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Copyright Litigation

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Led Zeppelin Prevails in Stairway to Heaven Copyright Battle

Nearly 40 years after Led Zeppelin released *Stairway to Heaven*—viewed by many as one of the greatest rock songs of all time—Led Zeppelin was sued for copyright infringement. The estate of guitarist Randy Wolfe, who composed *Taurus* in 1968, claimed that Led Zeppelin and its guitarist Jimmy Page and vocalist Robert Plant copied portions of it. After a six-year-long court battle, the *en banc* Ninth Circuit Court of Appeals (the “Court”) upheld a jury verdict in favor of Led Zeppelin finding that the two songs are not substantially similar. Additionally, in a decision that will broadly impact the music industry, the Court overturned the so-called “inverse ratio rule,” a precedent that has governed copyright cases in the Ninth Circuit for the last 43 years. Of the eleven judges sitting *en banc*, 8 judges joined the majority opinion, one judge concurred, except for one portion, and two judges concurred in part and dissented in part, comprising a total of 73 pages in the slip opinion.

Wolfe wrote the instrumental song *Taurus* in or about 1967. In December 1967, Wolfe’s copyright in the unpublished musical composition of *Taurus* was registered and deposited a transcribed copy of *Taurus* (the “*Taurus* deposit copy”) with the United States Copyright Office, as required by the 1909 Copyright Act (the “1909 Act”).

In 1971, Led Zeppelin released *Stairway to Heaven*, written by Jimmy Page and Robert Plant.

Wolfe died in 1997 and in 2014 a co-trustee of his trust, Michael Skidmore, filed a suit alleging that *Stairway to Heaven* infringed the copyright in *Taurus* because the opening notes of *Stairway to Heaven* are substantially similar to the eight-measure passage at the beginning of the *Taurus* deposit copy. The claimed portion includes five descending notes of a chromatic musical scale. The beginning of *Stairway to Heaven* also incorporates a descending chromatic minor chord progression in A minor. The composition of *Stairway to Heaven*, however, has a different ascending line that is played concurrently with the descending chromatic line, and a distinct sequence of pitches in the arpeggios, which are not present in *Taurus*.

The district court ruled that under the 1909 Act, the scope of the copyright was circumscribed by the musical composition transcribed in the *Taurus* deposit copy. Thus, only the one-page *Taurus* deposit copy, and not a sound recording, could be used to prove substantial similarity between *Taurus* and *Stairway to Heaven*. On the same grounds, the district court excluded from evidence *Taurus* sound recordings and expert testimony. The key issues at trial were: access to *Taurus* by Led Zeppelin band members and substantial similarity. On the access question, Page testified that he owned “a copy of the album that contains *Taurus*,” while denying any knowledge of *Taurus*.”

The substantial similarity question pitted two expert musicologists

against each other. While Skidmore’s expert, Dr. Alexander Stewart, acknowledged that a chromatic scale and arpeggios are common musical elements, he found *Taurus* and *Stairway to Heaven* similar because the descending chromatic scales in the two compositions skip the note E and return to the tonic pitch, A, and the notes in the scale have the same durations. Led Zeppelin’s expert, Dr. Lawrence Ferrara, testified that the two compositions are completely distinct. Dr. Ferrara testified that the similarities claimed by Skidmore either involve unprotectable common musical elements or are random.

The jury returned a verdict for Led Zeppelin. The jury found that Skidmore owned the copyright to *Taurus* and that Led Zeppelin had access to *Taurus*, but that the two songs were not substantially similar under the extrinsic test. Following the verdict, the district court entered a judgment and an amended judgment. Skidmore appealed.

A panel of the Ninth Circuit vacated the amended judgment in part and remanded for a new trial. The circuit granted rehearing *en banc*. At the outset, the *en banc* Court explained that the 1909 Act controls Wolfe’s copyright in *Taurus*, which was registered in 1967, that is, nine years before the more expansive 1976 Copyright Act came into effect. The Court found that the district court correctly concluded that under the 1909 Act, the *Taurus* deposit copy circumscribes the scope of the copyright.

The Court explained that to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music. Specifically, copyright protection for unpublished musical work could be obtained “by the deposit, with claim of copyright, of one complete copy of such work” (1909 Act, § 11) with the Copyright Office, and published work could be secured by

affixing a copyright notice “to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor.” (*Id.*, § 9.) The 1909 Act prohibited the destruction of copies of unpublished works without notice to the copyright owner. (1909 Act, §§ 59–60.) The Court explained that distributing sound recordings did not constitute publication under the 1909 Act and, in fact, the Copyright Office did not even accept sound recordings as deposit copies.

Based on the foregoing, the Court rejected Skidmore’s argument that the copyright extends beyond the sheet music. Accordingly, the Court held that it was not error for the district court to decline Skidmore’s request to play the sound recordings of *Taurus* or to admit the recordings on the issue of substantial similarity.

