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Petrella V. Metro-Goldwyn-Mayer: A ‘Stairway’ To Countless Copyright Claims

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Abstract

Iconic film critic, Roger Ebert, proclaimed that a scene from the hit movie *Raging Bull* showcased “acting as good as any ever put on the screen.”¹ In addition to cracking Ebert’s list of top ten movies, the American Film Institute declared *Raging Bull* the fourth greatest American movie of all time

KEYWORDS: stairway, copyright, victory

PETRELLA V. METRO-GOLDWYN-MAYER: A 'STAIRWAY' TO COUNTLESS COPYRIGHT CLAIMS

DYLAN FULOP*

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I. INTRODUCTION

Iconic film critic, Roger Ebert, proclaimed that a scene from the hit movie *Raging Bull* showcased “acting as good as any ever put on the screen.”¹ In addition to cracking Ebert’s list of top ten movies, the American Film Institute declared *Raging Bull* the fourth greatest American movie of all time.² Despite the critical acclaim, *Raging Bull* is not receiving headlines for the *knockout* performance delivered by Robert De Niro.³ Instead, *Raging Bull* is in the spotlight because of the impact a recent Supreme Court of the United States’ decision will have on copyright and patent law.⁴ On May 19, 2014, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*,⁵ the Supreme Court held that the equitable doctrine of laches does not apply to copyright infringement claims.⁶

Legal scholars are of the belief that the Supreme Court’s ruling will have a significant impact on copyright law.⁷ Specifically, they predict that the Supreme Court’s bar on the defense of laches will result in a substantial increase in copyright claims.⁸ This presumption was immediately evidenced by a lawsuit filed against Led Zeppelin claiming that their legendary song, *Stairway to Heaven*, was created as a result of copyright infringement.⁹

This Comment will focus on the Supreme Court’s holding in *Petrella*, its far-reaching implications, and the pending lawsuit against Led Zeppelin.¹⁰ Specifically, Part II of this Comment will explain, in detail, the doctrine of laches and the relevant copyright law necessary to appreciate the

1. Roger Ebert, *Ten Greatest Films of All Time*, ROGER EBERT’S J. (Apr. 1, 1991), <http://www.rogerebert.com/rogers-journal/ten-greatest-films-of-all-time>.

2. *AFI’s 100 Years . . . 100 Movies—10th Anniversary Edition*, AM. FILM INST. (2007), <http://www.afi.com/Docs/100Years/100Movies.pdf>; Ebert, *supra* note 1.

3. See David G. Savage, *Supreme Court Ruling Revives Copyright Suit; Justices Say Heirs of Composers and Writers Can Wait Decades to Seek Royalties from Rereleases*, L.A. TIMES, May 20, 2014, at B1; Ebert, *supra* note 1.

4. Bill Donahue, *With ‘Raging Bull’ Ruling, Copyright Cases Could Spike*, LAW360 (May 19, 2014, 7:54 PM), <https://www.law360.com/articles/539438/with-raging-bull-ruling-copyright-cases-could-spike>; see also *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, slip op. at 1 (U.S. May 19, 2014).

5. No. 12-1315, slip op. (U.S. May 19, 2014).

6. *Id.* at 1.

7. Donahue, *supra* note 4; see also *Petrella*, No. 12-1315, slip op. at 1.

8. Donahue, *supra* note 4; see also *Petrella*, No. 12-1315, slip op. at 1.

9. Todd McCormick & Jason M. Joyal, *How ‘Raging Bull’ Case Could Impact Entertainment Industry*, LAW360 (July 2, 2014, 10:08 AM), <https://www.law360.com/articles/552689/how-raging-bull-case-could-impact-entertainment-industry>; see also Complaint at 22–23, *Skidmore v. Led Zeppelin*, No. 2:14-cv-03089-JS (E.D. Pa. filed May 31, 2014).

10. See *Petrella*, No. 12-1315, slip op. at 1; Complaint, *supra* note 9, at 22–27; *infra* Parts II–IV.

significance of the Supreme Court's decision in *Petrella*.¹¹ Part III will thoroughly analyze *Petrella* by providing a background of the case and a detailed explanation of the Supreme Court's holding.¹² Then, Part IV of this Comment will transition into an extensive discussion of the lawsuit filed against Led Zeppelin and its acclaimed song, *Stairway to Heaven*.¹³

II. COPYRIGHT LAW

The origins of United States copyright law can be found in Article I, Section 8 of the United States Constitution, which provides that Congress has the authority “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴ Today, the United States Copyright Act (“the Act”) promulgates the founding fathers’ desire to promote innovation, while providing authors and inventors with exclusive rights to their works.¹⁵ Section 102(a) of the Act grants copyright protection for “original works of authorship fixed in any tangible medium of expression.”¹⁶ Under the Act, a copyright “vests initially in the author or authors of the work.”¹⁷ Pursuant to section 106 of the Act, a copyright owner is conferred “certain exclusive rights, including the rights to reproduce and [re]distribute the work and to develop and market derivative works.”¹⁸ However, these exclusive rights are protected for only a fixed period of time.¹⁹ Copyrighted works published before 1978—as were *Raging Bull* and *Stairway to Heaven*—“are protected for an initial period of [twenty-eight] years, which may be—and in [these] case[s] [were]—extended for a renewal period of up to [sixty-seven] years.”²⁰

11. See *Petrella*, No. 12-1315, slip op. at 1; *infra* Part II.

12. See *Petrella*, No. 12-1315, slip op. at 1; *infra* Part III.

13. See Complaint, *supra* note 9, at 1; *infra* Part IV.

14. U.S. CONST. art. I, § 8, cl. 8; Toni Lester, *Blurred Lines—Where Copyright Ends and Cultural Appropriation Begins—The Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217, 222–23 (2014).

15. See U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106 (2012).

16. 17 U.S.C. § 102(a) (limiting works of authorship to the following categories: “(1) [L]iterary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works”).

17. *Id.* § 201.

18. *Id.* § 106; *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 12-1315, slip op. at 2 (U.S. May 19, 2014).

19. 17 U.S.C. § 304(a).

20. *Petrella*, No. 12-1315, slip op. at 2 (citing 17 U.S.C. § 304(a)).

