economic motive in songwriting, Judge Owen makes the common misjudgment that the various possibilities for composers are indeed a “wellspring.” In reality, composers such as Harrison are limited by many musical rules.

A songwriter’s musical choices are far more limited than courts assume. Musical notes themselves are limited to the range twelve tones, which is called a “chromatic scale” when played in sequence.²⁸ In reality, a different sound exists from frequency to frequency but western music organizes these sounds into the twelve tones. The table below displays the twelve tones in relation to their measurement in hertz.²⁹ In eastern music, quartertones and other notes in between these twelve tones are still in use.³⁰ These notes sound odd to western listeners. Even when musical groups utilize eastern instruments, they tend to do so in the context of western music theory.³¹ Therefore, the first limitation a western songwriter faces is the choice of only twelve tones.

Example (starting at 440 Hertz)³²

²⁷ *Id.*

²⁸ NICHOLAS SLONIMSKY. WEBSTER’S NEW WORLD DICTIONARY OF MUSIC, 85 (1998). (Chromatic: Progression of notes by semitones or half steps; a “semitone” is the smallest division in the equally tempered scale; the “equally tempered scale” is also called the 12-equal temperament and has been the foundation of Western music since the mid-18th century).

²⁹ RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (2000). Hertz: the SI unit of frequency, equal to one cycle per second. Abbr.: Hz

³⁰ SLONIMSKY, *supra* note 28 at 418, 202 (quartertone: half a semitone, a logarithmic interval used by 20th Century composers, also used in non-Western music. Quartertones are found in the ancient Greek enharmonic scale).

³¹ TERENCE J. O’GRADY. THE BEATLES, A MUSICAL EVOLUTION, 80 (1983). (describing how the Beatles use nonharmonic tones, perhaps with a sitar, over stereotypical Western chord progressions).

³² Jonathan J. Dickau, THE EQUAL TEMPERED CHROMATIC SCALE. (March 4, 2012, 4:00 PM) <http://musicmaking.info/ChromaticScale.htm>.

Note	A	A#/Bb	B/Cb	C	C#/Db	D
Tone	1	2	3	4	5	6
Hertz	440	466.16	493.88	523.25	554.37	587.33
Note	D#/Eb	E	F	F#/Gb	G	G#/Ab
Tone	7	8	9	10	11	12
Hertz	622.25	659.26	698.46	739.99	783.99	830.61

The twelve potential notes are further limited in most works to the manner in which scales function in music. A typical scale has seven notes.³³ For example, a C Major Scale is the scale that has no sharps (#) or flats (b).³⁴

Example: The C Major Scale: C D E F G A B (scale degrees: 1, 2, 3, 4, 5, 6, 7)

When a song is said to be in a certain “key,” it really just means that the notes are derived from a scale. Sometimes there are “accidentals,” which are notes outside of the scale, but these usually occur in predictable situations. Accidentals may either imply the use of a different scale –or a “key change” – or they may be used to make the melody sound smooth. A “leading tone” in a minor scale is an accidental that allows the 7th note of the scale to lead up in a melodically pleasing way to the “tonic” note of the scale. More

³³ MARTA ARKOSSY GHEZZO, *SOLFEGE, EAR TRAINING, RHYTHM, DICTATION, AND MUSIC THEORY: A COMPREHENSIVE COURSE*, 24 (University of Alabama Press, 1980). (“A scale is a step-by-step succession of seven different notes with the first note repeated at the octave. The name of the scale (C,D,E, etc.) is given by the first step while the mode (major or minor) is determined by the manner of organizing the tones and semitones.” Tones are also called “whole steps” and semitones are called “half steps.” A major scale consists of: whole, whole, half, whole, whole, whole, half). *See also* MILLER, *supra* note 1 at 30-35, (There are 15 major scales and 15 minor scales. The minor scales can be altered to be natural minor scales, harmonic minor scales, and melodic minor scales (a more in-depth discussion on minor scales would be beyond the scope of this paper)).

