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PROVING COPYRIGHT INFRINGEMENT: WILL STRIKING SIMILARITY MAKE YOUR CASE?

I. INTRODUCTION

In June of 1996 the National Football League (“NFL”) and its expansion team, the Baltimore Ravens (“Ravens”), unveiled their newly designed team logo to the public for the first time at a press conference.¹ The team’s logo was a black raven holding a shield.² Upon seeing the logo, local fan and amateur artist Fredrick Bouchat immediately recognized the drawing as his own copyrighted work.³ Seeing his original artwork surprised Bouchat because he had not given the Ravens or the NFL permission to use any elements of his copyrighted work.

Bouchat filed suit in the United States District Court for the District of Maryland alleging that the NFL and the Baltimore Ravens violated his copyright in developing their logo.⁴ Bouchat ultimately recovered damages from the Ravens by proving that the Ravens and the NFL copied elements of Bouchat’s copyrighted work for their new logo.⁵ Although Bouchat was unable to directly show that the Ravens had the opportunity to view (and thus copy) his work, he was able to show that the Raven’s logo was “strikingly similar” to his copyrighted work. This showing of “striking similarity” proved to be sufficient for the Fourth Circuit to allow for a damage recovery.

The Bouchat case is important in the area of copyright law because it further highlights a split in authority among the circuit courts regarding the level of proof required to establish copyright infringement. Specifically, the divergent circuit court opinions do not agree on the level of proof

¹ Bouchat v. Baltimore Ravens Inc., 241 F.3d 350, 352-53 (4th Cir. 2001) (outlining particular facts of case). The NFL added the Baltimore Ravens by way of league expansion in 1995. *Id.* at 352.

² *Id.* at 353. Ravens team owner David Modell worked with the NFL Properties Design Director to develop the Ravens logo prior to the logo’s unveiling. *Id.*

³ *Id.* Fredrick Bouchat, a Maryland resident at the time of the announced expansion, created drawings and designs based on the Raven team name. *Id.* at 352.

⁴ *Id.* at 353. Bouchat obtained copyright registration for his shield drawing in August of 1996. *Id.*

⁵ *See id.* at 352. (affirming district court’s finding of copyright infringement liability on part of defendant).

required for a plaintiff to prove that a defendant had access to the copyrighted work.⁶

Part II of this Note reviews the basic history of the Copyright Act and its current breadth. Part III describes the requirements for obtaining a copyright and bringing an infringement action. Part IV outlines and examines the current split among the circuit courts of appeals and the conflicting standards that the circuit courts apply when deciding a copyright infringement action. Part V concludes that the Supreme Court will likely require the plaintiff to show that the defendant had some chance to view the work in order to succeed in an infringement action.

II. HISTORY OF COPYRIGHT LAW IN THE UNITED STATES

Copyright law in the United States is grounded in the Patent and Copyright Clause of the United States Constitution.⁷ The Patent and Copyright Clause provides that Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁸ Copyright protection can be traced as far back as the first Congress of the United States, which sat immediately after the formation of the Constitution.⁹

⁶ See *Bouchat*, 241 F.3d at 356-57. In *Bouchat*, the Fourth Circuit adopted the “strikingly similar” standard when determining if the defendant had access to the plaintiff’s work in a copyright infringement action. *Id.* The *Bouchat* court distinguished its adoption of the doctrine from that of the Fifth Circuit when it explained that the Fifth Circuit abandoned the requirement of access altogether in copyright infringement actions. *Id.* The *Bouchat* court refused to abandon the access requirement altogether, but rather allowed “striking similarity” to allow a presumption of access. See *id.* But see *Ferguson v. Nat’l Broad. Co., Inc.*, 584 F.2d 111, 114 (5th Cir. 1978) (holding copying may be proven without showing access).

⁷ U.S. CONST. art. I, § 8, cl. 8. “The clause in the Constitution granting to Congress the power to issue copyrights does not provide that such power shall vest exclusively in the Federal Government.” *Goldstein v. California*, 412 U.S. 546, 553 (1973) (holding state copyright law valid when no conflict with United States Constitution).

