[2012] Vol. 1 NTUT J. of Intell. Prop. L. & Mgmt.

RETHINKING THE "ACCESS" ELEMENT IN COPYRIGHT INFRINGEMENT CASES ABOUT POPULAR MUSIC

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ABSTRACT

This article explains why a popular music songwriter could easily infringe some old pop songs. The infringement theory is based on "subconscious copying." This thought may be right in the past, but in the era of Internet, the facts of subconscious copying may be deemed to be true in many situations. To illustrate the problem, two court cases are reviewed. These cases situate the songwriter in a very risky environment. Specially, the use of Internet may make the environment worse. Therefore, this article provides a solution, which points out the need of changing the determination of the "access" element in copyright infringement cases.

Keywords: Copyright, pop music, access

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I. Introduction

In the popular ("pop") music industry, musicians are always inspired by other musicians,[1] or they are good at synthesizing the past musical elements so as to create a new, fantastic composition.[2] Doubtlessly, the musicians are under a high risk of copyright infringement because they easily get access to others' works.[3]

To hold a copyright infringer liable, a plaintiff must prove (1) that he or she "owns a valid copyright" and (2) that the infringer "copied constituent elements of the copyrighted work."[4] Regarding the first element, the plaintiff must register the copyrighted work in the United States Register of Copyrights in order to establish prime facie evidence of a valid copyright.[5] However, the first element may be attacked by the infringer because of lack of originality.[6] Or, the copyright will be invalid because of lack of either fixation in a tangible medium of expression or authorship.[7] Besides, "the idea-expression dichotomy" and "the useful article doctrine" are used to destroy copyrightability.[8]

Regarding the second element, the plaintiff has to prove factual copying and substantial similarity between the infringed and infringed works.[9] Factual copying can be proved by either direct evidence or circumstantial evidence.[10] While the direct evidence is rarely provided, the circumstantial evidence may be shown by proving that "the infringer had access to the

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[1] For instance, Kenny "Babyface" Edmonds once said, "There's so much great music to learn from. Listen to Elton John, Stevie Wonder, the Beatles, and the Stones. Make them part of your playlist, and you'll have a wider background to inspire you." Josh B. Wardrop, *He's Got That Whip Appeal*, BERKLEE NEWS, Dec. 21, 2007, http://www.berklee.edu/news/2007/12/babyface.html (an interview report about Kenny "Babyface" Edmonds) (last visited Dec. 2, 2008).

[2] *See* Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 491 (2005).

[3] *See* Jamie Walsh, Case Note and Comment, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DEPAUL-LCA J. ART & ENT. L. 261, 261 (2006).

[4] Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 367 (5th Cir. 2004).

[5] Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003); Johnson v. Gordon, 409 F.3d 12, 17 (1st Cir. 2005) ("Upon the plaintiff's production of such a certificate, the burden shifts to the defendant to demonstrate some infirmity in the claimed copyright.").

[6] Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384, 387 (5th Cir. 1984).

[7] ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE 386-87 (Aspen Publishers 4th ed. 2006).

[8] *Id.* at 395-415.

[9] *Positive Black Talk Inc.*, 394 F.3d at 367.

[10] *Id.* at 367-68.

copyrighted work prior to the creation of the infringing work"[11] and that "probative similarity" between the copyrighted work and infringing work exists.[12] After the plaintiff establishes factual copying, the infringer can rebut it by showing that the infringing work was independently created.[13] But, if the infringer fails to do so, the plaintiff then successfully establishes factual copying.[14]

Regarding the issue of "substantial similarity," the plaintiff has to prove that "the copyrighted work and the allegedly infringing work are substantially similar."[15] The test for "substantial similarity" is "a two-part analysis: an objective extrinsic test and a subjective intrinsic test."[16] The objective extrinsic test asks "whether substantial similarity exists between the ideas and expression of the [copyrighted and infringing] works."[17] If the objective extrinsic test is passed, the subjective intrinsic test then asks, in view of a reasonable person, "whether the initial expression was (a) protected and (b) substantially taken."[18] Additionally, without proof of factual copying, the infringer may still be liable if the plaintiff can prove the "striking similarity" between the copyrighted and infringing works.[19]

Though the copyright infringement is established, the infringer may bring "the fair-use doctrine affirmative defense [to preclude] liability."[20] A judge will look at "the purpose and character of the [infringing] use," "the nature of the copyrighted work," "the amount and substantiality of the [infringing]

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[11] *Id.* at 368.

