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Rethinking Music Copyright Infringement In The Digital World: Proposing a Streamlined Test After the Demise of the Inverse Ratio Rule

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COMMENT

RETHINKING MUSIC COPYRIGHT INFRINGEMENT IN THE DIGITAL WORLD: PROPOSING A STREAMLINED TEST AFTER THE DEMISE OF THE INVERSE RATIO RULE

*“[T]he dissent prophesies that our decision will shake the foundations of copyright law, imperil the music industry, and stifle creativity.”*¹

INTRODUCTION

I simply cannot copy your song if I have never heard it before. In a hypothetical world in which I truly had no exposure to your musical composition, any eerie similarities between our two songs must necessarily be the product of our own individual imaginations. Indeed, copyright law protects such independent creation.² Determining that one song was copied from another, therefore, requires two things: that the songs be “too” similar, whatever that means, and that the second author have had some kind of access to the first author’s work.³

In reality, however, songs can only be so similar before a rational person will start to suspect that one songwriter must have had access to the other songwriter’s work—even if that access cannot be proven. When the similarity between two songs is high enough, we begin to infer access even in the absence of evidence.⁴ On the other

1. *Williams v. Gaye*, 885 F.3d 1150, 1182 (9th Cir. 2018). Despite the majority’s dismissal, time showed the dissent to be eerily prescient.

2. *E.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46, 348 (1991).

3. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1125 (9th Cir. 2018); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

4. *Rentmeester*, 883 F.3d at 1124.

hand, however, if the songs are only mildly similar, we typically demand more proof of access before we are willing to chastise the second author for copying.⁵

This inference gives rise to the now largely defunct inverse ratio rule⁶—a three-word phrase that struck fear into the hearts of musicians within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. While seemingly logical, the inverse ratio rule created three untenable situations; each resulted in deeming a song “copied,” which, most artists would likely agree, is a badge of shame.⁷ In the first, one songwriter could be found liable for copying—even in a song which bore little similarity to the supposed original—when a high amount of access to that supposed original could be shown.⁸ In the second, a song could be slapped with the “copied” stamp when it shared significant similarity with another, despite the songwriter having little access to the supposed original, because of the satisfaction of the inverse ratio rule⁹—a conclusion that seems to fly in the face of copyright’s supposed protection of independent creation. This scenario is often referred to as “subconscious copying.”¹⁰ Finally, the rule deemed “copied” songs that innocently drew on the inspiration of, or paid overt homage to, the work of another musician¹¹—an incredibly common phenomenon that artists have described as paying tribute to the “legacy” of influential musicians.¹²

5. *Id.*

6. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1066 (9th Cir. 2020).

7. See, e.g., Christine Nishiyama, *Inspiration vs. Imitation: How to Copy as an Artist*, MIGHT COULD STUDIOS (Sept. 2019), <https://might-could.com/essays/inspiration-vs-imitation-how-to-copy-as-an-artist/> [<https://perma.cc/2GVC-AZNG>].

8. *Zeppelin*, 952 F.3d at 1068 (citing *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961)).

9. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 484–85 (9th Cir. 2000) (first citing *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996); and then citing *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n.2 (9th Cir. 1987)).

10. *Id.* at 482–84. Subconscious copying, of course, can also occur in a high-access scenario. This Comment does not examine genuine examples of subconscious copying (or, for that matter, cases of deliberate copying) but rather focuses on troublesome implications of the inverse ratio rule—in this case, the notion that a song with high substantial similarity to another, even with a low level of access, must have been subconsciously copied.

11. *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), is widely seen within the music industry as an example of this issue. See *infra* notes 53, 81–82 and accompanying text.

12. Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants, *Williams*, 885 F.3d 1150 (No. 15-56880), 2016 WL 4592129, at *16 [hereinafter Songwriter Amici Brief].

In the face of such a bewildering rule, I might stop publishing songs altogether. After all, if I face a copyright lawsuit every time I compose—given that I have heard a wide array of songs in my lifetime—I may very well decide the risk is not worth the reward. I may derive my deepest joy from songwriting, but since I do not have \$5 million to pay your damages award, prudence dictates I remain silent.

This is the landscape song composers faced after a surprise 2015 verdict,¹³ in which a California jury found that Robin Thicke and Pharrell Williams had infringed the copyright of Marvin Gaye's *Got to Give It Up* with their smash hit, *Blurred Lines*¹⁴—the best-selling single in the world in 2013.¹⁵ Despite the fact that the two songs share little musical similarity—at least in the opinion of the music industry¹⁶—the courts hit Thicke and Williams with a \$5.3 million payout, along with fifty percent of royalties generated by their song.¹⁷

On appeal, when two members of a three-judge Ninth Circuit panel did not find enough reason to overturn the jury's verdict,¹⁸ panic set in.¹⁹ The music community shared the opinion²⁰ of Judge Jacqueline Nguyen, who in a spirited dissent argued that the majority had allowed for copyrighting of a musical style.²¹ “[B]y refusing to compare the two works,” Judge Nguyen wrote, “the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.”²²

This Comment will discuss the devastating blow to musicians inflicted by the *Blurred Lines* verdict's embrace of the inverse ratio

13. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015).

14. *Id.*

15. *Williams*, 885 F.3d at 1160.

16. See, e.g., Rhodri Marsden, *If You Think Robin Thicke's Blurred Lines Plagiarises Marvin Gaye, You Don't Understand Songwriting*, NEWSTATSMAN (Mar. 12, 2015), <https://www.newstatesman.com/culture/2015/03/if-you-think-robin-thickes-blurred-lines-plagiarises-marvin-gaye-you-dont-understand> [<https://perma.cc/FX7T-TMU7>].

17. *Williams*, 885 F.3d at 1162–63.

18. *Id.* at 1182–83.

19. See *infra* section II.B.

20. See, e.g., Brian McBrearty, *Stairway to Heaven, Blurred Lines, and the Silly Inverse Ratio Rule*, MUSICOLOGIZE (Feb. 6, 2019), <http://www.musicologize.com/stairway-to-heaven-blurred-lines-and-the-inverse-ratio-rule/> [<https://perma.cc/D5E6-EKW5>].

21. *Williams*, 885 F.3d at 1183 (Nguyen, J., dissenting).

22. *Id.*

rule.²³ Then, I will examine the *Stairway to Heaven* decision, in which the Ninth Circuit sharply changed course and decided to abrogate the inverse ratio rule.²⁴ This welcome policy change nevertheless leaves questions as to how the Ninth Circuit will balance considerations of access with substantial similarity as it assesses copying in future cases. More importantly, the explosion of access in the digital world has fatally weakened—across all circuits—the role of access within the infringement test. In that light, I will conclude with a modified standard by which music copyright infringement cases should be judged.

I. SETTING THE STAGE: THE LEGAL LANDSCAPE OF THE NINTH CIRCUIT

Before delving into the *Blurred Lines* and *Stairway to Heaven* cases, I will lay a foundation by outlining the law as it existed at the time the decisions were reached. Two notes are in order.²⁵ First, while different circuits may express the music copyright infringement test in varying terms, the test itself is largely the same across the nation. I will use the test as the Ninth Circuit frames it. Second, sometimes “substantial similarity” under the test’s copying prong is referred to as “striking similarity” or “probative similarity,” presumably to avoid confusion with the “substantial similarity” required under the unlawful appropriation prong.²⁶ The Ninth Circuit, however, uses the term “substantial similarity” for both prongs,²⁷ as do courts across the nation.²⁸ The following diagram

23. *Id.* at 1163 (majority opinion).

24. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1066 (9th Cir. 2020).

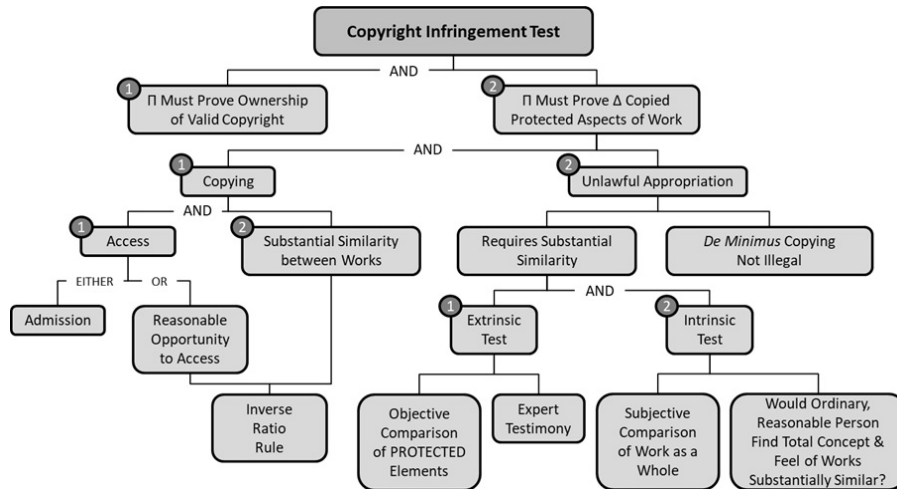
25. An additional issue also bears mentioning: The intrinsic test under the music copyright infringement test’s unlawful appropriation prong is highly problematic in that it gives consideration to unprotectable elements. *See, e.g., Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1125 (9th Cir. 2018); Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright’s “Substantial Similarity” Infringement Test*, 23 LEWIS & CLARK L. REV. 571 (2019). Such concerns, however, are beyond the scope of this Comment.

26. *See, e.g., Zeppelin*, 952 F.3d at 1064.

