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CURRENT TESTS OF SIMILARITY IN INFRINGEMENT PROCEEDINGS*

INTRODUCTION

Since man first began to reduce his creative thoughts to concrete form, society has been torn between two conflicting impulses—the desire to protect the author’s property right in his creation, and the wish to benefit by the broadest diffusion of created ideas.¹ Evolving from the union of these two impulses, and deeply rooted in the common law, modern copyright legislation originated in England with the passage of the Copyright Act of 1709.² The first copyright act in the United States, adopted in 1790, gave protection to authors for a period of fourteen years with a right of renewal for a similar period.³ The 1947 codification carried over the time limit of twenty-eight years with the renewal privilege.⁴

Authority for the Copyright Act⁵ is provided by Article 1, § 8, cl. 8 of the Constitution, allowing Congress the power:

... to 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. . . .

From this broad language, the question necessarily arises as to what the Founders intended to protect as a “writing”; i.e., what is the nature of a literary right?

This problem has long taxed the verbal ability of the judiciary, and it has come to be generally recognized that the concept does not lend itself to adequate definition. One attempt, by Lord Mansfield in 1769, stated that:

The property in the copy, thus abridged, is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and mode of expression.

* Entered in the Nathan Burkan ASCAP COPYRIGHT LAW COMPETITION, AUGUST, 1968.

1. Yankwich, *The Legal Protection of Ideas*, 43 U. VA. L. REV. 375 (1957).

2. 8 Anne c. 21 (1709) (repealed).

3. Act of May 31, 1790, c. 15, 1 Stat. 124.

4. 17 U.S.C. § 24 (1952).

5. 17 U.S.C. (Supp. 1950), *formerly* 1 Stat. 124 (1790).

It is equally detached from the manuscript, or any physical existence whatsoever.⁶

Mansfield's description was later adopted by the U.S. Supreme Court in *Holmes v. Hurst*.⁷

The right thus secured by the Copyright Act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air and sunlight; nor is the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas.⁸

Thus, the author's literary right extends only to his arrangement of ideas. However, the proposition is not that simple, for, according to Justice Story, to distinguish between a bare idea and the expression of that idea approaches the realm of metaphysics.⁹ Further confusion occurs when it is considered that although a copyright protects the means of expressing an idea, if the same idea can be expressed in a plurality of different means, a plurality of copyrights may result and no infringement will exist.¹⁰ Hence the problem faced by the courts in enforcing the Copyright Act is twofold:

- (1) What constitutes copyrightable material?
- (2) What constitutes infringement?

As a discussion of the former issue would mainly consist of summarizing a large group of rather vague quotations,¹¹ the purpose of this dis-

6. *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201, 251 (K.B. 1769).

7. 174 U.S. 82 (1879).

8. *Id.* at 86.

9. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (No. 4, 901) (C.C.D. Mass. 1841):

10. *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926). See *Dorsey v. Old Surety Life Ins. Co.*, 98 F.2d 872 (10th Cir. 1938); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1930). See also 119 A.L.R. 1250; *Christianson v. West Publishers*, 149 F.2d 202 (9th Cir. 1945).

11. The cases are too numerous and too conflicting for intelligent generalization. Compare *O'Brien v. R.K.O. Radio Pictures*, 68 F. Supp. 13 (N.Y. 1946) (idea that a motion picture be built around the story of the Palace Theater in New York, coupled with four brief suggestions for story treatment held insufficiently concrete); *Alberts v. Remington Rand*, 175 Misc. 486, 23 N.Y.S.2d 892 (1940) (written suggestion that defendant company produce and distribute to its customers a graph of the direction

cussion will be to evaluate the methods and evidence utilized by the courts in arriving at the determination of whether or not infringement has occurred. In doing so, it must be realized that the uncertainties in the law of copyright, coupled with the large amounts often involved in litigation, have given rise to a great number of baseless claims.¹² The courts have been aware not only of the frequency of these unfounded claims, but also of the social desirability of keeping creative writers reasonably free of the fear of lawsuits. Thus, in an effort to protect this privilege, there is some concern that they may have in certain respects unduly restricted the rights granted by the Copyright Act.¹³

