

## Articles

# I Hear America Suing\*: Music Copyright Infringement in the Era of Electronic Sound

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*Twentieth-century developments in audio recording, copying, and broadcast technologies thoroughly altered not only how popular music is distributed and consumed, but also how it is created. By the 1960s, sound recording technologies had become so refined, ubiquitous, and economically accessible that they—and no longer music notation—had become the primary means by which popular songs were created and documented. Audio technologies democratized authorship of popular music, but also led to the gradual lessening of original primary musical parameters (melody in particular) in many popular genres. Paradoxically, despite this general diminishment in original musical expression, the number of music infringement claims has grown inexorably, decade by decade, since the 1960s. The bases of these claims have also grown remarkably attenuated, often involving nothing more than a similar sound or a common word or two shared by two songs.*

*The proliferation of music infringement claims since the 1950s can be attributed to the lingering influence of *Arnstein v. Porter*, a case that established the framework for adjudicating copyright infringement cases still used today. *Arnstein* has fostered ongoing judicial diffidence on the essential question of substantial similarity of copyrightable expression between the works in dispute, as well as widespread reluctance by courts to dismiss claims, or grant defendants summary judgment. This reluctance has led to the*

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\* First published in 1860, Walt Whitman's "I Hear America Singing" was a "paean to American pluralism and personal industry [that bore] witness to an era before the machinery of the music business was first set in motion. By the early twentieth century, 'talking machines' were doing much of America's singing . . ." DAVID SUISMAN, *SELLING SOUNDS: THE COMMERCIAL REVOLUTION IN AMERICAN MUSIC* 8 (2012).

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*development of highly inconsistent case law precedent. In turn, this has provoked skittishness in the music industry that has resulted in establishing precautionary measures, creating higher barriers to entry. It has also led to the music industry's resorting to financial settlement, even for highly speculative infringement claims which, ultimately, engenders more of such claims.*

*This Article traces developments in sound technology, popular music, and music copyright infringement litigation in the twentieth and twenty-first centuries. It argues that if courts were more cognizant of the deep changes in the creation and musical content of popular songs since the Tin Pan Alley era of the early twentieth century, they might more confidently dispose of most music copyright infringement claims today through dismissal or summary judgment.*

## TABLE OF CONTENTS

INTRODUCTION.....	1189
I. BEFORE THE TWENTIETH CENTURY.....	1194
A. EARLY STATUTORY COPYRIGHT FOR MUSICAL WORKS.....	1194
B. EARLY INFRINGEMENT DISPUTES IN ENGLAND.....	1195
C. EARLY INFRINGEMENT DISPUTES IN THE UNITED STATES .....	1198
D. AMERICAN PIRATES OF <i>PENZANCE</i> AND <i>THE MIKADO</i> .....	1200
II. TIN PAN ALLEY .....	1205
A. OVERVIEW .....	1205
B. TIN PAN ALLEY: SHEET MUSIC.....	1208
C. TIN PAN ALLEY: MOVIES AND RECORDINGS .....	1210
D. THE END OF TIN PAN ALLEY.....	1213
III. AFTER TIN PAN ALLEY.....	1214
A. WHAT IS A COMPOSER?.....	1214
B. THE MYTH OF ROMANTIC JOINT AUTHORSHIP .....	1218
IV. INFRINGEMENT DISPUTES IN THE AGE OF ELECTRONIC MUSIC .....	1220
A. NOT FEELING GROOVY: <i>BRIGHT TUNES V. HARRISONGS</i> .....	1220
B. PULL THE PLUG!.....	1225
C. THE SOUND OF (POP) MUSIC: INFRINGEMENT LITIGATION AT THE END OF THE TWENTIETH CENTURY .....	1226
D. “WORDS, WORDS, WORDS, I’M SO SICK OF WORDS” .....	1231
E. FREE SAMPLE.....	1234
V. WHAT WENT WRONG? .....	1239
A. <i>ARNSTEIN’S LEGACY</i> .....	1239
B. WHAT SHOULD BE DONE? .....	1244
1. <i>A More Permissive Approach?</i> .....	1245
2. <i>A Sui Generis Infringement Test for Music?</i> .....	1248
C. RECAPITULATION.....	1250
CONCLUSION .....	1254

## INTRODUCTION

In April 2012, Guy Hobbs, a photographer from Cape Town, sued Elton John in the United States, claiming copyright infringement of Hobbs’s song “Natasha.”<sup>1</sup> Shortly after Hobbs had attempted—without

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1. *Hobbs v. John*, 722 F.3d 1089 (7th Cir. 2013). Hobbs also named Bernie Taupin and Big Pig Music as defendants. Elton John’s eponymous Big Pig Music is a company registered in England. Hobbs sued in the United States despite the fact that neither Elton John nor Hobbs is a citizen here; the United States offers the seductive possibility of a statutory damage windfall unavailable under English and South African copyright law. See 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04 (2010) (discussing the hapless C. Edward Feltner, Jr., who incurred jury-determined record-breaking statutory damages exceeding \$31 million for unauthorized broadcasts of syndicated television programs). On more

success—in the early 1980s to have “Natasha” published, Elton John and his lyricist Bernie Taupin published a recording of their song “Nikita.” “Nikita,” like “Natasha,” shared the conceit of a romantic relationship thwarted by politically established physical barriers like the Berlin Wall.

The dispute was reported in the popular press as one between Hobbs and Elton John, yet the infringement claim was based entirely on alleged similarities between Hobbs’s and Taupin’s lyrics conveying a similar romantic quandary.<sup>2</sup> By suing Elton John, Hobbs attempted to capitalize upon the fact that U.S. copyright law fuses authorship of words and music of songs into a single copyrightable work—even if Elton John contributed nothing to the lyrics of “Nikita,” as a co-author of the work he could be jointly liable for any copyright infringement associated with it.<sup>3</sup>

If, rather than publishing his lyrics to “Nikita” in a popular song Taupin had published them as a literary work, Hobbs would never have claimed infringement of “Natasha.” The fact that the words of “Nikita” were published in the same format as “Natasha”—an audio recording of a popular song—provoked Hobbs’s claim. No doubt the fact that the legal co-author and performer of “Nikita” indulged in flamboyant displays of wealth also contributed to Hobbs’s interest in pursuing both defendants.

Hobbs had the misfortune, however, of pursuing his case in federal district court in Illinois shortly after the Seventh Circuit affirmed a district court’s dismissal of a factually similar complaint against the rap performer Kanye West by another rapper, Vincent Peters.<sup>4</sup> West had access to a recording of a song by Peters and in one of his songs used several specific verbal references he had heard in that song.<sup>5</sup> Peters claimed that while these verbal references were not separately protectable, the combination of them in his song constituted copyrightable expression.<sup>6</sup> The district and circuit courts disagreed, and determined that Peters could not monopolize references to commonplace names or aphorisms simply by combining them. Combinations of the same references in Peters’ and West’s songs resulted in “only small cosmetic similarities.”<sup>7</sup> In other words, although West’s song used verbal references identical to Peters’, these references were *so literal* that they could not be protected alone or combined.

In the case against Elton John, the purported indications of copying included references to striking eyes, impossible love, unfulfilled desire and—

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limited remedies available under English and South African copyright statutes, see U.N. EDUC., SCIENTIFIC & CULTURAL ORG., COPYRIGHT LAWS AND TREATIES OF THE WORLD (2000).

2. See, e.g., *Elton John Confused by Lawsuit 26 Years After Song’s Release*, PAGE SIX (Apr. 27, 2012, 3:58 PM), <http://pagesix.com/2012/04/27/elton-john-confused-by-lawsuit-26-years-after-songs-release>. This Article uses “lyrics” as commonly understood, to mean the words of a popular song.

3. See 17 U.S.C. §§ 102, 201(a) (2015).

4. *Peters v. West*, 692 F.3d 629, 636 (7th Cir. 2012).

5. See *id.* at 631–32.

6. See *id.* at 635.

7. *Id.* at 636.

(most telling!) a three-syllable Russian name starting with “N” and ending in “A.”<sup>8</sup> These shared references were *so diffuse* that the plaintiff could not monopolize them simply by combining them. In short, neither Peters nor Hobbs could demonstrate that West or Elton John, respectively, had misappropriated original expression by exploiting well-known references. The Seventh Circuit upheld the district court’s granting of Elton John’s motion to dismiss, finding that the plaintiff’s claim “flounder[ed] [sic] on two well-established principles of copyright law.”<sup>9</sup> In the first place, copyright does not protect ideas; in the second, it does not protect particular expression of those ideas if the expression is indispensable, or even commonplace, in the treatment of a given topic.<sup>10</sup>

While the claim against Elton John was ultimately disposed of fairly and sensibly, it is remarkable that such a claim was brought in the first place, and even more so that it metastasized into an appeal requiring the attention and resources of the Seventh Circuit. To a greater extent than other areas of intellectual property, copyright attracts speculative claimants asserting implausible cases of misappropriation. Patent disputes typically involve plaintiffs with at least a modicum of scientific or engineering acumen, and trademark disputes are typically between commercial enterprises.<sup>11</sup> With its low threshold of eligibility, copyrightable expression can be achieved by anyone. Nevertheless, while many patentable inventions and registered trademarks have some monetary value, only a minute number of copyrightable works have any economic worth.

In winner-take-all markets, authors of the infinitesimal corpus of financially profitable copyrighted works are alluring and deserving targets of infringement claims in the minds of innumerable obscure novelists, songwriters, screenwriters, visual artists, and movie makers whose unread, unseen, and unappreciated *oeuvres* never make a cent. Accordingly, the greater an author’s fame and earnings, the more likely it is that unknown and impecunious authors will seek to siphon some of his<sup>12</sup> profits.<sup>13</sup>

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8. See *Hobbs v. John*, 722 F.3d 1089, 1094 (7th Cir. 2013). The court noted that while Nikita is a masculine name in Slavic countries it is often used as a women’s name in the West. *Id.* at 1094 n.5. The court’s analysis of the lyrics of the two songs, however, oddly presumed that the title of Elton John’s song was intended to refer to a desirable *woman*—highly unlikely, all things considered, but perhaps evidence of a bit of clever ambiguity on the part of the songwriters/performer marketing to listeners across hetero- and homosexual camps.

9. *Id.* at 1094. Judge Daniel Manion meant “founders” as in fail and sink; not “flounders” as in thrash about clumsily.

10. See *id.*

11. Practically every dispute mentioned on the homepage of the Journal of the Patent and Trademark Office Society on February 10, 2015 involved commercial enterprises, typically pharmaceutical companies. See J. PAT. & TRADEMARK OFF. SOC’Y, <http://www.jptos.org/index.php> (last visited June 9, 2015).

12. One commentator notes:

The rule governing traditional usage is that when “he” denotes the arbitrary person, its gender is purely grammatical, not semantic, and hence carries no implications as to the referent’s sex. So understood, “he” no more denotes a man because of being masculine,

Popular music songwriters and performers are particularly attractive butts of such claims. To assert a copyright infringement claim against writers Dan Brown or J. K. Rowling, one must have written something at least approximating a novel. But writing even a bad novel is challenging and time consuming. To lodge a colorable infringement claim against Michael Jackson or Elton John, on the other hand, one merely needs to have created a three-minute song in a popular idiom, which anyone with access to percussion tracks and digital audio recording equipment can readily do. Because the creation of music in popular genres like rap, rock, techno, and so on requires so little expertise, successful numbers in these idioms are more prone to infringement claims than are songs by, for instance, Tin Pan Alley relics like Marvin Hamlisch and Stephen Sondheim, who created more musically complex works using symbolic notation.<sup>14</sup>

Over the past fifty years, there has been an inexorably growing number of music copyright infringement claims. Between 1950 and 2000, U.S. courts issued more than twice the number of opinions in this area than they did between 1900 and 1950.<sup>15</sup> And since 2000, courts have already issued over half the number of opinions published between 1950 and 2000.<sup>16</sup>

These judicial opinions represent only a small portion of music copyright infringement claims; most are settled long before trial. While settlement—typically a “get lost” payment to the plaintiff—keeps disputes off court dockets, it also insidiously promotes spurious or attenuated claims by plaintiffs seeking similar payoffs from the music industry based on convenience and economic expediency.<sup>17</sup> The predilection on the part

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than the German ‘die Person’ or the French “la personne” denotes a woman, because of being feminine. The alternative practices that are currently recommended as inclusive—such as saying “he or she” or alternating “he” with “she”—actually threaten to rob the language of its capacity for gender-neutral reference to persons.

JONATHAN LEAR, *LOVE AND ITS PLACE IN NATURE: A PHILOSOPHICAL INTERPRETATION OF FREUDIAN PSYCHOANALYSIS* 4 n.1 (1999).

13. While the plaintiffs in music copyright infringement disputes are typically unknown individuals, the names of defendants are commonly well-known songwriters, recording companies, or successful bands. See *Case List*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/Pages/default.html> (last visited June 9, 2015). On the other hand, authors and owners of highly profitable works—like *Harry Potter*’s J.K. Rowling and Mickey Mouse’s Walt Disney Company—tend to invigilate them jealously to discourage anyone they perceive as threatening to draw off any derivative monetary potential from their works. See, e.g., John Eligon, *Rowling Wins Lawsuit Against Potter Lexicon*, N.Y. TIMES, Sept. 8, 2008, at B3.

14. See THE OXFORD HANDBOOK OF SONDEHEIM STUDIES (Robert Gordon ed., 2014); *Biography*, MARVIN HAMLISCH, <http://marvinhamlisch.us/biography> (last visited June 9, 2015).

15. See *Case List*, *supra* note 13.

16. See *id.*

17. The InPlay segment of the Music Copyright Infringement Resource provides information on a number of such fishing expeditions, including those targeting Madonna, Lady Gaga, Coldplay, and others. See *InPlay*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/inplay/Pages/default.html> (last visited June 9, 2015). James Singleton, a federal district judge in Alaska, an uncommon venue for copyright claims, let alone one involving music, voiced a refreshingly candid reaction to this phenomenon:

of the music industry towards settlement, however, ultimately reflects its chariness of the unpredictable results of litigation in this area since the peculiar case of *Arnstein v. Porter* in 1946.<sup>18</sup>

In *Arnstein*—discussed within at greater length—the Second Circuit established its durable and influential framework for determining copyright infringement, one that has proved to be particularly solicitous towards plaintiffs.<sup>19</sup> Despite overwhelming evidence that plaintiff Ira Arnstein was an emotionally disturbed gadfly whose songs had nothing in common with Cole Porter’s, the Second Circuit denied Porter’s request for summary judgment.<sup>20</sup> The court noted that popular songs are written for the delectation of “lay listeners.” Accordingly, the court reasoned, judges should avoid granting summary judgment in copyright disputes because doing so ultimately results in the court rather than lay listeners deciding the essential question: whether there exists substantial similarity of protected elements between the plaintiff and defendant’s works.<sup>21</sup>

*Arnstein* was decided in 1946, towards the end of the Tin Pan Alley era.<sup>22</sup> During the sixty years since then, the creation, distribution, consumption, and *content* of popular music have changed drastically, and more so than those of any other medium of expression.<sup>23</sup> They have changed to such an extent that one can reasonably assert that much of what we today consider to be popular music, as that term was understood in the 1940s, is actually something else—perhaps “popular sound,” or, less charitably, “popular noise.”<sup>24</sup>

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Such actions expend needlessly the efforts of the Court, defending parties and counsel, and the numerous resources attached thereto. To the detriment of his clients, the attorney who brings such cases to court raises false hopes of success in the litigants and needlessly prolongs the aggravation which a lawsuit often foments in its participants. As a fiduciary, it is as much the attorney’s responsibility to vigorously represent his clients as it is to counsel potential litigants of ill-conceived claims.

*Toliver v. Sony Music Entm’t, Inc.*, 149 F. Supp. 2d 909, 920 (D. Alaska 2001).

18. 154 F.2d 464 (2d Cir. 1946).

19. See *infra* note 131 and accompanying text.

20. See generally GARY A. ROSEN, *UNFAIR TO GENIUS: THE STRANGE AND LITIGIOUS CAREER OF IRA B. ARNSTEIN* (2012).

21. See *Arnstein*, 154 F.2d at 473 (“The question, therefore, is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners . . . Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine.”). Other circuits’ frameworks for evaluating copyright infringement disputes tend to be variants of the Second Circuit’s, and reflect their diffidence towards summary judgment. See Joshua M. Dalton & Sara Cable, *The Copyright Defendant’s Guide to Disproving Substantial Similarity on Summary Judgment*, LANDSLIDE, July/Aug. 2011, at 26.

22. See *infra* note 86 and accompanying text.

23. “[T]he extraordinarily rapid evolution of the means of musical distribution, rather than put in the service of the art itself—in cultural and moral public enrichment—has facilitated the vulgarization of a repertoire devoid of aesthetic meaning and directed towards the satisfaction of purely commercial appetites.” MICHEL GAUTREAU, *LA MUSIQUE ET LES MUSICIENS EN DROIT PRIVÉ FRANÇAIS CONTEMPORAIN I* (1970) (author’s translation).

24. Popular sound—or noise—might even become a sort of undesirable “utility.” “Imagine a world where music flows all around us, like water, or like electricity.” DAVID KUSEK & GERD LEONHARD, *THE*

If courts were cognizant of how the creation and content of popular music today is utterly dissimilar from the composition and content of popular music prior to the 1960s, they might feel less inhibited by the long shadow of *Arnstein's* near prohibition on granting summary judgment in music copyright infringement cases. If, moreover, courts recognized that the creation and locus of economic value in today's popular music are entirely remote from those of the Tin Pan Alley era of *Arnstein*, they might more confidently dispose of infringement disputes through summary judgment and curtail the growing epidemic of extravagantly attenuated claims in this area.

To appreciate how far we have strayed from the early conception of copyright as a means to counter wholesale copying of musical works, one must trace the evolution of case law in this area before popular music became a significant U.S. "industry." The maturation of this industry occurred in the early twentieth century with the technologies of the Tin Pan Alley era that led to the establishment of juridical approaches that still inform the handling of infringement disputes.

The balance of the following discussion focuses on how electronic technologies in the latter half of the twentieth century have so radically altered the creation and content of popular songs that, for the most part, the quantum and authorship of copyrightable expression they contain is so negligible and diffuse, respectively, as to be incapable of supporting infringement claims. Before considering the transformative influence of these technologies, let us review copyright protection for musical works prior to their arrival. This discussion should illustrate the remarkable expansion of copyright protection in this area over a relatively short period of time.

## I. BEFORE THE TWENTIETH CENTURY

### A. EARLY STATUTORY COPYRIGHT FOR MUSICAL WORKS

While musical works have played a leading role in copyright legislation and case law during the past fifty years, they were not protected by statutory copyright until late in the eighteenth century.<sup>25</sup> In 1777, Johann Christian

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FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL MUSIC REVOLUTION x (2005). This world has existed for some time now in the United States. Kusek and Leonhard go on to suggest that the pornography racket might provide a good model for the popular music industry in the future. *Id.* at 72. David Suisman notes that the music business has grown so large and has permeated our cultural lives so completely that it is everywhere, part of the very air we breathe. DAVID SUISMAN, SELLING SOUNDS: THE COMMERCIAL REVOLUTION IN AMERICAN MUSIC 8 (2012). "Music may still have cultural or aesthetic value, but neither governs its commercial production." *Id.* at 9.

25. Before enactment of the first copyright statute in England in 1710, particular works of music, and even music staff paper, were protected through royal grants to printers. See JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 12 (1994). Beginning in the late fifteenth century, similar privileges and patents protected the interests of a number of Continental music

Bach sued James Longman, a London music publisher who had published an unauthorized version of two of Bach's sonatas.<sup>26</sup> Deciding the dispute in Bach's favor, Lord Mansfield determined that "books and other writings" protected under the copyright statute were not limited to works of language or letters: "music is a science; it may be *written*; and the mode of conveying the ideas, is by signs and marks."<sup>27</sup> In other words, like literary works, musical works are products of human intellection and should enjoy the same protection once recorded in symbolic notation.

Thirteen years after Lord Mansfield determined that the English copyright statute protected works of music, the First Congress enacted the first U.S. copyright statute.<sup>28</sup> While England's earliest copyright statute—the Statute of Anne—simply identified the open-ended category "books" as the object of its protection, the U.S. statute protected not only books, but more specifically, "maps" and "charts."<sup>29</sup> Plotting the course for a wilderness, members of Congress were interested in promoting more the creation of land surveys and tide charts than viol da gamba sonatas.

Given the early U.S. statute's greater particularity of the scope of protectable works, it is not surprising that a revision of the statute—and not a judicial interpretation, as in England—brought works of music within the scope of U.S. copyright protection. In 1831, Congress passed the first comprehensive revision of the copyright statute and specifically included musical works among those protected.<sup>30</sup>

#### B. EARLY INFRINGEMENT DISPUTES IN ENGLAND

Early music copyright infringement cases in England are strikingly different from recent disputes in this area in the United Kingdom and elsewhere: they involved serious rather than popular works, and their claims were based upon unauthorized reproductions of the plaintiff's work *in toto*—not merely alleged musical similarities.<sup>31</sup> These differences

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printers and publishers. See Joanna Kostylo, *Commentary on Ottaviano Petrucci's Music Printing Patent (1498)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), www.copyrighthistory.org. These rights are often identified as monopolies, but "monopoly" implies a taking from the commonwealth—that is, acquisition of an exclusive privilege for something the public freely enjoyed prior to the grant. In fact, the public typically did *not* have the right to print and publish prior to the award of such privileges. See BRUCE WILLIS BUGBEE, THE EARLY AMERICAN LAW OF INTELLECTUAL PROPERTY: THE HISTORICAL FOUNDATIONS OF THE UNITED STATES PATENT AND COPYRIGHT SYSTEMS 6 (1961).

26. Johann Christian Bach was the eleventh child of Johann Sebastian and Anna Magdalena Bach; J.S. Bach also fathered seven other children with his first wife Maria—who was also his first cousin. See MALCOLM BOYD, BACH x (1997).

27. *Bach v. Longman*, (1777) 98 Eng. Rep. 1274, 1275 (emphasis added).

28. Copyright Act of 1790, 1 Stat. 124.

29. *Id.*

30. Copyright Act of 1831, 4 Stat. 436.

31. See, e.g., *Bach*, 98 Eng. Rep. at 1274. As is the case today, in the eighteenth century, only popular musical works were the subject of copyright infringement disputes. What we would now consider serious

underscore the remarkable and—as elaborated within—regrettable change over the past two hundred years in proprietary attitudes towards works of music.<sup>32</sup>

A long-held view of works written by English musicians is akin to the reputation of English cuisine: stolid and forgettable.<sup>33</sup> Not surprisingly, Londoners in the eighteenth and nineteenth centuries had a great appetite for sparkling new musical works from the Continent, especially operas from Italy and France.<sup>34</sup>

Despite the fact that sonatas by the Leipzig native Bach established copyright for musical works in 1777, for many years after this development, publishers in England capitalized upon the ambiguous copyright status of works of foreign musicians by issuing unauthorized versions of their scores.<sup>35</sup> Given the strong demand in England for music by non-English authors at the time, these piracies profited English music publishers who siphoned purchasers by offering cheaper editions than the legitimate original foreign versions. This practice provoked a number of lawsuits by authorized publishers, the disposition of which reveals a flagrantly protectionist stance by the English judiciary.<sup>36</sup> A similar chauvinist approach to copyright protection would, in turn, be visited upon English authors later in the nineteenth century in response to their attempts to combat piracy by American publishers.<sup>37</sup>

In the 1824 case *Clementi v. Walker*, the defendant published, without authorization, Friedrich Kalkbrenner's set of piano variations on the old French air, "Vive Henri IV," which was first published in France.<sup>38</sup> Kalkbrenner sold the right to publish the work in England to Muzio

or classical music, however, was popular then and therefore economically valuable. See *infra* note 38 and accompanying text.

