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Good Times Bad Times for the Music Industry: "If the Levee Breaks" It Might Leave Musicians "Dazed and Confused"

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**“GOOD TIMES BAD TIMES” FOR THE MUSIC INDUSTRY:
“IF THE LEVEE BREAKS” IT MIGHT LEAVE MUSICIANS
“DAZED AND CONFUSED”**

BY NATHANIEL J. AJOURI

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I. INTRODUCTION

Jimmy Page and Robert Plant wrote “if you listen very hard, the tune will come to you at last,” but you may not need to listen very hard at all to hear the tolling bells of alleged copyright infringement.¹ Music has a tendency to evolve out of material that has already been written, so it is certainly not surprising that a multitude of songs sound the same.² A study conducted by Matthias Mauch of Queen Mary University in London and Armand Leroi of Imperial College even suggested that the call and response development of music was similar to the way that living species develop.³ As a result of this style of development, the music industry is no stranger to copyright infringement lawsuits.⁴ But how close does one song need to be to another before we as a society feel comfortable asserting that the song was infringed upon, subjecting artists to lengthy legal battles?⁵

If any band has pushed the envelope of copyright infringement it would be Led Zeppelin, a blues-based rock band known for skyrocketing their way to legendary status through the skilful covering of early twentieth-century American music.⁶ However, Led Zeppelin has certainly not done this unscathed by lawsuits; the band has been sued multiple times by various artists, which have predominantly resulted in out-of-court settlements.⁷ However, Led Zeppelin’s most recent scrape with copyright law might have harsh consequences, not only for them, but for the

¹ The notorious and unmistakable lyrics from Led Zeppelin’s most famous track, *Stairway to Heaven*, may be an unfortunate and ironic foreshadow to the songs position today in the legal system.

² Jacob Moore, *57 Songs that Sound the Same*, COMPLEX (Oct. 30, 2017), <http://www.complex.com/music/2013/01/57-songs-that-sound-the-same/>.

³ *First Principals – How Music Evolves*, THE ECONOMIST (Jan. 1, 2018), <https://www.economist.com/news/science-and-technology/21650444-statistical-analysis-music-reveals-truth-about-its-periods>

⁴ Jordan Runtagh, *Songs on Trial: 10 Landmark Music Copyright Cases*, ROLLING STONE (Oct. 30, 2017), <http://www.rollingstone.com/music/lists/songs-on-trial-10-landmark-music-copyright-cases-20160608/the-beach-boys-vs-chuck-berry-1963-20160608>.

⁵ There have been a lot of deviations from what one might have considered to be the norm, highlighting what is truly a legal grey area.

⁶ Gavin Edwards, *Led Zeppelin’s 10 Boldest Rip-Offs*, ROLLING STONE, (Oct. 30, 2017), <http://www.rollingstone.com/music/news/led-zeppelins-10-boldest-rip-offs-20160622>.

⁷ Jeff Strawman, *Roots of Zeppelin* (Oct. 30, 2017), <http://www.led-zeppelin.org/audio-archive/44> (Mentioning that “they were sued by Arc Music in 1972” for infringement of Bring it on Home – Sonny boy Williamson, “in December 1972” for Killin’ Floor – Howlin’ Wolf, and “sued in 1985” for infringement of You Need Love – Willie Dixon).

music industry as a whole.⁸ In this case the band's 1971 release, voted thirty-first best song of all time by Rolling Stone, *Stairway to Heaven*, was in the crosshairs.⁹

For artists like Led Zeppelin, who began their music career in a time where music was often listened to on analog formats such as vinyl records, remastering their work is the only way to keep their work relevant in a quickly changing world of technology. However, current American copyright law creates a barrier and disincentive for artists to do this, having a potentially damaging effect on the preservation and listenability of important aspects of our art and culture. Furthermore, the current trend in the way courts use expert witnesses during copyright infringement trials creates more confusion and potential for error than benefit when the subject of the trial is blues-based music or other genres of music where the transcription of the music is relatively simple. Other methods of adjudicating copyright infringement trials, which have been proven to be ineffective when infringement occurs across genres, will prove their effectiveness in this kind of situation and allow juries to make accurate decisions.

Copyright infringement is determined by the substantial similarity standard. "The determination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law."¹⁰ "Evidence [of copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence – usually evidence of access – from which the trier of facts may reasonably infer copying."¹¹ If there is no similarity between two works, then access does not suffice to prove copyright infringement, if access exists, there must be evidence of copying through similarities.¹² This standard becomes more complex since "[t]he quantitative relation of the similar material to the total material contained in plaintiff's work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity."¹³ But this does not give the decision maker in a copyright infringement

⁸ Led Zeppelin has not yet settled their current lawsuit, that is now on appeal and so it appears that there is more at stake currently than there has been before for the band.

⁹ *500 Greatest Songs of All Time*, ROLLING STONE (2011), <http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/the-rolling-stones-sympathy-for-the-devil-20110525>.

¹⁰ 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A] (Matthew Bender, Rev. Ed. 2017).

¹¹ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

¹² *Id.*

¹³ 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A] [2] [a] (Matthew Bender, Rev. Ed. 2017).

case a clear guide on how to determine if infringement exists.¹⁴ As a result, the amorphous concept of substantial similarity has resulted in inconsistent results and arguably incorrect application.¹⁵

First, an introduction to *Skidmore v. Led Zeppelin*, the circumstances surrounding the formation of the bands, the composition of the two songs, and ultimately the trial is important to understand the context surrounding the following discussion will be explained in Section I. Section II will discuss the important aspect of originality in copyright law and the lack of focus on this aspect in *Skidmore v. Led Zeppelin*. Section III examines the perpetual statute of limitations issue in copyright law and the way in which it stifles the preservation of art and culture. Section IV discusses the “total concept and feel” construct and its place in determining whether or not copyright infringement exists in cases where expert witnesses might cause undue influence on a jury. What follows is a suggestion on how courts should adjudicate copyright infringement matters within certain genres to ensure the preservation of our culture and fair outcomes in jury trials.

A. Background and the Relationship Between Spirit and Led Zeppelin

Led Zeppelin’s recent lawsuit takes us back to the late 1960’s, where two bands formed nearly a year apart from each other. Randy Wolfe, Mark Andes, John Locke, Ed Cassidy, and Jay Ferguson joined to form Spirit in early 1967.¹⁶ Meanwhile, across the Atlantic, Robert Plant, John Paul Jones, and John Bonham created the now well-known band Led Zeppelin in 1968.¹⁷ Shortly after the formation of Spirit in 1967, the band signed its first recording contract with Ode Records.¹⁸ At the same time, Randy Wolfe entered into a songwriter agreement with Hollenbeck Music, which deemed him to be a writer for hire, giving Hollenbeck Music full rights of copyright renewal vested in Hollenbeck.¹⁹

There are competing views as to when and under what circumstances the

¹⁴ *Id.*

¹⁵ Katherine Lippman, *Comment: The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in the U.S. Circuit Courts*, 2013 *Mitch. St. L. Rev.* 513, 522 (2013)

¹⁶ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *2 (C.D. Cal. April 8, 2016).

