
RECENT CASES

INTELLECTUAL PROPERTY — COPYRIGHT IN MUSICAL COMPOSITIONS — NINTH CIRCUIT CONFINES THE SCOPE OF COPYRIGHT IN COMPOSITIONS UNDER THE 1909 ACT TO THE DEPOSIT COPY. — *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

When the Ninth Circuit affirmed the jury’s finding in *Williams v. Gaye*¹ that a collection of “signature phrases, hooks, bass melodies, [and] word painting” in Robin Thicke’s “Blurred Lines” was substantially similar to Marvin Gaye’s “Got to Give It Up,”² it blurred the line between musical inspiration and appropriation.³ Also left uncertain was the scope of copyright protection in works like Gaye’s that were registered in the form of sheet music “deposit copies” under the Copyright Act of 1909.⁴ Fearful that they too might be found to have illegally appropriated from their inspirations, popular musicians instituted the practice of granting songwriting credits and their associated royalties to anyone and everyone who may have influenced new music.⁵ Then, in the recent case *Skidmore v. Led Zeppelin*,⁶ the en banc Ninth Circuit established that the scope of copyright in unpublished musical works registered under the 1909 Act is limited to their deposit copies and clarified that protection for original selection and arrangement requires more than a mere “combination” of musical building blocks.⁷ The ruling held true to the purpose of the copyright statutes: incentivizing creation for the benefit of the public.⁸ But *Skidmore* has the practical effect of reducing pressure to grant attribution and royalties to songwriting influences — an effect made particularly unfortunate in light of the music industry’s historical failure to fairly compensate black musicians writing

¹ 895 F.3d 1106 (9th Cir. 2018).

² *Id.* at 1127.

³ See Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. CAL. L. REV. POSTSCRIPT 67, 68 (2018).

⁴ Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976); accord *Williams*, 895 F.3d at 1121. The 1976 Copyright Act provided for submission of sound recordings as deposit copies for musical compositions, effective after 1978. See 17 U.S.C. § 101; *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

⁵ Dorian Lynskey, *How Many People Does It Take to Write a Hit Song in 2019?*, GQ (Nov. 2, 2019), <https://www.gq-magazine.co.uk/culture/article/long-songwriting-credits> [<https://perma.cc/9FLV-GLTD>] (“[*Williams*] created a precedent that inspiration alone could lead to infringement. In the aftermath, a slew of opportunistic claims are being made on other hits.” (statement of Dean Marsh)).

⁶ 952 F.3d 1051.

⁷ *Id.* at 1063, 1075.

⁸ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

music under the 1909 Act and the current shortcomings of the “winner-takes-all” streaming market.

In December of 1967, guitarist Randy Wolfe (known as “Randy California”) filed a single page of music (the “deposit copy”) with the United States Copyright Office.⁹ The 124 notes of piano music distilled on that one page¹⁰ would serve to register the copyright in “Taurus,” a two-and-a-half minute instrumental guitar track released on the band Spirit’s first album, under the 1909 Act.¹¹ Decades later, after Wolfe’s death, that deposit copy was retrieved from the vaults of the Library of Congress when Michael Skidmore, co-trustee of the Randy Craig Wolfe Trust, alleged that the iconic introduction to Led Zeppelin’s legendary rock hit, “Stairway to Heaven,” was substantially similar to the first eight measures of “Taurus.”¹²

The United States District Court for the Central District of California determined on motion for summary judgment that, under the 1909 Act, only the one-page deposit copy could be used to prove substantial similarity between the two works.¹³ The court therefore granted Led Zeppelin’s motion to exclude sound recordings of “Taurus” and all expert testimony based thereon.¹⁴ “Dueling musicologists”¹⁵ took center stage during the five-day trial.¹⁶ As “only substantial similarity in protectable expression may constitute actionable copying,” it was essential to first distinguish protected from unprotected material in “Taurus.”¹⁷ Dr. Alexander Stewart, Skidmore’s witness, identified five categories of similarities between the two works,¹⁸ arguing that these same elements made both “Taurus” and “Stairway to Heaven” unique and memorable.¹⁹ In response, Dr. Lawrence Ferrara, Led Zeppelin’s musicologist, explained that the similarities were merely random or unprotectable.²⁰

⁹ See *Skidmore*, 952 F.3d at 1056–57.

¹⁰ See Vernon Silver, *The Legal Loophole that May Leave Some of Rock’s Greatest Riffs Up for Grabs*, BLOOMBERG (June 20, 2019), <https://www.bloomberg.com/features/2019-classic-rock-riffs-loophole> [<https://perma.cc/9YL4-LUDL>].

