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Note

The Corporate Receipt Conundrum: Establishing Access in Copyright Infringement Actions

Stacy Brown

A struggling songwriter\(^1\) sends a tape of her music to a record company with the hope of obtaining a contract. The company returns the tape to her, accompanied by a letter of rejection. She later hears a song on the radio by an artist under contract to the same record company that sounds remarkably like the one she submitted. She sues the company for copyright infringement, claiming that an employee had the opportunity to copy her work during the time that the company possessed the tape. Employees of the company submit affidavits denying they saw or heard her tape. Should her suit survive summary judgment?

Unless the two works are strikingly similar,\(^2\) a plaintiff\(^3\) first must satisfy the threshold question of whether the alleged infringer\(^4\) had access to her work before reaching the ultimate claim that the work was, in fact, unlawfully copied.\(^5\) To estab-

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1. This hypothetical is not intended to limit the issue to musical copyright infringement, since allegations of copyright infringement occur in many industries. Scriptwriter, toymaker or clothing designer are only some of the examples one could substitute for songwriter.

2. Stratchborneo v. Arc Music Corp., 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973) (explaining that to be considered striking, the similarities must be "of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source"); see also infra notes 31-32 (discussing substantial similarity in greater detail).

3. This Note will refer to the copyright owner as the plaintiff. Although it is not necessarily so, this Note will assume that the copyright owner is also the author of the work that was allegedly copied.

4. In many of the cases to which this Note refers, the named defendants are the companies that employ the individuals alleged to have infringed the plaintiff’s work, as well as the individuals themselves. See, e.g., Moore v. Columbia Pictures Indus., 972 F.2d 939, 944 (8th Cir. 1992). This Note will attempt to make the distinction between the defendant individual and the defendant company whenever necessary to avoid confusion.

5. "The fact that the defendant had access to the plaintiff's work and that the defendant's work is similar to the plaintiff's can form the basis for an
lish access, the plaintiff must show that the alleged infringer had a reasonable opportunity to view or copy her work.\(^6\) While a party moving for summary judgment has an affirmative burden to establish the absence of any triable issue of fact,\(^7\) the non-moving party, in this case the plaintiff, has the burden of producing sufficient evidence of access to warrant a trial.\(^8\) If the plaintiff can only produce evidence that the defendant company received her work, most courts will hold that this evidence alone does not create a genuine issue of material fact\(^9\) on access necessary to survive defendant's summary judgment motion.

Demonstrating that the alleged infringer had a reasonable opportunity to copy her work can be the most difficult hurdle a plaintiff faces when trying to survive summary judgment in copyright infringement actions,\(^10\) because it is often impossible

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\(^6\) PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 7.2.1, at 8 (1989). After the plaintiff establishes that the defendant in fact copied from her work, she must then show that the defendant copied "an improper amount." \(\text{Id.} \ § 7.3, \text{at } 21.\)

\(^6\) Moore, 972 F.2d at 942; Kamar Int’l v. Russ Berrie & Co., 657 F.2d 1059, 1062 (9th Cir. 1981); ALAN LATMAN, LATMAN’S THE COPYRIGHT LAW 192 (William F. Patry ed., 1986). Although some courts have defined access as the actual reading or knowledge of plaintiff’s work by the alleged infringer, see, for example, Bradbury v. Columbia Broadcasting Sys., 287 F.2d 478, 479 (9th Cir.), cert. dismissed, 368 U.S. 801 (1961), courts rarely use this definition, and most courts and commentators believe it to be erroneous. See, e.g., 3 MEVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A], at 13-15 (1992) (calling this definition erroneous). "[I]t is clear that even if evidence is unavailable to prove the fact of actual viewing, if it can be shown that the defendant had the opportunity to view, this (when combined with substantial similarity) is sufficient to permit the trier to conclude that copying has occurred." \(\text{Id.} ; \text{see also Smith v. Little, Brown & Co., 245 F. Supp. 451, 458 (S.D.N.Y. 1965) (choosing “opportunity to see” as definition of access over actual viewing), aff’d, 360 F.2d 928 (2d Cir. 1966).}\)

\(^7\) 1 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 56.3[14], at 529 (2d ed. 1993) (citing Bell v. Cameron Meadows Land Co., 669 F.2d 1278 (9th Cir. 1982)).

\(^8\) See Takeall v. Pepsico, Inc., 809 F. Supp. 19, 21 (D. Md. 1992) (granting defendant’s summary judgment motion because the plaintiff was unable to produce enough evidence of access).

\(^9\) See \text{FED. R. CIV. P. 56(c)} (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”); \text{see also FED. R. CIV. P. 56(e)} (“an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial”).

\(^10\) Sanford v. CBS, Inc., 594 F. Supp. 711, 713 (N.D. Ill. 1984) (“The most important component of this sort of circumstantial evidence [to prove copying] is proof of access.”). \text{But see Todd Shuster, Originality in Computer Pro-}
to produce any direct evidence of access.\textsuperscript{11} The corporate\textsuperscript{12} receipt doctrine addresses the special difficulty of proof that arises when the defendant is a business. The most lenient interpretation of this doctrine, called "bare corporate receipt," allows a plaintiff to satisfy her burden as to access merely by showing that the company employing the alleged infringer received the work.\textsuperscript{13} This interpretation of the doctrine, however, is not widely accepted. Instead, to meet the requirements

\textit{grams and Expert Systems: Discerning the Limits of Protection under Copyright Laws of France and the United States, 5 TRANSNAT'L LAW. 1, 33 (1992)} ("Access to a work apparently is shown easily and, in many cases, admitted by the defendant.") (citing David Nimmer, \textit{Analyzing Substantial Similarity in Software Infringement Cases, 6 COMPUTER LAW.} 17, 17-18 (1980)). Computer software claims, however, often present a different situation from literary and artistic claims, because software developers build progressively upon existing programs. The issue then becomes not whether the defendant had access, but rather whether she unlawfully appropriated the essential elements of the new program from past technologies. See Shuster, \textit{supra}, at 6.

\textsuperscript{11} See NIMMER & NIMMER, \textit{supra} note 6, § 13.02[A], at 13-15. The authors state:

Just as it is virtually impossible to offer direct proof of copying, so it is often impossible for a plaintiff to offer direct evidence that defendant (or the person who composed defendant's work) actually viewed or had knowledge of plaintiff's work. Such viewing will ordinarily have occurred, if at all, in a private office or home outside of the presence of any witnesses available to the plaintiff.

\textit{Id.; see also JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE} ¶ 7.2[3][a] (1989) (noting the difficulty in establishing access in cases where there has not been wide dissemination of the allegedly infringed work). Courts have adopted an "opportunity to copy" as the definition of access because of the difficulty of proof. \textit{See NIMMER & NIMMER, supra} note 6, § 13.02[A], at 13-15 n.5.

Even if the plaintiff is unable to prove actual viewing by the defendant, but is able to establish the reasonable opportunity to view, this should be regarded as a showing of "access" for the purposes of shifting the burden to defendant to establish independent creation. . . . [T]he burden should likewise shift where the defendant denies that he ever obtained physical possession although he had a reasonable opportunity to obtain such possession. . . . [T]he burden should shift because the plaintiff often can no more prove actual physical possession than he can, assuming such possession, prove the act of reading and the memory of such reading.

\textit{Id.}

\textsuperscript{12} The term "corporate" does not necessarily refer to a corporation, but rather to a business enterprise that employs both the individual with knowledge of plaintiff's work, and the individual accused of copying plaintiff's work. \textit{See Meta-Film Assocs., v. MCA, Inc., 586 F. Supp. 1346, 1358 (C.D. Cal. 1984)} (using this terminology to distinguish corporate receipt from the situation in which the person with knowledge and the alleged infringer have dealings with one another, but do not share a common employer).

of corporate receipt, courts have recently held that the plaintiff must provide additional evidence showing a relationship between the employee who received the submission at the company and the employee who allegedly copied it.\textsuperscript{14}

The difficulty in creating a rule applicable to all corporate receipt situations lies in the fact that companies vary as to size, structure, and policies.\textsuperscript{15} Larger and complex organizations present situations where it is least appropriate to presume that all employees have an opportunity to view outside submissions. The same characteristics, however, make it more difficult for plaintiffs to prove a possible chain of communication from the recipient to the ultimate user. The converse is true for smaller companies: fewer employees means less potential difficulty in showing access, and a greater possibility that the opportunity for access exists.

This Note considers the extent to which courts should


\textsuperscript{15} In some large corporations, for example, the process of reviewing submissions may require a work to pass through several different departments before the company ultimately rejects it. \textit{See Vantage Point, Inc. v. Parker Bros.}, 529 F. Supp. 1204, 1208 (E.D.N.Y. 1981), \textit{aff'd mem.}, 697 F.2d 301 (2d Cir. 1982). After the new product manager of Parker Brothers told the plaintiff that the company had a "degree of interest" in his version of a game, plaintiff's submission passed through the game development, marketing and costing departments before Parker Brothers ultimately rejected it. \textit{Id.} In other companies a particular department will automatically receive unsolicited submissions and will return them to the sender. The plaintiff in \textit{Vantage Point} also sent his game to the president of Milton Bradley. \textit{Id.} That company routed the submission to the president's secretary and then rerouted it to the customer service department, which returned it. \textit{Id.} The court found this policy sufficiently shielded pertinent company employees from an opportunity to view plaintiff's work. \textit{Id.} at 1212. Sometimes a plaintiff will address a submission directly to an employee in a decision-making position. When the company does not intercept the submission before reaching the employee's secretary, it becomes even more difficult to determine whether a reasonable possibility of access was created. \textit{See Novak v. National Broadcasting Co.}, 752 F. Supp. 164, 173 (S.D.N.Y. 1990) (upholding policy whereby manuscripts were routed directly to the legal department, but tapes such as plaintiff's went to the addressee's secretary for processing and return). Prior caselaw does not always provide guidance about how to interpret company policies because many courts do not discuss the corporation's procedures in detail. \textit{See}, e.g., Morrissey v. Proctor & Gamble Co., 379 F.2d. 675, 677 (1st Cir. 1967) (stating only that plaintiff sent his submission to the company and that all "pertinent employees" denied viewing the work); \textit{Bevan}, 329 F. Supp. at 604 (stating only that plaintiff addressed his submission to the President of CBS, and a CBS representative returned it).
adopt the doctrine of bare corporate receipt in copyright infringing suits. Part I describes the action of copyright infringement, focusing on the issue of access. Part II examines the body of law that has evolved around the corporate receipt doctrine. Part III submits that the current approach taken by courts to limit use of the corporate receipt doctrine to situations in which the plaintiff can show evidence of a nexus between the recipient of his work and the alleged infringer places a potentially insurmountable burden on plaintiffs suing large companies for copyright infringement. This Note proposes limiting use of the bare corporate receipt doctrine to suits in which plaintiffs cannot obtain enough evidence of access to survive summary judgment because the size and complex structure of the defendant company precludes the plaintiff from being able to show a nexus. In such situations, this Note argues, courts should allow a showing of bare corporate receipt to shift the burden of production to the defendant.

