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by Lee S. Brenner and Sarah L. Cronin

MORE *or* LESS

The Ninth Circuit, unlike the Second, has refrained from discarding the inverse ratio rule in determining copyright infringement

COPYRIGHT INFRINGEMENT CLAIMS require courts and juries to compare the similarity of the works created by the plaintiff and the defendant to determine whether infringement occurred. One issue with which courts have grappled is whether the extent of the defendant's access to the plaintiff's work is relevant to the level of similarity required to establish infringement. Under the so-called inverse ratio rule, if the plaintiff establishes a high degree of access to its work by the defendant, a finding of infringement may be based upon a lesser degree of similarity. The inverse ratio rule is rooted in case law from the 1930s through the 1950s. It is long past time for the Ninth Circuit to abandon it.

In 1961, the Second Circuit considered the rule and rejected it. While some courts in the Ninth Circuit have embraced or at least acknowledged the rule, others have ignored

it. Moreover, it is unclear what the precise role of the inverse ratio rule is, if any, in a copyright infringement case in the Ninth Circuit. A review of the leading cases in the Ninth Circuit and Second Circuit makes clear that the degree of access should be irrelevant to the degree of similarity required to establish infringement.

To establish copyright infringement in the Ninth Circuit, the plaintiff bears the burden of proving that he or she is the owner of a valid copyright, and the defendant copied elements of the plaintiff's work that are subject to copyright protection.¹ Copying is rarely established by direct evidence. Instead, plaintiffs typically attempt to establish copying through circumstantial evidence: The defendant who created the allegedly infringing work had access to the plaintiff's material, and substantial similarity exists between

the two works.² Establishing access requires the plaintiff to prove that the defendant had a reasonable opportunity to view the plaintiff's work.³ A "bare possibility" of viewing the plaintiff's work is insufficient.⁴

Substantial similarity is determined under an "extrinsic test" and an "intrinsic test."⁵ The extrinsic test "focuses on 'articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events' in the two works"⁶ and is objective.⁷ When the extrinsic test is applied, unprotectible elements—such as basic, stock ideas and concepts, and situations and inci-

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dents that flow naturally from generic plot lines (referred to as scenes a faire)—are disregarded.⁸ The fact finder then “must take care to inquire only whether ‘the protectible elements, standing alone, are substantially similar.’”⁹ Once the extrinsic test has been met, a plaintiff must also satisfy the intrinsic test, which is “a subjective comparison that focuses on ‘whether the ordinary, reasonable audience’ would find the works substantially similar in the ‘total concept and feel of the works.’”¹⁰

Courts in the Ninth Circuit often fail to discuss the difference between actual, in-fact copying and unlawful copying. Proving that a defendant actually copied the plaintiff’s work is not the ultimate test for copyright infringement. Indeed, the U.S. Supreme Court has instructed that “[n]ot all copying... is copyright infringement.”¹¹ Thus, if a defendant actually has copied the plaintiff’s work, the plaintiff still must establish that the works are substantially similar in terms of protectible expression—that is, unlawful copying.¹²

Unlike the Ninth Circuit, Second Circuit courts explicitly distinguish between actual, in-fact copying and unlawful copying. In particular, in the Second Circuit, the second prong of the infringement test (copying) is itself separated into two elements: A plaintiff must show that 1) the defendant actually copied the plaintiff’s work, and 2) the copying is unlawful because a substantial similarity exists between the defendant’s work and the protectible elements of the plaintiff’s work.¹³

In the Second Circuit, a plaintiff may establish actual copying circumstantially by demonstrating that the defendant had access to the plaintiff’s work and similarities exist between the works that are “probative of copying.”¹⁴ This level of similarity has been coined “probative similarity,” and it should not be confused with the term “substantial similarity” of protectible expression necessary to show that actual copying is unlawful.¹⁵ Thus, even if a defendant does not contest access and actual copying, courts within the Second Circuit reject claims for copyright infringement on the basis of lack of substantial similarity of protectible expression.¹⁶

History of the Rule

One of the earliest invocations of the inverse ratio rule was the Second Circuit’s 1938 holding in *Shipman v. R.K.O. Radio Pictures, Inc.*¹⁷ According to the court, “[I]f there is access, the probability that the similarities are the result of copying, intentional or unintentional, is so high that there is only one pertinent question: are the similarities of matters which justify the infringement claimed?”¹⁸ The court also noted in dictum that the defendant’s admission of access affected the weight

to be given to the similarities. In particular, the court explained that when there is an admission of access, there is a high probability—indeed a presumption—that the similarities are the result of copying.¹⁹ Nevertheless, the *Shipman* court concluded that its presumption of copying could not overcome the numerous differences between the two works and thus found no infringement.

