

Michael Skidmore v Led Zeppelin: US Copyright Infringement in Music

Abstract

Michael Skidmore v Led Zeppelin No. 16-56057, D.C. No. 2:15-cv-03462-RGK-AGR (9th March 2020)

The US Ninth Circuit Court of Appeal upheld that Led Zeppelin's song 'Stairway to Heaven' did not infringe the copyright of the instrumental song 'Taurus' and overruled circuit precedent to reject the inverse ratio rule.

Legal Context

The case involved a number of copyright issues, including the applicable US Copyright Act, the inverse ratio rule, the scope of music copyright, and the standards for infringement.

Facts

Randy Wolfe was a guitarist in the 1960s Southern California rock band, Spirit who wrote the instrumental song Taurus in 1966-76. Spirit signed a recording contract in 1967 and released their first album, which included the song Taurus. Stairway to Heaven was written by guitarist Jimmy Page and vocalist Robert Plant, members of British rock band Led Zeppelin and released on their fourth album in 1971. Wolfe passed away in 1997, his mother established the Randy Wolfe Trust and served as the trustee until she passed away and Michael Skidmore became a co-trustee in 2006.

In 2014, Skidmore brought an action against Led Zeppelin claiming that they copied Taurus in their song Stairway to Heaven. Mark Andes, bass player in Spirit, claimed that members of Led Zeppelin heard Taurus while on tour with Spirit together between 1968 and 1969. The case was able to overcome the laches defence, as it does not apply where the copyright infringement is ongoing. The jury found that Led Zeppelin had access to Taurus, but the two songs were not substantially similar (106 F. Supp. 3d 581 (E.D. Pa. 2015)). In 2018, an appellate court in San Francisco ruled that the jury should have been allowed to hear the two songs at trial, instead of relying on the music score. In September 2018, a Ninth Circuit three-judge panel ruled 3-0 that the judge provided "erroneous jury instructions" and ordered a new appeal en banc (905 F.3d 1116 (9th Cir.2018), reh'g en banc granted, 925 F.3d 999 (9th Cir. 2019).

On the 9th March 2020, the US Ninth Circuit upheld the original judgement that Stairway to Heaven did not infringe Taurus. In doing so the court declared that the relevant law was the 1909 Copyright Act which determined that only the score could be used, clarified the test for infringement and the scope of music copyright, and overturn the inverse ratio rule.

Analysis

Scope of Copyright Under US Copyright Act 1909

Wolfe's copyright in *Taurus* was registered in 1967, between the passage of the Copyright Act 1909 and the reform adopted in the 1976 Copyright Act, which came into force in 1978. The 1909 Act applied and therefore the deposit copy defined the scope of the *Taurus* copyright as the Act required registration for an unpublished work be obtained by depositing one complete copy of the work with the US Copyright Office. Protection under the 1909 Act only extended to sheet music, not sound recordings. Additionally, musical compositions were only considered published if the sheet music was published and distributing sound recordings did not constitute publication.

The 1967 deposit copy of *Taurus* was a single page of sheet music. Skidmore argued that the copyright extended beyond the sheet music, which was a reference point rather than a definitive filing. However, the court stated that this ignored the text of the statute which required one 'complete copy' and the purpose of the deposit; to make a record of the claimed copyright, provide notice to third parties and prevent confusion of the scope of the copyright.

Therefore, the court found that the district court correctly concluded that the *Taurus* deposit copy defined the scope of the copyright in question. Consequently, it was also correct to decline Skidmore's request to play the sound recording of the *Taurus* performance which contain further embellishments or to admit the recordings on the issue of substantial similarity.

The Elements of Copyright Infringement

The court clarified the elements required to prove copyright infringement under US copyright law; that the plaintiff owns a valid copyright and that the protected aspects of the work were copied. The second part contains two separate components; copying and unlawful appropriation. The court noted that these requirements are too often referred to in shorthand as 'substantial similarity' which fails to recognise the two distinct concepts.

In dealing with copying, the court highlighted that independent creation is a complete defence to infringement and 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 the defendant had access to the plaintiff's work and that 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." (*Bernal v Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010)).

On the other hand, the hallmark of 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 (*Cavalier v Random House Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)). The first part compares the objective similarities of specific protectable elements in the two works, which requires distinguishing between protected and unprotected material, and the second part tests for similarity of expression from the standpoint of the ordinary reasonable observer with no expert assistance. Both parts must be satisfied for the works to be deemed substantially similar.

