Entertainment Law

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Lawyers For The Talent

by Richard Dooling

!!! 27-Sep-2014 still need to add Denker v. Uhry and Campell v. Acuff Rose Music !!!

Infringement & Fair Use

Copying, Substantial Similarity, Parody

Infringement

Copyright is violated only if the prior work has been *copied.*

If I write an original song, then you come along, *copy* it, and publish it under your name, that's a copyright violation.

If I write an original song, and you just happen to INDEPENDENTLY create an identical song, even though you have never heard my song or read my music, I have no recourse against you under the copyright laws.

Therefore to prove copyright infringement, the copyright holder must prove that the accused infringers HAD ACCESS TO THE ORIGINAL WORK and COPIED it.

Judge Learned Hand put it this way:

> If 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 copyright it, others might not copy that poem, though they might of course copy Keats's . . .

To prove copyright infringement, the copyright holder must establish:

1. Ownership of a valid copyright.
2. Copying, which may be proved by direct or circumstantial evidence.

Bright Tunes Music Corp. v. Harrisongs Music, Ltd.

US Southern District New York (1976)

- Case on Google Scholar
- Case on Westlaw
- Case on Wikipedia.

One of the most famous copyright infringement suit of all time.

First listen to "He's So Fine,", a hit song composed by Ronnie Mack and performed by The Chiffons in the sixties.

Then listen to George Harrison's massive soulful hit "My Sweet Lord".

Now see if you can tell why the Chiffons sued? Five years of litigation ensued, resulting in a verdict for Mack and against Harrison. The case stands for the unsettling proposition that copyright infringement need not be intentional, and indeed may even be "unconscious" or take place in the "subconscious." Metaphysics meets copyright. When your client wrote her song, did she unintentionally infringe on lullaby her mother sang to her?

OWEN, District Judge.

This is an action in which it is claimed that a successful song, "My Sweet Lord," listing George Harrison as the composer, is plagiarized from an earlier successful song, "He's So Fine," composed by Ronald Mack, recorded by a singing group called the "Chiffons," the copyright of which is owned by plaintiff, Bright Tunes Music Corp.

'He's So Fine,' recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, "sol-mi-re," (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go "sol-la-do-la-*re*-do."

"My Sweet Lord," recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of "He's So Fine's" fourth repetition of motif B, "My Sweet Lord" has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition. The harmonies of both songs are identical.

> Fn. 6. Expert witnesses for the defendants asserted crucial differences in the two songs. These claimed differences essentially stem, however, from the fact that different words and number of syllables were involved. This necessitated modest alterations in the repetitions or the places of beginning of a phrase, which, however, has nothing to do whatsoever with the essential musical kernel that is involved.

George Harrison, a former member of The Beatles, was aware of "He's So Fine." In the United States, it was No. 1 on the billboard charts for five weeks; in England, Harrison's home country, it was No. 12 on the charts on June 1, 1963, a date upon which one of the Beatle songs was, in fact, in first position. For seven weeks in 1963, "He's So Fine" was one of the top hits in England.

According to Harrison, the circumstances of the composition of My "Sweet Lord" were as follows. Harrison and his group, which include an American black gospel singer named Billy Preston, were in Copenhagen, Denmark, on a singing engagement. There was a press conference involving the group going on backstage. Harrison slipped away from the press conference and went to a room upstairs and began "vamping" some guitar chords, fitting on to the chords he was playing the words, "Hallelujah" and "Hare Krishna" in various ways. During the course of this vamping, he was alternating between what musicians call a Minor II chord and a Major V chord.

At some point . . . he went down to meet with others of the group, asking them to listen, which they did, and everyone began to join in, taking first "Hallelujah" and then "Hare Krishna" and putting them into four part harmony. Harrison obviously started using the "Hallelujah," etc., as repeated sounds, and from there developed the lyrics, to wit, "My Sweet Lord," "Dear, Dear Lord," etc. In any event, from this very free-flowing exchange of ideas, with Harrison playing his two chords and everybody singing "Hallelujah" and "Hare Krishna," there began to emerge the My Sweet Lord text idea, which Harrison sought to develop a little bit further during the following week as he was playing it on his guitar. Thus developed motif A and its words interspersed with "Hallelujah" and "Hare Krishna."

