

COPYRIGHT INFRINGEMENT AND DIGITAL SAMPLING

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

LEARNED HAND, District Judge:

The copyright to the composition "Dardanella" covered the piece as a whole; there were not several copyrights for each part of it. Nevertheless the plagiarism of any substantial component part, either in melody or accompaniment, would be the proper subject of such a suit as this. To sustain it, however, more must appear than the mere similarity or even identity, of the supposed infringement with the part in question. In this lies one distinction between a patent and a copyright. One may infringe a patent by the innocent reproduction of the machine patented, but the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted. The plaintiff therefore concedes that it must show that Kern, the composer, used "Dardanella" as the source of his accompaniment.

The argument is a strong one. Not only is the figure in each piece exactly alike, but it is used in the same way; that is, as an "ostinato" accompaniment. Further, the defendants have been able to discover in earlier popular music neither this figure, nor even any "ostinato" accompaniment whatever. The fact that "Kalua" appeared shortly after "Dardanella" had faded out, and was written by one who had necessarily known it, as a musician knew it, makes it still more hard to assume any independent provenience for "Kalua." Can I suppose that such parallelism could be the result of coincidence only?

Mr. Kern swears that he was quite unconscious of any plagiarism, and on the whole I am disposed to give him the benefit of the doubt. For this I rely, not only upon the impression which he made upon me, but upon the insufficiency of the motive. I cannot agree that the accompaniment was at all as important to the success of "Dardanella" as the plaintiff would ask me to believe. I admit that it was a good bass, and helped; but I think the piece won its success substantially because of the melody. It is of course possible that Kern might have lifted it bodily, hoping to escape detection. However, he has an established place among composers of light opera, and has already succeeded more than once. Certainly detection would be a matter of some moment to him. No producer willingly invites the suits which follow musical piracy. Once convicted in such a case, Kern's market might suffer. With the profit small and price high, it seems to me unlikely that he should have set about deliberate plagiarism.

Whether he unconsciously copied the figure, he cannot say, and does not try to. Everything registers somewhere in our memories, and no one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain of "Kalua," Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity. So to hold I need not reject his testimony that he was unaware of such a borrowing. This I understand to have been Judge Knox's conclusion, reached upon the affidavits alone.

On the issue of infringement this conclusion is enough. The point is a new one, but I think it is plain. The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith. Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick. In an indictment under Copyright Act, § 28 (Comp. St. § 9549), the excuse might be a defense, since the infringement would not be willful; but it is seldom that a tort, as this is, depends upon the purpose of the wrongdoer. Therefore I find with the plaintiff on the issue of infringement.

Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940)

PER CURIAM:

This appeal depends upon whether the judge's findings that Sherman and Silver did not copy the plaintiff's composition was 'clearly erroneous' under Rule 52(a), Rules of Civil Procedure for District Courts, 28 U.S.C.A. following section 723c. The strength of the plaintiff's case lies in the substantial identity of a sequence of eight notes in his song and theirs; and indeed, that hardly does justice to the similarity between the two, because the sequence reappears in each song so frequently as to constitute the greater part of each. This makes the two, when rendered, so much alike to the ear, that the supposed piracy appears almost inevitable. Nevertheless, we are not convinced that that conclusion is inescapable. The showing of access was not very persuasive. It is true that Gladys Crane swore that Silver had heard her sing the plaintiff's song in June, 1928, shortly after its composition, and that her mother somewhat dubiously corroborated her. However, that was seven and a half years before the defendants' song was composed, a long time for such a theme to hang in Silver's memory. Meanwhile, the plaintiff's song had had very scant publicity, for although 1,500 copies had been sold, and there had been public performances in 1931, 1933, and 1935, nobody fastened Silver with knowledge of any of these. He denied that he had heard it at any time, and while he may have been mistaken, there is no reason a priori to upset the finding that he was not. We have already said in *Arnstein v. Marks Music Corporation*, 2 Cir., 82 F.2d 275, that such simple, trite themes as these are likely to recur spontaneously; indeed the defendants have been able to discover substantial equivalents of that at bar in a number of pieces which appeared earlier than the plaintiff's, and while this did not impair the copyright, it serves to fortify the judge's conclusion that the similarity did not falsify Silver's denial. It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism. . . .

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

FRANK, Circuit Judges:

1. Plaintiff with his complaint filed a jury demand which defendant moved to strike out. Defendant urges that the relief prayed in the complaint renders a jury trial inappropriate. We do not agree. . . .

2. The principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action. The answer depends on whether 'there is the slightest doubt as to the facts.' In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went to far as to constitute improper appropriation.

As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of the facts. If

COPYRIGHT WARS AND THE MUSIC INDUSTRY

evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.

In some cases, the similarities between the plaintiff’s and defendant’s work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. But such double-purpose evidence is not required; that is, if copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying.

Each of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts—of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions. But a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); and similarly as to a finding of no illicit appropriation.

3. We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant, we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.

. . . .

4. Assuming that adequate proof is made of copying, that is not enough; for there can be ‘permissible copying,’ copying which is not illicit. Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians.¹⁹ The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts. The question, therefore, is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine.²² Indeed, even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question.

We should not be taken as saying that a plagiarism case can never arise in which absence of similarities is so patent that a summary judgment for defendant would be correct. Thus suppose that Ravel’s ‘Bolero’ or Shostakovitch’s ‘Fifth Symphony’ were alleged to infringe ‘When Irish Eyes Are Smiling.’²³ But this is not such a case. For, after listening to the playing of the respective compositions, we are, at this time, unable to conclude that the likenesses are so trifling that, on the issue of misappropriation, a trial judge could legitimately direct a verdict for defendant.

At the trial, plaintiff may play, or cause to be played, the pieces in such manner that they may seem to a jury to be inexcusably alike, in terms of the way in which lay listeners of such music would be

¹⁹ Where plaintiff relies on similarities to prove copying (as distinguished from improper appropriation) paper comparisons and the opinions of experts may aid the court.

²² It would, accordingly, be proper to exclude tone-deaf persons from the jury.

