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Conquering Copyright: Why Copyright Needs to be Modernized Based on Practical Illustrations of Inconsistent Copyright Precedent

SaiPranay Vellala

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**CONQUERING COPYRIGHT: WHY COPYRIGHT NEEDS
TO BE MODERNIZED BASED ON PRACTICAL
ILLUSTRATIONS OF INCONSISTENT COPYRIGHT
PRECEDENT**

SaiPranay Vellala *

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I. INTRODUCTION

Music influences humankind. Whether the form of music is an orchestral symphony evoking sadness when a fan-favorite movie character dies, a song chanted by hundreds of people symbolizing their longing for freedom and equality, or a tune being used for an ancient religious chant, music permeates every aspect of human life. Given the importance of music in our society, one would assume that the creators of the music would be fairly and equally treated in the legal system—unfortunately, however, they are often not.

Musicians possess one of humankind’s most unique abilities: transforming noise and chaos into melodies that strike a chord with the listener’s emotions. And when a musician feels confident enough in their composition, they publish their music to the world, presuming copyright law affords protections. To their dismay, a musician’s hopes for equal protection under the law is often unsatisfied. A lesser-known musician will generally have a more difficult time proving copyright infringement with balancing tests such as the Inverse Ratio Rule. Take, for example, two musicians: an indie jazz guitarist (“Créateur”) with a studio in Nashville, Tennessee, and a major music producer (“Hans Zimmer”) with a studio in Los Angeles, California.

Créateur, the indie jazz guitarist, recently released his music on Spotify. A month before releasing his music, Créateur watched a Marvel Cinematic Universe film in theatres on box office release day with a movie soundtrack composed by Hans Zimmer. Créateur realized that the soundtrack during the end credits had some similarities to his own music. Despite the similarities, Créateur was confident his ideas were going to be a big hit, so he still released his music on Spotify. Flash-forward to today, Créateur was served with a lawsuit for copyright infringement, and the complaint made sure to mention that Créateur saw the Marvel movie and heard the end credit theme.

Depending on where the complaint was filed, the outcome of the case and the substantive analysis conducted may be totally different. Under one of the currently endorsed rules in the Sixth Circuit, because the complaint alleged that Créateur heard Hans Zimmer’s music, the allegedly copied

music does not actually have to be *that* similar.¹ Even with a select few similarities between the music pieces, Créateur might be infringing Hans Zimmer’s copyright—just because Créateur heard Hans Zimmer’s music. This seems unintuitive. The mere fact that Créateur heard Hans Zimmer’s work (establishing access in the actual copying analysis) favors a finding of copyright infringement, even though the pieces might not actually be *that* similar.

Because Créateur is based in Nashville—a city located in the Sixth Circuit’s jurisdiction—Créateur is subjected to the Inverse Ratio Rule, which is not applied in any other circuit in modern copyright practice.² If Créateur was based in Los Angeles, located in the Ninth Circuit, without changing any of the facts of the complaint, the fact that Créateur listened to Hans Zimmer’s music might affect the finding of infringement, but will not affect the amount of similarity required between both pieces of music.

The discrepancy between the infringement methodologies affects all creatives,³ even though the above example discusses only musicians. Copyright law should strive for uniformity and clarity while rejecting the unfairly prejudicial balancing test discussed above.

Part II of this note discusses the *prima facie* case of copyright infringement and the development and demise of the Inverse Ratio Rule in other circuits. Part III uses the Inverse Ratio Rule as a case illustration to show why the copyright infringement analysis requires modernization. Part III also presents several theories to ameliorate copyright infringement adjudication and any constitutional implications arising from the theories. Due to the outdated nature of the Copyright Act, a major overhaul of the copyright system, in addition to the Sixth Circuit’s abrogation of the

1. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1068 (9th Cir. 2020) (“[T]he inverse ratio rule unfairly advantages those whose work is *most* accessible by lowering the standard of proof for similarity. Thus the rule benefits those with highly popular works, like *The Office*, which are also highly accessible.”). See also discussion *infra* Part II; *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018). Instead of using *The Office*, this note uses legendary movie soundtrack producer Hans Zimmer.

2. Because the Second and Ninth Circuits contain New York City and Los Angeles in their jurisdictions, a lot of copyright cases originate in the Second and Ninth Circuits. As a result, both circuits have significantly more copyright jurisprudence; however, Nashville, a popular area for country music production, is located in the Sixth Circuit. Although creatives generally release their work in New York or Los Angeles, ensuring Nashville creatives are not prejudiced by the lack of modern copyright adjudication is paramount to an efficient and fair copyright system. This introductory hypothetical only involves musicians from the Sixth Circuit but affects writers, painters, and any other creative. See also discussion *infra* Part II.

3. The term “creatives” is a broad term describing “[a] creative person, a person whose job involves creative work.” *Creative*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

Inverse Ratio Rule, is paramount to the continued success and protection of creatives in the United States.

II. COPYRIGHT BACKGROUND

A. *Copyright Law 101: A Recipe for Infringement*

After the Constitution conferred the power to help authors secure exclusive rights in their writings to Congress, copyright law was created to protect “original works of authorship.”⁴ To present a prima facie case of copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁵ Because the first element of copyright ownership is usually conceded, the second element of copying original work requires more analysis. As a result, the element is broken into two main subcategories: (a) actual copying; and (b) unlawful appropriation.⁶

Actual copying is the cornerstone of copyright infringement—after all, there must have been some *copying* to have *copyright* infringement. Traditionally, to show copying, a plaintiff may show evidence of the defendant admitting to the fact that he/she copied or “circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying.”⁷ Circumstantial evidence, such as access, is usually balanced with probative similarities to determine whether the material the defendant copied was actually similar enough to the original material.⁸ However, defendants rarely admit they copied from someone else, forcing courts to turn to circumstantial evidence. As a result, federal circuit courts have proposed tests such as the sliding scale and the Inverse

4. 17 U.S.C. § 102(a). *See also* U.S. CONST. amend. I; U.S. CONST. amend. II; U.S. CONST. art. I, § 8, cl. 8.

5. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). *See also* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

6. *Arnstein*, 154 F.2d at 468. *See also* *Skidmore*, 952 F.3d at 1064 (quoting *Rentmeester*, 883 F.3d at 1116–17). The *Skidmore* Court also mentions that “[a]lthough these requirements are too often referred to in shorthand lingo as the need to prove ‘substantial similarity,’ they are distinct concepts.” *Id.* To ensure there is no confusion as to what “substantial similarity” means, this note will attempt to avoid all uses of the shorthand, replacing substantial similarity with access, probative similarity, or unlawful appropriation, whichever relevant. For reference, actual copying is whether the defendant illegally took from the copyright owner, whereas unlawful appropriation is whether the defendant took *too much* copyrightable material from the copyright owner.

7. *Arnstein*, 154 F.2d at 468.

8. For reference, access has been defined as “an opportunity to view the copyrighted work.” *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978) (citing 3 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (1978)).

Ratio Rule to help the jury—since copying is a question of fact—determine actual copying.⁹

The two main threshold cases for the sliding scale test for actual copying are summarized in tabular form below¹⁰:

Access	Probative Similarities	Actual Copying
No access	No similarities	Not satisfied (obviously)
Evidence of Access present	No similarities	Not satisfied
Evidence of Access present	Evidence of Probative Similarities present	Question for Jury
No access	Evidence of <i>Striking</i> Probative Similarities (higher bar)	Question for Jury

The issue of actual copying seems quite straightforward when discussing the threshold cases, but in some cases, the factfinder struggles to determine when enough access and probative similarity is present to provide a *prima facie* case of actual copying.¹¹ Circuits are split on how to help juries determine when circumstantial evidence is sufficient to prove actual copying.¹²

9. *Arnstein*, 154 F.2d at 468–69 (clarifying that “it is important to avoid confusing two separate elements essential to a plaintiff’s case in such a suit: (a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went to far as to constitute improper appropriation. . . . [and each] of these two issues—copying and improper appropriation—is an issue of fact.”).

10. *Id.* at 468. The table merely summarizes the case’s discussion of the access and probative similarity.

