

No. 24-981

IN THE
Supreme Court of the United States

❧

STRUCTURED ASSET SALES, LLC,

Petitioner,

v.

EDWARD CHRISTOPHER SHEERAN, PERSONALLY KNOWN AS ED SHEERAN, SONY/ATV MUSIC PUBLISHING, LLC, ATLANTIC RECORDING CORPORATION, DBA ATLANTIC RECORDS, BDI MUSIC LTD., BUCKS MUSIC GROUP LTD., THE ROYALTY NETWORK, INC., DAVID PLATZ MUSIC (USA) INC., AMY WADGE, JAKE GOSLING,

Respondents.

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

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
I. The 1909 Copyright Act Does Not Say That the Deposit Defines and Limits the Scope of Copyright Protection, but Prior Decisions Deferred to the Copyright Office	4
II. The Second Circuit's Analysis was Incomplete and Incorrect.....	11
CONCLUSION.....	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bouve v. Twentieth Century-Fox Film Corp.</i> , 122 F.2d 51 (D.C. Cir. 1941)	8
<i>Cadence Indus. Corp. v. Ringer</i> , 450 F. Supp. 59 (S.D.N.Y. 1978)	8
<i>Data Gen. Corp. v. Grumman Sys. Support Corp.</i> , 36 F.3d 1147 (1st Cir. 1994), (abrogated by <i>Reed Elsevier, Inc. v. Muchnick</i> , 559 U.S. 154 (2010), and holding modified by <i>D'Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.</i> , 111 F.4th 125 (1st Cir. 2024)	<i>passim</i>
<i>Golan v. Holder</i> , 565 U.S. 302 (2012)	13
<i>Itar-Tass Russian News Agency v. Russian Kurier, Inc.</i> , 153 F.3d 82 (2d Cir. 1998).....	13
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	2, 3, 4

Merrell v. Tice,
104 U.S. 557 (1881)*passim*

Parker v. Hinton,
No. 22-5348, 2023 WL 370910 (6th
Cir. Jan. 24, 2023) 5, 10

Skidmore as Tr. For Randy Craig Wolfe
Tr. v. Led Zeppelin,
952 F.3d 1051 (9th Cir. 2020) 5, 6, 7, 10

Statutes

Copyright Act of 1909 *passim*

Other Authorities

Compendium of Copyright Office
Practices: Acknowledgements
(3d ed. 2014)..... 3

Compendium of Copyright Office
Practices § 2.6.1.II.a (1st ed. 1967) 7

Compendium of Copyright Office
Practices § 504.2 (3d ed. 2017) 5

Copyright Office: Circular 6 10

H.R. REP. 94-1476, 1976 U.S.C.C.A.N.
5659 (1976) 8

Musical Copyright, Shafter, Alfred M.
(1932) 4

<i>Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961).....</i>	<i>6</i>
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ARGUMENT IN REPLY

The Second Circuit Court of Appeals has incorrectly decided an important question of federal law that has not been, but should be, settled by this Court, and has done so by improperly relying on administrative guidance, rather than proper statutory analysis.

The important question of federal law is whether and the extent to which, under the Copyright Act of 1909, a “deposit copy” that was filed in connection with an application for registration of a musical composition defined or limited the scope of protection afforded that composition. The Second Circuit answered “yes,” even though the 1909 Act is completely silent on the issue.

The Panel found that the deposit copy – handwritten sheet music in the “lead sheet” style – filed by composer Edward Townsend in 1973 in connection with his application to register the musical composition “Let’s Get It On,” strictly defined and limited the scope of protection given to that musical composition, notwithstanding the fact that the commercial sound recording of that composition (recorded by Mr. Townsend and Marvin Gaye) was released that same year and had been submitted to the Copyright Office **before** Mr. Townsend filed his application. As such, the Second Circuit concluded that it would be entirely proper for Ed Sheeran and Amy Wadge to appropriate wholesale substantial portions of “Let’s Get It On” for their 2014 hit song, “Thinking Out Loud,” as long as those portions did not appear on the 1973 handwritten deposit copy.

Because the 1909 Act does not address this issue, the Panel improperly deferred to the legal view of the Copyright Office in its administrative manual – the *Compendium of Copyright Office Practices* – in violation of this Court’s 2024 ruling in *Loper Bright*, in which it overruled the 1984 *Chevron* decision, and restored the role of statutory interpretation to the courts.

Were the Second Circuit’s decision allowed to stand, especially at this critical technological inflection point, one can clearly envision the use of artificial intelligence to automate and scale the exercise of appropriation, and release a limitless amount of music using portions of hit songs that are not protected under the Copyright Office’s mistaken view of the law.

