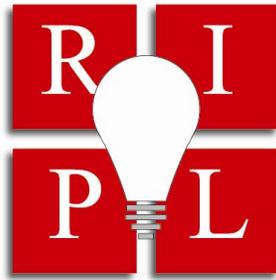


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DEJA VU OR COPYRIGHT INFRINGEMENT? WHY MELANIA TRUMP INFRINGED ON MICHELLE OBAMA'S COPYRIGHTED SPEECH THROUGH SUBCONSCIOUS COPYING

DANIELLE MOBLEY

ABSTRACT

In 2016, Melania Trump recited a beautiful speech at the Republican National Convention that had portions which sounded exactly like a speech given by Michelle Obama at the Democratic National Convention in 2008. Mrs. Trump feigned ignorance of the 2008 DNC speech, and essentially the speech was superseded by another news story within a week. While some critics claim plagiarism, Mrs. Obama could have a potential copyright infringement claim against Mrs. Trump based on the context of the speech, the actual portions lifted from Mrs. Obama's speech, and the doctrine of subconscious copying.

This article first examines the elements Mrs. Obama would need to prevail on a copyright infringement claim, discusses the judicially-created subconscious copying doctrine, and explains the relevant defenses to the subconscious copying doctrine. This article next analyzes the infringement action against Mrs. Trump and how subconscious copying plays an important role in the case. Finally, this article proposes that the subconscious copying doctrine be extended to political speech.

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I. INTRODUCTION

In 2008, Michelle Obama spoke for the first time as a potential First Lady at the Democratic National Convention regarding the family values that both she and her husband grew up on as well as the values they want to impress upon their children and the children of the nation.¹ She explained, “you work hard for what you want in life, that your word is your bond”² and “know that the only limit to the height of your achievements is the reach of your dreams and your willingness to work for them.”³

Fast-forward eight years to the 2016 Republican National Convention. Melania Trump is now in the same situation as Mrs. Obama: a potential First Lady, communicating her family values to the public.⁴ She discussed the values her parents

* © Danielle Mobley 2018. J.D. Candidate, 2018, The John Marshall Law School; M.P.S. in Paralegal Studies, 2013, The George Washington University; B.A. in Political Science and Legal Studies, 2010, University of Illinois at Springfield. The author would like to thank all of The John Marshall Law Review of Intellectual Property Law editors and staff members for their tireless work. I would like to dedicate this Comment to my family: my husband, my parents, my brother and sister, and my grandparents – thank you for believing in me and for your endless support to help me achieve this accomplishment.

¹ See Maggie Haberman & Michael Barbaro, *How Melania Trump's Speech Veered Off Course and Caused an Uproar*, N.Y. TIMES, July 20, 2016 at A1; Peter Slevin, Opinion, *Why Michelle Obama's Convention Speech was a Major Turning Point for Her*, THE WASHINGTON POST (July 20, 2016), https://www.washingtonpost.com/opinions/why-michelle-obamas-2008-convention-speech-was-a-major-turning-point-for-her/2016/07/20/77debd26-4e85-11e6-aa14-e0c1087f7583_story.html?utm_term=.d32ee1b60abe.

² See Robert Costa, Dan Balz, & Phillip Rucker, *Melania Trump's Apparent Plagiarism Caps Difficult Start to GOP Convention*, THE WASHINGTON POST (July 19, 2016), https://www.washingtonpost.com/politics/melania-trumps-apparent-plagiarism-caps-difficult-start-to-gop-convention/2016/07/19/b7bb509a-4dbc-11e6-aa14-e0c1087f7583_story.html; Maggie Haberman, Alan Rappeport, Patrick Healy, & Jonathan Martin, *Questions Over Melania Trump's Speech Set Off Finger-Pointing*, N.Y. TIMES (July 19, 2016), <http://www.nytimes.com/2016/07/20/us/politics/melania-trump-speech.html>.

³ See *supra* note 2. The relevant portions of her speech state:

And Barack and I were raised with so many of the same values: that you work hard for what you want in life; that your word is your bond and you do what you say you're going to do; that you treat people with dignity and respect, even if you don't know them, and even if you don't agree with them. . . . And Barack and I set out to build lives guided by these values and pass them on to the next generation. Because we want our children – and all children in this nation – to know that the only limit to the height of your achievements is the reach of your dreams and your willingness to work for them.

⁴ See Nick Gass, *Melania Trump's Prime-Time Speech was Strikingly Similar to Michelle Obama's*, POLITICO (July 19, 2016, 12:11 AM), <http://www.politico.com/story/2016/07/melania-tump-michelle-obama-225793>. Gass provides the text of both speeches to show the striking similarities between the two speeches and how the Trump campaign passed the blame to a group of speechwriters.

imprinted on her at a young age, specifically, “you work hard for what you want in life, that your word is your bond”⁵ and “know that the only limit to your achievements is the strength of your dreams and your willingness to work for them.”⁶

Within a few hours of the speech, political analysts and social media outlets were discussing the striking similarities between Mrs. Trump’s speech and Mrs. Obama’s 2008 speech.⁷ Most commentators agreed that she plagiarized part of her speech, but they were split on whether or not Mrs. Obama had a valid copyright infringement claim.⁸ Some commentators felt that it did not make a difference whether it was infringement or not because she was not the potential President.⁹

⁵ *Id.*

⁶ *Id.* The relevant portion of her speech states:

From a young age, my parents impressed on me the values: that you work hard for what you want in life. That your word is your bond and you do what you say and keep your promise. That you treat people with respect. They taught me to show the values and morals in my daily life. That is the lesson that I continue to pass along to our son. . . . And we need to pass those lessons on to the many generations to follow. Because we want our children in this nation to know that the only limit to your achievements is the strength of your dreams and your willingness to work for them.

⁷ Cf., J. Michael Keyes, *On Cribbing, Copyright and Mrs. Trump’s RNC Speech: OPINION: With Platitudes About Hard Work and Respect, Melania’s Address Echoed One We’d Heard in 2008*, THE NATIONAL LAW JOURNAL (July 25, 2016), <http://www.nationallawjournal.com/id=1202763447783/On-Cribbing-Copyright-and-Mrs-Trumps-RNC-Speech?slreturn=20160907114759>; Rebecca Campbell, *Could Copyright Infringement Claims be Made Against Melania Trump?*, LEGAL NEWS LINE (Aug. 7, 2016, 11:42AM), <http://legalnewsline.com/stories/510968187-could-copyright-infringement-claims-be-made-against-melania-trump>; Amanda Ciccattelli, *Melania Trump vs. Michelle Obama: Does copyright law cover public speeches?*, INSIDE COUNSEL, 2016 WLNR 22786694 (July 2016); Dorsey & Whitney LLP, *Melania Trump’s RNC Speech: Plagiarism, Copyright Infringement, or Both?*, JD SUPRA, 2016 WLNR 22119998 (July 21, 2016).