> Fn. 8. These words ended up being a "responsive" interjection between the eventually copyrighted words of "My Sweet Lord." In "He's So Fine", the Chiffons used the sound "dulang" in the same places to fill in and give rhythmic impetus to what would otherwise be somewhat dead spots in the music.

Approximately one week after the idea first began to germinate, the entire group flew back to London because they had earlier booked time to go to a

recording studio with Billy Preston to make an album. In the studio, Preston was the principal musician. Harrison did not play in the session. He had given Preston his basic motif A with the idea that it be turned into a song, and was back and forth from the studio to the engineer's recording booth, supervising the recording "takes." Under circumstances that Harrison was utterly unable to recall, while everybody was working toward a finished song, in the recording studio, somehow or other the essential three notes of motif A reached polished form.

> "Q. [By the Court]: . . . you feel that those three notes . . . the motif A in the record, those three notes developed somewhere in that recording session?
>
> "Mr. Harrison: I'd say those three there were finalized as beginning there."
>
> * * * * * *
>
> "Q. [By the Court]: Is it possible that Billy Preston hit on those [notes comprising motif A]?
>
> "Mr. Harrison: Yes, but it's possible also that I hit on that, too, as far back as the dressing room, just scat singing."

Similarly, it appears that motif B emerged in some fashion at the recording session as did motif A. This is also true of the unique grace note in the second repetition of motif B.

* * *

The Billy Preston recording, listing George Harrison as the composer, was thereafter issued by Apple Records. The music was then reduced to paper by someone who prepared a "lead sheet" containing the melody, the words and the harmony for the United States copyright application.

Seeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of the fact that they were utilizing the He's So Fine theme. However, they in fact were, for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase . . . [The judge then noted that "even Harrison's own expert witness acknowledged that although the two motifs were in the public domain, their use here was so unusual as to make them unique.]

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of "He's So Fine?" I do not believe he did so deliberately. Nevertheless, it is clear that "My Sweet Lord" is the very same song as "He's So Fine" with different words, and Harrison had access to "He's So Fine." This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished. *Sheldon v. Metro-Goldwyn Pictures Corp.,* (2d Cir. 1936); *Northern Music Corp. v. Pacemaker Music Co., Inc.,* (S.D.N.Y. 1965).

Given the foregoing, I find for the plaintiff on the issue of plagiarism, and set the action down for trial on November 8, 1976 on the issue of damages and other relief as to which the plaintiff may be entitled. The foregoing constitutes the Court's findings of fact and conclusions of law.

So Ordered.

Selle v. Gibb

US Court of Appeals (7th Cir. 1984)

- case on Google Scholar
- [case on Westlaw] (http://lawschool.westlaw.com/shared/westlawRedirect.aspx?task=find
- Wikipedia.

CUDAHY, Circuit Judge.

The plaintiff, Ronald H. Selle, brought a suit against three brothers, Maurice, Robin and Barry Gibb, known collectively as the popular singing group, the Bee Gees, alleging that the Bee Gees, in their hit tune, "How Deep Is Your Love," had infringed the copyright of his song, "Let It End." The jury returned a verdict in plaintiff Selle's favor on the issue of liability in a bifurcated trial. The district court, Judge George N. Leighton, granted the defendants' motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. *Selle v. Gibb,* (N.D.Ill. 1983). We affirm the grant of the motion for judgment notwithstanding the verdict.

I

Selle composed his song, "Let It End," in one day in the fall of 1975 and obtained a copyright for it on November 17, 1975. He played his song with his small band two or three times in the Chicago area and sent a tape and lead sheet of the music to eleven music recording and publishing companies. Eight of the companies returned the materials to Selle; three did not respond. This was the extent of the public dissemination of Selle's song. More facts at *Selle v. Gibb* (N.D.Ill.1983).

