A CRITICAL ASSESSMENT OF THE SUBCONSCIOUS COPYING DOCTRINE(*)

BİLİNÇALTI KOPYALAMA DOKTRİNİNİN ELEŞTİREL BİR DEĞERLENDİRMESİ

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Abstract

The notion of subconscious copying has generated a great deal of discussion and controversy within copyright law. The concept of subconscious copying is evaluated critically in this article, which also explores the key arguments for and against it. Subconscious copying is based on the premise that people may unintentionally produce works that are strikingly similar to works that already exist due to subconscious influences. Inconsistencies in court rulings result in variations in the doctrine's application and interpretation across various legal systems.

This article considers the standards that courts apply to assess whether subconscious copying has taken place and explores significant court judgments that have developed the idea of subconscious copying. While some courts place a strong emphasis on the availability of the original work and the degree of likeness, other courts value time distance as a crucial consideration. The article also compares the techniques taken by various legal systems, including the strict liability system in the US and the necessity of a causal connection in the UK and Canada.

In conclusion, the notion of subconscious copying is still a complicated and divisive topic in copyright law. Although it makes an effort to overcome the difficulties caused by unintentional impacts on creativity, its application and justification face considerable difficulties. The article advocates for a fair strategy that takes into account the needs of both the public and intellectual property rights' integrity.

Keywords

Subconscious Copying, Copyright Law, Case Law, Creativity, Implicit Memory.

Öz

Telif hakları yasasının bilinçaltı kopyalama kavramı büyük bir tartışma ve ihtilaf yaratmıştır. Bu makalede bilinçaltı kopyalama kavramı eleştirel bir bakış açısıyla değerlendirilmekte ve bu kavramın lehinde ve aleyhindeki temel argümanlar incelenmektedir. Bu felsefe temelde, insanların bilinçaltı etkileri nedeniyle istemeden de olsa halihazırda var olan eserlere çarpıcı biçimde benzeyen eserler üretebileceği fikrine dayanmaktadır. Mahkeme kararlarındaki tutarsızlıklar, doktrinin çeşitli hukuk sistemlerinde uygulanması ve yorumlanmasındaki farklılıklardan kaynaklanmaktadır.

Bu makale, mahkemelerin bilinçaltı kopyalamanın gerçekleşip gerçekleşmediğini değerlendirmek için uyguladıkları standartları vurgulamakta ve bilinçaltı kopyalama kavramını geliştiren önemli mahkeme kararlarını incelemektedir. Bazı mahkemeler original eserin mevcudiyetine ve benzerlik derecesine güçlü bir vurgu yaparken, diğer mahkemeler zaman mesafesini çok önemli bir husus olarak değerlendirmektedir. Makale ayrıca, ABD'deki katı sorumluluk sistemi ve İngiltere ve Kanada'daki nedensel bağlantı gerekliliği de dahil olmak üzere çeşitli yasal sistemler tarafından kullanılan teknikleri karşılaştırmaktadır.

Sonuç olarak, bilinçaltı kopyalama kavramı telif hakları hukukunda hala karmaşık ve bölünmüş bir konudur. Yaratıcılık üzerindeki kasıtsız etkilerin neden olduğu zorlukların üstesinden gelmeye çalışsa da, uygulanması ve gerekçelendirilmesi önemli zorluklarla karşı karşıyadır. Bu makale, hem kamunun ihtiyaçlarını hem de fikri mülkiyet haklarının bütünlüğünü dikkate alan adil bir stratejiyi savunmaktadır.

Anahtar Kelimeler

Bilinçaltı Kopyalama, Telif Hukuku, İçtihat Hukuku, Yaratıcılık, Örtük Hafıza.

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I. INTRODUCTION

The term "copy" is derived from the Latin word "copia" which means "abundance, plenty, multitude[1]." Copyright is a legal term that refers to the prohibition of unauthorized copying of work. Technological improvements have made copying a lot easier worldwide, and this issue brought many questions about copyright laws. The consensus is that a work is "original" in the UK for copyright purposes and hence qualifies for copyright protection, provided it is the result of the author's own skill and judgment.