³⁴ MILLER, *supra* note 1 at 18. (Sharps and flats are halfway above or below a note. A C-sharp, or C#, is halfway above a C.)

adventurous composers will use accidentals in unique ways, but a western listener will recognize that it sounds odd. So, a songwriter is limited by the fact they write music within a certain key –or must use the notes of a certain scale.

Scales work in a particular way, creating further limitations. The first note of a scale is called the “tonic” and is often returned to in the piece.³⁵ Many pieces begin or end on the tonic or the fifth note of the scale.³⁶ Albeit, these ideas cannot be adequately expressed in the scope of this article, the take-away so far is that songwriters are not limitless in their choices of potential notes, because of the 12-tone system and scales. When a songwriter begins a phrase, only certain notes will end that phrase in a way that is pleasing to the ear. The music theory behind the use of scales is a significant limitation to songwriters.

Most songwriters are also limited by the use of chords. The first note, third note and fifth note form a triad chord. There are other types of chords. When a songwriter plays a series of chords, it is called a chord progression. Some chord progressions are quite common in certain genres. For example, the band Axis of Awesome has a comedy sketch where they bring to light 60 pop songs that utilize the same four-chord progression.³⁷ Common chord progressions are most likely in the public domain. What

³⁵ MILLER, *supra* note 1 at 28. (The first note of a scales is called the tonic.)

³⁶ For example, the melodies from “Joy” and “E.T.” in *Baxter* begin on the first scale degree and end on the last. (see BAKER, MAUREEN, *supra* note 51 at page 1615 for list of notes) and the short melody in *Bright Tunes* starts on the fifth scale degree and ends on the first (see *Bright Tunes* at 178, do, re, mi, fa, sol, la, ti, do is the same as 1, 2, 3, 4, 5, 6, 7, 1 and Judge Owen describes the melody as beginning on sol (5) and eventually ending on do (1), see also note 38 on chord progressions. Most chord progressions end on the tonic chord.

³⁷ Rush, Andrea. *What Anna Karenina Might Have Said About Copyright Qualifications Under Canadian Law*. 7 J. Copyright Soc'y 667, 672, see also *The Axis of Awesome*: 4

elements of music are in the public domain is a discussion for another day. What has now been added is the fact that composers of popular music are further limited by the common practice of structuring songs around chord progressions.³⁸

Outside of note choices, there are typical rules guiding a song structure. Every composition begins with a small musical idea. It is common for the length of a musical phrase to be four bars long. “Bars” is another word for measures.³⁹ Often, a phrase will be doubled to eight bars. As in poetry, there are many formats for songwriting. For example, in jazz music, a common format is AABA.⁴⁰ In classical music, some common song structures are sonata-allegro, themes and variations, and fugues.⁴¹ The invention of a new song form is very rare.⁴²

There are other significant norms in musical genres, like rhythmical beats that are recycled over and over again. If you tell an educated drummer to play a “bossa nova”⁴³ beat, they will know exactly what you mean. Many will even have the exact same interpretation. Thus, the twelve possible notes, the use of scales and how they operate,

Chords (2001) Official Music Video (March 4, 2012, 5:00 PM)

<http://youtu.be/oOIdewpCfZQ>.

³⁸ MILLER, *supra* note 1 at 127-135 (A chord can be created out of any one of the seven notes of a scale and usually leads back to the tonic chord to resolve a piece of music. Chord progressions are based on rules of chord leading, where certain chords lead naturally to the next. For example, the chord based on the sixth scale degree leads best to the two, four, five or one chord. There are several common chord progressions, such as one-four-five, that are used over and over again for their pleasing chord leading qualities (see footnote 31 where Axis of Awesome demonstrates the use of a common chord progression).)

³⁹ GHEZZO, *supra* note 33 at 21-22, (“The measure is a musical fragment between two equally accented beats delimited by bar lines.”).

⁴⁰ MILLER, *supra* note 1 at 148.

⁴¹ COPLAND, AARON. WHAT TO LISTEN FOR IN MUSIC. 115 (1939).

⁴² *Id.* at 116.