[12] *Id.* Some Circuits do not require "probative similarity." *See e.g.*, Dawson v. Hinshaw Music Inc., 905 F.2d 731, 732 (4th Cir. 1990) ("[B]ecause of the difficulties in proving copyright infringement by direct evidence, the law has established a burden shifting mechanism whereby plaintiffs can establish a *prima facie* case of infringement by showing possession of a valid copyright, the defendant's access to the plaintiff's work, and substantial similarity between the plaintiff's and defendant's works."); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) ("Because direct evidence of copying is not available in most cases, plaintiff may establish copying by showing that defendant had access to plaintiff's work and that the two works are 'substantially similar' in idea and in expression of the idea.").

[13] *Id.* at 368.

[14] *Id.*

[15] *Id.*

[16] Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

[17] Toliver v. Sony Music Entm't Inc., 149 F. Supp. 2d 909, 915 (D. Alaska 2001).

[18] *Id.*

[19] *See e.g.*, John R. Autry, Note, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113, 113-14 (2002); Henry J. Lanzalotti, Casenote, *Is Proof of Access still Required? Proving Copyright Infringement Using the "Strikingly Similar" Doctrine: An Analysis of the Fourth Circuit's Decision in Bouchat v. Baltimore Ravens, Inc.*, 9 VILL. SPORTS & ENT. L.J. 97, 104-05 (2002).

[20] Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 581 (6th Cir. 2007).

portion," and "the [market] effect of the [infringing] use" to see whether the fair use would save the infringer.[21]

This essay focuses on the "access" element about the "factual copying" issue and wants to provide a solution for determining the "access" element with respect to pop music. Part II analyzes and criticizes two cases about how to prove that a copyright infringer had accessed to a copyrighted song. Part III proposes a new standard for judging the access element about the pop music copyright infringement, and some policy arguments are also presented to support such standard.

II. Two Extreme Cases of the Access Element

A. Teenage Memory of the Infringer-*Three Boys Music Corp. v. Bolton*

In *Three Boys Music Corp. v. Bolton*,[22] the infringing song was "Love Is a Wonderful Thing" written by Michael Bolton and Andrew Goldmark in early 1990,[23] while the infringed song was also with the same title and written by the Isley Brothers in 1964.[24] The Isley Brothers got a copyright of the infringed song from the Register of Copyrights and recorded for United Artists in 1964.[25] United Artists released the infringed song as a single in 1966, and several music magazines predicted that the infringed song would be a hit.[26] But, the Isley Brothers' "Love Is a Wonderful Thing" never got into any top 100 charts.[27] In 1991, the infringed song was released on CD by EMI after the infringing song was written.[28] Michael Bolton's "Love Is a Wonderful Thing" was released as a single in April 1991, and it ranked 49 on Billboard's year-end pop chart.[29] Through the Ninth Circuit' factual illustration, the infringing song was more popular or well-known than the infringed song.

The lawsuit was filed in 1992.[30] In 1994, the jury found the copyright infringement, and the defendant moved for judgment as a matter of law and

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[21] *Id.* at 581-82.

[22] 212 F.3d 477 (9th Cir. 2000).

[23] *Id.* at 481. You may watch the music video of "Love Is a Wonderful Thing" through http://www.youtube.com/watch?v=ddAoI8OMNcQ.

[24] *Id.* at 480. The information of the Isley Brothers may be found at http://en.wikipedia.org/wiki/The_Isley_Brothers. Their song cannot be found on the Youtube.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 480-81, 484.

[29] *Id.* at 481.

[30] *Id.*

new trial.[31] The district court judge dismissed the defendant's motions.[32] Finally, in 1996, the district court judge issued the judgment regarding the damages allocation.[33] The defendant, therefore, appealed.[34]

Regarding the "access" issue, the Ninth Circuit faced a question of whether to overturn the jury's verdict, and it decided to affirm the verdict.[35] The Ninth Circuit relied on the "subconscious copying" theory provided by Judge Learned Hand in 1924.[36] The basic concept is that "[e]verything registers somewhere in our memories, and no one can tell what may evoke it … Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick."[37] That is, somewhere in your memory about one old song may lead to the inference that you accessed that song. And, the Ninth Circuit went further by stating, "[T]he theory of subconscious copying has been applied to songs that are more remote in time."[38] This attitude caused the Ninth Circuit to sustain the jury's verdict finding that Michael and Andrew accessed to the infringed song.