A. *Statute of Limitations*

Despite lengthy periods of protection, copyright owners' ability to recover from infringement is hindered by a three-year statute of limitations period.²¹ Section 507(b) of the Act provides that, "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."²² "A claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.'"²³ For a copyright claim, this three-year period will begin to accrue at the moment an act of infringement occurs.²⁴ The Act's statute of limitations operates under a separate-accrual rule, which provides that "when a defendant commits successive violations, the statute of limitations runs separately from each violation."²⁵ Essentially, each act of infringement, by the same person or entity, will result in a new three-year limitations period.²⁶ Although the courts have implemented a recurring statute of limitations, "[u]nder the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence."²⁷ Ultimately, this means that a plaintiff is only entitled to recover for infringing acts that took place within the three years prior to the date the complaint was filed.²⁸

B. *Doctrine of Laches Applied to Copyright Law*

The doctrine of laches is an equitable defense that is typically raised when a plaintiff delayed filing their lawsuit without good reason.²⁹ The ability to invoke a defense of laches is dependent upon the reason the plaintiff delayed bringing the particular claim and the effect that this lapse of time had on the defendant.³⁰ In other words, to prevail on a defense of laches, the defendant must show that the plaintiff's delay was both *unreasonable* and caused them to be *prejudiced*.³¹

21. 17 U.S.C. § 507(b).

22. *Id.*

23. *Petrella*, No. 12-1315, slip op. at 4 (alteration in original) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)).

24. *Id.* (explaining that a complete cause of action arises when an infringing act occurs); *see also* 17 U.S.C. § 507(b).

25. *Petrella*, No. 12-1315, slip op. at 5.

26. *Id.*

27. *Id.*

28. *Id.* at 5–6.

29. Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VAND. L. REV. EN BANC 1, 1 (2014).

30. *Id.* at 2.

31. *Id.*

Due to some of the complexities involved with the application of a laches defense, the circuit courts have been divided as to whether this defense is available in copyright infringement actions.³² The circuits' split revolves around two primary concerns: Whether the application of laches should be allowed, despite a codified statute of limitations period, and whether the defense of laches is available for all claims or only equitable ones.³³

1. Laches Within a Prescribed Limitations Period

The courts' split is derived primarily from the ability of a laches defense to cut short a statute of limitations period that was prescribed specifically by Congress.³⁴ The circuit courts have adopted three distinct ways of dealing with a defense of laches, while still within the Act's three-year limitations period.³⁵ The courts have either completely barred the application of laches, allowed the application, or have permitted the defense of laches only in rare cases.³⁶

In *Lyons Partnership v. Morris Costumes, Inc.*,³⁷ the Fourth Circuit Court of Appeals held that laches could never bar a copyright infringement claim, so long as the claim is within the statute of limitations period.³⁸ The *Lyons Partnership* court suggested that if it were to allow a laches defense to cut short the statute of limitations period, enacted by the legislature, it would raise significant separation of powers concerns.³⁹

In contrast, the Seventh Circuit is of the opinion that a defense of laches may be available, regardless of a statute of limitations.⁴⁰ In *Martin v. Consultants & Administrators, Inc.*,⁴¹ the court noted that "there is plenty of authority for applying laches in cases governed by a statute of limitations."⁴²

Meanwhile, the Sixth, Tenth, and Eleventh Circuits have consistently held that a laches defense may be applied before a statute of limitations has

32. Vikas K. Didwania, Comment, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227, 1228 (2008).

33. *See id.* at 1236.

34. *Id.* at 1239 (explaining that "[t]he major concern[] among courts . . . [has] been separation of powers and judicial deference to Congress seemingly raised by the application of laches within the copyright infringement context").

35. *See id.* at 1239–44.

36. *See id.*

37. 243 F.3d 789 (4th Cir. 2001).

38. *Id.* at 798.

39. *Id.*

40. Didwania, *supra* note 32, at 1240.

41. 966 F.2d 1078 (7th Cir. 1992).

42. *Id.* at 1100.

run, *only* if rare and compelling circumstances exist.⁴³ The Sixth Circuit has held that in copyright litigation, laches applies only to *the most compelling of cases*.⁴⁴ Additionally, in *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises*,⁴⁵ the Eleventh Circuit noted that “there is a strong presumption [in copyright cases] that a plaintiff’s suit is timely if it is filed before the statute of limitations has run [and] [o]nly in the most extraordinary circumstances will laches be recognized as a defense.”⁴⁶

2. Laches: Equitable, Legal, or Both?

Having been developed by courts of equity, there is also constant debate as to whether a laches defense applies to all claims or merely equitable ones.⁴⁷ In *Lyons Partnership*, the Fourth Circuit proclaimed that laches “applies only in equity to bar equitable actions, not at law to bar legal actions.”⁴⁸ However, some circuit courts have held that “significant precedent exists for applying laches to bar [copyright] claims, even within the copyright context.”⁴⁹

The Seventh Circuit has observed that “although laches is an equitable doctrine, courts increasingly apply it in cases at law in which plaintiffs seek damages.” The Sixth Circuit has held that laches can be argued “regardless of whether the suit is at law or in equity, because, as with many equitable defenses, the defense of laches is equally available in suits at law.”⁵⁰

Most important to note, however, is the stance taken by the Ninth Circuit.⁵¹ In the *Raging Bull* lawsuit, the Ninth Circuit affirmed the District Court’s decision that the plaintiff’s copyright infringement claim was barred by laches, despite the claim being within the three-year limitations period.⁵²

43. *Peter Letterese & Assocs., Inc., v. World Inst. of Scientology Enters. Int’l*, 533 F.3d 1287, 1320 (11th Cir. 2008); *Didwania*, *supra* note 32, at 1242–43.

44. *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 233 (6th Cir. 2007).

45. 533 F.3d 1287 (11th Cir. 2008).

46. *Id.* at 1320.

47. *Bray*, *supra* note 29, at 1–3.

48. *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001).

49. *Didwania*, *supra* note 32, at 1238.

50. *Didwania*, *supra* note 32, at 1238–39 (quoting *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 234 (6th Cir. 2007); *Hot Wax, Inc. v. Turtle Wax Inc.*, 191 F.3d 813, 822 (7th Cir. 1999)).

51. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 956 (9th Cir. 2012), *rev’d*, No. 12-1315 (U.S. May 19, 2014).

52. *Id.* at 951, 955–56.

The Supreme Court of the United States granted certiorari on this case to once and for all “resolve [the] conflict among[st] the [c]ircuits on the application of the equitable defense of laches to copyright infringement claims brought within the three-year [statute of limitations] period prescribed by Congress.”⁵³

III. PETRELLA V. METRO-GOLDWYN-MAYER GOES THE DISTANCE

A. *Background*

In 1963, Frank Petrella authored a screenplay, which depicted the life of former middleweight champion, Jake LaMotta.⁵⁴ That very same year, Petrella and LaMotta registered a copyright for the work.⁵⁵ In 1976, thirteen years after collaborating to create the screenplay, Petrella and LaMotta assigned their rights in the work to Chartoff-Winkler Productions, Inc.⁵⁶ Two years later, United Artists Corporation, a subsidiary of Metro-Goldwyn-Mayer, Inc. (“MGM”), acquired the rights to Petrella’s screenplay, which became the inspiration behind the Martin Scorsese film, *Raging Bull*.⁵⁷ MGM released the iconic film and registered a copyright for it in 1980.⁵⁸ Just a year later, in 1981, Frank Petrella died while still within the initial terms of the copyright.⁵⁹

Although Petrella and LaMotta assigned their rights to the screenplay, the Supreme Court’s decision in *Stewart v. Abend*⁶⁰ declared that a copyright holder’s heirs could renew copyrights unburdened by previous assignments made by the author.⁶¹ In *Stewart*, the Supreme Court of the United States held that when an author who has assigned their rights away dies before the renewal period, “the assignee may continue to use the original work only if the author’s successor transfers the renewal rights to the assignee.”⁶² As a result of the Court’s decision in *Stewart*, the renewal rights for the screenplay, unburdened by the previous assignment, reverted to Frank

53. Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315, slip op. at 10 (U.S. May 19, 2014).

