

2005 WL 5632056

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United States District Court,
S.D. Florida.

Araron LASSIN, Moise Lassin,
and Marlon Barnett, Plaintiffs,

v.

ISLAND DEF JAM MUSIC GROUP, Roc-A Fella
Records, Universal Music and Video Distribution,
Inc., Malik Cox p/k/a “Memphis Bleek,” and
Maurice Young p/k/a “Trick Daddy,” Defendants.

No. 04-22320-CIV.

|
Aug. 9, 2005.

Attorneys and Law Firms

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ORDER GRANTING FINAL SUMMARY JUDGMENT

PAUL C. HUCK, United States District Judge.


*1 THIS MATTER is before the Court upon Defendants' Motion for Summary Judgment [DE# 68], filed June 21, 2005. In this case, the Plaintiffs claim that the Defendants' rap song “Round Here” infringes on their rap song “Around Here.” Because there is no substantial similarity between the protectible elements of the Plaintiffs' composition, and because the evidence does not establish the Defendants had access to the Plaintiffs' composition before their chorus was written, Defendants are entitled to final summary judgment.

I. PROCEDURAL AND FACTUAL BACKGROUND

The Plaintiffs are members of a rap group called the Jack Boyz, based in Fort Lauderdale, Florida. They acquired

the music to their song “Around Here” from Anthony Washington, then wrote the lyrics and recorded the song in November of 2001. They filed an application with the United States Copyright Office to obtain a sound recording registration for the composition on November 19, 2001, but the song was never commercially released on a record album, made into a video, published, or aired on any radio station licensed by the FCC. The Plaintiffs performed the song live, however, at several clubs in South Florida during the latter part of 2001 and in 2002.

Defendant Malik Cox, a resident of New York, is a gold-selling recording artist, performer, and songwriter. Cox first met Defendant Maurice Young in 2001 at Circle House Studio, at which time they spoke briefly about the possibility of collaborating together on a song. Eventually, Cox, Young, and non-parties Justin Smith and C. Harris co-authored a rap song titled “Round Here.” The process began in June of 2002 when Smith wrote the music. Cox wrote the lyrics to the chorus and the first verse of “Round Here” in the recording studio on June 16, 2002, when he heard, for the first time, the music written by Smith. The record company then sent the partially completed composition to Young for the second verse to be added. Young wrote his verse independently, at his home in Florida, without consulting Cox or Smith. The composition was then sent to C. Harris, who wrote the third verse. The song was released as a single in September or October of 2003 and appears on Cox's album “M.A.D.E.,” which was commercially released by Defendant Island Def Jam Music Group in December 2003.


Young was present in two different Fort Lauderdale clubs on five occasions when the Plaintiffs performed “Around Here.” Between March of 2001 and February of 2002, Cox (pka “Memphis Bleek”) occasionally came to South Florida to visit his brother and, according to Young's (pka “Trick Daddy”) testimony, Cox met with Young on three occasions sometime between 2001 and 2003. Plaintiffs contend the timing of the five live performances of “Around Here” in Young's presence, coupled with Young's meetings with Cox, permits the inference that Young discussed the Plaintiffs' composition with Cox before Cox wrote the lyrics for the chorus to “Round Here” on June 16, 2002. The Plaintiffs have initiated this litigation pursuant to  17 U.S.C. § 106, claiming the words “round here” and the structure in the Defendants' chorus violated their copyright to “Around Here.”¹

*2 The Defendants have moved for summary judgment, arguing (1) there is no substantial similarity between the

Defendants' chorus and the protectible elements of "Around Here;" (2) the Plaintiffs cannot establish that Cox had access to "Around Here;" and (3) evidence that Cox wrote the chorus independent of the Plaintiffs' composition rebuts any inference of copying. In opposition, the Plaintiffs argue (1) there is substantial similarity between the compositions because the elements that are copied are "original" enough to qualify for copyright protection and there are no other compositions that are as similar to "Around Here" as is "Round Here"; (2) there is evidence from which a reasonable jury could infer that Cox had access to Plaintiffs' composition before he composed the Defendants' chorus; and (3) the evidence does not establish the "independent creation" defense to copyright infringement. A hearing was held on the motion and it is now ripe for decision.

