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WHAT ARE WE TO DO WITH DEPOSIT COPIES?

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INTRODUCTION

Copyright protects written works.[1] However, the 1909 Copyright Act (the "1909 Act") only protected *published* written works, and sometimes, if the first written version of a work was registered before it was published, it was an incomplete deposit copy.[2] Recently, the Ninth Circuit adopted the view that the protected work of authorship, in certain cases, should be limited to the work expressed in the deposit copy and not in any later publication.[3] This comment argues, both as a doctrinal matter and practical matter, that this view is mistaken.

In 1831, musical compositions were added to copyright protection in order to give "the composer an adequate return for the value of his composition . . . ."[4] Under the 1909 Act, in order to register an unpublished work, one complete copy of the work in a legible notation had to be sent to the Copyright Office.[5]

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1. *See What Does Copyright Protect*, U.S. COPYRIGHT OFFICE: FAQ'S, https://www.copyright.gov/help/faq/faq-protect.html [https://perma.cc/K2EW-589Z] (last visited Oct. 31, 2019).

2. *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 24 et seq. (1976)).

3. *See* Skidmore v. Zeppelin, 905 F.3d 1116, 1134 (9th Cir. 2018).

4. H.R. REP. NO. 60-2222, at 7 (1909).

5. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 24 et seq. (1976)).

The 1909 Act further specified that phonorecords were not accepted as deposit copies.[6] In 1976, the Copyright Act underwent another major revision that eliminated the publication requirement and, as a result, also eliminated the need to use a deposit copy as a substitute for publication.[7]

One of the problems courts are faced with today is determining what happens with unpublished works registered under the 1909 Act: can only the sheet music filed with the deposit copy come into evidence when comparing two works as substantially similar? In 2015, the district court in *Williams v. Gaye* addressed the issue; however, the Ninth Circuit declined to decide the issue on appeal.[8] Later in 2018, in *Skidmore v. Zeppelin* ("*Skidmore*"), the Ninth Circuit concluded that when dealing with unpublished works under the 1909 Act, the deposit copy defines the scope of the copyright.[9] Part I of this comment is an overview of the deposit copy requirement under the 1909 Act. Part II will address what constitutes a deposit copy. Part III will address the repercussions of *Skidmore* and how the Ninth Circuit was incorrect in holding that the scope of a copyright comes simply from the deposit copy rather than the entire musical work.

I. OVERVIEW OF THE DEPOSIT COPY REQUIREMENT UNDER THE 1909 ACT

As the times have changed, copyright law has adapted. In 1790, maps, charts, and books were protected works.[10] In 1802, prints were added; in 1831, musical compositions were added; in 1856, dramatic works were added; in 1865, photographs were added; and in 1870, works of art were added.[11] Furthermore, in 1831, the term of protection was extended, and in 1870, the administration of registrations for copyright was moved to the Library of Congress Copyright Office.[12] In 1909, a major revision took place, expanding copyright protections "to include all works of authorship . . . ."[13] The 1909 Act allowed a work to be protected either through registration and submission of a

6. *Id*.

7. *General Guide to the Copyright Act of 1976*, U.S. COPYRIGHT OFFICE A2:08 (Sept. 1977), https://www.copyright.gov/reports/guide-to-copyright.pdf [https://perma.cc/8NG7-SJXT].

8. *See* Williams v. Gaye, 895 F.3d 1106, 1121 (9th Cir. 2018).

9. Skidmore v. Zeppelin, 905 F.3d 1116, 1134 (9th Cir. 2018).

10. *Copyright Timeline: A History of Copyright in the United States*, ASS'N RES. LIBR., https://www.arl.org/copyright-timeline/ [https://perma.cc/94Q3-VV78] (last visited Oct. 24, 2019).

11. *The 19th Century*, U.S. COPYRIGHT OFFICE: TIMELINE, https://www.copyright.gov/timeline/timeline_19th_century.html [https://perma.cc/BHL4-BKU5] (last visited Oct. 31, 2019).