32. See *infra* note 161 and accompanying text.

33. In 1904, German writer Oskar Schmitz articulated this perception in a treatise setting forth his assessment of the inferiority of English music compared with that of other European nations, Germany in particular. OSKAR SCHMITZ, *DAS LAND OHNE MUSIK: ENGLISCHE GESELLSCHAFTSPROBLEME* (1914). "From the very beginning the English have never striven to be a nation of culture" *Id.* at 42 (author's translation).

34. A dismissive attitude towards English music still holds to some extent; the chances, even today, of hearing a performance of German symphonic work or an Italian opera in London are vastly greater than those of hearing one of an English symphony or opera in Munich. The likelihood of hearing an English opera performed anywhere in Italy is almost nil.

35. See Ronan Deazley, *Commentary on Bach v. Longman* (1777), in *PRIMARY SOURCES ON COPYRIGHT*, *supra* note 25.

36. See *infra* note 38 and accompanying text.

37. "Sauce for the goose is sauce for the gander." The same chauvinism and intimation of cultural insecurity is found in a similar U.S. policy—valid until enactment of the Chace Act of 1891—denying copyright protection to the works of foreign authors. See *infra* note 38 and accompanying text.

38. *Clementi v. Walker*, (1824) 107 Eng. Rep. 601, 602. Ronan Deazley identifies the air as by Kalkbrenner himself. Ronan Deazley, *Commentary on Jeffreys v. Boosey* (1854), in *PRIMARY SOURCES ON COPYRIGHT*, *supra* note 25. "Vive Henri IV" is, in fact, a popular song dating from the time of France's Henri IV (1555–1610) and the tune has been the basis of many derivative musical works, including a set of piano variations by Liszt. See, e.g., ROBERT CHARLES LEE, *SOME LITTLE KNOWN LATE PIANO WORKS OF LISZT 1869–1886: A MISCELLANY* (1970).

Clementi, an Italian musician and publisher in London.<sup>39</sup> Walker, a competitor of Clementi's, published his unauthorized edition of Kalkbrenner's work based upon the score published in Paris, not Clementi's English edition.<sup>40</sup> When Clementi sued Walker for infringement of the English publication right that he had bought from Kalkbrenner, the court noted that at the time Walker published his unauthorized version, Clementi and Kalkbrenner had had only an oral agreement regarding the English rights.<sup>41</sup> While the court noted the absence of a written assignment, this lack was ultimately not dispositive on the question of infringement, because the court determined that, given the purpose of the English copyright statute to protect only "British interests," "British enterprise," and "British knowledge," it was not obligated to extend protection to interests based on works of foreigners.<sup>42</sup>

The English judiciary maintained this stance towards foreign publishers through the middle of the century. *Boosey v. Purday*, for instance, involved another unauthorized English publication of a foreigner's music—in this case, portions of Bellini's *La Sonnambula*.<sup>43</sup> In 1831, Boosey purchased from Bellini's Italian publisher, Giovanni Ricordi, the exclusive right to publish *La Sonnambula* in England.<sup>44</sup> Boosey then published a full piano-vocal score, and excerpts thereof, in England, shortly after which Purday came out with a competing edition of several of the opera's most popular numbers. Like the earlier *Clementi*, *Boosey* involved the work of a foreign author. But the latter dispute involved two domestic publishers—not an English publisher and a foreign one. Nevertheless, the *Boosey* court followed *Clementi* in determining that only English *authors* could benefit from rights granted under the Statute of Anne; works of foreign authors could not obtain statutory protection simply because they were published by an English house.<sup>45</sup> This narrow reading of the statute not only rendered worthless the publication rights Boosey had purchased from Ricordi, but also effectively placed in the public domain a vast number of works of foreign composers that dominated musical life in London at that time.

Several years after losing his dispute with Purday, Boosey again sued over an unauthorized publication of *La Sonnambula*, this time by a different English music publisher named Jefferys.<sup>46</sup> The House of Lords, which ultimately considered Boosey's claim, decided in favor of the

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39. *Clementi*, 107 Eng. Rep. at 602.

40. *Id.*

41. *Id.* at 605.

42. *See id.* at 604.

43. *Boosey v. Purday*, (1849) 154 Eng. Rep. 1159, 1159.

44. *Id.* at 1160.

45. *Id.* at 1163–64.

46. *Jefferys v. Boosey*, (1845) 10 Eng. Rep. 681 (H.L.).

defendant.<sup>47</sup> Protection under the English copyright statute, the Lords determined, could be premised not only upon the nationality of the author—the basis of the earlier *Purday* decision—but also on the place of first publication and residency of the author at that time.<sup>48</sup> English copyright protection could be provided to *La Sonnambula* only if Bellini was residing in England *and* the opera was first published in England during this residency.<sup>49</sup>

These shifting interpretations of the application of statutory copyright to works of foreign authors precipitated decades of improvisation by composers and publishers to meet publication, citizenship, and residency requirements in England and elsewhere in search of elusive protection beyond composers' home countries.<sup>50</sup> The denial of copyright to foreign composers in nineteenth-century English cases—or courts conditioning it upon compliance with irksome residency or publication requirements—appears anomalous today given the now well-established reciprocity of protection among developed nations.<sup>51</sup> This is especially true given that these early claims were based on shameless unauthorized republications of entire works, and not the covert appropriation of another's expression for the creation of a purportedly original musical work. Music copyright disputes based not on identical copying but on more attenuated musical similarities were a byproduct of the twentieth-century American music industry.

### C. EARLY INFRINGEMENT DISPUTES IN THE UNITED STATES

The earliest music copyright infringement disputes in Britain involved sonatas of Bach and a *semiseria* opera by Bellini.<sup>52</sup> Even the earliest U.S. cases, on the other hand, dealt with less rarified works. In 1845—fourteen years after the United States extended statutory protection to music—George Reed, who had published Henry Russell's popular

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47. *Id.* at 752.

48. *See id.* at 694–95, 710–11.

49. *Id.* at 749–50. With the decision of *Jeffreys v. Boosey*, England's copyright policy towards foreigners matched that of the United States at the time. In both countries, protection was provided only to works whose author resided in the country in question and first published his work there. For a discussion of the impact of *Jeffreys v. Boosey* on the development of Anglo-American copyright relations, see Deazley, *supra* note 35.

50. *See generally* Jeffery Kallberg, *The Chopin Sources: Variants and Versions in Later Manuscripts and Printed Editions* (1982) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago Library) (discussing Chopin's efforts to obtain copyright protection through simultaneous publication of his works in several countries); *see also* Joel Sachs, *Hummel and the Pirates: The Struggle for Musical Copyright*, 59 *MUSICAL Q.* 31, 31–33 (1973) (discussing the difficulties faced by Hummel in obtaining both domestic and international copyrights for his works under the English, French, and German systems).

51. *See generally* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986* (1987).

52. *See supra* note 31 and accompanying text.

song “The Old Arm Chair,” sued the publisher of a competing sheet music publication with the same title.<sup>53</sup> The words of both songs were taken in their entirety, and without authorization, from a poem “The Old Arm Chair” written some years earlier by an Englishwoman named Elizabeth Cook.<sup>54</sup>

Like plaintiffs in early English music copyright infringement cases, the plaintiff in *Reed v. Carusi* claimed that the defendant had infringed by republishing his entire work, and not—as would become the norm in twentieth-century disputes—merely that the plaintiff had misappropriated a portion of his melody.<sup>55</sup> Also, while “The Old Arm Chair” was a popular work in that it was widely disseminated as sheet music, musically it has much in common with operatic works of the same era. This musical affinity is unremarkable given that in the early 1800s operas of Rossini, Bellini, and other *ottocento* composers were as much in vogue in America as they were in Europe.<sup>56</sup> While these *bel canto* works are now consigned exclusively to the realm of highbrow music, they strongly influenced popular music in the nineteenth century when low and highbrow genres mingled in a promiscuous manner unthinkable today.<sup>57</sup>

At trial, presided over by the now much-maligned Justice Roger Taney, the defendant claimed that his setting of the public domain poem “The Old Arm Chair” was based not upon the music of Russell’s setting of the same text, but rather that of “New England,” another song to which

53. *Reed v. Carusi*, 20 F. Cas. 431, 432 (C.C.D. Md. 1845). For sound recordings and sheet music of both works, see *Reed v. Carusi*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/Before1900/Pages/reedcarusi.html> (last visited June 9, 2015).

54. See G. Latimer Apperson, *The Literary Associations of Wimbledon*, 1899 SURREY MAG. 252, 254 (noting the location at Wimbledon of Cook’s manuscript of the poem “The Old Arm Chair”).

55. *Reed*, 20 F. Cas. at 431. Twenty-three sheet music editions of Russell’s version of “The Old Arm Chair” were published in the nineteenth century. See Frank McCormick, George P. Reed v. Samuel Carusi: A Nineteenth Century Jury Trial Pursuant to the 1831 Copyright Act 2 (Jan. 10, 2005) (unpublished manuscript), available at [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1003&context=mlh\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1003&context=mlh_pubs).

56. Henry Russell studied with Rossini and Bellini before pursuing his career in the United States in the 1830s. See *Henry Russell, 1812–1900 [biography]*, LIBRARY OF CONG., <http://lcweb2.loc.gov/diglib/ihas/loc.natlib.ihas.200152698/default.html> (last updated Nov. 14, 2007). Samuel Carusi also could claim some connection to Bellini, having been born around the same time in Catania, Bellini’s native town in Sicily. Carusi demonstrated his affinity for the music of his fellow Catanian in his “revised and corrected” English-language version of the duet “Deh! Con te” from Bellini’s *Norma*. See LIBRARY OF CONG., *Deh! Con te, il prendi = For the Sake of These I Pray [from] Norma [sheet music]*, PERFORMING ARTS ENCYCLOPEDIA, (Sept. 6, 2013), <http://lcweb2.loc.gov/diglib/ihas/loc.music.smt1844.400230/default.html> (providing images of Carusi’s sheet music).

Appreciation of Italian opera in America was not limited to the upper crust in cities like New York and Boston; it was enormously popular among all economic classes, including prospectors in the California Gold Rush. A few of the hastily built opera houses that accommodated this enthusiasm can still be found in small California towns. See GEORGE MARTIN, *VERDI AT THE GOLDEN GATE* (1993).

57. Thanks to numerous recordings—Doc Watson, Everly Brothers, and so on—one work by Russell that is somewhat known even today is “My Grandfather’s Clock.” This song, and his excellent “Woodman Spare That Tree,” are more lyrical than “The Old Arm Chair” and one hears them occasionally on “good music” radio stations on July 4th.

the defendant Carusi owned the copyright.<sup>58</sup> A comparison of the three songs reveals this to be true; Carusi's lyrical melody in "The Old Arm Chair" maps closely to that of his "New England" and has surprisingly little in common with the narrowly ranged, and comparatively monotonous, melody of Russell's song.<sup>59</sup>

In his opinion, Taney instructed the jury that it could find Carusi liable for infringement only if Carusi's publication "[was] the same with that of Russell, in the main design, and in its material and important parts" and was not "the effort of his own mind, or taken from an air composed by some other person, who was not a plagiarist from that of Russell."<sup>60</sup> Despite the fact that the music of Carusi's work was demonstrably derived from an earlier work that he owned, the jury found him liable for infringement of Reed's song.<sup>61</sup> Taney, who appears not to have scrutinized the works in question, accepted the jury's determination; Carusi was enjoined from publishing his work further, and was ordered to pay damages of \$200. This unjust resolution set a regrettable precedent that would be often repeated in music copyright cases in the United States over the next 150 years.<sup>62</sup>

#### D. AMERICAN PIRATES OF *PENZANCE* AND *THE MIKADO*

Most of the operas and a preponderance of other serious works of music that were appreciated by Americans from the colonial era until well into the twentieth century were written by Europeans and were first published in Europe.<sup>63</sup> Until Congress passed the International Copyright

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58. The music and words of these works are posted on the Music Copyright Infringement Resource page. See *Reed v. Carusi*, *supra* note 53. Roger Taney—of *Dred Scott v. Sandford* notoriety—was Chief Justice when he presided over *Reed v. Carusi*, but spent more than half his time on Circuit Court cases. See CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 248 (1974).

59. The earlier work, "New England" by I.T. Stoddart, was published in 1841, several years before Carusi adapted its melody to "The Old Arm Chair." In 1840, Carusi did publish an arrangement for guitar of Russell's version of "The Old Arm Chair." See LIBRARY OF CONG., *The Old Arm Chair*, PERFORMING ARTS ENCYCLOPEDIA, (Sept. 6, 2013), <http://lcweb2.loc.gov/diglib/ihas/loc.music.sm1840.370920/default.html>. Given that works of music had only recently obtained statutory protection in the United States at that time, Carusi capitalized on the ambiguous copyright status for musical arrangements by publishing his unauthorized version of Russell's music. This conduct undoubtedly piqued Russell's publisher, who ultimately sued Carusi for publishing Carusi's vocal version of "The Old Arm Chair." See McCormick, *supra* note 55.

60. *Reed*, 20 F. Cas. at 432.

61. *See id.*

62. The jury was likely influenced by the fact that Carusi used imagery on the cover of his sheet music—a spectral woman standing behind a chair—that is nearly identical to that published by Reed. Both images are posted on the Music Copyright Infringement Resource case page. See *Reed v. Carusi*, *supra* note 53.

63. See LARRY STARR & CHRISTOPHER WATERMAN, AMERICAN POPULAR MUSIC: FROM MINSTRELSY TO MP3, at 10 (2003) (positing that until the middle of the nineteenth century, American popular music was "almost entirely European in character"). The *Star Spangled Banner*, for instance, is an eighteenth-century English drinking song set to new words by Francis Scott Key. See *The Star-Spangled Banner*, SMITHSONIAN INST., <http://amhistory.si.edu/starsspangledbanner> (last visited June 9, 2015).

Act of 1891, works by Europeans were ineligible for U.S. copyright protection unless their authors were living in the United States at the time of publication.<sup>64</sup>

Not surprisingly, early music copyright infringement disputes in the United States involved popular works because the output of Americans—to the extent Americans were writing music in the eighteenth and nineteenth centuries—was mainly popular songs. There was little need or incentive for domestic creation of new serious music given that, until 1891, U.S. music publishers could freely plunder a virtually bottomless trove of the greatest music ever written. “[T]he ready supply of European music made American composition unnecessary . . . . Composers in America have earned money writing music only at points where the supply of music from the Old World has failed to meet American needs.”<sup>65</sup> One consequence of this government-condoned piracy between 1831—when U.S. law first extended copyright to musical works—and the late nineteenth century, was that in the United States, only authors of popular songs might anticipate any interest in, and remuneration for, their work.<sup>66</sup>

The enactment of the International Copyright Act in the last decade of the nineteenth century, however, presaged the dawn of the American music industry. For the first time, U.S. copyright protection was extended to works of foreign authors; a few years later, the Cummings Copyright Bill extended performing rights to authors of not only dramatic works, but those of musical works as well.<sup>67</sup> Both pieces of legislation were the culmination of decades of lobbying by foreign authors—most notably Charles Dickens—chagrined by their inability to capitalize on the increasingly profitable American market.<sup>68</sup>

The *outré-Atlantique* vexation on the part of foreign authors in the nineteenth century is nicely illustrated by the litigious antics associated with operetta author Arthur Sullivan and his librettist William Gilbert. Gilbert and Sullivan’s tuneful operettas have witty original texts in English, and

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64. International Copyright (Chace) Act of 1891, 26 Stat. 1106.

65. RICHARD CRAWFORD, *THE AMERICAN MUSICAL LANDSCAPE: THE BUSINESS OF MUSICIANSHIP FROM BILLINGS TO GERSHWIN* 58–59 (2000).

66. As observed earlier, however, during this time—and even into the early decades of the twentieth century—serious and popular musical genres were not the antipodes they would eventually become. While there was little financial potential for an opera or symphony by an American composer in the nineteenth century, popular songs, like those of Stephen Foster, could be profitable. *See supra* note 56 and accompanying text.

67. Act of Mar. 3, 1897, 29 Stat. 694.

68. *See generally* CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* (2006). Those opposed to American copyright for Dickens and other foreigners argued that if Dickens’ works had been protected in the United States, copies would have been much more expensive and Dickens would never have been able to capitalize upon widespread popularity among American readers that enabled his profitable speaking tours in the United States. *See id.* at 166.

musical scores that are accessible to amateur performers.<sup>69</sup> Both attributes contributed to the American enthusiasm for these works that has been sustained, to some extent, even to the present.<sup>70</sup>

Until 1891, U.S. copyright law did not protect works of foreign authors unless they were first published in the United States while the author was living here.<sup>71</sup> In 1879, Gilbert and Sullivan's copyright assignee Richard D'Oyly Carte hoped—in vain—that by not publishing the score of *Pirates of Penzance*, and by holding its “official” premiere in the United States, he could prevent unauthorized American productions of this dramatic work.<sup>72</sup> This gambit did not dissuade American troupes from mounting unsanctioned productions of the operetta, although Carte did succeed in enjoining several American publishers from publishing collections of popular numbers from *Penzance*.<sup>73</sup>

Having failed to prevent unauthorized performances of *Penzance* in America, in 1885 Gilbert and Sullivan concocted an elaborate ruse to protect their newest operetta *The Mikado*. They initially published the work in the United States and in England but only as solo piano and piano-vocal scores, respectively.<sup>74</sup> The solo piano version of *The Mikado*

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69. See Ian Bradley, *Amateur Tenors and Choruses in Public: The Amateur Scene*, in THE CAMBRIDGE COMPANION TO GILBERT AND SULLIVAN 177, 177 (David Eden & Meinhard Saremba eds., 2009). Jacques Offenbach's 100 *opéras* and *opéras bouffes* from roughly the same time as Gilbert and Sullivan operettas were more popular throughout Europe than the Gilbert and Sullivan works. See generally PETER GAMMOND, OFFENBACH: HIS LIFE AND TIMES (1980). Offenbach's works enjoyed some vogue in the United States but never achieved the popularity of those of Gilbert and Sullivan because of two major shortcomings for American audiences: the librettos were in French; and Offenbach's music was relatively more challenging for amateur performers than that of Arthur Sullivan.

70. “The vocal parts in *The Mikado* are so easily encompassed, and restricted to such a modest range, that big lungs and technical virtuosity are no more prerequisites for their performance than they were for the musical comedies of Adam, Hiller, Monsigny, and Gretry.” Richard Silverman, *The Operas in Context*, in THE CAMBRIDGE COMPANION TO GILBERT AND SULLIVAN, *supra* note 69, at 69, 70 (quoting music critic Eduard Hanslick).

71. See Copyright Act of 1831, 4 Stat. 436, amended by Copyright Act of 1891, 26 Stat. 1106.

72. The work was first performed in Paignton, England, on December 30, 1879. The first American performance was given the following day in New York. See MICHAEL AINGER, GILBERT AND SULLIVAN: A DUAL BIOGRAPHY 180–81 (2002). Boston music publisher White-Smith had published an unauthorized selection of airs from Gilbert and Sullivan's *Pirates of Penzance* that had been performed, but not published, in England. The Massachusetts Circuit Court determined that this performance did not constitute publication of the operetta and enjoined White-Smith from selling their collection of numbers from it. See *Sullivan v. White*, Equity Case No. 1391 (C.C.D. Mass. 1879). White-Smith would, some twenty-eight years later, unsuccessfully claim that piano rolls were copies of their sheet music. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1907). The decision was voided by the 1909 Copyright Act that provided authors control over mechanical reproductions of their musical works.

73. See Zvi Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1159, 1171 (2007).

74. See *Carte v. Duff (The Mikado Case)*, 25 F. 183, 183–84 (C.C.S.D.N.Y. 1885). Piano-vocal scores reduce orchestral scores of a vocal works to versions that can be played at the piano (with standard treble and bass staves) but preserve the full complement of vocal parts. Because piano-vocal scores are compact, inexpensive, and—most importantly—provide a readily accessible means of learning and rehearsing vocal works, they are used almost to the exclusion of orchestral scores by singers and accompanists, and even by inexperienced conductors during performances.

had been prepared at Gilbert and Sullivan's behest by an American musician named George Tracey who travelled to London to accomplish this work.<sup>75</sup> Tracey obtained a U.S. copyright for his piano score that was published in England and the United States.<sup>76</sup> The full orchestral score from which Tracey derived his piano version was used for performances in London, but not published at that time.

James Duff, an American impresario, used Tracey's piano score to create an unauthorized orchestral score of *The Mikado*, prompting Carte to sue to prevent Duff from performing his orchestral version.<sup>77</sup> The Circuit Court, while skeptical of Duff's ethicality, determined that his orchestration did not infringe upon the copyright in Tracey's piano score, and that Duff could perform his version of the operetta as long as he did not represent it as the orchestral score of Gilbert and Sullivan.<sup>78</sup>

The court determined that Tracey's piano score was not a "new and original work," but rather simply a "cull[ing]" of "[Sullivan's] . . . melodies and their accompaniments."<sup>79</sup> In other words, the "new and original" work was entirely Gilbert and Sullivan's. Therefore, the publication in England of Tracey's piano score and Gilbert and Sullivan's piano-vocal score constituted an unwitting presentation to the public domain of the work's original musical and dramatic expression. The only U.S. rights retained by Gilbert and Sullivan were the copyright and public performance right to the operetta as embodied in *Sullivan's* orchestration of the work, which had not been published anywhere.

The outcome of *The Mikado* case may rattle our sense of equity, but the court was correct in determining that the solo piano and piano-vocal scores are representations of essentially the entire work.<sup>80</sup> This finding is relevant to investigation of how, over the past century, the qualitative and quantitative similarities between musical works upon which one can reasonably base a claim of infringement has changed dramatically.

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75. *See id.*

76. *Id.*

77. *Id.*

78. *Id.* at 184.

79. *Id.* at 185.

80. On the significance and use of piano-vocal scores by musicians as essentially complete musical works, see *supra* note 74. Two years before *The Mikado Case*, a Massachusetts court heard a factually similar dispute involving the unauthorized performance of the *Redemption Cantata*, a religious work by Charles Gounod. In *Thomas v. Lennon*, 14 F. 849 (C.C.D. Mass. 1883), the defendant intended to perform the work using an orchestral reconstruction of it that he had devised from a piano-vocal score published in England. The court determined that because the author had not published an orchestral version of his work in England, he retained the exclusive right to do so despite the fact that his orchestral version had already been performed. *Id.* at 852–53. In other words, because Gounod had not published *an* orchestral score, he retained the right to prevent the public performance of *any* orchestral score of his work, even though the underlying music was in the public domain in the United States because it had been published as a piano-vocal score in England.

Sullivan's initial version of *The Mikado* was rendered as a piano-vocal score, as were the preliminary manifestations of most operatic works of the nineteenth century. Composers drafted piano-vocal scores of operas first because this medium allows one to capture most of the essential information of complex works swiftly and in a manageable visual field—melody, harmony, rhythm, and text setting. It is only after this vital information has been recorded in symbolic notation that a composer will turn to the easier task of orchestration.

Arthur Sullivan's orchestrations comport with those of other light opera composers of his time in that they are clearly predicated upon musical information in the underlying piano-vocal score. A skilled musician familiar with other works of Sullivan—or for that matter of his contemporaries also working in this musical genre—could, therefore, create a full orchestral score based upon a piano score that would likely map closely to one Sullivan himself would draft.<sup>81</sup>

D'Oyly Carte sued over his exclusive right to perform *The Mikado* and not over his right to publish and sell copies of the work.<sup>82</sup> The gravamen of his dispute reflects a shift in, or at least dispersion of, the locus of economic value of musical works by the late nineteenth century. Physical copies of musical works were valuable, but increasingly so were public performances of them—particularly dramatic works like *The Mikado*.<sup>83</sup>

At issue in *The Mikado* case was the *complete* operetta of Gilbert and Sullivan, and not merely publication or performance of a derivative unauthorized arrangement of one or more of the popular numbers from the work.<sup>84</sup> In fact, the creation and distribution of such arrangements was commonplace and countenanced at the time, but would never be tolerated under today's copyright regime.<sup>85</sup> Today's "maximalist" view of copyright for musical works, and its deleterious consequences for successful popular musicians, developed alongside the early music industry in New York's Tin Pan Alley early in the twentieth century.

