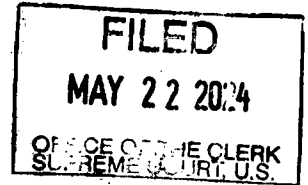


ORIGINAL

No. 23-

1243

IN THE  
Supreme Court of the United States



KIRK JOHNSTON,

*Petitioner,*

*v.*

CHAD KROEGER; MICHAEL KROEGER;  
RYAN PEAKE; DANIEL ADAIR; ROADRUNNER  
RECORDS, INCORPORATED; WARNER/  
CHAPPELL MUSIC, INCORPORATED,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

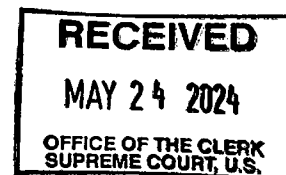
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## **QUESTIONS PRESENTED**

My name is Kirk Johnston, and I brought suit against the members of Nickelback and Warner Chappell for copyright infringement upon learning that my song Rock Star had been stolen. I'm asking the US Supreme Court to review my legal questions that were ignored at the district court and Fifth Circuit court of appeals.

1. Where I have presented competent expert evidence from a musicologist concerning the substantial and striking similarities of the hooks of the two works, is it legally appropriate for the court to disregard this evidence at the summary judgment stage in favor of its own opinion concerning the differences of the two songs, therefore denying me a right to a jury determination on the issues of substantial and striking similarity?
2. Where both parties have presented admissible testimony of competing musicology expert opinions, is it legally appropriate for the courts to resolve disputes and make factual determinations at the summary judgment stage concerning the similarities and differences between the hooks of the two songs, therefore denying me a right to a jury determination on the issues of substantial and striking similarity?
3. Where I have presented credible third party witness testimony concerning the

confirmed receipt of a demo tape containing my copyrighted work by the head of A&R at defendant Roadrunner Records's parent label Universal Records (along with an invitation to attend the local New York showcase performance of my copyrighted work), is it legally appropriate for the courts to disregard this access evidence at the summary judgment stage when considering defendants' "reasonable opportunity to hear" my copyrighted work, therefore denying me a right to a jury determination on the issue of access?

4. Similarly, is it legally appropriate for the courts to make a factual determination of a "bare possibility of access" at the summary judgment stage without considering all my credible access evidence, therefore denying me a right to a jury determination on the issue of access?
5. In this case, where the "discovery rule" clearly applies, is it legally appropriate for the courts to deny me the right to discovery of defendants' profits more than 3 years prior to the onset of the lawsuit, therefore denying me a right to a jury determination for the full scope of available damages?

**RELATED CASES**

*Johnston v. Kroeger, et al.*, 1:20-cv-00497-RP, U.S. District Court for the Western District of Texas (Austin Division). Judgment entered March 16, 2023.

*Johnston v. Kroeger, et al.*, No. 23-50254, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 19, 2024. Petition for Rehearing denied March 18, 2024.

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## **OPINIONS BELOW**

The Fifth Circuit's opinion is unpublished and reproduced at App. '1. The Fifth Circuit's denial of petitioner's motion for reconsideration is reproduced at App. 69. The opinion of the District Court for the Western District of Texas is reproduced at App. 67.

## **JURISDICTION**

This Court has jurisdiction under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL OR STATUTORY PROVISIONS**

The case involves interpretation of the Copyright Act 17 U.S.C. §§ 101 et seq., and particularly 17 U.S.C. § 501. The case also involves interpretation of Rule 56 of the Federal Rules of Civil Procedure.

## **STATEMENT OF THE CASE**

I brought this lawsuit for copyright infringement against the band Nickelback and its record labels Roadrunner Records and Warner Music.

In the summer of 2001, my band Snowblind recorded a demo CD containing four new songs, including a song that I fully wrote called Rock Star. The summer of 2001 included distributing these demo CDs to record label A&R executives and also playing live at two showcases. One showcase was at the famed Whisky a Go Go in Los Angeles, performing on the same night



as two other then unsigned popular bands Rooney and Maroon 5. The second showcase was in New York City at the famed Continental Club, which was booked by my longtime friend Eric Pulido who was an employee in the media department at Universal Records (then the parent label for defendant Roadrunner Records). In addition to booking us for the Continental showcase, Pulido also personally delivered a copy of our demo CD containing Rock Star to the head of A&R at Universal Records, with an invitation to attend the Continental showcase.

