

# Copyright's Entitlements and Limits

## A. Introduction

Assuming there's validly copyrighted subject matter and that the copyright is owned by a person (whom we'll call "the plaintiff"), what does that amount to? Just what is the "right" in copyright?

That's the concern of this portion of the casebook: copyright's entitlements and copyright's limits.

First things first, you've got to look at the statute. To the extent you have a copyright right, you only have it because Congress said you did. So we should pay attention to Congress's words. You're skeptical? It's true that the core concepts of copyright are summed up in a few tight phrases found close to the beginning of the Copyright Act of 1976. Thus, unpacking them in any meaningful way means diving deeply into the caselaw. And that is as Congress wanted it to be.

And yet! There are many, many more words in the '76 Act. Congress, it turns out, has had quite a lot to say about particulars of the scope of the right that copyright law provides. And while not seeking to force you to read all that verbiage, this portion of the casebook will encourage you to gaze over the vista.

Okay, now: Other first things first: The "right" in copyright is really just a right to sue people. And, as a lawyer, you'll know you know copyright law when you can analyze potential liability from a set of facts. So for that, you'll want to think in terms of elements of a claim that the plaintiff must prove and defenses that the defendant can assert.

In the terminology of a four-element structure for a prima facie case for copyright infringement (validity, ownership, actual copying, substantial appropriation), the coming swath of readings concerns the third and fourth elements. And also the defenses – including that famous and beloved animal, the four-legged fuzzy bear known as fair use.

## **B. Statute and Structure: Entitlements and Limits**

### **B.1. Lead-in**

The Copyright Act of 1976 begins with Chapter One, titled “Subject Matter and Scope of Copyright.” Within that chapter, the very first section is neither subject matter nor scope; rather, it’s § 101 (title: “Definitions”). But then the remainder of Chapter One really is subject matter and scope.

Sections 102 through 105 are subject matter. For example: § 102 (“Subject matter of copyright: In general”); § 105 (“Subject matter of copyright: United States Government works”).

Sections 106 through 122 – the remainder of the chapter – are scope.

Two at the beginning – § 106 and § 107 – are the heavyweights. Section 106 is the big, general grant of exclusive rights to copyright holders. Section 107 is the big, general limit on those rights: fair use. We’ll read them here, but appreciating the ins-and-outs means diving into the caselaw. That’s elsewhere – a bit further ahead. In the meantime, there’s more of the statutory vista to take in.

Sections 108 through 122 don’t have the same star power as the preceding pair, but they are extremely important because these sections are the giant warehouse of stakeholder compromise and legislative fine-tuning that applies to all kinds of particular situations and industry niches that require delicate handling.

This swath of the book considers the big structure of copyright’s protections – the metes and the bounds of copyright rights.

### **B.2. Six Rights Make a Wrong: § 106 & § 501**

#### **Pre-reading notes**

For copyright owners – that is, would-be plaintiffs – the most important sections of the Copyright Act of 1976 are § 106 and § 501.

Section 106 is the heart of the copyright concept: what it is that you have when you have a copyright. Within § 106 you will find a list of six things that are reserved for you and you alone when it comes to your copyrighted work. Six things that are prohibited to everybody else.

Section 501 is the fist. If anyone treads upon the rights within your exclusive domain, it is § 501 that gives you the power to do something about it. This is the general authorization for copyright holders to sue infringers and call upon the federal courts – to force the foe to answer, to adjudicate the dispute, and to compel any warranted remedy.

## 17 U.S.C. § 106 text with definitions

### § 106 • Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in **copies** or **phonorecords**;
- (2) to prepare **derivative works** based upon the copyrighted work;
- (3) to distribute **copies** or **phonorecords** of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of **literary**, musical, dramatic, and choreographic works, pantomimes, and **motion pictures** and other **audiovisual works**, to **perform** the copyrighted work **publicly**;
- (5) in the case of **literary**, musical, dramatic, and choreographic works, pantomimes, and **pictorial, graphic, or sculptural works**, **including** the individual images of a **motion picture** or other **audiovisual work**, to **display** the copyrighted work **publicly**; and
- (6) in the case of **sound recordings**, to **perform** the copyrighted work **publicly** by means of a **digital audio transmission**.

### Definitions from § 101 of terms in § 106

“**Audiovisual works**” are works that consist of a series of related images which are intrinsically intended to be shown by the use of **machines** or **devices** such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

“**Copies**” are material objects, other than **phonorecords**, in which a work is **fixed** by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a **machine** or **device**. The term “copies” includes the material object, other than a **phonorecord**, in which the work is first fixed.

