



# IP NEWS QUARTERLY



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## MUSIC COPYRIGHTS

### Introduction

The ability to copyright material in the United States has been a right almost as old as the country's existence, with the passage of the Copyright Act of 1790 giving authors the "sole right and liberty of printing, reprinting, publishing, and vending . . . maps, charts, and books." Music was not specified in this act, but sheet music was often submitted under the "book" category. The Copyright Act of 1831 officially added "musical compositions" to the list of works which could be protected with a copyright. As sound recordings and playback devices were not even invented until the mid 1870's, musical copyrights only covered the reproduction of the sheet music. The invention and popularity of the player piano in the late 1800's to early 1900's led to disputes over whether these instruments could play copyrighted music. This idea was addressed in the Copyright Act of 1909, which labeled music played by player pianos or other mechanical devices as falling under the protection of a copyright. Despite recordings becoming more popular and accessible, however, one could still only obtain a copyright on a physical musical score until 1971, when congress passed the Sound Recording Act of 1971. The ability to copyright recordings was further expanded with The Copyright Act of 1976, which is essentially the guiding Copyright Act through today. The 1976 Act was directed at new media which had been developed since 1909, such as movies, television shows, and sound recordings, and allowed these works to be copyrighted starting January 1, 1978.

The timing of these various Copyright Acts was important for the case *Skidmore as Trustee for Randy Craig Wolfe Trust v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)(*en banc*)(*"Skidmore"*), which was decided March 9, 2020 and whose Supreme Court appeal was denied on December 7, 2020, ratifying the Court of Appeals' decision.

In this case, Michael Skidmore, as a trustee for Randy Wolfe (or Randy California, singer and guitarist of the band *Spirit*) sued the band *Led Zeppelin* for copyright infringement of *Spirit's* song "Taurus." Skidmore alleged that *Led Zeppelin's* famous song "Stairway to Heaven" infringed on the "Taurus" copyright. The copyright for "Taurus" was registered in 1967, and because of the date, only the sheet music, and not a recording, was submitted for copyright protection. The Court of Appeals affirmed the 9<sup>th</sup> Circuit ruling that based on the sheet music alone, "Stairway to Heaven" did not infringe upon the "Taurus" copyright. This issue of IP News Quarterly will look at the arguments and rulings of this case, and further discuss how copyright law has changed in light of The Copyright Act of 1976.

### Arguments and Decision

In order to prove copyright infringement, in addition to obtaining a copyright registration, one must show that:

1. The creators of the alleged infringing product had access or knowledge of the copyrighted work.
2. The alleged infringing product is substantially similar to the copyrighted work.

In *Skidmore*, because neither side disputed the fact that Randy Wolfe had obtained a copyright on "Taurus," the arguments hinged on whether "Stairway to Heaven" copied one or more portions of "Taurus."

### In this issue:

#### Page 1:

Introduction

Arguments and Decision

#### Page 2:

Copyright Changes

### Did You Know?

While "Stairway to Heaven" is certainly a popular song in its own right, typically appearing in many "Greatest Songs of All Times" type lists, the song with this highest sales worldwide is, by far, Bing Crosby's "White Christmas." "White Christmas" was first sung on December 25, 1941 by Crosby on the radio, and was recorded in 1942. The themes and message in the Christmas song made it an instant hit with World War II soldiers and family members alike missing their loved ones at Christmastime. Since then, it has sold over 50 million copies, dwarfing the sales of other songs, such as the second best selling song worldwide, Elton John's "Candle in the Wind 1997" which has sold about 33 million copies.

(Continued on the Next Page)

One must first show access to the copyrighted work because “[n]o matter how similar the plaintiff’s and the defendant’s works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff’s work, the defendant is not liable for infringement.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018). Proving access can be shown by a direct connection between the creators of the works in question, or by proving that the copyrighted work was widely distributed. Showing “substantial similarity” between the alleged infringing product and the copyrighted work is proven by a two prong test, namely:

1. The Extrinsic Test – using *only* the protected parts of the copyright (excluding things like ideas, concepts, and public domain works), one must show that the details between the works are similar. Expert witnesses are allowed to testify for this test, to help individuals understand aspects of the copyrighted work.
2. The Intrinsic Test – looking at the works as a whole, one must show that these works have the same overall “concept and feel.” Expert witnesses are not allowed to testify for this test.

In the present case, Skidmore was able to prove that *Led Zeppelin* had access to “Taurus” before the creation of “Stairway to Heaven” through evidence that *Led Zeppelin* and *Spirit* played at the same venues, that *Led Zeppelin* performed a cover of one of *Spirit*’s songs, and through Jimmy Page’s (a member of *Led Zeppelin*) admission to having a copy of the CD with “Taurus” on it in his collection.

With the first step (access to “Taurus”) established, Skidmore then attempted to show that “Stairway to Heaven” and “Taurus” were substantially similar. Problematically, Skidmore desired to play audio recording of both “Stairway to Heaven” and “Taurus” to prove his point, but the trial court rejected this evidence as the copyright for “Taurus” only covered the music score, as discussed above. The expert witness for Skidmore attempted to show that the musical patterns between “Taurus” and “Stairway to Heaven” were substantially similar, but the expert witness for *Led Zeppelin* argued that any similar patterns were common musical elements which cannot be protected in a copyright. Using the first-prong “Extrinsic Test,” the jury was convinced by *Led Zeppelin*’s arguments, and concluded that there was no substantial similarity between the pieces.

Skidmore appealed this decision on the premise of the “inverse-ratio rule” which is sometimes used in copyright cases and states that as access to the copyrighted work becomes higher, the level of similarity needed to meet the threshold for “substantial similarity” becomes lower. In light of arguments regarding the validity of this rule and inconsistencies in its use, the 9<sup>th</sup> Circuit Court of Appeals *en banc* overruled the “inverse-ratio rule” stating that “[a]lthough we are cautious in overruling precedent—as we should be—the constellation of problems and inconsistencies in the application of the inverse ratio rule prompts us to abrogate the rule.” *Skidmore*, 952 F.3d at 1069.

### **Copyright Changes**

As discussed above, with the passage of The Copyright Act of 1976, recordings of movies, music, and other works are now able to be copyrighted. As shown in the case covered in this issue of IP News Quarterly, the inability to play the sound recording of “Taurus” hindered Skidmore’s arguments. Further, the Copyright Term Extension Act of 1998 extended copyrights to the life of the author plus 70 years for individuals and 120 years after creation or 95 years after publication, whichever end is earlier, for works made for hire. Having and defending one or more copyrights on your work can help protect your art, designs, or other key aspects of your business, but changing copyright laws (such as the abandonment of the inverse-ratio rule and changing copyright terms) can be a daunting task to navigate. If you think a copyright would help your company, if you would like to talk about the protection and benefits of a copyright, or if someone has copied your copyright protected work, the attorneys at IP Attorneys Group can help guide you through this process.



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