27. “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.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018). “Although these requirements are too often referred to in shorthand lingo as the need to prove ‘substantial similarity,’ they are distinct concepts.” *Zeppelin*, 952 F.3d at 1064.

28. “The more serious difficulty of describing the tests to determine infringement is compounded because two of the crucial terms in the infringement analysis, ‘copying’ and

outlines the relevant portions of music copyright infringement law at the time of the *Blurred Lines* decision.²⁹



As demonstrated by the diagram above, there are two prongs to copyright infringement analysis: (1) copying, sometimes called “copying-in-fact,” and (2) unlawful appropriation, sometimes called “misappropriation.”³⁰ The first “copying” prong is intended to serve as a sort of gatekeeper for the second and more stringent “unlawful appropriation” prong. Because copyright law theoretically protects independent creation—even of identical works³¹—the thinking is that some level of copying must be proven in order to find infringement.³² Suits that clear this gatekeeping bar then proceed to a more rigorous unlawful appropriation analysis, given that not all

‘substantial similarity,’ are used with different meanings in different contexts. The ambiguous use of these terms is so strongly embedded in the judicial decisions that the best thing to do is simply be aware of the ambiguities and be careful about the sense in which these words are being used at any given time.” 2 HOWARD B. ABRAMS & TYLER T. OCHOA, *THE LAW OF COPYRIGHT* §§ 14:3, 14:5 (2020).

29. The doctrine in this diagram is drawn primarily from *Zeppelin*, 952 F.3d at 1064; *Skidmore*, 905 F.3d at 1125; *Rentmeester*, 883 F.3d at 1116–17, 1124; and *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1162–65 (9th Cir. 1977). Although the Ninth Circuit abrogated the inverse ratio rule on which *Krofft* and *Rentmeester* relied, the non-inverse ratio rule parts of the cases remain good law.

30. See *supra* note 29.

31. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46, 348 (1991).

32. See *infra* section IV.B.2.c for discussion of how this gatekeeping function, while laudable in theory, fails its intended purpose. I therefore propose streamlining the infringement test to do away with this confusing prong altogether.

copying constitutes infringement.³³ As shown above, the inverse ratio rule applies to the first step of analyzing the existence of copying, but not to the second test for unlawful appropriation.³⁴

A. *What Is the Inverse Ratio Rule?*

The Ninth Circuit adopted the inverse ratio rule in 1977—thirty-eight years before the *Blurred Lines* decision and the same year in which Gaye wrote *Got to Give It Up*—in a case about children’s television characters.³⁵ The plaintiffs had created a children’s puppet television show and were in talks to allow McDonald’s restaurant to use those popular characters to market hamburgers.³⁶ The advertising agent working with the plaintiffs, however, stated the deal was canceled while secretly proceeding with the deal on his own.³⁷ In its ruling, the Ninth Circuit invoked the inverse ratio rule:

[W]here clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may . . . be lower than when access is shown merely by a preponderance of the evidence. As Professor Nimmer has observed: . . . “[S]ince a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof.” . . . We believe that th[e] degree of access [in this case] justifies a lower standard of proof to show substantial similarity [under the first prong of the infringement test].³⁸

Because copyright law protects even identical works if they were independently created,³⁹ access to an original work is necessary to prove copying of that work in the first prong of infringement analysis.⁴⁰ In fact, if a plaintiff can show that an alleged infringer had

33. De minimis copying is not illegal, *Feist*, 499 U.S. at 363, nor, usually, is copying of unprotectable elements, 17 U.S.C. § 102(b). See *infra* note 55.

34. *Rentmeester*, 883 F.3d at 1124.

35. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).

36. *Id.* at 1161.

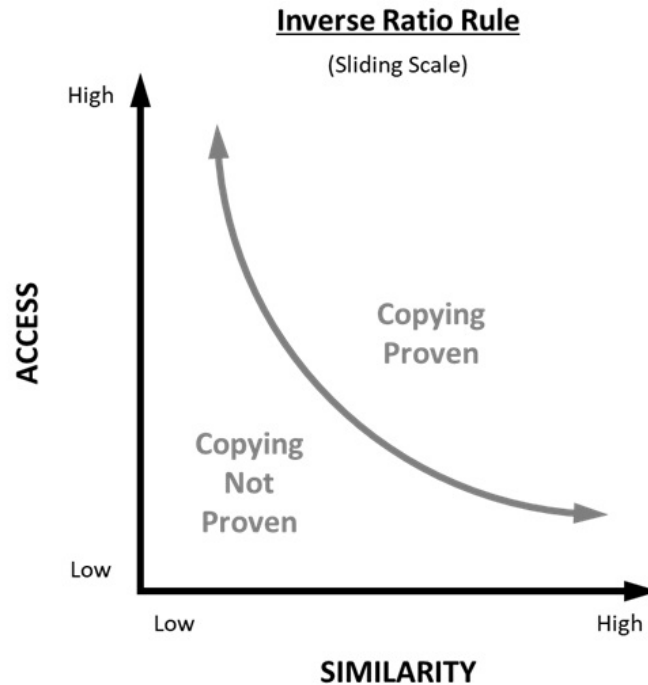
37. *Id.*

38. *Id.* at 1172 (internal citations and alterations omitted).

39. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46, 348 (1991).

40. We will see, however, that “proving access” as a concept has become meaningless in our digital world. See *infra* sections IV.A, IV.B.1.

access to her work, the inverse ratio rule steps in to lower the amount of similarity she must show between her work and the work of the alleged infringer.⁴¹ The inverse ratio rule looks like this:⁴²



B. Three Problems with the Inverse Ratio Rule

The problem with the inverse ratio rule, however, is that its implications do not make sense. While Nimmer’s statement holds logically true, it describes a static reality: If a high degree of similarity “dispense[s] with” the requirement to prove access, a lower degree of similarity must necessarily require proof of access.⁴³ It does not,

41. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018).

42. Due to the uncertainty in how the inverse ratio rule actually functions—such as to what exact degree it lowers the bar for substantial similarity—it is impossible to draw a mathematically precise graph. Even the question of whether the inverse ratio rule line crosses the Y axis (i.e., whether high access will totally do away with the need to demonstrate similarity) is unclear. See *infra* notes 47, 143 and accompanying text.

43. *Krofft*, 562 F.2d at 1172.

however, support the sliding scale inference pictured in the above graph's depiction of the inverse ratio rule, nor does it support the type of analysis employed by the Ninth Circuit in the *Blurred Lines* case: "We adhere to the 'inverse ratio rule,' which operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required."⁴⁴ Or, as the Ninth Circuit put it in a case decided only one month earlier, "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."⁴⁵

Taken to its logical conclusion, the inverse ratio rule provides that a plaintiff who can prove a high amount of access to a song need only prove minimal similarity in order to prove copying.⁴⁶ This is what the mathematical reality embodied in the graph above demonstrates. Yet many people might think that the inference is nonsensical. Just because I am highly familiar with your song does not mean that my song takes from it, parallels it, or even remotely sounds like it in any meaningful way. To hold my song to that standard is to erode my creative rights as a musician.

But a plaintiff likely must still prove *some* similarity between the works.⁴⁷ Given the aesthetically limited number of musical combinations with which songwriters work, however, a minimal amount of similarity will almost certainly be found among any two songs in a copyright suit, particularly after filtering for western music, then again for contemporary western music, then again for genre, and then again for current popular trends within genre. Indeed, a common complaint is that current music all sounds the same.⁴⁸ As Judge Learned Hand said, "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and

44. *Williams v. Gaye*, 885 F.3d 1150, 1163 (9th Cir. 2018).

45. *Rentmeester*, 883 F.3d at 1124.

46. *Id.*

47. Whether high, proven access to an "original" work can completely obviate the requirement of similarity is unclear. *See supra* note 42; *infra* note 143 and accompanying text.

48. *See, e.g.*, Michael A. Lanier, *Why Does Every Song Sound the Same?*, ODYSSEY (Oct. 25, 2016), <https://www.theodysseyonline.com/why-does-every-song-sound-the-same> [<https://perma.cc/4FGB-EBLV>]; Tom Barnes, *Scientists Just Discovered Why All Pop Music Sounds Exactly the Same*, MIC (Jan. 7, 2015), <https://www.mic.com/articles/107896/scientists-finally-prove-why-pop-music-all-sounds-the-same> [<https://perma.cc/36ZE-ANTD>].

much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.”⁴⁹

This is precisely why the other logical extreme of the inverse ratio rule—an automatic finding of “copying” in a situation with high similarity between works but little access to the supposed original—is so problematic. To be sure, subconscious copying can and does occur. A famous example of genuine subconscious copying exists in George Harrison’s *My Sweet Lord*, which a judge found to have infringed upon the Chiffons’ *He’s So Fine*.⁵⁰ The issue, however, is the fact that the inverse ratio rule facilitates an *automatic* finding of copying in a low-access situation when two songs sound highly similar. While the creator of a supposed original should certainly have the right to sue a songwriter over a highly similar song, copying—subconscious or otherwise—ought to be truly proven rather than assumed by way of the inverse ratio rule. Indeed, as a humorous video mashup of dozens of musically identical “four-chord songs” illustrates, much of popular music sounds highly similar while remaining on the proper side of copyright law.⁵¹ Such situations often fall squarely within copyright law’s *scènes à faire* doctrine (French for “scenes that must be done”), which does not afford protection to expression so common that it is “bound to recur.”⁵²

The third untenable situation created by the inverse ratio rule occurs when a songwriter draws on the inspiration of, or pays overt homage to, the work of an influential musician. The rule does not stomach such tribute, despite the fact that the artistic world thrives on inspiration: “From time immemorial, every songwriter, composer, and musician has been inspired by music that came before him or her. . . . This is especially so within a particular musical

49. Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940).

50. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), *aff’d sub nom.* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983).

51. Axis of Awesome, *All Popular Songs Are the Same 4 Chords*, YOUTUBE (Sept. 16, 2015), <https://www.youtube.com/watch?v=dFpryVMgni0> [<https://perma.cc/6TCQ-4ECW>].

52. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] (2020); *see, e.g.*, Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000) (“Under the . . . doctrine of scenes a faire, courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea; like merger, the rationale is that there should be no monopoly on the underlying unprotectable idea.”).

genre. Virtually no music can be said to be 100% new and original.”⁵³ Rather, the rule coldly calculates access and substantial similarity without regard to ephemeral inspiration, then spits out a label: copied.

To be fair, courts do not use the inverse ratio rule to completely settle whether copyright infringement occurred. As previously noted, the inverse ratio rule applies only to the first step of copyright analysis: whether copying took place.⁵⁴ Once more than a *de minimis*⁵⁵ amount of copying has been established, the court turns to the second step of copyright analysis: whether unlawful appropriation occurred.⁵⁶ The Ninth Circuit judges this step with a two-part analysis: the extrinsic test, which involves an “objective comparison of [only the] protected areas of a work” and often requires expert testimony; and the intrinsic test, which compares the two works as a whole and asks whether an “ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”⁵⁷ So although the inverse ratio rule is not the end-all-be-all of copyright infringement analysis, enough problems with the rule exist to make its conclusions highly troubling.

One final note is in order: By lowering the amount of substantial similarity that must be shown when a work is highly accessible, the inverse ratio rule unfairly privileges highly popular works. As the Ninth Circuit explained:

[T]he 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 . . . which are also highly accessible. But nothing in copyright law suggests that a work

53. Songwriter Amici Brief, *supra* note 12, at *9. Tracing the rich legacy of drawing on artistic inspiration is beyond the scope of this Comment.

54. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1130 (9th Cir. 2018); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018).

55. “De minimis” is short for the legal principle *de minimis non curat lex*, or “the law does not concern itself with trifles.” *De minimis non curat lex*, BLACK’S LAW DICTIONARY (11th ed. 2019). “[C]opyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

56. *Skidmore*, 905 F.3d at 1130.

57. *Id.* at 1125 (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)); *Rentmeester*, 883 F.3d at 1124.

deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.⁵⁸

Against this legal backdrop, the Ninth Circuit upheld a deeply troubling jury verdict in the *Blurred Lines* case that found copyright infringement of what many legal and artistic minds labeled an unprotectable musical “style” or “feel.”⁵⁹ Although the exact way in which the inverse ratio rule facilitated this outcome remains uncertain, it nevertheless played a significant role by lowering the bar the Gayes needed to clear in their quest to prove Thicke and Williams had stolen their father’s song.⁶⁰

II. *BLURRED LINES* DEALS A DEVASTATING BLOW

Dueling music experts testified at trial. Musicologist Judith Finnell spoke on behalf of the Gayes, whereas musicologist Sandy Wilbur supported Thicke and Williams.⁶¹ Complicating their analysis was the fact that the *Blurred Lines* suit fell under the Copyright Act of 1909, which did not protect sound recordings.⁶² The copyright protection afforded to the Gayes, therefore, was limited to the so-called “deposit copy” of sheet music submitted to the U.S. Copyright Office when the song was registered.⁶³ Any elements contained in the sound recording of *Got to Give It Up*, but not in the sheet music deposit copy, did not qualify for protection.⁶⁴

After winnowing out the unprotectable musical elements in Gaye’s song, the trial court compared the reports of the two musicologists, eventually determining that enough genuine issues of material fact existed under the “unlawful appropriation” prong’s extrinsic test to preclude awarding summary judgment to Thicke

58. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1068 (9th Cir. 2020).

59. *See, e.g., supra* notes 20–21 and accompanying text; *infra* note 82 and accompanying text.

60. *See infra* note 76 and accompanying text.

61. *Williams v. Gaye*, 885 F.3d 1150, 1161 (9th Cir. 2018).

62. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *5 (C.D. Cal. July 14, 2015); *see* Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(e), 9–12, 35 Stat. 1075, 1075–78. Congress began protecting sound recordings under federal law in 1972. *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (providing for “the creation of a limited copyright in sound recordings”).

63. *Bridgeport Music*, 2015 WL 4479500, at *5.

64. *Id.*

and Williams.⁶⁵ At trial, the musicologists disputed each other's assertions about the similarities of the two songs.⁶⁶ After a seven-day trial and two days of deliberations, the jury found that Thicke and Williams had infringed *Got to Give It Up*.⁶⁷ What elements of the infringement analysis the jury considered, however, remain murky.⁶⁸ It appears that the inverse ratio rule's thumb on the scale lowered the definition of "substantial similarity" so significantly⁶⁹ that the jury's decision constituted, in the words of Judge Nguyen in dissent, "finding substantial similarity between two pointillist paintings because both have a few flecks of similarly colored paint."⁷⁰

A. *How Did the Ninth Circuit Apply the Inverse Ratio Rule?*

In reexamining the *Blurred Lines* verdict, a two-judge majority on the Ninth Circuit panel confined most of its review to determining typical appellate matters, such as whether the trial court had abused its discretion or given wrong jury instructions.⁷¹ In fact, the majority took explicit issue with dissenting Judge Nguyen's detailed musical analysis of the facts of the case—or as the majority somewhat sarcastically termed it, Judge Nguyen's "expert review"—in commentary much bolder than is typically seen between fellow judges.⁷² Against that backdrop, the court again invoked the inverse ratio rule, but did so in a confusing manner:

65. *Williams*, 885 F.3d at 1161.

66. *Bridgeport Music*, 2015 WL 4479500, at *5–11.

67. *Williams*, 885 F.3d at 1159.

68. One of the main reasons I propose streamlining the music copyright infringement test, even given the demise of the inverse ratio rule, is because the test as it currently stands causes debilitating confusion. See *infra* section IV.B.2.a. The *Blurred Lines* decisions do not shed much light onto whether the jury found substantial similarity under the first "copying" prong of the infringement test. It appears—but is far from clear—that the jury did not assess "copying" substantial similarity at all, and thereby improperly applied the inverse ratio rule to lower the amount of substantial similarity needed under the second "unlawful appropriation" prong.

69. *Williams*, 885 F.3d at 1163.

70. *Id.* at 1183–84 (Nguyen, J., dissenting). In this quote, Nguyen refers to musicologist Finell's finding of substantial similarity, which, in agreeing with Finell, the jury apparently adopted. See *id.*

71. *Williams*, 885 F.3d at 1167, 1170 (majority opinion).

72. *Id.* at 1182. "The dissent's position violates every controlling procedural rule involved in this case. The dissent improperly tries, after a full jury trial has concluded, to act as judge, jury, and executioner, but there is no there there, and the attempts fails. . . . Given [its] flawed premise, it is perhaps unsurprising how little the dissent mirrors the majority

Access and substantial similarity are inextricably linked. We adhere to the “inverse ratio rule,” which operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required. Williams and Thicke readily admitted at trial that they had a high degree of access to “Got To Give It Up.” The Gayes’ burden of proof of substantial similarity is lowered accordingly. We use a two-part test for substantial similarity: an extrinsic test and an intrinsic test. For a jury to find substantial similarity, there must be evidence on both the extrinsic and intrinsic tests.⁷³

At first, the Ninth Circuit used “substantial similarity” to refer to the first “copying” prong of the infringement analysis. But then, the court appears to inexplicably shift to the second “unlawful appropriation” prong of the infringement analysis by describing the extrinsic and intrinsic tests.⁷⁴ Perhaps this is an example of the confusion resulting from the dual use of the term “substantial similarity,” to which the Ninth Circuit later referred.⁷⁵ At any rate, this language makes an analysis of how the inverse ratio rule applied to the *Blurred Lines* decision almost impossible to formulate.

The court thus left analysts hunting for clues somewhat disappointed: It did not explicitly define precisely how the presence of the inverse ratio rule relaxed the “substantial similarity” standard, nor did it indicate what similarities satisfied the lower sliding scale that would have failed to demonstrate substantial similarity in the absence of the inverse ratio rule. Furthermore, it did not specify under which prong of the infringement analysis it operated. Nevertheless, the rule played a clear role in the outcome of the case: “Although the dissent criticizes the inverse ratio rule,” the majority wrote, “the rule is binding precedent under our circuit law, and we are bound to apply it.”⁷⁶

opinion, and how far it veers into analysis untethered from the procedural posture of this case.” *Id.* at 1178; *see also supra* note 1 and accompanying text.

73. *Williams*, 885 F.3d at 1163 (citations, quotation marks, and parentheticals summarizing other cases omitted, but court’s explanatory text retained in full) (first citing *Swirsky v. Carey*, 376 F.3d 841, 844–45 (9th Cir. 2004); and then citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

74. *Id.* at 1163–64.

75. *See supra* notes 27–28 and accompanying text; *infra* note 178 and accompanying text; *see also infra* section IV.B.2.a (discussing a case in which another judge from the Ninth Circuit appears to make the same mistake).

76. *Williams*, 885 F.3d at 1163 n.6.

