

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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

v.

Led Zeppelin, *et al.*,  
Respondents

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

**PETITION FOR A WRIT OF CERTIORARI**

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Dated: August 6, 2020

**Question Presented 1**

1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921

1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934

1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947

1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960

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2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012

2013 2014 2015 represent the 106 years that the courts of this nation recognized that musical works were protected as created and fixed in a tangible medium under the Copyright Act of 1909—and that the deposit requirement was a technical formality. In those 106 years not one copyright trial was limited or controlled by the deposit, which was usually an incomplete outline of the song.

The Ninth Circuit’s *en banc* decision, holding that **only** paper sheet music deposits have copyright protection under the 1909 Act, will likely divest hundreds of thousands of songs of copyright protection. Thus, a question of first impression arises for this Court under the Copyright Act of 1909:

*Whether or not the Ninth Circuit Court of Appeals sitting en banc correctly held that musical copyright protection under the Copyright Act of 1909 is limited to sheet music deposits—and only sheet music deposits—or whether songs under the 1909 Act are protected as created and fixed in a tangible medium?*

## **Question Presented 2**

The Supreme Court has defined and established the concepts of originality and selection and arrangement in Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340 (1991), with it and the Courts of Appeal holding them to be fundamental aspects of copyright law and the extrinsic test.

Originality is a constitutional requirement for copyright protection, but is an extremely low bar. Selection and arrangement allows for the protection of combinations of otherwise unprotectable elements as long as the combination is original. Both concepts have widely and faithfully been applied since Feist by all the Courts of Appeal.

The Ninth Circuit's *en banc* opinion, however, redefined originality, significantly heightening the requirement in contradiction to Feist. It also held that selection and arrangement is not a necessary instruction for the extrinsic test.

This question of first impression for this Court is:

*Whether Ninth Circuit Court of Appeals was permitted to fundamentally alter wide swaths copyright precedent regarding the extrinsic test—namely originality, and selection and arrangement—in a way that directly challenges binding Supreme Court precedent to the contrary?*

### **Parties to the Proceedings**

The Petitioner, Michael Skidmore, Trustee for the Randy Craig Wolfe Trust was the Appellant below before the United States Court of Appeals for the Ninth Circuit.

The Respondents are the band Led Zeppelin; James Patrick Page; Robert Anthony Plant; John Paul Jones; Super Hype Publishing, Inc.; Warner Music Group Corporation, Atlantic Recording Corporation; and Rhino Entertainment Company.

### **Statement of Related Proceedings**

Skidmore v. Led Zeppelin, 952 F. 3d 1051 (16-56057; 16-56287) (9th Cir. March 9, 2020) (en banc); Skidmore v. Led Zeppelin, 925 F. 3d 999 (16-56057; 16-56287) (9th Cir. June 10, 2019) (granting rehearing); Skidmore v. Led Zeppelin, 905 F.3d 1116 (16-56057; 16-56287) (9th Cir. Sept. 28, 2018) (panel opinion); Skidmore v. Led Zeppelin, 2:15-cv-03462 (C.D. Cal. July 8, 2016) (judgment on jury verdict); Skidmore v. Led Zeppelin, 2:15-cv-03462 (C.D. Cal. April 9, 2016) (granting in part, denying in part SJ); Skidmore v. Led Zeppelin, 106 F. Supp. 3d 581 (E.D. Pa. May 6, 2015).

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## **PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Michael Skidmore, Trustee for the Randy Craig Wolfe Trust, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The Opinion of the United States Court of Appeals for the Ninth Circuit sitting *en banc* and affirming the lower court, following the grant of rehearing, is dated March 9, 2020. (App. 1). The Order of the United States Court of Appeals for the Ninth Circuit vacating the jury's verdict is dated September 28, 2018. (App. 74). The SJ order of the district court is dated April 8, 2016, denying in part and granting in part Led Zeppelin's motion for summary judgment. (App. 114). The motion in limine orders of the district court are dated April 25, 2016. (App. 111).

### **JURISDICTION**

Jurisdiction in this Court is founded under 28 U.S.C.A. 1254(2) since it is a question for Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The question presented is one that arises under the Copyright Act of 1909, ch. 320, § 1 et seq., 35 Stat. 1075, 1075 (1909) (repealed 1976), and Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.



## STATEMENT OF THE CASE

It is fitting, perhaps, that the future of music copyright law be decided by a case about rock n' roll's most iconic song, "Stairway to Heaven."

The Ninth Circuit's *en banc* opinion erodes the foundations of copyright law to the point of being unrecognizable. In the process, it deliberately ignores *stare decisis* and directly challenges binding precedent from this Court.

The opinion is a disaster for the creatives whose talent is often preyed upon. By the same token, it is a gift to the music industry and its attorneys—enthusiastically received—by a circuit whose own judge once observed: "Our circuit is the most hostile to copyright owners of all the circuits."<sup>1</sup> The "Court of Appeals for the Hollywood Circuit" has finally given Hollywood exactly what it has always wanted: a copyright test which it cannot lose. Portending what is to come, in the days following the decision's filing multiple major copyright rulings have already dramatically favored industry defendants.

The proverbial canary in the coal mine has died; it remains to be seen if the miners have noticed.

Plaintiff-Petitioner Michael Skidmore alleges that the creator of the famous introduction to "Stairway to Heaven" was not Led Zeppelin guitarist defendant Jimmy Page. Instead, he alleges that Page stole the introduction from the song

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<sup>1</sup> Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F. 3d 946, 958 (9th. Cir. 2012) (Fletcher, J) (concurring), *rev'd* 134 S. Ct. 1962, 188 L. Ed. 2d 979, 572 US 663 (2014). Judge Fletcher was specifically referring to the use of laches to bar copyright claims.

“Taurus” written by guitar prodigy Randy Wolfe of the 1960s and 70s psychedelic rock band Spirit (nicknamed Randy California by Jimmy Hendrix).<sup>2</sup>

A quick listen to “Taurus” and “Stairway to Heaven” as they were sold to the public makes it quite clear that Mr. Page undoubtedly used “Taurus” to create the nearly identical introduction in “Stairway to Heaven.” An expert comparison of the compositions of the two songs concluded that they are strikingly similar and practically identical. See, e.g., Opening Br., at 34, Reply Br., at 25-27, 31-36, Skidmore v. Led Zeppelin, (No. 16-56057) (experts explaining that the full composition of “Taurus” heard and copied by Page is strikingly similar to “Stairway to Heaven”).

