Copyrighting Compositions: How Inconsistencies Within the Circumstancial Evidence Analysis Affects Musical Composition Copyright Infringement Plaintiffs

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COPYRIGHTING COMPOSITIONS: HOW INCONSISTENCIES WITHIN THE CIRCUMSTANTIAL EVIDENCE ANALYSIS AFFECTS MUSICAL COMPOSITION COPYRIGHT INFRINGEMENT PLAINTIFFS

ABSTRACT
To resolve a musical composition copyright infringement case, courts employ the circumstantial evidence analysis. This analysis involves assessing whether the two works are substantially similar and whether the defendant had access to the plaintiff’s copyright-protected work. Despite efforts to keep pace with the rapidly changing world of music creation, these tests have fallen behind: circuits are split with respect to the way they determine substantial similarity, and courts have failed to update the access requirement in the age of the internet. Additionally, courts must adhere to the rules of either the 1909 Copyright Act or the 1976 Copyright Act, depending on which governs the specific copyright-protected work. These outdated statutes leave plaintiffs with few ways to get the most important part of any musical infringement case into evidence: the music itself. Accordingly, the circumstantial evidence analysis has historically been applied inconsistently and ineffectively. This Note explores the issues plaguing courts’ current methods and proposes an updated, uniform approach to resolving these cases.

INTRODUCTION
The lead single and title track, “Let’s Get It On,” in Marvin Gaye’s classic R&B album, Marvin Gaye: Let’s Get It On, is a ‘70s sexual anthem that likely brings up memories of all things sensual. Ed Sheeran’s 2014 smash hit “Thinking Out Loud” and its accompanying ballroom-dancing music video similarly invokes feelings of romanticism and thoughts about a dreamy, candlelit dinner. While the two songs share love as an inspiration, would it be farfetched to argue that Sheeran copied Gaye’s “Let’s Get It On” when he created “Thinking Out Loud”? Recently, courts in the United States had to make this determination involving the two industry legends.

1. MARVIN GAYE, Let’s Get It On, on MARVIN GAYE: LET’S GET IT ON (Tamla Recording Co. 1973).
In 2016, the Estate of Edward B. Townsend sued Sheeran for alleged copyright infringement. The Estate claimed the harmonies and rhythms in “Thinking Out Loud” were taken from “Let’s Get It On.” In 2019, a New York judge determined that the “$100 million copyright infringement lawsuit” would go to trial when he was unconvincing that the “harmonic and rhythm content in “Thinking Out Loud” was too commonly used in music to be copyrightable. But, in May 2023, the New York District Court reversed that decision, ruling in favor of Sheeran: it found that, indeed, Gaye’s song used chord progressions and rhythms much too common to earn copyright protection.

The copyright infringement claim against Sheeran was not the first of its kind alleged by the Gaye dynasty. In 2015, the Townsend Estate sued Robin Thicke and Pharrell Williams for infringing upon Gaye’s “Got to Give It Up” beat and melody with the duo’s 2013 hit “Blurred Lines.” In 2015, that controversial case concluded when a jury determined that the duo had, in fact, illegally infringed upon Gaye’s copyright.

Townsend’s Estate is not the only player in the music industry attempting to protect copyrighted work. Nor are Pharrell Williams and Robin Thicke the only notable artists accused of infringing upon such works. Copyright infringement suits are prevalent across the music industry—and no one seems safe. Pop stars such as Olivia Rodrigo and Dua Lipa, rock bands such as Led Zeppelin, rappers like Childish Gambino, and K-pop sensation BTS have all recently been involved in copyright suits, and the list does not end there.

Why is this? Are these popular—even legendary—musicians all simply copying lesser-known artists without giving due credit? Perhaps there is a

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4. Id.
6. See Rosenberg supra note 3.
8. See Rosenberg supra note 3.
9. Id.; MARVIN GAYE, Got to Give It Up, on GOLD (Motown Records 2004); ROBIN THICKE, T.I., & PHARRELL WILLIAMS, BLURRED LINES (UMG Recordings, Inc. 2013).
10. See Rosenberg supra note 3.
12. See id.
bigger issue: U.S. copyright law may not be sufficiently equipped to handle the unique nature of musical compositions.

Unfortunately, the answer is unclear. The current framework seemingly does its job. The similarities between Gaye’s “Got to Give It Up” and Robin Thicke and Pharrell Williams’ “Blurred Lines” are undeniable. From the outside looking in, this case appears to paint a picture of victory for copyright-protected musical composers. Similarly, the outcome in the Townsend’s Estate case against Ed Sheeran seems proper: “Thinking Out Loud” and “Let’s Get it On” sound entirely different. However, consider Led Zeppelin’s copyright dispute. In the 2020 case, the Estate of Michael Skidmore, the late member of the rock band Spirit, sued Led Zeppelin, alleging that the iconic song “Stairway to Heaven” copied portions of Spirit’s song “Taurus.” Again, like the songs “Blurred Lines” and “Got to Give It Up,” the similarities are uncanny. So why did the Ninth Circuit in Skidmore find that Spirit’s copyright had not been infringed upon? Conversely, “Thinking Out Loud” and “Let’s Get It On” lack such similarity that it is even more puzzling that this case went to trial.

How do courts determine where the lines between inspiration, coincidence, and copying become blurred? And why is it that some songs with similar components are determined to be copied, while others are not? The answer is that courts employ multiple tests and make copyright infringement determinations in drastically different ways when it comes to musical compositions. Furthermore, different sets of copyright rules apply to music registered at different times. Ultimately, the lack of uniformity and the unclear procedures create confusion and constrain the effectiveness of copyright protection for musical compositions.

Generally, courts in the United States follow a simple formula: to bring a successful copyright infringement suit, a party must first prove ownership over the copyright of the allegedly infringed work; and second, that the

14. See Skidmore as Tr. for Randy Craig Wolf v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).
15. See id. at 1057; LED ZEPPELIN, Stairway to Heaven, on LED ZEPPELIN IV (Atl. Records 1971); SPIRIT, Taurus, on SPIRIT (Epic Records 1968).
17. See Skidmore, 952 F.3d at 1060.
18. See Chernoff, supra note 5.
defendant copied protected parts of the copyrighted work. When there is
direct evidence of copying, cases tend to be straightforward. If there is no
direct evidence of copying, circumstantial evidence may be used to
demonstrate copyright infringement. Convincing circumstantial evidence
must demonstrate that the defendant “had access to the plaintiff’s work and
that the two works are substantially similar.”

Evidence of copyright infringement in cases involving music is usually
circumstantial. Unfortunately, the differences in approaches among U.S.
courts and circuits for resolving copyright infringement cases lie in
procedures involving circumstantial evidence. It follows that U.S. courts
fail to apply a uniform approach to determine whether musical copyright
infringement took place.

