

## **APPENDIX**

## INDEX TO APPENDICES

|  |          |
|--|----------|
| En Banc Opinion in the United States Court of Appeals<br>for the Ninth Circuit<br>(March 9, 2020) .....  | App. 1   |
| Opinion in the United States Court of Appeals<br>for the Ninth Circuit<br>(September 28, 2018) .....   | App. 74  |
| Civil Minutes Pretrial Conference Rulings on Motions in Limine in the<br>United States District Court for the Central District of California<br>(December 10, 2018) .....            | App. 111 |
| Civil Minutes Order Amended Ruling on Defendants' Motion in Limine No. 4<br>in the United States District Court for the Central District of California<br>(September 13, 2018) ..... | App. 113 |
| Civil Minutes Order on Defendants' Motion for Summary Judgment in the<br>United States District Court for the Central District of California<br>(March 12, 2015) .....               | App. 114 |
| Amended Judgment in the United States District Court for the Central<br>District of California<br>(July 8, 2016) .....   | App. 134 |
| Statutory Provisions Involved .....  | App. 136 |
| Copyright Act of 1909, ch. 320, § 1-13, 35 Stat. 1075, 1075 (1909)<br>(repealed 1976) .....  | App. 136 |
| Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 .....   | App. 143 |
| 1976 Act Legislative History, HR Rep. No.94-1476,<br>at p.129-31 (1976) .....  | App. 150 |

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MICHAEL SKIDMORE, as Trustee for  
the Randy Craig Wolfe Trust,  
*Plaintiff-Appellant,*

v.

LED ZEPPELIN; JAMES PATRICK  
PAGE; ROBERT ANTHONY PLANT;  
JOHN PAUL JONES; SUPER HYPE  
PUBLISHING, INC.; WARNER MUSIC  
GROUP CORPORATION;  
WARNER/CHAPPELL MUSIC, INC.;  
ATLANTIC RECORDING  
CORPORATION; RHINO  
ENTERTAINMENT COMPANY,  
*Defendants-Appellees.*

No. 16-56057

D.C. No.  
2:15-cv-03462-  
RGK-AGR

MICHAEL SKIDMORE, as Trustee for  
the Randy Craig Wolfe Trust,  
*Plaintiff-Appellee,*

v.

WARNER/CHAPPELL MUSIC, INC.,  
*Defendant-Appellant,*

No. 16-56287

D.C. No.  
2:15-cv-03462-  
RGK-AGR

OPINION

and

LED ZEPPELIN; JAMES PATRICK  
PAGE; ROBERT ANTHONY PLANT;  
JOHN PAUL JONES; SUPER HYPE  
PUBLISHING, INC.; WARNER MUSIC  
GROUP CORPORATION, ATLANTIC  
RECORDING CORPORATION; RHINO  
ENTERTAINMENT COMPANY,  
*Defendants.*

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding

Argued and Submitted En Banc September 23, 2019  
San Francisco, California

Filed March 9, 2020

Before: Sidney R. Thomas, Chief Judge, and M. Margaret  
McKeown, William A. Fletcher, Johnnie B. Rawlinson,  
Carlos T. Bea, Sandra S. Ikuta, Mary H. Murguia,  
Jacqueline H. Nguyen, Paul J. Watford, Andrew D.  
Hurwitz and Bridget S. Bade, Circuit Judges.

Opinion by Judge McKeown;  
Concurrence by Judge Watford;  
Partial Concurrence and Partial Dissent by Judge Ikuta



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**SUMMARY\***

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**Copyright**

The en banc court affirmed the district court's judgment after a jury trial in favor of Led Zeppelin in a copyright action alleging that the opening notes of *Stairway to Heaven* infringed *Taurus*, a song written by guitarist Randy Wolfe and performed by his band Spirit.

In Part I, the en banc court held that the 1909 Copyright Act, which does not protect sound recordings, rather than the 1976 Copyright Act, controlled its analysis because the copyright at issue was for the unpublished musical composition of *Taurus*, which was registered in 1967. The scope of the copyright in the unpublished work was defined by the deposit copy, which in the case of *Taurus* consisted of only one page of music. Accordingly, it was not error for the district court to decline plaintiff's request to play sound recordings of the *Taurus* performance that contained further embellishments or to admit the recordings on the issue of substantial similarity.

In Part II, the en banc court held that proof of copyright infringement required plaintiff to show: (1) that he owned a valid copyright in *Taurus*; and (2) that Led Zeppelin copied protected aspects of the work. The en banc court explained that the second prong contains two separate components: "copying" and "unlawful appropriation." A plaintiff may prove copying circumstantially by showing access and

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

striking similarity. The hallmark of “unlawful appropriation” is that the works share substantial similarities. Both an extrinsic and an intrinsic test must be satisfied for the works to be deemed substantially similar.

In Part III, the en banc court addressed the district court’s exclusion of sound recordings of *Taurus* as relevant to prove access but too prejudicial because of the risk that the jury would confuse access with substantial similarity. The en banc court concluded that this evidentiary issue was moot because the jury found access.

In Part IV, the en banc court addressed three jury instruction issues: (1) the failure to give an inverse ratio rule instruction; (2) the sufficiency of the court’s originality instructions; and (3) the failure to give a selection and arrangement instruction. In Part IV.A, joining the majority of circuits, the en banc court rejected the inverse ratio rule, which requires a lower standard of proof of substantial similarity when a high degree of access is shown. The en banc court overruled circuit precedent to the contrary. In Part IV.B, the en banc court held that the district court properly instructed the jury on originality. In Part IV.C.1, the en banc court concluded that the failure to give a selection and arrangement instruction would be reviewed for plain error. In Part IV.C.2, the en banc court held that the district court did not commit plain error. In Part IV.C.3, the en banc court held that the district court did not commit any error because plaintiff did not present a selection and arrangement theory at trial. In Part IV.C.4, the en banc court held that, even though the district court did not instruct the jury on selection and arrangement, its instructions, as a whole, fairly and adequately covered plaintiff’s argument for extrinsic similarity between *Taurus* and *Stairway to Heaven*.

In Part V, the en banc court held that the district court did not err in setting trial time limits, responding to a jury question, admitting expert testimony, or declining to award attorneys' fees.

Concurring, Judge Watford wrote that he joined the court's opinion, with the exception of section IV.C, because he saw no reason to decide whether plaintiff adequately preserved his request for a selection-and-arrangement instruction when, even if such an instruction had been given, no reasonable jury could have found infringement.

Concurring in part and dissenting in part, Judge Ikuta, joined by Judge Bea, wrote that she dissented from Part IV(B) to (C) because, without plaintiff's requested instruction on selection and arrangement, the jury was deprived of the opportunity to consider plaintiff's central theory of the case, and the instructions given to the jury were misleading.

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**OPINION**

McKEOWN, Circuit Judge, with whom THOMAS, Chief Judge, FLETCHER, RAWLINSON, MURGUIA, NGUYEN, Circuit Judges, join in full, and with whom WATFORD, Circuit Judge, joins except as to Part IV.C, and with whom HURWITZ, Circuit Judge, joins except as to Parts IV.C.3 and IV.C.4, and with whom BADE, Circuit Judge, joins except as to Part IV.C.3:

*Stairway to Heaven* has been called the greatest rock song of all time. Yet, hyperbole aside, nearly 40 years after the English rock band Led Zeppelin released its hit recording, the song is not impervious to copyright challenges. The estate of guitarist Randy Wolfe claims that Led Zeppelin and its guitarist Jimmy Page and vocalist Robert Plant copied portions of *Taurus*, a song written by Wolfe and performed by his band Spirit.

This appeal stems from the jury's verdict in favor of Led Zeppelin and a finding that the two songs are not substantially similar. Like the jury, we don't need to decide whether *Stairway to Heaven* has a place in the annals of iconic rock songs. Instead, we address a litany of copyright issues, including the interplay between the 1909 and 1976 Copyright Acts, the inverse ratio rule, the scope of music copyright, and the standards for infringement.

The 1909 Copyright Act, which does not protect sound recordings, controls our analysis. The copyright at issue is for the unpublished musical composition of *Taurus*, which was registered in 1967. The unpublished work is defined by the deposit copy, which in the case of *Taurus* consists of only one page of music. We also join the majority of circuits in rejecting the inverse ratio rule and overrule our precedent to the contrary. Finally, we are not persuaded by the challenges

to jury instructions and various other evidentiary and trial rulings. We affirm the district court's entry of judgment in favor of Led Zeppelin and related parties.

#### **BACKGROUND**

Randy Wolfe, professionally known as Randy California, wrote the instrumental song *Taurus* in 1966 or 1967. He was a guitarist in the band Spirit. Spirit signed a recording contract in August 1967 and released its first eponymous album—which included *Taurus*—a few months later. Wolfe also entered into an Exclusive Songwriter's and Composer's Agreement with Hollenbeck Music Co. ("Hollenbeck"). In December 1967, Hollenbeck registered the copyright in the unpublished musical composition of *Taurus*, listing Wolfe as the author. As required for registration of an unpublished work under the 1909 Copyright Act, which was in effect at the time, Hollenbeck transcribed *Taurus* and deposited one page of sheet music (the "*Taurus* deposit copy"), with the United States Copyright Office.

Around the same time, across the Atlantic, another rock band, Led Zeppelin, was formed by Jimmy Page, Robert Plant, John Paul Jones, and John Bonham. Led Zeppelin released its fourth album in late 1971. The untitled album, which became known as "Led Zeppelin IV," contained the now iconic song *Stairway to Heaven*. *Stairway to Heaven* was written by Jimmy Page and Robert Plant.

It is undisputed that Spirit and Led Zeppelin crossed paths in the late 1960s and the early 1970s. The bands performed at the same venue at least three times between 1968 and 1970. Led Zeppelin also performed a cover of a Spirit song, *Fresh Garbage*. But there is no direct evidence

that the two bands toured together, or that Led Zeppelin band members heard Spirit perform *Taurus*.

Wolfe passed away in 1997. After his death, Wolfe's mother established the Randy Craig Wolfe Trust (the "Trust")<sup>1</sup> and served as the trustee until she passed away. Neither Wolfe nor his mother filed a suit regarding *Stairway to Heaven*. Michael Skidmore became a co-trustee of the Trust in 2006.

Fast forward forty-three years from the release of *Stairway to Heaven* to May 2014. Skidmore filed a suit alleging that *Stairway to Heaven* infringed the copyright in *Taurus*, naming as defendants Led Zeppelin, James Patrick Page, Robert Anthony Plant, John Paul Jones, Super Hype Publishing, and the Warner Music Group Corporation as parent of Warner/Chappell Music, Inc. ("Warner/Chappell"), Atlantic Recording Corporation, and Rhino Entertainment Co. (collectively "Led Zeppelin").<sup>2</sup> One may wonder how a suit so long in the making could survive a laches defense. The Supreme Court answered this question in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, which clarified that laches is not a defense where copyright infringement is ongoing. 572 U.S. 663, 668 (2014).

Skidmore alleged direct, contributory, and vicarious copyright infringement. He also sought equitable relief for a claim that he titled "Right of Attribution—Equitable

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<sup>1</sup> Led Zeppelin does not challenge on appeal that all of Wolfe's intellectual property rights, including the ownership interest in *Taurus*, were transferred to the Trust.

<sup>2</sup> The case was filed in the Eastern District of Pennsylvania and later transferred to the proper venue, the Central District of California. *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 589–90 (E.D. Pa. 2015).

Relief—Falsification of Rock n’ Roll History.” Skidmore’s claims are not based on the entire *Taurus* composition. Rather, Skidmore claims that the opening notes of *Stairway to Heaven* are substantially similar to the eight-measure passage at the beginning of the *Taurus* deposit copy:



The claimed portion includes five descending notes of a chromatic musical scale. These notes are represented on the piano as a set of adjacent black and white keys, from right to left. The beginning of *Stairway to Heaven* also incorporates a descending chromatic minor chord progression in A minor. However, the composition of *Stairway to Heaven* has a different ascending line that is played concurrently with the descending chromatic line, and a distinct sequence of pitches in the arpeggios, which are not present in *Taurus*.

Led Zeppelin disputed ownership, access, and substantial similarity. Led Zeppelin also alleged affirmative defenses, including independent creation, unclean hands, and laches.



At the close of discovery, Led Zeppelin moved for summary judgment. The district court granted the motion in part and denied it in part. The district court dismissed the claims against defendants John Paul Jones, Super Hype Publishing, and Warner Music Group because they had not performed or distributed *Stairway to Heaven* within the three-year statute of limitations period preceding the filing of the complaint. The district court also granted summary judgment to Led Zeppelin on Skidmore's "Right of Attribution—Equitable Relief: Falsification of Rock n' Roll History" claim. Although the claim was "creatively termed" and "inventive" according to the district court, a right of attribution claim under the Copyright Act extends only to visual arts.

The district court also ruled that under the 1909 Act, the scope of the copyright was circumscribed by the musical composition transcribed in the *Taurus* deposit copy. Thus, only the one-page *Taurus* deposit copy, and not a sound recording, could be used to prove substantial similarity between *Taurus* and *Stairway to Heaven*.

The district court granted Led Zeppelin's motion in limine to exclude *Taurus* sound recordings and expert testimony based on those recordings. The district court again concluded that the *Taurus* deposit copy, rather than any recordings of Spirit's performance of *Taurus*, formed the sole benchmark for determining substantial similarity. The district court found that there were triable issues of fact relating to ownership, access, substantial similarity, and damages.

Against the backdrop of these rulings, the trial lasted five days. Two key issues predominated: access to *Taurus* by Led Zeppelin band members and substantial similarity.

On the access question, the district court allowed Skidmore to play various sound recordings of *Taurus* for Page outside of the presence of the jury. Skidmore then examined Page on access in front of the jury. Page testified that he owned “a copy of the album that contains ‘Taurus,’ . . . in [his] collection,” while denying “any knowledge of ‘Taurus.’”

The substantial similarity question pitted two expert musicologists against each other. Skidmore’s expert, Dr. Alexander Stewart, analyzed, one by one, five categories of similarities. Dr. Stewart acknowledged that a chromatic scale and arpeggios are common musical elements. But he found *Taurus* and *Stairway to Heaven* to be similar because the descending chromatic scales in the two compositions skip the note E and return to the tonic pitch, A, and the notes in the scale have the same durations. Then he pointed to three two-note sequences—AB, BC, and CF#—that appear in both compositions. In his view, the presence of successive eighth-note rhythms in both compositions also made them similar. Finally, he testified that the two compositions have the same “pitch collection,” explaining that certain notes appear in the same proportions in the beginning sequence of both works.

In sum, Dr. Stewart claimed that five musical elements in combination were copied because these elements make *Taurus* unique and memorable, and these elements also appear in *Stairway to Heaven*. Skidmore’s closing argument reinforced these points. Neither Dr. Stewart nor Skidmore’s counsel argued that the categories of similarities were selected and arranged to form protectable expression in the design, pattern, or synthesis of the copyrighted work. Nor did they make a case that a particular selection and

arrangement of musical elements were copied in *Stairway to Heaven*.

Led Zeppelin's expert, Dr. Lawrence Ferrara, testified that the two compositions are completely distinct. To highlight the marked differences in the compositions, he presented the following exhibit, which juxtaposed the claimed portion of *Taurus* against *Stairway to Heaven*:<sup>3</sup>

#### MUSICAL EXAMPLE 1

Four-measure chord progressions

Top two lines = Section A in "Taurus" with note values halved

Lower two lines = Measures 1-4 in "Stairway"

The musical notation is presented in two systems, each with a grand staff (treble and bass clefs). The top system represents Section A of "Taurus" with halved note values. It consists of four measures with the following chords: Am, Ab+ (G#-), C/G, and Gb#7 (F#b7). The fifth measure is marked "N.C." (No Chord) and the sixth measure is A5. The bottom system represents measures 1-4 of "Stairway to Heaven". It also consists of four measures with the following chords: Am, G#-, C/G, D/F#, F#maj7, and G/B Am. The notation shows the specific notes and rests for each measure, allowing for a side-by-side comparison of the two compositions.

Dr. Ferrara testified that the similarities claimed by Skidmore either involve unprotectable common musical elements or are random. For example, Dr. Ferrara explained that the similarity in the three two-note sequences is not musically significant because in each song the sequences

<sup>3</sup> The duration of the notes in the *Taurus* deposit copy are halved in this exhibit to allow a side-by-side comparison of the two compositions.

were preceded and followed by different notes to form distinct melodies. He described the purported similarity based on these note sequences as akin to arguing that “crab” and “absent” are similar words because they both have the letter pair “ab.” He also testified that the similarity in the “pitch collection” is not musically meaningful because it is akin to arguing that the presence of the same letters in “senator” and “treason” renders the words similar in meaning.

At the close of trial, the district court discussed with counsel the intended jury instructions. The district court did not give the proposed instructions on the inverse ratio rule and the selection and arrangement of unprotectable elements. Skidmore objected to the district court’s decision to omit an inverse ratio instruction but did not do so as to the omitted selection and arrangement instruction.

The jury returned a verdict for Led Zeppelin. In special interrogatories, the jury found that Skidmore owned the copyright to *Taurus* and that Led Zeppelin had access to *Taurus*, but that the two songs were not substantially similar under the extrinsic test. Following the verdict, the district court entered a judgment and an amended judgment.<sup>4</sup> Skidmore did not file any post-judgment motions challenging the verdict, but timely appealed from the amended judgment.

Significantly, Skidmore does not make a substantial evidence claim. Instead, he focuses on a handful of legal

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<sup>4</sup> The district court amended the judgment to include all defendants, including those to whom the district court granted summary judgment. Skidmore appeals from the amended judgment related to Led Zeppelin and related parties, but waived any argument regarding the defendants who prevailed at summary judgment.

issues, challenging: (1) the ruling that substantial similarity must be proven using the copyright deposit copy; (2) the ruling that sound recordings could not be played to prove access; (3) various jury instructions; (4) the imposition of overall time limits for the trial; (5) the fact that the full version of *Taurus* was played in response to the jury's request; and (6) the decision not to exclude or sanction Dr. Ferrara because of a claimed conflict of interest.

Warner/Chappell filed separate motions for attorneys' fees and costs, which the district court denied. Warner/Chappell timely cross-appealed and the two appeals were consolidated.

A panel of our court vacated the amended judgment in part and remanded for a new trial. We granted rehearing en banc.<sup>5</sup> *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018), *reh'g en banc granted*, 925 F.3d 999 (9th Cir. 2019).

## ANALYSIS

### I. THE 1909 COPYRIGHT ACT

The world of copyright protection for music changed dramatically during the twentieth century and those changes dictate our analysis here. The baseline issue we address is the scope of Wolfe's copyright in the unpublished composition *Taurus*, which was registered in 1967, between the passage of the Copyright Act of 1909 ("1909 Act") and

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<sup>5</sup> In connection with en banc proceedings, we received thoughtful amicus briefs from a broad array of interested groups, including intellectual property and musicology scholars; songwriters, composers, musicians, and producers; recording companies and music publishers; rights holders; and the U.S. government. We thank amici for their participation.

the sweeping copyright reform adopted in the Copyright Act of 1976 (“1976 Act”). We conclude that the 1909 Act controls and that the deposit copy defines the scope of the *Taurus* copyright.

**A. THE HISTORY OF COPYRIGHT PROTECTION FOR  
MUSICAL COMPOSITIONS AND SOUND  
RECORDINGS**

Although it seems unthinkable today, musical compositions were not explicitly subject to copyright in the United States until 1831, when Congress added “musical composition” to the list of statutorily protected works. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1909). Thus, the “musical composition,” which was understood to be a printed form of the music, joined the statutory protection afforded to dramatic compositions, maps, charts, engraving, photographs and other works.

Between 1831 and the early 1900s, a number of machines were invented that allowed mechanical reproduction of a musical composition. *Goldstein v. California*, 412 U.S. 546, 564 (1973). With the advent of player pianos at the turn of the century, the question arose whether copyright protection extended to the infringement of musical compositions by perforated piano rolls.<sup>6</sup> The Supreme Court held that the copyright statute barred the unauthorized copying of a musical composition “in intelligible notation,” but that it would be “strained and artificial” to consider musical sounds coming from an

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<sup>6</sup> A piano roll is “a roll, usually of paper, on which music is preserved in the form of perforations; it is recorded and played back mechanically on a player piano or pianola.” *Piano(la) roll*, The New Grove Dictionary of Jazz (Barry Kernfeld ed., 1994).

instrument to be a copy. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17–18 (1908). Justice Holmes commented in his concurrence that “[o]n principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act.” *Id.* at 20.

Congress stepped in to remedy the situation, perhaps heeding Justice Holmes’s call. The Copyright Act of 1909—landmark legislation that significantly revised copyright law—categorized mechanically-reproduced musical compositions, such as those played on player pianos and phonograph players, as “copies” of the original composition. 1909 Act, ch. 320, § 1(e), 35 Stat. 1075, 1075 (1909) (repealed 1976).

The statute provided copyright protection against “any arrangement or setting of [the musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.” *Id.* Skidmore seizes on this language to argue that the new legislation extended copyright protection beyond sheet music. The text does not support this reading. Although the 1909 Act extended copyright protection against infringement beyond the mere reproduction of the sheet music, Congress did not provide that copyrighted works could be anything other than sheet music or, for an unpublished work, the musical composition transcribed in the deposit copy. 1909 Act §§ 5, 11.

The Court reinforced this principle in *Goldstein v. California* when it noted that the amendments insured that *composers* of *original* musical works received adequate protection, and that “records and piano rolls were to be considered as ‘copies’ of the original composition . . . , and could not be manufactured” without a specified royalty

payment. 412 U.S. at 565–66. The Court emphasized that “composers were to have no control over the recordings themselves,” which Congress considered “a component part of a machine, capable of reproducing an original composition,” or “renderings of original artistic performance.” *Id.* at 566.

Requiring more formalities than the current copyright act, the procedures for obtaining copyright protection under the 1909 Act were very specific. 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. 1909 Act § 11. In contrast, protection for a published work could be secured by affixing a copyright notice “to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor.” *Id.* § 9. Either way, distributing sound recordings did not constitute publication under the 1909 Act, so musical compositions were only published if the sheet music also was published. *See ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000). Significantly, the Copyright Office did not even accept sound recordings as deposit copies. Indeed, “in order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.” 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (“Nimmer”) § 2.05[A] (2017).

Sound recordings did not become subject to copyright protection until 1972, and then only for the sound recordings fixed on or after February 15, 1972. 17 U.S.C. § 301(c). The amendment did nothing to change the requirements of the 1909 Act or the status of the *Taurus* copyright.

The copyright requirements were changed dramatically by the 1976 Copyright Act, which provided that public



distribution of a sound recording qualified as publication of a musical composition. *Id.* § 101. In other words, composers could submit a recording rather than sheet music as the deposit copy for a musical composition. The catch, for this case, is that publication before the 1978 effective date is not covered by the new statute.

### **B. THE *TAURUS* DEPOSIT COPY**

The 1967 deposit copy of *Taurus* is a single page of sheet music. Skidmore suggests that the copyright extends beyond the sheet music; that is, the deposit copy is somehow archival in nature and more of a reference point than a definitive filing. This approach ignores the text of the statute and the purpose of the deposit.

We have outlined copyright protection under the 1909 Act as follows: “[A]n unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.” *ABKCO*, 217 F.3d at 688 (quoting *LaCienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995)). The referenced federal copyright protection for unpublished works is found in the text of the statute: “copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a . . . musical composition . . .” 1909 Act § 11.

The text is clear—for unpublished works, the author must deposit one *complete copy* of such work. The purpose of the deposit is to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (the deposit requirement provides the “Copyright

Office with sufficient material to identify the work in which the registrant claims a copyright . . . [and] prevent[s] confusion about which work the author is attempting to register”), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 71 (1961) (one of the purposes of the deposit is “to identify the work” being registered).

Even before the 1909 Act, the Supreme Court stated that one objective of the deposit was to permit inspection by other authors “to ascertain precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561 (1881). At the time that *Taurus* was registered, the Copyright Office’s practice regarding applications to register unpublished musical compositions was to consider “writ[ing] to the applicant, *pointing out that protection extends only to the material actually deposited*, and suggesting that in his own interest he develop his manuscript to supply the missing element.” *Compendium of Copyright Office Practices* (“*Copyright Office Compendium*”) § 2.6.1.II.a (1st ed. 1967) (emphasis added). The inescapable conclusion is that the scope of the copyright is limited by the deposit copy.

The practical treatment of deposit copies underscores their importance. The 1909 Act prohibits destruction of copies of unpublished works without notice to the copyright owner. 1909 Act §§ 59–60. Buttressing this protection, the Register of Copyright’s policy is to retain access to the deposit copies of unpublished works for the full copyright term. *See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* at 80–81.

The cases Skidmore cites to suggest that the content of the deposit copy may be supplemented are not instructive. *See, e.g., Washingtonian Publ’g Co. v. Pearson*, 306 U.S.

30, 41–42 (1939) (addressing the failure to promptly submit a deposit copy for a *published* work); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486–87 (9th Cir. 2000) (addressing whether an incomplete deposit copy contained the “essential elements” of the musical composition such that subject matter jurisdiction was proper). Nor do the cases analyzing the 1976 Act illuminate the copyright scope question under the 1909 Act. *See Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009); *Nat’l Conference of Bar Exam’rs v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 482–83 (7th Cir. 1982).

Although Skidmore offers a host of reasons why adherence to the statute complicates proof in copyright cases, these arguments cannot overcome the statutory requirements. For example, Skidmore claims that it is impractical to compare a sound recording of the infringing work to a deposit copy of the infringed work, even though that is precisely what happened here, and experts for both sides were confident in their analysis. Indeed, during the trial, Skidmore’s master guitarist, Kevin Hanson, performed the *Taurus* deposit copy as he interpreted it.

Skidmore also complains that restricting protection to the deposit copy disadvantages musicians who do not read music because it can be time consuming and expensive to make an accurate deposit copy. Apparently, that was not a problem here, as Wolfe’s work was transcribed for the sheet music deposit. Digital transcription and other technological advances undercut this argument, not to mention that for decades now, sound recordings have been accepted as the deposit copy. Finally, Skidmore offers conjecture about what might happen if a deposit copy were lost or destroyed. We need not play this “what if” guessing game because the statute is clear and unambiguous.

The district court correctly concluded that under the 1909 Act, which controls the copyright registration in this case, the *Taurus* deposit copy circumscribes the scope of the copyright. Because the deposit copy defines the four corners of the *Taurus* copyright, it was not error for the district court to decline Skidmore's request to play the sound recordings of the *Taurus* performance that contain further embellishments or to admit the recordings on the issue of substantial similarity.

## II. ELEMENTS OF COPYRIGHT INFRINGEMENT

Proof of copyright infringement requires Skidmore to show: (1) that he owns a valid copyright in *Taurus*; and (2) that Led Zeppelin copied protected aspects of the work. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). Skidmore's ownership of a valid copyright in *Taurus* was not challenged on appeal.

The second prong of the infringement analysis contains two separate components: “copying” and “unlawful appropriation.” *Rentmeester*, 883 F.3d at 1117. Although these requirements are too often referred to in shorthand lingo as the need to prove “substantial similarity,” they are distinct concepts.

Because independent creation is a complete defense to copyright infringement, a plaintiff must prove that a defendant copied the work. *Feist*, 499 U.S. at 345–46. In the absence of direct evidence of copying, which is the case here, the plaintiff “can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff's work and that the two works share similarities probative of copying.” *Rentmeester*, 883 F.3d at 1117. This type of probative or striking similarity shows that the similarities

between the two works are due to “copying rather than . . . coincidence, independent creation, or prior common source.” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (omission in original) (quoting 4 Nimmer § 13.02[B]). A finding of such similarity may be based on the overlap of unprotectable as well as protectable elements. *Rentmeester*, 883 F.3d at 1117.

On the other hand, the hallmark of “unlawful appropriation” is that the works share *substantial* similarities. *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). In our circuit, we use a two-part test to determine whether the defendant’s work is substantially similar to the plaintiff’s copyrighted work. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). The first part, the extrinsic test, compares the objective similarities of specific expressive elements in the two works. *Id.* Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, “it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). The second part, the intrinsic test, “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)). Both tests must be satisfied for the works to be deemed substantially similar. *See Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

### III. EVIDENTIARY CHALLENGE—THE COPYING PRONG OF INFRINGEMENT

At trial, one of Skidmore’s key arguments was that Led Zeppelin members heard either performances or recordings of *Taurus* before creating *Stairway to Heaven*, and thus had access for purposes of copying the music. To prove that point, Skidmore wanted to play several recordings of *Taurus* during the testimony of Jimmy Page, claiming that *observing* Page *listening* to the recordings would have enabled the jury to evaluate his demeanor with respect to access. Skidmore’s counsel explained that the recordings could be offered to prove access, even if the court excluded them for proving substantial similarity. The district court determined that although the sound recordings were relevant to prove access, Skidmore’s approach would be “too prejudicial for the jury” because it risked confusing access with substantial similarity. Hence the court excluded the recordings under Federal Rule of Evidence 403. The court instead permitted Skidmore’s counsel to play the recordings for Page outside the presence of the jury and then question him about the recordings in front of the jury.

Skidmore’s position is a curious one and defies common sense. There 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. To prevent the jury from making an erroneous comparison for determining substantial similarity, the court properly excluded the sound recording, which contains performance elements that are not protected by the *Taurus* deposit copy. Indeed, the court’s exclusion ruling displayed a clear understanding of the distinct components of copying and unlawful appropriation, letting the evidence in “as far as

access,” but “not . . . to compare the performance” to *Stairway to Heaven*.

