

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL SKIDMORE, as Trustee for
the Randy Craig Wolfe Trust,
Plaintiff-Appellant,

v.

LED ZEPPELIN; JAMES PATRICK
PAGE; ROBERT ANTHONY PLANT;
JOHN PAUL JONES; SUPER HYPE
PUBLISHING, INC.; WARNER MUSIC
GROUP CORPORATION;
WARNER/CHAPPELL MUSIC, INC.;
ATLANTIC RECORDING
CORPORATION; RHINO
ENTERTAINMENT COMPANY,
Defendants-Appellees.

No. 16-56057

D.C. No.
2:15-cv-03462-
RGK-AGR

MICHAEL SKIDMORE, as Trustee for
the Randy Craig Wolfe Trust,
Plaintiff-Appellee,

v.

WARNER/CHAPPELL MUSIC, INC.,
Defendant-Appellant,

No. 16-56287

D.C. No.
2:15-cv-03462-
RGK-AGR

OPINION

and

LED ZEPPELIN; JAMES PATRICK
PAGE; ROBERT ANTHONY PLANT;
JOHN PAUL JONES; SUPER HYPE
PUBLISHING, INC.; WARNER MUSIC
GROUP CORPORATION, ATLANTIC
RECORDING CORPORATION; RHINO
ENTERTAINMENT COMPANY,
Defendants.

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted En Banc September 23, 2019
San Francisco, California

Filed March 9, 2020

Before: Sidney R. Thomas, Chief Judge, and M. Margaret
McKeown, William A. Fletcher, Johnnie B. Rawlinson,
Carlos T. Bea, Sandra S. Ikuta, Mary H. Murguia,
Jacqueline H. Nguyen, Paul J. Watford, Andrew D.
Hurwitz and Bridget S. Bade, Circuit Judges.

Opinion by Judge McKeown;
Concurrence by Judge Watford;
Partial Concurrence and Partial Dissent by Judge Ikuta

SUMMARY*

Copyright

The en banc court affirmed the district court's judgment after a jury trial in favor of Led Zeppelin in a copyright action alleging that the opening notes of *Stairway to Heaven* infringed *Taurus*, a song written by guitarist Randy Wolfe and performed by his band Spirit.

In Part I, the en banc court held that the 1909 Copyright Act, which does not protect sound recordings, rather than the 1976 Copyright Act, controlled its analysis because the copyright at issue was for the unpublished musical composition of *Taurus*, which was registered in 1967. The scope of the copyright in the unpublished work was defined by the deposit copy, which in the case of *Taurus* consisted of only one page of music. Accordingly, it was not error for the district court to decline plaintiff's request to play sound recordings of the *Taurus* performance that contained further embellishments or to admit the recordings on the issue of substantial similarity.

In Part II, the en banc court held that proof of copyright infringement required plaintiff to show: (1) that he owned a valid copyright in *Taurus*; and (2) that Led Zeppelin copied protected aspects of the work. The en banc court explained that the second prong contains two separate components: "copying" and "unlawful appropriation." A plaintiff may prove copying circumstantially by showing access and

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

striking similarity. The hallmark of “unlawful appropriation” is that the works share substantial similarities. Both an extrinsic and an intrinsic test must be satisfied for the works to be deemed substantially similar.

In Part III, the en banc court addressed the district court’s exclusion of sound recordings of *Taurus* as relevant to prove access but too prejudicial because of the risk that the jury would confuse access with substantial similarity. The en banc court concluded that this evidentiary issue was moot because the jury found access.

In Part IV, the en banc court addressed three jury instruction issues: (1) the failure to give an inverse ratio rule instruction; (2) the sufficiency of the court’s originality instructions; and (3) the failure to give a selection and arrangement instruction. In Part IV.A, joining the majority of circuits, the en banc court rejected the inverse ratio rule, which requires a lower standard of proof of substantial similarity when a high degree of access is shown. The en banc court overruled circuit precedent to the contrary. In Part IV.B, the en banc court held that the district court properly instructed the jury on originality. In Part IV.C.1, the en banc court concluded that the failure to give a selection and arrangement instruction would be reviewed for plain error. In Part IV.C.2, the en banc court held that the district court did not commit plain error. In Part IV.C.3, the en banc court held that the district court did not commit any error because plaintiff did not present a selection and arrangement theory at trial. In Part IV.C.4, the en banc court held that, even though the district court did not instruct the jury on selection and arrangement, its instructions, as a whole, fairly and adequately covered plaintiff’s argument for extrinsic similarity between *Taurus* and *Stairway to Heaven*.

In Part V, the en banc court held that the district court did not err in setting trial time limits, responding to a jury question, admitting expert testimony, or declining to award attorneys' fees.

Concurring, Judge Watford wrote that he joined the court's opinion, with the exception of section IV.C, because he saw no reason to decide whether plaintiff adequately preserved his request for a selection-and-arrangement instruction when, even if such an instruction had been given, no reasonable jury could have found infringement.

Concurring in part and dissenting in part, Judge Ikuta, joined by Judge Bea, wrote that she dissented from Part IV(B) to (C) because, without plaintiff's requested instruction on selection and arrangement, the jury was deprived of the opportunity to consider plaintiff's central theory of the case, and the instructions given to the jury were misleading.

COUNSEL

Francis Malofiy (argued) and Alfred Joseph Fluehr, Francis Alexander LLC, Media, Pennsylvania, for Plaintiff-Appellant.

Peter J. Anderson (argued), Law Offices of Peter J. Anderson, Los Angeles, California; Helene M. Freeman, Phillips Nizer LLP, New York, New York; for Defendants-Appellees.

Edwin F. McPherson and Tracy B. Rane, McPherson Rane LLP, Los Angeles, California, for Amici Curiae 123 Songwriters, Composers, Musicians, and Producers;

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.