



**RENTMEESTER v. NIKE, INC.**

Cite as 883 F.3d 1111 (9th Cir. 2018)

**1111**

**Jacobus RENTMEESTER,**  
**Plaintiff-Appellant,**

v.

**NIKE, INC., an Oregon corporation,**  
**Defendant-Appellee.**

No. 15-35509

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted July 11,  
2017, Portland, Oregon

Filed February 27, 2018

**Background:** Owner of copyright of photograph of basketball player attempting to dunk basketball brought action against manufacturer, asserting claims for direct, vicarious, and contributory infringement, as well as claim for violation of Digital Millennium Copyright Act. The United States District Court for the District of Oregon, Michael W. Mosman, Chief Judge, 2015 WL 3766546, dismissed the action. Owner appealed.

**Holdings:** The Court of Appeals, Watford, Circuit Judge, held that:

- (1) owner plausibly alleged that he owned valid copyright;
- (2) owner plausibly alleged “copying”;
- (3) fanciful or non-natural pose that photographer asked basketball player to assume, which was product of photographer’s own intellectual invention, was not copyrightable itself;
- (4) copyrighted photograph was entitled to broadest protection photograph could receive;
- (5) accused photograph was not substantially similar to related copyrighted photograph, and therefore accused photograph did not infringe;
- (6) accused logo was not substantially similar to related copyrighted photograph, and therefore logo did not infringe;
- (7) dismissal of action was appropriate; and

(8) district court did not abuse its discretion in dismissing suit with prejudice.

Affirmed.

Owens, Circuit Judge, filed opinion concurring in part and dissenting in part.

## **1. Federal Courts** ↗3635

De novo review applied to district’s court dismissal of copyright owner’s claims for direct, vicarious, and contributory infringement, as well as claim for violation of Digital Millennium Copyright Act, after concluding that neither photograph nor related logo infringed owner’s copyright. 17 U.S.C.A. § 1202.

## **2. Copyrights and Intellectual Property** ☞51

To state a claim for copyright infringement, claimant had to plausibly allege that he owned valid copyright in his photograph, and that defendant copied protected aspects of photo’s expression.

## **3. Copyrights and Intellectual Property** ☞53(1)

Proof of copying by the defendant is necessary because independent creation is a complete defense to copyright infringement; no matter how similar the plaintiff’s and the defendant’s works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff’s work, the defendant is not liable for infringement.

## **4. Copyrights and Intellectual Property** ☞4.5, 53(1)

An infringement defendant incurs no liability if he copies only the “ideas” or “concepts” used in the plaintiff’s work; to infringe, the defendant also must copy enough of the plaintiff’s expression of those ideas or concepts to render the two works “substantially similar.”

**5. Copyrights and Intellectual Property**  
☞83(3.1)

When the copyright infringement plaintiff lacks direct evidence of copying, he can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying; such proof creates a presumption of copying, which the defendant can then attempt to rebut by proving independent creation.

**6. Copyrights and Intellectual Property**  
☞83(3.1)

To prove copying, as required for copyright infringement, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff's work; they just need to be similarities one would not expect to arise if the two works had been created independently.

**7. Copyrights and Intellectual Property**  
☞53(1)

To prove unlawful appropriation, as required to prove copyright infringement, the similarities between the two works must be "substantial" and they must involve protected elements of the plaintiff's work.

**8. Copyrights and Intellectual Property**  
☞6, 83(3.5)

Owner of photograph of basketball player attempting to dunk basketball plausibly alleged that he owned valid copyright, as required for infringement claim, where complaint asserted that he had been sole owner of copyright in his photo since its creation, photo obviously qualified as "original work of authorship" given creative choices photographer made in composing it, and owner alleged that he previously registered his photo with Copyright Office, which permitted him to bring suit. 17 U.S.C.A. §§ 102(a)(5), 411(a).

**9. Copyrights and Intellectual Property**  
☞83(3.1)

Owner of photograph of basketball player attempting to dunk basketball plausibly alleged "copying," as required for infringement claim; owner provided color transparencies of his photo to defendant's creative director shortly before production of photo which established that defendant had access to it, and therefore reasonable opportunity to view it, and conceptual similarities between copyrighted photo and accused photo were obvious, which created presumption that accused photo was product of copying rather than independent creation.

**10. Copyrights and Intellectual Property**  
☞53(1)

Determining whether works are substantially similar involves a two-part analysis consisting of the "extrinsic test" and the "intrinsic test"; the extrinsic test assesses the objective similarities of the two works, focusing only on the protectable elements of the plaintiff's expression.

**11. Copyrights and Intellectual Property**  
☞4.5, 12(2), 53(1)

On an infringement claim, before a comparison can be made between the objective similarities of the copyrighted work and the accused work, a court must filter out the unprotectable elements of the copyrighted work, primarily ideas and concepts, material in the public domain, and scènes à faire, such as stock or standard features that are commonly associated with the treatment of a given subject; the protectable elements that remain are then compared to corresponding elements of the defendant's work to assess similarities in the objective details of the works.

**12. Copyrights and Intellectual Property**  
☞53(1)

On a copyright infringement claim, the intrinsic test requires a more holistic,

subjective comparison of the works, as compared to the “extrinsic test,” to determine whether they are substantially similar in “total concept and feel.”

### 13. Copyrights and Intellectual Property ☞53(1)

To prevail on a copyright infringement claim, a plaintiff must prove substantial similarity under the “extrinsic test” and the “intrinsic test.”

### 14. Copyrights and Intellectual Property ☞88

On a copyright infringement claim, only the extrinsic test’s application may be decided by the court.

### 15. Copyrights and Intellectual Property ☞6, 64

On a copyright infringement claim, photographs can be broken down into objective elements that reflect the various creative choices the photographer made in composing the image, such as choices related to subject matter, pose, lighting, camera angle, depth of field, and the like, but none of those elements is subject to copyright protection when viewed in isolation.

### 16. Copyrights and Intellectual Property ☞64

A photographer who produces a photo using a highly original lighting technique or a novel camera angle cannot prevent other photographers from using those same techniques to produce new images of their own, provided the new images are not substantially similar to the earlier, copyrighted photo.

### 17. Copyrights and Intellectual Property ☞6

A photographer cannot claim a monopoly through a copyright to photograph a particular subject just because he was the first to capture it on film; a subsequent photographer is free to take her own photo of the same subject, again so long as the

resulting image is not substantially similar to the earlier photograph.

### 18. Copyrights and Intellectual Property ☞6

Fanciful or non-natural pose that photographer asked basketball player to assume, which was product of photographer’s own intellectual invention, was not copyrightable itself, and therefore photographer could not use copyright law to prevent others from photographing person in same pose; photographer was entitled to protection only for way pose was expressed in his photograph, which was product of not just of pose but also camera angle, timing, and shutter speed that photographer chose.

### 19. Copyrights and Intellectual Property ☞12(3)

An author of a factual compilation cannot claim copyright protection for the underlying factual material because facts are always free for all to use; however, an author’s selection and arrangement of the material are entitled to protection if sufficiently original.

### 20. Copyrights and Intellectual Property ☞6

The individual elements that comprise a photograph can be viewed as the equivalent of unprotectable “facts” that anyone may use to create new works, and therefore a second photographer is free to borrow any of the individual elements featured in a copyrighted photograph, so long as the competing work does not feature the same selection and arrangement of those elements; in other words, a photographer’s copyright is limited to the particular selection and arrangement of the elements as expressed in the copyrighted image.

**21. Copyrights and Intellectual Property**  
☞12(1)

When only a narrow range of expression is possible, copyright protection is thin because the copyrighted work will contain few protectable features.

**22. Copyrights and Intellectual Property**  
☞6

Photograph of basketball player attempting to dunk basketball was entitled to broadest copyright protection photograph could receive due to photographer's selection and arrangement of many non-standard elements; photographer chose to place subject on open, grassy knoll with basketball hoop inserted as prop, whimsically out of place and seeming to tower well above regulation height, photographer captured subject in fanciful, highly original pose, one inspired more by ballet's grand jeté than by any pose basketball player might naturally adopt when dunking basketball, and photographer made creative choices with respect to lighting, camera angle, depth of field, and selection of foreground and background elements.

**23. Copyrights and Intellectual Property**  
☞6, 64

Accused photograph of basketball player attempting to dunk basketball was not substantially similar to related copyrighted photograph that was entitled to broad rather than thin protection because of range of creative choices open to photographer, and therefore accused photograph did not infringe; although photographer created wholly original subject matter by having subject pose in unusual or distinctive way, owner could not copy right pose in photograph, and there were differences in selection and arrangement of elements, as reflected in objective details in those photographs.

**24. Copyrights and Intellectual Property**  
☞6, 64

Accused stylized logo of silhouette of basketball player in fanciful, highly original pose, one inspired more by ballet's grand jeté than by any pose basketball player might naturally adopt, was not substantially similar to related copyrighted photograph that was entitled to broad rather than thin protection because of range of creative choices open to photographer, and therefore logo did not infringe; owner could not prohibit other photographers from taking their own photos of player in leaping, grand jeté-inspired pose, and accused photograph did not copy details of pose, unusual outdoor setting, or other objective details.

**25. Copyrights and Intellectual Property**  
☞82

Dismissal of infringement action, brought by owner of copyright of fanciful photograph of basketball player attempting to dunk basketball against manufacturer, was warranted, since copyrighted photograph and accused photograph properly were before court and thus capable of examination and comparison; nothing disclosed during discovery could alter fact that allegedly infringing works were not substantially similar to copyrighted photo.

**26. Copyrights and Intellectual Property**  
☞83(3.1)

In a copyright infringement action, the inverse ratio rule, which allows for a lower standard of proof of substantial similarity when a high degree of access is shown, assists only in proving copying, not in proving unlawful appropriation.

**27. Copyrights and Intellectual Property**  
☞83(3.1)

The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the copyright infringement plaintiff has shown.

**28. Copyrights and Intellectual Property****82**

District court did not abuse its discretion in dismissing copyright infringement suit with prejudice, since amending complaint would have been futile; owner's photo to and allegedly infringing works were not substantially similar and new allegations owner proposed to add would not have changed that dispositive fact. Fed. R. Civ. P. 15.

**Trademarks 1800**

Jumpman.

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Appeal from the United States District Court for the District of Oregon, Michael W. Mosman, Chief District Judge, Presiding, D.C. No. 3:15-cv-00113-MO

Dean M. Harvey (argued), Katherine C. Lubin, and Eric B. Fastiff, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, California; Cody Hoesly, Larkins Vacura LLP, Portland, Oregon; for Plaintiff-Appellant.

Dale Cendali (argued), Johanna Schmitt, and P. Daniel Bond, Kirkland & Ellis LLP, New York, New York; Jon Stride, Tonkon Torp LLP, Portland, Oregon; for Defendant-Appellee.

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge Owens

**OPINION**

WATFORD, Circuit Judge:

This is a copyright infringement action brought by the renowned photographer Jacobus Rentmeester against Nike, Inc. The case involves a famous photograph Rentmeester took in 1984 of Michael Jordan, who at the time was a student at the University of North Carolina. The photo originally appeared in *Life* magazine as

part of a photo essay featuring American athletes who would soon be competing in the 1984 Summer Olympic Games. We are asked to decide whether Nike infringed Rentmeester's copyright when it commissioned its own photograph of Jordan and then used that photo to create one of its most iconic trademarks.

## I

The allegations in Rentmeester's complaint, which we accept as true at this stage of the proceedings, establish the following. Rentmeester's photograph of Jordan, reproduced in the Appendix, is highly original. It depicts Jordan leaping toward a basketball hoop with a basketball raised above his head in his left hand, as though he is attempting to dunk the ball. The setting for the photo is not a basketball court, as one would expect in a shot of this sort. Instead, Rentmeester chose to take the photo on an isolated grassy knoll on the University of North Carolina campus. He brought in a basketball hoop and backboard mounted on a tall pole, which he planted in the ground to position the hoop exactly where he wanted. Whether due to the height of the pole or its placement within the image, the basketball hoop appears to tower above Jordan, beyond his reach.

Rentmeester instructed Jordan on the precise pose he wanted Jordan to assume. It was an unusual pose for a basketball player to adopt, one inspired by ballet's *grand jeté*, in which a dancer leaps with legs extended, one foot forward and the other back. Rentmeester positioned the camera below Jordan and snapped the photo at the peak of his jump so that the viewer looks up at Jordan's soaring figure silhouetted against a cloudless blue sky. Rentmeester used powerful strobe lights and a fast shutter speed to capture a sharp image of Jordan contrasted against the

sky, even though the sun is shining directly into the camera lens from the lower right-hand corner of the shot.

Not long after Rentmeester's photograph appeared in *Life* magazine, Nike contacted him and asked to borrow color transparencies of the photo. Rentmeester provided Nike with two color transparencies for \$150 under a limited license authorizing Nike to use the transparencies "for slide presentation only." It is unclear from the complaint what kind of slide presentation Nike may have been preparing, but the company was then beginning its lucrative partnership with Jordan by promoting the Air Jordan brand of athletic shoes.

In late 1984 or early 1985, Nike hired a photographer to produce its own photograph of Jordan, one obviously inspired by Rentmeester's. In the Nike photo, Jordan is again shown leaping toward a basketball hoop with a basketball held in his left hand above his head, as though he is about to dunk the ball. *See Appendix.* The photo was taken outdoors and from a similar angle as in Rentmeester's photo, so that the viewer looks up at Jordan's figure silhouetted against the sky. In the Nike photo, though, it is the city of Chicago's skyline that appears in the background, a nod to the fact that by then Jordan was playing professionally for the Chicago Bulls. Jordan wears apparel reflecting the colors of his new team, and he is of course wearing a pair of Nike shoes. Nike used this photo on posters and billboards as part of its marketing campaign for the new Air Jordan brand.

When Rentmeester saw the Nike photo, he threatened to sue Nike for breach of the limited license governing use of his color transparencies. To head off litigation, Nike entered into a new agreement with Rentmeester in March 1985, under which the company agreed to pay \$15,000 for the right to continue using the Nike photo on posters and billboards in North America

for a period of two years. Rentmeester alleges that Nike continued to use the photo well beyond that period.

In 1987, Nike created its iconic "Jumpman" logo, a solid black silhouette that tracks the outline of Jordan's figure as it appears in the Nike photo. *See Appendix.* Over the past three decades, Nike has used the Jumpman logo in connection with the sale and marketing of billions of dollars of merchandise. It has become one of Nike's most recognizable trademarks.

Rentmeester filed this action in January 2015. He alleges that both the Nike photo and the Jumpman logo infringe the copyright in his 1984 photo of Jordan. His complaint asserts claims for direct, vicarious, and contributory infringement, as well as a claim for violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1202. Rentmeester seeks damages only for acts of infringement occurring within the Copyright Act's three-year limitations period (January 2012 to the present). Doing so avoids the defense of laches that would otherwise arise from his 30-year delay in bringing suit. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, — U.S. —, 134 S.Ct. 1962, 1970, 188 L.Ed.2d 979 (2014).

[1] The district court granted Nike's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court dismissed Rentmeester's claims with prejudice after concluding that neither the Nike photo nor the Jumpman logo infringe Rentmeester's copyright as a matter of law. We review that legal determination *de novo*.

## II

[2] To state a claim for copyright infringement, Rentmeester must plausibly allege two things: (1) that he owns a valid copyright in his photograph of Jordan, and (2) that Nike copied protected aspects of

the photo's expression. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990).

[3, 4] Although our cases have not always made this point explicit, the second element has two distinct components: “copying” and “unlawful appropriation.” *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164–65 (9th Cir. 1977); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] (2017). Proof of copying by the defendant is necessary because independent creation is a complete defense to copyright infringement. No matter how similar the plaintiff's and the defendant's works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff's work, the defendant is not liable for infringement. *See Feist*, 499 U.S. at 345–46, 111 S.Ct. 1282. Proof of unlawful appropriation—that is, *illicit* copying—is necessary because copyright law does not forbid all copying. The Copyright Act provides that copyright protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [the copyrighted] work.” 17 U.S.C. § 102(b). Thus, a defendant incurs no liability if he copies only the “ideas” or “concepts” used in the plaintiff's work. To infringe, the defendant must also copy enough of the plaintiff's expression of those ideas or concepts to render the two works “substantially similar.” *Mattel, Inc.*

1. To avoid the confusion that arises from using the same term to describe two different concepts, some courts now use the term “probative similarity” to describe the similarities relevant to proof of copying. *See, e.g., Peter Letterese & Associates, Inc. v. World Institute*

*v. MGA Entertainment, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010).

[5] When the plaintiff lacks direct evidence of copying, he can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying. *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987); 4 Nimmer on Copyright § 13.01[B]. Such proof creates a presumption of copying, which the defendant can then attempt to rebut by proving independent creation. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

[6, 7] Unfortunately, we have used the same term—“substantial similarity”—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation. The term means different things in those two contexts. To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff's work. They just need to be similarities one would not expect to arise if the two works had been created independently. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); 4 Nimmer on Copyright § 13.01[B]. To prove unlawful appropriation, on the other hand, the similarities between the two works must be “substantial” and they must involve protected elements of the plaintiff's work. *Laureyssens*, 964 F.2d at 140.<sup>1</sup>

[8] In this case, Rentmeester has plausibly alleged the first element of his infringement claim—that he owns a valid

*of Scientology Enterprises, International*, 533 F.3d 1287, 1301 & n.16 (11th Cir. 2008); *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 368 & n.7 (5th Cir. 2004); *Laureyssens*, 964 F.2d at 140.

copyright. The complaint asserts that he has been the sole owner of the copyright in his photo since its creation in 1984. And the photo obviously qualifies as an “original work of authorship,” given the creative choices Rentmeester made in composing it. *See* 17 U.S.C. § 102(a)(5); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60, 4 S.Ct. 279, 28 L.Ed. 349 (1884). Rentmeester alleges that he registered his photo with the Copyright Office in 2014, which permits him to bring this suit. 17 U.S.C. § 411(a).

[9] Rentmeester has also plausibly alleged the “copying” component of the second element. He alleges that he provided color transparencies of his photo to Nike’s creative director shortly before production of the Nike photo. That allegation establishes that Nike had access to Rentmeester’s photo, which in this context means a reasonable opportunity to view it. *L.A. Printex Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012). Nike’s access to Rentmeester’s photo, combined with the obvious conceptual similarities between the two photos, is sufficient to create a presumption that the Nike photo was the product of copying rather than independent creation.

The remaining question is whether Rentmeester has plausibly alleged that Nike copied enough of the protected expression from Rentmeester’s photo to establish unlawful appropriation. To prove this component of his claim, Rentmeester does not have to show that Nike produced an exact duplicate of his photo. *See Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). But, as mentioned, he does have to show that Nike copied enough of the photo’s protected expression to render their works “substantially similar.” *See Mattel*, 616 F.3d at 913–14.