Selle first became aware of the Bee Gees' song, "How Deep Is Your Love," in May 1978 and thought that he recognized the music as his own, although the lyrics were different. He also saw the movie, "Saturday Night Fever," the sound track of which features the song "How Deep Is Your Love," and again recognized the music. He subsequently sued the three Gibb brothers; Paramount Pictures Corporation, which made and distributed the movie; and Phonodisc, Inc., now known as Polygram Distribution, Inc., which made and distributed the cassette tape of "How Deep Is Your Love."

The Bee Gees are internationally known performers and creators of popular music. They have composed more than 160 songs; their sheet music, records and tapes have been distributed worldwide, some of the albums selling more than 30 million copies. The Bee Gees, however, do not themselves read or write music. In composing a song, their practice was to tape a tune, which members of their staff would later transcribe and reduce to a form suitable for copyrighting, sale and performance by both the Bee Gees and others.

In addition to their own testimony at trial, the Bee Gees presented testimony by their manager, Dick Ashby, and two musicians, Albhy Galuten and Blue Weaver, who were on the Bee Gees' staff at the time "How Deep Is Your Love" was composed. These witnesses described in detail how, in January 1977, the Bee Gees and several members of their staff went to a recording studio in the Chateau d'Herouville about 25 miles northwest of Paris. There the group composed at least six new songs and mixed a live album. Barry Gibb's testimony included a detailed explanation of a work tape which was introduced into evidence and played in court. This tape preserves the actual process of creation during which the brothers, and particularly Barry, created the tune of the accused song while Weaver, a keyboard player, played the tune which was hummed or sung by the brothers. Although the tape does not seem to preserve the very beginning of the process of creation, it does depict the process by which ideas, notes, lyrics and bits of the tune were gradually put together.

Following completion of this work tape, a demo tape was made. The work tape, demo tape and a vocal-piano version taken from the demo tape are all in the key of E flat. Lead sheet music, dated March 6, 1977, is in the key of E. On

March 7, 1977, a lead sheet of "How Deep Is Your Love" was filed for issuance of a United States copyright, and in November 1977, a piano-vocal arrangement was filed in the Copyright Office.

The only expert witness to testify at trial was Arrand Parsons, a professor of music at Northwestern University who has had extensive professional experience primarily in classical music. He has been a program annotator for the Chicago Symphony Orchestra and the New Orleans Symphony Orchestra and has authored works about musical theory. Prior to this case, however, he had never made a comparative analysis of two popular songs. Dr. Parsons testified on the basis of several charts comparing the musical notes of each song and a comparative recording prepared under his direction.

According to Dr. Parsons' testimony, the first eight bars of each song (Theme A) have twenty-four of thirty-four notes in plaintiff's composition and twenty-four of forty notes in defendants' composition which are identical in pitch and symmetrical position. Of thirty-five rhythmic impulses in plaintiff's composition and forty in defendants', thirty are identical. In the last four bars of both songs (Theme B), fourteen notes in each are identical in pitch, and eleven of the fourteen rhythmic impulses are identical. Both Theme A and Theme B appear in the same position in each song but with different intervening material.

Dr. Parsons testified that, in his opinion, "the two songs had such striking similarities that they could not have been written independent of one another." He also testified that he did not know of two songs by different composers "that contain as many striking similarities" as do the two songs at issue here. However, on several occasions, he declined to say that the similarities could only have resulted from copying.