⁴³ SLONIMSKY, *supra* note 28 at 50 (bossa nova: Portuguese for “new beat;” popular Brazilian song and dance music influenced by samba and jazz and popular in the late 1950’s and 1960’s).

the use of chord progressions, the use of established song structures, and the use of common rhythms now limit our hypothetical songwriter.

Having defined a series of music theory ideas, one might see them as akin to scenes a faire. Scenes a faire are literally "scenes which 'must' be done."⁴⁴ These are clichés that must be expressed to complete a plot line or set the stage of a play.⁴⁵ For example, a play set in a hospital cannot be copyrighted to the extent that there exists a certain configuration of medical equipment. These details must be included to show that it is a hospital scene and are scenes a faire. In art blue and yellow create green, just as in music, C, E, and G create a C major chord. The combination of musical notes can be seen as akin to color theory. In math one plus one equals two, just as in music, the combination of two "quarter notes" equals a "half note."⁴⁶ Music theory can be seen as scenes a faire necessary to create the setting of a musical genre, or they can be viewed as scientific rules, like that of math or color theory.

Either way, these musical rules or tools for creation should be protected. Furthermore, they should be viewed as likely to occur between two different musicians with a similar education. The relevance of these musical limitations is that without them, music would not sound pleasing. Knowledge of the same rules may create a tendency towards similar songwriting habits. Every piece of music starts with a single musical idea.⁴⁷ As George Harrison describes in *Bright Tunes*, he came up with his musical idea by "vamping" or playing out the same musical pattern over and over again and letting it

⁴⁴ MATTHEW BENDER & COMPANY, INC. 4-13 NIMMER ON COPYRIGHT § 13.03, (2005). (quoting *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1949)).

⁴⁵ *Id.*

⁴⁶ SLONIMSKY, *supra* note 30.

⁴⁷ COPLAND *supra* note 41 at 23, ("Every composer begins with a musical idea... He doesn't know where it comes from—he has no control over it.").

evolve into something new.⁴⁸ Many songwriters recycle old ideas when coming up with new music.⁴⁹ Making sure that subconscious copying does not become an assumption where the potential for independent creation exists will protect musical habits that have developed because of the limitations of music theory.

While copyright law itself has a very basic goal, to balance access to information while providing creators with incentives⁵⁰, the nature of the music industry provides some unique issues in creating a market of western listeners who expect songwriters to fall within these musical limitations. An assumption against the potential for independent creation may provide current songwriters too much power, while limiting the ability of future songwriters to compose freely. Restructuring the copyright law in a manner that preserves both independent creation and subconscious copying, not just in theory, but also in reality, would not upset the balance between incentives and access. It would create greater access for songwriters and potentially greater incentives because the fear of unjustified litigation would not exist.

Congress should react so that the law is fair in light of how limited songwriters are. To allow for music infringement cases to fit into the framework of the Copyright Act of 1976, courts should lean heavily on the understanding of expert witnesses in order to

⁴⁸ *Bright Tunes*, 420 F. Supp. at 179.

⁴⁹ COPLAND *supra* note 41 at 23, “[A composer] collects musical ideas.”

⁵⁰ MICHAEL D. BIRNHACK. 4-19E NIMMER ON COPYRIGHT § 19E.01 INTRODUCTION TO NIMMER ON COPYRIGHT (2012). (Intellectual property is a public good. Conflict exists between the authors' desire to exclude the public and the nature of the public good as accessibly by many at once. “The public good is to foster creativity, which is crucial for the flourishing of culture. Dissemination of creative works and access to them are basic ingredients of research and education, and are crucial for a vibrant civic life and thriving of the political community. But copyright law allows for control of works, allowing their owner to limit the dissemination of works and access to them.”).

take into account a sophisticated musical understanding.⁵¹ The potential for independent creation to result is more likely than courts assume and musicologists should be key in helping courts understand this concept. The next section will explore the originality of works determined to be subconsciously copied. The line between what is subconscious copying and what is independent creation may be more obscure than Judge Owen makes it out to be.

