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[1960 F. 1512]; [1963] 2 W.L.R. 868

***587 Francis Day & Hunter Ltd. and Another v Bron and Another.**

Court of Appeal

L.J. Willmer, Upjohn, and Diplock

1963 Feb. 20, 21, 22, 25.

Copyright—Infringement—Musical work—Subconscious copying—Considerable degree of similarity between substantial part of alleged infringing work and original—Denial by composer of alleged infringing work of deliberate copying or conscious knowledge of original—Whether unconsciously copied—Whether unconscious reproduction an infringement— Copyright Act, 1956 (4 & 5 Eliz. 2, c. 74), ss. 2 (5), 49.

1 The plaintiffs, the owners of the copyright in a musical work "In a Little Spanish Town," composed by M. W., first published in 1926, and extensively exploited in the U.S.A. and elsewhere ever since, complained that their copyright had been infringed by the publication in 1959 by the defendants of a musical work "Why," composed by P. de A., which they alleged reproduced a substantial part of the plaintiffs' work. It was alleged that the first eight bars of the chorus of "In a Little Spanish Town" had been reproduced consciously or unconsciously in the first eight bars of "Why." 2 The defendants denied any such infringement, or that there had been any deliberate copying, and the composer of "Why" gave evidence, which was accepted by the judge, that he***588** had not consciously copied "In a Little Spanish Town," that he had not consciously heard it, but that if he had it was probably when he was young.

Wilberforce J. found that the first eight bars of the chorus of "In a Little Spanish Town" constituted a substantial part of the whole tune and that there was a definite or considerable degree of similarity between those eight bars and the first eight bars of "Why," though there were differences real enough to take into account when considering whether "Why" could be an independent creation. The judge accepted the defendants' case that there had been no conscious copying and held that there was insufficient evidence to prove unconscious copying and dismissed the plaintiffs' case.

The plaintiffs appealed, contending that reproduction of a substantial part coupled with proof of access to the original raised an irrebuttable presumption of unconscious copying :-

(1)that of the three relevant processes forbidden by section 2 (5) of the Copyright Act, 1956, 3 namely, "reproduction," arrangement," and "transcription," only "reproduction" could arise in this case since " arrangement" and "transcription" were necessarily the result of a conscious and deliberate process (post, p. 611).(2)That "reproduction" need not be identical reproduction since infringement of copyright in music was not a question of note for note comparison but depended upon whether the alleged infringing work was substantially the same as the original work (post, p. 611).(3)That proof of similarity between the alleged infringing work and the original, coupled with proof of access to the original, did not raise any irrebuttable presumption of copying, but at most raised a prima facie case for the defendant to answer (post, p. 612).(4)That reproduction by subconscious copying was a possibility which, if it occurred, might amount to an infringement, but that to establish liability on this ground it must be shown that the composer of the offending work was in fact familiar with the original work, and that there was some causal connection between the alleged infringing work and the original work (post, p. 614).(5)That it was therefore a simple question of fact whether the degree of objective similarity proved was sufficient to warrant

the inference that there was a causal connection between the two works. Here it was impossible to say that the judge had reached a wrong conclusion on this question of fact, and therefore the appeal should be dismissed (post, p. 614).Dictum of Astbury J. in Austin v. Columbia Gramophone Company Ltd. (1923) Macg.C.C. (1917-1923) 398, 409, 415 applied.Dictum of Luxmoore J. in G. Ricordi & Company (London) Ltd. v. Clayton & Waller Ltd. (1930) Macg.C.C. (1928-1935) 154, 162 considered.*Per* Upjohn L.J. I express no opinion whether there is***589** any difference in law between conscious and unconscious copying; that question does not arise (post, p. 622).*Per* Diplock L.J. Once the two elements of sufficient objective similarity and causal connection are established it is no defence that the defendant was unaware that what he was doing infringed the copyright in the plaintiff's work (post, 624).Decision of Wilberforce J. affirmed.

APPEAL from Wilberforce J.

The plaintiffs, Francis Day & Hunter Ltd., music publishers, of London, and Leo Feist Inc., music publishers Of New York, U.S.A., were the owners of the copyright in a musical work entitled "In a Little Spanish Town " of which the words were written jointly by Samuel Lewis and Joseph Young, and of which the music was composed by Mabel Wayne. This musical work was first published by Leo Feist Inc. in 1926. It was extensively exploited in the United States of America and elsewhere by the publication of sheet music, by the distribution of gramophone records and by broadcasting, and it appeared to have remained a popular hit ever since.

The defendants, Sydney Bron (trading as Debmar Publishing Company) and Debmar Publishing Co. Ltd. (incorporated on June 23, 1960, in order to carry on the business formerly carried on by Sydney Bron) were the publishers of another musical work entitled "Why," which was composed in 1959 by Peter de Angelis to words written by Bob Marcucci.

On November 17, 1960, the first named plaintiffs issued a writ against Sydney Bron (trading as Debmar Publishing Company) claiming an injunction to restrain him, his servants, agents or otherwise, from reproducing in any material form the musical work entitled "Why," or any other work which reproduced or was an adaptation of any substantial part of the plaintiffs' work "In a Little Spanish Town," or from authorising any of these acts without the consent of the plaintiffs. The writ further claimed an inquiry as to damages for infringement of copyright, an account of profits and delivery of any infringing material.

By their statement of claim dated November 21, 1960, the plaintiffs claimed that the defendants' musical work "Why" reproduced, or was an adaptation of, a substantial part of the music of the plaintiffs' work, that its reproduction in the form of sheet music, gramophone records or otherwise, constituted an infringement of the plaintiffs' copyright, and that all such reproductions of the defendants' work were infringing copies of the***590** plaintiffs' work entitling the plaintiffs to damages for conversion in respect of all such infringing copies distributed by them or with their authority. The defence was basically a denial of any infringement. On June 23, 1960, Debmar Publishing Co. Ltd. was incorporated to carry on the business formerly carried on by Sydney Bron (trading as Debmar Publishing Company) and on June 23, 1961, Debmar Publishing Co. Ltd. were added as defendants. By the use of interrogatories and admissions the issues were narrowed to one, namely, that of infringement.

On July 23, 1962, during the trial of the action, Leo Feist Inc. were added as additional plaintiffs (owing to the possible subdivision of the plaintiffs' title and to avoid the risk of duplicity of action).

The following reproduction of the first eight bars of the chorus of "In a Little Spanish Town" and "Why" has been made from the printed copies of the respective works put in evidence at the trial.

At the hearing, evidence was given by various mu-

sical experts and musical illustrations were given vocally and on the piano. Recordings (inter alia) of "In a Little Spanish Town" sung by Bing Crosby, made in 1955, of "In a Little Spanish Town" by Mr. Oliver and made about 1957 or 1958, and of "Why" sung by Anthony Newley, and of an instrumental version of "Why" recorded by Victor Sylvester's Band, were also played to the court.

Evidence, which the judge accepted, was given that Peter de Angelis was a man aged 33 who was born in 1928 or 1929, two or three years after the publication of " In a Little Spanish "Town," that he was educated and brought up in the United States of America, had been composing music since the age of 11, that is to say, since about 1940, and that at his junior and high schools he played in a dance band from the age of 13 till he was 19. The bands played in the main current "hits," that is to say, the popular tunes of the period, but also played symphonies. de Angelis agreed in evidence that he had heard a lot of music and had been affected by a lot of music. He described his main musical influence as the music of Puccini, Ravel and Debussy. He denied in terms that in composing "Why" he had copied "In a Little Spanish Town," or that he had read the written music of it. He did not recall having played "In a Little Spanish "Town" in his dance bands, and said that he would know if he had played it, that he had not heard it to his conscious knowledge,***591** "IN A LITTLE SPANISH TOWN"

Tabular or graphic material set at this point is not displayable.

"WHY"

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but that if he had heard it, it must have been when he was young. He denied having heard the recording of "In a Little Spanish "Town" in 4/4 time, sung by Bing Crosby.

The plaintiffs contended (inter alia) that de Angelis might well have copied "In a Little Spanish Town" subconsciously,***592** and asked the court to infer that he must have heard "In a Little "Spanish Town," which was admittedly first published in America in 1926 and had been extensively exploited there and elsewhere by the publication of sheet music, by the distribution of gramophone records and by broadcasting, and must have heard Bing Crosby's record.

The defendants argued that his knowledge of "In a Little Spanish Town" was not such that any such inference could be drawn.

Wilberforce J. in his judgment, in comparing and contrasting the two tunes, said: " 'In a Little Spanish Town, (which I shall call ' Spanish Town, for short) consists of verses followed by a chorus. I think I can dispose at once of the verses because it is not really disputed by the witnesses that they are unmemorable and unimportant. There are songs, of course, whose verses are a memorable and significant part of the composition, but this is not one; Dr. Bush was not challenged in his evidence on this point, and other witnesses agreed. So I leave out of account the verses and deal with ' Spanish Town ' on the basis that, significantly, it consists of the chorus.

"The chorus is written in 32 bars; the whole of it is in 3/4 or valse time. The theme is stated in the first eight bars; it commences in the first bar with a figure of six quavers, starting on the mediant note, the first three notes forming the common chord of the key. There is a drop of a sixth, then a return to the key note, and the last three notes of the bar are descending. That first bar is exactly repeated in the second bar. In the third bar the song arrives by an imperfect cadence at a held note, the second note in the scale, and that is held for two complete bars. In the fifth bar the original figure is sequentially repeated a tone lower down and again the fifth bar is exactly repeated in the sixth. Then the song arrives by a perfect cadence to a held note, which in this case is the tonic note, again held for two complete bars. There follow eight bars of a contrasting and (according to Dr. Bush) a subsidiary subject; this is

written mainly in crotchets and it is of quite a different character. In bar 17 the original theme is resumed with a repetition of bars 1 to 4. In the next four bars, bars 21 to 24, there is a variant of this of the same shape but with an attempt at modulation. That introduces, so it is said, an element of tension. Then there are four bars which return to the slow crotchet movement, which one could describe as a variation of the first contrasting or subsidiary subject, and the song is***593** rounded off with a combination of the first bar followed by the fifth bar and a conclusion on the key note. That, I hope, is a fair description of ' Spanish Town.'

