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Bouchat v. Baltimore Ravens: The Fourth Circuit Adopts the Strikingly Similar Doctrine to Infer Proof of Access

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Cover Page Footnote

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CASE COMMENT

Bouchat v. Baltimore Ravens: The Fourth Circuit Adopts the “Strikingly Similar” Doctrine to Infer Proof of Access

Douglas Raymond Arntsen*

INTRODUCTION

Copyright protection has evolved considerably from its British origin as a suppressive statute divesting control of the printing presses to only a few private publishers.¹ The empowerment of these “Stationers” to establish regulations concerning the publication of written material was changed through the passage of the Statute of Anne in 1710.² This statute, termed an “anti-censorship trade regulation statute,”³ devolved copyright power, granting individual authors copyright protection to effectuate the encouragement of public learning.⁴ The encouragement of public learning was also the principle the framers of the U.S. Constitution

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¹ See Robin D. Gross & Katina Bishop, *An “Odd Bird”—A Case for Balance in Copyright Law in Cyberspace*, Electronic Frontier Foundation, at <http://www.eff.org/cafe/oddbird.htm> (last visited Mar. 25, 2003).

² Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). See also Gross & Bishop, *supra* note 1.

³ Gross & Bishop, *supra* note 1.

⁴ Statute of Anne, 1710, 8 Ann., c. 19 (covering an “act for the encouragement of learning, by vesting the copies of printed books in the author’s [sic] or purchasers of such copies . . .”). See also L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 27–29 (1991).

desired to implement in the initial creation of American copyright protection.⁵

In the United States, the “Copyright Clause” of the Constitution establishes copyright protection.⁶ Current copyright law in the United States is based on the Copyright Act of 1976.⁷ Under this act, a copyright exists in “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁸

In order to obtain copyright protection, the proposed work must be a “fixed” and “original” work.⁹ The term “original” in this context dictates that a composition must be independently created and not copied from another work.¹⁰ Since “original” is not interpreted to mean unique or novel, highly similar works can be protected so long as they are not duplicates of one another.¹¹ Fixation occurs when a work is made “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹²

Copyrightable works include “pictorial, graphic, and sculptural works.”¹³ Once such a work is granted copyright protection, the copyright in the work of authorship instantaneously converts into the property of the creator who produced the work.¹⁴

⁵ See U.S. CONST. art. I, § 8, cl. 8. The underlying rationale of the copyright regime is to enable Congress to enact laws necessary to “Promote the Progress of Science and useful Arts.” *Id.*

⁶ See *id.*

⁷ Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–803 (2000)).

⁸ 17 U.S.C. § 102(a).

⁹ See *id.*

¹⁰ See *id.*; PATTERSON & LINDBERG, *supra* note 4, at 96–97.

¹¹ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”); *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

¹² 17 U.S.C. § 101 (defining “fixed”). In essence, as soon as an original work is created, it is copyrighted.

¹³ *Id.* § 102(a).

¹⁴ See *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

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Only the author or those deriving their rights through the author can rightfully claim copyright protection, and such protection continues for the life of the author plus seventy years.¹⁵ Federal law provides protection by shielding copyright owners from the unlawful reproduction, performance, adaptation, distribution, or display of copyright protected compositions as such usage constitutes infringement.¹⁶

Although registration is not necessary for copyright protection, there are several advantages designed to persuade authors to register.¹⁷ Registration verifies the copyright entitlement in the public record, and thereafter works may be eligible for statutory damages and attorney’s fees in successful litigation.¹⁸ If registration is completed before or within five years of publication, registration will provide prima facie evidence in court of the validity of the copyright and of the facts declared in the certificate.¹⁹

Although copyright attaches upon fixation, one cannot actually file suit against an alleged infringer until the work has been registered with the U.S. Copyright Office.²⁰ If the work is registered within three months from the date of first publication, or at least prior to the date of the alleged infringement, statutory damages can be collected from the infringer.²¹ Otherwise, actual damages may be the only avenue of reparation.²² For works created on or after March 1, 1989, the © symbol is used to

¹⁵ See Sonny Bono Copyright Term Extension Act of 1998 on Duration of Subsisting Copyrights, Pub. L. No. 105-298 (1998) (codified at 17 U.S.C. §§ 108, 203, 301–304); ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 349 (2d ed. 2000).

¹⁶ See 17 U.S.C. §§ 106, 109(a); MERGES ET AL., *supra* note 15, at 432–83. A copyright owner has the following exclusive rights: (1) the right to make copies; (2) the right to prepare derivative works; (3) the right to distribute original and/or copies of the copyrighted work; and (4) the right to perform or display the copyrighted work publicly. *Id.* at 432.

¹⁷ See 17 U.S.C. § 410(c).

¹⁸ See *Selle v. Gibb*, 741 F.2d 896, 898–99 (7th Cir. 1984).

¹⁹ 17 U.S.C. § 410(c). See also U.S. Copyright Off., *Copyright Basics*, <http://www.copyright.gov/circs/circ1.html> (Sept. 2000).

²⁰ See 17 U.S.C. § 411(a).

²¹ See *id.* § 412.

