

The Case for Common Property in Musical Objects

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ABSTRACT

*Copyright law's current framework for analyzing the similarity between musical works has invited a host of copyright infringement lawsuits that drag artists into court over small, commonplace segments of music. Plaintiff artists typically accuse defendant artists of copying, or even "stealing," from them. The language plaintiffs use to describe the alleged infringement treats these segments, which courts often refer to as "musical building blocks," as personal property that can be isolated within a song, and once identified, can be repeated, altered, or stolen. This Article contextualizes these common building blocks as "musical objects," whose authors are neither the artists alleging the infringement nor the defendants accused of "stealing" music. Instead, musical objects have developed through accretion over the course of music history, with many individuals making small, gradual contributions. Musical objects are communally composed, and they should be common property belonging to the public domain. Most traditions of music have rich histories of borrowing and copying between composers and artists; as such, conceiving of musical objects as belonging to all would allow the law to reflect this. In this Article's primary case study, *Gray v. Perry*, the US Court of Appeals for the Ninth Circuit determined these objects lack the originality required for copyright protection, and this Article proposes a theory of musical composition and ownership to support that court's fact-intensive holding. This theoretical foundation may guide future courts in recognizing and analyzing cases involving musical*

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objects to encourage outcomes that account for the cumulative process behind these objects' development.

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I. INTRODUCTION

Recent music copyright cases involving high-profile artists have incited heated debate over whether one's favorite artist "stole" the work of another.¹ Implicit in this debate is the assumption that the allegedly stolen content does indeed belong to an "owner," and that this owner can control who gets to use it.² Applied to the individual elements within a piece of music, such as small melodies or chord progressions, this assumption departs from established music-compositional practices.³ This Article problematizes the idea of owning the individual

1. See Thania Garcia, *Famous Music Copyright Cases Revisited: Ed Sheeran, Led Zeppelin, Katy Perry and More*, VARIETY (Apr. 27, 2023, 5:21 PM), <https://variety.com/lists/song-copyright-infringement-cases-ed-sheeran-historic/> [https://perma.cc/52DC-2MGR].

2. See 17 U.S.C. §§ 102, 201(a).

3. See generally J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, 50 NOTES 851, 851 (1994) (describing uses of preexisting music in creating new musical compositions throughout history).

elements that constitute a piece of music and suggests an approach to music copyright that resists theories of single-author ownership of the building blocks—“musical objects”—within a musical work.

This Article recasts these building blocks as musical objects, a concept well established in the field of music theory. Musical objects were recently on trial in the dispute between rapper Marcus Gray and popstar Katy Perry, which centered on the alleged theft of a single musical object: an eight-note ostinato figure⁴ present in Gray’s “Joyful Noise” that he claimed Perry misappropriated in her song “Dark Horse.”⁵ The ostinato, transcribed in Figure 1, appears in the verse of both songs, beginning at 0:00 (Gray)⁶ and at 0:20 (Perry).⁷



Ostinato from Marcus Gray’s “Joyful Noise” (beginning at 0:00, throughout)



Ostinato from Katy Perry’s “Dark Horse” (beginning at 0:20, recurring intermittently)

Figure 1: Comparison of the “Joyful Noise” and “Dark Horse” ostinati (transcribed by the author)⁸

4. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *3 (C.D. Cal. Mar. 16, 2020), *aff’d sub nom*, Gray v. Hudson, 28 F.4th 87 (9th Cir. 2022). An “ostinato” is the musical term for a short, repeated melodic phrase. Christopher Wilson, *Ostinato*, in THE OXFORD COMPANION TO MUSIC (Alison Latham ed., 2011). Other famous examples of ostinati in popular music include the bassline from “Another One Bites the Dust” by Queen, or the bassline from “Under Pressure” by David Bowie and Queen (or from “Ice, Ice, Baby,” by Vanilla Ice, if the reader prefers). See QUEEN, *Another One Bites the Dust*, on THE GAME (EMI 1980); DAVID BOWIE & QUEEN, *Under Pressure*, on HOT SPACE (EMI 1982); VANILLA ICE, *Ice, Ice, Baby*, on TO THE EXTREME (SBK 1990).

5. Perry, 2020 U.S. Dist. LEXIS 46313, at *3.

6. FLAME, *Joyful Noise*, on OUR WORLD: REDEEMED (Cross Movement Records 2008) <https://youtu.be/u-fnRgSGh4c> [<https://perma.cc/VU8B-AF2T>] (link directs to recording of the song posted on Marcus Gray’s YouTube account for his music under the stage name Flame).

7. KATY PERRY, *Dark Horse*, on PRISM (Capitol Records 2013) <https://youtu.be/0KSOMA3QBU0?t=18> [<https://perma.cc/UUK9-ZU3T>] (link directs to recording of the song posted on the official YouTube account for Katy Perry’s music).

8. Compare *id.* at 00:20, with FLAME, *supra* note 6, at 00:00.

Immediately, the ostinati have commonalities: the steady, repetitive rhythm, the descending melodic shape, and the pitches' relative location within each song's key, to name a few.⁹ These similarities may sound striking, until one realizes an iteration of this ostinato appears in more than two thousand compositions throughout music history.¹⁰ After several years of litigation and a July 2019 jury verdict awarding Gray \$2.8 million in damages, the US District Court for the Central District of California ultimately granted Perry's motion for judgment as a matter of law in March 2020.¹¹ The Ninth Circuit affirmed on March 10, 2022.¹² The opinions are a step in the right direction, maybe even a large step: despite all of the audible similarities Gray's expert identified, the district court found that no evidence could support the jury's conclusion that the "Joyful Noise" ostinato was original enough for the "Dark Horse" ostinato to infringe it.¹³ In affirming the district court, the Ninth Circuit noted that the points of similarity between the "Joyful Noise" and "Dark Horse" ostinati are "merely common musical 'building blocks,'" and finding infringement would grant Gray an "improper monopoly" over them.¹⁴ Even Gray's expert conceded that "no composer [is] entitled to monopolize" some of the most common elements of the ostinato, like the rhythm.¹⁵ I agree with the courts' decisions in this case and propose a theory of musical composition and ownership, grounded in music theory, history, and stylistic conventions, that both supports the Ninth Circuit's fact-intensive holding and harmonizes the law with musical practices.¹⁶ Ultimately, this Article argues that copyright law should recognize the musical building blocks as objects of common property and that an

9. *Perry*, 2020 U.S. Dist. LEXIS 46313, at *16. Plaintiff's expert identified nine similarities between the two ostinati: (1) the use of the minor scale, (2) a phrase length of eight notes, (3) the pitch sequence, (4) the melodic shape, (5) the rhythm consisting of eighth notes, (6) the even spacing of the eighth notes, (7) use of the phrase as an ostinato, (8) the "pingy" synthesized timbre, and (9) the placement of the ostinato in the songs' textures. *Id.* at *20–22.

10. *Id.* at *33–34; *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 9, *Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 [hereinafter Brief for Musicologists]. The musicologists—scholars of music history and music theory from institutions throughout North America—used a musicologist-compiled resource called "Theme Finder" to search for appearances of the *Perry* ostinato in previous music. *Id.* at 8.

11. *Perry*, 2020 U.S. Dist. LEXIS 46313, at *3–4, *54.

12. *Gray v. Hudson*, 28 F.4th 87, 103 (9th Cir. 2022).

13. *Perry*, 2020 U.S. Dist. LEXIS 46313, at *18–20, *36.

14. *Hudson*, 28 F.4th at 102.

15. *Id.* at 98–99.

16. *See generally id.* at 101–02.

understanding of the musical context for the objects offers a theoretical foundation on which to repeat the *Perry* court’s analysis.¹⁷

Part of the difficulty courts face in evaluating music infringement cases stems from the need to weigh the significance of the various heard similarities and differences between the two songs in dispute.¹⁸ That expert testimony—effectively obligatory in music infringement cases—is based on interpretive analysis rather than the factual knowledge that may guide experts in other disciplines further complicates the court’s task.¹⁹ Historically, Western musical creativity has hinged on melodic and harmonic ingenuity.²⁰ Once melodic and harmonic norms settled as the twentieth century approached, however, the locus of creativity in popular music shifted.²¹ Now, as legal scholar Robert Brauneis has observed, composers emphasize innovation in sonic elements like tone color and spatial effects, as well as by selecting and arranging existing elements in new ways.²² A music-theoretical perspective detailing how music has developed can explain why copyright law should shift to accommodate these models of modern creativity.

My analysis begins by introducing a music-theoretical concept—the musical object—that contextualizes these similarities within a long chain of authorship. Through this concept, I draw parallels between the musical objects that act as compositional building blocks in songs and other types of building blocks that copyright does not protect, such as certain elements of language and the visual arts.²³ These connections

17. *E.g., id.*

18. *See id.* Once a court has established copying in fact—that elements in the two works are objectively similar—it evaluates whether the similarities are “substantial.” *Perry*, 2020 U.S. Dist. LEXIS 46313, at *9. This can be a difficult task in any case, but fact finders without musical training will find it particularly difficult to assess the significance of a given similarity. *See* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA SPORTS & ENT. L.J. 137, 173 (2011).

19. *See* Lund, *supra* note 18, at 139.

20. *See, e.g.,* Jo Renee McCachren, Antoine Reicha’s Theories of Musical Form (Dec., 1989) (Ph.D. dissertation, University of North Texas) (nineteenth century theorist and composer Johann Mattheson considered melody “the basis of everything in the art of composition”).

21. *See* Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, GEO. WASH. L. FAC. PUBL’NS & OTHER WORKS, Feb. 2014, at 1, 18; LEONARD B. MEYER, *STYLE AND MUSIC: THEORY, HISTORY, AND IDEOLOGY* (1989).

22. *See* Brauneis, *supra* note 21.

23. *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.4(J), 906.1–906.3 (3d ed. 2021) [hereinafter COMPENDIUM] (offering examples of uncopyrightable features of visual arts. The Compendium’s example of a fleur de lys design is particularly clear: a fleur de lys on its own is a common, unprotectable object. A painting of Marie Antoinette with fleur de lys wallpaper in the background, however, would be copyrightable as a whole. In the painting, the fleur de lys is still not copyrightable on its own); *id.* § 707 (offering examples of uncopyrightable features of literary works). The Compendium is a “technical manual

place musical objects in a larger category of materials that authors use to create their works but that do not themselves merit copyright protection because they are best left freely available to other authors. Indeed, balancing copyright's structure of incentivizing creative uses of materials with the need to leave those materials available for future creations is a central tenet of all branches of intellectual property.²⁴ While our conception of certain discrete segments of music as tangible entities may invite authors to assert private ownership rights over them, this misunderstands these objects' role in musical composition.

