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**The End of the Inverse Ratio Rule in the Ninth Circuit and Its Effect on the Copyright System**

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## I. Introduction

George Harrison, a former member of The Beatles once stated, “I’d be willing [if] every time I write a song...somebody will have a computer and I can just play any new song into it, and the computer will say, ‘sorry’ or ‘ok’. The last thing I want to do is keep spending my life in court.”<sup>1</sup> Harrison was expressing his frustration of being unaware whether he was infringing on another musician’s work whenever he was creating a new song. He expressed this sentiment to the media in 1977 after the Southern District of New York held that Harrison’s song “My Sweet Lord” infringed on The Chiffon’s song “He’s so Fine.” That case was not the first, nor the last, in which popular artists have been involved in controversial infringement claims.

For instance, on June 29, 2019, musician Katy Perry lost a copyright infringement case, after a court in Los Angeles found that her hit “Dark Horse” infringed the 2008 song “Joyful Noise.”<sup>2</sup> A federal jury in Los Angeles ordered Perry, among others, to pay over \$2.8 million for infringing the song.<sup>3</sup> For many in the industry, this decision was another indicator that “music copyright lawsuits are scaring away new hits.”<sup>4</sup> Nonetheless, the music industry’s “worst nightmare” came in 2015 with the decision of *Gaye v. Williams*, involving a dispute between the estate of Marvin Gaye and the song “Blurred Lines.”<sup>5</sup> Judgment was entered in favor of Gaye’s estate for \$5 million, which signaled that not only could artists be liable for intentionally copying, but also for being influenced by other artists.<sup>6</sup> This notion of musical artists creating popular songs

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<sup>1</sup> In The Life of...The Beatles, *George Harrison on Why He Wrote "My Sweet Lord": 33 & 1/3 Interview (1976)*, YOUTUBE (Jun. 10, 2018), <https://youtu.be/a-0qlkg8xrs>.

<sup>2</sup> Ben Sisario, *Katy Perry and Others Must Pay \$2.8 Million Over 'Dark Horse,' Jury Says*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/arts/katy-perry-dark-horse-suit.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan 9, 2020, 2:08 PM), <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018); Jon Caramanica, *It's Got a Great Beat, and You Can File a Lawsuit to It*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/arts/music/pop-music-songs-lawsuits.html>.

and then later having to fight in court whether they plagiarized it from another artist, due to similarities between the songs, is a common occurrence.<sup>7</sup> Courts in the majority of this type of cases have applied doctrines, such as subconscious copying and the inverse ratio rule, which for the most part help plaintiffs succeed in their infringement claims. One of these doctrines, the inverse ratio rule, was subject to intense scrutiny in one of the last major music copyright decisions, *Skidmore v. Led Zeppelin*.<sup>8</sup>

The March 2020 *Led Zeppelin* case left an impression that the Ninth Circuit, home to some of the biggest controversies surrounding music copyright claims, might be reconsidering how it approaches copyright infringement claims. An issue that courts had trouble with was the extent that access to plaintiff's work is relevant when determining the similarity required to establish infringement.<sup>9</sup> One of the important decisions of the *Led Zeppelin* case was the abrogation of the inverse ratio rule, which had been in effect in the Ninth Circuit since 1977 and stated that the plaintiff's burden of showing substantial similarity is lowered if a plaintiff establishes a high degree of access by the defendant.<sup>10</sup>

The decision to reject the future use of the inverse ratio rule in the Ninth Circuit was the correct decision because access should not be used to lower the burden of either probative similarity or unlawful appropriation that the plaintiff must demonstrate to succeed in a copyright infringement claim. This comment will analyze the impact that the recent *Led Zeppelin* case will have on the future of copyright infringement claims, with a focus on the Ninth Circuit. Part II will explore the background of the copyright system and court created doctrines that have an effect on

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<sup>7</sup> *Id.*

<sup>8</sup> *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>9</sup> Lee S. Brenner & Sarah L. Cronin, *More or Less*, 34 L.A. LAW 29, 29 (2011).

<sup>10</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977), overruled by *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (deciding to apply the inverse ratio rule to decrease the necessary showing of substantial similarity needed to prove copyright infringement).

copyright infringement claims. Part III will describe and analyze the history of the inverse ratio rule, delving into its origin and decisions in the Ninth Circuit leading up to *Led Zeppelin*. Lastly, Part IV will focus on why the rejection of the inverse ratio rule was the correct decision; the implications it will have on future cases; and additional changes that the copyright system can undertake. Although this comment will examine copyright cases involving different forms of media, it will have a particular focus on music copyright and the future of such cases after the *Led Zeppelin* decision.

## **II. The Copyright System and the Infringement Test**

Recognizing the importance of protecting intellectual property, the founders of the nation granted Congress the power to protect it in the United States Constitution.<sup>11</sup> As stated in the Constitution, the goal of the copyright system is “to promote the progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>12</sup> Today, most of the copyright protections are found in the Copyright Act of 1976.<sup>13</sup> Copyright exists from the moment that a work is created, but one must register the work with the Register of Copyrights pursuant to 17 U.S.C. § 410, if one seeks to bring an infringement claim.<sup>14</sup> Copyright protects several types of subject matters, including musical works and sound recordings, which are involved in music copyright claims.<sup>15</sup> The Act gives copyright owners six exclusive rights related to the distribution of their original work.<sup>16</sup> Those six rights include: (1) the right to make copies and reproduce the original work, (2) prepare derivative works, (3) distribute copies to the public, (4) to perform the work in public, (5) to display the work, and

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<sup>11</sup> U.S. CONST. art I, § 8.

<sup>12</sup> U.S. CONST. art I, § 8; Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2020).

<sup>13</sup> U.S. COPYRIGHT OFFICE, [https://www.copyright.gov/timeline/timeline\\_1950-2000.html](https://www.copyright.gov/timeline/timeline_1950-2000.html) (last visited Apr. 16, 2021).

<sup>14</sup> 17 U.S.C. § 410 (2021).

<sup>15</sup> 17 U.S.C. § 102(a).

<sup>16</sup> 17 U.S.C. § 106.

(6) to perform sound recordings in public through digital audio transmission.<sup>17</sup> A copyright owner can bring a copyright infringement action when someone violates any of the exclusive rights listed in the Copyright Act.<sup>18</sup> However, protections granted by the Copyright Act extend only to “original works of authorship fixed in any tangible medium of expression.”<sup>19</sup>

### **A. Copyright Infringement**

To succeed in a copyright infringement case the plaintiff must prove two things. First, plaintiff must prove ownership of a valid copyright, which is relatively easy for the plaintiff to show. Second, the plaintiff must prove that the defendant copied protected aspects of the work.<sup>20</sup> The inverse ratio rule is centered around the second element.<sup>21</sup> This second element of the infringement test is further divided into two subcategories: actual copying and unlawful appropriation.<sup>22</sup> For actual copying, a plaintiff must prove the factual question of whether the defendant used the work as inspiration, model or template.<sup>23</sup> If this is the case then one can conclude that copying has occurred, but it is not the end of the analysis as one still has to inquire whether the copying can give rise to legal liability.<sup>24</sup> Hence, the second sub-category, often referred to as unlawful appropriation, is that the plaintiff must prove the legal question of whether “defendant’s work is substantially similar to plaintiff’s work such that liability may attach.”<sup>25</sup>

For the factual question of copying, there is rarely direct evidence of defendant actually copying the original work; thus, the plaintiff often proves actual copying by circumstantial

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<sup>17</sup> 17 U.S.C. § 106.

