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Let Me Get My Glasses, I Can't Hear You: Sheet Music, Copyright, and Led Zeppelin

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Let Me Get My Glasses, I Can't Hear You: Sheet Music, Copyright, and Led Zeppelin

ABSTRACT

Musical copyright infringement cases are experiencing an identity crisis. The crisis is that courts are beginning their analyses of the similarities between compositions by examining visual, rather than aural, evidence. Prior to the 1976 Copyright Act, copyright protection extended only to musical works reduced to sheet music. That sheet music, which is filed with the US Copyright Office (Copyright Office) as a “deposit copy,” represents the sum of the composition’s copyright protection. Even though Congress amended the Copyright Act to allow for sound recordings of a composition to function as a deposit copy post-1976, courts—particularly the Ninth Circuit—begin evaluating musical similarity by using their eyes, even though music is an art form created for the ears. This sheet music requirement was and continues to be particularly burdensome for artists who do not read or write sheet music, which amplifies deep-seated racial disparities in access to copyright protection. Contemporary litigation has crafted a work-around where sound recordings can be registered as a derivative “arrangement” of the composition, but this solution misses the point. Regardless of what sheet music purports to represent, any written arrangement fails to capture a composition’s full scope. Music, after all, is not a visual medium.

By contrast, this Note suggests that the Copyright Office allows for a singular supplementation of the original deposit copy, which would permit artists to replace the original sheet music deposit with a sound recording deposit. With the passage of the Music Modernization Act, Congress has exhibited a willingness to extend copyright protection. This Note urges Congress to go one step further and permit sound recordings to serve as evidence for all, rather than some, compositions to create a more equitable scope of protection for artists, regardless of their composition process.

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What separates inspiration from appropriation? At bottom, that question underlies copyright law and even intellectual property law as a whole. In the United States, copyright law protects original works of authorship that contain some modicum of creativity.¹ This protection applies to a variety of mediums, including books, films, architecture, and—as this Note will discuss—music.² The line between an idea that transforms an original work and one that constitutes intellectual property theft is often blurry. But drawing that line is essential if copyright law is to strike a balance between protecting the rights of copyright holders and the desire to incentivize new works.

Music, like many other art forms, has a storied history of inspiration and, in some cases, appropriation.³ In one copyright infringement trial, an attorney contended that there is no such thing

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

2. See 17 U.S.C. § 102.

3. See, e.g., *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> [<https://perma.cc/RS97-9TZ5>] (last visited Nov. 5, 2021).

as an uninspired piece of music, instead claiming that all artists are “like dwarfs sitting on the shoulders of giants . . . [t]here are no virgin births in music.”⁴ Artists are regularly asked who or what inspired them to create a particular piece of music.⁵ This sense of familiarity may even be desirable to listeners.⁶ But at what point does inspiration become appropriation?

A complete answer to that question is beyond the scope of this Note, which instead discusses how to compare purportedly appropriated music to the original work. Specifically, when a court analyzes a purportedly copied piece of music, what does and—more aptly—what should it compare the composition to? The US Court of Appeals for the Ninth Circuit has set a particularly restrictive standard for its comparison source—only sheet music registered with the US Copyright Office (Copyright Office)—leaving musical infringement cases in an awkward identity crisis.⁷ Before the Copyright Act of 1976 (the 1976 Act), copyright protection only subsisted in musical works that were either published according to specific procedures or works that were submitted as sheet music—known as deposit copies—to the Copyright Office.⁸ Thus, while music is designed to be heard; courts instead require that pre-1976 Act works be read to determine the scope of their legal protection.⁹

This incongruence stems from the treatment of music as a work of literature, an unfortunate antiquity of copyright law.¹⁰ This Note argues that music, even for the purposes of copyright doctrine, is not something that can be distilled to a purely literary, rote transcription. Even the best sheet music fails to capture all the nuances that make music . . . *music*. While a composer should not hold a monopoly on things similar to his or her composition, there should be an exclusive

4. Victoria Kim, Randy Lewis & Ryan Faughnder, *Ruling that ‘Blurred Lines’ Copied Marvin Gaye Song Rocks Music World*, L.A. TIMES (Mar. 10, 2015, 10:03 PM), <https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html> [<https://web.archive.org/web/20210907095809/https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html>].

5. See, e.g., David Fricke, *Billy Gibbons: My Life in 15 Songs*, ROLLING STONE (Nov. 10, 2015, 2:28 PM), <https://www.rollingstone.com/culture/culture-lists/billy-gibbons-my-life-in-15-songs-151784/> [<https://perma.cc/4FLD-Q85Z>] (interviewing Billy Gibbons, lead singer and guitarist of ZZ Top, and discussing other artists that had a significant impact on his life and music).

6. Emery Schubert, *The Influence of Emotion, Locus of Emotion and Familiarity upon Preference in Music*, 35 PSYCH. MUSIC 499, 510 (2007).

7. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063 (9th Cir. 2020).

8. See CRAIG JOYCE, TYLER T. OCHOA & MICHAEL CARROLL, COPYRIGHT LAW 423 (11th ed. 2020).

9. See *Skidmore*, 952 F.3d at 1063.

10. See *infra* Part II.

right broader than what may—or may not—have been printed on a piece of sheet music.¹¹

This Note proceeds in three subsequent parts. Part I analyzes the history of copyright law and litigation, with a focus on the Ninth Circuit, the only circuit court that has explicitly addressed the deposit copy problem. This Part also reviews current litigation, including *Skidmore v. Led Zeppelin*, a Ninth Circuit case that explicitly interpreted the 1976 Act as limiting the scope of compositions to what the deposit copy contains.¹² With that discussion in mind, Part II analyzes the *Skidmore* decision and identifies the issues with the Ninth Circuit's ruling in that case, including its shortsighted treatment of nontraditional composers.¹³ Part II also discusses the racial disparities that have undergirded courts' reliance on deposit copies, even before *Skidmore*.¹⁴ Part III then suggests possible standards that could be adopted to ameliorate the Ninth Circuit's restrictive holding in *Skidmore*, including an approach suggested by the Copyright Office.¹⁵

I. DAZED AND CONFUSED: THE DEVELOPMENT OF THE DEPOSIT COPY

A. A Brief History of Copyright Regimes

American copyright law finds its origin in the US Constitution, wherein Article I, Section 8 grants Congress the power 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.”¹⁶ This power became functional when the first Congress passed the Copyright Act of 1790, providing protection to books, maps, and charts.¹⁷ Musical works, also referred to as compositions, first gained protection in an 1831 amendment to this statute.¹⁸ At that time, recorded music did not exist, and sheet music

11. See *infra* Part III.

12. See 952 F.3d at 1063–64.

13. See *id.*

14. See *id.*

15. See *id.*

16. U.S. CONST. art. I, § 8, cl. 8.

17. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124–26 (repealed 1831).

18. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436–38 (repealed 1870).

transcriptions were the dominant mode of disseminating compositions.¹⁹

Indeed, the copyright for musical works did not seek to protect the performance of the music itself, instead seeking to protect the written notation of the composition.²⁰ Thus, a musical composition was considered copied and therefore infringed upon only if it was copied “in intelligible notation.”²¹ Functionally, this standard meant that copyright deposits took the form of sheet music written in Western notation.²² Western sheet music uses a defined set of symbols to represent the pitches, rhythms, and lyrics necessary to perform a piece of music, like a set of rudimentary instructions to perform the work.²³ Seemingly, the statutory scheme, or perhaps even the cultural climate of the day, had not evolved to the point of separating music from works of literature. Copyright law, up to this point, focused solely on written material.²⁴ Thus, even though the goal of musical composition was not to create a literary work—it was to create music—the copyright regime, functionally, protected only the written representation of the work rather than what modern society would consider the music itself.²⁵

In recognition of the flaws in the existing system, Congress passed the Copyright Act of 1909 (the “1909 Act”).²⁶ The 1909 Act altered the length of copyright protection, created a performance right to compositions, and—relevant to the issue presented here—codified the “deposit copy” requirement to register unpublished musical works.²⁷ However, under the 1909 Act, protection attached only to an unpublished musical work when a “visually perceptible” copy of that work was submitted to the Copyright Office.²⁸ The Act’s purpose was

19. See Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1248 (2019).

20. See *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 17–18 (1908).

21. *Id.* at 17.

22. See Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 10 (2014).

23. See Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 506 (2014).

24. See *id.* at 469–70.

25. See *White-Smith*, 209 U.S. at 19–20 (Holmes, J., concurring). This incongruence was recognized in a concurrence written by Justice Holmes, who noted that, “anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act.” *Id.* at 20.

26. Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075–88 (repealed 1976).

