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

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LEGAL ISSUES

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Cases of Note – Copyright

When A Bare Possibility of Access Is Not Enough

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Leonard Jones & James White v. Mary J. Blige; Universal-MCA Music Publishing et al, United States Court of Appeals for the Sixth Circuit, 2009 U.S. App. LEXIS 4451.

In the year 2000, Rap artist-wannabe **Tim Acker** a/k/a **Benevolence** wrote the lyrics to the unknown, except to litigants, “Party Ain’t Crunk.” His manager **James White** registered it with the U.S. Copyright Office listing himself as one of the authors.

The Urban Dictionary defines crunk as crazy, wild, stoned, delirious. A crunk-daddy is a party animal. And while your ace legal interpreter lacks the lyrics, presumably, party ain’t crunk, is a criticism of the absence of crazy and wild behavior.

Leonard Jones collaborated in some fashion and has a financial stake in the song, hence he’s in the caption. **Acker** was still involved, however, when a **Dannie Longmire** created beat tracks and a melody over which **Acker** recorded his lyrics. This with other songs was what was registered for copyright as “Benevolent Vol. 1.”

White then hooked up with **Abdul Fakir**, formerly of “The Four Tops,” who put him in touch with **Universal Music Enterprises** a division of **MCA Music Publishing**. But the Enterprises division does not do new music but rather re-issues greatest hits albums of oldies.

In May of 2001, **White** hand-delivered a sealed package with the demo CD, cover letter and photo of **Benevolence** looking street-wise and hip. **White** followed up with a phone call and was told by a secretary that the demo was on the desk of a top dog and he is “going to take a listen to it.”

Then **White** received the demo back in a fresh envelope with that dreaded letter “MCA is not accepting any unsolicited material at this time. Sorry.”

White was likewise unsuccessful at other record companies. Then — dum-da-dum-dum — he heard **Mary J. Blige**’s song “Family Affair” on the radio and was instantly convinced it infringed “Party Ain’t Crunk.”

And if you’re curious, a quick trip to YouTube will inform you that “Family Affair” actually does have a melody to it. “Party Ain’t Crunk,” alas, cannot be found.

So Who Is This Blige Exactly?

Mary J. Blige’s album *No More Drama* was released in 2001 to sell two million copies. “Family Affair” is the second song. The music was created by producer/performer **Andre Young** known to the public as “**Dr. Dre**.”

And for crossword puzzle addicts, Dr. Dre is always the answer to the rap music question.

Young — or **Dr. Dre** if you will — does music tracks which he provides for artists to lay vocals over. The first version of “Family Affair” was evidenced by a studio log as being done on September 13, 2000.

And doing some minor detective work, you’re noting the “Party Ain’t Crunk” demo was handed to MCA in May of 2001!!! Doesn’t seem like much of a case.

But Not Seeing Things That way, White Sued

But got bounced on summary judgment on the theory that no reasonable jury could find the lyrics of the two songs to be substantially similar; **MCA** did not have access to the lyrics; and evidence showed “Family Affair” was independently created.

So let’s go to the Sixth Circuit (OH, KY, TENN).

Review de novo blah blah. Was there any genuine issue of material fact for a jury? And more blah blah.

They do, however, note that summary judgment should be used sparingly in these type cases as substantial similarity can be such a close question of fact. But “a court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity.” **Kohus v. Mariol**, 328 F.3d 848, 853 (6th Cir. 2003) (quoting **Wickham v. Knoxville Int’l Energy Expo, Inc.**, 739 F.2d 1094, 1097 (6th Cir. 1984).

Which is a round-about way of saying the district court is entitled to make the decision itself.

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’ns, 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 **Glanzmann 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

White argued that receipt of a work by one employee of a company implies possession by another. See 4 **Melville B. Nimmer & David Nimmer, Nimmer on Copyright** § 13.02[A](2008).

continued on page 56

Questions & Answers — Copyright Column

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QUESTION: *An academic library has a scanner that is available to students. Not surprisingly, students often want to use it to digitize parts of library books which the library does not allow. Now the question has arisen about scanning images from books for use in class presentations and projects. Should the library permit students to scan images for these purposes? Should students follow the Classroom Guidelines just as faculty do such as limiting use to one class, etc.?*

ANSWER: The library likely has been more restrictive than is necessary. Libraries typically do not restrict copying by students on unsupervised photocopying equipment; the library's only responsibility is to post a notice that reproduction of copyrighted work is subject to the copyright law. See section 108(f)(1). Scanning is really no different. If the library is not doing the scanning for the student, the equipment is "unsupervised." Other than posting the 108(f)(1) notice on or near the scanner, there is no statutory responsibility to restrict the reproduction. On the other hand, should the student ask the librarian if she may copy an entire book, the librarian may want to say no and refer the student to the copyright law.

For presentations, it is section 110(1) and (2) for performances and displays that applies to the student. While subsection (1) relates to display of images and does not mention reproducing images, it is common practice to do so by making a **Powerpoint** slide, etc. For a transmitted performance through course management software or a password protected Website, the statute does envision making a copy in order to facilitate the performance, but only if there is no digital version of the work available.

The **Classroom Guidelines** apply to the institution and the faculty member and not to individual students.

QUESTION: *When does the estate of the author come into the picture for the expiration of copyrights?*

ANSWER: The term of copyright is completely tied to the death date of the author and is life of the author plus 70 years. Copyrights are property, and after the death of the author, copyrights pass through the author's will to whomever she designates as the beneficiary. Should the author die intestate (without a will) then copyright passes to the heirs of the author. The **1976 Act** intended that the copyright exist not only of the life of the author but also for two generations of her heirs. Whether the author, a beneficiary of the will or an heir owns the copyright, the term remains the same and is measured by the life of the author, not the owner of the copyright.

QUESTION: *If an academic librarian is preparing a presentation for students and for colleagues, may he incorporate content from a blog without infringing copyright?*

ANSWER: Blog content is copyrighted just as are other literary works. So, there are no special rules for blog content. A fair use portion of blog content can be used, just as a fair use portion of anything may be used. No permission is required to use a fair use portion, but for more than that, the librarian should contact the blog author, explain the use he wants to make of the blog content and ask permission to use the material.

QUESTION: *May a library bookclub show a commercial motion picture and still comply with copyright?*

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.

Cases of Note from page 55

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-swipe."

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. 🐼