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THERE'S NO SUCH THING AS INDEPENDENT CREATION, AND IT'S A GOOD THING, TOO

CHRISTOPHER BUCCAFUSCO*

ABSTRACT

Independent creation is the foundation of U.S. copyright law. A work is only original and, thus, copyrightable to the extent that it is independently created by its author and not copied from another source. And a work can be deemed infringing only if it is not independently created. Moreover, independent creation provides the grounding for all major theoretical justifications for copyright law. Unfortunately, the doctrine cannot bear the substantial weight that has been foisted upon it. This Article argues that copyright law's independent creation doctrine rests on a set of discarded psychological assumptions about memory, copying, and creativity. When those assumptions are replaced with contemporary accounts of how human

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memory influences the creative process, the independent creation doctrine becomes empirically meaningless. Independent creation, as copyright law understands it, does not exist.

Because the independent creation doctrine lacks any meaningful legitimacy, it has become a site of legal privilege and bias. Copyright law's treatment of independent creation has favored some creators' claims at the expense of others, privileging plaintiffs, older creators, and wealthier creators. These biases distort the law's attempt to optimally regulate cultural production. This Article offers several proposals for addressing these concerns, from rebalancing legal doctrines to a more radical solution: the wholesale jettisoning of independent creation. Copyright law does not need the independent creation doctrine, and it would be better off without it.

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INTRODUCTION

According to the U.S. Supreme Court, “originality” is “[t]he *sine qua non* of copyright.”¹ That a work owes its origin to an author and was not copied from another source—that is, it was independently created—provides constitutional grounding for the provision of exclusive rights in the work.² The dominant utilitarian approaches to copyright law foreground originality as an essential constituent of prudent copyright policy.³ And influential theorists ground both deontological and feminist accounts of copyright law on independent creation.⁴ All copyright theories champion independent creation.⁵

In U.S. copyright law, independent creation serves two fundamental doctrinal purposes. First, originality establishes the validity and scope of copyrighted works.⁶ Only if an author produces a work independently is it entitled to a valid copyright.⁷ If a work contains a nontrivial amount of original expression, its author can obtain a copyright in the independently created material that she contributed.⁸ Thus, without originality, there is no copyright. Second, copyright liability occurs only in the absence of originality.⁹ A later work infringes only if it is, at least in part, a copy of the plaintiff’s

1. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

2. *Id.* (describing “originality” as constitutionally necessary for copyright).

3. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 85-87 (2003).

4. See ABRAHAM DRASSINOWER, *WHAT'S WRONG WITH COPYING?* 57-58 (2015) (offering a Kantian account of copyright law); CARYS J. CRAIG, *COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW* 138-40 (2011) (defending a relational account of originality).

5. For comparative accounts of originality outside the United States, see generally ELEONORA ROSATI, *ORIGINALITY IN EU COPYRIGHT: FULL HARMONIZATION THROUGH CASE LAW* (2013); Carys J. Craig, *Resisting “Sweat” and Refusing Feist: Rethinking Originality After CCH*, 40 U.B.C. L. REV. 69 (2007).

6. See *Feist*, 499 U.S. at 346.

7. See *id.*

8. Contributing original material to a work is a necessary but not sufficient condition for validity. An author who does not fix her work within a tangible medium of expression will not be granted a copyright, 17 U.S.C. § 102(a), nor will an author who contributed unauthorized original material to another’s original expression—that is, created a derivative work, *id.* § 103(a).

9. See *Feist*, 499 U.S. at 345-46.

work rather than a wholly original, independent creation.¹⁰ Although the defendant's work might be identical to the plaintiff's, the plaintiff will only recover if they can prove that the defendant copied from them.¹¹

There is one difficulty. Independent creation, at least as copyright law conceives of it, does not exist. The doctrine reflects an outdated and impoverished view of human creativity and memory that ignores the complex ways in which human brains actually work.

The problem is especially stark in the subconscious copying doctrine. Copyright law treats a work as copied, and thus unoriginal, regardless of whether the putative author intended to copy or even knew that they were copying another work.¹² Rights and liabilities depend on whether, when they sat down to compose a song, for example, they were doing so freshly from their own ideas or, rather, were drawing on a tune they heard years ago that lodged itself in their memory only to reappear at this inauspicious instant. But how can we know whether the author subconsciously called it to mind when they created the new work? How can we know whether, instead, the author simply forgot the previous work? And how can we know whether, given certain similarities between the works, those similarities are more likely the result of copying than independent creation? Authors themselves will often not know the answers to these questions; for outsiders, they are impossible. Yet, the foundational doctrines of copyright validity and liability rest on being able to answer these questions consistently and accurately.

Because independent creation is fundamentally unknowable, if it exists at all, courts are chasing phantoms. Phantoms cannot be caught. But courts are forced to answer an unanswerable question, to pretend to have caught the phantom. As a result, copyright law's recognition of originality will inevitably be political. Those parties that are able to claim the mantle of originality will be those that the law or markets or history favor. Successful assertions of

10. *See id.*

11. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

12. Carissa L. Alden, Note, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDOZO L. REV. 1729, 1734-35 (2008).

independent creation are nothing more than rhetorical claims on behalf of creators. The law will unavoidably privilege those creators who most successfully wield its linguistic, political, and emotional tools.¹³

We see this privileging in the way copyright jurisprudence treats independent creation entirely differently for plaintiffs and for defendants. While plaintiffs' assertions of originality are regularly granted enormous deference by the Copyright Office, courts, and jurors, defendants are often presumed to have copied plaintiffs' works.¹⁴ If a plaintiff can prove that the defendant probably experienced their work at some point in the past, then they can get to a jury as long as there are sufficient similarities between the works to make copying possible.¹⁵ In a world of easy access to most works, this approach effectively assumes copying, and algorithmic detection of similarity will only worsen the problem.¹⁶ By contrast, authors who register their works with the Copyright Office receive prima facie evidence of originality despite there being no meaningful examination of their works.¹⁷ Defendants, however, often struggle at trial to introduce evidence demonstrating that aspects of the plaintiff's work already existed in the prior art and may have been copied from it.¹⁸ The independent creation doctrine skews heavily but arbitrarily in favor of plaintiffs, as well as earlier and wealthier creators, biasing who gets to speak and create. The upshot is a failure to properly regulate cultural production.

Having established that copyright's independent creation doctrines are flawed, this Article concludes with possibilities for addressing the problem. Some salutary effects could be achieved by simply treating plaintiffs' and defendants' assertions of independent

13. This is similar to the argument that Stanley Fish makes about "free speech." See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 63-69 (1994).

14. See *infra* Part III.A.

15. See *infra* Part III.B.

16. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 476 (2016) (arguing that algorithmic enforcement of copyright reflects a fundamental shift in our traditional system of governance).

17. See 17 U.S.C. § 410(c).

18. See Joseph P. Fishman & Kristelia García, *Authoring Prior Art*, 75 VAND. L. REV. 1159, 1161 (2022).

creation equally, either by leveling up our skepticism of plaintiffs or leveling down our skepticism of defendants.

More radically, copyright law should jettison questions of originality and copying entirely. A utilitarian copyright law has no need for independent creation, and it would be better off without the biases that the doctrine creates. Rather than asking whether an author copied earlier works, we might simply ask whether the work is sufficiently different from earlier works that copyright law wants to treat it as valuable—for example, valid or noninfringing. This change would focus the law's attention on what matters most, while removing the distortion and expense of litigating independent creation. Other doctrines, including the creativity standard, the idea/expression distinction, variations in scope, and damages are better able to accomplish those of copyright's goals that are currently dealt with by independent creation.

Part I of this Article introduces the central roles that originality and copying play in U.S. copyright law. Part II moves beyond legal doctrine to explore the theories of creativity and memory that undergird originality and copying jurisprudence, and it contrasts them with contemporary behavioral and cognitive science research. Part III explains how doctrinal treatment of independent creation varies substantially between plaintiffs and defendants. In so doing, it privileges some creators at the expense of others. Finally, Part IV offers possible paths forward, including the radical reorientation of copyright jurisprudence away from independent creation.

I. THE CENTRALITY OF ORIGINALITY AND COPYING TO COPYRIGHT LAW

Independent creation is, without question, the most important doctrine in U.S. copyright law.¹⁹ Whether a work is original—that is, independently created—is a necessary condition for it being granted a copyright, and the extent of its originality determines the copyright's scope.²⁰ Copying is the other side of the independent creation coin. A work is original to the extent that it contains some

19. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

20. *See id.* at 346.

minimal degree of creative expression that was not copied from another source.²¹ If a work is original, its author can obtain a copyright and begin earning money from it. Copying is also a requisite for copyright liability. Only when a work copies from another will it be found to infringe.²² If a work is copied, its creator may be responsible for millions of dollars in damages. Thus, these mirror doctrines determine a considerable area of the realm of copyright law's regulation of expression. This Part provides a brief primer on copyright's originality and copying doctrines for those who are new to the field.

A. Originality, Validity, and Scope

Without original expression, copyright does not subsist.²³ According to a long series of precedents,²⁴ the Supreme Court has recognized originality as a constitutional requirement of Congress's use of the power granted to it in Article I, Section 8, Clause 8.²⁵ But originality, as the term is used in copyright law, doesn't mean the same thing it does to most nonlawyers.

To be original means little more than to be not copied.²⁶ In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court addressed the constitutional question of whether or Congress could extend copyright protection to photographs as works of original authorship.²⁷ The Court found that the Constitution was broad

21. *Id.* at 345.

22. *See id.* at 345-46.

23. 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

24. *Feist*, 499 U.S. at 345; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

25. U.S. CONST. art. I, § 8, cl. 8 (providing that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *Feist*, 499 U.S. at 346 ("Originality is a constitutional requirement.").

26. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) ("Originality in this context 'means little more than a prohibition of actual copying.'" (quoting *Hoague-Sprague Corp. v. Frank C. Meyer, Inc.*, 31 F.2d 583, 586 (E.D.N.Y. 1929))).

27. 111 U.S. at 58.

enough to cover photographs on condition that the photograph seeking copyrightability constituted an independent creation—that it was “representative[] of original intellectual conceptions of the author.”²⁸ According to the Court, “[a]n author ... is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’”²⁹ Despite the defendant’s argument that photography is the “mere mechanical reproduction of the physical features or outlines of some object,”³⁰ the Court upheld Sarony’s copyright because it was a “useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same ... *entirely from his own original mental conception.*”³¹ The photo did not just copy what Oscar Wilde looked like.³² It also included expressions that emerged directly from Sarony’s mind.³³

In *Bleistein v. Donaldson Lithographing Co.*, Justice Oliver Wendell Holmes Jr. explained the nature of independent creation in copyright law.³⁴ There, the plaintiff had depicted circus performers for an advertising poster. But the pictures were no less original for having “been drawn from the life” and representing actual objects.³⁵ The drawings were the author’s “copies” of the real world, but they were, nonetheless, *his* copies.³⁶ According to Holmes, “[t]he copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”³⁷ Thus, having been processed through the plaintiff’s mind, the images became invested with his own ideas. But just because this artist had drawn these figures, copyright law wouldn’t stop others from depicting them:

28. *Id.*

29. *Id.* at 57-58. On copyright law’s theory of authorship, see generally Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016); Shyamkrishna Balganes, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017).

30. *Sarony*, 111 U.S. at 59; see also Joel Snyder, *Res Ipsa Loquitur*, in THINGS THAT TALK: OBJECT LESSONS FROM ART AND SCIENCE 195, 202 (Lorraine Daston ed., 2004).

31. *Sarony*, 111 U.S. at 60 (emphasis added).

32. *Id.*

33. *Id.*

34. 188 U.S. 239, 250 (1903); see also Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 366 (2017).

35. *Bleistein*, 188 U.S. at 248-49.

36. *Id.* at 249-50.

37. *Id.* at 250.

“Others are free to copy the original. They are not free to copy the copy.”³⁸ As a matter of validity, each independent author’s creation is entitled to its own copyright because it represents that author’s “unique” expressions.³⁹

Two famous circuit court judges have contributed important accounts of copyright law’s treatment of independent creation. In *Sheldon v. Metro-Goldwyn Pictures Corp.*, Judge Learned Hand rejected the defendant’s attempt to disprove the originality of the plaintiff’s play by “fill[ing] the record with earlier instances of the same dramatic incidents and devices.”⁴⁰ Unlike patented inventions, copyrighted works do not have to be new or novel.⁴¹ Judge Hand explained:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an “author”; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an “author,” and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.⁴²

As long as an author does not copy from prior sources, it doesn’t matter if she somehow produces an identical work.⁴³

Judge Jerome Frank’s opinion in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* perhaps best describes the role of independent creation in establishing copyright validity.⁴⁴ The plaintiff had produced mezzotint engravings of old masters’ paintings that were in the public domain.⁴⁵ The works strongly resembled the original paintings, but the mezzotinting process inevitably introduced differences and variations from them.⁴⁶ The defendants objected to the copyrights in the mezzotints on the grounds that they were simply

38. *Id.* at 249.

39. *See id.* at 250.

40. 81 F.2d 49, 53 (2d Cir. 1936).

41. *Id.*

42. *Id.* at 54 (first citing *Bleistein*, 188 U.S. at 249; and then citing *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927)).

43. *See id.*

44. 191 F.2d 99, 103 (2d Cir. 1951).

45. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 74 F. Supp. 973, 974-75 (S.D.N.Y. 1947), *modified*, 191 F.2d 99 (2d Cir. 1951).

46. *Id.* at 975.

copies of public domain works and, thus, unoriginal.⁴⁷ But, according to Judge Frank, “[t]he defendants’ contention apparently results from the ambiguity of the word ‘original’. It may mean startling, novel or unusual, a marked departure from the past.... [But] ‘[o]riginal’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’”⁴⁸ He explained further: “All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ *Originality in this context means little more than a prohibition of actual copying.*”⁴⁹ Relying on evidence that the mezzotints “were not intended to, and did not, imitate the paintings they reproduced,” Judge Frank upheld their copyrights.⁵⁰

Most recently, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court reiterated independent creation’s constitutional status.⁵¹ As the Court explained:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.⁵²

47. *Id.*

48. *Alfred Bell*, 191 F.2d at 102 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884)).

49. *Id.* at 102-03 (emphasis added) (footnote omitted). Judge Frank expanded on the rule of independent creation:

The “author” is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his.... “Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.”

Id. at 103 (quoting LEON H. ADMUR, *COPYRIGHT LAW AND PRACTICE* 70 (1936)).

50. *Id.* at 105.

51. 499 U.S. 340 (1991).