INFRINGEMENT PROCEEDINGS—PLAINTIFF'S BURDEN OF PROOF

Once a plaintiff in infringement proceedings has proven that he did obtain a copyright on his work, it is the function of the court to determine what part of his work the copyright actually protects and beyond that, whether the work allegedly infringing the copyrighted material is so similar that the author's property right has been abridged. In this respect, it must be shown that: (1) defendant had access to plaintiff's copyrighted work; (2) plaintiff's work was original; and (3) the two works are identical to a degree that a presumption of copying is raised. The issues of whether or not the work was copyrighted, and of whether or not the alleged infringer had access are fact questions to be decided by the jury. Then, once the court has determined the

in which the hair on an individual's face grows held too abstract); *and* *Thomas v. R.J. Reynolds Tobacco Co.*, 350 Pa. 262, 38 A.2d 61 (1944) (proposal that defendant advertise that its cigarettes burned approximately twice as long as competing brands held to warrant no compensation); *with* *Liggett & Myers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935) (letter embodying an idea for an advertisement in which a well-groomed gentleman offers a cigarette to his colleague who was to spurn the offer with the remark, "No thanks, I smoke Chesterfields," held sufficiently concrete); *and* *Cole v. Phillips H. Lord*, 262 App. Div. 116, 28 N.Y.S.2d 404 (1941) (program outline entitled "Racketeer and Co." containing plans for a radio show featuring a district attorney at war with the underworld held protectible in a suit against the producers of "Mr. District Attorney.")

12. See *Christie v. Cohan*, 154 F.2d 827 (2d Cir. 1946).

13. See *Nimmer, Inroads on Copyright Protection*, 64 HARV. L. REV. 1125 (1951).

This problem is an old one; in the words of Lord Mansfield:

. . . [W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits; and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. *Cary v. Longman*, 1 East 358, 362, 102 Eng. Rep. 138, 140 (K.B. 1801).

original portions of the plaintiff's work that may be entitled to legal protection, the question of similarity between these portions and the alleged infringing material goes to the jury.¹⁴ Problems of proving access and originality are not too difficult, as they depend upon the existence of events (often stipulated) which can be clearly tested by resort to specific law and fact.¹⁵ However, a short discussion of these elements, prior to examining the more important area of proving similarity, would be beneficial.

Access

An action for infringement does not fail merely because the defendant was not discovered in the actual act of copying. Obviously, if a work has been published and is in general circulation, that is, available for perusal by the public at large, a strong inference of access will arise.¹⁶ For this reason, the point is generally conceded by defendant. The question is more difficult, of course, if the work has not been generally distributed.¹⁷

Access has also been held to constitute evidence of similarity,¹⁸ though it must be kept in mind that it will not substitute for a lack of proof of copying, and there is no question that the degree of similarity necessary for infringement is not diminished by proof of access.¹⁹ Conversely, since it is dependent upon defendant's opportunity to copy and similarities present in the two works, it has been held that the greater the similarities, the easier it is to prove access.²⁰ In this instance, plain-

14. See Carman, *The Function of the Judge and Jury in the "Literary Property Lawsuit,"* 42 CALIF. L. REV. 52 (1954).

15. See Sorenson & Sorenson, *Re-examining the Traditional Legal Test of Literary Similarity: A Proposal for Content Analysis,* 37 CORN. L. Q. 638 (1952).

16. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Wilkie v. Santly Bros.*, 91 F.2d 978 (2d Cir. 1937), *aff'd on rehearing* 94 F.2d 1023 (2d Cir. 1938), *cert. denied*, 302 U.S. 735 (1938); *Golding v. R.K.O. Radio Pictures*, 35 Cal.2d 690, 221 P.2d 95 (1950).

17. See, e.g., *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893, (8th Cir. 1946).

18. See, e.g., *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533 (2d Cir. 1938); *O'Rourke v. R.K.O. Radio Pictures*, 44 F.Supp. 480 (D.C. Mass. 1942).

