

Misuse Of Inverse Ratio Copyright Rule Continues In 9th Circ.

By **Ethan Wong and Andrew Thomas** (January 7, 2020, 5:09 PM EST)

This fall, in a much-anticipated en banc hearing, the U.S. Court of Appeals for the Ninth Circuit considered the fate of one of classic rock's iconic anthems, "Stairway to Heaven." Michael Skidmore — suing as the trustee of the estate of the deceased lead singer of a band called Spirit — appealed a jury verdict finding that Led Zeppelin did not infringe Spirit's song "Taurus" in creating "Stairway to Heaven."

A Ninth Circuit panel reversed,[1] and Led Zeppelin petitioned for rehearing en banc. Front and center in the en banc hearing was whether Skidmore should have been able to play recordings of "Taurus" for the jury and whether the allegedly infringed portion of "Taurus" deserved only thin copyright protection because it consisted of a combination of basic musical elements.

Buried in the mix, however, lurked another issue that has long plagued copyright jurisprudence, particularly in the Ninth Circuit: the so-called inverse ratio rule. Skidmore raised the issue in his original appeal, arguing that the district court erred by not giving an inverse ratio jury instruction. The Ninth Circuit panel held that any error was harmless but nevertheless suggested that an inverse ratio rule instruction might be appropriate at a new trial on remand.[2]

In Led Zeppelin's petition for rehearing en banc, it urged the Ninth Circuit to overturn the rule, arguing that the inverse ratio rule "is logically flawed, unnecessary, incapable of being coherently applied, and rejected by sister Circuits." The Recording Industry Association of America echoed Led Zeppelin's disapproval, calling the rule "logically unsound" and urging the court to take the opportunity to reconsider it en banc.

Elaborated in a string of Ninth Circuit decisions, the inverse ratio rule eases a plaintiff's burden in copyright infringement suits: It requires "a lower standard of proof of substantial similarity when a high degree of access is shown." [3] To prove a copyright infringement claim, a plaintiff must (1) possess a valid copyright and (2) demonstrate that protected aspects of the work have been copied.

The latter consists of showing (a) copying (i.e., that the allegedly infringing work was not independently created) and (b) unlawful appropriation (i.e., that the allegedly infringing work took enough protected content from the original that the two works are substantially similar in their expression).[4]



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The inverse ratio rule purports to be the logical inverse of the striking similarity rule in copyright law, which recognizes that, even with little or no evidence of access, a presumptive “inference of copying” may be established if the works at issue share a very high degree of similarity.[5] The striking similarity rule is well established in federal copyright law and, when properly applied, is logically sound and consistent with common experience.[6]

It is grounded in the common-sense notion that, where two works are very highly similar, it seems reasonable to presume, absent contrary evidence, that the defendant had access to the plaintiff’s work and did not coincidentally happen to create a film or book or song that is so much like the plaintiff’s.[7]

By contrast, the inverse ratio rule — while apparently buoyed by judicial attraction to its quasi-mathematical label — is grounded in a logical fallacy. While a defendant who has never had access to a plaintiff’s work cannot have copied it, the converse is not true: The mere fact that a defendant had a reasonable opportunity to view the plaintiff’s best-selling novel or blockbuster film does not tell the court anything about whether the defendant actually copied any portion of the plaintiff’s work — let alone that the defendant copied original expression protected by copyright law.

Copyright litigants — and, too frequently, courts — have perpetuated and misinterpreted this pseudoscientific “rule.” Plaintiffs routinely lean on the inverse ratio rule to argue that because the defendant had a high degree of access to the plaintiff’s work, the plaintiff can get by with a lesser showing of similarity than otherwise would be required to prove that the defendant copied the plaintiff’s work.

Yet, this logic is confounding. Why should the amount of access that one has to a work determine whether it has been copied? The fact that everyone has seen (or can easily see) “The Godfather” or “Singing in the Rain” says nothing about whether a particular producer’s mafia movie or Jazz Age musical copies any aspect of those films.[8] No amount of access can make dissimilar works more alike or somehow make up for an inadequate showing of similarity.