52. *Id.* at 345 (citation omitted).

Here, the Court reiterated the essential role that independent creation plays in copyright validity.⁵³ It went a step further, however, and demanded that works demonstrate some level of creativity, although the Court conceded that the “vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁵⁴

Unless a work is independently created by its author, it is not eligible for a copyright.⁵⁵ Independent creation is, thus, a necessary condition for copyright validity.⁵⁶ But that is not originality’s only role. The scope of a plaintiff’s copyright is also determined by the extent to which the work is original.⁵⁷ That is, only those aspects of a work that were independently created by its author are entitled to copyright and can serve as the basis for an action for copyright infringement.⁵⁸ When a court or jury determines whether the defendant’s work infringes the plaintiff’s copyright, it should focus only on elements of the plaintiff’s work that the plaintiff herself originated.⁵⁹ Any elements of the work that were copied from other sources should be filtered out before the works are compared.⁶⁰

B. Copying, Independent Creation, and Liability

Originality, as a matter of copyright validity and scope, means little more than that the author did not copy some aspects of their work from prior sources. But originality also determines whether a work has been infringed, although now the focus shifts to the

53. *See id.*

54. *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (1990)).

55. *See supra* note 52 and accompanying text.

56. It is not, however, the only condition. Works must also demonstrate some minimal creativity consistent with *Feist*, and they must be fixed in a tangible medium of expression. 17 U.S.C. § 102(a) (“Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression.”).

57. *Feist*, 499 U.S. at 348 (“[C]opyright protection may extend only to those components of a work that are original to the author.” (first citing *L. Ray Patterson & Craig Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 800-02 (1989); and then citing *Jane C. Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 & n.12 (1990))).

58. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

59. *See id.* at 1116-17.

60. *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-10 (2d Cir. 1992).

defendant's originality.⁶¹ Copyright is, as its name suggests, a right to copy a covered work.⁶² But, by implication, a similar or identical work that does not copy the covered work, but that has recreated it independently, does not violate the right.⁶³ Independent creation is, according to copyright law, a complete defense to infringement.⁶⁴

As a nominal matter, the plaintiff must prove that the defendant copied their work in order to succeed in an action for infringement.⁶⁵ This is the second step in establishing a *prima facie* case of copyright infringement.⁶⁶ While the doctrine's historical origins are unclear,⁶⁷ Judge Hand's statement about Keats's poem quoted above indicates that it has been widely accepted for more than a century.⁶⁸ If the poet independently created the "Ode," not only would they be the author of their own copyrighted work but they would also not infringe any copyright that Keats may have had.⁶⁹

61. See *Rentmeester*, 883 F.3d at 1117.

62. 17 U.S.C. § 106(1) ("[T]he owner of copyright under this title has the exclusive rights ... to reproduce the copyrighted work in copies or phonorecords.").

63. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

64. *Rentmeester*, 883 F.3d at 1117.

65. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

66. *Id.*

67. George Ticknor Curtis briefly discussed independent creation in his 1847 treatise on copyright law. He writes:

Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the piracy. The main question in all such cases is, whether the author of the work, alleged to be a piracy, has resorted to the original sources, alike open to him and to all writers, or whether he has adopted and used the matter or plan of the work with the infringement of which he is charged.

GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 253 (The Lawbook Exch., Ltd. 2005) (1847).

68. See *supra* notes 41-42 and accompanying text. There are few discussions of copying prior to the early twentieth century, but I attribute this to changes in the scope of copyright over time. See CURTIS, *supra* note 67, at 254-59 (citing cases); EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 428-31 (Boston, Little, Brown & Co. 1879). Most early copyright cases were clear-cut cases of wholesale copying. The defendant copied much or all of the plaintiff's work and wasn't in a position to argue independent creation. Independent creation cases began to emerge in the early twentieth century as modern media spread popular culture around the globe and assertions of partial copying became increasingly likely. See R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 140 (2007).

69. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) ("[I]ndependent reproduction of a copyrighted work is not infringement', whereas it is vis a vis a patent." (footnote omitted)).

In modern jurisprudence, this requirement is referred to as copying-in-fact, as distinct from the third element of the plaintiff's prima facie case, unlawful appropriation, or, as it is sometimes known, copying-in-law.⁷⁰ Just as with originality and copyright validity, the question of copying-in-fact is a binary, empirical question.⁷¹ When the court asks whether the defendant copied, in fact, from the plaintiff, there are only two true answers: yes or no.⁷² Of course, in most cases, the best the law can do is "probably yes" or "probably no," but copyright law treats the question as having some basis in empirical reality.⁷³ At the time the defendant was composing their song, painting their picture, or writing their code, did they have in mind the plaintiff's work?

As alluded to above, however, copyright law does not require that the defendant knew or intended to copy the plaintiff's work.⁷⁴ The copying could have been entirely subconscious.⁷⁵ Thus, when the owners of the copyright in The Chiffons' song "He's So Fine" sued George Harrison for the similar melody in "My Sweet Lord," it was sufficient that Harrison had heard their song previously and that his subconscious mind sneakily inserted the melody into the song he was composing.⁷⁶ In an earlier opinion explaining the subconscious copying doctrine, Judge Learned Hand writes:

The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith. Once it appears that another has in fact used the copyright as the source of his

70. See *Skidmore*, 952 F.3d at 1064; *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 887 (7th Cir. 2021).

71. William W. Fisher III, *Recalibrating Originality*, 54 HOUS. L. REV. 437, 448 (2016).

72. See *id.*

73. David Aronoff, *Exploding the "Inverse Ratio Rule,"* 55 J. COPYRIGHT SOC'Y U.S.A. 125, 127 (2007) ("The inference of 'actual copying' based on proof of access and probative similarities is a question of probabilities.").

74. See *supra* note 12 and accompanying text.

75. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 16 (9th Cir. 1933) ("[I]f there was a subconscious memory of the story derived from such knowledge, and if the evidence was such that some unconscious and unintentional copying was disclosed by the play when produced, there might be an infringement, notwithstanding the intentions of the parties to avoid infringement.").

76. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 (S.D.N.Y. 1976), *aff'd order sub nom.* *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.⁷⁷

The subconscious copying doctrine means that defendants can be held liable for copying even though they do not remember the plaintiff's song, nor do they recall actually using it.⁷⁸ Copyright law is, in this sense, a strict liability offense.⁷⁹

Proving copying-in-fact can be straightforward, or it can seem daunting. Sometimes the defendant simply admits copying. In cases like *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* and *Steinberg v. Columbia Pictures Industries, Inc.*, defendants instructed their designers to produce works that resembled the plaintiffs' work, only not so much to be infringing.⁸⁰ Not all copying is infringement, so creators may try to design around an existing copyright's scope,⁸¹ or they may try to take advantage of fair use to avoid liability.⁸² In these cases, there is direct evidence of copying.

In other cases, though, plaintiffs must prove copying inferentially via circumstantial evidence.⁸³ Now, the question is whether the similarities between the plaintiff's work and the defendant's work probably occurred because of copying rather than through independent creation.⁸⁴ Although the doctrine in this area has often manifested enormous confusion among courts, virtually all courts now treat this question as a two-part inquiry.⁸⁵

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

78. Robin Feldman, *The Role of the Subconscious in Intellectual Property Law*, 2 HASTINGS SCI. & TECH. L.J. 1, 5-6 (2010).

79. Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305, 309 (2015).

80. *See* 562 F.2d 1157, 1161-62 (9th Cir. 1977); 663 F. Supp. 706, 710 (S.D.N.Y. 1987).

81. *See generally* Christopher Buccafusco, Stefan Bechtold & Christopher Jon Sprigman, *The Nature of Sequential Innovation*, 59 WM. & MARY L. REV. 1 (2017) (discussing the nature of building on or building around prior creativity and innovations).

82. *See* 17 U.S.C. § 107.

83. *Wilkie v. Santly Bros.*, 91 F.2d 978, 979 (2d Cir. 1937) (“[T]he charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement, and the combination of materials contained in the composition.” (citing *Edwards & Deutsch Lithographic Co. v. Boorman*, 15 F.2d 35 (7th Cir. 1926))), *reargued*, 94 F.2d 1023 (2d Cir. 1938).

84. *See* *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 926 (7th Cir. 2003).

85. *See, e.g., Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir. 2001); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169-70 (7th Cir. 1997).

First, the plaintiff must prove that the defendant probably had access to the plaintiff's work.⁸⁶ That is, the defendant must have had some reasonable opportunity to have experienced the plaintiff's work at some point in the past.⁸⁷ The inferential value of this step is clear: if the defendant had not previously experienced the plaintiff's work before creating their own, they simply could not have copied it.⁸⁸ For example, I have never heard the Wu Tang Clan's single-copy album *Once Upon a Time in Shaolin* that Martin Shkreli purchased in 2015.⁸⁹ If I somehow wrote a song that was similar to one of the ones on the album, the only possible conclusion is that I independently created it.

Second, having established a possibility of copying, the plaintiff must prove that copying probably, in fact, took place.⁹⁰ This involves an inquiry into the nature of the similarities between the plaintiff's work and the defendant's.⁹¹ Although courts have used various terms to describe this inquiry, Judge Posner helpfully asks: Are the similarities "suspicious"?⁹² Or, as the Ninth Circuit recently articulated the test: Do "the two works share similarities" that are "*probative of copying*"?⁹³ The idea here is that some sorts of similarities are indicative of copying while other sorts are not.⁹⁴ Consider, for example, *Pivot Point International, Inc. v. Charlene Products, Inc.*, where both the plaintiff's and the defendant's hair styling models

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

87. See, for example, *id.*, for an explanation of how a showing of access impacts a defendant's independent creation defense.

88. *Ty, Inc.*, 132 F.3d at 1169-70.

89. See Andrew Limbong, *Wu-Tang Clan Album Once Owned by Martin Shkreli Sold by U.S. Government*, NPR (July 27, 2021, 3:14 PM), <https://www.npr.org/2021/07/27/1021284593/martin-shkreli-wu-tang-clan-album-sold> [<https://perma.cc/7E27-QTJT>]. I am not one of the crypto bros who just bought the album for \$4 million. Taylor Locke, *What Are DAOs? Here's What to Know About the 'Next Big Trend' in Crypto*, CNBC (Oct. 25, 2021, 12:26 PM), <https://www.cnbc.com/2021/10/25/what-are-daos-what-to-know-about-the-next-big-trend-in-crypto.html> [<https://perma.cc/Z5JV-CZQL>].

90. *Ty, Inc.*, 132 F.3d at 1169-70.

91. See, for example, *id.* at 1170, for a comparison of the plaintiff's stuffed pig with the defendant's.

92. *Id.*

93. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (emphasis added).

94. Alan Latman, "*Probative Similarity*" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1190 (1990) ("A similarity, which may or may not be substantial, is probative of copying if, by definition, it is one that under all the circumstances justifies an inference of copying.").

had a mistaken second hairline.⁹⁵ The probability that both parties would independently make the same mistake in the same way is infinitesimally small.⁹⁶ By contrast, two works sharing similarities that are in the public domain is not probative of copying.⁹⁷ Many stuffed pig toys will have curly tails, and many rock and roll songs will have blues progressions, not because of copying, but because these are standard features of their genres.⁹⁸

* * *

Independent creation is copyright law's defining doctrine. It determines both which works get copyrights and which works are infringing. In theory, the law of originality and the law of copying-in-fact should be identical, because the two doctrines are asking the same question. In both cases, copyright law wants to know whether the author independently created the work or whether she copied it from a prior source. In Part III, I show how copyright law actually situates originality and copying differently, privileging plaintiffs and undermining defendants. Before that, though, the next Part challenges copyright law's fundamental conception of independent creation. The doctrine upon which so much of the law's edifice is constructed cannot bear its weight.

II. CREATIVITY AND MEMORY IN COPYRIGHT LAW

According to copyright law, to the extent that a work is copied, it is not original. "Original" and "copied" are both descriptions of works, but, more fundamentally, they are accounts of an author's mental state when creating. Copyright law treats the acts of originating and of copying as distinct psychological phenomena, one in which the author creates a work *ab initio*, without reliance on past work, and one in which the author replicates, consciously or unconsciously, some previously experienced work.

This Part begins by analyzing copyright law's implicit psychology of originality and copying, paying particular attention to its

95. 372 F.3d 913, 915-16 (7th Cir. 2004).

96. See *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003).

97. *Ty, Inc.*, 132 F.3d at 1171.

98. *Id.* at 1170; *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984).

construction of creativity and memory. I argue that the law's account of the relationship between creativity and memory rests on outdated psychological theories of how people remember. Then, drawing on recent research in cognitive psychology and neuroscience, I propose a psychologically realistic account of originality that does not distinguish it from copying.

I am not the first scholar to challenge copyright law's treatment of originality. For several decades, important work by humanistically-oriented scholars like Martha Woodmansee, Mark Rose, and James Boyle has demonstrated copyright law's commitment to Romantic conceptions of authorship that foreground some creative practices while ignoring other inputs.⁹⁹ More recently, legal scholars working within discourses that focus on race, gender, and critical theory have highlighted the ways in which copyright law's originality myths have favored some authors and activities at the expense of others.¹⁰⁰ These are massively important contributions to the literature, and I embrace them here. I hope that this Part adds to their efforts by bringing to bear insights from psychology and cognitive science to further undermine copyright law's conception of independent creation.

99. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425, 429 (1984); MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 37-38 (1994); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 135 (1993); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers,* 37 AM. U. L. REV. 625, 629-30 (1988); JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 51-59 (1996).

100. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context,* 84 N.C. L. REV. 547, 561-64 (2006); K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations,* 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008); Anjali Vats & Deidre A. Keller, *Critical Race IP,* 36 CARDOZO ARTS & ENT. L.J. 735, 736 (2018); Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet,* 53 UC DAVIS L. REV. 591, 591-92 (2019); CRAIG, *supra* note 4, at 31; K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues,* 16 AM. U. J. GENDER, SOC. POL'Y & L. 365, 365-66 (2008); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright,* 15 AM. U. J. GENDER, SOC. POL'Y & L. 273, 275 (2007); Dan L. Burk, *Feminism and Dualism in Intellectual Property,* 15 AM. U. J. GENDER, SOC. POL'Y & L. 183, 185 (2007); JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 83 (2012); Andrew Gilden, *Raw Materials and the Creative Process,* 104 GEO. L.J. 355, 357 (2016).

A. Copyright Law's Psychology of Creativity and Memory

Over the past century and a half, American copyright law has articulated a more or less explicit psychological account of authorship and originality. Beginning in the nineteenth century and continuing through to the twentieth, court opinions have developed theories of what it means to create an original work and what it means to copy. These theories map strikingly well on then-current ideas about creativity and its relationship to memory.

