

# Siskind v. Newton-John

United States District Court for the Southern District of New York

May 22, 1987, Decided and Filed

No. 84 Civ. 2634

## Reporter

1987 U.S. Dist. LEXIS 4084 \*; Copy. L. Rep. (CCH) P26,113

Laura Taylor Siskind a/k/a Laura Taylor, Plaintiff, v. Olivia Newton-John; John Travolta; MCA Records, Inc.; 20th Century Fox Film Corp.; Broadcast Music, Inc.; American Society of Composers, Authors and Publishers; Olivia Newton-John, d/b/a Zargon Music; David Foster, individually and d/b/a Foster Free Music, and Steve Lukather, individually and d/b/a Rehtakul Veets Music, Defendants

**Opinion by:** [\*1] GRIESA

## Opinion

---

### OPINION

GRIESA, J.

This is an action under the federal copyright law, 17 U.S.C. §§ 101 *et seq.*, and for unfair competition. Plaintiff Laura Taylor Siskind is claiming infringement of the copyright on her song entitled "Take Another Chance On Love." Plaintiff claims that a portion of this song was copied by defendants Olivia Newton-John, David Foster and Steve Lukather when they composed a song entitled "Take A Chance." Plaintiff claims a further act of infringement by virtue of the recording of the song by defendants Newton-John and John Travolta. Various other parties are joined as defendants, who allegedly participated in the infringement.

A common law claim of unfair competition is asserted under the doctrine of pendent jurisdiction.

Defendants have moved for summary judgment. A number of affidavits and depositions have been submitted on the motion. In addition, hearings were held, at which experts were called by both sides to testify on the issue of similarity. The purpose of the hearings was in large part to enable the court to have the musical questions illustrated on a piano and with recordings. The hearings were a necessary supplement to the papers submitted [\*2] on the motion, but did not involve a trial of the case.

It is now clear that defendants are entitled to judgment dismissing the complaint. The motion for summary judgment is therefore granted.

### FACTS

*Plaintiff's Song*

Plaintiff composed the song "Take Another Chance On Love." In December 1980 she made a tape recording of her song at her home in Florida. On December 30, 1980 plaintiff registered a claim to copyright her song and submitted a tape to the copyright office. Plaintiff has received a certificate of registration dated January 9, 1981 and bearing the number SRu 19-399. This version of the song will be referred to as the "Home Demo No. 1." At some point a second and somewhat different version was recorded at plaintiff's home. This was not separately registered for copyright.

In early 1981 plaintiff made a tape recording of "Take Another Chance On Love" and three other songs, "Paradise," "Think I'm In Love," and "Central Park." This recording was made at the Hit Factory Studio in New York City. The tape of this four-song recording is referred to as the "studio master tape." The version of "Take Another Chance On Love" in the studio master tape, referred to as the "studio [\*3] version," is somewhat different from the home demo versions. It is the studio version that plaintiff claims was copied by defendants.

As of the time this action was commenced in April 1984, the studio version had not been registered for copyright. Apparently in March 1986 plaintiff submitted the studio version for copyright registration, but the court has not been informed that a certificate has been issued. However, plaintiff argues that separate registration of the studio version is not really necessary, and that this version is covered by the copyright registration of Home Demo No. 1.

In August 1981 plaintiff signed an agreement with The Entertainment Company ("TEC") giving TEC the right to record "Paradise," one of the songs on the studio master tape. A singer named Sara Dash recorded "Paradise," and defendant Lukather played the guitar in that recording. Plaintiff contends that there is at least a triable issue of fact as to whether Lukather had access to the studio master tape, which included "Take Another Chance On Love" as well as "Paradise."

Viewing the record in the light most favorable to plaintiff, the court finds that plaintiff has made a showing that the studio master [\*4] tape was given to TEC for its use in deciding whether to purchase the rights to any of the four songs. But this showing goes no farther than to indicate that the tape was given to TEC personnel in New York. This does not show access as to Lukather. Lukather was not an employee of TEC. He was an independent musician, and was brought in solely as a "side man" for the recording of "Paradise." His work took place at an independent studio in California called Sound Labs.

At a conference with the court on February 13, 1986, plaintiff's attorney stated that an employee of TEC would provide evidence that someone in TEC's New York office sent the studio master tape to the California location where Lukather performed on the Sara Dash album. As it turned out, no affidavit or deposition testimony to this effect was presented on the motion. In fact, at a hearing of March 19, 1987 plaintiff's attorney conceded that he knows of no witness who could testify that the studio master tape was transported to California (Tr. 31).