The jury in the underlying trial unequivocally found that Page and the Led Zeppelin defendants had access to “Taurus.” Led Zeppelin and Page opened for Spirit in 1968, played several shows with them, covered a Spirit song, owned Spirit albums which included “Taurus,” and Mr. Page also extensively praised Spirit in interviews before and after “Stairway to Heaven’s” creation and release in 1971.

Yet, despite ironclad evidence that Page and Led Zeppelin had access to “Taurus,” and expert reports stating that the songs were striking similar, the jury delivered a verdict for defendants. Why did this happen?

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<sup>2</sup> Skidmore is Trustee of the Randy Craig Wolfe Trust, a charity focused on providing instruments and education to public school students, which owns Wolfe’s interest in “Taurus”.

**The Ninth Circuit *En Banc* Opinion Upends 106 Years of Precedent  
under the Copyright Act of 1909 by Holding that Musical Works can only  
be Protected as Sheet Music Deposits, Not as Created and Fixed in a  
Tangible Medium**

The reason for the defense verdict was that the district court never permitted the jury to hear a comparison of “Taurus’s” composition as created and fixed on an album, which is the composition Page had access to and copied from. The jury had no idea the songs were strikingly similar because it was never permitted to hear or compare them.

The district court, affirmed by the Ninth Circuit Court of Appeals sitting *en banc*, held that only sheet music could be copyrighted under the 1909 Act and limited the substantial similarity comparison to the registration deposit. This was, and is, an issue of first impression anywhere in the nation. (App. 100).

This limitation was legally baseless, and premised on the incorrect and ahistorical assumption that only sheet music could be copyrighted under the 1909 Act. Works under that Act were in actuality protected as they were created, whatever the medium. In 106 years of applying the 1909 Act no court in the country had ever previously held or contemplated that the deposit controlled the scope of a 1909 Act copyright.

The dire consequences of the *en banc* opinion to copyright owners cannot be understated. If copyright protection under the 1909 Act is limited to deposit sheet music, then virtually all songs composed before 1978 will lose almost all copyright protection because the lead sheets submitted for them were uniformly incomplete. This includes “Stairway to Heaven.”

The last time the Ninth Circuit did something like this, in La Cienega, it was forced to later acknowledge that it wrongly “took that settled law [of the last 100 years] and cast it on its head, threatening to thrust into the public domain hundreds of thousands of musical works which presently enjoy copyright protection.” ABKCO Music, Inc. v. LaVere, 217 F. 3d 684, 690-91 (quoting 143 Cong. Rec. H9882 (1997)). Remarkably, it has done the same thing again.

Demonstrating that Petitioner’s fears and warnings are not illusory, within just days of the *en banc* opinion being issued it was used by a district court in the Second Circuit as the sole basis to artificially limit copyright protection in the plaintiff’s musical work in a major case case superstar artist Ed Sheeran. See, e.g., Griffin v. Sheeran, No. 17 Civ. 5221 (LLS) (S.D.N.Y. March 24, 2020). Cases under the 1909 Act are common, and will continue to be for the foreseeable future, necessitating that this Court address the Ninth Circuit’s holding before the damage becomes irreversible.

**The Ninth Circuit *En Banc* Opinion Baselessly Altered the Extrinsic Test in A Way that Violates Binding Precedent of this Court, and Completely Undermines the Substantial Similarity Comparison**

In addition to the deposit copy problem, which solely affects 1909 Act cases, the *en banc* opinion has also directly challenged binding precedent by this Court on copyright protection and how to conduct the extrinsic substantial similarity test, including for cases under the 1976 Act.

Specifically, this Court in Feist Publications, Inc. v. Rural Telephone Service Co. made it unambiguously clear that originality and selection and arrangement are foundational concepts for copyright law. 499 US 340 (1991). In Feist, this Court held

that originality is a constitutional requirement and low bar, and that it requires no more than that the work in question have a modicum of creativity and not be copied from any other source. Id. Feist also observed that the combinations of elements together, even if those elements are unprotectable, are to be afforded copyright protection if original. Id.

Despite Feist's binding precedent, and faithful application by all the Courts of Appeals since Feist was decided, the Ninth Circuit *en banc* decides to baselessly redefine originality as a high bar to gaining copyright protection. It also eliminates the concept of selection and arrangement from the extrinsic test. These holdings, which directly violate Feist, are matters of first impression for this Court.

The dissenting judges candidly observe that by eliminating selection and arrangement the *en banc* court “weakens copyright protection for musicians **by robbing them of the ability to protect a unique way of combining musical elements.**” (App. 66, 73) (emphasis added). The dissent is warning that the harm stemming from the *en banc* opinion will not be limited to Petitioner’s case and is in fact intended to alter copyright law going forward.

If this Court does not grant this petition, and fails to reaffirm the basic principles explained in Feist, there will be cascading and irrevocable effects throughout the country. The Ninth Circuit is one of the copyright circuits, and its stature often gives its copyright decisions an added national importance.

Already the *en banc* decision has been applied in extraordinary ways, which has the music industry and its lawyers praising the decision. See Alexander Kaplan,

Sandra Crawshaw-Sparks, Simona Weil, *Led Zeppelin Ruling is Already Affecting Copyright Litigation*, PROSKAUER (April 3, 2020, available at <https://www.proskauer.com/uploads/led-zeppelin-ruling-is-already-affecting-copyright-litigation>) (stating that en banc decision has “turned the tide of music copyright infringement law toward defendants, limiting what courts will find protectable and what they will permit a jury to consider when asked to find unlawful copying”).

Most notably, days after the decision came out it was used to vacate the “Dark Horse” verdict against Katy Perry in the Central District of California. Gray v. Katy Perry, 2:15-cv-05642 (C.D. Cal. March 16, 2020). That district court applied the baseless formulations of originality and selection and arrangement used by the Ninth Circuit’s *en banc* opinion to upend the jury’s verdict.

The effect of this ruling is a gift to the industry, a disaster for independent artists, and spells the end of any real copyright protection for musical works.

