

CAN ARTISTS RECAPTURE THEIR COPYRIGHTS IN
MUSICAL COMPOSITIONS THAT HAVE BEEN LOST TO
THE PUBLIC DOMAIN?
SKIDMORE V. LED ZEPPELIN APPLIED

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INTRODUCTION

The U.S. Copyright Office has stated that “[t]he United States has the most innovative and influential music culture in the world.”¹ For this reason, it is essential that there is a legal framework in place that efficiently and equitably protects the rights that music artists hold in their original works. It is even more essential that music artists are not only aware of, but actually understand, the rights that they are granted under the laws that govern their works. The U.S. Constitution granted Congress the power to enact copyright legislation to protect musical works in Article I, Section 8, Clause 8,² also known as the “Intellectual Property Clause.”³ The primary body of law that governs these copyrights is found in Title 17 of the U.S. Code, which is then administered by the U.S. Copyright Office.⁴

An issue concerning the scope of these copyright laws has recently come to surface in the Ninth Circuit case *Skidmore v. Led Zeppelin*. In *Skidmore*, the plaintiff, Michael Skidmore, acted as trustee for the estate of Randy Wolfe—who is professionally known as Randy California and the guitarist of the rock group Spirit—and brought suit against the rock band known as Led Zeppelin for copyright infringement.⁵ The allegation was that Led Zeppelin’s decades-old classic *Stairway to Heaven* directly, contributorily, and vicariously infringed on Wolfe’s *Taurus*.⁶ With the Copyright Act of 1909 controlling its analysis, the Ninth Circuit analyzed Skidmore’s claim that *Stairway to Heaven*’s opening notes are substantially similar to an eight-measure passage in the *Taurus* deposit copy.⁷ As part of its analysis, the court held that the scope of the copyright for musical compositions under the Copyright Act of 1909 is limited to the deposit copy,⁸ which is defined as “[a] physical or electronic embodiment of a work. . . . [that] is submitted with an application for

¹ U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 12 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/PJZ7-YCP8>].

² “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

³ *U.S. Copyright Beginnings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/history/copyright-exhibit/beginnings> [<https://perma.cc/2UCX-NBK3>].

⁴ *Copyright Law of the United States (Title 17) and Related Laws Contained in Title 17 of the United States Code*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/title17> [<https://perma.cc/HK8L-MC7X>].

⁵ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056–57 (9th Cir. 2020) (en banc).

⁶ *Id.* at 1057.

⁷ *Id.*

⁸ *Id.* at 1063–64.

registration and must conform to the U.S. Copyright Office's regulations and other requirements."⁹ After determining that a single page of sheet music "defines the four corners of the *Taurus* copyright,"¹⁰ the Ninth Circuit affirmed the judgment of the United States District Court for the Central District of California and found that *Stairway to Heaven* did not infringe on *Taurus*.¹¹

In light of the holding in *Skidmore*, this Note will analyze whether pre-1978¹² musical compositions, which are governed by the Copyright Act of 1909, have lost portions that were not committed to paper in the form of a deposit copy to the public domain.¹³ In line with the Ninth Circuit's rationale, this Note will argue that all portions of these pre-1978 musical compositions that have not been memorialized in deposit copies have been surrendered to the public domain, and therefore copyright owners do not have rights to them.¹⁴ This Note will also argue that musicians are essentially left with no legal remedies to recapture copyrights in the portions of musical compositions that they have already lost to the public domain, unless Congress has the ability to legislatively overrule *Skidmore*.¹⁵

In reaching these conclusions, Part I will begin with a brief explanation of some foundational copyright law basics, including descriptions of the Copyright Acts of 1909 and 1976, as well as the fundamental differences between musical compositions and sound recordings. Two copyright concepts—originality¹⁶ and registration¹⁷—which have been developed through case law and legislation, will be discussed in detail regarding their relevance to *Skidmore* and the inability of music artists to recapture copyrights from the public domain. Then, Part II will discuss the Copyright Act of 1909's influence on the ruling in *Skidmore*. Next, Section II.A will discuss the impact that this ruling has

⁹ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES GLOSSARY 5, in U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021) [hereinafter COPYRIGHT OFFICE PRACTICES GLOSSARY], <https://copyright.gov/comp3/docs/glossary.pdf> [<https://perma.cc/C6HK-MKPF>] (defining "deposit copy").

¹⁰ *Skidmore*, 952 F.3d at 1064.

¹¹ *Id.* at 1079.

¹² Although the most recent Copyright Act was passed on October 19, 1976, it did not become effective until January 1, 1978. See Catherine Zaller Rowland, *45 Years Ago Today, a New US Copyright Act Became the Law of the Land*, COPYRIGHT CLEARANCE CTR. (Oct. 19, 2021), <https://www.copyright.com/blog/45-years-ago-today-a-new-us-copyright-act-became-the-law-of-the-land> [<https://perma.cc/A6ZD-Z9HB>]. Therefore, the term "pre-1978" will be used throughout this Note to refer to those works still governed by the Copyright Act of 1909.

¹³ See discussion *infra* Section II.A.

¹⁴ See discussion *infra* Section II.A.

¹⁵ See discussion *infra* Part III.

¹⁶ See discussion *infra* Section I.B.

¹⁷ See discussion *infra* Section I.C.

already had, and will continue to have, on other musical compositions that were copyrighted before 1978 under the Copyright Act of 1909. Moving forward from the ruling in *Skidmore*, Part III will discuss whether artists can in any way recapture the copyrights they have lost to the public domain due to not memorializing all portions of a musical composition in the deposit copy. Taking a practical approach, Part III will explore avenues artists have taken in an attempt to recapture their copyrights, such as altering their original deposit copies¹⁸ or creating derivative works.¹⁹ Additionally, Part III will discuss the constitutional powers of Congress under the Intellectual Property Clause and whether Congress has the power to legislatively reverse the Ninth Circuit's holding in *Skidmore*. However, as the Conclusion will indicate, there is likely no way to recapture copyrights that have already been lost to the public domain, which will ultimately have the effect of fulfilling the Intellectual Property Clause's purpose of promoting creativity and the arts.²⁰

I. COPYRIGHT LAW BASICS

Although copyright law's foundation to protect individuals' intellectual property rights is rooted in the U.S. Constitution,²¹ it is also derived from, and shaped by, statutes, regulations, and court decisions.²² With the explicit grant of power to Congress in the U.S. Constitution to enact copyright laws, the framers believed that they would "promote the [p]rogress of [s]cience"²³ by allowing individuals the opportunity to secure exclusive rights in certain original works for a limited amount of time.²⁴ As a result of providing artists protection over their original works against infringement by third parties, creators have a legal right to receive economic rewards while the public is given the opportunity to benefit from the enjoyment they experience as a result of these works, which

¹⁸ See discussion *infra* Section III.A.

¹⁹ See discussion *infra* Section III.B.

²⁰ See discussion *infra* Conclusion.

²¹ *What Is the Purpose of Copyright Law*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/purpose-of-copyright> [https://perma.cc/E2AB-9YY4].

²² U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 102 (3d ed. 2021) [hereinafter COPYRIGHT OFFICE PRACTICES], <https://www.copyright.gov/comp3/docs/compendium.pdf> [https://perma.cc/P63T-UMNR]. "Although copyright law is driven by a federal statute, federal court decisions are a very important source of copyright law. Sometimes court decisions are important because they are interpreting the meaning of a provision of the Copyright Act." JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 4 (3d ed. 2021).

²³ U.S. CONST. art. I, § 8, cl. 8.

²⁴ *What Is the Purpose of Copyright Law*, *supra* note 21.

might not otherwise have been created or disseminated without the establishment of this legal right.²⁵ Ultimately, the purpose of copyright law was to induce artists to create new, original works and make them available for public enjoyment.²⁶ Therefore, copyright laws aim to balance two competing interests: the authors' rights to control their works and the public's interest in accessing those works.²⁷

A. Background and History

The first federal copyright laws were enacted in 1790 pursuant to the aforementioned constitutional provision, using Britain's Statute of Anne as their model, but it only extended protection to charts, books, and maps.²⁸ Musical compositions first came under copyright protection in 1831 as a result of a revision of the copyright laws, which also then extended the term of protection from fourteen to twenty-eight years.²⁹ Technological advances in communication required Congress to make even more significant revisions to these laws,³⁰ and the first comprehensive body of federal copyright law was later enacted in 1909.³¹ As detailed by the U.S. Copyright Office, the Copyright Act of 1909 was in effect until December 31, 1977, and it was then repealed and replaced with the Copyright Act of 1976.³² The Copyright Act of 1976, which went into effect on January 1, 1978, is now the current body of copyright laws in the United States.³³ Despite being repealed and ultimately replaced with the Copyright Act of 1976, the Copyright Act of 1909 is still highly

²⁵ *Id.*

²⁶ *Id.*

²⁷ "The ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination." 8 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* app. 14, ch. I.D (2022).

²⁸ *The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html [<https://perma.cc/KU5R-78NL>].

²⁹ *Historically Significant U.S. Copyright Legislation*, MUSIC LIBR. ASS'N, https://www.musiclibraryassoc.org/mpage/copyright_hsl [<https://perma.cc/9D93-C6FU>].

³⁰ U.S. COPYRIGHT OFF., *GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 1:1 (1977)*, <https://www.copyright.gov/reports/guide-to-copyright.pdf> [<https://perma.cc/8TDG-NL6B>].

³¹ *1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html [<https://perma.cc/FTT9-T37X>].

³² "This law as amended was the copyright law of the United States from July 1, 1909 through December 31, 1977. It was repealed effective January 1, 1978 and replaced with the 1976 Copyright Act." COPYRIGHT OFFICE PRACTICES GLOSSARY, *supra* note 9, at 1 (defining "1909 Copyright Act").