"'Why' is composed throughout in 4/4 time. Again it starts with a sequence of eight bars or, as some witnesses have preferred to describe it, two sequences of four bars; I do not think the dispute on that subject is of very great importance. As with 'Spanish Town,' bars 1 and 2 are identical and so are bars 3 and 4. As with 'Spanish Town,' bars 5 and 6 are sequences of bars 1 and 2, for practical purposes one tone lower. As with ' Spanish Town,' bar 1 starts on the mediant note, but in this case the note occupies one half of the bar. The second half of the bar has four quavers, the first of which, as in 'Spanish Town,' is one sixth below the opening note. The last three notes are the same as the last three in 'Spanish Town,' but there is missing in this first bar, and also the second bar, the intermediate tonic note. At bar 3, and also at bar 7, the same note is reached as in ' Spanish Town,' but here the note is not held. After the interval of a crotchet, there is a descent in each case to the dominant note, which is then held for the remainder of the two bars. After the first eight bars, ' Why' does not proceed as does ' Spanish Town ' to a contrasting subject. 'Why' is a 'thematic' song; the same theme is continued and developed practically throughout. This is done in two forms; first of all, bars 9 to 12, and then in bars 13 to 15, where a modulation occurs into a different key. At this point there was some difference of opinion as to the exact division or analysis which should be accepted, but I do not think the difference is important; There is at any rate a short passage, the result of which is a return to the original key. There follows a re-statement of the first eight bars, with only the minor exception that one short note is added at one point. Then, after a final version of the theme, the song ends with quite a different movement, mainly in crotchets, which I hope I may be forgiven for saying was of a somewhat lame character.

"Many witnesses were called on either side to explain and analyse the musical character of these two songs. They represented different attempts to put into words what is ultimately a matter for the ear, and there was necessarily some difference of approach, according to the individual backgrounds of the individual witnesses; there was the composer's approach, the conductor's approach and the approach of the lecturer.

"I do not think that any of these witnesses, whether for the***594** plaintiffs or for the defendants, really disputed the similarity of the two songs. The plaintiffs' witnesses placed their emphasis on the degree of similarity, saying that it was considerable, to various degrees; the defendants' witnesses, while not in terms denying similarity, drew attention to differences which they considered to be significant in different degrees. In endeavouring to reach an approach which is neither too superficial nor unduly academic or technical, I think I must to some extent rely on my own aural judgment, instructed as it has been by these various experts. As it was put by Professor Nieman, 'The public has a purer approach to music than the critics.' That, of course, does not mean that one must discount the help that the critics can give, but I think I must rely on the ear as well as on the eye, and on the spoken words of the witnesses.

"I reach these conclusions as to the similarity or otherwise of the two songs. First, there is a difference in structure between the two songs; one is composed on the basis of contrast and return, or as Professor Nieman put it, on a rondo scheme, and the other is constructed on a thematic basis. Secondly, the essential part of 'Spanish Town' lies

in its first eight bars; they imprint themselves on the mind, to use Dr. Bush's words. They give it its character and its memorability- 'They are '"Spanish Town,"' to quote Mr. Phillips, and further the first eight bars do amount to a long phrase in terms of composition, and that is relevant when one has to consider the question of copying or coincidence.

"It would follow from this that if - and I underline the word 'if' - 'Why' has borrowed this essential theme in its first eight bars, the procedure adopted by 'Why' of staying with it and varying the development instead of following the 'Spanish Town' procedure of contrast, would not make a significant difference with 'Spanish Town'; it might even accentuate the likeness. Indeed, Mr. Goodwin said in his evidence that if someone had given him the first four bars of 'Why,' he would try to do with them something like what Mr. de Angelis has done with them.

"Thirdly, the theme of 'Spanish Town' is made up of commonplace elements or, as some witnesses have called them, cliches. The first six notes are a commonplace enough series; they are found in an Austrian country dance and in a song 'Let Us Sing Merrily.' The device of repetition, of resting for two bars on a long note and of repetition in sequence, are the commonest tricks of composition. But many writers of***595** great music have used clechés to produce masterpieces; indeed, some of them have found in the commonplace character of their basic phrase, their stimulus. Professor Nieman gave some interesting examples from the music of Mozart, and most writers of popular songs use, and can use, nothing else. No example was given of precisely this combination having been used in other compositions, though it was apparent that the musical dictionaries and the experience of the witnesses had been thoroughly combed. The best that Professor Nieman, with his great experience, could do on this was to refer to a song called 'Doodle-doo-doo,' which for my part I found some distance removed from 'Why.' It is generally agreed by witnesses on both sides that the combination which has in fact been adopted by the composer of 'Spanish Town' is something which has character and charm and that to produce it is an act of composition.

"Fourthly, taking merely the notes of the melodies, there is a noticeable correspondence between the two songs. It is not note for note, nor at any point do more than five consecutive notes coincide, but the correspondence exists. However, I think the defendants' witnesses did establish that the omission in 'Why' of the tonic note in the third place is not insignificant. The leap of one sixth down, and immediately up the whole way in 'Why,' which, according to Mr. de Angelis, was the result of Puccini's influence, does create an impression which the more gradual arpeggio effect of 'Spanish Town' does not give. This point was related to the question of rhythm, which I shall discuss in a moment.

"Fifthly, the harmonic structure of the two 8-bar sections is identical, but is completely commonplace and insignificant.

"Sixthly, correspondence of melodic notes, even complete correspondence, is not enough to make one tune like another. Many examples were given where there is an exact coincidence of notes, but the tunes are different and indeed incomparable. Time and rhythm are of equal, and in some views of greater, importance. The song 'Let Us Sing Merrily' was given as an example of the use of the same notes as the first bar of 'Spanish 'Town,' with a totally different effect produced in rhythm.

"Seventhly, although 'Spanish Town' is in 3/4 time and 'Why' is in 4/4 time, this is not of itself a decisive factor in establishing a difference between them. It is not really disputed, as Mr. Masters first said, that in the field of popular songs, many tunes can be transferred from one time to the***596** other and retain their substantial identity. This is not true of all tunes, but in relation to 'Spanish Town' it was shown, by means of recordings played in 4/4 time, that adaptations to this time could be made without loss of recognition.

"Eighthly, as regards rhythm, there are certain differences. The swing in 'Why' from the mediant held for half a bar, down a sixth, to an accented note does create a different impression from the even movement from the mediant (duration a quaver) down a sixth to an unaccented note. The accent in 'Spanish Town' is on the tonic third note.

"Ninthly, the difference in the third and seventh bars is not unimportant; there is character in the drop of a fifth and a fourth respectively to a different long note, and I should say here that I accept it as clear from Mr. de Angelis's evidence that this difference is not really to be accounted for by the exigencies of the words; it was a deliberate choice of composition made by him before the words were written.

"These are perhaps in themselves small points; some of them are what I may call 'professionals'' points and one must resist the temptation, which I think some of the defendants' witnesses did not fully resist, to atomise what is a living phrase. One must not lose sight of the musical character and the aural appeal of the sentence as a whole.

"The conclusion I reach is that there is undoubtedly a degree of similarity between these two songs, the only question being what adjective one should put before the word 'degree.' Mr. Lucas said that the similarity was 'enormous' but I think on this point he was a somewhat exuberant witness. Mr. Phillips said that the difference was not great considering the field of the popular song. On the whole, I think Mr. Palmer's word 'definite' or 'considerable' is the right weight to put upon the degree of similarity; it is such that an ordinary reasonably experienced listener might think that perhaps one had come from the other. On the other hand, there are certain differences, not sufficient to destroy the apparent similarity, but real enough to take into account when one is considering whether it is possible that so similar a tune as 'Why' could have been developed by independent creation rather than by imitation. So much as regards similarity."

Wilberforce J. reached the conclusion that there was a definite or considerable degree of similarity between the two tunes but that to succeed the plaintiffs must prove not only objective similarity but that this similarity was due to an act of copying ***597** whether conscious or subconscious. He accepted de Angelis's evidence that there had been no conscious copying on his part; he refused to draw the inference that de Angelis must have heard "Spanish Town" or Bing Crosby's recording of it, and on the issue of unconscious copying he held that there was insufficient factual material from which to infer that de Angelis had sufficient knowledge or memory of " Spanish Town" to justify the conclusion that in composing "Why" he had unconsciously copied "Spanish Town"; and accordingly he dismissed the plaintiffs' case.

The plaintiffs appealed.

At the hearing of the appeal Leslie Gordon Murchie, professor of music of the Guildhall School of Music, was called as an independent expert, chosen by agreement between the parties to demonstrate two tunes and the other musical illustrations given in the court below. He took the following oath: "I swear by Almighty God that I will, to the best of my ability, skill and knowledge, well and truly interpret and illustrate to the court the music and all such matters and questions as may be required of me"

John Foster Q.C. and *F. E. Skone James* for the appellants. Protection for musical copyright is afforded by section 2 of the Copyright Act, 1956. The Act contains no reference to "copying" as such, but the interpretation which has been put upon the Act is that copyright involves the protection of copyright owners from having their work copied by others. A copyright is not the same as a patent, for the patentee is protected against any similar independent invention, whereas the copyright owner is not. The inference of copying, which the courts have held should be read into the Act, is objective, that is to say, the "copying" may be either conscious or unconscious, and it is the latter which is important

in this case. Wilberforce J. found that there was similarity between the two works sufficient to provide the first of the ingredients necessary to constitute an infringement, but he went on to hold that the composer of "Why" did not deliberately or consciously copy "In a Little Spanish Town" (referred to hereafter as "Spanish Town") and that on a consideration of all the facts, it was not possible to hold that he had unconsciously copied it. Unconscious copying is not a contradiction in terms. It means reproduction amounting to an infringement. It means that a person has reproduced a substantial part of a copyright work, not because***598** he looked at it, or thought of the original, but because it was at the back of his mind, or on his subconscious mind, from having heard it on the radio or elsewhere. Strictly speaking, it is a contradiction in terms, but it is a useful way of saying that the composer looked at the copyright work and took bits out of it, or that when he composed his own work he had the copyright work at the back of his mind and reproduced it subconsciously. Musical people have tunes in their minds which they can produce consciously; they also have tunes in their minds, which, when composing, they may reproduce subconsciously.

