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NOTE

*WILLIAMS V. GAYE: FURTHER BLURRING
THE LINES BETWEEN INSPIRATION
AND INFRINGEMENT*

ALYSSA CHAVERS*

“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 much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism.”¹

INTRODUCTION

During the summer of 2013, Robin Thicke’s (“Thicke”) and Pharrell Williams’s (“Williams”) song “Blurred Lines” became wildly popular and occupied music charts for weeks.² The song was dubbed as Billboard’s Song of the Summer for 2013,³ and was the best-selling single of 2013;⁴ thus, it was no surprise when the controversies over “Blurred

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¹ Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) (per curiam).

² Liat Kornowski, *15 Notable Events of Summer 2013*, HUFF. POST (Sept. 2, 2013, 8:46 AM), https://www.huffingtonpost.com/2013/09/02/notable-events-of-summer-2013_n_3836247.html.

³ Gary Trust, *Robin Thicke’s ‘Blurred Lines’ Is Billboard’s Song of the Summer*, BILLBOARD (Sept. 5, 2013), <http://www.billboard.com/articles/news/5687036/robin-thicke-blurred-lines-is-billboards-song-of-the-summer>.

⁴ Stuart Dredge, *Global Music Sales Fell in 2013 Despite Strong Growth for Streaming Services*, THE GUARDIAN (Mar. 18, 2014, 9:00 AM), <http://www.theguardian.com/technology/2014/mar/18/music-sales-ifpi-2013-spotify-streaming> (reporting that “Blurred Lines” sold 14.8 million units in track downloads and equivalent streams).

Lines” made headlines.⁵ The song was highly controversial. It included misogynistic lyrics,⁶ and a music video that was removed, and then censored on YouTube for violating the site’s policies regarding nudity.⁷ During an interview, Thicke discussed the overwhelming popularity of the song stating, “We felt like maybe it was something special but it was so different. We didn’t know it would be this big.”⁸ While “Blurred Lines” enjoyed chart-topping popularity, a separate controversy was developing. Marvin Gaye’s (“Gaye”) family accused Thicke and Williams of copying the “feel and sound” of Gaye’s song “Got to Give It Up.”⁹ Thicke had previously, and publicly, indicated that “Got to Give It Up” was the influence for “Blurred Lines.”¹⁰

The case began in the United States District Court in the Central District of California (“district court”), with a jury finding in favor of Nona Marvisa Gaye, Frankie Christian Gaye, and Marvin Gaye III (“Gaye Parties”).¹¹ The Thicke Parties (Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water from Nazareth Publishing, Inc.) appealed to the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”), where the Ninth Circuit affirmed the district court’s ruling, holding that “Blurred Lines infringed on the copyright in “Got to Give It Up.”¹² The decision set the music world into a flurry—artists

⁵ Dorian Lynskey, *Blurred Lines: The Most Controversial Song of the Decade*, THE GUARDIAN (Nov. 13, 2013, 2:32 PM), <https://www.theguardian.com/music/2013/nov/13/blurred-lines-most-controversial-song-decade>.

⁶ Geeta Dayal, *Robin Thicke’s “Blurred Lines”: It’s sexist and awful.*, SLATE (Dec. 19, 2013, 2:44 PM), http://www.slate.com/articles/arts/the_music_club/features/2013/music_club_2013/robin_thicke_s_blurred_lines_it_s_sexist_and_awful.html (quoting lyrics, such as “I know you want it” and “I hate these blurred lines”).

⁷ Jessica Rawden, *Robin Thicke’s Blurred Lines Video Banned from YouTube*, CINEMA BLEND, <https://www.cinemablend.com/pop/Robin-Thicke-Blurred-Lines-Video-Banned-From-YouTube-54244.html>.

⁸ Radio.com, *GRAMMY Behind The Song: Robin Thicke’s “Blurred Lines.”* YOUTUBE (Dec. 10, 2013), https://www.youtube.com/watch?time_continue=63&v=pHP_yOGs-HQ.

⁹ Zoe Chace, *Robin Thicke’s Song Sounds Like Marvin Gaye. So He’s Suing Gaye’s Family.* NPR (Aug. 19, 2013, 1:05 PM), <http://www.npr.org/sections/money/2013/08/19/213471083/robin-thickes-song-sounds-like-marvin-gaye-so-thicke-is-suing-gayes-family>.

¹⁰ Jon Caramanica, *Yesterday’s Style, Today’s Hits*, THE NEW YORK TIMES (Aug. 2, 2013), <https://www.nytimes.com/2013/08/03/arts/music/blurred-lines-makes-robin-thicke-white-souls-leader.html>.

¹¹ *Williams v. Bridgeport Music, Inc.*, Case No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. 2015), *aff’d in part, rev’d in part sub nom.* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹² *Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018) (the Ninth Circuit affirmed in part and reversed in part. The Ninth Circuit affirmed the district court’s ruling regarding copyright infringement, but reversed the judgment against Harris and the Interscope Parties).

feared that the decision would limit their creativity and put a stop to any music that has the same feel or groove as other music.¹³

The first opinion was published on March 21, 2018 and applied the inverse-ratio rule as the standard for the court's analysis.¹⁴ The inverse-ratio rule operates like a "sliding scale"—the greater the showing of access to a song, the lesser the showing of substantial similarity is required.¹⁵ The rule is binding precedent in the Ninth Circuit, and as the opinion states, the court was "bound to apply it."¹⁶ However, about four months later, on July 11, 2018, the court unexpectedly published a modified opinion to the *Williams v. Gaye* case.¹⁷ The two opinions look virtually identical, with one glaring omission—all discussion of the inverse-ratio rule is gone.¹⁸

If the court was bound by precedent to apply the inverse-ratio rule to this particular case, then it is reasonable to question why the rule was omitted entirely in the subsequent, and therefore binding opinion.¹⁹ The inverse-ratio rule is heavily criticized²⁰ and the second, modified opinion may have been the Ninth Circuit's way of adapting to the changing landscape in the copyright realm. This Note argues, in part, that the omission of the inverse-ratio rule in the second *Williams* opinion is proof of the Ninth Circuit quietly abolishing the outdated rule.

