

Dazed and Confused: Copyright Limitation

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DAZED AND CONFUSED: COPYRIGHT LIMITATION

I. INTRODUCTION

Known as one of the greatest rock songs of all time, the song “Stairway to Heaven” was released in 1971 by the band Led Zeppelin.¹ However, only three years earlier, in 1968, another band, Spirit, released their instrumental hit, “Taurus.”² The songs shared a coincidentally similar descending guitar figure.³ Randy Craig Wolfe, better known as “Randy California,” was the lead singer of Spirit, and owned the copyright to Taurus.⁴ The copyright then passed to the Randy Craig Wolfe Trust when he died in 1997, saving his son from being swept out to sea.⁵ Michael Skidmore, the current Trustee of California’s Trust, became the new Taurus copyright owner.⁶ In a classic David-and-Goliath tale, Skidmore initiated a copyright infringement battle against Led Zeppelin over the allegedly lifted arpeggio.⁷

¹ Rolling Stone, 500 Greatest Songs of All Time Rolling Stone (2018), <https://www.rollingstone.com/music/music-lists/500-greatest-songs-of-all-time-151127/led-zeppelin-stairway-to-heaven-2-70822/>. Stairway to Heaven is ranked #31 on the Rolling Stone

² Joe Blevins, *A guitarist on whether "Stairway To Heaven" really rips off "Taurus"*, AV NEWS (2017), <https://news.avclub.com/a-guitarist-on-whether-stairway-to-heaven-really-rips-1798248408>.

³ *Skidmore v. Led Zeppelin*, CV153462RGKAGR, 2016 WL 1442461, at *1 (C.D. Cal. Apr. 8, 2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Aram Sinnreich, *If Led Zeppelin Goes Down, We All Burn*, THE DAILY BEAST (2016), <https://www.thedailybeast.com/if-led-zeppelin-goes-down-we-all-burn>.

Part II of this Note will provide background information on the history of the Copyright Act of 1909 and how its transformation has affected copyright for music producers and artists.⁸ Part III will discuss the subject opinion of this Note, *Skidmore v. Led Zeppelin*.⁹ Part IV will discuss the legal analysis of the Ninth Circuit's opinion.¹⁰ Part V will discuss the future implications of the ruling, and what this means for the courts and the music industry.¹¹ Part VI will conclude the overall discussion.¹²

II. BACKGROUND

A. *The Copyright Act of 1909*

The Copyright Act of 1909 was a landmark statute for U.S. Copyright law.¹³ Under the Act, copyright protection was extended only to works which were published and were affixed with a notice of copyright.¹⁴ State copyright law had control over unpublished works.¹⁵ The Copyright Act provided that federal law controlled published works even when not affixed with a notice of copyright.¹⁶

Led Zeppelin, the famous rock 'n' roll band, is seen as the Goliath and Spirit as David.

⁸ See *infra* Part II.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part V.

¹² See *infra* Part VI..

¹³ Copyright Act of 1909, Pub.L. 60–349, 35 Stat. 1075 (1909) (prior to 1976 amendment; *Eldred v. Ashcroft*, 537 U.S. 186, 247, 123 S. Ct. 769, 803, 154 L. Ed. 2d 683 (2003) (calling the statute a landmark decision.).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* § 10.

If a work did not have a notice of copyright it was considered published under the Act and it became a part of the public domain.¹⁷ The Copyright Act of 1909 was repealed and superseded by the Copyright Act of 1976, but the copyright protection for songs published prior to 1976 are still evaluated under the 1909 Act.¹⁸

B. Music Copyright

Federal copyright law extends protections to specific subject matter.¹⁹ Music copyright is protected under 17 U.S.C. §§ 101-810, and protects musical works and sound recordings.²⁰ Therefore, songs like Taurus, which was recorded on a phonorecord, are protected under the Copyright Act of 1909 as a musical work or a sound recording.²¹ This most recent appellate decision clarified the copyrightability of songs recorded under the auspices of the Copyright Act of 1909.²²

To qualify as a musical work, a song must be written by a composer and consist of a "rhythm, harmony, and melody."²³ The copyright protection of such a work extends to lyrics that accompany the song.²⁴ While a statutory definition doesn't exist within the Act, case law has defined a musical work as a "particular sequence and arrangement of lyrics and/or music that comprise what

¹⁷ *Id.*

¹⁸ 17 U.S.C. § 102 (2012); *See generally* Skidmore for Randy Craig Wolfe Tr. v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018).

