

## INTRODUCTION

Direct evidence of copying is seldom available to a plaintiff in an infringement controversy. For that reason, courts have generally accepted circumstantial evidence to create a **presumption** of copying. To raise this **presumption**, a plaintiff must show that (1) plaintiff's and defendant's works were substantially similar, and (2) there was a reasonable possibility that defendant had access to plaintiff's work. *Ale House Management, Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137, 143 (4th Cir. 2000); *Towler v. Sayles*, 76 F.3d 579, 581-83 (4th Cir. 1996); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988). Plaintiff may prove reasonable possibility of access through circumstantial evidence. *Towler*, 76 F.3d, at 581, 583. A **reasonable possibility of access** means that it was reasonably possible that the paths of the infringer and the infringed work crossed or that the infringer had a reasonable opportunity to view it. *Towler*, 76 F.3d, at 581, 583. Once the **presumption** of copying arises in a plaintiff's favor, it does not vanish upon the defendant's introduction of contradicting evidence and is deemed sufficient to generate a jury question whether defendant copied. *Keeler Brass Co.*, 862 F.2d, at 1065-66; Advisory Committee Notes to Fed.R.Evid. 301 (Presumptions in General in Civil Actions and Proceedings).

The judgment in this case is fact and circumstances driven and does not

hinge upon a rule or decision of law. The close relationships of the intermediaries, when combined with the other probative, circumstantial evidence of access, such as Plaintiff's meeting with Moag, common errors, striking similarity and the admission of Defendants' own experts that the two works could not have been created independently of each other, coupled with the strength of Plaintiff's prior creation evidence, fully support the finding that there was a reasonable possibility of access. The Decision is in accord with and faithfully applies *Towler*, 76 F.3d, at 582-83, to the facts of this case and is consistent with the decisions of the other circuits that a reasonable possibility of access may be inferred from relationships and a channel of communication linking intermediaries and the alleged copier. Plaintiff, therefore, need not prove a chain of custody establishing that the infringed-upon work was passed from one intermediary to another to the actual copier, in order to create a presumption of copying and a jury question. Nor need the Plaintiff show direct evidence of an intermediary's possession.

The petition is based on the testimony of various witnesses for the defense and an argument that their testimony was direct, uncontradicted and unimpeached. This argument is at odds with the presumption of copying created in Plaintiff's favor under established Fourth Circuit law. Moreover, Defendants' witnesses were impeached and contradicted; and, the record reflects that Defendants' witnesses do not support Defendants' bald denial of access. Defendants did not base any Rule

50(a) motion on their own witnesses and simply have not preserved this contention.

The policy concerns raised by the Dissent in Part III, D.2. are not present in this case because Plaintiff produced substantial and credible evidence that he created his Ravens shield drawing well prior to the selection of the team's name and well in advance of the Defendants' design process. By contrast, Defendants were unable to establish independent creation of their work. Defendants' design appeared from out of nowhere less than two weeks after Bouchat's fax was sent. Defendants' designers, who were working under extreme time pressures to produce, had no preliminary design work that resembled the shield design. They did not know the dates, times and sequence of their design development, could not explain the source of their design concept, could not explain suspicious discrepancies in the dates of their computer files and were proven to have scanned materials into their computers from copyrighted children's bird books and other copyrighted sources, manipulated them and presented them as their work product on this project.

COPIES OF TWO WORK INSERTED

### Prior Creation

Plaintiff corroborated his creation of his Ravens shield design in early December 1995 with the testimony of reputable, credible witnesses. Among them were a Deputy Secretary of the Maryland Department of Labor, Licensing and Regulation, Assistant Attorneys General, Public Information officers, fraud investigators and other responsible public servants who worked in the building where Plaintiff was employed as a security guard. Some of these witnesses even saw Bouchat's preliminary work product, and Plaintiff introduced some of his work-in-progress, describing in detail the process by which he developed his shield drawing. An Assistant Attorney General testified that he told Bouchat in mid-December 1995, to put a 8 on his works and date them. Bouchat gave dated, signed copies of his work bearing a 8 as Christmas gifts in December, 1995 and introduced into evidence some of these gifts that had been recovered from their recipients.