B. *Music Industry Responds to the Blurred Lines Decision*

When the *Blurred Lines* decision came out, the music industry was stunned by both the substance of the decision and the indecipherable way in which it was reached. “You’ve made it illegal to reference previous material,” Gregory Butler, a Los Angeles composer and producer, told the *Los Angeles Times*.⁷⁷ “I’m never going to come up with something so radically different that it doesn’t contain references to something else.”⁷⁸

“There’s no question in my mind that there has been a chilling effect,” litigator Christine Lepera told the *New York Times* about four years after the *Blurred Lines* verdict.⁷⁹ In fact, music industry insiders referred to the case as “the latest watershed, putting the commonly understood rules of songwriting up for debate.”⁸⁰

Perhaps because musicians do not typically study copyright law, their critiques rarely pinpointed particular “substantial similarity” errors they felt the Ninth Circuit had committed. Nevertheless, legal as well as artistic protests emerged in the wake of the *Blurred Lines* verdict:

The law should provide clearer rules so that songwriters can know when the line is crossed, or at least where the line is. . . . Appellants have been found liable for the infringement of an *idea*, or a series of *ideas*, and not for the *tangible expression* of those ideas, which is antithetical to Section 102(b) of the Copyright Act. Such a result, if allowed to stand, is very dangerous to the music community, is certain to stifle future creativity, and ultimately does a disservice to past songwriters as well. . . . The inherent danger of such a result is that, without drawing a proper line between what is an idea and what is an expression, or between what is an influence and what is an infringement, future songwriters do not know whether their “influence” is going to land them with the next hit record or land them in court—or both, as demonstrated in this case.⁸¹

77. Victoria Kim, Randy Lewis & Ryan Faughnder, ‘*Blurred Lines*’ Ruling Stuns the Music Industry, L.A. TIMES (Mar. 11, 2015, 6:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-blurred-lines-ruling-roiled-the-music-industry-20150310-story.html> [https://perma.cc/7PKC-32JJ].

78. *Id.*

79. Ben Sisario, ‘*Blurred Lines*’ on Their Minds, Songwriters Create Nervously, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> [https://perma.cc/AYQ7-HSPZ].

80. *Id.*

81. Songwriter Amici Brief, *supra* note 12, at *2–3, *8. See also, e.g., Brief of Amicus

As indicated above, musicians took legal issue with the third untenable situation created by the inverse ratio rule—the inability of creators to enjoy artistic inspiration from music giants who had come before them:

Quite simply, if an artist is not allowed to display his or her musical influences, for fear of legal reprisal, there is very little new music that is going to be created, particularly with the limitations that already naturally exist in songwriting. . . . There appears to be no easy way, no bright line, to determine in music cases—and it was certainly not done in this case [*Blurred Lines*—the difference between creating the same “feel” or “style,” and infringing a copyright. . . . One might ask if there is a better legacy for a songwriter than to inspire other songwriters to write music and pay homage to him for inspiring that music . . . , keeping his name and his music alive for generations to come. . . . It is difficult to imagine a songwriter that comes along after this case publicly affording *any* credit to *any* influence that he or she receives from *any* songwriter.⁸²

After the *Blurred Lines* verdict, two related types of litigation began to emerge. Fairly obscure artists, heartened by the sudden success of dubious copyright claims, filed suit against megahits in the hopes of taking some of the massive profits.⁸³ And so-called heritage producers, who hit their musical peak years ago, began suing to take a slice of the money made by popular new songs.⁸⁴

Christine Lepera’s insight shone true not long after she spoke to the *New York Times*, when she defended singer Katy Perry against a lawsuit by Christian rapper Flame.⁸⁵ Flame contended that Perry had stolen a distinctive musical line from his song *Joyful Noise* to use in her smash hit *Dark Horse*.⁸⁶ In closing arguments, Lepera told the jury: “They’re trying to own basic building blocks

Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, *Williams*, 885 F.3d 1150 (No. 15-56880), 2016 WL 4592128 [hereinafter Musicologist Amici Brief].

82. Songwriter Amici Brief, *supra* note 12, at *10, *12–13, *16.

83. See 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/> [https://perma.cc/YDC5-5M9J].

84. See *id.*

85. Andrew Dalton, *Jury: Katy Perry’s ‘Dark Horse’ Copied Christian Rap Song*, ASSOCIATED PRESS (July 30, 2019), <https://apnews.com/article/7eef738596e9458each9f9015d7fd7fe> [https://perma.cc/UL2N-VFKV].

86. *Id.*

of music, the alphabet of music that should be available to everyone.”⁸⁷ Perry lost the lawsuit.⁸⁸

“The aftereffects of the *Blurred Lines* decision . . . have been felt most acutely by rank-and-file songwriters, who work in obscurity even as their creations propel others to stardom,” the *New York Times* wrote.⁸⁹ “The ramifications for them have been inescapable, affecting royalty splits, legal and insurance costs, and even how songs are composed.”⁹⁰

In fact, insurance rocketed into the forefront of the post-*Blurred Lines* world once the inverse ratio rule made music copyright lawsuits so much easier to win.⁹¹ One music manager—Lucas Keller, who has worked with Carrie Underwood and Muse—now encourages all his songwriters to obtain errors-and-omissions insurance to protect themselves from even accidental copying.⁹² The music industry understandably balks at the necessity of buying this insurance, which can cost anywhere from \$20,000 to \$250,000 a year, but the stakes are high: “We all feel like the system has failed us,” Keller told *Rolling Stone*.⁹³ “There are a lot of aggressive lawyers filing lawsuits and going ham on people.”⁹⁴

Songwriters in particular bear the brunt of the inverse ratio rule’s dominance, as they are typically far less wealthy than the famous singers who perform their creations.⁹⁵ “We’re all nervous and afraid to fall into a battle over something as minor as a few

87. *Id.*

88. Judge Christina Snyder overturned the jury’s verdict as against the clear weight of the evidence in March 2020, in a decision that was influenced by the verdict in the *Stairway to Heaven* case. See *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275136, at *5, *8, *18 (C.D. Cal. Mar. 16, 2020). The plaintiff has appealed the ruling to the Ninth Circuit. Bill Donahue, *Katy Perry Copyright Accuser Takes Case to 9th Circ.*, LAW360 (Apr. 16, 2020, 3:20 PM), <https://www.law360.com/articles/1264505> [<https://perma.cc/3ZEJ-A652>]. See *infra* section IV.B.2.a for further discussion of Judge Snyder’s decision.

89. Sisario, *supra* note 79.

90. *Id.*

91. See, e.g., Wang, *supra* note 83.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

notes or words,” Ross Golan, a songwriter for a slew of stars including Maroon 5 and Ariana Grande,⁹⁶ told *Rolling Stone*.⁹⁷

So the music industry held its breath when a member⁹⁸ of a little-known band called Spirit sued Led Zeppelin, alleging that the rock group stole its iconic introduction to *Stairway to Heaven* from Spirit’s 1968 song *Taurus*.⁹⁹ “The copyright lawsuit boom, and its unintended side effects, may be just getting started,” *Rolling Stone* warned as the case wound its way through the courts.¹⁰⁰ But in a stunning move, the full Ninth Circuit threw out the ruling of its own three-judge panel¹⁰¹—and, less than two years after clinging to the inverse ratio rule as binding precedent the court had no choice but to apply,¹⁰² overturned the rule as bad law.¹⁰³

III. *STAIRWAY TO HEAVEN* KILLS THE INVERSE RATIO RULE

Randy Wolfe, known professionally as Randy California, wrote *Taurus* in 1966 or 1967, inspired by the astrological sign of “a woman he loved and eventually married.”¹⁰⁴ Spirit released the album containing *Taurus* in January 1968, having registered the song’s copyright a month earlier.¹⁰⁵ As the governing law at the time of the song’s registration was the Copyright Act of 1909, the song’s copyright did not extend to the recorded, audible version—rather, it was limited to the single page of sheet music registered

96. *Ross Golan*, NMPA, <https://nmpa.org/about/ross-golan/> [<https://perma.cc/X7TQ-RHBM>].

97. Wang, *supra* note 83.

98. The band member, Randy Craig Wolfe, died before the lawsuit was filed. Michael Skidmore, co-trustee of the Randy Craig Wolfe Trust, filed suit on the trust’s behalf. *See infra* notes 111–13 and accompanying text.

99. Plaintiff’s Complaint: Copyright Infringement and Related Claims Regarding *Stairway to Heaven* at 2–3, *Skidmore v. Led Zeppelin*, 2014 WL 9909350 (E.D. Pa. May 31, 2014) (No. 15-cv-03462).

100. Wang, *supra* note 83.

101. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079 (9th Cir. 2020).

102. *Williams v. Gaye*, 885 F.3d 1150, 1163 n.6 (9th Cir. 2018).

103. *Zeppelin*, 952 F.3d at 1069.

104. *Id.* at 1056; *id.* at 1081 (Ikuta, J., concurring in part and dissenting in part).

105. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1121–22 (9th Cir. 2018).

as the deposit copy.¹⁰⁶ Only musical elements written on the deposit copy were eligible for copyright protection.¹⁰⁷

Led Zeppelin released its untitled fourth album, which would come to be known as *Led Zeppelin IV*, in late 1971.¹⁰⁸ On the album was the famous *Stairway to Heaven*, written by guitarist Jimmy Page and vocalist Robert Plant, including its now-classic guitar introduction.¹⁰⁹ The song became an enduring success and is widely considered one of the greatest rock songs of all time.¹¹⁰

A. *Trial and First Appeal*

Decades passed. Randy Wolfe died in 1997.¹¹¹ In 2006, journalist Michael Skidmore became co-trustee of the Randy Craig Wolfe Trust.¹¹² In 2014—forty-three years after *Stairway to Heaven* hit the airwaves—Skidmore filed suit on behalf of the trust, alleging that the song's introduction infringed the introduction to *Taurus*.¹¹³

The Ninth Circuit later described the allegedly similar eight-measure excerpt of the songs as follows:

The claimed portion includes five descending notes of a chromatic musical scale. . . . 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

106. *Id.* at 1121, 1123; see Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(e), 9–12, 35 Stat. 1075, 1075–78.

