

Part II – Essay

I. Album Cover

A. Ownership

The *Heroes* album cover is a collective work comprising the underlying photo and identifying text. Although Sukita initially selected contact sheets, it is a protectable compilation authored by Bowie as he informed Sukita of which picture would ultimately be included and himself chose the typeface (which alone is not copyrightable (Steinberg) making this a thinner copyright) and placement of the album name (§101) - this selection and arrangement are two examples of a modicum of originality sufficient for copyrightability (Feist, §101). It is likely not a derivative work of the underlying photo because the textual addition is trivial under even the lowest standard for originality indicated by Meskill's Batlin dissent (Magic Marketing). Therefore, it must be determined whether Bowie, Sukita, or both are authors of the photo because protection of the compilation extends only to the material contributed by *its* author (§103), and if Bowie is not an author, he would need an exclusive license from Sukita to bring suit in his own name (Ocasek).

Under the general rule, Sukita as the photographer is the author because he actually translated the idea into a fixed, tangible expression (Lindsay). However, an exception exists for when that person is merely an amanuensis of the true author because the expression is transposed by mechanical or rote transcription under his authority (Lindsay). It is unclear whether this exception applies because although the pose was Bowie's idea and Sukita admitted that he did not give directions, there is no evidence of Bowie planning like Lindsay because it started as a general photo session and he moved naturally during the shoot.

Fortunately, if Sukita were more than an amanuensis, Bowie and Sukita would likely be joint authors of the photo as each included independently copyrightable contributions (with Bowie at least arranging the subject (Burrow-Giles)) and the two likely fully intended to be co-authors (Thomson). This full intent is proved by a mutual

intent to merge into one work, which is necessary between a photographer and the subject, and a mutual intent to be co-authors and when there is no contract, there are three recognized tests for the second element: (1) under Childress, we notice that the decision-making authority factual indicia supports a joint work theory as each allowed the other to make artistic choices during the shoot and afterwards; (2) under Aalmuhammed, Bowie calls Sukita a “master” but this is not the same as a “mastermind” as he was not referring to just this photo and Sukita admitted to Bowie’s artistic control (in addition to this test seemingly conflicting with the notion of “joint” authorship); and (3) under Richlin, the audience appeal criteria would likely support Bowie as at least a joint author. Therefore, Bowie is likely at least a joint author.

Alternatively, Bowie could solely own the photo as a work made for hire if Sukita is deemed either his employee with the work established in the scope of his employment or his independent contractor commissioned for use as contribution to a collective work, although this label would require a signed written contract which Bowie does not remember (§101). Of the twelve employment factors, the low level of skill required, long duration of relationship, regular business of Bowie, and Bowie being in business indicate Sukita is an employee; the location of work indicates Sukita was an independent contractor; and the remaining factors are unclear based on the facts provided (Reid). If Sukita were an employee, the photo would be created within the scope of his employment as Bowie selected, hired, and paid Sukita to take pictures.

B. Rights Infringed

Assuming Bowie owns the entire album cover, the §106 rights he should claim the Penetrators infringe are (1) reproduction, (2) derivative work, (3) distribution, and (5) public display. §106 (1) and (2) infringement should be pled together as the distinction is if the Penetrator’s work has enough originality to be a derivative work. There are three standards for this originality, and as you cannot copyright the subject matter of a photo (Leigh), even under the lowest standard (Batlin dissent) it is unlikely this is a derivative work as the only distinguishable variation is the trivial use of a dark coat instead of a dark leather jacket. Even if this analysis is mistaken, infringement of either right is analyzed under the Arnstein 2-part test (Horgan).

Although there is no direct evidence that the Penetrators copied the *Heroes* cover, there is overwhelming circumstantial evidence through both access to this famous artist's (whom the Penetrators are covering) world-famous work released decades prior and striking probative similarity with the same pose, lighting, background, positioning and style of the text (with the font not being protectable under Steinberg), and camera angle (Burrow-Giles). Additionally, this copying is certainly improper appropriation of the protected expression, as an actual album purchaser would find substantial similarity through a dissection (as I did for probative similarity, and even without the unprotectable elements) or total look and feel approach (Arnstein Dissent), although this analysis may be unnecessary due to the striking probative similarity (Harrisongs). If the reproduction right is violated, then the distribution of infringing copies is usually infringed as well. Finally, the infringing reproduction or unauthorized derivative work is a pictorial or graphic work that is almost certainly displayed publicly (§101), infringing §106 (5).

