

# Led Zeppelin Ruling Is Already Affecting Copyright Litigation

By **Alexander Kaplan, Sandra Crawshaw-Sparks and Simona Weil** (April 3, 2020)

Based on the first two decisions applying the U.S. Court of Appeals for the Ninth Circuit's March 9 en banc decision in the Skidmore v. Led Zeppelin "Stairway to Heaven" case, the recent trajectory of the law governing music copyright infringement appears to have changed.

It had been widely believed that the Ninth Circuit's 2018 decision in the infamous "Blurred Lines" case, Williams v. Gaye,[1] set too liberal a standard for providing copyright protection to components of a musical composition and that the decision would lead to a stifling of creativity and an increase in copyright infringement lawsuits.

More specifically, there had been concern that in affirming the jury's verdict finding infringement in Williams, the Ninth Circuit condoned granting copyright protection to building blocks of music over which no artist should hold a monopoly. A strongly worded dissent warned that the majority opinion "establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere." [2]

A fair reading of the Ninth Circuit's en banc Skidmore v. Led Zeppelin decision, which, it should be noted, did not face the procedural roadblocks to an analysis of the protectability of the music that the Williams panel did,[3] suggested that the court swung the pendulum toward more circumspect protection of short musical phrases and compositional elements found in popular music, and the selection and arrangement of those individual, unprotectable components.

Indeed, within 10 days of the decision, the U.S. District Court for the Central District of California relied on the en banc decision to throw out a jury's finding of copyright infringement in the high profile case brought against Katy Perry (and others) over her hit song, "Dark Horse."

A week later, a judge in the U.S. District Court for the Southern District of New York followed the Led Zeppelin decision in the high profile case brought against Ed Sheeran (and others) over his hit song, "Thinking Out Loud," and ruled in favor of the defendants in limiting the scope of the plaintiff's copyright claim.

The three decisions together, issued within a span of three weeks, have 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.

While the Ninth Circuit en banc court's decision to abandon the widely criticized inverse ratio rule[4] drew immediate (and well-deserved) attention, the holdings of the decision that have had immediate impact concern the scope of copyright protection in musical compositions under the 1909 Copyright Act and commonly found compositional elements and their selection and arrangement in songs.

## Gray v. Perry: The Dark Horse Case



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On March 17, U.S. District Judge Christina Snyder of the Central District of California overturned the jury verdict finding that Katy Perry's song, "Dark Horse," infringed the copyright of a Christian rap song, "Joyful Noise," by the artist, Marcus "Flame" Gray. The musical element at issue was an eight-note ostinato, or repeated musical phrase, that plaintiff claimed had been copied and was subject to protection based on the alleged distinctive combination of the multiple musical components.

Often, where plaintiffs are relying on short phrases and other musical building blocks as the alleged similarities between the works in issue, they attempt to argue that the selection and arrangement of those elements are protectable and have been copied. The en banc Led Zeppelin opinion addressed how a selection and arrangement argument could succeed, and Judge Snyder relied on it in granting the Perry defendants' renewed motion for judgment as a matter of law.

While recognizing that the original selection and arrangement of unprotected elements can be protectable, the en banc Ninth Circuit in Led Zeppelin cautioned that a protectable selection and arrangement of musical elements requires more than just picking and choosing a number of unprotectable elements shared by two works that are otherwise dissimilar.

Rather, "[w]hat a selection and arrangement copyright protects is the particular way in which the artistic elements form a coherent pattern, synthesis, or design." [5] Thus, "a selection and arrangement copyright is infringed only where the works share, in substantial amounts, the 'particular,' i.e., the 'same,' combination of unprotectable elements." [6] A plaintiff must demonstrate "how these musical components relate[] to each other to create the overall design, patterns, or synthesis." [7]

The Led Zeppelin defendants had asked the Ninth Circuit to adopt "virtual identity," not substantial similarity, as the standard governing a selection and arrangement theory of unlawful appropriation.

While the en banc panel concluded that it did not have to reach the question and that there is no heightened standard beyond substantial similarity for proving actionable copying, [8] the court observed in dicta that:

for works where there is a narrow range of available creative choices, the defendant's work would necessarily have to be "virtually identical" to the plaintiff's work in order to be substantially similar. [9]

Judge Snyder relied on this language and found that:

because "the range of protectable expression" in an 8-note pop music ostinato comprised of individually unoriginal elements "is narrow" — the combination of unprotectable elements in defendants' allegedly-infringing ostinato would necessarily have to be "virtually identical" to their counterparts in the plaintiffs' ostinato "in order to be substantially similar." [10]

Judge Snyder ruled that "the signature elements of the 8-note ostinato in 'Joyful Noise' [were] not a particularly unique or rare combination" and that, applying Led Zeppelin, "it is not enough to assert 'a combination of unprotectable elements without explaining how these elements are particularly selected and arranged.'" [11]

Judge Snyder's opinion also cited to the Led Zeppelin decision concerning originality and the

protectability of common elements found in music, noting that "building blocks belong in the public domain." Judge Snyder conducted a thorough analysis of whether the individual elements of the ostinato were protectable and found they were not.[12]

The Led Zeppelin dicta on the limits of the selection and arrangement theory, and Judge Snyder's reliance on it to find in favor of the defendants, is notable and undoubtedly will be relied on by future similarly situated music copyright defendants.

### **Ed Sheeran's "Thinking Out Loud"**

In this case, currently before the Southern District of New York, the heirs of Ed Townsend, the co-writer of Marvin Gaye's iconic 1973 song, "Let's Get It On," allege that Ed Sheeran's "Thinking Out Loud" infringes the copyright in the musical composition of Let's Get It On.