⁸ Compare Anandashankar Mazumadar, *Did Melania Trump Infringe 2008 Obama Speech?*, BLOOMBERG LAW (July 19, 2016), <https://bol.bna.com/did-melania-trump-infringe-2008-obama-speech/> (Mrs. Obama may have a claim for copyright infringement, but some issues including whether Mrs. Obama or her speechwriters were federal employees and if the speeches were substantially similar to one another.), and Elura Nanos, *Could Michelle Obama Sue Melania Trump Over Plagiarized Speech?*, LAW NEWZ (July 19, 2016, 10:52AM), <http://lawnewz.com/politics/does-michelle-obama-have-a-legal-claim-against-melania-trump-over-speech/> (Mrs. Obama may have claim for copyright stating she is not a federal employee and the works are substantially similar.), and R. Scott Rasnic, *Why the Plagiarism in Melania Trump’s Speech Matters (Essay)*, INSIDE HIGHER ED (July 21, 2016, 3:00AM), <https://www.insidehighered.com/views/2016/07/21/why-plagiarism-melania-trumps-speech-matters-essay> (Mrs. Obama may have a copyright claim because of the context of the speech and the importance of the portions lifted), with Ben Shapiro, *Does Melania’s Plagiarism Matter? Not for the Reason You Think*, THE DAILY WIRE (July 19, 2016), <http://www.dailywire.com/news/7585/does-melania-plagiarism-matter-not-reason-you-ben-shapiro> (Shapiro thinks the problem is more about the terrible job the campaign did in controlling this issue. The campaign is now about Donald Trump’s issues and not his overall presidential message.) and Eric Zorn, *Opinion, Why the Melania Trump Dust-Up Matters*, THE CHICAGO TRIBUNE (July 19, 2016 5:62PM), <http://www.chicagotribune.com/news/opinion/zorn/ct-why-the-melania-trump-dust-up-matters-20160719-story.html> (Zorn believes that Mrs. Trump’s speech was a minor blunder and that Trump’s campaign should have done better to do damage control. He also states that she is not running for anything, so why is it so important?).

⁹ See Shapiro, *supra* note 8 (claiming the controversy should not be about her, but about Trump since he is the political figure) and Zorn, *supra* note 8 (claiming Mrs. Trump is not running for anything so it should not matter).

Part II of this article will examine the elements needed to prevail on a copyright infringement claim and discuss the creation by the courts of the subconscious copying doctrine and the relevant defenses to the doctrine. Part III will analyze the infringement action against Mrs. Trump and how subconscious copying plays an important role in the case. Finally, Part IV will propose that the subconscious copying doctrine be extended to political speech.

II. BACKGROUND

A. The Basic Elements of Copyright Infringement

When an author notices that someone has copied her work, she may file a copyright infringement action. She must prove two elements: (1) that she is the owner of a valid copyright and (2) the defendant copied original elements of the work.¹⁰ If a work has been registered with the United States Copyright Office, it is presumed to be a valid work.¹¹ However, if the work is not registered, the court will look at the five elements to establish if the work is a valid copyright. They are: (1) the “originality” of the work; (2) the “copyrightability of the subject matter”; (3) an exact date or time the work was produced; (4) “compliance with applicable statutory formalities”; and (5) if the plaintiff is not the author, he must show that there was a transfer of rights between the original author and the plaintiff so as to effectuate the plaintiff with the valid copyright.¹² Once the author has established ownership of the copyright, the burden shifts to the copier to counter the evidence.¹³

¹⁰ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). This is the governing common law rule to establish copyright infringement. See also 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2015).

¹¹ 17 U.S.C. § 410 (2017). The section states in relevant part:

In any judicial proceedings the 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.

¹² *Tanya Creations, Inc. v. Talbots, Inc.*, 356 F. Supp. 2d 97, 100-101 (D.R.I. 2005) (citing 4-13 NIMMER ON COPYRIGHT § 13.01, *et seq.* (2004)).

¹³ 4-13 NIMMER, *supra* note 10, § 13.01, (explaining that registration of the copyright is prima facie evidence of author's ownership of the copyright). In this instance, Mrs. Obama would have to show that she owns the copyright to the speech and not the cable companies or the speechwriter. The Supreme Court stated that while a speech is broadcast by television or recorded for later purposes, if the speech had been written down and given to the press prior to the oral delivery, the copyright belongs to the speaker. *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 106 (S.D.N.Y. 1963).

Assuming the author can prove she owns a valid copyright,¹⁴ she next must prove that the defendant actually copied her work.¹⁵ Because it is unlikely that she can establish actual copying by the copier, copying is normally shown by the author's "proof of access and 'substantial' similarity."¹⁶ The definition of "access," interpreted by the court, "merely means an opportunity to view the protected material."¹⁷ The courts often look at access as a "reasonable opportunity" or "reasonable possibility" of viewing plaintiff's work,¹⁸ defining "reasonable access as 'more than a bare possibility.'"¹⁹ However, access cannot be assumed though "mere speculation or conjecture. There must be a reasonable possibility of viewing the plaintiff's work—not a bare possibility."²⁰ If there is no access, "the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."²¹ Substantial similarity may also be proven if the "total concept and feel" of the infringed work is so similar that the reasonable person would think of the original work.²²

A plaintiff can prove access either by (1) showing "the infringed work has been widely disseminated; or (2) a particular chain of events existed by which the alleged infringer might have gained access to the copyrighted work."²³ When proving access, it does not matter if it was deliberate or unconscious, if access and substantial similarity are proven, it may amount to copyright infringement.²⁴

Assuming Mrs. Obama can prove that she has a valid copyright, this article will focus on the access element, as the subconscious copying doctrine stems directly from that portion of the infringement analysis.

¹⁴ Some commentators feel that Mrs. Obama would own the copyright because she was not a federal employee, so her speechwriters would have written the speech "for hire" and under the Copyright Act Mrs. Obama and not the speechwriters would own the copyright. *See* Nanos, *supra* note 8, (under federal law, if she was a federal employee the speech would be part of the public domain), and 17 U.S.C. § 201 (giving copyright to the hiring party of "a work prepared by an employee within the scope of his or her employment").

¹⁵ *See supra* note 10.

¹⁶ *Id.* at § 13.01.

¹⁷ *Robert R. Jones Ass'n, Inc. v. Nino Homes*, 858 F.2d 274, 277 (6th Cir. 1988).

¹⁸ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (*citing*, 4-13 NIMMER ON COPYRIGHT, § 13.02[A] at 13-19 (1999), *Jason v. Fonda*, 526 F. Supp. 774, 7745 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1983)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

²² *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110-1111 (9th Cir. 1970).

²³ 4-13 NIMMER, *supra* note 10, §13.02.

²⁴ *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) ("[U]nconscious plagiarism is actionable quite as much as deliberate"); *See also Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) ("the fact that infringement is 'subconscious' or 'innocent' does not affect liability, although it may have some bearing on remedies." (*citing*, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998-99 & n.12 (2d Cir. 1983))).

B. *The Birth of the Subconscious Copying Doctrine*

The origin of the subconscious copying doctrine came from Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*,²⁵ which involved two musical compositions.²⁶ The defendant argued that he was unconscious of any copying, and at first Judge Learned Hand gives him the “benefit of the doubt.”²⁷ However, Judge Learned Hand found that the defendant infringed on the plaintiff’s copyright, even though it was an unconscious copying.²⁸

Explaining the doctrine, Judge Learned Hand stated that copyright infringement did not rely on the defendant’s “good faith,” and because there was no other way to explain the extreme likeness between the two compositions, it must have followed that the defendant copied subconsciously and “invaded the author’s rights.”²⁹ Judge Learned Hand stated, “[e]verything registers somewhere in our memories, and no one can tell what may evoke it.”³⁰ He went on to state that the infringer cannot make the excuse that he copied because, “his memory has played him a trick.”³¹ Since then, this doctrine has been applied three times by the court to find copyright infringement: *Edwards & Deutsch Lithographing Co. v. Boorman*,³² *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,³³ and *Three Boys Music Corp. v. Bolton*.³⁴

C. *Interpreting the Subconscious Copying Doctrine*

Two years following *Fred Fisher*, the Seventh Circuit found infringement through subconscious copying in *Edwards & Deutsch Lithographing Co. v. Boorman*.³⁵ The Court stated that even though the defendants swore they did not copy the plaintiff’s compilation of banker information, they were still liable for copyright infringement.³⁶

²⁵ *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924).

