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INTRODUCTION

During the past decade or so, stakeholders in the United States popular music sector have become rattled by the possibility of defending themselves against music copyright infringement allegations based on insignificant similarities, or even merely stylistic commonalities, between two musical works. Marquee pop performers like Pharrell Williams, Katy Perry, Ed Sheeran, Taylor Swift, and Led Zeppelin are among many popular musicians who have defended themselves against such claims, attesting the industry's rueful maxim: "Have a hit, get a writ."[1] This unease among popular songwriters developed over several decades as courts and jurors became increasingly sympathetic towards infringement allegations involving musical works that could not be considered "copies" of an earlier work under any normative understanding of that term.[2]

In 2018, the Ninth Circuit Court of Appeals upheld a jury verdict that "Blurred Lines," a hit by Robin Thicke and Pharrell Williams, infringed Marvin Gaye's "Got to Give it Up."[3] Many musicians and copyright experts

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[1] *See* Williams v. Gaye, 895 F.3d 1106, 1117 (9th Cir. 2018); Gray v. Perry, No. 2:15-cv-05642-CAS (JCX), 2019 U.S. Dist. LEXIS 113807, at *10 (C.D. Cal. Jul. 5, 2019); Griffin v. Sheeran, No. 17 Civ. 5221 (LLS), 2020 U.S. Dist. LEXIS 52908, at *3 (S.D.N.Y. Mar. 24, 2020); Hall v. Swift, 786 F. App'x 711, 711 (9th Cir. 2019); Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057-58 (9th Cir. 2020).

[2] *See* Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L. J. 1187, 1194 (2015) (suggesting that "[t]o appreciate how far we have strayed from the early conception of copyright as a means to counter wholesale copying of musical works, one must trace the evolution of case law in this area before popular music became a significant U.S. 'industry'").

[3] *See* Gaye, 895 F.3d at 1115.

deemed the verdict an untenable and confusing precedent.[4] They argued that while the *sound* of the recorded performances of the songs share some stylistic similarities, there was no meaningful similarity of original *musical* expression.[5]

In a trenchant dissenting opinion, Judge Jacqueline Nguyen predicted this verdict would inhibit the work of popular songwriters, making them vulnerable to claims of misappropriation of unprotectable generic musical elements and styles.[6] Furthermore, she argued, a decision protecting such elements could generate an absurd cascade of colorably legitimate infringement claims.[7] If Thicke and Williams could be found liable for using generic musical and stylistic elements in earlier works by Marvin Gaye, Gaye likewise could be deemed liable for having used generic elements found in the songs of legions of songwriters preceding him.[8]

Those supporting the *Williams v. Gaye* verdict have proposed that it exposed and remedied a long-standing disparity between copyright protection afforded works of Black and White musicians.[9] This disparity, they claim, can be attributed to the judiciary's obsolete perspective that the protectable scope of a musical work is limited to original melodic, harmonic, and rhythmic expression represented in visual notation.[10]

In this article, I suggest that this invocation of racial prejudice appears to be a gambit to assert control over generic musical elements that copyright was never intended to protect.[11] I begin with a discussion of the development of copyright protection for musical works, and how, over time, recording technologies significantly affected the creation of popular musical expression, and the means of protecting it. Then I consider whether and how

[4] *See* Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1865 (2018) (citing extensive press coverage supporting his claim that "[i]t's tough to overstate the amount of controversy that the case has generated").

[5] *See id.*

[6] Gaye, 895 F.3d at 1141 (Nguyen, J., dissenting).

[7] *See id.* at 1152.

[8] *Id.*

[9] *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 , Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (No. 15-56880), 2019 U.S. 9th Cir. Briefs LEXIS 2423, at *20 [hereinafter IIPSJ Brief]; Sean O'Connor et al. *"Blurred Lines" Ruling Brings Justice to Composers Like Marvin Gaye,* SEATTLE TIMES (May 6, 2018, 1:01 PM), https://www.seattletimes.com/opinion/blurred-lines-ruling-brings-justice-to-composers-like-marvin-gaye/.

[10] *See id.*

[11] I subscribe to the American Psychological Association style guide's policy that "racial and ethnic groups are designated by proper nouns and are capitalized." *See* Kwame Anthony Appiah, *The Case for Capitalizing the B in Black,* THE ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ (arguing that "black and white are both historically created racial identities, and whatever rule applies to one applies to the other").

the copyright interests of Black popular musicians have been unfairly recognized because of the medium in which many recorded their musical expression. I posit that the modes of creation and fixation used by musicians of any race are irrelevant to the scope of protectable expression in a musical work, and that the ambit of protectable musical expression readily can, and should, be defined by its visual representation. I conclude by suggesting that rather than expanding the scope of protectable musical expression to encompass stylistic and sonic components, contracting it, and even limiting protection for melody, would promote creation of innovative musical expression, particularly in genres like jazz improvisations and spirituals arrangements, to which Black musicians have contributed so significantly.