In his deposition and affidavit, Lukather stated that he did not receive the studio master tape of the four songs at the time he recorded "Paradise." Lukather stated that it is [\*5] industry practice, and his practice, to use sheet music notations for the kind of work which he did on "Paradise." This would obviously relate to the specific song being recorded.

Plaintiff's song was never broadcast or commercially recorded.

*Defendants' Song*

In the summer of 1983 defendants Newton-John and Travolta were making a movie which was later entitled "Two Of A Kind." Defendant Foster, a songwriter and musician, was the musical producer for the sound track, and he brought in Lukather, who was a songwriter as well as a musician, to assist in the production of the music.

During the work on the movie it was determined that a song should be written for Newton-John and Travolta to sing together as an expression of nervousness about falling in love. This was the genesis of the song which became "Take A Chance." Most of the song's melody was worked out by Newton-John, Foster and Lukather one night at the Sunset Sound studio in Hollywood, California. Newton-John composed the lyrics the next day. The song was used in the movie, which was released in December 1983.

Newton-John, Foster and Lukather have given depositions and affidavits in which they state that they never received, [\*6] heard or knew of plaintiff's song at the time they composed "Take A Chance" or at any other time prior to this lawsuit. They are not acquainted with plaintiff and have never heard her perform.

### *Comparison of Two Songs*

An undue amount of time and effort has been consumed in dealing with the issue of the extent of similarity of plaintiff's and defendants' songs. During a portion of the proceedings on the present motion all the relevant materials were not before the court. Now that the record is complete, the necessary conclusions can be drawn without difficulty.

Plaintiff's claim relates to the chorus of her song, which she alleges was copied in the chorus of defendants' song. The choruses are only portions of the songs, and they are the only portions about which there is any claimed similarity or copying.

In plaintiff's song the chorus appears for the first time after Verse 1. The lyrics of the chorus are:

Take a chance, take a chance; Take another chance on love. Take a chance, take a chance; Take another chance on love.

This is followed by Verse 2, after which there is a repetition of the chorus. Then comes Verse 3. The song concludes with the chorus repeated twice and a [\*7] fade.

Defendants' song commences with Verses 1 and 2, followed by the chorus:

Take a chance, take a chance. Shall I take another chance on love? Take a chance, take a chance. Shall I take another chance on love? When it feels so right; When I'm safe and warm inside? Take chance and fall tonight.

After this comes Verse 3. The song concludes with the chorus repeated twice and then a fade.

The verses of the two songs are entirely different. However, as the quoted material indicates, the lyrics of the first four lines of defendants' chorus are the same as the lyrics of plaintiff's chorus, except that the words "Shall I" appear at the beginning of the second and fourth lines of defendants' chorus. Defendants argue that the words and phrases in these choruses are commonplace, and as such have appeared in various popular songs other than those of the parties to this action. Defendants cite songs with the titles "Take a Chance," "Take a Chance on Love," and "Take Another Chance." However, no other song has been found with the precise arrangement of the phrases as contained in the songs in the present case.

It should be noted that in plaintiff's chorus there is both a "lead vocal" and [\*8] a "background vocal." The lyrics quoted above are in the lead vocal. The background vocal consists of repetitions of the phrases "Take another chance, take another chance on love." There is no background vocal in defendants' chorus.

Turning to the musical aspect, the melody of defendants' chorus is entirely different from the melody of either the lead vocal or the background vocal of plaintiff's chorus. The only contention about similarity of music relates to rhythm and harmonics.

The rhythmic similarities only occur in connection with the short phrases "Take a chance." It is true that in both plaintiff's and defendants' songs the music in these phrases has two quick notes followed by a longer note. But this is simply a function of the rhythm of the words. This is the rhythm with which one would normally speak this phrase. As to the other phrases ("Take another chance on love" in plaintiff's chorus, and "Shall I take another chance on love" in defendants' chorus), the rhythm in the two songs is different, reflecting the different rhythm of these words.

As to the harmonics, it appears that in both plaintiff's and defendants' choruses the music involves a progression from an F minor [\*9] seventh, to a G minor seventh to a C minor seventh, and a repetition of this progression. Plaintiff argues that the melodies in both songs are based on these harmonics or chords, and that this indicates copying. Defendants point out that the two melodies are entirely different even though they may consist of notes taken from the same multi-note chords. As to the harmonic progressions, defendants contend that they are so standard that no inference of copying can be drawn.