[10–13] In our circuit, determining whether works are substantially similar involves a two-part analysis consisting of

the “extrinsic test” and the “intrinsic test.” The extrinsic test assesses the objective similarities of the two works, focusing only on the protectable elements of the plaintiff’s expression. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). Before that comparison can be made, the court must “filter out” the unprotectable elements of the plaintiff’s work—primarily ideas and concepts, material in the public domain, and *scènes à faire* (stock or standard features that are commonly associated with the treatment of a given subject). *Id.* at 822–23. The protectable elements that remain are then compared to corresponding elements of the defendant’s work to assess similarities in the objective details of the works. The intrinsic test requires a more holistic, subjective comparison of the works to determine whether they are substantially similar in “total concept and feel.” *Id.* at 822 (internal quotation marks omitted). To prevail, a plaintiff must prove substantial similarity under both tests. *Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

[14] Only the extrinsic test’s application may be decided by the court as a matter of law, *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987), so that is the only test relevant in reviewing the district court’s ruling on a motion to dismiss. Before applying the extrinsic test ourselves, a few words are in order about the filtering process that the test demands.

Certain types of works can be dissected into protected and unprotected elements more readily than others. With novels, plays, and motion pictures, for instance, even after filtering out unprotectable elements like ideas and *scènes à faire*, many protectable elements of expression remain that can be objectively compared. “[P]lot, themes, dialogue, mood, setting, pace,

characters, and sequence of events” are elements we have previously identified. *Funky Films*, 462 F.3d at 1077 (internal quotation marks omitted).

[15–17] Photographs cannot be dissected into protected and unprotected elements in the same way. To be sure, photos can be broken down into objective elements that reflect the various creative choices the photographer made in composing the image—choices related to subject matter, pose, lighting, camera angle, depth of field, and the like. See *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074–75 (9th Cir. 2000). But none of those elements is subject to copyright protection when viewed in isolation. For example, a photographer who produces a photo using a highly original lighting technique or a novel camera angle cannot prevent other photographers from using those same techniques to produce new images of their own, provided the new images are not substantially similar to the earlier, copyrighted photo. With respect to a photograph’s subject matter, no photographer can claim a monopoly on the right to photograph a particular subject just because he was the first to capture it on film. A subsequent photographer is free to take her own photo of the same subject, again so long as the resulting image is not substantially similar to the earlier photograph.

That remains true even if, as here, a photographer creates wholly original subject matter by having someone pose in an unusual or distinctive way. Without question, one of the highly original elements of Rentmeester’s photo is the fanciful (non-natural) pose he asked Jordan to assume. That pose was a product of Rentmeester’s own “intellectual invention,” *Burrow-Giles*, 111 U.S. at 60, 4 S.Ct. 279; it would not have been captured on film but for Rentmeester’s creativity in conceiving it. The pose Rentmeester conceived is thus quite unlike the pose at issue in *Harney v.*

*Sony Pictures Television, Inc.*, 704 F.3d 173 (1st Cir. 2013), which consisted of nothing more than a daughter riding piggyback on her father’s shoulders. The photographer there did not orchestrate the pose and, even if he had, the pose is so commonplace as to be part of the public domain. *Id.* at 187; see also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998) (pose of a nude, pregnant woman in profile is part of the public domain).

[18] Without gainsaying the originality of the pose Rentmeester created, he cannot copyright the pose itself and thereby prevent others from photographing a person in the same pose. He is entitled to protection only for the way the pose is expressed in his photograph, a product of not just the pose but also the camera angle, timing, and shutter speed Rentmeester chose. If a subsequent photographer persuaded Michael Jordan to assume the exact same pose but took her photo, say, from a bird’s eye view directly above him, the resulting image would bear little resemblance to Rentmeester’s photo and thus could not be deemed infringing.

[19, 20] What *is* protected by copyright is the photographer’s selection and arrangement of the photo’s otherwise unprotected elements. If sufficiently original, the combination of subject matter, pose, camera angle, etc., receives protection, not any of the individual elements standing alone. In that respect (although not in others), photographs can be likened to factual compilations. 1 Nimmer on Copyright § 2A.08[E][3][c]; Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 Harv. J. L. & Tech. 339, 350–51 (2012). An author of a factual compilation cannot claim copyright protection for the underlying factual material—facts are always free for all to use. *Feist*, 499 U.S. at 347–48, 111 S.Ct.

1282. If sufficiently original, though, an author's selection and arrangement of the material are entitled to protection. *Id.* at 348–49, 111 S.Ct. 1282. The individual elements that comprise a photograph can be viewed in the same way, as the equivalent of unprotectable “facts” that anyone may use to create new works. A second photographer is free to borrow any of the individual elements featured in a copyrighted photograph, “so long as the competing work does not feature the same selection and arrangement” of those elements. *Id.* at 349, 111 S.Ct. 1282. In other words, a photographer's copyright is limited to “the particular selection and arrangement” of the elements as expressed in the copyrighted image. *Id.* at 350–51, 111 S.Ct. 1282.<sup>2</sup>

[21] This is not to say, as Nike urges us to hold, that all photographs are entitled to only “thin” copyright protection, as is true of factual compilations. A copyrighted work is entitled to thin protection when the range of creative choices that can be made in producing the work is narrow. *Mattel*, 616 F.3d at 913–14. In *Mattel*, we noted by way of illustration that “there are only so many ways to paint a red bouncy ball on blank canvas.” *Id.* at 914. We contrasted that with the “gazillions of ways to make an aliens-attack movie,” a work that would be entitled to “broad” protection given the much wider range of creative choices available in producing it. *Id.* at 913–14. When only a narrow range of expression is possible, copyright protection is thin because the copyrighted work will contain few protectable features.

Some photographs are entitled to only thin protection because the range of creative choices available in selecting and arranging the photo's elements is quite limited. That was the case in *Ets-Hokin v.*

2. We deal here with photographs of recognizable subject matter, rather than more abstract photographic works. We need not decide

*Skyy Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003), where we held that the plaintiff's commercial product shots of a vodka bottle were entitled to only thin protection. Given the constraints imposed by the subject matter and conventions of commercial product shots, there were relatively few creative choices a photographer could make in producing acceptable images of the bottle. As a result, subtle differences in lighting, camera angle, and background were sufficient to render the defendant's otherwise similar-looking photos of the same bottle non-infringing. *Id.* at 766.

With other photographs, however, the range of creative choices available to the photographer will be far broader, and very few of those choices will be dictated by subject matter or convention. On the spectrum we set out in *Mattel*—the relatively small number of ways “to paint a red bouncy ball on blank canvas” on one end, and the “gazillions of ways to make an aliens-attack movie” on the other—many photos will land more on the “aliens-attack movie” end of the range. 616 F.3d at 913–14. As with any other work, the greater the range of creative choices that may be made, the broader the level of protection that will be afforded to the resulting image. See *id.* at 916; *McCulloch*, 823 F.2d at 321.

[22] Rentmeester's photo is undoubtedly entitled to broad rather than thin protection. The range of creative choices open to Rentmeester in producing his photo was exceptionally broad; very few of those choices were dictated by convention or subject matter. In fact, Rentmeester's photo is distinctive precisely because he chose *not* to be bound by the conventions commonly followed in photographing a basketball player attempting to dunk a

whether the same principles would apply with equal force to that latter category of works.

basketball. Such photos would typically call for a basketball court as the setting, whether indoors or out. Rentmeester chose instead to place Jordan on an open, grassy knoll with a basketball hoop inserted as a prop, whimsically out of place and seeming to tower well above regulation height. Rentmeester also departed from convention by capturing Jordan in a fanciful, highly original pose, one inspired more by ballet's *grand jeté* than by any pose a basketball player might naturally adopt when dunking a basketball. These creative choices—along with the other choices Rentmeester made with respect to lighting, camera angle, depth of field, and selection of foreground and background elements—resulted in a photo with many non-standard elements. Rentmeester's selection and arrangement of those elements produced an image entitled to the broadest protection a photograph can receive.

[23] With those preliminary observations out of the way, we can now turn to whether Rentmeester has plausibly alleged that his photo and the Nike photo are substantially similar under the extrinsic test. As discussed, that inquiry requires us to assess similarities in the selection and arrangement of the photos' elements, as reflected in the objective details of the two works. We do not have a well-defined standard for assessing when similarity in selection and arrangement becomes "substantial," and in truth no hard-and-fast rule could be devised to guide determinations that will necessarily turn on the unique facts of each case. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). The best we can do is borrow from the standard Judge Learned Hand employed in a case involving fabric designs: The two photos' selection and arrangement of elements must be similar enough that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them." *Id.*

We conclude that the works at issue here are as a matter of law not substantially similar. Just as Rentmeester made a series of creative choices in the selection and arrangement of the elements in his photograph, so too Nike's photographer made his own distinct choices in that regard. Those choices produced an image that differs from Rentmeester's photo in more than just minor details.

Let's start with the subject matter of the photographs. The two photos are undeniably similar in the subject matter they depict: Both capture Michael Jordan in a leaping pose inspired by ballet's *grand jeté*. But Rentmeester's copyright does not confer a monopoly on that general "idea" or "concept"; he cannot prohibit other photographers from taking their own photos of Jordan in a leaping, *grand jeté*-inspired pose. Because the pose Rentmeester conceived is highly original, though, he is entitled to prevent others from copying the details of that pose as expressed in the photo he took. Had Nike's photographer replicated those details in the Nike photo, a jury might well have been able to find unlawful appropriation even though other elements of the Nike photo, such as background and lighting, differ from the corresponding elements in Rentmeester's photo.

But Nike's photographer did not copy the details of the pose as expressed in Rentmeester's photo; he borrowed only the general idea or concept embodied in the photo. Thus, in each photo Jordan is holding a basketball above his head in his left hand with his legs extended, in a pose at least loosely based on the *grand jeté*. The position of each of his limbs in the two photos is different, however, and those differences in detail are significant because, among other things, they affect the visual impact of the images. In Rentmeester's photo, Jordan's bent limbs combine with the background and foreground elements

to convey mainly a sense of horizontal (forward) propulsion, while in the Nike photo Jordan's completely straight limbs combine with the other elements to convey mainly a sense of vertical propulsion. While the photos embody a similar idea or concept, they express it in different ways. See *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 775-77, 2018 WL 841431, at \*4-5 (9th Cir. Feb. 13, 2018).

As to the other highly original element of Rentmeester's photo—the unusual outdoor setting he chose—Nike's photographer did not copy the details of that element either. The two photos again share undeniable similarities at the conceptual level: Both are taken outdoors without the usual trappings of a basketball court, other than the presence of a lone hoop and backboard. But when comparing the details of how that concept is expressed in the two photos, stark differences are readily apparent. Rentmeester set his shot on a grassy knoll with a whimsically out-of-place basketball hoop jutting up from a pole planted in the ground. The grassy knoll in the foreground of Rentmeester's photo is wholly absent from the Nike photo. In fact, in the Nike photo there is no foreground element at all. The positioning of the basketball hoops is also materially different in the two photos. In Rentmeester's photo, the hoop is positioned at a height that appears beyond the ability of anyone to dunk on (even someone as athletic as Jordan), which further contributes to the whimsical rather than realistic nature of the depiction. The hoop in the Nike photo, by contrast, appears to be easily within Jordan's reach.

The other major conceptual similarity shared by the two photos is that both are taken from a similar angle so that the viewer looks up at Jordan's soaring figure silhouetted against a clear sky. This is a far less original element of Rentmeester's photo, as photographers have long used

similar camera angles to capture subjects silhouetted against the sky. But even here, the two photos differ as to expressive details in material respects. In Rentmeester's photo, the background is a cloudless blue sky; in the Nike photo, it is the Chicago skyline silhouetted against the orange and purple hues of late dusk or early dawn. In Rentmeester's photo, the sun looms large in the lower right-hand corner of the image; in the Nike photo the sun does not appear at all. And in Rentmeester's photo, parts of Jordan's figure are cast in shadow, while in the Nike photo every inch of Jordan's figure is brightly lit.

Finally, the arrangement of the elements within the photographs is materially different in two further respects. In Rentmeester's photo, Jordan is positioned slightly left of center and appears as a relatively small figure within the frame. In the Nike photo, he is perfectly centered and dominates the frame. In Rentmeester's photo, the basketball hoop stands atop a tall pole planted in the ground, and the hoop's position within the frame balances Jordan's left-of-center placement. In the Nike photo, the hoop takes up the entire right border of the frame, highlighting Jordan's dominant, central position. The hoops are also lit and angled differently toward the viewer, further distinguishing their expressive roles in the photographs.

In our view, these differences in selection and arrangement of elements, as reflected in the photos' objective details, preclude as a matter of law a finding of infringement. Nike's photographer made choices regarding selection and arrangement that produced an image unmistakably different from Rentmeester's photo in material details—disparities that no ordinary observer of the two works would be disposed to overlook. What Rentmeester's photo and the Nike photo share are simi-

larities in general ideas or concepts: Michael Jordan attempting to dunk in a pose inspired by ballet's *grand jeté*; an outdoor setting stripped of most of the traditional trappings of basketball; a camera angle that captures the subject silhouetted against the sky. Rentmeester cannot claim an exclusive right to ideas or concepts at that level of generality, even in combination. Permitting him to claim such a right would withdraw those ideas or concepts from the "stock of materials" available to other artists, 4 Nimmer on Copyright § 13.03[B][2][a], thereby thwarting copyright's "fundamental objective" of "foster[ing] creativity." *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983). Copyright promotes the progress of science and the useful arts by "encourag[ing] others to build freely upon the ideas and information conveyed by a work." *Feist*, 499 U.S. at 349–50, 111 S.Ct. 1282. That is all Nike's photographer did here.

[24] If the Nike photo cannot as a matter of law be found substantially similar to Rentmeester's photo, the same conclusion follows ineluctably with respect to the Jumpman logo. The logo is merely a solid black silhouette of Jordan's figure as it appears in the Nike photo, which, as we have said, differs materially from the way Jordan's figure appears in Rentmeester's photo. Isolating that one element from the Nike photo and rendering it in a stylized fashion make the Jumpman logo even less similar to Rentmeester's photo than the Nike photo itself.<sup>3</sup>

### III

Rentmeester makes three additional arguments in support of reversal, none of which we find persuasive.

3. The district court concluded that, because infringement cannot be shown as a matter of law, Rentmeester's claim under the Digital Millennium Copyright Act fails as well. Rent-

### A

[25] First, Rentmeester contends that dismissal at the pleading stage is rarely appropriate in copyright infringement cases and that he should have been allowed to take discovery before the district court assessed substantial similarity. It is true that dismissal of copyright infringement claims occurs more commonly at the summary judgment stage, but dismissal at the pleading stage is by no means unprecedented. See, e.g., *Peters v. West*, 692 F.3d 629, 631 (7th Cir. 2012); *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 64–65 (2d Cir. 2010); *Christianson v. West Publishing Co.*, 149 F.2d 202, 203 (9th Cir. 1945). Dismissal is appropriate here because the two photos and the Jumpman logo are properly before us and thus "capable of examination and comparison." *Christianson*, 149 F.2d at 203. Nothing disclosed during discovery could alter the fact that the allegedly infringing works are as a matter of law not substantially similar to Rentmeester's photo.

This is not a case in which discovery could shed light on any issues that actually matter to the outcome. In some cases, the defendant claims independent creation as a defense and thus denies having had access to the plaintiff's work. In that scenario, disputed factual issues will often require discovery to flesh out. Here, Nike does not contest that it had access to Rentmeester's photo, so that issue is not in dispute.

In other cases, more may need to be known about the range of creative choices available to the plaintiff photographer in order to determine the breadth of protection available to his work. Here, we have accepted as true all of Rentmeester's alle-

meester does not challenge that conclusion on appeal, other than to argue that the district court erred in holding that Nike's works are non-infringing.

gations concerning the creative choices he made in producing his photograph. But even granting his photo the broad protection it deserves, a comparison of the works at issue makes clear that Nike's photographer made creative choices of his own, which resulted in an image and derivative logo not substantially similar to Rentmeester's photo. Nothing disclosed during discovery could strengthen Rentmeester's arguments on this score.

## B

[26] Second, Rentmeester asserts that because he has made a strong showing of access, he need make only a lesser showing of substantial similarity. For this proposition he relies on the so-called "inverse ratio rule." Under the inverse ratio rule, we require "a lower standard of proof of substantial similarity when a high degree of access is shown." *Three Boys Music*, 212 F.3d at 485 (internal quotation marks omitted). That rule does not help Rentmeester because it assists only in proving copying, not in proving unlawful appropriation, the only element at issue in this case. *See Jane C. Ginsburg & Robert A. Gorham*, Copyright Law 133–34 (2012); 4 Nimmer on Copyright § 13.03[C], [D]; 3 William F. Patry, Patry on Copyright § 9:91 (2017).

Recall from our earlier discussion that a plaintiff who lacks direct evidence of copying can attempt to prove that fact circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying. *See Baxter*, 812 F.2d at 423; 4 Nimmer on Copyright § 13.01[B]. The inverse ratio rule provides that the stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying. On the flip side, the more compelling the similarities supporting an inference of copying, the less compelling the evidence of access need be. Indeed, if

the similarities are "striking" enough—that is, highly unlikely to have been the product of independent creation—such similarities can be sufficient on their own to establish that the defendant must have had access to the plaintiff's work. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997); *Baxter*, 812 F.2d at 423–24 & n.2. That was the case in *Feist*, for example, where the plaintiff planted fictitious entries in its white pages directory precisely to detect copying and those same fictitious entries appeared in the defendant's competing directory. 499 U.S. at 344, 111 S.Ct. 1282.

[27] But again, after proving that the defendant's work is the product of copying rather than independent creation, the plaintiff must still show copying of protected expression that amounts to unlawful appropriation. *Peters*, 692 F.3d at 635. The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown. *Id.*; *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 372 n.11 (5th Cir. 2004); 3 Patry on Copyright § 9:91. The substantial similarity standard represents copyright law's attempt "to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement." *Warner Bros.*, 720 F.2d at 245. That balance does not shift depending on how strong the plaintiff's proof of access may be.

The inverse ratio rule thus assists Rentmeester on the issue of copying, but that component of his claim is not contested in this appeal. The only issue relevant here is whether Nike engaged in unlawful appropriation by copying more of Rentmeester's protected expression than copyright law

allows. The inverse ratio rule has no bearing on that determination.

C

[28] Finally, Rentmeester contends that the district court should have granted him leave to amend his complaint, rather than dismissing the action with prejudice. The district court did not abuse its discretion in dismissing Rentmeester's suit with

prejudice because amending the complaint would have been futile. Rentmeester's photo and the allegedly infringing works are as a matter of law not substantially similar. None of the new allegations Rentmeester proposed to add would have changed that dispositive fact.

**AFFIRMED.**

Appendix

Appendix—Continued

### Appendix



Rentmeester's photograph



Nike's photograph



Nike's Jumpman logo

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with most of the majority's analysis, and with its holding that Rentmeester cannot prevail on his Jumpman logo copyright infringement claim. However, I respectfully disagree with the majority's conclusion as to the Nike photo.