Following presentation of the case, the jury returned a verdict for the plaintiff on the issue of liability, the only question presented to the jury. Judge Leighton, however, granted the defendants' motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. He relied primarily on the plaintiff's inability to demonstrate that the defendants had access to the plaintiff's song, without which a claim of copyright infringement could not prevail regardless how similar the two compositions are. Further, the plaintiff failed to contradict or refute the testimony of the defendants and their witnesses describing the independent creation process of "How Deep Is Your Love." Finally, Judge Leighton concluded that "the inferences on which plaintiff relies is not a logical, permissible deduction from proof of 'striking similarity' or substantial similarity; it is 'at war with the undisputed facts,' and it is inconsistent with the proof of nonaccess to plaintiff's song by the Bee Gees at the time in question." 567 F.Supp. at 1183.

II

Both we and the district court must be reluctant to remove an issue from the purview of the jury on either a directed verdict or a judgment notwithstanding the verdict. Nonetheless, we have a duty to determine whether there is sufficient evidence to support the position of the nonmoving party, in this case, the plaintiff. The standards applicable to a motion for judgment notwithstanding the verdict and to a directed verdict are, of course, the same. All the evidence, taken as a whole, must be viewed in the light most favorable to the nonmoving party. This evidence must provide a sufficient basis from which the jury could have reasonably reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts (citations omitted).

III

Selle's primary contention on this appeal is that the district court misunderstood the theory of proof of copyright infringement on which he based his claim. Under this theory, copyright infringement can be demonstrated when, even in the absence of any direct evidence of access, the two pieces in question are so strikingly similar that access can be inferred from such similarity alone. Selle argues that the testimony of his expert witness, Dr. Parsons, was sufficient evidence of such striking similarity that it was permissible for the jury, even in the absence of any other evidence concerning access, to infer that the Bee Gees had access to plaintiff's song and indeed copied it.

In establishing a claim of copyright infringement of a musical composition, the plaintiff must prove:

1. ownership of the copyright in the complaining work;
2. originality of the work;
3. copying of the work by the defendant, and
4. a substantial degree of similarity between the two works.

The only element which is at issue in this appeal is proof of copying; the first two elements are essentially conceded, while the fourth (substantial similarity) is, at least in these circumstances, closely related to the third element under plaintiff's theory of the case.

Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement.... However, because direct evidence of copying is rarely available, the plaintiff can rely upon circumstantial evidence to prove this essential element, and the most important component of this sort of circumstantial evidence is proof of

access.... The plaintiff may be able to introduce direct evidence of access when, for example, the work was sent directly to the defendant (whether a musician or a publishing company) or a close associate of the defendant. On the other hand, the plaintiff may be able to establish a reasonable possibility of access when, for example, the complaining work has been widely disseminated to the public....

If, however, the plaintiff does not have direct evidence of access, then an inference of access may still be established circumstantially by proof of similarity which is so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded. If the plaintiff presents evidence of striking similarity sufficient to raise an inference of access, then copying is presumably proved simultaneously, although the fourth element (substantial similarity) still requires proof that the defendant copied a substantial amount of the complaining work. The theory which Selle attempts to apply to this case is based on proof of copying by circumstantial proof of access established by striking similarity between the two works.

One difficulty with plaintiff's theory is that no matter how great the similarity between the two works, it is not their similarity *per se* which establishes access; rather, their similarity tends to prove access in light of the nature of the works, the particular musical genre involved and other circumstantial evidence of access. In other words, striking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access.

As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was *available* to the alleged infringer. As noted, two works may be identical in every detail, but, 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. Therefore, if the plaintiff admits to having kept his or her creation under lock and key, it would seem logically impossible to infer access through striking similarity. Thus, although it has frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone....

The greatest difficulty perhaps arises when the plaintiff cannot demonstrate any direct link between the complaining work and the defendant but the work has been so widely disseminated that it is not unreasonable to infer that the defendant might have had access to it....

In granting the defendants' motion for judgment notwithstanding the ver-

dict, Judge Leighton relied primarily on the plaintiff's failure to adduce any evidence of access and stated that an inference of access may not be based on mere conjecture, speculation or a bare possibility of access. 567 F.Supp. at 1181.