At the trial, the plaintiff provided four types of evidence. First, Michael and Andrew lived in Connecticut in 1966.[39] Michael liked R&B songs, led a band performing popular songs of Black singers, and had a brother who collected a lot of records.[40] Second, three DJs said that the infringed song was widely disseminated on radio and television stations.[41] The infringing song was played several times for several months on one TV show broadcast in Philadelphia, New York, and Hartford-New Haven and some radio shows broadcast in Philadelphia, Chicago, Buffalo, and New York.[42] Third, Michael once met the Isley Brothers in one 1988 concert, where he said he knew the group very well and had all stuff.[43] Fourth, Michael once asked Andrew whether their song copied Marvin Gaye's "Some Kind of

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 481-82.
[36] *Id.* at 482.
[37] *Id.* at 482-83 (citing Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147-48 (S.D.N.Y. 1924)).
[38] *Id.* at 483 (discussing ABKCO Music, Inc v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983)).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 483-84.

Wonderful."[44]

On the other hand, the defendants provided several attacks. First, they never admitted hearing the infringed song.[45] The song never reached the top 100 of the Billboard's pop music chart, and the new release of the infringed song was made after they wrote the infringing song.[46] Second, two songs were not strikingly similar.[47] Third, three R&B experts said they never heard the infringed song, and the Connecticut TV shows never played the infringed song.[48]

Relying on the lower court's record, the Ninth Circuit agreed with the possibility that two teenagers, who liked R&B music, could remember the infringed song, when the song was played on radio or TV shows for several weeks, so as to subconsciously copy the song after 25 years.[49] Since the jury fully heard both sides' arguments, the Ninth Circuit deferred to the jury's findings.[50] That is, the Ninth Circuit affirmed that an infringer's teenage memory can be used to establish the "access" element by not overturning the inference of the jury that Michael and Andrew would subconsciously copy the infringed song because their possible teenage memory of such song.

B. Submissions to Persons Surrounding the Infringer-*Armour v. Knowles*

In *Armour v. Knowles*,[51] the plaintiff, Jennifer Armour, a singer and songwriter, composed a demo tape by which she hoped to advance her career.[52] The tape was produced in early January 2003, and it included an instrumental version of her song, "Got a Little Bit of Love for You."[53] On February 12, 2003, she registered a copyright of an acappella version of her song.[54] Sometime between January and March 2003, her manager, Marc McKinney, sent copies of the tape to many people that he thought could help contact Beyoncé Knowles (known as "Beyoncé").[55] But, no one responded to him, and no tapes were return.[56]

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[44] *Id.* at 484.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] 512 F.3d 147 (5th Cir. 2007).
[52] *Id.* at 150-51.
[53] *Id.* at 151.
[54] *Id.*
[55] *Id.*
[56] *Id.*

The infringing song was "Baby Boy," which was commercially released on June 24, 2003.[57] The song was collected in one Beyoncé's album, which Beyoncé began to produce in February 2003.[58] On July 11, 2005, the plaintiff sued Beyoncé and other defendants for copyright infringement.[59] The plaintiff claimed that Beyoncé's "Baby Boy" copied parts of her song, "Got a Little Bit of Love for You."[60] At the district court, the defendants successfully moved for summary judgment.[61] Consequently, the plaintiff appealed.[62]

On appeal, one of the issues was whether Beyoncé had accessed to the infringed song.[63] The Fifth Circuit held that the plaintiff did not prove Beyoncé's access.[64] Basically, the Fifth Circuit asked whether the infringer "had a reasonable opportunity to view the copyrighted work[] before creating the infringing work."[65] And, a bare possibility, a finding based on speculation or conjecture, or nothing more than a tortuous chain of hypothetical transmittals is insufficient to establish the "access" element.[66] Generally, the Fifth Circuit did not believe the plaintiff's story.

The infringing song was made through a long process, and the disputed part of the infringing song was composed by February 13, 2003.[67] To prove the "access" element, the plaintiff provided four paths by which Beyoncé had access to the infringed song.[68] One path stood for one person the tapes were given to.[69] But, all paths failed. First, the plaintiff admitted that the tapes were sent or given to three persons either late February or early March 2003.[70] Second, although the tape was mailed to the last one person (called "T-Bone") at the end of January, the plaintiff could not provide sufficient evidence showing the relationship between T-Bone and Beyoncé.[71] Here, the plaintiff only provided an affidavit of Mr. McKinney, stating that he thought that T-Bone and Beyoncé were good friends, and other evidence showing

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[57] *Id.* You may watch the music video of "Baby Boy" through http://www.youtube.com/watch?v=EuNIKjKuptQ.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 152.
[64] *Id.*
[65] *Id.* at 153 (citation omitted).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 153-54.
[71] *Id.* at 154-55.

that T-Bone and Beyoncé once worked in a movie before.[72]

Although the Fifth Circuit thought that the plaintiff did not prove the "access" element, it still provided six logic steps of showing the relationship: "(1) T-Bone and Beyonce were in fact good friends; (2) T-Bone and Beyonce regularly communicated; (3) T-Bone received and listened to the demo tape …, (4) after receiving and listening to it, T-Bone gave the tape to Beyonce; (5) Beyonce received the tape and had the opportunity to listen to it; (6) all of this happened [before the disputed part was composed]."[73] These six steps could be a rule of showing the relationship between an infringer and a third party by whom the infringer would have a chance to access the copyrighted work.