³³ "Passed by Congress and effective on January 1, 1978, this law as amended is the current Copyright Law of the United States. It is codified in Title 17 of the U.S. Code." *Id.* (defining "1976 Copyright Act").

relevant in today's legal landscape because it still governs the copyrights in works that were published before 1978.³⁴ With that being said, copyright owners, especially musicians whose original works are still governed by the former Copyright Act, need to understand the key differences between the two Acts.³⁵ They should understand what rights are afforded to them under each of the Acts, and if any of their rights have been lost to the public domain, whether there are any affirmative steps they could take to recapture these rights.³⁶

Within U.S. copyright law, there is a material difference between musical compositions and sound recordings.³⁷ As defined by the U.S. Copyright Office, “[a] musical composition consists of music, including any accompanying words, and is normally registered as a work of performing arts.”³⁸ Musical compositions include, for example, the underlying musical melody of work and its lyrics, and they are often fixed through a copy of sheet music.³⁹ On the other hand, “[a] sound recording results from the fixation of a series of musical, spoken, or other sounds.”⁴⁰ Sound recordings include, for example, a particular performance by an artist, and they are often fixed on a phonorecord such as a CD.⁴¹ Further emphasizing the difference between these two separate works, the U.S. Copyright Office stresses that sound recording copyrights are not the same as, or substitutes for, the underlying musical composition copyrights.⁴² These rights remain completely distinct under the law,⁴³ especially under the Copyright Act of 1909, which significantly impacted the result of *Skidmore v. Led Zeppelin*.⁴⁴

³⁴ *Historically Significant U.S. Copyright Legislation*, *supra* note 29.

³⁵ See *The Copyright Conundrum: Understanding the Basics of US Copyright Law*, NEW ENGLAND MUSEUM ASS'N, https://www.nemanet.org/files/4613/8552/6685/The_Copyright_Conundrum-Outline.pdf [<https://perma.cc/BGR9-U7MG>] (“The 1976 Act was created because the 1909 Act was very unfair to artists due to its complicated rules. Many artists lost the rights to their works without realizing it.”).

³⁶ See *id.*

³⁷ *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/register/pa-sr.html> [<https://perma.cc/V844-6E6J>].

³⁸ *Id.*

³⁹ U.S. COPYRIGHT OFF., CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2021) [hereinafter CIRCULAR 56A], <https://www.copyright.gov/circs/circ56a.pdf> [<https://perma.cc/3ZSP-48DB>].

⁴⁰ *Copyright Registration of Musical Compositions and Sound Recordings*, *supra* note 37.

⁴¹ CIRCULAR 56A, *supra* note 39, at 1.

⁴² *Id.*

⁴³ “A musical work and a sound recording of that musical composition are separate works. The copyright in a musical work covers the music (and lyrics, if any) embodied in the musical composition itself, but does not cover a particular recording of that composition (or *vice versa*).” COPYRIGHT OFFICE PRACTICES, *supra* note 22, § 802.2(B).

⁴⁴ See discussion *infra* Part II.

When it comes to securing federal copyright protection for musical compositions under the Copyright Act of 1909, two important concepts require further analysis: (1) originality and (2) registration and deposit copies. Regarding the subject matter of a work, the Copyright Act of 1909 lists the specific types of works that can be considered copyrightable, which does not include sound recordings,⁴⁵ as long as they are original. Although the federal statute does not explicitly mention originality, the requirement that these works be original in nature is grounded in the Constitution.⁴⁶ Once the work in question satisfies these subject-matter requirements, the registration and publication formalities necessary to secure federal copyright protection become relevant.⁴⁷ Authors of original works had to comply with these mechanisms in order to avoid losing copyright protection.⁴⁸ These copyright concepts are important in two instances. First, they are important in the infringement analysis, especially when it comes to defining the scope of the copyright.⁴⁹ Second, they are important in determining whether musicians can recapture copyrights already lost to the public domain, especially when it comes to the standard of what sufficiently meets the constitutional requirement of originality.⁵⁰

B. Originality

Originality is a fundamental component in securing copyright protection.⁵¹ The concept of originality arises from the Intellectual Property Clause of the U.S. Constitution, which limits copyright

⁴⁵ Copyright Act of 1909, ch. 320, § 5, 35 Stat. 1075 (repealed 1978) (“That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: (a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses, prepared for oral delivery; (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art; models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings or plastic works of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations: *Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.”).

⁴⁶ FROMER & SPRIGMAN, *supra* note 22, at 26–27.

⁴⁷ *See id.* at 163.

⁴⁸ “Failure to comply with these requirements either terminated the copyright or prevented it from arising in the first place.” *Id.*

⁴⁹ *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1060–64 (9th Cir. 2020) (en banc).

⁵⁰ *See discussion infra* Section III.B.

⁵¹ “The question of originality, the threshold standard of qualification for copyright protection, is at the core of copyrightability.” Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 4 (1992).

protection to the “Writings” of “Authors.”⁵² The Supreme Court highlighted this point in *Feist Publications, Inc. v. Rural Telephone Service Co.* when it stated that “[o]riginality is a constitutional requirement.”⁵³ While this constitutional requirement of originality was embodied in the Copyright Act of 1909,⁵⁴ it is now explicitly codified in the Copyright Act of 1976, which states that copyright protection will only extend to works of authorship that are original and fixed in a tangible medium of expression.⁵⁵ Since the statutory language is silent as to what makes a work of authorship original, and Congress has not provided much guidance as to its meaning, the courts have been responsible for defining this central term.⁵⁶

The requirement of originality is discussed at length in *Alfred Bell & Co. v. Catalda Fine Arts*.⁵⁷ In *Alfred Bell*, the Second Circuit ruled that, in reference to a copyrighted work, originality means that the work in question owes its origin to the author, with no significant amount of novelty or uniqueness required.⁵⁸ The plaintiff in that case essentially reproduced mezzotint engravings⁵⁹ that had already entered the public domain, which the defendants produced and sold under the belief that the plaintiff could not receive copyright protection for such works, and the plaintiff then claimed copyright infringement.⁶⁰ The court established that the defendants’ public domain argument was irrelevant because reproductions can be copyrighted if they are translations of works already in the public domain.⁶¹ More importantly, in clarifying the ambiguity of

⁵² *Id.* at 3; U.S. CONST. art. I, § 8, cl. 8.

⁵³ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

⁵⁴ *Id.* at 351.

⁵⁵ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

⁵⁶ FROMER & SPRIGMAN, *supra* note 22, at 26–27.

⁵⁷ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

⁵⁸ “‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’ No large measure of novelty is necessary.” *Id.* at 102 (quoting *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 57–58 (1884)).

⁵⁹ As defined by Merriam Webster, “mezzotint” is the “manner of engraving on copper or steel by scraping or burnishing a roughened surface to produce light and shade.” *Mezzotint*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mezzotint> [<https://perma.cc/F8TT-LGG7>].

⁶⁰ See *Alfred Bell & Co. v. Catalda Fine Arts*, 74 F. Supp. 973, 974–75 (S.D.N.Y. 1947).

⁶¹ *Alfred Bell*, 191 F.2d at 104 (“We consider untenable defendants’ suggestion that plaintiff’s mezzotints could not validly be copyrighted because they are reproductions of works in the public domain. Not only does the Act include ‘Reproductions of a work or art’, but—while prohibiting a copyright of ‘the original text of any work . . . in the public domain’—it explicitly provides for the copyrighting of ‘translations, or other versions of works in the public domain’ . . . The mezzotints were

the constitutional requirement for originality, the court emphasized that the Constitution does not require that a copyrighted work be new or innovative.⁶² The court further established that, to satisfy the constitutional requirement, all that is required is that the author made a nontrivial contribution that renders the work distinguishable from the original.⁶³ Therefore, although the underlying work remained in the public domain, the plaintiff was free to create another version of the work by incorporating original elements within it.⁶⁴ Since the plaintiff's version of the mezzotint had enough identifiable differences from the original production, it was able to receive copyright protection; therefore, the defendants infringed on the plaintiff's copyrights.⁶⁵

The Supreme Court in *Feist Publications* stated that “[t]he *sine qua non* of copyright is originality.”⁶⁶ In *Feist*, two companies that produced telephone directories for overlapping areas in the Kansas region disputed whether the compilation of contact information, not merely the contact information itself, is copyrightable, and therefore whether the defendant would be infringing on the plaintiff's copyright by reproducing information in the plaintiff's possession without its permission.⁶⁷ Reiterating the principle that originality requires the work to be independently created by its author and possess a minimal degree of creativity, the Court found that there was no infringement by the defendant as the plaintiff did not satisfy the constitutional standard for originality to qualify for copyright protection.⁶⁸ Failing to establish originality for its compilation of contact information in its telephone directory, the plaintiff could not demonstrate that it selected or arranged uncopyrightable facts in an original way to qualify for copyright protection.⁶⁹ The Court also reasoned that to extend copyright protection because of the effort exercised by the plaintiff would misrepresent foundational principles of copyright law by granting rights to an author

such ‘versions.’ They ‘originated’ with those who make them, and—on the trial judge’s findings well supported by the evidence—amply met the standards imposed by the Constitution and the statute.” (footnotes omitted) (first quoting 17 U.S.C. § 5; then quoting *id.* § 8; and then quoting *id.* § 7)).

⁶² *Id.* at 102–03 (“[N]othing in the Constitution commands that copyrighted matter be strikingly unique or novel. . . . All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945))).

⁶³ *Id.*

⁶⁴ *See id.* at 104–05.

⁶⁵ *See id.*

⁶⁶ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁶⁷ *See id.* at 342–44.

⁶⁸ *Id.* at 362–64.

⁶⁹ *Id.*

in materials that were in the public domain.⁷⁰ *Feist* has essentially provided the standard for the concept of originality, which has had a broad impact on underlying copyright jurisprudence.⁷¹ The importance of having originality in creative works, and its necessity in making a work eligible for copyright protection, is not only reiterated, but strengthened through, the development of the case law, as indicated by *Alfred Bell* and *Feist*.

In the discussion at hand, these principles of originality are essential in determining both whether Led Zeppelin's *Stairway to Heaven* infringed Wolfe's *Taurus* and whether artists of pre-1978 songs even have the ability to recapture the compositional copyrights they have already lost to the public domain. With the former, as discussed in *Skidmore*, originality was a key issue to be presented to the jury.⁷² Invoking *Feist*, the Ninth Circuit in *Skidmore* instructed the jury that no individual can copyright particular non-protectable musical "building blocks" or "common musical elements," as this would frustrate copyright law's purpose and stifle the creation of new works.⁷³ *Skidmore* elaborated on this concept with its explanation that, while a common four-note sequence is not a copyrightable expression, there is a possibility that a seven-note sequence may qualify as an original expression, and a musical work that consists entirely of common material would obviously not qualify as a work of original authorship.⁷⁴ With the latter, as discussed in Section III.B, when determining whether derivative works can provide music artists with the capability of recapturing rights from the public domain, originality is one of the primary criteria to be considered in the analysis.⁷⁵ Derivative works, in order to be copyrightable, must not be mere copies of preexisting works but must have added elements of original expression.⁷⁶ Further, if these compositions are already created and lost to the public domain, these works also cannot be considered "original" to receive copyright protection.⁷⁷ What constitutes originality,

⁷⁰ *Id.* at 354 ("Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles. . . . [T]o accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'" (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.04 (1990))).

