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Casenote

IS PROOF OF ACCESS STILL REQUIRED? PROVING COPYRIGHT INFRINGEMENT USING THE "STRIKINGLY SIMILAR" DOCTRINE: AN ANALYSIS OF THE FOURTH CIRCUIT'S DECISION IN BOUCHAT v. BALTIMORE RAVENS, INC.

I. INTRODUCTION

The Baltimore Ravens, formerly the Cleveland Browns, relocated to Baltimore, Maryland in 1995.1 Frederick Bouchat, an amateur artist and avid Baltimore fan, was enthusiastic about the news of a possible National Football League ("NFL") franchise in the city of Baltimore.2

Much to Bouchat's surprise, however, when the Ravens unveiled their new team logo in June 1996, it was nearly identical to a drawing that he created and allegedly submitted to the Ravens for consideration.3 In August 1996, Bouchat obtained a copyright registration for his drawing, and in May 1997, he filed suit against the Ravens for copyright infringement.4

The Framers of the United States Constitution provided Congress with the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."5 As a result, copyright law has evolved greatly since the framing of the Constitution and encourages creative activity by awarding the crea-

1. See Larry Weisman, Baltimore, NFL Kick Off Again, USA TODAY, Aug. 30, 1996, at C1 (noting this would be first season since 1983 that Baltimore has been home to NFL team). On December 18, 1983, the Colts left Baltimore and relocated to Indianapolis. See id.
2. See Bouchat v. Baltimore Ravens, Inc., 228 F.3d 489, 491 (4th Cir. 2000) (indicating that Bouchat was excited about possibility of NFL team returning to Baltimore).
3. See id. at 491-92 (noting that Bouchat claimed to have faxed his drawings to John Moag, chairman of Maryland Stadium Authority, who was supposed to pass drawings to Ravens for consideration).
4. See id. at 492 (indicating Bouchat contacted lawyer after he and several coworkers recognized new Raven's logo as Bouchat's work). According to Bouchat's attorney, seventeen witnesses were expected to testify that they saw the drawing before the Ravens unveiled their logo. See Michael James, Pigtown Man's $10 Million Lawsuit Over Logo for Ravens Goes to Trial, BALT. SUN, Oct. 7, 1998, at B3.
5. U.S. Const. art. I, § 8, cl. 8.

(97)
tor "exclusive rights over their creation for a number of years." In turn, new advancements tend to provide a benefit to society as a whole.

When a plaintiff brings a suit alleging copyright infringement, the plaintiff first must prove ownership of a valid copyright. Next, a plaintiff must prove that the defendant actually copied the plaintiff's work. Direct proof that a defendant copied the plaintiff's work is often difficult to obtain; therefore, a plaintiff must often prove copying with circumstantial evidence. To prove copying circumstantially, a plaintiff must prove that the defendant had access to the work and the two works are substantially similar. A court may infer access if the two works are so strikingly similar as to "preclude any explanation other than that of copying." The circuit courts disagree on whether a showing of striking similarity is enough to prove copying without any further proof of access.

This Note analyzes the Fourth Circuit's adoption of the "strikingly similar" doctrine in Bouchat v. Baltimore Ravens, Inc. The Fourth Circuit upheld the trial court's finding of copyright in-

6. Jarrod M. Mohler, Comment, Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases, 68 U. Cin. L. Rev. 971, 973 (2000) (explaining that public policy considerations have been responsible for evolution of copyright law). Public policy considerations require a balancing between the creator's right to control and reap the benefits of their creation during their lifetime and the public's competing interest to build upon and improve the work of the creator. See id. at 974.

7. See id. at 973 (recognizing advancement of creative works as important to public).


9. See id. (indicating that proof of copying is often difficult element to prove).

10. See id. at 316-17 (noting that plaintiffs use circumstantial evidence more often than direct proof of copying).

11. See id. (indicating that to prove access plaintiff must "do more than suggest the mere prospect of access"). Two ways of proving access include demonstrating a chain of events that would result in the defendant's access to the work or proof that the work was widely disseminated. See id. at 317.

12. Aaron M. Broaddus, Eliminating the Confusion: A Restatement of the Test for Copyright Infringement, 5 DePaul-LCA J. ART & ENT. L. & POL'Y 43, 47 (1994) (noting most courts still require some possibility that defendant had access to plaintiff's work). A greater showing of similarity permits a lesser showing of access than normally required. See id. at 48.

13. See Mohler, supra note 6, at 977 (recognizing that at least one circuit requires some possibility that defendant had access to copyrighted work even when there is striking similarity between the two works).

14. 228 F.3d 489 (4th Cir. 2000).
fringement and adopted the "strikingly similar" doctrine.\textsuperscript{15} The court, however, did not abandon the access requirement when there was a finding of striking similarity.\textsuperscript{16} Section II of this Note details the facts of \textit{Bouchat}.\textsuperscript{17} Section III provides a background of copyright law, including a discussion of the case law pertaining to the "strikingly similar" doctrine.\textsuperscript{18} Section IV discusses the holding and rationale of \textit{Bouchat}.\textsuperscript{19} Section V provides a critical analysis of the court’s holding and decision to adopt the “strikingly similar” doctrine.\textsuperscript{20} Section VI of this Note discusses the impact \textit{Bouchat} will have on the access requirement of copyright law in cases that involve circumstantial evidence to prove copying.\textsuperscript{21}

\textbf{II. Facts}

In \textit{Bouchat}, the Fourth Circuit examined whether sufficient evidence existed in a copyright infringement suit to sustain a jury verdict in favor of Bouchat.\textsuperscript{22} Bouchat alleged that Baltimore Ravens, Inc. and National Football League Properties, Inc. (" Defendants") infringed on Bouchat's copyrights, which included a shield drawing

\begin{itemize}
\item \textsuperscript{15} See id. at 493 (finding that evidence of access was sufficient but examination of “strikingly similar” doctrine was also necessary).
\item \textsuperscript{16} See id. at 493-94 (disagreeing with Fifth Circuit's approach of “wholesale abandonment of access requirement in face of striking similarity”). The Fourth Circuit agreed with the Second and Seventh Circuits, which allow an inference of access when there is a finding of striking similarity, but still maintain access as a requirement to circumstantially prove copying. See id. at 494.
\item \textsuperscript{17} For a discussion of the facts in \textit{Bouchat}, see infra notes 22-39 and accompanying text.
\item \textsuperscript{18} For a discussion of copyright law that includes the case law pertaining to the “strikingly similar” doctrine, see infra notes 40-105 and accompanying text.
\item \textsuperscript{19} For a discussion of the Fourth Circuit's holding and analysis, see infra notes 106-39 and accompanying text.
\item \textsuperscript{20} For a critical discussion of the court's holding and adoption of the “strikingly similar” doctrine, see infra notes 140-67 and accompanying text.
\item \textsuperscript{21} For a discussion of the impact the court's decision to adopt the “strikingly similar” doctrine will have on the access requirement of copyright law, see infra notes 168-72 and accompanying text.
\item \textsuperscript{22} See 228 F.3d 489, 491 (4th Cir. 2000). After a five week trial, the jury returned a verdict in favor of Bouchat. See id. The defendants filed a motion for judgment as a matter of law and, in the alternative, for a new trial, alleging that the plaintiff failed to prove that the defendants had access to the plaintiff's work. See id. The district court denied the defendants' motions, but certified several questions for the Court of Appeals to consider. See id. The certified questions for interlocutory appeal included: "(1) [w]as the plaintiff's proof of a reasonable possibility of access legally insufficient? (2) [i]f so, will the Fourth Circuit adopt the 'strikingly similar' doctrine of inferring access, as expressed in Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988)?" Id. at 492. The second certified question is the focus of this Note.
\end{itemize}
created by Bouchat similar to the new Raven’s team logo unveiled in 1996.\textsuperscript{23}