IV. A Closer Look at Cases Involving Subconscious Copying

The case that introduced the idea of subconscious copying was *Fred Fisher, Inc. v. Dillingham* 298 F. 145 (S.D.N.Y. 1924) in a decision by Judge Learned Hand. In concluding that the piece was subconsciously copied, he wrote, “I cannot really see how else to account for a similarity, which amounts to identity. So to hold I need not reject his testimony that he was unaware of such a borrowing.”⁵² However, Judge Hand’s understanding of music hardly warranted such a broad statement. His “comparative method” test for finding substantial similarity in music infringement cases is simplistic, ignores rhythmical values, and is rarely considered today.⁵³ The point being, should the fact that Judge Hand sees no possibility for independent creation create the standard today? This early case on the subject of subconscious copying quoted a well-respected writer on originality who explains,

“Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner or for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been

⁵¹ Baker, Maureen. *A Note to Follow So: Have we Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. Cal. L. Rev. 1583 (1992) at page 1619, (“Because the jury needs to be educated, the musicologist would appear to play a necessary part in the proceedings.”)

⁵² *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (D.N.Y. 1924).

⁵³ Baker, *supra* note 51 at page 1605.

unlawful copying. In many cases the natural or necessary resemblance between two productions which are the result of independent labor will amount to substantial identity. . . .no conditions as to originality are imposed upon the makers, except that each shall be the producer of that for which he claims protection.”⁵⁴

Here, the concepts of originality and independent creation are considered, as the doctrine of subconscious copying becomes law. Judge Hand ultimately makes an assumption against independent creation. But was this case decided correctly?

A musical analysis of the ideas in *Fred Fisher* show that the ideas not so unique as to make the potential of independent creation impossible. The complaining work is "Dardanella" by Felix Bernard & Johnny Black and the defending work is "Kalua" by Jerome Kern.⁵⁵ The similarity between the two works lies in the ostinato accompaniment.⁵⁶ An osinato is a continually repeating musical pattern, originally used in counterpoint.⁵⁷ Counterpoint is a method of composition popular in Johannes Sebastian Bach's time.⁵⁸ Although the rules of counterpoint no longer dictate what people today hear as sounding harmonious, most all music students and composers have studied it. To compose an ostinato pattern is by no means unique.

The ostinato in Dardanella contains the following pattern:⁵⁹

Note	C	G	C	G	D	G	E	G
Scale Degree	1	5	1	5	2	5	3	5

⁵⁴ *Fisher* 298 F. 145 at 151 (quoting *Drone on Copyright* at page 205.).

⁵⁵ UCLA, Music Copyright Infringement Resource, (March, 4, 2012 5:00 PM) <http://cip.law.ucla.edu/cases/1920-1929/Pages/fredfisherdillingham.aspx>.

⁵⁶ *Fisher* 298 F. 145 at 147.

⁵⁷ SLONIMSKY, *supra* note 28, at 370 (defining ostinato.).

⁵⁸ *Id.* at 104-105 (Counterpoint involves rules that create patterns thought to sound “consonant” or harmonious).

⁵⁹ Edward Samuels, *Chapter 7, THE ILLUSTRATED STORY OF COPYRIGHT*, (March 6, 2012 3:30 PM), <http://www.edwardsamuels.com/illustratedstory/isc7.htm>.

The ostinato in Kalua contains the following pattern:⁶⁰

Note	C	C	D	E
Scale Degree	1	1	2	3

Above is a depiction of the notes and the relative scale degrees. Refer back to Part III, where the role of scale degrees was discussed. Just like my example of a scale in Part III, this is in C Major. Although there are twice as many notes in Dardanella's pattern, these notes are played twice as fast so both patterns are the same length. The basic pattern is the one depicted above in Kalua: one, one, two, and three. Bass players often alternate between the first and fifth scale degrees when playing a "walking" bass line.⁶¹ Therefore, in Dardanella, the presence of the G's or the fifth scale degree repeated after each note is just the composer's way of mimicking a base line and can be ignored for our purposes. Essentially, this case is over ascending up a c-major scale by just three notes. This is hardly unique. The defendant listed many pieces where this had been done before.⁶² The defendants did not list an example of this phrase as an ostinato.⁶³ Judge Hand's reasoning seems to suggest that ascending a scale by three notes in the context of an ostinato pattern is inherently original under the originality requirement. Otherwise, he would have not concluded that there could be no other explanation but for subconscious copying.⁶⁴ However, within in the context of the basic music theory principles established in Part III concerning scales and common musical forms, it seems possible that two

