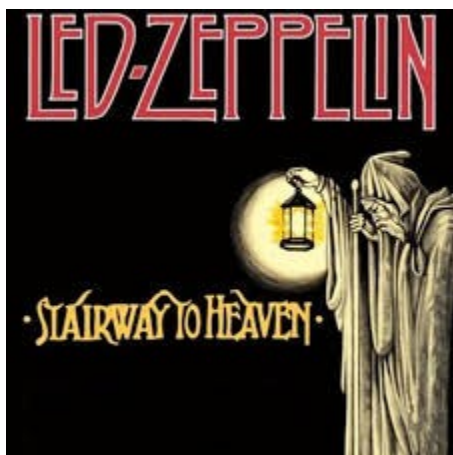


Stairway To Retrial: 9th Circuit Erases Jury Verdict in Favor of Led Zeppelin

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by J. Michael Keyes



As it turns out, all that glitters is not gold. Or at least that's probably how Led Zeppelin feels after the 9th Circuit overturned a shiny jury verdict in favor of the iconic British rock band. The dispute involves a copyright infringement claim that Led Zeppelin and its hirsute founders did not originate the opening guitar riff to "Stairway to Heaven." Instead, or so goes Plaintiff's theory, they copied it from an obscure 1970s song called "Taurus," written by an arguably even more obscure artist known as Randy Craig Wolfe. The case was ultimately tried to a California jury, and included

blockbuster testimony from both Jimmy Page and Robert Plant—two of the rockin' co-founders of Zeppelin. The jury rejected the claim and rendered a verdict that the two songs were not "substantially similar." The plaintiff appealed and many thought (myself included) that the stores would all be closed on appeal. With a word the Plaintiff got what he came for: reversal.

The 9th Circuit overturned the verdict for principally two reasons—both of which relate to the jury instructions on "substantial similarity" and "originality." In connection with the extrinsic test for substantial similarity, the 9th Circuit held the trial court failed to instruct the jury that the "selection and arrangement" of unprotectable musical elements (such as the descending chromatic baseline or the arpeggiated chords on top of that baseline) can be protected for purposes of copyright when they are combined in an original way. Further, the 9th Circuit said the trial court erred when it instructed the jury that "common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes" are not protected by copyright. These errors, says the 9th Circuit, were prejudicial to Plaintiff and can only be rectified with a retrial. Ooh, this makes me wonder.

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While the 9th Circuit has repeatedly embraced the concept that combining unprotectable elements can create a protectable work, this does not seem like a worthy reason for reversal in this case. Why? Because this specific musical motif that forms the basis of the copyright claim (descending chromatic baseline with arpeggiated chords on top of it) has been around for centuries. No offense to Plaintiff (or Messrs. Page and Plant for that matter), but this riff is not original to any of them. An Italian composer named Giovanni Battista Granata uses this same chromatic baseline and arpeggiated melody in a work called “Sonata di Chitarra, e Violino, con il suo Basso Continuo.” It was written back in the 1600s. You can hear it [here](#) (go to the 35 second mark). It might just make you wonder, too, whether Plaintiff has a valid claim for copyright infringement.

And as we wind on down the road back to retrial, the 9th Circuit provided guidance on a key evidentiary issue: whether the actual *sound recording* of Taurus embodies the protected work or the *sheet music* deposited with the Copyright Office. The trial court ruled—and the 9th Circuit affirmed—that because the underlying unpublished musical work was created under the 1909 Copyright, it is the deposit copy and not the sound recording that defines the scope of protection for Plaintiff.

There is definitely a bustle in Led Zeppelin’s hedgerow because of the 9th Circuit's decision to erase the verdict. But hopefully the jury will listen very hard, and the right decision will come to it at last, as Lady Justice is buying a stairway to retrial.