²³ In such a case, the complete absence of similarity would negate both copying and improper appropriation.

COPYRIGHT WARS AND THE MUSIC INDUSTRY

likely to react. The plaintiff may call witnesses whose testimony may aid the jury in reaching its conclusion as to the responses of such audiences. Expert testimony of musicians may also be received, but it will in no way be controlling on the issue of illicit copying, and should be utilized only to assist in determining the reactions of lay auditors. The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation;²⁴ for the views of such persons are caviar to the general—and plaintiff's and defendant's compositions are not caviar.²⁵

....

Modified in part; otherwise reversed and remanded.

CLARK, Circuit Judge (dissenting):

While the procedure followed below seems to me generally simple and appropriate, the defendant did make one fatal tactical error. In an endeavor to assist us, he caused to be prepared records of all the musical pieces here involved, and presented these transcriptions through the medium of the affidavit of his pianist. Though he himself did not stress these records and properly met plaintiff's claims as to the written music with his own analysis, yet the tinny tintinnabulations of the music thus canned resounded through the United States Courthouse to the exclusion of all else, including the real issues in the case. Of course, sound is important in a case of this kind, but it is not so important as to falsify what the eye reports and the mind teaches. Otherwise plagiarism would be suggested by the mere drumming of repetitious sound from our usual popular music, as it issues from a piano, orchestra, or hurdy-gurdy—particularly when ears may be dulled by long usage, possibly artistic repugnance or boredom, or mere distance which causes all sounds to merge. And the judicial eardrum may be peculiarly insensitive after long years of listening to the 'beat, beat, beat' (I find myself plagiarizing from defendant and thus in danger of my brothers' doom) of sound upon it, though perhaps no more so than the ordinary citizen juror—even if tone deafness is made a disqualification for jury service, as advocated.

Pointing to the adscititious fortuity inherent in the stated standard is, it seems to me, the fact that after repeated hearings of the records, I could not find therein what my brothers found. The only thing definitely mentioned seemed to be the repetitive use of the note e 2 in certain places by both plaintiff and defendant, surely too simple and ordinary 2 device of composition to be significant. In our former musical plagiarism cases we have, naturally, relied on what seemed the total sound effect; but we have also analyzed the music enough to make sure of an intelligible and intellectual decision. Thus in *Arnstein v. Edward B. Marks Music Corp.*, 2 Cir., 82 F.2d 275, 277, Judge L. Hand made quite an extended comparison of the songs, concluding, inter alia: '* * * the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes, even though the identity extend through a sequence of twelve notes.' See also the discussion in *Marks v. Leo Feist, Inc.*, 2 Cir., 290 F. 959, and *Darrell v. Joe Morris Music Co.*, 2 Cir., 113 F.2d 80, where the use of six similar bars and of an eight-note sequence frequently repeated were respectively held not to constitute infringement, and *Wilkie v. Santly Bros.*, 2 Cir., 91 F.2d 978, affirming D.C.S.D.N.Y., 13 F. Supp. 136, certiorari denied *Santly Bros. v. Wilkie*, 302 U.S. 735, where use of eight bars with other similarities amounting to over three-quarters of the significant parts was held infringement.¹

²⁴ Our comments in this paragraph would be pertinent if the trial were before a judge alone. Of course, a judge trying a case without a jury does not direct himself to enter a verdict; but the applicable standards are virtually the same, for he is then, in part, a one-man jury.

²⁵ Nor need plaintiff's be.

¹ In accord is Shafter, *Musical Copyright*, 2d Ed. 1939, c. 6, particularly p. 205, where the author speaks of 'the 'comparative method,' worked out by Judge Learned Hand with great success,' and 'his successful method of analysis,' citing *Hein v. Harris*, C.C.S.D.N.Y., 175 F. 875, affirmed 2 Cir., 183 F. 107, and *Haas v. Leo Feist, Inc.*, D.C.S.D.N.Y., 234 F. 105; and p. 194, where he approves of Judge Yankwich's course in attaching an exhibit of analysis to his opinion in *Hirsch v. Paramount Pictures, Inc.*, D.C.S.D.Cal., 17 F. Supp. 816—'this sensible procedure,' 'a splendid model for future copyright decisions.' I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and

COPYRIGHT WARS AND THE MUSIC INDUSTRY

It is true that in *Arnstein v. Broadcast Music, Inc.*, 2 Cir., 137 F.2d 410, 412, we considered ‘dissection’ or ‘technical analysis’ not the proper approach to support a finding of plagiarism, and said that it must be ‘more ingenuous, more like that of a spectator, who would rely upon the complex of his impressions.’ But in its context that seems to me clearly sound and in accord with what I have in mind. Thus one may look to the total impression to repulse the charge of plagiarism where a minute ‘dissection’ might dredge up some points of similarity. Hence one cannot use a purely theoretical disquisition to supply a tonal resemblance which does not otherwise exist. Certainly, however, that does not suggest or compel the converse—that one must keep his brain in torpor for fear that otherwise it would make clear differences which do exist. Music is a matter of the intellect as well as the emotions; that is why eminent musical scholars insist upon the employment of the intellectual faculties for a just appreciation of music.²

Consequently I do not think we should abolish the use of the intellect here even if we could. When, however, we start with an examination of the written and printed material supplied by the plaintiff in his complaint and exhibits, we find at once that he does not and cannot claim extensive copying, measure by measure, of his compositions. He therefore has resorted to a comparative analysis—the ‘dissection’ found unpersuasive in the earlier cases—to support his claim of plagiarism of small detached portions here and there, the musical fillers between the better known parts of the melody. And plaintiff’s compositions, as pointed out in the cases cited above, are of the simple and trite character where small repetitive sequences are not hard to discover. It is as though we found Shakespeare a plagiarist on the basis of his use of articles, pronouns, prepositions, and adjectives also used by others. The surprising thing, however, is to note the small amount of even this type of reproduction which plaintiff by dint of extreme dissection has been able to find.