In 1942, in *O’Rourke v. R.K.O. Radio Pictures, Inc.*,²⁰ a case before a U.S. district court in Massachusetts, the defendant admitted he had access to the plaintiff’s script but denied that he copied any part of it. The court ostensibly rejected the “presumption theory” set forth in *Shipman* but nevertheless stated, inexplicably, that “in the face of a showing of access strong proof from the defendant is required that its material is from an independent source.”²¹ Ultimately, the court held that even if some of the changes in the defendant’s work had been “suggested” by the plaintiff’s work, this only showed, at best, a use of such a small fraction of the plaintiff’s ideas that it did not rise to the level of copyright infringement.

In *Golding v. R.K.O. Pictures, Inc.*,²² the California Supreme Court in 1950 addressed state common law copyright infringement. The defendants in the case, who were producers of a motion picture, appealed a judgment against them, arguing that there was insufficient evidence to support a judgment that they plagiarized the plaintiffs’ play. The defendants admitted access,²³ and the court noted that the defendants also demonstrated an inclination to pirate the plaintiffs’ work.²⁴

In discussing whether the defendants had engaged in unauthorized copying, the supreme court looked to the decisions in both *Shipman* and *O’Rourke*. After reviewing these cases, the court concluded, “An inference of copying may arise when there is proof of access coupled with a showing of similarity.”²⁵ Then, without citing any authority, the court stated:

Where there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the inference of copying may be indulged.²⁶

The California Supreme Court did not announce in *Golding* that it was making a new rule of federal copyright law (nor did it have the authority to do so). Nevertheless, its seemingly innocuous statement—“Where there is strong evidence of access, less proof of similarity may suffice”—has become the basis and oft-quoted language for those parties seeking to apply the inverse ratio rule in federal copyright infringement cases.

The *Golding* court addressed the issue of access in its determination of whether there had been actual copying, not whether the two works were substantially similar. Indeed, to find liability for damages, the court noted that the plaintiffs must also show “substantial evidence of similarity between plaintiffs’ literary property and the moving picture produced by defendants.”²⁷ The court then compared the two works in order to determine whether there was substantial similarity between the plaintiffs’ play and the defendants’ motion picture regarding the protectible features of the plaintiffs’ play.²⁸ In this part of the analysis, the court did not even discuss the issue of access.

Ultimately, the *Golding* court found the evidence sufficient for the jury to find that the two works were substantially similar and held the defendants liable for infringing on the plaintiffs’ protectible property rights.²⁹ Still, it remained unclear whether federal courts would adopt any of the statements made by the *Golding* court.

Four years after the *Golding* decision, in 1954, a U.S. district court in the Southern District of New York issued a ruling in *Morse v. Fields*, a copyright infringement case.³⁰ In the court’s determination of whether actual copying had taken place, the court distinguished between the similarity necessary to show actual copying and the similarity necessary to show actionable copying. The court analyzed the actual, in-fact copying element by looking to the evidence of access and similarity. Regarding access, the plaintiff showed that his article had appeared in a national publication. Nevertheless, the court found, “With the evidence so posited, the 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.”³¹ The *Morse* court never reached the issue of actionable copying.