¹⁹ 17 U.S.C. § 102 (2012).

²⁰ 17 U.S.C. §§ 101-810, *et seq.*

²¹ 17 U.S.C. § 102(a)(7) (2012).

²² Skidmore for Randy Craig Wolfe Tr. v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018).

²³ Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 272 n.1 (6th Cir. 2009).

²⁴ *Id.*

most people refer to as a 'song.'"²⁵ Additionally, the copyright of a musical composition specifically protects the “generic sound” that would arise in its performance.²⁶

A sound recording, on the other hand, operates alongside a musical work.²⁷ A sound recording is defined as a musical work's reproduction onto a playable device. Sound recordings are a result of a *fixation* of “a series of musical, spoken, or other sounds.”²⁸ Therefore, a sound recording can be fixed on any object that allows sound to be heard directly or with the aid of a machine.²⁹

C. Copyright Infringement

In order to prove copyright infringement, a party must first show that they own a valid copyright to the work or part of the work.³⁰ After proving ownership, a plaintiff must show that the defendant copied protected aspects of the work's expression.³¹ Whether a defendant has copied a protected expression gives way to two separate issues: copying and unlawful misappropriation.³² A plaintiff must be able to show that the defendant *copied* the work, since independent creation is a valid copyright infringement defense.³³

²⁵ *Id.*

²⁶ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (2002).

²⁷ Melville B. Nimmer, *Nimmer on Copyright* § 2.05 (2016).

²⁸ *Id.* at § 2.10.

²⁹ *Id.*

³⁰ *Skidmore*, 905 F.3d at 1125.

³¹ *Id.*

³² *Id.*

³³ Pahlck, Harold Eric, "Independent Creation Defense and Patent Law" (2013). https://scholarship.shu.edu/student_scholarship/282.

i. Types of Copyright Infringement

Three types of copyright infringement were raised in this case: direct infringement, contributory infringement, and vicarious infringement.³⁴ Skidmore also raised a violation of a right to attribution which is often raised in conjunction with copyright infringement claims.³⁵

Direct copyright infringement claims are brought under 17 U.S.C. § 106.³⁶ Under the statute, direct infringement occurs when a party reproduces, distributes, displays or performances a copyrighted work, or prepares a derivative work based on the copyrighted work, without authorization.³⁷ In order to claim direct infringement, plaintiff must show that he is the owner of a valid copyright, and the defendant is infringement on the copyright.³⁸

Contributory copyright infringement is a form of secondary liability.³⁹ While the Copyright Act doesn't expressly impose liability for contributory infringement, the Supreme Court has held that lack of express language in the Copyright Act "does not preclude the imposition of liability for copyright infringements or on certain parties who have not themselves engaged in the infringing activity."⁴⁰ A contributory infringement is one who "knowingly induces, causes, or materially contributes to copyright infringement by another," but themselves has not committed in the

³⁴ *Skidmore*, 905 F.3d at 1122.

³⁵ *Id.*

³⁶ 17 U.S.C. § 106.

³⁷ *Id.*

³⁸ *Skidmore*, 905 F.3d at 1125.

³⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005).

