

MUSIC AS A MATTER OF LAW

*Joseph P. Fishman**

ABSTRACT. What is a musical work? Philosophers debate it, but for judges the answer has long been simple: music means melody. Though few recognize it today, that answer goes all the way back to the birth of music copyright litigation in the nineteenth century. Courts adopted the era’s dominant aesthetic view identifying melody as the site of originality and, consequently, the litmus test for similarity. Surprisingly, music’s single-element test has persisted as an anomaly within the modern copyright system, where typically multiple features of eligible subject matter are eligible for protection.

Yet things are now changing. Recent judicial decisions are beginning to break down the old definitional wall around melody, looking elsewhere within the work to find protected expression. Many have called this increasing scope problematic. This Article agrees—but not for the reason that most people think. The problem is not, as is commonly alleged, that these decisions are unfaithful to bedrock copyright doctrine. A closer inspection reveals that, if anything, they are in fact more faithful than their predecessors. The problem, rather, is that the bedrock doctrine itself is misguided. Copyright law, unlike patent law, has never shown any interest in trying to increase the predictability of its infringement test, leaving second comers to speculate as to what might or might not be allowed. But the history of music copyright offers a valuable look at a path not taken, an accidental experiment where predictability was unwittingly achieved by consistently emphasizing a single element out of a multi-element work. As a factual matter, the notion that melody is the primary locus of music’s value is a fiction. As a policy matter, however, that fiction has turned out to be useful. While its original, culturally-myopic rationale should be discarded, music’s unidimensional test still offers underappreciated advantages over the “everything counts” analysis that the rest of the copyright system long ago chose.

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* Assistant Professor of Law, Vanderbilt Law School. For helpful comments and conversations, I thank Funmi Arewa, Shyam Balganesh, Stephanie Bair, Oren Bracha, Chris Buccafusco, Kristelia Garcia, Daniel Gervais, Sean O’Connor, Emily Richmond, Chris Serkin, and Emily Zazulia, as well as participants in the BYU Intellectual Property Colloquium, the Sixteenth Annual Intellectual Property Scholars Conference, the Vanderbilt Intellectual Property Scholars Roundtable, and the Vanderbilt Summer Brown Bag Colloquium Series. I’m also grateful to Andrea Alexander and the Vanderbilt Law Library for tracking down some rather exotic requests. Any wrong notes are my own.

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INTRODUCTION

“Any disinterested judge will have to admit that melody is, after all, the soul of music.”

— Jean-Jacques Rousseau, 1765¹

What is a musical work? The question may seem metaphysical. But so long as the musical work remains a subject of copyright protection, law needs to answer it. Our copyright system tasks courts with figuring out how much similarity between two compositions is too much, or where the composition stops and the performer’s interpretation of it begins. To fulfill that responsibility, one needs a theory for defining the musical work at the outset.

For much of U.S. history, law collapsed the answer down to a single element: melody.² Courts traditionally deemed melody (that is, the series of tones of particular durations that you might offer if asked to hum a few bars)³ to be “the finger prints of the composition,” what “establish[es] its identity.”⁴ That definition places melodic

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1. ALFRED RICHARD OLIVER, *THE ENCYCLOPEDISTS AS CRITICS OF MUSIC* 43 (1947) (quoting and translating Jean-Jacques Rousseau, *Musique*, in 10 DENIS DIDEROT & JEAN LE ROND D’ALEMBERT, *ENCYCLOPÉDIE* (1765)).
 2. See, e.g., Charles Cronin, *Concepts of Melodic Similarity in Music-Copyright Infringement Suits*, in *MELODIC SIMILARITY: CONCEPTS, PROCEDURES, AND APPLICATIONS* 187, 188 (Walter B. Hewlett & Eleanor Selfridge-Field eds. 1998) (“Although plaintiffs invariably claim musical rather than melodic infringement, courts pay little attention to rhythm, harmony, or other elements of music. They mention them, if at all, as support for their findings of melodic similarities.”); Mark Osteen, *Rhythm Changes: Contrafacts, Copyright, and Jazz Modernism*, in *MODERNISM AND COPYRIGHT* 89, 102 (Paul K. Saint-Amour ed. 2011) (“[T]he bulk of twentieth-century legal rulings affirm melody is the primary consideration in determining originality and infringement.”); Leon R. Yankwich, *Legal Protection of Ideas—A Judge’s Approach*, 43 VA. L. REV. 375, 388 (1957) (“[W]hether we are dealing with music of the highest quality or popular music, originality lies in the arrangement of the musical notes so that they form a tune or air.”); *Melody*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <http://mcir.usc.edu/glossary/M-R/Pages/Melody.html> (“Melody is overwhelmingly the single most important feature of a musical work in evaluating the merits of copyright infringement claims. The entire corpus of judicial opinions in the area of music copyright infringement dwells on melody as the single most idiosyncratic element of the works in question . . .”). For further discussion, see Part I.
 3. A standard, if more formal, definition is “pitched sounds arranged in musical time in accordance with given cultural conventions and constraints.” Alexander L. Ringer, *Melody*, GROVE MUSIC ONLINE, OXFORD MUSIC ONLINE, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/18357>. A melody may be played by any instrument.
 4. *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952); *accord MCA, Inc. v. Wilson*, 425 F. Supp. 443, 450 & n.9 (S.D.N.Y. 1976).

likeness at the center of music infringement cases, alongside only the literary content of any accompanying lyrics. Rhythm, harmony, orchestration, and organizational structure are ostensibly peripheral.⁵ As far as copyright is concerned, many aspects of your favorite recording wouldn't truly be part of the musical work that the recording embodies.⁶

Yet lately that conventional wisdom has seemed imperiled. In 2015, musicians Robin Thicke and Pharrell Williams were found liable for infringement in a headline-grabbing trial over their hit *Blurred Lines*.⁷ Accused of infringing the copyright in Marvin Gaye's *Got to Give it Up*, Thicke and Williams acknowledged a stylistic overlap between the two songs but insisted that the lack of melodic similarity precluded any claim of infringement.⁸ The jury disagreed, awarding the Gaye estate over \$7 million in damages.⁹ The court subsequently upheld the evidentiary sufficiency of the verdict based on a "constellation" of similarities between the two pieces' basslines, keyboard parts, and vocal contours.¹⁰ It emphasized an expert witness's conclusion

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5. See, e.g., *N. Music*, 105 F. Supp. at 400 (concluding that rhythm and harmony are categorically in the public domain and that neither "can itself be the subject of copyright"); Joanna Demers, *Sound-Alikes, Law, and Style*, 83 U.M.K.C. L. REV. 303, 303–04 (2014) ("[C]opyright law suggests that the center of a musical composition is its melody (and lyrics, if present). The outskirts of the musical work are inhabited by supposedly incidental qualities like harmony, rhythm, and timbre—aesthetically important to be sure, but possessing no property status."); Jeffrey G. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. 81, 129 (1972) ("[I]f the melodic similarities extend over a long enough stretch of music, it would seem that no amount of non-melodic differences—rhythm, harmony, accompaniment, or mood—should shield the defendant.").
 6. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2016) ("It stretches matters too far to conclude that everything on the recording forms part of the musical composition.").
 7. See Ben Sisario & Noah Smith, *'Blurred Lines' Infringed on Marvin Gaye Copyright, Jury Rules*, N.Y. TIMES, Mar. 11, 2015, at B1.
 8. E.g., Trial Tr., 73:19–23, Mar. 12, 2015, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004, ECF No. 331 (asserting during opening statement that "the most important factor . . . as to determine whether or not there is a similarity" is that "there are not two consecutive notes with the same duration and location in the two songs"); Pls.' & Counterdefs.' Notice of Mot. & Mot. for Summ. J. or, in the Alternative, Partial Summ. J.; Mem. of Points & Authorities at 2, *Williams*, July 22, 2014, ECF No. 89 ("The alleged melodic 'similarities' . . . do not contain two consecutive notes with the same pitch and duration and placement in the measure (*i.e.*, rhythm) in both songs. *This is highly unusual in an infringement claim.*").
 9. The court subsequently reduced the figure to \$5.3 million. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004, 2015 WL 4479500 (C.D. Cal. July 14, 2015), *appeal filed sub nom Williams v. Gaye*, No. 15-56880 (9th Cir. Dec. 8, 2015).
 10. *Id.* at *21–*22.

that these features, though lacking a note-to-note melodic correspondence, were nevertheless “the ‘heartbeat of the songs,’ or the ‘pulse that runs through the song and drives each song.’”¹¹ Mixed anatomical metaphors aside, the holding seems a far cry from the familiar view that melody alone provides “the finger prints of the composition.”¹²

It’s tough to overstate the amount of controversy surrounding the judgment, which is currently on appeal to the Ninth Circuit,¹³ in both legal and music circles. Several copyright analysts have panned its reliance on non-melodic elements as legal error.¹⁴ A former general counsel of the National Music Publishers Association blamed the decision for making “fuzzier” a once-straightforward system in which “melody and lyrics were the basis of all infringement claims.”¹⁵ Many musicologists describe it as a departure from the popular legal consciousness regarding permissible borrowing,¹⁶ some even arguing as amici in the case that music infringement disputes

11. *Id.* at *22 (quoting Trial Tr. 53, Feb. 26, 2015, ECF No. 336 (testimony of Dr. Judith Finell)).

12. *N. Music*, 105 F. Supp. at 400.

13. *Williams v. Gaye*, No. 15-56880 (9th Cir. Dec. 8, 2015).

14. See, e.g., Erin Fuchs, *That Huge ‘Blurred Lines’ Verdict Came Out of Left Field And Sets A Terrible Precedent*, BUSINESS INSIDER (Mar. 11, 2015), <http://www.businessinsider.com/copyright-lawyers-are-shocked-by-the-robin-thicke-blurred-lines-verdict-2015-3> (quoting Professor Christopher Sprigman’s commentary that “[m]elody is copyright-able . . . ‘Blurred Lines’ sounds something like the Marvin Gaye song. The reason they sound alike is they’re in the same genre. They don’t have the same melody.”); Parker Higgins, *Copyright Mixtape: How the ‘Blurred Lines’ Lawsuit Could Change Music Forever*, RATTER (Feb. 16, 2015), <http://ratter.com/ratter/all/archive/213510-copyright-mixtape-how-the-blurred-lines-lawsuit-coul> (arguing that if copyright were to protect more than melody, it would improperly propertize the “feel” of a song); Tim Wu, *Why the “Blurred Lines” Copyright Verdict Should Be Thrown Out*, NEW YORKER (Mar. 12, 2015), <http://www.newyorker.com/culture/culture-desk/why-the-blurred-lines-copyright-verdict-should-be-thrown-out> (arguing that the court committed a “serious error” in letting the dispute ever reach a jury because the accused infringers could not be liable if they did not copy “any actual sequence of notes”).

15. See Ben Sisario, *Led Zeppelin’s ‘Stairway to Heaven’ to Be Scrutinized in Court in Copyright Case*, N.Y. TIMES, June 6, 2016, at B1 (quoting Jay Rosenthal).

16. See, e.g., Joe Bennett, *Did Robin Thicke Steal ‘Blurred Lines’ from Marvin Gaye?*, JOE BENNETT (Feb. 1, 2014), <https://joebennett.net/2014/02/01/did-robin-thicke-steal-a-song-from-marvin-gaye> (providing a musicologist’s pre-trial stance that “[t]he Gaye and Thicke recordings sound very similar to each other, but they use different notes, so it would be difficult to make a case that the composition has been plagiarised”); Chi Chi Izundu, *Music Industry ‘Paranoid’ After Pharrell Williams, Robin Thicke Blurred Lines Case*, BBC NEWSBEAT (Oct. 13, 2015), <http://www.bbc.co.uk/newsbeat/article/34389573/music-industry-paranoid-after-pharrell-williams-robin-thicke-blurred-lines-case> (quoting a musicologist’s position that “there are no two consecutive notes in the vocal melodies or even the bass lines that occur in the same place for the same duration. They are, by definition, different songs.”); Randy Lewis, *Brian Wilson, Bonnie McKee, and Others React to ‘Blurred Lines’ Verdict*, L.A. TIMES,

“invariably focus on the melodies of two songs.”¹⁷ As one professor and frequent expert witness in music copyright infringement cases explained, “Melody tends to be the meat in a copyright issue. . . . That’s what gets you at the musical expression that’s ultimately the test of whether there’s ultimately been an infringement.”¹⁸ Another opined that the verdict represented a “sea change” in the copyright scope granted to musical works, which “for the past century until this verdict . . . ha[d] privileged only two elements as being deserving of protection . . . the melody and the lyrics,” and which was now for the first time expanding to cover “other elements of a composition” like rhythm, bassline, and “ephemeral things like timbre and instrumentation.”¹⁹ Many musicians, accustomed to imitating non-melodic elements of the music they hear, now worry that the legal shadow in which they’ve long worked is shifting unpredictably.²⁰ A public radio program that was devoted to the case led off by ob-

Mar. 14, 2015 (quoting a songwriting professor’s comments that the verdict could have “significant ramifications for pop music creators” because it “appears to go beyond the elements of a song that may be a copyright—primarily melodies and lyrics—and extends to tempo, feel and instrumentation”).

17. Br. of Amicus Curiae Musicologists in Support of Pls.-Appellants-Cross-Appellees at 2, *Williams v. Gaye*, No. 15-56880 (9th Cir. Aug 30, 2016).
18. Brian Wise & Naomi Lewin, *Detecting Music Plagiarism, After the ‘Blurred Lines’ Case*, WQXR (Mar. 18, 2015), <http://www.wqxr.org/#!/story/detecting-music-plagiarism-post-blurred-lines-case/> (quoting Professor Lawrence Ferrara).
19. Tom Ashbrook, *‘Blurred Lines’ in Music Copyright Fight*, ON POINT WITH TOM ASHBROOK, (Mar. 17, 2015, 11:00 AM), <http://onpoint.wbur.org/2015/03/17/blurred-lines-copyright-robin-thicke-marvin-gaye-pharell> (quoting musicologist Joanna Demers at minutes 3:50–4:50 in the broadcast); *see also id.* (quoting entertainment lawyer and music business management professor John Kellogg at minutes 5:10–18 agreeing that “over the past 100 years basically the melody and lyrics have been the things that’s really been protected”); Joanna Demers, *Blurry*, MUSICOLOGY NOW (Mar. 27, 2015), <http://musicologynow.ams-net.org/2015/03/blurry.html> (observing that, before commencement of the case, “most musicians, lawyers, and industry observers thought that the laws . . . were clear [that] [m]elody and lyrics cannot be copied without permission . . . [while] [r]hythm, harmony, and style are all subject to copying . . .”).
20. *See, e.g., ‘Blurred Lines’ Verdict Could Have Chilling Consequences*, CBS NEWS (Mar. 11, 2015, 10:45 AM), <http://www.cbsnews.com/news/pharrell-robin-thicke-blurred-lines-guilty-verdict-impact-music-industry/> (quoting a music journalist’s reaction that the verdict departed from the principle that “[t]he one and only part of a composition that’s really protected by copyright is the melody of the song”); Laurreta Charlton, *A Copyright Expert Explains the ‘Blurred Lines’ Ruling*, VULTURE (Mar. 11, 2015, 3:11 PM), <http://www.vulture.com/2015/03/what-the-blurred-lines-ruling-means-for-music.html> (quoting a music producer’s observation that in copyright “rhythm hasn’t been taken as seriously” because “[w]hen we think of copyright infringement, we think of a melody being stolen. . . . [Melody has] always been the main indicator of copyright. I own my melodies.”); Victoria Kim, et al., *‘Blurred Lines’ Ruling Stuns the Music Industry*, L.A. TIMES, Mar. 11, 2015 (referencing longtime industry executive Irving Azoff’s observation that copyright disputes “were normally resolved between music business insiders based on how many notes in a row were shared by two songs”); Jody Rosen, *Questlove*

serving that “a lot of composers wonder if copyright is now being extended to cover not just lyrics and melody but a lot of other stuff like tone, rhythm, tempo.”²¹ *USA Today* ran a column after the verdict indicating that the case could give rise to a “new ambulance-chasing business in the music industry” and quoting a *Billboard* editor’s warning that the entire industry would need to tread carefully “with anything that feels similar inspired by something else.”²²

Some fret that we’re already witnessing a “*Blurred Lines* Effect” in which nervous composers prophylactically award songwriter credits (and the accompanying slice of royalties) to anyone who has previously written a vaguely reminiscent song.²³ One artist who’s felt the brunt of that effect explained that “[w]e’re all standing on the shoulders of giants. There’s nothing that hasn’t been done.”²⁴

Yet if there’s nothing new under the sun in trying to create music, neither is there anything new under the sun in trying to define it. Nearly a century ago, a similar controversy played out across the Atlantic. In 1922, a British composer named Frederic Austin produced the smash hit of his day when he arranged new musical accompaniments for the then-obscure John Gay opera *Polly*.²⁵ The opera, a sequel to Gay’s more widely known *The Beggar’s Opera*, had been published in 1729 in a bare-bones

on *Working with Elvis Costello, Miley’s Twerking, and His Lunchtime D.J. Sets*, VULTURE (Sep. 18, 2013, 1:15 PM), <http://www.vulture.com/2013/09/questlove-on-his-new-album-with-elvis-costello.html> (stating before the trial that copying musical style should be permitted but that “[i]f it were a case of melodic plagiarism, I would definitely side with the [Gaye] estate”).

21. See Wise & Lewin, *supra* note 18.
22. Andrea Mandell, ‘*Blurred*’ Verdict Is Bad News for Music Biz, USA TODAY, Mar. 10, 2015.
23. Dee Lockett, *Miguel Credited Billy Corgan on ‘1979’-Sounding New Song So He Wouldn’t Get Sued*, VULTURE (July 15, 2015, 12:07 PM), <http://www.vulture.com/2015/07/miguel-credits-billy-corgan-on-a-new-song.html>; see also Megan Coane & Maximilian Verrelli, *Blurring Lines? The Practical Implications of Williams v. Bridgeport Music*, LANDSLIDE MAG., Jan.-Feb. 2016. (“As a result of the ‘Blurred Lines’ case, we are more likely to see preemptive writing credits given to original composers whose works are allegedly infringed, the prompt settlement of cases of alleged infringement to avoid costly litigation and negative press, and fewer lawsuits overall in response to this dangerous precedent.”); Ed Christman, ‘*Uptown Funk!*’ Gains More Writers After Gap Band’s Legal Claim, BILLBOARD (May 1, 2015, 12:21 AM), <http://www.billboard.com/biz/articles/6553523/uptown-funk-gains-five-co-writers> (quoting an industry executive’s observation that, after the verdict, “[e]veryone is being a little more cautious. Nobody wants to be involved in a lawsuit.”).
24. *Miguel Explores Race, Finds New Voice on ‘Wildheart’*, BILLBOARD (July 13, 2015), <http://www.billboard.com/articles/news/6627416/miguel-explores-race-finds-new-voice-on-wildheart>.
25. See *Austin v. Columbia Gramophone Co.*, [1923] Macg. Cop. Cas. 398, 400 (Eng.) (describing the 1922 London production of *Polly* as “an immediate success” and “one of the most popular entertainments of the day”).

arrangement of vocal melodies and accompanying basslines.²⁶ Austin took the existing melodies and composed new musical settings and orchestrations for them.²⁷ Seeing the runaway success of the new production, the Columbia Gramophone Company sought to release a recording of musical highlights, only to learn that Austin had signed an exclusive deal with a different record label.²⁸ Believing that the only copyrightable content of *Polly* was the melodies, which were already in the public domain, Columbia dispatched its music director to the British Museum to copy out those melodies from Gay's original edition and then add his own arrangements—which ended up sounding a lot like Austin's.²⁹ Columbia released a recording of those soundalike arrangements, and Austin sued in chancery court for infringement.

