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access

substantial similarity

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100 3 29

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access

substantial similarity

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<sup>1</sup>	81	3063			(1)
(2)		99	2019		
		92	5807	97	3914
	809				97
<sup>2</sup>		v.s.	237	1999.08	
			54	67-68	1998.04
	126-127			1991.11	



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7

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II 401-402

2000.12

2009.09 7



5 actual  
viewing knowledge  
6

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<sup>5</sup> Schwarz v. Universal Pictures Co., 85 F. Supp. 270(S.D.Cal.1945).

<sup>6</sup> Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d at 532 (stating that “direct evidence of copying is uncommon” so plaintiff may prove infringement “indirectly or inferentially”)



Evidence	Burden of Persuasion	Burden of Producing
		7
		8
1		
		A

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<sup>7</sup> See Miguel A. Mendez, Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence, U.S.F.L.Rev.38, 2003, at 139,142.

<sup>8</sup>

22      241   2005.06  
69      196   2009.03



a genuine issue of material fact

A a

reasonable jury, crediting and weighting the evidence the plaintiff produced,

could find A standard of proof

25%

judgment as a matter of law

trial

summary judgment

plaintiff's case

directed verdict

9

2

prosecution's case in chief

defendant's case in

chief

probable cause

prima facie case

probable cause

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9

230-231



directed verdict of acquittal <sup>10</sup>

Beyond a Reasonable Doubt Evidence	Clear and Convincing Preponderance of Evidence
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11

171

90.28<sup>12</sup>

90 95 <sup>13</sup>

2

<sup>10</sup>

133 27 2006.06

100-101

2003.04

<sup>11</sup>

678-679

2008.09

<sup>12</sup>

C.M.A. McCauliff, Burden of Proof: Degrees of Belief, Quanta of Evidence, or Constitution Guarantees?, Vand. L. Rev. 35, at 1293, 1325-1326, 1328-1329, 1332.

8 202

<sup>13</sup>

10 31



					A
			14		171
50 <sup>15</sup>					
3					
			16		
17				18	171
74.99 <sup>19</sup>					
	70	80			
			20		
<hr/>					
<sup>14</sup>		11	679		
<sup>15</sup>	C.M.A. McCauliff, supra note 12, at 1293, 1325-1326, 1328-1329, 1332.				
	8	202			
<sup>16</sup>		11	679		
<sup>17</sup>	Kenneth S. Broun, McCormick on Evidence, 2006, at 570.				8
	202				
<sup>18</sup>		10	30		
<sup>19</sup>	C.M.A. McCauliff, supra note 12, at 1293, 1325-1326, 1328-1329, 1332.				
	8	202			
<sup>20</sup>		10	30		





Brown Simpson  
O. J. Simpson  
Ron Goldman  
Simpson  
Nicole  
21  
*Old Chief v. United States*

22

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<sup>21</sup> 8 199 200

<sup>22</sup> *Old Chief v. United States*, 519 U.S. 172 (1997) (stating that “The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged beyond a reasonable doubt.”).



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<sup>23</sup> 8 249

<sup>24</sup> Paul Goldstein, *GOLDSTEIN ON COPYRIGHT(II)*, Wolters Kluwer Law & Business, Third Edition, 2010, at 9:9.

<sup>25</sup> *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, supra note 6.



26

27

viewing

knowledge

actual

Nimmer

Nimmer

Nimmer

28

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<sup>26</sup> William F. Patry, *Patry on Copyright*(3), Thomson West, 2007, at 9-47 9-49 9-50-9-51.

<sup>27</sup> *Schwarz v. Universal Pictures Co.*, *supra* note 5.

<sup>28</sup> Melville B. Nimmer & David Nimmer, *NIMMER ON COPYRIGHT*(4), LexisNexis, 2005, at 13:16.



Nimmer

Nimmer

Patry

29

Nimmer

bare possibility

speculation

conjecture <sup>30</sup>

Nimmer

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*Spiegelman v. Reprise Records*

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Haifa

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<sup>29</sup> William F. Patry, *supra* note 26, at 9-50 9-51.

<sup>30</sup> *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978) (stating that “speculations and inferences as to access are insufficient” to survive a motion for summary judgment).

<sup>31</sup> Melville B. Nimmer & David Nimmer, *supra* note 28, at 13:20-13:21.

