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“STAIRWAY TO HEAVEN” OR STAIRWAY TO THE PUBLIC DOMAIN: COPYRIGHT INFRINGEMENT OF MUSICAL WORKS UNDER THE 1909 COPYRIGHT ACT

Ellen Komlos*

INTRODUCTION

The music industry “runs on its copyrights.”¹ Writers create copyrightable compositions, artists perform copyrightable songs, and record companies capture musical works as copyrightable sound recordings. The value of the music industry, projected to reach \$41 billion by 2030, can be attributed in large part to copyright.² Copyright law protects the expression of original works and encourages creativity by bestowing upon authors the exclusive rights to their creations.³ Today, copyright protection for musical works exists in both the musical composition—the underlying musical notes and lyrics⁴—and in the recording artist’s performance of the song embodied in a sound recording.⁵

The courtroom has become a familiar place for many of today’s musical artists.⁶ For the music industry in particular, complex disputes often arise

* J.D. (2021), Washington University School of Law.

1. GEOFFREY P. HULL ET AL., *THE MUSIC BUSINESS AND RECORDING INDUSTRY* 51 (3d ed. 2011).

2. Ed Christman, *Music Industry Will Hit \$41 Billion By 2030 According to New Goldman Sachs Report*, *BILLBOARD MAG.* (Aug. 29, 2017), <https://www.billboard.com/articles/business/7949040/music-industry-will-hit-41-billion-by-2030-according-to-new-goldman-sachs> [https://perma.cc/3G5M-99YX].

3. *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 135-37 (Peter K. Yu ed., 2007).

4. *Copyright Registration for Musical Compositions*, COPYRIGHT.GOV (2020), <https://www.copyright.gov/circs/circ50.pdf> [https://perma.cc/6VBC-NEMG].

5. *Id.*; Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (extending copyright protection to sound recordings in 1971); Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (extending copyright protection to pre-1972 sound recordings).

6. After the *Blurred Lines* ruling in 2015, the list of pop stars accused of copyright infringement for allegedly borrowing their music include: Katy Perry, Sam Smith, Ariana Grande, Lizzo, and Ed Sheeran. Jon Caramanica, *It’s Got a Great Beat, and You Can File a Lawsuit to It*, *N.Y. TIMES: CRITIC’S NOTEBOOK* (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/arts/music/pop-music-songs-lawsuits.html> [https://perma.cc/H8HP-4A5E].

involving a myriad of parties, applicable laws, artistic works, and rights at stake. In *Skidmore v. Led Zeppelin*,⁷ the Ninth Circuit confined the scope of the plaintiff's rights in unpublished musical works protected by the Copyright Act of 1909 ("1909 Act") to the deposit copy: the hardcopy filed with the Copyright Office for registration.⁸ *Skidmore* involves the songs "Taurus," released in 1968 by the American Rock Band and plaintiff, Spirit, and "Stairway to Heaven" released in 1971 by the English Rock Band and defendant, Led Zeppelin.⁹ When the deposit copy contains less material than the performance or sound recording of the same work, as in "Taurus," additional confusion enters the copyright infringement inquiry.¹⁰

The deposit copy requirement dates back to the beginning of copyright legislation with the Copyright Act of 1790.¹¹ Required for copyright registration under the 1909 Act, deposit copies varied with the nature of the copyrightable work, including: sheet music, fabric swatches, patterns, globes, jewelry, posters, and more.¹² Plaintiffs seeking to expand their rights label the deposit copy requirement, for unpublished musical works under the 1909 Act, as artificial and impractical.¹³ Plaintiffs argue confining the scope of the inquiry to the deposit copy unfairly disadvantages musicians unable to read sheet music.¹⁴ Capturing lengthy songs in sheet music deposit copies proved tedious, whether handwritten or printed, resulting in omissions.¹⁵

7. *Skidmore II*, 905 F.3d at 1131, *aff'd by Skidmore III*, 952 F.3d at 1064.

8. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

9. BOB LESZCZAK, WHO DID IT FIRST?: GREAT ROCK AND ROLL COVER SONGS AND THEIR ORIGINAL ARTISTS 202 (2014); see Jason Heller, *Who Were Spirit, the Band From Led Zeppelin's 'Stairway' Trial?*, ROLLING STONE (June 10, 2016), <https://www.rollingstone.com/music/music-news/who-were-spirit-the-band-from-led-zeppelins-stairway-trial-78245/> [https://perma.cc/2CB2-RX23].

10. Criticized as impractical, the notes present in the deposit copy were played by the plaintiff's guitarist at trial for comparison to Led Zeppelin's audio recording. *Skidmore III*, 952 F.3d at 1063, *cert. denied sub nom. Skidmore v. Zeppelin*, 141 S. Ct. 453 (2020), *reh'g denied sub nom. Skidmore v. Zeppelin*, No. 20-142, 2020 WL 7132739 (U.S. Dec. 7, 2020).

11. Copyright Act of 1790, 1 Stat. 124.

12. *Deposit Requirements for Registration of Claims to Copyright in Visual Arts Material*, COPYRIGHT.GOV, <https://www.copyright.gov/circs/circ40a.pdf> (last visited Aug. 25, 2020).

13. Appellant's Opening Brief at 11, *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1131 (9th Cir. 2018), *reh'g en banc granted sub nom. Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (No. 16-56057), 2017 WL 1101634, at *18.

14. *Skidmore II*, 905 F.3d at 1134.

15. *Id.*; Brian McBrearty, *Highlights of Jimmy Page Testimony: Stairway v Taurus*, POPULAR MUSICOLOGY, (Oct. 26, 2016), <http://www.popularmusicology.com/2016/10/26/jimmy-page-testimony-trial-musicology-highlights/> [https://perma.cc/2EKR-WS97].

Since 1978, Congress has allowed the full audio recording, rather than a sheet music deposit copy, to be deposited with the Copyright Office to obtain federal copyright protection.¹⁶ However, the 1909 Act remains the source of copyright protection for works created between July 1909 and January 1978.¹⁷ In *Skidmore v. Led Zeppelin*,¹⁸ Spirit’s deposit copy of “Taurus,” created in 1968, failed to capture “the guitar introduction that obviously links the two songs.”¹⁹ Therefore, Spirit’s rights, as the plaintiff alleging infringement of a work protected under the 1909 Act, depended upon the sheet music deposit copy rather than any subsequent audio recording.²⁰

In *Skidmore*, the District Court prohibited the plaintiff from playing the “Taurus” sound recording in front of the jury to determine whether the defendants had access to the work.²¹ The District Court reasoned that the full audio would be too prejudicial to the infringement inquiry given their decision to limit the scope of the plaintiff’s rights to the work as reflected in the sheet music deposit copy.²² At trial, Led Zeppelin guitarist and songwriter, Jimmy Page, instead listened to the full audio “Taurus” recording outside of the presence of the jury and returned for questioning in front of the jury.²³

The Ninth Circuit panel, consisting of three judges, found that the District Court’s procedure improperly limited the probative value of the defendant’s testimony since the jury could not observe the defendant’s demeanor while listening to the full audio version of the plaintiff’s song.²⁴ Despite finding that the District Court abused its discretion, the Ninth Circuit panel held that the error was harmless because the jury found that the works were not substantially similar.²⁵ The panel stated that a proper limiting instruction would have eliminated juror confusion with respect to multiple audio versions.²⁶ On review, the *en banc* Ninth Circuit highlighted

16. 17 U.S.C. §§ 407–408 (1976).

17. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

18. *Skidmore II*, 905 F.3d at 1131.

19. McBrearty, *supra* note 15.

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

21. *Skidmore II*, 905 F.3d at 1135.

22. *Id.*; FED. R. EVID. 403.

23. *Skidmore II*, 905 F.3d at 1123–24.

24. *Id.* at 1135.