¹⁷ *Id.* at *2

¹⁸ *Id.*

¹⁹ *Id.*

song *Taurus* was written.²⁰ Led Zeppelin claims that *Taurus* was initially composed and recorded at Ode Records for Spirit's first studio album.²¹ They contend that this would have been after the exclusive songwriter agreement that Randy Wolfe had signed with Hollenbeck Music.²² Led Zeppelin supported this claim with testimony from Spirit band members stating that *Taurus* was recorded for Spirit's initial album after the 1967 recording contract with Ode Records.²³ Led Zeppelin also submitted a copyright registration by Hollenbeck Music registering *Taurus* with the Copyright Office.²⁴

The plaintiff, trustee for the Randy Wolfe trust, claims that in late 1966, before any contracts had been signed, Wolfe wrote *Taurus* for his high school sweetheart who would eventually become his wife.²⁵ This was supported by Spirit band members stating that even though the song was recorded for the 1967 album, it was created before the 1967 agreements.²⁶ Further testimony suggested that Spirit regularly played the song at a club in Hollywood in 1967 before any agreements had been executed.²⁷

In 1968, the following year, Spirit released their second album and launched a tour to promote the record.²⁸ Between 1968 and 1970, Spirit and Led Zeppelin performed at the same venue at least three times.²⁹ Led Zeppelin, in its United States debut, opened for Spirit at a festival in Denver in 1968.³⁰ The bands then both played at the Atlanta International Pop Festival and the Seattle Pop

²⁰ *See id* at *2-4.

²¹ *Id* at *3.

²² *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *3 (C.D. Cal. April 8, 2016).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at *3-4

²⁷ *Id* at *4.

²⁸ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *4 (C.D. Cal. April 8, 2016).

²⁹ *Id.*

³⁰ *Id.*

Festival in 1969.³¹ Both groups also performed at the Texas International Pop Festival in 1969.³² However, they performed on different days and there was no evidence to suggest that the members of Led Zeppelin were present when Spirit played.³³ Furthermore, the members of Spirit did not recall performing *Taurus* at that festival.³⁴

The parties had differing views about the interactions between the bands at these festivals.³⁵ The members of Led Zeppelin do not recall ever sharing a stage with the band, or listening to any of the music that they played at these festivals.³⁶ Conversely, the members of Spirit recalled talking with the members of Led Zeppelin between sets and performing in succession at two of the festivals.³⁷ Wolfe stated in interviews that Led Zeppelin members “used to come up and sit in the front row of all [Spirit’s] shows and [they] became friends.”³⁸ There was very little evidence presented by the plaintiffs to suggest that Led Zeppelin did indeed watch Spirit perform.³⁹

Led Zeppelin testified that they recorded *Stairway to Heaven*, the track that was allegedly copied *Taurus*, between late 1970 and early 1971 entirely in London.⁴⁰ The song was first performed in March 1971 and was released on the band’s fourth album in November 1971.⁴¹

Randy Wolfe never sued Led Zeppelin over *Stairway to Heaven* in his lifetime and was recorded in interviews stating: “...if [Led Zeppelin] wanted to use

³¹ *Id.*

³² *Id.* at *5.

³³ Skidmore v. Led Zeppelin, CV 15-3462 RGK, 2016 WL 1442461, *5 (C.D. Cal. April 8, 2016).

³⁴ *Id.*

³⁵ *Id.* at *4-5.

³⁶ *Id.* at *5.

³⁷ *Id.*

³⁸ Skidmore v. Led Zeppelin, CV 15-3462 RGK, 2016 WL 1442461, *6-7 (C.D. Cal. April 8, 2016).

³⁹ *See id.* at *5-6.

⁴⁰ The claim that the track was written entirely in London was discredited by the Plaintiff by providing deposition testimony from Jimmy Page (guitarist of Led Zeppelin) that stated that he mixed *Stairway to Heaven* at Sunset Studios in Los Angeles, California. *Id.* at *6

⁴¹ *Id.*

[*Taurus*], that's fine" and "[I]'ll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit."⁴² Wolfe died in 1997 and his mother (who also never sued over *Stairway to Heaven*) assumed the role of his trustee from 2002 until her death when plaintiff in this action assumed that role.⁴³ But upon the arrangement of a remaster and re-release of *Stairway to Heaven* by Rhino Entertainment Co., the plaintiff sued Led Zeppelin alleging that *Stairway to Heaven* infringed *Taurus* - forty-three years after the initial release of the song.⁴⁴

B. At Trial

During the trial, both parties offered expert testimony about the similarities of the two songs.⁴⁵ Alexander Stewart, an expert witness for the plaintiff, explained that the only relevant section of *Stairway to Heaven*, for the purposes of the lawsuit, was the beginning two-minute segment of the song.⁴⁶ Mr. Stewart designed a chart that compared the sections of *Taurus* and *Stairway to Heaven* in order to represent their similarities to the court.⁴⁷ Alexander Stewart stated that "[n]early 80% of the

⁴² *Id* at *6-7.

⁴³ *Id.* at *7.

⁴⁴ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *7 (C.D. Cal. April 8, 2016).

⁴⁵ *Id* at *7-12.

⁴⁶ *Id* at *8.

⁴⁷

<i>Taurus</i>	<i>Stairway to Heaven</i>
0:00 Intro	0:00 A instrumental)
00:45 A	0:13 A (instrumental)
00:58 A	0:26 B
1:12 B	0:53 A (vocal)
1:37 A	1:06 A (vocal)
1:50 A	1:20 B

pitches of the first eighteen notes match, along with their rhythms and metric placement. The harmonic setting of these ‘A’ sections feature the same chords during the first three measures and an unusual variation on the traditional chromatic descending bass line in the fourth measure.”⁴⁸ However, Led Zeppelin also produced expert testimony that stated the contrary.⁴⁹ Led Zeppelin’s expert testimony was largely based on the fact that whether or not the two recordings sounded similar was not at issue in the case but instead what was at issue was the transcript of *Taurus* and *Stairway to Heaven*.⁵⁰ Lawrence Ferrara opined that alleged similarities to *Stairway to Heaven* such as performance techniques, instrumentation, and orchestration are mentioned nowhere in the transcription of *Taurus*.⁵¹ Furthermore, Ferrara addressed Stewart’s chart representing the alternating A and B sections and stated that these commonalities did not evince a substantial similarity between the works because alternating A and B sections have been generic in music for centuries.⁵² Furthermore, Ferrara stated that the chart only addresses the first two minutes of each song and completely ignores the last six minutes of *Stairway to Heaven*, which constitutes over 70% of the song.⁵³ Led Zeppelin also provided expert testimony prepared by Rob Mathes, who performed the *Taurus* transcript on a steel string acoustic guitar and echoed the conclusions of Ferrara that the two songs are not substantially similar.⁵⁴

2:04 B	1:47 A (vocal)
	2:00 A (instrumental)
	2:14 End of relevant por

⁴⁸ *Id* at *9.

⁴⁹ *Id* at *11.

⁵⁰ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *11-12 (C.D. Cal. April 8, 2016).

⁵¹ *Id* at *11.

⁵² *Id* at *11-12.

⁵³ *Id* at *12.

⁵⁴ *Id* at *12.

C. The Decision

The court ultimately decided to grant a motion for summary judgment limiting the plaintiff's damages to 50% (which they stated was his share as a beneficial owner) but denied the summary judgment as to the copyright claim against Led Zeppelin.⁵⁵ The plaintiff appealed on the grounds that the court did not admit evidence of the recordings into the trial, and the case has since been remanded for a new trial.

II. A COPYRIGHT CLAIM ON 18 NOTES?

Rock music is often influenced by a combination of both classical music and the blues. As a direct descendent of the blues, rock shares many of its characteristics such as generic chord progressions, guitar riffs, musical themes, and instrumentation. Therefore, the concept of only an original expression being copyrightable plays a significant role when blues-based music is under scrutiny for copyright infringement. Failure to address this issue could have dire consequences for blues (and similar genre) musicians.