⁷¹ Abrams, *supra* note 51, at 5.

⁷² *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069–72 (9th Cir. 2020) (en banc).

⁷³ *Id.* at 1069–70.

⁷⁴ *Id.* at 1070–71.

⁷⁵ See discussion *infra* Section III.B.

⁷⁶ See discussion *infra* Section III.B.

⁷⁷ See discussion *infra* Section III.B.

and whether a work meets that standard of originality, is central to the copyright protection afforded to musical compositions.⁷⁸

C. *Registration and Deposit Copies*

While the originality requirement is more of an abstract matter, the mechanism for registration is more technical and procedural.⁷⁹ Although the Copyright Act of 1909 did not require registration as a prerequisite for copyright protection, it was a prerequisite to commencing litigation and maintaining an infringement action.⁸⁰ Additionally, with registration being optional until the last year of the first copyright term, the copyright owner would only be entitled to renewal if registration occurred within that period; otherwise, the work would fall into the public domain at the end of the first term.⁸¹

Compared to the Copyright Act of 1976, the Copyright Act of 1909 required more formalities to secure federal copyright protection.⁸² Under the Copyright Act of 1976, federal copyright protection is extended to a published or unpublished work of authorship from the moment of its creation, but only if it meets the required standard of originality and has been fixed in a tangible medium of expression.⁸³ On the other hand, under the Copyright Act of 1909, with respect to registration and acquiring federal statutory copyright protection, a distinction was made between published and unpublished works.⁸⁴ For published works, federal copyright protection could only be secured with proper notice.⁸⁵ Although the Copyright Act of 1909 did not explicitly define what constitutes a publication,⁸⁶ a work was considered published when copies of that work had been distributed to the public by sale or other transfer of ownership.⁸⁷ Further, a work was considered to have notice when a

⁷⁸ See discussion *infra* Section III.B.

⁷⁹ FROMER & SPRIGMAN, *supra* note 22, at 163.

⁸⁰ Zvi S. Rosen & Richard Schwinn, *An Empirical Study of 225 Years of Copyright Registrations*, 94 TUL. L. REV. 1003, 1052 (2020); FROMER & SPRIGMAN, *supra* note 22, at 172.

⁸¹ FROMER & SPRIGMAN, *supra* note 22, at 172.

⁸² *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020) (en banc).

⁸³ 17 U.S.C. § 102(a); COPYRIGHT OFFICE PRACTICES, *supra* note 22, § 202.

⁸⁴ Copyright Act of 1909, ch. 320, §§ 9, 11, 35 Stat. 1075 (repealed 1978).

⁸⁵ Copyright Act of 1909 § 9 (“That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act.”); Rosen & Schwinn, *supra* note 80, at 1021.

⁸⁶ FROMER & SPRIGMAN, *supra* note 22, at 165.

⁸⁷ COPYRIGHT OFFICE PRACTICES GLOSSARY, *supra* note 9, at 15 (defining “publication”).

statement was placed on those copies that informed the public that the owner of the copyright was claiming ownership over that work.⁸⁸ In order for this notice to be proper, three requirements had to have been met: (1) the word “Copyright” or its abbreviation had to appear on the title page or, for a musical composition, on the first page of the music,⁸⁹ accompanied by (2) the copyright owner’s name and (3) the year in which copyright protection was secured through publication.⁹⁰ In order to secure federal protection through publication, the copyright owner had to comply with all of these statutory formalities.⁹¹ If the copyright owner published the work without complying with these formalities, the implication was that the work would fall into the public domain and no longer be protected under state law.⁹²

On the other hand, for those works that were unpublished, federal copyright protection could be secured only by certain classes of works, including musical compositions, through registration.⁹³ Additionally, unpublished works were automatically protected upon their creation under state common law without having to adhere to any of these formalities.⁹⁴ Therefore, common law copyright protection was retained by unpublished works up until their publication with proper notice or registration, in which case federal copyright protection was then extended.⁹⁵

Once protection was secured through publication with proper notice or through registration, the copyright owner was then required to deposit copies of the copyrighted work with the U.S. Copyright Office.⁹⁶

⁸⁸ *Id.* at 4.

⁸⁹ Copyright Act of 1909 § 19 (“That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music . . .”).

⁹⁰ *Id.* § 18 (“That the notice of copyright required by section nine of this Act shall consist either of the word ‘Copyright’ or the abbreviation ‘Copr.’, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication.”).

⁹¹ FROMER & SPRIGMAN, *supra* note 22, at 164.

⁹² *Id.*

⁹³ Copyright Act of 1909 § 11 (“That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies under sections twelve and thirteen of this Act where the work is later reproduced in copies for sale.”).

⁹⁴ FROMER & SPRIGMAN, *supra* note 22, at 164.

⁹⁵ Rosen & Schwinn, *supra* note 80, at 1021.

⁹⁶ 2 NIMMER & NIMMER, *supra* note 27, § 7.16[A][2][b].

As required by legislation for works that were published with proper notice of copyright, two complete copies of the best edition of the work were to be promptly deposited with the U.S. Copyright Office.⁹⁷ For works that were unpublished, or not reproduced for sale, only one complete copy of the work was required.⁹⁸ The goal of the deposit copy was not only to provide the Library of Congress with copies of the copyrighted work to bolster its written record, but also to satisfy the prerequisite of bringing an infringement suit.⁹⁹ However, as indicated by the development of the case law below, it is evident that how deposit copies would be used in infringement cases for works governed by the Copyright Act of 1909 remained unclear.¹⁰⁰

The nature of the deposit copy varied with each type of copyrightable work, and for musical compositions under the Copyright Act of 1909, the deposit copy consisted of sheet music,¹⁰¹ as sound recordings were not an acceptable form of deposit copy media.¹⁰² As explained by the U.S. Copyright Office, these deposit copies needed to be clear and contain all of the material that the applicant intended to register.¹⁰³ Despite this demand, deposit copies often consisted of only a single page of sheet music, as did Skidmore's *Taurus*, because handwriting or even printing lengthy songs in the form of sheet music was a tedious process that often resulted in omissions.¹⁰⁴ As a result, deposit copies in the form of sheet music tended to be short and sometimes even inaccurate for a variety of reasons, including the fact that

⁹⁷ Copyright Act of 1909 § 12 (“That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in: the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, which copies, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.”); Ellen Komlos, Note, “*Stairway to Heaven*” or *Stairway to the Public Domain: Copyright Infringement of Musical Works Under the 1909 Copyright Act*, 65 WASH. U. J.L. & POL’Y 185, 190 (2021).

⁹⁸ Copyright Act of 1909 § 11; Komlos, *supra* note 97, at 190.

⁹⁹ FROMER & SPRIGMAN, *supra* note 22, at 174.

¹⁰⁰ See discussion *infra* Part II.

¹⁰¹ Komlos, *supra* note 97, at 186.

¹⁰² *Id.* at 190–91.

¹⁰³ COPYRIGHT OFFICE PRACTICES GLOSSARY, *supra* note 9, at 5 (defining “deposit copy”).

¹⁰⁴ “Capturing lengthy songs in sheet music deposit copies proved tedious, whether handwritten or printed, resulting in omissions.” Komlos, *supra* note 97, at 186.

many artists did not know how to write the sheet music themselves and often had to rely on someone else to prepare the deposit for them.¹⁰⁵

Therefore, the issue of registration and deposit copies is relevant to the discussion at hand because confusion arises during the infringement inquiry when a deposit copy is incomplete, meaning that it contains less material than a sound recording of the same work.¹⁰⁶ The issues that arise with lacking deposit copies in copyright infringement suits governed by the Copyright Act of 1909 were addressed by the Ninth Circuit in both *Williams v. Gaye*¹⁰⁷ and *Skidmore v. Led Zeppelin*.¹⁰⁸

II. THE COPYRIGHT ACT OF 1909 AND ITS INFLUENCE ON THE DECISION IN *SKIDMORE V. LED ZEPPELIN*

Williams v. Gaye, a Ninth Circuit case that predates *Skidmore v. Led Zeppelin*, sets the foundation for this deposit copy dilemma. Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. filed a complaint in the United States District Court for the Central District of California against Marvin Gaye's heirs seeking a declaratory judgment that their single, *Blurred Lines*, which happened to be the best selling single in the world in 2013,¹⁰⁹ did not infringe on the underlying musical composition of Gaye's *Billboard* number one hit *Got To Give It Up*.¹¹⁰ Similar to the work at issue in *Skidmore*, the work at issue in *Williams* was composed before 1978, and therefore the compositional copyright is also governed by the Copyright Act of 1909.¹¹¹ The Central District of California identified the

¹⁰⁵ Daniel Abowd, Note, *FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1311, 1367 (2020) (“[B]ecause so many songwriters are not literate in formal European musical notation (or choose to compose in other formats), many written reductions that are used as deposit copies are merely rough transcriptions of recordings of the composition, jotted down at some point by an industry scribe. Thus, “[t]he result might or might not accurately represent the actual melody and chords composed, and might include or omit other important, original elements of the composition.” (footnotes omitted) (quoting Brief for Institute for Intellectual Property and Social Justice Musician and Composers and Law, Music and Business Professors as Amici Curiae Supporting Appellees at 17, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (No. 15-56880))).

¹⁰⁶ “When the deposit copy contains less material than the performance or sound recording of the same work, as in ‘Taurus,’ additional confusion enters the copyright infringement inquiry.” Komlos, *supra* note 97, at 186.

¹⁰⁷ *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹⁰⁸ *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc).

¹⁰⁹ *Williams*, 895 F.3d at 1116.

¹¹⁰ John Quagliariello, Note, *Blurring the Lines: The Impact of Williams v. Gaye on Music Composition*, 10 *HARV. J. SPORTS & ENT. L.* 133, 135–37 (2019).

