

No. 20-142

IN THE
SUPREME COURT OF THE UNITED STATES

Michael Skidmore, Trustee for the Randy Craig Wolfe Trust
Petitioner

v.

Led Zeppelin, et al.
Respondents

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

PETITION FOR REHEARING

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PREAMBLE

Pursuant to Rule 44.1 of this Court, Petitioner Michael Skidmore, Trustee for the Randy Craig Wolfe Trust, respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit's *en banc* opinion heralds the "death of music copyright," just as happened to literary copyright before it.¹ Copyright law is meant to protect the *Creatives* who create, not the *Industry* who takes. This is not a hyperbolic warning, but a fact unless this Court grants review.

The reformulation of the copyright test by the Ninth Circuit essentially gives the unscrupulous a license to steal and commit plagiarism. These changes to the law were heavily lobbied for by the recording industry for years, an industry which dominated the amici briefing before the Ninth Circuit (often referred to as the Hollywood Circuit because it is hostile to creatives).

This petition shows just how misleading those amici briefs were, which the Ninth Circuit relied on in coming to its decision.

PETITION FOR REHEARING

The original certiorari petition asked this Court to resolve two issues of first impression: (1) whether a deposit lead sheet defines a copyright under the 1909 Copyright Act, and (2) whether the Ninth Circuit's evisceration of the substantial similarity extrinsic test should be reversed.

¹ See Steven T. Lowe, "Death of Copyright," Los Angeles Lawyer (Nov. 2010).

The Ninth Circuit's holding that the deposit copy controlled the scope of a copyright was a first in 106 years and will divest hundreds of thousands of songs of copyright protection under the 1909 Act.

However, the Ninth Circuit's holding regarding the extrinsic test—fundamentally altering its nature—***applies to all copyright cases under both the 1909 Act and the 1976 Act.*** Given how drastically this will immediately change copyright law in America, this Court should immediately review the *en banc* holding.

These changes are particularly brazen. Consider, the Ninth Circuit's opinion purported to redefine what “originality” is. It cannot do this. Originality is a constitutional requirement which can only be changed through constitutional amendment or by this Court. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340, 348-51 (1991). This Court has specifically held that originality only requires a modicum of creativity, and that a work with a modicum of creativity is original as long as it is not copied from another source. Id. It need not be novel. Id.

Yet, the Ninth Circuit raised the bar significantly, instead holding that for a work to be original it has to be novel. Pet. for Cert., at p.25-27. The Ninth Circuit did this because the industry, when defending infringement lawsuits, wants to be able to claim that no work is truly novel when broken down into its elemental parts (e.g., a song is a collection of notes, and all the notes have been used in songs before). Essentially, industry defendants are going to claim that every musical element appears in the prior art and that therefore every plaintiff has an unprotectable work.

When the redefinition of originality is combined with the Ninth Circuit's concomitant holding limiting the application of selection and arrangement, it essentially means that artists who have their musical compositions stolen no longer can claim protection in their work. Given that there is nothing new under the sun, there is virtually no musical element that could be considered novel under the industry and Ninth Circuit's formulation of originality.

It is hardly in dispute that the Ninth Circuit's holding represents a stark departure from precedent of this Court regarding the definition of originality, selection and arrangement, and how to conduct the extrinsic test. Pet. for Cert, at p.27. In effect, this new extrinsic test—which the Ninth Circuit unilaterally adopted without any real briefing on the monumental change it was making—excludes vast amount of expression as unprotectable and makes it near impossible for a plaintiff to win. (App. 65) (Ninth Circuit dissent stating that new extrinsic test “cut out the heart of Skidmore's case”); Pet. for Cert., at p.29; see also 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”).

The *en banc* decision was quickly used by a Los Angeles Central District of California court to wipe out the Dark Horse plaintiff victory against Katy Perry. See Gray v. Katy Perry, 2:15-cv-05642 (C.D. Cal. March 16, 2020). It was also used to severely limit the scope of a major case against superstar Ed Sheeran. Griffin v. Sheeran, No. 17 Civ. 5221 (LLS) (S.D.N.Y. March 24, 2020).

Petitioner's initial petition forthrightly pointed out that the Ninth Circuit Opinion was not only a gift to the industry, but that the *en banc* panel had improperly used the rehearing rules to circumvent a full and fair adjudication of its reinvention of the extrinsic test. Pet. for Cert., at p.33-34. Specifically, the panel granted Petitioner's rehearing on the deposit issue, but then focused solely on the extrinsic test at the rehearing and in the new *en banc* opinion. Id.

If copyright law in the United States is going to be completely upended, it should be thoroughly briefed and not achieved through procedural sleight of hand. As this Court noted, the Ninth Circuit has a penchant for deciding the case it wants to, not the case actually before it. US v. Sineneng-Smith, 140 S. Ct. 1575, 590 US __ - (2020).

