"Ooh it Makes Me Wonder": Do the Courts Finally Understand the Problems with Copyright Infringement and Pop Music?

*Kate Camarata**

"Writing has laws of perspective, of light and shade, just as a painting does, or music. If you are born knowing them, fine. If not, learn them. Then rearrange the rules to suit yourself."[1]

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1. Interview by Pati Hill with Truman Capote, *Truman Capote, The Art of Fiction No.17*, PARIS REV. (Spring–Summer 1957), https://www.theparisreview.org/interviews/4867/truman-capote-the-art-of-fiction-no-17-truman-capote [https://perma.cc/47SP-6AGZ].

INTRODUCTION

The interaction between music and law is unique to copyright litigation. Music is "commonly regarded as a rule-free zone," whereas the law is structured and, in essence, the "origin for rules."[2] Because "direct evidence of copying is seldom available" in music infringement cases, plaintiffs largely rely on circumstantial evidence.[3] Given this fact, courts deciding music infringement cases began to recognize the inherent issues with applying copyright law to music.[4] As the seminal music copyright infringement case across the federal courts, *Arnstein v. Porter* amalgamated the then-prevailing wisdom regarding access, similarity, expert testimony, and the role of juries.[5]

The plaintiff in this case, Ira Arnstein, was a mildly successful musical composer during the Tin Pan Alley-era who was convinced that fellow composers, including famous songwriter Cole Porter, were stealing his works to profit from them.[6] Consequently, he filed a number of infringement lawsuits against fellow composers.[7] Arnstein demanded a jury trial, but Porter moved to strike this demand and moved for summary judgment.[8] The trial court granted summary judgment in favor of Porter, and Arnstein appealed.[9] In this decision, Judge Frank, writing for the Second Court of Appeals, stated that the appropriateness of a jury trial turned on whether a dispute as to the facts existed—specifically whether there were sufficient similarities between Arnstein's original and the Porter's song to prove copying.[10] The court noted in this regard that "analysis ('dissection') [of the works] is relevant, and the testimony of

2. Iyar Stav, *Musical Plagiarism: A True Challenge for the Copyright Law*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 2 (2014).

3. Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 258 (2013).

4. See *infra* Part I.B explaining the difficulties of proving access and similarity in music copyright infringement cases. See generally the following cases that discuss the two aforementioned elements: Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 275–7 (2d Cir. 1936); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924); Hein v. Harris, 175 F. 875, 877 (C.C.S.D.N.Y. 1910).

5. *See generally* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

6. *Arnstein*, 154 F.2d at 467–68.

7. *See* B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 489–90 (2001) (Arnstein "also believed plagiarists had deprived him of the rewards of his talent by infringing upon the copyrights to his compositions to their personal aggrandizement").

8. *Arnstein*, 154 F.2d at 468.

9. *Id.*

10. *Id.*

experts may be received to aid the trier of the facts."[11] Therefore, experts may deconstruct a musical composition into its components' parts (i.e., melody, harmony, rhythm, texture, and formal structure) and use their expertise to help a trier of fact make informed decisions regarding the resemblance between two works according to music theory.[12] *Arnstein* is of great importance to the discussion of this Note because it instituted the two-pronged substantial similarity test that courts still use today. The purpose of this Note is to examine the difficulties of utilizing this test as it applies to popular music through the recent *Skidmore v. Led Zeppelin* decision.[13] As *Arnstein* became a widely followed precedent, music copyright holders were in the prime economic position—they owned exclusive rights to sheet music reproductions, mechanical reproductions of their music, public performances, and arrangements or adaptations of their musical compositions.

When music copyright law came into existence in the early 1800s, music was "far more of a one-dimensional entity, much like a book, a map, or other work of authorship;"[14] however, as music evolved into a more prominent commodity within society, music copyright law remained stagnant, despite the cultural and technological changes that altered how music was consumed. Since the 1950s, music has become an even greater commodity with the advent of major technological advances. Cassette tapes—and eventually compact discs—facilitated rapid-fire copying through the exchange of compositions between individuals.[15] Personal listening devices, like the Apple iPod and Sony Walkman, provided music at any venue, whether public or private.[16] Additionally, "the Internet has [also] made the procurement of all types of music incredibly easy, and monstrously cost effective."[17] For instance, with a quick subscription to Spotify, users gain access to over 30 million songs within its library, which quantifiably translates into "one song for every second of every day for almost a year (347 days)."[18] The development of technology has made music more easily accessible and digestible, which has offered no shortage

11. *Id.*

12. *See* CATHERINE SCHMIDT-JONES, THE BASIC ELEMENTS OF MUSIC 1 (2009).

13. Skidmore v. Led Zeppelin, 905 F.3d 1116, 1121 (9th Cir. 2018).

14. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 419 (2004).

15. *Id.* at 418; *see also* Martin F. Halstead, *The Regulated Become the Regulators, Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L. REV. 195, 199–201 (2001).

16. Keyes, *supra* note 14, at 418.

17. *See id.*

18. Mick Symons, *Spotify: Everything You Need to Know!*, DIVERSITY FUND (May 25, 2018), https://www.imore.com/spotify [https://perma.cc/9HRN-WRQF].

of music copyright infringement lawsuits.[19] Yet, as the technology advanced, the standard for music copyright infringement never followed. As a result, courts apply the same standard utilized in 1950 for music created within the new 2020s decade.

The process of determining whether music infringement exists relies on the inherent subjectivity of the listener to discern if substantial similarity[20] between two musical works exists. The peculiar characteristics of music bear significantly on each listener; consumers absorb, appreciate, and retain music differently than plays, novels, or visual and architectural works. In fact, studies suggest that a particular area of the brain that comprehends and stores musical information exists.[21] However, both Congress and courts even today continue to treat music like other types of works of authorship by approaching issues of protection and infringement in the same manner.[22] Because current copyright laws cover such a broad scope of works,[23] the standards adopted by courts to assess substantial similarity are unclear, leading to results that are inevitably ad hoc.[24]

Accordingly, this one-size-fits-all formulation poses issues for adapting copyright to the context of music.[25] The purpose of copyright law is to encourage artistic and creative expression by providing incentives to

19. In fact, from 1950 to 2000, there were forty-three reported cases dealing with music copyright infringement, nearly twice as many as compared within the previous fifty-year period (1900–1950). *See* Keyes, *supra* note 14, at 418.

20. Substantial similarity is defined as "a level of similarity that shows improper appropriation of the plaintiff's work. . . . If the similarity of the defendant's work to protectable elements in the plaintiff's work is minimal, or if similarity only exists with regard to unprotectable elements of the work, then there is no substantial similarity." *Substantial Similarity*, U. MICH. LIBR. RSCH. GUIDES (May 16, 2020), https://guides.lib.umich.edu/substantial-similarity/glossary#s-lg-box-wrapper-21057273 [https://perma.cc/FDP2-B2Q6].

21. *See* ELENA MANNES, THE POWER OF MUSIC: PIONEERING DISCOVERIES IN THE NEW SCIENCE OF SONG 27–39 (2011) (describing various neuroscientific studies of music and the brain, including one that identified the rostomedial pre-frontal cortex as the primary area of the brain stimulated when one listens to music).

22. Keyes, *supra* note 14, at 410.

23. *See* 17 U.S.C. § 102(a). Copyright protection covers the following works of authorship in the following categories: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.*

24. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

25. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 457, 556 (2006); *see, e.g.*, Lisa Gitelman, *Reading Music, Reading Records, Reading Race: Musical Copyright and the U.S. Copyright Act of 1909*, 81 MUSICAL Q. 265, 273 (1997) (discussing how intellectual property rights in cases of music were difficult because the "legal standards of intellectual property were written, published works or visually apprehended works" that courts could construe as "protected 'writings'").

authors;[26] yet it simultaneously limits protection, thereby allowing society to benefit from new ideas and information.[27] The law neither adequately measures how music is perceived and comprehended by society nor promotes copyright law's broader policy goals.[28] Instead, the law needs to be tailored to provide greater flexibility for the manner in which people are allowed to respond to the music they perceive. Therefore, current music copyright law should be changed to reflect the modern regime of popular music consumption in order to adequately provide protection for musical artists.