¹¹¹ *Williams*, 895 F.3d at 1117 (“The district court ruled that the Gayes’ compositional copyright, which is governed by the Copyright Act of 1909, did not extend to the commercial sound recording

question to be answered as whether copyright protection for musical compositions governed by the Copyright Act of 1909 is limited only to the elements featured in the deposit copy or whether the composition's sound recording is also admissible.¹¹² The district court took the position that only the deposit copy was protected under the Copyright Act of 1909, and the sound recording is excluded from consideration.¹¹³ Therefore, the jury was unable to rely on sound recordings during the infringement analysis as a result of the judge ruling them inadmissible as evidence.¹¹⁴

On appeal, the Ninth Circuit refused to address this issue and did not determine what the scope of copyright protection was for a musical composition under the Copyright Act of 1909.¹¹⁵ The Ninth Circuit essentially held that, with respect to musical compositions, the copyright is not confined to a narrow range of expression in substantiating a copyright infringement claim.¹¹⁶ Even though the Ninth Circuit affirmed the district court's ruling that Williams and Thicke were liable for infringement,¹¹⁷ the case left open, at the circuit level, the question of what constitutes the scope of a compositional copyright under the Copyright Act of 1909.¹¹⁸

of 'Got To Give It Up,' and protected only the sheet music deposited with the Copyright Office. The district court accordingly limited its review of the evidence to the deposit copy . . ."); *id.* at 1121 ("For purposes of this appeal, we accept, without deciding, the merits of the district court's ruling that the scope of the Gayes' copyright in 'Got To Give It Up' is limited to the deposit copy.").

¹¹² *Id.* at 1121 ("It remains unsettled, however, whether copyright protection for musical compositions under the 1909 Act extends only to the four corners of the sheet music deposited with the United States Copyright Office, or whether the commercial sound recordings of the compositions are admissible to shed light on the scope of the underlying copyright.").

¹¹³ "Here, the district court ruled that the 1909 Act protected only the deposit copy of 'Got To Give It Up,' and excluded the sound recording from consideration." *Id.*

¹¹⁴ "No actual sound recordings of the songs were to be used or relied upon by the jury, as the judge had ruled them inadmissible as evidence. This inadmissibility was due to the inconsistencies in federal copyright law." Quagliariello, *supra* note 110, at 137.

¹¹⁵ *Williams*, 895 F.3d at 1121 ("The Gayes assert that Marvin Gaye's studio recording may establish the scope of a compositional copyright, despite the 1909 Act's lack of protection for sound recordings. The Thicke Parties, on the other hand, elevate the deposit copy as the quintessential measure of the scope of copyright protection. Nevertheless, because we do not remand the case for a new trial, we need not, and decline to, resolve this issue in this opinion.").

¹¹⁶ "[T]he court reaffirmed the notion that musical compositions are not confined to a narrow range of expression and that a party need only find substantial similarity—not virtual identity—to substantiate a copyright infringement claim." Quagliariello, *supra* note 110, at 140.

¹¹⁷ *Williams*, 895 F.3d at 1118, 1138.

¹¹⁸ Quagliariello, *supra* note 110, at 140 ("[T]he opinion offered little to no substantive precedent for future musical copyright infringement claims aside from reaffirming the fact that music is subjected to a broader range of copyright protection that will ultimately be decided at the discretion of the factfinder. The court did not resolve the question of whether sound recordings can be used as evidence in cases involving songs subjected to the 1909 Copyright Act. Rather, it stated that ambiguity made the trial judge's decision to bar the evidence a proper decision, but elected not to address the question because the case was not going to be remanded for a new trial.").

In the wake of *Williams*, the Ninth Circuit was once again faced with a copyright infringement case involving the scope of the copyright for a musical composition governed by the Copyright Act of 1909.¹¹⁹ However, the Ninth Circuit in *Skidmore v. Led Zeppelin* resolved the question left open in *Williams* regarding the extent of copyright protection. In *Skidmore*, Michael Skidmore, the trustee for Randy Wolfe, also known as Randy California from the band Spirit, brought a copyright infringement action against Led Zeppelin, forty years after the band released *Stairway to Heaven*, alleging that the opening notes of the band's classic song infringed on Wolfe's *Taurus*.¹²⁰ The Ninth Circuit stated a two-prong test for proving copyright infringement, which required Wolfe to first show "that he own[ed] a valid copyright," and second "that Led Zeppelin copied protected aspects of the work."¹²¹ While it was never challenged whether Skidmore owned a valid copyright in *Taurus*,¹²² one of the relevant issues on appeal was to what extent the musical composition of the song was copyrighted.¹²³

First arising in the United States District Court for the Central District of California, the issue regarding the scope of Skidmore's copyright became relevant during the substantial similarity analysis, specifically when the court had to decide what the protected and unprotected elements of the work were in order to determine whether there was infringement.¹²⁴ Led Zeppelin argued that the substantial similarity analysis could only consider those elements that were protected by the musical composition copyright, as opposed to the sound recording,¹²⁵ and therefore urged the court to disregard the expert reports submitted by Skidmore "because they improperly consider[ed] unprotected performance elements in the sound recordings of *Taurus*."¹²⁶ On the other hand, Skidmore, relying on language from *Three Boys Music v. Bolton*,¹²⁷ argued that the elements in the sound recording are to still be

¹¹⁹ *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc).

¹²⁰ *Id.* at 1056.

¹²¹ *Id.* at 1064 (citing *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018)).

¹²² "Skidmore's ownership of a valid copyright in *Taurus* was not challenged on appeal." *Id.*

¹²³ *Id.* at 1062–65.

¹²⁴ *Skidmore v. Led Zeppelin*, No. CV 15-3462, 2016 U.S. Dist. LEXIS 51006, at *44–49 (C.D. Cal. Apr. 8, 2016).

¹²⁵ "According to Defendants, the only copyrighted work is the musical composition, not the sounds recording, and Plaintiff's experts erred by relying on the performance elements in the sounds recordings to conclude that the two works are substantially similar." *Id.* at *45.

¹²⁶ *Id.*

¹²⁷ *Id.* at *47 ("In *Three Boys Music*, the Ninth Circuit did not suggest that a copyright claimant may rely on additional elements in a sound recording to prove infringement of an underlying musical composition. Instead, the court merely reiterated the established proposition that an

considered by a jury even when not reflected in the deposit copy.¹²⁸ The district court then established that Skidmore improperly relied on features that were beyond the scope of the compositional copyright by analyzing performance elements in the sound recording, and therefore disregarded those features from the infringement analysis.¹²⁹ The court then determined that, once the unprotected elements of the sound recordings were disregarded, there were sufficiently similar protectable elements to deny Led Zeppelin's motion for summary judgment, leaving this a question for the jury.¹³⁰ The jury ultimately found in favor of Led Zeppelin that the two songs are not substantially similar, and Skidmore appealed to the Ninth Circuit.¹³¹

One of the primary arguments Skidmore made on appeal was that the lower court was incorrect in limiting the composition of *Taurus* to the exact notes as indicated on a "simplistic archival lead sheet" that had been submitted to the U.S. Copyright Office as part of the registration in 1967.¹³² More specifically, Skidmore argued that the deposit copy for Wolfe's *Taurus*, which was a single page of sheet music, was for archival purposes only and should be treated as a point of reference as opposed to a definitive filing.¹³³ In other words, he tried to extend the scope of the copyright he had in *Taurus* beyond the sheet music to encompass the entire musical composition.¹³⁴ However, the Ninth Circuit reasoned that this approach does not adhere to statutory text and also disregards the

incomplete deposit copy of sheet music does not invalidate a copyright or strip the court of jurisdiction. The quoted language Plaintiff relies on addressed only subject matter jurisdiction—not the content protected by copyright.”)

¹²⁸ Plaintiff disputes that his copyright is limited to the music sheet deposited with the Copyright Office. In retort, he invokes *Three Boys Music* to argue that elements reflected in a sound recording, even if not on the deposit sheet, are to be considered by a jury.” *Id.* at *46.

¹²⁹ *Id.* at *48–49.

¹³⁰ *Id.* at *51.

¹³¹ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1056 (9th Cir. 2020) (en banc).

¹³² Appellant's Opening Brief at 19, *Skidmore*, 952 F.3d 1051 (No. 16-56057).

¹³³ “The 1967 deposit copy of *Taurus* is a single page of sheet music. Skidmore suggests that the copyright extends beyond the sheet music; that is, the deposit copy is somehow archival in nature and more of a reference point than a definitive filing.” *Skidmore*, 952 F.3d at 1062.

¹³⁴ *Id.* at 1061. Skidmore argued that § 1(e) of “[t]he 1909 Act was specifically enacted to open up the scope of protected expression beyond merely sheet music.” Appellant's Opening Brief, *supra* note 132, at 20. Elaborating on this point, the appellant's brief also stated:

Congress moved to *expand* the scope of copyright protection in the 1909 Act by defining the scope of protection in musical works as: “any system of notation or any form of record in which the thought of an author might be recorded and from which it may be read or reproduced.”

Id. at 31 (quoting Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (repealed 1978)).

purpose of deposit copies.¹³⁵ As a result of the lower court's rulings, to Skidmore's detriment, an incomplete deposit of *Taurus* was compared to *Stairway to Heaven*, as opposed to a more complete version found within a sound recording, which Skidmore claimed was "practically identical" to *Stairway to Heaven*.¹³⁶

For works governed by the Copyright Act of 1909, Skidmore claimed that a work was given common law copyright protection at the moment of creation, and upon registration, federal copyright protection was then extended.¹³⁷ In support of his position, Skidmore further argued that there is no indication in the Copyright Act of 1909 that federal registration with the U.S. Copyright Office of a work previously protected by the common law would then limit the scope of copyright protection.¹³⁸ Also, Skidmore noted that nowhere in the legislation or case law is it implied that the deposit copy is to govern the scope of the copyright for a musical composition.¹³⁹ Led Zeppelin countered Skidmore's arguments by indicating that the Copyright Act of 1909 did not account for the registration of common law copyrights, and as a result, they were completely separate from federal statutory copyrights.¹⁴⁰ Therefore, common law copyright did not determine the scope of federal statutory copyrights—federal law did.¹⁴¹

In its discussion on this point, the Ninth Circuit adhered to the belief that, under the Copyright Act of 1909, an unpublished work received copyright protection under state common law from the moment of its creation until it received protection under the federal copyright scheme through registration.¹⁴² The Ninth Circuit, in framing its reasoning, combined this outline of the Copyright Act of 1909 with the statutory language, which states that "copyright may also be had of the works of an

¹³⁵ "This approach ignores the text of the statute and the purpose of the deposit." *Skidmore*, 952 F.3d at 1062.

¹³⁶ Appellant's Opening Brief, *supra* note 132, at 21.

¹³⁷ *Id.* at 20.

¹³⁸ "There is no indication that federally registering the common law copyright could in anyway result in the limitation of the scope of the copyright." *Id.*

¹³⁹ "[N]owhere in the case law or the 1909 Act, is it contemplated that this purely archival requirement governs the scope of the composition in the work." *Id.* at 21.