Thus, in *Testa v. Janssen,* 492 F.Supp. 198, 202-03 (W.D.Pa. 1980), the court stated that "[t]o support a finding of access, plaintiffs' evidence must extend beyond mere speculation or conjecture. And, while circumstantial evidence is sufficient to establish access, a defendant's opportunity to view the copyrighted work must exist by a reasonable possibility — not a bare possibility" (citations omitted).

Judge Leighton thus based his decision on what he characterized as the plaintiff's inability to raise more than speculation that the Bee Gees had access to his song. The extensive testimony of the defendants and their witnesses describing the creation process went essentially uncontradicted, and there was no attempt even to impeach their credibility. Judge Leighton further relied on the principle that the testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction or inconsistency with other evidence on the particular point at issue....

Judge Leighton's conclusions that there was no more than a bare possibility that the defendants could have had access to Selle's song and that this was an insufficient basis from which the jury could have reasonably inferred the existence of access seem correct. The plaintiff has failed to meet even the minimum threshold of proof of the possibility of access and, as Judge Leighton has stated, an inference of access would thus seem to be "at war with the undisputed facts." 567 F.Supp. at 1183.

IV

The grant of the motion for judgment notwithstanding the verdict might, if we were so minded, be affirmed on the basis of the preceding analysis of the plaintiff's inability to establish a reasonable inference of access. This decision is also supported by a more traditional analysis of proof of access based only on the proof of "striking similarity" between the two compositions. The plaintiff relies almost exclusively on the testimony of his expert witness, Dr. Parsons, that the two pieces were, in fact, "strikingly similar." Yet formulating a meaningful definition of "striking similarity" is no simple task, and the term is often used in a conclusory or circular fashion.

Sherman defines "striking similarity" as a term of art signifying "that degree of similarity as will permit an inference of copying even in the absence of proof of access...." Sherman, *Musical Copyright Infringement,* at 84 n. 15. Nimmer states that, absent proof of access, "the similarities must be so striking as to

preclude the possibility that the defendant independently arrived at the same result." Nimmer, *Copyright*, at 13-14.

"Striking similarity" is not merely a function of the number of identical notes that appear in both compositions.... An important factor in analyzing the degree of similarity of two compositions is the uniqueness of the sections which are asserted to be similar.

If the complaining work contains an unexpected departure from the normal metric structure or if the complaining work includes what appears to be an error and the accused work repeats the unexpected element or the error, then it is more likely that there is some connection between the pieces.... If the similar sections are particularly intricate, then again it would seem more likely that the compositions are related. Finally, some dissimilarities may be particularly suspicious. *See, e.g., Meier Co. v. Albany Novelty Manufacturing Co.,* 236 F.2d 144, 146 (2d Cir.1956) (inversion and substitution of certain words in a catalogue in a "crude effort to give the appearance of dissimilarity" are themselves evidence of copying); *Blume v. Spear,* 30 F. 629, 631 (S.D.N.Y.1887) (variations in infringing song were placed so as to indicate deliberate copying); Sherman, *Musical Copyright Infringement*, at 84-88. While some of these concepts are borrowed from literary copyright analysis, they would seem equally applicable to an analysis of music.

The judicially formulated definition of "striking similarity" states that "plaintiffs must demonstrate that 'such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.' " *Testa* (W.D.Pa.1980).

> To prove that certain similarities are "striking," plaintiff must show that they are the sort of similarities that cannot satisfactorily be accounted for by a theory of coincidence, independent creation, prior common source, or any theory other than that of copying. Striking similarity is an extremely technical issue — one with which, understandably, experts are best equipped to deal.

Sherman, *Musical Copyright Infringement*, at 96.

Finally, the similarities should appear in a sufficiently unique or complex context as to make it unlikely that both pieces were copied from a prior common source....