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81. *The Mikado Case* offers a curious twist to the commonplace compositional practice of the time. Despite the fact that Sullivan originally wrote *The Mikado* as a piano-vocal score, Tracey's solo piano score was derived not from Sullivan's piano-vocal score but rather Sullivan's *orchestral* score. Perhaps Gilbert and Sullivan hoped that the skill needed to distill a full score down to its musical essence in a solo piano score would satisfy any concerns as to original expression on which Tracey's copyright claim would depend. If so, they hoped in vain.

82. Public instrumental concerts of new musical works were typically one-off events in mid-nineteenth Europe. New operas, on the other hand, would be performed as often as enthusiasm for the work lasted. See F. M. SCHERER, *QUARTER NOTES AND BANK NOTES* (2004).

83. See *THE CAMBRIDGE HISTORY OF AMERICAN MUSIC* 162–63 (David Nicholls, ed., 1998) (discussing the variety of musical dramatic works in vogue in nineteenth century America).

84. See *The Mikado Case*, 25 F. at 184.

85. For example, P. Bucalossi & Arthur Sullivan, *The Mikado Quadrille: On Airs from Gilbert and Sullivan's Opera* (Chappell & Co. 1885).

II. TIN PAN ALLEY<sup>86</sup>

## A. OVERVIEW

After the United States extended copyright protection to works of foreigners in 1891, American music publishers could no longer pirate the publications of authors overseas with legal impunity.<sup>87</sup> Operating under this new limitation, publishers in the United States focused increasingly on popular works of American rather than European songwriters. In fact, these American songwriters were often émigrés from Europe—or were trained by European musicians—who were often well-versed in serious as well as popular music in Europe at that time.<sup>88</sup>

The new emphasis on publishing American rather than European songwriters after U.S. copyright was extended to foreign authors in 1891 opened the possibility to Americans of participating in windfalls from sheet music sales to amateurs who played the piano, and sang, at home.<sup>89</sup> In the last decades of the nineteenth century—the early Tin Pan Alley era—sheet music publishing was profitable to such an extent that successful songwriters established their own publishing firms.<sup>90</sup>

In the early 1900s, the piano was only somewhat less ubiquitous a household article as the television would—tragically—become in American households by the end of the twentieth century.<sup>91</sup> It was mostly amateurs, and more commonly women than men, who played these instruments.<sup>92</sup>

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86. “Suggesting the tinny sound of the overworked upright pianos used by song pluggers in publishers’ salesrooms, the term is said to have been coined by Monroe H. Rosenfeld, composer of such songs as *Those Wedding Bells Shall Not Ring Out* (1896), *Take Back Your Gold* (1897) and *She Was Happy Till She Met You* (1899).” H. Wiley Hitchcock, *Tin Pan Alley*, in GROVE MUSIC ONLINE (2013), <http://www.oxfordmusiconline.com.libproxy.usc.edu/subscriber/article/grove/music/27995>.

87. See International Copyright Act of 1891, 26 Stat. 1106.

88. Fred Fisher, for instance, founder of one of Tin Pan Alley’s most important publishing houses, was born and educated in Germany. See ARTHUR IGER, *MUSIC OF THE GOLDEN AGE, 1900–1950 AND BEYOND* 7 (1998).

89. For example,

[t]he firms of Thomas B. Harms (established in 1881) and M. Witmark & Sons (1885) published only popular songs. Able now to concentrate their attention on a single, highly profitable publishing niche, publishers like these developed great efficiencies. . . and as a result, popular music became a very big business indeed. Just how big (and how profitable) it remained for the 1890s to discover.

See THE CAMBRIDGE HISTORY OF AMERICAN MUSIC, *supra* note 83, at 183.

90. See generally RUSSELL SANJEK & DAVID SANJEK, *AMERICAN POPULAR MUSIC BUSINESS IN THE 20TH CENTURY* (1988). Among the well-known songwriters who were also publishers are Harry Von Tilzer—née Aaron Gumbinski—whose most popular number was “Under the Anheuser Bush,” Charles Harris, who wrote “After the Ball Is Over”—the most popular song of the early 1890s—and Irving Berlin. NICHOLAS E. TAWA, *THE WAY TO TIN PAN ALLEY: AMERICAN POPULAR SONG, 1866–1910*, at 39 (1990).

91. The growth of piano ownership generated an increased demand for sheet music to play on these instruments. In 1850, only five percent of American households owned a piano; by 1900 it was twelve percent, and by 1923 twenty-three percent. See SCHERER, *supra* note 82, at 156; see also CRAIG ROELL, *THE PIANO IN AMERICA, 1890–1940* (1989).

92. Elijah Wald states:

Given the limited skill of these players, songs written for their enjoyment were necessarily fairly simple, deliberately made so by writers more musically accomplished than those purchasing their works.<sup>93</sup>

The piano's popularity contributed, ironically, to two phenomena associated with the developing American music industry: popular music became more commercially valuable than serious works; and, by catering to the limited ability of amateur performers, songwriters abetted the division, continually widening since the turn of the twentieth century, between the content—and audiences—of serious and popular music.<sup>94</sup>

The player piano that became enormously popular in the 1920s, and the subsequent development and ultimately universal adoption of sound recording and radio broadcasting technologies, were simultaneously detrimental and beneficial to music in America.<sup>95</sup> On one hand, these technologies promoted a decline in musical literacy, the passive and uncritical enjoyment of music, and what would develop into the scourge of aural pollution in the form of popular music seeping into virtually every corner of commercial public space in the United States.<sup>96</sup> “The long reach of the music business meant not only more music in more places than ever before, but also an erosion of silence or opportunity for reflection, for being

Most of the famous composers and concert virtuosos were men, but it is worth noting that, in middle- and upper-class homes of the nineteenth century, the majority of musicians were female. . . . [A]ny properly brought up young lady was expected to be able to perform on the keyboard . . . and a typical evening's playing might range from Beethoven to “The Old Folks at Home.”

ELIJAH WALD, *HOW THE BEATLES DESTROYED ROCK 'N' ROLL: AN ALTERNATIVE HISTORY OF AMERICAN POPULAR MUSIC* 19 (2009). By the late nineteenth century, music publishers increasingly emphasized the aesthetic appeal of sheet music as an *object*. “In at least one instance, publishers even tried to increase the olfactory appeal by using perfumed paper.” SUISMAN, *supra* note 24, at 59.

93. David Suisman argues that piano mania in early twentieth century America ultimately fostered the development of less demanding popular music:

The transformation of American musical culture constituted a departure from the disciplined, skill-based regime of the piano in the parlor in the nineteenth century. The advent of a novel kind of popular music written for the market brought light, catchy songs that were easy to play and sing into the rhythms of daily life . . . .

*Id.* at 10.

94. German philosopher Theodor Adorno believed that popular and serious music attained a perfect balance in Mozart's *The Magic Flute* (1791), since which it has not been possible to effectively fuse popular and serious musical styles. See THEODOR W. ADORNO, *ESSAYS ON MUSIC* 290 (Richard Leppert ed., Susan H. Gillespie trans., 2002).

95. CRAIG ROELL, *THE PIANO IN AMERICA, 1890–1940*, at 57–58 (1989) (“The invention of the phonograph and player piano . . . brought the conflict between mechanization and art under greater scrutiny, and infused it with a new, more sinister threat. What would happen to the moral value of music if the musical experience were trivialized, if it were no longer something to be painstakingly cultivated? . . . [I]f music became available to everyone everywhere, would the experience be impoverished by the very act of democratizing it?”).

96. “Music, any music at all, is so welcome to the weak of mind and so readily supplied by their commercial manipulators that almost all the music you hear, at least all you hear inadvertently, is bad.” PAUL FUSSELL, *BAD: OR, THE DUMBING OF AMERICA* 126 (1991).

alone, quietly, with one's own thoughts."<sup>97</sup> On the other hand, they were also the impetus for the development of the "golden age" of American popular music, roughly between 1920 and 1960.<sup>98</sup>

As Americans were entertained increasingly by popular music recordings and broadcasts, Tin Pan Alley songwriters tailored their works less to the modest abilities of at-home, amateur performers—housewives in particular.<sup>99</sup> When the commercial value of their songs became generated by the consumption of recordings and broadcasts rather than sheet music sales, songwriters wrote more musically—and verbally—sophisticated works geared towards professional performers.<sup>100</sup> This economic shift, engendered by electric technologies, allowed George Gershwin, Cole Porter, Nathaniel Shilkret, and others to fully tap their musical talents to produce relatively complex popular works.<sup>101</sup> This freedom, in turn, led to the development of what is commonly regarded as the only distinguished corpus of popular music to date in the United States.<sup>102</sup>

The growing diversity of technologies by which to enjoy music: pianos, player pianos, and eventually phonorecords, radio broadcasts, and movies, also generated unprecedented economic returns for not only publishers, broadcasters, and film studios, but also authors and performers of popular music.<sup>103</sup> Not surprisingly, since the 1920s this surge in economic value has been accompanied by a steadily growing number of copyright disputes over the authorship of popular—and profitable—songs.<sup>104</sup>

97. SUISMAN, *supra* note 24, at 13–14.

98. ROSEN, *supra* note 20, at 23 ("If 'Tin Pan Alley' denotes an era when music publishers dominated the popular music world, and 'rock and roll' a time, apparently here to stay, defined by superstar performers and integrated big media companies, then the intervening period, when the composers and lyricists of the American popular art song reigned, was truly the 'Age of the Songwriter.'").

99. Immediately prior to the recording era, "[o]ur popular song, in its industrial phase, beg[an] largely under the influence of women . . . . It [was] women who [sang] songs in the home. It [was] women who play[ed] them on the piano." SUISMAN, *supra* note 24, at 46 (quoting Isaac Goldberg, "one of Tin Pan Alley's shrewdest critics").

100. See ROSEN, *supra* note 20, at 22. "In one form or another, sound was the commodity the music industry trafficked in, and as a consequence auditory exposure was inseparable from promotion." SUISMAN, *supra* note 24, at 11.

101. Irving Berlin had little formal training in music composition but he was a reasonably competent pianist and he invariably worked with literate musicians who rendered his melodic ideas into meaningful tunes and harmonized them as well. See ALEC WILDER, *AMERICAN POPULAR SONG: THE GREAT INNOVATORS 1900–1950*, at 93 (1972).

102. See generally IGER, *supra* note 88. Immigration into the United States at this time by educated Jewish musicians has been identified as the wellspring for this musical era. See ROSEN, *supra* note 20, at 10; see also Bruce Bawer, *The Golden Age of American Song Was the Golden Age of America*, FORBES (Mar. 24, 2013, 10:00 PM), <http://www.forbes.com/sites/realspin/2013/03/24/the-golden-age-of-american-song-was-the-golden-age-of-america>.

103. See TAWA, *supra* note 90, at 55–81 (discussing the ascendance of the traveling performing musician, and various technologies that enabled this development, such as the incandescent light bulb).

104. David Suisman observes that, "[w]hat distinguished Tin Pan Alley from other modes of making music was that the *primary* motivation for writing a song was to sell it, not to express some inherently human feeling or musical impulse." SUISMAN, *supra* note 24, at 22.

Like the earliest English music copyright infringement disputes, the handful of American music cases prior to 1900 were based on a defendant's alleged misappropriation of essentially the *entire* work of the plaintiff. This was true not only in *Reed v. Carusi*, in which the disputed works also had identical titles and lyrics, but also in *Ferrett v. Atwill* and in *Jollie v. Jacques*, which involved competing editions of the same public domain folksong.<sup>105</sup> Likewise, in *Blume v. Spear*, the plaintiff claimed that it was the defendant's copying of her melody *in toto* that infringed upon her earlier work.<sup>106</sup> Agreeing with the plaintiff in this case, the Circuit Court determined:

The theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces. . . . When played by a competent musician, they appear to be really the same. There are variations, but they are so placed as to indicate that the former [plaintiff's song] was taken deliberately, rather than that the latter was a new piece.<sup>107</sup>

The broader and swifter dissemination of popular songs in the early decades of the twentieth century led to briefer windows of popularity for these works.<sup>108</sup> It also promoted financial growth of the American music industry and a simultaneous increase in the number of plaintiffs eager to partake in it through claims of copyright infringement lodged against successful industry players. "The rise of music as big business was a multinational and transnational phenomenon, but one in which the United States had a leading position. . . . The result was that music in many ways came to be manufactured, marketed, and purchased like other consumer goods."<sup>109</sup> The conditions that enabled the dramatic increase in infringement claims in the latter half of the twentieth century originated in the Tin Pan Alley era of the first half; the widespread distribution of popular songs through sheet music, and eventually audio recordings, radio broadcasts, and motion pictures.

## B. TIN PAN ALLEY: SHEET MUSIC

An early Tin Pan Alley case, *Boosey v. Empire Music*,<sup>110</sup> dates from an era in which the economic value of popular songs was still largely generated by sales of sheet music for private performances at home.

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105. See *Reed v. Carusi*, 20 F. Cas. 431 (C.C.D. Md. 1845); *Ferrett v. Atwill*, 8 F. Cas. 1161 (C.C.S.D.N.Y. 1846); *Jollie v. Jacques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850). Scores and recordings of the disputed works in these cases are posted at the Music Copyright Infringement Resource. See *Case List*, *supra* note 13.

106. *Blume v. Spear*, 30 F. 629, 629–30 (C.C.S.D.N.Y. 1887). For scores and recordings of the disputed works in this case, see *Blume v. Spear*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/Before1900/Pages/blumespear.html> (last visited June 9, 2015).

107. *Blume*, 30 F. at 631.

108. David Suisman likens Tin Pan Alley's production of popular songs to that of couturiers or jewelry makers "whose goods, in order to be successful, had to be similar to what came before but always a little different." SUISMAN, *supra* note 24, at 48.

109. *Id.* at 9.

110. 224 F. 646 (S.D.N.Y. 1915).

Unlike nineteenth century infringement cases dealing with competing publications in the same genre and intended for the same audience, *Boosey* involved the plaintiff's maudlin ballad "I Hear You Calling Me" and the defendant's upbeat syncopated ragtime number, "Oh Tennessee I Hear You Calling Me."<sup>111</sup> The plaintiff's claim was based on commonalities between five words and two measures of music of his song and the defendant's.<sup>112</sup>

The court acknowledged that "[t]he 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."<sup>113</sup> The court determined, nevertheless, that the defendant had infringed the plaintiff's work based upon minimal musical and verbal similarities of the "hook," or what the court called the "sentiment" of both songs: "The 'I hear you calling me' has 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."<sup>114</sup>

This is a pioneering decision in that it was the first determination of infringement based on qualitatively slight musical similarities between the disputed musical works. The court rationalized its holding by suggesting that its underlying concern was to protect the economic interests of the incipient American music industry: "[T]hese cases must be viewed and dealt with from a practical standpoint. Songs of this character usually have a temporary vogue, and, if the sale is stopped just at the time that the public is keen, serious injury may be done."<sup>115</sup>

Ten years later, in an opinion by Learned Hand, the same court based its finding of infringement on a similarly minor musical correspondence between two songs. In *Fred Fisher v. Dillingham*, the musical similarities did not involve melody—almost invariably the focus of subsequent music copyright disputes—but rather a repeating accompaniment figure found in both songs that Hand referred to as an *ostinato*.<sup>116</sup>

In vain, the defendant Dillingham claimed that Jerome Kern's "Kalua" did not infringe upon the plaintiff's "Dardanella" because the accompaniment figure in question was commonly found in works that

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111. For scores and recordings of the disputed works in this case, see *Boosey v. Empire Music*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1910-1919/Pages/booseyempire.html> (last visited June 9, 2015).

112. See *Boosey*, 224 F. at 646–47.

113. See *id.* at 647.

114. *Id.*

115. *Id.*

116. *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 146 (S.D.N.Y. 1924). The musical figure in question in *Fred Fisher* does not function as an "ostinato" (that is, an "obstinately" repeating motive), but rather as a simple arpeggiated chord accompaniment, the style of which has been used in innumerable popular and serious works for over 200 years.

preceded those of both parties.<sup>117</sup> The court acknowledged that the disputed musical material could be found in public domain works. It went on to determine, however, that while neither the plaintiff nor the defendant relied upon those earlier public domain works in creating their songs, the defendant *did* draw upon this material as he had heard it in the plaintiff's song.<sup>118</sup> In other words, the court found Kern liable for having unconsciously copied the plaintiff's particular *deployment* of public domain musical material in an attempt to create a similarly affective musical number.<sup>119</sup>

Hand's *Fred Fisher* opinion is predictably brilliant, weaving together the author's original insights and case law precedent. Its conclusion, however, is uncharacteristically erroneous. Even if Hand's inference were true—that defendant's accompaniment style was inspired by plaintiff's earlier use of it—he averts from the fact that musicians have used this accompaniment, commonly known as an “Alberti bass,” since the early eighteenth century.<sup>120</sup> The plaintiff's use of this accompaniment style in a popular song in the twentieth century may have been anomalous, but no matter how unusual the circumstances of its deployment, this use should not have permitted him to monopolize this musical *idea* applied to a particular musical genre.

During the forty years following *Fred Fisher*, music copyright infringement cases involved, almost invariably, popular songs in the Tin Pan Alley tradition.<sup>121</sup> Increasingly, over these forty years, the defending works in these cases were songs distributed not only in sheet music, phonorecords, and radio broadcasts, but also on soundtracks accompanying movies.<sup>122</sup> Not surprising given the enormous appetite for Hollywood films and the glamorous and lucrative character of this youthful industry, its successful players were targets of resentful plaintiffs whose participation in the industry was peripheral, or even merely a figment of magical thinking.

### C. TIN PAN ALLEY: MOVIES AND RECORDINGS

In 1937, in *Hirsch v. Paramount Pictures*, the plaintiff claimed that a song performed in defendant's movie “Two for Tonight” was based on a melody that she had hummed at a Hollywood restaurant in the company

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117. *See id.* at 148.

118. *Id.* at 149–50. Learned Hand's reasoning here anticipated his well-known remark in a later appellate copyright opinion involving dramatic works: “[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

119. *Fred Fisher*, 298 F. at 147. Another better-known copyright decision based on unconscious copying is *Bright Tunes Music v. Harrisongs*. *See infra* note 169 and accompanying text.

120. *See Alberti Bass*, THE OXFORD COMPANION TO MUSIC (Alison Latham ed., 2002).

121. *See Case List*, *supra* note 13 (containing the titles of the songs involved in these disputes).

122. *See id.*

of a songwriter employed by Paramount.<sup>123</sup> Copyright disputes over the songs “Play, Fiddle Play,” “Someday My Prince Will Come,” “Drummer Boy,” and “Perhaps” also involved works whose popularity—and profitability—stemmed from their having been incorporated into feature films.<sup>124</sup> Royalties from the use of popular songs in radio and television broadcast advertisements became a valuable income stream for the music industry, as evidenced in copyright disputes over beer commercials in the 1950s.<sup>125</sup>

By the 1930s, popular music had become widely disseminated through phonorecordings and radio broadcasts.<sup>126</sup> One finds, at this point, a new genus of plaintiff among the music publishers and professional songwriters that had invariably been the complainants in music copyright infringement claims until then. In *Arnstein v. Shilkret*, *Wilkie v. Santly Brothers*, *Hirsch v. Paramount Pictures*, and *Carew v. RKO Radio Pictures*, the plaintiffs were not established music publishers but rather amateur or semi-professional—and typically unpublished—songwriters who had seized upon a tantalizing verbal or musical similarity between their work and something they may have heard on the radio or at the cinema.<sup>127</sup>

The most notorious incarnation of this new category of plaintiff was Ira Arnstein. In his legal capers between 1933 and 1946, Arnstein pursued the most prominent songwriters of the day, including Irving Berlin, Nathaniel Shilkret, and Cole Porter, claiming that they had

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123. See *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 817 (S.D. Cal. 1937). For scores and recordings of the disputed works in this case, see *Hirsch v. Paramount Pictures*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1930-1939/Pages/hirschparamount.html> (last visited June 9, 2015).

124. George Cukor used Emery Deutsch’s “Play Fiddle, Play” in his *DINNER AT EIGHT* (Metro-Goldwyn-Mayer 1933). See *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275 (2d Cir. 1936). Snow White sings Frank Churchill’s “Someday My Prince Will Come” in Disney’s movie by the same name. See *Allen v. Walt Disney Prods.*, 41 F. Supp. 134, 134–35 (S.D.N.Y. 1941). Judy Garland made Roger Eden’s “Drummer Boy” popular by performing it in the movie *STRIKE UP THE BAND* (Metro-Goldwyn-Mayer 1940). See *Jewel Music Pub. Co. v. Leo Feist, Inc.*, 62 F. Supp. 596, 596 (S.D.N.Y. 1945). Deana Durbin did the same for “Perhaps” in *NICE GIRL?* (Universal Pictures 1941). See *Heim v. Universal Pictures, Co.*, 154 F.2d 480, 481 (2d Cir. 1946). For scores, audio recordings, and video clips of the disputed works in these cases, see *Case List*, *supra* note 13.

125. See *Robertson v. Batten, Barton, Durstine & Osborne, Inc.*, 146 F. Supp. 795 (S.D. Cal. 1956) (alleging use of plaintiff’s “Whistling Song” in San Francisco Beer Company commercial); *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729 (W.D. Mo. 1956) (challenging use of musical idea found in jingle plaintiff had proposed to defendant). For scores and audio recordings of the disputed works in these cases, see *Case List*, *supra* note 13.

126. See WILLIAM HOWLAND KENNEY, *RECORDED MUSIC IN AMERICAN LIFE: THE PHONOGRAPH AND POPULAR MEMORY, 1890–1945*, at 182–201 (1999) (discussing widespread popularity of the phonograph and recorded music in America during the urbanization of the 1930s).

127. See, e.g., *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199 (S.D. Cal. 1942); *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937); *Wilkie v. Santly Bros., Inc.*, 13 F. Supp. 136 (S.D.N.Y. 1935); *Arnstein v. Shilkret*, No. 8152 (S.D.N.Y. Dec. 20, 1933), available at <http://mcir.usc.edu/cases/1930-1939/Pages/ArnsteinShilkret.html>. Judicial opinions, scores, and audio recordings of the disputed works can be found at *Case List*, *supra* note 13.

infringed upon his melodies in creating popular songs like “Don’t Fence Me In” and “Night and Day.”<sup>128</sup> Arnstein was mentally disturbed.<sup>129</sup> The courts were aware of his condition and laced their opinions with admonitions—unheeded—to this irritating plaintiff about the potential consequences of prosecuting meritless suits.<sup>130</sup>

Arnstein obtained his only “win” in 1945 when the Second Circuit overturned the summary judgment that had been granted to Cole Porter in Arnstein’s case against him.<sup>131</sup> The opinion by Judge Jerome Frank remains an important copyright decision because it set forth the framework that still informs the disposition of infringement claims in the Second Circuit and beyond, involving not only music but also all manner of expressive works.

