

Part II:

Bowie will argue that he holds a copyright over the 1977 photograph, the cover of the *Heroes* album “cover art”, and the musical work “Suffragette City.”

Bowie garners copyright protection over the 1977 photograph under §102(5). The evidence suggests that the 1977 photo is the exact photo used on the cover art and thus it easily satisfies Justice Holmes’s modicum of creativity threshold for originality. (*Bleistein*) Bowie’s originality lays in his “particular pose for the photo”, arrangement/selection of his black leather jacket, black/grey backdrop, disposition of light and shade and his evocative expression, which is fixed, in photographic form. (*Burrow-Giles*, §102)

Sukita took the photo and thus he may also (unsuccessfully) claim ownership of the photo. Unlike *Lindsay*, there is no evidence suggesting Bowie dictated Sukita to the extent required to qualify him as a mere amanuensis, so he probably was not. Although the photo was a work “specifically commissioned for use as a contribution to a collective work,” i.e. the album (§101), Bowie cannot recall a written agreement regarding who owns the copyright. Assuming, *arguendo* that there is as signed written agreement whereby the parties agreed that the photo “shall be considered a work made for hire,” then only Bowie will be considered the author of the photo. Since it is unclear whether such agreement exists it is imperative to determine whether an employer- employee relationship exists. Applying the common law agency factors applied in *CCNV v. Reid*, the factors weigh against an employer-employee relationship—the photo shoot was at Sukita’s studio and Bowie himself hired and paid Sukita, not his business. Although Bowie and Sukita worked together overtime, that is insufficient by itself to establish an employer-employee relationship.

Since, Sukita is not an employee and it is unclear whether a written agreement exists, Sukita may claim joint authorship. This argument is likely to fail

because joint authorship requires the parties make independent (*non- de minimis*) copyrightable contributions and intend to be co-authors. (*Larson*). Sukita may argue he exercised artistic control when he: decided not to give Bowie directions, but rather capture his natural being (*Larson*); and selected and sent Bowie a bunch of contact sheets. He would argue that the foregoing constituted his copyrightable contribution (*Larson*); and Bowie himself referred to him as a “master” when discussing his work (see mastermind test in *Aalmuhammed v. Lee*), but this is not a strong argument. Like in *Leigh v. Warner Bros*, Sukita did not think of any creative setting, select/pose Bowie, alter his physical appearance prior to taking the photo, or select the background of the photo, therefore his copyrightable contribution, if any, is *de minimis*. Furthermore, the audience appeal of the photo is arguably only attributed to Bowie. (*Richlin*) He is one of the greatest musicians of the 20<sup>th</sup> century, and thus it is him who “sells” the photo, not Sukita.

The cover art was based on the 1977 photograph. Depending on how much it was transformed the cover art might qualify as a derivative work. [§101]. In order to garner protection as a derivative work, there must be authorization from the copyright holder and substantial (non-trivial) variation from the preexisting work. (*Batlin*) If Sukita should win his joint-work argument, then Bowie would have to account to Sukita any profits made from the use of the photo, but Bowie would still be able to license himself the right to use the photo for the album cover. (*Larson*) Arguably, the aesthetics of the cover art do not satisfy the substantial variation standard. The only variation between the photo and the cover art is the typeface and placement of the typeface on the cover art. Such changes are trivial and minute and because the standard is not “distinguishable” variation but “substantial”, (see dissent in *Batlin*) sufficient originality is lacking. Bowie will argue that his selection of the particular typeface and his arrangement of the album name on the cover constitute sufficient originality (*Feist*) to garner protection as a derivative work. If it is found that there is no sufficient originality in the artistic judgments, then the cover art will be merely an authorized copy.

Bowie will argue that “The Penetrators” (Penetrators) violated his exclusive right of reproduction and/or his right to prepare derivative works. Bowie must

prove infringement under *Arstein v. Porter's* two-prong test— that there was copying and it was unlawful. Bowie can prove copying either by direct evidence (admission or testimony), or circumstantial evidence. Circumstantial proof can be demonstrated by access and similarity. There is evidence of access to the cover art. Penetrators is in the music business and the song “Heroes” on the album is consistently named as one of the most important rock songs of all time— it placed 46<sup>th</sup> on Rolling Stone’s Greatest 500 list (see *BrightTunes, Arstein*), and the covers are clearly similar. Furthermore, the covers are so strikingly similar (in the posing of the subject, back drop, black jacket costume, typeface and location of typeface) as to preclude the possibility of independent creation by Penetrators, and thus access may be inferred.

To prove unlawful copying, the works must be substantially similar as to the protected expression (discussed above) in the eyes of the ordinary lay observer (i.e. ordinary music consumers). Penetrators have included a great deal of Bowie’s artistic expression when creating their cover art and therefore a *de minimis* use defense will not be successful. (*BET*) Substantial similarity may be demonstrated by fragmented literal similarity and comprehensive non-literal similarity. (*Steinberg, Roth Greeting Cards*) There is fragmented literal similarity in that the selection of costume, subject looking down at an angle, typeface and location of typeface, one hand in the air while the other is on the chest, disposition of the small light behind the subject are all the same. Penetrators will argue against fragmented literal similarity by claiming that the typeface is not copyrightable (see *Magic Marketing*); the subject’s left hand in their cover art is straight up, whereas Bowie’s is at an angle and the right hand’s three fingers are angled down, whereas, Bowie’s fingers are angled up; they have two small icons at each bottom corner; and the backdrop is greyish/green. However, since the overall total and look and feel of covers are the same, there is comprehensive non-literal similarity, thus substantial similarity is established. The images don’t have to be identical—looking at Penetrators’ cover art would conjure up Bowie’s cover art in the mind of the ordinary observer. (*Peter Pan Fabrics*) Bowie has a viable copyright infringement claim.

