

NOTES

Closing the Stairway to Heaven: The Ninth Circuit Disincentivizes Music Creation

I. OVERVIEW	197
II. BACKGROUND	198
A. <i>Copyright Protection over Musical Compositions</i>	199
B. <i>Circuits Split on the Inverse Ratio Rule</i>	200
C. <i>Originality: Feist’s Legacy</i>	201
III. COURT’S DECISION.....	202
IV. ANALYSIS	205
A. <i>No Longer ‘Dazed and Confused’</i>	205
B. <i>‘Whole Lotta Love’ for Bad Policy</i>	206
C. <i>‘The Song Remains the Same,’ but the Copyright Protection is Gone</i>	207

I. OVERVIEW

Randy Wolfe, better known as Randy California, wrote the song “Taurus” for his band Spirit in the 1960s.¹ Soon after, Wolfe’s label registered the song as an unpublished musical composition with the United States Copyright Office.² Pursuant to the 1909 Copyright Act (1909 Act), Wolfe’s record label transcribed the song onto one page of sheet music (Taurus deposit copy), and deposited it with the Office.³ Led Zeppelin released “Led Zeppelin IV” in 1971.⁴ Track four on the album was the song “Stairway to Heaven,” which has been called one of the greatest rock songs of all time.⁵ Led Zeppelin and Spirit performed at the same venue three times between 1968 and 1970, but Led Zeppelin never heard Spirit perform “Taurus.”⁶ Wolfe passed away in 1997.⁷ Seventeen years later, Michael Skidmore, Wolfe’s co-trustee, filed a suit against Led Zeppelin, alleging the opening notes of “Stairway to Heaven” were substantially similar to the beginning of “Taurus,” therefore infringing its copyright.⁸

1. Skidmore v. Led Zeppelin, 952 F.3d 1051, 1056 (9th Cir.) (en banc).
2. *Id.* at 1056-57.
3. *Id.* at 1057.
4. *Id.*
5. *Id.* at 1056.
6. *Id.* at 1057.
7. *Id.*
8. *Id.*

At trial, the United States District Court for the Central District of California ruled that only the Taurus deposit copy, and not a sound recording, could be used to prove substantial similarity because the 1909 Act governed the copyright's scope.⁹ Additionally, the district court denied Skidmore's requests for certain jury instructions.¹⁰ The jury returned a verdict for Led Zeppelin, finding that although Skidmore owned the copyright and Led Zeppelin had access to "Taurus," the two songs were not substantially similar.¹¹

Skidmore appealed the decision to the United States Court of Appeals for the Ninth Circuit.¹² He appealed the lower court's decision that only the deposit copy could be used to prove substantial similarity and that it was erroneous to omit his requested jury instructions.¹³ A Ninth Circuit panel vacated the judgment in part and remanded it to the district court. Subsequently, the Ninth Circuit granted a rehearing en banc.¹⁴ The United States Court of Appeals for the Ninth Circuit *held* that, the substantial similarity analysis was limited to the Taurus deposit copy, the inverse ratio rule was rejected, and the district court did not err in its jury instructions. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1078 (9th Cir. 2020) (en banc).

II. BACKGROUND

To succeed on a copyright infringement claim, a plaintiff must show that he owns a valid copyright and that the defendant copied protected elements of the work.¹⁵ When there is no direct evidence that the defendant copied the work, copying can be proved circumstantially by showing the defendant had access to the work and that the two works are substantially similar.¹⁶ The Ninth Circuit employs a two-part analysis, known as the extrinsic test and intrinsic test, to determine whether works

9. *Id.* at 1058.

10. *Id.* at 1060 (noting that Skidmore requested instructions on the inverse ratio rule and on copyright protection over the selection and arrangement of unprotected elements).