Copyright is a right of property; it is international, and should be properly protected. If it were possible for a person merely to alter a tune slightly and then avoid liability by denying that he had looked at the original, it would open the way to blatant plagiarism. Unconscious copying has arisen in cases where the courts have inferred copying despite a denial by the defendant. If, on a balance of probabilities, it were to appear that a defendant had been guilty of copying when on the true facts he was innocent, the degree of injustice would be small. If A composes a tune and two years later B composes the same tune independently, it is better that of two innocent people, B should suffer rather than A. The proper inference is that the second tune was copied from the first unless the defendant can prove that he was not in a position to copy it. But the plaintiff must first prove that the defendant could have had access to the original. A patentee's position, on the other hand, is stronger because he does not have to prove that the infringer could have had access. In musical copyright the rule should be that once the two tunes are shown to be substantially similar, and the possibility of access is proved, the defendant will be held liable for infringement unless he can prove affirmatively that he did not have access. If the true inference from the facts is that the composer must have had access to the copyright work, in the sense that he must have heard it, then an irrebuttable presumption arises that he has copied it. In literary copyright, if substantial similarity is proved, the presumption of copying is irrebuttable unless the defendant can prove, for example, that he was in prison without access to books. It would be wrong to assume that the greater the similarity the greater the likelihood of copying, for a tune may stay the same even although it is played in a different time, in a different key and with a different rhythm. If the copying were unconscious***599** the chances are that there might be more differences than if the copying were done consciously.

[UPJOHN L.J. The owner of a patent has a monopoly: that is not so with copyright. In this case the defendant's denial of copying was believed. In many cases one can say "I don't believe the defendant because the similarity is so great," but if the defendant carries conviction that he did not copy it, that is sufficient.]

The more brazen the copier, the more persuasive a witness is he likely to be. If unconscious copying is not held to be an infringement, any good witness will be able to copy and get away with it: the standard in England will then be lower than elsewhere. Although a copyright owner does not possess a monopoly, he should be protected against infringement if he can prove objective similarity and access to the original. If one does not have that standard, it would depend upon the purely negative one of whether or not the defendant be believed.

Secondly, if it is necessary in a case of unconscious copying to show a higher degree of similarity than

normal, that higher degree exists in this case. If the theory of unconscious copying is rejected, the plaintiff may be without a remedy where an honest man is unaware that he is copying. The theory of unconscious copying is still at large. It would be disastrous to hold that there was no such thing. There is a degree of similarity necessary to constitute infringement, a higher degree to show that it was unconscious, and a still higher one to show that you just don't believe the defendant. The issue has not arisen before because there have been no cases of unconscious copying. The cases were decided on the degree of similarity as to whether or no there had been conscious copying. This is a very serious matter for the publishing world. Unconscious copying shows less similarity than conscious copying.

[DIPLOCK L.J. I should want expert evidence on that.]

I would have thought judicial notice could be taken of that. It is necessary to exclude coincidence in order to protect the owner of the tune.

[WILLMER L.J. Your proposition involves liability without fault, but fault may be inferred if there has been failure to make inquiries.]

That is on the same lines as German law, where the composer has to look up tunes in a musical dictionary. But if he has access he is deemed to have copied. It would be a defence for***600** the defendant to say "I did not consciously copy, and before publishing I made extensive inquiries," because in that case access would have been negatived. In the case of a musical composer, there is a presumption that he did copy, even if he denies it, not because he is lying but because it was in his subconscious mind. [Austin v. Columbia Gramophone Co. Ltd. 4 was referred to.]

"Spanish Town" has been extensively exploited both here and in the United States of America ever since it was first published in 1926. The judge did not attach sufficient importance to this fact. The composer of "Why " must have heard it. The degree of similarity between the two tunes is very great; the change of key is immaterial, nor is the change of time or rhythm enough to make any real difference. It is necessary to prove access, but here the composer of "Why" must have heard "Spanish Town." The judge ought therefore to have found that there had been unconscious copying and that the composer of "Why" had been using his "memory. The judge has found that there is a degree of similarity which, if there had been conscious copying, would amount to an infringement. G. Ricordi & Co. (London) Ltd. v. Clayton & Waller Ltd. 5 shows that in the opinion of Luxmoore J. eight bars is a sufficiently substantial part to form the basis of an infringement. So little is known as to how the mind works, that the fact that one has not consciously copied does not mean that one has been independent.

[UPJOHN L.J. If you are right, the witness de Angelis would have to submit to hypnosis to find out what influenced his mind when he was composing "Why."]

In Cholvin v. B. & F. Music Co. 6 it was held that in an action for copyright infringement the charge of infringing will not fail merely because the infringer was not caught in the act, where access may be inferred or found circumstantially. If there is evidence of access and similarities exist, the judge must decide whether the similarity is sufficient to prove copying. In Fred Fisher Inc. v. Dillingham 7 it was held that plagiarism of any substantial component part of a musical copyright, either in melody or accompaniment, is a proper subject for copyright protection. An author's right is an absolute right to prevent others from copying his original collocation of words or notes and does***601** not depend upon the infringer's good faith. In that case the similarity lay in the accompaniment; here, therefore, where the similarity lies in the tune, the case is a fortiori. Learned Hand J. found in that case that there was unconscious copying which amounted to an infringement. These cases set a standard and bring out the dangers which would result if some such

rule as this were not established. The sleepwalker is walking just the same although he is unconscious of doing so. The same applies to the unconscious copier. If the main assessment is to be by ear, these two tunes are very, very alike. To the unconscious mind time is not important, it matters not whether what was heard was heard recently or not. The mind can recall it. Evidence shows that "Why" having taken the first eight bars, repeats and emphasises those eight bars, and then, after a modulation to another key, the tune climbs back to the original key and ends with a piece that is individual. But there is a higher degree of similarity than is normally sufficient for infringement. The whole eight bars having been reproduced, it is outside the bounds of possibility that they have not been copied. The words of "Why" can readily be superimposed upon the tune of "Spanish Town" or vice versa, and that assists in proving that there is a greater degree of similarity than is required in the normal case.

Further, the defence could not point to any tune more similar to "Why" than is "Spanish Town." Unconscious piracy is just as actionable as deliberate copying; the intention is immaterial: see Horace G. Ball's Law of Copyright and Literary Property, 1st ed. (1944), p. 329, where it is stated that unconscious piracy is just as actionable as deliberate, intentional copying. Publication, to constitute infringement of copyright, need not be copied directly from the copyrighted article, it is sufficient if a copy is made from memory, even without conscious plagiarism: Edwards & Deutsch Lithographing Co. v. Boorman. 8 Where evidence of access is absent to prove copying, the similarities must be so striking as to preclude the possibility that the plaintiff and the defendant independently arrived at the same result: Arnstein v Porter. 9 Some people possess photographic memories, and so, eliminating coincidence, if the witness denies deliberate copying, and that is accepted by the judge, the only explanation is unconscious copying, which should be recognised so as to conform with international standards and so as to give due protection to copyright. By Article 4 (1) of the International Conventionon Copyright signed at Brussels on June 26, 1948,***602** authors who are nationals of any of the countries of the union enjoy in other countries the rights which their respective laws afford them. It has long been assumed that unconscious copying is copying. This is the first case where it has been argued that if the copying were unconscious it would be a good defence. In Heim v. Universal Pictures Co. 10 it was held that where evidence compelled no conclusion regarding access, copying might still be proved by showing a striking similarity.

For the proposition that unconscious plagiarism is as actionable as deliberate plagiarism, see Sheldon v. Metro-Goldwyn Pictures Corporation. 11 It is not necessary to charge the witness with perjury. Nobody quite knows the origin of his inventions - memory and fancy merge even in adults.

Skone James following. The argument for the appellants can be put in four propositions: (1) Reproduction within the meaning of the Copyright Act, 1956, requires (a) that there should be sufficient objective similarity between the two works and (b) that there should be some causal connection between the plaintiff's work and that of the defendant. (2) It is irrelevant whether or not the defendant was consciously aware of such causal connection. (3) Where there is a substantial degree of objective similarity, this, of itself, will afford prima facie evidence to establish a causal connection. At least it is evidence from which such an inference may be drawn. (4) The fact that the defendant denies that he consciously copied the plaintiff's work affords some evidence to rebut the inference of causal connection arising from the objective similarity, but it is not conclusive.

As to (1) (supra), the Copyright Act, 1956, contains no reference to copying, but section 2 (5) restricts the "reproduction" of a copyright work "in any material form," and by section 49 (1) reproduction is defined as covering reproduction of a substantial part of a copyright work. There is, however, nothing to show whether the reproduction must be conscious, or otherwise. There is nothing to show

whether any form of copying, intentional or otherwise, is required, or to show whether or not coincidental copying is caught by the Act. Purefoy Engineering Co. Ltd. v. Sykes Boxall & Co.12 throws some light on what amounts to reproduction. An accurate statement of the law is that there must be some causal connections between the***603** plaintiff's work and that of the defendant. It is not essential that the defendant's work should be taken directly from that of the plaintiff. See also Hanfstaengl v. Empire Palace Ltd.13

As to (2) above, when considering whether there has been an infringement it is not necessary to prove mens rea. The printer, for instance, may be guilty of infringement though he has no conscious intent. Conscious knowledge of infringement is wholly irrelevant.