It is well settled that individual notes and chords, like linguistic and visual idioms, do not on their own receive copyright protection; if it were otherwise, courts would see many more music claims alleging infringement of single pitches or chords.²⁵ But combining these elements into melodies does not necessarily create protectable entities, either. Part II first provides a brief overview of music copyright. Then, Part III introduces the concept of musical objects and explains how musical building blocks such as the *Perry* ostinato take on identities separate from the musical compositions in which they appear. These independent identities allow their recognition across musical works, and they contribute to a vocabulary shared both within and between different styles of music.²⁶ They are not original creations of the artists who use them but rather evolve over time through the contributions of many artists.²⁷ Regrettably, their recognizability facilitates infringement lawsuits by norm-violating artists who feel their objects have been stolen from them.²⁸

Parts IV and V bring the concept of musical objects into dialogue with copyright law: first by discussing how they interact with

for the Copyright Office's staff, as well as a guidebook for authors, copyright licensees, practitioners, scholars, the courts, and members of the general public." 37 C.F.R. § 201.2(b)(7).

24. See Jessica D. Litman, *The Public Domain*, 39 EMORY L. J. 960, 968 (1990) (the public domain allows the copyright system as a whole to work by leaving the "raw materials of authorship" available for others to use); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014) (stating that "we have repeatedly emphasized this concern that patent law not inhibit further discovery by improperly tying up the future use of these building blocks of human ingenuity"); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 565 n.27 (1987) (Brennan, J., dissenting) (reasoning that "descriptive words and terms cannot be monopolized as trademarks . . . the available vocabulary of descriptive words would be reduced").

25. See, e.g., *Gray v. Hudson*, 28 F.4th 87, 99 (9th Cir. 2022) ("[I]t is necessary to distinguish between an abstract sequence of pitches and a melody . . ."); *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004) ("To pull these elements out of a song individually, without also looking at them in combination, is to perform an incomplete and distorted musicological analysis.").

26. See MEYER, *supra* note 21, at 11–12.

27. See *id.*

28. See Garcia, *supra* note 1.

copyright's concept of originality, and then by examining some infringement cases in which the court's analysis would have benefitted from a music-theoretical understanding of musical objects. Finally, Part VI proposes that a copyright regime that places musical objects in the public domain best appreciates objects' essential role as communally created foundational building blocks of musical works.

Throughout the Article, I return to *Perry* to explain how the Ninth Circuit's recent decision offers a way to think about how the law might recognize that musical objects belong to the public domain.²⁹ Implicit in an artist's assertion of copyright in a musical object is the misguided conclusion that they are the object's author, and as author, they own the object they created.³⁰ But this conclusion misses the point. As the amici in *Perry* identified, at least two thousand others are also authors of the same object at issue in that case (see Figure 2 for a few examples).³¹ Some scholars have recently written that judicial concern about "prior art" is on the rise in music copyright cases, and prior art figures prominently in most expert opinions.³² The prior art offered by the amici musicologists in *Perry* convinced both the district court and the Ninth Circuit that Gray could not own the particular musical object at issue in the case.³³ I argue that the music-theoretical understanding of musical objects offers an avenue to follow the court's analysis in future cases.

29. See *Hudson*, 28 F.4th at 97.

30. See 17 U.S.C. §§ 102 ("Copyright protection subsists . . . in original works of authorship . . ."), 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

31. Brief for Musicologists, *supra* note 10.

32. See Joseph P. Fishman & Kristelia García, *Authoring Prior Art*, 75 VAND. L. REV. 1159, 1159 (2022).

33. See *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *32–34 (C.D. Cal. Mar. 16, 2020), *aff'd sub nom*, 28 F.4th 87 (9th Cir. 2022); *Hudson*, 28 F.4th at 92.

Figure 2(a): Jean Philippe Rameau: Platée, Opera, Minuet No. 1³⁴Figure 2(b): Chinese Traditional: Ni zenneng wangle meimei wo³⁵Figure 2(c): Alessandro Besozzi, Trio³⁶

Figure 2: Selection of the existing similar melodies to the Perry ostinato

While individual artists may own the copyrights in their songs, I argue the musical objects within those songs are unprotectable common property belonging to the public domain. Such a conception would reflect that musical objects result from the efforts of innumerable authors across time. Most traditions of music have rich histories of borrowing and copying between composers and artists,³⁷ and a legal recognition of musical objects as common property would allow the law to reflect this. Though the term “common” property sounds very similar to the established concept of “communal” property, scholars distinguish these two kinds of property.³⁸ Common property “confers a right *not to be excluded* from the use of property.”³⁹ The concept of “communal” property most frequently arises in the context of shared items of cultural heritage.⁴⁰ There, a well-defined community exercises the exclusive property rights that are typically held by individuals.⁴¹

34. JEAN-PHILIPPE RAMEAU, *Opera Minuet No. 1*, on PLATÉE (1745) (as transcribed by themefinder.org, *infra* note 144).

35. CHINESE TRADITIONAL, *Ni Zenneng Wangle Meimei Wo* (as transcribed by themefinder.org, *infra* note 144).

36. ALESSANDRO BESOZZI, *Trio* (as transcribed by themefinder.org, *infra* note 144).

37. See generally Burkholder, *supra* note 3.

38. Christopher Rodgers, *Towards a Taxonomy for Public and Common Property*, 78 CAMBRIDGE L.J. 124, 125 (2019); Lakshman Guruswamy, Jason C. Roberts & Catina Drywater, *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 720–21 (1999).

39. Rodgers, *supra* note 38.

40. Guruswamy et al., *supra* note 38.

41. See *id.*

“Communal intellectual property” follows this definition.⁴² It is a “right collectively held by communities over their intellectual property.”⁴³ In this Article, I use “common property” to refer to objects that belong to the public domain and which no one may exclude others from using.⁴⁴

In practice, this characterization of musical objects could provide a framework for courts to follow the Ninth Circuit’s *Perry* decision in future cases.⁴⁵ I suggest that doing so will simplify some aspects of the similarity analysis and lead to holdings that better account for the iterative process of use and modification in the public domain that supports musical objects’ development. Most importantly, however, incorporating the concept of musical objects into copyright’s similarity analysis will bring music copyright law into better alignment with the norms of musical creation. It will leave essential musical building blocks available to future creators, while also allowing creators to continue to enjoy copyright protection for their creative selections and arrangements of objects in combination with the innovative sound qualities now at the center of modern music. By pursuing such alignment, copyright can strengthen its credibility with musical communities as a functional way to encourage and regulate musical creativity.

II. MUSIC COPYRIGHT OVERVIEW

To bring a successful copyright infringement claim, a plaintiff must prove (1) “ownership of a valid copyright,” and (2) “copying of constituent elements of the work that are original.”⁴⁶ In the absence of direct evidence that the defendant copied the plaintiff’s work, the plaintiff may prove copying by showing that (1) the defendant had access to the copyrighted work, and (2) that the allegedly copied portions are substantially similar to the plaintiff’s work.⁴⁷ To determine the substantial similarity of two works, the Ninth Circuit (the home of most cases discussed here) uses a two-part test.⁴⁸ The first part, the “extrinsic test,” compares the “objective similarities of specific expressive elements in the two works,” which involves analytical

42. Enninya S. Nwauche, *The Emerging Right to Communal Intellectual Property*, 19 MARQ. INTELL. PROP. L. REV. 221, 225 (2015).

43. *Id.*

44. See Litman, *supra* note 24, at 968, 984, for a similar use.

45. See *id.* at 994.

46. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

47. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (citing *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *overruled by Skidmore*, 952 F.3d at 1066).

48. *Skidmore*, 952 F.3d at 1064.

dissection to separate the protectable and unprotectable elements within the copyrighted work.⁴⁹ Nearly all music cases enlist expert testimony at this stage to opine on what elements of a piece of music are original.⁵⁰ The second part, the “intrinsic test,” asks whether the ordinary, reasonable observer would find the works substantially similar.⁵¹ An infringing work must satisfy both parts of the test in order to be substantially similar to the copyrighted work.⁵²

Throughout the evaluation of a claim, it is essential to note that the music we know as “the song” is protected by two copyrights, usually held by different parties.⁵³ The copyright in the musical work, or musical composition, typically protects elements like the lyrics, melodies, harmonies, and rhythms in a song.⁵⁴ The Copyright Act does not contain any hard rules about which musical elements belong to the musical work, but courts consistently confine it to these four elements.⁵⁵ Notably, each of these elements may be readily captured visually by Western music notation.⁵⁶ The copyright in the sound recording of that composition protects any other original expression captured within the sound.⁵⁷ By this definition, sound recordings are typically defined negatively; that is, they possess all of the sounds that the composition does not.⁵⁸ This commonly includes parameters like expressive timing, timbre, texture, and mixing techniques.⁵⁹ Moreover, the sound recording is distinct from a phonorecord, which is the physicality or digital file to which the sound recording of the musical work is fixed.⁶⁰

49. *Id.*

50. See Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 10, 23 (Stan. Pub. L., Working Paper No. 1661434, 2010) (noting that expert testimony can dissect the protectable elements of a song from the unprotectable and comment on the different types of similarities that appear between two works). The Supreme Court held in *Feist* that a work of authorship is original when it (1) is independently created, and (2) possesses at least a small amount of creativity. 499 U.S. at 345.

51. *Skidmore*, 952 F.3d at 1064.

52. *Id.*

53. Justin Jacobson, *Copyrights 101*, TUNECORE (Nov. 30, 2018), <https://www.tunecore.com/guides/copyrights-101#:~:text=One%20of%20these%20is%20a,or%20%E2%80%9Cmaster%20recording%E2%80%9D%20itself> [https://perma.cc/RJ8K-3ZP7].

54. COMPENDIUM, *supra* note 23, § 802.3.

55. See *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004).

56. *Music 101: What Is Musical Notation? Learn About the Different Types of Musical Notes and Time Signatures*, MASTERCLASS (June 7, 2021), <https://www.masterclass.com/articles/music-101-what-is-musical-notation-learn-about-the-different-types-of-musical-notes-and-time-signatures> [https://perma.cc/9RPV-GJ8A].