A “**derivative work**” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, **motion picture** version, **sound recording**, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

To “**display**” a work means to show a **copy** of it, either directly or by means of a film, slide, television image, or any other **device** or **process** or, in the case of a **motion picture** or other **audiovisual work**, to show individual images nonsequentially.

The terms “**including**” and “**such as**” are illustrative and not limitative.

“**Literary works**” are works, other than **audiovisual works**, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, **phonorecords**, film, tapes, disks, or cards, in which they are embodied.

“**Motion pictures**” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To “**perform**” a work means to recite, render, play, dance, or act it, either directly or by means of any **device** or **process** or, in the case of a **motion picture** or other **audiovisual work**, to show its images in any sequence or to make the sounds accompanying it audible.

“**Phonorecords**” are material objects in which sounds, other than those accompanying a motion picture or other **audiovisual work**, are

**fixed** by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a **machine** or **device**. The term “phonorecords” includes the material object in which the sounds are first **fixed**.

“**Pictorial, graphic, and sculptural works**” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a **useful article**, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

To **perform** or **display** a work “**publicly**” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to **transmit** or otherwise communicate a **performance** or **display** of the work to a place specified by clause (1) or to the public, by means of any **device** or **process**, whether the members of the **public** capable of receiving the **performance** or **display** receive it in the same place or in separate places and at the same time or at different times.

“**Sound recordings**” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

To “**transmit**” a **performance** or **display** is to communicate it by any **device** or **process** whereby images or sounds are received beyond the place from which they are sent.

**17 U.S.C. § 501 text with definitions**

**§ 501 · Infringement of copyright**

(a) Anyone who violates any of the exclusive rights of the **copyright owner** as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports **copies** or **phonorecords** into the **United States** in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any **State**, any instrumentality of a **State**, and any officer or employee of a **State** or instrumentality of a **State** acting in his or her official capacity. Any **State**, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial **owner** of an exclusive right under a copyright is entitled, subject to the requirements of section 411 {“*Registration and civil infringement actions*”}, to institute an action for any infringement of that particular right committed while he or she is the **owner** of it.~

*{Remainder of subsection (b) and following subsections have been omitted.}*

**Definitions from § 101 of terms in § 501**

“**Copies**” and “**Phonorecords**” [*see above for § 106*]

“**Copyright owner**”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

“**State**” includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

The “**United States**”, when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

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### B.3. Visit the Fair Grounds: § 107

#### Pre-reading notes

Section 107 is the statutory home of fair use.

You might say § 107 is the yin to § 106's yang. They are opposites, but also complements. If § 106 is fire, then § 107 is water. Together, they are intended to give the copyright system balance.

The House Report on the '76 Act explains where fair use came from and why legislators wanted to give it its own space on the board:

The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some {gauge} for balancing the equities.

These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107.

H.R. Rep. No. 94-1476 at 65 (1976).

The “four standards” to which the House committee was referring are the four factors markedly set off as a numbered list within § 107’s text.

### **§ 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.

### **Definitions from § 101 of terms in § 107**

“**Copies**” *[see above for § 106]*

“**Phonorecords**” *[see above for § 106]*

“**Copyright owner**”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

“**Publication**” is the distribution of **copies** or **phonorecords** of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute **copies** or **phonorecords** to a group

of persons for purposes of further distribution, *public performance*, or *public display*, constitutes publication. A *public performance* or *display* of a work does not of itself constitute publication.

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#### B.4. Admire the Detail Job: §§ 108–122

##### Pre-reading notes

After sections 106 and 107 (just 122 and 175 words, respectively) you will walk straight into a word blizzard. Page after page of tough-trudge prose piled into hierarchically indented drifts. But there's a reason: Section 108 and subsequent sections are where Congress put all of the finely hammered compromises and delicately calibrated policy mechanisms for those circumstances that, in the judgment of Congress, needed special handling.

To be a copyright maven, you don't need to read all these sections of the statute word for word. But it's very important to know they exist. In any given copyright classroom, it's nearly a sure thing that some of those in the seats will wind up doing work for a client with business in one of the niches covered by these detail-heavy sections.

Niches like what? Well, how about jukeboxes? Did you ever think about how copyright works with jukeboxes? Congress did. Also: signals bouncing off the satellites, accessible books for the blind, cable TV, and so much more.

And what kind of detailed arrangements did Congress make? Safe harbors and strict prohibitions. Finely detailed exceptions and clearly marked no-go zones. There are compulsory licenses, procedures for setting royalty rates, and on and on.

What follows below is a quick travel guide – right-sized to fit on a slick tri-fold brochure (admittedly one that leaves little room for pictures) – with blurbs for each of the sections. And the list actually starts back at § 106 so that you can see all the scope-of-copyright provisions of the '76 Act in context.