The plaintiff in *Skidmore v. Led Zeppelin* provided expert testimony that nearly 80% of the first 18 notes (14 notes), were identical in terms of their pitch and rhythm.⁵⁶ Both songs are clearly more than 18 notes - and this number of notes represents a very small section of *Taurus*, and an even smaller section of *Stairway to Heaven*.⁵⁷ The Ninth Circuit Court of Appeals has recently addressed a situation regarding alleged copyright infringement of a small piece of a song.⁵⁸ The court in *VMG Salsoul, LLC v. Ciccone*, handled a situation in which the owner of a sound recording of *Ooh I love it (Love Break)* brought a copyright infringement claim against Madonna over the use of single and double horn hits in her hit song, *Vogue*.⁵⁹ The court held that a de minimis exception applied in the case of the horn hits, because the single horn hit lasted less than a quarter-second and the double-horn hit lasted less than a second, only appearing five or six times in *Vogue*.⁶⁰ Because of the legal maxim, *de minimis non curat lex* (often rendered as, "the law does not

⁵⁵ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *19 (C.D. Cal. April 8, 2016).

⁵⁶ *Id* at *9

⁵⁷ *Taurus* has a run time of two minutes and thirty-seven seconds and *Stairway to Heaven* has a much longer running time of eight minutes and two seconds. 18 notes is a very small percentage of each song.

⁵⁸ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 871 (9th Cir. 2016).

⁵⁹ *Id* at 874-77.

⁶⁰ *Id* at 879, 887.

concern itself with trifles”) and its previous holding in *Newton v. Diamond*, the court determined that a plaintiff must show that the copying was greater than de minimis.⁶¹

Fourteen out of eighteen consecutive notes that are identical is more substantial than the horn hits considered in *VGM Salsoul, LLC v. Ciccone*.⁶² However, even between the Circuit Courts there does not seem to be agreement on how much needs to actually be copied before copyright infringement can be claimed successfully.⁶³

The court in *VMG Salsoul, LLC v. Ciccone* noted that they were taking the unusual step of creating a circuit split by disagreeing with a recent Sixth Circuit decision.⁶⁴ They even noted that they only chose to do so after very careful reflection because “the creation of a circuit split would be particularly troublesome in the realm of copyright. Creating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.”⁶⁵ To further complicate the issue, even within the Ninth Circuit the judges opinions on the issue were split, which seems to suggest even more of a grey area in the law.⁶⁶

Despite the fact that 18 notes out of an entire song does not seem to be much, copyright law has involved itself where even less has been copied.⁶⁷ In *ZZ Top v. Chrysler Corp.*, the band famous for its Texas blues-based rock sued Chrysler Corporation alleging copyright infringement for using a guitar riff from their hit song *La Grange* in a television commercial.⁶⁸ The defendant automobile company conceded the fact that it copied the guitar riff from *La Grange* exactly, but challenged the originality of the riff and its copyrightability.⁶⁹ In challenging the

⁶¹ *Id* at 877 (citing *Newton v. Diamond*, 388 F.3d 1189, 1192-93 (9th Cir. 2004)).

⁶² Even though the court stated that the horn hits happened five or six times through the song, the alleged copyright infringement in *Stairway to Heaven* would likely have more substance as an actual musical motif rather than embellishment or accentuation that a horn hit would be characterized as.

⁶³ Compare *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 871 (9th Cir. 2016) with *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 792 (6th Cir. 2005).

⁶⁴ *Id* at 886.

⁶⁵ *Id.*

⁶⁶ *Id* at 888.

⁶⁷ *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 983 (W.D. Wash. 1999).

⁶⁸ *Id* at 985.

⁶⁹ *Id.*

copyrightability of the guitar riff, the defendant compared the riff to seven other songs, noting similarities in their rhythm. This argument included the riff in Norman Greenbaum's *Sprit in the Sky*, which the defense stated was virtually identical to the riff in *La Grange*.⁷⁰ This challenge was ultimately not accepted by the court, but the concept of a riff (or in the case of *Skidmore v. Led Zeppelin*, the 18 notes) not being copyright infringement because the allegedly infringed riff itself is not original was used by Led Zeppelin to defend their alleged copyright infringement.⁷¹ Although Led Zeppelin did not state that the riff from *Taurus* had been used nearly identically before, as Chrysler did, they drew attention to the fact that the guitar section in question had been used previously in music through their expert witness testimony.⁷²

Despite the fact that the relevant parts of each song are not identical, warranting some distinction from *ZZ Top v. Chrysler Corp.*, the idea of only original works of authorship being copyrightable has an interesting role in *Skidmore v. Led Zeppelin* mainly because of its near absence in the judges decision on the motion for summary judgment.⁷³ Although it seemed to have been for the most part overlooked by the court handling their case, the music community has been quite vocal in speaking out about this idea.⁷⁴ “[E]ven if Led Zeppelin *did* write the song immediately after hearing “Taurus,” it’s not clear that what they took was original to the older song. Both tunes are based on a descending chromatic A-minor harmonic structure, which basically means playing one of the most common chords in Western music (a minor triad), then moving the lowest note one piano key at a time for a few bars, from the root down to the fifth. This trick, which is sometimes referred to as a ‘line cliché’ or a ‘lament bass,’ has been around for hundreds of years in the classical music world, and appears in the work of Henry Purcell, J. S.

⁷⁰ *Id* at 985-86.

⁷¹ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *9-12 (C.D. Cal. April 8, 2016). Led Zeppelin produced Ferrara, an expert witness that stated that the only thing that was valid for consideration of copyright infringement after the unprotected elements were removed were the interchanging A and B sections of the song. He noted that this musical device of alternating sections has been used in music for “centuries.” The Plaintiff also produced an expert witness that supported this notion to a degree as he stated that both songs had a “decidedly ‘classical’ style” and were evocative of a renaissance atmosphere.”

⁷² *Id.*

⁷³ *See generally* *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *1 (C.D. Cal. April 8, 2016); *see generally* *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 983 (W.D. Wash. 1999).

⁷⁴ *Aram Sinnreich, If Led Zeppelin Goes Down, We All Burn, THE DAILY BEAST* (Dec. 27, 2017), <https://www.thedailybeast.com/if-led-zeppelin-goes-down-we-all-burn>

Bach, and countless others.”⁷⁵ This extremely common phrase was used in rock music nearly a decade before it was used in *Taurus*.⁷⁶ Furthermore, in an interview with the BBC in 2014, Jimmy Page, the guitarist of Led Zeppelin, stated when asked about how he had started to write *Stairway to Heaven* “[he] wanted to try to put something together which started with quite a fragile exposed acoustic guitar playing in sort of the style of a poor man’s *Bourée* by Bach.”⁷⁷ Despite this consideration apparently not being discussed heavily in the trial, the jury eventually returned a verdict in favor of Led Zeppelin. Whether this was due to oversight or simply bad lawyering, the lack of attention given to this aspect of originality raises concerns for blues-based musicians.⁷⁸ Although the allegedly infringed upon guitar part in *Stairway to Heaven* is said to be heavily influenced by classical music, Led Zeppelin and their contemporaries in rock music are very often influenced by the blues, a genre that creates its iconic sound by the repeated use of generic chord progressions and musical themes. When this genre is exposed to copyright infringement law suits without attention drawn to this musical tradition, the false identification of infringement is more probable and may cause hardships for musicians doing what is expected of the genre.