²⁶ *Id.* The plaintiff had the copyright to the entire composition “Dardanella” and alleged that the defendant used it as the accompaniment to his musical number “Kalua.”

²⁷ *Fred Fisher*, 298 F. at 147. Learned Hand explained it is highly unlikely the defendant intentionally copied the composition because the defendant was established among opera composers and if convicted of infringement, his marketability would suffer greatly.

²⁸ *Id.* at 147. “On the whole, my belief is that, in composing the accompaniment to the refrain of ‘Kalua,’ Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for the similarity, which amounts to identity.”

²⁹ *Fred Fisher*, 298 F. at 147-148.

³⁰ *Id.* at 147.

³¹ *Id.* at 148.

³² 15 F.2d 35 (7th Cir. 1926).

³³ 420 F. Supp. 177 (S.D.N.Y. 1976) *reh’g sub nom.* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798 (S.D.N.Y. 1981), *modified & remanded*, 722 F.2d 988 (2d Cir. 1983).

³⁴ 212 F.3d at 480.

³⁵ *Edwards*, 15 F.2d 35 (7th Cir. 1926). This case involved an “interest and discount time teller” for bankers. The defendants asserted that the plaintiff did not have a valid copyright because the information was in the public domain and even if it was a valid copyright there was no copying.

³⁶ *Id.* at 36-37. Specifically, the Court said, “It is not necessary, in order to hold against this contention, that [defendants] swore falsely, or that they consciously followed [plaintiff]’s work. They had sold and handled [plaintiff]’s publication for several years. The must have become very familiar with the plan, arrangement, and combination set forth in it.”

While the court did not cite *Fred Fisher*, the concepts were highly similar.³⁷ The Court stated, “If the thing covered by a copyright has become familiar to the mind’s eye, and one produces it from memory and writes it down, he copies just the same, and this may be done without conscious plagiarism.”³⁸

The doctrine was not used again until 1976 in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*³⁹ Mr. Harrison’s gospel song was almost a complete replica of the chart-topping hit from six years earlier, “He’s So Fine” by The Chiffons.⁴⁰ The court recognized that the songs were essentially identical, except for one phrase.⁴¹ Again, the court acknowledged that while Mr. Harrison did not intentionally copy the song, he had access to the song because of its popularity and his status in the music world.⁴²

The final and most recent case, *Three Boys Music Corp. v. Bolton*, involved two songs that were strikingly similar to one another with identical song titles.⁴³ The Court focused on the issue of access and went through the history of the subconscious copying doctrine citing *Fred Fisher* and *ABCKO*.⁴⁴ The court reluctantly affirmed the jury’s verdict of infringement because the standard of review required deference to the trier of fact.⁴⁵ The court distinguished this case from *ABCKO*, as the Isley Brothers song was (1) not a hit single, (2) not released on an album until a year after Bolton wrote his song, and (3) there was no claim by the Isley Brothers that the songs were strikingly similar.⁴⁶

An alleged copier has a few defenses she can utilize to combat the subconscious copying doctrine, such as independent creation, First Amendment protection, and fair use.⁴⁷

³⁷ *Edwards*, 15 F.2d at 37. Similar to Judge Learned Hand, the Seventh Circuit said, “[o]ne may copy from memory. It is not necessary to such act that the copied article be before him at the time. Impressions register in our memories, and it is difficult at times to tell what calls them up.”

³⁸ *Id.*

³⁹ 420 F. Supp. 177 (S.D.N.Y. 1976) *reh’g sub nom.* ABCKO Music, Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798 (S.D.N.Y. 1981), *modified & remanded*, 722 F.2d 988 (2d Cir. 1983). Former Beatle, George Harrison, wrote the song “My Sweet Lord” which, according to the plaintiffs, infringed on an earlier chart-topping song, “He’s So Fine” performed by the “Chiffons,” with the copyright owned by Bright Tunes Music Corp.

⁴⁰ *Id.* The court states that the songs consist of four repetitions of one musical phrase manipulated to fit the lyrics and then another four repetitions of a second musical phrase with a grace note in the third repetition. The only difference between Harrison’s song and the Chiffon’s song was that Harrison only repeated the second musical phrase three times instead of four, but the harmonies are identical to each other.

⁴¹ *Id.* at 180 (stating that looking at the transcript between the court and Harrison “neither Harrison nor Preston were conscious of the fact that they were utilizing the He’s So Fine theme.”).

⁴² *Bright Tunes*, 420 F. Supp. at 180. The court stated that Harrison’s subconscious knew the song even though his mind did not and that his song is identical to the Chiffon’s only with different words and Harrison had access to the song because he is a famous musician that had been in the music world when the song became so popular. Therefore, his copying is, “under the law, infringement of copyright, and [was] no less so even though subconsciously accomplished.”

⁴³ *Three Boys Music Corp.*, 212 F.3d at 480.

⁴⁴ *Id.* at 483.

⁴⁵ *Id.* at 485 (stating “[a]s a general matter, the standard for reviewing jury verdicts is whether they are supported by ‘substantial evidence’ that reasonable minds would come to the same conclusion. (citing, Poppell v. City of San Diego, 149 F.3d 951, 962 (9th Cir. 1998)).

⁴⁶ *Three Boys Music Corp.*, 212 F.3d at 484.

⁴⁷ See discussion *infra* Part II.D.

D. Common Defenses to Access Element

1. Independent Creation

The copier can argue independent creation as a defense to copyright infringement.⁴⁸ The Court has stated that even if the two works are identical, “if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement.”⁴⁹

2. First Amendment Protection

The copier may also argue that his work is covered under the First Amendment Free Speech Clause thus precluding copyright infringement.⁵⁰ The Supreme Court has stated that political expression is strongly protected by the First Amendment and would need a compelling state interest to allow the speech to be limited.⁵¹

3. Fair Use

The final defense a copier could use to combat infringement would be that the amount of the original document used was fair use. Section 107 to the Copyright Act states the four factors a court must look at to determine if the copying was fair use: “(1) the purpose and nature of the use; (2) the nature of the of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; [and] (4) the effect on the potential market for or value of the copyrighted work.”⁵²

E. A Note on Plagiarism

While most people use Plagiarism and copyright infringement as synonyms, copyright infringement is a criminal act, where plagiarism is just a moral & ethical wrong.⁵³ Some critics have used plagiarism as a way to sweep this current controversy

⁴⁸ See *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 755 (S.D.N.Y. 1960) (“The ideas involved are not so unique or unusual as to make it unlikely that they were created independently. The fact that the remainder of the lyrics, the music and the themes of the two songs are entirely different strengthens this conclusion.”); and *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

⁴⁹ *Selle*, 741 F.2d at 902.

⁵⁰ See *Sid & Marty Krofft TV Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

⁵¹ See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) and *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

⁵² See 17 U.S.C. § 107 and *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 560-561 (1985).

⁵³ See *Keyes*, *supra* note 7. *Keyes* explained the major differences between plagiarism and copyright infringement, though most people use each concept as synonyms of the other. He said plagiarism is where someone pretends another’s work is her own by not citing the source of the

under the rug.⁵⁴ As we will see, Mrs. Trump's defenses to infringement should fail based on the subconscious copying doctrine because she is a public figure and should be held to a higher standard.