57. See COMPENDIUM, *supra* note 23, § 803.2(A).

58. See *id.*

59. See *Newton v. Diamond*, 349 F.3d 591, 595 (9th Cir. 2003) (discussing the need to “filter out” the elements of the sound recording in order to assess infringement of the composition).

60. See COMPENDIUM, *supra* note 23, § 802.4(B).

This Article’s discussion of musical objects is confined to those that belong to musical compositions. In *Perry* and the other cases I consider, the musical objects at issue consist of melody, harmony, and rhythm—musical parameters that fall squarely within copyright law’s definition of the composition.⁶¹ The concept of musical objects, however, is not inherently limited to these elements. For example, the process of sampling creates musical objects by force; the segments of music used are cut (or more accurately, copied) from their original recording and pasted into a new one.⁶² A sample excerpts a slice of a sound recording, which includes not only melody, harmony, and rhythm, but also timbre, performance, and sound engineering features.⁶³ The sampled portions of music are passed between artists in the same way as the *Perry* ostinato.⁶⁴ Unsurprisingly, similar accusations of “theft” surround the use of unauthorized samples.⁶⁵ A sample differs from the compositional objects at the center of this Article because the sound clip embodies the entire sound recording for the sampled portion of the song. It includes pitches, harmonies, and rhythms, but also timbral decisions, spatial effects, and the selection and arrangement of all these elements—primary elements in modern musical creativity. Recorded objects have their own peculiarities and will not be explored further here. This Article instead focuses on compositional objects, like those at issue in *Perry*.⁶⁶

A. *Prior Art in Copyright Law*

A final principle of copyright law relevant to courts’ analyses of musical objects in infringement suits is the traditional understanding that prior art—work existing before the plaintiff created their allegedly infringed work—“does not form an inherent part of adjudicating copyright cases.”⁶⁷ Courts have historically held that the appearance of a similar work or part of a work in the public domain does not render an author’s copyright invalid, as long as the author created their work

61. See *id.* § 618.4(C).

62. See Will Fulford-Jones, *Sampling*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.47228> [<https://perma.cc/GPU8-2DMC>].

63. See *id.*

64. See *id.*

65. Even courts buy into this. See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (using the biblical quote “Thou shalt not steal”).

66. See *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *3 (C.D. Cal. Mar. 16, 2020), *aff’d sub nom.*, *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022).

67. MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01(A)(2) (Matthew Bender ed., rev. ed. 2023).

independently.⁶⁸ That author's copyright, however, only attaches to those parts of the work that they created; materials that began in the public domain will stay there.⁶⁹ In some of copyright's most influential cases, judges have stated this point clearly and emphatically.⁷⁰ The 1924 case *Fred Fisher v. Dillingham*, discussed further in Part V, focused on whether a plaintiff's use of public domain material in their work could provide a defense to a defendant's infringement of that material.⁷¹ The case involved a pair of similar ostinati appearing in two songs, and Judge Learned Hand rejected the defendant's argument that the appearance of the same ostinato in works predating the plaintiff's song could undercut the originality of the plaintiff's use.⁷² Fourteen years later, in the context of a theatrical production, Judge Hand continued to emphasize this point in *Sheldon v. Metro-Goldwyn Pictures Corp.*, where he rejected the defendant's offerings of prior art to weaken the plaintiff's copyright, declaring that "it [made] no difference how far the play was anticipated" by earlier similar works.⁷³ Courts have continued to insist that copyright may subsist in any work at which the author "independently arrived," even if that work is similar, even identical, to a prior work.⁷⁴

On first consideration, copyright's lack of deference to prior art seems like a barrier to a social, cumulative view of musical composition in which authors draw from and add to existing material. Despite claiming to avoid deference to prior art, however, courts do consider it a relevant piece of their infringement analyses.⁷⁵ As the court in *Granite Music Corp. v. United Artists Corp.* observed, "the law is replete with cases which [assume], *sub silentio*, that prior works [are] relevant."⁷⁶ That case involved an alleged copying of a four-note musical object that the defendant identified in seven works that predated the plaintiff's song.⁷⁷ In recognizing prior art, the court stated outright what it remarked that other courts have, at best, only acknowledged implicitly:

68. *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 149 (S.D.N.Y. 1924).

69. *See id.* at 150.

70. *See, e.g., id.*; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53 (2d Cir. 1936).

71. *Fred Fisher, Inc.*, 298 F. at 149.

72. *Id.* at 148, 152.

73. *Sheldon*, 81 F.2d at 53 (concerning a play based on a real murder trial. Judge Hand held that, although defendant was welcome to base his film on the same trial, he could not take from plaintiff's work those elements that were altered from the original facts).

74. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (differentiating patent and copyright cases).

75. *See, e.g., Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976).

76. *Id.*

77. *Id.* at 720–21.

the appearance of the disputed four-note segment in prior works meant that the plaintiff's work was "not a 100 percent unique composition."⁷⁸

Today, the relevance of prior art in music copyright infringement analyses is becoming even more common, as Joseph Fishman and Kristelia García observe in their article, *Authoring Prior Art*.⁷⁹ Prior art "allows judges to understand a work in its creative context," and, in cases that allege infringement of a musical object, Fishman and García argue the creative context in which that object developed should be a necessary component of an infringement analysis.⁸⁰ They further note that courts most often weigh prior art in their analyses when the plaintiff alleges infringement of a short fragment of their song,⁸¹ or under my framework, in cases centered on a musical object. The study of prior art provides important context about how previous artists have used the object, and it invites judges to consider the numerous individuals who have contributed to the object's development.⁸² Its increasing visibility in infringement cases is a promising development, and this Article further explores the support it can offer to similarity analyses in Part VI.

III. THEORIES OF THE MUSICAL OBJECT

Artists who bring infringement lawsuits over musical objects make two assumptions: first, that writing a musical composition makes one the author of the individual elements that comprise their composition; and second, that holding a copyright in a musical composition makes one the owner of those individual elements.⁸³ To understand why these assumptions are misguided, it is necessary to understand those precise individual elements.

A. Musical Objects in Early Music

In *Whose Music Is it Anyway: How We Came to View Musical Expression as a Form of Property*, Michael Carroll considers the social and material evolutions that have led artists to make proprietary

78. *Id.*

79. Fishman & García, *supra* note 32.

80. *Id.* at 1164.

81. *Id.* at 1182.

82. See Matthew Butterfield, *The Musical Object Revisited*, 21 MUSIC ANALYSIS 327 (2002).

83. See, e.g., *Granite Music*, 532 F.2d at 721.

claims in their music.⁸⁴ Carroll points out that in the ancient world, communities treated music as “divinely inspired,” and early theorists such as Plato, Pythagoras, and Ptolemy connected the harmonic series to the natural worlds, both earthly and celestial.⁸⁵ The harmonic structures found within music were merely expressions of a “rational order underlying formal perfections throughout the universe.”⁸⁶ People did not have ownership interests in music because they did not create it. Even performers who, according to a modern understanding, did compose their own music “understood themselves to be giving voice to an existing cultural script.”⁸⁷ After the invention of musical notation in the Middle Ages, however, humans gained the ability to preserve music and perform a single piece repeatedly.⁸⁸ Notation “enable[d] the objectification of musical expression,” and created a new, visual space in which music could evolve.⁸⁹ In important ways, music left the realm of the divine and came more squarely under human control.⁹⁰ Music-making no longer required improvisation as its starting point; notation facilitated a single-author narrative of musical expression flowing from human (now the “composer”) to paper.⁹¹ The progression of notation and of the composer provided the “preconditions for copyright.”⁹²

While notation can create physical objects that represent music, music theoretical literature also suggests that musical objects exist independently of notation.⁹³ Several authors have attempted to trace the emergence of understanding music as an object, even before

84. Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405 (2004).

85. *Id.* at 1409; James Haar, *Music of the Spheres*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://www.oxfordmusiconline.com/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000019447> [<https://perma.cc/GET5-TKS3>].

86. ANDREW BARKER, GREEK MUSICAL WRITINGS: II, HARMONIC AND ACOUSTIC THEORY 271 (1989) (Barker’s forward to his translation of Ptolemy’s *The Harmonics* (2nd century A.D.)).

87. Carroll, *supra* note 84, at 1426–27.

88. *Id.* at 1437–38.

89. *Id.*

90. *See id.*

91. This is an oversimplification. As Carroll points out, early notation was a “descriptive” system that codified existing musical compositions, acting as more of a cue card for performing musicians. *See id.* at 1439–40. Markings called “neumes” conveyed the approximate shape of a melody and showed its interaction with other melodies in the music. This facilitated, approximately, repeated performances of the music. It would take a few hundred years before notation gained prescriptive capabilities that would enable musicians to perform unknown works, or composers to write music without first manifesting it aurally. *See also* Ian D. Bent, David W. Hughes, Robert C. Provine, Richard Rastall, Anne Kilmer, David Hiley, Janka Szendrei, Thomas B. Payne, Margaret Bent & Geoffrey Chew, *Notation*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.20114> [<https://perma.cc/Y8YP-T5N8>].

92. Carroll, *supra* note 84, at 1450.

93. *See id.*

referring to it as an “object” explicitly.⁹⁴ Lydia Goehr’s *The Imaginary Museum of Musical Works* analyzed this history with respect to treating entire musical works as objects, while others examined the ways that musical culture treats smaller elements within musical works as objects.⁹⁵ Copyright lawsuits focus on these smaller musical elements, with songwriters treating them as objects by asserting property rights in them.⁹⁶

Copyright infringement lawsuits are not the only instances in which composers objectify segments of music, and examples of composing with musical objects date back to at least the eighteenth century.⁹⁷ According to work in schema theory, a subfield of music theory dedicated to studying the musical patterns in the music of the Classical era,⁹⁸ composers understood music to involve combining and developing upon preexisting patterns known and shared among their contemporaries.⁹⁹ Composers recognized the schemata that they used when they heard them in the work of others, because those writing in the Western Classical tradition shared “nearly the same repertory of schemata.”¹⁰⁰ In fact, the primary marker of style in that era was a “particular repertory of stock musical phrases” which composers combined in predictable ways.¹⁰¹ A similar stock repertory of harmonic schema has evolved in modern popular music, many of which are what Christopher Doll describes as “chord loops”—“phrases that end where they begin” by eliding the boundaries between one harmonic pattern and the next.¹⁰²

94. See LYDIA GOEHR, *THE IMAGINARY MUSEUM OF MUSICAL WORKS: AN ESSAY IN THE PHILOSOPHY OF MUSIC* (1994); ROBERT O. GJERDINGEN, *MUSIC IN THE GALANT STYLE* (2007) (describing recurrent “schema” Classical composers passed around between compositions); Barry Empson, *Schoenberg’s Hat: Objects in Musical Space, in FRAMEWORKS, ARTWORKS, PLACE: THE SPACE OF PERCEPTION IN THE MODERN WORLD* (Timothy J. Mehigan, ed.) (2008).