## **I. Factual Background**

In late 1966 through the summer of 1967 Randy Wolfe’s band Spirit played every week in Hollywood at a club called the Ash Grove. (App. 115). Wolfe was professionally known by the nickname Jimmy Hendrix gave him, Randy California. One of the songs Spirit played every night was “Taurus”. Id. The recordings of Spirit playing the Ash Grove show that the composition of “Taurus” was in a concrete, definite, and final form in early to mid-1967. Id. Later in 1967, Wolfe signed a recording contract. Id. The first Spirit album was released in late 1967. Id. The

publisher, Hollenbeck, then filed a copyright for “Taurus” that listed Randy Wolfe as the author. Id. As part of the copyright registration packet, an incomplete deposit copy lead sheet was transcribed by a “B. Hansen,” not by Randy California or any other member of the band. Opening Br., at 15, *Skidmore v. Led Zeppelin* (16-56057). Plaintiff’s experts even the defense expert guitarist Rob Mathes observed that the lead sheet was incomplete. See, e.g., Opening Br., at 34, Reply Br., at 25-27, 31-36, Skidmore v. Led Zeppelin, (No. 16-56057).

This lawsuit alleges that Led Zeppelin, and defendants Jimmy Page and Robert Plant, copied “Taurus” to create the beginning to “Stairway to Heaven.” A jury found that Page and Plant had access to “Taurus” because Page and/or Plant owned the eponymous *Spirit* album that included “Taurus,” owned many Spirit albums, heard “Taurus” live in concert, opened for Spirit, covered Spirit songs, and were friends with the members of Spirit. (App. 14, 25, 58).

## **II. Procedural Background**

1. **The Trial** - Defendants filed for summary judgment on many issues, including alleging that the paper sheet music deposit was incomplete, contesting access and asserting independent creation, and asserting that the works were not substantially similar. Plaintiff opposed.

The District Court held under Three Boys Music that the deposit was jurisdictional in nature, and that the inaccuracies in the deposit were not fraudulent or prejudicial and that it had subject matter jurisdiction. (App. 121-22). The Court, however, also held that the deposit controlled the scope of protected expression in a

musical copyright under the 1909 Act. The Court limited the substantial similarity comparison to the exact notes on the deposit lead sheet. (App. 129). This was a huge victory for Led Zeppelin, because when the album compositions of both songs are heard side by side (the full composition of “Taurus” that Page heard and the “Stairway to Heaven” composition that Page later created based on “Taurus”), it becomes unambiguously clear that Page took the song verbatim from Randy California. See, e.g., Opening Br., at 34, Reply Br., at 25-27, 31-36, Skidmore v. Led Zeppelin, (No. 16-56057). The inaccurate deposit sheet music is less similar to Stairway than full “Taurus” composition. Id.

The Court then held that there was material dispute of fact based on substantial similarity and access. (App. 130-31). At the motion in limine phase, the Court again strictly limited the substantial similarity comparison to the exact notes on the deposit lead sheet, over Plaintiff’s objection. (App. 111).

The jury’s verdict found that Plaintiff owned the copyright, and that Defendants had access to “Taurus,” but found for Defendants on the extrinsic test. (App. 134). Plaintiff timely appealed.

## **2. A Ninth Circuit Panel Vacates the Jury Verdict**

Plaintiff’s appeal included challenges to the district court’s decision to restrict the substantial similarity comparison to the deposit copy, the failure to apply the Three Boys Music prejudice analysis to inaccuracies in the deposit copy, and the incorrect extrinsic test jury instructions (the originality instructions, and the omitted selection and arrangement instruction).



The panel vacated the jury verdict and remanded for a new trial. (App. 74). The panel upheld the district court's decision on the deposit copy, affirming that it controlled the scope of a 1909 Act musical copyright. (App. 104). It did not address the Three Boys Music prejudice analysis. The Panel, however, easily concluded that the extrinsic test instructions on originality and selection and arrangement were prejudicial error. "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.'" (App. 90).

### **3. Plaintiff Filed a Petition for Limited Rehearing on the Deposit Copy Issue; Defendants Filed for Rehearing on the Jury Instructions; the Court Granted En Banc Rehearing**

Following the panel opinion vacating the jury verdict, plaintiff Skidmore filed for a limited rehearing en banc on the two aspects of the deposit copy issue: (1) noting that a deposit was never meant to control the scope of copyright under the 1909 Act, and (2) even if a deposit controlled the scope of copyright, Defendants would suffer no prejudice if the full composition they were alleged to have copied was used. Skidmore did so despite the successful appeal because the way that the deposit argument was being analyzed enervated his ability to fairly prove his case, and would similarly deprive thousands of copyright owners of ownership in their rights.

At the same time, Defendants filed for rehearing regarding the jury instructions. The issues that Defendants filed for rehearing on were overwhelmingly not suitable for en banc review.

Rehearing was then granted. Skidmore v. Led Zeppelin, 925 F. 3d 999 (9th Cir. June 10, 2019) (granting rehearing).

#### **4. The Ninth Circuit Sitting *En Banc* Affirms the District Court Jury Verdict**

The *en banc* court affirmed the jury verdict. (App. 1) The opinion first analyzes the deposit copy issue. As the panel did, the *en banc* opinion erroneously claimed that only sheet music could be copyrighted under the 1909 Act, failing to accord proper significance to the fact that the common law governed the creation of copyright. (App. 22). The opinion failed to address why the inaccuracies in the “*Taurus*” lead sheet should be disregarded under Three Boys Music where there was no prejudice to the Defendants.

The opinion then went on to affirm the jury instructions on selection and arrangement and originality. (App. 33, 39). A dissent was filed from the opinion’s conclusion on the selection and arrangement jury instructions, noting that Skidmore had unambiguously presented a selection and arrangement theory at trial and that the failure to give the instruction “cut the heart out” of Plaintiff’s case. (App. 65).

### **REASONS FOR GRANTING THE PETITION**

#### **I. The Court Should Grant the Petition Because the Ninth Circuit Court of Appeals Erroneously Held that A 1909 Copyright Act Musical Composition is Limited to Sheet Music; A 1909 Act Composition is Actually Protected as Created and Fixed in a Tangible Medium**

There is a common misconception among lawyers and the judiciary that, under the Copyright Act of 1976, copyrighted works were for the very first time protected at the moment they were fixed in a tangible medium. It is also widely believed that under the 1909 Copyright Act musical works could only be protected as sheet music

and that creation and fixation were irrelevant. See, e.g., Skidmore v. Led Zeppelin, 952 F. 3d 1051, 1064 (9th Cir. 2020) (*en banc*) (erroneously stating that “the deposit copy defines the four corners of the “*Taurus*” copyright”). Undergirding this is a belief that the theoretical foundations of copyright law as we know it today were not as developed in 1909, and that the 1909 Act rotely promoted form over substance. This is legally and historically false as applied to copyright creation, protection, and the the deposit copy.