III. ANALYSIS

Assuming Mrs. Obama has a valid copyright, Mrs. Obama's case would be extremely tight if the subconscious copying doctrine was not expanded to include political speeches.⁵⁵ While political speech receives the greatest protection under the First Amendment,⁵⁶ the constitutional principles involving copyright protection should protect Mrs. Obama's unique expression of her ideas from Mrs. Trump or any other speaker.⁵⁷ Critics would prefer that the subconscious copying doctrine be either severely restricted or even abandoned, but in instances such as this case the doctrine should be expanded to include political speech.⁵⁸ This case differs from a frivolous

information. It is not against the law, but society sees it as a breach of ethics. An infringer copies someone's work without permission and tries to pass it off as his own which is against the law and subject to criminal penalties.

⁵⁴ See Farida Fawzy, *From Speeches to Ph.D.'s: Politicians Called Out for Copying*, CNN, (July 19, 2016, 8:29 AM), <http://www.cnn.com/2016/07/19/politics/politicians-plagiarism/index.html>. Fawzy documents ten times that politicians had plagiarized including former Vice President Joe Biden. See also Karen Swallow Prior, *Plagiarism is a Distinctively American Problem: The Melania Trump speech controversy highlights how much Americans value originality*, VOX, (July 21, 2016, 10:00 AM), <http://www.vox.com/2016/7/21/12247032/melania-trump-plagiarism-history>. Prior discusses the concept of plagiarism in American culture and discusses how easy it is to commit and detect plagiarism today because of computer technology. She also discusses how Thomas Jefferson was accused of plagiarism, as well as former President Barack Obama. See also Costa, *supra* note 2. (Costa used the term plagiarism instead of copyright infringement throughout his article to express that the allegations were coming from the Clinton campaign.); Kyle Wingfield, *Melania's Moment: Why the Speech Matters*, THE ATLANTA JOURNAL-CONSTITUTION, (July 19, 2016, 11:59AM), <http://fox.25boston.com/news/melania-s-moment-why-the-speech-matters/407305323> (Wingfield passes the blame to a campaign aide cutting and pasting from Mrs. Obama's speech and not on the First Lady).

⁵⁵ See Mazumdar, *supra* note 8 (discussing that it would be a very close case in terms of copyright infringement).

⁵⁶ U.S. CONST. Amend. 1 ("Congress shall make no law . . . abridging the freedom of speech, or of the press"). See also Buckley, 424 U.S. at 14 (1976) (holding that public discussion & debate of current issues about political candidates is "integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") and *Citizens United v. FEC*, 558 U.S. at 329 (2010) ("Political speech, speech that is central to the meaning and purpose of the First Amendment").

⁵⁷ See U.S. CONST. art. I § 8, cl. 8 (Congress's power to make laws protecting the copyrights). When a conflict arises between the Copyright Clause and the First Amendment, the courts "compelling state interest." *Citizens United*, 558 U.S. at 340 ("political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny'"). However, not all political speech is protected. See *Arica Inst., Inc. v. Palmer*, 761 F. Supp. 1056, 1066 (S.D.N.Y. 1991) (while the court ruled there was no copyright infringement against plaintiff, the court did state that "[e]xtensive paraphrasing plainly constitutes copyright infringement") (emphasis added).

⁵⁸ See Joel S. Hollingsworth, *Stop Me If I've Heard This Already: The Temporal Remoteness Aspect of the Subconscious Copying Doctrine*, 23 HASTINGS COMM. & ENT. L.J. 457 (Winter, 2001) (suggesting the current doctrine leaves the defendant defenseless); Kimberly Shane, *The Unconscious Erosion of*

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lawsuit that the critics are concerned will happen if the doctrine is expanded because of the almost identical circumstances surrounding not only the content of the speeches but also the context of the performance given by both women. Both women stood on a stage at a political national convention as two potential First Ladies and delivered beautiful speeches about the values of themselves and their husbands and what they wanted the people to know about their lives. Many people picked up on the infringement within a matter of hours, yet nothing was done about it. This is why the subconscious copying doctrine should apply here. Mrs. Trump claimed she wrote the speech by herself, and within a week the story was over.⁵⁹ Therefore, this doctrine should not be limited to the music and theater industries, but should be expanded to other prominent public figures, as they should be held to the highest standard.⁶⁰

A. *Obama v. Trump*

Assuming Mrs. Obama is the author of the speech, it is original, and in a tangible medium, the crux of this case revolves around the two-pronged test of access and substantial similarity.⁶¹ To start with substantial similarity, Mrs. Obama can claim that Mrs. Trump not only took the words of the speech but she also expressed them in the same arena as Mrs. Obama back in 2008.⁶² Assuming Mrs. Obama can prove the substantial similarity prong, the court will focus on the access issue, where the subconscious copying can apply.⁶³ While Mrs. Trump denied ever using Mrs. Obama's speech and the Trump campaign manager claimed Mrs. Trump had simply used "common words," there is little doubt that she had access to this speech.⁶⁴

Copyright Legitimacy By The Unconscious Copying Doctrine, 13 U. DENV. SPORTS & ENT. LAW J. 53 (Fall, 2012) (believes the unconscious copying doctrine should be completely abandoned); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI. KENT L. REV. 842 (stating that the doctrine makes it a punishment against the authors to have a copyright); and Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1002-1003 (suggests the doctrine should be used as a potential defense to infringement in conjunction with the independent creation doctrine).

⁵⁹ See Scott Stump, *Melania Trump on Convention Speech: I Wrote it With as Little Help as Possible*, TODAY (July 19, 2016, 7:15 AM), <https://www.today.com/news/melania-trump-convention-speech-i-wrote-it-little-help-possible-t100942>.

⁶⁰ See *Fred Fisher*, 298 F. 145 (infringement of music); *Bright Tunes*, 420 F. Supp. 177 (infringement of music); *Three Boys Music Corp.*, 212 F.3d 477 (infringement of music); *Sheldon*, 81 F.2d 49 (infringement of play); *Sid & Marty Krofft*, 562 F.2d at 1157 (infringement of television show); *Whitney*, 179 F. Supp. 751 (infringement of music); and *Selle*, 741 F.2d 896 (infringement of music).

⁶¹ See *Feist*, 499 U.S. at 361.

⁶² See *Roth*, 429 F.2d at 1110. The Court stated that if it had the work had the same "total concept and feel" of the original and the reasonable observer will think of the original work, then the original author has a claim for copyright infringement. In Mrs. Obama's case, Mrs. Trump used the snippets from the speech in the same sort of venue and in front of a similar audience and platform, a political national convention. This proves the substantial similarity prong of the copyright infringement test of *Feist*.

⁶³ See *Fred Fisher*, 298 F. at 147-148.