Courts are not in complete disagreement, however. One trend that most
federal circuits seem to follow is the abandonment of the infamous “inverse
ratio rule,” which requires “a lower standard of proof of substantial similarity
when a high degree of access is shown.”27 All but the Sixth Circuit have abandoned this rule.28 While moving away from this rule is likely beneficial for musical composers, the related idea of access remains an important consideration for copyright infringement lawsuits.29 Due to the rise and proliferation of streaming services and the internet generally, access is an entirely different concept now than when the Copyright Act was last updated in 1976.30 Therefore, what is needed to satisfy the access requirement of the circumstantial evidence analysis remains at issue for courts since it is not defined by the Copyright Act.31

This Note argues that U.S. courts must employ a uniform approach to musical composition copyright infringement cases where circumstantial evidence is used to prove copyright infringement. Furthermore, this Note defends courts’ abandonment of the inverse ratio rule and proposes that the second element of the circumstantial evidence analysis—access—be made available as a defense in such cases instead of a requirement to be demonstrated by a plaintiff. Part I of this Note discusses the different tests and approaches courts use to determine whether a substantial similarity exists between a copyright-protected musical composition and a new work. Part II considers the legal concept of access in copyright law. Part III examines the history of the inverse ratio rule and its recent abandonment. Part IV addresses another major inconsistency within musical copyright infringement cases: the disparities between the 1909 Copyright Act and the 1976 Copyright Act and how these differences harm composers. Finally, Part V proposes a uniform solution tailored specifically to protect composers and artists.

I. THE FIRST ELEMENT: SUBSTANTIAL SIMILARITY

The issues considered by a court and, subsequently, a jury in a circumstantial evidence copyright infringement analysis are complex.32 A

27. See id.; see Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1066 (9th Cir. 2020) (quoting Three Boys, 212 F.3d at 485 (referencing Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996))).
28. See Chernoff, supra note 5.
29. “[S]ubstantial similarity is inextricably linked to the issue of access.” Skidmore, 952 F.3d at 1065–66 (quoting Three Boys, 212 F.3d at 485 (referencing Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996))).
32. When a court is presented with direct evidence of copying to support a copyright infringement allegation, a suit becomes focused on different issues. Those cases focus then on the second element of a copyright infringement case: evidence that the defendant owned a copyright and what exactly that copyright protection covered. Interestingly, the ownership element is discussed with respect to musical compositions in the Williams v. Gaye case discussed earlier. In the appeal to the Ninth Circuit, Judge Smith clarified how the two elements go hand in hand:
copyright plaintiff with no direct evidence of copying must first demonstrate the convoluted element of substantial similarity through a successful presentation of circumstantial evidence.33

Substantial similarity is present when two compositions “are so alike that the later” work can reasonably be regarded as taking the “original expression” of the copyright-protected work.34 In practice, however, the outcome of this analysis depends on the circuit in which the case is brought.35 There are two dominant tests to determine substantial similarity: the Second Circuit’s and the Ninth Circuit’s.36

A. SECOND CIRCUIT’S APPROACH: QUANTITATIVE & QUALITATIVE ELEMENTS

The Second Circuit finds substantial similarity when “the copying is quantitatively and qualitatively sufficient” to show that copying occurred.37 Both elements—qualitative and quantitative—must be present to satisfy the Second Circuit’s test.38

Because the requirement is one of substantial similarity to protected elements of the copyrighted work, it is essential to distinguish between the protected and unprotected material in all a plaintiff’s work. Still, substantial similarity can be found in a combination of elements, even if those elements are individually unprotected. (“Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”) This principle finds particular relevance in application of the intrinsic test, as a trier of fact may find that the overall impact and effect indicate substantial appropriation, even if any one similarity taken by itself seems trivial.

Williams v. Gaye, 895 F.3d 1106, 1164 (9th Cir. 2018) (emphasis in original) (internal quotation marks, citations, and footnote omitted). The court then went on to clarify that musical compositions are entitled to a broad range of protection because music is uniquely not “capable of ready classification into only five or six constituent elements[,]” but instead is composed of a “large array of elements[,]” only some combinations of which may be protected by copyrights. See id.

33. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).

34. Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC, 956 F.3d 532, 539 (6th Cir. 2020).


36. “[T]his is not surprising, since the industries that generate the most copyright disputes are located in New York (publishing, media) and California (entertainment, software/gaming).” Id. There is also a substantial similarity test called the “abstraction-filtration-comparison test.” This computer program test “applies the levels of abstraction test, similar to the second circuit approach . . . to separate ideas from expression.” To perform this test, courts must “filter the non-protectable elements of the work from the protectable material” and then “compare the two works to determine if any of the protected expression was copied.” This test, established in the Second Circuit, has been adopted for “application in computer software infringement cases.” See Chernoff, supra note 5. For that reason, I will not discuss this test.

37. See Chernoff, supra note 5 (quoting Ringgold v. Black Entm’t Televisions, Inc., 126 F.3d 70, 75 (2d Cir. 1997).

38. Id.
The quantitative prong depends “on the amount of a [protected] work that is copied.” 39 Yet, stealing even a small part of a copyright-protected work may satisfy the quantitative element. 40 If the copied aspects are “of great qualitative importance to the [original] work as a whole[,]” this prong may be met regardless of how much was taken from the protected composition. 41

For example, in New Old Music Group v. Gottwald, the court held that when the defendant copied a one-measure drumming pattern from the protected work, 42 this measure satisfied the quantitative element. 43 There, the drum pattern stolen from the original work was repeated in eighty-seven of the protected composition’s 104 measures. 44 Because the copied measure thus accounted for an estimated 83 percent of the protected composition, it was of great importance to the copyright-protected work as a whole, thus satisfying the quantitative element. 45

The second element of the Second Circuit’s test, the qualitative element, depends upon “whether there has been copying of the expression in the copyrighted work.” 46 This element can be satisfied when a plaintiff demonstrates that the part of the copyrighted work that was taken is distinctive in the new composition. 47 For example, in New Old Music Group, the court held that the qualitative element was satisfied when the defendant’s composition stole the percussion progression from the original work. 48 Even though the drumline was only one part of the defendant’s composition, the court found that the drumming pattern acted as the backbone of the defendant’s song. 49 Therefore, the stolen percussions were qualitatively significant to the work. 50

39. Id.
41. Id.
44. Id.
45. Id.
46. More specifically, the Second Circuit employs an “abstraction test” to “separate expression from idea” to help determine the qualitative element. See Chernoff, supra note 5. The Second Circuit has utilized this test in copyright cases involving literary works, such as novels and plays, and computer programs. See Comput. Assocs. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 707 (2d Cir. 1992). However, there have not been any cases utilizing this aspect of the qualitative test for copyright cases involving music. See Chernoff, supra note 5.
47. See New Old Music Grp., 122 F. Supp. 3d at 97 (“The Court thus cannot conclude as a matter of law that the [copied part] is qualitatively insignificant to the work” when the drum part that was copied “can reasonably be described as the backbone of the song.”).
48. Id.
49. Id.
50. Id. The Second Circuit also utilizes an “ordinary observer test.” Under this test, the court focuses on whether an ordinary observer would “regard the aesthetic appeal of the two works as the
B. NINTH CIRCUIT’S APPROACH: TOTAL CONCEPT & FEEL TEST