Additionally, this Note demonstrates that the Ninth Circuit's decision to abandon the rule indicates their understanding that copyright law must better reflect today's technology. As with many areas of law, copyright law has been due for an update, so that the law may better reflect today's technology and refrain from stifling creativity in the music industry. For the music industry to continue to expand and thrive, adaptation

¹³ Adrienne Gibbs, *Marvin Gaye's Family Wins 'Blurred Lines' Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018, 3:37 PM), <https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#a8b7104689b4>; *see also* Brief of Amicus Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, 2016 WL 4592128, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (over 200 songwriters, composers, musicians, and producers warned the Ninth Circuit about the effect on the music industry if infringement was found against the Thicke parties).

¹⁴ *Williams v. Gaye*, 885 F.3d at 1163 (9th Cir.), *amended by* 895 F.3d 1106 (9th Cir. 2018).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹⁸ *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹⁹ *Compare Gaye*, 885 F.3d at 1163 n.6 (explaining that the inverse-ratio rule is "binding precedent under [their] circuit law, and [they] are bound to apply it.") with, *Gaye*, 895 F.3d 1106 (9th Cir. 2018).

²⁰ David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 143 (2008) ("The IRR is a deleterious doctrine that provides no analytical benefits in evaluating or determining a copyright infringement case."); *see also* William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019) ("There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.").

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of past musical works through sampling and borrowing is necessary.²¹ As Judge Learned Hand noted, there are only a limited number of musical note combinations that are pleasing to the listener, making the possible combination of notes for new musical works highly limited.²² Instead of viewing the adaptation of past musical works as “copying,” copyright law must support the notion that artists’ work can be used as building blocks for future creators to produce their own music, especially considering the amount of music available to the public today.²³

Part I of this Note outlines the factual and procedural history of *Williams* and discusses the Ninth Circuit’s analysis in its first and second opinions. Part II discusses the historical background of copyright law in the United States, namely the Copyright Act of 1909 and the Copyright Act of 1976. Additionally, this section explains the structure of a music copyright infringement suit, including the elements required to make a successful infringement claim.

Part III argues why courts should presume access in music copyright infringement cases, and subsequently, abandon the inverse-ratio rule. The inverse-ratio rule should be abandoned because people’s access to music has never been easier in today’s digital world. A plaintiff’s burden to prove substantial similarity between the plaintiff’s song and the defendant’s song, should not be diminished as a result of the defendant’s access to the plaintiff’s song. Instead, a defendant’s access to a particular song should be presumed in copyright infringement cases. This Note does not argue that the access requirement is unnecessary in such cases. Access is still necessary for copying because one cannot copy what one has never seen. However, it does not necessarily follow that more access increases the likelihood of copying.

I. *WILLIAMS V. GAYE* – FACTUAL AND PROCEDURAL BACKGROUND

In 1976, Marvin Gaye recorded “Got To Give It Up.”²⁴ In 1977, “Got To Give It Up” reached number one on Billboard’s Hot 100 chart, and in the same year Jobete Music Company registered the song with the United States Copyright Office.²⁵ The registration included six pages of handwritten sheet music accrediting the words and music of “Got to Give

²¹ Carys J. Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, in OSGOODE LEGAL STUDIES RESEARCH PAPER SERIES 43, 48 (B.C. Doagoo et al. eds., 2014).

²² *Darrell*, 113 F.2d at 80.

²³ Alison P. Wynn, Note, *Copyright Law—Unique Characteristics of Music Warrant Its Own System: How Adopting the Intended Audience Test Can Save Music Copyright Litigation*, 39 W. NEW ENG. L. REV. 1, 14–15 (2017).

²⁴ *Gaye*, 895 F.3d at 1116.

²⁵ *Id.*

It Up” to Marvin Gaye.²⁶ Upon Marvin Gaye’s death, the Gaye Parties inherited the copyrights to Marvin Gaye’s musical composition.²⁷

Thirty-six years later in 2012, Williams and Thicke wrote and recorded “Blurred Lines.”²⁸ Clifford Harris, Jr.²⁹ (“Harris”) separately wrote and recorded a verse for “Blurred Lines” that was added to the song several months later.³⁰ By 2013, “Blurred Lines” was the best-selling single in the United States.³¹ The copyright to the musical composition of “Blurred Lines” is jointly held by Thicke, Williams, and Harris.³²

A. THE GAYE PARTIES PREVAIL IN THE DISTRICT COURT

The Gaye Parties approached Williams and Thicke with infringement accusations after hearing “Blurred Lines.”³³ When negotiations failed, Williams, Thicke, and Harris filed suit in the district court on August 15, 2013, seeking declaratory judgment of non-infringement.³⁴ The Gaye Parties counterclaimed against the Thicke Parties, claiming copyright infringement in “Got to Give It Up.”³⁵

Experts play a crucial role in helping parties establish the element of copying.³⁶ Both parties relied on expert testimony in this case: Sandy Wilbur testified on behalf of the Thicke Parties to show there were no similarity between the two songs; Dr. Ingrid Monson and Judith Finell testified on behalf of the Gaye Parties to show the songs were substantially similar.³⁷ The experts’ opinions differed greatly. Wilbur testified that there was no evidence of substantial similarity between “Blurred Lines” and “Got To Give It Up,”³⁸ while Dr. Monson identified har-

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Clifford Harris, Jr. is popularly known as T.I., *Williams v. Gaye*, 895 F.3d 1106, 1116 (9th Cir. 2018).

³⁰ *Gaye*, 895 F.3d at 1116.

³¹ Keith Caulfield, *Justin Timberlake’s ‘20/20’ 2013’s Best Selling Album, ‘Blurred Lines’ Top Song*, BILLBOARD (Jan. 2, 2014), <https://www.billboard.com/articles/news/5855151/justin-timberlakes-2020-2013s-best-selling-album-blurred-lines-top-song> (explaining that 6.5 million copies of “Blurred Lines” were sold in 2013).