An author acquires a set of rights similar to property rights when they produce a piece of work that is covered by copyright under the law[2]. An author has a right to file a copyright infringement case if the author discovers that someone has copied their work[3]. In order to succeed in a case of infringement, a copyright owner must first show that the defendant intentionally or unintentionally copied from their work[4]. A claimant must prove they are the legal copyright owners, and that the defendant has infringed ontheir work by copying. If it is not possible to show direct proof of copying, the court has to decide based on the elements of substantial similarity and reasonable access[5].

The concept of "substantial similarity" is a doctrinal instrument used in copyright law to establish illegal copying as a normative inquiry[6]. Also, the defendant somehow must be able to access the original work to copy[7]. The plaintiff may first present proof that indicates a certain course of action or may demonstrate that the work was generally made available to the public. On the other hand, the defendant always has the option to show that the work in question was created independently without the impact of the plaintiff's work[8]. The defendant will then be absolved of responsibility for the copyright violation. However, even if the defendant claims not to have copied knowingly, the court may declare infringement if the defendant cannot disprove the plaintiff's claim of infringement[9].

Human conduct is the result of a complex web of conscious and subconscious impulses and behaviours, therefore, when creativity first emerges, humans might not be aware of what initiated the process or what factors were considered in their own works[10]. This brings the question whether an author could be liable for copyright infringement if they think they created something on their own without influence, but the creation is substantially similar to another author's previous work.

This article will discuss some of the different perspectives on subconscious copying from legal scholars, focusing mainly on how the copyright law system should work, whom the law should protect, and whether there is a need for using the subconscious copying doctrine in court decisions. Section I will explore the doctrine based on various court decisions. Section II will look into the possible justifications and reasons for the doctrine are explained. Section III will discussthe various views of those that oppose the doctrine. The article will examine cases from the common law judicial system, where the majority of cases take place, and the argument of subconscious copying is employed. The fact that the US common law judicial system handled the first case using the subconscious copying idea gives us the opportunity to compare and contrast common law systems in some other common law nations such as UK, Australia, Canada.

1 **Boon**, Marcus (2010), In Praise of Copying Cambridge, Harvard University Press, p. 285.

2 **Jaeger**, Christopher Brett (2008), 'Does That Sound Familiar: Creators' Liability for Unconscious Copyright Infringement Note', Vanderbilt Law Review, N: 6, V: 61, p. 1910.

3 **Mobley**, Danielle (2017), 'Deja Vu or Copyright Infringement: Why Melania Trump Infringed on Michelle Obama's Copyrighted Speech through Subconscious Copying', John Marshall Review of Intellectual Property Law, N: 3, V: 17, p. 363.

4 **Goldstein,** Paul & **Hugenholtz,** P. Bernt (2019), International Copyright Principles, Law, and Practice, Fourth Edition, Oxford University Press, p. 285.

5 **Jaeger**, p. 1911.

6 **Balganesh**, Shyamkrishna (2012), 'The Normavitiy of Copying in Copyright Law', Duke Law Journal, N: 2, V: 72 p. 215.

7 **Alden**, Carissa L. (2007), 'A Proposal to Replace the Subconscious Copying Doctrine Note', Cardozo Law Review, N: 4, V: 29, p. 1733.

8 **Jaeger**, p. 1911-1912.

9 **Alden**, p. 1734.

10 **Feldman**, Robin (2010), 'The Role of the Subconscious in Intellectual Property Law', Hastings Science and Technology Law Journal, p. 1-2.

Overall, this article argues that the subconscious copying doctrine is difficult to justify because of limited resources, daily human interaction, implicit memory, the possible effects of decreasing the number of authors, and the inconsistency of protecting the intention for different law systems. Some suggestions regarding the legislation will be presented in the conclusion.

II. ORIGINS OF THE SUBCONSCIOUS COPYING DOCTRINE ON CASE LAW

Copyright law is related to implicit memory, which affects behaviour without the subject being aware of it. It is because someone's subconscious copying of various creations, which is obviously related, may have an impact on them while they are creating[11]. The phrase "unconscious mind" is most frequently associated with Sigmund Freud and the field of psychoanalysis, but the idea existed for hundreds of years before Freud. But for Freud, the idea that memories, emotions, and other mental activities were not conscious took on a different, useful meaning[12].