11. *Id.*

12. *Id.*

13. *Id.* In addition, Skidmore appealed the court's ruling that the sound recordings could not be played to prove access, the trial time limits, the fact that the full version of "Taurus" was played at the request of the jury, and the decision to allow Led Zeppelin's expert's testimony despite a conflict of interest. *Id.*

14. *Id.*

15. *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (citing *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

16. *Id.* at 984-85.

are substantially similar.¹⁷ The extrinsic test requires the plaintiff to show an objective overlap of concrete elements between the works.¹⁸ The intrinsic test considers whether an ordinary, reasonable person would find the “‘concept and feel of the works’ to be substantially similar.”¹⁹ If both parts of the test are satisfied, the plaintiff has proved that the defendant infringed his copyright.²⁰

A. *Copyright Protection over Musical Compositions*

Musical compositions first received express federal copyright protection under the Copyright Act of 1831.²¹ This Act granted copyright holders the exclusive right to sell copies of musical scores so that others could play the compositions in their homes.²² The need for copies of the musical score declined as technology progressed and more machines that could mechanically reproduce compositions were invented.²³ Because the Copyright Act of 1831 did not grant copyright owners the exclusive right to sell reproductions beyond the musical scores, various problems arose for the owners.²⁴ This eventually led to Congress passing the 1909 Act.²⁵ This time, Congress ensured that composers of original musical works were protected when their work was “copied” onto records and piano rolls.²⁶ However, the Act did not grant composers control over the recordings themselves.²⁷ Congress only considered records to be a part of the machine which reproduced the original musical composition.²⁸

For an unpublished work to receive copyright protection under the 1909 Act, a complete copy of the work had to be deposited with the Copyright Office.²⁹ For musical compositions, the composition had to be

17. *Id.* at 985.

18. *Id.*

19. *Id.* (quoting *Pasillas*, 927 F.2d at 442).

20. *See id.*

21. *Goldstein v. California*, 412 U.S. 546, 564 (1973).

22. *Id.*

23. *Id.* at 564-65.

24. *See id.* at 565; *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (holding that piano rolls were not copies within the meaning of the 1831 Act, and therefore copyright owners were not entitled to protection over them).

25. *Goldstein*, 412 U.S. at 565.

26. *Id.* at 565-66. (“[U]nder [section] 1(e), records and piano rolls were to be considered as ‘copies’ of the original composition they were capable of reproducing, and could not be manufactured unless payment was made to the proprietor of the composition copyright.”).

27. *Id.* at 566.

28. *Id.*

29. Act of March 4, 1909, ch. 320, § 10, 35 Stat. 1075 (1909) (repealed 1976).

reduced to sheet music or some other tangible form.³⁰ In *Williams v. Gaye (Williams II)*, the Ninth Circuit noted that the question of whether copyright protection applied only to sheet music or if it extended to sound recordings under the 1909 Act remained unsettled.³¹ The court in *Williams II* declined to decide the issue and merely accepted the district court's ruling that the deposit copy submitted to the Copyright Office defined the scope of protection.³²

B. Circuits Split on the Inverse Ratio Rule

The Ninth Circuit first articulated the inverse ratio rule in *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*³³ The court held that the standard of proof for substantial similarity was lower when there was clear and convincing evidence of access.³⁴ Because the court inconsistently applied it, this rule had a mixed application in subsequent rulings.³⁵ Recently, the court added to the confusion in *Williams v. Gaye*, better known as the "Blurred Lines Case".³⁶ In the original opinion of *Williams v. Gaye (Williams I)*, the Ninth Circuit adhered to the inverse ratio rule, labeling it as "binding precedent."³⁷ But in an amended opinion, *Williams II*, the court removed all reference to the rule without explanation.³⁸

The uncertainty and confusion surrounding this rule were echoed in other circuits.³⁹ Most circuits that addressed the rule rejected it or refused

30. DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2017).

31. *Williams v. Gaye (Williams II)*, 895 F.3d 1106, 1121 (9th Cir. 2018).

32. *Id.*

33. *See Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).

34. *Id.*

35. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003); *Metcalf v. Bocho*, 294 F.3d 1069, 1074-75 (9th Cir. 2002); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996); *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (9th Cir. 1990); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987).

36. *See Williams II*, 895 F.3d at 1120.

37. *Williams v. Gaye (Williams I)*, 885 F.3d 1150, 1163 n.6, 1168 (9th Cir. 2018).

38. *See Williams II*, 895 F.3d at 1120.