<sup>18</sup> 17 U.S.C. § 501.

<sup>19</sup> 17 U.S.C. § 102(a).

<sup>20</sup> 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01 (rev. ed. 2020).

<sup>21</sup> *Id.* at § 13.03 (stating that proof of access can aid in showing copying as a factual matter, but access “exerts no impact on copying as a legal matter.”).

<sup>22</sup> *Id.* at § 13.01.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *Skidmore*, 952 F.3d at 1051 (stating that “[a]lthough these requirements are too often referred to in shorthand lingo as the need to prove ‘substantial similarity,’ they are distinct concepts.”).

evidence of (1) access and (2) probative similarity.<sup>26</sup> Access is often defined as an opportunity to view plaintiff's work or the "opportunity to copy."<sup>27</sup> Access is proven either by (1) proving that the original work has been widely disseminated, or (2) showing that "a particular chain of events exists by which the alleged infringer might have gained access to the copyrighted work."<sup>28</sup> On the other hand, probative similarity is the similarities between the works that may give rise to an indication that actual copying has occurred.<sup>29</sup> The inquiry is important because independent creation of a work is a complete defense to copyright infringement.<sup>30</sup> Thus, if the similarities between the works are of such quality that would not arise independently in both works, it is probative that defendant copied as a factual matter.<sup>31</sup> If this is not the case, the defendant can argue that he independently created his work, and thus a dismissal of the case, in favor of the defendant, would be proper.

On the other hand, for unlawful appropriation, which is the legal question that the plaintiff must prove, the inquiry is if the works are substantially similar.<sup>32</sup> Here the Ninth Circuit, and other courts, use the extrinsic and intrinsic test.<sup>33</sup> Under the extrinsic test courts objectively analyzes the two works and looks for similarities of specific expressive elements.<sup>34</sup> Conversely, the intrinsic test, looks at the "similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance."<sup>35</sup>

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<sup>26</sup> *Id.* at 1064.

<sup>27</sup> Nimmer, *supra* note 20, § 13.02.

<sup>28</sup> Nimmer, *supra* note 20, § 13.02.

<sup>29</sup> Nimmer, *supra* note 20, § 13.02.

<sup>30</sup> *See also Skidmore*, 952 F.3d at 1064 (explaining that because independent creation is a complete defense to copyright infringement, the plaintiff must show that the defendant actually copied the work.).

<sup>31</sup> Nimmer, *supra* note 20, § 13.02.

<sup>32</sup> Nimmer, *supra* note 20, § 13.01.

<sup>33</sup> Nimmer, *supra* note 20, § 13.03.

<sup>34</sup> Nimmer, *supra* note 20, § 13.03.

<sup>35</sup> Nimmer, *supra* note 20, § 13.03.

In the Supreme Court case of *Feist v. Rural*<sup>36</sup>, the Court illustrates the difference between probative similarity and unlawful appropriation. There, the plaintiff alleged that defendant copied plaintiff's original telephone listing to create their own.<sup>37</sup> The Court found that there was actual copying because the defendant had copied plaintiff's work, even copying fictitious listings that plaintiff had placed in their telephone listings to identify possible infringers.<sup>38</sup> Thus, plaintiffs satisfied the factual question. Nevertheless, the Court found that for the issue of unlawful appropriation, liability could not attach because the listings themselves were not original, it was a list based on facts that did not give rise to liability.<sup>39</sup> As the Ninth Circuit once explained, the distinction between factual and legal copying "means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."<sup>40</sup>

#### **B. Court Created Doctrines that Affect the Infringement test.**

Defendants in music copyright cases have to overcome court created doctrines that tend to benefit a plaintiff's infringement claim, such as subconscious copying. This doctrine states that copying can be shown by demonstrating that a defendant unconsciously copied the work.<sup>41</sup> The case *Bright Tunes Music Corp. v. Harrisongs Music, Ltd*<sup>42</sup>, illustrates the controversy surrounding the application of this doctrine. The case involved the song "My Sweet Lord" by George Harrison, which was the first number one single by a member of The Beatles as a solo artist.<sup>43</sup> Harrison was

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<sup>36</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991); *See Nimmer supra* note 18, § 13.01 (explaining that *Feist*, illustrates the importance of the distinction between actual copying and unlawful appropriation).

<sup>37</sup> *Feist*, 499 U.S. at 344.

<sup>38</sup> *Id.* at 361.

<sup>39</sup> *Id.* at 361.

<sup>40</sup> *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005).

<sup>41</sup> Judge Learned Hand first developed this concept in the case *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924).

<sup>42</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

<sup>43</sup> Jon Dennis, *My Sweet Lord — the song that earned George Harrison a lawsuit*, FINANCIAL TIMES (July 31, 2018), <https://ig.ft.com/life-of-a-song/my-sweet-lord.html>.

sued by Bright Tunes Music, who owned the rights to the song “He’s so Fine” by the Chiffons, which had been a number one single in both the United States and the United Kingdom.<sup>44</sup> After examining how the song was created, the Southern District of New York reasoned that Harrison did not consciously copied the work, but rather unconsciously copied it.<sup>45</sup>

Furthermore, in the appeal which affirmed the verdict, the Second Circuit expressed that the doctrine was not in conflict with the defense of independent creation. Subconscious copying, however, does seem to be in conflict with independent creation, because one can create a song that sounds extremely similar to a previously popular song, even if they had not heard that popular song before. Nonetheless, courts may be inclined to find that a defendant unconsciously copied the work, if there is evidence of wide dissemination of the original work, instead of granting the defense of independent creation.

Ultimately the Southern District of New York ruled that the two songs were the same. After the ruling the Judge who delivered the verdict stated to George Harrison’s attorney that “[he] actually like[d] both songs,” to which Harrison’s attorney responded, “[w]hat do you mean both? You’ve just ruled they’re one and the same.”<sup>46</sup> Although the remarks can be taken as humorous, it also showcases one of the problems that music copyright has not accepted, which is that one can be heavily influenced by a prior idea and turn that idea into their own distinctive expression.

### **C. The Inverse Ratio Rule**

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<sup>44</sup> *Bright Tunes Music Corp.*, 420 F. Supp. at 179.

<sup>45</sup> *Id.* at 180 (“[b]ecause his subconscious knew it already had worked in a song his conscious mind did not remember.”); see generally The George Washington University Law School, *Bright Tunes Music v. Harrisongs Music*, GW LAW BLOGS, <https://blogs.law.gwu.edu/mcir/case/bright-tunes-music-v-harrisongs-music/> (last visited Apr. 16, 2021) (comparing the sounds of the two recordings at issue.).

<sup>46</sup> *George Harrison on the 'My Sweet Lord' Lawsuit*, YOUTUBE (Nov. 19, 2011), [https://www.youtube.com/watch?v=1klQUpGP8o&ab\\_channel=aus200200](https://www.youtube.com/watch?v=1klQUpGP8o&ab_channel=aus200200); see also *Bright Tunes Music Corp.*, 420 F. Supp. at 180-81 (“[I]t is clear that My Sweet Lord is the very same song as He's So Fine with different words.”).