Copyright law now applies similarly to both conscious and unconscious copyingwhich leads to both forms being held accountable for copyright infringement[13]. In legal writing, this rule is known as the subconscious copying rule/doctrine. In different countries and legal systems, the terms "unconsciously" and "subconsciously" copying are used synonymously[14]. On the contrary, according to the Navara v. M. Witmark & Sons[15] case, conscious copying means being aware of the original reproducing it deliberately, intentionally, and adopting it as their own.

The starting point of subconscious copying doctrine can be traced first in the Fred Fisher, Inc. v. Dillingham[16] case, which dealt with two musical pieces. Judge Learned Hand ruled that because there was no other way to explain the striking similarity between the two pieces, the defendant copied subconsciously. He also mentioned that copyright infringement cannot depend on the defendant's good faith, so there is copyright infringement[17]. The court decision was based on the findings that the access to the piece was undeniable, the two items were practically identical, and there wasn't much time between when the work was accessed and when the unauthorized content was produced. Since Fred Fisher's case was revealed, the case has been the fundamental basis for the implementation of the doctrine for a long time[18].

There have been some case decisions that ruled the existence of subconscious or unconscious copying since the Fisher case, such as Sheldon v. Metro-Goldwyn Pictures Corp.[19] case, Harold Lloyd Corp. v. Witwer[20] case, Twentieth Century-Fox Film Corp. v. Dieckhaus[21] case, Whitney v. Ross Jungnickel, Inc.[22] case and United Artists Corp. v. Ford Motor Co.[23] case. In these cases, the courts decided whether there was subconscious copying or not based on three elements which were the access to the original work, the degree of similarity, and the degree of temporal remoteness[24]. However, in some of these court cases, the lack of access to the original

[11] **Jaeger**, p. 1904-1905.

[12] **Miller**, Michael Craig (2010), 'Unconscious or Subconscious?' (Harvard Health, https://www.health.harvard.edu/blog/unconscious-or-subconscious-20100801255, last accessed 8 December 2021.

[13] **Jaeger**, p. 1905.

[14] **Suvapan,** Janyarak & **Sirichit**, Methaya (2019), 'The Subconscious Copying Doctrine Across the Legal System of the United States of America, United Kingdom and France', Naresuan University Law Journal, N: 2, V: 12, p. 71. Freud also used the two terms synonymously. See **Miller**.

[15] Navara v Witmark Sons, New York Supreme Court [1959] 17 Misc. 2d 174.

[16] FredFisher, Inc v Dillingham, United StatesDistrict Court fortheSouthernDistrict of New York [1924], 298 F. 145.

[17] **Mobley**, p. 365.

[18] **Hollingsworth**, Joel S. (2000), 'Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine', Hastings Communications and Entertainment Law Journal, N: 2, V: 23, p. 462-463.

[19] Sheldon v Metro-Goldwyn Pictures Corporation, The Court of Criminal Appeal 2nd Circuit [1939] 106 F.2d 45.

[20] Harold Lloyd Corporation v Witwer, The Court of CriminalAppeal [1933] 9th Circuit 65 F.2d 1.

[21] Twentieth Century-Fox Film Corp v Dieckhaus the Court of Criminal Appeal 8th Circuit [1946] 153 F.2d 893.

[22] Whitney v Ross Jungnickel, IncUnited StatesDistrict Court fortheSouthernDistrict of New York [1960] 179 F. Supp. 751.

[23] United Artists Corp v Ford Motor Co United States District Court for the Southern District of New York [1980] 483 F. Supp. 89.

[24] **Hollingsworth**, p. 463-470.

work and/or lack of substantial similarity resulted in a rejection of subconscious copying and thus also a rejection to the claim.

