

Cite as 420 F.Supp. 177 (1976)

See, *Matthews v. Commonwealth*, 216 Va. 358, 218 S.E.2d 358 (1975); *Pruitt v. Guerry*, 210 Va. 268, 170 S.E.2d 1, 3 (1969); *Peyton v. French*, 207 Va. 73, 147 S.E.2d 739, 743 (1966). The Court is not satisfied in light of the interceding sixteen years between the alleged improper certification and this action that retrial as an adult would be an appropriate remedy in the event that petitioner prevails on the merits. See, *Redmon v. Peyton*, 298 F.Supp. 1123, 1128 (E.D.Va.), *rev'd on other grounds*, 420 F.2d 822 (4th Cir. 1969). Cf. *Powell v. Hocker*, 453 F.2d 652 (9th Cir. 1971); *James v. Cox*, 325 F.Supp. 15, 21-24 (E.D.Va.1971). As the Virginia courts have expressly rejected the premise of petitioner's substantive argument, and would not, in any event, grant effective relief upon the showing of a constitutional violation, resort to the state courts would be an act of futility. Under these circumstances, exhaustion is not required. *Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973); *Perry v. Blackedge*, 453 F.2d 856 (4th Cir. 1971), *aff'd*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

[2, 3] This Court recently concluded that *Kent* entitles a juvenile to the assistance of counsel, a hearing, and a statement of reasons and certification proceedings in Virginia Juvenile Courts. *Inge v. Slayton*, 395 F.Supp. 560, 566-67 (E.D.Va.1975). In granting relief in that case, the Court found *Kent* to be of constitutional stature warranting retroactive application. Cf., *Kemplen v. Maryland*, 428 F.2d 169 (4th Cir. 1970); *Woodall v. Pettibone*, 465 F.2d 49 (4th Cir. 1972). In the absence of controlling authority to the contra, the Court adheres to its views expressed in *Inge v. Slayton*, *supra*. But see *Bombacino v. Bensiger*, 498 F.2d 875 (7th Cir. 1974) (Judge Stevens); *Harris v. Procunier*, 498 F.2d 576 (9th Cir. 1974) (en banc).

[4, 5] Petitioner's state court records do not contain a statement of reasons why he was certified to be tried as an adult notwithstanding the recommendation to the contra. The respondent is not willing to concede, however, that no reasons were given. The Supreme Court has made it clear

that the statement of reasons to which the petitioner was entitled, need not adhere to any particular form. The statement merely must sufficiently "demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." *Kent v. United States*, *supra*, 383 U.S. at 561, 86 S.Ct. at 1057. Whether the petitioner was informed of the reasons for his certification as an adult and, if so, whether on the facts of this case, the procedure utilized comports with the heretofore quoted standard to present material issues of fact to which there is dispute. Accordingly, a hearing is required. The appropriate remedial measures, if any, to be taken, should the petitioner prevail will be considered at that time. See *Woodall v. Pettibone*, 465 F.2d 49, 52-53 (4th Cir. 1972).

An appropriate order will issue.



**BRIGHT TUNES MUSIC CORP.,
Plaintiff,**

v.

**HARRISONGS MUSIC, LTD., et
al., Defendants.**

No. 71 Civ. 602.

United States District Court,
S. D. New York.

Aug. 31, 1976.

As Amended Sept. 1, 1976.

Action was brought claiming that song My Sweet Lord was plagiarized from He's So Fine. The District Court, Owen, J., held that inasmuch as My Sweet Lord is the same song as He's So Fine with different

words, and composer of My Sweet Lord had access to He's So Fine, copyright was infringed even though subconsciously accomplished.

Order accordingly.

Copyrights ⇌ 66

Inasmuch as composer of song My Sweet Lord had access to an earlier successful song He's So Fine, and the songs were the same with different words, copyright was infringed even though composer of My Sweet Lord did not deliberately use the music of He's So Fine.

Pryor, Cashman & Sherman, by Gideon Cashman, James A. Janowitz, New York City, for plaintiff.

Hardee, Barovick, Konecky & Braun, by Joseph J. Santora, Robert B. McKay, Michael Perlstein, New York City, for defendants Harrisongs Music, Ltd., George Harrison, Apple Records, Inc. and Apple Records, Ltd.

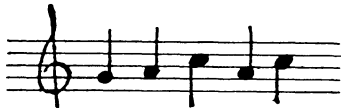
Leibman & Schreier, by Leonard S. Leibman, New York City, for defendant Broadcast Music, Inc.

Netter, Dowd, Ness, Alfieri & Stern, by Edward Berman, New York City, for defendant Hansen Publications, Inc.

1.



2.



