

# Entertainment Law

Lawyers For The Talent

Richard Dooling

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# Lawyers For The Talent

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## Infringement

Copying, Substantial Similarity, Parody

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

If Mark Musician writes an original song, then Sally Songwriter comes along, *copies* it, and publishes it under her name, that's a copyright violation.

If Mark Musician writes an original song, and Sally Songwriter just happens to *independently* create an identical song, then Mark Musician has no recourse against Sally Songwriter under the copyright laws.

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 copyrights 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 of constituent elements of the work that are original.

[Feist Publications v. Rural Telephone Service Co.](#) (US 1991)

## Access & Substantial Similarity

Direct evidence of copying is rare, so courts rely instead on circumstantial evidence to prove copying, usually by allowing the plaintiff to prove that the works are substantially similar and that the defendant had *access* to the work.

Access is usually a crucial component of any copyright claim, because similarity alone is usually not enough. Creating a substantially similar work is not a copyright violation unless the defendant *copied* plaintiff's work.

Plaintiff has the burden of proving that the defendant copied original elements from the plaintiff's copyrighted work. The plaintiff may show

the defendant copied from the work by showing by a preponderance of the evidence that the *defendant had access* to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and original elements of the plaintiff's work.

[U.S. Courts for the Ninth Circuit Manual of Model Civil Jury Instructions: 17.15 Copying—Access and Substantial Similarity.](#)

### Striking Similarity

If the plaintiff is unable to prove that the defendant had access to plaintiff's work, then sometimes the court may allow plaintiff to prove that the two works are so *strikingly similar* that defendant must have had access. However courts are careful to point out that proof of 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 relating to access.

See [Selle v. Gibb](#) below.

*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 suits 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 a lullaby her mother sang to her?

### Excerpts from *Bright Tunes* opinion

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.

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.

## Access

### *Selle v. Gibb*

US Court of Appeals (7th Cir. 1984)

- [case on Google Scholar](#)
- [case on Westlaw](#)
- [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.”

## 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 verdict, 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](#), (W.D.Pa. 1980), the court stated that:

To 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.

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."

## 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.

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*.

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* (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

Copyright plaintiffs must prove that alleged infringers had access to plaintiff’s copyrighted work *and* must prove that the infringing work is “substantially similar” to the copyrighted work. The test for “substantial similarity” is “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Warner Bros. Inc. v. ABC* (2d Cir. 1981).

In *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.”

We can see a similar analysis applied in the following case.

*Denker v. Uhry*

US District Court, SD New York (1992)

- [Case on Google Scholar](#)
- [Case on Westlaw](#).

MUKASEY, District Judge.

In these copyright infringement actions, plaintiff Henry Denker, author of the novel *Horowitz and Mrs. Washington* and the play of the same title, sues defendant Alfred Uhry, author of the play *Driving Miss Daisy* and the screenplay of the same title, and others involved in the production and distribution of the play and film versions of *Driving Miss Daisy*. Defendants have moved jointly for summary judgment on the issue of improper appropriation. For the reasons set forth below, defendants’ motion is granted.

I.

Plaintiff is a respected and prolific author. He has written 24 novels, more than 1,000 scripts for radio and television, screenplays for three feature films and teleplays for 12 network specials. Seven of his plays have been produced on



Broadway and two at the Kennedy Center for Performing Arts in Washington D.C. Plaintiff's *Horowitz and Mrs. Washington*, the subject of these lawsuits, originally was published as a novel in 1979 by G.P. Putnam's Sons and then as a condensed book by Reader's Digest in 1980. Later rewritten for the stage, *Horowitz and Mrs. Washington* had a run of seven performances at the Joshua Golden Theater on Broadway in April 1980.

Alfred Uhry, a defendant in both actions, has been writing lyrics, plays and screenplays since 1958. *Driving Miss Daisy*, his Pulitzer Prize winning play, first was produced in New York by defendant Playwrights Horizons in 1987 ... Adapted for the screen by Uhry in 1988, *Driving Miss Daisy* won four Academy Awards including Best Picture and Best Screenplay ...

#### ***A. Horowitz and Mrs. Washington***

Plaintiff's works depict the relationship between Samuel Horowitz, a crusty, bigoted, 72-year-old Jewish man and Harriet Washington, his black physical therapist. The play is set in New York City during July 1977. The action in the novel takes place over a few months sometime in the late 1970's.

Early in the novel, and at the beginning of the play, Horowitz, recovering from a stroke, is brought home from the hospital to his Upper West Side apartment by his son Marvin Hammond. Immediately apparent is Horowitz's hostility to the non-white, non-Jewish world. We learn at the outset that he believes, notwithstanding his doctor's insistence to the contrary, that his stroke was precipitated by an earlier mugging at the hands of a gang of "black bastards," and that his doorman, Juan, who refuses to accept a tip because of Horowitz's illness, is really a "shrewd little Puerto Rican ... setting him up for bigger tips."

Upon arriving at his apartment, Horowitz is horrified to learn that Marvin and his sister Mona Fields have hired Harriet Washington, a "schvartzer," to assist in his rehabilitation. "You can't trust them!" he warns his son. "They mug me, slash me, give me a stroke...." Marvin, however, is adamant, and Horowitz relents when he learns the alternative is a nursing home.

The next few sequences in both novel and play depict Mrs. Washington's patient but firm attempts to overcome Horowitz's hostility and proceed with his physical therapy. Mrs. Washington, to whom Horowitz refers as the "Black Hitler," insists that Horowitz perform a variety of tasks designed to rehabilitate his hand and leg, including cutting his food, crumpling newspapers, shuffling cards, walking, and buttoning his clothes. The nature of Denker's work and its characters is illustrated by the following exchange from the play ...

WASHINGTON: Lift your foot like this. Didn't they teach you at the hospital?

HOROWITZ: And if I try I'll be able to dance in the ballet? (He barely raises it.) There! Better?

WASHINGTON: No!

HOROWITZ: Tell me, my dear Mrs. Washington, you ever had the ambition to run a concentration camp?

WASHINGTON: Tomorrow will be better. And now for your occupational therapy.

HOROWITZ: My occupation I already know. I used to be in wholesale paper and twine.

WASHINGTON: Manual dexterity, Mr. Horowitz. Proprioceptive Neuromuscular Facilitation.

HOROWITZ: There is nothing worse than an educated negro.

Despite Horowitz's offensive manner, Mrs. Washington refuses to quit because the job allows her to help her widowed daughter who is raising two children.

As the novel and play progress, Horowitz increasingly is impressed by Mrs. Washington's integrity and determination, and his attitude towards her gradually softens. During a visit to Central Park the two talk of the loss of their respective spouses. Later Horowitz, who is saddened by eating alone in the dining room where he used to eat with his wife, asks Mrs. Washington if she would join him for dinner. When Mrs. Washington agrees to have coffee while Horowitz eats, it is the first time she sees him smile. Eventually, as the friendship develops Horowitz's racial remarks become more humorous than hostile and he uses them, albeit awkwardly and insensitively, in an attempt to express his growing admiration for Mrs. Washington.

Later on in the two works, New York City erupts in rioting and looting during a city-wide electrical blackout. The following morning, Mrs. Washington returns to Horowitz's apartment visibly upset. Mrs. Washington's grandson Conrad, after listening to his grandmother's recent complaints of being unable to sleep because of the heat, tried to steal an air conditioner and was arrested. Moved by the story, Horowitz calls his son Marvin, a lawyer, and demands he help Conrad. When Mrs. Washington expresses her appreciation, Horowitz replies, it is "[l]ittle enough to do for a friend."

A lawyer from Marvin's firm secures Conrad's release with "just a warning." In the novel, Horowitz, Mrs. Washington and her grandchildren celebrate by having

dinner at a French restaurant and attending a Shakespeare play in Central Park. In both the novel and play, Horowitz gives Conrad a gold coin that he received from his father on his bar mitzvah. He tells Conrad that when he is angered by his inability to be helpful to his mother and grandmother the coin will serve as a reminder that the answer is hard work.

A week later, Conrad is stabbed. In the novel, Horowitz rushes to Harlem Hospital, assuming that Conrad was injured in the course of a drug deal. There he finds Mrs. Washington, sitting on a chair next to Conrad's bed, crying. In a rage, Horowitz calls the boy an "animal" who "belongs in a cage."... In both novel and play, the scene ends with Mrs. Washington telling Horowitz that Conrad was stabbed when two men attempted to steal the gold coin. In the novel, Horowitz apologizes. In the play, Mrs. Washington storms out in anger.

