

# SUMMARY JUDGMENT IN COPYRIGHT: FROM COLE PORTER TO SUPERMAN

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## I. INTRODUCTION

Although the Federal Rules of Civil Procedure allow for summary judgment in copyright infringement cases, the conventional notion is that there is an aversion to summary judgment in such cases. This proposition comes from the landmark case in this field, *Arnstein v. Porter*,<sup>1</sup> wherein the Second Circuit stated that "generally there should be trials in plagiarism suits."<sup>2</sup>

For thirty-eight years, *Arnstein's* prohibition against summary judgment in copyright infringement cases has, for the most part, been cited by anyone opposing the motion. It is time that its precedential value be tested and the following questions be asked: Should the teaching of *Arnstein* be limited to plagiarism, as opposed to all the other causes of action that may constitute copyright infringement? Has the influence of *Arnstein* been diminished<sup>3</sup> and, if so, to what extent? My conclusion is that *Arnstein* is no longer good law.

## II. HISTORICAL ORIGINS OF SUMMARY JUDGMENT

A summary judgment procedure, restricted in its application to actions on bills of exchange and promissory notes, was first introduced in England in 1855.<sup>4</sup> As stated in the Preamble to the Summary Procedure on Bills of Exchange Act of 1855, its purpose was to eliminate the unjust delays and unnecessary expenses in recovering amounts due on such bills and notes "by reason of frivolous or fictitious Defences to Actions thereon."<sup>5</sup>

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<sup>1</sup> *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

<sup>2</sup> *Id.* at 474.

<sup>3</sup> *Hoehling v. Universal City Studios*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

<sup>4</sup> Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424 (1929); Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956).

<sup>5</sup> See Clark & Samenow, *supra* note 4, at 424.

The same purpose for summary judgment applies today: to expedite the determination of actions on their merits and to eliminate sham claims or defenses without the necessity of a full trial.

In England, there was a steady enlargement of the scope of the summary judgment remedy until it is now used in most actions.<sup>6</sup> The growth of summary judgment actions in the United States was hampered by the fact that each state had its own rules for summary judgment.<sup>7</sup> It was not until 1938, when the Federal Rules of Civil Procedure became effective, that there was a uniform system allowing for summary judgment in federal courts.<sup>8</sup>

### III. HISTORY ON THE USE OF SUMMARY JUDGMENT IN COPYRIGHT ACTIONS

The Enabling Act of June 19, 1934,<sup>9</sup> authorized the Supreme Court to prescribe federal rules of civil procedure for the district courts, including the District of Columbia. The Supreme Court appointed an Advisory Committee which prepared various drafts and reports. The new Federal Rules of Civil Procedure became effective on September 16, 1938.<sup>10</sup>

Rule 1 states that the federal rules govern all civil actions, with the exceptions stated in Rule 81. Rule 81(a)(1) states that the rules do not apply to proceedings "in copyright under Title 17, U.S.C., except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

Because the Supreme Court had not made the federal rules applicable to copyright infringement actions, *Bergmann v. Joe Morris Music Co.*,<sup>11</sup> held that as of May, 1939, such rules did not apply to suits for copyright infringement. However, by court order dated June 5, 1939, Copyright Rule 1 was amended, effective September 1, 1939, to provide that the Federal Rules of Civil Procedure applied to infringement actions, except to the extent that they are inconsistent with the Copyright Rules.<sup>12</sup> Summary judgment under Rule 56 then became applicable to federal copyright actions.

<sup>6</sup> *Id.*

<sup>7</sup> Prior to 1938, federal courts could utilize summary judgment only in those states that had such a procedure. Conformity Act, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

<sup>8</sup> Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159 (1938-39).

<sup>9</sup> 28 U.S.C. § 2072 (1982).

<sup>10</sup> *Id.* at 160.

<sup>11</sup> 27 F. Supp. 985 (S.D.N.Y. 1939).

<sup>12</sup> Amendment of Copyright Rules 307 U.S. 652 (1939); *Kingsway Press, Inc. v. Farrell Publishing Corp.*, 30 F. Supp. 775 (S.D.N.Y. 1939).

## IV. MECHANICS OF SUMMARY JUDGMENT

Summary judgment is appropriate only if there is no genuine issue of material fact.<sup>13</sup> A dispute of fact is "material" if it "affects the outcome of the litigation and is genuine if manifested by substantial evidence going beyond the allegations of the complaint."<sup>14</sup> The moving party for the motion assumes the burden of demonstrating that there was no genuine issue of material fact.<sup>15</sup>

In reviewing the record, the evidence must be viewed and all reasonable inferences must be drawn in a manner most favorable to the non-moving party. However, as set forth in Rule 56(f), an adverse party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is no genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. On the other hand, the party opposing the motion may show at the time, under subdivision (f) of the Rule, that he cannot present facts essential to justify his opposition. In any event, the Rule should not apply to any issue which cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility. As an example, summary judgment is rarely used in cases dealing with a party's state of mind or where the issues are highly complex.

V. THE LANDMARK CASE OF *ARNSTEIN V. PORTER*

Professor Melville B. Nimmer, discussing summary judgment, states that *Arnstein* illustrates "the proper use of summary judgment in copyright infringement actions."<sup>16</sup> I respectfully suggest that the standard set by the Second Circuit in that case was too restrictive and was tinged with conservatism and great caution.

In *Arnstein*, the Second Circuit, which along with the Ninth Circuit establishes much of the law in the copyright field, limited the availability of summary judgment in copyright actions. Judge Frank, in an action brought against Cole Porter for the infringement of many uncopyrighted musical compositions, posed the issue as "whether the lower court under Rule 56, properly deprived plaintiff of a trial of his

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<sup>13</sup> FED. R. CIV. P. 56(c); *Condon v. Local 2944, United Steel Workers of Am.*, 683 F.2d 590, 594 (1st Cir. 1982).

<sup>14</sup> *Pignons S.A. de Mecanique v. Polaroid Corp.*, 657 F.2d 482, 486 (1st Cir. 1981) (quoting *Hahn v. Sargent*, 523 F.2d 462, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976)).

<sup>15</sup> *White v. Hearst Corp.*, 669 F.2d 14, 17 (1st Cir. 1982); *Mack v. Cape Elizabeth School Bd.*, 533 F.2d 720, 722 (1st Cir. 1977).

<sup>16</sup> 3 M. NIMMER, NIMMER ON COPYRIGHT § 12.10 n.15 (1983).

copyright infringement action."<sup>17</sup> The issue could have been posed as a method of striking sham claims and defenses to avoid dilatory tactics, and to relieve court calendars which could have produced a different result.

Judge Frank said that summary judgment should not be granted when "there is the slightest doubt as to the facts."<sup>18</sup> Judge Frank added that he doubted whether the Supreme Court, by authorizing summary judgment, intended to permit a "trial by affidavits," a procedure favoring a party with a more ingenious and better paid lawyer.<sup>19</sup>

Judge Frank was writing for the majority. In a spirited dissent, Judge Clark defended the federal summary judgment procedure, of which he was one of the chief architects. He considered that the rules contain neither any restriction on the kinds of action to which it is applicable nor any presumption against its use.

One commentator has criticized Judge Frank's finding, that a genuine issue of material fact existed, as resting on a rather insubstantial basis.<sup>20</sup> Just months after the decision, a student Note<sup>21</sup> voiced a fear that "if the limited theory of the majority in the *Arnstein* case is extended beyond plagiarism actions, the procedure will be reduced in stature to little more than the old demurrer."<sup>22</sup>

Criticism also has been leveled on the "slightest doubt test" as being a misleading gloss on the words "genuine issue" in Rule 56(c) and as expressing little more than that the opposing party should be given the benefit of reasonable doubts in evaluating his response. The rub was that the "slightest doubt" test seemed to ask whether the opposing party could conceivably develop a *prima facie* case at trial, notwithstanding the strength of the moving party's proof. This standard means that summary judgment could be denied on facts requiring the grant of a motion for directed verdict.<sup>23</sup> With such interpretation, the Second Circuit's doctrinal view interfered with summary judgment's primary function of intercepting factually deficient claims and defenses in advance of trial.

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<sup>17</sup> *Arnstein*, 154 F.2d at 468.

<sup>18</sup> *Id.* at 468.

<sup>19</sup> *Id.* at 471.

<sup>20</sup> 6 J. MOORE & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 56.15 [1.02] (3d ed. 1982).

<sup>21</sup> Note, *Scope of Summary Judgment under Federal Rules of Civil Procedure*, 55 *YALE L.J.* 810 (1946).

<sup>22</sup> *Id.* at 815.

<sup>23</sup> Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *YALE L.J.* 745, 761 (1974).

*Arnstein* was the basis for the truism that summary judgment has been traditionally disfavored in copyright litigation. Notwithstanding *Arnstein*, summary judgment continued to be granted in copyright infringement cases. Professor Ralph S. Brown<sup>24</sup> cites *Roberts v. Dahl*,<sup>25</sup> which declares *Arnstein* to be "virtually destroyed as a meaningful precedent."<sup>26</sup> Nonetheless, because of *Arnstein*, it became difficult to obtain summary judgment.

#### VI. THE IMPLICIT OVERRULING OF *ARNSTEIN* IN *DRESSLER*

In *Dressler v. MV Sandpiper*,<sup>27</sup> libelant in an action in admiralty moved for and was granted summary judgment. Judge Kaufman explained that there have been sharply divergent judicial attitudes towards the desirability of the summary judgment procedures:

[M]any courts and commentators have insisted that the device of summary judgment was to have a far broader range than the old, common-law demurrer, and that the availability of affidavits, depositions, admissions and the like represented an acknowledgement that mere formal denials and allegations, while sufficient to stand as pleadings, were to be pierced upon Rule 56 motions and could not forestall the award of summary relief.<sup>28</sup>

Judge Kaufman added that:

[A] large number of courts, often, expressing a fear of "trial by affidavit," displayed a far more restrictive attitude towards motions for summary judgment. In this Circuit, for example, numerous decisions seemed to reflect a great reluctance to find that no genuine issue of fact remained for trial, and we have hence reversed and remanded a long line of cases in which summary judgment had been awarded below.<sup>29</sup>

Based upon then recent amendments to Rule 56, which were designed to overcome cases like *Arnstein*, the summary judgment standard was relaxed. In that way, and by virtue of a non-copyright

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<sup>24</sup> B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* 246 (3d ed. 1978).

<sup>25</sup> 168 U.S.P.Q. 428 (Ill. Cir. Ct. 1971), *aff'd*, 6 Ill. App. 3d 395, 286 N.E.2d 51 (Ill. App. Ct. 1972).

<sup>26</sup> *Id.* at 435.

<sup>27</sup> 331 F.2d 130 (2d Cir. 1964).

<sup>28</sup> *Id.* at 132.

<sup>29</sup> *Id.* (citing *Arnstein*, 154 F.2d 464).

case, the Second Circuit began to rid itself of the "devastating gloss" on Rule 56.<sup>30</sup>

#### VII. THE CONTINUING SECOND CIRCUIT GLOSS ON SUMMARY JUDGMENT

Notwithstanding *Dressler*, some panels of the Second Circuit continued to apply the "slightest doubt" test. The most celebrated case in a line of cases reversing district judges when they granted summary judgment was *Heyman v. Commerce Industry Insurance Co.*,<sup>31</sup> in which Judge Kaufman, citing both *Arnstein* and *Dressler*, said:

[W]hen the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought . . . with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. . . . This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.<sup>32</sup>

After such decision, it was almost impossible to obtain summary judgment in the Second Circuit. To try for summary judgment was a waste of a litigator's time. Perhaps realizing that he had gone too far in *Heyman*, Judge Kaufman reversed his tone in *SEC v. Research Automation Corp.*:<sup>33</sup>

Summary judgment, however, is not necessarily precluded merely because the legal issue is complex. . . . Indeed, the policy favoring efficient resolution of disputes, which is the cornerstone of the summary judgment procedure, would be completely undermined if unsubstantiated assertions were sufficient to compel a trial.<sup>34</sup>

Judge Kaufman's decision in *Research Automation* signalled the change in the Second Circuit's attitude towards summary judgment.

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<sup>30</sup> See Clark, 'Clarifying' Amendments to the Federal Rules? 14 OHIO ST. L.J. 241, 249 (1953).

<sup>31</sup> 524 F.2d 1317 (2d Cir. 1975).

<sup>32</sup> *Id.* at 1320.

<sup>33</sup> 585 F.2d 31 (2d Cir. 1978).

<sup>34</sup> *Id.* at 33.

## VIII. THE CONTINUING LEGACY OF ARNSTEIN

In *Hoehling v. Universal City Studios*,<sup>35</sup> Judge Kaufman did not refer to his own decision in *Dressler* when he said that "summary judgment has traditionally been frowned upon in copyright litigation."<sup>36</sup> He nonetheless granted summary judgment after finding that the similarities between the works at issue were attributable to non-copyrightable historical facts and *scenes a faire*. Judge Kaufman said:

Nevertheless, while *Arnstein's* influence in other areas of the law has been diminished . . . a series of copyright cases in the Southern District of New York have granted defendants summary judgment when all alleged similarity related to *non*-copyrightable elements of the plaintiff's work. . . . These cases signal an important development in the law of copyright, permitting courts to put a "swift end to meritless litigation" and to avoid lengthy and costly trials.<sup>37</sup>

The pall created by *Arnstein* continued. If there was any doubt that *Arnstein* was impliedly overruled by *Dressler*, Judge Friendly in *Beal v. Lindsay*,<sup>38</sup> said that "[t]he rule of *Arnstein v. Porter* . . . that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts, no longer is good law."<sup>39</sup> However, in *Allen v. Susskind Hall of Fame Corp.*,<sup>40</sup> a case involving historical facts, the Southern District of New York, citing *Arnstein*, considered that neither copying nor substantial similarity is susceptible to a motion for summary judgment. The issue in *Allen* was the source of the passages in question, that is, whether or not facts or "faction," a mixture of facts and fiction, were involved. In a case that clearly lent itself to early adjudication, the judge, relying on *Arnstein*, refused to grant summary judgment.<sup>41</sup>

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<sup>35</sup> 618 F.2d 972 (2d Cir.), cert. denied, 449 U.S. 841 (1980).

<sup>36</sup> *Id.* at 977.

<sup>37</sup> *Id.* (citations omitted).

<sup>38</sup> 468 F.2d 287 (2d Cir. 1972).

<sup>39</sup> *Id.* at 291.

<sup>40</sup> 1982 COPYRIGHT L. DEC. (CCH) ¶ 25,471 (S.D.N.Y. 1982).