In 1884, the Supreme Court first began to limn its understanding of copyright authorship and originality in the *Sarony* case.¹⁰¹ The Court explained that the constitutional term “writings” referred to “all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression.”¹⁰² Authors, thus, have ideas in their minds which they then find some means of articulating or expressing. But, according to the Court, not all such expressions are subject to copyright.¹⁰³ Only those that are original merit exclusive rights.¹⁰⁴ Original expressions, the Court explains, are those that “owe[]” their origin to the author, that arise independently in the author’s mind.¹⁰⁵ The photographs at issue in the *Sarony* case could not be original, the defendant argued, because they were simply mechanical copies of things that exist in nature.¹⁰⁶ Nothing of the photographer’s mind is in them; that was simply how Oscar Wilde looked on the day in question.¹⁰⁷

Now, as we’ve seen in Part I, copyright law imposes no great hurdle on the degree of cleverness required for an author’s expressions

101. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

102. *Id.*

103. *See id.* at 60.

104. *See id.*

105. *Id.* at 57-58.

106. *Id.* at 58-59 (“[I]t is said that an engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in securing its exclusive use or sale to its author, while the photograph is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.”).

107. The Court effectively rejects a conception of photography as a mechanical copy of nature. As Joel Snyder explains, “A copy is *supra* an exact and precise representation of its model; the copy contains no new ideas.” Snyder, *supra* note 30, at 202.

to count as original. To be original, an expression need not be as novel as an invention must be to earn a patent.¹⁰⁸ An original expression need not be new to the world at large, but it must be new to the authors themselves.¹⁰⁹ That is, the authors must not have copied the expression from another source. As Judge Hand explained in *Sheldon*, the naïve poet who composes “Ode on a Grecian Urn” is just as original, in a copyright sense, as Keats’s was.¹¹⁰ That similar works preceded the author’s in the public domain does not affect its copyright if the author “did not use” them.¹¹¹

But to fully appreciate copyright’s psychology of originality, Judge Hand’s opinion on copyright validity in *Sheldon* must be read with his earlier opinion on infringement in *Fred Fisher, Inc. v. Dillingham*, where he introduced subconscious copying.¹¹² In the latter case, the defendant swore he had no recollection of hearing the plaintiff’s musical composition and, accordingly, that he could not have consciously copied it.¹¹³ Judge Hand believed him, but to no avail. Judge Hand explained:

*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,” [the defendant] 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.... Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick.*¹¹⁴

Judge Hand’s account of creativity and memory here is striking. When someone experiences a work, Judge Hand claims, the experience registers in their mind, leaving a memory trace.¹¹⁵ Once

108. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53 (2d Cir. 1936).

109. *Id.* at 54.

110. *Id.*

111. *Id.* at 53.

112. 298 F. 145, 147 (S.D.N.Y. 1924).

113. *Id.*

114. *Id.* at 147-48 (emphases added).

115. *See id.* at 147.

laid down, that memory trace may later emerge when the author begins to compose a new work.¹¹⁶ And, according to Judge Hand, the author may have no idea that they are accessing the subconscious memory trace rather than creating the work from scratch.¹¹⁷

Judge Hand's understanding of memory is fascinating for another reason: its apparent treatment of forgetting. The author's memory, Judge Hand claims, may have played a trick on him,¹¹⁸ but notice the particular trick it has played. The author's memory may have forgotten that it had experienced the prior work, but, Judge Hand seems to imply, it cannot have forgotten the work itself.¹¹⁹ Once the memory trace is laid down, it is there for good.

Similar ideas about memory and copying are on display in Judge Richard Owen's opinion in *Harrisonsongs*, the case involving George Harrison and The Chiffons.¹²⁰ Judge Owen noted, "[s]eeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry."¹²¹ Judge Owen concluded that Harrison must have known about "He's So Fine" since it was a major hit, including at a time when the Beatles had a #1 single.¹²² He then recounted Harrison's testimony about how he composed "My Sweet Lord," "vamping" guitar chords while playing with the words "Hare Krishna" and "Hallelujah."¹²³ While Harrison and the other witnesses to the composition were unsure of exactly how the song came together, Judge Owen was confident that he knew:

116. *See id.*

117. In an early case, Judge Story recognized the possibility that a defendant might access the plaintiff's work but not use it. Although Judge Story accepted the plaintiff's evidence that the defendant read his book, he noted that "[i]t may be true, that Davies had seen and read Emerson's book, and yet that he may not have copied or adopted or taken any part of it from that of Emerson; but from common sources open to all authors and compilers." *Emerson v. Davies*, 8 F. Cas. 615, 621 (C.C.D. Mass. 1845) (No. 4,436).

118. *See Fred Fisher, Inc.*, 298 F. at 148.

119. *See id.*

120. *Bright Tunes Music Corp. v. Harrisonsongs Music, Ltd.*, 420 F. Supp. 177, 178 (S.D.N.Y. 1976), *aff'd order sub nom. ABKCO Music, Inc. v. Harrisonsongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

121. *Id.* at 180.

122. *Id.* at 179.

123. *Id.*

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success.¹²⁴

While Harrison's creative process was a mystery to himself and others, Judge Owen could detect the plagiarism. It was the product of Harrison's subconscious mind.

Judge Hand's and Judge Owen's ideas about creating and copying reflect a conception of memory that was enormously influential throughout the twentieth century and that owes much of its popularity to the writings of Sigmund Freud and his followers. Freud's theories of the unconscious mind were enormously important in twentieth-century legal literature, and there is no doubt that Judge Hand and others were aware of his writings.¹²⁵ For Freud, the unconscious exists as a largely inaccessible storehouse of the mind's fantasies, traumas, and memories.¹²⁶ Its contents might arise to the conscious mind in dreams or through triggering events, although when they do, the conscious mind is rarely aware of their origin.¹²⁷ Only through psychoanalysis can people learn to interpret the ways in which their unconscious manifests itself consciously.¹²⁸

Freud theorized the workings of memory similarly. According to Freud, the mind "has an unlimited receptive capacity for new perceptions and nevertheless lays down permanent—even though not

124. *Id.* at 180 (footnote omitted).

125. See Learned Hand, Book Review, 35 HARV. L. REV. 479, 480 (1922) (reviewing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921)); see also JEROME FRANK, *LAW AND THE MODERN MIND* 359 (1949).

126. SIGMUND FREUD, *The Interpretation of Dreams*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 191-92 (A.A. Brill ed., trans., 1938).

127. See *id.* at 183.

128. *Id.* at 191-92. Freud worked out his evolving theory of the unconscious over several decades and a number of books. Peter Gay's excellent biography of Freud charts his development. See PETER GAY, *FREUD: A LIFE FOR OUR TIME*, at xvii-xviii, xx (2006).

unalterable—memory-traces of them.”¹²⁹ As we experience things, they pass through our “perceptual apparatus”—our senses—and they become imprinted on the unconscious “mnemic apparatus,” or memory.¹³⁰ The memory traces are engraved in the unconscious mind like writing on a wax tablet, permanently stored for the possibility of later retrieval.¹³¹ Although the memories are stored permanently, however, we often have little knowledge or recollection that they are there.¹³² Thus, for Freud, while the memories themselves are not forgotten, we may forget exactly which memories we remember.¹³³

Carl Jung, Freud’s student and subsequent rival, had similar ideas about memory and the unconscious, and he connected them explicitly to the phenomenon of subconscious copying.¹³⁴ Jung recognizes forgetting as “a normal process” by which ideas lose their energy and thus their connection to the conscious mind.¹³⁵ But, he explains: “[T]he forgotten ideas have not ceased to exist. Although they cannot be reproduced at will, they are present in a subliminal state—just beyond the threshold of recall from which they can rise again spontaneously at any time, often after many years of apparently total oblivion.”¹³⁶ Jung explains that the buried ideas may yet emerge to influence our everyday lives in ways that we “do not decide and intend.”¹³⁷

By way of example, Jung describes cases of “cryptomnesia” or “concealed recollection,” where an author discovers that his own work “bears a striking similarity to the work of another author—a

129. SIGMUND FREUD, *A Note Upon the ‘Mystic Writing Pad,’* in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 227, 228 (James Strachey ed., trans., 1961). Freud notes that he had already begun working these ideas out in his earlier book, *The Interpretation of Dreams* (1900). *Id.*

130. *Id.* at 227-28.

131. Subsequent authors analogized memory to photography and film in its capacity to permanently store sense impressions. See ALISON WINTER, *MEMORY: FRAGMENTS OF A MODERN HISTORY* 91-92 (2012); DOUWE DRAAISMA, *METAPHORS OF MEMORY: A HISTORY OF IDEAS ABOUT THE MIND* 110 (Paul Vincent trans., 2000).

132. See FREUD, *supra* note 129, at 227.

133. See *id.* at 228.

134. On Jung’s relationship to Freud, see HENRI F. ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY* 455, 462, 483 (1970).

135. CARL G. JUNG, *Approaching the Unconscious,* in *MAN AND HIS SYMBOLS* 34 (Carl G. Jung ed., 1964).

136. *Id.*

137. *Id.* at 37.

work that he believes he has never seen.”¹³⁸ Jung mentions a passage from Nietzsche that was identical to an old seaman’s yarn and that Nietzsche’s sister confirmed he had read as a child.¹³⁹ Musicians, too, can experience cryptomnesia:

Much the same sort of thing may happen to a musician who has heard a peasant tune or popular song in childhood and finds it cropping up as the theme of a symphonic movement that he is composing in adult life. An idea or an image has moved back from the unconscious into the conscious mind.¹⁴⁰

In these cases, Jung reports, the original experience of the copied work was laid down in the unconscious and buried, perhaps for decades, before it arose unbidden and unacknowledged into consciousness during composition of the “new” work.¹⁴¹ The author has a secret memory of the earlier work, stored in a permanent memory trace, that may uncontrollably emerge without their awareness or intention that it should.¹⁴²

The parallels between Freud’s and Jung’s accounts of memory and copying and those of Judges Hand and Owen are striking.¹⁴³ According to both sets of authors, as we experience works of art, music, and literature, they imprint themselves permanently on our unconscious minds. There, they are stored faithfully for years, as newly experienced works are added to the storehouse of our minds. Then, one day, inspiration strikes, and we begin to compose a new work. An image, melody, or character emerges into our minds, but it comes not from our imagination but rather from our unconscious

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 37-38.

142. Freud had similar ideas about the unconscious nature of creative production. Reflecting on the source of poetic inspiration in an essay from 1908, Freud writes, “Our interest in the problem is only stimulated by the circumstance that if we ask poets themselves they give us no explanation of the matter, or at least no satisfactory explanation.” SIGMUND FREUD, *The Relation of the Poet to Day-Dreaming*, in ON CREATIVITY AND THE UNCONSCIOUS: PAPERS ON THE PSYCHOLOGY OF ART, LITERATURE, LOVE, RELIGION 44, 44 (Benjamin Nelson ed., 1958). Peter Gay writes of Freud’s account of creativity, “Freud’s analysis of literary creativity, then, is sober rather than rhapsodic; it concentrates on the psychological transactions between the creator and his childhood, between maker and consumer.” GAY, *supra* note 128, at 308.

143. One might be tempted to ascribe them to cryptomnesia itself.

memory of a prior work. And yet we have no knowledge of the plagiarism until it is pointed out to us in the comments section when we post our songs on YouTube. For Freud and Jung, these quirks of memory highlighted the unseen role of the unconscious. But for Judges Hand and Owen, they are the basis for copyright infringement.

By implication, authors who originate new content do so independently of works they have experienced.¹⁴⁴ As Jung explains, “completely new thoughts and creative ideas can also present themselves from the unconscious—thoughts and ideas that have never been conscious before.”¹⁴⁵ Originality occurs when “inspirations ... appear suddenly from the unconscious” without any prior referent or subliminal memory trace.¹⁴⁶

This is copyright’s conception of originality as well. According to Judge Jerome Frank, the common law’s most committed Freudian, “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”¹⁴⁷ Original expressions are the author’s own: “Originality in this context ‘means little more than a prohibition of actual copying.’”¹⁴⁸ Original expressions are not copied from prior sources but emerge directly into the author’s mind.¹⁴⁹

144. The distinction between copying and creativity is an old one. According to the eighteenth-century English poet Edward Young, “An Original may be said to be of a *vegetable* nature; it rises spontaneously from the vital root of genius; it *grows*, it is not *made*: *Imitations* are often a sort of *manufacture* wrought up by those *mechanics, art, and labour*, out of pre-existent materials not their own.” EDWARD YOUNG, *A Letter to the Author of Sir Charles Grandison*, in CONJECTURES ON ORIGINAL COMPOSITION 3, 7 (Edith J. Morley ed., 1918); see also Snyder, *supra* note 30, at 202.

145. JUNG, *supra* note 135, at 38.

146. *Id.*

147. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)) (citing *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914)).

148. *Id.* at 103 (quoting *Hoague-Sprague Corp. v. Frank C. Meyer, Inc.*, 31 F.2d 583, 586 (E.D.N.Y. 1929)).

149. Judge Frank explains that just as intention is not necessary for copying, nor is it necessary for originality:

There is evidence that they were not intended to, and did not, imitate the paintings they reproduced. But even if their substantial departures from the paintings were inadvertent, the copyrights would be valid. A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation

B. Creativity, Copying, and Memory

Originating and its mirror copying are the foundational acts that copyright law regulates. Both are descriptions of the mental relationship between current authors and prior ones. For copyright law to appropriately regulate expression, then, it must maintain a reasonably accurate understanding of how people create. Unfortunately, the theories of memory and creativity that it borrowed from Freud and Jung are not up to the task. Here, I begin to provide a modern account of the role of memory in creativity and copying derived from contemporary cognitive psychology and neuroscience.

1. Sins of Memory

Over the last quarter century, new research on memory has begun to alter our understanding of how the brain processes, retains, and recalls information. Daniel Schacter has been at the forefront of research employing novel behavioral and neuroscience techniques to elucidate how our memories work. Among Schacter's most important contributions is the notion that memory is an adaptive system, such that memory's supposed failures are often products of an efficient cognitive process.¹⁵⁰ Schacter has identified "seven sins of memory"—shortcomings that affect all people but that also illuminate the ways in which memory succeeds.¹⁵¹ Several of these "sins" are relevant to creativity.¹⁵²

For example, it is now clear that much sensory information fails to encode itself in our memories or does so only weakly.¹⁵³ Attention is typically strongly associated with memory encoding, but often, people pay only limited attention to many aspects of their experiences.¹⁵⁴ They simply fail to notice seemingly significant changes in

unintentionally, the "author" may adopt it as his and copyright it.
Id. at 104-05 (footnotes omitted).

