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# ARE MUSICIANS FULL OF IT? THE METAPHORICAL AND FIGURATIVE POWER OF SUBCONSCIOUS COPYING IN COPYRIGHT INFRINGEMENT CASES

JAY SANDERSON\* & LEANNE WISEMAN\*\*

*Subconscious copying is copyright infringement. In this paper, however, we argue that claims of subconscious copying in copyright infringement cases have significance beyond legal doctrine. Using the recent United States District Court decision involving Pharrell Williams and Robin Thicke’s worldwide hit Blurred Lines as a starting point, we argue that subconscious copying claims have a metaphorical and figurative value that has various dimensions. In this way, claims of subconscious copying draw attention to the creativity, brilliance and genius of musicians. They reinforce the ethereal nature of music creation. They also portray music creation as a burden and a sacrifice, and that only a select few are capable of drawing on their subconscious to create and share music. Perhaps, then, evoking subconscious copying allows musicians to mitigate the harm to their reputation and seek dignity and self-respect; even when they are liable for copyright infringement.*

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\* Jay Sanderson is Senior Lecturer, USC Law School, University of the Sunshine Coast.

\*\* Leanne Wiseman is Associate Professor, Griffith Law School, Griffith University. The authors would like to thank the anonymous reviewers for their helpful comments.

## I INTRODUCTION

On 10 March 2015, a United States District Court jury found that the hit song *Blurred Lines* infringed copyright in Marvin Gaye's song *Got to Give It Up*.<sup>1</sup> The jury awarded Gaye's children over \$US7 million of the profits earned by *Blurred Lines*, which was the biggest hit single in 2013, selling over 6 million digital copies in the United States alone.<sup>2</sup> While the United States District Court decision has been appealed,<sup>3</sup> the copyright infringement case involving Pharrell Williams and Robin Thicke raises a number of general questions around copyright infringement of musical works that do not depend on the specific outcome of the appeal. Firstly, it raises questions about the idea/expression dichotomy, the determination of substantial part, co-ownership, and the culture of "borrowing" in music.<sup>4</sup> Secondly, it raises questions about the unpredictable and practical consequences of bringing copyright infringement cases before the courts. The Williams and Thicke dispute, for example, helped renew interest in both songs. In the first week of the trial, *Blurred Lines* sold an estimated 6000 digital copies and was streamed nearly 2 million times, and *Got to Give It Up* sold approximately 1300 digital copies.<sup>5</sup>

While these questions deserve closer consideration, they are not the focus of this paper. Instead, our goal is to consider another issue raised by the case — the role played by subconscious copying claims in copyright infringement cases. Pharrell Williams, for

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<sup>1</sup> The case was initiated in August 2013 by Williams, Thicke and Clifford Harris Jnr (aka T.I.) to seek a declaration of non-infringement; *Pharrell Williams et al v Bridgeport Music Inc et al, No 13-06004* (CD Cal, 2013). The other defendants in the case, Clifford Harris Jnr (also known as T.I.) and the record label were not liable for copyright infringement.

<sup>2</sup> Keith Caulfield, 'Justin Timberlake's "20/20" 2013s Best Selling Album, "Blurred Lines" Top Song', *Billboard* (online), 2 January 2014 <<http://www.billboard.com/articles/news/5855151/justin-timberlakes-2020-2013s-best-selling-album-blurred-lines-top-song>>.

<sup>3</sup> An appeal was lodged in the United States District Court Central District of California, Western Division on 1 May 2015. One key ground of appeal was the fact that the jury could only consider the sheet music and was not allowed to hear the songs in dispute. The appeal seeks a range of orders including judgement, declaration or a new trial; see Ben Challis, 'Mind The Gap: Songwriters Unsettled as "Uptown Funk" gets Five More Writers', on *The 1709 Blog* (2 May 2015) <<http://the1709blog.blogspot.com.au/2015/05/mind-gap-uptown-funk-gets-five-more.html>>.

<sup>4</sup> For a discussion of some of these issues, see Charlotte A Tschider, 'Automating Music Similarity Analysis in "Sound-Alike" Copyright Infringement Cases' (2014) 25(2) *New York State Bar Association Entertainment, Arts and Sports Law Journal* 60; Margit Livingston and Joseph Urbinato, 'Copyright Infringement of Music Cases: Determining Whether What Sounds Alike is Alike' (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 2012.