<sup>41</sup> *Cf. Cero v. Seven-Up Co.*, 535 F. Supp. 212, 217 (E.D.N.Y.), *aff'd*, 714 F.2d 113 (2d Cir. 1982) (rejecting *Arnstein* standard).

IX. THE NEW STANDARD FOR SUMMARY JUDGMENT  
IN THE SECOND CIRCUIT

In *Warner Brothers v. American Broadcasting Cos.*<sup>42</sup> the issue was whether a fictional character in a series called *The Greatest American Hero* infringed upon the character of Superman. The Second Circuit held that "a reasonable jury could not conclude that Hinkley [the fictional character from *The Greatest American Hero*] is substantially similar to the Superman character . . . ." <sup>43</sup> The court believed that "[c]ourts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputable issues of fact."<sup>44</sup> The court held that the lack of substantial similarity was so clear as to fall outside "the outer limit of reasonable fact-finding marked by the courts."<sup>45</sup>

It is noteworthy that the court in *Warner Brothers* did not cite *Arnstein*. The standard applied in *Warner Brothers* is as follows:

[W]e have recognized that a court may determine non-infringement as a matter of law on a motion for summary judgment, either because the similarity between two works concerns only "non-copyrightable elements of the plaintiff's work," . . . or because no reasonable jury, properly instructed, could find that the two works are substantially similar.<sup>46</sup>

The standard then is whether there are issues of material fact to be tried<sup>47</sup> and whether such issues "fall outside the range of reasonably disputed fact questions requiring resolution by a jury."<sup>48</sup>

With such decision, the Second Circuit clearly moved beyond the "slightest doubt of the facts" standard of *Arnstein*, a test which substantially lessened the prospects for summary judgment in most actions. The new standard is the same as the standard for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure, that is, that no reasonable juror could find otherwise. Such standard is more liberal and permits greater judicial discretion. Another way to

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<sup>42</sup> 1983 COPYRIGHT L. DEC. (CCH) ¶ 25,584 (2d Cir. 1983).

<sup>43</sup> *Id.* at 18,452.

<sup>44</sup> *Id.* at 18,453.

<sup>45</sup> *Id.* at 18,455.

<sup>46</sup> *Id.* at 18,448-49 (citations omitted).

<sup>47</sup> *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres*, 388 F.2d 272, 279 (2d Cir. 1967), *aff'd on other grounds*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

<sup>48</sup> *Warner Bros.*, 1983 COPYRIGHT L. DEC. (CCH) at 18,448.



phrase the standard would be that a favorable verdict based upon the evidence alone would be intolerable as a matter of reasoning.<sup>49</sup>

Functionally, the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for a directed verdict.<sup>50</sup> An earlier denial of a motion for summary judgment should not be considered a barrier to a later consideration of a motion for a directed verdict.<sup>51</sup>

As phrased by Justice Jackson in *Sartor v. Arkansas Natural Gas Corp.*,<sup>52</sup> "a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."<sup>53</sup>

*Warner Brothers* permits summary judgment if the basic issues in a copyright infringement claim, that is, whether the works are substantially similar so as to permit an inference of copying and whether the lack of substantial similarity is so clear, fall outside the range of reasonably disputed fact questions requiring resolution by a jury.

#### X. THE NINTH CIRCUIT VIEW

One aspect of the federal system is that, absent direction from the United States Supreme Court, one federal circuit need not follow another circuit, and one district court need not follow any other district court or authorities from any other circuit.<sup>54</sup> It is thus important to determine how other circuits deal with summary judgment in copyright cases, particularly the Ninth Circuit, which includes Los Angeles. Is *Arnstein* followed in the Ninth Circuit? Is the test for that circuit the "slightest doubt of the facts" test?

In *Twentieth Century-Fox Film Corp. v. MCA, Inc.*,<sup>55</sup> the Ninth Circuit considered the grant of summary judgment to be improvident. Defendants had produced or distributed a television film *Battlestar: Galactica* which the producer of the film *Star Wars* considered a copyright infringement. For the purpose of the motion, defendants

<sup>49</sup> J. WIGMORE, CODE OF EVIDENCE § 2803 (3d ed. 1942).

<sup>50</sup> 6 J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.01 [10] (2d ed. 1983).

<sup>51</sup> *LaRue v. General Tel. Co. of S.W.*, 545 F.2d 546 (5th Cir. 1977).

<sup>52</sup> 321 U.S. 620 (1944).

<sup>53</sup> *Id.* at 624.

<sup>54</sup> Conflict in circuit decisions and forum shopping led to the creation of the U.S. Court of Appeals for the Federal Circuit (CAFC), 28 U.S.C. § 41 (1982). The CAFC has exclusive jurisdiction over appeals in patent infringement cases brought in any of the district courts. Unlike other circuit courts, the jurisdiction of the CAFC is determined by the nature of the case and not by geography.

<sup>55</sup> 715 F.2d 1327 (9th Cir. 1983).

admitted access to plaintiff's work. Such admission was necessary to prevent an issue of fact as to access. With such admission, the only issue that remained was that of substantial similarity. Defendants argued that *Battlestar: Galactica* was dissimilar to *Star Wars* as to both ideas and expression of those ideas so that no material issue of fact existed. The district court agreed with defendants' position, but the Ninth Circuit did not. The Ninth Circuit held that "it is a close enough question that should be resolved by way of a trial . . . reasonable minds could differ on those key factual issues."<sup>56</sup>

Is this a return to the "slightest doubt of the facts" test? In *Twentieth Century-Fox*, the Ninth Circuit observed that summary judgment determinations may "result from close factual analyses . . . [I]f Rule 56 is to be given any effect, summary judgment must be granted in certain situations."<sup>57</sup> However, it must be remembered that Judge Frank in *Arnstein* also said that his decision did not preclude summary judgment in a plagiarism case where the facts were indisputably established.<sup>58</sup>

In short, is there any difference between the notion of an "extremely close question of fact" as used in *Twentieth Century-Fox* and the notion that the facts must be "indisputably established" as used in *Arnstein*? Because *Arnstein* was cited in *Twentieth Century-Fox*, it could be argued that the Ninth Circuit was following *Arnstein*.<sup>59</sup>

In *See v. Durang*,<sup>60</sup> another panel of the Ninth Circuit discussed the citation in *Twentieth Century-Fox* of *Arnstein*:

No special standard is applied in determining whether summary judgment is appropriate on the issue of substantial similarity of expression in a copyright case. Contrary to plaintiff's contention, *Sid & Marty Krofft Television Productions v. McDonald's Corp.* . . . , does not hold that summary judgment is always inappropriate on the issue of substantial similarity of expression if there is a substantial similarity of ideas. Plaintiff offers neither authority nor reason supporting such a *per se* rule. Summary judgment is proper if reasonable minds could not differ as to the presence or absence of substantial similarity of expression. . . . *Sid & Marty*

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<sup>56</sup> *Id.* at 1329.

<sup>57</sup> *Id.* at 1330 n.6.

<sup>58</sup> See *Arnstein*, 154 F.2d at 473; 6 J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.17 [14] (3d ed. 1982).

<sup>59</sup> 513 F.2d 913 (9th Cir. 1975).

<sup>60</sup> 711 F.2d 141 (9th Cir. 1983).

*Krofft* . . . , rejected the suggestion in *Arnstein v. Porter* (citation omitted), that summary judgment can be granted for the defendant only if the similarities are "trifling."<sup>61</sup>

*Twentieth Century-Fox* cites *Arnstein* with approval but not on this point.<sup>62</sup>

I suggest that *See* may indicate that the *Arnstein* doctrine of summary judgment has fallen into disuse in the Ninth Circuit. I further suggest that in *Jason v. Fonda*,<sup>63</sup> where summary judgment was granted because the evidence showed only a bare possibility of access,<sup>64</sup> the court applied the standard of summary judgment that is analogous to the standard of a directed verdict.

In both the Ninth Circuit's decision in *Jason* and the Second Circuit's holding in *Warner Brothers*, the standard for summary judgment was whether no reasonable trier of fact could find that the parties' works were substantially similar. In both cases, by the use of summary judgment, the courts exercised their responsibility to monitor the outer limits within which a jury may determine reasonably disputed issues of fact.

## XI. OTHER CIRCUITS

I have been unable to find many cases in which the circuit courts dealt with summary judgment in copyright infringement actions.

### A. First Circuit

In *O'Neill v. Dell Publishing Co.*,<sup>65</sup> the standard for summary judgment is whether an ordinary reasonable person would find no similarity of expression and only a remote resemblance of ideas. "The question of similarity of expression must start with a comparison of

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<sup>61</sup> *Id.* at 143 (citations omitted).

<sup>62</sup> *Twentieth Century-Fox*, 696 F.2d at 691.

<sup>63</sup> 698 F.2d 966 (9th Cir. 1982).

<sup>64</sup> For criticism of *Arnstein's* dictum that access may be inferred where the accused work is "strikingly similar" to the complaining work, see Osterberg, *Striking Similarity and the Attempt to Prove Access and Copying in Music Plagiarism Cases*, 2 J. COPYRIGHT ENT. SPORTS L. 85 (1983). The author believes that to the extent there is probative value inherent in the existence of similarities, it exists only if there has been a threshold showing of a reasonable opportunity to copy. Therefore, Mr. Osterberg feels that when all probative evidence shows that there was no opportunity to copy, a plagiarism claim should be dismissed on a motion for summary judgment. See, e.g., *Selle v. Gibb*, 567 F. Supp. 1175, 1183 (N.D. Ill. 1983).

<sup>65</sup> 630 F.2d 685 (1st Cir. 1980).

the two works. If, as here, it is clearly lacking, then summary judgment should be invoked."<sup>66</sup>

### B. Fifth Circuit

In *Ferguson v. National Broadcasting Co.*,<sup>67</sup> the court stated that "Arnstein . . . is no longer good law . . . . Recent decisions indicate that once the moving party has properly supported his summary judgment motion, the party must rebut with 'significant probative' evidence."<sup>68</sup>

### C. Other Circuits

Decisions in the Third, Sixth and Eleventh Circuits do not contain any discussion as to the standard utilized in summary judgment cases.<sup>69</sup>

## XII. PATENTS

What is the judicial attitude toward summary judgment in patent law, which is considered to bear a "historic kinship" with copyright law? Due to the technological problems that arise in litigation involving a utility patent, summary judgment is seldom used in patent cases. It is sometimes used in connection with defenses such as file wrapper estoppel.<sup>70</sup> With reference to design patents, the Ninth Circuit has said that, since no special technological problems are present, "the legal issues . . . are particularly adapted to summary . . . disposition."<sup>71</sup> The infringement standard is the same as the standard used in copyright—a determination of similarity of two designs in the "eyes of the ordinary observer."<sup>72</sup> Since there is a certain amount of overlap in the protection available through design patents and that available by copyright, it is not surprising that, to the extent summary judgment is appropriate in copyright, it is also appropriate for design patent.<sup>73</sup>

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<sup>66</sup> *Id.* at 690.

<sup>67</sup> 584 F.2d 111 (5th Cir. 1978).

<sup>68</sup> *Id.* at 114.

<sup>69</sup> *Norris Indus. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983); *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982); *Hoste v. Radio Corp. of Am.*, 654 F.2d 11 (6th Cir. 1981).

<sup>70</sup> See *Straussler v. United States*, 290 F.2d 827 (Ct. Cl. 1961).

<sup>71</sup> *Schwinn Bicycle Co. v. Goodyear Tire & Rubber Co.*, 444 F.2d 295, 298 (9th Cir. 1970).

<sup>72</sup> *Gorham Co. v. White*, 81 U.S. 511, 527-28 (14 Wall 1871).

<sup>73</sup> See *In re Yardley*, 493 F.2d-1389 (C.C.P.A. 1974).

## XIII. THE ROLE OF THE COURTS

The trend indicates that summary judgment will be increasingly sought in copyright cases. If successful, it is an effective and efficient tool that eliminates costly and time consuming trial work. If unsuccessful, it may encourage the court to impose a judicial settlement during the course of a pre-trial conference as the court may have been sufficiently educated by exposure to the motion papers to recognize the likely result and impress settlement.

In *Davis v. United Artists, Inc.*,<sup>74</sup> Judge Weinfeld of the Southern District of New York granted summary judgment to the defendants.

In resisting the defendants' motion for summary judgment, plaintiff raises the usual plea that there are issues of fact as to substantial similarity which require jury determination and relies in large measure upon the oft-quoted language in *Arnstein v. Porter* that "generally there should be trials in plagiarism suits." However, the *Arnstein*-court itself recognized that cases could "arise in which absence of similarities [may be] so patent that a summary judgment for defendant would be correct." Unless the summary judgment rule is to become a dead letter, it may properly be and has been enforced even in plagiarism suits. Where there is no genuine issue of fact with respect to the basic legal matters to be decided, a party should not be put to the heavy burden and expense of time consuming litigation. Courts are required in copyright infringement cases, no less than in other types of litigation, to put "a swift end to meritless litigation."<sup>75</sup>

Judge Weinfeld then granted summary judgment because the isolated similarities were strained, insignificant and the necessary consequences that flowed were from a common theme.

The standard should not be the *Arnstein* standard. As Judge Meanor observed in *Midway Mfg. Co. v. Bandai-America, Inc.*,<sup>76</sup> a court should grant a copyright litigant summary judgment only if it would be required at trial to direct a verdict for the moving party. The test then would be whether a court can rule that no reasonable jury would find a lack of substantial similarity between the works.<sup>77</sup>

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<sup>74</sup> 547 F. Supp. 722 (S.D.N.Y. 1982).

<sup>75</sup> *Id.* at 723-24.

<sup>76</sup> 546 F. Supp. 125 (D.N.J. 1982).

<sup>77</sup> *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 610, 624 (2d Cir. 1982); *Knickerbocker Toy, Inc. v. Genie Toys, Inc.*, 491 F. Supp. 526 (E.D. Mo. 1980).

What then does a court actually do when faced with a motion for summary judgment?<sup>78</sup> It would appear that most courts simply decide the motion by what the judge feels appropriate, with the court generally denying the motion whenever it is in doubt. The "slightest doubt test" permitted a timorous approach to summary judgment.

Professor Martin Louis<sup>79</sup> considers that most courts draw from the available clichés, and few courts set forth a useful rationale in deciding whether to grant the motion. He suggests that after the movant has presented evidence which would support a finding of the non-existence of an essential element of the opposing party's case, the opposing party should be required to present evidence sufficient to support an affirmative finding on his or her case. If this cannot be done, the opposing party may offer an excuse showing reasonable prospects for obtaining more evidence.

