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Has Skidmore v Led Zeppelin changed US music copyright infringement rules for better or worse?

👤 Hayleigh Boshier Sunday, March 15, 2020 - copyright, Copyright infringement, Hayleigh Boshier, inverse ratio rule, music, music copyright, substantial similarity, US copyright

The US 9th Circuit Court of Appeal [\[in a 73 page judgement!\]](#) has upheld the verdict that Led Zeppelin's '**Stairway to Heaven**' did not infringe the copyright of the song 'Taurus'. The case on Appeal involved a number of copyright issues, including the standards for infringement, the interplay between the 1909 and 1976 Copyright Acts, the scope of copyright in music copyright and overturning the inverse ratio rule.

Background to the case

Randy Wolfe (a.k.a Randy California) was a guitarist in the 1960s Southern California rock band, Spirit. In 1966-76 he wrote the instrumental song Taurus, which was released on their first album in 1967. The copyright was registered the same year in the unpublished musical composition of Taurus, by a one-page deposit with US copyright office.

Stairway to Heaven, by British rock band Led Zeppelin, has been called the greatest rock song of all time. 43 years after its release, in 2014, Michael Skidmore on behalf the estate of Randy Wolfe, claimed that Led Zeppelin, its guitarist Jimmy Page and vocalist Robert Plant copied Taurus in Stairway to Heaven. Mark Andes, the bass player in Spirit, alleged that Led Zeppelin heard Taurus while on tour with Spirit in the US between 1968 and 1969

[\[Here's a lovely YouTube video of a musician playing both.\]](#)



Jimmy Page and Robert Plant - Led Zeppelin
Image: Jim Summaria

In 2016, the LA jury's verdict found in favour of Led Zeppelin that the two songs were not substantially similar. But in 2018, an appellate court in San Francisco ruled that the trial should have allowed the jury to hear the two songs, instead of basing their decision on the music score and in September 2018 a Ninth Circuit three-judge panel ruled 3-0 that the original trial's judge provided "erroneous jury instructions" and ordered a new appeal en banc.

Clarifying the Elements of Copyright Infringement under US Law

The court set out the requirements for proving copyright infringement under US copyright law: That the plaintiff owns a valid copyright; and that the protected aspects of the work were copied, which includes two separate components: (a) copying and (b) unlawful appropriation. The court complained that these requirements are too often referred to in shorthand as 'substantial similarity' which fails to recognise that there are two distinct concepts. In dealing with 2(a), the court highlighted, that

“ Independent creation is a complete defense to copyright infringement ”

Therefore a plaintiff must prove that a defendant copied the work. In the absence of direct evidence of copying, such as in this case, the plaintiff can attempt to prove it circumstantially by showing that 1) the defendant had access to the plaintiff's work and 2) the two works share similarities probative of copying. This type of probative similarity needs to show that the similarities between the two works are due to "copying rather than . . . coincidence, independent creation, or prior common source." The hallmark of 2(b) - unlawful appropriation- is that the works share substantial similarities. In the ninth circuit, a two-part test is used to determine whether the defendant's work is substantially similar, both of which must be satisfied. The first part compares the objective similarities of specific protectable elements in the two works and the second part tests for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.

Scope of copyright

Wolfe's copyright was registered in 1967, between the passage of the Copyright Act of 1909 and the sweeping copyright reform adopted in the Copyright Act 1976. The court determined that the 1909 Act applied and therefore the one-page deposit copy defined the scope of the Taurus copyright because, [under the 1909 Act, copyright only extended to sheet music and not sound recordings.](#) [\[Published works could be protected with a copyright notice on each copy published, but musical compositions were only considered published if the sheet music was published and distributing sound recordings did not constitute publication.\]](#) [\[Clarification: Sound recordings were first protected under US copyright law in 1972, for recordings made after 15th February 1972\].](#)

Skidmore argued that the copyright extended beyond the sheet music and was more of a reference point than a definitive filing. But, the court found this ignored the wording of the statute and the purpose of the deposit - to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright. Therefore, the district court correctly declined Skidmore's request to play the sound recordings of the Taurus performance that contain further embellishments or to admit the recordings on the issue of substantial similarity.

This will have a [direct impact of the decision on Ed Sheeran "Let's Get it On" v "Thinking Out Loud" case \[Katpost here\]](#), where Sheeran's lawyers argued that the Let's Get It On deposit defines the scope of protection, but Townsend's team argued that the composition is embodied on [↑](#) [daye](#) recording. Let's Get It On was written in 1973, so would also fall under the 1976 Act. Following this case, it seems that the Court will be restricted to considering the deposit - in favour of Sheeran's arguments.