As stated previously, to prove copying one needs to show (1) actual copying (comprised of access and probative similarity) and (2) unlawful appropriation.<sup>47</sup> It is conceded that the stronger the similarity between the two works, the less proof of access that is required.<sup>48</sup> However, the opposite is not necessarily true, as it does not follow that showing a strong amount of access can eradicate the necessity of showing substantial similarity between the works at issue.<sup>49</sup> This is the proposition recognized as the inverse ratio rule which states that "a lower standard of proof of substantial similarity" is suitable "when a high degree of access is shown."<sup>50</sup> Consequently, if the copyright holder demonstrates a strong evidence of access, then the "less compelling the similarities between the two works need to be in order to give rise to an inference of copying."<sup>51</sup>

The inverse ratio rule applies to the factual question of copying.<sup>52</sup> One of the common confusions arising out of the application of the rule is where exactly in the infringement test is the rule applicable.<sup>53</sup> This misconception arises due to courts confusing "probative similarity" and "unlawful appropriation." More specifically, the unlawful appropriation and probative similarity elements are often both referred to as "substantial similarity".<sup>54</sup> Thus, judges have applied the inverse ratio rule to lower the standard of proof of the unlawful appropriation element.<sup>55</sup> Other times courts have used it to lower the standard of proof of only probative similarity.<sup>56</sup> Professor Alan Latman argues that the term substantial similarity should strictly be applied only to refer to

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<sup>47</sup> Nimmer, *supra* note 20 § 13.01.

<sup>48</sup> Nimmer, *supra* note 20 § 13.02.

<sup>49</sup> Nimmer, *supra* note 20 § 13.03.

<sup>50</sup> *Skidmore*, 952 F.3d at 1066.

<sup>51</sup> *Id.*

<sup>52</sup> See Nimmer, *supra* note 20, § 13.03 (explaining that confusion between actual copying and unlawful appropriation causes misapplication of the inverse ratio rule.).

<sup>53</sup> David Aronoff, *Exploding the Inverse Ratio Rule*, 55 J. Copyright Soc'y U.S.A. 125, 129 (2008). ("[f]requently, cases invoking the [inverse ratio rule] conflate the elements of actual copying and unlawful appropriation under the 'substantial similarity' rubric, and assume without analysis that the [inverse ratio rule] is applicable to both elements.").

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

unlawful appropriation, in order to avoid confusion.<sup>57</sup> It should be applied strictly to unlawful appropriation, not only to avoid confusion, but because the inquiries for probative similarity and unlawful appropriation are different. As explained in the Supreme Court in *Feist*, you can have actual copying, but that does not mean that legal liability can attach.

To showcase the problems arising out of the application of the rule in the context of the music industry, consider the following hypothetical scenario of a copyright infringement suit involving two songs. If defendant had full access of the recording of plaintiff's song, for instance, he was in the music studio when plaintiff's song was recorded and created, and then he created his own song, it does not mean that the works are substantially similar. The two works could be entirely distinct, but the rule serves to the advantage of the plaintiff in proving copyright infringement. Conversely, if the defendant did not have any access to the song the inverse ratio rule is useless because the rule only applies when there is high degree of access. Additionally, because some courts lower the standard of the unlawful appropriation element, and not probative similarity, the use of the rule can lead to unfair results for the defendant. For example, applying it strictly to probative similarity, which is the appropriate method, means that the burden of demonstrating unlawful appropriation is not lowered. On the other hand, if one applies it solely to the unlawful appropriation element, it means that the plaintiff gains an advantage because the burden is lowered, and the high degree of access can make up for any dissimilarities in the songs. If no other affirmative defense applies, it means that the plaintiff is likely to succeed in the case. If the rule is used to its extreme, it can lead to situations where simply showing high access can lower the element of unlawful appropriation, thus eradicating the need of showing probative

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<sup>57</sup> Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1188 (1990).

similarity. It would also run afoul the distinction that the Supreme Court in *Feist* established, which is that actual copying is distinct from unlawful appropriation.

### III. Origins of the Inverse Ratio Rule

Before the *Led Zeppelin* decision, most of the circuits that had considered the rule, the Second, Fifth, Seventh, and Eleventh Circuit, had rejected the use of the inverse ratio rule, with only the Sixth and Ninth Circuit endorsing the rule.<sup>58</sup> In his account about the inverse ratio rule, David Aronoff mentions that the term “inverse ratio rule” first appeared in a New York case, *Morse v. Field* from 1954.<sup>59</sup> Nevertheless, its actual origins can be traced back to 1938 when the Second Circuit in *Shipman v. R.K.O Radio Pictures*,<sup>60</sup> without mentioning the rule by name, applied the rationale of the rule.<sup>61</sup> The Second Circuit, however, was the first to explicitly reject the rule in 1961 in the case *Arc Music Corp. v. Lee*.<sup>62</sup> The Second Circuit explained that the federal law at that time—and still today—mentions nothing about the rule.<sup>63</sup> The court was troubled by the proposition that similarity could be diminished by mere evidence of access, stating that “[a]t best its scope of possible application is small, since it can apply only to justify a result after a showing of similarity has been made.”<sup>64</sup> It should be noted that presently when plaintiffs in the District Courts for the Second Circuit have argued for the use of the rule, the courts have rejected its use, but emphasized that its use is only for actual copying and not unlawful appropriation, while the

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<sup>58</sup> *Skidmore*, 952 F.3d at 1066 (9th Cir. 2020).

<sup>59</sup> Aronoff, *supra* note 53 at 132.

<sup>60</sup> *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 538 (2d Cir. 1938).

<sup>61</sup> Aronoff, *supra* note 53 at 131.

<sup>62</sup> *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961); *See Nimmer, supra* note 20, § 13.03 (“Although it is completely rejected by the Second Circuit, it would seem to have a very limited measure of validity.”).

<sup>63</sup> *Arc Music Corp.*, 296 F.2d at 187.

<sup>64</sup> *Id.*

Ninth Circuit applied the rule erroneously to the unlawful appropriation component, in several cases.<sup>65</sup>

Meanwhile, in 1994, the Eleventh Circuit rejected to use the rule in *Beal v. Paramount Pictures Corp*<sup>66</sup> because it was first raised in a reply brief, it had never been used in the Eleventh Circuit, and strong access did not “do away with the necessity of finding similarity.”<sup>67</sup> Likewise, in 2004, the Fifth Circuit acknowledge the existence of the rule and its use in other circuits but declined to adopt it.<sup>68</sup> Lastly, in 2012, the Seventh Circuit refused to endorse the future use of the rule in a music copyright infringement suit involving the artist Kanye West.<sup>69</sup>

#### **A. The Early History of the Inverse Ratio Rule in the Ninth Circuit**

The inverse ratio rule first appeared in the Ninth Circuit in 1977 in the case *Sid & Marty Krofft TV Prods. v. McDonald's Corp.*<sup>70</sup> In this case the plaintiffs, Sid and Marty Krofft, were approached by NBC to develop a television show targeted to children.<sup>71</sup> An advertising agency approached the plaintiffs with a proposal to use plaintiffs’ characters for a marketing campaign for the fast food chain McDonalds.<sup>72</sup> Plaintiffs were told that the marketing campaign was cancelled,

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<sup>65</sup> See *Green v. Lindsey*, 885 F. Supp. 469, 480 (S.D.N.Y. 1992) (“Moreover, even if the inverse-ratio rule were good law in the Second Circuit, plaintiff misperceives the effect of that rule. The inverse-ratio rule, if applied, affects the quantum of proof of similarity necessary to create an inference of copying, it does not affect the quantum of proof of similarity, i.e., substantial, necessary to prove misappropriation of expression.”); *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t*, 487 F. Supp. 2d 41, 47 n.4 (D. Conn. 2007) (“While access may be relevant to the first prong of analysis [copying], with respect to the second prong [substantial similarity], the Second Circuit has rejected the Ninth Circuit’s inverse ratio rule [thus] defendants’ assumed access to the screenplay is insufficient for a finding of substantial similarity.”); *Sheldon Abend Revocable Tr. v. Spielberg*, 748 F. Supp. 2d 200, 204 n.3 (S.D.N.Y. 2010) (reasoning that the inverse ratio rule is irrelevant to the case because it is only applicable to the issue of actual copying.).