Frederick Bouchat was an amateur artist and avid Baltimore fan.\textsuperscript{24} Bouchat had only a ninth grade education and worked as a security guard at the front entrance of the Maryland State Office building.\textsuperscript{25} In 1995, Bouchat learned of the possibility that Baltimore would be the future home of a new NFL team.\textsuperscript{26} Bouchat combined his excitement as a Baltimore fan with his artistic abilities and began to design logos to compliment his favorite choice for a potential team name, the Ravens.\textsuperscript{27} Bouchat designed a helmet logo and affixed the logo to a miniature football helmet.\textsuperscript{28} Ultimately, he gave his helmet creation to Eugene Conti, a state official who worked in the Maryland State Office building.\textsuperscript{29}

Conti arranged a meeting between Bouchat and John Moag, chairman of the Maryland Stadium Authority, to do a story on Bouchat for the employee newsletter.\textsuperscript{30} At the meeting, Bouchat described his drawings to Moag, who recommended that Bouchat send them to him so he could pass them along to the Ravens for consideration.\textsuperscript{31} On April 1 or 2, 1996, Bouchat obtained permission to use the office fax machine and faxed his drawings to the Maryland Stadium Authority.\textsuperscript{32}

On April 2, 1996, David Modell, the Baltimore Ravens team owner, discussed the development of a Ravens logo with the NFL Properties Design Director.\textsuperscript{33} Thereafter, Modell communicated

\begin{footnotesize}
\begin{enumerate}
\item See id. at 491-92 (indicating Bouchat claimed that defendants copied his protected work, while defendants claimed they independently created new logo).
\item See id. at 491.
\item See id. (noting that Bouchat used his job to display his artwork because people pass through front entrance).
\item See id.
\item See id.
\item See Bouchat, 228 F.3d at 491 (stating that Bouchat proudly showed his work to fellow employees and gave two of the logo drawings away as holiday gifts).
\item See id.
\item See id. (indicating that Conti displayed miniature football helmet in his office).
\item See id. (noting Moag was man responsible for bringing NFL team to Baltimore). The meeting between Bouchat and Moag occurred in Moag’s law office. See id. During this time, the Ravens, and team owner, David Modell, temporarily occupied the same office suite as Moag. See id. Photos were taken at the meeting, and Moag informed Bouchat that the new team’s name would be the Ravens. See id.
\item See id.
\item See Bouchat, 228 F.3d at 491-92 (noting Bouchat received confirmation that his fax was sent but did not keep printed confirmation receipt). Bouchat was unfamiliar with the fax machine and his immediate supervisor had to show him how to operate the machine. See id.
\item See id.
\end{enumerate}
\end{footnotesize}
directly with the design team concerning the development of a logo.\textsuperscript{34} Later, in June 1996, the Ravens revealed their new logo, which happened to be a Raven holding a shield.\textsuperscript{35}

Immediately after the unveiling, Bouchat and his co-workers recognized the new Ravens' logo as being the same as Bouchat's work.\textsuperscript{36} As a result, Bouchat hired an attorney, and by August 1996, he obtained a copyright for his work.\textsuperscript{37} In May 1997, Bouchat filed a copyright infringement lawsuit in which he obtained a favorable verdict in November 1998.\textsuperscript{38} The Court of Appeals for the Fourth Circuit affirmed the trial court's verdict and held that the plaintiff's proof of reasonable possibility of access was sufficient, but even if it had not been, the two works were so strikingly similar as to cause an inference of access.\textsuperscript{39}

III. BACKGROUND

In 1976, Congress established 17 U.S.C. §§ 101-1332, known as the Copyright Act.\textsuperscript{40} The backbone of the Copyright Act is section 106, which provides the owner of the copyright with exclusive rights to reproduce the work, prepare derivative works, perform the work publicly and display the work publicly.\textsuperscript{41} In \textit{Feist Publications, Inc. v. Penguin Books, Ltd.} \textsuperscript{42}

\textsuperscript{34} See id.

\textsuperscript{35} See id.

\textsuperscript{36} See id. (indicating that Bouchat had shown his drawings to many co-workers); see also James, supra note 4, at B3 (noting that Bouchat's attorney claimed seventeen witnesses were prepared to testify that they saw Bouchat's drawing prior to Ravens' unveiling of their logo).

\textsuperscript{37} See \textit{Bouchat}, 228 F.3d at 492. Bouchat said that it was not about the money and all he wanted was "a little recognition." See Michael James, \textit{Ravens' Latest Loss Comes in Court Suit: A Jury Finds That the NFL Team Copied Its Logo From a Local Amateur Artist}, BALTIMORE SUN, Nov. 4, 1998, at A1. Bouchat only wished for an autographed helmet out of the deal. See id.

\textsuperscript{38} See \textit{Bouchat}, 228 F.3d at 492 (noting verdict was limited only to claim relating to shield drawing). Bouchat brought suit for infringement for three of his copyrighted drawings, but he succeeded only in the claim regarding the shield drawing. See id. at 492 n.1. On appeal, the only issue was copyright infringement for the shield drawing. See id.

\textsuperscript{39} See id. at 493-95 (deciding to adopt "strikingly similar" doctrine that provided for inference of access, as followed by Second Circuit).


**Rural Telephone Service Co.**,42 the Supreme Court outlined what a plaintiff must prove to be successful in a copyright infringement case.43 First, the plaintiff must prove ownership of a valid copyright.44 Second, the plaintiff must prove that the alleged infringer copied protected elements of the work.45

After a plaintiff proves valid ownership of a copyright, a plaintiff must prove two essential pieces of the second prong pertaining to proof of copying.46 First, the plaintiff must show that the defendant actually copied the plaintiff’s work.47 Next, the plaintiff must show that the there was an unlawful appropriation of the work by the defendant.48 To show copying, a plaintiff can provide either direct evidence of copying or circumstantial evidence that the defendant had access to the work and the two works are substantially similar.49

A. Copyright Ownership

A plaintiff must prove copyright ownership as a prerequisite to the institution of an action for copyright infringement.50 A valid copyright registration certificate constitutes prima facie evidence of copyright ownership.51 After a prima facie showing of ownership

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43. See id. at 345-64.
45. See id. at 361 (citing Harper and Row Publishers, Inc., 471 U.S. at 548). In Feist, the plaintiff claimed that the defendant infringed his copyright by copying names, towns and telephone numbers from the plaintiff’s white pages. See id. The Supreme Court held that an alphabetical arrangement of preexisting data is not an original work protected by the Copyright Act. See id. at 363.
46. See Bevill, supra note 8, at 316 (explaining that plaintiff must prove that defendant “illicitly copied his work” after proving ownership of valid copyright).
47. See id. (noting that actual proof of copying is often difficult to obtain); see also Broadus, supra note 12, at 45 (“once ownership is established, the court must then turn to the more difficult issue of copying”).
48. See id. (explaining that to prove illicit copying, plaintiff must prove both that defendant copied plaintiff’s protected work and that there was unlawful appropriation by defendant).
49. See Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988) (noting that direct evidence of copying was lacking, therefore, proof by circumstantial evidence was necessary); see also Broadus, supra note 12, at 45-46 (noting that direct evidence of copying is often not available and using circumstantial evidence to prove copying is more common).
50. See 17 U.S.C. § 411(a) (1994). Section 411(a) provides in relevant part: “[N]o action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title . . . .” Id.
51. See 17 U.S.C. § 410(c) (1994). Section 410(c) provides:
has been established, the burden then shifts to the defendant to rebut the ownership.\textsuperscript{52}