On the issue of access, Skidmore wanted to prove this at trial by playing the song to Jimmy Page on the stand so that the jury could determine that he'd heard it before from reaction. [What?!] Unsurprisingly, the District Court decided this would be too prejudicial for the jury and only let the sound recording be played for Page outside the presence of the jury. [Although, during the trial, Skidmore's witness, guitarist Kevin Hanson, was able to perform two versions of the Taurus deposit copy—one with just the bass clef part and one with the treble and bass clef parts together.] The Ninth Circuit Appeal Court agreed with the District Court, in particular because the sound recording included elements that were not protected by the Taurus deposit copy. Letting this evidence be used for access but not for similarity demonstrated the distinction between the components of copying and unlawful appropriation. In any event, the jury did find that Page had access to Taurus, because Page told them that he owned a copy of Spirit's album (whilst continuing to deny any knowledge of the song).

(1) Overruling precedent - the inverse ratio rule abrogated

Skidmore raised three issues on appeal relating to the jury instructions on which they based their decision: (1) failure to give an inverse ratio rule instruction; (2) the sufficiency of the court's originality instructions; and (3) the failure to give a selection and arrangement instruction.

The court gave an overview of the history and struggles of the chequered application of the rule and took the opportunity to reject the inverse ratio rule, under which a lower standard of proof of substantial similarity has previously been permitted where there was a high degree of access, stating that its formulation was at odds with the copyright statute.

Interestingly, the court also noted that the concept of "access" is increasingly diluted in our digitally interconnected world. The Court is right to acknowledge that in the current digital climate the test of access is increasingly diluted and that access has often been proved by wide dissemination, but this can be established by a trivial showing that the work is available on demand. As such, this case may be raising the bar for access that has found itself lowered as a result of technological advances, and in future - hopefully just because a song has a certain number of YouTube views or listens on Spotify, should not determine access by the defendant. [This was a particularly sore point in the Katy Perry case [Katposts [here](#) and [here](#)], where the Court accepted that since the song had 3.88 million views on YouTube across 6 videos, Perry and could have heard the song. This is an average of 633,333 views, in over a decade, which this Kat found unimpressive, since, for example, over 5 billion videos are watched on YouTube every single day, YouTube gets over 30 million visitors per day, and 10,113 YouTube videos have generated over 1 billion views.]



Music to my ears
Image: RachelH

(2) Original elements of music

Skidmore objected to the list of unprotectable elements provided in the jury instructions on copyright. In particular, he argued that characterizing the "descending chromatic scales, arpeggios or short sequence of three notes" as examples of common musical elements" was prejudicial to him.

The Appeal Court stated, however, that Jury Instruction No. 16 correctly listed non-protectable musical building blocks that no individual may own, and did not, as Skidmore claimed, exclude the particular use of musical elements in an original expression.

Clarifying the tests for infringement and non-protectable elements of music could be a welcomed relief to the growing number of cases where similar songs are found to have been infringing. In this case the court specifically noted that descending chromatic scale, arpeggios, and other common elements are not protected by copyright. [Whereas in the Katy Perry case, for example, the crux of the similarity was a descending minor mode 8 figure ostinato, also found in Bach's Violin Sonata in F Minor, Hammerstien's Ol Man River, and even, according to the defence, Mary Had A Little Lamb.]

(3) Selection and Arrangement argument

Skidmore argued that the jury should have been provided with selection and arrangement instructions - relating to an infringement claim based on original selection and arrangement of unprotected elements. However, both Skidmore's counsel and his expert confirmed the separateness of the five elements by calling them "five categories of similarities". The Ninth Circuit stated that Skidmore misunderstood what the copyright law means by a "combination," "compilation," and "selection and arrangement" of unprotectable elements. They clarified that the word "combination" cannot mean any "set" of artistic building blocks. As such, failure to properly invoke a selection and arrangement argument destroyed Skidmore's request for a selection and arrangement instruction for the jury. He is not entitled to an instruction based on a legal theory that was not presented to the jury.

Circuit Judge Ikuta partially dissented on this point and said that "this substantive ruling weakens copyright protection for musicians by robbing them of the ability to protect a unique way of combining musical elements."

Skidmore's lawyer, **Francis Malofiy**, thinks that this case is "a big win for the multi-billion dollar industry against the creatives.... They won on a technicality. But they absolutely stole that piece of work." This Kat happens to respectfully disagree, this not a David and Goliath situation, its more of a civil war because the music industry and the creators are on both sides of these copyright infringement cases. She believes that this case has provided clarity for future copyright infringement cases of musical works and has the potential to curb the rate of cases in the music sector.

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