There have been other cases of subconscious copying, such as Bright Tunes Music Corp. v. Harrisongs Music, Ltd.[25] case, Three Boys Music Corp. v. Bolton[26] case, and Edwards & Deutsch Lithographing Co. v. Boorman[27] case[28]. In all these three court cases, the court determined that the copied work was exactly or highly comparable to the original, and since there was proof that the copied material had been accessed, it was still an infringement even though it was not intentional. However, Three Boys Music Corp.'s proof of "reasonable access" was significantly more circumstantial than Fred Fisher, Inc.'s and Bright Tunes Music Corp.'s proof of "reasonable access." Also, unlike Fisher, where the unconsciously copied work appeared soon after the original, the supposedly copied work in the Three Boys Music Corp. v. Bolton case appeared twenty-five years after the original[29]. Likewise, on the appeal of ABKCO Music, Inc. v. Harrisongs Music, Ltd. case[30], the court stated that where the likeness was so strong and access was obtained, so there is no basis for reversal due to the remoteness of that access based on the circumstances[31].

All these court decisions onsubconscious copying come from copyright's strict liability approach. In other words, this approach requires imposing culpability on a second author or artist who was subconsciously copying a copyrighted work[32]. In light of all of these court rulings, it is certain that defendants will be held responsible for any copies they made, whether they did so intentionally or unintentionally. Unintentional copying does not serve as a defence against a claim of copyright infringement, even if the defendant may have done so unwittingly due to unconscious processes[33]. Also, it can be understood from the Navara v. M. Witmark & Sons case that courts do not want to widen the subconscious copying area. When asked to decide if subconscious copying is a copyright tort in common law, the court decided that the intention should be felonious to be considered as a tort and giving such as a decision means extending the subconscious copying doctrine[34].

In summary, courts can decide whether or not there was subconscious copying mostly based on the existence of access to the original work and the degree of similarity rather than temporal remoteness. Several other courts, though having considered the subconscious copying concept, found it unsuitable to their particular situations for a range of factors such as lacking similarities between two works or absence of access by the defendant[35].

Contrary to the strict liability framework used by US courts to address subconscious copying, UK courts use a different, less stringent interpretation of the doctrine.

As stated in the Francis Day & Hunter, Ltd. v. Bron case, UK Courts aim to establish a causal connection and take the defendant's testimony into account when deciding whether there has been a copyright infringement[36]. The Court of Appeal stressed that the existence of subconscious copying is a factual question that depends on the specific facts of the case. Since there is a chance that two musical compositions with similar qualities could have been separately composed, strong proof of subconscious copying is also required[37]. The Canadian Courts'

[25] Bright Tunes Music Corp v Harrisongs Music, Ltd, United States District Court for the Southern District of New York [1976] 420 F. Supp. 177.

[26] Three Boys Music v Michael Bolton United States Court of Appeals 9th Circuit [2000] 212 F.3d 477.

[27] Edwards & Deutsch Lithographing Co v Boorman, United States Court of Appeals 7th Circuit [1926], 15 F.2d 35.

[28] **Alden**, p. 1736.

[29] **Jaeger**, p. 1922.

[30] ABKCO Music v Harrisongs Music, United States Court of Appeals 2nd Circuit [1983] 722 F.2d 988.

[31] **Hollingsworth**, p. 472.

[32] **Gordon**, Wendy J. (1990), 'Review: Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship by by Paul Goldstein', The University of Chicago Law Review, N: 3, V: 57, p. 1028.

[33] **Leaffer,** Marshall A. (2019), Understanding Copyright Law, Seventh Edition, Carolina Academic Press, p. 755.

[34] **Alden**, p. 1741.

[35] ibid, p. 1739.

[36] **Alden**, p. 1753.

[37] **Sanderson**, Jay & **Wiseman**, Leanne [2015], 'Are Musicians Full of It? The Metaphorical and Figurative Power of Subconscious Copying in Copyright Infringement Cases', Griffith Journal of Law & Human Dignity, Special Art Issue, p. 57.

adoption of the subconscious copying doctrine is more similar to the UK Courts than the US Courts. Moreover, in the Drynan v. Rostad[38] case, the Canadian Court found the notion of subconscious copying very problematic, emphasizing that its application requires medical evidence[39]. Likewise, the Full Federal Court of Australia emphasized the causal connection in subconscious copying while dealing with the EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd.[40] case. According to it, copyright may be violated via unconscious copying and the intention to profit from another's work is not required for infringement; however, the requirement of a causal link should be met[41].