⁴⁰ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

infringing acts.⁴¹ A contributory infringer can be held liable if he knows or has reason to know of the infringement.⁴²

Like contributory infringement, vicarious copyright infringement is a form of secondary liability, and does not have express liability language under the Copyright Act.⁴³ Instead, case law has defined the elements and degree of liability.⁴⁴ Vicarious liability is based on the doctrine of *respondeat superior*, which holds that an employer or a principal is legally responsible for the wrongful acts of an employee or agent, if such actions occur within the scope of employment.⁴⁵ In various copyright infringement, a party may be held liable for the infringement caused by another if (1) the party has the ability to control the activities and (2) has a direct financial interest in the infringing activities.⁴⁶ Unlike contributory infringement, vicarious infringement does not require the vicarious party to have intent or knowledge.⁴⁷

ii. Copying

A plaintiff's first course of action should be to provide evidence of direct copying.⁴⁸ If a plaintiff cannot provide evidence of direct copying, he can "attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work," and that the two works share similarities probative of copying.⁴⁹ When a high degree of access is shown, a lower amount of similarity is

⁴¹ *Metro-Goldwyn-Mayer Studios*, 545 U.S. 913 (2005).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Metro-Goldwyn-Mayer Studios*, 545 U.S. 913 at 928.

⁴⁷ *Id.* at 932.

⁴⁸ *Skidmore*, 905 F.3d at 1122.

⁴⁹ *Id.*

needed to prove copying.⁵⁰ To prove copying, the similarities between the two works need to be extensive, and they don't need to involve protected elements of the plaintiff's work.⁵¹ They only need to be similarities that the court would not expect to arise if the two works had been created independently.⁵²

iii. Unlawful Misappropriation

A higher showing of substantial similarity is needed to prove unlawful misappropriation.⁵³ The relevant works must share *substantial* similarities, which must involve parts of the plaintiff's work that are original and therefore protected by copyright.⁵⁴ To determine substantial similarity, the Ninth Circuit uses the extrinsic and intrinsic tests.⁵⁵

The extrinsic test is an objective comparison of protected areas of a work.⁵⁶ This is accomplished by "breaking the works down into their constituent elements, and comparing those elements" to determine whether they are substantially similar.⁵⁷ The only elements that can be compared under the extrinsic test are those that are protected by copyright.⁵⁸ Extrinsic tests are typically difficult to administer in the musical context.⁵⁹

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Skidmore*, 905 F.3d at 1122.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The intrinsic test, on the other hand, is more concerned with a subjective comparison of the works.⁶⁰ The intrinsic test asks, “would the ordinary, reasonable person find the total concept and feel of the works to be substantially similar?”⁶¹ The extrinsic test requires an analytical comparison of each aspect of the piece, while the intrinsic test considers the overall feel of the piece.⁶² Both tests are normally left for a jury to determine.⁶³

III. SKIDMORE V. LED ZEPPLIN

A. Factual Background

In 1967, the rock band Spirit released their first self-titled album, which included the song Taurus.⁶⁴ Led Zeppelin was one of the biggest names in rock ‘n’ roll in the ‘70s toured with Spirit in 1968, appearing with them at two outdoor music festivals.⁶⁵ In 1971, Led Zeppelin released their named album Led Zeppelin IV, which was considered one of the peak moments of ‘70s hard rock.⁶⁶ After its release, members of the rock music community noticed that the introduction to one of the songs, Stairway to Heaven, sounded

⁶⁰ *Skidmore*, 905 F.3d at 1122.

⁶¹ *Id.*

⁶² *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072 (9th Cir. 2006).

⁶³ Scott Hervey, *The Complexity of Proving Copyright Infringement* The IP Law Blog (2007), <https://www.theiplawblog.com/2007/02/articles/copyright-law/the-complexity-of-proving-copyright-infringement/>.

⁶⁴ *Skidmore for Randy Craig Wolfe Tr. v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018).

⁶⁵ *Id.* at 1122.