The Court also held that proof of copyright infringement required plaintiff to show: (1) that he owned a valid copyright in *Taurus*; and (2) that Led Zeppelin copied protected aspects of the work. The Court explained that the second prong contains two separate components: “copying” and “unlawful appropriation.” A plaintiff may prove copying circumstantially by showing access and striking similarity. The hallmark of “unlawful appropriation” is that the works share substantial similarities. Both an extrinsic and an intrinsic test must be satisfied for the works to be deemed substantially similar. Here, there was no dispute regarding *Taurus* ownership and Page’s admission that he owned a copy of *Taurus* demonstrated access. The jury, however, concluded that the works were not substantially similar and, thus, because the extrinsic test was not satisfied, the jury did not reach the intrinsic test.

The Court further considered the following jury instruction challenges: (1) the failure to give an inverse ratio rule instruction;

(2) the sufficiency of the district court’s originality instructions; and (3) the failure to give a selection and arrangement instruction. The Court affirmed the district court’s challenged jury instructions and, significantly, abrogated the inverse ratio rule.

The Court explained that copyright infringement cases often boil down to the crucial question of substantial similarity, which is linked to the issue of access. The inverse ratio rule requires a lower standard of proof of substantial similarity when a high degree of access is shown. Consequently, the stronger the evidence of access, the less compelling similarities are required for an inference of copying.

The Court held that the rule is not a part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties. The Court noted that the majority of other circuits, that is, the Second, Fifth, Seventh, and Eleventh Circuits, declined to adopt the inverse ratio rule, and that only the Ninth Circuit and Sixth Circuit have endorsed it. However, even within the Ninth Circuit, the application of the rule has been inconsistent because it was unclear whether the rule applied to the element of actual copying or unlawful appropriation.

The Court explained that the lack of clear guidance was likely due to the use of the term “substantial similarity” both in the context of copying and unlawful appropriation. The Court, however, explained, access is relevant only in establishing the act of copying, not in establishing the degree of copying: once copying is established, access is irrelevant and the inquiry shifts to the final stage of the infringement analysis, that is, material appropriation.

The Court concluded that the flaws in the inverse ratio rule can be seen in the inconsistent application throughout the years, the logic of the circuits that have rejected the

rule, and analysis by academics and commentators. Additionally, the Court noted that the concept of “access” is increasingly diluted in our digitally interconnected world and, thus, access is often proved by the wide dissemination of the copyrighted work. Indeed, given the many ways of accessing media online, access may be established by a trivial showing that the work is available on demand. Consequently, the Court concluded, the inverse ratio rule unfairly advantages those whose work is most accessible by lowering the standard of proof for similarity.

The Court emphasized that nothing in copyright law suggests that work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders. Finally, the Court noted, the inverse ratio rule improperly dictates how the jury should reach its decision, which is by preponderance of evidence (in civil cases) and not by a judge-made “inverse burden rule.” For all these reasons, the Court joined other circuits and abrogated the inverse ratio rule.

The Court also affirmed the district court’s originality instructions. Skidmore argued that Jury Instruction 16 characterizing “descending chromatic scales, arpeggios or short sequence of three notes” as examples of “common musical elements” was prejudicial to him. The Court explained that, while the copyright originality bar is low, copyright does require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements, such as common or trite musical elements, are excluded. The Court concluded that Jury Instruction No. 16 correctly listed non-protectable musical elements that no individual may own. The Court further noted that a four-note sequence common in the music field

is also not copyrightable expression in a song.

The Court additionally rejected Skidmore's challenge to the copyright originality in Jury Instruction No. 20. Specifically, the Court explained that Jury Instruction No. 20 correctly articulated both requirements for originality: that the work is created "independently by the work's author," and contains "at least some minimal creativity."

The Court also held that the district court did not commit a plain error in omitting Skidmore's "selection and arrangement" instruction. First, the Court noted, Skidmore waived this objection because he did not properly object to the district court's decision to omit the instruction. Moreover, the Court held that, even if the failure was error, such error did not produce a miscarriage of justice. The Court explained that a selection and arrangement instruction would not have convinced the jury that *Stairway to Heaven* was substantially similar to the deposit copy of *Taurus*. Therefore, the failure to give the selection and arrangement instruction cannot have likely prejudiced the outcome of the case.

Finally, the Court concluded that the district court did not commit

any error. The Court explained that while a copyright plaintiff may argue infringement based on original selection and arrangement of unprotected elements, Skidmore did not present that as a separate theory at trial. The Court further noted that even though the district court did not instruct the jury on selection and arrangement, its instructions, as a whole, fairly and adequately covered Skidmore's argument for extrinsic similarity between *Taurus* and *Stairway to Heaven*.

Judge Watford concurred in part (except for section IV.C of the Court's opinion) because he saw no reason to decide whether plaintiff adequately preserved his request for a selection-and-arrangement instruction when, even if such an instruction had been given, no reasonable jury could have found infringement.

Judge Ikuta, joined by Judge Bea, dissented from Part IV(B) and (C) of the Court's opinion because, without plaintiff's requested instruction on selection and arrangement, the jury was deprived of the opportunity to consider plaintiff's central theory of the case, and the instructions given to the jury were misleading.

The ruling is a hard-fought win for Led Zeppelin. Importantly, the abrogation of the inverse ratio rule in the Ninth Circuit will broadly impact the entire music industry and copyright infringement claims and deter forum shopping.

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