95. Goehr, *supra* note 94.

96. See Brief for Musicologists, *supra* note 10.

97. GJERDINGEN, *supra* note 94.

98. Usually considered 1750–1827 (beginning with the death of J.S. Bach and ending with the death of Ludwig Van Beethoven). Bertil van Boer, *Classical Era*, OXFORD BIBLIOGRAPHIES <https://www.oxfordbibliographies.com/view/document/obo-9780199757824/obo-9780199757824-0128.xml> [<https://perma.cc/6JS8-TQ35>] (Oct. 29, 2013).

99. GJERDINGEN, *supra* note 94, at 10–11.

100. *Id.* at 16.

101. *Id.* at 6.

102. See CHRISTOPHER DOLL, *HEARING HARMONY: TOWARD A TONAL THEORY FOR THE ROCK ERA* 86, 281–83 (2017). Examples of chord loops in well-known songs include the chorus of “Blister in the Sun” by The Violent Femmes and the verses of “Piano Man” by Billy Joel. In both songs, listen for short segments of repetition in the bass. See VIOLENT FEMMES, *Blister in the Sun*, on VIOLENT FEMMES (Craft Recordings 1983); BILLY JOEL, *Piano Man*, on PIANO MAN (Columbia 1973).

In the late nineteenth and early twentieth centuries, composers such as Arnold Schoenberg based compositions around abstract series of pitches—“musical ideas”—which they considered identical even among non-identical presentations.¹⁰³ Schoenberg conceived of his musical ideas as constant, explaining that one perceives them just as one’s “mind always recognize[s] . . . a knife, a bottle or a watch, regardless of its position.”¹⁰⁴ While Schoenberg himself did not employ the term, Barry Empson observes that Schoenberg regarded sequences of musical sounds in his work as “some sort of object.”¹⁰⁵ Specific acknowledgement of a “musical object” would come later in the evolution of music theory, but composers and listeners alike understood the importance of stable, recognizable patterns in musical composition.¹⁰⁶ Composing in a particular style, be it galant, expressionist, or dance-pop, requires a composer to transmit stylistic information to their audience; history depicts a long-standing practice of conveying this style through common musical objects.¹⁰⁷

B. Music-Theoretical Perspectives on the Musical Object

The most influential explicit references to musical objects come from French electronic composer Pierre Schaeffer in his book *Treatise on Musical Objects* and music theorist Patricia Carpenter in her essay “The Musical Object.”¹⁰⁸ Influenced by the phenomenology of Edmund Husserl and Maurice Merleau-Ponty, both authors recognize the object as a segment of music having a kind of fixed identity.¹⁰⁹ Schaeffer describes musical works as being comprised of objects, or “sound building blocks” which one can “isolate and compare . . . independently from the context[s]” from which the objects came.¹¹⁰ For Carpenter, an archetypal musical object is a melody.¹¹¹ A melody can be transposed to different pitches, but still remain recognizable as itself.¹¹² Its identifying characteristics “persist and are recognizable through

103. Empson, *supra* note 94, at 83.

104. *Id.*

105. *Id.*

106. *See id.*

107. *See id.*

108. *See* PIERRE SCHAEFFER, TREATISE ON MUSICAL OBJECTS: AN ESSAY ACROSS DISCIPLINES 205–48; 379–90 (Christine North & John Dack trans., University of California Press 2017) (1966); Patricia Carpenter, *The Musical Object*, CURRENT MUSICOLOGY, Jan. 1967, at 56, 56.

109. SCHAEFFER, *supra* note 108, at 17; Carpenter, *supra* note 108, at 60.

110. SCHAEFFER, *supra* note 108, at 17.

111. *See* Carpenter, *supra* note 108, at 60.

112. *Id.*

time.”¹¹³ Both authors agree that objects appear within pieces of music, but also possess identities outside of them; they are not products of the “sheer act of music-making, but musical ‘thing[s]’” that are “available for contemplation and analysis” outside the temporal listening experience.¹¹⁴ A musical object is a segment of music with the ability to be “heard and reheard.”¹¹⁵ Its identity is independent of “any single experience of it” in one artist’s song.¹¹⁶ Nearly forty years later, Matthew Butterfield further explored that same understanding of the musical object, explaining that it is “treated as an entity . . . and putatively exists fully independent of the real contexts in which it is encountered.”¹¹⁷ Butterfield agreed with Carpenter that one can consider the object in a general sense, independent of a particular performance.¹¹⁸

While Butterfield’s conception of the musical object aligns with that offered by Carpenter and Schaeffer, his reconsideration of it offers a more rigorous approach informed by advances in cognitive science undertaken in the years since the earlier authors’ writings.¹¹⁹ Butterfield explains that listeners tend to “map [their] experience of physical objects onto [their] experience of sounds and thereby ‘objectify’ them.”¹²⁰ Listeners treat sounds as objects because such treatment

113. *Id.* at 62.

114. *Id.* at 64.

115. *Id.*

116. *Id.*

117. Butterfield, *supra* note 82, at 327.

118. *Id.*

119. In particular, work by George Lakoff and Mark Johnson. *See generally*, GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (theorizing that metaphors relating to the physical world help humans understand abstract experiences).

120. Butterfield, *supra* note 82, at 333. Under the surface of this mapping lies an *idealized cognitive model* (ICM) which guides one’s understanding of physical object categories. The closer a thing or experience fits the ICM, the more easily one understands it as an object. The ICM has six conditions:

1. An object is an other, not I;
2. It is structured in our perception by container and part-whole image schemata;
3. It is some type of thing, i.e. it can be categorized at the basic level with respect to perceived shape and function;
4. It is durable, material and present as perceived through vision and/or touch;
5. Its shape and size tend towards gestalt in our perception—i.e. optimally the whole can either be held in the hands or fit entirely within the field of vision (or at least enough parts can be seen that one can imaginatively extrapolate the size and shape of the whole); and
6. It is inanimate.

Id. at 337. From here, Butterfield explains that music is a relatively poor example of an object, but through what George Lakoff and Mark Johnson refer to as the “ontological metaphor,” we can treat

proves a useful method of understanding the aural world a piece of music creates.¹²¹

Under Butterfield's analysis, audiences experience musical objects on either a *microscopic* or *macroscopic* level.¹²² At the macroscopic level are entire compositions.¹²³ In a music copyright case, this would be the complete song of which only a small portion is typically at issue. Objects at the microscopic level are smaller building blocks¹²⁴ like those at the center of many infringement lawsuits. They are small enough to be "wholes that emerge entirely within the psychological present in . . . short-term memory,"¹²⁵ durationally determinate, and exhibit core features sufficiently discrete and articulate to differentiate themselves from the surrounding musical contexts.¹²⁶ A single pitch or chord can be an object, but because objects need a shape or articulation to stand out from the rest of the composition, an object is more discernable as a motive, rhythmic figure, or short melodic phrase, such as the *Perry* ostinato or those offered in Figure 3.¹²⁷ It is difficult and unhelpful to hear each individual note in that ostinato as an independent object; the singular pitches C and B are not on their own useful points of comparison or similarity among songs because they are practically universal, appearing in nearly all songs. A slightly longer phrase which repeats both of those pitches under a steady rhythm, as in *Perry*, may be more useful to identify between songs, because it is specific and stable enough for listeners to recognize across different contexts.¹²⁸

To further clarify what kinds of musical elements a musical object might include, Stephen Davies's concept of ontological "thickness" and "thinness" offers a helpful framing.¹²⁹ In discussing the historical performance movement in Baroque music, Davies explains that the musical features belonging to a "work" depend on whether one

musical objects "as though they were in fact definite bounded things upon which we can take action." *Id.* at 339.

121. *Id.* at 339.

122. *Id.* at 349.

123. *Id.*

124. *Id.*

125. *Id.* See also MICHEL CHION, SOUND: AN ACOUSOLOGICAL TREATISE 173 (James A. Steintrager trans., Duke University Press 2016) (2010) ("defined as enclosed within a temporal listening frame, this notion of sound object . . . is applicable only to a portion of that which we hear").

126. Butterfield, *supra* note 82, at 350.

127. *Id.*

128. *Id.* at 353.

129. Stephen Davies, *The Ontology of Musical Works and the Authenticity of Their Performances*, 25 NOÛS 21, 25 (1991).

conceives of the work as thick or thin.¹³⁰ Under a very thin understanding, “the musical work is said to be a sound-structure of (timbre-less) rhythmically articulated notes, or a relationship between notes, or some combination of these two.”¹³¹ A thick view of the musical work, on the other hand, requires that a piece “possess a sound-structure with tempo, timbre, etc., which must be produced by the playing of certain types of instruments.”¹³² I understand Davies’s concept to apply to smaller segments of music like the *Perry* ostinato.¹³³ A thin conception of the ostinato includes only the notes, rhythms, and relationships between those two parameters (this is how the court conceived of the ostinato, too).¹³⁴ A thick conception more closely resembles the one Marcus Grey proposed, which the court rejected: it includes the synthesized timbres, the textural placement in the mix, and its thematic use as an ostinato.¹³⁵ When the sum total of the musical object’s parts amount to a “thin” musical structure, it should be difficult for a party to claim they are the author or owner.¹³⁶ As the object grows thicker with qualities, however, the artist can build a stronger case that they have amassed an original compilation of existing or new musical features.¹³⁷

A musical object has concrete, constant qualities that make it identifiable across different composers’ work, and these qualities grow more well-defined through frequent use.¹³⁸ Repetition can clarify an object in at least two ways.¹³⁹ First, an object in a song can take the form of a “few unchanging figures that permeate the entire” piece.¹⁴⁰ This type of repetition happens *within* a song. In both Gray’s “Joyful Noise” and Perry’s “Dark Horse,” the ostinato emerges as a discrete object through its constant repetition; the repetition defines the ostinato’s beginning and end for listeners.¹⁴¹ Second, the object can appear as the same basic shape across many works, and listeners can recognize each work’s particular rendition.¹⁴² This is the type of

130. *See id.* at 27.

131. *Id.* at 26.

132. *Id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. Carpenter, *supra* note 108, at 80.

