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NOTES

Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?

*Karen Bevill**

I. INTRODUCTION

Our society has progressed far from the days of manual typewriters, carbon paper, and telephone switchboards. In today's world, with the click of a button, computers can copy complete novels and full-length CDs in a few short minutes.¹ With the advances of technology, information has become a global commodity, and copyright law has gained importance on an international level. We have surpassed the print era in which our current copyright law was developed.² Consequently, copyright law must change and adapt to the digital age in which we live.³

One notable element of copyright law that has become outdated is

* J.D. Candidate, Rutgers School of Law-Newark, 2000; B.A., Pepperdine University, 1995. The author wishes to thank her family, Rick, and the Salzers for their encouragement and support. She also wishes to thank Maral Kazanjian for her insightful comments and dedication in editing this Note.

1. Quicker modem lines can accomplish the same thing in only seconds.

2. See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 172 (1989).

3. See generally April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web*, 24 RUTGERS COMPUTER & TECH. L.J. 75 (1998) (addressing the need for a change in copyright law in light of Internet technology); Douglas J. Masson, Comment, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, 71 IND. L.J. 1049 (1996) (describing the conflict between current copyright law and digital systems, specifically digital libraries). But see John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84, 85 (concluding that copyright law is not capable of being adapted to the new digital age).

Sweden has recognized the need to change its laws with respect to copyright protection. See Kai R. Lofthus, *Sweden Looks to Strengthen Law for Copyright Owners*, BILLBOARD, Nov. 14, 1998, at 59. New Swedish legislation favoring copyright holders became effective on January 1, 1999. See *id.* Sweden's government acknowledged that their laws needed to fit the "digital arena." See *id.* Their chosen route was to make it easier to get search warrants to investigate the theft of intellectual property, focusing on the police enforcement side of the law. See *id.*

the access requirement for proof of copying in a copyright infringement action. Access is one part in a two-step process for establishing an inference of copying.⁴ The access requirement was formerly justified because it seemed to be a reasonable piece of circumstantial evidence of copying. Access has lost its significance, however, in light of the technological advances that have occurred since our copyright law was enacted. Geography is a minimal barrier to communication and travel, and copies of all types of creative works can be made quickly, easily, and by a broader range of people.

This Note will show that the access requirement has lost its probative value in copyright infringement actions. It is not indicative of how the trier of fact will decide. Presence or absence of access does not have a significant impact on the outcome of a case. In fact, some courts determine the existence of access based more on the credibility of the parties than the character of the evidence.⁵

This Note will further show that the access requirement has lost much of its force in light of the rise of Internet use, in particular, digital music downloading. Music is more readily available and transmittable than it has ever been. In the past, plaintiffs have typically demonstrated access by showing that their work was "widely disseminated" or that the defendant was able to gain access to the plaintiff's work through some chain of events, including corporate receipt.⁶ Now, if a work has been performed even once, it is possible for virtually anyone to have access to it. Consequently, the access requirement should be eliminated. Instead of focusing on access, parties and the courts should turn their attention to the issue of independent creation, which has a closer nexus and more probative value to the core issue of copyright infringement.

Part II of this Note will discuss the elements that are necessary to a finding of copyright infringement. Part III.A. will then discuss the current state of the access requirement. Part III.B. will discuss why the access requirement is not determinative and how it has lost its vitality in light of digital technology and the Internet. It will further demonstrate how access, which was once designed to protect the defendant from accidental infringement, has become a plaintiff's tool. Part III.C. will evaluate the merits of and rationale for abolishing the access requirement. Part IV will posit that the defense of independent creation is a more appropriate focal point for the court's examination. Finally, Part V will provide recommendations to musi

4. See *infra* notes 35-41 and accompanying text.

5. See *infra* notes 107-113 and accompanying text.

6. See *infra* notes 90-95 and accompanying text.

cians on how to protect themselves in a copyright infringement action.

II. FRAMEWORK OF A COPYRIGHT INFRINGEMENT ACTION

Congress established copyright law pursuant to Article I, Section 8, Clause 8 of the Constitution which states that "[t]he Congress shall have Power To 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."⁷ Title 17 U.S.C. §§ 101-1101 provide the statutory framework for a copyright infringement action.⁸ In order to prevail on a claim of copyright infringement, the plaintiff must prove that he has a valid copyright for the work and that the defendant illicitly copied the work.⁹

As a society, we value the arts and wish to foster creativity through the granting and enforcement of copyrights.¹⁰ But copyright law is devoid of a bright line distinguishing work that deserves to be protected from that which does not, and how much protection is needed to keep competing interests in balance. While we strive to encourage creativity, we do not want to restrict the *use* of creative work so that others are precluded from benefiting from it.¹¹ The difficulty in balancing these conflicting concerns has been recognized for centuries.

[W]e must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹²

7. U.S. CONST. art. I, § 8, cl. 8.

8. See 17 U.S.C. §§ 101-1101 (1994).

9. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977).

10. See *Arden v. Columbia Pictures Indus.*, 908 F. Supp. 1248, 1259 (S.D.N.Y. 1995) (stating that determinations regarding substantial similarity are made in consideration of the goal of fostering creativity); *Pendleton v. Acuff-Rose Publications, Inc.*, 605 F. Supp. 477, 484 (M.D. Tenn. 1984) (stating that copyright laws seek to foster creativity while also providing wide use of subject matter).

11. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (reasoning that copyright protection is "for the general public good" because it stimulates creativity); Masson, *supra* note 3, at 1063, 1066 (advocating the use of digital libraries to facilitate the "wide dissemination of information").

12. *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 367 (S.D.N.Y. 1955) (citation omitted), *aff'd*, 228 F.2d 221 (2d Cir. 1955); *accord Pendleton*, 605 F. Supp. at 484 (stating that we must reward creativity while allowing the public to derive pleasure from the work).

A valid copyright may be granted pursuant to 17 U.S.C. § 410(c).¹³ "The Copyright Act of 1976 . . . protects 'original works of authorship fixed in any tangible medium of expression.'"¹⁴ Therefore, in order to acquire a valid copyright, the work must be original.¹⁵ "[O]riginality is the *sine qua non* of copyrightability."¹⁶ While originality is required, the work does not have to be the first of its kind.¹⁷ Courts have construed the test of originality as imposing a minimal burden.¹⁸ Nevertheless, the originality requirement is not

13. Section 410(c) states in relevant part:

[T]he certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

17 U.S.C. § 410(c) (1994); see also *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 n.1 (2d Cir. 1977) (upholding presumption of registration as establishing prima facie proof of ownership); *Tuff 'N' Rumble Management, Inc. v. Profile Records Inc.*, 42 U.S.P.Q.2d (BNA) 1398, 1400 (S.D.N.Y. 1997) (denying the presumption where work was first published eighteen years before registered and placing burden on plaintiff to establish validity of copyright). Lack of copyright registration, however, will not be an immediate bar to the initiation of a suit. See, e.g., *Tuff 'N' Rumble Management, Inc.*, 42 U.S.P.Q.2d (BNA) at 1400-01.

As a first step towards copyright protection, at least one company, www.firstuse.com, provides a "digital stamp" that offers time-stamping of intellectual property. See Paul Verna, *Digital Stamp Offered—Firm Says Tool Protects Against Infringers*, BILLBOARD, Nov. 7, 1998, at 27. While this digital stamping is not a copyright, it provides a means to establish the date on which intellectual property was developed. See *id.* The more traditional means of time-stamping, including "notarization or sending a certified letter to oneself," lack one benefit that using www.firstuse.com provides, namely 24-hour worldwide access. See *id.* The digital stamping is accomplished in seconds. See *id.*

14. *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 838 (Fed. Cir. 1992) (citing 17 U.S.C. § 102(a) (1988)).

15. See *Tempo Music, Inc. v. Famous Music Corp.*, 838 F. Supp. 162, 169 (S.D.N.Y. 1993) (citing *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (en banc) and distinguishing between originality and novelty of a work).

16. *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981).

17. See *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 399 (S.D.N.Y. 1952) (citation omitted). Conceivably, two virtually identical songs could both have valid copyrights if they were created "innocently and independently." *Id.* at 398. This is where copyright and patent protections diverge. To receive patent protections, the work must be both original and the first of its kind. See, e.g., *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 64 (3d Cir. 1978) (distinguishing patent, which protects novelty and invention, from copyright which protects "little more than . . . actual copying").

18. See *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (stating that meeting the requirement of originality is a low threshold); see also *L. Batlin &*

merely illusory.¹⁹ Cliches and common sayings, for example, cannot be copyrighted,²⁰ nor can facts or compilations of fact that lack any originality in "selection and arrangement."²¹

Copyrights exist to protect the forms of expressions of ideas.²² A copyright does not protect a bare idea, but protects the *expression* of a person's idea.²³ Frequently, it may be difficult to distinguish an idea from expression.²⁴ If there is a limited range of expression for an idea or if the expression and idea are interconnected, then copyright law will not protect the expression "because doing so would confer a *de facto* monopoly over the idea."²⁵ Creative works are more suitable to copyright protection than are works with factual elements.²⁶ Copyright protection does not extend to common expressions, "facts, information in the public domain, and *scenes a faire*."²⁷

Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (stating that all that is needed to satisfy the originality requirement is that the author added something meaningful of his own to the work).

19. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (providing that the "standard of originality is low but it does exist" and determining that the compilation of telephone numbers in the white pages is not sufficiently original to be afforded copyright protection).

20. See *Pendleton*, 605 F. Supp. at 486 ("The terms 'drink,' 'smoke,' and 'dirty joke' are not subject to the proscriptions of copyright law . . ."); *Alexander v. Haley*, 460 F. Supp. 40, 46 (S.D.N.Y. 1978) ("[w]ords and metaphors are not subject to copyright protection"); *Stratchborneo v. ARC Music Corp.*, 357 F. Supp. 1393, 1404-05 (S.D.N.Y. 1973) (denying copyright protection to a common phrase).

21. *Feist Publications, Inc.*, 499 U.S. at 349. The Supreme Court held that the plaintiff's telephone "white pages" are not entitled to copyright protection. See *id.* at 364. The Court defined the white pages as a compilation of facts, arranged in alphabetical order and not requiring creativity or originality. See *id.* at 362. Therefore, the Court held that the white pages did not possess the requisite level of originality for copyright protection. See *id.*

22. See *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1163 (stating that an axiom of copyright law is to protect the "particular expression of the idea and never the idea itself").

23. See *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1344 (5th Cir. 1994) (stating that in addition to ideas, copyright protection does not extend to "processes, methods or scientific discoveries"); *Arden*, 908 F. Supp. at 1258; *Pendleton*, 605 F. Supp. at 480.

24. See *Pendleton*, 605 F. Supp. at 481 ("the demarcation between idea and expression is not susceptible to a litmus test determination").

25. See *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir. 1994) (affirming district court determination that words, phrases, and ideas that are copied verbatim were a copyright infringement). As discussed, cliches, words, and common expressions are not susceptible to being copyrighted. See *Alexander*, 460 F. Supp. at 46; *Stratchborneo*, 357 F. Supp. at 1405.

26. See *DSC Communications Corp. v. DGI Techs., Inc.*, 898 F. Supp. 1183, 1190 (N.D. Texas 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996).

27. *Engineering Dynamics, Inc.*, 26 F.3d at 1344.

Registering the copyright certificate provides prima facie proof of the copyright's validity.²⁸ Presentation of a valid copyright certificate has a burden-shifting effect.²⁹ If the defendant chooses to contest the copyrightability of the plaintiff's work after the plaintiff has presented a copyright certificate, the burden of proof shifts to the defendant to prove the copyright's invalidity³⁰ or the falsity of any of the facts presented in the certificate.³¹

Once plaintiff has established that he has a valid copyright, then he must prove that the defendant illicitly copied his work.³² To prove illicit copying, the plaintiff must first prove that his work was copied.³³ He must next prove that the defendant unlawfully appropriated the copy.³⁴ Since actual proof of copying is customarily difficult to obtain, plaintiffs may prove copying circumstantially.³⁵ To do

28. See 17 U.S.C. § 410(c); accord *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992); *Arden*, 908 F. Supp. 1248; *DSC Communications Corp.*, 898 F. Supp. at 1187. A defendant may rebut the presumption of copyright validity, however, by showing that the plaintiff's design is not original, but "that it is in fact a copy of a preexisting one." *North Coast Indus.*, 972 F.2d at 1033.

29. See *Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 436 (S.D. Fla. 1995).

30. See *Arden*, 908 F. Supp. at 1260; *DSC Communications Corp.*, 898 F. Supp. at 1187. A defendant may attack the copyrightability of a work by attacking its originality, see *supra* notes 13-21 and accompanying text, or by maintaining that the idea and expression are too interrelated, see *supra* notes 22-27 and accompanying text.

31. See 17 U.S.C. § 410(c); *Playboy Enters., Inc.*, 900 F. Supp. at 436; 4 MELVILLE B. NIMMER & DAVID NIMMER, *SYMNER ON COPYRIGHT* § 13.01[A] (1999).

In *Brown Bag Software v. Symantec Corp.*, the defendants rebutted the presumption of a software program's copyright validity by showing that other programs had employed the same copyrighted elements prior to the plaintiff's copyright registration. See 960 F.2d 1465, 1474 (9th Cir. 1992). While this is not always sufficient to "rebut the presumption [of originality] in the absence of any evidence that [the plaintiff] copied from these other programs," *Johnson Controls v. Pheonix Control Sys.*, 886 F.2d 1173, 1175 (9th Cir. 1989), the court could find copying because the plaintiff had admitted he was inspired by the prior programs.

32. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

33. See *infra* notes 35-64 and accompanying text.

34. See, e.g., *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1165 (explaining that "unlawful appropriation" results from copying the "protected expression itself"); *Arnstein*, 154 F.2d at 468; *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 457 (S.D.N.Y. 1965) (stating that the second element of a copyright infringement action is that the infringing work copied a material and substantial portion of the plaintiff's work). See *infra* notes 65-69 and accompanying text on unlawful appropriation.

35. See, e.g., *Kepner-Tregoe, Inc.*, 12 F.3d at 532 (stating that "direct evidence of copying is uncommon" so plaintiff may prove infringement "indirectly or inferentially"); *Little, Brown & Co.*, 245 F. Supp. at 458 (stating that if the defendant denies copying the plaintiff's work, it can be proven circumstantially).

so, a plaintiff must prove that the defendant had access to the work, and then prove that the two works are "substantially similar."³⁶ Proving the foregoing creates an inference of copying.³⁷

Some courts have defined "access" as "hearing or having a reasonable opportunity to hear the plaintiff's work."³⁸ Consequently, to demonstrate access, the plaintiff must do more than suggest the mere prospect of access.³⁹ Plaintiffs may establish access by showing some "chain of events" whereby the defendant gained access to the work⁴⁰ or that the work was widely disseminated.⁴¹ The access requirement will be discussed in detail in Part III of this Note.

Occasionally, a plaintiff may succeed in an action for copyright infringement without proof of access if the infringing work bears such a "striking similarity"⁴² to the plaintiff's copyrighted work that a possibility of anything other than copying is unbelievable.⁴³ Common errors in the two works, for example, is strong evidence of copying.⁴⁴ If there is a striking similarity between the two works, some

36. See *Kepner-Tregoe*, 12 F.3d at 532; *Arnstein*, 154 F.2d at 468; *Little, Brown & Co.*, 245 F. Supp. at 458.

37. See *Kepner-Tregoe*, 12 F.3d at 532.

38. *Intersong-USA v. CBS*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

39. See *Gaste*, 863 F.2d at 1066; see also *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978) (stating that "speculations and inferences as to access are insufficient" to survive a motion for summary judgment). While speculation may not suffice, it seems that courts have relaxed plaintiff's burden of establishing access.

40. See, e.g., *Gaste*, 863 F.2d at 1067 (finding access even though it was through a long and "attenuated chain of events"). This means of proving access frequently occurs when an artist has given his work to a company in the hopes that it will produce the work. See, e.g., *Intersong-USA*, 757 F. Supp. at 281 (asserting access through the plaintiff's submission of a demonstration tape to the defendant); *Meta-Film Assocs., Inc. v. MCA*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984) (seeking to prove access through a chain of events beginning with submission of a screenplay to a movie director); *Little, Brown & Co.*, 245 F. Supp. at 458 (finding access since the defendant had an opportunity to see work through a third party who had access to the plaintiff's manuscript).

41. See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997-98 (2d Cir. 1983) (finding that work, which defendant remembered hearing being played on the radio, was widely disseminated and satisfied the access requirement).

42. See generally Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189-90 (1990) (discussing use of "substantial similarity" as an alternative to access).

43. See *Gaste*, 863 F.2d at 1068 (permitting jury to infer copying from striking similarity); *Arnstein*, 154 F.2d at 469 (envisioning a case where similarity would be enough to prove access); *Scott*, 449 F. Supp. at 520.

44. See *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 446 (4th Cir. 1986) (stating that common errors or apparently intentional minor changes are compel-

courts will lessen the stringency of the access test.⁴⁵

The second element the plaintiff must establish to prove copying is substantial similarity⁴⁶ between the plaintiff's and defendant's works.⁴⁷ The substantial similarity of the two works should be determined from the perspective of the layperson.⁴⁸ Expert testimony may be introduced, however, to show the similarity of the works based on a technical dissection of the composition.⁴⁹ Some courts will only allow expert testimony to prove certain prongs of the test.⁵⁰ The Ninth Circuit, however, has routinely admitted both expert and lay testimony.⁵¹

The outcome of the substantial similarity test is dependent upon a reasonable person's reaction to a work,⁵² and an examination of the similarity of both idea and expression.⁵³ Some courts separate the

ling evidence that the work was copied from another).

45. See *Gaste*, 863 F.2d at 1067-68 (stating that the need to meet the access requirement is less rigorous when striking similarities exist); *Arnstein*, 154 F.2d at 469.

46. For a discussion of the substantial similarity requirement, see generally Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181 (1994).

47. See *Arnstein*, 154 F.2d at 468.

48. See *id.* at 473 (determining that expert testimony in this circumstance is impermissible); *Tuff 'N' Rumble Management Inc.*, 42 U.S.P.Q.2d (BNA) at 1402.