⁶⁰ *Id.*

⁶¹ MILLER *supra* note 1 at 174, many bassists stop at the third or fifth of the chord, instead of just the root.

⁶² *Fisher* 298 F. 145 at 146.

⁶³ *Id.*

⁶⁴ *Id.* at 147.

composers could independently create such a basic musical idea. The question of whether this was truly a case of independent creation or subconscious copying is still unresolved.

Likewise, the musical ideas in *Bright Tunes* make sense under the rules of music theory and could have been conceived independently. Several elements are simply true to that time period and genre. The song format and percussion choices are like many traditional rock songs from the 60's-70's. Judge Owens opinion expresses the melodic motifs in sol-fa as "sol mi re" and "sol-la-do-la-do."⁶⁵ In other words the first motif consists of the fifth, third and second scale degree (5, 3, 2). One who has studied music theory would explain that this works because it outlines a descending triad, but instead of landing on the first scale degree, which would make the pattern feel resolved, it ends on the second scale degree, leaving the listener waiting for the next part. A phrase that leaves a basic triad unresolved is very simple and can probably be found in many musical works.⁶⁶ The next motif consists of the fifth, sixth, first, sixth, and first scale degrees (5, 6, 1, 6, 1). This works well to resolve the previous motif, because not only does it start with the same note as before, but also it finally brings the listener to the first scale degree—the note that would have created a sense of resolution in the first motif. Judge Owen states that the melody worked for Harrison because he subconsciously knew that it worked for the Chiffons.⁶⁷ The truth is it worked for Harrison because of the reasons

⁶⁵ *Bright Tunes*, 420 F. Supp. 177 at 179 and SLONIMSKY, *supra* note 28 at 495, (sol-fa: solmization, and the symbols sung on it; solmization" Method of teaching the scales and intervals by symbols; its invention is ascribed to Guido d'Arezzo.)

⁶⁶ SLONIMSKY, *supra* note 28 at 435, (resolution: the progression of a dissonance, whether a simple interval or a chord, . . .one passing through some intermediate dissonance(s) before reaching the final restful consonance.)

⁶⁷ *Bright Tunes*, 420 F. Supp. 177 at 180.

stated above. Any songwriter would agree that starting a piece on the fifth scale degree and having it ultimately resolve to the first scale degree is a pleasing and well known effect. Given how simplistic the melody is, and how much it conforms to ideas inherent in western music theory, it is possible that this was not a case of subconscious copying, but independent creation.

V. How to Preserve the Right of Independent Creation

A defendant has a high threshold for establishing independent creation, making it very difficult to prove; however, the possibility of independent creation exists. Does the balance lay in abolishing subconscious copying entirely? Some have criticized the application of the subconscious copying standard in regards to how easy it is to establish access.⁶⁸ Others have suggested that the statutory damages for subconscious copying should be lowered to the minimum, like in innocent infringement cases.⁶⁹ After all, in 1924 Judge Hand applied the minimum statutory damages in *Fisher*, whereas in 2001, in *Three Boys*, Michal Bolton faces a 5.4 million dollar judgment.⁷⁰ Abolishing the subconscious copying standard entirely may result in too many litigants claiming that they subconsciously copied a work, abusing the doctrine.⁷¹ After all, it is difficult to know what is really going on in one's mind. So how do we structure copyright law in a way that allows for both?

⁶⁸ Alden, Clarissa L. *A Proposal to Replace the Subconscious Copying Doctrine*. 29 *Cardozo L. Rev.* 1729 at 1747, see also, Hollingsworth, Joel S. *Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine*. 23 *Hastings Comm. & Ent. L.J.* 457, at page 472 (discussing the disregard to the time that passes between access and infringement in subconscious copying cases).

