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COPYRIGHT INFRINGEMENT: PROOF OF ACCESS THROUGH STRIKING SIMILARITY

Selle v. Gibb

No. 78 C 3656 (N.D. Ill. July 8, 1983)

The plaintiff, Ronald H. Selle, an antique dealer, a part-time musician and a composer of popular songs, brought this action against Barry Gibb, Robin Gibb and Maurice Gibb (also known as The Bee Gees), Phonodisc, Inc. and Paramount Pictures, Inc., under the federal copyright laws to recover for the alleged infringement of a musical copyright. Selle claimed that a song entitled "Let It End," which he composed and later copyrighted on November 17, 1975, was copied by the Bee Gees in the form of a song entitled "How Deep Is Your Love," copyrighted on March 7, 1977 (vocal arrangement copyrighted in November of 1977).

In the absence of any evidence of direct access to his copyrighted song, the plaintiff sought to prove inferred access through the doctrine of "striking similarity." After hearing the evidence presented, the jury returned a verdict for the plaintiff. Defendants then filed a timely motion for judgment notwithstanding the verdict, or in the alternative for a new trial, and in the event both motions were denied, for a certificate authorizing an immediate appeal.

The district court granted defendants' motion for judgment notwithstanding the verdict, and conditionally granted the motion for a new trial in the event that its grant of the judgment notwithstanding the verdict would be reversed on appeal. The district court held: proof of copyright infringement through evidence of "striking similarity" to infer access is rebutted by uncontradicted evidence of nonaccess and independent creation, such that a verdict by the jury of infringement cannot stand. *Selle v. Gibb*, No. 78 C 3656 (N.D. Ill. July 8, 1983).

The defendants' motion for judgment notwithstanding the verdict was granted on the grounds that the evidence did not support the jury's finding of infringement. Accordingly, the facts as presented at the trial will be examined.¹

In the fall of 1975, the plaintiff Ronald Selle, a clothing salesman in Chicago, conceived a melody while shaving. The entire

1. *Selle v. Gibb*, No. 78 C 3656 (N.D. Ill. July 8, 1983).

composition was completed in one day. During the following week, he composed the lyrics and reduced the song to writing in its final form. He testified that he received no assistance in either composing the music, or writing the words. He titled the song, "Let It End." Selle applied for a copyright for the song which was issued on November 17, 1975.

At the time Selle composed the song, he had a small band of musicians with whom he played local engagements in the Chicago area. On two or three occasions, the band performed "Let It End." Those engagements were the only times that the song was ever performed in public.

Shortly after receiving the copyright, Selle and his band tape recorded the song and sent copies to eleven music recording and publishing companies. Eight of the tapes were returned; three were not. Selle's song, "Let It End," was never reproduced by any music company; it was never recorded by any recording company or artist; and the lead sheet to it was never published or sold to anyone.

In May 1978, while working in his yard, Selle heard a song being played on the stereo of a teenager who lived next door. Selle thought that the song he heard was "Let It End," although there "were different words to it and was a different rendition."² When Selle asked the teenager the name of the song, he was told that the song was "How Deep Is Your Love," soundtrack music from a well-known movie, "Saturday Night Fever." Selle examined the container of the cassette and noticed that credit for creating the music was claimed by the Bee Gees, brothers, Barry, Robin and Maurice Gibb. Paramount Pictures made and distributed the movie and Phonodisc (known as Polygram Distribution) made and distributed the cassette tape of "How Deep Is Your Love."

The Bee Gees are internationally known as musical performers and composers of popular songs. Although they do not read or write music, they have composed over 160 songs. When they conceive a song, they use a tape recorder. After the song is recorded, members of their staff reduce the composition to a form that can be duplicated for sale and used for obtaining a copyright. Throughout their career of more than 25 years, the Bee Gees had never previously been accused of copying anyone else's song or composition.

In January 1977, the Bee Gees, their wives and certain members of their staff went to a recording studio located in a chateau

2. *Id.* at p. 5.

in France, "to mix a live album and to write a few songs."³ Six or more new songs were composed for the album. While under oath, Barry Gibb described one particular recording session. Much of his testimony was supported by the testimony of his brothers and other members of the Bee Gees' staff who were present.

Barry Gibb described the session as follows: in January 1977, Blue Weaver, then employed by the Bee Gees as a keyboard player, was seated at a piano when Barry Gibb said to him, "Play me a beautiful chord."⁴ Weaver then testified that he and Barry Gibb began to exchange ideas about a song as he played a few chords. He testified that Barry "would say, 'What was that you just played' and I would play it again. He [Barry Gibb] would say, 'Yes, that's a nice one. We will use that.'"⁵

Weaver testified that in this way "How Deep Is Your Love" was created. The Bee Gees applied for a copyright for the lead sheet of "How Deep Is Your Love" which was issued on March 7, 1977. A piano-vocal arrangement was filed in the Copyright Office in November 1977. Everyone connected with the defendants in the case testified under oath that at no time before the session described did either Weaver or any of the Bee Gees have access to the plaintiff's song.

The work tape of "How Deep Is Your Love" was admitted into evidence at the trial. By listening to the tape, the jury was able to hear the voices of Blue Weaver and Barry Gibb as they created the song. Barry Gibb testified that his brothers later joined in finishing the song, and Weaver explained that he took the cassette with him to London in February 1977.

Other than noting differences in the keys of the demonstration tape, the lead sheet and the piano-vocal arrangement of "How Deep Is Your Love," the plaintiff did not dispute, nor contradict any of the defendants' evidence of nonaccess to his song or their independent creation of "How Deep Is Your Love."

