Stairway to Retrial: 9th Circuit Court of Appeals Cites Error in Led Zeppelin Infringement Ruling

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In 2016, a California jury decided that Led Zeppelin's "Stairway to Heaven" did not infringe on Randy Wolfe's "Taurus". However, the 9th Circuit Court of Appeals reviewed that decision and has now called for a do-over, citing reversible error in evidentiary rulings by the trial judge. In particular, the Court of Appeals stated that the trial judge erred by failing to advise the jury that, while specific elements of a song are not protected, a combination of those elements could be protected, as well as prohibiting Wolfe's camp from playing the actual recordings.

It has long been accepted that individual notes, chords, scales, rhythms and harmonies, as well as content in the public domain, are not protectable elements of a song. However, the trial judge, U.S. District Judge R. Gary Klausner, failed to instruct the jury that, while these elements may not individually or separately constitute copyrightable material, a combination of these elements could well be original enough to make out a case for a protectable copyright. Ninth Circuit Judge Richard Paez stated, in pertinent part:

> *Nowhere did the jury instructions include any statements clarifying that the selection and arrangement of public domain elements could be considered original. Jury Instruction No. 20 compounded the errors of that omission by furthering an impression that public domain elements are not protected by copyright in any circumstances. This is in tension with the principle that an original element of a work need not be new; rather, it need only be created independently and arranged in a creative way. See Feist Publ'ns, 499 U.S. at 345, 349; see also Swirsky, 376 F.3d at 849. Jury Instruction Nos. 16 and 20 in combination likely led the jury to believe that public domain elements—such as a chromatic scale or a series of three notes—were not protectable, even where there was a modification or selection and arrangement that may have rendered them original.*
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This error was compounded by the trial court, according to the Ninth Circuit, when it also barred the jury from hearing the actual songs during the trial.

> *The district court excluded the sound recordings under Federal Rule of Evidence 403, finding that "its probative value is substantially outweighed by danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Fed. R. Evid. 403. Here, the district court abused its discretion in finding that it would be unduly prejudicial for the jury to listen to the sound recordings in order to assess Page's access to "Taurus." The district court acknowledged that the recordings were relevant to whether Page had access to "Taurus," as Page would have heard and allegedly copied a recording of "Taurus." The district court was concerned, however, that allowing the jury to hear the recordings would confuse them.*

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While it is understandable for the trial judge to be concerned that listening to both songs in their entirety, when many of the individual elements are not protectable, could confuse the jury, the Ninth Circuit did not feel that this potential prejudicial effect outweighed its probative value. While not explicitly stated, the Ninth Circuit may well have been suggesting that there would be no prejudice if the parties and their experts do their job in properly explaining the permissible and non-permissible elements.

However, the Ninth Circuit also suggested another reason that the songs should be played to the jury; specifically, that there could be probative value in the jury merely observing the reactions of the parties while the songs are being played.

> *Although the jury could still draw conclusions and inferences from Page's demeanor during his testimony, allowing the jury to observe Page listening to the recordings would have enabled them to evaluate his demeanor while listening to the recordings, as well as when answering questions. Limiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition. For example, the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity.*
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It seems inconceivable that Jimmy Page, Robert Plant and/or John Paul Jones are going to have any reaction while listening to the recordings, let alone any reaction that should lead a juror to draw any conclusion. All of the parties have heard both versions numerous times prior to trial and, thus, there will certainly be no surprise. The parties will also be even better prepared for testimony during the new trial. They will be cognizant that any reaction could impact the outcome, as the court has signaled that any reaction is now something to look out for.

As the song goes, "There's a feeling I get, when I look to the west." In this case, that feeling is that playing both songs in this California Federal Courthouse may confuse the jury and lead to a different result.

Jeff Cohen is a member of Flaster Greenberg's Litigation, Intellectual Property, Corporate and Real Estate Practice Groups. He has been a trial attorney for more than 23 years, counseling and representing a diverse range of clients in matters related to commercial contracts, shareholder and partnership agreements, trademarks, copyrights, patents, including Hatch-Waxman, insurance coverage, franchise disputes and commercial construction.

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