This Note explores the inherent weaknesses with the substantial similarity test for copyright infringement as it relates to popular music through the lens of the recent Ninth Circuit case, *Skidmore v. Led Zeppelin*.[29] The importance of this 2020 en banc opinion should not go unnoticed; the rehearing of this case resolved issues related to music and copyright law and established a new precedent[30] for the aforementioned substantial similarity test.[31] For purposes of this Note, "pop music" shall mean music written, marketed, and intended to achieve mass distribution and mass appeal. However, this term should not be confused with the genre of pop music. Instead, the term "pop music" as used throughout this Note should be thought of as an umbrella category of music—encompassing smaller subgenres like rock and pop—that is designed to achieve commercialized, monetary gains. Pop music arguably derives its success from its harmonies and chord progressions.[32] The "limited number of notes and chords available to composers" within music generally contributes to the issues that are inherent to copyright claims involving pop music.[33] Given the fact that most musical works, including pop music,

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26. *See* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 285 (2004) ("It is not wrong or inaccurate to say that copyright is a system of property rights designed to encourage creation.").

27. *See generally* Mike Masnick, *Yes, Copyright's Sole Purpose is to Benefit the Public*, TECHDIRT (Apr. 10, 2012), https://www.techdirt.com/articles/20120407/00171418416/yes-copyrights-sole-purpose-is-to-benefit-public.shtml [https://perma.cc/VR34-CVEF].

28. *See generally* Keyes, *supra* note 14.

29. Skidmore v. Led Zeppelin, 905 F.3d 1050, 1058 (9th Cir. 2018).

30. *Skidmore*, 905 F.3d 1050. The Ninth Circuit in its en banc decision overruled the inverse ration rule, which allows for a lower standard of proof for the substantial similarity prong of copyright infringement when a higher degree of access was found. Although an important change to the future of music copyright cases, this aspect of the opinion will not be discussed in this Note.

31. As of October 5, 2020, the Supreme Court denied certiorari. *See* Ben Sisario, *Led Zeppelin Wins Long 'Stairway to Heaven' Copyright Case*, N.Y. TIMES (Oct. 5, 2020), https://www.nytimes.com/2020/10/05/arts/music/stairway-to-heaven-led-zeppelin-lawsuit.html [https://perma.cc/6CH3-AUN9].

32. *See* CHRISTOPHER DOLL, HEARING HARMONY: TOWARD A TONAL THEORY FOR THE ROCK ERA 7 (2017).

33. Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).

tend to borrow elements from other musical works, the substantial similarity test creates problems when employed within the musical context.

Part I of this Note will review the history and purpose of copyright protection as well as explain the current tests utilized by courts in copyright infringement cases. This Part will also show the difficulties of applying these tests to music. Part II will provide a brief explanation of the basics of Western music theory and composition. This Part will also explore characteristics that have contributed to what makes pop music so appealing to mass audiences. Part III will explain information regarding the facts and holding of the three-member Ninth Circuit panel decision of *Skidmore v. Led Zeppelin*. Finally, Part IV will examine the holdings of the en banc opinion in *Skidmore* and explain why this decision ultimately changed music copyright law for the better by providing a set of guidelines that should allow courts to now make better informed decisions regarding pop music plagiarism.

I. HISTORY OF COPYRIGHT LAW AND ITS APPLICATION TO MUSIC

The challenges that arise when applying copyright law to musical works are rooted in the history of copyright law itself. Most of these issues facing music copyright stem from the very purpose for which copyright was invented.[34] The objective of "copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development."[35] In order to determine how the law should change, we must consider not only the history of the copyright statute but also how the law currently applies to music. By tracing historical and legislative developments and the evolution of the copyright infringement tests, this Part outlines the development of the copyright infringement doctrine and shows the difficulties of applying copyright infringement tests in a pop music context.

A. Early and Current Legislation

Article I, Section 8, Clause 8 of the U.S. Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[36] Accordingly, the Constitution provides Congress with the means to enact copyright laws in

34. *See* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 934 (2005).
35. Whelan Assocs., Inc. v. Jaslow Dental Lab'y, Inc., 797 F.2d 1222, 1235 (3d Cir. 1986).
36. U.S. CONST. art I, § 8, cl. 8

order to promote the public welfare.[37] Congress's first exercise of this explicit power was The Copyright Act of 1790 (the 1790 Act).[38] Conflicting state copyright laws created a need for a uniform national system and, to that end, the 1790 Act was created.[39]

The Act was initially intended to protect only literary property.[40] It was not until the Copyright Act of 1831 that Congress explicitly extended copyright protection to musical compositions, giving owners of copyright in music compositions the same rights as those enjoyed by copyright owners of literary works.[41] However, at this time, protection was only extended to unauthorized printing and distribution of sheet music because during this period music could only be fixed within this medium.[42] In early music copyright cases, judges used their discretion to determine whether copyright infringement existed, and courts tended to analyze music infringement claims using the same rules and standards used for infringement claims involving works of literary authorship.[43] It is important to realize, however, that the music "industry" in those days operated in a similar fashion to other sectors of publishing industry at that time (i.e., "printing copies and selling those hard copies to the public through retail outlets and roving salesman").[44] Therefore, "[b]ecause music had similar commercial qualities to books," Congress conceptualized music in the same way as other works protected by copyright.[45]

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37. *See United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ1a.html [https://perma.cc/M5H7-NXUR] [hereinafter *A Brief Introduction and History*].

38. ROBERT P. MERGES, MARK A. LEMLEY & PETER S. MENELL, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 386 (Vicki Been et al. eds., 4th ed. 2007).

39. *Id.*

40. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1, 8–9 (1993) (explaining how development of the printing press prompted the idea that authors could have intangible property rights beyond a written manuscript); *see also* Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3, 6–10 (2002) (explaining the concept of a book as a form of real estate and how copyright protections function in the same manner for both literary and real property).

41. Act of Feb. 3, 1831, ch. XVI § 4.

42. *A Brief Introduction and History*, *supra* note 37.

43. *See, e.g.*, Jollie v. Jacques, 13 F. Cas 910 (C.C.S.D.N.Y. 1850) (No. 7437) (one of the first music copyright cases reported, which set the judicial precedent for treating music in the exact same fashion as any other work protected by copyright); *see also* Keyes, *supra* note 14, at 410.

44. *See* Keyes, *supra* note 14, at 412; *see also* DAVID A. JASEN, TIN PAN ALLEY: THE COMPOSERS, THE SONGS, THE PERFORMERS AND THEIR TIMES at xvi (1988).

45. *See* Keyes, *supra* note 14, at 412.

By 1909, a bill was introduced that significantly changed the 1790 Act[46] due to the technological advances of the time.[47] For example, in less than a decade after Edwin Votey invented the pianola,[48] approximately "seventy-five thousand player pianos in the United States, and over a million piano rolls were sold."[49] The 1909 bill "broadened the scope of categories protected by copyright to include all works of authorship, and extended the term of protection to twenty-eight years with a possible renewal of twenty-eight [years]."[50] This modification resulted from new mechanisms for creating and distributing works of authorship, with sound recordings being one of the most prominent.[51] However, it was not until 1972 that "sound recordings" of musical compositions were considered "works of authorship" and consequently received protection under the copyright clause.[52]

Thus, as music became more accessible in the early 1900s with the advent of new technologies, such as the radio, lawsuits increased when composers claimed that their musical pieces were "substantially similar" to other pieces.[53] Between 1915 and 1950, "twenty-three reported federal cases directly centered on . . . specific music copyright issue[s]."[54] Consequently, federal courts began refining an actual legal test for music copyright, which placed "specific burdens on the plaintiff."[55] As previously mentioned, in *Arnstein v. Porter*, the U.S. Court of Appeals for the Second Circuit redefined the legal standard used for music copyright infringement claims by establishing the "substantial similarity test," a two-prong test in which the plaintiff must show: (1) that a defendant

46. The 1790 Act was the world's first copyright law, providing authors with the sole right of printing their works for fourteen years past the date of publication. It is commonly known as the *Statute of Anne*. *See, e.g.*, Gerard Magavero, *The History and Background of American Copyright Law: An Overview*, 6 INT'L J.L. LIBRS. 151–54 (1978).

47. *See generally id.*

48. "A pianola is a type of mechanical piano[,]" in which "air is forced through holes in a roll of paper to press the keys" and play a song automatically. *See Pianola*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/pianola [https://perma.cc/GE2L-KHCQ].

49. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 34 (2000).

50. *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline/ [https://perma.cc/5BG2-4R7R].

51. *Id.*

52. Ryan Lloyd, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 148 (2014) (citing 17 U.S.C. § 102(a) (1990) and 17 U.S.C. § 114 (1998)).