In any event, the evidentiary question is moot. It turns out Skidmore’s examination of Page on access proved fruitful. When Page testified, he candidly admitted to owning “a copy of the album that contains ‘Taurus,’ . . . in [his] collection,” though still denying “any knowledge of ‘Taurus.’” The jury found that both Page and Plant “had access to the musical composition Taurus before *Stairway to Heaven* was created.” Once the jury made that finding, the remaining questions on the jury verdict form related to substantial similarity of the works.

In answer to the question of whether “original elements of the musical composition Taurus are extrinsically similar to *Stairway to Heaven*,” the jury said no. Because the extrinsic test was not satisfied, the jury did not reach the intrinsic test. Although these findings ended the jury’s copyright analysis, Skidmore also challenges various trial rulings.

#### IV. THE JURY INSTRUCTION CHALLENGES

Three jury instructions are at issue in this appeal: (1) the failure to give an inverse ratio rule instruction; (2) the sufficiency of the court’s originality instructions; and (3) the failure to give a selection and arrangement instruction. We review for abuse of discretion the district court’s formulation of the instructions and review *de novo* whether the instructions accurately state the law. *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 941 (9th Cir. 2011). We consider the issued instructions as a whole, but reversal is not warranted if “the error is more probably than not harmless.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 802, 805 (9th Cir. 2001) (quoting *Caballero v. City of*

*Concord*, 956 F.2d 204, 206 (9th Cir. 1992)). “[W]hen a litigant in a civil trial fails to object to a jury instruction, we may review the challenged jury instruction for plain error.” *Chess v. Dovey*, 790 F.3d 961, 970 (9th Cir. 2015).

#### **A. THE INVERSE RATIO RULE**

Copyright infringement cases often boil down to the crucial question of substantial similarity. We have stated that “substantial similarity is inextricably linked to the issue of access,” and have adhered to “what is known as the ‘inverse ratio rule,’” which requires “a lower standard of proof of substantial similarity when a high degree of access is shown.” *Three Boys Music*, 212 F.3d at 485 (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). That is, “the stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying.” *Rentmeester*, 883 F.3d at 1124.

Skidmore proposed an inverse ratio rule instruction, but the court chose not to give the instruction. The court reaffirmed this decision when Skidmore raised the question again after the close of testimony: “We’re not going to give that instruction.” Because the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary. *See e.g., Three Boys Music*, 212 F.3d at 485–86; *Shaw v. Lindheim*, 919 F.2d 1353, 1361–62 (9th Cir. 1990).

The circuits are split over the inverse ratio rule, but the majority of those that have considered the rule declined to adopt it. The Second, Fifth, Seventh, and Eleventh Circuits have rejected the rule. *Peters v. West*, 692 F.3d 629, 634–35



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(7th Cir. 2012) (noting that the circuit has never endorsed the idea that “a ‘high degree of access’ justifies a ‘lower standard of proof’ for similarity”); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 371 (5th Cir. 2004) (acknowledging the rule but explicitly not adopting it), *abrogated on other grounds by Reed Elsevier*, 559 U.S. 154; *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994); *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961). Only our circuit and the Sixth Circuit have endorsed it.<sup>7</sup> See *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004); see also *Peters*, 692 F.3d at 634 (similarly describing the split).

But even within our circuit, our embrace and application of the rule have had a “checkered application.” 4 Nimmer § 13.03[D]. The very nature of the rule spawned uncertainty in its application. We first articulated the rule in 1977, holding that the high “degree of access” present in that case “justifie[d] a lower standard of proof to show substantial similarity,” though “[n]o amount of proof of access will suffice to show copying if there are no similarities.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977), *superseded on other grounds by* 17 U.S.C. § 504(b). In its next breath, the court in *Krofft* admitted that “it is impossible to quantify this standard,” so it is unsurprising that the court was unclear—failing to explain whether the rule applied to the actual copying or unlawful appropriation prong of the infringement analysis. *Id.*; see David Aronoff, *Exploding the “Inverse Ratio Rule,”* 55 J. Copyright Soc’y U.S.A. 125, 136 (2008)

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<sup>7</sup> The Federal Circuit has applied the rule, but only because it “applies copyright law as interpreted by the regional circuits, in this case . . . the Ninth Circuit.” *Amini Innovation Corp. v. Anthony Cal., Inc.*, 439 F.3d 1365, 1368–69 (Fed. Cir. 2006).

(“[T]he court [in *Krofft*] was confused as to whether the [inverse ratio rule] applied to the element of actual copying or unlawful appropriation . . .”).

A decade later, we reversed course and distanced ourselves from *Krofft*, relying on the Second Circuit’s rejection of the inverse ratio rule in *Arc Music*. See *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987). According to *Aliotti*, because the rule “ha[d] been employed by no Ninth Circuit case since *Krofft* and had been earlier criticized for ‘confus[ing] and even conceal[ing]’ the requirement of substantial similarity,” the court declined to “address the continuing viability of” the rule. *Id.* (alteration in original) (quoting *Arc Music*, 296 F.2d at 187–88). But *Aliotti* was a momentary detour. We later returned to the inverse ratio rule and, in a series of cases throughout the 1990s and early 2000s, applied it in confusing ways.

Revitalizing *Krofft*, we several times affirmed that the rule guided our analysis of similarity. See, e.g., *Three Boys Music*, 212 F.3d at 485–86; *Smith*, 84 F.3d at 1218 & n.5; *Shaw*, 919 F.2d at 1361–62. Even so, we did not explain *how* to apply the rule. See Aronoff, *supra*, at 137 (applying the rule in the context of the unlawful appropriation analysis, “the court did not articulate how [access] is to be considered, or the weight it is to be given”).

The lack of clear guidance is likely due in no small part to our use of the term “substantial similarity,” both in the context of copying and unlawful appropriation, muddying the waters as to what part of the infringement analysis the rule applies. See 3 William F. Patry, *Patry on Copyright* (“Patry”) § 9.91 (2017) (“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.”). In *Rentmeester*, we pointed out the term’s dual use and ultimately stated that the inverse ratio rule “assists only in proving copying, not in proving unlawful appropriation.” 883 F.3d at 1124.

Capping off this period of expansion, we even pushed past the rule’s outer limits set forth in *Krofft*, *i.e.*, that “[n]o amount of proof of access will suffice to show copying if there are no similarities.” 562 F.2d at 1172. In *Metcalf v. Bochco*, though we did not explicitly name the rule, we held that because access was not disputed, we “could easily infer that the many [generic] similarities between [the works] were the result of copying, not mere coincidence.” 294 F.3d 1069, 1074–75 (9th Cir. 2002).

Confusion followed in *Metcalf*’s wake. In one case, we tried to cabin *Metcalf* to cases where there was a clear “concession of access.” *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178–79 (9th Cir. 2003). In other cases, where access was assumed (though not conceded), we “side-stepped” *Metcalf* and held that the similarities between works were insufficient to support a conclusion of copying. Aronoff, *supra* at 139; *see e.g.*, *Funky Films*, 462 F.3d at 1081 n.4; *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010). The result?—confusion about when to apply the rule and the amount of access and similarity needed to invoke it.

Our jurisprudence in recent years brought additional uncertainty. In 2000, we circumscribed the rule by explaining that it is not a two-way street: while the rule “requires a lesser showing of substantial similarity if there is a strong showing of access,” it does not mean that “a weak showing of access requires a stronger showing of substantial

similarity.” *Three Boys Music*, 212 F.3d at 486. In 2018, it seems, the rule goes both ways: it also provides that the “more compelling the similarities supporting an inference of copying, the less compelling the evidence of access need be.” *Rentmeester*, 883 F.3d at 1124.<sup>8</sup> In the face of tangled precedent, the *Rentmeester* panel tried to carefully thread the needle, but ended up adding another indecipherable stitch.

Just two years ago, we again sowed doubt whether the rule ought to apply at all. In *Williams v. Gaye*, which dealt with the song *Blurred Lines*, the majority initially defended use of the rule against the dissent’s criticism because the rule is “binding precedent” that “we are bound to apply.” 885 F.3d 1150, 1163 n.6 (9th Cir. 2018). But in an amended opinion, the court deleted all references to the rule. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). One commentator posited the rule was excised because it “is so controversial.” Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. Cal. L. Rev. Postscript 67, 75 n.22 (2018).

As we struggled with the inverse ratio rule over the years, the Second Circuit rejected it as early as 1961, describing the idea as a “superficially attractive apophthegm which upon examination confuses more than it clarifies.” *Arc Music*, 296 F.2d at 187. The court reasoned that “access will not supply [similarity’s] lack, and an undue stress upon that one feature can only confuse and even conceal this basic requirement.” *Id.* at 187–88. Importantly, the Second

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<sup>8</sup> The Ninth Circuit Model Jury Instructions Copyright § 17.17 (2017)—Copying—Access and Substantial Similarity—and the *Supplemental Instruction* suffer from similar infirmities in trying to reconcile the case law.

Circuit noted that there is “no such principle” in “the federal law of copyright.” *Id.* at 187.

The Second Circuit also identified the problematic implications of this principle where access is very high and similarity very low: “[t]he logical outcome of the claimed principle is obviously that proof of actual access will render a showing of similarities entirely unnecessary.” *Id.* However, “it does not follow that ‘more’ access increases the likelihood of copying.” Aronoff, *supra*, at 126. Yet that is what the rule compels. Complete access without any similarity should never result in infringement liability because there *is* no infringement. Even so, the rule suggests that liability may be imposed in such a case. “There is,” however, “simply no logic in presupposing that the mid-points of [the rule] give rise to a ‘ratio’ of access to similarity constituting proof of” infringement. *Id.* at 141. Indeed, even “[w]hen the inverse ratio rule is applied, we still don’t know how much similarity is required.” Patry § 9.91.

The flaws in the rule can be seen in the inconsistent ways in which we have applied the rule within our circuit, the logic of the circuits that have rejected the rule, and analysis by academics and commentators. *See id.* (“There is nothing positive that can be said about a rule that lacks any clarity at all: trying to get a jury to both understand the rule and apply it properly is totally impossible.”).

As a practical matter, the concept of “access” is increasingly diluted in our digitally interconnected world. Access is often proved by the wide dissemination of the copyrighted work. *See Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). Given the ubiquity of ways to access media online, from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand. *See Brooks*

Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. Times, Nov. 18, 2019 (In addition to Netflix, which “entertain[s] more than 158 million subscribers worldwide,” there are currently “271 online video services available in the United States”).

To the extent “access” still has meaning, the inverse ratio rule unfairly advantages those whose work is *most* accessible by lowering the standard of proof for similarity. Thus the rule benefits those with highly popular works, like *The Office*, which are also highly accessible. But nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.

Finally, the inverse ratio rule improperly dictates how the jury should reach its decision. The burden of proof in a civil case is preponderance of the evidence. Yet this judge-made rule could fittingly be called the “inverse burden rule.”

Although 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. Access does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work. By rejecting the inverse ratio rule, we are not suggesting that access cannot serve as circumstantial evidence of actual copying in all cases; access, however, in no way can prove substantial similarity. We join the majority of our sister circuits that have considered the inverse ratio rule and have correctly chosen to excise it from copyright analysis. In light of this holding, the district court did not err in failing to instruct the jury on the inverse ratio rule.

## B. THE ORIGINALITY INSTRUCTIONS

Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality. *Feist*, 499 U.S. at 345 (“The *sine qua non* of copyright is originality”; “[t]he vast majority of works make the grade quite easily . . . .”); *see also* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship . . . .”).

Even in the face of this low threshold, copyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. *See* 17 U.S.C. § 102(b); *Feist*, 499 U.S. at 345–46. Nor does copyright extend to “common or trite” musical elements, *Smith*, 84 F.3d at 1216 n.3, or “commonplace elements that are firmly rooted in the genre’s tradition,” *Williams*, 895 F.3d at 1140–41 (Nguyen, J., dissenting). These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author. *See Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (“[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law”). Authors borrow from predecessors’ works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works. *See id.* at 813 (“we must be careful in copyright cases not to cheat the public domain”); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (“General ideas . . . remain forever the common property of artistic mankind.”); 1 Nimmer § 2.05[B] (“In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.”). With



these background principles in mind, we review the district court's instructions on originality, Nos. 16 and 20.<sup>9</sup>

Jury Instruction No. 16 explained "what a copyright is, what it protects, and what it does not protect."<sup>10</sup> Relevant

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<sup>9</sup> By filing proposed originality instructions and objecting to Led Zeppelin's versions, Skidmore preserved his objection to the originality instructions given by the district court. *See* Fed. R. Civ. P. 51(c)(1); C.D. Cal. Local Rule 51-1, -5.

<sup>10</sup> Jury Instruction No. 16 reads in full as follows:

Plaintiff has filed a claim against Defendants for violation of the United States Copyright Act, which governs this case. In order for you to undertake your responsibility, you must know what a copyright is, what it protects, and what it does not protect.

Copyright confers certain exclusive rights to the owner of a work including the rights to:

1. Reproduce or authorize the reproduction of the copyrighted work;
2. Prepare derivative works based upon the copyrighted work.
3. Distribute the copyrighted work to the public; and
4. Perform publicly a copyrighted musical work.

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.

to this appeal, the instruction provided that “[c]opyright only protects the author’s original expression in a work.” This statement comes straight from the Supreme Court’s opinion in *Feist*. The instruction went on to state that copyright “does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.” Although this statement is derived from *Smith*, Skidmore objects to the list of unprotectable elements. In particular, he argues that characterizing the “descending chromatic scales, arpeggios or short sequence of three notes” as examples of “common musical elements” was prejudicial to him.

To put this instruction in context, it is useful to outline the essence of the “common musical elements” or building blocks. The chromatic scale is one of two principal scales in Western music. It consists of twelve pitches separated by a half-step. On a piano, this means playing the white and black keys in order from left to right. Three or more notes or pitches sounded simultaneously are called chords, and an arpeggio, sometimes called a broken chord, is “[a] chord whose pitches are sounded successively, . . . rather than simultaneously.” *Arpeggio, Chromatic, and Chord, Harvard Dictionary of Music* (Don Michael Randel ed., 4th ed. 2003).

To conduct a copyright infringement analysis, the factfinders ask “whether ‘the *protectible elements, standing alone*, are substantially similar’” and “disregard the non-

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Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.

protectible elements.” *Cavalier*, 297 F.3d at 822 (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)); see *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994) (same). Jury Instruction No. 16 correctly listed non-protectable musical building blocks that no individual may own, and did not, as Skidmore claims, exclude the particular use of musical elements in an original expression.

For example, despite Skidmore’s challenge to the characterization of descending chromatic scales as unprotectable, even his own expert musicologist, Dr. Stewart, agreed musical concepts like the minor chromatic line and the associated chords have been “used in music for quite a long time” as “building blocks.” This candid acknowledgement was echoed by Led Zeppelin’s expert. Dr. Ferrara described the “chromatic scale, descending or ascending,” as “a musical building block. This is something that no one can possibly own.” The commonality of descending scales and arpeggios has been reinforced by the Copyright Office, which lists “[d]iatonic or chromatic scales” and “arpeggios” as common property musical material. *Copyright Office Compendium* § 802.5(A) (3d ed. 2017). Emphasizing the importance of original creation, the Copyright Office notes that “a musical work consisting entirely of common property material would not constitute original authorship.” *Id.* Just as we do not give an author “a monopoly over the note of B-flat,” descending chromatic scales and arpeggios cannot be copyrighted by any particular composer. *Swirsky*, 376 F.3d at 851.

We have never extended copyright protection to just a few notes. Instead we have held that “a four-note sequence common in the music field” is not the copyrightable expression in a song. *Granite Music Corp. v. United Artists*

*Corp.*, 532 F.2d 718, 721 (9th Cir. 1976). In the context of a sound recording copyright, we have also concluded that taking six seconds of the plaintiff’s four-and-a-half-minute sound recording—spanning three notes—is de minimis, inactionable copying. See *Newton*, 388 F.3d at 1195–96. One of our colleagues also expressed skepticism that three notes used in a song can be copyrightable by observing that of the “only 12<sup>3</sup> or 1,728 unique combinations of three notes,” not many would be useful in a musical composition. See *Williams*, 895 F.3d at 1144 n.6 (Nguyen, J., dissenting). The Copyright Office is in accord, classifying a “musical phrase consisting of three notes” as de minimis and thus not meeting the “quantum of creativity” required under *Feist*. *Copyright Office Compendium*, § 313.4(B) (3d ed. 2017). At the same time, we have not foreclosed the possibility that “seven notes” could constitute an original expression. *Swirsky*, 376 F.3d at 852. To the contrary, our sister circuit observed decades ago that “the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes.” *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936).

In view of our precedent and accepted copyright principles, the district court did not commit a reversible error by instructing the jury that a limited set of a useful three-note sequence and other common musical elements were not protectable.

The district court also instructed the jury on copyright originality in Jury Instruction No. 20, which states:

An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public

domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff's work is limited to the part created:

1. independently by the work's author, that is, the author did not copy it from another work; and
2. by use of at least some minimal creativity.

Despite Skidmore's claim that the following language has no support in the law and was prejudicial—"any element from prior works or the public domain are not considered original parts and not protected by copyright"—this is black-letter law. *See* 17 U.S.C. §§ 102(b), 103. Reading this sentence with the preceding one—an "original work may include or incorporate elements taken from prior works or works from the public domain"—we conclude that Jury Instruction No. 20 correctly instructed the jury that original expression can be the result of borrowing from previous works or the public domain.

Skidmore appears to want less than the law demands. In his closing and on appeal, he argued that a work is original as long as it was independently created. Not quite. Though not demanding, originality requires at least "minimal" or "slight" creativity—a "modicum" of "creative spark"—in addition to independent creation. *Feist*, 499 U.S. at 345–46, 362. Jury Instruction No. 20 correctly articulated both requirements for originality, that the work be created "independently by the work's author," and contain "at least some minimal creativity." The court's omission of the optional, bracketed language from the Ninth Circuit Model Jury Instruction 17.14 (2017)—which reads, "In copyright

law, the ‘original’ part of a work need not be new or novel”—was not a reversible error. The reference to “minimal creativity” in Jury Instruction No. 20 embraces this concept. Reviewing the jury instructions as a whole, we conclude that the originality instructions were sound and were not prejudicial to Skidmore.

### **C. THE OMISSION OF A SELECTION AND ARRANGEMENT INSTRUCTION**

#### **1. Skidmore Forfeited His Objection to the Omitted Selection and Arrangement Instruction**

The district court did not give what Skidmore denominates as a “selection and arrangement” instruction. Because Skidmore did not preserve his objection to the omission, we review for plain error.

Skidmore maintains that his objection was preserved by the timely filing of a proposed selection and arrangement instruction and by objecting to Led Zeppelin’s version. Not so. Federal Rule of Civil Procedure 51(d)(1)(B) provides that “a failure to give an instruction” must be both “properly requested . . . and . . . also properly objected [to].” An objection must be made “on the record,” “promptly after learning that the instruction or request will be . . . refused.” Fed. R. Civ. P. 51(c)(1), (c)(2)(B). Skidmore may have requested a selection and arrangement instruction, but he did not object to the district court’s decision to omit the instruction. In other words, Skidmore’s proffer of the instruction was necessary but not sufficient to preserve the objection. *See United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1184 (9th Cir. 1989) (objection waived where “counsel offered the . . . proposed instructions” but “no objection was made to the failure to give them”);

*Monroe v. City of Phoenix*, 248 F.3d 851, 858 (9th Cir. 2001) (objection waived where counsel “simply submitted a proposed jury instruction” but “failed to properly object at trial to the failure to give the proposed instruction”), *abrogated on other grounds by Scott v. Harris*, 550 U.S. 372 (2007).

Nor is this the type of situation where “it is obvious that in the process of settling the jury instructions the court was made fully aware of the objections of the party and the reasons therefor and further objections would be unavailing.” *Reed*, 884 F.2d at 1184. According to Skidmore, he could not object to the refused instruction because the district court forbade oral objections. The record tells a different story. Skidmore’s myriad other objections, all allowed by the district court, undermine his account of the procedure at trial. For example, Skidmore requested the omission of an instruction on a topic not presented to the jury; objected to the wording of several jury instructions; and proposed a new jury instruction. The court’s response was to entertain extensive discussion from the parties about the instructions, letting them state their objections “for the record.” Further, the court asked Skidmore to draft the proposed new instruction and bring it in the next day.

A parallel omission situation is illuminating. Skidmore objected to the court’s refusal to include a jury instruction on the inverse ratio rule. The judge overruled that objection without suggesting that he would not entertain others. Indeed, when raising the inverse-ratio objection, counsel said “one last thing,” implying that he had no other objections. In contrast, Skidmore did not object to the court’s refusal to include a jury instruction on selection and arrangement during the extensive discussion counsel and the court had on jury instructions. Nor did Skidmore object to

the omission of the selection and arrangement instruction before the jury was summoned the next morning.

Skidmore was responsible for compiling the court's final instructions, so he was well aware of what instructions were included and omitted. The court affirmatively engaged with Skidmore when he wanted to "make sure" that certain instructions had been included. Although Skidmore argues that the selection and arrangement theory was central to his infringement case, his conspicuous silence on the omission of what he claims to be a crucial instruction cannot be squared with the court's willingness to discuss specific instructions. On this record, it was not "obvious" that an objection to the failure to give a selection and arrangement instruction would be "unavailing."

In any case, there is a real possibility that the district court simply overlooked the instruction, and would have been willing to give one had the omission been brought to its attention. But absent notice and an objection, the district court cannot be expected to divine an objection to an omitted instruction. We do not impose such prescience on the district court in the face of the complicated, and often hurried, process of producing a final set of instructions. We noted long ago that the district court need not "rummage through . . . proposed instructions in an effort to discover potential objections to instructions not . . . given . . . ." *Bertrand v. S. Pac. Co.*, 282 F.2d 569, 572 (9th Cir. 1960). By not putting the district court on notice of an objection to a refused instruction, Skidmore forfeited his objection. Therefore, we apply plain error review. Fed. R. Civ. P. 51(d)(2).



## 2. The District Court Did Not Commit a Plain Error in Omitting the Instruction

Because Skidmore did not preserve his objection, we review the omission of a selection and arrangement instruction for “a plain error in the instructions . . . if the error affects substantial rights.” Fed. R. Civ. P. 51(d)(2); *see Chess*, 790 F.3d at 970. Under plain error review of a civil jury instruction, we consider whether “(1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights.” *C.B. v. City of Sonora*, 769 F.3d 1005, 1018 (9th Cir. 2014) (en banc). Even where these demanding requirements are met, “the decision whether to correct a plain error under Federal Rule of Civil Procedure 51(d)(2) is discretionary,” typically invoked only where “the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings” “to prevent a miscarriage of justice.” *Id.* at 1018–19.

Even if there was an error in not giving the instruction, and even assuming the error was plain, we cannot conclude that it produced a miscarriage of justice. The district court did not err in withholding the studio version of *Taurus* from the jury. A selection and arrangement instruction would not have convinced the jury that *Stairway to Heaven* was substantially similar to the deposit copy of *Taurus*. Therefore, the failure to give the selection and arrangement instruction cannot have “likely prejudiced the outcome of the case,” or “seriously impaired the fairness, integrity, or public reputation of judicial proceedings.” *Hoard v. Hartman*, 904 F.3d 780–787 (9th Cir. 2018) (internal quotation marks omitted). We may also take “into consideration ‘the costs of correcting [the] error,’” *id.* (quoting *C.B.*, 769 F.3d at 1018), and that factor clearly supports letting the jury verdict stand.

This case involved a lengthy trial, and there is little reason to have another trial that Skidmore cannot win.

“Rare is the case where the district court’s errors are so grave as to ‘seriously impair[ ] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 791 (alteration in original) (quoting *C.B.*, 769 F.3d at 1019); *see also Teixeira v. Town of Coventry ex rel. Przybyla*, 882 F.3d 13, 18 (1st Cir. 2018) (describing such errors as “hen’s-teeth rare”). This is not such a case. The district court did not commit a plain error in deciding not to give a selection and arrangement instruction.

### **3. Skidmore Did Not Present a Selection and Arrangement Theory**

Finally, we conclude that the district court did not commit any error. The fatal flaw in Skidmore’s argument that he was entitled to a selection and arrangement instruction is that he did not present that as a separate theory at trial. To be sure, a copyright plaintiff may argue “infringement . . . based on original selection and arrangement of unprotected elements.” *Metcalf*, 294 F.3d at 1074 (quoting *Apple Computer*, 35 F.3d at 1446). The supposed centrality of a selection and arrangement theory is belied by the trial record. Skidmore never once used the words “selection” or “arrangement” during trial. But we do not rest our discussion on invocation of copyright vernacular; more importantly, Skidmore never presented the argument to the jury. Nowhere did Skidmore argue that the claimed elements were selected and arranged in a particular way to create the resulting four-bar passage in Section A of the musical composition in *Taurus*. Nor was there a word in Skidmore’s closing about the selection and arrangement theory. Notably, our decision here is based on the trial

evidence and not an appellate adjudication of copyrightability.

At trial, Skidmore’s copyright infringement claim was based on the combination of five elements: minor chromatic line and associated chords; duration of pitches of minor chromatic line; melody placed over the descending chromatic line consisting of combination of arpeggios and two-note sequences; rhythm of steady eighth note beats; and pitch collection.

Skidmore and his expert underscored that the presence of these five musical components makes *Taurus* unique and memorable: *Taurus* is original, and the presence of these same elements in *Stairway to Heaven* makes it infringing. This framing is not a selection and arrangement argument. Skidmore never argued how these musical components related to each other to create the overall design, pattern, or synthesis. Skidmore simply presented a garden variety substantial similarity argument. Yet, Skidmore relies on the handful of times that his expert musicologist, Dr. Stewart, referred to the “unique and memorable” parts of the *Taurus* composition as a “combination” to argue that he made a selection and arrangement argument at trial, though not even this “combination” characterization was included in his closing.

Semantics do not characterize legal arguments—substance does. Skidmore does not contest that the selection and arrangement must itself be original to merit copyright protection. *See Feist*, 499 U.S. at 358. 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.” *Satava*, 323 F.3d at 811. Put another way, what

a selection and arrangement copyright protects is the *particular* way in which the artistic elements form a coherent pattern, synthesis, or design. See *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 850–51 (9th Cir. 2012) (“original selection, coordination, and arrangement” that result in the overall “design” are protectable); *Metcalf*, 294 F.3d at 1074 (“Each note in a scale . . . is not protectable, but a pattern of notes in a tune may earn copyright protection.”); *United States v. Hamilton*, 583 F.2d 448, 452 (9th Cir. 1978); see also *Feist*, 499 U.S. at 350–51; *Rentmeester*, 883 F.3d at 1119.

Skidmore and his experts never argued to the jury that the claimed musical elements cohere to form a holistic musical design. Both Skidmore’s counsel and his expert confirmed the separateness of the five elements by calling them “five categories of similarities.” These disparate categories of unprotectable elements are just “random similarities scattered throughout [the relevant portions of] the works.” *Shaw*, 919 F.2d at 1362 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)). Labeling them a “combination” of unprotectable elements does not convert the argument into a selection and arrangement case.<sup>11</sup> Skidmore’s selection and arrangement argument fails because a copyright plaintiff “d[oes] not make an argument based on the overall selection and sequencing of

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<sup>11</sup> Skidmore misconstrues *Swirsky*’s observation that we have upheld “a jury finding of substantial similarity based on the combination of five otherwise unprotectable elements.” 376 F.3d at 849. There, the court was trying to fathom which aspects of a musical composition can be used for a similarity analysis, given that no definitive list of musical elements existed in the case law. Properly read, *Swirsky* left open the possibility that five or more different musical elements may be analyzed for a substantial similarity analysis, not that a set of five musical elements is always sufficient to find infringement. *Id.*

... similarities,” if the theory is based on “*random* similarities scattered throughout the works.” *Metcalf*, 294 F.3d at 1074–75 (quoting *Cavalier*, 297 F.3d at 825); *see also Litchfield*, 736 F.2d at 1356 (same). 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. *Satava*, 323 F.3d at 811–12. Without such arrangement, there is no liability for taking “ideas and concepts” from the plaintiff’s work, “even in combination.” *Rentmeester*, 883 F.3d at 1122–23.

Skidmore misconstrues what the copyright law means by a “combination,” “compilation,” and “selection and arrangement” of unprotectable elements. The word “combination” cannot mean any “set” of artistic building blocks. We have explained that only the “*new* combination,” that is the “*novel* arrangement,” *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947) (emphasis added), and not “*any* combination of unprotectable elements ... qualifies for copyright protection,” *Satava*, 323 F.3d at 811. Likewise, a protectable “compilation” is the precise “result[]” that is “formed by the collection and assembling of preexisting materials ... that are selected, coordinated, or arranged.” 17 U.S.C. § 101.

Therefore, a selection and arrangement copyright is infringed only where the works share, in substantial amounts, the “particular,” *i.e.*, the “same,” combination of unprotectable elements. *Feist*, 499 U.S. at 349, 350–51. A plaintiff thus cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work, in a different aesthetic context. Because many works of art can be recast

as compilations of individually unprotected constituent parts, Skidmore’s theory of combination copyright would deem substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors. We have already rejected such a test as being at variance with maintaining a vigorous public domain. *See, e.g., Shaw*, 919 F.2d at 1362–63.