¹¹ See *Skidmore*, 952 F.3d at 1056; *id.* at 1081 (Ikuta, J., concurring in part and dissenting in part).

¹² See *id.* at 1057 (majority opinion).

¹³ See *Skidmore v. Led Zeppelin*, No. 15-3462, 2016 WL 1442461, at *16, *19 (C.D. Cal. Apr. 8, 2016).

¹⁴ *Id.* at *16.

¹⁵ Jon Caramanica, *It’s Got a Great Beat, and You Can File a Lawsuit to It*, N.Y. TIMES (Jan. 6, 2020), <https://nyti.ms/39J2lsi> [<https://perma.cc/AZV2-UN9E>].

¹⁶ See *Skidmore*, 952 F.3d at 1058–60.

¹⁷ *Id.* at 1064.

¹⁸ See *id.* at 1074. Dr. Stewart identified a shared minor chromatic line and associated chords, duration of pitches, melody over arpeggios and two-note sequences, eighth-note rhythm, and pitch collection. *Id.*

¹⁹ *Id.* at 1059.

²⁰ See *id.* at 1059–60.

The jury returned a verdict for Led Zeppelin, finding no extrinsic similarity²¹ between the deposit copy and “Stairway to Heaven.”²² Skidmore appealed from the amended judgment.²³

Writing for the Ninth Circuit panel, Judge Paez²⁴ decided as a matter of first impression that the deposit copy defined the scope of the “Taurus” copyright under the 1909 Act.²⁵ The panel then vacated and remanded the amended judgment in part on the grounds that the district court failed to instruct the jury that an original “selection and arrangement” of otherwise nonprotectable elements would qualify for copyright protection²⁶ — this, the court concluded, was the central theory of Skidmore’s case.²⁷ The panel found no grounds for remand, however, in the district court’s omission of an instruction on the “inverse ratio” rule, which lowers the standard of proof for substantial similarity where proof of access to the allegedly infringed work is high.²⁸

The Ninth Circuit granted rehearing en banc.²⁹ In an opinion authored by Judge McKeown,³⁰ the court first affirmed the panel’s conclusion that the deposit copy circumscribed the scope of the “Taurus” copyright.³¹ At the time of the 1909 Act, Congress extended copyright protection in compositions to copies made in any other system of notation or record, but did not provide that the copyrighted works themselves could be anything other than sheet music.³² The fact that composers had no control over mechanical reproductions (originally in the

²¹ In the Ninth Circuit, extrinsic similarity is similarity that is “‘substantial’ and to ‘protected elements’ of the copyrighted work.” *Skidmore v. Led Zeppelin*, No. 15-3462, 2016 WL 1442461, at *16 (C.D. Cal. Apr. 8, 2016) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

²² *Skidmore*, 952 F.3d at 1060.

²³ *Id.*

²⁴ Judge Paez was joined by Judge Ikuta and Judge Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

²⁵ *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1132, 1134 (9th Cir. 2018).

²⁶ *Id.* at 1127; *accord id.* at 1137.

²⁷ *See id.* at 1127. The panel concluded that Skidmore had not waived any objection to the instructions as both sides had proposed and objected to each other’s instructions on the issue. *See id.* at 1126–27. The panel ultimately found this omission to be prejudicial. *See id.* at 1127, 1130.

²⁸ *Id.* at 1130. Omission of an inverse ratio instruction was harmless because the jury never reached the question of copying, *see id.* at 1130–31, and any failure to play the sound recording to prove access was harmless as well, given already substantial evidence of access in the record, *see id.* at 1135. Led Zeppelin performed at the same location as Spirit four times between 1968 and 1970 and covered Spirit’s song “Fresh Garbage.” *See id.* at 1122. Additionally, the panel found no abuse of discretion in the district court’s denial of Skidmore’s request for sanctions on Led Zeppelin’s musicologist, and declined to consider whether the court abused its discretion in imposing time limits or in deciding which version of “Taurus” to play in response to the jury’s request. *Id.* at 1136.

²⁹ *See Skidmore v. Led Zeppelin*, 925 F.3d 999, 1000 (9th Cir. 2019) (mem.).

³⁰ Judge McKeown was joined in full by Chief Judge Thomas and Judges Fletcher, Rawlinson, Murguia, and Nguyen, and in part by Judges Watford, Hurwitz, and Bade.

³¹ *See Skidmore*, 952 F.3d at 1063–64.

