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FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights

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Cover Page Footnote

J.D. Candidate, 2021 (Evening Division), Fordham University School of Law; M.A., 2014, New York University; B.A., 2011, Cornell University. Thank you to Professor Hugh Hansen and his staff at the Emily C. & John E. Hansen Intellectual Property Law Institute, particularly Soban Ahmed, Yuan Yuan Wang, and Rilana Wenske, for their guidance. Thank you also to Professors Olivier Sylvain, Kristelia García, Joseph Fishman, Pamela Samuelson, Sepehr Shahshahani, Janet Freilich, and Ron Lazebnik for their comments and suggestions. A special thank you to my editor, Claire Abrahamson, for her wisdom, and to the staff and editorial boards of both the Fordham IPLJ and the Fordham Law Review for their encouragement and assistance. Finally, a profound thank you to the Royalty Network team, particularly Frank and Kathy, for their support, and to my family and my wife, Naina, for their love. Disclosure: the author is employed as Vice President—General Manager at The Royalty Network, Inc., a music publisher that represents a portion of the work “Thinking Out Loud” in certain territories, on behalf of songwriter Amy Wadge, and is tangentially involved in its surrounding litigations. All views expressed are the author’s own and do not reflect the opinions of The Royalty Network, Inc., its clients, or its affiliated songwriters.

FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights

Daniel Abowd*

Sound recordings are not musical compositions. Sound recordings embody musical compositions. Thus, when sound recordings appear in musical composition infringement trials, they do so as an imperfect facsimile of the composition they actualize. As a result, they can confuse and mislead juries tasked only with evaluating the similarity of the underlying composition. On the other hand, music is an aural medium: how can juries be expected to compare two songs without listening to their commercial embodiments?

Several recent cases have hinged on the admissibility of sound recordings in composition infringement trials. In doing so, they have implicated three fundamental questions: (1) Where does composition end and sound recording begin? (2) How has the evolution of creative and business practices in the music industry complicated the formerly tidy separation of composition and perfor-

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mance/recording? (3) What are the policy implications for courts defining “composition” more broadly or more narrowly, and how do these interact with the underlying policies governing sound recording evidentiary decisions?

This Note targets a seemingly simple question: how should courts approach the use of sound recordings in composition infringement trials? Any thorough answer, however, must grapple with the many underlying creative, industry, and public policy complexities that bear on that debate. Thus, this Note necessarily traces the historical convergence of composition and recording in creative, industry, and judicial contexts. It then discusses the underlying policy arguments that favor and oppose the unrestricted use of sound recordings in composition infringement trials. Finally, it marshals all of this context into a proposed “Triad” judicial framework that explicitly links a court’s inquiry into the “compositionality” of a recorded element to litigants’ burdens in seeking to admit, or preclude, that element as evidence of substantial similarity among compositions.

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A DAY IN THE LIFE: INTRODUCTION

There was a moment when Robin Thicke and Pharrell Williams were clearly going to win. Amid the torrent of popular and scholarly writing debating the *Blurred Lines* verdict¹ and its survival in the Ninth Circuit,² that moment has been largely muffled by the din surrounding the reality that Thicke and Williams (the “Thicke Parties”) did not, in fact, win. But the moment existed, and for that forgotten snapshot in time, their adversaries were doomed.

In what was described as a “huge victory”³—an “unblurred victory”⁴—for the Thicke Parties, with “devastating consequences”⁵ for the Marvin Gaye estate, the district court ruled that the commercially released sound recording of “Got to Give It Up” by Marvin

¹ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015), *aff’d in part, rev’d in part sub nom.* *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), and *aff’d in part, rev’d in part sub nom.* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). The jury found Thicke and Williams, but not co-writer/rapper Clifford Harris a/k/a T.I., liable for infringement. *Id.* The district court overruled the jury’s finding of no liability for T.I. *Id.*

² *Williams*, 895 F.3d at 1116 (primarily affirming on “narrow grounds” the district court’s ruling, while reversing the district court’s decision to override the jury’s verdict in favor of T.I.).

³ *Marvin Gaye ‘Got to Give It Up’ Recording Barred From ‘Blurred Lines’ Trial*, ABC7 (Jan. 27, 2015), <https://abc7.com/entertainment/marvin-gaye-got-to-give-it-up-recording-barred-from-blurred-lines-trial/492597/> [<https://perma.cc/R6RW-QMHV>].

⁴ Nancy Dillon, *Marvin Gaye’s ‘Got to Give It Up’ Will Not Be Played For Jurors During ‘Blurred Lines’ Copyright Trial*, N.Y. DAILY NEWS (Jan. 27, 2015, 1:45 PM), <https://www.nydailynews.com/entertainment/music/jurors-not-hear-marvin-gaye-song-blurred-lines-trial-article-1.2093741> [<https://perma.cc/4GDZ-AV45>].

⁵ Eriq Gardner, *Marvin Gaye Family Seeks ‘Blurred Lines’ Appeal, Warns of ‘Devastating Consequences’ of Key Ruling (Exclusive)*, HOLLYWOOD REPORTER (Jan. 29, 2015, 3:15 PM), <https://www.hollywoodreporter.com/thr-esq/marvin-gaye-family-seeks-blurred-768223> [<https://perma.cc/J6EJ-HFSV>].

Gaye could not be played for the jury whose role it would be to determine whether the Thicke Parties' 2013 number one hit "Blurred Lines" had infringed Gaye's 1977 masterpiece.⁶ For an infringement claim less grounded in melodic and lyrical similarities, and more reliant on the kind of "stylistic similarities" native to the recording, and not reflected in the sheet music, this really mattered.⁷ Without hearing the recording, jurors would not be allowed to consider the many performance, production, and arrangement elements that made the two records sound so alike.

The Gaye estate scrambled together an interlocutory appeal⁸ of the ruling: "[We] do not believe that a truly fair trial can take place if the jury cannot hear and compare both songs."⁹ The district court denied the motion.¹⁰ At that point, victory for the Thicke Parties was all but assured—per conventional wisdom, anyway.

In fact, the court had already subtly walked back its ban of the "Got to Give It Up" commercial recording. Its revised ruling allowed "edited sound recordings" in which certain elements had been digitally removed.¹¹ Less than two months later, twelve jurors who had never heard—in court, at least—the commercial version of "Got to Give It Up," found the Thicke Parties liable for infringement.¹² A few years later, the Ninth Circuit upheld the jury's findings.¹³

⁶ Final Pretrial Conference at 1, *Williams v. Bridgeport Music Inc.*, No. 2:13-CV-06004 (C.D. Cal. Aug. 15, 2013), ECF No. 226.

⁷ See Allen Madison & Paul Lombardi, *Blurred Justice*, 39 *LOY. L.A. ENT. L. REV.* 145, 193 (2019); Jennifer Jenkins, *The "Blurred Lines" of Law*, *CTR. FOR STUDY PUB. DOMAIN*, <https://web.law.duke.edu/cspd/blurredlines/> [<https://perma.cc/SY8Z-KX3T>].

⁸ Counter-Claimants' Ex Parte Application for Continuance of Trial, Reconsideration of Granting Motion in Limine No. 1–3 and Certification of Question for Interlocutory Appeal, *Williams v. Bridgeport Music Inc.*, No. 2:13-CV-06004 (C.D. Cal. Aug. 15, 2013), ECF No. 232.

⁹ Dillon, *supra* note 4.

¹⁰ See (In Chambers) Order Re Defendants' Ex Parte Application for Continuance of Trial, Reconsideration of Granting Motion in Limine No. 1–3 and Certification of Question for Interlocutory Appeal, *Williams v. Bridgeport Music Inc.*, No. 2:13-CV-06004 (C.D. Cal. Aug. 15, 2013), ECF No. 251.

¹¹ *Id.*

¹² *Williams*, 2015 WL 4479500, at *1.

¹³ *Williams v. Gaye*, 895 F.3d 1106, 1116 (9th Cir. 2018).

Over the past half-decade, music industry rhetoric surrounding copyright infringement litigation has intensified.¹⁴ That heightened pitch can largely be traced to March 10, 2015, the date of the *Blurred Lines* verdict.¹⁵ It has not subsided: similarly controversial decisions have been rendered in infringement proceedings involving hits by Led Zeppelin¹⁶ and Katy Perry,¹⁷ in the wake of a seemingly ever-swelling deluge of infringement complaints.¹⁸

¹⁴ See, e.g., Ben Sisario, 'Blurred Lines' Lawyer Rocks Music Industry Again, N.Y. TIMES (Mar. 15, 2015), <https://www.nytimes.com/2015/03/16/business/media/blurred-lines-lawyer-rocks-music-industry-again.html> [<https://perma.cc/XGQ4-R37U>].

¹⁵ See *id.*; Eriq Gardner, 'Blurred Lines' Trial Verdict: Jury Rules Against Pharrell Williams & Robin Thicke, BILLBOARD (Mar. 10, 2015), <https://www.billboard.com/articles/news/6495159/blurred-lines-trial-verdict> [<https://perma.cc/3L2L-X2C6>]; see also Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1865 (2018) ("It's tough to overstate the amount of controversy that the case has generated."). "Blurred Lines" has garnered controversy along multiple fronts. For discussion of the song's lyrical sex and consent issues, see *Pharrell Says He's Embarrassed by "Blurred Lines,"* GQ (Oct. 14, 2019), <https://www.gq.com/story/pharrell-embarrassed-by-blurred-lines> [<https://perma.cc/U92F-EALR>]; Elizabeth Plank, *Robin Thicke's Sexism Isn't "Blurry,"* SALON (July 27, 2013), https://www.salon.com/2013/07/27/blurred_lines_is_clearly_sexist_partner/ [<https://perma.cc/XS8D-9HUX>]; Julie Beck, *When Pop Culture Sells Dangerous Myths About Romance*, ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/when-pop-culture-sells-dangerous-myths-about-romance/549749/> [<https://perma.cc/36MN-HWNR>].

¹⁶ See *Stairway to Court: US Judges Order New Led Zeppelin Plagiarism Trial*, GUARDIAN (Sept. 28, 2018, 9:01 PM), <https://www.theguardian.com/music/2018/sep/28/led-zeppelin-plagiarism-zeppelin-spirit-stairway-to-heaven-new-trial> [<https://perma.cc/M4LQ-SML6>]; see also Daniel Sanchez, *123 Artists File an Amicus Brief in Led Zeppelin's Closely Watched 'Stairway to Heaven' Lawsuit*, DIGITAL MUSIC NEWS (Aug. 2, 2019), <https://www.digitalmusicnews.com/2019/08/02/led-zeppelin-amicus-brief/> (non-archivable website); Jon Blistein, *A New Led Zeppelin Court Win Over 'Stairway to Heaven' Just Upended a Copyright Precedent*, ROLLING STONE (Mar. 9, 2020, 3:45 PM), <https://www.rollingstone.com/music/music-news/led-zeppelin-stairway-to-heaven-copyright-infringement-ruling-appeal-964530/> [<https://perma.cc/5DF7-TDJ7>].

¹⁷ See, e.g., Jem Aswad, *Katy Perry and Co-Writers Call 'Dark Horse' Decision a 'Travesty of Justice'*, VARIETY (Aug. 2, 2019), <https://variety.com/2019/music/news/katy-perry-and-co-writers-call-dark-horse-decision-a-travesty-of-justice-1203290191/> [<https://perma.cc/F37V-SWKV>]; Eriq Gardner, *Judge Wipes Out \$2.8M Copyright Verdict against Katy Perry*, CAPITOL RECORDS, HOLLYWOOD REPORTER (Mar. 17, 2020, 4:26 PM), <https://www.hollywoodreporter.com/thr-esq/judge-wipes-28m-copyright-verdict-katy-perry-capitol-records-1285141> [<https://perma.cc/5JAB-XX8F>].

¹⁸ See *Music Copyright Infringement Resource*, GW LAW BLOGS, <https://blogs.law.gwu.edu/mcir/cases/> [<https://perma.cc/B2SU-JHX5>]; Bill Donahue, *2016: The Year the Music Sued*, LAW360 (Jan. 13, 2017, 5:06 PM), <https://www.law360.com/articles/880127/2016-the-year-the-music-sued> [<https://perma.cc/5JGF-TLUD>]. Some have

Lurking beneath disagreements on the merits of each case are a number of ongoing larger, even existential, debates that strike at the underlying purposes of copyright, the legal identity of the musical “composition,” and the proper methods by which such works ought to be dissected in court. These discussions are not new. Yet, the specific procedural and substantive postures of recent high-profile cases have triggered a glut in both popular and scholarly discussion surrounding the eminently technical idiosyncrasies of music copyright litigation.¹⁹

This Note seeks to distill from that glut a seemingly simple question: how should courts approach the use of sound recordings in composition infringement trials? The simplicity of this framing is misleading, however. It is impossible to adequately answer this question without confronting another: how can one determine what is a probative (or misleading) representation of a musical composition without first defining the border between composition and recording? Accordingly, this Note outlines the various creative, industry, and public policy nuances that affect these two inseparable inquiries.

Seeking to best navigate these complexities, this Note’s proposed Triad approach explicitly acknowledges the symbiosis between the formal “composition” doctrinal discussion and the functional evidentiary debate, and purposefully marries the two. It forges a middle-ground compromise that respects songwriters’ narrow, consensus view of what constitutes a composition, while also heeding the increased blurriness between composition and recording. The proposed three-step Triad approach begins with a judicial inquiry into (1) the “compositionality” of a recorded element offered into evidence. It proposes a suite of non-dispositive factors to guide the compositionality inquiry, and then leverages that

speculated that the flood will subside in the wake of the recent prominent and defendant-friendly Led Zeppelin and Katy Perry outcomes. See Ben Sisario, *The ‘Blurred Lines’ Case Scared Songwriters. But Its Time May Be Up.*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/arts/music/blurred-lines-led-zeppelin-copyright.html> [https://perma.cc/ZPF7-ZZGM]; see also Jonathan Bailey, *Burying Blurred Lines*, PLAGIARISMTODAY (Apr. 7, 2020), <https://www.plagiarismtoday.com/2020/04/07/burying-blurred-lines/> [https://perma.cc/K2HW-UAZF].

¹⁹ See, e.g., *infra* notes 238, 264, 274 and accompanying text.

finding to allocate the burden for (2) introducing or (3) precluding recorded elements embodying the material in question.

This Note does not evaluate whether specific cases were rightly or wrongly decided, nor does it apply doctrine to ongoing proceedings in an effort to predict or promote an outcome based on any interpretation of the law as it exists today. Rather, this Note adopts a history- and policy-driven search for clarity: how can courts balance creative and industry perspectives with evolving realities in order to facilitate future creativity and promote consistent, predictable justice?

This Note will proceed in four parts. Part I explores the history of the two music copyrights (composition and sound recording), the creative practices they promote, and their gradual convergence along both creative and business dimensions. Part II examines how this convergence has been reflected in the courts. Building upon this historical background, Part III articulates the policy implications surrounding different approaches to defining musical compositions and the use of sound recordings in infringement proceedings involving those compositions. Finally, Part IV shepherds these historical and policy complexities into a judicial approach that allows courts the stability and flexibility to best promote both judicial and creative clarity.

I. BORDERLINE: THE HISTORICAL CONVERGENCE OF COMPOSITION AND SOUND RECORDING

Musical compositions and sound recordings form two discrete pieces of intellectual property. Any single composition may be embodied in an infinite number of separate sound recordings. To illustrate, the composition “Yesterday,” written by Paul McCartney and John Lennon, has been recorded thousands of times.²⁰ Each of those sound recordings constitutes a separate piece of intellectual property (e.g., “Yesterday” as recorded by Gladys Knight & The Pips, or “Yesterday” as recorded by Marvin Gaye, or “Yesterday” as

²⁰ *Most Recorded Song*, GUINNESS WORLD RECORDS, https://web.archive.org/web/20060910071729/http://www.guinnessworldrecords.com/content_pages/record.asp?recordid=50867 [<https://perma.cc/VFA4-ADT9>].

recorded by The Beatles). But each separate recording embodies the same single composition: the song “Yesterday,” as written by Paul McCartney and John Lennon.²¹

The delineation between these two basic widgets of musical creativity is foundational to the modern music industry. Fundamentally, the sound recording and composition copyrights comprise two wholly distinct intellectual assets, governed by distinct regulatory schemes, judicial doctrines, and industry infrastructures.²² While federal copyright law in the United States has provided for the protection of musical compositions since 1831,²³ Congress did not extend copyright protection to sound recordings until 1972—nearly a hundred years after Thomas Edison first secured a patent for the invention of the phonograph.²⁴ This sound recording copyright is bound by the literal performance as actually reflected on the recording, and is endowed in the performers of the music.²⁵ Meanwhile, the composition copyright applies to the underlying piece of songwriting and is endowed in the authors of the song.²⁶ The rights of one do not extend to the other.²⁷

²¹ *Yesterday*, ASCAP: ACE REPERTORY, <https://www.ascap.com/repertory#ace/search/workID/550055368> [<https://perma.cc/34HW-DN7C>].

²² See *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575, 1576 n.1 (D.N.J. 1987).

²³ Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436–38; see also Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003).

²⁴ See *History of the Cylinder Phonograph*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-sound-recordings/history-of-the-cylinder-phonograph/> [<https://perma.cc/XVD4-2SL5>]; see also Loren, *supra* note 23, at 686 (“This new layer of copyright protection is separate from the protection granted to any musical work that may also be reproduced in a sound recording. The sound recording copyright protects the elements of original authorship that inhere in a sound recording, whether it is a recording of a musical performance, the reading of a book, or the sounds of railroad whistles.”).

²⁵ See 17 U.S.C. § 114 (2012) (extending sound recording protection to “the actual sounds fixed in the recording”). Courts have interpreted this to preclude any authorized taking of any portion of the sound recording. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005); 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10 (2019).

²⁶ See Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 146 (2011); Fishman, *supra* note 15, at 1884.

²⁷ See Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 524 (2006).

In practice, the precise border separating the two copyrights can be significantly blurrier than this simple overview might suggest. To be sure, the bounds of the recording copyright are easy enough to define: only literal sounds taken from the actual recording are protected.²⁸ Even the most convincing sonic mimicry does not infringe a sound recording copyright.²⁹ By stark contrast, however, the bounds of the composition are not nearly so conspicuous. This ambiguity, along with its doctrinal and practical significance, will be explored in depth beginning in Part II of this Note.

First, though, in order to understand contemporary confusion around the role sound recordings play in defining the compositions they embody and why that issue is crescendoing today, it is imperative to track the separate—but increasingly overlapping—history of both forms of musical creativity. Accordingly, Part I of this Note traces the historical origins of the foundational dichotomy between composition and sound recording. Part I.A focuses on the era before the invention and widespread adoption of recorded music. Part I.B discusses the rise of recorded music and the initial separation of the music industry’s compositional and recording silos. Parts I.C and I.D document two modern creative developments that have significantly obscured the boundaries between composition and sound recording: the commingling of individual creative roles, and the merging of the creative processes associated with composition and production. Finally, Parts I.E and I.F explore two business practices that inform the industry’s own conception of the composition: modern songwriter share allocation and the rise of sampling.

A. Before Recorded Music

The tidy formal border between sound recordings and the compositions they embody derives directly from the real-world creative delineations that existed throughout most of the first century of U.S. copyright governance.³⁰ For most of that period, spanning from the

²⁸ See Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for A Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 400 (2019).

²⁹ See *id.*; Joanna Demers, *Sound-Alikes, Law, and Style*, 83 UMKC L. REV. 303 (2014).

³⁰ Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 2–3

original Copyright Act of 1790³¹ through the nineteenth century, recorded music did not exist.³² Musical works were authored by composers and notated visually for use by performers.³³ The dominant commercial format was sheet music, which conveyed notes, rhythms, lyrics, and other stylistic cues to the performer.³⁴ The Copyright Act of 1831,³⁵ the first to extend protection to musical compositions, reflected this relatively simple creative and industry configuration.³⁶

Contemporary conceptions of the composition placed particular emphasis on melody, as notated in the sheet music. This “outsized importance” of melody in Western musical culture stemmed from compositional norms of the pre-record era.³⁷ At that time, “[t]he usual compositional process was first to create music at the piano and then subsequently orchestrate it.”³⁸ The resulting cultural “subordination of timbre to pitch” would survive centuries of creative and industry upheaval.³⁹

(2014) (characterizing the first “150 years” of United States copyright law as construing music as a “two-stage art of [protected] composition and [unprotected] performance.”). “Composition—a deliberative activity that allowed rethinking and editing—produced a score, a stable, visually perceptible representation of melody, harmony, and rhythm that used a system of mostly discrete notation.” *Id.* Performance, then, constituted a “real-time, low-deliberation, no-editing activity that was evanescent, unrepeatable, purely aural, and continuous.” *Id.*

³¹ Copyright Act of 1790, ch. 15, 1 Stat. 124, 124–26.