<sup>5</sup> See Victoria Kim, 'Marvin Gaye Children Ask Judge to Bar Sales, Performance of "Blurred Lines"', *Los Angeles Times* (online), 18 March 2015 <<http://www.latimes.com/local/lanow/la-me-ln-blurred-lines-injunction-20150318-story.html>>; Tim Kenneally, "'Blurred Lines" Trial Nearly Doubles Sales of Disputed Marvin Gaye Song', *The Wrap* (online), 9 March 2015 <<http://www.thewrap.com/blurred-lines-lawsuit-nearly-doubles-sales-of-disputed-marvin-gaye-song/>>.

example, told the California United States District Court that he had no intention of copying Marvin Gaye, and that ‘music is magic’ and the song *Blurred Lines* was ‘feel. Not infringement’.<sup>6</sup> In this article we argue that, while it is no defence for a defendant to claim they did not know they were copying (as neither intent nor knowledge are required for copyright infringement to be established), claims of subconscious copying in copyright infringement cases have a metaphorical and figurative power that has various dimensions.<sup>7</sup> One dimension of the subconscious copying claim brings with it associations of creativity, brilliance and genius. Another dimension of the subconscious copying claim evokes the burden and sacrifice that artists must bear, and that only limited people are capable of turning their subconscious into a hit song.

In order to make the argument that subconscious copying claims have a metaphorical and figurative power. The first part of the paper briefly sets out the relevant law, and shows how subconscious copying is not an excuse for copyright infringement. The second part of the paper sketches some of the history and thinking around the subconscious mind in psychology, philosophy and art. In so doing, we highlight the perception of the subconscious as magical, mythical, authentic and instinctive. The subconscious copying claim, therefore, has metaphorical and figurative value. Claiming subconscious copying draws attention to the creativity, brilliance and genius of musicians. It reinforces the ethereal nature of music creation. It also portrays music creation as a burden and sacrifice that only a few talented people can bear. In conclusion the third part of the paper suggests that claiming subconscious copying allows musicians to not only mitigate harm to their reputation, but also to seek dignity and self-respect, even when they are liable for copyright infringement.

## II SUBCONSCIOUS COPYING IS COPYRIGHT INFRINGEMENT

There are generally two requirements that need to be satisfied in order to establish copyright infringement. First, there must be copying of the copyright work. Without direct evidence of copying, courts will consider indirect or circumstantial evidence of copying. One of the ways that courts determine whether indirect copying has occurred is

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<sup>6</sup> Pamela Chelin, ‘Pharrell Williams Takes the Stand at “Blurred Lines” Trial: “This is the Last Place I Want to Be”’, *The Wrap* (online), 4 March 2015 <<http://www.thewrap.com/pharrell-williams-takes-the-stand-at-blurred-lines-trial-this-is-the-last-place-i-want-to-be/>>.

<sup>7</sup> See, eg, Patricia Louise Loughlan, ‘Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property’ (2006) 28(2) *Sydney Law Review* 211.

by considering access to the plaintiff's copyright work. Determining whether the defendant had access to the copyright work is a question of fact and requires consideration of numerous factors including the reach or dissemination of the plaintiff's work (for example, through sales and performances), the defendant's background, and dealings with other artists, publishers and record companies.<sup>8</sup> Secondly, for there to be copyright infringement there must be 'substantial reproduction' of (in Australia) or 'substantial similarity' to (in the United States) the plaintiff's copyright work. In terms of musical works, a range of factors — including sharing elements such as rhythm, pitch, lyrics, cadence and the verse-chorus relationship — will be assessed to determine whether there has been a 'substantial reproduction' or there is 'substantial similarity'.<sup>9</sup>

While copying and substantial similarity/reproduction are needed to establish copyright infringement, intent or knowledge is not.<sup>10</sup> This means that it is no defence to copyright infringement for the defendant to claim that they did not know they were copying, and copyright infringement can arise from subconscious copying.<sup>11</sup> Indeed, subconscious copying has been held to be copyright infringement in a number of countries. In the United States, in *Fred Fisher Inc v Dillingham*,<sup>12</sup> the composer of an opera (Mr Kern) was accused of infringing copyright in a piece called *Dardanella*. In finding that the defendant's piece, *Ka-lu-a*, had infringed Fisher's *Dardanella*, Judge Hand accepted that infringement was likely due to subconscious copying. On this point, Judge Hand concluded:

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 'Kalua', Mr Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before ... Once it appears that another has in fact used the copyright as the source of his production, he

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<sup>8</sup> See, eg, *Three Boys Music Corp v Bolton* 212 F 3d 477 (9<sup>th</sup> Cir, 2000).

