

**UNDERSTANDING THE CONCEPT OF “STRIKING SIMILARITY” IN COPYRIGHT-  
INFRINGEMENT LITIGATION**

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The two essential elements that a plaintiff must prove in a copyright-infringement case are ownership and copying.<sup>1</sup> “Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.”<sup>2</sup>

Although those two principles are clear, confusion surrounds the evidentiary standard necessary to sustain a finding of copying where the works are not simply “substantially similar” but are “strikingly similar.” One court has written “[i]f the two works are so strikingly similar as to preclude the possibility of independent creation, ‘copying’ may be proved without a showing of access.”<sup>3</sup> On the other hand, a different court has written “[t]he 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.”<sup>4</sup>

The better reasoned view is that a plaintiff must always present proof to establish a reasonable possibility of access, but that proof may be the degree of similarity between the two works. If the similarity is striking, then the finder of fact may infer access.

This principle regarding striking similarity is nothing more than the application of principles of circumstantial evidence to copyright-infringement litigation. The doctrine of circumstantial evidence generally permits the inference of a fact based upon the existence of another fact. Black’s Law Dictionary defines circumstantial evidence as: “Testimony not based on actual personal knowledge or observations of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.”<sup>5</sup>

The fact that permits the inference here is the fact of striking similarity. The fact to be inferred is access.

Perhaps the leading case in the debate regarding striking similarity and access is *Selle v. Gibb*. In *Selle*, the court found that the Bee Gee's work "How Deep Is Your Love" did not infringe the plaintiff's work "Let It End."<sup>6</sup> Plaintiff presented proof that he had performed his song in the Chicago area and had "sent a tape and lead sheet of the music to eleven music recording and publishing companies."<sup>7</sup> The plaintiff also presented an expert witness who "testified on the basis of several charts comparing the musical notes of each song and a comparative recording prepared under his direction."<sup>8</sup> The musicologist was unable to testify, however, "that the similarities could only have resulted from copying."<sup>9</sup>

The Bee Gees did not present an expert witness. They did present evidence of independent creation. Their manager and two musicians testified about the creation of "How Deep Is Your Love" and also identified a work tape memorializing the creation of that work.<sup>10</sup>

The court reviewed the circumstantial evidence and reached two conclusions. First, the jury's inference of access was unreasonable.<sup>11</sup> Second, the court concluded that the plaintiff's proof did not meet the definition of "striking similarity."<sup>12</sup>

In finding the jury's inference to be unreasonable, the court wrote "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."<sup>13</sup> The court then focused on the lack of widespread dissemination, the failure

to present evidence regarding the actions of the companies to whom plaintiff delivered his work and the “extensive testimony of the defendants and their witnesses.”<sup>14</sup>

Regarding the definition of “striking similarity,” the court concluded that plaintiffs were required to demonstrate that the similarities “can only be explained by copying, rather than by coincidence, independent creation, or prior common source.”<sup>15</sup> The court identified examples of persuasive evidence of striking similarity: repeated error, sufficient degree of intricateness, and suspicious dissimilarities.<sup>16</sup> The court noted that the plaintiff’s expert witness “did not state that the similarities could only be the result of copying.”<sup>17</sup>

Thus, *Selle* does not stand for the stark conclusion that striking similarity alone is insufficient to prove access, as many have written. Rather, a careful reading of the case reveals only that the reviewing court really found that the plaintiff failed to meet his burden of proof.

*Selle* does concede that a plaintiff may prove access with circumstantial evidence.<sup>18</sup> In reaching that conclusion, *Selle* relies upon *Ferguson v. National Broadcasting Company, Inc.* In *Ferguson*, the court found that “The evidence presented clearly does not raise a question of fact as to whether the two compositions were so strikingly similar as to preclude the possibility of independent creation.”<sup>19</sup> *Ferguson* does recite that a plaintiff can establish copyright infringement without proof of access, but *Ferguson* relies on Professor Nimmer as authority for that proposition.<sup>20</sup>

That treatise discusses “[a] more common circumstance requiring no *independent* proof of access.”<sup>21</sup> The treatise recognizes that a court may infer access

based on the degree of similarity.<sup>22</sup> Proof of access exists; that proof is the degree of similarity. Nimmer does not, however, conclude that proof of access is unnecessary.

In *Bouchat v. Baltimore Ravens, Inc.*, the United States Court of Appeals for the Fourth Circuit wrote, “this court does not favor the wholesale abandonment of the access requirement in the face of striking similarity.”<sup>23</sup> The court relied upon *Ferguson* for the proposition that the Fifth Circuit had abandoned the requirement of proving access. As we have already concluded, however, a careful reading of *Ferguson* does not justify the Fourth Circuit’s characterization.