49. See *Arnstein*, 154 F.2d at 473 (stating that expert testimony may be introduced to assist in determinations of lay listeners).

50. See *id.* at 468 (stating that expert testimony is irrelevant when the court is determining whether there was an unlawful appropriation, but allowing it at the copying determination stage).

51. See, e.g., *Brown Bag Software*, 960 F.2d at 1474 n.3.

52. See *Baxter v. MCA*, 812 F.2d 421, 424 (9th Cir. 1987) (stating that expert testimony is not required to determine substantial similarity); *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164.

53. See *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164; see also *Litchfield v. Spielberg*, 736 F.2d 1352, 1356, 1358 (9th Cir. 1984) (determining that there was similarity in neither idea nor expression). The test for similarity of ideas is extrinsic, focusing on "alleged similarities in the objective details of the works." *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164. Extrinsic factors can be objectively listed. See *id.* When works deal with the same subject, some similarities are inevitable. See *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 367 (S.D.N.Y. 1955). In *Alexander*, for example, both authors had written books on Holmes. *Id.* at 266. The similarities that were due to the historical data about Holmes were not considered in the substantial similarity determination. See *id.*

The test for similarity of expression, however, is intrinsic and depends on the subjective response of the layperson. See *Litchfield*, 736 F.2d at 1356 (considering extrinsic evidence from viewpoint of the "ordinary reasonable person"); *Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 ("similarity in expression is necessarily more subtle and complex" and depends on "impression of the average reasonable" person).

substantial similarity test into two parts.⁵⁴ Step one is an extrinsic test—an objective test that evaluates the similarity of ideas.⁵⁵ Step two is an intrinsic test—a subjective test employing the reasonable person standard and evaluating the similarity of expression.⁵⁶ This intrinsic test evaluates the “total concept and feel of the works.”⁵⁷ Some courts have held that upon satisfaction of the extrinsic test, it is improper for a court to grant summary judgment in a copyright infringement action;⁵⁸ it creates an issue that must be decided by the trier of fact.⁵⁹

The courts have not established an explicit rule defining the amount of a work that must be copied to constitute a “substantial similarity.”⁶⁰ The amount of similarity is not determinative of the issue. The court should consider both the “quantity and quality” of the copied material⁶¹ and should scrutinize the work as a whole rather than dissect it.⁶² Consequently, the test is fact intensive.⁶³ Ordinarily, the determination of substantial similarity is a matter reserved for the jury.⁶⁴

54. See *Atari Games Corp.*, 975 F.2d at 844; see also *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 945 (8th Cir. 1992) (separating the substantial similarity test into external and internal components).

55. See *Atari Games Corp.*, 975 F.2d at 844.

56. See *id.*

57. *Litchfield*, 736 F.2d at 1357; accord *Data East USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987).

58. See *Shaw v. Lindheim*, 919 F.2d 1353, 1359 (9th Cir. 1990) (holding that the lower court should not have granted summary judgment for defendant, in a literary copyright infringement action, after plaintiff satisfied the extrinsic test).

59. See *id.*

60. See 4 NIMMER & NIMMER, *supra* note 31, § 13.03[A][2]; see generally Lape, *supra* note 46. This test is unclear in light of digital sampling and manipulation of music and pictures. See Lape, *supra* note 46, at 98. Some copied works may seem original to the lay observer. See *id.*

61. See *Little, Brown & Co.*, 245 F. Supp. at 458.

62. See *Arnstein*, 154 F.2d at 468 (stating that at this stage, “dissection’ and expert testimony are relevant”); *Tuff ‘N’ Rumble Management Inc.*, 42 U.S.P.Q.2d (BNA) at 1402.

63. See *Litchfield*, 736 F.2d at 1355.

64. See *Moore*, 972 F.2d at 945; *Singer v. Citibank N.A.*, No. 91 Civ. 4453, 1993 WL 177801, at *3 (S.D.N.Y. Sept. 20, 1993). Because it is a factual question, summary judgment is disfavored in intellectual property suits where substantial similarity claims are at issue. See *Twentieth Century-Fox Film Corp. v. MCA*, 715 F.2d 1327, 1330 n.6 (9th Cir. 1983). But see *Aliotti*, 831 F.2d at 900 (determining that summary judgment would be proper in copyright infringement cases where, for example, “no reasonable jury could find [that] two lines of stuffed animals” could be substantially similar); *Pellegrino v. American Greetings Corp.*, 592 F. Supp. 459, 462 (D.S.D. 1984) (holding that, despite the fact that it is generally improper to grant summary judgment in intellectual property cases, since the

Finding that the defendant copied the plaintiff's work does not, however, end the inquiry. The plaintiff must also establish unlawful appropriation because "[n]ot all copying is copyright infringement."⁶⁵ The question of whether the copying is illicit⁶⁶ turns on whether the copied portion of the work is what the layperson finds aesthetically pleasing and what causes the ensuing piece to reap financial returns.⁶⁷ When making a determination of unlawful appropriation, the court should consider whether the artistic appeal is the same for both works.⁶⁸ Factors the court should consider include "the purpose and character of the use . . . the nature of the copyrighted work; the amount and substantiality of the portion used . . . ; and the effect of the use upon the potential market for or value of the copyrighted work."⁶⁹ Consequently, the requirement of substantial similarity must be met at the second stage of analysis as well as in the copying determination stage, which may create confusion.⁷⁰

The defendant may raise several defenses to a finding of copyright infringement. If the plaintiff establishes access and substantial similarity, the defendant can rebut the presumption of copying by furnishing proof that he created his work independently.⁷¹ Additional

defendant provided a copyright registration of his work antecedent to the plaintiff's copyright, there was no evidence of access, and there were only a few similarities between the works, summary judgment was proper), *aff'd*, 760 F.2d 272 (8th Cir. 1985).

65. *DSC Communications Corp.*, 898 F. Supp. at 1188 (citation omitted).

66. The term "illicit copying" is used virtually interchangeably with "unlawful appropriation" by courts.

67. *See Arnstein*, 154 F.2d at 473; *Denker v. Uhry*, 820 F. Supp. 722, 728 (S.D.N.Y. 1992) ("Copying is actionable when [the] defendant appropriates the economic value of the work as measured by the work's appeal to the public."), *aff'd without op.*, 996 F.2d 301 (2d Cir. 1993).

68. *See Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 141-42 (2d Cir. 1992) (contending that there is unlawful appropriation if an observer would be confused and regard the two works as essentially the same, and finding no unlawful appropriation where expression could be regarded as different by the ordinary observer).

69. *DSC Communications Corp.*, 898 F. Supp. at 1188.

70. *See Laureyssens*, 964 F.2d at 140 ("The presence of a 'substantial similarity' requirement in both prongs of the analysis . . . creates the potential for unnecessary confusion . . .").

71. *See Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1986); *Favia v. Lyons Partnership, No. 94 Civ. 3277*, 1996 WL 194306, at *2 (S.D.N.Y. Apr. 23, 1996); *Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F. Supp. 651, 657 (S.D.N.Y. 1995). In the latter case, the defendant showed a history of independent creations, which the court considered to "militate[] slightly toward[s] an inference" that the work in question was created independently. *Tienshan*, 895 F. Supp. at 657-58. He also created the design at "a very busy time of the year," which the court inferred to mean that he may have had more of a need to copy. *See id.* at 657-58. *But see Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988)

defenses⁷² that contradict unlawful appropriation include: a showing that the use is a fair use,⁷³ a parody,⁷⁴ that the defendant had a license,⁷⁵ that defendant was a joint owner,⁷⁶ or that the copyright was abandoned.⁷⁷ Absence of intent to copy, however, is not a defense.⁷⁸ Likewise, in musical copyright infringement actions, belonging to a different genre of music than the original will not save a work from being found in violation of the copyright laws.⁷⁹

The following analysis of copyright law is derived from copyright actions from a variety of copyrighted materials including: music,⁸⁰ lyrics,⁸¹ books,⁸² computer software,⁸³ and movies.⁸⁴ The following

(“[I]ndependent creation’ is not an affirmative defense.”). Independent creation will be discussed at length in Part IV of this Note.

72. The defenses listed are not intended to be a comprehensive list of defenses in a copyright infringement action.

73. See 17 U.S.C. § 107 (1994) (stating that “fair use of a copyrighted work, includ[es] . . . reproduction . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research”); 4 NIMMER & NIMMER, *supra* note 31, § 13.05. The rationale for allowing a fair use exception to copyright rules is to allow for dissemination of information and, consequently, education of the public. See *Atari Games Corp.*, 975 F.2d at 842-43 (determining that fair use was not an applicable defense where defendant was not authorized to have possession of the plaintiff’s source code which it obtained from the Copyright Office).

74. See 17 U.S.C. § 107; see also, *e.g.*, *MGM v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351, 360 (N.D. Ga. 1979) (holding that while parodies and satires are fair uses of copyrighted works, they are limited by § 107 in the amount of the protected work that they may use).

75. See *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990). By granting a license, the plaintiff gives up the right to sue the licensee for copyright infringement. See *id.* at 559.