My band Snowblind received positive feedback from numerous record labels in the summer of 2001, with Rock Star as the song that most A&R executives were interested in. Unfortunately, 9/11 derailed our efforts to sign with a label, and also derailed the music industry as a whole. Later that year, Snowblind broke up as a band, ending our musical journey.

Fast forward to 2018, three of the four members assembled to remaster our prior music with producer Mark Younger-Smith, the former guitarist for Billy Idol. It was during these sessions that Mark Younger-Smith brought to our attention that Rock Star was musically and lyrically similar to another rock song that he had heard. With a brief search, we determined that the similar song was Nickelback's Rockstar. After consulting several musicology experts and several law firms, I brought this lawsuit in May 2020.

My case is straightforward, but is factually complicated. I understand that in order to prove my case, I must show that at least a portion of Nickelback's

Rockstar is “substantially similar” to portions of my song. Although this is apparent by simply listening to the two hooks of the songs, I understand that musicology experts are often used in cases just like this to isolate the copied musical material (in this case the vocal melodies of the hooks) so that a jury can compare exactly what was copied. I presented the expert testimony of Dr. Kevin Mooney, who thoroughly demonstrated the aggregation of eight musical elements of the hook that creates a unique sound. In particular, Dr. Mooney provided critical testimony that this combination could not be coincidental, and could only be explained by copying. Nickelback also presented a musicology expert Dr. Ferrara, which provided rebuttal testimony and attempted to note differences in the musical features of the two hooks, although each of his points was fully addressed by Dr. Mooney. I thought that the function of the jury was to resolve fact issues like this, but the Magistrate instead chose to resolve the similarity issue against me at the summary judgment stage, as if she was a juror weighing the credibility and testimony of the two experts.

I also understand that in order to win my case, I need to prove that Defendants had a “reasonable opportunity”, and not just a “bare possibility” to hear my song. Instead of considering all of my evidence, the Magistrate decided “bare possibility” based on a fraction of the access facts. My prior attorneys indicated that this is wrong at the summary judgment stage, that all of my facts should have been considered, with all inferences from those facts in my favor. Instead, the courts disregarded all of the evidence discussed

above concerning Pulido and issuing summary judgment against me. Granting summary judgment is wrong, since the disregarded Pulido testimony clearly demonstrates a reasonable opportunity to hear my song according to Fifth Circuit law, which is discussed below. It also appears that the Magistrate gave significant weight to the self-serving testimony of the Nickelback band members, who swore that they independently created their version of the Rockstar song. Granting Nickelback summary judgment of no access based on Nickelback's self-serving testimony cannot be a proper application for summary judgment.

I petition the Supreme Court for the opportunity to have all of my facts considered according to the proper summary judgment standard. It is clear to me that the Magistrate was interested in "fact resolution" not "fact identification" as is appropriate at the summary judgment stage. It is also clear to me that the Fifth Circuit did not want to dig into the factual intricacies of this case in order to apply the proper summary judgment standard. I have a right to a jury trial to resolve the disputed similarity and access issues.

### **ARGUMENT**

I approach this petition with the facts of my case that are well documented in the various court and appellate filings by my previous lawyers. This includes witness declarations, witness deposition testimony, and the musicology expert report of Dr. Kevin Mooney. At the summary judgment stage, I understand that there is a very specific standard—that the facts that I offer into evidence are to be considered and believed

when determining if there is a fact issue. The district court and the Fifth Circuit both failed to follow this standard, and both courts in essence weighed the evidence and made factual determinations, which I understand is the role of the jury not the judge.

It is my hope that this Court will hear and consider my questions and issue a ruling in accordance with the summary judgment standard.

#### **QUESTION 1—DR. MOONEY’S EXPERT OPINION CONCERNING THE HOOKS**

Dr. Kevin Mooney (expert PhD musicologist) testified to the similarities of every aspect of my song and the defendant’s song sharing substantial similarities. He testified that the “hooks” especially share eight identical musical traits, and that these eight traits result in a near identical sound. The defendant’s musicologist refutes, however there are four of the eight similarities that he cannot refute and agrees with Dr. Mooney’s testimony. Rather than acknowledge the factual issues raised by the two experts, the Magistrate Judge instead made a factual determination that no juror could hear similarities in the two hooks, therefore essentially disregarding my Dr. Mooney’s testimony. This is not the summary judgment standard.