¹⁴⁰ "[T]he 1909 Act did not provide for registration of common law copyrights and, instead, statutory and common law copyrights were completely divorced. Indeed, most states did not even have common law copyright." Combined Answering and Opening Brief at 41, *Skidmore*, 952 F.3d 1051 (Nos. 16-56057, 16-56287) (citing *Goldstein v. California*, 412 U.S. 546, 558 (1973)).

¹⁴¹ "[T]he scope of federal statutory copyright is determined by federal law, not by the law of those states that did have common law copyright." *Id.*

¹⁴² "[A]n unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme." *Skidmore*, 952 F.3d at 1062 (quoting *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000)).

author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one *complete* copy of such work if it be a . . . musical composition . . . ”¹⁴³ The Ninth Circuit then concluded that the federal statutory language is clear with respect to unpublished works, which explains that the copyright owner has to deposit one *complete* copy of the work for purposes of making a record of the copyright claimed, providing notice to third parties, and preventing confusion about the copyright’s scope.¹⁴⁴

In defending its position, Led Zeppelin argued that a musical composition could only be federally protected under the Copyright Act of 1909 if the work was published with required notice or registered as unpublished with an accompanying deposit copy, but not simply upon fixation in tangible form.¹⁴⁵ Since sound recordings were not considered copies of a musical composition under the Copyright Act of 1909, a musical work had to be reduced to sheet music or some other manuscript form to claim copyright protection.¹⁴⁶ Led Zeppelin further explained that Skidmore’s argument in favor of extending protection over not just the deposit copy but also versions of the composition that were embodied in recordings was incorrect by directly countering the argument made by Skidmore under § 1(e) of the Copyright Act of 1909.¹⁴⁷ Although this legislation identified a new right to record a musical composition in “any form of record in which the thought of an author may be recorded and from which it may be read or reproduced,”¹⁴⁸ Congress clarified that it had no intention with the passage of the Copyright Act of 1909 to extend this right to the actual mechanical reproductions themselves.¹⁴⁹ Moreover, the courts, the Register of Copyrights, and commentators have all declined to extend federal copyright protection to sound recordings when interpreting the Copyright Act of 1909.¹⁵⁰

Based on these arguments, Led Zeppelin contended that the sound recordings were not copies of the *Taurus* musical composition and further that the lower court properly required the 1967 copyrighted *Taurus* deposit copy to be used to prove substantial similarity with Led

¹⁴³ *Id.* (emphasis added) (quoting Copyright Act of 1909, ch. 320, § 11, 35 Stat. 1075 (repealed 1978)).

¹⁴⁴ *Id.*

¹⁴⁵ Combined Answering and Opening Brief, *supra* note 140, at 35.

¹⁴⁶ “Because sound recordings were not copies of a musical composition, ‘to claim copyright in a musical work under the 1909 Act, the work had to be reduced to sheet music or other manuscript form.’” *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2017)).

¹⁴⁷ *Id.* at 37.

¹⁴⁸ *Id.* at 38–39 (quoting Copyright Act of 1909 § 1(e)).

¹⁴⁹ *Id.* at 39 (quoting H.R. REP. NO. 60-2222, at 9 (1909)).

¹⁵⁰ *Id.*

Zeppelin's *Stairway to Heaven*.¹⁵¹ Finding in favor of Led Zeppelin, and affirming the lower court's rulings, the Ninth Circuit found that the Copyright Act of 1909 controlled the issue of copyright registration in this case, and therefore, the deposit copy defined the scope of the copyright.¹⁵² Based on this determination, the Ninth Circuit concluded that *Stairway to Heaven* did not infringe *Taurus*.¹⁵³

A. *What Implications Does the Skidmore Ruling Have on Other Works Created Under and Governed by the Copyright Act of 1909?*

The Ninth Circuit's ruling regarding deposit copies and the scope of copyright protection under the Copyright Act of 1909 will have various implications on the music industry, while at the same time promoting creativity in the arts. On the one hand, with respect to "the history and spirit of copyright statutes," the Ninth Circuit's ruling is aligned with the legislative intent to benefit the public interest and not to primarily compensate artists.¹⁵⁴ This means that, in limiting the scope of musical composition copyrights to their deposit copies, the Ninth Circuit has provided artists—especially those who wish to create music with some influence from preexisting songs that already entered the public domain—with a broader range of creativity. On the other hand, the Ninth Circuit's ruling remains controversial because of the potential legal impact it will have on pre-1978 works, like *Taurus* and *Stairway to Heaven*, regarding the status and breadth of their copyright protection.

Legal scholars have weighed in on whether the Ninth Circuit's ruling regarding deposit copies is correct. For example, Sadie Zurfluh provides a compelling argument as to why the Ninth Circuit's ruling may be incorrect both doctrinally and practically.¹⁵⁵ Doctrinally, she argues, similarly to Skidmore, that the Ninth Circuit did not adhere to stare decisis because the Copyright Act of 1909 was established to overturn the decision in *White-Smith Music Publishing Co. v. Apollo Co.*¹⁵⁶ and extend

¹⁵¹ *Id.* at 41.

¹⁵² *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063–64 (9th Cir. 2020) (en banc).

¹⁵³ "[The Ninth Circuit] affirm[s] the judgment that Led Zeppelin's *Stairway to Heaven* did not infringe Spirit's *Taurus*." *Id.* at 1079.

¹⁵⁴ Recent Case, *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020), 134 HARV. L. REV. 1543, 1547 (2021).

¹⁵⁵ Sadie Zurfluh, Comment, *What Are We to Do with Deposit Copies?*, 23 MARQ. INTEL. PROP. L. REV. 231 (2019).

¹⁵⁶ *Id.* at 236. "The Supreme Court held that the copyright statute barred the unauthorized copying of a musical composition 'in intelligible notation,' but that it would be 'strained and artificial' to consider musical sounds coming from an instrument to be a copy." *Skidmore*, 952 F.3d

the copyright protection for musical compositions beyond sheet music.¹⁵⁷ Practically, she argues that the Ninth Circuit’s ruling as it stands today will subject almost all pre-1978 musical compositions to the revocation of their copyright protection.¹⁵⁸ This concern is echoed in Skidmore’s Petition for Writ of Certiorari to the U.S. Supreme Court, which emphasized that the Ninth Circuit’s ruling will have “dire consequences,” such as the loss of copyright protection for all songs composed before 1978 as a result of their incomplete deposit copies.¹⁵⁹ Essentially, the implication of these incomplete deposit copies is that any portions not previously memorialized in the deposit copy that was submitted as part of the registration record have been lost to the public domain.¹⁶⁰ Since these portions are lost to the public domain, it follows that the missing portions are not entitled to copyright protection and are free to be used by the public in its own creative works.¹⁶¹ The Ninth Circuit’s ruling, therefore, has the potential to “divest hundreds of thousands of songs of copyright protection.”¹⁶²

By making clear distinctions as to what is and is not protected by copyright and limiting protection for pre-1978 musical compositions, the Ninth Circuit’s ruling in *Skidmore* has already started to affect copyright infringement litigation,¹⁶³ which, according to Skidmore, will only

at 1061 (quoting *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908)). “Congress stepped in to remedy the situation The Copyright Act of 1909—landmark legislation that significantly revised copyright law—categorized mechanically-reproduced musical compositions, such as those played on player pianos and phonograph players, as ‘copies’ of the original composition.” *Id.* (quoting Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (repealed 1978)). Skidmore argued then that this revision to the Copyright Act “extended copyright protection beyond sheet music.” *Id.* However, the Court ultimately reasoned that “[a]lthough the 1909 Act extended copyright protection against infringement beyond the mere reproduction of the sheet music, Congress did not provide that copyrighted works could be anything other than sheet music or, for an unpublished work, the musical composition transcribed in the deposit copy.” *Id.*

¹⁵⁷ Zurfluh, *supra* note 155, at 236; *Skidmore*, 952 F.3d at 1061.

¹⁵⁸ Zurfluh, *supra* note 155, at 236.

¹⁵⁹ Petition for Writ of Certiorari at 4, *Skidmore*, 952 F.3d 1051 (No. 20-142) (“The dire consequences of the *en banc* opinion to copyright owners cannot be understated. If copyright protection under the 1909 Act is limited to deposit sheet music, then virtually all songs composed before 1978 will lose almost all copyright protection because the lead sheets submitted for them were uniformly incomplete.”).

¹⁶⁰ Zurfluh, *supra* note 155, at 238–39.

¹⁶¹ *Id.* at 239.

¹⁶² Petition for Writ of Certiorari, *supra* note 159, at i.

¹⁶³ Alexander Kaplan, Sandra Crawshaw-Sparks & Simona Weil, *Led Zeppelin Ruling Is Already Affecting Copyright Litigation*, PROSKAUER (Apr. 3, 2020), <https://prfirmppwwcdn0001.azureedge.net/prfirmstgacctpwwcdncont0001/uploads/3a6f58a48a2aaf2e1ce0eb66df6abf99.pdf> [https://perma.cc/4HZ4-XQ8L] (“It has quickly become apparent that the Ninth Circuit’s *en banc* Led Zeppelin decision draws important boundaries as to what is protectable by copyright in music—both with respect to the limits of protection in a pre-

accelerate moving forward.¹⁶⁴ For example, in a recent Southern District of New York case, the heirs of Ed Townsend alleged that Ed Sheeran's *Thinking Out Loud* infringed Marvin Gaye's iconic 1973 song *Let's Get It On*.¹⁶⁵ The case was put on hold, awaiting the result of *Skidmore*, since a similar question existed as to whether the jury could hear the recording of the song or whether copyright protection was limited to the musical composition as memorialized in the deposit copy.¹⁶⁶ Following in the Ninth Circuit's footsteps, the Southern District of New York held that *Let's Get It On's* 1973 copyright was limited to what was expressed in the deposit copy, which was the sheet music,¹⁶⁷ and the recording of the song was not admissible.¹⁶⁸ Therefore, as a result of this ruling, several of the elements included in Gaye's song recording, such as instruments and his vocal performances that do not appear in the simple melody, cannot be protected under the compositional copyright because they are not also in the deposit copy.¹⁶⁹

Conversely, pointing out that the Ninth Circuit's ruling is correct and not as detrimental as some may perceive it to be, an article published by *Harvard Law Review* reiterates the constitutional purpose of copyright law to incentivize creation for public benefit.¹⁷⁰ Furthermore, the article explains that while the Ninth Circuit's ruling may make it harder to establish similarity between pre-1978 musical works for infringement purposes, the result "is the means by which copyright [law] advances the progress of science."¹⁷¹ If "copyright law is intended to serve the purpose of enriching the general public through access to creative work,"¹⁷² then perhaps the Ninth Circuit's ruling aligns with the constitutional objective of promoting the creation of original works for public enjoyment. Therefore, it seems that the Ninth Circuit's ruling provides the desired

1976 Copyright Act musical composition and the protectability of commonly found musical phrases and other elements, as well as the alleged combinations of such elements.").

