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### Skidmore v. Led Zeppelin: Extraordinary Circumstances and the Perpetual Statute of Limitations in Copyright Infringement

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# SKIDMORE V. LED ZEPPELIN: EXTRAORDINARY CIRCUMSTANCES AND THE PERPETUAL STATUTE OF LIMITATIONS IN COPYRIGHT INFRINGEMENT

*Joseph A. Greene*

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## SKIDMORE V. LED ZEPPELIN: EXTRAORDINARY CIRCUMSTANCES AND THE PERPETUAL STATUTE OF LIMITATIONS IN COPYRIGHT INFRINGEMENT

Joseph A. Greene\*

### I. INTRODUCTION

In 1971, Led Zeppelin, one of the most successful rock bands in history, released the album *Led Zeppelin IV*, often referred to as the “peak of Seventies hard rock.”<sup>1</sup> While it received rave reviews, some within the music community could not help but notice the similarities between one song on the album and a different one written previously by another band.<sup>2</sup> Four years earlier, in 1967, the band Spirit had released its first album, which included the instrumental composition “Taurus.”<sup>3</sup> A year later, Spirit was on tour with the then little-known band Led Zeppelin.<sup>4</sup> Led Zeppelin released *Led Zeppelin IV* years after the tour; members of Spirit noticed that one song on the album, “Stairway to Heaven,” shared a number of similarities with “Taurus.”<sup>5</sup> However, even after “Stairway to Heaven” became a huge success and a judgment of music plagiarism could have been lucrative, Randy “California” Wolfe, the band’s guitarist and composer of “Taurus,” never brought a lawsuit.<sup>6</sup>

Wolfe’s reluctance was not on account of music copyright infringement claims being novel or unprecedented. As early as 1936, researchers began looking into ways of indexing musical ideas to help composers assess their risk of infringement.<sup>7</sup> For example, Dr. Siguard Bernhard Hustvedt contemplated creating an index containing previously used musical expressions.<sup>8</sup> Unfortunately, we will never know if a card catalog of musical ideas would have been beneficial—or even possible—as it never came into being. What we do know is that without it, the task of determining whether one song copied another would fall to someone—and that someone was federal district courts.

Throughout the twentieth century, federal district courts, especially those located in the country’s meccas of entertainment—Los Angeles and New York—experienced an influx of suits from musicians claiming that another artist’s work

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1. *500 Greatest Albums of All Time*, ROLLING STONE (May 31, 2012), <http://www.rollingstone.com/music/lists/500-greatest-albums-of-all-time-20120531/led-zeppelin-led-zeppelin-iv-20120524>.

2. *Skidmore v. Led Zeppelin*, No. CV 15–3462 RGK (AGR<sub>x</sub>), 2016 WL 1442461, at \*3 (C.D. Cal. Apr. 8, 2016).

3. *Id.* at \*1.

4. *Id.* at \*2.

5. *Id.* at \*3.

6. *Id.*

7. *Work Started on Tune Index: Move Begun To End Musical Plagiarism by Savants of Tin Pan Alley*, PITTSBURG PRESS, May 6, 1936, at 36, <https://news.google.com/newspapers?nid=1144&dat=19360506&id=nF1bAAAAI1BAJ&sjid=3EsEAAAAI1BAJ&pg=5019,4168497&hl=en>.

8. *Id.*

bore a “substantial similarity” to their own.<sup>9</sup> Large verdicts, settlements, and years of litigation have turned music copyright infringement claims into big business. In 1976, George Harrison was found to have “subconsciously” copied the Chiffons’s song “He’s So Fine” when composing his song “My Sweet Lord,” leading to a settlement in excess of a half-million-dollars and an additional twenty-two years of litigation.<sup>10</sup> In 1990, Vanilla Ice settled out of court with Queen and David Bowie over the similarity between the bass lines of their respective songs, “Ice Ice Baby” and “Under Pressure.”<sup>11</sup> In 2015, the United States District Court for the Central District of California ordered Robin Thicke and Pharrell Williams to pay \$7.4 million to the estate of Marvin Gaye because a jury found their single “Blurred Lines” substantially similar to Gaye’s “Got to Give it Up.”<sup>12</sup> And these examples merely scratch the surface.

A year after the media-jarring “Blurred Lines” verdict, the same district court heard another high-profile music plagiarism case. Michael Skidmore, the holder of Randy “California” Wolfe’s copyright in “Taurus,” brought suit in 2014 alleging the beginning of “Stairway to Heaven” was “substantially similar” to Spirit’s “Taurus.”<sup>13</sup> Unlike any other high profile case, however, this suit was initiated forty-three years after “Stairway to Heaven” first became a popular success.<sup>14</sup> At first glance, legal scholars and laypersons alike should be wondering how it is possible to bring a copyright infringement claim against a song written nearly half a century ago, given that the statute of limitations for civil copyright claims is only three years. However, Led Zeppelin re-released *Led Zeppelin IV* in 2014, and therefore initiated a completely new statutory period.<sup>15</sup>

The Supreme Court had had the opportunity to weigh in on the issue in 2014. In *Petrella v. Metro-Goldwyn-Mayer*, the Court addressed this unlimited limitation in the context of a screenplay written more than two decades prior.<sup>16</sup> It held that, absent extraordinary circumstances, laches cannot be used to bar a claim for copyright infringement brought within the three-year statutory period.<sup>17</sup> This decision laid the legal foundation for Michael Skidmore’s case, providing him with the opportunity to pursue a claim nearly half a century old. Furthermore, it highlighted how judicial interpretation of—and congressional acquiescence to—issues within the copyright statute of limitations have effectively made the music

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9. See generally *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (establishing the principle of unlawful appropriation of a musical composition).

10. Jordan Runtagh, *Songs on Trial: 10 Landmark Music Copyright Cases*, ROLLING STONE (June 8, 2016), <http://www.rollingstone.com/music/lists/songs-on-trial-10-landmark-music-copyright-cases-2016-0608/vanilla-ice-vs-queen-and-david-bowie-1990-20160608>; see also *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976).

11. See Runtagh, *supra* note 10.

12. Ann Oldenburg, ‘*Blurred Lines*’ Jury Finds for Marvin Gaye, USA TODAY (Mar. 10, 2015, 5:35 PM), [www.usatoday.com/story/life/music/2015/03/10/blurred-lines-trial-verdict/24492431/](http://www.usatoday.com/story/life/music/2015/03/10/blurred-lines-trial-verdict/24492431/); see also *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500 (C.D. Cal. July 14, 2015).

13. *Skidmore v. Led Zeppelin*, No. CV 15–3462 RGK (AGRx), 2016 WL 1442461 (C.D. Cal. Apr. 8, 2016).

14. *Id.* at \*1-2.

15. 17 U.S.C. § 507(b) (2012); *Skidmore*, 2016 WL 1442461, at \*7.

16. *Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962, 1970 (2014).

17. *Id.* at 986.

copyright limitations period perpetual, with the three-year limit renewing with every reproduction of the work.