\section*{B. Copyright Infringement}

\subsection*{1. Copying}

To prove infringement, a plaintiff must show that the defendant actually copied the plaintiff’s protected work.\textsuperscript{53} A plaintiff can prove that the defendant copied the protected work by presenting either direct or circumstantial evidence.\textsuperscript{54} Typically, the plaintiff is not able to prove copying with direct evidence; therefore, the plaintiff often must prove that the defendant copied the work with circumstantial evidence.\textsuperscript{55}

Using circumstantial evidence, the plaintiff will attempt to prove that the defendant had access to the work and that substantial similarity exists between the works.\textsuperscript{56} A plaintiff can prove that the defendant had direct access if he sent the work directly to the

In any judicial proceedings the certificate of a registration made before or within five years after the first publication of the work shall constitute prima facie evidence of validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded to the certificate of a registration made thereafter shall be within the discretion of the court.

\textit{Id.}

\textsuperscript{52} See \textit{Gaste}, 863 F.2d at 1064-65 (dismissing defendant’s claims of invalid copyright because certificate of copyright registration was produced and not rebutted); see also Broadus, \textit{supra} note 12, at 45 (noting that most plaintiffs do not have trouble proving ownership). The Copyright Act makes it easier to prove ownership initially, and there is difficulty in rebutting ownership, therefore, this prong is met without much trouble before addressing the more difficult prong of proving copying. See Broadus, \textit{supra} note 12, at 45.

\textsuperscript{53} See \textit{Selle v. Gibb}, 741 F.2d 896, 901 (7th Cir. 1984) (noting that proof of copying is crucial to infringement claim because without copying there is no infringement regardless of similarity between the works).

\textsuperscript{54} See \textit{Mohler}, \textit{supra} note 6, at 977 (noting that copying prong can be proven by direct evidence but is more often proven by circumstantial evidence). Direct evidence of copying is so rare that some commentators substitute “direct evidence of copying” with “defendant’s admission to copying.” Alan Latman, “Probative Similarity” As Proof of Copying: Toward Dispelling Some Myths In Copyright Infringement, 90 \textit{COLUM. L. REV.} 1187, 1192 (1990) (indicating that if defendant does not admit to copying, plaintiff must prove copying with circumstantial evidence).

\textsuperscript{55} See \textit{Gaste}, 863 F.2d at 1066 (noting that “copying has traditionally been proven circumstantially, [as] copiers are rarely caught red-handed”).

\textsuperscript{56} See \textit{Ferguson v. Nat'l Broad. Co.}, 584 F.2d 111, 113 (5th Cir. 1978) (indicating that plaintiff generally proves copying by showing access and substantial similarity); see also Mohler, \textit{supra} note 6, at 977 (noting that evidence should show that copying can be “reasonably inferred”). In order to prove copying in the majority of the circumstances, most courts require that the plaintiff show both access and substantial similarity. See \textit{Towler v. Sayles}, 76 F.3d 579, 582 (4th Cir. 1996) (explaining that defendant could create presumption of copying by proof of access and substantial similarity); see also Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F.2d 1059, 1062 (9th Cir. 1981) (noting that once plaintiff proves access and substantial
defendant or a person closely associated with the defendant.\textsuperscript{57} Alternatively, the plaintiff may establish access if the work has been widely disseminated to the public.\textsuperscript{58}

If, however, clear circumstantial evidence is lacking, some courts will allow the jury to infer access when the two works are so strikingly similar so as to preclude the possibility of independent creation.\textsuperscript{59} The circuits disagree on how much weight to give the "strikingly similar" doctrine.\textsuperscript{60} Every court allows the showing of striking similarity to partially compensate for a deficiency in proof of access, but not all courts allow striking similarity to compensate for a complete lack of proof of access.\textsuperscript{61} Although slight differences

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  \item similarity, burden shifts to defendant to prove that he did not copy plaintiff's work).
  \item See \textit{Kamar Int'l}, 657 F.2d at 1062 (finding access where defendant did business with same third party as plaintiff).
  \item See \textit{Twin Peaks Prods., Inc. v. Publ'ns Int'l}, Ltd., 996 F.2d 1366, 1372 (2d Cir. 1992) (finding access when protected work was shown in broadcast programs that defendants had access to).
  \item See \textit{Gaste}, 863 F.2d at 1068 (holding evidence of striking similarity sufficient to permit jury to infer access); see also 4 \textbf{MELVILLE B. NIMMER, NIMMER ON COPYRIGHT} § 13.02[B], 13-23 (2001) (indicating common circumstance where copying need not be proven occurs "when the similarity between plaintiff's and defendant's works is sufficiently striking such that the trier of fact may be permitted to infer copying, notwithstanding the plaintiff's failure to prove access."); \textit{Mohler, supra} note 6, at 979 ("If evidence of access is not apparent, the similarities between the two works must be so 'striking' as to preclude the possibility of independent creation."). The theory behind the "strikingly similar" doctrine is that if the works are so similar that there is no other explanation than copying, the fact that the works are strikingly similar proves the defendant must have had access to the plaintiff's work. See \textit{Broaddus, supra} note 12, at 47.
  \item See \textit{Mohler, supra} note 6, at 977 (noting differences among circuits treatment of the access requirement in light of works found to be strikingly similar); see also \textit{Broaddus, supra} note 12, at 47 (noting that most courts require at least showing of bare possibility of access); \textit{Bevill, supra} note 8, at 317-18 (discussing effect of "strikingly similar" doctrine on access requirement). A plaintiff may succeed in a copyright action, without proof of access, if the works are so strikingly similar as to make it unbelievable that anything other than copying is possible. See \textit{Bevill, supra} note 8, at 317-18. Some courts will "lessen the stringency of the access test" upon a showing of striking similarity. See \textit{id}.
  \item See \textit{Gaste}, 863 F.2d at 1067 ("In this Circuit, the test for proof of access in cases of striking similarity is less rigorous."). The court indicated that there could be the possibility of cases where two works are so strikingly similar as to preclude the possibility of independent creation, and therefore, copying could be proven without a showing of access. See \textit{id.} at 1068. The court noted that the jury is "permitted to infer access" with striking similarity, but is not required to find access. \textit{Gaste}, 863 F.2d at 1068. Although striking similarity alone may be enough to create the inference of copying, the "inference must be reasonable in light of all the evidence." \textit{Id.}; see also \textit{Selle v. Gibb}, 741 F.2d 896, 902 (7th Cir. 1984) ("[A]lthough proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable."). The \textit{Selle} court indicated it would be a rare situation when striking similarity alone would establish access. See \textit{Selle}, 741
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arise, the circuits generally take two positions. Circuits allow for the showing of striking similarity to dispense with the requirement of access, while other circuits lessen the amount of proof necessary to show access and essentially permit the jury to infer access from striking similarity. The Fifth Circuit stands alone in allowing striking similarity to formally dispense with the access requirement. The Second, Seventh and Fourth Circuits, in varying degrees, do not dispense with the requirement of access. The First, Third and Sixth Circuits have acknowledged the existence of the doctrine without taking a position on which they will follow.