In 1961, the Second Circuit expressly rejected the inverse ratio rule in *Arc Music Corporation v. Lee*.³² On appeal, the plaintiff argued that the lower court had committed an error by not accepting the rule. In response, the court held that nothing like the inverse ratio rule even existed with respect to federal copyright claims:

In the federal copyright law we find no such principle. The evidence for [the inverse ratio rule’s] existence is meager in any event; it is asserted to be contained in generalized statements in a state decision dealing with appropriation of literary property. The court [in *Golding*]...did not assume, however, to be erecting a new principle of law, but only to justify the sufficiency of the evidence to support a jury verdict.... We fear that counsel with that semantic

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13. A B C D
14. True False
15. True False
16. True False
17. True False
18. True False
19. A B C D
20. True False

1. In *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corporation*, McDonald's commercials were alleged to have infringed upon the characters appearing in which children's television series?

- A. *Dr. Shrinker*.
- B. *Sigmund and the Sea Monsters*.
- C. *H.R. Pufnstuf*.
- D. *Land of the Lost*.

2. When a plaintiff has established that a defendant has actually copied his or her work, the plaintiff does not need to show that the defendant's work is substantially similar to the plaintiff's work with regard to protectible expression.

- True.
- False.

3. In *Golding v. R.K.O. Pictures, Inc.*, the Ninth Circuit held that when the evidence of access is strong, less proof of similarity may suffice to uphold a judgment of copyright infringement.

- True.
- False.

4. In applying the extrinsic test, unprotectible elements are generally disregarded.

- True.
- False.

5. In 1961, the Second Circuit in *Arc Music Corporation v. Lee* stated that:

- A. The inverse ratio rule is helpful in the right context.
- B. The inverse ratio rule's roots stem from the comments of Judge Learned Hand.
- C. The inverse ratio rule should be applied in all copyright cases in which access has been shown.
- D. None of the above.

6. Copying can be established by circumstantial evidence.

- True.
- False.

7. Proof of access alone may sometimes establish actual copying.

- True.
- False.

8. In 1968, *Nimmer on Copyright* noted that:

- A. The inverse ratio rule was completely rejected by one court.
- B. A very high degree of similarity is required to dispense with proof of access.
- C. Clear and convincing evidence of access will not avoid the necessity of also proving substantial similarity.
- D. All of the above.

9. In *Rice v. Fox Broadcasting Company*, the Ninth Circuit found that the plaintiff's evidence of access was strong enough to trigger the inverse ratio rule.

- True.
- False.

10. A "bare possibility" of viewing the plaintiff's work is insufficient to establish access.

- True.
- False.

11. In *Benay v. Warner Bros. Entertainment, Inc.*, the Ninth Circuit held that the plaintiffs did not show sufficient similarity to maintain their claim, in spite of the lower standard that applied because of the inverse ratio rule.

- True.
- False.

12. If the inverse ratio rule is applied in a given copyright case, it follows that the plaintiff's copyright claim will survive summary judgment.

- True.
- False.

13. What television show appeared in a Ninth Circuit copyright case because it allegedly infringed on the plaintiff's screenplay, *The Funk Parlor*?

- A. *The Sopranos*.
- B. *Six Feet Under*.
- C. *Sex and the City*.
- D. *Dexter*.

14. In *Metcalf v. Bochco*, the Ninth Circuit expressly referred to the phrase "inverse ratio rule."

- True.
- False.

15. In *Funky Films, Inc. v. Time Warner Entertainment Company, L.P.*, the Ninth Circuit held that general plot similarities are protected under copyright law.

- True.
- False.

16. The court in *Morse v. Fields* held that the plaintiff was not entitled to the benefit of the inverse ratio rule, even though the plaintiff made a showing that his article appeared in a national publication.

- True.
- False.

17. No amount of proof of access will suffice to show copying if there are no similarities between the protected expressions in the two works.

- True.
- False.

18. In 1968, *Nimmer on Copyright* followed the Second Circuit's lead by expressly rejecting the inverse ratio rule.

- True.
- False.

19. The Ninth Circuit questioned the viability of the inverse ratio rule in:

- A. *Novak v. Warner Bros. Pictures, LLC*.
- B. *Aliotti v. R. Dakin & Company*.
- C. *Arc Music Corporation v. Lee*.
- D. *Shaw v. Lindheim*.