MUSIC, COPYRIGHT, AND TECHNOLOGY

Since revision in 1831, the United States' copyright statute has expressly protected musical works.[12] This addition to protectable books, maps and charts occurred a few years after Stephen Foster was born, and before the enormous expansion later in the century of the sheet music publishing industry.[13] Over the nearly two hundred years that followed, the scope and duration of statutory protection have grown inexorably, and now provide authors exclusive rights, typically for a century or longer, not only to copies of their musical compositions rendered in various media, but also performances, arrangements, and other works derived from them.[14]

Until 1978, when the current U.S. Copyright Act became effective, protection for published works was conditioned on the author or owner of the work registering and depositing printed copies at the Copyright Office.[15] To register copyrights in musical works applicants were required to submit scores, sheet music, or lead sheets delineating the claimed protectable musical expression in standard music notation.[16]

By the latter half of the twentieth century electric sound recording technology had become increasingly effective, inexpensive, and ubiquitous.[17] This development made it possible for musically illiterate performers to document their songs by simply recording their performances

[12] Copyright Act of 1831, ch. 16, 4 Stat. 436.

[13] *See generally*, HARRY DICHTER & ELLIOTT SHAPIRO, EARLY AMERICAN SHEET MUSIC: ITS LURE AND ITS LORE, 1768-1889 (1941).

[14] *See* Copyright Act of 1976, 17 U.S.C. §§ 101-1332.

[15] Copyright Act of 1909, ch. 320, § 12, 35 Stat. 1075, 1078.

[16] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1063 (9th Cir. 2020) (noting that under the 1909 Act, the Copyright Office Compendium of 1967 referred to deposits of unpublished musical works as manuscripts).

[17] *See An Audio Timeline*, AUDIO ENGINEERING SOCIETY, http://www.aes.org/aeshc/docs/audio.history.timeline.html (last updated June 13, 2014).

of them. [18] The current copyright statute reflects the sea-change effected by recording technology in the generation and recording of popular music. Original musical works are now protected if they are "fixed in any tangible means of expression," and the Copyright Office accepts audio recordings as deposits for registration of musical works.[19] Congress also recognized, in 1971, the economic value of performances of musical works, and established a separate copyright for sound recordings of them.[20] Accordingly, if for instance, Lady Gaga records Stephen Foster's "Beautiful Dreamer," she would obtain a copyright for her recorded performance, but not for Foster's song, which is in the public domain.

Widespread consumer access to recording and synthetic sound technologies also led to pandemic music illiteracy among popular songwriters.[21] The appeal of works of songwriters lacking the ability to juggle complex combinations of musical parameters acquired through musical literacy, tends to depend more on particular sounds and performances than on their works' typically exiguous musical content.[22] Should we broaden the scope of protectable expression in popular music to reflect this shift in the locus of its economic value from musical expression to performance?

RACE AND COPYRIGHT FOR MUSICAL WORKS

Discussing "a legacy of unequal [copyright] protection" Professor K.J. Greene identifies three reasons why he believes Black authors received "less copyright protection": "(1) inequalities of bargaining power (2) the clash between the structural elements of copyright and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works."[23] The first and third of these reasons are borne out by historical evidence.[24] The second however, is

[18] "Thanks to electricity, every consumer can be a producer…Rock's electronic instruments are easy to play and accessible to anyone who has the wherewithal to buy a used Fender in a pawn shop." ROBERT PATTISON, TRIUMPH OF VULGARITY: ROCK MUSIC IN THE MIRROR OF ROMANTICISM 136 (1987).

[19] *See* U.S. Copyright Office, *Copyright Registrations for Musical Compositions*, CIRCULAR, no. 50, Oct. 2019, at 1, https://www.copyright.gov/circs/circ50.pdf.

[20] *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

[21] *See* Jon Henschen, *The Tragic Decline of Music Literacy (and Quality)*, INTELLECTUAL TAKEOUT (Aug. 16, 2018), https://www.intellectualtakeout.org/article/tragic-decline-music-literacy-and-quality/.

[22] *See id. See also infra* note 26 and accompanying discussion.

[23] K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 356-57 (1999).

[24] *See infra* note 26 and accompanying text.

more problematic, implying a monolithic Black musical culture that copyright law cannot accommodate.

Since its inception in the early twentieth century the U.S. popular music recording industry has differentiated its products by genre: "rhythm & blues," "hip-hop," "disco," as well as by social and racial characteristics of anticipated consumers: "hillbilly", "Western", "race" (i.e., Black), "popular" (i.e., White), etc.[25] To capitalize on the potential appeal to White consumers of works recorded by Black performers on "race" records, mainstream record companies produced legally permissible "mirror" recordings of these works marketed as "popular".[26] To promote the greatest number of sales among White consumers, these companies capitulated to widespread Jim Crow sentiment in the United States in first half of the century and engaged White performers for these recordings.[27]

The unfairness of this practice was compounded by the companies' arguably unwitting misappropriation of copyrightable musical expression contained in recordings by Black performers. Professor Robert Brauneis has discussed how Black performers in the first half of the twentieth century, while performing musical numbers for recordings, often added significant original musical expression of their own.[28] Because these performers' additional material was not submitted with the registration for the underlying work, it devolved to the public domain by "divestitive" publication through their recordings. White performers performed and recorded this additional expression without compensating, or even acknowledging, its Black authors.

Particularly during the first half of the Twentieth Century, unscrupulous music publishers and agents fraudulently obtained copyrights for works by Black musicians, capitalizing on their lack of awareness of their rights; their often-straitened finances; lack of verbal literacy; and by simple theft.[29] White musicians, particularly those from poor rural communities, also suffered such unethical and illicit acts. The 1909 Act, effective at that time, did not facilitate this conduct; in fact it promulgated civil and criminal penalties for such deliberate infringements.[30] Like many other outbreaks of unethical or

[25] *See* William G. Roy, *"Race Records" and "Hillbilly Music": Institutional Origins of Racial Categories in the American Commercial Recording Industry*, 32 POETICS 265 (2004).