It can be understood from all these court decisions that, in the doctrine, unconscious copying is an infringement after all, and it is still brought up in copyright infringement cases. Of course, mostly in these cases, defendants first claim that they created something on their own. However, if there are enough elements for infringement, such as substantial similarity, reasonable access, or causal link depending on the courts, the court may decide, or defendants argue that there might be unconscious copying. But if the liability does not change, why is subconscious copying ever a factor in copyright cases? One of the advantages of claiming subconscious copying might be that it can reduce financial damagesif someone is found responsible for violating copyright. Protecting one's reputation and demanding respect in the event of copyright violations may be another reason to engage in subconscious copying[42]. Up until now, the court decisions show that the damages decided by the courts against defendants have risen significantly. So, it can be argued that instead of lessening the compensation, saving their reputation may be a greater motive for the infringers because famous people will benefit and often use it. Also, in the court, we are under oath not to lie, so if the defendants say that they made it on their own, but the courts find that they copied other works, it might be interpreted as a lie. Therefore, applying the doctrine in relation to the defence is useful to mitigate reputational lose and compensation.

III. MAIN JUSTIFICATIONS FOR THE SUBCONSCIOUS COPYING DOCTRINE

To understand the main justifications of subconscious copying doctrine, one should first have a look at the benefits of copyright law in general. Copyright law protects a wide range of original forms of expression, such as novels, films, musical compositions, and computer software applications. In this context, the author's creation of work provided the basis for statutory copyright. The copyright provisions have three basic policies as they encourage learning to prevent copyright restrictions, safeguard and improve the public domain, and ensure that the general public has access to copyrighted works[43]. The economic and cultural significance of this set of norms is quickly growing andmany businesses' fortunes are now strongly reliant on intellectual property rights.

The first justification of the doctrine is based on the irrelevance of morality to the original creation. It is common knowledge that copyright safeguards a work's originality, yet originality is not a bar to immoral behaviour, rather, it is viewed as a judicial pronouncement of appropriate authorisation. One may argue that ignoring subconscious urges is not a problem, and there is no need to involve human emotions if the legislation does not encourage improper behaviour on the part of a later creator. Since originality is not an issue of mentality, the infringer's guilt is not important[44].

The second way thedoctrine can be justified is from an economic perspective. It can be argued that potential copiers are better cost avoiders; therefore, assigning the cost of infringement to them is more economical[45]. Intellectual property considers public

[38] Drynan v Rostad, Ontario Court of Justice (General Division) [1994] 59 C.P.R. (3d) 8.

[39] **Alden**, p. 1754.

[40] EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd, Full Court of the Federal Court of Australia [2011] 47.

[41] **Sanderson** & **Wiseman**, p. 57-58.

[42] ibid, p. 58.

[43] **Patterson**, L. Ray (2000), 'Understanding the Copyright Clause', Journal of the Copyright Society of the U.S.A., V: 47, p. 389.

[44] **Feldman**, p. 10.

[45] ibid, p. 9.

interest, and it is one of its distinctive features. While the cost of generating a copyright-protected work is generally considerable, the cost of replicating it, whether by the creator or by those to whom he has made it available, is frequently low. Others may be discouraged from producing copies if the creator's copies are priced at or near marginal cost, but the creator's overall profits may not be enough to cover the cost of generating the work. Therefore, copyright protection balances the costs of restricting access to work with the benefits of offering to create it in the first place[46].

Thirdly, the property rights perspective is used to justify the doctrine. Instead of natural rights or labour theory, utilitarian philosophy serves as the foundation for both intellectual property rights and property in general, which decides whether something is legally defined as property. As a result, after a label is applied, the law gives the property owner jurisdiction over the property. Without such legal protection, one may claim that there will be a decreased investment in creative and inventive growth since engaging in some activities will be more difficult due to a lack of financial benefits[47].