20. The inverse ratio rule may have some limited viability in the Second Circuit.

- True.
- False.

proclivity natural to our profession have allowed themselves to be seduced by a superficially attractive apophthegm which upon examination confuses more than it clarifies.

According to *Arc Music Corporation*, access will not make up for a lack of similarity, “and an undue stress upon that one feature can only confuse and even conceal this basic requirement.”³³ Thus, within the Second Circuit, the inverse ratio rule as a mechanism for finding infringement was dealt a

in support of the notion that the inverse ratio rule lowered the quantum of proof necessary to show substantial similarity.

Later Developments in the Ninth Circuit

Then the Ninth Circuit, in 1977, offered its version of the rule in *Sid and Marty Krofft Television Productions, Inc. v. McDonald’s Corporation*.³⁶ In this case, plaintiffs Sid and Marty Krofft alleged that McDonald’s McDonaldland commercials infringed the copyright in the characters appearing in the

The Ninth Circuit did not address the inverse ratio rule again for approximately 10 years. While the Ninth Circuit in 1987 questioned the viability of the inverse ratio rule in *Aliotti v. R. Dakin & Company*,⁴³ three years later it held in *Shaw v. Lindheim* that the rule was still alive.⁴⁴ Nevertheless, although the *Shaw* court stated that the inverse ratio rule was germane and cited to *Krofft*, the court never explained how the rule actually should be applied.⁴⁵

The Ninth Circuit appeared to apply a dif-

The plaintiff argued that she should have been given an opportunity to satisfy a lower burden of proof under the inverse ratio rule. But the Ninth Circuit did not agree that the plaintiff’s invocation of the inverse ratio rule required the district court’s decision to be reversed. Borrowing a line from *Krofft*, the court reasoned that “[n]o amount of proof of access will suffice to show copying if there are no similarities.”

seemingly fatal blow.³⁴

Nevertheless, the life of the inverse ratio rule was not completely extinguished. For example, it appeared to be resuscitated in the 1968 edition of *Nimmer on Copyright*—one of the leading copyright law treatises since its initial publication in 1963. In “The Effect of Access upon the Determination of Substantial Similarity,” a section of the 1968 edition, author Melville B. Nimmer wrote:

It has been noted in a prior section that evidence of striking similarity will sometimes permit a finding of copying without proof of access. It is obvious that the converse proposition is not equally valid. That is, clear and convincing evidence of access will not avoid the necessity of also proving substantial similarity since access without similarity cannot create an inference of copying. However, this so-called “Inverse Ratio Rule” although completely rejected by one court, would seem to have some limited validity. That is, 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. This is not to say that a showing of substantial similarity may ever be avoided.³⁵

Nimmer did not cite *Golding*, or any case,

H.R. Pufnstuf children’s television series. The defendants admitted that they copied the idea of the plaintiffs’ television series but argued that the expression of the idea was too dissimilar for a finding of infringement.³⁷ After reviewing representative samples of the defendants’ and the plaintiffs’ work, the *Krofft* court held that the two works were substantially similar.³⁸

Surprisingly, only after finding that the two works were substantially similar did the court address the issue of access, which was undisputed as a matter of fact. Notably, the court stated, “No amount of proof of access will suffice to show copying if there are no similarities.”³⁹

The court then proceeded to set forth its version of the inverse ratio rule as a means for lowering the threshold of proof required to show substantial similarity. The court noted that, in doing so, “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.”⁴⁰

The *Krofft* court cited *Nimmer* in support of its formulation of the inverse ratio rule.⁴¹ Ultimately, the court concluded that the degree of access present in the case justified a lower standard of proof to show substantial similarity—but the court candidly admitted that the lowered standard was “impossible to quantify.”⁴²

ferent version of the inverse ratio rule in *Metcalfe v. Bochco*, a 2002 decision. The plaintiffs sued for copyright infringement, alleging that the defendants’ television show infringed their treatment for a motion picture.⁴⁶ The court commented that the plaintiffs’ case was “strengthened considerably by [the defendants’] concession of access to their works”—a concession that had been made for purposes of the defendants’ summary judgment motion.⁴⁷ In light of the evidence of access, the court held that a trier of fact “could easily infer that the many similarities between plaintiffs’ scripts and defendants’ work were the result of copying, not mere coincidence.” Notably, the *Metcalfe* court never used the phrase “inverse ratio rule” or otherwise set forth the specifics of the rule—namely, that strong evidence of access can lower the quantity of proof required for substantial similarity.