III. STRETCHING THE STATUTE OF LIMITATIONS

Music technology and the world of record production is often quite a “behind-the-scenes” industry. As a result, people are often not as knowledgeable about the processes that create the music they listen to as they would be about the music itself. Thus, it is easy for mistakes as to the character of certain processes to be made during a trial and as a result, have devastating effects for musicians and art as a whole. Mixing and mastering are two very different but equally vital steps in

⁷⁵ *Id.*

⁷⁶ *Id.* (“When Spirit used the lament bass technique in 1968, it wasn’t even new to the world of acoustic folk-rock guitar. A great example of prior art in this case is Davey Graham’s 1959 version of ‘Cry Me a River.’ Although his work isn’t widely known these days, Graham was highly influential in his time (his Wikipedia entry lists him as an influence on Zeppelin’s guitarist Jimmy Page), an even a layperson listening to his guitar work on “Cry Me a River” could easily discern the same basic riff that’s at issue in this case.”)

⁷⁷ BBC News, *Jimmy Page: How Stairway to Heaven was Written – BBC News*, YOUTUBE (Dec. 27, 2017), <https://www.youtube.com/watch?v=DDo4CA13LbY&feature=youtu.be>

⁷⁸ Because music is something that develops from its predecessors, it would seem unfair to punish musicians for doing what they have been taught to do, develop off of their musical ancestors. Not only are the musicians who have used this musical device highly studied and revered (making it understandable that modern day musicians would feel inclined to use these musical devices), the device itself is very basic in structure and form. Supporting a copyright infringement claim on such a device could have terrible consequences for musical development as a whole because musicians would have a harder time developing off of predecessor ideas without risking lawsuits for the work they have done.

the production of a record and have two very different and distinct goals and should be looked at as individual processes. Remastering, which is often confused with remixing (perhaps because they are both processes that happen after the initial production of a song) also has a very distinct purpose in the music industry. When the purpose of a remaster, and the product it creates, are confused or mislabeled, the effect it has thus far had on the statute of limitations in copyright law has a drastic effect on our ability (or desire) to preserve the listenability of our music.

Any copyright claim must be commenced within three years after the claim accrued.⁷⁹ In the case that the defendant concealed the infringement, the statute of limitations can be tolled for the period that the plaintiff could not reasonably have learned about the infringement.⁸⁰ With the infamy that *Stairway to Heaven* attracted, it would seem unlikely that the band members of Spirit would have had a difficult time in learning about the alleged infringement.⁸¹ Since the song was released in November of 1971, by November of 1974 the statute of limitations on any copyright claim should have already run and Michael Skidmore would be precluded from bringing his suit against Led Zeppelin.⁸² However, this is not what occurred.

Forty six years have passed since the release of *Stairway to Heaven*; that is more than 15 times the time allowed by the statute of limitations for a copyright claim.⁸³ The court in *Skidmore v. Led Zeppelin* reasoned that the claim was not barred because “[h]ere, Plaintiff brought suit within the three-year retrospective statute of limitations, as Defendants released a new, *remastered* version of *Stairway*

⁷⁹ 17 U.S.C. § 507(b) (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim is accrued.”)

⁸⁰ SHELDON W. HALPERN, SEAN B. SEYMORE & KENNETH L. PORT, FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW COPYRIGHT, PATENT, AND TRADEMARK § 109[A] [5] (2012).

⁸¹ As was mentioned before, the song has been named one of the top 100 songs ever written. It has been used countless times in various different media. Any contemporaries of Led Zeppelin would have been exposed to the song likely days after it came out let alone years. This is especially true for a band that claims to have played countless shows with Led Zeppelin and claims to have had a good relationship with the band.

⁸² Ted Drozdowski, *The Story Behind “Stairway to Heaven,”* GIBSON (Jan. 1, 2018), <http://www.gibson.com/News-Lifestyle/Features/en-us/story-behind-stairway-to-heaven-1026-2012.aspx> (“How did high school dances end before November 8, 1971? That’s the date that Led Zeppelin released a promotional disc to FM rock stations that would become the world’s most-played radio hit and cross over to teen-packed auditoriums everywhere, “Stairway to Heaven”).

⁸³ As of December 27, 2017.

to *Heaven* in 2014” (emphasis added).⁸⁴ The court went on to reason that since the defendants had committed an infringing act by remastering their song, the statute of limitations had reset and the claim was not barred.⁸⁵ Furthermore, because of the decision in *Petrella v. MGM*, the doctrine of laches would not bar the claim since the statute of limitations had not run and because “[they adhered] to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.”⁸⁶

Some artists are capable of outlasting technological trends in the music industry, and for a good reason.⁸⁷ Generally, these artists tend to have either captured an important moment in history, a reflection of society, or a message that speaks to people on a personal or moral level. Just like museums strive to preserve paintings so that generations of people have the opportunity to see them and learn from the context that surrounds that painting, so too is it important that artists make their music available for people to listen to. Allowing a statute of limitations to “reset” every time an artist remasters their work is detrimental to a musician’s ability to do this.

A. Should a remaster really be a copyright event?

The court in *Lee v. A.R.T. Company* addressed a similar issue to the remastering that took place in *Skidmore v. Led Zeppelin*.⁸⁸ There, the defendant took works of art that the plaintiff had created and copied them onto tiles, not changing the content of the art.⁸⁹ Judge Easterbrook stated that reframing a painting certainly did not create a derivative work, and so, “[i]f the framing process does not create a derivative work, then mounting art on a tile, which serves as a flush frame, does not create a derivative work.”⁹⁰ The court further stated “[i]f mounting works is a ‘transformation,’ then changing a paintings frame or a photograph’s mat equally

⁸⁴ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *20 (C.D. Cal. April 8, 2016) (citing *Petrella v. MGM*, 134 S. Ct. 1962, 1969 (2014) (“each infringing act starts a new limitations period”).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Several musicians are known for transcending decades. Artists like, Bob Dylan, Paul McCartney, Cher, and even Led Zeppelin have all had successes over several decades and have had important messages that have been passed down through multiple generations of music admirers.

⁸⁸ *See Lee v. A.R.T. Co.*, 125 F.3d 580, 580 (1997).

⁸⁹ *Id.*

⁹⁰ *Id.* at 581.

produces a derivative work.”⁹¹ The court noted that this would be a jarring result.⁹² In *Skidmore v. Led Zeppelin*, Led Zeppelin remastered *Stairway to Heaven*, taking it from a vinyl format and converting it to a digital format. The content of the work did not change. This is highly analogous to the reframing situation that Judge Easterbrook discusses.⁹³ In essence, Led Zeppelin reframed their work.

However, this notion that a remaster of a track triggers a copyright event is not unheard of. In *ABS Entertainment, Inc. v. CBS Corp.*, the court determined that some remastered recordings had sufficient changes from the original recordings to qualify for federal copyright protection under 17 U.S.C.S. section 114 because the changes reflected multiple kinds of creative authorship.⁹⁴ They noted that “[w]hen Mr. Inglot remastered a work, he made changes such as ‘adjust[ing] the bass, treble, midrange, and other frequencies on the equalizer to emphasize and deemphasize certain instruments and vocal sections.’ He also made numerous equalization changes and ‘mastered the loudness profile of each track, to create a balanced, consistent profile across the entire album.’”⁹⁵ It is therefore not hard to imagine the reasoning behind allowing a remaster to trigger a copyright event, however, when looked at in the realm of music technology and record production, this reasoning applied by courts seems to break down.⁹⁶

“Mastering is the term most commonly used to refer to the process of taking an audio mix and preparing it for distribution. There are several considerations in this process: unifying the sound of a record, maintaining consistency across an album, and preparing it for distribution.”⁹⁷ This is a stark difference in changes to the recordings that would be done during the mixing

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *ABS Entm’t, Inc. v. CBS Corp.*, 2016 WL 4259846, at *1 (C.D. Cal. 2016).