39. *See Arc Music Corp. v. Lee*, 296 F.2d 186, 187 (2d Cir. 1961) (rejecting the inverse ratio rule); *Eaton v. Nat'l Broad. Co.*, 972 F. Supp. 1019, 1026 n.12 (E.D. Va. 1997) (declining to apply the rule); *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004) (applying the rule); *Peters v. West*, 692 F.3d 629, 634-35 (7th Cir. 2012) (declining to apply the rule); *Dream Custom Homes, Inc. v. Mod. Day Constr., Inc.*, 476 F. App'x 190, 192 (11th Cir. 2012) (declining to apply the rule); *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368-69 (Fed. Cir. 2006) (applying Ninth Circuit law and applying the rule).

to apply it because it was not the law of their circuit.⁴⁰ The Sixth Circuit has employed the rule, but the court has not held that it is mandatory in every substantial similarity analysis.⁴¹

C. *Originality: Feist's Legacy*

Only original works qualify for copyright protection.⁴² A work is original if it is an independent creation of the author.⁴³ The United States Supreme Court established in *Feist Publications, Inc. v. Rural Telephone Service, Co.*, that, despite originality's low threshold, a proposed copyright holder still had to show a "modicum of creativity."⁴⁴ Copyright protection could never encompass "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form"⁴⁵ An author needed to contribute "something recognizably 'his own.'"⁴⁶ Additionally, expressions common to a certain subject matter or medium are not original, and therefore cannot be protected by copyright.⁴⁷

In a copyright infringement case, the court must examine whether the protectable elements are substantially similar.⁴⁸ However, a particular combination of unprotectable elements may be original enough to obtain copyright protection.⁴⁹ Unprotected elements in musical works include diatonic or chromatic scales, arpeggios, and chord symbols based on standard progressions.⁵⁰ A combination "of a limited number of notes can garner copyright protection."⁵¹ But, there is not a uniform set of factors used to determine whether a musical composition, as a whole, is protectable.⁵²

40. See *Arc Music Corp.*, 296 F.2d at 187; *Eaton*, 972 F. Supp. at 1026 n.12; *Peters*, 692 F.3d at 634-35; *Dream Custom Homes*, 476 F. App'x at 192.

41. See *Stromback*, 384 F.3d at 293 (stating that less compelling proof of access may suffice when the similarity between the works is strong).

42. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

43. *Id.*

44. *Id.* at 346.

45. 17 U.S.C. § 102(b).

46. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir. 2000) (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 n.5 (9th Cir. 1977)).

47. *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

48. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

49. See *Satava*, 323 F.3d at 811.

50. See U.S. COPYRIGHT OFF., THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.5 (3d. ed. 2017), <http://www.copyright.gov/comp3/2017version/docs/compendium.pdf>.

51. *Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004).

52. See *id.* at 849.

III. COURT'S DECISION

In the noted case, the Ninth Circuit provided much needed clarity for future copyright infringement litigation.⁵³ The Ninth Circuit affirmed the district court's judgment for Led Zeppelin, holding that "Stairway to Heaven" did not infringe "Taurus."⁵⁴ The court held that the "Taurus" copyright's scope was limited to the Taurus deposit copy and that the district court did not err in its originality instructions.⁵⁵ Additionally, the court sitting en banc abrogated the inverse ratio rule and overruled its cases to the contrary.⁵⁶

The court began by noting that its analysis was controlled by the 1909 Act because it was the law in effect when "Taurus" was registered with the Copyright Office.⁵⁷ In discussing the history of copyright protection for sound recordings, the court illustrated the background and importance of the 1909 Act through caselaw.⁵⁸ The court struck down Skidmore's argument that the 1909 Act extended copyright protection beyond just sheet music by examining the text of the Act.⁵⁹ The court concluded it extended protection against infringement, but "did not provide that copyrighted works could be anything other than sheet music or . . . the deposit copy."⁶⁰

The court cited decisions prior to the 1909 Act to support its assertion that sheet music and deposit copies defined the scope of copyright under the 1909 Act.⁶¹ In rejecting Skidmore's argument that the deposit copy was more of a reference point than a definitive filing, the court cited both Supreme Court and First Circuit decisions to explain the purpose and

53. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056 (9th Cir. 2020) (en banc).

54. *Id.* at 1079.

55. *Id.* The court additionally held there was no error with respect to the jury instructions as a whole, and that the lower court did not err in setting trial time limits, responding to a jury question, admitting expert testimony, or declining to award attorney's fees. *Id.* Judge Watford concurred, with the exception of the ruling on the selection and arrangement instruction. *Id.* at 1079-80 (Watford, J., concurring).

