

No. 20-142

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IN THE

**Supreme Court Of The United States**

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Michael Skidmore, as Trustee for the Randy Craig Wolfe  
Trust,

Petitioner,

v.

Led Zeppelin et al., and Warner/Chappell Music, Inc.,

Respondents

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE  
BRIEF AND BRIEF OF THE PULLMAN GROUP, LLC  
AND STRUCTURED ASSET SALES, LLC AS AMICUS  
CURIAE IN SUPPORT OF GRANTING THE PETITION**

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September 10, 2020

**MOTION OF THE PULLMAN GROUP, LLC AND  
STRUCTURED ASSET SALES, LLC FOR LEAVE  
TO FILE A BRIEF AMICUS CURIAE IN SUPPORT  
OF GRANTING THE PETITION**

The Pullman Group, LLC and Structured Asset Sales, LLC (“Amici”) hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Amici* are filing this motion because they have been unable to secure consent from Respondent.<sup>1</sup> The proposed brief is attached.

As more fully explained in the Statement of Interest of *Amici Curiae* beginning on page 1 of the attached brief, amici are concerned that the Ninth Circuit’s decision, if allowed to stand, will have serious negative repercussions for *amici* and the larger community of authors, artists and copyright owners. The brief of *amici* will assist the Court in determining whether to grant certiorari, because the brief elaborates on why the Ninth Circuit’s ruling on the so-called “deposit copy” issue erroneously limits basic, long-standing principles of copyright law based solely on administrative function of the United States Copyright Office.

Just days after the erroneous Ninth Circuit decision was issued in *Skidmore*, its conclusion regarding the “deposit copy” issue was adopted by

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<sup>1</sup> On August 13, 2020, counsel for *Amici* contacted counsel for Respondent, and asked whether Respondent would consent to Amici filing a brief in support of the Petition for Certiorari. On August 17, 2020, counsel for Respondent advised counsel for *Amici* that Respondent would not so consent.

the United States District Court for the Southern District of New York in *Griffin v. Sheeran*, 1:17-cv-05221-LLS (S.D.N.Y.) in a manner that materially restricts the ability of the plaintiffs in that case to litigate their copyright infringement case.<sup>2</sup> *Amicus Structured Asset Sales, LLC* has brought two cases in the Southern District of New York based on the same core allegations of infringement as are at issue in the *Griffin* case. *Structured Asset Sales, LLC v. Sheeran*, 1:18-cv-05839-LLS (*SAS I*); *Structured Asset Sales, LLC v. Sheeran*, 1:20-cv-4329-RA (*SAS II*).

At the heart of all three cases is the allegation that the 1973 musical composition “Let’s Get it On” – written by Marvin Gaye and Edward Townsend and performed by Gaye – has been infringed by the 2014 release of “Thinking Out Loud,” written by Ed Sheeran and Amy Wadge and performed by Sheeran. The *SAS II* matter – in fact – was filed in partial response to the *Skidmore* and *Griffin* “deposit copy” decisions, and bases its claims of infringement not only on the 1973 registrations for “Let’s Get it On,” but also on an additional registration for that composition secured in 2020, using the 1973 sound recording of “Let’s Get it On” as its deposit copy.

The potential for adoption of the erroneous *Skidmore* deposit copy holding in the two *Structured Asset Sales* matters presents a direct threat to the ability of *amici* to litigate their claims and protect their financial interests as beneficial copyright owners.

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<sup>2</sup> *Griffin v. Sheeran*, No. 1:17-cv-05221-LLS (S.D.N.Y. March 24, 2020) (ECF 121).

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as amici curiae.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "K. M. Kelly", is written over a horizontal line.