⁹⁵ *Id.* at *16

⁹⁶ Changes that would have occurred during the mastering would have been very similar to those mentioned in *ABS Entm’t, Inc. v. CBS Corp.* Changes such as adjustments to equalization, compression (creating a uniformity in volume throughout the song), spatial imaging (engineering the way the song takes space in the audio field) etc.

⁹⁷ *What is Mastering*, IZOTOPE (Dec. 27, 2017), <https://www.izotope.com/en/community/blog/tips-tutorials/2014/06/what-is-mastering.html>.

process.⁹⁸ “Mixing refers to the process of putting multiple layers of audio together to make one final track or to musically modify an existing track. When mixing a song, you are tinkering with basically everything you have recorded. You’ll do things like [add] effects, adjust fader, EQ your tracks and so on.”⁹⁹ Mixing involves more production decisions that are really responsible for the way the song comes out sounding, as opposed to mastering which is “[i]n a very basic sense . . . making sure that song one doesn’t blow out the speakers while song two is barely audible.”¹⁰⁰

After a song has been produced the first time, it can go through additional changes. A very common change that a song might go through after its initial production is a remaster. Generally, when a mastering engineer sets out to remaster an old track, they attempt to “enhance[e] the sound quality of [the] older recording.”¹⁰¹ This is especially true when the song or album that they are remastering was originally released on an older media platform like vinyl records or tape.¹⁰² “When a song or album is ‘remastered,’ this typically means the quality has been enhanced, but the original artistic intention of the recording has not be [sic] altered. Remastering can involve a transfer from analog to digital as well as an adjustment to the loudness, dynamic range, and tonal balance.”¹⁰³ Thus, when a track is being remastered there may be some creative decisions that are being made, but those decisions are not the same genre of decisions that would be made by a musician in writing a composition. Rather, they are more closely related to decisions

⁹⁸ Generally, when an album is recorded, the audio files are first taken, it is then mixed by an audio engineer, which is where the major decisions about how the song is going to sound, and what the “production” will sound like. After this, it is given to a mastering engineer who then works to make sure that the song fits with the rest of the album and is ready to be released in a professional sounding format.

⁹⁹ Heather McDonald, *The Difference Between Mixing and Mastering Know the Difference Before You Head to the Studio to Record*, THE BALANCE (Dec. 27, 2017), <https://www.thebalance.com/the-difference-between-mixing-and-mastering-2460689> (Effects that would often be included in the track would be those such as creating an echo on a vocal line, making a voice sound like it is coming through a radio speaker, and other creative tools such as these that are responsible for the way the original composition is expressed through the recording).

¹⁰⁰ *Id.*

¹⁰¹ Remaster, Merriam-Webster Dictionary (2017) (to create a new master of especially by altering or enhancing the sound quality of an older recording).

¹⁰² Dave Roos, *How Do They Remaster CDs and DVDs?*, HOWSTUFFWORKS (Dec. 28, 2017), <https://entertainment.howstuffworks.com/remaster-cds-dvds.htm>.

¹⁰³ *Remixed, Remastered, or Reissued . . . What Does it All Mean?*, AUDIOGON HUB (December 28, 2017), <http://hub.audiogon.com/blog/2013/01/28/remixed-remastered-or-reissued-what-does-it-all-mean/>.

that would be made by an engineer when ensuring a building will meet city regulations.¹⁰⁴ The decisions are for the most part functional, rather than creative or artistic.

Technology has been developing at an exponential rate in forms such as computer processing speed (where the doubling of computer processing speed every 18 months is known as Moore's Law) and this is also true in the music industry.¹⁰⁵ Since *Stairway to Heaven's* release in 1971, there have been at least 23 new audio formats that have been released to the public.¹⁰⁶ This is roughly a new audio format every two years since the song's release, and there does not appear to be any signs of audio technology slowing down. Even outside of audio formats, the technology that we use to listen to music has been advancing exponentially.¹⁰⁷ "Loudspeakers have come a long way from the time of Johann Philipp Reis and Alexander Graham Bell, to the high-fidelity speakers that you know today; and the technology just keeps evolving . . . there seems to be no end to the rapidly improving audio technology that designers and engineers use today. As the demand for loudspeakers that reproduce sound as faithfully and as true to the original audio signal continue to rise, you can expect to see more advancements and innovations coming out to further enhance the way you listen."¹⁰⁸ *Stairway to Heaven* has outlasted the technology on which it was originally intended to have been listened to and it does not show any signs of being forgotten before the next and newest audio technology is released.¹⁰⁹

¹⁰⁴ A mastering engineer is making decisions that will ensure the track is viable on modern equipment and still aurally pleasant when played on things like radio in the car or used in television commercials.

¹⁰⁵ Big Think Editors, *Big Idea: Technology Grows Exponentially*, BIGTHINK (Dec. 28, 2017), <http://bigthink.com/think-tank/big-idea-technology-grows-exponentially>

¹⁰⁶ From 1971 until 2017, HiPac, Dolby Stereo, Elcaset, LaserDisc, Compact Disc, Betamax Digital Audio, High Definition Compatible Digital, Digital Audio Tape, Digital Compact Cassette, MiniDisc, RevealAudio, DVD, DTS-CD, DVD-Audio, Super Audio CD, Dual Disc, HD DCD, Blu-ray Disc, slotMusic, Blu-spec CD, SILK, DCP, and Opus have all been released as new audio formats. *Timeline: Digital Technology and Preservation*, DIGITAL PRESERVATION MANAGEMENT (Dec. 28, 2017), <http://www.dpworkshop.org/dpm-eng/timeline/viewall.html>. Not all of these formats have been used extensively (although a good number of them have been very popular for an extended period of time) however, the vast number of completely different audio formats truly highlights how quickly audio technology is advancing.

¹⁰⁷ *The Evolution of Audio Speakers in 2017*, TECHNOUNDED.COM (Dec. 28, 2017), <http://www.techsounded.com/the-evolution-of-audio-speakers/>.

¹⁰⁸ *Id.*

¹⁰⁹ Much like how people still listen to music from the 18th century, songs like *Stairway to Heaven* that changed the face of music will likely be listened to for centuries to come.

Music is an important part of society and can have drastic effects on the way we feel and behave in our daily lives.¹¹⁰ Furthermore, music is often created during pressing social events which when listened to retrospectively can provide insight into the thoughts and feelings of people who lived through those events, acting like a historical microscope exposing something that would otherwise not be noticeable.¹¹¹ This creates an important historical record that can be looked back on and used to determine mistakes we as a society may have made in the past, or to develop on successes.¹¹² Thus, with such an important lesson to be learned hidden within the music we create, it is important to preserve these lessons in a way that allows future generations of musicians and historians to access them (despite the quick pace of changing technology).¹¹³

With the societal importance of music, and the rapidly changing technology, it is important to ensure that we are able to access past recordings on our current technology. Ignoring the recent resurgence in the production and sale of vinyl music by the self-proclaimed “hipsters,” music available only on vinyl records or even tape cassettes is often unplayable due to the difficulty of coming across record players or tape players and recent technology trends seem to indicate that this rendering obsolete of old technology is going to continue.¹¹⁴ Therefore, remastering, “an act of preservation,” similar to reframing a painting, is important to keep our

¹¹⁰ Sandra F. Rief, *The Importance of Music, Art*, LDONLINE (Dec. 28, 2017), <http://www.ldonline.org/article/5824/>.