As noted, the plaintiff relies almost entirely on the testimony of his expert witness, Dr. Arrand Parsons. The defendants did not introduce any expert testimony, apparently because they did not think Parsons' testimony needed to be refuted. Defendants are perhaps to some degree correct in asserting that Parsons, although eminently qualified in the field of classical music theory, was not equally qualified to analyze popular music tunes. More significantly, however,

although Parsons used the magic formula, "striking similarity," he only ruled out the possibility of independent creation; he did not state that the similarities could only be the result of copying. In order for proof of "striking similarity" to establish a reasonable inference of access, especially in a case such as this one in which the direct proof of access is so minimal, the plaintiff must show that the similarity is of a type which will preclude any explanation other than that of copying.

In addition, to bolster the expert's conclusion that independent creation was not possible, there should be some testimony or other evidence of the relative complexity or uniqueness of the two compositions. Dr. Parsons' testimony did not refer to this aspect of the compositions and, in a field such as that of popular music in which all songs are relatively short and tend to build on or repeat a basic theme, such testimony would seem to be particularly necessary. We agree with the Sixth Circuit which explained that "we do not think the affidavit of [the expert witness], stating in conclusory terms that 'it is extremely unlikely that one set [of architectural plans] could have been prepared without access to the other set,' can fill the gap which is created by the absence of any direct evidence of access." *Scholz Homes, Inc. v. Maddox,* 379 F.2d 84, 86 (6th Cir.1967).

To illustrate this deficiency more concretely, we refer to a cassette tape ... and the accompanying chart.... These exhibits were prepared by the defendants but introduced into evidence by the plaintiff. The tape has recorded on it segments of both themes from both the Selle and the Gibb songs interspersed with segments of other compositions as diverse as "Footsteps," "From Me To You" (a Lennon-McCartney piece), Beethoven's 5th Symphony, "Funny Talk," "Play Down," and "I'd Like To Leave If I May" (the last two being earlier compositions by Barry Gibb). There are at least superficial similarities among these segments, when played on the same musical instrument, and the plaintiff failed to elicit any testimony from his expert witness about this exhibit which compared the Selle and the Gibb songs to other pieces of contemporary, popular music. These circumstances indicate that the plaintiff failed to sustain his burden of proof on the issue of "striking similarity" in its legal sense — that is, similarity which reasonably precludes the possibility of any explanation other than that of copying.

The plaintiff's expert witness does not seem to have addressed any issues relating to the possibility of prior common source in both widely disseminated popular songs and the defendants' own compositions. At oral argument, plaintiff's attorney stated that the burden of proving common source should be on the defendant; however, the burden of proving "striking similarity," which, by definition, includes taking steps to minimize the possibility of common source, is on the plaintiff. In essence, the plaintiff failed to prove to the requisite degree that the similarities identified by the expert witness — although perhaps

"striking" in a non-legal sense — were of a type which would eliminate any explanation of coincidence, independent creation or common source, including, in this case, the possibility of common source in earlier compositions created by the Bee Gees themselves or by others. In sum, the evidence of striking similarity is not sufficiently compelling to make the case when the proof of access must otherwise depend largely upon speculation and conjecture.

Therefore, because the plaintiff failed both to establish a basis from which the jury could reasonably infer that the Bee Gees had access to his song and to meet his burden of proving "striking similarity" between the two compositions, the grant by the district court of the defendants' motion for judgment notwithstanding the verdict is affirmed.

> At oral argument, plaintiff's attorney analyzed the degree of similarity required to establish an inference of access as being in an inverse ratio to the quantum of direct evidence adduced to establish access. While we have found no authoritative support for this analysis, it seems appropriate. In this case, it would therefore appear that, because the plaintiff has introduced virtually no direct evidence of access, the degree of similarity required to establish copying in this case is considerable.

NOTES *Selle v. Gibb*, (7th Cir. 1984)

Ronald Selle composed "Let It End" in the fall of 1975, secured copyright, and played it a few times with his band in Chicago. Selle sent the tape and sheet music to record companies, with no luck.