Lastly, some may justify the doctrine based on the effectiveness of the administration. Since it is simple to claim the work is created by the infringer author and it is complex to refute that, this may end up infringers making poor defences. Therefore, the subconscious copying doctrine helps decrease the number of these poor claims by infringers[48].

It can be seen from all the possible explanations of the subconscious copying doctrine that there are advantages for several reasons. The arguments seem logical for protecting the main idea of intellectual property rights and the public interest of these rights. It would be logical that if the subconscious copying does not bring the infringement solution, most infringers will start claiming unconscious copying even if they intentionally copied in the first place. In addition, infringers maylose their fears of having to pay high damages because they can always use the doctrine to hide their true intentions. Of course, the other main purpose of copyright and intellectual property is to serve a safe atmosphere for authors to create new ideas and creations but is it possible to find out the real intentions of people while deciding if there is a subconscious or intentional copying in the cases? On the other hand, some laws in different areas protect people's intentions and moral behaviours, so it should be asked if it is impossible or fair not to protect the latter author in this sense and based on this law system. Also, creators and their intentions are needed to be protected mostly because art itself comes from the human mind, values, ideals, morality, and inspiration.

Thanks to the development of technology, it is much easier for people to copy a piece and get profit from it. As discussed before, creating activity is not something that everyone can do easily, so it will be cheaper for infringers to steal something and profit from it instead of creating something which may take years. Loosening this doctrine may open a door to infringers who want to earn money in a short time. Nevertheless, the latter authors who think they have created something original must afford all the costs in the creation period but may end up paying a lot of damages for subconscious copying. Therefore, the issue here is whether both sides' economic conditions are worth protecting or not. The originalauthor has already too many legal rights and financial gains for too many years, so it should be considered that the loss of the latter author will be excessive and at least some level of protection should be brought for the sake of creativity.

All these logical arguments will bring some other discussions as well. On the one hand, if the law does not protect author's rights and financial interests, it may have a severe effect on the incentivization to create new works. They may think that even if they create something, the infringers may copy it based on poor defences or subconscious copying and there will not be any financial or legal advantages for them to be a subject of laws even after the long and hard work they experience. On the other hand, all these

[46] **Landes**, William M. & **Posner**, Richard A. (1989), 'An Economic Analysis of Copyright Law', The Journal of Legal Studies, N: 2, V: 30, p. 326.

[47] **Beckerman-Rodau**, Andrew (2010), 'The Problem with Intellectual Property Rights: Subject Matter Expansion', Yale Journal of Law and Technology, N: 1, V: 13, p. 43-45.

[48] **Feldman**, p. 9-10.

possible explanations are mostly based on protecting the first author's rights, but this may bring a deterrent effect for new authors to create something as they may fear ending up becoming an infringer instead of a creator. Also, after all the work they have done for a long, the idea of paying damages will prevent them to create something or hide it secretly after the creation.

As it can be seen, there are always two sides before justifying one's perspective so it should be discussed critically before making a judgment because the doctrine can be changed depending on what the law wants to protect.

IV. THE CRITICISM OF THE SUBCONSCIOUS COPYING DOCTRINE

As Feldman states, the subconscious copying doctrine is open to some criticisms[49]. The doctrine can be criticized from moral, economical, logical, psychological, and property rights perspectives. Morally, the idea may appear difficult because there is occasionally no copying and hence the subsequent author has no obligation to the earlier author[50]. One could urge that copyright legislation should take a more moral approach. Copyright law could be rewritten to focus more on equity, rejecting liability in the scenario of justifiable infringer activity or terrible copyright holder action. For instance, trade secret liability is based on principles of equity and unlawful conduct. A judgment of trade secret misuse usually necessitates a finding of wrongdoing on the part of the defendant[51]. Also, in criminal cases, or a crime to be committed, the precise subjective element, or men's rea, must be determined and wrongful intentions are the core of an offense. So, there is inconsistency in different laws[52]. A similar approach can be adopted in copyright law as well.