Traditionally, copyright infringement is proven by ownership of a valid copyright, access and copying.⁶ However, since direct evidence of copying is seldom available to the plaintiff, access may be inferred, and therefore, copying proven, by showing the striking similarity of the works in question.⁷

3. *Id.* at p. 7.

4. *Id.* at p. 7.

5. *Id.* at p. 8.

6. 3 NIMMER ON COPYRIGHT, Section 13.01[A], p. 13-3 (1983).

7. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980).

It is not difficult to conceive of the reasons for the striking similarity doctrine. One can imagine the hardships suffered by plaintiffs unable to sustain the burden of proving direct access even where two works in question are practically identical, and where the plaintiff's allegedly copied composition has been publicly disseminated. Given the public distribution of a copyrighted work, and a subsequent "strikingly similar" second work, it appears just that the plaintiff should not be denied recovery because of the difficulty of proving direct access.

To prove that the similarities are striking, the plaintiff 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.⁸ If there is proof of striking similarity which precludes the possibility of independent creation, proof of direct access is not required.⁹ Expert testimony is required, however, to prove that two or more works are so strikingly similar that they can only be explained by copying.¹⁰

In *Selle*, the plaintiff called an expert witness who compared the two songs and testified that in his opinion they were "strikingly similar." The court noted, however, that on several occasions the plaintiff's expert refused the opportunity to say that the similarities could only have come from copying.¹¹ The defendants did not produce expert testimony. Instead, as elaborated upon above, the defendants' case focused on extensive evidence of the circumstances surrounding the independent creation of "How Deep Is Your Love," together with the testimony of the defendants and others on their behalf, of nonaccess to the plaintiff's song. All of this evidence was uncontradicted by the plaintiff.¹²

This case raises the issue of whether the inference of access through the proof of striking similarity can be rebutted by uncontradicted evidence of nonaccess and independent creation. It is the plaintiff's position that proof of striking similarity raises an irrebuttable inference of access and any claims of nonaccess or independent creation are irrelevant. The defendants argue that any access inferred from the striking similarity of the two songs has been rebutted by the uncontradicted evidence of nonaccess and the in-

8. *Stratchborneo v. ARC Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).

9. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980).

10. *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

11. No. 78 C 3656 at 12.

12. No. 78 C 3656 at 6-9.

dependent creation of "How Deep Is Your Love."

In its opinion, the district court considered the evidentiary value of an inference and noted, that where the case of a plaintiff is based upon an inference or inferences, it must fail upon proof of undisputed facts inconsistent with such inference or inferences.¹³ Faced with plaintiff's uncontradicted expert testimony of the striking similarity of the two works and the corresponding inference of access raised by that testimony, as opposed to the defendants' uncontradicted evidence of nonaccess and independent creation, the court held that the inference must fail. Judge Leighton noted in his opinion that, "under this significant circumstance, it matters not, despite the testimony of plaintiff's expert, how strikingly similar are the two musical compositions."¹⁴

A timely notice of appeal has been filed to the Circuit Court of Appeals for the Seventh Circuit, and the appeal is pending. The decision on appeal may do much to clarify the significance of the striking similarity doctrine in copyright infringement cases. In particular, the decision will test the strength of the inference of access raised by expert testimony of striking similarity.

In deciding this issue, the court of appeals must bear in mind the function which the doctrine of striking similarity should serve. The doctrine should apply to cases in which a copyrighted work has been publicly disseminated by publishing, recording or large scale performing. Under these circumstances, an inference of access is reasonable, given the wide opportunity for access, particularly when the second work bears striking similarity to the first.

However, such was not the situation in *Selle*. In *Selle*, the plaintiff's song was never publicly disseminated by any medium through which it could reasonably be inferred that the defendants had access to it. This fact, coupled with the overwhelming evidence of independent creation that went uncontested by the plaintiff, created a situation to which the doctrine should not have applied.

The defendants could have strengthened their position by presenting expert testimony to contradict the testimony offered by the plaintiff. Having gone uncontradicted, the jury's finding of striking similarity based on the expert testimony will be assumed true on appeal.

Despite this possible error, however, the court of appeals should affirm the district court. The inference of access must fail in light of the uncontradicted evidence of nonaccess and indepen-

13. No. 78 C 3656 at 26; *Trippy v. Sams*, 512 F. Supp. 5, 7 (E.D. Tenn. 1980).

14. No. 78 C 3656 at 26.

dent creation. A work is original and may demand copyright protection even if it is completely identical with a prior work provided it was not copied from such prior work but is rather a product of the independent efforts of its author.¹⁵ To quote Judge Learned Hand, "independent reproduction of a copyrighted musical work is not infringement"¹⁶ A later Second Circuit opinion noted, "[M]ere similarity would, of course, be insufficient if the compositions are the fruits of independent conceptions."¹⁷ The court's holding recognizes the situation that may arise, as here, where two works appear to be strikingly similar yet evidence supports findings of independent creation. In such a case, the uncontradicted testimony of nonaccess and independent creation should dispel any inference raised. The very nature of an inference is its logical relation to proven facts and its natural deduction therefrom. However, when considered with undisputed facts in opposition to it, the inference no longer proceeds logically from the facts, and must fail.

To hold otherwise in this case, would be to disregard extensive uncontradicted evidence as to the independent creation of the defendants' song. Considered in this light, the decision of the district court in granting defendants' motion for judgment notwithstanding the verdict should be affirmed.

Sandra K. Smokler

15. *Novelty Textile Mills Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2nd Cir. 1977).

16. *Arnestein v. Edward B. Marks Music Corp.*, 82 F.2d 275 (2nd Cir. 1936).

17. *Wilkie v. Santly Brothers, Inc.*, 91 F.2d 978, 979 (2nd Cir. 1937).