I. COPYRIGHT AND THE CORPORATE RECEIPT DOCTRINE

A. THE ELEMENTS OF AN INFRINGEMENT ACTION

The Constitution provides that Congress has the power "[t]o promote the Progress of ... useful Arts, by securing for limited Times to Authors ... the exclusive Right to their ... Writings." 16 Copyright law seeks to reward creators for their efforts and to benefit society by encouraging creative works. 17

16. U.S. CONST. art. I, § 8, cl. 8. Through the four revisions of the Copyright Act, Congress has expanded the scope of protection so that it now extends to "original works of authorship fixed in any tangible medium of expression," which includes literary, musical, dramatic, choreographic, graphic, and audiovisual works, and motion pictures. 17 U.S.C. § 102 (1988).

17. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind ... copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors ... "); see also Shuster, supra note 10, at 16 ("[C]opyright law is primarily an economic mechanism. Courts applying copyright law seek an equilibrium between the needs of creators, who require incentives to be innovative and productive, and the needs of people in society, who benefit most when access to information, technology and art is unencumbered."). But see Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1290 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and Useful Arts.' ").
Copyright law also encourages originality\textsuperscript{18} by protecting the copyright owner's expression of ideas against infringement.\textsuperscript{19} Originality is not defined in the Copyright Act,\textsuperscript{20} but it means that the copyrighted work is the result of the author's own creativity and was created independently of other authors' works.\textsuperscript{21} In copyright infringement actions, courts must often determine whether the requirement of originality has been met.

A party claiming infringement must show three things to prevail in a copyright infringement action:\textsuperscript{22} that he or she owned the copyright,\textsuperscript{23} that the defendant copied from the copyright owner's work,\textsuperscript{24} and that the material copied amounts...
to an unlawful appropriation. Absent an admission by the defendant, it is virtually impossible to provide direct evidence of copying. Therefore, courts allow plaintiffs to prove copying circumstantially by demonstrating first that the alleged infringer had access to the plaintiff's material, and second, that the two works are substantially similar. Evidence of both ac-

scious, such as if the defendant heard the plaintiff's work at some time, but then forgot it. Id. 25. This final stage of the analysis is established if "the infringement is substantial and material enough (either quantitatively or qualitatively)." LATMAN, supra note 6, at 196. The plaintiff must prove that at least some of the elements copied were protectable subject matter. Id. There is, therefore, a distinction between permissible and impermissible copying. MILLER & DAVIS, supra note 18, at 339. For example, even if two works are identical, if both works were copied from a common source which is in the public domain, the copying is permissible. Michelle V. Francis, Comment, Musical Copyright Infringement: The Replacement of Arnstein v. Porter—A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test, 17 PEPP. L. REV. 493, 505 n.104 (1990). Only when the plaintiff is able to establish copying, either through direct evidence or by circumstantial evidence of access and substantial similarity, does the court proceed to inquire into whether the copying was illicit. Arnstein, 154 F.2d at 468. 26. Defendants sometimes concede access for summary judgment purposes when they feel they can prevail on the issue of substantial similarity. See Ronald S. Rosen & Douglas C. Fairhurst, Summary Judgment in Copyright, Trademark and Unfair Competition Litigation, available in WESTLAW, PLI database, at *2 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3875, 1991). 27. See Gaste v. Kaiserman, 863 F.2d. 1061, 1066 (2d Cir. 1988) (stating that "copiers are rarely caught red-handed"); Cholvin v. B. & F. Music Co., 253 F.2d 102, 103 (7th Cir. 1958) ("[T]he charge of infringing does not fail merely because the infringer was not caught in the act . . . ."); see also HAZARD, supra note 11, ¶ 7.2[4] (noting the "sheer necessity of the theory of access in proving copying acknowledges that a plaintiff will rarely have direct proof of copying," such as would be the case if the plaintiff actually saw the defendant photocopy the work). In addition, copying may occur without "objective physical manifestation," such as copying from memory. NIMMER & NIMMER, supra note 6, § 13.01[B], at 13-11. Nor does the defendant have any incentive to remember the event. GOLDSTEIN, supra note 5, ¶ 7.2.1.1, at 10. But see Alan Latman, "Probative Similarity" as Proof of Copying: Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1194 (1990) ("[L]et plaintiff's counsel neither despair nor overlook the possibility of proving copying directly . . . . For example, there may be collaborators, co-workers and others who have in fact observed the producer of defendant's material at work."). 28. See Gaste, 863 F.2d. at 1066 (stating that "copying has traditionally been proven circumstantially"); see also LATMAN, supra note 5, at 191 (stating that the plaintiff may prove copying by indirect or circumstantial evidence). 29. For a detailed discussion of substantial similarity, see NIMMER & NIMMER, supra note 6, ¶ 13.03, at 13-27. Professor Latman suggests that the term "probative similarity" be used in place of "substantial similarity" because "a similarity, which may or may not be substantial, is probative of copying, if by definition, it is one that under all the circumstances justifies an inference of
cess and substantial similarity creates an inference of copying.\footnote{30}

In most situations a plaintiff must show both access and substantial similarity. If the works are so strikingly similar as to preclude the possibility of coincidence or independent creation,\footnote{31} some courts will infer that copying occurred,\footnote{32} thus obviating the need to show access.\footnote{33} Only rarely, however, will two works be strikingly similar; generally plaintiffs must establish access.\footnote{34} If a plaintiff successfully establishes both access and copying." Latman, supra note 27, at 1190. Latman also suggests use of the term "probative similarity" when establishing indirect proof of copying because the inquiry should not be confused with the one undertaken later in the process to determine whether similarities are substantial enough to constitute unlawful appropriation. Latman, supra note 6, at 193. Most courts, however, continue to use the term "substantial similarity." See, e.g., Moore v. Columbia Pictures Indus., 972 F.2d 939, 941-42 (8th Cir. 1992); Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

30. Novak v. National Broadcasting Co., 752 F. Supp. 164, 168 (S.D.N.Y. 1990); see Ideal Toy Corp. v. Kenner Prods. Div. of General Mills Fun Group, 443 F. Supp. 291, 302 (S.D.N.Y. 1977) ("In most cases courts have no objective evidence of the process by which the challenged object was developed and thus are forced to rely on the inferences which may be drawn from two basic facts: access and substantial similarity."). The rationale for allowing an inference of copying to substitute for direct proof is the theory that "access gave the defendant the opportunity to copy the plaintiff's work, and the . . . similarities between the two works indicate that the defendant in fact seized the opportunity." Goldstein, supra note 5, § 7.2.1, at 8. Some courts state that access and substantial similarity create a presumption of copying. See, e.g., Benson v. Coca-Cola Co., 795 F.2d 973, 974 (11th Cir. 1986); Arthur Rutenberg Corp. v. Parrino, 664 F. Supp. 479, 482 (M.D. Fla. 1987).

31. Striking similarity means that "in human experience it is virtually impossible that the two works were independently created." Nimmer & Nimmer, supra note 6, § 13.02[B], at 13-22 n.20.2. Striking similarity has also been characterized as "word for word." Id. § 13.03[D], at 13-75.

32. See, e.g., Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 483 (D. Neb. 1981) (finding access based on striking similarities). But see Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) (finding striking similarity, but still requiring evidence of access to establish a "minimum threshold of proof which demonstrates that the inference of access is reasonable"). Commentators, however, have criticized the Selle decision for requiring more than a bare possibility of access when striking similarity is found. See, e.g., Nimmer & Nimmer, supra note 6, § 13.02[B], at 13-24. Nimmer makes the following analogy: "If two books of one thousand pages each were word-for-word the same, surely a bare possibility of access, at most, should be sufficient to counter a claim of coincidental similarity." Id.

33. See Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 948 (S.D. Cal. 1961), aff'd, 304 F.2d 251 (9th Cir. 1962) ("[A]ccess is but a means of eliminating coincidence or independent effort as an explanation for likenesses between the copyrighted article and the infringing article."); see also Latman, supra note 6, at 195. ("[S]triking similarity provides indirect proof of access, which in turn combines to provide indirect proof of copying.").