³² *Gaye*, 895 F.3d at 1116.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 129 (1988), available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2804&context=flr>.

³⁷ *Gaye*, 895 F.3d at 1117.

³⁸ *Id.*

monic and melodic similarities between the two songs.³⁹ Finnell identified a “‘constellation’ of eight similarities” between the two songs, “consisting of the signature phrase, hooks, hooks with backup vocals, “Theme X,” backup hooks, bass melodies, keyboard parts, and unusual percussion choices.”⁴⁰

Both Williams and Thicke testified that they had access to “Got to Give It Up” and that they drew inspiration from Marvin Gaye.⁴¹ After two days of deliberations, the jury returned a verdict in favor of the Gaye Parties, finding the Thicke Parties liable for infringing the copyright in “Got To Give It Up.” The jury awarded the Gaye Parties four million dollars in damages.⁴² Both the Thicke Parties and the Gaye Parties appealed to the Ninth Circuit.⁴³

B. THE NINTH CIRCUIT AFFIRMED THE DISTRICT COURT RULING

The Ninth Circuit affirmed the district court ruling in a published opinion on March 21, 2018 (“the first opinion”).⁴⁴ On July 11, 2018, the court issued a modified opinion to the *Williams* case (“the second opinion”). The opinions are virtually identical, with the exception of the discussion regarding the inverse-ratio rule in the second opinion.

1. *The Discussion and Analysis of the Inverse-Ratio Rule in the First Opinion*

In the first opinion’s discussion of the applicable standard in a copyright infringement claim, the court explains that they are bound to apply the inverse-ratio rule.⁴⁵ The inverse-ratio rule “operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required.”⁴⁶ The court explained that because Williams and Thicke admitted to a “high degree” of access to “Got to Give It Up,” the Gaye Parties’ burden of proving substantial similarity was lowered.⁴⁷

³⁹ *Id.* at 1118.

⁴⁰ *Id.* at 1117.

⁴¹ *Id.*

⁴² *Id.* at 1118.

⁴³ *Id.* at 1115–16 (Three consolidated appeals were made to the Ninth Circuit following the district court’s judgment: the Thicke parties appeal, the Interscope Parties appeal, and the Gaye family appeal. For purposes of this Note, only the Thicke parties appeal will be discussed as the Interscope Parties appeal and the Gaye family appeal are not relevant to the discussion of this Note).

⁴⁴ *Gaye*, 885 F.3d 1150 (9th Cir.), *amended by* 895 F.3d 1106 (9th Cir. 2018).

⁴⁵ *Id.* at 1163 n.6.

⁴⁶ *Id.* at 1163 (9th Cir.).

⁴⁷ *Id.*

This application of the inverse-ratio rule was also shown in a discussion of one of the instructions⁴⁸ to the jury in the district court.⁴⁹ Instruction 41 stated: “If you conclude that the Thicke Parties had access to either or both of the Gaye Parties’ works before creating . . . their works, you may consider that access in connection with determining whether there is substantial similarity between . . . [the] works.”⁵⁰ The court goes on to explain that the instruction was “[i]n line with our inverse ratio rule” and the instruction allows the jury to “consider access ‘in connection with’ substantial similarity.”⁵¹

2. *The Omission of the Inverse-Ratio Rule in the Second Opinion and the Remaining Analyses*

On appeal, the Thicke Parties asked the Ninth Circuit to reverse the district court’s denial of their motion for summary judgment and vacate the district court’s judgment and remand for a new trial.⁵²

The Thicke Parties requested reversal of their motion for summary judgment because they argued the district court erred in its application of the extrinsic test for substantial similarity.⁵³ The Ninth Circuit allowed the district court’s decision to stand, and held that the order was not reviewable because the court “generally do[es] ‘not review a denial of a summary judgment motion after a full trial on the merits.’”⁵⁴

Next, the Thicke Parties request to vacate the district court’s judgment and remand for a new trial was also denied.⁵⁵ There were several arguments the Thicke Parties gave for the remand of a new trial: “instructional error⁵⁶, improper admission of expert testimony, and lack of evidence supporting the verdict.”⁵⁷ The Thicke Parties argued that the verdict was “against the clear weight of the evidence” because “there is

⁴⁸ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining general instruction as instructions given to the jury by the judge before they begin deliberation).

⁴⁹ *Gaye*, 885 F.3d at 1168 n.12.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Gaye*, 895 F.3d at 1115.

⁵³ *Id.* at 1122.

⁵⁴ *Id.* at 1122 (quoting *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting *Banuelos v. Constr. Laborers’ Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004)).

⁵⁵ *Id.* at 1128.

⁵⁶ *Id.* at 1115 (The Thicke Parties argued that Instructions 42 and 43 were given incorrectly, and the Ninth Circuit held that the district court did not err in giving either instruction. For purposes of this Note, further analysis on the instructional error argument is not relevant to the analysis of this Note).

⁵⁷ *Id.*

no extrinsic or intrinsic similarity between the two songs.”⁵⁸ The court explained that they were bound by the “limited nature of [their] appellate function in reviewing the district court’s denial of a motion for a new trial.”⁵⁹

The Ninth Circuit affirmed the district court’s ruling, holding that the Thicke Parties infringed on the Gaye’s copyright in “Got To Give It Up.”⁶⁰ The court explained that so long as “there was some ‘reasonable basis’ for the jury’s verdict,” [they would] not reverse the district court’s denial of a motion for a new trial.”⁶¹ The court will typically reverse “only when there is an *absolute absence of evidence* to support the jury’s verdict.”⁶² For music copyright cases, courts “will not second-guess the jury’s application of the intrinsic test.”⁶³ The court also explained that their “decision does not grant license to copyright a musical style or ‘groove.’”⁶⁴ The Ninth Circuit held that there was no abuse in the district court’s discretion in denying the Thicke Parties’ motion for a new trial.⁶⁵

Similar to the first opinion, the court explained that, without direct evidence of copying, proof of infringement involves fact-based showings that the defendant had access to the plaintiff’s work and the two works are substantially similar.⁶⁶ However, where the first opinion discussed the inverse-ratio rule immediately following that rule,⁶⁷ the second opinion omitted the discussion entirely.⁶⁸ Additionally, where the first opinion’s discussion of the inverse-ratio rule is used as a justification for the language in Instruction 41,⁶⁹ the second opinion omits discussion of the inverse-ratio rule.⁷⁰ In its place, and directly after quoting the language from Instruction 41, the court writes, “Instruction 41 merely reiterates that the Gayes may choose to prove infringement by using a circumstantial theory.”⁷¹

⁵⁸ *Id.* at 1127.