[Later that night, tired, alone and embarrassed, Horowitz deviates from his low cholesterol diet and orders a corned beef sandwich, coleslaw, pickles and a beer from a delicatessen. He then suffers a mild heart attack. Driven by fear, and helped by Mrs. Washington, Horowitz experiences remarkable recovery.]

At the end of the novel and play, Mrs. Washington informs Horowitz that she must leave to care for other patients. Horowitz gives Mrs. Washington "her pinochle winnings"—a sizable gift for her grandchildren's education—and the two vow to remain friends. The novel's final scene occurs almost one year after Horowitz's stroke. Unbeknownst to Horowitz, Mrs. Washington watches as he walks to and from synagogue to honor the anniversary of his wife's death.

### ***B. Driving Miss Daisy***

Uhry's *Driving Miss Daisy* tells the story of Daisy Werthan, an elderly, Jewish woman, and her 25-year relationship with Hoke Coleburn, her black chauffeur. Set in Atlanta between 1948 and 1973, *Driving Miss Daisy* is a distinctively southern story. Daisy is a refined southern woman, who, like Horowitz, is strong-willed and struggles to maintain her independence in the face of advancing age. Hoke, a product of the segregated south, is uneducated but possessed of a strong sense of dignity and, together with Daisy, adjusts to advancing age and changing times.

Uhry's works begin with Daisy, 72 years old, inadvertently putting her car in reverse and crashing into her neighbor's yard. In the next scene in the film, and the first in the play, Daisy and Boolie, her 40-year-old son, argue about whether Daisy should continue to drive. Despite his mother's protests, Boolie hires Hoke Coleburn as her chauffeur.

Initially, Daisy ignores Hoke. She walks and takes public transportation rather

than being driven. When Hoke attempts to perform household chores to relieve his boredom, Daisy demands that he stop. In both the movie and the play, Hoke eventually convinces Daisy to allow him to drive her to the supermarket. Daisy begins barking out orders from the moment she gets into the car. She accuses Hoke of speeding although he is driving 19 miles an hour in a 35-mile-an-hour zone; she becomes panic stricken when Hoke decides to take a more direct route to the supermarket than the one Daisy is used to; she demands he park the car in the shade; and she takes the keys when entering the supermarket. While Daisy is shopping Hoke calls Boolie to tell him he drove Daisy to the market: “Yassuh, only took six days. Same time it take the Lawd to make the worl’.”

In a subsequent scene, Daisy telephones Boolie early in the morning and insists that he come to the house immediately. When Boolie arrives, Daisy triumphantly displays evidence of a missing can of salmon as proof that Hoke is stealing from her. Shortly thereafter, Hoke arrives for work, and before either Daisy or Boolie can mention the missing salmon, Hoke hands Daisy a new can to replace the salmon he had eaten the previous day. An embarrassed Daisy quickly bids Boolie good-bye.

We next see Daisy tending to her husband’s grave on what is referred to in the screenplay as a “full, fuzzy-green, warm morning.” She asks Hoke, who is standing nearby, to put a pot of azaleas on Leo Bauer’s grave. Hoke cannot locate the Bauer grave and, deeply embarrassed, is forced to admit to Daisy that he is unable to read. Daisy, formerly an elementary school teacher, teaches Hoke to sound out the name Bauer. Throughout the works Daisy helps Hoke learn to read and write....

A few years later, we see Hoke and Boolie discussing the new car Boolie bought for Daisy. Hoke tells Boolie he bought Daisy’s old car from a dealer. Although he could have saved money by buying it directly from Daisy, Hoke tells Boolie “yo’ mama in my business enough as it is. I ain’ studyin’ makin’ no monthly car payments to her. Dis mine the regular way.”

In the film we next see Daisy and Hoke on the way to Mobile, Alabama to visit Daisy’s relatives. While they are picnicking on the side of the road two Alabama state troopers pull over. The troopers inspect Hoke’s drivers license and the car registration. Walking away, one comments: “An old nigger and an old Jew woman takin off down the road together. Now that is one sorry sight.” The other replies: “I’ll tell you one sorrier. They’re sitting in a Cadillac and I’m sittin’ next to you.”

Later in the journey, Hoke tells Daisy that he has to stop the car to “make water.” When Daisy tells him to wait until they arrive. Hoke drives on a minute and then abruptly stops the car. He tells Daisy quietly but firmly: “I ain’ no dog and I ain’ no chile and I ain’ jes’ a back of the neck you look at while you goin’ wherever you want to go. I am a man nearly seventy-two years old and I know when my bladder full and I gettin’ out dis car and goin’ off down the de road like I got to do. And

I'm takin' de car key dis time. And that's de end of it."

We next see Hoke in Boolie's office at the Werthan Company telling Boolie that Boolie's cousin Jeannette Lewis has offered him a job. Hoke indicates that it "got him thinking." When Boolie offers a raise to sixty-five dollars a week, Hoke counters with seventy-five and Boolie agrees. As Hoke leaves Boolie's office he tells him it "feel good" to have "people fightin' over you."

After an unstated passage of time, we join a frightened Daisy alone in her home during a winter ice storm. To Daisy's surprise, Hoke shows up for work. Because they are unable to drive, Daisy asks Hoke to keep her company for the day. He agrees and lights a fire. While Daisy "sits contented in her chair" the focus shifts to Boolie who is calling to check up on Daisy. He offers to visit her once the storm subsides, but Daisy declines because Hoke is with her. When Daisy describes Hoke as "very handy," Boolie is startled and remarks that he has never heard his mother "say loving things about Hoke before."

Some years later, Hoke and Daisy are caught in a traffic jam on the way to synagogue. Hoke, who has asked a police officer, informs Daisy that the synagogue was bombed. Distressed, Daisy vehemently insists that it must have been the conservative or orthodox synagogue, rather than the reform synagogue she attends, that was the intended target. Hoke replies: "It doan' matter to them people. A Jew is a Jew to them folks. Jes like light or dark we all the same nigger." Daisy begins to cry.

In the next sequence, Boolie tells Daisy that he cannot accompany her to a United Jewish Appeal dinner at which Martin Luther King will be speaking. Boolie explains that his business would be threatened if associates believed he supported Martin Luther King, and suggests that Daisy invite Hoke. On the way to the dinner Daisy mentions the ticket to Hoke. Hoke, offended by the last-minute invitation, refuses: "Next time you ask me someplace, ask me regular.... Things changin', but they ain't change all that much."

Several years pass. Hoke arrives at the house to find Daisy, who is 90, overwrought. She is searching frantically for her students' homework and insists that she is late for school. After calling Boolie, Hoke calms Daisy down. Daisy eventually regains her composure and tells Hoke that he is her best friend. The scene fades with Daisy and Hoke silently holding hands.

The final scenes take place on Thanksgiving two years later. In the film, we first see the outside of Daisy's home with a real estate agent's "For Sale" sign on the lawn and a "sold" sticker pasted over the sign. Boolie, 65 years old, is walking through the house when Hoke, 85, enters. The two briefly walk through the house and then leave to visit Daisy who has been living at a nursing home. When they arrive the

patients are finishing their dinner. Daisy is sitting at a table vacantly staring into space when Hoke and Boolie join her. When Daisy does not respond, Boolie starts to make some forced small talk with Hoke. Daisy, who either has been listening or has just become lucid, tells Boolie that Hoke has come to see her not him and sends Boolie to “charm the nurses.”

Daisy, regaining for a moment her feisty manner, ensures that Boolie is still paying Hoke. Hoke notices that Daisy has not eaten her pumpkin pie. The play and movie close with Hoke carefully cutting the pie and feeding it to her.

## II.

### A. *Theme*

The summary judgment standard is easier stated than applied. There is no bright line rule to distinguish between idea and expression, and in comparing works of fiction the distinction “is especially elusive.” *Hoehling v. Universal City Studios*, (2d Cir. 1980) ...

In the case at hand ..., there are indeed similarities between the works. Each is about an elderly, white Jewish person, who, in the face of advancing age and resulting loss of independence, requires the assistance of a black helper, and after initial resistance, develops a friendship with the helper. Beyond this level of abstraction, however, the works are markedly dissimilar.

