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BARE POSSIBILITY OR REASONABLE OPPORTUNITY? IN DEFENSE OF A DEFENDANT-CONSCIOUS VIEW OF “ACCESS” IN A DIGITAL AGE

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I. INTRODUCTION

Courts are struggling to modernize the definition of “reasonable opportunity to access a protected work” (“reasonable opportunity”). They are struggling because the rise of digital music streaming services and the ease with which artists can share their music on the Internet have radically increased music’s accessibility and availability. In response to this reality, the Ninth Circuit recently took a step with the potential to distort the concept of reasonable opportunity.

On March 9th, 2020, in its decision *Skidmore v. Led Zeppelin*, the Ninth Circuit joined the Second, Fifth, Seventh, and Eleventh Circuits in rejecting the inverse ratio rule, a controversial and problematic doctrine which unfairly advantaged popular works.¹ Unfortunately, while *Skidmore* addressed one problem, it opened the door to another: allowing a plaintiff to establish that a defendant “accessed” the allegedly infringed work by “a trivial showing that the work is available on demand.”²

While some may argue that the Ninth Circuit’s proposition is dicta, lawyers and judges will nevertheless cite it in support of a lower standard for “reasonable opportunity.”³ Therefore, it is worthwhile to consider what would happen if courts fully embraced this position.

This article proposes reexamining the line between a “bare possibility” and “reasonable opportunity” and maintaining a defendant-conscious, reasonable view of access. Part II briefly summarizes

¹ *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020), cert. denied sub nom. *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, No. 20-142, 2020 WL 5883816 (U.S. Oct. 5, 2020), reh'g denied sub nom. *Skidmore v. Zeppelin*, No. 20-142, 2020 WL 7132739 (U.S. Dec. 7, 2020); *Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961); *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 372 (5th Cir. 2004), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994). While the IRR is currently endorsed only in the Sixth Circuit, the Sixth Circuit recently suggested that it was open to abrogating the rule if given the opportunity. *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 n.1 (6th Cir. 2020) (“In any event, the ‘inverse-ratio rule’ appears to be on its last legs.”).

² *Skidmore*, 852 F.3d at 1068 (citing Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. Times, Nov. 18, 2019).

³ Indeed, at least one court has already done so. In *Gray v. Perry*, the court cited *Skidmore*’s “on demand” proposition when declining to disturb the jury finding of access. Ultimately, the court granted judgement as a matter of law on other grounds. *Gray v. Perry*, No. 215CV05642CASJCX, 2020 WL 1275221, at *14 (C.D. Cal. Mar. 16, 2020).

the background copyright law and discusses *Skidmore*'s potential to change the access analysis. Part III describes negative effects of a solely plaintiff-centric view of "access." Part IV proposes maintaining a defendant-conscious, reasonable view of access and describes third-parties' roles in the "access" analysis. Part V summarizes and concludes this article.

II. BACKGROUND COPYRIGHT LAW AND *SKIDMORE*

a. Elements of a Copyright Infringement Claim

A copyright infringement claim requires that a plaintiff show: (1) that he owns a valid copyright in the work; and (2) that the defendant copied protected aspects of the work.⁴ In this article, I will focus exclusively on the "copied protected aspects" element which contains two components: copying and unlawful appropriation.⁵

i. Copying

The "copying" component requires that the plaintiff show, typically by circumstantial evidence, that the defendant "actually copied" the protected work⁶ by showing: (1) that the defendant had access to the plaintiff's work; and (2) that the works share similarities probative to copying.⁷

A. Access

The first requirement for a circumstantial case of "copying" is that the defendant had "access" to the allegedly infringed work. The basis for this requirement comes from the commonsense proposition that no defendant can truly copy something he does not have access to.⁸ Nevertheless, "access" is the most misunderstood and misapplied element of the infringement analysis.⁹ Three primary points of contention frequently arise.

First is whether "access" requires that the defendant actually viewed, heard, or read the plaintiff's work. The prevailing idea is that access can be inferred from a "reasonable opportunity to view"; proof of actual viewing is unnecessary.¹⁰

⁴ *Skidmore*, 952 F.3d at 1064 (citing *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018), cert. denied, 139 S. Ct. 1375, 203 L. Ed. 2d 609 (2019), and overruled on other grounds by *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)).