This Note addresses this anomaly—specifically, how it came to be, its current application, and what can be done about it. In Part II, this Note gives the background information of the case-in-chief, *Skidmore v. Led Zeppelin*, and briefly identifies its relevant holdings. Part III provides an outline of substantive copyright law, focusing on the subject matter of works protected under the law, the scope of those protections, and the legal basis of musical work infringement claims. Last, in Part III, this Note looks to *Skidmore*'s application of this substantive law. Part IV explores the various limitations on actions for copyright infringement, including the defenses of: (1) an expired statute of limitations; (2) waiver or abandonment of rights; and (3) the equitable doctrine of laches. It then looks to *Skidmore*'s application of these defenses in relation to Led Zeppelin's motion for summary judgment. Part V provides an in depth discussion of *Petrella v. Metro-Goldwyn-Meyer*, a 2014 Supreme Court case in which several issues related to limitations on actions in copyright were addressed. Then, in Part VI, the Supreme Court's holding and reasoning from *Petrella* are applied to and analyzed through the lens of the facts in *Skidmore*. In this section, this Note will argue that the court, in applying *Petrella*, failed to properly consider and appreciate the circumstances of the case in light of the Supreme Court's recognition in *Petrella* that exceptional circumstances may bar a copyright infringement action, even when a statute of limitations is present. Part VII suggests changes to the Copyright Act which, if employed by Congress, would eliminate the ambiguity in the statute and relieve the federal district courts of the heavy burden it creates.

## II. *SKIDMORE V. LED ZEPPELIN*

### A. *Facts*

In late 1967, Spirit released their first album with Ode Records, which contained the instrumental composition "Taurus."<sup>18</sup> A year later, they toured across the United States in an effort to promote their second album.<sup>19</sup> During the tour in Denver, Colorado, an up-and-coming British rock band named Led Zeppelin opened for Spirit.<sup>20</sup> Two years after that tour, when Led Zeppelin returned to England during the holiday season of 1970 into 1971, they recorded "Stairway to Heaven," which they first performed later that year in March.<sup>21</sup> In November 1971, Led Zeppelin released "Stairway to Heaven" as the fourth track on the album *Led Zeppelin IV*.<sup>22</sup>

In the years that followed, fans loyal to both bands, and even some band members themselves, could not help but notice the similarity between the opening sections of each song.<sup>23</sup> During a 1991 interview, an interviewer asked Wolfe about the likelihood that Led Zeppelin had copied "Taurus," but Wolfe brushed off any

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18. *Skidmore*, 2016 WL 1442461, at \*1.

19. *Id.* at \*2.

20. *Id.*

21. *Id.*

22. *Id.* Under current Copyright Law, Led Zeppelin's phonorecord release of the song in 1971 would constitute "publication" of the work, and thus would be the official beginning of when they were susceptible to infringement suits. See 17 U.S.C. § 101 (2012).

23. *Id.* at \*3.

concerns.<sup>24</sup> He went so far as to say, “I’ll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit.”<sup>25</sup> Wolfe did approach several lawyers throughout the years about bringing suit, all of which said the case was too old and declined to take it.<sup>26</sup> Meanwhile, “Stairway to Heaven” was being played time and time again across radio waves, in record stores, and at the end of countless middle school dances. True to his word, Wolfe never filed suit before his death in 1997, when he drowned while saving his son.<sup>27</sup> It was not until May 2014 that Michael Skidmore, acting on behalf of Wolfe’s trust, brought an action against Led Zeppelin.<sup>28</sup> Shortly thereafter, in October 2014, the album *Led Zeppelin IV* was re-released.<sup>29</sup>

### B. Arguments

In this action, Skidmore alleged copyright infringement and a violation of the right of attribution against defendants Led Zeppelin, each individual member of Led Zeppelin, and a number of record labels.<sup>30</sup> In their motion for summary judgment,<sup>31</sup> Led Zeppelin put forward several separate defenses, two of which, abandonment/waiver of rights and laches, related to the timeliness of the lawsuit.<sup>32</sup>

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24. *Id.*

25. *Id.*

26. *Led Zeppelin Verdict: Band Didn’t Steal “Stairway to Heaven” Riff*, CBS NEWS, <http://www.cbsnews.com/news/led-zeppelin-verdict-stairway-to-heaven/> (last updated June 23, 2016).

27. *Id.*

28. *Skidmore*, 2016 WL 1442461, at \*1.

29. Kory Grow, *Led Zeppelin Continue Reissues With ‘IV’ and ‘Houses of the Holy,’* ROLLING STONE (July 29, 2014), <http://www.rollingstone.com/music/news/led-zeppelin-continue-reissues-with-iv-and-houses-of-the-holy-20140729>.

30. *Skidmore*, 2016 WL 1442461, at \*1.

31. *Id.* After the court’s ruling on this motion, a trial over the merits of the case was held and a jury returned a verdict for defendants, saying that defendants had access to the song “Taurus” but that it was not substantially similar to “Stairway to Heaven.” Matt Diehl, *Led Zeppelin ‘Stairway’ Verdict: Inside the Courtroom on Trial’s Last Day*, ROLLING STONE (June 23, 2016), <http://www.rollingstone.com/music/news/led-zeppelin-stairway-verdict-inside-the-courtroom-on-trials-last-day-20160623>.

32. *Skidmore*, 2016 WL 1442461, at \*5. Led Zeppelin also called into question whether Wolfe had retained the rights to the copyright of the song in order to have standing to sue. *Id.* at \*8. Wolfe had entered into an exclusive songwriter agreement with Hollenbeck Music designating him a “writer for hire” with “full rights of copyright renewal vested in Hollenbeck” in 1967. *Id.* at \*1. Because of this, Led Zeppelin argued that Wolfe was not the rightful copyright owner. *Id.* at \*9. Skidmore put forward evidence that “Taurus” was actually written prior to the agreement, and thus was not created at the “instance and expense of the engaging party.” *Id.* at \*8 (quoting Twentieth Century Fox Film Corp. v. Entm’t Distrib., 429 F.3d 869, 877 (9th Cir. 2005) (referring to the Ninth Circuit’s approach to works made for hire under the 1909 Copyright Act)). The court held that Skidmore had proffered enough evidence to survive summary judgment. *Id.* at \*9. The work for hire doctrine has since been defined by Congress, *see* 17 U.S.C. § 101 (2012), and clarified by the Supreme Court, *see* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). For the purposes of this Note, we will assume that Wolfe had a claim to the copyright of the song and thus had standing to sue.