While the Second Circuit focuses on only objective evidence of copying, the Ninth Circuit introduces a more subjective approach to determine substantial similarity.51 The Ninth Circuit’s “total concept and feel” test considers whether substantial similarity is present based upon an observer’s evaluation of the work’s “total concept and feel”—if the stolen work mirrors that of the copyright-protected work.52 Under the umbrella of the total concept and feel test, extrinsic and intrinsic elements must be satisfied to demonstrate substantial similarity.53

The extrinsic element of the Ninth Circuit’s total concept and feel test is an objective analysis.54 The extrinsic test focuses on an “analytical dissection of a work and expert testimony.”55 This dissection involves breaking down the compositions into their foundational elements and simply comparing the bones of each work.56 The result of the extrinsic test is generally decided as a matter of law.57

Because matters of objective foundational elements are in question during an extrinsic analysis, expert testimony is especially helpful.58 For example, the lower courts in Williams v. Gaye determined that, as a matter of law, the plaintiff showed circumstantial evidence sufficient to satisfy the extrinsic test.”59 There, the defendant, Williams, asserted that there was no extrinsic similarity between the two works because “no two [individual] notes ha[d] the same pitch, rhythm[.] and placement.”60 However, after considering expert musicological analysis, the Central District of California disagreed.61 Due to the nature of music as a medium, an analysis of a musical composition cannot merely compare single elements in isolation.62 Rather,

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51. See Chernoff, supra note 5.
52. See id.
53. “The Ninth Circuit expanded this doctrine by dividing the substantial similarity analysis into an ‘extrinsic test’ and an ‘intrinsic test;’ both are needed to show substantial similarity to prove infringement.” See id.
54. See id.
55. Williams v. Gaye, 895 F.3d 1106, 1163 (9th Cir. 2018) (internal quotation marks omitted).
56. See id.
57. See Chernoff, supra note 5.
58. Expert testimony is especially helpful for cases of copyright infringement for musical compositions: an understanding of music theory is necessary to understand compositions by their foundational elements. Music theory experts will also be able to testify whether certain elements of music are acceptably copied or if something unique was done in one particular work that was copied in another. See id.
60. See id. at *9.
61. See id.
62. See id.
“[o]bjective analysis of music under the extrinsic test [must] . . . [consider] other elements of the composition.”63 When pitch, timing, rhythm, and rhythm placement were considered together instead of individually throughout the two works, the extrinsic analysis demonstrated substantial similarity between the compositions.64

The second part of the Ninth Circuit’s substantial similarity test, the intrinsic element, is considered only after the extrinsic element is satisfied.65 Determination of the intrinsic element is reserved solely for the trier of fact.66 This analysis asks “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”67 Put differently, the intrinsic test asks the “reasonable person” to consider whether an allegedly infringing work expresses ideas substantially similar to those of the protected composition.68

Thus, the Ninth Circuit’s approach, unlike the Second Circuit’s, considers more than objective elements.69 It focuses on the music listener’s experience—which is inherently important in a music copyright infringement suit—without relying on it entirely.70

C. SO, WHICH APPROACH WORKS BETTER?

While both the Ninth and Second Circuits’ tests strive to protect copyright owners, the Ninth Circuit’s test is better equipped to serve musical composition copyright owners. The “total concept and feel test” is more relevant to how music is consumed and used; music, as an artistic medium, revolves around its “concept and feel” with a constant consideration of the listener.71 Moreover, the Ninth Circuit’s use of both objective and subjective

63. Id. (quoting Swirsky v. Carey, 376 F.3d 841, 847–48 (9th Cir.2004)).
64. Id.
65. See Chernoff, supra note 5.
66. See Williams, 895 F.3d at 1119.
67. Williams, 2015 WL 4479500, at *21 (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 447, 485 (9th Cir. 2000)).
68. See Chernoff, supra note 5. Notably, courts have made an important distinction regarding this element: While copyrights protect the original expression of ideas, they do not “afford a monopoly over ideas.” Stratchboreno v. Arc Music Corp., 357 F. Supp. 1393, 1404 (S.D.N.Y. 1983) (citing Morrissey v. Proctor & Gamble, 379 F.2d 675 (1st Cir. 1967); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); and N. Music Corp. v. King Rec. Distrib. Co., 105 F. Supp. 393 (S.D.N.Y.1952)). For example, in Stratchboreno v. Arc Music Corporation, the Southern District of New York held that no copyright infringement occurred because the allegedly copied composition did not pass the intrinsic test. See id. at 1405. The court also held that the defendants, who composed an upbeat workout track, did not copy the plaintiff-composers who previously released a similar version of workout music. See id. Importantly, the court found it unreasonable to afford the copyright-protected plaintiffs a monopoly over similar upbeat workout music. See id. at 1404. Because only certain combinations of notes, chords, and rhythmic structures sound appealing in the specific “upbeat workout” genre in question, the court held that the intrinsic element could not be satisfied. See id.
69. See Chernoff, supra note 5.
70. Id.
71. Id.
elements adds additional value to its approach. In contrast, the Second Circuit employs two sub-tests that numerate, quantify, and break music down into its blocks to compare them. While this approach is mirrored in part by the Ninth Circuit’s test, the Second Circuit’s test fails to account for music’s emotional, inextricable, and intrinsic nature. Finally, the Ninth Circuit’s test not only allows but encourages musical experts to help decide whether a musical composition was copied. The prowess of music theory experts is undeniably necessary in making such determinations. Therefore, the Ninth Circuit’s test is arguably better suited for musical composition copyright holders, as it is tailored to the intrinsic nature of their work and acknowledges the limits of legal experts’ musicological understanding.

II. THE SECOND ELEMENT: ACCESS

A. WHAT IS ACCESS & HOW DOES A PLAINTIFF SHOW IT?

The second step to demonstrate copyright infringement under a circumstantial evidence analysis is proving access. A copyright holder must show that the alleged infringer had access to their original, copyright-protected work. Generally, to establish access, a plaintiff must demonstrate that “the defendant had a ‘reasonable’ opportunity to view or copy the copyright-protected composition.” This “reasonable opportunity” must be more than a “bare possibility.” Often, to determine whether an alleged infringer had meaningful access to a protected composition, courts will “look at how widely the [musical composition] has been distributed to the public,” specifically within a particular geographical location.

There are two approaches a plaintiff may take to demonstrate access: by showing either that the plaintiff’s work has been widely disseminated or by demonstrating a chain of events that establishes a link between the plaintiff’s work and the defendant’s access.

72. Id.
73. Id.
74. Id.
75. See Chernoff, supra note 5.
76. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).
77. See id. (citing Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996)).
78. See Schnapp, supra note 31.
81. See Three Boys, 212 F.3d at 482.
i. Widespread Dissemination

Courts have grappled with widespread dissemination and have stated that the “evidence required to show widespread dissemination will vary from case to case.” However, widespread dissemination turns on the “degree of a work’s commercial success and on its distribution through radio, television, and other relevant mediums[.]” such as music streaming services and the internet. However, this standard is surprisingly difficult to demonstrate in practice. For example, in *Loomis v. Cornish*, the plaintiff-composer alleged that widespread dissemination demonstrated access because their copyright-protected work was popular in the local geographic area when the defendant-songwriters worked there. The plaintiff reasoned that the mere presence of defendant-songwriters in the area while the composition was most popular created a reasonable possibility of access. However, the Ninth Circuit rejected this argument.