56. *Id.* at 1079 (majority opinion).

57. *Id.* at 1061.

58. *See id.* (citing Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1909); *Goldstein v. California*, 412 U.S. 546, 564 (1973); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17-18 (1908); 1909 Act, ch. 320, § 1(e), 35 Stat. 1075, 1075 (1909) (repealed 1976)).

59. *Id.* at 1061-62.

60. *Id.* ("Registration for an unpublished musical work could be obtained 'by the deposit, with claim of copyright, of one complete copy of such work' with the Copyright Office. . . . [T]he Copyright Office did not even accept sound recordings as deposit copies." (quoting 1909 Act § 11)).

61. *See id.* (citing *Goldstein*, 412 U.S. at 565-66; *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000)).

importance of the deposit copy.⁶² The deposit copy made a record of the copyright, provided notice to other authors, and prevented confusion about the scope of the copyright by ascertaining precisely what the copyright's subject was.⁶³ The court additionally noted that the Copyright Office's practices for registering unpublished musical compositions at the time included writing to the applicant, "pointing out that protection extend[ed] only to the material actually deposited"⁶⁴ The court was not convinced by Skidmore's other arguments as to why the deposit copy should not control the scope, stating that they were mere conjecture.⁶⁵ Finally, the court concluded the district court did not err in declining to play the "Taurus" sound recordings or in refusing to admit the recordings on the substantial similarity issue, because the deposit copy defined the scope of "Taurus's" copyright.⁶⁶

In the court's discussion of copyright infringement, it addressed several challenges that Skidmore made to the district court's jury instructions.⁶⁷ First, the court examined the inverse ratio rule instruction, which Skidmore claimed should have been given to the jury.⁶⁸ However, the court declared that the inverse ratio rule "defie[d] logic" and rejected it, overruling prior Ninth Circuit cases to the contrary.⁶⁹ The court extensively examined the inverse ratio rule's "checkered application" in the Ninth Circuit and the rule's problematic nature to illustrate why it took the opportunity to abrogate it.⁷⁰ As a practical matter, the court explained

62. *See id.* at 1062-63 (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161-62 (1st Cir. 1994); *Merrell v. Tice*, 104 U.S. 557, 561 (1881)).

63. *Id.*

64. *Id.* at 1063 (quoting U.S. COPYRIGHT OFF., *THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES* § 2.6.1.II.a. (1st ed. 1967)).

65. *Id.*

66. *Id.* at 1063-64.

67. *See id.* at 1064-65.

68. *Id.* at 1065-66.

69. *Id.* at 1066.

70. *Id.* at 1066-67; *see Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977), *superseded by statute*, 17 U.S.C. § 504(b) (holding that the high degree of access required a lower standard of proof); *Allolti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (reasoning the rule had not been employed by the Ninth Circuit since *Krofft*); *Three Boys Music v. Bolton*, 212 F.3d 477, 485-86 (9th Cir. 2000) (employing the rule); *Smith v. Jackson*, 84 F.3d 1213, 1218 & n.5 (9th Cir. 1996) (employing the rule); *Shaw v. Lindheim*, 919 F.2d 1353, 1361-62 (employing the rule); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018) (stating the rule "assists only in proving copying, not in proving unlawful appropriation"); *Metcalf v. Bochco*, 294 F.3d 1069, 1074-75 (9th Cir. 2002) (holding that because access was not disputed, it was easy to infer that the similarities were the result of copying); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178-79 (9th Cir. 2003) (reasoning that *Metcalf* only applied in cases of clear concession of access); *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d at 1072, 1081 n.4 (9th Cir. 2006); *Benay v. Warner Bros. Ent., Inc.*, 607 F.3d 620, 625 (9th Cir. 2010).

that access was often proved because of the digitally interconnected world and the various ways to access media using platforms like YouTube, Netflix, and Spotify.⁷¹ Therefore, because the inverse ratio rule lowered the standard of proof, the rule unfairly advantaged those with the most accessible works (i.e., better-funded rights holders).⁷² The inverse ratio rule skewed the jury's decision-making by replacing the correct burden of proof with the "inverse burden rule."⁷³ In rejecting the inverse ratio rule, the court held that the district court did not err by refusing to instruct the jury on the rule.⁷⁴