³² See Loren, *supra* note 23, at 686.

³³ See *id.* at 679.

³⁴ See Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1248 (2019). Initially, even after the rise of recorded music, the preeminence of sheet music continued. See Charles Cronin, *Seeing Is Believing: The Ongoing Significance of Symbolic Representations of Musical Works in Copyright Infringement Disputes*, 16 COLO. TECH. L.J. 225, 226 (2018).

³⁵ Copyright Act of 1897, ch. 392, 29 Stat. 694.

³⁶ See Loren, *supra* note 23, at 679–81 (observing that the Act did not grant authors exclusive reproduction or public performance rights; it merely afforded them protection against unauthorized copying of their written reductions).

³⁷ Fishman, *supra* note 15, at 1875–77 (tracking the ways in which, historically, “[melody’s] primacy begot property.”).

³⁸ *Id.* at 1875.

³⁹ *Id.* at 1875–77 (outlining a “dichotomy that continues to influence music copyright today: those who create new melodies are artists, while those who recontextualize those melodies are mere craftsmen.”).

In the early twentieth century, new means of reproducing and distributing musical works emerged. First came self-playing piano rolls, whose advent triggered a reckoning of federal licensing laws; the Copyright Act of 1909⁴⁰ again positioned the composition as equivalent to the written score.⁴¹ Although piano rolls would quickly become the first of many formerly prominent, effectively obsolete twentieth-century music technologies, copyright law's fixation on the written score would continue to govern a new non-written format: recorded music.

B. *Tin Pan Alley*

Neither piano rolls, nor the first half-century of recorded music did much to change the incumbent separation of the composition and performance processes. For much of the twentieth century, composition was understood to be a thoroughly self-contained exercise. As a rule, the popular music supply chain featured a songwriting process whose entire life cycle began and ended prior to the performance/recording stage.⁴² This model was typified by the “Tin Pan Alley” machine, wherein music publishers would employ composers and lyricists to create what were understood to be fully formed compositions, and “song pluggers” to place those compositions with popular recording artists and performers.⁴³ Even as these stark

⁴⁰ Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075–88.

⁴¹ See *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 11 (1908); Brauneis, *supra* note 30, at 13 (“[*White-Smith*] reaffirmed the centrality of the score.”). In response to *White-Smith*, Congress promptly endowed to rightsholders the exclusive right to mechanical reproduction of media such as piano rolls or records. See *id.* Still, the Copyright Act of 1909 only contemplated protection via “publication of *visually perceptible copies* of that composition” or by “registration accompanied by deposit of a *visually perceptible copy*.” *Id.* (emphasis added); see also *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *6 (9th Cir. Mar. 9, 2020) (“Although the 1909 Act extended copyright protection against infringement beyond the mere reproduction of the sheet music, Congress did not provide that copyrighted works could be anything other than sheet music or, for an unpublished work, the musical composition transcribed in the deposit copy.”).

⁴² See Shourin Sen, *The Denial of A General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233, 246 (2007); see also *America's Music Publishing Industry: The Story of Tin Pan Alley*, PARLOR SONGS ACADEMY, <http://parlorsongs.com/insearch/tinpanalley/tinpanalley.php> [<https://perma.cc/3SGZ-8R3A>].

⁴³ See, e.g., Sen *supra* note 42, at 246. For additional context on music publishing, see Shalini Sutharshana, *A Brief History of Music Publishing*, SONGTRUST (Apr. 3, 2018),

dividing lines began to fade,⁴⁴ iterations of this model remained successful through the 1960s. Berry Gordy's Motown enterprise employed what Gordy considered an "assembly line for music,"⁴⁵ where "[a]rtists performed, writers wrote, producers produced," instrumentalists played their instruments, pluggers plugged, and so on.⁴⁶

Thus, for the first half-century of marketed recorded music, the predominant supply chain for the production of music was linear: (1) composition (as conceived at the time: melody, harmony and lyrics) as a self-contained process; and (2) production, arrangement, and performance. As a result, defining the scope of a composition was simple: it was nothing more and nothing less than what the composer(s) had created during step one.

C. The Commingling of Songwriter, Producer, and Artist Roles

After centuries of siloed compositional and performance roles, the walls started to crumble fairly quickly in the 1960s.⁴⁷ Suddenly, many of the decade's most successful artists were penning their own hits, including musicians as varied as Bob Dylan, Otis Redding, Joan Baez, Paul Simon, Joni Mitchell, Dolly Parton, and Aretha

<https://blog.songtrust.com/brief-history-of-the-music-publishing> [<https://perma.cc/A6Q9-7YJM>].

⁴⁴ See *infra* Part I.C.

⁴⁵ See Helienne Lindvall, *Behind the Music: Motown—a Pop Factory with Quality Control*, *GUARDIAN* (Nov. 26, 2010, 11:59 AM), <https://www.theguardian.com/music/musicblog/2010/nov/26/behind-music-motown-pop-factory> [<https://perma.cc/FW8Q-8L9V>].

⁴⁶ See Vince Carducci, *Manufacturing Motown*, *POPMATTERS* (Jan. 26, 2009), <https://www.popmatters.com/69384-manufacturing-motown-2496071565.html> [<https://perma.cc/PF6E-ZXC5>] (quoting Temptations leader Otis Williams).

⁴⁷ There were exceptions. See, e.g., Christopher Reynolds, *Documenting the Zenith of Women Song Composers: A Database of Songs Published in the United States and the British Commonwealth, CA. 1890–1930*, 69 *NOTES* 671, 675 (2013) (documenting early 20th century women songwriters, including some who were also performers, such as Bessie Smith); Ted Ownby, *Jimmie Rodgers: The Father of Country Music*, *MISSISSIPPI HISTORY NOW* (July 2004), <https://web.archive.org/web/20101007161643/http://mshistory.k12.ms.us/articles/39/jimmie-rodgers-the-father-of-country-music> [<https://perma.cc/AX58-QHP4>]; Duke Ellington: *The Composer, Pt. 1*, *NPR* (Nov. 19, 2018, 10:16 AM), <https://www.npr.org/2008/11/19/97193567/duke-ellington-the-composer-pt-1> [<https://perma.cc/CT99-DKJA>].

Franklin.⁴⁸ This was mirrored by the emergence of rock bands, such as The Beatles and The Rolling Stones, who played their own instruments and sang songs composed by group members.⁴⁹ Meanwhile, Tin Pan Alley songwriters like Carole King and Neil Diamond became mainstream recording artists.⁵⁰ By the end of the 1960s, even the rigid divisions at Motown began to dissolve: artists whose talents extended beyond performance started to assert themselves as writers and producers.⁵¹ Chief among those artists were Stevie Wonder and, significantly, Marvin Gaye.⁵²

Also noteworthy was the convergence of the songwriting and producing roles. As the purview of the record producer expanded beyond its original bundle of talent scouting, business development, and logistical responsibilities⁵³ into a more influential creative position,⁵⁴ it became more common for songwriters—including Ray

⁴⁸ *History: The Singer/Songwriter*, BMI, https://www.bmi.com/genres/entry/history_the_singer_songwriter [<https://perma.cc/55XN-EGGH>].

⁴⁹ It was not normal when they started. See DAVID SHEFF, *ALL WE ARE SAYING: THE LAST MAJOR INTERVIEW WITH JOHN LENNON AND YOKO ONO* 171 (St. Martin's Griffin 1st ed. 2000) ("Paul and I just went off in the corner of the room and finished [writing 'I Wanna Be Your Man'] while [members of the Rolling Stones, who would soon record the song] were all still there talking. We came back and that's how Mick and Keith got inspired to write, because, 'Jesus, look at that. They just went in the corner and wrote it and came back!'").

⁵⁰ *The "Brill Building Sound" Shaped Pop and Rock and Roll in the 60's*, MUSIC ORIGINS PROJECT, <https://www.musicorigins.org/item/the-brill-building-sound-shaped-pop-and-rock-and-roll-in-the-60s/> [<https://perma.cc/L7LT-DEAH>].

⁵¹ See Francesca D'Amico, *The Revolution Will Not Be Televised, But It Will Be Recorded: Soul, Funk, and the Black Urban Experience, 1968–1979*, in *THE GLOBAL SIXTIES IN SOUND AND VISION: MEDIA, COUNTERCULTURE, REVOLT* 188 (T. Brown & A. Lison eds., Palgrave Macmillan 2014).

⁵² See Charles Moss, *What's Going On: Marvin Gaye's Liberation from the Motown Sound*, POPMATTERS (Jan. 28, 2009), <https://www.popmatters.com/69381-whats-going-on-marvin-gayes-liberation-from-the-motown-sound-2496071599.html> [<https://perma.cc/7R2L-6M8V>]; Chris Williams, 'I Thought He Was a Messenger': Making Stevie Wonder's 'Talking Book,' ATLANTIC (Oct. 29, 2012), <https://www.theatlantic.com/entertainment/archive/2012/10/i-thought-he-was-a-messenger-making-stevie-wonders-talking-book/264182> [<https://perma.cc/J79P-T3FC>].

⁵³ See Greg Kot, *What Does a Record Producer Do?*, BBC (Mar. 10, 2016), <http://www.bbc.com/culture/story/20160310-what-does-a-record-producer-do> [<https://perma.cc/QJ4A-F3AR>].

⁵⁴ See Randall Roberts, *How George Martin's Studio Tricks and Innovations Changed Pop Music*, L.A. TIMES (Mar. 9, 2016, 1:41 PM), <https://www.latimes.com/entertainment/>

Davies of The Kinks,⁵⁵ Brian Wilson of The Beach Boys,⁵⁶ and Norman Whitfield, Holland-Dozier-Holland, and Smokey Robinson of Motown⁵⁷—to serve in this capacity.

D. *The Merging of Composition and Production*

It may have been inevitable, once the barrier between *composers* and *performers* eroded, that the neat delineation between *composition* and *performance/production* would soon follow. Relatively early examples of the convergence of composition and recording efforts include works such as “Birthday” by The Beatles,⁵⁸ “Under Pressure” by Queen and David Bowie,⁵⁹ and much of the album *Remain in Light* by the Talking Heads,⁶⁰ which were all composed at least in part during the recording process. Decades before the rise of modern sampling,⁶¹ Brian Wilson experimented with recording numerous “brief musical passages” and stitching them together into new compositions.⁶² In one doctrinally consequential example,

music/posts/la-et-ms-how-george-martin-studio-tricks-beatles-changed-pop-music-20160309-story.html [https://perma.cc/BR35-MTPA].

⁵⁵ See Matt Frost, *Ray Davies: Five Decades in the Studio*, SOUND ON SOUND, <https://www.soundonsound.com/people/ray-davies> [https://perma.cc/S4X7-KRE9] (discussing, with Davies himself, how the “ups and downs [arising] when a musician and principal songwriter begins to move from being produced to being producer” interweaved with his actual compositional process).

⁵⁶ See Carl Wilson, *The Beach Boys’ Brian Wilson: America’s Mozart?*, BBC (June 9, 2015), <http://www.bbc.com/culture/story/20150608-is-this-americas-mozart> [https://perma.cc/5H42-BSCR].

⁵⁷ Rashad Grove, *Got to Give it Up: 15 Songwriters and Producers That Shaped the Motown Sound*, UDISCOVERMUSIC (Nov. 7, 2019), <https://www.udiscovermusic.com/stories/motown-sound-producers-and-songwriters> [https://perma.cc/376T-W37U].

⁵⁸ *The White Album*, BEATLES ULTIMATE EXPERIENCE, <http://www.beatlesinterviews.org/dba09white.html> [https://perma.cc/Y4JN-8S3G].

⁵⁹ See Josh Jones, *The Making of Queen and David Bowie’s 1981 Hit “Under Pressure”*: Demos, Studio Sessions & More, OPEN CULTURE (June 16, 2014), <http://www.openculture.com/2014/06/the-making-of-under-pressure.html> [https://perma.cc/R8SQ-A8K2].

⁶⁰ See Dave Simons, *The Song or the Studio: Which Comes First?*, BMI (Sept. 13, 2017), <https://www.bmi.com/news/entry/the-song-or-the-studio-which-comes-first> [https://perma.cc/NUR7-L82R].

⁶¹ See *infra* Part I.F.

⁶² See Simons, *supra* note 60.

George Clinton composed his allegedly infringed hit “Atomic Dog” as he recorded it.⁶³

This was a harbinger of norms to come. While the linear composition-then-recording supply chain of yore is not wholly extinct,⁶⁴ modern pop music is dominated by a digital creative process that merges composition with production.⁶⁵ Digital recording technology has allowed for more democratized creation: it has become common practice for producers to source arrangement and production elements from multiple collaborators through the sharing of digital recording session files with other creators, including lyric and melody writers (“topliners”), as well as other producers.⁶⁶

Directly contrary to the traditional configuration, today “[i]n commercial songwriting, the track virtually always comes first.”⁶⁷ Often, producers will send out the same backing track⁶⁸ to several topliners, who then submit what are essentially competing melodic

⁶³ See Brief of Defendants–Appellants at 29, *Bridgeport Music v. Smelzgood Entm’t*, No. 07–5596, 2007 WL 5066300 (6th Cir. Dec. 12, 2007). In a suit alleging infringement of “Atomic Dog” by the group Public Announcement, Clinton’s publisher would use this fact to (successfully) argue that composition and recording were equivalent. See *infra* notes 110, 173 and accompanying text.

⁶⁴ It is still common in some genres, including modern country music. See, e.g., JOHN SEABROOK, *THE SONG MACHINE: INSIDE THE HIT FACTORY* 200 (2015) (observing the “spiritual” connection between Nashville and Tin Pan Alley).

⁶⁵ See Brauneis, *supra* note 30, at 3 (explaining that in modern music creation, “the roles of composer, musician, and producer are blurred as composition, performance, recording, synthesizing, sequencing, sampling, editing, processing, and mixing are accomplished iteratively and collaboratively,” and thus written reductions are “only approximations of the recorded works.”).

⁶⁶ See Brief Amicus Curiae of the Institute for Intellectual Property and Social Justice Musician and Composers and Law, Music, and Business Professors in Support of Appellees at 36, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (arguing that modern music creators birth compositions that are “purely aural and digital” such that “paper sheet music notation itself is becoming an archaic, possibly obsolescent, format”).

⁶⁷ Benjamin Samama, *What’s the Difference Between a Songwriter and a Topline Writer?*, SONICBIDS BLOG (Mar. 2, 2016, 8:00 AM), <http://blog.sonicbids.com/whats-the-difference-between-a-songwriter-and-a-topline-writer> [<https://perma.cc/2TRB-6JF7>].

⁶⁸ The term “backing track” refers to a sound recording’s produced instrumental arrangement, which in western popular music typically accompanies the record’s lead vocal track. See Alex Needham, *John Seabrook on The Song Machine: “There’s a Dark Side to Pop,”* GUARDIAN (Nov. 26, 2011, 11:37 AM), <https://www.theguardian.com/music/2015/nov/04/john-seabrook-song-machine-review-pop-music> [<https://perma.cc/W59E-GSRQ>]; *Backing Track*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/backing-track> [<https://perma.cc/PE3R-AYWW>].

and lyrical bids to complete the same unfinished song.⁶⁹ Instead of responding to pre-existing bundles of harmony, melody, and lyric, today's arrangement and production elements predate, and therefore directly affect and inspire, the melodic and lyrical material that sits atop them.⁷⁰ Experts have dubbed this reversal a change from the traditional "melody-and-lyrics" conception of songwriting, to the modern "track-and-hook" model.⁷¹

E. The Evolution of Songwriter Splits

The convergence of the composition and recording processes has spurred a shift in the predominant norms guiding the allocation of songwriter splits—the primary way in which the music industry defines compositional ownership and, by implication, the composition itself.⁷² Songwriter splits, or shares, refer to the percentage of

⁶⁹ See Helienne Lindvall, *Behind the Music: Why Topline Melody Writing Creates Disputes Between Artists and Songwriters*, GUARDIAN (Aug. 26, 2011, 8:38 AM), <https://www.theguardian.com/music/musicblog/2011/aug/26/topline-melody-disputes-artists-songwriters> [<https://perma.cc/Z594-W74U>] (discussing the complications arising from this practice). See also Needham, *supra* note 68 (reporting the "hot water" that producer/writer Ryan Tedder found himself in when Kelly Clarkson "noticed that the song he'd given her, *Already Gone*, was uncomfortably close to one he'd done with Beyoncé, *Halo*.").

⁷⁰ Harmony is typically created as a part of the track production process, although topliners and melody can play a role in shaping harmony. See generally SEABROOK, *supra* note 64, at 189.

⁷¹ See *id.* at 200 ("[Track-and-hook] has largely replaced the melody-and-lyrics approach to songwriting [from the] Tin Pan Alley era] . . . It is common practice for a producer to send the same track to multiple topliners—in extreme cases, as many as 50—and choose the best melody from among the submissions."). The term "hook," in this context, broadly refers to a song's primary vocal melodic material. See *id.* "Hook" is often also used to describe specific load-bearing chunks of melody that songwriters center their compositions around, such as a chorus or memorable repeated phrase. See Tom Cole, *You Ask, We Answer: What's A Hook?*, NPR (Oct. 15, 2010, 6:52 PM), <https://www.npr.org/sections/therecord/2010/10/15/130588663/you-ask-we-answer-what-s-a-hook> [<https://perma.cc/N5AM-YD2H>].

⁷² See Justin M. Jacobson, *Are You Co-Writing Songs? A "Split Sheet" Just Isn't Enough*, HYPEBOT (Nov. 25, 2015), <https://www.hypebot.com/hypebot/2015/11/why-a-songwriter-split-sheet-just-isnt-enough-draft.html> [<https://perma.cc/6ZCT-SCHN>]; Education, SONA, <https://www.wearsona.com/education> [<https://perma.cc/C32K-LGZ9>].

ownership allocated to each co-writer of a given musical work.⁷³ Ownership may be divided equally among co-writers,⁷⁴ but relative adjustments may be made for a number of factors, including the extent of a co-writer's contribution, a co-writer's stature or seniority, or a co-writer's leverage.⁷⁵ While any of these or other factors may inform negotiations, there are no set rules governing share allocation. In reality, co-writers often do not even finalize shares until after the commercial release of the sound recording embodying their composition.⁷⁶

Traditionally, it was customary to allocate 50% to the creation of the lyrics and 50% to the creation of the accompanying music (melody, harmony, and rhythm).⁷⁷ This convention reinforced the understanding that a composition was a self-contained bundle of words and melody. Two modern changes have complicated this practice. First, as the industry has largely shifted to a "Production + Topline" model,⁷⁸ songwriter share norms have followed: typically, 50% is now allocated to the creators of the backing track (generally producers and musicians, who arrange, record, and produce a recording's instrumental bedrock) and 50% is allocated to "top-

⁷³ See Helienne Lindvall, *Calculating the Credits Behind Songwriting*, GUARDIAN (June 24, 2008, 6:15 AM), <https://www.theguardian.com/music/musicblog/2008/jun/24/calculatingthecreditsbehind> [<https://perma.cc/SZ8K-QYK3>].

⁷⁴ This is the statutory default. See 17 U.S.C. § 201 (2018).

⁷⁵ See *Cottrill v. Spears*, No. CIV.A. 02-3646, 2003 WL 21223846, at *3 (E.D. Pa. May 22, 2003), *aff'd*, 87 F. App'x 803 (3d Cir. 2004), *as amended on reh'g* (June 2, 2004); Theodora Michaels, *Agree On Your Songwriter Splits*, HEVEDBURG MUSIC, <http://www.hevedburgmusic.com/article3.html> [<https://perma.cc/4GSU-EDNZ>]; Patty Way, *Co-Writing Nashville Style*, ENVATO TUTORIALS (Feb. 12, 2013), <https://music.tutsplus.com/articles/co-writing-nashville-style-audio-16388> [<https://perma.cc/4V96-63QV>].

⁷⁶ See ASCAP, *Welcome to Splitsville, USA—Where Co-Writers Live Together in Harmony*, YOUTUBE (Aug. 29, 2018), https://www.youtube.com/watch?v=RaFZ_Q40qWk&feature=youtu.be [<https://perma.cc/XN54-AJXY>]; Lindvall, *supra* note 73.

⁷⁷ See Richard Osborne, *Doing the Splits: The Creative Accounting of Songwriting Shares*, IASPM UK & IRELAND CONFERENCE 2016: CREATIVITY, PRACTICE AND PRAXIS, BRIGHTON 4-6 (2016) (noting that performing rights organization regulations codified this approach).