12. *Copyright Timeline: A History of Copyright in the United States*, *supra* note 10.

13. *Id*.

deposit copy or through publication.[14] Unpublished works were not protected under the 1909 Act.[15] Only state common law protected unpublished works.[16] However, a copyright owner could constructively publish the work by filing for a registration before actual publication,[17] which, as you will see, is what happened in the cases below.[18]

Phonorecords were not accepted as forms of deposit copies of the underlying works until the 1976 Copyright Act (the "1976 Act").[19] A phonorecord is defined by the Copyright Office as

> [a] material object in which sounds are fixed and from which sounds can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or device. A phonorecord may include a cassette tape, an LP vinyl disc, a compact disc, or other means of fixing sound. A phonorecord does not include those sounds accompanying a motion picture or other audiovisual work.[20]

In 1976, the Copyright Act underwent another major revision; [21] this revision remains the most current Copyright Act. The 1976 Act extended the term of protection and discussed copyright scope and subject matter of works covered, exclusive rights, copyright term, copyright notice, copyright registration, copyright infringement, fair use, and defenses and remedies to infringement.[22] The 1976 Act, differing from the 1909 Act, stated that a complete copy or a phonorecord *must* be sent with the application for an unpublished work.[23] With the 1976 Act, Congress intended the standards of originality and creativity, that had been developed by the courts under the 1909 Act, to remain the same under the new law.[24]

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14. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 24 et seq. (1976)).

15. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[A][2][c] (2019) [hereinafter NIMMER ON COPYRIGHT].

16. *Id.*

17. *Id*.

18. *See* discussion *infra*.

19. *General Guide to the Copyright Act of 1976*, *supra* note 7, at 3:3.

20. *U.S. Copyright Office Definitions*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/help/faq/definitions.html [https://perma.cc/PFA7-4QF3] (last visited Oct. 31, 2019).

21. *General Guide to the Copyright Act of 1976*, *supra* note 7, at A2:08.

22. *Copyright Timeline: A History of Copyright in the United States*, *supra* note 10.

23. *General Guide to the Copyright Act of 1976*, *supra* note 7, at A2:08.

24. *Id*.

"[C]opyright law only protects an author's expression," not facts and ideas within a work.[25] In order to prove copyright infringement, two elements must be met: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.[26] A plaintiff can establish copyright infringement by showing either that a defendant had access to the work or that the two works are substantially similar in idea and expression of the idea.[27]

II. ARE MUSICAL WORKS LIMITED TO A DEPOSIT COPY OR CAN DEPOSIT COPIES EVIDENT OF MUSICAL WORKS INCLUDE OTHER THINGS?

What the deposit copy was limited to has changed as the Copyright Act has changed. In *Williams v. Gaye*, the district court held that the 1909 Act protected only the sheet music that was deposited with the Copyright Office and not the sound recording itself.[28] In 1976, Marvin Gaye recorded the song *Got to Give It Up* and deposited six pages of handwritten sheet music with the Copyright Office.[29] He published the work by filing for a registration before actual publication,[30] which is known as constructive publication.[31] Gaye did not write or read sheet music.[32] Rather, he hired an unidentified transcriber to notate the sheet music.[33] Gaye's song was governed by the 1909 Act.[34]

In 2012, Pharrell Williams and Robin Thicke wrote *Blurred Lines*, which, in 2013, became the best-selling single in the world.[35] The Gaye family claimed that the song infringed on *Got to Give It Up*, and Williams and Thicke sued for a declaratory judgment of non-infringement.[36] The district court held that, since only the sheet music was deposited with the Copyright Office, only the sheet music was protected.[37] The Gayes hired Dr. Ingrid Monson, the Quincy Jones Professor of African American Music at Harvard University, and musicologist Judith Finell, who argued that "a deposit copy is 'not intended to represent fully

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25. Taylor Turville, Note, *Emulating vs. Infringement: The "Blurred Lines" of Copyright Law*, 38 WHITTER L. REV. 199, 201 (2018) (quoting Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990)) (internal quotation marks omitted).