Congress and the circuit courts—including many prior rulings of the Ninth Circuit—have repeatedly confirmed that unpublished works are protected ***as created*** under the 1909 Act, not as they were deposited. This is immutable historical fact. Registration and deposit were jurisdictional formalities, not substantive ones, meant to confer federal protections, the ability to file suit, and for archival purposes.

Furthermore, Justice Oliver Wendell Holmes’s concurrence in White-Smith Music Publishing Co. v. Apollo Co., 209 US 1, 28 S. Ct. 319, 52 L. Ed. 655 (1908)—a concurrence which became the basis for the 1909 Act—explains at length that musical compositions are protected as created, not as they appear on paper. The Ninth Circuit’s failure to ascertain the intellectual foundation of the 1909 Act led to its erroneous belief that only paper sheet music had copyright protection under the 1909 Act.

If this petition is denied, and the Ninth Circuit’s opinion reversed, it will divest virtually every owner of a 1909 Act musical work of their copyright.

a. **Congress and the Courts of Appeal Confirm that Works were Protected as Created and Fixed in a Tangible Medium under the 1909 Act, Not as Deposited; Not One Case in 106 Years Ever Used a Deposit Copy as a Basis for the Substantial Similarity Comparison**

Under the 1909 Copyright Act there was a dual common law-federal system: initial common law copyright protection vested upon the work’s creation and fixation in a tangible form, and then the *already existing* copyrights could *receive* federal jurisdiction and protections when registered or published, as explained by Congress when drafting the 1976 Act. See HR Rep. No.94-1476, at p.129-31 (1976) (stating that under the 1909 Act there was “a dual system of ‘common law copyright’ for unpublished works and statutory copyright for published works”).

The Second and Ninth Circuit Courts of Appeal have long recognized as historical fact that, under the 1909 Act, the registration and deposit of a preexisting common law work meant that a common law copyright “received” federal protection—not that the deposit created a new work or altered the scope of an existing common law copyright. Roy Export Estab. v. Columbia Broadcasting, 672 F.2d 1095, 1101 (2d Cir. 1982) (stating that under the 1909 Act, “[s]tate law protection begins with a work’s creation,” and continues until owner “secures federal protection”); La Cienega Music Co. v. ZZ Top, 53 F.3d 950, 952-53 (9th Cir. 1995)<sup>3</sup> (stating that “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” [emphasis added]); ABKCO Music, Inc. v. LaVere, 217 F.3d

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<sup>3</sup> *preempted by* Act of Nov. 13, 1997, Pub. L. No. 105-80, § 11, 111 Stat. 1529, 1534 (codified as amended at 17 U.S.C. § 303(b) (2000)).

684, 688 (9th Cir. 2000) (accord); Societe Civile Succession Guino v. Renoir, S49 F.3d 1182, 1185 (9th Cir. 2008) (accord); Cosmetic Ideas, Inc. v. IAC/Interactivecorp., 606 F.3d 612, 618 (9th Cir. 2010) (accord). Justice Holmes recognized in his 1908 concurrence in White-Smith that: “A musical composition is a rational collocation of sounds apart from concepts, ***reduced to a tangible expression...***” White-Smith, 209 US at 18 (Holmes, J.) (concurring) (emphasis added). His opinion said nothing about sheet music.

It is key to realize that the 1909 Act does not address the creation of copyright or its scope; this omission was deliberate and not some egregious oversight. It was understood that copyright creation and its scope was addressed by the common law. The 1909 Act instead addressed how to obtain federal protections (i.e., publication or registration) and the rights available to the holders of existing copyrights registered with the federal government (e.g., granting exclusive right to make copies). This was the dual scheme that the 1976 legislative history recognized. See HR Rep. No.94-1476, at p.129-31 (1976).

The Ninth Circuit, unfortunately, did not realize that the 1909 Act was deliberately silent on how copyright is created. The Ninth Circuit therefore went searching for an answer in the text of the 1909 Act that was not present. When the Ninth Circuit erroneously claims that “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” it incorrectly assumed that the 1909 Act meant to define how a copyright could be created. (App. 17). The Act, when

placed in its proper historical context, obviously had no such intent. When the *en banc* opinion postures that the “statute is clear and unambiguous” this is mere rhetorical roughage unmoored from the Act’s purpose and limitations. (App. 21). These errors by the *en banc* opinion completely undercut the entire rationale for its holding that unpublished and published works could only exist as sheet music.

Needless to say, the scope of the already created and protected common law work did not change or shrink when registered and deposited with the federal government, as implied by the *en banc* opinion’s holding. The drafters of the 1909 Act even cautioned that the Act should not in any way be read as “abrogating” common law copyright protection. 1909 Act, § 2.

In 106 years no court has ever held that a deposit lead sheet defined the scope of copyright, ***and a deposit was never used by a single court or in a single trial as the basis for the substantial similarity comparison.*** If a sheet music deposit in fact controlled the substantial similarity comparison, then the Ninth Circuit and Defendants should have identified a single court in over a century that applied it as such. Again, it was settled law for a century that the deposit was not substantive, did not control the substantial similarity comparison, and instead was jurisdictional and archival.

The Ninth Circuit’s opinion almost entirely ignores the dual system under the 1909 Act, and fails to give any significance to the fact that works were plainly protected as created. It has needlessly disturbed a settled matter, creating an issue of first impression for this Court.

**b. The Purpose of the Deposit Lead Sheet was a Technical, Non-substantive Formality, Which has Been Uniformly Recognized as Jurisdictional and Archival**

Contrary to the Ninth's Circuit's opinion, the deposit did not define the scope of copyright. However, that begs the question, what was the purpose of the deposit requirement? After all, the deposit requirement does require that a "complete" copy of the work be submitted to the Copyright Office.

There are two questions that must be answered: (1) why was the form of the deposit in paper, and (2) if the deposit did not substantively define the copyright, what was its purpose?

**First**, the simple reason that a paper sheet music deposit was required for unpublished works is because it was convenient in 1909 and accepting piano rolls (huge cylinders) would have been absurdly impracticable and unthinkable. This, however, as this petition explains, does not lead to the conclusion that only paper compositions had copyright.