A formulary approach is not a substitute for effective advocacy permitting an intelligent judge to make a balance. Judge Clark suggests that "[w]hat is needed is the application of common sense, good judgment and decisive action . . . ."<sup>80</sup> However, such observation does not aid the law's need for predictability.

Judge Weinstein was surely correct when he wrote that "[s]ince courts are composed of mere mortals they can decide matters only on the basis of probability, never on certainty."<sup>81</sup> As so, like any other motion, summary judgment decisions are inevitably *ad hoc*. The problem then is the standard to be applied by the judge.

*Arnstein*, in a sense, strangled judicial discretion; it read Rule 56 too narrowly. *Warner Brothers*, by introducing a more liberal standard, should permit more flexibility and thus serve the primary functions of summary judgment.<sup>82</sup> To settle a meritless case, because summary judgment is unavailable, is wrong and permits a misuse of the legal system. It is my impression that there has been a recent strong tendency to grant and affirm summary judgments.

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<sup>78</sup> There is no denial of any constitutional right of jury trial where no genuine issue remains for trial. See *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962).

<sup>79</sup> Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

<sup>80</sup> Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 579 (1952).

<sup>81</sup> *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971).

<sup>82</sup> *Warner Bros.*, 1983 COPYRIGHT L. DEC.(CCH) ¶ 25,584, represents the view of one panel of the Second Circuit.

#### XIV. EXAMPLES OF SUMMARY JUDGMENT IN COPYRIGHT INFRINGEMENT LITIGATIONS

Appended to this article is a list of approximately 140 copyright cases involving summary judgment compiled from various sources.<sup>83</sup> The appendix<sup>84</sup> makes clear, despite *Arnstein*, that summary judgment is granted to both plaintiffs and defendants in infringement cases. Moreover, summary judgment is granted in all issues involving copyright litigation, including plagiarism. As examples:

##### A. *Performing Rights*

Summary judgment has been granted to copyright owners based upon unauthorized public performances of plaintiffs' musical composition.<sup>85</sup> In *Chess Music, Inc. v. Tadych*,<sup>86</sup> the first reported summary judgment case decided under the 1976 Copyright Act, the court awarded summary judgment to plaintiffs stating: "The law is clear that summary judgment may be granted in a copyright infringement [action] where, as here, the court finds that there is no issue as to any material fact."<sup>87</sup>

##### B. *Fair Use*

In *Marcus v. Rowley*,<sup>88</sup> summary judgment was granted upon a finding that the defendants copied almost one-half of plaintiffs' book, including all of its substantial composition.

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<sup>83</sup> 3 M. NIMMER, NIMMER ON COPYRIGHT § 12.10 (1983); 16 WEST'S FEDERAL PRACTICE DIGEST 2d (1976 & Supp. 1983); 11 MODERN FEDERAL PRACTICE DIGEST (1960). Additional cases are cited from the annotations found under FED. R. CIV. P. 56, 28 U.S.C.A. § 24 (1982 & Supp. 1983).

<sup>84</sup> See *infra* p.72.

<sup>85</sup> See *Associated Music Publisher, Inc. v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944), *cert. denied*, 323 U.S. 766 (1944); *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 113 F.2d 627 (2d Cir. 1940); *Chess Music, Inc. v. Tadych*, 467 F. Supp. 819 (E.D. Wis. 1979); *Shapiro, Bernstein & Co. v. Log Cabin Club Ass'n*, 365 F. Supp. 325 (N.D. W.Va. 1973); *Edwin H. Morris & Co. v. Burton*, 201 F. Supp. 36 (E.D. La. 1961).

<sup>86</sup> 467 F. Supp. 819 (E.D. Wis. 1979).

<sup>87</sup> *Id.* at 821.

<sup>88</sup> 695 F.2d 1171. (9th Cir. 1983).

### C. Ideas

In *Musto v. Meyer*,<sup>89</sup> a motion to dismiss, which was treated as one for summary judgment, was granted since the only substantial similarity was as to non-copyrightable ideas.<sup>90</sup>

### D. Historical Facts

In *Gardner v. Nizer*,<sup>91</sup> summary judgment was granted because similarities related only to historical facts.<sup>92</sup>

### E. Scenes a Faire<sup>93</sup>

In *Giangrasso v. Columbia Broadcasting System*,<sup>94</sup> summary judgment was granted because the only similarities were non-copyrightable *scenes a faire*.<sup>95</sup>

### F. Functional Aspects

In *Decorative Aides Corp. v. Staple Sewing Aides Corp.*,<sup>96</sup> summary judgment was granted because the only similarities related to non-copyrightable functional aspects.<sup>97</sup>

The appendix to this article describes in detail almost every reported summary judgment case in copyright litigation. Summary judgment is utilized in all issues in copyright infringement actions, including the issue of access, which is usually seen as a fact issue.<sup>98</sup> As may be expected, defendants succeed more than plaintiffs. Moreover,

<sup>89</sup> 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979).

<sup>90</sup> See *Durham Indus. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980); *O'Neill v. Dell Publishing Co.*, 630 F.2d 685 (1st Cir. 1980); *Reyher v. Children's Television Workshop*, 387 F. Supp. 869 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). *But see Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

<sup>91</sup> 391 F. Supp. 940 (S.D.N.Y. 1975); *Fuld v. National Broadcasting Co.*, 390 F. Supp. 877 (S.D.N.Y. 1975).

<sup>92</sup> See *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978).

<sup>93</sup> *Scenes a faire* are incidents, characters or settings which are standard elements in the treatment of a given topic. *Reyher v. Children's Television Workshop*, 533 F.2d at 91.

<sup>94</sup> 1982-83 COPYRIGHT L. DEC. (CCH) ¶ 25,386 (E.D.N.Y. 1982).

<sup>95</sup> See *See v. Durang*, 711 F.2d 141 (9th Cir. 1983); *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978); *Reyher v. Children's Television Workshop*, 387 F. Supp. 869 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 87 (2d Cir. 1976).

<sup>96</sup> 497 F. Supp. 154 (S.D.N.Y. 1980), *aff'd*, 657 F.2d 262 (2d Cir. 1981).

<sup>97</sup> See *Norris Indus. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983); *Durham Indus. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980).

<sup>98</sup> See *supra* note 63.



it is easier to win if piracy, rather than plagiarism, is involved. The trend favors summary judgment.

#### XV. THE POLITICS OF SUMMARY JUDGMENT

Judges understand the cost of litigation. It may be that the change in judicial attitudes toward summary judgment reflects judicial acceptance of such reality. Nonetheless, some practical advice is that all lawsuits must be individualized. Any discussion of summary judgment must be considered in the context of the increasing importance of the individual assignment system utilized in many district courts. Under that system, upon the filing of a summons and complaint, a judge is assigned to supervise all phases of the case, including pre-trial motions. It is therefore important for any practitioner to *research the judge to whom his or her case is assigned to determine the extent to which the general rules relating to pre-trial motions will be altered.* Some judges refer cases to magistrates, a practice which may tend to slow cases down. Other judges require a pre-trial conference before any motion, whether a discovery motion or a substantive motion. The way in which a litigator establishes his or her pre-trial motion plan, to some extent, must take into consideration the audience to which he or she will be playing. In federal courts, the litigator has the ability to recognize the judge's proclivities almost from the day that the action is filed. There are significant differences in the practices of judges, and one use of a legal research computer is researching the judge by programming his or her name along with Rule 56.

#### XVI. THE CONTINUING ALLURE OF *ARNSTEIN*

Why is *Arnstein* so often cited? In framing the issue of infringement, Judge Frank, in *Arnstein*, suggested a two-pronged approach: was there copying, and was the copying (assuming it to be proved) an improper appropriation? The purpose was to refine the issue and possibly, as to the first prong, to limit the "ordinary observer" test.<sup>99</sup> In a sharp dissent, Judge Clark said that the claim of similarities sufficient to justify an inference of copying "is a simple deduction to be made intelligently, not two with the dominating one to be made blindly."<sup>100</sup>

<sup>99</sup> See *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977).

<sup>100</sup> *Arnstein*, 154 F.2d at 476 n.l.

As Professor Brown reports,<sup>101</sup> at least one judge in *Ideal Toy Corp. v. Fab-Lu Ltd.*,<sup>102</sup> at first regarded the two-prong approach as an alternative way of formulating the issue of substantial similarity; but the test was revived in 1975 in *Universal Athletic Sales Co. v. Salkeld*.<sup>103</sup> Finally, in the celebrated case of *Sid & Marty Krofft Television Productions v. McDonald's Corp.*,<sup>104</sup> the Ninth Circuit, in a sense, resurrected the *Arnstein* approach by formulating a two-prong extrinsic-intrinsic test for infringement based upon the idea-expression dichotomy.

Even though the Ninth Circuit considered that "*Arnstein's* alternative holding that summary judgment should not be granted when there is the slightest doubt as to the facts has been disapproved,"<sup>105</sup> the court said that *Arnstein* is still good law, referring to *Arnstein's* test for infringement, not summary judgment.

In the field of copyright, it is understandable that practitioners and some courts in considering *Arnstein* do not make the separation of holding and alternative holding made by the Ninth Circuit in *Krofft*. I suggest that this confusion is the reason that *Arnstein* will be cited by any party opposing a motion for summary judgment and why courts still cite it on summary judgment motions. Even though *Arnstein* is not "good law" insofar as summary judgment is concerned, *Arnstein* continues to be seminal in framing the issue of infringement. Since it is a landmark case to that extent, *Arnstein* even for the initiated, sadly remains influential for summary judgment in copyright law.

Moreover, academics continue to use the teachings of *Arnstein*. Professors Brown, Gorman, Latman and Goldstein, in some of the leading casebooks in the copyright field, include *Arnstein* as a principal case.<sup>106</sup> Although such treatment is necessary for comprehensive education, it also may explain why the alternative holding of *Arnstein* has not fallen into disuse. In a capsule, *Arnstein* is dead but not buried.

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<sup>101</sup> B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* 339 (3d ed. 1978).

<sup>102</sup> 360 F.2d 1021, 1022 (2d Cir. 1966).

<sup>103</sup> 511 F.2d 904 (3d Cir.), cert. denied, 423 U.S. 863 (1975). This case contains the Delphic pronouncement that "[s]ubstantial similiarity is not always substantial similiarity," referring to the difference between the copying issue and the issue of the impression made on an ordinary lay observer. *Id.* at 907.

<sup>104</sup> 562 F.2d 1157 (9th Cir. 1977).

<sup>105</sup> *Id.* at 1165.

<sup>106</sup> P. GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 830 (2d ed. 1981); B. KAPLAN & R. BROWN, *CASES ON COPYRIGHT* (3d ed. 1978); A. LATMAN & R. GORMAN, *COPYRIGHT FOR THE EIGHTIES* 318 (1981). But see 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 12.10 n.15 (1983) in which Professor Nimmer refers to criticism of the summary judgment standard enunciated in *Arnstein*.

## XVII. CONCLUSION

I suggest that the "traditional" aversion to summary judgment in copyright<sup>107</sup> represented no more than a widespread judicial skepticism to the summary judgment process. Summary judgment cannot be had if there is an extremely close question of fact in a copyright or any other case. I suggest that there is no subtext to Rule 56 with special rules for copyright infringement cases.

Due to the abundance of litigated copyright cases, it may be that judges no longer regard copyright as enormously technical, so that copyright cases no longer have special standing or special rules. The fact that copyright is treated like any other case also can be seen from the emerging notion that there is no presumption of irreparable harm in copyright preliminary injunctions.<sup>108</sup>

Summary judgment is always difficult to obtain: it depends upon the facts of the case, advocacy, the proclivities of the judge and his or her ability to withstand reversal. The granting of summary judgment, like so many other decisions in copyright law or any other kind of case, involves balancing and discretion.

In any event, *Arnstein*, as legal precedent, is increasingly considered as an anachronistic view of the role of summary judgment in copyright litigation. There is no longer any presumption against the use of Rule 56 in copyright infringement actions. *Arnstein* is not the present state of the law.<sup>109</sup>

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<sup>107</sup> Compare the "constitutional" aversion to the use of summary judgment in libel. "The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111 n.9 (1979). One result of reducing the number of summary judgment motions sought is to increase litigation costs: In the case of the media, such increase may eliminate many controversial books, articles and broadcasts because of the risk and cost of libel claims.

<sup>108</sup> Cf. *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11 (2d Cir. 1982); A. LATMAN, *THE COPYRIGHT LAW* 236 (5th ed. 1979).

<sup>109</sup> *Smith v. Weinstein*, 1984 COPYRIGHT L. DEC. (CCH) ¶ 25,625 (S.D.N.Y. 1984).

## APPENDIX\* OF SUMMARY JUDGM

CASE & CITATION	PARTIES & PROPERTY	ISSUES
1930's		
Lowenfels v. Nathan, 2 F. Supp. 73 (S.D.N.Y. 1932)	Author of tragic opera (Plaintiff) sued author, composer, producer and publisher of musical satire <i>Of Thee I Sing</i> (Defendants) for copyright infringement.	Plagiarism
Ornstein v. Paramount Prods., 9 F. Supp. 896 (S.D.N.Y. 1935)	Author of play (Plaintiff) sued motion picture producer (Defendant) for copyright infringement.	Plagiarism
Shipman v. R.K.O. Radio Pictures, 20 F. Supp. 249 (S.D.N.Y. 1937), <i>aff'd</i> , 100 F.2d 533 (2d Cir. 1938)	Author of play (Plaintiff) sued motion picture producer (Defendant) for copyright infringement.	Literary larceny
Caruthers v. R.K.O. Radio Pictures, 20 F. Supp. 906 (S.D.N.Y. 1937)	Author (Plaintiff) of unpublished manuscript dealing with the early history and settlement of Oklahoma claimed that defendant's motion picture <i>Cimarron</i> , based on the novel by Edna Ferber, infringed his common law copyright.	What, if anything was appropriated; whether that was copyrightable material; and if so, whether it was a substantial and material part of the plaintiff's work
Dezendorf v. Twentieth Century-Fox Film Corp., 99 F.2d 850 (9th Cir. 1938)	Author of unpublished play (Plaintiff) claimed the defendant's motion picture infringed his common law copyright.	Literary larceny
Eisman v. Samuel Goldwyn, Inc., 23 F. Supp. 519 (S.D.N.Y. 1938), <i>rev'd sub nom.</i> Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir. 1939)	Author of two versions of a play, one copyrighted and the other uncopyrighted, (Plaintiff) claimed defendant's motion picture infringed her copyright.	Literary larceny

\* The appendix was prepared by Deborah Locitzer of the Benjamin N. Cardozo School of Law with the assistance of the staff members of the *Cardozo Arts & Entertainment Law Journal*.