The court held that it was unreasonable to assume that the defendant-songwriters’ job responsibilities involved “listening to local radio, reading [the] local press, or scouring local bands, and that there was no evidence that [the defendant] undertook any other activity in that market” that would reasonably expose them to the plaintiff’s composition.

Even though the plaintiff’s work was at its peak popularity and the defendants were in the area where it was most popular, the widespread dissemination theory failed because the defendants’ responsibilities in the area did not make it certain that they would utilize media. But is it reasonable to assume that just because a group of songwriters was not required to utilize local media, they did not have access to it? To illustrate with a real-world example, consider the countless times you have heard the same Harry Styles song playing in grocery stores, pharmacies, or restaurants. Even though you may have never downloaded the song or been “responsible for” listening to it, you might have heard that Harry Styles song in many different places, perhaps without even realizing it. But, according to the court’s theory in *Loomis*, even this extensive exposure is insufficient to prove access.

A similar finding in the Fifth Circuit confirms the issue with the widespread dissemination rule. In *Batiste v. Lewis*, the plaintiff, a jazz

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82. *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (citing L.A. Printex Indus., Inc. v. Aeropostale, Inc. 676 F.3d 841, 847 (9th Cir. 2012)).
83. See id. (citing Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003)); *Art Attacks Ink*, 581 F.3d at 1144–45; and Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483 (9th Cir. 2000)).
84. See *Loomis*, 836 F.3d at 995.
85. Id.
86. Id. at 998.
87. Id.
88. See id. (citing 4 MEVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02(A) (2015)).
89. Id.
musician, supported his theory of widespread dissemination of his copyright-protected work with evidence of his music being “broadcast on local radio stations; sold in record stores, on his website[,] and at live shows; and digitally downloaded or streamed throughout online services such as iTunes, Spotify, and YouTube.” Yet, the court rejected his theory, instead holding that the evidence indicated that his record only demonstrated a few sales in some local stores and “sparse” downloads and streams.

It seems counterintuitive to proclaim that another composer is unlikely to have meaningful access to a composition that was published on the internet. In this regard, courts fail to recognize the possibilities the internet creates. Even with minimal streams or downloads tracked by platforms like YouTube or Spotify, there is no evidence about the individuals responsible for those streams, to whom they are connected, or the sites on which they shared or reposted the songs—even if with just a brief clip of the composition. While this argument may tread slightly on a slippery slope, it is unreasonable to assume that low sales numbers or modest streaming and download figures could not have reached a significantly larger audience. After all, the wonders of the internet are available to most people in the developed world.

The Central District of California appears to agree with my critiques of prior courts’ reasoning. In Marcus Gray v. Katy Perry, the court found a “reasonable possibility” that defendants had access to a copyright-protected work through a theory of widespread dissemination. While building upon the principle established in Loomis, the court clarified that a showing of commercial exploitation is not necessary to prove access because “such reasoning would make it permissible to infringe on a copyrighted work simply because it was never for sale.” Thus, the court found a theory of widespread dissemination successful when plaintiffs demonstrated that multiple videos containing the copyright-protected song were uploaded to YouTube, but only had a collective total of over one million views. The plaintiff also showed evidence that the song’s video was posted on Myspace pages, where it was played more than 1.5 million times. While this

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90. See Batiste v. Lewis, 976 F.3d 493, 503 (5th Cir. 2020).
91. Id.
93. “In most cases, the evidence of widespread dissemination centers on the degree of a work’s commercial success and on its distribution through radio, television, and other relevant mediums.” Loomis, 836 F.3d at 997; see also Pine, supra note 92.
94. Pine, supra note 92.
95. Id.
adaptation of the widespread dissemination rule is clearly more inclusive, the rule in practice is not uniformly applied in practice.

**ii. Chain of Events**

Even if a copyright infringement plaintiff fails to demonstrate access through a theory of widespread dissemination, they may still satisfy the access element by successfully arguing under the chain of events theory.\textsuperscript{96} Under this theory, the plaintiff aims to “establish[] a link between the[ir] work and the defendant’s access[,]” such as dealings with a record label.\textsuperscript{97}

For example, in *Loomis*, the plaintiff’s chain of events theory was that a number of delegates could have provided a copy of their copyright-protected work to defendant-songwriters.\textsuperscript{98} There, the court rejected the plaintiff’s chain of events theory, stating that a demonstration of “mere corporate receipt” of a copyright-protected work by an “individual who shares a common employer with the alleged copier” is insufficient.\textsuperscript{99} Instead, the court held that a successful chain of events theory would have to show that a third party, which dealt with both the plaintiff and defendant, had actual possession of the plaintiff’s work.\textsuperscript{100} Even though the plaintiff in *Loomis* identified several common third parties, the court found no evidence, beyond speculation, to show a nexus between a label representative who had actual receipt of the copyrighted work and the group that allegedly copied the song.\textsuperscript{101}

On the other hand, in *Skidmore*, the court found that the plaintiff’s chain of events theory was reasonable when it was undisputed that Spirit, the plaintiff-band alleging copyright infringement, and Led Zeppelin worked together in the period when Zeppelin wrote the allegedly copied song.\textsuperscript{102} It

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\textsuperscript{96} “Where there is no direct evidence of access, circumstantial evidence can be used to prove access either by (1) establishing a chain of events linking the plaintiff’s work and the defendant’s access or (2) showing that the plaintiff’s work has been widely disseminated.” *Loomis*, 836 F.3d at 995.

\textsuperscript{97} See Schnapp, supra note 31.

\textsuperscript{98} *Loomis*, 836 F.3d at 995; see also Pine, supra note 92 (Clarifying that to successfully demonstrate widespread dissemination, plaintiffs must merely “set out specific facts showing a genuine . . . reasonable possibility that defendants had the chance to view the protected work.”).

\textsuperscript{99} *Loomis*, 836 F.3d at 995.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 996. There, the plaintiff suggested that Sunny Elle Lee, who worked for UMG records and requested a copy of the copyrighted song, created a “triable issue of access because Lee’s responsibility as [a representative] was to ‘find’ and ‘share’ music.” Id. Thus, because Lee was successful at her job and “received a promotion,” a reasonable juror could extrapolate that she provided the copyrighted work to the defendant songwriters. *Id.* The court rejected this argument, stating that there was no evidence of a “nexus between Lee and the [defendant] songwriters” because the plaintiff failed to dispute that “Lee was not part of the work unit that created [the defendant songwriters group].” *Id.*

\textsuperscript{102} *Skidmore* as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020). There was evidence that the bands worked together in the late 1960s and early 1970s when the allegedly copied song was released. *Id.* at 1051.
was also undisputed that “[t]he bands performed at the same venues at least three times” within that period and that “Zeppelin also performed a cover of a Spirit song . . . .”\textsuperscript{103} However, like \textit{Loomis}, no evidence suggested that Led Zeppelin had or received actual possession of the allegedly copied work itself or that the copyright-protected song was played when the bands toured together. Therefore, it remains unclear what the Ninth Circuit deems “actual receipt,” as it required in \textit{Loomis}.\textsuperscript{104} Because there is no clear rule for what type of “chain” shows a successful chain of events, courts are inconsistent with their findings.