<sup>32</sup> *Spiegelman v. Reprise Records*, 35 U.S.P.Q.2d 1732, 1733 (S.D.N.Y. 1995).

<sup>33</sup>

500

*See* *McRae v. Smith*, 968

F. Supp. 559,562,565 (D. Colo. 1997).



2                      *Columbia Pictures Corp. v. Krasna*                      34

Goldstein

speculative proofs

Goldstein

35

1                      *Higgins v. Woroner Prods., Inc.*                      36

2                      *Meta-Film Assocs., Inc. v. MCA, Inc.*                      37

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<sup>34</sup> *Columbia Pictures Corp. v. Krasna*, 65 N.Y.S.2d 67 (Sup. Ct. N.Y. County 1946).

<sup>35</sup> Paul Goldstein, *supra* note 24, at 9:10.

<sup>36</sup> *Higgins v. Woroner Prods., Inc.*, 161 U.S.P.Q. 384 (S.D. Fla. 1969).

<sup>37</sup> *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1359(C.D. Cal.1984).



3                      *Jorgensen v. Epic/Sony Records*                      38

unsolicited work

Patry

the trier of fact

significant

affirmative

probative

speculation

conjecture

39

regularly

40

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<sup>38</sup> *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 48, 69 U.S.P.Q.2d 1067 (2d Cir. 2003).

<sup>39</sup> *Intersong-USA v. CBS*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

<sup>40</sup> William F. Patry, *supra* note 26, at 9-55 9-56.





Nimmer

43

44

*Bouchat v. Baltimore Ravens*

45

Bouchat

1996

1998

46

47

Moag

Moag

<sup>43</sup> Melville B. Nimmer & David Nimmer, *supra* note 28, at 13:17.

<sup>44</sup> *Id.* at 13:31.

<sup>45</sup> *Bouchat v. Baltimore Ravens*, 241 F.3d 350(4th Cir. 2001).

<sup>46</sup> 1996 1998



<sup>47</sup> Bouchat







	close relationship	
	Nimmer	
	Moag	
	Moag	200
	Nimmer	48
		Bouchat
2		
		Goldstein
49		
1		
2		

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<sup>48</sup> Melville B. Nimmer & David Nimmer, *supra* note 28, at 13:19.

<sup>49</sup> Paul Goldstein, *supra* note 24, at 10:49-10:50.



*Cholvin v. B&F Music Co.* 50

2000 4 20

51

## 2 Patry

Patry

Patry

inferential access

52

Patry

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Patry

considerable commercial

success

ready availability in the marketplace 53

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<sup>50</sup> *Cholvin v. B&F Music Co.*, 253 F.2d 102,116 U.S.P.Q.491(7th Cir. 1978).

<sup>51</sup>

17000 videos  
28 , at 13:25.

Nimmer

supra note

<sup>52</sup> Patry

*See*

William F. Patry, *supra* note 26, at 9-53.

<sup>53</sup> *Id.* at 9-51.



54

Patry

MTV

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trade shows

Showroom

Patry

regularly attend

trade shows

Showroom

regularly read

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<sup>54</sup> *Id.* at 9-57 9-58.

<sup>55</sup> *Id.* at 9-58 9-59.



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Patry

		X	X		Y	Y		
Y								Y
								57

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<sup>56</sup> *Id.* at 9-62 9-63.

<sup>57</sup> *See* William F. Patry, *supra* note 26, at 9-68.

Patry

Y

58

possibility

bare possibility

reasonable

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possibility  
<sup>59</sup> 584 F.2d 111,113,200 U.S.P.Q.65(5th Cir. 1978).

bare  
*See* Ferguson v. National Board.Co.,

physical



4 Vicarious inference

Vicarious inference Patry

A.

B.

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propinquity

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*See*

Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 942(8th Cir. 1992).

*See* Robinson v. New Line Cinema Corp., 42 F. Supp. 2d 578,588 (D.MD 1999).

<sup>60</sup> *See* William F. Patry, *supra* note 26, at 9-69.

<sup>61</sup> *Id.* at 9-70 9-71.



5

Municipal Office  
fantastic possibility

62

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<sup>62</sup> *Id.* at 9-73 9-74.



## 1 *Gaste v. Kaiserman*

*Gaste v. Kaiserman* <sup>63</sup>

Pour Toi

Le Feu aux Poudres

15,000

1973

Feelings

Feelings

Pour Toi

Pour Toi

Pour Toi

Pour Toi

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<sup>63</sup> *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988).