⁶⁴ See Nanos, *supra* note 8. The statement made by campaign manager Paul Manafort about the speech is as follows: "to think that she'd be cribbing Michelle Obama's words is crazy." *Id.* The Trump campaign also stated the speech "reflected Melania's own thinking" and she had used "words that are common words." *Id.*

The 2008 Obama speech and the 2016 Trump speech not only have identical language, but also have the “total concept and feel” of the 2008 speech which contributes greatly to the infringement analysis.⁶⁵ While some people claim that ninety-three percent of Mrs. Trump’s speech was her own, the focus is not on how much of the speech was copied, but rather that the speech was actually copied.⁶⁶ While she may have only copied seven percent of Mrs. Obama’s speech, the portions she copied were so blatant that within hours people were talking about how similar the two speeches were.⁶⁷

Mrs. Trump can deny ever watching the 2008 Democratic National Convention or seeing a copy of Mrs. Obama’s speech, however the speech writers and/or political personnel helping her should have been quick to realize the significant similarities between the language of Mrs. Trump’s speech and Mrs. Obama’s speech.⁶⁸ Therefore, even though Mrs. Trump claimed she wrote the speech mostly on her own and denied using Mrs. Obama’s speech, the subconscious copying doctrine would apply because of her status in the political world (as well as her staffers) and would constitute infringement similar to that in *Bright Tunes*.⁶⁹

B. Political Speech and Copyright Protections

This case conflicts with the First Amendment and the protection of freedom of speech.⁷⁰ While it is true that political speech receives the most protection under the first amendment because it bolsters the “free circulation of ideas,” not all political speech is protected.⁷¹ As Jeremy Waldron states in his article, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, “free speech is seen as a social good in copyright [law because] . . . it contributes to this dissemination of information.”⁷² The Supreme Court has been silent when the First

⁶⁵ *Id.* (“A conclusion of a work’s having been derived from a copyrighted source often boils down to the general *feel* of whether that work is too close to the original.”); *See also*, Rasnic, *supra* note 8 (“Along with making a case for her husband as a viable presidential candidate, it was her first significant attempt to sell herself to the country as first lady, which was the same exact context as Michelle Obama’s speech”).

⁶⁶ *See* Costa, *supra* note 2 (“New Jersey Governor Chris Christie . . . effectively acknowledged some plagiarism even as he defended Melania Trump and the campaign, saying ‘Ninety-three percent of the speech is completely different than Michelle Obama’s speech’”).

⁶⁷ *Id.*

⁶⁸ *See Bright Tunes*, 420 F. Supp. at 180-181 (While it was evident that Harrison did not consciously recall the “He’s So Fine” tune and did not deliberately copy the tune, he still had ample access to the song as it was a number one hit and widely disseminated in the music world. Therefore, he subconsciously copied the tune, which is nevertheless copyright infringement).

⁶⁹ *Id.* While Mrs. Trump may have been thinking of similar values and ideals she was raised on, the fact that they were spoken in the same sequence and almost identical phrasing clearly shows that this was an infringement on Mrs. Obama’s copyrighted speech.

⁷⁰ *See Buckley*, 424 U.S. at 14, and *United Citizens*, 558 U.S. at 340.

⁷¹ *See Arica*, 761 F. Supp. at 1066.

⁷² Waldron, *supra* note 58, at 857. “The Constitution stipulates that authors’ rights are created to serve the social good, so any balancing must be done within the overall context of the public good . . . such as the progressive effects of the free circulation of ideas.”

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Amendment collides with copyright law mainly because the “idea-expression dichotomy” balances out the two laws effortlessly.⁷³

Nimmer states that copyright law intrudes on freedom of speech because it curtails the right to copy the “expression of others,” but copyright law rationalizes this by the greater good in encouraging the copyright of creative works.⁷⁴ The law also impinges on the creator's right to control his compositions because his ideas are not safeguarded, but it is also defended by the “greater public need for free access to ideas as part of the democratic dialogue.”⁷⁵

While Mrs. Obama’s ideas and values of her speech are not protectable under the idea-expression dichotomy, her expressions of those ideas, through the performance of her speech in 2008 are protected under the copyright.⁷⁶ Thus, while political speech receives the highest protection under the First Amendment, it does not allow Mrs. Trump to copy portions of those ideas and express them in the same way as Mrs. Obama did in her 2008 speech.⁷⁷

C. Critiquing the Subconscious Copying Doctrine

The main argument asserted by critics is that the subconscious copying doctrine punishes the alleged infringer, who is also a creator.⁷⁸ They posit that the alleged infringers want the freedom to build on past creators’ works.⁷⁹ The subconscious copying doctrine does not stifle this contention as some may suggest. On the contrary, courts have declined to use the subconscious copying doctrine in close cases.⁸⁰

⁷³ See *Sid & Marty Krofft*, 562 F.2d at 1170.

⁷⁴ *Id.* (citing Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L. REV. 1180, 1192-93 (1970) and *Lee v. Runge*, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting).

⁷⁵ *Id.*

⁷⁶ See *Sid & Marty Krofft*, 562 F.2d at 1170. The court references the *King v. Mister Maestro, Inc.* case, to illustrate the principle that Dr. King’s political views may be mass circulated, but the exact expression of those views in a speech would be protected. 224 F. Supp. 101 (S.D.N.Y. 1963).

⁷⁷ See Deidre A. Keller, “What He Said.”: *The Transformative Potential Of The Use Of Copyrighted Content In Political Campaigns – Or – How A Win For Mitt Romney Might Have Been A Victory For Free Speech*, 16 VAND. J. ENT. & TECH. L. 497, 509-510 (Spring, 2014). Further in the article, Keller states that “if the alleged infringing content is an exact reproduction of the copyrighted content, the idea-expression dichotomy can only mitigate a finding of infringement.” *Id.* at 519.

⁷⁸ See Waldron, *supra* note 58, at 862. “Intellectual property rights are rewards or incentives, and they serve the excellent purpose of encouraging authors. But the rewards here are not just medals or Nobel prizes, the incentives we dole out amount literally to restrictions on others’ freedom that may be exploited for authors’ benefits.”

⁷⁹ *Id.* at 875.

⁸⁰ See *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (declined to apply the subconscious copying doctrine where the plaintiff could not overcome the defendants argument of independent creation and the works were only slightly similar); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946) (declined to apply the doctrine where the similarities of the works were materials within the public domain and there was direct evidence that the defendant did not have access to plaintiff’s work); *Whitney*, 179 F. Supp. at 751 (declined to apply the doctrine because the plaintiff failed to prove the defendant had access, only one line of lyric was the same and everything else was different, and defendant’s claim that line came from a quotation within the public domain); and *United Artists Corp. v. Ford Motor Co.*, 483 F. Supp. 89 (S.D.N.Y. 1980) (doctrine was not applied because defendants conceded access and the works were not substantially similar).

The major cases where the Court utilized the subconscious copying doctrine were instances where it would have been unjust not to find infringement because the works were almost identical.⁸¹ The doctrine allows for a presumption of access through likelihood of knowledge based on popularity or wide dissemination, when an author has no direct evidence of access.⁸²

Additionally, the critics believe that the doctrine not only punishes the creator but that it also smothers creativity.⁸³ They argue that the doctrine has expanded the works that are protected under the Copyright Act because defendants can no longer claim that they honestly thought they were creating something new.⁸⁴ They claim that authors are no longer capable of originality and need the public domain and free flow of ideas to create new, original works.⁸⁵ In other words, creativity rests on those of our predecessors.⁸⁶

Finally, some critics feel that the doctrine should be abandoned completely because it punishes a person for creating a work in the exact same way the original author created his work – through his subconscious.⁸⁷ They argue that this expansion of copyright infringement halts creativity because it deters future artists from creating new works since they will worry about whether the idea has been done before in a similar expression.⁸⁸

However, because the gathering of direct evidence is next to impossible, the doctrine exists for the extremely trying cases, such as this one. While it could seem to be stifling creativity by broadening the protection of works, there are still the defenses of independent creation and fair use to combat the subconscious copying doctrine. The doctrine has been used to protect artists that create works that slowly fade from popularity from other artists attempting to benefit from that prior popularity.⁸⁹ The

⁸¹ See *Fred Fisher*, 298 F. at 145 (“Not only is the figure in each piece exactly alike, but it is used in the same way.”); *Bright Tunes*, 420 F. Supp. at 177 (The two songs use the same two motifs with an identical grace note in the same second repetition with the only difference being in one song has the second motif being repeated three times instead of four.); *Edwards*, 15 F.2d at 35 (7th Cir. 1926) (the doctrine was applied where “all the essentials of the thing copyrighted, similarity amounts to identity and the evidence establishes infringement”); and *Three Boys Music Corp.*, 212 F.3d at 477 (where the two songs were substantially similar and there was showing of access based on defendant being in the music business and a big fan of the plaintiffs).