150. Daniel L. Schacter, *The Seven Sins of Memory: Insights from Psychology and Cognitive Neuroscience*, 54 AM. PSYCH. 182, 196 (1999).

151. *Id.* at 183.

152. See generally Annie S. Ditta & Benjamin C. Storm, *A Consideration of the Seven Sins of Memory in the Context of Creative Cognition*, 30 CREATIVITY RSCH. J. 402 (2018).

153. See Schacter, *supra* note 150, at 185-87.

154. *Id.*

their surroundings.¹⁵⁵ And even when they do pay attention, their experiences may fail to strongly encode in their long-term memories.¹⁵⁶ Contrary to Freud, Jung, and copyright law, many of the works that we experience may simply create no memory trace whatsoever.¹⁵⁷

Moreover, even encoded memories often prove transient.¹⁵⁸ That is to say, people forget stuff. Contemporary evidence suggests that what we term forgetting is a process of both loss of mental information over time and retrieval failures due to blocking or inaccessibility.¹⁵⁹ Forgetting can happen quickly, in minutes, and it can occur over years.¹⁶⁰ As with encoding failures, memory transience is often a product of attention and usage.¹⁶¹ Memories that are repeatedly accessed tend to fade less and less quickly than those that are rarely or never accessed.¹⁶² Forgetting can, in fact, be enormously important for creativity. Experiments suggest that people can experience creative blockages when they fixate on previous solutions to problems.¹⁶³ By forgetting those solutions, they open themselves up to new potential paths.¹⁶⁴ As Benjamin Storm and Genna Angello write, sometimes in order to “‘think outside the box,’ one must forget what is ‘inside the box.’”¹⁶⁵

155. See Daniel J. Simons & Daniel T. Levin, *Change Blindness*, 1 TRENDS COGNITIVE SCIS. 261, 261 (1997) (showing that people are often “blind” to changes that occur in the media that they experience).

156. Schacter, *supra* note 150, at 185.

157. See *supra* Part II.A.

158. Schacter, *supra* note 150, at 184.

159. *Id.*

160. *Id.*

161. See *id.* at 184-86.

162. See *id.* at 188.

163. Benjamin C. Storm, Genna Angello & Elizabeth Ligon Bjork, *Thinking Can Cause Forgetting: Memory Dynamics in Creative Problem Solving*, 37 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 1287, 1287 (2011) (“One context in which forgetting may play a particularly critical role is that of creative problem solving. The difficulty in many creative tasks lies in the constraining influence of old ideas, which can cause *mental fixation* and impede the generation of new and creative ideas. Thus, to think creatively, one must not only be able to think of new and appropriate ideas but one must also be able to put aside or forget old and inappropriate ideas.” (citation omitted)).

164. See generally Benjamin C. Storm & Trisha N. Patel, *Forgetting as a Consequence and Enabler of Creative Thinking*, 40 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 1594 (2014).

165. Benjamin C. Storm & Genna Angello, *Overcoming Fixation: Creative Problem Solving and Retrieval-Induced Forgetting*, 21 PSYCH. SCI. 1263, 1264 (2010).

These findings likely seem trite. But notice how starkly they differ from copyright law's assumptions. Your brain is not a replication of the contents of your Spotify history. But you probably do remember the words to the Cardi B songs that are in your yearly Spotify Wrapped list, and you may remember them for decades to come. If an author reproduces a portion of a song that they heard some years before, how can we know if their mind ever encoded the memory trace in the first place or how much of the trace remained when it may have been accessed? Neuroimaging studies are unlikely to ever be able to answer these questions, yet copyright law presumes that jurors can.

One aspect of Jung's account of creativity and memory has been supported by modern experimental evidence. People do, in fact, exhibit cryptomnesia, where they are unable to recall whether they created something themselves or borrowed it from another source.¹⁶⁶ Interestingly, people make attribution errors in both directions: sometimes they take credit for ideas that others invented, while at other times, they give credit to others for their own ideas.¹⁶⁷ To a considerable extent, then, much of creative production does lie outside of our conscious, willful control.

2. *Memory, Copying, and Creativity*

Copyright law's implicit psychology of creativity posits that originating and copying are distinct mental phenomena. Either an author is creating new expressions separate from previously experienced and remembered content, or she is replicating, to some degree, that content. Contemporary cognitive neuroscience, however,

166. See Alan S. Brown & Dana R. Murphy, *Cryptomnesia: Delineating Inadvertent Plagiarism*, 15 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 432, 432 (1989); Richard L. Marsh & Gordon H. Bower, *Eliciting Cryptomnesia: Unconscious Plagiarism in a Puzzle Task*, 19 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 673, 673 (1993); C. Neil Macrae, Galen V. Bodenhausen & Guglielmo Calvini, *Contexts of Cryptomnesia: May the Source Be with You*, 17 SOC. COGNITION 273, 273 (1999); Gayle T. Dow, *Do Cheaters Never Prosper? The Impact of Examples, Expertise, and Cognitive Load on Cryptomnesia and Inadvertent Self-Plagiarism of Creative Tasks*, 27 CREATIVITY RSCH. J. 47, 47 (2015).

167. See Timothy J. Hollins, Nicholas Lange, Christopher J. Berry & Ian Dennis, *Giving and Stealing Ideas in Memory: Source Errors in Recall Are Influenced by Both Early-Selection and Late-Correction Retrieval Processes*, 88 J. MEMORY & LANGUAGE 87, 100 (2016).

increasingly suggests that creativity is dependent on memory. We simply cannot be creative without remembering.¹⁶⁸

Creativity researchers often disaggregate creativity into two separate phases: idea generation and idea evaluation.¹⁶⁹ When creating, we begin by generating potentially valuable new ideas, and then we judge the new ideas to determine their appropriateness to the task.¹⁷⁰ The first process is bottom-up, while the latter is top-down.¹⁷¹ But the bottom-up process of idea generation does not involve creating ideas from whole cloth. Rather, behavioral and neuroimaging studies indicate that it typically involves engagement with episodic memory.¹⁷² For example, people who produce more episodic memories, or those who have been encouraged to engage their episodic memories, tend to perform better on creativity tasks.¹⁷³ And studies with professional writers, musicians, and poets who are asked to create new works while in brain scanners demonstrate activation of brain regions associated with episodic memory.¹⁷⁴

168. Although this Section draws on contemporary social science about creativity, memory, and copying, much recent humanistic scholarship comes to similar conclusions about the role of copying in creativity. See, e.g., Max Paddison, *Mimesis and the Aesthetics of Musical Expression*, 29 *MUSIC ANALYSIS* 126, 126, 131, 139 (2010) (discussing the importance of mimesis to theorists like Aristotle, Walter Benjamin, and Albrecht Wellmer).

169. Roger E. Beaty, Mathias Benedek, Paul J. Silvia & Daniel L. Schacter, *Creative Cognition and Brain Network Dynamics*, 20 *TRENDS COGNITIVE SCIS.* 87, 90 (2016).

170. See *id.* at 91.

171. *Id.* at 92.

172. Donna Rose Addis, Ling Pan, Regina Musicaro & Daniel L. Schacter, *Divergent Thinking and Constructing Episodic Simulations*, 24 *MEMORY* 89, 89 (2016).

173. See generally Kevin P. Madore, Donna Rose Addis & Daniel L. Schacter, *Creativity and Memory: Effects of an Episodic-Specificity Induction on Divergent Thinking*, 26 *PSYCH. SCI.* 1461 (2015); Kevin P. Madore, Brendan Gaesser & Daniel L. Schacter, *Constructive Episodic Simulation: Dissociable Effects of a Specificity Induction on Remembering, Imagining, and Describing in Young and Older Adults*, 40 *J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION* 609 (2014).

174. See generally K. Erhard, F. Kessler, N. Neumann, H.-J. Ortheil & M. Lotze, *Professional Training in Creative Writing Is Associated with Enhanced Fronto-Striatal Activity in a Literary Text Continuation Task*, 100 *NEUROIMAGE* 15 (2014); Siyuan Liu, Ho Ming Chow, Yisheng Xu, Michael G. Erkkinen, Katherine E. Swett, Michael W. Eagle, Daniel A. Rizik-Baer & Allen R. Braun, *Neural Correlates of Lyrical Improvisation: An fMRI Study of Freestyle Rap*, 2 *SCI. REPS.* 834 (2012); Siyuan Liu, Michael G. Erkkinen, Meghan L. Healey, Yisheng Xu, Katherine E. Swett, Ho Ming Chow & Allen R. Braun, *Brain Activity and Connectivity During Poetry Composition: Toward a Multidimensional Model of the Creative Process*, 36 *HUM. BRAIN MAPPING* 3351 (2015); Qunlin Chen, Roger E. Beaty & Jiang Qiu, *Mapping the Artistic Brain: Common and Distinct Neural Activations Associated with*

By contrast, research by Melissa Duff and colleagues indicates that people with brain damage that affects their memories perform meaningfully worse on creativity tasks.¹⁷⁵ They studied people who had impairments to their hippocampus, one of the brain regions most strongly associated with declarative memory.¹⁷⁶ When compared with people without such impairments, the amnesiac participants were less creative on standard tests of both verbal and figurative memory.¹⁷⁷ According to the authors, “the same processing features of the hippocampus that are used in service of declarative or episodic memory for new experiences are used in service of creative thinking, including the ability to rapidly generate, combine, and recombine existing mental representations in the moment to create something new.”¹⁷⁸

Memory is essential to creativity because memory contributes to imagining or simulating possible future experiences.¹⁷⁹ When we create, we draw on our memories of our past experiences to contemplate alternatives.¹⁸⁰ Without memories, we have no sense of what sorts of solutions “work” or where opportunities for other developments lie.¹⁸¹ And although creativity research proposes two distinct steps of idea generation and idea evaluation, the process is more richly interactive than this account suggests. When we are creating, we are always necessarily remembering and copying as well.

Where Judge Owen saw copying and plagiarism in George Harrison’s vamping on older tunes, creativity researchers would see experimentation, evaluation, remix, and play.¹⁸² Or consider the

Musical, Drawing, and Literary Creativity, 41 HUM. BRAIN MAPPING 3403 (2020).

175. Melissa C. Duff, Jake Kurczek, Rachael Rubin, Neal J. Cohen & Daniel Tranel, *Hippocampal Amnesia Disrupts Creative Thinking*, 23 HIPPOCAMPUS 1143, 1147 (2013).

176. *Id.* at 1143.

177. *Id.* at 1147-48.

178. *Id.* at 1148.

179. See Madore et al., *supra* note 173, at 1461.

180. See *id.* at 1467.

181. Michael Joyce & Anita Lundberg, Copying to Learn: Mimesis, Plagiarism and 21st Century English Language Education 6 (Jan. 2013) (unpublished conference paper) (on file with the 2d International Higher Education Teaching and Learning Conference) (“All [writing experts] claim that copying to learn produces real, tangible benefits for practitioners; helping them notice and absorb the features and qualities of the work they aspire to do. Copying enables them to learn, to become successful writers and artists—or students.”).

182. On the concept of play and its relation to intellectual property law, see COHEN, *supra*

recent Beatles documentary *Get Back*, which presents footage of the band composing the songs on its last album *Let It Be*.¹⁸³ While working out the lyrics, melody, and structure of songs like “Get Back” and “The Long and Winding Road,” the Beatles are constantly surrounded by the music of other artists. They’re listening to the Rolling Stones’ album *Beggars Banquet*.¹⁸⁴ And while they compose their own songs, they repeatedly begin playing songs by Hank Williams, Ray Charles, and even the Isley Brothers.¹⁸⁵ They also play their own older songs, as they try to solve creative problems in new and different ways. But none of this is “copying” in the sense that copyright law understands it.¹⁸⁶

Although the Beatles probably remembered and had access to more of the music of their past than most people do, in general, artists’ memories are not storehouses of all of their past experiences.¹⁸⁷ Much of what they hear, they never remember, and what they do remember fades and changes.¹⁸⁸ Moreover, creating and copying are not the distinct psychological phenomena that copyright law imagines. Creating a new work is always and fundamentally an act of remembering older works, thinking through them in an attempt to find different artistic paths.¹⁸⁹

note 100, at 83.

183. Marta Zamfirescu, *Every Song in The Beatles: Get Back*, SCREENRANT (Dec. 7, 2021), <https://screenrant.com/beatles-get-back-soundtrack-songs-guide/> [<https://perma.cc/4SVS-FG2U>].

184. See David Tobocman, *Rock Albums that Changed the World: Beggars Banquet*, ESTHETIC LENS MAG. (Mar. 12, 2019), <https://www.estheticlens.com/2019/03/12/rock-albums-that-changed-the-world-beggars-banquet> [<https://perma.cc/TR7P-P4CP>].

185. See Zamfirescu, *supra* note 183; see also JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 134-35 (2008) (discussing Ray Charles’s joining of melodies from gospel with rhythm and blues to create his hit songs).

186. See MARCUS BOON, *IN PRAISE OF COPYING 3* (2010) (ebook) (“But suppose copying is what makes us human—what then? More than that, what if copying, rather than being an aberration or a mistake or a crime, is a fundamental condition or requirement for anything, human or not, to exist at all?”).

187. Simon Nørby, *Why Forget? On the Adaptive Value of Memory Loss*, 10 PERSPS. ON PSYCH. SCI. 551, 551-52 (2015) (asserting that the commonly held conception that memories are accurately stored by humans is inaccurate). It is clear that John Lennon, who was high as a kite for much of the documentary, barely even knew what song he was currently singing, never mind songs from his past.

188. *Id.* (“[T]he historical prevalence of the ‘storehouse’ metaphor, which suggests that memories are accurately and orderly stored and retrieved, may have led to a descriptive conceptualization of forgetting and may have hindered a more functional approach.”).