¹⁶⁴ Petition for Writ of Certiorari, *supra* note 159, at 21.

¹⁶⁵ Griffin v. Sheeran, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019).

¹⁶⁶ Kaplan, Crawshaw-Sparks & Weil, *supra* note 163.

¹⁶⁷ Griffin v. Sheeran, No. 17 Civ. 5221, 2020 U.S. Dist. LEXIS 52908, at *2 (S.D.N.Y. Mar. 24, 2020).

¹⁶⁸ *Id.* at *3–4.

¹⁶⁹ *Id.* at *3 ("The Gaye sound recording contains many elements: percussion/drums, bass-guitar, guitars, Gaye's vocal performances, horns, flutes, etc., which do not appear in the simple melody of the Deposit Copy. These additional elements—at least some of which appear in Think Out Loud in more or less similar form—are not protected by copyright, because they are not in the Deposit Copy.").

¹⁷⁰ Recent Case, *supra* note 154, at 1543.

¹⁷¹ *Id.* at 1550 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991)).

¹⁷² *What Is the Purpose of Copyright Law*, *supra* note 21.

balance between the rights of creators and the interest of the public, as discussed in Part I.¹⁷³

III. MOVING ON FROM *SKIDMORE*: CAN PRE-1978 ARTIST CREATIONS RECEIVE PROTECTION?

As a result of the ruling in *Skidmore*, musicians are left with several questions that require clarification. How do artists go about potentially recapturing their rights in musical compositions from pre-1978? Is it even possible? Or are the portions of pre-1978 creations not memorialized in their deposit copies, and potentially lost to the public domain, gone from their ownership forever? As the evidence suggests, these rights have been lost to the public domain,¹⁷⁴ and therefore there are no legal remedies for artists to recapture their copyrights in the portions of the musical compositions that have not been submitted to the U.S. Copyright Office in the deposit copies.

As indicated by *Skidmore* in his Petition for Writ of Certiorari to the U.S. Supreme Court, copyright infringement cases under the Copyright Act of 1909 are common and will continue to be brought moving forward.¹⁷⁵ Therefore, artists may want to understand how this ruling affects the copyrights they hold in their pre-1978 musical compositions. Also, they may want to know whether there is anything else they could do to afford themselves extra legal protection under the current laws, and without congressional action, to secure the copyrights they believe that they have in their once original musical works. As this Part will demonstrate, the rights claimed by these artists are already in the public domain, and there is nothing any artist can currently do to get them back under their protection without the aid of Congress.¹⁷⁶ However, this will ultimately have the effect of promoting the progress of science as was intended by the framers when drafting the Intellectual Property Clause of the Constitution.¹⁷⁷

¹⁷³ See *supra* Part I.

¹⁷⁴ Zurfluh, *supra* note 155, at 238–39.

¹⁷⁵ “Cases under the 1909 Act are common, and will continue to be for the foreseeable future, necessitating that this Court address the Ninth Circuit’s holding before the damage becomes irreversible.” Petition for Writ of Certiorari, *supra* note 159, at 5.

¹⁷⁶ See discussion *infra* Sections III.A–III.C.

¹⁷⁷ See discussion *supra* Part I.

A. *The Inability to Alter Deposit Copies*

With the *Skidmore* ruling, artists may question if there is anything they can do to add to the deposit copies they already have on file, thereby expanding the protection they have for their musical composition. The U.S. Copyright Office allows for supplementary registrations to be used to correct errors in existing registrations or to amplify information provided in an existing registration, known as a “basic registration.”¹⁷⁸ When a supplemental registration is issued, the basic registration is not canceled, and the registration number remains the same.¹⁷⁹ In other words, the two registrations will simultaneously exist in the public record, with the supplemental registration complementing the basic registration, but not replacing it.¹⁸⁰ The U.S. Copyright Office allows for amplification of a basic registration when a copyright owner wants to provide additional information to the existing registration that should have initially been included but was omitted for some reason.¹⁸¹ Therefore, at first glance, this seems like an easy fix to the deposit copy issue faced by artists who have pre-1978 musical composition copyrights.

However, the U.S. Copyright Office explicitly sets forth what elements may and may not be addressed with a supplementary registration.¹⁸² While copyright owners *can* “add the name of a co-claimant who should have been listed when the basic registration was made” or “reflect a change in the title of the work or to add a subtitle,” the U.S. Copyright Office explicitly states that a supplementary registration *cannot* be used to “correct errors or omissions appearing in the deposit copy(ies)” or “add or correct a copyright notice to the deposit copy(ies).”¹⁸³ With that being said, this potential avenue for artists to

¹⁷⁸ *About Supplementary Registration*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/eco/help-supplementary.html> [<https://perma.cc/JE5Z-3TU9>].

¹⁷⁹ “When the Copyright Office issues a supplementary registration, it does not cancel or replace the basic registration or the registration number. Likewise, the Office does not change the information set forth in the basic registration or the public record for that registration.” *Id.*

¹⁸⁰ “[T]he basic registration and the supplementary registration coexist with each other in the public record, and the supplementary registration augments—but does not supersede—the information set forth in the basic registration.” *Id.*

¹⁸¹ “An ‘amplification’ may be appropriate (i) if you want to add information [that] should have been included in the existing registration, but was omitted when the registration was made” *Id.*

¹⁸² *See id.*

¹⁸³ *Id.* The Compendium of Post-Registration Procedures supplies the situations where supplementary registration is inappropriate and therefore cannot be used to amplify the information in the basic registration. It explicitly states, “[a] supplementary registration may only be used to correct or amplify the information set forth in a certificate of registration. The U.S. Copyright Office will not issue a supplementary registration to correct an error in the deposit copy(ies) that were submitted with the application for basic registration.” COPYRIGHT OFFICE PRACTICES, *supra* note 22, § 1802.7(D).

expand the scope of their musical composition copyrights under the current laws is essentially futile. Whether copyright holders will have the option to alter their original deposit copies at some point in the future depends on whether Congress chooses to amend this provision and thereby expand the rights that copyright holders have over their works.

While allowing musicians to alter their previously registered deposit copies seems like the most obvious and direct way for musicians to try to recapture the copyrights that have already entered the public domain, logically the reason against allowing them to do so makes sense. If the portions of the musical composition have not been fixed into a tangible medium, even if they were once deemed original, they cannot receive the protection of the federal copyright laws.¹⁸⁴ Therefore, the portions not included in the deposit copy are in the public domain and have already forfeited their copyright protection. This logic also stems back to first principles of originality as set forth in *Feist*. For example, “[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected.”¹⁸⁵ The reason for this is that certain types of information (such as facts) do not owe their origin to any one author; therefore, they may not receive copyright protection because they are in the public domain and available to be used by every person in their own creative works.¹⁸⁶ Similar to these facts, portions of a musical composition that have been forfeited to the public domain are also available for use by other musicians in their own musical works.¹⁸⁷

B. *Derivative Works*

Artists may also question if there is anything they can do to recreate their classic musical works in order to reregister them and include the missing musical composition elements under a new registration. Pursuant to copyright laws, copyright owners have the right to prepare derivatives, which are works based on other preexisting works.¹⁸⁸ For musicians, a derivative work could include “[a] musical arrangement of a preexisting musical work.”¹⁸⁹ With that being said, adding a new verse to,

¹⁸⁴ See discussion *supra* Section I.C.

¹⁸⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

¹⁸⁶ *Id.* at 347–48.

¹⁸⁷ See *id.* at 359 (“[C]opyright . . . has no effect one way or the other on the copyright or public domain status of the preexisting material.” (quoting H.R. REP. NO. 94-1476, at 57 (1976))).

¹⁸⁸ COPYRIGHT OFFICE PRACTICES GLOSSARY, *supra* note 9, at 5 (defining “derivative work”); U.S. COPYRIGHT OFF., CIRCULAR 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS 1–2 (2020) [hereinafter CIRCULAR 14], <https://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/D4Q5-ENC7>].

¹⁸⁹ CIRCULAR 14, *supra* note 188, at 1.

or changing the melody of, a pre-1978 song in hopes of securing an opportunity to register a derivative of the original seems like another possible avenue that artists could take in an attempt to recapture the musical composition copyrights they have lost to the public domain. However, as with altering deposit copies, this proposal has also proven futile as the copyright protection extended to derivative works is limited.¹⁹⁰

A derivative work can be registered with the U.S. Copyright Office only if it constitutes subject matter that is actually copyrightable.¹⁹¹ To qualify for copyright protection, these derivative works must meet certain criteria, such as incorporating a preexisting work and adding original elements of authorship to that work.¹⁹² As discussed in *Alfred Bell*, the newly added copyrightable elements in the derivative work may only be registered if there is a sufficient amount of originality.¹⁹³ Although the legislation itself does not explicitly provide the threshold of originality that is required of a derivative work when compared to the original work, it does state that copyright protection will only extend to the material that was contributed by the author and is distinguishable from preexisting material in the underlying work.¹⁹⁴ In addition, the Second Circuit in *L. Batlin & Son, Inc. v. Snyder* explained that a reproduction of an underlying public domain work must contain an original contribution distinct from the original and “be more than a mere copy” of the original.¹⁹⁵ It follows that if the new work is a mere copy of the original, then it is not a derivative, and no copyright protection can extend to the newer version.¹⁹⁶ Therefore, when a work is essentially a duplication of

¹⁹⁰ *Id.* at 2 (“The copyright in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work. Protection does not extend to any preexisting material, that is, previously published or previously registered works or works in the public domain or owned by a third party.”).

¹⁹¹ COPYRIGHT OFFICE PRACTICES, *supra* note 22, § 311.1.

¹⁹² CIRCULAR 14, *supra* note 188, at 1 (“To be copyrightable, a derivative work must incorporate some or all of a preexisting ‘work’ and add new original copyrightable authorship to that work.”).

¹⁹³ See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951).

¹⁹⁴ 17 U.S.C. § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”); FROMER & SPRIGMAN, *supra* note 22, at 45 (discussing § 103(b)).