⁸² See *Fred Fisher*, 298 F. at 146 (“On the whole, my belief is that, in composing the accompaniment . . . Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity”).

⁸³ See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and The Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1030-31 (Summer 1990).

⁸⁴ See Shane, *supra* note 58, at 65.

⁸⁵ *Id.* at 53. Shane believes it is unfounded that courts punish an artist for his subconscious creation of art while acting as if the original artist that has copyright protection created her work without any help or subconscious copying of another.

⁸⁶ See Gordon, *supra* note 83, at 1030 (stating that “all art is a creative misreading of one’s predecessors” and that all works are essentially derivatives of former works).

⁸⁷ See Shane, *supra* note 58, at 71-73. Shane feels that the courts should return to the strict doctrine of proving actual copying as both works were created from the authors’ respective subconscious, so why punish the alleged infringer for subconsciously and unknowingly creating the same work as the original author.

⁸⁸ *Id.* at 73.

⁸⁹ See *Fred Fisher*, 298 F. at 145. The Court stated “[t]he fact that [defendants work] appeared shortly after [plaintiff’s] had faded out, and was written by one who had necessarily known it, as a

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cases that use the subconscious copying doctrine scrutinize the infringer's background to make sure he would have had knowledge of the work, but just "forgot" about it.⁹⁰

D. Why the Subconscious Copying Doctrine is Important

Congress created The Copyright Act "to promote the Progress of Science and useful Arts."⁹¹ The subconscious copying doctrine serves an important purpose in copyright infringement cases, providing the recognition authors deserve when their works have been "forgotten."⁹² Copyright is about proper accreditation and the prevention of one person taking credit for another's creativity.⁹³ Without the subconscious copying doctrine, anyone could claim that he created an original work on his own and the original author would have a difficult time attempting to counter that defense.⁹⁴ Most infringement cases could be avoided if an author would conduct due diligence to see if his new work had been created in the past.⁹⁵

While some argue that the doctrine represses creativity, it actually bolsters creativity.⁹⁶ Under the idea-expression dichotomy, ideas are not copyrightable, only the expression of those ideas.⁹⁷ Facts, ideas, and methods are strictly within the public domain and are not protected under the Copyright Act.⁹⁸ If an author has knowledge of the existing copyright, he could ask permission to use the idea or only use so much as to constitute fair use of the copyrighted work.⁹⁹ Authors have exclusive rights, which allow for the free flow of ideas within the marketplace.¹⁰⁰ The subconscious copying doctrine, used sparingly, is simply a method for the original author to get accreditation and prevent someone from stealing the author's work for his personal gain.¹⁰¹

musician who knew it, makes it still more hard to assume any independent provenience for [defendant's work]."

⁹⁰ *Id.*

⁹¹ U.S. CONST. art. I § 8, cl. 8.

⁹² See *ABKCO*, 722 F.2d at 998 ("[W]hen a defendant's work is copied from the plaintiff's, but the defendant in good faith has forgotten that the plaintiff's work was the source of his own, such 'innocent copying' can nevertheless constitute an infringement").

⁹³ See Robin Feldman, *The Role of the Subconscious in Intellectual Property Law*, 2 HASTINGS SCI. & TECH. L.J. 1, 9 (Winter, 2009).

⁹⁴ *Id.* at 9-10.

⁹⁵ Gordon, *supra* note 83 (critiquing Professor Goldstein and his favoring the subconscious copying doctrine).

⁹⁶ See Waldron, *supra* note 58, at 848-849. Waldron states that the subconscious copying doctrine provides great protection to the original author and furthers the principles in which copyright protection was founded on: (1) the bolstering of creativity and (2) obtaining proper recognition for one's creativity.

⁹⁷ See Gordon, *supra* note 83.

⁹⁸ See Shane, *supra* note 58, at 67 (Explaining the argument that the public domain exists for the expansion of ideas and creativity).

⁹⁹ *Id.*

¹⁰⁰ 17 U.S.C. § 106. These rights include: (1) reproduction, (2) display, (3) performance, (4) distribution, and (5) preparation of derivative works. *Id.*

¹⁰¹ See Feldman, *supra* note 93.

While some believe that the 1790 Copyright Act's strict infringement actions better serve the purpose of the Copyright Act, the law evolved for a reason.¹⁰² When a person creates a beautiful speech about the values she was brought up on and delivers it to a crowd, she does not expect others to plagiarize the content and give almost the exact same speech eight years later.¹⁰³ The Copyright Act and free marketplace of ideas concept are not a place to copy the same expression of a speech.¹⁰⁴

That is not to say that Mrs. Trump could not use Mrs. Obama's ideas.¹⁰⁵ Those ideas and values could have been expressed in different words and phrases, but Mrs. Trump took whole paragraphs from the prior speech.¹⁰⁶ Not only that, but she performed the speech in a similar role (as a potential First Lady) and with a similar audience (at a National Convention).¹⁰⁷ Without the subconscious copying doctrine, Mrs. Trump and others in similar situations would not only get accreditation for something they did not create, but also get away with essentially stealing another's work.¹⁰⁸ This stifles creativity because some creators may be hesitant to put their works on display for fear that someone will snatch it away, pass it off as their own and feign ignorance. Assuming direct evidence is non-existent, without a doctrine like the subconscious copying doctrine, those creators would have no claim.

IV. PROPOSAL

The subconscious copying doctrine has been confined mostly to the music and theater industry.¹⁰⁹ Most cases of copyright infringement have been against politicians for using songs while out on the campaign trail.¹¹⁰ The subconscious copying doctrine

¹⁰² See Shane, *supra* note 58, at 71-72 (arguing that the doctrine should be abandoned, and the Copyright Act of 1790 should be reapplied because it furthers the constitutional purpose of promoting "the progress of science and useful arts" U.S. CONST. art I § 8, cl.8.).

¹⁰³ See *Sid & Marty Krofft*, 562 F.2d at 1170 ("Thus, the political views of Dr. Martin Luther King may be widely disseminated. But the precise expression of these views in a speech may be protected").

¹⁰⁴ *Id.*

¹⁰⁵ See 17 U.S.C. § 102(b) (2017) (Ideas are not protected under the Copyright Act). See also Campbell, *supra* note 7 (phrases are not original expressions, but Mrs. Obama could "claim protection in the arrangement and selection of these phrases").

¹⁰⁶ See Rasnic, *supra* note 8.

¹⁰⁷ *Id.* Both women were potential first ladies on a national convention stage in front of a political audience speaking about the values shared with their husbands.

¹⁰⁸ Feldman, *supra* note 93. While Feldman explained that most artists do not intentionally copy another's work, it is safe to assume that there are some artists who practice copying others works intentionally.

¹⁰⁹ See 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 9.2 (2005) (Discussing the elements of copyright infringement). Goldstein stated, "[n]ot surprisingly, claims of subconscious copying characteristically arise in musical infringement cases where the copyrighted elements are so often brief and easily remembered."