In Gaste v. Kaiserman, for example, the plaintiff claimed copyright infringement of an unsuccessful song entitled "Pour Toi" that he composed in 1956. Seventeen years later, the defendant composed and published the hit song "Feelings," which the plaintiff

F.2d at 901.  But see Ferguson, 584 F.2d at 113 ("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.").

62. See Mohler, supra note 6, at 977 (indicating that at least one circuit requires there be some possibility that defendant had access to copyrighted work).

63. See Broaddus, supra note 12, at 48 (indicating that showing of striking similarity may lessen or dispense with access requirement). The distinction between the two theories is better understood by looking at the courts' distinctions because some courts eliminate the requirement of access in light of striking similarity, and other courts use striking similarity as evidence tending to prove access. Compare Ferguson, 584 F.2d at 113 (indicating that copying can be proven without showing of access in light of striking similarity between the two works that precludes possibility of independent creation), with Ty, Inc. v. GMA Accessories, 132 F.3d 1167, 1170 (7th Cir. 1997) (citing Selle, 741 F.2d at 901) (stating that plaintiff "must produce evidence of access, [but] a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access").

64. See Ferguson, 584 F.2d at 113 (finding that striking similarity may be enough to prove copying, even in absence of evidence of access).

65. See Gaste, 863 F.2d at 1068 (finding that striking similarity allows jury to infer access); see also Bouchat v. Baltimore Ravens, Inc., 228 F.3d 489, 494 (4th Cir. 2000) (stating that "striking similarity is one way to demonstrate access," however, "[a]ccess remains an indispensable part of a copyright infringement claim"); Ty, 132 F.3d at 1170 (finding showing of striking similarity is evidence of access).

66. See Ellis v. Diffie, 177 F.3d 503, 507 (6th Cir. 1999) (recognizing "case law indicates that stronger the similarity between the two works in question, less compelling proof of access needs to be"); Midway Mfg. Co. v. Bandai-Am., Inc., 546 F. Supp. 125, 153 (D.N.J. 1982) (indicating such pervasive similarities between works that no reasonable jury could find that defendant did not copy plaintiff's work), aff'd, 775 F.2d 70 (3d Cir. 1985); Contemporary Arts, Inc. v. F.W. Woolworth Co., 93 F. Supp. 739, 743 (D. Mass. 1950) (concluding similarities could hardly be result of coincidence and "similarities being so striking, access may be inferred"), aff'd, 193 F.2d 162 (1st Cir. 1951).

67. 863 F.2d 1061 (2d Cir. 1988).

68. See id. at 1063 (noting plaintiff registered his copyright in U.S. in 1957 but worldwide revenues from song totaled less than fifteen thousand dollars).
alleged infringed on his copyright. Because evidence of access in the traditional sense was lacking, the plaintiff also presented evidence of striking similarity to prove access. The court instructed the jury that it could infer that the defendant copied the work from the striking similarity of the two songs. The jury found that the defendant copied the work. The Second Circuit affirmed and indicated that striking similarity between two works can alone raise an inference of copying, as long as that inference is reasonable in light of all the evidence.

In Selle v. Gibb, the Seventh Circuit addressed the application of the "strikingly similar" doctrine when Ronald Selle brought a copyright infringement suit against the popular singing group, the Bee Gees. The plaintiff alleged that the defendants infringed on his copyright of the song "Let It End" with their hit song "How Deep Is Your Love." The plaintiff presented an expert witness, who opined that the two works were so similar they could not have been created independent of each other, but he declined to testify that the similarities could be explained only by copying. The defendants rebutted the expert's testimony with evidence of independent creation that consisted of a tape showing the actual process of the song's creation. The jury returned a verdict for the plaintiff, but the trial judge granted the defendants' motion for judgment

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69. See id. (indicating song became international smash hit and won awards in many countries).
70. See id. at 1067 (noting plaintiff's theory of access was based on attenuated chain of events).
71. See id. at 1067-68 (recognizing trial judge instructed jury that "if a copyrighted work and an allegedly infringing work are strikingly similar, 'then access does not have to be proven'").
72. See Gaste, 863 F.2d at 1067-68.
73. See id. at 1068 (clarifying that jury is permitted, not required, to infer access from striking similarity). The Gaste court stated that a plaintiff cannot prove copying by striking similarity alone if "the evidence as a whole does not preclude any reasonable possibility of independent creation." Id. The court found that the jury's decision was supported by the evidence in light of the expert testimony and aural renditions of the songs. See id.
74. 741 F.2d 896 (7th Cir. 1984).
75. See id. at 898 (noting that Bee Gees consisted of three brothers: Maurice, Robin and Barry Gibb).
76. See id.
77. See id. at 899 (noting that plaintiff's expert had never before made a comparative analysis of two popular songs). The court also noted that persons testified that many of the notes in songs were identical in pitch and symmetrical position. See id.
78. See id. (indicating creation consisted of keyboard player playing tune while brothers hummed or sang).
notwithstanding the verdict. The Seventh Circuit affirmed, holding that there was insufficient evidence to prove access. The court found that the availability of the plaintiff's song was "virtually de minimis," and the evidence of striking similarity between the two songs was not strong enough to create an inference of access. The court concluded that "although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable."

Later, in *Ty, Inc. v. GMA Accessories*, the Seventh Circuit clarified its position on the "strikingly similar" doctrine. Ty, Inc., manufacturer of the well-known "Beanie Babies" stuffed animals, brought suit against GMA alleging that it infringed on Ty's copyright of its stuffed pig named "Squeeler." Ty offered evidence that the two stuffed pigs were nearly identical. Although Ty's pigs had been widely disseminated, GMA tried to argue lack of access; however, the Seventh Circuit found that there was enough of a striking similarity between the two pigs to create an inference of access. The court made an important clarification by stating that "we do not read our decision in *Selle* to hold or imply ... that no matter how closely the works resemble each other, the plaintiff must produce some (other) evidence of access."

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79. See *Selle*, 741 F.2d at 899 (noting that although judge denied motion for directed verdict, it is more efficient to send matter to jury so case will not have to be retried if, on appeal, trial judge is found to have erred).

80. See *id.* at 901 (explaining that circumstantial evidence can prove copying, but most important component of circumstantial evidence is proof of access).

81. See *id.* at 902.

82. Id.

83. 132 F.3d 1167 (7th Cir. 1997).

84. See *id.*

85. See *id.* at 1169. Ty also brought suit against GMA for infringement of its cow "Daisy;" however, the claim for infringement of "Daisy" was not at issue on appeal. See *id.*

86. See *id.* (commenting that only real difference in the two animals was due to camera tricks by GMA and defective example of pig introduced into evidence by GMA).

87. See *id.* at 1170-71 (noting that allegedly copied work was mass produced and widely available for about five dollars).

88. *Ty*, 132 F.3d at 1170. The court was careful to clarify that the access requirement was not dispensed when considering the striking similarity of the two works. See *id.* The court points out that if the two works are so similar as to make it "highly unlikely to have been an accident of independent creation," the similarity is evidence of access. *Id.*
In *Ferguson v. National Broadcasting Co.*, the Fifth Circuit developed its position on the "strikingly similar" doctrine. The plaintiff alleged that NBC infringed on his 1953 copyright of the song "Jeanne Michele" with its theme song to the television program "A Time to Love," which aired in 1973. The plaintiff was unable to prove access but proposed that the two works were so strikingly similar that access need not be proven. The Fifth Circuit stated that "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." The court ultimately concluded that the bare evidence presented by the plaintiff did not warrant a factual question as to whether there was striking similarity.