²² See *id.*

designate copyright protection,²³ and allows the owner to receive damages²⁴ and avert innocent infringement defenses.²⁵ Generally, civil remedies are available to the copyright owner for any act of infringement.²⁶ The plaintiff (copyright owner) can immediately seek an injunction to halt the alleged infringement,²⁷ and, if successful, can recover his or her actual damages plus the infringer's profits or statutory damages.²⁸

To prevail in a copyright infringement action, a plaintiff must first exhibit ownership of a valid copyright.²⁹ Secondly, the plaintiff must proffer evidence that the defendant copied the plaintiff's work.³⁰ This may be demonstrated through inference or proof of substantial similarity between the original work and the alleged infringer's compilation, in combination with evidence that the defendant had access to the work.³¹ The requirements for substantial similarity and proof of access are inversely proportional.³² As the degree of similarity increases, the need to show proof of access decreases.³³ In instances of "striking similarity," access generally will be inferred absent proof to the contrary.³⁴ Conversely, if direct proof of access is established, less similarity will be needed to prove infringement.³⁵

Since direct evidence of copying is rarely available to a plaintiff in a copyright infringement action, circumstantial evidence has been granted judicial acceptance as creating a

²³ See *id.* § 401(b)(1).

²⁴ See *id.* § 504.

²⁵ See *id.* § 401(d). An innocent infringer is one who infringes on a copyright unknowingly, i.e., without notice. MERGES ET AL., *supra* note 15, at 369.

²⁶ See 17 U.S.C. § 501(b). In contrast, criminal remedies are available only for limited types of infringing acts. See *id.* § 506(a); MERGES ET AL., *supra* note 15, at 548–56.

²⁷ See 17 U.S.C. § 502(a).

²⁸ See *id.* § 504.

²⁹ See *id.* § 410(c). See also generally *id.* §§ 101–102; *Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

³⁰ See *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984).

³¹ See *id.* at 901–02.

³² See *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 714 (S.D.N.Y. 1987).

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

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presumption of copying.³⁶ To establish this presumption, a plaintiff must demonstrate that the works are substantially similar and that there was a reasonable possibility that the alleged infringer had access to the plaintiff’s work.³⁷ Access has been characterized as the opportunity to view a copyrighted work.³⁸ A plaintiff may prove that there was a reasonable possibility of access through circumstantial evidence.³⁹

BOUCHAT V. BALTIMORE RAVENS, INC.

A. Facts and Procedural History

Frederick E. Bouchat is an amateur artist, whose formal education ended in the ninth grade. He worked as a security guard at the front entrance of the Department of Labor, Licensing and Regulation, in downtown Baltimore.⁴⁰ Bouchat spent much of his spare time drawing and painting, and he often displayed his artwork to people as they entered and exited the State of Maryland office building on St. Paul Street.⁴¹ In the fall of 1995, Bouchat learned of the Cleveland Browns’ relocation to Baltimore.⁴² In late November 1995, Bouchat designed a logo for Baltimore’s new football team using portions of the Maryland state flag and a raven.⁴³ Bouchat affixed this design to a miniature football helmet, which he presented to Eugene A. Conti, Jr., who was then the

³⁶ See *Towler v. Sayles*, 76 F.3d 579, 581–83 (4th Cir. 1996); *Keeler Brass Co. v. Cont’l Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988).

³⁷ See *Towler*, 76 F.3d at 581–82.

³⁸ *Ferguson v. NBC, Inc.*, 584 F.2d 111, 113 (5th Cir. 1978). See also *Towler*, 76 F.3d at 582–83 (holding a reasonable possibility of access exists if it was reasonably possible that “the paths of the infringer and the infringed work crossed” or that the infringer had a reasonable opportunity to view it).

³⁹ *Ferguson*, 584 F.2d at 113. See also *Towler*, 76 F.3d at 582–83.

⁴⁰ *Bouchat v. Balt. Ravens, Inc.*, 241 F.3d 350, 352 (4th Cir. 2001), *cert. denied*, 532 U.S. 1038 (2001).

⁴¹ *Id.*

⁴² *Id.* See also *Cleveland Browns*, Wikipedia, at http://www.wikipedia.org/wiki/Cleveland_Browns (last visited Mar. 25, 2003).

⁴³ *Bouchat*, 241 F.3d at 352. See also Petition for a Writ of Certiorari, *Bouchat*, 241 F.3d at 350, http://www.whitecase.com/case_ravens_petition_writ.pdf.

Secretary of the Department of Licensing and Regulation.⁴⁴ Even before the new football team was officially named, Bouchat's drawings showed that he wanted to name the team the Ravens, as a tribute to the late Baltimore local Edgar Allen Poe.⁴⁵ In December 1995, Bouchat gave away copies of his shield drawings as presents.⁴⁶

On March 28, 1996, Conti arranged a meeting between Bouchat and John Moag, then chairman of the Maryland Stadium Authority (MSA).⁴⁷ Conti intended the meeting to procure an editorial about Bouchat and his sketches in the upcoming MSA employee newsletter.⁴⁸ At that conference, Bouchat was informed that the new team would indeed be named the Baltimore Ravens.⁴⁹ Moag offered Bouchat the MSA's fax number and instructed him to forward his logo sketches, which might then be relayed to team officials whose transition offices were in the same building.⁵⁰ Bouchat faxed his illustrations on April 1 or 2, but failed to retain a printed confirmation receipt of the transmission.⁵¹ While the miniature helmet did not feature the eventual Baltimore Ravens' disputed logo, Bouchat claimed that Moag requested that all other designs be faxed to Moag's MSA office.⁵² One of the drawings Bouchat sent to Moag was his shield drawing.⁵³ A day later, the team's owner, David Modell, convened with the NFL Properties design director to discuss the progress of a Ravens logo.⁵⁴ In June 1996, when the Baltimore Ravens revealed their logos to the public, the design was quite familiar to Bouchat and his acquaintances.⁵⁵ Bouchat contended that he faxed the same

⁴⁴ *Bouchat*, 241 F.3d at 352.

