
EXPLODING THE “INVERSE RATIO RULE”

by DAVID ARONOFF*

INTRODUCTION

History abounds with examples of pseudoscientific notions that have enjoyed substantial public acceptance, notwithstanding an absence of verifiable support. For example, phrenology has been used to explain human intelligence, astrology has been used to predict future events, and crop circles have been pointed to as evidence of alien visitors. Many such pseudoscientific principles are enduringly popular. However, few would contend that the legal rules underlying copyright infringement actions should be based on such empirically questionable theories.

For this reason, the continuing vitality in copyright law of the so-called “Inverse Ratio Rule” (“the IRR”) — at least within the Ninth Circuit¹ — is both puzzling and problematic. Put most simply, the IRR holds that in a copyright infringement case, where a high degree of access by the defendant to the plaintiff’s allegedly infringed work is shown, a lower degree of similarity will be required to establish infringement. Like many other pseudoscientific principles, the IRR seems to have some superficial appeal: After all, it seems logical that a diamond thief who readily has “access” to a burglaried jewelry store is more likely to have committed the crime than a suspect who was out of the country at the time of the theft.

However, as with all pseudoscientific principles, the IRR does not fare well under closer scrutiny. In the context of a diamond heist, does it really follow that a suspect who lives around the corner from the scene of a crime is more likely to have been the culprit than a suspect who lives five miles away? Even if that problematic question is answered in the affirmative, does it follow that the state’s burden to prove the elements of the crime should be lowered by a “ratio” based on the proximity (i.e., degree

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¹ This Article primarily focuses on judicial decisions within the Ninth Circuit. However, the issues and problems discussed herein are applicable to other circuits as well.