**Second**, the purpose of the deposit formality is jurisdictional and archival, as almost all available case law and authority note. No case before 2015 ever considered the deposit formality to be substantive, and it was instead analyzed as jurisdictional and/or a prerequisite to suit. See, e.g., Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486–87 (9th Cir. 2000) (stating that inaccuracies in the deposit copy did not divest federal court of subject matter jurisdiction if there was no fraud or prejudice); La Cienega, 53 F.3d at 952-53 (stating that works obtained federal protection "by complying with the requirements of the 1909 Act").

The deposit, of course, also had an archival purpose (to keep a record of the work) and to help identify the copyright. (App. 19-21). It no doubt should be as complete as possible. However, these tangential purposes do not mean that the deposit governs the scope of a work under the 1909 Act, any more than a deposit governs the scope of protection of a work under the 1976 Act. Under both copyright Acts works are protected as created—the entire of purpose of copyright as explained by Justice Holmes—not as deposited. See, e.g., 17 U.S.C. § 102.

The only authority which contradicts the conclusion that a deposit is a nonsubstantive formality is a Copyright Office compendium from 1967 which states that a registrant only has copyright as identified in the deposit. (App. 19-21). The compendium, however, does not have force of law and is more importantly wrong as explained throughout this petition. Works are protected as created by the common law. Further illustrating that the Copyright Office has the wrong of it, the current compendium still claims that under the 1976 Act the deposit governs the scope of protected expression. See U.S. Copyright Office, Compendium of U.S. Copyright Office Practices. § 504.2 (3d ed. 2017). Yet, it is universally recognized that a 1976 Act work is protected as it is created when fixed in a tangible medium under section 102, not as deposited. 17 U.S.C. § 102; (App. 103). The copyright office's compendiums are wrong (even today), ignore the importance of fixation under both acts, and do not cite any authority to support their interpretation.



**c. The Full Composition of “Taurus” was Fixed in a Tangible Medium, a Recording, which was Copied by Defendants *who Never Saw the Deposit Lead Sheet***

Randy Craig Wolfe composed “Taurus” in 1966 and it was fixed at that time in recordings. (App. 111). At the time of its fixation it gained common law copyright protection. Like most composers who composed works under the 1909 Act, Randy Wolfe did not know how to read or create sheet music.

Thus, when Wolfe and his band signed a record deal, the publisher hired someone named “B. Hansen” to transcribe an outline of the song for the registration deposit requirement. (App. 122-23). This deposit sheet music is not an independent work of art and it was not created by the author Randy Wolfe. *Id.* It is extremely incomplete and inaccurate as compared to the full composition of “Taurus.” See, e.g., Opening Br., at 34, Reply Br., at 25-27, 31-36, Skidmore v. Led Zeppelin, (No. 16-56057) (experts explaining why the deposit is inaccurate and unfaithful to the full composition of “Taurus,” and that the full composition is strikingly similar to “Stairway to Heaven”).

Defendants never saw or heard the deposit of “Taurus,” and defendant Page has admitted to owning the full composition of “Taurus” as embodied on Spirit’s album (the composition Wolfe’s publishers intended to copyright), which a jury found Page had access to before he created “Stairway to Heaven.” (App. 12). This composition of “Taurus” that Page had access too is the protected essence of “Taurus,” as conceived by Justice Holmes. This gives rise to the question: how can the substantiality similar comparison be grounded on sheet music that Page never had access to and could not read?

**d. The Three Boys Music Prejudice Analysis Should be Applied to the Deposit Copy If the Deposit Governs the Scope of Protected Copyright; This is a Matter of First Impression**

Three Boys Music holds that when a registration or deposit is inaccurate, and there is no fraud and prejudice to the Defendants, the deposit can be disregarded in favor of the full composition. Three Boys Music, 212 F.3d at 486–87 (“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.”); see also Copperweld Corp. v. Independence Tube Corp., 467 US 752, 762-63 (1984) (disapproving of legal doctrine that “‘makes but an artificial distinction’ at the expense of substance”).

In Three Boys Music, despite arguments by the defense that the deposit was incomplete, the Court found that there was no fraud or prejudice to the Defendants. The Court then approved a substantial similarity comparison using the full composition of the underlying song, as fixed in a recording, that the defendant had access to. Three Boys Music, 212 F.3d at 486–87.

Plaintiff has repeatedly asked the courts to apply this standard to this case, and instead use the composition in the “Taurus” recording Page owned, because the “Taurus” deposit is very inaccurate. See, e.g., Opening Br., at 34, Reply Br., at 25-27, 31-36, Skidmore v. Led Zeppelin, (No. 16-56057) (experts explaining why the deposit is inaccurate and unfaithful to the full composition of “Taurus,” and that the full composition is strikingly similar to “Stairway to Heaven”).

However, this argument has not been addressed by any court. Instead it has been conclusorily dismissed, with the courts noting that Three Boys Music prejudice

analysis addressed the deposit requirement as jurisdictional not substantive. Indeed, the district court applied the Three Boys Prejudice analysis jurisdictionally and found there was no prejudice to Defendants. (App. 123).

However, the argument made by Plaintiff was that, regardless of whether the deposit was considered jurisdictional or substantive, the prejudice analysis should nevertheless be applied. Restated, the Courts have never explained why the prejudice analysis does not apply if the deposit controls the scope of a song's composition. A Court of Appeals' failure to address a dispositive issue on appeal is grounds for reversal. See Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

As explained below, if the deposit is confirmed to control the scope of a 1909 Act musical work, most songs composed before 1976 are going to lose protection and enter the public domain. By granting this petition, and holding that the prejudice analysis should be applied where the deposit is inaccurate, this Court could entirely avoid a contentious debate on the purpose of the deposit requirement under the various copyright Acts, while ameliorating the far reaching consequences such interpretations will have.

**e. The Court should Grant this Petition because If the Deposit Governs the Scope of Copyright, there will be Extensive Damage to Creator's Rights and Copyright Law**

Should the deposit be construed as strictly controlling the scope of copyright, it will fundamentally damage copyright law under the 1909 Act on every level.

**First**, the Ninth's holding will dramatically divest hundreds of thousands of 1909 Act copyright owners of ownership in their works, destroying a national

uniformity on the issue that has lasted 100 plus years. This divestation is already happening, see Sheeran, No. 17 Civ. 5221, and will only accelerate as time goes on.