¹¹⁰ See Keller, *supra* note 77, at 499 (citing Katie Byrne, *K'Naan Wants Mitt Romney to Stop Using Waving Flag*, MTV (Feb. 1, 2012, 7:50 PM), <http://www.mtv.com/news/articles/1678368/knaan-mitt-romney-waving-flag.jhtml> ("Waving Flag"); Miriam Coleman, *Newt Gingrich Ordered to Stop Using "How You Like Me Now?"*, ROLLING STONE (Jan. 28, 2012, 1:30 PM), <http://www.rollingstone.com/music/news/newt-gingrich-ordered-to-stop-using-how-you-like-me-now-20120128> ("How You Like Me Now?"); Andy Greene, *Katrina and the Waves Join Tom Petty's Fight Against Michele Bachmann*, ROLLING STONE (June 29, 2011, 3:50 PM), <http://www.rollingstone.com/politics/news/katrina-and-the-waves-join-tom-pettys-fight-against->

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should be extended into the realm of political speeches. While political speech does retain First Amendment protection, this does not mean that it should allow political speeches to be copied at will.¹¹¹ Being a judge-made doctrine, the courts have the power to extend it to political speech so long as it does not impinge on the First Amendment. The court could also allow independent creation as a defense to the doctrine for better protection against frivolous lawsuits.

A. Freedom of Speech & the Expression of Ideas

The Constitution protects the freedom of speech,¹¹² with political speech receiving the most protection.¹¹³ Free speech fosters the dissemination of information and free debate in the search for the truth.¹¹⁴ The policy behind copyright protection is to reward original expression of ideas and bolster creativity.¹¹⁵ However, ideas are not protected, only the expression of those ideas.¹¹⁶ Therefore, politicians can and should find a different way to express those ideas.

B. Independent Creation as Defense

While independent creation can be a defense to all copyright infringement claims, when looking at the subconscious copying doctrine, the court should presume infringement unless the defendant can rebut the presumption through independent creation. As Professor Goldstein stated in his treatise on copyright, the typical analysis for not using independent creation as a defense to infringement actions is because “the infringer is better placed to guard against mistake.”¹¹⁷ There is nothing

michelebachmann-20110629 (“Walking on Sunshine”); *Alleged Copyright Infringement and Newt Gingrich: What’s All the Fuss?*, DICKINSON LAW: IOWA INTELLECTUAL PROPERTY BLOG (Feb. 1, 2012), <http://www.dickinsonlaw.com/2012/02/allegedcopyrightinfringement-and-newt-gingrich-whats-all-the-fuss> (“Eye of the Tiger”); *Silversun Pickups Tell Romney to Stop Using ‘Panic Switch’*, ROLLING STONE MUSIC (Aug. 16, 2012, 9:50 AM), <http://www.rollingstone.com/music/news/silversun-pickups-tells-romneyto-stop-using-panic-switch-20120816> (“Panic Switch”); *Tom Petty to Michele Bachmann: Stop Playing ‘American Girl’*, HUFFINGTON POST (June 28, 2011, 7:15 PM), http://www.huffingtonpost.com/2011/06/28/tom-petty-michelebachmann_n_886384.html (“American Girl”).

¹¹¹ *Id.* at 507 (“lower courts have consistently rejected the First Amendment as a defense to a copyright infringement claim”).

¹¹² U.S. CONST. Amend. 1 (“Congress shall make no law . . . abridging the freedom of speech”).

¹¹³ *Id.* at 502 (“[T]he First Amendment affords speech within the context of a political campaign the highest degree of protection”).

¹¹⁴ Waldron, *supra* note 58, at 856-857.

¹¹⁵ See GOLDSTEIN, *supra* note 109, § 9.1.2 (“Infringement rules closely follow the precept that copyright law rewards original expression”).

¹¹⁶ See *Feist*, 499 U.S. at 349-350 (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work”). See also *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 547, 105 S. Ct. 2218, 2224 (1985) (“no author may copyright facts or ideas”).

¹¹⁷ See GOLDSTEIN, *supra* note 109, § 11.4. Goldstein goes on stating that the best example how the rule works well is in the case of a person who “forgets” and believes he is creating a new and original work instead of from his own “recollection.” *Id.*

stopping a person from doing a little research to see if this particular idea has been previously expressed in a similar or identical way.”¹¹⁸

Politicians of all people should research before stating anything. And most, if not all, of them perform this practice.¹¹⁹ Why should a copyright owner suffer for someone else’s lack of knowledge?¹²⁰ Nimmer explains that without the subconscious copying doctrine “copyright would lose much of its value if third parties [such as politicians who use speech writers], were insulated from liability because of their claimed innocence as to the culpability of the persons who supplied them with infringing materials.”¹²¹ Indeed, the Second Circuit agreed, stating “the problems of proof inherent in a rule that would permit innocent intent as a defense . . . could substantially undermine the protections Congress intended to afford to copyright holders.”¹²²

C. Why the Court Should NOT Abandon the Doctrine

Some critics argue that the subconscious copying doctrine should be abandoned altogether.¹²³ However, without the doctrine anyone can feign ignorance and win so long as the original copyright holder cannot establish direct copying or access to the work.¹²⁴ Abandoning the doctrine would stifle one of the main goals of copyright protection: rewarding creativity and allowing for the “greedy public [to] steal the fruits of [his or her] genius.”¹²⁵

Others argue that every work is based off of a preceding work in some shape or form.¹²⁶ While it may be true, the main reason people believe this cliché is because they forget about the many works and ideas that are in the public domain.¹²⁷ Every

¹¹⁸ See GOLDSTEIN, *supra* note 109, § 9.1.1. Goldstein states in his treatise, “[i]t will be the rare and naïve defendant who, in the face of such similarities asserts that he has not infringed. . . . [S]uch complete identity between the two works will leave little room for doubt that the defendant copied from the plaintiff.”

¹¹⁹ See Costa, *supra* note 2. In speaking with a former speechwriter from the Bush administration, Matt Latmier, he stated “In the Bush White House, this speech would have been vetted by 15 to 20 people before the first lady ever saw it.” *Id.*

¹²⁰ Feldman, *supra* note 93, at 9-10 (stating that the doctrine is justified because “the defense, ‘I created it on my own,’ is easy to claim and difficult to disprove. The subconscious copying rule, therefore, reduces the number of circumstances in which accused infringers will raise baseless defenses”). See also GOLDSTEIN, *supra* note 109, § 9.2.1 (“the defendant himself will have no incentive to keep his memory of the event alive”);

¹²¹ NIMMER, *supra* note 10, § 13.08 (discussing how “innocent intent” and the subconscious copying doctrine are no defense to copyright infringement).

¹²² *ABKCO*, 722 F.2d at 999.

¹²³ See Shane, *supra* note 58, at 71. Shane posits that the doctrine should be abandoned, and the copyright infringement standard should revert to cases of direct copying. She states that this allowed artists to be inspired and create freely without worrying about whether “their subconscious [is] playing tricks on them.” *Id.*

¹²⁴ Feldman, *supra* note 93, at 9-10.

¹²⁵ Litman, *supra* note 58, at 965.

¹²⁶ *Id.* at 966; see also Gordon, *supra* note 83, at 1030 (reiterating the view of critic Harold Bloom, that “all art is a creative misreading of one’s predecessors, a Freudian rebellion against what came before; seen this way, all works are potentially derivative”).

¹²⁷ Litman, *supra* note 58, at 966-967 (stating that this is a truism that has not been fully examined).