⁶⁶ *Id.*

almost identical to Taurus.⁶⁷ Despite this, Spirit’s guitarist, Randy “California” Wolfe, never brought a lawsuit.⁶⁸

B. The District Court Decision

After Wolfe’s passing, Michael Skidmore, the trustee of the Randy “California” Wolfe trust and holder of Wolfe’s copyright for “Taurus,” brought suit in 2014.⁶⁹ Skidmore alleged that Stairway to Heaven was substantially similar to Taurus.⁷⁰ The suit alleged direct, contributory, and vicarious copyright infringement, and a violation of the right to attribution.⁷¹ Regarding copyright infringement, Skidmore alleged that the introductory notes in Stairway to Heaven were substantially similar to the notes in Taurus.⁷² Skidmore’s right of attribution claim was based on a “Falsification of Rock and Roll History” theory of liability.⁷³ In response, Led Zeppelin brought forth several defenses, including abandonment/waiver of rights and laches, due to the timeliness of the suit; independent creation, and unclean hands.⁷⁴ They also disputed ownership, substantial similarity, and access.⁷⁵ After discovery, Led Zeppelin’s motion for summary judgement was granted in part and denied in part.⁷⁶ The court granted the motion on Skidmore’s right to attribution because it was not able to find a

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1125.

⁷⁰ *Skidmore v. Led Zeppelin*, No. CV15-3462 RGK (AGRx), 2016 WL 1442461, at *1 (C.D. Cal. Apr. 8, 2016).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (The Court found that there were no cases to support this theory of liability.).

⁷⁴ *Id.*

⁷⁵ *Skidmore*, 905 F.3d at 1122.

⁷⁶ *Id.*

claim relating to the “Falsification of Rock and Roll History.”⁷⁷ The court denied summary judgement on the copyright infringement claim.⁷⁸

Since Taurus was recorded in 1967, its copyright is governed by the Copyright Act of 1909.⁷⁹ Therefore, the protectable copyright was not the recorded copy, but rather the deposit copy of the song.⁸⁰ The court determined that in order to find copyright infringement, Skidmore would have to show that there was a substantial similarity using the deposit copy of Taurus.⁸¹ Finally, the district court found that there were issues of fact regarding the ownership, access, substantial similarity, and damages.⁸² In 2016, a jury trial was held to determine the issues.⁸³ During this trial, the court denied Skidmore’s request to have a sound recording of Taurus played.⁸⁴ The judge determined that although the recording would be relevant to prove access, it was too prejudicial for the jury.⁸⁵

In 2016, the jury verdict found in favor of Led Zeppelin.⁸⁶ While the jury found that the Skidmore did have ownership of the copyright for Taurus, and that Led Zeppelin had access to Taurus, the two songs were not substantially similar under the extrinsic test.⁸⁷

⁷⁷ *Id.* at 1123.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Skidmore*, 905 F.3d at 1123.

⁸² *Id.*

⁸³ *Id.* at 1124.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Skidmore*, 905 F.3d at 1125.

C. Ninth Circuit Decision

The standard for reviewing the scope of copyright protection for musical works and jury instruction issues for abuse of discretion is *de novo*.⁸⁸ The Ninth Circuit vacated the district court's holding in part and remanded for further proceedings.⁸⁹ First, the Court found that a jury instruction on selection and arrangement was warranted, and that the district court's failure to include this jury instruction was not harmless error.⁹⁰ Second, the failure to include an instruction regarding the inverse ration rule was harmless.⁹¹ Third, the deposit copy, rather than the sound recording, defined the scope of copyrightability for Taurus under the Copyright Act of 1909.⁹² Fourth, while the district court erred in precluding the jury hearing a sound recording of Taurus to prove access, the error was harmless⁹³. Finally, the district court did not abuse its discretion when it denied the Skidmore's request for sanctions based on alleged conflict of Led Zeppelin's expert musicologist.⁹⁴

IV. LEGAL ANALYSIS

The Ninth Circuit adopted the initial two-step analysis for copyright infringement claims: (1) establishing ownership of a valid copyright and (2) that the defendant copied aspects of the plaintiff's protected copyright.⁹⁵ Both parties agreed that Skidmore owned the

⁸⁸ *Id.* at 1126.

⁸⁹ *Id.* at 1117.