The ensuing bench trial teed up the same question in early-twentieth-century England as the *Blurred Lines* case did in early-twenty-first-century America: can one infringe the copyright in a musical work if one never copies a melody? Austin argued that, new melodies or not, his arrangements were original enough in themselves that copyright should subsist in them.³⁰ Columbia took the position that “so long as Mr. Austin’s actual notes and bars were not copied,” it was “at liberty to orchestrate, lengthen, quicken, introduce imitative and chorus effects, and generally dress up the tune in the same way as the plaintiff.”³¹ Strikingly, in an appeal to creativity policy that could easily be mistaken for a modern critique of the *Blurred Lines* decision, the former organist of Westminster Abbey provided expert testimony imploring the court to adopt the defendants’ bright-line test:

The need is for a guiding rule. The principle that there is only copyright in a sequence of notes is a rough and ready rule which may not be perfect in its application to all cases, but it is intelligible and clear. Any other principle will certainly be very difficult for the musician to apply, and almost impossible for a lawyer, himself probably inexperienced, to interpret.³²

Unmoved, the court sided with the plaintiff, reasoning that copyright should subsist in “a combination of ideas, methods, and devices used and expressed in and going to

26. *Id.*

27. *See id.* (“Although Mr. Austin takes the melody from Gay’s airs he alters the structure of the music and his whole scheme of harmony is a departure from [the existing] setting of the same air and produces a different effect to the ears.”).

28. *See id.* at 401.

29. *Id.* at 401–03.

30. *Id.* at 403–04.

31. *Id.* at 403.

32. *Id.* at 406–07 (quoting trial testimony of Sir Frederick Bridge).

form part of a new and original work, based though it be on old airs.”³³

It’s taken the United States an extra ninety years, but the *Blurred Lines* judgment has finally compelled a similar reevaluation here of just what the law means when it says “music.” In fact, the answer is no longer anywhere near as uniform as the popular condemnation of the outcome would suggest. Recent (and significantly less scrutinized) district court decisions have held that copyright protection could extend to a piece’s rhythm, percussion, or instrumental riffs.³⁴ The Sixth Circuit has upheld an infringement verdict based on copying vocal refrains of a particular rhythm and timbre.³⁵ Dicta from the Ninth Circuit likewise suggests that one could infringe a musical work by copying some permutation of chord progression, key, tempo, and genre.³⁶ These decisions are arguably consistent with the jury verdict against Thicke and Williams, yet are inarguably inconsistent with the prevailing belief that copyright considers a composition to be little more than its tune. *Blurred Lines* is a symptom, not a cause, of confusion over just what copyright’s theory of the musical work is.

That confusion may only now be getting serious attention, but it had been lying dormant for decades. As I discuss in Part I of this Article below, the judges and commentators who endorsed the equation of music with melody did so based on specific views of what makes music creative. Consciously or not, courts adopted the view of nineteenth-century European music theorists and critics who saw melody as a musical work’s aesthetic core. The ontology of music in the courthouse reflected the ontology of music in the concert hall.

Today, however, this unidimensional scope is doubly puzzling. Part II explains why. First, it’s anomalous within the modern copyright system. Copyright protects original expression, just not the underlying ideas being expressed.³⁷ For most subject matter, that broad eligibility principle means that any number of individual elements as well as their combination are potentially protectable.³⁸ To the extent that music copyright reduces to melody, the regime is unusually narrow.

Second, it rests on a myopic view of musical creativity. Many genres deemphasize

33. *Id.* at 421.

34. *See* *New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78 (S.D.N.Y. 2015) (drumbeat); *BMS Entm’t/Heat Music LLC v. Bridges*, 2005 WL 1593013, at *3–*5 (S.D.N.Y. July 7, 2005) (combination of rhythmic elements); *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983 (W.D. Wash. 1999) (guitar riff).

35. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.2d 267 (6th Cir. 2009).

36. *Swirsky v. Carey*, 376 F.3d 841, 848–50 (9th Cir. 2004).

37. 17 U.S.C. § 102.

38. *See infra* Part II.

melody and innovate around other elements. Over the last 150 years, composers have originated far more than just tunes, from new harmonic sequences in Western art music to new percussion loops in hip-hop to new guitar vamps in alternative rock. A monomaniacal focus on melody pushes all of these beyond copyright's pale of expression—but why?

The answer, as I argue in Part III, is not the one that the classical doctrine provides. Instead, it's the one hinted at by that Westminster Abbey organist so many years ago: the interests of second comers.³⁹ The conventional, melody-obsessed wisdom is the right approach after all—it's just the rationale that needs to change. Infringement doctrine's emphasis on a work's melody should be justified not as a recognition of its composer's creativity but rather as a facilitation of downstream composers' future creativity. Music cases have provided subsequent generations with what by copyright's standards is an uncharacteristically clear boundary to work around: to avoid infringement, avoid the tune. Because music is perceived to be relatively modular, with melody often distinguishable from other constitutive elements, both downstream composers and judges can confine their infringement inquiry to a narrow field.

That model, which as Part IV discusses could be generalized to other subject matter besides music, offers advantages over the “everything counts” analysis for other expressive media, where the analysis is often scattershot and unpredictable. Few are satisfied with the muddle that is copyright's substantial similarity test, and this Article is not the first to lament the pathological uncertainty surrounding its application.⁴⁰ The history of music copyright, however, offers an underappreciated and important example of a clearer, albeit narrower, approach. Unlike our patent system, which has tried to develop an infrastructure that notifies downstream actors of the range of different products that the owner can claim,⁴¹ the copyright system has seemingly been content to throw up its hands, declare that any such notice is infeasible, and leave everyone to guess just how far a copyrighted work's unwritten penumbra and emanations go. But music copyright's old unidimensional infringement standard, built on an underinclusive definition of original expression, offers an unintentional glimpse at the functioning of a copyright system that's willing to sacrifice an increment of scope for an increment of clarity.

That tradeoff is one that the recent crop of music infringement cases has not

39. See *supra* note 32.

40. See *infra* Part III.

41. See *id.*

been willing to make. And at least so long as the only doctrinal lever is the qualitative value of the copied expression, it has no reason to make it. Substantial similarity isn't likely to deliver a different result unless it starts making room for predictable similarity.

I. HOW COPYRIGHT DEFINES THE MUSICAL WORK

Music has been copyrightable subject matter in the United States since 1831.⁴² For much of the time since then, as I outline in section I.A below, music plagiarism cases have revolved around a single dimension. The coin of the realm was melody, whose imitation has tended to be both necessary and sufficient to sustain an infringement claim.⁴³ If one copied a protected work's melody, one was liable even if other elements were not copied.⁴⁴ And if one didn't copy melody, liability was unlikely.

These days, the sufficiency is still there—copying melody seemingly remains as proscribed as it ever was. But, as I explain in section I.B, the necessity is changing. A handful of recent court cases, most visibly but certainly not exclusively the *Blurred Lines* infringement verdict, have begun to nudge infringement analysis toward finding liability even without any melodic copying to speak of.

What should count as music infringement is up for grabs. There's lamentably little dialogue between legal scholars and musicologists, two groups that could offer each other helpful expertise on the topic. Many in the legal community continue to point to melody as music's primary element under copyright, sometimes with a polite but brief nod to rhythm and harmony.⁴⁵ More abstract concepts like timbre are often

42. See Copyright Act of 1831, 4 Stat. 436.

43. In legal historian Alex Sayf Cummings' summary, "[t]raditionally, the law protected only what could be written down on the page—the lyrics and melody of a song—not its rhythm, timbre, or tone." Alex Sayf Cummings, *The "Blurred Lines" of Music and Copyright: Part One*, OUPBLOG (Apr. 28, 2015), <http://blog.oup.com/2015/04/blurred-lines-copyright-part-one/>.

44. See, e.g., ALFRED M. SHAFER, *MUSICAL COPYRIGHT* 199 (2d ed. 1939) ("[O]ne may copy a melody by changing the rhythm—and still be infringing."); Sherman, *supra* note 5, at 129 ("[I]f the melodic similarities extend over a long enough stretch of music, it would seem that no amount of non-melodic differences—rhythm, harmony, accompaniment, or mood—should shield the defendant.").

45. See, e.g., PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 2.8 (quoting *Northern Music's* "fingerprints" passage for the proposition that "[b]ecause melody is so salient, and is relatively unconstrained by musical convention, it is typically the principal vessel of originality in musical compositions"); NIMMER, *supra* note 6, § 2.05[D] (noting the split of authority on harmony and rhythm and the safe conclusion that melody is "the usual source of protection for musical compositions"); ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS* 51 (2003) (quoting *Northern Music* for the

excluded entirely.⁴⁶ Indicative of this approach is a recent study that characterized a musician's choice to incorporate particular synthesized sounds in a rhythmic pattern as "demonstrat[ing] hardly more original authorship than does a decision to print a phone directory using a particular font, or to paint a wall a certain color."⁴⁷ Others see the primacy historically attached to melody as a misstatement of law borne out of an availability heuristic. According to them, courts pay melody so much attention not because of copyright doctrine but rather because of all the other unoriginal elements in the pop songs that tend to trigger copyright litigation.⁴⁸

Meanwhile, several prominent musicologists who specialize in music copyright

prevailing definition of a musical work under copyright law); Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 498 (2014) ("In analyzing the music composition copyright, consideration of infringement tends to be limited to three principal notated musical features: melody, which is typically given primary consideration, and to a lesser extent harmony and rhythm."); Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 278 & 292 (2013) (observing that "melody drives the infringement bus" and that "[j]ust as words are the basic components of novels and lines of computer code are the fundamental elements of software programs, pitches are the building blocks of musical works. . . . [I]n comparing two musical works, experts should focus on the identity (or lack thereof) between the pitches of each composition."); Michael Zaken, *Fragmented Literal Similarity in the Ninth Circuit: Dealing with Fragmented Takings of Jazz and Experimental Music*, 37 COLUM. J.L. & ARTS 283, 290 (2014) ("[W]hile a few courts have found the possibility of creativity in rhythm or harmony, most courts look to melody alone as the main source of creativity.").

46. See, e.g., Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, VA. SPORTS & ENT. L.J. 137, 144 (2011) (conceptualizing the elements of "phrasing, style, genre, tempo, key, timbre, and orchestration" as belonging to a particular performance rather than to the performed work itself).
47. Charles Cronin, *I Hear America Swing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1227–28 (2015).
48. See, e.g., WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 3.93 & n.8 (2016) ("Originality in a musical composition consists not just of melody or harmony, but also in the combination of these two in addition to any other elements, such as rhythm or orchestration. . . . While conventional harmonic progressions are not protected, there is plenty of room for originality in harmony."); Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 270 (1996) (arguing in the copyrightability context that just because "much tinkering with rhythm is insignificant does not mean that an arranger cannot, in fact, make an original contribution by making rhythmic changes"). Bob Brauneis makes another version of this argument based on the availability of expression amenable to written notation, rather than on the availability of expression amenable to marketable originality. See Robert Brauneis, *Musical Work Copyright for the Era of Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 16 (2014) ("[I]n many of the cases in which courts articulated a definition of musical works in terms of a finite list of elements, they were not rejecting other elements proposed by one of the parties; rather, they were simply articulating what they were used to seeing in thinly notated sheet music or lead sheets.").

disputes have expressed exasperation that the law in the wake of the *Blurred Lines* verdict might suddenly protect something more than melody.⁴⁹ The way things have always worked, the story goes, “only tunes and words are explicitly covered, while rhythm, instrumentation, timbre, and tempo remain in the vague terrain of phenomena that, each on its own, remain without protection.”⁵⁰ Measured against that baseline, the jury’s verdict was a “sea change.”⁵¹

As for musicians, at least those who have been speaking with the press, many reveal a similar sense of incredulity at the notion that non-melodic elements can be propertized.⁵² That reaction makes sense, given the borrowing norms within many music genres today. Producers have gotten used to recreating existing beats and backing tracks, believing that they aren’t copyrightable.⁵³ It’s copying the melodies that brings trouble. When Kelly Clarkson was accused in 2009 of plagiarizing a Beyoncé track based largely on similarity between the instrumental productions, she defended herself by pointing out that “our melodies are different.”⁵⁴ That reflexive response suggests that copying melody is exceptional. It’s transgressive in a way that copying any of the surrounding elements isn’t perceived to be.

But as I argue below, it’s wrong to brand a single jury verdict as a departure from the rules of what can be copied. The *Blurred Lines* case was preceded by, and has since been followed by, several precedential holdings that have shifted that terrain more than the vagaries of a jury ever could. What the verdict did do is make startlingly visible just how weak the legal edifice supporting a melody-only regime has always been.⁵⁵

49. See *supra* text accompanying note 16 through note 19.

50. Joanna Demers, *Music, Copies and Essences*, in *THE SAGE HANDBOOK OF POPULAR MUSIC* (Andy Bennett & Steve Waksman eds., 2015).

51. See *supra* text accompanying note 19; see also Laretta Charlton, *Why Copyright Infringement Became Pop’s Big Problem, According to the ‘Blurred Lines’ Musicologist*, *VULTURE* (Dec. 11, 2015, 12:10 PM), <http://www.vulture.com/2015/12/why-copyright-infringement-became-pops-big-problem.html> (arguing that reconstructing a song’s rhythm is an “area where there are no rules—and that’s what’s changing as a result of this case”).

52. See *supra* text accompanying note 20 through note 21.

53. See JOHN SEABROOK, *THE SONG MACHINE: INSIDE THE HIT FACTORY 201* (2015).

54. James Montgomery, *Kelly Clarkson to Put Ryan Tedder Drama to Bed on Upcoming Tour*, *MTV.COM* (Sept. 18, 2009), <http://www.mtv.com/news/1621839/kelly-clarkson-to-put-ryan-tedder-drama-to-bed-on-upcoming-tour/>.

55. See Demers, *supra* note 19 (“The idea that copyright only protects melody and lyrics, while situationally true, is a thought-fiction, a crutch that over time has helped us to bypass a messier truth: copyright law says very little about what in a musical composition it protects. This fiction has been

A. *The Long Reign of Unidimensional Similarity*

The emphasis on the tune within music copyright generally tracks a similar emphasis within classical Western musical aesthetics. In the mid-eighteenth century, Rousseau theorized that harmony, rhythm, and orchestration were ultimately subordinate to melody.⁵⁶ In his view, later encapsulated in his entry on music for Diderot's *Encyclopédie* that is quoted in this Article's epigraph, any composer who didn't comprehend that relationship would ultimately fail to evoke any emotions within the listener.⁵⁷ "Music," he wrote, "depicts only by means of *Melody* and draws all its force from it," such that without melody music would "wear[y] the ears and always leave[] the heart cold."⁵⁸ Melody unified a musical work just as action unified a dramatic tragedy.⁵⁹ To succeed as a piece of music, "the whole ensemble must convey only one melody to the ear and only one idea to the mind."⁶⁰ Harmony was like the colors in a painting, which, in Rousseau's view, could convey pleasure but not meaning. Melody alone made music a language.⁶¹

By the nineteenth century, various voices around Europe had adopted the view

repeated without qualification or nuance to the point that it has become a myth.").

56. See Jean-Jacques Rousseau, *Letter on French Music*, in JEAN-JACQUES ROUSSEAU: ESSAY ON THE ORIGIN OF LANGUAGES AND WRITINGS RELATED TO MUSIC 141, 154–55 (John T. Scott trans. & ed. 1998).
57. See *supra* note 1.
58. Jean-Jacques Rousseau, *Dictionary of Music*, in ROUSSEAU, *supra* note 56, at 366, 422.
59. *Id.*
60. *Id.*; see also Jean-Jacques Rousseau, *On the Principle of Melody, or Response to the "Errors on Music"*, in *id.* 260, 269 (arguing that harmony and sounds "are actually only the instruments of the melody," and that "if the Musician thinks only of his harmony, if he neglects the essential part, which is the song, in order to chase after chords and filling it out, he will produce a great deal of noise and little effect, and his deafening Music will give much more pain to the head than emotion to the heart").
61. See Jean-Jacques Rousseau, *Examination of Two Principles Advanced by M. Rameau in his Brochure Entitled: "Errors on Music in the Encyclopedia"*, in *id.* 270, 279 ("The most beautiful chords, like the most beautiful colors, can convey to the senses a pleasant sensation and nothing more. . . . It is by means of [melodies] that music becomes oratorical, eloquent, imitative, they form its language; it is by means of them that it depicts objects to the imagination, that it conveys feelings to the heart. Melody is in music what design is in Painting, harmony produces merely the effects of colors. It is by means of the song, not by means of the chords, that sounds have expression, fire, life; it is the song alone that gives them the moral effects that produce all of Music's energy."); Jean-Jacques Rousseau, *Essay on the Origin of Languages*, in *id.* 289, 320–21 ("Melody does in music precisely what design does in painting; it is melody that indicates the contours and figures, of which the accords and sounds are but the colors. . . . If there were nothing but [colors or sounds] in them, they would both be counted among the ranks of the natural sciences, and not the fine arts. It is imitation [of nature] alone that elevates them to that rank. Now, what makes painting an imitative art? It is design. What makes music

that melody represents the kernel of musical expression.⁶² Many perceived melody to be music's vessel of romantic genius.⁶³ Unlike other compositional facets, melody was seen as being unteachable, acquired only by divine gift.⁶⁴ "Melody," the music director of the Königsberg Theater wrote in 1855, "cannot be taught. . . . We may criticize it here and there, but we cannot improve it, or it is no melody."⁶⁵ Hegel's aesthetic theory, like Rousseau's, championed melody over harmony as the universalizing element of musical language.⁶⁶ Adolf Bernhard Marx singled out melody for its capacity to stand independently and unadorned: "[M]elody is the simpler substance and precedes and is primary to harmony, which cannot form an artwork by itself, as melody is famously able to do (e.g., in unaccompanied song)."⁶⁷

Whatever the justifying theory, melody attained outsized importance in nineteenth-century musical practice and reception. The usual compositional process was to create music first at the piano and then subsequently orchestrate it, reflecting the subordination of timbre to pitch.⁶⁸ When asked why he preferred to compose for violin, despite his training as a pianist, composer Max Bruch explained that "the violin

another? It is melody.").