Defendants also argued that plaintiffs failed to produce a deposit copy of the “Taurus” musical composition from the copyright office. *Skidmore v. Led Zeppelin*, No. CV 15–3462 RGK (AGRx), 2016 WL 1442461, at \*8 (C.D. Cal. April 8, 2016). The court quickly dispersed with this argument, noting that defendants had presented no authority for this argument and that Ninth Circuit precedent forgave mistake on copyright registrations. *Id.*

They also sought summary judgment on the merits of the case, asserting that Skidmore could not demonstrate copying.<sup>33</sup>

### C. Holdings

On the issue of abandonment/waiver, the United States District Court for the Central District of California found for the plaintiffs.<sup>34</sup> The court reasoned that there was a triable issue of fact as to whether Wolfe, through his statement during his 1991 interview, had acted in a manner with the intent to abandon his rights in the song.<sup>35</sup> The court next addressed whether the lawsuit was barred by the doctrine of laches. It rejected the defendant's argument and held that the equitable doctrine of laches did not bar Skidmore's claim.<sup>36</sup> Finally, the court considered expert testimony regarding the similarity of both songs, held that a triable issue of fact existed as to whether "Stairway to Heaven" bore substantial similarity to legally protectable elements of "Taurus," and thus sent the case to be addressed on its merits by a jury.<sup>37</sup>

## III. COPYRIGHT INFRINGEMENT IN MUSIC

Copyright law serves a unique purpose in the American legal system. It is premised on the idea that the law can protect a person's imaginative creations.<sup>38</sup> Under the Copyright Act, for a work to be protected it must be: (1) an "original work[] of authorship"; and (2) "fixed in any tangible medium of expression."<sup>39</sup> The bar for originality is low and requires only a minimal level of creativity.<sup>40</sup> Fixation, like originality, is relatively easy to establish. For a work to be fixed, its embodiment in a copy or phonorecord must be "sufficiently permanent or stable" so it can be communicated for more than a "transitory duration."<sup>41</sup> Regarding "Taurus," the court did not address whether the song was sufficiently original or whether the song was included on Spirit's first album.<sup>42</sup> Thus—at least for the purposes of this Note—we can infer that the song was protectable.

### A. Protected Subject Matter in Music Copyrights

The Copyright Act extends its protections to a specific subject matter.<sup>43</sup> Two types of subject matter apply to recorded music: the protection for musical works,<sup>44</sup> and the protection for sound recordings.<sup>45</sup> Therefore, a song recorded on a

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33. *Skidmore*, 2016 WL 1442461, at \*5.

34. *Id.* at \*7.

35. *Id.* at \*6.

36. *Id.* at \*8.

37. *Id.* at \*11.

38. Mark S. Lee, *Entertainment and Intellectual Property Law* § 1:2 (2016 ed.).

39. 17 U.S.C. § 102(a) (2012).

40. In the seminal opinion by Justice O'Connor, the Supreme Court held that an alphabetical arrangement of names and phone numbers did not "[possess] at least some minimal degree of creativity," thus setting the bar for originality that is followed today. *Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991).

41. 17 U.S.C. § 101 (2012).

42. *Skidmore*, 2016 WL 1442461, at \*1.

43. *See* 17 U.S.C. § 102 (2012).

44. 17 U.S.C. § 102(a)(2) (2012).

45. 17 U.S.C. § 102(a)(7) (2012).

phonorecord, such as “Taurus,” has two separate and distinct ways in which it is protected from unlawful copying. These two protections are commonly confused, and distinguishing them is crucial.

First, a musical work or composition is a song written by a composer consisting of “rhythm, harmony, and melody.”<sup>46</sup> The musical work protection extends to any accompanying words that go along with the work.<sup>47</sup> Simply put, a musical work is a “particular sequence and arrangement of lyrics and/or music that comprise what most people refer to as a ‘song.’”<sup>48</sup> Further, “[a] musical composition’s copyright protects the generic sound that would necessarily result from any performance of the piece.”<sup>49</sup> The drafters of the Copyright Act did not think it necessary to create a statutory definition of musical work, as the term has a “fairly settled meaning.”<sup>50</sup>

In contrast, a “sound recording” operates in conjunction with a musical work; it is the work’s reproduction onto a phonorecord.<sup>51</sup> A sound recording “result[s] from the fixation of a series of musical, spoken, or other sounds.”<sup>52</sup> Sound recordings may be fixed in any tangible medium including phonograph discs, cassettes, and other objects that allow sound to be communicated either directly or with the aid of a machine.<sup>53</sup> In sum, “[t]he sound recording is the sound produced by the performer’s rendition of the musical work.”<sup>54</sup>

The court had dealt with this distinction itself years before *Skidmore*. In *Newton v. Diamond*, the musical piece—a combination of musical work and sound recording—at issue was a six-second segment of the plaintiff’s song, “Choir.”<sup>55</sup> Defendants, alternative rock and hip-hop group, the Beastie Boys, looped the short segment repeatedly in their song “Pass the Mic.”<sup>56</sup> The group had obtained a license to use the sound recording but not the musical work.<sup>57</sup> The Beastie Boys filed a motion for summary judgment, arguing that the musical work rights in the short sample could not be protected as a matter of law.<sup>58</sup>

Recognizing that the license prevented an infringement claim regarding the sound recording, the *Newton* court addressed only the musical work protections to determine whether the Beastie Boys had unlawfully appropriated the underlying composition of “Choir.”<sup>59</sup> It looked first at what elements of Newton’s composition

46. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 272 n.1 (6th Cir. 2009); *see also* Lee, *supra* note 38, at § 7.3.

47. 17 U.S.C. § 102(a)(2) (2012).

48. *Bridgeport Music*, 585 F.3d at 272 n.1.

49. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (2002).

50. Melville B. Nimmer, *Nimmer on Copyright* § 2.05 (2016).

51. *Id.* at § 2.10.

52. 17 U.S.C. § 101. The Act continues to distinguish sound recordings from those sounds that accompany audiovisual works, such as motion pictures. *Id.*

53. Nimmer, *supra* note 50, at § 2.10.

54. *Newton*, 204 F. Supp. 2d at 1249-50.

55. *Id.* at 1246.

56. *Id.*; BEASTIE BOYS, *Pass the Mic*, on CHECK YOUR HEAD (Capitol Records 1992). You can hear the sampled portion of the plaintiff’s song clearly at the beginning of the recording, and intermittently throughout the song.

57. *Newton*, 204 F. Supp. 2d at 1246-47. Newton had sold the rights to the sound recording to ECM records, who then licensed it to the Beastie Boys. *Id.* at 1249.

58. *Id.* at 1247. The Beastie Boys also argued “any misappropriation [was] *de minimis*, and thus not actionable as copyright infringement.” *Id.* The Ninth Circuit affirmed the district court’s decision on this ground. *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003).