25. *Id.* at 1130.

26. *Id.* at 1135.

the mootness of this evidentiary issue, because the jury found that the defendants had access to the plaintiff's work, while expressing its opinion that the District Court was right to exclude the full audio.²⁷

This Note assesses the clarifications, implications, and remaining sources of confusion resulting from the Ninth Circuit's decisions in *Skidmore v. Led Zeppelin*. It argues the District Court (*Skidmore I*) and the Ninth Circuit *en banc* (*Skidmore III*) properly recognized the confusion likely to result from the panel's decision. However, the Ninth Circuit panel (*Skidmore II*) faltered in leaving open the possibility for a lay jury, in a different case, to hear the full audio recording of the plaintiff's work copyrighted under the 1909 Act to determine defendants' access. Under current precedent and trial procedure, the same jury determining access then determines substantial similarity.²⁸ The panel's decision, in some cases, would introduce the full sound recording, while the Ninth Circuit *en banc* holds: only the composition reflected in the deposit copy is protected and therefore relevant to the substantial similarity inquiry for works protected by the 1909 Act.

The Federal Rules of Evidence,²⁹ the psychological theory of neural nostalgia,³⁰ and precautions taken in similarly complex patent law cases³¹ rebuke the procedure seemingly endorsed by the panel in *Skidmore II*: introduction of multiple versions of audio.³² The inverse ratio rule,³³ which may still exist in the Ninth Circuit in limited form,³⁴ compounds the

27. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir. 2020).

28. *Skidmore II*, 905 F.3d at 1124; MANUAL OF MODEL CIVIL JURY INSTRUCTIONS: FOR THE DIST. COURTS OF THE NINTH CIRCUIT § 17.17 (2020).

29. FED. R. EVID. 403.

30. Mark J. Stern, *Neural Nostalgia: Why Do We Love the Music We Heard as Teenagers?*, SLATE (Aug. 12, 2014), <https://slate.com/technology/2014/08/musical-nostalgia-the-psychology-and-neuroscience-for-song-preference-and-the-reminiscence-bump.html> [<https://perma.cc/LS9D-ZYTT>].

31. The Supreme Court decided courts are better suited than juries to conduct claim construction. Vincent P. Kovalick, *United States: Markman Hearings and Their Critical Role In U.S. Patent Litigation*, MONDAQ (Dec. 16, 2009), <https://www.mondaq.com/unitedstates/patent/91044/markman-hearings-and-their-critical-role-in-us-patent-litigation> [<https://perma.cc/4T86-86YK>].

32. *Skidmore II*, 905 F.3d at 1135.

33. The more similarity you can prove, the less access you need to prove and vice versa. *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/> [<https://perma.cc/Z772-H3P4>].

34. Ethan Wong & Andrew Thomas, *Misuse of Inverse Ratio Copyright Rule Continues in 9th Circ.*, LAW 360 (Jan. 7, 2020), <https://www-law360-com.ezproxy.law.wustl.edu/articles/1230576/misuse-of-inverse-ratio-copyright-rule-continues-in-9th->

problematic nature of the panel’s proposed procedure in *Skidmore II*.³⁵ With the inverse ratio rule, a high degree of access has led to liability in cases where there is a lower degree of similarity among works.³⁶ Courts recognize that the complicated nature of musical works and shifts in technology have necessitated flexible tests.³⁷ Critics, prior to the *en banc* decision (*Skidmore III*), argued the threat of litigation from plaintiffs seeking “a windfall from a song they didn’t make a hit” presented risk of stifling the creativity of later musical artists.³⁸ The copyright system depends upon striking the appropriate balance between authors’ rights and allowing room for the creativity of later artists.³⁹

On one hand, this Note argues the Ninth Circuit—in *Skidmore III*—properly recognized the danger of confusion among members of the jury resulting from the introduction of multiple audio versions. On the other hand, this Note cautions that by confining the scope of the plaintiff’s rights to the deposit copy, limiting the audio played for the jury, and eliminating the plaintiff friendly inverse ratio rule, the Ninth Circuit eliminated plaintiff friendly measures. This Note advocates for additional measures such as two lay juries, additional pre-trial procedure, or help from musically skilled adjudicators to increase the likelihood of proper application of the various tests and audio versions. Without additional safeguards to protect the integrity of the infringement analysis, increased appropriation by later, more popular musical artists will likely result. The later, musical giant will prevail in court and the original author’s work will be pushed into the public domain, meaning it will be available for later artists’ appropriation, knowing they will not be held accountable in subsequent litigation.

Part I of this Note examines the history of the Copyright Act and the development of copyright infringement and inverse ratio rule case law in the Second and Ninth Circuits. Part II of this Note describes potential

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35. *Skidmore II*, 905 F.3d at 1116.

36. Rick Sanders, *Blurred Lines: The Ninth Circuit’s Opinion Is Slightly Less “Crazy,”* AARON SANDERS LAW (July 16, 2018), <https://www.aaronsanderslaw.com/blurred-lines-the-ninth-circuits-opinion-is-slightly-less-crazy/> [https://perma.cc/E6ZA-ELAX].

37. *Id.*

38. Jem Aswad, *Katy Perry’s ‘Dark Horse’ Case and Its Chilling Effect on Songwriting*, VARIETY (Aug. 6, 2019), <https://variety.com/2019/biz/news/katy-perry-dark-horse-lawsuit-joyful-noise-chilling-effect-on-songwriting-1203292606/> [https://perma.cc/P67R-7G6N].

39. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 115–16 (2001).

effects of the complicated copyright infringement tests, confusing jury instructions, and inconsistent balancing mechanisms. Part III of this Note discusses potential solutions and proposes the use of two lay juries, additional pre-trial procedure, or Administrative Copyright Judges similar to the Administrative Patent Judges of the Patent Trial and Appeals Board (“PTAB”) to mitigate harm resulting from the confusing copyright infringement tests currently in place

I. HISTORY

A. Copyright Legislation

In the United States, the Constitution grants Congress the power to regulate copyrights.⁴⁰ The first piece of copyright legislation, the Copyright Act of 1790, was of limited scope.⁴¹ Over time, protection expanded to reflect advances in technology and communication including radio, jukeboxes, sound motion pictures, television, communications satellites, cable television, computers, photocopying, and videotape recorders.⁴² Under the 1909 Act, state common law rights protect the copyrightable work from the moment of its creation.⁴³ Artists obtained federal copyright registration under the 1909 Act through publication with notice of copyright and promptly depositing two complete copies⁴⁴ of the best published edition with the Copyright Office⁴⁵ or, for works not reproduced for sale, by depositing one complete copy of the work.⁴⁶ Under the 1909 Act, sound

40. “To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.” U.S. CONST. art. I, § 8, cl. 8.

41. *A Brief History of Copyright in the United States*, COPYRIGHT.GOV, https://www.copyright.gov/timeline/timeline_18th_century.html [<https://perma.cc/J7BN-HNJA>] (protecting books, maps, and charts for 14 years with a renewal period of another year upon registration with the district court).

42. Initial copyright protection period extended to 28 years in 1831, photographs became protectable in 1865, and musical compositions became protectable in 1897. *Id.* See also *General Guide to the Copyright Act of 1976*, THE LIBRARY OF CONGRESS, <https://www.copyright.gov/reports/guide-to-copyright.pdf> [<https://perma.cc/65G7-39H6>] (last visited Nov. 11, 2019); JESSICA LITMAN, *DIGITAL COPYRIGHT* 48 (2001).

43. 17 U.S.C. § 2 (1964).

44. 17 U.S.C. §§ 12–13 (1964).

45. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

46. 17 U.S.C. § 11 (1964).

recordings were not acceptable deposit copy media.⁴⁷ Distribution of phonorecords failed to satisfy the publication requirement; sheet music deposit copies alone satisfied the requirement for federal protection.⁴⁸

The Music Modernization Act of 1972 extended copyright protection to sound recordings, a form of expression distinguishable from musical composition.⁴⁹ After various minor revisions,⁵⁰ Congress approved the Copyright Act of 1976 (“1976 Act”),⁵¹ superseding the 1909 Act, with an effective date of January 1, 1978. Under the 1976 Act, federal copyright protection extends to published and unpublished works once they are fixed in tangible form.⁵² The deposit copy “requirement” for works under the 1976 Act becomes “due” three months after the work’s publication.⁵³ Unlike copyrights under the 1909 Act, the failure to make a prompt deposit under the 1976 Act, even if demanded by the Register of Copyrights, does not result in copyright forfeiture.⁵⁴

47. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020) (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (“Nimmer”) § 2.05[A] (2017)).

48. *Skidmore III*, 952 F.3d at 1062.

49. 17 U.S.C. § 102(a)(7).

50. *A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_18th_%20century.html [<https://perma.cc/5QRZ-6MGL>] (last visited Nov. 4, 2019) (Federal copyright protection extended to sound recordings in 1972. Recordings fixed prior to February 15, 1972 remain protected under state law).

51. 17 U.S.C. §§ 407–408 (1976).

52. *Id.*

53. Paul Goldstein, *Goldstein on Copyright* § 3.9 (3d ed. 2020).

54. *Id.*

B. Copyright Infringement Tests

“To establish [copyright] infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁵⁵ Production of a certificate of registration from the U.S. Copyright Office raises a presumption of plaintiff’s satisfaction of the first element: copyright ownership and validity.⁵⁶ Unlike the first element, musical works present special difficulties as compared to other, tangible copyrightable media when it comes to proving copying of original elements.⁵⁷ The complexity of applying the copying test for musical works has perpetuated inconsistent treatment both across and within circuits.⁵⁸

Copying of original elements—the second element in any copyright infringement claim—encompasses two separate inquiries: (1) copying and (2) improper, or unlawful, appropriation.⁵⁹ In rare cases, the plaintiff will establish copying through direct evidence.⁶⁰ More commonly, plaintiffs prove copying through indirect evidence: defendant’s access to the plaintiff’s work, “probative similarity” between the works, and expert testimony.⁶¹ Additionally, copyright infringement requires “substantial similarity” between the accused work and the protected material⁶² of the

55. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

56. Micro Star v. Formgen Inc., 154 F.3d 1107, 1110 (9th Cir. 1998) (ownership and validity satisfied by production of video game copyright registration).

57. The copying test applies to literary works which can be broken into discrete elements including “plot, themes, dialogue, mood, setting, pace, characters and sequence of events.” *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002) (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)); *United States v. Backer*, 134 F.2d 533, 535 (2d Cir. 1943) (deposit copies of figurines more easily comparable than sheet music deposit copies of musical works).

58. *Metcalf*, 294 F.3d at 1073; *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1375 (2019).

59. *Rentmeester*, at 1117; *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992).

60. Direct evidence includes “admissions, eyewitness testimony, and presence of watermarks or other features in the defendant’s work conclusively identifying the plaintiff’s work as the source.” Eric Osterberg, *Copyright Litigation: Analysing Substantial Similarity*, in PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY 2020 (Ser. No. 5-524-1501).

61. *Rentmeester*, 883 F.3d at 1117 (considering access and similarities probative of copying as indirect evidence); *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018) (considering expert testimony as indirect evidence); *Laureyssens*, 964 F.2d at 140 (“[I]ndirect evidence, include[es] access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony.”).

62. “A musical work consists of the composition, arrangement, and underlying work of art, including the lyrics of the music, if any.” *Issues in Musical Works*, 1 INFORMATION LAW § 6:29.

plaintiff’s work such that the copying amounts to improper, or unlawful, appropriation.⁶³ Elements protectable under copyright law for musical works—specifically musical composition—include melody, rhythm, harmony, and accompanying lyrics.⁶⁴

Courts admit confusion surrounds the application of the judicial tests for copying.⁶⁵ Most copyright infringement suits are brought in the Second and Ninth Circuits,⁶⁶ and accordingly, the forthcoming analysis will be focused on their precedent. In some cases, the Second and Ninth Circuits collapsed and conflated the copyright infringement tests by assessing *substantial* similarity, rather than *probative* similarity, in both the copying and the improper appropriation elements that comprise the second element of the copyright infringement test: copying of original elements.⁶⁷ Probative similarity asks whether the similarities between the two works suggests copying and can be rebutted by proof of independent creation.⁶⁸ Substantial similarity asks, more narrowly, whether the copying is actionable infringement because the defendant has used enough of plaintiff’s copyrightable expression.⁶⁹

63. *Laureyssens*, 964 F.2d at 140 (citing *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)).

64. *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFFICE 1, <https://www.copyright.gov/circs/circ56a.pdf> [<https://perma.cc/A8LZ-W3K7>].

65. “The presence of a ‘substantial similarity’ requirement in both prongs of the analysis—actual copying and whether the copying constitutes an improper appropriation—creates the potential for unnecessary confusion, especially because a plaintiff need not prove *substantial* similarity in every case in order to prove actual copying.” *Laureyssens*, 964 F.2d at 140.

66. DOROTHY J. HOWELL, *INTELLECTUAL PROPERTIES AND THE PROTECTION OF FICTIONAL CHARACTERS: COPYRIGHT, TRADEMARK, OR UNFAIR COMPETITION?*, at xii (1990).

67. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1375 (2019).

68. ROBERT C. OSTERBERG & ERIC C. OSTERBERG, *SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW* 355 (2003).

69. *Id.*

1. Copyright Infringement in the Second Circuit

The Second Circuit recognizes “wide dissemination” of a prior work as a basis for inferring access in the copying inquiry.⁷⁰ The Second Circuit recognizes probative similarity, which, in addition to access, completes the copying portion of the copying of original elements inquiry, when any similarities between the two works would not be expected to arise independently in the normal course of events and suggest copying.⁷¹ The Second Circuit goes a step further and holds, if two works are “so strikingly similar as to preclude the possibility of independent creation, copying may be proved without a showing of access.”⁷² In short, striking similarity means that it is virtually impossible, according to human experience, that the two works could have been created independently.⁷³

After the plaintiff proves copying, the Second Circuit applies the “ordinary observer test” for completely original works to determine substantial similarity for the improper appropriation inquiry.⁷⁴ The test asks whether an ordinary observer, unless they set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.⁷⁵ If, however, the work is not completely original and contains protectable and unprotectable elements, then the Second Circuit applies the “more discerning observer test” and filters out portions of the plaintiff’s works that are not protected by copyright.⁷⁶

70. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983).

71. Ringgold v. Black Entm’t. Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997); Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 370, 380 (5th Cir. 2004).

72. Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir.1995).

73. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.02[B] (2005).

74. Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001).

75. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

76. *Boisson*, 273 F.3d at 272.

2. Copyright Infringement in the Ninth Circuit

The Ninth Circuit, like the Second Circuit, accepts proof of wide dissemination of the copyrighted work as proof of access.⁷⁷ Additionally, both circuits recognize similarities probative of copying, or striking similarity, to satisfy the copying element of the copying of original elements aspect of the infringement inquiry.⁷⁸ However, the Ninth Circuit’s analysis differs from the Second Circuit with respect to determining the substantial similarity needed for a finding of improper, or unlawful, appropriation.⁷⁹ Unlike the Second Circuit, the Ninth Circuit’s test for substantial similarity contains an extrinsic and an intrinsic portion.⁸⁰ Under the extrinsic test, unprotectable elements of the work are not considered.⁸¹ The plaintiff must identify specific expressive elements of its work to withstand the objective comparison required by the extrinsic test.⁸² To prove the defendant’s work is substantially similar, the plaintiff must also satisfy the subjective intrinsic test which assesses the works as a whole to determine whether they are substantially similar.⁸³

a. *Williams v. Gaye*

In 2013, Marvin Gaye’s estate sued the creators of “Blurred Lines” for copyright infringement of the musical work “Got To Give It Up.”⁸⁴ Gaye’s work was registered in 1977 by depositing six pages of handwritten sheet music at the Copyright Office.⁸⁵ The District Court cabined Gaye’s protection for the work to the deposit copy because the work was registered before the 1978 effective date of the Copyright Act of 1976 and therefore protected under the 1909 Act.⁸⁶ Accordingly, an edited version of Gaye’s

77. *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016).

78. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

79. Scott Hervey, *The Complexity of Proving Copyright Infringement*, THE IP L. BLOG (Feb. 20, 2007), <https://www.theiplawblog.com/2007/02/articles/copyright-law/the-complexity-of-proving-copyright-infringement/> [https://perma.cc/9J2M-N4L5].

80. *Skidmore III*, 952 F.3d at 1064.

81. *Id.*

82. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822–29 (9th Cir. 2002).

83. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994).

84. *Williams v. Bridgeport Music, Inc.*, 2015 U.S. Dist. LEXIS 97262, at *16–17 (C.D. Cal. July 14, 2015).

85. *Id.*

86. *Id.* at *5.

song, containing only elements reflected in the deposit copy, played at trial rather than the commercial sound recording.⁸⁷

The Ninth Circuit declined to resolve the scope of the deposit copy and upheld the District Court's finding of infringement.⁸⁸ The Ninth Circuit afforded great deference to the jury, "[s]o long as the plaintiff can demonstrate, through expert testimony . . . that the similarity was 'substantial' and to 'protected elements' of the copyrighted work," it would not disturb the jury's application of the intrinsic test and held "Blurred Lines" infringed upon "Got To Give It Up."⁸⁹

b. Skidmore v. Led Zeppelin

The case *Skidmore v. Led Zeppelin* presented the Ninth Circuit once again with the opportunity to decide the scope of the plaintiff's rights for works protected by the 1909 Copyright Act.⁹⁰ In 2018—almost 50 years after the release of the accused musical work—the Ninth Circuit heard the copyright infringement suit filed by Michael Skidmore as trustee of Spirit band member Randy Craig Wolf.⁹¹ Evidence suggests the possibility that Spirit gave Led Zeppelin permission to use portions of "Taurus" while the two groups were on tour together even though Led Zeppelin songwriter, Jimmy Page, vehemently denied hearing "Taurus" before writing "Stairway to Heaven."⁹²

At the trial court level, a jury in the Central District of California (*Skidmore I*) found no substantial similarity between Led Zeppelin's musical work "Stairway to Heaven" and Spirit's copyright in "Taurus."⁹³ Spirit claims Led Zeppelin copied a chord progression used in the iconic "Stairway to Heaven" intro from their work "Taurus."⁹⁴ Spirit argued that elements reflected in the sound recording should be considered by the jury

87. *Id.* at *19.

88. *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018).

89. *Id.* at 1120 (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

90. *Id.*; *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1131 (9th Cir. 2018).

91. *Skidmore II*, 905 F.3d at 1116; LESZCZAK, *supra* note 9.

92. *McBrearty*, *supra* note 15.

93. *Skidmore II*, 905 F.3d at 1130.

94. Erica Banas, *Led Zeppelin 'Stairway' Lawsuit: Over 120 Artists Back Band Ahead of Trial*, 101 WRIF ROCK NEWS (Aug. 5, 2019), <https://wrif.com/2019/08/05/led-zeppelin-stairway-lawsuit-artist-support/> [<https://perma.cc/3T8P-394K>].

since the deposit copy is purely archival in nature.⁹⁵ The court rejected Spirit’s argument to extend copyright protection beyond the artificial deposit copy.⁹⁶

On appeal, a panel of three Ninth Circuit judges (*Skidmore II*) affirmed the District Court’s decision to limit the scope of the plaintiff’s copyright protection to the deposit copy.⁹⁷ Additionally, the Ninth Circuit panel found the District Court’s decision to prohibit playing the “Taurus” sound recording in front of the jury an abuse of discretion.⁹⁸ However, the panel found the error harmless since, despite the audio’s exclusion, the jury found that the defendants had access to the plaintiff’s work.⁹⁹ The Ninth Circuit panel reasoned that reading a proper limiting instruction to the jury would result in proper application of the access and similarity tests even though different audio applied to each of these tests.¹⁰⁰

The Ninth Circuit reheard the *Skidmore v. Led Zeppelin* case *en banc* on September 23, 2019 (*Skidmore III*).¹⁰¹ While regarding the District Court’s exclusion of the full audio as proper, the *en banc* Ninth Circuit held the evidentiary issue surrounding the appropriate audio moot.¹⁰² On rehearing, the plaintiff again urged the court to expand the scope of protection for works protected under the 1909 Act beyond the scope of the artificial deposit copy.¹⁰³ Plaintiff argued that the 1909 Act requires a “complete” copy which was not satisfied by its deposit copy and accordingly, the audio recording should be considered.¹⁰⁴ Defendants argued in support of the panel’s ruling in *Skidmore II*, limiting the scope of the plaintiff’s protection to the deposit copy, maintaining that the guitar solo in “Stairway to Heaven” is protectable, unlike that of “Taurus,” since its protection under the 1909 Act was acquired by public distribution of the

95. *Skidmore III*, 952 F.3d at 1062.

96. *Id.* at 1063–64.

97. *Skidmore II*, 905 F.3d at 1131.

98. *Id.* at 1135–36.

99. *Id.* at 1135.

100. *Id.*

101. *Skidmore III*, 952 F.3d at 1065.

102. *Id.*

103. Oral Argument at 11:50, *Skidmore III*, 952 F.3d 1051 (No. 16-56057), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016207 [<https://perma.cc/NHX3-SZFB>]; *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

104. Oral Argument, *Skidmore III*, 952 F.3d 1051 (No. 16-56057); *Three Boys Music*, 212 F.3d at 486.

copyrighted sheet music along with the performance of the guitar solo.¹⁰⁵ In a further attempt to resolve the decades of confusion surrounding the application of copyright law, the *en banc* Ninth Circuit (*Skidmore III*) held, “[b]y rejecting the inverse ratio rule, we are not suggesting that access cannot serve as circumstantial evidence of actual copying in all cases; access, however, in no way can prove substantial similarity.”¹⁰⁶ The Ninth Circuit reinstated the jury’s verdict in favor of the defendant, Led Zeppelin, in its written decision issued on March 9, 2020.¹⁰⁷ Plaintiff’s counsel filed a petition for certiorari on August 6th, 2020.¹⁰⁸ The first question presented asks, yet again, whether the *en banc* Ninth Circuit Court of Appeals correctly limited the scope to the sheet music deposit copy.¹⁰⁹ However, the petitions for certiorari and re-hearing by the Ninth Circuit *en banc* have each been denied.¹¹⁰

105. Response to Appellant Michael Skidmore’s Petition for Rehearing En Banc at 15, *Skidmore v. Led Zeppelin*, Nos. 16-56057 & 16-56287 (9th Cir. Dec. 10, 2018).

106. *Skidmore III*, 952 F.3d at 1069.

107. *Id.* at 1056.

108. *Skidmore III*, 952 F.3d at 1061, *petition for cert. filed*, (No. 20-142).

109. *Id.*

110. *Skidmore v. Led Zeppelin*, 141 S. Ct. 453, 454 (2020) (denying certiorari); *Skidmore v. Zeppelin*, No. 20-142, 2020 WL 7132739, at *1 (U.S. Dec. 7, 2020) (denying re-hearing).