C. Disadvantages to the Pop Music Industry

In *Three Boys Music Corp.*, the Ninth Circuit just punished Michael Bolton for his concerns of avoiding copyright infringement. And, image that you are a fan of some famous singer. Now, the singer you respect comes to sue you for copyright infringement, while you care about the copyright issues very much during the creation of your own song. Worse, your concern of copyright infringement when the song was being made could become a negative impact on the determination of independent creation.[74]

In *Armour*, on the other hand, the Fifth Circuit protected a successful singer from involving in unwanted copyright disputes. But, what the Fifth Circuit established is to make friends potential paths that lead the singer to copyright infringement.[75]

Both cases would be devastating to songwriters in the Internet era. First, through any video-sharing websites, such as Youtube, it is impossible for any persons to assert that they have not listened to any audio or visual works.[76] Especially, when an infringer has, for example, a Youtube account, a story of subconscious copying could be easily made. Second, many recording companies or artists have their Youtube web pages to post music videos,

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[72] *Id.* at 155.

[73] *Id.*

[74] *Three Boys Music Corp.*, 212 F.3d at 486.

[75] The Fifth Circuit introduced one Fourth Circuit's decision, Towler v. Sayles, 76 F.3d 579 (4th Cir. 1996). *Armour*, 512 F.3d at 155 & n.16. In *Towler*, the Fourth Circuit stated, "A court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who had a close relationship with the infringer." *Id.*, 76 F.3d at 583.

[76] There is an alternative way for an infringer to be caught in the "subconscious copying" theory, which is a music work used in TV commercials. *See* Nora Miles, Note, *Pop Goes the Commercials: The Evolution of the Relationship Between Popular Music and Television Commercials*, 5 VAND. J. ENT. L. & PRAC. 121, 121-22 (2003).

where they also allow others to comment.[77] Since the comments could be an audio and visual response, it is possible that someone could submit their works through these Youtube channels.[78] Therefore, an infringer could be easily caught through the *Armour* theory, especially under the circumstances where the web pages are created by the infringers or the music companies thereof.

III. A New Proposal

A. Reversing Test

The "reversing test" means that a court should consider the "similarity" element before deciding the "access" element. The basic idea is that, if there is no similarity to the extent where a reasonable person could believe there was some copying, we should not spend judicial resource, such as discovery, to deal with the "access" issue.

The consideration of the "similarity" element should be a question of degree. And, if the degree of similarity reaches a certain level, then the court should ask whether an infringer had accessed to the infringed work. Otherwise, the test should be stopped.

The inquiry for the "similarity" element should not depend on the degree of "access,"[79] but should focus on the component comparison of both infringed and infringing songs. The access stories in *Three Boys Music Corp.* and *Armour*, though the latter one did not make it, are not subject to a clear spectrum of the degree of "access." No direct copying was proved, but only some inference of possible copying was given. As a result, no real access has ever happened. And, there is no way to judge the degree of "access." The proposition that "when a high degree of access is shown, we require a lower standard of proof of substantial similarity"[80] is impracticable.

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[77] For instance, Atlantic Recording has http://www.youtube.com/user/AtlanticVideos, Sony BMG Music Entertainment has http://www.youtube.com/user/sonybmg, and Chilli (TLC member), has http://www.youtube.com/user/chillionlinevideos.

[78] Actually, a Youtube site, http://www.youtube.com/watch?v=6Oldo026juo, is used as path for Chilli to collect dancing videos.

[79] There are two sorts of "similarity" in the copyright infringement analysis. One is "probative similarity," which is used as one element of establishing "factual copying" in some federal circuit courts, *see e.g. Johnson*, 409 F.3d at 18 (1st Cir.); *Jorgensen*, 351 F.3d 51 (2d Cir.); *Positive, Black Talk Inc.*, 394 F.3d at 368(5th Cir.), but not in other federal circuit courts. *See e.g.*, *Towler*, 76 F.3d at 583-84 (4th Cir.); *Three Boys Music Corp.*, 212 F.3d at 481 (9th Cir.). The other is "substantial similarity," which are applied by all federal circuit courts. The degree of access will only affect the standard of "substantial similarity" in a sense of lowering the proof. *Three Boys Music Corp.*, 212 F.3d at 485. Here, the present proposal mentions this issue because the proposal makes the "access" element independent from the "similarity" element.

