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Sherry Vaughn

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## **Repp v. Webber,**

858 F. SUPP. 1292 (S.D.N.Y. 1994).

### *INTRODUCTION*

Plaintiff Ray Repp (“Repp”), a professional musician, commenced a copyright infringement action against defendant Andrew Lloyd Webber (“Webber”), a musical composer, alleging that Webber copied his song entitled “Till You.” Webber moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, contending that Repp could not refute evidence that Webber’s song was independently created. The United States District Court for the Southern District of New York granted Webber’s motion, holding that Repp had neither proven a prima facie case of copying nor discredited Webber’s evidence of independent creation.

### *FACTS*

Repp is a professional musician who works primarily in the field of popular liturgical music. Webber is the composer of several musical theater productions as well as liturgical music. Repp composed a folk song entitled “Till You” which was copyrighted in July 1978. The song was recorded on the album “Benedicamus”, which was advertised in a weekly Catholic newspaper, released at three religious conventions in 1978, re-released in December of that year, and distributed to Australia in 1981. The sheet music of “Till You” was sold in four books and Repp’s music was sold directly to retail stores. Additionally, Repp stated that he performed the song at over two hundred concerts throughout the United States, Canada, Korea, and Japan.

Webber composed “The Phantom of the Opera” in 1983 to exhibit the vocal talents of actress/singer Sarah Brightman, who assisted Webber in the composition. In early 1984 Webber provided a tape containing the melody of the song to English director Trevor Nunn. In July 1985, the song was performed at a private musical festival in Sydndmonton, England. A single was released in January 1986 and the song was registered with the United States Copyright Office in 1987.

Plaintiff Repp brought this action for copyright infringement alleging Webber copied “Till You” in the melody of “The Phantom of the Opera”. Webber moved for summary judgment pursuant to Federal Rule of Civil Procedure 56.

### *LEGAL ANALYSIS*

The issue before the District Court was whether a reasonable jury could find that Webber copied “Till You” in the composition of “The Phantom of the Opera.” The court stated that in order to show a prima facie case of copying, a plaintiff must show that the defendant “had access to the copyrighted work and that substantial similarities exist between the original work and the infringing

work.”<sup>1</sup> However, the defendant could rebut this showing by establishing that his work was independently created.<sup>2</sup> If copying is established, the plaintiff must still show that the copying constitutes an improper appropriation.<sup>3</sup>

The parties did not contest that Repp had a valid copyright in “Till You.” The court stated that generally summary judgment would be granted where the plaintiff clearly could not make out the elements of a copyright infringement claim. Thus, Webber had to show that there was no evidence to support Repp’s claim that Webber had access to “Till You” and that the two musical works were substantially similar.

Initially, the court determined whether Webber had access to Repp’s work. The court defined access as “hearing or having a reasonable opportunity to hear the plaintiff’s work, in other words having the opportunity to copy.”<sup>4</sup> Access must be a “reasonable possibility.”<sup>5</sup> Where the infringed work was widely distributed or the defendant may have gained access through a certain series of events, the plaintiff has proven access.<sup>6</sup>

Repp claimed that access could be inferred from the fact that a recording of his music was given to someone who also knew Webber and from the wide distribution of “Till You.” The court held that Repp had not demonstrated Webber had access to the copyrighted work. There was insufficient evidence to establish a connection between Velline and Webber to support a finding of access on that basis. The court found that Repp’s song had not been widely disseminated to the general public during the time period pertinent to the issue. Because Repp had no documentation of the number of copies of “Till You” distributed during the relevant time, the court found the evidence to be purely speculative. Moreover the court held that access was not established by the fact that Webber also composed liturgical music.

The court next addressed the issue of substantial similarity between “Till You” and “The Phantom of the Opera.” Repp argued that copying could be inferred and improper appropriation proved due to the striking similarities between the two compositions. The court stated that for similarities to yield such an inference the plaintiff must show that the similarities which exist between the works can only be due to copying, instead of alternative reasons.<sup>7</sup> Both Repp and Webber had experts testify as to the similarity of the pieces. Based upon this testimony as well as its own aural examination, the court determined that the similarities between the two songs were not of the nature to warrant a conclusion of copying without access. Although the pieces possessed common notes, the

1. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139 (2d Cir. 1990).

2. *Gund, Inc. v. Russ Berrie and Co.*, 701 F. Supp. 164, 168 (S.D.N.Y. 1990).

3. *Laureyssens*, 964 F.2d at 140.

4. *Sylvestre v. Oswald*, 1993 U.S. Dist. LEXIS 7002 at \*7 (S.D.N.Y. May 18, 1993) (*quoting Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991)).

5. *Id.*

6. *Sylvestre*, 1993 U.S. Dist. LEXIS 7002 at \*8.

7. *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).

court noted that the style and tempo differed. Consequently, Repp had not made out a prima facie case of copying.

Even though Repp had not established the elements of his claim, the court went on to consider Webber's evidence of independent creation. Webber had submitted declarations from himself and Sarah Brightman detailing the circumstances surrounding the creation of "The Phantom of the Opera." Repp, on the other hand, argued that Webber's history of copying from other composers refuted an assertion of independent creation. Since Repp had not indicated any previous determinations of copyright infringement, the court found that Repp had not controverted this evidence. As a result the court held that Webber's evidence of independent creation negated the instant claim.

#### *CONCLUSION*

Repp claimed that Webber infringed his copyright to the song "Till You" by copying the melody in "The Phantom of the Opera." The United States District Court for the Southern District of New York found that Repp had not proven that Webber had access to the song during the relevant time period. Although there was some similarity between the two pieces, the court held that it did not justify a conclusion of copying. Furthermore, since Webber had produced uncontradicted evidence of independent creation, the copyright infringement claim was negated. Thus, the court decided that Repp could not prove the elements of his claim and awarded summary judgment to Webber.

*Sherry Vaughn*