Some opponents disagree with the subconscious copying doctrine due to economic arguments[53]. The tenuous balance that copyright law strives to achieve between safeguarding an artist's ability to make money off of theircreative work and the public's desire for greater artistic production is disrupted by the doctrine. Courts place an undue burden on the later artist when they presume that a creator of a popular earlier-produced work who creates a work that visually or sonically bears strong similarities to it did so unintentionally[54]. Authors regularly incorporate components of previous works into new works; the cost of copyright protection for one work is passed on to future works' production[55]. The number of new works produced will decline due to the higher cost of producing them[56].

While opponents of the doctrine prioritise the increase of the number of new authors and arts, the proponents try to prevent new possible infringers from copying. Indeed, it is the art that should be protected, and bringing new ideas should be prioritized, otherwise, there will be nothing for copyright law to protect. The law tries to protect not just the author's rights but the economic part of the industry. However, if creative works decrease, the economic conditions of the industry will suffer anyway.

Some opponents object to the subconscious copying doctrine from a logical point of view[57]. In subconscious copying, it is more likely to involve cases of musical works partly due to the limited repertoire and significant conventions in musical genres, such as the use of repetitive rhythmical beats[58]. Especially, the musical options available to a songwriter are significantly more limited than courts imagine. Songwriters' options are limited to the twelve potential notes, the usage of scales and how they work, chord progressions, known song structures, and common rhythms. The question remains whether the principles of subconscious

[49] ibid, p. 6.

[50] **Gordon**, p. 1029-1030.

[51] **Feldman**, p. 10-11.

[52] **Sayre**, Francis Bowes (1932), 'Mens Rea', Harvard Law Review, N: 6, V: 45, p. 974.

[53] **Alden**, p. 1731.

[54] ibid.

[55] **Landes** & **Posner**, p. 332.

[56] **Alden**, p. 1744.

[57] **Skirpan**, Rebecca (2022), 'An Argument That Independent Creation is as Likely as Subconscious Copying in Music Infringement Cases', Law School Student Scholarship, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1123&context=student_scholarship, last accessed 4 November 2022.

[58] ibid.

copying and independent creativity create legal inconsistencies. The purpose of the songwriter is not considered when looking for copying; however, when evaluating originality as a foundation for establishing copyrightability, the creator's intent is taken into account[59]. It is possible that we will face these cases, mostly in music infringement cases. In this part of art, it is easy for people to hear a song and subconsciously copy it. With the fact that musical pieces come from limited notes and scales, the law system should stretch the rules for musicians; otherwise, it cannot protect the art.

The idea that independent creation is impossible may give existing composers an excessive amount of authority while restricting the freedom of future songwriters. If the copyright law were reorganized in a way that maintains both autonomous creation and unintentional copying, not only in theory but in reality, the equilibrium between incentives and access would not be broken. For example, under copyright law, software developers are able to invent ways to circumvent any copyright issues because the second product simply takes the old product's "ideas" rather than its "expression." It is because the "expression" is regarded as original; the final product is independently produced and is the software developer's original work. If this is a real possibility, copyright law should defend against the injustice of holding a songwriter responsible for a work that was developed independently[60].

Those who think the mentioned doctrine should be limited suggest that new evidentiary standards for situations involving subconscious copying may be able to strike a balance between that practice and independent creation under copyright law[61]. Also, because music is so heavily reliant on borrowing, one may assume that all musicians would find it in their best interests to reduce copyright protection in this field. It has been proposed that in a musical infringement lawsuit, courts impose some additional responsibilities on the plaintiff[62].