3. *The Inverse Ratio Rule*

The inverse ratio rule allows a higher showing of access to compensate for a lesser showing of similarities between works.¹¹¹ The aid this rule offered to copyright infringement plaintiffs came at a high cost, threatening the integrity of the copyright infringement inquiry as a whole because of the confusion resulting from its muddled application.¹¹² Confusion has surrounded the articulation, application, and direction of this rule since its inception.¹¹³

The Ninth Circuit first recognized the inverse ratio rule in 1977 with the case *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*¹¹⁴ In *Krofft*, the Ninth Circuit found the degree of access—where the defendants actually visited plaintiffs’ headquarters to discuss the copyrightable work—to justify a lower showing of substantial similarity.¹¹⁵ On the other hand, the Second Circuit’s firm rejection of the use of the inverse ratio rule to compensate for a lack of substantial similarity dates back to 1961.¹¹⁶ The Second Circuit, however, continues to accept the rule in limited form: accepting a lower showing of access when the *probative* similarities between the two works are strong.¹¹⁷

Decades after the Second Circuit rejected the rule, the Ninth Circuit began to clarify its articulation of the inverse ratio rule, holding the rule applies only to the copying analysis, not the unlawful appropriation inquiry.¹¹⁸ The case *Williams v. Bridgeport Music, Inc.*, involving Pharell Williams’ hit “Blurred Lines,” presented a rare situation: the defendants

111. *Skidmore III*, 952 F.3d at 1066 (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

112. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1375 (2019); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003).

113. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1131 (9th Cir. 2018).

114. Samuel Lewis, *Stairway to Heaven: End of the Inverse Ratio Rule Apophthegm*, LAW.COM, (Mar. 16, 2020), <https://www.law.com/dailybusinessreview/2020/03/16/stairway-to-heaven-end-of-the-inverse-ratio-rule-apophthegm/?slreturn=20200720143406> [<https://perma.cc/9HB2-WLAG>]; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977), *overruled by Skidmore III*, 952 F.3d at 1051.

115. *Lewis*, *supra* note 115; *Sid & Marty Krofft Television Prods. Inc.*, 562 F.2d at 1172.

116. *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961).

117. *Epic/Sony Records*, 351 F.3d at 56 (quoting *Nimmer on Copyright*, § 13.03[D], at 13–77).

118. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1375 (2019).

conceded access to the plaintiff's work.¹¹⁹ This concession led the Ninth Circuit to abandon the inverse ratio rule, in that instance, recognizing the concession could be used against defendants in both parts of the infringement test under the court's current inverse ratio rule precedent.¹²⁰

In *Skidmore III*,¹²¹ the Ninth Circuit joined the majority of circuits by "overruling" the inverse ratio rule.¹²² The *en banc* Ninth Circuit expressly stated, "access, however, in no way can prove substantial similarity."¹²³ Likewise, in *Laureyssens v. Idea Group, Inc.*, the Second Circuit distinguished the kind of similarity needed to prove copying, probative similarity, from substantial similarity which is needed to prove unlawful or improper appropriation.¹²⁴ The inverse ratio rule can no longer be invoked to aid Ninth Circuit plaintiffs in satisfying the unlawful appropriation inquiry of the copyright infringement analysis.¹²⁵

However, it remains unclear whether the Ninth Circuit intends to tolerate the inverse ratio rule within the copying inquiry: allowing a higher degree of access to compensate for a lower showing of probative similarity.¹²⁶ Had the inverse ratio rule persisted as previously interpreted by the Ninth Circuit—with substantial similarity improperly deemed to comprise both the copying and unlawful appropriation parts of the copyright infringement test—plaintiffs could win their case by proving access alone.¹²⁷ However, elimination of the plaintiff friendly inverse ratio rule combined with limiting the scope of plaintiff's rights under the 1909 Act to the deposit copy, and the remaining confusion inherent in the various infringement tests, the analysis may now be skewed too heavily in favor of the later, defendant artist.

119. *Williams v. Bridgeport Music, Inc.*, 2015 U.S. Dist. LEXIS 97262, at *16–17 (C.D. Cal. July 14, 2015).

120. Sanders, *supra* note 36.

121. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1131 (9th Cir. 2018), *aff'd by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

122. The continued adherence to the Inverse Ratio Rule by the last remaining court to endorse it, the Sixth Circuit, is uncertain. Lewis, *supra* note 115; *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 540 (6th Cir. 2020).

123. *Skidmore III*, 952 F.3d at 1064.

124. *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 140 (2d Cir. 1992).

125. *Skidmore II*, 905 F.3d at 1131, *aff'd by Skidmore III*, 952 F.3d at 1064.

126. Wong & Thomas, *supra* note 34.

127. Lewis, *supra* note 115.

II. HARMFUL EFFECTS

A. *Skidmore v. Led Zeppelin*

In *Skidmore v. Led Zeppelin*, the Ninth Circuit tackled multiple complex aspects of copyright law, for works protected under the 1909 Act. These complex aspects include: the application of the inverse ratio rule,¹²⁸ the scope of protection for works protected under the 1909 Act,¹²⁹ and the audio version to be played at trial.¹³⁰ The substantial similarity inquiry for musical works confuses lay judges and juries especially in cases like *Skidmore v. Led Zeppelin* where the tangible deposit copy omits aspects present in the sound recording version of the work.¹³¹

Following decades of uncertainty, the Ninth Circuit clarified their intended application of the inverse ratio rule.¹³² However, this holding raises a new concern: elimination of a plaintiff friendly mechanism.¹³³ In another plaintiff unfriendly move, the Ninth Circuit limited the scope of rights obtained under the 1909 Act to the deposit copy alone.¹³⁴ While plaintiffs criticize the deposit copy requirement as artificial, because many authors of musical works are unable read music,¹³⁵ it is even less likely that lay members of the jury read music.¹³⁶ Accordingly, testimony and jury instructions significantly influence jury findings purported to be based on sheet music alone.¹³⁷ Additionally, members of the jury might have already heard one, or both, of the musical works at issue in a copyright infringement

128. *Skidmore II*, 905 F.3d at 1130, *aff'd by Skidmore III*, 952 F.3d at 1066.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1064.

135. *Id.*; 7 Famous Musicians – Who Can't Read Music, THE MUSIC STUDIO (Nov. 8, 2017), <https://www.themusicstudio.ca/blog/2017/11/909/> [<https://perma.cc/7C9B-HHGV>] (Elvis Presley, Michael Jackson, The Beatles, Jimi Hendrix, and other musicians are unable to read music).

136. Jon Henschen, *The Tragic Decline of Music Literacy (and Quality)*, INTELLECTUAL TAKEOUT (Aug. 16, 2018), <https://www.intellectuالتakeout.org/article/tragic-decline-music-literacy-and-quality/> [<https://perma.cc/69UK-GGQ4>].

137. Megan Coane & Maximilian Verrelli, *Blurring Lines? The Practical Implications of Williams v. Bridgeport Music*, AMERICAN BAR ASSOCIATION (Jan./Feb. 2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music/ [<https://perma.cc/LKP9-E9DU>].

suit.¹³⁸ The fame of a song, or a juror’s prior knowledge of it, may subconsciously enter the determination irrespective of a limiting instruction telling the jury to disregard the full audio to determine the similarity of the works.¹³⁹

Finally, the Ninth Circuit left open the possibility, in another case, that the full audio version containing notes not reflected in the deposit copy could be played at trial for works protected by the 1909 Act.¹⁴⁰ The Ninth Circuit failed to note the realities of how difficult it would be for a juror to “forget” their prior knowledge—or knowledge gained from listening to the full audio for access—and disregard it, limiting their assessment of similarity to the audio reflecting the deposit copy.¹⁴¹ Even in simple cases, some jurors understand a minimal amount of legalese in jury instructions.¹⁴² Members of the jury may become fatigued by the time the judge reads the jury instructions at the end of trial.¹⁴³ Even though playing the full audio would benefit the plaintiff, in some cases, it would be improper to corrupt the integrity of the infringement inquiry, for works protected under the 1909 Act, by playing the full audio version of the work without additional measures in place.¹⁴⁴

In the wake of the *Skidmore v. Led Zeppelin* decisions, copyright law should look to new mechanisms to ensure the integrity of the infringement analysis. Remaining confusion would be mitigated by the use of a multiple jury proceeding, adjudicators with musical expertise, or additional pre-trial procedure.