34. See Dirkschneider, 543 F. Supp. at 482 n.10 (noting that showing striking similarity places a heavy burden on plaintiffs).
substantial similarity, the burden then shifts to the defendant to rebut the inference of copying by producing evidence that his work was independently created.35

B. ACCESS

The Copyright Act does not define access; courts have therefore done so.36 The prevailing definition of access is an opportunity to copy the protected material.37 Some courts and commentators characterize access as the opportunity to view or hear the plaintiff's work.38 Access, however, is not limited to situations in which the copier personally came into contact with the plaintiff's work. Access can exist via a channel of communication, "whereby given individuals may have communicated to the defendant the contents of plaintiff's work."39

The plaintiff must submit sufficient evidence to create a reasonable possibility of access, not just a bare possibility based

35. See Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 501 (2d Cir. 1982) ("Evidence of independent creation may be introduced by a defendant to rebut a plaintiff's prima facie case of infringement."); Novak v. National Broadcasting Co., 752 F. Supp. 164, 168 (S.D.N.Y. 1990) ("If a plaintiff raises an inference of copying, . . . a defendant may, nonetheless, rebut this inference either directly or by demonstrating that it independently created the accused work either without reference to the plaintiff's work, or by copying a work already in the public domain."). The defendant can introduce evidence of independent creation including her training in the field, the length of time it took her to create her work, or evidence that her work was copied from a common source. GOLDSTEIN, supra note 5, § 7.2.2, at 20.

36. The 1976 Copyright Act does not define access or even infringement. Rather, the Act states that infringement occurs when one of the copyright owner's § 106 rights have been violated. 17 U.S.C. § 106 (1988). Section 106 assigns to the copyright owner the right to reproduce the copyrighted work; to prepare derivative works based upon the copyrighted work; to distribute copies of the copyrighted work to the public by sale, rental, lease or lending; the right to perform the copyrighted work publicly; and the right to display the copyrighted work publicly. Id.

37. See Nimmer & Nimmer, supra note 6, § 13.02[A], at 13-16. This "theory of access" is important because direct evidence of copying is often unavailable. HAZARD, supra note 11, ¶ 7.2[1], at 7-6.

38. See, e.g., Bevan v. Columbia Broadcasting Sys., 329 F. Supp. 601, 604 (S.D.N.Y. 1971) (holding that access is the "reasonable opportunity to view or read plaintiff's work"); GOLDSTEIN, supra note 5, ¶ 7.2.1.1, at 10 (defining access as reading, seeing or hearing plaintiff's work); HAZARD, supra note 11, ¶ 7.2[3] ("[T]he defendant must have had an opportunity to see or hear the copyrighted work.").

39. Nimmer & Nimmer, supra note 6, § 13.02[B], at 13-20; see, e.g., Smith v. Little, Brown & Co., 245 F. Supp. 451, 458 (S.D.N.Y. 1965) (finding access because an editor had an opportunity to view the manuscript, and the alleged infringer had access to the editor), aff'd, 360 F.2d 928 (2d Cir. 1966).
on mere speculation or conjecture.\textsuperscript{40} The difference between a reasonable and a bare possibility is often a very close question\textsuperscript{41} because there may be considerable geographic distances and lapses of time separating the access to the plaintiff's work from the alleged infringement.\textsuperscript{42} Another factor that makes this distinction problematic is the difficulty of proof a plaintiff faces if the work has passed through the hands of several persons before reaching the alleged infringer.\textsuperscript{43}

Courts often infer that a reasonable opportunity to view a plaintiff's work arose when a third party intermediary with knowledge of the plaintiff's work had dealings with the alleged copier.\textsuperscript{44} Although the intermediary and alleged copier do not

\textsuperscript{40} See Ferguson v. National Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978) (finding evidence of access speculative and conjectural since court would have had to assume that both the defendant and the professional licensing association that allegedly transferred work to defendant were lying); Evans v. Wallace Berrie & Co., 681 F. Supp. 813, 817-18 (S.D. Fla. 1988) (finding "conclusory allegations of access" supported only by a "self serving affidavit" insufficient to survive summary judgment). Plaintiff will not survive summary judgment if her allegations are unsupported by "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

\textsuperscript{41} Nimmer & Nimmer, supra note 6, § 13.02[A], at 13-19; see also Goldstein, supra note 5, § 7.2.1.1, at 10 (stating that "virtually all decisions on which access is an issue turn on inferential proofs").

\textsuperscript{42} See Nimmer & Nimmer, supra note 6, § 13.02[A], at 13-18 to 13-19; cf. Nordstrom v. Radio Corp. of Am., 251 F. Supp. 41, 42 (D. Colo. 1965) (finding opportunity for access despite evidence that defendant was out of the country all but three of the days that plaintiff's composition was in his files). Compare Gaste v. Kaiserman, 863 F.2d 1061, 1067 (2d Cir. 1988) (finding reasonable opportunity for access despite the fact that defendant's alleged contacts with the third party were 20 years after the release of plaintiff's song and on a different continent) with Jason v. Fonda, 526 F. Supp. 774, 776 (C.D. Cal. 1981), aff'd, 698 F.2d 966 (9th Cir. 1982) (finding only a bare possibility for access even though 200-700 copies of the allegedly infringed book were available in bookstores near the defendant).

\textsuperscript{43} See, e.g., Sanford v. CBS, Inc., 594 F. Supp. 711, 713 (N.D. Ill. 1984) (finding opportunity for access when plaintiff sent tape to CBS Illinois office, which allegedly sent tape to Los Angeles office, which allegedly made tape available to CBS artists).

\textsuperscript{44} See Nimmer & Nimmer, supra note 6, § 13.02[A], at 13-17 ("[E]vidence that a third party with whom both the plaintiff and defendant were dealing had possession of plaintiff's work is sufficient to establish access by the defendant."). This theory prevents plaintiffs from being precluded from bringing suit when they did not personally give their work to the alleged infringer. See, e.g., Kamar Int'l v. Russ Berrie & Co., 657 F.2d 1059, 1062 (9th Cir. 1981) (finding access because defendant did business with same manufacturer as plaintiff). But see Evans v. Wallace Berrie & Co., 681 F. Supp. 813, 816 (S.D. Fla. 1988) (finding no access because court held the intermediary's testimony that admitted giving plaintiff's work to a publisher who could have communicated it to defendant to be hearsay).
share a common employer like in the corporate receipt situation,\textsuperscript{45} the intermediary could start a channel of communication through which information about the plaintiff's work could be transmitted to the alleged copier. Some courts, however, find evidence that can only indirectly link a plaintiff's work to the alleged copier via a channel of communication too tenuous to create anything more than a bare possibility of access.\textsuperscript{46} In \textit{Meta-Film Associates v. MCA, Inc.}, the District Court for the Central District of California addressed this concern by requiring the plaintiff to produce evidence showing that the dealings between the intermediary and the plaintiff, and those between the intermediary and the defendant, were on the same subject.\textsuperscript{47} Lack of evidence demonstrating a common connection led the court to find no access.\textsuperscript{48}

C. CORPORATE RECEIPT AS A MEANS OF PROVING ACCESS

When both the intermediary and the alleged infringer are employees of the same business, a plaintiff often faces an even more difficult challenge in showing access. The plaintiff, as an outsider unfamiliar with the defendant business entity, must produce evidence to contest the involved parties' denials of access.\textsuperscript{49} While discovery may uncover cursory evidence of certain employee relationships, a plaintiff may still be unable to produce evidence demonstrating that information or documents

\textsuperscript{45} See \textit{infra} part I.C. (discussing corporate receipt).

\textsuperscript{46} If a channel of communication as between the person to whom the work is submitted and the person who ultimately created defendant's work is established, but such channel involves a number of different persons, each of whom (other than the original person to whom plaintiff submitted the work) denies knowledge of the work, is access a reasonable or only a bare possibility? \textit{Nimmer \& Nimmer, supra} note 6, \S 13.02[A], at 13-19. One court found the channel of access alleged by plaintiff to be a "tortuous chain of hypothetical transmittals." \textit{Meta-Film Assocs. v. MCA, Inc.}, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984).

\textsuperscript{47} \textit{Meta-Film}, 586 F. Supp. at 1358. The court stated that the dealings must involve "some overlap in subject matter to permit an inference of access," but did not state the extent of overlap required. \textit{Id}. at 1358-59.

\textsuperscript{48} \textit{Id}. at 1358-59.

\textsuperscript{49} \textit{Bevan v. Columbia Broadcasting Sys.}, 329 F. Supp. 601, 610 (S.D.N.Y. 1971) (noting that the structure of the corporation would be foreign to the plaintiff and the witnesses would not be the plaintiff's own); see also \textit{Nimmer \& Nimmer, supra} note 6, \S 13.02[A], at 13-18 n.11 (criticizing \textit{Schwarz v. Universal Pictures Co.}, 85 F. Supp. 270 (S.D. Cal. 1945), for finding no possibility of access when the employee in possession of the plaintiff's work denied passing the work on to the allegedly infringing employee and the plaintiff could produce no evidence to the contrary).
in fact "flowed from one area of a firm to another." A plaintiff may also find it impossible to produce any evidence showing that there was an opportunity to view his work since he rarely witnesses and third parties rarely notice an alleged copier's contact with the work in question. In response, some courts have adopted the doctrine of "corporate receipt" whereby:

The fact that one employee of the corporation has possession of plaintiff's work should warrant a finding that another employee (who composed defendant's work) had access to plaintiff's work, where by reason of the physical propinquity between the employees the latter has the opportunity to view the work in the possession of the former.

This doctrine is related to the analysis that allows a plaintiff to establish access through a third party intermediary who, although not a co-worker of the defendant, had dealings with the defendant and knowledge of the plaintiff's work. The corporate receipt doctrine places this analysis in a business setting, by presupposing that co-workers in proximity to one another have dealings with each other, thereby creating the opportunity to transmit information between them. Because each setting differs, however, some courts have been reluctant to hold that physical proximity sufficient to satisfy corporate receipt necessarily exists between employees of a business.

Courts have interpreted the doctrine in two manners. The bare corporate receipt doctrine allows evidence that one employee of the defendant company received the plaintiff's submission to suffice for establishing access for summary judgment.