54. Savage, *supra* note 3; see Petrella, No. 12-1315, slip op. at 7 (explaining that although Frank Petrella was listed as the sole author, the registration stated that the screenplay was written in collaboration with LaMotta).

55. Petrella, No. 12-1315, slip op. at 7.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. 495 U.S. 207 (1990).

61. Petrella, No. 12-1315, slip op. at 7; see also Stewart, 495 U.S. at 221–22.

62. Stewart, 495 U.S. at 221.

Petrella's heirs upon his death.⁶³ Subsequently, Paula Petrella, the daughter of the late Frank Petrella, renewed the copyright to the 1963 screenplay in 1991, and became the "sole owner of the copyright in that work."⁶⁴

Paula Petrella filed a complaint in the United States District Court for the Central District of California on January 6, 2009, eighteen years after renewing the copyright.⁶⁵ Her copyright infringement suit "alleged that MGM violated . . . her copyright in the 1963 screenplay by using, producing, and distributing *Raging Bull*, a work she described as derivative of the 1963 screenplay."⁶⁶ Petrella sought both legal and equitable remedies.⁶⁷ Additionally, pursuant to section 507(b) of the Act, she could only seek relief for acts of infringement that occurred between January 6, 2006 and January 6, 2009.⁶⁸

Subsequently, MGM moved for summary judgment, claiming that the suit should be barred based upon the doctrine of laches.⁶⁹ MGM asserted that Petrella's eighteen-year delay in filing the suit was both unreasonable and prejudicial towards MGM.⁷⁰ Ultimately, the district court granted MGM's motion for summary judgment, holding that laches barred the lawsuit because MGM was indeed prejudiced by Petrella's unreasonable delay in filing the suit.⁷¹

Upon appeal, the Ninth Circuit affirmed the district court's decision to dismiss the lawsuit based upon the doctrine of laches.⁷² The Ninth Circuit ruled in favor of MGM, despite Petrella being within the three-year statute of limitations period, because "Petrella was aware of her potential claims many years earlier."⁷³ On October 1, 2013, the Supreme Court of the United States granted certiorari to hear the case and resolve the laches conflict.⁷⁴

63. *Id.* at 220–21; *see also* *Petrella*, No. 12-1315, slip op. at 7.

64. *Petrella*, No. 12-1315, slip op. at 8; *see also* 17 U.S.C. § 304(a)(1)(A)–(B) (2012) (providing that a copyrighted work published before 1978 is set to expire twenty-eight years after the creation of the work, *unless* the copyright is extended for a renewal period of up to sixty-seven years).

65. *See Petrella*, No. 12-1315, slip op. at 8.

66. *Id.*

67. *See id.* (explaining that Petrella's complaint requested both monetary and injunctive relief).

68. *Id.* at 8–9; *see also* 17 U.S.C. § 507(b); *supra* Part II.A.

69. *Petrella*, No. 12-1315, slip op. at 9.

70. *Id.*

71. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 951 (9th Cir. 2012), *rev'd*, No. 12-1315 (U.S. May 19, 2014).

72. *Id.* at 951, 957.

73. *Id.* at 952.

74. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, 2013 WL 5430494, at *1 (U.S. Oct. 1, 2013).

B. *Petrella Wins in Split-Decision*

1. SCOTUS Delivers Knockout Punch to Laches

In a six to three decision, the Supreme Court of the United States reversed and remanded the Ninth Circuit's ruling, finding that in the face of a statute of limitations, the equitable defense of laches cannot be invoked to bar legal relief.⁷⁵ This decision resolved the long-standing debate as to whether laches can be applied within a prescribed statute of limitations period and its application to legal claims.⁷⁶

Section 507(b), it is undisputed, bars relief of any kind for conduct occurring prior to the three-year limitations period. To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, however, courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff.⁷⁷

In order to reach this holding, the Supreme Court first noted that the Ninth Circuit erred by neglecting to recognize that section 507(b) of the Act already accounts for the delay of filing the suit.⁷⁸ Led by Justice Ginsberg, the majority explained that because a plaintiff cannot recover retrospectively beyond the prescribed three-year window, any profits made outside that window remain the defendant's to keep.⁷⁹

Second, the Supreme Court explained that the Act already allows defendants to offset against profits made within the three-year look-back period.⁸⁰ Section 504(b) of the Act allows infringers to prove "deductible expenses and the elements of profit attributable to factors other than the copyrighted work."⁸¹ Although laches cannot be invoked within the limitations period, the Supreme Court suggested that a delay in filing the suit could be a factor in determining the appropriate relief to be awarded.⁸²

75. *Petrella*, No. 12-1315, slip op. at 21–22; Savage, *supra* note 3.

76. *See Petrella*, No. 12-1315, slip op. at 1; Savage, *supra* note 3.

77. *Petrella*, No. 12-1315, slip op. at 1; *see also* 17 U.S.C. § 507(b) (2012).

78. *Petrella*, No. 12-1315, slip op. at 11; *see also* 17 U.S.C. § 507(b).

79. *Petrella*, No. 12-1315, slip op. at 11–12.

80. *Id.* (citing 17 U.S.C. § 504(b)).

81. 17 U.S.C. § 504(b).

82. *Petrella*, No. 12-1315, slip op. at 19.