## CASES IN COPYRIGHT LITIGATION

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

1930's

Defendants' motion to dismiss the complaint was granted. There was no copyright infringement in view of the dissimilar treatment of the two plays and the fact that certain incidents referred to in both plays were clearly in the public domain. Judge Woolsey recommended that the procedure of annexing copies of both works to the complaint "should become the usual method of dealing with copyright suits, unless, owing to nice questions of originality or access, oral evidence is indicated as necessary." 2 F. Supp. at 75.

Defendant's motion to dismiss the complaint was granted. The court concluded that although both authors had drawn upon a common plot or theme, there were material differences in the principal characters, locale, episodes and dialogue.

Defendant's motion to dismiss the complaint was granted. After reading the plaintiff's play and the cutting continuity of the defendant's film, and viewing the film, the court concluded that the differences between the two works were greater than their similarities.

Defendant's motion to dismiss the complaint was granted. Even assuming access, the court concluded that the material taken from the plaintiff was either not copyrightable, unsubstantial, or unimportant to the essential structure of the plaintiff's work.

Although the Ninth Circuit approved of the procedure adopted by the Southern District of New York of annexing both works to the complaint, this case was distinguished on the ground that the issue was not fair use, but originality, which was a question of fact, rather than law, and one that could not be "summarily disposed of upon a motion to dismiss, but which must be established by proof." 99 F.2d at 851.

Although the district court judge had read both versions of the plaintiff's play, he compared them to the cutting continuity of the film and concluded there was no unfair use. The Second Circuit reversed and remanded to decide whether the cutting continuity was a reasonably fair synopsis of the film. "[T]he issue of fair use . . . is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain." 104 F.2d at 662.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
1940's		
Houghton Mifflin Co. v. Stackpole Sons, Inc., 31 F. Supp. 517 (S.D.N.Y.), <i>modified</i> , 113 F.2d 627 (2d Cir. 1940)	Publishing company (Plaintiff), which allegedly owned the exclusive rights to publish Adolf Hitler's autobiographical and political treatise <i>Mein Kampf</i> , sought a permanent injunction to restrain the defendant's publication of an American translation.	Validity of the Assignment from the German publisher to the plaintiff
Solomon v. R.K.O. Radio Pictures, 40 F. Supp. 625 (S.D.N.Y. 1941)	Author of play (Plaintiff) sued motion picture producer (Defendant) claiming that the defendant's motion picture infringed his play.	Whether the defendant had made unfair use of a sufficient amount of the plaintiff's copyrightable material
Edward B. Marks Music Corp. v. Stasny Music Corp., 1 F.R.D. 720 (S.D.N.Y. 1941)	Alleged assignee of the rights in a musical composition (Plaintiff) sued music publisher (Defendant) for copyright infringement.	1) Whether the musical composition was a traditional folksong in the public domain 2) Whether the original assignor was the author of the musical composition
New York Tribune, Inc., v. Otis & Co., 39 F. Supp. 67 (S.D.N.Y. 1941)	Newspaper publisher (Plaintiff) sued investment and banking firm (Defendant) claiming that the defendant's unauthorized reproduction of the newspaper's masthead and leading editorial constituted copyright infringement.	Fair use
Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859 (S.D.N.Y. 1942)	Music publisher (Plaintiff) sued music publisher (Defendant) for infringement of the plaintiff's renewal copyrights in the music of two musical compositions and lyrics of a third.	1) Assignment of renewal rights 2) Joint authorship
Rossiter v. Vogel, 46 F. Supp. 749 (S.D.N.Y. 1942), <i>rev'd</i> , 134 F.2d 908 (2d Cir. 1943)	Alleged owner of song (Plaintiff) sought declaratory judgment establishing ownership of renewal rights and injunction restraining further use by the defendant music publisher.	Validity of the assignment of the renewal rights

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

1940's

Although the Second Circuit agreed with the district court that there was no conceivable reason why Rule 56 should not apply to copyright injunctions, there was a genuine issue of fact concerning the validity of the assignment from the German publisher to the plaintiff. The fact that the Second Circuit had held the *prima facie* proof of ownership sufficient to grant a temporary injunction was not conclusive; therefore, the defendant was entitled to a trial on that issue.

Court concluded there was enough similarity between both works in theme, characters, locale and incidents to preclude a holding that there was no infringement as a matter of law. Since a triable issue was presented, the court denied the defendant's motion for summary judgment.

Court determined that a sharp issue of fact was raised regarding whether the composition was in the public domain and since the papers submitted were inadequate to determine that issue, the plaintiff's motion was denied.

The determination of fair use should not be resolved on affidavits, but is best left to the trial judge; therefore, the defendant's motion for summary judgment was denied.

Plaintiff's motion for summary judgment was denied. Issues of fact were raised which would have to be determined at trial before it could be said that the defendant had no interest in the renewal copyright. Issues of fact were also raised as to whether the co-authors possessed the requisite common design and collaboration to determine joint authorship.

Although the district court had granted the plaintiff's motion for summary judgment the Second Circuit reversed and remanded for trial. The evidence of inadequate consideration, especially when taken with the allegations of deceit, presented a triable issue as to the enforceability of the assignment to the plaintiff.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Piantadosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943)	Composer of a song (Plaintiff) sued music publisher and motion picture studio (Defendants) for copyright infringement, claiming that the use of the song in the defendant's motion picture was not licensed by the plaintiff or either of his co-owners.	1) Existence of an employer—employee relationship between the music publisher and the composer 2) Existence of a license to use the song from the music publisher to the motion picture producer
MacDonald v. DuMaurier, 144 F.2d 696 (2d Cir. 1944)	Author of magazine story and novel (Plaintiff) claimed that the novel and film <i>Rebecca</i> infringed her copyright, and therefore sued the author, publisher and motion picture producer (Defendants) for copyright infringement.	Whether the matter copied constituted a substantial part of the copyrighted material in the plaintiff's work
Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)	Composer of popular songs (Plaintiff) some of which had been published and others of which had been either performed publicly or sent to radio stations, movie producers, music publishers or band leaders sued the composer Cole Porter (Defendant) for copyright infringement.	1) Whether the defendant copied from plaintiff's copyrighted works 2) Whether the copying, if proved, went so far as to constitute improper appropriation
Sub-Contractor's Register, Inc. v. McGovern's Contractors & Builders Manual, Inc. 69 F. Supp. 507 (S.D.N.Y. 1946)	Publisher of directory of construction trade (Plaintiff) sued publisher of similar directory (Defendant) for copyright infringement and unfair competition.	1) Piracy 2) Unfair competition
Home Art, Inc. v. Glensder Textile Corp., 81 F. Supp. 551 (S.D.N.Y. 1948)	Plaintiff sued defendant for copyright infringement claiming that the defendant manufactured silk scarves bearing a copy of plaintiff's copyright reproduction of an oil painting.	1) Whether the original painting was in the public domain 2) Whether the plaintiff's copyright in the reproduction was valid 3) Whether the design on the scarf was copied from the original painting
Winwar v. Time, Inc., 83 F. Supp. 629 (S.D.N.Y. 1949)	Author of historical narrative (Plaintiff) sued publisher of magazine article (Defendant) for copyright infringement.	Defendant claimed the inclusion of a passage from plaintiff's copyrighted book was permitted under the fair use doctrine



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 SUMMARY JUDGMENT  
 GRANTED
 

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Defendant's motion for summary judgment was granted. Mere denials, unaccompanied by any facts which could be admissible in evidence at a hearing are not sufficient to raise a genuine issue of fact. No genuine issue concerning a material fact was raised by the pleadings, affidavits and answer to interrogatories.

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 SUMMARY JUDGMENT  
 DENIED
 

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Although the Second Circuit regarded *Rebecca* as "immeasurably superior" to the plaintiff's work and expected that ultimately the complaint would be dismissed, it concluded that the result had been "prematurely reached by a forbidden path" and the plaintiff had been deprived her day in court. 144 F.2d at 701. Here the common matter, consisting of concrete incidents and details was not so trifling that it could be ignored. *Id.* Note: Judge Clark argued in dissent that the court's preference for a full and formal trial on the merits was "contrary to the provisions, as well as the spirit, of the new civil rules. . . ." *Id.*

Although the Second Circuit conceded that some parts of the plaintiff's story were "fantastic" and "improbable," 154 F.2d at 469, it reasoned that where credibility is crucial, summary judgment based on depositions becomes "improper and a trial indispensable." *Id.* at 471. Adhering to the view that "generally there should be trials in plagiarism suits," *id.* at 474, the defendant's motion for summary judgment was denied. Note: Judge Clark in dissent criticized the Second Circuit's conservative approach to summary judgment. *Id.* at 479.

Plaintiff's motion for summary judgment was granted because defendant's directory imitated plaintiff's in size, lettering, color scheme and style and included the same classifications, arrangement, display advertisements and even errors as plaintiff's directory.

Plaintiff's motion for summary judgment was granted because the defendant failed to present evidence sufficient to raise issues for trial.

Defendant's motion for summary judgment was denied. Questions as to where the expressions originated and the facts relating to the alleged fair use should be determined upon a trial of these issues.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
1950's		
Millstein v. Leland Hayward, Inc., 10 F.R.D. 198 (S.D.N.Y. 1950)	Author of copyrighted, but unpublished play (Plaintiff) sued Leland Hayward, author of the play <i>State of the Union</i> (Defendant) for copyright infringement, fraud and breach of a fiduciary duty.	1) Infringement of copyright in unpublished play 2) Fraud and breach of a fiduciary duty
Thompson v. Gernsback, 94 F. Supp. 453 (S.D.N.Y. 1950)	Author of article published in psychiatry journal (Plaintiff) sued publisher of sex magazine (Defendant) for copyright infringement.	Fair use
Curtis Pub. Co. v. Union Leader Corp., 12 F.R.D. 341 (D.N.H. 1952)	Publisher of the magazine, <i>Saturday Evening Post</i> , (Plaintiff) sued publisher (Defendant) for copyright infringement of a literary composition.	Among the affirmative defenses raised by the defendant was the claim that it had been induced by the plaintiff to copy and reprint the article
Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947 (Cal. 1953)	Author of literary composition (Plaintiff) sued the producers of the motion picture <i>Tarzan's Magic Fountain</i> (Defendant) for copyright infringement and breach of express and implied contracts.	1) Plagiarism 2) Breach of express and implied contracts to pay the reasonable value of plaintiff's composition regardless of whether it was original
Kurlan v. Columbia Broadcasting Sys., 40 Cal.2d 799, 256 P.2d 962 (Cal. 1953)	Creator of radio programs (Plaintiff) based on the further adventures of the principal characters from the short stories, Broadway play and motion picture <i>My Sister Eileen</i> sued radio broadcaster (Defendant) for copyright infringement and breach of implied and express contracts.	1) Plagiarism 2) Breach of express and implied contracts to pay the reasonable value of the radio program idea
Siewek Tool Co. v. Morton, 128 F. Supp. 71 (E.D. Mich. 1954)	Tool Company (Plaintiff) sued a competitor (Defendant) for copyright infringement of tool catalogue.	Whether the catalogue was published without proper notice of copyright
Carmichael v. Mills Music, Inc., 121 F. Supp. 43 (S.D.N.Y. 1954)	Composer of songs (Plaintiff) brought this action against his publisher (Defendant) for declaratory judgment on the ownership of copyright renewal rights for fourteen musical compositions.	Ownership of copyright renewal rights

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

## 1950's

Defendant's motion for summary judgment was granted on all counts. The judge stated that he did not have the "slightest doubt" that the plaintiff's claim is the product of nothing but hope that, to avoid the expense and irritation of litigation, the owner of a successful play would buy his peace. Summary judgment was designed specifically to put a quietus on that kind of a claim." 10 F.R.D. at 200.

Although the judge conceded that it was difficult to perceive of the defendant's magazine as a "work of science," he nevertheless felt compelled to deny the plaintiff's motion for summary judgment.

Plaintiff's motion for summary judgment was denied. The court stated that the burden was on the plaintiff, as the moving party, to establish the non-existence of a genuine issue of fact, and here the plaintiff had made no attempt to "pierce the allegation of fact" set up in the defendant's affirmative defense. 12 F.R.D. at 341.

The court determined that as a matter of law there was no similarity as to the protectible portions of the plaintiff's composition and therefore the defendant's demurrer was sustained on the issue of plagiarism. However, defendant's demurrers on the counts based on express and implied contracts were overruled.

The court concluded that as a matter of law there was no protectible property in the basic core of the story, nor was there any similarity between the defendant's radio program and the protectible portions of the plaintiff's program. However, since some similarity might be found in the program format and radio production techniques, the defendant's demurrer was overruled.

Defendant's motion for summary judgment was granted because the court found the copyright notice on the catalogue to be defective and therefore invalid.

However, the defendant was not entitled to summary judgment on the issue of whether the illustrations in the catalogue were still protected by the copyright on an earlier catalogue in which they were also included.

While the case was considered ripe for declaratory judgment, it was not considered ripe for summary judgment. Evidence of inadequate consideration coupled with the allegation that the defendant took unconscionable advantage of the plaintiff presented triable issues.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Miller v. Goody, 125 F. Supp. 348 (S.D.N.Y. 1954)	Copyright owner of musical compositions (Plaintiff) sued record companies (Defendant) for copyright infringement.	Failure to give notice to the copyright proprietor and copyright office of an intention to exercise the compulsory license provisions of the copyright statute.
Buckler v. Paramount Pictures, 133 F. Supp. 223 (S.D.N.Y. 1955)	Author of copyrighted, but unpublished play (Plaintiff) sued producer of the motion picture <i>Sunset Boulevard</i> (Defendant) for copyright infringement and misappropriation of literary material.	1) Copyright infringement 2) Misappropriation of literary material
G. Ricordi & Co. v. Sloman, 19 F.R.D. 196 (W.D. Pa. 1956)	Plaintiff sued the president of the opera guild and the Pittsburgh Opera Company (Defendants) claiming that their performance of <i>Madame Butterfly</i> without the plaintiff's authority constituted copyright infringement.	Unauthorized public performance of copyrighted opera
Malkin v. Dubinsky, 146 F. Supp. 111 (S.D.N.Y. 1956)	Author of copyrighted, but unpublished play (Plaintiff) sued president of union (Defendant) claiming the union's motion picture infringed his copyright.	Unlawful appropriation
C.S. Hammond & Co. v. International College Globe, Inc., 146 F. Supp. 514 (S.D.N.Y. 1956)	Plaintiff claimed that defendant's inflatable globe map of the world infringed plaintiff's copyrighted inflatable globe.	1) Copyright infringement 2) Unfair competition
Independent Film Distrib. Ltd. v. Chesapeake Indus., 148 F. Supp. 611 (S.D.N.Y. 1957), <i>rev'd</i> , 250 F.2d 951 (2d Cir. 1958)	Alleged owner of copyright in two motion pictures (Plaintiff) sued film distributors (Defendants) to restrain them from offering the films for sale on the grounds that such a sale would infringe the plaintiff's copyright in the film.	Whether default judgment and foreclosure sale of film negatives constituted a valid defense to copyright infringement action
Trowler v. Phillips, 260 F.2d 924 (9th Cir. 1958)	Map maker (Plaintiff) sued a competitor (Defendant) for copyright infringement of maps of California.	Whether there was a lack of sufficient originality in the plaintiff's maps to make them the subject of a valid copyright

SUMMARY JUDGMENT  
GRANTED

Plaintiff was granted a default judgment and the defendant's recording equipment was impounded until royalties and damages were paid, and notice of intention to exercise the compulsory license provisions was given.