26. *Elements of Copyright Infringement*, 9 ARIZ. PRAC., BUS. L. DESKBOOK § 15:12 (2018–19 ed.).

27. *Id*.

28. Williams v. Gaye, 895 F.3d 1106, 1117 (9th Cir. 2018).

29. *Id*. at 1116.

30. *Id*.

31. NIMMER ON COPYRIGHT, *supra* note 15, at § 7.16[A][2][c].

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

33. *Id*.

34. *Id*. at 1117.

35. *Id*. at 1116.

36. *Id.*

37. *Id*. at 1117.

the composition. At best, it is a skeletal representation or sketch, and usually shows only the most basic vocal melodies, typically only a single iteration of the beginning sections, some beginning lyrics, and chord indications.'"[38] Further, Finell stated that "lead sheets were notated after the composition was completed and recorded, in order to fulfill music copyright registration requirements. They were often notated by music copyists employed by the music publishers rather than by the artists themselves."[39] The Gayes argued that the scope of a deposit copy should be expanded to include more than just the deposit copy itself and include the actual musical work.[40] The district court held that the sheet music deposited with the Copyright Office is what is protected.[41] The case went up on appeal,[42] but the Ninth Circuit declined to address the issue of what constitutes a protected work.[43]

In 2018, in *Skidmore*, the plaintiff, Michael Skidmore, brought a copyright infringement suit on behalf of the estate of one of the band members of Spirit.[44] Spirit had written the song *Taurus* in 1966,[45] and here, he constructively published[46] the work by filing his sheet music with the Copyright Office in 1967.[47] Led Zeppelin crossed paths with Spirit on several occasions in the 1960s and 1970s.[48] The Zeppelin band had performed covers of other Spirit songs.[49] Spirit and Zeppelin even performed at the same concert where Spirit played *Taurus*.[50] Skidmore filed suit alleging copyright infringement.[51] The court held that "[b]ecause the 1909 Act governed the scope of the copyright . . . obtained in 'Taurus' . . . the protectable copyright was the musical composition transcribed in the deposit copy of 'Taurus' and not the sound recordings."[52]

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38. Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK, 2014 WL 7877773, *7 (C.D. Cal. Oct. 30, 2014).

39. *Id*. (quoting Declaration of Judith Finell, at ¶ 42, Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK, 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014) (No. 112-3)) (internal quotation marks omitted).

40. *Id*.

41. *Williams*, 895 F.3d at 1117.

42. *Id*. at 1115.

43. *Id.* at 1121.

44. Skidmore v. Zeppelin, 905 F.3d 1116, 1121 (9th Cir. 2018).

45. *Id*. at 1122.

46. NIMMER ON COPYRIGHT, *supra* note 15, at § 7.16[A][2][c].

47. *Skidmore*, 905 F.3d at 1122.

48. *Id*.

49. *See id*.

50. *Id*.

51. *Id*.

52. *Id*. at 1123.

The Ninth Circuit, in *Skidmore*, addressed the following question: what defines the scope of a protectable copyright?[53] It held that a deposit copy, rather than a sound recording, defines the scope of a protectable copyright.[54] The court stated that "the structure of the 1909 Act demonstrates that the deposit copy encompasses the scope of the copyright for unpublished works, as the deposit copy must be filed not only to register the copyright, but for the copyright to even exist."[55] The 1909 Act makes a copyright completely dependent on a deposit copy.[56] Thus, it follows that the deposit copy defines the scope of the copyright. The court further stated that "[i]t was not until the 1976 Act that common law copyright was federalized and copyright attached at the creation of the work."[57] Therefore, the scope of a copyright for any work created prior to the 1976 Act is defined only by the deposit copy.