27. *Id.*

28. Brauneis, *supra* note 22, at 13.

to bring clarity to copyrights and allow courts “to ascertain precisely what was the subject of copyright.”²⁹ If the composition was published in sheet music form, that published copy was protected as a copyrightable work.³⁰ For compositions not published in a sheet music form, the composer had to submit a copy of the song in some form of manuscript—most often, either sheet music or a lead sheet.³¹ Notably, sound recordings were not subject to protection under the 1909 Act, and a song was not considered “published” under the 1909 Act if it was released only as a sound recording without sheet music.³² In the eyes of the Copyright Office a song was only considered published after the commercial release of sheet music.³³ The deposit copy served as the piece of intelligible, written notation filed with the Copyright Office for unpublished musical works.³⁴

Perhaps in recognition of this seeming incongruence between copyright’s conceptualization of music as literature and the more rational conception of music as *music*, Congress amended the Copyright Act in 1971 and, for the first time, provided mechanical protection to sound recordings.³⁵ This change meant that prospective users had to acquire a license to use a sound recording in certain circumstances.³⁶ Then, in the 1976 Act, Congress redefined “publication” to include the release of a sound recording.³⁷ Thus, composers no longer had to transcribe their work to register it; a recording of the song was sufficient.

A sound recording has long been considered distinct from the composition that underlies it.³⁸ Analytically, sound recordings are a

29. *Merrill v. Tice*, 104 U.S. 557, 561 (1882) (discussing deposit copy requirements for books, the forerunner to the sheet music deposit copy requirement).

30. *See ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 688 (9th Cir. 2000).

31. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05 (2021). A lead sheet is a further simplified transcription of a song, often indicating only the chord changes and melodic contour of the song. Jonathan Feist, *Why Lead Sheets?*, BERKLEE (June 1, 2018), <https://www.berklee.edu/berklee-today/summer-2018/lead-sheet> [<https://perma.cc/S8WC-8B9B>].

32. *See ABKCO Music*, 217 F.3d at 691.

33. 17 U.S.C. § 301(c); *see also id.* § 303(b) (noting explicitly that publication of a phonorecord before January 1, 1978, did not constitute publication).

34. *See Brauneis*, *supra* note 22, at 9.

35. Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391; BRIAN T. YEH, CONG. RSCH. SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 9–11 (2015).

36. *See* 17 U.S.C. § 114.

37. *Id.* § 101.

38. *See id.* § 102(2), (7); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009).

“derivative work” of the underlying musical work that they describe.³⁹ Derivative works are based on some sort of preexisting subject matter, such as a movie adaptation of a book.⁴⁰ The movie is based on the expression contained in the book. In the same way, a song’s sound recording is a derivative, or “second generation,” work based on the underlying musical composition.⁴¹ While it exists as an independent work, it relies on the expression contained in the original work.⁴² The expression a derivative work adds is independently copyrightable from that contained in the original work, provided that the new material meets the threshold requirements of originality and fixation required of all copyrightable material.⁴³

Recent cases that analyzed works under the 1976 Act have held that compositional elements can be contained solely in the sound recording and not in sheet music, especially when the sheet music is created after the song is recorded.⁴⁴ However, these cases apply to the 1976 Act, not the 1909 Act;⁴⁵ thus, much of American music—everything recorded before January 1, 1978—is limited to the four corners of the deposit copy.⁴⁶

39. See JOYCE ET AL., *supra* note 8, at 172.

40. *Id.*

41. *Id.*

42. *Id.*

43. See 17 U.S.C. § 103; *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 516 (7th Cir. 2009).

44. See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009) (holding that the rhythmic use of the word “dog” was nevertheless part of the composition copyright under the 1976 Copyright Act when it was not contained in sheet music because the underlying composition was created spontaneously in the studio without sheet music); *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004) (holding that the use of a three note motif from another composition did not constitute infringement when the band had licensed the sound recording but not the composition itself because the compositional element used was not significant when compared to the underlying composition as a whole).

45. See generally *Bridgeport*, 585 F.3d at 276; *Newton*, 388 F.3d at 1196.

46. See, e.g., *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063–64 (9th Cir. 2020).

B. Current Litigation

Copyright law has undergone some further revision; for example, the Digital Millennium Copyright Act (DMCA) and the Music Modernization Act (MMA) have added additional protections.⁴⁷ In particular, the MMA imported sound recordings created prior to 1972 into the federal copyright scheme.⁴⁸ While the underlying musical compositions in these pre-1972 recordings had been, and remain, eligible for protection, the sound recordings themselves were considered ineligible subject matter.⁴⁹ The MMA changed that by granting federal protection to these recordings.⁵⁰ These acts did not, however, alter the registration requirements for copyright protection: for any compositions created before 1978, any unpublished work had to be registered as sheet music.⁵¹ This oddity in copyright law has spawned high-profile cases in recent years.⁵² Several of the biggest names in American music, including Pharrell Williams, Led Zeppelin, and Ed Sheeran, were subject to lawsuits that claimed they infringed the composition copyrights of their musical forerunners.⁵³

47. Generally, the DMCA created a statutory scheme to punish copyright infringers operating on online platforms. *See generally* 17 U.S.C. § 512. The MMA, Congress's most recent statute governing copyright, made three important changes to copyright law. *See The Music Modernization Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/music-modernization/> [<https://perma.cc/A9JP-6WJE>]. In addition to importing pre-1972 recordings into the federal copyright protection scheme, it created a blanket licensing scheme for digital music providers (Spotify, Apple Music, etc.). *See id.* It also created a royalty scheme for producers, engineers, and other technical artists to receive royalties from songs they helped create. *See id.*

48. 17 U.S.C. § 1401.

49. *Id.* § 303(c) (prohibiting copyright of pre-1972 sound recordings prior to passage of the MMA).

50. *Id.* § 1401.

51. *See* ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 691 (9th Cir. 2000).

52. *See* Joshua Rosenberg, *Ed Sheeran Going to Trial over 'Thinking Out Loud' Plagiarism Allegations*, FORBES (Jan. 4, 2019, 8:10 PM), <https://www.forbes.com/sites/legalentertainment/2019/01/04/ed-sheeran-going-to-trial-over-thinking-out-loud-plagiarism-allegations/?sh=3931407e62cc> [<https://perma.cc/7U5H-QUSM>]; 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/9FZJ-TK35>].

53. *See, e.g.*, Williams v. Gaye, 895 F.3d 1106, 1116 (9th Cir. 2018); Skidmore v. Led Zeppelin, 952 F.3d 1051, 1056 (9th Cir. 2020); Griffin v. Sheeran, No. 17 Civ. 5221, 2020 U.S. Dist. LEXIS 52908, at *2 (S.D.N.Y. Mar. 24, 2020).

1. Blurred Lines

In 2013, Marvin Gaye's estate alleged that the songwriting team of the 2013 hit song "Blurred Lines" infringed on Gaye's 1976 song "Got to Give It Up."⁵⁴ After an infringement demand, Pharrell Williams and Robin Thicke, lead songwriters for "Blurred Lines," filed suit seeking a declaratory judgment of non-infringement.⁵⁵ At the trial level, the jury returned a mixed verdict that, in relevant part, found that Williams and Thicke had infringed Gaye's copyright.⁵⁶ On appeal, the Ninth Circuit determined, without ruling on the issue, that it would consider only the deposit copy, not the sound recording, of "Got to Give It Up" to determine the scope of the composition since the song was registered under the 1909 Act.⁵⁷ The court, nevertheless, affirmed the trial court's judgment that "Blurred Lines" infringed the copyright in "Got to Give it Up."⁵⁸ This decision was criticized for allowing Gaye to copyright a "style" of music because, as the dissent contended, the similar elements in the two songs should not rise to the level of protectability.⁵⁹

2. Stairway to Heaven

More recently, *Skidmore v. Led Zeppelin*, the Ninth Circuit again took up the deposit copy issue.⁶⁰ In this case, the trustee of the estate of Randy Wolfe, guitarist of the band Spirit, brought suit against Led Zeppelin, claiming that the introduction to "Stairway to Heaven" infringed on Spirit's song, "Taurus."⁶¹ After a complicated procedural history, the Ninth Circuit reheard the case en banc to address several copyright issues, including the relationship between the 1909 and 1976 Copyright Acts.⁶² As a threshold matter, the court found that the 1909 Act controlled in this case, given the registration dates of the two songs—1967 for "Taurus" and 1971 for "Stairway."⁶³ Since both "Taurus" and "Stairway" had not been commercially

54. *Williams*, 895 F.3d at 1116.

55. *Id.*

56. *Id.* at 1118.

57. *Id.* at 1121.

58. *Id.* at 1138.

59. *Id.* at 1138–42 (Nguyen, J., dissenting).

60. *See generally* *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

61. *Id.* at 1057.

62. *Id.* at 1060–61.