In the present case what the court has to decide is a simple question of fact. It is whether, from the degree of objective similarity it is a case where the court will infer a causal connection. It is plain that there is a great degree of similarity, and the defendants being unable to find any other tune which shows a greater similarity to "Why" than does "Spanish Town," the court ought to infer a causal connection between the two tunes.

The impression to be derived from the evidence of de Angelis, the composer of "Why," is that he thought that he derived his inspiration from Puccini; it is submitted that in fact he derived it from "Spanish Town." The similarity is so great that the court should infer unconscious copying. A simple denial that the work was not consciously copied is not enough to outweigh the similarity.

John Arnold Q.C. and *J. E. Williams* for the defendants. The case put forward by the plaintiffs is that if a composer, having heard a piece of music belonging to the plaintiff, then composes a piece of music and in doing so is inspired by the piece which he has heard, or may have heard, to the extent that the piece he then composes bears considerable similarity to the piece he has, or may have, heard, then although he has no conscious knowledge that he is copying, he is guilty of a breach of copyright. This important and interesting doctrine is, however, not even hinted at in the books of authority upon the subject of copyright: see Copinger on Copyright, 9th ed. (1958), and Halsbury's Laws of England, 3rd ed. (1954), Vol. 8.

There are three things which, on a construction of section 2 of the Copyright Act, 1956, may be a breach of musical copyright, and only three, namely; (i) reproduction, (ii) arrangement and (iii) transcription. Reproduction is dealt with by section 2 (5) (a), arrangement and transcription by sections 2 (5) (f) and 2 (6) (b) taken together. If reproduction stood alone it would provide very limited protection since it would afford no protection unless ***604** a work were copied identically. But arrangement and transcription cover cases where the tune taken is chopped about and altered. Whereas it may be possible to reproduce a work unconsciously, it is impossible to arrange or transcribe it unconsciously. If unconscious activity can result in a breach of copyright, it can, therefore, only be by reproduction, and reproduction means identical reproduction. Reproduction under section 49 may be of a "substantial part," but there is no suggestion in the Act of any such thing as "substantial reproduction." The part that is reproduced must be reproduced identically. In the present case there is nothing approaching identity between the plaintiffs' work and that of the defendants, and there can therefore be no infringement, whether conscious or unconscious, by way of reproduction. To take a single bar of music and reproduce that is never a breach of copyright because the part taken must be substantial. Here the question was whether eight bars formed a substantial part and the judge found that it did.

It has been suggested that there is some other level of similarity that controls or is relevant to the decision of the court as to whether there has been unconscious copying, and that if there is a sufficiently high degree of similarity the court will reject the sworn testimony of a witness denying any act of

copying. The defendants deny that any such conception exists. Identity is the highest possible level of similarity, yet the court could nevertheless say that it was coincidental. As Luxmoore J. said in G. Ricordi & Co. v. Clayton & Waller, 14 there can be no infringement by an identical work if it is arrived at independently. No level of similarity is so great that copying must be inferred, but no doubt a high degree of similarity will operate upon the mind of the court. A fortiori if, as here, the similarity amounts to less than identity. The judge has accepted the sworn denial by the defendants' witness, and has taken account of the ordinary factors of credibility. The plaintiffs' approach to the question is a false one. No doubt it is true that if there be such a thing as unconscious copying, which can constitute a breach of copyright, the court will, in making its decision, take into account the degree of similarity between the two tunes, but that is not the only factor to be considered. There is also the extent to which the composer of the defendants' work has been familiar***605** with the plaintiffs' work. The reproduction of idiosyncrasies of the plaintiffs' work would go far beyond mere similarity.

The plaintiffs' theory rests on no judicial or textbook authority. It is devised solely for the purposes of the present case. It was also sought to rest the argument on the principle that it was otherwise impossible to do justice in the sphere of international comity. But if any such presumption had been intended by Parliament it could easily have been put into the statute. It is said that American cases do recognise such a principle and that Great Britain would be put in a politically embarrassing position under the international copyright union if this principle were not applied here. See Ball on Law of Copyright and Literary Property, 1st ed. (1944), p. 329. Here the foreign law has not been proved satisfactorily or at all. Since the question of unconscious copying is one of fact it is furthermore a question for the trial court and not for this court: Cholvin v. B. & F. Music Co. 15 It is question of fact, not one of presumption for the court.

To prove copying in this case it must be shown that the first bar has been taken and that it has been developed similarly over the succeeding eight bars. The effect of the evidence is that the development over the succeeding eight bars is not inevitable but is at least an expected development. It may be open to the plaintiffs to say that the judge has not given due weight to the correspondence between the melody and the rhythm of the first bars of the two tunes, but not that he has failed to recognise it. The judge in fact drew attention to certain differences between the two tunes. The first bar of "Spanish Town" is divided into six quavers, in "Why" the first bar is divided into one minim and four quavers. The last three notes of each of the two bars are similar but that fact is not remarkable. What is important is that all six notes of the first bar of "Spanish Town" are similar to the first notes of an Austrian Landler composed by Lichnowsky before 1815. The first part of the first bar of "Spanish Town" differs radically from the first part of the first bar of "Why." The bars are totally different from each other in rhythm, though melodically they are practically the same. The third note of the first bar of "Spanish Town" does not occur in the first bar of "Why" and the judges drew attention to this difference and to its great aural significance. There is also a striking difference between the third bars of the two tunes.***606** The third bar of "Spanish Town" has a long-held note, the supertonic. In "Why" the supertonic is of very short duration and there is then a drop of a fifth to a long-held note. There is a much closer correspondence between Lichnowsky's Austrian Landler and "Spanish Town" than there is between "Spanish Town" and "Why."

Both the two tunes, it is true, make use of the same two devices, (1) repetition of the opening bar and (2) sequential treatment of the theme one tone lower down; but both these devices are extremely common ones. The fact remains, of course, that both devices are used here, but the onus rests squarely on the plaintiffs of proving copying. This onus is a serious one both because the evidence of

access is thin and because this is the first case in this country in which it has been attempted to argue that unconscious copying constitutes an infringement of copyright. Luxmoore J. in Ricordi's case 16 barely touched upon it.

Wilberforce J. did not leave any relevant aspect of this case out, or misinterpret the evidence; nor did he make any finding for which there was no evidence, and the inferences he drew have not been shown to be wrong. It would be impossible to say, that the composer of "Why" copied "Spanish Town" rather than Lichnowsky's Landler. It would not be sufficient, to constitute copying, for the court to hold that de Angelis took the idea of the treatment from "Spanish Town," but did not take the first bar. Conversely, if the court took the view that the first bar had been taken but not the treatment, that would not be sufficient either. It must be the whole eight bars or nothing, and the third bars of the two tunes are radically different. Nor could it be done unconsciously by a process of adaptation.

Skone James in reply. The argument that reproduction must be identical reproduction is untenable. If that were a correct principle it would have to apply not only to music but to any form of copyright.

[WILLMER L.J. We need not trouble you on that point.]

"Why" shows a sufficiently close similarity to "Spanish Town" to lead one to say, adopting the words of Lord Maugham in King Features Syndicate (Incorporated) v. Kleeman O. & M.) Ltd.17 that "Why" has "adopted the essential features and substance" of "Spanish Town." If inspiration is drawn from the plaintiffs' work and the work produced is a ***607** colourable reproduction, that is sufficient. The sole question here is whether the defendants' work has been derived directly or indirectly from that of the plaintiff. The reproduction need not be a voluntary act. A printer is liable though he does not know that he is copying. Neither intention nor knowledge is essential, one remembers a tune and thinks that it is an old song not subject to copyright, it is nonetheless infringement, if it is in fact a different tune in which a copyright exists. Similarly, if a tune comes into one's head and one thinks "Ah that is a new tune," but the court holds that it is in fact a copyright tune, that is nonetheless infringement. The intention of the infringer is immaterial: Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd.18

It was argued for the defence that the American cases were only of persuasive authority if the corpus of law was the same. Here the only relevant part of the law is the same since infringement of copyright both in America and England involves "reproduction." That which is reproduced must be derived from the original. The court need only be satisfied that one work was in fact derived from the other and was not coincidental. The court is not confined to cases of intentional copying. It was said that this was only the second case in this century in this country in which, in cases of musical copyright, unconscious copying has been mentioned. In fact there have only been four or five cases of musical copyright this century so that the comment is not very meaningful. Derogatory references were also made as to the subconscious, with references to Freud and the like, but the subconscious is in fact no more than a store in the mind upon which it is possible to draw. Reproduction need not be identical; so long as a substantial part is reproduced that is sufficient. Whether the copying is conscious or unconscious the probability is that there will be no exact identity because, if it is consciously done, the copier will not be so foolish, and, if it is unconsciously done, it is unlikely that it will be done with complete accuracy. So the fact that the reproduction is not accurate does not prove that it has not been consciously copied. De Angelis in evidence insisted that the leaps down of a fifth in the third and seventh bars of "Why" were due to the influence of Puccini's music. These leaps, with the change of time, are the only real differences between the two tunes - the difference of key is immaterial. It is true that the***608** defendants' degree of familiarity with the plaintiffs' work has not been shown to be

strong, but de Angelis must have heard the earlier tune at some time, since it has been extensively exploited in the United States of America ever since 1926. The judge considered the right points, but was wrong on the inferences he drew and on the weight to be attached to the evidence. He ought to have concluded from the evidence that "Why " was in fact derived from " Spanish Town."

WILLMER L.J.

This is an appeal from a judgment of Wilberforce J., given on July 27, 1962, whereby he dismissed an action brought by the plaintiffs for infringement of their copyright in a song called "In a Little Spanish Town" (to which I will refer hereafter as "Spanish Town"). This was composed in 1926, and (as has been admitted by the defendants) was extensively exploited in the United States of America and elsewhere by the publication of sheet music, by the distribution of gramophone records and by broadcasting. Unlike many popular songs, "Spanish Town" appears to have retained its popularity over the years. Records published in this country (some of them quite recently) were played to us during the course of the hearing; and, speaking for myself, I was readily able to recognise the tune as a familiar one which I had heard on frequent previous occasions.