*Horowitz and Mrs. Washington*, which spans one month in the play and several months in the novel, tells the story of the crass, opinionated Horowitz, who with Mrs. Washington’s help quickly overcomes his prejudice and the physical handicaps and threatened loss of independence caused by age. Evident throughout the work are racial tensions as they occur in the cultural and ethnic mix of New York City. In addition to Horowitz’s overt racism, such tensions manifest themselves in the urban problems that form the background of the work such as the street crime that is the cause of much of Horowitz’s fear and which has taken the life of Mrs. Washington’s son-in-law.

By contrast, *Driving Miss Daisy* spans 25 years in the deep south and although plaintiff relies heavily on the fact that it too depicts the development of a friendship between an elderly Jewish character and a black helper, *Driving Miss Daisy* is defined by its setting. The political and social climate in the post-war South is evident in all aspects of the work from the character’s personalities— Daisy’s refinement, Hoke’s lack of education and initial subservience—to the events that cause that relationship to develop—the bombing of the synagogue, the racism of

the state troopers, Martin Luther King's speech. Similarly, because of the 25-year span of the work, the theme of aging is expressed differently. Whereas Horowitz is handicapped by the sudden onset of illness and eventually regains his independence, in *Driving Miss Daisy* the audience sees Hoke and Daisy age slowly over time with the inevitable result that at the works' close Daisy, unlike Horowitz, is unable to overcome the physical effects of her advanced age.

Plaintiff is correct in his assertion that racism is a major theme in both *Horowitz and Mrs. Washington* and *Driving Miss Daisy*. However, the expression of this theme differs. Horowitz is knowingly and overtly racist, believing that the men who assaulted him and the residents of Harlem who took advantage of the blackout to loot and riot are typical of all blacks. Eventually, through his interaction with Mrs. Washington, he learns "that you c[an] no more make a general rule about blacks than you c[an] about Jews." Daisy, by contrast, resists all suggestions that she harbors racist attitudes. When Boolie compares her resistance to Hoke to the racism of other southern whites, she responds: "Why, Boolie! What a thing to say! I'm not prejudiced! Aren't you ashamed?" Yet, evident in instances such as Daisy's inability to invite Hoke to the Martin Luther King dinner, is that Daisy has to some extent been affected by her environment. The overt racism in *Driving Miss Daisy* comes from outside the relationship in the attitude of the state troopers and the bombing of synagogue and forms the background of the work. *Driving Miss Daisy* is concerned primarily with Daisy's growing awareness of her own attitudes and eventual ability to recognize Hoke as a friend, set against this background. In essence, unlike plaintiff's works, Uhry's works address the racism in a society in addition to the racism in a particular person.

### **B. Total Concept and Feel**

The works also differ in total concept and feel; such a difference provides a proper basis for determining that a defendant's work does not infringe a plaintiff's. Despite its serious themes, *Horowitz and Mrs. Washington* is principally a comedy. Horowitz, although a bigot, is a comedic character. His racial and ethnic slurs, interaction with Mona, temper tantrums and social commentary on topics ranging from detente to *The New York Times* are used by Denker for comedic purposes as well as to establish Horowitz's ignorance and insensitivity. By the end of the works, as evident in the rehearsal for Mona's arrival, even the normally proper Mrs. Washington joins in some of Horowitz's antics. By contrast, *Driving Miss Daisy* is more of a poignant and sentimental work. Conspicuously absent in defendants' works is the television situation comedy tone so prevalent in *Horowitz and Mrs. Washington*.

### C. Plot

Plaintiff attempts to overcome these differences in theme, setting and tone by pointing to certain discrete similarities between the works. The purported similarities, however, either involve unprotected *scenes a faire*— “scenes that necessarily result from the choice of a setting or situation,” *Walker*—or are not similarities at all.

Plaintiff points out that each of the works opens with an “accident” befalling the main character. Notwithstanding plaintiff’s recommendation that the Court “take judicial notice of the common use of the term ‘cerebral accident’ to refer to a stroke”, to claim that the events are similar in that both are “accidents” is less an argument than a pun; the events are distinct not only as expression but also in the ideas they express. Horowitz is mugged and subsequently suffers a stroke while Daisy inadvertently drives her car into her neighbor’s yard. These are not similar events. Further, the underlying ideas are dissimilar. Although in both *Horowitz and Mrs. Washington* and *Driving Miss Daisy* these events give rise to the need for a helper, Horowitz overcomes the physical effects of the stroke whereas Daisy’s accident is the first manifestation of the aging process that ultimately destroys her independence. Thus, at most plaintiff has alleged that Uhry used a somewhat similar plot device to that employed in *Horowitz and Mrs. Washington*, which does not constitute infringement.

Similarly, plaintiff maintains that the plot device used by Uhry to depict Hoke’s devotion to Daisy is identical to that used by plaintiff to depict Mrs. Washington’s loyalty to Horowitz. In plaintiff’s work, Mrs. Washington travels to Horowitz’s apartment despite a citywide power outage and climbs 11 flights of stairs to do so. In what plaintiff characterizes as a remarkably similar scene, Hoke reports for work despite an ice storm and hazardous driving conditions. Although plaintiff is correct in the sense that in both works the helper demonstrates loyalty by traveling to work at some personal risk, such generalized plot devices, like the so-called “accidents” discussed above, are not entitled to copyright protection. In *Smith v. Weinstein*, (SDNY), *aff’d without op.*, (2d Cir. 1984), both plaintiff’s screenplay and defendant’s allegedly infringing movie included scenes wherein convicts escaped during a rodeo. In granting summary judgment for defendant, Judge Sofaer reasoned that “the development of the rodeo as an escape vehicle is protectible, but only at a level that particularizes the general into characters, details, and events.” *Id.* Here defendant Uhry’s use of a plot device that differs as to “characters, details, and events” does not amount to infringement. Plaintiff is not entitled to copyright protection for all instances of misfortune that befall the elderly or all demonstrations of dedication by a servant or helper.

I fail also to see a similarity in expression between Mrs. Washington surreptitiously



watching Horowitz walk to synagogue at the end of *Horowitz and Mrs. Washington* and Hoke visiting Daisy at the nursing home at the end of *Driving Miss Daisy*. Although both are methods of expressing the helper's devotion, it is clear that this idea is expressed in dissimilar fashion. In fact, the differences underscore the authors' divergent treatment of the age theme. Mrs. Washington can watch from afar because she has helped Horowitz regain his independence and her assistance is no longer needed. Uhry, however, depicts age as depriving Daisy of her independence. Hoke, himself unable to drive because of failing eyesight, must feed his friend who, because of physical infirmities caused by age, is unable to care for herself.

Plaintiff relies on several other similarities between the works that amount, if anything, to similarities in general themes or ideas. For instance, citing Daisy teaching Hoke to read and write and Horowitz giving Mrs. Washington a check to further the education of her grandchildren, plaintiff argues that "striking is the fact that they [Daisy and Horowitz] assist both Hoke and Mrs. Washington in ways that are educational." Plaintiff also points to the fact that both Hoke and Mrs. Washington previously had worked for Jewish families. In *Driving Miss Daisy* Uhry's only use of this fact is when Hoke tells Boolie that he worked for Judge Stone for seven years and finds that despite what people say, Jews are quite generous. By contrast, it is evident in plaintiff's works that Mrs. Washington has a genuine appreciation for Jewish culture. While in the employ of the Rosengartens, or in the play the Schencks, Mrs. Washington took the time not only to learn to cook traditional dishes which she serves to Horowitz but also to learn about Jewish culture. Plaintiff uses this as a foil for Horowitz's racism. For instance, early in the play, Mrs. Washington tells Horowitz a story about a *tzaddik*, a righteous scholar, which she learned while working for the Schencks. Horowitz, angry at what he perceives as Mrs. Washington's flippant reference to the *tzaddik*, explains that a *tzaddik* is "a scholar, a philosopher, with enormous love of all God's creatures, even the smallest." Mrs. Washington retorts: "And the blackest?" Again, although plaintiff may have established that the works used like themes or ideas, here the helper's previous exposure to Jews and Judaism, the expression differs.

The remainder of the similarities alleged by plaintiff involve *scenes a faire*—incidents or events that necessarily follow from a common theme or setting. It is well-accepted that copyright protection, does not extend "to 'stock' themes commonly linked to a particular genre." *Walker* ...

