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Cases of Note

by **Bruce Strauch** (the Citadel) <strauchb@citadel.edu>

Copyright — In Which An Aspiring Screen Writer Learns That His Access Came Too Late

Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corporation, United States Court of Appeals for the Sixth Circuit, 361 F.3d 312; U.S. App. LEXIS 5174 (2004).

There's no paranoia like that of a rejected author. You know the feeling. We're the big literate generation and each and every one of us figured on being a paperback writer.

You're roundly rejected. And then your marvelous plot comes out under another author's name.

You know what happened. The evil swine publishers handed your brilliant story line off to one of their pals. It's an insiders game and all of us rubes out in fly-over country are regularly ripped off.

By golly, you'll sue.

Good luck.

Randy Kornfield is a freelance screenplay writer who went out into the mean malls of America in search of a Mighty Morphin' Power Ranger for his son's birthday. Shaken by the difficulty of this task, he sat down and wrote a screen "treatment" which is to say a six page summary. This he registered with the **Writer's Guild of America**. Shortly thereafter he registered a full screenplay.

Fox Film Corp liked the idea and bought it. Two more screenwriters were hired to work on the thing with **Kornfield** and the title "**Jingle All The Way**" (**JATW**) was given it.

Of course, **Kornfield** lost all control over the outcome, but he was being paid and with some luck his name might not be shoved to the bottom of the writing credits.

Meanwhile, a Detroit school teacher named **Brian Webster** was deeply rattled by the difficulty of his search for a Golden Batman and wrote a screenplay about his ordeal. This one was titled "**Could This Be Christmas**" (**CTBC**) and was registered with the **Copyright** office. **Webster** and his agent **Murray Hill Publications** tried to sell it to various producers without success.

Webster sold all rights to the **CTBC** screenplay to **Murray Hill** which submitted it to a division of **Fox** where it was read and summarized by **Rudy Romero** who just happened to be a friend of **Randy Kornfield**. And **Romero** just happened to perform the same role for **JATW** a few short months later.

Your worst fears realized. And then there's the double-paranoia. Nothing happened until the agent owned all rights. Then it got read.

Fox turned down **CTBC**.

JATW went into production and was written up in *Daily Variety* where the article was spotted by an alert **Murray Hill** principal.

Lawyers were summoned to send sternly worded cease-and-desist letters to **Fox**. Negotiations failed when **Murray Hill** wouldn't lay out any particular theory of how **Fox** got access to **CTBC**. **JATW** was released to achieve a commercial success of \$183 million.

Murray Hill sued for infringement of copyright of the **CTBC** screenplay. The jury gave them a verdict in the millions, arrived at prior to the final box-office tally above.

Fox appealed of course or we wouldn't be here today.

Elements of Proof in Copyright Cases

"To succeed in a copyright infringement action, a plaintiff must establish that he or she owns the copyrighted creation, and that the defendant copied it." **Kohus v. Mariol**, 328 F.3d 848, 853 (6th Cir. 2003).

"However, in most cases courts have no objective evidence of the process by which the challenged object was developed and thus are forced to rely on the inferences which may be drawn from two basic facts: access and similarity." **Glanzmann v. King**, 1988 U.S. Dist. LEXIS 15705 (E.D. Mich. 1988) (citing **Ideal Toy Corp. v. Kenner Prods.**, 443 F. Supp. 291 (S.D.N.Y. 1977)).

"Where there is no direct evidence of copying, a plaintiff may establish 'an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.'" **Kohus**, 328 F.3d at 853-54 (quoting **Ellis v. Diffie**, 177 F.3d 503, 506 (6th Cir. 1999)).

This opinion was written the way I used to do appellate briefs — an unbroken bunch of strung-together quotes. What's wrong with those U-Mich law clerks? I thought they were supposed to be so smart.

So How Do the Thieves Get Access?