*Attorney for Amici Curiae  
The Pullman Group, LLC and  
Structured Asset Sales, LLC*

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Structured Asset Sales, LLC (“SAS”) is a Limited Liability Company, which invests in and owns rights to thousands of songs and musical compositions and is owned by David Pullman, based in Los Angeles, California who is its Founder, Chairman and CEO, as well as the Founder, Chairman and CEO of The Pullman Group, LLC, the creator of all Pullman Bonds, the first ever music, entertainment and intellectual property including copyright asset backed securitizations of any kind in history including the world famous financial landmark \$55 million transaction rated single-A level by multiple ratings agencies Pullman Bond for David Bowie, and Pullman Bond series for the Motown Hit Machine, Holland Dozier Holland, R & B Royalty, Ashford & Simpson, The Godfather of Soul, James Brown and The Isley Brothers, among others backed by copyrights worth hundreds of millions of dollars. See [www.pullmanbonds.com](http://www.pullmanbonds.com).

SAS is a beneficial owner of one-third of all of the copyright rights of the catalog of songwriter Edward Townsend, including the musical composition “Let’s Get it On.” “Let’s Get it On” was written and produced by Townsend and Marvin Gaye in 1973, registered internationally in 1973, and

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least 10 days notice of *Amici*’s intention to file this brief.

renewed with the United States Copyright Office in 2000.

SAS is the plaintiff in two cases currently pending before the United States District Court for the Southern District of New York, *Structured Asset Sales, LLC v. Sheeran*, 1:18-cv-05839-LLS (*SAS I*); *Structured Asset Sales, LLC v. Sheeran*, 1:20-cv-4329-RA (*SAS II*). In those cases, SAS alleges that Mr. Sheeran’s 2014 song, “Thinking Out Loud,” infringes the copyright in the composition “Let’s Get it On.” In *SAS I*, SAS’s copyright infringement claims arise from the two registrations issued in 1973 for the “Let’s Get it On” composition, both of which used “lead sheet” sheet music as their deposit copies. The copyright infringement claims in *SAS II* arise from the two 1973 registrations and a registration secured in 2020 for the “Let’s Get it On” composition, which used the 1973 sound recording of the song as its deposit copy.

Cases – like *SAS I* and *SAS II* – involving infringement of musical compositions that were registered before the U.S. Copyright Office allowed for the submission of sound recordings as deposit copies for compositions are being affected, and will continue to be affected by the *Skidmore* ruling and by other courts that choose to follow *Skidmore*. Similarly, the portions of the *en banc* decision addressing copyright protection arising from “selection and arrangement” of elements speak directly to the arguments in many cases of non-literal, but nevertheless actionable, copying of musical compositions.

*Amici* have an interest in maintaining the broad protection granted under the Copyright Act to the copyrighted works they own and in which they invest, including “Let’s Get it On.” They also have an interest in preventing the spread of the rulings of the Ninth Circuit in *Skidmore* from being upheld or adopted by other Circuits.

## SUMMARY OF ARGUMENT

The Copyright Act grants owners of musical compositions a broad set of rights in connection with the works they own, including the right to bring actions against those who would infringe their rights by copying, performing or distributing musical compositions or recordings that are substantially similar to, and thus infringing of, the registered compositions.

Both the Copyright Act of 1976 (the “1976 Act”), and its predecessor from 1909 (the “1909 Act”), required copyright registrants to submit “deposit” copies of their works. Under the 1909 Act, the U.S. Copyright Office would only accept sheet music, or equivalent writings using various notation systems, as deposit copies in connection with musical compositions. Beginning with the enactment of the 1976 Act, the U.S. Copyright Office accepted musical recordings – such as vinyl records, tapes, CDs and digital files – as deposit copies for applications for the registration of musical compositions.

It is Respondents’ position (and that of the Ninth Circuit, sitting *en banc*) that in copyright infringement actions brought by the owners of musical compositions registered under the 1909 Act, the scope of the plaintiff’s rights is limited to the musical notations on the sheet music submitted to the U.S. Copyright Office as deposit copies, to the exclusion of any elements of the musical composition not found on the deposited sheet music, such as elements one might hear in a recording of such composition. It is also their position that for musical compositions registered following the enactment of

the 1976 Act, when the U.S. Copyright Office accepted musical recordings as deposit copies, the scope of plaintiff's rights expanded to the bounds of whatever was submitted as a deposit copy, including musical recordings.