REASONS FOR REHEARING

A petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. See Rule 44.2.

Petitioner has described the shady rehearing process used to issue this *en banc* opinion. The core of that complaint was that the Ninth Circuit had not decided the

petition for rehearing *en banc* before it, but instead without giving notice to Petitioner decided a multitude of unrelated issues that the court wanted to rule on.

Petitioner now brings new information to this Court's attention that this process was influenced by filings from music industry figures which were, at a minimum, highly misleading.

Specifically, an amicus brief was submitted on behalf of what was misleadingly called "123 Songwriters, Composers, Musicians, and Producers." See 123 Songwriter Amicus Brief, No. 16-56057 (Doc. No. 118). Great pains were taken by the amici to (falsely) portray themselves as unaffiliated artists who were friends of the court and dedicated to getting the law right. This brief advanced the same propositions as an amicus brief submitted by the Recording Industry Association of American ("RIAA"). See RIAA Amicus Brief, No. 16-56057 (Doc. No. 120). The purpose and effect of these amicus briefs was to push the narrative to the *en banc* court that both songwriters and the industry agreed that copyright law needed to be changed.

The songwriter amicus brief was in many respects adopted by the *en banc* court; in particular it advocated for limiting or eliminating selection and arrangement from the extrinsic test and redefining what is an original work worthy of protection.

The Ninth Circuit's opinion admits the amici were relied upon, specifically citing to and thanking the "broad array" of diverse amici:

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

Skidmore v. Zeppelin, 952 F. 3d 1051, 1060 n5 (9th Cir. 2020).

However, contrary to the impression the Ninth Circuit had that 123 songwriters got together and submitted a brief they thought would uphold and advance the principles of copyright law, *these are in fact some of the wealthiest musicians, music executives, and attorneys on the planet*. These industry figures do not have the foundational principles of copyright law in mind, nor did they individually decide to participate as amici; their names were submitted by the recording industry in an effort to convince the Hollywood Circuit that there was broad support for their copyright poison pills.

Petitioner is presenting here for the first time a selection of the alleged 123 “songwriters” with their publicly available net worth and titles, to illustrate just who the law was changed for and who it was not:

Name	Net Worth (\$)	Occupation
Max Martin	300 million	Producer
Sean Lennon	200 million	Musician
Nile Rodgers	70 million	Producer
Maynard James Keenan (Tool)	60 million	Musician
Danny Carey (Tool)	50 million	Musician
Jonathon Davis (Korn)	50 million	Musician
Terius “The-Dream” Nash	50 million	Producer
Bob Ezrin	40 million	Producer
Justin Chancellor (Tool)	35 million	Musician
Rob Halford (Judas Priest)	30 million	Musician
James Shaffer (Korn)	30 million	Musician
Bonnie McKee	30 million	Songwriter
Mike Shinoda (Linkin Park)	23 million	Musician
Eddie Money	20 million	Musician
Curt Smith	20 million	Musician/Producer
Roland Orzabal (Tears For Fears)	20 million	Musician

James Iha (Smashing Pumpkins)	20 million	Musician
Tim Alexander	18 million	Musician
Jason Mraz	15 million	Musician
Nancy Wilson (Heart)	15 million	Musician
Shea Taylor	15 million	Songwriter
Rick Nowels	13 million	Producer
Brett Gurewitz (Bad Religion)	12 million	Musician
Cliff Calabro	11 million	Producer
Harvey Mason Jr.	10 million	Producer
Les Claypool (Primus)	10 million	Musician
Brian Welch (Korn)	10 million	Musician
Carla Azar	10 million	Musician
Siedah Garrett	10 million	Musician
Toby Gad	10 million	Producer
Darrell Brown	9.15 million	Producer
Rami Yahcoub	20 million	Musician
Greg Wells	8 million	Producer
Itaal Shur	10 million	Producer
Billy Howerdel (A Perfect Circle)	6 million	Musician
Savan Kotecha	18 million	Producer
Spencer Bastien	5 million	Producer
Aloe Blacc	5 million	Producer
Michelle Lewis	5 million	Songwriter
Dallas Davidson	14 million	Songwriter
Karen Fairchild (Little Big Town)	10 million	Musician
Ross Golan	1.2 million	Producer
DJ Frank E	1 million	Producer
Al Jones	800K	Songwriter
Marty James	700K	Producer
Bishop Briggs	1.5 million	Musician
Nash Overstreet	13 million	Musician
Aton Ben-Horin	1 million	Global VP of A&R for Warner Music Group's labels
Brian McPherson		Attorney/owner of Pacific Electric Music Publishing
Chris Briggs		Executive at EMI
Matt Adell		Executive at Growling & Scaling Music