The defendants are the publishers of another song called "Why," which was composed in 1959 by Peter de Angelis. "Spanish Town" is written in 3/4 time, and "Why" in 4/4 time. There are a number of other differences between the two works which were the subject of a good deal of evidence by musical experts on both sides. But when the two songs were played to us, it was immediately apparent, to me at any rate, that the effect on the ear was one of noticeable similarity. This is a matter which is not without importance, for, as was pointed out by Astbury J. in Austin v. Columbia Gramophone Co. Ltd., 19 "Infringement of copyright in music is not a question of note for note comparison," 20 but falls to be determined "by the ear as well as by the eye." 21

Wilberforce J. included in his judgment a detailed analysis of the musical structure of the two sings. I accept this as correct, and it is, I think, unnecessary for me to repeat it except in summary form. In each case the essential feature of the song is contained in the first eight bars, which constitute what has been ***609** described as a musical sentence, and in which the main theme is stated. It is common ground that in the case of "Spanish Town," these first eight bars of the chorus constitute a "substantial part" of the work within the meaning of section 49 of the Copyright Act, 1956. In "Spanish Town" a subsidiary and contrasting theme is then introduced, after which there is a return to the original theme, which is then re-stated with variations. By way of contrast, "Why" is described as a "thematic" song; there is no subsidiary or contrasting theme, but, practically speaking, the whole song is devoted to the development of the original theme.

Having given his analysis of the musical structure of each song, Wilberforce J. proceeded to state his conclusions as to the points of similarity or difference under nine headings, which I will attempt to summarise. (1) The structure of the two songs is different in the way that I have already described. (2) The first eight bars being the essential part of "Spanish Town," if the theme therein stated has been borrowed in "Why," the fact that it is developed by staying with it, rather than by way of contrast and return, would not make a significant difference, but might even accentuate the likeness. (3) The theme of "Spanish Town" is built up of musical commonplaces or cliches. The six notes of the first bar are a commonplace series, found in other previous musical works, and the manner in which this phrase is developed during the rest of the first eight bars is by way of some of the commonest tricks of composition. The result, however, is a combination which gives character and charm to "Spanish Town." (4) On a note for note comparison between the two songs there is a noticeable correspondence, though at no point do more than five consecutive notes correspond. But the fact that in "Why" the descent of one-sixth from the first to the

second note is immediately followed by a leap back of a sixth to the original note instead of an arpeggio, as in "Spanish Town," constitutes a not insignificant difference. (5) The harmonic structure of the first eight bars is the same in both cases; but this is completely commonplace and insignificant. (6) Correspondence of notes is not of itself enough to create similarity; time and rhythm are equally important. (7) In the present case there is a difference in time, but this is not a decisive factor, for in the case of "Spanish Town," as with other popular songs, a change of time from 3/4 to 4/4 does not destroy its substantial identity, or cause loss of recognition. (8) There is, however, a significant difference in rhythm between the two songs; this is exemplified in***610** the first bar, which in the case of "Spanish Town" consists of an even sequence of six quavers, whereas in the case of "Why" the first note is held for half a bar, and is followed by a descent to an accented note. (9) There is a significant difference between the two songs in the third and seventh bars. In "Spanish Town" these consist of a single held note; in "Why" these bars each start with the same note as in "Spanish Town," but after an interval of a crotchet there is a drop of a fifth and a fourth respectively to a different held note.

Having stated these various points of similarity and difference (which I wholly accept) the judge expressed the view that, in relation to the aural appeal of the sentence as a whole, there is an undoubted degree of similarity between the two songs, the only question being what adjective to put before the word "degree". He expressed his conclusion as follows: "On the whole, I think Mr. Palmer's word 'definite' or 'considerable' is the right weight to put upon the degree of similarity; it is such that an ordinary reasonably experienced listener might think that perhaps one had come from the other." With that conclusion I entirely agree.

If the matter stopped there, I do not think it could be doubted that there was material on which to base the inference that the composer of "Why" deliberately copied from "Spanish Town." Were that the right inference, I am satisfied that the degree of similarity would be sufficient to constitute an infringement of the plaintiffs' copyright. But the composer of "Why" was called as a witness, and not only denied copying, but denied that he had ever seen the music of "Spanish Town," or even consciously heard it. He was a man of 33 years of age, and had lived most of his life in the United States. He stated that he had been composing music ever since he was 11, and had played various instruments in dance bands. In cross-examination he admitted that at a younger age he might have heard "Spanish Town," because he had heard a lot of music, but he adhered to his statement that he had never consciously studied it, and said that he did not recall ever playing it. Wilberforce J. accepted his evidence, and I do not think that we in this court could properly interfere with that finding even if we were invited to do so, which we were not.

But that, the plaintiffs say, is by no means the end of the case, for de Angelis could well have copied from "Spanish Town" subconsciously. The song having been extensively exploited in the United States, the overwhelming probability (it***611** is said) is that he must have heard it; and the degree of similarity between "Spanish Town" and "Why" is such that an inference of, at any rate, subconscious copying should be drawn. That, it is contended, would be enough to constitute an infringement of the plaintiffs' copyright. Wilberforce J., however, decided that there was not sufficient material to justify the inference that de Angelis copied the plaintiffs' work, even subconsciously; and he accordingly dismissed the action. It is to this point that the present appeal has been mainly directed.

In approaching the suggestion of subconscious copying on the part of de Angelis, it is to be observed that the Copyright Act, 1956, nowhere uses the word "copying." [His Lordship read section 2 (5) and continued:] By subsection (6) (b) "adaptation" in relation to a musical work is defined as meaning "an arrangement or transcription of the work." By section 48 (1) "reproduction" is defined

as including reproduction in the form of a record. There is no further relevant definition of the word, and it has been left to judicial decision to introduce the notion of copying.

Mr. Arnold, in presenting his argument on behalf of the defendants, drew attention to the fact that in relation to musical copyright there are, under section 2 of the Act, only three forbidden processes, namely, "reproduction," "arrangement," and "transcription." Arrangement and transcription, he submitted, can be only the result of a conscious and deliberate process; a man cannot arrange or transcribe without knowing that he is doing so. Wilberforce J.'s acceptance of the evidence of de Angelis, therefore precludes the possibility of finding any infringement of the plaintiffs' copyright by arrangement or transcription. This submission must, I think, be accepted.

Mr. Arnold conceded that reproduction could possibly be the result of a subconscious process. But he went on to submit that reproduction within the section could mean nothing short of identity. Reproduction, under section 49, may be of a substantial part; but there is no suggestion in the Act of any such thing as a "substantial reproduction." In the present case it cannot be said that there is anything approaching identity between the plaintiffs' work and that of de. Angelis. Consequently, Mr. Arnold submitted, there could be no infringement of the plaintiffs' copyright, whether conscious or unconscious, by way of reproduction.

I find myself quite unable to accept this submission, for I can find no warrant for the suggestion that reproduction, within the***612** meaning of the section, occurs only when identity is achieved. This not only offends against common sense, but is, I think, contrary to authority. In Austin v. Columbia Gramophone Company Ltd. 22 the headnote reads: "Infringement of copyright in music is not a question of note for note comparison, but of whether the *substance* of the original copyright work is taken or not." In the course of his judgment in that case Astbury J. 23 quoted from the earlier case of D'Almaine v. Boosey, 24 where it was laid down that 25 "it must depend on whether the air taken is substantially the same with the original." I accept that as a correct statement of the principle.

On the other side, Mr. Foster, for the plaintiffs, submitted in the first place that de Angelis's denial of copying was wholly irrelevant. For where, as was said to be the case here, a sufficient degree of similarity is shown, and it is further proved that the composer of the second work had access to the earlier work in the sense that he must probably have heard it, an irrebuttable presumption arises that the former has been copied from the latter. No authority was cited in support of this proposition, which, if well-founded, would eliminate the necessity for any further evidence once similarity coupled with access had been proved. In my judgment, the proposition contended for is quite untenable; the most that can be said, it seems to me, is that proof of similarity, coupled with access, raises a prima facie case for the defendant to answer.

Mr. Foster contended in the alternative that the degree of similarity found by Wilberforce J. in the present case is such as to compel an inference of copying which, even if subconscious, is sufficient to give the plaintiffs a cause of action for infringement. I confess that I have found the notion of subconscious copying one of some difficulty, for at first sight it would seem to amount to a contradiction in terms, the word "copying" in its ordinary usage connoting what is essentially a conscious process. The textbooks on copyright make no reference to the subject, and English authority in relation to it is confined to a single dictum of Luxmoore J. in G. Ricordi & Company (London) Ltd. v. Clayton & Waller Ltd. 26 Our attention was, however, called to a number of cases in the United States in whichm the subject has***613** been discussed, and in some of which a decision in favour of the plaintiff has been based on a finding of subconscious copying.

It appears to me that the question must be considered in two stages, namely, (1) whether subconscious copying is a psychological possibility, and

(2) if so, whether in a given case it is capable of amounting to an infringement of the plaintiffs' copyright.

As to the first of these questions, it was suggested by Mr. Arnold that medical evidence should always be required before a finding of subconscious copying could be justified. I cannot think that this is necessary; for the psychological possibility of subconscious copying was clearly recognised by Luxmoore J. and in the various American decisions, which must be regarded as of high persuasive authority. What Luxmoore J. said, in relation to the defendants before him in the Ricordi case, 27 was: "If there has been any infringement, it must have been subconsciously, because the persons responsible knew the air complained of so well that they have taken it because they knew it." Similarly, in two American cases in which the plaintiff succeeded on the ground of subconscious copying, namely, Fred Fisher Inc. v. Dillingham 28 and Edwards & Deutsch Lithographing Company v. Boorman, 29 the decision was based on the finding of a high degree of familiarity with the plaintiffs' work. From this emerges the conclusion, which seems to me to be consonant with good sense, that if subconscious copying is to be found, there must be proof (or at least a strong inference) of de facto familiarity with the work alleged to be copied. In the present case, on the findings of Wilberforce J., this element is conspicuously lacking.