Though it is most instructive, it will serve no good purpose for me to restate here this showing as to each of the pieces in issue. As an example of the rest, we may take plaintiff’s first cause of action. This involves his ‘A Modern Messiah’ with defendant’s ‘Don’t Fence Me In.’ The first is written in 6/8 time, the second in common or 4/4 time; and there is only one place where there is a common sequence of as many as five consecutive notes, and these without the same values. Thus it goes. The usual claim seems to be rested upon a sequence of three, of four, or of five—never more than five—identical notes, usually of different rhythmical values. Nowhere is there anything approaching the twelve-note sequence of the Marks case, *supra*. Interesting is the fact that the closest tonal resemblance is to be found between a piece by defendant written back in 1930 and an uncopyrighted waltz by plaintiff (rejected here by my brothers because it is uncopyrighted) which was never published, but, according to his statement, was publicly performed as early as 1923, 1924, and 1925.

assistance of experts, and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury—the now chosen instrument of musical detection—could be expected to separate those issues and the evidence accordingly. If there is actual copying, it is actionable, and there are no degrees; what we are dealing with is the claim of similarities sufficient to justify the inference of copying. This is a single deduction to be made intelligently, not two with the dominating one to be made blindly.

² Thus Stewart Macpherson, Professor of Harmony and Composition in the Royal Academy of Music, says in his standard text. *Form in Music*, Rev. Ed. 1930, 1, 2: ‘Music appeals to us in a threefold way, which may be described under the headings of (i) Physical Sensation; (ii) Emotion, or feeling; (iii) Intellect (i.e. critical judgment, based upon certain reasoning powers within us). The first of these agencies, that of physical sensation, is without doubt the lowest of the three, and is one we share with the rest of the animal creation, upon whom—as we all know—certain sounds seem to have a distinct and immediate effect—often that of pain. * * * [The second] lies on a much higher plane than mere physical sensation. It is more subjective, and is the response of something in our own consciousness to some (often indescribable) quality in the music to which we are listening. * * * But, in judging of the emotional effect of a work, the factor of association has to be taken into account, and it is a truism to say that we are often tempted to estimate a poem or a musical work quite out of all proportion to its real value as a work of art, simply because it is associated, perhaps, in our thoughts with certain events or crisis in our own lives, or is the expression—probably the very imperfect expression—of some sentiment with which we are in sympathy and accord.

‘Here then, in order that we may the better arrive at a just and critical appreciation of that to which we may be directing our attention, comes the necessity for the employment of the intellectual faculties of our nature. ‘To judge a composition simply from the manner in which it works upon our feelings, is no better than judging a picture or a poem merely from our sympathy with its subject.’ We here are called upon to exercise our judgment, to decide upon such questions as style, symmetry, and balance of design—to say, in fact, whether the composer has put his thoughts into the most convincing shape, into that form which will best convey their meaning.’

COPYRIGHT WARS AND THE MUSIC INDUSTRY

In the light of these utmost claims of the plaintiff, I do not see a legal basis for the claim of plagiarism. So far as I have been able to discover, no earlier case approaches the holding that a simple and trite sequence of this type, even if copying may seem indicated, constitutes proof either of access or of plagiarism. In addition to the cases already cited, see the fine statements of Bright, J., in *Arnstein v. Broadcast Music, Inc.*, D.C.S.D.N.Y., 46 F. Supp. 379, 381, affirmed 2 Cir., 137 F.2d 410, *supra*, and of Yankwich, J., in *Carew v. R.K.O. Radio Pictures*, D.C.S.D.Cal., 43 F. Supp. 199. That being so, the procedure whereby the demonstration is made does not seem to me overimportant. A court is a court whether sitting at motion or day calendar; and when an issue of law is decisively framed, it is its judicial duty to pass judgment. Hence on the precedents I should feel dismissal required on the face of the complaint and exhibits.

But of course as the record now stands, the case is still stronger, for it appears that access must rest only upon a showing of similarities in the compositions. Under the procedure employed, the parties were entitled to require discovery of the case relied on by the other. This they did by each taking the deposition of the other, resulting in a categorical denial by defendant of having ever seen or heard plaintiff's compositions and no showing by plaintiff of any evidence of access worthy of submission to any trier of fact. And I take it as conceded that these trifling bits of similarities will not permit of the inference of copying. . . . Further, my brothers reject as 'utterly immaterial' the help of musical experts as to the music itself (as distinguished from what lay auditors may think of it, where, for my part, I should think their competence least), contrary to what I had supposed was universal practice—thereby adding a final proof of the anti-intellectual and book-burning nature of their decision. Thus it seems quite likely that the record at trial will be the one now before us.

Since the legal issue seems thus clear to me, I am loath to believe that my colleagues will uphold a final judgment of plagiarism on a record such as this. The present holding is therefore one of those procedural mountains which develop where it is thought that justice must be temporarily sacrificed, lest a mistaken precedent be set at large. . . .

. . . Of course it is error to deny trial when there is a genuine dispute of facts; but it is just as much error—perhaps more in cases of hardship, or where impetus is given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated. . . . Here I think we ought to assume the responsibility of decision now. If, however, we are going to the other extreme of having all decisions of musical plagiarism made by ear, the more unsophisticated and musically naive the better, then it seems to me we are reversing our own precedents to substitute chaos, judicial as well as musical.

ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983)

PIERCE, Circuit Judge:

I. BACKGROUND

A. Events Leading to Liability Trial

On February 10, 1971, Bright Tunes Music Corporation (Bright Tunes), then copyright holder of the song "He's So Fine," composed by Ronald Mack, brought this copyright infringement action in the United States District Court for the Southern District of New York against former member of the musical group "The Beatles" George Harrison, and also against related entities (hereinafter referred to collectively as "Harrison Interests"), alleging that the Harrison composition, "My Sweet Lord," (hereinafter referred

COPYRIGHT WARS AND THE MUSIC INDUSTRY

to alternatively as “MSL”) infringed the Ronald Mack composition, “He’s So Fine,” (hereinafter referred to alternatively as “HSF”).²

When this action was commenced, the business affairs of The Beatles, including Harrison Interests, were handled by ABKCO Music, Inc. (ABKCO) and Allen B. Klein, its President and “moving spirit.” ABKCO was Harrison’s business manager during the initial stages of the copyright liability action herein, at which time the litigation was handled for Harrison by ABKCO’s General Counsel.