Some courts have taken the logical fallacy even further — to the point that it undermines bedrock principles of copyright law. Whether reflective of careless phrasing or careless thinking, courts sometimes have described the inverse ratio rule as requiring a lesser showing of substantial similarity or infringement where the plaintiff can establish that the defendant had a high degree of access to the plaintiff’s work.

In *Benay v. Warner Brothers Entertainment Inc.*, for example, the Ninth Circuit stated that “[u]nder the ‘inverse ratio’ rule, if a defendant had access to a copyrighted work, the plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work.”[9]

Such statements of the rule improperly suggest that abundant evidence of access can somehow excuse a plaintiff from having to show that the defendant copied a substantial amount of original, protectable expression from the plaintiff’s work — which is required for a showing of unlawful appropriation (i.e., infringement) — as opposed to unprotectable facts, ideas or stock literary devices (which might support a showing of copying-in-fact).

Distinguishing unprotectable ideas and facts from protected expression is critical to ensuring that no author can improperly gain a monopoly over the facts, stock characters, familiar settings, and other conventions of storytelling that are the common building blocks of literary works.[10] An historian, for

example, may keep the plaintiff's biography of George Washington open on his desk for weeks or months at a time, but if all he copies are facts, then there can be no infringement – no matter how pervasive his access to the source material may have been.

The Ninth Circuit recently revisited the inverse ratio rule in *Rentmeester v. Nike Inc.*,^[11] a case involving the photograph behind Nike's famous "Jumpman" logo. While the court did not jettison the inverse ratio rule entirely,^[12] it did neuter its more troubling applications. In *Rentmeester* — decided seven months before the Skidmore panel decision — the Ninth Circuit held that the inverse ratio rule applies only to the threshold question of copying-in-fact, and not to the ultimate issue of substantial similarity in protectable expression (i.e., unlawful appropriation).

Jacobus Rentmeester, a photographer, brought suit against Nike for infringing his photo of a leaping, dunking Michael Jordan when creating its own Michael Jordan photograph, which then became the basis for the Jumpman trademark. On appeal, Rentmeester argued that because he made a strong showing of access, he was less obligated to show that Nike's photo and logo were substantially similar to his photograph in terms of their protectable expression.

The court disagreed, explaining that in a copyright suit the plaintiff must show both copying (i.e. that the allegedly infringing work was not independently created) and unlawful appropriation (i.e. that the allegedly infringing work took enough protected content from the original that the two works are substantially similar in expression).^[13] Because the court decided the copyright infringement question based on a lack of similarity in protected expression, it concluded that the inverse ratio rule "does not help Rentmeester because it assists only in proving copying, not in proving unlawful appropriation, the only element at issue in this case."^[14]

In other words, a strong showing of access only reduces the standard to establish that the allegedly infringing work copied some aspects of the original, whether or not those aspects are protectable under copyright law. But a strong access showing does not alter the standard for demonstrating that the two works are substantially similar in terms of expression protected by copyright law. In the court's words: "The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown."^[15]

In an opinion by U.S. Circuit Judge Paul Watford, the court explained the source of the confusion: "Unfortunately, we have used the same term—'substantial similarity'—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation," but the "term means different things in those two contexts."^[16]

The court reasoned that to prove copying, the similarities need not be extensive and therefore the inverse ratio rule could apply. But, for unlawful appropriation, the similarities between the two works must be substantial and they must involve protected elements of the plaintiff's work. The inverse ratio rule "has no bearing on that determination."^[17]

Will this cabined reading neutralize the rule's potential for jurisprudential mischief? In limiting the rule to actual copying, the Ninth Circuit installed a solid backstop and did about as much as it could in a panel decision to clarify the law. Even in a situation where a litigant has demonstrated a high level of access, he or she gains only a lower standard of proof for copying-in-fact. Plaintiffs still must show that the works in question are substantially similar with respect to their protectable elements.