The Ninth Circuit says the deposit copy defines the scope of the copyright.[58] This is the holding lower courts are left with to apply. Skidmore, in his brief to the court, stated that a deposit copy is purely archival in nature under the 1909 Act.[59] Further, he argued "that the express purpose of the 1909 Act was to overturn *White-Smith* and extend copyright protection beyond sheet music,"[60] relying on section 1(e) from the 1909 Act, which protects "any system of notation or any form of record in which the thought of an author may be recorded . . . ."[61] However, the Ninth Circuit rejected Skidmore's argument.[62]

I believe Skidmore was correct and that the Ninth Circuit erred by finding the deposit copy defines the scope of the copyright under the 1909 Act. The Ninth Circuit failed to adhere to stare decisis and, further, did not consider the consequences of its decision.[63] To adhere to stare decisis is "to stand by . . . and not disturb what is settled."[64]

If left to stand, the Ninth Circuit's decision will essentially "revoke copyright protection for almost all musical compositions created before 1978

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53. *Id.* at 1131.

54. *Id.*

55. *Id.* at 1134.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1132.

60. *Id.*

61. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 24 et seq. (1976)).

62. *Skidmore*, 905 F.3d at 1134.

63. Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc at 19, Skidmore v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018) (No. 74).

64. Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc, supra note 63, at 18 (quoting In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996)) (internal quotation marks omitted).

. . . ."[65] Most songs from 1909 to 1978, excluding classical music, were not composed on sheet music.[66] Rather, they were composed on instruments.[67] The sheets that were filed with the Copyright Office were enough to identify the songs, but rarely included all of the notes in the song.[68] The lead sheets were also frequently inaccurate.[69]

This is what happened with *Taurus* and *Stairway to Heaven* ("*Stairway*"). *Stairway* was not composed on paper, but rather with instruments.[70] The song, as found on the *Led Zeppelin IV* album version, includes 11,000 notes.[71] However, only 400 notes are found on the deposit lead sheet, which means that essentially only 3.6% of *Stairway* is copyrighted under the panel's decision.[72] Thus, "[t]he panel's decision creates a discordant copyright scheme, never intended by Congress," where only small bits of songs would have copyright protection.[73] Songwriters will suffer dire consequences if musical composition copyrights are limited to deposit copies.[74]

Critics argue that music publishers, "who [have] both expertise in doing so and every incentive . . . [to] capture[] . . . the original elements of musical compositions," typically prepare deposit copies.[75] They argue that great care is taken in preparing deposit copies, especially in *Taurus* because the deposit copy was marked "rev.," indicating that is was likely revised.[76] Critics further argue that deposit copies can be brief but can still contain the melody and elements of the musical composition intended to be protected.[77] However, these are inaccurate statements about deposit copies.[78] Deposit copies are, oftentimes, an insufficient representation of the entire musical composition as shown in the example of *Stairway's* deposit copy only having 400 notes out of the 11,000 notes that make up the entire work.[79]

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65. *Id*. at 5 (emphasis omitted).
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*. at 19.
71. *Id*. at 6.
72. *Id*.
73. *Id*. at 20.
74. *See id*. at 13.
75. Response to Appellant Michael Skidmore's Petition for Rehearing En Banc at 18, Skidmore v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018) (No. 84).
76. Response to Appellant Michael Skidmore's Petition for Rehearing En Banc, *supra* note 75, at 18–19.
77. *Id*. at 19.
78. *See id*. at 19–20.
79. Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc, *supra* note 63, at 6.