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51. See Goldstein, supra note 5, § 7.2.1.1, at 10. Goldstein noted that "the occasions for direct proof of access will be few since the facts surrounding the defendant's exposure to the plaintiff's work are unlikely to excite the attention of third parties, and since the defendant himself will have no incentive to keep his memory of the event alive." Id.


purposes.\textsuperscript{54} The two courts that adopted this method did not require the plaintiff to produce any additional evidence, such as proof that an employee responsible for the allegedly infringing work received the submission.\textsuperscript{55}

Other courts, such as the district court in \textit{Meta-Film}, already hesitant to infer access from an alleged channel of communication between parties with no common employer, have imposed an additional restriction on the corporate receipt doctrine. Rejecting “bare corporate receipt” as unresponsive to the realities of business,\textsuperscript{56} these courts require plaintiffs to show that the employee who received the submission had a close working relationship with the employee who allegedly copied it.\textsuperscript{57} The court in \textit{Meta-Film} suggested that this requirement would be satisfied if these persons were members of the same work unit or in a supervisory relationship.\textsuperscript{58} Courts that accept this interpretation therefore require plaintiffs to produce evidence of a closer proximity between employees than merely working for the same company to create an inference of access.

\textsuperscript{54} See Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 677 (1st Cir. 1967); Bevan v. Columbia Broadcasting Sys., 329 F. Supp. 601, 609 (S.D.N.Y. 1971). In \textit{Bevan}, the court was considering defendant's motions for a judgment notwithstanding the verdict or alternatively for a new trial. \textit{Id.} at 602-03, 610. The standard for J.N.O.V. and summary judgment, however, are the same. \textit{Moore, supra note 7,} at 56.3[14], at 529.

\textsuperscript{55} \textit{Morrissey}, 379 F.2d at 677 (“[O]n a motion for summary judgment a plaintiff should not have to go to the point of showing that every employee of a corporate defendant received his notification.”); \textit{Bevan}, 329 F. Supp. at 609 (“[R]eceipt of a manuscript at defendants' principal corporate office has been held sufficient to raise a triable issue, despite plaintiff's inability to show receipt by the responsible employee.”) (citing \textit{Morrissey}). Courts and commentators have characterized these two cases as actually having more evidence than just bare corporate receipt to support their findings of access. \textit{See Meta-Film,} 586 F. Supp. at 1357 (noting that the key feature of cases which demonstrate access based on corporate receipt is the close relationship between the intermediary and the alleged copier, not just the fact that they shared a common employer); \textit{Marshall A. Leaffer, Understanding Copyright Law} § 9.4, at 267 n.10 (citing \textit{Meta-Film}).

\textsuperscript{56} \textit{Meta-Film,} 586 F. Supp. at 1357-58. The court noted, “In such a business [as filmmaking], countless unsolicited scripts are submitted to numbers of individuals on studio lots every day. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual . . . to every other individual just because they occupy offices on the same studio lot.” \textit{Id.} at 1357.

\textsuperscript{57} \textit{Id.; see also} Moore v. Columbia Pictures Indus., 972 F.2d 939, 944 (8th Cir. 1992) (holding that the close relationship, as required by \textit{Meta-Film,} was present).

\textsuperscript{58} \textit{Meta-Film,} 586 F. Supp at 1357. The court implied that “an individual in a position to provide suggestions or comments with respect to the defendant's work” would be adequate. \textit{Id.}
D. SUMMARY JUDGMENT

Summary judgment was traditionally a disfavored remedy in copyright infringement actions.\(^59\) The Second Circuit Court of Appeals in \textit{Arnstein v. Porter} held that courts should not grant summary judgment in copyright infringement actions if there is "the slightest doubt as to the facts."\(^60\) Courts were reluctant to employ summary judgment because access and substantial similarity can be extremely close questions of fact\(^61\) and often rest on credibility determinations.\(^62\) Commentators have since discredited the \textit{Arnstein} "slightest doubt" standard;\(^63\) one described it as a "misleading gloss" on the language of Federal Rule of Civil Procedure 56(c).\(^64\) Courts no longer consider \textit{Arnstein}'s summary judgment standard to be good law.\(^65\)

\(^{59}\) Hartnick, supra note 22, at 57; see also \textit{Arnstein v. Porter}, 154 F.2d 464, 474 (2d Cir. 1946) (stating that "generally there should be trials in plagiarism suits").

\(^{60}\) \textit{Arnstein}, 154 F.2d at 468.

\(^{61}\) \textit{Id.} at 469; see also Latman, supra note 27, at 1211 (noting that credibility questions arising from the issue of copying "could well block summary judgment in a case in any way close").

\(^{62}\) See Bevan v. Columbia Broadcasting Sys., 329 F. Supp. 601, 609 (S.D.N.Y. 1971) (stating that "access is predominantly a question of credibility"); see also Smith v. Little, Brown & Co., 360 F.2d 928, 929 (2d Cir. 1966) (stating that "credibility of this testimony [as to access] was an issue to be determined by the trial judge"). The court in \textit{Arnstein} stated its rationale for mandating that issues of access go to the jury as follows:

If, after hearing both parties testify, the jury disbelieves defendant's denials, it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the "crucial test of credibility"—in the presence of the jury.

\textit{Arnstein}... was too restrictive and was tinged with conservatism and great caution. ... [The court] posed the issue as "whether the lower court under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action." The issue could have been posed as a method of striking sham claims and defenses to avoid dilatory tactics, and to relieve court calendars which could have produced a different result.

Hartnick, supra note 22, at 55-56; see also \textit{GOLDSTEIN}, supra note 5, § 7.4.2 at 39-40 (stating that \textit{Arnstein} "has since been limited, ignored or abandoned in the Second Circuit"). \textit{But see} Hartnick, supra note 22, at 70 ("\textit{Arnstein}... sadly remains influential for summary judgment in copyright law."). Despite its obsolescence in summary judgment jurisprudence, \textit{Arnstein} continues to be important in explaining copyright infringement. \textit{See supra} note 22.

\(^{63}\) One commentator has stated that:

\textit{Arnstein}... has since been limited, ignored or abandoned in the Second Circuit.

\(^{64}\) Hartnick, supra note 22, at 56.

\(^{65}\) See Beal v. Lindsey, 468 F.2d 287, 291 (2d Cir. 1972) (stating that "[t]he
Courts currently prohibit summary judgment when there is a genuine issue of material fact. The rule "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." The increasingly prodigious costs of discovery and litigation underscore the need to use summary judgment to reduce the number of unmeritorious copyright infringement lawsuits. Access, however, is a question of fact. Disposition by summary judgment is inappropriate, therefore, if conflicting evidence creates a genuine factual


66. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Courts have applied this standard in copyright cases. See Moore v. Columbia Pictures Indus., 972 F.2d 939, 942 (8th Cir. 1992) (upholding summary judgment because of plaintiff's failure to demonstrate substantial similarity); Baxter v. MCA, Inc., 612 F.2d 421, 424 (9th Cir.) (holding material issue existed as to substantial similarity), cert. denied, 448 U.S. 954 (1987); see also Goldstein, supra note 5, § 7.4.2, at 39 (stating that "no genuine issue as to any material fact" [standard] governs contemporaneous copyright infringement decisions).

67. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The plaintiff ultimately bears the burden of proving copying by the defendant. Nimmer & Nimmer, supra note 6, § 12.11[D], at 12-161 (stating "the plaintiff has the burden of proving both access and substantial similarity").

68. See Hartnick, supra note 22, at 66 ("To settle a meritless case, because summary judgment is unavailable, is wrong and permits a misuse of the legal system."). One commentator has also stated:

[O]ne need only consider the businesses of motion pictures, television and publishing—industries which are frequent targets for claims (many often in the frivolous category) but which nonetheless require careful handling and the expenditure of substantial time, effort and money because even courts disposed to consider summary judgment still permit plaintiffs to engage in extensive discovery.

Rosen & Fairhurst, supra note 26, at *2. But see Arnstein v. Porter, 154 F.2d 464, 471 (2d Cir. 1946) (noting that "trial by affidavit" would often favor the party with the best lawyers).

69. See Rosen & Fairhurst, supra note 26 at *2 (stating that "[i]n those industries (motion pictures, television and publishing) which are overburdened by the sheer number and costliness of unmeritorious lawsuits, such claims warrant disposition by summary judgment procedure").

70. Arnstein, 154 F.2d at 469; see also Harry G. Henn, Henn on Copyright Law: A Practitioner's Guide ¶ 27.6, at 351 n.27 (3d ed. 1991) ("Findings of access and substantial similarity are factual, i.e., reviewable for clear error.").

71. The court in Celotex asserted that summary judgment is not "a disfavored procedural shortcut," but rather is designed to "secure the just, speedy
II. CURRENT APPLICATIONS OF THE CORPORATE RECEIPT DOCTRINE

The fact-specific nature of copyright infringement cases has led courts to ad hoc decisions on the issue of access. In reaching their decisions, courts have also sought ways to discourage plaintiffs from instigating meritless copyright litigation. These considerations suggest a need for a clear standard on access that is sufficiently stringent to eliminate unnecessary litigation, yet which equitably allocates the burdens of production between the parties.

The corporate receipt doctrine accepts circumstantial evidence of receipt of the plaintiff's work at the defendant company and the physical proximity that often exists among coworkers in place of more direct but often unobtainable evi-
dence of access. The majority of courts that define the doctrine to require a significant nexus or close relationship between the employee who received the work and the alleged infringer, however, are skeptical that receipt of the plaintiff's work by one employee necessarily creates an opportunity to communicate about the work to other employees. These courts, therefore, have interpreted the doctrine restrictively in an effort to address modern business practices in which companies may have employees at many different floors, buildings, or office locations. In so doing, they have intentionally diminished the plaintiff's ability to survive summary judgment on the issue of access.

A. "Bare Corporate Receipt" Cases

In the 1967 decision Morrissey v. Procter & Gamble, the First Circuit found that receipt of the plaintiff's sweepstakes rules at the defendant's principal corporate office was enough to raise a genuine issue of fact as to access. The district court granted summary judgment in favor of the defendant, based on affidavits by pertinent company employees denying that they saw the rules. The Court of Appeals reversed, holding that the corporate receipt doctrine created a sufficient inference of access for the case to proceed to trial. The court stated:

Even if we assume that if, at the trial of the case, it should be found that the particular employees of the defendant responsible for the contest were in fact without knowledge of plaintiff's rules, ... on a motion for summary judgment a plaintiff should not have to go to the point of showing that every employee of a corporate defendant received his notification.