76. See *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984) (holding that a copyright holder does not have the right to sue a co-owner for copyright infringement); see also 1 NIMMER & NIMMER, *supra* note 31, § 6.10 (1999).

77. See *Warner Bros. Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir. 1983) (declining to hold that the plaintiff had abandoned his copyright by virtue of failing to comply with quality control standards); 4 NIMMER & NIMMER, *supra* note 31, § 13.06.

78. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) (“Intention to infringe is not essential . . .”); *ABKCO Music, Inc.*, 722 F.2d at 998.

79. See *Jarvis v. A & M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993).

80. See, *e.g.*, *ABKCO Music, Inc.*, 722 F.2d at 990 (claiming infringement of musical composition).

81. See, *e.g.*, *Favia*, 1996 WL 194306, at *1 (claiming that the defendant copied words from plaintiff’s play for use in a song on a television show).

82. See, *e.g.*, *Little, Brown & Co.*, 245 F. Supp. at 452 (claiming infringement of plaintiff’s book idea by another author and the publishing company to whom she submitted her first five chapters).

83. See, *e.g.*, *Johnson Controls, Inc. v. Phoenix Control Sys.*, 886 F.2d 1173, 1174 (9th Cir. 1989) (claiming infringement of computer software).

84. See, *e.g.*, *Twentieth Century-Fox Film Corp.*, 715 F.2d at 1328 (claiming

analysis may also apply to the aforementioned materials, but is focused on copyright infringement actions for musical works.

III. THE ACCESS REQUIREMENT IS NO LONGER AN APPROPRIATE FOCAL POINT IN A COPYRIGHT INFRINGEMENT ACTION

A. *Satisfaction of the Access Requirement is Dependent Upon the Court and the Credibility of the Parties*

Access is one part of a two-step process for determining whether a defendant has copied a plaintiff's work.⁸⁵ The plaintiff has the burden of proving access.⁸⁶ Access "may not be inferred through speculation or conjecture;"⁸⁷ access must be shown through "significant, affirmative and probative evidence."⁸⁸ While this may be the proclaimed standard, in practice courts impose a much less stringent burden upon a plaintiff in proving access. The stringency of the test depends on the court and on the credibility of the parties.⁸⁹

*Repp v. Lloyd Webber*⁹⁰ established the means by which a plaintiff can demonstrate access. In order to prove access, the plaintiff may show that the work was "widely disseminated"⁹¹ or well known,⁹² or may simply advance a reasonable theory of access that the trier of fact would find believable.⁹³ For example, if the work

infringement of book and movie *Star Wars* by movie and television series *Battlestar: Galactica*).

85. See *supra* notes 32-37 and accompanying text.

86. See *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978), *aff'd without op.*, 197 U.S. App. D.C. 180 (1979); *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 367 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955).

87. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (citing *Ferguson v. National Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978)); see *Tuff 'N' Rumble Management Inc. v. Profile Records Inc.*, 42 U.S.P.Q.2d (BNA) 1398, 1401-02 (S.D.N.Y. 1997); *Alexander*, 132 F. Supp. at 367.

88. *Intersong-USA v. CBS*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991); see also *Tuff 'N' Rumble Management Inc.*, 42 U.S.P.Q.2d (BNA) at 1401-02; *Scott*, 449 F. Supp. at 520.

89. See *infra* notes 96-113 and accompanying text.

90. 947 F. Supp. 105 (S.D.N.Y. 1996), *rev'd on other grounds*, 132 F.2d 882 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 52 (1998).

91. See 4 NIMMER & NIMMER, *supra* note 31, § 13.02[A].

92. See, e.g., *Bevan v. CBS*, 329 F. Supp. 601, 604 (S.D.N.Y. 1971) (validating jury disbelief of defendants' claim not to have known of the play once the plaintiff demonstrated the popularity of his play).

93. See, e.g., *Johnson Controls, Inc.*, 886 F.2d at 1176 (finding access where some of defendant's employees were former employees of plaintiff); *Favia v. Lyons Partnership*, No. 94 Civ. 3277, 1996 WL 194306, at *3 (S.D.N.Y. Apr. 23, 1996) ("showing either that (1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work" will suffice for proof of access).

was not widely disseminated, plaintiffs often attempt to establish access by showing that they submitted their work to a company and that, through some chain of events, the alleged infringer gained access to the submitted work.⁹⁴ In fact, the "receipt of a manuscript at defendants' principal corporate office has been held sufficient to raise" a presumption of access.⁹⁵

The plaintiff is not required to prove that the defendant actually heard or saw the work, but only that the defendant had an *opportunity* to hear or see it.⁹⁶ The stringency of the access requirement varies among the circuit courts. The Second Circuit places a low burden on plaintiffs seeking to establish access.⁹⁷ The Second Circuit has found access when the plaintiff's access theory relied on an "attenuated chain of events extending over a long period of time and distance."⁹⁸ Similarly, the Ninth Circuit has found access solely from the fact that both parties employed the same foreign manufacturer to produce their products.⁹⁹

The Second Circuit has even found access based solely on the extent of the substantial similarity between the works. In *Wilkie v. Santly Bros., Inc.*,¹⁰⁰ the plaintiff had never copyrighted his song or performed it in public.¹⁰¹ Nevertheless, the court found that defendant had copied plaintiff's song.¹⁰² Plaintiff never asserted a theory of how the defendant might have come upon the work.¹⁰³ The implausibility of having two so substantially similar songs produced independently was sufficient to satisfy circumstantial proof of access.¹⁰⁴

In contrast, the Eleventh Circuit found that a plaintiff failed to establish access through the theory that the defendants traveled throughout the United States during the time that plaintiff was performing his song.¹⁰⁵ The Central District of California has further stated that access could not be based upon a "tortious chain of

94. See, e.g., *Intersong-USA*, 757 F. Supp. at 281 (asserting access based on, in addition to radio play, the submission of the song to the corporate defendant).

95. *Bevan*, 329 F. Supp. at 609.

96. See *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 458 (S.D.N.Y. 1965) (claiming that there is uncertainty, but supporting the latter view).

97. See *Bevan*, 329 F. Supp. at 609.

98. *Gaste*, 863 F.2d at 1067.

99. See *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981).

100. 91 F.2d 978 (2d Cir. 1937).

101. See *id.* at 979.

102. See *id.* at 980.

103. See *id.* at 979.

104. See *id.*

105. See *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986).

hypothetical transmittals."¹⁰⁶

While the courts do not appear to be any more lax in requiring access, at least one court seems to base its decision more on the credibility of the parties than on the plaintiff's theory of access. The Southern District of New York is exemplary of a jurisdiction that may ultimately make determinations of access based largely upon its opinion of the credibility of the parties. In *Intersong-USA v. CBS, Inc.*,¹⁰⁷ the Southern District reviewed testimony from both parties and concluded that plaintiffs' theory of access was unpersuasive.¹⁰⁸ The plaintiff's lack of believability is the only explanation for the court's conclusion when considering the fact that plaintiff submitted his song to defendants' music company and his song received radio play in cities where the defendants visited.¹⁰⁹ Both wide dissemination and corporate receipt are recognized grounds for finding access in the Southern District.¹¹⁰ *Repp v. Lloyd Webber*, for example, stated that wide dissemination is a means of establishing access.¹¹¹ *Smith v. Little, Brown & Co.*¹¹² determined that corporate receipt was also a viable means of asserting access.¹¹³ The apparently inconsistent logic and outcomes can only be resolved by concluding that credibility is the most significant factor in determining access in the Southern District. This should leave parties wondering whether establishing access is worth the time and effort since the court's decision, in actuality, may turn on the parties' performance in the courtroom.

B. The Access Requirement is Not, In Practice, Vital to the Copyright Infringement Action

1. Access is Not Determinative

Proof of access is currently, at least nominally, required for the plaintiff to establish copying in a copyright infringement action. Upon closer examination, however, it is apparent that access is not an essential element of the claim. If no similarities exist between the works, "no amount of evidence of access will suffice to prove copying."¹¹⁴ Furthermore, the Second Circuit has found that undue em-

106. *Meta-Film Assocs., Inc. v. MCA*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984).

107. 757 F. Supp. at 281-82.

108. *See id.*

109. *See id.*

110. *See infra* notes 111-13.

111. *See Repp*, 947 F. Supp. at 114.

112. 245 F. Supp. at 458.

113. *See id.*

114. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d. Cir. 1946).

phasis on the access requirement can actually confuse the true issue in a copyright infringement action.¹¹⁵

In contrast, even if there is no evidence of access, copying may be inferred if there are such striking similarities between the works such that the possibility of independent creation becomes implausible.¹¹⁶ Since neither the presence nor the absence of access is determinative to courts in copyright infringement actions, it is not an essential element of a suit. The frivolity of the access requirement is further evidenced through the number of defendants that are willing to concede the issue. In copyright infringement actions, defendants commonly concede access to a work in order to focus on what they deem to be the more important element—substantial similarity.¹¹⁷ Perhaps they reason that the effort spent contesting access would be wasted because, if there is enough substantial similarity between the works, the court will infer access.¹¹⁸

2. Access is an Inconsequential Burden in Light of our Digital Age

In addition to being a dispensable element in a copyright infringement action, the burden the access requirement imposes on the plaintiff is negligible. Courts appear to accept most any theory of access that appears credible.¹¹⁹ Such acceptance is justifiable be-

115. See *ARC Music Corp. v. Lee*, 296 F.2d 186, 187-88 (2d Cir. 1961) (stressing that access may confuse and conceal the copying issue).