⁸ U.S. CONST. art. I, § 8, cl. 8. Scholars have read the Constitution’s language to define three doctrinal imperatives: (1) to promote learning (progress of science), (2) to secure the author’s right to profit from his work (exclusive right), and (3) to enhance the public domain (limited times). See L. Ray Patterson & Craig Joyce, *Monopolizing The Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 783-91 (1989).

⁹ See *Burrow-Giles Lithograph v. Sarony*, 111 U.S. 53, 56-57 (1884) (holding photographs protected by copyright clause of United States Constitution). The first Congress of the United States enacted a statute that provided a fourteen year copyright to any author of a map or a chart. *Id.* at 56-57. This statute was subsequently amended in 1831 by “an Act to amend the several acts respecting copyright, musical compositions, and cuts, in connection with prints and engravings” that extended the term for protection from fourteen years to twenty-eight years. *Id.* at 57. The title of this act used the term “copyright” for the first time in the Congressional legislation. *Id.*

Since the first copyright act in 1790, Congress has overhauled copyright law several times.¹⁰ Presently the two acts of Congress that control copyright law are The Copyright Act of 1909 ("1909 Act")¹¹ and The Copyright Act of 1976. ("1976 Act").¹² In the 1976 Act, Congress declared that copyright exists in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹³ Additionally, under the 1976 Act, Congress specifically extended copyright protection to "original works of authorship."¹⁴ The 1976 Act now covers literary works, musical compositions, photographic works, sculptures, and several other categories of works.¹⁵

¹⁰ See 17 U.S.C. § 101 (1976); 17 U.S.C. § 101. (1909).

¹¹ See 17 U.S.C. § 101 (1909).

¹² See 17 U.S.C. § 101 (1976).

¹³ 17 U.S.C. § 102(a) (1976). The Act of 1976 effectively preempted then current copyright law by eliminating common law copyright protection in the states. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (2002).

¹⁴ See 17 U.S.C. § 102(a) (1976); see also *Feist Publ'ns, Inc. v. Rural Tel. Co.*, 499 U.S. 340, 355 (1991). In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: "The two fundamental criteria of copyright protection are originality and fixation in tangible form." *Id.* (quoting H.R. REP. NO. 94-1476, at 51 (1976)).

It is well established that the originality for obtaining a copyright is an extremely low threshold, unlike the novelty requirement for securing a patent. Originality for copyright purposes amounts to ' . . . little more than a prohibition of actual copying.' No matter how poor the authors addition, it is enough if it be his own.

Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988) (quoting *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951)).

¹⁵ See 17 U.S.C. § 102 (1976). The statute defines the scope of copyright protection as follows:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

III. ELEMENTS OF A COPYRIGHT INFRINGEMENT ACTION

The holder of a copyright may recover damages by showing that another party violated one or more of the copyright owner's exclusive rights granted by the Copyright Act.¹⁶ To prove copyright infringement, a plaintiff must show that a defendant unlawfully copied original material that is protected by a valid copyright.¹⁷ When showing that the defendant copied the plaintiff's work, the plaintiff may provide either direct or circumstantial evidence of copying.¹⁸ Copying in copyright infringement actions has traditionally been proven circumstantially because copiers are rarely caught red-handed.¹⁹ One way that a plaintiff may prove copying through circumstantial evidence is by showing that the defendant had (1) access to the protected work and that (2) "substantial similarity" exists between the original work and the alleged copy.²⁰

In an action for copyright infringement, an author must show (1) ownership of a copyright, and (2) copying by the alleged infringer.²¹ Once

¹⁶ See 17 U.S.C. § 106 (1976). Section 106 states:

Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

¹⁷ See *Feist*, 499 U.S. at 361 (defining elements for copyright infringement in finding residential telephone directory information unprotected by copyright law); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (explaining requirement of originality in author's work to become protected form of expression); *Bouchat*, 241 F.3d at 353 (outlining elements of copyright infringement analysis).