To the extent Skidmore’s combination theory was meant to encompass or be a variation on the theme of the selection and arrangement claim, the jury was adequately instructed, as noted below. To the extent Skidmore now claims the selection and arrangement theory was a separate claim, he never articulated that theory at trial. But, in any event, any omission was not in error. The trial court was not compelled to give the instruction, nor did it really matter in the end in light of the evidence and the jury’s finding that the relevant portions of the songs were not substantially similar.

Ultimately, failure to properly invoke a selection and arrangement argument is a death knell for Skidmore’s request for a selection and arrangement instruction. He is not entitled to an instruction based on a legal theory that was not presented to the jury. *See Roberts v. Spalding*, 783 F.2d 867, 873 (9th Cir. 1986) (“[T]he district court was under no duty to submit to the jury proposed instructions that contain . . . a theory not supported by the evidence . . .”).<sup>12</sup> The

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<sup>12</sup> That both Skidmore and Led Zeppelin proposed their own version of a selection and arrangement instruction does not affect whether the district court was required to instruct the jury on the selection and arrangement theory. This just reflects the common practice of proposing, such as in this case several months ahead of trial, broad sets of jury instructions, trial exhibits, and witness lists that may cover an argument presented at trial. The court’s ultimate decision on instructions depends on the proof at trial.

district court committed no error by declining to instruct the jury on selection and arrangement.<sup>13</sup>

#### **4. The Jury Instructions Fairly Covered Skidmore’s Theory**

Even though the district court did not instruct the jury on selection and arrangement, its instructions, as a whole, fairly and adequately covered Skidmore’s argument for extrinsic similarity between *Taurus* and *Stairway to Heaven*. As discussed above, Jury Instruction No. 20 explained to the jury that an “original work may include or incorporate elements taken from prior works or works from the public

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<sup>13</sup> Led Zeppelin and several amici have argued that even if Skidmore is entitled to a selection and arrangement instruction, the standard to determine unlawful appropriation under this theory is “virtual identity,” not substantial similarity. We do not need to reach this issue because, as noted above, Skidmore has not made a sufficiency of evidence argument. But to be clear, we do not recognize a separate, heightened standard for proving actionable copying. The standard is always substantial similarity. Of course the degree of overlap in original expression that is required for the similarity to be substantial is determined by the range of possible protectable expression. See *Apple Comput.*, 35 F.3d at 1443. More similarities are required to infringe if the range of protectable expression is narrow, because the similarities between the two works are likely to cover public domain or otherwise unprotectable elements. See *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010). Thus, for works where there is a narrow range of available creative choices, the defendant’s work would necessarily have to be “virtually identical” to the plaintiff’s work in order to be substantially similar. We have at times described this result as the work having a “thin” copyright. E.g., *Apple Comput., Inc.*, 35 F.3d at 1446–47; see also *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989) (“A factual compilation receives only limited copyright protection.”). A selection and arrangement copyright is not always thin. Compare *L.A. Printex Indus.*, 676 F.3d at 850 (broad selection and arrangement copyright) with *Satava*, 323 F.3d at 811 (thin selection and arrangement copyright).

domain,” and that the “original part” of the work only requires “minimal creativity” by the author. This instruction was immediately followed by Jury Instruction No. 21, which explained that the taking of “original material protected by the copyright” in “significant” amounts constituted infringement. Accordingly, to determine whether the *Taurus* deposit copy was substantially similar to the musical composition of *Stairway to Heaven*, the jury needed to determine whether “any . . . musical elements that are original to *Taurus* . . . also appear in *Stairway to Heaven*.” The instructions fairly and adequately covered Skidmore’s sole argument on substantial similarity, *i.e.*, that there were “five things that these two songs ‘*Taurus*’ and ‘*Stairway to Heaven*’” shared.

## V. VARIOUS REMAINING CHALLENGES

### A. TRIAL TIME LIMITS

Based on pretrial proceedings and the scope of proposed testimony, before trial began, the district court advised the parties that each side would have ten hours of witness time. Neither party objected. Skidmore now complains the court’s inflexibility was a due process violation. During Led Zeppelin’s case in chief, the court advised that Skidmore’s counsel was exceeding his time limits. Skidmore requested “a little bit of leeway in getting additional time.” When the court gave Skidmore ten additional minutes for cross-examination of each of Led Zeppelin’s remaining witnesses, Skidmore’s counsel said, “[t]hat’s fair.” After Led Zeppelin concluded its case, Skidmore requested leave to call two rebuttal witnesses, though he did not identify them. There was no offer of proof and the request was denied.

The district court was not inflexible or unforgiving. Skidmore’s counsel was warned during the trial that he was



getting into “all kinds of background information and things that really aren’t relevant to this case.” The court gave extra time every day and in granting Skidmore extra time to examine defense witnesses, the court reminded counsel that his examination had been “repetitive,” included “many questions that were irrelevant,” and included “gaps . . . where [he] could have been presenting evidence.” Although the court said there was “no excuse and no reason to give [Skidmore] more time,” the court did so anyway. Skidmore has shown no prejudice from these rulings. The district court did not abuse its discretion in limiting trial time by being up front about the limits and then being flexible at counsel’s request. *See Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443, 450–51 (9th Cir. 1994).

#### **B. THE DISTRICT COURT’S RESPONSE TO JURY QUESTION**

During deliberation, the jury asked to listen to “1. Plaintiff’s audio of *Taurus* (guitar)” and “2. Plaintiff’s audio of *Stairway to Heaven* (guitar).” During trial, Skidmore’s witness, master guitarist Kevin Hanson, performed two versions of the *Taurus* deposit copy—one with just the bass clef part and one with the treble and bass clef parts together. Skidmore’s counsel argued that the jury should hear the bass-clef-only version because that version was played repeatedly during trial whereas the version with both parts “was never played . . . in full.” When the court asked the jury which version it wanted to hear, one juror said “Bass clef,” while the jury foreperson followed up and said “full copy.” No other juror spoke up or countermanded the foreperson’s request. The district court directed that the full deposit-copy version be played and asked if that answered the jury’s question. The foreperson replied, “thank you.” Skidmore made no objection at that point and the jury heard

the “full copy,” which includes both clefs in the introduction to the songs. The jury made no follow-up request. Skidmore waived any objection to the claim that there was a conflict between jurors and any error was harmless.

### C. ADMISSION OF DR. FERRARA’S TESTIMONY

Skidmore filed a motion for sanctions and to preclude Led Zeppelin’s expert musicologist, Dr. Ferrara, from testifying at trial. At his deposition, Dr. Ferrara testified that he had previously analyzed the similarities between *Taurus* and *Stairway to Heaven* sound recordings for Rondor Music (“Rondor”), a subsidiary of Universal Music Publishing Group. Universal Music Publishing Group was working for Hollenbeck, Spirit’s publisher. Dr. Ferrara explained that his analysis for Rondor had already been completed by the time he was contacted by Led Zeppelin’s counsel. Rondor waived any conflict and consented to Led Zeppelin retaining Dr. Ferrara as an expert witness.

As a preliminary matter, the district court denied Skidmore’s motion as improperly noticed, over the page limit, and untimely. On that basis alone, the district court’s ruling was not an abuse of discretion. But even without these infirmities, the district court did not err in denying the motion. Skidmore’s challenge is based on a purported conflict of interest that made it improper for Dr. Ferrara to testify for Led Zeppelin without disclosing the conflict or obtaining a waiver from Skidmore.

This argument fails because there was no conflict of interest. Although Rondor waived any potential conflict from having Dr. Ferrara testify on behalf of Led Zeppelin, even that is immaterial because Rondor does not have any interest in this litigation. Skidmore contends that Rondor’s parent, Universal Music, was working for Hollenbeck, an

entity that owed a fiduciary duty to Skidmore as a publisher of Spirit's music. But a music publisher does not have a fiduciary relationship with its composers, absent special circumstances. *See Cafferty v. Scotti Bros. Records, Inc.*, 969 F. Supp. 193, 205 (S.D.N.Y. 1997). Skidmore made no showing of any special circumstances, or that Hollenbeck was a fiduciary of the Trust. Nor did Skidmore show that Dr. Ferrara had confidential information concerning Skidmore. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). Rondor retained Dr. Ferrara to obtain his opinion on two publicly available sound recordings, which he communicated telephonically to Rondor. All of this occurred before Dr. Ferrara ever had contact with Led Zeppelin's attorneys. The district court did not abuse its broad discretion by permitting this expert testimony. *See Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980).

#### **D. ATTORNEYS' FEES**

Warner/Chappell cross appeals the district court's denial of attorneys' fees and costs under 17 U.S.C. § 505. The Supreme Court counsels that a court has "broad leeway" to consider the relevant factors that promote the purposes of the Copyright Act, but the Court also has cautioned against giving substantial weight to just one factor, and directed the courts to "give due consideration to all . . . circumstances relevant to granting fees." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1799, 1883, 1885 (2016).

Here, after weighing the factors and the circumstance of the case, the district court found that litigation misconduct and the degree of success swung solidly in favor of Warner/Chappell, that the need for compensation weighed slightly in favor of Warner/Chappell, but that motivation, frivolousness, and objective reasonableness weighed

strongly in favor of Skidmore. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558–59 (9th Cir. 1996). Warner/Chappell’s argument that litigation misconduct should form a sole, independent basis for consideration is contrary to the Supreme Court’s guidance in *Kirtsaeng*. The district court did not abuse its discretion in concluding that an award of attorneys’ fees was not appropriate in light of the Copyright Act’s essential goals. Nor did the district court err in declining to award costs to Warner/Chappell.

### CONCLUSION

This copyright case was carefully considered by the district court and the jury. Because the 1909 Copyright Act did not offer protection for sound recordings, Skidmore’s one-page deposit copy defined the scope of the copyright at issue. In line with this holding, the district court did not err in limiting the substantial similarity analysis to the deposit copy or the scope of the testimony on access to *Taurus*. As it turns out, Skidmore’s complaint on access is moot because the jury found that Led Zeppelin had access to the song. We affirm the district court’s challenged jury instructions. We take the opportunity to reject the inverse ratio rule, under which we have permitted a lower standard of proof of substantial similarity where there is a high degree of access. This formulation is at odds with the copyright statute and we overrule our cases to the contrary. Thus the district court did not err in declining to give an inverse ratio instruction. Nor did the district court err in its formulation of the originality instructions, or in excluding a selection and arrangement instruction. Viewing the jury instructions as a whole, there was no error with respect to the instructions. Finally, we affirm the district court with respect to the remaining trial issues and its denial of attorneys’ fees and costs to Warner/Chappell.

The trial and appeal process has been a long climb up the *Stairway to Heaven*. The parties and their counsel have acquitted themselves well in presenting complicated questions of copyright law. We affirm the judgment that Led Zeppelin's *Stairway to Heaven* did not infringe Spirit's *Taurus*.

**AFFIRMED.**

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WATFORD, Circuit Judge, concurring:

I join the court's opinion, with the exception of section IV.C. I see no reason to decide whether Skidmore adequately preserved his request for a selection-and-arrangement instruction because, even if such an instruction had been given, no reasonable jury could have found infringement here.

At trial, Skidmore predicated his theory of originality on *Taurus*' selection and arrangement of five unprotectable musical elements in the first four measures of the song. Specifically, Skidmore contended that *Taurus* uniquely combined the following features: a five-note descending chromatic scale in A minor; a sequence of half notes and whole notes in the scale; a melody involving various arpeggios and note pairs; a rhythm of successive eighth notes; and a collection of pitches in distinct proportions. None of those elements is subject to copyright protection in its own right; they belong to the public domain from which all musical composers are free to draw. *See, e.g., Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976); Copyright Office Compendium § 802.5(A) (3d ed. 2017).

Skidmore can claim protection for the original selection and arrangement of those elements, but the scope of that protection depends on the “range of possible expression.” *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). 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. *See Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam). For instance, once Randy Wolfe settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear).<sup>1</sup>

In light of the narrow range of creative choices available here, Skidmore “is left with only a ‘thin’ copyright, which protects against only virtually identical copying.” *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003); *see also Apple Computer*, 35 F.3d at 1439 (“When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”). In my view, this standard is separate from—and more demanding than—the “substantial similarity” test. As our cases have repeatedly recognized, the substantial-similarity framework applies only to works with broad copyright protection, while the virtual-identity standard governs thin copyrights. *See, e.g., L.A. Printex Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 851 (9th Cir. 2012); *Mattel*,

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<sup>1</sup> Skidmore argues that *Taurus*’ omission of one note from the descending chromatic scale further contributed to the song’s originality. While this alteration may represent an original use of the descending chromatic scale, it does not change the limited scope of *Taurus*’ copyright. As with Skidmore’s selection-and-arrangement theory, there are only so many ways to modify a descending chromatic scale in four measures.

*Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010); *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *Ets-Hokin*, 323 F.3d at 766; *Apple Computer*, 35 F.3d at 1439.

Contrary to Skidmore’s contention, we have never held that musical works are *necessarily* entitled to broad copyright protection. We did state in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), that “[m]usical compositions are not confined to a narrow range of expression.” *Id.* at 1120. But we made that statement in the context of assessing the creative choices involved in composing an entire song, which of course could involve a broad range of expression. *See id.* at 1117–18, 1120. We had no occasion there to categorically exempt musical works from the same principles we use to assess the scope of copyright protection for all other works.

Given the thin protection afforded the selection and arrangement of basic musical elements at issue here, Skidmore could prove infringement only if the relevant passages of *Taurus* and *Stairway to Heaven* are virtually identical. They are not. Undeniable and obvious differences exist between the first four measures of both songs: The notes in the melodies are different; the use of the treble clef in conjunction with the bass clef is different; and the rhythm of eighth notes is different. Those facts preclude a finding of virtual identity. As a result, even if the district court had given the jury a selection-and-arrangement instruction, Skidmore’s infringement claim would have failed as a matter of law.

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IKUTA, Circuit Judge, joined by BEA, Circuit Judge, concurring in part and dissenting in part:

The plaintiff's theory of infringement in this case was straightforward: a four-bar musical passage of *Taurus* that combined an ascending line and a descending chromatic line in a unique and memorable way was substantially similar to the "iconic notes" of a musical passage repeated multiple times in the first two minutes and fourteen seconds of *Stairway to Heaven*. Both the plaintiff and defendant requested jury instructions on the key legal principle underlying this theory: that a combination of common musical elements can be protectable under copyright law, even if each individual element is too common on its own to be protected. Although this legal principle is well supported in our case law and had ample foundation in the evidence in this case, the district court failed to give any instruction on this theory to the jury. Without plaintiff's requested instruction, the jury was deprived of the opportunity to consider the plaintiff's central theory of the case, and the instructions given to the jury (to the effect that common musical elements were not protectable under copyright law) were misleading. Therefore, I dissent from Part IV(B) to (C).

I

It was the late 1960s when songwriter Randy "California" Wolfe wrote a new instrumental piece which he entitled *Taurus* after the astrological sign of a woman he loved and eventually married.<sup>1</sup> Wolfe's band, Spirit, played

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<sup>1</sup> The origin of the song remains a bit of a mystery, as Skidmore alleged in his complaint that the song was inspired by Wolfe's deep



the song regularly, and it became one of the band's signature numbers. There was substantial evidence that Led Zeppelin was at least familiar with Spirit and their work. In 1968, for instance, Led Zeppelin opened for Spirit at a concert in Denver, and the two bands played the same concerts on other occasions. Randy Wolfe died in 1997, and his intellectual property passed into a trust.

When the Supreme Court ruled in 2014 that laches would not bar a copyright infringement lawsuit, *see Petrella v Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014), Michael Skidmore, the trustee for Randy Wolfe's estate, filed suit against Led Zeppelin. As stated in the original complaint, Skidmore's theory was that the "iconic notes to 'Stairway to Heaven,' that have enthralled generations of fans, sound almost exactly the same as" the "unique 2 minutes and 37 second instrumental titled 'Taurus.'"

At trial, Skidmore presented evidence to the jury to show the following: The deposit copy of *Taurus* is a single page, comprising 18 bars of music. Skidmore focused on a four-bar passage from this deposit copy, which Skidmore claimed was both unique and protectable, and which was substantially similar to a repeated musical passage in *Stairway to Heaven*. The four-bar passage in *Taurus* (referred to as "Section A") is followed by a seven-measure bridge (labeled "Section B") in an AABAAB format. Section A had an ascending arpeggiated melodic line (identified in the treble clef) that included a series of two-note melodic phrases that move from A to B, B to C, and C to F sharp. This ascending melodic line is played over an arpeggiated descending chromatic line (identified in the bass

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affection for his bandmates from the band Spirit, some of whom had the astrological sign Taurus.

clef) which skipped the note “E” in its descent before resolving harmonically.<sup>2</sup> According to Skidmore’s experts, Section A of *Taurus* is memorable and unique. Although descending chromatic lines are commonly used in certain genres of music, Dr. Alexander Stewart testified that the composer of *Taurus* had “found a way to use it in a way that is unlike other works that use [a descending chromatic] line.” Specifically, most songs employing a descending chromatic line resolve the scale by passing through the fifth note of the scale (here, the note E), but *Taurus* stops short of the fifth note. Stewart also testified that the combination of two-note melodic phrases in the ascending line in Section A was “unique,” “distinct,” and “used in an original and creative way.” Skidmore’s experts discussed a number of other musical elements in Section A, including the rhythm, chord progression, and duration of pitches in the minor descending chromatic line. Finally, Skidmore presented expert testimony that the combination of the descending and ascending lines, along with the other musical elements, made Section A unique. Stewart testified that the combination of musical elements in Section A, including “an ascending line with unique AB, BC, C to F-sharp pairs” and “the descending line having a similar chord progression arpeggiated in a unique way” were “significant” and “unique” when taken together. And Kevin Hanson, another expert, testified that “the descending chromatic line, in conjunction with the other arpeggiated figures in the

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<sup>2</sup> Led Zeppelin’s expert, Dr. Lawrence Ferrara, likewise testified that the focus of the case was on Section A of *Taurus*, which had “relevant similarities” to the “opening four measures of the guitar” that is played six times in the first two minutes and fourteen seconds of *Stairway to Heaven*.

ascending melody . . . combined [to] form one piece of original music.”

In addition to offering evidence that Section A of *Taurus* was unique and original, Skidmore also presented evidence that the opening two minutes and fourteen seconds of *Stairway to Heaven* incorporated elements that were substantially similar to Section A of *Taurus*. *Stairway to Heaven*’s opening included a thirteen-second musical passage (also referred to as Section A) which is repeated six times, separated by a B section or bridge, in an AABABAA format. *Stairway to Heaven*’s Section A contained an ascending line which used a substantially identical pitch sequence as Section A in *Taurus*, as well as the same memorable two-note phrases. This ascending line played over a descending chromatic line, which likewise skipped over the fifth note in resolving the scale. In his closing argument, Skidmore asserted that “the only two songs in music history that are able to show that it skips the E was two pieces of work: ‘Taurus’ and ‘Stairway to Heaven.’” In addition to using the same pitch sequence, *Stairway to Heaven* used the same rhythm and metric placement.

Led Zeppelin’s defense was based on its argument that the musical elements in Section A of *Taurus* were too common to be protectable. Accordingly, it proposed the following jury instructions.<sup>3</sup> Instruction No. 16 stated that “common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes” are not protected by copyright. Instruction No. 20 stated that “any elements from prior works or the public domain are not

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<sup>3</sup> The numbering of these three instructions corresponds to the instructions eventually given by the court.

considered original parts and not protected by copyright.” And Instruction No. 21 stated:

You must then disregard all musical elements that are not original to Taurus. Once you have disregarded all musical elements that are not original to Taurus, you must decide whether there are any remaining musical elements that are original to Taurus and also appear in Stairway to Heaven and, if so, whether they are substantial similarities or insubstantial similarities.

In response, Skidmore proposed two instructions to explain that while musical elements that are too common are not protectable under copyright law, such common elements could be protectable in combination under some circumstances.<sup>4</sup> Proposed Instruction No. 35 read, in part, that “[a] combination of individually otherwise unprotected elements can be infringed upon.” Skidmore also proposed Jury Instruction No. 38, entitled “Combination of Unprotectable Elements,” which stated: “You may find a combination of unprotectable elements to be protectable.”

Led Zeppelin objected to both instructions and proposed Instruction No. 29, which stated: “An author’s arrangement

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<sup>4</sup> The majority refers to this instruction regarding the protectability of a combination of musical elements as a “selection and arrangement instruction.” While I use this terminology for convenience, the words “selection” and “arrangement” have no special significance in our precedent; the missing instruction could equally be termed a “combination instruction” or “compilation instruction.” See, e.g., *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (allowing that an original “combination of unprotectable elements may qualify for copyright protection”).

and selection of unprotected elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” Skidmore objected to this formulation of the instruction.

The district judge considered these objections, but did not allow the parties to make any arguments. Although the judge conferred with the parties outside of the presence of the jury to rule on various pretrial motions, he asked the lawyers to recess for 45 minutes while he prepared the jury instructions. After the recess, the judge addressed counsel, and stated: “This is not to discuss with counsel what instructions are going to be given and which aren’t. Both sides have fully briefed this on the instructions, their objections, their replies, et cetera, that I am confident that I can just come out and give the instructions.” The judge then appointed Skidmore’s counsel to act as “scrivener” to “prepare a clean set of instructions,” and dictated the approved jury instructions to Skidmore’s lawyer. The court included Led Zeppelin’s Instruction Nos. 16, 20 and 21, but did not include either Skidmore’s or Led Zeppelin’s version of the selection and arrangement instruction. Skidmore’s lawyer commented on the wording of two instructions. But when he raised a concern regarding the omission of an instruction on the inverse ratio rule, the court dismissed the question brusquely, saying that the issue was not addressed “because we weren’t giving that instruction,” and repeated, “[w]e’re not going to give that instruction.” The judge then ended the meeting. The court’s decision to omit any selection and arrangement instruction was not discussed.

On appeal, Skidmore argues that the court erred in not giving the jury the proposed instruction.

## II

“A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence.” *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (citing *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir. 1994)). A district court errs when it “rejects proposed jury instructions that are properly supported by the law and the evidence.” *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009). Moreover, “[j]ury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading.” *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (per curiam) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999)). “In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (cleaned up) (quoting *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1988)).

Skidmore’s request for an instruction that “a combination of unprotectable elements [is] protectable” is supported by both law and evidence.

First, as the majority agrees, the principle underlying Skidmore’s requested jury instruction is well-supported in law. Maj. Op. at 44–45. The Supreme Court has made clear that even a work “that contains absolutely no protectible . . . expression” can meet “the constitutional minimum for copyright protection if it features an original selection or arrangement.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). We have applied this principle to musical elements. In doing so, we do not draw a distinction between a “combination,” “compilation,” and a “selection

and arrangement” of musical elements. Thus, in *Three Boys Music Corp. v. Bolton*, we upheld a jury finding of “infringement based on a unique compilation” of five unprotectable musical elements: “(1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.” 212 F.3d 477, 485 (9th Cir. 2000). Similarly, in *Swirsky v. Carey*, we disapproved of the district court’s approach to pulling “elements out of a song individually, without also looking at them in combination,” explaining that to “disregard chord progression, key, tempo, rhythm, and genre is to ignore the fact that a substantial similarity [between copyrighted and allegedly infringing works] can be found in a combination of elements, even if those elements are individually unprotected.” 376 F.3d 841, 848 (9th Cir. 2004). Even though “chord progressions may not be individually protected, if in combination with rhythm and pitch sequence, they show the chorus of [a work] to be substantially similar to [another work], infringement can be found.” *Id.*; see also *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (applying this principle to visual arts, and holding that “a combination of unprotectable elements may qualify for copyright protection” so long as the “combination constitutes an original work of authorship” and is “sufficiently original to merit protection”) (emphasis and citations omitted). Accordingly, the legal basis for an instruction that a combination of unprotectable elements may be protectable under copyright law is well-established.

Second, the evidence introduced at trial was sufficient for the court to instruct the jury on this principle. Both of Skidmore’s experts testified that Section A of *Taurus* was original and creative and gave *Taurus* a distinct and memorable sound. Both also testified that the combination

of musical elements present in Section A of *Taurus* was substantially similar to the six thirteen-second passages in Section A of *Stairway to Heaven*. This evidence is sufficient for a reasonable juror to conclude that Section A of *Taurus* was protectable, and that the repeated appearance of a substantially similar musical passage in the first two minutes and fourteen seconds of *Stairway to Heaven* constituted infringement. Because Skidmore's proposed instruction had a foundation in law and was supported by the evidence, the district court erred in declining to give it.

This error cut the heart out of Skidmore's case. Without this instruction, the three instructions given by the court regarding the unprotectability of common elements (Instruction Nos. 16, 20 and 21) told the jury that a descending chromatic scale, arpeggios, and other common elements are not protected by copyright, and that the jury must disregard all such elements. In other words, the jury was told to disregard the precise elements that Skidmore's experts testified had been combined in a unique and original way, and thus the district court improperly foreclosed the possibility that *Taurus*'s combination of a descending chromatic line (which skipped the note E) and an ascending line using memorable note pairs was protected. Therefore, while Instruction Nos. 16, 20 and 21 are correct statements of the law, they are misleading in omitting the principle that a combination of unprotected elements can be protected. As such, the jury instructions establish a legal principle that is erroneous, and if allowed to stand, establish a mistaken view of copyright protection. Reversal for a new trial is required.

### III

The majority's conclusion that "the district court did not commit any error" in failing to give the jury a selection and



arrangement instruction is wrong as a matter of law.<sup>5</sup> Maj. Op. at 43. First, the majority makes a legal error in concluding that Skidmore was not entitled to a selection and arrangement instruction because “Skidmore never presented the argument to the jury.” Maj. Op. at 43. Rather, according to the majority, Skidmore’s copyright infringement claim was based on “disparate categories of unprotectable elements,” which the majority describes as the “minor chromatic line and associated chords; duration of pitches of minor chromatic line; melody placed over the descending chromatic line consisting of combination of arpeggios and two-note sequences; rhythm of steady 8th note beats; and pitch collection.” The majority claims that Skidmore “never argued how these musical components related to each other to create the overall design, pattern, or synthesis.” Maj. Op. at 44.

The majority’s characterization of Skidmore’s case is belied by both the trial record and by common sense. Hanson testified that Section A of *Taurus* had the holistic musical design that the majority says is lacking from Skidmore’s argument; among other things, “the descending chromatic line, in conjunction with the other arpeggiated figures in the ascending melody . . . combined [to] form one piece of original music.” Stewart also testified that the combination of musical elements present in Section A of *Taurus* was “unique and original.” And in closing argument, contrary to the majority’s contention, Maj. Op. at 43,

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<sup>5</sup> Because the majority concludes that the district court “did not commit any error” at all, Maj. Op. at 43, it is irrelevant to the majority’s decision whether Skidmore preserved his claim of error and, if not, whether the district court’s error was plain. Because the majority’s discussion of these points is unnecessary, I focus on the majority’s erroneous reasoning regarding the merits of the district court’s error.

Skidmore reiterated that it was the combination of a descending chromatic line and ascending line that made *Taurus* unique and protectable. This is a paradigmatic “selection and arrangement” theory, similar to the one we approved of in *Three Boys*, 212 F.3d at 485 (upholding a jury finding of infringement based on a “unique compilation of [musical] elements”).

Moreover, the majority’s claim that Skidmore’s selection and arrangement argument fails because his theory was based on “random similarities scattered throughout the works,” Maj. Op. at 45 (emphasis omitted), is unreasonable on its face given the brief nature of the passage Skidmore argued was protected.<sup>6</sup> As the majority acknowledges, Maj. Op. at 43, Section A of *Taurus* consists of only four bars of music. And Skidmore argued that the combination of the musical elements in this passage (the ascending melodic line is played over an arpeggiated descending chromatic line which skipped the note “E” in its descent) made it a unique piece of original music that was substantially similar to a specific thirteen-second passage in *Stairway to Heaven*. Nor does the trial record support the majority’s claim that the similarities were “scattered throughout” Section A of

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<sup>6</sup> The concurrence’s claim that *Taurus* is entitled to meager copyright protection because there “are relatively few ways to express a combination” of notes “in just four measures,” and because there is only a “narrow range of creative choices available here,” Concurrence at 55, would come as a surprise to the experts who opined on *Taurus* – and indeed, would likely surprise any talented composer. Like words, musical notes are subject to a range of expression limited only by the imagination and skill of the artist. A poet may select and arrange a mere 16 words (all of them common and unprotectable by themselves) so they are as memorable and unique as a Shakespeare play. See, e.g., William Carlos Williams, *The Red Wheelbarrow*, in *THE COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS, VOLUME I, 1909–1939* at 224 (A. Walton Litz & Christopher MacGowan eds., 1986).

*Taurus*; rather, Skidmore explained at trial that the various musical elements that were combined in an original way to form *Taurus* played “simultaneously.” There is simply no support in the record for the majority’s theory that Skidmore’s infringement claim was based on random “disparate categories of unprotectable elements” in *Taurus* that merely had counterparts in *Stairway to Heaven*. Maj. Op. at 45.

In short, the majority’s misunderstanding of the evidence and its conclusion that the musical elements identified by Skidmore “do not cohere to form a holistic musical design” as a matter of law, Maj. Op. at 45, provide a good lesson as to why, as an appellate body, we are foreclosed from determining whether an identified combination of musical elements is original. We are not well situated to determine whether a musical passage is original; such a determination should have been left up to a properly instructed jury. *See Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938). Nor should we determine whether the four bars at issue meet some judicially constructed standard for “holistic musical design.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). But without an instruction that a combination of unprotectable elements can be protectable if combined in an original way, the jury in Skidmore’s case was deprived of the opportunity to pass judgment on Skidmore’s selection and arrangement theory.