Defendants' argument about the standard nature of the basic harmonic progression is supported by the testimony of plaintiff's expert that the progression is "not unusual" (Minutes of March 19, 1987, p. 59).

## DISCUSSION

Defendants raise an initial jurisdictional question. Section 411(a) of the Copyright Act of 1976, 17 U.S.C. § 411(a), provides that "no 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." This requirement is jurisdictional. *International Trade Management, Inc. v. United States*, 553 F. Supp. 402, 403 (Ct. Cl. 1982). In that case the court held that it did not have jurisdiction over a [\*10] claim of infringement because the registration had not been completed.

The only copyright registration effected by plaintiff prior to the institution of the present action related to Home Demo No. 1. However, it is the studio version which has allegedly been copied. No application for registration of the studio version was made until after the lawsuit was instituted. The court has not been informed that a certificate has been issued. Defendants urge that there is no jurisdiction to entertain a copyright action regarding the studio version.

Plaintiff argues, however, that the studio version is a "derivative work" of Home Demo No. 1 and is thus protected by the copyright pertaining to the home demo. Plaintiff cites 17 U.S.C. § 103(a) which provides that the "subject matter of a copyright . . . includes compilations and derivative works."

For purposes of this motion, the court will assume that the studio version is a derivative of Home Demo No. 1 within the meaning of the statute. This brings us to the merits.

To prove infringement, plaintiff must show copying by defendants. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 106 S. Ct. 2278 (1986); *Warner [\*11] Brothers v. American Broadcasting Co.*, 654 F.2d 204, 207 (2d Cir. 1981). An inference of copying may be drawn where the plaintiff establishes that the defendant had access to the copyrighted work and that substantial similarity exists as to protectable material in the two works. *Walker*, 784 F.2d at 48. To establish access, plaintiff must show more than a "bare possibility" of access. *Meta-Film Associates, Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984); *see also Ferguson v. National Broadcasting Co.*, 584 F.2d 111 (5th Cir. 1978).

A weak case of access can be compensated for by what is termed "striking similarity," *i.e.*, proof of similarity so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded. *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

Courts have regularly granted summary judgment in copyright cases where it is clear that the plaintiff cannot make out the elements of the claim. See, e.g., *Vantage Point, Inc. v. Parker Bros.*, 529 F. Supp. 1204 (E.D.N.Y. 1981), *aff'd without opinion*, 697 F.2d 301 (2d Cir. 1982).

Defendants Newton-John, Foster and [\*12] Lukather have sworn in depositions and affidavits that they did not receive, hear or know of plaintiff's song at the time they composed their own song "Take A Chance."

On plaintiff's side, the only colorable claim of access is that Lukather had access to the studio master tape at the time he recorded "Paradise."

There is no support whatever for this claim. The most that plaintiff can be said to have shown is that the studio master tape was in the possession of TEC personnel in New York. However, Lukather was an independent musician who only worked on the recording of one song, "Paradise," at an independent studio in California. Despite earlier indications to the contrary, plaintiff's attorney now concedes that he has no evidence that the studio master tape was taken to California. It must be concluded that plaintiff has made no showing of access which is even sufficient to raise a triable issue of fact.

On the issue of similarity, basically all the facts are before the court which could be presented at a trial. Plaintiff has not made out a case of similarity of the kind which could raise an inference of copying, particularly in view of the lack of access. The lyrics in both choruses [\*13] are a series of commonplace phrases. The commonplace phrases in defendants' song fit quite naturally into the theme of the movie for which the song was written. All this is consistent with independent creation rather than copying.

As to the music, the melodies are entirely different. The limited rhythmic similarities relate to the rhythm of the words and do not indicate copying of plaintiff's rhythm. To the extent that there are similarities in harmonic progressions, it is a matter of standard or usual harmonic progressions, something which does not indicate copying. In any event, it is the melody which is the most important feature of the music, and the melodies in plaintiff's and defendants' works are quite different. See *Northern Music Corp. v. King Record Distributing Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

## CONCLUSION

There is no triable issue of fact on the issue of copying - i.e., on the question of whether defendants had access to plaintiff's material and on the question of whether the two works have similarities indicating copying. Defendants are entitled to summary judgment dismissing the copyright claims. The findings on these claims also dispose of the unfair [\*14] competition claim. The action is dismissed.

SO ORDERED.

---

End of Document