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PERSPECTIVE

9th Circuit quietly buries music law's inverse ratio rule

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As another Grammys night passes into the mist of pop music history, recording artists, music executives and intellectual property attorneys may wonder whether another banner year of copyright infringement suits will rattle and rankle the industry of rock and roll, rhythm and blues, and pop music. No less than four of the eight songs nominated for Song of the Year featured artists and songwriters sued for copyright infringement and two of the remaining four songs drew accusations of copyright infringement that have not matured into court filings.

A recent appellate ruling in the *Blurred Lines* case (*Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018)) affirmed the lower court's \$5.3 million copyright infringement verdict for the heirs of Marvin Gaye, a disappointing development for many in the music business who claim the decision chills creativity by blurring the line between copyrightable musical elements and mere "influence" or "vibe," which are non-protectable. But a late-breaking amendment to the ruling may give creatives a bit of comfort, as the court quietly edited the "inverse ratio rule" out of existence. That modification does not change the damages award to the heirs of Marvin Gaye, creator of the 1977 megahit "Got to Give It Up," or remove the heirs' entitlement to half of the future royalties from "Blurred Lines," a chart-topping pop hit from cur-



New York Times News Service

Pharrell Williams, in Los Angeles, Dec. 5, 2017. The 9th Circuit recently affirmed the lower court's \$5.3 million verdict in a case claiming that Williams and Robin Thicke copied a Marvin Gaye song.

rent superstars Robin Thicke and Pharrell Williams.

The little-noticed amendment expunged all references to the inverse ratio rule, a bane and a boon to music copyright infringement litigants for decades, which provides that the greater the evidence of access to a copyrighted work

by an alleged infringer, the less evidence of substantial similarity may be required by the complaining litigant.

More noted was the eloquent dissent from Circuit Judge Jacqueline Nguyen, warning that the decision "strikes a devastating blow to future musicians and

composers everywhere" and an amicus brief filed by more than 200 music artists called the verdict "very dangerous" to creativity in the music industry. Justice Nguyen's opinion, favoring creative defendants who admittedly were influenced by predecessors, carries little authority, but the expungement of the inverse ratio rule might move the dial on future music copyright cases in favor of those creatives.

To understand how the removal of the inverse ratio rule may change things going forward, history is instructive. The rule gained ascendancy in the influential 9th Circuit music copyright infringement case of *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), cited in *Blurred Lines* and the recent *Stairway to Heaven* opinions. In the *Bolton* case, which was won on appeal by Pierce O'Donnell, a partner at the authors' law firm of Greenberg Glusker, LLP, the pop singer Michael Bolton was found to have infringed the famous funk rock group the Isley Brothers' copyright on a song with the same title: "Love is a Beautiful Thing." Justice Dorothy W. Nelson explained that "in what is known as the 'inverse ratio rule,' we 'require a lower standard of proof of substantial similarity when a high degree of access is shown.' *Bolton*, 212 F.3d at 485, citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.1996).

Interestingly, the evidence of access in *Bolton* was not deemed terribly strong: the Isleys' song was never commercially released

until a year after Bolton claimed to have written his song, and the Isley song was never a hit on the Billboard charts or otherwise. Nor did the Isleys claim that Bolton's song was strikingly similar to theirs, which would have lowered the proof of access bar, under the inverse ratio rule. Nonetheless, the Court of Appeals sided with the jury in finding for the Isleys and the case went on to become fodder for the estate of Marvin Gaye and others seeking to prove copyright infringement where many argue that substantial similarity is less than striking.

District courts in the 9th Circuit struggled over the years to refine the rule to make sense. One California court described it as a "one-way" street, saying: "It 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." *Gable v. National Broadcasting Co.*, 727 F. Supp. 2d 815, 824 n.2 (C.D. Cal. 2010). The 9th Circuit's latest move in *Blurred Lines* removes rather than refines the rule. *Bolton* and the inverse ratio rule were also cited in the 2018 appeal involving Led Zepelin's signature song "Stairway to Heaven," *Skidmore v. Led Zepelin*, 905 F.3d 1116, (9th Cir.). In that case, the trial court found no infringement, which would

seem to swing the pendulum back in the direction of copyright infringement defendants, but the 9th Circuit ordered a new trial. The *Skidmore* appellate decision not only referenced the inverse ratio rule, but also, upon remanding the case for an unrelated reason, actually encouraged the district court to apply it, but in a different way than before.

Skidmore altered the inverse ratio rule's application in a way that mirrors the 2nd Circuit's approach to the rule, an approach long favored by copyright scholars. Under the 2nd Circuit's approach, copyright infringement plaintiffs need to prove "copying" (wherein the inverse ratio rule applies) and "unlawful appropriation" (or substantial similarity in 9th Circuit terms). Accordingly, while the amount of the access that the defendant had to the plaintiff's work still factors into the equation, it has no bearing on the substantial similarity analysis. *Skidmore* seems to suggest that the inverse ratio rule still may apply but only in proving superficial copying, as it does not affect the substantial similarity analysis. Indeed, the 9th Circuit even adopted the 2nd Circuit's terminology of "copying" and "unlawful appropriation," an approach teased in the 9th Circuit's 2018 *Rentmeester v. Nike* decision. If *Skidmore* put the brakes on the inverse ratio rule, the *Blurred Lines* case may push it off the road of the 9th Circuit's juridical authority absolutely.

Through its July 2018 amend-

ed opinion in *Blurred Lines*, the 9th Circuit was not only finally catching up to the Second Circuit, which buried the rule 50 years ago, but also was bringing the law more up to speed with technological advancements. With the prevalence of user-upload portals like Youtube and Soundcloud and the emergence of independent distribution services like TuneCore that allow individual users to quickly and cost-effectively distribute their music through online retailers like iTunes, Spotify, Amazon Music and others, the copyright infringement requirement of "access" has little, if any, teeth in today's stream-first society. By seemingly lessening the importance of "access" in copyright law, it appeared that the 9th Circuit was actually keeping pace with the ever-evolving music industry landscape.

What effect, if any, might the Court of Appeals' scrubbing of

the rule have on music copyright litigation and creative behavior? Without the rule, all music copyright cases will require equally strict scrutiny of similarity proof, regardless of access considerations. In other words, whether a song was a Billboard top 10 hit or only 10 people heard it, the standard of proof required to prove substantial similarity, the touchstone of all copyright cases, will be the same. If two songs don't share copyrightable elements, such as melodic, harmonic and rhythmic features, a copyright infringement lawsuit should fail, regardless of how much access to the song a defendant had. Time and trials will tell.

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