Against the Grain

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Cases of Note- Copyright - Rock Legends and Substantial Similarity

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LEGAL ISSUES

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Cases of Note — Copyright

Rock Legends and Substantial Similarity

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MICHAEL SKIDMORE AS TRUSTEE FOR THE RANDY CRAIG WOLFE TRUST v. ALL THE LED ZEPPELIN GANG AND WARNER MUSIC ET AL. **2018 U.S. APP. LEXIS 27680.**

Apologies in advance for not knowing squat about music. But this is much in the news and seems topical.

Randy Wolfe was a California rocker in the glorious '60s and was actually given the nickname "Randy California" by none other than **Jimi Hendrix**.

How cool is that?

Much of **Randy's** work was not terribly commercial, but he was revered among guitarists, able to play like **Hendrix**, **Clarence White**, **Roger McGuinn**, or **Wes Montgomery**, often all within the same song.

He wrote the song "Taurus" for his first album *Spirit* released in 1967 by **Hollenbeck Music** which copyrighted it and listed him as the author.

'67 was the Summer of Love for those of you not old enough to remember. Hippies gathered in Haight-Ashbury; ***Tim Leary*** *advised "Turn on, tune in, drop out." The "Human Be-In" at Golden Gate Park inspired the musical* ***Hair****.*

The ***Monterey Pop Festival*** *introduced us to* ***The Who, Grateful Dead, Big Brother and the Holding Company, Jefferson Airplane, Janis Joplin****.*

The media went crazy and defined the '60s as counterculture and sex, drugs, and rock-and-roll. In fact, the first half of the decade had been exactly like the '50s. And American rubes such as myself only saw the second half through the pages of ***Life*** *magazine.*

Led Zeppelin was formed in 1968 by **Jimmy Page**, **Robert Plant**, **John Paul Jones**, and **John Bonham**. **Page** (songwriter) and **Plant** (lyrics) of course are legendary in rock history.

The band, perhaps the most successful and influential in history after the ***Beatles****, broke up in 1980 when drummer* ***John Bonham*** *drank a major quantity of vodka for breakfast on top of his antidepressant meds and pegged out.*

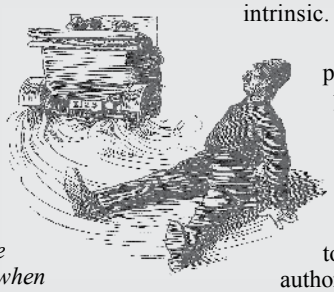
For their fleshly exploits see ***Stephen Davis****,* Hammer of the Gods *(****Wm. Morrow & Co.*** *1985). Mind you, the three surviving members hate the book, and the author has the industry monicker of "Stephen Salacious." But that sounds like a recommendation.*

Led Zeppelin and **Wolfe** moved in the same circles. **Zep** would cover another **Wolfe** song "Fresh Garbage." They both performed at concerts together.

The **Zep** gang heard "Taurus" repeatedly. **Jimmy Page** owned a copy of the album *Spirit.*

1971 brought us "Led Zeppelin IV." And on it was — you guessed it — "Stairway to Heaven."

In 1997, **Randy "California" Wolfe** drowned in undertow off the coast of Molokai. All his intellectual property was put in a trust by his mother. And percolating along was the question of whether **Zep** had ripped off "Taurus."



The Supreme Court decided laches is not a defense for an ongoing copyright violation in ***Petrella v. Metro-Goldwyn-Mayer, Inc.,*** 134 S. Ct. 1962, 1967-68 (2014).

Laches is a defense of dorking around for too long before bringing your suit. You can see the reasoning of not a defense when "Stairway to Heaven" is beloved of drug users and still being played ad nauseam.

Thus, the trust sued for copyright infringement in 2015.

Trust claims the opening notes of "Stairway" are substantially similar to those in "Taurus."

Jimmy Page the famous **Zep** music composer admitted he owned the *Spirit* album but had not heard it before he wrote "Stairway."

Which given the concerts, seems untrue.

The jury listened to both songs and determined that **Zep** had access to "Taurus" but the songs were not substantially similar.

And it went to appeal.

The Ninth Circuit

The holding of this case is 19-pages long which is an exhausting read of legal gobble-de-goop for me. But paring it down drastically, there's really only one issue of interest — a particular charge to the jury.

Substantial similarity is required to prove unlawful appropriation. The extrinsic test breaks the works down into constituent elements and compares them. ***Swirsky v. Carey,*** 376 F.3d 841, 845 (9th Cir. 2004).

No, the jurors don't have to have degrees in Musicology. Expert witnesses are used.

The intrinsic test is "whether the ordinary reasonable person would find the total concept and feel for the works to be substantially similar." ***Three Boys Music Corp. v. Bolton,*** 212 F.3d 477, 485 (9th Cir. 2000). This is a subjective comparison.

And juries are good at being subjective.

For victory, the Trust needs a "yea" in both tests. One "nay" knocks them out. The jury found no substantial similarity under the extrinsic test so they didn't have to go on to intrinsic.

Notes of a scale are not protected by copyright, but you can combine unprotectable elements to be protectable. ***Swirsky,*** 376 F.3d at 848. The notes must be combined with enough originality to make an original work of authorship. ***Satava v. Lowry,*** 323 F.3d 805, 811 (9th Cir. 2003).

Does that seem like something we need to be told?

At any rate, the district court failed to tell the jury that, but the 9th Circuit saw it as pretty harmless.

Because common sense?

More importantly, the district court told the jury that copyright does not protect "chromatic scales, arpeggios or short sequences of three notes."

Little bitty bits are not original.

Let's remember that the bar for originality is pretty gosh darn low. It's minimal creativity. *See:* ***Feist Publ'ns v. Rural Telephone Serv. Co., Inc.*** 499 U.S. 340, 348 (1991).