The Ninth Circuit has issued similar decisions before, upending settled law, and resulting in national condemnation. When the Ninth Circuit reflected on the La Cienega decision, in ABKCO, it recognized that it had improperly “took that settled law [of the last 100 years] and cast it on its head, threatening to thrust into the public domain hundreds of thousands of musical works which presently enjoy copyright protection.” See ABKCO Music, Inc. v. LaVere, 217 F. 3d 684, 690-91 (quoting 143 Cong. Rec. H9882 (1997)). Incredibly, it has heedlessly done the same thing here.

Almost all musical compositions composed and registered under the 1909 Act were composed not on sheet music, but on instruments and recordings. Opening Br. 36, 43-44, Skidmore v. Led Zeppelin, (No. 16-56057). The sheet music deposits were almost uniformly inaccurate and incomplete lead sheets. This includes “Taurus,” and “Stairway to Heaven” of which only 400 notes of 11,000 were included in the deposit. Id. It would have cost thousands of dollars to fully transcribe just one song, something that no contemplated or practiced. If the deposit controls the scope of protection in a song, then 1909 Act songs will be nothing more than incomplete outlines on dusty paper that no one has ever seen.

In particular, this will most heavily impact historically disenfranchised communities (black blues artists, for example, which Led Zeppelin heavily “borrowed” from and sometimes had to settle with) where the composition of music was not done on paper, raising serious equal protection concerns. See U.S. Const., Amdt. 5; US v.

Windsor, 133 S. Ct. 2675, 2693 (2013); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

**Second**, this ruling will render the substantial similarity comparison under the 1909 Act an artificial and pointless exercise. The elements of a copyright claims are (1) ownership, (2) access, and (3) substantial similarity. The point of a copyright claim, as Justice Holmes observed in his White-Smith concurrence, is to prove that the defendant had access to the plaintiff's work at issue, and then prove that the defendant used *the access to that specific work* to impermissibly copy the work at issue. "

The Ninth Circuit's *en banc* opinion nonsensically holds that access and copying are no longer related, effectively destroying the purpose of a copyright claim. Restated, the copyright comparison now compares the allegedly infringing work to a sheet music outline the infringer never saw or heard. This renders the comparison nonsensical.

**Third**, under the Ninth Circuit's ruling, the actual recordings of Plaintiff's composition that the Defendants accessed/heard and copied are now inadmissible in music copyright trials. (App. 22, 111). This alone is simply flabbergasting, especially as for 106 years there was never any such restriction.

**Fourth**, fundamental aspects of song composition which have always been included in the 1909 Act substantial similarity analysis are now permanently excluded. See Three Boys Music, 212 F.3d at 485–86 (recognizing lyric, rhythm, pitch, shifted cadence, instrumental figures, verse/chorus relationship, and fade ending as

compositional elements); Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004) (stating that “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”). Many of these common elements are usually never placed on inherently bare paper sheet music.

The fundamental reality is that if the Ninth Circuit’s *en banc* opinion is left standing, the 1909 Act similarity comparison will no longer be grounded in copyright principles. Justice Holmes would be baffled and chagrined to see his 1908 observations about the fundamental nature of copyright law, which were incorporated into the 1909 Act, so cavalierly cast aside.

## **II. The Court Should Grant this Petition because the Ninth Circuit *En Banc* Opinion Fundamentally Alters and Challenges Binding Precedent on the Extrinsic Test, Namely Originality and Selection and Arrangement**

In addition to the deposit copy matter, Plaintiff’s petition takes issue with Ninth Circuit’s indefensible holding on the jury instructions given on the extrinsic test. The instructions concerned two topics central to the comparison, originality and selection and arrangement. As opposed to the deposit copy issue addressed in Section I which concerns the 1909 Act, the *en banc* court’s errors in this section affect the substantial similarity analysis for ***all future cases*** under both the 1909 and 1976 Acts.

The Ninth Circuit’s *en banc* opinion has, without any regard for *stare decisis*, fundamentally altered these basic copyright concepts, directly bringing itself into

conflict with not only this Court's Feist decision, but every other circuit, on how to conduct the substantial similarity test under the 1909 and 1976 Acts.

The need for the Supreme Court to address and reverse the *en banc* opinion is significantly heightened by the fact that the Ninth Circuit handles a disproportionate number of copyright cases as the "Hollywood Circuit," meaning that allowing the Ninth Circuit opinion to stand will result in a huge percentage of copyright cases being decided under a plainly erroneous rubric.

**a. The Ninth Circuit has Contradicted this Court's Binding Precedent by Effectively Redefining Originality in a Way that Contradicts this Court's Feist Decision**

The Ninth Circuit's *en banc* opinion has redefined originality in a way which fundamentally contradicts this court's decision in Feist Publ'ns, and the essence of copyright law.

This Court holds that originality is the foundation of copyright law:

*The sine qua non of copyright is originality.... **Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.***

Feist Publ'ns, 499 U.S. at 348 (emphasis added). The Feist court stressed that only "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent" are not afforded protection. It is key that the factfinder understand that a work need not be novel to be original, only that it not be copied. See Swirsky, 376 F.3d at 851 (stating that "originality means little more than a prohibition of actual copying").

The *en banc* opinion turns this simple, binding definition on its head. The *en banc* court, over objection, endorses the district court's instruction on originality which was in fact a custom defense instruction:

“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.**”

(App. 92) (emphasis added). This instruction inexplicably removed the language from Feist in the Ninth Circuit Model Instruction 17.13 stating that *a work did not need to be novel to be original*, and instead adding language not contained in any definition of originality, holding that *if an element was not novel in view of the prior art it was not original*. (App. 92). Whatever this instruction describes, it is not originality as defined by Feist and applied by every other circuit. See, e.g., Christian Louboutin v. Yves Saint Laurent America, 696 F. 3d 206, 223 n20 (2d Cir. 2012); Home Legend, LLC v. Mannington Mills, Inc., 784 F. 3d 1404, 1409 (11th Cir. 2015); Oracle America, Inc. v. Google Inc., 750 F. 3d 1339, 1354 (Fed. Cir. 2014); Society of Holy Transfiguration v. Gregory, 689 F. 3d 29, 48 - Court of Appeals, 1st Circuit 2012; Kelley v. Chicago Park Dist., 635 F. 3d 290, 302-03 (7th Cir. 2011) (holding that author's use of geometric shapes was original and protectable); ATC Distribution Group, Inc. v. Whatever It Takes Transmissions, 402 F. 3d 700, 710 (6th Cir. 2005).