Then, following the list, two particular sections get a special look: § 115 and § 120.

## §§ 106–122 blurbs

### § 106 • Exclusive rights in copyrighted works

This section provides the core substantive foundation for the copyright entitlement and, thereby, for claims of infringement. It lists those actions of a defendant that can qualify as infringement, with some categories applying only to certain categories of works. The exclusive rights include: reproduction (copying), distributing copies, publicly performing, publicly displaying, and making derivative works.

### § 106A • Rights of certain authors to attribution and integrity

This section provides what are known as “moral rights” to authors in certain cases of works of visual arts. These rights, when applicable, exist regardless of whether the author has assigned the copyright to the work.

### § 107 • Limitations on exclusive rights: Fair use

This hugely important section provides a statutory basis for fair use. It sets out non-exclusive examples of fair purposes and provides a list of four factors to be considered.

### § 108 • Limitations on exclusive rights: Reproduction by libraries and archives

This lengthy section privileges libraries and archives with regard to making copies of works in particular circumstances.

### § 109 • Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

This detailed section concerns what owners of lawfully created copies are allowed to do with those copies.

Subsection (a) expressly allows resale of copies, e.g., as with used bookstores. (Cases call this the “first sale defense.”)

Subsection (b) prohibits renting phonorecords (e.g., compact discs), and copies of software (e.g., installation discs for a suite of office productivity software).

Subsection (c) privileges owners of lawful copies to publicly display those copies.

**§ 110 • Limitations on exclusive rights: Exemption of certain performances and displays**

This lengthy section provides specific allowances, for would-be defendants, in performances and displays of copyrighted works in very particular circumstances, including in contexts of classroom teaching, religious services, audiences of persons with disabilities, government activities, activities of nonprofit organizations, and playing of broadcast radio or television content in public places.

**§ 111 • Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable**

This extremely lengthy and detailed section is mostly concerned with cable TV systems and the circumstances in which they could have liability for retransmitting copyrighted works. It also concerns other sorts of secondary transmission – by satellite, within apartment buildings and hotels, and more. Inter alia, it provides various exemptions and prescribes arrangements for compulsory licensing and royalties.

**§ 112 • Limitations on exclusive rights: Ephemeral recordings**

This section deals with so-called “ephemeral recordings” made by broadcasters in the course of transmitting programming that includes copyrighted works for which they have a license or privilege to transmit. For instance, a nationally distributed radio top-40 countdown show or late-night television talk show might include copyrighted sound recordings or musical works which they are privileged to perform publicly under § 106 or some blanket license, but those privileges and/or licenses don’t extend to making copies of those works. This section, inter alia, provides allowances for taping such programs in advance and sending copies to affiliate stations for local broadcast.

**§ 113 • Scope of exclusive rights in pictorial, graphic, and sculptural works**

Section 113 attempts to avoid problematic interpretations of the 1976 Act’s more general provisions when it comes to pictorial, graphic, and sculptural (“PGS”) works. Subsections (a) and (b), provides that the ’76 Act is not intended to change bedrock doctrine developed in prior caselaw with regard to PGS works. Subsection (c) provides a safe harbor for advertising and news reporting that reproduces copyrighted works in the course of using images of PGS works. Subsection (d) concerns moral rights established in § 106A.

**§ 114 • Scope of exclusive rights in sound recordings**

Sound recordings are treated differently under copyright in many ways. This section adds to the different treatment evident in § 106, and provides much more detail with regard to the limited scope of copyright for a sound recording. This section further narrows the scope of rights in sound recordings by providing various exemptions and statutory licensing provisions pertaining to transmissions and retransmissions. Assorted provisions are aimed at ensuring the legality of varied existing and expected commercial operations – providing means of facilitating usages, determining appropriate royalty rates, and so on.

**§ 115 • Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords**

This stupendously lengthy and detailed section provides a right to record cover versions of previously released songs by means of a compulsory license with a reasonable royalty.

**§ 116 • Negotiated licenses for public performances by means of coin-operated phonorecord players**

This agreeably concise section makes provisions for jukeboxes.

**§ 117 • Limitations on exclusive rights: Computer programs**

This section provides that certain copying and adapting of computer programs will not be infringing. Some circumstances dealt with include archiving and making repairs.

**§ 118 • Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting**

This section provides compulsory licenses to public broadcasting for certain works, subject to payments of reasonable royalties.

**§ 119 • Limitations on exclusive rights: Secondary transmissions of distant television programming by satellite**

This section, added by the Satellite Home Viewer Act of 1988 and since amended, inter alia provides legal means for satellite retransmission of broadcast content to households.