11. *See, e.g., Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), *overruled by Skidmore*, 952 F.3d 1051. In *Williams v. Gaye*, the appellate court affirmed a disturbing district court opinion and jury verdict that applied the Inverse Ratio Rule. Many music industry professionals, copyright infringement analysts and copyright jurisprudence commentators have commented that the jury decided the case on uncopyrightable “style” and “feel” rather than pondering actual copying and unlawful appropriation. *See also Williams*, 885 F.3d at 1183 (Nguyen, J., dissenting); Brian McBrearty, *Stairway to Heaven, Blurred Lines, and the Silly Inverse Ratio Rule*, MUSICOLOGIZE (Feb. 6, 2019), <http://www.musicologize.com/stairway-to-heaven-blurred-lines-and-the-inverse-ratio-rule/> [<https://perma.cc/EAB2-4GG9>].

12. *See Skidmore*, 952 F.3d at 1065–66.

B. *The Rise to Fame: The Inverse Ratio Rule in the Second Circuit*

Enter stage right: the Inverse Ratio Rule. In 1938, the Second Circuit presented “the fundamental building blocks” of the Inverse Ratio Rule.¹³ Specifically, the court concluded that “where there is access, there is a *high degree of probability* that the similarity results from copying and not from independent thought and imagination. Indeed, it might well be said that where access is proved or admitted, there is a presumption that the similarity is not accidental.”¹⁴

In 1950, the Second Circuit reworded the rule into a more recognizable form, holding that “[w]here there is strong evidence of access, less proof of similarity may suffice,”¹⁵ until finally in 1954, the term Inverse Ratio Rule was coined.¹⁶ In this 1954 formulation of the Inverse Ratio Rule, the court cautiously applied the Inverse Ratio Rule only to the issue of actual copying, contrasting earlier Second Circuit cases where the courts applied the Inverse Ratio Rule to both actual copying and unlawful appropriation.¹⁷

A few years later, in 1961, the Second Circuit rejected the rule and refused to give an Inverse Ratio Rule jury instruction.¹⁸ The plaintiff, relying on the older Second Circuit formulation, stated the proposed jury instruction as, “if access is directly proven to have existed and the inference of such access is strong, the degree of similarity between the compositions in order to find copying need not be as great in the event that the access is only indirect and inferential.”¹⁹ The Second Circuit stated that access is “an element of plaintiff’s case” and an inference of fact that is required to find copying.²⁰ However, “access will not supply [the] lack [of degree of similarity], and an undue stress upon that one feature can only confuse and even conceal [the] basic requirement” of finding similarity.²¹ The Inverse Ratio Rule was “a superficially attractive

13. David Aronoff, *Exploding the “Inverse Ratio Rule,”* 55 J. COPYRIGHT SOC’Y U.S. 125, 130 (2008).

14. *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938) (emphasis added).

15. *Golding v. R.K.O. Pictures*, 221 P.2d 95, 98 (Cal. 1950).

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

17. *Id.* In the 1954 formulation, the *Morse* Court held that “plaintiff is entitled to little benefit from the ‘inverse ratio’ rule to the effect that when access is established a lesser degree of similarity is required” and as a result “plaintiff has failed to prove copying.” *Id.* Although modern copyright law might concur with this rule, it was inconsistent with Second Circuit’s jurisprudence at the time, causing confusion.

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

19. *Id.*

20. *Id.*

21. *Id.* at 187–88.

apophthegm [sic] which upon examination confuses more than it clarifies” because the Inverse Ratio Rule can only be used after “a showing of similarity has been made.”²²

C. *The Rise from the Grave: The Inverse Ratio Rule in the Ninth Circuit*

Although the Second Circuit rejected the Inverse Ratio Rule, it was described in the most well-known copyright treatise in 1963—Nimmer on Copyright.²³ Shortly thereafter, the Ninth Circuit adopted the rule quoting Nimmer on Copyright holding 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.”²⁴ The Ninth Circuit also stated that a clear and convincing showing of access lowers the proof required to show substantial similarity.²⁵ Because of the lowered standard of proof needed for substantial similarity, the court applied the Inverse Ratio Rule, stating that the plaintiffs’ visit with a third party to discuss creative works for the defendant constituted access, and therefore, the “degree of access justifies a lower standard of proof to show substantial similarity.”²⁶

The court, in this situation, applied the Inverse Ratio Rule incorrectly.²⁷ While discussing how a higher showing of access affects substantial similarity, the court required a lower standard of proof for unlawful appropriation instead of probative similarity.²⁸ A few years later,

22. *Id.* at 187.

23. See generally 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[D]. This is the modern reformulation and discussion of the Inverse Ratio Rule. For reference, Prof. Nimmer is a renowned copyright expert, practicing lawyer, and author of the most well-known copyright treatise; Nimmer is the copyright analogous of Prof. Prosser for Torts.

24. *Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) (quoting 2 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 143.4 (1976)).

25. *Sid & Marty Krofft Television*, 562 F.2d at 1172 (“This is not to say, however, that where clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may not be lower than when access is shown merely by a preponderance of the evidence.”).

26. *Id.* (“In addition to substantial similarity, a plaintiff must show access in order to prove infringement.”).

27. See Aronoff, *supra* note 13, at 136.

28. *Sid & Marty Krofft Television*, 562 F.2d at 1172. See also Aronoff, *supra* note 13, at 136. Commentator David Aronoff also discussed this confusion: “the context of the Ninth Circuit’s quotation from Nimmer in Krofft indicates that the court was confused as to whether the IRR applied to the element of actual copying or unlawful appropriation But only a sentence or two later, the court in Krofft stated that ‘the subjective [i.e., intrinsic] test applies’ in determining substantial

the Ninth Circuit realized its confusion in the earlier case and questioned the “viability of Professor Nimmer’s proposal.”²⁹ However, just three years later, the Ninth Circuit stated that “[b]ecause no subsequent decision has disturbed the access rule established[], we believe that it is the law of this circuit,”³⁰ and thereafter, considered access to plaintiff’s work in determining unlawful appropriation.³¹

Incomprehensibly, the Ninth Circuit kept applying the Inverse Ratio Rule to unlawful appropriation and overemphasizing access in the Inverse Ratio Rule stating the plaintiff’s case was “strengthened considerably by [defendant’s] concession of access.”³² “If the trier of fact were to believe that [defendants] actually read the scripts, as alleged by [plaintiffs], it could easily infer that the many similarities between plaintiffs’ scripts and defendants’ work were the result of copying, not mere coincidence.”³³ The court found that defendant’s work was substantially similar to plaintiff’s work primarily based on the overwhelming showing of access, despite the Inverse Ratio Rule suggesting access affects actual copying—not the amalgamation of actual copying and unlawful appropriation.

D. *The Final Countdown: The Sixth Circuit Stands Alone*

Nonetheless, around the same time as the Second and Ninth Circuit’s confusion with the Inverse Ratio Rule, the Sixth Circuit endorsed the rule, discussing that “the stronger the similarity between the two works in question, the less compelling the proof of access needs to be.”³⁴ And in

similarity under the IRR, thus indicating that the IRR is material to the issue of unlawful appropriation.” *Id.*

29. *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (citing *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961)). (“We thus need not address the continuing viability of Professor Nimmer’s proposal, which has been employed by no Ninth Circuit case since *Krofft* and had been earlier criticized for ‘confus[ing] and even conceal[ing]’ the requirement of substantial similarity.”)

30. *Shaw v. Lindheim*, 908 F.2d 531, 539 (9th Cir.), opinion amended and superseded, 919 F.2d 1353 (9th Cir. 1990). The Court dismissed the earlier decision rejecting the Inverse Ratio Rule by stating it was pure dictum.

31. *Id.*

32. *Metcalfe v. Bochco*, 294 F.3d 1069, 1075 (9th Cir. 2002) (citing *Shaw*, 919 F.2d at 1361).

33. *Metcalfe*, 294 F.3d at 1075. As Commentator David Aronoff points out, “[t]he court’s invocation of the IRR in *Metcalfe* is at best illogical.” Aronoff, *supra* note 13, at 138 n.79.

34. *Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999). Fortunately, the Sixth Circuit’s first case of copyright infringement dealing with the IRR had no dispute of substantial similarity, so the Sixth Circuit could not confuse the two elements of infringement. But in a later case, the Sixth Circuit discusses that “in some cases the relationship between the degree of proof required for similarity and access may be inversely proportional: where the similarity between the two works is strong, less compelling proof of access may suffice, and vice-versa.” *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004) (citing *Ellis*, 177 F.3d at 507).