On the second question, namely, whether any subconscious copying proved could amount to an infringement of the plaintiffs' copyright, it seems to me that all that can be said is that at least the dictum of Luxmoore J. 30 envisages the possibility. On this point I do not think that much help is to be derived from the American decisions which have been cited, since the American statute under which they were decided is markedly different in its terms. No evidence of American law was adduced, and in its absence it is not for us to construe the American statute. It may, however, be observed (as was pointed out by Mr. Skone James) that in order to establish an infringement of copyright, it is not necessary to prove anything in the nature of mens rea. The***614** printer, for instance, may be held guilty of infringement though he has no conscious intent.

The conclusion at which I arrive on this part of the case is that subconscious copying is a possibility which, if it occurs, may amount to an infringement of copyright. But in order to establish liability on this ground, it must be shown that the composer of the offending work was in fact familiar with the work alleged to have been copied. This view is, I think, not inconsistent with the submissions put forward by Mr. Skone James. In the course of an argument which, for my part, I found convincing, he submitted that in considering whether there has been reproduction, so as to constitute an infringement within the Act, it is wholly irrelevant to inquire whether any copying has been conscious or subconscious. It is for this reason, he modestly suggested, that the textbooks are silent on the subject of subconscious copying. Mr. Skone James presented his argument in four propositions which, if I understood him correctly, may be summarised as follows: (1) In order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the two works, and (b) some causal connection between the plaintiffs' and the defendants' work. (2) It is quite irrelevant to inquire whether the defendant was or was not consciously aware of such causal connection, (3) Where there is a substantial degree of objective similarity, this of itself will afford prima facie evidence to show that there is a causal connection between the plaintiffs' and the defendants' work; at least, it is a circumstance from which the inference may be drawn. (4) The fact that the defendant denies that he consciously copied affords some evidence to rebut the inference of causal connection arising from the objective similarity, but is in no way conclusive.

If this is the right approach (as I think it is) it becomes a simple question of fact to decide whether

the degree of objective similarity proved is sufficient, in all the circumstances of the particular case, to warrant the inference that there is a causal connection between the plaintiffs' and the defendants' work. This is the way in which, as it seems to me, Wilberforce J. in the present case approached the question which he had to decide. In his judgment, he directed himself as follows: "The final question to be resolved is whether the plaintiffs' work has been copied or reproduced, and it seems to me that the answer can only be reached by a judgment of fact upon a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, the character of ***615** the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendants' work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiffs' work." In my judgment that was a proper direction, against which no criticism can fairly be brought.

Having so stated the question to be determined, and the matters to be considered, Wilberforce J. stated his conclusion as follows: "In this case, after taking account of the respective character and similarities of the two works as previously discussed, and relating this to the fact that there is no direct evidence that Mr. Peter de Angelis ever knew the work of 'Spanish Town' before he composed 'Why,' I have come to the conclusion that I have not sufficient factual material from which to draw an inference that he had sufficient knowledge or memory of 'Spanish Town' at the date of composition, to justify me in finding, against his express denial, that in composing 'Why' he copied, without knowing that he did so, 'Spanish Town' or a part of 'Spanish Town.' Putting it in another way, it does not seem to me that the degree of similarity shown, coupled with the fact, which I think is as far as it is possible to go by inference, that at some time and in some circumstances Mr. de Angelis must have heard 'Spanish Town,' is enough to make good the plaintiffs' case."

The question, being one of fact, is eminently one for the determination of the trial judge, as I think is recognised in the American cases which were cited to us. It is to be remembered that Wilberforce J. not only had the advantage, denied to us, of himself seeing and hearing the witnesses at first hand; he also had the advantage, which strikes me as being of great importance, of hearing how the musical experts who were called as witnesses illustrated the technical evidence which they gave by demonstrations, both vocally and on the piano. Bearing this in mind, and having regard to the judge's acceptance of the evidence given by de Angelis, it is, in my judgment, impossible for us in this court to say that he reached a wrong conclusion on what was eminently a question of fact for him.

I should perhaps mention one further consideration which appears to me to be of possible significance, and which was not dealt with specifically by Wilberforce J. I have already referred to the fact that the six quavers which form the opening bar of***616** "Spanish Town" are, as the judge observed, a commonplace series to be found in other previous musical compositions. Our attention was drawn, for instance, to an Austrian dance tune composed in the early nineteenth century by Von Lichnowsky, the opening bar of which is identical with that of "Spanish Town." The same sequence of notes is also to be found in a song entitled "Let Us Sing Merrily," although in this case there is a difference of tempo. In these circumstances, the fact that "Why" begins with an opening bar containing a similar, though not identical, phrase is of no special significance. By itself it would not be sufficient to warrant the inference that, if the phrase was copied, it was copied from the plaintiffs' work rather than some other composition. What is significant is the fact that both in "Spanish Town" and "Why" the opening phrase enunciated in the first bar is developed over the remainder of the first eight bars by the use of the same devices or tricks of composition,

namely, repetition followed by a pause, followed again by further repetition with a slight variation. It is this circumstance which produces the degree of similarity between the two compositions. If it could be said that this method of development was so distinctive and idiosyncratic as to preclude the possibility that its adoption by the two composers was the result of coincidence, this would be a very strong argument in the plaintiffs' favour. But, as pointed out by Wilberforce J., the devices used by the two composers for developing the phrase stated in the first bar are among the commonest tricks of composition and, I would add, exactly the sort to be expected from the composer of a popular song. I do not think, therefore, that in the circumstances of this case, the fact that de Angelis developed the opening phrase stated in the first bar by way of the same devices as were employed by the composer of 'Spanish Town " can be taken as in any sense proof of copying. There is at least an equal probability that his choice of these devices was the result of coincidence.

In my judgment, no sufficient reason has been shown for interfering with Wilberforce J.'s decision, and I would, accordingly, dismiss the appeal.

UPJOHN L.J.

I agree with the judgment which has just been delivered.

When Mr. Foster opened this appeal, he invited us in the name of international comity to say that a right of property (that is, copyright) which is the subject of international convention***617** must be protected in a most special and unique way. We were invited to say that if similarity of the alleged infringing work to the original work was established as a fact, and if it was further established that the alleged infringer had had some access to the original work, then although a denial of conscious plagiarism was accepted, we were bound, as an irrebuttable presumption of law, to say that the alleged infringer must have unconsciously copied the original work. The doctrine was said to be necessary to protect the author of the original work, for otherwise (so it was argued) any infringer could escape the consequences of plagiarism by denying that he had done so. Alternatively, it was said that if some undefined higher degree of similarity between the two works could be proved - something higher than is necessary to prove similarity in fact - then that would be sufficient to establish a similarity from which we were bound to infer unconscious copying.

Apart from the appeal to international comity, no authority and no textbook has been cited in support of this remarkable doctrine. Copyright is statutory, and depends upon section 2 of the Copyright Act, 1956. No hint of this doctrine appears there.

As to international comity, while it is true that in the United States of America a number of authorities (to some of which I shall have occasion to refer later) accept the doctrine that subconscious or unconscious copying may be inferred in a proper case and operate as a breach of copyright, not one of those authorities gives any support to this alleged and startling doctrine. The authorities in question in each case treated the question of unconscious copying as purely a question or inference of fact which might be drawn in the circumstances of a particular case, and not as a presumption of law. We were not referred to the laws of any other convention country, and the relevant paragraph (No. 4) of the Brussels Convention itself lends no support to the doctrine. I therefore reject this submission.

The truth is that the plaintiff in a copyright action must show that a substantial part of the original work has been reproduced; see section 2 (5) and section 49 of the Copyright Act, 1956; and, although not expressed in the Act, it is common ground that such a reproduction, in the words of Mr. Skone James, must be causally connected with the work of the original author. If it is an independent work, then, though identical in every way, there is no infringement. If a true infringer wrongly persuades the court that it is his own unaided work, the

plaintiff***618** fails, as do other plaintiffs when fraudulent defendants unhappily succeed (as, no doubt, they sometimes do) in persuading the court that they have not been fraudulent. The question, therefore, in this case is whether there has been a breach of section 2 (5); that subsection has been read by my Lord, and I will not read it again.

This is really a question of fact and nothing else, which depends on the circumstances of each case; but it is a question of fact which must be taken in two stages. The first stage is objective, and the second stage subjective. The first question is whether in fact the alleged infringing work - which for the sake of brevity I will inaccurately call the defendant's work, for though the composer was a witness, he was not a defendant - is similar to the work of the original author - which again for the sake of brevity I will, with equal inaccuracy, call the plaintiff's work. Is it then proper to draw the inference that the defendant's work may have been copied from the plaintiffs' work? This is purely an objective question of fact, and depends in large degree upon the aural perception of the judge, but also upon the expert evidence tendered to him; but it is essentially a jury question. A defendant might in theory go into the witness-box and say that he had deliberately made use of the plaintiff's work, but that it is not an infringement, either because he did not make use of a substantial part of the plaintiff's work, or that, though the plaintiff's work has been utilised, he has been able so to alter it that it cannot properly be described as a reproduction. The onus is on the plaintiff to prove the contrary as a matter of purely objective fact, and if he cannot do so then the morally dishonest defendant will escape the consequence of the allegation of infringement. No such question arises in this case. At this stage similarity has been found by Wilberforce J., and that is not challenged before us. For myself, I think that perhaps I would have used rather stronger adjectives than "definite" or "considerable" similarity, which were the words used by the judge; the adjective "close" would be more appropriate, but nothing, I think, turns upon that matter.

The next stage is the subjective stage and is equally a question of fact, though, of course, the degree of similarity is most important in reaching this subjective conclusion. The question at this stage, put bluntly, is: has the defendant copied the plaintiff's work, or is it an independent work of his own? Mr. Skone James, in an attractive argument, agrees that the plaintiff, in order to succeed, must prove a causal connection***619** between his work and the defendant's work; but he submits that, providing that upon a proper inference from the known facts, it is right to assume that the alleged infringing work was derived from the plaintiff's work, it matters not whether it was done consciously or unconsciously. There is, he submits, no difference in principle between a conscious act of piracy and an unconscious act of piracy; all that must be established is a causal connection.