Since *Metcalfe*, the inverse ratio rule has enjoyed little success in the Ninth Circuit. Indeed, post-*Metcalfe*, the Ninth Circuit has not relied upon the inverse ratio rule as a basis for finding that infringement occurred based upon some lower measure of similarity.

For example, in *Rice v. Fox Broadcasting Company*, the Ninth Circuit found that the plaintiff’s evidence of access was not strong enough to trigger application of the inverse ratio rule.⁴⁸ The *Rice* court noted that in cases applying the inverse ratio rule, the fact that the defendants had conceded access to the plaintiff’s copyrighted work was a promi-

ment factor in the court's analysis.⁴⁹

In 2006, the plaintiff in *Funky Films, Inc. v. Time Warner Entertainment Company, L.P.*, alleged that the HBO television series *Six Feet Under* infringed her screenplay *The Funk Parlor*.⁵⁰ The Ninth Circuit concluded that, while the two works shared certain plot similarities, these were not protected under copyright law. Notably, for purposes of the summary judgment motion, the district court assumed that the defendants had access to the plaintiff's script.⁵¹

The plaintiff argued that she should have been given an opportunity to satisfy a lower burden of proof under the inverse ratio rule. But the Ninth Circuit did not agree that the plaintiff's invocation of the inverse ratio rule required the district court's decision to be reversed. Borrowing a line from *Krofft*, the court reasoned that "[n]o amount of proof of access will suffice to show copying if there are no similarities."⁵² The court must have been referring to the lack of protectible similarities, because the court's opinion is littered with numerous examples of nonprotectible similarities between the two works at issue.

Later in 2010, the Ninth Circuit in *Benay v. Warner Bros. Entertainment, Inc.*, assumed for the purpose of its analysis of a claim of copyright infringement that the inverse ratio rule applied to lower the burden on the plaintiffs to show similarity. In spite of the lower standard, the court held that the plaintiffs still did not show sufficient similarity to maintain their claim.⁵³

In *Novak v. Warner Bros. Pictures, LLC*, an unpublished opinion also issued last year, the Ninth Circuit once again held that the inverse ratio rule did not help the plaintiffs because there were no similarities of protected expression in the two works.⁵⁴ Moreover, the court explained that even under a relaxed standard, the requisite similarities must be "concrete and or articulable" to satisfy the extrinsic test. Ultimately, the court rejected the plaintiffs' copyright infringement claim, finding that the only articulable similarities between the two works consisted of unprotected elements.⁵⁵

The Second Circuit got it right. The Ninth Circuit appears to be struggling to get rid of the inverse ratio rule once and for all. Courts within the Second Circuit have made clear that the inverse ratio rule has no bearing upon the determination of whether or not two works are substantially similar in protectible expression.⁵⁶ Indeed, the Second Circuit has maintained its rejection of the inverse ratio rule with respect to substantial similarity of protectible expression.⁵⁷ Thus, when actual copying is either admitted or assumed, the inverse ratio rule "is irrelevant."⁵⁸

As the Second Circuit has noted, the level of access a defendant may have had to the

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plaintiff's work can have no logical effect on whether two works—compared side by side—are substantially similar in their protectible elements. This is because no amount of access can make nonprotectible elements magically become protectible.

The Ninth Circuit recognized this principle in 2010, albeit in the unpublished *Novak* opinion. It also appears to have implicitly recognized this principle in *Funky Films* and *Benay*, in which the court assumed access yet found no substantial similarity between the works at issue—notwithstanding the numerous, nonprotectible elements shared by those works.

Even if the Ninth Circuit were to employ the inverse ratio rule, that decision would not necessarily make the rule any more meaningful than it is now. To date, it is not clear how much access is required to trigger the application of the rule in the first instance. Does the evidence have to be "strong," or does it need to be "clear and convincing," as the *Krofft* court suggested in 1977?