³² *See id.* at 1061–62.

form of piano rolls, now sound recordings) generated from copies of their works reinforced the conclusion that compositional copyright did not extend to separate performance elements embodied in those reproductions.³³ Thus, the district court had not abused its discretion in restricting Skidmore from playing sound recordings of “Taurus” for the jury, and the question of whether sound recordings could be played to prove access was moot.³⁴

Next, the court addressed the jury instructions. It began by overruling Ninth Circuit precedent, joining the majority of circuits in abrogating the inverse ratio rule, which “is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties.”³⁵ It then reversed the panel, finding that the originality instructions “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.”³⁶ It emphasized that the Ninth Circuit has “never extended copyright protection to just a few notes.”³⁷ Next, the court reversed the panel with respect to the selection and arrangement instruction: not only had Skidmore failed to preserve his objection to the omission of the instruction at trial,³⁸ but he had never presented a selection and arrangement theory at all.³⁹ Skidmore had simply described a “combination” of five “random” unprotectable elements without explaining “the *particular* way” in which the musical elements “cohere[d] to form a holistic musical design.”⁴⁰ Absent original selection and arrangement, there can be “no liability for taking ‘ideas and concepts,’” such as musical building blocks, “even in combination.”⁴¹ The instructions as they were given therefore “fairly and adequately” covered Skidmore’s argument.⁴²

In his concurrence, Judge Watford explained that he saw no reason for the court to address the question of preservation of the selection and

³³ *See id.*

³⁴ *See id.* at 1065.

³⁵ *Id.* at 1066.

³⁶ *Id.* at 1070.

³⁷ *Id.* at 1071.

³⁸ *See id.* at 1072–73.

³⁹ *Id.* at 1074–76.

⁴⁰ *Id.* at 1074–75.

⁴¹ *Id.* at 1075 (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1122–23 (9th Cir. 2018)).

⁴² *Id.* at 1076. The court also affirmed the district court’s decision to deny Skidmore’s request for sanctions and to preclude Led Zeppelin’s musicologist from testifying, finding no conflict of interest, *see id.* at 1078, and its denial of the separate motion for attorneys’ fees and costs by Led Zeppelin’s publisher, *see id.* at 1078–79.

arrangement instruction when no reasonable jury could have found substantial similarity based on the deposit copy anyway.⁴³ Concurring in part and dissenting in part, Judge Ikuta, joined by Judge Bea, contended that both the trial record and common sense showed Skidmore had presented an argument that the five musical elements he identified “cohere[d] to form a holistic musical design.”⁴⁴ Failure to instruct the jury on selection and arrangement, coupled with a misleading originality instruction, “cut the heart out of Skidmore’s case”⁴⁵ and amounted to a miscarriage of justice.⁴⁶

The Ninth Circuit’s ruling on the deposit copy issue and the selection and arrangement instruction are true to the history and spirit of copyright statutes as legislation intended primarily to benefit the public interest, not to compensate artists. Yet the deposit copy ruling disadvantages songwriters, particularly black blues songwriters composing under the 1909 Act, who historically struggled to secure adequate compensation in the music industry.⁴⁷ And the court’s clarification that selection and arrangement requires more than a mere combination of elements reduces pressure to credit artists who influenced new music — a practice that arose in the context of cases like *Williams* and today’s difficult winner-take-all digital streaming market.⁴⁸ So while *Skidmore* correctly clarified the limited scope of copyright in musical compositions, it has the unfortunate practical effect of making it more difficult than ever for songwriters to negotiate songwriting credits and royalties.

In circumscribing the scope of the compositional copyright embodied in the deposit copy, the Ninth Circuit preserved Congress’s distinction between the composition and the reproductions, a distinction intended to avoid “powerful and dangerous monopolies” that might restrict public

⁴³ *Id.* at 1079 (Watford, J., concurring). As there are “relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical conventions and styles,” Judge Watford contended that the portion of “Taurus” at issue enjoyed only “thin” copyright. *Id.* at 1079–80. Judge Watford contended that copying of “thin” copyright requires “virtual identity.” *Id.* at 1080. In dicta, the majority maintained that the standard for “thin” copyright is always “substantial similarity,” though more similarities — necessarily amounting in some cases to “virtual identity” — are required to prove copying where the range of protectable expression is limited. *Id.* at 1076 n.13 (majority opinion).

⁴⁴ *Id.* at 1086 (Ikuta, J., concurring in part and dissenting in part) (quoting *id.* at 1075 (majority opinion)). Judge Ikuta also contended that Skidmore had not forfeited his objection, but rather that the district court had “brusquely silenced” his attempts to object at trial. *Id.* at 1087.

⁴⁵ *Id.* at 1084.