59. *Newton*, 204 F. Supp. 2d at 1249.



were protected by the musical composition copyright.<sup>60</sup> The techniques Newton used—playing a note then singing the note above it—had been used a number of times, by other artists, prior to his recording.<sup>61</sup> Newton argued, however, that his unique approach to using the technique—which his expert witness termed the “Newton Technique”—made “Choir” original.<sup>62</sup> The court, however, did not accept this argument. While Newton’s approach in using the technique may have been original, it appeared nowhere in the musical composition.<sup>63</sup> The modification that Newton employed was not indicated in the musical score and was merely a result of his performance.<sup>64</sup> The court drew a line between what is written down in the score as part of the composition and what the artist adds as a result of his or her personal performance, and determined that it would consider only the former to fall within the musical work protections.<sup>65</sup> The court reasoned that: (1) the portion of the composition sampled was too small to constitute an infringement; (2) it was not qualitatively distinctive enough, meaning it was not sufficiently significant to the song as a whole, to overcome its small size; and (3) Newton’s expert witnesses had considered performance techniques outside the scope of the composition in their analyses of the composition’s originality.<sup>66</sup> Thus, the short segment was not protectable as a matter of law, and the Beastie Boys were successful on their motion for summary judgment.<sup>67</sup>

The lesson from *Newton* is that a musical composition is specific, fixed at the time it is created, and cannot be altered by anything outside the written notes, even by the most unique performance technique. Whether it is fixed on paper such as “Choir,” or on a phonorecord such as “Taurus,” a musical work does not change over time and is defined at the moment it is written or created. In *Skidmore*, the suit called into question whether Led Zeppelin had infringed on the musical work—not sound recording—in “Taurus.” The song was written in 1967, and thus its musical work and underlying composition were fixed in that year and could not change over time. If Led Zeppelin did indeed infringe “Taurus” when it re-released “Stairway to Heaven” in 2014, that infringement is identical to the infringement that took place in 1967 because the musical composition, as a matter of law, cannot change over time.

### B. Substantial Similarity

In order for *Skidmore* to succeed on the merits, he was required to show the existence of a substantial similarity between the musical work of each song, which is typically done by employing circumstantial evidence.<sup>68</sup> The plaintiff, after proving ownership of the copyright, must show that the defendant copied protected elements of the copyrighted work.<sup>69</sup> Because direct evidence of copying is not usually

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60. *Id.*

61. *Id.* at 1250 (listing a number of musical works that had previously incorporated the technique).

62. *Id.* at 1251

63. *Id.*

64. *Id.*

65. *Id.* at 1252

66. *Id.* at 1254-56.

67. *Id.* at 1256, 1260.

68. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

69. *Id.*

available to the plaintiff, the plaintiff must show that the defendant had access to the copyrighted work and that the two works are substantially similar.<sup>70</sup>

“Access requires ‘an opportunity to view or to copy plaintiff’s work.’”<sup>71</sup> This opportunity must be reasonable and there must be “more than a ‘bare possibility’” of viewing by the defendant.<sup>72</sup> Under Ninth Circuit precedent, the inverse-ratio rule requires that where there is a high degree of access shown, there is a lower standard of proof of substantial similarity of the works.<sup>73</sup> This proof is shown through a two-part test.<sup>74</sup> First, during the extrinsic test, the court usually creates an analytical dissection of the work by relying on expert testimony.<sup>75</sup> During this test, plaintiffs must identify concrete elements on which to base their claim.<sup>76</sup>

The second part of the substantial similarity test is the intrinsic test, under which a jury must determine “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”<sup>77</sup> This analysis relies on fact-based showings to a jury, whose verdict is given deferential treatment so long as it is based on sufficient evidence.<sup>78</sup>

On the issue of access, evidence clearly established on the record included: (1) Spirit and Led Zeppelin’s performances at the same venue at least three times between the Denver show in 1968 and the release of *Led Zeppelin IV* in 1971; (2) the interactions between the groups at the festivals; and (3) the admissions from members of Led Zeppelin that they were fans of Spirit.<sup>79</sup> Led Zeppelin argued that no reasonable juror could find access based on this chain of events.<sup>80</sup> Led Zeppelin also offered into evidence additional facts mitigating the amount of interaction both parties had during these performances.<sup>81</sup> The court held there was sufficient circumstantial evidence regarding Led Zeppelin’s access to “Taurus,” and therefore a factual dispute existed that needed to be addressed.<sup>82</sup>

Moving on to the extrinsic test, the *Skidmore* court first noted the protected element in question was the descending chromatic bass line during the first two minutes of the song, lasting thirteen seconds.<sup>83</sup> Skidmore’s experts testified that the two songs shared several similarities during that portion of the song, and that the beginning section is arguably the most qualitatively important segment of the song.<sup>84</sup> Defendant’s experts countered that the descending chromatic bass line was a

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70. *Id.*

71. *Id.* at 482 (quoting *Sid and Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)).

72. *Id.* (quoting *Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir. 1982)).

73. *Id.* at 485.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 2011)).

78. *Id.* at 481-82.

79. *Skidmore v. Led Zeppelin*, No. CV 15-3462 RGK (AgRx), 2016 WL 1442461, at \*2, 12 (C.D. Cal. Apr. 8, 2016).

80. *Id.* at \*13.

81. *Id.*

82. *Id.* at \*11.

83. *Id.* at \*16.

84. *Id.* (citing *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (“Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find a substantial similarity.”)).

“common convention that abounds the music industry,” and thus was not a protectable element of the song.<sup>85</sup> The court noted the “similarities here transcend the core structure,” taking into account the notoriety of the segment as well as the fact that both bass lines were played at the same pitch.<sup>86</sup> It held that Skidmore had identified sufficient concrete protectable elements for the case to proceed.<sup>87</sup>

In all musical work infringement cases, the court does not second-guess the jury’s finding during the intrinsic test, and reverses factual findings of access during the extrinsic test if they involved a clearly erroneous application of the law.<sup>88</sup> Thus, a jury is given a significant responsibility in determining whether two works are substantially similar. The district court hearing the case must therefore exercise due diligence in eliminating frivolous claims, properly weighing the evidence given during depositions, eliminating unprotectable elements of the content in question, and otherwise narrowing the scope of the jury’s consideration as much as possible.

#### IV. LIMITATIONS ON ACTIONS FOR COPYRIGHT INFRINGEMENT

While the case was brought forty-three years after the first cause of action accrued, the re-release of *Led Zeppelin IV* triggered the beginning of a new statutory period, allowing the case to proceed.<sup>89</sup> As with any area of law, defendants in copyright infringement cases are allowed to present a number of defenses in the pre-trial phase to have the complaint either dismissed during pleadings or after a successful motion for summary judgment; in this case, Led Zeppelin filed a motion for summary judgment on several grounds.<sup>90</sup> We look first at the statute of limitations in copyright law and how courts have applied and interpreted it since its codification. We then look specifically at two of the defenses offered by Led Zeppelin in *Skidmore*, abandonment and laches, then relate them back to the statute of limitations.

##### *A. Statute of Limitations*

Copyright law is unique in the way that it tracks the period for a statutory limitation on actions for untimeliness. “When a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong.”<sup>91</sup> In 1957, Congress adopted an express three-year statute of limitations for copyright infringement claims.<sup>92</sup> While Congress may have placed a firm limit on bringing suit, it neglected to take into account the nature and type of property protected under copyright law. Courts and scholars have had to pick up the slack by recognizing that a separate-accrual rule governs the copyright statute of limitations.<sup>93</sup> Each time a work is reproduced—for example, a re-release of a record—or distributed,

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85. *Id.*

86. *Id.* at \*17.