⁴⁵ *Id.* at 353.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 352-53.

⁵³ *Id.* at 353.

⁵⁴ *Id.*

⁵⁵ *Id.* See also Darren Rovell, *Supreme Court's Pass Is Ravens' Loss on Logo Appeal*, ESPN, at <http://www.espn.go.com/nfl/s/2001/0521/1202578.html> (May 21, 2001) ("It

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design, a logo depicting a winged shield displaying a large *B*, the word “Ravens,” and a cross, to the MSA in early April.⁵⁶ Although the MSA shared the same Pratt Street office with Baltimore Ravens’ team owner David Modell at the time that Bouchat asserts his drawings were viewed and copied, stadium authorities and Ravens officials denied receiving the drawings or copying them.⁵⁷ The Ravens contended that league artists at NFL Properties in New York created the design without any participation from Bouchat.⁵⁸

In August 1996, Bouchat enlisted the services of Howard J. Schulman, of Schulman & Kaufman, L.L.C., to acquire a copyright registration for his shield drawing.⁵⁹ Thereafter, in May 1997, Bouchat filed suit in the United States District Court for the District of Maryland accusing the Baltimore Ravens and NFL Properties, Inc., of copyright infringement.⁶⁰ While Baltimore Ravens executives contended that artists at NFL Properties designed the logo, the team’s logo utilized a design nearly identical to Bouchat’s.⁶¹ In November 1998, a jury returned a verdict in favor of Bouchat as to his shield drawing.⁶² Afterwards, the Ravens moved for a judgment notwithstanding the verdict or alternatively for a new trial, contending that Bouchat failed to prove that the Ravens had access to Bouchat’s drawings.⁶³

In an opinion dated February 19, 1999, United States District Judge Marvin J. Garbis denied the defendant’s motion, concluding that the jury’s November verdict was “supported by adequate evidence.”⁶⁴ Furthermore, Judge Garbis rejected the defense

was on television because they unveiled it on the side of a building at the Orioles game,” Bouchat said. “It was so huge and I was so excited.”

⁵⁶ *Bouchat*, 241 F.3d at 353.

⁵⁷ *Id.* at 353, 361.

⁵⁸ *Id.* at 353.

⁵⁹ *Id.*

⁶⁰ *Id.* at 350, 353.

⁶¹ *Id.* at 354. See also *Ravens Logo Lawsuit in Hands of Jury*, AUGUSTA CHRON. (Ga.), Oct. 29, 1998, at http://www.augustasports.com/stories/102998/pro_124-6468.shtml.

⁶² *Bouchat*, 241 F.3d at 352.

⁶³ *Id.*

⁶⁴ James Franklin, *A Federal Judge Has Upheld a Jury’s Verdict*, ASSOC. PRESS, Feb. 22, 1999, available at 1999 WL 12932437. See also Dave McKenna, *Logo á No-Go*, WASH. CITY PAPER (D.C.), Jan. 12, 2001, <http://www.washingtoncitypaper.com/>

lawyers' assertion that one juror had been coerced by a deadlocked panel into deciding in favor of Bouchat.⁶⁵ Because the trial was bifurcated, and a completely separate trial before another federal jury would be held to assess the penalty that the infringers would pay, no damages were awarded.⁶⁶ Under the ruling, Bouchat would return for a new hearing in the United States district court in Baltimore to ascertain whether he would receive a percentage of the Ravens' profits from merchandise bearing the disputed shield logo, or some other measure of damages.⁶⁷

The defendants filed an interlocutory appeal and the district court certified four questions for interlocutory appeal to the Fourth Circuit.⁶⁸ First, the lower court inquired into whether Bouchat's evidence of a reasonable possibility of access to his drawing by the Ravens and NFL Properties was insufficient to justify the finding of copyright infringement.⁶⁹ Second, if Bouchat's evidence was insufficient, the lower court questioned whether the Fourth Circuit would adopt the "strikingly similar" doctrine inferring access.⁷⁰ Third, the district court questioned whether Bouchat's failure to note the derivative nature of his drawing on his copyright

archives/cheap/2001/cheap0112.html. After the jury decided in Bouchat's favor, the team replaced the helmet logo and abandoned the utilization of the disputed logo. *See id.*

The Ravens, because of the trial loss, stopped using the shield on their helmets prior to the 1999 season. The replacement design, a manic bird mocked even by some home fans as the "Heckle and Jeckle" logo, makes for what is widely regarded as the ugliest headgear in the league.

Id. Of the 18,708 who voted, 7,107 chose in a two day poll conducted by the *Baltimore Sun*, a profile logo over a straight-on look of a Raven's head and a shield featuring elements of the Maryland state flag with the initials *B* and *R*. *See id.*

⁶⁵ Franklin, *supra* note 64.