Feelings 20

Pour Toi

20

Patry

64

**2 *ABKCO Music, Inc. v. Harrisongs Music, Ltd.***

*ABKCO Music, Inc. v. Harrisongs Music,*

*Ltd.* <sup>65</sup>

Goldstein

66

**3 *Three Boys Music Corp. v. Bolton***

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<sup>64</sup> William F. Patry, *supra* note 26, at 9-60 9-61.

<sup>65</sup> *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 221 U.S.P.Q. 490 (2d Cir. 1983).

<sup>66</sup> Paul Goldstein, *supra* note 24, at 10:50.





	<i>Three Boys Music Corp. v. Bolton</i>	67
Wonderful Thing	Michael Bolton	Love is a Three Boys Music Corp.
Thing	Isley Brothers	Love is a Wonderful 1966 Love is a
Wonderful Thing		
	1990	Love is a Wonderful Thing
		Love is a Wonderful Thing
		5 6
	Love is a Wonderful Thing	6
		20
Love is a Wonderful Thing		20
		13
		Love
is a Wonderful Thing		Love
is a Wonderful Thing		
	1990	Love is a Wonderful Thing
	Love is a Wonderful Thing	1991
CD		
	Rhythm and Blues	
		20

<sup>67</sup> Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir.2000).



Love is a Wonderful Thing

Wonderful Thing

Love is a

6

Rhythm and Blues

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68

fact

works

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<sup>68</sup> M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 446 (4th Cir. 1986) (stating that “common errors or apparently intentional minor changes are compelling evidence that the work was copied from another”).

<sup>69</sup> General Drafting Co. v. Andrews, 37 F.2d 54,56 (2d Cir.1930).

<sup>70</sup> Sub-Contractors Register, Inc. v. McGovern’s Contractors & Builders Manual,



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74,75

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Inc. 1945

270

1946

*See* Sub-Contractors Register, Inc. v. McGovern's Contractors & Builders Manual, Inc., 69 F. Supp. 507, 509, 70 U.S.P.Q.440 (S.D.N.Y. 1946).

<sup>71</sup> Huie v. National Broad. Co., 184 F. Supp. 198, 125 U.S.P.Q.226 (S.D.N.Y. 1960).

<sup>72</sup> Paul Goldstein, *supra* note 24, at 9:15-9:16.

<sup>73</sup> *Id.* at 9:16.

<sup>74</sup> *Id.* at 9:16- 9:20.

<sup>75</sup>

telling dissimilarities



## 1

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## 2

*Old Chief v. United States*

Karen Bevill

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Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.

*See* Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1316, 161 U.S.P.Q. 3(2d Cir. 1969)

<sup>76</sup> Scott v. Paramount Pictures Corp., *supra* note 30, *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

<sup>77</sup> William F. Patry, *supra* note 26, at 9-49.

<sup>78</sup> *Id.* at 9-80 9-84.

<sup>79</sup> Paul Goldstein, *supra* note 24, at 9:13; William F. Patry, *supra* note 26, at 9-55 9-56.



*Old Chief v. United States*

narrative richness

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Patry

82

Goldstein

*Selle v. Gibb* <sup>83</sup>

Selle Gibb

How Deep Is Your Love

Let It End

<sup>80</sup> Karen Bevill, COPYRIGHT INFRINGEMENT AND ACCESS: HAS THE ACCESS REQUIREMENT LOST ITS PROBATIVE VALUE ?, Rutgers Law Review, Fall 1999, at 332.

<sup>81</sup> See *In re Winship*, 397 U.S. 358, 359 (1970)(The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged.)

<sup>82</sup> William F. Patry, *Patry on Copyright*(1), Thomson West, 2007, at 3-79.

<sup>83</sup> *Selle v. Gibb* 741 F.2d 896,223 U.S.P.Q 195(7th Cir.1984).



84

85

Nimmer

86 Patry

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<sup>84</sup> Paul Goldstein, *supra* note 24, at 9:21-9:22.      *Sheets v. Twentieth Century-Fox Film Corp.*

*See* *Sheets v. Twentieth Century-Fox Film Corp.*, 33 F. Supp. 389, 46 U.S.P.Q. 120 (D.D.C. 1940).