⁵ *Id.* at 1117. While these two components are often condensed into the shorthand "substantial similarity," they are distinct, and both are essential to find copyright infringement. *Skidmore*, 952 F.3d at 1064; David Aronoff, Exploding the "Inverse Ratio Rule", 55 J. Copyright Soc'y U.S.A. 125, 127 (2008).

⁶ *Skidmore*, 952 F.3d at 1064; Aronoff, *supra* note 5, at 127.

⁷ *Skidmore*, 952 F.3d at 1064 (quoting *Rentmeester*, 883 F.3d at 1117).

⁸ William F. Patry, § 9:22.Access, 3 Patry on Copyright § 9:22 (2020) (citing, e.g., *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997)).

⁹ 3 Patry on Copyright § 9:22.

¹⁰ E.g., *Sid & Marty Krofft TV Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1772 (9th Cir. 1977) (citing *Arrow Novelty Co. v. Enco National Corp.*, 393 F.Supp. 157, 160 (S.D.N.Y.), *aff'd*, 515 F.2d 504 (2d Cir. 1975) and *Universal*

Second is the threshold between a “reasonable opportunity” and a “bare possibility” of viewing a plaintiff’s work.¹¹ Courts have proposed that plaintiffs “can establish access either by demonstrating that (1) the infringed work has been widely disseminated; or (2) a particular chain of events exists by which the alleged infringer might have gained access to the copyrighted work.”¹² Courts have defined “widely disseminated” as either considerable commercial success or ready availability in the marketplace.¹³

Third is whether copying can ever be presumed with merely a high degree of similarity and no evidence of access. Circuits are split on this question, which I will address in the following section.

B. Probative Similarities

The second requirement for a circumstantial case of “copying” is that “the two works share similarities probative of copying.”¹⁴ Historically, there has been confusion about this element because some courts have used, and continue to use, the term “substantial similarity” to describe both the “probative

Athletic Sales Co. v. Salkeld, 340 F.Supp. 899, 901 (W.D.Pa. 1972)); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.02[A] (2020); *but see Schwarz v. Universal Pictures Co.*, 85 F.Supp. 270, 271 (S.D. Cal. 1945); *Bradbury v. CBS*, 287 F.2d 478 (9th Cir. 1961) (applying the “actual reading or knowledge” standard of access based on both parties’ stipulation). One criticism of allowing an inference of access to lead to an inference of copying is that it “dispens[es] with evidence in favor of inferences, and piling one inference on top of another, a dangerous step.” 3 Patry on Copyright § 9:25.

¹¹ Nimmer, *supra* note 10 (citing, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000)) *overruled on other grounds by Skidmore*, 952 F.3d (“There must be a reasonable possibility of viewing plaintiff’s work—not a bare possibility. Distinguishing ‘bare’ from ‘reasonable,’ unfortunately, is anything but straightforward.”).

¹² Nimmer, *supra* note 10 (quoting *Repp v. Lloyd Webber*, 947 F.Supp. 105, 114 (S.D.N.Y. 1996)); *but see* 3 Patry on Copyright § 9:25 (“In order for an inference of access to be permissible, there must be established facts regarding the work’s general availability *as well as* specific, credible evidence about defendant’s reasonable opportunity to have been exposed to the work.” (emphasis added)).

¹³ 3 Patry on Copyright § 9:23 (citing, e.g., *Mestre v. Vivendi Universal U.S. Holding Co.*, 2005 WL 1959295 (D. Or. 2005)); 3 Patry on Copyright § 9:26. Courts have also recognized a “doctrinal variant that focuses on saturation in a relevant market in which both the plaintiff and the defendant participate.” *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (citing *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 847 (9th Cir. 2012), *as amended on denial of reh’g and reh’g en banc* (June 13, 2012)).