## IV

Although unnecessary to its resolution, the majority's rulings on forfeiture and plain error are also wrong. Maj. Op. at 39–43.

## A

First, Skidmore did not forfeit his objection to the district court's omission of his selection and arrangement instruction. As we have previously explained, a party need not make a formal objection to the omission of a jury instruction if the party has made the district court "fully aware of a [party's] position" with respect to a jury instruction, *Brown v. AVE MCO Inv. Corp.*, 603 F.2d 1367, 1371 (9th Cir. 1979), such as by raising the issue on multiple occasions, *see Dorn*, 397 F.3d at 1189, and the district court has made clear that it would not give the instruction, *see id.* (holding that party did not have to object to the underlying jury instruction when the court was fully informed regarding the party's position on the jury instructions and "any further objection would have been superfluous and futile"); *Brown*, 603 F.2d at 1373 (holding that the party preserved its objection to a jury instruction when the court was aware of the issue and it was clear that the court would not change its mind).

Here, as in *Brown*, the judge was fully aware of Skidmore's position on the requested jury instruction. Skidmore had proposed two jury instructions on the issue, and questioned witnesses at trial about the creative combination of various musical elements in *Taurus*. Led Zeppelin even cited Skidmore's reliance on a selection and arrangement theory as the rationale for proposing a selection and arrangement instruction of its own, which it described as "crucial." Moreover, as in *Dorn*, objecting would have been

pointless. The judge made clear that he had already heard all the argument he would need, and that he did not want to discuss which instructions “are going to be given and which aren’t” with counsel. Although the majority discounts the effect of the judge’s warning because Skidmore sought to clarify or correct the jury instructions on other issues, the judge brusquely silenced Skidmore when he mentioned the omission of an instruction on the inverse ratio rule. At that point, any objection would be “superfluous and futile as well as contrary to the court’s warning.” *Dorn*, 397 F.3d at 1189. We do not know what objections Skidmore would have raised if not for the court’s prefatory warning that began the conference and its sharp rejection of Skidmore’s request at the close of the conference; the majority thus reads too much into Skidmore’s effort to open the door to further discussion by assuring the court there would only be “one last thing.” Given the imbalance of power that exists between a judge and a litigant, we should be careful not to require a litigant to defy explicit warnings from the court. Accordingly, Skidmore preserved his challenge to the omission of a selection and arrangement instruction, and the majority’s review should have been de novo. *See Gulliford v. Pierce Cty.*, 136 F.3d 1345, 1348 (9th Cir. 1998).

## B

Second, even if Skidmore had forfeited his objection to the omission of the selection and arrangement instruction, the district court’s failure to give this instruction – which had been requested by both parties – was plainly erroneous, and the majority’s conclusion to the contrary is wrong. Under our plain error jurisprudence, “[w]e may exercise our discretion to correct a district court on plain error review when the following factors are met: (1) the district court erred; (2) the error was obvious or plain; (3) the error

affected substantial rights; and (4) the error ‘seriously impaired the fairness, integrity, or public reputation of judicial proceedings.’” *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018) (quoting *C.B. v. City of Sonora*, 769 F.3d 1005, 1018–19 (2014)). An error affects substantial rights when it “affect[s] the outcome of the district court proceedings.” *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also Bearchild v. Cobban*, 947 F.3d 1130, 1139 (9th Cir. 2020) (“We will usually find sufficient prejudice to warrant reversal where ‘it is impossible to determine from the jury’s verdict and evidentiary record that the jury would have reached the same result had it been properly instructed.’”) (quoting *Hoard*, 904 F.3d at 791)

We recently found the district court’s instructional error met this standard in *Hoard*, where the plaintiff brought a § 1983 claim against an officer who allegedly had violated his right to be free from excessive force. 904 F.3d at 785. In that case, the district court (with plaintiff’s counsel’s *approval*) provided an erroneous definition of the word “sadistically” to the jury. *Id.* at 786. Because this definition “saddled [the plaintiff] with the unnecessary and exceedingly difficult burden of proving that the officer was not just cruel, but sadistic as well,” *id.* at 782, and made it difficult for the plaintiff to prevail, we held that “th[e] error likely prejudiced the outcome of the case and—left uncorrected—would contribute to a miscarriage of justice.” *Id.* at 787. Therefore, we vacated the district court’s judgment and remanded. *Id.*

Here, as in *Hoard*, all four prongs of the plain error test are met. For the reasons previously explained, the district court erred by failing to give the crucial selection and arrangement instruction requested by both parties. Moreover, this error was obvious or plain: Skidmore

presented enough evidence at trial supporting the selection and arrangement theory which had been recognized by both parties as Skidmore’s central theory at trial. Omitting the instruction in spite of the parties’ consensus is an “error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection.” *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011) (quoting *United States v. Truman*, 122 F.3d 1167, 1170 (9th Cir. 1997)); *see also Hoard*, 904 F.3d at 790 (explaining that it must have been “sufficiently clear at the time of trial” that the instructions were erroneous for the error to be plain).

Moreover, the error was sufficiently prejudicial with respect to the outcome of the case, given that the omission of the instruction—which “saddled [Skidmore] with the unnecessary and exceedingly difficult burden of proving” that the four bars in *Stairway to Heaven* were substantially similar to *Taurus* without relying on the unique way in which musical elements in *Taurus* were combined—necessarily precluded the jury from finding in Skidmore’s favor. *Hoard*, 904 F.3d at 782. Furthermore, by introducing testimony from two experts on the issue, Skidmore “introduced evidence from which a jury could have found” substantial similarity, *Bearchild*, 947 F.3d at 1148 such that it is “impossible to determine whether the jury would have reached the same result had it been properly instructed,” *id.* at 1134. This is enough under our law to show that the error affected substantial rights.

Finally, as in *Hoard*, if “left uncorrected[, this error] would contribute to a miscarriage of justice.” 904 F.3d at 787. It is clear that the district court’s failure to give a correct instruction deprived Skidmore “of a meaningful and fair opportunity” to present his claim. *See id.*; *Bearchild*,

947 F.3d at 1149 (“Because [plaintiff’s] ability to pursue his claim was fundamentally diminished by the jury instructions in this case, the final prong of the plain error test is satisfied.”). Skidmore had adduced sufficient evidence for a reasonable juror to find that *Taurus* was protectable under copyright law, and that there was a substantial similarity between *Stairway to Heaven* and the *Taurus* deposit copy, as the district court’s prior rejection of Led Zeppelin’s summary judgment motion confirmed. Therefore, the omission of the selection and arrangement instruction not only “placed a heavy thumb on the scale in favor of the [d]efendants,” *Hoard*, 904 F.3d at 792, but decided the case entirely. Accordingly, the district court’s error was plain, and just as in *Hoard*, we must vacate the district court’s plainly erroneous ruling.

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The majority’s rulings on forfeiture, plain error, and the merits are redundant and inconsistent. If there is no error at all, the majority had no need to reach forfeiture or plain error. Instead, the majority touches all three doctrines and makes each of them worse. Nevertheless, my key concern is the majority’s erroneous legal ruling on whether the four-bar instrumental passage in *Taurus* was protectable and substantially similar to the “iconic” opening bars of *Stairway to Heaven*. Unlike the rulings on forfeiture and plain error, this substantive ruling weakens copyright protection for musicians by robbing them of the ability to protect a unique way of combining musical elements. Therefore, I dissent from Parts IV(B) to (C) of the majority opinion.



**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

MICHAEL SKIDMORE, AS TRUSTEE  
FOR THE RANDY CRAIG WOLFE  
TRUST,

*Plaintiff-Appellant,*

v.

LED ZEPPELIN; JAMES PATRICK  
PAGE; ROBERT ANTHONY PLANT;  
JOHN PAUL JONES; SUPER HYPE  
PUBLISHING, INC.; WARNER MUSIC  
GROUP CORPORATION; WARNER  
CHAPPELL MUSIC, INC.; ATLANTIC  
RECORDING CORPORATION; RHINO  
ENTERTAINMENT COMPANY,

*Defendants-Appellees.*

No. 16-56057

D.C. No.  
2:15-cv-03462-  
RGK-AGR

MICHAEL SKIDMORE, AS TRUSTEE  
FOR THE RANDY CRAIG WOLFE  
TRUST,

*Plaintiff-Appellee,*

v.

WARNER/CHAPPELL MUSIC, INC,  
*Defendant-Appellant,*

and

LED ZEPPELIN; JAMES PATRICK  
PAGE; ROBERT ANTHONY PLANT;  
JOHN PAUL JONES; SUPER HYPE  
PUBLISHING, INC.; WARNER MUSIC  
GROUP CORPORATION, ATLANTIC  
RECORDING CORPORATION; RHINO  
ENTERTAINMENT COMPANY,  
*Defendants.*

No. 16-56287

D.C. No.  
2:15-cv-03462-  
RGK-AGR

OPINION

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding

Argued and Submitted March 12, 2018  
San Francisco, California

Filed September 28, 2018

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Before: Richard A. Paez and Sandra S. Ikuta, Circuit  
Judges, and Eric N. Vitaliano, \* District Judge.

Opinion by Judge Paez

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**SUMMARY\*\***

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**Copyright**

The panel vacated in part the district court's judgment after a jury trial in favor of the defendants and remanded for a new trial in a copyright infringement suit alleging that Led Zeppelin copied "Stairway to Heaven" from the song "Taurus," written by Spirit band member Randy Wolfe.

The jury found that plaintiff Michael Skidmore owned the copyright to "Taurus," that defendants had access to "Taurus," and that the two songs were not substantially similar under the extrinsic test.

The panel held that certain of the district court's jury instructions were erroneous and prejudicial. First, in connection with the extrinsic test for substantial similarity, the district court prejudicially erred by failing to instruct the jury that the selection and arrangement of unprotectable musical elements are protectable. Second, the district court prejudicially erred in its instructions on originality. The

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\* The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel concluded that the district court did not err in failing to instruct the jury on the inverse ratio rule, but such an instruction might be appropriate on remand.

The panel further held that the scope of copyright protection for an unpublished musical work under the Copyright Act of 1909 is defined by the deposit copy because copyright protection under the 1909 Act did not attach until either publication or registration. Therefore, the district court correctly ruled that sound recordings of “Taurus” as performed by Spirit could not be used to prove substantial similarity.

Addressing evidentiary issues, the panel held that the district court abused its discretion by not allowing recordings of “Taurus” to be played for the purpose of demonstrating access. The district court did not abuse its discretion by failing to exclude expert testimony on the basis of a conflict of interest.

In light of its disposition, the panel vacated the district court’s denial of defendants’ motions for attorneys’ fees and costs and remanded those issues as well.

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#### **COUNSEL**

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### OPINION

PAEZ, Circuit Judge:

This copyright case involves a claim that Led Zeppelin copied key portions of its timeless hit “Stairway to Heaven” from the song “Taurus,” which was written by Spirit band member Randy Wolfe. Years after Wolfe’s death, the trustee of the Randy Craig Wolfe Trust, Michael Skidmore, brought this suit for copyright infringement against Led Zeppelin, James Patrick Page, Robert Anthony Plant, John Paul Jones, Super Hype Publishing, and the Warner Music Group Corporation as parent of Warner/Chappell Music, Inc., Atlantic Recording Corporation, and Rhino Entertainment Co. (collectively, “Defendants”). The case proceeded to a jury trial, and the jury returned a verdict in favor of Defendants. Skidmore appeals, raising a host of alleged trial errors and challenging the district court’s determination that for unpublished works under the Copyright Act of 1909 (“1909 Act”), the scope of the copyright is defined by the deposit copy. We hold that several of the district court’s jury instructions were erroneous and prejudicial. We therefore vacate the amended judgment in part and remand for a new trial. For the benefit of the parties and the district court on remand, we also address whether the scope of copyright protection for an unpublished work under the 1909 Act is defined by the deposit copy. We hold that it is. We also address several other evidentiary issues raised by Skidmore that are likely to arise again on remand. Finally, in light of our disposition,

we vacate the denial of Defendants’ motions for attorneys’ fees and costs and remand those issues as well.

## I.

### A.

Randy Wolfe, nicknamed Randy California by Jimi Hendrix, was a musician and a member of the band Spirit. He wrote the song “Taurus” in late 1966. Spirit signed a recording contract in August 1967, and its first album *Spirit*—which included “Taurus”—was released in late 1967 or early 1968. Hollenbeck Music (“Hollenbeck”) filed the copyright for Taurus in December 1967 and listed Randy Wolfe as the author. As part of the copyright registration packet, “Taurus” was transcribed into sheet music that was deposited with the Copyright Office (“Taurus deposit copy”).

The band Led Zeppelin, formed in 1968, consisted of Jimmy Page, Robert Plant, John Paul Jones, and John Bonham. Spirit and Led Zeppelin’s paths crossed several times in the late 1960s and early 1970s. On tour, Led Zeppelin would occasionally perform a cover of another Spirit song, “Fresh Garbage.” Spirit and Led Zeppelin both performed at a concert in Denver in 1968 and at the Atlanta International Pop Festival, the Seattle Pop Festival, and the Texas Pop Festival in 1969. There is no direct evidence that Led Zeppelin band members listened to Spirit’s performances on any of these dates, although members of Spirit testified that they conversed with Led Zeppelin members, and one Spirit band member testified that Spirit had played “Taurus” the night both bands performed in Denver. Additionally, there was evidence at trial that Robert Plant attended a February 1970 Spirit performance. Jimmy Page testified that he currently owns a copy of the album

*Spirit*, but he was unable to clarify when he had obtained that copy. In late 1971, Led Zeppelin released its fourth album, an untitled album known as “Led Zeppelin IV.” One of the tracks on the album is the timeless classic “Stairway to Heaven,” which was written by Jimmy Page and Robert Plant.

Randy Wolfe passed away in 1997, and his mother established the Randy Craig Wolfe Trust (the “Trust”). All of Wolfe’s intellectual property rights were transferred to the Trust, including his ownership interest in “Taurus.”<sup>1</sup> His mother was the trustee or co-trustee until her death in 2009, after which time Skidmore became the trustee. Immediately after the Supreme Court’s decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1662, 1667–68 (2014), which clarified that laches is not a defense where copyright infringement is ongoing, Skidmore filed this suit on behalf of the Trust alleging that “Stairway to Heaven” infringed the copyright in “Taurus.”

## B.

Skidmore initially filed his complaint in the Eastern District of Pennsylvania, but the case was subsequently transferred to the Central District of California. *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 589–90 (E.D. Pa. 2015). Skidmore alleged direct, contributory, and vicarious copyright infringement. He also alleged a claim titled “Right of Attribution—Equitable Relief—Falsification of Rock n’ Roll History.” With regard to copyright infringement,

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<sup>1</sup> Ownership of the Taurus copyright was one of the disputed issues at trial, but the jury found that Skidmore “is the owner of a valid copyright in Taurus.” The Defendants do not challenge that finding on appeal.

Skidmore alleged that the opening notes of “Stairway to Heaven” are substantially similar to those in “Taurus.” The Defendants disputed ownership, substantial similarity, and access. They also alleged a number of affirmative defenses including unclean hands, laches, and independent creation.

After discovery, Defendants moved for summary judgment, which the district court granted in part and denied in part. Specifically, the district court granted summary judgment to John Paul Jones, Super Hype Publishing, and Warner Music Group (“summary judgment defendants”), as they had not performed or distributed “Stairway to Heaven” in the three-year statute of limitations period preceding the filing of the complaint. Additionally, the district court granted summary judgment to Defendants on Skidmore’s “Right of Attribution—Equitable Relief—Falsification of Rock n’ Roll History” claim, as the district court “had diligently searched but [was] unable to locate any cognizable claim to support this [Falsification of Rock n’ Roll History] theory of liability.”

Because the 1909 Act governed the scope of the copyright Wolfe obtained in “Taurus,” the district court further concluded that the protectable copyright was the musical composition transcribed in the deposit copy of “Taurus” and not the sound recordings. The district court therefore concluded that to prove substantial similarity between “Taurus” and “Stairway to Heaven,” Skidmore would have to rely on the “Taurus” deposit copy rather than a sound recording. The district court also found that there were triable issues of fact relating to ownership, access, substantial similarity, and damages that could only be resolved at trial.

At a pretrial conference in April 2016, after reviewing summaries of each witnesses’ proposed testimony, the



district court decided to allot each side ten hours to present its case. The district court also tentatively granted Defendants' motion in limine to exclude recordings of Spirit performing "Taurus" as well as expert testimony based on those recordings, again concluding that the 1967 deposit copy should be the baseline when considering substantial similarity. Before trial, the district court filed an order confirming its prior tentative rulings on the motions in limine.

As part of expert discovery, Skidmore's attorney deposed Dr. Lawrence Ferrara, Defendants' expert musicologist. During the deposition it came to light that in 2013 Dr. Ferrara had done a comparison of the "Taurus" and "Stairway to Heaven" recordings for Rondor Music ("Rondor"), a subsidiary of Universal Music Publishing Group.<sup>2</sup> Dr. Ferrara testified that when he was approached by Defendants' counsel, he informed them that he had already completed an analysis for Rondor. Defendants' counsel consulted with Rondor, which waived any conflict and consented to Dr. Ferrara being retained as an expert witness for Defendants. Throughout the deposition, Skidmore's counsel objected and requested copies of Dr. Ferrara's communications with Rondor and Universal. After the deposition, Skidmore filed a Motion for Sanctions and to Preclude Dr. Ferrara from testifying at trial. The district court denied Skidmore's motion because it was improperly noticed, over the page limit, and untimely.

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<sup>2</sup> Skidmore presented evidence that Universal Music was working for Hollenbeck, the publisher of Spirit's music. Skidmore alleged during the deposition that because of this connection, Hollenbeck owed fiduciary duties to Skidmore.

A five-day jury trial ensued. While questioning Jimmy Page, Skidmore's counsel requested that several sound recordings of Spirit performing "Taurus" be played so that he could ask Page whether he had ever heard any of the recordings. When Defendants objected, Skidmore's counsel explained that the recordings were offered to prove access, rather than substantial similarity. The district court determined that although the sound recordings were relevant to prove access, it would be too prejudicial for the jury to hear the recordings. To avoid any prejudice, the district court had Page listen to the recordings outside the presence of the jury and then allowed Skidmore's counsel to question him about them in the presence of the jury. Page eventually testified that he presently had an album containing "Taurus" in his collection, but while testifying he did not admit to having heard any recordings of "Taurus" prior to composing "Stairway to Heaven."

Also of note, Kevin Hanson, Skidmore's master guitarist, performed the "Taurus" deposit copy as he interpreted it, and played recordings of his performances of the beginning notes of the "Taurus" deposit copy and "Stairway to Heaven." The "Taurus" recording Hanson played for the jury during his testimony, however, only contained the bass clef and excluded the treble clef, which contained additional notes.

During the cross-examination of Dr. Ferrara, Skidmore used up the last of his ten hours of allotted trial time. The district court found that Skidmore had not made effective use of his time for a variety of reasons, but granted Skidmore two additional minutes to finish cross-examining Dr. Ferrara and ten minutes to cross-examine each remaining witness. Skidmore was not allowed to call rebuttal witnesses.

During jury deliberations, the jury asked to hear Skidmore's recording of Hanson playing both "Taurus" and "Stairway to Heaven." The district court asked if the jury would like to hear the deposit-copy version of "Taurus" or the version of "Taurus" with only the bass clef. One juror responded with "bass clef" but the jury foreperson responded with "the full copy." The district court directed that the full deposit-copy version be played and asked if that answered the jury's question, to which the foreperson replied "thank you." The other juror did not object to hearing the full copy rather than the bass clef version.

The jury ultimately returned a verdict for Defendants. The jury found that Skidmore owned the copyright to "Taurus," that Defendants had access to "Taurus," but that the two songs were not substantially similar under the extrinsic test.<sup>3</sup> Following the verdict, the district court entered an amended judgment in favor of all Defendants. Skidmore did not file any post-judgment motions challenging the verdict, but timely appealed from the amended judgment.<sup>4</sup> In this appeal, Skidmore challenges (1) various jury instructions, (2) the district court's ruling that substantial similarity must be proven using the copyright

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<sup>3</sup> The extrinsic test is one of two tests used to determine if an allegedly infringing work is substantially similar to a copyrighted work. This test objectively compares the protected areas of a work. *See, infra* p. 13; *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

<sup>4</sup> Skidmore appeals from the amended judgment, which listed all defendants, but none of his arguments implicate the summary judgment defendants. Defendants argue that this waives any challenge to the summary judgment order as it relates to those defendants. We agree. *See, e.g., Classic Concepts, Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1285 (9th Cir. 2013). Accordingly, we do not address any of the claims against the summary judgment defendants, and we do not disturb the amended judgment as it relates to those defendants.

deposit copy, (3) the district court's ruling that sound recordings could not be played to prove access, (4) the district court's decision not to exclude or sanction Dr. Ferrara, (5) the fact that the full version of "Taurus" rather than the bass clef version was played in response to the jury's request, and (6) the imposition of strict time limits as a violation of due process.

Following entry of the amended judgment, Warner/Chappell filed a motion for attorneys' fees and a motion for costs. The district court denied these motions. Warner/Chappell timely cross-appealed, and we consolidated the two appeals.

## II.

We begin with a discussion of the elements that Skidmore must establish to prevail on his copyright infringement claim.

In order to prove copyright infringement, a plaintiff must show "(1) that he owns a valid copyright in his [work], and (2) that [the defendants] copied protected aspects of the [work's] expression." *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018) (citing *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 345 (1991)). In this appeal, the parties do not contest that Skidmore owns a valid copyright in "Taurus," so our analysis turns on the second issue.

Whether Defendants copied protected expression contains two separate and distinct components: "copying" and "unlawful appropriation." *Rentmeester*, 883 F.3d at 1117. A plaintiff must be able to demonstrate that a defendant copied his work, as independent creation is a complete defense to copyright infringement. *See Feist*

*Publ'ns*, 499 U.S. at 345–46; *see also Rentmeester*, 883 F.3d at 1117. In cases such as this one where there is no direct evidence of copying, the plaintiff “can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff’s work and that the two works share similarities probative of copying.” *Rentmeester*, 883 F.3d at 1117. “When a high degree of access is shown,” a lower amount of similarity is needed to prove copying. *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (citation omitted). “To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff’s work. They just need to be similarities one would not expect to arise if the two works had been created independently.” *Rentmeester*, 883 F.3d at 1117.

To prove “unlawful appropriation” a higher showing of substantial similarity is needed. *Id.* The works must share *substantial* similarities and those similarities must involve parts of the plaintiff’s work that are original and therefore protected by copyright. *Id.* To determine whether an allegedly infringing work is substantially similar to the original work, we employ the extrinsic and intrinsic tests. The extrinsic test is an objective comparison of protected areas of a work. This is accomplished by “breaking the works down into their constituent elements, and comparing those elements” to determine whether they are substantially similar. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). Only elements that are protected by copyright are compared under the extrinsic test. *Id.* The intrinsic test is concerned with a subjective comparison of the works, as it asks “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (citation omitted).

**III.**

We turn first to Skidmore’s argument that the district court failed to properly instruct the jury on the elements of his copyright infringement claim as discussed above and whether the court’s alleged errors were prejudicial. Skidmore argues: (1) that the district court erred by failing to give an instruction that selection and arrangement of otherwise unprotectable musical elements are protectable; (2) that the district court’s jury instructions on originality and protectable musical elements were erroneous; and (3) that the district court erred in failing to give an inverse ratio rule instruction. We address each of these in turn.

We review for abuse of discretion the district court’s formulation of jury instructions and review de novo whether the instructions misstate the law. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 941 (9th Cir. 2011). As a general matter, prejudicial error in jury instructions occurs when “looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered.” *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (quoting *In re Asbestos Cases*, 847 F.2d 523, 524 (9th Cir. 1998)) (alteration in original)). “An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless.” *Id.* at 805 (quoting *Caballero v. City of Concord*, 956 F.2d 204, 206–07 (9th Cir. 1992)).

**A.**

Skidmore argues that the district court’s failure to instruct the jury that the selection and arrangement of unprotectable musical elements are protectable is reversible error. Each side had included a version of such an instruction in their proposed jury instructions. The district

court, however, did not include either instruction in its final version of the instructions nor did it modify any of the substantive instructions to include this point. We conclude that the district court erred by failing to instruct the jury on this issue and that the error was prejudicial.

We are concerned here with the extrinsic test for substantial similarity, as the jury decided that there was no extrinsic substantial similarity and failed to reach the intrinsic test. In the musical context, the extrinsic test can be difficult to administer. *See Swirsky*, 376 F.3d at 848. Although individual elements of a song, such as notes or a scale, may not be protectable, “music is comprised of a large array of elements, some combination of which is protectable by copyright.” *Id.* at 849. For example, we have “upheld a jury finding of substantial similarity based on the combination of five otherwise unprotectable elements.” *Id.* (citing *Three Boys*, 212 F.3d at 485). In other circumstances, we have recognized that “a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (citations omitted). The copyright in an arrangement of public domain elements extends only to the originality contributed by the author to the arrangement. *Id.* at 811–12; *see also Feist Publ’ns*, 499 U.S. at 345. Thus, there can be copyright protection on the basis of a sufficiently original combination of otherwise non-protectable music elements. The district court’s failure to so instruct the jury was especially problematic in this case, because Skidmore’s expert, Dr. Stewart, testified that there was extrinsic substantial similarity based on the combination of five elements—some of which were protectable and some of which were in the public domain.

Although Defendants requested an instruction on selection and arrangement, they argue that the district court's failure to give such an instruction does not warrant reversal. First, Defendants argue that Skidmore waived any objection to the court's failure to give such an instruction, in part because Skidmore did not voice any objection when the district court was reading the final jury instructions to counsel. This argument is baseless. Although Skidmore's counsel transcribed and assembled the jury instructions as directed by the district court, the court specifically stated that it did not want any oral objections to its final jury instructions, as the parties had already submitted separate instructions and written objections to the other side's proposed instructions. Skidmore proposed an instruction on selection and arrangement as did the Defendants and each side objected to the other side's proposed instruction as required by Local Rule 51-1, 5. *See, e.g., Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016).

Next, Defendants contend that Skidmore did not argue or present evidence of a copyrightable selection and arrangement of otherwise unprotectable elements. When objecting to one of Skidmore's jury instructions, however, Defendants expressly stated that Skidmore relied on a selection and arrangement theory in his argument for infringement. On appeal, Defendants maintain that Skidmore instead relied on the similarity of a "combination" of elements present in "Taurus" and "Stairway to Heaven." Defendants' refined argument splits hairs and contradicts their earlier position. Whether or not the words "selection and arrangement" were used at trial is irrelevant because it is clear that this legal theory formed the basis of Skidmore's infringement claim. Indeed, the fact that Defendants recognized this argument at trial undermines their contrary argument here. Additionally, many selection and



arrangement cases also refer to a “combination” of musical elements, further undermining Defendants’ proffered distinction. *See Swirsky*, 376 F.3d at 849; *Satava*, 323 F.3d at 811. As both sides recognized in their proposed jury instructions, a selection and arrangement instruction was appropriate and necessary given the basis for Skidmore’s infringement claim.

Defendants also argue that any error is harmless, because the jury would likely have reached the same verdict even if it had been instructed on selection and arrangement. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). We disagree. Without a selection and arrangement instruction, the jury instructions severely undermined Skidmore’s argument for extrinsic similarity, which is exactly what the jury found lacking. Given that nothing else in the instructions alerted the jury that the selection and arrangement of unprotectable elements could be copyrightable, “looking to the instructions as a whole, the substance of the applicable law was [not] fairly and correctly covered.” *Swinton*, 270 F.3d at 802 (alteration in original) (quotations omitted). Indeed, as discussed further below, other instructions when considered in the absence of a selection and arrangement instruction imply that selection and arrangement of public domain material is not copyrightable. For instance, Jury Instruction No. 20, which instructed the jury that “any elements from . . . the public domain are not considered original parts and not protected by copyright,” suggests that no combination of these elements can be protected by copyright precisely because the court omitted a selection and arrangement instruction. The district court’s failure to instruct the jury on selection and

arrangement was therefore prejudicial given Skidmore's theory of infringement.<sup>5</sup> *Id.*

### B.

Skidmore also argues that the district court erred in two ways in its formulation of the jury instructions on originality. First, Skidmore contends that Jury Instruction No. 16 erroneously stated that copyright does not protect "chromatic scales, arpeggios or short sequences of three notes."<sup>6</sup> Second, Skidmore argues that Jury Instruction No.

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<sup>5</sup> Each side proposed its own selection and arrangement instruction and objected to the language of the other party's proposed instruction. We leave it to the district court on remand to determine which version of the proposed instructions to adopt, given applicable precedent on the issue. *See, e.g., Feist Publ'ns*, 499 U.S. at 345; *Swirsky*, 376 F.3d at 848; *Satava*, 323 F.3d at 811; *Three Boys*, 212 F.3d at 485.

<sup>6</sup> In full, Jury Instruction No. 16 reads as follows:

Plaintiff has filed a claim against Defendants for violation of the United States Copyright Act, which governs this case. In order for you to undertake your responsibility, you must know what a copyright is, what it protects, and what it does not protect.

Copyright confers certain exclusive rights to the owner of a work including the rights to:

1. Reproduce or authorize the reproduction of the copyrighted work;
2. Prepare derivative works based upon the copyrighted work.
3. Distribute the copyrighted work to the public;  
and

20 on originality should not have instructed the jury that “[h]owever, any elements from prior works or the public domain are not considered original parts and not protected by copyright,” and should have included the admonition from the Ninth Circuit Model Jury Instruction 17.13 that “[i]n copyright law, the ‘original’ part of a work need not be new or novel.”<sup>7</sup> Defendants argue that Skidmore waived a challenge to these jury instructions for the same reason he waived a challenge to the lack of a selection and arrangement

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4. Perform publicly a copyrighted musical work.