To establish copyright infringement, a plaintiff must demonstrate that the defendant copied the plaintiff’s work and that this copying involved misappropriation of the plaintiff’s protected original expression.<sup>132</sup> *Arnstein* qualified this two-step process by establishing that, while professional musicians may advise the court on the initial question of copying, only the untutored ears of ordinary listeners may decide the ultimate question whether such copying amounts to misappropriation of protectable musical expression.<sup>133</sup>

In his vigorous dissent in *Arnstein*, Judge Charles Clark argued that Judge Frank’s approach was patently backward.<sup>134</sup> According to Clark, established practice and common sense dictate that expert testimony should inform courts on the scope of copyrightable expression in the plaintiff’s work and not merely on the preliminary question whether the disputed works are substantially similar overall. The majority’s decision to leave the question of substantial similarity of protected expression to the uninformed ears of jurors was nothing less than “so clear an invitation to exploitation of slight musical analogies by

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128. See *Case List*, *supra* note 13 (documenting all of the cases brought by Ira Arnstein).

129. See generally ROSEN, *supra* note 20.

130. See *Shilkret*, No. 8152 (“[W]hile I have the strongest feeling that the plaintiff ought not to continue to make a nuisance of himself, I do believe that he is convinced of the merit of his own contention. . . . I would warn the plaintiff, however, who seems rather prone to instigate these controversies, that it will be a matter for the Court to consider in the future whether he can be allowed to do so upon the mere payment of costs.”).

131. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). Writing for the majority in the Second Circuit decision, Judge Frank ruled that courts should not grant summary judgment “where there is the slightest doubt as to the facts.” *Id.* at 468 (quoting *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945)). Clark’s dissent accuses the majority of creating an *ad hoc* standard for summary judgment based upon dicta in *Doehler* not applicable to the *Arnstein* dispute. See *id.* at 479 (Clark, J., dissenting). Under the current Federal Rules of Civil Procedure, a court may grant summary judgment if “there is no genuine issue as to any material fact.” FED. R. CIV. P. 56(a).

132. See 4 NIMMER & NIMMER, *supra* note 1, § 13.01.

133. See *Porter*, 154 F.2d at 473.

134. See *id.* at 479 (Clark, J., dissenting).

clever musical tricks in the hope of getting juries hereafter in this circuit to divide the wealth of Tin Pan Alley.”<sup>135</sup>

The majority’s “anti-intellectual” and “book-burning” decision would, in Clark’s view, lead to the “extreme of having all decisions of musical plagiarism made by ear, the more unsophisticated and musically naive the better.”<sup>136</sup> Clark’s monition of “judicial as well as musical [chaos],” was grounded in his realization that having uninformed lay listeners decide infringement disputes would mean that outcomes of these cases would be predicated on aural rather than visual evidence.<sup>137</sup> Clark’s comments also intimated his presumption that the protectable expression of a work of *music*—and not a particular performance thereof—is most clearly rendered in visible scores best analyzed by experts.

The surge in the number of music infringement claims since *Arnstein* proves Clark’s prescience in asserting that “this holding seems . . . an invitation to the strike suit par excellence.”<sup>138</sup> The geographical scope of the targets of the “strike suits” he anticipated, however, ultimately expanded beyond New York’s Tin Pan Alley to include the profitable entertainment industries of Hollywood and Nashville. We consider next some of these disputes and how they have contributed to the increasingly peculiar—and also simply increasing—litigation in this area.

#### D. THE END OF TIN PAN ALLEY

The economic underpinnings of the American popular music industry in the second half of the twentieth century can be traced to recording and radio and television broadcast technologies developed earlier in the century. As markets for pianos and sheet music flagged in the 1930s and 1940s, those for music recordings—and the radios and players on which to hear them—grew swiftly.<sup>139</sup> By the late twentieth century, popular music was universally enjoyed passively—the fallout of significant incremental advances in audio recording and reproducing technologies throughout the 1900s. These technologies promoted a change from a culture “rooted in the values of production to one rooted in the values of consumption.”<sup>140</sup>

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135. *Id.*

136. *Id.* at 478, 480.

137. *Id.* at 480.

138. *Id.*

139. SUISMAN, *supra* note 24, at 16–17 (“[P]opularity of recordings sent American piano business into terminal decline. By the late 1920s, the popularity of player-pianos had faded, and near the end of the decade only eighty-one piano manufacturers remained in the United States, down from a peak of nearly three hundred in 1909. By 1933 that number dropped to thirty-six.”); *see also* KENNEY, *supra* note 126, at xii (identifying the period between 1890 and 1945 as the era of the phonograph’s rise and decline as the dominant medium of popular recorded sound).

140. SUISMAN, *supra* note 24, at 92.

Less immediately obvious—and certainly less recognized—than effects of technologies upon distribution and consumption of popular music are the effects of sound recording and broadcast technologies on its *creation and content* in the late twentieth and early twenty-first centuries. These technologies played a steadily expanding role in the authorship of primary musical elements like melody and harmony as well as secondary elements like timbre, volume, tempo, and duration.<sup>141</sup>

Digital recording and distribution technologies since the 1980s further elevated the importance of these secondary elements—as well as non-musical attributes of imagery and words—in the economic value of recordings of popular music.<sup>142</sup> In fact, by the end of the twentieth century, works of popular music had become so dependent upon these secondary and non-musical elements that 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.<sup>143</sup>

### III. AFTER TIN PAN ALLEY

#### A. WHAT IS A COMPOSER?

“Popular” as a category of American music is largely a twentieth century phenomenon. Prior to the establishment of Tin Pan Alley in the late nineteenth century, there was, of course, a great deal of music to be heard apart from the serious works written and performed by literate musicians. Songs associated with labor (such as farming, railroads, and canal building) religious hymns, patriotic anthems, military marches, and drinking songs were widely enjoyed by all classes.<sup>144</sup>

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141. With the advent of broadcasting, popular songs “followed an enduring template according to which the songs were musically simple, chorus-oriented, and about three minutes in length.” *Id.* at 277. The three-minute standard can be traced to the fact that one side of a 78 rpm disk—on which Tin Pan Alley songs were first recorded—could accommodate about three minutes of recorded sound. See STARR & WATERMAN, *supra* note 63.

142. The role of imagery in the marketing and appeal of popular songs grew steadily throughout the twentieth century. As early as 1890 “song slides”—projected images relating to the topic of a new song—were used to promote sales of sheet music. See SUISMAN, *supra* note 24, at 65.

143. In their discussion of Blind Lemon Jefferson’s recording of the blues number “Black Snake Moan” Larry Starr and Christopher Waterman note:

The melodic character of the vocal part is restricted to brief, repeated ideas; each of the six three-line stanzas is set essentially to the same music, and all the repeated lines of text are set to the same repeated music. These features are probably what led H.C. Handy to refer to the country blues as “monotonous.” . . . If we listen closely to what Jefferson actually *does* with his seemingly restricted materials, we may come to appreciate an expressive intensity in his work that could leave Tin Pan Alley records sounding impoverished by comparison.

STARR & WATERMAN, *supra* note 63, at 105. H.C. Handy’s statement that country blues is monotonous music is correct; country blues musical materials are not “seemingly restricted”—they *are* restricted compared to those of other popular genres of the time.

144. See generally JOHN A. LOMAX & ALAN LOMAX, *AMERICAN BALLADS & FOLK SONGS* (1934) (describing the wide range of popular ballads in America during the nineteenth century).

Given that these works were mainly transmitted orally, there was little demand for published copies of them that could be sold; they had, therefore, scant economic value. Accordingly, much popular American music of the eighteenth and nineteenth centuries was akin to what we now consider folk music in that its authorship and performance were not closely associated with a particular individual or time. With diffuse—if any—authorial claims, these works were perceived as part of American culture, like regional dialects, dress, or cuisines.<sup>145</sup>

By the late nineteenth century, the enjoyment of popular music had become a more private endeavor. The surge in the number of pianos sold, and the home performances that these instruments begot, stoked the fledgling market for Tin Pan Alley works. Until music recordings supplanted sheet music, these songs posed few musical challenges that amateurs could not readily negotiate. The requisite simplicity and formulaic nature of these readily playable songs, in turn, made them prone to staleness, and this susceptibility fed demand for a steady supply of fresh tunes.<sup>146</sup>

In the twentieth century, radio—and eventually television—broadcast technologies and motion pictures influenced the content and length of popular music numbers that were created specifically for these technologies.<sup>147</sup> However, sound recording technologies fundamentally changed *how* popular music was created. Until the 1950s, most mainstream American popular music was recorded in scores by literate songwriters and not by performers.<sup>148</sup> By the 1960s this was no longer true. By then, jazz, blues, and hillbilly recordings had been widely disseminated, and works in these genres had no tradition of—or need for—notation.<sup>149</sup> New

145. See Michael Broyles, *Immigrant, Folk, and Regional Musics in the Nineteenth Century*, in *THE CAMBRIDGE HISTORY OF AMERICAN MUSIC*, *supra* note 83, at 135, 135–57.

146. See ROSEN, *supra* note 20, at 10–11.

147. Movies and television gradually fostered audience intolerance for musical numbers that suspended rapid visual dramatic action that these technologies delivered. Movie audiences today would never abide performances of complete musical numbers—of serious numbers, no less—that were commonplace in, for example, Marx Brothers movies like *Horse Feathers* and early television programs like *The Jack Benny Show*.

148. See generally TAWA, *supra* note 90. On the currency of music notation at that time, consider the fact that before Richard Strauss's *Der Rosenkavalier* was first performed in New York in 1913, the *New York Times* published a full-page story on the opera with a full recounting of its plot, as well as *music notation* of several of its most significant themes! *Richard Strauss Enters the Field of Comic Opera*, N.Y. TIMES, Feb. 5, 1911, at 14. Given the current state of musical literacy, the *New York Times*, America's "newspaper of record," would no sooner print music notation today than it would print an article in a language other than English.

149. Photographs of performances by jazz orchestras and smaller popular music ensembles invariably show players performing without scores. See, e.g., Photograph of Louis Jordan and His Timpany Five taken in 1946, in STARR & WATERMAN, *supra* note 63, at 171. Photographs of performances by orchestras in liner notes of a recording of an opera or symphonic work, on the other hand, typically show each performer's eyes fixed upon a music stand bearing part of a score, reflecting the primacy of the musical work itself, not individual performers.

works in these genres—as well as nascent rock and roll—were typically created and recorded by performers improvising upon existing generic musical frameworks like the twelve-bar blues chord progression or a well-known melody.

The ability to capture music visually allowed authors to generate more sophisticated and original works than otherwise.<sup>150</sup> Composition through recordings of iterative noodling at an instrument limits the musical complexity of the resultant work. This is true because we have a greater capacity simultaneously to synthesize visual symbols than aural perceptions.<sup>151</sup> Over the course of Western civilization, significant works of music and poetry have been transmitted orally.<sup>152</sup> The overwhelming majority of what we consider literary, dramatic, and musical masterpieces, however, could only have been created—and transmitted—using visual symbols of verbal and musical notation.

Since time immemorial, popular music, however, has been created and transmitted orally. Only between roughly 1850 and 1950—the Tin Pan Alley era of the twentieth century in particular—were the majority of popular musical works in America created, published, and consumed in symbolic notation.<sup>153</sup> Not surprisingly, during this period, many American popular songs reflected the vocabulary of serious music; Tin Pan Alley tunesmiths and music theater composers invariably had some grounding in classical music, and many authors of popular songs also wrote serious works.<sup>154</sup>

Since the development of sound recordings, radio broadcasts and motion pictures in the early 1900s, popular music has become vastly more profitable than serious music. Musicians hoping to participate in this economic boon wrote works appealing to the tastes of a growing audience that enjoyed popular music mainly through recorded performances.<sup>155</sup>

Sound recordings provided to listeners for the first time the ability to replay a professional's performance of a popular song until it was “in

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150. Even the most preternaturally gifted musicians relied upon visual drafts and notes in creating their works. See DOUGLAS JOHNSON ET AL., *THE BEETHOVEN SKETCHBOOKS 3* (Douglas Johnson ed., 1985) (discussing how “there are few important composers . . . for whom some [visual] sketches have not been found”).

151. See JOHN MEDINA, *BRAIN RULES: 12 PRINCIPLES FOR SURVIVING AND THRIVING AT WORK, HOME, AND SCHOOL* 221, 223 (Tracy Cutchlow ed., 2008).

152. Perhaps the most famous of these orally-transmitted works is *Beowulf*, although many believe that even this work, dating from the seventh century, was transmitted as a verbal text. See JOHN MILES FOLEY, *THE THEORY OF ORAL COMPOSITION* 67 (1991).

153. See generally STARR & WATERMAN, *supra* note 63.

154. Erich Korngold, who wrote the score for the 1938 movie *The Adventures of Robin Hood*, worked with Mahler and Richard Strauss and taught composition at Vienna's Staatsakademie before emigrating from Austria during the Anschluss. Max Steiner, who composed the music for *Gone with the Wind*, studied with Brahms. Richard Rogers studied music at Columbia University and Juilliard. Even the disturbed gadfly Ira Arnstein *v. Porter* obtained a basic musical education at a well-regarded music school in New York at the turn of the twentieth century. See ROSEN, *supra* note 20, at 42.

155. See generally STARR & WATERMAN, *supra* note 63.

one's ear."<sup>156</sup> With such aurally acquired knowledge, and rudimentary ability with the guitar—or other instrument that requires minimal training to produce some suggestion of musical sound—one can replicate the basic musical and verbal elements of these works while performing one's own version of them.

The technologies that initially expanded the market for these musicians' written compositions, however, ultimately eviscerated it. Sound recordings and radio broadcasts also disseminated blues, hillbilly, gospel, and other genres of non-notated music that ultimately held greater mass appeal than Tin Pan Alley numbers—and certainly more than symphonies and operas.<sup>157</sup> Crucially important to the question of how sound recordings affected copyrightable musical expression is the fact that

[s]ounds . . . are not part of music, however essential they are to its transmission. . . . Sounds, in fact, are not even what musical notation specifies . . . . What scores do specify is information about music—*structural* components, such as pitches, relative attack-times, [and] relative durations.<sup>158</sup>

By the end of the twentieth century, most popular songs were created and distributed entirely as sound, and the once-vibrant sheet music industry had disappeared. Refinements in audio and recording technologies had made it possible for musically illiterate or semi-literate performers to create and record salable musical numbers—activities limited to literate professionals earlier in the century.<sup>159</sup> These technologies did not elevate thousands of garage musicians into pop stars; the popular music market can support only a tiny fraction of them. They did, however, profoundly influence the content of American popular music by providing the means by which individuals with scant—or no—musical education could become simultaneously both the putative authors and performers of the bulk of the output of the popular music industry.

Rock's electronic instruments are easy to play and accessible to anyone who has the wherewithal to buy a used Fender in a pawn shop. . . . The rock star who is still learning his chords has nothing to fear in the electronic arena, where his producer will turn the sow's ear of his

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156. See KENNEY, *supra* note 126, at xiii (discussing the effects of repeated exposure to an audio recording of a musical work on our perception and recollection of it).

157. DAVID MORTON, *OFF THE RECORD: THE TECHNOLOGY AND CULTURE OF SOUND RECORDING IN AMERICA* 8 (2002) (“[R]ecording brought high culture music into the capitalist system of production. . . . Sales of popular music, not classical music, have been the major source of growth in the industry, so economic logic would dictate that recording technology should evolve somehow to suit popular music. However, during the formative years of the record industry, it was classical and other forms of highbrow music which proved surprisingly influential in fomenting technical change and shaping the practices associated with music recording studios.”).

158. Benjamin Boretz, *Nelson Goodman's Languages of Art from a Musical Point of View*, in *PERSPECTIVES ON CONTEMPORARY MUSIC THEORY* 31, 34 (Benjamin Boretz & Edward T. Cone eds., 1972).

159. See ROBERT PATTISON, *THE TRIUMPH OF VULGARITY: ROCK MUSIC IN THE MIRROR OF ROMANTICISM* 136 (1987) (listing Duran Duran and Sid Vicious of the Sex Pistols as examples of successful, yet musically illiterate performers).

strumming into the silk purse of 24-track recording. . . . In live performance his lack of skill . . . will rebound to his credit. . . . The audience will take his incompetence first as a mark of his primitive authenticity, second as a mark of his pharmacological heroics, and last as a pledge that the most ordinary mortal can rise to stardom.<sup>160</sup>

Refinements in audio recording and transmission technologies fostered not only a decline in music literacy and the market for popular sheet music, but also other developments affecting authorship and the locus of economic value in popular music: a trend towards collective authorship; the growing significance of input from audio engineers; the importance of secondary and non-musical elements like words, imagery, and physical attributes of performers; and the *sine qua non* role of electric power. The following discussion examines these developments and their effect on the creation of copyrightable musical expression.

#### B. THE MYTH OF ROMANTIC JOINT AUTHORSHIP

The relative importance of music and words in vocal works has been debated for centuries.<sup>161</sup> Nevertheless, we know *Don Giovanni* as Mozart's opera (not Lorenzo Da Ponte's), *Porgy & Bess* is by George Gershwin (not librettist Edwin DuBose Heyward) and "Smoke Gets in Your Eyes" is Jerome Kern's (not wordsmith Otto Harbach's). The fact that we credit Mozart, Gershwin, and Kern as the primary authors of these works suggests widespread, if tacit, acknowledgement that their work in the relatively *recherché* idiom of notated music requires more time, talent, and expertise than that of librettists working with the written word—something we all can do to some extent.

Tin Pan Alley and Broadway show composers collaborated with lyricists, but most of their creative work was done alone. For practical reasons, a musical score—like a novel or a painting—can be fixed only by someone working alone. The relative complexity of these works required that they be created and documented by a single musician simultaneously juggling many musical parameters. Like hundreds of forgotten songwriters who wrote alone at dilapidated pianos in Tin Pan Alley at the turn of the twentieth century, Richard Rogers, Marvin Hamlisch, and Stephen Sondheim similarly spent untold solitary hours at the end of the

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160. *Id.* In a recent paean to the pop music duo "MS MR," Mark Guiducci writes: "How's this for a *Girls*-era cliché? Two recently graduated Vassar classmates with no formal musical training resolve to write hit songs in a Bushwick bedroom with only a MacBook, a keyboard, and good taste in their arsenal." Mark Guiducci, *Of a Certain Age*, VOGUE, May 2013, at 238.

161. Mozart famously stated that in opera, poetry must be an "obedient daughter" to music. See HERMANN ABERT, W.A. MOZART 664–65 (1956) (Cliff Eisen ed., Stewart Spencer trans., 2007) (suggesting that Mozart's statement is less a dictate than it is a reaction to dramatically less qualified poets). The question of the relative importance of words and music has been a lively issue in opera since its inception and has been the topic of operas themselves, such as Antonio Salieri's *PRIMA LA MUSICA POI LE PAROLE* (1786) and Richard Strauss's *CAPRICCIO* (1942) (about a competition for supremacy among art, music, and poetry).

century—albeit ultimately at well-maintained Steinways in luxurious quarters in Beverly Hills and New York’s Upper East Side.<sup>162</sup>

In popular music, the longstanding division of authorship between composer and librettist dissolved in the latter half of the twentieth century.<sup>163</sup> The Broadway musical halfheartedly continues this tradition of bifurcated authorship, but for the most part the currency of the American popular music industry is no longer the output of songwriters working in isolation.<sup>164</sup>

The authorship of songs in genres like rock, pop, and rap tends to be more ambiguous than that of Tin Pan Alley songs, and of musicals rooted in this earlier genre. This is because the creation of these works does not require documentation in a score—and the reflective isolation required to produce one.<sup>165</sup> Musically illiterate songwriters necessarily depend upon their aural memories to create new songs that, in turn, cannot be too complex or lengthy such that they are not readily retained within—and repeatedly performed from—the same memory.<sup>166</sup> These limitations are not merely accommodated by, but actually foster, collaborative authorship.

The popular music industry clings, nevertheless, to the financially profitable associations of romantic authorship, promoting new songs with images of individual author/performers alone in creative communion with a guitar or microphone.<sup>167</sup> In fact, the authorship of these works as circulated in live performances, and on audio and video recordings, is a thoroughly collective effort, with vital contributions to the end product from music “arrangers,” sound and lighting engineers, choreographers, photographers, and hairdressers. These collaborators are, however, rarely

162. See generally MERYLE SECREST, *STEPHEN SONDHEIM: A LIFE* (1998).

163. See STARR & WATERMAN, *supra* note 63, at 225.

164. Musicals are increasingly, like pop songs, being “created by committee.” For example, *Spiderman: Turn Off the Dark*, the recent mega-flop, touted music by David Evans and Paul Hewson (“The Edge” and “Bono,” respectively). See Ben Brantley, *Good vs. Evil, Hanging by a Thread*, N.Y. TIMES, Feb. 8, 2011, at C1.

165. Salzburg’s Mozarteum has preserved the little cabin (Zauberflötenhäuschen) in which Emanuel Schikaneder (impresario and collaborator on *The Magic Flute*) purportedly imprisoned Mozart to deprive him of human contact that might distract him from working alone on the music of the opera. See Andrea Roithmayr et al., *Funny Facts About the City of Mozart*, VISIT-SALZBURG, <http://www.visit-salzburg.net/funfacts.htm> (last visited June 9, 2015).

166. For the same reason many popular songs today are characterized by “repetition without development.” Paul Fussell notes:

[O]nly outright snobbery could find great differences between the banal repetitiveness of Percy Grainger’s *Country Gardens* and the latest reggae hit, although for insensitive overstatement and pure unvarying noise, the reggae would probably win the prize. Both depend upon such BAD techniques as repetition without development and a lack of closure and thus resemble BAD conversation.

FUSSELL, *supra* note 96, at 125.

167. For example, the photograph of Justin Bieber that graces the packaging of his “remix” album. See JUSTIN BIEBER, *MY WORLDS ACOUSTIC* (Universal Music 2010).

acknowledged as co-authors; doing so might offer a revealing glimpse behind the scenes that would tarnish the creative auras of Justin Bieber, Madonna, Beyoncé, Jay Z, and similarly marketable performers.

The music industry's perpetuation of the notion of individual authorship, through imagery and promotion that fuses song performance with creation, has led to an output ostensibly by, and for, youth. Even in the heydays of Cole Porter, Irving Berlin, and Jerome Kern, few of the millions who knew their songs from recordings were familiar with, or cared about, these composers' physiognomies or voices. The popularity of the recordings of the songs written by middle-aged men of nebbish appearance was kindled not by performances by the songwriters but rather by those with more seductive looks and sounds, like Ethel Merman, Bing Crosby, and Ginger Rogers. By the end of the century, with the tremendous encroachment of visual baggage, the popular music industry had become dominated by songs of photogenic author/performers under age forty.<sup>168</sup>

#### IV. INFRINGEMENT DISPUTES IN THE AGE OF ELECTRONIC MUSIC

##### A. NOT FEELING GROOVY: *BRIGHT TUNES V. HARRISONGS*

The copyright implications of collaborative musical authorship were raised for the first time in the well-known case *Bright Tunes Music Corporation v. Harrisongs Music Ltd.*<sup>169</sup> The publisher of “He’s So Fine”—a song made popular by a group known as the Chiffons—claimed Beatle George Harrison infringed upon “He’s So Fine” in his “My Sweet Lord.”<sup>170</sup>

In determining that George Harrison was liable for copyright infringement, Judge Richard Owen remarked: “Seeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry.”<sup>171</sup> Owen’s comment is peculiar not only because the reason *why* a composer chooses particular “notes and harmonies” is neither particularly interesting, nor even knowable, but also because it wrongly implies that George Harrison and Wagner shared a common source of choices of “notes and harmonies” with which to work.

Wagner epitomizes the romantic author, having written singlehandedly both the music and verbal texts for his enormously

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168. Exceptional are “acts” like the Rolling Stones or the Eagles that hobble along for decades, or reconstitute periodically to capitalize upon—and obliquely flatter—a superannuated fan base’s creaky attempts to reconnect temporarily with the 1960s and 70s.

169. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976). For scores and recordings of the disputed works in this case, see *Bright Tunes Music v. Harrisongs Music*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1970-1979/Pages/brightharrisongs.html> (last visited June 9, 2015).

170. *Bright Tunes Music*, 420 F. Supp. at 178.