Second, the court examined the originality instructions.⁷⁵ The court cited *Feist* to illustrate that originality had a low bar, but that copyright required a "modicum of creativity" and did not protect common musical elements.⁷⁶ The court stated that, in a copyright infringement analysis, factfinders should ask "whether the protectable elements, standing alone, are substantially similar."⁷⁷ Therefore, the district court did not err in listing non-protectable musical building blocks in the instructions.⁷⁸ The court pointed to Skidmore's own expert's testimony that the elements claimed to be similar between the two works were common building blocks of musical compositions.⁷⁹ In further discussion, the court explained that a three- or four-note sequence cannot be copyrighted, because it would lack a modicum of creativity.⁸⁰ Skidmore's argument that the instruction had no legal basis was struck down with a cite to the copyright statute, stating that "element[s] from prior works or the public domain [were] not considered original parts and not protected by

71. *Skidmore*, 952 F.3d at 1068.

72. *Id.*

73. *Id.* at 1069.

74. *Id.*

75. *See id.* at 1069-72.

76. *Id.* at 1069 (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991)). The court additionally stated that copyright does not extend to "common or trite" musical elements, *Smith v. Jackson*, 84 F.3d 1213, 1216 n.3 (9th Cir. 1996), or "commonplace elements that are firmly rooted in the genre's tradition," *Williams II*, 895 F.3d at 1140-41 (Nguyen, J., dissenting), because those elements are in the public domain and cannot be seized by an author, *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

77. *Id.* at 1070 (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)).

78. *Id.* at 1071.

79. *Id.* at 1070.

80. *Id.* at 1071 (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976); *Newton v. Diamond*, 388 F.3d 1189, 1195-96 (9th Cir. 2004); *Williams II*, 895 F.3d at 1144 n.6 (Nguyen, J., dissenting); THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 50, § 313.4(B)).

copyright.”⁸¹ Therefore, the court held that the district court’s instructions correctly articulated to the jury that originality required at least a modicum of creativity and independent creation.⁸²

Judge Ikuta, joined by Judge Bea, dissented to the majority’s rulings on the originality instructions.⁸³ Ikuta posited that the originality instructions were misleading by stating that common musical elements were not protectable.⁸⁴

IV. ANALYSIS

The Ninth Circuit’s decision in the noted case provided clarity for future copyright infringement cases among the music industry. While the decision had positive implications for future copyright infringement litigation in the Ninth Circuit, the court severely limited copyright protection for independent creators.⁸⁵ The court effectively disincentivized music creation by ruling that musicians and composers could not obtain protection over certain musical elements and combinations.⁸⁶ Additionally, the court reenforced bad policy in holding that the Taurus deposit copy dictated the scope of the copyright.⁸⁷

A. *No Longer ‘Dazed and Confused’*

On a positive note, the Ninth Circuit’s decision abrogated the confusing inverse ratio rule and solidified the test for substantial similarity.⁸⁸ This clarity was needed after the Ninth Circuit’s controversial decision in *Williams II*, which broadly defined copyright protection over musical works and opened the door for frivolous infringement claims.⁸⁹ The inverse ratio rule lowered the standard of proof for owners of highly-accessible works.⁹⁰ In today’s technology-dependent world, access is

81. *Id.*

82. *Id.* at 1071-72. The opinion concludes after the court addresses the challenges to the selection and arrangement instructions, trial time limits, response to the jury question, admission of expert testimony, and attorney’s fees, affirming the district court with respect to each. *Id.*

83. *See id.* at 1080-81 (Ikuta, J., dissenting).

84. *Id.*

85. *See id.*

86. *See id.* at 1070-72 (majority opinion).

87. *See id.* at 1063-64.

88. *Id.* at 1064-69.

89. *See Williams II*, 895 F.3d at 1138; Gene Quinn, *Ninth Circuit Says ‘Blurred Lines’ Infringed Marvin Gaye’s ‘Got to Give it Up,’* IP WATCHDOG (Mar. 21, 2018), <http://www.ipwatchdog.com/2018/03/21/blurred-lines-infringed-got-to-give-it-up/id=95108/>.