[26] *See* Robert Brauneis, Copyright, Music, and Race: The Case of Mirror Cover Recordings 7 (Jul. 22, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591113 (mentioning that the compulsory license provision in the Copyright Act of 1909 established the legality of this practice).

[27] *See id.* at 8.

[28] *See id.* at 7.

[29] *See generally* Greene, *supra* note 23.

[30] *See* Copyright Act of 1909, ch. 320, §§ 25-28, 35 Stat. 1075, 1081-82.

illegal behavior, one can attribute this one to social ills like racism, poverty, illiteracy, and unequal access to legal advice.

Nearly a century on, race continues to play a significant role in marketing popular music. Today, however, White songwriters/performers no longer eschew certain musical and stylistic elements commonly associated with the works of Black songwriters/performers. Instead, Bruce Springsteen, Justin Bieber, Justin Timberlake, Robin Thicke, and many other White pop musicians calculatedly incorporate musical and stylistic elements, as well as visual elements like dress and gestures, associated with Black culture, in their songs, and their performances of them.[31]

Like the producers of White "mirrors" who profited from *avoiding* stereotypical elements associated with performances by Black musicians, or who incorporated only those elements considered appealing to mainstream audiences, White musicians now profit by *embracing* them.[32] One reason for doing so is to flatter their White fans who believe that by appreciating and purchasing recorded and live performances of musicians whose work ostensibly demonstrates enlightened views about racial parity and inclusivity, these attributes can be ascribed to them as well.[33]

There is little question that, particularly in the first half of the twentieth century, Black songwriters suffered unequal copyright protection because of racial prejudice, and illicit conduct by White music industry impresarios. Next we consider the more difficult question whether bias against the creative modes and media commonly ascribed to Black musicians has contributed to this record of unequal protection.[34]

Those claiming that copyright law has inadequately protected musical works by Black authors have based this assertion on arguments about the collaborative ethos of composition among Black musicians;[35] the emphasis

[31] *See* PATTISON, *supra* note 18, at 44 (musing on the implications of a Bruce Springsteen album cover with an image of the White Springsteen "recumbent upon" Black saxophonist Clarence Clemons).

[32] This embrace is underscored by use of stereotypical visual imagery associated with Black performers captured in the audio-video recordings of choreographed performances. *E.g.*, Justin Timberlake, *Like I Love You*, YOUTUBE (Oct. 22, 2009), https://www.youtube.com/watch?v=FQ3slUz7Jo8.

[33] British pop singers who perform with American accents have similar financial motivations. Shunning the sound of English accents long associated with Victorian primness in American popular entertainment, for example, MARY POPPINS (Walt Disney Productions 1964), MY FAIR LADY (Warner Bros. 1964), THE KING AND I (20th Century-Fox)) they adopt mid- or low-brow American intonation and vernacular to profit from the vulgarity and unrestraint they signal, which are essential to the merchantability of most popular songs today. *See* PATTISON, *supra* note 18, at 151 *et seq.*

[34] *See* GREENE, *supra* note 23, at 356.

[35] *See* Elizabeth Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 605 (2019) (claiming "copyright disadvantages those whose backgrounds and cultural forms embrace cumulative creation and oral transmission of

Black musicians place on oral rather than written traditions;[36] Black musicians' frequent borrowing of existing expression;[37] and Black musicians' focus on performance rather than the underlying musical work.[38] While *Williams v. Gaye* was under appeal, the Institute for Intellectual Property and Social Justice submitted an amicus brief supporting the Gaye family.[39] Its authors repeatedly claim that the Copyright Office's policy prior to 1978, that applicants submit notated copies of musical works with their applications was discriminatory.[40]

Until 1978 the Copyright Office would register only musical works represented in visible notation.[41] Black songwriters may have been less likely than their White counterparts to be versed in music notation. This is the basis of the argument of those claiming that this requirement reveals

creative techniques"). Ann Bartow makes a similar claim on behalf of women, that copyright poorly accommodates communally created works like quilts, that are typically associated with women. *See* Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551, 573-74 (2006).

[36] *See* GREENE, *supra* note 23, at 355, n.68 (noting that like indigenous folklore, musical works by Black musicians were often fixed, and then claimed, by individuals other than the authors).

[37] *See* Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 622 (2006) (suggesting, for instance, that "features associated with hip hop are intensive borrowing, which is at odds with contemporary perceptions of composition that see borrowing as necessarily signaling a lack of originality").

[38] *See* Larisa K. Mann, Decolonizing Copyright Law: Learning from the Jamaican Street Dance 60 (Fall 2012) (Ph.D. dissertation, University of California, Berkeley), https://escholarship.org/content/qt7h8449q6/qt7h8449q6.pdf (identifying "syncretism and phonographic orality" as key characteristics of Jamaican music, neither of which copyright accommodates).

[39] *See* IIPSJ BRIEF, *supra* note 9.

[40] "The Copyright Office's former policy of requiring written music deposits contravened the 1909 Act and also discriminated against traditionally marginalized composers." *Id.* at *11. "Composers not fluent in European staff notation, composers who work in aural traditions and genres where such notation is not very helpful, and composers from disadvantaged backgrounds have routinely been discriminated against by a copyright system at times improperly administered so as to extend protection to only certain kinds of privileged works." *Id.* at *46-47. *See also*, Petition for Writ of Certiorari at 21, Skidmore v. Zeppelin 952 F. 3d 1051 (9th Cir. 2020) (No. 20-142) (claiming that limiting protected musical expression to that recorded in music notation "will most heavily impact historically disenfranchised communities (black blues artists, for example…)").