⁷⁸ See *supra* notes 69-71 and accompanying text.

liners” (writers of the melodic and lyrical material that sits atop the backing track).⁷⁹

Second, a broader coalition of music creators now enjoy access to songwriter shares than was once the case. Traditionally, instrumentalists and producers, operating from the perspective that a composition was a complete and self-contained work prior to the recording process, would not typically have expected to attain songwriter credit.⁸⁰ This model became ubiquitous through the emergence of rock bands that centered around songwriting partnerships like Lennon/McCartney and Jagger/Richards.⁸¹ This “all-or-nothing” approach to rock songwriter credits once again reinforced the notion that composition was distinct from the arrangement, production, and performance of a piece.

Today, instrumentalists, producers, and background vocalists who contribute creative ideas to the arrangement, production, and performance of a sound recording are much more likely to be credited as songwriters.⁸² Not coincidentally, the number of credited songwriters per pop hit has consistently, and dramatically, increased over the past several decades.⁸³ While arguably reflecting a

⁷⁹ See Donna-Claire Chesman, *Drew Love Pulls Back the Curtain on What It Means to Be a Songwriter in 2019*, DJBOOTH (Apr. 16, 2019), <https://djbooth.net/features/2019-04-16-drew-love-interview-songwriting-royalty-exchange> [<https://perma.cc/H9P3-NMYA>]; Cliff Goldmacher, *The Dos and Don'ts of Co-Writing*, BMI (June 28, 2011), https://www.bmi.com/news/entry/the_dos_and_donts_of_co-writing [<https://perma.cc/B9JR-WSC4>]; Chris Robley, *Should My Producer Get Publishing and Songwriting Credit?*, DIY MUSICIAN (July 11, 2018), <https://diymusician.cdbaby.com/music-rights/does-my-producer-deserve-publishing-and-songwriting-credit> [<https://perma.cc/4PS4-XNQA>].

⁸⁰ See Mark Sutherland, *Songwriting: Why It Takes More Than Two to Make a Hit Nowadays*, MUSIC WEEK (May 16, 2017, 12:01 AM), <https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478> [<https://perma.cc/UL76-4PZP>] (remarking that today’s producers and musicians are “more likely to be credited [as songwriters] for their contributions”).

⁸¹ See Osborne, *supra* note 77, at 4–6.

⁸² See Sutherland, *supra* note 80.

⁸³ See Dorian Lynskey, *How Many People Does It Take to Write a Hit Song in 2019?*, GQ (Nov. 2, 2019), <https://www.gq-magazine.co.uk/culture/article/long-songwriting-credits> [<https://perma.cc/7HNS-8AU5>] (enumerating several other factors that have also contributed to this trend); Dan Kopf, *How Many People Take Credit for Writing a Hit Song?*, PRICEONOMICS, <https://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song> [<https://perma.cc/ZE8F-5QEWF>].

reasonable business reward for creative effort, these trends significantly blur the distinction between compositional creativity and arrangement, production, or performance creativity.⁸⁴

F. Sampling

Another modern practice that has obscured the composition/recording boundary is the rise of sampling.⁸⁵ Typically, an artist or producer samples by incorporating a portion of a pre-existing sound recording into a new sound recording.⁸⁶ Any given sample might encompass melodic and lyrical elements,⁸⁷ or, commonly, “groove” elements such as a drum pattern.⁸⁸ The borrowed material might permeate the majority of the new work,⁸⁹ or it might be as fleeting as a baby’s coo.⁹⁰

⁸⁴ Further blurring the lines between composition and recording is a practice that is wryly characterized by songwriters as “change a word, get a third.” Successful artists, leveraging songwriters’ willingness to barter an interest in their composition in exchange for securing a prominent placement, are often able to negotiate a songwriter credit even when they played no songwriting role. See Helienne Lindvall, *Behind the Music: Credit Where Credit’s Due*, GUARDIAN (Jan. 23, 2008, 9:00 AM), <https://www.theguardian.com/music/musicblog/2008/jan/23/ivealwaysstudiedthecredits> [<https://perma.cc/9J7P-TS9S>].

⁸⁵ See generally Eckhause, *supra* note 28.

⁸⁶ Kevin Cornell, *Music Sampling: Breaking Down the Basics*, TUNECORE (Aug. 9, 2016), <https://www.tunecore.com/blog/2016/08/music-sampling-breaking-down-the-basics.html> [<https://perma.cc/D6NM-25AF>]. Here, “sampling” is defined as taking from a pre-existing sound recording, as distinct from the “interpolation” of a pre-existing composition without using any embodying recorded material. See *What Is the Difference Between a Sample and Interpolation?*, SONGTRUST, <https://help.songtrust.com/knowledge/what-is-the-difference-between-a-sample-and-interpolation> [<https://perma.cc/5EA7-V793>].

⁸⁷ See, e.g., *Kanye West Feat. Rihanna and Swizz Beatz’s ‘Famous’ Sample of Sister Nancy’s ‘Bam Bam’*, WHOSAMPLED, <https://www.whosampled.com/sample/408737/Kanye-West-Rihanna-Swizz-Beatz-Famous-Sister-Nancy-Bam-Bam> [<https://perma.cc/HBL5-84H2>].

⁸⁸ See, e.g., *Samples of When the Levee Breaks by Led Zeppelin*, WHOSAMPLED, <https://www.whosampled.com/Led-Zeppelin/When-the-Levee-Breaks/sampled> [<https://perma.cc/R2UF-PERY>].

⁸⁹ See, e.g., *UGK Feat. OutKast’s ‘Int’l Players Anthem (I Choose You)’ Sample of Willie Hutch’s ‘I Choose You’*, WHOSAMPLED, [https://www.whosampled.com/sample/1201/UGK-OutKast-Int%27l-Players-Anthem-\(I-Choose-You\)-Willie-Hutch-I-Choose-You](https://www.whosampled.com/sample/1201/UGK-OutKast-Int%27l-Players-Anthem-(I-Choose-You)-Willie-Hutch-I-Choose-You) [<https://perma.cc/85JQ-H3M8>].

⁹⁰ See, e.g., *Aaliyah Feat. Timbaland’s ‘Are You That Somebody?’ Sample of Jac Holzman’s ‘Happy Baby’*, WHOSAMPLED, <https://www.whosampled.com/sample/313684/Aaliyah-Timbaland-Are-You-That-Somebody%3F-Jac-Holzman-Happy-Baby> [<https://perma.cc/Y4B8-XU3E>].

Because recordings embody compositions, industry norms dictate that sample licenses are sought for both the sampled recording and its underlying composition.⁹¹ Typically, the sample license for the composition might involve a flat fee, as well as songwriter credit.⁹² As a result, the new sound recording and its underlying composition become even more intertwined: the industry's understanding of the new composition becomes defined, in part, by the pre-existing sound recording—regardless of the nature of the embedded compositional material taken along for the ride.⁹³

⁹¹ See Jamie Davis-Ponce, *Borrowing Success: How to Legally Sample Music*, SONICBIDS BLOG, <http://blog.sonicbids.com/borrowing-success-how-to-legally-sample-music> [<https://perma.cc/4QA8-R97X>]; *Music Sampling and Beat Licensing*, TUNECORE, <https://www.tunecore.com/guides/music-sampling-and-beat-licensing-101> [<https://perma.cc/Y7ZV-ZQFX>]. While unlikely, it is technically possible to lawfully sample a recording without authorization from the compositional rightsholders. See *Newton v. Diamond*, 388 F.3d 1189, 1196–97 (9th Cir. 2004). An uncleared sample is an infringement of the sound recording copyright. See *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

⁹² See Cornell, *supra* note 86. As is typically the case with songwriter splits, there are no hard and fast rules, but rather a fluid bargaining process. See *id.*

⁹³ Further complications may arise as the emerging retail markets for musical stems, beats, and sound libraries become more influential. See *Unbundling the Song: Inside the Next Wave of Recorded Music's Disruption*, FORBES (May 13, 2018, 7:44 PM), <https://www.forbes.com/sites/cheriehu/2018/05/13/unbundling-the-song-inside-the-next-wave-of-recorded-musics-disruption/#350689079cae> [<https://perma.cc/HB2M-C4XR>]; Carmin Chappell, *'Old Town Road' is Now the Longest-Running No. 1 Song—and the Beat Lil Nas X Used Only Cost \$30*, CNBC (July 23, 2019, 2:40 PM), <https://www.cnbc.com/2019/07/23/lil-nas-x-bought-the-beat-used-in-old-town-road-for-30-on-beatstars.html> [<https://perma.cc/37E6-XHPQ>]; Dani Deahl, *Justin Bieber Was Accused of Stealing a Melody, But It's Actually a Royalty-Free Sample You Can Buy Online*, VERGE (Feb. 17, 2020, 11:45 AM) <https://www.theverge.com/2020/2/17/21140838/justin-bieber-changes-running-over-asher-monroe-synergy-splice-sample-melody> [<https://perma.cc/UAV5-DDND>]; Jacob Goldstein, *How to Make It in the Music Business*, PLANET MONEY (Sept. 15, 2017), <https://www.npr.org/sections/money/2017/09/15/551236508/episode-794-how-to-make-it-in-the-music-business> [<https://perma.cc/KR7F-U2AX>]. Incidentally, this shared sourcing of production material is just part of a general empirical trend towards sonic homogeneity in modern popular music. See, e.g., Chris Wickham, *Pop Music Too Loud and All Sounds the Same: Official*, REUTERS (July 26, 2012, 9:04 AM), <https://www.reuters.com/article/us-science-music/pop-music-too-loud-and-all-sounds-the-same-official-idUSBRE86P0R820120726> [<https://perma.cc/V7UR-V3MC>]; Greg Milner, *They Really Don't Make Music Like They Used To*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/opinion/what-these-grammy-songs-tell-us-about-the-loudness-wars.html> [<https://perma.cc/UN25-7GWN>]. The sonic homogeneity trend, combined with judicial reliance upon recordings, could further stoke the substantial

II. FORMATION: THE JUDICIAL COLLISION OF COMPOSITION AND SOUND RECORDING

Part II of this Note outlines how the creative and business developments discussed in Part I have filtered into the courtroom. Part II.A tracks evolving judicial understandings of the “composition.” Part II.B explores administrative variables affecting the scope of compositional copyright protection. Part II.C provides a structural overview of infringement proceedings and lays the evidentiary foundation for the sound recording-specific discussions at issue in this Note. Finally, Part II.D dissects recent composition infringement proceedings where sound recording rulings have taken center stage.

A. *Judicial Conceptions of “Composition”*

For much of American history, the legal definition of the musical composition was effectively limited to the work’s melody.⁹⁴ This view permeated nineteenth-century case law.⁹⁵ It followed, then, that a musical work could only infringe another when “to the ear of the average person the two *melodies* sound . . . the same.”⁹⁶ While

similarity flames. Still, as these headlines illustrate, there is a tendency for critics to overstate the homogeneity trend, and to conflate sonic and compositional homogeneity; there is separate, less stark, evidence of increasing pop compositional homogeneity. See, e.g., Andrew Thompson & Matt Daniels, *The Musical Diversity of Pop Songs*, PUDDING, <https://pudding.cool/2018/05/similarity> [<https://perma.cc/V6MT-GF3U>].

⁹⁴ *Id.* at 1863; see also NIMMER, *supra* note 25, § 2.05[B] (“Melody is, of course, the usual source of protection for musical compositions.”); Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 278 (2013) (“[M]elody [generally] drives the infringement bus.”).

⁹⁵ See Fishman, *supra* note 15, at 1869 (“Consciously or not, courts adopted the view of nineteenth-century European music theorists and critics who saw melody as a musical work’s aesthetic core.”); see, e.g., *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (“It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity.”); *Jollie v. Jaques*, 13 F. Cas. 910, 913 (C.C.S.D.N.Y. 1850) (contrasting the “genius” of melody creation with the “mechanic” nature of accompaniment).

⁹⁶ *Hein v. Harris*, 175 F. 875, 877 (C.C.S.D.N.Y. 1910), *aff’d*, 183 F. 107 (2d Cir. 1910) (emphasis added).

outlier cracks in this policy occasionally formed,⁹⁷ the judicial fixation on melody persisted for many decades after the advent of recorded music.⁹⁸ Gradually, however, courts increasingly validated infringement claims that extended beyond melody and into melody-adjacent elements such as harmony and rhythm.⁹⁹ This seemingly inconsequential shift presaged the modern blurring of the composition/recording dichotomy.

1. Compositions v. Recordings

Philosophically, a sound recording forms an uneasy bond with the composition it embodies; it is simultaneously a “terminal and canonical version of [the] composition” while also presenting, in fact, a “limited representation of [that] composition.”¹⁰⁰ On the one hand, any single composition can be recorded, arranged, and adapted in an infinite number of ways.¹⁰¹ On the other, most commercially successful compositions tend to be overwhelmingly associated with a single recording.¹⁰²

Functionally, recordings have provided countless more variables for would-be copiers to parrot. While nineteenth-century putative infringers were generally restricted to the limited confines of sheet music, modern proceedings typically involve putative infringers with access to widely disseminated, complex sound

⁹⁷ See, e.g., *Fred Fisher, Inc., v. Dillingham*, 298 F. 145, 145–47 (S.D.N.Y. 1924) (holding that a justiciable infringement claim could arise from a copying of the “‘ostinato,’ or constantly repeated figure” in the accompaniment alone).

⁹⁸ See, e.g., *King*, 105 F. Supp. at 400 (defending its focus on melody on the grounds that the possibilities among arrangement variables such as tempo, rhythm, and harmony had either “been long since exhausted” or had entered the public domain).

⁹⁹ See, e.g., *Tempo Music, Inc. v. Famous Music Corp.*, 838 F. Supp. 162, 168 (S.D.N.Y. 1993) (rejecting the assertion “that harmony can never be the subject of copyright” in a dispute over authorship of an alternate version—with a revised melody and no lyrics—of the Duke Ellington standard “Satin Doll”); see also Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 498 (2014) (construing infringement inquiries as typically being limited to “melody, which is typically given primary consideration, and to a lesser extent harmony and rhythm.”).

¹⁰⁰ Tod Machover & Charles Holbrow, *Toward New Musics: What the Future Holds for Sound Creativity*, NPR (July 26, 2019, 6:00 AM), <https://www.npr.org/2019/07/26/745315045/towards-new-musics-what-the-future-holds-for-sound-creativity> [<https://perma.cc/K2PH-NX3G>].

¹⁰¹ See *id.*

¹⁰² See *id.*

recordings embodying the compositions at issue.¹⁰³ Accordingly, these defendants may have mimicked an array of elements present in a plaintiff's recording that may not appear in any written reduction, such as performance expression, sonic timbre, production effects, and nuanced instrumental arrangements. Consequently, courts have been left to decide which of these elements are legally part of the underlying composition, and which are irrelevant to a claim of composition infringement. The doctrine emerging from these efforts is anything but straightforward.

2. Modern Doctrine

While there is general consensus that any given sound recording contains elements that fall outside the scope of the composition it embodies,¹⁰⁴ the next step—surveying the border between the two copyrights—becomes trickier. Broadly speaking, courts view the composition copyright as encompassing “the generic sound that would necessarily result from any performance of the piece.”¹⁰⁵ Conversely, a sound recording consists of the “sound produced by the performer's rendition of the musical work.”¹⁰⁶

Writing in pre-*Blurred Lines* 2011, Professor Jamie Lund referred to the traditional conception of composition as a bundle of “rhythm, harmony, and melody” as the “dominant rule.”¹⁰⁷ She acknowledged, however, “passing references to the contrary” and

¹⁰³ See *infra* Part II.D.

¹⁰⁴ See, e.g., NIMMER, *supra* note 25, § 2.05[A] (“[I]t stretches matters too far to conclude that everything on the recording forms part of the musical composition.”).

¹⁰⁵ Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g*, 388 F.3d 1189 (9th Cir. 2004), and *aff'd*, 388 F.3d 1189 (9th Cir. 2004).

¹⁰⁶ *Id.* (citing NIMMER, *supra* note 25); see Dustin Mets, *Did Congress Protect the Recording Industry into Competition? The Irony of the Digital Performance Right in Sound Recordings Act*, 22 U. DAYTON L. REV. 371, 372–73 (1997); Lund, *supra* note 26, at 145.

¹⁰⁷ Lund, *supra* note 26, at 144; see, e.g., Rose v. Hewson, No. 17–CV–1471 (DLC), 2018 WL 626350, at *3 (S.D.N.Y. Jan. 30, 2018) (dismissing an infringement claim brought against U2, based on allegedly similar guitar solos: “a court considers only a song's composition—the notes, rhythm, and harmony, for example—and does not consider elements of performance of the composition, like the skill with which the composition is played.”). Even after *Blurred Lines*, this approach persisted: “The way things have always worked, the story goes,” wrote Professor Joseph Fishman in 2018, “only tunes and words are explicitly covered.” Fishman, *supra* note 15, at 1872.

cited to the court's contention in *Swirsky v. Carey* that "[o]ther courts have taken account of additional components of musical compositions, including melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics."¹⁰⁸ To that end, while some courts have expressly denied protection to performance elements present on a recording, such as the timbre and performance techniques of a recorded flute,¹⁰⁹ at least one court has declined to consider *any* element of a recording to be outside the scope of compositional protection.¹¹⁰

Meanwhile, recent cases have accelerated the effective expansion of the legal bounds of the composition.¹¹¹ Led by *Blurred Lines*, they have illuminated the reality that "what the law means when it says 'music' . . . is no longer anywhere near as uniform as the popular condemnation of the [*Blurred Lines*] outcome would suggest."¹¹² Prospective plaintiffs have taken notice and asserted claims far adrift from the traditional "words and melody" paradigm.¹¹³

3. Protectable, Unprotectable, or "Constellation"

Despite a wealth of case law on the topic, no set definition has emerged to distinguish protectable elements of a composition from musical elements that are not protectable. Protectable elements may include "melodic lines, harmonic lines, and percussive parts," along with original combinations of these elements and other elements that

¹⁰⁸ *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004), *as amended on denial of reh'g* (9th Cir. Aug. 24, 2004) (reversing the district court's summary judgment for defendants—Mariah Carey, and her co-writers—on the work "Thank God I Found You," who were alleged to have copied the chorus of "One of Those Love Songs," as performed by Xscape). The court also noted that "commentators have opined that timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, basslines, and new technological sounds can all be elements of a musical composition." *Id.*

¹⁰⁹ *Newton v. Diamond*, 388 F.3d 1189, 1191–94 (9th Cir. 2004) (affirming the district court's summary judgment for defendants, the Beastie Boys, whose record "Pass The Mic" had included a flute sample, for which a sound recording—but *not* a composition—sample license had been secured). In finding no "substantial" copying of the composition, the court distinguished the recorded flautist's "highly developed performance techniques" from "a generic rendition of the composition." *Id.*

¹¹⁰ *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).

¹¹¹ *See infra* Part II.D.

¹¹² *Fishman*, *supra* note 15, at 1868–69.

¹¹³ *See id.* at 1890.

are not protectable on their own.¹¹⁴ Meanwhile, “musical concepts, musical motifs, or trite or commonplace musical expressions” are not protectable.¹¹⁵ Nor, at least doctrinally, can protection extend to musical styles or genres.¹¹⁶ In practice, the precise line between protectable and unprotectable expression is “largely a matter of fact to be decided by the jury.”¹¹⁷

While compilations of otherwise unprotectable elements may receive protection,¹¹⁸ there is no clear threshold for what constitutes a protectable critical mass of otherwise unprotectable elements.¹¹⁹ The boundaries become especially difficult to navigate in modern infringement cases involving recorded works whose aesthetic impacts combine different kinds of elements that may not be individually protectable. For example, the *Blurred Lines* claim¹²⁰ primarily centered around what the Gaye estate’s expert referred to as “constellations” of melodic similarities—some of which may have been too commonplace or fleeting to be individually pro-

¹¹⁴ Social Justice, *supra* note 66, at 7–8; *see also* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:93 (last updated Sept. 2019); Brauneis, *supra* note 30, at 16 (“[I]n many of the cases in which courts articulated a definition of musical works in terms of a finite list of elements, they were not rejecting other elements [but rather] articulating what they were used to seeing in thinly notated sheet music or lead sheets.”).

¹¹⁵ Maureen Baker, Note, *La(w)—A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1590 (1992).

¹¹⁶ *See* Madison, *supra* note 7, at 193.

¹¹⁷ *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482, 485 (9th Cir. 2000) (affirming a jury verdict that the Michael Bolton hit “Love is a Wonderful Thing” had infringed a “unique compilation of [five unprotectable] elements” from the Isley Brothers work of the same name).

¹¹⁸ *Id.* at 485–86 (“Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”).

