[US] *Sheet Music v. Sounds*: Led Zeppelin case reminds us of copyright technicalities

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The copyright infringement case brought against Led Zeppelin reached its final conclusion in October 2020, as the United States Supreme Court declined the opportunity to hear an appeal of the Ninth District Federal Appeals Court in California. Accordingly, the ruling in favour of Led Zeppelin in *Michael Skidmore v. Led Zeppelin et al., Case no. 16-56057 (9th Cir., March 9, 2020)* holds as good law, likely much to the relief of record labels and well-known artists alike.

In the *Skidmore v. Led Zeppelin* litigation, the question before the court was whether the opening notes of Led Zeppelin's 1973 anthem *Stairway to Heaven* infringed a song written by Randy Wolfe. Wolfe, known professionally as Randy California, wrote *Taurus* in 1967 and regularly performed the piece with his psychedelic rock band Spirit. In 2014, Michael Skidmore, the co-trustee of Randy California's estate, brought a copyright infringement claim on the trust's behalf against the band Led Zeppelin, its individual members, Warner Music, and others.

After Led Zeppelin successfully defended the case before a jury in 2016, Skidmore had the judgment overturned in 2018. In that decision, the appeals panel invalidated the original ruling owing to errors of due process and poor jury instructions. The matter was re-litigated and, in March 2020, the appellate court reinstated the original victory for Led Zeppelin. In her judgment, Judge M. Margaret McKeown covers several key points, including the decision not to play recordings of the songs at trial, and questions of originality and similarity.

Given the pervasiveness of music streaming platforms today, it is easy to forget that in the United States, prior to the sweeping reforms of The Copyright Act of 1976, it was only the printed form (sheet music) of a composition that was protected under copyright law. Thus, when Randy California wrote *Taurus* in 1967, his work fell under the scope of The Copyright Act of 1909. The 1909 Act required that a copy of the sheet music be submitted to the Copyright Office and, importantly for our purposes, the copyright protection did not extend to the sound recording itself.

For this reason, it was only the one-page deposit copy of *Taurus* which ultimately defined the scope of the copyright. On appeal, Skidmore argued that the original jury should have been permitted to listen to the two songs in order to compare

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their substantial similarity (discussed below). However, Judge McKeown disagreed, and ruled that it had been proper to limit the similarity analysis to the sheet music.

For a work to be protected by copyright, it must be independently created by the author and involve at least some minimal creativity. In proving copyright infringement, the claimant must establish that the defendant actually "copied" the work in question, in a manner which amounts to "unlawful appropriation". This can be further broken down into two limbs: "access" and "striking similarity" to the original content. The fact that Led Zeppelin had access to *Taurus* was not at issue. Indeed, Led Zeppelin performed with Spirit at least once, and Led Zeppelin's guitarist Jimmy Page testified that he owned Spirit's albums. The substantial similarity question, however, pitted expert musicologists against each other.

Absent the ability to play the songs for the jury, the legal teams needed to rely on the expert analysis of the musical compositions. Skidmore's lawyer set out five similarities, including the descending chromatic scales and the repetition of three two-note sequences (AB, BC, and CF#). Unsurprisingly, Led Zeppelin's expert explained that the compositions were completely different. Furthermore, it was argued that the alleged infringement concerned aspects which were either "unprotectable common musical elements" or simply "random" creative choices.

The court agreed that "copyright only protects the author's original expression in a work and does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes." Furthermore, the court observed that once Randy California had settled on using a descending chromatic scale in A minor, there were only a "limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear)." Thus, given the relatively "narrow range of creative choices available" to Led Zeppelin, Skidmore could only assert "a 'thin' copyright, which protects against only virtually identical copying."

Stairway to Heaven is a radio classic and is estimated to have generated more than USD 500 million (EUR 412 million) in revenue over the decades. Randy California once told a journalist, "If you listen to the two songs, you can make your own judgment … I'd say it was a rip-off. And [Led Zeppelin] made millions of bucks on it and never said 'Thank you', never said, 'Can we pay you some money for it?' It's kind of a sore point with me."

One might wonder if the outcome would have been different had the 1976 Copyright Act applied, thereby permitting the jury to listen to the songs themselves. Although the lawsuit's analysis revolves around technical points of both musical arrangement and intellectual property legislation, it is also a prime example of the ways in which technology can outpace the law in the creative

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sector more generally.

Michael Skidmore v. Led Zeppelin et al., Case no. 16-56057 (9th Cir., March 9, 2020)

https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/16-56057.pdf

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