

# Archetype IP<sup>SM</sup>

## Federal Circuit Friday

[www.archetype-ip.com](http://www.archetype-ip.com)

March 2020

Federal Circuit Friday becomes "9th Circuit Friday" when that court issues an interesting intellectual property decision. In *Skidmore v. Led Zeppelin* (March 9), the 9th Circuit, *en banc*, properly affirmed a jury verdict that Led Zeppelin's STAIRWAY TO HEAVEN does not infringe the copyright on Spirit's song TAURUS.

### The Alleged Copyright Infringement

Skidmore<sup>1</sup> alleged that STAIRWAY is "substantially similar" to TAURUS, and therefore infringes the copyright on TAURUS, because it contains several musical elements from TAURUS. To illustrate the allegations, I've marked-up the relevant portions of the two pieces' scores:

**TAURUS**

Am Ab+ (G#+) C/G Gb#7 (F#7) N.C. A<sup>5</sup>

**STAIRWAY**

Am G#- C/G D/F# Fmaj7 G/B Am

Legend:

- Green square: Descending chromatic lines
- Yellow circle: Successive two-note figures
- Red eighth notes: Successive eighth-note rhythms (faded portion indicates pattern in third bar of STAIRWAY that is not reciprocated in TAURUS)

Specifically, Skidmore alleged that in writing STAIRWAY, Jimmy Page copied several elements from TAURUS:

- A descending minor chromatic line (indicated by the green-shaded squares) that skips the note "E" (the missing note designated by the "X" boxes on beat three of the third measure), returns to the tonic pitch "A" (in the fourth measure), and has notes of "the same durations."<sup>2</sup>
- A set of successive two-note figures: A to B, B to C, and C to F#/G<sup>b</sup> (indicated by the yellow-shaded circles)<sup>3</sup> and the use of arpeggios (chord tones played sequentially rather than simultaneously).

<sup>1</sup> Skidmore is the trustee of the estate of deceased Spirit guitarist Randy California, the composer of TAURUS.

<sup>2</sup> By "duration" I believe he meant being *spaced rhythmically* the same – *i.e.*, on beats 1 and 3.

<sup>3</sup> Although the B to C and C to F#/G<sup>b</sup> pairs are in corresponding locations ("and-one" bridging the first and second measures, and "and-three" in the second measure), the initial A to B pair is out of sync between the two pieces – "one-and" in the first measure in TAURUS but "and-three"

# Archetype IP<sup>SM</sup>

## Federal Circuit Friday

- "Successive eighth-note rhythms" (indicated by the red beamed eighth-note figures).
- The overall "pitch collection" in the relevant portions of the two pieces, meaning that "certain notes appear in the same proportions in the beginning sequence of both works."

### **Background: Relevant Black Letter Copyright Law**

#### 1. Scope of copyright for musical compositions under the 1909 Copyright Act:

- a. The printed form of a musical composition defines the scope of copyright – *i.e.*, sheet music or other manuscript.
  - i. A sound recording of a musical work is not relevant to the scope of the copyright.<sup>4</sup>
  - ii. Published musical work: Published sheet music or manuscript defines the scope of the copyright.
  - iii. Unpublished musical work: Score or manuscript provided to the Copyright Office upon registration (called a "deposit copy") defines the scope of the copyright.
- b. Individual musical elements are protected by copyright if they are original – *e.g.*, an original melody or chord progression.
- c. An original "selection and arrangement" of otherwise unprotectable (*i.e.*, unoriginal) musical elements is also protected by copyright – *e.g.*, an original combination of otherwise commonly-known chords, arpeggios, and rhythms.

#### 2. Copyright infringement:

- a. Plaintiff must own a valid copyright in the musical work at issue.
- b. Defendant must have copied protected aspects of the copyrighted work in two ways:
  - i. Copying *per se* – as a factual matter, the defendant copied from the copyrighted work.<sup>5</sup>
    - 1) Direct evidence of copying (*e.g.*, admission by defendant, testimony by a witness that observed copying, etc.).
    - 2) Circumstantial evidence of copying:
      - Defendant had access to the copyrighted work; and
      - The two works share similarities that are probative of copying. Because the issue in this prong is simply whether copying occurred, the requisite similarities can be found in either protectable or unprotectable elements of the copyrighted work.
  - ii. Unlawful appropriation – the works share substantial similarities such that the copying was unlawful.<sup>6</sup> Two tests must be satisfied:
    - 1) Extrinsic test: Objective similarities of specific expressive (*i.e.*, protectable, original) elements in the two works.
    - 2) Intrinsic test: Similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.

