



## *Performance of Magic Trick Protected Under Copyright Law, Nevada District Court Holds*

April 29, 2014

By: [Seth I. Appel](#), Associate

A renowned illusionist has achieved a very real victory in court. The U.S. District Court for the District of Nevada held that Teller's performance of his *Shadows* magic trick is protected under copyright law, even though the magic trick itself is not. *Teller v. Dogge*, 110 USPQ2d 1302 (D. Nev. 2014).<sup>1</sup>

Teller – a well-known magician, best known as half of Penn & Teller – has performed *Shadows* for over three decades. This illusion involves a spotlight pointed at a vase containing a rose, projecting a shadow onto a screen as shown below:



Teller, wielding a large knife, slowly cuts the leaves and petals of the rose's shadow on the screen. Meanwhile, the corresponding leaves and petals of the real rose fall to the ground.

---

<sup>1</sup>[http://scholar.google.com/scholar\\_case?case=12052870780115350990&q=teller+v+dogge&hl=en&as\\_sdt=40006](http://scholar.google.com/scholar_case?case=12052870780115350990&q=teller+v+dogge&hl=en&as_sdt=40006).



GERALDSON LLP • 200 South Wacker Drive, Suite 2900 • Chicago, IL 60606-5896 • T (312) 554-8000 • F (312) 554-8015 • [www.pattishall.com](http://www.pattishall.com)

These materials have been prepared by Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP for general informational purposes only. They are not legal advice. They are not intended to create, and their receipt by you does not create, an attorney-client relationship.

Teller brought a lawsuit against Gerard Dogge, a Dutch performer who uploaded to YouTube two videos of himself performing a similar illusion, entitled *The Rose and Her Shadow*.

Dogge's caption for the videos stated: "I've seen the great Penn & Teller performing a similar trick and now I'm very happy to share my version in a different and more impossible way with you." Dogge admitted that he posted the videos in an attempt to sell the illusion's secret.

The court last month court granted Teller's motion for summary judgment on his copyright infringement claim, holding that Teller's performance of *Shadows* is subject to copyright protection. While magic tricks are not protected under copyright law, the court explained, the Copyright Act protects "dramatic works" and "pantomimes." 17 U.S.C. § 102(a). "The mere fact that a dramatic work or pantomime includes a magic trick, or even that a particular illusion is its central feature does not render it devoid of copyright protection," the court found.

The court rejected Dogge's argument that Teller had waived his copyright because his partner, Penn Jillette, had issued a challenge of sorts, publicly stating that "no one will ever figure out" *Shadows*. This statement, the court observed, "merely provokes others to unearth the secret, not perform the work." And for copyright purposes, the secret behind the trick is insignificant: "the performance it is used for is everything."

Having determined that Teller's illusion merited copyright protection, the court had no trouble finding infringement. Applying the Ninth Circuit's two-part analysis – an "extrinsic test" and an "intrinsic test" – the court found that Teller's *Shadows* and Dogge's *The Rose and Her Shadow* were substantially similar.

The court noted that the two parties' illusions were "nearly identical twins," even though their secrets may have been different.

*In discerning substantial similarity, the court compares only the observable elements of the works in question. Therefore, whether Dogge uses Teller's method, a technique known only by various holy men of the Himalayas, or even real magic is irrelevant, as the performances appear identical to an ordinary observer.*

Last week the court set trial for June 2, 2014, to determine whether Dogge committed willful infringement and to decide Teller's unfair competition claim.

In its summary judgment order, the court noted that the magic community has traditionally blackballed performers who reveal other magicians' secrets. This case confirms that wronged magicians also may have another avenue for relief, in federal court.

\* \* \*

Seth I. Appel is an associate attorney at [Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP](#), a [leading intellectual property law firm](#) based in Chicago, Illinois. Pattishall McAuliffe represents both plaintiffs and defendants in [trademark](#), [copyright](#), and [unfair competition trials and appeals](#), and advises its clients on a broad range of domestic and international intellectual property matters, including [brand protection](#), [Internet](#), and [e-commerce](#) issues. Mr. Appel's practice focuses on litigation, transactions, and counseling with respect to [trademark](#), [trade dress](#), [copyright](#) and [Internet law](#).