As for the Appellate Court, one of the Judges stated that she had discussed the “dissimilarities” of the two works “with a friend”. This is where she gathered her information to base her opinion that no juror could hear similarities in the two hooks, again disregarding Dr.

Mooney's expert opinion in favor of her opinion that the songs don't sound the same.

## **QUESTION 2—COMPETING EXPERT OPINIONS**

In document #27 (order denying motion to dismiss) Magistrate Judge Susan Hightower stated "Having listened to the works at issue, Dkts. 17-1 and 17-2, the Court finds that it is possible for a reasonable juror to determine that the works share protectable elements." (page 7, doc 27 case 1:20-cv-00497-RP) Which was adopted by Judge Pitman on August 26, 2021. The Magistrate denied Defendants' motion to dismiss and allowed my case to continue to discovery. During discovery, Dr. Mooney testified with great specificity how the hooks of the two songs were substantially/ strikingly similar, and that the aggregated similarities in the notes in particular were not coincidental and could only be explained by copying.

However, in considering Defendants' motion for summary judgment, the Magistrate's report took a 180-degree turn, stating "The Court has concluded a side-by-side examination of the works, carefully listening to and considering all versions of the songs of record. Viewing the evidence and drawing inferences in a manner most favorable to Johnston, the evidence does not establish that the songs are strikingly similar. As an "ordinary listener" the court concludes that a layman would not consider the songs or even their "hooks" to be strikingly similar. Stated simply, they do not sound alike." (page 8-9, doc # 67 filed on February 15, 2023)

It is clear that the Magistrate did not consider Dr. Mooney's testimony, and instead ignored both experts' opinions in order to reach her own opinion that "they do not sound alike." The Magistrate denied me the opportunity to have a jury resolve the factual issues raised by the two musicology experts. And the Magistrate did so by completely contradicting her earlier factual finding that "a reasonable juror [could] determine that the works share protectable elements." The Magistrate's waffling opinions concerning the similarity of the hooks of the two songs alone demonstrates there is a fact issue for jury to resolve.

Even the Fifth Circuit failed to follow the summary judgment standard, insisting on resolving the ultimate issue of similarity rather than acknowledge the factual issues raised by both musicology experts. Considering I was the non-moving party, there was no "drawing of inferences in manners most favorable to (me) Johnston." Based on this standard there is no doubt that a reasonable juror, when guided by Dr. Mooney to focus on the musical notes of the two hooks (the portion of Defendants' song alleged of copying), could find substantial, if not striking, similarity between the two hooks.

The appellate hearing provided a further glimpse into the inappropriate review of my case:

1. At time 14:54 the Judge that introduced the case says, "I had some help from someone who is a musician, and he says . . . ". She, like Hightower, disregarded my musicology expert in favor of an

unidentified third party who rendered her opinion without the benefit of my expert's evidence and opinion at trial.

2. The Judge that did the most talking at the time of 24:27 says "So if it's a notion that a reasonable juror could find or could not find, so if that's not the case your argument is that the Magistrate Judge could listen to the songs and say NAH." My answer: to the extent that the Magistrate disregarded my evidence concerning similarity, then it is improper for the Magistrate to deny me a jury trial on this issue by saying "NAH."

This is not a case involving a copyrighted book where a reasonable juror could compare the pages side-by-side. This is not a case involving a painting where a reasonable juror could compare the two paintings side-by-side. This is a music copyright case, where Defendants' copied hook is repeated 5 times (as opposed to being repeated 9 times in my song), with the hooks not lining up at the same points in each song. Furthermore, the songs are in different genres (indie rock vs. pop rock). Even the primary instrument, the electric guitar, are played dramatically differently in each song (smooth strummed vs. choppy scat). Dr. Mooney's testimony cuts through these differences and focuses the jury on the appropriate comparison of notes, that copying of the specific combination of notes that create a unique sound that is not coincidental and could only be explained by copying. To the extent Defendants' expert disagreed, then there is clearly a fact issue

for the jury to resolve. Neither the Magistrate or the Fifth Circuit considered Dr. Mooney's analysis (which serves to help the jury focus on the copied material and is therefore necessary at the summary judgment stage), and instead reached a conclusion based on a side-by-side comparison of two songs that can't be simply compared side-by-side like a book or painting.