"Access is essentially 'hearing or having a reasonable opportunity to hear the plaintiff[s]' work and thus having the opportunity to copy.'" **Ellis**, 177 F.3d at 506 (quoting **Tree Publ'g Co. v. Warner Bros. Records**, 785 F. Supp. 1272, 1274 (M.D. Tenn. 1991)). "Access is proven when the plaintiff shows that the defendant had an opportunity to view or to copy plaintiff's work." **Glanzmann**, 8 U.S.P.Q.2d at 1595 (citing **Sid & Marty Krofft Television Prods. V. McDonald's Corp.**, 562 F.2d 1157, 1163 (9th Cir. 1977)).

"Although 'evidence that a third party with whom both the plaintiff and defendant were concurrently dealing had possession of plaintiff's work is sufficient to establish access by the defendant,' 'access may not be inferred through mere speculation or conjecture.'" **Ellis**, 177 F.3d

at 506 (quoting 4 **Melville B. Nimmer & David Nimmer**, **Nimmer** on Copyright § 13.02[A]).

Which is to say you need some probative evidence. But of course you'll never have anything really conclusive. No disgruntled insider will ever turn traitor in the movie biz. He might be banished to Kansas City or Dubuque.

If you can't prove access, then you have to substitute "striking similarity" which is to say such a level of similar-

ity that it "precludes the possibility of independent creation." **Glanzmann**, 8 U.S.P.Q.2d at 1595 (citing **Ferguson v. Nat'l Broad. Co.**, 584 F.2d 111 (5th Cir. 1978)).

The 6th Cir. curiously says you usually can show access — presumably through the submission of the screenplay/manuscript that is the source of writer paranoia. So you won't need striking similarity but only substantial similarity. And that's the stumbling block.

Because as you will shortly see, all Hollywood product is utter hack work. But we're in court, and the only solution there is ...

We Need One of Those Two-pronged Tests

If you're interested, the case has some impossible gobbledy-gook about the difference between the Second Circuit's test and that of the Ninth Circuit which it admits has a huge caseload and endless experience in movie copyright infringement.

The big difference seems to be the 9th Cir. is more willing to allow expert testimony, presumably because there are a lot of experts lounging around Hollywood swimming pools who need the work.

But why defer to those who know what they're doing? Having your very own two-pronger is just irresistible. And the 6th Cir.'s is (1) i.d. elements that are protectable, and (2) determine if there is substantial similarity.

That Messy Idea v. Expression Dichotomy

Copyright protects expression of ideas, not the ideas themselves. **Kohus**, 328 F.3d at 855. This sets up a nasty spectrum ranging from more expression-like to more idea-like. But there's no clear point where you cross a line from one into another.

"No principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.'" **Peter Pan Fabrics v. Martin Weiner Corp.**, 274 F.2d 487, 489 (2d Cir. 1960). Which is why it's a jury question and not one of law.

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The case doesn't say this, but it's important because the idea of chasing around after a toy is not protected. And that's what confuses the paranoid author:

"But I had a life-altering experience in the malls," he wails. "An epiphany, gosh-darn-it. This is my story I'm telling and you can't have it."

Scenes a faire are expressions not protected because they follow so naturally from an unprotected idea.

"While both the **Dinosaur World** books and the **Jurassic Park** works share a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers, these settings are classic scenes a faire that flow from the uncopyrightable concept of a dinosaur zoo. Thus, though perhaps substantially similar, the settings are not protectable." *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996). "The common use of such stock ... merely reminds us that in Hollywood, as in the life of men generally, there is only rarely anything new under the sun." *Id.* At 588 (quoting *Berkie v. Crichton*, 761 F.2d 1289 (9th Cir. 1985)).

"A story has a linear dimension: it begins, continues, and ends. If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line." *Warner Bros. V. ABC*, 720 F.2d 231, 241 (2d Cir. 1983).

It's not clear why the 6th Cir. heaved this law in, but I get the feeling that Michigan is real uncomfortable with this "art thing" and trying to prove they're on top of it all.

Virtually everything in the following stories strike me as current obsession "stock," and I'd challenge anyone to focus enough to compare the sequence of events.

But Let's Apply the Facts — You Be The Jury

And remember, the jury doesn't just find facts in copyright law. It also serves as a proxy for the intended audience. Would the infringing work reduce your appetite for consuming the original? See *Kohus*, 328 F.3d at 856-57.