If you recall, that one is about arrangement of a telephone book. Which seems like a quaint artifact today, but was an issue a couple of decades ago.

And the 9th Circuit in ***Swirsky*** found that chromatic scales were protectable.

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Chromatic scale is a scale of twelve pitches, each a semitone above or below the adjacent one. And that's completely over my head.

In an arpeggio, you take a chord and play it one note at a time. Okay, I get that.

The error was not harmless because the Trust's expert witness testified that **Zep** had copied an original chromatic scale. He said "Taurus" had public domain elements that were modified in an original way. And this would go to extrinsic substantial similarity.

An original element of a song need not be new; just created independently in a creative way. ***Swirsky***, 376 F.3d at 849.

The jury charge was dismissive of his testimony and contrary to a 9th Circuit holding.

So this got sent back for a new trial.

*Our son, who was a young teen in the glory days of **Led Zeppelin**, listened to both intros and said he couldn't hear any similarity. So trust would lose on the intrinsic test with him on the jury.*

*He also had an interesting take on laches. He reasoned that **Randy California** was alive from '71 to '97 and heard "Stairway" numerous times. How could anyone not hear it? Over. And. Over.*

He was pals with **Led Zep**, and as a musician's musician, knew how music is put together.

If he had no objection, why should his heirs be able to bring suit?

Questions & Answers
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QUESTION: A North Carolina school librarian asks about the photographs of Queen Anne's Revenge, the vessel of the pirate, Blackbeard, found shipwrecked off the coast of North Carolina and the recent litigation with the State of North Carolina for copyright infringement.

ANSWER: In ***Allen v. Cooper***, 895 F.3d 337, 4th Cir. (2018), the appeals court reversed the district court decision. Plaintiffs claimed copyright infringement for the posting of six photographs of the shipwreck on a state website violated a 2013 settlement between North Carolina on one side and the salvage company and photographer on the other. The district court held that the ***Copyright Remedy Clarification Act of 1990*** abrogated Eleventh Amendment immunity for states from copyright infringement suits. The Fourth Circuit disagreed and found that the settlement's language did not constitute a waiver of Eleventh Amendment immunity, nor did the aforementioned Act abrogate sovereign immunity of the state. Further, none of the exceptions to sovereign immunity applied. The case was remanded to the district court instructing it to dismiss with prejudice all claims against state officials.

Random Ramblings — Sex, Intellectual Freedom, and Academic Libraries

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Are academic libraries able to deal with overtly sexually oriented materials required by their faculty for teaching and research? I have two reasons for writing this column. First, I'm using it as a practice run for a presentation that I'll be giving at the **2018 Charleston Conference**. I'll be examining the broader question of objectionable resources in general, but sexual materials will be a key part of my presentation. Second, I was chair of the **ACRL** Intellectual Freedom Committee from 2002-2006 before it was disbanded. I often heard that intellectual freedom wasn't an issue for academic libraries, but I strongly disagree.

The proximate cause for my research was a presentation at **Wayne State University** on December 2, 2017, by **Jennifer Nash**, Associate Professor of Gender & Sexuality Studies and African American Studies at **Northwestern University**. She gave a fascinating talk on the role of African-American women in X-rated movies with a focus on the 1978 film, *Sex World*. Surprisingly, the African-American woman overcame the prejudices of the white male and seized the more powerful role in the relationship. I came away from the talk asking whether academic libraries would buy such materials for legitimate research needs. I also remember my spouse telling me about an assignment in the 1970s where she was required to visit an adult bookstore. I could see a similar assignment today to view an X-rated film. In other words, faculty and students could have a need for such materials for legitimate teaching and research, but would the academic library buy them?

A few words are in order regarding pornography and commercially produced X-rated films. The most important fact is that pornography among consensual adults is legal. The Supreme Court has effectively decriminalized pornography. Commercial pornographers wish to avoid prosecution and want clear guidelines about what is legal or not. Child pornography is illegal because actors under eighteen cannot give legal consent. Most X-rated films show consensual acts where both men and women are eager to participate in sex and are shown having a good time. Violence does occur in about 13% of pornography according to one research study, but the violence shown is most often consensual. Furthermore, in X-rated films, women also abuse men. Finally, the producers of X-rated films can find more than enough willing female and male actors so that issues of sex trafficking are irrelevant for mainstream productions.

The rules for following Constitutional principles including freedom of speech are different for private and public academic libraries. Private institutions have a much greater ability to control the research and teaching of their faculty. Religious institutions have broader rights to require that their faculty and students adhere to certain standards as long as doing so does not interfere with civil liberties enshrined in law, e.g., a prohibition against racial discrimination. Some federal or state programs require further restrictions if the institution accepts tax dollars, but many offer exemptions from some rules for religious and other private institutions. One very clear exception is the ability to have single-sex colleges and universities without facing a discrimination challenge. On the other hand, a private institution that wished to support teaching topics that require the use of objectionable materials such as X-rated films may find it easier to do so than a publicly funded institution. Politicians or concerned citizens would have a much greater ability to apply pressure on the institution to avoid teaching such subjects even if doing so ran counter to the cultural diversity of the nation and the principle that moral beliefs cannot drive policy without sufficient proof that such laws have a secular purpose. I understand that overlooking constitutional rights happens frequently and that many individuals or institutions are unwilling or unable to challenge such actions in court where they often receive an unsympathetic hearing from judges and juries. One common example is the difficulty, including threats of funding cuts, that institutions of higher education have faced in sponsoring art exhibits with erotic or blasphemous content.

My answer to whether the academic library should buy materials such as X-rated videos for valid teaching and research is quite simple. The mission of the academic library is to support the teaching and research needs of faculty, students, and staff. The

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