Legal News You Can Use
April 2005
By Andrew Berger
"Hey, That Looks Like Mine"
The Law of Substantial Similarity

Have you ever looked at another's work and thought it was yours? If so, you may have angrily asked yourself, "can they get away with this?"

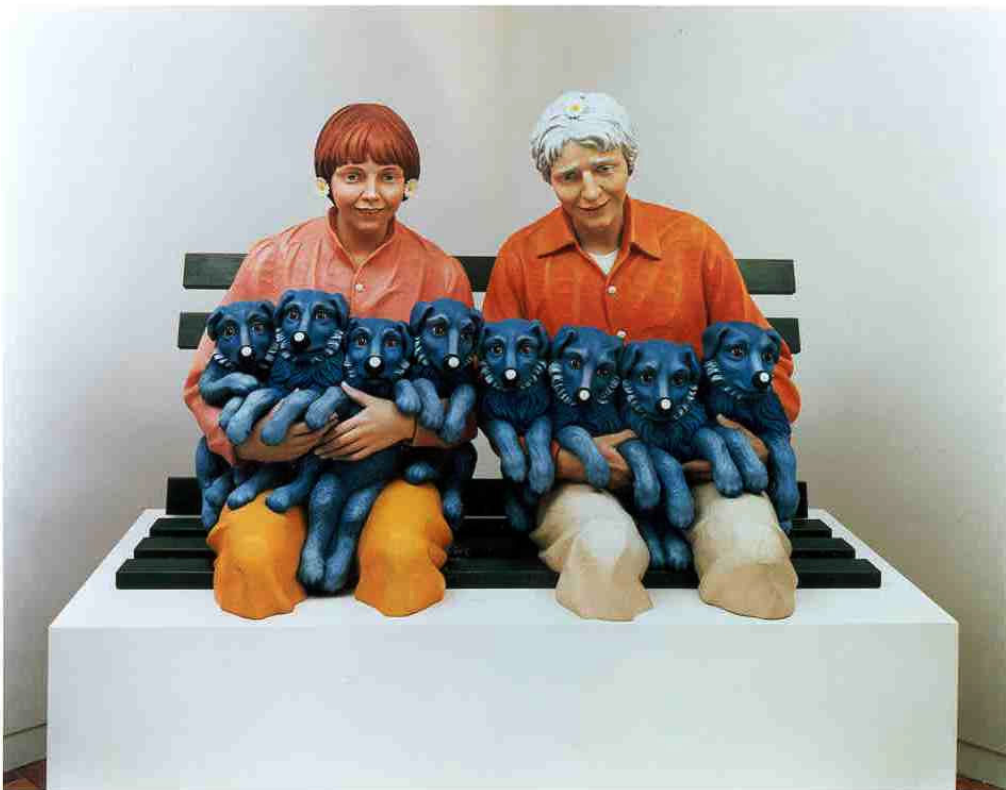
Here is some guidance. **In a nutshell, to show infringement, you need to prove that the alleged infringer (the "Plagiarist") actually copied your work and that the copy is substantially similar to yours.**

Copying requires that you show that the Plagiarist had access to your work. Access means that the Plagiarist had a reasonable opportunity to see it; **you don't have to prove he did.** You can show access by demonstrating that your work was widely published or distributed. You can also prove access by demonstrating that you sent your work to a person in the Plagiarist's organization with a close relationship with the Plagiarist, such as his supervisor. But if the Plagiarist shows he independently created his similar work without ever having a reasonably possibility or seeing yours, your infringement claim will be dismissed.

Assuming access, you can establish copying through a side-by-side comparison of the Plagiarist's work and yours. In making that comparison the court looks at all the elements in each work, including those taken from the public domain. If there is copying, a court then focuses on whether the works are substantially similar. Here the focus is narrower. The court excludes all public domain elements from its analysis and looks only at those elements that are protectible.

In determining the protectible elements, a court will distinguish between the idea underlying your work and its expression. Only the expression is protectible. The distinction between idea and expression is often elusive. Two cases, *Rogers v. Koons* and *Psihoyos v. McCann Erickson and Microsoft*, help explain the distinction. This firm represented the plaintiff photographer in both. In the first, the photographer, Art Rogers, created a wonderful photo of eight puppies sitting on a bench:

Jeff Koons, a well-known sculptor, had an Italian craftsman simply copy the photo producing the following:

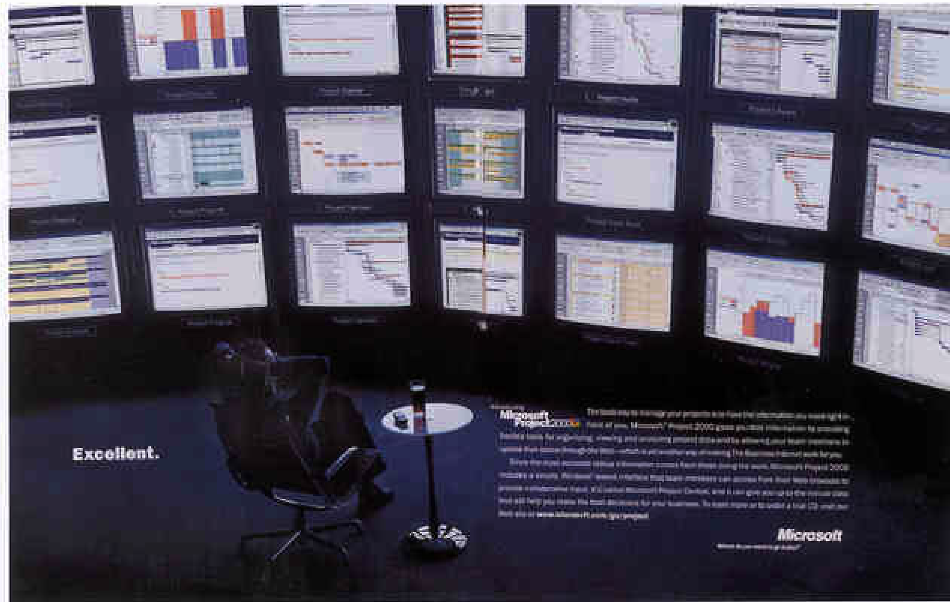


The Second Circuit Court of Appeals, in finding Koons' work substantially similar and therefore infringing, stated:

> It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Roger's *expression* of this idea—as caught in the placement, in the particular light and in the expressions of the subjects--that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.

In the second case, Mr. Psihoyos created a photo called 500 TVs (below). It depicts a model in the center of a dark room looking at a wall of 500 TV screens arranged in a parabola around him. The model is dressed in business casual clothes and sits in an office chair in a relaxed, contemplative pose with his legs crossed and hands behind his head. His silhouette is illuminated by blue light emanating from the monitors. Each TV screen displays a different still image. The photograph won many awards and was published more than a hundred times in magazines and newspapers around the world.

Thereafter, McCann Erickson, the ad agency, created an ad for Microsoft promoting the launch of one of its software programs. The ad included a photo containing many elements similar to those in Mr. Psihoyos' photograph.



In Mr. Psihoyos' suit against McCann and Microsoft, we argued that McCann had access to Mr. Psihoyos' photograph because the creators of the ad at McCann had a reasonable opportunity to see the photo. The opportunity arose because the creators read or subscribed to magazines and newspapers in which the photo had been extensively published.

We also argued that there were a number of elements in the Psihoyos photo that McCann had copied and that the idea and expression underlying each was the same. The idea behind both photos was to present a confident person in control of multiple streams of information. We argued the expression was also the same because each photo:

A. Depicts the model in the same relaxed pose sitting with hands behind his head and legs crossed facing a bank of monitors arranged in a parabola;

B. Shows the model similarly dressed, sitting in a similar office chair;

C. Uses exclusively backlit lighting;

D. Has a similar raised perspective with the viewer looking down at the model and monitors;

E. Presents a horizontal composition that focuses the viewer's eye towards the banks of monitors;

F. Places the model in the center of the photo, a few feet in front of the monitors.

Our able adversary raised a number of defenses, including that a photo of a person in a "control room" facing a bank of monitors was commonplace and therefore not protectible. He creatively presented the court a videotape of similar scenes from various media, including the Simpsons TV show, showing some of the same elements present in Mr. Psihoyos' photo.

Although the *Rogers* and *Psihoyos* cases were resolved on a confidential basis, they highlight the questions you should ask yourself next time you see a work that looks like it might be yours. The questions are:

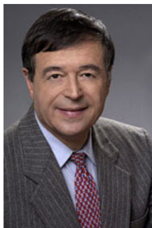
1. **Is there access**? Did the potential defendant have a reasonable opportunity to see your work? Unless you establish access, you cannot show infringement.

2. **Is there copying**? Do a side-by-side comparison. Count the elements in your work that are also present in the similar work. Although there is no minimum number, are there a fair number of common elements?

3. **Is there substantial similarity**? What was the idea underlying your photo and how have you expressed it? Has the Plagiarist copied your expression, not simply your idea? Compare the protectible elements. These elements include placement of the subjects, their poses and expression, perspective, composition, lighting, film, color and layout. Have you and the Plagiarist similarly expressed a number of these elements?

In sum, if there is access, copying and substantial similarity, there may well be infringement.

© 2005 Andrew Berger


©2005 Beth Green Studios

This newsletter is general in nature and provides information to our clients and friends. It is not intended as a substitute for legal advice or a legal opinion given in response to a specific set of facts and should not be relied on for that purpose. If you wish additional information about the above or have questions, please contact Andrew Berger at (212) 702-3167; berger@tanhelp.com .
To be placed on the list for a free subscription to **Legal News You Can Use**, please send an email to berger@tanhelp.com with the words "please add me to the list" in the subject line.
To opt out of the list of subscribers, please send an email to the same address and in the subject line state "please remove me from the list." We will comply right away. Thank you.

Andrew Berger
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue New York, NY 10022