⁶⁹ Alden, Clarissa, *supra* at 1761-1764.

⁷⁰ *Fisher* 298 F. 145 at 151; *Three Boys* 212 F.3d 477 at 480.

⁷¹ Idea given to me by Professor Frank Politano at Seton University Hall School of Law.

If judges assume that independent creation is impossible, then the subconscious copying standard threatens to turn music infringement cases into strict liability cases. This would make the concept of independent creation a legal fiction. In trademark law and patent law there is a strict liability standard for someone infringing a trademark or a patent. This standard balances with the interest of the public, because a businessperson can easily perform a trademark or patent search to make sure he or she does not infringe on another's rights using government published data bases meant for this purpose. However, songwriters do not have such a resource. There is no government publication listing the musical combinations already currently copyrighted. Such a system may seem absurd, but if music plagiarism becomes a matter of strict liability, then it would become necessary to balance the higher level of protection for copyright holders with the interests of the public. If the application of subconscious copying begins to override the potential for a finding of independent creation, songwriters will have great difficulty in preventing lawsuits. With judgments in the millions, this effect would be unfair for the songwriting community.

If the conjecture that independent creation is as likely as subconscious copying in music infringement cases is indeed correct, then the adjudication of these cases should reflect the reality of the music songwriting process.

For example, courts have been much more willing to consider that nature of software engineering when dealing with reverse engineers utilizing the clean room process.⁷² By passing desired specifications down to "clean" programmers, who have not had access to the original product, software companies are able to avoid copyright

⁷² Barbara J. Vining, *The Future of Computer Software in the Reverse Engineering War: Excessive Protection v. Innovation*, 67 Brooklyn L. Rev. 597, 572-573. (2001).

An Argument that Independent Creation is as likely as Subconscious Copying in Music Infringement Cases

violations. The “clean” programmers work in a “clean room” environment devoid of any interaction with the original work or those exposed to the original work.⁷³ Copyright law has allowed these software engineers to intentionally manufacture a method of bypassing any copyright violations under the technicality that the second product only uses the “ideas” and not the “expression” of the original product.⁷⁴ In other words, the final product is independently created and original to that software engineer because the “expression” is considered to be original. It seems a reasonable conclusion that any striking similarities that result are from the similar manner in which software engineers think. The software industry has set up the clean room process in order to display this lack of copying. Musicians, on the other hand, have no way of setting up a similar clean room environment for composition. It is not enough to say that two musicians create the same thing because they think in the same manner. However, if this is a true possibility, then copyright law should protect against the injustice of holding a songwriter liable of an independently created work.

Theoretically, analogizing musical limitation inherent in popular genres to scenes a faire would be possible solution. The analogy makes sense. Just as one usually has a doctor wear a white jacket in a movie, a songwriter would normally to use a rock and roll

⁷³ *Id.*, (Using the clean room is a step-by-step process. First a “dirty” engineer is exposed to the program the company wishes to mimic and they develop a set of specifications. This removes the “ideas” from the “expression.” Then the “dirty” engineer passes the ideas on to a “clean” engineer who programs the product to meet the specifications. In the end, the company has created a product that does basically the same thing as the original but is free from infringement because it is not the same expression.).

⁷⁴ NIMMER, *supra* note 16 (“...if the defendant's work copies not merely the idea, but "the expression of the idea" contained in plaintiff's work, then the two works are substantially similar and infringement may be found. The House Report expressly endorses and perpetuates, under the current Act, this "idea-expression" dichotomy, so that it is now statutorily codified.”)

drum pattern to alert the listener to the fact that it is rock music. However, given the difficulty courts have in even establishing substantial similarity in cases of music infringement, it seems like such a concept would be too difficult to adjudicate.⁷⁵ It would require courts to adopt a more sophisticated understanding of musical elements than when determining substantial similarity. Apply a defense of scenes a faire to solve the issue of possible independently created would be ineffective. It would require the introduction of the merger doctrine to bridge the scenes a faire together in order to claim that the combination of these musical scenes a faire are unprotectable just they are individually.⁷⁶ Courts would be unwilling to indulge the idea that such abstract concepts are scenes a faire.