139. *See id.*

140. *Id.*

141. *See* Brief for Musicologists, *supra* note 10.

142. Carpenter, *supra* note 108, at 80.

repetition that occurs between Gray’s song, Perry’s song, and the thousands of other works the *Perry* amici cite.¹⁴³ It is this second type of repetition that often brings musical objects into the courtroom, but such repetition is also essential to the development of cross-composer musical style.¹⁴⁴

To summarize, a musical object is a discrete, repeatable segment of music that comprises part of a musical whole. It has no prescribed length, but at the microscopic level Butterfield describes, a musical object should be both long enough to be recognizable across different repetitions and short enough to be retained in the listener’s memory.¹⁴⁵ Its identifying characteristics are most commonly pitch, rhythm, and harmony, and those characteristics remain constant among the objects’ appearance in different pieces of music.¹⁴⁶ In addition to the objects’ contribution to the piece’s musical content, they convey stylistic information and place the artist’s work within a culturally rich shared history. The objects’ fixed identities between pieces of music allows artists, analysts, and listeners to isolate them from the context of individual compositions for aural or, when notation is present, visual study.¹⁴⁷

C. Objects and Intertextuality

Trading objects between pieces of music situates a given piece within a tradition of other similar pieces. As Butterfield notes, musical objects “emerge from the activities of numerous individuals.”¹⁴⁸ So when the law identifies segments of music as discrete objects capable of being isolated, repeated, or stolen, that identification “masks” the dense network of individuals who contributed to the object’s development.¹⁴⁹ Objects aid in establishing stylistic norms and are one reason that rock music sounds different from jazz, which sounds different from bluegrass.¹⁵⁰ When an artist places an object from a particular style into their work, they borrow from a shared vocabulary, like a linguistic

143. See Brief for Musicologists, *supra* note 10. For a subset of these works, visit THEME FINDER RESULTS, <http://www.themefinder.org/cgi-bin/themerresults?session=09482009&page=1> [<https://perma.cc/26YV-9H3B>] (last visited Feb. 11, 2024). See Figure 2a–c for specific examples.

144. See Brief for Musicologists, *supra* note 10.

145. See Butterfield, *supra* note 82, at 349.

146. See *id.* at 350; Carpenter *supra* note 108, at 64.

147. See Carroll, *supra* note 84, at 1438.

148. Butterfield, *supra* note 82, at 328.

149. *Id.* at 329.

150. See ALLAN F. MOORE, SONG MEANS: ANALYSING AND INTERPRETING RECORDED POPULAR SONG 119–20 (2012) (explaining how the norms of a musical style develop).

idiom or turn of phrase.¹⁵¹ While their choice of object makes an immediate contribution to the song's musical content, it also imbues the piece with meaning about style and history through the object's intertextual information—the traces of those earlier works and artists that used the object in the past.¹⁵²

The connection between an object and the musical style to which it belongs (within an artist's catalogue, between artists, or between genres) is so strong that crossing objects between dissimilar styles often has a humorous effect.¹⁵³ In an essay about musical humor in the movie *This is Spinal Tap*, for instance, John Covach observes that “incongruities [between styles] are key to the humor” in songs from the movie.¹⁵⁴ For example, in the song “Heavy Duty,” a texture saturated with musical objects associated with Heavy Metal is juxtaposed with brief objects from Classical string quartets.¹⁵⁵ The string quartet interludes are humorous because they are so “desperately out of place.”¹⁵⁶ Without recognizable musical objects of both styles in the song, the humorous effect would be weaker. The parodic nature of *Spinal Tap* may give the music within it fair use protections unavailable in typical infringement suits not involving parody.¹⁵⁷ Still, the musical objects in “Heavy Duty” function as markers of musical style in the same way as in non-parodic music.¹⁵⁸

Musical objects drive humor throughout the film and underscore the important role objects play in communicating style. In fact, some authors have characterized musical style as a collection of objects.¹⁵⁹

151. Brief for Musicologists, *supra* note 10, at 5.

152. See generally JULIA KRISTEVA, THE KRISTEVA READER, 34, 37 (Toril Moi ed., 1986) (1966) (defining intertextuality as an approach to interpretation that treats a text as “a mosaic of quotations; any text is an absorption and transformation of another”). For intertextuality in recent music, see e.g., Lori Burns, Alyssa Woods & Marc LaFrance, *The Genealogy of a Song: Lady Gaga's Musical Intertexts on The Fame Monster*, 12 TWENTIETH-CENTURY MUSIC 3, 9 (2015) (explaining that Lady Gaga's music “constructs [its] own stylistic and genre-based lineage” thereby “writing herself into music history”).

153. See John Covach, *Stylistic Competencies, Musical Humor, and “This is Spinal Tap”*, in CONCERT MUSIC, ROCK, AND JAZZ SINCE 1945: ESSAYS AND ANALYTICAL STUDIES 399, 403 (Elizabeth West Marvin & Richard Hermann eds., 1995).

154. *Id.*

155. *Id.*

156. *Id.*

157. See Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1876 (2018).

158. See Covach, *supra* note 153, at 403.

159. See, e.g., Mark Spicer, *Reggatta de Blanc: Analyzing Style in the Music of the Police*, in SOUNDING OUT POP: ANALYTICAL ESSAYS IN POPULAR MUSIC 124, 127 (John Covach & Mark Spicer eds., 2010). The terms “topic” and “schema” are music-theoretical terms equivalent to my use of “musical object.” The sub-field of Topic Theory analyzes the development of topics/objects

Placement of objects throughout a song indicates information about the song to the listening public. On the songwriting side, the bulk of creative compositional choices in modern music come from the selection and arrangement of existing harmonic, melodic, and rhythmic objects. As instruments and production technologies continue to develop, however, musical innovation's focus has shifted away from these recurring harmonic, melodic, and rhythmic patterns and toward the so-called "secondary parameters" of timbre, texture, and other features of sound quality.¹⁶⁰ In "Joyful Noise" and "Dark Horse," the ostinato object is one component of each song that situates them within the popular music of the early twenty-first century.¹⁶¹ Its presence in each song is a marker of belonging, a nod to other songs like it.

In a copyright system that understands objects as I have described, artists use materials from a shared vocabulary of ideas, add their own artistry, and return the object to the commons, leaving it more intertextually rich than they found it. In a system that over-attributes objects to individual artists or fails to recognize the objects' recurring nature, however, later artists who incorporate existing musical objects into their music may be accused of infringing, copying, or even worse, "stealing."¹⁶² In reality, it is nearly impossible for an aggrieved plaintiff, a court, or even an expert musicologist to disaggregate the many tiny contributions that comprise an object, such that no one has an authorial claim in the whole.¹⁶³ Misunderstanding the musical object by treating it as the property of an individual artist hinders the ability of later artists to compose new pieces and prevents copyright law from promoting progress in music composition.

IV. DEFINING ORIGINALITY

The observation that musical objects are cumulatively created over time significantly weakens any single artist's claim to own a particular object appearing in one of their songs.¹⁶⁴ The system of music copyright will function best when its guiding principles align with those

across different pieces, composers, styles, and eras throughout music history. *See generally* DANUTA MIRKA, THE OXFORD HANDBOOK OF TOPIC THEORY (2014).

160. *See* Brauneis, *supra* note 21; *see also* Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 432 (1988). For discussion of primary and secondary parameters in music, *see* MEYER, *supra* note 21, at 14–16.

161. *Gray v. Hudson*, 29 F.4th 87, 99 (9th Cir. 2022).

162. *See id.*

163. *See generally* Butterfield, *supra* note 82, at 328–29.

164. *See generally id.*

of the creative work it governs.¹⁶⁵ If this is the case, copyright needs to recognize that most musical objects cannot be traced back solely to the artist bringing the claim. Copyright only protects works that are “original to the author,” which requires that the work is both: (1) independently created by the author; and (2) minimally creative.¹⁶⁶ Independent creation means that an author created the work on their own, without copying from prior works.¹⁶⁷ The Supreme Court clarified in *Feist* that an independently created work may closely resemble other works and still receive protection “as long as the similarity is fortuitous, not the result of copying.”¹⁶⁸

Independent creation alone, however, does not entitle a work to copyright protection.¹⁶⁹ The work must also display at least some creativity, “no matter how crude, humble, or obvious it might be.”¹⁷⁰ *Feist* suggests that copyright protection requires only a low amount of creativity, but neither the Court nor the Copyright Act states explicitly what “creativity” means.¹⁷¹ Despite the central role creativity plays in courts’ infringement analyses, the term does not appear in the Copyright Act anywhere.¹⁷²

In music composition, creativity involves a combination of both innovation and choice: through the discovery and use of new musical elements, and from making new choices within existing compositional constraints.¹⁷³ A compositional constraint might be that a phrase will begin on the home, or “tonic” chord of a key,¹⁷⁴ or that each measure of music will begin with a note in the melody that is consonant with the

165. See related arguments in DANIELLE SIMONE, COPYRIGHT AND COLLECTIVE AUTHORSHIP: LOCATING THE AUTHORS OF COLLABORATIVE WORK 71 (2019) (asserting that analyzing the way a particular creative community conceives of authorship can “enrich our understanding” of how copyright should determine authorship. By aligning with community norms and expectations, copyright can maintain its credibility as a “tool for regulating authorship”); see also Susan Corbett, *Creative Commons Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?*, 74 MODERN L. REV., 503, 531 (2011).

166. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

167. COMPENDIUM, *supra* note 23, § 308.1.

168. *Feist*, 499 U.S. at 345.

169. *Id.* at 346.

170. *Id.* at 345.

171. *Id.*; see also 17 U.S.C. § 101 (the Copyright Act contains no definition of “creativity”).

172. See § 101 (the Copyright Act contains no mention of “creativity”).

173. See MEYER, *supra* note 21, at 142–43 (observing that the current age conceives of creativity as nearly the same as innovation and fails to acknowledge that creativity also involves making choices among existing possibilities).