If access has been clearly proven, the plaintiff must still show that the works are substantially similar to create an inference of copying. Many commentators and some courts label this prong as "probative similarity" in order to avoid confusion with the "substantial similarity" requirement needed to prove improper appropriation. Most courts hold that "the two works are to be compared in their entirety" when evaluating whether probative similarity exists. Therefore, a comparison should be made between both the protected and unprotected elements of the works. A plaintiff may

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89. 584 F.2d 111 (5th Cir. 1978).
90. See id. (holding that under "strikingly similar" doctrine copying may be proved without a showing of access, but evidence in current case was insufficient to support such a finding).
91. See id. at 112 (indicating plaintiff alleged that first sixteen and last eight measures of her song were infringed upon).
92. See id. at 113 (noting that finding access in this case would require piling of assumptions on top of assumptions).
93. Id. at 113 (emphasis added).
94. See *Ferguson*, 584 F.2d at 113-14 (noting that only evidence plaintiff submitted was the two compositions and defendant submitted affidavits of experts indicating that the works were not strikingly similar).
95. See *Bevil*, supra note 8, at 318 (noting second element of proof is that the two works are substantially similar).
96. See *Latman*, supra note 54, at 1190 (suggesting use of term "probative similarity" to prove an inference of copying in order to avoid confusion). Proof of similarity to create inference of copying is not the same as proof of similarity to show improper appropriation. See id. Less evidence is needed to prove an inference of copying. See id. Most courts have ignored the differences in the proof of similarities required for these prongs and continue their double usage of the term "substantially similar." See id. The Second Circuit has incorporated Professor Latman's terminology in their copying test. See *Laureysens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992) (adopting "probative similarity" language in test for proving inference of copying).
97. Broaddus, supra note 12, at 52.
98. See *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993) (finding that copying of unprotected elements can have probative value in
use expert testimony to assist the trier of fact in determining whether the similarities are probative of copying. After a finding of probative similarity, the jury will consider whether the copying constitutes improper appropriation.  

2. *Improper Appropriation*

After the court finds that the defendant copied the plaintiff's work, the plaintiff must show that the copying extended to a protected expression of the work and that the expression has qualitative value in order to find infringement. To prove improper appropriation, the plaintiff must show that the two works are substantially similar. Determining the amount of similarity needed to prove improper appropriation is one of the most difficult pieces of copyright law. Generally, the test for substantial similarity does not allow expert testimony; rather, the test considers whether a lay observer would find sufficient, substantial similarity between the two works for a finding of improper appropriation. The existence of diverse opinions among the courts and commentators has resulted in the emergence of several divergent tests to prove improper appropriation.

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99. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1474 (9th Cir. 1992) (indicating that expert testimony is relevant to both analysis of ideas behind works and objective analysis of expression); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232 (finding that use of expert testimony is permissible to aid trier of fact in determining probative similarity).

100. See Broaddus, supra note 12, at 52 (indicating finding of no probative similarity would justify summary judgment for defendant).

101. See id. at 55 (noting that defendant's copying of plaintiff's work is not enough to warrant finding of infringement).

102. See Mohler, supra note 6, at 979 (indicating that plaintiff must prove that defendant copied enough of protected work in order to succeed in infringement action).

103. See id. ("Slight or trivial similarities are not sufficient to find substantial similarity, yet the works need not be identical.").

104. See id. at 980 (citing Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966) (quoting popular definition of substantial similarity as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work").

105. See id. (noting that four tests have been developed and each has gained wide acceptance). Because this Note mainly focuses on the "strikingly similar" doctrine, it is enough to know that the plaintiff must prove improper appropriation, and there are different methods by which plaintiff may do so, depending upon which circuit plaintiff brings the action.
IV. NARRATIVE ANALYSIS

In Bouchat, the district court certified the following questions for the Fourth Circuit to consider on interlocutory appeal: "(1) [w]as the plaintiff’s proof of a reasonable possibility of access legally insufficient? (2) [i]f so, will the Fourth Circuit adopt the ‘strikingly similar’ doctrine inferring access, as expressed in Gaste v. Kaiserman . . . "106 First, the Fourth Circuit examined whether the plaintiff’s proof of access was legally sufficient.107 The court stated that to establish access, Bouchat must show that the NFL designers, the alleged infringers, “had an opportunity to view Bouchat’s drawing.”108 The court noted that the jury could infer access if a third party intermediary, who had a close relationship with the alleged infringers, had access.109 Next, the Bouchat court reasoned that the evidence the jury could credit to the plaintiff established more than a hypothetical possibility that the alleged infringers had the opportunity to view Bouchat’s drawing.110 The court agreed that the defendant successfully showed that Bouchat had not proven that


Two other issues the court considered were:

(3) Should the copyright infringement claim be dismissed because the plaintiff failed to note the derivative nature of the shield drawing on the application for copyright, where the defendants have not proven fraud or a purposeful failure to advise the copyright office of facts that might have caused rejection of the application? (4) Did the court improperly coerce the jury to reach its verdict?

Id.

The court answered these latter issues in the negative. See id. at 495.

107. See id. at 492-93 (noting that with insufficient direct evidence of copying, plaintiff may prove copying by showing that defendant had access to plaintiff’s work and that the two works are substantially similar).

108. Id. at 492 (citing Towler v. Sayles, 76 F.3d 579, 582 (4th Cir. 1996)).

109. See id. (indicating if Modell, third party intermediary, had access, then jury could infer that NFL designers had access). The Fourth Circuit “has rejected mere ‘speculative reasoning’ as a basis of proving access, especially when intermediaries are involved.” Id. The court stated, “[r]easoning that amounts to nothing more than a tortuous chain of hypothetical transmittals is insufficient to infer access.” Id. (citing Towler, 76 F.3d at 583 which quoted Meta-Film Assoc. v. MCA Inc., 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

110. See id. at 493 (concluding that Bouchat clearly presented sufficient evidence to sustain his burden). The evidence presented by Bouchat included: (1) the drawing’s transmission to Moag, who shared an office with Modell; (2) Bouchat’s testimony that Moag offered to forward the drawing to the Ravens; (3) Bouchat’s testimony that he sent the drawings to the Maryland Stadium Authority (“MSA”) and addressed them to Moag; (4) the usual practice at MSA to forward faxes addressed to Moag to his Pratt Street office; (5) Modell and Ravens’ staff members shared office space with Moag in the Pratt Street building; and (6) Modell’s office was in very close proximity to Moag’s office. See id. This evidence was sufficient for the jury to find access and the chain of transmittals was far more than hypothetical. See id.
Modell actually saw his drawings. The court, however, said that Bouchat need not prove that Modell actually saw the drawings, but only that "Modell had the opportunity to view them." Concerning the access issue, therefore, the Bouchat court ultimately held that the jury was entitled to conclude that Modell had access to the drawings. In making this conclusion, the Fourth Circuit distinguished the Bouchat holding from its earlier decision in Towler v. Sayles. In Towler, the court found insufficient proof of access when the plaintiff relied on a "theoretical possibility" that the defendant had access to the work. With a proper finding of access, the jury in Bouchat was able to combine proof of access with substantial similarity in order to find an inference of copying.