After correctly (1) setting out the law of copyright as applied to photographs, and (2) recognizing that Rentmeester's photo is entitled to "broad" copyright protection, the majority then dissects why, in its view, the Rentmeester and Nike photos are, as a matter of law, not substantially similar. This section of the majority reads like a compelling motion for summary judgment or closing argument to a jury, and it may be correct at the end of the day. Yet such questions of substantial similarity are inherently factual, and should not have been made at this stage of the game.

Where no discovery has taken place, we should not say that, as a matter of law, the Nike photo could never be substantially similar to the Rentmeester photo. This is an inherently factual question which is often reserved for the jury, and rarely for a court to decide at the motion to dismiss stage. See, e.g., *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th

Cir. 2012) ("Summary judgment is 'not highly favored' on questions of substantial similarity in copyright cases." (citation omitted)); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) ("Because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation." (citation and alteration omitted)); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1213 (11th Cir. 2000) ("Copyright infringement is generally a question of fact for the jury to decide . . . and the court erred in holding as a matter of law that no reasonable jury could find that the Warner Brothers promotional single-frame images were substantially similar to the aspects of [the photographer's] work protected by copyright.").

"Although it may be easy to identify differences between" the two photos, the Nike photo also has "much in common" with the broadly protected Rentmeester photo. *Leigh*, 212 F.3d at 1216 (reversing summary judgment for defendant with respect to its alleged infringement of a photograph notwithstanding "undeniably[ ] significant differences between the pictures"). For example, in addition to the similarity of both photos capturing Michael Jordan doing a grand-jeté pose while hold-

ing a basketball, both photos are taken from a similar angle, have a silhouette aspect of Jordan against a contrasting solid background, and contain an outdoor setting with no indication of basketball apart from an isolated hoop and backboard.

I cannot say that no reasonable jury could find in favor of Rentmeester regarding the Nike photo, so I would hesitate in granting summary judgment. Here, the majority did not permit the case even to go that far. Rather, it substituted its own judgment—with no factual record development by the parties—as to why the photos are not substantially similar.

While I disagree with the majority's ruling as to the Nike photo, I agree with its holding as to the Jumpman logo. The only element of the Rentmeester photo which Nike possibly could have copied to create the Jumpman logo is the outline of Jordan doing a grand-jeté pose while holding a basketball. As the cases that the majority cites make clear, the outline of a pose isolated from a photograph enjoys, at best, "thin" copyright protection. A grand-jeté dunking pose cannot receive the broad protection that Rentmeester claims, even if Rentmeester encouraged Jordan to strike it. The pose is ultimately no different from the Vulcan salute of Spock, the double thumbs up of Arthur Fonzarelli, or John Travolta's iconic Saturday Night Fever dance pose. *See, e.g., Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 187 (1st Cir. 2013) (holding that piggyback pose in photograph was unprotected element); *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983) (per curiam) (holding that figurine's "traditional fighting pose" was unprotected element); *Reece v. Island Treasures Art Gallery, Inc.*, 468 F.Supp.2d 1197, 1206–07 (D. Haw. 2006) (holding that hula pose in photograph was unprotected element); *cf. Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1036–44

(9th Cir. 2015) (holding that yoga sequence fell outside of copyright protection).

All of these poses can exist independently of the photographer taking them. It does not matter that Rentmeester told Jordan to pose that way—standing alone, a photograph of a mannequin or marionette in that same pose would receive the same thin protection. *Cf. Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 774–76, 2018 WL 841431, at \*3–4 (9th Cir. Feb. 13, 2018) (holding that two dolphins crossing each other was an unprotected element because that pose can be found in nature and it was irrelevant that the dolphins were posed by animal trainers). Indeed, Rentmeester cannot cite any cases to suggest that Jordan's pose, in isolation, enjoys anything more than the thinnest of copyright protection. To hold otherwise would mean that a photographer would own a broad copyright over photos of human movements, including facial expressions. I cannot find any authority in our cases or the relevant copyright statutes that would permit such a radical change in our intellectual property laws. *Cf. id.* at 775, 2018 WL 841431, at \*4 (reaffirming that "ideas, 'first expressed in nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them'"') (quoting *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003)).

At this stage of the litigation, we assume that (1) Nike traced the Jumpman logo directly from the Nike photo, and (2) that Nike based its photo on the Rentmeester photo. Even assuming all of this to be true, the Jumpman logo is not "virtually identical" to the image of Jordan in the Rentmeester photo. *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010). For example, there are differences in the angles of Jordan's arms and legs, and the Jumpman logo is a black silhou-

ette. And without being virtually identical, the Jumpman logo—the outline of a pose by Jordan in the Nike photo—cannot infringe upon any thin copyright protection enjoyed by the few elements of the Rentmeester photo allegedly copied. *See id.*

Accordingly, while I agree with the majority regarding the Jumpman logo, I think that whether the Nike photo is substantially similar is not an uncontested breakaway layup, and therefore dismissal of that copyright infringement claim is premature.<sup>1</sup>



**LOCAL JOINT EXECUTIVE BOARD  
OF LAS VEGAS; Culinary Workers  
Union Local #226; Bartenders Union  
Local 165, Petitioners,**

v.

**NATIONAL LABOR RELATIONS  
BOARD, Respondent,**

**Archon Corporation, Respondent-  
Intervenor.**

**No. 15-72878**

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted November 14,  
2017 San Francisco, California

Filed February 27, 2018

**Background:** Union petitioned for review of order of National Labor Relations Board (NLRB), 2000 WL 962990, which dismissed union's consolidated complaints against employers for unilaterally terminating union dues checkoff under expired collective bargaining agreements (CBAs). The Court of Appeals, Paez, Circuit Judge,

- Because I would reverse the district court's dismissal of Rentmeester's copyright infringement claim with respect to the Nike photo, I

309 F.3d 578, granted petition, vacated, and remanded. On remand, 2007 WL 2899736, NLRB reaffirmed dismissal of complaints on alternate grounds. Union petitioned for review. The Court of Appeals, Paez, Circuit Judge, 540 F.3d 1072, granted petition, vacated, and remanded. On remand, 2010 WL 3446120, NLRB reaffirmed. Union petitioned for review. The Court of Appeals, Paez, Circuit Judge, 657 F.3d 865, granted petition and remanded. On remand, NLRB declined to award make-whole relief, instead ordering prospective relief only. Union petitioned for review.

**Holdings:** The Court of Appeals, Paez, Circuit Judge, held that:

- (1) NLRB clearly abused its discretion in denying its standard remedy of make-whole relief;
- (2) union's challenge of NLRB's award of prospective-only relief was not premature; and
- (3) NLRB clearly abused its discretion in ordering prospective-only relief.

Vacated and remanded with instructions to award make-whole relief.

## 1. Labor and Employment ↗1812

National Labor Relations Board (NLRB) is vested with broad discretion in devising remedies to undo the effects of violations of the NLRA. National Labor Relations Act § 10, 29 U.S.C.A. § 160(c).

## 2. Labor and Employment ↗1876

Court of Appeals reviews the National Labor Relations Board's (NLRB) remedial orders with respect to a violation of the NLRA for a clear abuse of discretion. National Labor Relations Act § 10, 29 U.S.C.A. § 160(c).

would also reverse the dismissal of his Digital Millennium Copyright Act claim as to the Nike photo.

cuit has noted, “[i]t is unnatural to speak of one litigant withdrawing another’s motion.” *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010). Moreover, if “departure” included deportations or removals, the regulation would read: “Departure [e.g., *deportation or removal*] from the United States of a person who is the subject of *deportation or removal proceedings* . . . shall constitute a withdrawal of the appeal.” That would be an odd way to read the regulation.

Notably, Section 1003.2(d) — the substance of which was promulgated on the same day as § 1003.4, *see Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings*, 61 Fed. Reg. 18,900, 18,905–07 (April 29, 1996) — states that “[a]ny departure from the United States, *including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings*, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.” 8 C.F.R. § 1003.2(d) (emphasis added). Here, if “departure” included forcible removals, it would have been unnecessary in § 1003.2(d) to state that a “departure” includes the “deportation or removal” of the person subject to the proceedings. Indeed, this shows that the agency knew how to specify that “departure” includes forcible removals when it intended to do so.

I therefore concur that Lopez’s appeal was not withdrawn under § 1003.4 when he was forcibly removed from this country.

Michael SKIDMORE, AS TRUSTEE  
FOR the RANDY CRAIG WOLFE  
TRUST, Plaintiff-Appellant,

v.

Led ZEPPELIN; James Patrick Page;  
Robert Anthony Plant; John Paul  
Jones; Super Hype Publishing, Inc.;  
Warner Music Group Corporation;  
Warner/Chappell Music, Inc.; Atlantic  
Recording Corporation; Rhino Enter-  
tainment Company, Defendants-Ap-  
pellées.

Michael Skidmore, as Trustee for the  
Randy Craig Wolfe Trust,  
Plaintiff-Appellee,

v.

Warner/Chappell Music, Inc.,  
Defendant-Appellant,  
and

Led Zeppelin; James Patrick Page; Rob-  
ert Anthony Plant; John Paul Jones;  
Super Hype Publishing, Inc.; Warner  
Music Group Corporation, Atlantic  
Recording Corporation; Rhino Enter-  
tainment Company, Defendants.

No. 16-56057, No. 16-56287

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted En Banc  
September 23, 2019 San  
Francisco, California  
Filed March 9, 2020

**Background:** Owner of copyright for song “Taurus” brought action against band, band members, and others alleging that band’s song “Stairway to Heaven” infringed its copyright. Following transfer from the United States District Court for the District of Pennsylvania and jury verdict in defendants’ favor, the United States District Court for the Central District of



California, No. 2:15-cv-03462-RGK-AGR, R. Gary Klausner, J., entered amended judgment in defendants' favor, and, 2016 WL 6674985, denied defendants' motion for attorney fees and costs. Owner appealed and defendants cross-appealed. The Court of Appeals, 905 F.3d 1116, vacated in part and remanded. Rehearing en banc was granted, 925 F.3d 999.

**Holdings:** The Court of Appeals, McKeown, Circuit Judge, held that:

- (1) scope of songwriter's copyright in unpublished musical composition was limited by deposit copy;
- (2) high degree of access to copyrighted work does not justify lower standard of proof to show substantial similarity in copyright infringement action, overruling *Three Boys Music Corp. v. Bolton*, 212 F.3d 477; *Shaw v. Lindheim*, 919 F.2d 1358; *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 883 F.3d 1111; *Smith v. Jackson*, 84 F.3d 1213; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157; *Metcalf v. Bochco*, 294 F.3d 1069; *Rice v. Fox Broad. Co.*, 330 F.3d 1170; *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620; *Williams v. Gaye*, 895 F.3d 1106;
- (3) district court did not commit plain error in omitting plaintiff's proposed selection and arrangement instruction;
- (4) district court did not abuse its discretion in limiting each side to ten hours of witness time;
- (5) district court did not abuse its discretion in permitting defendants' expert to testify; and
- (6) district court did not abuse its discretion in declining to award attorney fees and costs.

Affirmed.

Watford, Circuit Judge, concurred and filed opinion.

Ikuta, Circuit Judge, concurred in part, dissented in part, and filed opinion in which Bea, Circuit Judge, joined.

#### 1. Copyrights and Intellectual Property

☞8

Although Copyright Act of 1909 extended copyright protection against infringement beyond mere reproduction of sheet music, Congress did not provide that copyrighted works could be anything other than sheet music or, for unpublished work, musical composition transcribed in deposit copy. 17 U.S.C.A. § 1 et seq. (1909).

#### 2. Copyrights and Intellectual Property

☞66

Distributing sound recordings did not constitute publication under Copyright Act of 1909, so musical compositions were only published if sheet music also was published. 17 U.S.C.A. §§ 9, 11 (1909).

#### 3. Copyrights and Intellectual Property

☞8, 10.2

Under Copyright Act of 1909, scope of songwriter's copyright in unpublished musical composition was limited by deposit copy, and did not extend to sound recordings of composition's performance that contained further embellishments. 17 U.S.C.A. § 1 et seq. (1909).

#### 4. Copyrights and Intellectual Property

☞51

Proof of copyright infringement requires copyright owner to show that: (1) he owns valid copyright in work; and (2) alleged infringer copied protected aspects of work.

#### 5. Copyrights and Intellectual Property

☞75, 83(1)

Because independent creation is complete defense to copyright infringement, plaintiff must prove that defendant copied work.

#### 6. Copyrights and Intellectual Property

☞83(3.1)

In absence of direct evidence of copying, plaintiff asserting copyright infringement claim can attempt to prove it circumstantially by showing that defendant had

access to plaintiff's work and that works share similarities probative of copying.

**7. Copyrights and Intellectual Property**  
☞53(1)

In copyright infringement action, finding of similarity between copyrighted work and defendant's work may be based on overlap of unprotectable as well as protectable elements.

**8. Copyrights and Intellectual Property**  
☞53(1)

To determine whether allegedly infringing work is substantially similar to plaintiff's copyrighted work, extrinsic test compares objective similarities of specific expressive elements in works, and intrinsic test tests for similarity of expression from standpoint of ordinary reasonable observer, with no expert assistance.

**9. Copyrights and Intellectual Property**  
☞53(1)

Because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, it is essential to distinguish between protected and unprotected material in plaintiff's work.

**10. Evidence** ☞146

Probative value in watching band member's reaction to listening to copyrighted song at trial to prove access to the song half century ago was substantially outweighed by danger of unfair prejudice from potential jury confusion between access and substantial similarity in copyright infringement action against band and band members; there would have been very little, if any, probative value in watching the band member's reaction, and risk of jury making erroneous comparison for determining substantial similarity was present, since the recording of the song contained performance elements that were not protected by the deposit copy. Fed. R. Evid. 403.

**11. Federal Courts** ☞3601

Court of Appeals reviews for abuse of discretion district court's formulation of

jury instructions and reviews de novo whether instructions accurately state law.

**12. Federal Courts** ☞3601, 3703(1)

In reviewing district court's jury instructions, Court of Appeals considers issued instructions as a whole, but reversal is not warranted if error is more probably than not harmless.

**13. Federal Courts** ☞3416(1)

When litigant in civil trial fails to object to jury instruction, Court of Appeals may review challenged jury instruction for plain error.

**14. Copyrights and Intellectual Property**  
☞83(3.1)

High degree of access to copyrighted work does not justify lower standard of proof to show substantial similarity in copyright infringement action, overruling *Three Boys Music Corp. v. Bolton*, 212 F.3d 477; *Shaw v. Lindheim*, 919 F.2d 1353; *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 883 F.3d 1111; *Smith v. Jackson*, 84 F.3d 1213; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157; *Metcalf v. Bochco*, 294 F.3d 1069; *Rice v. Fox Broad. Co.*, 330 F.3d 1170; *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620; *Williams v. Gaye*, 895 F.3d 1106.

**15. Copyrights and Intellectual Property**  
☞4.5, 12(1)

Copyright requires at least modicum of creativity and does not protect every aspect of work; ideas, concepts, and common elements are excluded. 17 U.S.C.A. § 102(b).

**16. Copyrights and Intellectual Property**  
☞12(2)

Copyright protection does not extend to common or trite musical elements, or commonplace elements that are firmly rooted in genre's tradition. 17 U.S.C.A. § 102(b).

**17. Copyrights and Intellectual Property**  
☞53(1)

To conduct copyright infringement analysis, factfinders ask whether protecti-

ble elements, standing alone, are substantially similar and disregard non-protectible elements.

**18. Copyrights and Intellectual Property**  
☞12(2)

Copyright does not protect common musical elements, such as descending chromatic scales, arpeggios, or short sequences of three notes.

**19. Copyrights and Intellectual Property**  
☞12(3)

Original work may include or incorporate elements taken from prior works or works from public domain, but any element in original work from prior works or public domain are not considered original parts and are not protected by copyright. 17 U.S.C.A. §§ 102(b), 103.

**20. Copyrights and Intellectual Property**  
☞12(1)

To warrant copyright protection, originality requires at least minimal or slight creativity—modicum of creative spark—in addition to independent creation. 17 U.S.C.A. § 102(b).

**21. Federal Courts** ☞3416(2)

Copyright owner did not preserve his objection to district court's omission of selection and arrangement instruction in copyright infringement action by timely filing proposed selection and arrangement instruction and by objecting to alleged infringer's version, where owner did not object to district court's decision to omit instruction, and there was no indication that district court would not have allowed oral objection or that such objection would have been unavailing. Fed. R. Civ. P. 51(c)(1), (c)(2)(B), 51(d)(1)(B).

**22. Federal Courts** ☞3416(1)

Under plain error review of civil jury instruction, Court of Appeals considers whether (1) there was error; (2) error was obvious; and (3) error affected substantial

rights, and even where these demanding requirements are met, decision whether to correct plain error is discretionary, typically invoked only where error seriously impaired fairness, integrity, or public reputation of judicial proceedings to prevent miscarriage of justice. Fed. R. Civ. P. 51(d)(2).

**23. Federal Courts** ☞3395

District court did not commit plain error in action alleging infringement of musical composition in omitting copyright owner's proposed instruction that selection and arrangement of unprotectable musical elements were protectable by copyright, where owner never presented selection and arrangement theory to jury, and instruction would not have convinced jury that accused work was substantially similar to deposit copy.

**24. Copyrights and Intellectual Property**  
☞12(3)

What selection and arrangement copyright protects is particular way in which artistic elements form coherent pattern, synthesis, or design.

**25. Copyrights and Intellectual Property**  
☞12(3)

Presenting combination of unprotectable elements without explaining how these elements are particularly selected and arranged amounts to nothing more than trying to copyright commonplace elements; without such arrangement, there is no liability for taking ideas and concepts from plaintiff's work, even in combination.

**26. Copyrights and Intellectual Property**  
☞12(3)

Only new combination of unprotectable elements qualifies for copyright protection. 17 U.S.C.A. § 102(b).

**27. Copyrights and Intellectual Property**  
☞12(3)

Selection and arrangement copyright is infringed only where works share, in substantial amounts, particular, i.e., the same, combination of unprotectable elements.

**28. Copyrights and Intellectual Property**

53(1)

Plaintiff asserting copyright infringement claim cannot establish substantial similarity by reconstituting copyrighted work as combination of unprotectable elements and then claiming that those same elements also appear in defendant's work, in different aesthetic context.

**29. Federal Civil Procedure** 2173

Party is not entitled to instruction based on legal theory that was not presented to jury.

**30. Copyrights and Intellectual Property**

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District court did not abuse its discretion in copyright infringement action in limiting each side to ten hours of witness time, where court was up front about limits, then gave extra time every day at counsel's request, and granted plaintiff extra time to examine defense witnesses, and plaintiff failed to establish any prejudice as result of court's limits.

**31. Evidence** 535.5

District court did not abuse its discretion in permitting defendants' expert to testify in action alleging infringement of plaintiff's copyright in musical composition, even though expert had previously analyzed similarities between sound recordings in question for subsidiary of company that was working for plaintiff's publisher, where expert had completed his analysis for subsidiary by time he was contacted by defendants' counsel, subsidiary waived any conflict and consented to defendants retaining expert, subsidiary had no interest in litigation, and there was no evidence that expert had confidential information concerning plaintiff.