138. In voir dire, the attorneys asked whether prospective jurors had seen either Spirit or Led Zeppelin perform in concert. Suevon Lee, ‘Stairway to Heaven’ Jurors to Face Personal Pre-Trial Queries, LAW 360 (Apr. 19, 2016, 7:53 PM), <https://www-law360-com.ezproxy.law.wustl.edu/articles/786339/-stairway-to-heaven-jurors-to-face-personal-pre-trial-queries>.

139. Stern, *supra* note 30.

140. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1065 (9th Cir. 2020) (holding the evidentiary issue regarding the proper audio as moot).

141. *Id.*; Stern, *supra* note 30.

142. *Jurors Are Practical Problem Solvers, but Have Difficulty Understanding Jury Instructions, Experts Say*, AMERICANBAR.ORG (Aug. 14, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/jurors_are_practical/ [<https://perma.cc/U4ZT-VGHZ>].

143. *Through the Eyes of the Juror: A Manual for Addressing Juror Stress*, NAT’L CTR. FOR STATE COURTS (1998), <http://www.ncsc-jurystudies.org/What-We-Do/~media/Microsites/Files/CJS/What%20We%20Do/THROUGH%20THE%20EYES%20OF%20THE%20JUROR.ashx> [<https://perma.cc/X4HJ-QSG7>].

144. *Infra*, Section III.

B. The Second Circuit: Griffin v. Sheeran

In June of 2019, Marvin Gaye’s estate sued Ed Sheeran¹⁴⁵ alleging the song “Thinking Out Loud” infringed upon Gaye’s copyright in the 1973 musical work “Let’s Get It On.”¹⁴⁶ Like “Taurus,” “Let’s Get It On” is protected by the 1909 Act.¹⁴⁷ Judge Stanton of the Southern District of New York stayed the *Griffin v. Sheeran* case pending the outcome of *Skidmore v. Led Zeppelin*.¹⁴⁸ Particularly, Stanton awaited the Ninth Circuit’s decision on whether the scope of the inquiry depends upon the deposit copy and whether the full audio recording can be played in front of the jury to prove access.¹⁴⁹ The Ninth Circuit’s decision will likely be good news for the defendant, Ed Sheeran, and his 2014 hit song.

Only 400 out of 11,000 (3.6%) of the notes in “Stairway to Heaven” are reflected in its deposit copy.¹⁵⁰ The most notable omission is Stairway’s iconic opening.¹⁵¹ Like “Taurus” in *Skidmore*, other musical works protected by the 1909 Act—including Stairway, the defendant song in *Skidmore*—have significant portions omitted from their deposit copies. These works may become more susceptible to free riders¹⁵²—those attempting to benefit from their influencers—given the decreased chance of

145. Sheeran has been accused of copyright infringement before and settled a \$20 million dollar suit over his song “Photograph” in 2017. Harriet Alexander, *Ed Sheeran Faces Trial in New York Accused of Copying Marvin Gaye’s Let’s Get It On*, THE TELEGRAPH (Jan. 4, 2019), <https://www.telegraph.co.uk/news/2019/01/04/ed-sheeran-faces-trial-new-york-accusations-copying-marvin-gayes/> [https://perma.cc/9QY5-3K4R].

146. *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019).

147. Works created between July 1909 and January 1978 are protected by the 1909 Act. *Id.* at 494–96; Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

148. Amy X. Wang, *A Plagiarism Lawsuit Against Ed Sheeran Depends on One Against Led Zeppelin*, ROLLING STONE (July 5, 2019), <https://www.rollingstone.com/pro/news/lawsuit-ed-sheeran-marvin-gaye-led-zeppelin-spirit-855803/> [https://perma.cc/HYM3-4VDA].

149. *Id.*; *Griffin v. Sheeran*, 2020 U.S. Dist. LEXIS 52908, at *3–*4 (S.D.N.Y. Mar. 24, 2020) (holding “the Gaye sound recording is inadmissible in any way which might confuse the jury into thinking it represents what is protected by copyright”).

150. Appellant’s Petition for Limited Panel Rehearing/Rehearing En Banc. The petition for writ of certiorari cites to Petition for Writ of Certiorari at 21, *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (No. 16-56057).

151. *Id.*

152. “Free Bird” by Lynyrd Skynyrd, “Born to Run” by Bruce Springsteen, “Purple Haze” by Jimi Hendrix, “Hotel California” by The Eagles, and “Riders on the Storm” by the Doors are protected under the 1909 Act and their deposit copies omit significant portions of the work. Vernon Silver, *The Legal Loophole That May Leave Some of Rock’s Greatest Riffs Up for Grabs*, BLOOMBERG BUSINESSWEEK (June 20, 2019), <https://www.bloomberg.com/features/2019-classic-rock-riffs-loophole/> [https://perma.cc/HU46-3MQY].

being held liable in court.

C. Juries in Copyright Infringement Cases

The Supreme Court recognizes a constitutional right to trial by jury under the Seventh Amendment for copyright infringement suits seeking statutory damages.¹⁵³ Despite the three-year statute of limitations for copyright infringement,¹⁵⁴ ongoing streaming, distribution, and performance of the musical work may entitle Spirit to three years of royalties for the continued infringement of “Taurus,” if infringement is proven.¹⁵⁵ In a recent interview, Spirit’s attorney, Francis Malofiy, commented on his success in *Marino v. Usher*,¹⁵⁶ a similar case in which he won \$44 million in damages mostly punitive in nature on behalf of the plaintiff songwriter Dan Marino.¹⁵⁷ Malofiy stated, “I knew that once we got in front of a fair jury, empowering them to have their voices heard, I knew we would win.”¹⁵⁸

In intellectual property cases, both parties have traditionally preferred jurors with relevant technical training.¹⁵⁹ However, present day jury consultants emphasize juror’s attitudes toward intellectual property realizing external factors—including attitudes toward the governmental entities issuing intellectual property registrations—can factor into verdicts.¹⁶⁰ Further, District Judge in the Northern District of California, Judge William Alsup, has observed that one side in an intellectual property case often wants to eliminate prospective jurors with technical backgrounds.¹⁶¹

153. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998).

154. 17 U.S.C. § 507(b).

155. 17 U.S.C. §§ 504, 507.

156. *Marino v. Usher*, 22 F. Supp. 3d 437, 446 (E.D. Pa. 2014), *aff’d*, 673 F. App’x 125 (3d Cir. 2016), *and aff’d*, 673 F. App’x 125 (3d Cir. 2016).

157. A.D. Amorosi, *Led Zeppelin ‘Stairway to Heaven’ Case Resumes, Opposing Lawyer Calls It a Battle ‘Against Giants,’* VARIETY (Sept. 23, 2019, 8:05 AM), <https://variety.com/2019/music/news/led-zeppelin-stairway-to-heaven-trial-resumes-today-1203345674/> [<https://perma.cc/82FW-JR9R>].

158. *Id.*

159. *Juror Attitudes in Intellectual Property Cases*, TRIAL BEHAVIOR CONSULTING (Oct. 6 2015), <https://trialbehavior.com/juror-attitudes-in-intellectual-property-cases/> [<https://perma.cc/82UU-MRYR>].