3. All the experts agreed on this.

OPINION AND ORDER

OWEN, District Judge.

This is an action in which it is claimed that a successful song, My Sweet Lord, listing George Harrison as the composer, is plagiarized from an earlier successful song, He's So Fine, composed by Ronald Mack, recorded by a singing group called the "Chiffons," the copyright of which is owned by plaintiff, Bright Tunes Music Corp.

He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, "sol-mi-re," (hereinafter motif A),¹ altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B).² While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern.³ In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go "sol-la-do-la-re-do."⁴

My Sweet Lord, recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of He's So Fine's fourth repetition of motif B, My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition.⁵ The harmonies of both songs are identical.⁶

4.



5. This grace note, as will be seen *infra*, has a substantial significance in assessing the claims of the parties hereto.

6. Expert witnesses for the defendants asserted crucial differences in the two songs. These claimed differences essentially stem, however, from the fact that different words and number of syllables were involved. This necessitated modest alterations in the repetitions or the places of beginning of a phrase, which, however, has nothing to do whatsoever with the essential musical kernel that is involved.

George Harrison, a former member of The Beatles, was aware of He's So Fine. In the United States, it was No. 1 on the billboard charts for five weeks; in England, Harrison's home country, it was No. 12 on the charts on June 1, 1963, a date upon which one of the Beatle songs was, in fact, in first position. For seven weeks in 1963, He's So Fine was one of the top hits in England.

According to Harrison, the circumstances of the composition of My Sweet Lord were as follows. Harrison and his group, which include an American black gospel singer named Billy Preston,⁷ were in Copenhagen, Denmark, on a singing engagement. There was a press conference involving the group going on backstage. Harrison slipped away from the press conference and went to a room upstairs and began "vamping" some guitar chords, fitting on to the chords he was playing the words, "Hallelujah" and "Hare Krishna" in various ways.⁸ During the course of this vamping, he was alternating between what musicians call a Minor II chord and a Major V chord.

At some point, germinating started and he went down to meet with others of the group, asking them to listen, which they did, and everyone began to join in, taking first "Hallelujah" and then "Hare Krishna" and putting them into four part harmony. Harrison obviously started using the "Hallelujah," etc., as repeated sounds, and from there developed the lyrics, to wit, "My Sweet Lord," "Dear, Dear Lord," etc. In any event, from this very free-flowing exchange of ideas, with Harrison playing his two chords and everybody singing "Hallelujah" and "Hare Krishna," there began to emerge the My Sweet Lord text idea, which Harrison sought to develop a little bit further during the following week as he was playing it on his guitar. Thus developed

7. Preston recorded the first Harrison copyrighted recording of My Sweet Lord, of which more *infra*, and from his musical background was necessarily equally aware of He's So Fine.

8. These words ended up being a "responsive" interjection between the eventually copyrighted

motif A and its words interspersed with "Hallelujah" and "Hare Krishna."

Approximately one week after the idea first began to germinate, the entire group flew back to London because they had earlier booked time to go to a recording studio with Billy Preston to make an album. In the studio, Preston was the principal musician. Harrison did not play in the session. He had given Preston his basic motif A with the idea that it be turned into a song, and was back and forth from the studio to the engineer's recording booth, supervising the recording "takes." Under circumstances that Harrison was utterly unable to recall, while everybody was working toward a finished song, in the recording studio, somehow or other the essential three notes of motif A reached polished form.

"Q. [By the Court]: . . . you feel that those three notes . . . the motif A in the record, those three notes developed somewhere in that recording session?

"Mr. Harrison: I'd say those three there were finalized as beginning there."

* * * * *

"Q. [By the Court]: Is it possible that Billy Preston hit on those [notes comprising motif A]?

"Mr. Harrison: Yes, but it's possible also that I hit on that, too, as far back as the dressing room, just scat singing."

Similarly, it appears that motif B emerged in some fashion at the recording session as did motif A. This is also true of the unique grace note in the second repetition of motif B.

"Q. [By the Court]: All I am trying to get at, Mr. Harrison, is if you have a recollection when that [grace] note popped into existence as it

words of My Sweet Lord. In He's So Fine the Chiffons used the sound "dulang" in the same places to fill in and give rhythmic impetus to what would otherwise be somewhat dead spots in the music.

ends up in the Billy Preston recording.

* * * * *

“Mr. Harrison: . . . [Billy Preston] might have put that there on every take, but it just might have been on one take, or he might have varied it on different takes at different places.”