Lastly, the Supreme Court addressed the significance of the defense's origins.⁸³ The Supreme Court explained that "laches' . . . principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation."⁸⁴ Before the 1938 merger of law and equity, laches was used to account for delay in the absence of a statute of limitations.⁸⁵ Using this logic, the Supreme Court determined that if within the statute of limitations period, laches ought to be limited to extraordinary cases in which the plaintiff is seeking equitable relief.⁸⁶

In the opinion, Justice Ginsburg references the Sixth Circuit case, *Chirco v. Crosswinds Communities Inc.*,⁸⁷ to demonstrate the *extraordinary* circumstances that would justify a curtailment of equitable relief at the outset of litigation.⁸⁸ In *Chirco*, plaintiff Michael Chirco filed an infringement lawsuit alleging that Crosswinds Communities built its housing development by using his copyrighted architectural design without his permission.⁸⁹ Chirco, however, had knowledge of Crosswinds' plans to use his design well before the construction process began.⁹⁰ In fact, Chirco waited to file his complaint until Crosswinds completed 168 of the 252 proposed units.⁹¹ The Supreme Court explained that even though the infringing act was within the three-year look-back period, this would be an instance where a laches defense ought to prevail, assuming the plaintiff is seeking injunctive relief.⁹²

2. The Significance of Petrella's Victory

The Supreme Court's decision that laches could not be invoked as a bar to Petrella's infringement claim is expected to have far-reaching implications on both copyright law and the entertainment industry as a whole.⁹³ The general consensus among parties on both sides of the aisle is that this ruling will lead to a significant rise in copyright claims.⁹⁴ Dylan Ruga—an intellectual property attorney at Steptoe and Johnson, LLC—described the decision as a "boon for plaintiffs and a defeat for

83. *See id.* at 12.

84. *Id.*

85. *Id.*; *see also* Bray, *supra* note 29, at 6.

86. *Petrella*, No. 12-1315, slip op. at 20.

87. 474 F.3d 227 (6th Cir. 2007).

88. *Petrella*, No. 12-1315, slip op. at 20; *Chirco*, 474 F.3d at 229.

89. *Chirco*, 474 F.3d at 229.

90. *Id.* at 230.

91. *Id.*

92. *Petrella*, No. 12-1315, slip op. at 20; *see also Chirco*, 474 F.3d at 229.

93. *See Petrella*, No. 12-1315, slip op. at 22; McCormick & Joyal, *supra* note

9.

94. *See McCormick & Joyal, supra* note 9.

defendants.”⁹⁵ Ruga went on to explain that it will lead to “a flood of new lawsuits based on purported infringement of films, television programs, music, and other copyrighted material that were created decades ago but are still exploited today.”⁹⁶

Many within the entertainment industry have suggested that *Petrella* will have unintended consequences that go beyond the scope of litigation.⁹⁷ In an amicus brief jointly filed by DirecTV, Dish Network, Tivo, and others, these powerful corporations argued that a decision in favor of *Petrella* would chill innovation.⁹⁸ In its brief, these industry leaders explained that creators of dual use technology products—such as iPods, DVRs, and DVD players—are often sued for copyright infringement under theories of secondary liability.⁹⁹ Having abolished the defense of laches, these companies suggest that they will be subject to endless liability, which will ultimately disincentivize the creators of these items from investing the money necessary to create these types of products.¹⁰⁰

The entertainment industry’s prime concern, however, is the degree of vulnerability that the *Petrella* decision has imposed upon them.¹⁰¹ In the majority opinion, Justice Ginsburg expressly rejected the defendant’s argument that a laches defense is necessary to prevent a copyright owner from sitting and waiting until an alleged infringers return on investment is substantial enough to file a lawsuit.¹⁰² Intellectual property lawyer, Brad Newberg, took issue with the Supreme Court’s stance suggesting that Justice Ginsburg is “saying that no matter how long it takes you, you should game the system.”¹⁰³ Newberg went on to proclaim, “[she is] inviting plaintiffs to game the system, to wait until something like a key witness for the defense dies.”¹⁰⁴ Mark Haddard, a partner with Sidley Austin LLP, shared Newberg’s sentiment.¹⁰⁵ Haddard explained:

Writers “can now wait for decades to see if a film or a song that they think incorporates their work becomes a hit and a money-maker before suing to get their share of the profits . . . The decision is likely to put pressure on studios to negotiate a license

95. Donahue, *supra* note 4.

96. *Id.*

97. McCormick & Joyal, *supra* note 9; *see also Petrella*, No. 12-1315, slip op.

at 22.

98. McCormick & Joyal, *supra* note 9.

99. *Id.*

100. *Id.*

101. *Id.*; *see also Petrella*, No. 12-1315, slip op. at 22.

102. *Petrella*, No. 12-1315, slip op. at 16.

103. Donahue, *supra* note 4.

104. *Id.*

105. *See id.*

early on with someone they think has a valid claim, to avoid having to pay more expensive claims later.”¹⁰⁶

On the other hand, many have argued that the Supreme Court’s decision will have an alternative effect.¹⁰⁷ Some contend that eliminating a laches based defense is fair and just because it allows copyright owners with limited resources time to establish the means necessary to enter into a lawsuit against a large corporation.¹⁰⁸ Proponents of the Supreme Court’s decision also argue that copyright owners finally find themselves on an even playing field with these big-time entertainment studios.¹⁰⁹ In their amicus brief, the California Society of Entertainment Lawyers revealed that, in the Ninth Circuit, studios and networks have won every single copyright infringement case since 1990.¹¹⁰ The Supreme Court’s decision on May 19, 2014, will likely put an end to these types of disproportionate outcomes.¹¹¹

Ultimately, there is one thing that parties on both sides of the issue can agree upon, and that is the subsequent increase in lawsuits that will stem from this ruling.¹¹² Agreeing with Mr. Ruga, Brad Newberg predicted that “[t]his will open the floodgates for copyright lawsuits going forward as masses of litigants from the ‘70s, ‘80s and ‘90s will likely come out of the woodwork.”¹¹³ Although legal scholars—like Ruga and Newberg—expected a significant rise in copyright lawsuits, nobody could have expected the immediate impact it would have.¹¹⁴ On May 31, 2014, a mere twelve days after the *Petrella* ruling, a complaint was filed against Led Zeppelin, alleging that the band stole the intro to its timeless classic, *Stairway to Heaven*.¹¹⁵

106. *Id.*

9. 107. *Petrella*, No. 12-1315, slip op. at 21–22; McCormick & Joyal, *supra* note 9.

108. Donahue, *supra* note 4.

109. McCormick & Joyal, *supra* note 9.

110. *Id.*

note 9. 111. *See Petrella*, No. 12-1315, slip op. at 21–22; McCormick & Joyal, *supra*

112. Donahue, *supra* note 4; McCormick & Joyal, *supra* note 9.

113. Donahue, *supra* note 4.

114. *See* Donahue, *supra* note 4; McCormick & Joyal, *supra* note 9.