160. *Id.*

161. The Honorable William Alsup, *Huge Numbers of Patent Cases: How One District Judge*

The amorphous nature of musical works, particularly with respect to those unable to read sheet music, introduces additional uncertainty for litigants in cases decided by a lay jury. The average human being encounters music inadvertently in their day-to-day life. Traveling in elevators, dining at restaurants, and attending community events all present opportunities for musical exposure. The psychological theory of neural nostalgia recognizes the strong influence of older songs on artists, particularly those reminiscent of positive memories from teenage years.¹⁶² A pleasing tune may influence an artist’s stylistic choices in creating their work. Further, the same tune could enter the mind of a juror, threatening the application of the complex copyright infringement inquiries.

III. PROPOSED SOLUTION

A. The Goal: Minimizing Confusion

Musical works, by nature, necessitate more amorphous copyright infringement tests than those applied to tangible works of art.¹⁶³ For tangible works such as posters, maps, and photographs, the deposit copy is an exact copy that can be readily compared to the alleged infringer.¹⁶⁴ Safeguards must be put in place to counteract natural human tendencies¹⁶⁵ resulting in copying and improper application of the infringement inquiry. Many successful artists’ works are influenced to some degree by their role models and mentors that have gone before them.¹⁶⁶ Copyright law recognizes that no musical work is truly original.¹⁶⁷ At the same time, it is important for artists to have some latitude in seeking protection for their creative expressions.¹⁶⁸ Accordingly, copyright law recognizes independent

Manages Them – The 2018 Supreme Court IP Review Address, 18 CHI. KENT J. INTELL. PROP. 111, 115–16 (2019).

162. Stern, *supra* note 30.

163. HOWELL, *supra* note 66.

164. *Id.*

165. Stern, *supra* note 30.

166. Famous mentor and mentee duos include: Jay Z and Rihanna, Madonna and Britney Spears, Ed Sheeran and Anne-Marie. *Six Stars Who Have Been the BEST Mentors to Their Pop Proteges*, (Jan. 22, 2018), <https://www.capitalfm.com/features/celebrity-mentors/> [https://perma.cc/E34Y-3CE4].

167. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

168. Shyamkrishna Balganes, *Foreseeability and Copyright Incentives* (John M. Olin L. & Econ. Working Paper No. 400, 2008),

creation as a defense to infringement.¹⁶⁹ Inadvertent or subconscious copying, however, can result in copyright infringement liability.¹⁷⁰

The access requirement considers artistic influence and balances access in the overall determination of copyright infringement liability.¹⁷¹ Informing the jury of protectable aspects of musical works and the audio relevant to each infringement inquiry leaves too much room for error if handled by a limiting instruction alone.¹⁷² Without safeguards in place to supplement the reading of jury instructions, introducing multiple versions of audio threatens the integrity of the judicial process.¹⁷³

https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1212&context=law_and_economics [<https://perma.cc/62WL-Z2AW>].

169. U.S. CONST. art. I, § 8, cl. 8.; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991).

170. Robert K. Walker, *Ghosts in the Hit Machine: Musical Creation and the Doctrine of Subconscious Copying*, ABA JOURNAL (Mar. 1, 2017), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/march-april/ghosts-hit-machine-musical-creation-doctrine-subconscious-copying/ [<https://perma.cc/35SG-365E>].

171. *Id.*

172. See generally David Alan Sklansky, *Evidentiary Instructions And The Jury As Other*, 65 STAN. L. REV. 407, 408 (2013) (It is a “well-known fact[]” that limiting instructions “do not work.”).

173. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1124 (9th Cir. 2018) (discussing jury disagreement and confusion over which audio to be re-played: bass clef or full audio version).

A. Two Lay Juries

In the same trial, different musical renditions may relate to different copyright infringement elements.¹⁷⁴ Portions of the plaintiff’s song, exceeding the number of notes reflected in the deposit copy, might be played in front of the jury to determine whether the defendants had access to the work, as part of the copying inquiry.¹⁷⁵ However, for the purpose of determining unlawful, or improper appropriation for works protected by the 1909 Act, only notes reflected in the deposit copy are relevant.¹⁷⁶ In practice, musicians may attend trial to play the notes reflected in the deposit copy for the jury to aid in the unlawful appropriation inquiry.¹⁷⁷

Two distinct trials, or a multiple jury proceeding, should be considered to mitigate the harmful effects of juror confusion. Lay jurors face difficulty in erasing what they have heard if different, yet similar, audio versions are played for access and then substantial similarity.¹⁷⁸ In cases where multiple audio versions must be introduced, empaneling two lay juries is not unduly burdensome given the value of the rights at stake.¹⁷⁹ Spirit successfully argued to the Ninth Circuit panel (*Skidmore II*) that the full audio recording, rather than a musical rendering of the deposit copy, must be played in front of the jury so the jury may assess the credibility of the witness’s testimony.¹⁸⁰ The Ninth Circuit *en banc* (*Skidmore III*) disagreed with the panel on this point;¹⁸¹ however, in another case where access is not moot, a jury could be confronted with multiple audio versions. Allowing the same jury to later hear a different musical rendering, for consideration of unlawful appropriation, permits too much room for confusion. There is a risk that the jury has already made up their mind about liability, after hearing the music relevant only to the initial determination of access.

174. *Id.*

175. *Id.*

176. *Id.* at 1131–35.

177. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063 (9th Cir. 2020).

178. *Sometimes Two Juries Are Better Than One*, N.Y. TIMES (Dec. 20, 1993), <https://www.nytimes.com/1993/12/20/us/sometimes-two-juries-are-better-than-one.html> [<https://perma.cc/3YCR-2VHA>].

179. Debra C. Weiss, *\$2.5B Verdict is Largest Patent Infringement Award in US History; Will Award Be Tripled?*, ABA JOURNAL (Dec. 19, 2016), http://www.abajournal.com/news/article/2.5b_verdict_is_largest_patent_infringement_award_in_us_history_will_award [<https://perma.cc/K3UE-YN9A>].

180. *Skidmore II*, 905 F.3d at 1136.

181. *Skidmore III*, 952 F.3d at 1064.

The 1909 Act's confinement of protection for songs multiple minutes long to the deposit copy—in some cases only a single sheet of paper¹⁸²—necessitates well-defined tests. The Ninth Circuit's abrogation of the inverse ratio rule is a critical step on this path to clarity.¹⁸³ Careful consideration of the deposit copy and well-tailored limiting instructions¹⁸⁴ are necessary, but not sufficient, for future copyright infringement cases.

If artists borrow from the popular riffs unprotected by deposit copies filed in the 1960s and 1970s, they might achieve success at first; however, estates awaiting the outcome of this suit will likely bring suits even if they are unlikely to succeed.¹⁸⁵ *Skidmore v. Led Zeppelin* may lead to greater attribution of musical influences and a strengthening of ties within the musical community.¹⁸⁶ The solution to these costly battles might well lie in increased up-front communication between artists, before the release of a musical work.¹⁸⁷ Today, cases have arisen in which the later, musical giant has borrowed from protectable aspects of an earlier artists work without permission, only to thank them later.¹⁸⁸

182. *Id.* at 1062.

183. *Id.* at 1069.

184. FED. R. EVID. 105; Sklansky, *supra* note 175.

185. Examples of lawsuits. Barry Werbin & Sharon O'Shaughnessy, *Supreme Court Ensures Copyright Suit Against MGM "Rages" On*, THE ENTERTAINMENT, ARTS & SPORTS LAW BLOG (May 20, 2014), http://nysbar.com/blogs/EASL/2014/05/supreme_court_ensures_copyrigh.html [<https://perma.cc/PD6N-4T5N>]. Jacqueline Lechtholz-Zey, *United States: The Raging Bull Case— Why It Matters*, MONDAQ (Jan. 24, 2015), <http://www.mondaq.com/unitedstates/x/368682/Copyright/The+Raging+Bull+Case+Why+It+Matters> [<https://perma.cc/6DHY-8E2J>].