2003, the Second Circuit re-endorsed the rule, but only for the issue of access and probative similarities.³⁵

However, fast-forwarding fifteen or so years, in 2020, the Ninth Circuit finally overruled the Inverse Ratio Rule, stating that “access, however, in no way can prove substantial similarity,” meaning access will not affect the unlawful appropriation inquiry.³⁶ It remains unclear whether the true Inverse Ratio Rule—the effect of access and probative similarity on each other—will still be used in the Ninth Circuit.

After the Ninth Circuit’s abrogation of the Inverse Ratio Rule, the Sixth Circuit remains the last circuit standing to endorse the rule—at least in full.³⁷ Although the Sixth Circuit discusses as dicta that “fundamental problems lie with the inverse-ratio rule,” the Sixth Circuit has yet to abrogate the Inverse Ratio Rule and replace the rule with a less confusing and more consistently-applied rule.³⁸

III. STATEMENT OF THE CASE

Upon scrutinizing decades of copyright jurisprudence, a common theme emerges: analyzing copyright infringement is unclear for judges, juries, creatives, and practitioners. Although some legal theories, such as the Inverse Ratio Rule, were introduced to assist copyright infringement inquiries, these legal theories merely increased the complexity and confusion present in copyright cases. Especially after the Ninth Circuit’s rejection of the Inverse Ratio Rule in 2020—creating a circuit split with the Sixth Circuit—because the Inverse Ratio Rule is “not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties,”³⁹ abrogating the Inverse Ratio Rule in the Sixth Circuit is crucial.

Copyright law is a federal issue, and copyright infringement adjudication varies significantly between each circuit creating significant issues of fairness. Since 1976, copyright law has minimally changed while technology has transformed copyright infringement adjudication, specifically the issue of access in the actual copying inquiry. Therefore,

35. *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003) (citing 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[D] (2002)) (“There is an inverse relationship between access and probative similarity such that ‘the stronger the proof of similarity, the less the proof of access is required.’”).

36. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1068–69 (9th Cir. 2020).

37. *Id.*

38. *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 n.1 (6th Cir. 2020). *See also Stromback*, 384 F.3d at 293.

39. *Skidmore*, 952 F.3d at 1066.

significant changes to the copyright system, not only in the Sixth Circuit, but also other federal circuits, are required to create uniformity and clarity. Due to the jurisprudential implications of fundamentally troublesome copyright law precedent, such as the Inverse Ratio Rule, modernization of the entire copyright infringement analysis is imminently necessary.

IV. ANALYSIS

Since the dawn of copyright infringement suits, judges and juries have been tasked with deciding the fate of musicians, artists, and other creatives. The intellectual property protections they seek to use, stemming from the Constitution,⁴⁰ are nothing but confusing to navigate.⁴¹ As a result, the legislature and industry commentators have explored ways to simplify the process.⁴² Unfortunately, barely any of the methods the legislature and commentators have adopted ease a plaintiff's prima facie case to establish copyright infringement.⁴³ And consequently, the effects of an un navigable law and a doctrinal confusion on establishing a prima facie case create chaos for judges and juries in deciding who is "right."

Although the copyright act and decades of copyright jurisprudence provide some adjudicatory guidance, courts are still unsure how to interpret and apply the copyright statute when analyzing infringement. Copyright common law created an elemental breakdown of infringement—a good first step.⁴⁴ Then, common law broke down the already broken down law into more sub-elements.⁴⁵ Finally, in the 1950s, common law tests for infringement emerged, breaking down the sub-elements into multi-level complex fact inquiries.⁴⁶ Of these tests, the most unclear test to be introduced by the courts was the Inverse Ratio Rule—a

40. U.S. CONST. art. I, § 8, cl. 8.

41. *Skidmore*, 952 F.3d at 1065–66.

42. *See, e.g.*, Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (enacted); Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, 2176 (2020) (enacted). *See also, e.g.*, SMART Copyright Act, S.3880, 117th Cong. (2022).

43. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 991 (1997); John R. Zoesch III, "Discontented Blues": *Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 CATH. U. L. REV. 867, 900 (2006); Jin-Won Jung, *Nudging Websites: A Proposal for A Hybrid Regulatory Scheme to Enforce Online Copyright*, 8 I/S: J. L. & POL'Y FOR INFO. SOC'Y 149, 150–53 (2012).

44. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). *See also* *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

45. *Armstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

46. *Golding v. R.K.O. Pictures*, 221 P.2d 95, 98 (Cal. 1950). *See also* *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938).

rule that attempted to inject mathematical ratios into a fact-based inquiry, without actually using any real math at all.⁴⁷

Over time, the Inverse Ratio Rule did more harm than good: it causes judges and juries to blend together the elements of copyright infringement; it unfairly prejudices parties in the fact-based inquiries; it lacks useful application in present day; and most importantly, it subverts what should be a naturally intuitive inquiry into a predefined, mathematical formula.⁴⁸

Fortunately, most circuits have abrogated or rejected the rule—all circuits, except the Sixth. Following suit, the Sixth Circuit must also abrogate the Inverse Ratio Rule.⁴⁹ And since there are no substantive or procedural tests to assist a judge and jury in copyright infringement adjudication, a novel, procedural overhaul of the entire copyright infringement system is suggested herewith.

A. *Abandonment: A Tale of Two Circuits*

With evidence being the centerpiece of the factual element of actual copying, modern day adjudication of access is concerningly difficult with worldwide dissemination of creative productions.⁵⁰ Referring back to the

47. Aronoff, *supra* note 13, at 140. Commentator David Aronoff writes, “If the IRR is genuinely a “ratio,” what quantum of additional strong ‘access’ excuses what measure of weak ‘similarity’? Does 15% greater access excuse 15% less similarity?” *Id.*

48. “The inverse ratio theory confuses fundamental principles of infringement analysis: access is relevant only in establishing the act of copying, not in establishing the degree thereof. Once copying is established, access is irrelevant and the inquiry shifts to the final stage of the infringement analysis, material appropriation.” *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1067 (9th Cir. 2020) (quoting 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9.91 (2017)). *See also* Aronoff, *supra* note 13, at 140; *Williams v. Gaye*, 885 F.3d 1150, 1163 (9th Cir. 2018). While comparing the Inverse Ratio Rule to a sliding scale, *Williams* discussed that “because Williams and Thicke readily admitted at trial that they had a high degree of access to ‘Got To Give It Up[,]’ [t]he Gayes’ burden of proof of substantial similarity is lowered accordingly.” *Williams*, 885 F.3d at 1163. Since the name of the legal theory is Inverse *Ratio* Rule, one would hope that the court would guide a jury by indicating how much the burden of proof is lowered: this ostensibly did not occur.

49. *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004); *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 (6th Cir. 2020). *See also Skidmore*, 952 F.3d at 1066.

50. *See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983); *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 104 (7th Cir. 1958). In regard to access, these two cases show how widespread dissemination resulted in an inference of access. First, in *Harrisongs Music*, George Harrison infringed Ronald Mack’s “He’s So Fine,” and the court held that “even if there had not been such direct evidence of access, access still may have been found because of the wide dissemination of HSF at that time.” 722 F.2d at 998. Second, in *Cholvin*, with 200,000 records being sold and widespread radio broadcasts, the court held that the trial court’s inferences to access were “reasonably warranted in drawing from the same, [and] constitute[d] substantial support” in the finding of copyright infringement. 253 F.2d at 104.

introductory hypothetical, if a famous musician released a song tomorrow, millions of people would listen to that song, notwithstanding the derivative uses of TikTok dance videos and Instagram covers.⁵¹ Any copyright infringement suit initiated against the famous musician would pose evidentiary nightmares—intuitively, the harder the question of access, the more complicated the Inverse Ratio Rule is to apply consistently.

If the Inverse Ratio Rule was applied to a case with a famous musician whose music was widely disseminated, how does one analyze the balancing test of access versus probative similarity? Because of the widespread dissemination of the famous musician's piece—take for example, Rondo Alla Turca by Wolfgang Amadeus Mozart (even though the song has entered the public domain since the copyright term expired)—would it be reasonable to infer access since everyone has heard the piece in some form? Then, using the plain definition of the Inverse Ratio Rule, the higher the level of access to the famous musician's piece, the lower the level of probative similarity required to find infringement. If infringement is found by inferring an extremely high level of access from widespread dissemination, does that mean the level of probative value is extremely low?