189. See COHEN, *supra* note 100, at 83 (“Through [appropriating cultural goods], some

This account thoroughly undermines copyright law's attempt to distinguish original works from copies in a large number of cases. Often, many similar works will precede the work at issue.¹⁹⁰ Let's imagine three separate works that precede the work in question, each of which has five elements or features, indicated by different letters:

Work 1: A, B, C, D, E

Work 2: A, B, D, F, G

Work 3: A, C, D, E, F

And let's imagine that the work in question has the following elements:

Work 4: A, B, D, E, F

Assuming that the author of Work 4 has experienced all three of the prior works, what can we say about whether they copied from one or more of them? In order to answer that question, we need to be able to make some determination of the following:

- (a) When they experienced each of those works, did they properly encode memories of them?
- (b) If they properly encoded memories of them, did those memories remain consistent, did they alter over time, or were they forgotten entirely?
- (c) When they composed Work 4, did they call to mind, consciously or unconsciously, any of the prior works? If so, which one(s)? In their entirety, or only in pieces?
- (d) If they had elements of one or more of the prior works in their mind, consciously or unconsciously, when they were vamping, playing, or remixing possible ideas, did they actually replicate those works rather than find their own path? If so, which one(s)?

situated users become authors: they create works that are intended to be shared with others, and some of those works attain wider fame and influence.”).

190. See 17 U.S.C. § 101 (defining a derivative work as “a work based upon one or more preexisting works”).

These are enormously complicated empirical questions.¹⁹¹ They are questions that contemporary psychological science cannot answer. And, very often, they are questions that the creators themselves cannot answer. Instead, the law tries to rely on beliefs about the probabilities that two humans might independently find their way to similar solutions to a creative problem.¹⁹² But this quickly devolves into storytelling.¹⁹³ It is in this sense that I argue that independent creation does not exist, at least as copyright law understands it.¹⁹⁴ In copyright law, independent creation is entirely mythical. As the next Part shows, once the doctrine loses its connection to empirical reality, independent creation becomes a matter of whose narratives are privileged and whose are rejected.

III. THE DISPARATE TREATMENT OF ORIGINALITY AND COPYING

In copyright law, originality and copying are two sides of the same coin.¹⁹⁵ Copyright's validity and scope determinations are, to a large extent, questions of whether the plaintiff copied or

191. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990) (“We lack the capacity to ascertain the sources of individuals’ inspirations. Thus, the boundaries of copyright are inevitably indeterminate.”).

192. Litman gives the following hypothetical:

Imagine a slight variation: two schoolboys encounter Keats’ *Ode* when their teacher reads it aloud to them in class. Neither pays close attention. The first of the boys forgets the *Ode* utterly; the second has no conscious memory of the poem, but Keats’ turns of phrase stick in his subconscious mind. Both boys grow up to be poets with no further contact with the works of Keats, and each composes the *Ode on a Grecian Urn* with no awareness that Keats has anticipated him. The similarities of the first poet’s poem to that of Keats are sheer coincidence, and he is entitled to copyright his poem. The second poet, of course, relied unknowingly on his subconscious memory, and he is not entitled to a copyright because he copied his poem, albeit subconsciously, from Keats.

Id. at 1000-01.

193. On stories and trials, see generally ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999).

194. Of course, this is not to claim that any assertion of creation independent of some particular work is implausible or untrue. We can say with confidence that Shakespeare did not copy from Bob Dylan, for example. But this is a trite observation and hardly worthy of retaining an otherwise meaningless doctrine.

195. Latman, *supra* note 94, at 1189 (“The defendant must have seen or heard the plaintiff’s work at some time prior to creating his or her own work *and* have used plaintiff’s work in some fashion as a model. Thus, ‘copying’ in the first instance is the obverse of independent creation.” (first citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); and then citing *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924))).

independently created.¹⁹⁶ Conceptually, those questions mirror the liability question of whether the defendant copied from the plaintiff or independently created.¹⁹⁷ As a matter of legal practice, however, there are stark differences between them. Copyright law is much more likely, all else equal, to find that a plaintiff's independent creation claim is valid than they are a defendant's similar assertion.¹⁹⁸ This Part explores that divergence and its implications for copyright and creativity. Copyright law privileges some creators' narratives—plaintiffs, earlier creators, and wealthier creators—over others.

A. Copyright's Originality Credulity

Copyright subsists only in original works of authorship and only to the extent of their originality.¹⁹⁹ And the first element of a copyright infringement action is proof of a valid copyright.²⁰⁰ But despite the centrality of originality to copyright, the law addresses the issue in a thoroughly unquestioning manner.²⁰¹ When it comes to determining the scope of the plaintiff's copyright, the law is wholly credulous of the plaintiff's assertions of independent creation.²⁰² The point, here, is not about whether the work as a whole passes copyright's low originality threshold. Instead, the question is whether certain aspects of the plaintiff's work that they allege to have been infringed were original to them.

Consider how this goes. In order to bring a lawsuit for copyright infringement, a plaintiff must first register the work with the

196. See, e.g., *Boisson v. Banian, Ltd.*, 273 F.3d 262, 270 (2d Cir. 2001) (“[A]n author is entitled to copyright protection for an independently produced original work despite its identical nature to a prior work, because it is independent creation, and not novelty that is required.” (first citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[A], at 2-9 (2001); and then citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991))).

197. See *id.*

198. See generally Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621 (2019).

199. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (“An author ... is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’”).

200. See *supra* Part I.A.

201. See Fisher, *supra* note 71, at 438.

202. See *id.*

Copyright Office.²⁰³ In theory, the Office might examine a work to determine whether it demonstrates the requisite originality demanded by *Feist*.²⁰⁴ In practice, however, the Office virtually never so much as glances at the more than half a million works that come through its doors each year.²⁰⁵ How could the relatively few people²⁰⁶ who work at the Copyright Office possibly determine whether, and the extent to which, all of the songs on all of the albums registered each year are original? Obviously, they cannot.²⁰⁷

To the extent that the Copyright Office does engage in some examination of originality, it almost exclusively addresses itself to the use of common shapes and symbols in two- and three-dimensional designs.²⁰⁸ Moreover, when the Office does review a registration with some care, it generally issues wholesale up-or-down determinations of copyright validity.²⁰⁹ The Patent and Trademark Office's practices of clarifying the scope of inventions and marks through office action letters is nowhere to be found in the Copyright Office.²¹⁰

The effect of registration on validity is significant. Once approved by the Copyright Office, the registered work is granted *prima facie*

203. 17 U.S.C. § 411(a).

204. See *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“[C]opyright protection may extend only to those components of a work that are original to the author.” (first citing *L. Ray Patterson & Craig Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLAL. REV. 719, 800-02 (1989); and then citing *Jane C. Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 & n.12 (1990))).

205. See U.S. COPYRIGHT OFF., ANNUAL REPORT: FISCAL 2019, at 4 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf> [<https://perma.cc/8QU9-V7NM>].

206. The Copyright Office employs approximately one hundred people to review registrations, giving each person about five thousand per year or about twenty per workday. *Hearing Before the Subcomm. on Cts. & Intell. Prop. of the H. Comm. on the Judiciary*, 105th Cong. 3 (1998) (statement of Hon. Marybeth Peters, Register of Copyrights, Copyright Office of the United States).

207. See Zvi S. Rosen, *Examining Copyright*, J. COPYRIGHT SOC'Y U.S.A. (forthcoming) (manuscript at 8-10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4099976 [<https://perma.cc/6BTP-F2M3>] (discussing the current methods of examination in the U.S. Copyright Office).

208. Of the thirty-three opinions of the Copyright Review Board addressing appeals of denials of registration based on originality grounds in 2021, all but two of them involved such designs. See *Review Board Opinions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulings-filings/review-board> [<https://perma.cc/GTC8-Z6FY>].

209. See Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169, 175-76 & n.28 (2008).

210. See TMEP § 704 (July 9, 2022) (explaining trademark examinations and procedures); MPEP § 704 (9th ed. June 2020) (explaining patent examinations and procedures).

validity when it is asserted in subsequent lawsuits.²¹¹ While the presumption can be overcome with evidence to the contrary, defendants are immediately put at a disadvantage: they must prove that the asserted aspects of the plaintiff's work were copied rather than individually created.²¹² Often, they do not even try.²¹³ It is rare for a defendant to argue that the portions of the work being asserted against it were copied from prior sources.²¹⁴ And when they do, courts and jurors seem to demonstrate great credulity towards the plaintiff's originality.²¹⁵

Consider some recent examples from music copyright litigation. When Taylor Swift was accused of copying the lines "Players gonna play/Haters gonna hate" from a song written by Sean Hall and Nathan Butler, most of the validity discussions from the district and circuit courts addressed whether this was too simple of a phrase to merit copyright at all.²¹⁶ But there was no serious question as to whether the plaintiff had originated the lines rather than copying them from one of several prior sources.²¹⁷ Similarly, in cases by Marvin Gaye's estate against Pharrell Williams and Robin Thicke, and by the owners of a copyright in the song "Taurus" asserted against Led Zeppelin's "Stairway to Heaven," no court meaningfully considered whether the portions of the songs that the plaintiffs alleged were infringed were, in fact, originally created by their authors.²¹⁸ Yet in both cases, nothing about the asserted portions of the songs is obviously original, and both asserted songs have significant historical precedents.²¹⁹

211. 17 U.S.C. § 410(c).

212. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (noting the "low bar" to copyright originality and "on the issue of originality ... it is even clearer that copyright registration created a presumption of validity" (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.1[A] (1988))).

213. Fishman and García suggest that this trend may be changing in some music litigation. See Fishman & García, *supra* note 18, at 1161-62.

214. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53 (2d Cir. 1936) (discounting the defendant's attempts to have "filled the record with earlier instances of the same dramatic incidents and devices" to disprove plaintiff's originality).

215. See, e.g., *Gaste*, 863 F.2d at 1069.

216. See *Hall v. Swift*, No. CV 17-6882, 2018 WL 2317548, at *7 (C.D. Cal. Feb. 13, 2018), *rev'd*, 786 F. App'x 711, 712 (9th Cir. 2019).

217. See generally *id.*

218. *Williams v. Gaye*, 895 F.3d 1106, 1119-20 (9th Cir. 2018); *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1076 n.13 (9th Cir. 2020) (en banc).

219. See *Williams*, 895 F.3d at 1119-20; *Skidmore*, 952 F.3d at 1076 n.13.

Unlike patent law, copyright litigation has no distinct opportunity for “claim construction,” where the scope of the plaintiff’s work is determined in advance of its submission to the jury.²²⁰ While patents are construed, or interpreted, in light of prior art to determine which aspects of their claims are novel and nonobvious,²²¹ copyrights get no such scrutiny. Instead, courts largely accept the plaintiff’s assertion that the work as a whole is original,²²² and they leave to the jury the question of whether enough of the plaintiff’s work was copied to justify liability. And I am not familiar with any case in which a defendant has successfully alleged that the plaintiff subconsciously copied the asserted work from prior sources. To the extent that any further analysis of the plaintiff’s work takes place, it does so through jury instructions about the degree of similarity that is necessary for infringement or the level of discernment that jurors should use in comparing the two works.²²³

B. The Ease of Proving Copying

Logically, the question about whether the defendant copied from the plaintiff is the same as the question of whether the plaintiff created an original work or copied from prior sources. Modern copyright law, however, seems to treat these inquiries with very different beliefs about their probability. Just as courts tend to accept plaintiffs’ claims that they created independently of prior sources, they tend to accept plaintiffs’ arguments that defendants copied from them rather than from the prior art.²²⁴ In effect, plaintiffs are privileged as original creators, while defendants are presumed to be plagiarists.

220. On patent claim construction, see David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 228-33 (2008).

221. *Id.*

222. See, e.g., *Heim v. Universal Pictures Co.*, 154 F.2d 480, 481 (2d Cir. 1946) (accepting plaintiff’s claim that “he did not base any part of [his song] upon any prior musical work; he definitely was not influenced at all by any prior works; and that every part of his musical composition was original with him”).

223. *Skidmore*, 952 F.3d at 1076 n.13 (virtually identical standard); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001) (more discerning observer standard).

224. See *Loren & Reese*, *supra* note 198, at 649-50.

Consider, for example, what happens to the presumption of originality that attaches to a copyright registration. While registration provides prima facie evidence of validity for the plaintiff's work, it carries no weight whatsoever for the defendant's—even when the defendant's work is also registered.²²⁵ Song *A* is released in 2018 and is registered with the Copyright Office. Song *B* is released two years later, and it, too, is registered. When the owner of the copyright in *A* sues the authors of *B*, the former is treated as presumptively original, and the defendant is required to prove otherwise. By contrast, no such presumption attaches to *B*, even though it too has gone through the same registration process as *A*.²²⁶

Now, in theory, the plaintiff has to prove that the defendant copied from them rather than independently created.²²⁷ In most cases, however, this is no great hurdle. Recall from Part I that, in the absence of direct evidence, proof of copying-in-fact involves demonstrating both (1) probable access to the work and (2) similarities probative of copying.²²⁸ Neither element, however, presents difficulty for most plaintiffs.

For much of the history of copyright law, establishing that the defendant had probably experienced the plaintiff's work could have been challenging. Even in popular media like movies and music, artists might not be expected to know many of the works in their fields, and they might be especially unlikely to know works from other countries or other genres.²²⁹ An accused artist might plausibly claim never to have heard of even a fairly well-known creator who was not directly relevant to their own work.²³⁰ But, as recent court opinions have recognized, modern mass media have changed these probabilities.²³¹ The internet and platforms like YouTube, Spotify,

225. Litman, *supra* note 191, at 1003.

226. *See id.*

227. *See* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018).

228. *See supra* Part I.B.

229. Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632, 638-39 (S.D. Cal. 1935) (noting that access is harder to prove when the work is not in general circulation).

230. *See, e.g., id.*

231. Skidmore v. Led Zeppelin, 952 F.3d 1051, 1068 (9th Cir. 2020) (en banc); Gray v. Perry, No. 15-CV-05642, 2020 WL 1275221, at *13 (C.D. Cal. Mar. 16, 2020); Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1099 (7th Cir. 2017) (“The access requirement is not onerous.”). As early as the 1930s, some courts were assuming access on the basis of the publication of the plaintiff's work. *See Echevarria*, 12 F. Supp. at 638 (“Ordinarily, of course, after a literary work is published, it is accessible to every one.”); Detective Comics, Inc. v.

and the like give creators access to huge swaths of the world's creative production.²³² And this goes not just for megastars but also for the millions of amateur creators who similarly post their content online.²³³ Coupled with the passive nature of much online media consumption, where algorithms and playlists feed new content without affirmative requests by the consumer,²³⁴ it is possible that people may be exposed to an enormous variety of content.