63. *Id.*

distributed as sheet music, they were both considered unpublished musical compositions with respect to their copyright protections.⁶⁴

In August 1967, Spirit released its debut album, which contained “Taurus.”⁶⁵ Subsequently, in December of that year, pursuant to a licensing agreement, the band’s label registered “Taurus” with the Copyright Office by submitting a one-page sheet music transcription that contained the lyrics and a rudimentary transcription of the instrumental melody and chords.⁶⁶ Led Zeppelin later released “Stairway” on its untitled fourth album in 1971.⁶⁷ The two bands crossed paths between the release of the two songs and played at the same venue at least three times in those intervening years.⁶⁸ While there was no evidence in the record that the bands toured together, they were certainly familiar with each other, and access to the work is a necessary finding in a musical infringement case.⁶⁹

Much later, in 2014, Michael Skidmore, trustee of the now-deceased Randy Wolfe’s trust, brought suit claiming that Led Zeppelin infringed on Wolfe’s copyright in “Taurus.”⁷⁰ Despite the fact that “Stairway” included a number of other concurrent elements, specifically at issue was a descending chromatic, A-minor chord progression present in both songs.⁷¹ After a five-day trial centered on the testimony of dueling musicologists, a jury returned a verdict in favor of Led Zeppelin; the jury found that the band may have had access to the work, but the two compositions are not substantially similar.⁷² After Skidmore appealed, the Ninth Circuit vacated the

64. *Id.* at 1056.

65. *Id.*

66. *Id.* at 1056–57.

67. *Id.* at 1057.

68. *Id.*

69. *Id.* at 1057, 1064. Further, Jimmy Page, the guitarist of Led Zeppelin and author of “Stairway” admitted in testimony that he owned a copy of the album containing “Taurus,” although he denied familiarity with the song. *Id.* at 1059.

70. *Id.* at 1057. The Supreme Court had previously ruled that suits for copyright infringement were not subject to a laches defense where the purported infringement was ongoing. *See Petralla v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014). In 2014, Led Zeppelin’s fourth album was commercially rereleased. *Skidmore v. Led Zeppelin*, No. CV 15–3462, 2016 WL 1442461, at *7 (C.D. Cal. Apr. 8, 2016). Skidmore filed suit in the Eastern District of Pennsylvania on May 31, 2014. *Skidmore v. Led Zeppelin*, 106 F. Supp. 3d 581, 586–87 (E.D. Pa. 2015). Thus, because of this rerelease, indicating purported ongoing infringement, Skidmore was able to dodge the laches issue, even forty-three years after “Stairway” was initially released. *See Skidmore*, 952 F.3d at 1057.

71. *Skidmore*, 952 F.3d at 1058.

72. *Id.* at 1059–60.

judgment and remanded on the basis of an error in jury instructions.⁷³ It then agreed to rehear the case en banc.⁷⁴

Upon rehearing, the Ninth Circuit concluded that the 1909 Act was the operative law for both “Stairway” and “Taurus.”⁷⁵ Under an analysis of that law, and in contrast to its previous approach in the earlier “Blurred Lines” litigation, the Ninth Circuit directly ruled—rather than simply assumed—that compositions registered under the 1909 Act are expressly limited to the deposit copy.⁷⁶ Thus, rights holders cannot rely on a sound recording to define the scope of the composition in an infringement suit if the work-in-suit was released before 1978.⁷⁷

Interpreting the 1909 Act, the court found that if a work was unpublished under the 1909 Act, then the author must have submitted a full copy of the work to the Copyright Office for registration, and this deposit copy would then serve as the complete record of the scope of the work.⁷⁸ The court dismissed a number of concerns about the impracticality of relying solely on the deposit copy, including concerns about artists who do not read sheet music, the possible destruction of deposit copies, and the evidentiary impracticality of comparing the contents of one song’s deposit copy to another song’s sound recording at trial.⁷⁹ Those concerns failed to persuade the court in light of the statute’s “clear and unambiguous” language.⁸⁰

73. *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1121, 1137 (9th Cir. 2018), *rev’d en banc*, 952 F.3d 1051 (9th Cir. 2020). In its initial hearing of the case, the Ninth Circuit vacated the trial court’s judgment and remanded based on its findings that the court’s failure to instruct on a “selection and arrangement” theory of copyright infringement was prejudicial, that it erred in its instructions on originality, and that it abused its discretion by not allowing a recording of “Taurus” to be played for the jury during examination as proof of access. *Skidmore*, 905 F.3d at 1137. Notably, the Ninth Circuit found, even in this first hearing, that the deposit copy should indicate the scope of the copyright protection under the 1909 Act. *Id.* at 1134.

74. *Skidmore v. Led Zeppelin*, 925 F.3d 999, 1000 (9th Cir. 2019).

75. *Skidmore*, 952 F.3d at 1063–64.

76. *Compare id.*, with *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018).

77. *Skidmore*, 952 F.3d at 1079.

78. *See Skidmore*, 952 F.3d at 1062 (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994) (indicating that the deposit copy requirement was designed to provide notice to other creators of what was claimed and to avoid confusion)).

79. *Skidmore*, 952 F.3d at 1063.

80. *Id.*

After that holding on this threshold issue, the court then affirmed the jury's judgment that no infringement occurred.⁸¹ Although Skidmore petitioned the Supreme Court for certiorari after the decision, the Court denied the petition, thus leaving the Ninth Circuit's judgment as the last word on the issue.⁸²

3. Thinking Out Loud

Shortly after the ruling in *Skidmore*, a federal judge in New York ruled that the court would consider only the deposit copy in *Griffin v. Sheeran* to determine the scope of the original composition.⁸³ In this suit, the holders of rights to Marvin Gaye's "Let's Get It On" filed suit against Ed Sheeran, alleging that his song "Thinking Out Loud" infringes on their compositional copyright.⁸⁴ In ruling on a motion *in limine*, the court, citing *Skidmore*, noted that the deposit copy of "Let's Get It On" represented the full scope of the composition.⁸⁵

As these cases illustrate, the deposit copy issue remains a live question. The Ninth Circuit's analysis is the first on the issue, but no other circuit has formally adopted the Ninth Circuit's deposit copy rule. The rule's adoption by a Second Circuit district court indicates that the *Skidmore* decision may have staying power.⁸⁶ But, is it the right decision? Perhaps it is the most easily administrable, but does utility necessarily equal propriety? What problems does the *Skidmore* holding create?

81. Unlike its initial hearing of the case, the court determined there was no error in the jury instructions given that Skidmore did not explicitly present the selection and arrangement theory of infringement at trial, and it affirmed the district court's judgment in full. *Compare id.* at 1079, *with* Skidmore v. Led Zeppelin, 905 F.3d 1116, 1121 (9th Cir. 2018).

82. *Skidmore*, 952 F.3d 1051, *cert. denied*, 141 S. Ct. 453 (2020).

83. *Griffin v. Sheeran*, No. 17 Civ. 5221, 2020 U.S. Dist. LEXIS 52908, at *3 (S.D.N.Y. Mar. 24, 2020).

84. *See id.*

85. *See id.* at *2.

86. *See id.*

II. PHYSICAL GRAFFITI: PROBLEMS WITH RELIANCE ON SHEET MUSIC

Skidmore creates a bright-line standard for copyright law.⁸⁷ Either something is contained in the deposit copy and is thus protectable, or it is not.⁸⁸ The administrability of *Skidmore*'s bright-line rule creates more issues than it solves. While purporting to simplify the analysis, the *Skidmore* court judicially enshrined a longstanding musical inequity—the prioritization of sight over sound in a field ostensibly focused on the heard over the seen.⁸⁹

The *Skidmore* decision creates an explicit bias in copyright law towards visual representations of music, something previously seen but never formally codified.⁹⁰ Although written in the pre-*Skidmore* era, some scholarship implies that this “visual bias” is a vestigial growth of a much larger trend in the law.⁹¹ Indeed, the *Skidmore* approach looks similar to a parol evidence analysis in a contract dispute where the text of the document is prized above all.⁹² It also falls in line with other areas of intellectual property law. For example, patent coverage is determined by the patent application's claims—a written document—as opposed to any other evidence.⁹³

Thus, the document-above-all approach chosen by the *Skidmore* court should come as no surprise when considered in a broader legal context.⁹⁴ The written word seems to reign supreme in law.⁹⁵ However, in a field like music, which is intrinsically built on something other than the written word, it seems evasive to rely on the principle of “text first” rather than the substance of the very product copyright seeks to protect. Rather than evaluate the musical work as an auditory medium, courts typically resort to the more familiar

87. See *Skidmore*, 952 F.3d at 1061.

88. See *id.*

89. See *id.* at 1079.

90. See *Arewa*, *supra* note 23, at 469.

91. *Id.* at 481–82.

92. Broadly, the parol evidence rule is a common law principle of contract law that states when a contract is reduced to writing, that writing supersedes evidence of any previous negotiations or other terms not specified in the contract. See, e.g., TRACEY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS 309–10 (2d ed. 2017); *Gianni v. R. Russell & Co.*, 126 A. 791, 792 (Pa. 1924). The parol evidence rule typically excludes any outside evidence of the scope of the terms of a contract, much like the deposit copy requirement excludes any outside evidence of the scope of the composition. See *Gianni*, 126 A. at 792; *Griffin v. Sheeran*, No. 17 Civ. 5221, 2020 U.S. Dist. LEXIS 52908, at *2 (S.D.N.Y. Mar. 24, 2020).