116. See *id.*; *Wilkie*, 91 F.2d at 980 (stating that even though there was no proof of access, the similarities were so striking and so unique that the judge properly found no possibility of coincidence). But see 4 *NIMMER & NIMMER*, *supra* note 31, § 13.02[B] (1998) (stating that if striking similarity is found, “the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable” (quoting *Selle v. Gibbe*, 741 F.2d 896, 902 (7th Cir. 1984))). The Seventh Circuit has stated that only rare circumstances would warrant a finding of access based solely on the extent of the substantial similarity. See *Selle v. Gibbe*, 741 F.2d 896, 901 (7th Cir. 1984).

117. See, e.g., *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992) (conceding access to the plaintiff’s work); *Tienshan, Inc. v. C.C.A. Int’l (N.J.), Inc.*, 895 F. Supp. 651, 656 (S.D.N.Y. 1995) (conceding access to plaintiff’s dinnerware box design). Some defendants have gone so far as to concede both access and substantial similarity. See, e.g., *Denker v. Uhry*, 820 F. Supp. 722, 728 (S.D.N.Y. 1992) (conceding valid copyright and actual copying and focusing on what sort of copying is actionable), *aff’d without op.*, 996 F.2d 301 (2d Cir. 1993); *Alexander v. Haley*, 460 F. Supp. 40, 43 (S.D.N.Y. 1978) (conceding both elements of copying, access, and substantial similarity, in order to focus on the issue of unlawful appropriation).

118. See *Selle*, 741 F.2d at 901 (establishing striking similarity as an alternate to finding access).

119. See *supra* notes 83-110 and accompanying text.

cause of the ease with which access can be gained to protected works. One court even determined that access to a protected work could be acquired from the Copyright Office itself.¹²⁰ By completing a form with the Copyright Office, alleging that a controversy existed, an attorney was given access to the copyrighted work.¹²¹

Courts have long accepted the wide dissemination theory of access,¹²² presumably because the likelihood that defendant was exposed to the plaintiff's work is significant. Wide dissemination is the presumption of access because plaintiff's work has been widely distributed and actual exposure would be difficult to prove or disprove.¹²³ Wide dissemination has become more common with the advances of technology, the ease of travel, and the globalization of economy fueled by the Internet. Wide dissemination is no longer limited to commercially successful works. Virtually anyone with computer access can distribute their work or someone else's on a massive scale.

Advancing technology has been a constant source of concern for copyright holders.¹²⁴ Copyright holders, however, have focused more on the way technology enables the public to copy protected works, rather than the ease of access that technology provides.¹²⁵ In the 1970s, the biggest copyright concern was photocopiers.¹²⁶ Debate arose between authors and publishers, on the one hand, and photocopier manufacturers, libraries, and schools on the other.¹²⁷ Even then, commentators recognized that photocopying was just the beginning of the problems that technology would create for copyright law.¹²⁸ One scholar, Nicholas Henry views technology not only as a copyright concern, but as a larger threat to State power.¹²⁹ Photocopiers, computers, and other "neo-publishing devices have rendered the State not merely powerless to enforce its own laws, but unable to

120. See *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 841 & n.3 (Fed. Cir. 1992).

121. See *id.*

122. See *supra* note 91, discussing the wide dissemination theory.

123. See 4 NIMMER & NIMMER, *supra* note 31, §13.02[A].

124. See NICHOLAS HENRY, COPYRIGHT-INFORMATION TECHNOLOGY-PUBLIC POLICY: PART II: PUBLIC POLICIES-INFORMATION TECHNOLOGY 2 (1976) (identifying photocopiers and computers as some of the "greatest concern[s] among copyright owners").

125. See *id.*

126. See *id.*

127. See *id.* at 47-48.

128. See *id.* at 48-49.

129. See *id.* at 13 (stating that technological innovations hinder the ability of states to enforce their laws and protect property).

protect the property . . . of its citizens as well."¹³⁰

The modern day equivalent of photocopying, in terms of threatening copyrighted works, is computers and the Internet. "Every day tens of thousands of people download music from the Internet onto their PCs without paying a cent."¹³¹ Several companies have emerged that sell music over the Internet.¹³² This is an attractive alternative to consumers because the CDs may be less expensive, downloading is quite simple, and consumers can select songs and purchase them to compile their own custom CDs.¹³³ Technology has improved greatly in the past few years, allowing a person to download a CD-quality song in merely twenty seconds.¹³⁴ Many of the songs that are available on these sites are unheard of, however, because the major music labels have been reluctant to license their songs to Internet music providers.¹³⁵ Therefore, Internet music providers mostly offer music "from independent and small labels."¹³⁶ While this is advantageous to independent musicians, it undermines the legal rationale for allowing wide dissemination to serve as the basis for finding access. Wide dissemination is no longer a feat achieved by the musicians with the largest number of sales. In fact, it is no longer a feat that belongs exclusively to the musician. If he performs his song even once, someone could record it and post it on

130. *Id.*

131. Nikhil Hutheesing, *The Web Plays On*, FORBES, Nov. 16, 1998, at 51.

132. Internet sales are booming in areas other than music sales as well. Amazon.com, for example, sells books, CDs, videos, and audiotapes over the Internet. See David Rath, *Powell's Takes on World Market with Internet Sales*, BUS. J. PORTLAND, Nov. 6, 1998, at 29. That company sold \$116 million worth of merchandise online in the quarter ending June 30, 1998. See *id.* Over the past few years, the stock prices for several Internet companies have risen tremendously including Amazon.com, Yahoo, and K-tel, whose stock more than doubled the day after the company announced that it would sell CDs through an Internet site. See Mathew Ingram, *Internet Stocks Climb Up and Away*, THE GLOBE & MAIL, Nov. 5, 1998, at D6.

133. See Hutheesing, *supra* note 131, at 51. Several web sites exist that allow customers to create their own CDs, such as www.goodnoise.com, www.cductive.com, and www.musicmaker.com.

134. See *id.* at 52. Moving Picture Experts Group Audio Layer 3, better known as MP3, is a technology that compresses a CD-quality song so that a person can download it quickly. The music industry dislikes MP3 "because it does not safeguard music by encrypting it." *Id.* Pirates use the MP3 "to scan songs off CDs," then sell them without having to pay royalties. *Id.*

135. See *id.* at 51-52. They do not want to alienate the big music stores that are the traditional means of selling their music. See *id.* They also want to sell whole CDs of the particular artist, not just one or two songs. See *id.*

136. *Id.* at 52. Some Internet sites do provide downloadable music that is more popular and timely. Such sites are usually pirates, however, providing the music without the permission of the copyright holder.

the Internet.

Technological progress is inevitable. For copyright holders who once resisted photocopiers and cassette tapes, the battle of the day is the MP3. The MP3 is a technological advancement that allows music to be compressed for faster downloading on the Internet.¹³⁷ The battle against MP3 is probably futile, as it was with the photocopiers and cassette tapes.¹³⁸ The internet site www.MP3.com has more than 100,000 people log onto it every day.¹³⁹ "Forrester Research estimates that at least 5 million people worldwide are active MP3 us-

137. It previously took several hours to download a full-length CD, but now with the MP3, it only takes seconds. The MP3 is the current target for copyright holders and the music industry.

138. Attacking the process of copying will only provide limited protection to copyright holders. For example, the "Rio" is a new gadget that is "smaller than a deck of cards" and will allow a person to download music to transport without the need of CDs. Hutheesing, *supra* note 131, at 53. The Record Industry Association of America ("RIAA") has been trying to keep the Rio from being available for sale. *See id.* In the case of *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999), the District Judge denied the RIAA's request for a permanent injunction on the sale of the Rio. The plaintiffs in the action represented "over ninety percent of all legitimate sound recordings." *See id.* at 625.

The RIAA alleged that Diamond violated the Audio Home Recording Act of 1992 ("AHRA"). *See* 17 U.S.C.A. §§ 1001 to 1101 (West Supp. 1999). The AHRA governs digital audio recording ("DAR") devices, *see Recording Indus. Ass'n*, 29 F. Supp. 2d at 628, and the District Judge declined to apply the AHRA to the Rio. *See id.* Furthermore, plaintiffs failed to establish any wrongs that would justify an imposition of a preliminary injunction, while granting the preliminary injunction would be to the great detriment of Diamond, causing them to lose multiple millions of dollars in foregone revenue. *See id.* at 633. The District Judge reasoned that, since the Rio can be used for downloading and listening to legitimate music, an injunction on the device would be overly restrictive. *See id.* at 633.

The RIAA appealed the ruling and lost. *See Recording Indus. Ass'n*, 180 F.3d at 1081 (holding that Diamond Multisystems does not violate the AHRA). The RIAA was against the sale of the Rio because the MP3 song files are frequently posted on the Internet illegally. *See* Doug Reece, *Industry Wary as Wave of Portable MP3 Players Looms*, BILLBOARD, Sept. 19, 1998, at 1. With a Rio, people could potentially download music from the Internet without paying and listen to it for as long as they wanted, or until they decided to record something else on the MP3 player.