Following this determination, the Bouchat court addressed whether to adopt the "strikingly similar" doctrine. The court looked to decisions in the Second, Seventh and Fifth Circuits to decide whether, and in what form, to adopt the doctrine. The court assessed the Second Circuit's decision in Gaste and the Seventh Circuit's decision in Ty as permitting an inference of copying if the two works are strikingly similar. The court then contrasted

111. See Bouchat, 228 F.3d at 493 (noting Bouchat was not required to prove that Modell actually saw and copied drawings).
112. Id. (concluding sufficient evidence existed to find Modell had opportunity to view drawing).
113. See id. (concluding that there was sufficient evidence to support finding of access).
114. 76 F.3d 579 (4th Cir. 1996).
115. See id. at 583 (explaining plaintiff's theory of access as speculative). The Bouchat court explained that the plaintiff in Towler attempted to prove access on the theory that the "agents to whom she had sent her screenplay 'could have sent the work to' the alleged infringer." Bouchat, 228 F.3d at 492-93 (quoting Towler, 76 F.3d at 583). The Bouchat court explained that this reasoning only created a hypothetical possibility that the screenplay was sent to the defendant, but no evidence existed that the agents did in fact send the work to the defendant. See id. Moreover, the defendant in Towler never dealt with the agents to whom the plaintiff had sent her screenplay. See Towler, 76 F.3d at 583.
116. See Bouchat, 228 F.3d at 493 (concluding jury could properly find Ravens copied Bouchat's drawings).
117. See id. (recognizing question as conditional upon finding there was legally insufficient evidence to prove access). Although the court firmly held that there was sufficient evidence of access, the court found it proper to decide whether the Fourth Circuit would adopt the "strikingly similar" doctrine. See id.
118. See id. at 493-94 (addressing differences in application of doctrine among circuits). For further discussion on the positions taken by the various circuits, see supra notes 60-94 and accompanying text.
119. See Bouchat, 228 F.3d at 493-94 (recognizing agreement between Second and Seventh Circuits in application of "strikingly similar" doctrine). The Fourth Circuit explained that the "strikingly similar" doctrine expressed in Gaste "permits an inference of access in cases where the two works in question are so similar as to create a high probability of copying and negate the reasonable possibility of inde-
these holdings with the Fifth Circuit’s decision in Ferguson and its application of the “strikingly similar” doctrine. In Ferguson, the Fifth Circuit allowed a finding of copying without any showing of access when striking similarity exists between the two works.

The Bouchat court, however, did not agree with the Fifth Circuit’s abandonment of the access requirement. Instead, the court agreed with the Second and Seventh Circuits that if works are strikingly similar, it only raises an inference of copying. The Fourth Circuit modeled its application of the doctrine from the Second Circuit’s decision in Gaste. Specifically, the Fourth Circuit clearly stated that a showing of striking similarity does not relieve the plaintiff of his burden to prove access; rather, the showing is circumstantial evidence tending to create an inference of access. Furthermore, the court held that it would adopt the “striking similarity” doctrine consistent with the Second and Seventh Circuits, and the access prong would not be eliminated. The court made clear that the plaintiff offered sufficient evidence for an independent showing of access, but held nonetheless that “the striking similarity of the works was a proper factor for the jury to consider, in conjunction with all other evidence, to determine whether the plaintiff had proven copying by circumstantial evi-

120. See Bouchat, 228 F.3d at 494 (criticizing Fifth Circuit’s approach to “strikingly similar” doctrine).

121. See id. (indicating that Fifth Circuit abandons access requirement when there is showing of striking similarity).

122. See id. ("[U]nlike the Fifth Circuit, this court does not favor the wholesale abandonment of the access requirement in the face of a striking similarity.").

123. See id. (indicating access should remain “indispensable” part of copyright infringement suit).

124. See id. at 493-94 (discussing Gaste decision and adopting "strikingly similar" doctrine as expressed by Gaste). The court quoted the Second Circuit, “[a] plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.” Id. at 494 (quoting Gaste, 863 F.2d at 1068). The court also quoted the Seventh Circuit, “no matter how great the similarity between the two works, it is not their similarity per se which establishes access.” Id. (quoting Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984)).

125. See Bouchat, 228 F.3d at 494 (discussing importance of leaving access prong intact). The court concluded that the level of similarity between the works can be used as evidence of access, but a finding of access must be reasonable in light of all the evidence. See id.

126. See id. (indicating no binding precedent in Fourth Circuit regarding application of Gaste opinion).
The court, therefore, affirmed the district court's denial of the defendant's motion for judgment as a matter of law.\textsuperscript{128} The dissent vigorously disagreed with the majority's conclusions that significant evidence of access existed and that the Fourth Circuit should adopt the "strikingly similar" doctrine.\textsuperscript{129} First, the dissent argued that the plaintiff's showing of access was wholly lacking and amounted to nothing more than a "tortuous chain of hypothetical transmittals."\textsuperscript{130}

The dissent stated that the jury was entitled to credit Bouchat's testimony and could have concluded that Bouchat sent the fax to the MSA.\textsuperscript{131} The dissent, however, argued that the evidence did not support a finding of access beyond this point.\textsuperscript{132} A finding that the alleged infringers had access to the drawing would require piling inference upon inference.\textsuperscript{133}

The dissent disagreed with the finding of access, but claimed that after the majority held that there was sufficient evidence to prove access, it was unnecessary to examine the "strikingly similar"

\begin{itemize}
\item [127.] \textit{Id.}
\item [128.] See \textit{id.} at 495.
\item [129.] See \textit{id.} at 495-503 (King, J., dissenting) (arguing majority incorrectly found sufficient evidence to support finding of access, and furthermore, majority should not have adopted the "strikingly similar" doctrine).
\item [130.] \textit{Bouchat}, 228 F.3d at 497 (King, J., dissenting) (internal quotations omitted). The dissent said that the majority properly recognized that piling inference upon inference to support a finding of access is insufficient, however, the majority incorrectly applied the evidence in the current case to the appropriate standard. See \textit{id.} at 496 (King, J., dissenting). The dissent stated that in order for the jury to conclude the defendants had access to the drawing, they would have to assume the drawing traveled the following route:

[1] the Maryland Stadium Authority ("MSA") actually received Bouchat's facsimile transmission (Step 1); [2] MSA then forwarded Bouchat's fax to the Pratt Street office of John Moag's law firm (Step 2); [3] David Modell of the Baltimore Ravens (which rented office space in the Pratt Street building housing Moag's law firm - but on a different floor than Moag), received Bouchat's drawing (Step 3); [4] Modell, or someone else within the Ravens organization, forwarded Bouchat's drawing to designers Rhonda Kim and Kurt Osaki of the NFLP in New York (Step 4).
\item [131.] \textit{Id.} at 497.
\item [132.] See \textit{id.} at 497 (King, J., dissenting) (opining that evidence was marginal at best, as it was not corroborated with any other evidence).
\item [133.] See \textit{id.} at 497-502 (King, J., dissenting) (concluding endless piling of inferences and uncontradicted testimony offered by defendants precluded finding of access). The dissent continued to explain that the jury was not permitted to discredit the defendant's uncontradicted testimony, which was offered to disprove the hypothetical chain of events created by the plaintiff, in order to support a finding of access. See \textit{id.} at 498.
\end{itemize}
The dissent specifically stated that it would not be able to join the majority’s endorsement of the doctrine. The dissent argued that the “strikingly similar” doctrine ignores the fact that access and substantial similarity are crucial and distinct elements to every copyright infringement claim. The dissent believed that access is extremely crucial because no matter how similar the two works are, if the defendant did not copy the plaintiff’s work then copyright infringement did not occur. In its final argument, the dissent suggested that the access requirement remain separate and distinct from the requirement that the works be substantially similar. The dissent concluded that the jury’s verdict in favor of the plaintiff was unsupported factually and legally flawed.