93. See *Arewa*, *supra* note 23, at 482.

94. See *Skidmore*, 952 F.3d at 1061.

95. See *supra* note 92 and accompanying text.

visual representation embodied by a written transcription.⁹⁶ As a result, courts are evading an accurate analysis of the work by effectively relying on a “translation” of the work across mediums.

A. *Compositional Deficiencies in Deposit Copies*

This visual bias is especially stark when considering the compositional process as a whole. Not all songwriters in popular music compose through sheet music, and some songwriters compose their work spontaneously.⁹⁷ Many of these songwriters, including some of the most famous musicians in history, cannot read or write in traditional sheet music form and instead compose by ear.⁹⁸

The Bee Gees, internationally renowned artists,⁹⁹ are a prime example of this phenomenon. In an infringement suit brought against the group, various witnesses testified that none of the members could read or write music; instead, they composed in the studio, recorded the song, and then had a staff member transcribe a sheet music reduction of the resulting composition.¹⁰⁰ Interestingly, the court’s opinion uses the word “reduce” to describe the transcription process.¹⁰¹ Sheet music often represents a “reduction” or simplification of what a listener can actually hear on a recording, typically to simplify the musical work such that it can be played by an individual or by musicians of lower skill.¹⁰² Unless a composer is writing out the entirety of the score, it is highly unlikely that every note will be represented.¹⁰³ Typically, popular sheet music contains the lyrics, the melody, a reduction of the chords played, and some rudimentary instruction on how to perform

96. See, e.g., *Skidmore*, 952 F.3d at 1064.

97. See *Selle v. Gibb*, 741 F.2d 896, 899 (7th Cir. 1984) (detailing the compositional process of the pop group, the Bee Gees, in which they composed music spontaneously in the studio and tasked a label employee with transcribing sheet music from the recording following the session).

98. See, e.g., Sharyn Alfonsi, *Paul McCartney Opens Up About Abbey Road, the Beatles’ Breakup in Wide-Ranging Interview*, CBS NEWS (June 23, 2019), <https://www.cbsnews.com/news/paul-mccartney-opens-up-about-abbey-road-the-beatles-breakup-yoko-ono-in-wide-ranging-60-minutes-interview-2019-06-23/> [<https://perma.cc/7TYF-4ZNK>].

99. *Selle*, 741 F.2d at 898.

100. See *id.* at 899.

101. *Id.*

102. See ARNOLD SCHOENBERG, *THE MODERN PIANO REDUCTION* (1923), reprinted in *STYLE AND IDEA: SELECTED WRITINGS OF ARNOLD SCHOENBERG* 348, 348 (Leonard Stein ed., Leo Black trans., Univ. of Cal. Press 1984) (1975) (describing a reduction as “something extracted” from a composition).

103. See *id.* at 350.

the piece (dynamics, tempo, etc.).¹⁰⁴ This skeletal song structure does not represent the breadth of the sound recording—or even the entirety of the musical work—nor does it purport to.

The act of reduction is an artistic decision in and of itself. The transcriber must decide what to include and what to omit.¹⁰⁵ In effect, the transcriber is deciding what pieces are necessary to reproduce the song. If the songwriter is the transcriber, and therefore the person making those decisions, then there is no problem. However, when the transcriber is someone else, as was the case with the Bee Gees, it complicates the issue.¹⁰⁶ The question then becomes whether the transcriber was faithful to the original artist's intent.¹⁰⁷ Did the transcriber capture the heart of the composition as the artist would recognize it? It could be difficult to say, especially if the artist cannot read the transcription to find out.

Sheet music in music composition plays a fundamental role in this discussion.¹⁰⁸ As some scholars argue, sheet music's role is to be a set of instructions to help guide an artist to produce a musical work; sheet music is not the work itself.¹⁰⁹ However, copyright law has long held that there needs to be some form of fixation for a work to qualify for protection.¹¹⁰ When initially faced with this question, the Supreme Court held that the fixation must be in a form that human eyes can readily interpret.¹¹¹ Consequently, player piano rolls—sheet music that a mechanical piano, but not a human, could read—did not infringe a musical work.¹¹²

104. See Charles Cronin, *Seeing Is Believing: The Ongoing Significance of Symbolic Representations of Musical Works in Copyright Infringement Disputes*, 16 COLO. TECH. L.J. 225, 226 (2018).

105. See SCHOENBERG, *supra* note 102, at 349 (likening reduction to viewing a statue from only one viewpoint).

106. See *Selle*, 741 F.2d at 899.

107. See *Arewa*, *supra* note 23, at 495.

108. See *id.* at 467–69.

109. See *id.*

110. See, e.g., 17 U.S.C. § 102(a) (indicating the work must be “fixed in any tangible medium of expression, now known or later developed” to be eligible for copyright protection).

111. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

112. *Id.* at 18.

B. Racial Disparities in Copyright Protection

Lurking below the superficial issue of representational accuracy and artistic expression is a more deeply rooted problem. Prioritizing sheet music notation may create a racial disparity in copyright protection.¹¹³ Certain genres of music have an inextricable link to African American culture and tradition, among them jazz and blues.¹¹⁴ Both of these genres rely largely on an unwritten tradition.¹¹⁵ As some scholars have noted, attempting to capture the rhythmic nuance of African music with traditional Western sheet music notation “is a lot like trying to capture the sea with a fishnet.”¹¹⁶

Well known for its improvisational elements, jazz is one genre often associated with an unwritten tradition.¹¹⁷ The 1930s saw the height of jazz as it became indelibly intertwined with contemporary pop culture.¹¹⁸ Jazz music, in particular, represents an amalgamation of written and oral tradition.¹¹⁹ A number of the proverbial giants in the genre—Duke Ellington and Louis Armstrong, for example—made numerous copyright deposits.¹²⁰ These deposits contained similar deficiencies to those at issue in *Skidmore*.¹²¹ They were almost always deposited in sketch, the incomplete lead-sheet form, rather than transcription, which notates everything heard on the recording.¹²² Interestingly, many songs were copyrighted in multiple forms as the arrangement evolved over time—an almost prescient vision of the Copyright Office’s derivative work solution to *Skidmore*, which this Note will later discuss.¹²³

Supplementing—or even coexisting with—this written tradition was a distinct oral tradition in jazz.¹²⁴ David Chevan discusses much of the fascinating tension between written and oral

113. See generally K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’NS & ENT. L.J. 339 (1999).

114. *Id.* at 353.

115. See generally THOMAS J. HENNESSEY, *FROM JAZZ TO SWING: AFRICAN-AMERICAN JAZZ MUSICIANS AND THEIR MUSIC, 1890–1935* (1994).

116. Greene, *supra* note 113, at 379.

117. Arewa, *supra* note 23, at 520.

118. *Id.* at 520.

119. *Id.* at 522.

120. *Id.*

121. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

122. See Arewa, *supra* note 23, at 522.

123. See *id.*; see also *infra* Section III.B.

124. See David Chevan, *Written Music in Early Jazz 1* (1997) (Ph.D. dissertation, City University of New York) (ProQuest).

tradition in his dissertation on the era.¹²⁵ As he writes, the ability of jazz musicians, particularly Black jazz musicians, to read sheet music varied considerably.¹²⁶ The spectrum between “readers,” who could fluently read and perform from sheet music, and “fakers,” who could not, resulted in a variety of rehearsal and performance techniques.¹²⁷ Generally, most bands had at least one reader who could serve in a teaching role.¹²⁸ In many cases, a reader might have even pretended to be a faker—that is, pretended that he was unable to read—to find work with certain bands or in the context of certain performances.¹²⁹

Chevan recounts one particular anecdote in which an orchestra playing a dance for white patrons elected not to use sheet music in the performance, despite the fact that every member could read, to maintain the illusion of natural, gifted talent.¹³⁰ The bandleader would take requests from the patrons, ask the requester to sing part of the melody, and then ask for a few minutes to workshop the song with the band, only to play the song exactly as it had been rehearsed with sheet music prior to the performance.¹³¹ Eubie Blake, a jazz musician, reported that it was common for his band to memorize all the music they planned to play because a white audience would not accept that Black jazz musicians could—or perhaps, more aptly, would have to—read music.¹³² This societal pressure helped cement the perception that lives on even today: “jazz was the antithesis of classical music.”¹³³

Nevertheless, musically literate jazz musicians—as well as their counterparts in traditional European art music—would often alter the written score to accommodate their specific performance.¹³⁴ Jazz composition was—and remains—a highly complicated process, and jazz musicians composed in a myriad of ways.¹³⁵ When performing and recording, many musicians interpolated improvisation into their compositions in such ways that the differences between the composed and improvised portions were indistinguishable.¹³⁶ Often synonymous

125. *See generally id.*

126. *Id.* at 74.