\textbf{B. INDEPENDENT CREATION: AN INAPPROPRIATE AFFIRMATIVE DEFENSE}

Even if copyright infringement plaintiffs satisfy the unclear and varied requirements set by courts and establish access, defendants can still evade culpability.

Copyright infringement defendants have an affirmative defense available to dispute successful theories of access if they can show independent creation.\textsuperscript{105} Under the independent creation idea, defendants may evade infringement liability if they can prove they “independently created the work in question.”\textsuperscript{106}

This defense is difficult to establish.\textsuperscript{107} To be successful, a defendant must show “that any similarity or resemblance of . . . the copyrighted work is coincidental, rather than due to copying.”\textsuperscript{108} Additionally, the defendant would have to prove that it created the work without knowledge of, or having been exposed to, the copyrighted work.\textsuperscript{109}

Courts have been unclear as to whether the independent creation defense is absolute. For example, in 2020, the Ninth Circuit stated in \textit{Skidmore} that “if two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.”\textsuperscript{110} However, the Ninth Circuit also held in \textit{Rentmeester v. Nike, Inc.}, that even if plaintiffs establish access and substantial similarity to the copyrighted work, “the defendant can rebut the presumption of copying by proving

\textsuperscript{103} Id. at 1057.
\textsuperscript{104} See \textit{Loomis}, 836 F.3d at 995.
\textsuperscript{105} See \textit{Repp v. Weber}, 132 F.3d 882, 889 (2d Cir. 1997).
\textsuperscript{107} See \textit{id}.
\textsuperscript{108} See \textit{id}.
\textsuperscript{109} See \textit{id}; see also \textit{Loomis}, 836 F.3d at 995.
\textsuperscript{110} See \textit{Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin}, 952 F.3d 1051, 1070 (9th Cir. 2020).
independent creation.” Yet, in 2017, the Ninth Circuit stated that “where works are so overwhelmingly identical [the] possibility of independent creation is precluded.”

Nonetheless, while plaintiffs struggle to satisfy one of the courts’ stringent access tests, defendants always have an opportunity to rebut this finding. Accordingly, access is overall one of the least consistent and most difficult elements of copyright infringement suits. But the issue of access does not end here; it resurfaces disguised under the infamous inverse ratio rule.

III. THE INVERSE RATIO RULE

The inverse ratio rule, very generally, combines the requirements of substantial similarity and access. The rule lowers a plaintiff’s burden of demonstrating substantial similarity if there is clear and obvious access to a copyright-protected composition. In other words, the stronger a plaintiff’s demonstration of access, the less the plaintiff must demonstrate substantial similarity to be successful in a copyright infringement case.

Most federal circuits have rejected the inverse ratio rule. The Fifth Circuit rejected the rule in the 2004 case Positive Black Talk Inc. v. Cash Money Records. There, the plaintiff argued that the lower court should have given instructions based on the inverse ratio rule, which, at the time, was used by multiple other jurisdictions. However, the court declined to adopt the rule, stating that the instruction would not change the outcome given the jury’s finding on substantial similarity in the court below.

While the Seventh Circuit has “allowed a high level of similarity to suggest access[,] . . . a ‘lower standard of proof’ ha[d] never been endorsed because of a higher level of access[,]” thus declining to apply the inverse ratio rule. In Peters v. West, a 2012 case heard by the Seventh Circuit, Peters alleged that Kanye West illegally infringed on his protected work with

111. See Vondran, supra note 106.
112. Unicorns, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 985 (9th Cir. 2017) (citing Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1330 (9th Cir. 1983)).
113. See Chernoff, supra note 5.
114. See generally Skidmore, 952 F.3d at 1065–66.
115. See id. The inverse ratio rule also “allows a case for infringement in the absence of proof of access when the works are strikingly similar.” See Chernoff, supra note 5. The “strikingly similar” rule, which is “well established in federal copyright law[,]” states 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.” Ethan Wong & Andrew Thomas, Misuse of Inverse Ratio Copyright Rule Continues in 9th Circ., JENNER (Jan. 7, 2020, 5:09 PM) https://www.law360.com/articles/1230576.
116. See Chernoff, supra note 5.
118. Id.
119. Id. at 371–72.
120. See Chernoff, supra note 5.
West’s song “Stronger.” There, the court stated that they had “occasionally endorsed something that comes close to th[e] inverse [ratio rule] approach” by holding that the amount of similarity required to establish access “[should be] in an inverse ratio to the quantum of direct evidence adduced to establish access.” However, the court had never allowed such a finding to lower the standard of proof for substantial similarity. In this way, the Seventh Circuit declined to adopt the inverse ratio rule in the Peters case, holding that although West had adequate access to the plaintiff’s work, there was insufficient similarity between the two works to support a finding of a copyright infringement.

Further, in 1994, the Eleventh Circuit denied application of the inverse ratio rule in Beal v. Paramount Pictures Corporation, stating that the rule had never been employed in the circuit.

Most notably, however, both the Second and, more recently, the Ninth Circuits have rejected the inverse ratio rule. The Second Circuit rejected the rule in Arc Music Corporation v. Lee, arguing that the rule’s logic was faulty. This is because “proof of actual access [would] render a showing of similarities entirely unnecessary.” Despite using the rule for decades, the Ninth Circuit rejected it in Skidmore, where the late guitarist for rock band Spirit alleged that Led Zeppelin copied their “Stairway to Heaven” from their late 1960s work “Taurus.” In its seventy-three-page decision, the court took the opportunity to tackle many issues in copyright law, but most notably the inverse ratio rule. While the Ninth Circuit maintained that “substantial similarity is inextricably linked to the issue of access,” it agreed with the lower court that “the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and parties . . .

121. Peters v. West, 692 F.3d 629, 631 (7th Cir. 2012).
122. See id. at 634.
123. See id. at 635.
124. See id.
126. This is significant because, as noted above, “the industries that generate the most copyright disputes are located in New York (publishing, media) and California (entertainment, software/gaming).” DLA PIPER, supra note 35; see also Chernoff, supra note 5.
128. Id.
129. See Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020). Some may wonder why forty years later the Wolfe estate wants to, or is even allowed to, bring suit alleging copyright infringement. First, it is important to note that in Petrella v. Metro-Goldwyn-Mayer, Inc., the Supreme Court held that “laches is not a defense where copyright infringement is ongoing.” Id. at 1058. Second, when Wolfe passed away in 1997, his mother created the Randy Craig Wolfe Trust in his honor. “The trust financially supports after-school music education programs for underprivileged elementary school children . . . The funding [for the trust] comes from royalties from his songs and recording contracts, so a share of royalties from ‘Stairway’ would have been [of great help] to [support] the program.” Graham, supra note 19.
130. Skidmore, 952 F.3d at 1065–69.
131. Id.
132. Id. at 1066.
Reflecting on earlier applications, the Ninth Circuit admitted that the rule was not a useful tool to make copyright infringement determinations—rather, it only confused the process.