### **QUESTIONS 3 AND 4—EVIDENCE OF ACCESS**

Like the similarity issue, the Magistrate and the Fifth Circuit chose to disregard the most important issue a jury would consider at trial, and in doing so granted summary judgment that a reasonable juror could not find that Defendants had a reasonable opportunity to access my copyrighted song. Instead, the courts decided that the access evidence to be a "bare possibility" of access. This ruling finds no support in the controlling Fifth Circuit law, or the law of many other courts, as was briefed to the Magistrate and the Fifth Circuit by my prior lawyers.

The following is a summary of my points concerning access, which clearly raises a fact issue as to whether Nickelback and its handlers had a "reasonable opportunity" to access my original work. The following facts (and others) can be found on Doc #34 filed September 29, 2023, my request for reconsideration to the Fifth Circuit:

Eric Pulido, my friend, and employee at Universal Music Group ("UMG", the parent entity to Defendant Road Runner Records in 2001) during the relevant period in the summer of 2001 testified that he



personally delivered a CD containing my song to UMG'S A&R executives. Pulido also testified that the UMG executives received the music and/or attended a live show by my band performed at the Continental Club in New York. Pulido is a direct connection to the defendant's having gained access to my work. However, the Magistrate and the Fifth circuit disregarded this key evidence.

David Rath, an A&R representative with Defendant Roadrunner in 2001 described in his deposition testimony the myriad ways in which music was received and considered by Roadrunner. Rath acknowledged that he even received music from a competitor, inquiring whether he might be interested in pursuing them.

Kevin Estrada, the vice president of A&R at Roadrunner in 2001, described in his deposition testimony that recording industry insiders, including Nickelback's management group Union Entertainment Group (UEG), a Los Angeles based firm, often attended showcases at the Whiskey a Go Go in Los Angeles to hear unsigned bands, such as Rooney, Maroon 5, and my band that played on the same bill in August of 2001. Estrada also testified that UEG representatives John Greenburg and Brian Coleman regularly attended shows at the Whiskey. With the regional popularity of Maroon (to become Maroon 5) and Rooney at that time, and with my band Snowblind playing on the same bill, UEG and Roadrunner had more than a reasonable opportunity to hear and gather our demo CD containing my copyrighted song.

UEG's connection is important when considered with the testimony of Eddie Travis, which was found admissible but otherwise wholly disregarded by the Magistrate and the Fifth Circuit.

Eddie Travis was a song writer with the band Chlorine, who was also managed by UEG and signed with UEG at the same time as Nickelback. Travis testified that he had specific conversations with UEG representative regarding Nickelback. Furthermore, a jury would be permitted to consider Travis' firsthand knowledge that UEG passed music demos of unsigned bands to its members, including Nickelback and his band Chlorine. Travis also testified that he has irrefutable evidence that Nickelback in fact used UEG's "support," including copying music from unreleased songs of other UEG bands including his band, Chlorine. Travis' testimony was fully admitted by the Magistrate over objections from Defendants at summary judgment and should have therefore been considered by the Magistrate and the Fifth Circuit on the issue of access. Instead, the courts relied heavily on Defendants' evidence, specifically the biased testimony of the Nickelback band members who claimed that they independently created the accused song. It is improper at summary judgment for the courts to consider the Defendants testimony while simultaneously disregarding my best evidence of access.

A jury would also have the opportunity to consider Nickelback's own "discovery" by its label Roadrunner Records, which demonstrates the reasonableness of my access facts in the context of how music was distributed in the early 2000s. According to Chad Kroeger

(Nickelback's lead singer), Nickelback was introduced to Roadrunner executive Ron Burman through an unsolicited introduction by an intermediary who they had never met. This referral was not employed at Roadrunner and his exact posture in the music industry was never known to Kroeger. These facts are virtually identical to my case, and a reasonable juror could reasonably find that my song could/would travel the same way Nickelback's unpublished music passed in the music industry at that time.

