Cases of Note -- Copyright: When a Bare Possibility of Access Is Not Enough

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Infringement Elements

Plaintiff has to show ownership of copyright and proof of copying. Lacking proof, he may establish an inference by showing access and a substantial similarity between the two works. Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999).

“Access is essentially hearing or having a reasonable opportunity to hear the plaintiff[s] work and thus having the opportunity to copy.” Id. at 506. But — big BUT — although both White and Blige were concurrently dealing with MCA, “access may not be inferred through mere speculation or conjecture.” Murray Hill Publ’n’s, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 316 (6th Cir. 2004) (quoting Ellis, 177 F.3d at 506).

“Nor is a ‘bare possibility’ of access sufficient …[; a] plaintiff must establish that defendant(s) had a ‘reasonable possibility’ to view plaintiff’s work.” Id. (quoting Glanzman v. King, 8 U.S.P.Q.2d (BNA) 1594, 1595 (E.D. Mich. 1988).

White’s “probative” evidence consisted of him having delivered the CD to MCA, someone opened it and told him a Senior VP would listen to it. And Blige is published by MCA so she must have heard it.

So there.

But not so fast. Blige presented uncontroverted evidence that she and others created “Family Affair” and had no access to “Party Ain’t Crunk.” The MCA secretary in question testified she never listened to it nor passed it to a Senior VP. She opened it and sent it back with the kiss-off letter. And the VP in question said he had no contact whatsoever with Blige et al. His gig was golden oldies.

Corporate Receipt Doctrine

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The Sixth Circuit had not taken a published stance on this, but had affirmed a district court’s refusal to make the inference from a bare showing of corporate receipt. In Glanzmann, a secretary at Columbia Pictures received a script which the corporate receipt theory would require a quantum leap to Stephen King then having access to it despite the complete impossibility of that under the facts.

This was Stephen King’s novel Christine and a ten-page plot sketch called “Side-swepe.”

Other circuits required evidence of reasonable possibility of the work getting into the hands of the infringer. Towler v. Sayles, 76 F.3d 579, 583 (4th Cir. 1996) (requiring a “close relationship” for the corporate receipt doctrine to apply).

The Sixth Circuit noted it’s hard for plaintiff to show chain of possession once the CD enters the maw of a giant corporation. But Blige had clear evidence of independent creation. “[A]n inference of copying is rebuttable by evidence of independent creation of the allegedly infringing work.” Ellis, 177 F.3d at 507.

Dr. Dre documented the various states of development and was finished with “Family Affair” by January 10, 2001. “Party Ain’t Crunk” was not in final form until March of 2001 and was not in MCA’s hands until May of that year.

ANSWER: Certainly it is possible for a library bookclub to view a movie, but the viewing is a public performance. Therefore, the library must seek permission and pay performance royalties, if required. If the library acquired the public performance rights when it purchased the copy of the movie, then no further permission is required. But simply purchasing the movie on DVD does not typically include the public performance rights.

QUESTION: Many academic institutions now have Copyright or Scholarly Communications Officers. What do these people do?

ANSWER: Colleges and universities have begun to recognize how important copyright is to its faculty, staff and students. While university attorneys are there to advise the institution on all legal issues, including, copyright, they typically are not able to provide the services and help that a Copyright Officer can. Typically, these positions require a law degree, and often also a library degree. The duties of a Copyright Officer may include: (1) developing educational materials, online instruction and Websites about copyright for the institution; (2) offering copyright education and training programs for faculty, students and staff; (3) assisting the library by reviewing licenses for copyrighted materials; (4) answering questions for individual faculty members about the use of copyrighted works in their teaching and scholarship; (5) advising faculty about copyright transfers for their publications; (6) coordinating activities with the campus Office of Legal Counsel and (7) serving as an ex officio member of the campus Copyright Committee.

Additionally, campus Copyright Officers often develop relationships with other copyright experts around the country to share information and materials. Some officers also have responsibility for developing testimony in various hearings, etc.

QUESTION: Are libraries considered to be an educational institution?

ANSWER: For copyright purposes, the question is not whether an institution is educational in nature but whether it is organized under the U.S. tax code as a nonprofit educational institution. Nonprofit educational institutions have certain privileges and exceptions that apply to them in copyright which are not available to for-profit educational institutions or to non-educational organizations.

So, to answer the question, libraries are not necessarily educational institutions. To some extent, the answer depends on the type of library. A library in a school or college or university is a part of an educational institution, and therefore it is educational. A corporate library, even a nonprofit corporation library, is not an educational institution. A public library, while it definitely has an educational mission is a nonprofit library but not a nonprofit educational institution.