*Amici* disagree, and take the position that plaintiffs bringing actions for copyright infringement based on musical compositions registered under the 1909 Act are not limited in their claims to the sheet music submitted as deposit copies, but rather may argue that the registered composition includes additional elements, and is entitled to present evidence in support of that position.

As *amici* explain, the Ninth Circuit, sitting *en banc*, appears to have failed to follow this Court's admonition regarding interpretation of the Copyright Act: "The Act ... should not be read as if they were written today, for to do so would inevitably distort [its] intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973).

Professors Nimmer explain – in a section of their treatise cited with approval by Respondents and the Ninth Circuit sitting *en banc* – that the reason the U.S. Copyright Office did not allow applicants for the registration of musical compositions to submit recordings as deposit copies was because – at that time – the law did not recognize that musical recordings could infringe musical compositions. According to Nimmer, with the enactment of the 1976 Act, and the recognition that musical recordings could infringe musical compositions, the U.S. Copyright Office changed its

policies to allow submission of musical recordings as deposit copies for musical compositions.

Musical compositions registered before the U.S. Copyright Office changed its policies have sheet music on file with the Copyright Office because, and only because, the Copyright Office was laboring under a policy based on a legal principle which has since been abrogated, in favor of the modern view that musical compositions clearly can, and often do, embody more than is shown using musical notation on sheet music. Prohibiting plaintiffs from introducing evidence beyond the sheet music to demonstrate the breadth of their musical compositions, based on the historical policies of the Copyright Office, has the effect of robbing those plaintiffs of the full protections granted to them by the Copyright Act.

To put it another way, Respondents' position suggests that if the creators of musical compositions had not diligently registered their compositions, but rather waited a number of years until they could file recordings as deposit copies, they would have been rewarded for their delay by a grant of broader protection for their compositions. Such an outcome would be unfair, and would run contrary to the well-established principle under Copyright Law of rewarding early movers, for example through access to a wider range of damages if their registrations precede the alleged infringements.

In this case, and in numerous other cases now pending around the country, including *Griffin*, *SAS I* and *SAS II*, courts should recognize that plaintiffs' pre-1976 Act copyright registrations for musical

compositions encompass all elements of those compositions, whether or not shown on the sheet music on file at the U.S. Copyright Office, and those courts should make evidentiary rulings in accordance with that recognition, without binding plaintiffs' hands and limiting their ability to make their infringement arguments, either.

*Amici* respectfully request that this Court grant Petitioner's petition for a writ of certiorari so that due consideration may be given to this important issue.

## ARGUMENT

### I. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO HALT THE GROWING INFLUENCE OF THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE "DEPOSIT COPY" REQUIREMENTS

This Court should find that musical compositions registered prior to the enactment of the 1976 Act may include elements not reflected in the sheet music on file with the U.S. Copyright Office.

In *Goldstein v. California*, a case cited with approval several times by the Ninth Circuit *en banc*, this Court noted the following:

To interpret accurately Congress' intended purpose in passing the 1909 Act and the meaning of the House Report petitioners cite, we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909, in which they were written.

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

This Court went on to explain that as the Copyright Act was amended and replaced in 1873, then 1909, and then 1976, the conception of what a



“copy” could be, and thus what was entitled to protection, expanded. This happened, in large part, because of the development of new technology that had not even been conceived of under the prior iteration of the law:

In 1831, Congress first extended federal copyright protection to original musical compositions. An individual who possessed such a copyright had the exclusive authority to sell copies of the musical score; individuals who purchased such a copy did so for the most part to play the composition at home on a piano or other instrument. Between 1831 and 1909, numerous machines were invented which allowed the composition to be reproduced mechanically....It is against this background that Congress passed the 1909 statute. After pointedly waiting for the Court's decision in *White-Smith Music Publishing Co.*, Congress determined that the copyright statutes should be amended to insure that composers of original musical works received adequate protection to encourage further artistic and creative effort.

*Goldstein v. California*, 412 U.S. 546, 564 (1973) (citing *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908)).

The advent of reproduction technology for music – starting with piano rolls with perforations and moving into analog and then digital recording technology – changed and continues to change our collective conception of what the Copyright Act should protect.