SUMMARY JUDGMENT  
DENIED

Defendant's motion for summary judgment was granted. The motion picture was so dissimilar from the play in every important respect (e.g., story, plot, characters, incidents, scenes and dialogue) that there was no genuine issue of fact as to similarity and "therefore no reason for putting the defendant to the expense of a trial, or for passing upon other issues." 133 F. Supp. at 223.

Plaintiff's motion for summary judgment was denied where the pleadings and the defendant's answer and affidavit disclosed that an issue of fact existed as to whether the plaintiff consented to the performance and whether the president acted individually or as an officer of the guild.

Plaintiff's motion for summary judgment was denied. Judge Kaufman stated that a careful reading of both works indicated that the similarities were "more than inconsequential." 146 F. Supp. at 112.

Plaintiff's motion for summary judgment was denied. Trier of fact should determine the likelihood of copying based on an opportunity to evaluate the credibility of witnesses. The issue of confusion in the public mind between the two globes should not be resolved on the basis of affidavits.

Default judgment and foreclosure sale of film negatives presented triable issues of fact so that plaintiff's motion for summary judgment was denied.

Defendant's motion for summary judgment was denied. Issues of fact could not be resolved by briefly describing the map maker's method of compilation. An examination of the source material was needed to determine the copyrightability of the maps.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Harms, Inc. v. F.W. Woolworth Co., 163 F. Supp. 484 (S.D. Cal. 1958), and Harms Inc. v. Tops Music Enter., Inc. of Cal., 60 F. Supp. 77 (S.D. Cal. 1958)	Owner of copyright in musical compositions (Plaintiff) sued seller of records of pirated songs (Defendants) claiming copyright infringement.	Liability for the sale and distribution of records of pirated songs.
Costello v. Loew's, Inc., 159 F. Supp. 782 (D.D.C. 1958)	Author (Plaintiff) of copyrighted drama based on Malory's <i>Morte d'Arthur</i> and Tennyson's <i>Idylls of the King</i> sued motion picture producer (Defendant) for copyright infringement and misappropriation.	1) Copyright infringement 2) Misappropriation
Holt Howard Assocs. v. Goldman, 177 F. Supp. 611 (S.D.N.Y. 1959)	Manufacturer (Plaintiff) of sculptured ceramic containers known as "Pixieware" sought an injunction to prevent a competitor (Defendant) from selling an allegedly infringing line of crockery.	1) Whether some of the plaintiff's crockery was sold in the United States without copyright notice 2) Whether the defendants were innocent infringers
Harris v. Fawcett Publications, Inc., 176 F. Supp. 390 (S.D.N.Y. 1959)	Author (Plaintiff) of three articles about Elizabeth Taylor published in <i>Look</i> Magazine sued free-lance writer and publisher of <i>Motion Picture</i> magazine (Defendants) for copyright infringement, claiming that the defendants' story was copied from the plaintiff's articles.	1) The use of common sources 2) Whether the defendant's use of the plaintiff's story, if any, was fair use.
1960's		
Brecht v. Bentley, 185 F. Supp. 890 (S.D.N.Y. 1960)	Stefan Brecht (Plaintiff), the alleged copyright owner of the German play <i>Mother Courage</i> by Bertolt Brecht, sued to enjoin Eric Bentley and others (Defendants) from producing Bentley's English translation of the play.	1) Ownership of copyright 2) Plaintiff's standing to sue 3) Statute of Frauds 4) Statute of Limitations and laches 5) Compliance with the Copyright Act
S.C. Johnson & Son, Inc. v. Drop Dead Co., 201 F. Supp. 442 (S.D. Cal. 1961), <i>aff'd</i> , 326 F.2d 87 (9th Cir. 1963), <i>cert. denied</i> , 377 U.S. 907 (1964)	Manufacturer of cleaning wax (Plaintiff) sued the defendant corporation for unfair competition, and trademark and copyright infringement of the label on its product "Pledge."	1) Copyright infringement 2) Trademark infringement 3) Unfair competition

SUMMARY JUDGMENT  
GRANTED

Court granted plaintiff's motion for partial summary judgment insofar as it related to the issue of liability only. The documents clearly showed that the plaintiff had title to the songs and the defendants were liable for the unauthorized use of the songs through the sale of the records.

Defendant's motion for summary judgment was granted. The two works were not similar insofar as protected original portions of the plaintiff's drama was concerned.

SUMMARY JUDGMENT  
DENIED

Issues as to whether the plaintiff had forfeited or abandoned its copyright by publication without proper copyright notice precluded granting summary judgment, but the defendants were entitled to an injunction *pendente lite* against the plaintiff.

Plaintiff's motion for summary judgment was denied. That the likelihood of copying is very strong is not sufficient for the granting of summary judgment. The plaintiff has the burden of "conclusively" demonstrating defendant's copying by proving that 'the similarities' are 'overwhelming and pervasive' . . . where there is even the 'slightest trace of a factual issue' a trial must be ordered." 176 F. Supp. at 394.

## 1960's

Defendants' motion for summary judgment was denied on all of the issues raised. The defendant's assertion that he translated the play and secured the copyright on his translation with the playwright's consent presented an issue of fact which required a trial.

Defendant's motion for summary judgment was denied on all three counts. Regarding the copyright infringement count, the court held that it could not determine as a matter of law that the plaintiff's admitted distribution of advertising placards without a copyright symbol was a sufficient dedication to the public so as to void the copyright.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Consumers Union of U.S. Inc. v. Hobart Mfg. Co., 199 F. Supp. 860 (S.D.N.Y. 1961)	Consumers organization (Plaintiff) sued dishwasher manufacturer (Defendant) claiming that the use of statements from the plaintiff's magazine in the defendant's sales bulletin constituted copyright infringement and unfair competition.	1) Copyright infringement 2) Unfair competition
Edwin H. Morris & Co. v. Burton, 201 F. Supp. 36 (E.D. La. 1961)	Copyright owner of musical compositions (Plaintiff) sued proprietor of nightclub (Defendant) for copyright infringement.	Unauthorized public performance of copyrighted musical compositions
Brennan v. Paramount Pictures, 209 F. Supp. 150 (S.D.N.Y. 1962)	Author of short story (Plaintiff) sued motion picture producer (Defendant) for copyright infringement.	Whether the plaintiff had standing to raise the issue of infringement due to the prior sale of the property in a bankruptcy proceeding
Jacobs v. Hill, 210 Cal. App.2d 164, 26 Cal. Rptr. 591 (Cal. Ct. App. 1962)	Author of book (Plaintiff) sued motion picture producer (Defendant) for copyright infringement.	1) Substantial similarity 2) Access
Cortley Fabrics Co. v. Slifka, 175 F. Supp. 66 (S.D.N.Y. 1959), <i>aff'd</i> , 317 F.2d 924 (2d Cir. 1963)	Converter of textiles (Plaintiff) sued fabric company (Defendant) for copyright infringement of fabric design.	Sufficiency of copyright notice
Dugan v. American Broadcasting Co., 216 F. Supp. 763 (S.D. Cal. 1963)	Author (Plaintiff) claimed defendant's television program infringed his copyrighted playlet.	Substantial similarity
Dietrich v. Standard Brands, Inc., 32 F.R.D. 325 (E.D. Pa. 1963)	Holder by assignment of copyright in a slide rule calculator (Plaintiff) claimed that the distribution by the defendant corporation to retail grocers of a similar slide rule calculator constituted copyright infringement.	1) Validity of plaintiff's copyright 2) Access
Loomskill, Inc. v. Slifka, 223 F. Supp. 845 (S.D.N.Y. 1963), <i>aff'd</i> , 330 F.2d 952 (2d Cir. 1964)	Manufacturer of textiles (Plaintiff) sued fabric company (Defendant) for copyright infringement of fabric design.	Sufficiency of copyright notice



SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Defendant's motion for summary judgment was granted on the issue of copyright infringement. Even though the defendant admitted copying the plaintiff's words, they were purely factual statements which could not have been formulated in any other manner.

Defendant's motion for summary judgment was denied on the issue of unfair competition because there was an unresolved question of fact as to whether there was competition between the plaintiff and the defendant.

Court held that the plaintiff was entitled to summary judgment restraining infringing performances where the defendant had failed to file any response to the request for admissions incorporating the allegations of the complaint.

Defendant's motion for summary judgment was denied because material issues remained as to the author's alleged equitable ownership of the copyright.

Defendant's motion for summary judgment was granted because there were no triable issues of fact as to similarity or access.

Plaintiff's motion for summary judgment was granted. Notice of copyright imprinted on the selvage for each repeat of the copyrighted design was sufficient where no other location within the body of the design was feasible.

Defendant's motion for summary judgment was granted. After comparing the scripts the court concluded that the points of essential difference so far outnumbered the points of similarity that it did not appear that "anyone could persuade himself that one was borrowed from the other." 216 F. Supp. at 766.

Plaintiff's motion for summary judgment was denied. Issues of fact were raised as to whether the plaintiff's calculator was an "original work" and whether the defendant's calculators were designed and manufactured independently of and without access to any subject matter claimed by the plaintiff to be protected by the copyright.

Plaintiff's motion for summary judgment was granted. Copyright notice printed on the selvage of the fabric was adequate to establish notice.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Berlin v. E.C. Publications, Inc., 219 F. Supp. 911 (S.D.N.Y. 1963), <i>aff'd</i> , 329 F.2d 541 (2d Cir. 1964), <i>cert. denied</i> , 379 U.S. 822 (1964)	The composer Irving Berlin (Plaintiff) sued the publisher of <i>Mad Magazine</i> (Defendant) for copyright infringement of his musical composition.	Fair use
Burke & Van Heusen, Inc. v. Arrow Drug, Inc., 233 F. Supp. 881 (E.D. Pa. 1964)	Holder of copyright in musical compositions (Plaintiff) sued wholesale and retail drug corporation (Defendant) for copyright infringement.	Whether the defendant could sell the records separately rather than use them as a premium in conjunction with the sale of shampoo
Edwin H. Morris & Co. v. Munn, 233 F. Supp. 71 (E.D.S.C. 1964)	Owner of copyright in musical compositions (Plaintiff) sued performer (Defendant) for copyright infringement.	Unauthorized public performance of musical composition
Leo Feist, Inc. v. Debmar Publishing Co., 232 F. Supp. 623 (E.D. Pa. 1964)	Composer of song (Plaintiff) claimed that the defendants' publication, reproduction and performance of the song <i>Why</i> infringed his copyright.	Substantial similarity
Land v. Jerry Lewis Prods. Inc., 140 U.S.P.Q. 351 (Cal. Super. Ct. 1964)	Author of screen play (Plaintiff) claimed that the defendant's motion picture <i>The Nutty Professor</i> infringed her script.	1) Plagiarism 2) Breach of contract
Electronic Publishing Co. v. Zalytron Tube Corp., 226 F. Supp. 760 (S.D.N.Y. 1964)	Publisher of advertising catalogues for customers (Plaintiff) claimed the defendant's corporation copied from one of their catalogues.	Whether the customer for whom the plaintiff's catalogue was prepared was an indispensable party to the action
Nom Music Inc. v. Kaslin, 227 F. Supp. 922 (S.D.N.Y. 1964), <i>aff'd</i> , 343 F.2d 198 (2d Cir. 1965)	Assignee of copyright (Plaintiff) sued composer (Defendant) for copyright infringement.	Whether the substitution of the plaintiff's name as the copyright owner prior to the recordation of the assignment resulted in a dedication of the composition to the public
H.M. Kolbe Co. v. Shaff, 240 F. Supp. 588 (S.D.N.Y. 1965), <i>aff'd</i> , 352 F.2d 285 (2d Cir. 1965)	Manufacturer of textiles (Plaintiff) sued officers and directors of fabric company (Defendants) for copyright infringement of a fabric design.	1) Similarity of textile design 2) Liability of corporate officer for infringement

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Defendant's motion for summary judgment was granted. The court concluded that the defendant's parody had neither the intent nor the effect of fulfilling the demand for the original song and that no greater amount had been appropriated than necessary to recall the original song.

Defendant's motion for summary judgment was granted. The Copyright Act does not grant the copyright proprietor the right to control the use or disposition of individual copies of the work once he has sold or otherwise disposed of them.

Plaintiff's motion for summary judgment was granted since there was no genuine issue as to any material fact.

Defendants' motion for summary judgment was granted on the ground that the matter had been judicially determined in their favor in a copyright infringement action in Great Britain. The British court had concluded that there had been "no conscious or subconscious copying" and the American court applied the doctrine of collateral estoppel to the foreign judgment.

Defendant's motion for summary judgment was granted on the issue of plagiarism. The court held that there was insufficient likeness between the two properties to allow a cause of action in plagiarism.

Defendant's motion for summary judgment was denied on the question of whether the defendants had breached a contract by failing to pay the plaintiff for an idea submitted to them at their request and subsequently used by them.

Defendant's motion for summary judgment was denied. Plaintiff had established the validity of its copyright, therefore there was no failure to join an indispensable party.

Defendant's motion for summary judgment was denied. Section 32 of the 1909 Copyright Act applies to cases where a statutory or published copyright is assigned and not as here where the statutory copyright is first obtained by the assignee of an unpublished work.