Another problem with modern day access is qualitatively or quantitatively determining level of access.⁵² If the Inverse Ratio Rule was a “ratio,” then a quantifiable value of access would aid the analysis. In modern day, analysis could commence with the number of streams. For an artist like Taylor Swift who receives millions of streams in a year and is internationally recognized, an average hypothetical person could listen to a Taylor Swift song hundreds of times purposefully and potentially another hundred times through inadvertent radio broadcasts, TikTok uses, Super Bowl commercials, etc. Compared to an indie artist who receives a mere 10,000 streams in a year, an average hypothetical person could listen to the indie artist's song only a hundred times purposefully without additional inadvertent listens. Does the Inverse Ratio Rule indicate that

51. For reference, Taylor Swift's *Red* had 90.8 million streams on release day. Chris Willman, *Taylor Swift Breaks Two Spotify Records in One Day With Release of "Red (Taylor's Version)"*, VARIETY (Nov. 13, 2021), <https://variety.com/2021/music/news/taylor-swift-breaks-spotify-record-red-taylors-version-streams-1235111709/> [<https://perma.cc/A5M9-8E8N>]. Within the next week, the amount of people listening to the song intentionally (e.g., by choosing the song on Spotify) or unintentionally (e.g., hearing the song in an advertisement) will probably grow exponentially.

52. “[T]he concept of ‘access’ is increasingly diluted in our digitally interconnected world.” *Skidmore*, 952 F.3d at 1068. The court also discusses that “[g]iven the ubiquity of ways to access media online, from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand.” *Id.*

the total number of streams should be used in comparison to the infringing artist's individual streams? What "ratio" of listens indicates access is present? The Inverse Ratio Rule unmistakably provides no guidance here.⁵³ The pure balancing test describes access as *a* factor in determining if similarity was present, but under the Inverse Ratio Rule, even using a value-based level of access in relation to a total number of streams where access is a binding factor in the similarity analysis does not assist in determining whether access was actually present.⁵⁴

Finally, an emerging issue in copyright infringement suits regarding access is content no longer available to the public.⁵⁵ Contrary to the underlying concept of disclosing to the public in return for a right of exclusion, modern streaming platforms have created limited series—television shows that air for a limited amount of time and then disappear (presumably forever).⁵⁶ Similarly, prominent musicians—Taylor Swift, for example—can release a song and, thereafter, re-release the same song several years later with modifications.

Applying the Inverse Ratio Rule to these situations results in evidentiary challenges. If a Netflix show is unavailable in the copyright infringement case's jurisdiction, it is nearly impossible to demonstrate similarity to a jury for their fact-finding copying determinations. The evidentiary challenges create additional practical nightmares since a jury is unable to listen to the original piece, and the jury needs to differentiate between the original and the modified piece to properly decide actual copying. Ideally, probative similarity should be balanced with access, but access to which album and how much on a quantifiable level creates evidentiary issues that are exacerbated with the use of the Inverse Ratio Rule allocating more importance to access than practicable.

B. Common Sense Disintegrates: Parsing the Inverse Ratio Rule

Instead of a chart showing the threshold cases, a sliding scale can better represent the access versus probative similarity relationship. To

53. *See id.* at 1068.

54. *See id.* at 1067–68. And even if there was "[c]omplete access without any similarity . . . there is no infringement. Even so, the [Inverse Ratio] rule suggests that liability may be imposed in such a case." *Id.*

55. Mark A. Lemley, *Disappearing Content*, 101 B.U. L. REV. 1255 (2021) ("One of the great advantages of digital content has been that, for the last forty years, people have had access to whatever content they want, whenever they wanted it. That is starting to change. We're moving backwards. Content is disappearing—not just becoming available only in limited times or circumstances but becoming entirely unavailable.").

56. *Id.* at 1257. Netflix, for example, had a Spanish show named *El Ministerio del Tiempo* which is available now only in Nicaragua. *Id.* at n.2.

differentiate between an ideal conceptualization of the balancing test, this paper will split the access and probative similarity issues into two: a forward relationship and a reverse relationship. The forward relationship is how the probative similarity analysis affects the access analysis; the reverse relationship is how the access analysis affects the probative similarity analysis. The fundamental issue of copyright infringement should be finding if copyrightable subject matter was taken and then determining if too much of the copyrightable subject matter was taken, i.e., was there copying and then if substantial copying took place.⁵⁷

Probative Similarity v. Access – Forward Relationship



Access v. Probative Similarity – Reverse Relationship



In the Inverse Ratio Rule, the reverse relationship is the issue in that it changes the level of copying required to find copyright infringement.⁵⁸ By showing a large amount of access, a plaintiff's burden of showing probative similarities decreases. In other words, if a defendant heard plaintiff's song, less probative similarity is required to find copyright infringement. But if defendant heard plaintiff's song once, *arguendo*, how much less probative similarity is required compared to more access?

57. See *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961) (discussing that “[t]he logical outcome of the claimed principle is obviously that proof of actual access will render a showing of similarities entirely unnecessary”).

58. *But c.f. Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 824 n.2 (C.D. Cal. 2010) (noting that “[i]t should be noted that the inverse ratio rule only works in one direction—that is, while a strong showing of access will result in a lower threshold showing of substantial similarity, a weak showing of access does not require a greater showing of similarities between the plaintiff's and defendant's works.”), *aff'd sub nom. Gable v. Nat'l Broad. Co.*, 438 F. App'x 587 (9th Cir. 2011), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

Alternatively, if defendant heard plaintiff's song thousands of times, is the probative similarity required mathematically so low that it does not matter anymore?

Fundamentally, the reverse relationship causes significantly more problems than the forward relationship. The forward relationship is intuitive in that probative similarities are given importance first. By prioritizing the finding of similarities and determining access afterwards, the analysis ensures there are similarities probative of copyright infringement first. Because defenses such as independent creation are available in copyright, determining access was also present ensures that the independent creation defense is not disregarded since the defendant could not have independently created the work if the defendant saw or heard the plaintiff's work.⁵⁹

However, the forward relationship still poses some problems. By continuing to suggest that less similarity can somehow be sufficient when more access is present, the forward relationship improperly shows the requirement to find copyright infringement. Yet, the conceptualization of the Inverse Ratio Rule in the forward relationship ensures probative similarity is analyzed first. If the copyright system wishes to keep any part of the Inverse Ratio Rule, the forward relationship should be prioritized.

C. Time to Start Anew: Copyright Infringement Reinvented

Presuming the Sixth Circuit abrogates the Inverse Ratio Rule and joins the majority of its sister circuits, the question becomes: How should copyright infringement be adjudicated? If concerns on infringement have been around for centuries and copyright infringement is more complicated than ever, how can we ameliorate the system?

59. *Amstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946). The court discussed that “[t]he similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.” *Id.* In other words, the court first looked at probative similarity between both pieces and then assessed if access was present to ensure the independent creation defense is not ignored. Also, for reference, “[p]roof of copying by the defendant is necessary because independent creation is a complete defense to copyright infringement. No matter how similar the plaintiff's and the defendant's works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff's work, the defendant is not liable for infringement.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018).

1. Implementation of Administrative Copyright Judges before Commencement of Infringement Suit

Similar to modern patent litigation, where a district court judge stays litigation until an Administrative Patent Judge decides the validity of a patent at the United States Patent and Trademark Office (USPTO),⁶⁰ copyright law should allow for alternative procedures where experts on copyright law can better adjudicate infringement cases and opine on crucial matters concerning similarity and access.

For example, in Japanese Patent Office proceedings, an administrative advisory opinion about the technical scope of a patent can be sought from the Patent Office.⁶¹ Similar to United States' cases, the technical scope is "resolved by a court," but "because the Patent Office is a technologically specialized public institution and is expected to impartially and reliably determine the scope of the patented invention,"

60. "Patent litigation defendants often file motions to stay co-pending patent litigation while they await the PTAB's resolution of any pending IPRs." Douglas B. Wentzel, *Stays Pending Inter Partes Review: Not in the Eastern District of Texas*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 120, 122 (2016). See also Laura Lydigsen, "Staying" Power: *Litigation Stays Under the America Invents Act*, DEL. LAW. 14, 14–15 (2015) ("The new reality for patent litigation thus often involves the patentee being forced to defend the validity of the patent at the USPTO—frequently against long odds—before pursuing claims for infringement in district court District courts must frequently determine whether to stay litigation pending the outcome of an AIA review.").