87. *Id.*

88. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

89. *See supra* notes 28 and 29.

90. *See supra* note 33.

91. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1662, 1669 (2014).

92. *See* 17 U.S.C. § 507(b) (2012).

93. *Petrella*, 134 S. Ct. at 1669.

the infringer is liable to suit.<sup>94</sup> Therefore, courts are required to address two questions arising under these circumstances: (1) when does the statute of limitations begin to accrue; and (2) how far back do you look to measure damages?

### *1. Moment of Accrual*

Courts have been forced to determine when the clock on the statute of limitations for copyright infringement begins to tick. In doing so, they have developed two different approaches. First, the *injury rule* holds that the accrual period begins when the infringement first occurs. This theory was discussed in detail in *Auscape International v. National Geographic Society*.<sup>95</sup> Looking to legislative history, the United States District Court for the Southern District of New York found that Congress had the goal of creating a fixed statute of limitations.<sup>96</sup> The court reasoned infringement is generally done through public display or performance, and thus a person can easily ascertain any infringement of his or her rights.<sup>97</sup> Therefore, it adopted the injury rule because it is more fixed, in line with Congress's intentions, and is better suited for infringement cases where the injury would be immediately known.<sup>98</sup>

The second approach, which has much wider acceptance among the circuits,<sup>99</sup> is the *discovery rule*. Under that rule, the statute of limitations does not begin to accrue until the copyright holder learns, or reasonably should have learned, of the infringement.<sup>100</sup> This theory, contrary to the injury rule, considers the circumstances of the plaintiff—i.e., whether they knew or should have known about the infringement—in determining the start of the clock to file suit. The discovery rule tends to be applied when a statute is silent on the issue.<sup>101</sup> It is the method applied by the Ninth Circuit in copyright cases.<sup>102</sup>

### *2. How to Measure Three Years*

When awarding damages, courts have struggled in determining how far back they should look when assessing them, and have developed two possible approaches to the question. The first, the *continuing wrong theory*, was created by Judge Posner in *Taylor v. Meirick*.<sup>103</sup> Under this theory, when there has been a series of infringements lasting for more than the initial statutory period, as long as the most recent one occurred within three years and the plaintiff was reasonably ignorant to the previous infringements, the plaintiff can bring suit and collect damages for all infringements.<sup>104</sup> In *Taylor*, while the infringing acts took place over the course of

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94. *Id.*

95. 409 F. Supp. 2d. 235 (S.D.N.Y. 2004).

96. *Id.* at 245 (asserting that the legislative history makes it clear that injury rule is in line with the certainty Congress intended when drafting the Copyright Act).

97. *Id.* at 247.

98. *Id.*

99. *Petrella*, 134 S. Ct. at 1969 n.4.

100. *Id.*

101. *TRW, Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

102. *See Polar Bear Prods., Inc. v. Timex*, 384 F.3d 700, 706 (9th Cir. 2004).

103. 712 F.2d 1112, 1118 (1983).

104. *Nimmer*, *supra* note 50, at § 12.05.

several years, because Taylor filed suit within three years of the last act, he was able to collect damages for all of the previous infringements.

The second and more widely held theory is the *rolling theory*.<sup>105</sup> Under that theory, the court cuts off any damages that occurred more than three years before the cause of action was filed.<sup>106</sup> For example, if the series of infringements began on May 1, 2000, and the plaintiff waited until June 30, 2010 to file suit, the plaintiff could only recover for profits and damages attributable to infringement since June 30, 2007. This is now the accepted measuring stick to use as the Supreme Court officially adopted this approach in *Petrella*.<sup>107</sup>

### B. Waiver/Abandonment

Abandonment of a copyright occurs only if there is intent shown by the copyright holder to abandon the work: manifestation of which is shown through an overt act.<sup>108</sup> This is not a heavily litigated subject area, but the *Skidmore* court cited two analogous cases which addressed the issue, and adopted its reasoning to form its holding on abandonment. Here we take a closer look at those cases.

In *Melchizedek v. Holt*, the plaintiff copyright holder stated on several occasions that he did not care about copyrights and that there are more important things than copyright protection.<sup>109</sup> Of these statements, the *Skidmore* court cited a remark the copyright creator made while at a conference in Germany: “I don’t care about copyrights or any of that stuff, that doesn’t matter. Forget it, just take it and you’ll understand what this is all about by tomorrow.”<sup>110</sup> The court in *Melchizedek* held that the plaintiff’s statements did not amount to an intent to abandon rights because it was unclear which copyrights he was talking about.<sup>111</sup>

The second analogous case referred to in *Skidmore* involved the “Happy Birthday” song. In *Marya v. Warner/Chappell Music, Inc.*, the plaintiffs filed a class action suit for declaratory judgment that the copyright of the song, owned by the defendant, was invalid.<sup>112</sup> As in *Skidmore*, the plaintiffs offered evidence from a magazine article showing that the defendant had acquiesced to the use of the lyrics by the public, resigning herself to the fact that the lyrics had become common property.<sup>113</sup> The court stated, “[w]e cannot say that this evidence is sufficient to entitle Plaintiffs to a directed verdict at trial inasmuch as it is not a direct quote from [the lyricist].”<sup>114</sup>

From these two cases we may surmise that, at least for the *Skidmore* court’s analysis, abandonment of a copyright is an affirmative defense in which the defendant must prove that: (1) the copyright holder in their statements was referencing the specific work in question; and (2) there was a direct quote expressing the holder’s intent to abandon their rights to the work.

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105. *Id.*

106. *Id.*

107. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1970 (2014).

108. Nimmer, *supra* note 50, at § 13.06.

109. 792 F. Supp. 2d 1042, 1048 (D. Ariz. 2011).

110. *Skidmore v. Led Zeppelin*, No. CV 15-3462 RGK (AGRx), 2016 WL 1442461, at \*5 (C.D. Cal. April 8, 2016) (quoting *Melchizedek*, 792 F. Supp. 2d at 1048).

111. *Melchizedek*, 792 F. Supp. 2d at 1052.

112. 131 F. Supp. 3d 975, 979 (C.D. Cal. 2015).

113. *Id.* at 992-93.

114. *Id.* at 993.

Abandonment of rights was the first defense that Led Zeppelin asserted. The band argued that Wolfe's statement during the 1991 interview, in which he seemed to brush off any concern about them infringing "Taurus," was a clear manifestation of intent to abandon and an affirmative act of abandonment.<sup>115</sup> Led Zeppelin even garnered testimony from the person who conducted the interview.<sup>116</sup> Skidmore countered with evidence showing Wolfe never reviewed the article before it was published, the tone of the interview was one of "trying to save face and make light of a bad situation" rather than communicating a serious intent to abandon his rights, he had subsequently acted in a manner inconsistent with such an intent, and he had been in talks with different attorneys throughout the years about filing an infringement action.<sup>117</sup> The court found, comparing these facts to the cases discussed above, that the evidence offered conflicting issues of fact that a jury would need to sort out.<sup>118</sup> In deciding the summary judgment motion before it, the *Skidmore* court gave greater weight to circumstantial evidence regarding the tenor of the interview and Wolfe's state of mind during it than to the direct quote from Wolfe in which he expressly referenced both songs in question.