**32. Copyrights and Intellectual Property**

90(1, 2)

District court did not abuse its discretion in declining to award attorney fees and costs to defendants that prevailed in

copyright infringement action, even though court determined that litigation misconduct and degree of success swung solidly in defendants' favor, and that need for compensation weighed slightly in their favor, where court found that motivation, frivolousness, and objective reasonableness weighed strongly in plaintiffs' favor. 17 U.S.C.A. § 505.

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Appeal from the United States District Court for the Central District of California, R. Gary Klausner, District Judge, Presiding, D.C. No. 2:15-cv-03462-RGK-AGR

Francis Malofiy (argued) and Alfred Joseph Fluehr, Francis Alexander LLC, Media, Pennsylvania, for Plaintiff-Appellant.

Peter J. Anderson (argued), Law Offices of Peter J. Anderson, Los Angeles, California; Helene M. Freeman, Phillips Nizer LLP, New York, New York; for Defendants-Appellees.

Edwin F. McPherson and Tracy B. Rane, McPherson Rane LLP, Los Angeles, California, for Amici Curiae 123 Songwriters, Composers, Musicians, and Producers; Nashville Songwriters Association International (NSAI); and Songwriters of North America (SONA).

Eugene Volokh, Mayer Brown LLP, Los Angeles, California; Danielle M. Aguirre and Erich C. Carey, National Music Publishers' Association, Washington, D.C.; for Amici Curiae Recording Industry Association of America and National Music Publishers Association.

Sean M. O'Connor, Center for the Protection of IP, Arlington, Virginia; Lateef Mtima and Steven D. Jamar, Institute for Intellectual Property and Social Justice, Inc.

Professor Mark A. Lemley, Stanford Law School, Center for Internet & Society,

Stanford, California, for Amici Curiae 19 Intellectual Property Professors.

Kenneth D. Freundlich, Freundlich Law, Encino, California, for Amici Curiae Musicologists.

Joseph H. Hunt, Assistant Attorney General; Nicola T. Hanna, United States Attorney; Scott R. McIntosh and Daniel Tenny, Appellate Staff; Civil Division, United States Department of Justice, Washington, D.C.; Regan A. Smith, General Counsel and Associate Register of Copyrights; Jason E. Sloan, Assistant General Counsel; Jalyce E. Mangum, Attorney-Advisor; United States Copyright Office, Washington, D.C.; for Amicus Curiae United States.

W. Michael Hensley, AlvaradoSmith, Santa Ana, California, for Amicus Curiae The Pullman Group LLC and Structured Asset Sales LLC.

Before: SIDNEY R. THOMAS, Chief Judge, and M. MARGARET McKEOWN, WILLIAM A. FLETCHER, JOHNNIE B. RAWLINSON, CARLOS T. BEA, SANDRA S. IKUTA, MARY H. MURGUIA, JACQUELINE H. NGUYEN, PAUL J. WATFORD, ANDREW D. HURWITZ and BRIDGET S. BADE, Circuit Judges.

Concurrence by Judge WATFORD; Partial Concurrence and Partial Dissent by Judge IKUTA

### OPINION

McKEOWN, Circuit Judge, with whom THOMAS, Chief Judge, FLETCHER, RAWLINSON, MURGUIA, NGUYEN, Circuit Judges, join in full, and with whom WATFORD, Circuit Judge, joins except as to Part IV.C, and with whom HURWITZ, Circuit Judge, joins except as to Parts IV.C.3 and IV.C.4, and with whom BADE, Circuit Judge, joins except as to Part IV.C.3:

*Stairway to Heaven* has been called the greatest rock song of all time. Yet, hyperbole aside, nearly 40 years after the En-

glish rock band Led Zeppelin released its hit recording, the song is not impervious to copyright challenges. The estate of guitarist Randy Wolfe claims that Led Zeppelin and its guitarist Jimmy Page and vocalist Robert Plant copied portions of *Taurus*, a song written by Wolfe and performed by his band Spirit.

This appeal stems from the jury's verdict in favor of Led Zeppelin and a finding that the two songs are not substantially similar. Like the jury, we don't need to decide whether *Stairway to Heaven* has a place in the annals of iconic rock songs. Instead, we address a litany of copyright issues, including the interplay between the 1909 and 1976 Copyright Acts, the inverse ratio rule, the scope of music copyright, and the standards for infringement.

The 1909 Copyright Act, which does not protect sound recordings, controls our analysis. The copyright at issue is for the unpublished musical composition of *Taurus*, which was registered in 1967. The unpublished work is defined by the deposit copy, which in the case of *Taurus* consists of only one page of music. We also join the majority of circuits in rejecting the inverse ratio rule and overrule our precedent to the contrary. Finally, we are not persuaded by the challenges to jury instructions and various other evidentiary and trial rulings. We affirm the district court's entry of judgment in favor of Led Zeppelin and related parties.

### BACKGROUND

Randy Wolfe, professionally known as Randy California, wrote the instrumental song *Taurus* in 1966 or 1967. He was a guitarist in the band Spirit. Spirit signed a recording contract in August 1967 and released its first eponymous album—which included *Taurus*—a few months later. Wolfe also entered into an Exclusive Songwriter's and Composer's Agreement with Hollenbeck Music Co. ("Hollenbeck"). In

December 1967, Hollenbeck registered the copyright in the unpublished musical composition of *Taurus*, listing Wolfe as the author. As required for registration of an unpublished work under the 1909 Copyright Act, which was in effect at the time, Hollenbeck transcribed *Taurus* and deposited one page of sheet music (the “*Taurus* deposit copy”), with the United States Copyright Office.

Around the same time, across the Atlantic, another rock band, Led Zeppelin, was formed by Jimmy Page, Robert Plant, John Paul Jones, and John Bonham. Led Zeppelin released its fourth album in late 1971. The untitled album, which became known as “Led Zeppelin IV,” contained the now iconic song *Stairway to Heaven*. *Stairway to Heaven* was written by Jimmy Page and Robert Plant.

It is undisputed that Spirit and Led Zeppelin crossed paths in the late 1960s and the early 1970s. The bands performed at the same venue at least three times between 1968 and 1970. Led Zeppelin also performed a cover of a Spirit song, *Fresh Garbage*. But there is no direct evidence that the two bands toured together, or that Led Zeppelin band members heard Spirit perform *Taurus*.

Wolfe passed away in 1997. After his death, Wolfe’s mother established the Randy Craig Wolfe Trust (the “Trust”)<sup>1</sup> and served as the trustee until she passed

away. Neither Wolfe nor his mother filed a suit regarding *Stairway to Heaven*. Michael Skidmore became a co-trustee of the Trust in 2006.

Fast forward forty-three years from the release of *Stairway to Heaven* to May 2014. Skidmore filed a suit alleging that *Stairway to Heaven* infringed the copyright in *Taurus*, naming as defendants Led Zeppelin, James Patrick Page, Robert Anthony Plant, John Paul Jones, Super Hype Publishing, and the Warner Music Group Corporation as parent of Warner/Chappell Music, Inc. (“Warner/Chappell”), Atlantic Recording Corporation, and Rhino Entertainment Co. (collectively “Led Zeppelin”).<sup>2</sup> One may wonder how a suit so long in the making could survive a laches defense. The Supreme Court answered this question in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, which clarified that laches is not a defense where copyright infringement is ongoing. 572 U.S. 663, 668, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014).

Skidmore alleged direct, contributory, and vicarious copyright infringement. He also sought equitable relief for a claim that he titled “Right of Attribution—Equitable Relief—Falsification of Rock n’ Roll History.” Skidmore’s claims are not based on the entire *Taurus* composition. Rather, Skidmore claims that the opening notes of *Stairway to Heaven* are substantially similar to the eight-measure passage at the beginning of the *Taurus* deposit copy:

1. Led Zeppelin does not challenge on appeal that all of Wolfe’s intellectual property rights, including the ownership interest in *Taurus*, were transferred to the Trust.
2. The case was filed in the Eastern District of Pennsylvania and later transferred to the

proper venue, the Central District of California. *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 589–90 (E.D. Pa. 2015).



The claimed portion includes five descending notes of a chromatic musical scale. These notes are represented on the piano as a set of adjacent black and white keys, from right to left. The beginning of *Stairway to Heaven* also incorporates a descending chromatic minor chord progression in A minor. However, the composition of *Stairway to Heaven* has a different ascending line that is played concurrently with the descending chromatic line, and a distinct sequence of pitches in the arpeggios, which are not present in *Taurus*.

Led Zeppelin disputed ownership, access, and substantial similarity. Led Zeppelin also alleged affirmative defenses, including independent creation, unclean hands, and laches.

At the close of discovery, Led Zeppelin moved for summary judgment. The district court granted the motion in part and denied it in part. The district court dismissed the claims against defendants John Paul Jones, Super Hype Publishing, and Warner Music Group because they had not performed or distributed *Stairway to Heaven* within the three-year statute of limitations period preceding the filing of the complaint. The district court also granted summary judgment to Led Zeppelin on Skidmore's "Right of Attribution—Equitable Relief: Falsification of Rock n'

"Roll History" claim. Although the claim was "creatively termed" and "inventive" according to the district court, a right of attribution claim under the Copyright Act extends only to visual arts.

The district court also ruled that under the 1909 Act, the scope of the copyright was circumscribed by the musical composition transcribed in the *Taurus* deposit copy. Thus, only the one-page *Taurus* deposit copy, and not a sound recording, could be used to prove substantial similarity between *Taurus* and *Stairway to Heaven*.

The district court granted Led Zeppelin's motion in limine to exclude *Taurus* sound recordings and expert testimony based on those recordings. The district court again concluded that the *Taurus* deposit copy, rather than any recordings of Spirit's performance of *Taurus*, formed the sole benchmark for determining substantial similarity. The district court found that there were triable issues of fact relating to ownership, access, substantial similarity, and damages.

Against the backdrop of these rulings, the trial lasted five days. Two key issues predominated: access to *Taurus* by Led Zeppelin band members and substantial similarity.

On the access question, the district court allowed Skidmore to play various sound

recordings of *Taurus* for Page outside of the presence of the jury. Skidmore then examined Page on access in front of the jury. Page testified that he owned “a copy of the album that contains ‘Taurus,’ . . . in [his] collection,” while denying “any knowledge of ‘Taurus.’”

The substantial similarity question pitted two expert musicologists against each other. Skidmore’s expert, Dr. Alexander Stewart, analyzed, one by one, five categories of similarities. Dr. Stewart acknowledged that a chromatic scale and arpeggios are common musical elements. But he found *Taurus* and *Stairway to Heaven* to be similar because the descending chromatic scales in the two compositions skip the note E and return to the tonic pitch, A, and the notes in the scale have the same durations. Then he pointed to three two-note sequences—AB, BC, and CF#—that appear in both compositions. In his view, the presence of successive eighth-note rhythms in both compositions also made them similar. Finally, he testified that the two compositions have the same “pitch col-

lection,” explaining that certain notes appear in the same proportions in the beginning sequence of both works.

In sum, Dr. Stewart claimed that five musical elements in combination were copied because these elements make *Taurus* unique and memorable, and these elements also appear in *Stairway to Heaven*. Skidmore’s closing argument reinforced these points. Neither Dr. Stewart nor Skidmore’s counsel argued that the categories of similarities were selected and arranged to form protectable expression in the design, pattern, or synthesis of the copyrighted work. Nor did they make a case that a particular selection and arrangement of musical elements were copied in *Stairway to Heaven*.

Led Zeppelin’s expert, Dr. Lawrence Ferrara, testified that the two compositions are completely distinct. To highlight the marked differences in the compositions, he presented the following exhibit, which juxtaposed the claimed portion of *Taurus* against *Stairway to Heaven*:<sup>3</sup>

#### MUSICAL EXAMPLE 1

Four-measure chord progressions

Top two lines = Section A in “Taurus” with note values halved

Lower two lines = Measures 1-4 in “Stairway”

Dr. Ferrara testified that the similari-

ties claimed by Skidmore either involve

<sup>3</sup>. The duration of the notes in the *Taurus* deposit copy are halved in this exhibit to

allow a side-by-side comparison of the two compositions.

unprotectable common musical elements or are random. For example, Dr. Ferrara explained that the similarity in the three two-note sequences is not musically significant because in each song the sequences were preceded and followed by different notes to form distinct melodies. He described the purported similarity based on these note sequences as akin to arguing that “crab” and “absent” are similar words because they both have the letter pair “ab.” He also testified that the similarity in the “pitch collection” is not musically meaningful because it is akin to arguing that the presence of the same letters in “senator” and “treason” renders the words similar in meaning.

At the close of trial, the district court discussed with counsel the intended jury instructions. The district court did not give the proposed instructions on the inverse ratio rule and the selection and arrangement of unprotectable elements. Skidmore objected to the district court’s decision to omit an inverse ratio instruction but did not do so as to the omitted selection and arrangement instruction.

The jury returned a verdict for Led Zeppelin. In special interrogatories, the jury found that Skidmore owned the copyright to *Taurus* and that Led Zeppelin had access to *Taurus*, but that the two songs were not substantially similar under the extrinsic test. Following the verdict, the district court entered a judgment and an amended judgment.<sup>4</sup> Skidmore did not file any post-judgment motions challenging the verdict, but timely appealed from the amended judgment.

4. The district court amended the judgment to include all defendants, including those to whom the district court granted summary judgment. Skidmore appeals from the amended judgment related to Led Zeppelin and related parties, but waived any argument regarding the defendants who prevailed at summary judgment.

Significantly, Skidmore does not make a substantial evidence claim. Instead, he focuses on a handful of legal issues, challenging: (1) the ruling that substantial similarity must be proven using the copyright deposit copy; (2) the ruling that sound recordings could not be played to prove access; (3) various jury instructions; (4) the imposition of overall time limits for the trial; (5) the fact that the full version of *Taurus* was played in response to the jury’s request; and (6) the decision not to exclude or sanction Dr. Ferrara because of a claimed conflict of interest.

Warner/Chappell filed separate motions for attorneys’ fees and costs, which the district court denied. Warner/Chappell timely cross-appealed and the two appeals were consolidated.

A panel of our court vacated the amended judgment in part and remanded for a new trial. We granted rehearing en banc.<sup>5</sup> *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018), reh’g en banc granted, 925 F.3d 999 (9th Cir. 2019).

## ANALYSIS

### I. THE 1909 COPYRIGHT ACT

The world of copyright protection for music changed dramatically during the twentieth century and those changes dictate our analysis here. The baseline issue we address is the scope of Wolfe’s copyright in the unpublished composition *Taurus*, which was registered in 1967, between the passage of the Copyright Act of 1909 (“1909 Act”) and the sweeping copyright reform adopted in the Copyright Act of

5. In connection with en banc proceedings, we received thoughtful amicus briefs from a broad array of interested groups, including intellectual property and musicology scholars; songwriters, composers, musicians, and producers; recording companies and music publishers; rights holders; and the U.S. government. We thank amici for their participation.

1976 (“1976 Act”). We conclude that the 1909 Act controls and that the deposit copy defines the scope of the *Taurus* copyright.

#### A. THE HISTORY OF COPYRIGHT PROTECTION FOR MUSICAL COMPOSITIONS AND SOUND RECORDINGS

Although it seems unthinkable today, musical compositions were not explicitly subject to copyright in the United States until 1831, when Congress added “musical composition” to the list of statutorily protected works. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1909). Thus, the “musical composition,” which was understood to be a printed form of the music, joined the statutory protection afforded to dramatic compositions, maps, charts, engraving, photographs and other works.

Between 1831 and the early 1900s, a number of machines were invented that allowed mechanical reproduction of a musical composition. *Goldstein v. California*, 412 U.S. 546, 564, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973). With the advent of player pianos at the turn of the century, the question arose whether copyright protection extended to the infringement of musical compositions by perforated piano rolls.<sup>6</sup> The Supreme Court held that the copyright statute barred the unauthorized copying of a musical composition “in intelligible notation,” but that it would be “strained and artificial” to consider musical sounds coming from an instrument to be a copy. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 17–18, 28 S.Ct. 319, 52 L.Ed. 655 (1908). Justice Holmes commented in his concurrence that “[o]n principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too

narrow, ought to be made so by a further act.” *Id.* at 20, 28 S.Ct. 319.

Congress stepped in to remedy the situation, perhaps heeding Justice Holmes’s call. The Copyright Act of 1909—landmark legislation that significantly revised copyright law—categorized mechanically-reproduced musical compositions, such as those played on player pianos and phonograph players, as “copies” of the original composition. 1909 Act, ch. 320, § 1(e), 35 Stat. 1075, 1075 (1909) (repealed 1976).

[1] The statute provided copyright protection against “any arrangement or setting of [the musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.” *Id.* Skidmore seizes on this language to argue that the new legislation extended copyright protection beyond sheet music. The text does not support this reading. Although the 1909 Act extended copyright protection against infringement beyond the mere reproduction of the sheet music, Congress did not provide that copyrighted works could be anything other than sheet music or, for an unpublished work, the musical composition transcribed in the deposit copy. 1909 Act §§ 5, 11.

The Court reinforced this principle in *Goldstein v. California* when it noted that the amendments insured that composers of *original* musical works received adequate protection, and that “records and piano rolls were to be considered as ‘copies’ of the original composition . . . , and could not be manufactured” without a specified royalty payment. 412 U.S. at 565–66, 93 S.Ct. 2303. The Court emphasized that “composers were to have no control over

6. A piano roll is “a roll, usually of paper, on which music is preserved in the form of perforations; it is recorded and played back me-

chanically on a player piano or pianola.” *Piano(la) roll*, The New Grove Dictionary of Jazz (Barry Kernfeld ed., 1994).

the recordings themselves,” which Congress considered “a component part of a machine, capable of reproducing an original composition,” or “renderings of original artistic performance.” *Id.* at 566, 93 S.Ct. 2303.

[2] Requiring more formalities than the current copyright act, the procedures for obtaining copyright protection under the 1909 Act were very specific. Registration for an unpublished musical work could be obtained “by the deposit, with claim of copyright, of one complete copy of such work” with the Copyright Office. 1909 Act § 11. In contrast, protection for a published work could be secured by affixing a copyright notice “to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor.” *Id.* § 9. Either way, distributing sound recordings did not constitute publication under the 1909 Act, so musical compositions were only published if the sheet music also was published. See *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000). Significantly, the Copyright Office did not even accept sound recordings as deposit copies. Indeed, “in order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.” 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (“Nimmer”) § 2.05[A] (2017).

Sound recordings did not become subject to copyright protection until 1972, and then only for the sound recordings fixed on or after February 15, 1972. 17 U.S.C. § 301(c). The amendment did nothing to change the requirements of the 1909 Act or the status of the *Taurus* copyright.

The copyright requirements were changed dramatically by the 1976 Copyright Act, which provided that public distribution of a sound recording qualified as publication of a musical composition. *Id.* § 101. In other words, composers could

submit a recording rather than sheet music as the deposit copy for a musical composition. The catch, for this case, is that publication before the 1978 effective date is not covered by the new statute.