[80] *Swirsky*, 376 F.3d at 844.

The question of degree is a factorial determination. The determination is like a "fair-use" analysis, where a court should go through several factors in order to decide the existence of "similarity" between copyrighted and infringing works. And, the factors mean the components that are contributed to both infringed and infringing songs.

The two general components are lyrics and melodies. The lyrics between the infringed and infringing works are easily compared while the comparison of the melodies is complex. The factors for the melody comparison include tempos, pitches (or pitch emphasis or sequences), chords, choruses, notes, baselines, key, harmony, and rhythm.[81] Other factors about the compositional methodologies may be considered, such as "inversion" and "retrograde."[82]

Finally, under the present proposal the line of similarity is not drawn because of the complexity of the music works so that it is better to let judges to go through many factors to reach their conclusions.

B. Appropriation for Pop Music

The new proposal reflects the nature of the pop music. First, the songwriters in the pop music industry are always inspired by previous songs or contemporary songs. Second, the songwriters in the pop music industry have to listen to others' works in order to frame or secure particular features of pop songs. For example, country music, R&B music or jazz music has distinct features for listeners to identify what it is. Thus, it is easy to get a scheme like *Three Boys Music Corp.* to establish factual copying.

Besides, in the cases where the songwriters are singers, the scheme like *Three Boys Music Corp.* is more likely to be established. People who become a pop music singer generally love pop music. They love music, so they are willing to take a chance to be a pop music star. How can you image a pop music singer who has never listened to pop music? As a result, "access" may be always loaded in a high degree, so courts may always lower the "similarity" standard even though the infringed and infringing works are sounded differently or distinctively in view of general pop music listeners or even though the infringed work is an unpopular song for all times.

Especially in the era of Internet composing of many video-sharing websites, it is easier for a song to reach a songwriter. Some websites, such as Youtube, have increasing database of music works. Even though a law suit

[81] *See id*. at 845-46, 848 & n.13, 849; *see also* David S. Bloch, *"Give the Drummer Some!" On the Need for Enhanced Protection of Drum Beats*, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 189 (1997).

[82] *See Johnson*, 409 F.3d at 21.

may follow, some people still upload songs or music videos to Youtube.[83] Hence, the increasing database of music works on Internet make the "access" standard lower and lower, so that no one can get away from the theory of subconscious copying like *Three Boys Music Corp.* unless he or she has never surfed on Internet.

Moreover, the interactive function of the video-sharing websites makes the strict rule in *Armour* for the "access" element looser and looser. It is not like a case of software infringement, where an infringer should buy a product to analyze. Rather, it is a case where an infringer could be easily caught by a song submitter through the interactive function.

Therefore, we need to find a way to get around the current legal theory about the "access" element. The best way as proposed above is to consider the "similarity" element before the "access" element is evaluated. If no similarity exists, there is no need to discover "access." That is, since the "access" element seems to be presumptively established in the pop music cases the key issue should be the "similarity" element.

IV. Conclusion

Pop music has unique features and deserves a different treatment when the copyright infringement concerning a pop music song is analyzed. The current "access" theory for establishing factual copying is not healthy to the pop music industry. So, the legal standard for factual copying should be changed. The present proposal is simple and straight. It requires that the "similarity" element should be dealt with before the "access" element is considered. The consideration behind this proposal includes the awareness of Internet effects and nature of songwriters or singers in the pop music industry. With the present proposal, it will not be a presumptive "sin" that songwriters are inspired by previous songs or artists.

Cited as:

Bluebook Style: Ping-Hsun Chen, *Rethinking the "Access" Element in Copyright Infringement Cases about Popular Music*, 1 NTUT J. OF INTELL. PROP. L. & MGMT. 189 (2012).

APA Style: Chen, P.-H. (2012). Rethinking the "access" element in copyright infringement cases about popular music. *NTUT Journal of Intellectual Property Law & Management, 1*(2), 189-199.

[83] *See* Andrea Frey, Note, *To Sue or Not to Sue: Video-Sharing Web Sites, Copyright Infringement, and the Inevitability of Corporate Control*, 2 BROOK. J. CORP. FIN. & COM. L. 167, 167-68 (2007).