186. Taylor Swift wanted to borrow the popular rhythm from Right Said Fred's "I'm Too Sexy." The group accepted a blind offer from Swift and thinks "[i]t's pretty cool" how she was able to channel the cynical aspect of their work. In the past, the group turned down an artist who wanted to change the lyrics into something sexual. Kory Grow, *Right Said Fred on Taylor Swift's 'Cynical' 'Look What Your Made Me Do.'* ROLLING STONE (Aug. 25, 2017), <https://www.rollingstone.com/music/music-features/right-said-fred-on-taylor-swifts-cynical-look-what-you-made-me-do-205808/> [<https://perma.cc/VHK9-ME47>].

187. *Cf.* Geoff Edgers, *Sam Smith Stole a Tom Petty Song, Which is a Grand Tradition in Pop Music*, WASH. POST (Jan. 26, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/01/26/sam-smith-stole-a-tom-petty-song-which-is-a-grand-tradition-in-pop-music/> [<https://perma.cc/PV6W-J2LA>]. Sam Smith later shared credit after failing seek permission from Tom Petty to use "I Won't Back Down" for his song, "Stay With Me." Robin Thicke did not ask permission to use "Got to Give It Up" for his song "Blurred Lines."

188. Grow, *supra* note 189.

C. Pre-Trial Procedure

Courts favor early settlement in intellectual property cases.¹⁸⁹ In patent law cases, courts require Markman hearings early on in the case.¹⁹⁰ The timing of this procedure aims to encourage settlement.¹⁹¹ Likewise, courts should consider requiring mandatory pre-trial hearings for the complicated aspects of copyright infringement cases. Licensing and settlements provide reliable frameworks for adversaries¹⁹² whereas unpredictable judges and juries can result in large verdicts going either way in copyright infringement cases.¹⁹³ Critics may argue that upfront communication in copyright infringement cases does not alleviate the same risks seen in patent infringement cases. In patent law, awards have reached \$2.5 billion;¹⁹⁴ awards of that magnitude have yet to be seen in copyright infringement cases.

189. Kovalick, *supra* note 31.

190. Judges hold and decide Markman hearings, also known as claim construction hearings, to further uniformity. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391 (1996); N.D. Cal. Civ. L.R. 16-10.

191. *Id.*

192. Grow, *supra* note 189.

193. Prior to being overturned, the verdict against Katy Perry was \$2.78 million. Emily Zemler, *Katy Perry Appeals Ruling in ‘Dark Horse’ Plagiarism Trial*, ROLLING STONE (Oct. 15, 2019), <https://www.rollingstone.com/music/music-news/katy-perry-appeal-dark-horse-plagiarism-trial-899175/> [<https://perma.cc/6BE6-G3FC>]; *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *18 (C.D. Cal., Mar. 16, 2020) (damages vacated because plaintiffs failed to satisfy the extrinsic test).

194. Weiss, *supra* note 182.

D. Administrative Copyright Judges

Additionally, courts should consider the integration of a skilled panel of “Administrative Copyright Judges” to mitigate the harmful, defendant-favored effects likely to result from the confusing aspects of the copyright infringement analysis. In 2004, The Copyright Royalty and Distribution Reform Act enacted the U.S. Copyright Royalty Board: a panel of three judges appointed by the Librarian of Congress to oversee statutory licenses.¹⁹⁵ The Act requires each judge to have a law degree, at least seven years of legal experience, and at least one of the judges to have significant knowledge of copyright law.¹⁹⁶ Expanding the jurisdiction of this pre-existing panel, along with new appointees, would increase efficiency and accuracy with respect to the technical aspects of the infringement inquiry, as it has in the resolution of statutory licensing in copyright cases.

The Patent Trial and Appeal Board (“PTAB”), an administrative law body of the United States Patent and Trademark Office (“USPTO”), was formed on September 16, 2012 as part of the America Invents Act.¹⁹⁷ Congress implemented the PTAB in part because of the difficulties faced by non-technical judges and juries in deciding cases pertaining to complex technologies.¹⁹⁸ In many cases, particularly where the 1909 Copyright Act applies since the inquiry requires interpretation of sheet music, the analysis rises to a similar level of technical difficulty compared to patent law cases. For such cases, the implementation of a similar administrative law body should be considered. Just as certain patent litigants benefit from Administrative Patent Judges with expertise as scientists and engineers,¹⁹⁹ copyright litigants would benefit from the formation of an administrative body composed of Administrative Copyright Judges possessing expertise in music and other arts.

195. *About Us*, UNITED STATES COPYRIGHT ROYALTY BOARD, <https://www.crb.gov> [<https://perma.cc/N5S5-5EJ8>].

196. *Id.*

197. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011).

198. Michael Goodman, *What’s So Special About Patent Law?*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 797 (2016).

199. *Advantages of the Patent Trial and Appeal Board*, ROPES & GRAY, <https://www.ropesgray.com/en/info/PTABinsights-Video-Series-Advantages-of-the-Patent-Trial-and-Appeal-Board> [<https://perma.cc/V4ZS-L3TW>].

CONCLUSION

After decades of confusion and inconsistent tests, the Ninth Circuit attempted to rectify its copyright precedent in *Skidmore v. Led Zeppelin*. The court tackled the complex inverse ratio rule, the scope of protection for works protected under the 1909 Copyright Act, and the confusion inherent in the introduction of multiple versions of musical works. However, the Court left open the possibility, in another case, that the same jury would hear multiple audio versions relevant to different parts of the copyright infringement inquiry. This decision impacts musical artists, as has already been seen in the Second Circuit with the Ed Sheeran case,²⁰⁰ irrespective of the Supreme Court’s denial of certiorari.²⁰¹

The Ninth Circuit’s decision in *Skidmore v. Led Zeppelin* threatens older, lesser-known musicians with works copyrighted under the 1909 Act. First, the Court either abrogated the inverse ratio rule entirely or limited its applicability to the copying inquiry for copyright infringement. Second, the Court narrowed the scope of plaintiff’s rights in musical works protected under the 1909 Act to the deposit copy. Petitions for certiorari²⁰² and for rehearing by the Ninth Circuit *en banc* have each been denied.²⁰³ Until the Ninth Circuit or Supreme Court condemns the Ninth Circuit’s decisions in *Skidmore II* and *III* in a subsequent case, portions of musical works protected under the 1909 Act not reflected in the deposit copy will become part of the public domain, advantaging alleged infringers like Led Zeppelin.

To mitigate the harmful effects inherent in the current state of copyright law for works protected under the 1909 Act, Congress should enact legislation in support of (1) a panel of Administrative Copyright Judges; (2) two lay juries: one for determining access and the other for determining similarity among protected aspects of the works; or (3) implement additional pre-trial procedures. If patent law is entitled to the benefit of Administrative Patent Judges, why is copyright law forbidden from adopting a similar procedural safeguard? Musical expertise would bring value to deciphering sheet music and the audiological comparison of musical works. While no copyrightable work is truly original, defendants

200. Griffin v. Sheeran, 351 F. Supp. 3d 492 (S.D.N.Y. 2019).

201. Skidmore v. Zeppelin, 141 S. Ct. 453, 454 (2020).

202. *Id.*

203. Skidmore v. Zeppelin, No. 20-142, 2020 WL 7132739, at *1 (U.S. Dec. 7, 2020).

should not be unfairly advantaged, as in cases like *Skidmore v. Led Zeppelin*, without due credit given to their influencers, mentors, and sources of inspiration. Additionally, the above proposals would preserve the integrity of the infringement inquiry, provide plaintiffs with appropriate safeguards, and further the subsidiary goals of attribution and upfront communication.