

17.17 Copying—Access and Substantial Similarity

Instruction [*insert cross reference to the pertinent instruction, e.g., Instruction 17.5*] states that the plaintiff [*name*] has the burden of proving that the defendant [*name*] copied original elements from the plaintiff [*name*]'s copyrighted work. The plaintiff [*name*] can prove that the defendant [*name*] copied from the work [by proving by a preponderance of the evidence that the defendant [*name*] had access to the plaintiff [*name*]'s copyrighted work and that there are substantial similarities between the defendant [*name*]'s work and original elements of the plaintiff [*name*]'s work] [by proving by a preponderance of the evidence that there is a striking similarity between the defendant [*name*]'s work and the plaintiff [*name*]'s copyrighted work]. If the plaintiff [*name*] fails to prove that the defendant copied the plaintiff [*name*]'s work, your verdict should be for the defendant [*name*].

Comment

This instruction explains how a plaintiff can satisfy the burden of proving the second requirement set forth in Instruction 17.5: that “the defendant copied original expression from the copyrighted work.” The Ninth Circuit has historically described this test as having two elements: “access” and “substantial similarity.” *See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000); *Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062, 1065 (9th Cir. 2016); *see also* Comment to Instruction 17.1 (Preliminary Instruction—Copyright). In some cases, the Ninth Circuit has described the elements as “copying” and “unlawful appropriation,” borrowing the Second Circuit’s description from *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (acknowledging that “our cases have not always made this point explicit,” then citing *Arnstein*); *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc) (citing *Rentmeester*). Both *Rentmeester* and *Skidmore* applied the elements of the *Arnstein* test in similar ways to access and substantial similarity. *See Rentmeester*, 883 F.3d at 1117 (analyzing the “copying” element by discussing “access” and the “unlawful appropriation” element by discussing “substantial similarity”); *Skidmore*, 952 F.3d at 1064 (“[T]he hallmark of ‘unlawful appropriation’ is that the works share substantial similarities.”) (emphasis deleted). Cases since *Skidmore* have continued to refer to the copying test as requiring access and substantial similarity. *See, e.g., Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1084 (9th Cir. 2022); *Gray v. Hudson*, 28 F.4th 87, 96 (9th Cir. 2022); *Woodland v. Hill*, 136 F.4th 1199, 1210 (9th Cir. 2025) (rejecting plaintiff’s theory that allegations of copying of twelve photos showed serial infringement and “raise[d] an inference of copying”).

Access and substantial similarity are each explained further in the following two instructions. *See* Instruction 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 (Substantial Similarity—Extrinsic Test; Intrinsic Test).

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). “[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.’” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (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)), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). “[S]triking similarity shows that the similarities between the two works are due to copying rather than coincidence, independent creation, or prior common source.” *Skidmore*, 952 F.3d at 1064 (quotation marks, ellipsis, and citation omitted).

Supplemental Instruction

[If the defendant has submitted evidence that a similarity between the infringed and the allegedly infringing work is not due to the defendant’s copying, replace the instruction with the following.]

The plaintiff [name] has the burden of proving that the defendant [name] copied original elements from the plaintiff [name]’s copyrighted work. If the plaintiff [name] [proves by a preponderance of the evidence that the defendant [name] had access to the plaintiff [name]’s copyrighted work and that there are substantial similarities between the defendant [name]’s work and original elements of the plaintiff [name]’s work] [proves by a preponderance of the evidence that there is a striking similarity between the defendant [name]’s work and the original elements of the plaintiff [name]’s copyrighted work] then there is a presumption that the defendant [name] copied from the plaintiff [name]’s copyrighted work. If the plaintiff [name] fails to prove that the defendant [name] copied from the plaintiff [name]’s work, your verdict should be for the defendant [name].

The defendant [name] may rebut the presumption of copying. If you find that the defendant [name] has proved by a preponderance of evidence that the similarities between the defendant [name]’s work and the copyrighted work are due to [alternative case of similarity], your verdict should be for the defendant [name].

A presumption of copying arises if the plaintiff proves that the defendant had access to the plaintiff’s work and that there is a substantial similarity between the original elements of the infringed and alleged infringing works, or if there is a striking similarity between the infringed and alleged infringing works that raises the inference of access. *Three Boys*, 212 F.3d at 486 (“By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying.” (citing *Granite Music Corp. v. United Artists Corp.*, 532

F.2d 718, 721 (9th Cir. 1976))). The defendant may rebut the presumption through proof of independent creation. *Id.*; cf. *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); *Skidmore*, 952 F.3d at 1064 (holding that “probative or striking similarity shows that the similarities between the two works are due to copying

rather than coincidence, independent creation, or prior common source”) (quotation marks, ellipsis, and citation omitted).

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