### Evidence of Access Under *Towler*

While the Dissent acknowledges that a plaintiff may prove access by circumstantial evidence; slip opinion, at 11; *see also Towler*, 76 F.3d, at 581, 583; the Dissent departs from the analysis of *Towler* concerning intermediaries and imposes a requirement that Bouchat provide direct evidence of a chain of custody

that leads from MSA to Moag to Modell to the NFLP designers.<sup>1</sup> Thus, the Dissent requires Plaintiff to trace the specific course of his artwork from the MSA to Moag to Modell to the NFLP designers and then argues that he failed to do so. This is clearly inconsistent with *Towler*, which instructs that "[a] court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer. There must be concurrent "contact" between those in the channel through which the work flowed during the same period, and the dealings between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access. *Id.* at 583;<sup>2</sup> see also *Moore v. Columbia Pictures*

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<sup>1</sup>Bouchat's testimony concerning his faxing of material was corroborated by his immediate supervisor, Jan Drabek, who testified that Bouchat had obtained permission from Roger Sullivan, the head of General Services, to use the fax machine for the purpose of sending his drawings to MSA. Bouchat, according to Drabek's testimony, told Drabek at the time that he wanted to use the fax machine to transmit his drawings to MSA, because they had expressed an interest in his artwork. Approximately two weeks later, Bouchat confirmed to Drabek that he had sent his drawings to MSA. Additionally, Richard Feller testified that Bouchat told him at the time that he was going to send his drawings to MSA.

<sup>2</sup>The Court found *Towler's* proof was insufficient because: 1) the alleged infringer, Sayles, had no concurrent or other contact or relationship with the purported intermediary; 2) there was no evidence that other parties, claimed to be intermediaries, had any relationship with Sayles at the time he was working on his manuscript; 3) there was substantial testimony from Sayles that he began creating the work four months before *Towler* sent the script; and 4) and, very importantly, the two works were not substantially similar, let alone strikingly similar. *Id.*, at 584.

*Industries, Inc.*, 972 F.2d 939, 942 (8th Cir. 1992)(Alike other courts, we believe that the corporate receipt doctrine applies where there is a relationship linking the intermediary and the alleged copier, even though the purported copier is not an employee of the intermediary.) ; 4 Nimmer on Copyright, ' 13.02[A], 13-20, 21 (In view of the fact that it would usually not be possible for the plaintiff to offer direct evidence of such knowledge by the various persons in such a channel of communication, it would seem that proof of the fact of communication (on any subject) as between the various persons in the channel should suffice to permit the trier of fact to find access, without any need to directly counter such persons' respective denials of knowledge).

The evidence established the intermediary relationship between Moag/MSA and the Ravens. Moag was Chairman of MSA and had an unusually close relationship with the Ravens during the precise period when Bouchat faxed his works to MSA, the same period when NFLP designers were just beginning their preliminary work on the Ravens' logo project. Moag, as MSA Chairman, had been instrumental in negotiating and arranging for the team to leave Cleveland by putting together an attractive financial package consisting in part of a new stadium that induced the team to leave Cleveland. One of the photographs taken at Bouchat's

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meeting with Moag appeared in a DLLR newsletter with the caption that read in part, "Mr. Moag accepted the helmet and assured Fred that it would be passed onto Mr. Modell." During March and April 1996, since the team did not yet have its own office, Moag and his law firm provided the new team temporary space in its office rent-free, demonstrating physical propinquity.

There was evidence that Moag was located in close proximity to David Modell and Ravens personnel within Suite 1100, 250 W. Pratt Street. Moag testified that his office on the 11<sup>th</sup> floor was on the same floor as Modell's within earshot. Modell and the team had use of and access to the entire suite and used the firm's telephone system and photocopy, fax and postage machines in its work room, which was located in the center of the 11<sup>th</sup> floor space. Modell and the team used the services of the firm's receptionist and internal mail and fax delivery personnel. On April 8, 1996, Modell used the firm's fax cover sheets for transmission of directives concerning the logo project to NFLP in New York. David Modell was gregarious and socialized with Moag and his secretary in the office; and team personnel used the lunch room in the suite, along with law firm employees.

MSA offices, which are located in the Warehouse at Camden Yards, a little more than a block away from 250 W. Pratt Street, acted as a mail drop and fax reception facility for the team, since it did not have its own address. MSA received mail and faxes for the Modells, the team and Moag. MSA personnel would sort and

open any mail addressed to Moag, Modell or the team and deliver it to the law firm's front desk where it was sorted by the receptionist and distributed by internal messenger to Moag, Modell or the team. Likewise, the law firm's personnel in the photocopy room received faxes as they arrived and distributed them to the appropriate persons within the law firm or the new team. MSA personnel signed postal return receipts on behalf of the Modells and the team for mail containing artwork submitted by the public addressed to Modell and forwarded it on to the Pratt Street office. Additionally, there was overlap in subject matter between Moag/MSA and the Ravens' identity, in that the team's logos were incorporated into parts of the stadium itself, which required the approval and involvement of MSA.