19. *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961).

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

It is obvious that proof of access and similarity are greatly intertwined:

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 facts must determine whether the similarities are sufficient to prove copying . . . If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and

tiff's task is facilitated, since access need not be established by direct evidence and may be inferred from the surrounding circumstances.²¹

Originality

Non-original works are excluded from protection by Section 8 of the Copyright Act.²² Originality does not require that the author's work be novel,²³ for it is sufficient if it is the product of the author's independent industry or an elaboration of material already in the public domain.²⁴

Theoretically, the essence of creative originality lies in the mode in which the conflict at the basis of every dramatic work finds expression.²⁵ Thus, the criterion used by the courts in determining originality has been not the newness of ideas, but their distinctive development.²⁶ Here again, the law suffers for want of an adequate definition, for though a plot is certainly more developed than an idea, it is generally considered non-copyrightable.²⁷ Since there are only thirty-six fundamental plots available to writers,²⁸ all well-used since the time of Homer,

defendant independently arrived at the same results. *Id.* at 468.

In addition, several types of evidence, such as common errors, or identity of phraseology, used to prove similarity, may also be used in proving access.

21. *Kovacs v. Mutual Broadcasting System*, 221 P.2d 108, 113 (Cal. 1950).

22. 17 U.S.C. § 8 (1958).

23. See *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956) (dictum); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951) (dictum). See also *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945) (dictum); *Dellar v. Samuel Goldwyn*, 150 F.2d 612 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1945).

24. However, copyright protection does not extend to works solely in the public domain.

25. Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457 (1951).

Dramatic creation, whether in the form of plays, novels, or stories, consists in so arranging ordinary happenings or matters of common experience and portraying human characters that a light suffuses them which turns them into patterns of universal experience. In this realm, originality lies. *Id.* at 485.

26. See H. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY*, §§ 108-110 (1944).

27. It is generally agreed that copyright law does not protect the plot of an author, but only his embellishments of it. *London v. Biograph Co.*, 231 Fed. 696 (2d Cir. 1916). A certain amount of confusion exists, at least regarding dramatic works, as to whether "idea," "theme," and "plot" mean the same thing. See *Gropper v. Warner Bros. Pictures, Inc.*, 38 F. Supp. 329 (S.D.N.Y. 1941), which held that the three men mean the same. See also *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (plot and theme are identical); *Underhill v. Belasco*, 254 Fed. 838 (S.D.N.Y. 1918) (ideas are uncopyrightable but a theme may be protected); *Frankel v. Irwin*, 34 F.2d 142 (S.D.N.Y. 1928) (plots may be protected).

28. All these plots were codified by Georges Polti in his work entitled *THE THIRTY-SIX DRAMATIC SITUATIONS* (1940).

it is actually impossible for an author to develop an original plot, although one court has recognized that a writer might create such a unique series of events that the very use of the plot itself would result in plagiarism.²⁹ Thus, only the author's embellishment of whichever of the thirty-six fundamental plots he has chosen is protected.³⁰

In addition, the infringing work and the infringed work may have both been based upon a common source, such as an historical event.³¹ An author would be barred from obtaining a copyright on an event in history, nor could he support an infringement action on certain scenes which the infringing author would quite naturally include in his work. For example, a claim was made that the motion picture, "The Harvey Girls" infringed upon two stories, "Cupid Rides the Rails" and "Old John Santa Fe."³² The picture and stories were based on waitresses employed by the Harvey eating houses in the Southwest at the turn of the century. The court recognized that there were similar incidents in the productions, but it held that such similarities were due to the nature of the subject matter and not to copying. Both the picture and stories were set in the same geographical area and both had the typical western background, including individual characters in the stereotyped role of hero, heroine and villain. "Considering that both the movie and the manuscript presented activities of Harvey Girls, and information concerning them was received from the same source, we think it reasonable that some similarities in character portrayal could be discovered."³³ Certain similarities may also be inherent in certain situations, the result being that in the progression of the story line, identical scenes are bound to appear. Thus, an author cannot claim originality in his succession of events when the plot he has used tends to dictate that these events must occur.