### C. Development of the Equitable Doctrine of Laches

The doctrine of laches is an affirmative defense by which a plaintiff can be barred from relief, equitably, if the defendant can show the circumstances of the case warrant it.<sup>119</sup> The application of the doctrine in copyright law was summarized in Judge Learned Hand's 1916 decision in *Haas v. Feist, Inc.*<sup>120</sup> In that case, the court addressed the similarity of two songs.<sup>121</sup> After receiving initial notice of the infringement, the plaintiff delayed bringing suit for several months.<sup>122</sup> Judge Hand reasoned:

[I]t is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his exploitation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.<sup>123</sup>

The plaintiff in *Hass* was allowed to recover damages only to the extent they accumulated before he received notice of the infringement, so as to avoid capitalization of the defendant's cost in exploiting the work.<sup>124</sup>

The Ninth Circuit first addressed the issue in 1947 in *Universal Pictures Co. v. Harold Lloyd Corp.*<sup>125</sup> The appellant, Universal, invoked the doctrine of laches in

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115. Skidmore, 2016 WL 1442461, at \*5.

116. *Id.*

117. *Id.* at \*6.

118. *Id.*

119. Fed. R. Civ. P. 8(c)(1).

120. 234 F. 105 (S.D.N.Y. 1916).

121. *Id.* at 107.

122. *Id.* at 108.

123. *Id.*

124. *Id.* at 109.

125. 162 F.2d 354 (9th Cir. 1947).

an attempt to preclude Lloyd's recovery of damages.<sup>126</sup> Universal argued that, after notice of the infringement, Lloyd had *unreasonably delayed* for fifteen months before asserting a claim for infringement.<sup>127</sup> The court opined that the general rule from *Haas* was "reasonable," but noted that Judge Hand had also discussed that, where the defendant had deliberately copied a work, laches may be irrelevant.<sup>128</sup> Here, there was widespread dissemination of the infringing work, and the length of copied material was a significant portion of the original work, thus reducing the value of the original.<sup>129</sup>

Upon the adoption of the express three-year limitation in 1957, a circuit split developed over whether laches still had a role in copyright infringement. The Eastern District of New York and the Fourth Circuit both held that copyright law, since the adoption of a statute of limitations, no longer recognized the equitable defense.<sup>130</sup> The Ninth Circuit, on the other hand, upheld its past precedent applying the doctrine when it addressed the issue in *Petrella v. Metro-Goldwyn Meyer*: in applying the laches doctrine, the court held that, because the plaintiff had intentionally delayed bringing suit until the copyrighted work proved profitable, that plaintiff was precluded from bringing suit.<sup>131</sup>

#### V. "RAGING BULL": THE SUPREME COURT WEIGHS IN

In 2014, the problems involving the statute of limitations in copyright infringement and the applicability of laches came to a head. The Supreme Court chose to address the issue when it heard *Petrella* on appeal from the Ninth Circuit. This case provided the backbone for the *Skidmore* court's holding.

##### A. Background

In 1976, Frank Petrella and Jake "The Bronx Bull" LeMotta sold a screenplay they had written about LeMotta's time as a boxing champion of the 1940s and 1950s.<sup>132</sup> Four years later, a subsidiary of Metro-Goldwyn-Mayer ("MGM") created and released the film "Raging Bull" after acquiring the rights to the screenplay in 1978.<sup>133</sup> In 1991, Petrella's daughter, Paula, renewed the copyright in the original screenplay and eventually became the sole owner of the copyright.<sup>134</sup> In 2009, after several years of back and forth between Paula Petrella and MGM regarding her rights to the work, Petrella filed a copyright infringement claim in the familiar United States District Court for the Central District of California.<sup>135</sup>

MGM moved for summary judgment, arguing that Petrella, by waiting eighteen years to file her complaint—the time since she had acquired the rights in 1991—had

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126. *Id.* at 372.

127. *Id.*

128. *Id.*

129. *Id.* at 369.

130. Nimmer, *supra* note 50, at § 12.06.

131. 695 F.3d 946, 956 (9th Cir. 2012).

132. *Petrella v. Metro-Goldwyn-Meyer Inc.*, 134 S. Ct. 1962, 1970 (2014); *see also Jake LaMotta Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/jake-lamotta-259489#professional-boxing-success> (last updated Nov. 28, 2016).

133. *Petrella*, 134 S. Ct. at 1970.

134. *Id.* at 1971.

135. *Id.*

unreasonably delayed the suit and prejudiced MGM's case.<sup>136</sup> The district court held, and the court of appeals affirmed, that the equitable doctrine of laches barred any relief for Petrella.<sup>137</sup> The Ninth Circuit noted in its decision that it suspected the true cause of Petrella's delay was the fact that, although the film had not made any money in years, MGM had made a substantial investment in exploiting "Raging Bull," believing they were the sole owners of the copyright to the screenplay.<sup>138</sup>

### B. Holding and Reasoning

The Supreme Court reversed, holding that: (1) laches could not be evoked to bar adjudication of a claim brought within the three-year statutory period; (2) in extraordinary circumstances, the threshold of relief may be equitably barred by laches; and (3) a plaintiff's delay in bringing suit can impact a court's assessment of damages.<sup>139</sup>

The Court noted that the principle application of laches was to claims for which Congress "provided no fixed time limitation."<sup>140</sup> The doctrine originated in courts of equity where no express limit existed,<sup>141</sup> and the Supreme Court has routinely cautioned against invoking it as a bar to legal relief.<sup>142</sup> The purpose of Congress enacting the statute of limitations was, in part, to create uniformity regarding the time in which copyright claims could be pursued.<sup>143</sup> Looking for consistency in copyright suits, the Court held that "in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."<sup>144</sup>

Adopting the *rolling theory* of relief, the majority continued and reasoned that because the copyright act itself takes into account delays in bringing action, a plaintiff can "gain retrospective relief only three years back from the time of the suit,"<sup>145</sup> thus, an "infringer is insulated from liability for earlier infringements of the same work."<sup>146</sup> The Court noted that a defendant still may try to reduce actual damages by offsetting profits made during that period with "deductible expenses" incurred, while generating profits and "elements of profit attributable to factors other than the copyrighted work."<sup>147</sup>

On the issue of accrual, the Court did not expressly adopt either the *injury rule* or the *discovery rule*. It stated in dicta that the limitations period generally begins when the plaintiff has a "present cause of action," and "can file suit[,] and obtain relief."<sup>148</sup> This would indicate an adoption of the injury rule, as evidenced by beginning the clock at the time of infringement without regard to whether the plaintiff knew or should have known that their work was being used. However, the

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136. *Id.*

137. *Id.* at 1971-72.

138. *Id.* at 1972.

139. *Id.* at 1967.

140. *Id.* at 1973.