Plaintiff introduced into evidence artwork that had flowed from members of the public to MSA at Camden Yards, to the office shared by Moag, Modell and the team, and then on to NFLP. The evidence also clearly revealed the intermediary relationship between Modell/Ravens and NFLP designers. David Modell contributed creative ideas and provided managerial direction to the NFLP design team. Modell had overall supervision and control of the logo development process.<sup>3</sup>

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<sup>3</sup>Defendants state that the jury found against Bouchat on the issue of access



### Errors Common to Both Works

Both the Plaintiff's and the Defendant's works shared common mistakes not found in the public domain or anywhere else. Defendants' own expert testified that the raven in the respective shield designs did not resemble a real bird, i.e., was fanciful, and had feet that were the digging claws of a mammal, such as a bear or badger, and contained the very same ornithological errors in proportion, wing shape, notches and number of wing feathers and slots. These mistakes did not have sources within Defendants' research materials. Some of Defendants' internal work product that was not made public contained, so that Plaintiff could not have had access to it, the same mistakes found in the tail feathers of Plaintiff's shield design. Further, the stylistic typography of the letter B departed from the type used by professional designers. *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 446 (4th Cir. 1986) (The courts have consistently viewed evidence of common errors as the strongest evidence of copying.) citing *Callaghan v. Myers*, 128 U.S. 617, 659-62 (1888) (common mistakes not attributable to the public domain are unmistakable evidence that the subsequent work was not independently created);

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on two of the three drawings. This is wrong. The special question posed to the jury was whether Bouchat proved by a preponderance of evidence that he created in 1995 the same exact drawing as was attached to his copyright application.

*see also Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir.1984)(accused work repeats unexpected departure from normal structure and common errors).

Striking Similarity As Evidence of Access.

While Plaintiff's case does not rely on striking similarity alone to establish access by the Defendants, the degree of similarity and the unique nature of the works not attributable to the public domain constitute probative evidence of access, when viewed in conjunction with the other probative evidence of access in this case. *Id.*, at 901(striking similarity is usually just one piece of circumstantial evidence tending to show access); *Gaste v. Kaiserman*, 863 F.2d 1061, 1067-68 (2nd Cir. 1988); *see also Ty, Inc. v. G.M.A. Accessories*, 132 F.3d 1167 (7th Cir. 1997)(two virtually identical, fanciful pigs, neither of which could be attributable to anything in the public domain). The Dissent, Part IV, suggests that the Decision adopts a *per se* rule eliminating the need for any other proof of access in cases involving striking similarity and that the Decision is at odds with the Second Circuit decision in *Gaste* and the Seventh Circuit in *Selle*. The Decision, however, clearly follows *Gaste* and *Selle* and emphasizes that other evidence of a reasonable possibility of access is necessary to meet Plaintiff's burden. Slip Op., at 6-7. This Court, in affirming, the district court in *Takeall* in an unpublished opinion, while declining to adopt a *per se* rule that would eliminate the need for other proof of access, did not reject the use of striking similarity, noting that A[s]triking similarity

is just one piece of circumstantial evidence tending to show access<sup>o</sup> and must not be considered in isolation. *Takeall v. Pepsico, Inc.*, no. 93-1237, 1993 U.S. App. LEXIS 31911, at 11-13 (4<sup>th</sup> Cir. Dec. 8, 1993). Furthermore, the decision here goes no further than <sup>A</sup>the level of similarity . . . can be used as evidence of access<sup>o</sup>, emphasizing that the <sup>A</sup>access prong remains intact<sup>o</sup>. Slip Op., at 7.

Once the head with associated feathers, claws and tail feathers of Bouchat's design are removed, Plaintiff's drawing and Defendant's logo involve over 20 separate design elements, all of which are virtually identical and are identical in their total arrangement and composition. Making this case unique to any other addressing striking similarity, the experts for both sides agreed that the two works could not have been done independently of each other and, therefore, someone copied. Although Defendant offered this testimony to contradict Bouchat's prior creation and to prove Bouchat had copied the Raven's logo, the district court found that one could reasonably infer from it that someone copied and that the jury reasonably decided it was the Defendant, given the overwhelming evidence of Bouchat's prior creation and other evidence supporting a reasonable possibility of access.