....

“It is well settled that copying may be inferred where a plaintiff establishes that the defendant had access to the copyrighted work and that the two works are substantially similar.” In this case Judge Owen determined 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.” He concluded that the substantial similarity coupled with access constituted copyright infringement, even though subconsciously accomplished.

Appellees argue on cross-appeal that the instant case differs significantly from those cases relied upon by the district court to support its conclusion of subconscious infringement, and from the only other case in this circuit which held that subconscious copying can constitute infringement, *i.e.*, *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924). In addition, they urge upon this court the position that it is unsound policy to permit a finding of copyright infringement on the basis of subconscious copying. We reject both arguments and affirm the decision of the district judge.

First, we do not find dispositive appellees’ distinction between the instant case and *Sheldon and Fisher* cases. Appellees point out that in those two cases, the infringing work was created very shortly after the infringer had had access to the infringed work. Here, in contrast, appellees note. Harrison’s access to HSF occurred in 1963, some six years before he composed MSL. We disagree with appellees’ position that such temporal remoteness precludes a finding of access. First, Harrison himself admitted at trial that he remembered hearing HSF in the early sixties when it was popular. Moreover, even if there had not been such direct evidence of access, access still may have been found because of the wide dissemination of HSF at that time. See *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir.1946); 3 M. Nimmer, *Nimmer on Copyright* § 13.02[A] (1983). Indeed, in 1963, the year of Harrison’s admitted access to HSF, the song was “Number One on the *Billboard* charts” in the United States for five weeks, and it was one of the “Top Thirty Hits” in England for seven weeks that same year. Thus, even if the evidence, standing alone, “by no means compels the conclusion that there was access . . . it does not compel the conclusion that there was not.”

As to the requisite finding of substantial similarity, we affirm the determinations of the district judge, since we do not find them to be clearly erroneous. Even Harrison conceded at trial that the two songs were “strikingly similar” as played by a pianist during the liability trial.

This case is unlike *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940), cited by appellees. In *Darrell*, the Court of Appeals affirmed the district court’s finding of no plagiarism, when there had been “substantial identity” between the songs at issue. The *Darrell* court found of particular significance that the songs’ themes were trite and access had occurred some seven and a half years before the defendant’s song was composed. The court noted:

Such simple, trite themes as these are likely to recur spontaneously; . . . It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.

We find this case distinguishable. Indeed, on the facts herein, the district judge did not find repetition of “trite themes,” but rather, “a highly unique pattern”. Moreover, in *Darrell*, the court found that the

² In 1973, a similar infringement action was brought in England by The Peter Maurice Music Co., Ltd. (Maurice), which in 1963, had received from Bright Tunes an assignment of all copyright rights for HSF worldwide (except the United States and Canada).

COPYRIGHT WARS AND THE MUSIC INDUSTRY

allegedly infringed song “had had very scant publicity” and credited the defendant’s denial of ever having heard it. This is unlike the case at bar where HSF had had very substantial dissemination and where Harrison acknowledged that he had heard HSF at least a few times. We accept the *Darrell* court’s observation that “recurrence is not . . . an inevitable badge of plagiarism.” However, on the facts presented herein, where the similarity was so striking and where access was found, the remoteness of that access provides no basis for reversal.

Appellees argue next that it is unsound policy to permit a finding of infringement for subconscious copying, particularly on the facts of this case. They assert that allowing for subconscious infringement brings the law of copyright improperly close to patent law, which imposes a requirement of novelty. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir.1951) (“independent reproduction of a copyrighted . . . work is not infringement’, whereas it is *vis a vis* a patent”) (quoting *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 275 (2d Cir.1936)). We do not accept this argument.

It is not new law in this circuit that when a defendant’s work is copied from the plaintiff’s, but the defendant in good faith has forgotten that the plaintiff’s work was the source of his own, such “innocent copying” can nevertheless constitute an infringement. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d at 54; *see also* 3 M. Nimmer, *Nimmer on Copyright* § 13.08 (1983). We do not find this stance in conflict with the rule permitting independent creation of copyrighted material. It is settled that “intention to infringe is not essential under the [Copyright] Act,” *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931). Moreover, as a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders. We therefore see no reason to retreat from this circuit’s prior position that copyright infringement can be subconscious.¹²

Because there was sufficient evidence of record to support the district judge’s findings of substantial similarity and access, we affirm the finding of copyright infringement. . . .

Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000)

NELSON, Circuit Judge:

In 1994, a jury found that Michael Bolton’s 1991 pop hit, “Love Is a Wonderful Thing,” infringed on the copyright of a 1964 Isley Brothers’ song of the same name. The district court denied Bolton’s motion for a new trial and affirmed the jury’s award of \$5.4 million.

Bolton, his co-author, Andrew Goldmark, and their record companies (“Sony Music”) appeal, arguing that the district court erred in finding that: (1) sufficient evidence supported the jury’s finding that the appellants had access to the Isley Brothers’ song; (2) sufficient evidence supported the jury’s finding that the songs were substantially similar

We affirm.

I. BACKGROUND

The Isley Brothers, one of this country’s most well-known rhythm and blues groups, have been inducted into the Rock and Roll Hall of Fame. They helped define the soul sound of the 1960s with songs such as “Shout,” “Twist and Shout,” and “This Old Heart of Mine,” and they mastered the funky beats of

¹² We note that although a finding of innocent infringement does not affect liability, such a finding might constitute a factor to be considered in the fashioning of remedies in a given case.

COPYRIGHT WARS AND THE MUSIC INDUSTRY

the 1970s with songs such as “Who’s That Lady,” “Fight the Power,” and “It’s Your Thing.” In 1964, the Isley Brothers wrote and recorded “Love is a Wonderful Thing” for United Artists. The Isley Brothers received a copyright for “Love is a Wonderful Thing” from the Register of Copyrights on February 6, 1964. The following year, they switched to the famous Motown label and had three top-100 hits including “This Old Heart of Mine.”