Plaintiff was entitled to summary judgment against the corporate officer to collect damages because the plaintiff had a prior judgment on the same issue against the corporation and the officer was personally involved in directing the production of the infringing designs.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Northern Music Corp. v. Pace-maker Music Co., 147 U.S.P.Q. 358 (S.D.N.Y. 1965)	Owner of copyright in a song (Plaintiff) sued composer (Defendant) for copyright infringement and unfair competition.	1) Access 2) Unfair competition
Miller Studio, Inc. v. Pacific Import Co., 39 F.R.D. 62 (S.D.N.Y. 1965)	Owner of copyright in decorative wall plaques (Plaintiff) sued the distributor of allegedly identical plaques (Defendant) for copyright infringement.	1) Access 2) Similarity
Columbia Broadcasting Sys. v. Teleprompter Corp., 251 F. Supp. 302 (S.D.N.Y. 1965)	Television broadcasting company (Plaintiff) sued cable television operators (Defendant) for copyright infringement.	Whether the importation of distant signals constituted a "performance" which would incur copyright liability
Ross Prods, Inc. v. N.Y. Merchandise Co., 242 F. Supp. 878 (S.D.N.Y. 1965)	Toy manufacturer (Plaintiff) sued a competitor (Defendant) for copyright infringement.	1) Validity of United States copyright 2) Prior publication in Japan without copyright notice
Nordstrom v. Radio Corp. of Am., 251 F. Supp. 41 (D. Colo. 1965)	Composer of musical compositions (Plaintiff) sued RCA (Defendant) for copyright infringement.	1) Access 2) Similarity
Shapiro, Bernstein & Co. v. Gabor, 266 F. Supp. 613 (S.D.N.Y. 1966)	Publisher of musical compositions (Plaintiff) sued president of record manufacturing company (Defendant) for nonpayment of royalties.	Whether the parties had substituted a private licensing agreement for the protections afforded by the Copyright Act
Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966)	Publisher of musical compositions (Plaintiff) sued record manufacturer, mail order sales agency, advertising agency and owners of two radio stations (Defendants) for non-compliance with the statutory licensing provisions.	Manufacture and sale of records that reproduced copyrighted musical compositions without compliance with statutory license provisions
Rytvoc, Inc. v. Robbins Music Corp., 289 F. Supp. 136 (S.D.N.Y. 1967)	Assignee of renewal copyrights in songs (Plaintiff) sued music publisher (Defendant).	1) Whether the songs were composed as works made for hire 2) Validity of the assignment of renewal rights to plaintiff

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Summary judgment motions by both parties were denied. Because the issue of access is a crucial factual issue, the case does not lend itself to a summary disposition.

Plaintiff's motion for summary judgment was granted. Where the defendant's plaques clearly appeared to be copies of the plaintiff's plaques and the defendant failed to show that its plaques were obtained from some source other than the plaintiff's, the inference of copying was justified.

Plaintiff's motion for summary judgment was denied in the Southern District of New York. Since the case was one of first impression and the factual disputes were of a technical nature, the court concluded it was better to hear live testimony from the experts with an opportunity for cross examination.

Summary judgment motions by both parties were denied because there was an issue of material fact as to whether the plaintiff in good faith failed to indicate the prior publication of the toy in Japan which would have resulted in an initial rejection of the plaintiff's United States copyright application.

Defendant's motion for summary judgment was denied. Although the defendant admitted there was a high degree of similarity, there was a question of fact with regard to access. The court refused to substitute a "trial by affidavit" where the credibility of the declarants was a prime issue. 251 F. Supp. at 43.

Defendant's motion for summary judgment was denied. Whether the defendant was personally liable for the corporation's non-payment of royalties was a matter for trial.

Defendants' motion for summary judgment was denied. Whether the defendants had actual or constructive knowledge of the record manufacturer's infringement was an unresolved question of fact.

Plaintiff's motion for summary judgment was denied. Several issues of fact needed to be resolved concerning the relationship of the composer to his employer and the validity of the assignment from the composer to the plaintiff.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Blumcraft of Pittsburgh v. Newman Bros., 373 F.2d 905 (6th Cir. 1967)	Creator of ornamental hand-railing design (Plaintiff) sued a competitor (Defendant) for copyright infringement.	1) Access 2) Substantial similarity
Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967)	Author of a set of rules for a sales promotional contest (Plaintiff) claimed that the defendant corporation infringed his copyright by copying, almost precisely, Rule 1.	1) Whether Rule 1 was copyrightable subject matter 2) Access
Ware v. Columbia Broadcasting Sys., 61 Cal. Rptr. 590, 155 U.S.P.Q. 413 (Cal. App. 1967)	Author of a play (Plaintiff) sued television producer (Defendant) for copyright infringement.	Substantial similarity
Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968)	Publisher of <i>Life</i> magazine (Plaintiff) sued publisher of book (Defendant) for copyright infringement based on the unauthorized use of photographs of the Kennedy assassination in Dallas.	1) Whether the photographs were copyrightable subject matter 2) Whether defendant's use of the photographs was fair use
Gethers v. Blatty, 283 F. Supp. 303 (C.D. Cal. 1968)	Copyright owner of play (Plaintiff) sued author and publisher of novel (Defendants) for copyright infringement, unfair trade practices and unfair competition.	1) Substantial similarity 2) Unfair trade practices and unfair competition
Rodgers v. Living Room Lounge, Inc., 291 F. Supp. 599 (D. Mass. 1968)	Owner of copyright in four songs (Plaintiff) brought a civil action for damages against owner of public lounge (Defendant) for unauthorized use of the copyrighted musical compositions.	Unauthorized public performance of musical compositions
Nathan v. Monthly Review Press, Inc., 309 F. Supp. 130 (S.D.N.Y. 1969)	Albert Einstein's trustees (Plaintiffs) sued editors and publishers of <i>Monthly Review</i> (Defendants) to establish ownership of Einstein's essay entitled "Why Socialism?"	Whether the author had retained ownership of the essay or donated it unconditionally to the defendants
Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366 (S.D.N.Y.), <i>aff'd</i> , 415 F.2d 1007 (2d Cir. 1969)	Manufacturer of textiles (Plaintiff) sued fabric company (Defendant) for copyright infringement of fabric design.	1) Whether the design had entered the public domain 2) Substantial similarity

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Although the district court had granted the defendant's motion for summary judgment, the Sixth Circuit denied the motion on the ground that there were genuine issues of material facts relating to the charge of infringement.

Defendant's motion for summary judgment was granted. Since there were at best only a limited number of forms of expression for the substance of the contest (which in itself was uncopyrightable), the rules were deemed to be uncopyrightable subject matter.

Defendant's motion for summary judgment was granted because there was no substantial similarity between the scripts.

Court ruled that the defendant was entitled to summary judgment on the issue of fair use even without a written or formal motion under FED. R. CIV. P. 56(c).

Although the court held that the photographs were copyrightable subject matter, the plaintiff's motion for summary judgment was denied because the defendant's use of the photographs constituted fair use.

Defendant's motion for summary judgment was granted on both claims. Even though there was access, the court concluded that there was no substantial similarity between the protectible portions of the plaintiff's play and the defendant's novel.

Plaintiff's motion for summary judgment was granted based on the affidavit from ASCAP that the plaintiff's songs had been played in the defendant's lounge.

Motions for summary judgment by both parties were denied. Where documents are ambiguous and parole evidence would be admissible to clarify ambiguity, a genuine issue exists as to a material fact which precludes summary judgment.

Plaintiff's motion for summary judgment was granted. The design had not been placed in the public domain when the designer allowed a few trusted customers to view it in confidence and an ordinary observer could see the similarity between the plaintiff's design and the defendant's copy.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Higgins v. Woroner Prods. Inc., 161 U.S.P.Q. 384 (S.D. Fla. 1969)	Copyright owner (Plaintiff) sued broadcasting company (Defendant) for copyright infringement.	Sufficiency of access to establish indirect proof of copying
Kennyvonne Music Inc. v. Columbia Broadcasting Sys., 150 U.S.P.Q. 785 (S.D.N.Y. 1969)	Assignee of copyright from composer (Plaintiff) sued CBS (Defendant) for copyright infringement of musical composition.	Ownership of copyright
1970's		
Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970)	Executors (Plaintiffs) of the estate of David Goodis, author of the novel <i>Dark Passage</i> , sued the producers of the television series <i>The Fugitive</i> (Defendants) for copyright infringement.	1) Whether the novel had fallen into the public domain 2) Whether the contract between the author and the producer of the film version (which was assigned to the defendant) also conveyed the rights to produce a television series
Higgins v. Baker, 309 F. Supp. 635 (S.D.N.Y. 1970)	Trustee of Wilhelm Reich Infant Trust Fund (Plaintiff) sued author and publisher (Defendants) for copyright infringement of book.	1) Validity of copyright 2) Plaintiff's "unclean hands" 3) Substantial similarity 4) Fair use
Herbert Rosenthal Jewelry Corp. v. Grossbardt, 428 F.2d 551 (2d Cir. 1970)	Manufacturer of jeweled turtle pin (Plaintiff) sued manufacturer of a copy of the pin (Defendant) for copyright infringement.	1) Forfeiture of copyright due to inadequate notice 2) Whether the designer of the pin, not the plaintiff, was the copyright owner
Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284 (6th Cir. 1971)	Creator of plastic model airplane kits (Plaintiff) sued creator of same (Defendant) for copyright infringement.	1) Whether the model airplane kits were copyrightable subject matter 2) Adequacy of copyright notice
Harcourt, Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517 (S.D.N.Y. 1971)	Publisher of answer sheet to student achievement test (Plaintiff) sued manufacturer of charts and business forms (Defendant) for copyright infringement.	1) Whether the answer sheet was copyrightable subject matter 2) Validity of copyright



SUMMARY JUDGMENT  
GRANTED

Defendant's motion for summary judgment was granted. "[T]he bare possibility of access is insufficient to establish . . . proof of copying." 161 U.S.P.Q. at 384.

SUMMARY JUDGMENT  
DENIED

Motions for summary judgment by both parties were denied. Where "there are outstanding conflicting claims to copyright as well as disputed issues of fact with respect to oral and written contractual arrangements . . . [n]othing short of a trial of the facts can resolve the issues presented." 150 U.S.P.Q. at 786.

## 1970's

The Second Circuit held that the contract clearly conveyed the rights to produce a television series based on the novel and therefore upheld the district court's decision to grant summary judgment in favor of the defendant on that issue.

The Second Circuit held that there had been no forfeiture of the novel into the public domain and reversed the district court's decision to the extent it granted summary judgment in favor of the defendant on that issue.

Defendant's motion for summary judgment was denied. Although the issue of substantial similarity is often determined on a motion for summary judgment, the determination of fair use can only be made when the facts are fully exposed and summary judgment cannot be granted solely on the basis of the other party's "unclean hands."

Motions for summary judgment by both parties were denied; however the plaintiff was granted a preliminary injunction.

Plaintiff's motion for summary judgment was denied. Although the Sixth Circuit affirmed the district court's conclusion that the airplane models were copyrightable subject matter, the case was remanded for a trial on the issues of notice and infringement.

Although it was the defendant who moved for summary judgment, the court denied the motion and granted summary judgment in favor of the plaintiff, holding that the answer sheet was copyrightable, was validly copyrighted, and that the copyright was infringed.

CASE/CITATION	PARTIES & PROPERTY	ISSUES
Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971)	Author (Plaintiff) brought copyright infringement suit against publisher (Defendant) claiming that the defendant's book was plagiarized from several of the plaintiff's novels.	Whether the Florida Blameless Ignorance doctrine would toll the statute of limitations
Celestial Arts, Inc. v. Neyler Color-Lith Co., 339 F. Supp. 1018 (E.D. Wisc. 1971)	Owner of copyright in certain works of art (Plaintiff) sued publishing company (Defendant) for copyright infringement.	Plaintiff's failure to join indispensable parties
Champion Map Corp. v. Twin Printing Co., 350 F. Supp. 1332 (E.D.N.C. 1971)	Designer of copyrighted folding map (Plaintiff) sued printer and distributor of identical map (Defendant) for copyright infringement.	Substantial similarity
Bevan v. Columbia Broadcasting Sys., 329 F. Supp. 601 (S.D.N.Y. 1971)	Authors of copyrighted play <i>Stalag 17</i> (Plaintiffs) sought injunctive and monetary relief for copyright infringement from the producers and sponsors of the television series <i>Hogan's Heroes</i> (Defendants).	Substantial similarity
Bernstein v. Adams Getschall Broadcasting Co., 176 U.S.P.Q. 286 (E.D.N.Y. 1972)	The composer, Leonard Bernstein (Plaintiff) sued two radio stations (Defendants) for copyright infringement involving over fifty-four musical compositions.	Unauthorized public performance of musical compositions
Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150 (N.D. Ill. 1972)	Manufacturer of statues (Plaintiff) sued president of company (Defendant) for copyright infringement of sculpture.	1) Validity of plaintiff's copyright. 2) <i>Infringement</i>
Roberts v. Dahl, 168 U.S.P.Q. 428 (Ill. Cir. Ct. 1971), <i>aff'd</i> , 6 Ill. App. 3d 395, 286 N.E.2d 51 (1972)	Plaintiff sought to recover damages for infringement of her common law copyright in unpublished scripts for a television series on beauty hints from the hostess, sponsor, broadcaster, public relations firm and advertising agency of the allegedly infringing television series (Defendants).	1) Access 2) Independent creation 3) Substantial similarity

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**SUMMARY JUDGMENT  
GRANTED**


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**SUMMARY JUDGMENT  
DENIED**


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Defendant's motion for summary judgment was granted. To apply this local doctrine would frustrate the congressional goal of homogenous application of the copyright laws.

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Defendant's motion was denied. Since all infringers are jointly and severally liable, the plaintiff may sue infringers as he chooses.

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Plaintiff's motion for summary judgment was granted. The maps were more than similar—they were practically identical in that only one word had been relocated, and the plaintiff's name and copyright notice had been deleted.

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Defendant's motion for a judgment notwithstanding the verdict was granted because the court concluded there was no substantial similarity between the two works except as to non-copyrightable *scenes a faire*.

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Plaintiff's motion for summary judgment was granted. Absent an answer from the defendant, the court may assume that the charges are undisputed and hence grant summary judgment as there is no issue as to a material fact.

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Defendant's motion for summary judgment was denied. "[T]he test for infringement of a copyright is of necessity so vague . . . that many variables must be considered which often renders summary judgment inappropriate." 347 F. Supp. at 1156.

