COPYCAT OR COINCIDENCE: ESTABLISHING COPYRIGHT INFRINGEMENT IN SIMILAR LITERARY WORKS

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INTRODUCTION

Similarity between two works often implies that one is a copy of the other. However, in the creative world, where different perspectives of an idea can be produced by different authors and each work will be original, similarity without more cannot be conclusive proof of copyright infringement. Accordingly, one of the defences to a claim of copyright infringement is independent creation. This describes when two people independently create the same or substantially similar work. This paper seeks to explain the additional requirements which a claimant in a copyright infringement action must establish, beyond the similarity between his work and the alleged infringing work, in order to establish a case of copyright infringement.

ESTABLISHING COPYRIGHT INFRINGEMENT

Essentially, copyright infringement entails the unauthorized use of a copyright protected work. Section 14 of the Copyright Act (the "**Act**") provides that copyright is infringed by any person who without the license or authorization of the owner of the copyright "...does, or causes any other person to do an act, the doing of which is controlled by copyright..." The Act, in Section 5, sets out the controlled acts, which are solely reserved for the owner of the copyright. Without due authorization from the owner and outside the parameters of the exceptions provided for under the Act – fair use, educational and academic purposes, public interest, amongst others – the doing of any of the controlled acts in relation to a protected work, such as producing, reproducing, performing or publishing the work or any part of it, amongst others, would constitute an infringement of copyright.

To successfully prove infringement of copyright in a work, a claimant (after having established that the work is an original expression, and therefore qualifies for the inherent protection guaranteed by copyright) must establish causal connection between his work and the alleged infringing work as well as a substantial taking by the alleged infringing work from his work.

A. Causal Connection

Here, the claimant must establish a likelihood, on the balance of the evidence available, that the infringing work was copied from his/her work. The copyright work must be the source from which the infringing work is derived. Where the claimant's work precedes

that of the defendant, the defendant had opportunity of access to the claimant's work, and there are strong similarities between both works, there will be a prima facie assumption that the defendant copied the claimant's work[1]. Prior existence is easy to establish. It is an issue of fact determined by date of publication. Establishing that the defendant had access to his work may be a bit more tricky. This may be satisfied where, for example, the claimant is able to show that his work – say, a book, song or a movie – was widely read or performed in areas and at times that would make it highly likely that the defendant heard or watched it. When the claimant can demonstrate access, he still needs to demonstrate sufficient similarity between the defendant's and the claimant's work to make copying more likely than independent creation. The claimant could show that the defendant made a verbatim copy of his entire work or that a part of both works are similar or that both works have similar aesthetic appeal.[2]

B. Substantial Taking

Having established causal connection, the plaintiff must establish that a substantial part of the copyrighted work was copied by the infringing work. This is often determined by a confirmation of the quality rather than the quantity of what may have been taken. In this regard, it is important to note that copyright law protects the particular original expression of a work and not the underlying idea behind the work. The fact that a latter work bears some similarity to an existing work, does not, without more, amount to an infringement of the copyright.

For instance, the Disney movie, Cinderella, is protected by copyright as an original expression. While authors are advised to steer clear of the character "Cinderella" and specific portions of the story attributable to her unique character, Disney does not have a monopoly over Cinderella-style stories. The story of an orphan mistreated at home, who later finds favour with royalty or rises to some success is a common story/idea in traditional folklore, here at home in Nigeria and in other cultures.

In the same vein, two authors may base their work on the same or similar historical source in the public domain. Reference to this identical source does not necessarily mean that one copied the other. For example, two people taking photographs of Niagara Falls from the same place at the same time of the day and year and in identical weather.[3] In the case of *Franklin Mint Corp. v. National Wildlife Art Exchange Inc.,*[4] the plaintiff, the National Wildlife Art Exchange, commissioned a well-known wildlife artist to produce a water colour bird painting of cardinals. The artist transferred the copyright to the plaintiff, who issued limited edition prints of the work. Three years later, the defendant commissioned the same artist to paint a set of four bird pictures, including one of cardinals, and also issued prints of the pictures for sale. The plaintiff sued the defendant for copyright infringement

[1] Plateau Publishing & Anor v. Adophy (1986) 4 NWLR (Pt. 34) 205 pages 615-616
[2] Masterpiece Inv. Ltd v. Worldwide Business Media Ltd (1990 – 1997) 3 L.P.L.R 345
[3] DAVID VAVER, *PRINCIPLES OF COPYRIGHT: Cases and Materials* WIPO Publication No. 844(A/E/F) at page 137. Accessed at https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf
[4] 575 F.2d 62 (U.S.: Court of Appeals, 3rd Cir. 1978)

of its cardinal prints. Both versions depicted two cardinals in profile, a male and a female perched one above the other on apple tree branches in blossom. The plaintiff claimed that the painter had copied a substantial part of the earlier work. The painter replied that he had just taken the idea and that he should not be barred from ever painting pictures of cardinals again. The Court noted thus; *"...Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement. Indeed, an artist is free to consult the same source for another original painting ..."*[5]

So, how then do you establish substantial taking? Usually, Courts consider both the quality and the quantity of work taken, and relatively small parts of a work have been deemed sufficient to constitute substantial taking where they constitute the heart of the claimant's work and are his original creation. In June 2009, Larrikin Music, who owned the copyright of "Kookaburra," a nursery rhyme originally written by Marion Sinclair in 1932 and which was popular in Australia for decades sued the Australian rock group, Men at Work for infringing its copyright in the nursery rhyme. Men at Work had composed and recorded an equally famous, perhaps more famous song, called "Down Under." The song included a flute riff which appears several times, albeit short, in order to inject some "Australian flavor" into it. The court held the defendants liable for copyright infringement and here's how the court expressed the relevant standard:

> *Copyright infringement arises when a defendant "has copied a substantial part of the copyrighted work. The question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken".* [6]

Similarly, the use of a twenty second portion of a four -minute musical in the background of a news clip has been held to amount to substantial copying.[7]

CONCLUSION

Similarity of a copyrighted prior work with a latter work does not in itself ground a claim for copyright infringement. The claimant must be able to establish a causal connection between both works, and substantial taking. The claimant is not required to prove these elements beyond reasonable doubt. However, given the gravity of the claim, the court would have to be strongly persuaded by the balance of evidence before it, to hold that the defendant indeed infringed the claimant's work.

[5] DAVID VAVER, *PRINCIPLES OF COPYRIGHT: Cases and Materials* WIPO Publication No. 844(A/E/F) at page 143. Accessed at https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf
[6] Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited [2010] FCA 29, Federal Court (Australia)
[7] *Hawkes & Sons (London) Ltd v. Paramount Film Service Ltd* [1934] Ch. 593

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