Then Selle saw the hit movie *Saturday Night Fever* and heard "How Deep Is Your Love?" by the Bee Gees. Selle brought an action against the Bee Gees alleging copyright infringement and claiming that the Bee Gees must have copied Selle's "Let It End" in composing "How Deep Is Your Love".

Plaintiff Selle called only one expert: Dr. Arrond Parsons, a professor of classical music. Parsons had never done song comparisons.

The jury decided in favor of plaintiff Selle, but the judge granted judgment notwithstanding the verdict. Why? No access! The district court said that **proof of copying is essential.** If no direct evidence of access, then inference of access may be established by striking similarity. But circumstantial evidence of access may be rebutted by evidence that the work was created independently, or that both copies are based on a common source in the public domain.

> Two works may be identical in every detail, but, 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. Therefore, if the plaintiff admits to having kept his or her creation under lock and key, it would seem logically impossible to infer access through striking similarity. Thus, although it has frequently been written that striking similarity alone can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.

Substantial Similarity: Books, Plays, Movies

Nichols v Universal (2d Cir. 1930). Judge Learned Hand compared a play, *Abie's Irish Rose*, with a movie *The Cohens and the Kellys* in a copyright suit.

Copyright in literary works "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." Instead, Judge Hand formulated "the abstractions test":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended . . . . Nobody has ever been able to fix that boundary, and nobody ever can. In some cases the question has been treated as though it were analogous to lifting a portion out of the copyrighted work; but the analogy is not a good one, because though the skeleton is a part of the body, it pervades and supports the whole. In such cases we are rather concerned with the line between expression and what is expressed."

Fair Use

- Fair Use (very short "official" explanation of fair use).

> Fair use is a DEFENSE to copyright infringement. It allows the taking of some part of a copyrighted work without the need to secure the author's permission. Examples of fair use include: news reporting, criticism, comment, teaching . . . parody, scholarship, or research.

Pocket Lawyer For Filmmakers, 2nd Edition, page 245.

Copyright Statute

107 -Limitations on exclusive rights: Fair use

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Who decides whether use of a copyrighted work was fair?

The court does. AFTER the fact. Meaning that the accused infringer has already been hauled into court by the copyright holder. Attorneys fees (kaching!) This why copyright CLEARANCES and LICENSING are essential BEFORE the movie is made. Clearances are designed to keep the artist from being sued in the first place.

Harper & Row v. The Nation (Sct. 1985)

The Watergate Scandall forced Richard Nixon to resign as President of the United States in 1974. Vice President Gerald Ford became president, and thirty days later granted Nixon a full pardon for any crimes he may have committed while in office.

The decision caused an outrcy in the press and public indignation from citizens (particularly Democracts) who wanted Nixon tried, convicted, and possibly sent to prison.

Five years later, Ford published *A Time to Heal: The Autobiography of Gerald R. Ford.* and was marketed in part as Ford's chance to explain his decision to pardon Nixon.

In March 1979, weeks before Ford's publisher *Harper & Row* planned to publish *A Time To Heal,* an undisclosed source provided The Nation Magazine with Ford's unpublished manuscript.

Working directly from the bootleg copy of the pages, an editor of The Nation produced a short piece entitled "The Ford Memoirs-Behind the Nixon Pardon."

The Nation piece was timed to "scoop" an article scheduled shortly to appear in Time Magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. ("Harper"). When Time found out about The Nation article, Time canceled its agreement.

Harper sued The Nation for copyright infringement and won.

On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material.

The Supreme Court reversed. Writing for the majority Justice Sandra Day O'Connor acknowledged that the Second Circuit was correct to note that Ford's book was "news" and mostly "facts," the kind of material that militates in favor of a fair use finding. But O'Connor placed greater emphasis on the author's publishing rights under 106:

> The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

The Court applied the four prongs of the 107 fair use as follows:

1. The purpose and character of the use:

The Court agreed with the Second Circuit that The Nation's purpose in publishing the excerpts was ostensibly "news reporting," and that 107 lists news

reporting as one of the exemplary activities tending toward a finding of fair use. But the court insisted that the issue was not what constitutes "news," but whether a claim of newsreporting is a valid fair use defense to an infringement of *copyrightable expression*."

