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HALFWAY ON THE "STAIRWAY TO HEAVEN": AN ANALYSIS OF COPYRIGHT PROTECTION FOR MUSICAL WORKS IN THE NINTH CIRCUIT

RIDHIMA BHARDWAJ* AND SANKALPA KOIRALA**

Abstract

Music is pleasing to the ears of the consumers but is confusing to a judge. There exist difficulties in differentiating the protectable elements of musical works from the unprotectable elements. The Ninth Circuit has constantly erred by protecting elements of musical works that ought not to be protected. Judges with no musical knowledge cannot analyse if infringement has taken place or not. However, in the Ninth Circuit, adjudicating power is primarily provided to the judges and the juries, despite expert opinions being taken. Nevertheless, some positive steps have been taken. In 2020, the Ninth Circuit abrogated the controversial inverse ratio rule. Further, the confusing tests undertaken to find infringement were clarified. Such decisions have been welcomed. However, these steps have only brought the Ninth Circuit halfway to an ideal copyright regime, as various problems still exist in the tests themselves. The tests demand for expert opinions but expect the judges to make their own subjective analysis as an ordinary observer by ignoring the expert opinions. The judges are expected to determine infringement based on the "feel and groove" of a song but, such similarity in the feel and groove can be a result of the unprotected elements. Further, the courts sometimes fail to acknowledge the inherent limitations in the playing field when it comes to musical compositions and that similarity to some extent is inevitable. Such shortcomings can result in the protection of ideas and goes against the copyright law. The shortcomings are intertwined and the article attempts to explain them and provide a viable solution. This article highlights the journey that has been taken by the Ninth Circuit and the journey that is still left to be taken. It discusses the problems prevalent in the Ninth Circuit, while also bringing observations and analysis propounded by other circuits and judgments.

* Fourth-year student at Rajiv Gandhi National University of Law, Punjab.
** Fourth-year student at Rajiv Gandhi National University of Law, Punjab.
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I. INTRODUCTION

The very first copyright law of the United States of America ("US") did not protect musical works until its revision in 1831.[1] Currently, in the US, the purpose of copyright law has been described in economic terms.[2] While economic gain is not the only consideration of copyright protection,[3] we can observe that music has today become a commodity bought and sold in the marketplace.[4] Courts, while dealing with infringement cases, have also seen *"whether the secondary use usurps the market of the original work".*[5] In the case of *Oyewole*, the court decided in favour of the defendants, as one of the factors that it observed was that, it was unlikely that the target audience of the defendant and the plaintiff were the same, which therefore did not affect the potential market value of the song.[6] Therefore, copyright protects a composer's market interest. *"The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions, which is derived from the lay public's approbation of his efforts."*[7] Later, it was further clarified that it is not just monetary gain of the author that is seen but also if the user of the work profits from the use of the copyrighted work without payment of the customary price to the author.[8] This further puts a light on the economic value that the copyright regime seeks to protect.

Different circuits in the US have different approaches to determine copyright infringement in the case of musical compositions.[9] There exists a lot of confusion and shortcomings in the judicial system when it comes to the determination of infringement, especially in the case of musical works. For example, it can be observed that the inverse ratio rule (See, **II (B)**), as earlier adopted by the Ninth Circuit, disproportionately protected popular musical works. However, it is largely observed that the rule has been plaintiff-centric as the rule has helped in establishing infringement even against popular musical works, where its artist(s) were the defendants.[10] It can also be observed that even in cases of dissimilarities between the musical works, courts in the

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[1] Maria Scheid, *When does music enter the public domain in the United States?*, Ohio State University (July 27, 2020), https://library.osu.edu/site/publicdomain/2020/07/27/when-does-music-enter-the-public-domain-in-the-united-states/.
[2] *See* Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 554 (2006).
[3] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954).
[4] STEVEN MILES, CONSUMERISM AS A WAY OF LIFE 107 (1998).
[5] Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).
[6] Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018).
[7] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).
[8] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[9] Eric Rogers, *Substantially Unfair: An Empirical Examination of Copyright Substantial Similarity Analysis among the Federal Circuits*, 2013 MICH. ST. L. REV. 893, 911 (2013) [hereinafter "Rogers"].
[10] *See* Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018).

Ninth Circuit have found infringement.[11] Further, given the monetary stake at hand, along with the shortcomings that exist, cases of infringement are filed invariably against popular songs,[12] thus depriving the artists of the monetary value of their works.

Western music and the litigation on it suffer from a lack of familiarity with music theory, unhelpful contribution by music experts, failure to acknowledge inherent constraints in the western tonality and, difficulty in differentiating between the plaintiff's work from the music in the public domain.[13] While some confusions have been clarified by the Ninth Circuit, the copyright regime, when it comes to the protection of musical works, is still halfway from an ideal copyright regime.

A. Tests Undertaken by the Ninth Circuit: A Brief History

Methods used by the courts to analyse and decide cases of copyright infringement are different among different circuits.[14] The Second Circuit, as provided in *Arnstein v. Porter*, follows a three-step requirement of; (a) proof of access, (b) substantial similarity, and (c) improper appropriation. It is essentially a two-part test where the plaintiff has to prove "copying" and "illicit copying".[15] However, the Ninth Circuit has taken a slightly different stance, since, to prove infringement, it requires; (a) valid copyright, (b) proof of access along with similarity, and (c) substantial similarity.[16] One must prove that he has valid copyright on the work and that the other copied the protected elements of the copyright.[17] The question as to whether the copying amounts to improper appropriation is not explicitly considered by the Ninth Circuit, but is implicit in the courts' consideration of the similarities among the works.[18]

The extrinsic-intrinsic (two-prong-test) approach was pioneered in the Ninth Circuit[19]and later adopted by the Fourth and the Eighth Circuits.[20] Until 1977, the Ninth Circuit essentially

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[11] *See* Alex Abad-Santos, *A jury said Katy Perry's "Dark Horse" copied another song. The $2.8 million verdict is alarming,* Vox (Aug. 2, 2019, 2:02 PM), https://www.vox.com/culture/2019/7/30/20747100/katy-perry-dark-horse-joyful-noise-copyright-2-8-million.

[12] *See* Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936); *see also* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147-148 (S.D.N.Y. 1924); *see also* Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910); *see also* Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

[13] Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 275 (2013) [hereinafter "Livingston"].

[14] Rogers, *supra* note 9.

[15] *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[16] *See* Darian Hogan, *Stairway To Inverse Ratio Rule Abrogation*, The Biederman Blog (Mar. 16, 2020), https://www.biedermanblog.com/stairway-to-inverse-ratio-rule-abrogation/.

[17] Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994).

[18] Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LCA J. ART & ENT. L. 43, 46 n.18 (1994-1995) [hereinafter "Broaddus"].

[19] *See* Sid & Marty Krofft Television Productions., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th. Cir. 1977).

followed the ordinary observer test developed by the Second Circuit.[21] In 1977, the case of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*, in the Ninth Circuit, developed the concept of the extrinsic and intrinsic test.[22] It was decided that, in the first part, i.e. the extrinsic test, only the work's ideas are compared. *Krofft's* reasoning was questionable. Similarities in ideas are often found but are not a ground for infringement. *Krofft* largely eliminated the possibility of the case being won by a defendant on summary judgment grounds.[23] (See, **VI (B)**) *Krofft* created more problems than it solved, as it misread *Arnstein*'s two-part test as an idea-expression dichotomy.[24] Finally, in *Shaw v. Lindheim,*[25] the Ninth Circuit corrected itself[26] and held that the extrinsic test should be used to determine similarity of expressions. The extrinsic test and the intrinsic test are now more sensibly termed as "objective test" and "subjective test", respectively.[27] While in *Shaw* the use of the extrinsic test was limited to literary works, the case of *Brown Bag Software v. Symantec Corp*.[28] made it clear that the expansive reading of the extrinsic test was not limited to literary works.

B. Tests Undertaken by the Ninth Circuit in the Present

Initially, other circuits adopted the tests propounded in these two circuits (i.e., the Ninth and the Second Circuit), some with their own modifications.[29] It has been observed that the two circuits' analyses have converged together in the present.[30] However, some differences do exist. Currently, the steps to establish infringement in the Ninth Circuit have been provided in the flowchart below:

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[20] *See* Towler v. Sayles, 76 F.3d 579, 583–84 (4th Cir. 1996); *see also* Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987).
[21] Rogers, *supra* note 9, at 907.
[22] *See* Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).
[23] Broaddus, *supra* note 18, at 53.
[24] Montgomery Frankel, *From Krofft to Shaw, and Beyond - The Shifting Test for Copyright Infringement in the Ninth Circuit,* 40 COPYRIGHT L. SYMP. 429, 434 (1990-1991) [hereinafter "Frankel"].
[25] *See* Shaw v. Lindheim, 908 F.2d 531, 535 (9th Cir. 1990).
[26] Christopher Jon Springman & Samantha F. Hednik, *The Filtration Problem in Copyright's "Substantial Similarity" Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 579 (2019) [hereinafter "Springman"].
[27] *See* Antonick v. Elec. Arts, Inc., 841 F.3d 1062, 1066 (9th Cir. 2016).
[28] *See* Brown Bag Software v. Symantec Corp, 960 F.2d 1465, 1476 (9th Cir. 1992).
[29] Livingston, *supra* note 13, at 262.
[30] *See* Jenny Small, *The Illusion of Copyright Infringement Protection*, 12 CHI-KENT J. INTELL. PROP. 217, 221-222 (2013).

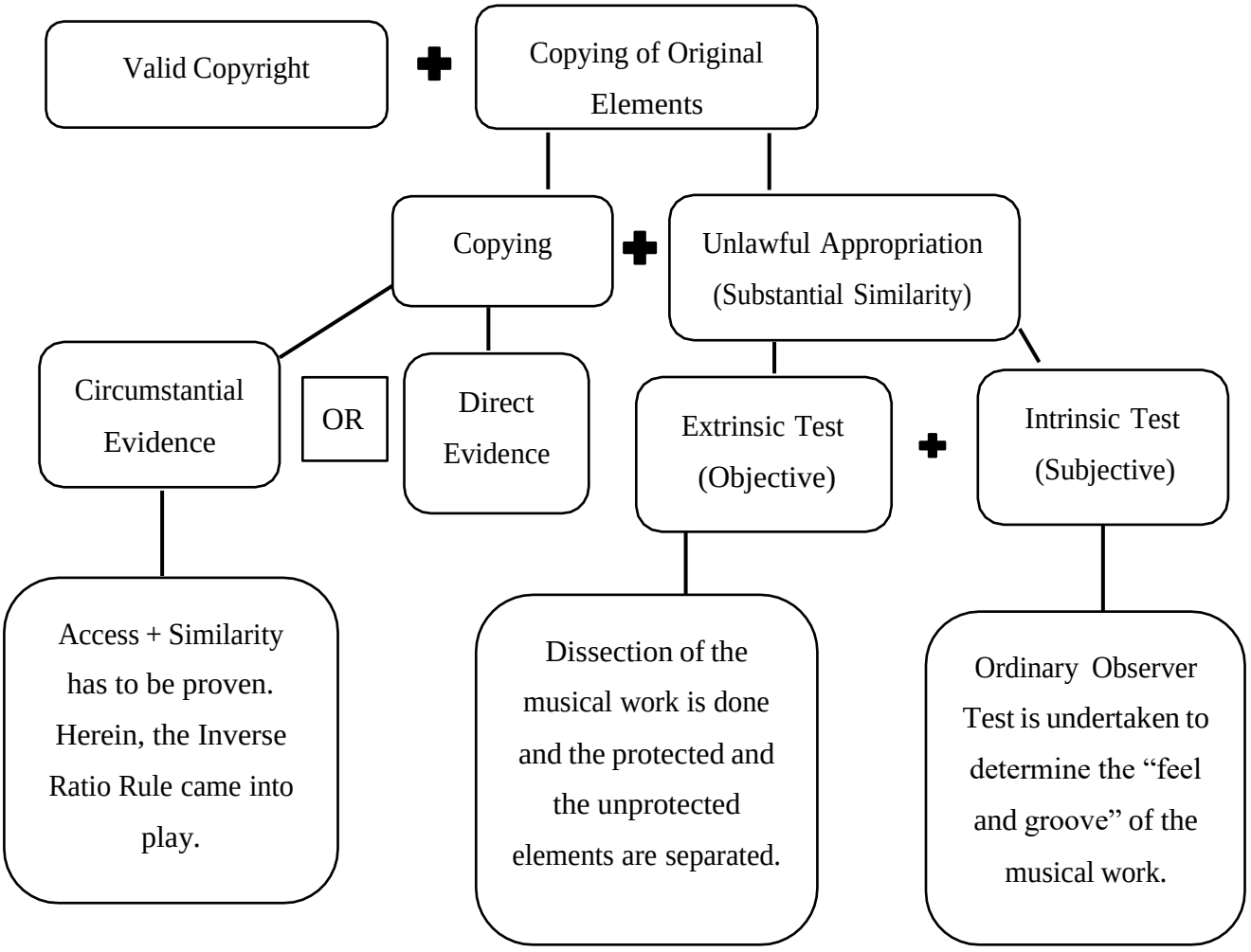

Figure-1: Tests Undertaken in the Ninth Circuit to Determine Infringement of Musical Copyright