62. The composer Jean-Phillipe Rameau, Rousseau's frequent sparring partner in matters of music theory, took the opposite position. He argued that music was a mathematical science whose guiding feature was harmony, not melody. But it was Rousseau's view that won popular support. See Colm Kiernan, *Additional Reflections on Diderot and Science*, 14 *DIDEROT STUD.* 113, 138 (1971) ("Notwithstanding the disapproval of musical connoisseurs, in our own day it is the melodic principle which has triumphed in popular music: to that extent it is Rousseau who has triumphed over Rameau.").
63. See DAVID TRIPPETT, *WAGNER'S MELODIES: AESTHETICS AND MATERIALISM IN GERMAN MUSICAL IDENTITY 70-71* (2013); MATTHEW GELBART, *THE INVENTION OF 'FOLK MUSIC' AND 'ART MUSIC': EMERGING CATEGORIES FROM OSSIAN TO WAGNER 215-16* (2007) (describing the aesthetic theory under which "genius (as nature) had been mapped onto melody and artifice had been mapped onto harmony and counterpoint," leaving melody the "litmus test of originality" in the Romantic era).
64. TRIPPETT, *supra* note 63, at 70-71.
65. *Id.* at 74.
66. See Lawrence Kramer, *The Mysteries of Animation: History, Analysis, and Musical Subjectivity*, 20 *MUSIC ANALYSIS* 153, 160 (2001).
67. TRIPPETT, *supra* note 63, at 71 (quoting and translating A.B. MARX, *DIE ALE MUSIKLEHRE IM STRET IN UNSERER ZEIT* 16 (1841)). German music theorist Johann Mattheson made a similar argument a century earlier in his treatise *The Perfect Chapelmaster*. See EDWARD A. LIPPMAN, *A HISTORY OF WESTERN MUSICAL AESTHETICS* 64 (1992) (quoting Mattheson's position that "[a] piece for one voice even without accompaniment can very well exist, but a so-called harmony without melody is only an empty sound and no vocal piece at all").
68. See KAREN PAINTER, *SYMPHONIC ASPIRATIONS: GERMAN MUSIC AND POLITICS, 1900-1945* 83 (2009).

can sing a melody better than the piano can, and melody is the soul of music.”⁶⁹ Wagner, echoing his contemporaries’ views, pointed to melody as the litmus test for creative talent.⁷⁰ Indeed, a composer who sacrificed tunes for the sake of other musical innovations did so at his own peril. Despite lauding melody as much as his peers did, Wagner himself was excoriated in some circles for ostensibly neglecting it in his operas. Upon hearing Wagner’s music in 1860, one prominent reviewer commented that “[f]ifty years on this path and music will be dead, because we will have killed melody, and melody is music’s soul.”⁷¹ Composer and critic E.T.A. Hoffman summed up the prevailing view when he characterized melody as nothing less than “the primary and most exquisite thing in music.”⁷² As originality ascended to the rank of most desired quality of art music over the course of the Romantic era, a work’s melody became the place where observers went to look for it.⁷³

That primacy begot property. In 1829, German and Austrian music publishers and retailers convened in Leipzig to agree contractually, in the absence of effective statutory copyright protection, that they would not copy each others’ compositions.⁷⁴

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69. CHRISTOPHER FIFIELD, *MAX BRUCH: HIS LIFE AND WORKS* 24 (New ed. 2005). A similar position has been attributed to Joseph Haydn. See Marion M. Scott, *Haydn: Fresh Facts and Old Fancies*, PROCEEDINGS OF THE MUSICAL ASSOC., 68TH SESS. 92 (1942) (recounting Haydn’s comment, “[T]he air—(i.e. the melody)—is the soul of music; it is the life, the spirit, the essence of a composition.”)
70. Richard Wagner, *ZUKUNFTSMUSIK*, in 3 *RICHARD WAGNER’S PROSE WORKS* 333 (trans W. Ashton Ellis, 1894) (“We will start with the axiom that *music’s only form is melody*, that it is not even thinkable apart from melody, that music and melody are absolutely indisseverable. . . . [T]o say that any music has no melody . . . simply announces the composer’s lack of talent, his want of originality, compelling him to cobble up his piece from melodic phrases often heard before, and therefore leaving the ear indifferent.”).
71. Flora Wilson, *Future History: Wagner, Offenbach, and “La Musique de L’avenir” in Paris, 1860*, 30 *OPERA Q.* 287, 298 (2014) (quoting Paul Bernard, *Richard Wagner et La Musique De L’Avenir*, LE MÉNESTREL, Jan. 29, 1860, 65).
72. TRIPPETT, *supra* note 63, at 12 (quoting and translating E.T.A. Hoffman, *Über einen Ausspruch Ausspruch Sachini’s und über den sogenannten Effekt in der Musik*).
73. See GELBART, *supra* note note 63, at 217 (“[S]ince the lasting attachment to melody was now bound to the new criterion of originality as a component of individual genius—the result was a prejudice for melodic originality.”).
74. See F. M. SCHERER, *QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES* 176 (2004). In 1837, Prussia became the first of the German states to grant formal copyright protection to authors. See generally Friedemann Kawohl, *Music Copyright and the Prussian Copyright Act of 1837*, in *NINETEENTH-CENTURY MUSIC: SELECTED PROCEEDINGS OF THE TENTH INTERNATIONAL CONFERENCE* 281 (Jim Samson & Bennett Zon eds. 2002).

Two years later, in a follow-on agreement drafted by composer and conductor Heinrich Dorn, the major publishers specified melody as the relevant substance of those protected compositions: “Melody will be recognized as the exclusive property of the publisher, and every arrangement that reproduces the composer’s notes and is only based on mechanical workmanship should be seen as a reprint and be subject . . . to a fine of 50 Louis d’or.”⁷⁵ Small publishing houses, which couldn’t afford the rights to publish complete operas, protested that they should be able to print at least the hit tunes in new, lighter arrangements.⁷⁶ Citing the previous industry agreement, a major publisher shot back with a dichotomy that continues to influence music copyright today: those who create new melodies are artists, while those who recontextualize those melodies are mere craftsmen. “An illegal reprint,” he explained, “is every reproduction requiring mere mechanical skills if the creation of a modified form is not regarded as an intellectual product itself.”⁷⁷ An arrangement of a preexisting tune met that definition.⁷⁸ In sum, he concluded, “[f]or judgments concerning the publishing rights, the melody is to be presumed as a principle.”⁷⁹ When the Saxon Copyright Act was passed in 1844, it included a provision codifying this industry norm of “property in the melody.”⁸⁰ These developments reflected the legal recognition in Germany that, as musicologist David Trippett notes, melody had become “the main protectable ‘object’ of a musical work.”⁸¹

Around the same time, the propertization of melody was taking hold in common-law jurisdictions.⁸² Likely the earliest judicial decision to define music copyright

75. TRIPPETT, *supra* note 63, at 137 (quoting and translating FRIEDEMANN KAWOHL, URHEBERRECHT DER MUSIK IN PREUSSEN 239–41 (2002)).

76. *See* Kawohl, *supra* note 74, at 290–91.

77. *Id.* at 291 (quoting and translating Friedrich Hofmeister).

78. *Id.*

79. *Id.*

80. Friedemann Kawohl, *Commentary on the Leipzig Music Publishers’ Union Against Piracy (1830)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_d_1830a.

81. TRIPPETT, *supra* note 63, at 137. Germany’s prioritization of melody continues today in Article 24 of its Copyright Act. *See* Act on Copyright and Related Rights, art. 24, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html (providing that a “free use” defense “shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work”).

82. Rousseau’s writings on the aesthetic primacy of melody were widely circulated in Britain. *See* GELBART, *supra* note note 63, at 69.

in these terms came in the 1835 British case *D'Almaine v. Boosey*.⁸³ The dispute concerned a music publisher that had rearranged arias from the 1834 opera *Lestocq* as instrumental dance music. The Court of Exchequer held that the reorchestration did not excuse copying the aria's tune, for "[i]t is the air or melody which is the invention of author, and which may in such cases be the subject of piracy."⁸⁴ When listeners hear music, the court reasoned, they hear melody, and "the mere adaptation of the aria, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same."⁸⁵ The court viewed melody as establishing not just a piece's identity but also its originality. It explained that the melody was "that in which the whole meritorious part of the invention consists The original aria requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment."⁸⁶

This conclusion is especially surprising given the era's doctrinal tolerance for "fair abridgements." Today, the U.S. Copyright Act considers a musical arrangement to be a derivative work, whose preparation would be an infringement unless authorized by the owner of the copyright in the underlying work.⁸⁷ So, too, does the equivalent law in the United Kingdom.⁸⁸ But that legal infrastructure did not exist in 1835.⁸⁹ Instead, defendants were free to argue in equity that the creative effort they had invested in abridging an existing work rendered them authors rather than infringers.⁹⁰ As one court summarized the doctrine, a noninfringing abridgement "should contain an

83. 1 Younge & Coll. Ex. 288 (1835). See also Jane C. Ginsburg, *Opera and Copyright*, THE MEDIA INSTITUTE (Aug. 13, 2013), <http://www.mediainstitute.org/IPI/2013/081313.php> (associating *D'Almaine* with the principle that "the essence of the work is its melody").

84. 1 Younge & Coll. Ex. at 301–02.

85. *Id.* at 302.

86. *Id.*

87. See 17 U.S.C. § 101 (including "musical arrangement" in a statutory list of paradigmatic derivative works).

88. See Copyright, Designs, and Patents Act, 1988, c. 48, § 21(3)(b) (U.K.).

89. See PATRY, *supra* note 48, § 9:98.

90. See *Gyles v. Wilcox*, 2 Atk. 141, 143 (1740) (No. 130) (holding that "abridgments may with great propriety be called a new book," and therefore noninfringing, "because . . . the invention, learning, and judgment of the [secondary] author is shewn in them"); *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.) (citing *Gyles* for the proposition that, under U.S. law, an abridgement was "fair" and noninfringing if it included "real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon"). For more on the intersection between early-nineteenth-century fair abridgement doctrine and *D'Almaine*, see Ginsburg, *supra* note 83.

epitome of the work abridged—the principles, in a condensed form of the original book. . . . To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose.”⁹¹

Arguably, taking individual arias from a lengthy operatic opus and adapting them into light dance music would qualify. Not so, the *D’Almaine* court decided. The relevant unit of analysis for assessing abridgement was neither the opera as a whole nor even the musical setting in which the aria’s tune was embedded. It was, rather, the tune itself. Adapters of musical works thus received far less license to operate without the owner’s permission than did adapters of literary works.⁹²

D’Almaine’s trope of the “mere mechanic in music” versus the innovative melodist migrated to the United States, where it has held sway through the years. In *Jollie v. Jacques*,⁹³ decided in 1850, the defendants had allegedly copied the plaintiff’s piano arrangement of a public-domain polka tune.⁹⁴ The arranger had apparently “expended much labor, time, and musical knowledge and skill, in preparing and producing” the work in suit.⁹⁵ The defendants argued that they had not copied anything material from the plaintiff, who had “made no change in the [polka’s] melody” and therefore had not “added any new matter to the composition, or to the combination of the materials of the original air, but had simply adapted the old melody to the piano-fore.”⁹⁶ Justice Nelson, riding circuit, determined that the case could be resolved only after the presentation of evidence and denied the plaintiff’s motion for a pretrial injunction.⁹⁷ In so doing, he explained in terms virtually identical to *D’Almaine*’s that original melody gets more robust protection than does original orchestration:

The composition of a new air or melody is entitled to protection; and the appropriation of the whole or of any substantial part of it without the license of the author is a piracy. . . . If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty; and the addition of variations makes no difference. The original air requires genius for its con-

91. *Story v. Holcombe*, 23 F. Cas. 171, 172, 174 (C.C.D. Ohio 1847) (No. 13,497)

92. See PATRY, *supra* note 48, §9:98 n.3 (discussing *D’Almaine* and noting that “[m]usical compositions . . . appear to have been treated differently” than literary works).

93. 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437).

94. *Id.* at 912.

95. *Id.* at 913.

96. *Id.*

97. *Id.* at 914.

struction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment.⁹⁸

Across the turn of the century, legal rhetoric in the United States continued to identify melody as the sine qua non of music copyright. Perhaps the most famous Supreme Court encounter with music infringement, the 1908 case *White-Smith Music Publishing Co. v. Apollo Co.*,⁹⁹ characterized a musical work under the Copyright Act of 1870¹⁰⁰ as “the compilation of notes which, when properly played, produces the melody which is the real invention of the composer.”¹⁰¹ The composer’s exclusive right thus covered “the order of notes which produce the air or melody which the composer invented.”¹⁰² The Court ultimately dismissed the case on the now-superseded ground that a musical work recorded in an exclusively machine-readable (rather than human-readable) format like a player-piano roll is not an infringing “copy.” To be sure, the Court’s holding in *White-Smith* was based entirely on the medium in which the defendant had fixed the copyrighted work and thus technically makes no law on what the work is. But even in setting up the dispositive fixation issue, the Court’s discussion of the work itself tellingly dwells on melody as a metonym for music.

Such rhetoric soon cashed out in influencing case outcomes. Shortly after joining the bench in 1909, Judge Learned Hand echoed (though did not cite) *White-Smith*’s characterization of the musical work in his decision in *Hein v. Harris*,¹⁰³ an infringement case that squarely presented the question of how important melody is to the work’s scope. Hand defined a musical composition as a “collocation of notes”

98. *Id.* at 913; *accord* *Daly v. Palmer*, 6 F. Cas. 1132, 1136–37 (C.C.S.D.N.Y. 1868) (No. 3,552) (lauding the reasoning in *Jollie* and *D’Almaine* as “eminently sound and just”). *Jollie*, unlike most of the cases discussed in this section, assessed copyrightability rather than infringement. Another copyrightability case decided similarly under a subsequent version of the statute is *Cooper v. James*, which denied protection for the addition of an alto line to an existing three-part harmony because “anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright.” 213 F. 871, 872 (N.D. Ga. 1914). As in *Jollie*, the court deemed the “tune” to be the relevant work in which originality may subsist. *But see* *Italian Books v. Rossi*, 27 F.2d 1014, 1014 (S.D.N.Y. 1928) (holding that a new arrangement of a folk song could be copyrighted because it “differed in words and music from any version of it that has been proved, although the theme was the same and the music quite similar”).

99. 209 U.S. 1 (1908).

100. Ch. 230, § 86, 16 Stat. 198.

101. *Id.* at 11.

102. *Id.*

103. 175 F. 875 (C.C.S.D.N.Y.), *aff’d*, 183 F. 107 (2d Cir. 1910).

and its infringement as “a similarity [that] is substantially a copy, so that to the ear of the average person the two melodies sound to be the same.”¹⁰⁴ Applying that definition, he instituted a test that would come to be called his “comparative method.”¹⁰⁵ First, he would abstract out any sense of rhythm by changing the time values of the defendant’s notes to match the plaintiff’s (or else simply assigning equal time values to both); then, he would transpose the defendant’s work into the same key as the plaintiff’s work; and last, he would line up the two altered staves side by side and measure the confluence of pitches.¹⁰⁶ In *Hein*, this test led Hand to find infringement based on corresponding pitches in thirteen out of seventeen total bars.¹⁰⁷

When Congress began the copyright reform process that culminated in the Copyright Act of 1909,¹⁰⁸ it was heavily preoccupied with music, thanks to *White-Smith’s* erstwhile holding that player-piano rolls didn’t count as actionable copies. While Congress undid the rule about which embodiments constitute copies,¹⁰⁹ its discussion of the copied music continued *White-Smith’s* rhetorical focus on melodies. Early in the process, the representative of the Music Publishers Association of the United States entered into the Congressional Record an article that all but regurgitated *D’Almaine*, invoking without citation its mantra that “it is the air, or melody, which is the invention of the author.”¹¹⁰ Thorvald Solberg, the first Register

104. *Id.* at 877. The definition was a rare departure from the established rule, endorsed by virtually every other judge—including Hand in later cases—that copyright infringement required not just excessive similarity but also actual copying. See Joseph P. Fishman, *The Copy Process*, 91 N.Y.U. L. REV. 855, 905 (2016).

105. See, e.g., ALFRED M. SHAFTER, *MUSICAL COPYRIGHT* 205 (2d ed. 1939) (“[T]he ‘comparative method’ worked by Judge Learned Hand with great success[] is most useful in deciding where the melody itself is altered—but fundamentally the same as the one allegedly copied.”); Paul W. Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232, 235 (1955) (discussing Hand’s “comparative method” and its “implicit recognition” of an “exaggerated importance of melody”).

106. *Id.*; Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 822 (2016) (noting that Hand’s music copyright opinions “often focused on the melodic component of a work, which he believed endowed the work with its commercial and popular significance” and that “[c]onsequently for copying to be actionable it needed to be of the melody, regardless of how extensive it was”).

107. 175 F. at 876.

108. Act of Mar. 4, 1909, Pub. L. 60–349, ch. 320, 35 Stat. 1075 (1909).

109. See *id.* § 1(e).

110. *Hearings Before the Comms. on Patents of the S. and H.R., Conjointly, on the Bills S. 6330 & H.R. 19853*, 59th Cong. 243 (Dec. 7–11, 1906) (quoting George Furniss, *Copyright from Publisher’s Standpoint Essential to the Development of the Useful Arts—Melody the Creation of Genius—Property Rights*

of Copyrights, likewise remarked at a hearing that “the copyright in musical works” means “the melody or a theme.”¹¹¹ By the time the final legislative text was enacted, it granted the owner of a musical-composition copyright 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”¹¹² Only that single element was isolated from the overall work for purposes of defining the owner’s exclusive ability to reproduce it.

Under the 1909 Act, the trend continued. A popular treatise of the day defined infringement of a musical work as an act of copying that results in a scenario in which “the theme or melody of two works is substantially the same.”¹¹³ Hand employed his comparative method again to find infringement in *Haas v. Leo Feist, Inc.*,¹¹⁴ this time drawing lines between identical pitches on an exhibit showing a note-by-note comparison of the melodies.¹¹⁵

In *Fred Fisher, Inc. v. Dillingham*,¹¹⁶ decided a few years later, Hand at least ventured beyond the primary melodic line—yet still remained fixated on tallying notes elsewhere in the piece. The opinion led off by declaring that “the plagiarism of any substantial component part, *either in melody or accompaniment*,” could support an infringement action.¹¹⁷ Under that standard, Hand imposed liability based on copying not a topline tune but a repeated accompaniment motif called an ostinato.¹¹⁸ Nevertheless, the focus remained on a quantifiable sequence of pitches, albeit ones played to support a primary theme rather than as part of that theme itself. For Hand, the decision remained consistent with his comparative method; the “substantial component part” of which he wrote remained the notes, not their tonal quality or their surrounding harmonic or rhythmic context. Whether he called it a melody or an

Inherent, MUSIC TRADES, Nov. 17, 1906)).

111. STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE FIRST SESSION OF THE CONFERENCE ON COPYRIGHT 104 (June 1, 1905).

112. 1909 Act § 1(e) (emphasis added). The provision also enacted a compulsory license—now found in § 115 of the current Copyright Act—that allowed second comers to record their own arrangements of previously recorded works, commonly called cover versions. *Id.*

113. WILLIAM B. HALE, A TREATISE ON THE LAW OF COPYRIGHT AND LITERARY PROPERTY § 320, at 1147 (1917).

114. 234 F. 105 (S.D.N.Y. 1916).

115. See *Haas v. Leo Feist, Inc.*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <http://mcil.usc.edu/cases/1910-1919/Pages/haasleofeist.html>.

116. 298 F. 145 (S.D.N.Y. 1924).

117. *Id.* at 147 (emphasis added).

118. *Id.*

accompaniment, what Hand cared about in a music case was the pitches.¹¹⁹

While other judges weren't as punctilious note counters as Hand was, the results were similar. In *Boosey v. Empire Music*,¹²⁰ for example, the court was tasked with comparing a plaintive English love ballad and a Tin Pan Alley ragtime number about Tennessee. The only similarity was the use of a six-note motif for the recurrent phrase "I hear you calling me."¹²¹ That was enough. The court decided that the sequence of notes functioned as what we might today call the song's hook, providing "the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater."¹²² Yet the court candidly acknowledged that its judgment had little to do with market substitution. It was under no illusion that the audience for one work would actually buy copies of the other:

[T]he sale of defendant's composition cannot interfere with the sale of plaintiffs' composition by virtue of the inherent difference, generally speaking, of the tastes to which they appeal; and therefore the case is not one where plaintiffs' commercial exploitation of their composition is interfered with, but one which involves solely the rights under the statute.¹²³

To justify an infringement finding on the ground that rights were violated is, of course, tautological. The real question is what could make six notes a legally protectable unit. In *Empire Music*, the answer wasn't economics. More likely, it was the aesthetic norm of nineteenth-century European art music, along with its judicial mouthpieces *D'Almaine* and *Jollie*: melody is the locus of genuine musical creativity.

The clearest articulation of this principle came a few decades later in *Northern Music Corp. v. King Record Distributing Co.*¹²⁴ The court began its discussion by positing that the frontier of musical innovation had essentially closed for all but melody. The supply of fresh rhythms (which the court conflated with tempo) had been "long since exhausted," leaving originality in the domain "a rarity, if not an impossibility."¹²⁵ Likewise, harmony "is achieved according to rules which have been

119. Hand did suggest that notes beyond a topline melody were less important, concluding that the copying was harmless because "the piece won its success substantially because of the melody" and so awarding the minimum allowable damages. *Id.*

120. 224 F. 646 (S.D.N.Y. 1915).

121. *See id.* at 647 ("The two compositions are considerably different, both in theme and execution, except as to this phrase, 'I hear you calling me,' and, as to that, there is a marked similarity.").

122. *Id.*

123. *Id.*

124. 105 F. Supp. 393 (S.D.N.Y. 1952).

125. *Id.* at 400.

known for many years.”¹²⁶ The result, according to the court, is a categorical exclusion of these elements, for “[b]eing in the public domain for so long neither rhythm nor harmony can in itself be the subject of copyright.”¹²⁷ Melody is all that remains, and it is melody alone that would provide the musical work its ontological status:

It is in the melody of the composition—or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity.¹²⁸

This is a striking statement. Confusion over how to define copyright’s central unit of measurement—the work—is one of the most familiar sources of anxiety in the field.¹²⁹ And yet here the answer, at least for musical works, is presented with elegant simplicity. The musical work is the melody—no more, no less.¹³⁰

126. *Id.*

127. *Id.* At least one commentator has explicitly endorsed this categorical view. See Sherman, *supra* note 5, at 126 (“It has been said that originality in rhythm is an impossibility, and this view is probably correct.”).

128. 105 F. Supp. at 400.

129. See, e.g., House Comm. on the Judiciary, 88th Cong., Copyright Law Revision, Part 4, at 158 (testimony of Barbara Ringer that “courts have struggled mightily with this rather common problem, and have not really come up with a satisfactory result”); Paul Goldstein, *What is a Copyrighted Work? Why Does it Matter?*, 58 UCLA L. REV. 1175, 1175 (2011) (noting that the Copyright Act “extends its protection to ‘original works of authorship,’ [but] nowhere in fact delimits the metes and bounds of a copyrighted work, or even prescribes a methodology for locating a work’s boundaries”); Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 FORDHAM. L. REV. 575, 576 (2005) (“American copyright law is an enormous legal structure, full of defined terms, all built on one completely undefined term: the ‘work.’ . . . But the law runs silent on the foundational concept on which these definitions are built.”).

130. *Northern Music* has provoked occasional frustration. For earlier critiques, see Brauneis, *supra* note 48, at 17–18 (criticizing *Northern Music* for “fail[ing] to recognize that copyright protects a musical work as a whole” and that a combination of individually unprotectable elements may itself be protected); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 431 (1988) (“If only melody can be original, if melody is the sole measure of a work’s identity, no change which the defendant makes in harmony or rhythm could possibly matter. In the eyes of the law, such changes would be as irrelevant as changing the color of the paper in [a] hypothetical photocopier.”); Orth, *supra* note 105, at 234–35 (arguing that *Northern Music* “is inaccurate musically, and may well beg the consideration that melodies are often best disguised by using harmonies and rhythms, even old ones, to achieve a seemingly ‘original’ combination,” but still conceding that “in musical infringement cases the courts have been predominantly concerned with melody”).

B. The Emergence of Multidimensional Similarity

In the time since the passage of the current Copyright Act in 1976,¹³¹ the picture has gotten hazier. It's not that the statute has added new information about what a musical work is. Because Congress believed that the term had a "well settled meaning,"¹³² the 1976 Act, like its predecessors, does not define it.¹³³ The Act provides only that musical works—whatever they may be—are protectable works of authorship.¹³⁴ Music, like other works, continues to receive seemingly open-ended protection against copying any amount of expression that is deemed sufficiently substantial.¹³⁵ The 1976 Act also retains the 1909 Act's narrow requirement of melodic consistency in cover songs,¹³⁶ allowing artists to avail themselves of the compulsory license even when modifying the musical arrangement "to conform it to the style or manner of interpretation of the performance involved," just so long as it does not "change the basic melody or fundamental character of the work."¹³⁷

Instead, the uncertainty is coming from the courts. On the one hand, some judicial decisions continue the pattern set over the previous century, from the German publishers' agreements to *Northern Music's* declaration that elder generations had already devoured all the original rhythms and harmonies. Music industry norms, too, reflect that pattern today, showing less tolerance for borrowings of melody than of other elements. On the other hand, decisions expanding the scope of music infringement liability have slowly accrued, punctuated by the *Blurred Lines* decision. The upshot is growing confusion over what can be copied and what cannot.

131. Pub. L. No. 94-553, 90 Stat. 2541.

132. H.R. Rep. No. 94-1476, at 53 (1976).

133. See 17 U.S.C. § 101 (defining various categories of copyrightable subject matter, including architectural works, audiovisual works, and literary works—but not musical works).

134. *Id.* § 102(a)(2).

135. H.R. Rep. No. 94-1476, at 61–62 (1976); S. Rep. No. 94-473, at 58 (1975) ("As under the present law, a copyrighted work would still be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement so long as the author's 'expression' rather than merely the author's ideas are taken.").

136. See *supra* note 112.

137. 17 U.S.C. § 115(a)(2).

1. Cases Retaining the Traditional Approach

In terms of case law, one can still find support for the proposition that melody is king. To be sure, not many infringement decisions these days expressly exclude non-melodic elements as *Northern Music* did, though a few still do.¹³⁸ Even so, sometimes the takeaway amounts to something similar. In *Newton v. Diamond*,¹³⁹ the Ninth Circuit decided 2–1 that the Beastie Boys could not be held liable for sampling a short phrase from a composition by jazz flautist James Newton. The separate copyright in Newton’s sound recording was not at issue, leaving the court only to determine the scope of the musical work that was embodied within it. As displayed below in Figure 1, Newton’s score instructed the performer to sing the notes C, D-flat, and then back to C while also simultaneously playing a held C on the flute.¹⁴⁰ In the sampled recording, Newton performed the phrase by overblowing the single flute note “in such a way as to emphasize the upper partials of the flute’s complex harmonic tone [although] such a modification of tone color is not explicitly requested in the score.”¹⁴¹ The result was a distinctive timbre, a sequence whose pitches are perfectly commonplace but whose tonal quality is anything but. The court concluded that this timbre was merely “the result of Newton’s highly developed performance techniques, rather than the result of a generic rendition of the composition”—and therefore not part of the musical work copyright.¹⁴² Once shorn of the timbral characteristics that made the sampled music even remotely interesting, the three-note phrase presented

138. See *Siskind v. Newton-John*, No. 84 Civ. 2634, 1987 WL 11701, at *5 (S.D.N.Y. May 22, 1987) (quoting *Northern Music* for the proposition that “it is the melody which is the most important feature of the music” and therefore finding no infringement based on a lack of melodic similarity); *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 450 & n.9 (S.D.N.Y. 1976) (finding infringement based on a confluence of successive pitches and quoting with approval *Northern Music’s* passage about melody being the composition’s “fingerprints”); see also *Johnson v. Gordon*, 409 F.3d 12, 23 (1st Cir. 2005) (holding that a particular harmonic progression was not copyrightable and quoting with seeming approval *Northern Music’s* categorical exclusion of harmonic originality, although acknowledging that “there may be some circumstances in which a common harmonic progression could be exploited in an original (and, thus, protectable) manner”); Cronin, *supra* note 2, at 192 (noting contemporary examples of litigants continuing to employ Hand’s method of melodic comparison).

139. 388 F.3d 1189 (9th Cir. 2004).

140. *Id.* at 1191.

141. *Id.* at 1194 (brackets in original).

142. *Id.* at 1195.

an easy case of *de minimis* use.¹⁴³



FIG. 1: SCORE FROM *NEWTON V. DIAMOND*

For my purposes here, I needn't quibble with the ultimate judgment of noninfringement. But the court's rationale underlying that judgment betrays the same narrow definition of the musical work that motivated the earlier decisions discussed in the previous subsection. Funmi Arewa has argued that this case reveals judges' "visual bias" in music copyright disputes, gravitating toward the sometimes-sparse markings on the score rather than the fulsome aural expression through which most audiences experience the piece.¹⁴⁴ I agree that courts are susceptible to such biases and that *Newton* is a good example of it.¹⁴⁵ There's yet another problem, however, with the majority's analysis. The score arguably (at least arguably enough to survive summary judgment) instructs the very realization that the majority ascribed purely to the per-

143. *Id.* at 1198.

144. See Arewa, *supra* note 45, at 502–05.

145. For an even more recent and higher-profile example, consider the lawsuit against Led Zeppelin over the opening riff of *Stairway to Heaven*. See *Skidmore v. Led Zeppelin*, No. 15-CV-03462, 2016 WL 1442461, at *16 (C.D. Cal. Apr. 8, 2016) (finding that plaintiff's experts assessing the similarity between musical works impermissibly relied on "performance elements" that were "beyond the scope of the musical composition," including fingerpicking style, use of an acoustic guitar, flute, strings, and harpsichord; use of "atmospheric sustained pads"; and the music production and mixing process).

former's interpretive choice. As the dissent emphasized in seizing on the explanation of one of Newton's experts, "the special playing technique described in the score (holding one fingered note constant while singing the other pitches) and the resultant complex, expressive effect that results" actually shows "that the 'unique expression' of this excerpt is not solely in the pitch choices, but is actually in those particular pitches performed in that particular way on that instrument."¹⁴⁶ Thus, in the dissent's view, "the 'playing technique' is not a matter of personal performance, but is a built-in feature of the score itself."¹⁴⁷

The majority did not, in fact, straightforwardly apply a rule that the composition is limited to the notation on the page.¹⁴⁸ It first needed to evaluate how much was actually on the page to begin with. Part of what may be driving the majority to filter out timbre and instrumentation *in spite of* the score is the background belief that the tune is the text. Everything else is its interpretation. Indeed, one subsequent decision has followed *Newton's* lead in allocating timbral creativity to performance rather than to composition even without a written score to fall back on.¹⁴⁹

2. Cases Promoting a Broader Approach

At the same time, however, another set of recent cases has quietly chipped away at the doctrinal wall around melody. The first change came in *Tempo Music, Inc. v. Famous Music Corp.*¹⁵⁰ The case concerned the copyrightability of harmonies that Duke Ellington's frequent collaborator Billy Strayhorn composed for the jazz song *Satin Doll*. Ellington's estate, which stood to retain a larger royalty share if Strayhorn's estate had no copyright interest in the harmony, argued right out of the *Northern Music* playbook that "harmony can never be the subject of copyright" because it "is in the common musical vocabulary; only the melody and structure are distinctively original."¹⁵¹ But breaking from the old view that music consists first of melodic originality

146. *Newton*, 388 F.3d at 1198 (Graber, J., dissenting) (quoting the opinion of U.C. Irvine composition professor Christopher Dobrian).

147. *Id.* at 1198 (Graber, J., dissenting).

148. Arguably the majority even departed from such a rule. See Brauneis, *supra* note 48, at 37 (arguing that the *Newton* dissent "may be more purely following the notation approach, acknowledging that written notation often includes special directions that shape timbre and not just pitches and duration")

149. See *Poindexter v. EMI Record Grp.*, No. 11 Civ. 559(LTS)(JLC), 2012 WL 1027639 (S.D.N.Y. Mar. 27, 2012).

150. 838 F. Supp. 162 (S.D.N.Y. 1993).

151. *Id.* at 168. That anyone would take this position in the name of Ellington, one of jazz's great harmonic

and afterward only mere mechanics,¹⁵² the court determined that “while . . . melody generally implies a limited range of chords which can accompany it, a composer may exercise creativity in selecting among these chords. . . . Creating a harmony may, but need not, be merely a mechanical by-product of melody.”¹⁵³ It rejected the contrary reasoning of *Northern Music*, a decision from the same court, as unpersuasive dicta.¹⁵⁴

Tempo Music, though, was a copyrightability case, asking only whether the creator of a particular artistic element within a work met copyright’s threshold of authorship. What about the infringement side of the equation—could a second comer be liable for copying part of a musical work other than its tune (or lyrics)? Increasingly, courts are answering yes. In *BMS Entertainment/Heat Music LLC v. Bridges*,¹⁵⁵ for example, the court refused to dismiss an infringement claim against hip hop artists Ludacris and Kanye West for allegedly copying a refrain that combined (a) a call-and-response format; (b) the lyrics “like that” preceded by a one-syllable word (“just like that” in one song and “straight like that” in the other); and (c) a rhythmic pattern of an eighth note, quarter note, and eighth note.¹⁵⁶ Recognizing that each of these elements might have been unprotectable standing alone, the court nevertheless invoked the bedrock copyright principle that “unoriginal elements, when combined, may constitute an original, copyrightable work.”¹⁵⁷ Like the *Blurred Lines* litigation a decade later, the case would only be resolved after a high-profile trial against celebrity defendants; unlike in that litigation, however, the defendants won.¹⁵⁸

A similar emphasis on rhythm and tone quality drove the Sixth Circuit to uphold an infringement verdict in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*¹⁵⁹ That case turned on the defendants’ use of samples from the George Clinton funk song *Atomic Dog*. The relevant copyright was in the musical composition, rather than in the sound recording, but the court effectively collapsed the distinction.¹⁶⁰ It con-

innovators, is deeply ironic. See *infra* Part II.A.

152. See *supra* text accompanying note 86 through note 98.

153. 838 F. Supp. at 168.

154. *Id.* at 169.

155. No. 04 Civ. 2584(PKC), 2005 WL 1593013 (S.D.N.Y. July 7, 2005).

156. *Id.* at *5.

157. *Id.* at *3 (citing *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995)).

158. See *Kanye, Ludacris Prevail in Copyright Case*, BILLBOARD (June 2, 2006), <http://www.billboard.com/articles/news/58252/kanye-ludacris-prevail-in-copyright-case>.

159. 585 F.3d 267 (6th Cir. 2009).

160. See *id.* at 276 (“[T]he song was composed and recorded in the studio simultaneously and,

cluded that Clinton’s “repetition of the word ‘dog’ in a low tone of voice at regular intervals and the sound of rhythmic panting” were integral elements of the musical work.¹⁶¹ The jury thus properly considered them in finding that the defendants infringed.

Arguably the most expansive definition of the musical work so far arrived in the 2015 decision *New Old Music Group, Inc. v. Gottwald*.¹⁶² The court there concluded that a work could infringe merely by copying a work’s percussion, entirely independent of the melodies and harmonies surrounding it. The dispute hinged on a claim “based solely on the drum set part of [the allegedly copied work], and not on the parts played by any other instruments,” meaning that there were “no other harmonic, melodic or lyrical similarities” between them.¹⁶³ The court denied the defendants’ summary judgment motion based on an original combination of elements within the drum pattern, which in the court’s estimation could “reasonably be described as the driving groove, or backbone, of the song.”¹⁶⁴

The defendants tried to argue that the percussion pattern was prevalent within the genre. That prevalence, they stressed, undermined any inference of actual copying and, moreover, rendered any material that might have been copied freely appropriable anyway under copyright’s *scènes à faire* doctrine.¹⁶⁵ The representative examples that they submitted each bore fine-grained differences from the plaintiff’s work, such as use of a tambourine or open hi-hat instead of a closed hi-hat.¹⁶⁶ The defendants contended—understandably, given the history of music copyright—that “a composition does not change based upon the instrument which performs it.”¹⁶⁷ The court disagreed, however. Citing dicta from a prior infringement case that had been decided based on garden-variety melodic content, the court determined that “instrumenta-

therefore, . . . the composition was embedded in the sound recording.”).

161. *Id.* at 272, 275.

162. 122 F. Supp. 3d 78 (S.D.N.Y. 2015).

163. *Id.* at 83.

164. *Id.* at 95–97.

165. *Id.* at 87–88, 95. Under that doctrine, “a copyright owner can’t prove infringement by pointing to features of his work that are found in the defendant’s work as well but that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.” *Gaiman v. McFarlane*, 360 F.3d. 644, 659 (7th Cir. 2004) (internal quotation marks omitted).

166. 122 F. Supp. 3d at 87–88.

167. *Id.* at 87 (quoting Reply Br. at 11).

tion is . . . a compositional component to a musical work.”¹⁶⁸ That conclusion meant that the plaintiff’s particular percussion choices were original enough, and the defendants’ alleged copying substantial enough, to merit a trial.