CTBC: Poor, single mother white cleaning woman Bess engages in store battle with rich black realtor woman Clare over a super-hero "**Action Man**" figure. Clare wins.

Brawl No. 1 goes to black woman.

Bess' ratty apartment is going to be torn down by Clare the rapacious and empowered black woman.

Woo. Reverse stereotypes. Now that's original.

There are some scenes involving a toy gun that looks real.

Gun control nightmare. And should we allow war toys at all?

Bess goes to clean Clare's house and mistakes the medical doctor husband for a servant because he is — you guessed it — black like Clare.

How's that for heavy social commentary?

Bess spots the disputed Action Man and hides it to retrieve later.

She's not original enough to smuggle it out, and anyhow this sets up interracial brawl No. 2.

Bess gets romantically involved with Steve a wealthy toy store owner who she thinks is merely a store Santa Claus.

Because of course she has low self-esteem and can't believe a wealthy guy would be so inadequate he has to come down to her level to find love.

Bess breaks into Clare's house and after a struggle escapes with the Action Man.

Brawl No.2 goes to white woman. They're tied now.

Bess learns Steve is wealthy and fights with him for deceiving her. She feels guilty and returns the Action Man.

Bess is arrested as a prowler. Bess' mother — who seems to be forced into the plot purely for this scene because Bess has to be in jail — berates Clare. Clare feels guilty and gives away toys to poor kids.

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Clare gets Bess out of jail and offers her an Action Man. Bess declines.

Moral high ground to white woman. She's learned to value people over things.

Clare decides to not tear down the ratty apartment building.

Black woman climbs firmly onto moral high ground.

Bess makes up with toy magnate Steve. Her kid gets an Action Man under the Christmas tree and assumes it came from Santa Claus.

But of course it was from Steve who is in touch with his feminine side and doesn't need praise.

And in a final multi-cultural wonder, three store Santas turn around and reveal themselves as black, white and Japanese.

Santas that look like America.

Was That Dreck or What? And How's That Appetite for Another Version?

Now remember, this is the one that made it to the screen and was allegedly pirated from the prior one.

JATW: Workaholic CEO Dad doesn't make it to his son's karate award. But the dutiful mother of course does.

Groveling to make up with kid, Dad promises him a much sought-after "**Turbo Man**" action figure for Christmas.

Yes. Buying the love of a child. That's a never-before-seen little morality tale.

A riot ensues at the store as customers battle for the final remaining toy. Dad wrestles with the requisite black man, but they both lose toy to an infant.

The black character is an overweight postman.

The symbolism of this completely escapes me.

They rush to a radio station where you can win a Turbo Man by naming all of Santa's reindeer. They lose again.

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White v. black combat a draw so far.

There are some scenes involving a fake bomb.

Hollywood's morbid phobia of bomb detonating heartland militia nuts.

Dad returns home to find wife and an "oleaginous" divorced neighbor decorating the tree. Dad is jealous.

Why is he overweight? Is this another cruel stock mockery of the avoirdupois challenged? Or would Camille Paglia say it symbolizes Venus of Willendorf female chthonian nature? He's in touch with his feminine side and can communicate readily with wife. Neighbor is Venus the good listener while Alpha-Mars hubby wants to prove his manhood by breaking down doors and solving the toy problem.

And sure enough, Dad breaks into neighbor's house to steal a Turbo Man where he is attacked by — get this — a pet reindeer — and manages to set several rooms on fire.

The big slapstick scene. Although you must admit that reindeer is as close to originality as Hollywood can achieve. They've boldly gone beyond football playing chimps. And the courage it took to face down PETA.

Neighbor and Dad's wife discover him and are disgusted.

A devastating commentary on the modern dysfunctional nuclear family and the non-metrosexual male.

Dad goes to a parade, is mistaken for an actor and shoved into a Turbo Man costume. He's given a Turbo Man action figure to present to the lucky child of his choice. Naturally he hands it to his kid.

Dad the modern day hero to his consumption-glutted kid. And you'll note he didn't give it to a kid bald from chemotherapy or one in a wheelchair. Very daring on the part of the writers. Social-Darwinism in an age otherwise wallowing in sensitivities.