171. *Id.* at 180.

significant—and simply enormous—works like *Tristan und Isolde*. Wagner's determination to be solely responsible for the entire authorship of his works comports with the megalomaniacal tendencies for which he is well known. It was also, however, essential to achieving his goal of an aesthetically synthesized *Gesamtkunstwerk* in which a single author is responsible for all elements of an opera—visual, musical, and dramatic.<sup>172</sup>

George Harrison, on the other hand, and by his own admission, had minimal authorial ambitions when he, his musical cohort, and a complement of recording engineers, cobbled together “My Sweet Lord”—the financial success of which provoked the copyright owners of “He’s So Fine” to seek a portion of its profit.<sup>173</sup> Owen’s opinion documents the process by which the song was created, which involved little more than Harrison jamming with other musicians, riffing on the three-note motif that was the primary basis for the infringement claim.<sup>174</sup>

Every note and word of *Tristan und Isolde*—performances of which run five hours—can be attributed, through voluminous autograph sketches, scores, and correspondence, to Wagner alone.<sup>175</sup> The same is not true of George Harrison’s three-minute “My Sweet Lord” not only because there was never any need for comparable graphical documentation for such a musically simple work, but also because Harrison himself described the creation of the song as an entirely collaborative effort, the outcome of which not even he could parse the authorship.<sup>176</sup>

In a footnote to his opinion, Judge Owen made a significant observation: “Harrison . . . regards his song as that which he sings at the particular moment he is singing it and not something that is written on a piece of paper.”<sup>177</sup> In other words, George Harrison correctly understood that the musical elements of “My Sweet Lord” patched together in a jam session were merely the framework for secondary and non-musical elements for which he alone would be responsible. These elements would largely determine the commercial potential of the song: words, performance, and the imagery and fame associated with George Harrison and the Beatles.

If Judge Owen had subscribed to Harrison’s conception of the authorship of “My Sweet Lord,” the fact that the contested songs shared *primary* musical elements would have been tempered by the fact that the *secondary* and non-musical elements were utterly dissimilar. By focusing entirely on commonalities between rudimentary primary musical elements, Judge Owen correctly found substantial similarities between the works.

172. See *Gesamtkunstwerk*, 2 THE NEW GROVE DICTIONARY OF OPERA (Stanley Sadie ed., 1992).

173. See *Bright Tunes Music*, 420 F. Supp. at 179.

174. See *id.*

175. See John Deathridge, *Public and Private Life: on the Genesis of Tristan und Isolde and the Wesendonck Lieder*, in RICHARD WAGNER: TRISTAN UND ISOLDE 19, 22 (Arthur Groos ed., 2011).

176. See *Bright Tunes Music*, 420 F. Supp. at 180.

177. *Id.* at 180 n.9.

Confronting uncontroverted evidence of the communal creation of “My Sweet Lord” that involved no reference whatever to “He’s So Fine,” however, Judge Owen was forced to resort to the extravagant inference that Harrison was solely responsible for the primary musical elements of “My Sweet Lord” that he unwittingly borrowed from “He’s So Fine.”<sup>178</sup> These elements buried in his unconscious mind somehow became Harrison’s inspiration despite the spectacular incongruity between the topical and musical affects of the two songs.<sup>179</sup>

Since *Bright Tunes Music*, the late-twentieth century phenomenon of communal composition of popular songs has been a recurrent quandary in teasing out questions of authorship in music copyright infringement cases. Several years after *Bright Tunes Music*, in *Selle v. Gibb*, the “disco sensation” Bee Gees found themselves in a disagreeable morass similar to George Harrison’s when confronted by a plaintiff who had written a song with a melody strikingly similar to that of “How Deep Is Your Love.”<sup>180</sup> The Bee Gees song, which had been created after the plaintiff’s, was popular and profitable, having been incorporated into the soundtrack of the movie *Saturday Night Fever*.<sup>181</sup>

After a trial in which the plaintiff handily established striking similarities between the melodies of his song and the Bee Gee’s, the jury found the defendants liable for infringement.<sup>182</sup> The district court ignored the jury’s finding and determined that the Bee Gees could not be liable given the extraordinarily attenuated possibility of their access to the plaintiff’s work.<sup>183</sup> The district court’s determination—affirmed by the appeals court—that the jury’s verdict was wrong is highly unusual.<sup>184</sup> It also suggests that Judge Clark was justified in his dire prognostication in his dissent in *Arnstein v. Porter*, in which he warned of the consequences of having “decisions of musical plagiarism made by ear, the more musically unsophisticated and musically naïve the better.”<sup>185</sup>

The Bee Gees ultimately convinced the court that they had created “How Deep Is Your Love” without reference to the plaintiff’s preexisting “Let It End” using taped recordings of the group bandying about melodic fragments and words to assemble a new song<sup>186</sup>: “By listening to the tape,

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178. *See id.*

179. *See id.*

180. *Selle v. Gibb (Selle II)*, 741 F.2d 896 (7th Cir. 1984).

181. For scores, recordings, and video clips of the disputed works, see *Case List, supra* note 13.

182. *See Selle v. Gibb (Selle I)*, 567 F. Supp. 1173, 1175 (N.D. Ill. 1983).

183. *See id.* at 1183.

184. *See Serv. Auto Supply Co. of Puerto Rico v. Harte & Co., Inc.* 533 F.2d 23, 24–25 (1st Cir. 1976) (stating that a directed verdict in “favor of the party having the burden of proof is rare,” but allowed where that party “has established . . . by testimony that the jury is not at liberty to disbelieve”). The Federal Rules of Civil Procedure use “judgment as a matter of law” rather than “judgment notwithstanding the verdict.” *See* FED. R. CIV. P. 50.

185. *Arnstein v. Porter*, 154 F.2d 464, 480 (2d Cir. 1946) (Clark, J., dissenting).

186. *See Selle I*, 567 F. Supp. at 1177.

one can actually hear the voices of Blue Weaver and Barry Gibb; one is admitted into the creative process by which the accused song, according to defendants, was composed.”<sup>187</sup>

The circumstances surrounding the improvisatory creation by performers and sound engineers of “My Sweet Lord,” were remarkably similar to those of the Bee Gee’s song “How Deep Is Your Love.” The court in the earlier *Bright Tunes Music* dispute based its opinion on the Tin Pan Alley model of a sole musical author, and not the more fluid, collaborate authorship subscribed to by the court in *Selle*. If the *Bright Tunes Music* court had accepted—as I believe it should have—the protean and collective authorship asserted by George Harrison, its finding of unconscious copying by five or six would have been difficult to justify—surely *someone* would have noticed derivation from an earlier hit.

It was not until nearly twenty-five years after *Bright Tunes Music* that the question of apportioning authorship in popular songs created through improvisation was directly addressed in a copyright infringement dispute. In *BTE v. Bonnecaze*, the ousted drummer of the so-called alternative band BTE claimed he had contributed to jam sessions in which the band’s songs were created and, as a joint author, he was entitled to royalties generated by them.<sup>188</sup> The court disagreed because “Bonnecaze [did not] produce any evidence that any alleged contributions that he made to the underlying songs were ever fixed in a tangible form of expression.”<sup>189</sup> Only if, the court stated, Bonnecaze had produced evidence of his participation in the creation of the songs *and* demonstrated that his contributions contained sufficient original expression that they could independently obtain copyright protection, might he have qualified as a joint author.<sup>190</sup>

It is the second requirement—independent copyrightability of individual contributions to a jointly created work—that does not mesh comfortably with the character of authorship in a vast number of popular songs since the 1960s.<sup>191</sup> Songs across genres like rock, disco, and rap are almost invariably the product of group improvisation on a verbal or musical germ like a melodic motif, a rhythmic tattoo, a simple chord progression, or a few words. One member of a group—such as Barry Gibb for “How Deep Is Your Love”—might initiate the process, but

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187. *Id.*

188. *See* *BTE v. Bonnecaze*, 43 F. Supp. 2d 619, 621 (E.D. La. 1999).

189. *Id.* at 627.

190. *See id.* at 626.

191. The *Bonnecaze* court subscribed to the standard for copyrightability in jointly authored works recommended by Professor Paul Goldstein: “In part, Professor Goldstein’s test provides that ‘[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.’” *Id.* at 625 (quoting *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994)) (citing PAUL GOLDSTEIN, 3 COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.2 (1989)).

once it is underway, the contributions of the players—and audio engineers—either coalesce into a unified work or swiftly peter out into discarded musical and verbal chaff. This improvisatory and iterative approach produces songs in which the contributions of individual participants are impossible to separate. Moreover, any concerns—tacit or expressed—about attribution during this process would be disruptive, and distort its outcome.

The requirement on which *Bonnecaze* turned—that each contribution to a work of joint authorship be independently copyrightable—is particularly problematic when applied to contemporary popular music. This is true because, today, *none* of the authors who jointly create a popular song may have contributed individually copyrightable musical expression. In *Bright Tunes Music*, for instance, the only purely musical content of “My Sweet Lord” directly attributable to George Harrison alone was a three-note descending motive and two chords.<sup>192</sup> Most of the song as ultimately performed, recorded and marketed, resulted from a group of improvising musicians and audio engineers elaborating upon—and departing from—Harrison’s trivial suggestion.

Musical works created through collective improvisation—including most popular songs from the 1960s forward—are necessarily circumscribed by the performing capacities and limitations of the participants. This restriction is a repercussion of musical illiteracy. Cole Porter could visually record musical expression he was incapable of performing. George Harrison—and most songwriter/performers since his time—may have imagined musical expression beyond his performance ability but, unable to record it himself, he could not claim authorship of it. Lacking access to the virtually infinite number of musical “choices” available to literate musicians, George Harrison was limited to recording only musical expression that he could perform.

Of course, popular music has never shared the musical range of serious idioms. If it had, it would no longer be popular because its complexity would alienate the very (large) audience it is intended to please. The movement away from symbolic notation toward recorded improvisation as means of fixing musical works represents, nevertheless, a narrowing of musical “choices” available to popular songwriters. This compression of the *musical* palate, however, has been ameliorated by an expansion of the *sonic* palate available to recording engineers. Increasingly sophisticated audio technologies have significantly affected the creation and economic value of popular music over the past fifty years, yet the authorship and copyright implications of this influence have not been closely examined or even recognized.

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192. See *supra* note 169 and accompanying text.

## B. PULL THE PLUG!

Advances in music technologies have always fostered innovation in the composition and performance of musical works. The development of the fortepiano allowed Mozart to write concertos that exploited an instrument with a greater expressive and pitch range than the baroque harpsichord.<sup>193</sup> Nineteenth century enhancements to the fortepiano, in turn, made possible Liszt's virtuosic showpieces—performances of which on an eighteenth century fortepiano would reduce the earlier instrument to kindling.<sup>194</sup> The extended tonal gamut and iron frame of pianos of the early nineteenth century enabled Liszt to write music containing sustained notes and chords that he could not have employed had he been writing music for the harpsichord. The same technological developments, of course, also enable performers to render the particular *sound* that Liszt anticipated in his *music*.

Technological advancements to “acoustic” music instruments have enhanced the musical vocabularies of serious composers. Technological advancements in electronic technologies, on the other hand, have tended to enrich only the sonic vocabularies of popular musicians in the latter half of the twentieth century. The widespread adoption of electronic recording and the dependence upon synthesized sounds led to not only abandonment of symbolic notation, but also a more subtle shift away from the preeminence of melody among the basic musical parameters of popular songs.<sup>195</sup> This shift, in turn, elevated the role of secondary musical elements like timbre, along with non-musical elements like lyrics and imagery.

Sonic qualities of volume, pitch, duration, and timbre are as much the domain of recording engineers as they are of songwriter/performers whose works they massage into marketable products. The significance of those manipulating electrical knobs and sliders to the appeal of a live performance or recording is obvious when one considers the consequence of their absence, along with that of the electricity that powers their mixers, amplifiers, and speakers. Like photographers and cosmeticians who truss and tweak fashion models to produce the most profitable images, sound engineers manipulate the recorded and amplified sounds of voices of performers like Madonna, Kanye West, Miley Cyrus, and Justin Timberlake to ensure their appeal to mainstream taste.<sup>196</sup> Of course, the appeal of the vocal renderings of these stars also depends greatly on their physical

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193. See generally STEWART POLLENS, *THE EARLY PIANOFORTE* (1995) (discussing expanded keyboard gamut, and innovations to enhance dynamic variation, in the early pianoforte).

194. See, e.g., FRANZ LISZT, *MEPHISTO WALTZES*.

195. See *infra* note 298 and accompanying text.

196. “When the rocker sells out . . . he becomes the creature of his managers, who haul him about the countryside . . . like so much cabbage, displaying him at \$15 a ticket to coliseums packed with exploited adolescents.” PATTISON, *supra* note 159, at 149.

appearance; if Justin Timberlake gained 100 pounds his voice might improve, but it is safe to assume that his earnings from recordings of it would worsen.<sup>197</sup>

An electrical failure during an unamplified performance by a performer of Gershwin songs might not even momentarily interrupt the concert.<sup>198</sup> A power failure at a performance by pop music stars Madonna or Kanye West, however, would literally be a showstopper, bringing proceedings to a deliciously embarrassing standstill. Without electricity to maintain their Potemkin villages of amplified synthetic sound, these performances would be piteous. To the extent the gyrating stars' unamplified voices and strumming remain audible and visible prior to their fleeing the hellish exposure of an unplugged stage, they would sound and look risibly impotent.<sup>199</sup>

### C. THE SOUND OF (POP) MUSIC: INFRINGEMENT LITIGATION AT THE END OF THE TWENTIETH CENTURY

The shift in the relative importance of primary, secondary, and non-musical elements in much popular music of recent decades is reflected in music copyright infringement disputes during this time. Since the 1970s, these disputes have increasingly involved claims of minimal melodic similarities, or similarities between secondary musical elements associated more with the sound of a particular performance than with an underlying musical work.<sup>200</sup> This has been a gradual trend, and courts have more often than not thwarted plaintiffs' attempts to capitalize upon minor or commonplace musical similarities between their songs and commercially successful works of defendants.

In the 1986 case of *Benson v. Coca-Cola*, an amateur songwriter claimed that the music of the jingle "I'd Like to Buy the World a Coke" infringed his earlier song "Don't Cha Know."<sup>201</sup> The two works shared nothing more than a similar rising four-note opening motive. The Eleventh

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197. The expression "it ain't over until the fat lady sings" alludes to the general—and mostly accurate—perception that singers of serious music, and opera in particular, tend towards obesity. When one sees lithe performers in an opera production, chances are they will never open their mouths; they are deployed as dancers and as supernumeraries who provide visual relief from the singing principals and chorus members.

198. It might even prompt one. When Hurricane Sandy shut down New York's power grid in October 2012, one pianist soothed her nervous neighbors in their darkened high-rise with an impromptu recital. See Brenda Cronin, *Pianist Ruth Slenczynska, 89, Shows No Signs of Diminuendo*, WALL ST. J., Oct. 31, 2014, at D7.

199. Performances of popular music are typically given in venues larger than those used for serious music. Even when popular music is performed in auditoriums like the Metropolitan Opera or Carnegie Hall, however, electronic sound amplification—the use of which would be considered disgraceful by performers of serious music in these venues—invariably becomes part of the show.

200. See *Case List*, *supra* note 13.

201. See *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1986). For sound recordings and sheet music of both works, see *Benson v. Coca-Cola Co.*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1980-1989/Pages/bensoncocacola.html> (last visited June 9, 2015).

Circuit affirmed the lower court's directed verdict in favor of the defendant.<sup>202</sup> In an attempt to overcome the remote possibility of access to his work on the part of Coca-Cola Company, the plaintiff had hoped to convince the court that a paltry melodic commonality rendered the works strikingly similar. Rejecting his attempt, the court observed that popular works—like the numbers here—are musically unsophisticated, and that the less musically complex the works in question, the more difficult it is to establish striking similarity of protected musical expression between them.<sup>203</sup>

In 2009, the Sixth Circuit reached a similar conclusion in an infringement claim against rap performer Mary J. Blige.<sup>204</sup> The only musical similarity between the disputed works—plaintiff's "Party Ain't Crunk" and Blige's "Family Affair"—is a steady percussive beat in quadruple meter heard throughout both songs.<sup>205</sup> What caught the plaintiff's attention could not have been the fact that the songs shared a steady pulsing beat with an emphasis on the downbeat and played at the same speed; these characteristics are common to innumerable songs in every genre. It was, rather, the fact that both songs used the slang "crunk," and that the *sound*—timbre, attack, decay—of both rhythm tracks is similar.<sup>206</sup>

The Sixth Circuit appeals court upheld the lower court's grant of summary judgment to the defendant. Not only was the plaintiff unable to prove defendant's access to his work, but also the defendant solidly established her independent creation of the "non-lyrical" portion of "Family Affair."<sup>207</sup> Accordingly, the court did not need to consider the similarities between the music of the two works and whether any legal significance attached to the fact that the independently created rap songs shared a similar rhythm track.

The use of similar rhythm (or "drum" or "percussion") tracks in these works is, in fact, not coincidental because these two tracks contain minimal original musical expression. What was somewhat coincidental was the musicians' choice of similar synthesized *sounds* to be used in the performance of an unoriginal repeating steady rhythmic pulse. The choice of one sound or another in this context, however, demonstrates hardly

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202. See *Benson*, 795 F.2d at 975.

203. See *id.* at 975 (citing *Selle II*, 741 F.2d 896 (7th Cir. 1984)).

204. See *Jones v. Blige*, 558 F.3d 485 (6th Cir. 2009). For sound recordings of both works, see *Jones v. Blige*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/2000-2009/Pages/jonesblige.html> (last visited June 9, 2015).

205. See *Jones v. Blige*, *supra* note 204.

206. "Crunk" is slang referring to either a type of rap music characterized by repeated shouted phrases, or an excited person. See *Crunk*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/crunk](http://www.oxforddictionaries.com/us/definition/american_english/crunk) (last visited June 9, 2015).

207. See *Blige*, 558 F.3d at 490.

more original authorship than does a decision to print a phone directory using a particular font, or to paint a wall a certain color.

Like the *Benson* and *Blige* cases, *Newton v. Diamond* also involved an infringement claim based on minimal musical material.<sup>208</sup> Jazz flutist James Newton had recorded an improvised solo performance that he called “Choir.” He assigned his rights in the recording to ECM Records but not the ownership of his copyright in the underlying musical work. ECM Records licensed a rap group, “Beastie Boys,” to use the first six seconds of the recording that the group looped as part of the sonic background for their voices in one of their songs.<sup>209</sup> Newton claimed that the defendants’ use of the sound recording clip infringed upon the music copyright to “Choir,” to which he had retained title.<sup>210</sup>

Newton’s work, as documented in music notation submitted to the Ninth Circuit, comprises two pitches and a few vague performance instructions.<sup>211</sup> In his recorded performance, Newton plays the first of the two pitches and, for several seconds, meanders about them humming and modulating the intensity of his blowing over the flute’s blow hole.<sup>212</sup> The minimal musical information of Newton’s score, in conjunction with nebulous performance instructions, conveys virtually no authorial intent.<sup>213</sup>

While Newton’s six-second recorded performance contains more *sound* than that evidenced in his score, it does not contain more *music*.<sup>214</sup> In fact, the only original aspect of the six-second opening of “Choir” is the particular sound of Newton’s recorded performance of it. Given the score’s paucity of musical information, the sound of performances of “Choir” by flutists other than Newton should be somewhat different from his. Even if another flutist learned the opening of “Choir” only by listening to Newton’s recording, his primary concern would be copying Newton’s sound, not his music.<sup>215</sup> Accordingly, although Newton registered his copyright in “Choir” using his audio recording rather than the sketchy

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208. See *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003). For sound recordings of both works, see *Newton v. Diamond*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/2000-2009/Pages/newtondiamond.html> (last visited June 9, 2015).

209. See *Newton*, 349 F.3d at 593.

210. See *id.*

211. The Ninth Circuit’s opinion includes an image of Newton’s “score.” See *id.*

212. The result sounds like a whirring humming top. See *Newton v. Diamond*, *supra* note 208.

213. The expression “senza misura” (“without measure”) instructs the performer to play rhythmically freely without being bound to a preordained meter. Newton’s use of “senza misura” on his copyright deposit is precious because musicians associate the expression with legitimate music scores that bear no resemblance to Newton’s napkin jottings. It also further undermines Newton’s authorial claim as his “senza misura” burdens the performer with providing rhythmic authorship to this work.

214. See *infra* Part V for a discussion of the difference between these two terms.

215. In fact, given the freedom/burden (“senza misura”) Newton’s score accords the performer, a performer who copies Newton’s recorded performance could be said *not* to be performing Newton’s score.

score relied upon by the Ninth Circuit, his having done so did not expand the scope of his copyright in a work of music.<sup>216</sup>

Finding for the defendant, the district court determined not only that the use of the six-second clip was musically *de minimis*, but also that Newton's score did not contain sufficient original expression in the first place to qualify for copyright protection.<sup>217</sup> The Ninth Circuit affirmed the lower court, agreeing with its determination that the defendant's copying of the trivial musical information contained within the audio clip was *de minimis*.<sup>218</sup>

In evaluating the content of both the audio recording and notation of "Choir," the Ninth Circuit obliquely addressed the ultimate question of what constitutes a copyrightable work of music in an age of recorded sound.<sup>219</sup> Newton, the court suggests, may have created interesting sounds in his recorded performance of the opening of "Choir," but these could not be considered part of a copyrighted musical work:

Whatever copyright interest Newton obtained in this "dense cluster of pitches and ambient sounds," he licensed that interest to ECM Records . . . . Thus, regardless of whether the average audience might recognize "the Newton technique" at work in the sampled sound recording, those performance elements are beyond consideration in Newton's claim for infringement of his copyright in the underlying composition.<sup>220</sup>

In other words, while Newton's recording contains *souçons* of improvised melody, rhythm, and even harmony, it is essentially a work of sound built from elements of duration, pitch, timbre, and volume. Sounds become musical only when they are heard within the intelligible structure of a work comprised of purely musical elements like melody, harmony, and rhythm. An original musical work requires a new "structure of relationships" among musical—not sonic—elements; "musical meaning is solely a function of context."<sup>221</sup>

It is more difficult to create an original musical "structure of relationships" relying more on sounds than on abstract musical elements.

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216. Newton deposited with his copyright registration a cassette recording of his performance—and not the scrap of doodling that appears in the published court opinion. See Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTEL. PROP. 1, 38 n.116 (2014). Although Newton claimed copyright in a musical work, he erroneously registered the work as a sound recording. Brauneis raises the question why the Ninth Circuit relied on Newton's score as representing the musical work despite the fact that Newton submitted a recording of the work that arguably contains greater musical information than the notation alone. *Id.*

217. See *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003).

218. *Id.* at 598.

219. *Id.* at 592.

220. *Id.* at 596.

221. See Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 437 (1988). Keyt suggests that courts adjudicating claims of music copyright infringement should examine not only the literal similarities between the musical elements of both works, but their semantic similarities as well, that is, "the degree to which two compositions resemble each other in effect—the response produced in the listener." *Id.* at 430.

Nevertheless, this is how popular songs have been created for the past fifty years, resulting in an overall contraction of original purely musical content and greater musical uniformity. This conformity, in turn, has increased the likelihood that two songs will have not only substantially similar musical elements, but also similar sounds.