⁶⁶ See Tiffany Wlazlowski, *What's to Be Done with the Highway Signs? That's the Question Facing the Baltimore Ravens*, DAILY RECORD (Balt.), Mar. 24, 1999, at 3A. On July 24, 2002, a jury, assessing the issue of damages, awarded zero damages to Bouchat. Bouchat's attorney stated that he is contemplating appealing the decision. *See* Laurie Willis, *Nothing Owed in Ravens Lawsuit: Logo Artist Didn't Deserve Compensation, Jurors Rule*, BALTIMORE SUN, July 25, 2002, at 1B. However, in *Baltimore Ravens, Inc. v. Bouchat*, 532 U.S. 1038 (2001), the Supreme Court denied certiorari.

⁶⁷ *See* Jay Apperson, *Ravens Lose Appeal of Logo Ruling*, BALTIMORE SUN, Oct. 4, 2000, at 1B.

⁶⁸ *Bouchat v. Balt. Ravens, Inc.*, 241 F.3d 350, 353 (4th Cir. 2001), *cert. denied*, 532 U.S. 1038 (2001).

⁶⁹ *Id.*

⁷⁰ *Id.*

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application necessitated the dismissal of his copyright infringement claim.⁷¹ Finally, the lower court asked whether the jury had been improperly coerced to reach its verdict.⁷²

On October 3, 2000, the Fourth Circuit affirmed the district court’s refusal to overturn the jury verdict in favor of Bouchat.⁷³ The defendants appealed the Fourth Circuit’s ruling before the penalty phase began, but on May 21, 2001, the United States Supreme Court denied certiorari.⁷⁴

B. Opinion of the Fourth Circuit

On October 3, 2000, the United States Court of Appeals for the Fourth Circuit answered the certified questions posed by the district court and ruled in favor of Bouchat.⁷⁵ In a two-to-one decision, authored by U.S. District Court Judge James H. Michael, Jr., of the Western District of Virginia,⁷⁶ and joined by Circuit Judge H. Emory Widener, the appellate panel upheld the original federal jury verdict that the Baltimore Ravens had infringed on several of Bouchat’s copyrights when developing the “shield logo” for their new National Football League team.⁷⁷

The Fourth Circuit ruled that Bouchat was entitled to the lower court’s adoption of the “strikingly similar” doctrine, which created a presumption that the defendants had access to the plaintiff’s work.⁷⁸ The court also upheld the lower court’s holding, citing its findings that David Modell (or his intermediary) had the

⁷¹ *Id.* See also 17 U.S.C. § 101 (2000). The Copyright Act defines a derivative work as a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole represent an original work of authorship, is a “derivative work.”

Id. For a derivative work to be copyrightable, it must be sufficiently dissimilar from the original work so that it can be deemed a new work in its own right. *Id.*

⁷² *Bouchat*, 241 F.3d at 353.

⁷³ *Id.* at 352.

⁷⁴ *Bouchat*, 532 U.S. 1038 (2001).

⁷⁵ *Bouchat*, 241 F.3d at 352.

⁷⁶ Judge Michael sat on the Fourth Circuit by special designation. *Id.*

⁷⁷ *Id.* at 354.

⁷⁸ *Id.* at 354–55. See also *Ferguson v. NBC, Inc.*, 584 F.2d 111 (2d Cir. 1978).

opportunity to view the work and that the subsequent material produced was considerably similar to Bouchat's work.⁷⁹ Taken together, these facts were sufficient to establish copyright infringement under the presumption of defendants' access.⁸⁰

The Fourth Circuit affirmed the ruling by U.S. District Judge Marvin J. Garbis, of the District of Maryland, denying a motion by the Ravens and NFL Properties for judgment notwithstanding the jury verdict.⁸¹ The appellate panel ruled that Bouchat had not invalidated his copyright protection by incorporating public domain elements in his drawing, or by failing to indicate the derivative nature of his authorship on his copyright application.⁸² They held that Bouchat's accidental but harmless mistake in his copyright application did not subsequently preclude an infringement action against defendants.⁸³ Judge Michael emphasized that Bouchat clearly presented sufficient evidence to sustain his burden of showing that the defendants had access to the copyrighted drawings and that there was enough similarity between Bouchat's drawing and the Ravens' logo for the jury to conclude that the defendants copied Bouchat's work.⁸⁴

Judge Michael began the opinion by assessing whether Bouchat had proved that the NFL's designers and artists had access to the drawings.⁸⁵ To succeed in his copyright infringement case, the appellate court maintained that Bouchat needed to prove that the Ravens and league officials had access to the work by showing

⁷⁹ See *Bouchat*, 241 F.3d at 356–57; U.S. Copyright Office, *supra* note 19.

⁸⁰ *Bouchat*, 241 F.3d at 357.

⁸¹ *Id.*

⁸² *Id.* at 354.

Defendants admit that Modell and other Ravens staff shared office space with Moag . . . and that Modell's own office was within "earshot" of Moag's office. By proving that the drawings were transmitted to Moag, and that Modell shared the same office space with Moag, Bouchat proved that Modell had "access" to Bouchat's drawing.

Id.

⁸³ *Id.* at 356.

⁸⁴ *Id.* at 353–54 (citing *Towler v. Sayles*, 76 F.3d 579, 581 (4th Cir. 1996) (citing *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 361 (1991))).