#### B. THE TAURUS DEPOSIT COPY

The 1967 deposit copy of *Taurus* is a single page of sheet music. Skidmore suggests that the copyright extends beyond the sheet music; that is, the deposit copy is somehow archival in nature and more of a reference point than a definitive filing. This approach ignores the text of the statute and the purpose of the deposit.

We have outlined copyright protection under the 1909 Act as follows: “[A]n unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.” *ABKCO*, 217 F.3d at 688 (quoting *LaCienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995)). The referenced federal copyright protection for unpublished works is found in the text of the statute: “copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a . . . musical composition . . . .” 1909 Act § 11.

The text is clear—for unpublished works, the author must deposit one *complete copy* of such work. The purpose of the deposit is to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright. See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (the deposit requirement provides the “Copyright Office with sufficient material to identify the work in which the registrant claims a copyright . . . [and] prevent[s] confusion about which work the author is

attempting to register”), abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010); *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 71 (1961) (one of the purposes of the deposit is “to identify the work” being registered).

[3] Even before the 1909 Act, the Supreme Court stated that one objective of the deposit was to permit inspection by other authors “to ascertain precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561, 26 L.Ed. 854 (1881). At the time that *Taurus* was registered, the Copyright Office’s practice regarding applications to register unpublished musical compositions was to consider “writ[ing] to the applicant, pointing out that protection extends only to the material actually deposited, and suggesting that in his own interest he develop his manuscript to supply the missing element.” *Compendium of Copyright Office Practices* (“Copyright Office Compendium”) § 2.6.1.II.a (1st ed. 1967) (emphasis added). The inescapable conclusion is that the scope of the copyright is limited by the deposit copy.

The practical treatment of deposit copies underscores their importance. The 1909 Act prohibits destruction of copies of unpublished works without notice to the copyright owner. 1909 Act §§ 59–60. But tressing this protection, the Register of Copyright’s policy is to retain access to the deposit copies of unpublished works for the full copyright term. See *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* at 80–81.

The cases Skidmore cites to suggest that the content of the deposit copy may be supplemented are not instructive. See, e.g., *Washingtonian Publ'y Co. v. Pearson*, 306 U.S. 30, 41–42, 59 S.Ct. 397, 83 L.Ed. 470 (1939) (addressing the failure to promptly submit a deposit copy for a published

work); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486–87 (9th Cir. 2000) (addressing whether an incomplete deposit copy contained the “essential elements” of the musical composition such that subject matter jurisdiction was proper). Nor do the cases analyzing the 1976 Act illuminate the copyright scope question under the 1909 Act. See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009); *Nat'l Conference of Bar Exam'r's v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 482–83 (7th Cir. 1982).

Although Skidmore offers a host of reasons why adherence to the statute complicates proof in copyright cases, these arguments cannot overcome the statutory requirements. For example, Skidmore claims that it is impractical to compare a sound recording of the infringing work to a deposit copy of the infringed work, even though that is precisely what happened here, and experts for both sides were confident in their analysis. Indeed, during the trial, Skidmore’s master guitarist, Kevin Hanson, performed the *Taurus* deposit copy as he interpreted it.

Skidmore also complains that restricting protection to the deposit copy disadvantages musicians who do not read music because it can be time consuming and expensive to make an accurate deposit copy. Apparently, that was not a problem here, as Wolfe’s work was transcribed for the sheet music deposit. Digital transcription and other technological advances undercut this argument, not to mention that for decades now, sound recordings have been accepted as the deposit copy. Finally, Skidmore offers conjecture about what might happen if a deposit copy were lost or destroyed. We need not play this “what if” guessing game because the statute is clear and unambiguous.

The district court correctly concluded that under the 1909 Act, which controls the

copyright registration in this case, the *Taurus* deposit copy circumscribes the scope of the copyright. Because the deposit copy defines the four corners of the *Taurus* copyright, it was not error for the district court to decline Skidmore's request to play the sound recordings of the *Taurus* performance that contain further embellishments or to admit the recordings on the issue of substantial similarity.

## II. ELEMENTS OF COPYRIGHT INFRINGEMENT

[4] Proof of copyright infringement requires Skidmore to show: (1) that he owns a valid copyright in *Taurus*; and (2) that Led Zeppelin copied protected aspects of the work. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018) (citing *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)). Skidmore's ownership of a valid copyright in *Taurus* was not challenged on appeal.

The second prong of the infringement analysis contains two separate components: “copying” and “unlawful appropriation.” *Rentmeester*, 883 F.3d at 1117. Although these requirements are too often referred to in shorthand lingo as the need to prove “substantial similarity,” they are distinct concepts.

[5–7] Because independent creation is a complete defense to copyright infringement, a plaintiff must prove that a defendant copied the work. *Feist*, 499 U.S. at 345–46, 111 S.Ct. 1282. In the absence of direct evidence of copying, which is the case here, the plaintiff “can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying.” *Rentmeester*, 883 F.3d at 1117. This type of probative or striking similarity shows that the similarities between the two works are due to “copying rather than . . . coincidence, independent creation, or prior common

source.” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (omission in original) (quoting 4 Nimmer § 13.02[B]). A finding of such similarity may be based on the overlap of unprotectable as well as protectable elements. *Rentmeester*, 883 F.3d at 1117.

[8, 9] On the other hand, the hallmark of “unlawful appropriation” is that the works share *substantial* similarities. *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). In our circuit, we use a two-part test to determine whether the defendant's work is substantially similar to the plaintiff's copyrighted work. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). The first part, the extrinsic test, compares the objective similarities of specific expressive elements in the two works. *Id.* Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, “it is essential to distinguish between the protected and unprotectable material in a plaintiff's work.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). The second part, the intrinsic test, “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)). Both tests must be satisfied for the works to be deemed substantially similar. See *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

## III. EVIDENTIARY CHALLENGE—THE COPYING PRONG OF INFRINGEMENT

[10] At trial, one of Skidmore's key arguments was that Led Zeppelin members heard either performances or recordings of *Taurus* before creating *Stairway to*

*Heaven*, and thus had access for purposes of copying the music. To prove that point, Skidmore wanted to play several recordings of *Taurus* during the testimony of Jimmy Page, claiming that *observing* Page *listening* to the recordings would have enabled the jury to evaluate his demeanor with respect to access. Skidmore's counsel explained that the recordings could be offered to prove access, even if the court excluded them for proving substantial similarity. The district court determined that although the sound recordings were relevant to prove access, Skidmore's approach would be "too prejudicial for the jury" because it risked confusing access with substantial similarity. Hence the court excluded the recordings under Federal Rule of Evidence 403. The court instead permitted Skidmore's counsel to play the recordings for Page outside the presence of the jury and then question him about the recordings in front of the jury.

Skidmore's position is a curious one and defies common sense. There would have been very little, if any, probative value in watching Page's reaction to *listening* to *Taurus* at the trial in 2016 to prove access to the song half a century ago. To prevent the jury from making an erroneous comparison for determining substantial similarity, the court properly excluded the sound recording, which contains performance elements that are not protected by the *Taurus* deposit copy. Indeed, the court's exclusion ruling displayed a clear understanding of the distinct components of copying and unlawful appropriation, letting the evidence in "as far as access," but "not . . . to compare the performance" to *Stairway to Heaven*.

In any event, the evidentiary question is moot. It turns out Skidmore's examination of Page on access proved fruitful. When Page testified, he candidly admitted to owning "a copy of the album that contains 'Taurus,' . . . in [his] collection," though

still denying "any knowledge of 'Taurus.'" The jury found that both Page and Plant "had access to the musical composition *Taurus* before *Stairway to Heaven* was created." Once the jury made that finding, the remaining questions on the jury verdict form related to substantial similarity of the works.

In answer to the question of whether "original elements of the musical composition *Taurus* are extrinsically similar to *Stairway to Heaven*," the jury said no. Because the extrinsic test was not satisfied, the jury did not reach the intrinsic test. Although these findings ended the jury's copyright analysis, Skidmore also challenges various trial rulings.

#### IV. THE JURY INSTRUCTION CHALLENGES

[11–13] Three jury instructions are at issue in this appeal: (1) the failure to give an inverse ratio rule instruction; (2) the sufficiency of the court's originality instructions; and (3) the failure to give a selection and arrangement instruction. We review for abuse of discretion the district court's formulation of the instructions and review *de novo* whether the instructions accurately state the law. *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 941 (9th Cir. 2011). We consider the issued instructions as a whole, but reversal is not warranted if "the error is more probably than not harmless." *Swin-ton v. Potomac Corp.*, 270 F.3d 794, 802, 805 (9th Cir. 2001) (quoting *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992)). "[W]hen a litigant in a civil trial fails to object to a jury instruction, we may review the challenged jury instruction for plain error." *Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015).

##### A. THE INVERSE RATIO RULE

Copyright infringement cases often boil down to the crucial question of substantial similarity. We have stated that "substan-

tial similarity is inextricably linked to the issue of access,” and have adhered to “what is known as the ‘inverse ratio rule,’” which requires “a lower standard of proof of substantial similarity when a high degree of access is shown.” *Three Boys Music*, 212 F.3d at 485 (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). That is, “the stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying.” *Rentmeester*, 883 F.3d at 1124.

[14] Skidmore proposed an inverse ratio rule instruction, but the court chose not to give the instruction. The court reaffirmed this decision when Skidmore raised the question again after the close of testimony: “We’re not going to give that instruction.” Because the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary. See e.g., *Three Boys Music*, 212 F.3d at 485–86; *Shaw v. Lindheim*, 919 F.2d 1353, 1361–62 (9th Cir. 1990).

The circuits are split over the inverse ratio rule, but the majority of those that have considered the rule declined to adopt it. The Second, Fifth, Seventh, and Eleventh Circuits have rejected the rule. *Peters v. West*, 692 F.3d 629, 634–35 (7th Cir. 2012) (noting that the circuit has never endorsed the idea that “a ‘high degree of access’ justifies a ‘lower standard of proof for similarity’”); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 371 (5th Cir. 2004) (acknowledging the rule but explicitly not adopting it), *abrogated on other grounds by Reed Elsevier*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18; *Beal v. Paramount Pictures Corp.*, 20

7. The Federal Circuit has applied the rule, but only because it “applies copyright law as interpreted by the regional circuits, in this case

F.3d 454, 460 (11th Cir. 1994); *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961). Only our circuit and the Sixth Circuit have endorsed it.<sup>7</sup> See *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004); see also *Peters*, 692 F.3d at 634 (similarly describing the split).

But even within our circuit, our embrace and application of the rule have had a “checkered application.”<sup>4</sup> Nimmer § 13.03[D]. The very nature of the rule spawned uncertainty in its application. We first articulated the rule in 1977, holding that the high “degree of access” present in that case “justify[d] a lower standard of proof to show substantial similarity,” though “[n]o amount of proof of access will suffice to show copying if there are no similarities.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977), superseded on other grounds by 17 U.S.C. § 504(b). In its next breath, the court in *Krofft* admitted that “it is impossible to quantify this standard,” so it is unsurprising that the court was unclear—failing to explain whether the rule applied to the actual copying or unlawful appropriation prong of the infringement analysis. *Id.*; see David Aronoff, *Exploding the “Inverse Ratio Rule”*, 55 J. Copyright Soc’y U.S.A. 125, 136 (2008) (“[T]he court [in *Krofft*] was confused as to whether the [inverse ratio rule] applied to the element of actual copying or unlawful appropriation . . . ”).

A decade later, we reversed course and distanced ourselves from *Krofft*, relying on the Second Circuit’s rejection of the inverse ratio rule in *Arc Music*. See *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987). According to *Aliotti*, because the rule “ha[d] been employed by no Ninth Circuit case since *Krofft* and had been earlier criticized for ‘confus[ing] and even

. . . the Ninth Circuit.’” *Amini Innovation Corp. v. Anthony Cal., Inc.*, 439 F.3d 1365, 1368–69 (Fed. Cir. 2006).

conceal[ing] the requirement of substantial similarity,” the court declined to “address the continuing viability of” the rule. *Id.* (alteration in original) (quoting *Arc Music*, 296 F.2d at 187–88). But *Aliotti* was a momentary detour. We later returned to the inverse ratio rule and, in a series of cases throughout the 1990s and early 2000s, applied it in confusing ways.

Revitalizing *Krofft*, we several times affirmed that the rule guided our analysis of similarity. *See, e.g., Three Boys Music*, 212 F.3d at 485–86; *Smith*, 84 F.3d at 1218 & n.5; *Shaw*, 919 F.2d at 1361–62. Even so, we did not explain *how* to apply the rule. *See Aronoff, supra*, at 137 (applying the rule in the context of the unlawful appropriation analysis, “the court did not articulate how [access] is to be considered, or the weight it is to be given”).

The lack of clear guidance is likely due in no small part to our use of the term “substantial similarity,” both in the context of copying and unlawful appropriation, muddying the waters as to what part of the infringement analysis the rule applies. *See* 3 William F. Patry, *Patry on Copyright* (“Patry”) § 9.91 (2017) (“The inverse ratio theory confuses fundamental principles of infringement analysis: access is relevant only in establishing the act of copying, not in establishing the degree thereof. Once copying is established, access is irrelevant and the inquiry shifts to the final stage of the infringement analysis, material appropriation.”). In *Rentmeester*, we pointed out the term’s dual use and ultimately stated that the inverse ratio rule “assists only in proving copying, not in proving unlawful appropriation.” 883 F.3d at 1124.

Capping off this period of expansion, we even pushed past the rule’s outer limits set forth in *Krofft*, *i.e.*, that “[n]o amount of

proof of access will suffice to show copying if there are no similarities.” 562 F.2d at 1172. In *Metcalf v. Bochco*, though we did not explicitly name the rule, we held that because access was not disputed, we “could easily infer that the many [generic] similarities between [the works] were the result of copying, not mere coincidence.” 294 F.3d 1069, 1074–75 (9th Cir. 2002).

Confusion followed in *Metcalf*’s wake. In one case, we tried to cabin *Metcalf* to cases where there was a clear “concession of access.” *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178–79 (9th Cir. 2003). In other cases, where access was assumed (though not conceded), we “side-stepped” *Metcalf* and held that the similarities between works were insufficient to support a conclusion of copying. *Aronoff, supra* at 139; *see e.g., Funky Films*, 462 F.3d at 1081 n.4; *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010). The result?—confusion about when to apply the rule and the amount of access and similarity needed to invoke it.

Our jurisprudence in recent years brought additional uncertainty. In 2000, we circumscribed the rule by explaining that it is not a two-way street: while the rule “requires a lesser showing of substantial similarity if there is a strong showing of access,” it does not mean that “a weak showing of access requires a stronger showing of substantial similarity.” *Three Boys Music*, 212 F.3d at 486. In 2018, it seems, the rule goes both ways: it also provides that the “more compelling the similarities supporting an inference of copying, the less compelling the evidence of access need be.” *Rentmeester*, 883 F.3d at 1124.<sup>8</sup> In the face of tangled precedent, the *Rentmeester* panel tried to carefully thread the needle, but ended up adding another indecipherable stitch.

8. The Ninth Circuit Model Jury Instructions Copyright § 17.17 (2017)—Copying—Access and Substantial Similarity—and the *Supple-*

*mental Instruction* suffer from similar infirmities in trying to reconcile the case law.

Just two years ago, we again sowed doubt whether the rule ought to apply at all. In *Williams v. Gaye*, which dealt with the song *Blurred Lines*, the majority initially defended use of the rule against the dissent's criticism because the rule is "binding precedent" that "we are bound to apply." 885 F.3d 1150, 1163 n.6 (9th Cir. 2018). But in an amended opinion, the court deleted all references to the rule. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). One commentator posited the rule was excised because it "is so controversial." Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. Cal. L. Rev. Postscript 67, 75 n.22 (2018).

As we struggled with the inverse ratio rule over the years, the Second Circuit rejected it as early as 1961, describing the idea as a "superficially attractive apophthegm which upon examination confuses more than it clarifies." *Arc Music*, 296 F.2d at 187. The court reasoned that "access will not supply [similarity's] lack, and an undue stress upon that one feature can only confuse and even conceal this basic requirement." *Id.* at 187–88. Importantly, the Second Circuit noted that there is "no such principle" in "the federal law of copyright." *Id.* at 187.

The Second Circuit also identified the problematic implications of this principle where access is very high and similarity very low: "[t]he logical outcome of the claimed principle is obviously that proof of actual access will render a showing of similarities entirely unnecessary." *Id.* However, "it does not follow that 'more' access increases the likelihood of copying." Aronoff, *supra*, at 126. Yet that is what the rule compels. Complete access without any similarity should never result in infringement liability because there is no infringement. Even so, the rule suggests that liability may be imposed in such a case.

"There is," however, "simply no logic in presupposing that the mid-points of [the rule] give rise to a 'ratio' of access to similarity constituting proof of" infringement. *Id.* at 141. Indeed, even "[w]hen the inverse ratio rule is applied, we still don't know how much similarity is required." Patry § 9.91.

The flaws in the rule can be seen in the inconsistent ways in which we have applied the rule within our circuit, the logic of the circuits that have rejected the rule, and analysis by academics and commentators. See *id.* ("There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.").

As a practical matter, the concept of "access" is increasingly diluted in our digitally interconnected world. Access is often proved by the wide dissemination of the copyrighted work. See *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). Given the ubiquity of ways to access media online, from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand. See Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. Times, Nov. 18, 2019 (In addition to Netflix, which "entertain[s] more than 158 million subscribers worldwide," there are currently "271 online video services available in the United States").

To the extent "access" still has meaning, the inverse ratio rule unfairly advantages those whose work is *most* accessible by lowering the standard of proof for similarity. Thus the rule benefits those with highly popular works, like *The Office*, which are also highly accessible. But nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.

Finally, the inverse ratio rule improperly dictates how the jury should reach its decision. The burden of proof in a civil case is preponderance of the evidence. Yet this judge-made rule could fittingly be called the “inverse burden rule.”

Although we are cautious in overruling precedent—as we should be—the constellation of problems and inconsistencies in the application of the inverse ratio rule prompts us to abrogate the rule. Access does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work. By rejecting the inverse ratio rule, we are not suggesting that access cannot serve as circumstantial evidence of actual copying in all cases; access, however, in no way can prove substantial similarity. We join the majority of our sister circuits that have considered the inverse ratio rule and have correctly chosen to excise it from copyright analysis. In light of this holding, the district court did not err in failing to instruct the jury on the inverse ratio rule.

#### B. THE ORIGINALITY INSTRUCTIONS

Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality. *Feist*, 499 U.S. at 345, 111 S.Ct. 1282 (“The *sine qua non* of copyright is originality”; “[t]he vast majority of works make the grade quite easily . . .”); *see also* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship . . .”).

[15, 16] Even in the face of this low threshold, copyright *does* require at least a

9. By filing proposed originality instructions and objecting to Led Zeppelin’s versions, Skidmore preserved his objection to the originality instructions given by the district court. *See* Fed. R. Civ. P. 51(c)(1); C.D. Cal. Local Rule 51-1, -5.