90. *Skidmore*, 952 F.3d at 1068.

increasingly diluted through the Internet and various streaming sites.⁹¹ The fact that a song has a large number of hits or streams on such sites should not eliminate the standard of proof for similarity, which is what the inverse ratio rule did.⁹² It unfairly advantaged owners of popular, and often better-funded, musical works.⁹³ The Ninth Circuit's abrogation of the rule shifts the substantial similarity analysis to what really matters—whether the two works actually are substantially similar.⁹⁴

B. 'Whole Lotta Love' for Bad Policy

The court reenforced bad public policy in holding that the 1909 Act did not provide copyright protection over sound recordings.⁹⁵ While this holding is somewhat consistent with precedent, it reenforces bad policy.⁹⁶ The 1909 Act significantly revised and progressed copyright law by providing copyright owners with protection over innovations such as piano rolls and other forms of mechanically-reproduced musical compositions.⁹⁷ Congress passed the 1909 Act to extend copyright protection to inventions that did not exist when the previous Copyright Act was written.⁹⁸ Accordingly, new forms of mechanically-reproduced musical compositions invented after the enactment of the 1909 Act should receive copyright protection as a matter of policy.⁹⁹

The court chose to answer the long and unsettled question that the court in *Williams II* declined to address, concluding that the Taurus deposit copy governed the copyright's scope.¹⁰⁰ Although the jury was not permitted to listen to the "Taurus" sound recording to determine whether it was substantially similar to "Stairway to Heaven," the songs subjectively sound quite similar.¹⁰¹ It would not be unreasonable to expect

91. *Id.*

92. *See id.*; Sarah Bro, *Ninth Circuit Shows Led Zeppelin a Whole Lotta Love in 'Stairway' Copyright Win*, NAT'L L. REV. (Mar. 25, 2020), <http://www.natlawreview.com/article/ninth-circuit-shows-led-zeppelin-whole-lotta-love-stairway-copyright-win>.

93. *See Skidmore*, 952 F.3d at 1068.

94. *See id.*

95. *Id.* at 1061.

96. *See id.*; Goldstein v. California, 412 U.S. 546, 565-66 (1973).

97. *See Skidmore*, 952 F.3d at 1061.

98. 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:45 (2020).

99. *See id.*

100. *Skidmore*, 952 F.3d at 1061; *see Williams II*, 895 F.3d at 1121.

101. *Skidmore*, 952 F.3d at 1064; *see* Sophia Waterfield, 'Taurus' by Spirit vs. 'Stairway to Heaven': Listen to Both Songs After Led Zeppelin Wins Copyright Case, NEWSWEEK (Mar. 10, 2020 8:43 AM) <http://www.newsweek.com/taurus-spirit-vs-stairway-heaven-listen-both-songs-after-led-zeppelin-wins-copyright-case-1491406>.

the case to come out differently if the jury was allowed to listen to the sound recording on the question of substantial similarity.¹⁰²

The Ninth Circuit's decision regarding the 1909 Act has already affected other high-profile copyright infringement cases within its jurisdiction.¹⁰³ In a suit between Marvin Gaye's decedents and Ed Sheeran, a judge recently granted Sheeran's motion to limit the scope of the Gaye copyright to the deposit copy, as the 1909 Act governed when it was registered.¹⁰⁴ The judge declared the recording inadmissible in any way which might lead the jury to believe it represents what the copyright protected.¹⁰⁵ The judge's determinations relied on the Ninth Circuit's decision in the noted case.¹⁰⁶

C. *'The Song Remains the Same,' but the Copyright Protection is Gone*

The Ninth Circuit's decision will disincentivize music creation as composers will not be able to obtain protection over certain musical elements and combinations. The *Williams II* decision received widespread criticism by setting "too liberal a standard" for copyright protection.¹⁰⁷ The holding extended protection to individual building blocks of music, granting copyright holders a monopoly over them.¹⁰⁸ The Ninth Circuit overcorrected this liberal standard in the noted case.¹⁰⁹ The court limited copyright protection for composers whose works contain such building blocks.¹¹⁰ Building blocks are "commonplace elements firmly rooted in the genre's tradition."¹¹¹ They are the foundation upon which a composer's creativity grows into a complete musical work. While not protectable on their own, these elements can be combined to create a musical work that receives copyright protection.¹¹²

102. See *Waterfield*, *supra* note 101.

103. See *Griffin v. Sheeran*, No. 17 Civ. 5221 (LLS), 2020 WL 5522835, at *1 (S.D.N.Y. Mar. 24, 2020).

104. *Id.*

105. *Id.* at *1-2.