Currently, only the Sixth Circuit uses the inverse ratio rule. The court defended its use of the rule in *Stromback v. New Line Cinema*. There, the court followed its own precedent presented in *Ellis v. Diffie*, affirming the idea that “in some cases[,] the relationship between the degree of proof required for similarity and access may be inversely proportional: where the similarity between the two works is strong, less compelling proof of access may suffice, and vice-versa.”

Total abolition of the inverse ratio rule seems inevitable. Yet, to grasp the significance of uniformly rejecting this rule, it is important to understand how copyright cases are generally handled under the different copyright acts. Usually, the version of the Copyright Act that governs a certain case defines what medium of a work may be copyright-protected. This introduces challenges in defining and demonstrating access, which, when the inverse ratio rule is involved, further complicates defining and demonstrating copyright infringement.

**IV. THE 1909 COPYRIGHT ACT VS. THE 1976 COPYRIGHT ACT**

Determining which Copyright Act governs a particular musical composition infringement allegation is the threshold issue in any infringement case. A final notable inconsistency affecting musical composition copyright plaintiffs is the disconnect between the 1909 Copyright Act and the 1976 Copyright Act and the cases governed under each. A further hurdle is the 1976 Act’s lack of accountability for modern

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133. The Ninth Circuit explained:

But even within our circuit, our embrace and application of the rule has had a checkered application. The very nature of the rule spawned uncertainty in its application. We first articulated the rule in 1977, holding that the high degree of access present in that case justified a lower standard of proof to show substantial similarity, though no amount of proof of access will suffice to show copying if there are no similarities. In its next breath, the court in *Krofft* admitted that it is impossible to quantify this standard, so it is unsurprising that the court was unclear—failing to explain whether the rule applied to the actual copying or unlawful appropriation prong of the infringement analysis. A decade later, we reversed course and distanced ourselves from *Krofft*, relying on the Second Circuit’s rejection of the inverse ratio rule in *Arc Music*, *See Aliotti v. R. Dakin & Co.*

We later returned to the inverse ratio rule and, in a series of cases throughout the 1990s and early 2000s, applied it in confusing ways.

134. *Id.* at 1067.
137. *Id.* at 293 (citing *Ellis v. Diffie*, 177 F.3d 503, 506-07 (6th Cir. 1999)).
streaming and other internet services that affect how music is used, consumed, and released.\textsuperscript{139}

During the twentieth century, copyright law—as it applies to music—changed drastically.\textsuperscript{140} However, the changes do not apply retroactively to newer copyright-protected musical compositions.\textsuperscript{141} If a musical composition was produced and registered between 1909 and 1976, its copyright is governed by the 1909 Act.\textsuperscript{142} For example, in \textit{Skidmore}, the Ninth Circuit determined that the 1909 Act would govern the case because the composition at issue, “Taurus,” was registered in 1967 between the passage of the 1909 and 1976 Copyright Acts.\textsuperscript{143}

The biggest difference between the two copyright acts is the way in which musical compositions may be memorialized under copyright protection. In earlier versions of the Act, only published compositions were granted copyright protection.\textsuperscript{144} Under early copyright law, published musical compositions were “understood to be a printed form of the music[.]”\textsuperscript{145} In the late 1800s and early 1900s, when technology began to change how music was created, played, and consumed, the Supreme Court maintained that only written copies of sheet music could be protected by copyright law.\textsuperscript{146} In response, Congress wrote and passed the 1909 Copyright Act, which “categorized mechanically-produced musical compositions, such as those played on player pianos and phonograph players, as ‘[deposit] copies’ of the original composition.”\textsuperscript{147} This new legislation afforded published compositions copyright protections as written sheet music, and

\begin{itemize}
\item[M139] Musical compositions became subject to copyright protection in 1831. \textit{See Skidmore}, 952 F.3d at 1060–61. Since then, there have been two prominent copyright acts which have affected compositions: the 1909 1976 Acts. \textit{Id.}
\item[M140] \textit{Id.} at 1060.
\item[M141] \textit{Id.} at 1060–61.
\item[M142] \textit{Id.} at 1060.
\item[M143] Specifically, the court stated:
\begin{quote}
The baseline issue we address is the scope of Wolfe’s copyright in the unpublished composition [“Taurus”], which was registered in 1967, between the passage of the Copyright Act of 1909 . . . and the sweeping copyright reform adopted in the Copyright Act of 1976. . . . We conclude that the 1909 Act controls and that the deposit copy defines the scope of the ‘Taurus’ copyright.
\end{quote}
\textit{Id.} at 1060–61 The court further stated that “[t]he catch, for this case, is that publication before the 1978 effective date is not covered by the [1976 Act].” \textit{Id.} at 1062.
\item[M144] \textit{Id.} at 1061.
\item[M145] \textit{Id.} Remember, “recordings” hardly existed. This made sense given the circumstances of the time.
\item[M146] “Between 1831 and the early 1900s, a number of machines were invented that allowed mechanical reproduction of a musical composition.” \textit{Id.} at 1060. However, the Supreme Court in \textit{White Smith Music Publishing Company v. Apollo Company} held that “it would be ‘strained and artificial’ to consider musical sounds coming from an instrument to be a copy.” \textit{Id.}
\item[M147] \textit{Id.}
unpublished compositions protections in the form of a “deposit copy.”

Historically, however, courts have not interpreted the language of the 1909 Act to protect anything besides written sheet music for published works or the deposit copy for unpublished works.149

The court in its 2020 Skidmore opinion upheld this interpretation.150 There, the plaintiff sought to play a recording of their composition for the jury and argued that the language of the 1909 Act supported the argument that the legislation extended copyright protection beyond written sheet music, and therefore the recording of their song fell under their copyright and could be brought before the jury.151 However, the court, maintaining that only the written music was copyright-protected under the then-governing 1909 Act, restricted the plaintiff from playing their work for the jury.152 Instead, the plaintiff could only demonstrate alleged infringement based on the music written on a page.153

Why did the plaintiff care so much that a recording constituted the protected work? Listening to the two pieces reveals undeniable similarities.154 If the plaintiff could have played the recording of their song alongside “Stairway to Heaven,” it likely would have drastically raised the chances that jurors would notice similarities in the pieces. Instead, because the 1909 Act governed the plaintiff’s work, the plaintiff was unable to utilize a recording during the case, which they ultimately lost.155

Unlike the 1909 Act, the 1976 Act “provided that public distribution of a sound recording qualified as publication of a musical composition.”156 This meant that sound recordings could be “submitted rather than sheet music as the deposit copy for a musical composition.”157 However, even the 1976 Act