[41] *See* Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 4 (2014) ("[Before the 1976 Copyright Act] musical compositions still needed to be fixed in scores to gain copyright protection"). During the 1920s and 30s the Copyright Office also accepted piano rolls as deposits for music registrations. *See* IIPSJ Brief, *supra* note 9, at *22.

copyright law's bias favoring White authors.[42] However, many White popular songwriters active before 1978 also were incapable of writing or reading music notation.[43] Moreover, songwriters who are incapable of writing music have long employed literate musicians to transcribe their performances as sheet music and lead sheets.[44] Perhaps access to these transcribers by Black songwriters may have been more limited than that of Whites, but such transcriptions have been used to register thousands of songs by both Black and White authors.[45]

Those who claim that the earlier law's visual representation requirement discriminated against, or at least disadvantaged, Black songwriters have suggested that by allowing audible media to be used to register musical works, Black songwriters were, finally, able to obtain copyright protection as readily as Whites.[46] More problematically, they claim that this broadening of acceptable media by which works may be registered implies a broadening of the scope of protectable expression of musical works fixed in audio recordings.[47] In fact, there is no correlation

[42] *See* IIPSJ BRIEF, *supra* note 9, at *22 (asserting that "the form-of-deposit discrimination problem arose because many of our nation's most gifted [and internationally acclaimed] composers who worked outside of the European classical or formal music tradition—albeit squarely within emerging twentieth century Western popular music genres—were not fluent in European staff notation").

[43] Including Irving Berlin, Elvis Presley, The Beatles, and Bruce Springsteen. David Galeson, *From "White Christmas" to Sgt. Pepper: The Conceptual Revolution in Popular Music*, NBER WORKING PAPER 13308, August 2007, at 16, 23.

[44] Irving Berlin, for instance, hired a musically literate pianist to realize and "transcribe" his melodies. *See* ALEXANDER WOOLLCOTT, THE STORY OF IRVING BERLIN 37 (1925).

[45] Marvin Gaye's publisher employed a music transcriber to register copyrights for his songs, including "Got to Give it Up". *See* IIPSJ BRIEF, *supra* note 9, at *32. *See also Skidmore*, 952 F.3d at 1063 (rejecting Skidmore's claim that limiting protection to musical expression represented in visual notation disadvantaged musically illiterate authors, noting that the author of the complaining work had no difficulty in obtaining or paying for a transcription of the music in his recorded performance of it).

[46] *See* Elizabeth Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 632-33 (2019) (suggesting that "[g]ranting protection to sound recordings was certainly not all bad for creators of color, as it tended to counteract some of the prejudices against non-notable works").

[47] The authors of the IIPSJ Brief argue that "[i]f Gershwin could notate for old-fashioned car squeeze bulbs as he did in "An American in Paris," … and to which presumably the copyright in that composition extends—why could Gaye not also enjoy protection for his R&B or Soul orchestral composition as to the material executed by cowbells and background voices?" IIPSJ BRIEF, *supra* note 9, at *49-50. In fact, Gershwin's use of a bulb horn, and Gaye's use of a cowbell, are musical *ideas*, and not protectable expression. Accordingly, when he used a bulb horn in his *De Profundis for a Speaking Pianist* (1982) Frederic Rzewski did not have to obtain the Gershwin estate's authorization. Likewise, for example, Rossini's well-known unusual use of the violin bow (tapping bow sticks against music stands) in the overture to *La scala de seta* (1812) was

between a work's protectable expression and the medium in which it is recorded. While the choice of medium may affect the *type* of expression recorded, it does not bear on whether, or the extent to which, it is protectable.

SCOPE OF PROTECTION FOR ORIGINAL MUSICAL EXPRESSION

The U.S. Copyright Act identifies, but does not define, "musical works" as a category of protectable expression.[48] The Compendium of U.S. Copyright Practices, however, which "provides expert guidance" on copyright, identifies "main elements of copyrightable musical work authorship [as] melody, rhythm, harmony, and lyrics, if any."[49] Of course, musical works may also comprise many other elements like instrumentation, dynamics, tempo, phrasing, etc. But the fact that the U.S. Copyright Office did not include these within the "main elements" of musical works, implies a hierarchy of significance among them that musicians have intuited from time immemorial. They fall along a spectrum ranging between sound/performance elements at one end, to more purely musical elements like melody at the other. One can identify these poles as the *how* and the *what* of music. Melody, for instance, lies on the *what* end of the spectrum, whereas dynamics lie on the *how* side. Melody and harmony tell us *what* notes to perform, while dynamics tell us *how* to perform them.[50]

This spectrum also indicates a hierarchy of dependency among musical elements. The significance of dynamics, instrumentation, tempos, and even the key of a song depends entirely upon its more fundamentally *musical* elements of melody, harmony, and rhythm. Imagine a musical work containing a tempo, meter, key, phrasings, instrumentation, and perhaps even a verbal text, but no melody, rhythm, or harmony. The work is meaningless because, apart from the words, it contains no information about *what* to perform. Two high-profile copyright cases from over a century ago, involving mechanical reproductions of musical works, are curiously relevant on the issues of hierarchy and dependency among musical elements.

an *idea* that later composers could freely use. Only the particular rhythmic figure to which Rossini applied the idea, might be considered protectable musical *expression*.

[48] Copyright Act of 1976, 17 U.S.C. § 102 (2018).