¹¹⁹ This has not prevented folklore from arising among musicians regarding the existence of a mythical bright line separating innocuous influence from infringement. *See, e.g.*, Janet Fries & Jennifer T. Criss, *Debunking Copyright Myths*, 11 LANDSLIDE 35, 37 (2019); D. Pinter, *Plagiarism or Inspiration?*, SOUNDSCAPES (Sept. 2015), http://www.icce.rug.nl/~soundscapes/VOLUME18/Plagiarism_or_inspiration.shtml [<https://perma.cc/PKR9-S8K3>]; *Is There a “Four Note” Rule that Defines Plagiarism in Music?*, STACK EXCHANGE, <https://musicfans.stackexchange.com/questions/5080/is-there-a-four-note-rule-that-defines-plagiarism-in-music/5093> [<https://perma.cc/VMW5-C5BS>].

¹²⁰ *See infra* Part II.D.

tectable—and arrangement devices such as basslines, percussive elements, keyboard parts, and background vocals.¹²¹

B. Scope of Protection

Separate from the debate over which species of musical expression can *conceivably* be protectable, a distinct inquiry addresses the extent to which a *specific composition's* protection is constrained by the information its copyright registration conveys. The administrative rules governing registration procedures began to change with the passage of the Copyright Act of 1976.¹²² Nearly five decades later, the doctrinal significance of those changes remains unsettled.

1. Pre-1978 and Post-1978 Copyright Office Regulation

Prior to the 1976 Act, which became effective January 1, 1978,¹²³ a musical composition “could receive federal copyright protection either through registration and submission of a deposit copy [with the Copyright Office] or through publication.”¹²⁴ The purpose of the deposit copy is to allow the Copyright Office, and the public, “to identify the work in which the registrant claims a copyright”¹²⁵ and “to ascertain precisely what [is] the subject of copyright.”¹²⁶ Before the 1976 Act, the Copyright Office did not accept sound recordings as deposit copies to substantiate the registration of their underlying compositions.¹²⁷

¹²¹ See *Williams v. Gaye*, 895 F.3d 1106, 1117 (9th Cir. 2018). The doctrine of *scènes à faire* precludes protection for “the indispensable or standard aspects of a work.” *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 274 (6th Cir. 2009).

¹²² 17 U.S.C. § 101 *et seq.* (2018).

¹²³ Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541.

¹²⁴ *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1132 (9th Cir. 2018), *reh'g en banc granted sub nom.* *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019), and *on reh'g en banc sub nom.* *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808 (9th Cir. Mar. 9, 2020) (“[D]istributing phonorecords did not constitute publication under the 1909 Act.”).

¹²⁵ *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–63 (1st Cir. 1994), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

¹²⁶ See *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *7 (9th Cir. Mar. 9, 2020) (quoting *Merrell v. Tice*, 104 U.S. 557, 561 (1881)).

¹²⁷ See Brief for the United States as Amicus Curiae in Support of Appellees at 3, *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (Nos. 16–56057, 16–56287), 2019

After Congress extended copyright protection to sound recordings, it also provided that composers could now submit sound recordings as deposit copies for their composition copyright registrations.¹²⁸ Thus, although recordings and compositions formed two discrete, self-contained types of intellectual property, one could now be used to substantiate the other at the Copyright Office.¹²⁹ With that step, the gradual industry comingling of the two foundational formats of musical creativity found its statutory corollary. This was no mere formality: in 1978, 14% of musical work registrations were accompanied by sound recording deposit copies.¹³⁰ By 2012, that number had risen to 77%.¹³¹

The precise legal significance of the deposit copy remains an open issue—one directly implicated in contemporary proceedings,¹³² and only just recently settled for the first time in the Ninth Circuit.¹³³ The central question for pre-1978¹³⁴ works concerns the extent to which copyright protection is limited to the four corners of the written deposit copy. By extension, a related inquiry concerns the extent to which elements that are present in the recording, but not in the written deposit copy, may factor into an infringement claim. Though seemingly limited in scope, this inquiry operates as a proxy for a more fundamental question that applies to all recorded works, regardless of era: where does composition end and sound recording begin?

WL 3992659 (arguing that the deposit copy should define the scope of protection for unpublished works under the 1909 Act). Because “distributing sound recordings did not constitute publication under the 1909 Act,” musical works were only considered published for copyright purposes “if the sheet music also was published.” *Skidmore*, 2020 WL 1128808, at *7.

¹²⁸ *Skidmore*, 905 F.3d at 1132 (citing 17 U.S.C. §§ 407–08 (1976)).

¹²⁹ *See id.*

¹³⁰ *See Brauneis*, *supra* note 30, at 28.

¹³¹ *See id.* (adding that seventeen percent were accompanied by sheet music, and the remaining six percent by text/lyrics only).

¹³² *See infra* Part II.D.

¹³³ *See Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *2 (9th Cir. Mar. 9, 2020).

¹³⁴ The inflection point is January 1, 1978, the date the Act became effective. Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541.

2. The Deposit Copy Question

For popular music works, written deposit copies often take the form of “lead sheets.” These simplified reductions typically communicate a work’s core vocal melody lines, chord progressions, and other prominent instrumental parts such as bass lines, in addition to “performance directions such as ‘moderate swing’” and other indicia “designed to be used by professional performers who know how to interpret and extrapolate from them.”¹³⁵

Courts have typically ascribed significant weight to deposit copies for pre-1978 works. Writing in pre-*Blurred Lines* 2014, Professor Robert Brauneis noted that “[d]uring the era that federal copyright required fixation of musical works in written notation [i.e., pre-1978], the legal concept of the musical work was . . . limited to the elements represented in that notation.”¹³⁶ Accordingly, performance elements falling outside of the notated reduction were outside of the scope of protection.¹³⁷ The district court in *Blurred Lines* conformed to this understanding. It held that the deposit copy—including elements “implied,”¹³⁸ but not explicitly notated therein—defined the scope of protection for “Got to Give It Up.”¹³⁹ In upholding the bulk of the jury’s verdict, the Ninth Circuit panel “accept[ed], without deciding, the merits of the district court’s ruling” on the deposit copy issue.¹⁴⁰ Only a few years later, the Ninth

¹³⁵ Social Justice, *supra* note 66, at 22 (suggesting that “[n]o musician believes” that a lead sheet reflects the entirety of a modern pop song). *But see* Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants at 15, 17, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (Nos. 15–56880, 16–55089, 16–55626), 2016 WL 4592129 (warning that broadening compositional copyright protection beyond the type of information notated on a written score would chill creativity: “If copyright were to extend [beyond melody, to] the ‘feel’ of a song . . . we lose the next disco, the next Motown, the next batch of protest songs.”).

¹³⁶ Brauneis, *supra* note 30, at 18.

¹³⁷ *See id.*

¹³⁸ Musicians, *supra* note 135, at 4–5 (arguing that the district court “emasculated” its ruling limiting protection to the deposit copy by allowing the Gaye estate’s expert to testify as to elements present in the sound recording that she attested were “implied in the deposit copy”).

¹³⁹ *Williams v. Gaye*, 895 F.3d 1106, 1121 (9th Cir. 2018).

¹⁴⁰ *Id.*

Circuit would revisit the same question—and arrive at the same answer—in *Skidmore v. Led Zeppelin*.¹⁴¹

3. Creators' Consensus

From their bird's eye view, floating above doctrinal weeds and bureaucratic policies, songwriters and musicians—"at least those who have been speaking with the press"—are united in expressing "incredulity at the notion that non-melodic elements can be proper-tized."¹⁴² This "prevailing belief" among creators that a composition is "little more than its tune" closely resembles the traditional inclination to limit the composition to its notation-friendly melodic, harmonic, and lyrical elements.¹⁴³ Creators in the recorded music space "have gotten used to recreating existing beats and backing tracks," secure in their belief that it is "copying the melodies that brings trouble."¹⁴⁴ When plagiarism accusations pertain to production elements, their "reflexive" defense is to say "our melodies are different."¹⁴⁵ Or, per Pharrell Williams: "Look at the sheet music!"¹⁴⁶

C. Infringement Proceedings

When alleging infringement of a composition, the two basic elements a plaintiff must prove are: (1) that the plaintiff owns or controls the applicable copyright (this is often uncontested)¹⁴⁷ and (2) that the defendant copied *protected* elements of that work.¹⁴⁸

¹⁴¹ 2020 WL 1128808, at *2 (9th Cir. Mar. 9, 2020) (holding definitively, in an en banc opinion, that the scope of copyright for unpublished pre-1978 works is "defined by the deposit copy"); see *infra* Part II.D.

¹⁴² Fishman, *supra* note 15, at 1872–73; see also *infra* notes 231–39 and accompanying text.

¹⁴³ See *id.* at 1869; SEABROOK, *supra* note 64, at 201 (confidently articulating the widely held belief among creators that "beats and chord progressions can't be protected under the existing copyright laws, which recognize only the melody and lyrics.").

¹⁴⁴ Fishman, *supra* note 15, at 1873.

¹⁴⁵ *Id.*

¹⁴⁶ PAUL LESTER, IN SEARCH OF PHARRELL WILLIAMS 192 (Omnibus Press 2015); see also Dan Rys, *Pharrell Has Found His Happy Place in the Mainstream*, XXL (Mar. 4, 2014), <https://www.xxlmag.com/news/2014/03/pharrell-found-happy-place-mainstream/> [<https://perma.cc/B3KB-KJFF>].

¹⁴⁷ See Madison, *supra* note 7, at 153.

¹⁴⁸ See *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 274 (6th Cir. 2009).

Copying is typically proven through circumstantial evidence showing (1) that the defendant had access¹⁴⁹ to the allegedly infringed work and (2) that the defendant's work and the plaintiff's work are "substantially similar."¹⁵⁰

1. Substantial Similarity

While the various circuit approaches supply their own idiosyncrasies, on the balance, their resemblances outweigh their differences. First, "[s]ubstantial similarity is generally a question of fact for a jury."¹⁵¹ Second, summary judgment is typically "frowned upon."¹⁵² Finally, the leading circuits¹⁵³—the Second and Ninth

¹⁴⁹ To show access, a plaintiff must show that the defendant had a "reasonable possibility" of encountering the alleged infringed work, usually either through circumstantial evidence placing the defendant in proximity to the plaintiff's work, or as is common in music cases, because the plaintiff's work has been "widely disseminated." *See* *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000). Some circuits have employed an "inverse ratio rule," whereby a greater showing of access reduces the requisite level of similarity. *See id.* at 486. However, the Ninth Circuit's en banc decision in *Stairway to Heaven* to join several other circuits in shuttering the "inverse ratio rule" is likely to have a significant impact on the relationship between access and similarity in future infringement cases. *See* *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *11–13 (9th Cir. Mar. 9, 2020); *see also* Eriq Gardner, *Led Zeppelin Wins Latest 'Stairway to Heaven' Copyright Fight*, *BILLBOARD* (Mar. 9, 2020), <https://www.billboard.com/articles/business/9330743/led-zeppelin-stairway-heaven-copyright-dispute-appeals> [<https://perma.cc/P4WG-6H8F>] (predicting that the decision "will likely become a new standard in copyright infringement cases and may be presented to the Supreme Court."); Bobby Owsinski, *Led Zeppelin's New Copyright Win Might Change How Courts View Infringement*, *MUSIC 3.0* (Mar. 11, 2020), <https://music3point0.com/2020/03/11/stairway-infringement> [<https://perma.cc/L42X-FXBF>] (discussing the decision's potential effect on future infringement cases).

¹⁵⁰ *See id.* at 481.

¹⁵¹ *See, e.g.,* *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 310 (S.D.N.Y. 1999); *see also* *Madison*, *supra* note 7, at 154.

¹⁵² *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980).

¹⁵³ As the respective homes of music industry hubs New York and California, these circuits hear the most music copyright cases. *See* *Infringement Resource*, *supra* note 18; *All Sectors: County Business Patterns by Legal Form of Organization and Employment Size Class for U.S., States, and Selected Geographies: 2017*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=&g=0100000US.04000.001&t=Employment&table=CB1700CBP&tid=CBP2017.CB1700CBP&n=512230&hidePreview=true&vintage=2017&cid=EMP&lastDisplayedRow=36> [<https://perma.cc/LWH5-N4QS>] (showing that California and New York are home to the greatest number of music publishers, as of 2017). Other circuits use similar approaches. *See, e.g.,* *Kohus v. Mariol*, 328 F.3d 848, 855 (6th

Circuits—each deploy a two-pronged test: first inviting objective, expert analysis of the two works,¹⁵⁴ and then asking a lay jury to subjectively assess similarity.¹⁵⁵ In both circuits, expert analysis is typically confined to the first prong.¹⁵⁶ The second, pivotal prong hinges on how the “ordinary observer”¹⁵⁷ or “ordinary reasonable person” would experience the two works.¹⁵⁸

2. “Filtering Out”

As a doctrinal matter, substantial similarity analysis is confined to the *protected* elements of a plaintiff’s allegedly infringed work.¹⁵⁹ Courts must make an effort to “extract the unprotectible elements . . . and ask whether the protectible elements, standing alone, are substantially similar.”¹⁶⁰ This “filtering out” process generally applies to both the objective, analytical inquiries, as well as the

Cir. 2003); *Bruemmer v. Reardon*, No. 1:11–CV–988, 2013 WL 12123372, at *1 (W.D. Mich. Feb. 8, 2013).

¹⁵⁴ See *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004) (noting that the Ninth Circuit’s “extrinsic” test evaluates “external, objective criteria [and] requires analytical dissection of a work and expert testimony.”); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)) (construing the “intrinsic” test as determining whether a lay person would find the “total concept and feel of the works to be substantially similar.”); *New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78, 84 (S.D.N.Y. 2015) (articulating the Second Circuit’s two-pronged test: (1) that the plaintiff’s work “was ‘actually copied’ and (2) that the portion copied amounts to an ‘improper or unlawful appropriation’”); *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999) (defining substantial similarity as whether a lay observer would “regard [the] aesthetic appeal as the same.”).

¹⁵⁵ The Ninth Circuit introduced this approach in *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, elaborating that the “intrinsic” test gauges the subjective “response of the ordinary reasonable person” to the alleged similarities between works). 562 F.2d 1157, 1164 (9th Cir. 1977).

¹⁵⁶ *Id.* (“[Under the intrinsic text] analytic dissection and expert testimony are not appropriate.”); see *Baker*, *supra* note 115, at 1594 (“Expert testimony . . . is relevant only to show how the ordinary reasonable person may hear the compositions in question.”).

¹⁵⁷ *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001).

¹⁵⁸ *Krofft*, 562 F.2d at 1164.

¹⁵⁹ *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir.1994) (“[T]he unprotectable elements have to be identified, or *filtered*, before the works can be considered as a whole.”) (emphasis added).

¹⁶⁰ *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 498 (S.D.N.Y. 2019) (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)); see *Swirsky*, 376 F.3d at 845 (“[I]t is essential to distinguish between the protected and unprotected material in a plaintiff’s work.”).

subjective, “ordinary observer” inquiries.¹⁶¹ In other words, the material at the disposal of both expert analysts and lay jurists is supposed to be “filtered” to exclude unprotected material.

As a practical matter, this can prove difficult. Courts must manage an internal tension: on the one hand, they must “attempt to extract the unprotectible elements from [substantial similarity] consideration.”¹⁶² On the other—in an effort to avoid “excessive splintering”¹⁶³—they have also “disavowed” any purported requirement to “dissect” works into their most basic atomic elements.¹⁶⁴ This tension breeds a problematic circularity. Properly deferential courts leave the question of a given element’s protectability to jurors, who are tasked with comparing un-“filtered” works in order to determine which material must be “filtered” from the plaintiff’s work—only to then ask those same jurors, who have already been exposed to unprotected material, to appraise *only* protected elements for similarity between the plaintiff’s and defendant’s works.¹⁶⁵

3. Evidentiary Backdrop

Because federal courts have exclusive jurisdiction over copyright matters, these sorts of evidentiary dilemmas typically fall within the purview of the Federal Rules of Evidence.¹⁶⁶ For our purposes, the most important of the Federal Rules is Rule 403,¹⁶⁷ which provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting

¹⁶¹ See Madison, *supra* note 7, at 154. Here, the leading circuits differ. The Second Circuit’s objective prong simply evaluates whether copying, in fact, occurred, regardless of the protectability of the elements that were copied. See *Arnstein v. Porter*, 154 F.2d 464, 472 (2d Cir. 1946).

¹⁶² *Knitwaves*, 71 F.3d at 1002.

¹⁶³ *Mena v. Fox Entm’t Grp., Inc.*, No. 11–CV–5501 (BSJ), 2012 WL 4741389, at *4 (S.D.N.Y. Sept. 29, 2012).

¹⁶⁴ *Griffin*, 351 F. Supp. at 499 (reiterating the significance of a work’s “total concept and overall feel”).

¹⁶⁵ See *supra* Part II.A.3.

¹⁶⁶ See 28 U.S.C. § 1338.

¹⁶⁷ See *infra* Part III.D.

cumulative evidence.”¹⁶⁸ This is a direct articulation of the balancing test underlying much evidentiary theory: that courts should attempt to maximize useful information while minimizing harmful or distracting information.¹⁶⁹

To a lesser extent, two rules governing expert testimony also influence the role of sound recordings in composition infringement trials, by way of musicologist analysis that may flow from those recordings. Rule 702 provides that expert testimony must be “reliable” and “help[ful]” to the trier of fact,¹⁷⁰ while Rule 703 allows for expert testimony to be based on information that may not, itself, be admissible “[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”¹⁷¹ These evidentiary matters have played a central role in several recent proceedings.

D. Recent Proceedings Featuring Sound Recording Rulings

Prior to *Blurred Lines*, modern decisions had already done much to collapse the gap between composition and performance/recording. Courts in these cases extended protection to, among other things, recorded drumbeats, rhythmic patterns, guitar riffs,¹⁷² as well as the “musical punctuation” of the recorded vocal performance of the word “dog” and some surrounding vocal “panting.”¹⁷³ However, other decisions took greater care to distinguish between sound

¹⁶⁸ Fed. R. Evid. 403.

¹⁶⁹ See Fed. R. Evid. 403 (advisory committee’s note).

¹⁷⁰ Fed. R. Evid. 702.

¹⁷¹ Fed. R. Evid. 703.

¹⁷² See Fishman, *supra* note 15, at 1889 (citing *New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78, 97 n.1 (S.D.N.Y. 2015) (denying defendants’ motion for summary judgment on the grounds that the drum groove from the recording embodying plaintiffs’ composition could “reasonably be described as the driving groove, or backbone, of the song”)); *BMS Entm’t/Heat Music LLC v. Bridges*, No. 04 Civ. 2584, 2005 WL 1593013, at *3–5 (S.D.N.Y. July 7, 2005) (denying defendants’ motion for summary judgment based on similarity of rhythmic patterns in a “call-and-response” as embodied on a recording embodying plaintiff’s work); *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 986 (W.D. Wash. 1999) (granting plaintiffs’ motion for summary judgment on liability, construing the guitar riff as embodied in a ZZ Top record as part of the underlying composition).

¹⁷³ *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 276 (6th Cir. 2009) (affirming a verdict of infringement, finding no prejudicial error in the district court’s decision to allow the jury to consider these elements—which did not appear in the sheet music—from the George Clinton record “Atomic Dog”).

recordings and the compositions embodied therein.¹⁷⁴ At least one pre-*Blurred Lines* court, citing a “significant risk of confusing and misleading the jury,” invoked the composition/recording distinction in an evidentiary context by barring the use of a sound recording at trial.¹⁷⁵ More recently, starting with *Blurred Lines*, three proceedings have touched directly upon this collision of formal compositional protection and functional evidentiary rulings.

1. *Blurred Lines*

“The majority allows the Gayes to accomplish what no one has before: copyright[ing] a musical style.”¹⁷⁶ This flourish—from the lone dissenting judge on the Ninth Circuit panel that upheld the bulk of the district court’s finding that “*Blurred Lines*” had indeed infringed “*Got to Give It Up*”—neatly encapsulated the primary criticisms directed at both the district and circuit court holdings.¹⁷⁷

However it looked to the outside world, the proceedings actually presented a somewhat complicated picture. The Thicke Parties succeeded in preventing the Gaye estate from introducing the full commercial recording of “*Got to Give It Up*” at trial.¹⁷⁸ They also—at least formally—notched a major victory in convincing the district court to limit protection to the work’s deposit copy.¹⁷⁹ But the district court, in denying summary judgment, held that there was a triable issue of fact as to what musical expression was actually indicated in the deposit copy.¹⁸⁰ As a result, at trial, the jury was given

¹⁷⁴ See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1193–94 (9th Cir. 2004).

