**17.17 Copying—Access and Substantial Similarity**

Instruction [*insert cross reference to the pertinent instruction, e.g., Instruction 17.5*] states that the plaintiff has the burden of proving that the defendant copied original elements from the plaintiff’s copyrighted work. The plaintiff may show the defendant copied from the work by proving by a preponderance of the evidence that the defendant had access to the plaintiff’s copyrighted work and that there are substantial similarities between the defendant’s work and original elements of the plaintiff’s work.

If you find that the plaintiff has failed to prove either access to the plaintiff’s copyrighted

work or substantial similarities between the defendant’s work and original elements of the

plaintiff’s work, your verdict should be for the defendant.

**Comment**

Regarding access, substantial similarity, and independent creation, *see* *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985). *See also* Instruction 17.14 (Copyright Infringement—Originality), 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 (Substantial Similarity—Extrinsic Test; Intrinsic Test). The word “copying” is described by the Ninth Circuit as “shorthand” for the various activities that may infringe any of the copyright owner’s “exclusive rights,” which are described in 17 U.S.C. § 106.  *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) (quoting *S.O.S., Inc. v. Payday, Inc.,* 886 F.2d 1081, 1085 n.3 (9th Cir. 1989)).

If it can be determined that either access or substantial similarity are lacking in a

particular case, the remaining prong need not be addressed; failure on either prong is sufficient

for failure of the claim. *See Gray v. Hudson*, 28 F.4th 87, 96 (9th Cir. 2022).

*Supplemental Instruction*

For guidance in modifying the instruction so that the jury may consider evidence of a “striking similarity” between works to infer access, *see* *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (“[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were ‘strikingly similar.’” (citing *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996), and *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n.2 (9th Cir. 1987)); *see also Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1084 (9th Cir. 2022) (discussing two-pronged extrinsic and intrinsic test for striking similarity).

If the plaintiff shows that the defendant had access to the plaintiff’s work and that there is a substantial similarity between the infringed and infringing works, a presumption of copying arises shifting the burden to the defendant to rebut the presumption or to show that the alleged infringing work was independently created. *Three Boys Music*, 212 F.3d at 486 (“By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation.” (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976))); *see also Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (“It is true that defendants had access to plaintiff’s [copyrighted] pin and that there is an obvious similarity between plaintiff’s pin and those of defendants. These two facts constitute strong circumstantial evidence of copying. But they are not conclusive, and there was substantial evidence to support the trial court’s finding that defendant’s pin was in fact an independent creation.” (citations omitted)).

In *Skidmore v. Led Zeppelin*,952 F.3d 1051, 1069 (9th Cir. 2020) (en banc), the Ninth Circuit rejected the “inverse ratio rule,” which had provided that if a defendant had access to copyrighted work, the plaintiff could show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work. “We join the majority of our sister circuits that have considered the inverse ratio rule and have correctly chosen to excise it from copyright analysis.”  *Id.*

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