Penetrators will argue fair use. The purpose and character of Penetrators' use weighs against fair use. Although the work is transformative, their cover is likely a satire commenting on some broad idea (since their cover song of "Suffragette City" is about "yuppie economic angst and economic role reversal"), exploiting Bowie's work for commercial gains. If so, copying requires greater justification since a satire does not need to infringe, whereas a parody necessarily does. If viewed as a parody then Penetrators are justified in taking the heart of Bowie's work. (*Acuff-Rose, Harper & Row*)

The second factor weighs against Penetrators since the nature of Bowie's work, (a compilation of a photograph with overlaying text) is closer to the core of protection when aggregated together than in isolation.

The amount and substantiality used was both qualitatively and quantitatively extensive since Penetrators took the heart of Bowie's cover art, going against fair use, unless the court decides that Penetrators' cover art is a parody.

The fourth factor, the effect of the use upon the potential market or value of the copyrighted work weighs in favor of fair use. Although Penetrators' cover is commercial, it is still transformative (it does not intend to usurp Bowie's cover art), thus it is unlikely that harm to the market will occur. There is a market for derivative works in satire, but Penetrators' satire serves a different market (punk consumers).

Since, the majority of the factors weigh against a finding of fair use, Penetrators are infringing Bowie's copyright.

Bowie may also sue Penetrators for violating his §106(3) right of distribution if Penetrators also distributed their infringing cover art.

Bowie garners copyright protection over the musical work "Suffragette City" under §102(2). Musical works inherently contain the requisite modicum of creativity—they are infused with personality and "personality always contains something unique." (Justice Holmes in *Bleistein*)

Bowie may sue Penetrators for violating his §106 rights of reproduction and distribution. Penetrators will most likely concede that they reproduced and distributed a cover version of "Suffragette City."

Infringement is clear under *Arstein*, since Penetrators made the exact musical composition with minor changes to the lyrics. However, Penetrators will likely argue (successfully) that they had a compulsory license to cover the musical composition and distribute it (§115). Assuming, *arguendo* that Penetrators failed to serve a notice of intention upon Bowie (which it sounds like they did since Bowie does not know if Penetrators applied for a compulsory license) before making and distributing their cover, a compulsory license would be inapplicable; Penetrators would be infringing. [§115(b)(1)-(2)] Even if Penetrators did provide notice under §115(a)(2), Penetrators could only change the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but could not change the fundamental character of the work. Arguably, the fundamental character of the work is changed since Penetrators altered Bowie's lyrics, which were widely thought to describe sexual desires between a man and a woman, to lyrics that Bowie's thinks describe yuppie economic angst and economic role reversal. If it is found that the fundamental character of Bowie's work is changed, Penetrators will have infringed.

Nevertheless, Penetrators will argue their cover is fair use. The purpose and character of the use weighs in favor of fair use. Bowie will argue the use is commercial since it exploits his copyrighted work for financial gains. The work clearly is transformative, but it is not so clear-cut as to whether the work is a parody or a satire. On the one hand, the lyrics appear to comment on an idea in society (i.e. yuppie's and their economic angst), thus constituting a satire. On the other hand, Penetrators' lyrics constantly reference "Suffragette" City". Bowie's lyrics describe a man who is powerfully attracted to a woman, the "suffragette", as against the man's desires for drugs. Like the "suffragette" in Bowie's work is controlling the man that is singing, arguably the "suffragette" in Penetrators' work is the economy and the lyrics describe how the economy controls the yuppies. If so, the work is a parody, commenting or critiquing the original to some degree.

The second factor weighs against Penetrators since Bowie's musical work is at the core of protection.

Since Penetrators copied Bowie's entire musical composition, the third factor will weigh against Penetrators, unless the court finds that Penetrators' work is a parody, in which case taking the whole work is justified. A parody must necessarily use the original work to the extent that a reasonable person could conclude the parody is critiquing the original. (*Acuff-Rose*)

The fourth factor weighs in favor of fair use. Although the use is commercial, the work is transformative and whether or not the work is viewed as a parody, Penetrators' cover does not supplant Bowie's "Suffragette" City". On the contrary, Bowie will argue that Penetrators' cover of his song in conjunction with their imitation of his cover art does in fact show Penetrators intended to supplant his work, and widespread and unrestricted conduct of this sort will negatively effect the market for the original. However, because the lyrics and covers are somewhat different, it is unlikely people will confuse the works of world-renowned English rock star with the works of a German punk band. Furthermore, it does not appear that Bowie intends to license "Suffragette City" for a creation of derivative works for parodies or satires and there does not appear to be a market for derivative punk versions of "Suffragette" City."

Penetrators have a strong fair use defense.

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