**§ 120 • Scope of exclusive rights in architectural works**

This section provides that pictures of architectural works won't be infringing if the architectural work is visible from a public place. This section also allows alterations of buildings without resulting in infringement of the derivative works right.

**§ 121 • Limitations on exclusive rights: Reproduction for blind or other people with disabilities**

This section privileges certain nonprofit organizations and governmental agencies to reproduce and distribute within the United States accessible copies and recordings of others' published works in accessible formats to persons with disabilities.

**§121A • Limitations on exclusive rights: reproduction for blind or other people with disabilities in Marrakesh Treaty countries**

This section privileges certain exporting and importing of copies of works in accessible formats.

**§ 122 • Limitations on exclusive rights: Secondary transmissions of local television programming by satellite**

This section makes additional provisions regarding satellite retransmission with particular allowances for "local into local" retransmission.

**17 U.S.C. § 115 text with definitions**

Cover versions of hit songs have long been a staple of popular music. And the '76 Act made sure to keep the tradition going. Section 115 guarantees anyone with an ounce of musical talent – or not even – the right to do a cover version of someone else's song – whether that someone else likes it or not. But the '76 Act does believe in copyright owners getting paid. So the section provides for compulsory licenses – with royalties – for recording cover versions.

Section 115 is very long and detailed – as it needs to be to create the procedure and substance for the compulsory licensing scheme. But here's an extreme abridgement that gives you the idea.

**§ 115 • Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords**

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License in General.—

(1) Eligibility for compulsory license.—

(A) Conditions for compulsory license.—A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work

(B) Duplication of sound recording.—A person may not obtain a compulsory license for the use of the work in the

making of phonorecords duplicating a sound recording fixed by another {with some exceptions}

- (2) Musical arrangement.—A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

*{remainder of § 115 omitted}*

### 17 U.S.C. § 120 text with definitions

When Congress added architectural works to the list of what was copyrightable, legislators included § 120 to avoid at least some unpalatable side effects.

#### § 120 • Scope of exclusive rights in architectural works

(a) Pictorial Representations Permitted.—The copyright in an **architectural work** that has been constructed does not include the right to prevent the making, distributing, or *public display* of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

(b) Alterations to and Destruction of Buildings.—Notwithstanding the provisions of section 106(2), the owners of a building embodying an **architectural work** may, without the consent of the author or copyright owner of the **architectural work**, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

### Definitions from § 101 of terms in § 120

An “**architectural work**” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

To “**display**” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

To *perform* or *display* a work “**publicly**” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

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## C. I Heard It On the Radio: Proving actual copying

### C.1. Lead-in

Boil down a claim for copyright infringement of the reproduction right until you're left with four elements. They are: (1) a valid copyright, (2) ownership by the plaintiff, (3) actual copying by the defendant, and (4) substantial appropriation by the defendant.

Here we are concerned with that third element: actual copying.

### C.2. Discussion and explanation

#### Copyright: against copying

If you author an original work of creative expression, you have a copyright. That means you have “exclusive rights” with regard to your work. But only kind of sort of. If we're being precise about it, copyright does not give you exclusive rights over that expression. Not really. Technically, everyone in the world at large is allowed to make, distribute, and reproduce the exact same expression. Instead, what they can't do is copy from you.

Another way of talking about this concept is with the phrase “independent creation.” Copyright will not interfere with anyone's activities concerning a work that was created independently of yours. Thus, if you write a 100,000-word novel, and someone else writes the exact same 100,000 words in the exact same order, then your copyright gives you no ability to exclude that someone else from reproducing, distributing, performing, etc. that novel.

Whether a jury will believe them – that they wrote the same 100,000 words in the same order – is a different matter entirely.

Because actual copying is an essential ingredient in a cause of action for copyright infringement, the burden of proving actual copying is on the plaintiff.

#### My name is trouble ...

It is the official stance of this casebook that a good name for this element is “actual copying.” But it's far from the only phrase used by courts, lawyers, and scholars. This element is also called “copying in fact,” among other adequate names. But some names come with problems. Unfortunately, courts

have often spoken of this element as being a requirement of “substantial similarity.”

First, “substantial similarity” is problematic here because it conflates the doctrinal requirement for the plaintiff’s claim with the test to determine whether the requirement is fulfilled. When people talk about “substantial similarity” in this vein they really referring to an idea of how to *prove* actual copying.

Second, and even more confusing, the courts also use the phrase “substantial similarity” to identify the entirely distinct fourth element of substantial appropriation.

The use of the phrase “substantial similarity” in regard to the concepts found in both the third and fourth elements of a copyright claim can – if luck runs out – cause lawyers and judges to come around to believing that there’s only one element of “substantial similarity.” Then, actual copying and substantial appropriation have been conceptually conflated.