<sup>9</sup> *Ibid.*

<sup>10</sup> For a discussion of intent and subconscious copying, see Dane S Ciolino and Erin A Donelon, 'Questioning Strict Liability in Copyright' (2001) 54 *Rutgers Law Review* 351; Peter Hastie, 'The Concept of Subconscious Copying: Substantive Law and an Evidentiary Notion' (1995) 6 *Australian Intellectual Property Journal* 16.

<sup>11</sup> See Robin Cooper Feldman, 'The Role of the Subconsciousness in Intellectual Property Law' (2010) 2 *Hastings Science & Technology Law Journal* 1; Carissa L Alden, 'A Proposal to Replace the Subconscious Copying Doctrine' (2007) 29 *Cardozo Law Review* 1729; Joel S Hollingsworth, 'Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine' (2000) 23 *Hastings Communication & Entertainment Law Journal* 457.

<sup>12</sup> 298, F 145 (SD NY, 1924). See also *Bright Tunes Music Corp v Harrisongs Music Ltd*, 420 F Supp 177 (SD NY, 1976); *Three Boys Music Corp v Bolton* 212 F 3d 477 (9<sup>th</sup> Cir, 2000).

has invaded the author's rights. It is no excuse that in doing so his memory has played a trick on him.<sup>13</sup>

In the United Kingdom, it was the case of *Francis Day & Hunter Ltd v Bron*<sup>14</sup> that confirmed that subconscious copying could amount to infringement. In *Francis Day*, the Court of Appeal was asked to consider whether the defendant's song, *Why*, published in 1959, had infringed the copyright in the plaintiff's song *In A Little Spanish Town*, published in 1926. Counsel acting for the plaintiff argued quite forcibly about the need to prevent subconscious copying of musical works, arguing that it was 'necessary to protect the author of the original work, for otherwise (so it was argued) any infringer could escape the consequences of plagiarism by denying that he had done so'.<sup>15</sup> The Court of Appeal made it clear that copyright infringement could occur through subconscious copying.<sup>16</sup> In concluding that there was no evidence of subconscious copying by the defendant in *Francis Day*, the Court of Appeal stressed that whether subconscious copying took place is a question of fact, and thus depends on the circumstances of the case. Furthermore, due to the possibility of the independent creation of similar musical works, strong evidence of subconscious copying is required. Upjohn LJ stated:

To my mind, the possibility that the defendant had heard it, or even played it in his early youth, is a quite insufficient ground upon which it would be proper to draw the inference of unconscious copying. It may be that in the future medical evidence will be available to guide us upon this point, but in the absence of acceptable and probative medical evidence I think it requires quite strong evidence, in a case such as this — where, as I have already pointed out, independent composition is a real practical possibility — to establish, as a matter of probability, that de Angelis's subconscious ego guided his hand.<sup>17</sup>

While there are no cases that deal directly with subconscious copying and copyright infringement in Australia, the Full Federal Court of Australia alluded to it in *EMI Songs*

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<sup>13</sup> *Fred Fisher Inc v Dillingham* 298 F 145, 147-148 (SD NY, 1924).

<sup>14</sup> [1963] Ch 587. See also *Poznanski v London Film Production* [1936-45] MacG Cop Cas 107.

<sup>15</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 617 (Upjohn LJ).

<sup>16</sup> *Ibid* 614 (Willmer LJ).

<sup>17</sup> *Ibid* 620-621 (Upjohn LJ).



*Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*.<sup>18</sup> When referring to the need for a causal connection, Jagot J stated:

Subconscious copying may infringe copyright. Provided the test of causal connection is satisfied, an intention to take advantage of the labour of another is not required in order for an action for copyright infringement to be sustained.<sup>19</sup>

The idea of subconscious copying was considered more fully in *Talbot v General Television Corp Pty Ltd*,<sup>20</sup> a case involving confidential information rather than copyright. In late 1976 and early 1977, Talbot disclosed the concept of a television program, to be called *To Make A Million*, and submitted a pilot script to Channel 9. Talbot did not receive a response from Channel 9, however, in April 1977, he became aware that Channel 9 were promoting a segment to be aired on the *A Current Affair* program. The promoted segment had a similar name, content, and format to that presented by Talbot. Talbot alleged that Channel 9 had made use of unauthorised confidential information. In response Channel 9 argued that they did not use Talbot's ideas, and that its segment had been independently conceived and developed. In finding that Channel 9 did in fact make unauthorised use of confidential information the Supreme Court of Victoria made it clear that it did not matter if this had been done subconsciously. Harris J stated:

That a person may come out with a suggestion which he honestly believes to be a novel suggestion of his own, but which can properly be attributed to his mind having subconsciously used information which he had been given in the past and of which he has no conscious recollection.<sup>21</sup>

In summary, subconscious copying is no excuse for copyright infringement. Nonetheless, it is still raised in copyright infringement disputes. There are a number of possible reasons for this. One of the reasons for making a claim of subconscious copying is that it may reduce the amount of damages payable if the defendant is found liable for copyright infringement.<sup>22</sup> Another reason for claiming subconscious copying is to mitigate damage to reputation, and to seek dignity and respect in the face of copyright infringement. More

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<sup>18</sup> (2011) 276 ALR 35.