¹⁴ *Skidmore*, 952 F.3d at 1064 (quoting *Rentmeester*, 883 F.3d at 1117). A common method of showing probative similarities is identifying errors in the plaintiff’s work that the defendant’s work repeats. 3 Patry on Copyright § 9:20 (citing, e.g., *Fodor v. Time Warner, Inc.*, 19 F.3d 27 (9th Cir. 1994) (noting the common errors doctrine but adding “if Warner did not have access to the screenplay prior to the writing of Target Stealth even striking similarities between the two works must be deemed fortuitous”). There is no particular amount of similarity that must be shown. The plaintiff does not even have to show that the copied elements are protected. 3 Patry on Copyright § 9:19. (citing *Benham Jewelry Corp. v. Aron Basha Corp.*, 1997 WL 639037 (S.D.N.Y. 1997); 4 Nimmer on Copyright § 13.01[B]; *but see Johnson v. Gordon*, 409 F.3d 12, 18-19 (1st Cir. 2005). If the plaintiff shows that anything at all was copied, he will have satisfied this portion of the test. 3 Patry on Copyright § 9:19 (“copying of anything, including a fictitious entry, a copyright notice, a digital watermark, and any number of uncopyrightable elements will do the trick.”).

similarities” component and the “unlawful appropriation” element.¹⁵ To avoid confusion courts have recently begun to follow¹⁶ Professor Alan Latman’s suggestion to use the term “probative similarities.”¹⁷

Another point of contention is the doctrine of “striking similarity,” which provides that “[i]f evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.”¹⁸ As recently as 2017, the Ninth Circuit has cited this doctrine favorably¹⁹ and relied on it to find “copying” without evidence of “access.”²⁰

ii. Unlawful Appropriation

“Not all copying, however, is copyright infringement.”²¹ The Ninth Circuit uses a two-part test to determine whether the defendant’s work unlawfully appropriates the plaintiff’s work.²² The extrinsic test compares the objective similarities of specific, protected, expressive elements in the two works.²³ “The intrinsic test ‘test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.’”²⁴

b. Skidmore v. Led Zeppelin

¹⁵ Nimmer, *supra* note 14 n.31.4 (citing, e.g., *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975)); *Skidmore*, 952 F.3d at 1067 (citing 3 Patry on Copyright § 9:91 (2017)) (“The lack of clear guidance is likely due in no small part to our use of the term ‘substantial similarity,’ both in the context of copying and unlawful appropriation, muddying the waters as to what part of the infringement analysis the [IRR] applies.”).

¹⁶ Nimmer, *supra* note 14 (citing *Rentmeester*, 883 F.3d at 1117).

¹⁷ Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187 (1990).

¹⁸ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *but see* 3 Patry on Copyright § 9:38-43.

¹⁹ *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (quoting *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984)) (“striking similarity can allow a reasonable inference of access when ‘the similarity is of a type which will preclude any explanation other than that of copying.’”).

²⁰ *Unicolors*, 853 F.3d at 988 (“In short, it is permissible to infer copying in this case, even absent evidence of access.”); *but see Selle*, 741 F.2d at 902 (“Thus, although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable.”). Like the IRR, the “striking similarity” analysis blurs the line between the “copying” and “unlawful appropriation” elements by introducing an analysis of the type and degree of similarities which is inappropriate in the “copying” phase of the analysis. 3 Patry on Copyright § 9:43.

²¹ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

²² *Skidmore*, 952 F.3d at 1064 (citing *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)).

²³ *Id.*; *Skidmore*, 952 F.3d at 1064 (quoting *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)) (“Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, ‘it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.’”).

²⁴ *Skidmore*, 952 F.3d at 1064 (quoting *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008)). As a practical matter, it is difficult to distinguish the intrinsic test from the extrinsic test. The jury is supposed to make a finding of similarity without expert assistance, but by the time the jury is sent to deliberate, it has already heard expert testimony. To be fair, courts commonly ask juries to disregard something that its members actually heard, but too much of this can lead to the granting of a new trial. It seems like the intrinsic test should be either decided earlier in the trial, before experts testify, or decided by a group of people different from the jury.

In *Skidmore*, the Ninth Circuit definitively rejected the inverse ratio rule,²⁵ which provided that in a copyright infringement claim, a lower standard of proof of substantial similarity was appropriate when a high degree of access to the copyrighted work was shown.²⁶ After recounting the rule’s “checkered application” and confusing history in the Ninth Circuit,²⁷ the court made some striking observations about how the concept of access has changed in the modern era—“[a]s a practical matter, the concept of ‘access’ is increasingly diluted in our digitally interconnected world.”²⁸ The court continued, “[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.”²⁹ The court concluded:

To the extent “access” still has meaning, the inverse ratio rule unfairly advantages those whose work is *most* accessible by lowering the standard of proof for similarity...But nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.³⁰

III. NEGATIVE EFFECTS OF A SOLELY PLAINTIFF-CENTRIC, “ON DEMAND” VIEW OF ACCESS

a. A plaintiff-centric, “on demand” view of access would have negative consequences.

i. It would distort the line between a bare possibility of access and a reasonable opportunity to access.