The portable MP3 player is being met with mixed responses outside the United States. *See* Doug Reece, *Ruling Favors Digital Player Rio*, BILLBOARD, Nov. 2, 1998, at 8. Nearly every major record label in Korea, where Samsung owns a large music label and will produce a portable MP3 player called the Yepp, will employ the MP3 format. *See id.* In Europe, however, "the response from rights owners to the idea of portable MP3 players was negative." *Id.*

139. *See* Julian Dibbell, *The Record Industry's Digital Daze: Thanks to MP3, This Could Finally be the End of the Music Business as We Know It*, ROLLING STONE, Nov. 26, 1998, at 104.

ers.”¹⁴⁰ Copyright holders should give up trying to fight the progression of technology by seeking injunctions on sales¹⁴¹ and instead focus their attention on creating their own technology, better ways to prove copyright infringement, and alternate means to assimilate new technology into the existing framework of copyright law.¹⁴²

Some have begun to take measures. The Genuine Music Coalition, for example, aims to “use its open-standard enhancements of digital music formats such as MP3 to ‘provide digital authentication of the origin and ownership of music.’”¹⁴³ Such measures would allow consumers to more easily discern whether a site contains pirated or licensed music.¹⁴⁴

The Reston Company, which has a custom CD compilation Internet site, plans to introduce digital downloading where customers can download songs onto their hard drives or “burn[] [them] onto a disc using a home CD-writer.”¹⁴⁵ The easy access to creative works

140. *Id.*

141. Some people feel that the RIAA's suit against Diamond is motivated by the “big five” music companies' fears of what the MP3 may do to their existing distribution system or that independent labels will gain more control of the music industry. See William Werde, *It's the End of the Music Business as We Know It, and the MP3 Feels Fine: Is Downloading Digital Files Music's Future?*, CMJ, Jan. 1999, at 24, 25. The MP3 provides a means by which upcoming musicians can post their music on the Internet and “create awareness in a cost-effective manner.” *Id.* at 24, 25. Cost-effectiveness is not the goal, however, of established and profitable music companies and it causes them concern to see independent labels gaining a hold in a market that they are averse to.

Most commentators feel that the MP3 format is the future of music and that the music industry must recognize and adapt to it. Perhaps the RIAA recently resigned itself to this fact when it hired Leonardo Chiariglione, who was instrumental in the development of MP3, to develop technology that would enable copyright protection for music distributed over the Internet. See Neil Strauss, *Expert to Help Devise Format for Delivering Music on Internet*, N.Y. TIMES, Mar. 1, 1999, at C1.

142. Digital Media Association (“DiMA”) is a trade association that “represent[s] the interests of online record retailers, webcasters and [I]nternet technology companies and lobb[ies] for them in DC.” David Grad, *The Industry: Untangling the Web*, N.Y. PRESS, Jan. 13-19, 1999, at 21. The Senate was considering the Digital Millennium Copyright Act, S. 2037, 105th Cong. (1998), which, if passed, would have had a detrimental effect on DiMA's interests. It was passed in October, 1998, but through the DiMA's efforts webcasters' interests were considered and protected. See Grad, *supra* at 21. DiMA's director, Jonathan Potter, believes that “[b]roadcast, cable, satellite or webcast should be irrelevant categories in copyright law . . . [c]opyright obligations should be based on the context of one's use, the quality of one's use, the market implications of one's use, but not the technology one exploits.” *Id.*

143. *Liquid Audio Leads Genuine Music Coalition*, CMJ NEW MUSIC REP., Feb. 15, 1999, at 1, 15.

144. *See id.*

145. Eric Fischer, *Reston Firm Sees Future in Selling Custom-designed CDs: 15*

is not limited to music. The Reston Company also visualizes expanding into music video, where their customers could customize their own DVDs composed of their favorite videos.¹⁴⁶

The Internet provides an easier means of gaining access to protected works, and it also lessens or eliminates many of the traditional international barriers to communication. "The Internet has no borders."¹⁴⁷ This makes it much easier to transport intellectual property around the world. Before the Internet, a court might have been less willing to find access to a work that originated in a foreign country.¹⁴⁸ But geography is no longer an obstacle to communication. The issues that inhere in applying copyright law to the Internet on a global level are plentiful. The means by which American copyright holders can be protected against infringement on the Internet in foreign countries, however, is beyond the scope of this Note.¹⁴⁹

With the increase in popularity of the Internet, geography poses no barrier to the access to information or creative works. Companies that provide music through their Internet sites typically provide less popular music from small labels and older music. Thus, music that is not widely disseminated through traditional means may be as accessible as music that is so disseminated.

Allowing the possibility of access through the Internet to suffice in copyright infringement actions may seem to conflict with the general rule that a finding of access must be premised on a reasonable opportunity, something more than a mere possibility.¹⁵⁰ It is no different, however, from finding actual access when a song has been played on the radio consistently.¹⁵¹ In fact, availability of music on the Internet provides a greater opportunity for access than radio play.

minutes with . . . Robert Bernardi, WASH. TIMES, Oct. 12, 1998, at D17.

146. *See id.*

147. Grad, *supra* note 142, at 21.

148. *See, e.g.*, *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1098 (9th Cir. 1994) (expressing the opinion that United States copyright laws do not have effect on infringement that takes place abroad).

149. Copyright holders have real reason to fear infringement in foreign countries. In *Subafilms, Ltd.*, the court held that "United States copyright laws do not reach acts of infringement that take place entirely abroad." *See Subafilms, Ltd.*, 24 F.3d at 1098. The court reasoned that it was more properly a matter reserved to Congress if it wanted to protect copyright holders at the risk of offending other nations. *See id.* at 1097. The United States was a member of the Universal Copyright Convention and also belongs to the Berne Convention for the Protection of Literary and Artistic Works. These treaties strive to provide the same degree of protection to works of foreign origin as the foreign country does.

150. *See, e.g.*, *Intersong-USA v. CBS*, 757 F. Supp. 518, 520 (S.D.N.Y. 1991) (requiring a showing of access through "significant, probative or affirmative" evidence).

151. *See Gaste*, 863 F.2d at 1066.

The Internet reaches the whole world and reaches millions more people than any radio station. The rationale for allowing a wide dissemination theory of access to suffice should also accept distribution via the Internet. Because of the popularity and ease of use of the Internet, wide dissemination has become a minimal barrier to plaintiffs seeking to establish access.

3. The Access Requirement Has Become a Plaintiff's Tool

One of the original purposes of the access requirement was to protect a defendant from being punished for accidentally infringing on another person's copyrighted work.¹⁵² Since the number of pleasing musical arrangements is not infinite, it is possible that two works independently created could be substantially similar. Access, then, was a means by which a defendant could defend himself.¹⁵³

The number of defendants willing to concede access in copyright infringement actions suggests that access is now a plaintiff's tool.¹⁵⁴ The access requirement would only benefit the defendant if the plaintiff's work was not widely disseminated and if the plaintiff could propose no other theory by which the defendant might have been given the opportunity to view the plaintiff's work.¹⁵⁵ Even then, the access requirement would not benefit the defendant if his work was so substantially similar to the plaintiff's that the court would deem a finding of access to be unnecessary.

Since defendants frequently concede access and have other defenses available to them, and the court may presume access from substantial similarity, it appears that the existence of the access requirement does not significantly affect defendants and helps them only when their testimony is particularly credible. The access requirement is an element that plaintiffs have the burden of proving,¹⁵⁶ and therefore, presumably the plaintiff would not object to

152. See *Malkin v. Dubinsky*, 203 N.Y.S.2d 501, 508 (Sup. Ct. 1960) ("Accidental similarity is not actionable plagiarism.").

153. See *id.* (finding that "plaintiff must demonstrate that the defendants had access thereto" and that "[c]opying may be shown by direct evidence of access, that the alleged plagiarist had seen or heard the plaintiff's work, or by proper circumstantial evidence").

154. See, e.g., *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992) (conceding access); *Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F. Supp. 651, 656 (S.D.N.Y. 1995) (conceding access in dinnerware box design infringement); *Branch v. Ogilvy & Mather, Inc.*, 765 F. Supp. 819, 822 (S.D.N.Y. 1990) (stipulating access in cookbook copyright infringement case).

155. See, e.g., *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980) (stating that access need not be found where the court finds striking similarity).

156. See *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C.

eliminating the requirement unless it fortified his case. In contrast to situations involving the wide dissemination theory for establishing access, if a plaintiff had actual evidence that the defendant had access to the plaintiff's work, he would probably want to present this evidence. Even if the access requirement were eliminated, the plaintiff would not necessarily be foreclosed from presenting such evidence.