<sup>85</sup> *See* *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 399 (S.D.N.Y. 1952)(Separate songs which are alike in every respect can be copyrighted without denial of any one's rights, for copyright does not give a monopoly of ideas, but second song must be innocently and independently composed.)

<sup>86</sup> Melville B. Nimmer & David Nimmer, *supra* note 28, at 13:32.



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Patry

<sup>87</sup> William F. Patry, *supra* note 26, at 9-55 9-56.

<sup>88</sup> *Id.* at 9-80 9-84.

<sup>89</sup>

54-55 8 1999 3

<sup>90</sup> *See* Repp v. Lloyd Webber, 132 F.3d 882, 891 (2d Cir. 1997) (identifying independent creation as an affirmative defense); Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 783 (2d Cir. 1994) (finding that once the plaintiff establishes substantial similarity, if there is no showing of independent creation, there was an inference that defendant copied the plaintiff's work).

<sup>91</sup> Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988)( determining that the burden should remain with the plaintiff)



92

procedural justice

93

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*Kalpakian*

<sup>94</sup>

*Herbert Rosenthal Jewelry Corp. v.*

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<sup>92</sup> William F. Patry, *supra* note 26, at 9-87.

<sup>93</sup> *See Overman v. Loesser*, 205 F.2d 521 (9th Cir. 1953)( strong convincing and persuasive evidence to... refute the inference of copying.)

<sup>94</sup> *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741, 170 U.S.P.Q. 557 (9th Cir. 1971).





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<sup>95</sup> striking similarity

striking

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<sup>95</sup> Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, *Columbia Law Review* 90,1990.06, at 1189-90. (discussing use of “substantial similarity” as an alternative to access)

; *Gaste v. Kaiserman*, 863 F.2d 1061, C.A.2 (N.Y.), 1988 (permitting jury to infer copying from striking similarity.)  
(stating that the need to meet the access requirement is less rigorous when striking similarities exist.)

<sup>96</sup> William F. Patry, *supra* note 26, at 9-90; *see also* *Wilkie v. Santly Bros.*, 91 F.2d 980, C.A.2 1937. (stating that even though there was no proof of access, the similarities were so striking and so unique that the judge properly found no possibility of coincidence).



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*Keene v. Wheatley* 99

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Patry

Patry

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A.

B.

C.

D.

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<sup>97</sup> Hoffman v. Pressman Toy Corp., 790 F. Supp. 498, 505 (D.N.J. 1990), aff'd, 947 F.2d 935 (3d Cir. 1991)

<sup>98</sup> Melville B. Nimmer & David Nimmer, supra note 28, at 13:26.

<sup>99</sup> Keene v. Wheatley, 14 F. Cas. 180, 195, No. 7644, 4 Phila. 157 (C.C.E.D. Pa.1861) (No. 7,644):[A] prolonged series of thoughts or statements, each one in itself simple, cannot have been expressed originally by two persons in the same words arranged in the same succession. In language of the mathematician, such a coincidence is infinitely improbable. It has, from experience, been long recognized as absolutely impossible.

<sup>100</sup> William F. Patry, supra note 26, at 9-113.



E.

101

Patry

102

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1

A.

B.

C.

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<sup>101</sup> *Id.* at 9-114.

<sup>102</sup> *Id.* at 9-115.



D.

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Patry

103

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<sup>103</sup> *Id.* at 9-92 9-96 9-97.



Conger

*Fodor v. Time Warner, Inc.*

104

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the missing evidence

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<sup>107</sup> Patry

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<sup>104</sup> *Fodor v. Time Warner, Inc.*, 19 F.3d 27 (9th Cir. 1994).

<sup>105</sup> William F. Patry, *supra* note 26, at 9-95 9-96.

<sup>106</sup> *Id.* at 9-135.

<sup>107</sup> *Bouchat v. Baltimore Ravens*

(“this count does not favor the



1

possibility

conjecture

speculation

bare

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wholesale abandonment of the access requirement in the face of a striking similarity. Rather, like the Second and Seventh Circuits, this court recognizes that striking similarity is one way to demonstrate access. Access remains an indispensable part of a copyright infringement claim.”) *see supra* note 45.

<sup>108</sup> William F. Patry, *supra* note 26, at 9-136.



narrative richness

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Patry

Nimmer Goldstein

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