---

in the first measure in STAIRWAY. The other possible initial A to B pair in TAURUS is at "four-and" in the first measure, which overlaps the B to C pair and is still out of sync with the A to B in STAIRWAY.

<sup>4</sup> Sound recordings did not become eligible for copyright protection until 1972 and did not become "publications" that could define the scope of the copyright on a musical composition until 1978.

<sup>5</sup> The issue here is simply whether defendant copied from the copyrighted work, not whether the copying was sufficiently extensive or significant to violate the copyright. Thus, this prong of the infringement test distinguishes copying of the protected work from "coincidence, independent creation, or prior common source," which are safe zones that do not involve or lead to copyright infringement.

<sup>6</sup> In contrast to the copying *per se* prong, the issue here is whether the copying was sufficiently extensive or significant to violate the copyright.

## **The 9th Circuit's *en banc* Decision & What It Adds to the Law**

In the district court trial, the jury found for Led Zeppelin, determining that (i) Skidmore owned a valid copyright to TAURUS; (ii) Jimmy Page had access to TAURUS; but (iii) the two songs were not substantially similar under the extrinsic test for unlawful appropriation.

### *Summary of the 9th Circuit's Decision*

The 9th Circuit affirmed the jury's verdict of no copyright infringement. The court first determined that the 1909 Copyright Act applies to the dispute, under which the written deposit copy of TAURUS – rather than the sound recording of the song – defines the scope of the copyright. Then the court determined that the trial judge had correctly instructed the jury on the applicable law and there was no reason to overturn the jury's verdict or provide a new trial, especially since Skidmore had presented only a "garden variety" substantial similarity case based on a set of unprotectable common musical elements rather than a case based on an original "selection and arrangement" of those musical elements. The court also took the opportunity to eliminate the so-called "inverse ratio rule" in the 9th Circuit.

### *Details*

Skidmore raised a slew of legal issues on appeal, but I will focus on the points decided by the 9th Circuit that are more significant and outcome-determinative:

#### *The 1909 Copyright Act applies.*

- The 1909 Copyright Act applies to this dispute because TAURUS was registered with the Copyright Office in 1967, nine years before the sweeping changes enacted by the 1976 Copyright Act.<sup>7</sup>

#### *Under the 1909 Act, the deposit copy of TAURUS defines the scope of the copyright.*

- The sound recording of TAURUS is not relevant to the scope of the copyright.
- Because TAURUS is "unpublished" (*i.e.*, was not published in sheet music or other manuscript form), the copy of TAURUS deposited with the Copyright Office defines the scope of the copyright. The deposit copy of TAURUS comprises one page of handwritten sheet music (which forms the basis for the score that is reproduced and marked-up above).
- Thus, the district court did not err by precluding Skidmore from playing the sound recording of TAURUS for the jury during testimony by Jimmy Page.
  - Skidmore alleged that playing the sound recording was important because "*observing Page listening* to the recordings would have enabled the jury to evaluate his demeanor with respect to access" to the work.
  - The 9th Circuit didn't buy this argument at all, referring to it as a "curious" argument that "defies common sense" because "[t]here would have been very little, if any, probative value in watching Page's reaction to listening to Taurus at the trial in 2016 to prove access to the song half a century ago." Moreover, Page had already admitted that he had access to TAURUS before he wrote STAIRWAY in the form of a sound recording (the Spirit album that included TAURUS) in his extensive record collection.<sup>8</sup>
  - It's clear that Skidmore actually wanted to use the sound recording of TAURUS to sway the jury regarding *substantial similarity* under the "unlawful appropriation" prong, which would have been improper because substantial similarity must be judged by comparison solely to the deposit copy.

