Wednesday, March 11, 2020

On March 9, 2020, the Ninth Circuit issued its en banc decision in the long-running and closely watched copyright case concerning the rock group Led Zeppelin’s 1971 song “Stairway to Heaven.” *Skidmore v. Led Zeppelin et al.*, Case No. 16-56057 (9th Cir. Mar. 9, 2020). A 2014 lawsuit in the Central District of California alleged that “Stairway to Heaven” infringed portions of an instrumental composition titled “Taurus” that had been recorded and released in 1967 by the group Spirit. Capping off several years of uncertainty, the Court’s en banc opinion reversed the previous 2018 ruling of a three-judge panel and reinstated the judgment entered at the district court, where a jury found that “Stairway to Heaven” does not infringe the “Taurus” musical composition.

Among many topics covered, the Ninth Circuit’s en banc opinion contains three sets of holdings that, absent a successful petition to the U.S. Supreme Court, should have continuing implications for copyright litigation in the Ninth Circuit. These holdings may be summarized as follows:

- **End of the Inverse-Ratio Rule.** In its most dramatic holding, the en banc Court overruled longstanding Ninth Circuit case law applying the so-called “inverse-ratio rule” when assessing whether an allegedly infringing work is “substantially similar” to the plaintiff’s work. Always controversial, the
“inverse ratio rule” has given copyright plaintiffs in this Circuit (as well as the Sixth Circuit) a “lower standard of proof for substantial similarity” when there is proof of a “high degree of access.” The trial jury had found that Led Zeppelin band members Jimmy Page and Robert Plant did have access to “Taurus.” (Page even testified he owned a copy of the album containing it.) Plaintiff (trustee for the estate of the “Taurus” composition’s author) argued that the district court erred by not issuing a jury instruction on the inverse-ratio rule. En banc, the Ninth Circuit took the opportunity to abrogate the rule as ambiguous and illogical, holding it unjustifiably lowers the bar for proving infringement of works that are highly accessible. Thus, a plaintiff in the Ninth Circuit can no longer use strong evidence of access to bolster an otherwise tenuous claim of substantial similarity.

- **Originality and “Selection and Arrangement” Claims.** Reversing the 2018 panel, the en banc Court also rejected claims that the trial court’s jury instructions had been inadequate and prejudicial, including instructions describing various “common musical elements” (such as arpeggios, scales, or three-note sequences) as not protectable. Furthermore, the Court held that the trial court did not err by omitting a jury instruction relating to copyright protection afforded to original “selection and arrangements” of otherwise unprotected elements. Here, the Court largely sidestepped the ultimate question by ruling that the plaintiff had (1) failed to argue any actual theory of selection and arrangement to the jury, and (2) failed to timely preserve an objection when the court issued its jury instructions without inclusion of such an instruction. Because of this, any review of the court’s omission was elevated to a review for “plain error,” a standard plaintiff simply could not meet. Needless to say, the Court’s analysis and holding on these topics should offer guidance to future copyright plaintiffs asserting claims or going to trial in the Ninth Circuit.

- **1909 vs. 1976, and Musical Compositions vs. Recordings.** The Led Zeppelin ruling contributes to a growing corpus of Ninth Circuit case law that involves the complex interplay of sound recordings and musical compositions under the 1909 and 1976 Copyright Acts. Ruling on the issue for the first time, the Ninth Circuit held that the scope of the musical composition “Taurus” – a work created under the former 1909 Copyright Act – was limited to the musical notation actually deposited with the Copyright Office in 1967. On this basis, the Court found it was not error for the district court to restrict the jury’s consideration only to the “Taurus” musical composition as reflected in the deposit copy, and to deny consideration of the “Taurus” sound recording as evidence either of access or of substantial similarity. In this manner, the ruling solidified some of the challenges facing plaintiffs in copyright claims involving musical compositions, particularly those that are governed by the 1909 Act.

Unless Plaintiff can convince the United States Supreme Court to grant a petition for certiorari (which must be filed within 90 days), this decision will have a significant impact on copyright infringement claims litigated in the Ninth Circuit.

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