The court in *Bouchat* aligned itself with the Second and Seventh Circuits, which *Bouchat* characterized as recognizing that “striking similarity is one way to demonstrate access.”<sup>24</sup> *Bouchat* looked to the Second Circuit’s decision in *Gaste v. Kaiserman* for the principle that an inference of access is appropriate “where the two works in question are so similar as to create a high probability of copying and negate the reasonable possibility of independent creation.”<sup>25</sup> Indeed, *Gaste* recognizes that striking similarity permits but does not require an inference of access but cautions that “that inference must be reasonable in light of all the evidence.”<sup>26</sup>

In *Calhoun v. Lillenas Publishing*, the United States Court of Appeals for the Eleventh Circuit wrote, “Where a plaintiff cannot demonstrate access he may, nonetheless, establish copying by demonstrating that his original work and the putative infringing work are strikingly similar.”<sup>27</sup> The court relied not just upon *Ferguson* but also upon *Herzog v. Castle Rock Entertainment* and *Benson v. Coca Cola Co.*

*Herzog*, however, relies solely on *Ferguson*.<sup>28</sup> *Benson* does not rely on *Ferguson*; *Benson* relies on *Selle*.<sup>29</sup> Since *Selle* concluded that the plaintiff had not met

his burden of establishing “striking similarity” and that the jury’s inference to the contrary was unreasonable, *Calhoun’s* reliance on *Selle* is misplaced.

In *Lipton v. The Nature Company*, the United States Court of Appeals for the Second Circuit has held that “if the two works are so strikingly similar as to preclude the possibility of independent creation, “copying” may be proved without a showing of access.”<sup>30</sup> The supporting authority for that holding is, you guessed it, *Ferguson*. The court also cites *Gaste*, but we already know that *Gaste* does not support such a proposition.

Other cases that conclude that a plaintiff is excused from proving access if the plaintiff can establish striking similarity inevitably trace back either directly or indirectly, through *Lipton*, to *Ferguson*.<sup>31</sup> In *La Resolana Architects, PA v. Reno, Inc.*, the United States Court of Appeals for the Tenth Circuit wrote, “if a plaintiff is unable to demonstrate access, he may establish (factual) copying by demonstrating that the copyrighted work and the alleged infringing work are ‘strikingly similar.’”<sup>32</sup> *La Resolana* does not rely directly on *Ferguson*, but the case upon which *La Resolana* relies does rely directly on *Ferguson*.

Another case stating that a plaintiff is excused from proving access is *Murray Hill Publ’ns., Inc. v Twentieth Century Fox Film Corp.* In *Murray Hill*, the court wrote “Where the plaintiff cannot prove access, the copyright infringement claim can still succeed, but only by proof of a higher level of similarity than the merely substantial.”<sup>33</sup> That language is not critical to the result of the case, however, and is therefore merely dicta. More importantly, the court also noted in its explanation of striking similarity that “striking similarity carries the burdens of proof that the infringing work is sufficient

[sic] similar as to intrude into the copyrighted work's protection *and* that the defendant must have had access to the copyrighted work, even if the plaintiff can provide no extrinsic proof of that fact."<sup>34</sup> Thus, the court's own explanation of how striking similarity alone proves access embraces the principle that the existence of one fact (striking similarity) allows the inference of another fact (access).

Many cases claiming that copying can be proved without proof of access trace back eventually to *Arnstein v. Porter*.<sup>35</sup> *Arnstein*, however, does not abolish the requirement of proving access. Rather, that case also relies upon the principles of circumstantial evidence to establish the fundamental element of access: "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."<sup>36</sup>

Even some of the cases that allegedly abolish the requirement of proving access speak in terms of circumstantial evidence. For instance, in *Baxter v. MCA, Inc.*, the court wrote "Absent evidence of access, a 'striking similarity' between the works may give rise to a permissible inference of copying."<sup>37</sup> Thus, the court embraced the use of circumstantial proof to establish access in purporting to abolish the requirement altogether.

*Baxter* relied not just on *Selle* and *Nimmer* but also *Schultz v. Holmes*.<sup>38</sup> *Schultz* provides:

Appellant was unable to produce any direct evidence of copying, but endeavored to establish this circumstantially. She produced evidence which in her view shows that Holmes had access to her music. She then sought to demonstrate that the musical similarity is so striking that it could only have resulted from copying.<sup>39</sup>

Clearly, *Schultz* does not stand for the proposition that proof of access is not required.