C. §107 Fair Use Defense

The first factor strongly favors Bowie as the Penetrators use is not transformative but duplicative from the cover of a rock album to the cover of a punk-rock single and was almost certainly commercial. The second factor also favors Bowie, as album covers are artistic despite not being high art (Bleistein) and Bowie's is arguably his most elegant and dramatic. The third factor overwhelmingly favors Bowie as the Penetrators both qualitatively and quantitatively took so much from the *Heroes* cover as explained in the similarity analysis. The fourth and most important factor looks to the effect on the current and potential markets for album covers as merchandise and also favors Bowie because generally the less transformative under the first factor, the more market displacement (Connectix) and if reproduction became widespread, it would further limit the royalties Bowie receives from merchandise sales. The Penetrators could claim that their cover is a parody of Bowie's in order to change the transformative, amount and substantiality, and market considerations; however it does not comment on the infringed copyrighted work (or anything) to deserve such recognition. As discussed more below, the musical cover of "Suffragette City" tells the story of a financially (rather than romantically) troubled person and so when combined with the visual cover art they could jointly comment on Bowie's fame and fortune, but this is far from the naiveté of an

earlier day (Campbell) as the *Heroes* cover does not portray Bowie's success. If anything it is a satire of the Penetrator's lack of success, but that does not aid their fair use defense.

II. Musical Composition

A. Licenses

As Bowie is concerned with a cover and not sampling of the nondramatic "Suffragette City," the rights potentially infringed by the Penetrators relate to his underlying musical composition and not an individual derivative work sound recording. As Bowie authorized the public distribution of *The Rise and Fall of Ziggy Stardust and the Spiders from Mars* in 1972 and it included a sound recording of "Suffragette City," §115 provides for a compulsory mechanical license for anyone to make their own sound recording based on its composition, subject to certain restrictions. The primary purpose to distribute phonorecords for private use requirement is likely satisfied by the Penetrators if they made their own sound recording and did not use it in a music video or soundtrack (§115(a)(1)). The Penetrators must also file notice of intention to obtain a license with the copyright owner within thirty days after making and before distributing any phonorecords (§115(b)(1)), which Bowie's managers says has not yet been done and we have no facts relating to distribution or creation. Failure to comply would foreclose the possibility of a compulsory license and immediately render reproduction and distribution of the cover actionable infringement (§115(b)(2)). Bowie's primary complaint is with the changes to the composition; however, the new arrangement could be protected under §115(a)(2) if it is deemed necessary to conform to the style or manner of interpretation and does not change the basic melody or fundamental character of the work. As the Penetrators are a punk band, it would not be surprising that they made some changes, but Bowie's displeasure and the new message (discussed *infra*) indicates that the fundamental character has likely been changed thus providing another reason why the cover is not subject to a compulsory license.

It is possible that the Penetrators have negotiated a package Harry Fox license if Bowie or his music publishing operation had authorized the Harry Fox Agency to issue licenses and collect royalties on his behalf.

B. Rights Infringed

Assuming that neither license applies and although it is unclear whether the Penetrators have performed their work or have distributed it, Bowie should at least allege infringement of his §106 (1), (2), and (3) rights to the musical composition. Again, the only distinction between (1) and (2) is the modicum of creativity originality requirement, but in regards to the musical composition, even under the most stringent Batlin majority substantial variation standard, it is likely that this will be deemed to be a derivative work rather than reproduction due to the message substantially changing to an economic theme (especially with “I can’t afford my bills”). Nevertheless, in case this standard is not met, infringement of (1) and the usually implicated (3) should also be alleged. Unlike the altered infringement test for sound recordings, musical compositions are subject to the usual Arnstein 2-part analysis.

Again we have no direct evidence of copying, but overwhelming circumstantial evidence of access to Bowie’s song on a historic album as well as striking probative similarity considering the songs have the same title (which we can consider under probative similarity despite usually being uncopyrightable (Magic Marketing)), exactly identical or juxtaposing word choices (“cause I (you) can’t afford the ticket”; “There’s only room for one and here she comes, here she comes”), and similar form. Substantial similarity can also be established as the average actual listener would identify the fragmented literal similarity of certain phrases (especially the repetition of “Hey man” or “Hey girl”) as well as the comprehensive nonliteral similarity with the exact same number of lines broken into the same verse, verse, chorus, verse, chorus, bridge, chorus, outro form and complaining male perspective.

C. §107 Fair Use Defense

The first factor likely only slightly favors Bowie, as there is probably a strong commercial nature and purpose, but it is somewhat transformative because of the likely punk influences and change in message to explain financial, and not female, troubles. This transformation is significant because “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use” (Campbell). The second factor is in Bowie’s favor as musical compositions are at the core of intended copyright protection (Campbell). The third factor should also weigh

in Bowie's favor as the Penetrators took a substantial percentage of the phrases and arrangement of the original "Suffragette City" in addition to at least some of the qualitative struggles of a drug using young man, even with an altered message. The fourth factor also is in Bowie's favor partly due to the commercial nature of the cover in the rock, albeit punk, market supplanting sales of Bowie's song. This reasoning is strengthened by the fact that widespread copying, especially with the same title, would flood the market for similar rock music thus diluting Bowie's economic return. As discussed in I.C., the Penetrator's use would more likely be a satire than a parody and thus not significantly alter the fact that this was not a fair use and they should be found liable for infringing the "Suffragette City" musical composition in addition to the *Heroes* cover.

This essay is 1,999 words.