148. Deposit copies are copies of publications. In the case of musical compositions, deposit copies may be in the form of legible lead or sheet music or disks or tapes, which are clear and audible. See Musical Composition Deposit Requirements, COPYRIGHT.GOV, https://www.copyright.gov/register/pa-deposit-music.html; -text=Copies%20should%20be%20legible%2C%20and,or %20placed%20in%20a%20folder, (last visited Nov. 27, 2023).
149. Skidmore, 952 F.3d at 1061.
150. Id.
151. “The [1909 Act] provided copyright protection against ‘any arrangement . . . in . . . any form of record in which the thought of an author may be recorded and form which it may be read or reproduced.’” Id. (quoting 1909 Act, 17 U.S.C. § 1(e)).
152. Id. at 1064.
153. Id.
155. The court clarified that “publication before the 1978 effective date is not covered by the [1976] statute.” Skidmore, 952 F.3d at 1062. In other words, all musical compositions memorialized before 1978 are governed by the 1909 Act. Id.
156. Id.
157. Id.
has its caveats. For a sound recording to be subject to copyright protection, it must have been fixed “on or after February 15, 1972.”  The differences in the governing Acts are yet another example of inconsistencies that confuse copyright law as it applies to musical compositions. Intuitively, one may think that the 1909 Act will become futile, but that is not necessarily true. Musicians will continue to be inspired by counterparts from generations prior, and, as seen before, the lines between inspiration and copying are often razor-thin. Thus, even those compositions published pre-1972 will always be subject to copying. As a result, if musicians continue to compose, past works will continue to be threatened by a lack of adequate protection.

For the sake of uniformity and acceptance of the modernization of music as a medium, the 1976 protections over sound recordings must be applied retroactively to previous works.

V. PROPOSED SOLUTIONS

The inconsistent approaches to each element of the circumstantial evidence analysis in copyright law are confusing and do not adequately protect composition copyright owners. To better protect artists, consider this three-fold solution: first, courts must implement uniform approaches with respect to each element of the circumstantial evidence copyright infringement analysis; second, these highly technical issues should be kept out of the courts and out of juries’ hands; and third, redress should prioritize compensating artists for inadequate protection through royalty deals.

A. UNIFORMITY ACROSS THE BOARD

Courts have several different approaches with respect to each element of the circumstantial evidence analysis, which is not only confusing but also increases the risks of inconsistent applications. To resolve this contention, this Note proposes that courts adopt a singular, uniform approach that uses the same rules, tests, and standards. Not only will this better protect copyright infringement plaintiffs, but it will clearly establish rules and expectations for future artists.

i. Substantial Similarity

As discussed above, there are currently two main approaches to a substantial similarity analysis: the Second Circuit “quantitative and

158. Id.
159. See generally id.
qualitative” tests and the Ninth Circuit “total concept and feel” test. Courts should adopt the Ninth Circuit’s approach across the board.

The Ninth Circuit’s test objectively considers whether the foundational elements of two compositions are similar, just like the Second Circuit’s approach. However, the Second Circuit’s approach fails in its lack of consideration for the listener’s experience. Unlike the Second Circuit’s approach, the Ninth Circuit relies partly on listeners to determine whether two songs sound the same. While it seems quite trivial, it is counterintuitive for courts to decide that two works are not substantially similar when they fundamentally sound the same. And while the Ninth Circuit’s approach asks this simple question, it does not solely rely on it.

The extrinsic element of the Ninth Circuit’s total concept and feel test encourages utilization of music theory experts’ knowledge, which is undeniably important. Indeed, bringing in experts to elucidate the intricacies of music and why certain elements do or do not constitute evidence of copying is imperative. Music theory is a science, and if the courts do not treat it as such, artists will remain unprotected.

ii. Access, Independent Creation, & The Inverse Ratio Rule

After successfully demonstrating substantial similarity, a copyright infringement plaintiff must show access. This is arguably the most difficult element for a copyright plaintiff to successfully establish. The access element also allows defendants a chance for a defendant to completely overturn a copyright infringement case with the independent creation defense.

Hence, courts should uniformly abolish access as a requirement. Instead, the burden should shift to the defendant to disprove access—that is, they did not have access to a plaintiff’s copyright-protected work. This change would repeal access as a requirement and keep in place the independent creation defense, which is not easily demonstrated.

While the independent creation defense provides a reasonable opportunity for copyright infringement defendants to demonstrate that they did not copy a protected composition, the presence of the defense begs the question: Why are plaintiffs required to demonstrate access at all when courts consistently disagree as to what satisfies the heavy burden of demonstrating

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160. See supra notes 37–70 and accompanying text for a discussion regarding the Second Circuit’s “quantitative/qualitative” test and the Ninth Circuit’s “total concept and feel” test.
161. See supra notes 71–78 and accompanying text for a comparison between the Ninth Circuit’s and Second Circuit’s tests and discussion regarding why the Ninth Circuit’s test is better suited for musical composition copyright infringement plaintiffs.
162. See supra notes 76–104 and accompanying text for a discussion regarding the access requirement and different tests courts use to determine whether the element is satisfied.
163. See supra notes 105–112 and accompanying text for a discussion of the independent creation defense.
access? Furthermore, why must a plaintiff meet that onerous burden only to allow a defendant to rebut it completely?

The unclear boundaries regarding the requirement of access confuse and frustrate the focus of a copyright infringement suit. Therefore, it is only reasonable that courts should adopt a uniform approach. This proposal is not so far-fetched: in its Skidmore opinion, the Ninth Circuit even stated that having to show “‘access’ is increasingly diluted in our digitally interconnected world[,]” and “[a]ccess is often proved by the wide dissemination of the copyrighted work.”164 The prevalence of the internet and its almost limitless bounds make a demonstration of access a seemingly moot point in 2023 and onwards.

Importantly, while the independent creation rule should remain intact, the bar for using the defense should remain high. Additionally, a defendant’s demonstration of independent creation should not be dispositive. Disregarding an allegation of copying solely because the plaintiff has one favorable element is unwarranted. As established throughout this Note, music is not a medium where parts can be considered independently; it must be considered as a whole. Therefore, no single element should serve as conclusive evidence for or against an entire copyright infringement claim.

As the internet and technology continue to develop, establishing access to prove copyright infringement will become increasingly more difficult.165 Accordingly, it is unreasonable for courts to assume that any given party did not have access to any given work. The internet is too vast a medium to believe that because a work had only a certain number of streams or downloads, it did not reach a large audience. The element of demonstrating access is difficult for plaintiffs to show, and courts seem confused by the nature of a saturated market.166 Therefore, plaintiffs should not have to demonstrate access to demonstrate copying. Instead, access should be inferred.