⁴⁶ *Id.* at 1088.

⁴⁷ See Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 603 & n.177 (2010).

⁴⁸ See Blake Brittain, *Musicians More Careful After “Blurred Lines” Case*, BLOOMBERG L. (Sept. 18, 2015, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/musicians-more-careful-after-blurred-lines-case> [<https://perma.cc/XAK6-CD3H>].

enjoyment of music.⁴⁹ The 1909 Act instituted a compulsory license scheme through which piano roll makers would pay statutorily set royalties to composers to create reproductions of their music.⁵⁰ But Congress made clear that composers would have no control over the recordings made by these machines, and any benefit they accrued through this scheme was merely a “bonus” — such rights were given “primarily for the benefit of the public.”⁵¹

For many songwriters, however, that “bonus” benefit failed to fairly compensate them for their efforts and influence. The “availability of passive income streams from the sale or licensing of copyrights is a prime economic incentive for the creation of artistic works,”⁵² and royalty income is often songwriters’ central livelihood.⁵³ Despite their vast influence, many legendary blues musicians of the twentieth century died in poverty,⁵⁴ and the narrow scope of compositional copyright reinforced in *Skidmore* is partly to blame.⁵⁵ These artists’ original contributions to the genre did not translate well into sheet music, because originality in blues music, as in its West African antecedents,⁵⁶ lay “not in the raw materials employed for the composition, but in the style and presentation.”⁵⁷ Much blues music appeared only in sound recordings — “[p]en and paper never enter[ed] the equation unless the song [was] considered for recording and distribution.”⁵⁸ Similarly, blues compositions — heavily reliant on the borrowing and repetition integral to the style — were harder to translate into more legalistic conceptions of original contributions in copyright law.⁵⁹ This situation benefitted music listeners — a selection and arrangement monopoly over the simple twelve-bar I-IV-V

⁴⁹ H.R. REP. No. 60-2222, at 7 (1909). Congress recognized that “one company might secure . . . a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing the selling [of] music-producing machines.” *Id.*

⁵⁰ Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075-76 (repealed 1976).

⁵¹ H.R. REP. No. 60-2222, at 7.

⁵² Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274, 281 (2017).

⁵³ See SONGWRITERS GUILD OF AM., INC., COMMENTS OF THE SONGWRITERS GUILD OF AMERICA, INC. CONCERNING THE ASCAP AND BMI CONSENT DECREES 2 (Aug. 9, 2019), <https://www.songwritersguild.com/docs/SGA-comments-8-9-19-to-DOJ-re-Consent-Decrees.pdf> [<https://perma.cc/9FRJ-NALW>] (“[T]he inability to earn fair value for public performances (our most important source of royalty income) is continuing to cripple the ability of songwriters and composers to earn a living through our chosen profession.”).

⁵⁴ See, e.g., Arewa, *supra* note 47, at 576, 582.

⁵⁵ See *id.* at 605.

⁵⁶ See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 125 (2001).

⁵⁷ *Id.* at 124.

⁵⁸ *Id.*

⁵⁹ See *id.* at 120; Arewa, *supra* note 47, at 584, 596-99.

chord progression⁶⁰ would have classified most blues songs as infringements and hindered the evolution of jazz and rock music.⁶¹ But because the blues were considered “readily appropriable,”⁶² recording companies acquired black artists’ compositions for far less than their white counterparts’.⁶³ Led Zeppelin itself borrowed heavily from blues artists, particularly the legendary blues musician Willie Dixon — whom it was often unwilling to credit.⁶⁴

The *Skidmore* court also realigned its copyright jurisprudence with the purpose of copyright legislation when it clarified that original selection and arrangement requires more than a “combination” of unprotectable elements.⁶⁵ In *Williams*, the Ninth Circuit upheld a jury’s verdict of actionable copying even though “the two songs did not . . . share a single melodic phrase” or “a sequence of even two chords played in the same order, for the same duration” and had “entirely different song structures.”⁶⁶ But in clarifying that only “*new* combination[s]” and “*novel* arrangement[s]” qualify for selection and arrangement protection,⁶⁷ the Ninth Circuit cabined its opinion in *Williams*. It explicitly recognized that assigning exclusive rights to “commonplace elements . . . firmly rooted in [a] genre’s tradition”⁶⁸ would contradict copyright’s purpose by stifling creativity.⁶⁹

However, in correctly deciding the selection and arrangement issue with respect to Congress’s policy purposes, *Skidmore* has the unfortunate effect of reducing pressure to extend songwriting credits to anyone who may have influenced new music, a practice that arose in the context of cases like *Williams* and the “winner-takes-all” streaming market.⁷⁰ Songwriters lament the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) Consent Decrees,⁷¹ which they argue have prevented realization of the “full, fair

⁶⁰ See VAIDHYANATHAN, *supra* note 56, at 118.