An author's characterization may provide a basis for originality, al-

29. *Dam v. Kirk La Shelle Co.*, 175 Fed. 902 (2d Cir. 1910).

30. Plot ideas were considered as not copyrightable in the following cases: *Rosen v. Loew's Inc.*, 162 F.2d 785, 788 (2d Cir. 1947) (burning of Jewish books and hostility of German students toward Jewish teachers in Nazi Germany); *Bein v. Warner Bros. Pictures, Inc.*, 105 F.2d 969, 970 (2d Cir. 1939) (life in a reform school); *Macdonald v. Du Maurier*, 75 F. Supp. 655, 660 (S.D.N.Y. 1948) (second wife living in home formerly occupied by her husband and his first wife); *Rush v. Oursler*, 39 F.2d 468 (S.D.N.Y. 1930) (murder in theater during performance).

31. See *Lake v. Columbia Broadcasting System*, 140 F. Supp. 707 (S.D. Cal. 1956); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935).

32. *Funkhouser v. Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953), *cert. denied*, 348 U.S. 843 (1954) *rehearing denied*, 348 F. Supp. 45 (S.D.N.Y. 1957).

33. *Id.* at 189.

though the less developed the characters, the less chance that they may be copyrightable.³⁴ Ordinarily characters must have a personalized being and possess individual personalities, or embody distinctive qualities.³⁵ However, it has been recognized that the use made of well-known characters may be subject to copyright.³⁶

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.³⁷

Generally, most copyrighted works are, in essence, expansions and variations of previous works. It is only when the author is able to embellish his plot of characters in a unique manner that his claim of originality will be allowed.

Originality in dramatic composition does not attach to ideas. But it may attach to combinations of ideas, to their development through incidents and the interplay of characters and to that skill which turns an ordinary incident into a distinctive one, to achieve an original result. The result may not be considered a great creation, by high standards of literary criticism. But if it has these individual characteristics, it is original and the courts will recognize it as such.³⁸

Evidence of Similarities

The issue, once questions of access and non-existence of independent effort have been satisfied, is: "are there similarities of matters which

34. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1930).

35. *Seltzer v. Sunbrock*, 22 F. Supp. 621, 629 (S.D. Cal. 1938).

36. *Lewys v. O'Neill*, 49 F.2d 603, 612 (S.D.N.Y. 1931) (dictum).

37. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 at 121 (2d Cir. 1930) *cert. denied*, 282 U.S. 902 (1930).

38. *Yankwich, Originality in the Law of Intellectual Property*, *supra* note 25, at 469. *Accord*, *Affiliated Enterprises v. Gruber*, 86 F.2d 958 (1st Cir. 1936); *O'Brien v. R.K.O. Radio Pictures*, 68 F. Supp. 13 (S.D.N.Y. 1946); *Bowen v. Yankee Network*, 46 F. Supp. 62 (D.C. Mass. 1942); *Carter v. Bailey*, 64 Me. 458 (1874). *But see*, *Golding v. R.K.O. Radio Pictures*, 35 Cal.2d 690, 221 P.2d 95 (1950); *Stanley v. Columbia Broadcasting Sys.*, 35 Cal.2d 653, 221 P.2d 73 (1950); *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal.App.2d 556, 90 P.2d 371 (1939). *Cf.*, *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930).

justify the infringement claim? Was there a piracy of a copyrightable play, as shown by similarities of locale, characters, and incidents?"³⁹

Generally, the court will determine whether or not there is an issue of similarity before submitting it to the jury. Once the question is before the jury, the best evidence of similarity between the two works are the works themselves.⁴⁰ Except for the few jurisdictions allowing it probative force,⁴¹ expert evidence is generally not admissible for any purpose.⁴² Exclusion has resulted from the fear that, by dissection, abstraction, and analysis, the most dissimilar topics may be synthesized into a theme to show identity. This view is apparently based upon a statement made by Judge Learned Hand in the case of *Nichols v. Universal Pictures*.⁴³

We cannot approve of the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in box or bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. *It ought not be allowed at all*; and while its admission is not a ground for reversal, it cumpers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical.⁴⁴ (Emphasis added.)