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.

Also, there can be no copyright infringement without actual copying. If two people independently create two works, no matter how similar, there is no copyright infringement unless the second person copied the first.

<sup>7</sup> Jury Instruction No. 20 reads:

An original work may include or incorporate elements taken from prior works or works from the public domain. However, any elements from prior works or the public domain are not considered original parts and not protected by copyright. Instead, the original part of the plaintiff’s work is limited to the part created:

1. independently by the work’s author, that is, the author did not copy it from another work; and
2. by use of at least some minimal creativity.

instruction. For the reasons discussed above, this argument fails. We further conclude that the district court erred in its instructions on originality.

There is a low bar for originality in copyright. *See Swirsky*, 376 F.3d at 851 (“[O]riginality means little more than a prohibition of actual copying.”) (internal quotations omitted). Copyright extends to parts of a work created (1) independently, i.e., not copied from another’s work and (2) which contain minimal creativity. *See Feist Publ’ns*, 499 U.S. at 348. Most basic musical elements are not copyrightable. *See Smith v. Jackson*, 84 F.3d 1213, 1216 n.3 (9th Cir. 1996) (explaining that “common or trite” musical elements are not protected); *Satava*, 323 F.3d at 811 (holding that expressions that are common to a subject matter or medium are not protectable); *Swirsky*, 376 F.3d at 851 (acknowledging that a single musical note lacks copyright protection). In *Swirsky*, however, we recognized that while “a single musical note would be too small a unit to attract copyright protection . . . an arrangement of a limited number of notes can garner copyright protection.” *Id.* We therefore concluded that seven notes could be sufficient to garner copyright protection. *See id.* at 852.

Jury Instruction No. 16 included an instruction that “common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes” are not protected by copyright. This instruction runs contrary to our conclusion in *Swirsky* that a limited number of notes can be protected by copyright. *See id.* at 851. When considered in the absence of a selection and arrangement instruction, Jury Instruction No. 16 could have led the jury to believe that even if a series of three notes or a descending chromatic scale were used in combination with other elements in an original manner, it would not warrant copyright protection. *See*

*Swinton*, 270 F.3d at 802. This error was not harmless as it undercut testimony by Skidmore’s expert that Led Zeppelin copied a chromatic scale that had been used in an original manner. *See Clem*, 566 F.3d at 1182 (an error in a jury instruction is harmless if “it is more probable than not that the jury would have reached the same verdict had it been properly instructed” (citation omitted)).

Similarly, Jury Instruction No. 20 omitted parts of the test for originality and added misleading language. Under *Feist Publications*, originality requires that a work not be copied and that it be produced with a minimal degree of creativity. 499 U.S. at 348. The original part of a work does not need to be new or novel, as long as it is not copied. *Id.* The district court, however, omitted Skidmore’s requested instruction—drawn from Ninth Circuit Model Instruction 17.13—that “the ‘original’ part of a work need not be new or novel.”<sup>8</sup> Additionally, Jury Instruction No. 20 stated that “any elements from prior works or the public domain are not considered original parts and not protectable by copyright.” While this statement is not literally incorrect, it misleadingly

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<sup>8</sup> At the time of trial, Ninth Circuit Model Instruction 17.13 provided that:

An original work may include or incorporate elements taken from works owned by others, with the owner’s permission. The original parts of the plaintiff’s work are the parts created:

1. independently by the work’s author, that is, the author did not copy it from another work; and
2. by use of at least some minimal creativity.

In copyright law, the “original” part of a work need not be new or novel.

suggests that public domain elements such as basic musical structures are not copyrightable even when they are arranged or modified in a creative, original way. *See Swirsky*, 376 F.3d at 852. Ninth Circuit Model Instruction 17.13 avoids this problem by not including this misleading statement.

Nowhere did the jury instructions include any statements clarifying that the selection and arrangement of public domain elements could be considered original. Jury Instruction No. 20 compounded the errors of that omission by furthering an impression that public domain elements are not protected by copyright in any circumstances. This is in tension with the principle that an original element of a work need not be new; rather, it need only be created independently and arranged in a creative way. *See Feist Publ'ns*, 499 U.S. at 345, 349; *see also Swirsky*, 376 F.3d at 849. Jury Instruction Nos. 16 and 20 in combination likely led the jury to believe that public domain elements—such as a chromatic scale or a series of three notes—were not protectable, even where there was a modification or selection and arrangement that may have rendered them original. Skidmore's expert testified that "Taurus" contained certain public domain elements—such as chromatic scales—that were modified in an original way, but the jury instructions as a whole likely would have led the jury to believe that such evidence could not establish the basis of a cognizable copyright claim. Similarly, the instructions undermined Skidmore's expert's testimony that "Taurus" and "Stairway to Heaven" were similar because of the combination of otherwise unprotectable elements.

In sum, we conclude that the district court's originality jury instructions erroneously instructed the jury that public domain elements are not copyrightable, even if they are

modified in an original manner or included as part of a selection and arrangement. We further conclude that these instructions were prejudicial as they undermined the heart of Skidmore’s argument that “Taurus” and “Stairway to Heaven” were extrinsically substantially similar. *Clem*, 566 F.3d at 1182. Because the district court erred both in the formulation of the originality jury instructions and in withholding a selection and arrangement instruction, we vacate the judgment and remand for a new trial.

### C.

Skidmore also argues that the district court erred by not including a jury instruction on the inverse ratio rule. Under the “inverse ratio rule,” a lower standard of proof of substantial similarity is required “when a high degree of access is shown.” *Rice*, 330 F.3d at 1178 (citation omitted). We recently clarified the framework underlying the inverse ratio rule. *See Rentmeester*, 883 F.3d at 1124–25. This rule “assists only in proving copying, not in proving unlawful appropriation.” *Id.* at 1124. Even if a plaintiff proves that a defendant copied his work, the plaintiff must still show that the copying “amounts to unlawful appropriation.” *Id.*; *see also Peters v. West*, 692 F.3d 629, 635 (7th Cir. 2012). “The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown.” *Rentmeester*, 883 F.3d at 1124; *see also Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 372 n.11 (5th Cir. 2004).

Unlike in *Rentmeester*, where the parties did not contest that copying had occurred, Skidmore must prove both unlawful appropriation and copying to prevail. 883 F.3d at 1124. While an inverse ratio rule jury instruction may have been helpful to Skidmore in proving copying, the jury verdict form makes clear that the jury did not decide whether

Led Zeppelin had copied parts of “Taurus.” Rather, the jury ended its deliberations after deciding that “Taurus” and “Stairway to Heaven” were not substantially similar under the extrinsic test. Substantial similarity under the extrinsic and intrinsic test goes to unlawful appropriation, rather than copying. *Id.* at 1117. The jury found that under the extrinsic test, any similarity was not substantial. Therefore, there was not unlawful appropriation under *Rentmeester*. *See id.* Because the jury did not reach the question of copying, the inverse ratio rule was not relevant, and any error in not including it was harmless.

Because we are remanding for a new trial, however, we note that in a case like this one where copying is in question and there is substantial evidence of access, an inverse ratio rule jury instruction may be appropriate. *See Rice*, 330 F.3d at 1178 (declining to apply the inverse ratio rule at the summary judgment stage because the claims of access were “based on speculation, conjecture, and inference which are far less than the ‘high degree of access’ required for application of the inverse ratio rule”); *see also Swirsky*, 376 F.3d at 844 (applying the inverse ratio rule because access was conceded); *Metcalf v. Bocho*, 294 F.3d 1069, 1075 (9th Cir. 2002) (same); *Shaw v. Lindheim*, 919 F.2d 1353, 1361–62 (9th Cir. 1990) (same). Here, there was substantial evidence of access, and indeed, the jury found that both James Page and Robert Plant had access to “Taurus.” On remand, the district court should reconsider whether an inverse ratio rule instruction is warranted unless it determines, as a matter of law, that Skidmore’s “evidence as to proof of access is insufficient to trigger the inverse ratio rule.” *Rice*, 330 F.3d at 1178.



#### IV.

Because we are remanding for a new trial, we address three of Skidmore’s additional assignments of error that will continue to be relevant on remand. First, we address whether the district court erred by holding that the deposit copy of “Taurus,” rather than a sound recording, defined the scope of the protectable copyright. We hold that there was no error in the district court’s ruling. Next, we analyze whether the district court abused its discretion by not allowing recordings of “Taurus” to be played for the purpose of demonstrating access; we conclude that it did. Finally, we examine whether the district court abused its discretion in not excluding Dr. Ferrara’s testimony due to an alleged conflict of interest. We hold that the district court’s ruling was well within its discretion.

#### A.

Skidmore argues that the district court erred in concluding that the deposit copy of “Taurus” defines the scope of the protected copyright under the 1909 Act and that sound recordings of “Taurus” as performed by Spirit could not be used to prove substantial similarity. Because the copyright of “Taurus” was registered in 1967, the 1909 Act applies. *See Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 876 (9th Cir. 2005) (considering infringement claims under the 1909 Act because the copyrighted work “was published before the January 1, 1978, effective date of the 1976 Copyright Act”). We review de novo legal questions such as the appropriate scope of copyright protection. *See Rentmeester*, 883 F.3d at 1116.

The scope of copyright protection for musical works has been in flux throughout the different versions of the Copyright Act. In 1831, the Copyright Act of 1790 was

amended and copyright protection was extended to musical compositions for the first time. Copyright Act of 1831, 4 Stat. 436 (1831) (repealed 1909). Musical protection under the 1831 Act only extended to the sheet music itself. *See Goldstein v. California*, 412 U.S. 546, 564 (1973). Around the turn of the twentieth century, devices called piano player rolls were invented, which allowed songs to be recreated mechanically on a piano. *See White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 10–11 (1908). In its 1908 *White-Smith* opinion, the Court held that the only protected musical expression under the Copyright Act of 1831 was sheet music, and that infringement could only occur by duplicating the sheet music. *Id.* at 17. Therefore, the makers of piano player rolls did not infringe the copyrights of musical composers. *Id.*

Congress promptly enacted the Copyright Act of 1909. Copyright Act of 1909, 35 Stat. 1075 (1909) (repealed 1978) (the “1909 Act”). In this 1909 iteration, Congress made clear that the scope of protection “[t]o print, reprint, publish, copy, and vend the copyrighted work” under § 1(a) extended to “any arrangement or setting of [the musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.” 1909 Act § 1(e).

“Under the 1909 Act, an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme.” *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000) (quoting *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. 1995), *superseded by statute on other grounds*, 17 U.S.C. § 303(b) (1997)). A work could receive federal

copyright protection either through registration and submission of a deposit copy, 1909 Act § 10, or through publication, *id.* § 9. Distributing phonorecords did not constitute publication under the 1909 Act, so musical compositions were only published if the sheet music were also published.<sup>9</sup> *ABKCO*, 217 F.3d at 688. Additionally, the Copyright Office did not accept sound recordings as deposit copies under the 1909 Act. *See* M. Nimmer & D. Nimmer, 1 Nimmer on Copyright § 2.05[A] (2017).

In 1972, Congress extended copyright protection to sound recordings as separate copyrightable works from musical compositions. 17 U.S.C. § 102(a)(7). The Copyright Act was again amended in 1976 and this amendment allowed musical composers to submit a recording rather than sheet music as the deposit copy for a musical composition. 17 U.S.C. §§ 407, 408 (1976).

Skidmore argues that under the 1909 Act, a deposit copy is purely archival in nature, whereas Defendants argue that for unpublished works, the deposit copy defines the scope of the copyright. This is an issue of first impression in our circuit as well as our sister circuits. One district court considered the issue prior to this case and concluded that for unpublished works under the 1909 Act, the deposit copy defines the scope of the copyright. *See Williams v. Bridgeport Music*, 2014 WL 7877773, at \*6–10 (C.D. Cal.

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<sup>9</sup> We held in *La Cienega* that the sale and distribution of sound recordings in phonorecords constituted a publication. 53 F.3d at 953. After that decision, Congress passed a law stating that the distribution of phonorecords before 1978 did not count as publication. 17 U.S.C. § 303(b). We subsequently held in *ABKCO* that *La Cienega* was an incorrect statement of law and that § 303 retroactively applied. *See ABKCO*, 217 F.3d at 691–92.

Oct. 30, 2014). On appeal, we declined to reach the issue. *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018).

Skidmore argues that the express purpose of the 1909 Act was to overturn *White-Smith* and extend copyright protection beyond sheet music. Specifically, Skidmore relies on § 1(e), which extended copyright protection to “any system of notation or any form of record in which the thought of an author may be recorded.” § 1(e). But, as Defendants point out, this actually defines the forms an infringing copy can take, rather than the scope of what can be copyrighted. § 1(a), (e). Therefore, although the 1909 Act clearly extended copyright law to protect against infringement beyond mere reproduction of the sheet music—in contravention of *White-Smith*—it did not clearly state that copyrighted works could be anything other than published sheet music or the musical composition transcribed in the deposit copy. Indeed, “in order to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.” Nimmer on Copyright § 2.05[A] at 2–62 (2017).

Skidmore also cites to a host of cases to support his argument, but these cases are distinguishable. Skidmore relies primarily on *Three Boys*, 212 F.3d at 486–87. In *Three Boys*, appellants argued that because the deposit copy was incomplete—contrary to the 1909 Act’s requirement that a “complete copy” be deposited—subject matter jurisdiction did not exist. *Id.* at 486. In response, we observed that an expert had testified that the essential elements of the musical composition were intact in the deposit copy; therefore we declined to overturn the jury’s finding that the deposit copy was “complete” because there was no intent to defraud and any inaccuracies in the deposit copy were minor. *Id.* at 486–87. Since *Three Boys* dealt with whether the deposit copy

adequately satisfied the “complete copy” statutory requirement, it is not directly on point. Nonetheless, Skidmore argues that we should extrapolate from language in *Three Boys* that the expert “even played the deposit copy” to conclude that a recording was also played, and that the recording was used for purposes of evaluating substantial similarity. *Id.* While the evidentiary presentation in *Three Boys* may support Skidmore’s claim that typically sound recordings have been used in infringement trials under the 1909 Act, our resolution of the “complete copy” issue did not create binding precedent that copyright protection extended to sound recordings under the 1909 Act. *Id.*

Skidmore also relies on three other cases to support his argument that copyright protection under the 1909 Act extends beyond sheet music, none of which are helpful. One of the cases cited by Skidmore concludes that a copyright obtained via publication is not invalidated by failure to deposit promptly a copy. *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 41–42 (1939). The deposit copy carries less importance for published works, however, so this conclusion is not particularly instructive. 2 *Nimmer on Copyright* § 7.17[A] (citing 17 U.S.C. § 704(d) for the proposition that either the original or a copy of the deposit copy must be kept for unpublished works). Unlike for unpublished works, a deposit copy is not necessary to secure copyright in published works. 1909 Act § 9.

The other two cases both deal with copyright issues under the 1976 Act. *See Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009); *Nat’l Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 482–83 (7th Cir. 1982). Neither of these cases help us determine whether the deposit copy for unpublished works defines the scope of copyright protection

under the 1909 Act. The 1976 Act includes a provision providing that federal copyright protection attaches upon fixation of a work to any tangible medium, which can include a sound recording. 17 U.S.C. § 102(a). This provision, however, was not a part of the 1909 Act. As a result, although it makes sense in the context of the 1976 Act to look at a recording for evidence of what the composition includes because federal copyright protection attaches when the work is recorded, it makes significantly less sense to do so for the 1909 Act.

The cases Defendants offer in support of their argument are also not directly on point. Some do not pertain to the 1909 Act, which is problematic for the reasons discussed above. *See, e.g., White-Smith*, 209 U.S. at 15–16; *Merrell v. Tice*, 104 U.S. 557, 558 (1881). More persuasive are the cases that, in the context of discussing the current copyright scheme, opined that one of the purposes of the deposit requirement is to provide “sufficient material to identify the work in which the registrant claims a copyright.” *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–63 (1st Cir. 1994); *see also Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 367 F. Supp. 2d. 514, 520 (S.D.N.Y. 2005). These cases support Defendants’ contention that the deposit copy defines the scope of the copyright, but as in *Three Boys* the ultimate holding in these cases was that minor errors in the deposit copy do not invalidate a copyright. *See Data Gen. Corp.*, 36 F.3d at 1163.

As further support for their position, Defendants contend that the treatment of deposit copies under the 1909 Act supports their argument that for unpublished works, the deposit copy defines the scope of the copyright. The 1909 Act prohibits the destruction of the deposit copies of

unpublished works without notice to the copyright owner. *See* 1909 Act §§ 59–60; Report of the Register on the General Revision of the U.S. Copyright Law at 81 (1961). Additionally, the Register of Copyright’s policy is to retain access to unpublished works for the full copyright term. *See* Report of the Register on the General Revision of the U.S. Copyright Law at 80–82 (1961).<sup>10</sup>

We are persuaded that for unpublished musical works under the 1909 Act, the deposit copy defines the scope of the copyright. Overall, the structure of the 1909 Act demonstrates that the deposit copy encompasses the scope of the copyright for unpublished works, as the deposit copy must be filed not only to register the copyright, but for the copyright to even exist. The 1909 Act states that “copyright may also be had of the works of an author of which copies are not reproduced for sale, *by the deposit*, with claim of copyright, of one complete copy of such work.” 1909 Act § 11 (emphasis added). Because the 1909 Act makes the existence of copyright dependent on the deposit copy, it makes sense that the deposit copy also defines the scope of the copyright. It was not until the 1976 Act that common law copyright was federalized and copyright attached at the creation of the work. Recognizing the importance of deposit copies for unpublished works, Congress and the Register of Copyrights have taken care to ensure the preservation of deposit copies. 1909 Act §§ 59–60; Report of the Register on the General Revision of the U.S. Copyright Law at 80–82 (1961). Similarly, even under later versions of the Copyright

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<sup>10</sup> In the 1976 Act, Congress prohibited the destruction of deposit copies of unpublished works during the copyright term unless a reproduction had been made. 17 U.S.C. § 704(d). *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 172 (1976) (recognizing “the unique value and irreplaceable nature of unpublished deposits”).

Act, the purpose of deposit copies has been described as providing a way “to identify the work in which the registrant claims a copyright.” *Data Gen. Corp.*, 36 F.3d at 1161–62. Given that copyright protection under the 1909 Act did not attach until either publication or registration, we conclude that for unpublished works the deposit copy defines the scope of the copyright.

Skidmore puts forth three policy arguments, but they do not alter our conclusion as they do not override the weight of the 1909 Act’s statutory scheme and legislative history. First, Skidmore argues that it is challenging to compare a sound recording of the infringing work to a deposit copy of the infringed work. While many copyrighted works, such as books, can be easily formatted to satisfy the deposit copy requirement, musical works are not as well reflected in deposit copies. This makes the intrinsic test for substantial similarity especially challenging when comparing a deposit copy to a sound recording, as the intrinsic test is concerned with the general “total concept and feel” of a work. *See Three Boys*, 212 F.3d at 485. Second, Skidmore argues that our conclusion is biased against musicians who do not read music and could not possibly have written the deposit copies of their own songs. It is not uncommon for musicians who are composing songs to not know how to read music. Skidmore argues that for musicians who do not read music it would be overly time consuming and expensive to make accurate deposit copy sheet music going forward. For new works, however, sound recordings can be deposited as the deposit copy, so we are not overly concerned with the costs of transcribing deposit copies for new compositions. *See* 17 U.S.C. §§ 407, 408. Finally, Skidmore raises the question of whether a copyright claim would be provable if a deposit copy were lost or destroyed. These policy arguments do not undermine the statutory framework that



leads us to conclude that the deposit copy defines the scope of a copyrighted work for unpublished musical works under the 1909 Act.<sup>11</sup>

**B.**

Skidmore argues that the district court erred by failing to allow recordings of “Taurus” to be played to prove access. This was an evidentiary ruling, which we review for abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009). Although Skidmore’s counsel was permitted to play recordings for Page outside the presence of the jury, who was then questioned about them in front of the jury, Skidmore argues that the jury could not assess Page’s credibility without observing him listening to the recordings and then answering questions about the recordings.

As the jury ultimately found that both Plant and Page had access to “Taurus,” any error in precluding the recordings was harmless. *See United States v. Edwards*, 235 F.3d 1173, 1178–79 (9th Cir. 2000) (stating that an evidentiary ruling is reversed only if the error “more likely than not affected the verdict”). As this issue will likely arise again at retrial, we address whether the district court abused its discretion.

The district court excluded the sound recordings under Federal Rule of Evidence 403, finding that “its probative value is substantially outweighed by danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . .” Fed. R. Evid. 403. Here, the district court abused its discretion in finding that it would be unduly prejudicial for

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<sup>11</sup> We leave open the possibility that where the deposit copy has been lost or destroyed, an original sound recording may be used as evidence of the scope of the copyright under the 1909 Act.

the jury to listen to the sound recordings in order to assess Page's access to "Taurus." The district court acknowledged that the recordings were relevant to whether Page had access to "Taurus," as Page would have heard and allegedly copied a recording of "Taurus." The district court was concerned, however, that allowing the jury to hear the recordings would confuse them.

Skidmore argues that by not allowing the jury to observe Page listening to the recordings of "Taurus," the effect of the court's ruling was to decrease the probative value of Skidmore's questioning of Page. Although the jury could still draw conclusions and inferences from Page's demeanor during his testimony, allowing the jury to observe Page listening to the recordings would have enabled them to evaluate his demeanor while listening to the recordings, as well as when answering questions. Limiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition. For example, the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity. *See United States v. W.R. Grace*, 504 F.3d 745, 765 (9th Cir. 2007) (providing that "the court substantially underestimated the . . . potential efficacy of a limiting instruction"). Given the probative value of the information and the relatively low risk of unfair prejudice, we conclude that the district court abused its discretion in excluding the evidence. *See Fed. R. Evid.* 403.

### C.

Skidmore also argues that the district court abused its discretion by failing to disqualify Defendants' expert Dr. Ferrara or to give a negative inference instruction to the jury

because he previously had been hired by Rondor to compare “Stairway to Heaven” to the original recording of “Taurus.” District courts have “broad discretion” in making evidentiary rulings, including whether to allow expert testimony. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). We thus review for abuse of discretion the district court’s decision to allow expert testimony. *See id.*

The district court did not abuse its discretion when it denied Skidmore’s request for sanctions against Dr. Ferrara and excluded his testimony. Skidmore’s motion was rejected as untimely and improperly filed. Even if the motion had been timely filed, the district court did not err in denying the motion because there was no conflict that merited monetary sanctions or exclusion of Dr. Ferrara’s testimony. Skidmore argues that Dr. Ferrara effectively switched sides in this case. We have held that when an expert switches sides, the party moving for disqualification must show that the expert in question has confidential information from the first client. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). Here, even if Dr. Ferrara switched sides, there was no showing that Dr. Ferrara had confidential information. Rondor retained Dr. Ferrara to obtain his opinion on two publicly available songs, and he volunteered to share his conclusion with Skidmore. While he did not produce a report from this prior consultation, he did testify that he believed he communicated his opinion telephonically to Rondor rather than in a written report.

Additionally, there is no evidence presented that Dr. Ferrara did switch sides. Rondor does not have an interest in this case, nor does Universal Music, and Rondor waived any potential conflict that might arise from having Dr. Ferrara testify as an expert for Defendants. Skidmore

contends that Universal Music was working for Hollenbeck, which owed a fiduciary duty to Skidmore as a publisher of Spirit's music. He presents no evidence, however, that Hollenbeck owed a fiduciary duty to Skidmore. *See Cafferty v. Scotti Bros. Records, Inc.*, 969 F. Supp. 193, 205 (S.D.N.Y. 1997) ("In the absence of special circumstances, no fiduciary relationship exists between a music publisher and composers as a matter of law." (citation omitted)). On remand, in light of the current record, there is no basis for excluding Dr. Ferrara's testimony, giving an adverse jury instruction, or imposing monetary sanctions.

## V.

Defendants cross-appeal the district court's denial of their motions for attorneys' fees and costs. In light of our disposition, we vacate the district court's denial of attorneys' fees and costs under 17 U.S.C. § 505. In the event Defendants' prevail on remand, they may renew their motions.

## VI.

Given our disposition, we need not address the remaining arguments raised by the parties. To be clear, we do not consider whether the district court abused its discretion in determining which version of "Taurus" to play in response to the jury's request during jury deliberations. And, we do not address whether the district court's imposition of time limits violated due process. We note, however, that strict time limits are generally disfavored at trial. *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994). Given the complex nature of this case, we are troubled by the strict imposition of time limits and the relative inflexibility of the district court once Skidmore ran out of time. On remand, if the district court

again imposes time limits for the retrial it should ensure that each side has adequate time to present its witnesses and arguments.

## VII.

We vacate the amended judgment in part and remand for a new trial against Defendants because of the deficiencies in the jury instructions on originality and the district court's failure to include a selection and arrangement jury instruction. Additionally, although harmless in this instance, we conclude that the district court abused its discretion by not allowing the sound recordings of "Taurus" to be played to prove access. Further, at any retrial, the district court should reconsider whether an inverse ratio jury instruction is warranted. The district court did not err, however, in limiting the copyright of "Taurus" to its deposit copy or in allowing Dr. Ferrara to testify. Finally, we vacate the order denying Defendants' motions for attorneys' fees and costs. Given our disposition, there is no need to address the remaining issues raised by Skidmore.

**VACATED in part and REMANDED for a new trial.**

Appellant shall recover his costs on appeal.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

|          |  |      |                |
|----------|--|------|----------------|
| Case No. | CV 15-03462-RGK (AGRx)                   | Date | April 25, 2016 |
| Title    | MICHAEL SKIDMORE v. LED ZEPPELIN, et al. |      |                |

|                                   |  |                                   |  |
|-----------------------------------|--|-----------------------------------|--|
| Present: The Honorable            | R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE |                                   |  |
| Sharon L. Williams                | Shayna Montgomery                              | N/A                               |  |
| Deputy Clerk                      | Court Reporter / Recorder                      | Tape No.                          |  |
| Attorneys Present for Plaintiffs: |  | Attorneys Present for Defendants: |  |
| Francis Maolfiy. Glen Kulik       |  | Peter Anderson, Helene Freeman    |  |

**Proceedings: PRETRIAL CONFERENCE**

Case called. Court and counsel confer. Prior to the trial date, the parties shall submit a joint statement of the case. The joint statement should not exceed one paragraph. Each day of trial, counsel shall submit to the Court a list of witnesses, in the order they will be called. Court and counsel confer regarding voir dire, jury impanelment, trial hours, and introducing exhibits. Time limits for opening statements will be given to counsel on the first day of trial. The Court informs counsel that it intends to impose time limits of 10 hours per side.

The Court issues tentative rulings on motions in limine:

Defendants' Motion in Limine 1 to exclude testimony about Randy Wolfe's statements (DE 134), is GRANTED.

Defendants' Motion in Limine 2 to exclude newspaper articles and book excerpts (DE 135), is GRANTED with the caveat that Plaintiff may use Page's two statements from the magazine interviews solely for impeachment.

Defendants' Motion in Limine 3 to Exclude Recordings of *Taurus* (DE 136), is GRANTED: the only *Taurus* recordings properly presented to the jury are those that are strictly limited to the *Taurus* musical composition as transcribed in the copyrighted 1967 transcription.

Defendants' Motion in Limine 4 to Exclude testimony and exhibits of Defendant's experts (DE 137), is GRANTED insofar as the expert reports, testimony, or exhibits rely on unprotected performance elements.

Defendants' Motion in Limine 5 to exclude other claims accusing Led Zeppelin of copying (DE 138), is GRANTED.

App. 111

Defendants' Motion in Limine 6 to exclude report from purported Led Zeppelin historian (DE 139), is GRANTED.

Defendants' Motion in Limine 7 to exclude evidence about the parties' respective levels of wealth, (DE 140) is GRANTED.

Defendants' Motion in Limine 8 to exclude evidence about the charitable goals of the Trust (DE 141), is GRANTED.

Defendants' Motion in Limine 9 to exclude references to extraterritorial revenues and revenue earned outside the limitations period (DE 142), is DENIED as to evidence of extraterritorial profits/GRANTED as to evidence of revenue earned outside the limitations period.

Defendants' Motion in Limine 10 to exclude testimony of undisclosed witnesses (DE 143), the Court continues to deliberate on this motion.

Defendants' Motion in Limine 11 to exclude testimony of Larry Knight (DE 144), the Court continues to deliberate on this motion.

Defendants' Motion in Limine 12 to exclude references to Led Zeppelin members' drug and alcohol use (DE 145), is GRANTED.

Defendants' Motion in Limine 13 to exclude evidence of Defendants' insurance or indemnity agreements (DE 146), is GRANTED.

Defendants' Motion in Limine 14 to exclude the Complaint and FAC from evidence (DE 147), is GRANTED.

Plaintiff's Motion in Limine 1 to exclude evidence about the validity or legitimacy of the Trust (DE 149), is GRANTED as to evidence challenging whether certain legal formalities have been satisfied for the Trust to legally continue operating.

Plaintiff's Motion in Limine 2 to exclude evidence that Randy Wolfe's son, Quinn Wolfe, owns the copyright in *Taurus* as opposed to the Trust (DE 150), is DENIED.