[49] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.3 (3d ed. 2017).

[50] Aaron Keyt has alluded to the copyright significance of this spectrum when he explains that musical works are not works of sound: "composers do not create sounds at all; they create only musical structures which are revealed through sound." Copyrightable expression in musical works, therefore, is based upon "what the sounds do, how they are used, rather than what they are in acoustical terms." *Comment: An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 436-37 (1988).

In 1899 English music publisher Boosey & Co. sued Whight, a manufacturer of piano rolls, claiming Whight infringed the copyrights in a number of works Boosey owned.[51] Piano rolls are paper scrolls that have been perforated to indicate the melody, harmony, and rhythm of a musical work.[52] These perforations can be "read" and then sounded by a mechanical piano or organ, just as the tuned metal tines of a music box "read" melody, harmony, and rhythm designated by the pins on the rotating metal barrel, which they pluck.[53]

The court decided that piano rolls were not infringing because the musical information recorded in their perforations is not intelligible to humans in standard notation.[54] But the rolls also provided printed verbal cues about changes in speed and volume to be affected by the human operator of the mechanical organ or piano playing the work. These dynamic and tempo indications corresponded with those in Boosey's sheet music. As these were visually intelligible, the court concluded they *did* infringe.[55] Accordingly, while the court permitted the defendant to copy plaintiff's *most* significant musical information, it prohibited copying of its *least* essential and original musical elements. Nearly a decade later, in a factually similar dispute involving a music publisher named White-Smith, the United States Supreme Court concluded likewise that unauthorized piano roll reproductions of protected musical works were not infringing copies.[56]

Latent behind the tortured reasoning of both decisions was a last-minute protocol to the Berne Copyright Convention of 1886, which established that copies of copyrighted musical works that enabled *mechanical* renderings of them, were not infringing.[57] In the nineteenth century the Swiss were the most important developers and manufacturers of music boxes (and watches with similar mechanisms).[58] It appears this Swiss industry capitalized upon the goodwill from their nation's convening and hosting the Convention, and

[51] *See* Boosey v. Whight, 1 Ch. 836, (1899) (Eng.).

[52] *See generally*, Thomas W. Patteson, *Player Piano*, OXFORD HANDBOOKS ONLINE, Nov. 2014, https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935321.001.0001/oxfordhb-9780199935321-e-16.

[53] *Id.*

[54] *See Boosey*, 1 Ch. 836.

[55] *Id.*

[56] *See* White-Smith v. Apollo, 209 U.S. 1, 31-32 (1907).

[57] *See* BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (1886) 687 (L. Bently & M. Kretschmer eds., Berne Primary Sources on Copyright (1450-1900)), www.copyrighthistory.org.

[58] *See* MUSICBOX INFOS, http://www.alscher.ch/en/musicbox_infos.html (last visited Feb. 14, 2021).

lobbied the other national participants to accommodate this curious carveout.[59]

The player piano industry boomed in the first decade of the twentieth century in the United States and in Europe, and sales of piano rolls supplanted those of sheet music.[60] To avert ruinous financial consequences facing songwriters in the wake of the *Boosey* and *White-Smith* decisions, the Berne Convention and the U.S. Copyright Act were amended at that time to protect copyrighted musical works fixed in formats read by machines.[61]

The *Boosey* and *White-Smith* decisions are egregious for unfairly limiting protection of songwriters' most valuable expression, i.e. melody, harmony, and rhythm. Cases like *Williams v. Gaye,* on the other hand, are damaging because they expand protection beyond original musical expression. Copyright should protect as music only original melodic, rhythmic, and harmonic expression. Western notation most effectively and efficiently records expression incorporating these fundamental musical elements. Copyright should not protect particular dynamics, phrasing, tempi, instrumentation, and other stylistic elements as music, because authors' particular deployments of these elements evidences more non-protectable ideas than it does protectable expression.

Legally protecting ideas defeats copyright's fundamental objective to incentivize the production of original expression, because it enables monopolization of generic elements of musical, verbal, and visual expression. For musicians, elements like instrumentation and dynamics are akin to generic shapes and colors used by visual artists, or the punctuation and emphases by which writers organize and inflect their words.

The fact that Jeff Koons may have been the first to render balloon animals in shiny metal does not give him the right to prevent others from similar play because they are only copying the earlier artist's idea.[62]

[59] *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS FROM 1886 TO 1986, 156 (1986) (providing the report from the 1908 Berlin Convention that eliminated this carveout: "[f]or tunes a certain degree of dispensation was introduced in the 1886 Final Protocol, but this dispensation cannot extend beyond the terms that established it.").

[60] *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 31 (2000), http://www.edwardsamuels.com/illustratedstory/isc2.htm.

[61] *See* REVISED BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS OF NOV. 13, 1908 (1908), https://www.keionline.org/wp-content/uploads/1908_Berne_Convention.pdf; Copyright Act of 1909 §12, 35 Stat. 1075 (1909).

[62] "Why is 'Balloon Dog' . . . said to be by Jeff Koons? Mr. Koons did not conceive the original balloon figure of a dog, nor did he create the gigantic finished piece, made by Carlson & Company. Mr. Koons simply found something to duplicate and suggested making it big and shiny." Peter E. Rosenblatt, *Letter to the Editor*, N.Y.