61. Hisayoshi Yokoyama, *Advisory Opinion about the Technical Scope of a Patented Invention*, in JAPANESE PAT. L.: CASES AND COMMENTS 251 (Christopher Heath & Atsuhiko Furata eds., 2019). Contrary to advisory opinions being constitutionally frowned upon in the United States, in Japan, "the result of an advisory opinion . . . should be considered not merely as a private expert opinion, but as a public technical expert decision under an impartial procedure, which must be regarded as one of the prima facie authoritative decisions." *Id.* at 254 n.14 (citing T. KABE, SAIKŌ SAIBANSHO HANREI KAISETSU SHŌWA 43 NENDO [Commentary to the Supreme Court decisions of 1968] 254 (1969); Production Method for Scopolamine Butylbromide, Nagoya kōtōsaibansho Kanazawa shibu [Nagoya High Ct. Kanazawa Br.] June 14, 1967, Hei (ne) no. 137, 214 HANREI TIMES 160 (Japan)).

Administrative opinions can also be sought at the United States International Trade Commission ("ITC") through the Office of Unfair Import Investigations ("OUII"). Carl C. Charneski, *The Role of the Office of the Administrative Law Judges Within the United States International Trade Commission*, 8 J. MARSHALL REV. INTELL. PROP. L. 216, 230 (2009) ("Interestingly, and presumably of little comfort to respondents, the complainant may submit a draft of its complaint to the Office of Unfair Import Investigations . . . for a review prior to its official submission to the Secretary of the ITC. . . . While the OUII is a part of the ITC, at this stage, the OUII will provide only technical advice to the complainant regarding compliance with the applicable Commission procedural rules for the filing of a proper section 337 complaint.") (citing 19 C.F.R. § 210.73(a), § 210.56 (2008)). See also Holly Lance, *Not So Technical: An Analysis of Federal Circuit Patent Decisions Appealed from the ITC*, 17 MICH. TELECOMM. & TECH. L. REV. 243, 250 (2010).

For reference, the ITC can also review copyright infringement cases. 19 U.S.C. § 1337(a)(1)(B)(i). Implementing a procedure like the ITC's OUII opinion into district court litigation may ameliorate copyright adjudication.

using an administrative agency's decision on technical scope speeds up adjudication, costs less money, and creates a fairer and more educated result.⁶²

In the United States, both patent law and copyright law stem from the Constitution, but patent law receives substantially more administrative support.⁶³ With the exception of the recent Copyright Claims Board that acts like a small claims court,⁶⁴ copyright law lacks guidance. In fact, the United States Copyright Office has a Review Board to “hear[] final administrative appeals of refusals of copyright registration,”⁶⁵ but has no review board to decide any copyright matter after registration finalizes.

62. Yokoyama, *supra* note 61, at 251. *See also* Korean Patent Act §§ 132-16(1), 135(1). Similar to the Japanese Advisory Opinion, the Korean Intellectual Property Trial and Appeal Board has jurisdiction to adjudicate a trial concerning the scope of patent rights.

63. By mere conjecture, the reasons for copyright's lack of support are structure and funding. First, “[t]he copyright department was transferred in 1870 to the Librarian of Congress,” which is under the legislative branch of the federal government. U.S. GOV'T PRINTING OFF., REP. OF THE LIBRARIAN OF CONG., at 12 (December 9, 1897), <https://www.copyright.gov/reports/annual/archive/ar-1897.pdf>, [<https://perma.cc/TQJ4-GQNH>]. Second, “[f]or fiscal 2022, the [Copyright] Office request[ed] a combined total of \$98.0 million in funding.” *Statement of Shira Perlmutter, Register of Copyrights and Director, U.S. Copyright Off. Before the H. Comm on Appropriations*, 117 Cong. 5, (2021), <https://www.copyright.gov/about/budget/2022/house-budget-testimony-fy22.pdf> [<https://perma.cc/Q8K8-7GDX>].

Unlike copyright law, first, the patent office is an administrative agency organized in the executive branch of the federal government under the Department of Commerce. 35 U.S.C. § 2(a). Second, the USPTO (which is fully funded by patent prosecution fees), for only patent-earned revenue in 2020, grossed over \$3.3 billion dollars. U.S. PAT. AND TRADEMARK OFF., FY 2020: PERFORMANCE AND ACCOUNTABILITY REP., at 39, <https://www.uspto.gov/sites/default/files/documents/USPTOFY20PAR.pdf> [<https://perma.cc/567M-DPMF>].

Comparing both of these IP regimes' structures and revenues, copyright law is considerably outshadowed by patent law; perhaps, copyright law is neglected because it does not bring the same revenues as patent law does.

64. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, 2176 (2020); 17 U.S.C. § 1501.

A potential problem with the Consolidated Appropriations Act (“The CASE Act”) and any related proceedings such as the proposed CTAB is copyright law's organization under the legislative branch implicating constitutionality of quasi-judicial and quasi-legislative authority. *See* Carrisa Wilson, *The “Agencies” of Copyright Law: Constitutional and Administrative Law on the CASE Act of 2020*, 29 TEX. INTELL. PROP. L. J. 415 (2021). *See also* *United States v. Arthrex*, 141 S. Ct. 1970 (2021).

However, the positive effect of the CASE Act is the accessibility of implementing a CTAB. Fundamentally, the proposed CTAB is an extension of the Copyright Claims Board. If Congress implemented judicial proceedings within the Copyright Office already, then precedent to create a quasi-judicial tribunal can be relied upon to institute the CTAB.

65. *Review Board Opinions*, COPYRIGHT.GOV, <https://www.copyright.gov/rulings-filings/review-board/> [<https://perma.cc/MB43-UEQ5>].

Copyright law should require administrative judges to decide matters of access and similarity prior to the case being sent to a district court judge or jury. Instead of removing the question from the jury altogether, legislators should create a Copyright Trial and Appeal Board (“CTAB”)—analogous to the Patent Trial and Appeal Board (“PTAB”) and Trademark Trial and Appeal Board (“TTAB”).⁶⁶ The CTAB would function identically to the PTAB and TTAB in that, the CTAB would also have administrative review jurisdiction over issues of copyright registration and invalidity. Analogous to district court judges’ stay for PTAB validity decisions in patent infringement cases, district court judges in copyright infringement suits should stay judgment for the CTAB’s access and similarity decision, mirroring the Japanese Patent Office’s advisory actions for technical scope of patented inventions.

2. Problems with Implementing Administrative Copyright Law Judges—Seventh Amendment

A significant challenge with attempting to clarify the copyright system, especially in infringement findings, is determining if elements of copyright infringement are questions of law, questions of fact, or mixed questions of law and fact. Understanding whether actual copying and unlawful appropriation are questions of law or fact requires some historical context: in the 18th century English legal system, courts were split into courts of law and equity, and causes of action filed in a court of law were questions for juries.⁶⁷ Then, after the founding of the United States, the Seventh Amendment preserved the right to a jury⁶⁸—a blessing and a curse.⁶⁹

In modern practice,

[T]he Seventh Amendment thus applies not only to common-law causes of action, but also to ‘actions brought to enforce statutory rights that are

66. See 35 U.S.C. § 6 (creating the PTAB); 15 U.S.C. § 1067 (creating the TTAB).

67. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

68. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656–57 (1935); U.S. CONST. Amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial *by jury* shall be preserved.”) (emphasis added).

69. As Prof. Moses writes, “there are two very different views of the value of the civil jury. The first is that the civil jury is a cornerstone of democratic government, a protection against incompetent or oppressive judges, and a way for the people to have an active role in the process of justice. The second is that civil juries are inefficient, unpredictable, swayed by sympathy, and incompetent to decide complex cases.” Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000). Having a jury for a copyright case ensures that entirely-fact based determinations, like the elusive “substantial similarity,” is not decided by one person, but rather by a group of peers.

analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.⁷⁰

Alternatively stated, if an analogous cause of action was tried in an English court of law at the time of the United States' founding, a present cause of action may also be tried in a court of law.⁷¹ If there is an analogous cause of action, then the court next inquires “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”⁷²

For copyright infringement, because “[t]he practice of trying copyright damages actions at law before juries was followed in this country, where statutory copyright protections were enacted even before adoption of the Constitution,”⁷³ “there is no dispute that infringement cases today must be tried to a jury.”⁷⁴ But similar to the inquiry in *Markman v. Westview Instruments, Inc.*, although the ultimate dispute of infringement must be determined by a jury pursuant to the Seventh Amendment, the main question is “whether a particular issue occurring within a jury trial . . . is itself necessarily a jury issue.”⁷⁵ Therefore, the relevant inquiry is whether the “jury must shoulder this responsibility as necessary to preserve the substance of the common-law right of trial by jury,”⁷⁶ as analyzed through history, precedent, and functional considerations.