#### *The "Inverse Ratio Rule" is no more.*

- It was not error for the district court to refuse to instruct the jury on the so-called "inverse ratio rule," a judge-made rule under which "a lower standard of proof of substantial similarity [is required] when a high degree of access is shown."

<sup>7</sup> Those sweeping changes including sound recordings becoming recognized as "publications" that could define the scope of the copyright on a musical composition.

<sup>8</sup> Even though sound recordings were not eligible for copyright protection and were not considered "publications" for purposes of defining the scope of copyright, a sound recording could still serve to provide access to copyrighted content embodied in the recording. Similarly, a sound recording could infringe a copyright under the 1909 Act. Note the distinction between that which defines the scope of a music copyright and that which can be found to infringe a music copyright.

# Archetype IP<sup>SM</sup>

## Federal Circuit Friday

- The inverse ratio rule appears intended to apply to the "copying *per se*" prong of the copyright infringement test such that evidence that the defendant had a high degree of access to a copyrighted work (e.g., heard or listened to the song daily for an extended period, owned a copy of the work, etc.) reduces the degree of circumstantial evidence of similarity that is necessary to prove copying. Thus, the inverse ratio rule provides a sliding scale under which weaker circumstantial evidence of similarity suffices if high degree of access is shown.
  - However, the inverse ratio rule is expressed in terms of "*substantial* similarity," which confuses and conflates the "copying *per se*" prong and the "unlawful appropriation" prong of the infringement test.<sup>9</sup>
  - The inverse ratio rule also assumes, illogically, that "more access increases the likelihood of copying" and has been rejected by the majority of other federal appellate courts that have considered it.
- Because the inverse ratio rule "is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties," the 9th Circuit took the opportunity to "abrogate the rule in the 9th Circuit and overrule our prior cases to the contrary." ***This is a primary legal holding in this case – the inverse ratio rule is no longer the law in the 9th Circuit.***

### No error in instructing the jury that common musical elements are not copyrightable.

- The district court did not err by instructing the jury that copyright "does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes."
- Skidmore objected to this instruction because, by expressly identifying descending chromatic scales, arpeggios, and short sequences of three notes as examples of unprotectable elements, the instruction prejudiced his case. Actually, this instruction likely *killed* his case because Skidmore failed to present a "selection and arrangement" argument to the jury (see below).
- The 9th Circuit explained that the jury determines copyright infringement under the "unlawful appropriation" prong by asking "whether the protectible elements, standing alone, are substantially similar" and by "disregard[ing] the non-protectible elements."<sup>10</sup> That there was no error in the jury instruction is bolstered by Skidmore's own expert musicologist agreeing that "musical concepts like the minor chromatic line and the associated chords have been used in music for quite a long time as building blocks" and by precedent that sequences of three or four notes are insufficiently "original" to be protectable by copyright.<sup>11</sup>
- This jury instruction meant that the various similarities Skidmore identified between TAURUS and STAIRWAY (outlined above) could each be viewed as nothing more than an unprotected idea, theme, or common musical element.

### No error in omitting jury instruction regarding "selection and arrangement."

- The district court did not err by omitting a "selection and arrangement" instruction to the jury because Skidmore failed to properly object to the omission and failed to present a "selection and arrangement" theory at trial (and therefore could not have won on that theory in any event).
- Copyright protection is available for an original "selection and arrangement" of otherwise unprotectable elements. For example, copyright protection is available for an original selection and arrangement of

<sup>9</sup> "The inverse ratio theory confuses fundamental principles of infringement analysis: access is relevant only in establishing the act of copying, not in establishing the degree thereof. Once copying is established, access is irrelevant and the inquiry shifts to the final stage of the infringement analysis, material appropriation." Quoting 3 William F. Patry, PATRY ON COPYRIGHT § 9.91 (2017).

<sup>10</sup> Copyright requires "at least a modicum of creativity and [therefore] does not protect every aspect of a work." For example, copyright does not protect "ideas, concepts, and common elements" "common or trite musical elements," or "commonplace elements that are firmly rooted in the genre's tradition" because "[t]hese building blocks belong in the public domain and cannot be exclusively appropriated by any particular author."