<sup>66</sup> *Beal v. Paramount Pictures Corp.*, 20 F.3d 454 (11th Cir. 1994).

<sup>67</sup> *Id.* at 460.

<sup>68</sup> *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 372 (5th Cir. 2004).

<sup>69</sup> *Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012).

<sup>70</sup> *Sid & Marty Krofft TV Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *Skidmore*, 952 F.3d at 1066 (“We first articulated the rule in 1977...”).

<sup>71</sup> *Sid & Marty Krofft TV Prods.*, 562 F.2d at 1161.

<sup>72</sup> *Id.*

but in fact the agency and McDonalds moved forward with the campaign based on plaintiff's characters.<sup>73</sup>

On appeal, the Ninth Circuit, analyzing the access requirement of the copyright infringement test, articulated that no amount of access will suffice to show copying if there are no similarities.<sup>74</sup> The court, however, did state that it did not follow that "where clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may not be lower than when access is shown merely by a preponderance of the evidence."<sup>75</sup> This proposition by the court implies that clear evidence of access, such as when access is conceded, can lead to situations where the inverse ratio rule can make up for any dissimilarities as the burden will be lowered. The issue with this proposition is that whether or not two works are similar cannot depend on the amount of access.

In *Krofft* there was strong evidence of access as the agency had visited the plaintiff's headquarters in Los Angeles to discuss the campaign, even though the agency had already decided before meeting with the plaintiffs that they would not work with them.<sup>76</sup> Therefore, the court, applying the inverse ratio rule, stated that due to the high degree of access, a lower standard of proof to show substantial similarity was justified. The court took the idea of the inverse ratio rule from the Second Circuit, who had rejected its use, and also used the Nimmer treatise as support.<sup>77</sup> But the Ninth Circuit stated that since it was a subjective test, it was impossible to quantify the standard for the inverse ratio rule.<sup>78</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1172.

<sup>76</sup> *Sid & Marty Krofft TV Prods.*, 562 F.2d at 1161.

<sup>77</sup> 3 William F. Patry, Patry on Copyright § 9:236 ("Krofft went on to adopt the 'inverse ratio' rule previously rejected by the Second Circuit in *Arc Music Corp. v. Lee*.").

<sup>78</sup> *Sid & Marty Krofft TV Prods.*, 562 F.2d at 1172.

A decade later, in 1987, in *Aliotti v. R. Dakin & Co*<sup>79</sup> the Ninth Circuit, although it rejected to apply the rule, stated that it did not need to “address the continuing viability of Professor Nimmer's proposal” since “no amount of proof of access will suffice to show copying if there are no similarities.”<sup>80</sup> The *Aliotti* Court emphasized the fact that no other circuit had applied the rule since *Krofft* and that the Second Circuit had criticized it as confusing, a fact that was ignored by the *Krofft* Court.<sup>81</sup>

Only three years later, the Ninth Circuit in *Shaw v. Lindheim*<sup>82</sup>, returned to its original application of the rule in *Krofft*. The Ninth Circuit stated that the inverse ratio rule was the “law of this circuit” primarily “[b]ecause no subsequent decision has disturbed the access rule established in *Krofft*.”<sup>83</sup> Afterwards in 1996, the Ninth Circuit again applied the inverse ratio rule in the music copyright case *Smith v. Jackson*<sup>84</sup>, by reapplying the standard set forward by *Krofft* and with the support of the *Shaw* decision. In this case Michael Jackson as a defendant succeeded, even with the showing of high access because the court considered it to be *scenes a faire*.<sup>85</sup> According, to the Music Copyright Infringement Resource, a database hosted by the George Washington University Law School, the songs by plaintiffs are not publicly accessible, thus one is left to wonder what made the court consider it to be “scenes a faire.”<sup>86</sup> In both of these cases the Ninth Circuit applied the inverse ratio rule to the extrinsic test of substantial similarity, thus erroneously lowering the burden of proving unlawful appropriation, as opposed to probative similarity.

## **B. The 2000s: Erroneous Applications of the Rule**

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<sup>79</sup> *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987).

<sup>80</sup> *Aliotti*, 831 F.2d at 902; Nimmer *supra* note 20, § 13.03.

<sup>81</sup> *Aliotti*, 831 F.2d at 902. (9th Cir. 1987); *ARC Music Corp. v. Lee*, 296 F.2d 186, 187-88 (2d Cir. 1961).

<sup>82</sup> *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

<sup>83</sup> *Shaw*, 919 F.2d at 1361-62 (9th Cir. 1990).

<sup>84</sup> *Smith v. Jackson*, 84 F.3d 1213 (9th Cir. 1996).

<sup>85</sup> *Smith*, 84 F.3d at 1218.

<sup>86</sup> The George Washington University Law School, *Smith v. Michael Jackson*, GW LAW BLOGS, <https://blogs.law.gwu.edu/mcir/case/smith-v-michael-jackson/> (last visited Mar. 3, 2021).

The 2000's included a series of cases that contributed to the confusion and misapplication of the rule. First, the Ninth Circuit again applied the inverse ratio rule in *Three Boys Music Corp. v. Bolton*.<sup>87</sup> This was another notable music copyright case where Michael Bolton was sued by the Isle Brothers for copyright infringement and lost.<sup>88</sup> Here, the *Three Boys* Court added that the Ninth Circuit has “never held ... that the inverse ratio rule says a weak showing of access requires a stronger showing of substantial similarity.”<sup>89</sup> The Ninth Circuit applied the rule in that case only in one direction, benefiting the plaintiffs but not the defendants, contrary to previous decisions which had required stronger showing of similarity if access was uncertain.<sup>90</sup> In an amicus brief opposing the decision, the Recording Industry Association categorized this application of the inverse ratio rule as a new exception, with no case law precedent.<sup>91</sup> Moreover, they criticized the use of the rule to the unlawful appropriation element, instead of applying it only to probative similarity.<sup>92</sup> The Recording Industry Association stressed that the proper application of the rule was only for the actual copying component of the infringement test.<sup>93</sup>

Two years later in *Metcalf v. Bochco*<sup>94</sup>, the court considered a case with greater proof of access than in previous cases, which involved the alleged infringement of a TV script. Although the court did not mention the rule by its full name, it stated that due to the concession of access by defendants a trier of fact could easily infer that the similarities are due to copying.<sup>95</sup> Post-*Metcalf*

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<sup>87</sup> *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 486.

<sup>90</sup> See Aronoff, *supra* note 53, at 137 (explaining that there was no logic to the conclusion by the Ninth Circuit a lower showing of access does not benefit the defendant.).