It does not follow that A accessed something simply because B made it accessible. It is as if B were to claim that it is reasonable to assume that A accessed B’s song simply because B posted it to Spotify. This may not seem too far-fetched until we learn that, as of 2019, 40,000 songs are added to Spotify daily.³¹ It is difficult to say that this represents more than a bare possibility of access without further information

²⁵ *Skidmore*, 952 F.3d at 1066 (“Because the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary.”).

²⁶ *Skidmore*, 952 F.3d at 1066 (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). In other words, “the stronger the evidence of access, the less compelling the similarities between two works need[ed] be in order to give rise to an inference of copying.” *Skidmore*, 952 F.3d at 1066 (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018)).

²⁷ *Skidmore*, 952 F.3d at 1065-68.

²⁸ *Id.* at 1068.

²⁹ *Id.* (citing Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. Times, Nov. 18, 2019).

³⁰ *Skidmore*, 952 F.3d at 1068.

³¹ Tim Ingham, *Nearly 40,000 Tracks Are Now Being Added to Spotify Every Single Day*, Music Business Worldwide, (Apr. 29, 2019), <https://www.musicbusinessworldwide.com/nearly-40000-tracks-are-now-being-added-to-spotify-every-single-day/>. Add to this a possible trend towards more polarized listening habits. For example, 80% of Spotify streams coming from the top 20% most streamed songs in its Top 200 Charts playlist. Raul Vallejo, *Polarized listening habits: Spotify’s Top 200*, NYC Data Science Academy Blog, (Oct. 22, 2018), <https://nycdatascience.com/blog/student-works/r-shiny/polarized-listening-habits-spotifys-top200/>.

about the data profile of the streams, the listening habits of the defendant, or the potential relationship between the plaintiff and the defendant.³²

Palmieri v. Estefan provides a further illustration. In *Palmieri* the court held that “evidence showing that Gloria Estefan was present in a room with 15,000 records, including one containing plaintiff’s song” was insufficient to demonstrate access.³³ A shift toward Skidmore’s “on demand” standard of finding access from a bare showing that a song is available on Apple Music or Spotify would be like finding a reasonable opportunity to access in a case where a defendant was present in a “room” containing 70+ million records.³⁴

ii. It would widen the door for frivolous lawsuits and copyright trolls.

Skidmore seems to suggest changing the “access” pleading standard from evidence supporting an inference that the defendant accessed a work, to mere evidence that the plaintiff made the work accessible. This change would widen the door for frivolous lawsuits and copyright trolls.³⁵ Two common situations that give rise to copyright infringement claims are when a plaintiff claims that a defendant heard his popular song through some media and copied it (“widespread dissemination”), and when a plaintiff sends a song to a person with whom the defendant has a relationship (usually an A&R representative or producer), after which the defendant releases an allegedly infringing song (“access through intermediaries”).³⁶

First, a plaintiff-centric view of “access” opens the door to frivolous lawsuits arising out of “widespread dissemination.” It incentivizes flooding streaming services with as much content as possible, technically making it available on demand, with the hope that, somewhere down the line, another artist will release a similar song.

Second, a plaintiff-centric view of “access” opens the door to frivolous lawsuits arising out of “access through intermediaries”. It incentivizes flooding A&R representatives with unsolicited material

³² See 4 Nimmer on Copyright § 13.02[D] (quoting *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017)):

Regardless of previous definitions of the concept of “access,” this case therefore returns to first principles in ruling “that the existence of the plaintiff’s copyrighted materials on the Internet, even on a public and ‘user-friendly’ site, cannot by itself justify an inference that the defendant accessed those materials.” (quotation marks and citations omitted).

³³ 4 Nimmer on Copyright § 13.02[A] (discussing *Palmieri v. Estefan*, 35 U.S.P.Q.2d 1382, 1383 (S.D.N.Y. 1995)).

³⁴ Apple Music Home Page, <http://www.apple.com/apple-music/> (last visited Dec. 27, 2020) (“Stream over 70 million songs ad-free.”); see also *Company Info*, Spotify – For the Record, <http://newsroom.spotify.com/company-info/> (last visited Dec. 27, 2020) (“Number of tracks 60 Million+”).