Because, based on the differences discussed above, no reasonable juror could find the works substantially similar and because the few similarities between *Horowitz and Mrs. Washington* and *Driving Miss Daisy* involve non-copyrightable elements of plaintiff's work, summary judgment on the issue of improper appropriation of the work as a whole is warranted.

#### D. Characters

Nor has plaintiff established that the characters in *Driving Miss Daisy* are substantially similar to the characters in *Horowitz and Mrs. Washington*. The protection afforded characters depicted in a creative work is limited ...

Ultimately, then, the inquiry, whether applied to plot or characters, is the same: the court must determine whether defendant has so invaded plaintiff's work as to appropriate plaintiff's expression. Expression, as it must, remains for the most part undefined, except only as it is distinguished from uncopyrightable ideas or *scènes à faire*, concepts which themselves resist precise definition or easy application ...

Plaintiff contends that the following characters are substantially similar: (1) Daisy Werthan and Samuel Horowitz; (2) Hoke Coleburn and Harriet Washington; (3) Boolie Werthan and Marvin Hammond; and (4) Florine Werthan and Mona Fields.

Daisy and Horowitz share certain traits. Elderly, Jewish and strong-willed, they both mistrust their black helpers and actively resist encroachment on their independence. These shared traits, however, are expressed in different ways. Horowitz, aggressive, opinionated and overbearing, is, at his most presentable, a cantankerous old man. His overt racism and emotional outbursts pervade plaintiff's work. Daisy, by contrast, is a refined southern woman. Unlike Horowitz, Daisy avoids expressing her prejudices—certainly less pronounced in any event than Horowitz's—and in fact denies that she is prejudiced at all. Further, her reserve hinders her ability to express emotion. For instance, although Horowitz is able quickly to refer to Mrs. Washington as a friend, it takes Daisy much longer either to develop or perceive such feelings for Hoke. It is not until 18 years after the relationship begins, when Daisy is threatened with the loss of her relationship with Hoke due to her failing health, that she can do more than refer to Hoke as "handy" and actually call him her friend. Daisy, reserved and unemotional, and Horowitz, combative and comedic, are by no means substantially similar.

Nor are Mrs. Washington and Hoke substantially similar. Mrs. Washington, educated and self-assured, is able to withstand and counter Horowitz's repeated verbal assaults from the outset. On the other hand, Hoke, the victim of segregation, is uneducated and lacking self-confidence, and *Driving Miss Daisy* is, to some extent, the story of his development as well as Daisy's. Hoke slowly develops self-confidence and progresses gradually from his initial subservience to being able to stand up to Daisy as in the scenes where he insists on stopping the car and taking the key on the way to Mobile and later when he declines Daisy's invitation to the Martin Luther King speech. The similarities referred to by plaintiff—that they both are black, are hired to render assistance to an elderly Jewish person, develop a friendship with their employer and refer to having some kind of relationship with their children and grandchildren—are broad,

unprotectible character outlines; they mark where the similarities end

Because plaintiff has not established any similarities between the characters in *Horowitz and Mrs. Washington* and the characters in *Driving Miss Daisy* beyond unprotectible ideas and broad character outlines, summary judgment on the issue of infringement of characters is appropriate.

For the reasons stated above, summary judgment in both actions is warranted on the issue of improper appropriation, and the complaints are dismissed.

SO ORDERED.

- [New York Times on Denker v. Uhry case.](#)

## Screenplays and Substantial Similarity

### *Quirk v. Sony*

United States District Court (N.D. CA 2013)

- [case on Google Scholar](#)
- [case on Westlaw](#)

Order granting motions for summary judgment.

Richard Seeborg, District Judge.

### I. Introduction

In 1998, plaintiff Joe Quirk published a novel entitled *Ultimate Rush*, about a San Francisco package delivery service messenger, who carried out athletic and daring feats on rollerblades, and became involved in perilous situations with criminals relating to the contents of packages he was delivering. Quirk considered the action novel well-suited for adaption into a movie, and secured an option contract from Warner Brothers to that end. Although Warner Brothers commissioned two separate screenplays to be written from the book, it ultimately never pursued the project, and its option lapsed.

In 2010, Quirk heard from his publisher, friends and acquaintances that a movie entitled *Premium Rush* was in production. Set in New York, *Premium Rush* tells the story of a bicycle messenger pursued by a rogue cop, who is trying to obtain the mysterious contents of a package the messenger has been hired to deliver. Quirk concluded that *Premium Rush* represented an unauthorized adaptation of his novel, and brought this action for copyright infringement against the screenwriter

and director, and various entities involved in the production of the movie. Quirk also asserted a so-called *Desny* claim,<sup>[1]</sup> contending that defendants had breached an implied contract to pay for use of his work, regardless of whether their movie includes material that infringes his rights under copyright law.

In two separate motions, defendants now seek summary judgment on the copyright and *Desny* claims. In Quirk's view, there are sufficient similarities between his novel and the movie, particularly if traced through the intervening screenplays, to give rise to a strong inference that defendants had his novel and/or the screenplays commissioned by Warner Brothers in hand when writing and making their movie. Quirk proceeds, however, from an incorrect underlying legal premise. He believes that if he can show that defendants "adapted" his book into the movie, liability in copyright and/or under *Desny* will follow, *a fortiori*. Copyright, however, protects expression, not ideas, and even assuming defendants used Quirk's novel as a starting point, and "copied" from it as they worked, the final film does not include substantial similarities to any copyrightable expressions of the novel. "Copying deleted or so disguised as to be unrecognizable is not copying." *See v. Durang*, (9th Cir. 1983). While a *Desny* claim does allow protection for ideas in narrow circumstances, even assuming defendants had a copy of Quirk's novel in hand, liability does not follow for a number of reasons explained below. Accordingly, defendants' motions will both be granted.

### III. Background

Quirk wrote "*The Ultimate Rush*" between 1994 and 1997. He describes it as an "action-driven" novel, always intended for possible adaptation into a movie, "due to its highly-cinematic features." The novel was published in March of 1998 and released in paperback in October of 1998. Although the sales of the novel were modest, by Quirk's own admission, it was extensively reviewed and commented on in the media, and was widely available commercially.

Prior to publication, Quirk retained an agent, Matthew Snyder of California Artists Agency ("CAA"), who distributed pre-release copies and synopses of the novel to various persons and entities throughout the movie industry, seeking a film development deal. Eventually, Warner Brothers bought an option. During the term of that option, Warner Brothers commissioned two separate writers to prepare screenplays from the novel. The project never went forward, however, and the option eventually expired. Warner Brothers is the copyright holder in the two scripts it commissioned, and is not a party to this action.

The movie *Premium Rush* was written and directed by defendant David Koepps, and co-written by former defendant John Kamps. Koepps and Kamps allegedly

both have “specialized” in adapting the works of other writers into feature films. Separately and jointly they have written screenplays for many well-known films that were adaptations of other works. *Premium Rush* was released in 2012, after this litigation was underway.

#### IV. Discussion

##### A. Copyright claims

The complaint asserts four claims for relief sounding in copyright—direct infringement, contributory infringement, vicarious infringement, and declaratory relief. The sole basis of defendants’ challenge to all four counts is their contention that, “plaintiff has failed to adduce sufficient evidence of substantial similarity of copyright-protected material between his novel and Defendants’ motion picture.”

The analysis here is guided by the Ninth Circuit’s opinion in *Funky Films v. Time Warner*, (9th Cir. 2006), in which the court upheld a summary judgment ruling that the HBO series “Six Feet Under” bore no “substantial similarity” to the plaintiff’s screenplay for a proposed series called “The Funk Parlor,” which had previously been provided to an HBO executive. As explained in *Funky Films*, a plaintiff bringing a claim for copyright infringement must demonstrate “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, (US 1991). Here, as Quirk’s ownership in the copyright of his novel is undisputed, he need only demonstrate a triable issue of fact whether the defendants “copied anything that was ‘original’ to” the work. *Id.*

Except in cases with direct evidence of copying, “proof of infringement involves fact-based showings that the defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar.’” *Three Boys Music Corp. v. Bolton*, (9th Cir. 2000). For purposes of this motion, defendants have not challenged that they had access to Quirk’s novel, so the only question presented is whether the two works are substantially similar.