¹⁷⁵ *Fahmy v. Jay Z*, No. 2:07–CV–05715–CAS(PJWx), 2015 WL 5680299, at *14 (C.D. Cal. Sept. 24, 2015) (ruling on several pretrial motions in a proceeding involving an allegedly unlicensed sample incorporated into Jay-Z’s hit record, “*Big Pimpin*”); see Defendants’ Memorandum of Law in Support of Their First Motion in Limine, *Griffin v. Sheeran*, No. 1:17–CV–05221 (S.D.N.Y. May 21, 2019), 2019 WL 2604571, ECF No. 111.

¹⁷⁶ *Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018) (Nguyen, J., dissenting) (“‘*Blurred Lines*’ and ‘*Got to Give It Up*’ are not objectively similar. They differ in melody, harmony, and rhythm . . . [T]he majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.”).

¹⁷⁷ See *supra* notes 14–15.

¹⁷⁸ *Williams*, 895 F.3d at 1127 (majority opinion) (adding that the Thicke Parties “vigilantly policed the admission of testimony throughout trial, repeatedly instructing counsel to ensure that the experts tethered their testimony to the sheet music.”).

¹⁷⁹ *Id.* at 1117.

¹⁸⁰ *Id.* at 1124–25.

access to certain musical elements that, on appeal, the Thicke Parties argued were outside the scope of compositional protection.

The district court instructed the jury that it had heard “‘recorded versions of each work that each side has prepared based on what each side contends is shown in the deposit copy that was filed with the Copyright Office.’”¹⁸¹ Thus, it became the jury’s task to simultaneously decide what was present or implied in the deposit copy (and therefore protectable), and to determine the extent of similarity between those works, *only* among those protected elements.¹⁸² In affirming the bulk of the district court’s ruling, the Ninth Circuit majority noted that the experts for both sides “referenced the sound recording” and “agreed that sheet music requires interpretation,” so “[t]he question of whose interpretation of the deposit copy to credit was a question properly left for the jury to resolve.”¹⁸³

On appeal, the Thicke Parties also argued that the district court had improperly allowed the Gaye estate’s experts to “play audio ‘mash-ups’ superimposing” Gaye’s “Got to Give It Up” vocals onto the “Blurred Lines” accompaniment, and vice versa, and that these mash-ups contained the following unprotected elements: bass melodies, keyboard parts, and Marvin Gaye’s vocal performance.¹⁸⁴ On appeal, the Thicke Parties contended that Rule 403 “required exclusion of such evidence”—that the confusion likely to be caused by

¹⁸¹ *Id.* (quoting jury instructions from district court).

¹⁸² *Id.*

¹⁸³ *Id.* at 1125–26. *But see id.* at 1149 (Nguyen, J., dissenting) (stating that the Gayes’ expert’s testimony regarding similarities in bass melodies was “of questionable value” because “when comparing them, she showed the jury the . . . bass line that she had transcribed from the sound recording” where, importantly, “several notes were different in the deposit copy”). Citing Rule 702’s helpfulness requirement, the Thicke Parties had also sought to exclude portions of her testimony that had been based on the “Got to Give It Up” sound recording. *Williams v. Bridgeport Music, Inc.*, No. LACV13–06004 JAK(AGRx), 2015 WL 4479500, at *5 (C.D. Cal. July 14, 2015), *aff’d in part, rev’d in part sub nom. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), *aff’d in part, rev’d in part sub nom. Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

¹⁸⁴ *Williams*, 895 F.3d at 1126. *See* Oral Argument at 1:22, *Williams v. Gaye*, 885 F.3d 1150 (2018) (No. 15–56880), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012297 [<https://perma.cc/4E27-BHJG>] (“If you filtered out the unprotectable elements, it would have been a different case.”).

these mash-ups trumped their minimal relevance.¹⁸⁵ They emphasized that “any number of melodies . . . could fit over the relatively simple chord pattern of ‘Blurred Lines.’”¹⁸⁶ Relying upon its history of allowing mash-ups to be performed for juries, and noting that any flaws in mash-up conception or execution were subject to cross-examination, the Ninth Circuit found no abuse of discretion in the district court’s decision.¹⁸⁷ The panel “accept[ed], without deciding, the merits of the district court’s ruling” to limit protection to the deposit copy—the ruling that had precipitated the district court’s decision to exclude the full commercial “Got to Give It Up” sound recording from trial.¹⁸⁸ Fortuitously, the Ninth Circuit would get another crack at the deposit copy issue very soon.¹⁸⁹

Today, *Blurred Lines* continues to represent an important disconnect between formal and functional considerations. Formally, the court actually furthered the more limited conception of the composition that its decision’s creative and industry critics endorse. However, the court’s permissive “leave it to the jury” evidentiary approach allowed elements of the sound recording to play the functional role that those same critics fear can unduly sway jurors’ perceptions of similarity.¹⁹⁰ As a result, *Blurred Lines* highlights the significance of the evidentiary debate within music copyright infringement proceedings, as distinct from the doctrinal discussion surrounding the scope of protection for musical works.

2. *Stairway to Heaven*

In 2014, a trustee with an interest in the work “Taurus,” as performed by the band Spirit, filed an infringement complaint against

¹⁸⁵ Third Brief on Cross Appeal of Plaintiffs-Appellants-Cross-Appellees Pharrell Williams, Robin Thicke, Clifford Harris, Jr., and More Water from Nazareth Publishing, Inc. at 32, *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (Nos. 15–56880, 16–55089, 16–55626), 2017 WL 1633159.

¹⁸⁶ *Id.*

¹⁸⁷ *Williams*, 895 F.3d at 1126–27.

¹⁸⁸ *Id.* at 1121 (9th Cir. 2018).

¹⁸⁹ *See infra* Part II.D.2.

¹⁹⁰ *See infra* Part III.B.2.

Led Zeppelin.¹⁹¹ At issue: Led Zeppelin’s ubiquitous “Stairway to Heaven” chromatic guitar arpeggio intro.¹⁹² The trial primarily hinged on two issues: (1) access—Led Zeppelin had toured with Spirit during a period of time when Spirit would regularly perform “Taurus” live¹⁹³; and (2) prior art—whether similar chromatic arpeggios had appeared in works prior to “Taurus.”¹⁹⁴

The litigation also addressed the novel legal question of whether, for pre-1978 works governed by the 1909 Copyright Act, “the deposit copy defines the scope of the copyright.”¹⁹⁵ The district court said yes, and relied on this judgment in barring certain sound recordings of “Taurus” from being used at trial; the jury ultimately found no substantial similarity under the extrinsic test.¹⁹⁶ On appeal, a Ninth Circuit panel affirmed the decision to limit protection to the deposit copy, but vacated and remanded based on jury instruction errors, and because “the district court abused its discretion by not allowing the sound recordings of ‘Taurus’ to be played to prove access.”¹⁹⁷ On June 10, 2019, the Ninth Circuit vacated the panel’s ruling and issued an order for an en banc rehearing.¹⁹⁸ Nine months later, the full Ninth Circuit affirmed the jury verdict, and held that the deposit copy does indeed define the scope of copyright for unpublished pre-1978 works such as “Taurus.”¹⁹⁹

¹⁹¹ *Copyright Row Over Led Zeppelin Classic Stairway to Heaven*, BBC NEWS (May 21, 2014), <https://www.bbc.com/news/entertainment-arts-27497950> [<https://perma.cc/GAN7-QVN5>].

¹⁹² Amici Curiae Brief of Musicologists in Support of Defendants-Appellees at En Banc Rehearing at 6, *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (Nos. 16–56057, 16–56287), 2019 WL 2996345 (“Like varied colored flecks of paint, arpeggios and descending bass lines are musical ideas that must remain freely available to composers.”).

¹⁹³ See *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1122 (9th Cir. 2018), *reh’g en banc granted sub nom.* *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019), and *on reh’g en banc sub nom.* *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808 (9th Cir. Mar. 9, 2020).

¹⁹⁴ Musicologists’ Brief, *supra* note 192, at 12.

¹⁹⁵ *Skidmore*, 905 F.3d at 1131–32 (noting that “Taurus” was registered in 1967, prior to publication, under the 1909 Act).

¹⁹⁶ *Id.* at 1130–31.

¹⁹⁷ *Id.* at 1137.

¹⁹⁸ *Skidmore v. Led Zeppelin*, 925 F.3d 999, 1000 (9th Cir. 2019).

¹⁹⁹ *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *2 (9th Cir. Mar. 9, 2020). At the time this Note is being finalized, no petition for certiorari has been filed, although one may well be imminent. See Letter Addressed to Judge Louis L. Stanton from

At trial, issues surrounding the use of sound recordings took center stage. The plaintiff moved for the admission of several studio and live “Taurus” recordings to be played for Led Zeppelin guitarist and songwriter Jimmy Page on the stand, so that he could then be asked whether he had ever heard them.²⁰⁰ The district court agreed that the recordings were relevant for access, but that playing the recordings in front of the jury would be too prejudicial.²⁰¹ As a result, the court allowed the recordings to be played for Page outside of the presence of the jury, and then for questioning stemming from his impressions of the recordings to take place in front of the jury.²⁰² This decision was grounded in a Rule 403 analysis.²⁰³ The court construed the recordings’ probative value as pertaining to access only—because the recordings contained elements falling beyond the scope of the deposit copy, they were not probative of the protected elements of the work “Taurus.”²⁰⁴ Therefore, the court reasoned, allowing the jury to hear the recordings would pose a significant prejudicial risk sufficient to justify precluding the minimally probative evidence.²⁰⁵

This was a major victory for the defendants; the extent of this prejudicial effect had been a matter of significant pretrial contention. In their motion in limine to exclude the sound recordings, the defendants had stressed the “impossib[ility]” of expecting a lay jury to both “*identify* the material and elements that are not in the 1967

Hillel I. Parness, *Structured Asset Sales, LLC v. Sheeran*, No. 1:18-cv-05839-LLS (S.D.N.Y. Apr. 8, 2020), ECF No. 148 (attorney for one of the *Thinking Out Loud* plaintiffs, Structured Asset Sales, LLC, reporting that “[c]ounsel for the plaintiffs in the Skidmore case has told [Structured Asset Sales’] principal that he will be petitioning for certiorari”).

²⁰⁰ *Skidmore*, 905 F.3d at 1123–24. There were also several 703-adjacent issues regarding whether expert testimony could be based on the recording. *See* Defendants’ Reply in Support of Motion in Limine No. 4 and Daubert Motion to Exclude Stewart, Johnson, Bricklin, and Hanson, *Skidmore v. Led Zeppelin*, No. 2:15–CV–03462–RGK–AGR (C.D. Cal. May 10, 2016), 2016 WL 2771264 (“[T]he reports plaintiff’s witnesses did provide are fatally flawed because his witnesses base their opinions on elements not protected by the Taurus copyright.”).

²⁰¹ *Skidmore*, 905 F.3d at 1123–24.

²⁰² *Id.*

²⁰³ *See id.* at 1135 n.36.

²⁰⁴ *Id.* (“Here, the district court abused its discretion.”).

²⁰⁵ *Id.*

transcription” and to “disregard those materials and elements” as unprotected for the purposes of substantial similarity.²⁰⁶ In its now-vacated remand, the Ninth Circuit panel countered that “the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition . . . that the recordings . . . were not to be used to judge substantial similarity.”²⁰⁷ The en banc Ninth Circuit disagreed: it deemed the trial court’s exclusion of the sound recording proper “[t]o prevent the jury from making an erroneous comparison for determining substantial similarity.”²⁰⁸

Like *Blurred Lines* before it, the *Stairway to Heaven* proceedings highlight the importance of evidentiary concerns, distinct from their adjacent doctrinal questions. Even where there is agreement—as there was here—among the trial and appellate courts regarding the significance of the deposit copy, judicial perspectives vary regarding how to manifest those rulings in the courtroom. When should recordings be barred entirely? When are other precautions, such as limiting instructions to the jury, sufficient? Indeed, given the doctrinal consensus between the trial and appellate courts on the deposit copy issue, the seesawing evidentiary directives defining the district, panel, and en banc decisions have together reinforced the proposition that what jurors actually see and hear matters quite as much as what they are technically permitted to consider.

²⁰⁶ Defendants’ Notice of Motion and Motion in Limine No. 3 to Exclude Taurus Audio Recordings, Memorandum of Points and Authorities in Support, *Skidmore v. Led Zeppelin*, No. 2:15-CV-03462-RGK-AGR (C.D. Cal. May 10, 2016), 2016 WL 2771260 (emphasis added).

²⁰⁷ *Skidmore*, 905 F.3d at 1135. *But see* Brief Amici Curiae of the Recording Industry Association of America and the National Music Publishers Association in Support of Defendants-Appellees on en Banc Rehearing at 5, *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (Nos. 16-56057, 16-56287), 2019 WL 3763847 (criticizing the Ninth Circuit panel’s 403 approach: “[T]he jury was going to get vanishingly little probative information by watching Page while he listened to ‘Taurus’ being played.”).

²⁰⁸ *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *10 (9th Cir. Mar. 9, 2020) (“There would have been very little, if any, probative value in watching Page’s reaction to listening to *Taurus* at the trial in 2016 to prove access to the song half a century ago.”) (emphasis removed).

3. *Thinking Out Loud*

Only a few years removed from *Blurred Lines*, a second visible litigation involving a Marvin Gaye classic currently²⁰⁹ awaits resolution—this time in the Second Circuit. Two separate parties with an interest in “Let’s Get It On” have filed infringement claims in the Southern District of New York centering around Ed Sheeran’s 2013 hit “Thinking Out Loud.”²¹⁰ The claims rely heavily on non-melodic copying; the plaintiffs allege that the two works share substantially similar basslines, chord progressions, and drum patterns.²¹¹

As in *Stairway to Heaven*, the parties bitterly contest whether the deposit copy defines the bounds of copyright protection.²¹² The two sides disagree on the extent to which the bassline and percussion elements alleged to have been lifted by the “Thinking Out Loud” writers are actually part of the composition “Let’s Get It On.” The defendants argue that the composition is defined by the four corners of the deposit copy, which does not contain any bass or drum notation (although the plaintiffs argue that the bassline is implied by the deposit copy’s syncopated harmonic rhythm).²¹³ Meanwhile, the plaintiffs contend “that the composition is embodied on the Gaye recording, which is the first mechanical reproduction of [Let’s Get It On]” and which does contain the relevant bass and drum material.²¹⁴

²⁰⁹ This Note is entering its final stages of publication in mid-April 2020.

²¹⁰ See Eriq Gardner, *Ed Sheeran’s Copyright Battles Are Much Weirder Than Anyone Can Imagine*, HOLLYWOOD REPORTER (June 28, 2018, 9:31 AM), <https://www.hollywoodreporter.com/thr-esq/ed-sheerans-copyright-battles-are-weirder-anyone-can-imagine-1123850> [<https://perma.cc/XGM5-EBP7>].

²¹¹ *Griffin v. Sheeran*, 351 F. Supp. 3d 492, 499 (S.D.N.Y. 2019).

²¹² See *id.* at 495–96.

²¹³ *Griffin*, 351 F. Supp. 3d at 495–96. The parties also dispute how closely Gaye’s recorded vocal performance mirrors the notated deposit copy melody line. *Id.*

²¹⁴ *Id.* at 496 (denying summary judgment). Interestingly, several of plaintiffs’ pretrial documents mention other recordings, aside from the two works’ commercial releases, including a “demo recording of [“Thinking Out Loud”] that Sheeran and Amy Wadge recorded in Sheeran’s kitchen in England,” as well as a recording of Sheeran performing a live mash-up in which he toggled seamlessly between “Thinking Out Loud” and “Let’s Get It On.” See Reply Declaration of Ilene S. Farkas, *Griffin v. Sheeran*, No. 1:17–CV–05221 (S.D.N.Y. Sept. 28, 2018), ECF No. 85; Exhibit 6, *Griffin v. Sheeran*, No. 1:17–CV–05221 (S.D.N.Y. Dec. 8, 2017), ECF No. 67–6 (Plaintiffs’ expert’s initial report, referencing *livia4912, Thinking Out Loud (Lets Get It On) by Ed Sheeran*, YOUTUBE (Nov. 20, 2014), <https://www.youtube.com/watch?v=RxZjVZKVN7k> [<https://perma.cc/9R6D-MY4D>]).

After initially staying proceedings on July 2, 2019, pending resolution of the *Stairway to Heaven* appeal, the court eventually sided with the defendants.²¹⁵ The en banc Ninth Circuit issued its *Stairway to Heaven* opinion on March 9, 2020.²¹⁶ Fifteen days later, the *Thinking Out Loud* court granted the defendants' motion in limine "limiting Plaintiffs to comparing Thinking Out Loud with the musical composition Let's Get It On as reflected in the deposit copy."²¹⁷

The court also granted—with some qualification—the defendants' motions seeking to limit the role that sound recordings embodying "Let's Get It On" may play at trial.²¹⁸ Citing Rule 403, the defendants had moved to prevent the plaintiffs from introducing testimony or other evidence comparing "Thinking Out Loud" to elements contained only in a "particular recorded version" of "Let's Get It On," or that may merely be "implied" in the "Let's Get It On" deposit copy²¹⁹; and to prevent the commercial sound recording of "Let's Get It On" from being performed at trial, full-stop.²²⁰ The court ruled that "[t]he Gaye sound recording is inadmissible in any way which might confuse the jury into thinking it represents what is

²¹⁵ Order, *Griffin v. Sheeran*, 351 F. Supp. 2d 492 (S.D.N.Y. July 2, 2019) (No. 1:17-CV-05221), ECF No. 119.

²¹⁶ *Skidmore v. Led Zeppelin*, No. 16-56057, 2020 WL 1128808, at *2 (9th Cir. Mar. 9, 2020).

²¹⁷ See Notice of Motion—Defendants' First Motion in Limine, *Griffin v. Sheeran*, 351 F. Supp. 3d 492 (S.D.N.Y. May 21, 2019) (No. 1:17-CV-05221), ECF No. 109 (italics removed). The court initially denied this motion, but noted that the denial was "without prejudice and with leave to renew" at the conference that was to be scheduled "within 10 days" following the en banc decision in *Stairway to Heaven*. See *id.*; see also Motion in Limine Denied with Leave to Renew, *Griffin v. Sheeran*, 351 F. Supp. 3d 492 (S.D.N.Y. Feb. 12, 2020) (No. 1:17-CV-05221), ECF No. 120. Although his rulings in *Thinking Out Loud* would not technically be bound by *Stairway to Heaven*, Judge Stanton had previously stated that "[w]hatever the Ninth Circuit says, it's going to be damned educational. . . . To proceed in willful ignorance of them is folly." Bill Donahue, *How Will 'Stairway' Ruling Hit Other Big Music Cases?*, LAW360 (Mar. 11, 2020, 10:27 PM), https://www.law360.com/ip/articles/1252546/how-will-stairway-ruling-hit-other-big-music-cases-?nl_pk=892fdd10-89d8-4d9c-875a-d936bdc96875&utm_source=newsletter&utm_medium=email&utm_campaign=ip (subscription paywall). True to its word, the court reversed course after *Stairway to Heaven*. See Opinion & Order on Defendants' First Motion in Limine, *Griffin v. Sheeran*, No. 1:17-CV-05221 (S.D.N.Y. Mar. 24, 2020), ECF No. 121.

²¹⁸ See *Griffin et al*, *supra* note 217.

²¹⁹ Defendants' Memorandum, *supra* note 175, at 9–11.

²²⁰ Notice of Motion—Defendants' First Motion in Limine, *Griffin v. Sheeran*, No. 1:17-CV-05221 (S.D.N.Y. May 21, 2019), ECF No. 109.

protected by copyright” and that “[t]o that extent, Defendants’ . . . in limine requests are granted.”²²¹ However, it deferred the details “until trial.”²²² While it suggested that playing or referring to “portions, or the whole Gaye sound recording” at trial presently “seems . . . barred by Fed. R. Evid. 403,” the court signaled that “there may arise circumstances or arguments under which they may be admissible.”²²³ At the time this Note is being finalized, the precise application of these rulings is yet to be tested.

If and when *Thinking Out Loud* does proceed to trial—and perhaps to appeal—it will provide an opportunity for another circuit to develop case law governing when compositional protection is limited to the deposit copy, and when elements found only in recordings may be protected. Importantly, like its predecessors, it will also provide another test case for how these doctrinal decisions impact evidentiary rulings—and by extension, jurors’ perceptions of similarity.

III. STICKSHIFTS AND SAFETYBELTS: POLICY PROS AND CONS

The debate over the use of sound recordings in infringement trials is inextricably linked with the debate over how to define the bounds of a given composition. Any attempt to evaluate how probative or prejudicial a piece of evidence is to a compositional infringement claim inevitably depends on how one defines the composition in the first place. Accordingly, Part III navigates the intersection of policy implications inherent to each issue, while Part IV proposes a judicial framework that explicitly accounts for their overlap. First, Part III.A enumerates the policy pros and cons of an expanded view of what constitutes compositional creativity. Then, Part III.B compares the pros and cons of the unrestricted use of sound recordings in composition infringement trials.

