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## Ruling in laches case may cause a bustle in the hedgerow

I have rocked to the awesomeness of “Stairway to Heaven” for a long time. Whenever I’m at a wedding, I try to get the band to play this Led Zeppelin classic. Not since Czech composer Johann Stamitz (1717-1757) has a songwriter mastered the art of the crescendo as Jimmy Page did with “Stairway.” And no lyrics can surpass Robert Plant’s mysterious tale of the lady who’s sure that all that glitters is gold. I have often wondered, what do these lyrics really mean? Based on some recent developments, I think I figured it out — they are about copyright infringement.

As a fan of the song, I was dismayed to learn that a lawyer from Philadelphia recently filed a copyright infringement suit against Led Zeppelin, claiming that the haunting strains of “Stairway” were copied from an instrumental song called “Taurus” by the band Spirit (1967-1979). The song was written by the band’s guitarist, Randy California (who got his stage name playing with Jimi Hendrix in 1966).

In 1968-1969, before Page and Plant wrote “Stairway,” Led Zeppelin played at several concerts with Spirit where “Taurus” was performed, so Led Zeppelin clearly had the opportunity to hear it. That is called “access” and is one of the elements necessary to prove copyright infringement. The other requirement is to show substantial similarity of protectable elements of the work.

Is there substantial similarity between “Taurus” and “Stairway”? You, reasonable reader, can be the judges of that. The two songs are easy to find on the Internet. I won’t hazard an opinion, but will simply note that the lyrics of “Stairway” portend something ominous about infringement — “And if you listen very hard/The tune will come to you at last/When all are one and one is all. ...”

Page, when asked about the lawsuit, said it was “ridiculous.” Yes, of course — he knew from the first line of verse five that there was nothing to worry about — “if there’s a bustle in your hedgerow, don’t be alarmed now.”

He was no doubt thinking about the equitable doctrine of laches, which holds that if a person is aware he has a claim but waits an unduly long time to assert it, then the claim is foreclosed.

Certainly the members of Spirit heard “Stairway” upon its release in late 1970. Randy California said in an interview published in 1997 that “Stairway” was a “rip-off” of his song. But he never did anything about it. Randy’s statement and ensuing inactivity were, of course, foreshadowed in the last line of verse three — as one of “the voices of those who stand looking.”

Page may have thought that a supposed infringement that first occurred in 1970 could not be pursued in 2014, but “sometimes all of our thoughts are misgiven,” as he should have known from verse two.

Page was likely unaware of an important copyright case recently decided by the U.S. Supreme Court, *Petrella v. MGM* (May 19, 2014), that could have a significant impact on the “Taurus” litigation. Petrella raised the question whether a claim for damages in a copyright infringement lawsuit brought within the Copyright Act’s three-year statute of limitations could be barred by laches. The court held that it could not, even though the claim had been known for many years.

One might wonder how laches would come into play if the statute of limitations is only three years. It would seem there could be no undue prejudicial delay if a suit has to be brought within three years of the date the cause of action “accrues.” A copyright claim “accrues” when an infringing act occurs. The claim against Led Zeppelin would have accrued when “Stairway” was first released in 1970.

But you must be careful, “cause you know sometimes words have two meanings.” In copyright there is the “separate-accrual rule,” which holds that the statute of limitations runs separately from each violation. In other words, each infringing act starts a new period.

### INSIDE IP LAW



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The plaintiff in *Petrella* is the daughter of Frank Petrella, who wrote the screenplay to the 1980 movie “Raging Bull.” After Petrella died, his daughter, Paula, obtained the renewal rights to the copyright in 1991. Seven years later, Paula informed MGM that its continuing exploitation of the film infringed her copyright.

Paula repeatedly threatened to take action, but did nothing for nine more years. In 2009, 18 years after first asserting her claim against MGM, Paula filed suit seeking monetary and injunctive relief. To conform to the separate-accrual rule, she sought relief only for acts occurring in or after 2006.

The district court dismissed the case on the grounds of laches, and the 9th U.S. Circuit Court of Appeals affirmed. Petrella admitted that the reason she hadn’t filed suit earlier was because the film had not made money.

The Supreme Court ruled that Congress, by adopting a rule that allows a plaintiff to reach back only three years for damages, took account of the issue of undue delay. For activity within that three-year period, “courts are not at liberty to jettison Congress’ judgment on the timeliness of suit.” It held that laches “cannot be invoked to preclude a claim for damages

brought within the three-year window.”

The court did acknowledge that in extraordinary circumstances the laches doctrine might come into play in determining equitable remedies, such as injunctive relief, or in assessing the profits of the infringer attributable to the infringement.

As to the critique that this would allow plaintiffs to wait and see whether the infringing work makes money, the court said “there is nothing untoward about waiting to see whether an infringer’s exploitation undercuts the value of the copyrighted work” or to see if the harm is too small to justify litigation.

The “Taurus” suit comes just as Led Zeppelin plans to re-release the album containing “Stairway” in a deluxe, remastered edition. Under the reasoning of *Petrella*, even though “Stairway” was released 43 years ago, the plaintiff is not barred from a suit seeking damages resulting from infringements occurring during the past three years.

In light of *Petrella*, Led Zeppelin might want to consider engaging in settlement negotiations. As “Stairway” wisely instructs, “Yes, there are two paths you can go by, but in the long run/There’s still time to change the road you’re on.”

Settlement efforts are always a good course of action. I have no idea whether the parties will actually enter negotiations, but “it’s whispered that soon, if we all call the tune,/Then the piper will lead us to reason.”

After all these years, this is good news for Randy California’s estate. The estate no doubt takes comfort from the fact that “a new day will dawn for those who stand long,/And the forests will echo with laughter.”

So the perplexing lyrics of “Stairway” have much to say about copyright litigation, but one mystery remains. It is indisputably true that “There walks a lady we all know/Who shines white light and wants to show /How everything still turns to gold.” The only question is, for whom? It definitely makes me wonder.