Recent music copyright litigation suggests that plaintiffs and their attorneys are not especially concerned about proving access, even though they have little or no notoriety. For example, a Christian rap artist called Flame convinced a jury that Katy Perry had access to his 2009 song "Joyful Noise," although there was no reason to think that Perry or anyone who worked on the album had heard the song or knew who Flame was.²³⁵ A Florida rapper named Kidd Wes sued Childish Gambino, alleging that the latter's song "This Is America" infringed Wes's 2016 "Made in America."²³⁶ At the time the lawsuit was filed, the plaintiff's song had 335 views on YouTube and fewer than 1,000 streams on Spotify.²³⁷ Apparently, the plaintiff and his attorneys believed that one of those viewers was Donald Glover. This is not to suggest that the access prong will never protect defendants from spurious lawsuits, but, over time, it will prove less and less helpful.²³⁸

Bruns Publ'ns, Inc., 28 F. Supp. 399, 400 (S.D.N.Y. 1939) (holding that access to the *Superman* comics had been proven because the work was on newsstands for a year).

232. See *Design Basics, LLC*, 858 F.3d at 1107 (noting a handful of district court cases that have found access based on the plaintiff's internet presence); see also Alden, *supra* note 12, at 1731-32.

233. For more information about the growing number of amateur creators posting content online, see Werner Geysler, *22 Creator Economy Statistics that Will Blow You Away in 2022*, INFLUENCER MKTG. HUB (Aug. 1, 2022), <https://influencermarketinghub.com/creator-economy-stats/> [<https://perma.cc/3GZ8-Q7HG>].

234. Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 803, 829-30 (2022).

235. Memorandum in Support of Defendants' Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial at 17-19, *Gray v. Hudson*, No. 15-cv-05642, 2019 WL 8219993 (C.D. Cal. Oct. 9, 2019); see also *Perry*, 2020 WL 1275221, at *14.

236. Matthew Strauss, *Childish Gambino Sued by Rapper Who Alleges "This Is America" Copyright Infringement*, PITCHFORK (May 6, 2021), <https://pitchfork.com/news/childish-gambino-sued-by-rapper-who-alleges-this-is-america-copyright-infringement> [<https://perma.cc/3C3H-NXCQ>].

237. Chris Buccafusco (@cjbuccafusco), TWITTER (May 6, 2021, 5:46 PM), <https://twitter.com/cjbuccafusco/status/1390422865988751365> [<https://perma.cc/7DL3-43E7>].

238. Even in the 1930s, the improbability of access did not always save defendants. In

The second prong of the copying-in-fact inquiry, similarities probative of copying, has also rarely been burdensome to plaintiffs. The plaintiff's task here is to offer proof that the similarities between the two works more probably indicate copying rather than independent creation by the defendant.²³⁹ Only recently, however, has the Ninth Circuit even recognized this as a distinct inquiry, separate from the unlawful appropriation element of copyright infringement.²⁴⁰ And other circuits have regularly confused the two inquiries, subsuming them both under a search for "substantial similarities."²⁴¹

Copying-in-fact is an empirical question about the probability of copying versus independent creation. But notice how difficult this question is in most cases.²⁴² In order to estimate whether similarities are indicative of copying, we have to be able to estimate the size of the creative universe. Is this a narrow area of creative production where people are likely to hit on the same key ideas repeatedly, or is this a broad area of production where individual creators may space themselves out?²⁴³ We also have to estimate the capacities of human creativity, especially in a world where almost everyone is a creator. With 100,000 songs added to Spotify every day,²⁴⁴ how probable is it that musicians will develop the same sets of melodies? With 500 million tweets per day,²⁴⁵ how likely is it that several

Wilkie v. Santly Bros., the plaintiff's song had never been published, and it had only been performed a few times before a small number of people. Nonetheless, the defendant was found to have copied the song. *Wilkie v. Santly Bros.*, 13 F. Supp. 136, 136-37 (S.D.N.Y. 1935).

239. *E.g.*, *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

240. *E.g., id.*; *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

241. *See, e.g.*, *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1100-01 (7th Cir. 2017) (confusing the kinds of similarity that are relevant for copying-in-fact and unlawful appropriation).

242. *See, e.g.*, *Rentmeester*, 883 F.3d at 1117.

243. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam) ("[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."); *Design Basics, LLC*, 858 F.3d at 1100 ("The possibility of a prior common source is especially important in crowded fields such as popular music in *Selle* and designs for single-family homes in this case.").

244. Chris Willman, *Music Streaming Hits Major Milestone as 100,000 Songs Are Uploaded Daily to Spotify and Other DSPs*, VARIETY (Oct. 6, 2022, 5:55 PM), <https://variety.com/2022/music/news/new-songs-100000-being-released-every-day-dsps-1235395788/> [<https://perma.cc/GZ9T-FMD9>].

245. Kit Smith, *60 Incredible and Interesting Twitter Stats and Statistics*, BRANDWATCH (Jan. 2, 2020), <https://www.brandwatch.com/blog/twitter-stats-and-statistics/> [<https://>

people will independently write very similar jokes?²⁴⁶ For the most part, however, the law cares little about these difficult empirical questions.²⁴⁷ If plaintiffs can piece together enough similarities between the two works, they will get to a jury on the issue of copying-in-fact.²⁴⁸ The credulity that courts show towards plaintiffs' originality disappears when defendants' works are at stake.²⁴⁹

We can see the low bar to which plaintiffs are held in proving copying-in-fact in courts' repeated statements that independent creation is a complete defense to copyright infringement.²⁵⁰ In many cases, courts are willing to let a copying dispute get to a jury as long as the plaintiff can demonstrate a probability of access and some degree of similarity. At that point, they say, the burden shifts to defendants to absolve themselves of liability by proving independent creation.²⁵¹ But, once some probability of access is shown, what kind of evidence could satisfy this rebuttal?

In *Selle v. Gibb*, for example, the Bee Gees were accused of copying a song from a little-known songwriter, and the likelihood that they had access to his composition was remote.²⁵² But, to defend against the possibility that they would be found to have copied the work, the Bee Gees introduced a work tape of the recording session during which they composed the disputed song.²⁵³ Obviously, no one on the tape said, "Hey, let's copy that Ronald Selle tune!" But in

perma.cc/U8FS-5R25].

246. See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1804-05 (2008) (reporting that comedians admit that it is difficult to prove independent creation of their jokes).

247. *But see* Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1016-18 (S.D. Cal. 1942) (providing a rare case of a court taking seriously the difficulty of proving the empirical questions that underlie the copying-in-fact inquiry).

248. See Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 537 (2d Cir. 1938) ("[W]here access is proved or admitted, there is a presumption that the similarity is not accidental.").

249. See *id.*

250. See, e.g., Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) ("No matter how similar the plaintiff's and the defendant's works are, if the defendant created his independently ... the defendant is not liable for infringement." (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345-46 (1991))).

251. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000); Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976).

252. 741 F.2d 896, 898 (7th Cir. 1984). Plaintiff played his song with his band a few times in the Chicago area and sent copies to eleven recording and publishing companies. *Id.*

253. According to the court, the tape "preserves the actual process of creation during which the brothers, and particularly Barry, created the tune." *Id.* at 899.

light of courts' recognition of the subconscious copying doctrine, what could the tape truly have showed? The tape presented no evidence of the ideas that were running through Barry Gibb's head while he was working out the melody for "How Deep Is Your Love?" Once the court accepts some evidence of copying, it's hard to imagine how defendants can plausibly argue that their subconscious minds were not secretly accessing long hidden works.²⁵⁴

C. *Asymmetric Treatment of Originality and Copying*

The mirror inquiries of originality and copying often present virtually insoluble empirical questions about people's mental states. In light of the subconscious copying doctrine, the law must try to determine whether, at the time that people are creating works, other works that they have experienced in the past were running through their minds. Of course, the law asks difficult questions about people's mental states all of the time—for example, did the defendant intend to harm the plaintiff? And the subconscious copying doctrine makes a certain amount of sense from an evidentiary perspective.²⁵⁵ It would be difficult for plaintiffs to have to prove intentional copying in many cases. But the different doctrines that copyright law applies to originality and copying create asymmetries between different kinds of creators.

To illustrate the differences, imagine that a court is trying to determine the relationship between two works: *Work 1*, which was released in 2010, and *Work 2*, which was released in 2020. As a doctrinal matter, when copyright law asks about the relationship that *Work 2* bears to *Work 1*, the fact that the question arises in the context of the originality and validity of *Work 2* should not matter. This is the case when either (1) the plaintiff asserts the question and *Work 1* is prior art, or (2) the question arises in the context of copying and infringement and *Work 2* is alleged to infringe *Work 1*.

254. See Litman, *supra* note 191, at 1002 ("If the defendant cannot disprove exposure to the plaintiff's work, however, it is difficult—to say the least—for her to demonstrate that the similarities between the works reflect neither conscious nor unconscious copying." (citing 2 P. GOLDSTEIN, COPYRIGHT § 7.2.2, at 21 (1989))).

255. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983) ("Moreover, as a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders.").

In both cases, the fundamental empirical question for the fact-finder is: Did the creators of *Work 2* copy *Work 1* when they created it?

When *Work 2* was created by the defendants and is alleged to infringe *Work 1*, proof of some probability of access and some similarities probative of copying will be sufficient to establish that *Work 2* is a copy of *Work 1*.²⁵⁶ *Work 2* is not completely original and is, thus, infringing. Even though the defendants might not recall ever experiencing *Work 1*—and although they may credibly argue that if they did, they have entirely forgotten it—they may be found to have subconsciously copied it. By contrast, when *Work 2* was created by the plaintiffs and *Work 1* is prior art, the plaintiffs' copyright will be presumed valid, even though the Copyright Office made no meaningful examination into its originality. Moreover, although it is just as plausible that the plaintiffs had experienced *Work 1* and subconsciously copied it, no such inquiry will be made.²⁵⁷ I have found no case in which defendants have successfully challenged the originality of plaintiffs' work on the grounds that they may have subconsciously copied it from some prior work.

Consider the *Fred Fisher* case in which Judge Hand first announced the subconscious copying doctrine.²⁵⁸ The defendant was accused of copying an ostinato sequence from the plaintiff's composition, and the defendant pointed out ostinatos in prior works, including one by a composer named Landon.²⁵⁹ To Judge Hand, the earlier ostinatos did not invalidate the plaintiff's copyright because "there [was] no evidence to sustain the assertion that the Dardanelle 'ostinato' was in fact taken from Landon or from any other composition."²⁶⁰ While he embraced the plaintiff's assertion of independent creation, the judge, nonetheless, felt confident that the

256. See *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169-70 (7th Cir. 1997).

257. See Litman, *supra* note 191, at 1002-03 ("Defendant, therefore, tries to introduce evidence impeaching the originality of the plaintiff's work by producing similar works to which plaintiff had access and probably subconsciously copied. Plaintiff, however, waves her certificate of copyright registration (a prerequisite to suit), which is prima facie evidence of the validity of her copyright, including the originality of her work. Since defendant cannot produce direct evidence that plaintiff copied the prior similar works and does not receive the benefit of an access-plus-substantial-similarity inference, the attack on the plaintiff's copyright comes to naught. And defendant's own certificate of registration has no probative value as a defensive measure." (footnotes omitted)).

258. *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147-48 (S.D.N.Y. 1924).

259. *Id.* at 148-49.

260. *Id.*

defendant had subconsciously copied from "Dardanella," the plaintiff's work.²⁶¹

Three Boys Music, Corp. v. Bolton also starkly presents the disparate treatment of originality and copying.²⁶² There, the owners of the copyright in the Isley Brothers' song "Love is a Wonderful Thing" sued Michael Bolton, alleging that his song of the same name was copied from theirs.²⁶³ Other than their titles, the similarities between the two songs were limited, including some similarities in shifted cadence, the instrumental figures, the verse/chorus relationship, and the fade ending.²⁶⁴ Yet the trial court allowed the case to get to a jury, and the Ninth Circuit did not overturn the jury's finding of infringement.²⁶⁵ While the jury and court accepted that Bolton probably copied from the Isley Brothers, the plaintiffs' originality faced no such skepticism.²⁶⁶ Although eighty-five songs with the same title had been registered with the Copyright Office before the Isley Brothers' composition, no one seemed to doubt that their contribution was original.²⁶⁷ The same is true for the other entirely standard musical techniques that were asserted to be similar.

Finally, recall *Selle v. Gibb*.²⁶⁸ The plaintiff was a clothing salesman at a department store who testified that he composed his song while shaving one morning.²⁶⁹ The trial court and jury accepted his argument that "[n]o one assisted him either in composing the music, or in writing the words, or in phrasing the lyrics [and that he] did not copy from any prior musical work or composition."²⁷⁰ By contrast, the trial court allowed the jury to determine whether the Bee Gees copied his song, which had never been published and had only been performed a few times at some small venues in Chicago.²⁷¹ And the jury found in the plaintiff's favor, apparently because the

261. Alden, *supra* note 12, at 1735 n.34.

262. See 212 F.3d 477, 488-89 (9th Cir. 2000).

263. *Id.* at 477.

264. *Id.* at 485.

265. *Id.* at 485-86.

266. *Id.* at 484.

267. *Id.*

268. 567 F. Supp. 1173, 1175 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

269. *Id.*

270. *Id.*

271. *Id.* at 1175-76.

Bee Gees did not rebut the plaintiff's expert's testimony that the similarities between the two songs were so striking that they had to be the result of copying rather than independent creation.²⁷²

As discussed above, the Bee Gees managed to avoid liability for copying the plaintiff's song in part because of the existence of a work tape that recorded their creation of the song.²⁷³ Of course, the work tape tells us nothing about what was happening in Barry Gibb's subconscious mind. But its effect wasn't empirical, but rather rhetorical and political. According to the trial judge, through the tape "one is admitted into the creative process by which the accused song ... was composed."²⁷⁴ Or as the Seventh Circuit noted, "[t]his tape preserves *the actual process of creation* during which the brothers, and particularly Barry, created the tune."²⁷⁵ The judges believed that, through the tape, they could directly experience the band's creativity. The tape refigured the Bee Gees as musical originators rather than copiers. As a matter of copyright doctrine, the tape did no such thing. But as a matter of legal rhetoric, it is enormously powerful.

This is not to say that defendants are incapable of challenging the originality of plaintiffs' works or that it never happens. They are, and it does.²⁷⁶ But the structure of copyright litigation and the doctrines typically applied to questions of validity and infringement treat originality and copying very differently. Copyright law tends to presume that plaintiffs' works are original, while defendants can face a daunting burden of establishing that their works were not copied, perhaps even by their subconscious minds.

But this is more than a matter of doctrinal inconsistency. It is also a matter of power and privilege. By trusting plaintiffs and doubting defendants, copyright law favors some creators at the expense of others. First, it favors historically earlier creators who find themselves in the role of plaintiff over historically later creators who find themselves in the role of defendant. Simply by creating a work earlier in time, one is given the benefit of the doubt regarding

272. Maurice Possley, *Bee Gees Found Guilty of Plagiarism*, ROLLING STONE, Apr. 14, 1983, at 60 (quoting the jury foreman).