127. *See id.* at 73–76.

128. *Id.* at 76.

129. *Id.* at 75.

130. *Id.* at 82.

131. *Id.*

132. Michael Zaken, *Fragmented Literal Similarity in the Ninth Circuit: Dealing with Fragmented Takings of Jazz and Experimental Music*, 37 COLUM. J.L. & ARTS 283, 286 (2014).

133. *Id.*

134. Arewa, *supra* note 23, at 522.

135. Zaken, *supra* note 132, at 287.

136. *Id.*

with jazz, improvisation brought vitality and excitement to performances that defined the genre for many consumers, particularly white consumers enamored with the illusion of the inexplicably gifted Black musician.¹³⁷ However, this racist conceptualization created significant problems, and many of the highly sophisticated musicians of the era sought to dispel that deeply and foundationally racist notion with, unfortunately, limited success.¹³⁸

In summary, jazz—while rightfully recognized as a genre with a deeply rooted oral and improvisational tradition—also finds itself with a considerable written tradition.¹³⁹ The result of this amalgamation is a compositional hybrid not totally captured by either tradition.¹⁴⁰ Some commentators placed jazz compositions in line with classical music compositions, considering them just as “harmonically sophisticated.”¹⁴¹ Others, including the Pulitzer Prize committee, took an opposing view, deeming jazz composition insufficiently “serious” to be worthy of the prize.¹⁴² Considering jazz’s substantial tradition of unwritten composition, it feels disingenuous to limit the scope of copyright protection for these virtuosic musicians to only the four corners of the page, especially considering how foundational jazz is to modern music.¹⁴³ Moreover, *Skidmore’s* four-corners rule disproportionately discounts the contributions of countless jazz musicians and others who, despite their creative contributions, failed to compose in the traditional Western process of transcription.¹⁴⁴

C. *The Case for an Expanded Compositional Definition*

As mentioned above, although many jazz compositions were submitted for registration or published outright under the 1909 Act’s framework, they were often registered in a skeletal form.¹⁴⁵ Like taking a picture of a gourmet meal and considering it representative of the full dining experience, these skeletal lead sheets miss much of the nuance that makes up the full scope of a composition. A picture of a

137. *Id.*

138. *Id.* at 286–87.

139. *See id.* at 286.

140. *See id.*

141. *Id.*

142. *See* Greene, *supra* note 113, at 369–70.

143. *See id.* at 378–80.

144. *See id.* at 378–79; *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

145. *See* Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 481–82 (2005).

meal certainly captures some elements—the plating, the colors, perhaps even the memory of the meal itself. But it misses the essence of the dining experience. All the tastes, smells, and textures are absent from the photograph, and those sensations are typically what make a gourmet meal so enjoyable. While there is value in enjoying the visual aspects of a meal, patrons do not come to a restaurant to look at the food; they come to eat it.

In the same way, the vast majority of deposit copies miss the essence of what makes a composition a composition.¹⁴⁶ Phrasing, tempo, articulations, timbre, and so many other foundational elements of music are remarkably difficult to reduce to paper.¹⁴⁷ A deposit copy can represent the melody and rhythm of a piece—the plating of the meal—but the flavors that make up the composition are absent from the paper reduction. Music is designed to be consumed aurally, not visually. Reducing the complexity of a composition down to a piece of paper fundamentally mischaracterizes the nature of musical composition. While it may be possible to appreciate music in a visual form, that visual consumption misses the essence of the composition in the first place. Listeners do not need their glasses to enjoy music. As such, a court should not need its glasses to define the scope of that same music.

Some scholars argue that copyright protection should subsist in only a song's melodic content, as there is no copyright protection for an artist's performance under US law.¹⁴⁸ While the scope of what expression is and is not copyrightable surpasses the limits of this Note, a more expansive view of registration does not challenge that view. Regardless of whether a song's melodic content can be copyrightable, courts should not limit the scope of what represents copyrightable expression to the four corners of a piece of paper that may or may not have been accurate to begin with.

Allowing a more expansive definition of what represents the composition puts courts, juries, and all parties involved in infringement proceedings in a better position to decide what constitutes the work, given that they now have a more accurate and more accessible method of considering the compositions. An audience—in this case, a jury—may not be able to fully evaluate a

146. See Arewa, *supra* note 23, at 487–88.

147. *Id.* at 485.

148. See Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1862, 1869–70 (2018); Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC'Y 209, 209–10 (2013); *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004).

work apart from the totality of its parts.¹⁴⁹ A jury full of laypeople is much more likely to have success in evaluating a musical work when given the full picture of the work rather than the component pieces. Few individuals, outside of musicologists, actively break music down into its components as they listen.¹⁵⁰ However, this argument is blunted by the thrust of the Ninth Circuit's decision that the musical work embodied by the deposit copy and the musical work represented by the sound recording are, in effect, two different works.¹⁵¹ Therefore, an audience's perception of the sound recording would be a perception of an entirely separate work and, as such, would be irrelevant to the ultimate question of infringement. Even with that potential pitfall, an average jury member's inability to accurately evaluate a piece of music without all of its components outweighs the danger of introducing a recording.

D. Racial Disparities in Copyright Ownership

This discussion of the scope of copyright protection assumes that the Black artists responsible for the creation of a significant portion of music history remain in control of the intellectual property rights in their creations. Far too often, the original creations of Black artists were appropriated and exploited such that they never stood a chance of retaining any sort of intellectual property right.¹⁵² Professor K.J. Greene describes four separate models in which Black artists had their works appropriated by white artists for significant economic gain.¹⁵³ The first, the "Frankie Lymon pattern," occurred when an individual, often a manager or producer, would register the copyright of a work in such a way that it erased the contribution of Black artists by excluding the artist on the copyright registration.¹⁵⁴

Another model, the "Little Richard/Chuck Berry pattern," involved the creation of a work by Black artists and then an unconscionable sale of it to a record company or manager for "absurdly small sums."¹⁵⁵ Greene also describes two additional models in which white performers imitated or mocked the work of Black artists in such

149. David May, Note, "So Long as Time Is Music": When Musical Compositions Are Substantially Similar, 60 S. CAL. L. REV. 785, 795 (1987).

150. *Id.*

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

152. See, e.g., Greene, *supra* note 113, at 357–58.

153. *Id.* at 372–73.

154. *Id.* at 372.

155. *Id.* at 372–73.

a way that those white performers were then able to capitalize on said work more successfully than the initial creator.¹⁵⁶ Even with the large quantity of music created by Black artists, there is a disturbing racial disparity in the level of commercial success these artists were able to achieve as compared to their white counterparts.¹⁵⁷

Nowhere was this distinction clearer than in the “race records” market.¹⁵⁸ As early as the 1920s, there was a significant racial division in creating and marketing musical recordings.¹⁵⁹ Black artists were often relegated to selling their work through so-called “race records.”¹⁶⁰ These records were marketed as containing music appropriate for African American consumption only.¹⁶¹ In 1949, the nomenclature changed from race records to “rhythm and blues,” a broader categorization.¹⁶²

This segregation often resulted in appropriation through mechanical licensure, where Black artists saw their work used without compensation.¹⁶³ Later in music history, particularly the rock ‘n’ roll era of the 1950s and ‘60s, a Black artist would release a popular record that would then be appropriated in its entirety by a white artist.¹⁶⁴ The white artist’s cover of the song would then go on to outsell the original, typically as a result of having the full might of the record company’s marketing machine behind it, while the Black artist had no recourse against this “legitimized piracy.”¹⁶⁵

Under the 1909 Act, an artist had to obtain a compulsory license to reproduce a musical work, known as a mechanical license.¹⁶⁶ While this process seems facially race neutral, it was not in practice, as evidenced by the Little Richard/Chuck Berry pattern.¹⁶⁷ African

156. *Id.* at 373.

157. *Id.* at 377.

158. See Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 594–96 (2010).

159. *Id.* at 594–95.

160. *Id.* at 595.

161. *Id.* at 594–95.

162. *Id.* at 595–96.

163. See Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIA. ENT. & SPORTS L. REV. 218, 232–34 (1997).

164. *Id.*

165. Hines, *supra* note 122, at 484–85.

166. See Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075–76 (repealed 1976); *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Cts., the Internet & Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 16 (2004) (statement of Marybeth Peters, Reg. of Copyrights, U.S. Copyright Off.). The mechanical licensure scheme still exists in modern copyright law. See 17 U.S.C. § 115.