<sup>19</sup> Ibid 89-90 [221] (Jagot J).

<sup>20</sup> [1980] VR 224. See also *S W Hart & Co Pty Ltd v Edwards Hot Water System* (1984) 159 CLR 466, 472.

<sup>21</sup> *Talbot v General Television Corp Pty Ltd* [1980] VR 224, 242.

<sup>22</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 625 (Diplock LJ).

specifically, as we will show in the next section, a claim to subconscious copying has a certain metaphorical and figurative value that might embolden defendants to make such a claim.

### III THE SUBCONSCIOUS GENIUS

To seek a definition of the subconscious is not within the scope of this paper. Moreover, it would be futile to even try to define and delineate the subconscious. It is however, helpful to make some broad statements about the subconscious. There is little agreement or consensus on the definition or delimitation of the subconscious. Furthermore, the terms unconscious and subconscious are often used interchangeably. Importantly, however, the challenges associated with relying on the notion of subconscious is not lost on the courts. Lord Diplock, in *Francis Day*, pointed out the difficulty of proving subconscious copying and lamented the absence of medical support for such claims:

We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember, not a mere isolated phrase, but a 'substantial' part of the remembered work without remembering that one is remembering.<sup>23</sup>

What is the value of eliciting the subconscious? In psychology, the subconscious mind is generally thought to be the part of the mind that we are not fully aware of. While Sigmund Freud tends to be associated with the discovery of the subconscious, the word itself is a variation of the French *subconscient* developed by the French psychologist Pierre Janet (1859–1947). Janet argued that beneath the layers of thoughtful and analytical conscious mind lay an awareness that he called the *subconscient* mind.<sup>24</sup> Going even further back in history, Claxton argues that while it was not talked about in the same way (and was given different names) the subconscious has been identified and valued in many cultures and societies — from ancient descriptions of the “underworld”, to “invisible puppets” and theories of neuroscience.<sup>25</sup>

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<sup>23</sup> Ibid 263 (Diplock LJ).

<sup>24</sup> Henri F Ellenberger, *The Discovery of the Unconscious: The History and Evolution of Dynamic Psychiatry* (Basic Books, 2008).

<sup>25</sup> Guy Claxton, *The Wayward Mind: An Intimate History of the Unconscious* (Little, Brown, 2005).

In the early 20<sup>th</sup> century, artists picked up the idea of the subconscious. The surrealist movement, for example, borrowed some of the ideas, language, and techniques that focused on the subconscious mind.<sup>26</sup> For surrealist artists such as Breton, Ernst, and Dali, creativity was about feeling, not cognition. Indeed, surrealists believed that creativity that came from the subconscious mind was more powerful and authentic than anything produced from the conscious mind. In this way the subconscious was viewed positively, and for almost a century the subconscious mind has held a certain metaphorical and figurative power. The subconscious epitomises instinct and authenticity, and represents a way of creating that is unknowable and inaccessible to most people. The subconscious is: Magical. Powerful. Authentic. Sublime. Instinctive.<sup>27</sup> Many artists, therefore, are not fully aware of how they create, or what elements may be contemplated or integrated in their art. Moreover, art is the composition of everything that the artist hears and experiences, whether they are aware of it or not.

Let us return to subconscious copying claims in copyright infringement disputes. The metaphorical and figurative power of the subconscious means that if music emerges from subconscious copying, rather than conscious copying, the musician is hardly to blame. More specifically the metaphorical and figurative power of claiming subconscious copying helps musicians portray themselves as mythical and magical beings. Music is created by the musician, but the musician may not be aware of where the music came from or what was incorporated into it.<sup>28</sup> Musicians are merely the outlet or conduit for their creative feelings, experiences and instincts. Further, the music is always there in the musician — partly formed and ready to be shared with an audience. According to Schopenhauer the subconscious is the 'blind driving force' of the universe.<sup>29</sup> Notably, the driving force of the subconscious and its role in musical creation has been recognised in copyright infringement disputes. Such beliefs are reflected in comments by Pharrell

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<sup>26</sup> Gerard Durozoi and Alison Anderson (trans), *History of the Surrealist Movement* (University of Chicago Press, 2004).