⁸⁵ *Id.* at 354 (quoting *Meta-Film Assocs. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)). In *Meta-Film*, the plaintiff filed suit for copyright infringement, alleging that the defendants' movie and TV series were derived from the plaintiff's unpublished screenplay. *Meta-Film*, 586 F. Supp. at 1349.

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that they had an opportunity to view the work.⁸⁶ Judge Michael explained that where direct evidence of copying is lacking, a plaintiff can establish copying using circumstantial evidence that the alleged infringer had access to the original work and that the infringer’s work is substantially similar to the author’s original work.⁸⁷

The Baltimore Ravens argued that as the defendants denied ever receiving Bouchat’s faxed drawings, Bouchat’s evidence was merely a “tortuous chain of hypothetical transmittals” that failed to meet the necessary standard to prove access.⁸⁸ The Ravens contended that the design was created independently by league artists at NFL Properties and Bouchat had stolen the logo from the team.⁸⁹ However, the appellate court did not find the Ravens’ contentions to be convincing and upheld the jury’s findings that Modell had verified access to Bouchat’s sketches and that the chain from Bouchat to NFL Property’s designers was not so hypothetical as to preclude copyright infringement.⁹⁰

Judge Michael held that Bouchat was not required to prove that Modell in fact saw the drawings and copied them, but rather that he only had to establish that Modell or his intermediaries had access to the drawings.⁹¹ Judge Michael found Bouchat’s proffered evidence to be dispositive, noting that the jury was permitted to accept Bouchat’s evidence that his logo facsimile was transmitted to Moag, who shared an office with Modell at the time, and that Moag offered to forward his drawings to the Baltimore Ravens.⁹²

⁸⁶ *Bouchat*, 241 F.3d at 354. Ravens Spokesman Kevin Byrne stated, “The Ravens had no knowledge of Mr. Bouchat or his artwork prior to our approval of the NFL Properties design.” Gail Gibson, *Supreme Court Won’t Review Case Against Ravens Logo*, BALT. SUN, May 22, 2001, at 8B.

⁸⁷ *Bouchat*, 241 F.3d at 353–54 (citing *Towler*, 76 F.3d at 581–82).

⁸⁸ *Id.* at 354 (quoting *Meta-Film*, 586 F. Supp. at 1355).

⁸⁹ *Id.* See also Gibson, *supra* note 86; Rovell, *supra* note 55.

⁹⁰ *Bouchat*, 241 F.3d at 353.

⁹¹ *Id.* at 354 (Since “Modell had access to the drawings, the jury was able to combine that conclusion with the substantial similarity between the Ravens’ logo and Bouchat’s drawing to find, ultimately, that the Ravens copied Bouchat’s copyrighted work.”).

⁹² *Id.*

Judge Michael also found that evidence of the fax procedures followed by the MSA and Moag's law firm indicated that the MSA had likely forwarded Bouchat's fax to Moag at his law firm and that Modell probably examined Bouchat's logo design there, as Modell and other Ravens staff shared office space "within earshot" of Moag's office.⁹³ Although Bouchat failed to prove that Modell actually viewed Bouchat's drawings, the Fourth Circuit maintained that Bouchat was only required to prove that Modell had access to the drawings by showing that Modell had the opportunity to view them.⁹⁴ By demonstrating that the drawings were transmitted to Moag and that Modell shared the same office space with Moag, the majority found that Bouchat sufficiently established Modell's "access" to Bouchat's drawing to maintain a copyright infringement action.⁹⁵ The majority stated that once the jury concluded that Modell had access to the drawings, the jury was able to link that conclusion with the evidence of substantial similarity to find that the Ravens copied Bouchat's work.⁹⁶ Judge Michael noted that the district court speculated that the fax might even have been accidentally delivered to Modell since his name appeared on the fax, but that Bouchat's evidence was sufficient to demonstrate access without such conjecture.⁹⁷ Furthermore, the majority confirmed that the jury was entitled to infer that the NFL designers had access since Modell, a third-party intermediary with a close relationship to the designers, had access.⁹⁸

Although the appellate court ruled that the federal jury's finding of access had been supported by evidence, Judge Michael then considered the second certified question: whether to adopt the "striking similarity" doctrine.⁹⁹ In choosing to adopt the doctrine, Judge Michael found that the inference of access is justified where

⁹³ *Id.*

⁹⁴ *Id.* at 355.

⁹⁵ *Id.* at 354.

⁹⁶ *Id.* at 355–56 (citing *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988)). In *Gaste*, defendants appealed a ruling in favor of plaintiffs, the composers of an obscure French song composed nearly seventeen years before the defendants had arranged and published the popular song "Feelings." *Gaste*, 863 F.2d at 1061. A jury found the defendants liable for copyright infringement and awarded damages in favor of the plaintiffs. *Id.*

⁹⁷ *Bouchat*, 241 F.3d at 354.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Gaste*, 863 F.2d at 1068).

the two works are "so similar as to create a high probability of copying that negates the reasonable possibility of independent creation."¹⁰⁰ Judge Michael noted that the Fifth Circuit has gone so far as to find copying by a showing of striking similarity that "precludes the possibility of independent creation."¹⁰¹ The Fourth Circuit held, however, that striking similarity between the copyrighted and subsequent work constitutes circumstantial evidence of copying, only supporting an inference of access, which must still be shown.¹⁰²