Plaintiff's Motion in Limine 3 to exclude any expert on damages (DE 151), is DENIED to the extent Defendants wish to make arguments about damages based on information already contained in their musicologist's expert reports or testimony from lay witnesses about Defendants' respective revenues and deductible expenses.

**IT IS SO ORDERED.**

|                      |       |   |       |       |
|----------------------|-------|---|-------|-------|
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| Initials of Preparer | _____ |   | slw   | _____ |

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

|          |   |      |                |
|----------|---|------|----------------|
| Case No. | <b>CV 15-3462 RGK (AGRx)</b>                          | Date | April 25, 2016 |
| Title    | <b><i>Michael Skidmore v. Led Zeppelin et al.</i></b> |      |                |

|                        |  |
|------------------------|--|
| Present: The Honorable | R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE |
|------------------------|--|

Sharon L. Williams

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) Order re: Amended Ruling on Defendants' Motion in Limine No. 4 (DE 137)**

In its order denying Defendants' motion for summary judgment. This Court held that "Plaintiff's only copyright claim lies in the musical composition of *Taurus*, not the sound recording." (Order Den. Def.s' Mot. Summ. J. 17, ECF No. 159.) In light of this Order, Defendants have filed a Motion in Limine seeking to exclude all of Plaintiff's experts because they analyzed only the *Taurus* sound recording—not the musical composition. Plaintiff acknowledges that its expert reports considered only the *Taurus* sound recording but argues that these reports are admissible because "an expert may refer to the sound recording as long as the expert is clear that the compositional elements in question are represented in some way in the deposit copy." (Pl.'s Opp'n to Def.s' Mot. In Lim. No. 4, ECF No. 170.)

Because the deposit copy of *Taurus* registered with the Copyright Office is sheet music for the piano, Plaintiff's experts naturally relied on the *Taurus* sound recording to determine the melody, rhythm and other protected elements of the musical composition as played on the guitar. In doing so, however, Plaintiff's experts impermissibly analyzed unprotected elements not embodied in the musical composition (e.g., flute, recorder, fretboard positioning). Therefore, Plaintiff's expert reports are inadmissible in their present condition because they considered unprotected elements contained only in the sound recording. If Plaintiff wishes to introduce expert testimony at trial, it must submit reports completely purged of any reliance on the unprotected performance elements in the sound recording. Any comparison analysis must consider *only* the protected elements represented in the musical composition.

Should Plaintiff choose to submit new expert reports, he must do so within **FIVE DAYS** of this order.

**IT IS SO ORDERED.**

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App. 113 Initials of Preparer



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

|                 |   |             |               |
|-----------------|---|-------------|---------------|
| <b>Case No.</b> | <b>CV 15-3462 RGK (AGR<sub>x</sub>)</b>               | <b>Date</b> | April 8, 2016 |
| <b>Title</b>    | <b><i>Michael Skidmore v. Led Zeppelin et al.</i></b> |             |               |

|                               |   |
|-------------------------------|---|
| <b>Present: The Honorable</b> | <b>R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE</b> |
|-------------------------------|---|

Sharon L. Williams

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings:** (IN CHAMBERS) Order re: Defendants' Motion for Summary Judgment (DE 97)

## **I. INTRODUCTION**

On May 31, 2014, Michael Skidmore, as trustee for the Randy Craig Wolfe Trust ("Plaintiff") filed suit against Led Zeppelin, James Patrick Page, Robert Anthony Plant, John Paul Jones, Super Hype Publishing, Inc., and Warner Music Group Corp., which is the parent company of Warner/Chappell Music, Inc., Atlantic Recording Corporation, and Rhino Entertainment Company ("Defendants"). On October 8, 2014, Plaintiff filed a First Amended Complaint ("FAC"). The FAC claims that Defendants' song, *Stairway to Heaven*, infringes another song, *Taurus*, created by the rock band Spirit. The lawsuit alleges: (1) Copyright Infringement and (2) Violation of the Right of Attribution.

Presently before the Court is Defendants' Motion for Summary Judgment. For the following reasons, the Court **DENIES IN PART and GRANTS IN PART** Defendants' motion.

## **II. FACTUAL BACKGROUND**

This case involves the vehemently contested history of two songs: the iconic *Stairway to Heaven* by Led Zeppelin and the lesser-known *Taurus* by the rock band Spirit. Because the surviving band members of each group figure prominently in the ensuing narrative, the Court briefly sets out the cast of relevant figures.

In February 1967, Randy Wolfe (guitarist), Mark Andes (bassist), John Locke (keyboardist), Ed Cassidy (drummer), and Jay Ferguson (vocalist/precussionist) joined to form the band Spirit. Only two surviving members of the original group remain, Andes and Ferguson. Across the Atlantic, another rock group formed in 1968 when Jimmy Page (guitarist), Robert Plant (singer), John Paul Jones (bassist), and John Bonham (drummer) joined to create Led Zeppelin. The three surviving members of Led Zeppelin are Page, Plant, and Jones.

App. 114

**A. The Genesis of *Taurus***

On August 29, 1967, Spirit signed its first recording contract with Ode Records. On that same day, Wolfe entered into an exclusive songwriter agreement with Hollenbeck Music. The exclusive songwriter agreement deemed Wolfe a “writer for hire” with full rights of copyright renewal vested in Hollenbeck. Late in 1967, Ode Records released Spirit’s first eponymous album, which included an instrumental composition of *Taurus*. (Ferguson Depo. 46:10-19; Andes Depo. 57:16-22, ECF No. 97.)

According to Defendants, *Taurus* was initially composed and recorded in Ode Records’ studio after signing the August 1967 recording contracts and exclusive songwriter agreement. In his deposition, Ferguson, Spirit’s singer and tambourine player, testified that *Taurus* was recorded for the first Spirit album after the 1967 recording contract with Ode Records. (Ferguson Depo. 197:15-198:1, ECF No. 97.) Spirit’s bassist, Andes, also confirmed in deposition testimony that *Taurus* was recorded for Spirit’s initial album after the 1967 recording contract. (Andes Depo. 150:18-151:3, ECF No. 97.) Finally, Defendants submit a copyright registration showing that on December 22, 1967, Hollenbeck, as “Copyright Claimant,” registered a copyright in the *Taurus* musical composition with the Copyright Office.

Plaintiff offers a competing narrative of *Taurus*’ origin. According to declarations from Wolfe’s sisters, in late 1966—before the recording contract or the exclusive songwriter agreement—Wolfe wrote *Taurus* for his high school sweetheart who would eventually become his wife. (Andrea Wolfe Decl. ¶¶4-5; Janet Wolfe Decl. ¶¶4-5, ECF No. 118.) Andes and Ferguson also testified that Wolfe created the song *Taurus* before the 1967 recording contract and exclusive songwriter agreement. (Andes Decl. ¶4; Ferguson Decl. ¶4, ECF No. 119.) Furthermore, according to Andes and Wolfe’s sisters, Spirit regularly played *Taurus* at the Ash Grove club in Hollywood in early 1967—before the songwriter agreement was executed. (Andrea Wolfe Decl. ¶5; Janet Wolfe Decl. ¶5, ECF No. 118; Andes Depo. 150-156, ECF No. 124.)

**B. Interaction Between Spirit and Led Zeppelin**

In 1968, Ode Records released the second Spirit album, titled *The Family that Plays Together*, and launched a tour to promote the new record. Spirit and Led Zeppelin performed at the same venue on the same day at least three times between 1968 and 1970. The first occasion was on December 26, 1968 when Led Zeppelin, in its United States debut, opened for Spirit in Denver, Colorado (“Denver Festival”). Next, the two bands performed at the Atlanta International Pop Festival (“Atlanta Festival”) on July 5, 1969. Finally, the groups both appeared, along with at least ten other bands, at the Seattle Pop Festival (“Seattle Festival”) on July 27, 1969.

The parties present conflicting versions of the interaction between Led Zeppelin and Spirit at these three events. The surviving members of Led Zeppelin testified that they never toured with, shared a stage with, or listened to any of Spirit’s music during these brief encounters. The surviving Spirit members, on the other hand, recalled conversing with the Led Zeppelin members backstage between sets and performing in succession at two of the festivals.

The two groups also performed at the Texas International Pop Festival in August 1969, although on different days. There is no evidence that members of Led Zeppelin were present when Spirit performed at the Texas Pop Festival, and Spirit’s surviving members do not recall performing *Taurus* at the Texas Festival. (Pl.’s SGI Nos. 58-63, ECF No. 118.)

Similarly, Plaintiff submits a promotional poster from the three-day Northern California Folk-Rock Festival in May 1969, which shows that both Spirit and Led Zeppelin would be performing. (Malofiy Decl. Ex. 12, ECF No. 124.) Beyond that, however, there is no evidence that the two groups



performed on the same day or that Led Zeppelin watched Spirit's performance in Northern California. In fact, Spirit's surviving members do not recall performing *Taurus* at the Northern California festival. (Pl.'s SGI No. 65, ECF No. 118.)

### C. Release of *Stairway to Heaven* and the Intervening Years

The surviving members of Led Zeppelin testified that the band recorded *Stairway to Heaven* between December 1970 and January 1971 entirely in London, England. (Page Decl. ¶4; Plant Decl. ¶4; Jones Decl. ¶3, ECF No. 97.) Plaintiff rebuts with deposition testimony from Page, acknowledging that he and Plant mixed *Stairway to Heaven* at Sunset Studios in Los Angeles, California. (Page Depo. 140-143, ECF No. 124.) Regardless of where the song was mixed, neither party disputes that Led Zeppelin first performed *Stairway to Heaven* in March 1971. The song was first released on the band's untitled fourth album, *Led Zeppelin IV*, in November 1971.

In the intervening years, fans and critics alike noticed the similarity between the two songs. In fact, on April 2, 1991, Wolfe was interviewed in connection with a new album of Spirit recordings titled, *Time Circle*. In the interview, Wolfe was asked about the possibility that Led Zeppelin had copied the opening of *Taurus* for its song *Stairway to Heaven*. Wolfe responded that Led Zeppelin members "used to come up and sit in the front row of all [Spirit's] shows and became friends[,] and if they wanted to use [*Taurus*], that's fine." (Freeman Decl. Ex. 6 at 7, ECF No. 97.) Later in the interview, Wolfe reiterated, "I'll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit." (Freeman Decl. Ex. 6 at 8, ECF No. 97.)

Wolfe never sued over *Stairway to Heaven* during his lifetime, and he ultimately died in 1997. Wolfe's mother assumed the role as trustee of his trust from 2002 until her death, and she also did not bring suit. Plaintiff in this action became trustee of the Wolfe Trust in 2006. Between 2012-2014, Rhino Entertainment Co. arranged for the re-mastering and re-release of *Stairway to Heaven*. On May 2014, forty-three years after the initial release of *Stairway to Heaven*, Plaintiff initiated the instant action alleging that *Stairway to Heaven* infringed the copyright in *Taurus*.

## III. EXPERT REPORTS

The parties submit dueling expert reports disputing the similarity between *Taurus* and *Stairway*.

### A. Plaintiff's Expert Reports

Plaintiff's first expert, Alexander Stewart, prepared a 22-page report comparing recordings of *Taurus* with recordings and sheet music of *Stairway to Heaven*. (Stewart Decl. ¶2, ECF No. 118.) He explains that, for the purposes of the analytic comparison, the only relevant part of *Stairway to Heaven* is the beginning two-minute segment, which contains all the similarities. (Stewart Decl. ¶7, ECF No. 118.) The structural similarities between the two songs are represented below:

| <b>Taurus</b> | <b>Stairway to Heaven</b> |
|---------------|---------------------------|
| 0:00 Intro    | 0:00 A (instrumental)     |
| 00:45 A       | 0:13 A (instrumental)     |
| 00:58 A       | 0:26 B                    |
| 1:12 B        | 0:53 A (vocal)            |
| 1:37 A        | 1:06 A (vocal)            |

|        |                              |
|--------|------------------------------|
| 1:50 A | 1:20 B                       |
| 2:04 B | 1:47 A (vocal)               |
|        | 2:00 A (instrumental)        |
|        | 2:14 End of relevant portion |

As illustrated by the chart, both songs contain repeated “A” sections consisting of a four-measure descending A minor guitar pattern. In both songs, the “A” sections are separated by a longer “B” section, or bridge. (Stewart Decl. ¶5, ECF No. 118.) The two songs do, however, contain three structural differences. First, the version of *Taurus* appearing on the album contains a 45-second introduction; Stewart notes, however, that this introduction does not appear on any live or demo versions of *Taurus*. (Stewart Decl. ¶6, ECF No. 118.) Second, *Taurus* contains two repeated “A” sections (AABAAB) whereas *Stairway to Heaven* contains three repeated “A” sections (AABAABAA). Finally, the “B” section, or bridge, is seven measures in *Taurus* but eight measures in *Stairway to Heaven*. (Stewart Decl. ¶6, ECF No. 118.)

Despite these minor differences, Stewart opines that “[n]early 80% of the pitches of the first eighteen notes match, along with their rhythms and metric placement. The harmonic setting of these “A” sections feature the same chords during the first three measures and an unusual variation on the traditional chromatic descending bass line in the fourth measure.” (Stewart Decl. ¶24, ECF No. 118.)

Beyond the core structural and melodic similarities, Stewart opines that the two songs are also similar in instrumentation and orchestration. Stewart explains that “the presence of acoustic guitar, strings, recorder/flute sounds, and harpsichord as well as the noticeable absence of bass and drums (and other instruments characteristic of rock and roll) lend both songs a decidedly ‘classical’ style, particularly evoking a Renaissance atmosphere.” (Stewart Decl. ¶3, ECF No. 118.) Additionally, Stewart notes that live versions of *Taurus* also “feature a similar fingerpicking style in the passage’s later appearances.” (Stewart Decl. ¶3, ECF No. 118.)

Plaintiff also submits a 31-page expert report prepared by Erik Johnson who also compared both *Taurus* and *Stairway to Heaven*. Johnson transcribed the song *Taurus* from the sound recording and reduced it to its constituent elements: guitar, harpsichord, atmospheric percussion, and strings. (Johnson Decl. ¶11, ECF No. 118.) He also reconstructed *Stairway to Heaven* and recorded each instrument (electric bass, drum set, and electric piano parts) individually. (Johnson Decl. ¶8, ECF No. 118.)

After comparing the reconstructed versions of *Taurus* and *Stairway to Heaven*, Johnson concludes, “If *Stairway to Heaven* is stripped down to the bare elements that received songwriting credit, the listener is left with two parts: [1] an arpeggiated guitar part, the signature element, which is substantially the same as the signature guitar element in *Taurus*; [2] a vocal melody that bears significant resemblance to the harpsichord in *Taurus*, followed by a series of riffs, chord progressions and solos.” (Johnson Decl. ¶18, ECF No. 118.)

Plaintiff’s final expert report was prepared by Brian Bricklin, who compared audio files of *Taurus* and *Stairway to Heaven*. Bricklin spends the first eight pages of the report explaining the music production and mixing process. He then analyzes the two songs and concludes that “[b]oth songs are presented, in their final commercially released versions, with substantially similar production and mixing techniques.” (Bricklin Decl. ¶16, ECF No. 118.) Bricklin points out specific similarities such as “the use of reverb to create a mystic, dreamlike quality [so that] each note of the guitar has a ‘whispering tail.’”



## **B. Defendants' Expert Reports**

Defendants submit an expert report by Lawrence Ferrara who opines that *Taurus* and *Stairway to Heaven* are not substantially similar. Ferrara attacks Stewart's report because it "relies upon and analyzes and compares performance elements in *Taurus* recordings that are nowhere mentioned in the *Taurus* Transcription. The *Taurus* Transcription does not mention or reflect, for example, performance techniques, instrumentation and orchestration, or tempo (i.e., performance speed)." (Ferrara Decl. ¶6, ECF No. 97.)

After disregarding the unprotected performance elements in Stewart's report, Ferrara explains that the only remaining similarities are the interchanging "A" and "B" sections reflected in Stewart's chart above. (Ferrara Decl. ¶8, ECF No. 97.) Ferrara concludes that these commonalities do not evince a substantial similarity between the two works for several reasons. First, he explains that interchanging "A" and "B" sections have been generic in music for centuries. Next, Ferrara contends that Stewart's analysis focuses only on the first two minutes of each song while disregarding the last six minutes of *Stairway*, which constitutes over 70% of the song. Finally, Ferrara opines that any similarities between the two songs are insubstantial and represent commonplace musical devices. (Ferrara Decl. Ex. 1 at ¶22, ECF No. 97.)

Defendants also provide an expert report prepared by Rob Mathes who performed and recorded the *Taurus* sheet music deposited with the Copyright Office on a steel string acoustic guitar. (Mathes Decl. ¶3, ECF No. 97.) Mathes echoes the conclusions of Ferrara and finds that the two songs are not substantially similar.

## **IV. JUDICIAL STANDARD**

### **A. Summary Judgment**

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)-(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324. The materiality of a fact is determined by whether it might influence the outcome of the case based on the contours of the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id.*

### **B. Copyright**

"Proof of copyright infringement is often highly circumstantial, particularly in cases involving music. A copyright plaintiff must prove: (1) ownership of the copyright; and (2) infringement—that the defendant copied protected elements of the plaintiff's work." *Three Boys Music Corp. v. Bolton*, 212



F.3d 477, 481 (9th Cir. 2000). Here, Defendants challenge both elements of the copyright test, arguing that Plaintiff does not own the copyright in *Taurus* and cannot demonstrate copying. Additionally, Defendants raise three defenses: abandonment, laches, and defective deposit copy.

## V. DEFENSES

Defendants assert three defenses: (1) abandonment/waiver, (2) laches, and (3) defective deposit copy. The Court discusses each below.

### A. Abandonment/Waiver

Defendants contend that Wolfe waived his right to the *Taurus* musical composition. “In copyright, waiver or abandonment of copyright ‘occurs only if there is an intent by the copyright proprietor to surrender rights in his work.’” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). “Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it.” *United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988). “To find abandonment, ‘the copyright owner must have clearly manifested that intention through some affirmative act.’” *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392, 1398 (C.D. Cal. 1990).

On April 2, 1991, Wolfe was interviewed in connection with a new album of Spirit recordings titled, *Time Circle*. In the interview, Wolfe was asked about the possibility that Led Zeppelin had copied the opening of *Taurus* for its song *Stairway to Heaven*. Wolfe responded that Led Zeppelin members “used to come up and sit in the front row of all [Spirit’s] shows and became friends[,] and if they wanted to use [*Taurus*], that’s fine.” (Freeman Decl. Ex. 6 at 7, ECF No. 97.) Later in the interview, Wolfe reiterated, “I’ll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit.” (Freeman Decl. Ex. 6 at 8, ECF No. 97.) Defendants submit the original article, audio recordings of the interview, and deposition testimony from the journalist who conducted the interview, and argue that Wolfe’s public statement demonstrates abandonment of his right in *Taurus*. (Freeman Decl. Exs. 3-7, ECF No. 97.)

Two district court cases have addressed similar arguments of abandonment premised on a copyright holder’s public statements. In *Melchizedek v. Holt*, the copyright holder of several videos was quoted at a workshop saying, “I don’t care about copyrights or any of that stuff, that doesn’t matter. Forget it, just take it and you’ll understand what this is all about by tomorrow.” 792 F. Supp. 2d 1042, 1053 (D. Ariz. 2011). The court held that the remark was ambiguous as to which copyrights the plaintiff had supposedly abandoned and concluded that “questions of fact exist as to whether the overt acts . . . are indicative of Plaintiff’s intent to abandon copyright protection in the [videos].” *Id.* at 1054.

In *Marya v. Warner/Chappell Music, Inc.*, the copyright holder, who owned the lyrics to the famed *Happy Birthday* song, was mentioned in a *Time* magazine article as having “no complaint to make on the use of the words because she long ago resigned herself to the fact that her ditty had become common property of the nation.” No. CV134460, 2015 WL 5568497, at \*11 (C.D. Cal. Sept. 22, 2015). In addressing whether this quote constituted abandonment, the court held, “A public statement like this, if believed, is an overt act on which a reasonable fact finder could base a finding that Patty abandoned her copyright interest in the lyrics. However, we cannot say that this evidence is sufficient [for] a directed verdict at trial inasmuch as it is not a direct quote from [the copyright holder].” *Id.*

At the outset, the Court notes that both *Marya* and *Melchizedek* are factually distinguishable from the instant case. Unlike the copyright holder in *Melchizedek* who did not specify which work was supposedly abandoned, Wolfe explicitly referred to *Taurus* and Led Zeppelin in his interview. *Marya* is similarly distinguishable because the public statement was paraphrased whereas Wolfe’s statement was



a direct quote, according to deposition testimony from the journalist who conducted the interview. (Ruhlmann Depo. 17:17-25, ECF No. 124.) While neither *Marya* nor *Melchizedek* squarely governs the instant case, they provide guidance as to how this Court should approach the issue of abandonment. Both cases stand for the larger proposition that a copyright holder's statement must be viewed in context to determine whether it manifests an intent to abandon rights.

Here, Plaintiff has proffered sufficient evidence to raise a triable issue of fact as to whether Wolfe's statement evinced his intent to abandon rights in *Taurus*. For starters, the journalist who conducted the interview testified that Wolfe never received or reviewed the interview notes before the article was published. (Ruhlmann Depo. 17:17-25, ECF No. 124.) Plaintiff also points to the tenor of the interview, which indicates that Wolfe felt cheated by Led Zeppelin and was merely trying to save face and make light of a bad situation. Additionally, Plaintiff submits several pieces of evidence demonstrating that Wolfe acted in a manner inconsistent with an intent to abandon his rights. First, David Waterbury, Spirit's bass player from 1985 to 1988, testified that Wolfe told him that he was upset about the theft and wanted to sue, but was deterred and intimidated. (Waterbury Decl. ¶¶3-9, ECF No. 118.) Next, Wolfe's longtime friend, Tracy Longo, testified that Wolfe had been contemplating a lawsuit against Led Zeppelin for some time before his death. (Longo Decl. ¶26-27, ECF No. 118.)<sup>1</sup> Finally, Plaintiffs proffer testimony from Linda Mensch, an entertainment attorney in Chicago, Illinois, who testified that Wolfe came to see her in the 1990's to inquire about the possibility of bringing a lawsuit against Led Zeppelin. (Mensch Decl. ¶¶2-6, ECF No. 118.)<sup>2</sup>

In sum, a genuine issue of fact exists as to the abandonment defense, and the Court denies summary judgment on this basis.

## **B. Laches**

Defendants argue that the copyright claim is barred by laches because Plaintiff delayed bringing suit for over four decades (from the 1971 release of *Stairway to Heaven* until the 2014 filing of the instant action).

This issue is squarely governed by the Supreme Court's recent decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, where the Court held that "[l]aches . . . cannot be invoked to preclude adjudication of a [copyright] claim for damages brought within the three-year [statute of limitations]." 134 S. Ct. 1662, 1667 (2014). In *Petrella*, the Court explained that until 1957, federal copyright law did not include a statute of limitations for civil suits, which required federal courts to resort to the equitable doctrine of laches. *Id.* at 1668. In 1957, Congress enacted a three-year look-back limitations period for

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<sup>1</sup> Defendants object to this evidence on the basis of hearsay. The objection is overruled. Wolfe's statements of his intent are admissible under the "state-of-mind" exception to the hearsay rule, which allows "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan)." Fed. R. Evid. 803(3). Of course, Rule 803 allows only a statement of the declarant's state of mind, not "statements as to why [the declarant] held the particular state of mind, or what he might have believed that would have induced the state of mind." *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013).

<sup>2</sup> Defendants object to this evidence as inadmissible under the attorney-client privilege. The objection is overruled. Generally, "the client is the holder of . . . attorney/client privilege and has the right to assert such privilege, but . . . [i]t is also the law that someone other than the actual client can become the holder of the privilege." *Roberts v. Heim*, 123 F.R.D. 614, 629 (N.D. Cal. 1988). Defendants have failed to show how they could possibly hold Wolfe's attorney-client privilege in this situation; therefore, the Court rejects their argument.



all civil claims arising under the Copyright Act, largely obviating the need for the doctrine of laches. *Id.* at 1973. While the Court held that laches was unavailable as a defense to a copyright action seeking damages, it preserved the role of laches in copyright actions seeking equitable relief. *Id.* at 1977 (“In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable.”).

Here, Plaintiff brought suit within the three-year retrospective statute of limitations, as Defendants released a new, remastered version of *Stairway to Heaven* in 2014. *Id.* at 1969 (“[E]ach infringing act starts a new limitations period.”). Regardless of Plaintiff’s delay in bringing the action, as long as Defendants have committed an infringing act within the three years preceding suit, laches does not prohibit Plaintiff’s claim for damages.

Defendants argue that laches operates to bar Plaintiff’s action because the lawsuit is an equitable one and *Petrella* expressly reserved laches as a viable defense to equitable relief. According to Defendants, Wolfe is a beneficial owner, and the relationship between a beneficial owner and a legal owner is an “equitable trust relationship . . . which gives the [beneficial owner] standing to sue for infringement.” *Warren*, 328 F.3d at 1144. Defendants seize on this language and argue that because a beneficial owner exists in an “equitable trust relationship,” he necessarily brings an “equitable” claim subject to laches. The Court disagrees. Defendants’ argument, while semantically convenient, is legally baseless, as they indiscriminately latch onto the word “equitable” even though the word is used in two completely different contexts.

The use of “equitable” to describe the status of a beneficial owner is wholly distinct from the use of “equitable” to describe relief a court may grant under the Copyright Act. To describe the role of a beneficial owner as one in an “equitable trust relationship” is simply to explain that he retains an “equitable” right to bring suit even though he does not hold legal title in a copyright—such a characterization does not even remotely bear on the type of relief, legal or “equitable,” that a beneficial owner may pursue. The Supreme Court in *Petrella* was clearly concerned with “equitable” in the sense of the relief awardable, not the manner in which a copyright owner can sue. The language of the opinion bears this out. The Court held that “the consequences of a delay in commencing suit may be of sufficient magnitude to warrant . . . curtailment of the *relief equitably awardable*.” 134 S. Ct. at 1977. Moreover, in providing an example of equitable relief that would be precluded by laches, the Supreme Court referred to “injunctive relief” such as “destruction of the work.” *Petrella* 134 S. Ct. at 1978. Thus, the *Petrella* court used the term “equitable” as a concept of relief to be contrasted with legal or monetary remedy; the Court did not contemplate “equitable” in the sense that Defendants are invoking it.

Accordingly, the Court rejects this argument and finds that laches does not bar Plaintiff’s claim.

### C. Sufficiency of the Deposit Copy

Defendants contend that Plaintiff has failed to produce a deposit copy of the *Taurus* musical composition that was submitted to the Copyright Office in 1967. Even though Defendants were able to acquire a copy from the Library of Congress, they argue that the copy is defective because it does not bear the official Library of Congress stamp. (Anderson Decl. Exs. 17-18, ECF No. 97.)

The Court disposes of this argument in short order. First, Defendants do not cite any case law holding that a missing seal from the Copyright Office invalidates a deposit copy or prohibits an infringement claim. In fact, the case law points in the opposite direction, as the Ninth Circuit has held that mistakes or omissions on copyright registration material do not invalidate a copyright absent detrimental reliance by the infringer or intentional fraud by the registrant. *Three Boys Music*, 212 F.3d at 486; *KnowledgePlex, Inc. v. Placebase, Inc.*, No. C 084267, 2008 WL 5245484, at \*9 (N.D. Cal. Dec. 11, 2008).



17, 2008) (“[T]he Ninth Circuit has held that the standard governing the sufficiency of copyright deposits for purposes of maintaining an infringement suit is ‘broad and deferential.’”).

Here, Defendants have not alleged or proven either detrimental reliance or intentional fraud. Accordingly, the Court rejects this argument.

## VI. OWNERSHIP

The instant action is brought on behalf of the deceased Randy Wolfe by the trustee of his trust. Defendants contend that neither Wolfe nor his trustee can sue for copyright infringement of *Taurus* because: (1) the song is a work for hire owned by Hollenbeck Music, (2) Wolfe did not comply with statutory formalities to secure his federal copyright interest, and (3) Wolfe failed to timely respond to a discovery request, thereby conceding the work-for-hire issue.

### A. Work For Hire

“[T]o analyze questions arising from events that occurred before January 1, 1978, such as who is the author of the [work], the 1909 Act applies; for events that occurred after that date, such as registration of the renewal copyright, the 1976 Act applies.” *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 971 (9th Cir. 2008). Because *Taurus* was created before 1978 (either in 1966 as Plaintiff contends or in late 1967 as Defendants maintain), the issue is governed by the 1909 Act.

Under the 1909 Act, the author of a work owned the copyright in the work; however, the Act provided that “the word ‘author’ shall include an employer in the case of works made for hire.” 17 U.S.C. § 26 (repealed). While the 1909 Act explicitly carved out a work-for-hire exception, “[n]owhere did the [ ] Act define what was meant by ‘work made for hire’ or ‘employer.’” *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1136 (C.D. Cal. 2007). “Because the 1909 Act did not define ‘employer’ or ‘works made for hire,’ the task of shaping these terms fell to the courts. They concluded that the work for hire doctrine codified in [the 1909 Act] referred only to works made by employees in the regular course of their employment.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 744 (1989). Specifically, the Ninth Circuit “evaluated claims that a work was made for hire [under the 1909 Act] by asking whether it was created at the ‘instance and expense’ of the engaging party.” *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 877 (9th Cir. 2005).