While the Ninth Circuit has moved closer to the Second Circuit in its approach towards infringement cases, especially with respect to the extrinsic test, there still exist loopholes in the approach taken by the Ninth Circuit.[31]

There is a large discussion on the usage of the words like "copying", "similarity" and "substantial similarity",[32] which must be clarified before studying infringement analysis by the Ninth Circuit. The terms have a distinct meaning but have been used incorrectly in various judgments. Further,

[31] *Id*. at 261.
[32] *See* Broaddus, *supra* note 18, at 46-52.

the procedure for determining substantial similarity is clouded.[33] This adds to the already existing problems in analysing infringement in musical compositions.[34]

The Ninth Circuit considers a two-part extrinsic-intrinsic test in determining substantial similarity.[35] The Second Circuit has clarified that "probative similarity" is a threshold matter in showing "copying", while "substantial similarity" is a comprehensive test to determine "actionable copying".[36] While the Ninth Circuit has also recently accepted such differentiation,[37] it is important to note that, historically the term "substantial similarity" has been used in literature and numerous cases,[38] while dealing with "copying", which is incorrect. Therefore, for the purpose of clarity, while dealing with "copying" or the "inverse ratio rule", (even for the purpose of this article) one must remember that it deals with "probative similarity", even though other terms might have been used. Courts in the US have used the terms "probative similarity", "striking similarity" and "substantial similarity", which are not on a sliding scale. The terms "probative similarity" and "striking similarity", are analytical tools to determine factual copying while the term "substantial similarity" is used to determine if the factual copying is legally actionable i.e., if the protected elements of a song have been infringed. Therefore, while dealing with "copying", factual copying is established and while dealing with "substantial similarity", actionable copying is established. (See further, the case of *Skidmore v. Led Zeppelin* at **III**, which has clarified the confusion.)

II. DIRECT AND CIRCUMSTANTIAL EVIDENCE

Earlier, Courts recognised the importance of the two elements i.e., access,[39] and similarity.[40] It also recognised that direct evidence of copying is rarely available.[41] Since actual copying is rarely,

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[33] Joshua M. Dalton & Sara Cable, *The Copyright Defendant's Guide to Disproving Substantial Similarity on Summary Judgment*, 3 LANDSLIDE 26, 26 (2011) [hereinafter "Dalton"].
[34] *See* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 175 (2011) [hereinafter "Lund"].
[35] Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996).
[36] Sergiu Gherman, *Harmony and Its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 483, 488 (2009) [hereinafter "Gherman"].
[37] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).
[38] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000).
[39] *See* Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 275-76 (2d Cir. 1936); *see also* Wilkie v. Santly Bros., 13 F. Supp. 136, 136 (S.D.N.Y. 1935).
[40] *See* Fred Fisher v. Dillingham, 298 F. 145, 147 (S.D.N.Y 1924); *see also* Haas v. Leo Fiest, 234 F. 105, 107 (S.D.N.Y 1916); *see also* Boosey v. Empire Music, 224 F. 646, 647 (S.D.N.Y 1915); Hein v. Harris, 175 F. 875, 877 (C.C.N.Y. 1910).
[41] JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 915 (7th Cir. 2007); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996); Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir. 1995).

if ever, witnessed,[42] circumstantial evidence is sought to prove copying, which entails plaintiffs showing that the defendant had access to their works.[43] Then, plaintiffs establish that there is probative similarity[44] (as observed by the Fifth Circuit) which means, defendant's work contains similarity with the plaintiff's work, which can only be a result of copying and not a result of the use of public domain materials or coincidence.[45] In the Ninth Circuit as well, the plaintiffs are required to prove similarity between the works probative of copying, in addition to proving access, in absence of direct evidence.[46] However, the Circuit used to require a lower standard of proof of similarity if high access is shown (inverse ratio rule) while determining similarity.[47] The rule was rightly abrogated by the Ninth Circuit in 2020. (See, **III**)

A. Access

Courts have used the "chain of events theory", the "wide-dissemination theory" and the theory of "striking similarity" to establish access.[48] These theories have been acknowledged by the Ninth Circuit as well.[49] Under the chain of events theory, the plaintiff is required to prove that the musical copy had passed through one or more hands and had reached the defendant.[50] Courts have even found the possibility of access of the plaintiff's work based on the fact that the plaintiff, the defendant, and the producer *"[ran] in the same musical circles".*[51] In the modern world, such a judgment can have a negative impact, as a single producer can be involved in the production of multiple musical works.

Additionally, access has been construed where there was wide dissemination of work,[52] and objective factors like record sales and radio performances have also been looked upon to prove access.[53] Similarly, the number of plays on MySpace and YouTube have also been considered.[54] However, with the emergence of music streaming apps and websites, it has been questioned if it

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[42] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).
[43] Sarah Burstein, *Not (Necessarily) Narrower: Rethinking the Relative Scope of Copyright Protection for Designs*, 3 IP THEORY 114, 119 (2013) [hereinafter "Burstein"].
[44] *See* Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007).
[45] *See* Alan Latman, *Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1204 (1990).
[46] *See* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018).
[47] Sid & Marty Krofft Television Productions., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th. Cir. 1977).
[48] *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984); *see also* Peters v. West, 776 F. Supp. 2d 742, 748 (N.D. Ill. 2011); *see also* Alyssa Chavers, *Williams v. Gaye: Further Blurring the Lines between Inspiration and Infringement*, 50 GOLDEN GATE U. L. REV. 3, 14 (2020) [hereinafter "Chavers"].
[49] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482-485 (9th Cir. 2000).
[50] *See id.* at 482; *see also* Gaste v. Kaiserman, 863 F.2d. 1061, 1067 (2d Cir. 1988).
[51] Straughter v. Raymond, CV 08-2170 CAS (CWx), 19 (C.D. Cal. Aug. 19, 2011).
[52] *See* L.A. Printex Indus. Inc. v. Aeropostale, Inc. 676 F.3d 841, 846-47 (9th Cir. 2012).
[53] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000).
[54] Gray v. Perry, No. 2:15-cv-05642-CAS(JCx), 2019 WL 2992007, 13-15 (C.D. Cal. 2019).

is reasonable to assume access to such a large quantity of videos that are present in such platforms, even if their views are taken into consideration.[55] Logically, the answer should be negative.

Where a work is widely disseminated (for example, where the original work's DVD had earned $7,000,000 in the first two years since its release), its access by the defendant has been presumed.[56] In the case of *Rice v. Fox Broadcasting*, it was decided that since only 17,000 copies had been sold from 1986 to 1999, it could not be considered as widely disseminated.[57] In the internet world, it can be observed that if the musical work has an online presence and ease of access, access must be presumed. In this regard, it has been suggested that the defendants can rebut by showing improbability of access.[58] However, such a shift in the burden on the defendant further helps the plaintiff and can give rise to frivolous cases. Failure to evolve infringement standards with evolving technology poses a great risk.[59] Further, such finding of access based on wide dissemination is often accompanied by the issue of sub-conscious copying,[60] which adds to the problem. (See **VI (C)**)

It can be seen that popularity and wide distribution of work are elements that can result in an infringement being established easily.[61] The alleged infringer is also presumed to have access if the songs are so similar that the alleged copied work replaces the need for the original in the marketplace.[62] However, as observed in the Second and the Fifth Circuit, mere speculation or conjecture would not amount to access.[63] Access must be proved with significant, affirmative and probative evidence.[64] However, in the Ninth Circuit, the requirement is that there must be a reasonable opportunity of viewing the plaintiff's work by the defendant, not just a bare possibility.[65] It has been observed that, while previously, access was mostly a defence available to

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[55] *See* Jeanne C. Fromer, *The New Copyright Opportunist*, 67 J. COPYRIGHT SOC'Y U.S.A. 1, 12 (2020)
[56] Capcom Co. v. MKR Group, Inc., No. C 08-0904 RS, 2 (N.D. Cal. 2008).
[57] Rice v. Fox Broadcasting, 330 F.3d 1170, 1178 (9th Cir. 2003).
[58] Livingston, *supra* note 13, at 291.
[59] *Metro-Goldwyn-Meyer Studios, Inc. v. Grokster, LTD. - Brief of Professors Peter S. Menell, David Nimmer, Robert P. Merges, and Justin Hughes, as Amici Curiae in Support of Petitioners,* 20 BERKELEY TECH. L.J. 511, 514 (2005).
[60] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000).
[61] *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983); *see also* L.A. Printex Indus. Inc. v. Aeropostale, Inc. 676 F.3d 841, 846-47 (9th Cir. 2012).
[62] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-88 (1994).
[63] Armour v. Knowles, 512 F.3d 147, 153 (5th Cir. 2007); Intersong-USA v. CBS, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).
[64] Intersong-USA v. CBS, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).
[65] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000).

the defendant, the access requirement has become a plaintiff's tool in the modern world.[66] Therefore, there is a need to create a balance in the test to find access, by considering the aspects that direct evidence is rarely available as well as that dissemination is easily possible in the modern world.