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author uses “raw material[s]” from everyday life to create original works.¹²⁸ Without that vast public domain, most of the works created today would be illegal.¹²⁹

Not only does the public domain allow for creation of new works, artists can use works and still obtain a copyright through the fair use doctrine.¹³⁰ Another option would be to ask the original author for permission. The artistic world would flourish if more people asked for permission first instead of looking for forgiveness after taking the work.¹³¹

The subconscious copying doctrine should be extended to the political realm because the unique speeches performed by politicians are highly valuable and the direct copying of them should not be belittled to plagiarism.¹³² Politicians must be held to a high standard and sweeping this controversy under the rug as plagiarism sets the tone for future politicians that it is acceptable to steal another person’s words, within the same context, without permission.¹³³

Plagiarism, while not the same as copyright infringement, is a real problem in the school system today.¹³⁴ What people see, hear, and read influence their own behavior. When a person of authority gets away with copying another’s words, it sets the tone that copying is not a problem in the “real” world.¹³⁵ Professor Rasnic stated it best in his article, *Yes It Was Plagiarism* when he said that “[t]o deliver a plagiarized speech is bad enough, but celebrating the value of hard work and family values insults those principles that the speech ostensibly claims to cherish, regardless of its author(s).”¹³⁶

¹²⁸ *Id.* at 967.

¹²⁹ *Id.*

¹³⁰ See 17 U.S.C. § 107. The statute explains that it is fair use when a person copies by any means for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The statute provides four factors for the court to look at when determining fair use “(1) the character and purpose of the use, (2) the nature of the original work, (3) the amount used in relation to the entire work, and (4) the potential effect on the market for the work.”

¹³¹ In cases where the original owner denied permission and the infringer copied anyway the court still found infringement. See *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007) (it is an action for copyright infringement when a co-owner conveyed interest to a third party retroactively to the infringer) and *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2016 U.S. Dist. LEXIS 118793, at *17 (N.D. Ga. Mar. 31, 2016) (no fair use defense to copyright infringement when infringer could have gotten permission from copyright owner). However, there are some cases where the owner denied, the infringer copied anyway, and the court did not find infringement. See *Feist*, 499 U.S. 340. It is a gray area, but legally it would be safer to ask permission than seek forgiveness afterward to avoid future legal claims. Greg Kanaan, *Weird AL and Parody: Why it's Better to Ask Permission than Beg Forgiveness*, (July 22 2014, last visited February 15, 2017), <http://www.thelegalartist.com/blog/weird-al-parody-better-ask-permission-beg-forgiveness> (explaining how Weird Al always asks permission to parody songs when he could possibly get away without it). It seems to be the moral thing to do, but also the legal thing since people could sue for infringement if they deny infringement, but the copier does it anyway.

¹³² Rasnic, *supra* note 8.

¹³³ *Id.*

¹³⁴ *Id.* Rasnic is a professor of English at Cedar Valley College. He stated that “in 15 years, [he has] had a single semester . . . where [he has] not failed at least one student for plagiarism.” *Id.* See also Keyes, *supra* note 7. Keyes explained the major differences between plagiarism and copyright infringement, though most people use each concept as synonyms of the other.

¹³⁵ Rasnic, *supra* note 8.

¹³⁶ *Id.*

By softening the speech to an “act of plagiarism” it disrespects the people whom the speech “claims to hold in such high regard.”¹³⁷

In the case of Mrs. Trump, who denies ever using, seeing, or hearing Mrs. Obama’s speech, this is where the subconscious copying doctrine plays a central role.¹³⁸ It is not that she merely copied the words and ideas from Mrs. Obama’s speech, but rather that she used the actual expression of those words within that speech. Mrs. Trump delivered the speech on an identical stage in the exact same setting: A National Convention Stage. Without this doctrine, Mrs. Trump would get off scot-free because ideas are not expressions and she never remembered hearing the speech. Mrs. Obama would then have to prove direct or actual copying as well as access to prove infringement.

Because it is extremely rare to find evidence of direct or “actual” copying, or even to show a person had access to the work, courts create standards and doctrines to provide a safeguard for copyright protection.¹³⁹ The purpose of the creation of the subconscious copying doctrine by Judge Learned Hand in *Fred Fisher* is to deal with the “forgetful” infringer attempting to avoid paying the original author by feigning memory loss.¹⁴⁰ However, if the infringer actually did not know about the work that would be compelling evidence in support of an independent creation defense. While the doctrine is most commonly applied in the music realm, the political realm should look to this doctrine as well. Without it, anyone could say “I have a dream . . .” during a civil rights rally at a famous monument and then say they had never heard Dr. Martin Luther King’s speech prior to creating their own when Dr. King’s family sues him.¹⁴¹

¹³⁷ *Id.*

¹³⁸ See Costa, *supra* note 2. The authors note that the campaign spokesman for the Trump campaign stated that Melania Trump received help from a “team of writers [who] took notes on her life’s inspirations . . . [and her] immigrant experience and love for America shone through in her speech.” This statement conflicted with Melania’s statement before her speech, when she said, “I read it once over, and that’s all because I wrote it with as little help as possible.” See also John Ziegler, *Why Melania Trump’s Plagiarism of Michelle Obama REALLY Matters*, MEDIAITE (July 19, 2016, 5:18pm) <http://www.mediaite.com/online/why-melania-trumps-plagiarism-of-micelle-obama-really-matters/> (last visited September 22, 2016). Ziegler stated that “Melania told Matt Lauer that she basically wrote the speech herself,” and the speech was not vetted out of “incompetence and/or fear of making Trump’s wife look bad.”

¹³⁹ See 4-13 NIMMER, *supra* note 10, § 13.01 [B] (discussing how copying is established); *Fred Fisher*, 298 F. at 145 (creating the subconscious copying doctrine); and *Three Boys*, 212 F.3d at 481 (affirming the subconscious copying analysis of the lower court because and acknowledging “the difficulty of proving access and substantial similarity”).

¹⁴⁰ *Fred Fisher*, 298 F. at 148 (“Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick”).

¹⁴¹ See Transcript of Martin Luther King, Jr.’s “I have a Dream” Speech, AMERICAN RHETORIC, (last visited November 21, 2016) <http://www.americanrhetoric.com/speeches/mlkihavedream.htm>.

V. CONCLUSION

Copyright protection is afforded to many speeches and people refer to these famous speeches in countless music, writings, performances, etc.¹⁴² These speeches are remembered not only for their beautiful rhetoric but also for the expression of those ideas by the speaker. Mrs. Obama and Mrs. Trump spoke about the values imprinted on them by their parents—in almost identical expressions and terms.

This comment examined the elements needed to prevail on a copyright infringement claim and discussed the judicially-created subconscious copying doctrine. Then, it went on to apply the doctrine to the hypothetical Obama-Trump case and pointed out the criticism of the subconscious copying doctrine. Finally, it proposed that the subconscious copying doctrine should be applied to political speeches because without the doctrine, anyone could get away with copying a person's work by claiming they did not know of the other's work beforehand.

The doctrine provides an additional safeguard to those who create beautiful works to gain the well-deserved recognition and still bolsters creativity by continuing to hold that ideas are not copyrightable, just the exact expression of those ideas. Therefore, this incident should not go by the wayside and Mrs. Trump should be held accountable for her blatant copyright infringement of Mrs. Obama's powerful 2008 Democratic National Convention Speech.

¹⁴² See *Mister Maestro*, 224 F. Supp. at 101 (holding a speech given to an audience and recorded is not within the public domain and afforded copyright protection).