Given this reality, as reflected in *Newton*, the outcome of the recent dispute involving the hit “Blurred Lines” appears indefensibly regressive. In 2013, Marvin Gaye’s publisher and heirs demanded a monetary settlement from performers Pharrell Williams and Robin Thicke for alleged infringement of Gaye’s “Got to Give It Up.”<sup>222</sup> When Williams and Thicke sought declaratory relief on this allegation, the Gayes counterclaimed for copyright infringement, demanding a jury trial.<sup>223</sup>

The counterclaimants owned rights only to the underlying music of “Got to Give It Up,” and not the sound recording.<sup>224</sup> Gaye’s publisher had obtained a copyright registration for the song using a version rendered in music notation.<sup>225</sup> The court, therefore, limited analyses of the disputed works as presented during trial to that based upon information about them evident from their visual manifestations.<sup>226</sup>

The deposit used to register Gaye’s “Got to Give It Up” is more a “lead sheet” than “sheet music” in that it provides only minimal information intended to be used to render an original performance.<sup>227</sup> Apart from “lyrics,” Gaye’s lead sheet contains virtually no original musical expression, and it is immediately apparent upon seeing it that its symbolic notation is a transcription by a literate musician of a sound recording of quasi-improvised vocalizing involving no more than a handful of pitches.<sup>228</sup>

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222. See Complaint at 4, *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752. For access to audio clips of the works in question, as well as several significant filings in this litigation, see *Pharrell Williams, et al. v. Bridgeport Music, et al.*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/inplay/Pages/williams.html> (last visited June 9, 2015).

223. See Defendants’ Frankie Christian Gaye and Nona Marvisa Gaye Counterclaims, *Williams*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Oct. 30, 2013), ECF No. 14, 2013 WL 6079472.

224. *Id.* at 6.

225. See Declaration of Donna Stockett, *Williams*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Sept. 22, 2014), ECF No. 91-2, 2014 WL 5408782 (including copy of the copyright application and deposit).

226. See Minutes of Final Pretrial Conference; Status Conference re: Exhibits; Plaintiffs’ Motions *In Limine* and Defendants’ Motions *In Limine*, *Williams*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Jan. 26, 2015), ECF No. 226.

227. A “lead sheet” is “a score, in manuscript or printed form, that shows only the melody, the basic harmonic structure, and the lyrics (if any) of a composition.” Robert Witmer, *Lead Sheet*, in 2 *THE NEW GROVE DICTIONARY OF JAZZ* 561 (Barry Kernfeld ed., 2d ed. 2002). Today the term “sheet music” designates unbound printed music usually of ten or fewer pages. See *Sheet Music*, in *THE GROVE DICTIONARY OF AMERICAN MUSIC* 560 (Barry Kernfeld ed., 2d ed. 2013).

228. This is apparent because there is no indication of any preconceived arc or structure to the melody. Unoriginal harmonic progressions and an incessant percussive rhythmic underpinning provide structure to Gaye’s song. The melodic scraps sung above these elements were inserted haphazardly following the words, as reflected in the transcriber’s constant resorting to tie markings to create an intelligible visual rendering of music that was never intended to be captured in this manner.

The fact that the jury decided in favor of the Gayes, awarding them \$7.4 million, is arguably a regrettable, but not a surprising, outcome.<sup>229</sup> Both parties presented a great deal of quantitative, and ultimately irrelevant, information to the court about the musical similarities and dissimilarities of the songs in question.<sup>230</sup> Given that the only commonalities between the works were non-copyrightable generic musical and sonic elements, it appears that the verdict was based mainly on the jurors' opprobrium of the characters and veracity of Robin Thicke and Pharrell Williams, as depicted by Gaye's attorney.<sup>231</sup>

#### D. "WORDS, WORDS, WORDS, I'M SO SICK OF WORDS"<sup>232</sup>

Once the creation of popular songs no longer required musical literacy on the part of their ostensible sole creators, words rather than music became the principal element of individual authorship. George Gershwin left a voluminous collection of musical scores and sketches in his own hand.<sup>233</sup> To the extent they exist, holographs of songs by Michael Jackson, Bruce Springsteen, and Madonna contain nothing but words.<sup>234</sup> Even the least musically educated songwriter/performer is verbally literate; to the extent songwriter/performers—or bands—have abdicated musical authorship, they have commonly taken on the verbal authorship once handled mainly by lyricists in the Tin Pan Alley era.<sup>235</sup>

229. See Ben Sisaro, *Both Sides in 'Blurred Lines' Copyright Suit Signal a Continuing Battle*, N.Y. TIMES, Mar. 18, 2015, at C2.

230. Experts from both sides offered exhaustive analyses of the songs, applying classical music terminology and sophisticated analytic approaches to works that were created without reference to, or knowledge of, either. The effect is almost bathetic, like that one might generate by using the same terminology and analytic methods one would apply to an Old Master painting, to the doodling of a kindergartner. See, e.g., Transcript of Videotaped Deposition of Judith Finell, *Williams*, No. LA CV13-06004 JAK (AGRx) (C.D. Cal. Aug. 15, 2013), 2013 WL 4271752.

231. See Kory Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar 'Blurred Lines' Lawsuit*, ROLLING STONE (Mar. 10, 2015), <http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310>. Robin Thicke claimed he was drunk and high when he recorded "Blurred Lines." *Id.* The Gayes' attorney emphasized to the jury that both Williams and Thicke lied about how they created "Blurred Lines." *Jury Hears Closing Arguments in 'Blurred Lines' Case*, ASSOC. PRESS, Mar. 5, 2015, available at <http://www.nytimes.com/aponline/2015/03/05/us/ap-us-blurred-lines-song-dispute.html>.

232. MY FAIR LADY (Warner Bros. 1964).

233. Most of these materials are at the George and Ira Gershwin Collection in the Music Division of the Library of Congress. See Raymond A. White, *The Gershwin Legacy*, LIBRARY OF CONG., <http://www.loc.gov/loc/lcib/9809/gershwin.html> (last visited June 9, 2015).

234. An image of Michael Jackson's handwritten lyrics for "Beat It" sold for \$60,000 in 2009. See *\$60k Beat It Lyrics Put Jackson in the Autographs Big League*, PAUL FRASER COLLECTIBLES (Nov. 27, 2009), <http://www.paulfrasercollectibles.com/section.asp?docid=1191&catid=78&n=170110>. There is no score for Bruce Springsteen's hit "Born to Run"; his handwritten lyrics, however, were sold recently for nearly \$200,000. See Allan Kozinn, *Springsteen's Handwritten Lyrics to 'Born to Run' Sell for \$197,000*, N.Y. TIMES (Dec. 6, 2013, 11:13 AM), <http://artsbeat.blogs.nytimes.com/2013/12/06/springsteens-handwritten-lyrics-to-born-to-run-sell-for-197000>. The only authorial vestige of Madonna Ciccone's hit "Rain" is her jottings of its lyrics. See *Lot 175: Madonna Handwritten Lyrics to "Rain"*, LIVEAUCTIONEERS, <http://www.liveauctioneers.com/item/428754> (last visited June 9, 2015).

235. Literary amateurism in rap and rock songs is essential to their appeal.

The emphasis on the part of songwriter/performers on verbal rather than musical authorship is not limited to hip-hop/rap—genres in which musical elements of melody and harmony have never been significant. This shift in focus is also evident among other popular genres including country/western and mainstream pop/rock. A consequence of this shift in authorial emphasis—and capacity—in popular music has been a remarkable increase in the number of music copyright infringement disputes based as much on—if not more—alleged verbal similarities as musical similarities between two songs.

Many of these claims have involved songs with similar titles. In *Testa v. Janssen*, the plaintiff claimed that “Keep on Singing,” made popular by singer Helen Reddy, infringed upon the words and music of his song “Kept on Singing.”<sup>236</sup> Musically, the songs were entirely dissimilar, and the evidence offered on the question of access was based on hearsay of witnesses who were deceased or refused to aver the proffered evidence.<sup>237</sup>

The court decided that defendant’s access to the plaintiff’s work could be inferred only if there were striking similarities between the two songs.<sup>238</sup> The plaintiff’s experts then simply claimed that there were such similarities, which prompted the court to deny the defendant’s request for summary judgment.<sup>239</sup> The title “Kept on Singing” alone is not copyrightable, and the question of whether the works could be perceived as strikingly similar to support an inference of access, therefore, should have been narrowed to whether the plaintiff’s lyrics alone could prevent the defendant’s use of the same conceit of an impoverished child attaining affluence through singing.

Since *Testa v. Janssen*, mainstream pop and country/western stars have been confronted with a flurry of increasingly speculative infringement claims that invariably devolve to verbal similarities between the titles of two songs.<sup>240</sup> The same is true of recent claims involving hip-hop/rap numbers,

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One of rock’s saddest phenomena is the lyricist who doesn’t understand that his talent for the vulgar is incompatible with Romantic poetry in the respectable tradition . . . . The virtues of rock can easily become vices when composed for the printed page, where fun, strength, and laughter collapse into affectation.

PATTISON, *supra* note 159, at 208.

236. See *Testa v. Janssen*, 492 F. Supp. 198, 200 (W.D. Pa. 1980). For sound recordings and sheet music of both works, see *Testa v. Janssen*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1980-1989/Pages/testajanssen.html> (last visited June 9, 2015).

237. See *Testa*, 492 F. Supp. at 202.

238. See *id.* at 203.

239. See *id.*

240. Between 1997 and 2009, a number of copyright infringement claims involving profitable country and western songs and singers were tried and resulted in judicial opinions. In each one of these cases—all of which ultimately concluded with grants of summary judgment in favor of the defendants—the plaintiffs claimed that the defendant had infringed both their words and music. A cursory comparison, however, of the songs at issue in each of the cases, reveals no noticeable musical similarities whatever between any of them. Clearly, what provoked the plaintiffs in these disputes was simply the fact that

like that involving Kanye West discussed earlier. In *Peters v. West*, the plaintiff was provoked by the fact that his song and West's hit "Stronger" shared not only the same one-word title, but also Nietzsche's now-hackneyed—and disproven—aphorism "what doesn't kill you makes you stronger" and a passing reference to fashion model Kate Moss.<sup>241</sup>

Peters did not claim that West copied any musical expression. His allegation of infringement was based on his belief that verbal similarities involving even non-copyrightable ideas were actionable if defendant's work contained several similar references. In other words, his copyright in "Stronger" gave him the exclusive right to use a particular collocation of verbal references taken from the public domain. The court determined that West's use of the same combination of verbal references found in Peters' song was not infringing. Because the references themselves were not protectable expression, Peters could not monopolize his combination of their *underlying ideas*: pretty women, stoicism, and so on.<sup>242</sup>

Not surprisingly, infringement claims involving rap songs have been based upon verbal similarities, often involving nothing more than a common word or two.<sup>243</sup> And yet, of the various genres found in music copyright infringement cases, rap and hip-hop in general contain arguably the least original musical or verbal expression. This is because of the appropriationist nature of these genres, in which songs are often assembled from existing recorded tracks, and lyrics depend heavily upon literal references: to individuals (such as Alec Baldwin, Kate Moss, other rap singers, or the performer himself); things (such as loud signals of affluence, including Louis Vuitton merchandise and Mercedes-Benz automobiles); and places (such as Compton, Miami). "Alec Baldwin" used to evoke the image of a (once) attractive man is a crutch that shifts the expressive burden from the songwriter to Baldwin.<sup>244</sup>

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the defendants' works had titles similar to theirs. See *Ellis v. Diffie*, 177 F.3d 503 (6th Cir. 1999) ("Lay Me Out By the Jukebox When I Die" versus "Prop Me Up Beside the Jukebox (If I Die)"); *Brainard v. Vassar*, 625 F. Supp. 2d 608 (M.D. Tenn. 2009) ("Good Ol' Days to Come" versus "Good Old Days"); *McKinley v. Raye*, No. Civ.A.3:96-CV-2231-P, 1998 WL 119540 (N.D. Tex. Mar. 10, 1998) ("I Think About You" versus "I Think About You"); *McRae v. Smith*, 968 F. Supp. 559 (D. Colo. 1997) ("Every Minute, Every Hour, Every Day" versus "Every Second"). It is not surprising that country/western stars have been the target of such claims given that practitioners of this genre delight in double entendres and startling verbal fillips (such as "Heaven's Just a Sin Away" and "I'd Rather Have a Bottle in Front of Me Than a Frontal Lobotomy").

241. See *Peters v. West*, 692 F.3d 629 (7th Cir. 2012). The well-known aphorism is from Friedrich NIETZSCHE, *TWILIGHT OF THE IDOLS: OR HOW TO PHILOSOPHIZE WITH A HAMMER* (Duncan Large trans., Oxford University Press, 2009) (1888).

242. See *Peters*, 692 F.3d 629 at 636.

243. See, e.g., *Jones v. Blige*, 558 F.3d 485 (6th Cir. 2009) (slang expression "crunk"); *Positive Black Talk v. Cash Money Records*, 394 F.3d 357 (5th Cir. 2005) ("Back That Ass Up" versus "Back that Azz Up"); *Complaint, Batts v. Adams*, No. CV 10-8123-JFW (RZx) (C.D. Cal. Oct. 28, 2010) (the word "boom").

244. In a similar vein, Cole Porter used literal reference to great effect in "You're the Top," in which the Coliseum, the "Louvre Museum," the Mona Lisa, and so on stand in for original expressions of admiration on the part of a besotted and inarticulate swain who begins: "At words poetic, I'm so pathetic."

Although increasingly common, infringement claims based on insignificant verbal similarities between rap songs have not been successful. Recent decisions involving similarly insignificant *musical* similarities in sound recording sampling claims, however, suggest an uneasy drift towards the notion that sounds alone may constitute copyrightable musical and verbal expression.<sup>245</sup>

#### E. FREE SAMPLE

Since 1972, the U.S. copyright statute has protected recordings of “musical, spoken, or other sounds.”<sup>246</sup> Copyright protection for sound recordings, however, correlates to the extent to which the recorded sounds constitute original expression. The sounds themselves are not protected, but rather the recording of a particular rendition of them. An audio recording of, for instance, a mechanical “ringing the changes” of a cathedral’s bells, should obtain no copyright protection as a musical work, and minimal protection as a sound recording.<sup>247</sup> The work performed is simply an algorithm like that one might apply to a game of tic-tac-toe or KenKen. Recording the performance may involve some skill—such as adjusting microphones, as a photographer might adjust the angle of his lens—but the actual sounds produced and recorded depend entirely upon the physical characteristics of the bells and the mechanism striking them with no direct human participation.<sup>248</sup>

Infringement claims over rap songs based upon musical rather than verbal elements do not involve claims of musical similarities per se, but rather of illicit “sampling”—that is, use of a portion of an existing sound recording in a new number.<sup>249</sup>

In popular music, “sampling” typically involves no more than a few seconds taken from one of the several sound tracks comprising an existing song. The sampled bit may be inserted once or several times within the tracks of the new song or, more commonly, “looped”—that is, repeated successively as part of the background soundtrack over which original lyrics are chanted. It is possible to sample using analog technologies, but vastly

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245. See *infra* note 255 and accompanying text.

246. See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

247. “Ringing the changes” involves sounding a number of bells in every possible order. The greater the number of bells, therefore, the greater the number of possible “changes.”

248. If a band of bell ringers rang the changes, the recording would have a modicum more original expression stemming from the variations in volume and tempo attributable to the human performance.

249. See *infra* note 255 and accompanying text. “Sampling” refers to the practice, among popular musicians in particular, of lifting portions of an existing recording and using this “sample” (usually in a repetitive manner) as a component of a new song. The term is related to a more involved technique used by music technologists to create a digital record of various parameters of a given sound (such as a single pitch sounded on a particular violin) known as a “sample” that can be used in a variety of MIDI playback devices.

easier to do so with digital audio apparatuses; music sampling is a digital-era phenomenon.

Music copyright infringement disputes prior to the digital age invariably were grounded upon musical and verbal similarities between two songs. Sampling infringement cases, however, also involve similarity—in fact, identity—between portions of the recorded sound of the plaintiff’s and defendant’s works.<sup>250</sup> The activity, objectives, and results of sampling in rap music, however, are fundamentally different from those of copying musical expression in other popular genres, particularly from earlier eras.

Infringers typically attempt to capitalize upon the protected expression of another while seeking to camouflage the lifted material to avoid detection. The rap sampler’s objective, on the other hand, is typically to conjure awareness of a specific earlier work through literal sonic or verbal reference—much as verbal references to “Benz” and “Kate Moss” invoke a specific automobile or individual—not to capitalize upon another’s *musical* expression. The association may be derogatory—such as snippets of the sounds of a winsome ballad placed in a coarse musical and verbal context—or complimentary—such as a recording of an evocative sound used as part of a larger sonic background over which words are sung.<sup>251</sup>

Paradoxically, the more literal one’s copying, whether by sampling or imitation, the more likely it may result in a parody and thereby a permissible fair use of the existing work.<sup>252</sup> When the rap group 2 Live Crew invoked the pop ballad “Pretty Woman” for their take-off by the same title, it copied not only seminal words and music, but also sounds of the recording of Roy Orbison’s performance of his song.<sup>253</sup> In *Campbell v. Acuff-Rose*, Orbison’s publisher claimed that the group’s unauthorized use of verbal and musical portions of “Pretty Woman” infringed its copyright in

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250. See *infra* note 255 and accompanying text. More ambiguous in terms of copyright protection are recordings involving MIDI technology in which a work is mechanically rendered from *musical*, not merely sonic, information contained in a digital file. Digital audio files contain instructions that a digital-to-analog converter follows to reproduce certain sounds; these sounds convey musical information to listeners. MIDI files, on the other hand, contain essentially *musical* information that synthesizers read to produce *sound*. MICHAEL BOOM, MUSIC THROUGH MIDI: USING MIDI TO CREATE YOUR OWN ELECTRIC MUSIC SYSTEM 2 (1987). If I were to create a MIDI file of the musical information contained in a public domain music score, and then record a synthesizer’s rendering of this information, these efforts will produce little, if any, copyrightable original expression. Like a recording of a mechanized “ringing the changes” of a carillon, the underlying work is in the public domain and the recorded sound is determined mainly by physical attributes of the instruments producing the sound rather than by expressive direct human interaction with these instruments.

251. See, e.g., *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

252. This is not true for “mashups” that involve nothing more than combining two or more well-known recordings of others. Those who believe that their mashups are creative works, in Lee Siegel’s view, “[p]ut you in mind of Christopher Lasch’s definition of the clinical narcissist . . . as someone ‘whose sense of self depends on the validation of others whom he nevertheless degrades.’” LEE SIEGEL, AGAINST THE MACHINE: BEING HUMAN IN THE AGE OF THE ELECTRONIC MOB 142 (2008).

253. See *Campbell v. Acuff-Rose Music, Inc.* (*Campbell II*), 510 U.S. 569 (1994).

this song.<sup>254</sup> The rap group did not, apparently, sample Orbison's recording; instead, it used synthesized sounds precisely mimicking a segment of it.<sup>255</sup>

The Supreme Court ultimately determined that 2 Live Crew did not infringe upon Orbison's song despite the group's unauthorized use of a protected musical work. Such copying, the Court determined, is essential to the creation of effective parodies that, in turn, are a desirable form of expression in a free society.<sup>256</sup> If *Campbell* had involved a question of unauthorized sampling, the disposition of the case would have clarified the application of fair use in disputes involving unauthorized use of copyrighted sound recordings. In fact, most likely it was because *Campbell* did *not* involve sampling that the Sixth Circuit issued its provocative opinion in a factually somewhat similar dispute a decade later in *Bridgeport Music v. Dimension Films*.<sup>257</sup>

In *Bridgeport*, the plaintiff claimed that the defendant had, without authorization, incorporated a looped four-second clip from the plaintiff's song, which is by R&B performer George Clinton. The clip contained no original music; it was simply a distinctive sound akin to the siren of a police car.<sup>258</sup>

In *Campbell*, the Supreme Court endorsed precedent cautioning against judicial resort to "bright-line" rules in infringement cases implicating the defense of fair use: "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."<sup>259</sup> In *Bridgeport*, on the other hand, the Sixth Circuit relished the opportunity of promulgating a bright-line rule applicable to sampling:

Advances in technology . . . have made instances of digital sampling extremely common and have spawned a plethora of copyright disputes and litigation. The music industry, as well as the courts, are best served if . . . a bright-line test can be established. . . . [O]ne that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings. . . . Get a license or do not sample.<sup>260</sup>

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254. *See id.* at 573.

255. "[P]laintiffs have not shown by a preponderance of the evidence that any sampling really occurred here—and to my untrained ear, at least, it is obvious that most of the 2 Live Crew music was not lifted electronically from the 1964 recording." *Acuff-Rose Music, Inc. v. Campbell* (*Campbell I*), 972 F.2d 1429, 1444 n.5 (6th Cir. 1992). For sound recordings and sheet music of both works, see *Campbell v. Acuff-Rose*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1990-1999/Pages/campbellacuffrose.html> (last visited June 9, 2015). Even had the defendants sampled the Orbison recording, this literal copying could not have been the basis of an infringement claim because the Orbison recording, created in the 1960s, was not protected by the Sound Recording Act of 1971, which provides no retrospective coverage to sound recordings. *See* Pub. L. No. 92-140, 85 Stat. 391 (1971).

256. *See Campbell II*, 510 U.S. at 588.

257. *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

258. *See id.* at 796.

259. *See Campbell II*, 510 U.S. at 577.

260. *Bridgeport*, 410 F.3d at 798–801.

The plaintiff prevailed not because the court found substantial similarity between the works in question, but rather because the defendant had lifted—and not merely imitated, as did the defendant in *Campbell*—portions of the plaintiff’s sound recording.<sup>261</sup> The court observed that Congress, in legislating copyright protection for music recordings, limited sound recording rights vis-à-vis those enjoyed by songwriters and other authors.<sup>262</sup> Under the copyright statute, owners of sound recordings—unlike owners of literary, dramatic, and musical works—enjoy only a limited performance right, and no authority to prevent others from copying their protected expression through independent fixation of even slavish imitations of the original recorded performances.<sup>263</sup>

Because the statute permits copying, through independent fixation, of another’s copyrighted sound recording, the *Bridgeport* court inferred that Congress, in creating this loophole, must have intended that *any* copying of the protected recording itself would constitute infringement.<sup>264</sup> To support this inference, the court focused on the word “entirely” in the relevant statutory language limiting the rights provided to sound recordings: “[The rights] . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds.”<sup>265</sup> In other words, the court implied, Congress intended to counterbalance the limitation it imposed on the protection of sound recordings with an expansion of rights beyond those provided to other copyrightable works. Copying even what would otherwise be considered a *de minimis* portion of a protected literary or musical work would result in liability in the case of a copyrighted sound recording.

The *Bridgeport* decision has been warmly criticized as promoting a distorted view of Congress’s intent in legislating limitations on rights afforded sound recordings under Section 114 of the Copyright Act.<sup>266</sup> The House Report relating to the enactment of Section 114 indicates that Congress never intended this limitation on rights granted to sound recordings to be interpreted as an absolute prohibition against literal copying of a portion of a protected sound recording.<sup>267</sup> According to the report, unauthorized copying of the actual sounds of a protected recording constitutes infringement only when one reproduces “all or any substantial

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261. *See id.* at 802–04.

262. *Id.* at 800.

263. Copyright Act, 17 U.S.C. § 114(b) (2015).

264. *Bridgeport*, 410 F.3d at 805.

265. *Id.* at 799–800.

266. *See, e.g., Copyright Law—Sound Recording Act—Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright*, 118 HARV. L. REV. 1355, 1359 (2005) (“The court found that the sound recording copyright owner’s right to create a derivative work leads to a strict prohibition of sampling, but even a purely textual analysis of the statute proves this interpretation misguided.”).

267. *Id.* at 1360.

portion of the actual sounds.”<sup>268</sup> Accordingly, infringement claims involving portions of copyrighted sound recordings should be adjudicated using the same “substantial similarity” standard as are cases dealing with other copyrightable expression like literary and musical works.