167. Greene, *supra* note 113, at 367, 372–73.

American artists were often excluded during the copyright registration process or forced to sign away their copyrights for minuscule sums of money.¹⁶⁸ Thus, while the compulsory licensure and permission scheme seems to be race neutral, in reality, these statutory creations resulted in the appropriation of Black artists' works. Since these artists were often coerced into signing away their rights to the work,¹⁶⁹ they lacked any ability to prevent it from being copied by white artists, or, at the very least, to negotiate for a share of the profit from the cover version.¹⁷⁰

In some ways, the mechanical licensure regime has perpetuated this problem even further. Inherent in mechanical licensure is a requirement that artists can alter the arrangement to suit their artistic style, as long as the altered arrangement did not "change the basic melody or fundamental character of the work."¹⁷¹ Thus, baked into the modern licensure scheme is a requirement that the covering artist copy the central element of the song—the melody—as closely as possible.¹⁷² In a field of law so concerned with copying, it is odd that the law specifically requires that the covering artist take the most fundamental aspect of the song, in its entirety, from the original artist.¹⁷³ This was—and still is—most problematic when the covering artist is significantly more popular than the original artist, such that the consuming public might hear the cover without ever knowing the original existed. This is seldom a case of a well-known artist like Johnny Cash covering another well-known artist like Nine Inch Nails.¹⁷⁴ In many instances during the

168. *Id.* at 372.

169. Hines, *supra* note 145, at 480.

170. *Id.* at 476–77.

171. 17 U.S.C. § 115(a)(2).

172. *See id.*

173. *See id.*

174. Compare NINE INCH NAILS, *Hurt*, on THE DOWNWARD SPIRAL (Interscope Recs. 1994), with JOHNNY CASH, *Hurt*, on AMERICAN IV: THE MAN COMES AROUND (Am. Recordings 2002). Nine Inch Nails, a commercially popular band, originally recorded *Hurt* on the 1994 album *The Downward Spiral*, reaching number fifty-four on the Billboard charts. *See Chart History: Nine Inch Nails*, BILLBOARD, <https://www.billboard.com/music/Nine-Inch-Nails/chart-history/HSB> [<https://perma.cc/UGS7-VLD3>] (last visited Feb. 13, 2020). Johnny Cash, a legend of country music, later recorded a cover of the song to significantly greater critical success, particularly in the context of its accompanying music video. Bobby Moore, *The Lasting Impact of Johnny Cash's 'Hurt'*, WIDE OPEN COUNTRY, <https://www.wideopencountry.com/johnny-cash-hurt/> [<https://perma.cc/KWH8-9L4K>] (last visited Nov. 6, 2021). Cash's cover was so well received that Trent Reznor of Nine Inch Nails later remarked, "that song isn't mine anymore." Geoff Rickly, *Geoff Rickly Interviews Trent Reznor* for the American Press, NIN HOTLINE (June 26,

mid-twentieth century, the scenario usually involved a white artist lifting a song from a Black artist whose music had been sold only as a race record.¹⁷⁵

A prime example of this practice is one of rock 'n' roll's favorite sons, Elvis Presley. Elvis, a well-known imitator of the blues tradition of Black artists,¹⁷⁶ would often cover recordings of songs originally written and recorded by Black artists.¹⁷⁷ One of his first commercially successful recordings, "That's All Right Mama," was originally recorded by Arthur Crudup, a Black artist.¹⁷⁸ Other artists, including Elton John, Creedence Clearwater Revival, and Rod Stewart also recorded covers of Crudup's music.¹⁷⁹ Despite these commercially successful covers, Crudup himself saw little profit from his compositions, even though he was credited as a composer.¹⁸⁰ While Elvis's recording of the song eventually sold more than 500,000 copies, Crudup never realized any royalties from that song.¹⁸¹ Although a proposed settlement in 1968 would have paid him \$60,000 in royalties, this settlement failed to materialize.¹⁸² Crudup, who at one time remarked, "I was born poor, I live poor, and I'm going to die poor," died four years later in relative poverty.¹⁸³

Certainly, these anecdotes of musical appropriation are not rectified by an expanded deposit copy definition. But they illustrate that there are deep-seated inequities in the 1909 Act's regime, particularly in instances where the original artist was denied the credit he or she deserved when the copyright was registered, as described by Greene's "Frankie Lymon pattern," where the Black

2004), https://www.theninhotline.com/archives/articles/manager/display_article.php?id=11 [<https://perma.cc/2R62-XM95>].

175. Hines, *supra* note 145, at 486.

176. *Id.*

177. George Varga, *Was Elvis a Thief? Yes! No! Maybe? Music Stars Weigh in on Presley's Legacy*, SAN DIEGO UNION-TRIB. (Aug. 6, 2017, 6:05 AM), <https://www.sandiegouniontribune.com/entertainment/music/sd-et-music-elvis-thief-20170805-story.html> [<https://perma.cc/3RS7-TFQS>].

178. Hines, *supra* note 145, at 486.

179. *Id.*

180. See DAVID P. SZATMARY, *ROCKIN' IN TIME: A SOCIAL HISTORY OF ROCK-AND-ROLL* 27 (4th ed. 2000).

181. See *id.* at 26–27; Award for Elvis Presley's "That's All Right", RECORDING INDUS. ASS'N OF AM., https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=Elvis+Presley&ti=That%27s+All+Right#search_section [<https://perma.cc/872B-V7VN>] (last visited June 2, 2021); DICK WEISSMAN, *AMERICAN POPULAR MUSIC: BLUES* 47 (2005).

182. See SZATMARY, *supra* note 180, at 180.

183. *Id.*

artist was excluded from the copyright registration altogether.¹⁸⁴ However, an expanded definition of a deposit copy opens a broader conversation that tackles some of these deep-seated inequalities.

III. HEY, HEY WHAT CAN I DO? SOLUTIONS TO THE DEPOSIT COPY PROBLEM

Where do these issues leave copyright law? What solutions exist that can ensure artists are able to protect the core of their work without simultaneously granting artistic monopolies over entire musical genres?¹⁸⁵ There are two categories of answers to this question. Category one is no change at all. It is an acceptance of *Skidmore* as it stands.¹⁸⁶ Category two is reform. Some scholarship suggests the Federal Rules of Evidence could play a role in solving this issue by allowing recordings to supplement deposit copies.¹⁸⁷ The simplest solution, however, is the solution suggested by the Copyright Office in an amicus brief filed in *Skidmore* itself.¹⁸⁸ The Copyright Office suggests a regime of supplementary registration that is workable under current law, allows for the broadest possible protection of a pre-1976 sound recording, and, in many cases, preserves the full palette of remedies.¹⁸⁹ As this Note argues, the Copyright Office's proposal is the better option regarding current doctrine. Still, it could be improved by incorporating an additional step that allows for a one-time update of the deposit copy.

A. *The Status Quo*

The first type of approach is quite simple. The *Skidmore* decision stands as is and functions as the operative law on the issue.¹⁹⁰ However, for reasons discussed above, *Skidmore's* preservation of systemic flaws in copyright law fails to outweigh any sort of administrative advantage it might bring.¹⁹¹ *Skidmore* fails to

184. See Greene, *supra* note 113, at 372.

185. See *Williams v. Gaye*, 895 F.3d 1106, 1138–42 (9th Cir. 2018) (Nguyen, J., dissenting).

186. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

187. See Daniel Abowd, Note, *FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights*, 30 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1311, 1374–81 (2020).

188. See generally Brief for the United States as Amicus Curiae in Support of Appellees, *Skidmore*, 952 F.3d 1051 (No. 16-56057) [hereinafter Copyright Office Amicus Brief].

189. See *id.*

190. See *Skidmore*, 952 F.3d at 1062.

191. See *supra* Part II.

acknowledge that not all music is created equally and that music itself is unique in copyright law.¹⁹² This approach places the onus on the rights holder to obtain the best protection possible since the artist must personally control the level of protection by, for example, making sure that the deposit copy accurately reflects the heart of the copyrighted composition.¹⁹³ However, as mentioned in Part I, Congress solved this problem by allowing post-1976 Act sound recordings as deposit copies.¹⁹⁴

For all its problems, *Skidmore* is textually the most faithful reading of the 1909 Act because the 1909 Act states that a registering author must submit a “complete copy” of an unpublished work in order to receive protection for it.¹⁹⁵ Thus, anything that is not part of the deposit copy, per the statute’s text, is not part of the complete work.¹⁹⁶ That definition is a shortsighted and incomplete perspective on music, but it is nevertheless the statute’s text.