The Arnstein standard for summary judgment used in Morrissey—that it is inappropriate if there is the "slightest doubt as to the facts"—is no longer good law. Courts in the First Circuit

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74. 379 F.2d. 675 (1st Cir. 1967).
75. Id. at 677.
76. Id.
77. Id. The court stated: "[I]t [cannot] be said that no issue of fact as to access 'lurks' merely because it seems to the court that plaintiff's own proof has been satisfactorily contradicted." Id. The court actually made a two-step inference in this case, since there was no proof that plaintiff's submission was ever received. Id. After first asserting that evidence of the plaintiff mailing the work created an inference that the letter was received, the court then held that evidence of receipt created an inference of access. Id.
78. Id.
79. See supra note 65 and accompanying text.
have neither followed nor overruled Morrissey's holding as to corporate receipt.

Four years later, in Bevan v. Columbia Broadcasting System,\(^80\) the District Court for the Southern District of New York adopted the "bare corporate receipt" standard established in Morrissey.\(^81\) The court acknowledged the "generous definition of access"\(^82\) that suffices in the Second Circuit and held\(^83\) that receipt of a manuscript of plaintiff's play at defendant's principal corporate office satisfied the requirement of access.\(^84\) The court's rationale for adopting "bare corporate receipt" focused

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\(^80\) 329 F. Supp. 601 (S.D.N.Y. 1971). A precursor to Morrissey, cited in Bevan, was Smith v. Little, Brown & Co., 245 F. Supp. 451 (S.D.N.Y. 1965), aff'd 360 F.2d 928 (2d Cir. 1966). In Smith, the plaintiff sent a manuscript to the manager of defendant's New York office, who forwarded it to the managing editor of defendant's Boston office, who subsequently read and rejected it. Id. at 453. When the defendant later contracted with another author to write a book on the same subject as plaintiff's manuscript, plaintiff claimed that the editor working with the hired author had learned about plaintiff's manuscript from her colleague, the managing editor who had originally read it. Id. at 453-54. The court held that it was reasonable to infer that one editor could have the opportunity to learn about plaintiff's work from the other. Id. at 458.

\(^81\) Bevan, 329 F. Supp. at 609-10. Despite criticisms that the court actually had more evidence than just bare corporate receipt to find access, the court left no question as to its intention to follow Morrissey. It stated, "The issue of the sufficiency of bare corporate receipt has never been . . . isolated for decision in this Circuit or in the New York courts. . . . I believe that Morrissey is or would be adopted by this Circuit." Id.

\(^82\) Id. at 609. This "generous definition" required "plaintiff [to] show no more than that defendant had a reasonable opportunity to view or read plaintiff's work." Id. at 604. Although sometimes phrased less generously, this definition, or some variation thereof, is currently used by all courts. See supra part I.B. (discussing access).

\(^83\) Although this decision was considering a motion for judgment notwithstanding the verdict, both a J.N.O.V. and summary judgment determine whether a jury could reasonably decide in favor of an issue "as a matter of law." See supra note 54.

\(^84\) Bevan, 329 F. Supp. at 609. The judge stated that he would not have been inclined to accept plaintiff's theory of access, but he could "[n]ot say that the jury was not entitled as a matter of law to do so." Id. The manuscript was mailed to the president of the company who was involved in preproduction conferences for the allegedly copied television series, Hogan's Heroes. Id. at 603-04. Other courts charge that implicit in the court's finding was additional evidence of access beyond just corporate receipt since the play that plaintiff's manuscript was based upon, Stalag 17, had achieved popularity and notoriety, and evidence showed that it actually reached an executive with responsibility. See Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1357 (C.D. Cal. 1984) ("[The relationship between the parties in Bevan] went far beyond the simple fact that they shared a common employer."); Glanzmann v. King, 8 U.S.P.Q.2d 1594, 1596 (E.D. Mich., Aug. 29, 1988) (citing Meta-Film), aff'd, 887 F.2d 265 (6th Cir. 1989). However, the court in Bevan unequivocally stated that it was adopting the bare corporate receipt doctrine. 329 F. Supp. at 610.
on the nature of the access inquiry as a credibility determination, which leaves to the factfinder, in this case the jury, the task of deciding whom to believe.\textsuperscript{85} The court noted that “[a] contrary course would saddle a plaintiff with disproving non-access within a corporate structure foreign to him and by witnesses not his own.”\textsuperscript{86} The \textit{Bevan} decision remains good law.\textsuperscript{87}

B. \textit{META-FILM MODIFIES CORPORATE RECEIPT}

Other courts that have had an opportunity to rule on the issue currently disfavor the more lenient corporate receipt standard of \textit{Bevan} and \textit{Morrissey}. These courts require the plaintiff to show additional evidence of a relationship between the employee who received the work and the one who allegedly infringed it.\textsuperscript{88} \textit{Meta-Film Assocs. v. MCA, Inc.}\textsuperscript{89} established the proposition that access will usually be found where “an individual in a position to provide suggestions or comments with respect to the defendant’s work—a supervisory employee or an employee within the unit from which the defendant’s work was developed—had the opportunity to view the plaintiff’s work.”\textsuperscript{90} In other words, there must be a close and substantial nexus between the person who possessed knowledge of the plaintiff’s

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\item \textsuperscript{85} “[A]ccess is predominantly a question of credibility . . . to be weighed by the fact-finder against defense denials of knowledge, often accompanied by some explanation of the corporate handling of the submission.” \textit{Bevan}, 329 F. Supp. at 609.
\item \textsuperscript{86} \textit{Id.} at 610.
\item \textsuperscript{87} \textit{See, e.g.,} Merritt Forbes & Co. v. Newman Inv. Sec., 604 F. Supp. 943, 957 (S.D.N.Y. 1985) (citing \textit{Bevan} in holding that summary judgment was premature due to the difficulty of proof inherent in corporate receipt).
\item \textsuperscript{88} \textit{See Moore v. Columbia Pictures Indus.,} 972 F.2d 939, 944-45 (8th Cir. 1992); \textit{Glanzmann,} 8 U.S.P.Q.2d at 1396; \textit{Meta-Film,} 586 F. Supp. at 1357. In \textit{Glanzmann v. King}, author Stephen King was accused of copying his book \textit{Christine} from the plaintiff, who had previously sent a similar short story entitled \textit{The Side Swiper} to Columbia Pictures, the company that made a movie out of King’s book. \textit{Glanzmann,} 8 U.S.P.Q.2d at 1395. The court rejected plaintiff’s claim that King could have gained access to the short story from the secretary working at Columbia who responded to plaintiff’s submission. \textit{Id.} In so doing, the court adopted the approach of \textit{Meta-Film} as a “much more realistic view” than that espoused by \textit{Bevan}. \textit{Id.} “[T]he key feature present [in cases allowing access to be shown circumstantially] was the close relationship linking the intermediary and the alleged copier, which in each case went far beyond the simple fact that they shared a common employer.” \textit{Id.} at 1396 (quoting \textit{Meta-Film,} 586 F. Supp. at 1357).
\item \textsuperscript{89} 586 F. Supp. 1346 (C.D. Cal. 1984).
\item \textsuperscript{90} \textit{Id.} at 1357. The intermediary in past corporate receipt cases was, according to \textit{Meta-Film}, “a supervisor with responsibility for the defendant’s project, was part of the work unit as the copier, or contributed creative ideas or material to the defendant’s work.” \textit{Id.} at 1355-56.
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work and the person who allegedly copied it to create an inference of access.\textsuperscript{91}

In \textit{Meta-Film}, the court ruled that the plaintiff did not meet the requirements of corporate receipt by submitting evidence that he sent his script to a director under contract to and on the same film lot as the defendant company, which later made a successful film on the same subject.\textsuperscript{92} Because the director did not oversee the creation of the defendant's films, nor work in the unit that developed the allegedly infringing film, the court found the link between the director and the alleged infringer too attenuated to infer access.\textsuperscript{93} The court distinguished \textit{Bevan} and \textit{Morrissey} as cases in which "the alleged infringer and intermediary occupy positions such that it is natural that information possessed by one would be imparted to the other," thereby characterizing the bare corporate receipt cases as falling within the confines of its new standard.\textsuperscript{94} The court also explicitly rejected, however, a result the bare corporate receipt cases may have suggested:\textsuperscript{95} that the opportunity to copy plaintiff's work may exist merely by virtue of the intermediary and alleged infringer sharing a common employer.\textsuperscript{96}

More recently, in \textit{Moore v. Columbia Pictures},\textsuperscript{97} the plaintiff was a songwriter who submitted a tape to an employee of

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\textsuperscript{91} \textit{Id.} at 1357. The court rejected plaintiff's claim of access because there was "little, if any, nexus between the individual who possessed knowledge of plaintiff's work and the creator of the allegedly infringing work." \textit{Id.}

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.} "[P]laintiff must show something more than that he sent his work to a director who was under contract to the defendant and had an office on the defendant's lot." \textit{Id.}

\textsuperscript{94} \textit{Id.} at 1356. Commentators have also accepted this explanation. See LEAFFER, supra note 55, § 9.4, at 287 n.10 ("The key aspect of these cases is a close relationship linking the intermediary and the alleged copier, not just a showing that they shared the same employer.").

\textsuperscript{95} To prevent misunderstanding, the court added in a footnote that even if bare corporate receipt were found to be sufficient to establish access in that circuit, since the script was submitted to the director in his individual capacity and not as an employee of Universal, the access requirement still would not be satisfied. \textit{Meta-Film}, 586 F. Supp. at 1358 n.6. This leaves open the obvious question of why, if the intermediary was not an employee of the defendant corporation, the court was discussing corporate receipt caselaw. Although this Note does not advocate that corporate receipt is necessarily inappropriate, it was disingenuous of the \textit{Meta-Film} court to create a corporate receipt rule for a fact situation to which the rule may not apply.