A trip to the Copyright Office will reveal that many other musical monuments are at risk with their minimal protection. Take, for example, *Hotel California* by the Eagles: "[It] has two 1976 registrations, neither of which has the plucked guitar intro or the guitar solos from the studio version. A 1977 published version added a piano vocal arrangement with guitar chords. A published version from a 1978 songbook has the intro but still lacks the guitar solos."[80] Another example is *Free Bird* by Lynyrd Skynyrd: "[T]he album version[,] . . . which runs more than nine minutes, has an initial deposit copy of only eight lines, registered on Dec. 5, 1973. It contains only lyrics, melody, and basic chords. The only other registration . . . found was a four-page published piano arrangement from 1975."[81] American University Law School Professor Peter Jaszi says that "[n]o one should assume that solos not reflected in the deposit copies of sheet music are necessarily in the public domain . . . ."[82] Mark Jaffe, a copyright lawyer from San Francisco, continues this thought by saying that "[but] no one should assume they aren't . . . ."[83]

Critics who agree with the Ninth Circuit argue that only what is contained in the deposit copy is protected as a copyrighted work.[84] In *Bridgeport Music, Inc v. UMG Recordings, Inc*., the plaintiff claimed copyright in a musical composition, but the court refused to recognize copyright in the sheet music that the plaintiff later prepared, stating that it was not part of the original copyrighted work.[85] "Ordinarily, a registration for a work of authorship only covers the material that is included in the deposit copy(ies). It does not cover authorship that does not appear in the deposit copy(ies), even if the applicant expressly claims that authorship in the application."[86] Further, the critics argue, as they did in *Skidmore*, that only the deposit copy for *Taurus* is protected, not the entire work.[87]

ABKCO Music, Inc. v. LaVere was cited in both Zeppelin and Skidmore's appellate briefs.[88] Upon my review of the case, I believe it states that "an

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80. Vernon Silver, *The Legal Loophole That May Leave Some of Rock's Greatest Riffs Up for Grabs*, BLOOMBERG BUS. WKLY. (June 20, 2019), https://www.bloomberg.com/features/2019-classic-rock-riffs-loophole/ [https://perma.cc/K9TB-FKGC].

81. *Id.*

82. *Id*. (quoting Professor Peter Jaszi who served on a 1993 Library of Congress committee tasked with studying copyright issues) (internal quotation marks omitted).

83. *Id.*

84. *Id.*

85. Bridgeport Music, Inc v. UMG Recordings, Inc., 585 F.3d 267, 276 (6th Cir. 2009).

86. COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 500 (3d ed. 2017).

87. Response to Appellant Michael Skidmore's Petition for Rehearing En Banc, *supra* note 75, at 18–19.

88. *See* Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc, *supra* note 63, at 3; Response to Appellant Michael Skidmore's Petition For Rehearing En Banc, *supra* note 75, at 3.

unpublished work" receives federal protection under the 1909 Act, and that "under the 1909 Act the existence and scope of a copyright was determined at common law, which provided that a composition gained copyright protection from the 'moment of its creation.'"[89] A later registration of a copyright merely conferred federal protections and jurisdiction on the work, but did not alter the existing scope of the copyright.[90]

Critics argue that the copyrighted work is the work used in order to determine whether an infringement has occurred.[91] The copyrighted work under the 1909 Act would be the deposit copy that was filed with the Copyright Office,[92] and critics argue that the deposit copy is what should be used in an infringement case, not the entire work.[93] Under this theory, anything that is not in the deposit copy of a song is not protected.[94] To put this into perspective, consider *Hotel California* by the Eagles and the guitar solo at the beginning of the song. The guitar solo does not appear anywhere in the deposit copy.[95] Thus, under this theory, that famous guitar solo would not be protected and would presumptively be in the public domain.

The Supreme Court has yet to grant certiorari and issue an opinion on the deposit copy issue, which leaves works created prior to the 1976 Act in somewhat of a bind. I tend to agree with the plaintiff/appellant, Skidmore, in this case. I believe that limiting the scope of copyright to simply the deposit copy will have a chilling effect on copyright protection. As Skidmore pointed out in his brief, no appellate court has *ever* ruled that a deposit copy defines the scope of copyright protection.[96] Why would a court, almost one hundred years after the fact, hold that the deposit copy defines the scope of a protected work?