V. CRITICAL ANALYSIS

A. Access

In Bouchat, the Fourth Circuit found that there was sufficient evidence to support the jury’s finding of access. In doing so, the court rejected the argument advanced by the defendants that the plaintiff’s “proof amounts only to a ‘tortuous chain of hypothetical transmittals.”

In rejecting this argument, the court distinguished its earlier precedent in Towler from the instant case. In both cases, the plaintiff offered evidence of access by a third party intermediary to prove access of the alleged infringer. In Towler, the plaintiff

134. See id. at 502 (King, J., dissenting) (referring to majority’s adoption of “strikingly similar” doctrine as “unnecessary dicta” which “should accordingly lack precedential value”).
135. See Bouchat, 228 F.3d at 503 (King, J., dissenting) (finding “strikingly similar” doctrine runs contrary to fundamental principle in copyright law of independent creation).
136. See id. (King, J., dissenting) (emphasizing importance of keeping access prong intact).
137. See id. (King, J., dissenting) (indicating if there was no access to plaintiff’s work then it would logically follow that there could not be finding of copying of plaintiff’s work even if the two works were identical).
138. See id. (King, J., dissenting) (arguing absurd decisions would result if proof of one element was allowed to form inference for another element).
139. See id. at 503 (King, J., dissenting).
140. See Bouchat, 228 F.3d at 493 (concluding Bouchat had presented sufficient evidence that Modell had opportunity to view his drawings).
141. Id. at 492. If the evidence amounts only to a “tortuous chain of hypothetical transmittals,” it is legally insufficient to prove access. See id.
142. See Bouchat, 228 F.3d at 492-93 (indicating plaintiff in Towler relied on hypothetical possibility defendant received copyrighted work).
143. See Towler, 76 F.3d at 583 (explaining how plaintiff attempted to show several individuals qualified as intermediaries); see also Bouchat, 228 F.3d at 492-93.
claimed that access was established because she sent her screenplay to a film company and asked that it be forwarded to the defendant.\textsuperscript{144} While the defendant previously worked with the company’s predecessor and its employees, the defendant neither dealt with or worked for the company to which plaintiff sent her screenplay.\textsuperscript{145} The court concluded that the requisite close relationship between the intermediary and the defendant did not exist because “[a]t a minimum, the dealings between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access.”\textsuperscript{146}

In contrast, the third party intermediary in \textit{Bouchat} was the Ravens’ owner, Modell, who worked closely with the NFL designers in designing the team logo.\textsuperscript{147} Bouchat, however, did not fax his drawings directly to Modell; instead, he allegedly faxed them to Moag, who told Bouchat that he would forward them to the Ravens for consideration.\textsuperscript{148} Thus, in order to find access, the evidence must show that Moag received the fax and then forwarded it to Modell.\textsuperscript{149}

The dissent believed that under \textit{Towler}, the proof of access in this case consisted of piling inference upon inference; therefore, the evidence amounted to nothing more then a “tortuous chain of hypothetical transmittals.”\textsuperscript{150} In this case, however, everyone clearly

\textsuperscript{144} See \textit{Towler}, 76 F.3d at 583 (noting plaintiff mistakenly believed that company was owned by defendant).

\textsuperscript{145} See id. (noting plaintiff attempts to make connection by presenting evidence that film company supervisor and defendant’s attorney were social acquaintances). Plaintiff then argued that various individuals in the film industry had access to the plaintiff’s screenplay and could have forwarded the work to the defendant. See id.

\textsuperscript{146} Id. (quoting Meta-Film Assocs., Inc. v. MCA, Inc., 586 F. Supp. 1346, 1358 (C.D. Cal. 1984)).

\textsuperscript{147} See \textit{Bouchat}, 228 F.3d at 492 (indicating that during time after Bouchat allegedly faxed his drawings, Modell was in regular communication with design team).

\textsuperscript{148} See id. at 491 (noting Modell was temporarily occupying same office space with Moag).

\textsuperscript{149} See id. at 493 (noting Bouchat testified Moag had offered to forward fax of drawings to Ravens). For a complete discussion by the majority of the steps needed to prove that Modell received the drawings, see \textit{supra} note 110 and accompanying text. For the dissent’s view of the necessary assumptions, see \textit{supra} note 130 and accompanying text.

\textsuperscript{150} Id. at 497 (King, J., dissenting) (internal quotations omitted). The dissent also pointed out that defendants offered testimony that employees who normally handled faxes did not recall this particular fax. See id. at 498 (King, J., dissenting). This evidence contradicted the inferences needed to support a finding of access. See id. (King, J., dissenting).
involved shared a close relationship. First, Moag and Modell shared an office in the Pratt Street building, and Moag agreed to forward a fax of the drawing to the Ravens. Second, Modell had a close relationship with the design team, as he frequently communicated with them regarding the logo design.

Despite the dissent’s agreement with the majority that the jury was entitled to conclude that Moag received the fax, it disagreed that the remaining inferences could be made. The dissent and the majority agreed that the evidence was sufficient to prove Moag received the fax and the parties involved were connected through close relationships; the dissent, however, felt it was necessary to fill in the holes of the inferences drawn by this circumstantial evidence.

B. “Strikingly Similar” Doctrine

After finding sufficient evidence to support the access requirement, the Bouchat court addressed whether to adopt the “strikingly similar” doctrine. The court addressed this issue even though the question of striking similarity was contingent upon a finding of insufficient evidence to prove access.

151. See id. at 491-92 (indicating Modell and some of Ravens’ staff shared office space with Moag and Modell worked closely with NFL design team).

152. See Bouchat, 228 F.3d at 491 (noting that Moag told Bouchat to send him drawing and he would forward it to Ravens). The majority concluded that the jury was entitled to infer that Moag had forwarded the drawings to Modell because of his promise to do so. See id. at 493. The dissent disagreed with this assertion, but did agree that the jury could credit Bouchat’s testimony that he sent a fax of the drawings to Moag. See id. at 497 (King, J., dissenting).

153. See id. at 492 (noting that until logo’s unveiling, Modell was in communication with design team).

154. See id. at 497 (King, J., dissenting) (concluding although Bouchat’s evidence that Moag received fax was sufficient, Bouchat had much more to prove).

155. See id. at 495 (concluding jury was permitted to credit evidence and infer access). The majority reasoned that circumstantial evidence existed to fill in the holes. See id. First, Bouchat offered evidence that his drawing was faxed to Moag, who shared an office with Modell. See id. Second, there was evidence that Moag promised Bouchat that he would forward the drawings to the Ravens. See id. Third, there was evidence that it was the usual practice at MSA to forward faxes addressed to Moag to the Pratt Street building. See id. Finally, Modell shared office space with Moag. See id. Thus, the jury was permitted to credit this evidence and conclude that Modell had access to the drawings. See id.

156. See id. at 493 (finding proper to address whether Fourth Circuit should adopt “strikingly similar” doctrine).

157. See Bouchat, 228 F.3d at 493 (recognizing certification only required response upon finding insufficient evidence of access). The dissent felt that the court had no business addressing the issue, and the adoption of the doctrine was unnecessary dicta lacking precedential value. See id. at 502 (King, J., dissenting). The majority, however, did not believe the opinion was unnecessary dicta and stated that “the striking similarity of the works was a proper factor for the jury to
The court intended to adopt the doctrine consistent with the Second and Seventh Circuits' interpretation.\textsuperscript{158} The court clearly stated that it did not wish to dispense the access requirement when there is a finding of "striking similarity," as the Fifth Circuit had done.\textsuperscript{159} Instead, the court would allow "striking similarity" to serve as evidence in order to prove the access requirement.\textsuperscript{160}

While the court's interpretation is essentially correct, the court failed to recognize that no real substantive difference exists in the application of the doctrine among the Fifth, Second and Seventh Circuits.\textsuperscript{161} Substantively, these circuits apply the doctrine similarly, with the essential difference lying in the courts' language as to whether or not the court explicitly says that the access prong remains intact.\textsuperscript{162} In each circuit striking similarity can be enough to prove copying without other independent evidence of access.\textsuperscript{163}

The majority in \textit{Bouchat} adopted a broader interpretation of the "strikingly similar" doctrine because the court did not, at any

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\textsuperscript{158} \textit{See id.} at 494 (indicating their interpretation of doctrine is consistent with Second and Seventh Circuits' decisions).