¹⁸ See *Gaste*, 863 F.2d at 1061 (affirming district court decision allowing jury to infer copying of protected work).

¹⁹ See *id.* at 1066. (explaining circumstantial proof in copyright infringement action).

²⁰ See *Ferguson*, 584 F.2d at 113 (affirming district court's granting of defendant's motion for summary judgment due to lack of similarity).

²¹ See *id.* (outlining requirements to establish copyright infringement); *Sid & Marty Kroft Television Prod., Inc. v. McDonalds Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977) (explaining "copying" for purposes of copyright infringement analysis); see also 4 NIMMER *supra* note 13, at § 13.01 (2002). "Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant." 4 NIMMER *supra* note 13, at § 13.01.

the author is able to show that he holds a valid copyright, he must also show that the defendant copied his work.²²

The first element that a plaintiff in an infringement action must show is that they are the holder of a valid copyright.²³ By definition, "copyright in a work vests originally in the author or authors of the work."²⁴ Ownership of a valid copyright may be transferred by the author or authors.²⁵ 17 U.S.C. § 410 states in pertinent part that when, after examination, the Register of Copyrights determines that material constitutes copyrightable subject matter and that the other legal and formal requirements have been met, the Register shall issue to the applicant a certificate of registration under the seal of the Copyright Office.²⁶ An author holding a

²² See *Feist*, 499 U.S. at 344 (concluding telephone compilation lacked *de minimis* creativity required for copyright).

²³ See *Bouchat, Inc.*, 241 F.3d at 353 (explaining two-part analysis applied in copyright infringement action); see also *Feist*, 499 U.S. at 361 (outlining two-part test applied in copyright infringement action); *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984) (defining requirements in copyright infringement action as four-part test); *Ferguson* 584 F.2d at 113 (outlining requirements to show copyright infringement).

²⁴ 17 U.S.C. § 302(a) (1976). Although the copyright itself vests in the author at the time of creation, the term of the copyright continues for a term of seventy years after the author's death. *Id.*; see also 17 U.S.C. § 303(a) (1976) (defining term of copyright in work created before January 1, 1978); 17 U.S.C. § 201(a) (1976) (defining "initial ownership" of copyright).

²⁵ See 17 U.S.C. § 201(d) (1976) (defining transferability of ownership of copyright). The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or passed as personal property by the applicable laws of intestate succession. *Id.*

²⁶ 17 U.S.C. § 410 (1976). Section 410 states in full:

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration. (b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal. (c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court. (d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

Id.; see also 4 NIMMER *supra* note 13, at § 13.01[a]. Nimmer states:

certificate of copyright will be able to show prima facie evidence of a valid copyright.²⁷ Possession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable.²⁸ Once the plaintiff has established his prima facie ownership, the burden then shifts to the defendant to counter this evidence.²⁹ The determination of whether the subject matter of the copyright was properly granted copyright protection is ultimately a decision for the court.³⁰

The court's decision as to whether the author has a valid copyright will determine whether or not the author receives certain exclusive rights in the copyrighted work and whether the author receives the protection of the Copyright Act.³¹ When making the determination of validity, the courts are guided by the fundamental axiom of copyright law that no author may copyright his ideas or facts that he merely narrates.³² This principle creates a dichotomy in copyright between the author's copyrightable material and the underlying facts upon which his work is based.³³

Plaintiff's ownership, in turn, breaks down into the following constituent elements: (1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the works, such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff the valid copyright claimant.

Id.

²⁷ See *Superior Form Builders v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 492-95 (4th Cir. 1996) (stating receipt of copyright raises presumption of valid copyright). *But see* *Krafft v. Cohen*, 117 F.2d 579, 581 (3d Cir. 1941) (finding copyright holder not protected by statute).

²⁸ See *supra* note 27 and accompanying text.

²⁹ See *supra* notes 20-24 (explaining general elements of copyright infringement action).