In the recent case of *Old Chief v. United States*,¹⁵⁷ the Supreme Court discussed the general rule that "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story."¹⁵⁸ Although the case is an imperfect analogy because it arises from a criminal prosecution, the reasoning has application to copyright infringement actions. As in a criminal prosecution, the plaintiff in a copyright infringement action bears the burden of persuasion. Therefore, he should be able to present his case in a manner that provides narrative richness.¹⁵⁹ Where access could be actually shown, narrative richness would call for plaintiff to present the concrete evidence of access as opposed to reliance on a theory of wide dissemination. Moreover, if plaintiff felt that the trier of fact expected to hear how defendant came upon the plaintiff's work, plaintiff should be able to present evidence of access to satisfy the trier's expectations.¹⁶⁰

Plaintiffs, however, should think twice before rebuffing a defendant's offer of concession even though presenting each element of the claim may appear to strengthen their case and provide narrative richness. In *Alexander v. Haley*,¹⁶¹ the defendant was willing to concede both access and substantial similarity. The plaintiff, however, insisted that she be allowed to prove copying to strengthen her case.¹⁶² Ultimately, the court found that she failed to prove copying and she lost the case on an issue that defendant was willing to concede.¹⁶³

1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979); *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 367 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955).

157. 519 U.S. 172 (1997).

158. *Id.* at 190. Although the court discussed this general rule, it ultimately held that the defendant was allowed to stipulate to having a prior conviction without naming the offense because the prejudice of the conviction was determined to outweigh its probative value. *See id.* at 191-92.

159. *See id.* at 187 (recognizing the value in presenting evidence in a manner that "tells a colorful story with descriptive richness").

160. *See id.* at 188 (recognizing the value in providing the trier with what the trier may conceive to be "proper proof").

161. 460 F. Supp. 40 (S.D.N.Y. 1978).

162. *See id.* at 43.

163. *See id.* at 43-44.

At one point in the evolution of copyright law, the access requirement provided an additional advantage to a plaintiff above the possibility of strengthening his case. Professor Nimmer proclaimed that establishment of access could decrease a plaintiff's burden with respect to establishing the substantial similarity element of copying.¹⁶⁴ "Given that a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof."¹⁶⁵ While this logic makes intuitive sense, not many courts actually put it into practice.¹⁶⁶ Courts rarely lessen the substantial similarity burden because a plaintiff has established access.¹⁶⁷ In fact, such a proposition has been criticized by the Second Circuit,¹⁶⁸ and the Ninth Circuit has considered it to be impracticable.¹⁶⁹ This suggests that the judiciary believes, as do the parties,¹⁷⁰ that substantial similarity is the more important element in the copyright infringement action. Given the ease with which a plaintiff can establish access,¹⁷¹ it is logical for the Second and Ninth Circuits to reject the possibility of lessening the burden for proving substantial similarity.

C. Since the Access Requirement is not Vital and is no Longer a Substantial Barrier in Musical Copyright Infringement Actions, It Should be Eliminated

Parts III.A. and III.B. demonstrated that the access requirement is

164. See 4 NIMMER & NIMMER, *supra* note 31, § 13.03[D].

165. *Id.*

166. The Seventh Circuit has applied this "inverse ratio" rule, determining in one case that since the plaintiff failed to provide any evidence of access, he was required to present an appreciable amount of evidence of substantial similarity in order to prevail on his copyright infringement claim. See *Selle v. Gibb*, 741 F.2d 896, 903 n.4 (7th Cir. 1984).

167. See *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (stating that "no amount of proof of access will suffice to show copying if there are no similarities"). *But see Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) (following Professor Nimmer's belief that a finding of access justifies a lower standard of substantial similarity).

168. See *ARC Music Corp. v. Lee*, 296 F.2d 186, 187-88 (2d Cir. 1961) (stating that the suggested proposition is a "superficially attractive apothegm").

169. See *Aliotti*, 831 F.2d at 902. The court questioned the rationale behind this proposition since it is well established that access alone, no matter how clear the proof, cannot establish copying without substantial similarity. See *id.*

170. See *supra* notes 154-56 and accompanying text regarding the frequency with which defendants concede access in order to focus on substantial similarity.

171. See *supra* notes 119-123 and accompanying text.

not indicative of an outcome of the case and does not pose a significant barrier to plaintiffs that seek to prove copyright infringement. Some courts weigh the credibility of the parties over the strength of the evidence of access,¹⁷² and a plaintiff's case would not fail solely for failing to prove access.¹⁷³ Access is an antiquated element, developed before much of modern technology, and no longer has an effectual place in copyright law. Therefore, it should be eliminated. In its stead, the court should focus on an issue with a closer nexus to the issue of copying—*independent creation*.¹⁷⁴

Abolishing the access requirement in cases where the allegedly infringed work has been performed or released would produce several benefits. It would eliminate the unsatisfactory tests of wide dissemination and corporate receipt as determinants of whether defendant had access to plaintiff's work. It is possible that defendant could have actually heard a work that was performed only a few times. As the law currently stands, however, a plaintiff whose work was not widely disseminated and who does not submit a copy of the work to the defendant or a company affiliated with the defendant, will face substantial difficulty in proving access because the court is likely to conclude that access is too speculative.

On the other hand, if a song enjoyed great popularity, hence wide dissemination, but defendant had not heard it, the court would likely find, nonetheless, that defendant had access to it. That a work must be widely disseminated before the court will infer access does not comport with reality. In fact, Internet sites carry more work that is *not* widely disseminated.¹⁷⁵

The access requirement should also be eliminated in the interest of judicial economy. It would save judicial time if the court was not required to adjudicate access. Since some courts appear to be using the access requirement as a means of evaluating the credibility of the parties,¹⁷⁶ this could be done just as easily with the independent creation requirement.

While the access requirement seems to be of continuing utility in situations where the plaintiff has never performed or submitted his work, access is not the only tool that can protect defendants. Moreover, the limited situations where access is unlikely are not sufficient to justify retention of the antiquated concept. The defendant would

172. See *supra* notes 107-113 and accompanying text.

173. See *Wilkie v. Santly Bros.*, 91 F.2d 978 (2d Cir. 1937), *aff'd* 13 F. Supp. 136 (S.D.N.Y. 1935).

174. See *infra* Part IV for a discussion on the independent creation defense.

175. See *supra* note 135 and accompanying text.

176. See *supra* notes 107-113 and accompanying text.

not be harmed because he still has several defenses available to him, most importantly, the defense of independent creation. Similarly, plaintiffs would not necessarily be prevented from showing probative evidence of access if it strengthened their cases.¹⁷⁷ Therefore, the elimination of the access requirement would be preferable and, in its stead, shift the court's attention to independent creation.

IV. INDEPENDENT CREATION IS THE SOLUTION TO THE ACCESS PROBLEM

A. *The Controversy Over the Independent Creation Burden*

Once the plaintiff has established access and substantial similarity, some courts will shift the burden to the defendant to prove independent creation¹⁷⁸ or some other defense. There is considerable disagreement between the circuit courts on this issue. Most courts would agree that once the plaintiff creates an inference of copying, the defendant has the burden of *coming forward* with a defense.¹⁷⁹ If he does not, however, that is not necessarily fatal to his case. Since access and substantial similarity create an inference of copying, if the defendant did nothing to rebut it, then the court *could* properly find for the plaintiff.¹⁸⁰ An inference of copying, however, is not conclusive proof.¹⁸¹ "Proof of access and substantial similarity will permit, but do not require, a finding of copying."¹⁸²

The controversy between the circuit courts is whether the defendant also has the burden of proving his defense and, if he does, what standard of proof he must offer to defend himself successfully. The dispute arose from the case of *Overman v. Loesser*.¹⁸³ There, the court found that establishment of access and substantial similarity required the defendant to set forth "strong convincing and persuasive

177. See *supra* notes 156-60 and accompanying text.

178. See 4 NIMMER & NIMMER, *supra* note 31, § 13.02[A].

179. See, e.g., *Repp v. Lloyd Webber*, 132 F.3d 882, 891 (2d Cir. 1997) (identifying independent creation as an affirmative defense), *cert. denied*, 119 S. Ct. 52 (1998).

180. See *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 783 (2d Cir. 1994) (finding that once the plaintiff establishes substantial similarity, if there is no showing of independent creation, there was an inference that defendant copied the plaintiff's work).

181. See *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 66 (3rd Cir. 1978) (finding that trial court did not abuse its discretion in not finding copyright infringement).

182. 3 NIMMER & NIMMER, *supra* note 31, § 12.11[D].

183. 205 F.2d 521 (9th Cir. 1953).

evidence to . . . refute the inference of copying."¹⁸⁴ Denial was insufficient.¹⁸⁵ The court found support for its decision in *Ackermans v. General Motors Corp.*,¹⁸⁶ a prior patent infringement case. It is questionable, however, whether it is proper to analogize copyright law to patent law on this matter. "Patents are monopolies of the contents of a work as well as the right to reproduce the work itself" whereas copyrights permit another person to independently reproduce the copyrighted work without infringing.¹⁸⁷

The general rule is that "[t]he burden of proof . . . remains on the plaintiff throughout the presentation of the case, unless it is declared to be elsewhere by statute or practice."¹⁸⁸ Since the statute does not announce a burden-shifting effect, if there is one, it must be established through practice. The practices in the circuits differ.