Even a neutered inverse ratio rule, however, is a tool capable of easy misuse. First, it is still premised on

a logical fallacy. That someone has access (even a lot of access) to a work — a bestselling novel, say, or a blockbuster motion picture — says little (if anything) about the overall similarities between the two works or whether the defendant independently created his or her work. Accordingly, the rule’s application — almost by definition — will allow some copyright cases to go forward in the absence of substantial evidence or even a plausible allegation of copying.

Second, even in its cabined form the rule inevitably will foster confusion and inconsistent results. Despite its patina of mathematical elegance, the rule is inherently imprecise and provides no meaningful guidance: How much more access is required, for instance, to allow the plaintiff to survive by proving 20% less similarity?

And while recent district court decisions in the Ninth Circuit for the most part have adhered to the distinction drawn in *Rentmeester*, there already are outliers. In *Knowles v. Spin Master Studios Inc.*, [18] for example, the U.S. District Court for the Central District of California did not explicitly acknowledge the difference between actual copying and unlawful appropriation when invoking the inverse ratio rule.

It stated, rather, that under the inverse ratio rule “a plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work, if it can be shown that the defendant had access to the copyrighted work.”[19] It did not specify whether the “degree of similarity” under discussion was in the copying-in-fact or the unlawful appropriation context. These ambiguous statements have occurred in other cases as well.[20]

The inconsistent and misleading application of the rule, even after *Rentmeester*, provides further confirmation that, on its merits, the inverse ratio rule is not a useful tool and should therefore be retired from service by the en banc Ninth Circuit in *Skidmore*.

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[1] *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018), reh’g en banc granted sub nom. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 925 F.3d 999 (9th Cir. 2019).

[2] *Skidmore*, 905 F.3d at 1130.

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

[4] *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-18 (9th Cir. 2018), cert. denied, 139 S. Ct. 1375 (2019).

[5] See, e.g., *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987).

[6] The similarity must be “so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.” *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

[7] Even where there is striking similarity, however, a defendant could still avoid liability by establishing a defense of independent creation or a defense that both works copy a common precursor, since even striking similarity must arise from copying-in-fact. E.g., *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976) (“If A produced identically the same work as B, by independent thought, in good faith, without hearing, or seeing, B’s work, both A and B would be entitled to individual copyrights in their individual works.”); see also *Selle*, 741 F.2d at 901 (“[T]wo works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement.”).

[8] Some courts have rejected the inverse ratio rule for this reason. In *Arc Music*, for example, the Second Circuit definitively stated that it found “no such principle” in “the federal law of copyright.” *Arc Music v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961). It stated that such a principle, while “superficially attractive,” upon examination “confuses more than it clarifies.” *Id.*; see also *Peters v. West*, 692 F.3d 629, 634 (7th Cir. 2012) (rejecting the rule); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994) (same).

[9] *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010); accord *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (“Under the ‘inverse ratio rule,’ we require a lower standard of proof of substantial similarity when a high degree of access is shown.”); *Three Boys Music*, 212 F.3d at 485 (same); *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (9th Cir. 1990) (same).

[10] See 4 *Nimmer on Copyright* § 13.03[B][2] (“To grant property status to a mere idea would permit withdrawing the idea from the stock of materials open to other authors, thereby narrowing the field of thought open for development and exploitation.”).

[11] 883 F.3d 1111 (9th Cir. 2018).

[12] “[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent.” *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995).

[13] *Rentmeester*, 883 F.3d at 1116-17.

[14] *Id.* at 1124.

[15] *Id.*

[16] *Id.* at 1117.

[17] *Id.* at 1125.

[18] No. CV 18-5827 PA (JCX), 2018 WL 6131207 (C.D. Cal. Nov. 2, 2018).

[19] *Id.* at *3 (emphasis added).

[20] *Levi v. Strong*, No. CV 18-6156-CBM-RAOX, 2019 WL 3293240, at *2 n.2 (C.D. Cal. May 9, 2019) (“The Ninth Circuit applies an ‘inverse ratio rule,’ where it ‘require[s] a lower standard of proof of substantial similarity when a high degree of access is shown.’”) (quoting *Three Boys Music*, 212 F.3d at 485).