\textsuperscript{96} \textit{Id.} at 1357-58. "To the extent that any case suggests ... that 'bare corporate receipt' is sufficient as a matter of law to preclude a finding of non-access, ... the court rejects such reasoning." \textit{Id.}

\textsuperscript{97} 972 F.2d 939 (8th Cir. 1992).
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MCA records. The plaintiff claimed that through this employee, his tape got into the hands of a songwriting team that used plaintiff's work to compose their own. Although the court affirmed summary judgment for the defendant for lack of substantial similarity, it reversed the trial court and found that this connection created a reasonable possibility of access, "at least for summary judgment purposes." The court also, however, adopted the Meta-Film standard: "Like other courts, we believe that the corporate receipt doctrine applies where there is a 'relationship linking the intermediary and the alleged copier . . . .'"

C. EFFECT OF CORPORATE RECEIPT ON SUMMARY JUDGMENT

If a plaintiff cannot provide direct evidence of copying, he must produce sufficient circumstantial evidence of access and substantial similarity to create a genuine issue of material fact to proceed to trial. Even though the plaintiff always retains the burden of proving copying, at summary judgment the moving party has the burden of showing the absence of any triable issue.

Parties may not rest on mere allegations or denials of access for summary judgment purposes. Thus, if a plaintiff bases allegations of access on mere speculation or conjecture, or if a plaintiff only offers hypothetical scenarios, unsupported by

98. Id. at 941.
99. Id. at 947.
100. Id. at 945.
101. Id. at 942 (citing Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1357 (C.D. Cal. 1984)). The court found that the "key feature" of a close relationship was indeed present in this situation. Id. at 944-45.
102. See NIMMER & NIMMER, supra note 6, § 12.11[D], at 12-161 (stating that the plaintiff must prove both access and substantial similarity to prove copying circumstantially).
103. MOORE ET AL., supra note 7, ¶ 56.3[14], at 530. For the purposes of ruling on a summary judgment motion, all factual inferences are to be taken against the moving party. Id. ¶ 56.3[15], at 531.
104. FED. R. CIV. P. 56(e); see also Ferguson v. National Broadcasting Co., 584 F.2d 111, 113-14 (5th Cir. 1978) (stating that "the nonmoving party must rebut with 'significant probative' evidence"); Vantage Point, Inc. v. Parker Bros., 529 F. Supp. 1204, 1214 (E.D.N.Y. 1981) ("If the most that can be hoped for is the discrediting of defendant's denials at trial no question of material fact is presented.") (quoting Modern Home Inst. v. Hartford Accident & Indem. Co., 513 F.2d 102, 110 (2d Cir. 1975)), aff'd mem., 697 F.2d 301 (2d Cir. 1982).
105. See supra note 40 and accompanying text.
any evidence,\textsuperscript{107} to explain a defendant's connection to her work, no genuine issue of material fact exists. By definition, corporate receipt means that plaintiff has produced at least a minimal amount of evidence, because the defendant corporation possessed the plaintiff's work for some period of time. The disagreement lies in whether this evidence alone merits a trial on the issue of access.\textsuperscript{108}

A court also may grant a defendant's summary judgment motion on the issue of access if the defendant company produces evidence showing that it followed a company policy established to prevent any channel of communication between the employees who receive the submissions and those who are in positions to use them. If the defendant produces evidence that such a policy was in place and that it followed the policy, courts almost invariably grant summary judgment for the defendant on the issue of access.\textsuperscript{109}

In \textit{Vantage Point v. Parker Brothers},\textsuperscript{110} the court found a lack of access even though the company acknowledged receiving the plaintiff's proposal for a game. The defendant had a long-established policy under which employees routed all unprofessional, unsolicited submissions directly from the mail room to the customer service department and returned them unexamined to their senders, thereby ensuring that the employees involved in game development did not see them.\textsuperscript{111} The plaintiff claimed that Milton Bradley used this policy to


\textsuperscript{108}. The purpose of summary judgment is to "'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" \textit{Vantage Point}, 529 F. Supp. at 1207 (quoting Adv. Comm. Note to Proposed Amendments to Rule 56(e), 31 F.R.D. 648 (1962)).

\textsuperscript{109}. Courts grant summary judgment on the issue of access for the defendants despite flaws in the business procedures that create a possibility of access. In both \textit{Vantage Point}, 529 F. Supp. at 1204, and Novak v. National Broadcasting Co., 752 F. Supp. 164, 169 (S.D.N.Y. 1990), the submissions were not entirely insulated from the decision-making employees and actually reached the secretaries of the company presidents. The courts nonetheless granted summary judgment for the defendants. See also Downey v. General Foods Corp., 286 N.E.2d 257, 260 (N.Y. Ct. App. 1972) (holding that summary judgment was proper because company kept the plaintiff's submission under "lock and key" in files in which the allegedly infringing department had no need to research).

\textsuperscript{110}. 529 F. Supp. 1204 (E.D.N.Y. 1981), aff'd, 697 F.2d 301 (2d Cir. 1982).

\textsuperscript{111}. Id. at 1211. The customer service department sent "professional" unsolicited submissions to the development department whereas "non-professional" submissions were returned unexamined. Id. The court concluded that if plaintiff had produced evidence that the company treated his submission as
hide the company's true objective of obtaining game proposals while avoiding any obligation to the persons who created the ideas, but he had no evidence to back up this allegation.\textsuperscript{112} Even though the company deviated slightly from its policy—the submission reached the secretary of the company president who then returned it unopened—the court found no evidence of deviation from the company's overarching policy of insulating the creative personnel from submissions.\textsuperscript{113}

In \textit{Novak v. National Broadcasting Co.},\textsuperscript{114} the defendant had a different procedure for unsolicited submissions. NBC's policy was to route manuscripts to the legal department for return, but to send tapes such as the plaintiff's to the addressees' secretaries for processing and return.\textsuperscript{115} The plaintiff's tape of comedy sketches was addressed to the president of NBC, Brandon Tartikoff.\textsuperscript{116} According to Tartikoff's deposition testimony, it was his policy never to review unsolicited material.\textsuperscript{117} Tartikoff's secretary testified, however, that they usually forwarded the submissions to him, and he sent personal notes back to those submitters whose work he decided to view.\textsuperscript{118} In fact, the note the plaintiffs received with the return of their tape constituted a significant piece of evidence because it was of the type that a secretary, not Tartikoff, would usually send.\textsuperscript{119}

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"professional," such treatment together with similarity would permit an inference of copying. \textit{Id.}
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\textsuperscript{112} \textit{Id.}
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\textsuperscript{113} \textit{Id.} at 1212. The court stated:
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Undoubtedly defendant's showing on this point could be stronger. For example, [the president] might have stated more explicitly that his secretary determined for him whether materials sent by mail were a professional submission or not, and whether correspondence separable from the submission itself was ever put before him, or the secretary might have provided a corroborating affidavit. But we think that the affidavit he submitted . . . sufficiently explained what happened to the submission to remove any issue that he ever examined it, and therefore obligated plaintiff to produce facts controverting this version in order to preclude summary judgment . . . .
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\textit{Id.}
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\textsuperscript{114} 752 F. Supp. 164 (S.D.N.Y. 1990).
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\textsuperscript{115} \textit{Id.} at 169. "Processing" by the secretaries entailed "forward[ing] such submissions either to [Tartikoff's] Burbank or his New York city [sic] office, depending upon his whereabouts at the time of receipt. When the submissions pile up, Tartikoff's secretaries check with him to make sure he does not want to look at any of them, and then send back the submissions to the senders, often with a typed note acknowledging the return." \textit{Id.}
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\textsuperscript{116} \textit{Id.} at 167.
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\textsuperscript{117} \textit{Id.} at 169.
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\textsuperscript{118} \textit{Id.}
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\textsuperscript{119} \textit{Id.}
Despite the apparent deviation from the policy, the court held that it was not significant enough to raise a genuine issue of fact as to access.\textsuperscript{120}

III. A FRAMEWORK FOR ANALYZING CORPORATE RECEIPT CASES

Courts that follow Meta-Film's approach to corporate receipt are skeptical that access by one employee of a business entity necessarily creates access by other employees.\textsuperscript{121} The additional requirement of a substantial nexus or relationship between the intermediary and the alleged infringer creates a more restrictive standard of corporate receipt. Courts have denominated a subclass of the corporate receipt doctrine, called "bare corporate receipt," to distinguish the more lenient standard from the current one.\textsuperscript{122} These courts also discredit bare corporate receipt as unresponsive to the realities of modern business.\textsuperscript{123} They imply that "bare corporate receipt" creates only a "bare possibility of access."\textsuperscript{124} In certain circumstances, however, "bare corporate receipt" may create a reasonable opportunity for the alleged copier to come into contact with the plaintiff's work. The reasonableness of the opportunity depends on the facts of the case, and on the size and structure of the business.

The plaintiff only has to show that the alleged copier had an opportunity to copy her work for access purposes—not that

\textsuperscript{120} Id. The court noted that plaintiff failed to produce any affirmative evidence showing that NBC did not follow its policy. Id. The court did not, however, question the validity of the policy itself, which clearly did not insulate Tartikoff from submissions because they were forwarded to his offices. Id. Nor did the court seem concerned about the apparent inconsistencies in the deposition testimony of Tartikoff and his secretary. Id. These factors appear to create a question regarding adherence to the policy, and the soundness of the policy itself, that presents a "genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (quoting Fed. R. Civ. P. 56(e)).

\textsuperscript{121} See Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1357 (C.D. Cal. 1984) (finding that the "simple fact of sharing a common employer" should be considered insufficient to establish access).

\textsuperscript{122} See id. at 1355 (stating that plaintiff must show that the defendant had more than a "bare possibility" of access).