²²¹ Griffin et al, *supra* note 217.

²²² *Id.*

²²³ *Id.*

A. *Pros and Cons of an Expanded Definition of “Composition”*

There are many avenues for creative musical expression that fall outside of what has traditionally been understood to be compositional. Indeed, the advent of modern recording technology has allowed for the proliferation of production creativity to the point that some argue “more original expression [can] be found, typically, in the visual and audio recordings of a performance of a song than in the underlying musical work.”²²⁴ What’s more, they continue, in modern pop music, whether “measured by . . . authorial focus or commercial importance, production matters as much as the melodies that are ultimately appended to it.”²²⁵

Still, the narrow construction of the composition is grounded in centuries of musical tradition.²²⁶ It continues to define the modern industrial organization of the music sector,²²⁷ and remains ubiquitous among both creators and the infrastructure that supports them.²²⁸ Part III.A explores these, and other, policy arguments surrounding an expanded understanding of the musical composition.

1. Cons: Arguments for the Traditional Definition of “Composition”²²⁹

Arguments for preserving the traditional understanding of the composition tend, naturally, to be rooted in tradition. But that tradition represents more than mere complacent inertia—it reflects creators’ expectations and preferences, and facilitates a predictable, stable, manageable ecosystem that allows songwriters to feel safe creating music.

²²⁴ Fishman, *supra* note 15, at 1900; *see also* Gabriel Jacob Fleet, Note, *What’s in A Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1279 (2008).

²²⁵ Fishman, *supra* note 15, at 1900.

²²⁶ *See supra* Part I.

²²⁷ Kevin Cornell, *Breaking Down Copyrights in Music*, TUNECORE (Dec. 8, 2016), <https://www.tunecore.com/blog/2016/12/breaking-copyrights-music.html> [<https://perma.cc/NPR8-4MCU>].

²²⁸ *See supra* Part II.B.3.

²²⁹ This Note will discuss the “Cons” first, because they reflect the incumbent consensus among creators and their industry agents.

a) The Expanded Definition Defies Prevailing Industry Understanding and Preference

Does it really make sense to extend rights designed to protect music creators beyond where those same creators are telling us they should extend? The industry has organically evolved a culture that largely self-regulates around a consensus understanding that a composition is defined, if perhaps not literally by the sheet music conveying that composition, then by the *type* of expression captured in traditional sheet music notation.²³⁰ If composers themselves, and their agents, have always believed that the term “composition” refers to lyrics and melody, and, to a lesser extent, harmony and rhythm, why should courts impose a more expansive understanding? Why force a change that strengthens songwriter protection upon songwriters who are, by near consensus, not clamoring for that change?

In fact, composers are not merely ambivalent about expanding the scope of protection governing their core unit of currency; they are insistent that it is having a chilling effect on their creativity.²³¹ “[*Blurred Lines*] is definitely striking fear into the hearts of songwriters,” says singer-songwriter Bonnie McKee.²³² “We’re all standing on the shoulders of giants,” warns the R&B artist Miguel.²³³ “There’s nothing that hasn’t been done.”²³⁴ A group of

²³⁰ See *supra* Part II.B.3.

²³¹ See, e.g., Jon Caramanica, *It’s Got a Great Beat, and You Can File a Lawsuit to It*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/arts/music/pop-music-songs-lawsuits.html?login=smartlock&auth=login-smartlock> [https://perma.cc/NP6K-QTB9]; Michael Donaldson, *How Songwriters Got Thrown into a Minefield*, SYNCHTANK (Jan. 19, 2020), <https://www.synchtank.com/blog/how-songwriters-got-thrown-into-a-minefield/> [https://perma.cc/QLZ8-FHQ9]. But see Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1336 (2015).

²³² Madison, *supra* note 7, at 151. While the en banc *Stairway to Heaven* decision, combined a week later with a district court’s decision to throw out an infringement verdict against Katy Perry, have led some to suggest that “the ‘Blurred Lines’ curse—its chilling effect—has been lifted,” creator uncertainty is unlikely to evaporate overnight. See Sisario *supra* note 18 (quoting Katy Perry’s attorney and noted copyright litigator Christine Lepera).

²³³ Associated Press, *Miguel Explores Race, Finds New Voice On ‘Wildheart’*, BILLBOARD (July 13, 2015), <https://www.billboard.com/articles/news/6627416/miguel-explores-race-finds-new-voice-on-wildheart> [https://perma.cc/V7YA-N3LQ].

²³⁴ *Id.*

musicians writing as amici for the *Thicke Parties* in *Blurred Lines* articulated their concern “about the potential adverse impact on their own creativity, on the creativity of future artists, and on the music industry in general. . . . [T]he verdict in this case threatens to punish songwriters for creating new music that is inspired by prior works.”²³⁵

Commentators recognize that, practically, there is very little wholly original creation in music.²³⁶ New music is constructed using “building blocks from a vast historical trove of previously expressed ideas.”²³⁷ This reality endows a natural tension into copyright, where the line between inspiration and theft is not always clear.²³⁸ Courts have the opportunity to calibrate that line wherever they see fit. Naturally, too permissive an environment risks depressing the value of copyright through rendering it unenforceable.

Still, it is telling that the very creators who would suffer most from this deflation are the loudest voices bemoaning the recent infringement boom. As Professor Joseph Fishman has argued, perhaps the continued emphasis on melody as the predominant compositional feature “should be justified not as a recognition of its composer’s creativity but rather as a facilitation of downstream

²³⁵ Musicians, *supra* note 135, at 2 (“[A] budding songwriter . . . is going to think twice before he or she writes a song that ‘feels’ like a Marvin Gaye song or any other artist’s song, always with one foot in the recording studio and one foot in the courtroom.”); *see also* Brief of Amicus Curiae Musicologists in Support of Defendants’ Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial at 2, *Gray v. Perry*, No. 2:15-CV-05642-CAS-JC (C.D. Cal. 2018), No. 500-2 (“This confusion and uncertainty, in turn, is inhibiting the work of songwriters and the American music industry at large . . .”).

²³⁶ *See, e.g.*, Madison, *supra* note 7, at 151.

²³⁷ *Id.*; *see also* Brief of Amici Curiae 123 Songwriters, Composers, Musicians, and Producers, Along With Nsai and Sona, in Support of Defendants/Appellees at en Banc Rehearing at 20, *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (Nos. 16-56057, 16-56287), 2018 WL 9441019 (expressing gratitude and respect for copyright protection: “No conscientious songwriter wants to copy someone else’s music; nor do they want someone else to copy theirs However, Amici also understand that, like the music that was created before them, their own music will serve as building blocks for future songwriters.”).

²³⁸ *See* Olivia Lattanza, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of Williams v. Gaye on Creativity in Music*, 35 *TOURO L. REV.* 723 (2019).

composers' future creativity."²³⁹ Indeed, if creators place greater importance on their ability to continue to create in the future than on securing maximal protection for their existing creations, there is little reason for courts to construe copyright laws designed to protect those very creators in a way that expressly defies their wishes.

b) Broader Protection Risks Extending Copyright to Ideas,
Rather Than Expression of those Ideas

Underlying much of the backlash to the *Blurred Lines* outcome was the perception that the courts had endorsed extending protection to a musical style.²⁴⁰ To flirt with allowing protection for genres/styles/grooves is to imperil the foundational tenet that “[c]opyright protection applies to original expression of ideas, but not to the ideas themselves.”²⁴¹ In *Blurred Lines*, while “everyone agree[d],” at least doctrinally, that a “groove” or “genre” represented an “unprotectable idea,” in the eyes of the dissent and many onlookers, the outcome had the practical effect of protecting what should have been an unprotectable idea.²⁴² A similar dynamic looms in *Thinking Out Loud*.²⁴³

c) There is a Fundamental Difference Between
Composition and Performance

Also relevant to the *Thinking Out Loud* proceedings are the core creative distinctions between composition and other forms

²³⁹ Fishman, *supra* note 15, at 1869–70.

²⁴⁰ See *Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018) (Nguyen, J., dissenting); Madison, *supra* note 7, at 193 (“A style cannot be copyrighted because a style is not a unique artistic expression.”); Melinda Newman, *Top Lawyers on What Songwriters Must Learn from ‘Blurred Lines’ Verdict*, FORBES (Mar. 11, 2015, 12:15 PM), <https://www.forbes.com/sites/melindanewman/2015/03/11/top-lawyers-weigh-in-on-the-blurred-lines-verdict-and-what-songwriters-must-learn/#327891976bfa> [<https://perma.cc/S88X-M2HH>] (“[I]t seemed on its musical face that the groove captured by the recorded production may have been influential.”).

²⁴¹ Thomas M. Cunningham, *Extending Shaw v. Lindheim: Substantial Similarity and the Idea-Expression Distinction in Copyright of Non-Literary Subject Matter*, 55 U. PITT. L. REV. 239, 241 (1993) (analogizing this risk to allowing painters of a landscape to foreclose others from painting that same landscape).

²⁴² *Williams*, 895 F.3d at 1140.

²⁴³ See *supra* Part II.D

of musical creativity.²⁴⁴ While the workflows and timelines surrounding the composition and recording processes have converged, the two copyrights still represent two distinct forms of creativity, and two distinct forms of intellectual property.²⁴⁵ The compositional process—even when occurring simultaneously to the recording process—is a “deliberative process that allows for trial-and-error editing,” reflection, and revision.²⁴⁶ A recording, on the other hand, captures a series of performances which are “unrepeatable, evanescent, and aural.”²⁴⁷

Even as modern production practices increasingly resemble compositional creativity, a finished recording still represents a single, “limited representation” of the composition it embodies.²⁴⁸ Compositions, on the other hand, are endlessly adaptable to new contexts and new creative inputs.²⁴⁹ Even confining oneself to the information conveyed in a typical written deposit copy, there are

²⁴⁴ See *infra* note 338–40 and accompanying text.

²⁴⁵ See *supra* Part I.

²⁴⁶ Brauneis, *supra* note 30, at 8.

²⁴⁷ *Id.*

²⁴⁸ See Machover, *supra* note 100.

²⁴⁹ Furthermore, reading those new contexts into the underlying composition unjustly confers onto the composers the fruits of others’ creative labor. Why should songwriter Bob Dylan be granted property rights over the iconic “All Along the Watchtower” guitar riff that first appears in Jimi Hendrix’s cover version, or songwriter Dolly Parton over Whitney Houston’s divergent, oft-imitated vocal phrasings in her cover of “I Will Always Love You?” Compare BOB DYLAN, *All Along the Watchtower*, on JOHN WESLEY HARDING (Sony Music Entertainment 1970), with JIMI HENDRIX, *All Along the Watchtower*, on ELECTRIC LADYLAND (Sony Music Entertainment 1968); compare DOLLY PARTON, *I Will Always Love You*, on JOLENE (Sony Music Entertainment 1974), with WHITNEY HOUSTON, *I Will Always Love You*, on THE BODYGUARD—ORIGINAL SOUNDTRACK ALBUM (Arista Records 1992). This dynamic exists for any recording of a work, not merely covers. See Fleet, *supra* note 224, at 1278 (remarking that, while the “secondary” contributions of producers, side musicians, and sound engineers are often “viewed as outside the scope of the musical work” for ownership purposes, “primary contributors are allowed to rely on such contributions to prove their infringement claims”). Thus, credited songwriters’ copyrights are permitted to annex the uncredited creative contributions of others. See *id.* In response to this disconnect, some commentators have discussed expanding copyright protection for arrangements, distinct from both the compositions they interpret and the recordings that embody them. See, e.g., John R. Zoesch III, “Discontented Blues”: Jazz Arrangements and the Case for Improvements in Copyright Law, 55 CATH. U. L. REV. 867, 872 (2006); Jeffrey Brandstetter, *The Lone Arranger: Have the Courts Unfairly Singled Out Musical Arrangements by Denying Them Protection as Derivative Works?*, 15 ENT. & SPORTS L. 1, 22 (1997).

infinite arrangement and production choices that could accompany the basic chord progression, structure, and melodic/lyrical material reflected in the average lead sheet.²⁵⁰ By contrast, any single recording of a given composition is “static” and “terminal.”²⁵¹ It can be affected only by creating a new, derivative sound recording, at which point it is of course no longer the same sound recording.

d) A Narrower Definition Is Simply More Manageable

But apart from these more abstract issues, the recent proliferation of infringement claims, jarring verdicts, and industry unrest all suggest that the current expansion of infringement fervor poses more concrete manageability concerns.²⁵² To the extent that judicial economy, predictability, and the reduction of transaction and litigation costs are virtues unto themselves, then resurfacing the doctrinal preeminence of melody may be “the right approach . . . for reasons different than the [creative] ones that legal decision makers have historically given.”²⁵³ Perhaps a more compelling rationale is, simply, simplicity—“sacrific[ing] descriptive accuracy for sheer administrability”²⁵⁴ and predictability.²⁵⁵ Because substantial similarity has always “present[ed] one of the most difficult questions in copyright law,”²⁵⁶ the opportunity to both curb its influence, and stabilize its unsteady application, may be worth sacrificing some ancillary benefits.

²⁵⁰ See Defendants’ Memorandum, *supra* note 175.

²⁵¹ See Machover, *supra* note 100.

²⁵² See Kristelia A. García, *Improving the Quality and Consistency of Copyright Infringement Analysis in Music*, BERKELEY TECH. L.J. (Jan. 24, 2018), <https://bitlj.org/2018/01/improving-the-quality-and-consistency-of-copyright-infringement-analysis-in-music/> [<https://perma.cc/9N6E-JGRF>] (“[R]ecent litigation in the area has seen astronomical verdicts, irreconcilable outcomes, and a propensity toward settlement.”).

²⁵³ Fishman, *supra* note 15, at 1904.

²⁵⁴ *Id.*

²⁵⁵ See Brief Amici Curiae of 19 Intellectual Property Professors in Support of Petitioner Led Zeppelin at 13, *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1134–35 (9th Cir. 2018) (Nos. 16–56057(L), 16–56287), 2019 WL 2996344 (positing that, given the consistent historical judicial focus on melody and lyric, “[t]he author of ‘Taurus’ could not have reasonably expected his copyright to cover more than the notes of the melodic line.”).

²⁵⁶ NIMMER, *supra* note 25, § 13.03[A].

2. Pros: Arguments for an Expanded Definition of “Composition”

Still, what exactly are those ancillary benefits? First, fundamentally, an expanded understanding of the composition mirrors the historical convergence of compositional and recording creative and business practices.²⁵⁷ In addition, an expanded view of the composition could help to allay several inequities exacerbated by the narrow, consensus industry view.

a) A Broader Definition Promotes Fairness

The annals of pop and rock history are brimming with stories of underrecognized creative input—especially surrounding the allocation of songwriting credits.²⁵⁸ In one representative example, Levon Helm, drummer and singer for The Band, described in his autobiography his frustration with the disconnect between his group’s collaborative creative process and its concentrated songwriting credits. “When [our album] came out, we were surprised by some of the songwriting credits. In those days, we didn’t realize [music publishing] was the secret source of the real money in the music business.”²⁵⁹ Helm would famously hold a grudge against the group’s primary credited songwriter, Robbie Robertson, until the two reportedly reconciled at Helm’s deathbed.²⁶⁰ Helm blamed Robertson’s monopolization of songwriting credits, and of the resultant passive income, for condemning his collaborators to the lifetime of

²⁵⁷ See *supra* Part I.

²⁵⁸ See, e.g., Jenny Johnston, *We’re Like a Sad Old Couple . . . Only We Can’t Get Divorced! The Kinks’ Dave Davies on His Toxic, Lifelong Feud with His Brother Ray*, DAILY MAIL (May 12, 2017, 11:58 PM), <https://www.dailymail.co.uk/tvshowbiz/article-4498022/The-Kinks-Dave-Davies-feud-brother-Ray.html> [https://perma.cc/NH6C-SCNU] (quoting the Kinks’ “peeved” lead guitarist Dave Davies discussing his “richer, more overtly successful” older brother Ray, the band’s sole credited songwriter on the majority of its output: “Whether he would care to admit it or not, it was a collaboration of ideas.”).

²⁵⁹ LEVON HELM & STEPHEN DAVIS, *THIS WHEEL’S ON FIRE: LEVON HELM AND THE STORY OF THE BAND 209–10* (Chicago Review Press 2d ed., 2000); see also Lindvall, *supra* note 73.

²⁶⁰ Sean Michaels, *Robbie Robertson Seeks Reconciliation at Levon Helm’s Sickbed*, GUARDIAN (Apr. 19, 2012, 6:14 PM), <https://www.theguardian.com/music/2012/apr/19/robbie-robertson-levon-helm> [https://perma.cc/JWJ8-A8YH].

touring that he believed ultimately contributed to the death of bandmate Rick Danko.²⁶¹

This harsh dynamic is dulled by a culture that defines songwriting, and, by extension, the compositions themselves, more broadly. The kind of arranging, workshopping, and instrumental ingenuity that Helm believed was every bit as foundational to The Band's creative success as Robertson's words and melodies²⁶² are much more likely to be considered compositional contributions today.²⁶³ This allows for the financial rewards of musical creation to be spread in a manner more reflective of overall creative contribution.

b) Greater Accessibility of Songwriter Credit

That approach could pay extra dividends for historically disadvantaged and exploited groups of musicians. The expansion of liability could help curtail, for example, an "American cultural history [that] is full of examples of white artists appropriating the genius of their less privileged black competitors and predecessors."²⁶⁴ Indeed, for all the notoriety generated by *Stairway to Heaven*, Led Zeppelin's problematic knack for ripping off blues artists may ultimately present a better use case for easing plaintiffs' infringement burdens.²⁶⁵

²⁶¹ HELM, *supra* note 259, at 209–10.

²⁶² *See id.*

²⁶³ *See* Sutherland, *supra* note 80. Others have extended this logic beyond uncredited instrumentalists to suggest that ownership in musical works should more readily extend to other classes of music creators, including sound engineers. *See* Andrew Nietes, Note, *Bringing Swirly Music to Life: Why Copyright Law Should Adopt Patent Law Standards for Joint Authorship of Sound Engineers*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1321, 1345 (2019); Fleet, *supra* note 224, at 1275.

²⁶⁴ Alex Sayf Cummings, *The "Blurred Lines" of Music and Copyright: Part One*, OUPBLOG (Apr. 28, 2015), <https://blog.oup.com/2015/04/blurred-lines-copyright-part-one/> [<https://perma.cc/59CB-CJWA>]; *see generally* Toni Lester, *Blurred Lines—Where Copyright Ends and Cultural Appropriation Begins—the Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217 (2014) (tracing a long, profitable history of white artists appropriating black art, and offering musicological perspectives on how "Blurred Lines" fits that pattern).

²⁶⁵ *See* Stereo Williams, *Led Zeppelin's Controversial Legacy: Thievery, Underage Groupies and the 'Mud-Shark Incident'*, DAILY BEAST (Jan. 16, 2019, 1:33 PM), <https://www.thedailybeast.com/led-zeppelins-controversial-legacy-thievery-underage-groupies-and-the-mud-shark-incident?ref=author?ref=author> [<https://perma.cc/D95Z->

Additionally, popular songwriting and production are notoriously male-dominated fields,²⁶⁶ with women of color especially underrepresented.²⁶⁷ A culture of more inclusive crediting may facilitate equity along gender and racial dimensions. It is worth noting, however, that these disparities exist even as the twenty-first century, with its catchall crediting culture, enters its third decade²⁶⁸; clearly, crediting more contributors as songwriters is not a complete remedy, particularly when the classes of creatives enjoying newfound access to songwriter credits are themselves disproportionately male and white.²⁶⁹

c) Rightsholders Can License Around the New Reality

Meanwhile, beneath the ongoing debate, it is possible that a natural compromise is already surfacing: risk-averse rightsholders, recognizing the increased incidence of litigation in marginal cases,

BEH2]; Paul Resnikoff, *Robert Plant and Jimmy Page Openly Admit to Stealing Music*, DIGITAL MUSIC NEWS (Apr. 19, 2016), <https://www.digitalmusicnews.com/2016/04/19/robert-plant-and-jimmy-page-blatantly-admit-to-stealing-their-music-led-zeppelin/> (non-archivable website).

²⁶⁶ See Ben Sisario, *Gender Diversity in the Music Industry? The Numbers Are Grim*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/arts/music/music-industry-gender-study-women-artists-producers.html> [<https://perma.cc/2DMP-BFR2>]; Gil Kaufman, *2020 Songwriters Hall of Fame Inductees Revealed*, BILLBOARD (Jan. 16, 2020), <https://www.billboard.com/articles/columns/pop/8548194/2020-songwriters-hall-of-fame-inductees> [<https://perma.cc/TL5F-94P4>].