<sup>27</sup> See generally Claxton, above n 25.

<sup>28</sup> J Michael Keyes, 'Musical Musings: The Case for Rethinking Music Copyright Protection' (2004) 10(2) *Michigan Telecommunications and Technology Law Review* 407; Michael W Carroll, 'Whose Music is it Anyway? How We Came to View Music as a Form of Property' (2004) 72(4) *The University of Cincinnati Law Review* 1405.

<sup>29</sup> Arthur Schopenhauer, *The World as Will and Representation* (E F J Payne trans, Dover Publications Inc New York, 1966).

Williams and his attorneys,<sup>30</sup> who claimed that ‘music is magic’, the creation of *Blurred Lines* was ‘feel. Not infringement’,<sup>31</sup> and that Pharrell Williams has a ‘brilliant mind’.<sup>32</sup> In 1976 former Beatle, George Harrison’s song *My Sweet Lord* which was released in 1971 was found to have infringed the copyright of the 1962 song *He’s So Fine*.<sup>33</sup> In concluding that the two songs were essentially the same, District Court Judge Owen accepted that George Harrison had subconsciously copied the earlier song. In so doing Judge Owen described how a musician might subconsciously copy existing works:

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.<sup>34</sup>

Another dimension to subconscious copying claims is that it evokes the idea that music creation is a burden and a sacrifice, and that only a select few are capable of such a feat. This points to the image (or cliché) of a musician as someone that suffers for their art. In this way, by claiming subconscious copying musicians draw attention to the more challenging and undesirable aspects of creating music. This is a burden and challenge reflected in Jorge Luis Borge’s story, *Shakespeare’s Memory*.<sup>35</sup> The main character in Borge’s story, Hermann Sörgel, is given Shakespeare’s memory by a man he meets in a bar. Rather than being the inspiration and benefit that he expected, it is a burden that overwhelms him and is one that he is, ultimately, unable to endure. Drawing analogies to Borge’s Hermann Sörgel, the subconscious copying claim, therefore, is a way for musicians to assert that creating music is both a gift and a burden, and not accessible to

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<sup>30</sup> Robin Thicke adopted a very different approach — admitting that Williams wrote the song, and that he was ‘high on Vicodin and alcohol’ at the time. Thicke also backtracked from the comments he made about copying Marvin Gaye’s *Got To Give It Up* in a previous interview; Stelios Phili, ‘Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film’, *GQ* (online), 19 May 2013 <<http://www.gq.com/blogs/the-feed/2013/05/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy.html>>.

<sup>31</sup> Chelin above n 6.

<sup>32</sup> Ibid.

<sup>33</sup> *Bright Tunes Music Corp v Harrisongs Music Ltd*, 420 F Supp 177 (SD NY, 1976).

<sup>34</sup> Ibid 181.

<sup>35</sup> Jorge Luis Borge, *The Book of Sand and Shakespeare’s Memory* (Andrew Hurley trans, Penguin Classics, 2007) [trans of: *La Memoria de Shakespeare* (first published 1983)].

everyone. While many people listen to and experience music it is only brilliant minds that can create hit songs with that experience and knowledge. Musicians have vast knowledge and experience of music, musical techniques and genres. Their burden and sacrifice is to turn these traits, experiences and emotions into *new* music. Non-artists (for example, judges, lawyers and juries) could not produce a hit song, nor do they understand what it is like to have a developed and productive subconscious mind.

#### IV CONCLUSION

Subconscious copying is copyright infringement. In this article, however, we have argued that subconscious copying claims in copyright infringement disputes have significance beyond legal doctrine. Indeed, the claim to subconscious copying has metaphorical and figurative value. It draws attention to the creativity, brilliance and genius of musicians. It reinforces the ethereal nature of music creation. It also portrays music creation as a burden and a sacrifice that only a few are capable of turning into hit songs. Claiming subconscious copying allows musicians to mitigate damage to their reputation and seek dignity and self-respect; even when they are liable for copyright infringement. You may, of course, disagree. There are other reasons why subconscious copying claims may persist in copyright infringement cases. It is possible that claims to subconscious copying suggest a pretentious and conceited musician (rather than a brilliant, instinctive and genius one). And claims to subconscious copying may point to the fact that musicians are not full of subconscious but something altogether different.

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