In the earlier case of *Towler v. Sayles*, the Fourth Circuit held that in a copyright infringement action, a plaintiff could establish a presumption of copying by showing that the defendant had access to her original composition and that the two compositions in question were substantially similar.¹⁰³ The *Towler* court concluded that even if access were to be inferred for purposes of proving infringement, the plaintiff must also establish that the allegedly infringing work is substantially similar to the plaintiff's work.¹⁰⁴ In *Ferguson v. NBC*, however, the Fifth Circuit held that absent proof of access, a plaintiff can still prevail if she establishes that the two works were not just substantially similar, but were so strikingly similar as to exclude the possibility of independent creation.¹⁰⁵ Thus, the *Ferguson* court eliminated the prerequisite

¹⁰⁰ *Id.* at 355–56.

¹⁰¹ *Id.* at 356 (citing *Ferguson v. NBC, Inc.*, 584 F.2d 111, 113 (5th Cir. 1978)).

¹⁰² *Id.* at 355.

¹⁰³ *Towler v. Sayles*, 76 F.3d 579, 582 (4th Cir. 1996).

¹⁰⁴ *Id.* at 583.

¹⁰⁵ 584 F.2d 111 (5th Cir. 1978). In *Ferguson*, Appellant submitted copies of her unpublished work to six persons in the publishing industry who had no interest in publishing her work and returned the composition to Appellant. Appellant then alleged that Appellee infringed her copyright by utilizing the last eight and first sixteen measures of her composition in the theme tune of a television program aired by Appellee. Appellant also filed suit against the theme song composer but the court dismissed the action. The appellate court affirmed. The court held that when there is slight direct evidence of copying, the plaintiff normally proves this aspect by showing that the person who created the defendant's work had access to the copyrighted material. *Id.*

Appellant failed to prove that the theme composer had access to Appellant's work; there was also not proof of a substantial similarity between Appellant's composition and the theme song. Appellee offered evidence that the songs were not substantially similar. Once Appellee presented evidence supporting its motion for summary judgment, Appellant was obliged to submit considerable probative evidence to refute Appellee's

of establishing the element of access (by inferring access due to similarity).¹⁰⁶ The Fifth Circuit held that striking similarity may be sufficient to prove copying, even where there is no showing of access. Unlike the Fifth Circuit, Judge Michael asserted that the Fourth Circuit does not favor the “wholesale abandonment of the access requirement in the face of striking similarity.”¹⁰⁷ Rather, like the Second and Seventh Circuits, the Fourth Circuit recognized that striking similarity is simply one way to infer access.¹⁰⁸ The Second and Seventh Circuits infer access when two works are so similar as to make it highly probable that copying was involved, thereby negating the “reasonable possibility of independent creation.”¹⁰⁹

In *Bouchat*, the Fourth Circuit adopted this doctrine and declined to emulate the Fifth Circuit, holding that access remains an indispensable part of a copyright infringement claim, and striking similarity is but one way to demonstrate access.¹¹⁰ Judge Michael noted that the striking similarity between the works did not in itself dispense with the requirement of proof of access by Modell, but that such similarity “was a proper factor for the jury to consider” in its determination of whether Bouchat had proved copying.¹¹¹ The appellate court reasoned that Bouchat could use

evidence, which Appellant failed to do. The court affirmed the lower court’s ruling, finding summary judgment for Appellee was appropriate because Appellant failed to verify that Appellee had access to Appellant’s song and fell short in establishing a substantial similarity between the two works. *Id.*

¹⁰⁶ *Id.* See also *Towler*, 76 F.3d at 583–84.

Proving substantial similarity requires a two-part analysis. First, a plaintiff must show, typically with the aid of expert testimony, that the works in question are extrinsically similar because they contain substantially similar ideas that are subject to copyright protection. Second, a plaintiff must satisfy the subjective, or intrinsic, portion of the test by showing the substantial similarity in how those ideas are expressed.

Id.

¹⁰⁷ *Towler*, 76 F.3d at 584.

¹⁰⁸ See *id.* (citing *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) and *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984)).

¹⁰⁹ See *id.* (citing *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997)). In *Ty*, the appellant subsequent manufacturer’s bean-bag pig was strikingly similar to the original manufacturer’s pig. See *Ty*, 132 F.3d at 1170.

¹¹⁰ See *Bouchat v. Balt. Ravens, Inc.*, 241 F.3d 350, 356 (4th Cir. 2001), *cert. denied*, 532 U.S. 1038 (2001).

¹¹¹ See *id.*

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circumstantial evidence to prove copying because Modell had the opportunity to receive the faxed drawing since he shared office space with Moag.¹¹²

The Fourth Circuit next addressed the third certified question from the district court and held that the copyright infringement claim should not be discarded based on alleged imperfections in the plaintiff’s copyright application.¹¹³ The majority rejected the defense’s argument and found that Bouchat’s drawing was entitled to copyright protection.¹¹⁴ The Fourth Circuit concurred that Bouchat failed to state on his copyright application that certain elements of his design were in the public domain, but noted that Bouchat’s error was neither deceitful nor deliberate.¹¹⁵ Judge Michael determined that unintentional, harmless mistakes in a copyright application do not prohibit a subsequent infringement action, and that Bouchat’s shield logo was entitled to copyright protection because it was sufficiently original.¹¹⁶

Finally, the Fourth Circuit addressed the fourth certified question that raised the possibility that the lower court compelled a juror to reach a verdict by providing supplemental instructions and inquiring about the progress of the jury’s deliberations.¹¹⁷ The appellate court examined the circumstances surrounding the

¹¹² See *id.* at 354.