While sampling involves identity—and not mere similarity—of the expression at issue, the use of such identical protected expression from an existing sound recording does not necessarily constitute substantial similarity. In fact, the quantum of similar expression to support an infringement claim in sampling disputes should, arguably, be greater than it is in claims involving musical works. This is because the economic worth of sound recordings—unlike that of the recorded music itself—is based upon the combined values of the underlying work, and that of a particular performance of it. This is true of recordings of both serious and popular music, although the economic value of recordings of popular vocal music depends upon particular performers to an even greater extent than do serious instrumental works.<sup>269</sup>

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The greatest influence on the evolution of American popular music since the middle of the twentieth century has not been social or cultural developments but rather electric power. Universal and reliable access to ample and inexpensive electricity in the United States has made it possible for anyone to create musical works using recording technology, perform them using electrical amplification, manipulate these recordings using mixers and synthesizers, and easily appropriate (“sample”) recorded sound.

The democratizing influence of electricity, however, also engendered a recalibration of the musical, sonic, verbal, and visual components of popular songs. With the decline of purely musical elements, and ascendancy of sonic, verbal, and visual components, the rift between serious and popular music has never been wider. This democratization also has contributed to the remarkable increase in music infringement disputes in recent decades.

The fact that the means of creation and the musical content of popular music have changed dramatically over the past fifty years should not affect the disposition of copyright infringement disputes involving

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268. *See id.*

269. Pianist Evgeny Kissin’s recording of a public domain work by Chopin, for instance, will have greater economic value than his recording of a contemporary copyrighted composition. This is because the former, but not the latter, offers an ideal combination of an expressive work and a particular performer of it. While Kissin’s recording of a Chopin sonata is more valuable than that of a less preternaturally gifted pianist’s recording of his unembellished sung or played performance of “Happy Birthday” is not. Marilyn Monroe’s recorded performance of her singing “Happy Birthday,” on the other hand, is more valuable than Kissin’s, despite the fact that Monroe could barely carry a tune.

these works. Regardless of whether the claim involves words, music, or sampled recorded sounds, a plaintiff must still establish that the defendant misappropriated more than a *de minimis* portion of his copyrightable expression.<sup>270</sup>

Music infringement cases from the early twentieth century were typically based on claims of misappropriation of a song in its entirety.<sup>271</sup> By the end of the century, plaintiffs began attempting to monopolize distinctive sounds, performance styles, rhythmic tattoos, and even a single word in popular songs.<sup>272</sup> This spate of speculative claims belies a widespread perception of broader authorial entitlement than legislators ever intended copyright to provide. How might courts help reverse this litigious trend and the overreaching ethos it suggests and thereby foster a better understanding on the part of the popular music industry of the advantages of providing minimal copyright protection to works of popular music?

## V. WHAT WENT WRONG?

### A. ARNSTEIN'S LEGACY

The U.S. Copyright Statute of 1790 ran about two pages and provided copyright protection to maps, charts, and books.<sup>273</sup> The elegant Copyright Act of 1909 was ten times as long, accommodating new technologies like piano rolls.<sup>274</sup> The current U.S. Copyright Act is more than fifteen times as long as the 1909 Act—the result of the inexorably expanding scope of protection covering innovations like semiconductors and digital audio recorders. The term of protection also has continued to lengthen from twenty-eight years in 1790 to at least seventy today.<sup>275</sup>

The number of music infringement disputes has grown in tandem with the scope and term of copyright protection. This growth can partly be attributed to the gradual expansion of rights to works derived from protected expression.<sup>276</sup> The current copyright statute provides authors rights to derivative works, but defines this category very broadly.<sup>277</sup> It has

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270. See *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946).

271. See *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956) (“My God and I”); *Reed v. Carusi*, 20 F. Cas. 431 (C.C.D. Md. 1845) (“The Old Arm Chair”); *Norden v. Oliver Ditson Co., Inc.*, 13 F. Supp. 415 (D. Mass. 1936) (“O Gladsome Light”); *Cooper v. James*, 213 F. 871 (N.D. Ga. 1914) (“Never Turn Back”). An exception is *Carew v. R.K.O. Radio Pictures*, 43 F. Supp. 199 (S.D. Cal. 1942), in which the only similarity between the contested works was the common title “Chatterbox.” The case was dismissed.

272. See *supra* note 206 and accompanying text.

273. Copyright Act of 1790, ch. 15, 1 Stat. 124.

274. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

275. Copyright Act of 1976, 17 U.S.C. §§ 101–1330 (2015).

276. See Kindra Deneau, *The Historical Development and Misplaced Justification for the Derivative Work Right*, 19 B.U. J. SCI. & TECH. L. 68 (2013).

277. 17 U.S.C. § 101.

been left to courts to determine whether a specific work is derivative, and what constitutes illicit copying of it.

Statutory provision of copyright to derivative works, like the ever-lengthening term of copyright protection, reflects the development of media technologies that enabled the swift and economical distribution of expressive works in an expanding number of genres. A popular song in 1850 might have been gradually disseminated orally and perhaps through limited sheet music publication. In 2015, one has the capacity to circulate throughout the world a work in its original form, as a country/western number, an R&B version, and as a jazz improvisation, through live and recorded performances, as sound recordings, radio and television ads, movies, television shows, ring tones, YouTube, and other Internet social media.<sup>278</sup> Also contributing to the growth of infringement claims is the fact that while the statute specifies civil and criminal remedies for illicit copying, it does not establish an author's right to curtail the creation and distribution of works that are similar, substantially similar, or even strikingly similar, to theirs.<sup>279</sup> This right has been devised by federal courts over the past century.

Judicial accommodation of music claims can be traced to the lingering influence of *Arnstein*, a case that entirely ceded to lay listeners the ultimate question whether there is substantial similarity between the protected elements of the works in dispute.<sup>280</sup> Moreover, in promulgating this approach in 1946, the Second Circuit established an extraordinarily high threshold for summary judgment—of “not the slightest doubt” as to relevant facts.<sup>281</sup>

Subsequent cases have moderated *Arnstein*'s daunting threshold to that now promulgated in the Federal Rules of Civil Procedure: “no genuine issue as to any material fact.”<sup>282</sup> Despite the emergence of this less rigorous standard, courts have been surprisingly reticent to grant summary judgment in copyright infringement disputes because of the common perception that determining similarities between two expressive works involves an “extremely close question of fact.”<sup>283</sup>

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278. Some popular music genres—rock, hip-hop/rap, disco, techno—however, are not tractable to the creation of derivative works across genres. Unlike Christmas carols, for instance, whose thoroughly melodic orientation—and public domain status—renders them ideal fodder for commercial exploitation, the exploitation of a rock or rap number is mostly limited to a particular rendition—or one that slavishly imitates the sound of it.

279. 17 U.S.C. § 504.

280. See *supra* note 131 and accompanying text.

281. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

282. See *supra* note 131 and accompanying text.

283. “Summary judgment is often disfavored in copyright cases, for courts are generally reluctant to make subjective comparisons and determinations.” *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 709 (S.D.N.Y. 1987); see *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980) (citing *Porter*, 154 F.2d 464); see also *Dalton & Cable*, *supra* note 21, at 26.

Between 1960 and 2010, over forty music copyright infringement cases turned on summary judgment motions.<sup>284</sup> Almost invariably, the defendant sought summary judgment at the district court; in several instances, appeal courts overturned the district court's granting of defendant's motion.<sup>285</sup> In sixteen of forty-two cases, the courts denied defendants' motions for summary judgment.<sup>286</sup>

The 1965 case *Nordstrom v. R.C.A.* illustrates the potential for inaccurate outcomes resulting from courts' hesitancy to provide summary judgment in music infringement disputes.<sup>287</sup> Frank Nordstrom, a pro se plaintiff, claimed that Jerry Herman, well-known author of Broadway shows, such as *Hello Dolly*, had copied his song "Shalom" in a number by the same title for Herman's musical *Milk and Honey*. Nordstrom had submitted his unpublished song to R.C.A., which ultimately released an "original cast" recording of *Milk and Honey*, to be considered for recording, but Herman was out of the country for all but three of the days in which a notated copy of the song was in the R.C.A. office. R.C.A. testified that given established company practices, the only possible means by which Herman could have been exposed to the plaintiff's song would have been through the extraordinary coincidence of his hearing, on one of the three days in which he was in the U.S. at that time, a live audition of it at their studios—an event that never occurred.

Judge Alfred Arraj's opinion stated that the "defendant admitt[ed] that there is a high degree of similarity between the two compositions."<sup>288</sup> This is a perplexing statement given that the two songs are strikingly different in their musical particulars as well as in overall affect.<sup>289</sup> The songs are in different keys but, much more significantly, are in different

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284. See *Case List*, *supra* note 13, (listing all cases between 1960–2010, providing relevant judicial opinions and commentary on the disposition of each case).

285. See, e.g., *Glover v. Austin*, 289 Fed. App'x 430 (2d Cir. 2008); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *Repp v. Webber*, 132 F.3d 882 (2d Cir. 1997); *Baxter v. MCA, Inc.*, 812 F.2d 421 (9th Cir. 1987).

286. See *Case List*, *supra* note 13.

287. *Nordstrom v. Radio Corp. of Am.*, 251 F. Supp. 41 (D. Colo. 1965). For sound recordings and sheet music of both works, see *Nordstrom v. R.C.A.*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1960-1969/Pages/nordstromrca.html> (last visited June 9, 2015).

288. *Nordstrom*, 251 F. Supp. at 42.

289. *Id.* The court went on to say that it "assume[d] that they are nearly identical even to the extent of the accused composition duplicating plaintiff's error in introducing eight bars of new material, from the twenty-fifth to the thirty-second bars of his song, rather than only four bars needed to complete the correct metric structure." *Id.* In other words, the court appears to have subscribed to the remarkable suggestion by the plaintiff that the music of defendant's number infringed his song not because it contains even a passing melodic resemblance to it, but rather because defendant's work has the same overall structure, and, specifically, because defendant's number, like the plaintiff's, uses a structure of forty rather than thirty-six measures. Documentation available on the *Nordstrom* case page of the Music Copyright Infringement Resource presents the measures of the defendant's work that plaintiff considered suspicious. See *Nordstrom v. R.C.A.*, *supra* note 287. These were derived from the plaintiff's exhibit comparing the two works, and not from the published piano-vocal score of the defendant's work in which they do not appear.

*modes*. Herman's *minor* key and limited melodic range conveys a more serious affect than the *major* key of Nordstrom's more melodically expansive and cheerful number. The lyrics of both songs dwell on the title word "shalom"—perhaps the most commonly known Hebrew word among Anglophones, and certainly not copyrightable expression—but it is hard to believe the defendant ever admitted that this commonality constitutes a high degree of similarity between the *protectable expression* of Nordstrom's work and his own.

The *Nordstrom* court rationalized its denial of the defendant's request for summary judgment on a purported reluctance to deny the plaintiff an opportunity to cross examine the defendant on the question of access.<sup>290</sup> The extraordinarily remote possibility of access, however, along with the complete absence of meaningful musical similarities between the two songs, suggests that the court was swayed by the fact that Herman's song shared with Nordstrom's significant *unprotectable* expression. Accordingly, for Jerry Herman, the expression "shalom" came to represent not the "nicest greeting you know," but rather an unexpected fillip by which an obscure fellow musician convinced a court to entertain a meritless claim against him.<sup>291</sup>

A more recent example of the unfortunate consequences of courts' hesitancy to award summary judgment in music infringement disputes can be found in *BMS Entertainment v. Bridges*.<sup>292</sup> Two words, "like that," were the only common expression between the two rap songs in this dispute. The defendant, rap singer Chris "Ludacris" Bridges, sought summary judgment, arguing that even if his use of "like that" had been inspired by plaintiff's song, the words were not copyrightable expression and therefore not a legitimate basis for an infringement claim.<sup>293</sup>

The court denied summary judgment, citing precedent establishing that even "unoriginal elements, when combined, may constitute an original, copyrightable work."<sup>294</sup> The plaintiff deployed the expression "like that" in a repetitive call-and-response style that the defendant also used.<sup>295</sup> It is

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290. See *Nordstrom*, 251 F. Supp. at 43.

291. Jerry Herman's "Shalom" opens with the line: "Shalom, Shalom, You'll find Shalom the nicest greeting you know." See *Nordstrom v. R.C.A.*, *supra* note 287 (presenting sheet music and audio recording of Herman's number).

292. *BMS Entm't/Heat Music LLC v. Bridges*, 2005 No. 04 Civ. 2584 (PKC), 2005 WL 1593013 (S.D.N.Y. July 7, 2005). For relevant portions of sound recordings of both works, see *BMS Entertainment v. Bridges*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/2000-2009/Pages/bmsbridges.html> (last visited June 9, 2015).

293. See *BMS Entm't/Heat Music*, 2005 WL 1593013, at \*2.

294. *Id.* at \*9 (citing *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1004 (2d Cir. 1995)).

295. The plaintiff's expert report claimed that the musical setting of "like that" was similar in both songs; there were no pitches specified for these spoken words but in both the three syllables of "straight like that" and "just like that" were spoken to the same rhythm of an eighth note followed by a quarter note, followed by an eighth note. *Id.* at \*3. In fact, in the sound recordings of both songs—the only medium in which they were distributed—the rhythm of the utterances of these expressions comports with that of how these short

possible, the court reasoned, that a jury might find that non-protectable words used in this non-protectable manner could result in a copyrightable “total concept and feel.”<sup>296</sup> The case ultimately went before a jury that did not find this to be so.<sup>297</sup>

The court’s decision not to decide whether the dispute involved legitimate copyrightable expression at the summary judgment stage was based on shaky ground given that *every* copyrightable work—and non-copyrightable work—is a combination of unoriginal elements. Because all expressive works are, ultimately, combinations of “unoriginal elements,” techniques, and styles, the quotient of original expression resulting from such combinations can range from nil to highly inventive, with attendant copyright protection similarly ranging from nil, to “thin,” to “thick.”

The fact that an author may have combined elements of non-protectable expression does not lead to any presumption of likelihood that the resulting work is original expression.<sup>298</sup> In *BMS Entertainment*, two of the combined elements in question—call-and-response and repetition—are not even expression per se. They are, rather, techniques by which authors convey original expression through words, notes, colors, and so on. The court framed its decision not to determine whether the application of a commonplace technique to two spoken words constituted protectable expression as one of judicial restraint.<sup>299</sup> The consequences of such diffidence, however, were an additional two years of acrimonious litigation; over one hundred additional docket entries; and a punitive attorney fee award of hundreds of thousands of dollars against the plaintiff after a jury found no infringement.<sup>300</sup>

While a denial of summary judgment is not dispositive on the question of infringement, as a practical matter, it is commonly the end of litigation in a music infringement dispute. Rather than appeal the denial, or prepare for a trial, the defendant will cut financial losses through settlement rather than spend more money to try a case. Defendants—commonly music publishers and large media companies—realize that even if they ultimately obtain a favorable judgment at trial, the possibility of recouping any attorney fees from typically impecunious plaintiffs is slim. Plaintiffs and their counsel—often solo practitioners with scant

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phrases are typically spoken: two eighth notes followed by a quarter note. See *BMS Entertainment v. Bridges*, *supra* note 292.

296. *BMS Entm’t/Heat Music*, 2005 WL 1593013, at \*3 (citing *Knitwaves*, 71 F.3d at 1004).

297. See generally *id.*

298. Musical “mash-ups,” for example, merit no copyright protection.

299. The reluctance of the court to rule on this question likely stemmed in part from its realization that recent case precedent from the same court involving nearly identical facts to those of *BMS Entertainment* were utterly inconsistent on granting defendants’ requests for summary judgment in such disputes. See *BMS Entm’t/Heat Music*, 2005 WL 1593013, at \*4 (citing *Santrayll v. Burrell*, No. 91-CIV-3166, 1996 WL 134803, at \*2 (S.D.N.Y. Mar. 25, 1996); *Jean v. Bug Music, Inc.*, No. 00 Civ. 4022, 2002 WL 287786 (S.D.N.Y. Feb. 27, 2002)).

300. See *BMS Entertainment*, 2005 WL 1593013.

knowledge of copyright law representing the plaintiff on a contingency fee basis—welcome this outcome.<sup>301</sup> They also welcome the fact that should the plaintiff prevail at trial, he may elect an award of statutory damages.<sup>302</sup> These range between \$750 and \$30,000, as “the court considers just,” per work found to have been infringed, with no requirement that the plaintiff produce evidence of having incurred actual or potential damages.<sup>303</sup>

Financial settlements in response to courts’ denying motions for summary judgment spare courts the cost of trying the cases at hand. They also, however, ultimately increase their burden by encouraging others to make typically meritless assertions of infringement hoping to score a financial jackpot from courts’ improvident deference on the question of music similarity. The popular music industry has responded to this treacherous legal landscape by establishing policies shunning unsolicited submissions from those outside its stable of musicians under contract and by vetting all new releases of music recordings, film sound tracks, advertisements, ring tones, and so on for susceptibility to infringement claims.<sup>304</sup>

#### B. WHAT SHOULD BE DONE?

Much has been written about the peculiar challenges attending music copyright infringement disputes, and particularly the inequitable consequences of the application of well-established common law tests for determining liability.<sup>305</sup> Recommendations for courts to develop a more liberal approach to purported illicit copying among musicians are typically premised on either: (1) the argument that from time immemorial, musicians have created innovative works that appropriate significant original musical expression from the works of contemporaries as well as predecessors, and the vibrant results of this appropriation have shown this to be a necessary and desirable phenomenon;<sup>306</sup> or (2) the claim that musical works fundamentally differ from other works of expression such that the standard copyright infringement tests—operating reasonably effectively in the case of literary and graphical works—cannot be applied to them.<sup>307</sup>

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301. See Michael Harrington, *Singing All the Way to Court: Charges of Plagiarism Rock the Music World*, WASH. POST, Sept. 28, 1980, at K1.

302. See Copyright Act of 1976, 17 U.S.C. § 504(c) (2015).

303. *Id.* § 504(c)(1).

304. See Michael Harrington, *Going on the Record*, WASH. POST, Aug. 27, 1984, at C5; Robert Palmer, *The Pop Life*, N.Y. TIMES, Apr. 6, 1983, at C14.

305. Aaron Keyt offers an excellent discussion of these issues. See generally Keyt, *supra* note 221.

306. See, e.g., PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 91 (2011).

307. See, e.g., Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227 (2013).

### I. A More Permissive Approach?

Around 1730, Johann Sebastian Bach wrote an arrangement of Antonio Vivaldi's *Concerto for Four Violins*.<sup>308</sup> Bach changed the key of the concerto from B minor to A minor, and the four featured instruments from violins to harpsichords. More importantly, he enriched Vivaldi's score with melodic elaborations and harmonic colorations.<sup>309</sup> Bach first performed the concerto with his sons at Zimmerman's Coffee House in Leipzig. Neither Bach nor Zimmerman charged for the performance, although Zimmerman benefited from increased coffee sales.<sup>310</sup>

Both the Vivaldi concerto and Bach's arrangement of it are frequently performed today. While the popularity of Bach's concerto has arguably undermined the market for Vivaldi's original work, it is just as likely that the market for Vivaldi's concerto has been enhanced through association with the work of a musician of much greater renown.

Regardless whether Bach's ministrations improved the fortunes of Vivaldi's concerto, they would constitute a flagrant infringement of Vivaldi's work under current judicial interpretation of the U.S. Copyright Act. Is this a regrettable development, evidence of a contracting public domain? Many believe that the ability to freely appropriate others' expression is essential to musical innovation: "Bach did it, Beethoven did it, every blues musician has done it, and jazz depends upon it."<sup>311</sup> Indeed, current copyright law applied to jazz and other improvisatory genres has led to the absurdity of requiring improvising performers to pay royalties to the authors of the "standards" on which they riff.<sup>312</sup> But should authors today tolerate others "repurposing" entire works, something Bach and Beethoven resorted to in drafting their arrangements and variations? Imagine that John Williams arranged Stephen Schwartz's Broadway musical *Wicked* in full orchestral score, to be used in a feature film distributed by Universal Pictures. Even the hardest-bitten copyright minimalist is unlikely to take the position that Williams and Universal should be allowed to capitalize upon someone else's work without authorization and compensation—yet in the early 1730s that is what

308. BACH, CONCERTO FOR FOUR HARPSICHORDS, BWV 1065; VIVALDI, CONCERTO FOR FOUR VIOLINS, Op. 3, No. 10.

309. See Christoph Wolff & Walter Emery, *Johann Sebastian Bach § 18 (Orchestral Music)*, GROVE MUSIC ONLINE, <http://www.oxfordmusiconline.com/subscriber/article/grove/music/40023pg10> (last visited June 9, 2015) (discussing how Bach's additions made this and similar rewritings new works in their own right).

310. "From 1720 until his death in 1741 Gottfried Zimmermann ran a café and readily offered it as a performance space for musical ensembles in town. Audiences paid no admission fee but they bought coffee." ISO CAMARTIN, BIN ICH EUROPÄER?: EINE TAUGLICHKEITSPRÜFUNG 75 (2006).

311. AUFDERHEIDE & JASZI, *supra* note 306, at 91.

312. See Note, *Jazz Has Got Copyright and That Ain't Good*, 118 HARV. L. REV. 1940, 1958 (2005). In the early 1940s, the American Society of Composers, Authors, and Publishers embarked upon a campaign to identify swing musicians who incorporated snippets of popular songs' melodies in their improvisations, and demanded royalties for their doing so. See STARR & WATERMAN, *supra* note 63, at 139.

Bach and Zimmerman's Coffee House did shamelessly with respect to Vivaldi's concerto; *autres temps, autres moeurs?*

There was no copyright law in the German states in the early eighteenth century and Bach had no legal obligation to Vivaldi.<sup>313</sup> Nor did Bach have any ethical obligation to him, given the technology and economics of music distribution in his day.<sup>314</sup> Very little music was published then, and neither Bach nor Vivaldi earned their livelihoods from sales of copies or from public performances of their works; rather, their livelihoods derived from the government or the church. Music rarely circulated beyond the court, church, or city for which it was written and arrangements, like Bach's of Vivaldi's concerto, spread the music and renown of composers from elsewhere.<sup>315</sup>

Prior to market saturation by sound recording technology in the twentieth century, operas and symphonic works were disseminated not only in full and reduced scores but even more broadly through arrangements of, and improvisations upon, these works performed by church organists, virtuoso pianists like Liszt and Chopin, and a great variety of automata like barrel organs and music boxes.<sup>316</sup>

It would never have occurred to Liszt to seek Bellini or Verdi's authorization to publish and perform the works he derived from their operas. Nor would Bellini or even Verdi, who was known for his financial canniness, have considered demanding royalties from Liszt for capitalizing

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313. See generally HANSJÖRG POHLMANN, DIE FRUHGESCHICHTE DES MUSIKALISCHEN URHEBERRECHTS (1962) (noting that in the eighteenth and nineteenth centuries, the many feudal duchies comprising today's German Republic made it impossible to establish a uniform national copyright system like that of England at that time).

314. See SCHERER, *supra* note 82, at 88.

315. This is particularly true when the author of the arrangement accords appropriate credit to the earlier author, as Bach did in this case. Bach's *Concerto for Four Harpsichords* is generally referred to as his "*Concerto nach Vivaldi*," which translates to "Concerto after (in fact, musically and chronologically) Vivaldi's." Bach's contemporary, G.F. Handel, on the other hand, capitalized upon the fact that little music was published in his day by incorporating into his works significant portions of music that he lifted from the manuscripts of composers little known to his audiences. Handel never credited the composers whose music he appropriated; his "borrowings" have been identified over many years by musicologists. See generally SEDLEY TAYLOR, THE INDEBTEDNESS OF HANDEL TO WORKS BY OTHER COMPOSERS: A PRESENTATION OF EVIDENCE (Johnson Reprint Corp. 1971) (1906) (comparing various works of Handel to those of other composers). When Handel was once confronted with an instance of his plagiarism he is said to have responded: "That pig doesn't know what to do with such a tune." See ARTHUR ELSON, THE BOOK OF MUSICAL KNOWLEDGE 80 (1915).