Likewise, the distinctive onomatopoeia and extravagant punctuation associated with the style of the late Tom Wolfe, are unprotected ideas by which he inflected original strings of words by which he created copyrightable literary expression.[63] Literary elements like punctuation, emphases, and diacritical marks enrich the meaning of these sequences, but have no literary significance independent of them. Musical elements like dynamics, performing styles, tempos, and instrumentation similarly enhance the melodies, harmonies and rhythms to which they are applied, but have no independent musical significance.

MORE LIMITED PROTECTION FOR MELODY

The IIPSJ Brief amici argued that using recorded performances, rather than visual notation, to determine the scope of a work's original musical expression, would promote more equitable protection of musical works.[64] This approach would permit non-musically literate songwriters in particular, to protect instrumentation, styles, timbres, and other secondary musical elements in their recorded songs.[65] As mentioned earlier, in her *Williams v. Gaye* dissent, Judge Jacqueline Nguyen discredited this suggestion when she observed that expanding protection to previously unprotectable elements ultimately only increases the potential infringement liability of those asserting ownership of these musical ideas.[66]

In fact, American songwriters and musicians, musically literate or otherwise, would benefit from a *narrower* view of protectable musical expression which, under certain circumstances, might not even encompass melody. Melody is the most memorable and identifiable component of most musical works. To recall or communicate a popular song we cannot hum its harmony; we might tap a brief rhythmic figure from it, but more typically we will hum its melody, which conjures both the rhythm and harmony (and words) of the song.

In his examination of the long-standing primacy of melodic similarity in adjudication of music copyright infringement disputes, Professor Joseph Fishman observes that "[t]he notion that melody today is the primary locus of music's value, however defined, is a fiction."[67] This is true, but the fact

TIMES (May 4, 2008), https://archive.nytimes.com/query.nytimes.com/gst/fullpage-990DE1DD1230F937A35756C0A96E9C8B63.html.

[63] *See* Dexter Schraer, *Recommended: Tom Wolfe*, 70 THE ENG. J. 49 (1981) (characterizing Wolfe's stringing together long lists of hyphenated words as a "rhetorical trick").

[64] *See* IIPSJ Brief, *supra* note 9, at *50.

[65] *Id.*

[66] 895 F.3d 1106, 1141 (9th Cir. 2018) (Nguyen, J., dissenting).

[67] Fishman, *supra* note 4, at 1904.

that melody may no longer be the engine of economic value in popular songs does not mean that other *musical* components have assumed this role. This is certainly true of so many popular songs today, whose financial success depends mainly upon the appeal of the songwriters/performers, and audio and video engineers' artful massaging of their recorded performances into marketable products.[68] In other words, the relative importance of various compositional components (melody, timbre, style, etc.) to a work's *musical* value does not vary. Even if, for instance, electronically generated background timbres, or distinctive vocal technique, or clever lyrics, generate most of the appeal of a popular song, this fact does not elevate the *musical* significance of these attributes.

Professor Fishman argues that courts' ongoing focus on melody, despite its lessened significance in much popular music, remains useful because this "unidimensional" test provides a degree of predictability in music infringement disputes that is not available in claims involving other copyrightable works.[69] But courts' persistent emphasis on melodic similarity in adjudicating infringement claims has been beneficial also because it has prevented monopolization of secondary musical, and sonic, elements, despite the fact that these elements may generate most of the economic value, and even aesthetic appeal, of a popular song.

The judiciary's longstanding view that melody is the most protectable component of a musical work, however, is troublesome in connection with two musical genres to which Black musicians have made such significant contributions: jazz, and spiritual arrangements. Both genres incorporate existing melodic material from public domain or copyrighted works.[70] The authors' objective in both genres is to recontextualize the preexisting melody; often to outdo the author of the original musical context in virtuosity and complexity, even to the extent that the preexisting material may be no longer, or only faintly, perceptible.[71] Works of jazz in particular vary

[68] "The significance of those manipulating electrical knobs and sliders to the appeal of a live performance or recording is obvious when one considers the consequence of their absence, along with that of the electricity that powers their mixers, amplifiers, and speakers . . . sound engineers manipulate the recorded and amplified sounds of voices of performers like Madonna, Kanye West, Miley Cyrus, and Justin Timberlake to ensure their appeal to mainstream taste. Of course, the appeal of the vocal rendering of these stars also depends greatly on their physical appearance; if Justin Timberlake gained 100 pounds his voice might improve, but it is safe to assume that his earnings from [audio-video recordings of performances made while obese] would worsen." Cronin, *supra* note 2, at 1225.

[69] *See* Fishman, *supra* note 4, at 1908-09.

[70] *See* Sandra Jean Graham, *Spiritual*, GROVE MUSIC ONLINE (2020); DARIUSZ TEREFENKO, JAZZ THEORY: FROM BASIC TO ADVANCED STUDY, 251 et seq. (2d ed. 2017).