53. Keyes, *supra* note 14, at 415; *see also* ROBERT EICHBERG, RADIO STARS OF TODAY 1 (1937).

54. Keyes, *supra* note 14, at 415.

55. Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 728 (1987).

copied a plaintiff's copyrighted work, and (2) that the copying "constitute[d] improper appropriation."[56] This test is still used today.[57]

Here, the plaintiff must show that the copying was so extensive that the two works are "substantially similar."[58] The determination of this latter portion of the test involves a two-step process.[59] The first step serves as an evidentiary tool, focusing on whether the defendant had *access* to the protected work; the second step addresses liability issues, requiring the plaintiff to prove the defendant's work is substantially similar to their own.[60] Although the steps of this test seem straightforward, it is susceptible to skewed results when courts apply it to musical works. Given the fact that most musical works, including pop music, tend to borrow elements from other musical works, the test creates problems when employed within the musical context.

In 1976, Congress overhauled the Copyright Act to its current status.[61] The Act extends protection to any original works of authorship that are "fixed in any tangible medium of expression."[62] The use of the word "expression" is significant because the Act explicitly excludes mere ideas from protection.[63] The grant of copyright protection affords varying degrees of proprietorship in the work, including, but not limited to, exclusivity regarding reproductions, derivative remakes, and distributions.[64] Section 106 of the Copyright Act defines six exclusive

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56. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

57. *See, e.g.*, Atari, Inc. v. N. Am. Phillips Consumer Elec. Corp., 672 F.2d 607, 614 (7th Cir. 1982); Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co., 2018 WL 1242053, at *8 (N.D. Cal. 2018). Within this recent case, the court directly quotes from *Arnstein* to establish whether both prongs of copyright infringement have been met.

58. *Atari, Inc.*, 672 F.2d at 614 (citing Warner Brothers, Inc. v. Am. Broad. Cos., 654 P.2d 204, 207 (2d Cir. 1981)).

59. *Id.*

60. Cohen, *supra* note 47, at 728; *see also* Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements*, 66 IND. L.J. 175, 228 (1990).

61. *A Brief Introduction and History*, *supra* note 37.

62. *See* 17 U.S.C. § 102(a)(7) (1990).

63. *See* 17 U.S.C. §§ 102(a)–(b) (1990) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

64. *See* 17 U.S.C. § 106 (1990) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted works in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted works publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (6) in the case of literary, musical, dramatic, and choreographic works,

rights of a copyright owner, whereas Section 114 discusses the scope of these rights.[65] Finally, registration entitles a copyright owner, if successful in an infringement lawsuit, to statutory damages up to $150,000.[66]

B. Copyright Infringement Tests

To establish a prima facie case for copyright infringement, the plaintiff must prove: "(1) ownership of a valid copyright, (2) actual copying, and (3) actionable copying."[67] In other words, copyright holders must show "both that copying has occurred (actual copying) and that the copied work is 'substantially similar' to the original copyrighted piece (actionable copying)."[68] Direct evidence of actual copying rarely exists.[69] Therefore, to determine "actual copying," the court examines: (1) whether the defendant "had access to the plaintiff's work" during the time the defendant prepared his own work, and (2) whether there is "sufficient similarity between the works to prove copying."[70] Whether the defendant had *access* to the protected work serves as an evidentiary tool, but access by itself cannot be actionable; instead, the plaintiff must also prove the

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pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (7) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

65. *See id.*; *see also* 17 U.S.C. §§ 114(a)–(b) (1990) ("(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4). (b) the exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs . . . .").

66. *See* 17 U.S.C. § 504(c)(2) (1990).

67. *See* Moon Hee Lee, Note, *Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works*, 111 NW. U. L. REV. 833, 839, 839 n.33 (2017) (explaining how "the courts have had trouble separating the striking similarity related to actual copying and the substantial similarity related to actionable copying").

68. *Id.* at 839–40.

69. *See* Lee, *supra* note 81, at 840.

70. Nicole K. Roodhuyzen, Note, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL'Y 1375, 1387 n.58 (2007) (quoting ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3:1.1, at 3-3 (2003)).

defendant's work is substantially similar to their own to constitute improper appropriation.[71]

Once a plaintiff has proved the defendant copied his or her work, federal courts engage in different tests to determine whether works are "substantially similar."[72] Because most music copyright infringement cases are litigated in either the Second Circuit (New York City) or in the Ninth Circuit (Los Angeles), we will focus on the substantial similarity tests used in those courts[73]: (1) the "ordinary observer" test is associated with the Second Circuit and (2) the "extrinsic-intrinsic" test is associated with the Ninth Circuit.[74] The Second Circuit's "ordinary observer test" for substantial similarity uses the aforementioned *Arnstein v. Porter* framework: once copying has been established, it asks "whether 'an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'"[75] On the other hand, the Ninth Circuit's "extrinsic-intrinsic" test for substantial similarity includes an objective inquiry and a subjective inquiry.[76] The extrinsic prong requires "an objective comparison of specific expressive elements," while the subjective-intrinsic prong asks the fact finder to focus on the "total concept and feel of the [two] works."[77] Though the majority of courts use one of these two tests, some variations still exist from circuit to circuit.[78] While the tests seem relatively straightforward, they are inconsistently applied, thereby creating both confusion and unpredictability for courts and

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71. Cohen, *supra* note 55, at 728; *Arnstein*, 154 F.2d at 468; *Atari*, 672 F.2d at 614 (citing Warner Brothers, Inc. v. Am. Broad. Cos., 654 P.2d 204, 207 (2d Cir. 1981); *see also* Cohen, *supra* note 60, at 228.

72. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01(B) (2019) [hereinafter NIMMER].

73. Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 317 (6th Cir. 2004); *see also* NIMMER, *supra* note 72, § 13.03(E)(3).

74. *Murray Hill Publ'ns, Inc.*, 361 F.3d at 317. The importance of the Ninth and Second Circuits should not go unnoticed. The Ninth Circuit is commonly referred to as the "Hollywood" circuit because the majority of the copyright appeals originate in California, which is one home to the entertainment capital of the world. The Second Circuit includes New York City, birthplace of Tin Pan Alley, which was a collection of New York publishing and songwriting houses. *Id.*

75. Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d Cir. 1995) (quoting Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 766 (2d Cir. 1991)).

76. *See* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

77. *See* Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) (internal quotation marks omitted).

78. The Tenth Circuit uses an abstraction/filtration comparison test. The Sixth Circuit as well as the D.C. Circuit use a variation of this test. *See* Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright's 'Substantial Similarity' Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 585 (2019). Before the Second and Ninth Circuits diverged, they used a test similar to the one the Eleventh Circuit uses today. For more information, see ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3, at 3–2 (2003).

litigants.[79] Given the fact that most musical works, including pop music, tend to borrow elements from other musical works, the test creates problems when employed within the musical context. The following two sections consider these two tests in greater detail.

1. The Second Circuit

Those courts following the Second Circuit's substantial similarity test employ *Arnstein*'s two-step process, also known as the "ordinary observer test," in which a plaintiff must prove both "(a) that [the] defendant copied from [the] plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went to [sic] far as to constitute improper appropriation" to establish infringement.[80] Both of these inquiries are issues of fact for the jury.[81] In determining whether actual copying exists (the first or "copying" prong), "analysis ('dissection')" is appropriate and "the testimony of experts may be received to aid the trier of the facts."[82] Once a court has determined that copying has occurred, it applies the ordinary observer test, deciding whether an unlawful appropriation that would rise to the level of infringement (the second or "improper-appropriation" prong) has also occurred.

The ordinary observer test is grounded in gauging the reaction of an ordinary person; however, it is the trier-of-fact that "determines the issue in light of the impressions reasonably expected to be made upon the hypothetical ordinary observer."[83] The fact finder determines "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[84] In order to make this determination, courts must apply the same level of scrutiny as those that an ordinary consumer would use.[85] As a result, dissection[86] and expert

79. Jarrod M. Mohler, Comment, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 972 (2000).

80. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

81. *Id.* at 469.

82. *Id.* at 468.

83. Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting); *see also* La Resolana Architects, PA v. Reno, Inc., 555 F.3d 1171, 1180 (10th Cir. 2009) ("[T]he 'ordinary observer,' like the 'reasonable person' in tort law, is a legal fiction; it is the measure by which the trier of fact judges the similarity of two works.").

84. Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d Cir. 1995) (citing Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 766 (2d Cir. 1991)).