107. *Skidmore*, 905 F.3d at 1123.

108. *Id.* at 1122.

109. *Id.*

110. *E.g.*, *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056 (9th Cir. 2020); Scott Colothan, *Led Zeppelin's 'Stairway to Heaven' Voted the Greatest Rock Song*, GIGWISE (Apr. 19, 2010, 1:59 PM), <https://www.gigwise.com/news/55896/Led-Zepplins-Stairway-To-Heaven-Voted-The-Greatest-Rock-Song> [<https://perma.cc/Y8Y6-SFWY>]; *VH1: 100 Greatest Rock Songs*, ROCKONTHE.NET (2000), <http://www.rockonthenet.com/archive/2000/vh1rocksongs.htm> [<https://perma.cc/XZ53-Z8U7>].

111. Allen Kim, *Led Zeppelin Wins Major Copyright Battle for 'Stairway to Heaven'*, CNN (Mar. 10, 2020, 9:10 PM), <https://www.cnn.com/2020/03/10/entertainment/led-zeppelin-stairway-heaven-lawsuit-trnd/index.html> [<https://perma.cc/G6YU-TR62>].

112. *Id.*

113. Plaintiff's Complaint: Copyright Infringement and Related Claims Regarding *Stairway to Heaven*, *supra* note 99, at 2–3.

distinct sequence of pitches in the arpeggios, which are not present in *Taurus*.¹¹⁴

Just as in *Blurred Lines*, a battle of the experts ensued.¹¹⁵ Dr. Alexander Stewart, testifying for the plaintiff, agreed that chromatic scales and arpeggios appear often in many songs, but found the descending chromatic scales in *Stairway to Heaven* and *Taurus* to be substantially similar because each omitted the note E and returned to the root note A.¹¹⁶ Furthermore, as the Ninth Circuit later summarized, Stewart

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 collection,” explaining that certain notes appear in the same proportions in the beginning sequence of both works.¹¹⁷

Led Zeppelin’s expert, Dr. Lawrence Ferrara, did not agree.¹¹⁸ Ferrara

testified that the two compositions are completely distinct. . . . [and] that the similarities claimed by Skidmore either involve 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.¹¹⁹

Most people have to look up *Taurus* online—the song is fairly obscure. But that doesn’t matter, of course, to copyright law. Because independent creation is a defense to copyright infringement¹²⁰—indeed, Led Zeppelin employed independent creation as

114. *Zeppelin*, 952 F.3d at 1058.

115. *Id.* at 1059.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1059–60.

120. *E.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46, 348 (1991).

its affirmative defense—the question became: Did Led Zeppelin hear *Taurus* before composing *Stairway to Heaven*?¹²¹

At trial, no one disputed that Spirit and Led Zeppelin “crossed paths in the late 1960s and the early 1970s,” wrote the Ninth Circuit.¹²² “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*.”¹²³ In fact, Page claimed never to have seen a Spirit performance,¹²⁴ though he admitted to having an album containing *Taurus* in his collection.¹²⁵ He stated, however, that he had not heard the song before composing *Stairway to Heaven*.¹²⁶ In 2016, the jury apparently agreed with Dr. Ferrara that the songs were not substantially similar under the extrinsic test and cleared Led Zeppelin of copyright infringement.¹²⁷

Not so fast. In September 2018, a three-judge panel of the Ninth Circuit resurrected the case on appeal, finding that trial Judge Gary Klausner gave incorrect jury instructions.¹²⁸ His errors may have included his failure to instruct the jury to use the inverse ratio rule, which would have lowered the bar regarding the amount of substantial similarity the plaintiff would need to prove under the “copying” prong of infringement analysis.¹²⁹ On remand, the Ninth Circuit judges told the trial court to instruct the jury on the inverse ratio rule unless the court determined, as a matter of law,

121. *Zeppelin*, 952 F.3d at 1058, 1064–65.

122. *Id.* at 1057.

123. *Id.*

124. Kim, *supra* note 111.

125. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1124 (9th Cir. 2018).

126. *Id.*

127. *Skidmore v. Led Zeppelin*, No. CV 15-03462 RGK (AGRx), 2016 WL 6674985, at *1 (C.D. Cal. Aug. 8, 2016). The original opinion does not specify what kind of substantial similarity the jury found lacking. *See id.* at *2, *4. The Ninth Circuit, however, summarizes the jury verdict by stating it did not find substantial similarity under the extrinsic text, which falls under the second prong of analysis: unlawful appropriation. *See Skidmore*, 905 F.3d at 1124.

128. *Skidmore*, 905 F.3d at 1121.

129. *Id.* at 1130–31. The Ninth Circuit, however, held that omitting the inverse ratio rule instruction was harmless error, as the jury did not reach the question of copying given its finding that Led Zeppelin had not unlawfully appropriated the song’s introduction. *Id.*; *see infra* section IV.B.2.c.

that Led Zeppelin had insufficient access to *Taurus* to trigger the rule's use.¹³⁰

But something curious had happened two months prior to the three-judge panel's decision. After definitively stating in the *Blurred Lines* verdict that the inverse ratio rule was binding precedent the court was compelled to apply,¹³¹ the Ninth Circuit in July 2018 released an amended version of its *Blurred Lines* opinion.¹³² What changed? One thing only: Every mention of the inverse ratio rule, in both the majority opinion and the dissent, had been carefully deleted.¹³³

B. Ninth Circuit Reverses Course

Ten months after the three-judge panel of the Ninth Circuit issued its decision in the *Stairway to Heaven* appeal, and less than a year after releasing its mysteriously amended *Blurred Lines* decision, the Ninth Circuit agreed to re-hear *Stairway to Heaven* en banc, stating that the earlier panel's decision would not be cited as precedent.¹³⁴ The full Ninth Circuit heard the case again on September 23, 2019, and delivered its opinion about six months later on March 9, 2020.¹³⁵

The court issued no warm-up to what is arguably the most startling line in its opinion, given the havoc wreaked on the music industry by the Ninth Circuit's embrace of the inverse ratio rule: "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."¹³⁶ Only after this sentence did the court launch into an explanation.

130. *Skidmore*, 905 F.3d at 1130–31.

131. *Williams v. Gaye*, 885 F.3d 1150, 1163 n.6 (9th Cir. 2018); see *supra* note 76 and accompanying text.

132. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

133. Compare *Williams*, 885 F.3d 1150, with *Gaye*, 895 F.3d 1106.

134. *Skidmore v. Led Zeppelin*, 925 F.3d 999, 1000 (9th Cir. 2019).

135. *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

136. *Id.* at 1066.

After first establishing that, throughout the nation, only the Sixth Circuit joined the Ninth Circuit's embrace of the inverse ratio rule, the court admitted that its "checkered application" of the rule, and indeed the very nature of the rule itself, "spawned uncertainty."¹³⁷ Nodding to a 1987 decision that declined to apply the inverse ratio rule,¹³⁸ the court characterized that case as a "momentary detour" along the Ninth Circuit's route of applying the rule in "confusing ways."¹³⁹ "[W]e did not explain *how* to apply the rule," the court lamented.¹⁴⁰

The court then turned to William Patry, a well-respected copyright authority, to sum up the problem with the inverse ratio rule: "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."¹⁴¹

The court owned the confusion that resulted from the *Blurred Lines* embrace of the inverse ratio rule, along with its subsequent deletion from the amended opinion:

Just two years ago, we again sowed doubt whether the rule ought to apply at all. In . . . *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." But in an amended opinion, the court deleted all references to the rule.¹⁴²

In perhaps the most elegant summary of the rule's deficiencies, the court described the problem with the sliding scale graph demanded by the inverse ratio rule:

"The logical outcome of the claimed principle is obviously that proof of actual access will render a showing of similarities entirely unnecessary."¹⁴³ However, "it does not follow that 'more' access increases the likelihood of copying." Yet that is what the rule compels. Complete

137. *Id.*

138. *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987).

139. *Zeppelin*, 952 F.3d at 1066–67.

140. *Id.* at 1067.

141. *Id.* (quoting 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9.91 (2017)).

142. *Id.* at 1068 (citations omitted).

143. *See supra* notes 42, 47 and accompanying text and graph.

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.¹⁴⁴

With the inverse ratio rule thusly abolished, the Ninth Circuit overturned the decision of its three-judge panel and affirmed the original jury verdict that *Stairway to Heaven* did not infringe *Taurus*.¹⁴⁵ In fact, concurring Judge Paul Watford declared that “no reasonable jury could have found infringement here.”¹⁴⁶ At that point, the lawsuit had only one place left to go: an appeal to the U.S. Supreme Court. Skidmore, the plaintiff, petitioned the Supreme Court for certiorari on August 6, 2020,¹⁴⁷ but on October 5, 2020, the high Court denied the petition.¹⁴⁸ The *Stairway to Heaven* fight was over.¹⁴⁹

C. Inverse Ratio Rule on Its Last Legs

The only remaining spot in the nation in which the inverse ratio rule may still apply is the Sixth Circuit.¹⁵⁰ That court, however, sounds just as unimpressed with the rule as its sister circuits, mentioning it only in footnotes and indicating that the rule may be on its way out.¹⁵¹

In a copyright infringement suit involving holiday light sculptures in the shape of polar bears, deer, and other winter themes, the Sixth Circuit pointed out that, although the plaintiff invoked

144. *Zeppelin*, 952 F.3d at 1068 (citations omitted) (first quoting *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961); and then quoting David Aronoff, *Exploding the “Inverse Ratio Rule,”* 55 J. COPYRIGHT SOC’Y U.S.A. 125, 126 (2008)).