In its seminal decision last year, this Court turned a critical eye toward judges who abdicate their power and responsibility to interpret statutes, and instead adopt the views of administrators:

The view ... rests on a **profound misconception of the judicial role Courts interpret statutes, no matter the context**, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches **By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.**

Loper Bright Enters. v. Raimondo, 603 U.S. 369, 403-04 (2024) (emphasis added).

Copyright litigation in particular is marked by its deference to the Copyright Office (as reflected in the *Compendium*), treatises, and the copyright bar. The 2014 *Compendium* release itself was “developed and managed” by a prominent New York copyright litigator from the private sector.¹ In *Loper Bright*, this Court set the record straight, and made clear that it is the exclusive role of courts to interpret statutes and apply those interpretations to the facts. Reference to administrative and outside guidance has its place, but can never replace the primary responsibility – held only by the courts – of statutory interpretation.

Respondents devote significant space to two things **about which there is no debate**: (i) the 1909 Copyright Act protected musical compositions, not sound recordings; and (ii) the 1909 Act required a deposit copy as a prerequisite to registration. Petitioner’s argument has never been that the 1973 registration for the “Let’s Get It On” musical composition **also** protected the 1973 commercially-released sound recording of that famous composition, but rather that the handwritten sheet music submitted as the deposit for the registration does not define or limit the scope of protection, because **the 1909 Act does not say that it does**.

¹ See *Compendium: Acknowledgements* (3d ed. 2014) (available at <https://www.copyright.gov/comp3/acknowledgements.html>).

A 1932 treatise that Respondents cited explicitly recognizes that musical compositions exist beyond the printed page:

But, lest the reader labor under a delusion as to precisely *what* copyright is, let it be known at once that **the mere physical accessories of composition – paper, ink and so forth – are not in themselves the subject of copyright.** They are the “physical manifestation of original thought.”

Shafter, *Musical Copyright* (1932) at 26 (emphasis added) (citations omitted). Shafter called the deposit requirement an “arbitrary regulation” that conflicts with the “obvious” fact that “a phonograph record, or a piano roll – is as faithful a transcript of a musical idea as a ‘visible’ recording on paper.” *Id.* at 27 (citations omitted). Shafter recognized correctly that copyright does not protect the sheet music, but rather the underlying musical composition, **not to be limited by the paper deposit.**

I. The 1909 Copyright Act Does Not Say That the Deposit Defines and Limits the Scope of Copyright Protection, but Prior Decisions Deferred to the Copyright Office

Respondents argue that the Ninth, Sixth and Second Circuits conducted statutory analyses, but that is wishful thinking. There is little to no statutory analysis, but plenty of deference to the Copyright Office’s *Compendium*. *Loper Bright* was decided in June 2024 – **after** the Ninth Circuit’s March 2020 decision in

Skidmore v. Led Zeppelin, **after** the District Court’s decision in September 2021, **after** the Sixth Circuit’s decision in *Parker v. Hinton* in January 2023, and **after** briefing and oral argument to the Second Circuit in April 2024. The Second Circuit advanced an incomplete and unsupportable reading of the statute to justify its reliance on the Copyright Office, even **after** this Court warned against doing so.

The District Court in 2021 made no effort to quote or analyze any language from the 1909 Act, and relied entirely on: (i) this Court’s 1881 *Merrell v. Tice* decision (28 years **before** the 1909 Act); (ii) *Skidmore*; and (iii) the *Compendium*:

[T]he sheet music deposited with the Copyright Office (“Deposit Copy”) defines “precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561 (1881). “[T]he scope of the copyright is limited by the deposit copy.” *Skidmore v. Led Zeppelin*, No. 16-56057, March 9, 2020 p. 20 (9th Cir. 2020) (*en banc*). **The Copyright Office instructs** that “a registration for a work of authorship only covers the material that is included in the deposit copy(ies)” and “does not cover authorship that does not appear in the deposit copy(ies), even if the applicant expressly claims that authorship in the application.” U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*. § 504.2 (3d ed. 2017). **As such**, the Deposit Copy is the sole definition of the elements included in the protection of copyright, which does not include

other embellishments, even if they were added by Townsend himself – **because they have not undergone the copyright process.**

70-71a (emphasis added). The District Court did not quote or analyze the 1909 Act when it rendered either of its later decisions, either. 52a, 42a.