85. *See* OSTERBERG & OSTERBERG, *supra* note 78, § 3, at 3–5 (courts must apply "consumer scrutiny as opposed to courtroom scrutiny"); *see also* Hamil Am., Inc. v. GFI, Inc., 193 F.3d 92, 102 (2d Cir. 1999).

86. *See generally* Sarah Brashears-Macatee, Note, *Total Concept and Feel or Dissection?: Approaches to the Misappropriation Test of Substantial Similarity*, 68 CHI.-KENT L. REV. 913, 921 (1993) (detailing the dissection approach in copyright infringement cases).

testimony are not utilized in connection with this prong of the test.[87] This point complicates copyright infringement for fact finders[88] because most ordinary observers are likely incapable of detecting true appropriation.[89]

2. The Ninth Circuit

As distinct from the Second Circuit's analysis discussed above, the Ninth Circuit's substantial similarity test involves both extrinsic and intrinsic prongs.[90] The extrinsic prong is objective in nature,[91] "depend[ing] not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed."[92] In the extrinsic prong, the court lists, compares, and contrasts the elements involved within each work and then analyzes whether similarities in the expression of those elements exist.[93] When applying the extrinsic prong, courts within the Ninth Circuit are instructed to "filter out and disregard the non-protectible elements in making [their] substantial similarity determination," a process referred to as "analytical dissection."[94] This process involves " breaking works down into their constituent elements and comparing those elements to determine whether the similarities that exist are in the unprotectible elements."[95] Expert testimony is admissible to assist the court in this type of analysis.[96]

The intrinsic prong examines an ordinary person's subjective impressions of similarities between the two works.[97] This determination is

87. Arnstein, 154 F.2d at 468, 473.

88. *See infra* Part III.

89. *See* NIMMER, *supra* note 72, § 13.03(A)(1)(a) ("Obviously, no principle can be stated as to when an imitator has gone beyond the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960))).

90. *See* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

91. *See* Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990) (holding that the extrinsic part of the test is an objective analysis of expression).

92. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

93. The elements the courts list and analyze are as follows:

> For example, with respect to literary works, the elements are plot, theme, dialogue, mood, setting, pace, sequence of events, and characters. For works of visual art, the criterion includes shapes, colors, and arrangements of the representations in addition to the type of artwork involved, the materials used, the subject matter, and the setting for the subject.

OSTERBERG & OSTERBERG, *supra* note 78, § 3:2.1, at 3–24.

94. Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002); *Swirsky*, 376 F.3d at 845.

95. *See* Roodhuyzen, *supra* note 70, at 1399.

96. *Id.* at 1400; *see also* Antonick v. Elec. Arts, Inc., 841 F.3d 1062, 1067 (9th Cir. 2016); *Swirsky*, 376 F.3d at 845.

97. Shaw v. Lindheim, 919 F.2d 1353, 1360 (9th Cir. 1990).

exclusively a question for the jury.[98] The intrinsic prong subjectively evaluates whether a substantial similarity in expression exists by tracking the responses of an ordinary, reasonable observer.[99] Unlike the extrinsic prong, expert testimony is not permitted in this part of the analysis.[100] As such, fact finders face challenges because they are exposed to expert testimony when evaluating extrinsic similarities, yet they are required to disregard the testimony while evaluating similarities under this portion of the test.

II. COMPONENTS OF COMPOSITION: USING MUSIC THEORY FOR MUSIC INFRINGEMENT CASES

To fully understand the nature of the infringement claims in *Skidmore*, one must be familiarized with music theory. Given these strict legal tests, music is not always the easiest artistic medium to analyze within these parameters. Before addressing the facts and holding of *Skidmore*, the case in which unknown band Spirit sued the renowned rock legend Led Zeppelin for the opening riff in the song "Stairway to Heaven," a brief discussion of the basics of Western music theory and composition is necessary. Music theory forms the building blocks of most copyright infringement legal theories, such as the one argued by Mr. Skidmore.

Determining copyright infringement is a multilayered process and, as noted previously, courts often use expert testimony from a technical perspective to determine whether a defendant likely copied from the plaintiff.[101] Due to the methodical aspects of music, expert testimony carries significant weight because compositional techniques and theories are often unfamiliar to a judge or jury.[102] As musical experts, expert witnesses provide courts with a musicological framework by giving an opinion regarding whether the pattern of notes and chords appearing in the defendant's work is likely to have been the product of independent creation, reliance on a common public domain source, or the plaintiff's work.[103] Because pop music has an arguably formulaic style, it is important to explain the rudimentary characteristics through music theory.

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98. *See id.* at 1360–61.

99. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

100. *See id.*

101. *See* Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 945–46 (8th Cir. 1992) (describing use of experts in the extrinsic phase of the substantial similarity analysis).

102. *See generally* Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988).

103. *See generally id.*

A. Tonality in Western Music: The Basics

Essentially, all Western music is rooted in the organization of eight notes on or around one principal tone.[104] Various pitch organizations (whether melodic, harmonic, or contrapuntal), concepts of consonance and dissonance, and corresponding rhythm, beats, accents, and formal structure are all based on the principle of tonality. Whether listening to a Bach Prelude & Fugue,[105] a tone poem by Debussy,[106] a Beach Boys' classic song,[107] or Taylor Swift's "Blank Space," [108] even an uninformed ear will notice similarities between the each of the work's melodic structure, tonality, and rhythmic patterns. Pop music arguably condenses the "more complex, layered musical elements of classical music" into a digestible format: A "speech-like style usually encapsulated in a simple two-or three-part form organized into four eight-bar phrases."[109]

Tonality can be conceptualized upon the idea that any form of Western music, whether an orchestral symphony or a number one hit song on the radio, is centered on one primary pitch or tone and seven other pitches or chords that gravitate away from and finally return back to this original pitch or tone.[110] Key signature is essentially the note or pitch that is "considered home" for the song.[111] The key signature acts as a barrier, determining the rules for the song by instructing the composer on what notes can and cannot be played.[112] Each key contains a set number of sharps and flats.[113] The seven subsidiary pitches are arranged in a fixed series of whole and half steps known as major, minor, or modal scalar patterns within an octave.[114] These pitches may be major, melodic minor, or harmonic minor.[115]

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104. *See* Brian Hyer, *Tonality*, GROVE MUSIC ONLINE (Jan. 20, 2001), https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000028102 [https://perma.cc/X3FL-2HDZ].

105. *See* JOHANN SEBASTIAN BACH, THE WELL-TEMPERED CLAVIER: BOOK 1 (1722).

106. *See* CLAUDE DEBUSSY, LA MER (1905).

107. *See* THE BEACH BOYS, PET SOUNDS (1966).

108. *See* TAYLOR SWIFT, *Blank Space*, *on* 1989 (Big Machine Records 2014).

109. Livingston & Urbinato, *supra* note 3, at 240; *see also* John Covach, *Form in Rock Music: A Primer*, *in* ENGAGING MUSIC: ESSAYS IN MUSIC ANALYSIS 65, 69–74 (Deborah Stein ed., 2005).

110. *See* J. PETER BURKHOLDER, DONALD JAY GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 305, 365 (7th ed. 2006); *see also* Hyer, *supra* note 104.

111. *See generally Key Signature*, ENCYC. BRITANNICA, https://www.britannica.com/art/key-signature [https://perma.cc/BEJ2-F2ZW].

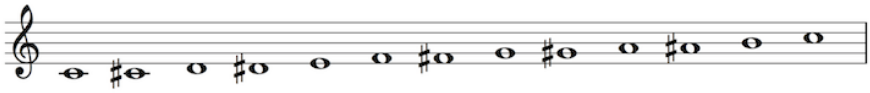
112. *Cf. id.*

113. *Id.* Sharps consist of raised pitches, and flats consist of lowered pitches. *Id.*

114. *See generally* William Drabkin, *Major*, GROVE MUSIC ONLINE (Jan. 20, 2001), https://doi.org/10.1093/gmo/9781561592630.article.53817 [https://perma.cc/5FKR-KVEQ].