10. Jury Instruction No. 16 reads in full as follows:

modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. *See* 17 U.S.C. § 102(b); *Feist*, 499 U.S. at 345–46, 111 S.Ct. 1282. Nor does copyright extend to “common or trite” musical elements, *Smith*, 84 F.3d at 1216 n.3, or “commonplace elements that are firmly rooted in the genre’s tradition,” *Williams*, 895 F.3d at 1140–41 (Nguyen, J., dissenting). These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author. *See Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (“[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law”). Authors borrow from predecessors’ works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works. *See id.* at 813 (“we must be careful in copyright cases not to cheat the public domain”); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (“General ideas . . . remain forever the common property of artistic mankind.”); 1 Nimmer § 2.05[B] (“In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.”). With these background principles in mind, we review the district court’s instructions on originality, Nos. 16 and 20.<sup>9</sup>

Jury Instruction No. 16 explained “what a copyright is, what it protects, and what it does not protect.”<sup>10</sup> Relevant to this ap-

Plaintiff has filed a claim against Defendants for violation of the United States Copyright Act, which governs this case. In order for you to undertake your responsibility, you must know what a copyright is, what it protects, and what it does not protect.

peal, the instruction provided that “[c]opyright only protects the author’s original expression in a work.” This statement comes straight from the Supreme Court’s opinion in *Feist*. The instruction went on to state that copyright “does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.” Although this statement is derived from *Smith*, Skidmore objects to the list of unprotectable elements. In particular, he argues that characterizing the “descending chromatic scales, arpeggios or short sequence of three notes” as examples of “common musical elements” was prejudicial to him.

To put this instruction in context, it is useful to outline the essence of the “common musical elements” or building blocks. The chromatic scale is one of two principal scales in Western music. It consists of twelve pitches separated by a half-step. On a piano, this means playing the white and black keys in order from left to right. Three or more notes or pitches sounded simultaneously are called chords, and an arpeggio, sometimes called a broken chord, is “[a] chord whose pitches are sounded successively, . . . rather than simultaneously.” *Arpeggio, Chromatic, and Chord, Harvard Dictionary of Music* (Don Michael Randel ed., 4th ed. 2003).

[17, 18] To conduct a copyright infringement analysis, the factfinders ask “whether ‘the *protectible elements, stand-*

Copyright confers certain exclusive rights to the owner of a work including the rights to:

1. Reproduce or authorize the reproduction of the copyrighted work;
2. Prepare derivative works based upon the copyrighted work;
3. Distribute the copyrighted work to the public; and
4. Perform publicly a copyrighted musical work.

*ing alone*, are substantially similar’” and “disregard the non-protectible elements.” *Cavalier*, 297 F.3d at 822 (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)); see *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994) (same). Jury Instruction No. 16 correctly listed non-protectable musical building blocks that no individual may own, and did not, as Skidmore claims, exclude the particular use of musical elements in an original expression.

For example, despite Skidmore’s challenge to the characterization of descending chromatic scales as unprotectable, even his own expert musicologist, Dr. Stewart, agreed musical concepts like the minor chromatic line and the associated chords have been “used in music for quite a long time” as “building blocks.” This candid acknowledgement was echoed by Led Zeppelin’s expert. Dr. Ferrara described the “chromatic scale, descending or ascending,” as “a musical building block. This is something that no one can possibly own.” The commonality of descending scales and arpeggios has been reinforced by the Copyright Office, which lists “[d]iatonic or chromatic scales” and “arpeggios” as common property musical material. *Copyright Office Compendium* § 802.5(A) (3d ed. 2017). Emphasizing the importance of original creation, the Copyright Office notes that “a musical work consisting entirely of common property material would not constitute original authorship.” *Id.* Just as we

Copyright only protects the author’s original expression in a work and does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.

Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.

do not give an author “a monopoly over the note of B-flat,” descending chromatic scales and arpeggios cannot be copyrighted by any particular composer. *Swirsky*, 376 F.3d at 851.

We have never extended copyright protection to just a few notes. Instead we have held that “a four-note sequence common in the music field” is not the copyrightable expression in a song. *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976). In the context of a sound recording copyright, we have also concluded that taking six seconds of the plaintiff’s four-and-a-half-minute sound recording—spanning three notes—is de minimis, actionable copying. *See Newton*, 388 F.3d at 1195–96. One of our colleagues also expressed skepticism that three notes used in a song can be copyrightable by observing that of the “only 123 or 1,728 unique combinations of three notes,” not many would be useful in a musical composition. *See Williams*, 895 F.3d at 1144 n.6 (Nguyen, J., dissenting). The Copyright Office is in accord, classifying a “musical phrase consisting of three notes” as de minimis and thus not meeting the “quantum of creativity” required under *Feist*. *Copyright Office Compendium*, § 313.4(B) (3d ed. 2017). At the same time, we have not foreclosed the possibility that “seven notes” could constitute an original expression. *Swirsky*, 376 F.3d at 852. To the contrary, our sister circuit observed decades ago that “the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes.” *Arnestine v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936).

In view of our precedent and accepted copyright principles, the district court did not commit a reversible error by instructing the jury that a limited set of a useful three-note sequence and other common musical elements were not protectable.

The district court also instructed the jury on copyright originality in Jury Instruction No. 20, which states:

An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff’s work is limited to the part created:

1. independently by the work’s author, that is, the author did not copy it from another work; and
2. by use of at least some minimal creativity.

[19] Despite Skidmore’s claim that the following language has no support in the law and was prejudicial—“any element from prior works or the public domain are not considered original parts and not protected by copyright”—this is black-letter law. *See* 17 U.S.C. §§ 102(b), 103. Reading this sentence with the preceding one—an “original work may include or incorporate elements taken from prior works or works from the public domain”—we conclude that Jury Instruction No. 20 correctly instructed the jury that original expression can be the result of borrowing from previous works or the public domain.

[20] Skidmore appears to want less than the law demands. In his closing and on appeal, he argued that a work is original as long as it was independently created. Not quite. Though not demanding, originality requires at least “minimal” or “slight” creativity—a “modicum” of “creative spark”—in addition to independent creation. *Feist*, 499 U.S. at 345–46, 362, 111 S.Ct. 1282. Jury Instruction No. 20 correctly articulated both requirements for originality, that the work be created “independently by the work’s author,” and con-

tain “at least some minimal creativity.” The court’s omission of the optional, bracketed language from the Ninth Circuit Model Jury Instruction 17.14 (2017)—which reads, “In copyright law, the ‘original’ part of a work need not be new or novel”—was not a reversible error. The reference to “minimal creativity” in Jury Instruction No. 20 embraces this concept. Reviewing the jury instructions as a whole, we conclude that the originality instructions were sound and were not prejudicial to Skidmore.

### C. THE OMISSION OF A SELECTION AND ARRANGEMENT INSTRUCTION

#### 1. Skidmore Forfeited His Objection to the Omitted Selection and Arrangement Instruction

The district court did not give what Skidmore denominates as a “selection and arrangement” instruction. Because Skidmore did not preserve his objection to the omission, we review for plain error.

[21] Skidmore maintains that his objection was preserved by the timely filing of a proposed selection and arrangement instruction and by objecting to Led Zeppelin’s version. Not so. Federal Rule of Civil Procedure 51(d)(1)(B) provides that “a failure to give an instruction” must be both “properly requested . . . and . . . also properly objected [to].” An objection must be made “on the record,” “promptly after learning that the instruction or request will be . . . refused.” Fed. R. Civ. P. 51(c)(1), (c)(2)(B). Skidmore may have requested a selection and arrangement instruction, but he did not object to the district court’s decision to omit the instruction. In other words, Skidmore’s proffer of the instruction was necessary but not sufficient to preserve the objection. See *United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1184 (9th Cir. 1989) (objection waived where “counsel offered the . . . proposed instructions” but “no objection was

made to the failure to give them”); *Monroe v. City of Phoenix*, 248 F.3d 851, 858 (9th Cir. 2001) (objection waived where counsel “simply submitted a proposed jury instruction” but “failed to properly object at trial to the failure to give the proposed instruction”), abrogated on other grounds by *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

Nor is this the type of situation where “it is obvious that in the process of settling the jury instructions the court was made fully aware of the objections of the party and the reasons therefor and further objections would be unavailing.” *Reed*, 884 F.2d at 1184. According to Skidmore, he could not object to the refused instruction because the district court forbade oral objections. The record tells a different story. Skidmore’s myriad other objections, all allowed by the district court, undermine his account of the procedure at trial. For example, Skidmore requested the omission of an instruction on a topic not presented to the jury; objected to the wording of several jury instructions; and proposed a new jury instruction. The court’s response was to entertain extensive discussion from the parties about the instructions, letting them state their objections “for the record.” Further, the court asked Skidmore to draft the proposed new instruction and bring it in the next day.

A parallel omission situation is illuminating. Skidmore objected to the court’s refusal to include a jury instruction on the inverse ratio rule. The judge overruled that objection without suggesting that he would not entertain others. Indeed, when raising the inverse-ratio objection, counsel said “one last thing,” implying that he had no other objections. In contrast, Skidmore did not object to the court’s refusal to include a jury instruction on selection and arrangement during the extensive discussion counsel and the court had on jury instructions. Nor did Skidmore object to

the omission of the selection and arrangement instruction before the jury was summoned the next morning.

Skidmore was responsible for compiling the court's final instructions, so he was well aware of what instructions were included and omitted. The court affirmatively engaged with Skidmore when he wanted to "make sure" that certain instructions had been included. Although Skidmore argues that the selection and arrangement theory was central to his infringement case, his conspicuous silence on the omission of what he claims to be a crucial instruction cannot be squared with the court's willingness to discuss specific instructions. On this record, it was not "obvious" that an objection to the failure to give a selection and arrangement instruction would be "unavailing."

In any case, there is a real possibility that the district court simply overlooked the instruction, and would have been willing to give one had the omission been brought to its attention. But absent notice and an objection, the district court cannot be expected to divine an objection to an omitted instruction. We do not impose such prescience on the district court in the face of the complicated, and often hurried, process of producing a final set of instructions. We noted long ago that the district court need not "rummage through . . . proposed instructions in an effort to discover potential objections to instructions not . . . given . . ." *Bertrand v. S. Pac. Co.*, 282 F.2d 569, 572 (9th Cir. 1960). By not putting the district court on notice of an objection to a refused instruction, Skidmore forfeited his objection. Therefore, we apply plain error review. Fed. R. Civ. P. 51(d)(2).

## 2. The District Court Did Not Commit a Plain Error in Omitting the Instruction

[22] Because Skidmore did not preserve his objection, we review the omission

of a selection and arrangement instruction for "a plain error in the instructions . . . if the error affects substantial rights." Fed. R. Civ. P. 51(d)(2); *see Chess*, 790 F.3d at 970. Under plain error review of a civil jury instruction, we consider whether "(1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights." *C.B. v. City of Sonora*, 769 F.3d 1005, 1018 (9th Cir. 2014) (en banc). Even where these demanding requirements are met, "the decision whether to correct a plain error under Federal Rule of Civil Procedure 51(d)(2) is discretionary," typically invoked only where "the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings" "to prevent a miscarriage of justice." *Id.* at 1018–19.

[23] Even if there was an error in not giving the instruction, and even assuming the error was plain, we cannot conclude that it produced a miscarriage of justice. The district court did not err in withholding the studio version of *Taurus* from the jury. A selection and arrangement instruction would not have convinced the jury that *Stairway to Heaven* was substantially similar to the deposit copy of *Taurus*. Therefore, the failure to give the selection and arrangement instruction cannot have "likely prejudiced the outcome of the case," or "seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Hoard v. Hartman*, 904 F.3d 780 787 (9th Cir. 2018) (internal quotation marks omitted). We may also take "into consideration 'the costs of correcting [the] error,'" *id.* (quoting *C.B.*, 769 F.3d at 1018), and that factor clearly supports letting the jury verdict stand. This case involved a lengthy trial, and there is little reason to have another trial that Skidmore cannot win.

"Rare is the case where the district court's errors are so grave as to 'seriously

impair[ ] the fairness, integrity, or public reputation of judicial proceedings.’’ *Id.* at 791 (alteration in original) (quoting *C.B.,* 769 F.3d at 1019); *see also Teixeira v. Town of Coventry ex rel. Przybyla*, 882 F.3d 13, 18 (1st Cir. 2018) (describing such errors as “hen’s-teeth rare”). This is not such a case. The district court did not commit a plain error in deciding not to give a selection and arrangement instruction.

### 3. Skidmore Did Not Present a Selection and Arrangement Theory

Finally, we conclude that the district court did not commit any error. The fatal flaw in Skidmore’s argument that he was entitled to a selection and arrangement instruction is that he did not present that as a separate theory at trial. To be sure, a copyright plaintiff may argue “infringement . . . based on original selection and arrangement of unprotected elements.” *Metcalf*, 294 F.3d at 1074 (quoting *Apple Computer*, 35 F.3d at 1446). The supposed centrality of a selection and arrangement theory is belied by the trial record. Skidmore never once used the words “selection” or “arrangement” during trial. But we do not rest our discussion on invocation of copyright vernacular; more importantly, Skidmore never presented the argument to the jury. Nowhere did Skidmore argue that the claimed elements were selected and arranged in a particular way to create the resulting four-bar passage in Section A of the musical composition in *Taurus*. Nor was there a word in Skidmore’s closing about the selection and arrangement theory. Notably, our decision here is based on the trial evidence and not an appellate adjudication of copyrightability.

At trial, Skidmore’s copyright infringement claim was based on the combination of five elements: minor chromatic line and associated chords; duration of pitches of minor chromatic line; melody placed over

the descending chromatic line consisting of combination of arpeggios and two-note sequences; rhythm of steady eighth note beats; and pitch collection.

Skidmore and his expert underscored that the presence of these five musical components makes *Taurus* unique and memorable: *Taurus* is original, and the presence of these same elements in *Stairway to Heaven* makes it infringing. This framing is not a selection and arrangement argument. Skidmore never argued how these musical components related to each other to create the overall design, pattern, or synthesis. Skidmore simply presented a garden variety substantial similarity argument. Yet, Skidmore relies on the handful of times that his expert musicologist, Dr. Stewart, referred to the “unique and memorable” parts of the *Taurus* composition as a “combination” to argue that he made a selection and arrangement argument at trial, though not even this “combination” characterization was included in his closing.

[24] Semantics do not characterize legal arguments—substance does. Skidmore does not contest that the selection and arrangement must itself be original to merit copyright protection. *See Feist*, 499 U.S. at 358, 111 S.Ct. 1282. We have extended copyright protection to “a combination of unprotectable elements . . . only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava*, 323 F.3d at 811. Put another way, what a selection and arrangement copyright protects is the *particular* way in which the artistic elements form a coherent pattern, synthesis, or design. *See L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 850–51 (9th Cir. 2012) (“original selection, coordination, and arrangement” that result in the overall “design” are protecta-

ble); *Metcalf*, 294 F.3d at 1074 (“Each note in a scale . . . is not protectable, but a pattern of notes in a tune may earn copyright protection.”); *United States v. Hamilton*, 583 F.2d 448, 452 (9th Cir. 1978); *see also Feist*, 499 U.S. at 350–51, 111 S.Ct. 1282; *Rentmeester*, 883 F.3d at 1119.

[25] Skidmore and his experts never argued to the jury that the claimed musical elements cohere to form a holistic musical design. Both Skidmore’s counsel and his expert confirmed the separateness of the five elements by calling them “five categories of similarities.” These disparate categories of unprotectable elements are just “random similarities scattered throughout [the relevant portions of] the works.” *Shaw*, 919 F.2d at 1362 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)). Labeling them a “combination” of unprotectable elements does not convert the argument into a selection and arrangement case.<sup>11</sup> Skidmore’s selection and arrangement argument fails because a copyright plaintiff “d[oes] not make an argument based on the overall selection and sequencing of . . . similarities,” if the theory is based on “random similarities scattered throughout the works.” *Metcalf*, 294 F.3d at 1074–75 (quoting *Cavalier*, 297 F.3d at 825); *see also Litchfield*, 736 F.2d at 1356 (same). Presenting a “combination of unprotectable elements” without explaining how these elements are particularly selected and arranged amounts to nothing more than trying to copyright commonplace elements. *Satava*, 323 F.3d at 811–12. Without such arrangement, there is no liability for taking “ideas and concepts” from the plaintiff’s work, “even

11. Skidmore misconstrues *Swirsky*’s observation that we have upheld “a jury finding of substantial similarity based on the combination of five otherwise unprotectable elements.” 376 F.3d at 849. There, the court was trying to fathom which aspects of a musical composition can be used for a similarity anal-

in combination.” *Rentmeester*, 883 F.3d at 1122–23.

[26] Skidmore misconstrues what the copyright law means by a “combination,” “compilation,” and “selection and arrangement” of unprotectable elements. The word “combination” cannot mean any “set” of artistic building blocks. We have explained that only the “new combination,” that is the “novel arrangement,” *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) (emphasis added), and not “any combination of unprotectable elements . . . qualifies for copyright protection,” *Satava*, 323 F.3d at 811. Likewise, a protectable “compilation” is the precise “result[ ]” that is “formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged.” 17 U.S.C. § 101.

[27, 28] Therefore, a selection and arrangement copyright is infringed only where the works share, in substantial amounts, the “particular,” i.e., the “same,” combination of unprotectable elements. *Feist*, 499 U.S. at 349, 350–51, 111 S.Ct. 1282. A plaintiff thus cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work, in a different aesthetic context. Because many works of art can be recast as compilations of individually unprotected constituent parts, Skidmore’s theory of combination copyright would deem substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same

ysis, given that no definitive list of musical elements existed in the case law. Properly read, *Swirsky* left open the possibility that five or more different musical elements may be analyzed for a substantial similarity analysis, not that a set of five musical elements is always sufficient to find infringement. *Id.*

notes, words, or colors. We have already rejected such a test as being at variance with maintaining a vigorous public domain. *See, e.g., Shaw*, 919 F.2d at 1362–63.

To the extent Skidmore's combination theory was meant to encompass or be a variation on the theme of the selection and arrangement claim, the jury was adequately instructed, as noted below. To the extent Skidmore now claims the selection and arrangement theory was a separate claim, he never articulated that theory at trial. But, in any event, any omission was not in error. The trial court was not compelled to give the instruction, nor did it really matter in the end in light of the evidence and the jury's finding that the relevant portions of the songs were not substantially similar.

[29] Ultimately, failure to properly invoke a selection and arrangement argument is a death knell for Skidmore's request for a selection and arrangement instruction. He is not entitled to an instruction based on a legal theory that

**12.** That both Skidmore and Led Zeppelin proposed their own version of a selection and arrangement instruction does not affect whether the district court was required to instruct the jury on the selection and arrangement theory. This just reflects the common practice of proposing, such as in this case several months ahead of trial, broad sets of jury instructions, trial exhibits, and witness lists that may cover an argument presented at trial. The court's ultimate decision on instructions depends on the proof at trial.