B. Inverse Ratio Rule

The inverse ratio rule is a common law doctrine that was used by many courts in infringement analysis.[67] The rule is that, for strong proof of access, weak proof of similarity is enough to prove copying.[68] Nimmer asserts that *"since a very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof."*[69] However, the Ninth Circuit finally did away with the rule in 2020, in the case of *Skidmore v. Led Zeppelin*[70] (See, **III**). This highly controversial rule severely impacted the copyright regime, especially with respect to musical works in today's world. The Ninth Circuit has historically used the inverse ratio rule in infringement cases.[71] Currently, it is only in the Sixth Circuit that the rule remains as a valid law.[72]

1. Access does not imply Similarity

A wide distribution of the work often allows inferring of access.[73] To prove access, the plaintiff only has to prove that the defendant had an opportunity to view the work. The plaintiff is not required to prove that the defendant actually viewed his or her work. Again, access may be inferred in cases of striking similarity among the two works.[74] Therefore, the requirement to prove access has been made easy, especially due to wide dissemination of work through the internet, thus correctly contradicting what Nimmer had stated. Further, access to musical work is not the same as access to other artistic expressions as many of the fundamental concepts of

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[66] Karen Bevill, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value*, 52 RUTGERS L. REV. 311, 331 (1999).
[67] Steven Shonack, *Postmodern Piracy: How Copyright Law Constrains Contemporary Art*, 14 Loy LA Ent. L.J. 281, 313 n.256 (1994) [hereinafter "Shonack"].
[68] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000).
[69] Sid & Marty Krofft Television Productions., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th. Cir. 1977).
[70] Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).
[71] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000); *see also* Shaw v. Lindheim, 919 F.2d 1353, 1361-62 (9th Cir. 1990); *see also* Sid & Marty Krofft Television Productions., Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th. Cir. 1977).
[72] *See* David A. Steinberg & James Berkley, *Appeals Court Rules In Favor Of Zeppelin*, 10 NAT'L L. REV. 71 (2020).
[73] Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984).
[74] Broaddus, *supra* note 18, at 47.

music are accessible to anyone. Based on this argument, it was suggested that the inverse ratio rule needs revision.[75]

While the concept of inverse ratio has been supported in principle (and also by some courts),[76] in practice, it has been unsound. According to Justice Clark in the case of *Music Corp. v. Lee*,[77] *"the logical outcome of the claimed principle is obviously that proof of actual access will render a showing of similarities entirely unnecessary."* Furthermore, he stated the rule to be *"a superficially attractive apophthegm which upon examination confuses more than it clarifies".* The Second Circuit further referred to the rule as an *"ingeniously fabricated principle of law"*.[78]

If there is no similarity, no amount of evidence of access will prove copying.[79] If due to a high level of access, a lower level of similarity suffices to establish infringement, it can lead to improper infringements based on similarity of ideas or unoriginal expressions.[80] Regardless of the quantum of proof of access, the requirement to show similarity is a matter of threshold.[81] The requirement to show similarities does not vary as proof of access increases or decreases. No amount to access amounts to copying where the works are devoid of similarity.[82] However, the inverse ratio rule accepted a lower degree of similarity if there was evidence of a high amount of access.[83] Therefore, the inverse ratio rule, which suggests a decrease in requirement to prove similarity is flawed.[84]

2. Plaintiff Centric Rule

The inverse ratio rule significantly impaired a defendant's case and has been said to be logically infirm.[85] This rule made it easier for the plaintiff-owner, whose copyright is well-known and successful, to prove copying on the part of the defendant.[86] In the case of *Three Boys Music Corp v. Bolton*,[87] the court found similarity between the works despite the claims that the defendant's

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[75] Nicholas Booth, *Backing down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 127 (2016).
[76] *See* Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157,1172 (9th Cir. 1977); *see also* Teinberg v. Columbia Pictures Indus., Inc. 663 F. Supp. 706, 714 (S.D.N.Y. 1987).
[77] Music Corp. v. Lee, 296 F.2d 186, 187 (2d Cir. 1961).
[78] *Id*.at 187.
[79] Jones v. Supreme Music Corp., 101 F. Supp. 989, 990 (S.D.N.Y. 1951).
[80] David Aronoff, *Exploding the Inverse Ratio Rule*, 55 J. COPYRIGHT SOC'Y USA 125, 126 (2008) [hereinafter "Aronoff"].
[81] Gherman, *supra* note 36.
[82] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).
[83] Rice v. Fox Broadcasting, 330 F.3d 1170, 1178 (9th Cir. 2003).
[84] *See* Broaddus, *supra* note 18, at 48-49.
[85] Dalton, *supra* note 33, at 31.
[86] *See* Burstein, *supra* note 43, at 122.
[87] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000).

song contained a mere similar combination of unprotected elements.[88] The court further stated that *"we have never held, however, that the inverse ratio rule says a weak showing of access requires a stronger showing of substantial similarity*."[89] Therefore, according to the case, if there is a weak showing of access, it is not required for the plaintiff to prove a stronger similarity. However, in the case of the presence of high proof of access, low proof of similarity suffices to prove copying. This further puts a light on the plaintiff-centric nature of the rule.

In *Metcalf v. Bochco*, it was observed that the defendant had seen the work more than once, and thus, the case largely favoured the plaintiff, although not expressly dealing with the rule.[90] In an increasingly small world, the inverse ratio rule becomes largely misleading, often inapplicable and, in some cases, useless.[91] The rule led to infringement being established even in a minimal degree of similarity. The rule must not be applied to reduce the burden of proof on the plaintiff. Rather the plaintiff must provide independent proof to establish similarity.[92]

The case of *Williams v. Gaye*[93] (See, **VI (G) (2)**) caused an uproar as it disproportionately favoured Gaye, whose work was said to have been infringed. However, in this case, in the first opinion published by the court on March 21, 2018, it was stated that the court was *"bound to apply [the inverse ratio rule]"* but, in a modified opinion published on July 11, 2018, all the discussions on the inverse ratio rules were gone.[94] Therefore, while the Ninth Circuit in this case (i.e. before the case of *Skidmore v. Led Zeppelin*) did not highlight any weakness, it certainly implied that an infringement case can be settled without the application of the rule.[95] While the court did favour Gaye, its silence on its second opinion is of significance.

3. Additional Shortcomings of the Rule

The majority have taken a contrary position to the inverse ratio rule.[96] The rule is deleterious and lacks any analytical benefit.[97] Further, it has been pertinently asked, with respect to the

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[88] *Id.*
[89] *Id.*
[90] *See* Metcalf v. Bochco, 294 F.3d 1069, 1075 (9th Cir. 2002).
[91] *See* Karlyn Ruth Meyer, *Doctrine of the Dead: How Capcom v. MKR Exposes the Decreasing Fit between Modern Copyright Infringement Analysis and Modern Video Games*, 9 CHI-KENT J. INTELL. PROP. 132, 141 (2010).
[92] Jamie Busching, *Shaw v. Lindheim: The Ninth Circuit's Attempt to Equalize the Odds in Copyright Infringement*, 11 LOY. ENT. L.J. 67, 85 (1991).
[93] Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).
[94] Chavers, *supra* note 48, at 8-10.
[95] *See id.* at 20.
[96] James S. Altman, *Copyright Protection of Computer Software*, 5 COMPUTER/L.J. 413, 420 n.42 (1985).
[97] Aronoff, *supra* note 80, at 143.

nomenclature of the rule that, *"if the 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?"*[98]

The rule entails an inherent bias against commercial use.[99] While the economic objective of copyright law does secure payment to the author, another reason for the existence of copyright law is to motivate creativity.[100] The inverse ratio rule instead discourages creativity. Because of the vague nature of the rule,[101] it incurred a significant risk when litigating similarity and access issues.[102] The problem starts with proving access itself. While access should be denied if the proof is too far-fetched,[103] courts have had trouble establishing a minimum threshold to establish access.[104] Proving the defendant's access to the plaintiff's work is a requirement,[105] but the inverse ratio rule that is applied along with this requirement has been unreasonable. Therefore, its abrogation has been a welcomed step.

III. CLARIFICATIONS PROVIDED BY SKIDMORE V. LED ZEPPELIN

In 2014, Micheal Skidmore, as a trustee for the estate of Randy Craig Wolfe, filed an action against Led Zeppelin's famous song "Stairway to Heaven" alleging that the opening notes[106] were copied from Sprit's song named "Taurus".[107] In this case, the requirements for infringement were finally clarified by the Ninth Circuit and the circuit joined the majority of other circuits by abrogating the controversial inverse ratio rule.[108]

Wolfe was a guitarist, a singer, and a songwriter to the band Spirit and wrote the song "Taurus" in 1967. In this case, there was evidence that the band Led Zeppelin had performed on the same day, in the same festival in which Spirit had also played, in at least three separate instances. Further, the band Led Zeppelin had also performed a cover version of one of the Spirit's songs

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[98] *Id*. at 140.
[99] Shonack, *supra* note 67, at 313.
[100] Fogerty v. Fantasy, Inc., 510 U.S. 517, 526-527(1994).
[101] Robert S. Gawthrop III, *An Inquiry into Criminal Copyright Infringement*, 20 COPYRIGHT L. SYMP. 154, 162 (1970).
[102] Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. DISP. RESOL. 439, 449 n.57 (2003) [hereinafter "Anway"].
[103] *See* Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984).
[104] Michael Landau & Donald E Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 726-727 (1998) [hereinafter "Landau and Biederman"].
[105] *See* Rice v. Fox Broadcasting, 330 F.3d 1170, 1178 (9th Cir. 2003).
[106] Sean O'Connor, *Why Stairway to Heaven Doesn't Infringe Taurus Copyright: Analysis & Demo of "Scène à faire" Motif Common to Both*, SpicyIP (June 19, 2016), https://spicyip.com/2016/06/why-stairway-to-heaven-doesnt-infringe-taurus-copyright-analysis-demo-of-scenes-a-faire-motif-common-to-both.html.
[107] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020).
[108] Alexander R. Wolfe, *Skidmore v. Led Zeppelin: Changing Music Infringement Analysis in the Ninth Circuit*, 23 U. DENV. SPORTS & ENT. L.J. 1, 1 (2020).

titled "Fresh Garbage".[109] However, there was no evidence that any members of Led Zeppelin had ever heard "Taurus" prior to the release of their hit song "Stairway to Heaven". The case was brought forty-three years after the release of the song "Stairway to Heaven" and nearly two decades after the passing away of Wolfe.[110]

The trial court ruled that the Copyright Act of 1909 was applicable rather than the 1976 Act since the songs were released prior to the 1976 Act. Since the Act of 1909 protects musical compositions in the form of sheet music and such protection is not provided to sound recordings, only the sheet music was used to enquire on substantial similarity. Further, the trial court did not provide the jury with inverse ratio rule instructions. The jury returned a verdict in favour of Led Zeppelin as it was found that there was no substantial similarity despite Led Zeppelin having access to the song "Taurus".[111] Skidmore appealed and challenged the trial court's decision to deny providing the jury with inverse ratio rule instruction. Eventually, the court again reinstated the trial court's ruling.[112]

In the appeal, the court analysed the test for copyright infringement. A plaintiff must prove ownership of copyright and that the defendant has copied protected aspects of the copyrighted work.[113] So as to prove copying of protected aspects, a plaintiff must prove both "actual copying" and "unlawful appropriation". The court further clarified that these tests are independent despite incorrectly and collectively, being referred to as "substantial similarity test".[114] The court provided that actual copying can be proven by circumstantial evidence of access and by establishing that the works share similarities probative of copying.