The solution lies in developing an effective procedural and evidentiary standard. Copyright infringement cases are factually based and the use of evidence is critical to the outcome of a case.⁷⁷ The type of access that must be shown in subconscious copying cases is no different than in cases of intentional copying.⁷⁸ The standard is that it must be reasonably possible that the defendant viewed the plaintiff's work.⁷⁹ Either the access is

⁷⁵ Baker, Maureen. *A Note to Follow So: Have we Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. Cal. L. Rev. 1583 (1992), (the focus on this article is to establish a norm for deciding cases of substantial similarity. The author makes clear that there is no current norm, and that courts use many different tests in trying to accomplish this. The role of the musicologist is key, but it is still difficult to bridge the gap between the knowledge of the musically trained and a lay person.)

⁷⁶ BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1142 (11th Cir. Fla. 2007). ("The merger doctrine provides that "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.") See also, *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991).

⁷⁷ NIMMER, *supra* note 16.

⁷⁸ *Three Boys Music*, at 483.

⁷⁹ MATTHEW BENDER & COMPANY, INC. 4 NIMMER ON COPYRIGHTS, § 13.02[A] 13-19 (2005).

apparent through dealings with the record company or source of the material, or access is inferred because of the widespread dissemination of the piece.⁸⁰ Widespread dissemination will most likely become easier to show over time due to increased public use of new media, such as Pandora and YouTube.⁸¹ To strengthen the requisite showing of access, the structure of litigation in music infringement cases must be reworked.

For example, in *Baxter v. MCA, Inc.* John Williams was accused of plagiarizing the work “Joy” by Leslie Baxter in the theme music from *E.T.: The Extra Terrestrial*.⁸² The potentially copied material was only a musical layer in Williams piece and not the main melody, so it is not surprising that case ultimately failed under the lay listener test for finding substantial similarity.⁸³ In other words, while the famous melody plays, the material similar to “Joy” also plays, creating a different harmonic structure than the original composition.⁸⁴ Although there was no infringement in this case, John Williams’ level of access to the original work was very significant. Williams had worked as Baxter’s pianist and even performed the piece in question. Such an intimate level of access would have presented highly probative evidence that significant access occurred for extended periods of time.

To contrast the level of access in *Baxter*, the access in *Three Boys Music Corp. v. Bolton*, one of the most recent and controversial findings of subconscious copying, provides an example of how the current evidentiary standard fails to capture the

⁸⁰ GOLDSTEIN, *supra* note 17.

⁸¹ Alden, *supra* note 68 at 1747.

⁸² *Baxter v. MCA, Inc.* 812 F.2d 421, 423 (9th Cir. 1987).

⁸³ *Arnstein* 154 F.2d 464 at 473, (describes the lay listener test, “The question, therefore, is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”).

⁸⁴ Baker, *supra* note 51 at 1606.

possibility of independent creation. In the 1960's The Isley Brothers wrote a song called, "Love is a Wonderful Thing" and in the late 1990's Michael Bolton and Andrew Goldmark wrote a similar song by the same title. A jury found them guilty of subconscious copying and the Ninth Circuit reluctantly affirmed the jury's holding.⁸⁵ The court admitted that they did not agree with the jury but upheld the decision under the current evidentiary standard; explaining "One must remember that the issue this Court must address is not whether Plaintiff has proven access by a preponderance of evidence, but whether reasonable minds could find that Defendants had a reasonable opportunity to have heard Plaintiff's song before they created their own song."⁸⁶ In this case Bolton was held liable for a song he never remembered listening to, that was written twenty-five years before his own song, and that was not widely disseminated.⁸⁷

The level of access in *Baxter* is the type of access that should be shown in cases of subconscious copying. If a court is willing to subject songwriters to such high stakes for something done subconsciously, then they should be absolutely certain that the songwriter was influenced by the complaining piece. Otherwise, it is as if courts deny the possibility of independent creation. Having described how easy it is to show access, the evidentiary methods of showing access must be reworked to allow for the defense of independent creation to function.