174. A key’s “tonic” chord is the primary note of that key. As the main note, it provides the basis of a key’s tonic chord and typically appears at the beginning and end of musical phrases. See *Tonic*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.28121> [<https://perma.cc/8J7H-UASL>].

harmony.¹⁷⁵ Adding something new is essential, but most instances of musical creativity will present existing material in a new way, rather than offering material never before heard.¹⁷⁶

Excepting perhaps the extreme avant-garde, all music comes from the compilation of preexisting elements; a phrase of music requires an arrangement of pitches, rhythms, and harmonies which its composer did not invent.¹⁷⁷ It thus falls on the courts to determine whether these arrangements of unprotectable elements possess the creativity necessary for protection.¹⁷⁸ In combination with Meyer's observations on innovation, they may interpret *Feist's* low bar for creativity to say that unprotectable, "utterly conventional ways of arranging" these elements are those that do not involve any new choices within existing compositional constraints.¹⁷⁹ This standard recognizes the paradox that the selection and arrangement of unprotectable musical elements in an object, or larger phrase that combines objects, might warrant copyright protection. Simultaneously, however, some aspects of a work may fail to meet the originality requirement.¹⁸⁰ Over time, the focus of musical creativity has shifted as songs are commonly composed in a recording studio (as opposed to merely being recorded there).¹⁸¹ As such, the source of innovation in new songs has shifted away from traditional locations in melody and harmony and toward musical parameters a recording captures particularly well, such as nuances in tone color and tuning.¹⁸²

In music cases after *Feist*, courts have found that copyright does not protect "common or trite musical elements," and that even the combination of these elements may fail to meet the low threshold for creativity.¹⁸³ In *Perry*, the ostinato features an evenly spaced rhythmic pulse with two repeating pitches located in the second and third

175. See MEYER, *supra* note 21, at 217.

176. *Id.*

177. See *Gray v. Hudson*, 28 F.4th 87, 99 (9th Cir. 2022) (differentiating an abstract sequence of pitches from a melody); *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004) (explaining the necessity of assessing combinations of unprotected elements holistically).

178. See *Hudson*, 28 F.4th at 99–100; *Swirsky*, 376 F. 3d at 848.

179. *Hudson*, 28 F.4th at 101.

180. See *id.* at 100–01.

181. Brauneis, *supra* note 21, at 24.

182. *Id.* at 18.

183. *Smith v. Jackson*, 84 F.3d 1213, 1216 (9th Cir. 1996), *overruled on other grounds by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (affirming that while *Smith's* main holding is overruled, the case is still good law for the statement that copyright does not extend to common or trite musical elements).

positions in a minor scale.¹⁸⁴ The main note of the ostinato is a pitch that belongs to the chord underlying the whole measure. That chord is the tonic of the song's key, and placing an ostinato over this chord is a common choice.¹⁸⁵ The main note of the ostinato descends to the next lowest note, which sets up a smooth melodic descent into the next note of that same tonic chord (see this illustrated in Figure 1, *supra*).¹⁸⁶ Gray's expert confirmed the ostinato's adherence to norms of tonal harmony, saying that "[scale degree] 3 wants to go to 2, [and] the 2 wants to go to 1 because 1 is our home [tonic] note."¹⁸⁷

While Gray may have chosen each note in the ostinato and chosen to follow these melodic conventions, neither choice is new.¹⁸⁸ None of these musical features are original, as the Ninth Circuit recently affirmed,¹⁸⁹ but rather are the culmination of hundreds of years of music history.¹⁹⁰ Musical objects come about through communal creation, and they should also be understood as common property.

V. MUSICAL OBJECTS IN PAST CASES

Opinions from other cases concerning musical objects, regardless of whether each court finds infringement, do not consider the long process of iterative, incremental creation that precedes musical objects.¹⁹¹ For example, the courts in both *Fred Fisher, Inc. v. Dillingham* and *Swirsky v. Carey* declined to find the defendants had avoided infringement when presented with a dispute over an object shared between two songs.¹⁹² The time between these two opinions from 1924 and 2004, respectively, indicates that the courts' acontextual understanding of the musical objects at issue in the cases is deeply ingrained in legal thinking about music. This history also shows that claims of originality in similar rudimentary musical building blocks have been a subject of litigation for nearly a century.

184. See *supra* Figure 1. The transcription provided visually highlights the aural similarities considered by the *Hudson* court.

185. *Hudson*, 28 F.4th at 100–01.

186. See *supra* Figure 1.

187. *Hudson*, 28 F.4th at 100.

188. *Id.* ("Dr. Decker's explanation that the two ostinat[i] moved 'through musical space' in similar ways simply reflects 'rules of consonance common in popular music.'").

189. *Id.* at 97–99.

190. *Id.* at 92–93.

191. See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004).

192. *Fred Fisher, Inc.*, 298 F. at 152; *Swirsky*, 376 F.3d at 853.

A. Fisher v. Dillingham

In *Fisher v. Dillingham*, the Southern District of New York considered another ostinato accompaniment, represented in Figure 3(a).¹⁹³ There, Judge Hand focused primarily on the independent creation aspect of the two-part originality inquiry the Supreme Court would much later state explicitly in *Feist*. He held that another earlier composer's use of Plaintiff Felix Bernard's ostinato did not invalidate Bernard's copyright.¹⁹⁴ Under a framework that embraces the communal authorship and common property of musical objects, the decision is puzzling. Judge Hand accepted without deep inquiry that Bernard independently created the ostinato in his piece, but he also noted that the pattern that the ostinato repeats could be found in the works of previous composers including Richard Wagner and Robert Schumann (though not as an ostinato),¹⁹⁵ and a composer named Landon (as an ostinato).¹⁹⁶ In the absence of evidence revealing that Bernard had copied his work from one of those earlier compositions, Hand rejected the argument that the presence of the ostinato pattern in prior works compromised Bernard's claim to originality.¹⁹⁷ The court's definition of originality required only "independent thought and an absence of copying the work of others," and it held that Bernard's work was original.¹⁹⁸

Even under this easily met standard for originality, which does not directly consider whether the ostinato contained "some minimal degree of creativity,"¹⁹⁹ Bernard's ostinato should not have been deemed original because he did not create it himself.²⁰⁰ Like other musical objects, the ostinati in Bernard's and defendant Jerome Kern's songs are part of an ongoing process of creation which drew upon the harmonic and textural developments of previous composers.²⁰¹ Specifically, the ostinati are developments on a ubiquitous arpeggio pattern, the Alberti bass.²⁰² Bernard may have made an independent

193. *Fred Fisher, Inc.*, 298 F. at 147; see *infra* Figure 3(a).

194. *Fred Fisher, Inc.*, 298 F. at 152; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

195. *Fred Fisher, Inc.*, 298 F. at 148.

196. *Id.* at 148–49.

197. *Id.*

198. *Id.* at 152 (quoting ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 184 (1917)).

199. See generally *Feist*, 499 U.S. at 345–46.

200. See *id.*

201. See *id.*; *Fred Fisher, Inc.*, 298 F. at 148.

202. An accompaniment pattern consisting of chords played note-by-note in the order: lowest, highest, middle, highest. David Fuller, *Alberti Bass*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.00447> [<https://perma.cc/7CAT-ZDXZ>].

choice in incorporating this Classical Era accompaniment pattern into his Tin Pan Alley Era show tune, but under a historically accurate understanding of musical objects, the originality comes from the creative *combination* of existing objects.²⁰³ Judge Hand did consider the composers' creative combinations as a whole, noting that, while the ostinato "helped" the success of Kern's song, he thought the piece "won its success" from the ostinato's combination with Kern's melody.²⁰⁴ But Judge Hand's nuanced analysis of the two works ultimately did not change the outcome.²⁰⁵ Finding infringement of the ostinato, Hand effectively granted Bernard ownership over an uncreative, common musical building block.²⁰⁶

B. Swirsky v. Carey

Nearly a century later, the infringement alleged in *Swirsky v. Carey* was broader than that in *Perry* or *Fisher*, covering the entire eight-measure choruses of Xscape's "One of Those Love Songs" and Mariah Carey's "Thank God I Found You."²⁰⁷ The most similar-sounding, contentious measures were measures one and five.²⁰⁸ The composers of Xscape's song filed suit for copyright infringement against Carey, and Carey moved for summary judgment.²⁰⁹ The district court granted summary judgment, agreeing with Carey that the plaintiffs raised no triable issue of material fact on the "extrinsic" prong of the Ninth Circuit's test for substantial similarity.²¹⁰ In particular, measures one and five of Xscape's song were not original enough to merit copyright protection.²¹¹ The Ninth Circuit reversed the district court's grant of Carey's motion for summary judgment, holding that the

203. See *Feist*, 499 U.S. at 345–46; *Fred Fisher, Inc.*, 298 F. at 148.

204. *Fred Fisher, Inc.*, 298 F. at 147.

205. *Id.* at 148.

206. *Id.*

207. See *Swirsky v. Carey*, 376 F.3d 841, 846 (9th Cir. 2004); XSCAPE, *One of Those Love Songs*, on TRACES OF MY LIPSTICK (Sony Music 1998), <https://youtube.com/watch?v=jX6flc09ZDM&feature=share&si=EMSIkaIECMiOmarE6JChQQ&t=57> [<https://perma.cc/7G5S-WBNB>] (link directs to a recording of the contested portion of the song posted on Xscape's official YouTube page for their music); MARIAH CAREY, *Thank God I Found You*, on RAINBOW (Columbia Records 1999), <https://youtube.com/watch?v=7KVxjQUCyn0&feature=share&si=EMSIkaIECMiOmarE6JChQQ&t=64> [<https://perma.cc/F5GH-VA3U>] (link directs to a recording of the contested portion of the song posted on Mariah Carey's official YouTube page for her music).

208. *Swirsky*, 376 F.3d at 853; see *infra* Figure 3(d) for a transcription (demonstrating that measure one was the same as measure five within each song).

209. *Swirsky*, 376 F.3d at 844.

210. *Swirsky v. Carey*, 226 F. Supp. 2d 1224, 1234 (C.D. Cal. 2002).

211. *Swirsky*, 376 F.3d at 846.

record reflected “sufficient disagreement concerning the substantial similarity” of the choruses to send the case to a jury.²¹² Moreover, the court declined to hold that measures one and five were unprotectable musical building blocks as a matter of law.²¹³ The court thus remanded the case, and the parties settled.²¹⁴

Throughout the opinion, the court closely interrogated the similarities and differences highlighted by the parties’ experts, devoting their most detailed discussion to the highly similar material in measure one.²¹⁵ Under my theory of musical objects, Xscape’s isolation of the melodic snippet from that measure rendered it an object, one which had undeniably comparable qualities to those in Carey’s song.²¹⁶ Between songs, the vocal melody was approximately the same with different ornamentation, as the Plaintiff’s expert observed.²¹⁷ The expert’s analysis selectively included only those notes he found structurally important to the song and thus had the effect of drawing attention to the shared musical objects between the choruses.²¹⁸ Separating structural notes (generally, those that are consonant with the underlying harmony and rhythmically emphasized) from ornamental ones is an established, legitimate method of musical analysis, and the Ninth Circuit agreed over Carey’s objections.²¹⁹ The court also vacated the district court’s finding that the music in measures one and five was unprotectable under the *scènes à faire* doctrine, which regards as unprotectable features of a work that are standard to that work’s genre or style.²²⁰ That doctrine is genre-specific, meaning that it applies of

212. *Id.* at 853.