**13.** Led Zeppelin and several amici have argued that even if Skidmore is entitled to a selection and arrangement instruction, the standard to determine unlawful appropriation under this theory is "virtual identity," not substantial similarity. We do not need to reach this issue because, as noted above, Skidmore has not made a sufficiency of evidence argument. But to be clear, we do not recognize a separate, heightened standard for proving actionable copying. The standard is always substantial similarity. Of course the degree of overlap in original expression that

was not presented to the jury. *See Roberts v. Spalding*, 783 F.2d 867, 873 (9th Cir. 1986) ("[T]he district court was under no duty to submit to the jury proposed instructions that contain . . . a theory not supported by the evidence . . .").<sup>12</sup> The district court committed no error by declining to instruct the jury on selection and arrangement.<sup>13</sup>

#### 4. The Jury Instructions Fairly Covered Skidmore's Theory

Even though the district court did not instruct the jury on selection and arrangement, its instructions, as a whole, fairly and adequately covered Skidmore's argument for extrinsic similarity between *Taurus* and *Stairway to Heaven*. As discussed above, Jury Instruction No. 20 explained to the jury that an "original work may include or incorporate elements taken from prior works or works from the public domain," and that the "original part" of the work only requires "minimal creativity" by the author. This instruction was immedi-

is required for the similarity to be substantial is determined by the range of possible protectable expression. *See Apple Comput.*, 35 F.3d at 1443. More similarities are required to infringe if the range of protectable expression is narrow, because the similarities between the two works are likely to cover public domain or otherwise unprotectable elements. *See Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010). Thus, for works where there is a narrow range of available creative choices, the defendant's work would necessarily have to be "virtually identical" to the plaintiff's work in order to be substantially similar. We have at times described this result as the work having a "thin" copyright. *E.g., Apple Comput., Inc.*, 35 F.3d at 1446–47; *see also Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989) ("A factual compilation receives only limited copyright protection."). A selection and arrangement copyright is not always thin. *Compare L.A. Printex Indus.*, 676 F.3d at 850 (broad selection and arrangement copyright) with *Satava*, 323 F.3d at 811 (thin selection and arrangement copyright).

ately followed by Jury Instruction No. 21, which explained that the taking of “original material protected by the copyright” in “significant” amounts constituted infringement. Accordingly, to determine whether the *Taurus* deposit copy was substantially similar to the musical composition of *Stairway to Heaven*, the jury needed to determine whether “any . . . musical elements that are original to Taurus . . . also appear in *Stairway to Heaven*.” The instructions fairly and adequately covered Skidmore’s sole argument on substantial similarity, *i.e.*, that there were “five things that these two songs ‘Taurus’ and ‘Stairway to Heaven’” shared.

## V. VARIOUS REMAINING CHALLENGES

### A. TRIAL TIME LIMITS

Based on pretrial proceedings and the scope of proposed testimony, before trial began, the district court advised the parties that each side would have ten hours of witness time. Neither party objected. Skidmore now complains the court’s inflexibility was a due process violation. During Led Zeppelin’s case in chief, the court advised that Skidmore’s counsel was exceeding his time limits. Skidmore requested “a little bit of leeway in getting additional time.” When the court gave Skidmore ten additional minutes for cross-examination of each of Led Zeppelin’s remaining witnesses, Skidmore’s counsel said, “[t]hat’s fair.” After Led Zeppelin concluded its case, Skidmore requested leave to call two rebuttal witnesses, though he did not identify them. There was no offer of proof and the request was denied.

[30] The district court was not inflexible or unforgiving. Skidmore’s counsel was warned during the trial that he was getting into “all kinds of background information and things that really aren’t relevant to this case.” The court gave extra time every day and in granting Skidmore extra time to examine defense witnesses, the

court reminded counsel that his examination had been “repetitive,” included “many questions that were irrelevant,” and included “gaps . . . where [he] could have been presenting evidence.” Although the court said there was “no excuse and no reason to give [Skidmore] more time,” the court did so anyway. Skidmore has shown no prejudice from these rulings. The district court did not abuse its discretion in limiting trial time by being up front about the limits and then being flexible at counsel’s request. *See Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443, 450–51 (9th Cir. 1994).

### B. THE DISTRICT COURT’S RESPONSE TO JURY QUESTION

During deliberation, the jury asked to listen to “1. Plaintiff’s audio of *Taurus* (guitar)” and “2. Plaintiff’s audio of *Stairway to Heaven* (guitar).” During trial, Skidmore’s witness, master guitarist Kevin Hanson, performed two versions of the *Taurus* deposit copy—one with just the bass clef part and one with the treble and bass clef parts together. Skidmore’s counsel argued that the jury should hear the bass-clef-only version because that version was played repeatedly during trial whereas the version with both parts “was never played . . . in full.” When the court asked the jury which version it wanted to hear, one juror said “Bass clef,” while the jury foreperson followed up and said “full copy.” No other juror spoke up or countermanded the foreperson’s request. The district court directed that the full deposit-copy version be played and asked if that answered the jury’s question. The foreperson replied, “thank you.” Skidmore made no objection at that point and the jury heard the “full copy,” which includes both clefs in the introduction to the songs. The jury made no follow-up request. Skidmore waived any objection to the claim

that there was a conflict between jurors and any error was harmless.

#### C. ADMISSION OF DR. FERRARA'S TESTIMONY

Skidmore filed a motion for sanctions and to preclude Led Zeppelin's expert musicologist, Dr. Ferrara, from testifying at trial. At his deposition, Dr. Ferrara testified that he had previously analyzed the similarities between *Taurus* and *Stairway to Heaven* sound recordings for Rondor Music ("Rondor"), a subsidiary of Universal Music Publishing Group. Universal Music Publishing Group was working for Hollenbeck, Spirit's publisher. Dr. Ferrara explained that his analysis for Rondor had already been completed by the time he was contacted by Led Zeppelin's counsel. Rondor waived any conflict and consented to Led Zeppelin retaining Dr. Ferrara as an expert witness.

[31] As a preliminary matter, the district court denied Skidmore's motion as improperly noticed, over the page limit, and untimely. On that basis alone, the district court's ruling was not an abuse of discretion. But even without these infirmities, the district court did not err in denying the motion. Skidmore's challenge is based on a purported conflict of interest that made it improper for Dr. Ferrara to testify for Led Zeppelin without disclosing the conflict or obtaining a waiver from Skidmore.

This argument fails because there was no conflict of interest. Although Rondor waived any potential conflict from having Dr. Ferrara testify on behalf of Led Zeppelin, even that is immaterial because Rondor does not have any interest in this litigation. Skidmore contends that Rondor's parent, Universal Music, was working for Hollenbeck, an entity that owed a fiduciary duty to Skidmore as a publisher of Spirit's music. But a music publisher does not have a fiduciary relationship with

its composers, absent special circumstances. *See Cafferty v. Scott Bros. Records, Inc.*, 969 F. Supp. 193, 205 (S.D.N.Y. 1997). Skidmore made no showing of any special circumstances, or that Hollenbeck was a fiduciary of the Trust. Nor did Skidmore show that Dr. Ferrara had confidential information concerning Skidmore. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). Rondor retained Dr. Ferrara to obtain his opinion on two publicly available sound recordings, which he communicated telephonically to Rondor. All of this occurred before Dr. Ferrara ever had contact with Led Zeppelin's attorneys. The district court did not abuse its broad discretion by permitting this expert testimony. *See Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980).

#### D. ATTORNEYS' FEES

Warner/Chappell cross appeals the district court's denial of attorneys' fees and costs under 17 U.S.C. § 505. The Supreme Court counsels that a court has "broad leeway" to consider the relevant factors that promote the purposes of the Copyright Act, but the Court also has cautioned against giving substantial weight to just one factor, and directed the courts to "give due consideration to all . . . circumstances relevant to granting fees." *Kirtsaeng v. John Wiley & Sons, Inc.*, — U.S. —, 136 S. Ct. 1979, 1983, 1985, 195 L.Ed.2d 368 (2016).

[32] Here, after weighing the factors and the circumstance of the case, the district court found that litigation misconduct and the degree of success swung solidly in favor of Warner/Chappell, that the need for compensation weighed slightly in favor of Warner/Chappell, but that motivation, frivolousness, and objective reasonableness weighed strongly in favor of Skidmore. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558–

59 (9th Cir. 1996). Warner/Chappell's argument that litigation misconduct should form a sole, independent basis for consideration is contrary to the Supreme Court's guidance in *Kirtsaeng*. The district court did not abuse its discretion in concluding that an award of attorneys' fees was not appropriate in light of the Copyright Act's essential goals. Nor did the district court err in declining to award costs to Warner/Chappell.

### CONCLUSION

This copyright case was carefully considered by the district court and the jury. Because the 1909 Copyright Act did not offer protection for sound recordings, Skidmore's one-page deposit copy defined the scope of the copyright at issue. In line with this holding, the district court did not err in limiting the substantial similarity analysis to the deposit copy or the scope of the testimony on access to *Taurus*. As it turns out, Skidmore's complaint on access is moot because the jury found that Led Zeppelin had access to the song. We affirm the district court's challenged jury instructions. We take the opportunity to reject the inverse ratio rule, under which we have permitted a lower standard of proof of substantial similarity where there is a high degree of access. This formulation is at odds with the copyright statute and we overrule our cases to the contrary. Thus the district court did not err in declining to give an inverse ratio instruction. Nor did the district court err in its formulation of the originality instructions, or in excluding a selection and arrangement instruction. Viewing the jury instructions as a whole, there was no error with respect to the instructions. Finally, we affirm the district court with respect to the remaining trial issues and its denial of attorneys' fees and costs to Warner/Chappell.

The trial and appeal process has been a long climb up the *Stairway to Heaven*. The parties and their counsel have acquit-

ted themselves well in presenting complicated questions of copyright law. We affirm the judgment that Led Zeppelin's *Stairway to Heaven* did not infringe Spirit's *Taurus*.

### AFFIRMED.

WATFORD, Circuit Judge, concurring:

I join the court's opinion, with the exception of section IV.C. I see no reason to decide whether Skidmore adequately preserved his request for a selection-and-arrangement instruction because, even if such an instruction had been given, no reasonable jury could have found infringement here.

At trial, Skidmore predicated his theory of originality on *Taurus'* selection and arrangement of five unprotectable musical elements in the first four measures of the song. Specifically, Skidmore contended that *Taurus* uniquely combined the following features: a five-note descending chromatic scale in A minor; a sequence of half notes and whole notes in the scale; a melody involving various arpeggios and note pairs; a rhythm of successive eighth notes; and a collection of pitches in distinct proportions. None of those elements is subject to copyright protection in its own right; they belong to the public domain from which all musical composers are free to draw. See, e.g., *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976); Copyright Office Compendium § 802.5(A) (3d ed. 2017).

Skidmore can claim protection for the original selection and arrangement of those elements, but the scope of that protection depends on the "range of possible expression." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). There are relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical

conventions and styles. *See Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam). For instance, once Randy Wolfe settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear).<sup>1</sup>

In light of the narrow range of creative choices available here, Skidmore “is left with only a ‘thin’ copyright, which protects against only virtually identical copying.” *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003); *see also Apple Computer*, 35 F.3d at 1439 (“When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”). In my view, this standard is separate from—and more demanding than—the “substantial similarity” test. As our cases have repeatedly recognized, the substantial-similarity framework applies only to works with broad copyright protection, while the virtual-identity standard governs thin copyrights. *See, e.g., L.A. Printex Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 851 (9th Cir. 2012); *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010); *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *Ets-Hokin*, 323 F.3d at 766; *Apple Computer*, 35 F.3d at 1439.

Contrary to Skidmore’s contention, we have never held that musical works are *necessarily* entitled to broad copyright protection. We did state in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), that “[m]usical compositions are not confined to a narrow range of expression.” *Id.* at 1120. But we made that statement in the context of assessing the creative choices involved

1. Skidmore argues that *Taurus*’ omission of one note from the descending chromatic scale further contributed to the song’s originality. While this alteration may represent an original use of the descending chromatic scale, it

in composing an entire song, which of course could involve a broad range of expression. *See id.* at 1117–18, 1120. We had no occasion there to categorically exempt musical works from the same principles we use to assess the scope of copyright protection for all other works.

Given the thin protection afforded the selection and arrangement of basic musical elements at issue here, Skidmore could prove infringement only if the relevant passages of *Taurus* and *Stairway to Heaven* are virtually identical. They are not. Undeniable and obvious differences exist between the first four measures of both songs: The notes in the melodies are different; the use of the treble clef in conjunction with the bass clef is different; and the rhythm of eighth notes is different. Those facts preclude a finding of virtual identity. As a result, even if the district court had given the jury a selection-and-arrangement instruction, Skidmore’s infringement claim would have failed as a matter of law.

IKUTA, Circuit Judge, joined by BEA, Circuit Judge, concurring in part and dissenting in part:

The plaintiff’s theory of infringement in this case was straightforward: a four-bar musical passage of *Taurus* that combined an ascending line and a descending chromatic line in a unique and memorable way was substantially similar to the “iconic notes” of a musical passage repeated multiple times in the first two minutes and fourteen seconds of *Stairway to Heaven*. Both the plaintiff and defendant requested jury instructions on the key legal principle underlying this theory: that a combination

does not change the limited scope of *Taurus*’ copyright. As with Skidmore’s selection-and-arrangement theory, there are only so many ways to modify a descending chromatic scale in four measures.

of common musical elements can be protectable under copyright law, even if each individual element is too common on its own to be protected. Although this legal principle is well supported in our case law and had ample foundation in the evidence in this case, the district court failed to give any instruction on this theory to the jury. Without plaintiff's requested instruction, the jury was deprived of the opportunity to consider the plaintiff's central theory of the case, and the instructions given to the jury (to the effect that common musical elements were not protectable under copyright law) were misleading. Therefore, I dissent from Part IV(B) to (C).

## I

It was the late 1960s when songwriter Randy "California" Wolfe wrote a new instrumental piece which he entitled *Taurus* after the astrological sign of a woman he loved and eventually married.<sup>1</sup> Wolfe's band, Spirit, played the song regularly, and it became one of the band's signature numbers. There was substantial evidence that Led Zeppelin was at least familiar with Spirit and their work. In 1968, for instance, Led Zeppelin opened for Spirit at a concert in Denver, and the two bands played the same concerts on other occasions. Randy Wolfe died in 1997, and his intellectual property passed into a trust.

When the Supreme Court ruled in 2014 that laches would not bar a copyright infringement lawsuit, *see Petrella v Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014), Michael Skidmore, the trustee for Randy Wolfe's estate, filed suit against Led Zeppelin. As stated in the original complaint,

1. The origin of the song remains a bit of a mystery, as Skidmore alleged in his complaint that the song was inspired by Wolfe's deep affection for his bandmates from the band Spirit, some of whom had the astrological sign Taurus.

Skidmore's theory was that the "iconic notes to 'Stairway to Heaven,' that have enthralled generations of fans, sound almost exactly the same as" the "unique 2 minutes and 37 second instrumental titled 'Taurus.' "

At trial, Skidmore presented evidence to the jury to show the following: The deposit copy of *Taurus* is a single page, comprising 18 bars of music. Skidmore focused on a four-bar passage from this deposit copy, which Skidmore claimed was both unique and protectable, and which was substantially similar to a repeated musical passage in *Stairway to Heaven*. The four-bar passage in *Taurus* (referred to as "Section A") is followed by a seven-measure bridge (labeled "Section B") in an AABAAB format. Section A had an ascending arpeggiated melodic line (identified in the treble clef) that included a series of two-note melodic phrases that move from A to B, B to C, and C to F sharp. This ascending melodic line is played over an arpeggiated descending chromatic line (identified in the bass clef) which skipped the note "E" in its descent before resolving harmonically.<sup>2</sup> According to Skidmore's experts, Section A of *Taurus* is memorable and unique. Although descending chromatic lines are commonly used in certain genres of music, Dr. Alexander Stewart testified that the composer of *Taurus* had "found a way to use it in a way that is unlike other works that use [a descending chromatic] line." Specifically, most songs employing a descending chromatic line resolve the scale by passing through the fifth note of the scale (here, the note E), but *Taurus* stops short of the fifth note. Stewart also testified that the combination of two-note me-

2. Led Zeppelin's expert, Dr. Lawrence Ferrara, likewise testified that the focus of the case was on Section A of *Taurus*, which had "relevant similarities" to the "opening four measures of the guitar" that is played six times in the first two minutes and fourteen seconds of *Stairway to Heaven*.

lodic phrases in the ascending line in Section A was “unique,” “distinct,” and “used in an original and creative way.” Skidmore’s experts discussed a number of other musical elements in Section A, including the rhythm, chord progression, and duration of pitches in the minor descending chromatic line. Finally, Skidmore presented expert testimony that the combination of the descending and ascending lines, along with the other musical elements, made Section A unique. Stewart testified that the combination of musical elements in Section A, including “an ascending line with unique AB, BC, C to F-sharp pairs” and “the descending line having a similar chord progression arpeggiated in a unique way” were “significant” and “unique” when taken together. And Kevin Hanson, another expert, testified that “the descending chromatic line, in conjunction with the other arpeggiated figures in the ascending melody . . . combined [to] form one piece of original music.”

In addition to offering evidence that Section A of *Taurus* was unique and original, Skidmore also presented evidence that the opening two minutes and fourteen seconds of *Stairway to Heaven* incorporated elements that were substantially similar to Section A of *Taurus*. *Stairway to Heaven*’s opening included a thirteen-second musical passage (also referred to as Section A) which is repeated six times, separated by a B section or bridge, in an AABABAA format. *Stairway to Heaven*’s Section A contained an ascending line which used a substantially identical pitch sequence as Section A in *Taurus*, as well as the same memorable two-note phrases. This ascending line played over a descend-

ing chromatic line, which likewise skipped over the fifth note in resolving the scale. In his closing argument, Skidmore asserted that “the only two songs in music history that are able to show that it skips the E was two pieces of work: ‘Taurus’ and ‘Stairway to Heaven.’” In addition to using the same pitch sequence, *Stairway to Heaven* used the same rhythm and metric placement.

Led Zeppelin’s defense was based on its argument that the musical elements in Section A of *Taurus* were too common to be protectable. Accordingly, it proposed the following jury instructions.<sup>3</sup> Instruction No. 16 stated that “common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes” are not protected by copyright. Instruction No. 20 stated that “any elements from prior works or the public domain are not considered original parts and not protected by copyright.” And Instruction No. 21 stated:

You must then disregard all musical elements that are not original to *Taurus*. Once you have disregarded all musical elements that are not original to *Taurus*, you must decide whether there are any remaining musical elements that are original to *Taurus* and also appear in *Stairway to Heaven* and, if so, whether they are substantial similarities or insubstantial similarities.