⁵⁹ *Id.* (quoting *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017)) (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)).

⁶⁰ *Id.* at 1138 (explaining that the district court’s entry of judgement against Harris and the Interscope parties was reversed, but the rest of the district court’s judgment was affirmed).

⁶¹ *Id.* at 1127 (quoting *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007)).

⁶² *Id.* (quoting *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017)) (quoting *Kode*, 596 F.3d at 612 (9th Cir. 2010)).

⁶³ *Id.* (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

⁶⁴ *Id.* at 1138.

⁶⁵ *Id.* at 1128.

⁶⁶ *Id.* at 1119.

⁶⁷ *Gaye*, 885 F.3d at 1163, *amended by* 895 F.3d 1106 (9th Cir. 2018).

⁶⁸ *Gaye*, 895 F.3d at 1119.

⁶⁹ *Gaye*, 885 F.3d at 1168 n.12, *amended by* 895 F.3d 1106 (9th Cir. 2018).

⁷⁰ *Gaye*, 895 F.3d at 1123 n.11.

⁷¹ *Id.*

II. HISTORICAL BACKGROUND OF COPYRIGHT LAW IN THE UNITED STATES

A. COPYRIGHT ACT OF 1909

Copyright laws in the United States come from a 1710 English statute known as the Statute of Anne.⁷² Most of the states created copyright laws that emulated some form of this statute.⁷³ Article I, Section 8 of the United States Constitution grants Congress the power “to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁷⁴ The primary purpose of copyright legislation is to encourage the creation and distribution of intellectual works for public welfare.⁷⁵ Another important purpose of copyright legislation is to give creators credit for their contribution to society.⁷⁶

Federal copyright statutes have undergone several revisions over the last 200 years. “The first federal copyright statute was enacted in 1790 and covered maps, charts and books.”⁷⁷ This statute gave authors and proprietors protection for 14 years with the option of renewing for a second term of 14 years.⁷⁸ General revisions were made in 1831, 1856, and 1897 to reflect concerns among musical artists.⁷⁹ In 1831, Congress amended the Copyright Act to include musical compositions in the form of sheet music.⁸⁰ In 1856, an amendment granted individual copyright holders of dramatic compositions the sole right to publicly perform the piece.⁸¹ In 1897, Congress extended the Copyright Act to apply to anyone publicly performing a protected musical work.⁸²

The Copyright Act of 1909 was based on the printing press as the main disseminator of information.⁸³ The Act of 1909 protected “‘writ-

⁷² MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, ch. 1, 1:1 (1977), available at <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

⁷³ *Id.*

⁷⁴ *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Copyright Act of 1831, ch. 16, § 4, 1 Stat. 436 (current version at 17 U.S.C. § 102 (2006)), available at https://www.copyright.gov/history/Copyright_Enactments_1783-1973.pdf.

⁸¹ Benjamin W. Rudd, *Notable Dates in American Copyright 1783–1969*, 28 Q. J. Libr. Cong. 137, 139 (1971), available at <https://copyright.gov/history/dates.pdf>.

⁸² Lydia Pallas Loren, *The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 260–61 (2010).

⁸³ *Id.*

ings' of an author;" a writing was interpreted as a "fixation in a tangible form [that had] a certain minimum amount of original, creative authorship."⁸⁴ Fourteen classes of works were enumerated in the Act: books, periodicals, lectures, dramatic musical compositions, musical compositions, maps, works of art, reproductions of a work of art, drawings of plastic works of a scientific or technical character, photographs, prints and pictorial illustrations, motion picture photoplays, motion pictures other than photoplays, and sound recordings.⁸⁵ Musical works only received copyright protection if the work was published with a notice of copyright.⁸⁶ If the work was not published, the artist had to deposit the composition with the Copyright Office for protection.⁸⁷

Modernly, significant changes in technology, such as the radio, television, communications satellites, cable television, computers, photocopying machines, and videotape recorders, made Congress's revision of the Copyright Act of 1909 crucial,⁸⁸ and led to the Copyright Act of 1976.

B. COPYRIGHT ACT OF 1976

The Copyright Act of 1976 brought about the most significant change to the Copyright Act. It superseded the 1909 Act and granted the public expanded rights.⁸⁹ The 1976 Act protects "original works of authorship which are fixed in a copy (material object, other than a phonorecord, from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device) or a phonorecord."⁹⁰ The 1976 Act enumerated seven classes of works: literary works, musical works (including any accompanying words), dramatic works, pantomimes and choreographic works, pictorial,

⁸⁴ MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, app. 2, A2:01 (1977) (citing Section 4 of the Copyright Act of 1909), available at <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

⁸⁵ *Id.* (citing Section 5 of the Copyright Act of 1909).

⁸⁶ Martin Bresslera & Robert L. Seigel, *Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal*, 7 CARDOZO ARTS & ENT. L.J. 115, 121–22 (1988).

⁸⁷ *Bridgeport Music*, 2014 WL 7877773, at *8.