273. See *supra* note 253 and accompanying text.

274. *Selle*, 567 F. Supp. at 1177.

275. *Selle v. Gibb*, 741 F.2d 896, 899 (7th Cir. 1984) (emphasis added).

276. *Fishman & García*, *supra* note 18, at 1170.

independent creation. Thus, the rock ‘n’ roll musicians of the 1960s through 1980s are figured as original creators, despite their massive borrowing from earlier, often Black, musicians who receive no credit.²⁷⁷ While benefit is conferred upon those certain creators, newer creators like Pharrell Williams, Katy Perry, Taylor Swift, and Childish Gambino are figured as mere copiers.

Next, and more perniciously, copyright’s disparate treatment of independent creation privileges wealthy creators like the Bee Gees who happened to be composing at a French chateau when a tape recorder was running.²⁷⁸ While the Bee Gees could reposition themselves as originators, other less well-resourced artists may not be so lucky. Few artists will be followed around by film crews that can claim to capture their “actual process of creation.”²⁷⁹ When they are sued for infringement, poorer artists will not be able to prove that they were creating independently rather than copying.

Because copyright law’s independent creation doctrine rests on unstable empirical foundations, legal discourse involving originality and copying inevitably become matters of privilege, rhetoric, and politics. Historically, copyright law has favored plaintiffs’ claims of independent creation over those of defendants.²⁸⁰ In Part IV, I consider what the law might do to address these concerns.

IV. SOLVING COPYRIGHT LAW’S INDEPENDENT CREATION PROBLEM

Copyright law’s twin doctrines of originality and copying, upon which so much of the legal edifice is made to stand, are hopelessly flawed. The law’s conception of the creative process—epitomized by the subconscious copying doctrine—is inconsistent with how creativity actually arises. This is a grand failing for a system that is meant to regulate creativity.²⁸¹ Further, the law’s disparate treatment of originality and copying for validity and for infringement exacerbates the problem, privileging some creators over others. In

277. See Arewa, *supra* note 100, at 616-17.

278. See *supra* notes 272-74 and accompanying text.

279. *Selle*, 741 F.2d at 899.

280. See *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988); *Fred Fisher, Inc., v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924).

281. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (showing that the purpose of copyright regulation is to promote science and art).

this Part, I explore three potential responses, in order of increasing radicality, that would more closely align copyright jurisprudence with the nature of creative production.

A. Balancing Validity and Infringement

Part III demonstrated that copyright law treats the question of independent creation differently depending on when it arises as a matter of the validity of the plaintiff's work or as a matter of the defendant's infringement. Courts are considerably deferential to plaintiffs' assertions of originality, granting them *prima facie* validity and rarely looking deeply into potential prior art from which the work could have been copied. By contrast, a simple showing of access and similarity by the plaintiff is enough to compel defendants to prove independent creation, even for already registered works.²⁸² This disparate treatment stacks the deck in favor of plaintiffs and impedes creativity.

The remedy is obvious: treat independent creation the same whether it arises as a matter of validity or as a matter of infringement. The harder question is which standard should change. Should copyright law be more suspicious of plaintiffs' independent creation at validity or less suspicious of defendants' independent creation at infringement?

As an empirical matter, it might make sense for copyright law to be less suspicious of defendants' claims of independent creation. One way of evaluating the research discussed in Part II is to conclude that independent creation happens far more often than copyright law seems to assume.²⁸³ Because creators might not remember works that they have experienced previously, and because they may not actually recall them to mind when composing, copyright law may be overestimating the amount of copying that is taking place, at least as a matter of infringement.²⁸⁴ If that is the case, then copyright law might choose to treat defendants' works more similarly to plaintiffs'. Thus, copyright law might impose a presumption

282. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000); Litman, *supra* note 191, at 1002-03.

283. See BOYLE, *supra* note 185, at 135 (discussing independent creation found in Ray Charles's style of copying).

284. See *supra* notes 150-67 and accompanying text (discussing memory and forgetting).

of independent creation in favor of defendants who have registered their works. And, as it does with prior art for plaintiffs' works, copyright law might require more than simply access and similarity, but rather specific evidence that the defendant actually used the plaintiff's work as a model.

Another way of interpreting the scientific research in Part II is that independent creation occurs less frequently than copyright law seems to assume. Because memory of prior works is essential to creating new works, so much of what creators do involves copying in one way or another.²⁸⁵ This reading could lead copyright law to be more suspicious of plaintiffs' claims to independent creation. The law could treat plaintiffs' originality the way it now treats defendants' copying. This would include jettisoning the presumption of validity and incorporating the subconscious copying doctrine into validity determinations.

Under this approach, when a plaintiff asserted the originality of a work at trial, the defendant would be free to attack its validity by pointing to one or more works in the public domain to which the author had access and with which the asserted work shares probative similarities. Even though the plaintiff might not remember encountering the work, or even though they might believe they did not use the prior work when creating their own, their work would be found invalid or narrowed in scope unless they could establish, by affirmative proof, that they independently created the work.

This approach, which would introduce something like claim construction to copyright litigation, could have several salutary effects. Most importantly, it would eliminate a number of copyright lawsuits, and it would vastly shrink the scope of the copyrights in many others. Other creators would feel free to pursue their own projects without fear that an earlier work might turn up that shared some similarities with theirs. And, more lawsuits could be eliminated earlier in litigation as courts narrowed the claims of the asserted works to the point that a finding of infringement was unlikely. Judges would play a larger role in managing the scope of asserted copyrights rather than simply handing the case off to the

285. See *supra* notes 168-81 and accompanying text (discussing memory and creativity).

jury with vague instructions about “reasonable observers” and “more discerning observers.”²⁸⁶

B. Abandoning Subconscious Copying

Much of the mischief caused by the search for independent creation arises from copyright law’s subconscious copying doctrine. Once the law accepts that, unbeknownst to themselves, authors may secretly replicate works that have been residing in their unconscious minds, virtually all assertions of independent creation are thrown into doubt. As long as a creator has experienced a work in the past, it is possible that their memory “played [them] a trick”²⁸⁷ and confidentially inserted the work into their new creation. Yet, because jurors have no better access to creators’ minds than do the creators themselves, copyright law is stuck at an empirical impasse.²⁸⁸

Copyright law could abandon the subconscious copying doctrine and demand proof of conscious, willful copying for infringement. Unfortunately, it’s not entirely clear what this approach would look like. As the *Harrisongs* court noted, proving intentional infringement could be enormously difficult in some cases.²⁸⁹ While there are plenty of cases in which the defendant clearly intended to copy the plaintiff’s work,²⁹⁰ in many more cases it would simply be very difficult to tell.²⁹¹ As the creativity research discussed above suggests, copying arises constantly through the process of generating and evaluating new ideas.²⁹² But, as the doctrine recognizes, much of this happens below the level of conscious awareness.²⁹³

If a defendant is unwilling to admit copying, copyright law would have two options. First, it could absolve the defendant of liability in

286. *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946) (articulating the reasonable observer test); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 271-73 (2d Cir. 2001) (articulating the “more discerning observer” test).

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

288. *See Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (demonstrating how jurors are expected to decide the fact of whether a party copied the other party’s work and are given deference at appeal).

289. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 999 (2d Cir. 1983).

290. *See supra* note 80 and accompanying text.

291. *See, e.g., Harrisongs Music, Ltd.*, 722 F.2d at 999.

292. *See supra* Part II.B.2.

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

all such cases, irrespective of the similarity of the two works. Or, second, it could continue doing what it now does, using circumstantial proof of intentional copying and allowing liability when the plaintiff proves access and similarity. The first route is implausible. And the second one retains the status quo without resolving the fundamental difficulty at the heart of the doctrine. Jurors will be left to make probability guesses about the likelihood of conscious-but-unadmitted copying given a certain amount of similarity. The law will not have succeeded in abandoning subconscious copying.

C. The End of Independent Creation

The most appropriate response to the evidence and arguments presented in this Article is for copyright law to abandon the concept of independent creation entirely. In a large number of cases, the doctrine is irrelevant because copying is not disputed.²⁹⁴ And in the cases where independent creation is disputed, it mostly causes mischief. Copyright's legal treatment of independent creation is a shamble, and the doctrine rests on empirically dubious foundations. Finally, at least from the perspective of copyright law's dominant utilitarian justification, the normative case for an independent creation doctrine, coupled with the subconscious copying doctrine, is weak. Copyright law would be better off without it.

1. Independent Creation Is Useless at Best

Even if copyright law corrected its disparate treatment of independent creation, the doctrine would still create substantial difficulties for the reasons identified in Part II. Copyright law is built upon the beliefs that originality is good and copying is bad.²⁹⁵ But in a large number of cases, distinguishing between these two behaviors is virtually impossible.²⁹⁶ Once we know that an author probably had access to a work, knowing whether they actually used that work in creating their own remains incredibly fraught.²⁹⁷ Copyright law could tinker with its doctrines and presumptions, but

294. *Cf. supra* notes 80-82 and accompanying text.

295. *See* Litman, *supra* note 191, at 965-66.

296. *See id.* at 1000-01.

297. *See id.* at 1002.

the fundamental empirical question of whether an author subconsciously copied a prior work is extraordinarily elusive.²⁹⁸

Moreover, the inquiry into copying may have a deleterious effect on other doctrines. As explained in Part I, the plaintiff's prima facie case of copyright infringement involves proof of both copying-in-fact and unlawful appropriation.²⁹⁹ It is not enough that the defendant copied from the plaintiff; the copying must also be of the kind that copyright wants to deter.³⁰⁰ The second element inquires into the extent to which copyrighted features of the plaintiff's work were copied in the defendant's work.³⁰¹ It asks whether there were "substantial similarities" between the two works.³⁰² Experimental research by Shyamkrishna Balganesh, Irina Manta, and Tess Wilkinson-Ryan suggests, however, that jurors who are told that the defendant copied from the plaintiff may require a lower showing of similarity for the second element.³⁰³ Thus, the inquiry into copying-in-fact may induce juries to find copyright infringement more often.³⁰⁴

My own experience teaching copyright law supports this finding. Take the case of *Rentmeester v. Nike, Inc.*, where the famous footwear brand copied the plaintiff's photo of Michael Jordan dunking a basketball.³⁰⁵ The district court dismissed the case, finding that Nike's copying was not unlawful, and the Ninth Circuit affirmed.³⁰⁶ But whenever I teach the case, a sizable portion of my class objects to the result on the grounds that Nike is free riding on the photographer's labor. People often have moral objections to free riding even when, in situations like this, the law deems it acceptable.³⁰⁷ Copyright's emphasis on the wrongness of copying may exacerbate those intuitions.

298. *See id.*

299. *See supra* Part I.B.

300. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

301. *Id.*

302. *Id.*

303. Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 289 (2014).

304. *See id.*

305. 883 F.3d 1111, 1116 (9th Cir. 2018).

306. *Id.* at 1125.

307. *See* RICHARD TUCK, FREE RIDING 207-09, 215 (2008).

Lawyers are smart, and juries could be better instructed to improve fact-finding. Copyright law could try to solve some of these problems. But is it worth the effort? Would generating more accurate independent creation verdicts make copyright law better? The answer depends on the normative significance of the distinction between copying and independent creation.

Copyright's fundamental goal is promoting expression through the provision of incentives to create.³⁰⁸ Accordingly, from the perspective of efficiently regulating creative production, it might be valuable to discourage copying and to encourage independent creation in some cases. Copying reproduces works that society already has, but independent creation can produce new, potentially valuable works.³⁰⁹ Incentives only work, however, if people can adapt their behavior in accordance with them. And the subconscious copying doctrine thoroughly undermines copyright law's incentive effect.

First, consider originality's inability to meaningfully demarcate the scope of a copyrighted work. Only those aspects of a work that are independently created by its author are copyrighted.³¹⁰ Other authors should be able to assess the bounds of existing copyrights, so they can safely create their own works. But, as Jessica Litman has explained, if the plaintiff's originality is largely unknowable, how can it properly set the boundaries of a work's scope?³¹¹ How are other creators to know which aspects of the plaintiff's work are original to them and which were copied from other sources? Even if copyright law seriously inquired into plaintiffs' originality, it would not provide adequate notice to other creators until they were sued for copyright infringement.

But things are yet worse for creators who want to avoid liability. Imagine an author who wants to create a new work. She is

308. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." (footnote omitted)).

309. See LANDES & POSNER, *supra* note 3, at 262-63.

310. See *supra* Part I.A.

311. See Litman, *supra* note 191, at 1004 ("[T]he concept of originality is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable.").

motivated (somewhat implausibly)³¹² by the promise of royalties that copyright law makes possible. She knows that if she creates an original work she will be entitled to a copyright, and she knows that if she copies an existing work, not only will she not obtain a copyright, she may be liable for damages. What are they to do? Try as they might to create an original work, their mischievous subconscious may call to mind some work that they experienced years ago. They will not have been able to control it, and they will not even know that (if) it happened until they are sued for copyright infringement.³¹³ If copyright law accepts the possibility of subconscious copying—and there seems to be little likelihood of the doctrine being rejected—authors’ attempts to comply with the law are futile.³¹⁴

Copyright law exists to encourage the creation of original works and to discourage copying, but to the extent that independent creation falls outside of authors’ conscious control, the law’s incentive effects are blunted. Is it really appropriate to reward some authors with millions of dollars of revenue while punishing others with similar levels of damages when none could control their behavior?³¹⁵ Yet copyright law’s independent creation doctrine does exactly this. According to copyright law, George Harrison’s “My Sweet Lord” was a success story. Until it wasn’t.³¹⁶ Once it was shown to be a copy of “He’s So Fine,” it was worthless, or worse, it was harmful.³¹⁷

2. *Similarity and Difference Are All that Matter*

The previous statement is obviously false. Harrison’s composition is still valuable. In fact, it is no less valuable—in any sense—for

312. See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 29 (2011).

313. See Litman, *supra* note 191, at 1010 (“Her brain has not organized all of this into neat, separable piles entitled ‘things that happened to me,’ ‘things I read once,’ and ‘things I thought up in a vacuum’ to enable her to draw the elements of her works of authorship from the correct pile. She did not, after all, experience them so discretely.”).

314. In theory, creators could try to learn as little as possible about other cultural production, but, even if this were possible, it certainly would not be desirable.