Evidentiary Challenge—The Copying Prong of Infringement

To prove that Led Zeppelin had heard Taurus before creating Stairway to Heaven, Skidmore requested to play the song to Page so that the jury could watch his reaction and determine that he had heard it before. The District Court decided this was too prejudicial for the jury and only let the sound recording be played without the presence of the jury. In any event, the jury found that Page had access to Taurus because he told them he owned a copy of Spirit's album, whilst continuing to deny any knowledge of the song.

The court agreed that this was the correct approach to prevent the jury from making an erroneous comparison for determining substantial similarity. Particularly 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.

(1) Overturning the Inverse Ratio Rule

Skidmore raised three issues on appeal relating to the jury instructions (1) the failure to give inverse ratio rule instructions; (2) the sufficiency of the court's originality instructions; and (3) the failure to give selection and arrangement instructions.

First, Skidmore proposed an inverse ratio rule instruction for the jury, under which a lower standard of proof of substantial similarity had been permitted where there was a high degree of access (*Three Boys Music*, 212 F.3d at 485 quoting *Smith v Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). The district court declined, and the court of appeal agreed. Giving an overview of the history and struggles of the chequered application of the rule, the court stated that it was not part of the copyright statute, it defied logic and created uncertainty for the courts and the parties. The court overturned the inverse ratio rule as its formulation was fundamentally at odds with the copyright statute.

The court also noted that the concept of "access" is increasingly diluted in the digitally interconnected world and access has often been proved by wide dissemination, established by a trivial showing that the work is available on demand.

(2) Originality Instructions - Protectable Elements in Music

Second, Skidmore objected to the list of unprotectable elements provided in the jury instructions on copyright. He argued that characterising the 'descending chromatic scales, arpeggios or short sequence of three notes' as examples of common musical elements was prejudicial.

Skidmore's expert musicologist agreed that musical concepts such as the minor chromatic line and the associated chords have been used in music for quite a long time as building blocks. Led Zeppelin's expert echoed this by described the

chromatic scale, descending or ascending as a musical building block that no one can possibly own.

The court found that the Jury Instruction correctly listed non-protectable musical building blocks that no individual may own, and did not exclude the particular use of musical elements in an original expression. As such, the district court did not err in its formulation of the originality instructions.

(3) Selection and Arrangement Instruction - A New Combination

Third, Skidmore argued that the jury should have been provided with selection and arrangement instructions; relating to a copyright claim based on original selection and arrangement of unprotected elements. However, both Skidmore's counsel and his expert confirmed the separateness of the elements by calling them five categories of similarities which were; 1) minor chromatic line and associated chords; 2) duration of pitches of minor chromatic line; 3) melody placed over the descending chromatic line consisting of combination of arpeggios and two-note sequences; 4) rhythm of steady eighth note beats; and 5) pitch collection.

The court found that Skidmore misunderstood what the law meant by a combination of unprotectable elements, which means only a new combination that is of novel arrangement, and not any combination of unprotectable elements, qualifies for copyright protection. As such, failure to properly invoke a selection and arrangement argument destroyed Skidmore's request for a selection and arrangement instruction. Moreover, the court stated that the selection and arrangement instruction would not have convinced the jury of substantial similarity and therefore failure to give the instruction would unlikely prejudice the outcome of the case in any event.

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."

Practical Significance

This case will have a direct impact on the decision of *Griffin v Sheeran* (1:17-cv-05221), in which Sheeran argued that the 'Let's Get It On' song deposit defined the scope of protection, but Griffin argued that the composition was embodied on the Marvin Gaye recording. The song was written in 1973, so would also fall under the 1976 Act. Following this case, if the Court will be restricted to considering the deposit.

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, particular as the court specifically noted that descending chromatic scale, arpeggios, and other common elements are not protected by copyright. For instance, in the matter of *Grey v Perry* (2:15-cv-05642-CAS-JC), Katy Perry's song 'Dark Horse' was found to have copied a minor mode 8 figure ostinato of another song 'Joyful Noise'. However, subsequent to

the Led Zeppelin, the court overturned the jury's award for \$2.8M. Directly following the courts determination of protectable elements and the application of the selection and arrangement rules clarified in this case, the court stated that none of the individual elements of Joyful Noise were protectable, nor did it fall within the combination protection. The court also noted the points made in the Led Zeppelin case on access, although still found that access was shown in the Perry case.

Overall, this judgement 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.