II. LEGAL ANALYSIS



A. Standard of Review









A summary judgment is proper only if the record before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The purpose of summary judgment is "to pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial."  *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56 advisory committee's note). In *Celotex Corp. v. Catrett* the Court held that summary judgment should be entered only against



a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.



 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

To prevail, the moving party must do one of two things: (1) show that the non-moving party has no evidence to support


its case, or (2) present "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial."  *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir.1991) (en banc);  *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1170 (11th Cir.1995). In making this determination, the court should consider all of the evidence in the light most favorable to the nonmoving party, with all reasonable inferences drawn in favor of that party. *Dibrell Bros. Intern., S.A. v. Banco Nazionale Del Lavoro*, 38 F.3d 1571, 1578 (11th Cir.1994).


*3 If the movant successfully discharges this initial burden, the burden shifts to the non-movant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the non-movant's case.  *Young*, 59 F.3d at 1170. The nonmoving party must do more than rely solely on its pleadings, and simply show that there is some metaphysical doubt as to the material facts.  *Matsushita*, 475 U.S. at 586-87. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.  *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Ritch v. Robinson-Humphrey Co.*, 142 F.3d 1391, 1393 (11th Cir.1998);  *EEOC v. Amego*, 110 F.3d 135, 143 (1st Cir.1997);  *Thornton v. E.I. Du Pont De Nemours and Co., Inc.*, 22 F.3d 284, 288 (11th Cir.1994). An issue is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.  *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir.1997). An issue is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case.  *Anderson*, 477 U.S. at 248;  *Allen*, 121 F.3d at 646.

A mere "scintilla" of evidence in favor of the nonmovant, or evidence that is merely colorable or not significantly probative is not enough to meet this burden. *Anderson*, 47 U.S. at 252. See also *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir.1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment). Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a general issue of material fact, then the court should refuse to grant summary judgment."   *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir.1989).

Under these standards, courts have “regularly granted summary judgment in copyright cases where it is clear that the plaintiff cannot make out the elements of the claim” of copyright infringement.  *Siskind v. Newton-John*, 1987 WL 11701 at *4 (S.D.N.Y. May 22, 1987). The Second Circuit has specifically approved the use of summary judgment in copyright cases, noting that the remedy “signal[s] 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.”  *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.1980).

B. Standards for Establishing Copyright Infringement






To prevail on an infringement claim, a plaintiff must establish (1) a valid copyright in the composition, and (2) that the defendant has copied protectible elements of the plaintiffs composition. See  *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). Defendants do not dispute Plaintiffs' copyright in “Around Here,” but they challenge the Plaintiffs' ability to establish actionable copying as a matter of law.




*4 To establish a claim of copyright infringement, the Plaintiffs must introduce evidence (1) that Cox actually copied Plaintiffs' chorus; or (2) that Cox had access to “Around Here” prior to writing the chorus to “Round Here” and substantial similarities exist between the two choruses such that an average lay observer would recognize Cox's composition as having been appropriated from the Plaintiffs' composition; or (3) that the disputed works are so “strikingly similar” that there is no possible explanation for the alleged similarities other than copying. See *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir.1986). “If the two works are so strikingly similar as to preclude the possibility of independent creation, ‘copying’ may be proved without a showing of access.”  *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir.1978). There is no evidence Cox actually copied Plaintiffs' chorus, so the Plaintiffs cannot establish infringement by the first method. Furthermore, after listening to and reading a transcription of both choruses, and reviewing the experts' reports, the Court concludes that Cox's composition is not strikingly similar to the Plaintiffs'. The Plaintiffs therefore cannot establish infringement by the third method. The dispositive issues on Defendants' motion for summary judgment are narrowed to whether the Plaintiffs' can establish that the two choruses are substantially similar and,

if so, whether Cox had access to the Plaintiffs' chorus before he wrote his chorus lyrics.

C. Substantial Similarity








Defendants argue the Plaintiffs cannot establish that substantial similarities exist between protectible elements of the two choruses at issue. A court's determination of the protectibility of musical expression is frequently informed by expert testimony. *Walker*, 784 F.2d at 51. The opinion of the Plaintiffs' expert, Kynch O'Kaine, and the Defendants' expert, Dr. Lawrence Ferrara, have therefore been considered. Dr. Ferrara details the differences in the lyrics of the verses and the rhythm, harmony and overall structure of “Around Here.” The Plaintiffs are not claiming infringement of the verses, rhythm, harmony or general structure of their song. They conceded at oral argument that the infringement claim only involves the Defendants' words “round here” in the chorus and the structure of the chorus. That structure is described by the Plaintiffs' expert as a hook (*i.e.* “around here” or “round here”) repeated, then an improvisation by someone, followed by the hook repeated again.