<sup>91</sup> Brief for Michael Bolton, as Amici Curiae Supporting Petitioners., *Bolton, v. Three Boys Music Corp.*, 2000 WL 34000040 (U.S.) (No. 00-689).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Metcalf v. Bochco*, 294 F.3d 1069, 1071 (9th Cir. 2002), overruled by *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>95</sup> *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179 (9th Cir. 2003) (“[O]ur decision in *Metcalf* was based on a form of inverse ratio rule analysis.”); see also Aronoff, *supra* note 53, at 138; Brenner, *supra* note 9, at 32 (for further discussion of the *Metcalf* case.).

the inverse ratio ruled enjoyed little success, but in 2003 the Ninth Circuit in *Rice v. Fox Broad. Co.*,<sup>96</sup> analyzing the status of the inverse ratio rule, differentiated *Rice* from previous cases that had applied the inverse ratio rule by stating that the standard set forward by *Metcalf* should only be used in cases where the defendants conceded to access.<sup>97</sup>

### **C. The 2010s: Making Sense of the Inverse Ratio Rule**

The 2010s started with several opinions still invoking the use of the inverse ratio rule, although in neither case the plaintiff was able to succeed in using the rule.<sup>98</sup> Nonetheless, there are two notable cases which laid the framework for the subsequent rejection of the inverse ratio rule in *Skidmore v. Led Zeppelin*. First, in *Rentmeester v. Nike*,<sup>99</sup> the Ninth Circuit resolved a copyright infringement claim of the Michael Jordan photography used for the Jordan brand logo. Second, in *Williams v. Gaye*,<sup>100</sup> the court analyzed an infringement claim involving the Robin Thicke song “Blurred Lines.”

In *Rentmeester*, the court did not invalidate the inverse ratio rule, but it clarified some of the confusion surrounding the use of the rule. In the discussion of the element of access, the court said that the inverse ratio rule applies to the category of actual copying, the factual question of the infringement test, and not to prove unlawful appropriation, which is the legal question.<sup>101</sup> The Ninth Circuit, took a different approach from its previous erroneous application of the rule in *Shaw*,

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<sup>96</sup> *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003); Brenner, *supra* note 9, at 32 (mentioning the little success that the inverse ratio rule had post-Metcalf.).

<sup>97</sup> *Id.* at 1178.

<sup>98</sup> See *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010) (“For purposes of the [Plaintiffs] copyright claim, we assume without deciding that the inverse ratio rule applies to lower the burden on the [Plaintiffs] to show similarity. Even if the Defendants had access to the Screenplay, the [Plaintiffs] have not shown sufficient similarity between the Screenplay and the Film to maintain an infringement claim under federal copyright law.”); *Novak v. Warner Bros Pictures, LLC*, 387 F. App'x 747, 749 (9th Cir. 2010) (finding that “even under a relaxed standard, the requisite similarities must be ‘concrete or articulable’ to satisfy the extrinsic test.”).

<sup>99</sup> *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018).

<sup>100</sup> *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

<sup>101</sup> *Id.* at 1123.



*Smith* and *Three Boys Music*.<sup>102</sup> Interestingly, the Recording Music Association had already pointed out this mistake to the court in their amicus brief in the *Three Boys Music* case, but the court still kept applying the rule in an erroneous manner.<sup>103</sup> The court emphasized the difference between the factual and legal components of the infringement test, stating that the substantial similarity standard of unlawful appropriation is necessary “to strike a delicate balance between the protection to which authors are entitled ... and the freedom that exists for all others to create their works outside the area protected against infringement.”<sup>104</sup> The court found that the use of the inverse ratio rule to lower the standard of substantial similarity to prove unlawful appropriation was not correct because the standard “does not vary with the degree of access the plaintiff has shown.”<sup>105</sup> This approach by the *Rentmeester* Court, is the correct approach for the use of the inverse ratio rule. As opposed to previous applications of the rule, this approach does not excessively burden defendants in infringement cases and satisfies the correct perception that not all copying will lead to legal liability. This approach, however, still has its flaws because a high degree of access does not mean that one can lower the probative similarity component if the works do not share many similarities. Although the Ninth Circuit finally clarified the use of the rule and was on the correct path, a different panel for the Ninth Circuit drifted away from this reasoning only three weeks later in their analysis of *Williams v. Gaye*.<sup>106</sup>

*Williams v. Gaye*, considered as the music industry’s “worst nightmare,” involved the estate of Marvin Gaye suing defendants Robin Thicke, Pharrell Williams, and others for copyright infringement due to similarities between Gaye’s song “Got to Give it Up” and the 2013 song

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1124.

<sup>105</sup> *Id.*

<sup>106</sup> Nimmer, *supra* note 20, § 13.03 (“That trenchant analysis set Ninth Circuit law on the correct path – until a bauble three weeks later, when a different panel handed down *Williams v. Gaye*.”).

“Blurred Lines”.<sup>107</sup> In its first opinion, the court stated that the inverse ratio rule is binding precedent of the Ninth Circuit, and thus they would apply it.<sup>108</sup> Gaye’s estate stressed for the application of the rule stating that Robin Thicke and Pharrell Williams had a high degree of access and thus the degree of substantial similarity should be diminished.<sup>109</sup> The Gaye estate reasoned that the inverse ratio rule should make up for any dissimilarity between the songs as Pharrell Williams and Robin Thicke both admitted that they looked up and admired Marvin Gaye and had Gaye in mind when making the song.<sup>110</sup> This again highlights the issue with the rule, because although one could argue that the rule could be relevant if the works are extremely similar, it does not follow that access should serve as a replacement to probative similarity if “Blurred Lines” is not similar to “Got to Give it Up.”

As pointed out by the Nimmer treatise, the court in *Williams v. Gaye* used the term “substantial similarity” to refer to both probative similarity and unlawful appropriation.<sup>111</sup> But the court applied the inverse ratio rule to the unlawful appropriation element—just like in *Shaw*, *Smith*, and *Three Boys Music*—as opposed to the probative similarity element of actual copying, which was the distinction that the panel in *Rentmeester* purported to make, only three weeks earlier.<sup>112</sup> The dissent explained the mistake by the majority by citing to the Nimmer treatise and stating that actual copying is not enough; legal consequences only attach if unlawful appropriation exists.<sup>113</sup> Surprisingly and without explanation, the panel in its amended decision, which still upheld the

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<sup>107</sup> Wang, *supra* note 4.

<sup>108</sup> *Williams*, 895 F.3d at 1163, n.6.

<sup>109</sup> *Id.*

<sup>110</sup> Brian McBrearty, *Stairway To Heaven, Blurred Lines, And The Silly Inverse Ratio Rule*, MUSICOLOGIZE (Feb. 6, 2019), <https://www.musicologize.com/stairway-to-heaven-blurred-lines-and-the-inverse-ratio-rule/>.

<sup>111</sup> Nimmer, *supra* note 20, § 13.03 (“The phrase ‘substantial similarity’ ... appears four times. All refer to the same element... “probative similarity” ... many courts historically used the phrase “substantial similarity” in that context, even though doing so confuses it with ... copying as a legal matter.”).

<sup>112</sup> *Id.*

<sup>113</sup> *Williams*, 885 F.3d at 1186.

jury verdict in favor of Gaye, deleted all the references to the inverse ratio rule that were mentioned in its original opinion, even those in the dissent.<sup>114</sup> Commentators argued that this signaled that the controversial rule “ha[d] finally danced its last dance in the Ninth Circuit.”<sup>115</sup> Nevertheless, because it was not officially rejected, the rule was still “law of this circuit” and a plaintiff could invoke it to succeed in a copyright infringement claim<sup>116</sup>

#### **D. *Skidmore v. Led Zeppelin*: The End of the Inverse Ratio Rule**

The end of the inverse ratio rule in the Ninth Circuit came in the *Skidmore v. Led Zeppelin* decision in March 2020. Michael Skidmore, the co-trustee of Randy Wolfe, guitarist of the band Spirit, brought suit against Led Zeppelin, arguing that the band’s 1971 song “Stairway to Heaven” infringed on the copyright of the rock song “Taurus” by the band Spirit.<sup>117</sup> Skidmore only alleged copyright infringement introduction of both songs, as opposed to infringement of the whole song.<sup>118</sup> He argued that the opening of “Stairway to Heaven” infringed on the eight-measure passage at the beginning of “Taurus.”<sup>119</sup>

At the District Court for the Central District of California, the jury returned a verdict for Led Zeppelin, finding that although there was access, the works were not substantially similar under the extrinsic test.<sup>120</sup> Nonetheless, one of the major issues presented was whether the District Court erred in not instructing the jury about the inverse ratio rule, which gave the Ninth Circuit

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<sup>114</sup> *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018); Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and its Aftermath*, 92 S. CAL. L. REV. Postscript 67, 75 (“The inverse ratio rule is so controversial that, in an amended decision, the Ninth Circuit deleted the paragraph from its original opinion discussing the rule and its application.”).