The second requirement of unlawful appropriation can be proven by showing that the protected elements of the work share "substantial similarity".[115] Now, the extrinsic-intrinsic test is undertaken to prove substantial similarity. The extrinsic test looks at what is protectable and what is not in the copyrighted work. Further, the test compares similarities of "specific expressive elements in the two works."[116] The intrinsic test looks at similarities between the

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[109] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020).
[110] Joseph A. Greene, *Skidmore v. Led Zeppelin: Extraordinary Circumstances and Perpetual Statute of Limitations in Copyright Infringement*, 69 ME. L. REV. 307, 311-316 (2017).
[111] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1059 (9th Cir. 2020).
[112] *Id*. at 1060.
[113] *Id*. at 1064.
[114] *Id.*
[115] *Id*.
[116] *Id*.

works from the view of an "ordinary reasonable observer". Finally, if all these requirements are fulfilled, it amounts to infringement. (See, **Figure-1**)

The court noted the inverse ratio rule, which requires a *"lower standard of proof of substantial similarity when a high degree of access is shown".*[117] The trial court had denied Skidmore's proposal for an application of the controversial rule. Upon appeal, it was decided that the rule is a judge-made law and is *"not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties."* The court cited the confusion created by previous cases as to which part of the test — copying or unlawful appropriation — the rule was applied upon.[118] Further, the rule was subjective and did not provide what amount of access and similarity is needed to invoke the rule.[119] It decided that the rule disproportionately favoured popular works which have been widely disseminated through the internet and the media. The court stated that *"the constellation of problems and inconsistencies in the application of the inverse ratio rule prompts us to abrogate the rule."*[120]

Upon appeal, three jury instructions were in issue; (a) failure to give an inverse ratio rule instruction, (b) insufficiency of the court's originality instructions and, (c) failure to give selection and arrangement instruction.[121] (Jury instructions have been further discussed below, see **VI (A)**) Jury instruction no. 16 highlighted the essence of the "common musical elements". The instruction was found to have correctly listed the unprotectable elements.[122] Jury instruction no. 20 correctly highlighted that original expressions can be a result of borrowing from previous works or from the public domain since it is well accepted that the "original" parts of the work need not be new or novel.[123] However, it was also found that while the jury instructions provided were correct statements, they were misleading when it came to instructions for differentiation of protectable and unprotectable elements of the works (See **VI (C-F)**), as it omitted the principle that combinations of unprotected elements can be protected.[124] Judge Ikuta and Judge Bae, concurring in part and dissenting in part, stated that such originality instruction, coupled with failure to instruct the jury on selection and arrangement, amounted to a miscarriage

[117] *Id*. at 1066.
[118] *Id*.
[119] *Id*. at 1067.
[120] *Id*. at 1069.
[121] *Id*. at 1065.
[122] *Id*. at 1070.
[123] *Id*. at 1071.
[124] Elizabeth Sawyer, *Dazed and Confused: Copyright Limitation*, 29 DEPAUL J. ART, TECH. & INTELL. PROP. L. 93, 107 (2019); *Id*. at 1085.

of justice.[125] This highlights the importance of jury instructions in differentiating protectable and unprotectable elements of musical works.

The judgment abrogated the controversial inverse ratio rule and provided clarifications to remove confusion with regard to the tests undertaken. However, the journey is only halfway done. Inherent problems lie in the tests undertaken by Ninth Circuit itself which should be corrected.

IV. EXTRINSIC TEST (OBJECTIVE TEST)

The "extrinsic test" relies on expert analysis to determine substantial similarity, unlike the "intrinsic test" where substantial similarity is determined based on the reactions of a "reasonable audience" for whom the works would normally be directed.[126] It is seen that only the extrinsic test deals with the matter of law.[127] Under the extrinsic test, the works are dissected into their elements for the determination of protected elements and their comparison. The "extrinsic test" relies on expert analysis to determine substantial similarity, unlike the "intrinsic test" where substantial similarity is determined based on the reactions of a "reasonable audience" for whom the works would normally be directed.

A. Dissection

Plaintiffs must prove that the defendants copied the protected elements of the copyrighted work.[128] Here, courts would determine the protected subject matter by dissecting melody, rhythm, and accompaniment of the musical works. For instance, Judge Learned Hand conducted an analytical dissection of musical works with an almost note-by-note comparison of the two songs in dispute.[129] The Ninth Circuit provided criteria like plot, theme, dialogue, mood, setting, pace, sequence of events, and characters for the extrinsic test with regards to literary works.[130]

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[125] *Intellectual Property - Copyright in Musical Compositions - Ninth Circuit Confines the Scope of Copyright in Compositions under the 1909 Act to the Deposit Copy. - Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020)*, 134 Harv. L. Rev. 1543, 1547 (2021).
[126] *See* Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1164-1166 (9th Cir. 1977).
[127] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1118 (9th Cir. 2018).
[128] Emily Miao & Nicole E. Grimm, *The Blurred Lines of What Constitutes Copyright Infringement of Music: Robin Thicke v. Marvin Gaye's Estate,* 20 WESTLAW J. INTELL. PROP. 1, 3-4 (2013).
[129] *See* Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936); *see also* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148-150 (S.D.N.Y. 1924); *see also* Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910).
[130] Shaw v. Lindheim, 919 F.2d 1353, 1356-57 (9th Cir. 1990); Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984).

However, it has failed to provide such elements for musical compositions,[131] which has made the extrinsic test face a difficult application in the courts, even if expert assistance is used.

B. Experts

Similarity is generally established through expert opinion after dissection of the disputed works. While some courts have recognised the need for experts, some courts (in some cases) had discounted them.[132] Courts have in the late nineteenth and early twentieth century, relied on their own musical knowledge[133] and did not use expert testimony, and thus the juries seemed absent.[134] In the case of musical works, experts have gotten greater importance since the technical aspects that musical works have, are unfamiliar to the judge and the jury.[135] Courts, very early on, had addressed the need for expert opinion in cases of disputes regarding musical works.[136] However, it can be seen that before such a need was realised, judges took an egoistic step and relied upon their own musical knowledge to analyse the works.[137] Nevertheless, in the present, the requirement of an expert for the purpose of dissection of work, cannot be denied.

An expert can dissect musical works into its melody, harmony, rhythm, texture, and formal structure for comparison between the works.[138] However, even if there are several elements to musical construction, it is seen that similarities in melody have been the most probative of copying.[139] Further, while musicologists might have the required knowledge and database for search before composing a musical work, others do not. Therefore, the musicologists can sometimes establish similarities, despite the authors not being aware of it.[140] Additionally, there exists a problem of hyper-dissection wherein "overlooking the forest for the trees" takes place.[141] Such issues must be made aware to the experts.

Further, the very nature of popular music is the reason why many works share common elements. Musicians work within a limited boundary of musical elements to make a popular

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131 Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004).
132 *See* Overman v. Loesser, 205 F.2d 521, 524 (9th Cir. 1953); *see also* Supreme Records, Inc. v. Decca Records, Inc., 90 F. Supp. 904, 912 (S.D. Cal. 1950).
133 *See* Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916); *see also* Boosey v. Empire Music Co., 224 F. 646, 647 (S.D.N.Y. 1915).
134 Livingston, *supra* note 13, at 256.
135 *Id.* at 239.
136 *See* Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923).
137 *See* Livingston, *supra* note 13, at 271.
138 *See* M. Fletcher Reynolds, *Selle v. Gibb and the Forensic Analysis of Plagiarism*, 32 C. MUSIC SYMP. 55 (1992).
139 *See* Johnson v. Gordon, 409 F.3d 12, 21 (1st Cir. 2005); *see also* Swirsky v. Carey, 376 F.3d 841, 846-847 (9th Cir. 2004); *see also* Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232-1233 (11th Cir. 2002).
140 *See* Landau and Biederman, *supra* note 104, at 734.
141 Johnson v. Gordon, 409 F.3d 12, 25 (1st Cir. 2005).

musical composition, as there are limited patterns of such musical elements that the consumers prefer (See, **VI (D)** and **VI (E)**). The requirement of familiar chord progression and lyrical themes are some of the reasons for common elements in music. Therefore, the experts should establish which elements used in the work of the plaintiff cannot be protected, taking these limitations into account. The music experts can analyse both the works and provide an opinion as to whether the patterns of notes and chords in the work are likely works of independent creation, works created from common public domain sources, or works created by copying the work of the plaintiff.[142] The experts can dissect the musical compositions and analyse if there is any similarity among the elements of melody, harmony, rhythm, etc. Further, they should also be able to look into the historical context and describe the music's public domain antecedents.[143] Since musical works are largely based on the historical development and prior arts in the field, the greater the knowledge and understanding that one has, the greater the perception of what is original and what is not.[144]

It is also important to note that while expert evaluation is important, experts have reached faulty conclusions.[145] Experts often aggregate their objective findings to come to a subjective conclusion. Thus, while hyper-dissection should be prevented, an expert must also not cross the boundary of the extrinsic test to analyse the "total concept and feel" of the work, which is a part of the intrinsic analysis.[146]

Additionally, courts have also been of the opinion that a party can buy an expert opinion. Therefore, a doubtful functioning of experts can be seen.[147] Further, a musicologist, while may understand and analyse the composition based on music theory, might lack an understanding of the particular nuances of a genre.[148] Therefore, it is of the utmost importance to assure the independence of the experts and that the experts' expertise aligns with the subject matter (genre) of the work, while also making them aware of the boundaries of the extrinsic test. Such expert opinion should be given importance in infringement analyses, even during the intrinsic test. (See, **V (A) (2)**)

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[142] *See* Repp v. Webber, 132 F.3d 882, 886-87 (2d Cir. 1997); *see also* Straughter v. Raymond, CV 08-2170 CAS (CWx) 23, (C.D. Cal. Aug. 19, 2011).
[143] Livingston, *supra* note 13, at 271.
[144] *Id.* at 241.
[145] *See id.* at 279.
[146] *See* Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).
[147] *See* Baron v. Leo Feist, Inc., 78 F. Supp. 686, 686-87 (S.D.N.Y. 1948); Livingston, *supra* note 13, at 273.
[148] *See* Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity Between Musical Works in Copyright Infringement Disputes,* 35 AIPLA Q. J. 331, 345 (2007) [hereinafter "Liebesman"].

V. INTRINSIC TEST (SUBJECTIVE TEST)

Both the intrinsic and the extrinsic tests need to be fulfilled to establish substantial similarity.[149] The subjective intrinsic test is necessary because it helps in determining *"whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."*[150] Herein, it is seen if there are similarities in the "total concept and feel" of the works.[151] Accordingly, an analytical dissection and expert testimonies are said to be inappropriate in this test. In *Shaw*, the Ninth Circuit made it clear that in the intrinsic test, substantial similarity in expression is to be determined depending on the response of an ordinary reasonable person. It does not depend on the type of external criteria and analysis which marks the extrinsic test.[152]

It is important to note that, as decided by the Second Circuit, *"... infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation."*[153] Similarly, the Ninth Circuit, in *Seth Swirsky v. Mariah Carey* provided that *"to pull these elements out of a song individually, without looking at them in combination, is to perform an incomplete and distorted musicological analysis."*[154] It was further stated that elements of a musical work might not be protected individually, but they may be protected when combined.[155] Thus, the extrinsic test is not enough. A musical work consists of elements like rhythm, harmony, and melody.[156] However, similarities between the songs are to be seen in overall sound, groove, and vibe rather than within melody, lyrics, or harmony.[157] For instance, in the case of *Three Boys*¸ substantial similarity was found due to *"a combination of five unprotectable elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) verse/chorus relationship; (5) the fade ending."*[158]

However, in the case of *Williams v. Gaye*,[159] (See, **(VI) (G) (2)**) the jury found infringement simply because the groove of the two songs sounded similar, despite there being several

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[149] *See* Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1076-1077 (9th Cir. 2006).
[150] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).
[151] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002); Sid & Marty Krofft Television Productions., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165 (9th. Cir. 1977); Roth Greeting Cards Co. v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).
[152] Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).
[153] Tufenkian Import/Export Ventures, Inc. v. Moomjy, 338 F.3d 127, 134 (2d Cir. 2003).
[154] Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).
[155] *Id.* at 848; Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003).
[156] Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 273 (6th Cir. 2009).
[157] *See* David Post, *Blurred Lines and Copyright Infringement,* WASHINGTON POST (Mar. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/12/blurred-lines-and-copyright-infringement/.
[158] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000).
[159] Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).

compositional differences.[160] This decision has not considered the history of art and musical composition,[161] as the genre of the music has not been given much consideration. Even if a subjective test is being undertaken, similarities in feel or groove should not solely result in infringement, because such element of "groove" can be fundamental to a specific musical style (genre).[162] Thus, the judgment has been heavily criticised in the musical and the legal world.