106. *Id.* at *1.

107. See *Williams II*, 895 F.3d at 1120; Alexander Kaplan, et al., *Led Zeppelin Ruling is Already Affecting Copyright Litigation*, PROSKAUER ROSE LLP (Apr. 3, 2020) <http://prfirmppwww.cdn0001.azureedge.net/prfirmstgacctpwwwcdncont0001/uploads/3a6f58a48a2aaf2e1ce0eb66df6abf99.pdf>.

108. See *Williams II*, 895 F.3d at 1120; Kaplan, *supra* note 107.

109. See *Williams II*, 894 F.3d at 1120; Kaplan, *supra* note 107.

110. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1080-81 (9th Cir. 2020) (en banc) (Ikuta, J., dissenting).

111. *Williams II*, 895 F.3d at 1141 (Nguyen, J., dissenting).

112. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

The district court's jury instructions explained that "ideas, themes, or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes" were not protected by copyright.¹¹³ However, the absence of an instruction explaining that the combination of the such elements could receive protection misled the jury.¹¹⁴ By holding that the district court did not err in giving this instruction, the Ninth Circuit severely limited copyright protection over such works.¹¹⁵ The precedent set by this decision "weakens copyright protection for musicians by robbing them of the ability to protect a unique way of combining musical elements."¹¹⁶ This will disincentivize music creation because composers will not be able to adequately protect their works.

The Ninth Circuit's holding on this issue has already been applied by other courts.¹¹⁷ Following the decision in the noted case, a judge for the United States District Court for the Central District of California ruled that Katy Perry's song "Dark Horse" did not infringe the plaintiff's work, because the relevant part of the plaintiff's work did not include any protectable elements.¹¹⁸ The judge cited the Ninth Circuit's discussion of unprotectable elements in the noted case, which was decided just a week before her ruling.¹¹⁹

While the Ninth Circuit's decision in the noted case provided clarity for copyright litigation and will deter frivolous infringement claims, the negative implications are far more dire. The decision has reenforced bad policy surrounding the 1909 Act by holding that the Taurus deposit copy defined the copyright's scope.¹²⁰ Additionally, the court limited protection over certain elements and combinations in musical works.¹²¹ These rulings will disincentivize music creation, especially among independent creators.

113. *Skidmore*, 952 F.3d at 1069-70 n.10.

114. *See id.* at 1080-81 (Ikuta, J., dissenting).

115. *See id.* at 1078 (majority opinion).

116. *Id.* at 1089 (Ikuta, J., dissenting).

117. *See Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *11 (C.D. Cal. Mar. 16, 2020); *Smith v. Weeknd*, No. CV 19-2507 PA, 2020 WL 4932074, at *6-7 (C.D. Cal. July 22, 2020) (holding the plaintiff's work was not original and therefore could not be infringed by the defendant's work).

118. *Gray*, 2020 WL 1275221, at *11.

119. *See id.* at *3.

120. *See Skidmore*, 952 F.3d at 1063; *Williams II*, 895 F.3d at 1121.

121. *See Skidmore*, 952 F.3d at 1080-81 (Ikuta, J., dissenting).

The Ninth Circuit's en banc decision set precedent that will continue to change the landscapes of the music industry and copyright law.¹²²

Rebecca Alba*

122. See *Gray*, 2020 WL 1275221, at *11; *Weeknd*, 2020 WL 4932074, at *6-7; *Griffin v. Sheeran*, No. 17 Civ. 5221 (LLS), 2020 WL 5522835, at *1 (S.D.N.Y. Mar. 24, 2020).

* © 2021 Rebecca Alba. Junior Member, Volume 23, *Tulane Journal of Technology and Intellectual Property*. J.D. candidate 2022, Tulane University Law School; B.S. 2019, Chemistry, University of South Carolina. The author would like to thank her family and friends for their support and encouragement, and the members of the *Tulane Journal of Technology and Intellectual Property* for their hard work and dedication.