21–22. 115. Complaint, *supra* note 9, at 7; *see also* *Petrella*, No. 12-1315, slip op. at

IV. RANDY CRAIG WOLFE TRUST V. LED ZEPPELIN

A. *Background*

1. Led Zeppelin

Requiring little introduction, Led Zeppelin is known around the world for transforming rock 'n' roll music.¹¹⁶ Comparing their influence to the Beatles, the Rock and Roll Hall of Fame proclaims that their combination of power and intensity mixed with the delicacy of British folk rock "redefined rock in the Seventies and for all time."¹¹⁷ Led by vocalist, Robert Plant, and guitarist, Jimmy Page, Led Zeppelin provided the world with timeless classics such as, *Black Dog*, *D'yer Mak'er*, and *Whole Lotta Love*.¹¹⁸ As many incredible songs as Led Zeppelin has released, no song has received quite the recognition and acclaim that *Stairway to Heaven* has.¹¹⁹ Despite never having been released as a single, the epic eight-minute song "remains [the] radio's all-time most requested rock song."¹²⁰

2. Randy "California" Wolfe

Despite a fantastic nickname, Randy Wolfe is not very renowned within the classic rock community.¹²¹ At only fifteen years old, however, Randy Wolfe received the nickname Randy California from legendary guitarist and rock 'n' roll icon, Jimi Hendrix.¹²² As a matter of fact, before the Jimi Hendrix Experience came to fruition, Randy California played guitar alongside Hendrix in the band Jimmy James and the Blue Flames.¹²³ After going their separate ways, Randy California moved to the West Coast and formed the psychedelic rock group, Spirit.¹²⁴ California's exposure to

116. *Led Zeppelin Biography*, ROCK & ROLL HALL OF FAME, <http://rockhall.com/inductees/led-zeppelin/bio/> (last visited May 12, 2015).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See Sean Michaels, *Led Zeppelin Accused of Stealing Stairway to Heaven Opening*, THE GUARDIAN (May 19, 2014, 7:13 EDT), <http://www.theguardian.com/music/2014/may/19/led-zeppelin-accused-stealing-stairway-to-heaven-opening>.

122. *Id.*

123. Pierre Perrone, *Obituary: Randy California*, THE INDEP., Jan. 17, 1997, at 18.

124. *Id.*

famous musicians continued while touring with his band.¹²⁵ In 1968 and 1969, Spirit played four shows with Led Zeppelin in Detroit, Atlanta, and Seattle.¹²⁶ In addition to those four shows, Led Zeppelin actually *opened up* for Spirit in a 1968 concert at the Denver Auditorium Arena.¹²⁷ Unfortunately, Spirit ended up being relatively unsuccessful, releasing only a few minor hits.¹²⁸ Spirit's less than moderate success in conjunction with a poor record deal, left Randy California bartering songs in exchange for food in the latter portion of his life.¹²⁹ Before California's untimely death in 1997, he reportedly told Listener Magazine that Zeppelin's *Stairway to Heaven* was ripped off from a Spirit song.¹³⁰

3. Stairway to Heaven

Legend has it, Jimmy Page created the masterpiece while doing what every other up-and-coming rock 'n' roll mogul would do, retreating to a secluded cottage in Wales without power or running water.¹³¹ After an arduous tour, Page decided to stay in the stone cottage known as Bron-Yr-Aur.¹³² "At Bron-Yr-Aur, by candlelight, Page constructed the bones of what may well be the most popular, and valuable, rock 'n' roll song of all time, *Stairway to Heaven*."¹³³ Upon his return to England that winter, Page showcased the instrumental foundation of the song to the rest of the band.¹³⁴ "As Page plucked, singer Robert Plant seemed to channel another world as he wrote the lyrics" to what would eventually become *Stairway to Heaven*.¹³⁵

Stairway to Heaven was released to the public in November 1971 on Led Zeppelin's fourth studio album, commonly referred to as Led Zeppelin IV.¹³⁶ In 2008, Conde Nast Portfolio magazine published an article that

125. See *id.*; Jeff Perlah, *Led Zeppelin Accused of Stealing 'Stairway to Heaven' Opening*, INT'L BUS. TIMES (May 20, 2014, 1:31 PM), <http://www.ibtimes.com/led-zeppelin-accused-stealing-stairway-heaven-opening-1587312>.

126. Perlah, *supra* note 125.

127. *Id.*

128. Vernon Silver, *Stairway to Heaven: The Song Remains Pretty Similar*, BLOOMBERG BUSINESSWEEK (May 15, 2014), <http://www.businessweek.com/articles/2014-05-15/led-zeppelins-stairway-to-heaven-vs-dot-spirits-taurus-a-reckoning>.

129. *Id.*

130. Perlah, *supra* note 125; see also Perrone, *supra* note 123 (explaining that Randy California drowned after saving his twelve-year-old son who was caught in a rip tide off the coast of Molokai, Hawaii).

131. Silver, *supra* note 128.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Silver, *supra* note 128.

estimated the song had earned over \$562 million from royalties and record sales.¹³⁷ While, the royalties are likely attributable to the radio demand of the song, the record's success is reflective of the band's refusal to release *Stairway to Heaven* as a single.¹³⁸ More than 23 million copies of Led Zeppelin IV have been sold in the United States alone.¹³⁹

4. Taurus

In 1968, three years prior to the release of *Stairway to Heaven*, Spirit released its self-titled debut album.¹⁴⁰ This album shares something in common with Led Zeppelin IV, but unfortunately for Spirit it is not the global success.¹⁴¹ Instead, it is the music that sounds eerily similar.¹⁴² Spirit's album boasts *Taurus*, a two minute and thirty-seven second instrumental piece that features an incredibly catchy plucked guitar line.¹⁴³ A guitar line that sounds awfully similar to the opening of *Stairway to Heaven*.¹⁴⁴

5. The Lawsuit

Declaring it *a long time coming*, Philadelphia lawyer, Francis Malofiy, filed a copyright infringement lawsuit against Led Zeppelin on behalf of the estate of Randy California.¹⁴⁵ In this case, *a long time coming* may be a bit of an understatement.¹⁴⁶ The suit alleges that the nearly forty-three-year-old song, *Stairway to Heaven*, was in part copied from Spirit's 1968 song *Taurus*.¹⁴⁷ In addition to the songs at issue being over forty years old, it is clear that California was aware of the alleged infringement for a significant amount of time.¹⁴⁸ In his 1997 interview with Listener Magazine, California was quoted,

I [would] say it was a ripoff, . . . [a]nd the guys made millions of bucks on it and never said [*t*]/*hank you*, never said, '[c]an we pay you some money for it?' It [is] kind of a sore point with me.

137. *Id.*

138. *Id.*

139. *Id.*

140. Michaels, *supra* note 121.

141. *See id.*

142. *Id.*

143. Complaint, *supra* note 9, at 6.

144. *See* Michaels, *supra* note 121.

145. Silver, *supra* note 128.

146. Michaels, *supra* note 121.

147. McCormick & Joyal, *supra* note 9.

148. *See* Silver, *supra* note 128.

