**17.18 Copyright Infringement—Copying—Access Defined**

[As part of its burden in Instruction [*insert cross reference to the pertinent instruction e.g., Instruction 17.5*], the plaintiff must prove by a preponderance of the evidence that [the defendant] [whoever created the work owned by the defendant] had access to the plaintiff’s work.] You may find that the defendant had access to the plaintiff’s work if [the defendant] [whoever created the work owned by the defendant] had a reasonable opportunity to [view] [read] [hear] [copy] the plaintiff’s work before the defendant’s work was created.

**Comment**

Proof of access requires “an opportunity to view or to copy plaintiff’s work.” *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp*., 562 F.2d 1157, 1172 (9th Cir. 1977); *see also Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) (requiring “a reasonable possibility, not merely a bare possibility”); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (same), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc)*.*

**Supplemental Instruction**

**[***If evidence offered at trial shows various ways of proving access, addthe following at the end of the instruction*.]

Access may be shown by:

[1.] [a chain of events connecting the plaintiff’s work and the defendant’s opportunity to [view] [hear] [copy] that work [such as dealings through a third party (such as a publisher or record company) that had access to the plaintiff’s work and with whom both the plaintiff and the defendant were dealing]] [or]

[2.] [the plaintiff’s work being widely disseminated] [or]

[3.] [a similarity between the plaintiff’s work and the defendant’s work that is so “striking” that it is highly likely the works were not created independent of one another].

**Comment**

“Where there is no direct evidence of access, circumstantial evidence can be used to prove access either by (1) establishing a chain of events linking the plaintiff’s work and the defendant’s access, or (2) showing that the plaintiff’s work has been widely disseminated.” (citation omitted) *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016); *see also Three Boys*, 212 F.3d at 482 (holding that reasonable access can be shown by a chain of events connecting plaintiff’s work and defendant’s access or by plaintiff’s work being widely distributed, and stating that the widespread dissemination approach is often coupled with a theory of “subconscious copying”); *Art Attacks Ink* 581 F.3d at 1143-45 (finding no access shown under chain of events or wide dissemination theories); *Kamar Int’l, Inc. v. Russ Berrie & Co*., 657 F.2d 1059 (9th Cir. 1981) (finding access shown by dealings between parties and third party on chain of events theory relating to same subject matter).

As to widespread dissemination, the plaintiff may show “the degree of a work's commercial success and on its distribution through . . . relevant mediums.” *Loomis*, 836 F.3d at 997; *see also Three Boys*, 212 F.3d at 484-85 (holding that sufficient evidence supported the jury’s conclusion that plaintiffs failed to prove widespread dissemination of their song when the protected song “never topped the Billboard charts or even made the top 100 for a single week,” “was not released on an album or compact disc until . . . after [defendants] wrote their song,” music experts “testified that they never heard” the protected song, and defendants “produced copies of ‘TV Guide’ from 1966 [the year the protected song was released] suggesting that the television shows playing the song never aired in Connecticut [where defendants lived at the time]”). In addition to raising an inference of access due to widespread dissemination, the plaintiff can raise an inference of access where the allegedly infringed work saturated a relevant market in which both the plaintiff and the defendant participate. *See Loomis*, 836 F.3d at 997; *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012) (holding that “there was a reasonable possibility that Defendants had an opportunity to view and copy [the allegedly infringed] design” where plaintiff’s fabric design “was widely disseminated in the Los Angeles-area fabric industry” over a four-year period and the parties both operated in that market during that period). The mere presence of the plaintiff’s work on a website is insufficient to establish widespread dissemination. *See Art Attacks Ink*, 581 F.3d at 1145.

As to the plaintiff demonstrating that there is a “striking similarity” between works to support an inference of access, *see* *Three Boys.,* 212 F.3d at 483 (holding that in absence of any proof of access, copyright plaintiff can still make out case of infringement by showing that songs were “strikingly similar.”

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