⁹⁰ *Id.* at 1116.

⁹¹ *Id.* at 1117.

⁹² *Id.*

⁹³ *Skidmore*, 905 F.3d at 1117.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1125.

Taurus copyright.⁹⁶ Thus, the first element of copyright infringement, valid copyright ownership, was quickly resolved. The Court then turned to the second issue: whether there was direct evidence of copying.⁹⁷

The Court began with Skidmore's first argument of whether the district court correctly instructed the jury on the elements of his copyright infringement claim, and whether the alleged errors were prejudicial.⁹⁸ Skidmore argued that (1) the district court erred by failing to give an instruction that selection and arrangement of otherwise unprotectable musical elements are protectable, (2) that the jury instructions on originality and protectable musical elements were erroneous; and (3) that the court failed to give an inverse ratio rule instruction.⁹⁹

A. Selection and Arrangement

The Ninth Circuit found that the district court erred in failing to instruct the jury that the selection and arrangement of unprotectable musical elements were protectable.¹⁰⁰ The instructions depended upon the extrinsic text for substantial similarity.¹⁰¹ In the trial, the jury determined that there was no extrinsic substantial similarity, yet did not move on to the intrinsic test.¹⁰² The Court acknowledged that in cases concerning musical elements, the extrinsic test may be difficult for a jury to administer.¹⁰³ The Ninth Circuit had previously ruled that

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1126.

⁹⁹ *Skidmore*, 905 F.3d at 1126-30.

¹⁰⁰ *Id.* at 1127.

¹⁰¹ *Id.* at 1126.

¹⁰² *Id.*

¹⁰³ *Id.*

substantial similarity can be based on a combination of five otherwise protectable musical elements.¹⁰⁴ Significantly, Skidmore’s expert witness testified that an extrinsic substantial similarity existed based on the combination of five musical elements.¹⁰⁵ Some of these elements were protectable, while some of them were in the public domain.¹⁰⁶ What musical elements are protectable is a question of law.¹⁰⁷ For musical compositions, elements that are “easily arrived at” like some chord progressions and three-note sequences are not copyrightable because they are so common.¹⁰⁸

Led Zeppelin argued that a reversal based on the district court’s instruction was not warranted on three grounds.¹⁰⁹ First, they alleged that Skidmore waived any objection to the instruction because he did not voice an objection when the district court read the jury instructions to counsel.¹¹⁰ The Court did not find this argument persuasive because the district court specifically told both parties that it was not going to hear any oral objections to the jury instructions.¹¹¹ Since both parties had submitted written proposed jury instructions, the Court determined that the submission, however different from the district court’s instructions, served as an

¹⁰⁴ *Three Boys*, 212 F.3d at 485, *see also* *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”)

¹⁰⁵ *Skidmore*, 905 F.3d at 1126.

¹⁰⁶ *Id.*

¹⁰⁷ *Newton*, 204 F.Supp.2d at 1253.

¹⁰⁸ *Id.* (citing *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2nd Cir. 1988); *Jarvis v. A & M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993)).

¹⁰⁹ *Skidmore*, 905 F.3d at 1128.

¹¹⁰ *Id.*

¹¹¹ *Id.*

objection.¹¹² Second, at the trial level, Led Zeppelin asserted that Skidmore relied on selection and arrangement theory in his infringement argument.¹¹³ Yet on appeal, they contended that Skidmore relied on a similarity of “a ‘combination’ of elements present in ‘Taurus’.”¹¹⁴ The Ninth Circuit determined that Led Zeppelin was “splitting hairs,” and that their appellate response contradicted their district court position.¹¹⁵ The Court found that whether the specific words “selection” and “arrangement” were used is not relevant.¹¹⁶ Skidmore’s infringement claim was based on the selection and arrangement theory.¹¹⁷ Led Zeppelin’s argument was undermined due to the fact that they recognized this at the trial level.¹¹⁸ The Court also cited case law where selection and arrangement theories incorporated the “combination of musical elements” terminology.¹¹⁹ Finally, the defendants asserted that reversal is unwarranted because the error was harmless.¹²⁰ They argued that even if the jury had been given the correct instruction on selection and arrangement, they would have reached the same verdict.¹²¹ The Ninth Circuit disagreed, stating that without an improper selection and arrangement instruction compromised Skidmore’s argument on extrinsic substantial similarity.¹²²

¹¹² *Id.* at 1127.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Skidmore*, 905 F.3d at 1127.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Skidmore*, 905 F.3d at 1127.