115. *See generally id.*

A key signature is made up of an arrangement of the aforementioned seven subsidiary pitches, which form a scale.[116] A scale refers to a succession of pitches ascending or descending in two types of steps: *half steps* or *whole steps*.[117] Western music theory is based on the chromatic scale, which a collection of twelve possible pitches that are commonly referred to as a "half tone" or "semitone."[118] The chromatic scale consists entirely of half steps, using every pitch on the keyboard within a single octave (the octave starts with the root note or "tonic" note and ends with the "octave" tonic note, which is exactly twice the pitch frequency of the root note).[119] To illustrate, a chromatic scale in the key of C would look like the following:[120]



A chromatic scale in the key of C written out is presented as the following:

C-C#-D-D#-E-F-F#-G-G#-A-A#-B-C

Or

C-Db-D-Eb-E-F-Gb-G-Ab-A-Bb-B-C[121]

Notice how an overlap occurs between the notes containing sharps and those containing flats (e.g., C# v. Db). These notes are called "enharmonic" because they are identical pairs of notes that can be written in two ways.[122] The notes in the scale are defined by the key signature, which helps an individual understand which sharps and flats are used in a song.[123]

The major scale is arguably the most recognizable in Western music. Think of the classic tune "Do-Re-Mi" sang by Julie Andrews in the 1965 film *The Sound of Music*.[124] This song is made up of major scale pitches,

116. Benjamin Hollis, *Scales and Key Signatures*, METHOD BEHIND THE MUSIC, https://method-behind-the-music.com/theory/scalesandkeys/ [https://perma.cc/XNU7-EJ4M].

117. *Scales and Scale Degrees*, OPEN MUSIC THEORY, http://openmusictheory.com/scales.html [https://perma.cc/N6AG-YQTJ].

118. *ETheory: Lesson 1.2—Scales*, EASTMAN SCH. OF MUSIC: CTR. FOR MUSIC INNOVATION & ENGAGEMENT, https://www.esm.rochester.edu/iml/entrepreneurship/eTheory/New_Horizons/1-2_Scales.php [https://perma.cc/5J9Y-BBDQ].

119. BURKHOLDER ET AL., *supra* note 110.

120. *Id.*

121. *Id.*

122. Mark DeVoto, *Enharmonic*, ENCYC. BRITANNICA, https://www.britannica.com/art/enharmonic [https://perma.cc/2LBP-EA9E].

123. *The Complete Guide to Music Key Signatures*, MERRIAM MUSIC (June 10, 2019), https://www.merriammusic.com/school-of-music/piano-lessons/music-key-signatures/ [https://perma.cc/4FBH-35J9].

124. THE SOUND OF MUSIC (20th Century Fox Film Corp. 1965).

consisting of eight notes: the tonic (I), supertonic (II), mediant (III), subdominant (IV), dominant (V), submediant (VI), leading tone (VII), and octave tone (VIII). These notes are called scale degrees because they are placed in context of a specific scale.[125] Solfège syllables, such as those in *The Sound of Music* (do, re, mi, etc.), can also be used to represent scale degrees.[126]

Once the key in a given song is known, the ground rules for what can be played in that key are pre-determined. The key signature defines the chords associated within each scale because "each 'key' or 'scale' has certain sharps or flats associated with it."[127] Certain chords are reserved for particular scales.[128] Therefore, the key of the song determines the notes within the scale, and subsequently, the notes of the scale determine the elements of a chord.

"A chord is any combination of three or more pitch classes that sound simultaneously."[129] In their most basic structure, chords are comprised of three notes called "triads": a "root" note, a third, and a fifth.[130] Major triads are "built with a major third and a perfect fifth from the root."[131] Minor triads are built with a minor third and a perfect fifth from the root.[132] If we build triads with each note in a key using only the notes available from its scale, the following pattern would emerge: Major, minor, minor, Major, Major, minor diminished.[133] Roman numerals are used to indicate each chord's position relative to the scale. Numerals that represent a major chord are capitalized, whereas minor and diminished chords are lower cased.[134] Thus, using Roman numerals, the following pattern emerges for triads in all major keys: I, ii, iii, IV, V, vi, vii°.[135]

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125. *See* Drabkin, *supra* note 115.

126. *Id.*; *see also* BURKHOLDER ET AL., *supra* note 110.

127. *See* Drabkin, *supra* note 115.

128. ChordWizard, *Chord/Scale Relations*, HOW MUSIC WORKS, https://www.howmusicworks.org/600/ChordScale-Relations/Chord-and-Scale-Relations [https://perma.cc/C8KV-79MB].

129. *Triads and Seventh Chords*, OPENMUSICTHEORY.COM, http://openmusictheory.com/triads.html [https://perma.cc/F9TY-4LF5].

130. *Introduction to Chords*, MUSICTHEORY.NET, https://www.musictheory.net/lessons/40 [https://perma.cc/SB4Z-5VJY].

131. *Id.*

132. *Id.*

133. Mantius Cazaubon, *Chords in the Key of C Major*, PIANO KEYBOARD GUIDE, http://www.piano-keyboard-guide.com/key-of-c.html [https://perma.cc/4S2P-R6AD].

134. *Id.* An "o" symbol denotes a diminished chord, where the chord is built on a minor third and a diminished fifth (the minor third is three half tones away from the root, and the diminished fifth is six half tones away from the root). *See* OPENMUSICTHEORY.COM, *supra* note **Error! Bookmark not defined.**.

135. Cazaubon, *supra* note 133.

This pattern is extremely useful for musicians because it establishes the framework for creating music, allowing composers and musicians to build off that structure. However, the rules provide only seven notes and seven combinations of notes that can be played in any key, thereby creating a catch-22 for musicians: While the rules of music theory offer musicians an ability to create, they simultaneously constrict musicians within the parameters of those set, available notes or chords.[136]

B. Pop Music Characteristics

What comprises pop music is difficult to pin down precisely. Pop music essentially encompasses many popular contemporary genres, such as rock, rap, and country.[137] In Simon Frith's essay, *Pop Music*, the British socio-musicologist explained that pop music is "music produced commercially, for profit, as a matter of enterprise not art."[138] While a generalization, pop music tends to be characterized by its simplicity; this quality may be what makes it "accessible to a general public (rather than aimed at elites or dependent on any kind of knowledge or listening skill)."[139] To elucidate this point, Frith explains that pop music "is about giving people what they already know they want rather than pushing up against technological constraints or aesthetic conventions."[140] Ordinary listeners often identify with pop music, which usually "express[es] commonplace feelings—love, loss, jealousy," instead of prompting listeners to realize "individual visions" or to "see the world in new ways."[141]

Pop music can be characterized as primarily vocal, and the themes of its songs are normally recognizable and easily understood.[142] It can be argued then that pop music's main appeals derives from its repetitive form, loud dynamics, and accented rhythm.[143] Most pop songs are short—

136. Nicholas Booth, Note, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 116 (2016).

137. SIMON FRITH, *Pop Music*, *in* THE CAMBRIDGE COMPANION TO POP & ROCK MUSIC 93, 94 (Simon Frith, Will Straw & John Street eds., 2001); Jamie Walsh, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DEPAUL J. ART, TECH, & INTELL. PROP. L. 261, 275 (2006).

138. Frith, *supra* note 137, at 94–95; Walsh, *supra* note 137, at 275.

139. Frith, *supra* note 137, at 94; *see* Walsh, *supra* note 137, at 275.

140. Frith, *supra* note 137, at 96; *see* Walsh, *supra* note 137, at 275.

141. Frith, *supra* note 137, at 96; Walsh, *supra* note 137, at 275–76.

142. *See* MARIANNE WILLIAMS TOBIAS, CLASSICAL MUSIC WITHOUT FEAR: A GUIDE FOR GENERAL AUDIENCES 16 (2003).

143. *Id.*

averaging less than three minutes[144]—and the songs are characterized by a single melody with simple harmony accompaniment.[145] Though pop music may add a distinct rock beat or clever rhythmic variances, such as syncopation or jazz harmonies, it exists for a short lifespan and thus the appeal is normally "immediately ascertainable."[146] Because pop music is arguably a commodity, at times little variance between songs of the same genre exist.[147] Once a record company finds either a formula or a pattern that makes money in the market, it usually continues to utilize this technique repeatedly because music is profit-oriented.[148]

In today's music industry, much of pop music can be said to incorporate some spectacle, whether it be theatrical staging, backup singers, dance steps, or stage effects involving lighting or video projections.[149] For instance, the late Michael Jackson incorporated a number of these elements into his videos.[150] Similarly, Lady Gaga's 2009 album *The Fame Monster* focused on visual aspects in her music videos through outrageous costumes and entertaining choreography.[151] Yet, Lady Gaga recently downplayed her normal visual spectacle with her 2016 album, *Joanne*, which focused instead on emotionally connecting with audiences through lyrics that highlight her vocal feats.[152] As artists continue to remove these extra productional variables, individuals will likely be able to more easily discern whether a song or other piece of music closely resembles an earlier work. Therefore, the central, musical characteristics of pop music remain even more significant. There are no shortages of pop stars in this day and age, but as their latest albums feature

144. B. LEE COOPER, POPULAR MUSIC PERSPECTIVES: IDEAS, THEMES, AND PATTERNS IN CONTEMPORARY LYRICS 4 (1991).

145. TOBIAS, *supra* note 142, at 16.

146. *See* Walsh, *supra* note 137, at 276.

