**9.18 Copyright – Infringement – Access**

Remember, I described the two general elements of infringement as access and substantial similarity. I’ll now discuss access in more detail.

[Name of plaintiff] can show that [name of defendant] had “access” to [his/her/its] work by showing that [name of defendant] had a reasonable opportunity to [see/hear] the work. It isn’t necessary to show that [name of defendant] actually [saw/heard] [name of plaintiff]’s work before creating [name of defendant]’s own work if the evidence reasonably establishes that [name of defendant] could have [seen/heard] it and could have copied it.

But you can’t base a finding that [name of defendant] had access to [name of plaintiff]’s work on mere speculation, conjecture, or a guess. To support a finding of access, there must be more than just a slight possibility of access. There must be a reasonable possibility of access.

Sometimes [name of plaintiff] can’t show that [name of defendant] had access to [his/her/its] work before [name of defendant] created an alleged copy. In these cases, [name of plaintiff] can still establish a rebuttable presumption of copying by showing that the material [name of defendant] allegedly copied is so strikingly similar to [his/her/its] copyrighted material that the similarity is unlikely to have occurred unless there was copying.

Put another way, if [name of plaintiff]’s work and [name of defendant]’s work are so strikingly similar that a reasonable person would assume [name of defendant] copied from [name of plaintiff]’s work and that there is no possibility of independent creation, coincidence, or prior common source, then [name of plaintiff] is entitled to a rebuttable presumption that copying occurred. “Strikingly similar” is a greater degree of similarity than “substantially similar.” An accused work is substantially similar to an original piece if an ordinary [observer/listener] would conclude that the accused work’s creator unlawfully took protectable material of substance and value from the original piece. Even if there is little similarity between the pieces, the accused work can still be substantially similar if the copied parts from the original piece are the important quality. A “rebuttable presumption” means that you assume that copying occurred unless [name of defendant] proves that it didn’t happen.

If [name of plaintiff] shows that [name of defendant] had access to the copyrighted material and that there is substantial similarity between the two works, or that the works are strikingly similar, then the burden of proof shifts to [name of defendant] to prove that [his/her/its] work is an independent creation – not a copy. Proof that a work is an independent creation overcomes a presumption of copying.

**Special Interrogatories to the Jury**

**Do you find from a preponderance of the evidence:**

 That [name of defendant] copied [name of plaintiff]’s work?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If you answered “Yes,” don’t answer Questions Nos. 2 through 4.

 That [name of defendant] had access to [name of plaintiff]’s work – that is, that [name of defendant] had a reasonable opportunity to [view/hear] it?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

And that the allegedly copied portion of [name of plaintiff]’s work is substantially similar to [name of defendant]’s work?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If you answered “No” to either portion of this question, proceed to Question No. 3. If you answered “Yes” to both portions, you may skip Question No. 3 and proceed to No. 4.

 That the allegedly copied part of [name of plaintiff]’s work is so strikingly similar to [name of defendant]’s work that the similarity is unlikely to have occurred unless there was copying?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant]’s work was independently created and was not copied from [name of plaintiff]’s work?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If you answered “No” to Question No. 4, you must find for [name of plaintiff] on [name of plaintiff]’s copyright-infringement claim.