The *Skidmore* court had likewise failed in its task in 2020, relying on: (i) *Merrell* (1884); (ii) *Data General* (1st Cir. 1994); (iii) a 1961 report from the Copyright Office; and (iv) the *Compendium*:

The **purpose** of the deposit is to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161-62 (1st Cir. 1994) (the deposit requirement provides the “Copyright Office with sufficient material to identify the work in which the registrant claims a copyright ... [and] prevent[s] confusion about which work the author is attempting to register”), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010); *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 71 (1961) (one of the purposes of the deposit is “to identify the work” being registered).

Even before the 1909 Act, the Supreme Court stated that one objective of the deposit was to permit inspection by other authors “to ascertain precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561, 26 L.Ed. 854 (1881). At the time that *Taurus* was registered, the **Copyright Office’s practice regarding applications** to register unpublished musical compositions was to consider “writ[ing] to the applicant, *pointing out that protection extends only to the material actually deposited*, and suggesting that in his own interest he develop his manuscript to supply the missing element.” *Compendium of Copyright Office Practices* (“*Copyright Office Compendium*”) § 2.6.1.II.a (1st ed. 1967) (emphasis added).

Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zepelin, 952 F.3d 1051, 1062-63 (9th Cir. 2020) (emphasis added). The Ninth Circuit stated that “[t]he **inescapable conclusion** is that the scope of the copyright [under the 1909 Act] is limited by the deposit copy,” but provided no statutory analysis to support that “inescapable conclusion.”

Working through *Merrell* and *Data General* further demonstrates the lack of a statutory foundation. In *Merrell*, this Court speculated “one object [of the deposit copy requirement] no doubt being to **enable other authors to inspect them** in order to ascertain precisely what was the subject of copyright.” *Merrell v. Tice*, 104 U.S. 557, 561, 26 L. Ed. 854 (1881). Over 100 years later, the First Circuit offered two **different**

reasons for the deposit copy: “**prevent confusion** about which work the author is attempting to register [and] furnish the Copyright Office with an **opportunity to assess** the copyrightability of the applicant’s work.” *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1162 (1st Cir. 1994) (emphasis added), *abrogated by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), and *holding modified by D’Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.*, 111 F.4th 125 (1st Cir. 2024).

The two goals offered by *Data General* speak to the role of the Copyright Office at the point of intake, which never involves substantive analysis of the work or comparison to prior art. *Cadence Indus. Corp. v. Ringer*, 450 F. Supp. 59, 65-66 (S.D.N.Y. 1978) (“undisputed that the Copyright Office has neither the facilities nor the authority to rule upon the factual basis of applications for registration or renewal, and that where an application is fair upon its face, the Office cannot refuse to perform the ‘ministerial duty’ of registration ‘imposed upon (it) by the law.’”) (*quoting Bouve v. Twentieth Century-Fox Film Corp.*, 122 F.2d 51, 56 (D.C. Cir. 1941)); H.R. REP. 94-1476, 157, 1976 U.S.C.C.A.N. 5659, 5773 (1976) (“claim to copyright is not examined for basic validity before a certificate is issued”).

Indeed, *Data General* noted that when it comes to computer code, the Copyright Office allows deposit of “identifying material” – exemplary portions of the code – that still meets the requirements of the statute (having a deposit) and the need of the Copyright Office to determine **minimal copyrightability**: “the

Copyright Office seems to have assumed that in such cases the deposited pages are likely to contain sufficient elements of original expression to determine the copyrightability of the work at issue.” *Data Gen.*, 36 F.3d at 1162.²

The final speculative policy reason, offered by the District Court in 2021, is that the portions of the work not found in the deposit copy “have not undergone the copyright process” (71a) but this – like the reasoning in *Data General* – is based on a misconception of what actually transpires at the Copyright Office. Deposit copies do not “undergo the copyright process,” especially when – as with computer software – only minimal portions of the work are deposited.

None of the reasons offered by *Merrell*, *Data General* or the District Court finds a source in the statute. Moreover, none presents a justification for the conclusion that the deposit defines or limits scope, as none necessitates that a deposit contain every last nuance of a musical composition. The *Merrell* assumption that “other authors” would travel to the Copyright Office (whether in 1881 or 2025) to review deposit copies of prior art **before engaging in the exercise of musical creation** is perplexing.³ Even if a hypothetical

² *Data General* described the deposit copy as providing “**sufficient material to identify** the work,” and the Report of the Register of Copyrights referred to it as a “deposit of material **to identify** the work.” *Data General*, 36 F.3d at 1161-62 (emphasis added); Report of the Register at 71 (emphasis added).

³ Even today, deposit copies are not available for inspection online, and although they can be inspected in person, “[s]ome of these materials are stored outside the Copyright Office.” See

creator made the trip, the “subject of copyright” is not coextensive with the outer limits of protection.