It therefore will avoid confusion to call this element of an infringement claim “actual copying” and to speak of the means of proving it as “probative similarity.” But don’t expect cases and writings about copyright law to adhere to such distinct terminology.

### **Two routes: direct and indirect**

The courts have recognized that there are two ways for a plaintiff to prove actual copying: direct and indirect.

Direct proof of copying involves presenting evidence of the copying itself. Evidence for such direct proof could be an admission by the defendant that they copied from the plaintiff – or copied from someone who copied from someone who copied from someone who copied from the plaintiff. Or, a plaintiff could provide direct proof with eyewitness testimony of someone who saw the defendant copy from the plaintiff’s work.

Direct proof of copying rarely exists, it is often said. Thus, there’s room for indirect proof.

### **Ingredients of indirect proof: access and similarity**

Indirect proof of copying involves having the factfinder draw an inference of copying from two underlying facts: **access** and **probative similarity** (often called “substantial similarity”).

To spell it out, indirect proof of actual copying requires (1) that the defendant had access to the plaintiff's work and (2) that the plaintiff's work and the accused work are probatively similar – i.e., so similar that the similarity itself tends to show copying.

Court decisions can vary widely in what will count as sufficient access for indirect proof of copying.

The access requirement has often been articulated by courts as meaning there is a “reasonable possibility” or “more than a ‘bare possibility’” that the defendant might have seen or heard the plaintiff's work. The defendant's admission that they were exposed to the plaintiff's work is, of course, fantastically helpful for an infringement case. But it's hardly necessary.

Courts may accept as proof of access the showing of some plausible chain of individuals by which the copyrighted expression may have been transmitted. For instance, if the defendant was associated with persons who reasonably may have come across the plaintiff's work, that can be sufficient for drawing the needed inference.

It's usually sufficient to show that the plaintiff's work was widely disseminated to the public (getting significant radio airplay, popping up on television, in a theatre near you). Regional dissemination works if the defendant was or might have been in the region. In *Three Boys Music v. Bolton* (9th Cir. 2000), limited record sales and radio/television airplay was sufficient to show access.

Many courts have spoken of an inverse relation between the amount of access needed to be demonstrated and the amount of similarity required of plaintiff's and defendant's works. The more similar they are, the less needs to be shown in the way of access. And vice versa.

Can similarity be enough on its own? The answer is yes/no/maybe/kind of/sort of/it depends. The general formula has been that showing access and substantial similarity, together, allow an inference of copying. But caselaw indicates that, at least sometimes, access itself may be inferred. A phrase tossed around in this vein is “striking similarity.”

In a lawsuit over cuddly, plush barnyard animals, the Seventh Circuit said:

“Access (and copying) may be inferred when two works are so similar to each other and not to anything in the public domain that it is likely that the creator of the second work copied the first, but the inference

can be rebutted by disproving access or otherwise showing independent creation<sup>{}</sup>”

*Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

One might well wonder why there’s so much talk here of appellate courts and holdings. Actual copying – and whether it’s been established by inference from access and similarity – seems like the quintessential jury issue. Indeed. And yet courts have shown themselves to have a hearty appetite for treating the matter – whether something actually happened in the past – as a question of law rather than an issue of fact.

### **C.3. Bright Tunes v. Harrisongs (S.D.N.Y. 1976)**

#### **Pre-reading notes**

This case decided that a songwriter could, in the process of songwriting, subconsciously copy from another song – thereby creating an infringing composition and recording. The case undoubtedly strikes fear into the hearts of working songwriters. But for retired tunesmiths, the possibility of subconscious copying may infuse a bit of excitement into the pastime of listening to new releases. The plaintiff’s work was “He’s So Fine.” The accused work was “My Sweet Lord.”

The Chiffons, a harmony-singing girl group out of New York, released their first single, “He’s So Fine,” in 1963. It went to number one on Billboard’s Hot 100 and R&B charts. The song was written by Ronnie Mack, who died of cancer at age 23 the same year.

About the same time, The Beatles, out of Liverpool, England, began releasing records. The four-member band broke up in 1970, and guitarist George Harrison embarked on a solo career. In 1970, Harrison wrote “My Sweet Lord,” which went on to be his first solo single and a global success, hitting number one in the U.S. (Billboard Hot 100), U.K., and more than a dozen countries in all.

Harrison wrote “My Sweet Lord” in the course of work with Billy Preston. The case calls Preston “an American black gospel singer,” but others would identify him first as a keyboardist/pianist. Indeed, Preston was a highly sought-after session keyboardist, recording with Sam Cooke, the Rolling Stones, and, perhaps most famously, with the Beatles. Preston was in the Abbey Road studio with the Beatles during some of their last recording

sessions. As a result, Preston's keyboarding plays a prominent role in hit Beatles' singles "Get Back" and "Let It Be."