It is clear that the Magistrate and Fifth Circuit only considered evidence that supported its predetermined narrative that Defendants' access to my song was only a "bare possibility." For example, in its Opinion dated February 19, 2024, the Fifth Circuit distilled my evidence of access into the five considerations: "(1) executives from Roadrunner's parent company, Universal Music, likely attended Snowblind's Continental Club show; (2) Nickelback's management group likely attended Snowblind's show at the Whisky a Go Go; (3) Nickelback and Snowblind were "moving in relatively the same circles" when they were searching for record label deals; (4) Nickelback routinely used music ideas from third-party bands; and (5) Johnston made significant efforts to publicize his music in the early 2000s." App. 5. After trivializing my evidence, the Fifth Circuit's then concluded that these facts, "in light of Nickelback's sworn testimony that they had never heard of Plaintiff or his music," amounted to mere speculation of access. App. 5-6.

In my petition for rehearing at the Fifth Circuit, my prior attorneys argued that my facts do not in any

way resemble the cases cited by the Fifth Circuit for “bare possibility of access.” I am copying that section here for your benefit as it contains an important legal analysis of my access facts:

Considering all of the facts, it is clear that the present case bears no resemblance to the facts of the cases cited by the Court.

In *Armour v Knowles*, 512 F.3d 147, 153-56 (5th Cir. 2007), the court considered at summary judgment plaintiff’s “chain of events” evidence on the access issue. As to three theories of access, the court correctly determined that plaintiff’s evidence rendered these theories to be temporarily impossible because defendant’s creation was before the alleged access. *Id.* The present case does not suffer from this timeline issue. As to plaintiff’s fourth theory of access, the court determined that there was a bare possibility of access because there was no evidence to support that the third-party recipient of the copyrighted work had any meaningful relationship to the defendant. *Id.*

The present case does not resemble the *Armour* fact pattern. For example, it is known through Mr. Pulido that Universal/Roadrunner was in direct receipt of the copyrighted work. Other courts have routinely held that a “close relationship” between a third-party intermediary and the alleged infringer, similar to the relationship between Universal and defendant Roadrunner Records/Nickelback, is

sufficient at summary judgment to demonstrate a reasonable opportunity for the copyrighted work to be heard. *See, e.g., Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 1939, 944 (8th Cir. 1992) (finding access where intermediary was in a position to provide suggestions with infringer); *Kamar Int'l, Inc. v. Russ Berrie and Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981) (“evidence 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”); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066-67 (2d Cir. 1988) (jury reasonably found access where plaintiff alleged that defendant obtained a copy of his song through the defendant’s publisher who had received a copy of plaintiff’s song nearly twenty years earlier).

The reliance on *Batiste v. Lewis*, 976 F.3d 493, 503-4 (5th Cir. 2020) is also misplaced with regards to the access issue, as there are significant distinctions between the facts of that case and the present situation. The *Batiste* Plaintiff offered a chain of events access theory based on the fact that defendants performed at a venue “not too far” from a store where Batiste’s copyrighted work was sold. *Id.* The *Batiste* facts reflect a typical “bare possibility” fact pattern where there is no evidence that the defendants were in actual receipt of the music, nor was there any evidence that defendants were even on notice that the plaintiff was performing

nearby. This is the opposite of the facts of the present case, Universal/Roadrunner was in actual receipt of plaintiff's copyrighted work and were specifically invited to the Continental Club.

To summarize, I have presented more than sufficient evidence to prove access, but the Magistrate and the Fifth Circuit refused to consider all of my access evidence. This is counter to the summary judgment standard, which is supposed to grant me all reasonable evidentiary inferences. The jury is entitled to hear and believe my access evidence.

### CONCLUSION

I ask that the Supreme Court please take action in my case. I provided sufficient evidence of access, and it was largely disregarded in favor of the Nickelback defendants' self-serving testimony concerning independent creation. I provided the expert musicology opinion of Dr. Kevin Mooney on issues of substantial and striking similarity of the hooks of the two songs, which is necessary to aid a jury in making the hook similarity comparisons needed in this case (I was told by my prior attorney that this is the "more discerning ordinary observer" standard.)

If any case is deemed non frivolous, it should be excluded from summary judgment. Here are the magistrate's own words. "First, the Court finds that Johnston's claims were not frivolous." Magistrate Judge Susan Hightower. App. 57.

I ask this Court to, at minimum, grant me the right to a jury trial on these factual issues. I feel my case has been improperly dismissed by a jury of one judge who set out to resolve all the factual issues in this case, counter to the summary judgment standard. I am entitled to a jury who will consider all of my evidence.

Respectfully submitted,

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