Hoping to benefit from the Isley Brothers’ Motown success, United Artists released “Love is a Wonderful Thing” in 1966. The song was not released on an album, only on a 45-record as a single. Several industry publications predicted that “Love is a Wonderful Thing” would be a hit—“Cash Box” on August 27, 1966, “Gavin Report” on August 26, 1966, and “Billboard” on September 10, 1966. On September 17, 1966, Billboard listed “Love is a Wonderful Thing” at number 110 in a chart titled “Bubbling Under the Hot 100.” The song was never listed on any other Top 100 charts. In 1991, the Isley Brothers’ “Love is a Wonderful Thing” was released on compact disc.

Michael Bolton is a singer/songwriter who gained popularity in the late 1980s and early 1990s by reviving the soul sound of the 1960s. Bolton has orchestrated this soul-music revival in part by covering old songs such as Percy Sledge’s “When a Man Love a Woman” and Otis Redding’s “(Sittin’ on the) Dock of the Bay.” Bolton also has written his own hit songs. In early 1990, Bolton and Goldmark wrote a song called “Love Is a Wonderful Thing.” Bolton released it as a single in April 1991, and as part of Bolton’s album, “Time, Love and Tenderness.” Bolton’s “Love Is a Wonderful Thing” finished 1991 at number 49 on Billboard’s year-end pop chart.

On February 24, 1992, Three Boys Music Corporation filed a copyright infringement action for damages against the appellants under 17 U.S.C. §§ 101 *et seq.* (1988). The parties agreed to a trifurcated trial. On April 25, 1994, in the first phase, the jury determined that the appellants had infringed the Isley Brothers’ copyright. At the end of second phase five days later, the jury decided that Bolton’s “Love Is a Wonderful Thing” accounted for 28 percent of the profits from “Time, Love and Tenderness.” The jury also found that 66 percent of the profits from commercial uses of the song could be attributed to the inclusion of infringing elements. On May 9, 1994, the district court entered judgment in favor of the Isley Brothers based on the first two phases.

The deadline for post-trial motions was May 25, 1994. On that day, the appellants filed a motion for judgment as a matter of law and a motion for new trial. The district court denied the motions on August 11, 1994. On June 8, 1994, the appellants filed a second motion for new trial based on newly discovered evidence on the issue of copyright ownership. The district court dismissed this motion as untimely.

On December 5, 1996, the district court adopted the findings of the Special Master’s Amended Report about the allocation of damages (third phase). In the final judgment entered against the appellants, the district court ordered Sony Music to pay \$4,218,838; Bolton to pay \$932,924; Goldmark to pay \$220,785; and their music publishing companies to pay \$75,900. They timely appealed.

II. DISCUSSION

Proof of copyright infringement is often highly circumstantial, particularly in cases involving music. A copyright plaintiff must prove (1) ownership of the copyright; and (2) infringement—that the defendant copied protected elements of the plaintiff’s work. Absent 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.”

Given the difficulty of proving access and substantial similarity, appellate courts have been reluctant to reverse jury verdicts in music cases. *See, e.g., [Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir. 1996)]* (affirming a jury’s verdict for the defendants in a copyright infringement case involving Michael Jackson and other musicians); *Gaste v. Kaiserman, 863 F.2d 1061, 1071 (2d Cir. 1988)* (affirming a

COPYRIGHT WARS AND THE MUSIC INDUSTRY

jury's damages award against a defendant in a music copyright infringement case). Judge Newman's opinion in *Gaste* nicely articulated the proper role for an appeals court in reviewing a jury verdict:

The guiding principle in deciding whether to overturn a jury verdict for insufficiency of the evidence is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.

In *Arnstein v. Porter*, the seminal case about musical copyright infringement, Judge Jerome Frank wrote:

Each of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts—of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions.

Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946).

As a general matter, the standard for reviewing jury verdicts is whether they are supported by “substantial evidence”—that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.

We affirm the jury's verdict in this case in light of the standard of review and copyright law's “guiding principles.” Although we will address each of the appellant's arguments in turn, we focus on access because it is the most difficult issue in this case. Our decision is predicated on judicial deference—finding that the law has been properly applied in this case, viewing the facts most favorably to the appellees, and not substituting our judgment for that of the jury.

A. Access

Proof of access requires “an opportunity to view or to copy plaintiff's work.” This is often described as providing a “reasonable opportunity” or “reasonable possibility” of viewing the plaintiff's work. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.02[A], at 13-19 (1999). We have defined reasonable access as “more than a ‘bare possibility.’” Nimmer has elaborated on our definition: “Of course, reasonable opportunity as here used, does not encompass any bare possibility in the sense that anything is possible. Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing the plaintiff's work—not a bare possibility.” “At times, distinguishing a ‘bare’ possibility from a ‘reasonable’ possibility will present a close question.”

Circumstantial evidence of reasonable access is proven in one of two ways: (1) a particular chain of events is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company), or (2) the plaintiff's work has been widely disseminated. See 4 Nimmer, § 13.02[A], at 13-20-13-21; 2 Paul Goldstein, *Copyright: Principles, Law, and Practice* § 8.3.1.1., at 90-91 (1989). Goldstein remarks that in music cases the “typically more successful route to proving access requires the plaintiff to show that its work was widely disseminated through sales of sheet music, records, and radio performances.” 2 Goldstein, § 8.3.1.1, at 91. Nimmer, however, cautioned that “concrete cases will pose difficult judgments as to where along the access spectrum a given exploitation falls.” 4 Nimmer, § 13.02[A], at 13-22.

Proof of widespread dissemination is sometimes accompanied by a theory that copyright infringement of a popular song was subconscious. Subconscious copying has been accepted since Learned Hand embraced it in a 1924 music infringement case: “Everything registers somewhere in our memories, and no one can tell what may evoke it Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.” *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147-48

COPYRIGHT WARS AND THE MUSIC INDUSTRY

(S.D.N.Y. 1924). In *Fred Fisher*, Judge Hand found that the similarities between the songs “amounted to identity” and that the infringement had occurred “probably unconsciously, what he had certainly often heard only a short time before.”