The holding in *Nichols* specifically rejected the use of Malevinsky's analytical tests proposed in the lower court.⁴⁵ As counsel for the plaintiff (Nichols), Malevinsky contended that defendant's motion picture entitled "The Cohens and the Kellys" infringed her copyrighted play, "Abie's Irish Rose." His tests involved the segregation of scenes of the

39. *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938).

40. See Carman, *supra* note 14.

41. See Sorenson & Sorenson, *supra* note 15.

42. *Nichols v. Universal Pictures*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1930).

43. *Id.*

44. *Id.* at 123.

45. *Nichols v. Universal Pictures*, 34 F.2d 145 (S.D.N.Y. 1928). See MALEVINSKY, *THE SCIENCE OF PLAYWRITING*, (1925).

play and picture, and the comparison of ideas or emotions forming the collocation of the two works. The theory was that if these be similar, the underlying ideas, emotional themes, basic characters, and "the crucible" must be similar. Hence, infringement would exist. However, the court rejected the tests on the ground that they merely showed a similarity of emotions, which, like ideas, are not entitled to copyright protection.⁴⁶ Since *Nichols*, other types of expert evidence, such as critical analysis,⁴⁷ parallel comparisons,⁴⁸ and dissection⁴⁹ have also been rejected. However, parallel column analysis has been approved, at least in the District Court for the Southern District of New York "when it is utilized in the determination of the issue of copying but not when it is offered with respect to the issue of unlawful appropriation or substantiality or materiality."⁵⁰

The adverse reaction toward expert evidence has no doubt arisen from the feeling that copyrighted works are written for impression upon the lay reader or listener rather than for the few critics or experts in the arts.⁵¹ Although drawn from an 1868 opinion,⁵² the "ordinary observer test" has always been of rather dubious origin.⁵³ However, there is no doubt that it is well-established today in its application

46. *Id.* at 147. These tests were also specifically rejected in *Lewys v. O'Neill*, 49 F.2d 603, 618 (S.D.N.Y. 1931).

47. *Twentieth-Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933).

48. *Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 32 (9th Cir. 1933).

49. *Universal Pictures Corp. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947).

50. *Morse v. Fields*, 127 F. Supp. 63, 66 (S.D.N.Y. 1954); *Heim v. Universal Pictures Corp.*, 154 F.2d 480, 488, n. 9 (2d Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

51. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Twentieth Century Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926).

52. *Daly v. Palmer*, 6 F. Cas. 1132 (No. 3,552) (S.D.N.Y. 1868), holding that the standards for determining similarity is whether the two works are recognized by the spectator, through any of the senses to which representation is addressed, as conveying substantially the same impressions to and exciting the same emotions in the mind in the same sequence or order. *Id.* at 1138.

53. At least one writer feels that there is nothing in the opinion (cases *supra* note 47) to indicate that there can be no dissection or analysis in considering the significance of sensory impressions. Thus it may be that the court merely intended to point up the principle that elements appealing to any of the senses may command copyright protection. See *Nimmer*, *supra* note 13.

to all types of copyright infringement action.⁵⁴ Federal District Courts using the ordinary observer test include the southern district of New York, the southern district of California, and the Second and Ninth Circuits. This makes it a virtually uniform rule, as almost all plagiarism cases are decided by the federal courts near New York and Hollywood, the world centers of the publishing and motion picture industries. Although the test has merit, critics have raised the objection that it has never been adopted by the Supreme Court.⁵⁵ In addition, most of the earlier cases applying the ordinary observation test involved patent infringement suits, where the main objective is to prohibit a resemblance which would deceive purchasers, a protection not necessary for copyrighted works.⁵⁶