145. *Id.* at 1079.

146. *Id.* (Watford, J., concurring).

147. Petition for Writ of Certiorari, *Skidmore v. Led Zeppelin*, 141 S. Ct. 453 (2020) (No. 20-142).

148. *Skidmore v. Led Zeppelin*, 141 S. Ct. 453 (2020) (mem.).

149. The decision was “seen as a win for the music industry. . . .” Gavin Evans, “*Stairway to Heaven* Copyright Battle Ends After U.S. Supreme Court Declines to Hear Case,” *COMPLEX* (Oct. 5, 2020), <https://www.complex.com/music/2020/10/led-zeppelin-stairway-to-heaven-copyright-battle-over-after-supreme-court-declines-to-hear-case> [<https://perma.cc/3APC-SN7W>]; see also, e.g., Jem Aswad & Gene Maddaus, *Led Zeppelin Wins ‘Stairway to Heaven’ Copyright Battle as Supreme Court Refuses to Hear Case*, *VARIETY* (Oct. 5, 2020, 8:32 AM), <https://variety.com/2020/music/news/led-zeppelin-win-stairway-to-heaven-copyright-1234792866/> [<https://perma.cc/X7BL-BQTC>].

150. See *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 n.1, 540 n.3 (6th Cir. 2020).

151. See, e.g., *id.*

the inverse ratio rule in its filings, it failed to “meaningfully develop” its argument or clarify the lower standard by which substantial similarity must be judged if the court found the inverse ratio rule to apply.¹⁵² Nevertheless, the court continued by spontaneously addressing the viability of the rule, noting that the Sixth Circuit remains the lone adherent to the troublesome doctrine.¹⁵³

“[F]undamental problems lie with the ‘inverse-ratio rule,’” the court pronounced.¹⁵⁴ After distancing itself from a previous invocation of the rule as “entirely dictum,” the court stated, “it does not appear that this circuit has meaningfully relied on the rule, in manner in which [plaintiff] requests, in any binding precedent. . . . So questions remain whether the inverse-ratio rule applies (or should apply) in our circuit. . . . [T]he ‘inverse-ratio rule’ appears to be on its last legs.”¹⁵⁵

IV. WHAT NOW?

With the deserved demise of the inverse ratio rule, the Ninth Circuit needs a modified way of judging music copyright infringement cases. The question of access deserves a long, hard look given the technological changes produced in society since the adoption of the Copyright Act of 1976. As will become apparent below, the fundamental shift in the nature of digital access requires a change in infringement analysis even in circuits that do not use the inverse ratio rule.

A. *Digital Age Creates New Landscape*

In the non-digital past, access was open for more dispute than it is now. While live performances and radio stations clearly provided access to new music, fans often had to have physical, tangible albums in their possession when they wanted to hear a particular song. Now, with the proliferation of digital music services such as

152. *Id.* at 536 n.1.

153. *Id.*

154. *Id.*

155. *Id.* (citations omitted). The court declined to resolve whether the inverse ratio rule applies in the Sixth Circuit, “given [the plaintiff’s] cursory presentation of the issue.” *Id.* As its only remaining adherents seem tepid at best, the inverse ratio rule may, once a case squarely presents the issue to the Sixth Circuit, become a deserved relic of a confusing past.

Pandora, YouTube, and Spotify, access has exploded. Many of these music services allow for playing a particular song on demand.

Imagine trying to prove that someone did—or did not—hear a particular song in this digital age. Whether that person owns a copy of the album on which the song appears, or has downloaded the song itself, is far less probative of whether they have listened to the song. It would be nearly impossible—if not actually impossible—to comb through someone’s listening history, or that of their friends, in an attempt to prove that a particular song had or had not been played.

Of course, courts have long allowed for an inference of access in recognition of the fact that access is difficult to prove.¹⁵⁶ But that inference of access now works against a defendant in a music copyright case. How exactly can defendants prove that they did not hear a particular song—even if they truly did not—when that song is splashed all over YouTube?

The courts are not blind to how this technological shift impacts copyright law. In fact, the Ninth Circuit discussed this issue in its final *Stairway to Heaven* opinion:

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. 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.¹⁵⁷

If the fact that a song is available on a music service serves as proof of access—even if an individual truly never listened—it becomes difficult to imagine a scenario in which access is not found. Furthermore, as the years advance, copyright suits over songs not available on music services may very well all but disappear. Access as a concept, therefore, has lost its probative value. With access rendered nearly moot, the courts should adopt a new framework for assessing music copyright infringement.¹⁵⁸

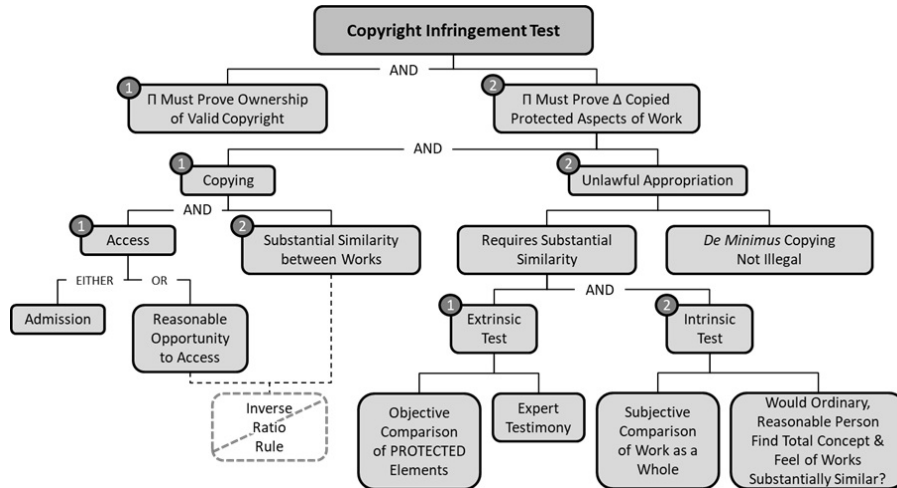
156. See, e.g., *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1068 (9th Cir. 2020).

157. *Id.* (citation omitted).

158. Access is not entirely beside the point. It remains logically impossible to copy a song that one has not heard. Independent creation is still protected by copyright law. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46, 348 (1991). See *infra* section IV.B.1 for how my proposed framework accounts for this issue.

B. *Proposed Modification to the Music Copyright Infringement Test*

The inverse ratio rule, of course, has been rightly eliminated from the Ninth Circuit's copyright infringement test, so an up-to-date diagram of current law appears below.



1. Removing Access from the Infringement Test

Given our new digital reality, retaining access as a factor in the music copyright infringement test serves little purpose. Remember, judging a defendant's access to an allegedly copied song does not depend on whether she actually heard it; rather, it depends on whether the song is available on demand.¹⁵⁹ Very few songs will fail to satisfy this standard.

A tiny percentage of songs, however, will slip through the cracks. Think of songs that were written for a sole performance at, say, an unfilmed retirement party. Or imagine a song a musician records in her basement studio for the simple joy of creation, but never uploads to a service such as SoundCloud or YouTube. Clearly such songs will constitute a microscopic portion of copyright infringe-

159. *Zeppelin*, 952 F.3d at 1068.

ment cases because they will be nearly impossible to actually infringe. An unpublished song that the world does not know exists is very difficult to listen to and copy.

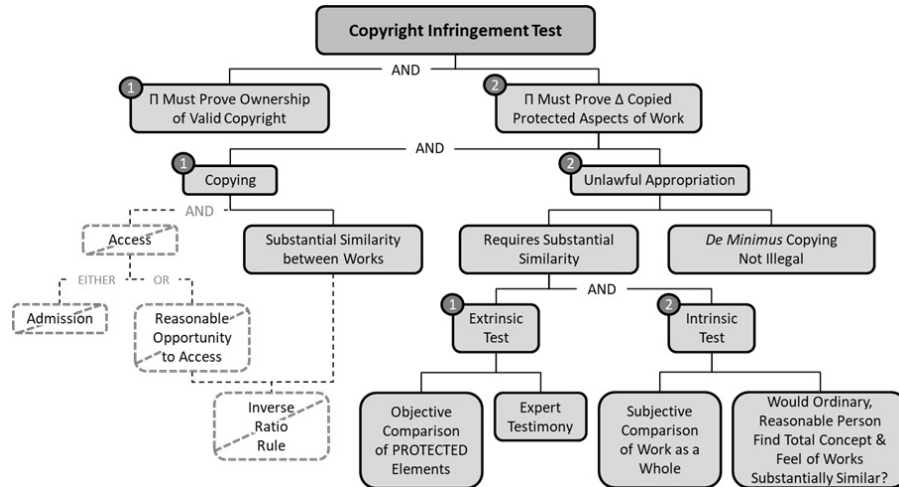
Because this possibility, however slight, does exist, our copyright regime should capture it. For this reason, the courts should retain the concept of access not as a factor in the infringement test, but rather as an affirmative defense. Just as a defendant may raise the affirmative defense of independent creation, so should a defendant be able to raise lack of access.¹⁶⁰ The burden will then fall on the defendant to prove that she never heard the song in question.

Two issues arise: Is it fair to place the burden of proof on the defendant in such a case? I posit that the law does this already. Given that a plaintiff may prove access simply by checking to see whether a song is available on YouTube, the defendant, practically speaking, already carries this burden of proof if she wishes to rebut. Making this change, therefore, will simply bring the law in line with what is already taking place.