That the Copyright Office only accepted sheet music as deposit copies under the 1909 Act is entirely consistent with the historical framework *Goldstein* provides, for just as it had not yet dawned on us to consider nascent or unborn technology to be a “copy” of music for protection purposes, the Copyright Office was not accepting piano rolls as deposit copies for musical compositions.

Today (and since the enactment of the 1976 Act) it is beyond question that musical recordings are entitled to copyright protection, and can serve as deposit copies for registrations of both recordings and compositions. This is not unlike the *en banc*’s court’s observation that “[a]lthough it seems unthinkable today, musical compositions were not explicitly subject to copyright in the United States until 1831....” Op. at 16. It is inconsistent and unfair to creators of earlier works, however, to expand the way in which we think about musical compositions to protect works registered once recordings were accepted as deposit copies, providing greater protection than those registered before.

The *en banc* court makes a point of quoting the 1967 edition of the Copyright Compendium, explaining:

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.” The inescapable conclusion is that the scope of the copyright is limited by the deposit copy.

Op. at 20 (*citing* Compendium of Copyright Office Practices § 2.6.1.II.a (1st ed. 1967) (emphasis added)).

In the view of *amici*, rather than supporting the Ninth Circuit’s conclusion, this quote from the original Compendium highlights the limitations of the thinking of the time, and to give it too much weight runs afoul of this Court’s admonishment from 1973 in *Goldstein*: “The Act and the report should not be read as if they were written today, for to do so would inevitably distort their intended meaning.”

In its opinion, the Ninth Circuit provided this limited quote from Nimmer on Copyright:

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.”

Op. at 18 (*quoting* 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.05[A] (2017)).

The Ninth Circuit, however, however, did not provide the full context of Professors Nimmers’ explanation, which is found under the heading “The Diminished Significance of Visible Notation”:

[A] The Diminished Significance of Visible Notation

A musical work is entitled to copyright as long as it is “fixed in any tangible medium of expression,” regardless of the nature of that medium. Specifically, it is no longer necessary, as formerly, that the medium be visibly intelligible. The fact that the grooves on a phonograph record may not be “read” is no bar to the copyrighting of a musical work by fixing it in record form. It is, thus, possible to obtain statutory copyright over a work merely by recording it, although the composer is unable or unwilling to reduce the work to written form in conventional musical notation.

This rule represents a sweeping departure from the 1909 Act; it constitutes an intentional overruling of *White-Smith Music Co. v. Apollo Co.*, in which the Supreme Court held

that, in order to constitute a “copy” within the meaning of then-extant copyright law, there must be “a written or printed record in intelligible notation.” The Court concluded that an unauthorized manufacturer and seller of perforated music on paper (piano rolls) was not an infringer, as piano rolls failed to qualify as “copies” under the above definition, as they lacked a visibly “intelligible notation.”

1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.05[A] (2017) (*citing White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908)) (emphasis added).

The Ninth Circuit’s very limited quotation from Nimmer robbed the passage of its proper meaning. What Professors Nimmer were saying is that the prior policy of the U.S. Copyright Office to accept only sheet music or equivalent written notational forms as deposit copies existed only because of the state of copyright infringement law at the time, and when infringement law changed, the policy changed with it. It would be inconsistent and inequitable to limit the scope of rights of copyright holders on this basis.

Indeed, Congress was careful to include the following in the “Transitional and Supplementary Provisions” of the 1976 Act: “All causes of action that arose under title 17 before January 1, 1978, shall be governed by title 17 as it existed when the cause of action arose.” PL 94–553 (S 22), PL 94–553, October 19, 1976, 90 Stat 2541. They did so to “make[] clear

that a cause of action existing on January 1, 1977, is to be governed by the law under which it arose.” H.R. Rep. 94-1476, 182, 1976 U.S.C.C.A.N. 5659, 5798. The obvious corollary is that infringement cases arising in the late 2010s, although involving copyright registrations granted in the early 1970s, would enjoy the expanded benefits of the modern view that musical compositions can embody a wide range of elements that may or may not be reflected in sheet music – as Nimmer’s own explanation demonstrates.