141. *Id.* at 1973, 1975.

142. *Id.* at 1973 (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)).

143. *Id.* at 1969.

144. *Id.* at 1974.

145. *Id.* at 1973.

146. *Id.* at 1969.

147. *Id.* at 1973 (citing 17 U.S.C. § 504(b) (2012)).

148. *Id.* at 1969.



Court recognized the existence of the discovery rule and its use by a majority of the circuits, and noted that it had “not passed on the question.”<sup>149</sup>

Most importantly, the Court did not completely prohibit applying laches in the copyright context. A statute of limitations does not completely bar claims for equitable relief, even though courts are generally cautioned against this.<sup>150</sup> The Court provided one example: “when a copyright owner engages in intentionally misleading representations concerning his abstention from suit, and the alleged infringer detrimentally relies on the copyright owner’s deception, the doctrine of estoppel may bar the copyright owner’s claims completely.”<sup>151</sup> Instead of a bright-line rule barring the laches defense when a statute of limitations is present, the Court reserved the doctrine’s application where the facts and circumstances of the case allow. Thus, in extraordinary circumstances, a court may bar a plaintiff’s entitlement to relief in the interest of equity.

### C. Dissent

*Petrella* was decided over a dissent written by Justice Breyer, joined by Chief Justice Roberts and Justice Kennedy, which took into account the practical considerations of modern litigation.<sup>152</sup> That dissent refutes the Court’s analysis in several ways.

First, the three-year look back limit on damages still allows plaintiffs to wait until net revenues from the infringement turned positive and, therefore, gain from collecting damages when the infringing work was most profitable.<sup>153</sup>

Second, a plaintiff can also delay suit until the defendant has recovered the majority of their expenses attributable to factors other than infringement, which the plaintiff would not be entitled to collect,<sup>154</sup> thus taking advantage of defendant’s profits without being required to subtract expenses.<sup>155</sup>

Third, legislative history, the practice of federal courts, and several decisions by the Supreme Court present no indication that Congress intended to bar the application of equitable relief—or equity to bar legal relief—by the enactment of an express statute of limitations.<sup>156</sup>

The first two bullets of reasoning are the result of the rolling statute of limitations. Justice Breyer cautioned that this rolling application allows claims to remain dormant until they prove profitable to the plaintiff.<sup>157</sup> For example, effective lawyering would advise a plaintiff to wait until the last day of a profitable statutory period to file his claim—especially when that period is several years after the initial infringing act occurred—when it is likely that the defendant has exhausted all of his own expenditures in exploiting the work and thus all monies received are pure

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149. *Id.* at 1969 n.4. At least one court has addressed this ambiguity in detail. *See* Design Basics LLC v. J&V Roberts Invs., 130 F. Supp. 3d 1266, 1282 (E.D. Wis. 2015) (holding that “until the Seventh Circuit holds otherwise,” it would continue to apply the discovery rule).

150. *Petrella*, 134 S. Ct. at 1973.

151. *Id.* at 1977.

152. *Petrella*, 134 S. Ct. at 1985 (Breyer, J., dissenting).

153. *Id.* at 1981.

154. 17 U.S.C. § 504(b) (2012).

155. *Petrella*, 134 S. Ct. at 1981-82 (Breyer, J., dissenting).

156. *Id.* at 1982.

157. *See id.* at 1980.

profit.<sup>158</sup> Indeed, the dissent takes note of this anomaly: “If a defendant reproduces or sells an infringing work on a continuing basis, a plaintiff can sue every 3 years until the copyright term expires—which may be up to 70 years after the author’s death.”<sup>159</sup>

Because the majority of the *Petrella* Court did not heed Justice Breyer’s warning, the *Skidmore* court was not required to address the statute of limitations.<sup>160</sup> However, the Supreme Court did leave open the extraordinary circumstances exception if the *Skidmore* court saw fit to use it. Looking for the application of laches in the case-in-chief, Led Zeppelin argued the case should not proceed because Skidmore was working in an equitable relationship for Wolfe, and *Petrella* expressly reserved laches as a defense for equitable relief.<sup>161</sup> Dismissing this argument as legally baseless and founded only on semantics, the *Skidmore* court held that the suit could move forward, given that it had been filed within the three-year statute of limitations—looking back to the re-release of the album in 2014—and finding no extraordinary circumstances.<sup>162</sup>

## VI. ANALYSIS

Just twelve days after the Supreme Court released its *Petrella* decision, Michael Skidmore brought his suit, arguing that a song written forty-three years earlier—which just happened to be one of the most commercially successful rock songs in history—bore a substantial similarity to a song a trustee he represented had written forty-five years before the complaint was filed, and thus unlawfully appropriated his rights. On its motion for summary judgment, Led Zeppelin put forth several arguments that were struck down one by one. With each ruling for the plaintiff, the court dug in deeper and deeper, failing to realize the burden it was putting on itself, the litigants, and the twelve people who would be asked to sort the whole mess out.

The case-in-chief presented a situation where extraordinary circumstances existed, and the court could and should have invoked the exception reserved in *Petrella* to bar Skidmore’s claim. First, with a direct quote from him and an express identification of the works in question, the court had the opportunity to dismiss the claim at summary judgment on the grounds that Wolfe had abandoned his rights to the work. Even if the court was reluctant to make a dispositive ruling on that basis, the evidence Skidmore presented refuting the conclusiveness of the interview was a subjective interpretation of Wolfe’s state of mind twenty-three years ago. And while Skidmore may have put forth several witnesses to speak to Wolfe’s state of mind at that time, the only reliable person to speak on a matter so subjective had been dead for several years. The feat required to evaluate and determine these subjective facts should have had an impact on the court’s consideration of whether extraordinary circumstances were present.

When considering whether a substantial similarity existed between the songs, the court failed to appreciate the daunting task the jury would have in addressing this issue. On the issue of access, the jury would be required to decide how closely the

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158. *Id.*

159. *Id.* at 1979-80.

160. *Skidmore v. Led Zeppelin*, No. CV 15-3462 RGK (AGRx), 2016 WL 1442461, at \*7 (C.D. Cal. 2016).

161. *Id.*

162. *Id.*

members of Spirit and Led Zeppelin had associated with one another while they toured together. The jury would then have to decide whether, during that association, there was more than a bare possibility that Led Zeppelin became so familiar with “Taurus” that it could copy its introduction. In order to decide this point, the jury would need to determine roughly how often Spirit played the song, and whether that amount satisfied the threshold requirement of access.<sup>163</sup> Skidmore’s case was supported only by testimony from Wolfe’s family that “Taurus” was Wolfe’s favorite song.<sup>164</sup> Because such evidence is circumstantial, the jury would need to consider the character of each witness in deciding these questions.<sup>165</sup> The witnesses in turn would be recalling events that occurred nearly half a century ago—twice as long ago as those concerning abandonment. This is another significant factor that the *Skidmore* court should have included when it considered the question of whether extraordinary circumstances existed to the extent that justifies a granting of summary judgment.