³⁰ See *supra* notes 20-24. The plaintiff's ownership constitutes a conclusion of law, based upon particular facts. See *id.*

³¹ See 17 U.S.C. § 106 (1976) (outlining rights of copyright holder); see also *TY, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1173 (7th Cir. 1997) (finding valid copyright in company's stuffed animal reproduction of pig and cow). "The Copyright Act forbids only copying; if independent creation results in an identical work, the creator of that work is free to sell it." *TY*, 132 F.3d. at 1169; see also *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1 (1st Cir. 1996) (finding professional football team produced similar logo design independently of copyright holder's logo design); *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (finding no copyright infringement where plaintiff showed no proof of access).

³² See *Feist*, 499 U.S. at 363 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (holding telephone directory not protected by copyright law)). The Court in *Feist* cited the respondent's brief which read: "facts and discoveries, of course, are not themselves subject to copyright protection." *Id.* at 345.

³³ See *Mazer v. Stein*, 347 U.S. 201, 220-21 (1954) (holding statuettes used as lamp bases copyrightable material). "It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself." *Sid & Marty Kroft Television Prod., Inc., v. McDonalds Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (finding defendant infringed upon plaintiff's "ideas" for television

The second element that the plaintiff must show is that the alleged infringer copied protected elements of the original work.³⁴ It is rare that a plaintiff is able to show copying through direct evidence.³⁵ As such, the holder of a copyright may show copying through circumstantial evidence because it is generally impossible to establish copying as a factual matter by direct evidence.³⁶ Therefore, copying is ordinarily established indirectly by proof of access and "substantial similarity."³⁷

To determine access, the plaintiff must generally show that the defendant has the opportunity to copy.³⁸ Courts generally require the plaintiff to show that the defendant had a reasonable opportunity to view the plaintiff's work.³⁹ Reasonable opportunity does not encompass any bare possibility in the sense that anything is possible.⁴⁰ A tortuous chain of hypothetical transmittals will not be enough to show that the defendant had access to the plaintiff's work.⁴¹

Ordinarily, the plaintiff must prove both access and copying by the defendant in order to succeed in an infringement suit.⁴² However, in rare

show). The court further explained that copyright protection is limited by the classic distinction between an 'idea' and the 'expression' of that idea." *Id.*

³⁴ See *Feist*, 499 U.S. at 361 (explaining analysis courts apply in copyright infringement action); *Bouchat*, 241 F.3d at 353 (applying copyright infringement analysis to artist's design); *Selle*, 741 F.2d at 900 (applying copyright infringement analysis to musical composition); *Ferguson v. Nat'l Broad. Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978) (noting no copyright protection afforded to musical composition where plaintiff offered no evidence of similarity).

³⁵ See 4 NIMMER *supra* note 13, at § 13.01[B]; *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (affirming jury award for infringement of musical composition). "Because copiers are rarely caught red-handed, copying has traditionally been proven circumstantially by proof of access and substantial similarity." *Gaste*, 863 F.2d at 1066 (quoting *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977)). The *Ferguson* court stated "Since there is seldom direct evidence of 'copying,' the plaintiff generally proves this element by showing that the person who composed the defendant's work had access to the copyrighted work and that the defendant's work is substantially similar to the plaintiff's." *Ferguson*, 584 F.2d at 113.

³⁶ See *Kroft Television*, 562 F.2d at 1163 (finding expression of idea itself to be copyrightable material) (citing *Mazer v. Stein*, 347 U.S. 201 (1954)).

³⁷ 4 NIMMER *supra* note 13, at § 13.01[B].

³⁸ 4 NIMMER *supra* note 13, at § 13.02[A].

³⁹ See *id.* "Even if the plaintiff is unable to prove actual viewing by the defendant, but is able to establish the reasonable opportunity to view, this should be regarded as a showing of 'access' for the purposes of shifting the burden to the defendant to establish independent creation." *Id.*

⁴⁰ *Bouchat v. Baltimore Ravens Inc.*, 241 F.3d 350, 358 (4th Cir. 2001). "A 'mere possibility' is not enough; rather it 'must be reasonable that the paths of the infringer and the infringed work crossed.'" *Id.* (quoting *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996) (affirming ruling two screenplays dissimilar for purposes of copyright infringement)).