Together, *Bridgeport* and *New Old Music* explode the division that *Newton* erects between the musical work and its performative realization. Substantial similarity doctrine prevents copying “the heart” of the work;¹⁶⁹ one can no longer assume that the heart is to be found in a sequence of pitches. The legal terrain is now fertile for claims focusing elsewhere. Unsurprisingly, copyright owners have begun to make them, filing multiple complaints that test the definition of music infringement.¹⁷⁰ One legal news outlet declared 2016 “The Year the Music Sued.”¹⁷¹

That disappearing boundary doubly constrains downstream composers. First, it expands the set of choices that a predecessor can make to transform the common and unprotected into the uncommon and protected. (Think you’re just copying a stock rhythm? If it’s packaged within an original orchestration, you may be infringing). Second, surrounding that rhythm with an entirely different melody—what law had for so long considered to be the site of a musical work’s identity—may still yield a substantially similar composition. One cannot rely on melodic dissimilarity as a safe harbor.

This shift is still unsettled enough that courts may wind up shoehorning elements into the familiar melody box even when they don’t really belong there. When the plaintiff sued musicians Usher and Justin Bieber for plagiarizing his song *Somebody to Love* in their identically-titled hit, he alleged a wide range of similarities but

168. *Id.* at 88 (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir.2004), for the proposition that elements of a musical composition include “timbre, tone, . . . [and] interplay of instruments”).

169. *See, e.g.*, *Harper & Row Publ’ns v. Nation Enters.*, 471 U.S. 539, 564–65 (1985); *Elsmere Music, Inc. v. NBC, Inc.*, 482 F. Supp. 741, 744 (S.D.N.Y.), *aff’d*, 623 F.2d 252 (2d Cir. 1980) (holding that copying a quantitatively small portion of a musical work could support an infringement finding if that portion is “the heart of the composition”).

170. *See, e.g.*, Compl. ¶ 66, *Yours, Mine & Ours Music v. Sony Music Ent’tmt*, No. 16-CV-8056 (C.D. Cal. Oct. 28, 2016) (alleging infringement over copying the “main instrumental attributes and themes,” such as “the distinct funky specifically noted and timed consistent guitar riffs present throughout the compositions, virtually if not identical bass notes and sequence, rhythm, structure, crescendo of horns and synthesizers”); Compl. ¶¶ 14–16, *Miller v. Lovato*, No. 16-CV-6272 (C.D. Cal. Aug. 22, 2016) (alleging infringement over copying a combination of hand claps and bass drum rhythms, along with “sonic qualities” such as signal decay); Compl. ¶¶ 68–69, *Dienel v. Warner-Tamerlane Publ’g Corp.*, No. 16-CV-978 (M.D. Tenn. May 25, 2016) (alleging infringement over copying a vocal timbre which is “inextricably linked” to the plaintiff’s composition and “the seed from which the entire song grows”).

171. Bill Donahue, 2016: *The Year the Music Sued*, LAW360 (Jan. 13, 2017 5:06 PM), <https://www.law360.com/articles/880127/2016-the-year-the-music-sued>.

conspicuously left out the melody.¹⁷² Realistically, he couldn't have included it, as the melodies had little in common.¹⁷³ The defendants predictably pounced on this omission, arguing that “melody is paramount” and quoting *Northern Music's* infamous passage.¹⁷⁴ The district court dismissed the complaint under Rule 12(b)(6) without much discussion.¹⁷⁵ On appeal, however, the Fourth Circuit vacated and remanded after reaching the opposite conclusion.¹⁷⁶ The appeals court acknowledged that the songs belonged to different genres (R&B versus dance pop/electronica, in the court's taxonomy) and that “numerically, the points of dissimilarity may well exceed the points of similarity.”¹⁷⁷ Nevertheless, it concluded—without the benefit of expert evidence—that a reasonable jury could still find substantial similarity based on the songs' choruses, in which the eponymous line “somebody to love” is sung to what the court characterized as “a strikingly similar melody.”¹⁷⁸ The court hedged on this last point, noting that “it sounds as though there are a couple of points in the respective chorus melodies where the Bieber and Usher songs go up a note and the Copeland song goes down a note, or vice versa,” but determined that a jury could look past these contrasts.¹⁷⁹

Yet melody can't be doing the work that the court assigns to it—the notes simply don't line up in a meaningful way.¹⁸⁰ So if not melody, what really motivated the Fourth Circuit? My guess (and one can't do much more than guess, given the scant explanation in the opinion) is that the answer lies in the close of the opinion, where the court noted that in both works “the singing of the titular lyric is an anthemic,

172. Compl. ¶ 47, *Copeland v. Bieber*, No. 13-CV-246 (E.D. Va. May 2, 2013).

173. See *Copeland v. Bieber*, MUSIC COPYRIGHT INFRINGEMENT RESOURCE, <http://mcir.usc.edu/cases/2010-2019/Pages/copelandvbieber.html> (“The pitch sequences of the settings, despite the fact that they are both minimal and unoriginal, are dissimilar. Copeland's starts on the home pitch, rises by a fifth and resolves a fourth *above* home whereas Bieber's begins a third above home, rises a second, and resolves *to* home.”).

174. See Mem. of Law in Support of the Universal Music Corp. and Def Jam Music Group Defs.' Mot. to Dismiss Complaint for Failure to State a Claim as a Matter of Law, *Copeland v. Bieber*, No. 13-CV-246, at 11 (E.D. Va. June 28, 2013).

175. See *Copeland v. Bieber*, No. 13-CV-246, 2014 WL 10935943, at *6 (E.D. Va. Mar. 28, 2014) (finding no substantial similarity as a matter of law because the two songs' “mood, tone, and subject matter differ significantly”).

176. 789 F.3d 484 (4th Cir. 2015).

177. *Id.* at 492–93.

178. *Id.* at 494.

179. *Id.*

180. See *supra* note 173.

sing-along moment, delivered at a high volume and pitch.”¹⁸¹ That is, the real similarity is the use of the same few words and the same dynamics at the same spot in the song in order to create a memorable tune, albeit a tune with different notes. But that’s not the mode of analysis that music infringement cases usually follow. Historically they examine melodies, a fact the court amply demonstrated when it cited to a string of cases that assessed similarity by tallying pitches.¹⁸² The court suggested that it was doing the same thing, even when it wasn’t.

Where we’re left today is a state of uncertainty over what kinds of musical borrowing can count as infringement. We may yet learn more when the Ninth Circuit decides the pending appeal of the *Blurred Lines* decision. Either way, however, the doctrine needs a normative framework for assessing how law *should* define the musical work. If law is going to regulate a *res* that it calls music—and it’s going to—then it needs a better idea of what the definition is supposed to do.

II. THE AESTHETICS AND ECONOMICS OF MELODY

As it happens, law isn’t the only field that has struggled to nail down the ontology of the musical work. Judges have stepped, likely without knowledge and certainly without acknowledgement, into a long-running debate between philosophers.¹⁸³ One camp, sometimes called the pure sonicists, posit that the work is constituted by its melody, rhythm, and harmony, which are the features that structurally organize the work’s note relationships.¹⁸⁴ Timbre and orchestration, pleasurable as they may be to the listener, do not subsist in the work as essential qualities. Thus, on this theory, Bach’s *Well-Tempered Clavier* would remain the same piece whether performed on a piano, a harpsichord, or a woodwind quartet,¹⁸⁵ and one of its fugues would remain

181. 780 F.3d at 495.

182. *Id.* at 493–94.

183. For an overview, see generally Andrew Kania, *The Philosophy of Music* § 2, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2014 ed.), <http://plato.stanford.edu/archives/spr2014/entries/music/>.

184. *Id.* A forceful proponent of this view is Roger Scruton, who argues that “[i]n describing the timbre of a tone we are not situating it in musical space; nor are we identifying that is essential to it as a musical individual. This is why orchestrations, reductions, and so on are, as a result, heard as versions of a piece, rather than as new musical entities.” ROGER SCRUTON, *THE AESTHETICS OF MUSIC* 77 (1997); see also William E. Webster, *A Theory of the Compositional Work of Music*, 33 J. AESTHETICS & ART CRITICISM 59 (1974).

185. SCRUTON, *supra* note 184, at 442.

the same fugue even if played on a choir of kazoos.¹⁸⁶ Another camp, sometimes called timbral sonicists, insist that simply getting the right pitches in the right order isn't enough; there also needs to be the right tone quality.¹⁸⁷

Throughout much of its history, copyright law has seemingly adopted a fragmented version of pure sonicism. The musical work as legal object amounts not even to a combination of melody, rhythm, and harmony, but more narrowly to melody in particular. The work reduces to a sequence of pitches that play out over time, even if divorced from those pitches' harmonic and rhythmic context.¹⁸⁸ On the other hand, when a more recent decision like *New Old Music*¹⁸⁹ parses between closed hi-hats and open hi-hats performing the same rhythm, law is adopting an equally fragmented version of timbral sonicism. On that theory, the sounds that matter are the rhythmic beats in what we perceive to be an authentic timbral context, whether or not they are in what we perceive to be an authentic melodic context.

I mention this divide not because I expect that philosophical jargon is going to pave the way out of copyright's definitional mess. In fact, if a judge ever mentions "timbral sonicism" in support of a decision, something has surely gone wrong. But at least the philosophers acknowledge that they are choosing sides on a contestable issue of aesthetics. Judicial opinions don't. Musicologist Joanna Demers captures the phenomenon well when she describes copyright law as constructing an implicit "hierarchy within the musical work" like something out of Aristotle, distinguishing between the "essential" substance of melody and the "accidental" ones of harmony, rhythm and timbre.¹⁹⁰

186. Peter Kivy, *Orchestrating Platonism*, in *AESTHETIC DISTINCTION* 42, 55 (T. Anderberg et al., eds. 1988).

187. See, e.g., Julian Dodd, *Sounds, Instruments, and Musical Works*, in *PHILOSOPHERS ON MUSIC: EXPERIENCE, MEANING, AND WORK* 23, 27–31 (Kathleen Stock ed. 2007). Though it's beyond my scope here, an even more rigorous test for identity between two works has been offered by instrumentalists (a term with a rather different meaning in this context than it does when applied to, say, Oliver Wendell Holmes). These analysts demand a match not only between timbres but also between the performance means through which they are produced. A harpsichord sonata played on a synthesizer that perfectly recreates a harpsichord sound is not the same work as the sonata played on a real harpsichord. See JERROLD LEVINSON, *MUSIC, ART, AND METAPHYSICS* 394–95 (2d ed. 2011) ("Part of the expressive character of a piece of music as heard derives from our sense of how it is being made in performance, and our correlation of that with its sonic aspect—its sound—narrowly speaking; and its expressive character tout court is partly a function of how it properly sounds taken in conjunction with how that sound is meant to be produced in performance.").

188. See, e.g., *Boosey v. Empire Music, Inc.* 224 F. 646 (S.D.N.Y. 1915).

189. 122 F. Supp. 3d 78 (S.D.N.Y. 2015).

190. Demers, *supra* note 5, at 310.

That courts have partaken in that hierarchizing for so long is puzzling. This is not how copyright usually works. To establish infringement, courts have long obligated plaintiffs to show “substantial similarity” between the accused and protected work.¹⁹¹ That requirement, which kicks in only after it has been shown that the defendant copied *something* from the plaintiff, is essentially a judge-made materiality threshold in all infringement actions.¹⁹² And so long as the copied expression is qualitatively material within the protected work, even a fragment will do.¹⁹³

In non-music cases, there are multiple elements of any given work that can cross that threshold. In the visual arts, for example, there is no single component of a work that exerts a gravitational pull on the infringement analysis. As Learned Hand explained in a 1960 case over fabric designs, “no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.”¹⁹⁴ Factfinders, he wrote, should simply consult the works’ “overall appearance.”¹⁹⁵ This refusal to single out a dominant element is especially noteworthy coming from the same judge who preferred to ap-

191. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“[T]he question is whether the part so taken is substantial.”); PATRY, *supra* note 48, § 9:59 (“For copying to constitute infringement, a defendant must have reproduced a material amount of the plaintiff’s expression, or as is frequently stated, the parties’ works must be ‘substantially similar.’”). For early statements of this part of the infringement standard, see *Perris v. Hexamer*, 99 U.S. 674, 678 (1878) (stating that in order to infringe the reproduction right, “a substantial copy of the work or a material part must be produced”); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (explaining that infringement occurs “if so much is taken, that . . . the labors of the original author are substantially to an injurious extent appropriated by another”).

192. See Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 206 (2012) (explaining that substantial similarity doctrine “places the burden to establish that the defendant’s copying is actionable as a legal proposition on the plaintiff in a copyright-infringement suit, even when the copying is shown to exist as a factual matter.”); EATON SYLVESTER DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 409 (1879) (stating that the substantial similarity inquiry “is equally applicable to maps, charts, pictorial productions, musical compositions, and in short all things which are the subjects of copyright”); PATRY, *supra* note 48, § 9:59.

193. See *Harper & Row Publ’ns v. Nation Enters.*, 471 U.S. 539, 543 (1985). The doctrine goes back a long way. See, e.g., *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (No. 13,497) (“The infringement of a copyright does not depend so much upon the length of the extracts as upon their value.”); *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Ma. 1839) (No. 5,728) (“[T]he question may naturally turn upon the point, not so much of the quantity, as of the value of the selected materials.”).

194. *Peter Pan Fabrics, Inc. v. Martin Werner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

195. *Id.* In that case, the court based its infringement holding on similarities in colors, shapes, and patterns.

proach music cases by carving up works into abstract sequences of pitches.¹⁹⁶

And so it continues today. Recent case law has explained that a defendant can infringe a visual work:

not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff's work of art—the excerpting, modifying, and arranging of public domain compositions, if any, together with the development and representation of wholly new motifs and the use of texture and color, etc.—are considered in relation to one another.¹⁹⁷

The decision in which this quote appears found infringement for copying the selective *omission* of visual motifs from a public domain design.¹⁹⁸ Another found infringement for copying the color scheme of the letters on an alphabet quilt.¹⁹⁹ In another, it was making a greeting card by copying a rough amalgamation of “the characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words.”²⁰⁰ And in yet another, it was for copying well-worn subject matter using the same “sketchy, whimsical style” as the original artist.²⁰¹ One cannot review these cases and come away with a rule that courts will focus on a particular visual element. A given case might turn on form, color, space, or the intersection of any of the above.

Theatrical works are subject to a similarly multidimensional infringement analysis. Over a century ago, courts began finding infringement based on copying not just dialogue but also wordless dramatic action.²⁰² One could infringe the copyright in a

196. See *supra* text accompanying note 103 through note 119 (discussing Hand's comparative method).

197. *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003).

198. *Id.* at 136.

199. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 273–74 (2d Cir. 2001); see also *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995) (finding infringement of a sweater design due to copying a combination of “(1) selecting leaves and squirrels as its dominant design elements; (2) coordinating these design elements with a ‘fall’ palette of colors and with a ‘shadow-striped’ . . . or a four-paneled . . . background; and (3) arranging all the design elements and colors into an original pattern for each sweater.”); *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112 (2d Cir. 1980) (finding the depiction of two nature scenes substantially similar due to common coloring, shading, composition, relative size and placement of components, and mood).

200. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

201. *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712–13 (S.D.N.Y. 1987). The case concerned the famous cover of *The New Yorker* magazine that portrayed “a parochial New Yorker's view of the world” in which Manhattan is larger than the rest of the planet. *Id.* at 710.

202. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911) (“Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion without the aid of a word.”); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55–56 (2d Cir. 1936) (“[A] play may be pirated without

novel or a film not just by copying its literal words, but also by copying details from its plot,²⁰³ its fictionalized setting,²⁰⁴ or its characters.²⁰⁵ Thanks to a series of recent judicial decisions, one could add to the list even its distinctive inanimate objects.²⁰⁶ For films, cinematographic effects and visual details get tacked on, too.²⁰⁷

To be sure, the infringement frameworks for these various fields weren't born this way. Over time, they've come to protect smaller and smaller chunks of expres-

using the dialogue Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very look of the actors themselves.”); *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3552) (“[I]t is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.”)

203. See, e.g., *Shaw v. Lindheim*, 919 F.2d 1353, 1362–63 (9th Cir. 1990) (cataloging various plot similarities and concluding that “[e]ven if none of these plot elements is remarkably unusual in and of itself, the fact that both scripts contain all of these similar events should give rise to a triable question of substantial similarity of protected expression.”); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55 (2d Cir. 1936) (finding infringement based on a common “sequence of confluent” in the two works’ plots).
204. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979); Steven D. Jamar & Christen Banca Glenn, *When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction*, 1 TEX. A&M L. REV. 959, 966 (2014) (“Creating a completely imaginary world ‘in a galaxy far, far away’ in a setting long, long ago might be protected, if it is sufficiently well-drawn to distinguish it from every other world or universe.”).
205. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Warner Bros. Pictures v. CBS*, 216 F.2d 945 (9th Cir. 1954); *Detective Comics, Inc. v. Bruns Publ'ns, Inc.*, 111 F.2d 432, 433–34 (2d Cir. 1940); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Lone Wolf McQuade Assocs. v. CBS, Inc.*, 961 F. Supp. 587 (S.D.N.Y. 1997); *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995); *Universal City Studios v. Film Ventures Int'l*, 543 F. Supp. 1134 (C.D. Cal. 1982).
206. See, e.g., *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (finding that the Batmobile is independently copyrightable as an anthropomorphized literary character); *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001) (recognizing a copyright in Freddie Krueger’s glove because it was a “component part of the character which significantly aids in identifying the character”).
207. See *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353 (N.D. Ill. 1989) (holding that a jury could find substantial similarity between two commercials based on common uses of silence and black backgrounds with white lettering in several scenes); *Chuck Blore & Don Richman Inc. v. 20/20 Advert. Inc.*, 674 F. Supp. 671, 677–78 (D. Minn. 1987) (extending protection in an audiovisual work to “the rapid-edit style and use of close-ups inherent in the visual style and tone”); see also *Atari, Inc. v. Midway Mfg. Co.*, 672 F.2d 607 (7th Cir. 1982) (finding two video games to be substantially similar audiovisual works based on their shared treatment of a “gobbler” and “ghost monsters”).

sion.²⁰⁸ On one level, then, courts' increasingly sensitive trigger finger for finding music infringement fits a general narrative about expanding copyright scope across the board. Yet music still remains an outlier. For other subject matter, that shift occurred nearly a century ago, while for music many seem to expect to find the same scope that courts were using in the early nineteenth century. Measured against the baseline of infringement in other expressive media, the notion that music cases should focus on only a single compositional element is strikingly anachronistic.

Courts and commentators tend to offer several explanations for this unusually singular focus. Some focus on the composer seeking copyright protection, others on the audience. None are fully convincing.

