

Margaret Walker ALEXANDER, Plaintiff, v. Alex HALEY, Doubleday & Company, Inc., and Doubleday Publishing Company, Defendants

460 F. Supp. 40 (S.D.N.Y. 1978)

Frankel, D.J.

Defendants' motions for summary judgment were held by the court pending an evidentiary hearing and report by Magistrate Gershon on one possibly material question of fact. The reports and recommendations are now before the court along with comments and objections by the parties. Upon all the original submissions, as thus amplified, the court concludes that defendants' motions should be granted.

I.

The plaintiff, Margaret Walker Alexander, initiated twin copyright infringement and unfair competition actions against Alex Haley and Doubleday Publishing Company and Doubleday & Co., Inc., his publishers, based upon alleged similarities between the book *Roots*, written by Haley, and the novel *Jubilee* and the pamphlet *How I Wrote Jubilee* ("HIWJ"), both written by the plaintiff. *Jubilee* was copyrighted in 1966, and HIWJ in 1972. The copyright for *Roots* was registered in 1976, although a portion of the material which later became *Roots* appeared under copyright in *The Reader's Digest* in 1974.

Both *Roots* and *Jubilee* are amalgams of fact and fiction derived from the sombre history of black slavery in the United States. Each purports to be at least loosely based on the lives of the author's own forbears. Differences in scope are, however, more striking than the similarities. *Jubilee* is a historical novel which recounts the life of Vyry (described as the author's great grandmother) starting around 1835, from her childhood and early adulthood in slavery, through the Civil War years and into Reconstruction. The novel is divided roughly into thirds, marked out by the beginning and the end of the Civil War. HIWJ, as its title suggests, is an account of the author's career, including her awakening interest in her family's and people's past, her many years of research, her struggle to complete the manuscript amidst other obligations, and an explanation of the mixture of fact and fiction in *Jubilee*.

Roots covers a much broader canvas, commencing its narrative in Africa and continuing through multiple generations of a single family, described as the ancestors of the author. The story commences in about 1750 and continues through the birth and life of the author. Well over a fifth of the book is set in Africa, and approximately three-quarters covers a period antedating the time of *Jubilee*. In the closing pages the author relates the story of his own life, the evolution of his concern with his family's past, his developing interest in writing, his research and the completion of his manuscript. Particular emphasis is placed upon an account of the trail the author says was followed to the unearthing of the African roots of his family tree.

II.

The case came before the court initially on defendants' motions for summary judgment. In order to succeed in her claims of infringement plaintiff has the burden of proving two elements: actual copying of her works by the defendant and substantial similarity between the accused work and the original. Actual copying may be established by direct proof or by proof of access plus a demonstration of similarities or other factors circumstantially evidencing copying. ...

IV.

In order to demonstrate the alleged similarity between Roots on the one hand and Jubilee and HIWJ on the other, plaintiff submitted several sets of affidavits and answers to interrogatories setting forth passages from Roots along with passages from the plaintiff's works, with certain portions underscored to highlight the asserted similarities. Plaintiff also submitted an affidavit commenting Seriatim on the alleged similarities.

After consideration of each of the numerous similarities suggested in the plaintiff's submissions, the court concludes that none supports the claim of infringement. By this the court means both that (1) no support is given to the claim of copying by such similarity as is shown, n3 and (2) that the claimed similarities do not, as a matter of law, constitute actionable substantial similarity between the works.

Substantial similarity is ordinarily a question of fact, not subject to resolution on a motion for summary judgment. In the instant case, however, defendants' argument is that such similarities as are claimed by the plaintiff are irrelevant because they relate solely to aspects of the plaintiff's works which are not protectable by copyright. The law seems clear that summary judgment may be granted when such circumstances are demonstrated.

The court agrees with defendants; each of the similarities asserted by the plaintiff is in one or more of several categories of attributes of written work which are not subject to the protection of the copyright laws.

Many of the claimed similarities are based on matters of historical or contemporary fact.¹

¹ This category covers a large number of what plaintiff cites as assertedly infringing passages. For instance, the passages from page 32 of Jubilee and page 521 of Roots cited by the plaintiff share only a reference to New Orleans and the women of mixed race found there. Another example reveals only two treatments of the theme of the westward movement and settlement in the United States (Jubilee, p. 43; Roots, pp. 287, 595.) Yet another is based on the historical fact of slave uprisings and the repressive measures taken to combat them. (Jubilee, pp. 51, 83; Roots, pp. 279, 282.) The record is replete with other examples which the court need not discuss. See, e.g., Jubilee, p. 91, Roots, p. 277 (Quakers as abolitionists); Jubilee, p. 146, Roots, p. 282 (process of manumission); Jubilee, p. 184, Roots, p. 626; Jubilee, p. 19, Roots, p. 373; Jubilee, p. 47, Roots, p. 429; Jubilee, p. 82, Roots, p. 387; Jubilee, p. 192, Roots, p. 572; HIWJ, p. 18, Roots, p. 671. This listing, like those that follow, is not intended to be exhaustive. With respect to each category, the court has made the judgment reported that the instances embraced are non-actionable because they are thus classifiable under at least one such heading.

No claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items, even if we were to assume that Haley was alerted to the facts in question by reading Jubilee.