One proposed alternative to the strict ordinary observer test is content analysis, which is "a precise research technique for the objective, systematic, and quantitative as well as qualitative description of the contents of any sort of communication; newspaper stories, editorials, etc."⁵⁷ Limited to problems of proof regarding content similarity, and strangely reminiscent of Malevinsky's analytical tests,⁵⁸ content analysis involves introduction of scientific evidence as to what would be the actual impression upon an ordinary observer through isolating, classifying and quantitatively inventorying words and themes in the two works. The result is a statistic representing the probability that such similarity did not occur by chance. Despite its advantage of reducing an obviously nebulous concept to a mathematical certainty, content analysis has received no immediate embrace by the courts since its inception, probably because its effect would only cloud the "infallible" perception of the average viewer. Expert testimony on the likelihood of two songs being independently composed by two separate musicians has been rejected on the grounds that it would invade the province of the court.⁵⁹ The connection between this holding and the type of evidence resulting from content analysis is too obvious to ignore.

54. It has even been held that if the work is intended for children, they must be included as "average observers." *Ideal Top Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238 (S.D.N.Y. 1966).

55. Cf. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1907).

56. In addition, there is the fact that early common law usually referred both works to a master. *Lawrence v. Dana*, 15 F. Cas. 26, 63 (No. 8,136) (C.C.D. Mass. 1869).

57. *Sorenson & Sorenson*, *supra* note 15.

58. *Id.*

59. *Overman v. Loessner*, 205 F.2d 521 (9th Cir. 1953), *cert. denied*, 346 U.S. 910 (1953).

Perhaps the best compromise between the expert witness and the lay observer is the judge himself, a theory espoused by Judge Yankwich of the Ninth Circuit.⁶⁰ Under this theory, the court itself determines the question of similarity by a comparative analysis of the two themes followed by a study of the prior use of similar situations in literature and the arts. Thus, the judge is placed in the seat of the lay observer, but he is a more sophisticated, better versed lay observer, and the main objection to the expert witness disappears.⁶¹ The question remains, however, whether the method would be as effective with a less enlightened judge on the bench than Judge Yankwich.

STANDARDS OF EVIDENCE

Despite the prevalence of the ordinary observer test and its obvious corollary that the best evidence of similarity is the two works themselves, a discussion of infringement proceedings would be incomplete without a survey of the standards of evidence used by the courts in determining the issue of plagiarism. Of course, copying may be shown by the lifting of a certain scene or incident. When this has occurred, the problem is easy. But the question becomes more difficult when the allegation involves paraphrasing, an evil facilitated by the rather large vocabulary of the English language.⁶² Here, an imitation of styles or features would not constitute infringement, but if it is so close as to appear to be mere evasion, it will be enjoined. Again, the manner of expression and sequence of incidents will be scrutinized, but it is enough that points of remarkable identity cover the central features

60. Yankwich, *supra* note 1.

61. This theory has been adopted in several courts. One such case held that in determining similarities, a judge is not confined to a comparison of the works involved. He may draw upon his own knowledge of literary matters in determining whether the pattern is of the type which, having been used in other works, can be given protection of the copyright law, or whether copying, if any there was, was permissible or illicit. Expert testimony, even of the highest type, need not be substituted for the judge's own conclusions arrived at from his own studies of the matter involved. *Bradbury v. Columbia Broadcasting Sys.*, 174 F. Supp. 733, 738 (S.D. Cal. 1959), *rev'd on other grounds*, 287 F.2d 478 (1959), *petition for cert. dismissed*, 368 U.S. 801 (1961).

62. Paraphrasing is tantamount to copying in copyright law. *Nutt v. Nat'l Institute for the Improvement of Memory*, 31 F.2d 236 (2d Cir. 1929); *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219, 227-228 (E.D.N.Y. 1963); *see Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

of both works.⁶³ Similar errors are, of course, a large factor,⁶⁴ but less aesthetic evidence such as an accused infringer's past copying or unusual speed in writing has also been proffered.⁶⁵ Ordinarily, however, plaintiff's course of action will follow a pattern of point by point similarities.