Meanwhile our black man has stolen a Dementor costume and attacks the kid endeavoring to filch away the action figure. Turbo and Dementor battle like in a TV program. Incredibly for these racially sensitive times, the white man wins. But he is dressed as Turbo Man after all.

Dad reveals his true identity to his kid. With a real Turbo Man for a dad, kid gives the action figure to black man. Dad, mom and kid make up and hug.

Heartwarming. Pause to wipe the tear from your eye.

Now we need that yuk-yuk denouement.

Mom wonders out loud what Dad bought her for Christmas. He realizes in horror that he forgot her.

How do they dream up these zany plots?

Yes, Your Verdict Is They Both Reek and Who Cares

But there's big money at stake here. And Fox's appeal on substantial similarity as a matter of law which is "appropriate only when there is a complete absence of fact to support the verdict, so that no reasonable juror could have found for the nonmoving party." *Fisher v. Ford Motor Co.*, 224 F3d 570, 574 (6th Cir. 2000) (quoting *Moore v. KUKA Welding sys. & Robot Corp.*, 171 F3d 1073, 1078 (6th Cir. 1999)).

Remember the JATW six page treatment? Fox had it before Murray Hill submitted their CTBC story. At trial, Murray Hill came up with some speculative ways that Fox could have seen their CTBC screenplay earlier, but those were of course ruled speculative.

They're spying on us all electronically. And Brian Webster talks in his sleep ... and ...

Murray Hill had an expert-prepared list of 24 similarities. However, all but six were in the screen treatment.

"[W]here defendant owns a prior work containing the same elements, he has no reason, beyond the illicit thrill of copyright infringement, to copy wrongfully from another what he could legally copy from himself." Finally, an original quote from the U-Mich law clerks of the 6th Cir. 361 F3d at 323. But isn't it logically impossible? If I possess A, and Ab comes over the transom, I can't pirate A no matter how much pleasure it would give me.

Now, applying the 6th Cir's two-prong test, you filter out unprotected elements and then look for substantial similarity.

Hence the district court should have filtered out the eighteen elements already owned by Fox. And hence a reasonable jury could not have found substantial similarity on those dicey remaining six.

And don't forget, JATW had that pet reindeer. You've never seen one of those before. 🦌

Questions & Answers — Copyright Column

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QUESTION: A librarian is giving a presentation at a professional conference and finds a cartoon on the Internet for which there is no copyright notice or other information. What are the risks and problems if he uses that cartoon in a PowerPoint for the conference? What if either the presenter or the conference organizers publish the presentation on the Web including the cartoon? Suppose that the librarian used the cartoon in the past without knowing that the cartoon was copyrighted?

ANSWER: The fact that the cartoon is found on the Internet does not alter the copyright status of the work in any way. It is a graphic work that in all likelihood is copyrighted. Since there is no longer any requirement of notice in the Copyright Act, the lack of a notice does not affect the status of the work. There is a slight possibility that the cartoon is public domain, but it is unlikely. So, assume that the cartoon is copyrighted.

If there is no identifying information, the first examination one should make is whether the style of the cartoon is such that its ownership can be traced. For example, *New Yorker* cartoons all have a particular style and *Far Side* cartoons are readily identifiable as such. Should

there be no way from the style to trace copyright ownership, then one conducts a risk assessment. Using the cartoon creates some risk, but it may be slight depending on how widely the presentation is distributed. Including the cartoon in a PowerPoint for a live presentation at a conference with no other reproduction is not as risky as publishing the slides containing the cartoon in print. The risk for publishing them on the Web is even greater. One should evaluate how critical it is to use the work, how widely it will be reproduced and distributed and now much risk the librarian is willing to take.

The final part of this question asks whether past use of a cartoon creates liability. Ignorance of the law is no excuse, and copyright law does not have an intent requirement, so one infringes even if she did not mean to do so. If the infringement occurred during the last three years, the answer is yes. The statute of limitations in the Copyright Act is three years. The owner of a registered copyrighted work may file suit for infringing activity going back three years.

QUESTION: When seeking permission to use a copyrighted work for an electronic reserves system, is email permission sufficient?

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