Several courts have opined on which issues should be reserved for the jury, including the Supreme Court.⁷⁷ For example, for issues concerning statutory damages under § 504(c) of the Copyright Act, “the Seventh Amendment provides a right to a jury trial on all issues pertinent” to the award of statutory damages.⁷⁸ In *Markman*, the Supreme Court intriguingly focused on functional considerations, rather than relying on history and precedent, to decide that, “when an issue ‘falls somewhere

70. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (quoting *Granfinanciera*, 492 U.S. at 42).

71. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (“[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.”).

72. *Markman*, 517 U.S. at 376.

73. *Feltner*, 523 U.S. at 350.

74. *Markman*, 517 U.S. at 377.

75. *Id.*

76. *Markman*, 517 U.S. at 377–85 (quoting *Tull v. United States*, 481 U.S. 412, 426 (1987)) (internal quotations omitted).

77. See *Markman*, 517 U.S. at 377–85; *Feltner*, 523 U.S. at 355.

78. *Feltner*, 523 U.S. at 355.

between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”⁷⁹ As a result, *Markman* assigned the duties of construing patent terms to a judge rather than a jury, even though the case discusses how expert testimony and interpreting patent terms is a credibility determination fit for a jury.⁸⁰

Appellate circuit courts, however, have disagreed on which appellate standard to use for copyright infringement.⁸¹ Although this seems irrelevant for determining if issues are reserved for a jury, analyzing an appellate court’s level of deference to a district court assists in determining whether the appellate court intended to preserve a question for a jury. If the appellate court gave relatively high deference to a district court’s fact-based determinations, then the appellate courts intended to preserve the jury question as a question of fact, but if the level of deference was relatively low for fact-based determinations, then the appellate courts intended to reserve the fact-based determinations for a judge as a question of law.⁸² Some circuits, such as the Third, Fifth, Sixth, Ninth,⁸³ and Eleventh Circuits, use a clearly erroneous standard for reviewing

79. 517 U.S. at 388.

80. *Id.*

81. See Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L. J. 2431, 2439 (1998).

82. *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 64 (1st Cir. 2000) (“The question of the appellate standard of review of the issue of substantial similarity is ultimately one of how much deference is given to the trier of fact. It is of a kind with other situations where the appellate court has before it undisputed documents or photographs, there are no credibility determinations, and there is no expert testimony. In such situations, it could equally well be said that the appellate court’s role in determining whether there was error has simply been made easier, not that the standard of review is different.”).

83. To make things even more complicated, tests for substantial similarity with circuits are also treated differently. For example, the Ninth Circuit uses the extrinsic test which “compares the objective similarities of specific expressive elements in the two works.” *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (citing *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)). In one case, the Ninth Circuit discusses that the extrinsic test involves questions of law, so the court can decide without the jury’s deliberations. *McCulloch v. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987). But in another case, the Ninth Circuit discussed that depending on the facts of the case, the jury might be needed to determine if a “substantial” amount was taken (what this paper refers to as unlawful appropriation). *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121 (9th Cir. 2018) (citing *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)), overruled by *Skidmore*, 952 F.3d 1051. *Rentmeester* states that there is no “well-defined standard for assessing when similarity in selection and arrangement becomes “substantial,” and in truth no hard-and-fast rule could be devised to guide determinations that will necessarily turn on the unique facts of each case.” 883 F.3d at 1121. Also, *Rentmeester* was indeed overruled by *Skidmore*, but only because *Rentmeester* discussed the application of the inverse ratio rule for finding actual copying.

substantial similarity,⁸⁴ where the appellate judges do not agree with “substituting [their] judgment for that of the trial judge on questions of fact.”⁸⁵ The Seventh Circuit differs slightly by claiming a clearly erroneous standard where “the appellate court itself [engages] in ‘side-by-side’ comparison and ‘ocular comparison,’”⁸⁶ indicating that the Seventh Circuit prefers to provide as much deference to the trial court as possible but can choose to change the standard at any given time. The First Circuit treats “the question of substantial similarity as a ‘mixed question of fact and law.’”⁸⁷

Although most circuits believe that there should be some deference given to trial court fact-based determinations for substantial similarity, like *Markman*, there is strong persuasion to cede some part of the “substantial similarity” issue from the jury—maybe even from the judge and to an agency with expertise in copyright law. *Markman* was decided on the premise that patent construction required “special training and practice, and as a result, a judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be.”⁸⁸

Looking through copyright infringement jurisprudence indicates that finding similarity is also something that requires “special training and practice,”⁸⁹ but balancing functional considerations with the constitutional requirement of preserving the right to a jury requires some creative thinking.

84. See *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1233 n.25 (3d Cir. 1986); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 532–33 (5th Cir. 1994); *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 70 (1st Cir. 2009); *Williams v. Kaag Mfrs., Inc.*, 338 F.2d 949, 951 (9th Cir. 1964); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 825 n.4, 830 (11th Cir. 1982).

85. *Kaag Mfrs., Inc.*, 338 F.2d at 951 (citing *Caddy-Imler Creations, Inc. v. Caddy*, 299 F.2d 79 (9th Cir. 1962)).

86. *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 63 (1st Cir. 2000) (citing *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 506 n.1 (7th Cir. 1994)).

87. *Segrets*, 207 F.3d at 64 (quoting *O’Neill v. Dell Publ’g Co.*, 630 F.2d 685, 687 (1st Cir. 1980)).

88. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388–89 (1996) (quoting *Parker v. Hulme*, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849)) (internal quotations omitted).

89. See *Markman*, 517 U.S. at 388–89 (quoting *Parker*, 18 F. Cas. at 1140).

3. Splitting the Copyright Infringement Issues Without Dissolving the Right to a Jury

If copyright infringement remained in district courts, instead of being split with a CTAB similar to the USPTO's post-grant proceedings, the issue of actual copying should be relinquished to a judge, and the issue of unlawful appropriation be retained as a jury question.⁹⁰ Although expert testimony credibility determinations are required, similar to *Markman*, how can a jury of laypersons truly determine if computer software is "substantially similar" to another piece of software?⁹¹ Similarly, in music copyright infringement cases, how can a layperson truly judge if a song is substantially similar to another song without any musical training, even with the help of expert testimony?⁹²

A judge is better suited to determine whether there is sufficient actual copying to allow for copyright infringement by reviewing expert testimony and using their own legal experience.⁹³ Determining if actual copying occurred is a dauntingly complex task.⁹⁴ First, the copyrightable subject matter of both materials must be determined. Then, depending on the specific type of material and the circuit where the court sits, the

90. Obviously, this is an avant-garde topic with minimal practical or precedential backing. Other articles have discussed ideas to ameliorate the copyright system, but to the best of my knowledge, no articles are solely devoted to this idea.

91. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) ("[I]n deciding the limits to which expert opinion may be employed in ascertaining the substantial similarity of computer programs, we cannot disregard the highly complicated and technical subject matter at the heart of these claims. Rather, we recognize the reality that computer programs are likely to be somewhat impenetrable by lay observers—whether they be judges or juries.).

92. As Mr. Jason Palmer discusses in his law review article, juries for music copyright cases should consist of musical jurors since "allowing the musical jury to prescribe the rules of infringement would more efficiently pursue the goal of copyright, while avoiding the improper influence of jurors' self-motivating desires." Jason Palmer, "Blurred Lines" Means Changing Focus: Juries Composed of Musical Artists Should Decide Music Copyright Infringement Cases, Not Lay Juries, 18 VAND. J. ENT. & TECH. L. 907, 933 (2016).

93. After the *Twombly* and *Iqbal* cases setting procedural standards for pre-trial dismissals, Mr. Evan Brown discusses in his law review article about how there should be a "pre-discovery dismissal of copyright infringement." Evan Brown, *Shaking Out the "Shakedown": Pre-Discovery Dismissal of Copyright Infringement Cases After Comparison of the Works at Issue*, 9 WASH. J.L. TECH. & ARTS 69, 70–71 (2013). By having the judge decide on key issues before going to trial, the pre-discovery dismissal saves money and time. See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). I, unfortunately, do not agree with this sentiment completely. I believe that discovery is usually required to understand the facts of the case; judges might have expertise in their legal fields, but rarely do they have an expertise in the field of the material, requiring expert testimony and therefore, discovery. The concept of pre-discovery dismissal fatally discriminates against plaintiffs whose materials are complex.