In modern cases, however, the theory of subconscious copying has been applied to songs that are more remote in time. *ABKCO Music, Inc v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) is the most prominent example. In *ABKCO*, the Second Circuit affirmed a jury’s verdict that former Beatle George Harrison, in writing the song “My Sweet Lord,” subconsciously copied The Chiffons’ “He’s So Fine,” which was released six years earlier. Harrison admitted hearing “He’s So Fine” in 1963, when it was number one on the Billboard charts in the United States for five weeks and one of the top 30 hits in England for seven weeks. The court found: “the evidence, standing alone, ‘by no means compels the conclusion that there was access . . . it does not compel the conclusion that there was not.’” In *ABKCO*, however, the court found that “the similarity was so striking and where access was found, the remoteness of that access provides no basis for reversal.” Furthermore, “the mere lapse of a considerable period of time between the moment of access and the creation of defendant’s work does not preclude a finding of copying.” 4 Nimmer, § 13.02[A], at 13-20 (citing *ABKCO*, 722 F.2d at 997-98).

The Isley Brothers’ access argument was based on a theory of widespread dissemination and subconscious copying. They presented evidence supporting four principal ways that Bolton and Goldmark could have had access to the Isley Brothers’ “Love is a Wonderful Thing”:

(1) Bolton grew up listening to groups such as the Isley Brothers and singing their songs. In 1966, Bolton and Goldmark were 13 and 15, respectively, growing up in Connecticut. Bolton testified that he had been listening to rhythm and blues music by black singers since he was 10 or 11, “appreciated a lot of Black singers,” and as a youth was the lead singer in a band that performed “covers” of popular songs by black singers. Bolton also testified that his brother had a “pretty good record collection.”

(2) Three disk jockeys testified that the Isley Brothers’ song was widely disseminated on radio and television stations where Bolton and Goldmark grew up. First, Jerry Blavitt testified that the Isley Brothers’ “Love is a Wonderful Thing” was played five or six times during a 13-week period on the television show, “The Discophonic Scene,” which he said aired in Philadelphia, New York, and Hartford-New Haven. Blavitt also testified that he played the song two to three times a week as a disk jockey in Philadelphia and that the station is still playing the song today. Second, Earl Rodney Jones testified that he played the song a minimum of four times a day during an eight to 14 to 24 week period on WVON radio in Chicago, and that the station is still playing the song today. Finally, Jerry Bledsoe testified that he played the song on WUFO radio in Buffalo, and WWRL radio in New York was playing the song in New York in 1967 when he went there. Bledsoe also testified that he played the song twice on a television show, “Soul,” which aired in New York and probably in New Haven, Connecticut, where Bolton lived.

(3) Bolton confessed to being a huge fan of the Isley Brothers and a collector of their music. Ronald Isley testified that when Bolton saw Isley at the Lou Rawls United Negro College Fund Benefit concert in 1988, Bolton said, “I know this guy. I go back with him. I have all his stuff.” Angela Winbush, Isley’s wife, testified about that meeting that Bolton said, “This man needs no introduction. I know everything he’s done.”

(4) Bolton wondered if he and Goldmark were copying a song by another famous soul singer. Bolton produced a work tape attempting to show that he and Goldmark independently created their version of “Love Is a Wonderful Thing.” On that tape of their recording session, Bolton asked Goldmark if the song they were composing was Marvin Gaye’s “Some Kind of Wonderful.”¹ The district court, in affirming the jury’s verdict, wrote about Bolton’s Marvin Gaye remark:

¹ Gaye recorded “Some Kind of Wonderful” after it had been made famous by The Drifters. Marvin Gaye also referred to the song’s chorus, “She’s some kind of wonderful,” in his song, “Too Busy Thinking About My Baby.”

COPYRIGHT WARS AND THE MUSIC INDUSTRY

This statement suggests that Bolton was contemplating the possibility that the work he and Goldmark were creating, or at least a portion of it, belonged to someone else, but that Bolton wasn't sure who it belonged to. A reasonable jury can infer that Bolton mistakenly attributed the work to Marvin Gaye, when in reality Bolton was subconsciously drawing on Plaintiff's song.

The appellants contend that the Isley Brothers' theory of access amounts to a "twenty-five-years-after-the-fact-subconscious copying claim." Indeed, this is a more attenuated case of reasonable access and subconscious copying than *ABKCO*. In this case, the appellants never admitted hearing the Isley Brothers' "Love is a Wonderful Thing." That song never topped the Billboard charts or even made the top 100 for a single week. The song was not released on an album or compact disc until 1991, a year after Bolton and Goldmark wrote their song. Nor did the Isley Brothers ever claim that Bolton's and Goldmark's song is so "strikingly similar" to the Isley Brothers' that proof of access is presumed and need not be proven.

Despite the weaknesses of the Isley Brothers' theory of reasonable access, the appellants had a full opportunity to present their case to the jury. Three rhythm and blues experts (including legendary Motown songwriter Lamont Dozier of Holland-Dozier-Holland fame) testified that they never heard of the Isley Brothers' "Love is a Wonderful Thing." Furthermore, Bolton produced copies of "TV Guide" from 1966 suggesting that the television shows playing the song never aired in Connecticut. Bolton also pointed out that 129 songs called "Love is a Wonderful Thing" are registered with the Copyright Office, 85 of them before 1964.

The Isley Brothers' reasonable access arguments are not without merit. Teenagers are generally avid music listeners. It is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later. Furthermore, Ronald Isley testified that when they met, Bolton said, "I have all his stuff." Finally, as the district court pointed out, Bolton's remark about Marvin Gaye and "Some Kind of Wonderful" indicates that Bolton believed he may have been copying someone else's song.

Finally, with regard to access, we are mindful of Judge Frank's words of caution in *Arnstein v. Porter*: "The judge characterized plaintiff's story as 'fantastic'; and in the light of the references in his opinion to the defendant's deposition, the judge obviously accepted the defendant's denial of access and copying Yet plaintiff's credibility, even as to those improbabilities, should be left to the jury." *Arnstein*, 154 F.2d at 469. In this case, Judge Baird heeded Judge Frank's admonition:

This Court is not in a position to find that the only conclusion that a reasonable jury could have reached is that Defendants did not have access to Plaintiff's song. One must remember that the issue this Court must address is not whether Plaintiff has proven access by a preponderance of evidence, but whether *reasonable minds* could find that Defendants had a *reasonable opportunity* to have heard Plaintiff's song before they created their own song.