Preston was also a songwriter. Though uncredited, he may have written a portion of "My Sweet Lord," albeit a portion unrelated to the copyright infringement case.

Bright Tunes initiated this lawsuit in 1971. The following opinion and order was issued in 1976. One issue in a long and winding litigation, the Second Circuit eventually upheld subconscious copying as a legitimate basis for infringement in *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

In the early 1990's, the litigation was still going on. Writing up another of multiple appellate opinions, the Second Circuit remarked in 1991, "Subsequent to the determinations to be made on the remand hereby directed, we fully expect the curtain to fall on this long-playing litigation." *Abkco Music, Inc., v. Harrisongs Music, Ltd.*, 944 F.2d 971 (2d Cir. 1991).

### Opinion

*{Edit by EEJ. Footnotes were handled in one of a few ways: They were deleted without indication; footnote text was incorporated into regular text and set off by enclosing superscript angle brackets; the footnote mark was retained and the footnote text was set off in a block paragraph.}*

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

United States District Court for the Southern District of New York  
420 F. Supp. 177 (1976)

Bright Tunes Music Corp., plaintiff, v. Harrisongs Music, Ltd., George Harrison, Apple Records, Inc. and Apple Records, Ltd., Broadcast Music, Inc., Hansen Publications, Inc. defendants. No. 71 Civ. 602. August 31, 1976. As Amended September 1, 1976. Counsel for plaintiff: Pryor, Cashman & Sherman, by Gideon Cashman, James A. Janowitz, New York, N.Y.. Counsel for defendants Harrisongs, Harrison, and Apple Records: Hardee, Barovick, Knoecky & Braun, by Joseph J. Santora, Robert B. McKay, Michael Perlstein, New York, N.Y.. Counsel for defendant BMI: Leibman & Schreier, by Leonard S. Leibman, New York, N.Y.. Counsel for defendant Hansen Publications: Netter, Dowd, Ness, Alfieri & Stern, by Edward Berman, New York, N.Y. Before District Judge OWEN.  
OPINION AND ORDER.

**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. <All the experts agreed on this.> 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. <This grace note, as will be seen *infra*, has a substantial significance in assessing the claims of the parties hereto.> The harmonies of both songs are identical.

<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. <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.> 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, germinating started and 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.”

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.

“Q. [By the Court]: All I am trying to get at, Mr. Harrison, is if you have a recollection when that [grace] note popped into existence as it ends up in the Billy Preston recording.

\* \* \*

“Mr. Harrison: ... [Billy Preston] might have put that there on every take, but it just might have been on one take, or he might have varied it on different takes at different places.”

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.<sup>9</sup>

<sup>9</sup>It is of interest, but not of legal significance, in my opinion, that when Harrison later recorded the song himself, he chose to omit the little grace note, not only in his musical recording but in the printed sheet music that was issued following that particular recording. The genesis of the song remains the same, however modestly Harrison may have later altered it. Harrison, it should be noted, regards his song as that which he sings at the particular moment he is singing it and not something that is written on a piece of paper.

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.<sup>10</sup>

<sup>10</sup> Preston may well have been the “composer” of motif B and the telltale grace note appearing in the second use of the motif during the recording session, for Harrison testified:

“The Court: To be as careful as I can now in summing this up, you can’t really say that you or Billy Preston or somebody else didn’t somewhere along the line suggest these; all you know is that when Billy Preston sang them that way at the recording session, you felt they were a successful way to sing this, and you kept it?”

“The Witness: Yes, I mean at that time we chose what is a good performance.”

“The Court: And you felt it was a worthy piece of music?”

“The Witness: Yes . . . .”

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. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B.<sup>11</sup>

<sup>11</sup> Even Harrison’s own expert witness, Harold Barlow, long in the field, acknowledged that although the two motifs were in the public domain, their use here was so unusual that he, in all his experience, had never come across this unique sequential use of these materials. He testified:

“The Court: And I think you agree with me in this, that we are talking about a basic three-note structure that composers can vary in modest ways, but we are still talking about the same heart, the same essence?”

“The Witness: Yes.”

“The Court: So you say that you have not seen anywhere four A’s followed by three B’s or four?”

“The Witness: Or four A’s followed by four B’s.”

The uniqueness is even greater when one considers the identical grace note in the identical place in each song.

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,<sup>13</sup> and Harrison had access to He’s So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *Northern Music Corp. v. Pacemaker Music Co., Inc.*, 147 U.S.P.Q. 358, 359 (S.D.N.Y.1965).