“When the issue is whether two works are substantially similar, summary judgment is appropriate if no reasonable juror could find substantial similarity of ideas and expression.” *Kouf v. Walt Disney Pictures & Television*, (9th Cir. 1994).

While summary judgment is not highly favored on the substantial similarity issue in copyright cases, the question may often be decided as a matter of law. Indeed, the Ninth Circuit has frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity. Thus, while Quirk quite

reasonably stresses that summary judgment on substantial similarity is to be approached with caution, it plainly is available in appropriate circumstances.

The substantial-similarity test contains an extrinsic and intrinsic component. At summary judgment, courts apply only the extrinsic test; the intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury. A plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.

The extrinsic test is objective and it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. The focus is on the presence or absence of articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in the two works. In applying the extrinsic test, the court compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.

"Protectable expression includes the specific details of an author's rendering of ideas." *Metcalf v. Bochco*, (9th Cir. 2002). Scenes à faire, however, which flow naturally from generic plot-lines, are not protectable. *See id.* The court "must take care to inquire only whether the protectable elements, standing alone, are substantially similar." *Cavalier v. Random House*, (9th Cir. 2002) (citations omitted). In particular, the court must "filter out and disregard the non-protectable elements in making [the] substantial similarity determination." *Id.*

## 1. The adaptation process

The central premise of Quirk's oppositions to these motions is that a comparison between his novel and defendants' movie reveals the latter to be an "adaptation" of the former. Quirk offers the expert declaration of Bruce Gelfand to explain the nature and extent of changes that screenwriters often make when adapting an underlying novel into a movie, and to provide an opinion that *Premium Rush* bears the hallmarks of having been created from *Ultimate Rush* through an entirely typical process of adaptation. The fundamental flaw in Quirk's analysis is that he effectively assumes he has a viable claim in copyright and/or under *Desny* as long as he can prove the movie is an "adaptation" of the novel in the sense described by Gelfand.

Gelfand defines adaptation as "a process of dramatic refinement of an underlying original work, to create an effective new work *utilizing the strengths of the original work*." (Emphasis added). While Gelfand acknowledges that adaptation is itself a craft requiring skill and creativity, he repeatedly suggests that one advantage to

creating movie scripts through adaptation rather than as wholly original works of authorship is to save time, money, and effort. Gelfand suggests that even where elements of a movie are radically different from an underlying novel, and perhaps are even improved, the adaptors still “stand on the shoulders” of the original author.

However accurate Gelfand’s description may be as to how movie scripts often are adapted from underlying novels, it does not reflect the appropriate legal standard for determining when a movie is a copy of (or, more precisely, a derivative work made from) an underlying novel within the meaning of copyright law. As he correctly notes at one point, “a piece of written work might have started as a copy of another work, but been changed so much that it can no longer be said to be substantially similar.” Although Gelfand offers that concession only in the context of disputing defendants’ claim that *Premium Rush* was “independently created,” it demonstrates that in his analysis, a movie could be an “adaptation” of a novel while not retaining substantial similarities that would give rise to copyright liability. The law, however, is clear: “Copying deleted or so disguised as to be unrecognizable is not copying.” *See v. Durang*, (9th Cir. 1983). The law is also clear that “ideas contained in a copyrighted work may be freely used so long as the copyrighted expression is not wholly appropriated.” *Allen v. Academic Games League of America, Inc.* (9th Cir. 1996).

By defining “adaptation” so broadly as to include a new work that merely utilizes “strengths” of the underlying work (rather than elements of protectable *expression*), and by considering new works with no substantial similarity to underlying novels as being within the meaning of “adaptation,” Gelfand has offered an analysis that addresses the wrong factual question. If Gelfand’s comparisons between the works are fair, and the conclusions he draws logically sound, then perhaps a reasonable inference could be drawn that the script of *Premium Rush* was developed through an “adaptation” process that began with Quirk’s novel (and/or one or both of the Warner scripts) as a starting point. The process by which *Premium Rush* was written is, though, tangentially relevant, at best. It would, for instance, bear on *willfulness*. The threshold question, however, and one which Gelfand’s mode of analysis is ill-designed to address, is whether the end product of the *Premium Rush* movie is “substantially similar” to Quirk’s novel, as that term is used in copyright law.

While Gelfand correctly states, “the goal of the analysis is to determine whether there are substantial similarities in the works,” he goes on to assert that “in the context of a novel-to-film adaptation, the issue here is what kinds of similarities between a novel and a film would tend to show that the screenplay film was copied (including unpermitted adaptation).” Thus, Gelfand has abandoned the correct inquiry (is there substantial similarity?) in favor of attempting to show that



defendants *used* Quirk's novel and/or the Warner screenplays as inspiration and as a shortcut around what would have been required by truly independent creation. Even assuming Gelfand is factually correct that *Premium Rush* was "adapted" from Quirk's novel in exactly the manner he believes occurred, and even assuming that the features he identifies as similarities are evidence of such an adaptation process, it simply does not automatically follow that there is liability under copyright law (or even under *Desny*, for reasons discussed below).<sup>[^3]</sup>

## 2. Intermediate scripts

Quirk's original opposition, and Gelfand's analysis, both rely heavily on drawing comparisons between either or both of the two Warner Brothers scripts and *Premium Rush*, or, in many instances between those scripts and *early drafts* of the *Premium Rush* script. Such comparisons naturally further Quirk's interest in attempting to show that the movie was made through an adaptation process that began with the novel, and progressed through multiple scripts to a final product. Neither the Warner Brothers scripts nor any preliminary drafts of the *Premium Rush* script, however, are relevant to the issues presented by this motion.

As noted in a prior order and not disputed by Quirk here, he lacks standing to pursue a copyright claim based on alleged infringement of any expression found in either of the Warner Brothers scripts that is not present in his novel. While Quirk does have standing to pursue copyright claims with respect to any protectable elements of expression in the Warner Brothers scripts *also* appearing in his novel, there is no reason for him to point to the scripts rather than directly to the novel.

Preliminary draft scripts of *Premium Rush* are similarly irrelevant to this motion. Quirk has not pleaded a claim that draft scripts constituted infringing works, even assuming such a claim might theoretically be possible. To argue the drafts are relevant, Quirk relies on [Sega Enters. Ltd. v. Accolade, Inc., \(9th Cir. 1992\)](#) for the proposition that copyright law "does not distinguish between unauthorized copies of a copyrighted work on the basis of what stage of the alleged infringer's work the unauthorized copies represent." In so doing, he overlooks the fact that in *Sega* the legality of "intermediate copying" of computer code was directly at issue. The court expressly distinguished cases, like this one, involving alleged copying of books, scripts, or literary characters, where "the eventual lawsuit alleged infringement only as to the final work of the defendants." Quirk also points to [Walker v. Time Life Films, Inc., \(2d Cir. 1986\)](#), but as his own quotation from that case shows, preliminary drafts were potentially relevant only "to show that defendants had gained access to plaintiff's work, borrowed from it, and later made changes in order to conceal that borrowing." *Id.* at 52. Access is *not* at issue here, as discussed above.



Additionally, even if defendants in this instance “borrowed and then made changes to conceal that borrowing,” there is no liability in copyright unless they failed to make enough changes to conceal the borrowing. Once again, “copying deleted or so disguised as to be unrecognizable is not copying.” *See v. Durang*, (9th Cir. 1983). In *Durang*, summary judgment had been granted for defendants based on lack of substantial similarity. On appeal, the plaintiff argued he should have been allowed further discovery to obtain “early drafts of defendant’s play on the theory they might reflect copying from plaintiff’s play that was disguised or deleted in later drafts.” *Id.* at 142. The Ninth Circuit rejected that argument (and others) and affirmed. *Id.* Thus, even assuming the preliminary drafts of *Premium Rush* scripts would be admissible to show access, and that they include indications of copying that was later deleted or revised, the only relevant question at this juncture is whether the final movie as filmed, edited, and released contains matter substantially similar to protectable elements of Quirk’s novel.[^4]

### 3. Inverse ratio

Quirk contends that because defendants have not challenged access for purposes of this motion, he is entitled to the benefit of the so-called “inverse ratio rule.” *See Swirsky v. Carey*, (9th Cir. 2004) (holding that the degree of similarity that a plaintiff must establish is reduced when there is evidence that a defendant had extensive access to the plaintiff’s work). On reply, defendants argue that the inverse ratio rule should *not* be applied because Quirk has the burden to show access, and mere allegations in his complaint are not sufficient to raise a triable issue of fact on that point. Defendants fail to recognize that because they expressly disclaimed any challenge to that element of the claim, the burden never shifted to Quirk to come forward with evidence in support of his allegations. *See Celotex* (moving party “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact.”) Defendants’ moving papers plainly state that they “are not moving for summary judgment on the issue of access at this time.” Accordingly, Quirk has the better argument that the inverse ratio rule can and should be applied to his benefit for purposes of this motion, and that he need only show a somewhat lesser degree of similarity to prevail.[^5] As discussed below, however, even under a lower standard, there is an insufficient showing of substantial similarity.