Although we might not reach the same conclusion as the jury regarding access, we find that the jury's conclusion about access is supported by substantial evidence. We are not establishing a new standard for access in copyright cases; we are merely saying that we will not disturb the jury's factual and credibility determinations on this issue.

B. Substantial Similarity

Under our case law, substantial similarity is inextricably linked to the issue of access. In what is known as the "inverse ratio rule," we "require a lower standard of proof of substantial similarity when a high degree of access is shown." *Smith*, 84 F.3d at 1218 (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (9th Cir. 1990); *Krofft*, 562 F.2d at 1172). Furthermore, in the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were "strikingly similar." See *Smith*, 84 F.3d at 1220; *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n.2 (9th Cir. 1987).

COPYRIGHT WARS AND THE MUSIC INDUSTRY

Proof of the substantial similarity is satisfied by a two-part test of extrinsic similarity and intrinsic similarity. See *Krofft*, 562 F.2d at 1164. Initially, the extrinsic test requires that the plaintiff identify concrete elements based on objective criteria. See *Smith*, 84 F.3d at 1218; *Shaw*, 919 F.2d at 1356. The extrinsic test often requires analytical dissection of a work and expert testimony. See *Apple Computer, Inc v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). Once the extrinsic test is satisfied, the factfinder applies the intrinsic test. The intrinsic test is subjective and asks “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”

We will not second-guess the jury’s application of the intrinsic test. See *Krofft* 562 F.2d at 1166 (“Since the intrinsic test for expression is uniquely suited for determination by the trier of fact, this court must be reluctant to reverse it.”). Furthermore, we will not reverse factual determinations regarding the extrinsic test absent a clearly erroneous application of the law. It is well settled that a jury may find a combination of unprotectible elements to be protectible under the extrinsic test because “the over-all impact and effect indicate substantial appropriation.”

1. Evidence of Substantial Similarity

Bolton and Goldmark argue that there was insufficient evidence of substantial similarity because the Isley Brothers’ expert musicologist, Dr. Gerald Eskelin, failed to show that there was copying of a *combination* of unprotectible elements. On the contrary, Eskelin testified that the two songs shared a combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending. Although the appellants presented testimony from their own expert musicologist, Anthony Ricigliano, he conceded that there were similarities between the two songs and that he had not found the combination of unprotectible elements in the Isley Brothers’ song “anywhere in the prior art.” The jury heard testimony from both of these experts and “found infringement based on a unique compilation of those elements.” We refuse to interfere with the jury’s credibility determination, nor do we find that the jury’s finding of substantial similarity was clearly erroneous.

2. Independent Creation

Bolton and Goldmark also contend that their witnesses rebutted the Isley Brothers’ prima facie case of copyright infringement with evidence of independent creation. By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation.

The appellants’ case of independent creation hinges on three factors: the work tape demonstrating how Bolton and Goldmark created their song, Bolton and Goldmark’s history of songwriting, and testimony that their arranger, Walter Afanasieff, contributed two of five unprotectible elements that they allegedly copied. The jury, however, heard the testimony of Bolton, Goldmark, Afanasieff, and Ricigliano about independent creation. The work tape revealed evidence that Bolton may have subconsciously copied a song that he believed to be written by Marvin Gaye. Bolton and Goldmark’s history of songwriting presents no direct evidence about this case. And Afanasieff’s contributions to Bolton and Goldmark’s song were described by the appellants’ own expert as “very common.” Once again, we refuse to disturb the jury’s determination about independent creation. The substantial evidence of copying based on access and substantial similarity was such that a reasonable juror could reject this defense.

3. Inverse-Ratio Rule

Although this may be a weak case of access and a circumstantial case of substantial similarity, neither issue warrants reversal of the jury’s verdict. An amicus brief on behalf of the recording and motion picture industries warns against watering down the requirements for musical copyright

COPYRIGHT WARS AND THE MUSIC INDUSTRY

infringement. This case presents no such danger. The Ninth Circuit's inverse-ratio rule requires a lesser showing of substantial similarity if there is a strong showing of access. *See Smith*, 84 F.3d at 1218. In this case, there was a weak showing of access. We have never held, however, that the inverse ratio rule says a weak showing of access requires a stronger showing of substantial similarity. Nor are we redefining the test of substantial similarity here; we merely find that there was substantial evidence from which the jury could find access and substantial similarity in this case.

. . . .

AFFIRMED.

Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984)

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 and, in the alternative, for a new trial. We [**2] 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. 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

COPYRIGHT WARS AND THE MUSIC INDUSTRY

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."

....

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

COPYRIGHT WARS AND THE MUSIC INDUSTRY

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. *See generally* 3 Nimmer, *Copyright* § 13.02 at 13-9 (1983) [hereinafter "Nimmer, *Copyright*"]. 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).

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.

For example, in *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir.), *cert. denied*, 329 U.S. 716 (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

COPYRIGHT WARS AND THE MUSIC INDUSTRY

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. In *Cholvin v. B. & F. Music Co.*, 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. In *Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 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 thirty 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. On the other hand, in *Jewel Music Publishing Co. 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 *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*, *Jewel Music Publishing Co.*, or *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. 567 F. Supp. at 1181. 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".

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. *Dieckhaus, supra*, 153 F.2d at 899-900. 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."³ 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 13-14.⁴

"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. 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.'" 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.), *cert. denied*, 298 U.S. 669 (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), *cert. denied*, 282 U.S. 902 (1931). 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. 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

³ 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."

⁴ 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.

COPYRIGHT WARS AND THE MUSIC INDUSTRY

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.”

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).⁵ 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. . . .