Another major category of items consists of material traceable to common sources, the public domain, or folk custom. Thus, a number of the claimed infringements are embodiments of the cultural history of black Americans, or of both black and white Americans playing out the cruel tragedy of white-imposed slavery.² Where common sources exist for the alleged similarities, or the material that is similar is otherwise not original with the plaintiff, there is no infringement. This group of asserted infringements can no more be the subject of copyright protection than the use of a date or the name of a president or a more conventional piece of historical information.

A third species of the alleged similarities constitutes what have been called Scenes a faire. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976). These are incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic. Attempted escapes, flights through the woods pursued by baying dogs, the sorrowful or happy singing of slaves, the atrocity of the buying and selling of human beings, and other miseries are all found in stories at least as old as Mrs. Stowe's. This is not, and could not be, an offense to any author. Nobody writes books of purely original content. In any event, the plaintiff misconceives the protections of the copyright law in her listing of infringements by including such Scenes a faire.³

Yet another group of alleged infringements is best described as cliched language, metaphors and the very words of which the language is constructed. Words and metaphors are not subject to copyright protection; nor are phrases and expressions conveying an idea that can only be, or is typically, expressed in a limited number of stereotyped fashions. Nor is the later use of stock ideas copyright infringement. Plaintiff collides with these principles over and over again as she extracts widely scattered

² One example is the references to laying out the body of a deceased on a "cooling board." (Jubilee, pp. 68-69; Roots, p. 355.) Uncontroverted affidavits show that this is an authentic piece of folk custom. See, also, Jubilee, p. 110, Roots, p. 518 (folk herbal medicines); Jubilee, p. 119, Roots, pp. 562-63 (cockfighting); Jubilee, p. 143, Roots, p. 310 ("jumping the broom" as a folk rite of marriage); Jubilee, p. 285, Roots, p. 644; Jubilee, p. 20, Roots, p. 364; Jubilee, p. 341, Roots, p. 365; Jubilee, p. 339, Roots, p. 247; Jubilee, p. 319, Roots, p. 212; Jubilee, p. 484, Roots, p. 327; Jubilee, p. 39, Roots, p. 383; Jubilee, p. 98, Roots, p. 396; Jubilee, p. 36, Roots, pp. 236, 438; Jubilee, p. 138, Roots, p. 439; Jubilee p. 100, Roots, p. 480; Jubilee, pp. 67, 83, 100, Roots, p. 418.

³ Examples include scenes portraying sex between male slaveowners and female slaves and the resentment of the female slave owners (Jubilee, p. 44, Roots, p. 436); the sale of a slave child away from her family and the attendant agonies (Jubilee, pp. 84-85, Roots, pp. 424-26); the horror of punitive mutilation (Jubilee, p. 114, Roots, p. 224); and slave owners complaining about the high price of slaves (Jubilee, p. 113, Roots, p. 397). See, also, Jubilee, p. 145, Roots, p. 403; Jubilee, p. 169, Roots, p. 232; Jubilee, pp. 172-73, Roots, p. 234; Jubilee, pp. 278-280, Roots, p. 644; Jubilee, p. 328, Roots, p. 649; Jubilee, p. 461, Roots, p. 361; HIWJ, p. 12, Roots, p. 664.

passages from her book and pamphlet, and juxtaposes them against similarly scattered portions of Haley's *Roots*, only to demonstrate the use by both authors of obvious terms to describe expectable scenes.⁴

Other alleged infringements display no similarity at all in terms of expression or language, but show at most some similarity of theme or setting.⁵ These items, the skeleton of a creative work rather than the flesh, are not protected by the copyright laws. It is only the means of expressing these elements that is protected by the copyright laws.

...

Every one of the alleged similarities between the plaintiff's two works and the defendants' book falls into at least one of the aforementioned categories of non-actionable material. Many fall into more than one. The review of the alleged similarities points unmistakably to the conclusion that no actionable similarities exist between the works. ...

⁴ Among the many examples are: "poor white trash" (Jubilee, p. 60, *Roots*, p. 294), and the fluffiness of cotton (Jubilee, p. 36, *Roots*, pp. 205, 207, 236). See, also, Jubilee, pp. 25-26, *Roots*, pp. 204, 221; Jubilee, p. 149, *Roots*, p. 435; Jubilee, p. 164, *Roots*, p. 243; Jubilee, p. 199, *Roots*, p. 628; Jubilee, p. 172, *Roots*, p. 209; HIWJ, pp. 15-16, *Roots*, pp. 673-75; Jubilee, p. 22, *Roots*, pp. 677, 679; HIWJ, p. 24, *Roots*, p. 686.

⁵ Examples of such alleged similarities include descriptions of puberty (Jubilee, pp. 53-54, *Roots*, pp. 412-13); hypocrisy in sermons delivered to slaves (Jubilee, p. 123, *Roots*, p. 451); and sexuality among the young (Jubilee, p. 136, *Roots*, p. 444). See, also, Jubilee, pp. 71, 80, *Roots*, pp. 449-453; Jubilee, p. 104, *Roots*, p. 594; Jubilee, p. 137, *Roots*, p. 265; Jubilee, p. 290, *Roots*, p. 219; Jubilee, p. 93, *Roots*, p. 210; HIWJ, p. 12, *Roots*, p. 668; HIWJ, p. 19, *Roots*, p. 682.