⁸⁸ MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, ch. 1, 1:1 (1977), available at <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

⁸⁹ MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., *Introduction to GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976*, (1977), available at <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

⁹⁰ MARYBETH PETERS, COPYRIGHT OFFICE, LIBRARY OF CONG., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, app. 2, A2:01 (1977) (quoting Sections 102(a), 301, 101 of the Copyright Act of 1976), available at <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

graphic, and sculptural works, motion pictures and other audiovisual works, and finally, sound recordings.⁹¹

An important difference between the Copyright Act of 1909 and the Act of 1976, is that only original compositions were protected under the Act of 1909, but sound recordings were not.⁹² The goal of the 1976 Act was to “strike a balance between protecting original works and stifling further creativity.”⁹³

C. STRUCTURE OF A MUSIC COPYRIGHT INFRINGEMENT SUIT

A copyright infringement claim involves many steps. To establish a claim for copyright infringement, the plaintiff must show (1) that they have a valid copyright ownership of an original musical work and (2) that the defendant copied protected elements of the plaintiff’s work.⁹⁴

1. *Valid Copyright Ownership*

A valid copyright certificate issued to the plaintiff from the Copyright Office is considered prima facie evidence⁹⁵ that the plaintiff’s ownership is valid.⁹⁶ If a defendant can show that the plaintiff’s work is not sufficiently original, the defendant may rebut a presumption of validity.⁹⁷ Defendants are only required to show that certain parts of the plaintiff’s work are unoriginal—the parts that the plaintiff claims the defendant is infringing upon.⁹⁸ Defendants should hire an expert musicologist to show that plaintiff’s work is not original.⁹⁹ The expert must be able to show that the plaintiff’s work is not original because it shares elements with prior, protected works.¹⁰⁰ These prior works are not subject to copyright protection because they are in the public domain.¹⁰¹

⁹¹ *Id.*

⁹² *Gaye*, 895 F.3d at 1121.

⁹³ *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 656 (6th Cir. 2004) *amended by* *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

⁹⁴ *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 361 (1991).

⁹⁵ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining prima facie evidence as evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced).

⁹⁶ 17 U.S.C. § 410(c) (2019).

⁹⁷ Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 ENT. SPORT. L. 3, 3 (1997).

⁹⁸ *Id.*

⁹⁹ Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 129 (1988), available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2804&context=fllr>.

¹⁰⁰ Christine Lepera & Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15 ENT. SPORT. L. 3, 4 (1997).

¹⁰¹ *Id.*

Both the courts and the Copyright Act are silent as to any definition of originality in copyright infringement cases. Typically, musical works will satisfy the originality requirement since they generally contain “some creative spark, ‘no matter how crude, humble or obvious’ it might be.”¹⁰²

2. *Defendant Copied Protected Elements of Plaintiff’s Work*

If the plaintiff is able to prove that their copyright ownership of an original work is valid, then the plaintiff must show that the defendant copied protected elements of the plaintiff’s work, either directly or indirectly.¹⁰³ Typically, there is no direct evidence that the defendant has copied the plaintiff’s work,¹⁰⁴ so circumstantial evidence may be used. A plaintiff who relies on circumstantial evidence is still required to show that (1) the defendant had access to the plaintiff’s work, and (2) the two works are “substantially similar.”¹⁰⁵ Substantial similarity is satisfied by a dual extrinsic and intrinsic test.¹⁰⁶

i. *Plaintiff Must Prove Defendant Had Access to Their Work*

To prove that the defendant had access to the plaintiff’s work, the plaintiff must show that the defendant had a reasonable opportunity to view or copy the work.¹⁰⁷ Plaintiffs do not have to show that the defendant actually heard the musical work, only that they had a reasonable opportunity to hear it.¹⁰⁸ Plaintiffs may use three theories to prove the defendant had a reasonable opportunity to access or hear their work: the chain of events theory, a combination of proof of wide dissemination and subconscious copying,¹⁰⁹ or by showing a striking similarity between the works.¹¹⁰

¹⁰² *Feist Publications*, 499 U.S. at 345 (1991) (quoting Melville B. Nimmer & David Nimmer, Nimmer on Copyright §§ 2.01 [A], [B] (1990)).

¹⁰³ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (explaining that when direct evidence of copying is not available, the plaintiff may still prove that infringement occurred, indirectly, by showing defendant had access and the two works are substantially similar).

¹⁰⁴ Daniel E. Wanat, *Copyright Law: Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(C)*, 39 U. MEM. L. REV. 1037, 1040 (2009).

¹⁰⁵ *Smith v. Jackson*, 84 F.3d 1213, 1218–19 (9th Cir. 1996), *superseded by statute as stated in Griffin v. Peele*, Case No. EDCV 17-01153 JGB (KKx), WL 5117555, at *1 (C.D. Cal. 2018).

¹⁰⁶ *Id.* at 1218.

¹⁰⁷ *Three Boys Music*, 212 F.3d at 482 (referencing Sid and Marty Krofft Television Productions, Inc. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 485.

Under the chain of events theory, the plaintiff must show that someone gave protected musical work to another person, and the work was then passed on through various people before arriving with defendant.¹¹¹ Under the second theory, the plaintiff proves access by showing that their musical work was “widely distributed through extensive radio or television airplay . . . record sales . . . [or] via the Internet . . . making practically any piece of music available (legally or illegally) with a mouse click.”¹¹² Under the third theory, the plaintiff can show a striking similarity between the musical works.¹¹³ Plaintiff must show that “the similarity is of a type which will preclude any explanation other than that of copying.”¹¹⁴

ii. Plaintiff Must Prove There Is A Substantial Similarity Between the Works

When the plaintiff proves that the defendant had access to their musical work, some courts will apply the “inverse ratio” rule.¹¹⁵ The inverse-ratio rule states that the more evidence the plaintiff provides in showing the defendant’s access, the less evidence of substantial similarity is needed, and vice versa.¹¹⁶

After access is established, the plaintiff must prove that their work and the defendant’s work are substantially similar.¹¹⁷ The Ninth Circuit uses a two-part test: “an objective extrinsic test and a subjective intrinsic test.”¹¹⁸ For the extrinsic test, the court “analytically dissect[s]” the musical works by considering expert testimony.¹¹⁹ This dissection requires “breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by substantial similarity.’”¹²⁰ If the plaintiff cannot provide sufficient evidence that a jury

¹¹¹ See *Gaste v. Kaiserman*, 863 F.2d 1061, 1067 (2d Cir. 1988) (explaining that “[a]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant’s access to a plaintiff’s work” even though it is an “attenuated chain of events.”).