²⁶⁷ See Nicole Pajer, *New Report Shows Major Lack of Representation by Women in the Music Industry*, BILLBOARD (Jan. 25, 2018), <https://www.billboard.com/articles/news/8096196/new-report-shows-major-lack-representation-women-music-industry> [<https://perma.cc/3L96-HBH8>]. For a cross-section showing under-representation along race/ethnicity lines in one music-heavy locality, see *The Austin Music Census*, AUSTINTEXAS.GOV (June 1, 2015) https://www.austintexas.gov/sites/default/files/files/Austin_Music_Census_Interactive_PDF_53115.pdf [<https://perma.cc/PZ9W-ABAQ>].

²⁶⁸ Recent reporting suggests that only very incremental progress has been made. See Tatiana Cirisano, *'Starting to See Change': USC Annenberg Study Finds Small Shift Toward a More Inclusive Music Industry*, BILLBOARD (Jan. 21, 2020), <https://www.billboard.com/articles/business/8548504/usc-annenberg-study-inclusion-women-industry-gender-gap> [<https://perma.cc/5KF3-MYH6>].

²⁶⁹ See, e.g., Naomi Larsson, *Live Music Acts Are Mostly Male-Only. What's Holding Women Back?*, GUARDIAN (Oct. 12, 2017, 1:00 AM), <https://www.theguardian.com/inequality/2017/oct/12/tonights-live-music-acts-will-mostly-be-male-only-whats-holding-women-back> [<https://perma.cc/REY5-H96Z>]; *Racial / Ethnic and Gender Diversity in the Orchestra Field*, LEAGUE OF AMERICAN ORCHESTRAS (Sept. 2016), <http://www.ppv.issuelab.org/resources/25840/25840.pdf> [<https://perma.cc/678V-ZN4N>].

have begun preemptively seeking interpolation licenses. The fear felt among creators is also being felt by their representatives. Indeed, when Miguel warned about “standing on the shoulders of giants,”²⁷⁰ it was in the context of explaining his team’s decision to proactively seek to license an old Smashing Pumpkins song they had determined Miguel’s new work resembled.²⁷¹ “Everyone is being a little more cautious,” an executive told *Billboard*.²⁷² “Nobody wants to be involved in a lawsuit.”²⁷³ So far, predictions in the immediate aftermath of *Blurred Lines* that “we are more likely to see preemptive writing credits given to original composers whose works are allegedly infringed” appear to have been prophetic.²⁷⁴ This pragmatic, risk-averse response may mitigate any chilling effect on composers’ creativity by lessening their exposure to potential infringement liability.

B. Pros and Cons of Unrestricted Sound Recording Use in Composition Infringement Trials

Sound recordings play an uneasy role in the debate over what falls under the “composition” banner. Proponents of the broader definition may look more favorably upon the evidentiary use of sound recordings, since they encourage a jury to evaluate everything (protected and unprotected). Proponents of narrower protection may look less favorably upon the evidentiary use of sound recordings for the same reason: recordings convey more than these

²⁷⁰ See Miguel, *supra* note 233.

²⁷¹ Kyle Anderson, *Billy Corgan Explains His Miguel Writing Credit for ‘Leaves’*, ENTERTAINMENT WEEKLY (July 22, 2015, 9:27 PM), <https://ew.com/article/2015/07/22/billy-corgan-explains-miguel-leaves-writing-credit/> [<https://perma.cc/V4UP-KR89>].

²⁷² Ed Christman, *‘Uptown Funk!’ Gains More Writers After Gap Band’s Legal Claim*, BILLBOARD (May 1, 2015, 12:21 AM), <https://www.billboard.com/articles/news/6553522/uptown-funk-gains-more-writers-after-gap-bands-legal-claim> [<https://perma.cc/VWY4-PWSC>]; see also Lynskey, *supra* note 83 (musing that one cause of the proliferation of credited songwriters per work “can be found in lawyers’ offices”).

²⁷³ *Id.*

²⁷⁴ Megan Coane & Maximillian Verrelli, *Blurring Lines? The Practical Implications of Williams v. Bridgeport Music*, AM. BAR. ASS’N. (Jan. 2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/blurring_lines_the_practical_implications_of_williams_v_bridgeport_music/ [<https://perma.cc/WU52-YKEZ>]. The prediction that there would be “fewer lawsuits overall in response to this dangerous precedent” appears to have been less accurate. See *id.*

proponents wish the jury to hear. But in reality, the use of sound recordings is a discrete issue from the scope of a composition. Sound recordings will always contain non-compositional elements. Thus, the evidentiary calculus boils down to any individual sound recording's usefulness, compared to the inherent risks of exposing jurors to the unprotected material it communicates.

1. Pros: Arguments for the Unrestricted Use of Sound Recordings in Composition Infringement Trials

The realities of the modern music industry loom large over this discussion, and recent history tends to weigh in favor of the evidentiary use of recordings in composition infringement trials. Increasingly, popular composition happens *through* the recording process, not prior to it, with songwriters, producers, and artists (indeed, the same person often occupies multiple of these titles) “creating, manipulating, and sending digital music files back and forth . . . to create a composition that is purely aural and digital.”²⁷⁵

- a) Unrestricted Sound Recording Use Reflects Evolving Creative Practices

As a result of this convergence, the most honest and contemporaneous manifestation of a composition is often the sound recording that was created as a part of the compositional process.²⁷⁶ Written reductions of the work are increasingly simplistic, retroactive reconstructions of a pre-existing sound recording.²⁷⁷ There are also substantive compositional achievements that can only be achieved through the recording process. Sound recordings, in modern practice, have become a frontier for creativity; rather than striving to faithfully and transparently capture performances verbatim, recordings have “become a focus of creative effort and [a] unit of creative production in [their] own right.”²⁷⁸ From the opening chord of “A Hard Day’s Night,” to “the use of compressors and noise gates to create the 1980s gated drum sound,” to the millennial repurposing of Auto-Tune as a creative apparatus, core achievements that are

²⁷⁵ See Social Justice, *supra* note 66, at 36.

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See Brauneis, *supra* note 30, at 24–25.

central to the audience's perception of the composition are increasingly native to recording technology.²⁷⁹ Thus, as composition and sound recording become more intertwined, it becomes less plausible, and less useful, to separate them at trial.

b) The Limitations and Drawbacks of Written Reductions²⁸⁰

Even setting aside these new creative frontiers, one need not search long in order to uncover the many drawbacks of reliance on written reductions of musical compositions, particularly in the popular music context. At its best, “[w]estern notation deals poorly with certain aspects of musical expression, like dynamics, attack, and timbre . . . which are necessarily approximate and suggestive, rather than precise and prescriptive.”²⁸¹ Plus, to be sure, written reductions of pop music rarely enjoy the best of western notation practices. Because such a miniscule percentage of musical works are ever embroiled in infringement proceedings, the primary purpose for which lead sheets are prepared is to serve as commercial charts which are distributed for use by consumer instrumentalists.²⁸² Unsurprisingly, these reductions are rarely prepared with the due care that their composer, let alone their composer's attorney, would wish for a potentially load-bearing legal document.²⁸³

²⁷⁹ *See id.* at 20–21, 27–28.

²⁸⁰ The policy considerations discussed in Part III are largely similar for both pre- and post-1978 works. This is one exception. The influence of written reductions is greater for pre-1978 works because of the bureaucratic requirement that their deposit copies be visually notated. *See supra* Part II.C.3. This cuts both ways: the inherent drawbacks to written reductions loom larger for the pre-1978 works compelled to rely on them, but so too do the predictability and clarity rationales for tying protectability to a single, federally anointed written iteration of the work. *See generally* United States, *supra* note 127. Allowing sound recordings to serve as deposit copies softens these drawbacks, but also sacrifices some of that clarity; it ratifies the basic tension inherent to using a sound recording as an inexact facsimile of the composition copyright it embodies. *See infra* notes 308–25 and accompanying text.

²⁸¹ Brauneis, *supra* note 30, at 10 (quoting MICHAEL CHANAN, *MUSICA PRACTICA* 5–6 (1994)).

²⁸² *See Baker, supra* note 115, at 1599.

²⁸³ *See id.* (“The information which has been left out may in fact be of such importance to the song itself that a finding of infringement would not occur if a different reduction of the music was used.”).

Additionally, because so many songwriters are not literate in formal European musical notation (or choose to compose in other formats), many written reductions that are used as deposit copies are merely rough transcriptions of recordings of the composition, jotted down at some point by an industry scribe.²⁸⁴ Thus, “[t]he result might or might not accurately represent the actual melody and chords composed, and might include or omit other important, original elements of the composition.”²⁸⁵

Written reductions also fail to do justice to the way in which music is actually experienced by listeners. “Most listeners do not break down musical compositions into their significant formal elements as they listen.”²⁸⁶ Only through experiencing a performance that ties together the separate elements can an audience access music’s “unique relational system” allowing for a “meaningful experience.”²⁸⁷ This is especially significant for juries tasked with evaluating the “total concept and feel” of two works.²⁸⁸

Reliance on notated music also spawns an inequitable system where protection may hinge on the composer’s fluency in European staff notation. “[This] disfavors those outside that particular music tradition.”²⁸⁹ In fact, the inability to read or write traditional European music notation is a trait shared by many of the most successful popular artists in history.²⁹⁰ More insidiously, classes of creators disproportionately disadvantaged by this formal standard include black musicians, other musicians of color, musicians from underprivileged backgrounds with less access to classical music

²⁸⁴ See Social Justice, *supra* note 66, at 16–17.

²⁸⁵ *Id.* at 17.

²⁸⁶ David May, Note, “So Long As Time Is Music”: *When Musical Compositions Are Substantially Similar*, 60 S. CAL. L. REV. 785, 795 (1987).

²⁸⁷ *Id.*

²⁸⁸ See Jenkins, *supra* note 7.

²⁸⁹ Social Justice, *supra* note 66, at 41–42, 55.

²⁹⁰ See, e.g., 7 Famous Musicians—Who Can’t Read Music, MUSIC STUDIO (Nov. 8, 2017), <https://www.themusicstudio.ca/blog/2017/11/909/> [<https://perma.cc/N7SS-W6CN>]. Notably, Marvin Gaye was another member of that club. See Social Justice, *supra* note 66, at 40–41 (“If Gershwin could notate for old-fashioned car squeeze bulb horns . . . why could Gaye not also enjoy protection for . . . cowbells and background voices?”).

education, and musicians from traditions where playing “by ear” is common.²⁹¹

Furthermore, beyond the *musical* accuracy issues discussed herein, copyright *ownership* inaccuracies have also resulted from the removal of the actual composer from the registration process. “[M]any marginalized composers, especially those of color and outside . . . the European staff notation tradition” were exploited in the twentieth century by gatekeepers who would either omit the true composer from the registration altogether, or fabricate phantom co-authors to cut into the true author’s ownership interest in the work.²⁹² By imposing fewer restrictions on the evidentiary use of sound recordings, courts can reduce copyright’s overall reliance on written reductions of compositions, and thus alleviate these problematic symptoms.²⁹³

c) Expert Methodology

The Federal Rules of Evidence’s treatment of expert testimony provides additional support for fewer restrictions on the use of sound recordings in composition infringement trials. Expert musicologists are trained in the study and theory of music, an aural medium. To strip them of the right to offer testimony evaluating musical expression in its native medium—sound recordings—is to deprive them, in the words of Rule 703, of the primary “facts or data”

²⁹¹ See Social Justice, *supra* note 66, at 17–18; Brief Amicus Curiae of the Professor Sean M. O’Connor and Institute for Intellectual Property and Social Justice (IIPSI) in Support of Plaintiff-Appellant at 29, *Skidmore v. Led Zeppelin*, 925 F.3d 999 (9th Cir. 2019) (Nos. 16–56057, 16–56287), 2019 WL 2996343 (identifying “inherently American music art forms such as jazz, country, bluegrass, R&B, and rock and roll” as traditions where many “first rank” composers did not write in European notation: “[t]heir compositions lived and breathed” on record).

²⁹² Social Justice, *supra* note 66, at 16–17. See K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 368 (1999) (documenting a systemic and “pervasive history of infringement” of works by black creators).

²⁹³ For a contrary view defending the continued reliance on written notation, see Cronin, *supra* note 34, at 227–28 (advocating limiting protection to the “long-established view” equating compositional protection to “melody, harmony, and rhythm” as indicated in written musical notation: “Musicians who assemble works . . . from sequences of recorded sounds cannot access the space, or long-range perspective, of visual representations that enable the creation of more musically complex works.”).

that members of the musicology field “reasonably rely on” both inside and outside of litigation.²⁹⁴ In other words, depriving musicologists of the ability to rely upon the precise medium that is so central to their expertise counteracts a major policy aim underlying evidentiary expert testimony rules: to replicate extrajudicial methodology in judicial contexts.²⁹⁵

Furthermore, expert musicologists comprise a significant expense for all litigants—an extra tax atop the other costs and uncertainties inherent to litigating these types of cases.²⁹⁶ Every restriction on the use of sound recordings, or content contained therein, erects an additional hurdle that requires additional musical manipulation. For every sound recording that is barred from the courtroom, another aural representation of the work, presumably either prepared or performed by the musicologist, must take its place. This, in turn, further increases both the parties’ reliance on their expensive experts and the experts’ ultimate influence on the outcome of the trial.²⁹⁷

d) Using Sound Recordings Is Just Simpler

Finally, in many ways, the use of sound recordings in composition infringement litigations is simply easier than the alternative. Music is an aural art form, and the experience of consuming a work of music cannot accurately be mimicked via other sensory

²⁹⁴ Fed. R. Evid. 703.

²⁹⁵ Fed. R. Evid. 703 (advisory committee’s note).

²⁹⁶ See Nicholas Vennekotter, Note, *Full Cost in Translation: Awarding Expert Witness Fees in Copyright Litigation*, 87 FORDHAM L. REV. 1721, 1737 (2019).

²⁹⁷ Judicial skepticism surrounding the influence of expert testimony on copyright litigation has a long and storied history. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930) (reasoning that expert testimony “ought not be allowed at all” because it “greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted”). Per Judge Learned Hand, beyond “cumber[ing] the case and tend[ing] to confusion,” expert testimony distracts the jury with “the intricacies of dramatic craftsmanship,” in place of “the firmer, if more naive, ground of [the jury’s] considered impressions upon its own perusal.” *Id.* Some modern scholars have explored the notion of a specialized copyright tribunal, more schooled in music’s formal complexities than today’s courts and juries, and less reliant upon experts. See García, *supra* note 252. This proposal underscores a key point that can be easily misplaced when discussing the drawbacks of lay juries: they apply to lay judges too. See Lund, *supra* note 26, at 173–74.

channels.²⁹⁸ It follows that the surgery of dissecting two works of music, and probing one for similarities to the other, can benefit from being performed within that same format. There is certainly also value to the use of visual formats; but of course, allowing audio comparisons does not preclude other means of comparison.²⁹⁹

Not only is music an aural medium, but it is one that is experienced holistically.³⁰⁰ Listeners do not perceive a musical work as merely the sum of its parts.³⁰¹ To the contrary, their experience flows from “the way in which the musical elements relate to each other.”³⁰² Ham-handed attempts to separate protected wheat from unprotected chaff can endanger the entire crop.

Juries also “tend to give more credence to demonstrations that are easier to understand.”³⁰³ Allowing them access to a medium they are familiar with—recordings—can simplify otherwise complicated proceedings for them.³⁰⁴ Moreover, because it is unreasonable to expect juries to opine on substantial similarity without hearing *some* kind of aural representation of the compositions at issue, any restriction on the recordings that can be used increases the burden on all parties—especially the party with the burden of proof—to contrive less straightforward aural demonstrations in place of readily available recordings.³⁰⁵

²⁹⁸ See Brauneis, *supra* note 30, at 45 (“Courts have frequently noted that music is fundamentally an aural experience and that one has to engage in acts of listening to determine whether two musical works are substantially similar.”).

²⁹⁹ See generally Baker, *supra* note 115, at 1633.

³⁰⁰ See May, *supra* note 286, at 795.

³⁰¹ See *id.* (“Most listeners do not break down musical compositions into their significant formal elements as they listen.”).

³⁰² *Id.*

³⁰³ Baker, *supra* note 115, at 1612.

³⁰⁴ Musicologists’ visual demonstrations can be particularly challenging for lay jurors to follow. See *id.* at 1608–14.

³⁰⁵ See Plaintiffs’ Objection and Companion Memorandum of Law in Opposition to Defendants’ First Motion in Limine and Memorandum of Law in Support of Their First Motion in Limine, Griffin v. Sheeran, No. 1:17–CV–05221 (S.D.N.Y. May 31, 2019), 2019 WL 2604573 (“To suggest that [not] playing the sound recording is likely to result in *less* confusion for a jury is, in a word, absurd.”) (emphasis added).

2. Cons: Arguments for More Restricted Use of Sound Recordings in Composition Infringement Trials

On the other hand, the danger posed by making things procedurally easier for lay jurors is that this may then spur their natural predisposition to misconstrue recordings—which are “intended only as a vehicle for presenting evidence of the underlying musical composition”—as equivalent to their underlying compositions.³⁰⁶

a) Practical Difficulties

For all the “ordinary,” “reasonable” language embedded in prevailing substantial similarity standards,³⁰⁷ attempting to aurally and contemporaneously pluck *only* protected, compositional elements from a recording is anything but “ordinary.” Sound recordings inevitably “invite[] the juror to make the wrong comparison by comparing the sound recordings rather than the compositional elements underlying each recording.”³⁰⁸ Recordings are simply not honest brokers of the compositions they embody. A recording is just as likely to resemble another recording that embodies an entirely different composition³⁰⁹ as it is to *differ* from a separate recording of the exact *same* composition.³¹⁰ The resultant risks to judicial fairness read directly out of Rule 403: “unfair prejudice, confusing the issues, misleading the jury.”³¹¹

³⁰⁶ See Lund, *supra* note 26, at 148–49.

³⁰⁷ See *supra* Part II.C.1.

³⁰⁸ Lund, *supra* note 26, at 149.

³⁰⁹ See, e.g., Tyler Cooper, *This Is How You Remind Me of Someday*, YOUTUBE (Jan. 10, 2009), <https://www.youtube.com/watch?v=pvujgcbCF8> [<https://perma.cc/4DWB-NDZV>].

³¹⁰ Compare Vintage.TV, *Don't Think Twice It's All Right—Bob Dylan*, YOUTUBE (June 27, 2014), <https://www.youtube.com/watch?v=u-Y3KfJs6T0> [<https://perma.cc/PXC5-GWGZ>], with Xenia, *Don't Think Twice, It's All Right—Keshha (Bob Dylan Tribute)*, YOUTUBE (Dec. 10, 2011), <https://www.youtube.com/watch?v=mNCEV7ZSNFo> [<https://perma.cc/R3U5-Q3ME>], and Siegfried Deniz, *Frankie Valli & 4 Seasons 10 Don't Think Twice, It's Alright*, YOUTUBE (June 29, 2013), <https://www.youtube.com/watch?v=KerQKsX0zlw> [<https://perma.cc/SW6P-4MCQ>].

³¹¹ Fed. R. Evid. 403.

b) Jury Confusion

Lay juries are “notoriously ill-suited” to the complexities of musical similarity analysis.³¹² Many commentators have speculated that the *Blurred Lines* jurors, in spite of the district court’s formal restrictions, were swayed by the two recordings’ stylistic similarities.³¹³ More generally, there is significant cause to be skeptical about jurors’ ability to parse composition from recording. When pop records resemble one another to the average listener, it is often due to production similarities.³¹⁴ “Melody often doesn’t do anywhere near as much of the lay listener’s heavy lifting as copyright traditionally assumes.”³¹⁵ Ultimately, listeners’ ears tend to gravitate

³¹² García, *supra* note 252; see also Gabriel A. Radvansky et al., *Timbre Reliance in Nonmusicians’ and Musicians’ Memory for Melodies*, 13 MUSIC PERCEPTION: AN INTERDISC. J. 127, 127–28 (1995) (discussing nonmusicians’ relative inability, compared with musicians, to focus on specific musical features, disaggregate musical elements from one another, and “structure their mental representation” of music).