¹¹¹ A striking example of this is the music that was created to protest the Vietnam war by artists such as Buffalo Springfield; George Harrison; Curtis Mayfield; Crosby, Stills, Nash, and Young; Joan Baez; The Rolling Stones; and Creedence Clearwater Revival that has survived the test of time and is frequently still listened to today. They provide a valuable insight into the way a group of people felt about a piece of American history. Matt Miller, *The Best Vietnam Protest Songs*, ESQUIRE (Dec. 28, 2017), <http://www.esquire.com/entertainment/music/g12255617/10-best-vietnam-songs/>.

¹¹² Music, much like other art, creates a record of history that might be easier to understand for the general population than a treatise on history, or records in a museum. It is a more accessible and easily comprehensible form of history.

¹¹³ See Jordan Russell, *Recognize the Importance of Folk Music in Preserving History*, THE NEVADA SAGEBRUSH (Dec. 29, 2017), <http://nevadasagebrush.com/blog/2015/02/17/recognize-the-importance-of-folk-music-in-preserving-history/>.

¹¹⁴ Even recently, a medium that was popular not too long ago has become defunct as computer manufacturers such as Apple have begun removing CD trays from their newest models of computers, forcing their customers to either go without the ability to play CDs on their new devices or invest in a separate peripheral to enable them to play CDs. See Christian Zibreg, *Apple Killed the Disc Drive, but it's for Your Own Good*, IDOWNLOAD BLOG (Dec. 29, 2017), <http://www.idownloadblog.com/2012/10/28/opinion-imac-optical-media/>.

culture accessible, so we can continue to learn from the artists before us.¹¹⁵

When the court in *Skidmore v. Led Zeppelin* decided that the remaster of a song that was released in 1971 was sufficient to defeat a claim of laches and reset the statute of limitations, they (and other courts that have made or will make the same decision) opened Pandora's box to a stifling in the preservation of music.¹¹⁶ There becomes a disincentive for artists, or their agents after they die, to modernize and make technologically relevant, the classics that they wrote and recorded for fear of being sued and having their songs be disgraced by allegations of copyright infringement.¹¹⁷ This ability to be sued for copyright infringement anytime an artist tries to update their work for the modern world keeps that artist in the crosshairs of litigation for as long as that artist wishes to remain relevant to culture and society.¹¹⁸ A three year statute of limitations already exists to protect musicians from infringement on their work.¹¹⁹ In the ever changing and highly publicized music industry, this should be sufficient time for an artist to bring suit for an alleged copyright.¹²⁰ By allowing an artist to sue another artist because of a remaster of a track that was allegedly infringed after the three year statute of limitations has passed, we create a potentially century long statute of limitations for artists wishing to keep their music relevant amongst our changing technology.¹²¹

¹¹⁵ See Matt Diehl, *Behind the Hype of Remastering old Albums*, POPULAR MECHANICS (Dec. 29, 2017), <http://www.popularmechanics.com/culture/music/a18623/behind-the-hype-of-remastering-old-albums/>

¹¹⁶ See *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *20 (C.D. Cal. April 8, 2016) (citing *Petrella v. MGM*, 134 S. Ct. 1962, 1969 (2014) (“each infringing act starts a new limitations period”).

¹¹⁷ If it becomes a risk for an artist to remaster their music for the fear of someone lurking in the shadows who had previously run their statute of limitations, waiting for a remaster or rerelease to sue, musicians would need to think twice before they decide to modernize their music. This danger is even stronger in the present case where not only is suit 46 years in the future, it is not even brought by the musician who wrote the song. The original author of *Taurus* is deceased and the suit is being brought by the manager of his trust.

¹¹⁸ Unless that artist has (extremely) loyal fans who keep rooms full of old equipment around to listen to the artist as they developed throughout the different audio formats.

¹¹⁹ 17 U.S.C. § 507(b) (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim is accrued.”)

¹²⁰ Especially in the modern fast burning music industry where artists are considered the top hit one day, and a thing of the past the next.

¹²¹ Similar to how Deadhand Control has been worked out of property law with devices such as the rule of perpetuities, a similar effect, whereby, artists (or their agents) can wait for a remaster to sue even a century after the song was written should be worked out of copyright law.

B. What updates should be considered copyright events?

Often, musicians will allow songs that they have previously written and recorded to be “remixed” (another form of production a song can go through after its initial production) by mixing engineers to create a new or fresh sound. “When a song or an album is said to be ‘remixed,’ what that really means is that the song has been purposely altered to sound different than the original. This can include changing the pitch, speed, tempo, and more. Additional tracks of vocals or instrumentals may be added. The remix could also be longer or shorter than the original. A remix is often a new interpretation to suit radio play, club or DJ play, for artistic purposes, or to reach a different audience.”¹²² Sometimes a track is broken down into basic parts to be used as a base for a different song altogether by another artist, this is called sampling.¹²³

Clearly a lot more is done to a track in terms of creating a new expression of the song when it is remixed as opposed to when it is remastered and thus, if Led Zeppelin had remixed *Stairway to Heaven* there might be an argument that the statute of limitations should reset as they would be using the allegedly infringed section of *Taurus* in a new way, for a new expression.¹²⁴ This is because in a hypothetical situation where *Stairway to Heaven* would have been remixed, a new composition would have been created with what would have been an allegedly infringed upon section of a previous song. Since “a remaster should not change the artistic vision of the recording artist and producer” and is often purely for the purpose of updating a songs quality or ability to be played on new technology, the argument that Led Zeppelin had infringed again upon the track by Spirit becomes weaker and risks creating a strong disincentive to update our culture as our technology advances.¹²⁵ Creating this disincentive for artists should be avoided so that future generations of musicians can continue to be inspired and learn from music of the past without having to collect a range of old and irrelevant technologies.

¹²² *Remixed, Remastered, or Reissued. . . What Does it All Mean?*, ADUIOGON HUB (Dec. 30, 2017), <http://hub.audiogon.com/blog/2013/01/28/remixed-remastered-or-reissued-what-does-it-all-mean/>.

¹²³ This is especially common in Hip-Hop where artists will rap over backing tracks or “beats” molded from other artist’s songs. A particularly famous example of this is a US *Billboard* Hot 100 number 1 hit released in 1989 by artist Vanilla Ice. In *Ice Ice Baby*, Vanilla Ice raps over the equally notorious bass line from *Under Pressure* by the band Queen, creating a completely different sounding song with parts of Queen’s song.

¹²⁴ *See id.*

¹²⁵ Sean O’Connor, *Update to Music Remixing vs. Remastering*, THE MEANS OF INNOVATION (Dec. 30, 2017), <http://meansofinnovation.com/486/update-to-music-remixing-vs-remastering/>.