The doctrine can also be criticized by looking at the psychological dimension. Copying entails deciding whether to finish your own work or use someone person's. This option is not available to the subconscious copier, either, since they are unaware that they are copying in the first place. So, from this perspective, the concept of subconscious copying may undermine the legitimacy of copyright protection[63]. In psychology, the subconscious mind is also said to be part of the mind that people are least aware of. Because of the subconscious's metaphorical and figurative power, if the latter work comes from unconscious copying rather than conscious copying, the artist is scarce to a fault. Most of the defendants facing accusations of infringement are musicians, and music is only a medium for them to convey their creative emotions, experiences, and intuition[64]. The musician's music is always present in him or her, partially developed and ready to be transmitted with others, such as discussed in the Williams v Gaye[65] case that it is about the feel[66]. Musicians are well-versed in a variety of musical genres, styles, and approaches. Therefore, this knowledge may bring them a burden that they cannot bear instead of the inspiration and profit that they hoped for[67]. In addition, we are subjects of human interactions every day, so it is becoming increasingly difficult for the innocent to refute unfounded accusations of copying.

It is mentioned that the law protects creation and originality, but the process of originality should also be protected, even if it is difficult to distinguish. It is a scientific fact that "cryptomnesia" is a psychological term used for unconscious copying. Therefore, scientifically people can think that they create something independently, but in fact, they do not because implicit memory is the reason. Despite all the justifications for the doctrine, the law should not underestimate the scientific facts.

59 ibid, p. 7-12.

60 ibid, p. 13, 20.

61 **Alden**, p. 1745-1746.

62 ibid.

63 **Vaver**, David (2001) 'Creating a Fair Intellectual Property System for the 21st Century F W Guest Memorial Lecture', Otago Law Review, N: 1, V: 10, p. 9.

64 **Sanderson** & **Wiseman**, p. 59.

65 Williams v Gaye, United States Court of Appeals 9th Circuit [2018]15-56880.

66 **Sanderson** & **Wiseman**, p. 59.

67 ibid, p. 62.

Under the property rights approach, the creator may bring a burden for other parties; consequently, this may lead to it being harmful to the public interest. Potential legal safeguards should aim to find the best possible equilibrium among offering sufficient legal protection to maximize the investment of time, effort, and funds in creative endeavours and minimizing any limits on the public's right to consume products made as a result of such invention[68]. It can be said that in its current form, the burden of proof for the level of exposure and degree of similarity required to establish a lack of originality is set extremely low[69]. Therefore, the delicate balance between safeguarding copyright holders and second creators-also known as "unconscious copiers"-is being disrupted. As a suggestion to bring the balance back, one might consider limiting the concepts of indirect and subconscious copying or simply permitting an injunction but no recompense for those who are caught up in these doctrines[70]. Of course, to prevent poor defences, courts should refuse to accept subconscious copying if the first work's creation date is close to the second work's publishing date.

V. CONCLUSION

The subconscious copying doctrine has been mentioned in several cases so far in different law systems and countries. The term comes from the idea that the original work is copied from another author who is not aware of copying it because the author's implicit memory plays a trick on creating a work original or independently. The law systems, however, treat the second author the same as the intentional copier. Therefore, the doctrine is criticized by many scholars for various reasons.

It can be said that the doctrine brings injustices and inconsistency in the law. The latter author's intention of creativity should be equal to other creativity processes because creativity itself is protected by law. The source of art is limited already, and such type of protection of the first author will decrease the number of new works and authors, which will affect both the public interest and the industry. Although the law tries to protect originality, it is a matter of fact that the line between independent creation and subconscious copying is very difficult to distinguish. And the law takes intention into consideration for the former, while it does not for the latter.

Both justifications for and arguments against doctrine may be right from the perspective they try to protect. The solution may lie at on the fact that a balance can be reached while protecting both sides. As a suggestion, the concept of subconscious copying can be limited while deciding no compensation for infringers even it can be decided for an injunction. Naturally, demonstrating unconscious copying will be tough, thus a lengthy procedure of determining the genuine intention should be implemented, and courts should refuse to accept subconscious copying if the time between pieces is so close to each other. Also, courts may ask or bring some additional responsibilities on the plaintiffs. In other words, the courts may give a chance to defendants to defend themselves even it is hard and may ask for additional proof from the plaintiffs to make such a claim. If the court decides that subconscious copying is the case, the court may not ask defendants to pay damages because there is also too much loss for them both financially and psychologically.

[68] **Beckerman-Rodau**, p. 46.

[69] **Feldman**, p. 9.

[70] **Vaver**, p. 10.

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