¹⁹⁵ *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (“The underlying work of art may as here be in the public domain. But even to claim the more limited protection given to a reproduction of a work of art (that to the distinctive features contributed by the reproducer), the reproduction must contain ‘an original contribution not present in the underlying work of art’ and be ‘more than a mere copy.’” (quoting 1 MELVILLE B. NIMMER, THE LAW OF COPYRIGHT § 20.2 (1975))).

¹⁹⁶ See COPYRIGHT OFFICE PRACTICES, *supra* note 22, § 313.4(A).

another, and no original expression has been added to the newer version, the newer work cannot be registered with the U.S. Copyright Office.¹⁹⁷

The Ninth Circuit reinforced these principles in *ABS Entertainment, Inc. v. CBS Corp.* when it held that a remastered sound recording cannot receive copyright protection as a derivative work “unless its essential character and identity reflect a level of independent sound recording authorship that makes it a variation distinguishable from the underlying work.”¹⁹⁸ Therefore, “if an allegedly derivative sound recording does not add or remove any sounds from the underlying sound recording, does not change the sequence of the sounds, and does not remix or otherwise alter the sounds in sequence or character,” then it “is likely to be nothing more than a copy of the underlying sound recording and is presumptively devoid of the original sound recording authorship required for copyright protection.”¹⁹⁹ If artists are trying to recapture the original rights they lost to the public domain, having to substantially change the underlying work they are seeking to protect in order to create a derivative work suitable for protection defeats the purpose.

In addition to the above, the inability of artists to use derivative works as a vehicle for recapturing copyrights lost to the public domain also makes sense when considering the fundamental principles of copyright law.²⁰⁰ Once material has entered the public domain, it is essentially “free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work.”²⁰¹ When discussing copyright protection in derivative works, the U.S. Copyright Office explicitly explains that copyright protection will not extend to the public domain material that was used to create the derivative work and will only extend to the newly added, original elements of the derivative work.²⁰² This point was also argued by Led Zeppelin in its brief to the Ninth Circuit, explaining that the creation of new versions of a copyrighted work does not expand the scope of that work’s copyright

¹⁹⁷ *Id.*

¹⁹⁸ *ABS Ent., Inc. v. CBS Corp.*, 900 F.3d 1113, 1126 (9th Cir. 2018).

¹⁹⁹ *Id.*

²⁰⁰ See discussion *supra* Section I.B.

²⁰¹ *Comput. Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992).

²⁰² CIRCULAR 14, *supra* note 188, at 2 (“Protection does not extend to any preexisting material, that is, previously published or previously registered works or works in the public domain or owned by a third party. . . . A work that has fallen into the public domain, that is, a work that is no longer protected by copyright, is also an underlying ‘work’ from which derivative authorship may be added, but the copyright in the derivative work will not extend to the public domain material, and the use of the public domain material in a derivative work will not prevent anyone else from using the same public domain work for another derivative work.”).

protection, but simply results in an entirely new work with protection limited to the newly added elements of protectable expression.²⁰³

Overall, once copyrights have been lost or forfeited to the public domain, it is essentially impossible for the original artists to recapture those rights under their ownership.²⁰⁴ Even though artists have the right to create derivative works,²⁰⁵ the new works must be comprised of original elements that differ from the preexisting work, and only then do artists have a claim for copyright protection in the new work.²⁰⁶ However, the protection afforded would still only extend to the newly added elements and not to the elements that were part of the original underlying work from which the new work was derived.²⁰⁷

C. *Could Congress Legislatively Change the Skidmore Ruling?*

1. Proposals from Legal Scholars

Identifying that the Ninth Circuit's ruling in *Skidmore* presents an issue for composers, songwriters, and musicians alike, legal scholars have posed similar questions and offered potential legislative and procedural solutions to the problem.²⁰⁸ For example, Sara Baumgardner proposed that sheet music deposit copies and the commercial sound recordings that the copies claim to represent be legislatively linked in order to provide artists protection beyond the scope of the deposit copies.²⁰⁹ This means, she explains, that artists who have submitted deposit copies as "visual" representations of their record should be required by Congress to have their deposit copy "fully, accurately, and completely" translate all elements of the musical work it claims to represent.²¹⁰ However, as she

²⁰³ "It also is black-letter copyright law that changing a copyrighted work does not change the protected portions of that work. Instead, a change to a work would at most result in a new work whose protection is strictly limited to the additional protectable expression." Combined Answering and Opening Brief, *supra* note 140, at 47.

²⁰⁴ See *Copyright and the Public Domain*, UNIV. OF CHI., <https://www.lib.uchicago.edu/copyrightinfo/pubdomain.html> [<https://perma.cc/83LZ-JEBV>].

²⁰⁵ *Id.*

²⁰⁶ CIRCULAR 14, *supra* note 188, at 2.

²⁰⁷ *Id.*

²⁰⁸ See generally Sara Baumgardner, *The "I Know It When I Hear It" Test: Decreasing Overdependence on Sheet Music in Substantial Similarity Cases*, 56 GONZ. L. REV. 351 (2020); Komlos, *supra* note 97.

²⁰⁹ Baumgardner, *supra* note 208, at 397.

²¹⁰ *Id.* at 400 ("[I]f Congress required sheet music deposit copies to reflect, fully and completely, the entire contents of the recordings they seek to represent, the district court would not have run into this evidentiary problem in the first place. Even if, under the 1909 Act, the recordings remained inadmissible, the sheet music deposit would represent all the sounds in the recording.").

states, this is not copyright law as it currently stands and would require Congress to amend the Copyright Act to afford artists these extra legal protections.²¹¹

Ellen Komlos also adheres to the belief that portions of a musical composition governed by the Copyright Act of 1909 will lose their copyright protection and become part of the public domain if they are not memorialized in the deposit copy,²¹² and she has similarly proposed legislative solutions that could mitigate the deleterious effects that the current state of copyright law will have on these works.²¹³ Her proposed solutions are intended to avoid human error and improper application of copyright principles during the infringement inquiry.²¹⁴ In her proposal, she suggests safeguards such as two lay juries,²¹⁵ an additional pretrial procedure,²¹⁶ and administrative copyright judges.²¹⁷ As is the case with Baumgardner, Komlos' proposals also require congressional action and do not answer the question as to what legal solutions artists currently have under this ruling.

2. Previous Legislation

Congress has previously used its legislative powers to fix inadequacies in copyright law by enacting legislation, some of which has been challenged on constitutional grounds.²¹⁸ For example, in *Eldred v. Ashcroft*, Congress, acting under the Intellectual Property Clause of the U.S. Constitution, expanded the duration of copyright protection by

²¹¹ *Id.* at 395–97.

²¹² “Until the Ninth Circuit or Supreme Court condemns the Ninth Circuit’s decisions in [*Skidmore*] in a subsequent case, portions of musical works protected under the 1909 Act not reflected in the deposit copy will become part of the public domain, advantaging alleged infringers like Led Zeppelin.” Komlos, *supra* note 97, at 211.

²¹³ *Id.*

²¹⁴ *Id.* at 205.

²¹⁵ *Id.* at 207 (“Two distinct trials, or a multiple jury proceeding, should be considered to mitigate the harmful effects of juror confusion. Lay jurors face difficulty in erasing what they have heard if different, yet similar, audio versions are played for access and then substantial similarity. In cases where multiple audio versions must be introduced, empanelling two lay juries is not unduly burdensome given the value of the rights at stake.”).

²¹⁶ *Id.* at 209 (“[C]ourts should consider requiring mandatory pre-trial hearings for the complicated aspects of copyright infringement cases.”).

²¹⁷ *Id.* at 210 (“[C]ourts should consider the integration of a skilled panel of ‘Administrative Copyright Judges’ to mitigate the harmful, defendant-favored effects likely to result from the confusing aspects of the copyright infringement analysis. . . . [C]opyright litigants would benefit from the formation of an administrative body composed of Administrative Copyright Judges possessing expertise in music and other arts.”).

²¹⁸ See *Eldred v. Ashcroft*, 537 U.S. 186, 192–93 (2003); *Golan v. Holder*, 565 U.S. 302, 307–08 (2012).

twenty years under the Copyright Term Extension Act (CTEA).²¹⁹ The CTEA followed a history of prior extensions where Congress provided for enlarged duration terms to existing and future copyrights.²²⁰ Before the CTEA, copyright protection for works under the Copyright Act of 1976 lasted for the life of the author plus an additional fifty years.²²¹ Now, under the CTEA, copyright protection for those works will last for the life of the author plus an additional seventy years.²²² Congress enacted this legislation to harmonize U.S. copyright terms with those adopted by the European Union.²²³

Petitioners, who utilized copyrighted works that already entered the public domain in their own products and services, challenged the constitutionality of the CTEA.²²⁴ They alleged that Congress went beyond the scope of its power in the Intellectual Property Clause because Congress only has the power to grant copyrights to authors for “limited [t]imes.”²²⁵ In other words, petitioners urged that the “limited [t]imes” language creates a constitutional boundary that Congress cannot, but did, cross.²²⁶ Essentially, the question for the Court was whether the U.S. Constitution gives Congress the authority to enact legislation that alters the duration of copyright protection.²²⁷

The Court evaluated the challenge by looking at Congress’ previous exercises of its constitutional authority under the Intellectual Property Clause.²²⁸ Congress expanded the term of the first federal copyright statute, which was enacted in 1790, from fourteen years from the date of publication with a fourteen-year renewal term, to forty-two years in 1831; and then it expanded the term again to fifty-six years in 1909.²²⁹ Each time, Congress applied the extension to existing and future works.²³⁰ Congress then switched the starting point from which copyright protection would run in 1976, which altered the method for computing

²¹⁹ *Eldred*, 537 U.S. at 192–93; Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 101, 108, 203, 301–304).

²²⁰ *Eldred*, 537 U.S. at 193.

²²¹ *Id.*

²²² *Id.*; 17 U.S.C. § 302.

²²³ *Eldred*, 537 U.S. at 196.

²²⁴ *Id.* at 193.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 192.

²²⁸ *Id.* at 194.

²²⁹ *Id.* (“Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for an additional 14 years), and to 56 years in 1909 (28 years from publication, renewable for an additional 28 years).”).