One example is *Burnett v. Lambino*,⁶⁶ in which the co-authors of the play "Shadows in the City" alleged infringement by the book and motion picture, "Blackboard Jungle." Similarities espoused by plaintiff included "(a) the confusion at a teacher's first meeting with his class; (b) a teacher forming an alliance with a class leader; (c) discipline through physical punishment; (d) a teacher showing the importance of English in everyday life; . . . (g) an experienced, cynical, uninterested teacher given to physical punishment; (h) a sneaky, cunning, belligerent student, bitter at the world; (i) a school principal who is a pompous, stupid man, uninterested in teaching problems."⁶⁷

Summarily dismissing these contentions, the court asserted that due to the highly general nature of the similarities, plaintiffs were "on the wrong side of the vague boundary between 'ideas' and 'expressions'."⁶⁸ Of more importance was the similarity of a teaching device used in both works and the fact that the main character in each case taught in room 206. Here, however, defendant was allowed to explain the simi-

63. *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238 (S.D.N.Y. 1966).

64. See *Frankel v. Irwin*, 34 F.2d 142 (S.D.N.Y. 1929); *W. H. Anderson Co. v. Baldwin Law Publishing Co.*, 27 F.2d 82 (6th Cir. 1928); *Lawrence v. Dana*, 15 F. Cas. 26, (No. 8,136) (C.C.D. Mass. 1869). See also *Adventures in Good Eating v. Best Places to Eat*, 131 F.2d 809 (7th Cir. 1942). However, common errors are not conclusive evidence. It has been held in an action for infringement on an inflatable globe map of the world, that four common errors, eleven common selections of uncommon places, and several omissions of important places did not conclusively demonstrate copying, and plaintiff was not entitled to summary judgment. *C. S. Hammond & Co. v. International College Globe, Inc.*, 146 F. Supp. 514 (S.D.N.Y. 1956). In this respect, it should be noted that maps as such are entitled to little copyright protection. *Axelbank v. Rony*, 277 F.2d 314 (9th Cir. 1960); *Amsterdam v. Triangle Publications*, 189 F.2d 104 (3d Cir. 1951); *Marken and Bielfield, Inc. v. Baughman Co.*, 162 F.Supp. 561 (E.D. Va. 1957).

65. See *Scott v. WKJG*, 376 F.2d 467 (7th Cir. 1967). Nor are authors above setting a trap for potential infringers. In *R. L. Polk & Co. v. Musser*, 105 F.Supp. 351 (E.D. Pa. 1952), plaintiff had inserted fictitious names and places in its city directory solely for the purpose of detecting infringement. However, the court held that though the fictitious names appeared in defendant's competing city directory, there was no infringement, as other evidence clearly negated the influence of substantial copying throughout the work.

66. 204 F. Supp. 327 (S.D.N.Y. 1962).

67. *Id.* at 332.

68. *Id.* at 333.

larity by proving that he had gotten the idea for his book from his own teaching experience in a vocational high school, where room 206 was located below a noisy machine shop, which he incorporated into his work; thus, he chose the room out of fidelity to physical accuracy. This testimony of defendant's as to why he chose room 206 was then fortified by showing other instances of literal reproduction in his novel of actual circumstances and events. It would appear that almost any evidence which defendant can raise to establish the independent origin of his work will be given proper credence by the courts.

Conversely, evidence of intent or willingness to infringe may be considered a link in the chain of circumstantial evidence indicating copying. Once copying is established, it is immaterial that a defendant could have created a similar work using elements fairly at his disposal.⁶⁹

DAMAGES

Even if the similarity is so great that an inference of copying arises, there is no infringement unless a "substantial" or "material" portion of the protected work is appropriated.⁷⁰ Thus the court, in deciding whether to give damages, injunction, or no remedy at all, takes into consideration such things as the decrease in value of the copyrighted work, whether or not the author's labor has been appropriated, the value of the part copied, and the relative value and purpose served in each work by the part copied. Since under the present copyright law damages can be awarded without banning the defendant's otherwise original work, varying degrees of appropriation may give rise to various amounts of damages short of injunction. A familiar approach extends itself into another area here, as it has been held in this regard that there will be no infringement unless the material copied was so substantial as to be obvious to the "ordinary observer."⁷¹

69. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951); *Davis v. Dupont de Nemours & Co.*, 240 F. Supp. 612, 620 (S.D.N.Y. 1965); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 268 (S.D.N.Y. 1959): *cf.* *Caldwell-Clements, Inc. v. Cowan Publishing Corp.*, 130 F. Supp. 326 (S.D.N.Y. 1955).