¹¹² Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 265–66 (2013).

¹¹³ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (“[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were “strikingly similar.”” See *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996)).

¹¹⁴ *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984).

¹¹⁵ *Bridgeport Music*, 2014 WL 7877773, at *11.

¹¹⁶ *Id.* at *11.

¹¹⁷ *Id.* at *5.

¹¹⁸ *Id.* at *6.

¹¹⁹ *Id.*

¹²⁰ *Id.*

could reasonably find extrinsic similarity, then a court must grant summary judgment for the defendant.¹²¹

Once the plaintiff has satisfied the extrinsic test, the court employs the intrinsic test.¹²² The intrinsic test asks whether an “ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”¹²³ The jury must determine, based on the evidence and testimony before them, whether there is a substantial similarity between the songs in question.¹²⁴

III. ARGUMENT

A. MUSIC STREAMING SERVICES ARE BECOMING INCREASINGLY UBIQUITOUS

Music streaming services are becoming increasingly ubiquitous, making the consumer’s access to music easier than ever. Even though the type of technology changed over time, the general concern by copyright holders has not: In the 1940s, the copyright concern was primarily connected to technology such as movies and radio;¹²⁵ In the 1970s, the concern stemmed from computer software and photocopying;¹²⁶ In the late 1990s and early 2000s, copyright holders were faced with a new concern spurred on by the development of the MP3 and custom CD compilation.¹²⁷ The MP3 enabled music compression for faster downloading on the Internet.¹²⁸ Shortly after its development, several companies started selling music over the Internet, allowing consumers to create custom CDs.¹²⁹ This technology was a big concern for record companies because they believed that the MP3 allowed music to be easily copied, en-

¹²¹ *Id.* (referencing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003)), *aff’d in part, rev’d in part sub nom.* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹²² *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *21 (C.D. Cal. 2015), *aff’d in part, rev’d in part sub nom.* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹²³ *Bridgeport Music*, 2015 WL 4479500, at *21 (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

¹²⁴ *Bridgeport Music*, 2014 WL 7877773, at *6.

¹²⁵ Mary L. Mills, Note, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT L. REV. 307, 307 (1989), available at <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=2766&context=cklawreview>.

¹²⁶ *Id.* at 314.

¹²⁷ Karen Beville, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 327–28 (1999).

¹²⁸ *Id.* at 328.

¹²⁹ *Id.* at 327.

couraged piracy, and could impede their economic growth.¹³⁰ Scholars and the music industry alike could not have foreseen the technological advancements of today.¹³¹ The days of burning CDs are gone, and the age of apps, custom playlists, and music streaming platforms are here. The consumer's ability to access music has never been easier.

Music streaming services have revolutionized the music industry by changing the way artists make music and the way people access music.¹³² Platforms like YouTube, Spotify, Apple Music, Pandora, Napster, and SoundCloud allow anyone with Internet access to browse through each platform's library of music.

The most popular of these streaming services, Spotify and Apple Music,¹³³ provide its users with the largest catalogues of music available on any of the services. Spotify quickly gained popularity after its founding in 2006 as a small start-up in Sweden.¹³⁴ Today, Spotify has a library of 30-million-plus songs and adds roughly 20,000 new songs each day.¹³⁵ The entire library of music is accessible by 108 million paying subscribers worldwide.¹³⁶ Apple Music, Spotify's main competitor, launched in 2015 with on-demand music, programmed playlists, and a live radio station.¹³⁷ Today, Apple Music has a library of around 45 million songs,¹³⁸ with roughly 60 million people paying for a subscrip-

¹³⁰ *The Big Five Hit the Web*, THE ECONOMIST (May 1999), available at <https://www.economist.com/business/1999/05/06/the-big-five-hit-the-web>.

¹³¹ Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311 (1999) (discussing the MP3 and the Internet in general as the biggest concern for copyright holders. This article was published in the early years of the Internet, as the World Wide Web was only eight years old).

¹³² *What is Streaming Music and How Has it Changed the Industry?*, MN2S (Apr. 23, 2018), <https://mn2s.com/news/label-services/what-is-streaming-music-changed-industry/>.

¹³³ *Most Popular Music Streaming Services in the United States as of March 2018, by Monthly Users (in millions)*, STATISTA (Mar. 2018), <https://www.statista.com/statistics/798125/most-popular-us-music-streaming-services-ranked-by-audience/>, (last visited Sept. 23, 2019).

¹³⁴ Jeff Parsons, *History of Spotify: How the Swedish Streaming Company Changed the Music Industry*, MIRROR (Apr. 3, 2018, 7:24 AM), <https://www.mirror.co.uk/tech/history-spotify-how-swedish-streaming-12291542>.

¹³⁵ Josh Levenson & Parker Hall, *Apple Music v. Spotify*, DIGITAL TRENDS (Sept. 6, 2019, 2:45 PM), <https://www.digitaltrends.com/music/apple-music-vs-spotify/>, (last visited Sept. 23, 2019).

¹³⁶ *Number of Spotify Premium Subscribers Worldwide from 1st Quarter 2015 to 2nd Quarter 2019 (in millions)*, STATISTA (Aug. 9, 2019), <https://www.statista.com/statistics/244995/number-of-paying-spotify-subscribers/>, (last visited Sept. 23, 2019).

¹³⁷ Stuart Dredge, *Apple Music Launches to Take on Spotify – and Traditional Radio*, THE GUARDIAN (June 30, 2015, 11:00 AM), <https://www.theguardian.com/technology/2015/jun/30/apple-music-launch-spotify-radio>.