A key question as the Sheeran case headed toward trial was whether the jury could hear Gaye's recording of the composition or whether copyright protection was limited to only the music notated in the sheet music. Anticipating the Ninth Circuit's decision of this very issue in the Led Zeppelin en banc appeal, the court had put the case on hold.

The Ninth Circuit ruled that the scope of copyright protection for musical works governed by the Copyright Act of 1909 (i.e., those created before the Jan. 1, 1978 effective date of the 1976 Copyright Act) is limited to what is contained in the deposit copy of the work. Applying the en banc holding, on March 24, Judge Louis Stanton ruled in an in limine order that copyright protection only extends to the deposit copy of "Let's Get It On," which was filed in 1973 and is subject to the 1909 Copyright Act.[13]

At trial, the plaintiffs therefore are limited to comparing "Thinking Out Loud" with the musical composition "Let's Get It On" as reflected in the deposit copy. Importantly, the sheet music does not include many elements in Gaye's well-known sound recording of Let's Get It On, including "percussion/drums, bass-guitar, guitars, Gaye's vocal performances, horns, flutes, etc., which do not appear in the simple melody of the Deposit Copy." [14]

Consequently, Judge Stanton ruled, "[t]hese additional elements — at least some of which appear in Thinking Out Loud in more or less similar form — are not protected by copyright, because they are not in the Deposit Copy." [15] Judge Stanton put off ruling on the extent to which any portion of the Gaye sound recording may be played or referred to at trial at all. [16]

While the question of the scope of protection in musical compositions governed by the 1909 Act had been unsettled until three weeks ago, a consensus has quickly formed limiting protection to the sheet music, and not the audible, additional music heard in the sound recording. This is significant, as allegations of copying typically arise from the defendant allegedly hearing the sound recording of the (more limited) musical composition.

### **Conclusion**

It has quickly become apparent that the Ninth Circuit's en banc Led Zeppelin decision draws important boundaries as to what is protectable by copyright in music — both with respect to the limits of protection in a pre-1976 Copyright Act musical composition and the protectability of commonly found musical phrases and other elements, as well as the alleged combinations of such elements.

The decision of the influential Ninth Circuit has already been followed by a district court in

the Southern District of New York, where the majority of music infringement cases outside of the Ninth Circuit are decided. There is no doubt that the Led Zeppelin en banc decision will continue to inform future copyright litigation. While we will have to wait and see to what extent the decision becomes a counterbalance to the concerns generated by the Williams decision, the early indications are the extent will be significant.

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[1] Williams v. Gaye [●](#), 895 F.3d 1106 (9th Cir. 2018).

[2] Id. at 1138 (Nguyen, J., dissenting).

[3] In the Blurred Lines appeal, the Ninth Circuit held that because the defendants had not filed a Rule 50(a) motion before the case was submitted to the jury it could not weigh the evidence and consider judgment as a matter of law. Williams, 895 F.3d at 1134-35.

[4] Skidmore v. Led Zeppelin [●](#), No. 16-56057, slip op. at 32 (9th Cir. March 9, 2020) (en banc). The Ninth Circuit historically, though inconsistently, had applied the inverse ratio rule, which requires “a lower standard of proof of substantial similarity when a high degree of access is shown.” Three Boys Music Corp. v. Bolton [●](#), 212 F.3d 477, 485 (9th Cir. 2000) (quoting Smith v. Jackson [●](#), 84 F.3d 1213, 1218 (9th Cir. 1996)). It has now joined the Second, Fifth, Seventh, and Eleventh Circuits rejecting the rule. Peters v. West [●](#), 692 F.3d 629, 634-35 (7th Cir. 2012); Positive Black Talk, Inc. v. Cash Money Records, Inc. [●](#), 394 F.3d 357, 371 (5th Cir. 2004); Beal v. Paramount Pictures Corp. [●](#), 20 F.3d 454, 460 (11th Cir. 1994); Arc Music Corp. v. Lee [●](#), 296 F.2d 186, 187-88 (2d Cir. 1961). Following the Led Zeppelin en banc decision, the Sixth Circuit is the only one applying the inverse ratio rule. See Stromback v. New Line Cinema [●](#), 384 F.3d 283, 293 (6th Cir. 2004).

[5] Led Zeppelin, No. 16-56057, slip op. at 45-46 (citing L.A. Printex Indus., Inc. v. Aeropostale, Inc. [●](#), 676 F.3d 841, 850-51 (9th Cir. 2012)).

[6] Id. at 46 (quoting Feist Publications, Inc. v. Rural Tel. Serv. Co. [●](#), 499 U.S. 340, 349, 350-51 (1991)).

[7] Id. at 44.

[8] Id. at 48 n.13.

[9] Id.

[10] Gray v. Perry [●](#), No. 2:15-cv-05642, slip op. at 22 (C.D. Cal. March 16, 2020) (citing Led Zeppelin, No. 16-56057, slip op. at 33) (internal citations omitted).

[11] Id. at 15, 20 (citing Led Zeppelin, No. 16-56057, slip op. at 44-45, 46)).

[12] Id. at 10 (C.D. Cal. March 16, 2020) (citing *Led Zeppelin*, No. 16-56057, slip op. at 33).

[13] *Griffin v. Sheeran*, No. 1:17-cv-05221, slip op. at 1-2 (S.D.N.Y. March 24, 2020).

[14] Id. at 2.

[15] Id. at 2.

[16] Id. at 3.