Some scholars argue that the allowance of sound recordings creates an evidentiary problem for the juries and judges tasked with determining similarity.¹⁹⁷ For example, professor Jamie Lund argues that elements like “phrasing, style, genre, tempo, key, timbre, and orchestration” all represent unprotectable performance elements embodied in the sound recording rather than the musical work itself.¹⁹⁸ With that in mind, Professor Lund analyzed the Lay Listener test, in which a court plays sound recordings for juries and asks them to compare the two underlying works.¹⁹⁹ Lund’s study found that mock juries were particularly susceptible to using the aforementioned nominally unprotectable performance elements as touchstones for comparing two pieces of work.²⁰⁰ Thus, the mock juries were much more likely to find two works similar when these elements sounded alike, regardless of whether the melody or other protectable elements were actually infringing.²⁰¹ Many might then argue that the use of sound recordings is particularly prejudicial in an infringement

192. See *supra* Part II.

193. See *Skidmore*, 952 F.3d at 1063–64.

194. See *supra* Part I.

195. See *Skidmore*, 952 F.3d at 1062; Copyright Act of 1909, ch. 320, § 11, 35 Stat. 1075, 1078 (repealed 1976).

196. See *Skidmore*, 952 F.3d at 1062.

197. See generally Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137 (2011).

198. *Id.* at 144–45.

199. *Id.* at 148.

200. *Id.* at 152.

201. *Id.*

context.²⁰² However, this concern may be better addressed by an evidentiary challenge rather than a wholesale bar to entry.²⁰³ Even still, this problem becomes moot when a sound recording becomes indicative of the scope of the underlying work.

While the *Skidmore* decision took a meandering path through the courts—starting in Pennsylvania, ending up in California, and making two stops at the Ninth Circuit along the way—its long history has finally come to a close.²⁰⁴ Skidmore petitioned the Supreme Court for certiorari, and his petition was denied in the fall of 2020.²⁰⁵ This tacit acceptance of the *Skidmore* decision indicates that, at least judicially, the chances of an outright revision to the law are slim.

Arguably, the *Skidmore* decision is the most faithful reading of the 1909 Act, for better or worse.²⁰⁶ Moreover, the US District Court for the Southern District of New York's favorable treatment of *Skidmore* in *Griffin* indicates that, at least for now, the *Skidmore* ruling is here to stay, even if *Skidmore*'s logic fails to account for the fact that music is an inherently different creative medium than nearly everything else protected by copyright.²⁰⁷

B. The Copyright Office's Proposed Approach

A second approach has been outlined in litigation—in *Skidmore* itself, no less—via an amicus brief.²⁰⁸ The Copyright Office filed that amicus brief in *Skidmore* in support of Led Zeppelin, arguing in favor of the deposit copy requirement.²⁰⁹ The brief also detailed how artists who sought to include elements outside the four corners of the sheet music could acquire copyright protection.²¹⁰

202. See *id.* at 175.

203. See Abowd, *supra* note 187, at 1374–81 (describing a framework in which a modified Federal Rules of Evidence 403 standard governs the admission of sound recordings).

204. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1057 n.2, 1060 (9th Cir. 2020).

205. *Skidmore v. Led Zeppelin*, 141 S. Ct. 453, 454 (2020).

206. See Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075–88 (repealed 1976).

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

208. See generally Copyright Office Amicus Brief, *supra* note 188.

209. See *id.* at 12–13.

210. See *id.* at 3–4.

1. Multiple Registrations

The Copyright Office suggested a system of protection through the registration of derivative works, an existing facet of copyright law.²¹¹ Copyright law has long contemplated the concept of derivative works.²¹² A rights holder could simultaneously hold a copyright for both a minimalistic, skeletal copy of the musical work and a more intricate transcription of the work as a whole.²¹³ All that the prospective rights holder would need to do is obtain federal copyright protection via registration for the new “arrangement” of the song created since obtaining copyright in one version of the work does not confer copyright for all versions.²¹⁴

In effect, the Copyright Office’s brief provides a work-around solution to the deposit copy issue.²¹⁵ Unlike other regimes, such as patent law, copyright law is not a zero-sum protection of a single version of the work.²¹⁶ Copyright can exist across multiple versions of the same work simultaneously,²¹⁷ meaning that there is no finite limit to what creative expression can be protected by copyright. The only barriers are that one must secure registration and meet the relatively low threshold levels of originality and fixation.²¹⁸ Even registration is unnecessary for protection.²¹⁹ As of the 1976 Act, copyright protection exists at the creation of the work.²²⁰ Registration is necessary only to litigate infringement and to recover certain types of damages.²²¹

211. *See id.*; 17 U.S.C. § 106(2).

212. *Compare* 17 U.S.C. § 106(2) (delineating the current scheme in which the copyright owner has the right to “prepare derivative works based upon the original work”), *with* 17 U.S.C. § 1(e) (1964) (stating the previous scheme in which the owner held the right “to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded”).

213. Copyright Office Amicus Brief, *supra* note 188, at 18–19.

214. *See* Richlin v. MGM Pictures, Inc., 531 F.3d 962, 973 (9th Cir. 2008); 17 U.S.C. § 103.

215. *See* Copyright Office Amicus Brief, *supra* note 188, at 14.

216. *See* JOYCE ET AL., *supra* note 8, at 7.

217. 17 U.S.C. § 101.

218. *See, e.g.*, Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991).

219. *See* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . 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.”).

220. *Id.* § 302(a); *see, e.g.*, Silverman v. CBS, Inc., 632 F. Supp. 1344, 1349 (S.D.N.Y. 1986).

221. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157–58 (2010).

In practice, the derivative-work approach suggested by the Copyright Office's amicus brief may be the most practical option to secure protection.²²² Rightsholders who want to ensure the more comprehensive protection of their work could register a full transcription of a studio or other more popular recording of their musical work as an arrangement. They could then litigate any future infringement by asserting their copyright in that derivative arrangement rather than in the original deposit copy.²²³

However, this approach presents a problem in the recovery of damages.²²⁴ The derivative-work approach would foreclose the possibility of a plaintiff's recovery of statutory damages.²²⁵ Statutory damages allow a successful plaintiff in an infringement suit to receive a statutorily mandated damages award.²²⁶ However, the infringed-upon work must be registered with the Copyright Office prior to the infringement to qualify for statutory damages.²²⁷ Thus, if an artist hears a song she thinks infringes on one of her own and *then* registers her copyright in an arrangement of her proprietary work, she would be ineligible for statutory damages even if a court finds infringement.²²⁸

So, to preserve the full menu of potential damages, an artist must preemptively register the supposed "full" arrangement of the sound recording prior to any potential infringement.²²⁹ Further, costs and attorney's fees will be awarded only in the event of prior registration.²³⁰ Consequently, an approach that requires registration could severely limit a plaintiff's potential recovery.

This approach could reach even further. The Copyright Office advocates for an artist's ability to simply register the sound recording

222. See Copyright Office Amicus Brief, *supra* note 188, at 14.

223. See, e.g., PETER FRAMPTON, *Baby, I Love Your Way*, on FRAMPTON COMES ALIVE! (A&M Recs. 1976). Frampton originally released the song on his 1975 album, FRAMPTON. PETER FRAMPTON, *Baby, I Love Your Way*, on FRAMPTON (A&M Recs. 1975). The live version, recorded a year later, went on to much greater commercial success than the studio original, reaching number twelve on the Billboard Hot 100 chart. See *Chart History: Peter Frampton*, BILLBOARD, <https://www.billboard.com/music/peter-frampton/chart-history/HSI/song/345686> [<https://perma.cc/5Z9T-M2ZK>] (last visited Nov. 7, 2021). Therefore, it could be prudent for Frampton to register an arrangement of the live version of "Baby, I Love Your Way," in addition to an arrangement of the original sound recording. See *id.*

224. See 17 U.S.C. § 504(c); Copyright Office Amicus Brief, *supra* note 188, at 15.

225. See 17 U.S.C. § 504(c); Copyright Office Amicus Brief, *supra* note 188, at 12.

226. See 17 U.S.C. § 504(c).

227. See *id.* § 412.

228. See *id.*

229. See *id.*

230. *Id.*

itself.²³¹ While the recording may not have been eligible for registration—in other words, protection—at the time of its creation, it most certainly would be eligible for protection now.²³² Under this expanded approach, nothing is stopping an allegedly infringed-upon plaintiff from registering a copyright in the recording itself and then immediately litigating the issue.