\textsuperscript{123} See id. at 1358 (rejecting bare corporate receipt as "unreasonable" in light of the "realities of the business"); see also Moore v. Columbia Pictures Indus., 972 F.2d 939, 942 (8th Cir. 1992) (stating that the corporate receipt doctrine articulated by Meta-Film is a much more realistic view than the bare corporate receipt doctrine of Bevan).

\textsuperscript{124} See supra note 40.
it was actually copied. Therefore, if the alleged infringer denies that he copied plaintiff's work, this denial actually goes to the ultimate question of copying, and not to the threshold access inquiry. If the alleged infringer denies that he even had the opportunity to copy plaintiff's work, but the plaintiff alleges that there was an opportunity supported by evidence of corporate receipt, a credibility issue may result, depending on the facts of the case, which is appropriately resolved at a trial on the merits.

A. A PROPOSAL TO CLARIFY CORPORATE RECEIPT

Between the cases in which the plaintiff offers only speculative allegations of access without any supporting evidence, and the rare cases in which the plaintiff possesses direct evidence of access, lies a "factual middle ground" for which it is difficult to create a bright-line rule that applies to all corporate receipt situations. The primary factors to which the corporate receipt doctrine directs an analysis are the degree of difficulty plaintiffs face to obtain evidence of access and the existence of any company policies designed to prevent access by relevant employees. The size of the business and the complexity of its organizational structure influence both of these factors.

1. Analogy to Overlapping Subject Matter Requirement in Third Party Intermediary Cases

When the intermediary and the alleged infringer are not part of the same business enterprise, the court in Meta-Film held that the dealings between the parties "must involve some overlap in subject matter to permit an inference of access." As support for its rule, Meta-Film distinguishes three cases in which the dealings between the plaintiff and the intermediary

125. See supra note 6 and accompanying text.
126. "The trier of fact may conclude that the person who created defendant's work had but did not avail himself of the opportunity to view, but this conclusion properly goes to the ultimate issue of copying, and not to the subordinate issue of access." NIMMER & NIMMER, supra note 6, § 13.02[A], at 13-16 to 13-17; see also LATMAN, supra note 6, at 192 ("Proof of access should not be confused with proof of copying.").
127. See GOLDSTEIN, supra note 5, § 7.2.1, at 12. Goldstein states that cases falling within "this factual middle ground usually rest on a strong intuition, or high statistical likelihood, that the defendant had at some point encountered plaintiff's work." Id.
and between the intermediary and the defendant involved overlapping subject matter, therefore justifying findings of access.

The court in Meta-Film characterizes the dealings in Kamar International v. Russ Berrie & Co.\(^{129}\) as involving "identical subject matter,"\(^{130}\) because the intermediary traded in stuffed toy animals with both the plaintiff and the defendant.\(^{131}\) The Meta-Film court also cites Russ Berrie & Co. v. Jerry Elsner Co.,\(^{132}\) in which the dealings involved a particular stuffed toy gorilla,\(^{133}\) and De Acosta v. Brown,\(^{134}\) in which the dealings between the intermediary and the defendant related to research for the defendant's book, which was based the life of the same character as the plaintiff's screenplay.\(^{135}\)

It is Ferguson v. National Broadcasting Co.,\(^{136}\) however, that the Meta-Film court argues "present[s] the most closely analogous factual situation" to that of the Meta-Film case.\(^{137}\) In Ferguson, the plaintiff submitted her work to BMI, a music publisher.\(^{138}\) The defendant, a prolific composer, also had dealings with this organization.\(^{139}\) Because the defendant's dealings with BMI were "not related to either the plaintiff or her composition," the court found the defendant had no opportunity to copy.\(^{140}\) The analogy is misplaced, however; in Ferguson, the

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129. 657 F.2d 1059 (9th Cir. 1981).
130. Meta-Film, 586 F. Supp. at 1358.
131. Kamar, 657 F.2d at 1062.
133. Id. at 984.
134. 146 F.2d 408 (2d Cir. 1944).
135. Id. at 410. In fact, the court found that the similarities between the two books were "too pointed to justify any other conclusion than that of copying." Id. The court did not characterize them as "striking," however, and still addressed the issue of access. Id. The plaintiff submitted her book on the life of Clara Barton to the intermediary, an agent. Id. The defendant later consulted this intermediary regarding "only a small and an early part of Clara Barton's life and only a portion of defendant Brown's book." Id. The court found that these limitations affected only the amount of recovery, not whether recovery itself was possible. Id.
136. 584 F.2d 111 (5th Cir. 1978).
137. Meta-Film Assocs. v. MCA, Inc., 586 F. Supp. 1346, 1359 (C.D. Cal. 1984). In Meta-Film, the dealings between the parties were all related to directing movies, but the movies were not on the same subject. The plaintiff's submission was entitled Frat Rats. Id. at 1349. The allegedly infringing film was Animal House. Id. Both satirized college fraternity life. Id. The defendant Universal hired the intermediary who received plaintiff's work as a director for an entirely different film entitled Bingo Long and the Traveling All Stars. Id. at 1352.
138. 584 F.2d at 112.
139. Id. at 112 n.1.
140. Id.
intermediary was a large organization while in *Meta-Film*, it was an individual who was under contract to the defendant and working on the defendant's film lot.\textsuperscript{141}

The term "overlapping subject matter" is necessarily vague due to the differing fact situations in copyright cases.\textsuperscript{142} The court in *Meta-Film* created this rule in an attempt to reconcile the holdings of past third party intermediary cases into a rule applicable to all third party intermediary situations.\textsuperscript{143} The court did not address, however, the difficulty in trying to confine all future third party intermediary situations to a narrow rule that does not even apply consistently to past cases.

The overlapping subject matter requirement may also place an insurmountable evidentiary burden on plaintiffs. For example, if the intermediary and the defendant deny that they communicated on a subject matter which overlaps with the plaintiff's work, the plaintiff can succeed only if he or she has knowledge of the communications between the other parties. It is unrealistic to expect plaintiffs to possess information about conversations to which they were not privy. In addition, dealings on any subject matter create an *opportunity* to communicate the contents of the plaintiff's work, which is all that access, by definition, requires.\textsuperscript{144} Whether the opportunity was reasonable depends on the nature of the dealings—information which, like direct evidence of the copying itself, the plaintiff is usually unable to obtain.\textsuperscript{145} For these reasons, courts should permit evidence of dealings between the parties on any subject matter to satisfy the access requirement.

2. The Nexus Requirement in Corporate Receipt Cases

When the plaintiff alleges that an opportunity to copy his work arose among co-workers of the same business, the *Meta-Film* court held that a nexus must exist between the employee with knowledge of the plaintiff's work and the alleged in-

\begin{itemize}
\item \textsuperscript{141} *Meta-Film*, 586 F. Supp. at 1357.
\item \textsuperscript{142} See supra note 73 and accompanying text.
\item \textsuperscript{143} *Meta-Film*, 586 F. Supp. at 1358-59, 1359 n.7.
\item \textsuperscript{144} See NIMMER & NIMMER, supra note 6, § 13.02[A], at 13-19 ("In view of the fact that it would usually not be possible for the plaintiff to offer direct evidence of such knowledge by the various persons in such a channel of communication, it would seem that proof of the fact of communication (on any subject) as between the various persons in the channel should suffice to permit the trier of fact to find access, without any need to directly counter such persons' respective denials of knowledge.").
\item \textsuperscript{145} See supra note 27 and accompanying text.
\end{itemize}
Pre-trial discovery may reveal whether the intermediary "was a supervisor with responsibility for the defendant's project, [or] was part of the same work unit as the copier," two of the situations *Meta-Film* suggests would satisfy corporate receipt. If formal relationships such as these were the only ones in which an opportunity to communicate information about a submission might arise, a plaintiff would not face insurmountable difficulty in establishing a channel of communication. As *Meta-Film* suggests, however, there are informal situations in which the contents of a plaintiff's work may be communicated.

If the intermediary "contributed creative ideas or material to the defendant's work," *Meta-Film* states that this relationship could also create a reasonable opportunity to copy the plaintiff's work. This third example of a relationship "in which it is natural that information possessed by one [employee] would be imparted to the other," while seemingly broadening the applicability of corporate receipt, in fact demonstrates the difficulty of proof underlying the need for the doctrine. The ability to produce evidence that the intermediary contributed in some manner to the alleged infringer's work would displace the plaintiff's need for the corporate receipt doctrine, because he would possess direct evidence that the intermediary had an opportunity to communicate the contents of his work to the alleged copier.

The preceding three examples of employee relationships that would satisfy *Meta-Film* 's corporate receipt standard are not the only conceivable situations in which an opportunity to copy might arise in the workplace. The recipient of plaintiff's work in *Meta-Film* was under contract to the defendant, but not technically an employee. Therefore, in that particular situation, the court may have been justified in concluding that it was "unreasonable to attribute the knowledge of any one individual—especially a non-employee—to every other individual just because they occupy offices on the same studio lot."

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147. *Id.* at 1355-56.
148. *Id.* at 1356.
149. *Id.*
150. *Id.* at 1357.
151. *Id.* The court states that the director "was not an executive overseeing the development of the studio's films. He did not work in a unit with Universal employees who were working on films other than the one which he was directing. Moreover, he had no interest in transmitting information to other
Where the intermediary and the alleged infringer are both employees of the same business entity, however, it is not unreasonable to conclude that the opportunity to share ideas may exist in many situations, both formal and informal. A rule limited to the situations articulated in *Meta-Film* may easily be circumvented by defendants who know they will not be held accountable if the pertinent employees are not in a clearly defined work relationship. In addition, co-workers may have a greater incentive to deny knowledge of the plaintiff's work than would a third party intermediary who is not an employee of the defendant.