Moreover, as recently recognized by a district court in the Central District of California, even when a high degree of access is shown, "[I]t is not clear just how much less the showing of substantial similarity need be."⁵⁹ Assuming a high degree of access, how much similarity would the plaintiff need to show under the inverse ratio rule? Is it still substantial similarity, or something less?

At bottom, there is no logical role for the inverse ratio rule in the Ninth Circuit's extrinsic test. Moreover, the Ninth Circuit already has recognized that the inverse ratio rule has no role in the intrinsic test. The Second Circuit was correct 50 years ago when it bluntly stated that the inverse ratio rule is irrelevant to the question of whether two works are substantially similar in their protectible elements. It is time for the Ninth Circuit to catch up. ■



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¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Kouf v. Walt Disney Pictures Television*, 16 F. 3d 1042, 1044 n.2 (9th Cir. 1994).

² *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F. 3d 1072, 1076 (9th Cir. 2006) (citations omitted).

³ *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 482 (9th Cir. 2000).

⁴ *Merrill v. Paramount Pictures Corp.*, No. 05-CV-1150, 2005 U.S. Dist. LEXIS 45401, at *20 (C.D. Cal. Dec. 19, 2005) (citations omitted); *see also* *Jason v. Fonda*, 526 F. Supp. 774, 776-77 (C.D. Cal. 1981).

⁵ *Funky Films*, 462 F. 3d at 1077.

⁶ *Id.* (citing *Kouf*, 16 F. 3d at 1045).

⁷ *Id.*

⁸ *Id.*; *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1129, 1133-34 (C.D. Cal. 2007); *Cavalier v. Random House, Inc.*, 297 F. 3d 815, 823 (9th Cir. 2002).

⁹ *Cavalier*, 297 F. 3d at 822 (quoting *Williams v. Crichton*, 84 F. 3d 581, 588 (2d Cir. 1996)).

¹⁰ *Id.* (quoting *Kouf*, 16 F. 3d at 1045).

¹¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹² See *Narell v. Freeman*, 872 F. 2d 907, 910-13 (9th Cir. 1989) (Despite the defendant's admission of copying, "no reasonable reader could conclude that the works are substantially similar."); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1143, 1171 n.44, 1174-87 (C.D. Cal. 2001) (Even assuming the defendants "made 'use' of Plaintiffs' works as source materials," there was no substantial similarity as a matter of law.); *Bensbargains.net, LLC v. XPBargains.com*, No. 06-CV-1445, 2007 U.S. Dist. LEXIS 60544, at *9 (S.D. Cal. Aug. 16, 2007) (The plaintiff must still prove substantial similarity "regardless of how strong its evidence is that Defendants in fact copied from [the plaintiff's work]."); See *v. Durang*, 711 F. 2d 141, 142-43 (9th Cir. 1983) (Even actual copying is irrelevant where no reasonable person could find any substantial similarity between the plaintiff's and the defendant's works.).

¹³ *Laureyssens v. Idea Group, Inc.*, 964 F. 2d 131, 140 (2d Cir. 1992).

¹⁴ *Jorgensen v. Epic/Sony Records*, 351 F. 3d 46, 51 (2d Cir. 2003).

¹⁵ *Tiانشan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F. Supp. 651, 656 & n.3 (S.D. N.Y. 1995).

¹⁶ *Walker v. Time Life Films, Inc.*, 784 F. 2d 44, 52 (2d Cir. 1986); *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1258 (S.D. N.Y. 1995); *Denker v. Uhry*, 820 F. Supp. 722, 728 (S.D. N.Y. 1992); *Williams v. Crichton*, 84 F. 3d 581, 587 (2d Cir. 1996).

¹⁷ *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938).

¹⁸ *Id.* at 537.

¹⁹ *Id.* at 538 (citations omitted).

²⁰ *O'Rourke v. R.K.O. Radio Pictures, Inc.*, 44 F. Supp. 480 (D. Mass. 1942).

²¹ *Id.*

²² *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. 2d 690

(1950).

²³ *Id.* at 693.

²⁴ *Id.* at 698.