316. In Luchino Visconti's film adaptation of Giuseppe Lampedusa's novel *Il Gattopardo* [The Leopard], upon arrival at their country seat in the Sicilian mountains, the exhausted aristocratic family immediately gives thanks to God for their safe arrival at the local church where the organist improvises on themes from Verdi's *LA TRAVIATA* (1853). (Verdi's opera retells the tragic story of Alexandre Dumas' novel *La Dame aux Camélias* about the disease and untimely death of a prostitute.) French composer Camille Saint-Saëns was an organist at Paris's La Madeleine in the 1860s and 70s and attendees at Mass often requested that he improvise upon melodies heard the night before at the *Opéra* that is in the same neighborhood as the church. See Janette Fishell, Organ Recital at the First Congregational Church, Los Angeles, Program Notes: A Tale of Three Cities (copy on file with Author).

upon their works. Both opera composers realized that Liszt's derivative works indicated the high quality of their operas. Audiences hearing *Reminiscences of Norma* or *Concert Paraphrase on Rigoletto* would be predisposed to attend performances of these and other new operas by the same composers; Liszt's borrowing was a valuable endorsement of their music, which promoted their economic interests and reputations.<sup>317</sup>

While Bach's enhancement of Vivaldi's concerto may have generated greater interest in Vivaldi's concerto than it might otherwise have enjoyed, it may also have undermined enthusiasm for the earlier work. The Vivaldi/Bach concertos, however, are anomalously fungible works; Liszt's arrangements for piano of Bellini operas and Beethoven symphonies are not. An audience at the concert today would take in stride learning at the concert hall that the Bach concerto had been substituted for the Vivaldi on the program it is about to hear. The same audience would be mutinous, however, to learn that a performance of a Liszt piano transcription had been substituted for a performance of an opera by Verdi or a symphony by Beethoven.

Today, a reworking that hews as closely as Bach's to the music of an existing work would be rightly considered infringing. This is because the economics of music creation and distribution have changed significantly over the past 250 years. Under the circumstances and expectations in which Bach created and performed his work, Vivaldi suffered no financial harm, despite the fact that Bach's work was virtually interchangeable with his.

On the other hand, the unauthorized score by John Williams we imagined a moment ago, that is similarly interchangeable with Stephen Schwartz's, would seriously compromise Schwartz's economic interests in *Wicked*, and film-related revenues particularly. This is because technology has eradicated the constraints of Bach's era on the reproduction and distribution of musical works. Apart from a few locals in Zimmerman's Coffee House who heard Bach perform his *Concerto after Vivaldi*, no one was even aware of the work's existence as it was not published or performed again until well into the nineteenth century.<sup>318</sup> John Williams' film adaptation of Schwartz's *Wicked*, however, would be heard by millions throughout the world within days of Universal's release of the film.

To summarize, the argument that history demonstrates the desirability of a more liberal approach to musical appropriation needs to be more nuanced. Liszt's piano paraphrases of operatic and symphonic works are so transformative of the works on which they were based that they

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317. RÉMINISCENCES DE NORMA (1841); PARAPHRASE DE CONCERT SUR RIGOLETTO (1859). Popular works by Liszt were also freely arranged by others like Jules de Swert, who created a cello version of Liszt's six *Consolations* (originally for solo piano).

318. The Bach concerto was not published until 1865. See INTERNATIONAL MUSIC SCORE LIBRARY PROJECT, <http://www.imslp.org> (last visited June 9, 2015).

complemented rather than competed with them—much the way jazz operates today.<sup>319</sup> On the other hand, an elaboration upon another's complete work, and in the same musical genre, while harmless 250 years ago, would unfairly compromise the financial interests of the first author today.<sup>320</sup>

## 2. *A Sui Generis Infringement Test for Music?*

Do musical works differ from other forms of human expression such that the existing infringement test for copying and substantial similarity cannot meaningfully be applied to them? Increasingly, those advocating for a revised test for evaluating music copyright infringement claims are making this argument.<sup>321</sup> As recently suggested, claims involving musical works should be adjudicated using a higher standard of similarity than that used for other works of expression because it is very difficult to create an original musical work given the limited parameters of music (melody, harmony, and rhythm).<sup>322</sup> Moreover, “music is the only type of creative work that appeals primarily to the ear rather than the eye.”<sup>323</sup>

319. In 1829, German and Austrian music publishers, in the absence of any national copyright legislation, ratified an anti-piracy agreement among themselves (essentially a cartel) that nicely balanced the financial interests of authors of original melodic material and others who capitalize upon it. Article 5 of the agreement established that “[m]elody is recognized as the exclusive property of the publisher and every arrangement that reproduces it that is based only on mechanical processing” constitutes a violation of the agreement. However, “variations, fantasies . . . based upon melodies of others, which themselves require mental activity and creative talent should be considered autonomous works,” and in questionable cases a committee will decide the matter. See MAX SCHUMANN, ZUR GESCHICHTE DES DEUTSCHEN MUSIKALIENHANDELS SEIT DER GRÜNDUNG DES VEREINS DER DEUTSCHEN MUSIKALIENHÄNDLER: 1829–1929, at 17 (1929) (author's translation). The appeal and distribution of musical works were less limited by national boundaries than those of literary works; hence, the music publishers were at the forefront of the development of statutory copyright in Germany. See *id.* at 37; see also F. M. Scherer, *The Emergence of Musical Copyright in Europe From 1709 to 1850*, at 8 (Harvard Kennedy Sch. Faculty Research Working Papers Series, Paper No. RWP08-052, 2008).

320. One of the few copyright infringement disputes in which this was the case is *Baron v. Leo Feist*, 78 F. Supp. 686 (S.D.N.Y. 1948). In *Baron*, the music of defendant's “Rum and Coca Cola”—a hit recorded by the Andrews Sisters—was copied entirely from plaintiff's little-known calypso song. For sound recordings and sheet music of both works, see *Baron v. Leo Feist*, UNIV. S. CAL. MUSIC COPYRIGHT INFRINGEMENT RES., <http://mcir.usc.edu/cases/1940-1949/Pages/baronfeist.html> (last visited June 9, 2015).

321. See, e.g., Keyt, *supra* note 221, at 443–44 (arguing that abstract tests for infringement should be replaced with consideration of market damage and apportionment of each composer's creative contribution to a work).

322. See Livingston & Urbinato, *supra* note 307, at 291.

323. *Id.* Livingston and Urbinato appear to have misread Judge Frank's facetious remark in his *Arnstein v. Porter* opinion about the improbability of Ravel or Shostakovich borrowing the melody of “When Irish Eyes Are Smiling.” The authors argue—as Frank clearly implies:

It is highly unlikely that composers of such high stature as Ravel and Shostakovich would appropriate ‘When Irish Eyes Are Smiling’ . . . Why would Ravel, a French/Spanish composer, reference or even want to reference an Irish tune . . . Why would Shostakovich, a Russian composer . . . reference an Irish tune . . .

*Id.* at 260 n.4. In fact, serious music is rife with instances of such unexpected musical juxtapositions, such as Brahms' incorporating the melody of “Battle Hymn of the Republic” into the first movement

The latter argument correctly implies that because our sense of hearing is less acute than sight, we are more sensitive in discerning similarities and differences between works perceived visually than aurally. But this argument is flawed in two respects: music is not the only authorial expression we experience primarily through hearing; and it does not distinguish between the perceptions of sound versus that of music.

Imagine that you are at a gym, on a treadmill mercifully equipped with a television screen—but you forgot to bring headphones! Sitcoms and reality shows—tempting but soundless—are out of the question and you must, reluctantly, resort to CNN with its text ribbon corresponding to the spoken words. Suppose instead that you brought your headphones but only the aural component of the television was working. You may be less stimulated without images accompanying the sound, but you will perceive more accurately the essential information conveyed in virtually everything being broadcast: the sitcom, reality show, news program—not to mention the PBS performance of Shakespeare—than you would if you only saw moving images. Apart perhaps from mime and dance, most works of the performing arts are perceived as much—if not more—through the ear than the eye.<sup>324</sup>

Purely graphical representations—that is, scores—on the other hand, remain the primary media by which musicians and musicologists perceive serious music. Like actors studying their parts, conductors, singers, pianists, and so on will silently *read* their scores repeatedly to understand them, internalize them, and commit them to memory.<sup>325</sup> Beethoven did not conceive or perceive his *Ninth Symphony*, or late string quartets, through his hearing—he was deaf when he wrote them; these works exist

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of his PIANO CONCERTO IN B-FLAT (1881); von Flotow's incorporating the entire "Tis the Last Rose of Summer" in his opera MARTHA (1847); Tchaikovsky's use of Wagner's "swan motif" from LOHENGREN (1850) in his ballet SWAN LAKE (1876); and the exquisitely incongruous use of the tune of "Home Sweet Home" in the aria sung by Donizetti's tragic heroine while incarcerated in the Tower of London in his opera ANNA BOLENA (1830).

"When Irish Eyes Are Smiling" is not an "Irish tune"—it was written by American songwriter Ernest Ball in 1912 for American audiences. The song was the subject of a dispute over a question about the validity of an assignment of copyright renewal rights. See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). The Supreme Court affirmed the Second Circuit opinion by Judge Clark, from which Judge Frank dissented. See *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949 (2d Cir. 1942). The reverse of judicial antipathy between Clark and Frank would reemerge several years later in *Arnstein v. Porter*, and the earlier case was undoubtedly the inspiration for Frank's reference to "When Irish Eyes Are Smiling" in the latter.

324. Even dance might be said to rely more on hearing than sight. We often listen to entire ballets (that is, performances of the music score) and conjure images of our favorite performers. To the extent dancers are capable of performing without music, watching them do so soon becomes tedious.

325. OLIVER SACKS, *MUSICOPHILIA: TALES OF MUSIC AND THE BRAIN* 31 (2007) ("[My father] always had two or three miniature orchestral scores stuffed in his pockets, and between seeing patients he might pull out a score and have a little internal concert. He did not need to put a record on the gramophone, for he could play a score almost as vividly in his mind, perhaps with different moods or interpretations, and sometimes improvisations of his own.").

thanks to Beethoven's sight and intellect.<sup>326</sup> Popular music today, on the other hand, is not written or read by anyone. Its creators/performers are mostly incapable of creating a visual record of their musical expression that, in turn, tends to be so rudimentary that there is no need to resort to a medium whose purpose is to record complex works.

The vocabulary of music is as large as—if not larger than—those of visual or literary works; and a literate musician today can create original musical expression as readily as a novelist or poet. What has diminished is not the potential to create original musical works, but rather the appreciation of them. In fact, the more original a work the less likely it will be valued, let alone tolerated, by lay audiences. Like the late prose works of Joyce, the music of twentieth century musicians like Elliott Carter and Milton Babbitt is highly original and enjoys, therefore, “deep” copyright protection. Paradoxically, there is little need for this protection given that the economic value of their music, like that of *Finnegan's Wake*, is almost nugatory because of its originality.

### C. RECAPITULATION

Since the Tin Pan Alley era and the establishment of the American popular music industry early in the twentieth century, courts have handled a continually growing number of infringement disputes based upon allegations of musical similarities. This is noteworthy because, since the middle of the century, the appeal and economic value of popular songs have become increasingly determined by sounds, words, imagery, and particular performances, rather than music.

The origins of this increased judicial burden, and the uneasiness it has produced within the music industry, can be traced to the courts themselves. To accommodate *Arnstein's* directive to defer to lay listeners in determining substantial similarity of protected expression, courts have been reluctant to grant summary judgment to defendants in music copyright infringement disputes. This restraint, in turn, has fostered an ethos of misguided opportunism resulting in absurdly speculative claims like those discussed in the Introduction.<sup>327</sup>

Courts could alleviate this problem by revamping established summary judgment and infringement standards. But this approach is utterly improbable and undesirable given that these standards, developed and

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326. *Early Mozart Works Discovered: Two Keyboard Pieces by the 8-Year-Old Composer Found in Salzburg*, CLASSICALMUSIC.COM (Aug. 3, 2009, 12:41 PM), <http://www.classical-music.com/news/early-mozart-works-discovered> (“An anecdote recounted by a family friend soon after Mozart's death, describe[s] how Leopold . . . [when] examining some blotchy, untidy sketches of an early concerto movement written by his 7 or 8-year old son . . . began to observe . . . the notes and music . . . He stared long at the sheet, and then tears, tears of joy and wonder, fell from his eyes.” (quotation marks omitted)).

327. See *supra* note 1 and accompanying text.

tested over decades of litigation, for the most part, promote equitable outcomes.<sup>328</sup> Courts could, however, more readily award summary judgment in music infringement cases than they have done in recent years, or simply dismiss them, if they were to acknowledge the significance of the fact that popular music—to a greater degree than other forms of protected expression—is profoundly different than that of the era in which *Arnstein* promulgated its framework for determining infringement and its exceedingly restrained approach to summary judgment.

Virtually all copyrightable works of expression are now created using tools and techniques different from those used in the first half of the twentieth century. Despite the fact that novelists, graphic designers, screen writers, and so on use different technologies to record their expression, they still employ the words, symbols, lines, and colors used by these authors since time immemorial. This is not true of contemporary popular songwriters/performers. Dramatic works are mainly perceived audibly, but no author creates, records, and distributes a dramatic work using audio technology; even if he were to dictate portions of it, he would ultimately work primarily with a visible verbal text. The music of popular songs, however, that was created, recorded, and distributed using symbolic notation in the first half of the twentieth century, is now created, recorded, distributed, and consumed, only as aural information.

Like popular music, dramatic, prose, and poetic works *could* be created and recorded exclusively as audible information. But novelists, playwrights, and poets create and record their works using visible symbols because they permit them to manipulate and control the creation of more complex works of personal expression than they could create using only recorded sounds.<sup>329</sup> Without the ability to work with visible music notation that similarly allows for the creation of complex and original works, songwriters will tend to produce musically derivative and simple songs warranting minimal copyright protection.

In the 1940s, when *Arnstein* was decided, the popularity and economic value of a song were determined by a blend of the quality of the music and the appeal of a particular performance of it. This is also true of popular songs today. In the 1940s, however, the song's writer was not also its performer, and the economic value of a song was not inextricably tied to a particular singer. Two recordings of a song by Cole Porter might be equally appealing despite the fact that they are by singers differing in age, sex, race, and voice type.

Since the 1950s, the economic value of popular songs has depended increasingly on the appeal of performances by the work's putative author.

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328. See Dalton & Cable, *supra* note 21, at 26.

329. Use of visible symbols to record these works also enables deeper and more personal enjoyment of them. We often find disappointing film adaptations of favorite novels, for instance, because they do not meet the richly textured visualizations of these works that our imaginations yield from reading.

There are dozens of economically valuable recordings of Gershwin songs, none of which feature George or Ira Gershwin. But there are few saleable recordings of songs by the Beatles or the Rolling Stones other than those by the Beatles and the Rolling Stones, and none whatever for a rap number by Kanye West other than his own.

Recordings of popular songs today are nonfungible, reflecting the fact that the economic value of songs in rock and rap genres depends overwhelmingly on the sounds and imagery of the songwriter/performer rather than the underlying musical work.<sup>330</sup> Accordingly, the economic interests of the copyright owners of songs in these genres can be undermined only by unauthorized copying of substantial—if not entire—portions of both the songwriter’s work and his performance of it.

This shift in value of popular songs from music to sounds and images corresponds to a gradual drift away from melodic primacy in popular music. In 1936, Judge Learned Hand observed that, although it is difficult to predict the success of a popular song: “it is the [melodic] themes which catch the popular fancy” and are, therefore, the proper focus of inquiry in an infringement dispute.<sup>331</sup> Learned Hand’s observation, however, is no longer applicable to popular music, particularly rock, rap, and techno numbers that contain little melodic material. The diminishment of melody in these genres reflects not only a rebalancing of musical parameters to emphasize repetitive rhythmic and harmonic patterns, but also the remarkable gender segregation associated with the creation and performance of popular music since the 1960s.<sup>332</sup>

Tin Pan Alley songwriters were overwhelmingly men, but their songs were sung and performed at least as often by women as by men.<sup>333</sup> The appeal of rock and rap songs, on the other hand, is yoked to the gender and race of the songwriter/performers.<sup>334</sup> Songwriter/performer

330. This is not to suggest that particular performers and imagery associated with them did not play a significant role in marketing popular music in the first half of the twentieth century as well. Referring to the music publisher Charles Harris, David Suisman notes that he “helped lay the foundation for the system of promotion of popular songs around the country. For the publisher, printing a picture of a well-known performer on the cover of the sheet music took advantage of the performer’s existing popularity.” SUISMAN, *supra* note 24, at 31.

331. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936).

332. See Joan Serra et al., *Measuring the Evolution of Contemporary Western Popular Music*, 2 SCI. REPS. No. 521, at 1 (2012), available at <http://dx.doi.org/10.1038/srep00521> (claiming that application of music information processing technologies has demonstrated: a narrowing of melodic diversity; homogenization of the timbral palate; and increasingly loudness levels in popular music between 1950–2000); see also Sean Michaels, *Pop Music These Days: It All Sounds the Same, Survey Reveals*, GUARDIAN (July 27, 2012, 10:32 AM), <http://www.theguardian.com/music/2012/jul/27/pop-music-sounds-same-survey-reveals> (summarizing report.).

333. See SUISMAN, *supra* note 24, at 22; *supra* note 104 and accompanying text.

334. The mostly meritocratic world of serious music performers is now vastly more integrated by race and gender than that of popular music. “Rock’s social consequences are incidental to and often contradictory of its avowed racial integration. There are more blacks at a Republican convention than

rock and rap groups are overwhelmingly comprised of men, and their songs and performances tend to project a grotesquely exaggerated adherence to male heterosexuality in efforts to counter, on behalf of their profitable audience of young men, homosexual anxiety evoked from its enjoyment of entertainment by “all male” casts “padding their crotches or highlighting their endowments.”<sup>335</sup> Melody, the most worrisome feminine musical attribute—particularly when sung—is sparingly used in rock and rap music.<sup>336</sup> Long-spun melodic themes are relegated to women singing “ballads,” or country/western crooners whose songs still reflect lyrical elements of their folk progenitors.<sup>337</sup>

With the diminished significance of melody in a number of popular genres, rhythm and—above all—sound became increasingly vital determinants of the appeal of numbers in genres like rock, rap, disco, and techno. Unlike melody, however, rhythm, sound, and structure in popular songs are not viable bases for music copyright protection. While the choice of particular rhythms and sounds—like that of harmonies and timbres—may involve “sweat of the brow,” there are too few rhythmic

at a Van Halen concert, and the music industry keeps its statistics on records sales separate but equal.” PATTISON, *supra* note 159, at 63.

335. *Id.* at 114. Pattison observes that “for all its pansexuality, rock is largely about men . . . . Rock celebrates pastoral and primitive utopias while swathing its stars in polyester jockstraps and arming itself with the latest devices of electronic technology.” *Id.* at 119, 126. Further, to abate homoerotic frisson among their male fans, rock and rap performers resort to preposterously misogynist lyrics simultaneously belittling and objectifying women. For example, the song *Girls*, by The Beastie Boys, contains the following lyrics: “Girls, to do the dishes; Girls, to clean up my room; Girls, to do the laundry; Girls, and in the bathroom.”

When a toy manufacturer released a parody of this song mocking its deliberately reactionary message, the Beastie Boys sued for copyright infringement claiming the band never authorized use of their songs in advertising. See *GoldieBlox, Inc. v. Island Def Jam Music Group*, No. 5:13-cv-05428 (N.D. Cal., 2013); see also Dave Itzkoff, *Beastie Boys Fight Online Video Parody of ‘Girls’*, N.Y. TIMES, Nov. 25, 2013, at C3.

336. Electric amplification is another component of rock and rap’s pseudo-masculinity. “Loud music in a public place is a way of swaggering—macho, aggressive. It’s hardly ever women students who play loud music out their windows.” Phyllis Rose, *Hers*, N.Y. TIMES, Mar. 29, 1984, at C2. Similarly, Allan Bloom observed that “[s]ome of [rock music’s] power comes from the fact that it is so loud. It makes conversation impossible, so that much of friendship must be without the shared speech that Aristotle asserts is the essence of friendship and the only true common ground.” ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 75 (1987).

337. In a twist on an expression of insane male insecurity, “real men don’t sing”; singing involves melody that involves higher pitches than the accompaniment in popular songs. High pitches are associated with voices of women and children; melodies that employ them may be decorated and “flowery” as suggested by the Italian “fiatura” used to describe embellished vocal lines, particularly those sung by sopranos. Melody is also the most memorable and replicable musical component of popular songs. One finds evidence of its diminished role in popular music today even in this writer’s observation that white and black laborers rarely, any longer, whistle, hum, or sing while working—they have little to work from, and machines do their “singing” for them—while their Latin American counterparts still sing and whistle popular songs from Central America that never abandoned their melodic base. Terada Honke, a brewer of superb sake near Tokyo emphasizes the importance of its employees’ singing while laboring to maintain the high quality of its product. *The Natural Organic Japanese Sake Brewery*, TERADA HONKE, <http://www.teradahonke.co.jp/english.htm> (last visited June 9, 2015).

and harmonic combinations, or rhythmic patterns, that are perceptible and appealing to popular music audiences, to permit the monopolization of any one of them.

#### CONCLUSION

Only the federal judiciary might abate the recent “plethora of copyright disputes and litigation” involving popular songs, and avert distorted verdicts in these disputes—like that of *Selle v. Gibb*.<sup>338</sup> Courts could further this goal by readily dismissing disputes, or by granting defendants summary judgment, based on a more informed understanding of the means by which the contested works were created than that generally evinced in judicial opinions in these cases in recent decades.

Given the transformation of popular music during this time—and the significant narrowing of copyrightable expression entailed—it is not unreasonable to assert that courts would have been justified in granting defendants summary judgment in practically every litigated claim of music copyright infringement over the past half century. With an appreciation of how popular music is now produced, a comparison of the genuinely *musical* elements of disputed works would, in virtually every instance, lead to the conclusion that there is “no genuine issue of material fact” on the question of substantial similarity of protected musical expression.

The diffuse and ambiguous authorship of most popular music today harkens back to that of American songs of labor, patriotism, piety, homesickness, and so on, from before the Tin Pan Alley era and the insidious development of a music “industry.” This is not a characterization that the recording industry acknowledges because it challenges its cultivated fallacy that today’s popular performers are exponents of the Tin Pan Alley tunesmith tradition. American popular music now implicates commercial stakes entirely absent from popular music in early America. This enormous growth in economic value, however, has not been generated by a commensurate development in original musical expression that can be specifically attributed to a particular author or authors.

Popular songs today are akin to Lego block or Tinker Toy assemblages in which the constituent components may contain greater inventiveness than their combination. Or, the finger paintings of toddlers whose doting parents—like music arrangers, audio engineers, and videographers—will transform them into attractive works by using skillful framing and presentation techniques unknown to their creators. Regardless of the potential appeal or marketability of such creations, however, the more nebulous their authorship, the more charily courts should view the legitimacy of infringement claims based upon them.

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338. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005).

Copyright's objective is to promote the creation of new works by protecting the economic potential of original expression. The economic potential of most popular music today is mainly determined by non-musical elements like performance style, personal appearance, and engineered sound—none of which is protected by copyright. Accordingly, most popular music should be accorded shallow protection compared to that provided works written before the rock 'n' roll era. The thinner the protection, the heavier the plaintiff's burden in a copyright infringement claim to demonstrate a defendant's copying of his work in its entirety.

Courts could cultivate a return to more permissible attitudes toward copying of musical expression through less hospitable reception of infringement disputes involving anything other than replication of substantial musical expression—essentially the entire work—that threatens to supplant it in the marketplace. Doing so might not initiate a second golden age of American popular song, but it likely would curtail the growing number of spurious infringement claims, and also reestablish the fundamental objectives of providing copyright to musical works that our forebears appear to have understood better than we.

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