The question of substantial similarity can be decided as a matter of law on a motion for summary judgment either where “the similarity concerns only noncopyrightable elements of a plaintiff[s] work, or when no reasonable trier of fact could find the works substantially similar.”  *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.1986). “[C]opyright protection may extend only to those components of a work that are original to the author.”  *Feist*, 499 U.S. at 348;  *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir.1992). Unoriginal, common musical devices generally are not protectible under copyright law, and cannot be a basis for a finding of substantial similarity.  *Jarvis v. A & M Records*, 827 F.Supp. 282, 291 (D.N.J.1993). See also *Intersong-USA v. CBS, Inc.*, 757 F.Supp. 274, 282 (S.D.N.Y.1991) (dismissing claim where only alleged similarities were “found in many other well-known songs,” and thus constituted “unoriginal,” “unprotectible expression”). If a defendant can show that the alleged infringing features of a plaintiff's work are “standard or common,” because they were either in widespread use, or ubiquitous in other works, it is reasonable to conclude that the features are not original to the plaintiff.  *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 135 n. 2 (2d Cir.2004).

*5 In this case, the Plaintiffs cannot establish that substantial similarities exist between protectible elements of the two compositions. A court's determination of the protectibility of musical expression is frequently informed by expert testimony.  *Walker*, 784 F.2d at 51. In Mr. O'Kaine's opinion, and consistent with the Plaintiffs' concession, the only lyrical similarities between the two works are the words "around here" in the chorus of "Around Here" and the words "round here" in the chorus of "Round Here." Mr. O'Kaine concedes that the phrases "around here" and "round here" are commonplace. His admission of unoriginality is supported by the findings of the Dr. Ferrara, who identified 28 musical compositions that contain as their title lyric either the phrase "around here" or "round here," many of which use the phrase repeatedly in the chorus. Similarly, Mr. O'Kaine testified that the structure of the chorus in both compositions (a hook repeated, an improvisation after the hook, and then the hook repeated again) is commonly used in rap songs. Thus, by Mr. O'Kaine's own admission, the structure of the Plaintiffs' chorus is a common musical technique used in rap music, and is not original to the Plaintiffs. Because the lyrical phrase "around here" is a common phrase and the structure of the Plaintiffs' chorus is common in rap music, these elements are not the Plaintiffs' original creation and cannot be the basis for a claim of substantial similarity. See  *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 363, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) ("originality requires only that the author make the selection or arrangement independently (*i.e.* without copying that selection or arrangement from another work), and that it display some minimal level of creativity). See also  *Jean v. Bug Music, Inc.*, 2002 WL 287786 at *7-8 (S.D.N.Y. Feb.27, 2002) (granting summary judgment on infringement claim because the lyrics "clap your hands" was a common phrase and no reasonable jury could find that the allegedly infringed song was protectible). Once the non-copyrighable elements—the common phrase and structure of the chorus—is extracted from "Around Here," no other similarities between the two compositions remain to support the Plaintiffs' claim. Therefore, no reasonable jury could conclude that the Plaintiffs' and the Defendants' compositions are substantially similar.

D. Access

Even if the Plaintiffs could establish substantial similarity between the two songs, Plaintiffs have not established evidence sufficient to carry their burden to prove Cox had

access to copy "Around Here." A plaintiff may prove access by demonstrating either that the infringed work has been widely disseminated so that it is reasonable to infer that the defendant heard or saw the infringed work, or that it is reasonable to infer from a particular chain of events that the defendant gained access to the copyrighted work. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d at 988, 998 (2d Cir.1983). Access is defined to include a reasonable opportunity to view the copyrighted work.  *Ferguson*, 584 F.2d at 113;   *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1250(11th Cir.1999). "Reasonable opportunity" does not encompass any bare possibility that the defendant viewed the copyrighted work. "Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing plaintiffs work—not a bare possibility."   *Herzog*, 193 F.3d at 1250 (citations omitted). Rather, a plaintiff bears the burden of presenting "significant, affirmative and probative evidence to support [the] claim" of access. *Scott v. Paramount Pictures Corp.*, 449 F.Supp. 518, 520 (D.D.C.1978). Thus, proof of a "bare possibility" of access is legally "insufficient to create a genuine issue of copying."  *Jason v. Fonda*, 526 F.Supp. 774, 777 (C.D.Cal.1981). See also,  *Ferguson*, 584 F.2d at 113.