94. As discussed in the background, actual copying can be through defendant's admission or through the circumstantial evidence debacle that the Inverse Ratio Rule tried to solve. See discussion *supra* Part II.

copyrightable subject matter of both materials must be compared to determine if there are similarities that are probative of copying. Afterwards, the court must determine if the alleged infringer had access to the original copyrighted material, and if the access was sufficient to dismiss the independent creation defense.⁹⁵ A determination of actual copying can be made only after analyzing all the above steps.

Additionally, a jury still makes the more important determination: unlawful appropriation. A judge, in deciding actual copying, merely evaluates whether: (1) circumstantial evidence, such as access, indicate an infringer *could have* committed copyright infringement; and (2) both materials contained similar copyrightable elements. The jury still retains the right of deciding whether an unreasonable amount of copyrightable elements were taken from the plaintiff's material—the crux of copyright infringement.⁹⁶ The jury is the sole decider of whether the defendant's exercise of the First Amendment was consistent with copyright law.

Because creative works are often inspired by other creative works, and because “copyright law regulates how much a new work may copy an older work,”⁹⁷ the jury is making the ultimate determination in the infringement analysis. And because the jury is the ultimate decision-maker, splitting the issues of copyright infringement “preserve[s] the substance of the common-law right of trial by jury,”⁹⁸ and therefore, does not implicate Seventh Amendment issues.

95. For reference, the independent creation defense is an affirmative defense where the defendant asserts he/she independently created the work without access to the plaintiff's work. *See* Procter & Gamble Co. v. Colgate-Palmolive Co., 199 F.3d 74, 77–78 (2d Cir. 1999); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (“Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an ‘author’; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author’”) (Hand, J.).

96. “The principle that trivial copying does not constitute actionable infringement has long been a part of copyright law. Indeed, as Judge Learned Hand observed over 80 years ago: ‘Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.’” *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) (quoting *West Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909)). The issue of “unreasonable amount of copyrightable elements” is referring to unlawful appropriation.

97. Palmer, *supra* note 92, at 907 (citing 17 U.S.C. § 101 (2012)).

98. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) (quoting *Tull v. United States*, 481 U.S. 412, 426 (1987) (quoting *Colgrove v. Battin*, 413 U.S. 149, 156 (1973))) (internal quotations omitted).

4. Increasing Usage of Copyright Special Masters

In many complex areas of law, special masters (or technical advisors)—not magistrate judges—are used.⁹⁹ In patent law specifically, special masters made recommendations in almost 41% of claim construction cases, 35% of patent discovery cases, 12% of infringement cases, and 8% of invalidity cases.¹⁰⁰ Even the United States Court of Appeals for the Federal Circuit has allowed special masters to make recommendations on claim construction, infringement, and invalidity.¹⁰¹

There are two main reasons to use special masters in patent law: (1) “the expertise that he or she may bring”; and (2) “harnessing special masters’ expertise leads to better decisions.”¹⁰² First, because most special masters are attorneys with “strong technical as well as legal training,”¹⁰³ special masters ensure the substantive law is administered correctly. “[S]pecial masters demonstrate[] a high level of training and expertise [], as well as substantial professional experience.”¹⁰⁴ Second, although “the appeal rate among cases with special masters is nearly identical to that of all patent cases as a whole[,] . . . a ruling in the average case with a special master is less likely to be reversed than a ruling in other complex patent cases.”¹⁰⁵

However, a potential issue of using special masters in copyright cases is the anticipated cost of a special master.¹⁰⁶ District court litigation already creates significant costs for parties and by employing a special

99. See Jay P. Kesan & Gwendolyn G. Ball, *A Study of the Role and Impact of Special Masters in Patent Cases*, ILL. PUB. L. RSCH. PAPER No. 08-23 (2009); Joshua R. Nightingale, *An Empirical Study on the Use of Technical Advisors in Patent Cases*, 93 J. PAT. & TRADEMARK OFF. SOC’Y 400 (2012); Luis Balart, *Having Your Cake and Eating It, Too: Using Special Masters in Daubert Hearings to Promote Scientific Analyses of Expert Testimony*, 80 LA. L. REV. 847 (2020); Josh Hartman & Rachel Krevans, *Counsel Courts Keep: Judicial Reliance on Special Masters, Court-Appointed Experts, and Technical Advisors in Patent Cases*, 14 SEDONA CONF. J. 61 (2013).

100. Kesan & Ball, *supra* note 99, at 17. For reference, the empirical data was collected in 2005–2006.

101. See *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1131 (Fed. Cir. 2011) (“A primary purpose of appointing a special master is to narrow the issues before the district court judge to facilitate an efficient and timely resolution of complex or highly-technical issues, such as patent claim construction.”); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1566 (Fed. Cir. 1988); *Riverwood Int’l Corp. v. Mead Corp.*, 212 F.3d 1365, 1366 (Fed. Cir. 2000).

102. Hartman & Krevans, *supra* note 99, at 70.

103. Kesan & Ball, *supra* note 99, at 5.

104. *Id.*

105. *Id.* at 10.

106. “The cost of appointing a master is an important issue which should not be ignored.” Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 486 n.35 (2009).

master, parties incur additional administrative costs. As Judge George C. Hanks succinctly states:

In addition to the cost of the special master’s hourly rate[—]a rate reflecting the experience and expertise that led to the appointment[—]the litigants incur the cost of the special master’s support staff, as well as transcriptions and other fees for each proceeding. As a result, special master fees in the largest [multi-district litigation] cases have reached into the hundreds of thousands of dollars.¹⁰⁷

Although there is an additional cost for special masters, the administrative costs are negligible when compared to prolonged district court litigation generally.¹⁰⁸ Even if the special master “[saves] the parties one discovery motion[,] it could add up to \$100,000.”¹⁰⁹

In addition to the potential cost-effectiveness of special masters, due to the success of special masters in patent cases, applying the same concept to copyright cases—an equally complex area of law—might improve the overall copyright infringement landscape. Since “[t]he purpose of copyright law is to benefit the public by balancing the interests of both the creator and the public generally[,] . . . [a] special master can cut through the confusion and interpret the core musical concepts at work to determine if there was truly copyright infringement.”¹¹⁰ Additionally, because a special master is appointed by a court to handle specific matters delegated to them,¹¹¹ using a special master does not implicate any Seventh Amendment issues. Unless an exception applies, a court “must evaluate objections to a master’s findings of fact and conclusions of law

107. George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 FED. CTS. L. REV. 35, 47–48 (2015).

108. See Merrill Hirsh, *A Revolution That Doesn’t Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation*, 58 NO. 4 JUDGES’ J. 30, 33 (2019).

109. Commentator Merrill Hirsh, an advocate for special masters, indicates that employing a special master can actually mitigate costs in the long term. In the \$100,000 discovery motion, Hirsh states that “[t]he special master’s bill for work avoiding that motion should not be anywhere close to that. And making special masters a more regular part of judicial administration, with a more clearly understood use and role, makes it easier to monitor and control their costs.” *Id.* at 33.

110. Kevin Evers, Comment, *Stairway to Certainty: The Need For Special Masters In Music Copyright Litigation*, 90 UMKC L. REV. 173, 188–89. Although Commentator Kevin Evers discusses special masters in music copyright infringement cases specifically, the application of special masters would benefit creatives in all copyrightable works. See also Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 407–08. Magistrate Judge Brazil also discusses some special programs in the Northern District of California where the special master will review both parties’ strengths and weaknesses and make an “educated guess[] about the probability of liability and the amount of damages.” *Id.* at 408. The parties obviously have the option to ignore the special master’s report and present the case to the jury.

111. FED. R. CIV. P. 53(a). See also Hartman & Krevans, *supra* note 99, at 62–65.

under de novo review.”¹¹² Because a special master can opine on matters of copyright infringement with their professional expertise, and because areas of law such as patent law have benefitted from the use of special masters, copyright law will be greatly benefitted by increasing the usage of special masters in copyright infringement cases.