\textsuperscript{159} \textit{See id.} at 494 (commenting on their disapproval of wholesale abandonment of access prong). The court quoted the Fifth Circuit's statement that "copying may be proved without a showing of access" with disapproval. \textit{See id.} (quoting Ferguson v. Nat'l Broad. Co., 584 F.2d 111, 113 (5th Cir. 1978)).

\textsuperscript{160} \textit{See id.} (noting importance that access prong remain intact).

\textsuperscript{161} \textit{See Gaste v. Kaiserman, 863 F.2d} 1061, 1068 (2d Cir. 1988) (citing Fifth Circuit decision in \textit{Ferguson} as precedent for "strikingly similar" doctrine).

\textsuperscript{162} \textit{Compare Gaste,} 863 F.2d at 1068 (permitting jury to infer access based on striking similarity, but also indicating that striking similarity, without more, could prove copying), and \textit{Ty, Inc. v. GMA Accessories, 132 F.3d} 1167, 1170 (7th Cir. 1997) (refusing to do away with access requirement, but indicating that high degree of striking similarity may alone be sufficient evidence to prove access), \textit{with Ferguson,} 584 F.2d at 113 (indicating that if the works are strikingly similar, copying may be proven without a showing of access).

\textsuperscript{163} \textit{See Gaste,} 863 F.2d at 1068 (noting that proving access in light of striking similarity is less rigorous in Second Circuit). The \textit{Gaste} court quoted an earlier Second Circuit decision, "[i]n some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, \textit{without more}, both to justify an inference of copying and to prove improper appropriation." \textit{Id.} at 1068 (quoting \textit{Armstein v. Porter,} 154 F.2d 464, 468-69 (2d Cir. 1946)). Then, the \textit{Gaste} court cited the Fifth Circuit's decision in \textit{Ferguson} for the proposition that if the two works are so similar as to preclude the possibility of the two being created independently, then copying may be proven without a showing of access. \textit{See id.} In conjunction, the Seventh Circuit stated "we do not read our decision in \textit{Selle} to hold or imply, in conflict with the \textit{Gaste} decision, that no matter how closely the works resemble each other, the plaintiff must produce some (other) evidence of access." \textit{Ty,} 132 F.3d at 1170. The Fifth Circuit also used a similar approach by stating that "[i]f the two works are so strikingly similar as to preclude the possibility of independent creation, 'copying' may be proven without a showing of access." \textit{Ferguson,} 584 F.2d at 113.
point in the opinion, state that a striking similarity may alone be enough to prove copying.\textsuperscript{164} From the opinion, one can infer that the court adopted the doctrine with the intention that the plaintiff is required to produce some other evidence of access in addition to striking similarity.\textsuperscript{165} It is clear that the majority made a distinction between the circuits because the Fourth Circuit wished to adopt a doctrine that still required some independent proof of access, separate from a showing of striking similarity.\textsuperscript{166} However, from a close reading of the decisions in the Second and Seventh Circuits, it is clear that the majority adopted a doctrine separate and distinct from those circuits.\textsuperscript{167}

VI. IMPACT

The decision in \textit{Bouchat} will likely play a substantial role in the ambiguous caselaw interpreting the "strikingly similar" doctrine.\textsuperscript{168} Before the \textit{Bouchat} decision, the split among the circuits was merely technical because either the court formally rid itself of the access prong in the face of striking similarity, or the court formally kept the access prong, but nonetheless would allow the plaintiff to succeed absent independent proof of access.\textsuperscript{169} Now, it is apparent from the language in the opinion, that the Fourth Circuit has taken the stance alone that there must be independent evidence of access, even when the works are strikingly similar.\textsuperscript{170} The Fourth Cir-

\textsuperscript{164} See \textit{Bouchat}, 228 F.3d at 494 (noting importance of leaving access prong intact).

\textsuperscript{165} See id. (noting inference of access must be reasonable in light of all evidence in particular case). The court also stated that "[i]t is clear that a showing of striking similarity does not per se relieve the plaintiff of his burden of establishing access." \textit{Id}. The court does not conclude that striking similarity between the works is evidence of access, but the court does not clarify whether this evidence standing alone would be enough to prove access. See \textit{id}.

\textsuperscript{166} See \textit{id}.

\textsuperscript{167} See \textit{Gaste v. Kaiserman}, 863 F.2d 1061 (2d Cir. 1988); see also \textit{Ty, Inc. v. GMA Accessories}, 132 F.3d 1167 (7th Cir. 1997).

\textsuperscript{168} See \textit{Bouchat}, 228 F.3d at 493-94 (indicating that Second and Seventh Circuits leave access prong intact). But see \textit{Ty}, 132 F.3d at 1170 (concluding that plaintiff may prove copying without independent showing of access, if the two works are strikingly similar enough); \textit{Ferguson}, 584 F.2d at 113 (concluding access need not be proven independently if the two works are strikingly similar). See generally Broaddus, \textit{supra} note 12.

\textsuperscript{169} See supra notes 162-63 and accompanying text.

\textsuperscript{170} See \textit{Bouchat}, 228 F.3d at 494 (indicating access prong remains intact when there is proof of striking similarity). Similar to the Second and Seventh Circuits, the Fourth Circuit does indicate that striking similarity would constitute evidence of access. See \textit{id}. However, the Fourth Circuit is adamant on the importance of proof of access and does not indicate that striking similarity alone may be enough to prove access. See \textit{id}.
cuit, therefore, clearly adopted a more limited version of the “strikingly similar” doctrine. Only time will tell if the court will con-
tinue to adhere to its limited interpretation of the doctrine.

The question remains as to whether this case represents prece-
dent for the “strikingly similar” doctrine or whether the discussion is dicta.171 If the discussion of the “strikingly similar” doctrine is in fact dicta, the opinion will lack precedential value, but the opinion will nonetheless prove to be persuasive authority in the Fourth Circuit.172

The Fourth Circuit’s decision in Bouchat and the other cases applying the “strikingly similar” doctrine have not clarified the application of this doctrine and many questions still remain. How similar do the two works have to be in the Second and Seventh Circuits to prove copying, absent independent evidence of access? Is that essentially the same as the Fifth Circuit? Does the Fourth Circuit require an independent showing of access in light of striking similarity to prove copying? The “strikingly similar” doctrine lacks a clear test to answer these questions. Litigants can only hope that the Supreme Court will eliminate the confusion sooner rather than later.

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171. See supra note 157 and accompanying text. The majority addressed the applicability of the “strikingly similar” doctrine after concluding that there was suf-
ficient independent evidence of access. See Bouchat, 228 F.3d at 494.

172. See Bouchat, 228 F.3d at 502 (King, J., dissenting) (offering opinion that adoption of “strikingly similar” doctrine is unnecessary dicta).