<sup>13</sup>Harrison himself acknowledged on the stand that the two songs were substantially similar. This same conclusion was obviously reached by a recording group called the “Belmonts” who recorded My Sweet Lord at a later time. With “tongue in cheek” they used the words from *both* He’s So Fine and My Sweet Lord interchangeably at certain points.

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.

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## C.4. Ronald H. Selle v. Barry Gibb (7th Cir. 1984)

### Pre-reading notes

Ronald H. Selle wrote the song “Let It End” in fall 1975 and registered the copyright in November of the same year. Selle performed the song with his band a few times. He also sent out tapes to about a dozen record and publishing companies, though he didn’t get a positive response.

In 1977, disco group the Bee Gees wrote and recorded “How Deep Is Your Love.” The song went on to be a huge hit, going to number one in the U.S. on Billboard’s Hot 100. Selle believed “How Deep Is Your Love” was the same song – essentially identical aside from the lyrics – as “Let It End.” He sued and won a jury trial. But the district court delivered judgment for the Bee Gees notwithstanding the verdict, holding that it was unlikely that the Bee Gees didn’t independently create “How Deep Is Your Love.” In this opinion, the Seventh Circuit affirms.

### Opinion

*{Edit by EEJ. To create consistency and improve readability, numbers over nine were set as numerals rather than words. Footnotes were handled in one of a few ways: they were deleted without indication; footnote text was incorporated into regular text and set off by enclosing superscript angle brackets; the footnote mark was retained and the footnote text was set off in a block paragraph. A superscript tilde indicates a deletion; a superscript pilcrow indicates an inserted paragraph break; a superscript hash mark indicates a deletion limited to one or more citations. Portions of citations were omitted without notation, including nearby “id.” where the citation reference is clear from the regular text. Whole endogenous citations (e.g., parties’ briefs, the district court’s opinion) removed without notation where the material cited is clear from context without the formal citation itself. Punctuation may have been moved to accommodate the deletion of citation material. Citation matter was added where a second-reference citation was less comprehensible in its absence.}*

## Selle v. Gibb

United States Court of Appeals for the Seventh Circuit

741 F.2d 896 (1984)

RONALD H. SELLE, Plaintiff-Appellant, v. BARRY GIBB, et al., Defendants-Appellants; RONALD H. SELLE, Plaintiff-Appellee, v. BARRY GIBB, et al., Defendants-Appellants. Nos. 83-2484, 83-2545. Argued April 13, 1984. Decided July 23, 1984. Appealed from the U.S. District Court for the Northern District of Illinois, Eastern Division. No. 78 C 3656 – Judge George N. Leighton presiding. Counsel for Plaintiff-Appellant: Barry A. Erlich, Engerman, Erlich, Jacobs and Berman, Chicago, Ill. Counsel for

Defendants-Appellees: Robert C. Osterberg, Abeles, Clark and Osterberg, New York, N.Y. Before Circuit Judges Wood and Cudahy, and Senior Circuit Judge Nichols. The Honorable Philip Nichols, Jr., Senior Circuit Judge for the Federal Circuit, sitting by designation. Affirmed. Opinion by CUDAHY.

### **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’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. We affirm.

### **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.<sup>4</sup>

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.<sup>4</sup>

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. 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 24 of 34 notes in plaintiff's composition and 24 of 40 notes in defendants' composition which are identical in pitch and symmetrical position. Of 35 rhythmic impulses in plaintiff's composition and forty in defendants', 30 are identical. In the last four bars of both songs (Theme B), 14 notes in each are identical in pitch, and 11 of the 14 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. 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.<sup>4</sup>

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.<sup>5</sup>

### 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. *See Sherman, Musical Copyright Infringement: The Requirement of Substantial Similarity*. Copyright Law Symposium, Number 92, American Society of Composers, Authors and Publishers 81-82 (1977). 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. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275 (2d Cir. 1936). 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. *See generally* 3 Nimmer, *Copyright* § 13.02 at 13-9. 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. See, e.g., *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (finding of access based on wide dissemination); Sherman, *Musical Copyright Infringement*, at 82.

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. 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.

For example, in *Twentieth Century-Fox Film v. Dieckhaus*, 153 F.2d 893 (8th Cir.1946), the court reversed a finding of infringement based solely on

the similarities between plaintiff's book and defendant's film. The court stated that the plaintiff herself presented no evidence that the defendant had had access to her book, and the only people to whom the plaintiff had given a copy of her book testified that they had not given it to the defendant. While the court also concluded that the similarities between the book and the film were not that significant, the result turned on the fact that "the oral and documentary evidence in the record ... establishes the fact that the defendant had no access to plaintiff's book unless the law of plagiarism permits the court to draw an inference contrary to such proof from its finding of similarities on comparison of the book with the picture." Thus, although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable.