### 4. Substantial similarity

Quirk’s novel tells the story of Chet, a rollerblading messenger in San Francisco

who is wrongly suspected of murdering a fellow messenger and who is being pursued by members of a criminal enterprise. The murder took place after Chet and his fellow messenger had become involved in delivering packages as part of a sprawling insider trading conspiracy involving investment bankers, Chinese drug lords, Italian mafia, a corrupt police officer, and a courier dispatcher. The dispatcher was central to the scheme, and selected Chet to make the deliveries that led to his involvement in the peril.

The novel includes elements such as Chet's use of computer hacking skills to uncover and expose the conspiracy, his psychological issues resulting from the traumatic death of his parents and his brother's drug addiction, his friendship with a disabled computer hacker roommate, and his romance with a bisexual punk musician skateboarder. The story unfolds over the course of many days in a linear narrative told from Chet's point of view. The book takes advantage of the unique settings of San Francisco, including scenes involving the city's hills, specific areas, cable cars, and the BART system. Quirk himself characterizes a dominant theme in the book as "the friction between the privileged and unempowered" which "is played out physically in the streets, [and] the unempowered win."

*Premium Rush* presents one afternoon in the life of Wilee, a New York bicycle messenger, who is attempting to deliver a package that, unknown to him for much of the story, contains a "Hawala ticket." The ticket can be exchanged for cash, and is used among some in the Chinese community to transfer money that cannot be easily traced. A corrupt police officer learns about the ticket, and the delivery in progress, from Chinese gaming operators to whom he owes a large gambling debt. The officer determines to steal the ticket, and begins chasing Wilee through the streets of New York.

The two works differ greatly in many large and small details as well as in their overall mood, style, and structure. In his supplemental comparison that focuses solely on the book and the final movie product, Quirk has nonetheless managed to set out some 35 pages of alleged substantial similarities. Review of that listing, however, reveals that Quirk is relying on subjective and often highly unfair *characterizations* of material in the book and the movie to create highly strained purported "similarities."

Examples include Quirk's insistence that the dispatcher characters in the two works are highly similar, while pointing only to generalized traits and negative behaviors. Moreover, despite purporting to limit his comparison to the book and the final movie, Quirk's supplemental filing resorts to arguing that in earlier drafts of the film, the dispatcher had "near-identical personal habits" to the character in the book. Quirk contends that by the final film, the dispatcher "had become a more funny/less abrasive South Asian-American jerk, so that a well-known South

Asian-American actor/comedian (Aasif Mandvi) could be used in the role.” This is an admission that the dispatch character was *changed* from the character created by Quirk, and it again reveals Quirk’s underlying premise that he can prevail merely by showing that the movie was adapted from the book. If the movie character evolved from one greatly resembling the book character into one with fewer commonalities, that might indeed support an inference that the book served as a source for the movie. It has no bearing, however, on whether the character in the final film is substantially similar to the character in the book, under principles applicable in copyright law.

Another example arises in Quirk’s contention that the presence of “Chinese gangsters” in both works represents a point of substantial similarity. Those elements, however, are far too generalized and generic to support an infringement claim. Quirk’s characterizations notwithstanding, the “Chinese gangsters” also play very different roles in the two works. In the book, the gangsters are among the antagonists chasing the messenger hero and threatening his life. In the movie, the gangsters are antagonistic to the corrupt policeman who is chasing and threatening the messenger—they are not the messenger’s enemy, but rather the enemy of his enemy.

Quirks’ comparisons also often misstate matters to create an exaggerated sense of the degree of similarity. Quirk describes the opening scenes of his book as including a depiction of Chet, maneuvering “through the city skillfully and brakeless, challenged by changing street lights,” and he asserts that the beginning of the movie shows Wilee doing the same. Chet, however, is on rollerblades which are described as in fact *including* heel brakes, which Chet uses, and shows another character how to use. Chet’s streetlight challenge at the outset involves him needing to time the start of his descent down a steep hill perfectly to catch all the green lights. His waiting for the precise moment to start is a significant part of the scene. Wilee faces no such challenge; he merely runs one red light. Thus the only real connection is the extremely broad similarity that both works have scenes near the beginning where the hero messenger maneuvers through the city “skillfully.”

Finally, in a particularly strained comparison, Quirk equates an incident in his book where the Chinese gangsters kidnap Chet’s love interest and hold her hostage, with the fact that the movie depicts Wilee’s bicycle being taken to a police impound lot while he is being transported to the hospital after an accident. Quirk asserts that the corrupt policeman “seized” the bike, when in fact it appeared to have been impounded as a matter of routine police procedure, carried out by other members of the police force. In any event, Quirk’s description of these two very different events as both being “antagonists take a hostage as leverage with [Chet/Wilee]” is emblematic of how tortured the attempt to find substantial similarity between the works becomes. A bicycle impounded after an accident, even if done at the

direction of a corrupt police officer who has been pursuing the hero, is simply not the same idea, much less the same expression, as the kidnapping of the hero's love interest by Chinese gangsters.

Quirk's remaining points of comparison virtually all suffer from the same or similar flaws. Selective and/or distorted characterizations of any two things can, of course, produce points of similarities. A blue whale is much like a hamster with respect to all the mammalian features they share. Yet a hamster is more like a sparrow than a whale, if one focuses on size, or the likelihood of finding one in the ocean, rather than whether the creatures under comparison are both mammals. The fact that a hamster bears some important features in common with whales, others with sparrows, and yet others with both, does not necessarily make a hamster "substantially similar" to either a whale or a sparrow.

Upon filtering out all the non-protectable elements and disregarding characterizations not fairly supported by the two works, Quirk simply has not pointed to sufficient commonalities of expression from which a reasonable fact-finder could conclude the movie and the book contain substantially similar protectable expression. Accordingly, summary judgment on the copyright claims is warranted.

[The *Desny* claim raised by Quirk is reprinted in the Idea Protection chapter.]

## 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. Attorney's fees (ka-ching!). 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* (US 1985)**

- [case at Google Scholar](#)
- [case at Westlaw](#)
- [case at Wikipedia](#)

The Watergate Scandal 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 outcry in the press and public indignation from citizens (particularly Democrats) 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.

## Parody & Fair Use

*Campbell v. Acuff-Rose Music, Inc.*

United States Supreme Court (1994)

- [case on Google Scholar](#)
- [case at Westlaw](#).
- [case at Wikipedia](#).
- [Listen to Roy Orbison’s “Pretty Woman”](#).
- [Listen to Two Live Crew’s parody of “Pretty Woman”](#).

JUSTICE SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew’s commercial parody of Roy Orbison’s song, “Oh, Pretty Woman,” may be a fair use within the meaning of the Copyright Act § 107.

Although the District Court granted summary judgment for 2 Live Crew, the Court of Appeals reversed, holding the defense of fair use barred by the song's commercial character and excessive borrowing.

Because we hold that a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand.

## I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. ... Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work...."

On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song.

Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'"

Nonetheless, in 1989, 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement.

The District Court granted summary judgment for 2 Live Crew, reasoning that the commercial purpose of 2 Live Crew's song was no bar to fair use; that 2 Live Crew's version was a parody, which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song" is; that 2 Live Crew had taken no more than was necessary to



“conjure up” the original in order to parody it; and that it was “extremely unlikely that 2 Live Crew’s song could adversely affect the market for the original.”

The District Court weighed these factors and held that 2 Live Crew’s song made fair use of Orbison’s original.