147. *See* COOPER, *supra* note 144, at 4.

148. Walsh, *supra* note 137, at 276.

149. Livingston & Urbinato, *supra* note 3, at 253; *see also* Richard Middleton & Peter Manuel, *Popular Music*, GROVE MUSIC ONLINE (Jan. 13, 2015), https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000043179 [https://perma.cc/F9W5-GWNN].

150. *See* Michael Jackson, *Thriller*, YOUTUBE (Oct. 2, 2009), https://www.youtube.com/watch?v=sOnqjkJTMaA [https://perma.cc/U93T-N9S3]; Michael Jackson, *Michael Jackson Super Bowl 1993 Performance HD*, YOUTUBE (June 19, 2019), https://www.youtube.com/watch?v=nBkNQZ-6QHg [https://perma.cc/F2BS-QC79].

151. *See* Lisa Robinson, *In Lady Gaga's Wake*, VANITY FAIR, Jan. 2012, at 50 (describing Lady Gaga's evolution from struggling singer/songwriter to international style icon and mesmerizing performer).

152. *See generally* Hannah Ewens, *The 'Joanne' Album Has Forever Changed Lady Gaga's Live Show*, NOISEY: MUSIC BY VICE (Jan. 23, 2018), https://www.vice.com/en_us/article/xw43k3/lady-gaga-joanne-european-tour-2018-milan-review [https://perma.cc/HBV3-WK5V].

simpler, stripped-back songs[153] that focus less on production value and instead highlight the musician's craftmanship or lyricism, possible copyright infringement becomes more apparent.

Because pop music generally employs simple progressions that are easily digestible by the listener, the most common chord progressions, resolutions of dissonances, and melodic and harmonic shapes tend to be employed to create a "hit."[154] If pop music's main goal is to maximize profits, then it must appeal to the largest possible population to do so. A potential way to accomplish this goal is through following a well-known chord pattern based on the tonic (I), leading to the subdominant (IV), creating tension with the dominant (V), and finally resolving the tension back to the tonic.[155] Thus, the importance of music theory should not be overlooked as it defines the available building blocks that can lead to music infringement lawsuits.

Pop music songs may arguably be prone to more music copyright infringement: pop music musicians are influenced by previous artists; artists in pop music tend to utilize the same formula; and the lucrative music business itself lends itself to high-profile litigation with large monetary damages. As a result, the "restrictions of Western tonal music, the relative simplicity of contemporary popular works, the commonality within genres, the rich shared musical heritage of most Western composers, and the vast and pervasive daily exposure to music experienced" can unsurprisingly result in the creation of two very similar works composed by two different composers.[156]

III. *Skidmore v. Led Zeppelin*

Skidmore v. Led Zeppelin was first filed in the Central District of California, and the defendants in this case, i.e., the band Led Zeppelin, won in a jury trial.[157] Before addressing the facts of this case, it is important to provide the reader with a brief explanation of its complicated procedural history. Skidmore, the plaintiff, appealed to the Ninth Circuit

153. *See* Brennan Carley, *Today's Top Pop Producers Look Ahead to the Future of Music*, SPIN (Oct. 23, 2015), https://www.spin.com/featured/future-of-music-producers-pop-music-diplo-stargate-ryan-tedder-benny-blanco/ [https://perma.cc/M9YR-8VS7]. Famous pop producer Diplo notes in his interview that he believes music will be "more stripped down[;] [w]e're already seeing that . . . . Now we're at a place with simple, clever songs, and engineering and sounds being reinterpreted in a clever way." *Id.*

154. *See Chord Progression List - Extensive*, STORY COMPOSITIONS, http://www.storycompositions.com/2008/06/common-chord-progressions.html [https://perma.cc/6RX3-L4UD].

155. *See id.*

156. Livingston & Urbinato, *supra* note 3, at 282.

157. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 453, *reh'g denied*, 141 S. Ct. 926 (2020).

Court of Appeals, which, in its three-panel decision, found for the plaintiffs and ordered a new trial.[158] The defendants appealed for a rehearing en banc, meaning the case was heard before eleven Ninth Circuit.[159] The Ninth Circuit en banc reinstated the jury verdict and found for the defendants.[160] The following section will address the strengths and weaknesses of the en banc decision in addition to the facts leading up to the multiple appeals.

In 1967, Spirit released its first album, which included the song "Taurus."[161] A year later, Spirit toured across the United States to promote their new record.[162] Led Zeppelin performed at the same venue, on the same day as Spirit, at least three times between 1968 and 1970.[163] One of these instances was in 1968, when Led Zeppelin purportedly opened for Spirit in Denver, Colorado.[164] Although surviving members of Led Zeppelin testified that they neither toured nor shared a stage with Spirit members, surviving members of Spirit recalled conversing with the band backstage as well as between both sets and performances.[165]

After the tour, Led Zeppelin returned to England, and began work on one of their most successful albums, *Led Zeppelin IV*.[166] The band recorded "Stairway to Heaven" and released the song as the fourth track on this album.[167] Although the album received rave reviews, some within the music industry noticed similarities between "Stairway to Heaven" and "Taurus."[168] In fact, in 1991, Randy Wolfe, guitarist of Spirit, was asked in an interview for *Time Circle* about the possibility that Led Zeppelin had copied the opening of "Taurus" for "Stairway to Heaven."[169] Wolfe responded by stating, "I'll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit."[170] Wolfe kept this promise and never

158. *See* Jonathan Zavin & Mary Jean Kim, Skidmore v. Led Zeppelin, LOEB & LOEB LLP (Sept. 28, 2018), https://www.loeb.com/en/ insights/publications/2018/10/skidmore-v-led-zeppelin [https://perma.cc/Q78F-LDLK]. *See generally* Skidmore v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018).

159. *See Skidmore*, 952 F.3d 1051.

160. Kyle Petersen & Wook Hwang, Skidmore v. Led Zeppelin, LOEB & LOEB LLP (Mar. 9, 2020), https://www.loeb.com/en/insights/publications/2020/03/skidmore-v-led-zeppelin [https://perma.cc/PEU4-9JRQ].

161. Skidmore v. Led Zeppelin, No. CV 15-3462 RGK (AGRx), 2016 WL 1442461, at *2 (C.D. Cal. Apr. 8, 2016).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at *3.

169. *Id.*

170. *Id.*

filed suit.[171] It was not until 2014 when Michael Skidmore, acting on behalf of Wolfe's trust, brought an action against Led Zeppelin.[172] Skidmore alleged that the opening notes of "Stairway to Heaven" were copied from and are substantially similar to those in "Taurus."[173] The case proceeded to trial in the Central District of California; the jury returned a verdict for the defendants, "finding that the two songs were not substantially similar under the 'extrinsic test,' which objectively compares the protected areas of work."[174]

On appeal, Skidmore challenged: "(1) various jury instructions, (2) the district court's ruling that substantial similarity must be proven using a copyright registration deposit copy, (3) the district court's ruling that sound recordings could not be played to prove the defendants' access to the song 'Taurus,' and (4) certain other evidentiary issues."[175] The Ninth Circuit explained that because ownership of the copyright of "Taurus" was not contested, the analysis turned on the second element of infringement, [176] i.e., whether the defendants copied protected aspects of the song.[177]

In the initial panel decision opinion of the case, the Ninth Circuit concluded that the district court erred by failing to instruct the jury that selection and arrangement of unprotectable musical elements are, in fact, protectable.[178] The court conceded that, in a musical context, the extrinsic prong is difficult to administer; although "individual elements of a song, such as notes or a scale, may not be protectable," different combinations of elements may be protectable.[179] The appellate court held that the district court's failure to instruct the jury was especially problematic in this case because Skidmore's expert testified that there was "extrinsic substantial similarity based on the combination of five elements."[180]

Regarding the jury instructions on originality, the Ninth Circuit agreed with Skidmore and held that the district court's instructions opposed the Ninth Circuit's 2004 *Swirsky v. Mariah Carey* opinion,

171. *Id.*

172. *Id.*

173. Sarah Bro, *Ramble on Back to Court: Led Zeppelin Can't Shake "Stairway" Infringement Claims*, VIII NAT'L L. REV., NO. 333, Nov. 29, 2018, https://www.natlawreview.com/article/ramble-back-to-court-led-zeppelin-can-t-shake-stairway-infringement-claims [https://perma.cc/F9L3-ZVLX].