As for the *character* of The Nation's use, the trial court found that The Nation knowingly exploited a purloined manuscript. The Supreme Court said that: "Fair use presupposes 'good faith' and 'fair dealing,' " which was decidedly lacking in The Nation's conduct.

2. The nature of the copyrighted work:

The Court characterized "A Time to Heal" as an unpublished historical narrative or autobiography. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy, but the Court again stressed: "The fact that a work is unpublished is a critical element of its 'nature.' "

> The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

3. Amount and Substantiality of the Portion Used.

As the Court put it:

> In absolute terms, the words actually quoted were an insubstantial portion of "A Time to Heal." The District Court, however, found that "[T]he Nation took what was essentially the heart of the book."

4. the effect of the use upon the potential market for or value of the copyrighted work.

The Court found that "this last factor is undoubtedly the single most important element of fair use." And The Nation's advanced publication of excerpts destroyed the market for first serial rights, because when Time Magazine learned of The Nation's publication it canceled the deal, and with good reason.

Headline cases

- *Harper & Row v. The Nation,* 471 US 439 (1985). Wikipedia
- *Campbell AKA Luke Skywalker v. Acuff-Rose Music, Inc.* 510 US 569 (1994). Wikipedia.
- *Bright Tunes Music Corp. v. Harrisongs Music,* 420 F.Supp. 177 (SDNY 1976) *My Sweet Lord* at Wikipedia.

- *Selle v. Gibb,* 741 F.2d 896 (1984). Wikipedia.

- *Denker v. Uhry,* 820 F. Supp. 722 (SDNY 1992). *New York Times*. matter](http://itlaw.wikia.com/wiki/Noncopyrightable_subject_matter).

Reference/Footnote Cases

- *Selle v. Gibb,* 741 F.2d 896 (1984). Wikipedia.

- *Denker v. Uhry,* 820 F. Supp. 722 (SDNY 1992). *New York Times*.
- *Beal v. Paramount Pictures,* 806 F. Supp. 963 (ND Ga 1992). Noncopyrightable subject matter.

Totally Optional Readings and Viewings

- Shepard Fairey and the Obama "Hope" Poster.
- The New Yorker: Who Owns This Image?
- Woody Allen's Midnight In Paris: Copyright Infringement? (In the film, Owen Wilson's character says: "The past is not dead. Actually, it's not even past." In *Requiem for a Nun*, Faulkner wrote: "The past is never dead. It's not even past." Faulkner Literary Rights argued this amounted to copyright infringement, but Sony countered by claiming de minimis and "fair use").
- *Woods v. Universal* (SDNY 1996)(*12 Monkeys* scene featuring Bruce Willis being interrogated in a futuristic chair infringes on drawing called *Neomechanical Tower (Upper) Chamber*).
- Article about *Woods v. Universal.*

More Totally Optional Reading & Viewing

- An Overview of the Elements of a Copyright Infringement Cause of Action - Part I: Introduction and Copying, by Jason E. Slowan
- Robin Thicke (*Blurred Lines*) vs. Marvin Gaye: Independent Creation vs. Subconscious Copying
- Larry Lessig TED Talk on User Generated Content.
- Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song
- Beastie Boys Fight Online Parody of 'Girls'
- NYTimes on 5Pointz Graffiti Site Lawrence Lessig Sues Over Takedown of YouTube Video Featuring Phoenix Song
- Beastie Boys Fight Online Parody of 'Girls'

- Marvin Gaye's Children Use Audio Mashup to Prove 'Blurred Lines' Is Infringing
- Documentary Filmmakers' Statement Of Best Practices In Fair Use (see *Pocket Lawyer* page 246).
- Code Of Best Practices In Fair Use For Online Video (see *Pocket Lawyer* page 246).