⁴¹ *Towler*, 76 F.3d at 583 (holding no proof of reasonable access by plaintiff).

⁴² See *Bouchat*, 241 F.3d at 350 (4th Cir. 2001) (holding copyright infringement by defendant); *TY*, 132 F.3d at 1167 (7th Cir. 1997) (holding defendant copied plaintiff's beanbag animal design); *Gaste*, 863 F.2d at 1061 (holding sufficient evidence to allow jury

instances, the similarity between the plaintiff's and defendant's work is sufficiently similar such that copying may be inferred even without proof of access.⁴³ In the case where this "strikingly similar" doctrine is applied, the requirement is generally that the similarities be so similar as to preclude the possibility of independent creation.⁴⁴

While the courts who have chosen to adopt "striking similarity" in place of access have discarded the requirement that the plaintiff prove access, many courts have continued to keep the access requirement as an element in the two-part test for infringement.⁴⁵ Among the courts that continue to require access, the measure of access required tends to be the turning point in the analysis.⁴⁶ It is at this point that the Circuit Courts of Appeals diverge and create a currently unresolved split in authority.⁴⁷

IV. ACCESS REQUIREMENT IN A COPYRIGHT INFRINGEMENT ACTION

The majority view among the circuits is that plaintiffs must prove access by the infringer in an infringement case. Conversely, the minority view allows access to be shown when "the two works were not just substantially similar, but were so 'strikingly similar' as to preclude the possibility of independent creation."⁴⁸ It is generally recognized in the minority jurisdictions, under this interpretation of 'strikingly similar,' that the similarities must be so "striking" as to preclude the possibility of independent creation.⁴⁹ This similarity may be regarded as "striking" for the purposes of the analysis even if they are less than verbatim or mirror images of each

to infer access); *Selle*, 741 F.2d at 896 (7th Cir. 1984) (holding finding of access at trial to be reasonable inference by jury). *But see Ferguson*, 584 F.2d at 111 (stating copying may be proven without showing access).

⁴³ See *Ferguson*, 584 F.2d at 113 (explaining "striking similarity" doctrine); 4 NIMMER *supra* note 13, at § 13.02[B] (providing overview of "striking similarity" doctrine).

⁴⁴ See *Ferguson*, 584 F.2d at 113; 4 NIMMER *supra* note 13, at § 13.02[B].

⁴⁵ See *Bouchat*, 241 F.3d at 350 (outlining and applying two-part analysis in copyright infringement); *TY*, 132 F.3d at 1167 (applying two-part access and copying analysis in copyright infringement action); *Gaste*, 863 F.2d 1061, 1066 (requiring showing of access in copyright infringement action); *Selle*, 741 F.2d 896, 901-02 (7th Cir. 1984) (holding plaintiff failed to meet threshold burden of showing access).

⁴⁶ 4 NIMMER *supra* note 13, at § 13.02[A].

⁴⁷ See *Bouchat*, 241 F.3d at 356-57 (observing split in authority regarding level of proof required to show access).

⁴⁸ *Ferguson* 584 F.2d at 113 (allowing for showing of copying without access). The court in *Ferguson* announced the minority rule when they held that a plaintiff was unable to show "striking similarity" in the instant case. *Id.* Even without proof of access, the plaintiff could have shown infringement if the two works were not just substantially similar, but 'strikingly similar.' *Id.*

⁴⁹ See 4 NIMMER *supra* note 13, at § 13.02[B] (defining "striking similarity" doctrine); see also *Bandai America, Inc. v. Bally Midway Mfg., Co.*, 775 F.2d 70 (3d Cir. 1985) (explaining "striking similarity" doctrine).

other.⁵⁰ Striking similarity simply means that viewed together, it is virtually impossible that the two works could have been created independently.⁵¹