Maybe someday their conscience will make them do something about it.¹⁴⁹

Prior to the Supreme Court's decision in *Petrella*, it is likely that the estate of Randy California could not have imagined that it would have a viable claim, forty-three years after the alleged infringement.¹⁵⁰ Under *Petrella*, the estate can potentially recover up to three years worth of profit, dating back from May 31, 2014, as well as, attribution rights or injunctive relief.¹⁵¹

Although this lawsuit may come as a surprise to fans, this is familiar territory for Led Zeppelin.¹⁵² Since the band's debut, Led Zeppelin has dealt with several lawsuits that have required them to redistribute portions of royalties and alter credits to *their* songs.¹⁵³ In the early 1970s, Zeppelin settled a dispute with music publisher Chester "Howlin' Wolf" Burnett over *The Lemon Song* by extending a writing credit to Mr. Burnett.¹⁵⁴ Around 1979, Led Zeppelin's chart-topping hit, *Whole Lotta Love* came under quite a bit of scrutiny when Shirley Dixon-Wilson, daughter of blues musician Willie Dixon, informed her father of the vast similarities between *Whole Lotta Love* and her father's song *You Need Love*.¹⁵⁵ Ultimately, Dixon filed suit and after an undisclosed settlement in 1987 the song now attributes credit to the members of Led Zeppelin as well as Willie Dixon.¹⁵⁶ Another song that has been subject to infringement claims was *Babe I'm Gonna Leave You*.¹⁵⁷ *Babe I'm Gonna Leave You* is a cover of a Joan Baez song that appeared on Led Zeppelin's debut album.¹⁵⁸ In 1960, Anne Bredon, a University of California-Berkeley student, wrote the song *Babe*, which became the song that both Joan Baez and Led Zeppelin covered.¹⁵⁹ Upon discovering her song was enshrined in classic rock history, Bredon hired an attorney and the dispute was quickly resolved by a settlement agreement of a 50-50 split in authorship.¹⁶⁰ Lastly, the hit song *Dazed and Confused* was

149. *Id.*

150. *See id.*; *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, slip op. at 22 (U.S. May 19, 2014).

151. *See* McCormick & Joyal, *supra* note 9; *Petrella*, No. 12-1315, slip op. at 5, 21.

152. Michaels, *supra* note 121; Silver, *supra* note 128.

153. Michaels, *supra* note 121; Silver, *supra* note 128.

154. Silver, *supra* note 128.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Silver, *supra* note 128.

160. *Id.* (explaining that Bredon was not a hard rock fan and did not learn of the infringement until the 1980s when her twelve year old son broke the news).

also in the spotlight recently when folk singer, Jake Holmes sued Jimmy Page and his record and publishing companies alleging copyright infringement of his 1967 song by the same name.¹⁶¹ Although both parties stipulated for a dismissal of the action in 2011, the credit for *Dazed and Confused* was changed to “Jimmy Page; inspired by Jake Holmes” the very next year.¹⁶²

Even though this most recent action brought against Led Zeppelin will likely result in a settlement, much like the above instances, the following sections of this Comment will analyze the merit of the infringement claim involving *Stairway to Heaven*.¹⁶³

B. Copyright Infringement of Music

In order to prove a copyright infringement claim, a plaintiff is required to show that he or she is the owner of a valid copyright and that the defendant copied protected elements of the copyrighted work.¹⁶⁴ This Comment will not examine the ownership element because the complaint filed against Led Zeppelin claims that a copyright for the song *Taurus*, which lists Randy California as the author, was filed in 1968 and later renewed in 1996.¹⁶⁵ Instead, it will focus on the complexities of proving that a defendant copied a plaintiff’s copyrighted work.¹⁶⁶ The copying element of a musical infringement claim can be established through either direct or circumstantial evidence.¹⁶⁷ Although direct evidence would on its face prove the copying element, it is rarely ever available because it requires some sort of admission by the defendant or a key witness.¹⁶⁸ Since direct evidence is so unlikely, most musical copyright infringement cases have to be proved via circumstantial evidence of copying.¹⁶⁹ To prove copying with circumstantial evidence, the estate of Randy Wolfe will be required to demonstrate that: (1)

161. *Id.*

162. *Id.* (suggesting that details of the settlement were private).

163. See Oliver Herzfeld, *Spirit v. Led Zeppelin: Analysis of the “Stairway to Heaven” Infringement Lawsuit*, FORBES (May 21, 2014, 1:50 PM), <http://www.forbes.com/sites/oliverherzfeld/2014/05/21/spirit-v-led-zeppelin-analysis-of-the-stairway-to-heaven-infringement-lawsuit/>; *infra* Part IV.B.

164. Emily Miao & Nicole E. Grimm, *The Blurred Lines of What Constitutes Copyright Infringement of Music: Robin Thicke v. Marvin Gaye’s Estate*, WESTLAW J. INTELL. PROP., Nov. 13, 2013, at 3, 4.

165. Complaint, *supra* note 9, at 7.

166. See *infra* Part IV.B–C.

167. Miao & Grimm, *supra* note 164, at 4.

168. *Id.*

169. *Id.*

Led Zeppelin had access to Spirit's song *Taurus*; and (2) Led Zeppelin's *Stairway to Heaven* is substantially similar to *Taurus*.¹⁷⁰

1. Access

The courts are varied in their approach to determining whether the defendant had access to a plaintiff's copyrighted work.¹⁷¹ The general rule, however, is that the plaintiff has the burden of showing "significant, affirmative and probative evidence" that the defendant had access to their work.¹⁷² In *Selle v. Gibb*,¹⁷³ the Seventh Circuit explained that the "plaintiff's work need only be available with some reasonable possibility of access."¹⁷⁴ Courts have proved access by circumstantial evidence through various different methods, including: Widespread dissemination, a chain of events, or in the absence of the previous, courts may even infer access from striking similarity of the works.¹⁷⁵

A plaintiff can satisfy his or her burden of proving access if he or she can show that the allegedly infringed work was widely disseminated to the public.¹⁷⁶ In *Cholvin v. B & F Music Company*,¹⁷⁷ the plaintiff's musical composition, *When the Sun Bids the Sky Goodnight*, was reproduced on two thousand copies of sheet music and released through four separate recordings, which resulted in more than two hundred thousand records sold.¹⁷⁸ The Seventh Circuit held that in light of the evidence, an inference of access was proper because the widespread dissemination of the song allowed for it to be heard on the radio from coast to coast.¹⁷⁹ However, in order for the court to make this type of inference, the dissemination must be significant.¹⁸⁰ For example, in *Jewel Music Publication Co. v. Leo Feist*,

170. See *id.*

171. Karen Bevell, Note, *Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 322 (1999).

172. *Id.* (quoting *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991)).

173. 741 F.2d 896 (7th Cir. 1984).

174. Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 234 (1990) (quoting *Selle*, 741 F.2d at 901)).

175. See *id.* at 234–38.

176. *Id.* at 234; see also *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103–04 (7th Cir. 1958).

177. 253 F.2d 102 (7th Cir. 1958).