315. See Alden, *supra* note 12, at 1751.

316. See *supra* note 76 and accompanying text.

317. Of course, it was not worthless to the owners of the copyright in “He’s So Fine,” who were now entitled to a share of the royalties that the song generated. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976), *aff’d order sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

being a copy of The Chiffons' song.³¹⁸ Why? Because it's different from "He's So Fine." And that's all that copyright law needs to—or, indeed, can—care about. I have argued that copyright law's independent creation doctrine does more harm than good. It does not create meaningful incentives to produce original work, but it is expensive to litigate, produces ungrounded liability judgments, and may corrupt other aspects of copyright liability. Importantly, the law does not need it.

Copyright law should abandon the independent creation doctrine. It should no longer ask whether an author's work is original, in the sense that its expression originates from the author rather than from another source. And copying-in-fact should no longer be an element of copyright infringement. Copyright law should not care whether someone copied—not that it actually can.³¹⁹ Copyright law would be no worse and it might be a lot better if it simply ignored independent creation.

From the perspective of copyright law's utilitarian foundation, independent creation has never played an especially important doctrinal role, nor has it received particularly full-throated defenses from scholars.³²⁰ Copyright law exists to encourage the creation of new works, and obviously society would be better off if the law encouraged the creation of valuable works rather than valueless ones.³²¹ But copyright law, at least since *Bleistein*, has tried to avoid aesthetic or cultural judgments of works for very good reasons.³²²

318. See BOYLE, *supra* note 185, at 135. Boyle asks, "Should we think less of Ray Charles's genius because we find just how closely two of the canonical songs in the creation of soul were based on the work of his contemporaries? Hardly. 'I Got a Woman' and 'This Little Girl of Mine' are simply brilliant." *Id.*; see also Carys J. Craig, *Transforming "Total Concept and Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine*, 38 CARDOZO ARTS & ENT. L.J. 603, 642 (2021).

319. See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 885 (1993) ("[T]his environment, having been thrust upon us by those in whose interests cultural commodities circulate, is now the only one we have, so that it is now in a sense unfair to deny us the liberty to make of it what we will.").

320. For example, Landes and Posner justify copyright's independent creation doctrine on the grounds that searching for other works would be too costly for authors. LANDES & POSNER, *supra* note 3, at 87.

321. Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, in 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 98, 99, 115 (Ben Depoorter & Peter S. Menell eds., 2019).

322. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); Beebe, *supra* note

Having given up on the possibility of directly incentivizing cultural “progress,” the law has instead settled for encouraging the creation of *more* works.³²³ *Feist*’s low validity bar enables virtually every work to receive a copyright,³²⁴ and the law can hope that the cornucopia of works thereby generated will, in one way or another, improve society. Variety has become the spice of copyright’s life.

Independent creation, however, does not have a meaningful role to play in this story. What matters about “My Sweet Lord,” for example, is that it’s different from “He’s So Fine” in ways that people value. Moreover, society is much better off with a copied “My Sweet Lord” than it is with a second, independently created “Ode on a Grecian Urn.” Once we have Keats’s, why do we need another? Independent creation, if there is such a thing, may or may not actually generate new works. If it does not, society is not better off. So what should matter? Similarity and difference. That’s all. Copyright law can achieve its goal of promoting expression and culture simply by encouraging the creation of new works, ones that are different in some way from those that came before. It need not care whether they were independently created or not.

3. Copyright Law Without Independent Creation

This Section begins the task of imagining copyright law without the independent creation doctrine. In an article like this one, many details must be left out. I will, however, suggest how both copyright validity and infringement would operate without independent creation. Importantly, I will show that other copyright doctrines are better suited to handling tasks that are currently assigned to the woefully unsatisfactory inquiry into independent creation. These are preliminary inquiries, and much work would remain.

The basic proposal is simple. Both copyright validity and copyright infringement have two elements, one of which relates to independent creation and one of which relates to aesthetic differences or similarities. Copyright validity involves (1) independent

34, at 333. *But see* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249-51 (1998) (arguing that this effort inevitably fails).

323. Beebe, *supra* note 34, at 330-31.

324. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (explaining the low threshold required for copyright protection).

creation plus (2) nontrivial creativity,³²⁵ while copyright infringement involves (1) copying-in-fact plus (2) substantial similarity.³²⁶ Copyright law would be no worse—and likely much better—if both inquiries simply jettisoned the first requirement of each pair.

To determine whether a work merits copyright, all the law needs to ask is whether the work is different from those that have come before it. Helpfully, *Feist* already provides guidance for how to do this. There, the Court added to its suggestion in *Bleistein* that origination was enough for copyrightability.³²⁷ In *Feist*, the Court asked whether a work evinces some minimal degree of creativity, rather than being “obvious” or “garden variety.”³²⁸ Even if someone independently created a phonebook that was organized alphabetically by last name, it would not receive a copyright, according to *Feist*, because this method is “entirely typical” and “commonplace.”³²⁹ Already the law imposes a creativity standard beyond independent creation.³³⁰ I am simply proposing that the law should rely solely on it for purposes of copyright validity.³³¹

325. *See id.* at 345.

326. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

327. *See supra* Part I.A.

328. 499 U.S. at 345, 362.

329. *Id.* at 362-63.

330. There is a vast literature on copyright law’s creativity standard. *See, e.g.*, Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1142-43 (2010); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151, 1192 (2007); Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 485-94 (2009); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2013 (2011); Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1531 (2011); Marc K. Temin, *The Irrelevance of Creativity: Feist’s Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN. ST. L. REV. 263, 278-79 (2006); Brian L. Frye, *Against Creativity*, 11 N.Y.U. J.L. & LIBERTY 426, 427-28 (2017); Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169, 171-72 (2008); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 848 (2010); Mark Bartholomew, *Copyright and the Creative Process*, 97 NOTRE DAME L. REV. 357, 361-65 (2021).

331. In this respect, copyright law’s validity requirement would look a lot more like design patent law’s validity requirement. *See* 35 U.S.C. § 171. Design patent law asks a patentee whether the design is substantially the same as designs that have come before it. There is no question of independent creation. *See Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008) (en banc) (articulating the test for substantial sameness); Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 BERKELEY TECH. L.J. 1, 3 (2016) (“Through its doctrinal structure, patent law essentially *presumes* copying on the part of any company that makes or uses technology developed after the date a patent issues.”). It is sufficient if the patentee has made something different. Although “novelty” seems like

Of course, the Supreme Court has declared that “originality” is a constitutional requirement of copyright law.³³² Originality does not appear in the constitutional text, however, and its apparently sacrosanct status has arisen only by implication from the term “Author.”³³³ Thus, the Court could reconsider this line of cases.³³⁴ In addition, as I explained in Part III, courts hardly scrutinize plaintiffs’ assertions of independent creation as it is. As a matter of copyright validity, the law has already effectively dropped the independent creation requirement.³³⁵ Practically, then, explicit recognition of the change would result in very little departure from the status quo.

Copyright law could also happily drop independent creation from its evaluation of copyright infringement. At the outset, it is worth noting that the doctrine does not have an impact on most copyright cases.³³⁶ The ability to assert independent creation as a defense does not absolve many defendants because many defendants admit to having copied the plaintiffs’ work.³³⁷ Very few will find themselves in the position of Childish Gambino or The Bee Gees, sued by an artist whom they had no real probability of copying.³³⁸

a high standard for copyrightable expression to meet, those familiar with design patent law can attest otherwise. Even incredibly simple designs often sail over the bar. It all comes down to how low the level of abstraction is set. *See* Christopher Buccafusco, Mark A. Lemley & Jonathan S. Masur, *Intelligent Design*, 68 DUKE L.J. 75, 96 (2018). When even minor variations are sufficient, then many works can count as “new.” Sarah Burstein, *Costly Designs*, 77 OHIO ST. L.J. 107, 115-16 (2016). Furthermore, copyright law could jettison the independent creation requirement and still maintain its current registration-based system rather than an examination-based system. Design regimes around the world grant exclusive rights in designs without actually examining their novelty. DAVID STONE, EUROPEAN UNION DESIGN LAW: A PRACTITIONERS’ GUIDE 348-49 (2d ed. 2016). U.S. copyright law could do the same. The task of determining validity would still largely reside where it currently does, with courts determining whether a work evinces sufficient creativity.

332. *Feist*, 499 U.S. at 346.

333. *See supra* Part I.A; U.S. CONST. art. I, § 8, cl. 8.

334. Certainly, a number of the Court’s current Justices seem to give prior decisions little weight. *See, e.g.*, Strict Scrutiny, *Smashing Precedents and Making Up Facts*, CROOKED (July 4, 2022), <https://crooked.com/podcast/smashing-precedents-and-making-up-facts/> [<https://perma.cc/7FXV-63RN>].

335. Joseph Fishman suggests that some copyright decisions involving music have in fact applied a novelty-like standard for years. *See generally* Joseph P. Fishman, *Originality’s Other Path*, 109 CALIF. L. REV. 861 (2021).

336. *See supra* Part III.A.

337. *See supra* Part I.B.

338. Thus, Landes and Posner’s worry that independent creation is necessary because authors cannot search for others’ works is insignificant. *See* LANDES & POSNER, *supra* note 3,

If copyright infringement eliminated independent creation as a defense, it would simply determine liability based on unlawful appropriation and fair use. Jurors would not have to determine whether the defendant probably copied from the plaintiff. They would only have to determine whether the defendant's work violated the plaintiff's reproduction or derivative works rights.³³⁹ Guided by a primary determination of the ways in which the plaintiff's work differed from those that came before, jurors would be asked whether the defendant's work was substantially similar to the plaintiff's and, if so, whether nonetheless the defendant's use was fair.

For example, when Taylor Swift was sued for using the phrase "Players gonna play/Haters gonna hate," the only similarities between her work and the plaintiff's work were lines that had already been used by others.³⁴⁰ Thus, the phrases should be free for her to use, whether or not the plaintiffs independently created them. The same is true for most of the musical elements at issue in the recent lawsuits against Led Zeppelin and Katy Perry.³⁴¹ Visual art cases would work similarly. There would be no need to try to determine which aspects of the photographs of Prince or Michael Jordan were independently created by their authors and which were copied.³⁴² The scope of those works would be based on what aspects of the works demonstrated sufficient creativity to differ from the underlying facts, for example, particular choices about lighting, focus, color, and other elements. Then, the law would ask whether those aspects of the works appeared in substantial form in defendants' works. These are objective considerations about the content of the works, not meaningless and biased subjective inquiries into

at 87. In the fields regulated by copyright law, authors are not actively looking for opportunities to skirt one another's rights. Or, if they are, it is because they already know of the existence of those works and are copying them.

339. Note that I am not here advocating for a wholesale shift to design patent law's infringement standard as well. There, any meaningful variation from a previous design is sufficient to create an independent right in the new design. But copyright's derivative works right means that even new versions of copyrighted works—for example, sequels—are infringements if they are not authorized by the copyright holder.

340. *Hall v. Swift*, 786 F. App'x 711, 711-12 (9th Cir. 2019).

341. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1059-60 (9th Cir. 2020) (en banc); *Gray v. Perry*, No. 15-CV-05642, 2020 WL 1275221, at *1 (C.D. Cal. Mar. 16, 2020).

342. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117-18 (9th Cir. 2018).

the process of creation. Copying, by either the plaintiff or defendant, would be irrelevant.

Although copyright law currently uses the language of “originality” to exclude some portions of the scope of a plaintiff’s work from consideration, other doctrines could do the work just as well or better. For example, copyright law excludes facts, words and short phrases, and simple geometrical shapes from the scope of a plaintiff’s work because these elements are not original to the author.³⁴³ But originality has always been a strange mechanism for getting at these issues.³⁴⁴ For example, the word “truthiness” owes its origin to Stephen Colbert and his writers, but copyright law still should not grant them exclusive rights in its use.³⁴⁵ Facts, words, and simple shapes are better excluded under § 102(b), which exempts from the scope of copyright “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”³⁴⁶ *Feist’s* requirement that works exhibit some minimal degree of creativity³⁴⁷ could also prohibit plaintiffs from asserting rights in short phrases like “you got it”³⁴⁸ or the simple shape of a log cabin.³⁴⁹ The law never needs to determine whether any of those elements originated with their putative authors.

Abandoning independent creation would, admittedly, turn some authors into infringers. The poet who innocently reproduced Keats’s

343. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350, 363 (1991); U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 707 (3d ed. 2021).

344. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 578 (2005).

345. *‘Truthiness’: Can Something “Seem,” Without Being, True?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/truthiness-meaning-word-origin> [<https://perma.cc/86L5-45JS>] (last updated Apr. 2020) (“In 2005, Stephen Colbert became the host of the eponymous late-night talk show, *The Colbert Report*. During his first show, Colbert presented the word *truthiness*, using it to express a kind of ‘truth’ that is derived from a visceral feeling rather than from any known facts.”).

346. 17 U.S.C. § 102(b).

347. See 499 U.S. at 345.

348. Bill Donahue, *Chris Brown and Drake Call ‘No Guidance’ Theft Lawsuit ‘Baseless,’* *BILLBOARD* (Jan. 13, 2022), <https://www.billboard.com/pro/chris-brown-drake-no-guidance-copyright-lawsuit> [<https://perma.cc/Q5U7-HXC4>].

349. U.S. Copyright Office, Correspondence ID 1-203WIKa; SR 1-5582119381, Noland’s Second Request for Reconsideration for Refusal to Register Log Cabin (May 25, 2018), <https://www.copyright.gov/rulings-filings/review-board/docs/log-cabin.pdf> [<https://perma.cc/VD4X-986A>] (denying registration of copyright).

“Ode” would now be liable for damages.³⁵⁰ Realistically, however, she would have been anyway. Outside of a very small number of examples, defendants in most mainstream media industries will not be able to assert meaningful independent creation defenses because access to the plaintiff’s work will be easy to prove. Yet the beneficial tradeoff for these wrongly maligned innocent creators is sizable. Copyright law would do away with the costs of litigating independent creation, it would lose the randomness and unreliability that come from jurors estimating its likelihood, and it would minimize biases about unlawful appropriation that arise from allegations of copying.

CONCLUSION

Although the doctrines of originality and copying have formed the bedrock of copyright jurisprudence since the nineteenth century, they were never more than chimerical. They are meaningless concepts, unsusceptible to empirical investigation and opposed to actual creative practice. Copyright law has no legitimate method for determining whether subconscious copying has occurred, and the copying that does occur is often a natural and beneficial aspect of creativity. Moreover, the law’s contemporary application of the independent creation doctrine is biased in favor of some creators at the expense of others. It privileges those earlier in time and those with more resources to assert their originality. Copyright law does not need independent creation and would be better off without it.

350. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).