The majority of circuits, however, refrain from a wholesale abandonment of the access requirement.⁵² Rather, according to the majority view in an infringement action, the plaintiff must show some evidence that the defendant had access.⁵³ Several leading cases in the Second and Seventh Circuits have announced a more flexible rule which allows “striking similarity” to allow the fact finder to infer access.⁵⁴ Generally, proof of access is evidence that tends to prove either that the defendant viewed the plaintiff’s work, or had a reasonable opportunity for such a view.⁵⁵

V. CONCLUSION

The courts must protect an author’s private right in his original work while ensuring that the protection afforded the author does not extend to the underlying facts upon which an author bases the work. To that end, the majority of Circuit Courts have adopted a standard analysis that shelters the author of an original work from infringement while balancing public policy considerations. To show copyright infringement, a defendant must show the plaintiff copied the protected work.⁵⁶ The majority of circuits first require the initial showing of access in order to show such copying.⁵⁷ Effectively, the access requirement provides an initial hurdle that a plaintiff must pass in his attempt to show copying.⁵⁸

⁵⁰ 4 NIMMER *supra* note 13, at § 13.02[B]. Nimmer suggests that absent proof of access, the similarities must be so striking as to preclude the possibility of independent creation. *Id.*

⁵¹ *Id.*

⁵² See *Bouchat*, 241 F.3d at 356 (applying “striking similarity” doctrine to allow inference of access by jury); *Gaste*, 863 F.2d at 1061 (allowing copyright infringement when access inferred by jury); *Selle*, 741 F.2d at 896 (requiring plaintiff meet threshold of proof when showing access).

⁵³ *TY*, 132 F.3d at 1170 (allowing jury inference of access when works are strikingly similar). The *Ty* court explained that, “[a]ccess (and copying) may be inferred when two works are so similar to each other and not to anything in the public domain that it is likely that the creator of the second work copied the first, but the inference can be rebutted by disproving access or otherwise showing independent creation . . .” *Id.* at 1171.

⁵⁴ See *Gaste*, 863 F.2d at 1061 (allowing jury to infer access in case of striking similarity); *Selle*, 741 F.2d at 896 (requiring plaintiff to meet minimum threshold of proof when showing access). The *Selle* court stated that striking similarity is just one piece of circumstantial evidence tending to prove access. *Id.* at 901.

⁵⁵ See 4 NIMMER *supra* note 13, at § 13.02[C].

⁵⁶ See *supra* note 17 and accompanying text (listing cases outlining elements in copyright infringement action).

⁵⁷ See *supra* notes 37-40 and accompanying text (explaining theory of access).

⁵⁸ See *supra* note 42 and accompanying text.

Alternatively, a minority of Circuit Courts have adopted the “strikingly similar” doctrine.⁵⁹ A plaintiff that is able to show “striking similarity” between a copyrighted work and an alleged copy is able to circumvent the initial burden of showing access.⁶⁰ In short, the “strikingly similar” doctrine allows courts to desert the long established access requirement.⁶¹ This wholesale abandonment of the access requirement allows the plaintiff in a copyright infringement action to show copying with no proof that the alleged copier ever had an opportunity to view the protected work. Deserting the access requirement in an infringement suit leaves open the possibility that two authors who independently create the near similar work will not be afforded equal protection under the Copyright Act.

Alternatively, including the requirement of access ensures both copyright protection and fundamental fairness in an infringement suit. As such, the U.S. Supreme Court should adopt the flexible rule announced by the Second and Seventh Circuits.⁶² This analysis provides the best possible solution to the access requirement dilemma.⁶³ The Supreme Court can continue to require the showing of access in copyright infringement actions while still providing fundamental fairness to those that have valid copyright infringement claims.

*Sean Robert Higgins*⁶⁴

⁵⁹ See *Ferguson*, 584 F.2d at 111 (stating copying may be proven without showing access).

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *supra* note 52 and accompanying text.

⁶³ See *id.*

⁶⁴ This Note is dedicated to all of my friends and family that helped with this piece and to the loving memory of my late grandfather Robert George Lemay.