The jury was unmistakably left with the impression that novelty is a required element of copyright and that any element that ever appeared in the prior art was legally not original. (App. 94). Defendants in fact argued at trial that elements of Plaintiff's works allegedly appeared in several pieces of esoteric prior art, but had no



proof at all Randy Wolfe had heard or copied any of this prior art. (App. 13). Thus, Defendants instead advocated for and obtained a legally erroneous jury instruction which incorrectly told the jury that the mere fact that an element appeared in the prior art meant it was unoriginal and not protectable.

The *en banc* opinion's only justification for the omission of the novelty line, and addition of the prejudicial prior art line, is to vaguely and conclusorily claim that other inapplicable instructions "embrace[] this concept." (App. 39). However, if anything the error was compounded not corrected by the other instructions the court chose.

For instance, the effect of this error was severely compounded by another custom defense instruction, also objected to, which baselessly told the jury that the exact musical elements at issue in the case were not protectable such as "such as descending chromatic scales, arpeggios or short sequences of three notes." (App. 33). The *en banc* opinion misleadingly affirmed, claiming that common and short elements and sequences are never able to be copyrighted. Id.

Of course, this is incorrect, because if a short phrase or common element is used in a creative way it can achieve protection. Swirsky, 376 F. 3d. at 849; Oracle, 750 F. 3d at 1362 ("The court failed to recognize, however, that the relevant question for copyrightability purposes is not whether the work at issue contains short phrases — as literary works often do — but, rather, whether those phrases are creative. See Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 52 (1st Cir. 2012) (noting that "not all short phrases will automatically be deemed

uncopyrightable"); see also 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.01[B] (2013) (“[E]ven a short phrase may command copyright protection if it exhibits sufficient creativity.”).

The *unrebutted* expert testimony at trial was that “Taurus” contained the use of a descending chromatic scale, copied in “Stairway to Heaven,” which was used in a unique way that does not appear in any prior art—especially when combined with the other elements at issue. (App. 93-94). The panel opinion notes that the errors “misleadingly suggest that public domain elements are not copyrightable even when” they are used “in a creative, original way.” *Id.*

In conjunction, these two erroneous instructions bluntly (but incorrectly) told the jury that most of Plaintiff’s song was not original, not protectable, and “undermined the heart of Skidmore’s argument.” (App. 96.).

It is important not to lose the forest for the trees: the introduction to “Stairway to Heaven” is the epitome of an iconic musical phrase, and has been jealously guarded by Led Zeppelin for decades. The notion that this expression is unprotectable is absurd.

The *en banc*’s endorsement of the Defendants’ efforts to redefine originality are a stark warning about the future of copyright law, especially after the jury’s verdict was vacated in the Gray v. Perry “Dark Horse” trial by repeated citation to the most problematic aspects of the *en banc* opinion. Gray v. Katy Perry, 2:15-cv-05642 (C.D. Cal. March 16, 2020). This redefinition of originality will greatly enhance Defendants’ ability to infringe music and defend lawsuits.

Given the consequences of inaction, and that the *en banc* opinion has violated binding precedent in this Court and stands in direct opposition to the other circuit courts which faithfully apply Feist, this Court should grant the petition on this issue of first impression.

**b. The Ninth Circuit has Fundamentally Contradicted this Court's Binding Precedent by Effectively Eliminating the Selection and Arrangement Instruction from the Extrinsic Test**

This Court observed in Feist that selections and arrangements of otherwise unprotectable elements are afforded copyright protection as long as they have a modicum of creativity and originality. 499 US at 348-51. Along with originality, it is foundational to copyright that unprotectable elements can be protected in combination.

At some level, all music is a combination of unprotectable elements: individual notes. The notes gain protection when they are combined and arranged in ways which have a modicum of originality. Swirsky, 376 F.3d at 849. Up until now, this principle had been faithfully applied in the Ninth Circuit. See, e.g., Swirsky, 376 F.3d at 849. Given the infinite forms that artistic expression take, such as combinations of musical elements, these compilations are afforded broad, not thin, protection. McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 321 (9th Cir. 1987) (stating that “Works that are not factual receive much broader protection under the copyright laws because of the endless variations of expression available to the artist” [emphasis added]).

As the dissent explains, Plaintiffs' experts painstakingly outlined a theory at trial that “Taurus” is protectable because it uses five elements, in combination and played simultaneously over top of each other, to create a unique and memorable

composition which was original and copied in “Stairway to Heaven”.<sup>4</sup> (App. 59-60, 65-66). It was a “paradigmatic” selection and arrangement theory. (App. 67).

Yet, the district court deliberately refused to give a selection and arrangement instruction, despite both sides asking for one. (App. 87-88). The effect was that the jury was told that Plaintiff’s individual elements were unprotectable, and then not informed that they could be protectable in combination. Plaintiff could not even close the case referencing the jury instruction he needed most because it had not been given. The correctness of the dissent’s conclusions that the district court’s rulings constitute “plain error” and “*cut out the heart of Skidmore’s case*” is beyond peradventure. (App. 65) (emphasis added).

Upon *en banc* rehearing, the opinion of the court affirmed the failure to give a selection and arrangement instruction on several puzzling grounds.<sup>5</sup> The most problematic is that it vaguely held that the failure to give a selection and arrangement argument was immaterial because other, unrelated, jury instructions somehow cover this concept. (App. 48). Yet the instructions referred to ***do not*** anywhere explain the basic principle that unprotectable elements can be protected as combination. The dissent recognizes that the Ninth’s opinion baselessly sanctions the

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<sup>4</sup> Note that this analysis only applies to the deposit copy and that if the full composition of “Taurus” as fixed in recordings is held to be the appropriate scope of the “Taurus” copyright, a new analysis will need to be conducted.

<sup>5</sup> For instance, even though the district court specifically stated that it would not allow any oral objections about instructions, the *en banc* court found that plaintiff had somehow waived the claim of error. The dissent notes that this is not remotely accurate, and that in any case the failure to give the instruction was plain error. (App. 69-70).

omission of this this instruction and “weakens copyright protection for musicians **by robbing them of the ability to protect a unique way of combining musical elements.**” (App. 66, 73). The endorsement of this omission by the *en banc* opinion directly contradicts Feist, and all precedent from the circuit courts. It will widely be used by industry defendants to further erode the concept of selection and arrangement.