¹¹³ See *id.*

¹¹⁴ See *id.* at 357.

Neither the fact that Bouchat incorporated public domain elements in his drawing (the letter *B*, a cross, a shield) nor the fact that he did not expressly indicate on his application that such elements rendered his authorship of the drawing derivative in nature, invalidate the protection to which his drawing is otherwise entitled under his valid copyright registration. Accidental but harmless mistakes in a copyright application do not subsequently preclude an infringement action against an alleged copier.

Id. (citation omitted).

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 356–57.

¹¹⁷ See *id.* at 357.

The district court specifically told the jurors that it was not suggesting anyone surrender their honest convictions about the case. The district court characterized its instructions as “fair and balanced,” and such a characterization is accurate. The fact that the jurors were actively encouraged to persist in their effort to reach consensus does not mean that they were coerced.

Id. (citations omitted).

federal jury's deliberations and concluded that the supplemental instructions and *Allen* charge¹¹⁸ given by the district court failed to constitute improper coercion.¹¹⁹ The Fourth Circuit held that no coercion existed when Judge Garbis encouraged the jury to persist in their endeavors toward reaching a verdict.¹²⁰

C. *The Dissent*

United States Circuit Judge Robert Bruce King dissented at length. He stated that the evidence presented did not substantiate an assumption that Bouchat's faxed shield drawing reached Moag at his law firm and further argued that the "strikingly similar" doctrine was insupportable as a matter of law.¹²¹ Judge King indicated that he found the evidence too speculative to support a finding of access.¹²² Specifically, the dissent stated that Bouchat produced no direct evidence of copying and failed to produce sufficient evidence to show that Moag received the shield drawing or that Modell had access to it.¹²³ Judge King argued that Bouchat's evidence of access comprised "nothing more than a 'tortuous chain of hypothetical transmittals.'"¹²⁴ The dissent found that Bouchat presented neither direct evidence that the defendants copied his drawing in creating the Ravens shield logo, nor proof that Modell or designers at the NFL office had even received the

¹¹⁸ See *Allen v. United States*, 164 U.S. 492 (1896); *United States v. McElhiney*, 275 F.3d 928, 935 (10th Cir. 2001) ("An *Allen* instruction is, in effect, a charge given by a trial court that encourages the jury to reach a unanimous verdict so as to avoid a mistrial."); *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (stating that, through an *Allen* charge, a trial court suggests "to jurors the desirability of agreement and avoidance of the necessity of a retrial before another jury").

¹¹⁹ See *Bouchat*, 241 F.3d at 357 (citing *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182 (4th Cir. 1994)).

¹²⁰ See *id.*

¹²¹ See *id.* at 358–59 (King, J., dissenting) (citing *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999) ("We review de novo a district court's denial of a Rule 50(b) motion for judgment as a matter of law, viewing the evidence in the light most favorable to the prevailing party and drawing all reasonable inferences in her favor.")).

¹²² See *id.* (King, J., dissenting) (citing *Towler v. Sayles*, 76 F.3d 579, 581–82 (4th Cir. 1996)).

¹²³ See *id.* (King, J., dissenting).

¹²⁴ *Id.* at 358 (King, J., dissenting) (quoting *Bouchat*, 241 F.3d at 354 (citations omitted)).

plaintiff’s faxed drawing.¹²⁵ Judge King disagreed with the majority’s conclusion that Bouchat had demonstrated access to his copyrighted works stating that the “majority’s inference-upon-inference determination that Moag received Bouchat’s shield drawing is much too speculative to support a finding of access.”¹²⁶

Judge King alluded to irrefutable evidence that Moag’s office did not receive Bouchat’s logo and indicated that the MSA’s general practice of forwarding correspondence to Moag was simply inadequate to uphold a jury finding that Bouchat’s drawing actually reached Moag’s office.¹²⁷ The dissent contended that even assuming that Bouchat’s drawing arrived at Moag’s office, Bouchat proffered no evidence to corroborate his assertion that Modell received the drawing.¹²⁸ Judge King maintained that Bouchat had not established that the NFL Properties designers had a reasonable opportunity to view or copy Bouchat’s drawing.¹²⁹ Judge King pointed out that the United State District Court for the Southern District of New York often dealt with the bare corporate receipt doctrine and remained “steadfast in holding that access cannot permissibly be inferred from ‘bare corporate receipt.’”¹³⁰ Judge King stated that the majority’s holding “dismantles the access requirement by allowing a tenuous, unproved, contradicted, and inconsistent chain of inferences to satisfy *Towler* and prove access.”¹³¹

¹²⁵ See *id.* at 359 (King, J., dissenting).

¹²⁶ *Id.* at 360 (King, J., dissenting).