Additionally, as Skidmore's brief also pointed out, most musical compositions created before 1978 would lose their copyrighted protection because they were composed on instruments, as opposed to sheet music.[97] The lead sheets that were filed with the Copyright Office for these songs could identify the songs but did not encompass the entirety of the work.[98] This is

89. Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc, *supra* note 63, at 5 (emphasis omitted).

90. *Id.*

91. Response to Appellant Michael Skidmore's Petition for Rehearing En Banc, *supra* note 75, at 16.

92. *Id.* at 9.

93. *Id.*

94. *See id.*

95. Silver, *supra* note 80.

96. Appellant's Petition for Limited Panel Rehearing/Rehearing En Banc, *supra* note 63, at 19.

97. *Id.* at 5.

98. *Id.*

exactly what happened with *Stairway*—as the lead sheet included only 400 notes—when the entire work was around 11,000 notes.[99]

III. LOOKING FORWARD AFTER *SKIDMORE* & ANALYZING ABUSE OF DISCRETION

I believe Congress intended the entirety of a work to be protected, not simply a lead sheet. This intention dates back to the first Copyright Act of 1790, where the purpose was "to provide incentive to authors, artists, and scientists to create original works by providing creators with a monopoly."[100] Congress wanted works to be protected, and they wanted to incentivize creators.[101] Thus, holding true with this intention, copyright protection should protect the entirety of a work and not simply a lead sheet that has been filed with the Copyright Office.

In *Skidmore*, the Ninth Circuit also addressed whether the district court abused its discretion in precluding the recordings of *Taurus* from being played, and it held that the district court did abuse its discretion.[102] Under the Federal Rules of Evidence, the district court found that the probative value of the evidence substantially outweighed the danger of unfair prejudice.[103] The district court stated that the recordings were relevant, but that the jury would be *confused* by hearing them in order to determine whether the defendant had access to the plaintiff's work.[104]

Federal Rules of Evidence 403 states that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[105] The Ninth Circuit stated that "the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity."[106] The Ninth Circuit further held that the recordings should have come into evidence but be limited to the issue of access.[107]

The Ninth Circuit seems to think that giving a limiting instruction is sufficient, but the problem is that once you ring a bell, you cannot unring it—

99. *Id.* at 6.
100. *Copyright Timeline: A History of Copyright in the United States*, *supra* note 10.
101. *Id.*
102. Skidmore v. Led Zeppelin, 905 F.3d 1116, 1131 (9th Cir. 2018).
103. FED. R. EVID. 403.
104. *Skidmore*, 905 F.3d at 1135.
105. FED. R. EVID. 403.
106. *Skidmore*, 905 F.3d at 1135.
107. *Id.*

meaning that once a jury hears the sound recording, they cannot unhear it. A limiting instruction "tells jurors not to use a particular piece of evidence to draw a certain inference, although they are free to use the evidence in other ways."[108] Professor David A. Sklansky puts it best: "There are two well-known facts about evidentiary instructions of both varieties. The first is that our system relies heavily on these instructions. The second is that they do not work."[109] Courts presume that juries will listen to these limiting instructions, and this is presumed to be a "premise upon which our jury system is founded."[110] Sklansky states that this presumption is "widely acknowledged to be false, a kind of professional myth."[111]

The issue of limiting instructions has been prevalent in our society for decades but is specifically relevant in regards to the *Skidmore* decision. In *Skidmore*, the Ninth Circuit first limited the scope of the copyright protection to the deposit copy, [112] which excluded the jury from hearing the sound recording of *Taurus*. Second, the Ninth Circuit held that the district court abused its discretion and stated that, in regards to the issue of access, the sound recording of *Taurus* can and should come into evidence; however, the Ninth Circuit also stated that the district court could have issued a limiting instruction.[113] A recording runs the risk of being even more dangerous than testimony from another person. This is the theory in psychology known as "thought suppression."[114] Dr. Broda-Bahm wrote an article in which there is a picture of a white polar bear at the top.[115] She says as you read this post, do not think about the white bear.[116] Then she goes on to say, "Test subjects given that instruction are, predictably, twice as likely to think about the bear as those who aren't given that instruction."[117] Juries given an instruction to only think about the song in the context of access, and not in the context of substantial

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108. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013).