Neither party disputes that on August 29, 1967, Wolfe entered into an exclusive songwriter agreement with Hollenbeck. The agreement deemed Wolfe a “writer for hire” with “full rights of copyright renewal vested in Hollenbeck.” (Anderson Decl. Ex. 11 at ¶11, ECF No. 97.) Hollenbeck also registered a copyright in the *Taurus* musical composition with the Copyright Office on December 22, 1967. The registration lists Hollenbeck as the “Copyright Claimant” and Wolfe as the “Author.” (Anderson Decl. Ex. 16, ECF No. 97.) In January 1996, however, Wolfe renewed the *Taurus* registration in his own name without any reference to Hollenbeck. (FAC Ex. 1, ECF No. 31.) Finally, on February 18, 2016, Hollenbeck filed supplementary registrations with the Copyright Office, amending both the December 1967 initial registration and the January 1996 renewal registration to clarify that *Taurus* was a work for hire. (Anderson Decl. Ex. 27, ECF No. 129.)

Defendants argue that *Taurus* is a work for hire based on the August 1967 exclusive songwriter agreement and the December 1967 copyright registration certificate listing Hollenbeck as a “Copyright Claimant.” Even though the December 1967 registration does not expressly designate *Taurus* as a “work for hire,” Defendants contend that such an inadvertent omission does not invalidate a registration certificate. *Urantia Found. v. Maaherra*, 114 F.3d 955, 963 (9th Cir. 1997) (“[I]nadvertent mistakes on registration certificates do not invalidate a copyright<sup>122</sup> unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office.”). Moreover,



Defendants maintain that any mistake in listing *Taurus* as a work for hire has been corrected by the supplementary registration, in which Hollenbeck amended the prior registrations to reflect that *Taurus* was a work for hire.

The Court finds that Defendants' reliance on the copyright registration certificates is misplaced. "A copyright certificate establishes prima facie evidence of the validity of a copyright and of the facts in the certificate. The presumption is rebuttable, and does not definitively resolve the ownership issue." *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1096 (N.D. Cal. 2002). Here, Plaintiff has proffered sufficient evidence to rebut the presumption created by the registration certificates. For instance, the two surviving members of Spirit testified that Wolfe created the song *Taurus* before the August 1967 exclusive songwriter agreement. (Andes Decl. ¶4; Ferguson Decl. ¶4, ECF No. 119.) Wolfe's sisters corroborate this point; they testified that in late 1966, Wolfe wrote *Taurus* for his high school sweetheart who would eventually become his wife. (Andrea Wolfe Decl. ¶¶4-5; Janet Wolfe Decl. ¶¶4-5, ECF No. 118.) Furthermore, according to Andes and Wolfe's sisters, Spirit regularly played *Taurus* at the Ash Grove club in Hollywood in early 1967—before the songwriter agreement was executed. (Andrea Wolfe Decl. ¶5; Janet Wolfe Decl. ¶5, ECF No. 118; Andes Depo. 150-156, ECF No. 124.)

Plaintiff has marshaled sufficient evidence to create a triable issue of fact as to whether Wolfe composed *Taurus* before or after the exclusive songwriter agreement, a question that bears directly on the issue of whether *Taurus* is a work for hire. Therefore, summary judgment on this basis is improper.

#### **B. Failure to Comply with Statutory Formalities**

Defendants posit that even if Wolfe had composed and performed *Taurus* live or recorded the song before August 29, 1967, he still does not own the copyright because he failed to comply with statutory requirements.

Under the 1909 Act, a work was protected by common law copyright from the moment of its creation; however, as soon as the work was published, the owner was divested of common law protection. *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir. 2008). At the point of divestiture, federal copyright protection did not attach immediately; rather, the owner was required to secure federal copyright protection in one of two ways: (1) by publishing the work with proper notice or (2) by not publishing the work but registering and depositing necessary copies with the Copyright Office. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004, 2014 WL 7877773, at \*8 (C.D. Cal. Oct. 30, 2014); *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 618 (9th Cir. 2010) ("[F]ederal copyright protection attached only upon publication, and even then, only if proper notice, registration, and deposit occurred."). Under the first method of securing federal copyright protection, neither a live performance nor distribution of a recording constitutes publication of a musical composition. *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688-89 (9th Cir. 2000) (explaining that selling or distributing records does not qualify as publication); *Am. Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1027 (9th Cir. 1981) ("It has long been held that mere performance or exhibition of a work does not constitute a publication of that work [under the 1909 Act].").

It is undisputed that Wolfe did not personally comply with the statutory formalities. He did not publish copies of *Taurus* with proper notice, nor did he register and deposit copies of the unpublished musical composition with the Copyright Office. Therefore, Defendants maintain, federal copyright protection never actually vested until Hollenbeck registered *Taurus* with a deposit copy in December 1967. Defendants' argument presumes that Hollenbeck must have owned *Taurus* as a work for hire because the song was not registered until December 1967—well after the exclusive songwriter agreement. That is not necessarily so. Assuming Wolfe did, in fact, compose *Taurus* before the August 1967 exclusive songwriter agreement, he acquired common law copyright protection from the moment



of creation. Absent evidence that he somehow lost or transferred his rights, Wolfe continued to own the copyright in *Taurus* when the common law copyright divested and the federal copyright protection attached upon registration in December 1967. The mere fact that Hollenbeck registered *Taurus* and appears as “Copyright Claimant” on the registration certificate does not dispose of Wolfe’s ownership claim.

In fact, the evidence in the record provides a plausible explanation as to why Hollenbeck would have registered *Taurus* as a claimant, even if Wolfe had independently created and continued to own the song. In the August 1967 exclusive songwriter agreement, Wolfe assigned his rights in all existing and future musical compositions to Hollenbeck in exchange for royalties.<sup>3</sup> An author who assigns his copyright in a work in exchange for royalties is considered a beneficial owner, while the assignee receiving title is deemed the legal owner of the copyright. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1144 (9th Cir. 2003) (defining a beneficial owner as “an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.”). Even under the 1909 Act, a beneficial owner had standing to sue for copyright infringement. *Moran v. London Records, Ltd.*, 827 F.2d 180, 183 (7th Cir. 1987). Assuming *Taurus* was included in the musical compositions that Wolfe assigned to Hollenbeck, Wolfe would have retained ownership as a beneficial owner, and the record company would have held title as legal owner. In such a situation, it would be entirely conceivable that Hollenbeck would register the song with both its name and Wolfe’s name on the certificate.

Of course, the Court does not take a position on the events that transpired over forty years ago. Suffice it to say that Plaintiff has proffered sufficient evidence to create a genuine issue of material fact as to the ownership of *Taurus*.

### **C. Untimely Response to Request for Admission**

Defendants’ final argument is that Plaintiff failed to answer a request for admissions in a timely manner, thereby conceding that *Taurus* is a work for hire. Counsel for Defendants claims that he warned Plaintiff’s counsel twice about late responses to requests for admission, and any delay in responding was inexcusable. (Andersen Decl. Ex. 13-14, ECF No. 97.) Plaintiff explains that the trustee of Wolfe’s trust had been involved in a serious accident and was unable to verify the answers by the deadline. Given the special circumstances, Plaintiff’s counsel mistakenly understood that he had been granted an extension; he subsequently worked with Defendants’ counsel to supplement discovery responses and deny that *Taurus* is a work for hire.

“A trial judge has discretion . . . to permit a late response to a request for admissions made pursuant to [Federal Rule of Civil Procedure 36], and thus relieve a party of apparent default.” *Am. Gen. Life & Acc. Ins. Co. v. Findley*, No. CV 12-01753, 2013 WL 1120662, at \*3 (C.D. Cal. Mar. 15, 2013). In determining whether to permit withdrawal or amendment of an admission, the court considers: (1) whether presentation of the merits will be subverted and (2) whether the non-moving party will suffer prejudice. *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007).

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<sup>3</sup> The exclusive songwriter agreement contains a section entitled “Grant of Rights,” in which Wolfe agreed to “irrevocably and absolutely assign[], transfer, set[] over and grant[] to [Hollenbeck] . . . the titles, words and music of any and all original musical compositions . . . which are now owned or controlled and which may, during the term hereof, be written, composed, created or conceived by [Wolfe].” (Anderson Decl. Ex. 11 at ¶3, ECF No. 97.) The agreement also includes a section labeled, “Compensation,” which specifies that Wolfe would receive royalties. (Anderson Decl. Ex. 11 at ¶7, ECF No. 97.)



“The first half of the test in [Rule 36] is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.” *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995). Here, upholding Plaintiff’s admission as to the work-for-hire issue would eliminate any presentation of the merits, as he would not have any standing to sue for copyright infringement. Therefore, the first prong is satisfied.

The second prong requires the party relying on the deemed admission to prove prejudice. *Conlon* 474 F.3d at 622. The Court finds that Defendants have not carried their burden to show prejudice. For starters, at the time of the late response, Defendants did not file a motion to compel or have the matter deemed admitted by the court. *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1247 (9th Cir. 1981) (“A party requesting an admission may, if he feels these requirements have not been met, move to determine the sufficiency of the answer, to compel a proper response, or to have the matter ordered admitted.”). Defendants chose not to pursue such remedies during discovery.

Beyond their inaction earlier in litigation, Defendants have failed to show any real prejudice. According to Defendants, in reliance on Plaintiff’s admission, they chose not to depose certain individuals, like Spirit’s producer, about the work-for-hire issue. The Court finds this argument unavailing. Even if Defendants had deposed Spirit’s producer and other unnamed potential deponents, they could not conclusively establish that *Taurus* was a work for hire in the face of Plaintiff’s contrary evidence. At most, then, Defendants would simply have fortified their position on the work-for-hire issue with additional testimony, but not enough to prevail on summary judgment because of Plaintiff’s evidence creating a triable issue of fact.

Accordingly, the Court rejects Defendants’ argument that Plaintiff conceded *Taurus* was a work for hire by his untimely response to admissions.

## **VII. COPYING**

“Because direct evidence of copying is not available in most cases, plaintiff may establish copying by showing that defendant had access to plaintiff’s work and that the two works are ‘substantially similar’ in idea and in expression of the idea.” *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996). Alternatively, “in the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were ‘strikingly similar.’” *Three Boys Music Corp.*, 212 F.3d at 485.

The Court finds that Plaintiff has failed to proffer evidence of striking similarity, but he has successfully created a triable issue of fact as to access and substantial similarity.

### **A. Striking Similarity**

“[I]n rare cases, a plaintiff can prove copying even without proof of access if he can show that the two works are not only similar, but are so strikingly similar as to preclude the possibility of independent creation.” *Stabile v. Paul Smith Ltd.*, No. CV 14-3749, 2015 WL 5897507, at \*9 (C.D. Cal. July 31, 2015). “[S]triking similarity simply means that in human experience it is virtually impossible that the two works could have been independently created.” *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1103 (C.D. Cal. 2005). “To show a striking similarity between works, a plaintiff must produce evidence that the accused work could not possibly have been the result of independent creation.” *Seals-McClellan v. Dreamworks, Inc.*, 120 F. App’x 3, 4 (9th Cir. 2004).

Here, Plaintiff’s experts opine that *Taurus* and *Stairway to Heaven* bear striking similarity. The Court disagrees. The expert reports point out structural commonalities shared by both songs, but striking similarity is an exceedingly high bar that requires a much greater showing. In fact, Plaintiff’s experts



admit that other works use “similar descending minor harmonic patterns.” (Stewart Decl. ¶41, ECF No. 118.) Even though the expert also states that *Taurus* and *Stairway to Heaven* “depart from the traditional sequence in similar and significant ways,” the fact remains that the primary feature in both works is a common musical structure. (Stewart Decl. ¶9, ECF No. 118.) Thus, the Court cannot definitively say based on the evidence provided that the two works bear a striking similarity.

In the absence of striking similarity, Plaintiff must show: (1) access and (2) substantial similarity to defeat summary judgment on the second element of his copyright claim. As the Court explains below, Plaintiff has demonstrated copying.

## **B. Access**

“To prove access, Plaintiff must show that the Defendants had a ‘reasonable opportunity’ or ‘reasonable possibility’ of viewing Plaintiff’s work prior to the creation of the infringing work.” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1053 (C.D. Cal. 2010). “Absent direct evidence of access, a plaintiff can prove access using circumstantial evidence of either (1) a chain of events linking the plaintiff’s work and the defendant’s access, or (2) widespread dissemination of the plaintiff’s work.” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846-47 (9th Cir. 2012)

Defendants contend that Plaintiff has not produced any evidence to show that members of Led Zeppelin had any access to the *Taurus* song. The Court addresses each type of access in turn.

### **1. Direct Evidence of Access**

“Direct access is shown if there is proof that defendant actually viewed, read, or heard the work at issue.” *Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1149 (C.D. Cal. 2015).

The Court finds that Plaintiff has not proffered sufficient evidence to raise a triable issue of fact that Led Zeppelin members had direct access to *Taurus*. Plaintiff introduces the testimony of Tracy Longo, Wolfe’s longtime friend, who recounted a story Wolfe told him: apparently, in 1968 or 1969, Page asked Wolfe to teach him the opening notes for *Taurus*. (Longo Decl. ¶19-21, ECF No. 118.) Plaintiff also submits an interview from April 1970 in which Page stated, “Spirit do some really nice things on albums. They give a really nice atmosphere when they play and I always enjoy seeing them.” (Malofiy Decl. Ex. 3, ECF No. 124.) In another interview, this one conducted in November 1972, Page was quoted as saying, “I saw Spirit a couple of times and thought they were very good.” (Malofiy Decl. Ex. 4, ECF No. 124.) Finally, Andes testified that Plant attended a Spirit show in February 1970 in Birmingham, England and went out drinking with the Spirit members after the concert. (Andes Depo. 111-118, ECF No. 119.)

The Court discounts Longo’s testimony and Page’s quoted remarks as they both constitute hearsay that does not fall into any exception. The only remaining testimony is that Plant attended a Spirit concert in 1970. Plaintiff does not provide any evidence that *Taurus* was played at the 1970 concert; therefore, while Plant’s presence at the concert may be circumstantial evidence of access, it does not establish direct access.

### **2. Circumstantial Evidence: Wide Dissemination**

“As a general matter, it appears that in order for a work to be widely disseminated, it must achieve a high degree of commercial success or be readily available in the relevant market.” *Loomis v. Cornish*, No. CV 12-5525, 2013 WL 6044345, at \*10 (C.D. Cal. Nov. 13, 2013); *see, e.g., Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009) (finding that 2,000 copies per year sold did not constitute wide dissemination); *Jason v. Fonda*, 526 F. Supp. 774, 776 (C.D. Cal. 1981)



*aff'd*, 698 F.2d 966 (9th Cir. 1982) (finding that 2,000 copies sold nationwide and 700 copies sold in southern California did not constitute wide dissemination); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (finding that 17,000 copies sold over thirteen years did not constitute wide dissemination).

The Court finds that Plaintiff has not proffered sufficient evidence to raise a triable issue of fact on the question of widespread dissemination. Neither party disputes that in 1967, Ode Records released Spirit's first eponymous album, which included an instrumental composition of *Taurus*. (Ferguson Depo. 46:10-19; Andes Depo. 57:16-22, ECF No. 97.) Beyond that, however, the record is devoid of any evidence from which a trier of fact can determine whether the song was disseminated widely. Plaintiff does not provide evidence that *Taurus* was played frequently on the radio or released as a single, nor does he submit any evidence attesting to record sales of Spirit's first album.

Instead, Plaintiff submits inadmissible testimony from Mike and Robert Lee, disc jockeys who worked for a Los Angeles radio station in late 1972 and 1973, who stated that *Taurus* was being played on the radio before 1971. (Mike Lee Decl. ¶¶3-4; Robert Lee Decl. ¶3, ECF No. 119.) The Court rejects this testimony, as neither of these witnesses was disclosed to Defendants. (Anderson Decl. ¶8, ECF No. 129.) "A party that fails to disclose witnesses pursuant to FRCP 26 may be prohibited from using that witness to supply evidence during any proceeding, unless that 'failure was substantially justified or is harmless.'" *Nuance Commc'ns, Inc. v. ABBYY Software House*, No. C 08-02912, 2012 WL 2838431, at \*1 (N.D. Cal. July 10, 2012).

Plaintiff also proffers testimony from Wolfe's sisters who claim that after the release of Spirit's first album, the group embarked on a lengthy tour to promote the record. (Andrea Wolfe Decl. ¶6; Janet Wolfe Decl. ¶7, ECF No. 118.) This testimony is devoid of any detail as to the duration of the tour, the size of the venues, or the number of shows played. Moreover Wolfe's sisters do not have personal knowledge about the extent of the tour, as they did not travel with the band. Therefore, the proffered evidence is entirely too speculative to demonstrate widespread dissemination.

Accordingly, Plaintiff has not proffered sufficient evidence to raise a genuine issue of fact as to access through wide dissemination.

### 3. Circumstantial Evidence: Chain of Events

The second way a plaintiff can present circumstantial evidence of access is by demonstrating a chain of events between the plaintiff's work and defendant's access to that work. *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 824 (C.D. Cal. 2010) *aff'd sub nom. Gable v. Nat'l Broad. Co.*, 438 F. App'x 587 (9th Cir. 2011).

As discussed in the factual section, the record conclusively establishes that Spirit and Led Zeppelin performed at the same festival on the same day three times between 1968 and the release of *Stairway to Heaven* in 1971. The record further demonstrates that at two of these concerts, the Denver Festival and the Atlanta Festival, the two groups performed in succession. The only question, then, is whether this chain of events is sufficient circumstantial evidence to raise a genuine issue of fact about access.

Defendants contend that these three encounters, without more, are not enough for a reasonable juror to find that Led Zeppelin members had access to *Taurus*. For starters, Defendants argue, Spirit rarely played *Taurus* in its performances between 1968 and 1971 because the goal of the tour was to promote its second album by playing new songs and old hits, which did not include *Taurus*. (Ferguson Depo. 53:22-54:21; Andes Depo. 68:7-70:6; ECF No. 97.) As further evidence that *Taurus* was rarely



performed on tour, Defendants submit a set list from a February 1969 live Spirit performance, which included thirteen songs but no mention of *Taurus*. (Anderson Decl. Ex. 20, ECF No. 97.) When asked about the set list, Andes confirmed that it represents a “typical set list for Spirit’s performances in that time period.” (Andes Depo. 103:18-24, ECF No. 97.) Even if Spirit had performed *Taurus* at any of these festivals, Defendants maintain, none of the Led Zeppelin members ever shared a stage with or heard any live performances by Spirit. (Page Decl. ¶¶8, 12-13; Plant Decl. ¶¶6-10; Jones Decl. ¶¶5-10, ECF No. 97.) According to Page, while the two bands may have preformed in succession on certain occasions, the process of dismantling and setting up equipment between acts generally took 15-20 minutes, meaning that bands would rarely spend time on stage together. (Page Decl. ¶14-15; Ferguson Depo. 344:10-347:6, ECF No. 97.)<sup>4</sup>

In retort, Plaintiff argues that Spirit regularly performed *Taurus* as part of its live tour. Wolfe’s sisters testified that Spirit “played *Taurus* at all their shows” because it was Wolfe’s “favorite song until the day he died.” (Andrea Wolfe Decl. ¶5-6; Janet Wolfe Decl. ¶5-7, ECF No. 118.) Ferguson testified that “there were certain songs [Spirit] played religiously every show. ‘Taurus’ was not, but it was played often.” (Ferguson Depo. 21:4-20, ECF No. 124.) He also explained that *Taurus* had its own unique role in Spirit shows because it served as an acoustic palate cleanser amidst the predominantly electronic music. (Ferguson Depo. 38:1-21, ECF No. 124.) Furthermore, Plaintiff submits evidence that Spirit crossed paths with Led Zeppelin at these music festivals. Andes testified that a mutual friend briefly introduced him and Spirit members to Led Zeppelin backstage at the Denver Festival. (Andes Depo. 105:11-108:3, ECF No. 124.) As to the Atlanta Festival, Ferguson testified that he had a “very clear memory” of Led Zeppelin performing on the same stage right after Spirit played. (Ferguson Depo. 16:16-23, 104:3-6, ECF No. 124.) Andes also recalled meeting and conversing with Plant when Led Zeppelin was going on stage after Spirit’s set at the Atlanta festival. (Andes Depo. 124:17-124:24, ECF No. 124.)

Beyond the interaction at the festivals, Plaintiff introduces other evidence to create a triable issue of fact regarding access. First, to impeach Page’s testimony that he “has never seen Spirit perform live,” Plaintiff submits two interview excerpts in which Page admitted that he was a fan of Spirit and had attended several shows. (Malofiy Decl. Exs. 3-4, ECF No. 124.) Next, Andes testified that Plant attended a Spirit show in February 1970 in Birmingham, England and went out drinking with the Spirit members after the concert. (Andes Depo. 111-118, ECF No. 119.) Finally, the surviving members of Led Zeppelin admitted to performing a bass riff similar to one featured in one of Spirit’s hit songs, *Fresh Garbage*—a song that appears on the same album as *Taurus*. (Page Depo. 388-390, ECF No. 124.) While they admit to playing a similar bass riff, however, the Led Zeppelin members testified that they heard the song from either the radio or a compilation of assorted American rock songs, not from Spirit’s album. (Page Decl. ¶17, Plant Decl. ¶13, Jones Decl. ¶¶12-13, ECF No. 97.)

Overall, Plaintiff has produced sufficient circumstantial evidence to raise a factual dispute on the issue of access. He has presented evidence that both bands performed in succession and actually interacted at two festivals. Moreover, Plaintiff submitted evidence that Spirit would often perform *Taurus* because it was arguably Wolfe’s favorite song. Beyond the two concerts, Plaintiff also proffers evidence that Led Zeppelin played one of Spirit’s songs that appeared on the same album as *Taurus*. Finally, he presents impeachment evidence to counter Page’s declaration that he never saw a Spirit performance.

### C. Substantial Similarity

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<sup>4</sup> Plaintiff disputes this with testimony from Andes that changing equipment between bands would not take a very long time because each band’s material was already set up before the show, meaning that the only work to be done was to remove the outgoing band’s equipment. (Andes 90:19-91:1, ECF No. 124.)



“Although summary judgment is not highly favored on questions of substantial similarity in copyright cases, summary judgment is appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity of ideas and expression.” *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990).

The parties submit dueling expert reports on the issue of substantial similarity. Defendants attack Plaintiff's expert reports on two bases: (1) the reports improperly consider unprotected performance elements of *Taurus*, and (2) once all the unprotected elements are stripped away, the remaining similarity is nothing more than a common descending bass line not entitled to protection.

1. Unprotected Performance Elements

Defendants urge this Court to disregard Plaintiff's expert reports because they improperly consider unprotected performance elements in the sound recordings of *Taurus*. According to Defendants, the only copyrighted work is the musical composition, not the sounds recording, and Plaintiff's experts erred by relying on the performance elements in the sounds recordings to conclude that the two works are substantially similar.

“Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights. . . . Accordingly, the court must first determine what elements of Plaintiff's work are protected by his copyright in the musical composition, as opposed to those protected by the copyright in the sound recording, and ‘filter out’ the latter.” *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248-49 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003). Courts have held that to determine substantial similarity in the context of a musical composition, only elements in the music sheets deposited with the Copyright Office—not elements in the sounds recordings—may be considered. *Williams*, 2014 WL 7877773 at \*9-10; *Fahmy v. Jay Z*, No. 207CV05715, 2015 WL 5680299, at \*13-14 (C.D. Cal. Sept. 24, 2015).

Plaintiff disputes that his copyright is limited to the music sheet deposited with the Copyright Office. In retort, he invokes *Three Boys Music* to argue that elements reflected in a sound recording, even if not on the deposit sheet, are to be considered by a jury. In *Three Boys Music*, a jury determined that the Michael Bolton song, *Love is a Wonderful Thing*, infringed on an eponymous song by the Isley Brothers. 212 F.3d at 480. Bolton appealed and argued that the Isley Brothers' deposit copy of sheet music varied from the sound recording, and, therefore, the trial court lacked subject matter jurisdiction. *Id.* at 486. The Ninth Circuit rejected this argument and explained, “Although the 1909 Copyright Act requires the owner to deposit a ‘complete copy’ of the work with the copyright office, our definition of a ‘complete copy’ is broad and deferential: ‘Absent intent to defraud and prejudice, inaccuracies in copyright registrations do not bar actions for infringement.’” *Id.* Plaintiff seizes on this language and contends that a deposit copy of sheet music does not constitute the entirety of a protected work; rather, additional elements, such as those embodied in a sound recording, may be considered. The Court finds this argument unavailing.

In *Three Boys Music*, the Ninth Circuit did not suggest that a copyright claimant may rely on additional elements in a sound recording to prove infringement of an underlying musical composition. Instead, the court merely reiterated the established proposition that an incomplete deposit copy of sheet music does not invalidate a copyright or strip the court of jurisdiction. The quoted language Plaintiff relies on addressed only subject matter jurisdiction—not the content protected by copyright. *Williams*, 2014 WL 7877773 at \*9 (explaining that *Three Boys Music* “address[ed] only subject matter jurisdiction, not the material actually protected by the copyright.”). In fact, in *Three Boys Music*, the plaintiff's expert “testified that the deposit copy included all of the song's essential elements such as the



title hook, chorus, and pitches.” *Id.* at 486 (emphasis added). Ironically, then, the very case Plaintiff relies on to argue that elements beyond the deposit copy should be considered presents a scenario in which no elements outside the deposit copy were considered.<sup>5</sup>

In the present case, Plaintiff’s only copyright claim lies in the musical composition of *Taurus*, not the sound recording. *Dowling v. United States*, 473 U.S. 207, 211, 105 n.4 (1985) (“Congress did not extend federal copyright protection to sound recordings until the Sound Recording Act of 1971 . . . and then only to sound recordings fixed after February 15, 1972.”). The Court finds that Plaintiff’s experts impermissibly relied on performance elements found in the sound recordings. For example, Stewart opined that *Stairway to Heaven* is substantially similar to recorded versions of *Taurus* based on common “fingerpicking style,” “acoustic guitar,” “classical instruments such as flute . . . strings and harpsichord,” “atmospheric sustained pads,” and “fretboard positioning.” Similarly, Bricklin focused almost exclusively on the music production and mixing process to conclude that *Taurus* and *Stairway to Heaven* shared a common ethereal ambience created in the production process. By analyzing performance elements in the sound recording of *Taurus*, Plaintiff’s experts improperly considered features beyond the scope of the musical composition—such features will be disregarded by this Court.

## 2. Extrinsic Test

Once all the unprotected performance elements are stripped away, the only remaining similarity is the core, repeated A-minor descending chromatic bass line structure that marks the first two minutes of each song.

“The substantial-similarity test contains an extrinsic and intrinsic component. At summary judgment, courts apply only the extrinsic test; the intrinsic test, which examines an ordinary person’s subjective impressions of the similarities between two works, is exclusively the province of the jury.” *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). “In analyzing musical compositions under the extrinsic test, [the Ninth Circuit has] never announced a uniform set of factors to be used. . . . So long as the plaintiff can demonstrate, through expert testimony that . . . the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work, the extrinsic test is satisfied.” *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004). “[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law.” *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

Here, Plaintiff has submitted expert testimony attesting to the substantial similarity of protected elements in *Taurus* and *Stairway to Heaven*. The similarity consists of repeated A-minor descending chromatic bass lines lasting 13 seconds and separated by a bridge of either seven or eight measures. Moreover, the similarity appears in the first two minutes of each song, arguably the most recognizable and important segments of the respective works. Finally, “[n]early 80% of the pitches of the first eighteen notes match, along with their rhythms and metric placement. The harmonic setting of these ‘A’ sections feature the same chords during the first three measures and an unusual variation on the traditional chromatic descending bass line in the fourth measure.” (Stewart Decl. ¶24, ECF No. 118.)

Defendants argue that the descending chromatic bass line is a centuries-old, common musical

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<sup>5</sup> Plaintiff’s reliance on *KnowledgePlex, Inc. v. Placebase, Inc.* is misplaced, as that case merely held that an incomplete deposit does not deprive the court of subject matter jurisdiction. Likewise, Plaintiff improperly relies on *Scentsy, Inc. v. B.R. Chase, LLC.*, because that case addressed copyright protection under the 1976 Act. 942 F. Supp. 2d 1045, 1050 (D. Idaho 2013), *aff’d in part, rev’d in part and remanded sub nom. Scentsy, Inc. v. Harmony Brands, LLC*, 585 F. App’x 621 (9th Cir. 2014).



element not entitled to protection, and, therefore, Plaintiff has failed to satisfy the extrinsic test. The Court disagrees. While it is true that a descending chromatic four-chord progression is a common convention that abounds in the music industry, the similarities here transcend this core structure. For example, the descending bass line in both *Taurus* and *Stairway to Heaven* appears at the beginning of both songs, arguably the most recognizable and important segments. *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (“Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.”) Additionally, the descending bass line is played at the same pitch, repeated twice, and separated by a short bridge in both songs. *Swirsky* 376 F.3d at 851 (“[E]ven an arrangement of a limited number of notes can garner copyright protection.”).

The Court finds that Plaintiff has demonstrated “enough similar protectable expression here that the issue of substantial similarity should [proceed to the jury].” *Scentsy, Inc. v. Harmony Brands, LLC*, 585 F. App'x 621, 622 (9th Cir. 2014); *Shaw v. Lindheim*, 919 F.2d 1353, 1360 (9th Cir. 1990) (“Once a court has established that a triable question of objective similarity of expression exists, by analysis of each element of the extrinsic test, its inquiry should proceed no further. What remains is a subjective assessment of the ‘concept and feel’ of two works . . . a task no more suitable for a judge than for a jury.”) Accordingly, the Court denies summary judgment on this ground.