¹²⁷ See *id.* (King, J., dissenting). The dissent contended that no one witnessed Bouchat faxing his shield drawing and no fax confirmation receipt or phone records were introduced at the trial. In addition, Bouchat failed to proffer evidence that the MSA office received the fax. *Id.* (King, J., dissenting).

¹²⁸ See *id.* (King, J., dissenting). Judge King noted that there was witness testimony from Moag, his secretary and the law firm’s manager, that no employee at MSA ever viewed the drawing. *Id.* (King, J., dissenting).

¹²⁹ See *id.* (King, J., dissenting).

¹³⁰ *Id.* at 363 (King, J., dissenting). See also *Dimmie v. Carey*, 88 F. Supp. 2d 142 (S.D.N.Y. 2000); *Tisi v. Patrick*, 97 F. Supp. 2d 539 (S.D.N.Y. 2000).

¹³¹ *Bouchet*, 241 F.3d at 363–64 (King, J., dissenting).

Finally, Judge King criticized the majority for needlessly adopting the “strikingly similar” doctrine.¹³² According to the dissent, the doctrine “runs contrary to a fundamental principle of copyright protection: independent creation,” because the doctrine assumes that where two works are strikingly similar, there is a great possibility that one was derived from the other.¹³³

CONCLUSION

After the Ravens had publicly unveiled their logo, Bouchat quickly filed for a copyright, nine months after he had allegedly created it. To succeed in his copyright claim, Bouchat was obligated to prove that NFL Properties in New York had access to his drawings. Bouchat’s claim of access relied heavily on a string of inferences that were deemed sufficient through the court’s adoption of the “strikingly similar” doctrine. That opinion, however, includes Judge King’s fourteen-page dissent where he argued that the verdict was “entirely without legal or factual support.”¹³⁴ Bouchat argued that the overlapping relationship of the intermediaries and their constant channels of communication established a jury question as to whether the defendants had copied his original works. The Fourth Circuit agreed, and the jury verdict was upheld.

Some would argue that the *Bouchat* court’s conclusion clearly conflicts with *Towler*.¹³⁵ In *Towler*, the mere possibility of access was insufficient to prove copyright infringement. In addition, the *Towler* court stated that a copyright plaintiff is required to present more than a “tortuous chain of hypothetical transmittals” and offer concrete evidence supporting the inference that the defendant

¹³² See *id.* at 364 (King, J., dissenting). The court had in fact rejected the doctrine in an earlier decision. *Takeall v. Pepsico, Inc.*, No. 93-CV-1237, 1993 WL 509876 (4th Cir. Dec. 8, 1993).

¹³³ See *Bouchat*, 241 F.3d at 365 (King, J., dissenting) (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“If by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”)).

¹³⁴ *Bouchat*, 241 F.3d at 365 (King, J., dissenting).

¹³⁵ See *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996).

received the allegedly infringed work. Bouchat did not claim to have faxed his drawing to Modell or the artists at NFL Properties. Instead, Bouchat, absent any direct evidence, claimed that the disputed drawings found their way from the MSA to Moag's office, to Modell, and finally to NFL Properties, Inc. where the artists there copied it. Bouchat's contention and the Fourth Circuit's opinion could also be said to contradict the highly persuasive law of the Second Circuit in *Gaste v. Kaiserman*¹³⁶ and the Seventh Circuit in *Selle v. Gibb*,¹³⁷ prohibiting proof of access based on mere conjecture. The *Gaste* court stated that "access must be more than a bare possibility and may not be inferred through speculation or conjecture."¹³⁸ Similarly, the *Selle* court asserted that "a plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone."¹³⁹

There is no simple rule concerning how much of a work may be taken before it rises to the level of infringement. Apparently, the more a work is copied, the easier it is to show substantial similarity. The *Bouchat* court, however, eliminated the need for access and adopted the rarely utilized "strikingly similar" doctrine to create an inference of access. Thus, even though the Ravens disputed evidence of access and presented substantial evidence of independent creation, Bouchat's copyright claim was successful.

As stated in Judge King's dissent, the majority's decision directly jeopardizes the ability of the Fourth Circuit to dismiss cases that are not rationally found in fact. Here, the determinative evidence of whether Modell had access to Bouchat's shield drawings was deduced by unsupported inferences. By upholding the jury's verdict, the Fourth Circuit failed to assess the reasonableness of the evidence presented. In doing so, the *Bouchat* court abandoned the copyright principle that a plaintiff must satisfy the burden of proof that the defendant had access to the allegedly infringed work. The majority not only lowers the standard of proof

¹³⁶ 863 F.2d 1061 (2d Cir. 1988).

¹³⁷ 741 F.2d 896 (7th Cir. 1984).

¹³⁸ *Gaste*, 863 F.2d at 1066.

¹³⁹ *Selle*, 741 F.2d at 901.

of access, but for the first time embraces the “strikingly similar” doctrine. This doctrine allows a plaintiff to prove copying absent proof other than the comparison of the two compositions. The adoption of the “strikingly similar” doctrine signifies that evidence of lack of access and the independent creation of the allegedly infringing work, no matter how persuasive, can ultimately be discounted. Under the majority’s opinion it seems that another person could follow Bouchat’s template and copy a commercial logo and then effectively file a suit against a business entity based exclusively on the similarities in the compositions and the person’s own testimony. Such instances could leave deep-pocketed defendants quite vulnerable to frivolous and costly lawsuits.