The *en banc* opinion also made the risible claim that Plaintiff had not presented a selection and arrangement theory because his experts testified that the elements were protected in “combination” not as an “arrangement,” and that he had identified merely random “scattered similarities.” (App. 67). **First**, this is illusory semantics; the language used mirrors the most recent and dispositive Ninth Circuit case, Swirsky, which faithfully applied Feist. See Swirsky, 376 F.3d at 849 (stating that Ninth Circuit had upheld “a jury finding of substantial similarity based on **the combination** of five otherwise unprotectable elements” [emphasis added]); see also Oracle America, Inc. v. Google Inc., 750 F. 3d 1339, 1362 (Fed. Cir. 2014). Petitioner has never seen a court rule against a litigant for using the court’s own language to describe a legal concept. The dissent disapproved of the majority’s word games (App. 61, 66-67). **Second**, the opinion of the *en banc* court is musically illiterate as it concerns its claim that Plaintiff’s expert picked random scattered similarities. The claimed protected combination of elements were all closely related to each other and were played over top of each other in four bars of music, making it impossible that they were randomly scattered. (App. 67).

In short, Skidmore fully endorses the dissent’s discussion of selection and arrangement, which correctly and rather harshly observes “The majority’s characterization of Skidmore’s case is belied by both the trial record and by common sense.” (App. 66, 73) (emphasis added). The dissent’s conclusions that the district court’s rulings constitute “plain error” and “*cut out the heart of Skidmore’s case*” are correct. (App. 65) (emphasis added). The panel opinion likewise cogently explains why the district court prejudicially erred. (App. 87-91).

**c. The Dire Consequences of the *En Banc* Opinion’s Holdings were Swift and Widespread, and will Continue to Worsen Unless this Court Grants Review**

Defendants have long sought to use originality in a way it was never designed for, to create a novelty requirement for copyright protection—exactly as the *en banc* opinion did. Defendants intend to claim that all works, at some level, are composed of elements already in the prior art for the purpose of claiming that plaintiffs do not own any of the elements in their works because they are not novel—as Defendants argued in this case.

Defendants have also long sought to eliminate and limit the applicability of the selection and arrangement concept. If Defendants can convince the courts that selection and arrangement is illegitimate and does not even have to be given as an instruction—after having heightened and obfuscated the bar for originality and protection of individual elements—then they practically cannot lose a case.

In effect, the Hollywood Circuit *en banc* opinion gives the industry defendants exactly what they have always wanted. As a result, within days of opinion being filed, a major copyright verdict against Katy Perry was vacated by a Central District of

California judge citing to the en banc opinion's erroneous holdings on originality and selection and arrangement. Gray v. Katy Perry, 2:15-cv-05642 (C.D. Cal. March 16, 2020).

If there was any doubt about what effect this precedent will have, consider the excitement in this analysis from industry defense attorneys who enthusiastically cheer the redefinition of originality and selection and arrangement because it has already "turned the tide of music copyright infringement law toward defendants." See Alexander Kaplan, Sandra Crawshaw-Sparks, Simona Weil, *Led Zeppelin Ruling is Already Affecting Copyright Litigation*, PROSKAUER (April 3, 2020, available at <https://www.proskauer.com/uploads/led-zeppelin-ruling-is-already-affecting-copyright-litigation>). They go on to eagerly observe that the limitation and erosion of the selection and arrangement concept is "notable and undoubtedly will be relied on by future similarly situated music copyright defendants." *Id.* Their jubilant attitude is understandable, as the Ninth Circuit just made their jobs much easier.

However, originality is a constitutional requirement and selection and arrangement is a foundational copyright concept; they cannot be changed at will for Defendants' to gain a litigation advantage.

This Court should grant the petition. Selection and arrangement is a cornerstone of copyright law, and if it is eliminated copyright will be but a shadow of its former self.

**d. The *En Banc* Court Violated Its Own Rules in Granting Rehearing *En Banc*, Causing Enormous Prejudice to Plaintiff**

This Court has recently expressed concern about the Ninth Circuit ignoring basic ground rules about addressing only those issues actually before the court. US v. Sineneng-Smith, 140 S. Ct. 1575, 590 US \_\_ - (2020).

After the panel opinion, Plaintiff-Petitioner filed for limited rehearing *en banc* on the deposit copy issue. See, e.g., Pet for Rhr., Skidmore v. Led Zeppelin, (No. 16-56057) The Defendants also filed for rehearing *en banc* on issues including on originality, selection and arrangement, and thin copyright.

Almost all of the Defendants' issues were not even remotely suitable for *en banc* review under Ninth Circuit Rule 35-1 (stating circuit split and national uniformity reasons for *en banc* review); see also FRAP 35. In contrast the deposit holding is one of first impression which does implicate national uniformity concerns, as well as conflicts with 106 years of national precedent.

Accordingly, the circuit court only ordered Defendants to respond to Plaintiff's petition. A petition for rehearing cannot be granted unless the other side is given a chance to respond. Ninth Circuit Rule 35-2. Plaintiff was never ordered to respond to the issues in Defendants' petition.

The Court then vacated the panel opinion and granted rehearing. However, the *en banc* opinion focused not on the deposit, but instead on fundamentally redefining originality and selection and arrangement—without ever having given Plaintiff the opportunity to oppose a rehearing on these bases.



Given the plainly activist role that the *en banc* court took towards reshaping and redefining settled copyright law, it must be inferred that this bait and switch about what petition the court was actually planning to address was deliberate.

The failure to give Petitioner the Rule 35-2 opportunity to respond was wildly prejudicial. As a result, Petitioner was blindsided when the Court addressed these jury instructions. In addition, as the dissent notes, the *en banc* court made factually baseless claims about the diligence of counsel and experts at trial (regarding waiver issues and expert testimony on the selection and arrangement instruction). Skidmore was given no notice that these issues would be addressed on rehearing, and no a chance to respond, all of which smacks of gamesmanship.

The consideration of the issues in Defendants' petition, without giving Plaintiff the chance to respond, violates the letter and spirit of Circuit Rule 35-2, FRAP 35, and was an abuse of discretion. Furthermore, these issues did not meet the rehearing standard. Id. The activist push by the *en banc* court to reshape long established copyright standards evidences a desire to improperly shape the case, avoid full briefing, and decide issues not before the *en banc* court. This was all reversible error.

### CONCLUSION

For the reasons set forth in this Petition, Michael Skidmore respectfully requests this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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