Grand Upright Music Ltd. v. Warner Brothers Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991)

DUFFY, District Judge:

⁵ The plaintiff, on cross-examination, admitted that there were some similarities, primarily in melody rather than rhythm, between his song and various other popular tunes, including “From Me To You” and several earlier Bee Gee compositions.

COPYRIGHT WARS AND THE MUSIC INDUSTRY

“Thou shalt not steal.” has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

This proceeding was instituted by Order To Show Cause to obtain a preliminary injunction against the defendants for the improper and unlicensed use of a composition “Alone Again (Naturally)” written and performed on records by Raymond “Gilbert” O’Sullivan. Defendants admit “that the Biz Markie album ‘I Need A Haircut’ embodies the rap recording ‘Alone Again’ which uses three words from ‘Alone Again (Naturally)’ composed by Gilbert O’Sullivan and a portion of the music taken from the O’Sullivan recording.” The only issue, therefore, seems to be who owns the copyright to the song “Alone Again (Naturally)” and the master recording thereof made by Gilbert O’Sullivan.

Three categories of proof lead me to the conclusion that the plaintiff is the true owner of these copyrights: (1) copies of the original copyrights made out to NAM Music, Inc., along with a deed vesting title to the copyrights in Gilbert O’Sullivan and another deed transferring the copyrights to the plaintiff corporation; and (2) the testimony of Gilbert O’Sullivan the acknowledged writer of the composition “Alone Again (Naturally)” and the performer who is featured on the master recording pirated by the defendants; and (3) the defendants’ actions both before and after the issuance of the defendant album in contacting Gilbert O’Sullivan and his brother/agent in an attempt to obtain a license to use the copyrighted material.

Defense counsel objected to the admission of copies of the certificates of copyright because they were not “authenticated.” It was apparent that defense counsel was not using this term “authenticate” in the sense that it is normally used in the law, particularly in the law of evidence. Since the original copyright was in the name of NAM Music, Inc., defense counsel seemed to argue that someone authorized by NAM Music, Inc. would have to identify the certificates in order to “authenticate” them.

Of course, the reader should be aware that NAM Music, Inc. had long been dissolved, as defense counsel knew. It was clear to me that the use of the word “authenticate” by defense counsel had nothing whatsoever to do with self-authentication of public records under Rule 902 of the Federal Rules of Evidence. Nor did counsel believe that the certificate was anything less than a true and complete copy of the public record.

Counsel for the defendants also attempted to keep out evidence of the transfer to the plaintiff of copyrights in the work at issue. Defense counsel did not conduct any discovery in the time between the institution of this lawsuit and the hearing on the preliminary injunction and claimed to be surprised when the plaintiff produced documentation of the transfer. However, that defense counsel did not adequately prepare for this hearing does not give the court cause to reject evidence of the transfer.

Defense counsel also objected to the admission of the transfer documents on the grounds that, since they had not been filed with the Registrar of Copyrights, they were without legal effect. This is not the law and the specific section upon which the defense counsel relied has long been repealed. These documents, taken together, prove valid copyrights vested in the plaintiff.

In addition to the documents offered into evidence by the plaintiff, Gilbert O’Sullivan—who the defendants acknowledge was the composer, lyricist and first performer of the piece at issue—testified that plaintiff is the owner of the copyright. There can be no one more interested in the question of valid copyright than a person in Gilbert O’Sullivan’s position and he was a thoroughly credible and believable witness. Defense counsel did not effectively controvert O’Sullivan’s testimony in any way. Indeed, the thrust of the cross-examination of O’Sullivan went to the artist’s motive for refusing to give the defendants a license to use the song.

However, the most persuasive evidence that the copyrights are valid and owned by the plaintiff comes from the actions and admissions of the defendants. Prior to the time that Biz Markie’s album was

COPYRIGHT WARS AND THE MUSIC INDUSTRY

released, the various defendants apparently discussed among themselves the need to obtain a license. They decided to contact O'Sullivan and wrote to his brother/agent, enclosing a copy of the tape. In this letter, an attorney for the defendant states:

This firm represents a recording artist professionally known as Biz Markie, who has recorded a composition for Cold Chillin' Records entitled "Alone Again" which incorporates portions of the composition entitled "Alone Again Naturally" originally recorded by Gilbert O'Sullivan (the "Original Composition").

Biz Markie would like to obtain your consent to the use of the "Original Composition."

In writing this letter, counsel for Biz Markie admittedly was seeking "terms" for the use of the material. One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!

Each defendant who testified knew that it is necessary to obtain a license—sometimes called a "clearance"—from the holder of a valid copyright before using the copyrighted work in another piece. Warner Bros. Records, Inc. had a department set up specifically to obtain such clearances. WEA International, Inc. knew it had to obtain "consents, permissions or clearances. . . ." Cold Chillin' Records, Inc. knew that such clearances were necessary.

Clearly, the attorneys representing Biz Markie and acting on his behalf also knew of this obligation. Biz Markie's attorneys sent copies of an August 16 letter, addressed to counsel for Cold Chillin' Records, Inc., to the other defendants. That letter contains the following:

In light of the fact that Cold Chillin' knew that other sample clearance requests were pending at that time, it follows that Cold Chillin' should have known that similar denials of permission by rightsholders of other samples used on the album and single might be forthcoming, for which similar action would have been appropriate. Nevertheless, instead of continuing to communicate with our client and us and otherwise cooperating to ensure that all rights were secured prior to release of the album and single, as it did in the situation involving the Eagles samples, Cold Chillin' unilaterally elected to release the album and single, perhaps with the thought that it would look to Biz for resolution of any problems relating to sampling rights, or the failure to secure such rights, that may arise in the future.

Consequently, if any legal action arises in connection with the samples in question, such action will not arise due to the fact that Biz used the samples in his recorded compositions, but rather, due to the fact that Cold Chillin' released such material prior to the appropriate consents being secured in connection with such samples.

From all of the evidence produced in the hearing, it is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records.² This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.

The application for the preliminary injunction is granted. . . .

SO ORDERED.

² The argument suggested by the defendants that they should be excused because others in the "rap music" business are also engaged in illegal activity is totally specious. The mere statement of the argument is its own refutation.