³⁵ 4 Nimmer on Copyright § 13.02[D] (quoting *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017)):

“[The essence of copyright trolling] is that the plaintiff is more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service. The paradigmatic troll plays a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.”

³⁶ See, e.g., *Peters v. West*, 692 F.3d 629.

(even more than people already do) and similarly troll for lawsuits. A plaintiff-centric view taken to the extreme would suggest that this “bare corporate receipt”³⁷ is sufficient to establish “access.”

Procedurally, a plaintiff-centric view of “access” would make it easier for a plaintiff to get a frivolous case in front of a jury, or to engage in “settlement shopping.”³⁸ If the only evidence needed to establish “access” is that a work is available on demand, coupled with the incredibly low bar set by the “probative similarity” component, then a plaintiff can make “copying” a triable element by simply showing that he took the unilateral step of making his work available. After this, it would be a numbers game where the more content a plaintiff “made available on demand,” the more likely he would find a “substantially similar” work in the future to file a lawsuit against.

A fair criticism of these points is that creators, distributors, and performers are, for many reasons, already incentivized to widely disseminate their content and will continue to do so regardless of changes to the definition of access. Perhaps a greater concern, then, is copyright trolls.³⁹

While patent trolling has been high on the academic and policy agenda since the mid-2000’s, copyright trolling has more recently taken over United States district courts’ dockets and has received comparatively little attention.⁴⁰ Relaxing the “reasonable opportunity to access” standard would make it easier for copyright trolls to get to a procedural posture in which they could engage in extortionate settlement practices.

IV. A DEFENDANT-CONSCIOUS, REASONABLE VIEW OF ACCESS

a. An extremely defendant-centric position of requiring a showing of actual access seems attractive but is unlikely to be practically feasible.

The age of data-collection seems to support the initial impression that, while our digitally interconnected world might dilute the concept of access, it also increases the opportunity to show definitive proof of actual access based on the amount of data that streaming services collect from their users.⁴¹ However, this seems unlikely to be practically feasible. While data collection has increased, so has public concern about privacy.⁴² While music streaming services collect user data and appear to be willing to share

³⁷ See 4 Nimmer on Copyright § 13.02[A].

³⁸ L.A. Printex, 676 F.3d at 848 (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 2455 (9th Cir. 2002)) (“Where reasonable minds could differ on the issue of substantial similarity...summary judgement is improper.”).

³⁹ Brad A. Greenberg, *Copyright Trolling and Presumptively Fair Uses*, 85 U. Colo. L. Rev. 53, 59 (2014):

“A copyright troll is a copyright owner who: (1) acquires a copyright - either through purchase or act of authorship - for the primary purpose of pursuing past, present, or future infringement actions; (2) compensates authors or creates works with an eye to the litigation value of a work, not the commercial value; (3) lacks a good faith licensing program; and (4) uses the prospect of statutory damages and litigation expenses to extract quick settlements of often weak claims.”

See also Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. Cal. L. Rev. 723 (2013); Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 Tex. Rev. Ent. & Sports L. 77 (2020).

⁴⁰ Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1007 (2015).

⁴¹ David Nimmer, *Fixing Copyright: Access Denied*, 2007 Utah L. Rev. 769 (2007).

⁴² Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information, Pew Research Center: Internet & Technology (Nov. 15, 2019),

it for law enforcement purposes,⁴³ there are broader privacy and proportionality considerations that courts are still wrestling with. In any event, the European Union’s General Data Protection Regulation’s “right to erasure”⁴⁴ and the California Consumer Privacy Act’s “right to deletion”⁴⁵ complicate a plaintiff’s ability to obtain data from streaming companies because a consumer can request that a streaming company delete their data. Because it is unlikely that a showing of “actual access” will be possible, courts will still need to infer access circumstantially.

b. A data analytics solution would be efficient and address proof problems.