A. Value Judgments

The justification with both the longest pedigree and the least contemporary relevance is that melody is uniquely significant to a work's value, either as art or as commodity. As discussed above in Part I, this view goes back to *D'Almaine* and its particular cultural backdrop.²⁰⁹ The defendant there made arguments that evoke two of the factors from the modern fair use test: the transformativeness of the use and the absence of market harm.²¹⁰ First, the defendant contended, his translation of the owner's opera from a high-minded opus into lighter dance accompaniment required "a very considerable degree of musical skill and talent."²¹¹ Second, that translation rendered the accused copies poor economic substitutes for the original opera.²¹²

In rejecting each argument, the court made an enduring normative judgment concerning music's value to both consumers and critics. According to the court, it was the tune that drove purchase decisions in the marketplace. By appropriating it,

208. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 478.

209. *D'Almaine v. Boosey*, 1 Younge & Coll. Ex. 288 (1835).

210. See 17 U.S.C. § 107.

211. *D'Almaine*, 1 Younge & Coll. Ex. at 292. In the United States, such authorial talent was once thought to be sufficient to immunize translators from infringement. See *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) ("To make a good translation of a work . . . often requires more learning, talent and judgment, than was required to write the original. Many can transfer from one language to another, but few can translate.").

212. *D'Almaine*, 1 Younge & Coll. Ex. at 296 (recounting the defendant's argument that the owner's publication was "intended for the higher purposes of music, while that of the defendant [was] adapted entirely and exclusively for dancing").

the arranger had taken “such as made that work most saleable.”²¹³ Moreover, the court continued, the arranger’s creative contribution was negligible. Creating a tune meant that you were making a real “invention,” the “whole meritorious part” of a work that “required the aid of genius for its construction.” Creating a setting in which to embed that tune meant that you were authorial chopped liver.²¹⁴

This analysis anticipates the familiar substantial similarity test that Judge Jerome Frank would establish a century later in the landmark case of *Arnstein v. Porter*.²¹⁵ That test asks “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”²¹⁶ And what is pleasing to the ears, according to *D’Almaine*, is the melody. That proposition has since been repeated in various judicial decisions²¹⁷ and academic commentaries.²¹⁸ It’s not always obvious whether the analysis is meant to appeal to the economists, the aestheticians, or some combination of the two. But the ease with which the evaluative move slips between them has allowed decision-makers to anchor on melodic overlap even when it’s apparent that either the consumers or the critics don’t care.²¹⁹

213. *D’Almaine*, 1 Younge & Coll. Ex. at 301.

214. For further discussion of the melded aesthetic and economic analysis in *D’Almaine*, see Anne Barron, *Copyright Law’s Musical Work*, 15 SOC. & LEGAL STUD. 101, 121–22 (2010).

215. 184 F.2d 464 (2d Cir. 1946).

216. *Id.* at 473.

217. See, e.g., *Siskind v. Newton-John*, No. 84 Civ. 2634, 1987 WL 11701, at *5 (S.D.N.Y. May 22, 1987) (“[T]he melody . . . is the most important feature of the music”); *Jollie v. Jacques*, 13 F. Cas. 910, 913 (C.C.S.D.N.Y. 1850) (No. 7,437).

218. See, e.g., Sherman, *supra* note 5 (arguing that melody is “the most conspicuous (to the lay ear) aspect of a song and is generally the part that makes it ‘popular and valuable,’ as that phrase is used in the qualitative measure of the ‘extent of the use.’”); *Melody*, *supra* note 2 (describing the judicial treatment of melody as “the single most idiosyncratic element of the works in question, and almost entirely the locus of the economic worth of a song.”).

219. See *Boosey v. Empire Music*, 224 F. 646, 647 (S.D.N.Y. 1915) (finding infringement based on melodic copying even while conceding that the defendant “cannot interfere with the sale of plaintiffs’ composition by virtue of the inherent difference, generally speaking, of the tastes to which they appeal” and that “the case is not one where plaintiffs’ commercial exploitation of their composition is interfered with”); *Hein v. Harris*, 175 F. 875, 876 (C.C.S.D.N.Y. 1910), *aff’d*, 183 F. 107 (2d Cir. 1910) (finding infringement based on melodic copying despite denigrating the works-in-suit as “the lowest grades of the musical art,” typical of “numberless songs, all of the same general character” that “each bear strong resemblance to each other” and “have a monotonous similarity, which only adds to the general degradation of the style of music which they represent”).

Yet whoever the proper audience is, the notion that melody always retains outsized importance is wrong. Across multiple genres, the claim is a descriptive failure. To begin with, even the European art music that helped cultivate the claim in the first half of nineteenth century began moving away from melodic emphasis in the second.²²⁰ Since then, the most memorable contributors to art music often attained that status for contributing something other than melody. For Wagner and Debussy, it was harmonies. For Messiaen, it was rhythms and orchestrations.²²¹ For Schoenberg, it was his dodecaphonic technique, which all but eliminated the listener's sense of melodic coherence. Around 1900, European music theorists began speaking of timbral innovation "liberating" music, opening up new expressive vistas that were off limits to prior generations that focused on pitch structures alone.²²²

Jazz, too, frequently displaces stable melodies from the center of the work. Much of the value in jazz songs lies in improvisation.²²³ Indeed, some recordings now recognized as classics do rather little in terms of tune. Take Duke Ellington's *Mood Indigo*, one of his best known works. It begins with an unusual chorale, full of chromatic harmonies and scored for a trio of trombone, trumpet, and bass clarinet.²²⁴ It then moves into a second section with a more discernible melody.²²⁵ That melody is neither espe-

220. Joanna Demers, *Melody, Theft, and High Culture*, in *MODERNISM AND COPYRIGHT* 114, 129 (Paul K. Saint-Amour ed. 2011) (describing the collective shift away from distinctive and memorable melodies in the second half of the nineteenth century).

221. In 1936, Messiaen would urge others to take up the banner of rhythmic innovation: "More rhythms made monotonous by their squareness? We want to breathe freely! Let us . . . rediscover sumptuous modality, which generates a warm and vibrant atmosphere in keeping with supple and sinuous rhythms and free-flowing imagination, unhindered by 'metre.'" Stephen Broad, *Messiaen and Cocteau*, in *OLIVIER MESSIAEN: MUSIC, ART, AND LITERATURE* 1, 5 (Christopher Dingle & Nigel Simeone eds. 2007)

222. See PAINTER, *supra* note 68, at 85–86.

223. See Arewa, *supra* note 45, at 531–32.

224. See Björn Heile, *Who Wrote Duke Ellington's Music? Authorship and Collective Creativity in 'Mood Indigo'*, in *CONCEPTS OF MUSIC AND COPYRIGHT: HOW MUSIC PERCEIVES ITSELF AND HOW COPYRIGHT PERCEIVES MUSIC* 123 (Andreas Rahmatian ed. 2015).

225. See *id.* at 135 ("[Ellington] base[d] the entire composition on its harmonic progression, so that the tune [in the second section] would appear like a solo chorus or one of a sequence of variations. . . . [The] basic [harmonic] progression is embellished by a rich and sophisticated chromaticism, which lends the piece its languid and sensuous quality and which is almost entirely lacking in the tune itself."); David Horn, *Some Thoughts on the Work in Popular Music*, in *MUSICAL WORK: REALITY OR INVENTION?* 14, 23 n.5 (Michael Talbot ed., 2000) ("[I]t seems unlikely that *Mood Indigo* would have acquired its status by virtue of its melody alone.").

cially interesting nor, as it happens, written by Ellington.²²⁶ His contribution, what gave the piece its lasting appeal, was the harmony, orchestration, and structural placement of the chorale.²²⁷ Many second comers have performed and riffed on the piece since its 1931 composition, standard stuff in jazz performance practice. Ellington's arrangement, however, remains indelibly his. As David Horn explains:

Countless other musicians [who] have performed their own versions of his 1931 melody *Mood Indigo* . . . have done so in the tried and trusted jazz manner of using, and placing their stamp on, whatever available material was found appealing. Put another way, they have added their voices to the ongoing, many-voiced dialogue with the piece. But the moment they attempt to reproduce the unusual voicing which gave the first performances and recordings of *Mood Indigo* their particular character, they enter into an entirely different relationship, one that recognizes—and, often, reveres—the presence of the author.²²⁸

Electronic dance music, which drives a worldwide market recently valued at nearly \$7 billion,²²⁹ likewise discounts melody in favor of sonic textures. The sound often matters more than the notes.²³⁰ Drum patterns are more salient than pitch sequences.²³¹ As one music critic observes, what strikes some classically trained musicians as the genre's "obvious and trite" melody lines is in fact a deliberate aesthetic choice favoring "a device to display timbre, texture, tone-colour, chromatics. . . . Complicated melodies would distract from the sheer lustrous materiality of sound-in-itself; the pigment is more important than the line."²³²

Of course, *Tempo Music* notwithstanding,²³³ much music copyright litigation involves pop songs, from Tin Pan Alley to today's top 40. Pop's emphasis on memorable hooks might lead one to conclude, as the Fourth Circuit did in *Copeland v. Bieber*, that infringement analysis can reasonably rest on those hooks alone.²³⁴ Yet

226. See Heile, *supra* note 224, at 129–30.

227. *Id.* at 136–37 ("The astonishing arrangement and harmony of this section clearly reveal Ellington as the composer, even if [another] did contribute the melodic line. . . . In terms of an aesthetic judgment of originality, these aspects arguably outweigh the 'ownership' of any of the melodies employed.")

228. Horn, *supra* note 225, at 22–23.

229. Glenn Peoples, *Global EDM Market Hits \$6.9 Billion*, BILLBOARD (May 22, 2015), <http://www.billboard.com/articles/business/6575901/global-edm-market-hits-69-billion>.

230. See, e.g., SIMON REYNOLDS, BRING THE NOISE: 20 YEARS OF WRITING ABOUT HIP ROCK AND HIP-HOP 314–15 (2011).

231. *Id.* at 315.

232. *Id.* at 314–15.

233. See *supra* text accompanying notes 150 through 154 (discussing *Tempo Music's* holding that harmony is an independently copyrightable musical element).

234. See 789 F.3d 484, 494 (4th Cir. 2015) (holding that a reasonable jury could find two works

those singable tunes are only a single piece of a much larger puzzle in modern songwriting. Gone are the Brill Building days in which one could package a melody with lyrics and call it a commercially viable song.²³⁵ The music one hears on mainstream radio today is instead produced through an assembly-line process that concentrates first on the production of the underlying beats and harmonies—melody is frequently the *last* thing to be ironed out.²³⁶ “Often,” one journalist observed after several years interviewing top producers and songwriters in the industry, “producers are not looking for a single melody to carry the song, but rather just enough melody to flesh out the production.”²³⁷

Measured by either authorial focus or commercial importance, production matters as much as the melodies that are ultimately appended to it. The sonic scaffolding produced in the studio is an essential component of the resulting work.²³⁸ For much music today, it no longer makes sense to think of the composition as a type of which a recording is a particular token. To put it another way, “[t]he production *is* the song.”²³⁹

Judicial gerrymandering of all musical works into compositional elements in the center and performative elements on the periphery is thus anachronistic and unconvincing. The timbre of synthesized beats is not, as has been argued, analogous to the

substantially similar based solely on their hooks because, “[a]s the part of a song that is most often repeated and remembered, a chorus hook is important not only aesthetically but also commercially, where it may be central to a song’s economic success”).

235. SEABROOK, *supra* note 53, at 200. Country music is probably the contemporary genre with the closest resemblance to this history.

236. *See id.* at 201.

237. *Id.*; *see also* Cronin, *supra* note 47, at 1225 (“The widespread adoption of electronic recording and the dependence upon synthesized sounds led to . . . [a] subtle shift away from the preeminence of melody among the basic musical parameters of popular songs.”).

238. *See, e.g.*, Richard Middleton, *Work-in(g)-Practice: Configurations of the Popular Music Intertext*, in *MUSICAL WORK: REALITY OR INVENTION?* 60, 60 (Michael Talbot ed., 2000) (discussing the various trends in popular music that “amount[] to a thorough blurring (or non-recognition) of the boundary between ‘performance’ and ‘composition’”); Brauneis, *supra* note 48, at 27 (arguing that rock music began erasing the line between performance and composition in the 1950s); Cronin, *supra* note 47, at 1214 (discussing the effect of digital recording technologies on production elements that occupy an increasing percentage of recordings’ economic value, to the point where “more original expression could be found, typically, in the visual and audio recordings of a performance of a song than in the underlying musical work”).

239. Andrew Marantz, *The Teen-age Hitmaker from Westchester County*, *NEW YORKER*, Aug. 19, 2016.

color of the wall.²⁴⁰ It's more like the color of a painting.²⁴¹

B. The Closing of the Musical Frontier

Even one who accepts that melody is no longer singularly important might still insist that it remains singularly original. Some court decisions have suggested that all the good harmonies and rhythms have already been taken.²⁴² The gist is that musical language is more tightly constrained by the marketplace (or, in the Second Circuit's parlance, "the infantile demands of the popular ear")²⁴³ and that the frontier has closed on viable new expression—except in the domain of melody. Outside of avant garde cases on the extreme margin, musical innovation would, on this account, inevitably reduce to melodic innovation.

Yet this theory, too, has serious flaws. At the outset, it can't account for the studio's production-based creativity discussed above. If, as I have argued, that creativity is in many cases part of the musical work, then it immediately takes a place next to (and perhaps even ahead of) melody as a fruitful source of original material. The theory also can't account for why, unlike in other areas of copyright law, an original arrangement of individually unoriginal elements must remain unprotected.²⁴⁴ Even assuming that melody is the only independent musical element in which creativity can still frequently subsist, there's not an obvious doctrinal reason why copying a combination of other elements wouldn't trigger liability.

It's also not clear that the remaining stock of original melodies is really so much larger than that of other elements of musical vocabulary. Indeed, precisely the opposite claim has been made in the past. Melodies, it was once said, had been used up, leaving composers to find musical originality some other place.²⁴⁵ Even in the nine-

240. See *supra* note 47.

241. Cf. Stephen Davies, *Perceiving Melodies and Perceiving Musical Colors*, 1 REV. PHIL. & PSYCH. 19 (2010).

242. See, e.g., *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

243. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940) (per curiam); see also, e.g., *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (instructing courts to be "mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently appear in various compositions, especially in popular music").

244. See *supra* text accompanying notes 197 through 207.

245. See, e.g., SHAFER, *supra* note 44, at 197 ("Since it is generally agreed that the original fund of melodic ideas has been exhausted, serious composers, and others, have turned to the two other important elements of music—harmony and rhythm."); Orth, *supra* note 105, at 234 (arguing that, given the various physical and economic constraints on music composition, "the claim has understandably been

teenth century, one could find handwringing that one generation of composers was left to fight over its predecessors' melodic scraps.²⁴⁶ The current characterization of melody as the last bastion of creativity may simply be a myth. The universe of original and marketable pitch sequences is not obviously bigger than the universe of original and marketable soundscapes in which those sequences can be contextualized.

C. *The Experience of Similarity*

A third possibility focuses on the audience rather than the composer. Copyright's infringement test requires fact finders to stand in the shoes of a lay listener.²⁴⁷ Perhaps the average lay listener experiences musical similarity most keenly when hearing a shared melody.²⁴⁸ If so, it might explain why infringement determinations would gravitate in that direction.

The available data, however, suggest otherwise. A series of controlled experiments involving mock jurors who were asked to decide an actually-litigated music copyright dispute found that their assessments were strongly influenced by changes in tempo, key signature, orchestration, and the overall style of performance.²⁴⁹ Varying the sound from slow R&B to calypso or big band jazz made participants less likely to

made that a melody can no longer be original" and that "[s]ince most if not all melodies hark back to old times, serious composers strike out in fields of harmony or rhythm (or lack of it)".

246. See TRIPPETT, *supra* 15, at 130 (quoting Wagner's conjecture that young composers "avoid melodies, for fear of having perhaps stolen them from someone else").

247. *Arnstein v. Porter*, 184 F.2d 464, 473 (2d Cir. 1946).

248. See, e.g., *Hein v. Harris*, 175 F. 875 (C.C.S.D.N.Y. 1910), *aff'd*, 183 F. 107 (2d Cir. 1910) (concluding that infringement exists "only when the similarity is substantially a copy, so that to the ear of the average person the two melodies sound to be the same"); *Jollie v. Jacques*, 13 F. Cas. 910, 913 (C.C.S.D.N.Y. 1850) (No. 7,437); *D'Almaine v. Boosey*, 1 *Younge & Coll. Ex.* 288, 302 (1835) ("[T]he mere adaptation of the aria, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same."); Sherman, *supra* note 5, at 125 (arguing that melody is the center of infringement suits because it "is the most conspicuous (to the lay ear) aspect of a song"); Raphael Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 5 *LOY. L.A. ENT. L. REV.* 61, 77 (1985) ("Because the aural impressions of the average person constitute the basis of the audience test, melody figures most prominently in this test. By emphasizing the importance of melody, Hand's 'comparative method' therefore functions much as an enhanced audience test.").

249. See Lund, *supra* note 46, at 144; see also Carys Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, in *INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES* 43, 58 (Doagoo et al., eds. 2014) (reporting cognitive psychologists' findings supporting the conclusion that "[o]ur ears are biologically hardwired to believe two violin melodies are more alike than two melodies for two different instruments")

perceive substantial similarity, even though the melody remained identical across conditions.²⁵⁰

Though surprising within the world of copyright, this experimental data shouldn't be too remarkable once one steps outside of it. For all the uproar over *Blurred Lines*, some have had an easier time hearing its gestalt similarity to *Got to Give It Up* than they have hearing the similarity between works that share only a melodic hook.²⁵¹ If copyright privileges melody, then the result is going to be backwards.

When pop songs blur together, it's often because of similar productions, not necessarily similar melodies. When they distinguish themselves, it's often a distinctive production at work.²⁵² Melody simply doesn't do anywhere near as much of the lay listener's heavy lifting as copyright traditionally assumes, whether that listener is making a purchase decision or casting a vote in the jury room.

III. MELODY LINES AS BOUNDARY LINES

Thus far, I've argued that systematically giving thicker protection to a work's melody than to the rest of it can't be justified on the doctrinal bases traditionally offered for it. It's not that melody is necessarily more qualitatively substantial than other aspects of music. It's not that melody is necessarily more original than other aspects of music. And it's not that melody is necessarily more of a standalone ID badge for the work than other aspects of music. The growing number of infringement cases that have incorporated a more multidimensional conception of copyright's musical object—the ones that cause panic about chilling effects and music-industry ambu-

250. Lund, *supra* note 46, at 147, 164–65.

251. See, e.g., John Hendrickson, *Why Marvin Gaye's Family Will Probably Lose the 'Blurred Lines' Case to Robin Thicke*, *ESQUIRE* (Mar. 4, 2015), <http://www.esquire.com/entertainment/music/a33459/blurred-lines-case/> (commenting, after two other works from different genres ignited a copyright controversy over a shared melodic hook, that *Blurred Lines* “sounds a lot more like” *Got to Give It Up* “[t]o the naked ear” even with different melodies than the other works did to each other); cf. Jon Caramanica, *A Verdict Based on an Old Way of Making Music*, *N.Y. TIMES*, Mar. 12, 2015, at C1 (arguing that other recent appropriations of artists' signature sounds are a “more meaningful sort of infringement” than the one in the *Blurred Lines* case and yet aren't reachable by copyright).