The Ninth Circuit contends that a burden-shifting effect occurs when the plaintiff presents evidence of access and substantial similarity.¹⁸⁹ The court has limited the burden-shifting effect, however, stating that it is erroneous to interpret *Overman* as requiring a *higher* standard of proof for the defendant in proving independent creation.¹⁹⁰ In contrast, the Second Circuit has held that, while independent creation may rebut a presumption of copying, the defendant will not invariably lose if he does not possess such proof.¹⁹¹

The Fourth Circuit has declined to impose a burden-shifting effect, contending that the burden of proof remains with the plaintiff.¹⁹²

184. *Id.* at 523.

185. *See id.*

186. 202 F.2d 642 (4th Cir. 1953).

187. *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976); *accord Franklin Mint Corp.*, 575 F.2d at 64 (distinguishing copyright from patent protections).

188. *Overman*, 205 F.2d at 523.

189. *See Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1991), *cited in Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 437 (S.D. Fla. 1995).

190. *See Overman*, 205 F.2d at 522-23 ("Overman's injection of this patent law axiom, as to defendant's heavy burden of proof, into copyright law has been ignored and disregarded.")

191. *See Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 501 (2d Cir. 1982).

192. *See Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988) (determining that the burden should remain with the plaintiff). The court claimed that the Ninth Circuit had employed "language that might be interpreted as shifting the burden" to the defendant to provide an affirmative defense, and it declined to adopt this interpretation. *Id.* at 1065-66. The language in *Kamar International, Inc.*, was more than suggestive of a burden-shifting effect. "[T]he burden shifts to the defendant to prove his work was not copied." 657 F.2d at 1062.

To support its decision, the Fourth Circuit concluded that “‘independent creation’ is not an affirmative defense.”¹⁹³ According to the Eleventh Circuit in *In re Rawson Food Service*,¹⁹⁴ “[a] defense which points out a defect in the plaintiff’s prima facie case is not an affirmative defense.”¹⁹⁵ Therefore, since providing evidence that the defendant had created his work independently would compromise the inference of copying that the plaintiff had established through access and substantial similarity—the plaintiff’s prima facie case—the Eleventh Circuit would reason that independent creation is not an affirmative defense.¹⁹⁶ Since it is not an affirmative defense, the burden of persuasion would remain with the plaintiff.

Despite the fact that it would go against normal proof schemes, there are several advantages to switching the burden of proof to defendant. Independent creation is a matter that is within the exclusive knowledge of defendant. Once asserted, a plaintiff can do little to rebut it. If a witness testifies credibly about a matter that is exclusively within his own knowledge, it can only be rejected if the other party provides evidence of “impeachment, contradiction or inconsistency with other evidence on the particular point at issue.”¹⁹⁷ This does provide a means by which the court might shift some of the burden back onto plaintiff. As the law currently stands, however, the court does not accept a defendant’s assertions of independent creation without question. When making an independent creation determination, the court may take the defendant’s training,¹⁹⁸ defendant’s history of independent creation,¹⁹⁹ and defendant’s history of copying into consideration.²⁰⁰

193. *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988).

194. 846 F.2d 1343 (11th Cir. 1988).

195. *Id.* at 1349.

196. *Cf. Repp*, 132 F.3d at 889 (“Independent creation is an affirmative defense.”), *cert. denied*, 119 S. Ct. 52 (1998).

197. *Selle v. Gibb*, 741 F.2d 896, 903 (7th Cir. 1984); *accord Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 216 (1931); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, 899-900 (8th Cir. 1946) (stating that a court should not disregard the testimony of a witness regarding a matter within his own knowledge solely because of suspicion that he is lying).

198. *See, e.g., Granite Music Corp.*, 532 F.2d at 720 (“Any evidence pertaining to the manner in which the defendant created his composition is logically relevant: his training, the subject matter of the art, his access to other works or to the plaintiff’s composition.”). *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.01[B].

199. *See, e.g., Malkin v. Dubinsky*, 203 N.Y.S.2d 501, 510 (Sup. Ct. 1960) (stating that the court should examine the circumstances involved in the creation of both plaintiff’s and defendant’s work and the background of both parties.). *See* 4 NIMMER & NIMMER, *supra* note 31, § 13.01[B].

200. *See, e.g., Scott v. WKJG*, 149 U.S.P.Q. (BNA) 413, 419 (N.D. Ind. 1966)

B. Independent Creation Provides a Superior Approach to Analyzing Copyright Infringement

Regardless of whether there would be a burden-shifting effect, independent creation is a more appropriate focal point in a copyright infringement action. Independent creation is more closely tied to the reality of copyright infringement than is the concept of access. As I discussed in Part III.B.2., access is an inconsequential barrier in our digital age. Plaintiffs are only required to present credible theories of access in some courts. In contrast, proof of independent creation would be more than hypothetical and inferential.

The defendant could testify as to how he thought of his work and the procedure that he went through to produce it. That would enable the trier of fact to evaluate the truthfulness of a party, instead of speculating on the likelihood that the defendant heard the plaintiff's song on the radio or was given a copy of the plaintiff's work after being passed through a chain of people.

Artists do not create their finished products without going through stages of production and draft making. Even if an artist has an epiphany visualizing his finished piece, he must still go through several steps to make the work presentable and profitable. Artists should be able to recount where their inspiration came from and should be required to produce drafts of the work from various stages of composition. Defendants might have trouble producing this sort of evidence for works composed many years prior to a copyright infringement action. But the court would still be able to evaluate the credibility of the defendant in order to decide on the assertion of independent creation.

Defendants already have the defense of independent creation available to them. Nevertheless, the court should address it more frequently because it makes more sense than does the moot concept of access. In every copyright infringement case, the court discusses the access and substantial similarity requirements. A discussion of independent creation, however, is more rare. In essence, it is a negative element of copying. By definition, if the defendant created his work independently, he did not copy it. Since access is only one part of a two-step process for determining an inference of copying, clearly, independent creation is more on point.

Access was once thought to protect the defendant from being found guilty for accidentally infringing on plaintiff's work. Clearly, indepen-

(finding it relevant that the defendant had only borrowed an idea for use in a play one time and that idea was in the public domain), *aff'd*, 376 F.2d 467 (7th Cir. 1967); see also 4 NIMMER & NIMMER, *supra* note 31, § 13.01[B].

dent creation has a closer nexus to this issue than access. As such, this undermines one of the original rationales for the access requirement. Defendants should have the burden of going forward with affirmative proof of independent creation, but only after plaintiff has established a high degree of similarity between the two works. The plaintiff, on the other hand, would still be allowed to attack the defendant's assertions of independent creation. Consequently, shifting the parties' and the court's focus from access to independent creation would not substantially disadvantage either party.

V. RECOMMENDATIONS FOR MUSICIANS

Because access has become an insignificant burden since the advent of the Internet, copyright holders should attempt to document their creative processes in more detail in order to protect themselves. As discussed in Part III.A., the credibility of the witnesses may be the most important factor in the court's determination of access. Having credibility be a determinative factor is not necessarily confidence engendering. In an ideal world, the court would always believe the party that was telling the truth, but that is clearly not always the case. Given the limited number of notes on the scale, it is possible that two independently created works could have substantial similarities. The plaintiff may vehemently believe that the defendant copied his work. Likewise, the defendant truly may believe that he did *not* copy the plaintiff's work. He may have heard the musical composition before and subconsciously incorporated it into his own composition.²⁰¹ In such a case, a court that decides access based on party credibility would be reaching the wrong result. Therefore, the prudent musician should have other evidence to bolster his side of the story. The modern musician should save the older drafts of his work in case a copyright infringement action later arises.

VI. CONCLUSION

Intellectual property may be one of our country's most valuable commodities. As a nation, we have placed value on the arts and sciences since our inception.²⁰² We pride ourselves on taking the lead in technological advancement and progress. But processes that are designed to make our lives easier and more enjoyable sometimes come with a catch. Copyright holders have long wrestled with how

201. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997-99 (2d Cir. 1983) (finding copyright infringement based on a theory of subconscious copying).

202. See U.S. CONST. art. I, § 8, cl. 8.

best to design and apply a system of copyright protection that is able to adapt to changing technology.

Computers may prove to be the most challenging advancement so far. With the Internet, information can be transmitted faster, farther, and easier than ever before. Because of the technology, it is much easier to access copyrighted works. Since the access requirement is not a determinative element in copyright infringement actions and is a minimal burden, the court should reevaluate whether it is serving a valid purpose. When our society has outgrown the utility of some elements of the law, it is time to change them. The access requirement is one such element. The access requirement was espoused before there were photocopy machines, faxes, and computers.²⁰³ These significant developments cast doubt on the importance of the access requirement in this age.

It would be better for parties in copyright actions and the courts to focus on proof of independent creation by the defendant rather than on proof of access. Independent creation bears a closer relation to the essential issues in copyright law. Independent creation is the converse of copying. By definition, a person did not copy if he created his work on his own. Furthermore, shifting the focus to independent creation would not be a significant detriment to either party.

Consequently, prudent musicians should protect themselves by retaining evidence of independent creation—documenting their creative process, recording the source of their inspiration and the steps they went through to create their finished product. This will protect them in case they are accused of copyright infringement. In pursuing a copyright infringement action, copyright holders should direct some of their attention from proving access into questioning the defendant's evidence of independent access

203. Our copyright law is from the "print era." See M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 172 (1989). In contrast, many now say we live in a "paperless society."