#### Impeachment and Contradiction of Defendant's Witnesses

The Dissent's emphasis on the Defendant's uncontradicted and unimpeached direct evidence overlooks and does not consider the presumption that arose in

Plaintiff's favor. Nor does it square with the record. Kim, the project's head designer, acknowledged at trial that on approximately 77 occasions during her deposition, she was unable to answer questions concerning the dates, times and sequence of design development or explain the source of the design. Osaki was similarly impeached. The jury could reasonably have concluded, therefore, that Kim and Osaki had no independent recollection concerning the chronology of their work product and that their testimony at trial was based on computer files that Plaintiff established were not trustworthy and contained suspicious irregularities and discrepancies concerning dates and times of last modification. Both Kim and Osaki acknowledged that they photocopied bird books in the Berkeley, California public library, scanned them into NFLP computers and incorporated the same images into commercial presentations made to David Modell for the project. Paula Guibault, NFLP in-house counsel, testified that such activity would violate the NFLP insulation policy. Bruce Burke, NFLP's creative director, testified that it would cause him a lot of concern if NFLP designers scanned silhouettes from published works in a public library into their computers and then incorporated them into presentations made to David Modell. Clearly, however, this is what the NFLP designers did.

Defendants point to various individuals who testified for the defense, arguing that they were in the channel of communication, but testified that they did not see

Bouchat's drawing. Defendants did not present testimony from all the persons in the channel of communication or those persons whose jobs necessarily would have involved the handling of the fax, such as, for instance, the receptionist at the law firm. Moag did not deny that he received Bouchat's drawing, as he testified only that he did not recall seeing it. His cross-examination established that he had a poor recollection of the events. Moag testified that he did pass on submissions for political reasons. Defendants point to Beth Henry, Moag's secretary, stating that outside submissions were placed in a separate folder, which was searched for Bouchat's drawings. Henry's testimony is contradicted in three respects. An examination of the file to which Henry made reference reflects that there were only three drawings in the entire file, not volumes of materials. Moag testified that he received numerous submissions of artwork from the public and that it was his practice to look at some of the drawings and then throw them out. Moreover, why would Bouchat's drawings be in the file, if they were passed on?

Defendants also point to David Cope's testimony to support the proposition that no artwork was forwarded to NFLP after April 1, 1996. While testifying that he had certain supervisory duties related to the intake of submissions from the public, he testified that he was not involved in the routine, day-to-day handling of the vast number of submissions from the public. He also testified that he did not begin his full-time duties with the Ravens until approximately March 18, 1996 and

had no involvement with submissions when he first began his duties. Cope testified that the team did not start sending back submissions from the public until April 4, 1996, i.e., after Bouchat faxed his works on April 1 or 2, 1996.

The Dissent notes that Cline conducted a search of MSA files, which revealed that Bouchat's fax was never received and forwarded to the team. There was no evidence, however, that MSA kept or had any reason to keep a copy of any of the many submissions of artwork that it received from members of the public. Nor would MSA personnel have any reason to recall a particular submission due to the volume of submissions that it received. Nor is there anything in the record to suggest that Cline ascertained the personal knowledge of each person who worked at MSA in March and April of 1996 who might have been in a position to see Bouchat's work.

Defendants point to the testimony of Paula Guibault for the proposition that it was NFLP's policy that its creative people were not to look at unsolicited submissions from the public and that any such materials were to be sent to her for return. Guibault, who became an NFLP employee in February 1996, testified that she embodied this policy in a March 11, 1996 memorandum, which was circulated to NFLP executives. While she testified in general terms that this policy was made known to some corporate executive officers, there was no testimony that the policy was implemented. There was no testimony that Kim or Osaki were familiar with

this policy and followed it. There was no testimony that the policy was given or explained to the designers or what steps were taken to ensure that its terms were followed. Guibault, significantly, did not testify how, in fact, the drawings received from the public were processed and ended up in her department. Guibault was unaware of the practices followed by NFLP designers, including their copying and manipulating from copyrighted bird books, and did not testify that she conducted any audit or inspection of their practices. David Modell's letters that he would pass on suggestions to NFLP was evidence that no policy was established, followed or long-standing. Cope's testimony that Ravens personnel looked at submissions from the public was evidence that the insulation policy was not followed.

The denials of access by Kim, Osaki, Burke and David Modell were so similar in content and theatrical in attitude that the jury could reasonably draw the conclusion that their testimony was rehearsed and staged, particularly given the presence of their witness coach. Emotions appeared to be turned on and off as if on cue. Their finger-pointing denigration of Bouchat also gave the impression of rehearsed performance rather than honest testimony. When combined with documentary evidence of the existence of a "party line" in the Ravens' dealings with the outside world in similar situations, it was reasonable for the jury to have an unfavorable view of the credibility of these witnesses.

## CONCLUSION

The concurrent relationship of the intermediaries involving overlapping subject matter, physical propinquity and an on-going concurrent channel of communication fulfilled the requirements of intermediary status under *Towler* and, along with the other circumstantial evidence of access, generates a jury question on this issue; and Appellants' petition should be denied.

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