The Court of Appeals for the Sixth Circuit reversed and remanded. Although it assumed for the purpose of its opinion that 2 Live Crew’s song was a parody of the Orbison original, the Court of Appeals thought the District Court had [failed to emphasize] that “every commercial use ... is presumptively ... unfair,” *Sony Corp. of America v. Universal City Studios, Inc.* (1984),. and it held that “the admittedly commercial nature” of the parody “requires the conclusion” that the first of four factors [nature of the use] relevant under the statute weighs against a finding of fair use.

Next, the Court of Appeals determined that, by “taking the heart of the original and making it the heart of a new work,” 2 Live Crew had, qualitatively, taken too much. Finally, after noting that the effect on the potential market for the original (and the market for derivative works) is “undoubtedly the single most important element of fair use,” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, (1985), the Court of Appeals faulted the District Court for “refusing to indulge the presumption” that “harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses.” In sum, the court concluded that its “blatantly commercial purpose ... prevents this parody from being a fair use.”

We granted certiorari ... to determine whether 2 Live Crew’s commercial parody could be a fair use.

## II

It is uncontested here that 2 Live Crew’s song would be an infringement of Acuff-Rose’s rights in “Oh, Pretty Woman,” under the Copyright Act ... but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, “To promote the Progress of Science and useful Arts. . . .” U.S. Const., Art. I, § 8, cl. 8.

For as Justice Story explained:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and

must necessarily borrow, and use much which was well known and used before.

In *Folsom v. Marsh*, (CCD Mass. 1841), Justice Story distilled the essence of law and methodology from the earlier cases:

look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible:

§ 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 non-profit 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.

Congress meant § 107 "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common-law tradition of fair use adjudication.... The fair use doctrine thus "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend* (1990).

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row*; and *Sony*.... The text employs the terms "including" and "such as" in the preamble paragraph

to indicate the “illustrative and not limitative” function of the examples given, § 101; see *Harper & Row, supra*, at 561, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.

## A

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). This factor draws on Justice Story’s formulation, “the nature and objects of the selections made.” ... The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” ... Although such transformative use is not absolutely necessary for a finding of fair use, *Sony, supra*, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, see, e. g., *Sony, supra*, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

This Court has only once before even considered whether parody may be fair use, and that time issued no opinion because of the Court’s equal division.... Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107....

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson’s Court of Appeals dissent, as “a song sung alongside another.” ... Modern dictionaries accordingly describe a parody as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought

and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. ... If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing....

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, see *Harper & Row*, 471 U. S., at 561. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Here, the District Court held, and the Court of Appeals assumed, that 2 Live Crew’s “Pretty Woman” contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew’s song copy the original’s first line, but then “quickly degenerat[e] into a play on words, substituting predictable lyrics with shocking ones . . . [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them.” ... Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song “was clearly intended to ridicule the white-bread original” and “reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.” ... Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew’s song, it assumed for purposes of its opinion that there was some.

We have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

- *Bleistein v. Donaldson Lithographing Co. (1903)* (circus posters have copyright protection).

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that "every commercial use of copy-righted material is presumptively . . . unfair. . . ." *Sony*. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. 471

U. S., at 561; House Report, p. 66. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.” *Harper & Row, supra*, at 592 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that “[n]o man but a blockhead ever wrote, except for money.” 3 Boswell’s Life of Johnson 19 (G. Hill ed. 1934).

*Sony* itself called for no hard evidentiary presumption. There, we emphasized the need for a “sensitive balancing of interests,” 464 U. S., at 455, n. 40, noted that Congress had “eschewed a rigid, bright-line approach to fair use,” ... and stated that the commercial or nonprofit educational character of a work is “not conclusive,” *id.*, at 448-449, but rather a fact to be “weighed along with other[s] in fair use decisions.... The Court of Appeals’s elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the proposition that the”fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.” 471 U. S., at 562. But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school.

## B

The second statutory factor, “the nature of the copy-righted work,” § 107(2), draws on Justice Story’s expression, the “value of the materials used.” ... This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.... We agree with both the District Court and the Court of Appeals that the Orbison original’s creative expression for public dissemination falls within the core of the copyright’s protective purposes.... This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a

parody case, since parodies almost invariably copy publicly known, expressive works.

## C

The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” § 107(3) (or, in Justice Story’s words, “the quantity and value of the materials used,” are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist’s justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See *Sony, supra*, (reproduction of entire work “does not have its ordinary effect of militating against a finding of fair use” as to home videotaping of television programs); *Harper & Row, supra* (“[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech” but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives.

The District Court considered the song’s parodic purpose in finding that 2 Live Crew had not helped themselves overmuch.... The Court of Appeals disagreed, stating that:

While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial.... We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.”

The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford’s memoirs, but we signaled the significance of the quotations in finding them to amount to “the heart of the book,” the part most likely to be newsworthy and important in licensing serialization. *Harper*. We also agree with the Court of Appeals that whether “a substantial portion of the infringing work was copied verbatim” from the copyrighted work is a relevant question, ... for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.



Where we part company with the court below is in applying these guides to parody, and in particular to parody in the song before us. Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. See, e. g., *Elsmere Music*; *Fisher v. Dees*. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through....

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see *Harper & Row, supra*, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scrape" noise, over-laying the music with solos in different keys, and altering the drum beat. This is not a case, then, where "a substantial portion" of the parody itself is composed of a "verbatim" copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that "no more was taken than necessary," ... but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even



if the portion taken is the original's "heart." As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

## D

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market" for the original. *Harper & Row*.... The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*.

Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets. In moving for summary judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original. They did not, however, thereby subject themselves to the evidentiary presumption applied by the Court of Appeals. In assessing the likelihood of significant market harm, the Court of Appeals quoted from language in *Sony* that "if the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated." 972 F. 2d, at 1438, quoting *Sony*. The court reasoned that because "the use of the copyrighted work is wholly commercial, ... we presume that a likelihood of future harm to Acuff-Rose exists." In so doing, the court resolved the fourth factor against 2 Live Crew, just as it had the first, by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.

No "presumption" or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.... *Sony*'s discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of *Sony* itself (home copying of television programming). In the former circumstances, what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it

clearly “supersede[s] the objects,” ... of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. *Sony*. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.... This is so because the parody and the original usually serve different market functions.

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,” ... the role of the courts is to distinguish between “biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.” *Fisher v. Dees*.

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. “People ask . . . for criticism, but they only want praise.” S. Maugham, *Of Human Bondage* 241 (Penguin ed. 1992). Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of “Oh, Pretty Woman,” the court erred....

2 Live Crew’s song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry, see *Harper & Row* ... Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. See § 106(2) (copyright owner has rights to derivative works). Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.

Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew’s parodic rap song on the market for a nonparody, rap version of “Oh, Pretty Woman.” And while Acuff-Rose would have us find evidence of a rap market in the very facts that 2

Live Crew recorded a rap parody of “Oh, Pretty Woman” and another rap group sought a license to record a rap derivative, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew’s parody, rap version. The fact that 2 Live Crew’s parody sold as part of a collection of rap songs says very little about the parody’s effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics. The District Court essentially passed on this issue, observing that Acuff-Rose is free to record “whatever version of the original it desires,” ... the Court of Appeals went the other way by erroneous presumption. Contrary to each treatment, it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disintitled the proponent of the defense, 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand.

### III

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew’s parody of “Oh, Pretty Woman” rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

*An omitted (but instructive) footnote:*

Finally, regardless of the weight one might place on the alleged infringer’s state of mind, compare *Harper & Row* (fair use presupposes good faith and fair dealing) with *Folsom v. Marsh* (good faith does not bar a finding of infringement); ... we reject Acuff-Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use. See *Fisher v. Dees*.

## APPENDIX A TO OPINION OF THE COURT

*“Oh, Pretty Woman” by Roy Orbison and William Dees*

Pretty Woman, walking down the street,  
Pretty Woman, the kind I like to meet,  
Pretty Woman, I don't believe you, you're not the truth,  
No one could look as good as you Mercy  
Pretty Woman, won't you pardon me,  
Pretty Woman, I couldn't help but see,  
Pretty Woman, that you look lovely as can be Are you lonely  
just like me?  
Pretty Woman, stop a while,  
Pretty Woman, talk a while,  
Pretty Woman give your smile to me  
Pretty Woman, yeah, yeah, yeah  
Pretty Woman, look my way,  
Pretty Woman, say you'll stay with me  
'Cause I need you, I'll treat you right  
Come to me baby, Be mine tonight  
Pretty Woman, don't walk on by,  
Pretty Woman, don't make me cry,  
Pretty Woman, don't walk away,  
Hey, O. K.  
If that's the way it must be, O. K.  
I guess I'll go on home, it's late  
There'll be tomorrow night, but wait!  
What do I see  
Is she walking back to me?  
Yeah, she's walking back to me!  
Oh, Pretty Woman.

