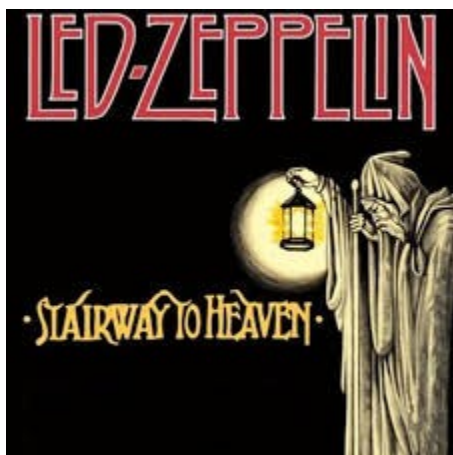


Led Zeppelin Reaches Heaven in Golden State Court: 9th Circuit Reverses Prior Decision in En Banc Ruling

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by Brad Hattenbach



We have previously written several posts about this copyright dispute over the signature opening guitar riff in the classic Led Zeppelin song "Stairway to Heaven." You may recall, the estate of musician Randy Craig Wolfe, guitarist for the band Spirit, which reached some popularity in the 1960's-70's, filed suit against Led Zeppelin claiming that Jimmy Page copied the Stairway riff from a Spirit instrumental recorded several years prior called Taurus. (Therefore, we are unable to juxtapose lyrics from both songs in pithy verse for this post.) In a rare turnabout in view of recent music copyright

infringement rulings, the piper apparently led the full 9th Circuit to reason, overruling the prior appellate panel decision, which had reversed the jury finding of no infringement. "Sometimes all of our [or perhaps the panel's] thoughts are misgiving."

Our first post covered the jury verdict in favor of the heavy metal balloon band. Our second post addressed the rationale for denial of attorney fees to the victorious defendants after trial. And, while I am an ardent music lover, I am not musically educated like my virtuoso colleague who deftly dissected the musical similarity issues in our most recent post. Thus, this final post (hopefully) in the series will comment on the issue of laches (or lack thereof) and address the en banc Court's reversal of the "inverse ratio rule," a long-standing legal doctrine in the "substantial similarity" analysis that is the basis for a determination of copyright infringement.

Why, and how, you might ask, was this action brought almost 50 years after both of the songs in question were written? Mr. Wolfe (nicknamed "Randy California" by none other than Jimmi Hendrix) apparently was unconcerned by any similarity between Stairway and Taurus. However, a number of writers commented on the similarity over the years

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and particularly in obituaries upon his untimely death in a tragic drowning accident in 1997. Normally, the legal doctrine of laches, which precludes redress after undue delay in taking action and resulting prejudice to the opposing party, would have preclude an infringement suit so long after the infringing act first occurred. However, a U.S. Supreme Court decision in 2014 held that laches is not a defense in copyright cases where the copyright infringement is ongoing. With the ubiquitous airplay of Stairway to Heaven on classic rock radio, much less continuing album sales of Led Zeppelin IV, it is hard to argue that any alleged infringement had stopped. Soon after the laches decision, a trustee of a trust set up by the estate of Mr. Wolfe opportunistically filed suit.

With the laches hurdle out of the way, the trust, as owner of a valid copyright, had to prove the defendants “copied protected aspects of the work” to achieve a judgment of copyright infringement. The 9th Circuit test for “copying” requires a determination of (a) “copying” [Hmm, you say, isn’t that redundant?]; and (b) “unlawful appropriation” [And where does this second part spring from?]. In the absence of explicit evidence of copying of a work, such can be proven by circumstantial evidence of access to the prior work and similarities in the works. Interestingly, Led Zeppelin opened for Spirit at a gig in Denver in 1968 and the bands appeared concurrently at several festival concerts the following year. More significantly, Jimmy Page admitted on the stand to owning the Spirit album on which Taurus was recorded (presumably before Stairway was written). Access proven; similarity for purposes of this part of the test was apparently not considered in question.

With regard to the second component of the paramount copying test, the 9th Circuit proceeds to explain “the hallmark of “unlawful appropriation” is that the works share *substantial* similarities,” *i.e.*, something more than the similarity required for the subordinate copying test. In this case, the jury rendered a verdict on the facts presented at trial that the two songs were not “substantially similar.” It is extremely difficult for a court to overrule a factual determination by a jury. However, the plaintiff argued (among other things) that the trial judge committed error by not instructing the jury on the “inverse ratio” rule. To make things even more circular, the Court describes this rule as follows: “substantial similarity is inextricably linked to the issue of access” [Wait, didn’t they court say earlier that access was a component of a different, first part of the copying test?] and therefore “a lower standard of proof of substantial similarity [is required] when a high degree of access is shown,” *i.e.*, an inverse ratio of proof [But what about it needing to be substantial?]. This logic seems cause for the forests to echo with laughter.

If your head is humming and this makes you wonder, it apparently made the present constitution of the 9th Circuit wonder as well. It noted in its discussion that all but one other circuit had already jettisoned the inverse ratio rule and many had never adopted it. The Court summarily had this to say on the way to its spring clean: “the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties. [W]e take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary.” Substantial similarity between the original and accused works is now the primary factor in determining whether there is an appropriation which is unlawful. [We will leave what constitutes a “lawful” appropriation for another time.]

It is a big step for a court to overrule its own precedent, so this decision is significant in the realm of copyright law, particularly for the Court that has jurisdiction over the highly creative hub of southern California. As a result of this change, plaintiffs may find it harder to prove their case regarding the second prong of substantial similarity. Access to almost all recorded music is ubiquitous in this digitally interconnected age. This fact did not escape notice by the Court, and this may be a more significant influence in its turnabout than expressed in the decision. As Robert Plant wrote, "Yes, there are two paths you can go by, But in the long run, There's still time to change the road you're on." It appears this advice was well received by the full Court.