Additionally, the intrinsic test is problematic because it requires the jury to analyse the musical work, by disregarding the expert opinion taken during the extrinsic test. It is difficult for a juror to forget what has been explained to him during the extrinsic test, and make a new analysis.[163] In the case of *Williams v. Gaye*, it has been said that the jurors were most likely influenced by Gaye's expert musicologist, while the best source for evaluation of similarity would have been the songs themselves.[164] This decision by the Ninth Circuit was said to definitely lessen outputs from artists.[165]

Further, the requirement to inquire about the "total concept and feel" of the works makes the matter worse. It requires the courts to look into "total concept", although "concepts" are not protected under Section-102 (b) of the Copyright Act.[166] Now, observation of an ordinary observer to determine substantial similarity is the least likely to respect such a boundary.[167] Further, the "feel" of a work can be a result of such elements of the work which are *scène à faire* (See, **VI (G)**), and are outside the scope of copyright protection. Thus, the dissection that takes place in the extrinsic test should not be entirely ignored, but should not be entirely relied upon either.

A. SUBSTANTIAL SIMILARITY

As already mentioned, to establish substantial similarity, both the intrinsic and the extrinsic test needs to be fulfilled. To prove substantial similarity, it should be shown that (a) the defendant

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[160] *See* John Quagliariello, *Blurring the Lines: The Impact of Williams v. Gaye on Music Composition,* 10 HARV. J. SPORTS & ENT. L. 133, 138 (2019).
[161] *See* Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out [162] Olivia Lattanza, *The Blurred Protection for the Feel or Groove of a Song under Copyright Law: Examining the Implications of Williams v. Gaye on Creativity in Music*, 35 TOURO L. REV. 723, 751 (2019) [hereinafter "Lattanza"].
[163] Lisa Field, *Copyright Infringement and Musical Expression: Creating Specific Jury Instructions for Comparing Music* 38 T. JEFFERSON L. REV. 152, 171 (2016) [hereinafter "Field"].
[164] Lattanza, *supra* note 162, at 725-726.
[165] *See* Randy Lewis, *More Than 200 Musicians Rally Behind Appeal of 'Blurred Lines' Verdict,* L.A. TIMES (Aug. 31, 2016), https://www.latimes.com/entertainment/music/la-et-ms-blurred-lines-appeal-musicians-20160831-snap-story.html.
[166] Springman, *supra* note 26, at 580.
[167] *Id.* at 574.

copied from the plaintiff's work and (b) that the copying constituted improper appropriation.[168] While the work of the defendant once needed to be virtually similar to the work of the plaintiff,[169] the current view is that significant parts of the work are also protected by copyright.[170] Exact copying of the work is not required to establish infringement.[171]

1. Qualitative, not Quantitative

Substantial similarity is based on the qualitative aspect of copying, as has been affirmed by courts of various jurisdictions within the US. The question is not "how much" has been copied but rather "what" has been copied.[172] As Judge Learned Hand has rightly remarked, *"no plagiarist can excuse the wrong by showing how much of his work he did not pirate."*[173] In the case of *Universal Pictures Co. v. Harold Lloyd Corp*,[174] it was decided that copyright infringement need not arise due to copying of the entire work or even a large portion of the work, in form or substance. However, it is important to note that there have been attempts by other Courts to set a quantitative ground to determine copying.[175] In the case of *Marks v. Leo Feist, Inc.*[176] (the case is responsible for the "six-bar rule") number of bars that were copied was looked upon by the Second Circuit and it was decided that taking of six bars is not actionable per se. However, courts have moved away from this finding as lesser copying of bars were also found to be actionable.[177] Copying of six-note chorus with similar melodies has been held to infringe copyright protection since the chorus formed the heart of the composition.[178] Copying of "the meritorious part of a song" can amount to infringement.[179] Some portion of musical works can contribute to or showcase the success of the work, and such substantial components, if copied, can easily amount to infringement.[180]

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[168] Stillman v. Leo Burnett Co., Inc., 720 F. Supp. 1353, 1357 (N.D. I11. 1989).
[169] Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L. J. 2055, 2105 (2012).
[170] Jay Dalter, Jr., *Trademark Protection for Industrial Designs*, U. ILL. L. REV. 887, 912-913 (1988).
[171] *See* Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946).
[172] *See* Maura Giannini, *The Substantial Similarity Test and Its Use in Determining Copyright Infringement through Digital Sampling*, 16 RUTGERS COMPUTER & TECH. L.J. 509, 520 (1990).
[173] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).
[174] Universal Pictures Co. v. Harold Lloyd Corporation, 162 F.2d 354, 361 (9th Cir. 1947).
[175] *See* Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music industry*, 4 HIGH TECH. L. J. 147, 163 (1989).
[176] Marks v. Leo Feist, Inc., 290 F. 959 (2d Cir. 1923).
[177] *See* Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 399 (S.D.N.Y. 1952); *see also* Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956).
[178] *See* Boosey v. Empire Music, 224 F. 646 (S.D.N.Y. 1915).
[179] Northern Music Corp. v. King Record Distributing. Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952).
[180] *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).

Similarly, in *Newton v. Diamond*, the Ninth Circuit found that a three-note segment melody was not quantitatively or qualitatively significant to give rise to an infringement.[181] Substantial taking includes qualitative substantial taking, as can be seen in the case of *Harper & Row Publishers, Inc. v. Nation Enterprises*,[182] wherein the Supreme Court found that copying 300 words of a 20,000 words article amounts to substantial taking as it was considered as the "heart of the matter". Qualitative analysis is favoured because signature-type sounds can have large commercial value. As largely observed in the Second Circuit, it is important to note that a "demands test" has been propounded. It sees if the copied work will lead to a decrease in demand of the plaintiff's work.[183] This highlights that the test is a qualitative test.

However, commentators have criticised the court's reliance upon outdated notions of melody, harmony, and rhythm, which are not reflective of the contemporary musical expression.[184] Further, it has been criticised that, application of the tests have arisen the problem of subjective and inconsistent results.[185] Therefore courts should see what "actually is" of qualitative significance rather than "what they think actually is" of qualitative significance. Now, to determine which part of the work has qualitative significance, the court must have some musical knowledge and should not completely ignore the extrinsic test.

2. Ordinary Observer Test

While dealing with the ordinary observer test, the Seventh Circuit provided that the test is to find out if the works are so similar that a lay observer can conclude that the defendant appropriated the protectable aspects of the plaintiff's work by taking that material of substance and value.[186] As provided by the Second Circuit, the test is used to determine *"whether defendant took from the plaintiff's work, so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."*[187] Similarity is determined based on whether an ordinary person can recognize copying of the plaintiff's work in the defendant's work.[188] For instance, the audience test (or the ordinary

[181] Newton v. Diamond, 388 F.3d 1189, 1194-96 (9th Cir. 2004).
[182] Harper & Row v. Nation Enterprises, 471 U.S. 539, 565 (1985).
[183] Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).
[184] *See* Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality of Contemporary Musical Expression*, 6 J. MARSHALL REV. INTELL. PROP. L. 489, 489-91 (2007).
[185] *See* Liebesman, *supra* note 148, at 333-35.
[186] Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir. 1982).
[187] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).
[188] *See* Warner Bros. Inc. v. American Broadcasting Cos., 654 F.2d 204, 208 (2d Cir. 1981).

observer test)[189] was undertaken by the Ninth Circuit to determine if a film infringed a novel.[190] However, such a test remains in use across all circuits while analysing different kinds of work.[191]

The ordinary observer test identifies which work of infringement may act as a market substitute to the copyrighted work, thus taking profits away from the owner of the copyrighted work.[192] In infringement of musical works, the test becomes an ordinary listener test.[193] However, articulation of a listener's experience after listening to the musical work is difficult due to the abstractness that aural perception holds.[194] This demands for a side-by-side comparison of the competing works.[195]

The ordinary observer test has caused confusion and prejudice amongst the jury.[196] Courts play sound recordings to jurors, for them to assess if there is any substantial similarity.[197] Judges can be both over-inclusive and under-inclusive in the assessment of infringement.[198] Judges and jury may find similarities in musical works merely because there exist similarities in performance and basic characteristics of the genre. Further, performances might cover up the similarity that lies in the protected musical components, thus easily fooling a judge.[199]

If a listener does not belong to the audience of the musical work, the listener is less likely to remember and recognize the presence or absence of key original elements.[200] Therefore, jurors are not able to recognize the elements since the songs may not be directed to their usual taste which they are familiar with. Where a listener is not able to draw elements of musical works into familiar structures, the listener's musical memory declines and the person is unable to recognize the expressive content of the composition to determine similarity.[201] In the case of *Dawson v. Hinshaw Music Inc.,* the Fourth Circuit stated that *"only a reckless indifference to common sense would lead a court to embrace a doctrine that requires a copyright case to turn on the opinion of someone who is ignorant of the*

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[189] Carl Sundholm, *Computer Copyright Infringement: Beyond the Limits of the Iterative Test,* 3 SANTA CLARA HIGH TECH. L.J. 369, 373 (2012).
[190] *See* Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 19 (9th Cir. 1933).
[191] *See* Dalton, *supra* note 33 at 27.
[192] Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1254-1255 (2014).
[193] *See* Springman, *supra* note 26, at 574.
[194] *See* W. JAY DOWLING, PERCEPTION OF MUSIC, BLACKWELL HANDBOOK OF PERCEPTION 470-71 (E. Bruce Goldstein ed.) (2001).
[195] Gherman, *supra* note 36, at 504.
[196] *See* Lund, *supra* note 34, at 140.
[197] *Id.* at 147.
[198] Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases,* 19 COLUM.-VLA J.L. & ARTS 109, 128 (1994).
[199] *See* Livingston, *supra* note 13, at 274.
[200] JANE O'DEA, VIRTUE OR VIRTUOSITY? EXPLORATION IN THE ETHICS OF MUSICAL PERFORMANCE 4-17 (2000).
[201] Gherman, *supra* note 36, at 513.

relevant differences and similarities between the two works."[202] Therefore, it is important to determine the narrow-audience for whom the music is made i.e. the "intended audience", rather than simply going with a "lay observer" test.[203]

It is important to note that a lay listener cannot be given so much power that *scène à faire* (See, **VI (G)**) becomes a copyrightable element, as can be seen in the case of *Kroft* where there was sub-conscious inclusion of *scène à faire* as a copyrightable element. Thus, expert testimony is required so that lay listeners can conduct their subjective test with full knowledge and context.[204] Since the ordinary observer test was not able to differentiate the unprotected elements of the work, the Second Circuit came up with the "more discerning ordinary observer test".[205] Further, successive filtering test has been suggested as an addition to the doctrines used by the circuits, during which, elements of the works are determined and further, it is determined if such elements are protected by the copyright laws.[206] However, when it comes to the Ninth Circuit, it might appear that such an additional step is not required as filtration of unprotected elements would already have been done in the extrinsic test, by an expert. Nevertheless, while undertaking the intrinsic test, only subjective analysis is undertaken and the extrinsic test is ignored. Therefore, the possibility of an unprotected element being protected can be observed, like in the case of *Williams v. Gaye.*[207] However, in *Williams v. Gaye*, the problem was with over-reliance upon the extrinsic test. Therefore, while undertaking the intrinsic test, the court should not entirely ignore the findings made in the extrinsic test. However, the court should also not completely depend on the findings of the extrinsic test. Such a situation arises because unprotected elements, together, can form a protectable work[208] and further because, similarity in "feel" of the work alone, while ignoring compositional differences, *scène à faire*, etc., cannot amount to infringement. [209]

VI. ADDITIONAL ISSUES

Additional issues which are general in nature and (mostly) not specific to the Ninth Circuit have also plagued the infringement analysis. For example, even if the tests have been satisfied on the face of it, there might exist justified grounds for copying which the court must also examine.