5. Incorporating Copyright Law into Federal Circuit Jurisdiction

In 1982, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) was created by merging the Court of Customs and Patent Appeals and the appellate jurisdiction of the Court of Claims.¹¹³ Because Congress noticed a trend in inconsistent patent jurisprudence across the country, Congress created the Federal Circuit with intentions “to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exists in the administration of patent law.”¹¹⁴ Although this paper discusses copyright infringement issues rather than patent law issues, both patent and copyright law are notoriously difficult for layperson jurors to understand and for judges to adjudicate.¹¹⁵ Both copyright and patent law are exclusive to federal jurisdiction already, and both regimes extensively require expert testimony. “The Federal Circuit is a panel of experts who specialize in, among other issues, patent law,”¹¹⁶

112. Hartman & Krevans, *supra* note 99, at 65 (citing FED. R. CIV. P. 53(f)(3), (4)).

113. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

114. H.R. REP. NO. 97-312, at 22–23 (1981).

115. Although using the federal circuit for appellate copyright issues does not help the underlying concern of fixing trial court copying uncertainty, conferring appellate jurisdiction will refine copyright jurisprudence in the long term. Also, because each circuit decides copyright law issues differently, conferring appellate jurisdiction to the federal circuit will remove circuit splits, and hopefully, create some semblance of copyright consistency.

116. Lena Streisand, *A Pendent Panel: Visiting Judges and Pendent Copyright Claims at the Federal Circuit*, 30 FED. CIR. B. J. 341, 342 (2021).

For reference, “[a]lthough the [US]PTO has this requirement for technical qualifications, federal judges who hear patent cases are not required to have technical backgrounds.” Dunstan H. Barnes, Note, *Technically Speaking, Does It Matter? An Empirical Study Linking the Federal Circuit Judges’ Technical Backgrounds to How They Analyze the Section 112 Enablement and Written Description Requirements*, 88 CHI.-KENT L. REV. 971, 981 (2013). Interestingly, Judge Learned Hand discussed the idea of “technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken.” *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911) *aff’d in part, rev’d in part sub nom. Parke-Davis & Co. v. H.K. Mulford & Co.*, 196 F. 496 (2d Cir. 1912). Then, a study consisting of data from 1997–2011 showed that “seven judges were classified as having technical (T) backgrounds and twenty-seven judges were classified as having non-technical (N) backgrounds.” Barnes, *supra* note 116, at 981. In 2017, a study found that four federal circuit judges were consistently adjudicating some areas of patent law, and six judges were “developing their methodologies” on some areas of patent law. See Matthew B. Hershkowitz, Note, *Patently Insane for*

and the overall result of staffing a patent-focused court with patent-trained judges has been generally helpful.¹¹⁷ By expanding the court and conferring appellate jurisdiction over copyright issues, the court retains its specialized focus in intellectual property and can help clarify copyright law on a federal scale more efficiently than every circuit being conflicted with each other.

Since the Federal Circuit has already examined complex copyright issues previously, conferring appellate jurisdiction over copyright issues is logical. Recently, in *Google v. Oracle*, the Federal Circuit examined a copyright infringement case dealing with computer software.¹¹⁸ Even though the Federal Circuit has appellate jurisdiction over patent cases, the jurisdiction statute only requires a patent case to be alleged in the complaint.¹¹⁹ By assigning the Federal Circuit appellate jurisdiction over copyright cases in addition to patent cases, copyright law will benefit from greater uniformity and the parties, likewise, will benefit from having specially-trained appellate judges adjudicating their cases.

However, the Federal Circuit's patent law decisions have introduced controversy.¹²⁰ Federal Circuit patent decisions are often reversed by the

Patents: A Judge-by-Judge Analysis of the Federal Circuit's Post-Alice Patentable Subject Matter Eligibility of Abstract Ideas Jurisprudence, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 109 (2017). Today's federal circuit might include more patent law expertise with the appointment of Judge Tiffany Cunningham (a chemical engineer), and Judge Leonard Stark (an experienced IP judge and professor). *Judge Biographies*, U.S. CT. APP. FED. CIR., <https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/> [<https://perma.cc/KN26-FNQD>].

The legislature, in addition to industry commentators, predicted that the patent claims at the Federal Circuit could be “a sensible accommodation of the usual preference for generalist judges and the selective benefit of expertise in highly specialized and technical areas.” S. REP. NO. 97-275, at 6 (1981).

117. *Contra* Jeremy W. Bock, *Restructuring the Federal Circuit*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 197, 213 (2014). (“Although expertise may enhance one’s ability to analyze problems involving complex subject matter—such as patent law—experts are susceptible to certain systematic errors and biases. As described in the cognitive psychology literature, the “curse of expertise” is a term that captures the cognitive pitfalls to which experts are particularly susceptible, such as underestimating the difficulties of non-experts and resisting correction.”).

118. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014).

119. 28 U.S.C § 1295(a)(1) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court of the United States . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents.”).

120. For example, Commentator Barnes mentions in his empirical study that “Federal Circuit judges with technical training or expertise are significantly more likely to disagree with a lower court’s decision as to the sufficiency of the patent specification than their Federal Circuit peers with less or no technical training. Federal Circuit judges with technical training may simply believe—consciously or subconsciously—that they “know better” than federal district court judges when analyzing the sufficiency of the patent disclosure. This belief may exist regardless of the technical

Supreme Court, despite the Federal Circuit’s technical expertise.¹²¹ Conferring exclusive appellate jurisdiction for copyright cases might similarly create additional confusion since Federal Circuit judges are not experts on copyright law and have misapplied copyright standards previously.¹²² Despite some potential negative jurisprudential implications, “[t]he increasing importance of the Federal Circuit to the Supreme Court and the wide-reaching influence the court holds due to its unlimited geographical jurisdiction position [establishes] the court as the voice of American intellectual property.”¹²³ As a result, conferring exclusive appellate jurisdiction for copyright cases to the Federal Circuit helps achieve uniformity in copyright jurisprudence.¹²⁴

V. CONCLUSION

Creatives in the United States depend on the success of the United States’ copyright system, and there is a strong need for modernization of the Copyright Act.¹²⁵ One of the main problems is the continued confusion of the term “substantial similarity.” Theories such as the Inverse Ratio Rule that confuse the issues of actual copying and unlawful appropriation do not resolve the problem.

Not only should the Sixth Circuit explicitly reject the Inverse Ratio Rule, following suit with almost every other circuit’s abrogation or rejection of the Inverse Ratio Rule, but also the entire process of finding copyright infringement needs a major refresh. Like the United States Patent and Trademark Office’s post-grant proceedings for patents, the Copyright Office should be given substantive administrative review

background of the lower court judge who decided the case that was subsequently appealed.” Barnes, *supra* note 116, at 971. Although this empirical study is nearly ten years old, the notion that federal circuit judges might reverse a lower court ruling because of a district court judge’s non-IP background might prejudice parties.

121. From 1999–2008, the Federal Circuit achieved an astonishing reversal rate of 92.3% for its patent-related cases. Roy E. Hofer & Joshua H. James, *Supreme Court Reversal Rates for Federal Circuit Cases*, 6 LANDSLIDE 40 (2014).

122. “[T]he Federal Circuit has suffered scrutiny for its treatment of copyright law. . . . For example, the Federal Circuit faced major criticism for its ongoing adjudication of the copyright dispute amongst Oracle and Google on the issues of copyrightability and transformative use in APIs.” Streisand, *supra* note 116, at 347–48.

123. *Id.* at 362.

124. *Id.*

125. See Leahy-Smith America Invents Act, 112 Pub. L. 29, 125 Stat. 284 (2011). In 2011, the Leahy-Smith America Invents Act modernized patent law, most notably by migrating to a first-to-file system instead of a first-to-invent system. For reference, copyright law was last updated in 1976. See Copyright Act of 1976, Pub. L. 94–553, 90 Stat. 2541.

capabilities to determine whether two pieces of material are similar enough to enable a finding of copyright infringement.

Alternatively, the issues of actual copying and unlawful appropriation should be split between judge (either administrative or Article III) and jury. Using the functional considerations in *Markman*, the judge should first analyze actual copying by determining whether there is enough probative similarity between both materials and whether sufficient access was present. Then, if judge finds actual copying, the jury should be tasked with analyzing unlawful appropriation through evaluating the probative similarities the judge found and deciding if an unreasonable amount of copyrightable subject matter was taken.

Finally, instead of each circuit creating its own copyright jurisprudence, Congress should act to create uniformity in copyright law by giving the United States Court of Appeals for the Federal Circuit appellate jurisdiction for copyright issues. The American copyright system requires a major makeover, and to begin the makeover, the Sixth Circuit should steer into the Ninth Circuit's skid by abrogating the Inverse Ratio Rule similar to the decision in *Skidmore v. Led Zeppelin*.¹²⁶

126. 952 F.3d 1051 (9th Cir. 2020).