252. See Horn, *supra* note 225, at 25 (observing that when a listener recognizes a familiar track on the radio, she “may be responding to melody or rhythm or vocal timbre, or to any combination of these and other parameters, but the first—and, in all probability, last—point of recognition is the particular sound-character of the record, in which the processes of technical production have played a crucial part”).

lance chasers²⁵³—are at least being honest. The notion that melody today is the primary locus of music’s value, however defined, is a fiction.

It is, however, a useful fiction. Emphasizing melody is the right approach, but for reasons different than the ones that legal decision-makers have historically given. The best justification for that emphasis isn’t that it faithfully applies underlying infringement doctrine. It is, rather, that it represents a different vision of what infringement doctrine could be. By sticking to a single element even as other subject matter has had to keep track of multiple ones, music could offer relative simplicity.²⁵⁴ It clung to a definition of creativity that effectively, though not intentionally, sacrificed descriptive accuracy for sheer administrability.

Elsewhere within the intellectual property system, courts give that tradeoff more attention. Patent law has long struggled with how to optimize it. By statute, applicants are required to conclude their submissions “with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.”²⁵⁵ Those claims are intended to put the world on notice of the range of embodiments covered by the patent.²⁵⁶ The Supreme Court has repeatedly emphasized the importance of that notice function for downstream creators.²⁵⁷ Putting the stakes in concrete terms, one Federal Circuit judge has cau-

253. See Mandell, *supra* note 22.

254. See, e.g., Demers, *supra* note 19 (observing that, before the *Blurred Lines* verdict, “most musicians, lawyers, and industry observers thought that the laws . . . were clear”).

255. 35 U.S.C. § 112(b).

256. See, e.g., *McClain v. Ortmyer*, 141 U.S. 419, 424 (1891) (“The object of the patent law in requiring the patentee [to write claims] is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them.”); *Hoganas AB v. Dresser Indus.*, 9 F.3d 948, 951 (Fed. Cir. 1993) (observing that patent claims are meant to “put[] competitors on notice of the scope of the claimed invention”).

257. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2130 (2014) (explaining that imprecise patent claims “foster the innovation-discouraging ‘zone of uncertainty’ against which this Court has warned” (citation omitted)); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 732 (2002) (“If competitors cannot be certain about a patent’s extent, they may be deterred from engaging in legitimate manufactures outside its limits”); *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942) (“A zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field.”); *Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938) (“The limits of a patent must be known for . . . the encouragement of the inventive genius of others”); see also Craig Allen Nard, *Certainty, Fence Building, and the Useful Arts*, 74 IND. L.J. 759, 775 (1999) (“A competitor, whether designing around or improving upon the claimed invention, must have confidence in where exactly the patentee built his fence so that he can proceed accordingly and position himself to avoid the potential sting of a plausible infringement allegation.”)

tioned that “[p]atent counselors should be able to advise their clients, with some confidence, whether to proceed with a product or process of a particular kind. The consequences of advice that turns out to be incorrect can be devastating, and the costs of uncertainty—unjustified caution or the devotion of vast resources to the sterile enterprise of litigation—can be similarly destructive.”²⁵⁸

At the same time, courts recognize that sometimes “language in the patent claims may not capture every nuance of the invention or describe with complete precision the range of its novelty.”²⁵⁹ They have therefore developed the doctrine of equivalents, which secures to the patentee “those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes.”²⁶⁰ That doctrine blurs boundary lines, abandoning some of the predictability that the claiming system is meant to provide, and so the Supreme Court and the Federal Circuit have devoted a great deal of energy to trying to get the balance right.²⁶¹

Of course, to spend much time with patents is to know that this system has its own flaws,²⁶² and I am not here to defend them. But notice that patent policymakers at least identify downstream predictability as a social good that is sometimes worth the loss of some incremental scope in the rights holder’s coverage. For my purposes here, the point isn’t that the patent system has successfully gotten its house in order. The point is that it’s trying.

Copyright law, by contrast, long ago threw up its hands and declared such optimization a fool’s errand. The modern substantial similarity test bends over backwards to try and guess what a lay observer would find qualitatively important in a work. Because every work is different, courts proceed case by case and are incapable of gener-

258. *Litton Sys., Inc. v. Honeywell, Inc.*, 87 F.3d 1559, 1580 (Fed. Cir. 1996) (Bryson, J., concurring in part and dissenting in part).

259. *Festo*, 535 U.S. at 731.

260. *Id.* at 733.

261. *Id.* at 731–32 (describing the various limitations on the doctrine, intended to preserve “the delicate balance . . . between inventors, who rely on the promise of the law to bring the invention forth, and the public, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor’s exclusive rights”); *see also, e.g.*, *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605 (1950); *Johnson & Johnson Assocs., Inc. v. R.E. Serv. Co.*, 285 F.3d 1046 (Fed. Cir. 2002)(en banc).

262. *See* Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PENN. L. REV. 1743, 1744–47 (2009) (noting the difficulties of precisely mapping words to things and suggesting that courts pay less attention to claim terms and more attention to the written description of the invention).

ating guidance at even high levels of generality.²⁶³ This inscrutability has been a familiar complaint for decades. In 1967, Benjamin Kaplan confessed that “[w]e are in a viscid quandary once we admit that ‘expression’ can consist of anything not close aboard the particular collocation in its sequential order.”²⁶⁴ Little has changed since. In 2016, the test is still described as “a virtual black hole in copyright jurisprudence.”²⁶⁵

Judges simply shrug it off. From the doctrine’s beginnings, courts embraced its vagueness as an unfortunate but unavoidable fact of legal life.²⁶⁶ One early commentator explained:

No fixed rule can be given for determining what amount of copied or borrowed matter is essential to constitute infringement; or, in other words, how small may be the quantity taken, and still amount to piracy. . . . The determination of this question of fact is often one of extreme difficulty, and the finding will vary with the circumstances in each case, and with the judgment of the person or persons whose duty it may be to ascertain the fact. The ratio which the part bears to the whole from which it is taken will often be a material consideration; but it is obvious that no relative or fractional part of either production in controversy can be fixed as a standard measure of materiality. An amount material in one case will be unimportant in another.²⁶⁷

Many have tried to make peace with this black box. As Judge Easterbrook put it, “[a]fter 200 years of wrestling with copyright questions, it is unlikely that courts will come up with the answer any time soon, if indeed there is ‘an’ answer, which we

263. See, e.g., Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987) (“[Substantial similarity] is a phrase that, instead of becoming more understood with each judicial interpretation, has become more ambiguous.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 158 (2009) (“If I want to create a sound recording but am not sure whether it will infringe the copyright of some other sound recording author, I simply have to create my work of authorship and then wait to see if litigation ensues.”); Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA L. REV. 465, 500 (2004) (noting that for copyrights, more so than for patents, “[o]bservers bear the costs of determining what constitutes the protected expression,” often through litigation); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 HARV. L. REV. 683, 716–17 (2012) (“The substantial similarity test is notoriously confusing and confused, perplexing students and courts alike.”).

264. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 48 (1967).

265. Balganesch, *supra* note 106, at 794.

266. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (“We have to decide how much, and while we are as aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it.”); *Bramwell v. Halcomb*, 3 My. & Cr. Ch. 737, 738 (1838) (“When it comes to a question of quantity, it must be very vague. . . . It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.”).

267. DRONE, *supra* note 192, at 413.

doubt.”²⁶⁸ The most that anyone is willing to say is that excessive similarity “occupies a non-quantifiable value on the legal spectrum between no similarity and identicalness,”²⁶⁹ but where on the spectrum is anyone’s guess. The leading copyright treatise today counsels that substantial similarity “presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”²⁷⁰ These comments are par for the course in the copyright world: caution the practitioner that substantial similarity is difficult, warn against trying to induce an analytical framework from existing precedent, and move on.

But what if downstream creators seeking to avoid infringement knew to concentrate on a particular expressive element within the copyrighted work? The work as a whole would still get a thin layer of protection against wholesale or nearly-wholesale copying. Only one part of it, however, would get thicker protection against even fragmentary copying under a substantial similarity analysis. Such a system, transparently weighing in favor of a single element, would make copyright more certain at the margins in signaling the work’s boundaries.

Roughly speaking, that’s the system of music copyright that the twentieth century grew up with. The great attention paid to melody effectively focused second comers on Kaplan’s elusive “particular collocation” even in cases of nonliteral copying.²⁷¹ Musical works did not have written claims, but as a practical matter they bore sign posts for where to tread most cautiously.

Melody makes a good focal point for two reasons. First and most importantly, it’s modular.²⁷² For the majority of nonliteral infringement cases likely to pass through the judiciary’s gates, one could spot a melody and then carve it away from the rest of the work. Second, once it has been identified, it is relatively easy to notate it as a quantifiable, isolated element. Notes, at least in Western music, are discrete variables. They can be counted. As a result, assessing the strength of two works’ melodic similarity requires far less sophistication than assessing the strength of two

268. *Nash v. CBS*, 899 F.2d 1537, 1540 (7th Cir. 1990).

269. *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1148 (11th Cir. 2007).

270. *NIMMER*, *supra* note 6, § 13.03.

271. *See supra* note 264. Indeed, practically anticipating Kaplan’s remark, Hand defined the musical work as the melody’s “collocation of notes.” *Hein v. Harris*, 175 F. 875, 877 (C.C.S.D.N.Y.), *aff’d*, 183 F. 107 (2d Cir. 1910).

272. My use of the modularity concept draws from Henry Smith’s work in property law. *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007). I thank Oren Bracha for suggesting this terminology.

works' timbral or structural similarity.²⁷³ Plenty of legal decision makers aren't fluent in musical terminology, of course, but even they probably understand what it means to say that two phrases have a certain number of notes in common.

Try, for instance, quantifying how much of a theatrical narrative has been copied. In one of copyright's canonical infringement cases, *Nichols v. Universal Pictures Corp.*,²⁷⁴ an enterprising expert witness claimed to do just that. The witness attempted to reduce any dramatic plot to a scientific formula, allowing infringement analysis to be performed with mathematical precision.²⁷⁵ Unsurprisingly, the argument did not go well in court.²⁷⁶ Surely, though, every would-be litigant would love such a formula if it actually offered some predictive power. In many nonliteral infringement contexts, the sheer quantum of incommensurable characteristics keeps that formula unattainable.²⁷⁷

Music cases offer a better, even if imperfect, forum for such assessments. Melody's modularity and quantifiability enables second comers to make a reasonable *ex ante* guess as to whether they have taken too much. Copy someone's original melody, the law would counsel, and you might be in trouble. Copy someone's original rhythm, harmony, orchestration, or organizational structure, on the other hand, and you're on far safer ground. Make no mistake, these guesses will always carry risk, since limiting the inquiry to a particular element still doesn't specify how much of that element may be copied. How many notes is too many will still likely vary from context to context.²⁷⁸ But the unidimensional framework is at least better than the alternative of trying to weigh the importance of multiple, interrelated dimensions simultaneously. Even if these boundaries will never be predictable with certainty (nothing concerning intellectual-property scope is), music cases could at least lower

273. For one of the several possible ways of doing this, see Adam Berenzweig, et al., *A Large-Scale Evaluation of Acoustic and Subjective Music-Similarity Measures*, *COMPUTER MUSIC J.*, Summer 2004, at 63–76. In short, it's complicated.

274. 45 F.2d 119 (1930).

275. See Jessica D. Litman, *Silent Similarity*, 14 *CHI-KENT J. INTELL. PROP. L.* 11, 36 (2015).

276. *Id.*

277. See Jeanne Fromer, *Claiming Intellectual Property*, 76 *CHI. L. REV.* 719, 782 (2009) (“There are so many characteristics that one might reasonably discern from the exemplar of any particular copyrightable work, which is why substantial-similarity judgments are unpredictable.”).

278. For this reason, a melody-centered infringement framework doesn't necessarily conflict with the Ninth Circuit's admonition that courts measuring substantial similarity must not “simply compare the numerical representations of pitch sequences and the visual representations of notes to determine that two [musical segments] are not substantially similar, without regard to other elements of the compositions.” *Swirsky v. Carey*, 376 F.3d 841, 847–48 (9th Cir. 2004).

the margin for error by keeping other variables out of the equation.

Recall the testimony of the Westminster Abbey organist from this Article's introduction.²⁷⁹ When he defended a melody-centered infringement test, it was on account of neither romantic genius nor consumer preferences but the need for "a rough and ready rule which may not be perfect in its application to all cases, but . . . is intelligible and clear."²⁸⁰ As a policy matter, that argument has always been the best one. There just hasn't been much need to make it until recently. In the United States, there wasn't any urgency to press the point because the perceived supremacy of melodic expression accomplished the same thing. But as the judicial conception of musical creativity expands, that privilege recedes, leaving behind a newly broadened copyright scope. The better we understand how audiences value musical works, the fuzzier the whole copyright enterprise becomes.²⁸¹ The problem is that existing doctrine doesn't provide the necessary tools to regain the clarity that is lost.

What might such a tool look like? After conducting an intriguing if unwitting experiment of focusing on melody for so long, music copyright offers one possible answer. In effect, the law chose a single, substantial, and easily-identifiable facet of the work and then let second comers organize their creative activities around that choice. To be sure, it precommitted a decisionmaker to exclude contextual color from case to case. The lack of flexibility inevitably increased the error rate of identifying the qualitatively important parts of a work. But combined with thin protection against literal, complete copies, a melody-centered substantial similarity doctrine delivered to most copyright owners protection against market-destructive piracy and to second comers a decent sense (relative to alternative nonliteral infringement regimes) of what the ground rules were.

The test is underinclusive, yet the resulting comfort with the rules of the game is likely worth the bargain. So long as the system continues to recognize non-melodic material as copyrightable expression, the cost of giving weaker protection to that material is likely minimal.²⁸² In the lion's share of potential copyright disputes over mu-

279. See *supra* note 32.

280. *Austin v. Columbia Gramophone Co.*, [1923] Macg. Cop. Cas. 398, 406-07 (Eng.).

281. The district court in the *Blurred Lines* case acknowledged that fuzziness in denying attorneys' fees to the Gaye estate. See *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004, slip opinion at 11 (C.D. Cal. Apr. 12, 2016) (ECF No. 554), *appeal filed sub nom Williams v. Gaye*, No. 15-56880 (9th Cir. Dec. 8, 2015) ("This case presented novel issues. How they would be determined was not, even with hindsight, something that was clear.").

282. If, on the other hand, non-melodic musical expression was ineligible for a copyright altogether, the impact would be more severe. Cowriters who contributed something other than the notes would be denied any copyright interest, and melody-less compositions would be entirely unprotected from

sic, a thin layer of protection covering literal copying of any original expression plus a thick layer of protection covering even non-literal copying of melodies in particular should be sufficient to maintain the economic incentive to create.

There are probably some cases where that level of protection wouldn't be sufficient. But their existence wouldn't justify a broader, more opaque standard unless their aggregate value outweighs the resulting costs to creative production in the long term. And when one considers the probable benefits of a clearer, unidimensional inquiry, that possibility appears remote. To begin with, clarity reduces the number of cases that require litigation to resolve.²⁸³ Consider, for example, the compulsory license for creating cover songs, the one statutory emphasis on melody in the current Copyright Act.²⁸⁴ That provision has yielded virtually no litigation over the extent of creative adaptation permitted to the licensee.²⁸⁵ Privileging melody as the common thread between original and cover keeps it that way.²⁸⁶

While this decrease in litigation costs is the most obvious benefit of a unidimensional test, in hindsight one can identify another: a generative payoff for second comers. Fighting a copyright dispute is expensive; losing a copyright dispute even more so.²⁸⁷ A publisher or record label, which bears high investment costs upfront but captures only a fraction of a potentially infringing use's social value, has every incentive to avoid those legal gray areas that might delay or scuttle a project.²⁸⁸ I have argued elsewhere that creators are often well equipped to think outside the boxes that existing copyright entitlements erect for them.²⁸⁹ But they still need to know where those

widescale reproduction. To be clear, my proposal is not to deny authorship status to composers of such expression, but only to restrict the scope of the rights that they receive.

283. See Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 329–32 (2013) (discussing false positives that result from uncertain boundaries in infringement disputes).

284. 17 U.S.C. § 115(a)(2).

285. For an exceedingly rare exception, see *TeeVee Toons, Inc. v. DM Records, Inc.*, No. 05 Civ. 5602 (JGK), 2007 WL 2851218, at *9 (S.D.N.Y. Sept. 27, 2007).

286. See Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC'Y U.S.A. 209, 247 (2013) ("If performance elements were part of the musical work, then the statutory license for covers could become much more complicated. . . . [Section 115(a)(2)] reflects specific Western norms about what musical works are, but it also gives cover artists greater certainty about what they can do.").

287. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 890–91 (2007).

288. *Id.* at 891; Depoorter & Walker, *supra* note 283, at 325.

289. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015).

boxes end and begin.²⁹⁰

The birth of bebop in the 1940s provides a case study in how drawing clear IP lines can direct creativity in unanticipated new directions. Jazz composers had by that time developed elaborate improvisatory techniques in their songs, often layered on top of familiar Tin Pan Alley tunes.²⁹¹ The problem was that, by repeating those tunes, the composers were excluded from copyright authorship. Not only did they lose out on earning royalty revenue themselves, but their record labels had to pay the compulsory license fee to the tunes' owners.²⁹² The predicament was the product of a legal system that undervalued the artistic contributions of these musicians, predominantly African American, in favor of those who operated within the old European model focusing on melody.²⁹³

That restriction, even if oblivious to the genre's aesthetic priorities, was at least clear. So the composers created around it. They developed original melodies to overlay on top of iconic—but, according to copyright, unprotectable—chord changes.²⁹⁴ The result was the cultivation of an influential musical idiom that would later be dubbed the contrafact.²⁹⁵ The most famous examples were hundreds of variations on the harmonic progression to George Gershwin's *I Got Rhythm*, popularly coined "rhythm changes," though there were many others.²⁹⁶ The contrafact took on artistic importance not because of its melody, as the legal system presumed, but because of the particular interplay it nurtured between old and new.²⁹⁷ These were not obvious examples of musicians relying on authorless *scènes à faire*.²⁹⁸ In bebop's infancy, these harmonies came from a known source—indeed, much of the point of rhythm changes was a conscious homage to Gershwin. If copyright law had formally attributed harmonies to an author as easily as it did melodies, contrafacts likely would not

290. See *id.* at 1385–87.

291. See Osteen, *supra* note 2, at 96–97; Horn, *supra* note 225, at 26–27.

292. Osteen, *supra* note 2, at 97–98.

293. See Arewa, *supra* note 45, at 483.

294. The result would likely have been different under an infringement regime like that contemplated by the district court in *Tempo Music*, but that decision wouldn't arrive until 1993.