## APPENDIX B TO OPINION OF THE COURT

*“Pretty Woman” as Recorded by 2 Live Crew*

Pretty woman walkin' down the street  
Pretty woman girl you look so sweet  
Pretty woman you bring me down to that knee  
Pretty woman you make me wanna beg please  
Oh, pretty woman  
Big hairy woman you need to shave that stuff

Big hairy woman you know I bet it's tough  
 Big hairy woman all that hair it ain't legit  
 'Cause you look like 'Cousin It'  
 Big hairy woman  
 Bald headed woman girl your hair won't grow  
 Bald headed woman you got a teeny weeny afro  
 Bald headed woman you know your hair could look nice  
 Bald headed woman first you got to roll it with rice  
 Bald headed woman here, let me get this hunk of biz for ya  
 Ya know what I'm saying you look better than rice a roni  
 Oh bald headed woman  
 Big hairy woman come on in  
 And don't forget your bald headed friend  
 Hey pretty woman let the boys Jump in  
 Two timin' woman girl you know you ain't right  
 Two timin' woman you's out with my boy last night  
 Two timin' woman that takes a load off my mind  
 Two timin' woman now I know the baby ain't mine  
 Oh, two timin' woman  
 Oh pretty woman

## Summary of Fair Use Factors

1. The Purpose & Character of the Use.
  - Commercial use is more likely to be UNFAIR.
  - Educational or private uses more likely to be considered fair.
  - Is there evidence of bad faith? (*Harper & Row*).
  - Is the allegedly infringing work *transformative*? (*Campbell*)
  - Transformative uses “add something new, with a further purpose or different character, altering the first with new expression, meaning or message” (*Campbell*).
  - Transformative uses are more likely to be fair use, and the other three factors become less important (*Campbell*).
2. Nature of the Work.
  - Spectrum of fact to fiction, where taking factual works is more fair taking fiction is less fair.
  - A greater latitude to disseminate historical or biographical facts than works of fiction.
3. Amount Taken

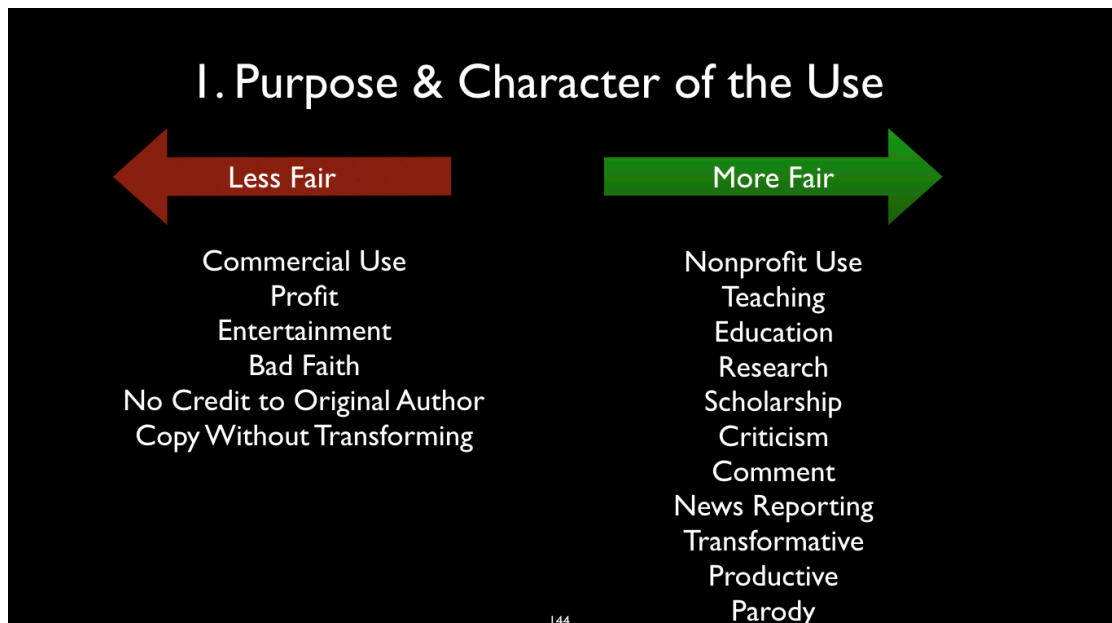


Figure 1: The Purpose and Character of the Use



Figure 2: Nature of the Work

- Some courts say that taking the entire work is presumptively unfair.
- Taking the “heart of the work,” even if a small amount, usually isn’t fair.
- Taking poems, song lyrics, etc. for a commercial use almost always unfair.
- In book publishing, for nonfiction and novels, usually 250 words.
- In music, general rule: If you sample, you license.

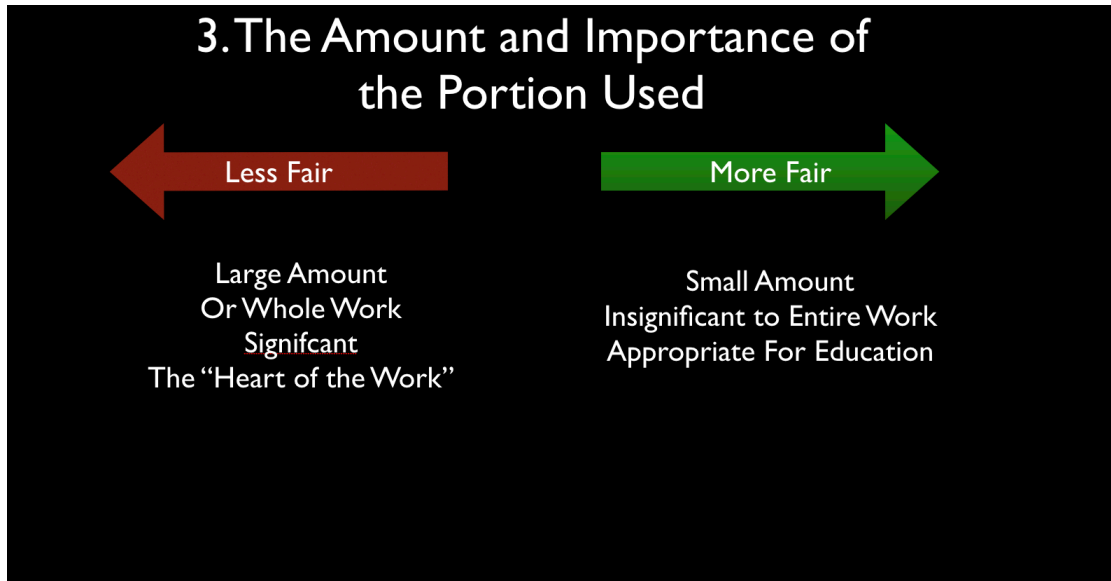


Figure 3: Amount taken

#### 4. Market Effect

- Often cited as THE most important factor (*Harper & Row*).
- Whether unrestricted and widespread conduct like the defendant’s would substantively and adversely impact the market, and the harm to the market for derivative works.
- CAUTION: Increasing demand for the underlying work doesn’t mitigate harm to a derivative market (*Harper & Row; Campbell*).

#### Totally Optional Readings and Viewings

- [Shepard Fairey and the Obama “Hope” Poster.](#)
- [‘Hope’ poster artist Shepard Fairey faces arrest in Detroit](#) By Nick Gass, 6/25/15 6:31 AM EDT.
- [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



Figure 4: Market Effect

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](#).
- [Led Zeppelin Win in ‘Stairway to Heaven’ Trial - Rolling Stone](#) (Led Zeppelin have won a copyright lawsuit that claimed they had plagiarized the music to their most celebrated song, “Stairway to Heaven.” A Los Angeles jury determined Thursday that the lawyer representing the estate of late guitarist Randy Wolfe, who played with the group Spirit, did not prove that the hard rockers lifted the song’s intro from Spirit’s 1968 instrumental “Taurus.”)

### 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).
- [The Fair Use App An Interactive Guide for Filmmakers and Video Creators](#)