²⁵ *Id.* at 695 (citing *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533, 538 (2d Cir. 1938), and *O'Rourke*, 44 F. Supp. at 482).

²⁶ *Id.*

²⁷ *Id.* at 698.

²⁸ *Id.* at 699.

²⁹ *Id.* at 701.

³⁰ *Morse v. Fields*, 127 F. Supp. 63 (S.D. N.Y. 1954).

³¹ *Id.* at 66 (citing *Golding*, 35 Cal. 2d at 695).

³² *Arc Music Corp. v. Lee*, 296 F. 2d 186 (2d Cir. 1961).

³³ *Id.* at 188 (citations omitted).

³⁴ However, the inverse ratio rule may have some limited viability in the Second Circuit. It may apply to the separate inquiry of whether or not there has been actual copying, as opposed to the question of whether or not two works are substantially similar in protectible expression. See *The Sheldon Abend Revocable Trust v. Spielberg*, No. 08 Civ. 7810, 2010 U.S. Dist. LEXIS 99080, at *8 n.3 (S.D. N.Y. Sept. 21, 2010); see also *Green v. Lindsey*, 885 F. Supp. 469, 480 (S.D. N.Y. 1992).

³⁵ 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT §143.4, at 634 (1968).

³⁶ *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F. 2d 1157 (9th Cir. 1977).

³⁷ *Id.* at 1165.

³⁸ *Id.* at 1167.

³⁹ *Id.* at 1172 (citing *Williams v. Kaag Mfrs., Inc.*, 338 F. 2d 949, 951 (9th Cir. 1964), and *Arnstein v. Porter*, 154 F. 2d 464, 468 (2d Cir. 1946)).

⁴⁰ *Id.*

⁴¹ (citing 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT §143.4, at 634); accord *Fink v. Goodson-*

Todman Enters., Ltd., 9 Cal. App. 3d 996, 1013 (1970).

⁴² *Sid & Marty Krofft*, 562 F. 2d at 1172.

⁴³ *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)).

⁴⁴ *Shaw v. Lindheim*, 919 F. 2d 1353 (9th Cir. 1990).

⁴⁵ *Id.* at 1362.

⁴⁶ *Metcalf v. Bochco*, 294 F. 3d 1069 (9th Cir. 2002).

⁴⁷ *Id.* at 1075 (citing *Shaw*, 919 F. 2d at 1361).

⁴⁸ *Rice v. Fox Broad. Co.*, 330 F. 3d 1170 (9th Cir. 2003).

⁴⁹ *Id.* (citing *Shaw*, 919 F. 2d at 1361-62; *Metcalf*, 294 F. 3d at 1075).

⁵⁰ *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F. 3d 1072, 1074 (9th Cir. 2006).

⁵¹ *Id.* at 1081.

⁵² *Id.* (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F. 2d 1157, 1172 (9th Cir. 1977)).

⁵³ *Benay v. Warner Bros. Entm't, Inc.*, 607 F. 3d 620, 625 (9th Cir. 2010).

⁵⁴ *Novak v. Warner Bros. Pictures, LLC*, No. 08-56957, 2010 U.S. App. LEXIS 14549 (9th Cir. July 15, 2010) (unpublished).

⁵⁵ *Id.* at *5-6.

⁵⁶ *The Sheldon Abend Revocable Trust v. Spielberg*, No. 08 Civ. 7810, 2010 U.S. Dist. LEXIS 99080, at *8 n.3 (S.D. N.Y. Sept. 21, 2010).

⁵⁷ *A Slice of Pie Prods., LLC v. Wayans Bros. Entm't*, 487 F. Supp. 2d 41, 47 n.4 (D. Conn. 2007) (citing *Arc Music Corp. v. Lee*, 296 F. 2d 186 (2d Cir. 1961)).

⁵⁸ *Green v. Lindsey*, 885 F. Supp. 469, 480 (S.D. N.Y. 1992).

⁵⁹ *Gable v. National Broad. Co.*, No. 08-CV-4013, 2010 U.S. Dist. LEXIS 77772, at *19 n.3 (C.D. Cal. Feb. 22, 2010).

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