## VIII. DAMAGES

### A. Recovery as a Beneficial Owner

Defendants argue that any potential recovery should be reduced by 50% because Plaintiff is suing as a beneficial owner based on his right to royalties under the 1967 exclusive songwriter agreement. (Anderson Decl. Ex. 11 at ¶11, ECF No. 97.) The exclusive songwriter agreement limited Wolfe to 50% of any recovery, and, therefore, the trust is also limited to half of any damages. *Manno v. Tennessee Prod. Ctr., Inc.*, 657 F. Supp. 2d 425, 432 (S.D.N.Y. 2009) (explaining that recovery in a copyright case is limited to a co-owner’s share of damages); *Nimmer on Copyright* § 12.03 (a joint owner can sue only “for his particular share of damages or profits”).

Plaintiff has not opposed this argument in his opposition brief. Therefore, the Court grants summary judgment on this issue and holds that Plaintiff, as a beneficial owner, is entitled to only 50% of the recovery.

### B. Laches as a Bar to Profits

Defendants argue that four decades of delay have severely prejudiced them in the form of lost documents, fading memories, and deceased witnesses. (Page Decl. ¶21-22, ECF No. 97.) They also claim that they did not know of the claim until shortly before it was filed in 2014, and, as a result, they could not have filed an action for declaratory relief. Therefore, Defendants maintain, laches operates to bar any award of profits.

In *Petrella*, the Supreme Court held that if a plaintiff ultimately prevails on a copyright claim, a district court may consider the plaintiff’s delay in commencing suit when “determining appropriate injunctive relief and assessing profits.” 134 S. Ct. at 1978. The Court cautioned, however, that courts should closely examine the defendant’s alleged reliance on the plaintiff’s delay and take into account

[defendant’s] early knowledge of [plaintiff’s] claims, the protection [defendant] might have achieved through pursuit of a declaratory judgment action, the extent to which [defendant’s] investment was protected by the separate-

accrual rule, the court's authority to order injunctive relief "on such terms as it may deem reasonable," § 502(a), and any other considerations that would justify adjusting injunctive relief or profits.

*Id.* at 1978-79.

Defendants' request is overbroad in light of the passage recited above. The Supreme Court did not hold that laches operates to categorically bar an award of profits; rather, it explained that an undue delay in bringing suit may justify adjusting profits. While this Court is sympathetic to Defendants' reliance on the 40-year delay, the circumstances do not merit an outright exclusion of all profits. Instead, if there is ultimately a finding of liability, Defendants may renew their request to reduce profits in an amount commensurate with the delay, and the Court will consider the issue again at that time.

### **C. Extraterritorial Profits**

Finally, Defendants contend that Plaintiff's damages should not extend to profits obtained from the exploitation of *Stairway to Heaven* outside the United States because the Copyright Act has no extraterritorial reach.

The Ninth Circuit has held that "infringing actions that take place entirely outside the United States are not actionable" under the Copyright Act. *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1091 (9th Cir. 1994). An exception exists, however, allowing a plaintiff "to recover damages flowing from exploitation abroad of the domestic acts of infringement committed by defendants." *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 992 (9th Cir. 1998).

Defendants contend that the extraterritorial principle applies to limit Plaintiff's profits because the undisputed evidence demonstrates that *Stairway to Heaven* was created entirely outside the United States, in London, England. (Page Decl. ¶4; Plant Decl. ¶4; Jones Decl. ¶3, ECF No. 97.) Plaintiff rebuts with Page's testimony that an early iteration of the song was actually mixed at Sunset Studios in Los Angeles, California. (Page Depo. 140-143, ECF No. 124.)

Plaintiff has proffered evidence to create a triable issue of fact as to whether extraterritorial profits are recoverable. Accordingly, the Court denies summary judgment on this issue.

## **IX. REMAINING CLAIMS**

### **A. Claims as to John Paul Jones and Hype**

Defendants argue that summary judgment is proper as to John Paul Jones, Super Hype Publishing, Inc., and Warner Music Group Corp. because none of these parties performed or distributed *Stairway to Heaven* within the three years preceding the instant action. In fact, in the 26(f) report, Plaintiff conceded that the three-year statute of limitations "precludes relief as to any alleged infringements prior to May 31, 2011." Plaintiff has not opposed this argument in the opposition brief. Therefore, the Court grants summary judgment as to John Paul Jones, Super Hype Publishing, Inc., and Warner Music Group Corp.

### **B. Right of Attribution Claim**

Defendants also seek summary judgment on Plaintiff's second claim, labeled "Right of Attribution—Equitable Relief—Falsification of Rock n' Roll History."



The Court grants summary judgment on this claim. Plaintiff presents an inventive—yet legally baseless—claim creatively termed, “Falsification of Rock n’ Roll History.” The Court has diligently searched but is unable to locate any cognizable claim to support this theory of liability.

Plaintiff’s Right of Attribution also fails, but for different reasons. First, the right of attribution, which arises under the Lanham Act, is limited to producers of actual products, not “to the author of any idea, concept, or communication embodied in those goods.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37, 123 S. Ct. 2041, 2050, 156 L. Ed. 2d 18 (2003). Second, “[t]he law is clear with respect to the right of attribution under Copyright Act— only works of visual arts may enjoy the right of attribution.” *Lahiri v. Universal Music & Video Distribution Corp.*, No. CV 02-8330, 2006 WL 6030551, at \*4 (C.D. Cal. Mar. 24, 2006). Third, Plaintiff has not opposed Defendants’ motion for partial summary judgement on this claim.

Accordingly, the Court grants summary judgment on the Right of Attribution claim.

#### **X. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Defendants’ Motion for Summary Judgment as to the Right of Attribution claim and as to all claims against John Paul Jones, Super Hype Publishing, Inc., and Warner Music Group Corp. The Court also **GRANTS** Defendants’ request to limit Plaintiff’s damages to 50% of the recovery (his share as a beneficial owner).

The Court **DENIES** Defendants’ Motion for Summary Judgment as to the Copyright Infringement claim against the remaining Defendants.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Initials of Preparer \_\_\_\_\_

NOTE: CHANGES MADE BY THE COURT

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

MICHAEL SKIDMORE, *etc.*,

Plaintiff,

vs.

LED ZEPPELIN, *et al.*,

Defendants.

) Case No. 2:15-cv-03462 RGK  
) (AGRx)

) [~~PROPOSED~~] AMENDED  
) JUDGMENT

**JUDGMENT**

The Court having granted the Motion of defendants John Paul Jones, Super Hype Publishing, Inc., and Warner Music Group Corp. for Summary Judgment; the action having been tried before the Court sitting with a Jury as to the remaining defendants, James Patrick Page, Robert Anthony Plant, Warner/Chappell Music, Inc., Atlantic Recording Corporation and Rhino Entertainment Company; Led Zeppelin, being a non-juridical entity that was never served; and the issues having been duly tried and the Jury having duly rendered its verdict,

**IT IS ORDERED AND ADJUDGED** that plaintiff Michael Skidmore take nothing; that the action **is closed**; and that defendants James Patrick Page, Robert Anthony Plant, John Paul Jones, Warner/Chappell Music, Inc., Atlantic Recording Corporation, Rhino Entertainment Company and Super Hype Publishing, Inc., and Warner Music Group Corp. recover of the plaintiff their costs of action, taxed in the sum of \$\_\_\_\_\_.

Dated: July 08, 2016



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The Honorable R. Gary Klausner  
United States District Judge

## AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

- (a) To print, reprint, publish, copy, and vend the copyrighted work; Exclusive right to print, publish and vend.
- (b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art; Exclusive right to translate, dramatize, arrange and adapt, etc.
- 15 (c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production; Exclusive right to deliver lectures, sermons, etc.
- (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, 20 produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; To represent dramatic works, or make record, or exhibit or perform, etc.
- 25

To perform  
music and  
make arrange-  
ment, setting,  
or record.

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published

Act not re-  
troactive.

Music by  
foreign au-  
thor.

and copyrighted after this Act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: *And provided further, and as a condition of extending the copyright control to such me-*

Control of  
mechanical  
musical repro-  
duction.

*chanical reproductions*, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit:

Royalty for  
use of music  
on records, etc.

Notice of use  
of music on  
records.

License to  
use music on  
records.

*And provided further*, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a



recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

- 5 In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court  
 10 may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

Failure to pay royalties.

- The reproduction or rendition of a musical composition  
 15 by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

Reproduction of music on coin-operated machines.

- SEC. 2. That nothing in this Act shall be construed to  
 20 annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

Right at common law or in equity.

- SEC. 3. That the copyright provided by this Act shall  
 25 protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon  
 30 composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.

Component parts of copyrightable work.

Composite works or periodicals.

- SEC. 4. That the works for which copyright may be  
 35 secured under this Act shall include all the writings of an author.

Works protected.

SEC. 5. That the application for registration shall specify to which of the following classes the work in which  
 40 copyright is claimed belongs:

Classification of copyright works.

- (a) Books, including composite and cyclopædic works,  
 40 directories, gazetteers, and other compilations;  
 (b) Periodicals, including newspapers;

Books, composite, cyclopædic works; directories, gazetteers, etc.

(c) Lectures, sermons, addresses, prepared for oral delivery;

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

5

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical character;

(j) Photographs;

10

(k) Prints and pictorial illustrations:

Classification does not limit copyright.

*Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act. 15

Compilations, abridgments, dramatizations, translations, new editions.

SEC. 6. That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such work, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works. 20 25

Subsisting copyright not affected.

Not subject-matter of copyright; works in public domain; government publications.

SEC. 7. That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided, however,* That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor. 30 35 40

SEC. 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: *Provided, however,* That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

Copyright to author or proprietor for terms specified in Act.

Foreign authors who may secure copyright protection.

Alien authors domiciled in U. S.

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

Authors, when citizens of countries granting reciprocal rights.

International agreement.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require.

Presidential proclamation.

SEC. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act.

Publication with notice initiates copyright.

SEC. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

Registration of copyright.

Copyright certificate.

SEC. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete

Copyright protection of unpublished works: lectures, dramas, music, etc.

copy of such work if it be a lecture or similar production or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies under sections twelve and thirteen of this Act where the work is later reproduced in copies for sale.

Deposit of  
copies after  
publication.

Two com-  
plete copies of  
best edition.

Periodical  
contributions.

Work not re-  
produced in  
copies for sale.

No action for  
infringement  
until deposit of  
copies.

Failure to  
deposit copies.

Register of  
copyrights may  
demand copies.

Failure to de-  
posit on de-  
mand.

SEC. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, which copies, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

SEC. 13. That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the

United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

Fine \$100  
and retail price  
of 2 copies,  
best edition.  
Forfeiture  
of copyright.

SEC. 14. That the postmaster to whom are delivered the articles deposited as provided in sections eleven and twelve of this Act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.

Postmaster's  
receipt.

SEC. 15. That of the printed book or periodical specified in section five, subsections (a) and (b) of this Act, except the original text of a book of foreign origin in a language or languages other than English, the text of all

Printed from  
type set within  
the United  
States.

Book in for-  
eign language  
excepted.

copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which

Lithographic  
or photo-en-  
graving proc-  
ess.

Printing and  
binding of the  
book.

requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are

Illustrations  
in a book.

Separate  
lithographs  
and photo-en-  
gravings.

located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this Act.

Books for  
blind excepted.

Books in for-  
eign languages  
excepted.

SEC. 16. That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or repre-

Affidavit of  
American  
manufacture.



Public Law 94-553  
94th Congress

An Act

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Oct. 19, 1976

[S. 22]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Title 17, USC,  
copyrights.

**TITLE I—GENERAL REVISION OF COPYRIGHT LAW**

SEC. 101. Title 17 of the United States Code, entitled "Copyrights", is hereby amended in its entirety to read as follows:

**TITLE 17—COPYRIGHTS**

| CHAPTER   | Sec. |
|---|------|
| 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT.....       | 101  |
| 2. COPYRIGHT OWNERSHIP AND TRANSFER.....            | 201  |
| 3. DURATION OF COPYRIGHT.....                       | 301  |
| 4. COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION..... | 401  |
| 5. COPYRIGHT INFRINGEMENT AND REMEDIES.....         | 501  |
| 6. MANUFACTURING REQUIREMENT AND IMPORTATION.....   | 601  |
| 7. COPYRIGHT OFFICE.....                            | 701  |
| 8. COPYRIGHT ROYALTY TRIBUNAL.....                  | 801  |

**Chapter 1.—SUBJECT MATTER AND SCOPE OF  
COPYRIGHT**

| Sec.  |
|---|
| 101. Definitions.   |
| 102. Subject matter of copyright: In general.   |
| 103. Subject matter of copyright: Compilations and derivative works.  |
| 104. Subject matter of copyright: National origin.  |
| 105. Subject matter of copyright: United States Government works.   |
| 106. Exclusive rights in copyrighted works.   |
| 107. Limitations on exclusive rights: Fair use.   |
| 108. Limitations on exclusive rights: Reproduction by libraries and archives.   |
| 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.                                     |
| 110. Limitations on exclusive rights: Exemption of certain performances and displays.   |
| 111. Limitations on exclusive rights: Secondary transmissions.  |
| 112. Limitations on exclusive rights: Ephemeral recordings.   |
| 113. Scope of exclusive rights in pictorial, graphic, and sculptural works.   |
| 114. Scope of exclusive rights in sound recordings.   |
| 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.       |
| 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players. |
| 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems.                              |
| 118. Scope of exclusive rights: Use of certain works in connection with non-commercial broadcasting.                            |

**§ 101. Definitions**

17 USC 101.

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless



of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.



A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.



"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 USC 102.

## § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expres-



sion, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

Works of  
authorship.

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

**§ 103. Subject matter of copyright: Compilations and derivative works** 17 USC 103.

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

**§ 104. Subject matter of copyright: National origin** 17 USC 104.

(a) **UNPUBLISHED WORKS.**—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) **PUBLISHED WORKS.**—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more



of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

17 USC 105. **§ 105. Subject matter of copyright: United States Government works**

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

17 USC 106. **§ 106. Exclusive rights in copyrighted works**

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 USC 107. **§ 107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 USC 108. **§ 108. Limitations on exclusive rights: Reproduction by libraries and archives**

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;



(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

# 1976 Act History

|                                 |                            |                       |
|---------------------------------|----------------------------|-----------------------|
| 94TH CONGRESS }<br>2d Session } | HOUSE OF REPRESENTATIVES { | REPORT<br>No. 94-1476 |
|---------------------------------|----------------------------|-----------------------|

## COPYRIGHT LAW REVISION

SEPTEMBER 3, 1976.—Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary,  
submitted the following

### REPORT together with ADDITIONAL VIEWS

[To accompany S. 22]

The Committee on the Judiciary, to whom was referred the bill (S. 22) for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

SEC. 101. Title 17 of the United States Code, entitled "Copyrights", is hereby amended in its entirety to read as follows:

#### TITLE 17—COPYRIGHTS

| Chapter   | Sec. |
|---|------|
| 1. Subject Matter and Scope of Copyright.....       | 101  |
| 2. Copyright Ownership and Transfer.....            | 201  |
| 3. Duration of Copyright.....                       | 301  |
| 4. Copyright Notice, Deposit, and Registration..... | 401  |
| 5. Copyright Infringement and Remedies.....         | 501  |
| 6. Manufacturing Requirement and Importation.....   | 601  |
| 7. Copyright Office.....                            | 701  |
| 8. Copyright Royalty Commission.....                | 801  |

#### Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT

|      |  |
|------|--|
| Sec. |  |
| 101. | Definitions.   |
| 102. | Subject matter of copyright: In general.   |
| 103. | Subject matter of copyright: Compilations and derivative works.                        |
| 104. | Subject matter of copyright: National origin.  |
| 105. | Subject matter of copyright: United States Government works.                           |
| 106. | Exclusive rights in copyrighted works.   |
| 107. | Limitations on exclusive rights: Fair use.   |
| 108. | Limitations on exclusive rights: Reproduction by libraries and archives.               |
| 109. | Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord. |
| 110. | Limitations on exclusive rights: Exemption of certain performances and displays.       |
| 111. | Limitations on exclusive rights: Secondary transmissions.                              |
| 112. | Limitations on exclusive rights: Ephemeral recordings.                                 |



## PURPOSE

The purpose of the proposed legislation, as amended, is to provide for a general revision of the United States Copyright Law, title 17 of the United States Code.

## STATEMENT

The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, Art. I, sec. 8). Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Between 1924 and 1940 a number of copyright law revision measures were introduced. All these failed of enactment, partly because of controversy among private interests over differences between the Berne Convention and the U.S. law. After World War II, the United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955.

In that year, the movement for general revision of the U.S. copyright law was revived and the legislative appropriations act for the next 3 years provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for such revision. There followed a period of study which produced 35 published monographs on most of the major substantive issues in copyright revision, and culminated in 1961 in the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law."

Between 1961 and 1964 there were numerous meetings and discussions under the auspices of the Copyright Office, participated in by representatives of a wide range of interests affected by the copyright law. Gradually a draft bill for general revision took shape, and toward the end of the 88th Congress, on July 20, 1964, it was introduced in both Houses. The 1964 revision bill was introduced in the House of Representatives as H.R. 11947, and in the Senate by request, as S. 3008.

No further legislative action was taken on the revision bill during the 88th Congress, but before the opening of the 89th Congress the



The provisions of subsection (d), requiring recordation of transfers as a prerequisite to the institution of an infringement suit, represent a desirable change in the law. The one- and three-month grace periods provided in subsection (e) are a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bona fide transferee to rely on the record at any particular time.

Under subsection (f) of section 205, a nonexclusive license in writing and signed, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers, on the ground that a nonexclusive license can have drastic effects on the value of a copyright. On the other hand, the impracticalities and burdens that would accompany any requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them.

#### SECTION 301. FEDERAL PREEMPTION OF RIGHTS EQUIVALENT TO COPYRIGHT

##### *Single Federal system*

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works, which has been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is "created" or, as that term is defined in section 101, when it is "fixed in a copy or phonorecord for the first time." Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system can be summarized as follows:

1. One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

2. "Publication," perhaps the most important single concept under the present law, also represents its most serious defect.

Although at one time, when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

3. Enactment of section 301 would also implement the "limited times" provision of the Constitution, which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undissemminated manuscripts available for publication after a reasonable period.

4. Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Under section 301, the statute would apply to all works created after its effective date, whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute and still under common law protection, section 303 of the statute would provide protection from that date on, and would guarantee a minimum period of statutory copyright.

#### *Preemption of State law*

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301(a) all "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 are governed exclusively by the Federal copyright statute if the works involved are "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103." All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was cre-

ated and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; as stated expressly in subsection (d) of section 301, there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8.

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. On the other hand, section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statute or common law until fixed in tangible form.

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.

Representatives of printers, while not opposed to the principle of section 301, expressed concern about its potential impact on protection of preliminary advertising copy and layouts prepared by printers. They argued that this material is frequently "pirated" by competitors, and that it would be a substantial burden if, in order to obtain full protection, the printer would have to make registrations and bear the expense and bother of suing in Federal rather than State courts. On the other hand, these practical problems are essentially procedural rather than substantive, and the proposal for a special exemption to preserve common law rights equivalent to copyright in unpublished advertising material cannot be justified. Moreover, subsection (b), discussed below, will preserve other legal grounds on which the printers can protect themselves against "pirates" under State laws.

In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute.



The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) subject matter that does not come within the subject matter of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as passing off and false representation"—represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.

"Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial data bases. Likewise, a person having no trust or other relationship with the proprietor of a computerized data base should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data. The unauthorized data access which should be remediable might also be achieved by the intentional interception of data transmissions by wire, microwave or laser transmissions, or by the common unintentional means of "crossed" telephone lines occasioned by errors in switching.

The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable. For example, the data may not be copyrighted because they are not fixed in a tangible medium of expression (i.e., the data are not displayed for a period or not more than transitory duration).

Nothing contained in section 301 precludes the owner of a material embodiment of a copy or a phonorecord from enforcing a claim of conversion against one who takes possession of the copy or phonorecord without consent.

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 12, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony during the 1975 hearings, the Department of Justice pointed out that, under section 301 as then written:

This language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribed activities violating rights equivalent to \* \* \* the exclusive rights within the general scope of copyright. \* \* \* Certainly such a result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings.

The Department recommended that section 301(b) be amended to exclude sound recordings fixed prior to February 15, 1972 from the effect of the preemption.

The Senate adopted this suggestion when it passed S. 22. The result of the Senate amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law, while post-1972 recordings would eventually fall into the public domain as provided in the bill.

The Committee recognizes that, under recent court decisions, pre-1972 recordings are protected by State statute or common law, and that should not all be thrown into the public domain instantly upon the coming into effect of the new law. However, it cannot agree that they should in effect be accorded perpetual protection, as under the Senate amendment, and it has therefore revised clause (4) to establish a future date for the pre-emption to take effect. The date chosen is February 15, 2047, which is 75 years from the effective date of the statute extending Federal protection to recordings.

Subsection (c) makes clear that nothing contained in Title 17 annuls or limits any rights or remedies under any other Federal statute.

#### SECTION 302. DURATION OF COPYRIGHT IN WORKS CREATED AFTER EFFECTIVE DATE

##### *In general*

The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. With certain exceptions, there appears to be strong support for the principle, as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished

## B. THE ORIGINALITY INSTRUCTIONS

Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality. *Feist*, 499 U.S. at 345 (“The *sine qua non* of copyright is originality”; “[t]he vast majority of works make the grade quite easily . . . .”); *see also* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship . . . .”).

Even in the face of this low threshold, copyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. *See* 17 U.S.C. § 102(b); *Feist*, 499 U.S. at 345–46. Nor does copyright extend to “common or trite” musical elements, *Smith*, 84 F.3d at 1216 n.3, or “commonplace elements that are firmly rooted in the genre’s tradition,” *Williams*, 895 F.3d at 1140–41 (Nguyen, J., dissenting). These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author. *See Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (“[E]xpressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law”). Authors borrow from predecessors’ works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works. *See id.* at 813 (“we must be careful in copyright cases not to cheat the public domain”); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (“General ideas . . . remain forever the common property of artistic mankind.”); 1 Nimmer § 2.05[B] (“In the field of popular songs, many, if not most, compositions bear some similarity to prior songs.”). With

law, the ‘original’ part of a work need not be new or novel”—was not a reversible error. The reference to “minimal creativity” in Jury Instruction No. 20 embraces this concept. Reviewing the jury instructions as a whole, we conclude that the originality instructions were sound and were not prejudicial to Skidmore.

### **C. THE OMISSION OF A SELECTION AND ARRANGEMENT INSTRUCTION**

#### **1. Skidmore Forfeited His Objection to the Omitted Selection and Arrangement Instruction**

The district court did not give what Skidmore denominates as a “selection and arrangement” instruction. Because Skidmore did not preserve his objection to the omission, we review for plain error.

Skidmore maintains that his objection was preserved by the timely filing of a proposed selection and arrangement instruction and by objecting to Led Zeppelin’s version. Not so. Federal Rule of Civil Procedure 51(d)(1)(B) provides that “a failure to give an instruction” must be both “properly requested . . . and . . . also properly objected [to].” An objection must be made “on the record,” “promptly after learning that the instruction or request will be . . . refused.” Fed. R. Civ. P. 51(c)(1), (c)(2)(B). Skidmore may have requested a selection and arrangement instruction, but he did not object to the district court’s decision to omit the instruction. In other words, Skidmore’s proffer of the instruction was necessary but not sufficient to preserve the objection. *See United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1184 (9th Cir. 1989) (objection waived where “counsel offered the . . . proposed instructions” but “no objection was made to the failure to give them”);



domain,” and that the “original part” of the work only requires “minimal creativity” by the author. This instruction was immediately followed by Jury Instruction No. 21, which explained that the taking of “original material protected by the copyright” in “significant” amounts constituted infringement. Accordingly, to determine whether the *Taurus* deposit copy was substantially similar to the musical composition of *Stairway to Heaven*, the jury needed to determine whether “any . . . musical elements that are original to *Taurus* . . . also appear in *Stairway to Heaven*.” The instructions fairly and adequately covered Skidmore’s sole argument on substantial similarity, *i.e.*, that there were “five things that these two songs ‘*Taurus*’ and ‘*Stairway to Heaven*’” shared.

## V. VARIOUS REMAINING CHALLENGES

### A. TRIAL TIME LIMITS

Based on pretrial proceedings and the scope of proposed testimony, before trial began, the district court advised the parties that each side would have ten hours of witness time. Neither party objected. Skidmore now complains the court’s inflexibility was a due process violation. During Led Zeppelin’s case in chief, the court advised that Skidmore’s counsel was exceeding his time limits. Skidmore requested “a little bit of leeway in getting additional time.” When the court gave Skidmore ten additional minutes for cross-examination of each of Led Zeppelin’s remaining witnesses, Skidmore’s counsel said, “[t]hat’s fair.” After Led Zeppelin concluded its case, Skidmore requested leave to call two rebuttal witnesses, though he did not identify them. There was no offer of proof and the request was denied.

The district court was not inflexible or unforgiving. Skidmore’s counsel was warned during the trial that he was

getting into “all kinds of background information and things that really aren’t relevant to this case.” The court gave extra time every day and in granting Skidmore extra time to examine defense witnesses, the court reminded counsel that his examination had been “repetitive,” included “many questions that were irrelevant,” and included “gaps . . . where [he] could have been presenting evidence.” Although the court said there was “no excuse and no reason to give [Skidmore] more time,” the court did so anyway. Skidmore has shown no prejudice from these rulings. The district court did not abuse its discretion in limiting trial time by being up front about the limits and then being flexible at counsel’s request. *See Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443, 450–51 (9th Cir. 1994).

#### **B. THE DISTRICT COURT’S RESPONSE TO JURY QUESTION**

During deliberation, the jury asked to listen to “1. Plaintiff’s audio of *Taurus* (guitar)” and “2. Plaintiff’s audio of *Stairway to Heaven* (guitar).” During trial, Skidmore’s witness, master guitarist Kevin Hanson, performed two versions of the *Taurus* deposit copy—one with just the bass clef part and one with the treble and bass clef parts together. Skidmore’s counsel argued that the jury should hear the bass-clef-only version because that version was played repeatedly during trial whereas the version with both parts “was never played . . . in full.” When the court asked the jury which version it wanted to hear, one juror said “Bass clef,” while the jury foreperson followed up and said “full copy.” No other juror spoke up or countermanded the foreperson’s request. The district court directed that the full deposit-copy version be played and asked if that answered the jury’s question. The foreperson replied, “thank you.” Skidmore made no objection at that point and the jury heard

the “full copy,” which includes both clefs in the introduction to the songs. The jury made no follow-up request. Skidmore waived any objection to the claim that there was a conflict between jurors and any error was harmless.

### C. ADMISSION OF DR. FERRARA’S TESTIMONY

Skidmore filed a motion for sanctions and to preclude Led Zeppelin’s expert musicologist, Dr. Ferrara, from testifying at trial. At his deposition, Dr. Ferrara testified that he had previously analyzed the similarities between *Taurus* and *Stairway to Heaven* sound recordings for Rondor Music (“Rondor”), a subsidiary of Universal Music Publishing Group. Universal Music Publishing Group was working for Hollenbeck, Spirit’s publisher. Dr. Ferrara explained that his analysis for Rondor had already been completed by the time he was contacted by Led Zeppelin’s counsel. Rondor waived any conflict and consented to Led Zeppelin retaining Dr. Ferrara as an expert witness.

As a preliminary matter, the district court denied Skidmore’s motion as improperly noticed, over the page limit, and untimely. On that basis alone, the district court’s ruling was not an abuse of discretion. But even without these infirmities, the district court did not err in denying the motion. Skidmore’s challenge is based on a purported conflict of interest that made it improper for Dr. Ferrara to testify for Led Zeppelin without disclosing the conflict or obtaining a waiver from Skidmore.

This argument fails because there was no conflict of interest. Although Rondor waived any potential conflict from having Dr. Ferrara testify on behalf of Led Zeppelin, even that is immaterial because Rondor does not have any interest in this litigation. Skidmore contends that Rondor’s parent, Universal Music, was working for Hollenbeck, an

entity that owed a fiduciary duty to Skidmore as a publisher of Spirit's music. But a music publisher does not have a fiduciary relationship with its composers, absent special circumstances. *See Cafferty v. Scotti Bros. Records, Inc.*, 969 F. Supp. 193, 205 (S.D.N.Y. 1997). Skidmore made no showing of any special circumstances, or that Hollenbeck was a fiduciary of the Trust. Nor did Skidmore show that Dr. Ferrara had confidential information concerning Skidmore. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). Rondor retained Dr. Ferrara to obtain his opinion on two publicly available sound recordings, which he communicated telephonically to Rondor. All of this occurred before Dr. Ferrara ever had contact with Led Zeppelin's attorneys. The district court did not abuse its broad discretion by permitting this expert testimony. *See Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980).

#### **D. ATTORNEYS' FEES**

Warner/Chappell cross appeals the district court's denial of attorneys' fees and costs under 17 U.S.C. § 505. The Supreme Court counsels that a court has "broad leeway" to consider the relevant factors that promote the purposes of the Copyright Act, but the Court also has cautioned against giving substantial weight to just one factor, and directed the courts to "give due consideration to all . . . circumstances relevant to granting fees." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1799, 1803, 1805 (2016).

Here, after weighing the factors and the circumstance of the case, the district court found that litigation misconduct and the degree of success swung solidly in favor of Warner/Chappell, that the need for compensation weighed slightly in favor of Warner/Chappell, but that motivation, frivolousness, and objective reasonableness weighed