While conscious acts of piracy may be established in the witness-box, unconscious acts of piracy must clearly be a matter of inference from surrounding circumstances. The alleged infringing work may be an identical reproduction of the original work with all its idiosyncrasies, and all the same mistakes. Theoretically and mathematically, that may be a complete coincidence, and both works may be the product of entirely independent brains; but the judge has to judge of these matters on the balance of probabilities; and such an identical reproduction may lead him to reject the evidence of the defendant, who otherwise appears to be an honest witness. Much less than complete identity may properly lead the judge, on the balance of probabilities, to reject the evidence of an apparently honest witness on this question. This is a question of pure fact in every case. It does not arise in this case for Wilberforce J. accepted the author's evidence that he did not consciously derive the composition of "Why" from "In a Little Spanish Town," and that has not been challenged before us.

At this stage, therefore, the question is whether, on the facts of the case, it is proper to infer that de Angelis has derived "Why" unconsciously from the

plaintiff's work, which he had heard at some earlier time. This again is purely a question of the proper inference of fact to be drawn from all the relevant and admissible known facts. There may be cases which, if the circumstances do not justify the conclusion that the defendant, in denying conscious plagiarism, is not telling the truth, yet justify the conclusion that he must have heard the plaintiff's tune, and subconsciously reproduced it.

I do not pause to recapitulate the facts of this case in any detail for they have been set out in much meticulous detail in Wilberforce J.'s judgment, and also by Willmer L.J., that I do not repeat them. I draw the conclusion that although, as I have already stated, the resemblance is a close one, that resemblance, in the circumstances of this case, is little evidence of conscious or unconscious copying.***620**

Wilberforce J. said: "Thirdly, the theme of 'Spanish Town' is made up of common-place elements, or, as some witnesses have called them, cliches. The first six notes are a commonplace enough series; they are found in an Austrian country dance and in a song, 'Let Us Sing Merrily.' The device of repetition, of resting for two bars on a long note and of repetition in sequence, are the commonest tricks of composition. But many writers of great music have used clichès to produce masterpieces; indeed, some of them have found in the commonplace character of their basic phrase their stimulus. Professor Nieman gave some interesting examples from the music of Mozart, and most writers of popular songs use, and can use, nothing else. No example was given of precisely this combination having been used in other compositions, though it was apparent that the musical dictionaries and the experience of the witnesses had been thoroughly combed."

Having heard the arguments of counsel, accompanied by very helpful demonstrations on the piano, I reach the conclusion of fact that, apart altogether from de Angelis's denial of conscious plagiarism, which was accepted, it is not a mere legal or mathematical possibility, but a real live practical possibility that the defendant's composition of "Why" is an independent composition. This practical possibility again does not conclude the matter, for the defendant's composition may nevertheless be the result of unconscious memory. But first it is necessary to establish the probability that the defendant has heard the plaintiff's composition.

Wilberforce J. had to deal with a difficult situation as to whether de Angelis had heard, or even played, as a youth in a dance band, the plaintiff's composition. I think it is possible that, although in perfect good faith he stated the contrary, de Angelis did hear the music, and possibly played it in his early youth. Each case must depend upon its own facts, and it is not possible to lay down any criteria. But it does seem to me that where, for the reasons I have given, there is evidence from the music itself that there is a real practical possibility of independent composition by the defendant, it requires quite strong evidence to support the view that there may have been unconscious copying. To my mind, the possibility that the defendant had heard it, or even played it in his early youth, is a quite insufficient ground upon which it would be proper to draw the inference of unconscious copying. It may be that in the future***621** medical evidence will be available to guide us upon this point, but in the absence of acceptable and probative medical evidence I think it requires quite strong evidence, in a case such as this - where, as I have already pointed out, independent composition is a real practical possibility - to establish, as a matter of probability, that de Angelis's subconscious ego guided his hand.

The cases in the United States to which we have been referred offer some instructive comparison on their facts, although I do not lose sight of the fact, of course, that cases are only authorities for legal propositions; but, nevertheless, I think the cases cited are helpful. In the first case, that of Fred Fisher Inc. v. Dillingham, 31 that great judge, Judge Learned Hand, in giving the famous composer, Jerome Kern, the benefit of the doubt, said 32 : "On the whole, my belief is that, in composing the accompaniment to the refrain of 'Kalua,' Mr. Kern

must have followed, probably unconsciously, what he had certainly often heard only a short time before." That is in marked contrast to the facts of this case.

Then, in a rather different case, Edwards and Deutsch Lithographing Co. v. Boorman, 33 the plaintiffs prepared, printed, published and distributed certain discount tables, the copyright work. The defendants published very similar tables. But there it was established that the defendants had sold and handled the plaintiffs' publications for years, and on that the inference was drawn of unconscious copying. Again the facts of that case are very different from the one before us.

Wilberforce J. put the relevant points to himself quite accurately, and my Lord has read that part of his judgment; and his summary, which I will venture to repeat, was this: "In this case, after taking account of the respective character and similarities of the two works as previously discussed, and relating this to the fact that there is no direct evidence that Mr. Peter de Angelis even knew the work 'Spanish Town' before he composed 'Why,' I have come to the conclusion that I have not sufficient factual material from which to draw an inference that he had sufficient knowledge or memory of 'Spanish Town' at the date of composition, to justify me in finding, against his express denial, that in composing 'Why' he copied, without knowing that he did so, 'Spanish Town,' or***622** a part of 'Spanish Town.'" I entirely agree with that conclusion of fact reached by Wilberforce J.

That makes it unnecessary to decide the really interesting question in this case whether Mr. Skone James is right when he says there is no difference in law between conscious and unconscious copying. It seems to me that that is an interesting question upon which I express no opinion, for, as I have said, it does not arise. Mr. Skone James, in support of his argument, has pointed out that an infringer may be entirely ignorant of knowledge of plagiarism; normally the printer and publisher will also be guilty of infringement though they have no reason even to suspect that any plagiarism can be suggested.

This, however, does not meet my difficulty. You do not necessarily have to show knowledge or suspicion of plagiarism against every defendant, but the plaintiff always has to prove that the alleged infringement is not the independent work of the alleged infringing author or composer, but is causally connected with the plaintiff's work.

The real question is this: can it be said to be an "act" of reproduction, for the purposes of section 2 (5) of the Copyright Act, 1956, if the alleged infringing work is not the conscious act of the infringer? It has been argued that Luxmoore J. in Ricordi's case 34 expressed the view that subconscious copying could be an infringement of copyright; but I do not think that he intended to express any view on the law at all. For my part, I think that this question, therefore, remains entirely open.

I agree that this appeal must be dismissed.

DIPLOCK L.J.

This appeal seems to me to turn entirely upon a question of fact: was the judge entitled, notwithstanding the similarities between the melodies of the plaintiffs' song "In a Little Spanish Town" and the defendants' song "Why," to refuse to infer that the composer of the latter work copied it from the former work?

It is conceded on the one hand (as is obvious to the ear) that the two works show considerable similarities, and on the other hand that the composer of "Why" did not intentionally copy it from "In a Little Spanish Town'"; but it was found by Wilberforce J. that the composer of "Why" must at some time and in some circumstances have heard "In a Little Spanish Town"; and it is contended by the plaintiffs that the only***623** proper inference of fact is that he must have stored it in his memory and reproduced it without being aware that he was performing an exercise of recollection and not an act

of independent creation.

To this assumed mental feat there has been applied the conveniently ambiguous term "subconscious copying"; and we have heard much argument as to whether, if it is established, it constitutes an infringement of the copyright in the work which has been unconsciously copied. For my part, I think that the law is perfectly clear, and that such difficulties as there are in this appeal are solely due to the absence of any factual information about the mental process involved in "subconscious copying." We know not whether it is rare or common, general or idiosyncratic, nor indeed whether it is possible to remember, not a mere isolated phrase, but a "substantial" part of the remembered work without remembering that one is remembering.

First, as to the law; and for this purpose I will assume that it is established that the composer of "Why" did in fact use his recollection of "a substantial part of" the melody of "In a Little Spanish Town " as the model for his own composition, although he was unaware that he was doing so, and genuinely thought that "Why" was his own independent creation. The word "to copy" is not used at all in the Copyright Act, 1956, nor was it in the Copyright Act, 1911. Nevertheless, it is well established that to constitute infringement of copyright in any literary, dramatic or musical work, there must be present two elements: first, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived. The necessity for the second element was expressly laid down by the Court of Appeal in Purefoy Engineering Co, Ltd. v. Sykes Boxall & Co. Ltd., 35 and is, indeed, implicit in all thee compilation cases, including the recent case in this court of William Hill (Football) Ltd. v. Ladbrokes (Football) Ltd., 36 where tables of betting odds were unanimously held not to infringe the copyright in substantially identical tables because the authors of the later tables, although very familiar with the earlier tables, had, in fact, worked out the odds for themselves. But while the copyright work must be***624** the source from which the infringing work is derived, it need not be the direct source: see Hanfstaengl v. Empire Palace Ltd.37 Mr. Skone James, I think put it with his usual accuracy when he said there must be a causal connection between the copyright work and the infringing work. To borrow an expression once fashionable in the law of negligence, the copyright work must be shown to be a causa sine qua non of the infringing work.

The necessity for a causal connection between the copyright work and the infringing work, although well established under the Copyright Act, 1911, either as being implicit in the legal concept of "copyright," or in the word "reproduce," is, I think, more easily deduced from the wording of the current Copyright Act of 1956. Section 1 (1) defines "copyright" in relation to a work as the exclusive right to do and to authorise other persons to do certain acts "in relation to that work"; and subsection (2) defines "infringement" as the doing of any of those acts by a person who is not the owner of the copyright or his licensee. The acts, which are defined in section 2, and include "reproducing the work in any material form," if they are to constitute infringement must thus be done "in relation to the work," an expression which connotes a causal connection between the copyright work and the act relied upon as an infringement. If the existence of the copyright work has no causal connection with the production of the alleged infringing work, even though the latter be identical with the former, there is no infringement of copyright.