178. *Id.* at 103.

179. See *id.* at 103–04.

180. See *Jewel Music Publ'g. Co. v. Leo Feist, Inc.*, 62 F. Supp. 596, 598 (S.D.N.Y. 1945).

Inc.,¹⁸¹ the court refused to infer access despite the fact that the plaintiff distributed four thousand copies of the song to broadcasting stations and artists, and sold 5626 copies of the song.¹⁸²

Evidence of widespread dissemination “may also support a theory of subconscious infringement.”¹⁸³ The theory of subconscious infringement was first postured by Judge Learned Hand in the case *Fred Fisher, Inc. v. Dillingham*.¹⁸⁴ In *Fred Fisher, Inc.*, Judge Hand inferred copying by implementing the following principal:

Everything registers somewhere in our memories, and no one can tell what may evoke it.

....

Once it appears that another has in fact used the copyright as the source of [their] production, [they have] invaded the author's rights. It is no excuse that in so doing [their] memory has played . . . a trick [on them].¹⁸⁵

In *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*,¹⁸⁶ the Second Circuit held that the district court's finding of subconscious infringement was proper.¹⁸⁷ In *ABKCO Music*, Beatles superstar George Harrison was sued for copyright infringement by Ronald Mack based on allegations that *My Sweet Lord* was copied from Mack's *He's So Fine*.¹⁸⁸ Although the court genuinely believed that Harrison was unaware of the infringement, it held that there was sufficient evidence to support that Harrison had access to *He's So Fine* due to its widespread distribution.¹⁸⁹ The court further explained that this ruling, predicated upon subconscious copying, was proper because the courts are not concerned with a defendant's intent; instead, its focus is whether the defendant had access to the infringed work.¹⁹⁰

Another means by which a plaintiff may establish access through circumstantial evidence is by showing a chain of events that allowed the defendant to have direct access to the copyrighted work.¹⁹¹ A prime example of this type of access can be found in the infringement suit against hip-hop

181. 62 F. Supp. 596 (S.D.N.Y. 1945).

182. *Id.* at 598.

183. Miao & Grimm, *supra* note 164, at 4.

184. 298 F. 145, 148 (S.D.N.Y. 1924).

185. *Id.* at 147–48.

186. 722 F.2d 988 (2d Cir. 1983).

187. *Id.* at 998–99.

188. *Id.* at 990.

189. *Id.* at 998–99.

190. *Id.*

191. Miao & Grimm, *supra* note 164, at 4.

mogul Kanye West.¹⁹² In this action, Vincent Peters, an aspiring rapper, “recorded and distributed a song entitled *Stronger*.”¹⁹³ Peters’ search for an executive producer came to an end when Kanye West’s long-time friend and business manager, John Monopoly, expressed interest.¹⁹⁴ In addition to sending Monopoly a copy of the recording, Peters also attended a meeting with Monopoly, during which he played the song *Stronger*.¹⁹⁵ Despite having agreed to be Peters’ executive producer, Monopoly did not end up producing any music for Peters due to a funding issue.¹⁹⁶ Less than a year after that meeting, Kanye West *coincidentally* released the hit song *Stronger*.¹⁹⁷ Although there is no direct evidence that West had access to Vincent Peters’ song, the court used a chain of events theory to support the inference that West did indeed have access to the copyrighted work.¹⁹⁸

Although the general rule is that there must be a *reasonable possibility of access* and that access may not be conferred through speculation and conjecture, the Second Circuit has inferred access from an *attenuated* chain of events.¹⁹⁹ In *Gaste v. Kaiserman*,²⁰⁰ the court held that the plaintiff’s theory, based on an attenuated chain of events, was sufficient to show access because a jury *could* reasonably conclude that the defendant had access to the song.²⁰¹

In this case, [the plaintiff’s] principal theory of access was that [the] owner [of the defendant’s publishing company], Lebendiger, received a copy of *Pour Toi* in the 1950s, when [the plaintiff] was trying to market the song to subpublishers, and that [the defendant] obtained it from Lebendiger in 1973. Georges Henon, a former employee of [the plaintiff] who had been responsible for distributing materials to foreign subpublishers, testified that he gave a recording of *Pour Toi* to Lebendiger in France in the 1950s and that he sent copies of the sheet music and record to Lebendiger in Brazil.²⁰²

192. See *Peters v. West*, 692 F.3d 629, 634 (7th Cir. 2012).

193. *Id.* at 631.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Peters*, 692 F.3d at 631.

198. *Id.* at 634.

199. E. Scott Fruehwald, *Copyright Infringement of Musical Compositions: A Systematic Approach*, 26 AKRON L. REV. 15, 21 (1992).

200. 863 F.2d 1061 (2d Cir. 1988).

201. *Id.* at 1067.

202. *Id.* at 1066.

The Second Circuit's liberal finding of access, under what it acknowledged as an attenuated chain of facts, sets a relatively low burden for proving access.²⁰³

2. Substantial Similarity

Once a plaintiff makes a showing that the defendant had access to the copyrighted work, the plaintiff must demonstrate that the two works are substantially similar.²⁰⁴ The seminal case with regard to musical infringement claims is *Arnstein v. Porter*.²⁰⁵ In *Arnstein*, the court created a two-prong test in its approach to determining whether the works are substantially similar.²⁰⁶ The first prong provides that "[i]f there is evidence of access . . . then the trier of the facts must determine whether the similarities are sufficient to prove copying, [and in this] analysis, *dissection* is relevant, and the testimony of experts may be received to aid the trier of the facts."²⁰⁷ Once copying is established by the above method, the court will employ the second prong of the test to determine if the similarity is substantial enough to constitute an improper appropriation.²⁰⁸ The court will make this determination by applying the lay-listener standard, which allows the jury to make a determination on the similarity of the songs without taking into account dissection or expert testimony.²⁰⁹ The *Arnstein* court justified the second prong of the test by explaining:

The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.²¹⁰

Dissatisfied with the Second Circuit's two-prong test, the Ninth Circuit created its own formula to determine the legitimacy of a musical

203. Fruehwald, *supra* note 199, at 21.

204. Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM.-VLA J.L. & ARTS 109, 111 (1995).

205. 154 F.2d 464 (2d Cir. 1946).

206. *Id.* at 468.

207. *Id.*

208. *Id.*

209. *Id.* at 468–69.