## II. DEPOSIT COPIES IDENTIFY – BUT ARE NOT IDENTICAL TO – UNDERLYING COPYRIGHTED WORKS

The Ninth Circuit’s approach (and that of Respondents when they were before the Ninth Circuit) continues to dance carefully around the fact that Nimmer on Copyright said something that terrifies Respondents, and is inconvenient for the *en banc* Court’s conclusion, an acknowledgement by the copyright luminaries that, prior to 1978, the Copyright Office only accepted sheet music as deposit copies for musical compositions, not as a limitation on the scope of the copyright, but because at that time that was the only accepted way to “publish” a composition:

Although *White-Smith* was decided the year before enactment of the 1909 Act, its doctrine became a part of that Act. It was applied, for example, to phonograph records and to magnetic tape, neither of which could be said to embody intelligible notations and

hence did not qualify as copies of the musical works thereby recorded. Because, under the 1909 Act, copyright protection required the placement of notice on copies (and likewise the deposit of copies), it followed that a musical work could not claim copyright unless the notice and deposit requirements were satisfied with respect to an object that constituted a visibly intelligible notation. Therefore, 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. (As an alternative, however, a musical composition recorded on a motion picture sound track could be protected under the motion picture copyright, even though not reduced to visibly intelligible notation.)

1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.05[A] (2017) (citing *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908)) (emphasis added).

We respectfully ask the Court to remember that musical compositions – like dance and other forms of art – are by their nature ephemeral. Musical notation is a way of trying to capture the ephemeral in the physical, but it is and has always been limited in its ability to capture every nuance of the work. Even musical recordings have their limitations, and the different types of recording technology have their respective advantages and

disadvantages – just ask any staunch proponent of vinyl records whether they enjoy listening to music on CD or over the Internet!

Similarly, when it comes to computer programs, the Copyright Office allows the deposit of portions of the underlying computer code, both because of the sheer size of some programs, as well as the need to maintain secrecy of the code:

#### Code without Trade Secret Material

If the source code does not contain trade secrets, submit one copy of the first twenty-five pages and last twenty-five pages of the source code for the specific version you want to register....

#### Code with Trade Secret Material

If the source code does contain trade secrets, you must indicate in writing to the Office that the code contains trade secret material. Using one of the following options, submit a portion of the code for the specific version you want to register:

- One copy of the first ten pages and last ten pages, blocking out none of the code;
- One copy of the first twenty-five pages and last twenty-five pages, blocking out the portions of the code containing trade secret material,



provided the blocked out portions are less than fifty percent of the deposit;...

Copyright Office, “Circular 61: Copyright Registration of Computer Programs” (Rev. Sept. 2017).

Deposit copies do not, and were never meant to be, a limitation on the scope of the copyright they represent. They serve an identifying function, but do not take the place of the underlying creation.

### **III. SONGWRITERS DO NOT BEHAVE AS THE NINTH CIRCUIT, RESPONDENTS AND THEIR *AMICI* SUGGEST**

The *en banc* Court wrote that “[t]he 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.” Op. at 18. Respondents before the Ninth Circuit and their supporting *amici* advanced much more strident versions of that same argument, predicting the dire consequences that would arise from a determination that deposit copies do not limit the scope of the underlying copyrighted compositions, one of them writing, for example, that “[s]ongwriters know and assume that copyrights are limited in scope by what is deposited with the Copyright Office, and if that rule is changed, it will stifle creation of new works

because the deposit copies will no longer be reliable guides as to the scope of prior copyrights.”<sup>4</sup>

This type of thinking suggests that songwriters not only research what works have been granted copyrighted registrations previously, but further research what was deposited with the Copyright Office in connection with those works, in order to determine the scope of those registrations. Even if songwriters behaved in such a way (and surely they do not), deposit copies are not readily available, and the retrieval process is neither simple nor speedy. Songwriters do not pull deposit copies from the Copyright Office during their creative process, and thus clarifying the relevance of deposit copies to the scope of copyrighted compositions will have no impact whatsoever on, and no prejudice to, the creative process of songwriters. To suggest otherwise is simply not credible, and the Court should not let this irrational argument cloud its analysis. Moreover, if Respondents suggest that songwriters knowingly and purposefully limit their copying to works released before 1978 (when deposit copies were limited to sheet music by operation of the Copyright Office), on the mistaken assumption that the registrations for the copied compositions do not cover the portions infringed, we would suggest this Court discourage them from doing so.