In January 2023, the Sixth Circuit dismissed claims on summary judgment because plaintiffs could not prove **that a deposit copy had been filed** with the Copyright Office. *Parker v. Hinton*, No. 22-5348, 2023 WL 370910, at *4 (6th Cir. Jan. 24, 2023). This point is objectively **correct**, as the 1909 Act specifically says that failure to submit a deposit copy is fatal to registration. The court **also** said, however, that plaintiffs had “failed to meet their burden on summary judgment,” which “underscores the purpose of the deposit copy requirement.” In doing so, the court went beyond the text of the 1909 Act, which says nothing about the purpose of the deposit copy requirement, nor about a relationship between the deposit copy and the scope and limits of copyright protection. The court relied improperly on the *Compendium*, and used circular logic to do so. It began with *Skidmore*’s “inescapable conclusion,” and “[t]herefore, protected elements of a plaintiff’s copyright must appear in the work’s deposit copy,” presenting (a) *Merrell* (1881); (b) *Data General* (1994); and (c) the *Compendium*, as if those flowed from *Skidmore*, rather than the other way around.

“Copyright Office: Circular 6” (available at <https://www.copyright.gov/circs/circ06.pdf>).

II. The Second Circuit’s Analysis was Incomplete and Incorrect

The Second Circuit opined on the “meaning of the 1909 Act,” concluding that everything turns on the word “complete”:

[E]nforceable protection for musical works is limited to the contents of the “complete copy” of the work filed with the Copyright Office at the time of registration. Extending its protection beyond the “complete copy” would negate the plain meaning of “complete.”

Context reinforces this reading. The 1909 Act required less than a “complete copy” for works other than musical compositions. For example, for a motion picture, Congress authorized deposit of “a title and description, with **not less than two prints taken from different sections.**” 17 U.S.C. §12 (1970). And for “a work of art or a plastic work or drawing,” Congress authorized deposit of a “photograph or other identifying reproduction thereof.” *Id.* **So Congress’s inclusion of “complete” to describe musical – but not other – works was deliberate.**

16a-17a (emphasis added).

That argument is undermined by an accurate reading of the statute, as the word “complete” appears **twice**, once in reference to “**one complete copy** of ... a lecture or ... dramatic, musical, or dramatico-musical composition,” and once in reference to “two prints

taken from different sections of a **complete motion picture**” The Panel quoted the “motion picture” language, but cut it off right before “of a **complete** motion picture.” In the case of a motion picture one must submit two excerpts of a **“complete motion picture,”** but in the case of a “motion-picture photoplay,” **there is no mention of working from a “complete” work.** If we were to give “complete” outsized meaning and importance, we would need to explain what it means in the case of a **“complete motion picture,”** and also explain its **absence** in the case of a “motion-picture photoplay” and the other types of works. We submit that this cannot be done in a consistent way.

Another challenge to the Panel’s interpretation is Section 13 – concerning published works – which required the deposit of “two complete copies of the **best edition thereof then published.**” Those words leave room for “better editions” that are **not** published, but certainly those “better editions” are also entitled to complete protection. Indeed, what better edition could there be than the sound recording already on file with the Copyright Office, but for the **administrative** limitation on using sound recordings as deposit copies?

The Panel tried to find a reading to support the *Compendium*’s position, but its interpretation fails due to the second appearance of the word “complete,” and more fundamentally **because the statute is silent on the role of the deposit copy in defining or limiting the scope of protection.** Most likely, “complete” had no substantive significance to Congress in 1909, but simply meant “complete” in the sense of “whole” – *i.e.*, do not submit half of the chapters of a

book. The Panel attempted and failed to come up with a legitimate statutory justification for its reliance on the **administrative pronouncement of the Copyright Office**.

The Panel warned that Petitioner’s position “would allow infringement suits for unregistered copyrights.” 19a. However, we **already** allow infringement suits to proceed without any copyright registration, and without any deposit copy to define the metes and bounds of protection, in the case of “foreign” works, where copyright protection arose in a foreign jurisdiction in which registration (and deposit copy) is not a prerequisite. *See Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998) (applying Russian copyright ownership doctrine); *Golan v. Holder*, 565 U.S. 302, 335 (2012) (“U.S. interests were best served by our full participation in the dominant system of international copyright protection”). The Panel brushed off this argument (20a), but Petitioner’s point was not to apply the “foreign” works rule to this case, but to recognize that copyright litigation does not always require deposit copies, and therefore deposit copies cannot be what determines the scope of protection.

CONCLUSION

The Court should grant the Petition for Writ of
Certiorari.

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