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[202] Dawson v. Hinshaw Music Inc., 905 F.2d. 731, 735 (4th Cir. 1990).
[203] *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).
[204] Torrean Edwards, *Scène à faire in Music: How an Old Defense Is Maturing, and How It Be Improved,* 23 MARQ. INTELL. PROP. L. REV. 105, 110 (2019) [hereinafter "Edwards"].
[205] Laureyssens v. Idea Group, Inc., 964 F.2d 131, 141 (2d Cir. 1992).
[206] *See* David Nimmer, Richard L. Brenacchi & Gary N. Frischling, *A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases*, 20 ARIZ. ST. L.J. 625, 651 (1988).
[207] Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).
[208] *See* Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004); *see also* Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003).
[209] *See* Lattanza, *supra* note 162, at 750-751.

Similarly, there exist issues with jury instructions and summary judgments, which are specific to the Ninth Circuit. Such issues add to the above-mentioned shortcomings within the tests undertaken by the Ninth Circuit.

A. Jury Instructions

As discussed above, the case of *Skidmore v. Led Zeppelin* (See **III**) highlighted the importance of jury instructions. Jury instructions provide guidance regarding the protected elements of a work. However, this is not the case in the Ninth Circuit when it comes to cases concerning musical infringement, because of the lack of a set of specific jury instructions with regards to musical infringement. This lacking leaves the test in the Ninth Circuit open to interpretation by jurors and courts, which results in confusion and chaos. Therefore, a model jury instruction needs to be added, which instructs the jury on the test, identification of protectable musical elements, etc.[210] Typical jury instructions as provided in the Ninth Circuit, in cases of alleged infringement, has disadvantaged the jurors due to the exclusion of specificity with regard to musical elements which forms the basis for their analysis.[211]

B. Issues with Summary Judgments

Plea for summary judgment can be observed in a lot of copyright disputes. A summary judgment can be provided in favour of both the defendants or the plaintiffs. It must be noted that to grant a summary judgment, only the extrinsic test is important as the subjective test is left to the jury.[212] Summary judgement is granted to the plaintiff where the works are overwhelmingly similar. It is granted to the defendant when the works are so dissimilar that an infringement claim would be without merit.[213] A summary judgment can be allowed in favour of the defendant where the defendant has copied mere ideas. Also, where copying of *scène à faire*, copying of mere facts, or the expressions which are obviously dissimilar have occurred, summary judgment can be provided in favour of the defendant.[214] In the case of *Narell v. Freeman*,[215] it was decided that *"...summary judgment is appropriate [in favour of the non-moving party (defendant)] if...no reasonable juror could find substantial similarity of ideas and expression."* Summary judgment should only be provided

[210] Field, *supra* note 163, at 168-169.
[211] *Id.* at 175.
[212] Seth Swirsky v. Mariah Carey, 376 F.3d 841, 845 (9th Cir. 2004); *see also* Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1477 (9th Cir. 1992).
[213] Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1330 (9th Cir. 1983).
[214] Frankel, *supra* note 24, at 441.
[215] Narell v. Freeman, 872 F. 2d. 907, 909 (9th Cir. 1989).

(in favour of the plaintiff) only in cases where the similarities are too obvious.[216] Here again, the problems observed in the case of extrinsic test comes into play. Further, courts should be careful not to look into subjective determination of similarity or dissimilarity.[217] However, courts have dealt with the findings of a reasonable juror as a ground to grant or dismiss summary judgment.[218]

However, summary judgment on the issue of substantial similarity is said to be unusual.[219] It is not favoured while dealing with substantial similarity issue.[220] Summary judgment has been frowned upon since the examination of substantial similarity is a question of fact.[221] But, the extrinsic test is largely a legal test rather than factual. The fact-based nature of the issue of substantial similarity, makes summary judgments rare.[222] Despite this, summary judgments in cases of substantial similarity have been pleaded substantially.

Defending a copyright action has become more expensive as cases which could have once ended in summary judgment itself, goes on to trial and appeal.[223] Thus summary judgment holds importance. On practical grounds, rather than disfavouring summary judgments completely, courts should provide such judgments in cases where there is absolute obviousness or non-obviousness of similarity or non-similarity, based on both legal and factual analysis. Such judgments should however, be rare.

C. Subconscious/Unconscious Copying

The terms "subconscious copying" and "unconscious copying" have been used synonymously in infringement cases.[224] Musicians and people are exposed to a large number of music every day, which gets stored in their memory consciously and subconsciously.[225] Further, contemporary music is consciously or subconsciously influenced by the previous generation of composers.[226] Subconscious copying occurs when a musician makes use of a combination of sounds that would

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[216] *See* Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366, 1369 (S.D.N.Y. 1969); Shonack, *supra* note 67, at 307.
[217] *See* Kouf v. Walt Disney Pictures & Television, 16 F.3d. 1042, 1045 (9th Cir. 1994).
[218] Narell v. Freeman, 872 F. 2d. 907, 910 (9th Cir. 1989); *Id.*
[219] T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112 (1st Cir. 2006).
[220] Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985); *see also* Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990).
[221] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980).
[222] Axelrod Cherveny Architects v. Winmar Homes, 2:05-cv-711-ENV-ETB, 14 (E.D.N.Y. Mar. 6, 2007).
[223] Landau and Biederman, *supra* note 104, at 725-726.
[224] Christopher Brett Jaeger, *Does That Sound Familiar: Creators' Liability for Unconscious Copyright Infringement,* 61 VAND. L. REV. 1903, 1905 n.9 (2008) [hereinafter "Jaeger"].
[225] Livingston, *supra* note 13, at 269-70.
[226] Livingston, *supra* note 13, at 290.

be pleasing to the listeners because *"his subconscious [mind] knew that [such combination] had already worked in a song his conscious mind did not remember."*[227] However, such copying would not escape infringement liability.[228] The doctrine of unconscious copying provides that if one produces from memory, a thing that his mind has been familiar with, it amounts to infringement. It is not relevant if the defendant unconsciously followed the plaintiff's work.[229]

While independent creation is a complete defence against copyright infringement,[230] subconscious copying is not.[231] Now, herein, it is important to note that the theory of subconscious copying is largely seen in musical works.[232] Relative simplicity, commonality within the genre, rich shared musical heritage and daily exposure to music, can lead to the creation of two similar works.[233]

Implicit memories, which are a part of the "unconscious", can affect behaviours even though the person is not aware of their influence.[234] However, subconscious copying being put on the same pedestal as deliberate copying is wrong. Courts treat unconscious copying as deliberate copying, making the unconscious copier liable for infringement.[235] Further, lack of awareness of copying is immaterial while determining infringement.[236] Such practices will negatively affect creative expressions and moral fairness.[237]

1. Plaintiff-Centric-Rule

The doctrine of sub-conscious copying might lead to a denial of the fact that copying does not always amount to infringement in the contemporary world.[238] The doctrine puts a substantial burden on the defendants.[239] For instance, in *Fred Fisher, Inc. v. Dillingham* in the US Court for the Southern District of New York, Judge Hand agreed with the defendant's argument of not having

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[227] Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180 (S.D.N.Y 1976).
[228] *Id.* at 180-181; Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S. D.N.Y. 1942).
[229] Edwards & Deutsch Lithographing Co. v. Boorman, 15 F.2d 35, 37 (7th Cir. 1926); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924).
[230] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).
[231] ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983).
[232] *See* Rebecca Tushnet, *Worth A Thousand Words: The Image of Copyright*, 125 HARV. L. REV. 683, 729 n.209 (2012).
[233] Livingston, *supra* note 13, at 282.
[234] *See* Howard Shevrin & Scott Dickman, *The Psychological Unconscious: A Necessary Assumption for All Psychological Theory?*, 35 AM. PSYCHOLOGIST 421, 423 (1980).
[235] *See* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 479-81 (2007).
[236] *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1942).
[237] Jaeger, *supra* note 224, at 1927; *see also* Kimberly Shane, *The Unconscious Erosion of Copyright Legitimacy by the Unconscious Copying Doctrine*, 13 U. DENV. SPORTS & ENT. L.J. 53, 67 (2012) [hereinafter "Shane"].
[238] Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAGAZINE (Feb. 2007), https://harpers.org/archive/2007/02/the-ecstasy-of-influence/.
[239] *See* Landau and Biederman, *supra* note 104, at 733 n.74.

copied the work consciously but the court was constrained to find infringement due to the virtual identity of the works and lack of a common prior source.[240] Additionally, despite long gaps of time between access and subconscious copying, courts have held the defendant liable.[241]

In *ABKCO*, where sub-conscious copying was established by the Second Circuit, it was held that *"the similarity was so striking and where access was found, the remoteness of that access provides no basis for reversal [of the finding of subconscious copying]"*[242] Similarly, in *Three Boys Music*, it was decided that the defendants must have subconsciously copied the plaintiff's work, even if there was a weak case of access.[243] The court held the defendant liable for infringement. The jury's finding of access was based on the defendant's admitted admiration of the plaintiff's music, and radio and television airplay in the mid-1960s. The defendant's exposure to the plaintiff's song was twenty-five years before his own song was written. Further, the defendant had no recollection of having heard the song, unlike in the case of *ABKCO Music*.[244]

Subconscious copiers might raise the argument of independent creation as a defence, as they believe that they have created the work independently.[245] Subconscious copying is difficult to be distinguished from the defence of independent creation.[246] Further, evidence of widespread dissemination may also support the theory of subconscious copying.[247] Therefore, the doctrine weakens even the defence of independent creation that is available to the defendant. Further, since wide dissemination can be easily done in the present, subconscious copying can be easily established as well.

Currently, subconscious copying can merely lessen the damages liability of the defendant.[248] Courts should allow subconscious copying as a defence, and should allow a rebuttable presumption that all copying is conscious. It has been argued that such defence should either be an entirely separate defence or a sub-set defence to the defence of independent creation.[249] Such defence should be allowed because it is unreasonable for courts to punish some artists, while blindly accepting that the artists who have been awarded the copyright (plaintiffs) have created

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[240] *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 152 (S.D.N.Y. 1924).
[241] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 483 (9th Cir. 2000).
[242] ABKCO Music, Inc v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983).
[243] *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 484-486 (9th Cir. 2000).
[244] *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998-999 (2d Cir. 1983).
[245] Jaeger, *supra* note 224, at 1912-1913.
[246] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1008-12 (1990).
[247] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000).
[248] Livingston, *supra* note 13, at 268.
[249] Jaeger, *supra* note 224, at 1925.

their works independent of any borrowing, influence, and their sub-consciousness.[250] Additionally, subconscious copying, if taken as a defence, serves the economic and moral aims of the copyright law itself.[251] However, "defence" as referred in this paragraph means "absolute defence from punishment" and not that the subconscious copier should be provided with copyright as well, because intention is irrelevant while determining if infringement has taken place. Again, however, it must be noted that the defence of subconscious copying should also be rare. Else, every defendant would take the defence of subconscious copying and intentional copying would go unpunished.

D. Limited Scope of Originality

While dealing with elements of musical work like rhythms and tempos, it has been observed that *"...these appear to have been long since exhausted; originality of rhythm is a rarity, if not an impossibility."*[252] Therefore, such limitations decrease the likelihood that similarities alone can prove copying, as common prior source can justify the similarity among the two works.[253] The tonality to the western music limits composition to finite boundaries and thus, similarity is inevitable. Further, although independent creation negates plagiarism, there exists an inevitable possibility of similarity among music based on the same genre.[254] Musical styles like country-western, hip hop, rock, blues, etc. have certain rhythms and musical motives. Therefore, a musical work is limited to some compositional choices, so as to comply with the expectations and requirements of the genre that the music intends to be based on.[255] This issue can be observed in the *Williams v. Gaye* judgment (See, **VI (G) (2)**). The Ninth Circuit as well has used this idea of "limited-ness" in the case of *Ets-Hokin v. Skyy Spirits*, wherein it decided that there are limited ways to photograph a vodka bottle and thus no copyright infringement can be made.[256]

Every artist is a finite source.[257] While considering the highly controversial issue of self-plagiarism, it has been argued that there exists only limited ways in which a single personality expresses himself. Therefore, repetition within his works is inevitable.[258] Thus, an artist is largely limited due to the limited elements available for composition of a music and by his own abilities.