174. *Id.*

175. *Id.*; *see also* Skidmore v. Led Zeppelin, 905 F.3d 1116, 1124 (9th Cir. 2018).

176. As previously explained, when there is no direct evidence of copying, the plaintiff can attempt to establish, by circumstantial proof, that the defendant had access to the plaintiff's work and that the two works share substantial similarities with respect to aspects of the plaintiff's work that are original and therefore protected by copyright.

177. *Skidmore*, 905 F.3d at 1125.

178. *Id.* at 1126.

179. *Id.*

180. *Id.*

"which held that a limited number of musical notes can be protected by copyright."[181] The court determined that this error was not harmless because it "undercut testimony by the plaintiff's expert that Led Zeppelin copied a chromatic scale that had been used in an original manner" by Spirit.[182] The court noted that "nothing else in the instructions alerted the jury that the selection and arrangement of unprotectable elements could be copyrightable."[183] Although the rudimentary elements of music are not copyrightable[184] and single musical notes lack copyright protection,[185] the Ninth Circuit recognized in *Swirsky* that "an arrangement of a limited number of notes can garner copyright protection."[186] Therefore, the court ultimately concluded that the seven note guitar line that opens "Taurus" could be sufficient to garner copyright protection.[187]

Additionally, the Ninth Circuit determined in its initial opinion that the district court erred in its formulation of the jury instructions regarding originality. Jury Instruction No. 16 stated that "common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes" are not protected.[188] However, the court determined that this instruction ran contrary to the aforementioned conclusion in *Swirsky*.[189] The Ninth Circuit stated that this jury instruction "could have led the jury to believe that even if a series of three notes or a descending chromatic scale were used in combination with other elements in an original manner, it would not warrant copyright protection," and consequently the jury could have reached a different verdict had the instruction been properly instructed.[190]

IV. *Skidmore* En Banc Decision and Its Implications

On March 9, 2020, the Ninth Circuit, sitting en banc, published an entirely separate opinion on *Skidmore v. Led Zeppelin*, upholding the district court jury verdict that the song "Stairway to Heaven" did not infringe on the 1968 song "Taurus."[191] This decision was vital to the future of pop music in copyright infringement cases because it finally offered

181. Bro, *supra* note 173.

182. *Id.*; *see supra* Section III.B for a discussion and definition of chromaticism.

183. *Skidmore*, 905 F.3d at 1127.

184. *See* Smith v. Jackson, 84 F.3d 1213, 1216 n.3 (9th Cir. 1996) (explaining that "common or trite" musical elements are not protected); *see also* Satava v. Lowry, 323 F. 3d 805, 810 (9th Cir. 2003) (holding that expressions that are "common to a subject matter or medium are not protectable").

185. *See* Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004).

186. *Id.*

187. *Skidmore*, 905 F.3d at 1128.

188. *Id.* at 1128–29.

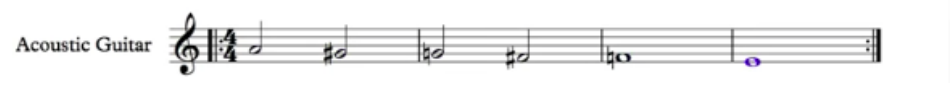
189. *See Swirsky*, 376 F.3d at 851.

190. *Skidmore*, 905 F.3d at 1129.

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

guidance as to what elements of pop music can be copyrighted. This part of the Note critiques the Ninth Circuit's three-panel decision, highlighting the complications and dangerous precedent it would have set if the en banc court did not reverse the appellate decision. This part also addresses the strengths and weaknesses of the en banc ruling, commenting as to whether the court finally—for lack of a better phrase—got it right.

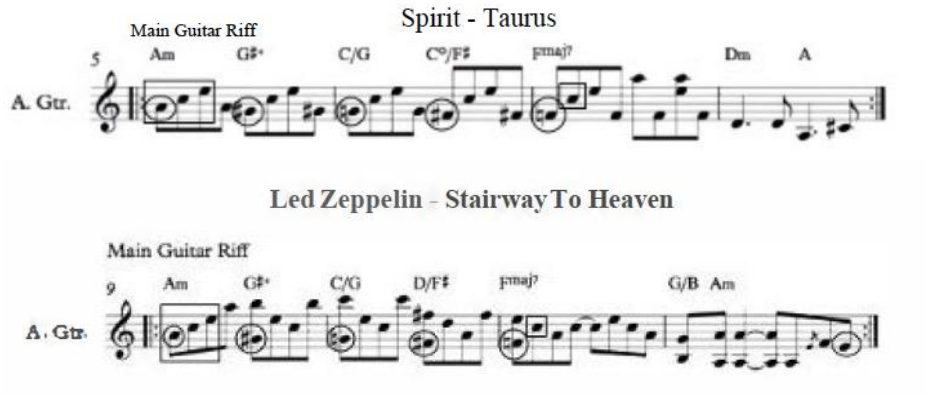
During the rehearing en banc, the defendants argued that the panel was incorrect when it held that the district court erred by failing to give a selection and arrangement instruction. The ruling of the three-panel Ninth Circuit decision effectively expanded the basis for finding copyright infringement in music cases. The defendant correctly emphasized that the purported selection and arrangement presented by Spirit should not have been afforded copyright protection; instead, the alleged musical infringement was simply a random, unprotected combination of elements.[192] The crux of the infringement allegation was a descending minor scale chromatic bass line. Without getting too entangled into a music theory analysis, both "Taurus" and "Stairway to Heaven" use this chromatic bass line ending on the fifth note, instead of the sixth note as indicated below.[193]



192. Brief of Amici Curiae: 123 Songwriters, Composers, Musicians, and Producers, Along with Nsai and Sona, In Support of Defendants for Panel Rehearing and Rehearing en banc at 2, Skidmore v. Led Zeppelin, 905 F.3d 1116 (2018) (No. 16-56287).

193. Eric Brook, *Musical Analysis of Led Zeppelin's "Stairway to Heaven" Copyright Infringement Suit*, YOUTUBE (June 20, 2016), https://www.youtube.com/watch?v=2UNbXL27cwc [https://perma.cc/8RBF-8M9P].

To illustrate this descending bass line in both songs, below is a musical written notation of both songs side-by-side for comparison. The circles notated on both photos below show the use of the above-mentioned chromatic bass line. It is true that both songs utilize the same set of notes depicted in the first diagram.



As the diagrams demonstrate, both songs share the same four common chords, which are listed above the staff: A minor chord, G# Major seventh chord, C Major seventh chord with G in the bass, and a F Major seventh chord. However, the cadence (or rather the conclusion of the phrase), is different in both: a D Minor chord to an A Major chord concludes "Taurus," whereas as a G Major chord with B in the bass line to an A Minor chord concludes "Stairway to Heaven."

In its three-panel opinion in *Skidmore*, the court incorrectly held that these trivial and commonplace similarities between two songs could constitute the basis for finding of infringement. But not all similarities amount to infringement. For instance, common phrases or short lyrics are not copyrightable.[194] In *Skidmore*, only four notes are identical in comparison to the two riffs: the first three notes in each diagram (shown in the first box) and the C in the third bar (also boxed). Although the first three notes have the same rhythm, the melody departs in each song with the next note, creating different arrangements that ultimately should not constitute copyrightable material.

194. *See* Prunté v. Universal Music Grp., Inc., 699 F. Supp. 2d 15 (D.C. 2010) (holding the use of cliché short phrases in a hip-hop song treating a very common subject cannot be said to create a distinctive musical effect).

The importance of this in-depth musical analysis should not be overlooked. The Ninth Circuit's original holding in this case was in direct contravention to established copyright law: rudimentary building blocks of compositions cannot be protected.[195] Accordingly, a moving chromatic bass line, which is arguably a common characteristic utilized in a variety of pop music songs,[196] should not have been afforded the copyright protection it received by the lower court in this case. Even if most of the previous sentences seemed like gibberish to a reader, the same basic conclusion holds true: there are some elements within pop music that cannot and should not be copyrightable.

