

Stairway to Heaven, but Not to the Supreme Court: Skidmore v. Led Zeppelin

Whether you realize it or not, nearly everyone has the opening riff to Led Zeppelin’s “Stairway to Heaven.” The iconic arpeggiated riff has become one of the recognizable pieces of American music. But, was it stolen? That’s what the Ninth Circuit had to determine in *Skidmore v. Led Zeppelin*.

In *Skidmore*, Michael Skidmore, trustee of the estate of Randy California, guitarist of the band Spirit, brought suit against Led Zeppelin, arguing that the intro to “Stairway” was copied from Spirit’s song “Taurus,” which begins with a similar arpeggiated riff.¹ While Led Zeppelin prevailed at trial in the District Court, that victory served as only the beginning of a protracted procedural history.² On appeal, the Ninth Circuit vacated and remanded the judgment, finding that the judge improperly instructed the jury.³ The Ninth Circuit then reheard the case en banc, where it reversed course and affirmed the trial court’s judgment.⁴ At issue in the rehearing were two primary questions. First, what was the scope of the copyright protection afforded to both songs in question, and second, under what standard was the court to determine if there was copying?⁵

To the first question, the court determined that for unpublished musical works registered under the 1909 Copyright Act, protection only extends to the work as defined by the deposit copy submitted to the Copyright Office.⁶ Under the 1909 Act, a musical work was not considered published unless sheet music for the song was commercially published, even if a sound recording of the song was released.⁷ Therefore, to gain copyright protection, the composer had to submit a “deposit copy” transcribing the song into sheet music to the Copyright Office.⁸ This deposit copy may have only contained a rudimentary sketch of the melody, and, very likely, did not contain everything heard in a recording of the song, as was the case here.⁹ Indeed, while “Taurus” and “Stairway” may sound alike to the average listener, the protectable elements of “Taurus” as indicated on the deposit copy did not rise to a level necessary for infringement.¹⁰

To the second question, the Court abrogated the longstanding (and controversial) inverse ratio rule.¹¹ To establish a copyright infringement, Skidmore had to prove that there was valid ownership of the “Taurus” copyright and that Led Zeppelin copied from the work.¹² In the Ninth Circuit, this second prong was governed by the inverse ratio rule, which stated that the higher a degree of access a potential infringer had to a work, the less similar the two works needed to be under the analysis to sustain a finding of infringement.¹³ Finding that the rule created an unfair

¹ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1058 (9th Cir. 2020).

² *See id.* at 1060.

³ *Id.*

⁴ *Id.* at 1079.

⁵ *See id.* at 1060.

⁶ *Id.* at 1063–64.

⁷ *See La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995).

⁸ Copyright Act of 1909 § 11.

⁹ *See Skidmore*, 952 F.3d at 1063.

¹⁰ *See id.* at 1079.

¹¹ *Id.* at 1069.

¹² *Id.* at 1064.

¹³ *Id.* at 1065–66

disadvantage to widely available, popular works, the court overruled the nearly forty-year old precedent.¹⁴

Thus, after establishing the scope of the protectable material to only that contained in the deposit copy, and rejecting the lowered evidentiary threshold of the inverse ratio rule, the Ninth Circuit affirmed the district court's ruling that "Stairway" did not infringe "Taurus."¹⁵

Following the Ninth Circuit's ruling, Skidmore petitioned for a writ of certiorari.¹⁶ Recently, the Supreme Court denied cert, leaving the Ninth Circuit's ruling intact.¹⁷ Thus, the inverse ratio rule has been abrogated in the Ninth Circuit (it remains in only the Sixth Circuit, which could be bad news for Nashville songwriters), and infringement cases involving music covered by the 1909 Copyright Act are now limited to considering only the deposit copy.

The Ninth Circuit's ruling on the deposit copy issue stands to have wide-reaching effects. Previously, that court had assumed without deciding that 1909 Act musical works were limited to the deposit copy, but it had never explicitly decided the issue.¹⁸ Now, other circuits seem to be following the same trend. In *Griffin v. Sheeran*, an infringement suit claiming that Ed Sheeran's "Thinking Out Loud" infringes Marvin Gaye's "Let's Get It On," a district judge recently ruled that the court will consider only the deposit copy when it determines the scope of copyright protection in that suit.¹⁹

Time will tell whether this ruling will solve problems or create them. Limiting copyright protection for compositions exclusively to formal notation seems to disadvantage composers, like Marvin Gaye, who could not read or write in traditional sheet music form. However, limiting the scope of prior compositions to the sheet music deposits seemingly protects modern composers by providing them more leeway for inspiration without fear of infringing on these past works. Certainly, this standard is more forgiving than the Ninth Circuit's last ruling on the issue, *Williams v. Gaye*, where the court seemingly found infringement on a "style" of a prior work.²⁰ Since, the Supreme Court agreed not to hear the case, it will be the job of the collective Circuits to determine how this rule functions in practice.

--Brandon Evans

In Skidmore v. Led Zeppelin, the Ninth Circuit limited copyright protection of musical compositions to only the four corners of the sheet music submitted to the Copyright Office rather than also considering the composition as embodied in a recording. Now that the Supreme Court has denied cert in the case, the rule appears to be around to stay.

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¹⁴ *Id.* at 1068

¹⁵ *Id.* at 1079

¹⁶ *Id.*, petition for cert. filed, No. 20-142 (Aug. 6, 2020)

¹⁷ *Id.*, cert denied

¹⁸ See *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2015)

¹⁹ See *Griffin v. Sheeran*, 2020 U.S. Dist. LEXIS 52908 (S.D.N.Y. Mar. 24, 2020)

²⁰ See *Williams*, 895 F.3d at 1138 (Nguyen, J., dissenting).