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Defendant's motion for summary judgment was granted. On the basis of the pleadings, depositions and affidavits, the court concluded that the defendants did not have access to the plaintiff's scripts and had independently created their program without the benefit of the plaintiff's scripts or ideas. Moreover, any similarities related to common expressions in the public domain or the defendant's own prior publications.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
Goodson-Todman Enters., v. Kellogg Co., 358 F. Supp. 1245 (C.D. Cal. 1973), <i>rev'd</i> , 513 F.2d 913 (9th Cir. 1975)	Owner of copyright in videotaped television show (Plaintiff) sued producer of television commercial (Defendant) for copyright infringement.	Idea/expression dichotomy
Shapiro, Bernstein & Co. v. Log Cabin Club Ass'n, 365 F. Supp. 325 (N.D. W.Va. 1973)	Owner of copyright in musical compositions (Plaintiff) sued public entertainment club (Defendant) for copyright infringement.	Unauthorized public performance of copyrighted musical compositions
Charron v. Meaux, 60 F.R.D. 619 (S.D.N.Y. 1973)	Composer (Plaintiff) sued the assignees of his musical compositions (Defendant) for copyright infringement, breach of contract and rescission.	1) Ownership of copyright 2) Breach of contract 3) Rescission
Jondora Music Publishing Co. v. Melody Recordings, Inc., 362 F. Supp. 488 (D.N.J. 1973).	Music publishing companies (Plaintiffs) sued manufacturers and sellers of tape recordings (Defendants) for copyright infringement of musical compositions.	1) Copyright protection of sound recordings 2) Failure to comply with compulsory license provisions
Foreign Car Parts, Inc. of New England v. Auto World, Inc., 366 F. Supp. 977 (M.D. Pa. 1973)	Importer and distributor of car parts and accessories (Plaintiff) sued retailer of automotive merchandise (Defendant) for copyright infringement of promotional brochure.	1) Lack of copyright notice 2) Whether an implied license to use the material existed
Leeds Music, Ltd. v. Robin, 358 F. Supp. 650 (S.D. Ohio 1973)	Copyright assignees of the rock-opera <i>Jesus Christ Superstar</i> (Plaintiffs) sought to enjoin the defendants from producing a similar television program or movie.	Validity of the plaintiffs' copyright
Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 378 F. Supp. 485 (S.D.N.Y.), <i>aff'd</i> , 509 F.2d 64 (2d Cir. 1974).	Manufacturer of jeweled turtle pin (Plaintiff) sued competitor (Defendant) for copyright infringement.	Copyright infringement of jewelry design
International Luggage Registry v. Avery Prods. Corp., 184 U.S.P.Q. 66 (N.D. Cal. 1974)	Lost and found service for luggage (Plaintiff) sued competitor and manufacturer of luggage labels (Defendants) for copyright infringement.	1) Whether the luggage label was copyrightable subject matter 2) Substantial similarity
Szeszsy v. W.G.N. Continental Broadcasting Corp., 20 Ill. App. 3d 607, 315 N.E.2d 263 (1974)	Author of script for audience participation television show (Plaintiff) sued television broadcasting company (Defendant) for copyright infringement.	Independent creation

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Plaintiff's motion for summary judgment was granted. The defendant's untimely and incomplete response to the plaintiff's Request for Admissions was deemed to be an admission to all the material facts under Fed. R. Civ. P. 36.

Defendant's motion for summary judgment was denied. "Whether 'idea' of [the plaintiff's television show] or the 'expression of that idea [citation omitted]' has been copied is at least a close enough question that it should be decided by way of an evidentiary hearing on the merits and not by way of summary judgment." 513 F.2d at 914.

Defendant's motion for summary judgment was denied. There were at least genuine issues of material fact as to whether the presumption of title in the alleged employer of the plaintiff had been rebutted, and as to privity between the plaintiff and assignees.

Defendants' motion for summary judgment was denied until the completion of discovery on the issue of noncompliance with the compulsory license provisions.

Plaintiff's motion for summary judgment was granted. Even if the plaintiff's distribution of promotional material from the brochure constituted a dedication to the public domain, the remainder of the brochure was still protected.

Summary judgment and permanent injunction granted in favor of the plaintiffs. Summary judgment is proper where, as here, "a trial would serve no useful purpose." 358 F. Supp. at 653.

Court granted summary judgment to the defendant even though the defendant had not moved for summary judgment.

Plaintiff's motion for summary judgment was denied. Plaintiff had failed to bring forth sufficient evidence to justify a trial on the issue of infringement.

Defendant's motion for summary judgment was granted. The copyrightable portions of the plaintiff's label bore no substantial similarity to the corresponding portions of the defendants' label.

Defendant's motion for summary judgment was denied. Since the defendant had not presented conclusive evidence of independent creation, a genuine issue of material fact had been raised for trial.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Rexnord, Inc. v. Modern Handling Sys., 397 F. Supp. 1190 (D. Del. 1974)	Manufacturer of conveyor systems and components (Plaintiff) sued competitor (Defendant) for copyright infringement of trade catalogue.	1) Abandonment of copyright 2) Substantial similarity 3) Unfair competition
Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975)	Author (Plaintiff) of a biography of Julius and Ethel Rosenberg brought a copyright infringement action against Louis Nizer, the author, and Doubleday & Co., the publisher, of <i>The Implosion Conspiracy</i> .	1) Validity of the plaintiff's copyright 2) Substantial similarity 3) Fair use
Italian Book Corp. v. Palms Sheepshead Country Club, Inc., 186 U.S.P.Q. 326 (E.D.N.Y. 1975)	Owner of copyright of four Italian songs (Plaintiff) sued country club and singer (Defendant) for unauthorized public performance of the songs.	Unauthorized public performance of musical compositions
Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir.), cert. denied, 423 U.S. 863 (1975)	Manufacturer of weight lifting machines (Plaintiff) sued competitor (Defendant) for copyright infringement of wall chart depicting sample exercises.	Substantial similarity
Fuld v. National Broadcasting Co., 390 F. Supp. 877 (S.D.N.Y. 1975)	Author of copyrighted, but unpublished script based on the life of the gangster "Bugsy" Siegel (Plaintiff) sued television network (Defendant) for copyright infringement.	Substantial similarity
Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975), cert. denied, 423 U.S. 841 (1975)	Music publishers (Plaintiff) brought a copyright infringement action claiming that the defendants manufactured and sold bootleg reproductions of copyrighted musical compositions.	Whether the defendant's recording was a "similar use" of the composition and thus permitted under § 1(e) of the 1909 Copyright Act
Frederick Fell Publishers, Inc. v. Lorayne, 422 F. Supp. 808 (S.D.N.Y. 1976)	Publisher (Plaintiff) sued author and publisher (Defendants) for breach of a non-competition agreement and copyright infringement of a book.	1) Copyright infringement 2) Breach of a non-competition agreement.
Meeropol v. Nizer, 417 F. Supp. 1201 (S.D.N.Y. 1976), aff'd in part, rev'd in part, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978)	Children of Julius and Ethel Rosenberg (Plaintiffs) sued Louis Nizer, the author, and Doubleday & Co., the publisher of <i>The Implosion Conspiracy</i> (Defendants) for the unauthorized use of their parents' letters.	Fair use

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 SUMMARY JUDGMENT  
GRANTED
 

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 SUMMARY JUDGMENT  
DENIED
 

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Cross motions on the issue of copyright infringement were denied. The court held that a question of fact existed even though it acknowledged that the extensive similarities in pictures and text (including mistakes) were not exclusively due to the similarity of the products.

Defendant's motion for summary judgment was granted since most of the allegedly infringing passages merely recounted factual and historical events, with little or no similarity in style or form of expression.

Plaintiff's motion for summary judgment was granted. Both the performer and the country club were held liable for the copyright infringement.

Plaintiff's motion for summary judgment was denied. The body positions on the two charts were necessarily similar and a lay observer could not find such a substantial similarity in expression as to constitute an appropriation of the plaintiff's work.

Defendant's motion for summary judgment was granted since the only similarities between the two works resulted from the fact that both dealt with the same subject and relied on common sources.

Plaintiff's motion for summary judgment was granted. "A taped duplicate is simply not a 'similar use' of the composition . . . but virtually indistinguishable . . ." 507 F.2d at 669-670.

Court held that there was a triable issue of fact with respect to the non-competition agreement so as to preclude a grant of summary judgment to the author.

Defendants' motion for summary judgment was denied. The plaintiffs were entitled to an opportunity to introduce evidence as to the defendant's purpose in using the verbatim letters and on the issue of damages.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
Filmvideo Releasing Corp. v. Hastings, 426 F. Supp. 690 (S.D.N.Y. 1976)	Purchaser of the motion picture negatives for <i>Hopalong Cassidy</i> (Plaintiff) sought a declaratory judgment that the underlying book was in the public domain; whereas the author's executor (Defendant) counterclaimed for an injunction to restrain the exhibition of the motion picture on television.	1) Validity of the renewal copyright in the book 2) Whether the motion picture was in the public domain 3) Substantial similarity
Reyher v. Children's Television Workshop, 387 F. Supp. 869 (S.D.N.Y. 1975), <i>aff'd</i> , 533 F.2d 87 (2d Cir. 1976), <i>cert. denied</i> , 429 U.S. 980 (1976)	Author and illustrator of children's story (Plaintiffs) sued producer of children's television show and magazine publisher (Defendants) for copyright infringement.	1) Idea/expression dichotomy 2) Substantial similarity
Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108 (2d Cir. 1977)	Author of biography (Plaintiff) sued the Book-of-the-Month Club (Defendant) for copyright infringement.	1) Statute of Limitations 2) Scope of author's release to publisher
Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978)	Author of novel <i>Jubilee</i> (Plaintiff) sued author and publisher of <i>Roots</i> (Defendants) for copyright infringement.	Substantial similarity
Ferguson v. National Broadcasting Co., 584 F.2d 111 (5th Cir. 1978)	Composer (Plaintiff) sued television producer (Defendant) for copyright infringement of unpublished musical composition.	Access
Murray v. Gelderman, 566 F.2d 1307 (5th Cir. 1978)	Author of book which listed menus of Famous New Orleans restaurants (Plaintiff) sued employer (Defendant) who originated the idea and covered expenses and publication costs to determine copyright ownership.	Whether the menu book was a "work made for hire" within the meaning of § 26 of the 1909 Copyright Act
Data Cash Sys. v. J S & A Group, Inc., 480 F. Supp. 1063 (N.D. Ill. 1979), <i>aff'd</i> , 628 F.2d 1038 (7th Cir. 1980)	Manufacturer of a computer chess game (Plaintiff) sued competitor (Defendant) for copyright infringement of object code program and for unfair competition.	1) Whether the object code program was protected by copyright law 2) Unfair competition



SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

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Defendant's motion for summary judgment on the counterclaim was denied on the ground that neither side submitted evidence which would allow a determination as to similarity as a matter of law.

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The Second Circuit affirmed the dismissal of the complaint on the ground that any similarity between the two works related to non-copyrightable matters such as themes, ideas and *scenes a faire*.

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Defendant's motion for summary judgment was granted on the ground that the claim was barred by the three year statute of limitations under § 115(b) of the 1909 Copyright Act.

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Defendant's motion for summary judgment was granted because similarities existed only as to uncopyrightable subject matter such as historical facts, material traceable to common sources, clichés, metaphors and *scenes a faire*.

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Defendant's motion for summary judgment was granted. The plaintiff was not entitled to recover absent a showing of access, or that the two works were so strikingly similar as to preclude the possibility of independent creation especially where, as here, the work had precursors in the public domain.

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Defendant's motion to dismiss was treated as a motion for summary judgment and was granted on the ground that there was an employment relationship which rendered the menu book a "work made for hire."

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Defendant's motion for summary judgment was granted. Since the plaintiff's object code could not be seen or read by human beings, it was not a "copy" protected by copyright law.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
Frankel v. Stein & Day, Inc., 470 F. Supp. 209 (S.D.N.Y. 1979), <i>aff'd</i> , 646 F.2d 560 (2d Cir. 1980)	Author of book (Plaintiff) sued publisher (Defendant) for breach of publishing contract and copyright infringement.	<ol style="list-style-type: none"> <li>1) Failure of the publisher to promote the book</li> <li>2) Failure of the publisher to pay author's share from the sale of paperback rights</li> <li>3) Failure of the author to submit a timely manuscript</li> <li>4) Jurisdiction over the copyright infringement claim</li> </ol>
Chess Music, Inc. v. Tadych, 467 F. Supp. 819 (E.D. Wis. 1979)	Music Publisher (Plaintiff) sought damages from owner of lounge (Defendant) for unauthorized performance of four compositions and injunction against further infringing performances.	Unauthorized public performance of musical compositions
Gee v. Columbia Broadcasting Sys., 471 F. Supp. 600 (E.D. Pa.), <i>aff'd</i> , 612 F.2d 572 (3d Cir. 1979)	Son and estate of recording artist's widower (Plaintiffs) sued record company (Defendant) for copyright infringement, breach of contract, misappropriation and unfair competition.	<ol style="list-style-type: none"> <li>1) Copyright infringement</li> <li>2) Breach of contract</li> <li>3) Misappropriation</li> <li>4) Unfair competition</li> </ol>
Musto v. Meyer, 434 F. Supp. 32 (S.D.N.Y. 1977), <i>aff'd</i> , 598 F.2d 609 (2d Cir. 1979)	Author of article published in medical journal (Plaintiff) brought a copyright infringement action alleging that a substantial portion of the defendant's book, <i>The Seven Per Cent Solution</i> , dealing with Sherlock Holmes' drug addiction was copied from his article.	<ol style="list-style-type: none"> <li>1) Idea/expression dichotomy</li> <li>2) Substantial similarity</li> </ol>
1980's		
O'Neill v. Dell Publishing Co., 630 F.2d 685 (1st Cir. 1980)	Author of unpublished manuscript (Plaintiff) sued publisher of novel (Defendant) claiming a violation of his common law copyright.	<ol style="list-style-type: none"> <li>1) Idea/expression dichotomy</li> <li>2) Substantial similarity</li> </ol>
Durham Indus., v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980)	Toy manufacturer (Plaintiff) sought a declaratory judgment that in manufacturing a line of toys and dolls it had not violated any legal rights of its competitor (Defendant); whereas the defendant counterclaimed for copyright infringement and unfair competition.	<ol style="list-style-type: none"> <li>1) Degree of originality in defendant's dolls protected by copyright</li> <li>2) Substantial similarity</li> <li>3) Unfair competition</li> </ol>

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 SUMMARY JUDGMENT  
 GRANTED
 

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The publisher's failure to pay the author's share from the sale of the paperback rights constituted a breach of contract which resulted in a reversion of the rights to the author and therefore the plaintiff's motion for summary judgment on the question of the court's jurisdiction over the copyright infringement claim was granted.