*6 Plaintiffs do not have any direct evidence that Cox had access to the their composition. It is undisputed that Cox never heard or otherwise had personal access to "Around Here" prior to writing the chorus of "Round Here." Plaintiffs admit they never met Cox before he wrote his chorus, nor did they ever provide him with a copy of their song.

The record further establishes that the Plaintiffs' song was not widely disseminated. It aired only on pirate radio stations in South Florida that were not FCC licensed and there was a limited distribution of compact discs to record industry personnel. The Plaintiffs acknowledge the song was never commercially released on a record album, never published by a music publishing company, and never played by a FCC licensed radio station.

The only method Plaintiffs have to prove access is therefore by an inference that Cox gained access to the their composition based on a chain of events. Plaintiffs point out that Young had direct access during late 2001 or during 2002 when he heard the Plaintiffs perform their song at clubs in South Florida. Since Young did not have any role in creating

the Defendants' chorus," Plaintiffs' theory is that a jury could reasonably infer from the circumstances that, after Young heard the Plaintiffs' song, Young collaborated with Cox to copy the Plaintiffs' chorus during the three meetings between Young and Cox that took place sometime between 2001 and 2003.

Cox states in his affidavit that he had no contact with Young during the time period in which he authored the chorus to "Round Here." Cox further attests that he never heard the Plaintiffs' song before he created the lyrics to his chorus, which he did in the studio on June 16, 2002, and that he independently created the lyrics on that day when he first heard the music and without any reliance on or use of the Plaintiffs' composition. Young's affidavit states that he did not meet with Cox at any time after "Around Here" was publicly performed in South Florida and before Cox authored the "Round Here" chorus. In the face of this sworn testimony, the Plaintiffs essentially argue the evidence permits the inference that Young met and actually collaborated with Cox to copy "Around Here" based on the possibility that the three meetings between Young and Cox could have occurred before Cox wrote the chorus on June 16, 2002. Plaintiffs, however, have no evidence that Young and Cox actually met before Cox wrote the chorus and, even if such dates were

established in the record, there is no evidence that Young and Cox discussed the Plaintiffs' composition. Plaintiffs simply offer their unsupported proposition that Young must have told Cox about "Around Here" before June 16, 2002. Viewing all the facts and reasonable inferences established in the record in the Plaintiffs' favor, the Court finds that the Plaintiffs' evidence is not the "significant, affirmative and probative evidence" necessary to establish access, and that any inference of an opportunity for Cox to be exposed to the Plaintiffs' composition would be mere conjecture and speculation by a jury.

III. CONCLUSION

*7 For all of the foregoing reasons, Defendants' motion for summary judgment [DE# 68] is GRANTED and the complaint is DISMISSED.

DONE in Chambers, Miami, Florida this 8th day of August, 2005.

All Citations

Not Reported in F.Supp.2d, 2005 WL 5632056

Footnotes

1 As discussed in Section C below, Plaintiffs contend the only protectible elements of their song are the words "around here" and the structure of the chorus. A structure frequently used in rap music is a "hook" that is repeated, followed by an improvisation, followed by the "hook" repeated. In this case, the "hook" is the phrase "around here." The following excerpt from each chorus demonstrates the point:

Plaintiffs' Chorus # 1

Around here around here you got to be careful when you comin **around here**, hey

Around here around here ain't nothin but killers and drug dealers **around here** c'-mon

Around here around here you got-ta be careful when you comin **around here** hey

Around here around here ain't nothing but killers and drug dealers **around here**.

Defendants' Chorus # 1

round here yeah round here yeah We rid-in clean on them things **round here yeah**

round here yeah round here yeah We blow-in dro get-tin low **round here yeah**

round here yeah round here yeah we rid-in clean on them things **round here yeah**

round here round here we blow-in dro get-tin low round **here yeah**

See, Lawrence Ferrara Report at Exhibits A and B (emphasis added).

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