³¹³ See, e.g., Lattanza, *supra* note 238, at 725 (“[T]he jury most likely found similarities based on the ‘mash-up’ recording of the songs, which . . . contained unprotectable elements.”); Madison, *supra* note 7, at 193 (2019) (“What makes the recordings of ‘Got to Give It Up’ and ‘Blurred Lines’ sound similar to some listeners is that they have stylistic similarities.”); Jenkins, *supra* note 7 (arguing that “it is very difficult to compare ‘total concept and feel’ without erroneously taking into account all of the unprotectable elements” present in the “Got to Give It Up” recording, including stylistic elements Gaye may have “copied directly from his Motown, funk, or disco predecessors,” basic chord progressions, and other “scènes à faire”). The Ninth Circuit itself expressed this concern at oral argument. Oral Argument, *supra* note 184 (expressing the eventually dissenting Judge Nguyen’s concern that exposure to unprotected recorded elements might “unduly sway the jurors”).

³¹⁴ See Fishman, *supra* note 15, at 1903.

³¹⁵ *Id.*; see Carys Craig & Guillaume Laroche, *Out of Tune: Why Copyright Law Needs Music Lessons*, in INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 43, 58 (B. Courtney Doagoo et al. eds., 2014) (“Our ears are biologically hardwired to believe two violin melodies are more alike than two melodies for two different instruments.”); Rita S. Wolpert, *Recognition of Melody, Harmonic Accompaniment, and Instrumentation: Musicians vs. Nonmusicians*, 8 MUSIC PERCEPTION 95 (1990) (reporting the results of an empirical study wherein the vast majority of subjects without musical training “chose instrumentation over melody and harmonic accompaniment as the salient cue for recognition.”). *But see* Lindsey R. Williams, *Effect of Music Training and Musical Complexity on Focus of Attention to Melody or Harmony*, 53 J. RES. MUSIC EDUC. 210, 216–17 (2005) (showing, empirically, that melody disproportionately attracts the attention of less musically educated listeners, relative to harmony); Caroline Palmer, *Listening, Imagining, Performing: Melody As a Life Cycle of Musical Thought*, 33 MUSIC PERCEPTION: AN INTERDISC. J. 3, 9 (2015) (describing melody, in a neuroscience context, as the “primary voice that grabs listeners’ attention”); Gino Stefani, *Melody: A Popular*

more towards the “sound-character” of a recording than to its embedded compositional elements.³¹⁶ Crucially, once the jury has attached “undue weight to irrelevant similarities between the recordings . . . [t]he proverbial bell cannot be un-rung.”³¹⁷

c) Jury Manipulation

Beyond the passive inevitability of jury confusion, the risk of deliberate jury manipulation by musicologists also warrants monitoring. There is nothing particularly sinister about this manipulation; experts, like attorneys, are retained to rhetorically position their client’s case in the most favorable light. But, uniquely, the musicologist is often the only party in the room fluent in their subject matter.³¹⁸ This dynamic presents special dangers, which in turn warrant more vigilant oversight.³¹⁹

A skilled musicologist can mold many dimensions of a recording in order to maximize, or minimize, its similarities to another

Perspective, 6 POPULAR MUSIC 21 (1987) (noting that melody is the singular “dimension of music which everyone can easily appropriate in many ways: with the voice by singing, whistling or putting words to it; with the body by dancing, marching, etc.”).

³¹⁶ See David Horn, *Some Thoughts on the Work in Popular Music*, in THE MUSICAL WORK: REALITY OR INVENTION? 14, 25 (Michael Talbot ed., 2000).

³¹⁷ Defendants’ Reply Memorandum of Law in Further Support of their First Motion in Limine, *Griffin v. Sheeran*, No.1:17-CV-05221 (S.D.N.Y. June 7, 2019), 2019 WL 3362228. Although courts may attempt to mitigate these concerns with limiting instructions (*see supra* note 207 and accompanying text), both the subject-matter-specific and broader legal literature are replete with skepticism as to whether these instructions have any meaningful effect. See, e.g., Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 126 (2013) (“On the whole, there is consensus that ‘when people attempt to ignore inadmissible information of which they are aware in making decisions or arriving at judgments . . . they frequently will be unsuccessful.’”) (quoting Chris Guthrie et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1262 (2005)); Fleet, *supra* note 224, at 1279 n.211 (“The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.”) (quoting *Krulwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

³¹⁸ See Musicians, *supra* note 135, at 12–13 (“Musicologists speak a language that is often foreign to judges (and juries).”).

³¹⁹ *Contra supra* notes 296–97 and accompanying text.

work: tempo, key, pitch, arrangement, mixing effects, etc.³²⁰ Vintage matters too: recordings from disparate eras evince sonic differences that can allow a musicologist to mask compositional similarities, and vice versa.³²¹ The same holds true for instrumentation.³²² Critically, the jury “does not have the required education to evaluate the relative reliability” of these tactics.³²³

The manipulation risks are especially pronounced for mash-ups. For example, the Gaye estate’s mash-up in *Blurred Lines* “sounds as if the melody to ‘Blurred Lines’ seamlessly floats over the top of the accompaniment to ‘Got to Give It Up.’”³²⁴ While “[t]o a music theorist, the mash-up sounds grindingly dissonant,” such technical critiques might be lost on a lay listener enraptured by mere alignment.³²⁵ Indeed, musicologists themselves harbor significant doubts regarding the general legitimacy of mash-ups as evidence.³²⁶ Without rigorous judicial oversight, there is no check on the potential influence they can wield with recordings at trial.

IV. THE WAY YOU MOVE: INTRODUCING THE “TRIAD” APPROACH

Seeking to respect the historical trends discussed in Parts I and II, and to properly calibrate the policy arguments explored in Part

³²⁰ See Baker, *supra* note 115, at 1587 (describing musicologist testimony as “typically designed to obscure or highlight similarities, and to divert the jury’s attention from more reliable music interpretations”).

³²¹ See *id.* at 1610.

³²² *Id.* (illustrating that a modern recording of the London Symphony Orchestra, set against a “little 18-piece ensemble in 1953 with very crude performing technology” can create the impression of “apples to oranges” even when the underlying compositions are “apples to apples”).

³²³ *Id.* at 1587.

³²⁴ Madison, *supra* note 7, at 193.

³²⁵ See *id.* Experts often offer dueling mash-ups, with a typical plaintiffs’ mash-up designed to emphasize the similarities between the two works at issue, and the typical defendants’ mash-up designed to “illustrate that any similarities between the works at issue can [also] be detected in other modern, pop songs performed in the same meter.” See, e.g., *Cottrill v. Spears*, No. CIV.A. 02–3646, 2003 WL 21223846, at *9 (E.D. Pa. May 22, 2003), *aff’d*, 87 F. App’x 803 (3d Cir. 2004), *as amended on reh’g* (June 2, 2004).

³²⁶ See, e.g., Colorado Law, *Colorado Law Live Stream*, YOUTUBE (Mar. 5, 2020), at time stamp 1:27:27, <http://www.youtube.com/watch?v=6-WIVS4DnpY&t=87m27s> [<https://perma.cc/Y7PW-AWYY>] (Musicologists Dr. Alex Stewart and Dr. Sandy Wilbur responding to the author’s question regarding the use of mash-ups as evidence).

III, this Note argues for more stringent judicial monitoring of the use of sound recordings in copyright infringement trials. As the recent leading cases show, the real-world implications of these evidentiary decisions are as functionally important as the doctrine developed along the way.³²⁷ To that end, this Note’s proposal explicitly links the doctrinal to the evidentiary—it ties the formal to the functional.³²⁸

For the same reasons, this Note also advocates de-emphasizing evidentiary reliance upon strict categories of protectable and unprotectable elements within specific compositions.³²⁹ Irrespective of the abstract wisdom of these categories, in reality, the mingling of composition and recording creativity—particularly in the presence of compilation claims³³⁰—has gelded the “filtering out” process.³³¹ This makes it difficult for the protectability issue to have a meaningful real-world impact on evidentiary decisions. As demonstrated in *Blurred Lines*, the current approach allows courts, where protectability is disputed, to leave its resolution to the jury, and thus err on the side of the jury hearing more rather than less.³³² The circularity of this model carries an inherent risk, as explained above: jurors cannot unhear what they have already heard.³³³

Instead, this Note advocates acknowledging the ongoing sunset of meaningful bright-line protectability rules, and instead encourages courts to impose a sliding-scale, fact-specific compositionality determination to allocate the relative burdens placed on each party for evidentiary offerings.³³⁴ The three steps of the

³²⁷ See *supra* Part II.D.

³²⁸ For a non-evidentiary proposal, see Professors, *supra* note 255, at 1, 19–25 (proposing imposing a “virtual identity” similarity requirement for claims that involve compilations of unprotectable elements).

³²⁹ See *supra* Part II.A.

³³⁰ See *supra* Part II.B.1.

³³¹ See *supra* Part II.C.2.

³³² See *supra* notes 165, 181–82 and accompanying text.

³³³ See Defendants’ Reply, *supra* note 317 and accompanying text; *supra* Part III.B.2.

³³⁴ See *supra* Part II.A. For a discussion on how burdens typically operate in copyright infringement cases, see Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 632 (2019). Importantly, this Note does not advocate a wholesale rejection of formal protectability, which remains useful for ensuring that certain elements correctly remain in the public domain, in spite of their compositional nature. See *supra* notes 115, 121 and

proposed “Triad”³³⁵ judicial approach, for any given contested recorded element, are: (1) to what extent is the recorded element in question compositional in nature, or to what extent does the full recording in question contain non-compositional elements? This inquiry, in turn, determines the relative burdens placed on each party in the later steps; (2) in what ways is the given recording, or recorded element, probative of the composition that is alleged to have been infringed; and (3) in what ways could the recording, or recorded element, be prejudicial, confusing, or misleading for a jury’s substantial similarity analysis?

Like Rule 403, Steps Two and Three of the Triad approach undertake an express evaluation of the probative value versus the prejudicial risks of the putative evidence. However, unlike Rule 403, which calls for relevant evidence to be admitted unless the probative value is “substantially outweighed” by prejudice, confusion, or delay, the Triad approach contemplates a more flexible burden.³³⁶

A. Triad Step One: “Compositionality” Spectrum

In Step One of the Triad approach, courts consider the extent to which a recorded element is compositional in nature. The more compositional the element, the less onerous the burden faced by the proponent of the evidence to get that element admitted. Conversely, the less compositional the recorded element, the greater its proponent’s burden becomes to admit that element into evidence.

An array of non-dispositive factors may be relevant to determining where on the compositionality spectrum an element falls. These include: (1) the manner of musical contribution at issue (melody, harmony, performance, timbre, arrangement, production, mixing, etc.); (2) whether the parties subjectively considered these contributions to be compositional; (3) the extent to which this kind of contribution is typically considered to be compositional; (4) the

accompanying text; Fishman, *supra* note 231, at 1381 (“A maximalist copyright law shorn of . . . the *scènes à faire* doctrine, and other safeguards for borrowing and quotation would cast a long shadow not just over what society creates but also how society creates.”).

³³⁵ The triad, “a chord made up of three tones . . . [,] is the basis of tonal harmony in music.” *Triad*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/art/triad-music> [<https://perma.cc/79XV-UDYN>].

³³⁶ Fed. R. Evid. 403.

presence, or absence, of this element in other iterations of the work, including demos, live performances, covers, and written reductions (deposited and otherwise);³³⁷ (5) the identity of the parties that made the contribution, and whether they are credited as songwriters; (6) the work's overall compositional process and chronology; and (7) the process and chronology through which the element at issue was added to the recording, and how that process and chronology interacted with the compositional process and chronology. In addition to this non-exhaustive list, judges may consider whether any policy implications like those discussed in Part III—particularly social justice considerations such as the presence of racial appropriation or pilfering—weigh in favor of compositionality.

Excerpts from Ed Sheeran's *Thinking Out Loud* deposition provide a useful illustration of several of the compositionality elements.³³⁸ Sheeran describes the initial songwriting process undertaken with co-writer Amy Wadge, and distinguishes their compositional creations conceived during a songwriting session at his house from production elements added later by producer Jake Gosling during a studio session.³³⁹ Sheeran remarks that “the song itself is a guitar and a vocal. . . . [I]f you put bass or drums or piano on it, that was [Gosling's] production . . . not songwriting.”³⁴⁰

Sheeran's testimony speaks directly to factor (2)—a party's subjective understanding that the drums and bass were not compositional—as well as factor (5)—the identity and status of the contributor (in this case the drums and bass were conceived by Gosling, who is *not* one of the two credited songwriters on “Thinking Out Loud”).³⁴¹ It also lays the chronological foundations relevant to factors (6) and (7).³⁴² The demo recording from Sheeran and

³³⁷ Importantly, factors (3) and (4) are the only two that invite expert testimony. The others are primarily factual inquiries. The Triad method thus carries the benefit of reducing experts' influence on the outcome, as well as on the parties' expert-related expenses. See *supra* notes 296–97 and accompanying text.

³³⁸ Exhibit 9, Griffin v. Sheeran, No. 1:17-CV-05221 (S.D.N.Y. July 27, 2018), ECF No. 67–9.

³³⁹ *Id.* at 6–7 (answering “yes” to this question: “To your understanding, [after the writing session] you had written the song and the song was complete?”).

³⁴⁰ *Id.* at 7.

³⁴¹ See Griffin v. Sheeran, 351 F. Supp. 3d 492, 494 (S.D.N.Y. 2019).

³⁴² Exhibit 9, *supra* note 338, at 6–8.

Wadge's initial writing session would also be relevant to factor (4).³⁴³ Taken together, these factors suggest that the drums and bass are not particularly compositional. Under the Triad approach, then, were the "Thinking Out Loud" writers to allege infringement against creators of a future work, they would have to satisfy a higher probative burden (Step Two) to introduce recordings that included Gosling's drums and bass, and their opponents would face a lower prejudicial burden (Step Three) to preclude those recorded elements.

The Triad approach's sliding-scale compositionality inquiry begins with a *rebuttable* presumption that, absent a showing of other factors, limits the composition to the narrow, songwriter-consensus, melody-centric view. This presumption vindicates music's "building block" nature,³⁴⁴ and facilitates new creativity by promoting simplicity, predictability and stability³⁴⁵—and also by quelling creators' anxieties³⁴⁶ surrounding the copyrightability of grooves, genres, and other core musical ideas.³⁴⁷ At the same time, by allowing this presumption to be rebutted by a number of non-dispositive factors, the Triad approach's attempted compromise respects the reality that in many contexts, composition and recording are becoming inherently more difficult to separate.³⁴⁸ It also affords courts the flexibility to counteract the exclusionary injustices that can occur as side-effects of the narrower view of compositionality.³⁴⁹ Fundamentally, this middle-ground approach allows judges, on a case-by-case basis, to link any of the policy arguments surrounding compositionality directly and explicitly to the evidentiary decisions that so often shape these verdicts.³⁵⁰

³⁴³ See Exhibit 6, *supra* note 214.

³⁴⁴ See *supra* note 237 and accompanying text.

³⁴⁵ See *supra* notes 253–55 and accompanying text.

³⁴⁶ See *supra* notes 230–39 and accompanying text.

³⁴⁷ See *supra* notes 240–42 and accompanying text. In this way, it operates similarly to limiting scope of copyright to a written deposit copy, but with the added benefit of applying meaningfully to post-1978 works. See *supra* note 280.

³⁴⁸ See *supra* Part I.

³⁴⁹ See *supra* notes 259–69 and accompanying text.

³⁵⁰ See *supra* Part II.D.

B. Triad Steps Two and Three: Probative v. Prejudicial Burdens

The subsequent evidentiary steps for contested recordings/recorded elements echo a traditional Rule 403 analysis,³⁵¹ differing only in the variable burden that they impose upon the parties, as determined in Step One's compositionality inquiry. The less compositional the element, the greater the showing of probative value (Step Two) necessary to achieve admission of the recorded element. The more compositional the element, the greater the showing of prejudicial risk (Step Three) necessary to *preclude* admission of the recorded element.

To illustrate: Marvin Gaye's vocal performance of a melody encompasses two traditionally compositional elements—a work's central melody, and its accompanying lyrics. However, it also bundles performance elements that are not traditionally compositional: vocal performance techniques, tone, timbre, and vocal production. Under the Triad approach, a party seeking to preclude admission of Marvin Gaye's vocal performance of vocal melody and lyrics—elements that are highly compositional³⁵²—would have to show a higher risk of prejudice (presumably posed by the bundled, minimally compositional vocal performance and production elements) than, for example, a party seeking to preclude elements that are presumptively less compositional, such as a production vocal reverb or guitar distortion.

Additionally, under Step Three, where there is a risk of prejudicial effect, courts may look to whether there are less prejudicial means of conveying the same probative information. This allows courts to consider the ease with which an element could be re-recorded, re-edited, re-mixed, performed live to the jury, or conveyed via other similarly probative means less obscured by unprotected similarities (or, conversely, by irrelevant dissimilarities that unduly distract from compositional similarity).³⁵³

³⁵¹ See *supra* Part II.C.3.

³⁵² See Fishman, *supra* note 15, at 1872.

³⁵³ This also provides an avenue for courts to factor in the influence, and expense, wielded by experts. See *supra* notes 296–97 and accompanying text. Together, these benefits should outweigh the costs associated with any additional procedural complexity that the Triad approach may inject into pretrial (e.g. more intricate motions in limine, or

The furthering, under Steps Two and Three, of the middle ground approach established in Step One allows courts to embrace the ethos of Rule 403: striving to maximize factfinders' access to helpful information, while minimizing their exposure to risky inputs. Importantly, though, this approach also allows courts to factor other policy arguments into the risks and rewards of admitting a given recorded element.³⁵⁴

Those risks and rewards will inevitably vary based on the facts of a specific case. In some instances, for example, the limitations of written reductions will be so overwhelming, or so unjust, that an overwhelming risk of jury confusion or manipulation associated with a recording should be deemed necessary to trump its probative value, and keep the recording out of evidence.³⁵⁵ Similarly, in some cases, it may be so practically impossible to convey to the jury a composition divorced from its recording,³⁵⁶ that a showing of prejudicial risk should have to be astronomical to defeat any showing of probative value.³⁵⁷ In other cases, it will be so practically simple to isolate and extract a recorded element, with so little an effect on the overall aural experience, that a massive showing of probative value should be necessary to overcome even a modest showing of prejudicial risk.³⁵⁸ Finally, in still other cases, the risks of jury confusion, or manipulation, centering around minimally compositional recorded elements will be so profound that practically no showing of

dueling expert compositionality testimony) or intra-trial proceedings. *See supra* notes 298–305 and accompanying text.

³⁵⁴ *See supra* Part III. The underlying rationale behind the Triad approach is the proposition that, if courts exert greater influence at early evidentiary checkpoints, they can constrain the factfinder's range of motion, and thereby regulate the entropic influence that lay jurors' lack of expertise can exert over verdicts. This model does, though, have the effect of shifting some of the onus for musical judgment from lay jurors to lay judges, who are not necessarily any better equipped to make musical judgments. *See supra* note 297. This is a valid concern. Ideally, however, by simply allowing parties to present arguments that go towards the compositionality factors, as well as any surrounding policy concerns, courts' initial threshold evidentiary decision would rely less on lay judges' ears, and more on their well-practiced ability to balance equities.

³⁵⁵ *See supra* notes 281–93 and accompanying text.

³⁵⁶ *See, e.g., supra* note 52.

³⁵⁷ *See supra* notes 276–79 and accompanying text.

³⁵⁸ *Contra supra* notes 298–300 and accompanying text.

probative value can justify admitting the evidence.³⁵⁹ Because these circumstances will necessarily vary from case to case, the Triad approach offers courts a sensible solution: the flexibility to fashion their responses accordingly.

CONCLUSION

The policies and infrastructure governing music copyright tiptoe many inherent tensions. In a perfect world, courts would not have to choose between expanding protection for creators' existing works and facilitating their ability to create future works. In a perfect world, a simple jury instruction would be enough to ensure that jurors were appropriately influenced by the protected elements of a composition embodied in a recording performed to them at trial, and not at all prejudiced by unprotected elements. Of course, modern copyright governance hardly exists in a perfect world.

To the contrary, copyright provides, by design, a regulatory compromise between owners and users—between existing creations and future creators. In order to breathe life into that compromise, and to adapt with evolving creative and industry realities, courts must be aware of historical complexities, as well as the many policy implications inherent to the judicial intersection of composition and recording. Courts must then, on a case-by-case basis, determine which considerations are the most significant. Regrettably, the prevailing judicial fixation on formal protectability fails to adequately navigate these difficult waters. Instead, it has yielded unpredictable verdicts, an onslaught of opportunistic infringement claims, and a class of creators utterly bewildered as to what they are lawfully permitted to create. By expressly linking “compositionality” to evidentiary determinations, courts can combine predictable structure with just flexibility, allowing them to fairly adjudicate immediate controversies, while also encouraging a safe, productive environment for the creation of new music.

³⁵⁹ See *supra* notes 305–25 and accompanying text.