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 SUMMARY JUDGMENT  
 DENIED
 

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Questions of fact were raised as to the publisher's failure to promote the book in accordance with the customary professional standards so as to preclude the defendant's motion for summary judgment on that issue.

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Plaintiff's motion for summary judgment was granted. Since the defendant failed to respond to the plaintiff's Request for Admissions and did not file any opposing affidavits, no genuine issue as to any material fact was raised.

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Defendant's motion for summary judgment was granted on all counts due to the plaintiff's failure to allege ownership of the statutory copyright, identify the songs, or specify the means by which the copyrights were infringed.

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Defendant's motion to dismiss was treated as one for summary judgment and was granted on the ground that the copying involved only an "idea" and not the "expression of an idea" and therefore was not actionable under the copyright laws.

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 1980's
 

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Defendant's motion for summary judgment was granted. A comparison of the two novels convinced the court that "an ordinary reasonable person would find no similarity of expression and only a remote semblance of ideas." 630 F.2d at 690.

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Plaintiff's motion for summary judgment dismissing the defendant's counterclaim was granted on the ground that the only similarities between the toys pertained to the non-copyrightable mechanical, rather than artistic aspects. Keeping in mind the fact that all dolls attempting to express the same idea will of necessity display at least some similarity, the court concluded that the "total effect of the image conveyed to an ordinary observer by the accused's dolls is quite distinct." 630 F.2d at 1022.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), <i>cert. denied</i> , 449 U.S. 841 (1980)	Author of an historical account of the destruction of the Hindenburg (Plaintiff) sued author and motion picture producer of Hindenburg disaster movie (Defendant) for copyright infringement and unfair competition.	1) Substantial similarity 3) Unfair competition
Knickerbocker Toy Co. v. Genie Toys, Inc., 491 F. Supp. 526 (E.D. Mo. 1980)	Manufacturer of copyrighted stuffed "Casey Jones" doll (Plaintiff) brought an infringement action against the manufacturer of an allegedly similar doll (Defendant).	Substantial similarity
Decorative Aides Corp. v. Staple Sewing Aides Corp., 497 F. Supp. 154 (S.D.N.Y. 1980), <i>aff'd</i> , 657 F.2d 262 (2d Cir. 1981)	Manufacturer of drapery header for home sewers (Plaintiff) sued competitor (Defendant) for copyright infringement of illustrated instruction sheet.	Substantial similarity
Broadcast Music, Inc. v. Moor-Law, Inc., 484 F. Supp. 357 (D. Del. 1980)	Music licensing organization (Plaintiff) sued owner of restaurant/night-club (Defendant) for copyright infringement of fourteen musical compositions.	1) Unauthorized public performance of musical compositions 2) Whether the plaintiff's licensing practices constituted an unreasonable restraint on trade
Testa v. Janssen, 492 F. Supp. 198 (W.D. Pa. 1980)	Assignees of composer (Plaintiffs) brought a copyright infringement action against the co-authors, publisher, recording artists and assignees (Defendants) of an allegedly infringing song.	1) Validity of plaintiff's copyright 2) Access 3) Substantial similarity
McMahon v. Prentice Hall, Inc., 486 F. Supp. 1296 (E.D. Mo. 1980)	Author of psychology textbook (Plaintiff) brought copyright infringement action against publisher (Defendant) of an allegedly similar textbook.	Substantial similarity
Hoste v. Radio Corp. of Am., 654 F.2d 11 (6th Cir. 1981)	Composer of unpublished musical composition (Plaintiff) sued record company and Elvis Presley's estate (Defendants) for copyright infringement.	1) Laches 2) Recovery of damages for period prior to filing complaint
Dan-Dee Imports, Inc. v. Well-Made Toy Mfg. Corp., 524 F. Supp. 615 (E.D.N.Y. 1981)	Assignee of copyright for bunny clip-on doll (Plaintiff) brought a copyright infringement action against the manufacturer (Defendant) of an allegedly infringing doll.	Validity of assignment of copyright to plaintiff

SUMMARY JUDGMENT  
GRANTEDSUMMARY JUDGMENT  
DENIED

Defendant's motion for summary judgment was granted because all the alleged similarities related to the non-copyrightable elements of the plaintiff's work, such as the basic plot or theme, historical facts, and *scenes a faire*.

Plaintiff's motion for summary judgment was granted on the ground that a side-by-side comparison of the two dolls established that the similarity was so striking that a directed verdict was appropriate.

Defendant's motion for summary judgment was granted since the similarity in the instruction sheets was dictated by functional aspects, in that the instructions could only be expressed in limited ways.

Plaintiff's motion for summary judgment was denied. Although there was no factual dispute as to whether the unauthorized performances took place, the plaintiff's licensing arrangements as applied to the defendant should be analyzed under the rule of reason.

Defendant's motion for summary judgment was denied. The court concluded that it could not hold as a matter of law that the two songs were not strikingly similar, and therefore there was a triable issue of fact.

Defendant's motion for summary judgment was granted. The court applied the "ordinary observer" test and concluded that the two books were not substantially similar.

Defendant's motion for summary judgment on the basis of laches was precluded by material issues of fact as to whether the delay in bringing the suit was unreasonable and whether the defendants had been prejudiced by the delay.

Defendant's motion for summary judgment was denied on the ground that a genuine issue of material fact was raised as to the validity of the transfer of copyright.

CASE & CITATION	PARTIES & PROPERTY	ISSUES
Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 57 (S.D.N.Y. 1981)	Composer and publisher of musical composition (Plaintiff) sued composer and publisher (Defendants) for copyright infringement of individual works and compilations.	Confirmation of arbitration award
Quinto v. Legal Times of Wash., Inc., 506 F. Supp. 554 (D.D.C. 1981)	Author of article (Plaintiff) sued newspaper publisher (Defendant) for copyright infringement.	Whether the publisher innocently reprinted the plaintiff's article
Burroughs v. Metro-Goldwyn-Mayer, Inc., 519 F. Supp. 388 (S.D.N.Y. 1981), <i>aff'd</i> , 683 F.2d 610 (2d Cir. 1982)	Heirs of the author of <i>Tarzan of the Apes</i> (Plaintiffs) sued the producers of the 1981 film version (Defendants) for copyright infringement.	1) Termination of license 2) Compliance with license agreement
Jason v. Fonda, 526 F. Supp. 774 (C.D. Cal. 1981), <i>aff'd</i> , 698 F.2d 966 (9th Cir. 1982)	Author of book (Plaintiff) sued Jane Fonda and the producers and broadcasters of the motion picture <i>Coming Home</i> (Defendant) for copyright infringement, misappropriation, unfair competition, and breach of an implied contract.	1) Access 2) Substantial similarity
Associated Film Distribution Corp. v. Thornburgh, 520 F. Supp. 971 (E.D. Pa. 1981), <i>rev'd</i> , 683 F.2d 808 (3d Cir. 1982)	Motion picture producers and distributors (Plaintiffs) sued the Governor of Pennsylvania and motion picture exhibitors (Defendants).	1) Constitutionality of Pennsylvania's motion picture statute 2) Preemption by Copyright Act
Allen v. Susskind Hall of Fame Corp., 1982 COPYRIGHT L. DEC. (CCH) ¶ 25,471 (S.D.N.Y. 1982)	Author of biography of Casey Stengel (Plaintiff) sued the authors and television program which used monologues recanting incidents of Stengel's life (Defendants) for copyright infringement.	Substantial similarity
Davis v. United Artists, Inc., 547 F. Supp. 722 (S.D.N.Y. 1982)	Author of novel about the Vietnam War (Plaintiff) sued the producer of the motion picture <i>Coming Home</i> (Defendant) for copyright infringement.	Substantial similarity
Giangrasso v. Columbia Broadcasting Sys., 1982 COPYRIGHT L. DEC. (CCH) ¶ 25,386 (E.D.N.Y. 1982)	Authors of television script (Plaintiffs) sued the producers of the television series <i>WKRP Cincinnati</i> (Defendants) for copyright infringement and unfair competition.	Substantial similarity

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 SUMMARY JUDGMENT  
GRANTED
 

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Plaintiff's motion for summary judgment was granted with regard to the individual works, but denied as to the compilations on the ground that an arbitrator's findings will be upheld as long as they are rational and there is no "manifest disregard of the law." 534 F. Supp. at 67.

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Plaintiff's motion for summary judgment was granted because even if the parties gave different versions of the facts, those differences would not be material to the outcome of the litigation.

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Defendant's motion to dismiss the complaint was granted on the ground that the defendant's 1981 film complied with the terms of a 1931 agreement which licensed the movie producer to create an original story using the Tarzan character.

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Defendant's motion for summary judgment was granted on the grounds that 1) evidence showing no more than a "bare possibility" of access to the plaintiff's book was insufficient to create a genuine issue of material fact, and 2) even assuming access, there was no substantial similarity between the two works.

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Plaintiff's motion for summary judgment was denied since the statute on its face was not unconstitutional, nor a threat to the copyright laws.

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Defendant's motion for summary judgment was denied on the ground that genuine issues of material fact were raised as to the source of the quotations.

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*Defendant's motion for summary judgment was granted because the isolated similarities were strained, insignificant and the necessary consequences that flowed from a common theme.*

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Defendant's motion for summary judgment was granted because the only similarities related to non-copyrightable ideas, characters and *scenes a faire*. "[C]omparison of the two works reveals that their similarity exists only at a level of abstractions too basic to permit any inference that defendant's wrongfully appropriated any 'expression' of plaintiffs' ideas. Furthermore, plaintiffs' characters are too undeveloped to permit protection . . ." *Id.* at 17,235.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
Gero v. Seven-Up Co., 535 F. Supp. 212 (E.D.N.Y.), <i>aff'd</i> , 714 F.2d 113 (2d Cir. 1982)	Artist (Plaintiff) sued soft drink bottler, advertising agency and others (Defendants) claiming their television commercial infringed his copyrighted artwork.	Substantial similarity
Midway Mfg. Co. v. Bandai-America, Inc., 546 F. Supp. 125 (D.N.J. 1982)	Manufacturer and seller of video games (Plaintiffs) sued importers of video games from Japan (Defendants) for copyright and trademark infringement.	1) Access 2) Substantial similarity 3) Trademark infringement.
Schuchart & Assocs., Professional Eng'rs, Inc. v. Solo Serve Corp., 540 F. Supp. 928 (W.D. Tex. 1982)	Architects and engineers (Plaintiffs) sued shopping center developers and others (Defendants) for copyright infringement of architectural plans.	1) Conspiracy to infringe 2) Unfair competition 3) Unjust enrichment
Knickerbocker Toy Co. v. Winterbrook Corp., 1982 Copyright L. Dec. (CCH) ¶ 25,525 (D.N.H. 1982)	Toy manufacturer (Plaintiff) sued employment project of a non-profit community action agency (Defendant) for copyright infringement of Raggedy Ann and Andy dolls.	1) Validity of plaintiff's copyright 2) Lack of originality in plaintiff's doll
Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983)	Author of book (Plaintiff) sued teacher (Defendant) who copied the plaintiff's material for non-profit educational purposes.	Fair use
Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983)	Producers of the motion picture <i>Star Wars</i> (Plaintiffs) sued the producers of the motion picture and television series <i>Battlestar: Galactica</i> (Defendants) for copyright infringement.	1) Idea/expression dichotomy 2) Substantial similarity
Norris Indus. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983)	Holder of copyright on wire-spoked wheel covers for automobiles (Plaintiff) brought a suit against a competitor (Defendant) alleging copyright and patent infringement, in which the Register of copyrights joined as a defendant to contest registrability.	1) Whether the wire wheel cover was a useful article 2) Whether there were separable works of arts entitled to copyright protection



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 SUMMARY JUDGMENT  
GRANTED
 

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Defendant's motion for summary judgment was granted because the plaintiff had failed to produce reliable evidence of the existence of the allegedly infringing commercial on which to base a comparison.

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 SUMMARY JUDGMENT  
DENIED
 

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Plaintiffs' motion for summary judgment was granted on the trademark issue only as to those names which were considered distinctive marks.

Court denied plaintiff's motion for summary judgment, holding that where substantial similarity is in issue, a court should grant summary judgment only if it would be required at trial to direct a verdict for the moving party.

Defendants' motion for summary judgment was granted because there was no genuine issue of material fact as to any conspiracy to infringe.

Defendant's motion for summary judgment was denied because factual disputes exist as to the plaintiff's copyright application, originality and the scope of copyright protection extended to the characters from the original book.

Plaintiff's motion for summary judgment was granted. Since the defendant's work was quantitatively and qualitatively a substantial copy of the plaintiff's work, was used for the same purpose, and did not credit the plaintiff, neither the fact that it was used for non-profit educational purposes nor that the plaintiff suffered no pecuniary damage supports a finding of fair use.

After viewing both films, the Ninth Circuit concluded that the trial court had improperly granted the defendant's motion for summary judgment because the question of whether the *Star Wars* idea or expression was copied was close enough that reasonable minds could differ on those key factual issues and should be resolved by way of a trial.

A partial summary judgment was granted in favor of both defendants on the ground that the wire wheel covers, as useful articles containing no physically or conceptually separable works of art, were not entitled to copyright protection.

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CASE & CITATION	PARTIES & PROPERTY	ISSUES
See v. Durang, 711 F.2d 141 (9th Cir. 1983)	Author of play (Plaintiff) brought copyright infringement action against playwright who wrote an allegedly similar play.	Substantial similarity
Warner Bros. v. American Broadcasting Cos., 1983 COPYRIGHT L. DEC. (CCH) ¶ 25,584 (2d Cir. 1983)	Owners of copyrights in various works embodying the character of Superman (Plaintiff) sued the producers of the television series <i>the Greatest American Hero</i> (Defendants) for copyright infringement, unfair competition and trademark dilution.	1) Substantial similarity 2) Unfair competition 3) Trademark dilution

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**SUMMARY JUDGMENT  
GRANTED**

Defendant's motion for summary judgment was granted on the ground that the only similarities related to non-copyrightable ideas and *scenes a faire* and that "no reasonable trier of fact could find the two plays to be substantially similar in their form of expressing common ideas." 711 F.2d at 143.

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**SUMMARY JUDGMENT  
DENIED**

Defendants were entitled to summary judgment on all three claims on the ground that reasonable observers could not conclude that the characters were substantially similar even though the principal character of the defendant's television series possessed some of the same superhuman powers popularized by Superman and shared by other superheroes.

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