#### **IV. THIS COURT SHOULD ALSO GRANT THE PETITION IN ORDER TO ADDRESS THE PROPER STANDARD FOR COPYRIGHT INFRINGEMENT OF MUSICAL**

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<sup>4</sup> Brief of *Amici Curiae* 123 Songwriters, Musicians and Producers, Along with NSAI and SONA (July 30, 2019) (Ninth Cir. Dkt. 118-2) at 11.

## COMPOSITIONS BASED ON THE “SELECTION AND ARRANGEMENT” OF ELEMENTS

*Amici* also endorse the Petition for *Certiorari* as it relates to the proper understanding of copyright protection for “selection and arrangement” of elements. As Petitioner has explained, the *en banc* court has improperly narrowed the important holding of this Court’s holding in *Feist*.

The *en banc* court invents a distinction that simply does not exist in *Feist* and its progeny. It appears to be the view of the Ninth Circuit that “selection and arrangement” requires a level of sophistication beyond an assemblage of elements, but the *en banc* court gives absolutely no clue as to how to identify what does and does not qualify for such treatment. Besides being entirely unworkable, that constrained interpretation finds no support in *Feist*, where this Court made clear that unprotectable common elements are protectible when combined in an original combination:

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original

that Congress may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

*Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (*citing* Nimmer §§ 2.11[D], 3.03; Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum.L.Rev. 516, 523 n. 38 (1981); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985)).

This Court held that a directory – speaking here about a telephone directory – is theoretically entitled to protection for the choices made when arraying factual information. The *en banc*'s call for some unspecified standard of sophistication in the selection and arrangement threatens the fundamental holding of *Feist*.

As Petitioner has already pointed out in its Petition, the Ninth Circuit was adhering to the teachings of *Feist* through its decision in *Swirsky v. Carey*, where it wrote the following:

Music, like software programs and art objects, is not capable of ready classification into only five or six constituent elements; music is comprised of a large array of elements, some combination of which

is protectable by copyright. For example, in *Three Boys* we upheld a jury finding of substantial similarity based on the combination of five otherwise unprotectable 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. Other courts have taken account of additional components of musical compositions, including melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics. In addition, commentators have opined that timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, basslines, and new technological sounds can all be elements of a musical composition. There is no one magical combination of these factors that will automatically substantiate a musical infringement suit; each allegation of infringement will be unique. So long as the plaintiff can demonstrate, through expert testimony that addresses some or all of these elements and supports its employment of them, 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), *as amended on denial of reh'g* (Aug. 24, 2004) (*citing Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), additional citations omitted)) (emphasis added).

The *en banc* Court deviated sharply from the *Swirsky* and *Feist* tradition, however, when it took the position that *Skidmore* had not even pled, let alone evidenced, a selection and arrangement theory, creating dangerous precedent that cannot be allowed to persist, because it contradicts the law as expressed by this Court. Preserving this Court's broad enunciation of the "selection and arrangement" standard is critical, especially when it comes to preserving and protecting the rights of musical creators whose work may not be infringed through wholesale lifting of melody or lyrics, but the more subtle appropriation of the overall structure or feel of a piece of music through infringement of the writers' selection and arrangement of even public domain elements.

## CONCLUSION

This Court should take this opportunity to state unequivocally that copyright registrations for musical compositions – especially those registered prior to January 1, 1978 – can and often do exist beyond the written page, and that infringement cases should follow this principle when it comes to admission of evidence concerning the scope of the

underlying composition. *Amici* respectfully request that the Court grant *certiorari* to Petitioner.

September 10, 2020

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Mr. Michael Kiley", is written over a horizontal line.

*Attorney for Amici Curiae  
The Pullman Group, LLC  
and Structured Asset  
Sales, LLC*