
Chapter 17 Copyright Infringement**§ 17.01 Direct Infringement**

What elements are needed to prevail on a claim of copyright infringement? How can such infringement be proved?

17 U.S.C. § 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. . . .

To prove copyright infringement, the plaintiff must prove (1) ownership of a valid copyright (usually through the showing of a certificate of registration); (2) the defendant has copied the work; and (3) such copying constitutes unlawful appropriation. Although direct evidence (such as an admission or a testimony from a witness who observed the defendant's copying act) can be used, circumstantial evidence is generally used to demonstrate copying.

To show that the defendant has copied unlawfully through circumstantial evidence, courts generally look at (1) access to the original work and (2) whether the copied work is substantially similar to the original work. Determining the latter is sometimes subjective. Courts therefore have developed various tests to provide guidance for lower courts and to help determine whether the issue should be reserved for a lay jury or for testifying experts.

THREE BOYS MUSIC CORP. V. BOLTON

212 F.3d 477 (9th Cir. 2000)

NELSON, J.

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 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. . . .

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. Judge Newman's opinion in *Gaste* [*v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988)] 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.

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.” *Sid and Marty Krofft*. This is often described as providing a “reasonable opportunity” or “reasonable possibility” of viewing the plaintiff’s work. 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.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (1999). “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. 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.” Nimmer, however, cautioned that “[c]oncrete cases will pose difficult judgments as to where along the access spectrum a given exploitation falls.”

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 (S.D.N.Y. 1924). In *Fred Fisher*, Judge Hand found that the similarities between the songs “amount[ed] 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."

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 disc 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.” The district court, in affirming the jury’s verdict, wrote about Bolton’s Marvin Gaye remark:

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 20 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 defendant’s deposition, the judge obviously accepted the defendant’s denial of access and copying. . . . [Y]et plaintiff’s credibility, even as to those improbabilities, should be left to the jury.” In this case, Judge Baird heeded Judge Frank’s admonition:

[T]his 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.” 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.”

Proof of the substantial similarity is satisfied by a two-part test of extrinsic similarity and intrinsic similarity. Initially, the extrinsic test requires that the plaintiff identify concrete elements based on objective criteria. The extrinsic test often requires analytical dissection of a work and expert testimony. 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. 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 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. 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.

NOTES AND QUESTIONS

1. The function of the work tape in this case is similar to the function of laboratory notebooks in the patent context. Providing detailed documentation of the creative or inventive process can cut both ways. In *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984), for example, the work tape helped exonerate the Bee Gees by documenting the band's recording process, notwithstanding the fact that the band's work was considered strikingly similar to that of the plaintiff's. As the court pointed out, using the tape, "The Bee Gees . . . 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." The tape therefore provided convincing evidence to refute the plaintiffs' claim that Selle's work had been copied.

2. The court wrote: "Subconscious copying has been accepted since Learned Hand embraced it in [*Fred Fisher*]. . . . It is no excuse that in so doing his memory has played him a trick." Do you agree? Should copyright law create liability for subconscious copying? Should the court look at the presence of bad faith instead?

3. The court described the inverse ratio rule, in which a strong showing of substantial similarity may compensate for a weak showing of access. Does such a rule make sense? Should we have such a rule? If the plaintiff does not have any evidence of access—direct or circumstantial—can he show only striking substantial similarity instead? Could there be situations where the similarities are so striking that the defendant could not have independently created the work?