The reason that courts allow evidence tending to support an inference of access instead of proof of actual access is because of the difficult proof problems that inhere in these types of lawsuits.⁴⁶ A “proof of actual access” requirement would also result in onerous discovery requests for third-party music streaming services and raise issues of data privacy. However, plaintiffs who upload music to streaming services have data analytics tools at their disposal that they could use in the pleading phase to provide evidence to support an inference of access. The vast majority of music streaming services give artists access to troves of free data regarding stream, listener, demographic, and geographic trends.⁴⁷ It would be helpful and efficient for plaintiffs, at least in the music industry, to include relevant data about the infringed song in their pleadings

<https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/>, (“Some 81% of the public say that the potential risks they face because of data collection by companies outweigh the benefits...”).

⁴³ See, e.g., 6. Sharing your personal data, Spotify Privacy Policy (effective as of Jan. 1, 2020), <https://www.spotify.com/us/legal/privacy-policy/#s6>:

“We share your personal data when we in good faith believe it is necessary for us to do so in order to comply with a legal obligation under applicable law, or respond to valid legal process, such as a search warrant, a court order, or a subpoena. We also share your personal data where we in good faith believe that it is necessary for the purpose of our own, or a third party’s legitimate interest relating to national security, law enforcement, litigation, criminal investigation, protecting the safety of any person, or to prevent death or imminent bodily harm, provided that we deem that such interest is not overridden by your interests or fundamental rights and freedoms requiring the protection of your personal data.”

⁴⁴ Council Regulation (EU) 2018/1725, On the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, 2018 O.J. (L 295) 65 (Article 19: Right to erasure).

⁴⁵ Cal. Civ. Code § 1798.105(a) (West) (“A consumer shall have the right to request that a business delete any personal information about the consumer which the business has collected from the consumer.”)

⁴⁶ 4 Nimmer on Copyright § 13.02[D]:

“Proof of access plus probative similarity is designed to protect plaintiffs and defendants alike. By not requiring *actual* viewing but only the *opportunity* to view, plaintiffs are benefitted by being spared impossible burdens of proof; by allowing dismissal of cases when there was no *reasonable* opportunity for defendant to view the work, defendants are benefitted by being spared limitless strike suits.”

⁴⁷ Spotify for Artists (last accessed Dec. 31, 2020), <https://artists.spotify.com>; Apple Music for Artists (last accessed Dec. 31, 2020), <https://artists.apple.com>; *How to Use Your SoundCloud Stats: The Basics*, SoundCloud Blog (last accessed Dec. 31, 2020), <https://blog.soundcloud.com/2015/03/11/how-to-use-your-soundcloud-stats/>; *YouTube Studio analytics basics*, YouTube Help (last accessed Dec. 31, 2020), <https://support.google.com/youtube/answer/9002587?hl=en>.

to help courts make informed decisions about whether a particular defendant had a reasonable opportunity to access an allegedly infringed song. At the very least, defendants should include information about the song's general success and its success in the defendant's geographic area, which the plaintiff has to find out anyway in order to serve the defendant with process. This would avoid inundating streaming services' legal departments with subpoenas, increase efficiency by inserting relevant evidence into the record that is most easily accessed by the plaintiff, and maintain sensitivity for privacy concerns.

c. Implementing widespread dissemination's doctrinal variant would modernize the reasonable opportunity analysis.

Another possible way to keep "access" defendant-conscious is to modify the "reasonable opportunity to view" standard. Specifically, I propose tweaking the "widely disseminated" analysis, and then combining it with the "particular chain of events by which the alleged infringer might have gained access to the copyrighted work" analysis.

Evidence that a work is commercially successful or readily available, and thus widely disseminated, tells us little about whether a particular defendant in a particular lawsuit had a "reasonable opportunity to access" that particular work. It may tell us that, in a sample of people, more are likely to have heard it, but this runs into naked statistical evidence and due process problems.⁴⁸ A slight language tweak would ease these problems.

"[Courts] have [] recognized a doctrinal variant [of widespread dissemination] that focuses on saturation in a relevant market in which both the plaintiff and the defendant participate."⁴⁹ This definition would allow a more targeted and accurate analysis of what the "widespread dissemination" analysis was originally intended to accomplish.

