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Article 8

Moore v. Columbia Pictures Industries, Inc., 972 F.2d 939, 941 (8th Cir. 1992)

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gious speech be afforded no disparate treatment from secular speech.

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1. Doe v. Small, 964 F.2d 611, 615 (7th Cir. 1992).
2. *Id.* at 617 (*citing* Heffron v. Int'l. Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)).
3. *Id.* (*quoting* Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990)).
4. *Id.* at 618.
5. *Id.*
6. *Id.* at 619.
7. *Id.*
8. *Id.* at 620 (*citing* Widmar V. Vincent, 454 U.S. 263 (1981); Fowler v. Rhode Island, 345 U.S. 67 (1953)).
9. *Id.* at 618.
10. Widmar, 454 U.S. at 271.
11. 964 F.2d at 621.

Moore v. Columbia Pictures Industries, Inc.,

972 F.2d 939, 941 (8th Cir. 1992).

INTRODUCTION

The plaintiff, Derrick D. Moore, a songwriter and musician, filed a copyright infringement suit against the defendants, Columbia Pictures Industries, Inc., a motion picture production company, MCA Records, Inc, a record production company, and Antonio Reid and Kenny Edmonds, two songwriters. The Eighth Circuit affirmed the district court's grant of the defendants' Motion for Summary Judgment, ruling that although the district court erred in finding that Moore's evidence was insufficient to show access to his copyrighted song, they were correct in finding that the plaintiff did not demonstrate substantial similarity between his work and that of the defendants.

FACTS

During March, April, and May of 1989, the plaintiff, Moore, composed a song entitled "She Can't Stand It." On March 22, 1989, Moore's agent, James Selmer, delivered the instrumental version of the uncompleted song to Cheryl Dickerson, MCA's Director of Artists and Repertoire. At that meeting, Dickerson said she liked the tape and wanted to keep it so that her supervisor, Louil Silas, could listen to it. Dickerson asked Selmer to send her the final version of the song, which he did on May 11, 1989. Neither Moore nor Selmer were ever contacted by Dickerson subsequent to that meeting.

During February and March of 1989, defendant Reid claims to have created a rhythm tract for a song called "On My Own." On March 21, 1989, he claims to have delivered this track to defendant Edmonds, who on March 22 (the same day Selmer met with Dickerson) began to create music to accompany Reid's rhythm tract. On March 23, defendants Reid and Edmonds composed lyrics for "On My Own." On March 25, they had the completed song and transferred it to a master tape. On March 31, Reid and Edmonds played "On My Own" over the phone to Silas, with whom they had worked in the past. In early April, Reid and Edmonds submitted a copy of their song to the producers of the movie "Ghostbusters II," who eventually used it as the theme song for the movie in June of 1989 after changing the title to "On Our Own." The song was released as a single in late May of 1989.

On June 6, 1989, the day Moore registered his song with the United Stated Copyright Office, he notified Columbia Pictures Industries, Inc. ("Columbia") that it was infringing on his copyright through the use of the song "On Our Own," a charge which Columbia denied. On July 14, 1989, Moore brought an action against the defendants in the United States District Court for the District of Minnesota[1] alleging infringement of his copyrighted song "She Can't Stand It."

LEGAL ANALYSIS

Moore argued, first, that the district court erred in finding the evidence did not establish a reasonable possibility that defendants Reid and Edmonds had access to "She Can't Stand It" before they composed "On My Own". Second, he claimed that the court erred in finding no substantial similarity between the two songs.

In the Eighth Circuit, copyright infringement is established by demonstrating: 1) ownership of the copyright, and 2) copying by the defendant.[2] Ownership of the copyright by Moore was not in dispute in this case. Because the second element could not be proven directly, copying can be demonstrated by showing: 1) that the alleged infringer had access to the copyrighted work, and 2) that the works at issue are substantially similar.[3]

The court first addressed the issue of access. Access can be established by proving that the defendants had an "opportunity to view or copy" the plaintiff's work.[4] A bare possibility of access to the work is not enough; a reasonable possibility of access must exist.[5] A reasonable possibility of access can be demonstrated under the "corporate receipt doctrine".[6] This court, like other courts, recognizes that the corporate receipt doctrine can apply if there is a relationship between the intermediary and the alleged infringer, even if the alleged infringer is not an employee of the intermediary.[7] Moore asserted that sufficient facts were presented to the district court to defeat the defendants' Motion for Summary Judgment on the basis of access.