<sup>115</sup> *Did The Ninth Circuit’s “Blurred Lines” Ruling Just Quietly Move To Kill Off The So-Called Inverse Ratio Rule?*, JDSPURA (Jul. 16, 2018), <https://www.jdsupra.com/legalnews/did-the-ninth-circuit-s-blurred-lines-73084/>.

<sup>116</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (9th Cir. 1990).

<sup>117</sup> *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1057 (9th Cir. 2020).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1060.

the opportunity to end the use of the rule once and for all.<sup>121</sup> In the preceding months before judgment was entered two amicus briefs in favor of Led Zeppelin, argued for the court to reconsider the continued validity of the inverse ratio rule.<sup>122</sup> First, the Recording Industry Association of America argued that the rule was “logically unsound” leading to confusion among the jury and that “the circuit split on the matter leads to copyright cases being unduly influenced by accidents of venue.”<sup>123</sup> Second, an amicus brief comprised by intellectual property professors insisted that the Ninth Circuit should not only reaffirm the *Rentmeester* reasoning—distinguishing between actual copying and unlawful appropriation—but also reject the use of the rule even for lowering the actual copying element of infringement test.<sup>124</sup> They concluded with an example illustrating the problem of the rule; just like Led Zeppelin might have had access to Spirit’s song, they also had even more access to the Rolling Stone’s popular song “Honky Tonk Women.”<sup>125</sup> They correctly argued that no one assumes that Led Zeppelin copied the Rolling Stone’s song even though there was more access because their work shares no similarities.<sup>126</sup> One can assume that under the inverse ratio rule, if the Rolling Stones sued Led Zeppelin for alleged infringement, the inverse ratio rule would benefit the Rolling Stones because the high degree of access can make up for any dissimilarities among the two works.

Finally, the Ninth Circuit in their en banc hearing decided to lay to rest the inverse ratio rule. The court delved into the extensive history of the rule, the confusion surrounding it, and what other circuits had opined about the rule.<sup>127</sup> The court in *Led Zeppelin*, highlighted an interesting

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<sup>121</sup> *Id.* at 1066.

<sup>122</sup> *Id.*

<sup>123</sup> Brief of the Recording Industry Association of America. et al. as Amici Curiae supporting Defendants-Appellees at 3-4, *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>124</sup> Brief of 19 Intellectual Property Professors as Amici Curiae in Support of Petitioner Led Zeppelin at 7-9, *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Skidmore*, 952 F.3d. at 1066-69.

point, which is that access has been diluted with the rise of digital media.<sup>128</sup> With the numerous ways that one can access media, from the internet to streaming services, the court found that the inverse ratio rule benefits those whose work is most accessible.<sup>129</sup> As the court pointed out, an owner of the copyright of popular shows such as “The Office,” which is highly accessible, benefit from the rule.<sup>130</sup> Owners of highly accessible songs could bring copyright infringement suit and benefit from the inverse ratio rule, by lowering the burden needed to prove substantial similarity.<sup>131</sup> Nonetheless, the court reasoned that nothing in copyright law gives greater protection to those with more popular works.<sup>132</sup> Lastly, the court criticized how the inverse ratio rule improperly tells the jury how it should reach its decision, disregarding the fact that the burden of proof is “preponderance of the evidence.”<sup>133</sup> Therefore, the court decided to overrule the use of the inverse ratio rule stating that access cannot be used to prove substantial similarity.<sup>134</sup> The Supreme Court in October 2020 declined the opportunity to hear the case, setting a conclusion to this dispute.<sup>135</sup>

#### **IV. Aftermath of *Skidmore v. Led Zeppelin***

After *Led Zeppelin* the only circuit still employing the inverse ratio rule is the Sixth Circuit. The Sixth Circuit, however, addressed the continued viability of the rule in a recent 2020 case stating that the rule “appears to be on its last legs.”<sup>136</sup> Although it did not reject the future use of

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<sup>128</sup> *Id.* at 1068.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020).

<sup>134</sup> *Id.*

<sup>135</sup> Bill Donahue, *Supreme Court Won't Hear Led Zeppelin Copyright Fight*, LAW 360 (Oct. 5, 2020), <https://www.law360.com/articles/1308109/supreme-court-won-t-hear-led-zeppelin-copyright-fight>. (explaining that Supreme Court Justices were not persuaded by the estate of Randy California’s argument that the *Skidmore* ruling “would be a ‘disaster for the creatives’ if left in place.”).

<sup>136</sup> *Enchant Christmas Light Maze & Mkt. v. Glowco, LLC*, 958 F.3d 532, 536 n.1 (6th Cir. 2020).

the rule, it laid the groundwork for a future panel to tackle the issue and lay rest to the controversial rule.<sup>137</sup>

Reactions to the *Led Zeppelin* decision were positive as many commentators advocated for the rejection of the inverse ratio rule in years prior to the decision.<sup>138</sup> The *Led Zeppelin* decision had immediate impact in the Ninth Circuit as only eight days later the District Court for the Central District of California, relying on *Led Zeppelin*, overruled the 2.8 million judgment against Katy Perry over alleged infringement.<sup>139</sup> The case involving Katy Perry, however, did not involve the inverse ratio rule, thus it is still too early to tell the effects that the rejection of the inverse ratio rule will have on the copyright system in the Ninth Circuit.<sup>140</sup> The parts of the decision in *Led Zeppelin* that have had immediate effect on the copyright system have been centered around the scope of protections in the 1909 Copyright Act and “commonly found compositional elements and their selection and arrangement in songs.”<sup>141</sup> Therefore, one is left to speculate as to what effect

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<sup>137</sup> Craig B. Whitney, *The Inverse Ratio Rule may be on its "Last Legs" in the Sixth Circuit*, MONDAQ (Jun. 2, 2020), <https://www.mondaq.com/unitedstates/copyright/944892/the-inverse-ratio-rule-may-be-on-its-last-legs-in-the-sixth-circuit>.

<sup>138</sup> Alexander Kaplan, Sandra Crawshaw-Sparks & Simona Weil, *Led Zeppelin Ruling Is Already Affecting Copyright Litigation*, LAW360 (Apr. 3, 2020), <https://www.law360.com/ip/articles/1259190/led-zeppelin-ruling-is-already-affecting-copyright-litigation> (stating that “... the Ninth Circuit en banc court’s decision to abandon the widely criticized inverse ratio rule drew immediate (and well-deserved) attention.”); Quinn Emanuel Urquhart & Sullivan, LLP, *June 2020: Trademark & Copyright Litigation Update*, JDSPURA (Jul. 8, 2020), <https://www.jdsupra.com/legalnews/june-2020-trademark-copyright-96271/>; Joseph M. Myles, *No Need to Wonder Anymore: Ninth Circuit Holds Stairway to Heaven Does Not Infringe Taurus*, FINNEGAN, (Apr. 1, 2020), <https://www.finnegan.com/en/insights/blogs/incontestable/no-need-to-wonder-anymore-ninth-circuit-holds-stairway-to-heaven-does-not-infringe-taurus.html> (explaining that the inverse ratio rule “has been criticized as leading to confusing rulings because the court never explained how to apply it – obviously, no amount of access makes B minor the same as C major.”).