Nevertheless, at least one case relies in part on *Baxter* for the proposition that, “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.’”<sup>40</sup>

Notwithstanding *Ferguson*, the better reasoned view is that a plaintiff in a copyright infringement case is never relieved of the obligation to establish access in the absence of direct evidence of copying. That proof, however, may be circumstantial.

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<sup>1</sup> *Ellis v. Diffie*, 177 F. 3d 503 (6<sup>th</sup> Cir. 1999).

<sup>2</sup> *Id.* at 504.

<sup>3</sup> *Ferguson v. National Broadcasting Company, Inc.*, 584 F. 2d 111, 113 (5<sup>th</sup> Cir. 1978).

<sup>4</sup> *Selle v. Gibb*, 741 F. 2d 896, 901 (7<sup>th</sup> Cir. 1984).

<sup>5</sup> Black’s Law Dictionary, p. 221 (5<sup>th</sup> Ed. 1979).

<sup>6</sup> *Selle*, 741 F. 2d at 898.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 899.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 903.

<sup>12</sup> *Id.* at 905.

<sup>13</sup> *Id.* at 901.

<sup>14</sup> *Id.* at 902-903.

<sup>15</sup> *Id.* at 904

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 905.

<sup>18</sup> *Id.* at 902.

<sup>19</sup> *Ferguson v. National Broadcasting Company, Inc.*, 584 F. 2d 111, 114 (5<sup>th</sup> Cir. 1978).

<sup>20</sup> *Id.* at 113.

<sup>21</sup> 4-13 *Nimmer on Copyright* § 13.02(B)(emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Bouchat v. Baltimore Ravens, Inc.*, 241 F. 3d 350, 356 (4<sup>th</sup> Cir. 2000).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 355-356.

<sup>26</sup> *Gaste v. Kaiserman*, 863 F. 2d 1061, 1068 (2<sup>nd</sup> Cir. 1988).

<sup>27</sup> *Calhoun v. Lillenas Publishing*, 298 F. 3d 1228, 1232 n. 6 (11<sup>th</sup> Cir. 2002).

<sup>28</sup> *Herzog v. Castle Rock Entertainment*, 193 F. 3d 1241, 1249 (11<sup>th</sup> Cir. 1999).

<sup>29</sup> *Benson v. Coca Cola Company*, 795 F.2d. 973, 975 n.2 (11<sup>th</sup> Cir. 1986).

<sup>30</sup> *Lipton v. The Nature Company*, 71 F. 3d 464, 471 (2d Cir. 1995)(quoting *Ferguson*, 584 F.2d at 113)..



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<sup>31</sup> See, e.g., *Corwin v. Walt Disney World Company*, 475 F. 3d 1239, 1253 (11<sup>th</sup> Cir. 2007); *Jorgensen v. Epic/Sony Records*, 351 F. 3d 46, 56 (2d Cir. 2003); *O’Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 515 (S.D.N.Y. 2008); *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980)

<sup>32</sup> *La Resolanan Architects, PA v. Reno, Inc.*, 555 F. 3d 1171, 1178 (10<sup>th</sup> Cir. 2009).

<sup>33</sup> *Murray Hill Publ’ns., Inc. v. Twentieth Century Fox Film Corp.* 361 F. 3d 312, 317 (6<sup>th</sup> Cir. 2004). See also, e.g., *Jones v. Blige*, 2009 U. S. App. LEXIS 4451 (6<sup>th</sup> Cir. 2009); *Fogerty v. MGM Group Holdings Corp., Inc.*, 379 F. 3d 348, 352 (6<sup>th</sup> Cir. 2004) (“Lastly, even without proof of access, a plaintiff still may prevail by showing a ‘striking similarity [between the works], precluding all possible conclusion but that the work was copied.’”).

<sup>34</sup> *Id.* at 317

<sup>35</sup> See, e.g., *Russ Berrie & Co., Inc. v. Jerry Elsner Co.*, 482 F. Supp. 980, 985-986 (S.D.N.Y. 1980).

<sup>36</sup> *Arnstein v. Porter*, 154 F. 2d 464, 468-469 (2<sup>nd</sup> Cir. 1946) .

<sup>37</sup> *Baxter v. MCA, Inc.*, 812 F. 2d 421, 423 (9<sup>th</sup> Cir. 1987).

<sup>38</sup> *Id.*

<sup>39</sup> *Schultz v. Holmes*, 264 F. 2d 942, 943 (9<sup>th</sup> Cir. 1959).

<sup>40</sup> *Three Boys Music Corporation v. Bolton*, 212 F. 3d 477, 485 (9<sup>th</sup> Cir. 2000).