109. *Id.*

110. Travison v. Jones, 522 F. Supp. 666, 669–70 (N.D.N.Y. 1981); *see e.g.*, Opper v. United States, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions"); *The Limiting Instruction—Its Effectiveness and Effect*, Note, 51 MINN. L. REV. 264, 267 (1966).

111. Sklansky, *supra* note 108, at 409.

112. *Skidmore*, 905 F.3d at 1134 .

113. *Id.* at 1135.

114. Ken Broda-Bahm, *Know the Limits of Limiting Instructions (But Don't Necessarily Discard the Instruction to Disregard)*, PERSUASIVE LITIGATOR (Oct. 13, 2011), https://www.persuasivelitigator.com/2011/10/limiting-instructions.html [https://perma.cc/YC4G-3Y5C].

115. *Id.*

116. *Id.*

117. *Id.*

similarity, are twice as likely to think about whether the songs are substantially similar.[118]

Shyamkrishna Balganesh, in his article *Judging Similarity*, writes that "[a]lthough the similarity finding is meant to involve no more than a comparison of the two works to assess whether they are sufficiently similar to render the copying problematic (i.e., improper), that judgment may be affected by the variability of this other evidence."[119] That precisely is the problem he argues: "Copyright law . . . seems to assume that the question of substantial similarity can continue to remain a simple comparison of the two works, even in the face of extensive factual evidence that bears directly on the dispute in question."[120] Society presumes that juries are able to "cabin and exclude from the analysis all of the evidence with which the court has been presented in the lead-up to the issue of substantial similarity."[121] However, as Dr. Broda-Bahm's article and our common sense will tell us, this is simply not the case.

Thus, the Ninth Circuit, with its holding, created a problem in relation to the deposit copy with the admission of the *Taurus* recording for the limited purpose of access. Juries, although instructed to refer only to the deposit copy, will not be able to unhear the sound recording, and if they hear a recording and decide that it is substantially similar, then the deposit copy might make no difference. A jury could decide to disregard a deposit copy all together or simply fit their interpretation of the recording into the deposit copy.

CONCLUSION

In conclusion, as stated earlier, the purpose of copyright law is to promote "the advancement of the arts by incentivizing the creation of new and original musical works through various laws of protection, thereby fostering both creativity and economic prosperity."[122] This purpose is important to remember when dealing with copyright infringement cases. Courts want to encourage creativity and economic prosperity through copyright law. *Skidmore*, decided by the Ninth Circuit, brings to the forefront issues in copyright law that prohibit such creativity and economic prosperity. The Ninth Circuit should reconsider the issue of the deposit copy decided in *Skidmore* and allow the entire sound recording to be considered with regards to the issue of substantial similarity. Additionally, not allowing the deposit copy to come into evidence with regards

118. *See id*.

119. Shyamkrishna Balganesh, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 269 (2014).

120. *Id.*

121. *Id.*

122. Jeremy Aregood, *Blurring the Line: An Examination of Technological Fact-Finding in Music Copyright Law*, 16 J. MARSHALL REV. INTELL. PROP. L. 114, 118 (2016).

to substantial similarity, but allowing it to come into evidence for a different purpose, defeats the purpose of excluding the deposit copy in the first place because once a jury hears something, they cannot unhear it. Thus, in order to promote the purpose of copyright law, the Ninth Circuit must change its ruling in regard to the limitation of the scope of the copyright from simply the deposit copy to the entire musical work.