<sup>139</sup> Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at \*54 (C.D. Cal. Mar. 16, 2020).

<sup>140</sup> Daniel A. Schnapp, *Good times, bad times: Ninth Circuit does away with “Inverse Ratio Rule” in Led Zeppelin copyright case and questions need to prove “access”*, NIXON PEOBODY (Mar. 10, 2020), <https://www.nixonpeobody.com/en/ideas/articles/2020/03/10/inverse-ratio-ruling-in-zeppelin-copyright-case> (“Time will tell if diminishing the need to show access, but overruling the ‘Inverse Ratio Rule,’ will make it more or less difficult to prove copyright infringement in Federal Courts in California and the Ninth Circuit in the future.”).

<sup>141</sup> Alexander Kaplan, Sandra Crawshaw-Sparks & Simona Weil, *Led Zeppelin Ruling Is Already Affecting Copyright Litigation*, LAW360 (Apr. 3, 2020), <https://www.law360.com/ip/articles/1259190/led-zeppelin-ruling-is-already-affecting-copyright-litigation> (explaining how the Led Zeppelin decision has affected copyright cases involving artists such as Katy Perry and Ed Sheeran.).

this will have on the copyright system. Nonetheless, one can predict, that the rejection of the inverse ratio rule will make it harder for plaintiffs to succeed in copyright infringement claims, as the inverse ratio rule was, for the most part, a rule that benefitted plaintiffs. It will benefit the copyright system in the Ninth Circuit, to the extent that future panels keep distinguishing between probative similarity and unlawful appropriation, as not all copying leads to legal liability.

### **A. Future of the Copyright System**

A high degree of access should not serve as a tool for plaintiffs to lower their burden of proving that the works are similar, especially when the works do not share many similarities. The inverse ratio rule gave plaintiffs greater advantage to succeed in an infringement claim, thus the Ninth Circuit made the correct decision in abrogating the rule. In terms of music copyright, it benefits the system because no amount of access can serve as a replacement to proving that the works are similar. One might argue, however, that this decision goes against the main goal of the copyright system. The main goal of the copyright system, from its inception, has been to incentivize creativity, “to promote the progress of Science and useful Arts.”<sup>142</sup> If the purpose of the copyright system is to incentivize creativity, it follows that the inverse ratio rule helped further that goal because it helped plaintiffs enforce their copyrights. The issue, however, especially in music copyright, is using court created doctrines such as the inverse ratio rule, to its extreme, to unfairly help a plaintiff when two songs are not as similar to the normal listener. The inverse ratio rule served at times as a limit on the progress of the useful arts, scaring away production of new music. On the one hand, it can be argued that being strict with copyright laws, such as enforcing the inverse ratio rule, incentivizes creativity because it forces artists to “think outside of the box” and add new expressions to previous ideas in the music scene. Nonetheless, it can hinder the

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<sup>142</sup> U.S. CONST. art I, § 8.

amount of music available to the public as artists might be scared of releasing songs due to fear of possible infringement. For example, after the ruling of the “My Sweet Lord” case, George Harrison expressed similar sentiments stating that the copyright case “made him so paranoid about writing that ... [he] didn’t want to touch the guitar or the piano in case [he was] touching somebody’s note.”<sup>143</sup> Therefore, the issue is how to balance the competing interests of protecting artist’s copyrights and, on the other hand, not restricting creativity by discouraging artists from creating new songs due to possible infringement claims.

This issue can be ameliorated by recognizing that music is different from other forms of subject matter protected by copyright. Music was built by borrowing from previous works to create something new. For instance, during the renaissance the principle of taking an already existing original work and creating a new arrangement out of it, which is referred to as *cantus-firmus*, was popular among artists.<sup>144</sup> Moreover, legendary composers, such as Mozart, Bach and Mendelssohn quoted directly from other popular hymns.<sup>145</sup> Similarly nowadays, although one is able to find completely unique songs, for the most part most songs are not completely original; they are based on inspirations building upon previous works. For instance, Pharrell Williams, a highly praised producer, stated that his work process is one of “reverse engineering”, seeking inspiration from previous works and analogizing how he as a musician tries to “build a building that doesn’t look the same but makes you feel the same way.”<sup>146</sup> This process was the one that got Pharrell Williams in trouble in *Williams v. Gaye*.<sup>147</sup> The copyright system must come to terms to the fact that most songs will inevitably have similarities, it must balance the competing interests of protecting artists’

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<sup>143</sup> In The Life of...The Beatles, *George Harrison on Why He Wrote "My Sweet Lord": 33 & 1/3 Interview (1976)*, YOUTUBE (Jun. 10, 2018), <https://youtu.be/a-0qlkg8xrs>.

<sup>144</sup> Dawn Leung, *Did Copyright Kill Classical Music?*, 3 ARIZ. ST. SPORTS & ENT. L.J. 327, 333-36 (2014).

<sup>145</sup> *Id.*

<sup>146</sup> GQ, *Pharrell and Rick Rubin Have an Epic Conversation*, YOUTUBE (Nov. 4, 2019), <https://youtu.be/PnahkJevp64>.

<sup>147</sup> *Id.*



works, but at the same time not limiting the creativity that comes from being inspired by other artists.

Therefore, the abrogation of the inverse ratio rule helps to the extent that it will make it harder to prove copyright infringement, especially in music copyright cases. The access component of the copyright infringement test has helped plaintiffs win against distinguished artist such as Katy Perry, and the court almost erroneously used it for *Williams v. Gaye*.<sup>148</sup> The difficulty of having the inverse ratio rule was that there was never any clear framework that judges could use to work from. Looking at the historical background of the rule in the Ninth Circuit, judges went back and forth about whether it was a “one-way” or “two-way” street rule.<sup>149</sup> There were also issues about whether it was applied to the factual question of copying or to the legal question. William Patry, author of the treatise *Patry on Copyright*, who also opposed the rule explained how the rule did not give any guidance on how to balance the ratio. He stated that according to the reasoning of the rule “if infringement is 100%, that 100% may be reached by 10% access and 90% similarity, by 90% access and 10% similarity, or by any figures in between [but] [u]nfortunately, there is no necessary relationship between access and similarity.”<sup>150</sup> There was never a clear explanation by courts as to how more access could decrease the similarity of the works.<sup>151</sup>

One could argue that the evidence that someone had high degree of access could be probative as to whether a person infringed, but it should not be used to diminish the burden of

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<sup>148</sup> Andrew Limbong, *Led Zeppelin Wins Copyright Dispute Over 'Stairway To Heaven'*, NPR (MAR. 9, 2020), <https://www.npr.org/2020/03/09/813763864/led-zeppelin-wins-copyright-dispute-over-stairway-to-heaven> (stating that “this access argument has helped win previous high-profile copyright cases against such artists as Robin Thicke and Katy Perry... this [Led Zeppelin Decision] might have some people thinking twice about bringing lawsuits against big stars.”); Nimmer, *supra* note 20, § 13.03 (explaining that the Court deleted all references of the Inverse Ratio Rule in the final opinion of *Williams v. Gaye*).