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[250] Shane, *supra* note 237, at 66.
[251] Jaeger, *supra* note 224, at 1928.
[252] Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952).
[253] *See* Strachborneo v. Arc Music Corp., 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).
[254] Livingston, *supra* note 13, at 227.
[255] *Id.* at 262.
[256] *See* Ets-Hokin v. Skyy Spirits, Inc., 255 F.3d 1068, 1082 (9th Cir. 2000).
[257] *See* Esquire v. Varga Enters. Inc., 81 F. Supp. 306, 307-08 (N.D. I11. 1948).
[258] *See* Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 543-44 (1992).

This further validates an artist being inspired by the works of other musicians. Thus, courts must recognise the limited scope of originality that exists for musical works.

E. Pleasing to the Ear

Judge Learned Hand once famously observed that *"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."*[259] There is an inherent limitation to the combination of notes that will sound pleasing or acceptable to a listener due to the conventional tonal practices in western musical works. It is universal human nature to prefer certain sounds, which again limits the scope of the combination of notes.[260] The restriction on the key signatures in music exists because they are what is pleasing to the ear.[261] Since musical compositions are based on common vocabulary and must be pleasing to one's sense of hearing, subconscious copying might exist in almost all works.[262] Further, popular music follows well-worn grooves, which again limits invention and variety in musical works.[263]

In copyright cases, one can observe that while the protection provided is broad, there are only a limited number of ways in which ideas can be expressed.[264] Only a limited number of chords and notes are available for the composition of musical works.[265] The Second Circuit, in the case of *Marks v. Leo Feist*, shows how the inherent limitations in musical components and the need for compliance with the consumer's preference (and their ability to sing and perform the song) can create similarity among musical works. It was decided that *"To be successful, it must be a combination of tones that can be played as well as sung by almost anyone. Within these limits, there will be some similarity of tone succession."*[266] When it comes to pop songs, the public seeks simple tonal-functional harmony, and the number of possible variations to the system is scarce.[267] Therefore, even for compliance with the consumer's need, repetition is inevitable.

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[259] *Darrell v. Joe Morris Music Co.*, 113 F. 2d 80 (2d Cir. 1940).
[260] *See* Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1895-96 (2018).
[261] *See* Grant Beiner, *Copyright in Music in U.S. Interpretation: The Case for Moving away from Easy and Nonsensical Findings of Copyright Infringement*, 60 S. TEX. L. REV. 459, 493 (2019) [hereinafter "Beiner"].
[262] Livingston, *supra* note 13, at 270.
[263] David W. Melville, *An Author's Right to Return to a Theme: Protecting Artistic Freedom in Visual, Musical and Literary Works*, 14 LOY. L.A. ENT. L. J. 427, 454 (1993-1994).
[264] *See* Emily Ranger-Murdock, *"Blurred Lines" to "Stairway to Heaven": Applicability of Selection and Arrangement Infringement Actions in Musical Compositions*, 67 UCLA L. REV. 1066, 1099 (2020).
[265] Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).
[266] Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923).
[267] Gherman, *supra* note 36, at 497-98.

F. Looking into the Past

It is important to note that earlier works inevitably influence an artist. Today, songs are inspired in parts by some musical genre, or artists, or even previous songs.[268] Composers from the US were, by the end of the 19th century, generating their musical works based on the European models.[269] Different pitch organisations, whether melodic, harmonic, or contrapuntal, and corresponding rhythms, beats, accents, and formal structure, are based on organisation of eight notes on or around one principle of tone (tonality).[270] In the 20th Century, the predominant style of contemporary music like country, folk, jazz, etc. followed the tenets of traditional tonality.[271] Therefore, historically, musical elements have been borrowed and composed within a narrow boundary of tonality.

Borrowing from past works is necessary in the music industry,[272] as it is a pervasive part of producing music.[273] Given the narrow field for the composition of musical works, musicians step on each other's toes for "creative necessity"[274] and borrow from other works of music.[275] Therefore, courts should acknowledge that borrowing from past musical works should be allowed to some reasonable extent especially given the fact that historically, music has developed through part-borrowings. Such argument is even more true considering the inherent limitation of elements faced when composing a musical work. However, such observations were not made in the highly criticised case of *Williams v. Gaye.* (See, **VI (G) (2)**)

G. Scène à faire

Not all copying amounts to copyright infringement,[276] as not all elements of musical work can be copyright protected.[277] "*The mere fact that a work is copyrighted does not mean that every element of the work*

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[268] Taylor Turville, *Emulating vs. Infringement: The "Blurred Lines" of Copyright Law,* 38 WHITTIER L. REV. 199, 218 (2018).
[269] RICHARD CRAWFORD, AMERICA'S MUSICAL LIFE 372-82 (2001).
[270] Livingston, *supra* note 13, at 239-240.
[271] *Id.* at 250.
[272] Carys J. Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons,* 10 OSGOODE LEGAL STUDIES RESEARCH PAPER SERIES 43, 48 (2014).
[273] Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context,* 84 N.C. L. REV. 547, 571-72 (2006).
[274] *See* Robert Rogoyski, *The Melody Machine: How to Kill Copyright, and Other Problems with Protecting Discrete Musical Elements,* 88 J. PAT. & TRADEMARK OFF. SOC'Y 347, 409 (2006).
[275] *See* J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection,* 10 MICH. TELECOMM. & TECH. L. REV. 407, 429 (2004).
[276] *See* Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).
[277] *See* Jeffrey Cadwell, *Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement,* 46 SANTA CLARA L. REV. 137, 166-67 (2005).

may be protected."[278] Elements of musical works like a key, meter, tempo, common song structures, common chord progressions, common melodies and, common percussive rhythms should be unprotected.[279]

Scène à faire, is a French expression that literally means "scene which 'must' be done".[280] Judge Yankwich introduced the doctrine of *scène à faire* to the US copyright law in 1942.[281] It is a theatre term which means *"the most important scenes in a play or opera, made inevitable by the action which leads up to it."*[282] However, courts struggle to determine which elements form *scène à faire*.[283]

Scène à faire can be a defence even in the presence of substantial similarity.[284] In the case of *Cain v. Universal Pictures Co.*,[285] it was decided that no infringement can be made out because the thematic commonality of the "scenes" was "common faire". In the legal world, it signifies that new works can come from a common idea which is germane to the genre.[286] *Scène à faire* flows from the theme itself and not from minds. Thus, they should not be copyright protected.[287] However, for instance, it is again important to note that the larger genre of "hip-hop" cannot be said to be a *scène à faire*.[288] *Scène à faire* prevents ownership of such elements of work that must not be owned.[289] Works under Section 102 (b) of the Copyright Act and *scène à faire* are placed outside the scope of copyright protection.[290] Since, infringement can arise only if there are similarities in protected elements of the works,[291] similarity of *scène à faire* among two works, does not amount to infringement. Further, Adorno's theory provides that the two essential elements of popular music are standardization and pseudo-individualization.[292] Therefore, protecting essential material of any composition would hinder the ability of the other composer.

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[278] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991).
[279] Griffin v. Sheeran, 351 F. Supp. 3d 492, 497 (S.D.N.Y. 2019).
[280] Schwarz v. Universal Pictures Co., 85 F. Supp. 270, 275 (S.D. Cal. 1945).
[281] Leslie A. Kurtz, *Copyright: The Scenes a faire Doctrine*, 41 FLA. L. REV. 79, 80 (1989).
[282] Edwards, *supra* note 204, at 108; *see also* Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003).
[283] *See* Edwards, *supra* note 204, at 110.
[284] *See id.* at 106.
[285] *See* Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).
[286] *See* ETS-Hokin v. Skyy Spirits, Inc., 255 F.3d 1068, 1082 (9th Cir. 2000).
[287] MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190, 194 (2d Cir. 2004).
[288] Swirsky v. Carey, 376 F.3d 841, 850 (9th Cir. 2004).
[289] *See* Patrick Metzger, *The Millennial Whoop: The Simple Melodic Sequence That's Showing Up All Over Contemporary Pop*, Brow Beat Slate's Culture Blog, (Aug. 29, 2016, 09:45 AM), : https://slate.com/culture/2016/08/the-millennial-whoop-the-simple-wa-oh-ing-melodic-sequence-showing-up-all-over-pop.html; *see also* Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986); *see also* Gates Rubber Co. v. Bando Chemical Indus., Ltd., 9 F.3d 823, 838 (10th Cir. 1993).
[290] Springman, *supra* note 26, at 572-573.
[291] *See* Gates Rubber Co. v. Bando Chemical Indus., Ltd., 9 F.3d 823, 834 (10th Cir. 1993).
[292] *See* RICHARD MIDDLETON, STUDYING POPULAR MUSIC 34-63 (1990).

Contemporary musical works are similar to each other, particularly when both are in the same genre.[293] Taking the example of the blues genre, the "walking" bass line might as well be a *scène à faire.* Further, the genre is based on the same "1/4/5" chord structure.[294] Now, for the jurors to accept such similarity, they must hold some musical knowledge.[295] Based on the similarities observed in a genre, it has been observed that, in some way, "feel" and "groove" are analogous to the *scène à faire* in a musical work.[296] This poses a large difficulty because, while dealing with alleged infringement cases, courts undertake a subjective test, wherein such elements are analysed. Specifically talking about the Ninth Circuit, the court considers the "feel" of the work in its intrinsic test, and has also found infringement based on similarity of the "groove" of the musical work. Judges must hold knowledge regarding such issues to correctly analyse infringement cases.

Courts have used the "useful article doctrine" and separated useful features from aesthetic features, in the context of copyright. Using this doctrine, courts provide protection to aesthetic features that are separable from the subject matter's useful application. However, such doctrine has largely been limitedly used for pictorial, graphical, and sculptural works.[297]

1. Smith v. Micheal Jackson

Micheal Jackson as well had to defend himself in an alleged copyright infringement case (*Smith v. Jackson*).[298] In an appeal to the Ninth Circuit by the plaintiffs, the court applied the extrinsic-intrinsic test to determine substantial similarity. In this case, the plaintiff forwarded the argument that there is a "presumption of originality" established by the certificate of copyright registration, even in case of a question as to whether certain motives constitute *scène à faire.* The lower court had held that "motives" from the song were unprotected *scène à faire* since they were so common. The court, during appeal, referred to the case of *Apple Computer, Inc.*,[299] wherein, the originality inquiry and *scène à faire* inquiry were dealt with separately. Thus, the Ninth Circuit, in the appeal, stated that the presumption of originality as accorded by a registration certificate cannot determine if some elements are copyrightable or not. It only validates the ownership of

[293] Moore v. Columbia Pictures Industries, Inc., 972 F.2d 939, 946 (8th Cir. 1992).
[294] *See How to Play the Blues: Chords, Patterns and Fills for Major and Minor Blues*, Guitar Player (April 14, 2020), https://www.guitarplayer.com/lessons/how-to-play-the-blues-chords-patterns-and-fills-for-major-and-minor-blues.
[295] *See* Springman, *supra* note 26, at 590.
[296] Lattanza, *supra* note 162, at 750.
[297] Gherman, *supra* note 36, at 500-501.
[298] Smith v. Jackson, 84 F.3d 1213 (9th Cir. 1996).
[299] *See* Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1444-45.

copyrightable work. The court in *Smith v. Micheal* also noted that proof of access is irrelevant for determining whether the similarity is due to unprotected *scène à faire*.[300]