¹²² *Id.*

B. Originality and Protectable Music Elements

The Court also found that the district court erred in assigning jury instructions regarding originality in two ways.¹²³ First, one jury instruction stated that common musical elements, like descending chromatic scales, arpeggios, and short sequences of three notes were not protectable under copyright law.¹²⁴ Coincidentally, these were exactly the kind of notes that “Taurus” and “Stairway to Heaven” shared.¹²⁵ Specifically, the Court found that this language undermined Skidmore’s expert testimony, that Led Zeppelin had “copied a chromatic scale, which had been used in an original manner.”¹²⁶ Second, the Ninth Circuit found that another jury instruction eliminated parts of the test for originality, and instead had added misleading language.¹²⁷ Skidmore had requested an instruction that acknowledged that the “original part of a work does not need to be new or novel, so long as it isn’t copied.”¹²⁸ The district court added new language, which suggested that public domain elements, like basic musical structures, were not copyrightable, “even when they are arranged or modified in a creative, original way.”¹²⁹ The Court determined that while the instruction was not literally incorrect, it was misleading.¹³⁰

¹²³ *Id.* at 1128.

¹²⁴ *Skidmore*, 905 F.3d at 1128.

¹²⁵ Joe Blevins, *A guitarist on whether "Stairway To Heaven" really rips off "Taurus"*, AV NEWS (2017), <https://news.avclub.com/a-guitarist-on-whether-stairway-to-heaven-really-rips-1798248408>.

¹²⁶ *Skidmore*, 905 F.3d at 1129.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

C. Inverse Ratio Rule

Skidmore argued that the district court erred by not including a jury instruction on the inverse ratio rule.¹³¹ The inverse ratio rule requires a lower standard of proof for establishing substantial similarity when showing a high degree of access by the alleged infringer.¹³² The jury's deliberations ended when they decided that the two songs weren't substantially similar.¹³³ They jury did not continue to the issue of copying.¹³⁴ The Ninth Circuit noted that because they were remanding the case for a new trial, that inverse ratio jury instructions may be appropriate in copyright infringement cases where there is substantial evidence of access.¹³⁵

D. Deposit Copy

Finally, the Ninth Circuit found that the deposit copy, rather than the sound recording, determined the scope of the "Taurus" copyright.¹³⁶ The Court did add that the district court abused its discretion by preventing the jury from hearing the sound recording of the song.¹³⁷ The Court found that it would have been important for the jury to hear it to assess whether Led Zeppelin had access to the recording, but because the jury found that the band had access, the error was harmless.¹³⁸

¹³¹ *Skidmore*, 905 F.3d at 1130.

¹³² *Rice v. Fox Broadcasting Company*, 330 F.3d 1170, 1178 (9th Cir. 2003).

¹³³ *Skidmore*, 905 F.3d at 1130.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1131.

¹³⁷ *Id.*

¹³⁸ *Skidmore*, 905 F.3d at 1135.

In light of these conclusions, the Ninth Circuit vacated the district court ruling in part and remanded the case for further proceedings.¹³⁹

V. IMPACT OF THE NINTH CIRCUIT OPINION/FUTURE IMPLICATION

The Court emphasized the distinction between copyrightable elements and those that are considered common.¹⁴⁰ This case further clarifies what recordings have potential for a copyright infringement suit, and which do not – especially if a deposit copy isn’t available.¹⁴¹ The decision also reinforces the idea that the bar for originality in the Ninth Circuit is fairly low.¹⁴² As long as they are combined with other elements, common musical elements, like arpeggios, chromatic scales, and short sequences can be considered original under the law.¹⁴³ This blurs the line between music that is considered original in the eyes of the artist and audience, and songs that have essentially been reworked based on prior music.