IV. A PLACE FOR THE TOTAL CONCEPT AND FEEL TEST IN MODERN COPYRIGHT INFRINGEMENT LAWSUITS

Expert witness testimony has had (especially since *Arnstein v. Porter*), and should have a place in copyright infringement lawsuits, especially since at times, differences in musical compositions can be very complex for someone not familiar with the intricacies of music to understand.¹²⁶ However, when certain genres of music such as rock and the blues are under scrutiny, the testimony of expert witnesses might have more of a convoluting effect, confusing the opinion of a jury, rather than helping to simplify the decision they are required to make.

Expert witnesses explained the transcripts of both *Stairway to Heaven* and *Taurus* to the jury during the trial of *Skidmore v. Led Zeppelin* and while this is not uncommon, raises the question as to whether or not this approach to determining whether or not there is copyright infringement in certain genres of music may cause a problem.¹²⁷ Furthermore, the audio recordings of the tracks were not played to the jury because the “[p]laintiff’s only Copyright claim lies in the musical composition of Taurus, not the sound recording.”¹²⁸ Instead, the transcripts of each song were played by musicians live during the trial.¹²⁹

In the total concept and feel construct “the inquiry is predicated not so much on dissection of the works at issue and close comparison of their details, as it is on examining the similarities and differences in the total concept and feel of the works.”¹³⁰ The belief when using this construct is that “[s]imilarity of expression depends on a subjective, intrinsic test” and this “focuses on the response of the ‘ordinary reasonable person’ to the works.”¹³¹ Furthermore, comparisons of similarities and differences between the works are “inherently subjective and unreliable.”¹³² The total concept and feel construct has been attacked because it “is

¹²⁶ See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (“Expert testimony of musicians may also be received . . . and should be utilized only to assist in determining the reactions of lay auditors.”)

¹²⁷ See *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *12 (C.D. Cal. April 8, 2016)

¹²⁸ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *47 (C.D. Cal. April 8, 2016)

¹²⁹ *Id.* at *12

¹³⁰ SHELDON W. HALPERN, SEAN B. SEYMORE & KENNETH L. PORT, FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW COPYRIGHT, PATENT, AND TRADEMARK § 109[B] [1] [b] (2012).

¹³¹ *Litchfield v. Spielberg*, 763 F.2d 1352, 1356 (9th Cir. 1984)

¹³² *Id.*

simply not helpful in analyzing works that, because of their different genres and media, must necessarily have a different concept and feel. Indeed, many ‘derivative’ works of different genres, in which copyright owners have exclusive rights, may have a different total concept and feel from the original work.”¹³³ However, in *Skidmore v. Led Zeppelin*, the problem of different genres is not present and so there may be a case for using a total concept and feel test because of the singular genre that *is* present.¹³⁴

Rock is a derivative genre of the blues, a genre that has deep roots in American history through slavery and early African American communities. “When we think of rock and roll, we think electric guitars, amplified sounds, and intricate styles of play,” but “rock and roll would not have existed without simple 12-bar forms, antiphonic textures, or walking bass lines used in blues music.”¹³⁵ Many of these same musical devices have been carried over into rock music and similarly, many of these devices have been carried over into Led Zeppelin’s music, especially since they are well known for covering and arranging old American blues standards.¹³⁶

As previously mentioned, much of the blues is based on a 12-bar chord structure, whereby a series of 4 different chords are played in a particular order, and then repeated until the song is completed.¹³⁷ Furthermore, a lot of (if not all of) what

¹³³ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.* 150 F.3d 132, 140 (2d Cir. 1998)

¹³⁴ In *Skidmore v. Led Zeppelin*, both parties are rock bands that have been influenced by a variety of different blues and classical musicians. Both bands are also well known as being progressive in the genre of rock and pushing the boundaries of what was normal and commonly recorded in rock music. Even if the songs in question (*Stairway to Heaven* and *Taurus*) are compared, they are both (at least initially in the case of *Stairway to Heaven*) acoustic rock tracks that are highly influenced by elements of baroque music. The genre is the same and so the issues that might arise when copyright infringement lawsuits are cross-genre are certainly not present in *Skidmore v. Led Zeppelin*.

¹³⁵ Reagan Wardensky, *How Did Blues Influence Rock and Roll?*, MUSIC (Jan. 1, 2018), <http://blogs.longwood.edu/reganwardensky/>

¹³⁶ Corbin Reiff, *Top 10 Led Zeppelin Blues Songs*, ULTIMATE CLASSIC ROCK (Jan. 1, 2018), <http://ultimateclassicrock.com/top-led-zeppelin-blues-songs/>. (Guitarist Jimmy Page stated that “[he] wanted Zeppelin to be a marriage of blues, hard rock and acoustic music . . . between unique adaptations, clever arrangements and more than a few borrowed lyrics and melody lines . . . Led Zeppelin returned to a full well of blues music for inspiration throughout the entirety of their career.”)

¹³⁷

I	I	I	I
IV	IV	I	I

is played over the 12-bar chord pattern is improvisation, meaning it will not be transcribed, even during the recording stage of making an album.¹³⁸ Thus, if looked at from the perspective of transcripts, the blues and blues-based music such as classic rock will look extremely similar, if not identical to other songs in the same genre of music.¹³⁹

During the trial of *Skidmore v. Led Zeppelin*, the court refused to play the audio recording of either song for the jury.¹⁴⁰ Instead, after much expert witness testimony pulling the song apart, Rob Mathes performed the transcript for the jury on a guitar.¹⁴¹ This decision to leave out the recording from the trial was supported with sound logic based on what the plaintiff was claiming and precedent, however, this standard of having expert witnesses pull apart a transcript in front of a jury in the realm of blues based music may be setting a stage for false identification of copyright infringement. As previously discussed, blues-based music generally has a very simple transcript because of the way it is improvised live, and its underlying simplicity. Therefore, if an expert is allowed to frame for a jury how the transcript of one blues-based song is similar to the transcript of another blues-based song (as

V	IV	I	V
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A typical 12-bar blues progression. This is repeated until the song is completed and is very typical for a very large portion of blues music.

¹³⁸ Because of the simplicity of the 12-bar chord progression, bands are able to keep track of where the song is going. This means that Blues songs often involve different band members taking turns improvising over the progression making each live performance slightly different than all the others.

¹³⁹ This point was brought up by Lawrence Ferrara, an expert witness for Led Zeppelin during the trial when he attacked another expert witness's report "because it 'reli[ed] upon and analyz[ed] and compar[ed] performance elements in *Taurus* recordings that are nowhere mentioned in the *Taurus* transcription.'" He further stated that "[t]he *Taurus* transcription does not mention or reflect, for example, performance techniques, instrumentation and orchestration, or tempo (i.e. performance speed)" highlighting the simplicity of blues based music transcription. *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *4 (C.D. Cal. April 8, 2016).

¹⁴⁰ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *47 (C.D. Cal. April 8, 2016) ("In the present case, Plaintiff's only copyright claim lies in the musical composition of *Taurus*, not the sound recording. . . by analyzing performance elements in the sound recording of *Taurus*, Plaintiff's experts improperly considered features beyond the scope of the music composition—such features will be disregarded by this court").

¹⁴¹ *Id.* at *12 ("Defendants also provide an expert report prepared by Rob Mathes who performed and recorded the *Taurus* sheet music deposited with the Copyright Office on a steel string acoustic guitar").

they surely will be), it is likely to strongly influence the jury into thinking there is copyright infringement where what is actually being identified is merely a musical tradition.¹⁴²

By allowing a jury to listen to the records of the tracks, and therefore, the total concept and feel of the tracks, without having an expert first tear apart something so simple and convolute the jury's impression of the two songs, juries will likely be able to determine whether two songs truly do have a substantial similarity and whether or not there was copyright infringement.¹⁴³ In certain genres, if the jury are left to decide whether infringement exists based on the transcripts alone and no recording, there will very likely be infringement found.