VI. A Proposal to Support the View that Independent Creation is Just as Likely as Subconscious Copying.

⁸⁵ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (2001), 480-485.

⁸⁶ *Id.*

⁸⁷ Hollingsworth, *supra* note 68 at 472-473.

Currently, a plaintiff must show both copying and substantial similarity to make out a case of copyright infringement.⁸⁸ Within the element of proving copying, a plaintiff must submit evidence that the defendant probably had access to the defendant's work.⁸⁹ The jury will be instructed that they only need to find that the defendant had a reasonable opportunity to have heard the plaintiff's song before they created their own song.⁹⁰ The defendant can rebut the alleged copying by challenging this evidence with his or her own evidence of independent creation. Technically, the burden of proof to show access never shifts, but remains on the plaintiff throughout.⁹¹ Therefore, the function of the "defense" of independent creation is in fact only used as evidence to cause the plaintiff to fail in proving actual copying.⁹²

To give the defense of independent creation power in court, it would make sense to both strengthen the required showing of access in subconscious copying cases and to allow independent creation to function as an affirmative defense to the element of actual copying. This would require the plaintiff to claim the work was subconsciously copied as an alternative argument. The jury must be instructed that, if they find that the work was not consciously copied, then access must have been likely to have occurred by clear and convincing evidence. Finally, the court should give more weight to the defense of independent creation by allowing the burden to shift to the defendant to rebut the element of actual copying. The result would give innocent defendants the opportunity to

⁸⁸ NIMMER *supra* note 8.

⁸⁹ MATTHEW BENDER & COMPANY, INC. 5-85 INTELLECTUAL PROPERTY COUNSELING & LITIGATION § 85.05 (2012).

⁹⁰ NIMMER *supra* note 8.

⁹¹ MATTHEW BENDER & COMPANY, *supra* note 89.

⁹² *Id.* ("the so-called defense of independent creation in fact only refers to the failure of the plaintiff to carry its burden to prove actual copying.")

overcome the assumption that independent creation is unlikely. Forcing the court to give the issue of independent creation more serious consideration would provide a better opportunity for consideration of the reality of the songwriting process.

VI. Conclusion

Copyright law encompasses both the subconscious copying doctrine and doctrine of independent creation. To prove subconscious copying a plaintiff must show substantial similarity and show reasonably that the defendant had possible access to the plaintiff's work. Congress has preserved the idea of independent creation in its requirement that works be original. If two authors independently create the same thing, then both are thought to have satisfied the originality requirement.

There are many musical rules that limit the choices of songwriters. Some of these are inherent in the study of music theory, and others come from norms within a particular genre. Even so, Judge Owen, in *Bright Tunes*, described the musical choices a composer has as a "wellspring." Judge Owen in *Bright Tunes* and Judge Learned Hand in *Fisher* both assume that the substantial similarities between the musical pieces in their respective cases could only be explained by subconscious copying. But by analyzing the musical simplicity of these pieces, one can see that there is potential for two composers to have written same thing. If, in fact, independent creation is more likely than courts assume, then the overuse of the subconscious copying doctrine may essentially do away with independent creation and make originality irrelevant in music infringement cases.

The way to create a balance within copyright law may be with a new evidentiary rule for subconscious copying cases. If access is to be shown by clear and convincing evidence, then it will be more likely that the defendant is actually a subconscious copier

An Argument that Independent Creation is as likely as Subconscious Copying in Music Infringement Cases

and not an independent creator. The high probative value placed on substantial similarity threatens the existence of reliable findings of independent creation. By making access a more challenging evidentiary burden, Congress would bring balance to the doctrines of subconscious copying and independent creation. In addition, by allowing defendants to plead independent creation as an affirmative defense, songwriters will have the opportunity to place more significance on the potential for independent creation. These changes would give current songwriters more security in going about their art form without fear of litigation.