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.<sup>4</sup>

In *Cholvin v. B.&F. Music*, 253 F.2d 102 (7th Cir. 1958), the plaintiffs' work had been distributed in 2000 professional copies of sheet music and four recordings, of which 200,000 records were sold, and it had been performed on several nationwide broadcasts. The court held that, in light of this circumstantial evidence, it was reasonable to infer, in combination with similarities between the two pieces, that there had been an infringement.<sup>5</sup>

In *Abkco Music v. Harrisongs Music*, 722 F.2d 988, 997-99 (2d Cir. 1983), the court found that there had been a copyright infringement based on a theory of subconscious copying. The complaining work, "He's So Fine," had been the most popular song in the United States for five weeks and among the 30 top hits in England for seven weeks during the year in which George Harrison composed "My Sweet Lord," the infringing song. This evidence, in addition to Harrison's own admission that the two songs were "strikingly similar," supported the finding of infringement.<sup>6</sup>

On the other hand, in *Jewel Music Publishing v. Leo Feist, Inc.*, 62 F. Supp. 596, 598 (S.D.N.Y. 1945), almost 10,000 copies of the complaining song had been distributed or sold and the music had also been broadcast on national performances. The court still concluded that the

showing of access was insufficient, in combination with the other evidence, to support a reasonable inference of access.

The possibility of access in the present case is not as remote as that in *Twentieth Century-Fox Film v. Dieckhaus* because neither side elicited testimony from the individuals (primarily employees of the publishing companies) to whom the plaintiff had distributed copies of his song. Such evidence might have conclusively disproved access. On the other hand, Selle's song certainly did not achieve the extent of public dissemination existing in *Cholvin v. B.&F. Music*, *Jewel Music v. Leo Feist*, or *Abkco Music v. Harrisongs Music*, and there was also no evidence that any of the defendants or their associates were in Chicago on the two or three occasions when the plaintiff played his song publicly. It is not necessary for us, given the facts of this case, to determine the number of copies which must be publicly distributed to raise a reasonable inference of access. Nevertheless, in this case, the availability of Selle's song, as shown by the evidence, was virtually *de minimis*.

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. Thus, in *Testa v. Janssen*, 492 F. Supp. 198, 202-03 (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." *See also Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978). <In *Scott*, the court held that plaintiff's allegations of access were merely speculation when she could not show that she had knowledge that any of the defendants had access to her song, although she had performed her song in public on several occasions and once on television.>

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. *Twentieth Century-Fox Film v. Dieckhaus*, 153 F.2d at 899-900. See also *Chesapeake and Ohio Railroad Co. v. Martin*, 283 U.S. 209, 216 (1931). 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."<sup>3</sup> Yet formulating a meaningful definition of "striking similarity" is no simple task, and the term is often used in a conclusory or circular fashion.

<sup>3</sup> Plaintiff also relies on the fact that both songs were played on numerous occasions in open court for the jury to hear and on the deposition testimony of one of the Bee Gees, Maurice, who incorrectly identified Theme B of Selle's song as the Bee Gees' composition, "How Deep Is Your Love."

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.<sup>#</sup> 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.<sup>#</sup> If the similar sections are particularly intricate, then again it would seem more likely that the compositions are related. Finally, some dissimilarities may be particularly suspicious. *See, e.g., Meier Co. v. Albany Novelty Manufacturing Co.*, 236 F.2d 144, 146 (2d Cir. 1956) (inversion and substitution of certain words in a catalogue in a “crude effort to give the appearance of dissimilarity” are themselves evidence of copying); *Blume v. Spear*, 30 F. 629, 631 (S.D.N.Y. 1887) (variations in infringing song were placed so as to indicate deliberate copying); Sherman, *Musical Copyright Infringement*, at 84-88. While some of these concepts are borrowed from literary copyright analysis, they would seem equally applicable to an analysis of music.

The judicially formulated definition of “striking similarity” states that “plaintiffs must demonstrate that ‘such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.’” *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980). *See also Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir. 1967) (the similarities must be “so striking and of such nature as to preclude the possibility of coincidence, accident or independent creation.”); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (same); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978) (same). Sherman adds:

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, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), or that the defendant was able to compose the accused work as a matter of independent creation, *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930). See also *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940) (“simple, trite themes ... are likely to recur spontaneously ... and [only few] ... suit the infantile demands of the popular ear”). Cf. *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (finding of a “highly unique pattern” makes copying more likely). With these principles in mind, we turn now to an analysis of the evidence of “striking similarity” presented by the plaintiff.

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. 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. 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.

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