In response, Skidmore proposed two instructions to explain that while musical elements that are too common are not protectable under copyright law, such common elements could be protectable in combination under some circumstances.<sup>4</sup> Pro-

3. The numbering of these three instructions corresponds to the instructions eventually given by the court.

4. The majority refers to this instruction regarding the protectability of a combination of musical elements as a “selection and arrangement instruction.” While I use this terminolo-

gy for convenience, the words “selection” and “arrangement” have no special significance in our precedent; the missing instruction could equally be termed a “combination instruction” or “compilation instruction.” See, e.g., *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (allowing that an original “combi-

posed Instruction No. 35 read, in part, that “[a] combination of individually otherwise unprotected elements can be infringed upon.” Skidmore also proposed Jury Instruction No. 38, entitled “Combination of Unprotectable Elements,” which stated: “You may find a combination of unprotectable elements to be protectable.”

Led Zeppelin objected to both instructions and proposed Instruction No. 29, which stated: “An author’s arrangement and selection of unprotected elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” Skidmore objected to this formulation of the instruction.

The district judge considered these objections, but did not allow the parties to make any arguments. Although the judge conferred with the parties outside of the presence of the jury to rule on various pretrial motions, he asked the lawyers to recess for 45 minutes while he prepared the jury instructions. After the recess, the judge addressed counsel, and stated: “This is not to discuss with counsel what instructions are going to be given and which aren’t. Both sides have fully briefed this on the instructions, their objections, their replies, et cetera, that I am confident that I can just come out and give the instructions.” The judge then appointed Skidmore’s counsel to act as “scrivener” to “prepare a clean set of instructions,” and dictated the approved jury instructions to Skidmore’s lawyer. The court included Led Zeppelin’s Instruction Nos. 16, 20 and 21, but did not include either Skidmore’s or Led Zeppelin’s version of the selection and arrangement instruction. Skidmore’s lawyer commented on the wording of two instructions. But when he raised a concern regarding the omission of an instruction on

the inverse ratio rule, the court dismissed the question brusquely, saying that the issue was not addressed “because we weren’t giving that instruction,” and repeated, “[w]e’re not going to give that instruction.” The judge then ended the meeting. The court’s decision to omit any selection and arrangement instruction was not discussed.

On appeal, Skidmore argues that the court erred in not giving the jury the proposed instruction.

## II

“A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence.” *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (citing *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir. 1994)). A district court errs when it “rejects proposed jury instructions that are properly supported by the law and the evidence.” *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009). Moreover, “[j]ury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading.” *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (per curiam) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999)). “In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (cleaned up) (quoting *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1988)).

Skidmore’s request for an instruction that “a combination of unprotectable elements [is] protectable” is supported by both law and evidence.

*nation of unprotectable elements may qualify*

for copyright protection”).

First, as the majority agrees, the principle underlying Skidmore's requested jury instruction is well-supported in law. Maj. Op. at 1074–75. The Supreme Court has made clear that even a work "that contains absolutely no protectible . . . expression" can meet "the constitutional minimum for copyright protection if it features an original selection or arrangement." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). We have applied this principle to musical elements. In doing so, we do not draw a distinction between a "combination," "compilation," and a "selection and arrangement" of musical elements. Thus, in *Three Boys Music Corp. v. Bolton*, we upheld a jury finding of "infringement based on a unique compilation" of five unprotectable musical elements: "(1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending." 212 F.3d 477, 485 (9th Cir. 2000). Similarly, in *Swirsky v. Carey*, we disapproved of the district court's approach to pulling "elements out of a song individually, without also looking at them in combination," explaining that to "disregard chord progression, key, tempo, rhythm, and genre is to ignore the fact that a substantial similarity [between copyrighted and allegedly infringing works] can be found in a combination of elements, even if those elements are individually unprotectable." 376 F.3d 841, 848 (9th Cir. 2004). Even though "chord progressions may not be individually protected, if in combination with rhythm and pitch sequence, they show the chorus of [a work] to be substantially similar to [another work], infringement can be found." *Id.*; see also *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (applying this principle to visual arts, and holding that "a combination of unprotectable elements may qualify for copyright protection" so long as the "combination

constitutes an original work of authorship" and is "sufficiently original to merit protection") (emphasis and citations omitted). Accordingly, the legal basis for an instruction that a combination of unprotectable elements may be protectable under copyright law is well-established.

Second, the evidence introduced at trial was sufficient for the court to instruct the jury on this principle. Both of Skidmore's experts testified that Section A of *Taurus* was original and creative and gave *Taurus* a distinct and memorable sound. Both also testified that the combination of musical elements present in Section A of *Taurus* was substantially similar to the six thirteen-second passages in Section A of *Stairway to Heaven*. This evidence is sufficient for a reasonable juror to conclude that Section A of *Taurus* was protectable, and that the repeated appearance of a substantially similar musical passage in the first two minutes and fourteen seconds of *Stairway to Heaven* constituted infringement. Because Skidmore's proposed instruction had a foundation in law and was supported by the evidence, the district court erred in declining to give it.

This error cut the heart out of Skidmore's case. Without this instruction, the three instructions given by the court regarding the unprotectability of common elements (Instruction Nos. 16, 20 and 21) told the jury that a descending chromatic scale, arpeggios, and other common elements are not protected by copyright, and that the jury must disregard all such elements. In other words, the jury was told to disregard the precise elements that Skidmore's experts testified had been combined in a unique and original way, and thus the district court improperly foreclosed the possibility that *Taurus*'s combination of a descending chromatic line (which skipped the note E) and an ascending line using memorable note pairs was protected.

Therefore, while Instruction Nos. 16, 20 and 21 are correct statements of the law, they are misleading in omitting the principle that a combination of unprotected elements can be protected. As such, the jury instructions establish a legal principle that is erroneous, and if allowed to stand, establish a mistaken view of copyright protection. Reversal for a new trial is required.

### III

The majority's conclusion that "the district court did not commit any error" in failing to give the jury a selection and arrangement instruction is wrong as a matter of law.<sup>5</sup> Maj. Op. at 1073–74. First, the majority makes a legal error in concluding that Skidmore was not entitled to a selection and arrangement instruction because "Skidmore never presented the argument to the jury." Maj. Op. at 1074. Rather, according to the majority, Skidmore's copyright infringement claim was based on "disparate categories of unprotectable elements," which the majority describes as the "minor chromatic line and associated chords; duration of pitches of minor chromatic line; melody placed over the descending chromatic line consisting of combination of arpeggios and two-note sequences; rhythm of steady 8th note beats; and pitch collection." The majority claims that Skidmore "never argued how these musical components related to each other

5. Because the majority concludes that the district court "did not commit any error" at all, Maj. Op. at 1074, it is irrelevant to the majority's decision whether Skidmore preserved his claim of error and, if not, whether the district court's error was plain. Because the majority's discussion of these points is unnecessary, I focus on the majority's erroneous reasoning regarding the merits of the district court's error.
6. The concurrence's claim that *Taurus* is entitled to meager copyright protection because there "are relatively few ways to express a combination" of notes "in just four meas-

to create the overall design, pattern, or synthesis." Maj. Op at 1074.

The majority's characterization of Skidmore's case is belied by both the trial record and by common sense. Hanson testified that Section A of *Taurus* had the holistic musical design that the majority says is lacking from Skidmore's argument; among other things, "the descending chromatic line, in conjunction with the other arpeggiated figures in the ascending melody . . . combined [to] form one piece of original music." Stewart also testified that the combination of musical elements present in Section A of *Taurus* was "unique and original." And in closing argument, contrary to the majority's contention, Maj. Op. at 1073–74, Skidmore reiterated that it was the combination of a descending chromatic line and ascending line that made *Taurus* unique and protectable. This is a paradigmatic "selection and arrangement" theory, similar to the one we approved of in *Three Boys*, 212 F.3d at 485 (upholding a jury finding of infringement based on a "unique compilation of [musical] elements").

Moreover, the majority's claim that Skidmore's selection and arrangement argument fails because his theory was based on "random similarities scattered throughout the works," Maj. Op. at 1075 (emphasis omitted), is unreasonable on its face given the brief nature of the passage Skidmore argued was protected.<sup>6</sup> As the majority

ures," and because there is only a "narrow range of creative choices available here," Concurrence at 55, would come as a surprise to the experts who opined on *Taurus* – and indeed, would likely surprise any talented composer. Like words, musical notes are subject to a range of expression limited only by the imagination and skill of the artist. A poet may select and arrange a mere 16 words (all of them common and unprotectable by themselves) so they are as memorable and unique as a Shakespeare play. See, e.g., William Carlos Williams, *The Red Wheelbarrow*, in THE COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS,

acknowledges, Maj. Op. at 1073–74, Section A of *Taurus* consists of only four bars of music. And Skidmore argued that the combination of the musical elements in this passage (the ascending melodic line is played over an arpeggiated descending chromatic line which skipped the note “E” in its descent) made it a unique piece of original music that was substantially similar to a specific thirteen-second passage in *Stairway to Heaven*. Nor does the trial record support the majority’s claim that the similarities were “scattered throughout” Section A of *Taurus*; rather, Skidmore explained at trial that the various musical elements that were combined in an original way to form *Taurus* played “simultaneously.” There is simply no support in the record for the majority’s theory that Skidmore’s infringement claim was based on random “disparate categories of unprotectable elements” in *Taurus* that merely had counterparts in *Stairway to Heaven*. Maj. Op. at 1075.

In short, the majority’s misunderstanding of the evidence and its conclusion that the musical elements identified by Skidmore “do not cohere to form a holistic musical design” as a matter of law, Maj. Op. at 1075, provide a good lesson as to why, as an appellate body, we are foreclosed from determining whether an identified combination of musical elements is original. We are not well situated to determine whether a musical passage is original; such a determination should have been left up to a properly instructed jury. See *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938). Nor should we determine whether the four bars at issue meet some judicially constructed standard for “holistic musical design.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251, 23 S.Ct. 298, 47 L.Ed. 460 (1903) (“It would be a dangerous undertaking for persons trained only to

the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). But without an instruction that a combination of unprotectable elements can be protectable if combined in an original way, the jury in Skidmore’s case was deprived of the opportunity to pass judgment on Skidmore’s selection and arrangement theory.

#### IV

Although unnecessary to its resolution, the majority’s rulings on forfeiture and plain error are also wrong. Maj. Op. at 1072–74.

#### A

First, Skidmore did not forfeit his objection to the district court’s omission of his selection and arrangement instruction. As we have previously explained, a party need not make a formal objection to the omission of a jury instruction if the party has made the district court “fully aware of a [party’s] position” with respect to a jury instruction, *Brown v. AVEMCO Inv. Corp.*, 603 F.2d 1367, 1371 (9th Cir. 1979), such as by raising the issue on multiple occasions, see *Dorn*, 397 F.3d at 1189, and the district court has made clear that it would not give the instruction, see *id.* (holding that party did not have to object to the underlying jury instruction when the court was fully informed regarding the party’s position on the jury instructions and “any further objection would have been superfluous and futile”); *Brown*, 603 F.2d at 1373 (holding that the party preserved its objection to a jury instruction when the court was aware of the issue and it was clear that the court would not change its mind).

Here, as in *Brown*, the judge was fully aware of Skidmore's position on the requested jury instruction. Skidmore had proposed two jury instructions on the issue, and questioned witnesses at trial about the creative combination of various musical elements in *Taurus*. Led Zeppelin even cited Skidmore's reliance on a selection and arrangement theory as the rationale for proposing a selection and arrangement instruction of its own, which it described as "crucial." Moreover, as in *Dorn*, objecting would have been pointless. The judge made clear that he had already heard all the argument he would need, and that he did not want to discuss which instructions "are going to be given and which aren't" with counsel. Although the majority discounts the effect of the judge's warning because Skidmore sought to clarify or correct the jury instructions on other issues, the judge brusquely silenced Skidmore when he mentioned the omission of an instruction on the inverse ratio rule. At that point, any objection would be "superfluous and futile as well as contrary to the court's warning." *Dorn*, 397 F.3d at 1189. We do not know what objections Skidmore would have raised if not for the court's prefatory warning that began the conference and its sharp rejection of Skidmore's request at the close of the conference; the majority thus reads too much into Skidmore's effort to open the door to further discussion by assuring the court there would only be "one last thing." Given the imbalance of power that exists between a judge and a litigant, we should be careful not to require a litigant to defy explicit warnings from the court. Accordingly, Skidmore preserved his challenge to the omission of a selection and arrangement instruction, and the majority's review should have been de novo. See *Gulliford v. Pierce Cty.*, 136 F.3d 1345, 1348 (9th Cir. 1998).

## B

Second, even if Skidmore had forfeited his objection to the omission of the selection and arrangement instruction, the district court's failure to give this instruction – which had been requested by both parties – was plainly erroneous, and the majority's conclusion to the contrary is wrong. Under our plain error jurisprudence, "[w]e may exercise our discretion to correct a district court on plain error review when the following factors are met: (1) the district court erred; (2) the error was obvious or plain; (3) the error affected substantial rights; and (4) the error 'seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018) (quoting *C.B. v. City of Sonora*, 769 F.3d 1005, 1018–19 (2014)). An error affects substantial rights when it "affect[s] the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); see also *Bearchild v. Cobban*, 947 F.3d 1130, 1139 (9th Cir. 2020) ("We will usually find sufficient prejudice to warrant reversal where 'it is impossible to determine from the jury's verdict and evidentiary record that the jury would have reached the same result had it been properly instructed.'") (quoting *Hoard*, 904 F.3d at 791)

We recently found the district court's instructional error met this standard in *Hoard*, where the plaintiff brought a § 1983 claim against an officer who allegedly had violated his right to be free from excessive force. 904 F.3d at 785. In that case, the district court (with plaintiff's counsel's approval) provided an erroneous definition of the word "sadistically" to the jury. *Id.* at 786. Because this definition "saddled [the plaintiff] with the unnecessary and exceedingly difficult burden of proving that the officer was not just cruel,

but sadistic as well,” *id.* at 782, and made it difficult for the plaintiff to prevail, we held that “th[e] error likely prejudiced the outcome of the case and—left uncorrected—would contribute to a miscarriage of justice.” *Id.* at 787. Therefore, we vacated the district court’s judgment and remanded. *Id.*

Here, as in *Hoard*, all four prongs of the plain error test are met. For the reasons previously explained, the district court erred by failing to give the crucial selection and arrangement instruction requested by both parties. Moreover, this error was obvious or plain: Skidmore presented enough evidence at trial supporting the selection and arrangement theory which had been recognized by both parties as Skidmore’s central theory at trial. Omitting the instruction in spite of the parties’ consensus is an “error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection.” *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011) (quoting *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997)); see also *Hoard*, 904 F.3d at 790 (explaining that it must have been “sufficiently clear at the time of trial” that the instructions were erroneous for the error to be plain).

Moreover, the error was sufficiently prejudicial with respect to the outcome of the case, given that the omission of the instruction—which “saddled [Skidmore] with the unnecessary and exceedingly difficult burden of proving” that the four bars in *Stairway to Heaven* were substantially similar to *Taurus* without relying on the unique way in which musical elements in *Taurus* were combined—necessarily precluded the jury from finding in Skidmore’s favor. *Hoard*, 904 F.3d at 782. Furthermore, by introducing testimony from two experts on the issue, Skidmore “introduced evidence from which a jury could have found” substantial similarity, *Bearchild*,

947 F.3d at 1148 such that it is “impossible to determine whether the jury would have reached the same result had it been properly instructed,” *id.* at 1134. This is enough under our law to show that the error affected substantial rights.

Finally, as in *Hoard*, if “left uncorrected[, this error] would contribute to a miscarriage of justice.” 904 F.3d at 787. It is clear that the district court’s failure to give a correct instruction deprived Skidmore “of a meaningful and fair opportunity” to present his claim. See *id.*; *Bearchild*, 947 F.3d at 1149 (“Because [plaintiff’s] ability to pursue his claim was fundamentally diminished by the jury instructions in this case, the final prong of the plain error test is satisfied.”). Skidmore had adduced sufficient evidence for a reasonable juror to find that *Taurus* was protectable under copyright law, and that there was a substantial similarity between *Stairway to Heaven* and the *Taurus* deposit copy, as the district court’s prior rejection of Led Zeppelin’s summary judgment motion confirmed. Therefore, the omission of the selection and arrangement instruction not only “placed a heavy thumb on the scale in favor of the [d]efendants,” *Hoard*, 904 F.3d at 792, but decided the case entirely. Accordingly, the district court’s error was plain, and just as in *Hoard*, we must vacate the district court’s plainly erroneous ruling.

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The majority’s rulings on forfeiture, plain error, and the merits are redundant and inconsistent. If there is no error at all, the majority had no need to reach forfeiture or plain error. Instead, the majority touches all three doctrines and makes each of them worse. Nevertheless, my key concern is the majority’s erroneous legal ruling on whether the four-bar instrumental passage in *Taurus* was protectable and substantially similar to the “iconic” open-

ing bars of *Stairway to Heaven*. Unlike the rulings on forfeiture and plain error, this substantive ruling weakens copyright protection for musicians by robbing them of the ability to protect a unique way of combining musical elements. Therefore, I dissent from Parts IV(B) to (C) of the majority opinion.



Jillian MCADORY, Plaintiff-Appellant,

v.

M.N.S. & ASSOCIATES, LLC, foreign limited liability company, Defendant,  
and

DNF Associates, LLC, foreign limited liability company, Defendant-Appellee.

No. 18-35923

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted October  
24, 2019 Portland, Oregon

Filed March 9, 2020

**Background:** Consumer filed suit against business that had purchased her debt alleging violations of Fair Debt Collection Practices Act (FDCPA). The United States District Court for the District of Oregon, Marco A. Hernandez, J., 2017 WL 5071263, dismissed. Consumer appealed.

**Holdings:** The Court of Appeals, Christen, Circuit Judge, held that complaint sufficiently alleged that principal purpose of debt purchasing company was debt collection.

Reversed and remanded.

Bea, Circuit Judge, dissented and filed opinion.

#### 1. Federal Courts ↗3587(1)

Court of Appeals reviews de novo district court's order granting a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

#### 2. Federal Civil Procedure ↗1829, 1835

On a motion to dismiss for failure to state a claim, the court accepts as true all well-pleaded factual allegations in the complaint, which are construed in the light most favorable to the nonmoving party. Fed. R. Civ. P. 12(b)(6).

#### 3. Finance, Banking, and Credit ↗1471

Because the Fair Debt Collection Practices Act (FDCPA) is broadly remedial, court liberally construes the statute in favor of consumers. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692 et seq.

#### 4. Statutes ↗1091

A statute's plain language is the starting point of court's statutory construction.

#### 5. Finance, Banking, and Credit ↗1476

Determining a business's principal purpose, as required to show it qualifies as a debt collector under the Fair Debt Collection Practices Act's (FDCPA) "principal purpose" prong, involves comparing and prioritizing the business's objectives, not analyzing the means employed to achieve them. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6).

#### 6. Finance, Banking, and Credit ↗1476

The relevant question in assessing a business's principal purpose, as required to show it qualifies as a debt collector under the Fair Debt Collection Practices Act's (FDCPA) "principal purpose" prong, is whether debt collection is incidental to the business's objectives or whether it is the business's dominant, or principal, objective. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6).