²³⁰ *Id.*

copyright duration.²³¹ While the 1790, 1831, and 1909 Copyright Acts provided that copyright protection began from the work's publication, the Copyright Act of 1976 provided that it would begin at the moment of the work's creation.²³² This allowed U.S. copyright law to align with the international standard under the Berne Convention.²³³ The CTEA was the fourth major extension of copyright duration by Congress.²³⁴

Consideration of text, history, and precedent led the Court to conclude that the Intellectual Property Clause gave Congress the power "to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future."²³⁵ Congress had a consistent historical practice of enacting legislation that applied to both future and existing copyrights.²³⁶ Since "[t]he CTEA reflects judgments of a kind Congress typically makes," the Court essentially concluded that it cannot be dismissed as beyond the scope of Congress' power.²³⁷

When the United States joined the Berne Convention, Congress enacted legislation in order to comply with the international copyright regime.²³⁸ In doing so, Congress gave works that enjoyed international copyright protection the full term of copyright protection that was available to domestic works in § 514 of the Uruguay Round Agreements Act.²³⁹ More specifically, this legislation granted copyright protection to preexisting works that were protected in their country of origin but not in the United States for various reasons.²⁴⁰ Prior to the enactment of § 514, U.S. copyright law had barriers to protection that caused certain foreign works to enter the public domain in the United States.²⁴¹

²³¹ *Id.* at 194–95.

²³² *Id.* at 195.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 199.

²³⁶ *Id.* at 204.

²³⁷ *Id.* at 205.

²³⁸ *Golan v. Holder*, 565 U.S. 302, 307 (2012).

²³⁹ *Id.*

²⁴⁰ *Id.* ("To perfect U.S. implementation of Berne, and as part of our response to the Uruguay round of multilateral trade negotiations, Congress, in 1994, gave works enjoying copyright protection abroad the same full term of protection available to U.S. works. Congress did so in § 514 of the Uruguay Round Agreements Act (URAA), which grants copyright protection to pre-existing works of Berne member countries, protected in their country of origin, but lacking protection in the United States for any of three reasons: The United States did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had failed to comply with U.S. statutory formalities (formalities Congress no longer requires as prerequisites to copyright protection).").

²⁴¹ *Id.*

However, as a result of the enactment of § 514, these foreign works were restored to protection from the public domain.²⁴²

In *Golan v. Holder*, petitioners of various professions, who all previously enjoyed access to the foreign works that were restored from the public domain, challenged the constitutionality of § 514.²⁴³ According to the petitioners, copyright law asserts that “a work that has entered the public domain, for whatever reason, must forever remain there.”²⁴⁴ The petitioners further argued that Congress went beyond the scope of its authority under the Intellectual Property Clause by extending copyright protection to creatives whose works have already entered the public domain.²⁴⁵ However, the Court explained that “no such barrier in the text of the Copyright Clause, historical practice, or our precedents” exists.²⁴⁶ Essentially, drawing from its decision in *Eldred v. Ashcroft*, the Court found that the restored copyrights are just as limited as those that were extended by the CTEA.²⁴⁷

Petitioners also argued that the enactment of this federal legislation could not serve the Intellectual Property Clause’s goal of advancing the progress of science because it does not provide any plausible incentives to create new works.²⁴⁸ In addressing this argument, the Court first established that each copyright provision does not need to operate to induce the creation of new works.²⁴⁹ Furthermore, the Court also found that compliance with the international copyright regime better served the objectives of the Intellectual Property Clause.²⁵⁰ Ultimately, the Court concluded that Congress did not go beyond its constitutional limitations when it enacted § 514²⁵¹ and that the Intellectual Property Clause does not “make[] the public domain, in any and all cases, a territory that works may never exit.”²⁵²

3. Would It Be Constitutional?

An analysis of previous congressional legislation gives the impression that Congress has broad constitutional authority to enact

²⁴² *Id.*

²⁴³ *Id.* at 307–08.

²⁴⁴ *Id.* at 308.

²⁴⁵ *Id.* at 318.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 319.

²⁴⁸ *Id.* at 324–25.

²⁴⁹ *Id.* at 325.

²⁵⁰ *Id.* at 326.

²⁵¹ *Id.* at 308.

²⁵² *Id.*

legislation in order to correct inequities and inadequacies in the country's copyright laws.²⁵³ However, the question as to whether Congress has broad power to legislatively reverse the Ninth Circuit's ruling in *Skidmore* does not have a clear answer.²⁵⁴ Based on a common understanding of the public domain in conjunction with previous case law and congressional legislation, Congress most likely cannot constitutionally legislatively reverse the Ninth Circuit's ruling in *Skidmore*.

Despite *Golan's* holding that the Intellectual Property Clause does not place any limitations on works exiting the public domain,²⁵⁵ other language in the opinion distinguishes the case from the situation in *Skidmore*. Perhaps most importantly, the opinion stresses that “[w]orks that have fallen into the public domain after the expiration of a full copyright term—either in the United States or the country of origin—receive no further protection under § 514.”²⁵⁶ The goal of enacting § 514 was to provide a remedy to foreign authors who suffered inequitable treatment as a result of restrictive U.S. copyright laws.²⁵⁷ The works of foreign authors that were restored under § 514 only subsisted for the remainder of the copyright term that the work would have enjoyed if it had never entered the public domain.²⁵⁸ With the goal of placing foreign works on equal footing with their U.S. counterparts, § 514 sought to ensure that the United States was complying with the standard enforced by the Berne Convention.²⁵⁹

There are multiple reasons why *Golan's* holding is narrow and does not extend to *Skidmore*. First, unlike the situation in *Golan*, it could be argued that most U.S. musicians had an equal opportunity to file a complete deposit copy with the U.S. Copyright Office. Second, unlike the restrictions imposed on foreign authors, there were no substantive legal restrictions that prevented musicians from ensuring their entire musical compositions were properly copyrighted. Third, unlike in *Golan*, Congress would not be enacting legislation in order to ensure compliance with an international treaty. Finally, if Congress were to enact legislation that allowed musicians to restore portions of their musical compositions they lost to the public domain, this would significantly stifle creativity,

²⁵³ See CONG. RSCH. SERV., CONGRESS'S POWER TO RESTORE COPYRIGHT PROTECTION TO WORKS THAT HAVE ENTERED THE PUBLIC DOMAIN: *GOLAN V. HOLDER* 5–6 (2011), https://www.everycrsreport.com/files/20110830_R41977_9e38fe9c106b92862ec6c75c1059031f16ce87f4.pdf [<https://perma.cc/L2MX-UN5E>].

²⁵⁴ See *id.* at 8–10.

²⁵⁵ *Golan*, 565 U.S. at 308 (“Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.”).

²⁵⁶ *Id.* at 315 (citing 17 U.S.C. § 104A(h)(6)(B)).

²⁵⁷ *Id.* at 318.

²⁵⁸ *Id.* at 315 (quoting § 104A(a)(1)(B)).

²⁵⁹ *Id.* at 311–15.

burden smaller artists who rely on the public domain for influence in their own creative works, and continue to compensate bigger artists.²⁶⁰

CONCLUSION

As evidenced by the discussion in this Note, “[n]o area of copyright law is more complex, or productive of more controversy over recent decades, than the tangle of copyright rules and industry practices that govern the music industry.”²⁶¹ Regardless, copyright has been called the “bedrock of the music industry” for several reasons.²⁶² Copyright law provides musicians with many rights, including, but not limited to, rights to reproduce a copyrighted work, prepare derivative works based upon the copyrighted work, distribute copies of the copyrighted work to the public, perform the work publicly, perform the work publicly by means of a digital audio transmission, and display the work publicly.²⁶³ Moreover, in addition to enabling musicians “to make a living” by generating income from their music through royalties and licensing deals,²⁶⁴ copyrighting musical works also provides musicians with two important benefits: (1) creating a public record of the copyright and (2) establishing the opportunity to sue for copyright infringement.²⁶⁵ For these reasons, it is important for creative works to be copyrighted,²⁶⁶ but it is even more important for artists to fully comprehend the scope of their rights under the current infrastructure of copyright laws.

While the U.S. Supreme Court has declined to hear an appeal of *Skidmore*,²⁶⁷ musicians, lawyers, scholars, students, and copyright holders

²⁶⁰ Kayla Stetzel, *Demystifying the Public Domain: How Expired IP Promotes Creativity*, IP BYTES (Aug. 6, 2021), <http://blogs.luc.edu/ipbytes/2021/08/06/demystifying-the-public-domain-how-expired-ip-promotes-creativity> [<https://perma.cc/G835-MGXX>].

²⁶¹ FROMER & SPRIGMAN, *supra* note 22, at 364.

²⁶² Ben Lowe, *Intellectual Property & Why It Is Important in Music*, MUSIC GATEWAY (May 6, 2020), <https://www.musicgateway.com/blog/how-to/intellectual-property-why-it-is-important-in-music> [<https://perma.cc/QJ6S-GPVM>].

²⁶³ Dmitry Pastukhov, *6 Basics of Music Copyright Law: What It Protects and How to Copyright a Song*, SOUNDCHARTS (Feb. 10, 2020), <https://soundcharts.com/blog/music-copyrights> [<https://perma.cc/2QCL-H9NM>].

²⁶⁴ Lowe, *supra* note 262.

²⁶⁵ Pastukhov, *supra* note 263.

²⁶⁶ See A. Rothstein, *The Importance of Copyright Law for Music Publishers*, INST. OF PROD. & RECORDING (Dec. 11, 2019), <https://www.ipr.edu/blogs/audio-production/copyright-law-music-producers> [<https://perma.cc/SJH8-CHNX>].

²⁶⁷ *Skidmore v. Led Zeppelin*, 141 S. Ct. 453 (2020) (denying cert.); Ben Sisario, *Led Zeppelin Wins Long ‘Stairway to Heaven’ Copyright Case*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/arts/music/stairway-to-heaven-led-zeppelin-lawsuit.html> [<https://perma.cc/2UHK-6PHV>].

will all continue to wait and see if Congress makes any substantial changes to current copyrights laws, and if so, if those changes will be constitutionally challenged. Based on this Note's derivative works analysis, specifically regarding the public domain,²⁶⁸ further analysis is needed to determine whether Congress could change the law to grant artists the right to works that have already entered the public domain without going against the Intellectual Property Clause's constitutional purpose. In the absence of any significant change, all these parties can do is make sense of the case law in front of them and continue to search for creative ways to protect these musical compositions moving forward. In the meantime, smaller independent artists can have the benefit of the public domain, using uncopyrighted portions of musical compositions to their advantage in creating meaningful works of art that could possibly be the next *Stairway to Heaven*.²⁶⁹

²⁶⁸ See discussion *supra* Section III.B.

²⁶⁹ See Sam Jones, *What Is Public Domain Music and What Are the Pros and Cons?*, MUSIC GATEWAY (July 15, 2021), <https://www.musicgateway.com/blog/music-industry/music-business/what-is-public-domain> [<https://perma.cc/A4NK-JDY6>]; Stetzel, *supra* note 260.