It is, however, in my view, equally clear law that neither intention to infringe, nor knowledge that he is infringing on the part of the defendant, is a necessary ingredient in the cause of action for infringement of copyright. Once the two elements of sufficient objective similarity and causal connec-

tion are established, it is no defence that the defendant was unaware (and could not have been aware) that what he was doing infringed the copyright in the plaintiff's work. This is expressly recognised by sections 17 and 18 of the Copyright Act, 1956, which restrict the remedies available against an innocent infringer, but recognises his liability. Thus under section 18, which gives to the copyright owner remedies in conversion and detinue in respect of infringing copies of his work, a defendant who "believed and had reasonable grounds for believing that they were not***625** infringing copies "is relieved of any liability in damages, but not of his liability to deliver up any infringing copies in his possession.

"Unconscious copying" in the sense in which it has been used in the argument postulates, first, such objective similarity between the copyright work and the alleged infringing work that the latter may properly be said to reproduce the former; secondly, that there is a causal connection between the copyright work and the alleged infringing work; thirdly, that the composer of the alleged infringing work believed (and may indeed have had reasonable grounds for believing) that there was no such causal connection. The first two, if established, in my view constitute breach of copyright; the third is irrelevant on liability although it may be relevant on remedy.

The real difficulty in this case is not one of law, but of fact. It involves an inquiry into the working of the human mind. It may well be that this is a matter upon which expert evidence is admissible; but cases in English courts are normally conducted upon the tacit assumption that where no question of disease of the mind is involved, the ordinary man, whether sitting in the jury-box or on the bench: is capable of determining (where it is relevant) what went on in the defendant's mind.

The present case was so conducted before Wilberforce J. No expert evidence was called as to how the human memory or musical creative faculties work; no investigation was made into the mental idiosyncrasies of the composer of "Why" or his methods of composition. Wilberforce J. was left to draw the inference of "subconscious copying" from the evidence (1) of the similarities between the melodies of "In a Little Spanish Town" and "Why" as explained by the conflicting evidence of expert musicians; (2) of the likelihood of the composer of "Why" having at some time heard "In a Little Spanish Town"; and (3) of his denial that he had consciously copied "In a Little Spanish Town."

On this state of the evidence, there were three possible explanations of the similarities: conscious copying, unconscious copying, coincidence. The first Wilberforce J. rejected. He accepted the denial of the composer of "Why." This is a finding of primary fact, and it depends ultimately on credibility. The appellants do not seek to disturb it. This reduces the possible explanations to two: unconscious copying, or coincidence. Wilberforce J. did not reject the possibility that "unconscious copying" of musical works can occur. He proceeded to consider, in the light of the conflicting expert evidence, which was***626** the more probable explanation of the similarities, unconscious copying, or coincidence. The relevant similarities were to be found in the first eight bars of the melody of "In a Little Spanish Town" which, it is common ground, do constitute a substantial part of that musical work. They are described clearly (and it is conceded accurately) in Wilberforce J.'s judgment.

The rival contentions, supported by expert evidence, may be summarised thus: The plaintiffs, conceding that the first bar by itself was a musical cliche in which there was no copyright, contended that the similarities in the use made of the cliche in eight successive bars in each of the two works were too great to be explained by coincidence. The defendants contended that, once a composer of popular songs had decided to use, as a basis of the theme of a popular song, the musical cliche contained in the first bar, the use which was in fact made of it in both "Why" and "In a Little Spanish Town" in the succeeding bars was a device by no means uncom-

mon in musical composition, and the similarities were readily explicable by coincidence. Wilberforce J. was not satisfied that the similarities were due to unconscious copying. This, no doubt, was an inference of fact, but one which depends, in part at least, upon the degree of conviction which the evidence of the respective experts carried, and thus one with which an appellate court should be slow to interfere. No attempt has been made to demonstrate that he has overlooked or misunderstood any of the evidence.

How, then, is the case for the appellants put? The procedure of the English courts, says Mr. Foster, is ill-adapted to deal with such esoteric problems as "subconscious copying." It places too heavy a burden upon those who seek to establish that it has occurred. Copyright is an international proprietary right, and English law should keep in step with foreign law. They order these things better in more sophisticated (though unspecified) jurisdictions. But the only foreign law to which we have actually been referred is to be found in the United States cases which my brethren have discussed; and there, it seems, the matter is dealt with in the same unsophisticated way as that in which Wilberforce J. dealt with this case, without making it impossible for the courts to find (where the evidence, so warrants) that unconscious copying has taken place.

Faced with the difficulty that "unconscious copying" is by definition not susceptible of direct proof in the present state of psychological techniques, it must always be a matter of inference from other facts, Mr. Foster's first bold submission was, that if ***627** the plaintiff proves (1) the presence of the necessary element of objective similarity between the copyright work and the alleged infringing work; and (2) the mere possibility of access to the copyright work by the author of the alleged infringing work, there is an irrebuttable presumption (that is, a presumption of law) that the author of the alleged infringing work unconsciously copied the copyright work; or, put more briefly, what cannot be proved must be presumed. With all respect, this is bad logic as well as bad law. For, unless "the law is an ass" - which I must ex officio irrebuttably presume it is not - the essential, though unexpressed, premise of this proposition is that the similarities cannot be due to coincidence; proof of possibility of access is thus unnecessary; access as well as unconscious copying can be irrebuttably presumed. But this is merely a roundabout way of saying that proof of a causal connection between the copyright work and the alleged infringing work is not a necessary element in infringement of copyright; and that is not the law.

Mr. Foster's alternative submission (although I understood it to be presented as one of law) was, I think, upon analysis merely one as to the proper inferences of fact to be drawn from varying degrees of similarity between the copyright work and the alleged infringing work. The degree of objective similarity is, of course, not merely important, indeed essential, in proving the first element in infringement, namely, that the defendant's work can properly be described as a reproduction or adaptation of the copyright work; it is also very cogent material from which to draw the inference that the defendant has in fact copied, whether consciously or unconsciously, the copyright work. But it is not the only material. Even complete identity of the two works may not be conclusive evidence of copying, for it may be proved that it was impossible for the author of the alleged infringing work to have had access to the copyright work. And, once you have eliminated the impossible (namely, copying), that which remains (namely, coincidence) however improbable, is the truth; I quote inaccurately, but not unconsciously, from Sherlock Holmes.

No useful purpose can thus be served by seeking to classify degrees of similarity into categories which must be taken to be sufficient to prove unconscious copying where access to the copyright work by the author of the alleged infringing work is proved (1) as a certainty; (2) as a probability; (3) as a possibility, and (4) as an impossibility. That is not how questions of fact are decided in courts of law, or

anywhere else.***628**

The answer, as Wilberforce J. said at the conclusion of an impeccable summary of the evidence, "can only be reached by a judgment of fact upon a number of composite elements." Those elements on which the judge directed himself have already been read by my Lord, and I need not repeat them.

I agree that it is impossible for this court, which has not heard the evidence or seen the witnesses, to say that Wilberforce J. came to a wrong conclusion of fact.Appeal dismissed with costs. Leave to appeal to House of Lords refused. ([Reported by T.C.C. BARKWORTH, Esq., Barrister-at-Law.])

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1. Copyright Act, 1956, s. 2: "(1) Copyright shall subsist, subject to the provisions of this Act, in every original literary, dramatic or musical work which is unpublished and of which the author was a 'qualified person' ... (5) The acts restricted by the copyright in a literary, dramatic or musical work are - (a) reproducing the work in any material form; (b) publishing the work; (c) performing the work in public; (d) broadcasting the work; (e) causing the work to be transmitted to subscribers to a diffusion service; (f) making any adaptation of the work; (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) of this subsection. (6) In this Act 'adaptation' ... (b) in relation to a musical work, means an arrangement or transcription of the work, so however that the mention of any matter in this definition shall not affect the generality of paragraph (a) of the last preceding subsection." S. 49. "(1) Except is so far as the context otherwise requires, any reference in this Act to the doing of an act in relation to a work or other subject-matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof, and any reference to a reproduction, adaptation or copy of a work, or a record embodying a sound recording, shall be taken to include a reference to a reproduction, adaptation or copy of a substantial part of the work, or a record embodying a substantial part of the sound recording, as the case may be:"

2. See post, p. 591.

3. See ante, p. 687.

4. (1923) Macg.C.C. (1917-1923) 398.

5. (1930) Macg.C.C. (1928-1935) 154.

6. (1958) 253 Fed. (2nd Series) 102.

7. (1924) 298 Fed. 145

8. (1926) 15 Fed. (2nd Series) 35.

9. (1946) 154 Fed. (2nd Series) 464.

10. (1946) 154 Fed. (2nd Series) 480.

11. (1936) 81 Fed. (2nd Series) 49.

12. (1955) 72 R.P.C. 89, C.A.

13. [1894] 2 Ch. 1; 63 L.J.Ch. 410; 10 T.L.R. 299, C.A.

14. (1930) Macg.C.C. (1928-1935) 154.

15. (1958) 253 Fed. (2rd Series) 102.

16. (1930) Macg.C.C. (1928-1935) 154.

17. [1941] A.C. 417; 57 T.L.R. 586; [1941] 2 All E.R. 403; 58 R.P.C. 207, H.L.

18. [1934] Ch. 593; 50 T.L.R. 363, C.A.

19. (1923) Macg.C.C. (1917-1928) 398.

20. Ibid. 415.

21. Ibid. 409.

22. (1923) Macg.C.C. (1917-1923) 398.

23. Ibid. 409, 410.

24. (1835) 1 Y. & C. 288.

25. Ibid. 302