¹³⁸ Josh Levenson & Parker Hall, *Apple Music vs. Spotify: Which Service is the Streaming King?*, DIGITAL TRENDS (Sept. 6, 2019, 2:45 PM), <https://www.digitaltrends.com/music/apple-music-vs-spotify/>, (last visited Sept. 23, 2019).

tion.¹³⁹ The large amount of users with access to these libraries of music does not include the number of users who choose not to pay for an account with either of the services; that number is likely in the millions, as well.¹⁴⁰ Even in the age of music streaming services, radio still reigns as the leading music platform with more than 243 million American adults that listen each month.¹⁴¹

B. THE ACCESS REQUIREMENT SHOULD BE PRESUMED IN EVERY MUSIC COPYRIGHT INFRINGEMENT CASE

The access requirement should be presumed in music copyright infringement cases because the requirement no longer fulfills its original purpose due to the widespread availability of music today. An original purpose of the access requirement in copyright infringement cases was to protect a defendant from punishment for accidentally infringing upon a plaintiff's copyrighted work.¹⁴² The access requirement was intended as an available defense.¹⁴³ To prove access, a plaintiff may show that the work was widely disseminated or a particular chain of events occurred in which the defendant could have gained access to the copyrighted work.¹⁴⁴ A plaintiff is not required to prove that a defendant actually heard or saw the work, only that the defendant had the opportunity to hear it.¹⁴⁵ Based on this, it is likely that a plaintiff will always be able to satisfy the access requirement because virtually every musical work is available through one, if not more, of the music streaming platforms available to consumers today.

¹³⁹ *Number of Apple Music Subscribers Worldwide from October 2015 to June 2019 (in millions)*, STATISTA (July 2, 2019), <https://www.statista.com/statistics/604959/number-of-apple-music-subscribers/>.

¹⁴⁰ Jon Porter, *Spotify Is First To 100 Million Paid Subscribers*, THE VERGE (Apr. 29, 2019, 7:39 AM), <https://www.theverge.com/2019/4/29/18522297/spotify-100-million-users-apple-music-podcasting-free-users-advertising-voice-speakers>, (explaining that including free subscribers, Spotify has a total of 217 million monthly active users worldwide).

¹⁴¹ *Radio Facts and Figures*, NEWS GENERATION (compiled from 2018 Nielsen Audio Today and Pew State of the News Media 2017), <https://www.newsgeneration.com/broadcast-resources/radio-facts-and-figures/>.

¹⁴² *Malkin v. Dubinsky*, 203 N.Y.S.2d 501, 508 (N.Y. Sup. Ct. 1960) (“Accidental similarity is not actionable plagiarism.”).

¹⁴³ *Id.* (explaining that a “plaintiff must demonstrate that the defendants had access thereto” and that “copying may be shown by direct evidence of access, that the alleged plagiarist had seen or heard the plaintiff’s work, or by proper circumstantial evidence . . .”).

¹⁴⁴ *Repp v. Webber*, 947 F. Supp. 105, 114 (S.D.N.Y. 1996) (citing to *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) and *Repp v. Webber*, 892 F. Supp 552, 556–57 (S.D.N.Y. 1995)).

¹⁴⁵ *Three Boys Music*, 212 F.3d at 482 (explaining that “[t]here must be a reasonable possibility of viewing the plaintiff’s work—not a bare possibility.”).

To have the opportunity to listen to music streaming platforms, consumers must have access to certain devices such as radios, TVs, smartphones, and computers. A recent study shows how a majority of the United States population has access to devices compatible with music streaming services: radio reaches 92% of the population; TV reaches 87%; 81% have access to a smartphone; 54% have access to a personal computer; and 46% have access to a tablet.¹⁴⁶ Additionally, an overwhelming majority of the United States population listens to music, dedicating more than 25 hours each week listening to music at home, while driving, working, and doing chores.¹⁴⁷ With numbers such as these, the mere opportunity for a defendant to hear a particular work will always be satisfied.

If the access requirement is always found to be satisfied because of people's access to devices and music streaming platforms like Spotify and Apple, then it follows that access should be presumed in all music copyright infringement cases.

C. WITH ACCESS PRESUMED, COURTS SHOULD ABANDON THE INVERSE-RATIO RULE

1. *History of The Inverse-Ratio Rule*

The roots of the inverse-ratio rule date back to the late 1930s when a plaintiff alleged that his stage play was infringed by a defendant's motion picture.¹⁴⁸ The court held that "where there is access, there is a high degree of probability that the similarity results from copying and not from independent thought and imagination. Indeed, it might well be said that where access is proved or admitted, there is a presumption that the similarity is not accidental."¹⁴⁹ Although the opinion declined to use the words "inverse" or "ratio," its reasoning is considered the fundamental building blocks of the inverse-ratio rule.¹⁵⁰ The phrase "inverse ratio rule" was used for the first time in a 1954 copyright case.¹⁵¹

¹⁴⁶ *Audio Today 2019: How America Listens*, THE NIELSEN COMPANY, at 3 (June 2019), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/06/audio-today-2019.pdf>.

¹⁴⁷ *Everyone Listens to Music, But How We Listen Is Changing*, THE NIELSEN COMPANY (Jan. 22, 2015), <https://www.nielsen.com/us/en/insights/article/2015/everyone-listens-to-music-but-how-we-listen-is-changing/>, (explaining that 93% of the U.S. population listens to music, with 25% listening in their car, 15% listening at work, and 15% listening while doing chores).

¹⁴⁸ *See Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533 (2d Cir. 1938).

¹⁴⁹ *Id.* at 538.

¹⁵⁰ David Aronoff, *Exploding the "Inverse Ratio Rule"*, 55 J. COPYRIGHT SOC'Y U.S.A. 125, 130 (2008) (citing to *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 538 (2d Cir. 1938)).