2. The Copyright Office Approach in Practice

In current litigation, one party has argued under the Copyright Office's approach.²³³ While *Griffin v. Sheeran*, the “Thinking Out Loud” litigation, began well before *Skidmore's* most recent pontifications on the scope of copyright, parallel litigation over the same composition has taken advantage of the Copyright Office's newly espoused theory.²³⁴ Filed in June 2020, *Structured Asset Sales, LLC v. Sheeran* (SAS) appears to be the first and, thus far, only litigation to use the Copyright Office's theory.²³⁵

In SAS, another owner of the copyright in “Let's Get It On,” brought suit against Ed Sheeran, his record label, and a host of other related defendants on essentially the same grounds at issue in *Griffin*.²³⁶ The only difference is that the plaintiff in SAS is armed with a much firmer foundation: the plaintiffs here come to court armed with a registration in the sound recording filed in 2020, not just the original deposit copy.²³⁷ As of the publication of this Note, the case is still pending before the Southern District of New York, where a court has deemed that the 2020 registration was valid and refused to dismiss the complaint's copyright infringement claim.²³⁸

While it remains to be seen exactly how the Southern District of New York will rule in this case of first impression, the Copyright

231. See Copyright Office Amicus Brief, *supra* note 188, at 19, 25.

232. See 17 U.S.C. § 102(a).

233. See Complaint at 15–16, *Structured Asset Sales, LLC v. Sheeran*, No. 1:20-cv-04329 (S.D.N.Y. June 8, 2020).

234. See *id.*

235. See *id.* at 5–6, 15–16.

236. See *generally id.* This suit is actually the second suit filed by Structured Asset Sales against Ed Sheeran. See *Structured Asset Sales, LLC v. Sheeran*, No. 18-CV-0583 (S.D.N.Y. June 28, 2018). In the first suit, plaintiffs brought largely the same claims as the plaintiffs in *Griffin* and premised their argument on the same copyright registration. See *id.*

237. See *id.* at 15.

238. See *Structured Asset Sales, LLC v. Sheeran*, No. 20-CV-4329, 2021 U.S. Dist. LEXIS 60826, at *20, *25 (S.D.N.Y. Mar. 30, 2021) (denying defendant's motion to dismiss but staying the case pending the resolution of SAS's parallel litigation in the same court based on the sheet music deposit copy).

Office's solution appears to be the most viable of those discussed in this Note, particularly if the court rules in favor of the plaintiffs in *SAS*. As the Copyright Office itself emphasizes, copyright is not a zero-sum game.²³⁹ In theory, then, the *SAS* plaintiffs have found a viable course of action, and every artist with work that predates the 1978 effective date of the 1976 Act should register his or her sound recordings as soon as possible.

This solution is particularly appealing because it requires no change to the current system, seeing as the hypothetical registrations would be perfectly in line with Copyright Office policy, and *Skidmore* would still stand as good law as it pertains to sheet music, all while artists receive deserved protection for their works.²⁴⁰ However, registering the work does not guarantee that a court will find infringement.²⁴¹ A substantial similarity analysis may determine that the purported similarities between two works fail to reach the threshold of copyrightability.²⁴² Nevertheless, this solution ensures that every possible similarity could be considered rather than relying on an incomplete deposit copy. Any artists concerned about protecting their pre-1976 Act compositions should register, at least, a more complete transcription as an arrangement of the song, if not a copy of the sound recording outright.

3. A Step Further

The Copyright Office's approach presents a workable standard that fits quite neatly into the existing copyright law structures.²⁴³ But it fails to recognize the root problem: the cognitive incongruence present in any deposit copy requirement.²⁴⁴ Sheet music is not truly music.²⁴⁵ It does not and never will represent the full scope of what makes up a musical work.²⁴⁶ In fact, Congress itself recognized this reality when it amended the Copyright Act to allow recordings to constitute publication and, thus, be registerable as a representation of the underlying work.²⁴⁷ Congress has even gone on to federalize

239. See Copyright Office Amicus Brief, *supra* note 188, at 12.

240. See *id.* at 25; *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

241. See 17 U.S.C. § 410(c) (stating that registration of the copyright with the Copyright Office is only prima facie evidence of a valid copyright).

242. See *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 516 (7th Cir. 2009).

243. See Copyright Office Amicus Brief, *supra* note 188, at 12–13.

244. See *supra* Section II.A.

245. See *Arewa*, *supra* note 23, at 469.

246. See *id.*

247. See 17 U.S.C. § 101.

protection for pre-1972 sound recordings as of the most recent major copyright legislation, which grants these recordings protection from infringement if they are still eligible for protection.²⁴⁸ So, Congress has created a system in which nearly all sound recordings have or have had independent protection from infringement and can now, after the 1976 Act, serve as representations of the underlying musical composition.²⁴⁹ Just as the Music Modernization Act (MMA) extended federal protection to pre-1972 sound recordings,²⁵⁰ perhaps more legislative action is needed to expand protection for these pre-1976 Act works.

The most fitting solution to the deposit copy problem is a separate statutory amendment that allows for a one-time update of the original sheet music deposit copy of a pre-1976 Act musical composition. This update would allow for a sound recording to supplant the original sheet music deposit copy, thus alleviating the visual bias presented by the 1909 Act's sheet music preference.²⁵¹ This update does not need to be mandatory. It could simply offer a single opportunity for the current rights holder in the musical work to substitute a sound recording as the deposit copy. This approach still allows courts to undertake the same analysis they employed in cases that limit the scope of the protection to the deposit copy, and it mitigates the visual bias of sheet music.²⁵² Thus, the interests of artists who could not read sheet music, like Marvin Gaye, would no longer be subject to the same registration disadvantage that plagued the 1909 Act.²⁵³ By allowing a sound recording to supplant the sheet music deposit copy, the copyright system comes closer to recognizing the role of music as music, rather than "music" as embodied by a visual representation rooted in a Western tradition that consistently minimizes the contributions of Black artists.²⁵⁴

This proposed update would not extend the term of protection, nor would it create any ownership inconsistencies. Just as with a current deposit copy, the purported similarities between two works would still need to pass muster under a similarity analysis, and the copyright owner would still need to prove that the supposedly infringed elements of the song were eligible for protection to begin

248. See 17 U.S.C. § 1401.

249. See 17 U.S.C. § 407.

250. See *id.* § 1401.

251. See Arewa, *supra* note 23, at 481–82.

252. See, e.g., *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1062 (9th Cir. 2020).

253. See *id.*

254. See *supra* Section II.B.

with.²⁵⁵ This proposed addition solely changes a court's medium of consumption from visual to aural. The court would now get to see *and* experience the musical meal in front of it.²⁵⁶

Other scholarship has advocated for a more rigorous deposit copy requirement, asserting that legislation should require that the deposit copy embody “every aspect” of the composition it seeks to represent.²⁵⁷ This forward-looking conceptualization does nothing for past works, however.²⁵⁸ In fact, this proposed standard might do nothing at all. The *Skidmore* court has already determined that the deposit copy is the final word on the scope of the work.²⁵⁹ A legislative amendment to that effect does not deal with the root discrepancy issue present when comparing sound recordings and musical works. A legislative mandate that deposit copies be complete transcriptions of all copyrightable material makes no functional change, even if it might encourage artists to be more inclusive in their deposit copies. Rather, it simply continues excluding things not contained in the deposit copy.

IV. THE SONG REMAINS THE SAME: FINAL THOUGHTS

While it appears that courts have taken a position on the deposit copy issue, this Note contends that the *Skidmore* decision is shortsighted.²⁶⁰ Copyright has largely been a broadly available protection for creative works.²⁶¹ It seems antithetical, then, for a court to reach what is a relatively restrictive outcome.

It is necessary for there to be some standard to measure infringement. Based on its interpretation of the law, the Ninth Circuit held that the line should be drawn at sheet music.²⁶² However, in the face of the 1976 Act, that decision seems arbitrary. Within a few years of the release of the songs at issue in *Skidmore*, Congress itself seemingly realized that it had created an arbitrary standard in the 1909 Act when it amended the 1976 Act to include a more expansive

255. See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (describing the steps in a musical infringement inquiry).

256. See *supra* Section II.C.

257. 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, 397 (2020).

258. See generally *id.*

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

260. See *id.*

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

262. See *Skidmore*, 952 F.3d at 1061.

definition of publication.²⁶³ While a more expansive definition of what qualifies as a pre-1976 deposit copy may be more difficult to administer, it is more equitable.²⁶⁴

The content of a deposit copy is only a threshold matter. The elements in the expanded definition proposed by this Note must still qualify for protection, and the court must still analyze the elements for infringement. The expanded standard simply widens the proverbial door. By considering a wider breadth of evidence, courts, and especially lay juries, will have a simpler time analyzing infringement.

It is time to revisit the concept of separate copyright protection for sound recordings and musical works and, at the very least, consider a baked-in musical work right within sound recordings. With recent advances in copyright like the MMA,²⁶⁵ the time could be right for a fuller evaluation of the copyright system as a whole. That issue is perhaps better left for a time “When the Levee Breaks” and copyright law experiences a more fundamental shift; so rather than “Ramble On,” it may be best to recognize that, at least for now, “The Song Remains the Same.”²⁶⁶ In the meantime, however, artists would be well advised to avail themselves of the Copyright Office’s suggested methodology for protecting their music, and Congress would be well advised to consider an expanded deposit copy definition.

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263. See 17 U.S.C. § 101 (redefining publication to include distribution of a sound recording).

264. See *supra* Section II.D.

265. See, e.g., 17 U.S.C. § 1401.

266. A Note about Led Zeppelin is incomplete without mentioning some of the band’s greatest hits. See LED ZEPPELIN, MOTHERSHIP (Atl. Recs. 2007) for recordings of each of these songs, amongst a collection of Led Zeppelin classics.

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