<sup>149</sup> Aronoff, *supra* note 53, at 140 (explaining that the Ninth Circuit did not use the rule as a “ratio” because it inconsistently applied it to benefit only plaintiffs, while other times it used it to benefit both parties.).

<sup>150</sup> 3 William F. Patry, *Patry on Copyright* § 9:236.

<sup>151</sup> David Aronoff, *Exploding the Inverse Ratio Rule*, 55 J. Copyright Soc'y U.S.A. 125, 129 (2008).

showing that the works are similar. High access cannot turn dissimilar works into similar works. Likewise, no amount of access can turn a B minor into a C major.<sup>152</sup> For instance, assume you have two copyright infringement cases, where access is conceded by the defendant, and the only difference among the cases is that one is litigated in the Ninth Circuit and the other in the Second Circuit. The plaintiff is likely to succeed in the Ninth Circuit if the court applies the inverse ratio rule as his burden to proving that the works are similar is diminished. On the other hand, if one litigated that case in the Second Circuit the burden to show that the works are similar is not diminished regardless if access is conceded or heavily contested. This leads to copyright cases being decided “by accidents of venue.”<sup>153</sup>

#### **B. Future of the “Access” Element of the Infringement Test**

With the decision to get rid of the inverse ratio rule questions arose as to whether access should still play a role in copyright infringement claims.<sup>154</sup> The Ninth Circuit touched upon the implications of access in the digital age, because even with the rejection of the inverse ratio rule, the access element of the infringement test might lead to controversial decisions. If a song is not widely disseminated the court will likely find that the access element is not proven, if there is not evidence to the contrary. Nevertheless, if it is widely disseminated and the alleged infringer states that they never heard it, access can still be proven through circumstantial evidence.<sup>155</sup> For instance, recently musical artists Kendrick Lamar and The Weeknd were sued for copyright infringement and the plaintiff argued that their original work was widely disseminated because their song and album was available for streaming, even if there was no evidence that they actually heard the

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<sup>152</sup> Myles, *supra* note 138.

<sup>153</sup> Brief of the Recording Industry Association of America, et al. as Amici Curiae supporting Defendants-Appellees at 3-4, *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

<sup>154</sup> Charles Cronin, *Marcus Gray, et al. v. Katy Perry, et al.*, GW LAW BLOGS, <https://blogs.law.gwu.edu/mcir/case/marcus-gray-et-al-v-katy-perry-et-al/>. (last visited Apr. 16, 2021).

<sup>155</sup> Karen Bevil, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?*, 52 Rutgers L. Rev. 311, 334 (1999).

song.<sup>156</sup> Similarly, in *Gray v. Perry*, the court originally accepted plaintiff's theory of widely dissemination, before reversing the jury's verdict, which was comprised of evidence of YouTube and Myspace views and that the song had won a Grammy.<sup>157</sup> Criticism of this reasoning included the fact that it is not hard to get thousands of views online, and that streaming has diluted the use of access in infringement cases.<sup>158</sup> Judgment was later reversed, in favor of Perry, primarily due to the *Led Zeppelin* ruling. Proof of access has lost its relevance, because most media can be found in streaming sites, thus giving a defendant an "opportunity to hear the work." Nonetheless, this does not resolve whether the two works are similar, which is the main issue in a copyright infringement case.

On the flip side, one can argue that access should still play a role in copyright because independent creation is a defense to copyright infringement, thus a plaintiff must show that the defendant had an opportunity to copy her original work. This defense is independent of the question whether an alleged infringer breached his duty not to copy another's work.<sup>159</sup> Therefore, access even if diluted in the digital age should still be proven because independent creation can be used as a complete defense to copyright infringement. A 1999 Law Review article presented the idea of replacing the access analysis in actual copying with proof of independent creation because access, which was once used to protect the defendant from being found guilty, has lost its value

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<sup>156</sup> Daniel A. Schnapp, *Battle of the Brooklyn-based Indie Band and Diamond and Platinum Certified Artists Kendrick Lamar and The Weeknd: Is it Necessary to Prove "Access" Under Copyright Law in an Era of Streaming?*, NIXON PEOBODY (Mar. 2, 2020), <https://www.nixonpeobody.com/ideas/articles/2020/03/02/can-be-presumed-in-copyright-infringement-cases>.

<sup>157</sup> *Gray v. Perry*, No. 215CV05642CASJCX, 2019 WL 2992007, at \*2 (C.D. Cal. July 5, 2019), appeal dismissed sub nom. *Gray v. Hudson*, No. 19-56195, 2020 WL 6066641 (9th Cir. Apr. 24, 2020) (reasoning that it is reasonable to argue at the summary judgment stage that "defendants would have accessed 'Joyful Noise' on Myspace or YouTube" in order to prove the issue of access.).

<sup>158</sup> Andrew Dalton, *Streaming Music May Make Cases like Katy Perry's More Common*, THE ASSOCIATED PRESS (Aug. 3, 2019), <https://apnews.com/article/0ad68859a96a4129a5e11294c73466be>.

<sup>159</sup> *Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012).

for defendants, thus independent creation has a stronger value to the issue of copyright infringement.<sup>160</sup>

### **C. The Next Steps for the Ninth Circuit in Copyright Cases**

Ultimately, this decision does not solve problems for copyright cases, as the copyright system still has its flaws, thus the system is in need of solutions to better evaluate copyright infringement cases, especially those involving music. While some record labels are able to afford musicologist to vet for possible infringement in new songs, other artists have to rely on insurance for protection.<sup>161</sup> One of the problems that arises in music copyright cases is that, if it goes to the jury, the jury often does not have the musical expertise to make an accurate decision. As stated by music attorney Ed McPherson, who has represented artists such as Lady Gaga and Frank Ocean, “[it is] very difficult for a jury of so-called peers to spend several days in court, learning about music and the song and copyright, and come out with a reasonable verdict.”<sup>162</sup> Nonetheless, one cannot take the right by jury away as that leads into problems with the Seventh Amendment, which grants the right to a jury trial. Others, however, such as attorney Richard Busch who won the *Blurred Lines* case, says that the jury is relevant for the intrinsic component of the copyright infringement test, which is the ordinary observer test.<sup>163</sup>

### **V. Conclusion**

Although at the moment it is too early to examine the impact that the abrogation of the inverse ratio rule will have on the Ninth Circuit, its abandonment indicates that the Ninth Circuit is reconsidering how it analyzes copyright infringement cases. This comment examined the history

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<sup>160</sup> Bevill, *supra* note 155, at 338-39.

<sup>161</sup> Wang, *supra* note 4.

<sup>162</sup> Jem Aswad, *Katy Perry's 'Dark Horse' Case and Its Chilling Effect on Songwriting*, VARIETY (Aug 6, 2019, 4:55 AM), <https://variety.com/2019/biz/news/katy-perry-dark-horse-lawsuit-joyful-noise-chilling-effect-on-songwriting-1203292606/>.

<sup>163</sup> *Id.*

of the inverse ratio rule in the Ninth Circuit and explained why the Ninth Circuit was correct in deciding to abrogate the use the rule; joining every other circuit except the Sixth Circuit. It explained how this decision would affect the future of copyright infringement claims, with a special emphasis on music copyright cases. Although the abrogation of the rule makes it more difficult for plaintiffs to succeed in copyright infringement claims, it does not discourage creativity, but rather promotes it. This is largely due to the fact that the inverse ratio rule was never applied correctly by courts and according to several copyright scholars it is logically unsound. Moreover, diminishing the burden on the amount of similarity that a plaintiff needed to show, due to the high amount of access made it unfair when the two works at issue did not have many similarities.