¹⁵¹ *Morse v. Fields*, 127 F. Supp. 63, 66 (S.D.N.Y. 1954).

i. Criticisms of The Inverse-Ratio Rule

The inverse-ratio rule has received criticism over the years as being confusing and difficult to apply.¹⁵² For example, the United States Court of Appeals for the Second Circuit rejected the rule in *Arc Music Corp. v. Lee* where the court examined the inverse-ratio rule and found that it lacked any analytical value.¹⁵³

The Ninth Circuit attempted to explain its version of the inverse-ratio rule as requiring a lesser showing of substantial similarity if there is a strong showing of access.¹⁵⁴ This rule only works in one direction—that is, “while a strong showing of access will result in a lower threshold showing of substantial similarity, a weak showing of access does not require a greater showing of similarities between the plaintiff’s and defendant’s works.”¹⁵⁵ However, when the inverse-ratio rule is applied, courts remain unsure of how less the showing of substantial similarity need be.¹⁵⁶ No court has provided a standard for the “ratio” itself. As one scholar stated, “If the [inverse-ratio rule] is genuinely a ratio, what quantum of additional strong access excuses what measure of weak similarity? Does 15% greater access excuse 15% less similarity?”¹⁵⁷

ii. The Ninth Circuit Quietly Abolished the Inverse-Ratio Rule in the Second Opinion

In the first opinion, the Ninth Circuit used the inverse-ratio rule in its analysis of “Blurred Lines” and “Got To Give It Up.”¹⁵⁸ Accordingly, because Williams and Thicke admitted at trial that they had a high degree of access to “Got To Give It Up,” the Gayes’ burden of proof for substantial similarity was lowered.¹⁵⁹ The first opinion of *Williams* added another case to the list of Ninth Circuit cases that failed to provide a clear standard for the inverse-ratio rule. The only explanation the court gave in the first opinion was that the Gayes’ burden of proof of substantial simi-

¹⁵² David Aronoff, *Exploding the “Inverse Ratio Rule”*, 55 J. COPYRIGHT SOC’Y U.S.A. 125, 143 (2008) (“The IRR is a deleterious doctrine that provides no analytical benefits in evaluating or determining a copyright infringement case.”); *see also* William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019) (“There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.”).

¹⁵³ *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961).

¹⁵⁴ *Three Boys Music*, 212 F.3d at 485.

¹⁵⁵ *Gable v. Nat’l Broad. Co.*, 727 F. Supp. 2d 815, 823 n.2 (C.D. Cal. 2010); *see also* *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1053 n.4 (C.D. Cal. 2010).

¹⁵⁶ *Id.* at 824 (recognizing that the inverse-ratio rule “is impossible to quantify”).

¹⁵⁷ David Aronoff, *Exploding the “Inverse Ratio Rule”*, 55 J. COPYRIGHT SOC’Y U.S.A. 125, 140 (2008).

¹⁵⁸ *Gaye*, 885 F.3d at 1163, *amended by* 895 F.3d 1106 (9th Cir. 2018).

¹⁵⁹ *Id.*

larity was lowered because Williams and Thicke admitted to having a high degree of access.¹⁶⁰ The court did not quantify how the burden of proof was to be lowered.

However, the omission of the inverse-ratio rule in the second opinion can be construed as the Ninth Circuit quietly abolishing the inverse-ratio rule. The inverse-ratio rule should be abandoned because a plaintiff will always satisfy the access requirement with the technological advances discussed above. Lowering a plaintiff's burden to prove substantial similarity will not help the court determine whether a defendant engaged in unlawful copying of the plaintiff's musical work. Substantial similarity is proven by "comparing the two works from the perspective of the ordinary observer"¹⁶¹ and this comparison should be completely unaffected by the defendant's degree of access. Instead, the courts should reiterate the importance of proving substantial similarity in music copyright infringement cases.

The omission of the inverse-ratio rule in the second opinion did not affect the rest of the court's analysis in the opinion.¹⁶² If proving access was so crucial to the analysis, the Ninth Circuit would not have omitted the inverse-ratio rule in the second opinion. This omission proves how the Ninth Circuit is trying to adapt to the changing landscape in the copyright realm and why courts should abandon the inverse-ratio rule.

It should not follow that a plaintiff's burden of proving substantial similarity should be lowered because the public has access to the work as well. There is the possibility that a defendant in a music copyright infringement case has never heard the plaintiff's work before. Lowering the plaintiff's burden of proving substantial similarity because of a high showing of access does nothing to solve whether the works are truly substantially similar. If the access requirement will always be satisfied due to the amount of music available to consumers, then plaintiffs will only need to show a "lesser" amount of similarity, which has the possibility of leading to erroneous rulings and judgments against defendants.

The inverse-ratio rule should be abolished in courts because in the modern day, a defendant's access to a musical work will always be found to exist. Under the current standard, access is easy to demonstrate because virtually every person has access to all public musical works. Since the creation of YouTube, Spotify, Apple Music, and other similar platforms, the access to music has never been greater.

¹⁶⁰ *Id.*

¹⁶¹ William F. Patry, PATRY ON COPYRIGHT § 9:91 (2019).

¹⁶² *Compare Gaye*, 885 F.3d 1150 with, *Gaye*, 895 F.3d 1106.

CONCLUSION

The *Williams* decision sent the music world into a flurry, with artists fearing that the decision might severely limit their creativity and put a stop to any music that has the same feel or groove as other music.¹⁶³ Additionally, the first *Williams* opinion added another case to the list of those that failed to provide a clear standard for the inverse-ratio rule. The access requirement must be presumed in every music copyright infringement case to adapt to the changing landscape in the copyright realm. Music streaming services revolutionized the music industry by changing the way artists make music and the way people access music.¹⁶⁴ Because of platforms like Spotify and Apple Music, and based on the current ways of proving access, a defendant will always be found to have access to a plaintiff's work. In addition to presuming access, and because access should be presumed, the courts should abandon the inverse-ratio rule because music streaming platforms will always satisfy the access requirement in copyright infringement cases. Lowering the plaintiff's burden of proving substantial similarity because of a high showing of access does nothing to solve whether the works are actually substantially similar.

¹⁶³ Adrienne Gibbs, *Marvin Gaye's Family Wins 'Blurred Lines' Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018, 3:37 PM), <https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#a8b7104689b4>; see also Brief of Amicus Curiae Musicologists in Support of Plaintiffs-Appellants-Cross-Appellees, 2016 WL 4592128, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (over 200 songwriters, composers, musicians, and producers warn the Ninth Circuit about the effect on the music industry if infringement is found against the Thicke parties).

¹⁶⁴ *What Is Streaming Music and How Has it Changed the Industry?*, MN2S (Apr. 23, 2018), <https://mn2s.com/news/label-services/what-is-streaming-music-changed-industry/>.