[71] *See* Mark Tucker & Travis A. Jackson, *Jazz*, GROVE MUSIC ONLINE (2020). (noting how in "'cutting contests' musicians took turns building long, virtuosic solos designed to impress or outdo opposing players.").

considerably in the degree to which they depart from the musical context of the original melody;[72] the same is true of classical music's theme-and-variation format.[73]

The fact that jazz and spiritual arrangements plainly incorporate existing melodies raises the question whether, under copyright law, they are derivative or transformative works. The Copyright Statute defines derivative works, but not transformative works.[74] Unauthorized works that incorporate another's copyrighted expression are only deemed "transformative" if they can be accommodated under the "fair use" provision of the Copyright Statute.[75] A significant body of case law has addressed the question of what makes a work "transformative", which has engendered predictable uncertainty and complexity as how best to answer it.[76]

The creator of a derivative work must first obtain authorization from the owner of the underlying work.[77] This authorization commonly involves financial consideration.[78] The author of a transformative work, on the other hand, is not required to obtain such authorization so long as he creates "something new, with a further purpose or different character, [that does] not substitute for the original use of the work."[79] This definition nicely describes the objective of most jazz musicians performing "standards".[80] However, because these "standards" are often melodies of well-known copyrighted songs, jazz works that allude to them have typically been considered derivative of them.[81]

[72] *See id.*

[73] *See* Elaine Sisman, *Variations*, GROVE MUSIC ONLINE (2001) (identifying many types of variations like "ostinato", "constant harmony", "melodic outline", "fantasy" that vary significantly in the extent they depart from the musical context of the original melody).

[74] Derivative works are "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted." Copyright Act of 1976, 17 U.S.C. § 101 (2018).

[75] *See* Copyright Act of 1976, 17 U.S.C. § 107 (2018).

[76] *See* 4 NIMMER ON COPYRIGHT § 13.05 (2019) (analyzing the disparate views of many court opinions that have dealt with this issue since Federal Judge Pierre Leval coined the term in his *Harvard Law Review* article in 1990).

[77] *See* Copyright Act of 1976, 17 U.S.C. § 106 (2018).

[78] *See* Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1945 (2005).

[79] U.S. COPYRIGHT OFFICE FAIR USE INDEX; MORE INFORMATION ON FAIR USE (2020), https://www.copyright.gov/fair-use/more-info.html#:~:text=Transformative%20uses%20are%20those%20that,purpose%20of%20encouraging%20creative%20expression.

[80] Note, *supra* note 78, at 1942 (noting that jazz standards are those pieces "that a professional musician may be expected to know").

[81] *Id.* ("These standards, also referred to as 'mainstream standards', were generally written in the 1930s, '40s, and '50s for film and Tin Pan Alley or Broadway musicals by

Like jazz numbers, arrangements of spirituals borrow preexisting melodies (and words), and therefore they too may be considered derivative rather than transformative of them.[82] Because the melodies incorporated into spirituals arrangements are from African American religious folksongs originating between the late-eighteenth and mid-nineteenth centuries, however, they are in the public domain, and arrangers do not need to obtain authorization to incorporate them into their works.[83] While authors of spirituals arrangements cannot prevent other arrangers from keying off the same religious folksongs, they can prevent others from copying their original musical recontextualizations of these folksongs, which copyright protects.[84]

Under the compulsory license provision of the U. S. Copyright Act anyone may arrange and record a musical work for which the copyright owner has already released a sound recording, as long as the arrangement does not change the melody or "fundamental character of the work."[85] It is peculiar, therefore, that jazz musicians typically rely upon compulsory licenses to use these "standards" given that jazz arrangements invariably change *both* the melody and the fundamental character of the popular songs that inspired their creation. [86] Unlike arrangers of spirituals, however, jazz musicians' copyright interest in their musical recontextualizations depends on terms established with the owner of the "standard".[87]

There is no clear delineation between derivative and transformative musical works, but the greater the extent to which the value of a later work depends upon preexisting musical expression, the more we should regard it as derivative rather than transformative, of the preexisting expression. Piano reductions of operas, symphonies, ballets, etc., for instance, are very useful, but they are highly derivative because their value as musical works depends almost entirely on preexisting expression.[88] On the other hand, while preexisting melodies may be the spark behind many jazz improvisations and arrangements of spirituals, the musical value of these works is generated

non-jazz musicians such as George Gershwin, Cole Porter, and Harold Arlen. Thus, jazz performers are typically not the copyright owners of the very pieces that undergird the jazz canon").

[82] *See* Graham, *supra* note 70.

[83]*See African American Spirituals,* LIBRARY OF CONGRESS PERFORMING ARTS ENCYCLOPEDIA, https://www.loc.gov/item/ihas.200197495/.

[84] *See* Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 248 (1996) (noting that "nothing in an arrangement of a public domain music composition is protected unless it qualifies as a 'derivative work.'").

[85] 17 U.S.C. § 115.

[86] *See* Note, *supra* note 78 at 1945.

[87] *See id.*

[88] *See* David Charlton & Kathryn Whitney, *Score,* GROVE MUSIC ONLINE (2020).

almost entirely by the later musician,[89] and we should, accordingly, regard these works as transformative per se.[90]

For centuries composers have used preexisting melodies as the generic kernels of transformative theme-and-variations and, more recently, jazz improvisations, and choral arrangements.[91] These musical metamorphoses can be so artful and complex that the original melodies are rendered essentially foils that reflect the later musician's virtuosity.[92] More significantly, these later works do not undermine, but typically enhance, the value we ascribe to the works whose melodies they incorporate.[93]

The same would be true of a hypothetical improvisation by Winton Marsalis on "Let it Go" from Disney's *Frozen*. Disney might be pleased if Winton Marsalis publicly performed and recorded this improvisation, but it would undoubtedly be more than displeased if Marsalis did not first obtain the company's authorization and agree to give Disney a portion of the profits from his performances and recordings. Disney's legal capacity to compel Marsalis to do so based upon the entrenched notion that his improvisation is a derivative rather than a transformative work, is paradoxical and unfair given that his recording would only enhance the reputation and profitability of Disney's song.