For purposes of summary judgment, therefore, if the plaintiff cannot produce evidence of a close relationship between the employee with knowledge of plaintiff's work and the one who allegedly copied it, and the size and structure of the defendant company suggests to the court that the plaintiff's ability to obtain evidence is hindered, bare corporate receipt should be sufficient to shift the burden of production to the defendant to show that there was no opportunity for access. Otherwise, the nexus requirement creates exactly the same barrier for plaintiffs that the doctrine was designed to cure: it requires plaintiffs to produce evidence of channels of communication within business entities that is often impossible to obtain.

A defendant could satisfy its burden of production by introducing evidence that the intermediary and the alleged copier were not in a position to share information about the subject matter of plaintiff's submission. Just as when the intermediary and infringer do not share a common employer, however, evidence of communication on any subject between co-workers should also be seen to create the opportunity to transmit information about plaintiff's work.

A defendant may also meet its burden by producing evidence of a company policy like the one in *Vantage Point*. The court's holding in *Meta-Film* was motivated by both the desire to discourage excessive litigation and the "realities of the business." Established procedures that effectively insulate creative and decision-making employees of large businesses

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Universal employees or executives regarding films that he was not interested in directing." *Id.*; see supra note 95.

152. *Vantage Point*, Inc. v. Parker Bros., 529 F. Supp. 1204, 1211 (E.D.N.Y. 1981), aff'd, 697 F.2d 301 (2d Cir. 1982); see supra notes 110-13 and accompanying text (discussing *Vantage Point*).

153. *Meta-Film*, 586 F. Supp. at 1357; see also supra note 56 and accompanying text.
from outside submissions are convincing when combined with evidence that the policy was strictly followed.\textsuperscript{154} The Vantage Point policy, although not strictly adhered to in that case, is an ideal example of such a policy. Routing submissions directly to a customer service or legal department with clear instructions for their return is the most conclusive evidence a defendant can offer to refute a plaintiff's claim of access, because it eliminates any opportunity for creative employees to come into contact with submissions.

By contrast, the routing policy in Novak did not insulate the president of NBC from submissions. In fact, according to testimony, they were forwarded to him.\textsuperscript{155} There was also conflicting testimony regarding whether Tartikoff ever reviewed outside submissions.\textsuperscript{156} The flaw in the design of the company's policy, combined with the lack of evidence showing that the procedures were actually followed, should have led the court to find a genuine issue of material fact rendering summary judgment inappropriate. To prevent companies from avoiding litigation by enacting sham policies in writing, courts must require defendants to produce evidence that their policies not only effectively insulate decision-making employees in theory, but also that they are strictly followed in practice. Mere denials of an opportunity to copy, unsupported by evidence, are insufficient to support a motion for summary judgment.\textsuperscript{157}

A policy such as the one at issue in Vantage Point may not be feasible if the company is too small or lacks the rigid departmentalization such a policy presupposes. In these situations, the rationale of bare corporate receipt is not applicable. If a company is small enough or organized in such a way that it cannot implement a policy to prevent access among employees, the barriers to a plaintiff's ability to establish a channel of communication between those employees are not as great.

Although not foolproof, consideration of routing policies in summary judgment determinations will likely reduce litigation and promote uniformity of result. Another effect, however, may be an increased reluctance by businesses to consider any

\textsuperscript{154} See NIMMER & NIMMER, supra note 6, § 13.02[C], at 13-25 n.26.


\textsuperscript{156} Id. at 169.

\textsuperscript{157} The moving party has an affirmative burden "to demonstrate the absence of genuine issues of material facts . . . . His papers are carefully scrutinized; and those of the opposing party are the whole indulgently regarded." MOORE ET AL., supra note 7, ¶ 56.3[14], at 529.
outside submissions out of fear of exposing themselves to liability. While perhaps regrettable, many businesses may value having clear choices. If a business chooses to reap the benefits of talent from outside its organization, it will be held accountable for doing so; if it declines this opportunity, its policies will protect it from protracted litigation.

B. EFFECT OF THE ADOPTION OF BARE CORPORATE RECEIPT

Maintaining a more lenient access requirement for summary judgment purposes does not have any substantial effect on the likelihood of a plaintiff prevailing on the merits on the issue of access. The plaintiff always retains the burden of proving that the alleged infringer had access to his work. At trial, after cross-examination, the factfinder may decide that the defendant’s evidence is more credible and hold that the alleged infringer had no opportunity for access. A trial merely ensures that if there is a genuine issue of material fact as to whether the alleged infringer had an opportunity to copy, the factfinder can evaluate his credibility.

Nor does modification of the access standard help the plaintiff with the other two components of copyright infringement, substantial similarity and independent creation. If the plaintiff’s work is not substantially similar to the allegedly infringing work, the defendant is entitled to summary judgment. While the access requirement may be bypassed entirely with a showing of striking similarity, the converse is not true. Similarity is the dispositive element of an infringement claim because no amount of evidence of access will create an inference of copying if there is not substantial similarity. Additionally, even if plaintiffs can produce no evidence of ac-

158. Nimmer & Nimmer, supra note 6, § 12.11[D], at 12-161 (stating that plaintiff must prove access); see supra notes 31-34 and accompanying text (discussing the exception to this rule if the works are strikingly similar).

159. See Moore et al., supra note 7, ¶ 56.3[15] (“If credibility must be weighed to decide factual disputes, summary judgment is inappropriate.”); Hartnick, supra note 22, at 55 (“[Summary judgment] should not apply to any issue which cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility.”).

160. See Nimmer & Nimmer, supra note 6, § 13.03[A], at 13-27 (“Substantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying.”).

161. See supra notes 31-34 and accompanying text.


163. Sid & Marty Krofft Television Prods. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977); Latman, supra note 6, at 192.
cess, courts still proceed to the similarity inquiry to determine if the similarities are striking. Striking similarity is a question of fact, and is often thought to be ill-suited to disposition by summary judgment. Reducing the plaintiff's burden as to access, therefore, will be unlikely to have an effect on the issue of similarity at the summary judgment stage.

164. See, e.g., Ferguson v. National Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978) (finding only a bare possibility of access, but proceeding to examine similarity to determine if it is striking). Latman suggests that courts may dispose of some suits by addressing the substantial similarity issue first: "If a finding for defendant is made on that issue, the court can avoid credibility issues arising from defendant's denial of copying ...." Latman, supra note 27, at 1211.


166. This proposition was put forth by the court in Arnstein, which distrusted summary judgment in copyright infringement suits generally, see supra note 59, but especially as to the issue substantial similarity. Judge Frank advocated summary judgment only if the judge is able "to conclude that the likenesses are so trifling that, on the issue of misappropriation, a trial judge could legitimately direct a verdict for defendant." Arnstein, 154 F.2d at 473. Arnstein's holding on summary judgment is no longer good law. See supra note 65. It remains influential, however, especially regarding the issue of substantial similarity. See, e.g., Moore v. Columbia Pictures Indus., 972 F.2d 939, 947 (8th Cir. 1992) (Lay, J., concurring in part and dissenting in part). Judge Lay argued that substantial similarity is a question of fact that should go to the jury:

I have played the tape which contains the two musical compositions and although I do not know the difference between be-bop, hip-hop, and rock and roll, the tunes all sound the same to me. This may be because I have no ear for music other than reflecting my generation's preference for the more soothing rhythms of Glen Miller and Wayne King or the sophisticated beat of Woody Herman playing the Wood Chopper's Ball. Obviously judges have no expertise to resolve this kind of question—which is why jurors should tell us whether a composite vote of reasonable minds can or cannot find similarity of expression.

Id.

167. Several courts have stated that the amount of access required decreases proportionally with the amount of similarity shown. E.g., Bevan v. Columbia Broadcasting Sys., 329 F. Supp. 601, 610 (S.D.N.Y. 1971). The rationale for allowing a reciprocal relationship between proof of access and similarity is that copying, in cases where evidence is only circumstantial, is a question of probabilities:

The point of the plaintiff's proof is to demonstrate that, in light of the defendant's access to plaintiff's work and the similarities between the two works, it is more probable than not that the defendant copied from the plaintiff's work. Recognizing that the issue is one of probabilities, courts have allowed strong similarities to compensate for weak—or no—proof of access.

GOLDSTEIN, supra note 5, § 7.2.1, at 8-9. It is not clear if the "Inverse Ratio Rule" also applies—that is, a strong showing of access may compensate for a weaker showing of similarity. Commentators seem to accept the rule. See GOLDSTEIN, supra note 5, § 7.2.1, at 9 n.4 ("One need not accept ... that proof
Second, if the defendant can produce evidence of independent creation, he will have successfully rebutted the inference of copying created by plaintiff's evidence of access and similarity.\textsuperscript{168} Copyright law only protects against unlawful copying of the plaintiff's work.\textsuperscript{169} If the defendant did not use plaintiff's work in some way as a model for his own, there can be no finding of copying.\textsuperscript{170} Therefore, if the defendant can show that he independently created the work in question, he is entitled to summary judgment, irrespective of the amount of access proven.\textsuperscript{171}

Finally, a plaintiff, such as this Note's hypothetical struggling songwriter, must show access. To use the bare corporate receipt doctrine, she first must show that her work was received by an employee of the allegedly infringing company.\textsuperscript{172}
If, through discovery, she has the good fortune to discover that the person who received her work was in the same department as, or a supervisor of, the employee who allegedly infringed her work, she will be able to establish an opportunity to copy even under the *Meta-Film* standard.173 If instead she suspects that the contents of her work were communicated through a less formal employee relationship, she will most likely be unable to produce evidence demonstrating the communication. Unless bare corporate receipt is a possibility in her circuit, this inability to obtain evidence of access will prevent her suit from surviving summary judgment.

**CONCLUSION**

Proving access in copyright infringement claims can be a difficult hurdle for plaintiffs to overcome when the person allegedly responsible for infringing the work is an employee of a large company. The corporate receipt doctrine has the potential to offset the inherent disadvantage plaintiffs face when suing businesses for infringement. As courts look for ways to reduce litigation in the area, they must be careful not to dismantle protections such as the corporate receipt doctrine, that have the potential to give plaintiffs a fair opportunity in copyright suits.

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