Deciding that the issues of abandonment of rights and access to the plaintiff’s work should be left to the jury, the court next considered whether laches could be applied in this case. Given the underlying holding in *Petrella*, and its exception for extraordinary circumstances, the *Skidmore* court stated, “[w]hile the [Supreme] Court held that laches was unavailable as a defense to a copyright action seeking damages, it preserved the role of laches in copyright actions seeking equitable relief.”<sup>166</sup> It continued, “the *Petrella* [C]ourt used the term ‘equitable’ as a concept of relief to be contrasted with legal or monetary remedy.”<sup>167</sup> Because Skidmore, like most plaintiffs, was seeking legal or monetary relief, the court rejected the application of laches.<sup>168</sup>

This is a mischaracterization and misunderstanding of the Supreme Court’s holding and reasoning in *Petrella*. The term “equitable” relates not to the type of relief sought but to the nature of the doctrine of laches. The Supreme Court gave no indication that it intended laches to apply to equitable relief as distinct from a legal or monetary relief. In fact, in circumstances where the plaintiff is the party that benefits from the application of the doctrine, such as in a situation involving the purposeful concealment of the infringing work by the defendant, that plaintiff is still able to seek monetary and legal relief. The Supreme Court reserved the doctrine to apply, under general equitable principles, where circumstances unfairly prejudice a party’s case.

Finally, this case highlights a major flaw in applying the *Petrella* decision to *Skidmore* and other similar music plagiarism cases. Even though a plaintiff bears the burden of proving its case if it wins the battle over laches, the task of proving a substantial similarity between two pieces of music in a musical work copyright infringement case is not compounded by aging evidence in the way that the defendant’s job of proving their defenses is. In *Skidmore*, whether the defendants

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163. *Id.* at \*12.

164. *Id.* at \*14.

165. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (“The credibility of witnesses is an issue for the jury and is generally not subject to appellate review.”).

166. *Skidmore*, 2016 WL 1442461, at \*7. This may have been a result of Led Zeppelin’s argument regarding the issue of equitable relief.

167. *Id.*

168. *Id.* at \*8.

had access was an issue of fact.<sup>169</sup> If access could be shown, the verdict would come down to whether the two songs share a substantial similarity based on the total concept and feel of the works.<sup>170</sup> Because a musical work is fixed at the time it is written—unlike the memory of a witness—the substantial similarity determination has not been detrimentally affected due to the lapse of time. The only evidence affected by delay is evidence critical to a defendant’s case, thus defendants are unfairly prejudiced by the passage of time. The Supreme Court employed the extraordinary circumstances situation to avoid this very scenario.

## VII. CONGRESSIONAL REPAIRS

While it would behoove federal district courts to, within reason, employ the extraordinary circumstances exception when faced with a situation similar to *Skidmore*, Congress has the ability to save them the trouble. The underlying problem from which all of these issues stem is the perpetual statute of limitations in copyright law, which effectively runs equal in time to the life of the copyright through the continuing reproduction of an infringing work. This was the underlying problem outlined in Justice Breyer’s *Petrella* dissent.<sup>171</sup>

Congress should eliminate the ambiguity regarding when the clock on the statute of limitations begins ticking. The discovery rule, or allowing courts when employing the injury rule to consider extraordinary circumstances and equity, would contribute to the overall fairness of proceedings and take into account a plaintiff’s justifiable reasons for delay. This would also alleviate situations where a plaintiff like *Skidmore*, or the hypothetical plaintiff in the *Petrella* dissent, is able to delay commencing suit for years while leading a defendant to rely on his inaction and exploit the infringing work, only to have the plaintiff file suit once exploitation has turned profitable.<sup>172</sup> Furthermore, this practice would be in line with the warning given by Judge Hand when he established the doctrine’s application in copyright law and therefore provide at least some of the uniformity initially sought by Congress.<sup>173</sup>

This issue of plaintiffs taking advantage of defendants by delaying the commencement of a suit could also be dealt with in another way. Congress should eliminate the rolling statute of limitations and stipulate that once a plaintiff knows or should have known about the infringement, a strict three-year time limit starts, and that time limit is not renewed with every act of infringement. This would work well in regard to the nature of a musical work, as it is stuck in the time in which it was created. For *Skidmore*, this would mean that once Led Zeppelin released “Stairway to Heaven,” Wolfe had three years to decide whether he wanted to file suit for copyright infringement. This would alleviate concerns of evidential prejudice the defendant may experience with the passage of time. It would also increase the likelihood that established on the record would be testimony from the actual copyright holder who has the greatest ability to shed light on the several issues a jury must consider—especially those involving his or her own state of mind. Furthermore, this practice would create a less ambiguous statute for courts to

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169. A jury did, in fact, find Led Zeppelin had access to “Taurus.” Diehl, *supra* note 31.

170. See *Three Boys*, 212 F.3d at 485.

171. See *supra* note 152.

172. *Petrella v. Metro-Goldwyn-Meyer*, 134 S. Ct. 1962, 1980 (2014) (Breyer, J., dissenting).

173. See *supra* note 123.

interpret, which would satisfy the uniform statutory period Congress had in mind in 1957.

### VIII. CONCLUSION

In a situation where: (1) the plaintiff knew of the infringing work forty-three years before he brought the claim; (2) the evidence needed to refute the claim, but not prove it, had disappeared throughout those forty-three years; and (3) the plaintiff had made a statement in which he made more than an implication that he was not going to pursue any claim against the defendant, any onlooker would think, in the interest of fairness, this case is dead on arrival. However, because of impractical interpretation of a statute by federal courts, and acquiescence in, or reluctance to, addressing the underlying problems, a jury was summoned to hear the merits of this case.

Congress looks for consistency with every statute it writes. However, considering every possible fact pattern when drafting a law is impossible, so Congress relies on courts to fill the gaps. While filling these gaps, courts must appreciate the challenge of considering all possible fact patterns and anticipate that, even when it appears the law favors only one party, the extraordinary circumstances of the case may merit holding for the other side in the interest of fairness and equity. This task was carried out by the Supreme Court in *Petrella*. There, even with a strict interpretation of the statute of limitations, the Court reserved a fail-safe for district courts—the extraordinary circumstances exception in applying the equitable doctrine of laches. In *Skidmore v. Led Zeppelin*, when faced with the same daunting task, the court failed to appreciate this idea and the challenges Congress is faced with. It failed to adhere to the underlying principle from *Petrella*: to be consistent, courts must strictly adhere to the limits imposed by Congress. However, in the most extraordinary of circumstances, fairness and equity should win the day.

These circumstances were ignored, and a case that should have been dismissed was sent to a jury to perform an impossible and unreasonable task. However, because of this, we are able to shed light on the underlying issues of this oversight and place a Band-Aid on the problem. Congress can look at the facts of *Skidmore* and appreciate the need to end the perpetual statute of limitations that has engulfed copyright law. Failure to do so would lead to an onslaught of overlooked extraordinary circumstances and more re-releases of classic albums that are hindered by a possible lawsuit over a song written a generation ago.