Traditionally, courts have found widespread dissemination through two methods: (1) considerable commercial success; and (2) ready availability in the marketplace. The age of digital streaming has affected both of these concepts, but it has affected "ready availability in the marketplace" in a more dramatic way. If the Internet is the marketplace, then any Internet content is technically available. However, the qualifier, "readily," suggesting that something can be found easily or without much difficulty, has an idiosyncratic meaning in a digital environment. Digital content is readily available to the extent it is promoted by a search algorithm, or to the extent that a user knows what they are looking for and how to find it. Most cases considering ready availability in the marketplace have focused on tangible objects with the capacity to be publicly displayed,⁵⁰ or music broadcast by radio,⁵¹ which itself is a marker of commercial success. The few cases considering ready availability on the Internet found that content is not readily available simply because it is on the Internet.⁵²

⁴⁸ G. Alexander Nunn, *The Incompatibility of Due Process and Naked Statistical Evidence*, 68 *Vanderbilt Law Review* 1407 (2019), Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol68/iss5/6>.

⁴⁹ *Loomis*, 836 F.3d at 997 (citing *L.A. Printex*, 676 F.3d at 847).

⁵⁰ See, e.g., *Odegard, Inc. v. Costikyan Classic Carpets*, 963 F. Supp. 1328, 1336 (S.D.N.Y. 1997) (discussing carpets displayed in showrooms); *Jason v. Fonda*, 526 F. Supp. 774 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982) (discussing books for sale in bookstores).

⁵¹ See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d. Cir. 1983).

⁵² *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1108 (7th Cir. 2017) ("...the existence of the plaintiff's copyrighted materials on the Internet, even on a public and 'user-friendly' site, cannot by itself justify and inference that the defendant accessed those materials."); *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 963 (C.D.

While this modification of the “widely disseminated” analysis is imperfect and runs into the semantic problems of defining “saturation,” “relevant market,” and “participate,” it at least considers the defendant’s actions in the analysis. It can also be appropriately described as “a particular chain of events by which the alleged infringer might have gained access to the copyrighted work,” helping to simplify a complicated test.

d. Third parties play an important role in the access analysis.

Even if courts never end up allowing a plaintiff to establish “access” by a showing that a work is available on demand, courts will still have to wrestle with the role that third parties’ play in the “access” analysis. In many situations, third parties are a crucial link in the chain of events leading to an “access” inference.⁵³

Plaintiffs can offer as evidence to support an inference of access: metrics such as number of streams; and evidence that the song was promoted through free methods, such as appearance on a Spotify-created playlist, or by paid methods, such as Marquee push-ads.⁵⁴ Streaming services’ search algorithm and promotional philosophies have a substantial effect on the practical accessibility of a song. This seems antithetical to the Ninth Circuit’s apparent goal of equal protection for works regardless of popularity or rights holders’ funds. Nevertheless, while it may be morally true that more popular works do not “deserve” better protection, popularity is still a useful proxy for inferring access.

It is also important to recognize that music consumers play an important role in determining whether a song achieves commercial success or ubiquity. While it is simple to pay for music promotion, audience response is less predictable and less susceptible to unfair manipulation, at least when considering that amount of popularity that it takes for a work to be truly woven into the cultural fabric. Thus, there is some validity to the proposition that ubiquity is evidence that supports an inference of access. However, I recognize that the distinction between ubiquitous and accessible is difficult to draw.

VI. CONCLUSION

Skidmore wisely rejected the inverse ratio rule; however, it also potentially shifted the definition of access by suggesting that access can be inferred by a trivial showing that a work is available on demand. This shift towards an almost exclusively plaintiff-centric view of “access” distorts the line between a “bare possibility” and “reasonable opportunity” and moves away from the standard for inferring access: evidence that the defendant had a reasonable opportunity to access the protected work. Courts should maintain a defendant-conscious view of “access,” either by requiring plaintiffs to share their data analytics in their pleadings, or by modifying the “widespread dissemination” standard, and should resist the temptation to let the digital age fundamentally distort the access analysis.

Cal. 2019) (“To the extent Defendants argue all that is required is that Plaintiff had access to the Internet, this argument is even more unsubstantiated than the one relating to Plaintiff’s visit to Mexico in 2004.”).

⁵³ For example, in *Peters v. West*, Vincent Peters alleged that Kanye West had access to Peters’ song because John Monopoly, a business manager and West’s collaborator, heard Peter’s allegedly infringed song before working with West on an album. In situations where a plaintiff tries to show access through evidence of widespread dissemination, there is usually a third party (e.g., a radio station or streaming service) who disseminates the work.

⁵⁴ Marquee Information Page, Spotify for Artists, <https://artists.spotify.com/marquee> (last visited Dec. 30, 2020).

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