

Copyright Developments

Denial of *Certiorari* Leaves in Place Ninth Circuit *En Banc* Decision Finding No Infringement in “Stairway to Heaven”

October 15, 2020

By [Joelle A. Milov](#)

The Supreme Court recently denied a petition for a writ of *certiorari* in a much-watched copyright case, leaving in place a March 2020 Ninth Circuit *en banc* opinion that cleared Led Zeppelin of allegations that the beginning of “Stairway to Heaven” infringed “Taurus,” written by Randy Wolfe and performed by the band Spirit. The Court’s denial leaves undisturbed the Ninth Circuit’s decision concerning the scope of the relevant copyright under the 1909 Copyright Act and the status of the inverse ratio rule in the Ninth Circuit.

First, the Ninth Circuit *en banc* panel found that the deposit copy of “Taurus” controlled the scope of rights at issue in the case. Pursuant to the 1909 Act, Wolfe’s rights in the unpublished composition were limited by the deposit copy, which consisted of one-page of sheet music. Because the deposit copy limited the scope of the work’s copyright, the panel found that the lower court did not err in rejecting Skidmore’s request to play “Taurus” sound recordings “that contain further embellishments” from the deposit copy or to admit the sound recordings for the purpose of analyzing substantial similarity.

Second, the panel abrogated the widely-criticized inverse ratio rule within the Ninth Circuit, joining the majority of circuit courts who have steered clear from adding such a rule to their copyright jurisprudence. Prior to the *Skidmore* decision, the Ninth Circuit adhered, albeit inconsistently, to the inverse ratio rule, whereby a plaintiff who was able to make a strong showing on access could provide a less strong showing on substantial similarity to make out its infringement claim. In *Skidmore*, the Ninth Circuit held that “[b]ecause the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties,” it “abrogated the rule in the Ninth Circuit and overrule[d] [their] prior cases to the contrary.” Accordingly, the *en banc* panel found that the district court did not err in refusing to provide a jury instruction on the inverse ratio rule.

While the long-term impact of the Ninth Circuit *en banc* opinion remains to be seen, it has already affected other copyright cases. In July of 2019, the court in *Griffin v. Sheeran*—a Southern District of New York case involving allegations that pop star Ed Sheeran’s “Thinking Out Loud” infringes the composition “Let’s Get It On”—put off the jury trial until the Ninth Circuit *en banc* panel returned its decision. Following the March 2020 opinion, the *Griffin* court

limited plaintiffs to comparing “Thinking Out Loud” with the deposit copy of the “Let’s Get It On” composition.

The Ninth Circuit’s *en banc* opinion is reported at *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020), and the Supreme Court’s denial of *certiorari* is reported at 2020 U.S. LEXIS 4591 (2020).

Joelle A. Milov



Associate

[Email](#) | 212.790.9247

Joelle has experience in intellectual property and commercial litigations, as well as counseling. She represents clients in a wide range of industries, including those in the music, food, and professional sports industries.