<sup>11</sup> Skidmore also argued that a jury instruction that "any element from prior works or the public domain are not considered original parts and not protected by copyright" was erroneous, but the 9th Circuit explained that that instruction was "black letter law" and that the fundamental point is that one may create an original – and therefore protectable – music expression by "borrowing from previous works or the public domain" provided that what is done with those unprotectable elements has at least a minimal degree of creativity – *i.e.*, is original.

# Archetype IP<sup>SM</sup>

## Federal Circuit Friday

common musical elements (such as descending chromatic scales, arpeggios or short sequences of three notes), elements from prior works, and/or elements from the public domain.<sup>12</sup>

- The 9th Circuit held:
  - First, Skidmore did not properly object to the district court's omission of the instruction. Although both Skidmore and Led Zeppelin offered draft jury instructions regarding "selection and arrangement," Skidmore failed to make and preserve for appeal any objection when the district court decided not to give that instruction to the jury.
  - Second, Skidmore did not present a "selection and arrangement" theory to the jury. Instead, Skidmore argued that (i) that the various musical elements identified above render TAURUS original, and (ii) that the presence of those same musical elements in STAIRWAY renders STAIRWAY infringing.
    - The 9th Circuit emphasized that "Skidmore never argued how these musical components related to each other to create the overall design, pattern, or synthesis" and instead "simply presented a garden variety substantial similarity argument."<sup>13</sup> "Presenting a 'combination of unprotectable elements' without explaining how these elements are particularly selected and arranged amounts to nothing more than trying to copyright commonplace elements."
    - Thus, even if it had been erroneous to withhold the "selection and arrangement" instruction from the jury, there was no "miscarriage of justice" because "[a] selection and arrangement instruction would not have convinced the jury that STAIRWAY TO HEAVEN was substantially similar to the deposit copy of TAURUS."
  - Third, the jury instructions given by the district court "fairly and adequately covered Skidmore's argument for extrinsic similarity" between TAURUS and STAIRWAY – "i.e., that there were five things that these two songs TAURUS and STAIRWAY TO HEAVEN shared." Because the jury determined that the STAIRWAY was not "substantially similar" to TAURUS under the extrinsic test of the "unlawful appropriation" prong, there is no copyright infringement.<sup>14</sup>

\*\*\*

It is a mystery why Skidmore did not clearly present a "selection and arrangement" theory at trial and insist on the jury instruction, since it appears to have been his best hope of victory. My guess is that Skidmore and his musicologist experts did not believe that the arrangement of the descending minor chromatic line, arpeggios, successive two-note figures, eighth-note rhythms, and pitch collection in TAURUS actually formed an overall design, pattern, or synthesis entitled to protection as a selection and arrangement. Or, Skidmore may have realized that the arrangement of those common elements in TAURUS is very different than the arrangement in STAIRWAY. Or, maybe Skidmore made a tactical decision that the jury would be more easily persuaded of substantial similarity based on a set of individual musical elements.

Regardless of Skidmore's trial strategy and tactical decisions, the case came out correctly and justice was done.

*A note regarding this month's accompanying photograph on the website: It's a photograph of Tower House, Jimmy Page's residence in Holland Park (London), UK, that I took in September 2018 while on holiday. Tower House is not only a beautiful home, it is also a historic structure that was designed and built by William Burges between 1875 and 1881.*

<sup>12</sup> The 9th Circuit stated it this way: "We have extended copyright protection to a combination of unprotectable elements . . . only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."

<sup>13</sup> Further, "Skidmore and his experts never argued to the jury that the claimed musical elements cohere to form a holistic musical design." The dissent argues that Skidmore *did* present a selection and arrangement case at trial, by asserting that "the descending chromatic line, in conjunction with the other arpeggiated figures in the ascending melody . . . combined [to] form one piece of original music," that "the combination of musical elements present in Section A of Taurus was 'unique and original,'" and that "it was the combination of a descending chromatic line and ascending line that made Taurus unique and protectable." Essentially, the majority set the bar higher than the dissent would have for presenting a selection and arrangement case at trial, requiring, for example, that the combination of elements forms a holistic musical design or otherwise relate to one another musically in a particular and articulable way.

<sup>14</sup> Significantly, Skidmore did not contest on appeal the jury's determination of lack of substantial similarity.