210. *Arnstein*, 154 F.2d at 473.

infringement claim.²¹¹ In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,²¹² the court determined whether two works were substantially similar by employing a two-part analysis: An extrinsic test and an intrinsic test.²¹³ Under the extrinsic test, the trier of fact will compare the similarity of the *ideas* behind the two works.²¹⁴ A determination will be made by comparing the similarity of elements, between the two works, through expert testimony and analytical dissection of those works.²¹⁵ If the trier of fact determines that there is a substantial similarity of ideas, then the court will apply the intrinsic test, which examines the work through the ears of an ordinary listener, without analytic dissection or expert testimony.²¹⁶ Although, the Ninth Circuit created this two-part analysis to distinguish itself from the two-prong test developed in *Arnstein*, in practice, the two methods became very similar.²¹⁷

3. Access and Substantial Similarity

Although a plaintiff typically needs to prove both access and substantial similarity, it is important to note how courts interpret these elements in conjunction with one another.²¹⁸ Some courts will “apply an inverse-ratio rule . . . between access” and substantial similarity, which suggests that “the more access the defendant had to the copyrighted work, the less similarity” the plaintiff will have to show to prove copying.²¹⁹ Additionally, some courts have gone as far to waive the access requirement if “the two works are *strikingly similar*.”²²⁰ These courts will make an inference that the defendant had access to the plaintiff’s copyrighted work if the plaintiff’s showing of similarity is so strong that it could only have been achieved “through copying and not by coincidence,” accident, or independent creation.²²¹

211. Kim, *supra* note 204, at 113–14.

212. 562 F.2d 1157 (9th Cir. 1977).

213. *Id.* at 1164.

214. *Id.* (explaining that ideas include specific criteria that can be listed).

215. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

216. *See* Miao & Grimm, *supra* note 164, at 4.

217. Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike*, 15 VAND. J. ENT. & TECH L. 227, 260–61 (2013); *see also* *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

218. *See* Livingston & Urbinato, *supra* note 217, at 264.

219. *Id.*; Miao & Grimm, *supra* note 164, at 4.

220. Miao & Grimm, *supra* note 164, at 4.

221. *Id.*

C. *Did Led Zeppelin Steal Its Stairway to Greatness?*

In an interview for *Light and Shade: Conversations*, Jimmy Page stated that “‘I always tried to bring something fresh to anything that I used.’ . . . ‘I always made sure to come up with some variation. In fact, I think in most cases, you would never know what the original source could be.’”²²² Page likely hopes the trier of fact will share his sentiment.²²³

In order to prevail on its copyright infringement claim, the estate of Randy California will first be tasked with the burden of showing that Led Zeppelin had access to Spirit’s song, *Taurus*.²²⁴ Since an admission of copying is highly unlikely, the estate of Randy California will almost certainly have to prove access by means of circumstantial evidence.²²⁵ The plaintiff’s counsel will likely be able to make a strong showing of access by implementing both a theory of widespread dissemination and by demonstrating direct evidence of access through a chain of events.²²⁶ Although, Spirit’s fame and notoriety pales in comparison to that of Led Zeppelin, the estate of Randy California will likely assert a widespread dissemination argument based upon the relative success of Spirit’s self-titled album that contained the song *Taurus*.²²⁷ Spirit’s album rose to thirty-one on Billboard’s Top 200 list in 1968.²²⁸ Randy California’s strongest theory of access, however, will be shown through a chain of events.²²⁹ The argument that Led Zeppelin had access to Spirit’s *Taurus* will center around the five concerts the two bands played together prior to the creation of *Stairway to Heaven*, but subsequent to Spirit’s release of *Taurus*.²³⁰ Like in *Peters v. West*,²³¹ where the court inferred access based upon the plaintiff’s interaction with the defendant’s close friend and manager, an inference of access will certainly be present in this case because Led Zeppelin likely heard *Taurus* while being physically present at a minimum of five Spirit concerts.²³²

After making a showing of access, the parties will move onto the much more litigious element, substantial similarity.²³³ In order to make a

222. Silver, *supra* note 128.

223. *See id.*

224. *See supra* Part IV.B.

225. *See* Miao & Grimm, *supra* note 164, at 4.

226. Brent, *supra* note 174, at 234–38.

227. *See Spirit: Awards*, ALL MUSIC, <http://www.allmusic.com/album/spirit-mw0000653465/awards> (last visited May 12, 2015).

228. *Id.*

229. *See supra* notes 178–82 and accompanying text.

230. *See supra* notes 140–44 and accompanying text.

231. 692 F.3d 629 (7th Cir. 2012).

232. *Id.* at 633–34; Herzfeld, *supra* note 163.

233. *See* Miao & Grimm, *supra* note 164, at 4.

determination on this element, an expert will be brought in to break down the works into elements and compare those elements to determine if the works are indeed *substantially similar*.²³⁴ If the experts make a convincing showing that protectable elements of *Taurus* are substantially similar to *Stairway to Heaven*, the trier of fact will then be required to determine if the guitar arpeggio opening of *Stairway to Heaven* and the instrumental track, *Taurus*, are similar enough to rise to the level of improper appropriation.²³⁵ The jury will be required to make this determination of improper appropriation based upon its untrained ears, without taking into account the experts' dissection or testimony.²³⁶ As a consequence of the ambiguity behind the substantial similarity test and the lack of case law, due to pre-trial settlements, this Comment will not attempt to infer what the jury's ultimate determination will be.²³⁷ However, it is important to note that if the Pennsylvania court chooses to adopt the inverse-ratio rule, Randy California's estate would have a significantly reduced burden of proving substantial similarity because its evidence that Led Zeppelin had access to *Taurus* is very strong.²³⁸

V. CONCLUSION

The purpose of this Comment was to demonstrate the immediate and long-term impact the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer* will have on copyright and patent law.²³⁹ Had it not been for this landmark decision, Led Zeppelin likely would not be facing a lawsuit for a song the band released almost forty-three years ago.²⁴⁰ Even if the estate of Randy California did file the lawsuit, absent the Supreme Court's decision in *Petrella*, Led Zeppelin would have been confident in their likelihood to prevail based upon California's unreasonable delay in filing the lawsuit.²⁴¹ However, this decision in *Petrella* has drastically changed the landscape of copyright law.²⁴² As intellectual property attorney Brad

234. *Id.* (explaining that these elements can include pitch, melody, lyrics, cadence, etc.).

235. *See* Herzfeld, *supra* note 163.

236. *Id.*; *see also* Miao & Grimm, *supra* note 164, at 4.

237. *See* Miao & Grimm, *supra* note 164, at 5 (explaining that very few copyright case actually go to trial).

238. *See* Livingston & Urbinato, *supra* note 217, at 264; Miao & Grim, *supra* note 164, at 4; Herzfeld, *supra* note 163.

239. *See* *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, slip op. at 21 (U.S. May 19, 2014).

240. *McCormick & Joyal*, *supra* note 9.

241. *Id.* (explaining that the lawsuit "would likely have been time-barred prior to *Petrella*"); *see also* *Petrella*, No. 12-1215, slip op. at 21-22.

242. *Petrella*, No. 12-1215, slip op. at 21; *McCormick & Joyal*, *supra* note 9.