Furthermore, a uniform abandonment of the inverse ratio rule would allow courts to abolish access as a requirement. Provided only one circuit has not abolished the inverse ratio rule, the Sixth Circuit should follow suit and reject it.167

iii. The 1909 Copyright Act & the 1976 Copyright Act

The differences between the 1909 Copyright Act and the 1976 Copyright Act are the most out-of-touch aspects of the circumstantial evidence

164. See Skidmore, 952 F.3d at 1069.
165. See id.
166. Take Loomis, for example: The court found no access despite the defendant-songwriters’ presence in an area where their work saturated the market. Loomis v. Cornish, 836 F.3d 991 (9th Cir. 2016).
167. See supra notes 113–138 and accompanying text for a discussion regarding the history of the inverse ratio rule and its abandonment.
analysis. Therefore, the 1976 Act should retroactively apply because it has the most modern considerations of copyright law. At the very least, the provision of the 1976 Act permitting sound recordings to be protected should apply retroactively to give previously protected artists a chance to update their copyrights with a sound bite.

Furthermore, Congress should consider updating the 1976 Act altogether. While better suited for modern society than the 1909 Act, the 1976 Act fails to account for streaming services and the internet. It is important that copyright law stay up to date and adequately protect art as it continues to modernize.

B. DON’T FLOOD THE DOCKETS: ALTERNATIVE DISPUTE RESOLUTION AGENCIES SHOULD HANDLE THESE CASES

Some may worry that retroactively applying the 1976 Copyright Act protections would create a rush to the courts. However, musical copyright composition cases can be addressed properly by alternative dispute resolution (ADR). Perhaps an agency staffed specifically with music theory experts and ADR professionals can be created to make the process even more seamless.

Agencies are successfully used across other areas of law. For example, the National Labor Relations Board (NLRB) is an independent federal agency created to protect employees’ rights. It also prevents harmful—and remedies problematic—labor practices. The NLRB is one of many independent government agencies that could be successfully mirrored to protect copyright owners. Just as the NLRB utilizes personnel to investigate claims of bad labor practices, music theory experts in a musical composition copyright infringement agency could similarly investigate allegations of stolen compositions. The NLRB also facilitates settlements to keep cases out of litigation. Similarly, this music copyright agency could utilize ADR to avoid flooding the dockets and keep music copyright issues in the hands of legal and musical experts.

Importantly, agencies such as the NLRB have the power to decide cases. The NLRB has Administrative Law Judges who hear cases where settlement failed to successfully remedy the situation. A music copyright


169. See supra notes 140–159 and accompanying text for a discussion regarding the changes made by the 1976 Copyright Act to the 1909 Copyright Act and their effects on musical composition copyright infringement plaintiffs.


171. Id. at 462.

172. Id. at 461.

173. Id.

174. Id.
agency would benefit from a similar structure. Musical copyright infringement plaintiffs should be able to bring a claim to an agency well-equipped to consider and remedy their issue.

The agency would be prepared to accept and consider claims following the uniform approach to the circumstantial evidence analysis described above. Music theory and legal experts would then consider the merits of the allegation and conduct an ADR-style settlement. If the settlement is unsuccessful, plaintiffs could appeal to an administrative law judge for a hearing. This agency would function with all the same resources and talent as the courts but without overwhelming the system. Moreover, it would employ uniform approaches and consistent decisions for musical composition copyright infringement plaintiffs.

C. ROYALTIES AS REMEDY

While a uniform approach may help courts consider musical composition copyright infringement cases fairly, the need for a new approach begets determining the adequate remedy for plaintiffs. Monetary compensation could be adequate in cases that allege copyright infringements. Royalties would be an ideal goal for a court or an agency to pursue in musical composition copyright infringement cases: they would signify recognition of an artist’s original work and award copyright owners whenever their protected work generates revenue—a sort of “thank you” to the original creator’s contribution to the art of music.175

Music is a shared experience that can be inspired by all parts of life. Composers and artists should not be forced to ignore inspiration when they find it, and royalty deals would recognize music’s contributory nature.

D. HOW WOULD THIS APPROACH CHANGE COPYRIGHT INFRINGEMENT CASES?

These changes could be demonstrated particularly well by discussing their potential impact on Skidmore. There, the Ninth Circuit found no evidence of copyright infringement when all aspects were independently considered.176 Consider the compositions at issue in Skidmore. The two songs sound considerably alike, yet the court found no copying.

Enacting the proposed changes to the circumstantial evidence analysis may have changed this outcome. First, in Skidmore, the 1909 Copyright Act

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175. In Skidmore, the plaintiff sought a monetary remedy to fund his after-school music education programs for underprivileged elementary school children. See Thomas Leatham, Randy California: The forgotten protegé of Jimi Hendrix and his tragic death, FAROUTMAGAZINE.CO.UK (Oct. 13, 2022), https://faroutmagazine.co.uk[randy-california-forgotten-protege-jimi-hendrix]; see also Graham, supra note 19.

176. Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1056 (9th Cir. 2020).
governed. That meant a sound recording was not allowed to be played for the jury. Under this new analysis, the recording could be played for the jury, given that the 1976 Act would apply retroactively. Next, the court would employ the total concept and feel test to determine substantial similarity. Under the extrinsic test, the experts who testified on behalf of each party still would have participated. They each testified to the fundamental and theoretical similarities and differences between the pieces and explained each to the jury. Under the intrinsic test, the jury would have been asked whether they found the two works—which they would have listened to—to be substantially similar, and it is very likely that the jury would believe the compositions were substantially similar. Access would have been presumed, and the defendant would have had the opportunity to present a (non-absolute) independent creation defense. But, because the bar for showing independent creation is high, the defense likely would have failed. Just as it did not have a place in the original case, the inverse ratio rule would not have applied to rebut any finding.

In the end, it is much more likely that the plaintiff would have won this case, which should have been the appropriate outcome. A win for the plaintiff here could have meant they would be entitled to royalties, which would have funded their after-school music education programs for underprivileged elementary school children. But because rigid, inconsistent, and outdated rules governed the case, it did not quite play out that way.

Furthermore, under this proposal, the Skidmore case would not have proceeded to trial. The plaintiff could have taken their complaint to the music copyright infringement agency, which would have addressed it using the same factors in ADR. Ideally, the involved parties would have reached a settlement that awarded the plaintiff a lump sum for the infringement and granted them royalties on the legendary anthem moving forward.

CONCLUSION

The current method of the circumstantial evidence analysis falls short of securing the copyright protections that plaintiffs expect when obtaining a copyright. Inconsistent findings and diverging tests across circuits are confusing and inefficient. The absence of bright-line rules universally harms plaintiffs, undermines the establishment of reliable precedents—a historical cornerstone of American courts—and allows artists to disguise copying as inspiration. This approach fails to acknowledge the impact of original composers on popular works.

177. Id. at 1061.
178. Id. at 1058.
179. Id. at 1059–60.
180. Id. at 1056.
181. See Leatham, supra note 175.
A uniform approach to the musical composition copyright infringement analysis would remedy the courts’ failures, offering overdue justice to many deserving artists. It would also better protect copyright owners and clarify the expectations imposed on new artists. An agency would help facilitate the application of this new approach and would strive to provide original creators the recognition they deserve. The current approach is flawed, and both the courts and the legislature bear a responsibility to artists to acknowledge and rectify these shortcomings.

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