⁶¹ See Arewa, *supra* note 47, at 576, 597–98.

⁶² See *id.* at 601.

⁶³ See *id.* at 603.

⁶⁴ See VAIDHYANATHAN, *supra* note 56, at 118–19.

⁶⁵ *Skidmore*, 952 F.3d at 1075.

⁶⁶ McPherson, *supra* note 3, at 67–68.

⁶⁷ *Skidmore*, 952 F.3d at 1075 (quoting *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) (emphasis added)).

⁶⁸ *Id.* at 1069 (quoting *Williams v. Gaye*, 895 F.3d 1106, 1141 (9th Cir. 2018) (Nguyen, J., dissenting)).

⁶⁹ See *id.* at 1075–76.

⁷⁰ Lynskey, *supra* note 5.

⁷¹ *United States v. ASCAP*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); *United States v. BMI*, No. 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994). The Consent Decrees mitigate anticompetitive action by ASCAP and BMI. See U.S. DEP’T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES 2 (2016), <https://www.justice.gov/atr/file/882101/download> [<https://perma.cc/5QHE-N8KW>]. ASCAP and BMI pool copyrights from their members, license the rights to publicly play or perform the works, and distribute profits back

market value” of performing rights in the digital music market.⁷² For the lucky few in the streaming market, a “fractional claim . . . on a pop megahit can mean millions of dollars.”⁷³ After *Williams*, there was a noted uptick in music infringement claims as songwriters used copyright litigation offensively to secure songwriting credits on such megahits.⁷⁴ The uptick in claims was accompanied by a steady increase in songwriting credits.⁷⁵ The specter of copyright litigation was a powerful tool to secure royalties on pop hits and enforce borrowing norms that are “aesthetic and ethical issues more than legal ones.”⁷⁶ This accreditation regime that arose out of litigation anxiety reflected the collaborative nature of the creative process and facilitated greater distribution of royalties.⁷⁷ As *Skidmore* reduced the viability of selection and arrangement infringement claims, it signaled that formal attribution of songwriting influences may no longer be necessary to avoid expensive settlements.

Skidmore held true to copyright legislation’s purpose in promoting the public interest in access to music. But copyright statutes have historically failed to benefit songwriters — some even more than others. The circumscription of copyright in compositions registered under the 1909 Act to their deposit copies will make it harder to establish similarity for pre-1978 works whose sheet music falls short of capturing original elements embodied only in a sound recording. And by reducing the viability of selection and arrangement claims, *Skidmore* has the unfortunate effect of reducing pressure to credit songwriting influences. Indeed, district courts across the country have relied on it in narrowing or dismissing allegations of borrowing against several pop stars.⁷⁸ Perhaps “[t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”⁷⁹ But songwriters would likely beg to differ — absent a credible threat of litigation, they may have lost their best bargaining chip to negotiate more favorable contracts and enforce ethical borrowing norms.

to the songwriters. *See id.* The Department of Justice requires ASCAP and BMI to license their entire repertoires to users, *id.* at 7, and has recently rejected proposals to allow publishers to “partially withdraw” their songwriters’ music from digital music streaming services to negotiate licenses directly, *id.* at 16.

⁷² SONGWRITERS GUILD OF AM., INC., *supra* note 53, at 2.

⁷³ Caramanica, *supra* note 15.

⁷⁴ *See* Lynskey, *supra* note 5.

⁷⁵ *See* Brittain, *supra* note 48. Drake’s “Sicko Mode” lists thirty songwriters. Lynskey, *supra* note 5. Taylor Swift credited Fred and Richard Fairbrass of the 1990s group Right Said Fred on her song “Look What You Made Me Do” even though the artists did not contact her. *See id.*

⁷⁶ VAIDHYANATHAN, *supra* note 56, at 123.

⁷⁷ *See* Lynskey, *supra* note 5.

⁷⁸ *See, e.g.,* Smith v. Weeknd, No. CV 19-2507, 2020 WL 4932074, at *6-7 (C.D. Cal. July 22, 2020); Griffin v. Sheeran, No. 17-cv-05221, slip op. at 1-2 (S.D.N.Y. Mar. 24, 2020); Gray v. Perry, No. 15-cv-05642, 2020 WL 1275221, at *8-11 (C.D. Cal. Mar. 16, 2020).

⁷⁹ Feist Pub’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).