There may be a place for expert witness testimony even where genres have simple transcripts and that is in alerting the jury to something that is not original and thus, not copyrightable.¹⁴⁴ However, while there is some benefit in allowing expert witnesses to testify in this situation, it would seem that more damage can be done by an expert witness than good since unnecessary and troublesome influences on a jury would create unequitable outcomes for musicians.

Certainly, both *Stairway to Heaven* and *Taurus* are more complex than your average 12-bar-blues chord progression and are not typically songs that would be improvised when played live by either band.¹⁴⁵ However, the implications of the decision that the trial court took by not allowing the recording to be played in court may extend to future suits within this genre of music. The plaintiff appealed the decision by the trial court on grounds that it was an error for the court to disallow the recording to be played to the jury and so, precedent will be set in the 9th Circuit

¹⁴² Two songs, rock or otherwise, that are based around a 12-bar chord pattern will likely have only minor differences, such as, the key that they are played in, lyrics, and different flourishes and fills by instruments. The way the chords are played, and the order they are played in, will likely be identical. Similarly, the way the bass descends in in *Stairway to Heaven* and *Taurus* is a musical tradition that, as was discussed, has been used for centuries in music.

¹⁴³ See 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A] (Matthew Bender, Rev. Ed. 2017) (“Just as copying is an essential element of copyright infringement, so substantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying. “This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial”).

¹⁴⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991) (“Originality is a constitutionally mandated prerequisite for copyright protection”).

¹⁴⁵ *Stairway to Heaven* for example has multiple sections to the song that are each in their own way technical and complex. Although Jimmy Page does often improvise his guitar solo section live, this section is not in conflict in the case, and in the grand scheme of the live performance, it is a very small section of the song that is *sometimes* improvised.

on the issue.¹⁴⁶ Furthermore, even though the outcome of the trial was in favor of Led Zeppelin despite the fact that similarities were drawn between the transcripts and the recording was not allowed to be played, the result may not be the same the next time. It is therefore important to ensure that our next steps forward in dealing with this sort of situation are careful and provide proper guidance to a jury so they are capable of making informed and fair decisions and provide justice to the musicians at trial within the realm of the genre.

V. CONCLUSION

When the court in *Skidmore v. Led Zeppelin* decided that the statute of limitations had not run because the track was remastered and that the doctrine of laches would not bar the lawsuit after 46 years, although supported by precedent, a dangerous scenario was drawn out for musicians who wish to remain relevant in the music industry and keep their music listenable for their fan base.¹⁴⁷ Often for artists that started their recording career when music was commonly listened to on vinyl, remastering their music to a digital format is the only way to truly keep it alive because of the way that music is currently listened to.¹⁴⁸ If musicians are subjected to the potential of lawsuits every time they try to make their catalog of music listenable in the modern age, it may become more worth it for them to abstain from doing so, leaving their music, and the important messages attached to them in the past.¹⁴⁹ Furthermore, the process of remastering is mostly technical (as opposed to artistic), ensuring tracks are listenable on different mediums and have similar

¹⁴⁶ Daniel Kreps, *Appeal Filed in Led Zeppelin ‘Stairway to Heaven’ Copyright Trial*, ROLLING STONE (Jan. 1, 2018), <https://www.rollingstone.com/music/news/appeal-filed-in-led-zeppelin-stairway-to-heaven-trial-w472692>

¹⁴⁷ *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *7 (C.D. Cal. April 8, 2016) (“Here, Plaintiff brought suit within the three-year retrospective statute of limitations, as Defendants released a new, remastered version of *Stairway to Heaven* in 2014”); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1967 (2014) (“Laches . . . cannot be invoked to preclude adjudication of a [copyright] claim for damages brought within the three-year [statute of limitations]”).

¹⁴⁸ *An Explosion in Global Music Consumption Supported by Multiple Platforms*, IFPI (Jan. 2, 2018), <http://www.ifpi.org/facts-and-stats.php> (In 2016 “[d]igital revenues overall grew by 17.7% to US\$7.8 billion, driven by a sharp 60.4% growth in streaming revenue – the largest growth in 8 years” whereas “[p]hysical format revenues declined by 7.6%, a higher rate than the previous year, which saw a decline of 3.9%.”).

¹⁴⁹ A three-year statute of limitations is more than enough time for a musician to discover that their music has been infringed upon, especially in today’s modern age of music where songs are release on the internet and can be accessed near instantly. Therefore, the rights of musicians are not unduly effected. Furthermore, if the artist uses the allegedly infringed upon section of music in a remix, or sampling project, then there is likely good reason to allow the statute of limitations to reset as a new expression is now present.

volumes, dynamics, and feel throughout the entire album.¹⁵⁰ By allowing the statute of limitations to reset every time an artist remasters their work, we expose artists to an unreasonably long statute of limitations that has the ability to hinder our preservation and accessibility of art and culture as artists refrain from updating their work for the modern world.

Blues music is often very simple in that it consists of simple patterns that are repeatedly played until the song concludes.¹⁵¹ Often, added on top of this are improvised sections and lyrics that make each blues song different, which are not transcribed. Therefore, blues-based music like that which would be common on a Led Zeppelin or Spirit album very likely has very little information on the transcript.

When the material at issue is basic (as in the sense of the transcripts in blues-based music), allowing expert witnesses to opine about similarities while also refraining from allowing the recordings to be played has a high potential of influencing juries to find copyright infringement where it may not exist.¹⁵² By employing the total concept and feel construct, allowing the juries to listen to the music the way it was intended to be listened to, and removing the expert testimony that has the strong likelihood of convoluting something that is already simple, we give juries a chance to make a fair decision and be a better judge about whether or not copyright infringement exists.¹⁵³

Although Led Zeppelin escaped the trial (relatively) unscathed (again), the decision on remand might change that. There is a good chance the decision on appeal will effect the music industry as a whole. This decision could signal a change for musicians, or an unfortunate retention of the status quo, ensuring the difficulty and risk for musicians to remain relevant in today's ever-changing, aggressive, and fast paced music industry.

¹⁵⁰ *Remixed, Remastered, or Reissued . . . What Does it All Mean?*, AUDIOGON HUB (December 28, 2017), <http://hub.audiogon.com/blog/2013/01/28/remixed-remastered-or-reissued-what-does-it-all-mean/> (“the original artistic intention has not been altered”).

¹⁵¹ This is especially common in older blues that is based on a 12-bar chord pattern and less common in modern blues that is more technical (although still present).

¹⁵² See *Skidmore v. Led Zeppelin*, CV 15-3462 RGK, 2016 WL 1442461, *47 (C.D. Cal. April 8, 2016); If the juries are allowed to listen to the original recordings, they may see similarities that they could not have seen through the simple transcripts or notice differences that they otherwise would not have noticed by simply looking at the simple transcripts.

¹⁵³ See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.* 150 F.3d 132, 140 (2d Cir. 1998); If a jury notices that although the chordal harmony of the songs may be the same, the way they are improvised over, or the feel of the song is portrayed is different, then they will be more likely to say that infringement does not exist. Whereas, had they only been allowed to see the transcript, it is more likely they would determine infringement exists because they have been influenced by what they see as experts on the matter.

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