Groups like the Recording Industry Association of America worry that this ruling “badly overprotect[s]” music copyright.¹⁴⁴

¹³⁹ *Id.* at 1137.

¹⁴⁰ *Id.* at 1129.

¹⁴¹ *Id.* at 1131.

¹⁴² P Juhasz, *No Stairway to Heaven in Zeppelin Copyright Infringement*, JUHASZ LAW (2018), <https://www.patenthorizon.com/no-stairway-to-heaven-for-led-zeppelin-in-taurus-copyright-infringement-lawsuit/>.

¹⁴³ *Skidmore*, 905 F.3d at 1128.

¹⁴⁴ Daniel Sanchez, *Major Labels & Publishers Warn of 'Especially Perilous' Consequences If the 'Stairway to Heaven' Ruling Is Overturned*, DIGITAL MUSIC NEWS (2018), <https://www.digitalmusicnews.com/2018/11/07/latest-riaa-nmpa-stairway-to-heaven-ruling/>.

Increasing the bar on originality and enforcing the intrinsic and inverse ratio rules may stifle creativity in new music, which is often influenced by “pre-existing thematic ideas.”¹⁴⁵ The National Music Publishers’ Association, observed that the Ninth Circuit has the opportunity to balance “the creative rights of past authors and present ones” with the remand.¹⁴⁶

One of the implications of this is an increase of copyright infringement lawsuits.¹⁴⁷ Especially in the Ninth Circuit, this may disadvantage independent artists, who may not be able to afford legal fees.¹⁴⁸ For songs that fall under the Copyright Act of 1909, this case sheds light on the issues of the scope of copyrightability.¹⁴⁹ Copyright owners like Skidmore have to be careful about comparing songs to the deposit copy, not to a recording of the song.¹⁵⁰

VI. CONCLUSION

The *Skidmore v. Led Zeppelin* decision surprised attorneys and musicians alike, but has left both groups wondering whether it has created more questions than answers.¹⁵¹ On one hand, the Ninth Circuit has given much needed clarification on the scope of copyrightability under the Copyright Act of 1909.¹⁵² On the other

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Aram Sinnreich, *If Led Zeppelin Goes Down, We All Burn*, THE DAILY BEAST (2016), <https://www.thedailybeast.com/if-led-zeppelin-goes-down-we-all-burn>.

¹⁴⁸ *Id.*

¹⁴⁹ See generally, *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018).

¹⁵⁰ *Id.*

¹⁵¹ P Juhasz, *No Stairway to Heaven in Zeppelin Copyright Infringement*, JUHASZ LAW (2018), <https://www.patenthorizon.com/no-stairway-to-heaven-for-led-zeppelin-in-taurus-copyright-infringement-lawsuit>

¹⁵² See generally, *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018).

hand, the increased protection on common musical elements may pose an obstacle to the music industry.¹⁵³

The impact of the remand will be felt no matter how the jury decides.¹⁵⁴ If the court finds that Taurus is still not substantially similar to Stairway to Heaven, artists may find that they have increased leeway to copy portions of previously published music.¹⁵⁵ This may include patterns like the descending guitar figure in Taurus, to potentially mimicking tunes.¹⁵⁶ If the jury determines that in light of the Ninth Circuit order, the songs are substantially similar, this could increase the number of copyright infringement lawsuits and stifle the musical creativity of new artists.¹⁵⁷

Elizabeth Sawyer

¹⁵³ Aram Sinnreich, *If Led Zeppelin Goes Down, We All Burn*, THE DAILY BEAST (2016), <https://www.thedailybeast.com/if-led-zeppelin-goes-down-we-all-burn>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*