The Billy Preston recording, listing George Harrison as the composer, was thereafter issued by Apple Records. The music was then reduced to paper by someone who prepared a “lead sheet” containing the melody, the words and the harmony for the United States copyright application.⁹

Seeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of the fact that they were utilizing the He’s So Fine theme.¹⁰ However, they in fact were,

9. It is of interest, but not of legal significance, in my opinion, that when Harrison later recorded the song himself, he chose to omit the little grace note, not only in his musical recording but in the printed sheet music that was issued following that particular recording. The genesis of the song remains the same, however modestly Harrison may have later altered it. Harrison, it should be noted, regards his song as that which he sings at the particular moment he is singing it and not something that is written on a piece of paper.

10. Preston may well have been the “composer” of motif B and the telltale grace note appearing in the second use of the motif during the recording session, for Harrison testified:

“The Court: To be as careful as I can now in summing this up, you can’t really say that you or Billy Preston or somebody else didn’t somewhere along the line suggest these; all you know is that when Billy Preston sang them that way at the recording session, you felt they were a successful way to sing this, and you kept it?”

“The Witness: Yes, I mean at that time we chose what is a good performance.

“The Court: And you felt it was a worthy piece of music?”

“The Witness: Yes”

for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B.¹¹

What happened? I conclude that the composer,¹² in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of He’s So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet

11. Even Harrison’s own expert witness, Harold Barlow, long in the field, acknowledged that although the two motifs were in the public domain, their use here was so unusual that he, in all his experience, had never come across this unique sequential use of these materials. He testified:

“The Court: And I think you agree with me in this, that we are talking about a basic three-note structure that composers can vary in modest ways, but we are still talking about the same heart, the same essence?”

“The Witness: Yes.

“The Court: So you say that you have not seen anywhere four A’s followed by three B’s or four?”

“The Witness: Or four A’s followed by four B’s.”

The uniqueness is even greater when one considers the identical grace note in the identical place in each song.

12. I treat Harrison as the composer, although it appears that Billy Preston may have been the composer as to part. (See fn. 10 *supra*). Even were Preston the composer as to part, this is immaterial. *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F.Supp. 1366, 1369 (S.D. N.Y.), *aff’d*, 415 F.2d 1007 (2d Cir. 1969).

Lord is the very same song as He's So Fine with different words,¹³ and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *Northern Music Corp. v. Pacemaker Music Co., Inc.*, 147 U.S.P.Q. 358, 359 (S.D.N.Y. 1965).

Given the foregoing, I find for the plaintiff on the issue of plagiarism, and set the action down for trial on November 8, 1976 on the issue of damages and other relief as to which the plaintiff may be entitled. The foregoing constitutes the Court's findings of fact and conclusions of law.

So Ordered.



**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,**

v.

**AMERICAN NATIONAL BANK,
Defendant.**

Civ. A. No. 76-26-N.

United States District Court,
E. D. Virginia,
Norfolk Division.

Aug. 31, 1976.

Equal Employment Opportunity Commission brought Civil Rights Act suit complaining that branch of defendant bank was guilty of discriminatory employment practices. Defendant moved for summary judgment. The District Court, Clarke, J., held that an administrative agency such as the EEOC, even in the absence of specific statu-

13. Harrison himself acknowledged on the stand that the two songs were substantially similar. This same conclusion was obviously reached by a recording group called the "Belmonts"

tory time limits, may not postpone enforcement indefinitely without excuse to prejudice of a defendant, that absent special circumstances, mere existence of a burdensome work load does not justify undue delays, that mere fact of six and one-half-year delay between filing of initial charges and bringing of action was insufficient to establish a defense in the nature of laches but that defense was good since defendant established prejudice in that, among other things, vital witness was presently 72 years of age and neither such witness nor two other witnesses of importance were currently employed by the bank and claimant herself could not remember having filed an employment application with subject branch of defendant bank.

Motion granted.

1. Civil Rights ⇔ 40

Although Equal Employment Opportunity Commission is not bound by any strict statutory time limit in bringing discriminatory employment practices suits, either state or federal, a limitation on EEOC enforcement powers may be found in traditional notions of equity and in provision of Administrative Procedure Act authorizing a reviewing court to compel agency action unlawfully withheld or unreasonably delayed. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; 5 U.S.C.A. §§ 706, 706(1).

2. United States ⇔ 133

Although general principle is that doctrine of laches may not be imputed against the United States to bar its actions in court, the government is not universally immune from claims of delay and resulting prejudice. 5 U.S.C.A. §§ 706, 706(1).

3. Civil Rights ⇔ 38

In order to file suit against employers or others to vindicate the public interest, the Equal Employment Opportunity Com-

who recorded My Sweet Lord at a later time. With "tongue in cheek" they used the words from both He's So Fine and My Sweet Lord interchangeably at certain points.