The appellate court agreed with Moore and concluded that there was a reasonable possibility that Reid and Edmonds heard "She Can't Stand It" before composing "On My Own."[8] Dickerson acquired a copy of "She Can't Stand It" on the same day that

Edmonds claims to have begun composing the music to accompany Reid's rhythm tract. Dickerson was initially excited about Moore's song, saying she was going to have her supervisor, Silas, listen to it, but then inexplicably lost interest in it, never contacting either Moore or Selmer about the possibility of a recording contract. Dickerson, Silas, Reid and Edmonds were all friends and had worked together in the past. Silas encouraged Reid and Edmonds to submit a song for the "Ghostbusters II" soundtrack. Applying the corporate receipt doctrine, the court decided that although Reid and Edmonds were not employees of MCA, Dickerson and Silas were in a position to provide suggestions or comments to the defendants regarding their work, and thereby concluded that there was a reasonable possibility that Reid and Edmonds had access to copy Moore's work.[9]

The court then addressed the issue of substantial similarity. In order for the plaintiff to show substantial similarity, he must demonstrate: 1) a substantial similarity of the general ideas, and 2) a substantial similarity of the expressions of those ideas.[10] The court utilizes the extrinsic test to decide upon the issue of similarity of ideas. Using this test, the court decides whether or not the details of the works contain objective similarities. If the court finds that objective similarities do in fact exist between the copyrighted work and the alleged infringing work, the court next uses the intrinsic test to decide similarity of expression.[11] This test uses a reasonable person standard.[12] Under the intrinsic test, the analysis is to decide whether or not the works are so dissimilar that "ordinary, reasonable minds [can]not differ as to the absence of substantial similarity in expression."[13] Expert testimony is admissible in utilizing the extrinsic test to see if the works contain objective similarities.[14]

The appellate court affirmed the lower court's decision that the works were not substantially similar, under the extrinsic test, in their ideas. The court based this decision on affidavits submitted by the parties. These affidavits, the court said, contained convincing testimony by the defendants' expert witnesses that the defendants' song, "On Our Own," and Moore's song, "She Can't Stand It," were not substantially similar. One defense witness, a producer/songwriter, testified that the melody, harmony, bass and accompaniment lines were "distinctly different" and that the "pitches, rhythms and phrasing of the vocal melodic lines are different virtually throughout [both songs]".[15] Each of the defendants' experts testified that any similarities between the songs were due to the fact that both were from the genre of R & B/hip-hop music.

In a deposition, the plaintiff's expert witness testified first that "On Our Own" was copied from "She Can't Stand It." However, upon later questioning, he wavered and admitted that it was possible that "On Our Own" was not copied from "She Can't Stand It." This witness, the court found, was unfamiliar with the genre of hip-hop music and was unable to musically classify the two songs. Based on the strength and depth of the defendants' expert testimony and on the "inconclusive and unsubstantiated testimony" of the plaintiff's expert, the court was convinced that under the extrinsic test, a reasonable factfinder could not find the two songs to be substantially similar.[16]

CONCLUSION

Although Moore was able to demonstrate a reasonable possibility that defendants Reid and Edmonds had an opportunity to obtain access to his work, the appellate court affirmed the district court's decision to grant the defendants' request for summary judgment because Moore was unable to show a substantial similarity between the ideas underlying the two works.

Judge Lay, in partial dissent, felt the case should have been remanded on the issue of substantial similarity.[17] In his opinion, the majority mistakenly allowed defendants to offer expert testimony to refute similarity of expression. Under *Hartman v. Hallmark Cards, Inc.*, expert testimony is applied to the extrinsic test for substantial similarity of ideas; while the factfinder, the jury, applies a reasonable person standard to determine similarity of expression.[18]

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1. Plaintiff Derrick D. Moore was a resident of Minneapolis, Minnesota.

2. Moore v. Colombia Pictures Industries, Inc., 972 F.2d 939, 941 (8th Cir. 1992) (*citing* Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S.Ct. 1282, 1296 (1991)); *accord,* Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987).

3. Moore, 972 F.2d at 941-942.

4. *Id.* at 942 (*quoting* Sid & Mary Krofft Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977)).

5. *Id.*

6. The corporate receipt doctrine states that "if the defendant is a corporation, the fact that one employee of the corporation has possession of the plaintiff's work should warrant a finding that another employee (who composed defendant's work) had access to plaintiff's work, where by reason of the physical propinquity between the employees the latter has the opportunity to view the work in the possession of the former". *Id.*

7. *Id.* (*citing* Metra-Film Assoc., Inc. v. MCA, Inc., 586 F. Supp. 1346, 1357 (C.D. Cal. 1984); *see also* Ferguson v. Nat'l Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978)).

8. *Id.*

9. *Id.* at 943. The court stated that case law in other circuits and districts supported their holding on access. *Id.* at 944.

10. *Id.* at 945.

11. Expression is infringed when the "total concept and feel" of the works are substantially similar. Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120-21 (8th Cir. 1987).

12. Moore, 972 F.2d at 945.

13. *Id.* (*quoting* Litchfield v. Spielberg, 736 F.2d 1352, 1355-56 (9th Cir. 1984).

14. *Id.* at 945.

15. *Id.* at 946.

16. *Id.*

17. *Id.* at 947.

18. *Id.* (*citing* Hartman, 833 F.2d at 120).