[89] The late Moses Hogan, a classmate of mine at Oberlin years ago, became well known for the spirituals arrangements he wrote in the tragically few, but enormously productive, years he lived following his formal education. While the melodies and words of public domain spirituals were the wellspring of Hogan's work, the vocal scores in which he documented his reworkings evidence brilliant original melodic, harmonic, and rhythmic expression. This expression's value is manifest by the enduring appeal of his works; there are hundreds of other arrangements of well-known spirituals, but few are performed, as often (or as globally) as Hogan's. Drawing on knowledge acquired at Oberlin (and later Juilliard) he wrought original musical expression far more complex than, yet reverential toward, the underlying works. Copyright provided incentives and rewards by giving him the exclusive right to copy and perform his arrangements, but it did not limit others' use of the underlying public domain spirituals that inspired his work. *See generally*, Anne Shelley, *Moses Hogan*, GROVE MUSIC ONLINE (2012).

[90] "Jazz musicians and aficionados rarely care what actual piece is being played - they care how it is played and by whom. The underlying song is simply a vehicle for showcasing the musician's true ideas and spontaneous compositions." *Note*, *supra* note 78, at 1952.

[91] *See* Sisman, *supra* note 73.

[92] Beethoven's *33 Variations on a Waltz by Diabelli* is one of the best-known examples of this phenomenon. *See* MAYNARD SOLOMON, BEETHOVEN 347 (Schirmer Books et. al. 2d rev. ed. 1998).

[93] For example, the fact that Frank Churchill's "Someday My Prince Will Come" (*Snow White*) has remained well known since it was first heard in 1937, can be attributed, at least in part, to popular arrangements of it by Miles Davis, David Brubeck, Wynton Kelly, and many other jazz musicians. *See Stories of Standards: "Someday My Prince Will Come,"* KUVO (2019), https://www.kuvo.org/stories-of-standards-someday-my-prince-will-come/.

CONCLUSION

Robin Thicke and Pharrell Williams did not appeal the Ninth Circuit's decision to the Supreme Court, so the *Williams v. Gaye* jury verdict can never be directly overturned.[94] In recent decisions favoring defendants Led Zeppelin and Katy Perry, however, courts have averted the pernicious implications of *Williams v. Gaye*.[95] In both cases the courts dwelt on the limited scope of protection for works with "thin" copyrights, signaling the judiciary's increasing skepticism towards infringement claims based on similar stylistic, acoustical, and secondary musical elements.[96]

I have argued here furthermore that copyright's objectives would be better served if only virtually identical unauthorized copies of even primary musical elements, including melody, were considered infringing. Accordingly, an unauthorized piano score that faithfully and fully reproduces the principal musical elements of a protected symphonic work would be infringing.[97] On the other hand, arrangements, fantasies, variations, etc. that are inspired by and allude to principal musical elements of a protected work should be considered transformative works, which not only do not compete with the earlier work in the market but, in fact, promote it.

Virtually all music infringement disputes could be dismissed if courts recognized copyrightable musical expression as limited to melody, harmony,

[94] *See* Joshua Rosenberg, *Controversial 'Blurred Lines' Suit Ends in $5 Million Verdict,* FORBES (Dec. 14, 2018, 6:51 PM EST) https://www.forbes.com/sites/legalentertainment/2018/12/14/controversial-blurred-lines-suit-ends-in-5-million-verdict/#32de4c2b6ffe.

[95] *See* Gray v. Perry, No. 15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020); Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020). The plaintiffs in both cases appealed these decisions, Gray to the Ninth Circuit and Skidmore to the U.S. Supreme Court. Gray's appeal is pending before the Ninth Circuit; the U.S. Supreme Court denied Skidmore's petition for a writ of certiorari on October 5, 2020.

[96] *See Gray*, 2020 U.S. Dist. LEXIS at *10-11 (Federal Judge Christina Snyder referring to *Zeppelin* to support her determination that only a "virtually identical" defending work may infringe a work with "thin" copyright protection).

[97] One does not need to obtain authorization to create a derivative work based upon an underlying work in the public domain. However, an underlying work may be in the public domain in one country but still protected in others. Pianist Yuja Wang painfully learned of such discrepancies when publisher Boosey & Hawkes, owner of the copyright to Stravinsky's *Le sacre du printemps*, forbade her performance of a faithful arrangement of it for piano and percussion that she had programmed for a number of dates in Europe. *Le Sacre* was published in 1921; as a Russian work it immediately entered the public domain in the U.S. Many European countries, however, extended the term of copyright protection for works published during and between the world wars, and in these countries *Le sacre* will be protected until 2056. *See* Olivier Vrins, *Yuja Wang Barred from Playing an Arrangement of Stravinsky's Rite of Spring in Europe,* ALTIUS BLOG, (Jan. 25, 2019), https://www.altius.com/blog/433/yuga-wang-barred-from-playing-an-arrangement-of-stravinsky-s-rite-of-spring-in-europe.

and rhythm, and that the medium in which a musical work is fixed should not affect the scope of its protection. While the contents of all genres of expression, and the media in which they are recorded, continually evolve, the scope of their copyrightable expression does not. Otherwise, copyright's objective to incentivize original expression would be compromised through inhibiting uncertainty. Because of the regrettable broadening of the scope of protectable expression promulgated by dispositions of various infringement disputes over the past few decades, American popular songwriters now face such uncertainty. Only courts can dispel this incertitude by limiting this scope, even excluding melody in cases involving transformative works, to restore the healthy cross-pollination of styles and genres that has always characterized American popular music.