Dina LaPolt		Entertainment Lawyer
Nick Gatfield	9 million	Industry Executive
Jesse Kirshbaum		CEO Music Agency
Laurent Hubert		President of Music Agency
Pete Giberga		Head of 300 Entertainment A&R
Richard James Burgess, PhD		CEO American Association of Independent Music
Michael Rosenblatt		CEO, President of Soundhouse Inc.
Merck Mercuriadis		CEO
T D Ruth		Attorney at Universal Music Group
Alan Melina		Head of New Heights Entertainment
Suzette Toledano		Attorney
Tomas Ericsson		CEO of American Mechanical Rights Agency
Evan Kidd Bogart		Record Company Executive
Lucas Keller		President of Milk & Honey Agency
Billy Mann		CEO Independent Green + Blown

The public has a right to know who copyright law was changed to favor, at the behest of misleading amici briefing during the *en banc* process.

Consider that Max Martin (real name Karl Martin Sandberg) was a defendant in the Katy Perry case. He was a direct beneficiary of the *en banc* opinion, given that it was used to reverse the jury verdict against him. Mr. Sandberg has stated in the past that he routinely steals music:

When people often ask me what it takes to write the perfect pop song. In my opinion there are two secrets. ***Steal from the best.*** I confess, I have through the years ripped off Abba, KISS ...”

“Polar Music Prize 2016,” TV4, YouTube (Minute 13:00-30) (June 17, 2016),

<https://www.youtube.com/watch?v=IUUpGwXW9xVk&feature=youtu.be> (emphasis added).

None of the songwriters or industry executives disclosed that they and their entities were defendants in copyright lawsuits and were actually interested parties who would directly benefit from the *en banc* opinion. ***They were not friends of the court.***

Remember, to the extent these wealthy individuals want to skirt the law, they can deploy armies of attorneys and even boast about poaching songs (as Led Zeppelin repeatedly did); however, the creatives with little to no wealth are stuck with the *en banc* opinion.

The deck is so stacked against the creatives by this new test that music copyright is no longer recognizable. Consider that copyright plaintiffs already lose almost every disputed copyright case,² and also often face and are threatened with punishing costs and fees if they lose, under section 505 of the Copyright Act. When a songwriter loses a case he loses his house, when the multi-billion dollar industry loses a case it is a drop in the bucket already accounted for.

As compared to even two decades ago, music copyright law both in theory and practice is an alien landscape. All of this happened without this Court stepping in.

² See Steven T. Lowe, “Death of Copyright,” Los Angeles Lawyer (Nov. 2010).

As note *supra*, the Dark Horse and Ed Sheeran cases have already used the Skidmore case to devastate otherwise cognizable plaintiff cases in the Ninth and Second Circuits respectively.

An additional case is the Smith v. Weeknd case, now being appealed, which Petitioner did not previously raise. See No. CV-19-2507, page 9 of 13 (C.D. Cal. July 22, 2020). Again, Max Martin was a defendant in that case, as was another name on the list, Savan Kotecha.

That Central District of California court held, citing to the Skidmore decision, that “once the prior art is filtered out” the plaintiffs’ song contained no protectable expression similar to the defendants’ song. Id. It then granted summary judgment for the Defendants.

Under this Court’s definition of originality in Feist, a work need only have a modicum of creative and be independently created. The fact that an element in a work is not novel or appears in some way in the prior art is not relevant, especially given that every musical element can have said to have been used before. However, citing to the *en banc* opinion, the plaintiffs in Smith were held ***to not even have a copyrightable song.***

The Smith court went even further, holding that the plaintiffs “cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work.” Smith, No. CV-19-2507 at p.10. Yet, this is exactly what selection and arrangement as stated in Feist by this Court provides for.

In effect, the Smith court held that (1) elements that appear in the prior art are no longer protectable, and (2) those unprotectable elements can no longer be protected in a selection and arrangement. In essence, even if a defendant has admittedly accessed and taken the song, the plaintiff is without recourse.

This is where copyright law is inexorably headed unless this Court grants a writ of certiorari.

The fundamental attack on the principles of Copyright law by the Ninth Circuit, in direct contravention of longstanding holdings from this Court such as Feist, cannot go unaddressed. This Court has a duty to step in to address a monumental shift taking place in intellectual property law with almost no oversight or deliberation.

The Ninth Circuit's *en banc* opinion will throw copyright law and analysis into chaos across the country, as different courts will begin to use wildly differing standards. Litigants will no longer have a clear understanding what originality or protectability mean. This is particularly problematic given that the Copyright Act imposes financial penalties if a suit is unsuccessful. Thus, creators are left in the dark about whether they should bring suit—that is, until this Court addresses these issues.

CONCLUSION

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

Respectfully submitted,

/s/ AJ Fluehr

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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