70. *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *Macdonald v. Du Maurier*, 144 F.2d 696 (2d Cir. 1944); *Kustoff v. Chaplin*, 120 F.2d 551 (9th Cir. 1941); *Rush v. Oursler*, 39 F.2d 468 (S.D.N.Y. 1930); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926).

71. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). Conversely, an appropriation of a substantial and material part of the protected work constitutes an infringement; it is not necessary to appropriate all of the work in order to infringe it. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

CONCLUSION

Since the first copyright law was enacted, significant changes in technology have affected its operation. Motion pictures, sound recordings, radio and television have developed, and during the past half-century, a wide range of new techniques for communicating printed matter, visual images, and recorded sounds have come into use. Sadly, copyright legislation and judicial construction have failed to keep pace with the continuing technological revolution in communications. Too keenly aware of the frequency of baseless claims, current court interpretation has severely restricted the protection of the copyright law, thus failing to recognize individual authorship for what it is, an indispensable natural resource.

The crux of the problem lies in the strict application of the ordinary observer test, which renders the burden faced by the plaintiff in infringement proceedings almost insurmountable. Unless the offending work has completely lifted an entire scene, the creative author has no chance against a clever paraphraser. As mentioned before, the author's ordinary course of proof is to bring to the court's attention certain similarities between his work and the defendant's. However, if these similarities are too broad, he will be denied recovery on the grounds that the matter is not original, as in *Burnett v. Lambino*.⁷² Conversely, if the proposed similarities are too narrow, they become expert testimony, and the author runs afoul of the ordinary observer rule. In one such case, a plaintiff listed thirty-eight similarities between her unpublished manuscript "Dancing Cannibale" and the photoplay "The Barefoot Contessa."⁷³ The court held that there was no infringement because

. . . many of the claimed similarities are the result of painstaking, careful, almost expert analysis by one particularly qualified to make a comparison. But the test is not whether an expert could dissect the two works as to be able to demonstrate, by virtue of his peculiar knowledge that there are similarities prohibited by law, rather, the similarity must be one that would be *apparent upon ordinary* observation.⁷⁴

This same conclusion has been reached in cases where the number of

72. 204 F. Supp. 327 (S.D.N.Y. 1962).

73. *Cantor v. Mankiewicz*, 203 N.Y.S.2d 626 (1960).

74. *Id.* at 631.

alleged similarities was even more substantial,⁷⁵ and it is apparent that the individual author is at the mercy of the large film corporations. Normally cast in the role of defendant, the film industry is consequently not subject to the ordinary observer test since its main defense will consist of an attack on the originality of the plaintiff's work. For this reason, the film corporations utilize their vast resources to retain "literary detectives," experts who make analytical comparisons of the contending scripts and (if they decide that there is a chance plaintiff may be able to bear his burden of similarity) try to search out their literary antecedents. In this respect, it has been recognized that if a professional writer were employed to do the copying, an ordinary observer would not notice that one work was taken from another, although a keen critic might.⁷⁶ As only a few courts have recognized the ease with which piracy may occur when works are converted from one medium to another,⁷⁷ it would appear that the answer lies in revision of the Copyright Act itself.

However, the copyright law would not prosper from more definitive legislation. As the concept of infringement must necessarily remain nebulous, the blame for the current lack of copyright protection rests upon the courts alone.

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75. *See, e.g.*, *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946), *cert. denied*, 329 U.S. 716 (1946).

76. *McConnor v. Kaufman*, 49 F. Supp. 738, 745 (S.D.N.Y. 1943).

77. *See, e.g.*, *Davis v. Dupont de Nemours & Co.*, 240 F. Supp. 612, 619 (S.D.N.Y. 1965); *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944); *Simonton v. Gordon*, 12 F.2d 116, 120 (S.D.N.Y. 1925).