In its en banc ruling, the Ninth Circuit corrected what could have been a devastating precedent for music copyright cases. The court explained that "Jury Instruction No. 16 correctly listed non-protectable musical building blocks that no individual may own."[197] In fact, even Skidmore's own expert "agreed [that] musical concepts like the minor chromatic [bass line] and the associated chords have been 'used in music for quite a long time' as 'building blocks.'"[198] In making this determination, the Ninth Circuit relied on past precedent and emphasized that never before have the courts extended copyright protection to just a few notes.[199] This holding is in accord with the Copyright Office, which has consistently classified a "'musical phrase consisting of three notes' as de minimis" and therefore not meeting the modicum of creativity requirement under *Feist.*[200]

The melodies of songs have always been afforded copyright protection.[201] Courts applying the Act protected the series of pitches and

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195. *See generally* Alex Ross, *The Unoriginal Originality of Led Zeppelin*, NEW YORKER (Apr. 14, 2016), https://www.newyorker.com/culture/cultural-comment/the-unoriginal-originality-of-led-zeppelin [https://perma.cc/SK6R-LCJS].

196. The chromatic bass line pattern is also known as the *basso lamento*: a ground bass line that falls step by step chromatically from the tonic note to the dominant note. It is used in pop music of the twentieth century, particularly in songwriting of the 1960s and 1970s. Song examples include: "'Chim Chim Cher-ee' from *Mary Poppins*; the Beatles' 'Michelle'; The Eagles' 'Hotel California'; and Bob Dylan's 'Ballad of a Thin Man.'" *See id.*

197. Skidmore v. Zeppelin, 952 F.3d 1051, 1070 (9th Cir. 2020).

198. *Id.*

199. *Id.* at 1071.

200. *Id.*; *see also* Compendium of U.S Copyright Office Practices, § 313.4(B) (3d ed. 2017). Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (standing for the principal that originality as determined by copyright statute does not require novelty but does require at least some minimal degree of creativity).

201. *See* Brief of Amici Curiae of 19 Intellectual Property Professors in Support of Petitioner Led Zeppelin at 12, Skidmore v. Led Zeppelin, 905 F.3d 1116 (2018) (No. 16-56287). ("Since Congress first extended copyright protection to music in 1831, the copyright in instrumental portions of a song has almost always [exclusively covered the melody].."); *see also* Joseph P. Fishman, *Music As a Matter of Law*, 131 HARV. L. REV. 1861, 1873–83 (2018) (reviewing the history of music infringement cases before the 1976 Act's passage).

corresponding duration, otherwise known as the tune. By contrast, the Act did *not* afford the protection Skidmore sought from the court: repeated eight-note beats or the chords associated with the chromatic bassline. Though in its earlier opinion the Ninth Circuit focused on the comment in *Swirsky*, which stated that unlawful appropriation could occur through a combination of individually unprotected elements such as "chord progression, key, tempo, rhythm, and genre," music cases have not historically worked this way nor should they.[202] As a result, the Ninth Circuit appropriately held in its en banc decision that "the district court did not commit a reversible error by instructing the jury that a limited set of a useful three-note sequence and other common musical elements were not protectable."[203]

This case ultimately changed music copyright law for the better because it reemphasized a narrowly tailored analysis between works and specified noncopyrightable elements, which in turn provides clarity for future music copyright cases. The precedent set by this decision effectively allows courts to focus on a melodic inquiry through a note-by-note comparison between the two works. This process effectively permits a listener to analyze each pop song in real time, affording the listener the opportunity to differentiate between the two works automatically. Through this tailored analysis, courts will focus their attention on the distinct melodies of two songs; the analysis hinges on whether the two works share minute, inconsequential similar melodies or whether the works are so similar that a lay listener could easily determine that the melodies are the same. Thus, the *Skidmore* holding reinforces an inquiry that was once customarily applied to music copyright infringement cases.[204]

Additionally, this en banc decision clarified the scope of copyrightability under the Copyright Act of 1909.[205] The Act explicitly grants the copyright owner of a musical work the exclusive right "to make any arrangement or setting of it *or of the melody of it* in any system of notation or any form of record."[206] Whether a musical element is protectable is a question of law.[207] Given that now certain elements, such

202. Swirsky v. Carey, 376 F. 3d 841, 848 (9th Cir. 2004).

203. *Skidmore*, 952 F.3d at 1071.

204. *See* N. Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (holding "neither rhythm nor harmony can in itself be the subject of copyright" and "[i]t is in the melody of the composition—or the arrangement of notes or tones that originality must be found").

205. *See generally* Skidmore v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2020).

206. Copyright Act of 1909, Pub. L. No. 60–349, § 1(e) (repealed and superseded by the Copyright Act of 1976, Pub. L. No. 94-553) (emphasis added).

207. Newton v. Diamond, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g*, 388 F.3d 1189, *and aff'd*, 388 F.3d 1189 (9th Cir. 2004).

as bass lines or common chord progressions, will not be afforded a copyright protection, melody can be singled out from the overall work for the purpose of defining the owner's reproduction rights. As such, the en banc hearing of *Skidmore* clarified the test for infringement and non-protectable elements of music, offering a welcomed sigh of relief to the future of music copyright cases.

Copyright law has often withheld protection from creative expression that could, in theory, be protected.[208] For instance, the Copyright Office will not register certain architectural structures, such as bridges, cloverleafs, or dams, even though they may contain architectural creativity.[209] Likewise, under the 1909 Act, choreographic compositions could only be protected as "dramatic works" if they represented or told a narrative story.[210] Congress deliberately chose not to protect all aspects of choreographic creativity, excluding protection for social dance steps and ballroom dances.[211]

The en banc holding of *Skidmore* follows this logic, eliminating protection for certain aspects of pop music that are inherent within this umbrella category. The once ill-defined range of infringing similarities is no more. Although Skidmore's lawyer, Francis Malofiy, thought the case was a "big win for the multi-billion-dollar industry against the creatives,"[212] one major achievement cannot be overlooked: *Skidmore*'s new holding clarified the scope of copyright protection. Courts are now not only better equipped to handle music infringement cases, but will also produce more consistent holdings, allowing both attorneys and musicians to have a better understanding and clearer guidelines as to what elements constitute copyright infringement. Had Skidmore prevailed in this decision, lawsuits within the music industry would have likely increased because the lower the bar for copyright infringement in music and increase the risk of artists getting sued (especially relating to popular music, which

208. *See* Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1236 (2016) (explaining that historically "Congress has not employed its full constitutional power when granting copyright protection").

209. *See* 37 C.F.R. § 202.11 (2019); *see also* Architectural Works Copyright Protection Act, Pub. L. No 101-650, 104 Stat. 5089, 5133 (1990). The Copyright Office may register a claim to copyright in an architectural work if the work is a humanly habitable structure that is intended to be both permanent and stationary. Nat'l Med. Care, Inc. v. Espiritu, 284 F. Supp. 2d 424, 435 (S.D.W. Va. 2003) (holding that "copyright protection only extends to as-built structures when the copyright is registered under the AWCPA").

210. Jessica Goudreault, *Copyrighting the Quotidian: An Analysis of Copyright Law for Postmodern Choreographers*, 39 CARDOZO L. REV. 751, 765–66 (2017).

211. *Id.* at 766.

212. Jon Blistein, *A New Led Zeppelin Court Win Over 'Stairway to Heaven' Just Upended a Copyright Precedent*, ROLLING STONE (Mar. 9, 2020), https://www.rollingstone.com/music/music-news/led-zeppelin-stairway-to-heaven-copyright-infringement-ruling-appeal-964530/ [https://perma.cc/DU5A-KQYV].

tends to be formulaic and highly profitable).[213] Instead, the en banc decision reduced the potential for increased lawsuits and created a lasting, positive impact for the future of pop music within the court system.

CONCLUSION

The importance of *Skidmore* should not go unnoticed. The court had the opportunity to both stifle the creativity of present and future songwriters and adversely impact the entire music industry. Thankfully, the Ninth Circuit chose to avoid the overbreadth and dangerous consequences of the earlier three-panel decision by rejecting Skidmore's arguments and retaining the traditional approach to copyright infringement based off melodic structure. As a result, the now-established precedent of the en banc *Skidmore* opinion can provide future courts with a test that produces consistent holdings and offers attorneys and musicians an easily understood set of guidelines to assess copyright protections for musical works.

213. *See* Aram Sinnreich, *If Led Zeppelin Goes Down, We All Burn*, THE DAILY BEAST (July 12, 2017), https://www.thedailybeast.com/if-led-zeppelin-goes-down-we-all-burn [https://perma.cc/ZM76-9URX].