Second, as discussed above, lack of access is very difficult to prove. It may seem cold comfort to insist that a defendant nevertheless has this option available to her as an affirmative defense. But this question merits the same response: This is how music copyright suits function already. True, proving lack of access will be a mammoth task. As the Ninth Circuit in *Stairway to Heaven* made clear, however, this is currently the case.¹⁶¹ Reshaping the concept of access into an affirmative defense will make it neither easier nor harder to succeed in proving lack of access. Instead, it streamlines the law to reflect our new digital reality, as depicted in the diagram below.

160. Indeed, independent creation is clearly highly relevant to the question of infringement. Nevertheless, it exists as an affirmative defense, not as a prong within the infringement test. Cabining access to an affirmative defense will likewise not diminish the reality that a genuine lack of access will stop an infringement suit in its tracks.

161. See *Zeppelin*, 952 F.3d at 1068.



2. Removing Copying from the Infringement Test

Now that the inverse ratio rule has been nearly eliminated from the nation's courts,¹⁶² and given that access should be addressed as an affirmative defense rather than within the infringement test, very little is left under the first “copying” prong. Only “substantial similarity between the works” remains.

a. Dual Use of Substantial Similarity Creates Confusion

The presence of substantial similarity under both prongs of the infringement analysis has created extreme confusion, as detailed previously regarding the *Blurred Lines* decision.¹⁶³ The aforementioned *Dark Horse* case provides another potent example of such confusion.¹⁶⁴ In overturning the jury verdict as against the clear weight of the evidence, Judge Christina Snyder articulated a legal framework that switched between the two kinds of substantial similarity. First, she stated that a finding of copying requires access

162. The possible exception of the Sixth Circuit, which has backed away from the rule, exists. See *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 n.1, 540 n.3 (6th Cir. 2020).

163. See *supra* section II.A.

164. *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275136, at *3 (C.D. Cal. Mar. 16, 2020); see *supra* notes 85–88 and accompanying text.

and substantial similarity between the works.¹⁶⁵ Then, she declared that substantial similarity is determined by the satisfaction of both the extrinsic and intrinsic tests¹⁶⁶—but this is true of substantial similarity under the “unlawful appropriation” prong, not the “copying” prong. After describing more thoroughly the extrinsic and intrinsic tests, Judge Snyder stated, “A plaintiff that proves substantial similarity must still prove access”¹⁶⁷—thereby switching back to the “copying” prong. Her analysis followed this same pattern, delving into whether plaintiffs had satisfied the extrinsic and intrinsic tests as she analyzed substantial similarity under the “copying” prong.¹⁶⁸ Once she reached her conclusions, she turned next to the question of access to complete her inquiry into the first prong, copying.¹⁶⁹

Judge Snyder never explicitly reached the second prong, nor did she use the words “unlawful appropriation” or “misappropriation” in her opinion. Rather, she analyzed the second, more rigorous “substantial similarity” element while she assessed copying.¹⁷⁰ In so doing, she folded the two steps of infringement analysis together, in what was otherwise an excellently reasoned and utterly thorough examination of the musical issues presented.

b. Dual Use of Substantial Similarity Is Superfluous

As Judge Snyder’s opinion inadvertently highlighted, the presence of “substantial similarity” under both prongs of the infringement analysis not only creates crippling confusion but is also superfluous. It is true that, as discussed above, the identical language refers to different levels of analysis.¹⁷¹ But the “copying” substantial similarity is lax compared to the “unlawful appropriation” substantial similarity.¹⁷² The “copying” substantial similarity asks only whether similarities exist that give rise to skepticism that the work was independently created.¹⁷³ It allows comparison

165. *Gray*, 2020 WL 1275136, at *3.

166. *Id.*

167. *Id.* at *4.

168. *Id.* at *4–13.

169. *Id.* at *13.

170. *Id.* at *4–13.

171. *See supra* note 27 and accompanying text.

172. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

173. *Id.*

of unprotected elements.¹⁷⁴ It is, in effect, the quantification of a raised eyebrow. Once that low bar has been crossed, analysis proceeds to whether unlawful appropriation took place—and this is where the heart of the analysis occurs.¹⁷⁵ Indeed, Judge Snyder’s thorough inquiry into unlawful appropriation-related substantial similarity left nothing for copying-related substantial similarity to investigate. Such odd duplication raises the question: Why bother with it at all—especially given the massive confusion it engenders?

The higher courts have acknowledged the issues with the “copying” prong of infringement analysis. Speaking specifically of access and substantial similarity under the “copying” prong, the Seventh Circuit said, “The standard for copying is surprisingly muddled. . . . The various efforts to define these two key concepts . . . have unfortunately had the unintended effect of obscuring rather than clarifying the issues.”¹⁷⁶ The Ninth Circuit has also bemoaned “copying” confusion resulting from the duplication of “substantial similarity” within both prongs: “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.”¹⁷⁷

Given that the “copying” prong of the infringement test generates this level of confusion, it is surprising that courts cling to it. What, exactly, is the benefit of proving copying for its own sake? De minimis copying is not illegal.¹⁷⁸ Copying unprotected elements is not illegal.¹⁷⁹ Any work that passes the raised-eyebrow standard of the “copying” prong is then subjected to a rightly rigorous unlawful appropriation analysis—which, if the verdict comes in for the plaintiff, establishes on its own that the material was wrongly used. Unlawful appropriation analysis is where the work takes place. If all that the first prong does is establish the existence of a potential issue, I posit that it serves no genuine purpose. Isn’t the lawsuit’s very existence evidence of a potential issue? If the suit is

174. *Id.*

175. *Id.*

176. *Peters v. West*, 692 F.3d 629, 633 (7th Cir. 2012).

177. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1067 (9th Cir. 2020).

178. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

179. But see *supra* note 25 regarding the problems arising under the intrinsic test, which are beyond the scope of this Comment.

without merit, the judge should throw it out. Everything else will pass this meager standard.

c. “Copying” Is No Longer a Gatekeeper in the Digital World

In theory, the “copying” prong of infringement analysis serves as a gatekeeper to the more stringent “unlawful appropriation” prong. Since unlawful appropriation cannot take place without actual copying, establishing first that copying occurred was thought to be vital to infringement analysis. I have already explained why the copying test, in practice, amounts to the superfluous flagging of a potential issue. But, given that copyright law theoretically protects independently created identical works, does this prong of the infringement analysis nevertheless serve an important gatekeeping function? Some evidence shows that the answer to this question, practically speaking, is no:

[T]he [*Stairway to Heaven*] jury verdict form makes clear that the jury did not decide whether Led Zeppelin had copied parts of “Taurus.” Rather, the jury ended its deliberations after deciding that “Taurus” and “Stairway to Heaven” were not substantially similar under the extrinsic test. . . . [T]he jury did not reach the question of copying.¹⁸⁰

Clearly, copying did not function as a gatekeeper in this case, as the jury never even considered the question. But aside from practical evidence that copying does not serve as an effective gatekeeper, significant theoretical concerns exist.

While a careful balance of access and substantial similarity may have effectively guarded the gate of years past, the framework forming the pillars of that gate has crumbled in the shadow of today’s access-on-demand environment. With proof of access reduced to a quick Google search ascertaining whether a particular song is available on demand, and “copying” substantial similarity wrongly analyzed or forgotten altogether, no vestiges of a gate remain to defend. There is little point to debating how best to protect the gate when the gate itself has been destroyed. Modifying the test to fit current realities, therefore, is far more practical than pretending the law defends a gate that no longer exists.

180. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1130 (9th Cir. 2018).

d. “Copied” Label May Create Unfair Prejudice

Furthermore, the “copying” prong of infringement analysis has the potential to create an overly prejudicial effect in the minds of lay jurors. From the time we are small children, we have drilled into our heads the concept that copying is lazy, shameful, and wrong—that it essentially amounts to stealing. While law-trained judges and attorneys may recognize that some copying is not “wrong”—for example, de minimis copying or copying of ideas—expecting a lay jury to grasp that distinction seems ambitious. Once a jury decides a song was copied, it is difficult to imagine that same jury will reach the conclusion, “But that’s all right.” The opaque nature of jury deliberations makes this question difficult to examine.

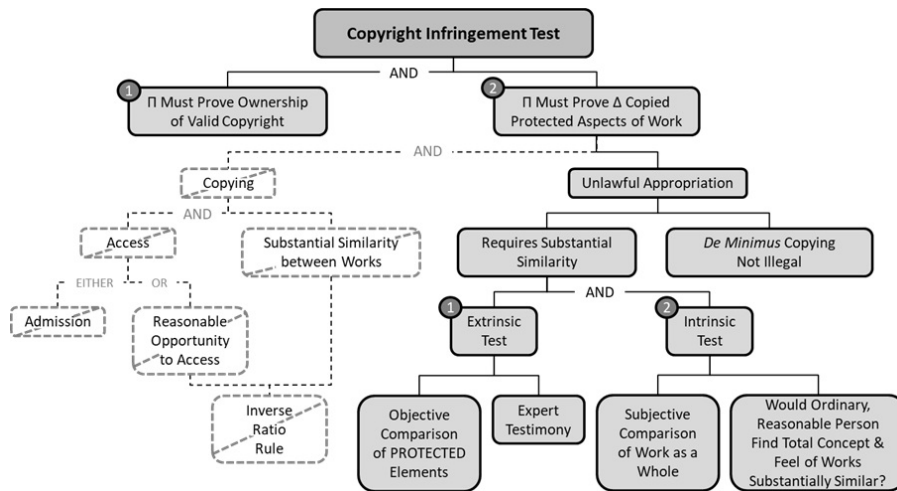
In fact, Thicke and Williams expressed concern about the psychological effects on the jury of labeling a song “copied”: “The Thicke Parties claim [a jury] instruction was prejudicial based on the improper admission of evidence that Thicke and Williams were influenced by the ‘groove’ and ‘feel’ of [*Got to Give It Up*], and by the Gayes’ efforts to portray Thicke and Williams as ‘copiers.’”¹⁸¹ The trial court, however, did not engage with this psychological argument in ruling that the jury instruction was acceptable.¹⁸² It would be instructive to know how much weight the jury attached to the finding that *Blurred Lines* was “copied” from Gaye as it proceeded to find unlawful appropriation.¹⁸³

The “copying” prong has outlived its usefulness. Stripped of the inverse ratio rule and access analysis, and given that substantial similarity is far more effectively analyzed under the “unlawful appropriation” prong, the “copying” prong does nothing but bog down the infringement test. Eliminating the prong will therefore both streamline and clarify the law, as depicted below.

181. Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *16 (C.D. Cal. July 14, 2015).

182. *Id.*

183. *Id.* at *1.



C. Streamlined Test Effectively Addresses Three Problems with the Inverse Ratio Rule

Streamlining the test in this manner effectively addresses the three pitfalls presented by the inverse ratio rule: (1) high access but low similarity; (2) low access but high similarity, sometimes at play in subconscious copying scenarios; and (3) inspiration or homage. Removing the “copying” prong from the analysis also addresses the lingering issues remaining in the interplay between access and substantial similarity, even after the abrogation of the inverse ratio rule in the Ninth Circuit.

My streamlined test allows for in-depth analysis of unlawful appropriation within each of these three scenarios, without the unnecessary distraction of whether a song was “copied.” For example, a high-access claim regarding a song bearing little similarity to a supposed original ought to be rigorously analyzed. While a finding of unlawful appropriation is certainly possible, the second creator deserves a thorough review given that the two songs do not sound much alike. The robust unlawful appropriation analysis should effectively analyze these issues. There is no need to slap an unhelpful—and possibly damning—label of “copied” on the song at the beginning of this process.

In the same way, this streamlined test will take better care of songs that sound similar to supposed originals, but where little access is found. The same rigorous unlawful appropriation analysis will examine whether infringement—subconscious or otherwise—has taken place, without, again, making use of the overly prejudicial label of “copied.” Finally, the streamlined test will analyze songs that draw inspiration from, or even pay overt homage to, the work of prominent musicians by focusing on the question that matters: “Did the songwriter take too much?” and *not* the unhelpful inquiry of whether the song ought technically to be labeled as “copied.”

My streamlined test furthermore preserves the essential concepts of independent creation and lack of access as affirmative defenses. Independent creation is already an affirmative defense, and given that access can be proven by a simple showing that a song is available on demand, the burden of proving lack of access already rests on the defendant if she wishes to rebut. Shifting lack of access into an affirmative defense thus brings the law in line with what is already taking place.

D. *Streamlined Test Would Have Solved Many Blurred Lines Controversies*

The *Blurred Lines* litigation would have benefitted from this streamlined analysis. At trial, too much weight fell on the amount of access Thicke and Williams had to Gaye’s song, despite the fact that Thicke and Williams readily admitted access.¹⁸⁴ Then, that high level of access was used under the improper inverse ratio rule to lower the amount of substantial similarity the Gayes needed to show between the songs. After that, the jury appears to have erroneously applied a lowered substantial similarity standard to the “unlawful appropriation” question rather than to the “copying” prong. The result? A multimillion-dollar verdict widely seen in the music industry as unjust and anathematic to creativity.¹⁸⁵

My streamlined test, however, would have freed the jury to focus purely on whether the Gayes had satisfied the extrinsic and intrinsic tests for substantial similarity. Rather than bowing to the dic-

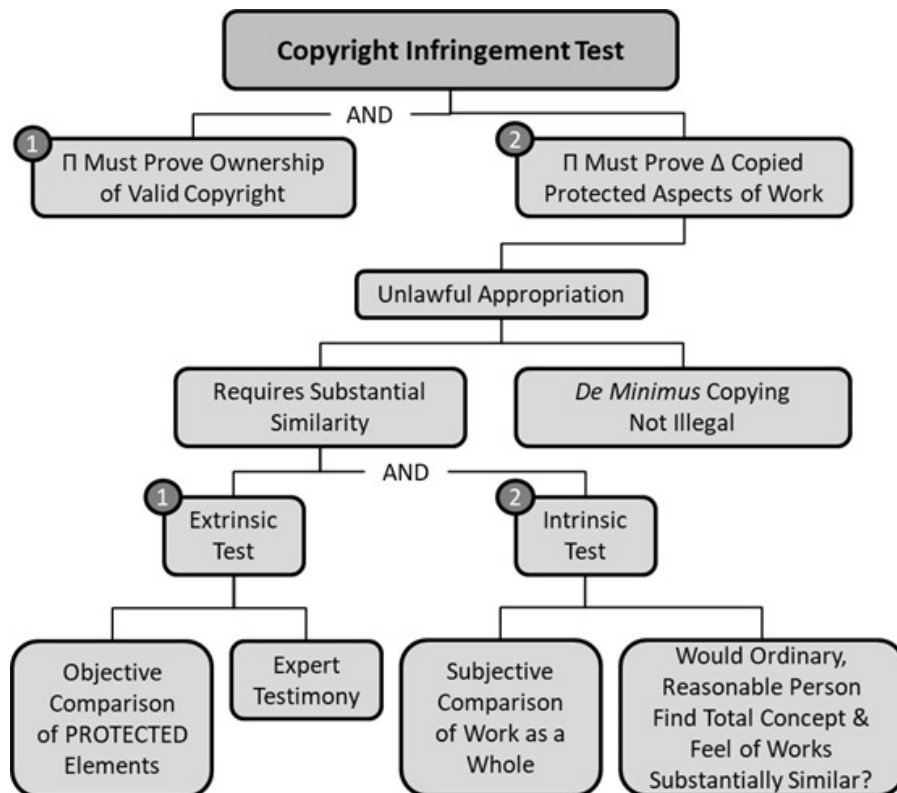
184. *Williams v. Gaye*, 885 F.3d 1150, 1161 (9th Cir. 2018).

185. *See supra* section II.B.

tates of an automatic rule, the jury could have thoughtfully balanced the desire of Thicke and Williams to pay tribute to Gaye's music against questions of whether they took too much. While various legal disputes would still have presented themselves—thus is the nature of litigation, after all—the jury would have presumed access, skipped the unnecessary debate over whether the song was “copied,” and lasered in on unlawful appropriation. Who knows what the result would have been if the bar to substantial similarity had not been erroneously lowered? What is clear, however, is that the decision's reasoning would have been cleaner, more sensible, and properly reflective of our new digital reality.

CONCLUSION

The final version of my proposed music copyright infringement test appears below.



After the surprise *Blurred Lines* verdict, the music industry panicked at the apparent reality that musicians could copyright a particular style or feel.¹⁸⁶ The *Stairway to Heaven* case underscored those fears when a three-judge panel of the Ninth Circuit overturned the jury verdict below and instructed further use of the inverse ratio rule.¹⁸⁷ But the Ninth Circuit's surprise abrogation of the inverse ratio rule foreshadows creative restoration in the music industry. Although we should continue to punish genuine thievery, we will hopefully no longer be so afraid of the specter of litigation that we cease to create.¹⁸⁸ After all, the entire purpose of copyright law is to promote art, not stifle it.¹⁸⁹

The welcome debunking of the inverse ratio rule in the Ninth Circuit has nevertheless left questions hanging about how to balance access with substantial similarity in order to prove copying. And in every circuit, the digital world's ubiquity of access has rendered nearly moot any sort of inquiry into access to an "original" author's works. Debilitating confusion has resulted from the existence of two separate substantial similarity tests. Finally, the question of copying is analyzed—when it is analyzed at all—under the guise of keeping a gate that no longer exists. It is time to tighten up the law and bring it in line with our new reality.

For that reason, the music copyright infringement test should no longer contain two prongs. Rather than focusing on the nebulous concept of copying, the law should zero in on unlawful appropriation analysis—which, after all, is the heart of the issue. Access should be presumed with rebuttal available as an affirmative defense. The weak, oft-forgotten substantial similarity under copying analysis should disappear, allowing the robust substantial similarity analysis under the unlawful appropriation prong to take center stage. Finally, "copying" as a label in and of itself should retire, allowing the factfinder to focus instead on whether a defendant unlawfully appropriated a plaintiff's song.

186. See *supra* notes 20–21, 82 and accompanying text.

187. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1137 (9th Cir. 2018).

188. "If this [*Blurred Lines*] jury verdict is allowed to stand, it will . . . have a deleterious effect on composers who will have the spectre of frivolous lawsuits hanging over them as they create new musical works tapping into the rich commonality of musical ideas that musicians have relied upon since time immemorial." Musicologist Amici Brief, *supra* note 81, at *23.

189. U.S. CONST. art. I, § 8, cl. 8.

Changing the law can be a long, arduous process, but it does happen. And it should happen. While principles such as protecting a creator's work and encouraging imagination remain timeless, the specific realities of our world evolve as the years pass. Our laws should keep pace. We should not shrink from parting ways with a standard that has grown feeble with age. Instead, we should protect creators of new and existing works by embracing a cleaner, streamlined analysis that provides clarity rather than confusion.

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