295. See James S. Patrick, *Charlie Parker and the Harmonic Sources of Bebop Composition: Thoughts on the Repertory of New Jazz in the 1940s*, 2 J. JAZZ STUD. 3 (1975).

296. See Osteen, *supra* note 2, at 89; Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1949 (2005). For an extensive but still nonexhaustive list of contrafacts, see *List of Jazz Contrafacts*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_jazz_contrafacts.

297. Osteen, *supra* note 2, at 97, 104–05.

298. Cf. *supra* note 165.

have been commercially possible.

The history of contrafacts is an example of how copyright policy choices can influence not just the level but also the direction of artistic investment. That influence may seem like a significant cost of trying to clear up infringement doctrine's persistent vaguenesses. But it isn't. To understand the potential objection, and why it ultimately fails, one needs to consider the complicated relationship between copyright and product quality.

One possible danger of imposing *ex ante* rules in defining infringement is that any under- or over-inclusivity would divert the trajectory of creators' activities.²⁹⁹ In fashion, for example, designers cling to the few buoys of intellectual-property protection in an industry where most expression isn't copyright eligible.³⁰⁰ It's one reason why firms may focus on innovating textile patterns and physically separable ornaments, which are protectable, rather than the cut of a garment, which isn't.³⁰¹ In standup comedy, the growth of plagiarism-style norms against appropriation helped shift resources away from developing original methods of delivery, which were natu-

299. See, e.g., GOLDSTEIN, *supra* note 45, § 1.14.2 at 1:56 (arguing that if protection for uses associated with a particular audience is decreased, “incentives to produce works tailored to the tastes of that audience will decline or disappear,” and theorizing that the first-sale exemption for DVD copies may prompt film producers to “invest less than they would otherwise would in producing motion pictures aimed at audiences that avoid movie theaters in favor of watching rented videocassettes and DVDs at home”); Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691, 1733 (2009) (“[T]he distributive outcomes generated by stronger or weaker levels of intellectual property may indirectly exert incentive effects with respect to the direction (or quality) of innovation investment, even if they exert no incentive effect with respect to the rate (or quantity) of innovation investment.”); Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 709, 714 (2014) (finding that, due to enforcement difficulties, the adult entertainment industry has shifted away from selling access to fixed content and is “increasingly moving into convenience and experience goods, which are inherently difficult to pirate”); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 332 (1989) (“[I]t is easy to note particular distortions that a copyright law corrects. Without copyright protection, . . . [t]here would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being first in the market for such works would be likely to exceed the losses from absence of copyright protection.”). In the patent literature, concerns over distortion are even more pronounced. See, e.g., Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900 (2013) (arguing that patent protection can have distortive effects, stemming from asymmetries between different types of informational goods and structural features of exclusion rights).

300. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1176–78 (2009).

301. *Id.* at n.116. Suk and Hemphill also note that the availability of trademark protection in the fashion industry leads some established firms to plaster their wares with marks, which form a bulwark against copying in the absence of effective copyright protection. *Id.* at 1177.

rally hard to copy, and toward developing original texts, which had been easily copyable until those norms started dissuading the copyists.³⁰² More or less protection doesn't just mean more or less stuff gets made. It can also mean that whatever stuff does get made is going to look or sound different.³⁰³

If that's so, my proposal may seem troublesome. It appears to interfere in the musicmaking of both the upstream composers seeking copyright protection and the downstream composers seeking to avoid infringement. On the upstream side, once composers (or the legally-sophisticated publishers with whom they work) know that melody carries enhanced copyright protection, they should rationally focus more on writing unappropriable tunes than on other, easily-appropriable forms of musical expression. One could quibble with the assumption that individual creators are so sensitive to these shifts in protection of fragments that they'd significantly alter their songs—at least so long as they're receiving protection against verbatim copying of the entire work. But there's probably at least some marginal effect. Downstream, where avoiding infringement is a real concern,³⁰⁴ there's likely to be an even larger effect. Composers may worry more about differentiating melodies than about differentiating other aspects of their compositions.³⁰⁵ Society would then miss out on whatever material they would have come up with had law not tilted the playing field.

That's not necessarily a losing trade, however. It seems clear enough that most of us want a continuing supply of new works (even though we now have more music than any of us could listen to in a lifetime). Copyright sensibly tries to facilitate that supply. Yet what that music should sound like is not something traditional copyright theory is equipped to predict.³⁰⁶ If a disproportionate legal emphasis on melody leads

302. See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA L. REV. 1787, 1857–58 (2008).

303. See *id.* (calling for greater recognition that copyright laws “may change the nature of the creative practices they are regulating, that different people are likely to create and consume at different levels of protection, and that different content is likely to be conducted under different production processes.”).

304. See generally Gibson, *supra* note 287.

305. For an example of this selective caution playing out through social norms, see Montgomery, *supra* note 54.

306. See, e.g., Jessica Silbey et al., Afterword, *Conferring About the Conference*, 52 HOUS. L. REV. 679, 681 (comments of Aaron Perzanowski) (“Copyright’s goals remain rather amorphous. We expect the copyright system to result in more creativity, to produce stuff. But beyond that, copyright policy has avoided considerations of what kind of stuff, produced by whom, and for whom.”). But see Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014) (arguing that information theory can help the answer the question of what kinds of works the copyright system should promote).

composers to spend more creative labor writing melodies, as an economic-incentives model would predict, the welfare effects are opaque. Perhaps some will shift serious resources toward tunesmithing. Perhaps some others will write melodies merely as a box to check off while continuing to invest compositional energy elsewhere, as the architects of jazz contrafacts did. Perhaps some musical work that would have been made under a more multidimensional infringement regime now does not get made, and a different musical work gets made in its place. Which path is going to make society better off?

One may be tempted to ask the market, letting price signals identify the most valuable expression. That, at least, is what classical copyright doctrine envisions.³⁰⁷ One could debate whether present consumer preference is the right way to measure value in this context.³⁰⁸ But even if it is, the market may not tell us. Even on welfarism's own preference-satisfaction terms, the market for expressive works is often beset by herd behavior and information cascades that cloud its signals with a great deal of noise.³⁰⁹ One telling experiment found that listeners' music ratings were strongly influenced by perceptions of others' music ratings; the average consumer's evaluation depended on what he or she thought other consumers thought.³¹⁰ Consumption choices can be referenda on the power of social influence as much as on artistic value.³¹¹

307. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (concluding that granting exclusivity over expressive works would promote progress “if they command the interest of any public” and thus “have a commercial value”); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (rejecting a de minimis exception for sound recordings because even a small snippet “is something of value,” otherwise the defendants would not have “intentionally sampled”); *Emerson v. Davies*, 8 F. Cas. 615, 620–21 (C.C. Mass. 1845) (“[W]hether to be better or worse is not a material inquiry in this case. If worse, his work will not be used by the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copy-right, ‘valere quantum valere potest’ [let it be worth as much as it is worth].” For more on copyright doctrine’s deference to the market for assessing aesthetic worth, see Barton Beebe, Bleistein, *the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. ____ (forthcoming 2017) (unpublished manuscript on file with author at 41–42).

308. See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the DMCA*, 87 VA. L. REV. 813, 888 (2001) (positing a distinction between great works and popular works).

309. See Fishman, *supra* note 289, at 1374 (describing the herd behavior and information cascades in markets for cultural goods, rendering market signals poor indicators of those goods’ innate quality).

310. Matthew J. Salganik et al., *Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market*, 311 SCIENCE 854, 855–56 (2006).

311. *Id.* at 856 (“[W]hen individual decisions are subject to social influence, markets do not simply aggregate preexisting individual preferences.”).

Perhaps there's something about law dirtying its hands in the elevation or demotion of particular expressive elements that lends the resulting products a veneer of inauthenticity. Yet to call that effect inauthentic is to assume a baseline of "pure" cultural production that has never really existed.³¹² Creativity is always contingent on the external environment, whether it's technology,³¹³ funding,³¹⁴ a physical ailment,³¹⁵ or even the weather.³¹⁶ Law is simply part of the mix. The length of pop songs, for example, is likely affected by how copyright law calculates mechanical royalties.³¹⁷ Contrafacts as a genre likewise came into existence because of copyright's asymmetrical protection of different musical elements. Trading completeness for predictability led to the production of new music that was obviously dependent on law, but not obviously poorer than what would otherwise have been produced. Law-induced redirection, in itself and without more, is normatively neutral, neither benefit nor cost. That music, or any artform, shifts with the legal winds does not ipso facto make it less valuable as a work of authorship.

Let me be clear: I am not making the absolute claim that *every* redirection of creative investment is impervious to welfarist criticism. Along certain vectors, where the divergence from audience preference is easier to identify, such criticism might be fully warranted. For example, relying on funding mechanisms that cater to decisionmakers other than the ultimate consumer may yield goods that the consumer genuinely deems inferior. The asymmetry between advertiser and consumer preferences is the well-known knock on traditional network television, whose advertiser-driven content favors tolerableness for the many at the expense of passionate allegiance for the few.³¹⁸ According to some, it's also the reason why the perceived renaissance in televi-

312. See Mike Madison, *Blurred Copyright Lines*, MADISONIAN.NET (Mar. 15, 2016), <http://madisonian.net/2015/03/16/blurred-copyright-lines/> (noting the imaginary baseline).

313. See Sean M. O'Connor, *Patented Electric Guitar Pick-Ups and the Creation of Modern Music Genres*, 23 GEO. MASON L. REV. 1007 (2016).

314. See Clive James, *Hit Men*, NEW YORKER, July 7, 1997, at 70, 72.

315. See *Paper Cuts Outs (Gouaches Découpés)*, HENRI MATISSE, http://www.henri-matisse.net/cut_outs.html.

316. See KRISTI MCKIM, *CINEMA AS WEATHER: STYLISTIC SCREENS AND ATMOSPHERIC CHANGE* 58–59 (2013).

317. Peter K. Yu, *How Copyright Law May Affect Pop Music Without Our Knowing It*, 83 U.M.K.C. L. REV. 363, 370 (2014).

318. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 165 (arguing that "advertiser-supported media tend to program lowest-common-denominator programs, intended to 'capture the eyeballs' of the largest possible number of viewers" who won't switch their TVs off, rather than "seek[ing] to identify what viewers intensely want to watch"); Simon P. Anderson & Jean J. Gabszewicz, *The Media*

sion programming today is predominantly supported by subscription-based channels that try to deliver a product worth paying for.³¹⁹ In that context, at least, there's a theoretically coherent case that a legal intervention biasing firms' monetization strategy for or against advertising dollars will affect product quality. But that effect results from an underlying market externality, not from government involvement in itself. The normative implications of a thumb on the infringement scale in favor of melody, by contrast, are far more ambiguous. A shift along that qualitative dimension doesn't obviously defy current demand any more than it obviously creates new demand.

Allocative concerns aside, one might still wonder about the distributional effects of protecting the musical element most favored in certain cultural traditions but not the ones most favored elsewhere. A melodic focus in music copyright reflects European aesthetic norms that don't represent much of modern musicmaking, especially within genres pioneered by musicians of color. Defining the musical work in terms of melody has discounted and discriminated against wide swaths of creativity from black artists.³²⁰

That critique is real. But increasing the number of musical elements in infringement actions doesn't resolve it. It's important not to lose sight of the fact that, in this context, protection for one means exclusion for others. Those same creative traditions rely heavily on musical borrowing that copyright's basic machinery has had trouble processing. Even with only melody protected, that borrowing has been costly. If distributive fairness is the goal, it's hard to see how making that borrowing still costlier would make the smaller slices of the pie any bigger. The development of contrafacts would have been much harder under a regime in which harmonic copying was regulated as strictly as melodic copying. Making the system sensitive to a wider array of creators is a worthy goal, but doing so through decisions like *Blurred Lines*

and Advertising: A Tale of Two-Sided Markets, in HANDBOOK OF THE ECONOMICS OF ARTS AND CULTURE 567 (Victor Ginsburgh & David Thosby eds., 2006); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 361 (1996).

319. See, e.g., ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 141–42 (2011); Harrison J. Reynolds, *Introducing Price Competition at the Box Office*, 20 UCLA ENT. L. REV. 1, 24–25 (2013).

320. See Sean O'Connor et al., Op-ed, *Overdue Legal Recognition for African-American Artists in 'Blurred Lines' Copyright Case*, SEATTLE TIMES, May 20, 2015, <http://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case/> (arguing that a focus on “catchy melodies . . . derived from a white, European—often ‘high brow’—approach to music. This marginalized the influential harmonic and rhythmic innovations of artists of color from jazz on through rock and hip-hop.”).

likely hurts more than it helps.³²¹

IV. CODA: BEYOND MUSIC

Legal predictability is relevant to all sorts of creators, of course, not just composers. It's thus worth considering whether music's old unidimensional approach could be translated into other areas of copyright law today. While a full treatment of that question is beyond my scope here, I close by offering a rough approximation of how one might generalize the music-specific proposal in the preceding section.

As others have discussed at length, the various creative domains governed by copyright law differ in important ways, from consumer demographics to production costs to network effects.³²² One underexplored source of heterogeneity is that some artforms are easier to break down into discrete chunks than others. One could call it the modularity of expression. Because music falls on the easier side of that range, melody can frequently be isolated to serve as a touchstone in infringement cases.

A similar dissection exercise would be more difficult in some other fields. Likely the least feasible would be visual works. We perceive pictures differently than we do prose, our brains processing an indivisible whole rather than a compilation of multiple elements.³²³ As Judge Jon Newman has remarked, "one cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text."³²⁴ Consequently, there aren't particular modules to which downstream creators trying to avoid infringement could easily restrict their inquiry.

A more interesting test case is literary characters. As a thought experiment, imagine if copying a character's name were a necessary (though not sufficient) condition for infringing the copyright in the character. Under this hypothetical regime, a

321. Moreover, if copyright were to try to encompass every form of creative authorship, it would look little like what we have today. Already the system excludes typeface developers, fashion designers, chefs, landscapers, and actors, despite the considerable creativity that each of them displays.

322. See, e.g., Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006).

323. See Tushnet, *supra* note 263 ("[B]ecause we process images so quickly and generally, we may stop looking before we realize that critical thought should be applied to them. Pictures are perceived more as a gestalt, while texts appear to the reader in a set sequence, most or all of which needs to be processed for the whole to be understood."); PATRY, *supra* note 48, § 9:71 (endorsing a "total concept and feel" test for visual works because "visual works can rarely be divided into chapters or paragraphs like textual works can and instead rely on perceptions of the whole to convey meaning")

324. Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 698 (1999).

new character could share a background and life story with a copyrighted predecessor, so long as the name changes. As a practical matter, this is roughly what happened when E.L. James wrote fan-fiction derivatives of Stephenie Meyer's popular *Twilight* series, only to subsequently swap out the relevant names and entitle her story *Fifty Shades of Grey*.³²⁵ Whether that change was sufficient to avoid infringement, as opposed to merely earning the copyright owner's blessing, we'll never know. There was no lawsuit. But if there had been, the name changes may very well have been insufficient under existing law to defeat an infringement action.³²⁶

If the name were instead an element of substantial similarity between literary characters, that likely result changes. A case could be made that the change would be for the better. Like melody in music (indeed, even *moreso*), one can easily isolate the name as a standalone feature. Downstream creators could have more certainty over whether they were going too far. Moreover, copyright owners may not be significantly threatened. In many contexts, a name change may render the resulting work a far less viable substitute for the original. Part of characters' enduring appeal is the notion that they live fictional lives, today part of one story and tomorrow part of a different one.³²⁷ If the defendant's character has a different name, the work isn't trying to present a new chapter in that life. The copyright owner's markets should be less imperiled once the linkage is broken.

How much less imperiled is an empirical question, whose answer may or may not ultimately support zeroing in on the name. I'm not the first to float the idea,³²⁸ and my goal isn't to press the case for it conclusively here. My point is only that a narrow test is at least worth exploring in the context of literary characters for the same reasons that make melody an appropriately narrow test in the context of music.

That some but not all subject matter could be amenable to a narrowly focused

325. See Marah Eakin, *Holy Crow! Fifty Shades of Grey is Crazy Similar to Its Twilight Origin Story*, A.V. CLUB (Feb. 12, 2015, 3:09 pm), <http://www.avclub.com/article/holy-crow-fifty-shades-grey-crazy-similar-its-twil-215185>; Jane Litte, *Master of the Universe versus Fifty Shades by E.L. James Comparison*, DEAR AUTHOR (May 13, 2012), <http://dearauthor.com/features/industry-news/master-of-the-universe-versus-fifty-shades-by-e-l-james-comparison/>.

326. See, e.g., *Lone Wolf McQuade Assocs. v. CBS, Inc.*, 961 F. Supp. 587, 593–94 (S.D.N.Y. 1997) (finding that a reasonable juror could find infringement based on sufficiently similar character traits, despite different names).

327. See Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 770–71 (2013) (describing the phenomenon in which “[r]eaders become deeply attached to ‘their’ characters”).

328. See E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC'Y U.S.A. 77, 96 (1974).

infringement inquiry means that copyright law would need some filtering system. Fortunately, the substantial-similarity framework itself already equips courts to perform such subject-matter tailoring. By policing the line demarcating how much non-literal copying is too much, courts are in a position to vary the thickness of the owner's entitlement according to what type of work it is.³²⁹ For some categories, the optimal thickness may be limited to a single dimension. Music is one example. Further research may reveal others.

CONCLUSION

Borrowing from an aesthetic norm with roots in nineteenth-century Europe, U.S. courts historically gave more protection to melody than to other musical elements because that's what they thought encapsulated the work. Perhaps that view is still true of certain genres. But it has long outlived the time when it could claim to be true of the full range of music created and consumed.

Unsurprisingly, then, the primacy of melody in infringement cases is weakening. That is a good thing for descriptive accuracy. But it is a troubling thing for music-making. Music copyright shouldn't privilege melody because that's what musical value or originality is always about (it's not). It shouldn't privilege melody because that's how listeners always cognize similarity (they don't). It should privilege melody, rather, because it helps downstream creators better understand what's allowed.

The American experience with music copyright over the last century offers a glimpse at what a substantial similarity regime might look like if it favored transparency over thoroughness.³³⁰ As a matter of doctrinal first principles, the recently expanded definition of the musical work is correct. But given the results, those principles may be misfiring.

329. See Balganes, *supra* note 192, at 231–32.

330. Cf. Tushnet, *supra* note 286, at 1003 (arguing for manageability rather than recognition of creativity to guide the decision whether performers can be authors under the Copyright Act).