2. Williams v. Gaye

The case of *Williams v. Gaye*[301] was unique because the two-musical works in dispute did not have similar melodies. The songs did not even share the same melodic phrase. The songs did not have any sequence of chords (not even two), played in the same order, for the same duration. The songs had differences in song structures and had no common lyrics.[302] The Ninth Circuit in the case improperly expanded the scope of copyright protection to the groove or feel of the song. To say that something "sounds like" the other, does not amount to copyright infringement.[303] The judgment in *Gaye* has essentially has protected ideas, which clearly goes against the intent of copyright protection, as provided in Section 102(b) of the Copyright Act.[304] The phrases with six consecutive eight notes in "Blurred Lines" (a song by William and others) and "Got to Give it up" (a song by Marvin Gaye) should have been considered as *scène à faire,* as such notes can also be found, for example, in the song "Thrift Shop" by Macklemore, Fetty Wap's "Trap Queen", Selena Gomez's "Bad Liar" and Ariana Grande's "breathin".[305]

In this case, Pharrell Williams, Robin Thicke, and others were sued by the family of Marvin Gaye for appropriation of a melody present in one of the Marvin Gaye's songs. Infringement was established based on groove and melody of the songs. However, the court was unable to distinguish between what is protected and what is not under the *scène à faire* doctrine. Attorneys of Thicke stated that the jury blurred the lines between what is protected and what is not, and that the musical style (genre) and the groove in Marvin Gaye's song were unprotected. The parties had accepted that their musical work was inspired by Marvin Gaye. However, such acceptance should not have influenced the court's decision because, as has been mentioned above, there is a large difference between "being inspired" and "infringement". Further, it is said that Gaye's song "Got to Give it Up" was itself inspired by Johnnie Taylor's "Disco Lady".[306] Therefore, the judgment is largely faulty. The protection provided to the groove of the song was

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[300] Smith v. Jackson, 84 F.3d 1213, 1220 (9th Cir. 1996).
[301] Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).
[302] Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. CAL. L. REV. 67, 67-68 (2018) [hereinafter "McPherson"].
[303] Tim Wu, *Why the "Blurred Lines" Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), https://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out.
[304] Copyright Act of 1976, 17 U.S.C. § 102(b); McPherson, *supra* note 302, at 68.
[305] Paymaneh Parhami, *Williams v. Gaye: Blurring the Lines of Copyright Infringement in Music*, 34 BERKELEY TECH. L.J. 1113, 1141 (2019).
[306] McPherson, *supra* note 302, at 74-76.

inappropriate as protectable elements like melody and lyrics were completely different.[307] Lack of proper instruction, or understanding of *scène à faire*, perhaps lead to an improper holding of infringement.[308] However, *Skidmore v. Zeppelin*, is thought to mark an end to the curse of "Blurred Lines".[309]

H. Functional Feature, Creativity and, Originality Requirement

Individual elements such as notes or scales should not be protected by copyright.[310] Basic musical harmonies are too unoriginal to provide them with copyright protection.[311] A twelve-bar blues harmonic progression should be unprotectable because of the functional feature that it lacks.[312] It has been argued that the doctrine of functionality, as can be seen in trademark laws, are to be applied so as to determine if protection to basic harmonic progression is to be provided or not.[313]

Unlike in cases of infringement of melodies, cases on infringement of lyrics are not confusing. In the case of *Hall v. Swift*, the chorus of Taylor Swift's Song "Shake It Off" was alleged to have infringed the song "Playas Gon' Play". The case concerned allegation of infringement based on the chorus which uses two three-word phrases i.e., "haters gonna hate" and "players gonna play". However, the district court found that the short phrases were unprotected as they were not sufficiently creative. It was further decided that while the amount of creative input required to be paid is low, it is not negligible. However, upon appeal to the Ninth Circuit, the decision of the district court was reversed and remanded. Nevertheless, what needs to be noted is that the Ninth Circuit did not state that there was a copyright infringement. It merely stated that *"because the absence of originality is not established either on the face of the complaint or through the judicially noticed matters, we reverse the district court's dismissal."* Currently (after the remand), the case can go to trial, because Taylor's request for a summary judgement has been denied.[314] Similarly, it has been

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[307] David Post, *Blurred Lines and Copyright Infringement,* WASHINGTON POST (Mar. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/12/blurred-lines-and-copyright-infringement/.
[308] *See* Edwards, *supra* note 204, at 112.
[309] *See* Ben Sisario, *The 'Blurred Lines' Case Scared Songwriters. But Its Time May Be Up.*, N.Y. TIMES (Mar. 24, 2020), https://www.nytimes.com/2020/03/24/arts/music/blurred-lines-led-zeppelin-copyright.html.
[310] Skidmore v. Zeppelin, 905 F.3d 1116, 1126 (9th Cir. 2018).
[311] Gherman, *supra* note 36, at 489.
[312] *Id.* at 484.
[313] *Id.* at 489.
[314] Hall v. Swift, No. 18-55426, 2-3 (9th Cir. 2019); Amanda Holpuch, *Taylor Swift Copyright Lawsuit May Go to Trial, Judge Rules,* N.Y. Times (December 10, 2021), https://www.nytimes.com/2021/12/10/arts/music/taylor-swift-lawsuit-shake-it-off.html

decided in another case that the use of the phrase "party and bullshit" is not enough to amount to infringement.[315]

Musical composition consists of musical notes, chord progression, lyrics, melodies, and anything with a spark of creativity and originality.[316] In the case of *Newton v. Diamond*,[317] the Ninth Circuit decided that *"C-D[b]--C, over a held C note…, lacked sufficient originality to merit copyright protection."* However, where a sequence of notes becomes protectable cannot be pinpointed. Further, the court's analysis of originality while dealing with melodies appears to lack formal guidelines.[318] Therefore, due to the very nature of musical compositions, there is difficulty in drawing the line from where "creativity" begins and with it, copyright protection. Thus, experts and judges should inquire together.

VII. SUGGESTIONS AND CONCLUSION

Led Zeppelin has faced many infringement allegations.[319] It can be observed that artists like Michael Jackson and Lionel Richie (Prince) were sued for copyright infringement half a dozen times or more, per year. Most of them were based on an outlandish accusation of access. Further, given the monetary stake at hand, copyright disputes are brought to court against popular music which creates the problem of "hits bring writs". However, the accusations, however far-fetched, consume the defendant's time and money. In the English Legal System, there are far fewer copyright infringement cases than in the US. This might be because of the requirement on the losing party to pay the other party's court costs and attorney's fees.[320] In the US as well, it has been decided in a case concerning infringement of musical work, that *"blatant disregard for the law warrants an award of cost and attorney's fee."*[321] If such an approach can be a practise, it can help in reducing frivolous litigations in the first place.

A consolidated test was developed by the Second Circuit[322] and has been adopted by many other circuits as well. This approach combines the extrinsic-intrinsic approach to one single inquiry. While the lay observer test is similar to that of the Ninth Circuit, one distinct advantage of the

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315 Oyewole v. Ora, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018).
316 Coe W. Ramsey & Amanda M. Whorton, *Music Law 101: What Does Copyright Law Protect?*, Reverbnation Blog (April 25, 2018), https://blog.reverbnation.com/2018/04/25/music-law-101-what-does-copyright-law-protect.
317 Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003).
318 Johannes Hoffman, *Breaking up Melodic Monopolies: A New Approach to Originality, Substantial Similarity, and Fair Use for Melodies in Pop Music*, 28 J.L. & POL'Y 762, 780 (2020).
319 *See* Skidmore v. Zeppelin, Plaintiff's Complaint, (U.S. Dist. Court, Eastern Dist. of PA), http://business.cch.com/ipld/zeppelincomplaint.pdf
320 Landau and Biederman, *supra* note 104, at 729-731.
321 Tempo Music, Inc. v. Christenson Food & Mercantile Co., 806 F. Supp. 816, 821 (D. Minn. 1992).
322 Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

consolidated approach is that there is no loss of information as can be observed while moving from the extrinsic test to the intrinsic test.[323] Such a system can be adopted by the Ninth Circuit to deal with the issue of information flow between extrinsic and intrinsic tests. While the intrinsic test is said to be independent of the extrinsic test, there remains a need to communicate some findings from the extrinsic test to the next stage of intrinsic test. Similarly, there remains an issue with the court's analysis being entirely clouded by the extrinsic test. A simple consolidated approach can help resolve such issues. Further, a logical end-all solution to the problems explained above might be to consolidate extrinsic-intrinsic test to a single inquiry such that the judges and the experts can work together.

While the latest decision on the *Skidmore v. Zeppelin* has helped the Ninth Circuit to come halfway on the "stairway to better copyright protection", we can observe from the above texts that there are other shortcomings as well. Lack of court's experience and familiarity with musical copyright issues, along with unpredictability and biases of juries[324] has led to contradictory and confusing results at the district court level. Judge Learned Hand had mentioned (although in relation to patent dispute) that *"I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these."*[325] A similar situation can be seen in musical works, where juries and judges, unfamiliar with musical elements, have the authority to make decisions regarding their originality. Nearly all jurors face difficulty in separating and identifying protected and unprotected elements in a musical work's melody, harmony, genre, rhythm, chord structure, progression, etc.[326] Therefore, the requirement of musical knowledge among judges and juries is important to decide on a copyright case. For example, in England, such cases were routinely put before Mr. Justice Whitford, who was an experienced musician, with knowledge both in law and music.[327] Thus, education of music to a juror is a solution.[328] In line with this suggestion, it can be said that the jury should be replaced with a panel of musicologists and music theorists.[329] In addition, the "more discerning ordinary observer test" and consolidated approach can be introduced in the Ninth Circuit.

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[323] Springman, *supra* note 26, at 581.
[324] Landau and Biederman, *supra* note 104, at 737.
[325] ParkeDavis & Co. v. H.K. Mulford Co., 189 F.95, 115 (S.D.N.Y. 1911).
[326] Springman, *supra* note 26, at 575.
[327] Landau and Biederman, *supra* note 104, at 731.
[328] *See* Maureen Baker, *La[w]: A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1619 (1992).
[329] Beiner, *supra* note 261, at 495.

Establishing a uniform approach throughout the nation, for the determination of infringement of musical works is a logical solution.[330] This further prevents the issue of forum shopping among the circuits.[331] The paramount goal of copyright law is to enhance predictability and certainty of copyright ownership,[332] and such uniformity can help towards this goal. The outcome of a copyright dispute was said to be difficult to predict when the inverse ratio rule and the idea-expression dichotomy came into play.[333] Overruling such confusing judge-made law (i.e., the inverse ratio rule) has been welcomed. Even the Sixth Circuit has recently questioned the application of the inverse ratio rule.[334] However, again, more clarity and certainty need to be brought in other tests and practices of the courts. Due to the presence of such unascertained practices in the courts, it can be observed that while the originality requirement for copyright protection is quite low, in the musical world, the requirement for originality is quite high which is akin to legal novelty,[335] thus violating the basic principle of copyright law. However, it must also be noted that absolute test for infringement can only be a myth due to the very nature of musical works and thus, the aim should be to make the tests as certain as possible rather than aiming for absolute certainty.

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[330] Jamie Walsh, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DEPAUL-LCA J. ART & ENT. L. 261, 306 (2006).
[331] Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL'Y 1375, 1418 (2007).
[332] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989).
[333] Anway, *supra* note 102, at 465 n.129.
[334] Criag B. Whitney, *The Inverse Ratio Rule Maybe On Its "Last Legs" in the Sixth Circuit,* Mondaq (June 2, 2020), https://www.mondaq.com/unitedstates/copyright/944892/the-inverse-ratio-rule-may-be-on-its-last-legs-in-the-sixth-circuit.
[335] *See* CRAIG JOYCE ET AL., COPYRIGHT LAW 84-86 (7th ed. 2007).