213. *Id.* at 851.

214. *Id.* at 853; Notice of Settlement, *Swirsky*, 376 F.3d (No. 2:00-cv-09926), https://web.archive.org/web/20120402095432/http://www.legalmetric.com/cases/copy-right/cacd/cacd_200cv09926.html [<https://perma.cc/E7CR-DG7S>].

215. *Swirsky*, 376 F.3d at 845–50.

216. *See id.*

217. *Id.* at 845 (“[T]he two songs’ choruses shared a ‘basic shape and pitch emphasis’ in their melodies.”).

218. *Id.* at 848.

219. *Id.* at 846–47; *see also* M. Fletcher Reynolds, *Music Analysis for Expert Testimony in Music Copyright Litigation* (1991) (Ph.D. dissertation, University of Kansas); ALLEN CADWALLADER, DAVID GAGNÉ & FRANK SAMAROTTO, *ANALYSIS OF TONAL MUSIC: A SCHENKERIAN APPROACH* (4th ed. 2019) (detailing an early-twentieth century theory of tonal harmony which rests on identifying a work’s structural notes and harmonies); Drew Nobile, *Harmonic Function in Rock Music*, 60 J. MUSIC THEORY 149, 165 (2016) (applying theories described in Cadwallader, Gagne, & Samarotto (2019) to popular music).

220. *Swirsky*, 376 F.3d at 850; *see also* NIMMER, *supra* note 67, § 13.03 (offering an example of “a broken-hearted lover seeking solace in country music, [with] the choice of a barroom with a jukebox as the setting” as a scene so common to the genre of country music as to be unprotectable).

stock features of works “in the same relevant field.”²²¹ The argument rested on the similarity between Xscape’s song and the prior art song, “For He’s a Jolly Good Fellow,” but the court declined to apply the doctrine to music shared by just two songs in different genres.²²² The court did recognize that the choruses had obvious similarities and ultimately gave great weight to the parties’ hair splitting over whether the objects in measure one of Xscape’s and Carey’s choruses were “almost identical” or “identical.”²²³ Ultimately, Xscape’s experts persuaded the court, which reversed the district court’s grant of summary judgment.²²⁴

Given its limited field of comparison with “One of Those Love Songs” and “For He’s a Jolly Good Fellow,” the Ninth Circuit’s rejection of the *scènes à faire* doctrine makes sense. The “scenes that must be done” in a classic folk song are not the same as those in a 1990s pop song.²²⁵ Both songs, and Carey’s “Thank God I Found You,” do, however, rely on conventions of tonal harmony, and Carey tried to argue that measure one of Xscape’s song was not original because it contributed “merely trivial” variations on “For He’s a Jolly Good Fellow.”²²⁶ However, since the two songs differed in meter, tempo, and key, the court held that a triable issue of fact existed as to whether the first measure of Xscape’s song was original.²²⁷ Because the court rejected all of Carey’s arguments about the unoriginality of Xscape’s song, it reversed the district court’s grant of summary judgment.²²⁸

C. Gray v. Perry

The Ninth Circuit’s later opinion in *Perry 2022* reached the correct result from a music-theoretical and legal perspective.²²⁹ The court held that Gray failed to submit legally sufficient evidence that copyright law protected the disputed similar portions of “Joyful Noise” and “Dark Horse.”²³⁰ Gray’s expert testified that when viewed in isolation, none of the common elements between the ostinati suggested

221. *Swirsky*, 376 F.3d at 850; *see also* Fishman & García, *supra* note 32, at 1171 (“*scènes à faire* is supposed to be specific to a work’s genre”).

222. *Swirsky*, 376 F.3d at 850.

223. *Id.*

224. *Id.* at 853.

225. NIMMER, *supra* note 67, § 13.03 (2022); *see also* Fishman & García, *supra* note 32, at 1171.

226. *Swirsky*, 376 F.3d at 851.

227. *Id.*

228. *Id.* at 853.

229. *See* Gray v. Hudson, 28 F.4th 87, 102 (9th Cir. 2022).

230. *Id.* at 103.

similarity.²³¹ Rather, “the combination of them” created a protectable entity.²³² While the court agreed with Gray’s expert that none of the ostinato’s individual elements were protectable, it also found that even the combination of the elements was unoriginal.²³³ When a combination of ordinary elements is “practically inevitable” or merely follows an “age-old practice, firmly rooted in tradition,” the selection and arrangement of the elements that comprise the whole are not protectable.²³⁴ In other words, they are “utterly conventional ways of arranging information.”²³⁵ As Leonard Meyer has noted on the musicological side, these conventions should be unprotectable because they are “shared, common property; [they] belong[] to the compositional community, not to the individual.”²³⁶

In its analysis of whether the selection and arrangement of common elements in the “Joyful Noise” ostinato contained enough creativity for copyright protection, the court followed *Satava v. Lowry*, a case that assessed whether one sculpture of a jellyfish enclosed in glass infringed another.²³⁷ Both sculptures enclosed a vertically-positioned glass jellyfish inside of a transparent, tapered glass casing.²³⁸ In holding no infringement had occurred, the Ninth Circuit determined that copyright protection did not attach in “elements of expression that naturally flow from the idea of such a sculpture.”²³⁹ The combination of unprotectable elements must itself be original in order to receive protection.²⁴⁰ In *Perry 2022*, the court focused on the shared pitch progression of the ostinati’s first six notes in combination with its static, stable rhythm.²⁴¹ Considering the “limited number of expressive choices available” and the “constraints of particular musical conventions and styles,” the court correctly held that the ostinato lacked the “quantum of originality needed to merit copyright protection.”²⁴² It lacked this quantum because cumulative creation means that no

231. Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *17–18 (C.D. Cal. Mar. 16, 2020), *aff’d sub nom.*, Gray v. Hudson, 28 F.4th 87 (9th Cir. 2022).

232. See *supra* note 9; Perry, 2020 U.S. Dist. LEXIS 46313, at *17–18.

233. Hudson, 28 F.4th at 101–02.

234. *Id.* at 101 (quoting Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 345, 363 (1991)).

235. Hudson, 28 F.4th at 101.

236. MEYER, *supra* note 21, at 220.

237. Hudson, 28 F.4th at 101 (citing *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)).

238. *Satava*, 323 F.3d at 811.

239. *Id.* at 810.

240. *Id.* at 811.

241. Hudson, 28 F.4th at 102.

242. *Id.* (first quoting *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079–80 (Watford, J., concurring); and then quoting *Satava*, 323 F.3d at 811).

individual contribution to the musical object could satisfy copyright's law standard of creativity.

Though Perry's expert was no doubt pleased with the case's outcome, the court's holding came from different reasoning than that offered by the expert's testimony.²⁴³ Instead of arguing that the "Joyful Noise" ostinato was unoriginal and therefore not entitled to protection, the expert split hairs to insist that the "Dark Horse" ostinato was not similar to "Joyful Noise."²⁴⁴ He argued that the ostinati were not substantially similar because, although each began with the same notes, the final notes differed.²⁴⁵ Moreover, a few well-known songs shared the same pitch sequences,²⁴⁶ and some additional songs shared both pitch sequence and rhythm.²⁴⁷ While arguments that emphasize differences between two expressions of the same object may succeed in some cases, they are somewhat disingenuous in downplaying very obvious similarities and overemphasizing small differences. Recognizing that the two ostinati are different iterations of the same musical object and that individual artists cannot claim copyright protection therein is more faithful to the sound of the two songs. We can admit that the ostinati sound nearly identical to each other, and in the same breath we can acknowledge that neither artist exclusively owns it.

VI. THE CASE FOR COMMON PROPERTY IN MUSICAL OBJECTS

A view of musical objects as common property within the public domain offers a way to interpret existing copyright law that productively aligns with music-compositional practices. Ultimately, this view does not look very different from simply treating musical objects as unprotectable. But the terminology used to explain the law matters.²⁴⁸ Here, the concept of communal creation explains *why* variations of musical objects that appear in previous works are not protectable, and therefore, not subject to individual ownership. This Part explains how an understanding of the communal creation of musical objects should shape the way the law treats them. Both legal

243. See *Hudson*, 28 F.4th at 94–95, 102.

244. *Id.* at 94–95.

245. *Id.* at 94.

246. *Id.* at 95.

247. *Id.*

248. See JACQUES ATTALI, *NOISE: THE POLITICAL ECONOMY OF MUSIC* ix (Brian Massumi, trans. 1984) (1977) ("It is because language happens historically and culturally to be expanded in certain ways that we are able to think (and speak) this or that new thought"); Patrick Barry, *The Words Under the Words*, 70 *STAN. L. REV. ONLINE* 70, 70–71 (2017).

precedent and Copyright Office materials establish that music copyright does not extend to “common property musical material,” which I argue encompasses musical objects.²⁴⁹ They should thus belong to the public domain, unencumbered by the limited monopoly copyright ownership confers.

A. Musical Objects Are Not Original

Musical objects fail copyright’s test for originality.²⁵⁰ First, the communal processes that create musical objects mean that they are not independently created.²⁵¹ Second, even if one assumes *arguendo* that copyright’s hypothetical, isolated, “magic” author did in fact independently create a musical object, it would not be creative.²⁵² The Ninth Circuit so held in its *Perry 2022* opinion,²⁵³ and while not binding law, the Copyright Office’s Compendium contains provisions that recognize these objects’ lack of creativity.²⁵⁴ The Office currently lists “diatonic and chromatic musical scales,”²⁵⁵ arpeggios,²⁵⁶ and “common chord progressions that merely consist of standard harmonies[,] or common musical phrases” as some examples of noncopyrightable

249. See, e.g., *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1070 (9th Cir. 2020); COMPENDIUM, *supra* note 23, §§ 313.4(D), 802.5(A) (listing uncopyrightable musical elements that are “common property musical material”).

250. See *Hudson*, 28 F.4th at 101.

251. *Supra* Part III.

252. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to composer anew Keats’s Ode on a Grecian Urn, he would be an ‘author’”); *Knickerbocker Toy Co. v. Winterbrook Corp.*, 554 F. Supp. 1309, 1317 (D.N.H. 1982) (citing *Sheldon*); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 345, 363 (1991).

253. *Hudson*, 28 F.4th at 102; see also *Skidmore*, 952 F.3d at 1071.

254. See COMPENDIUM, *supra* note 23, §§ 313.4(D), 802.5(A). The Compendium is a technical manual that instructs the Copyright Office staff on their statutory duties, and it serves as a resource on Office practices to authors, practitioners, courts, and scholars. See 37 C.F.R. § 201.2(b)(7).

255. COMPENDIUM, *supra* note 23, § 313.4(D). A “diatonic” scale is one consisting only of the seven pitches of a particular key, while a “chromatic” scale is one consisting of all possible twelve pitches in a Western tuning system. For further definition, see George Dyson & William Drabkin, *Chromatic*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.05718> [<https://perma.cc/68N5-JMRT>].

256. COMPENDIUM, *supra* note 23, § 802.5(A). An arpeggio is a melodic configuration in which the notes of a chord are individually articulated, rather than strummed or struck simultaneously. See *Arpeggio*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.01327> [<https://perma.cc/MDL4-PXQ5>].

material.²⁵⁷ Moreover, short musical phrases such as “mi do re sol, sol re mi do” lack “sufficient creative authorship.”²⁵⁸

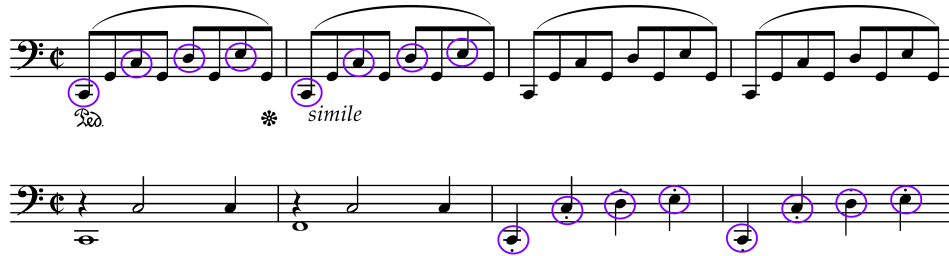


Figure 3(a): Musical objects at issue in *Fisher v. Dillingham* (Dardinella, top; Kallua, bottom)²⁵⁹



Figure 3(b): Chorus melody from “Shape of My Heart” by the Backstreet Boys²⁶⁰



Figure 3(c): Allegedly infringed object in complaint filed against Dua Lipa. (“Wiggle and Giggle All Night” by Corey Daye, top; “Levitating” by Dua Lipa, bottom)²⁶¹

257. COMPENDIUM, *supra* note 23, § 313.4(D).

258. *Id.* § 313.4(c).

259. SELVIN’S NOVELTY ORCHESTRA, *Dardanella* (Victor Studios 1919); CHARLES DILLINGHAM, *Ka-Lu-a*, on *GOOD MORNING DEARIE* (T.B. Harms Co. 1921).

260. TIM BYRON & JADEY O’REGAN, *HOOKS IN POPULAR MUSIC 177* (2022); BACKSTREET BOYS, *Shape of My Heart*, on *BLACK & BLUE* (Jive 2000).

261. Jeremy Orosz, *Dua Lipa’s “Levitating” Plagiarism Lawsuit Could Change Music Forever*, SLATE, (Mar. 17, 2022, 3:41 PM), <https://slate.com/culture/2022/03/dua-lipa-levitating-copyright-infringement-plagiarism-case.html> [<https://perma.cc/47GJ-EX56>]; CORY DAYE, *Wiggle & Giggle All Night*, on *CORY AND ME* (N.Y. Int’l Records 1979); DUA LIPA, *Levitating*, on *FUTURE NOSTALGIA* (Warner 2020).

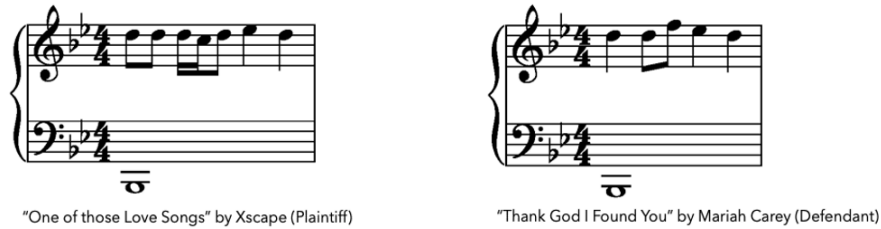
Figure 3(d): *Swirsky v. Carey*²⁶²

Figure 3: Other examples of musical objects

Other mediums have similar cultural norms, and the Copyright Office follows them.²⁶³ While choreographed dances, such as a particular ballet routine, can qualify for protection, “social dances,” like square dances and ballroom dances, cannot.²⁶⁴ A ballet such as *Swan Lake* combines common sequences of recognizable steps into an original creation, while a traditional square dance does not.²⁶⁵ Likewise, the visual arts do not protect common visual shapes.²⁶⁶ Neither a drawing of a single, conventional geometric shape, nor the selection and arrangement of shapes displayed in a “preordained or obvious arrangement” can receive protection.²⁶⁷ Within the tonal vocabulary of modern popular music, the pitches, rhythms, and harmonies of the *Perry* ostinato are an obvious arrangement of those musical elements.²⁶⁸ The Copyright Office has recognized that “a musical work consisting entirely of common property material would not constitute original authorship.”²⁶⁹

This does not by any means leave artists like Gray or Perry without copyright in their work.²⁷⁰ Rather than protecting the common musical elements that comprise the *Perry* ostinato, the artists should receive protection in the way they combine that ostinato with other

262. XSCAPE, *supra* note 207; CAREY, *supra* note 207.

263. See, e.g., COMPENDIUM, *supra* note 23, § 805.5(B)(2).

264. See *id.*

265. See *id.* § 805.5(B). “Swan Lake,” written by Pytor Tchaikovsky in 1876, is now in the public domain; it has aged out of copyright protection, whereas a square dance or a waltz was never protected in the first place. Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 JEFFREY S. MOORAD SPORTS L.J. 265, 283 n.86 (1999); COMPENDIUM, *supra* note 23, §§ 805.5(A), (B)(2).

266. COMPENDIUM, *supra* note 23, §§ 906.1–906.2 (listing uncopyrightable elements in the visual arts).

267. *Id.* § 906.1.

268. Gray v. Hudson, 28 F.4th 87, 98–100, 102 (9th Cir. 2022).

269. COMPENDIUM, *supra* note 23, § 802.5(A).

270. See *id.* § 802.8(A).

musical elements.²⁷¹ This could include the melodic and harmonic phrases that appear before, after, and alongside it; the timbral effects applied to it; and the surrounding musical texture. Musical creativity is currently at its height with regard to the selection and arrangement of these elements, while melodic and harmonic development has slowed since composers in the second half of the nineteenth century “began moving away from melodic emphasis.”²⁷²

The examples of uncopyrightable elements in music, dance, and the visual arts detailed by the Copyright Office provide support for the Ninth Circuit’s refusal to protect the individual elements of the *Perry* ostinato.²⁷³ The repetition of notes 2 and 3 of the minor scale are fragments of an unprotectable diatonic scale, and the tonic chord below each melody is the most obvious choice to begin the phrase.²⁷⁴ The court easily dismissed these features as unoriginal—even Gray’s expert agreed²⁷⁵—but the conclusion that the ostinato as a whole was unprotectable required further analysis.²⁷⁶

A music-theoretical understanding of musical objects like the *Perry* ostinato would fortify this analysis.²⁷⁷ Because the ostinato is recognizable not only as a point of similarity between Gray’s and Perry’s songs but also from its use in the other prior art Perry’s expert identified,²⁷⁸ the ostinato is a common, unoriginal object. Even if either artist came up with the phrase completely independently, its presence in other pieces of music suggests that its creation did not contain the “quantum of originality” necessary for copyright protection.²⁷⁹

The Ninth Circuit has recognized that combinations of unoriginal musical elements do not always contain sufficient creativity for copyright protection, even when those composite objects are

271. *Hudson*, 28 F.4th at 99.

272. See Joseph P. Fishman, *Music as a Matter of Law*, 131 HARV. L. REV. 1861, 1870, 1898 (2018) (“[M]any genres deemphasize melody and innovate around other elements.”); Ciro Scotto, *The Structural Role of Distortion in Hard Rock and Heavy Metal*, 38 MUSIC THEORY SPECTRUM 178, 178 (2016) (“[T]he ‘precise details of timbre and articulation can be essential properties of a musical work.’”).

273. See *Hudson*, 28 F.4th at 98.

274. See *id.* at 100–01. Other chords are, of course, possible and even common. Chords other than the tonic chord at the beginning of a phrase are, however, a break from Western tonal syntax that would be remarkable from both a musical and a copyright perspective. See *id.* at 100.

275. See *id.* at 100–01 (quoting *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (“Although no individual musical component of the Joyful Noise ostinato is copyrightable, we still must consider whether the Joyful Noise ostinato is protectible as a ‘combination of unprotectable elements.’”).

276. *Hudson*, 28 F.4th at 98.

277. See Brief for Musicologists, *supra* note 10, at 5–10.

278. See Fishman & García, *supra* note 32, at 1182.

279. See *Hudson*, 28 F.4th at 101 (quoting *Satava*, 323 F.3d at 811).

independently created.²⁸⁰ Its opinions in both *Perry 2022* and *Skidmore* embrace a careful analysis of whether compilations of common elements such as the *Perry* ostinato are in fact creative.²⁸¹ It has held that they are not, and a theory of common musical objects offers an explanation.²⁸²

As this Article has explained, myriad artists cumulatively create musical objects. They build upon stylistic vocabulary developed over the course of music history; consequently, a new composer's combination of pitches, rhythms, and harmonies from this vocabulary does not necessarily result in original entities.²⁸³ This is especially true in light of music's limited vocabulary.²⁸⁴ The musical objects that have appeared in recent cases combine unprotectable elements in ways so conventional that they fail to meet even *Feist's* low creativity threshold.²⁸⁵ Once a composer makes one compositional decision, others tend to follow in a limited number of ways. In *Perry*, once Gray or Perry decided to place a tonic chord at the beginning of the phrase containing the ostinato (not so much a choice as a stylistic default in popular music), stylistic constraints of the genre limited the possible pitches that could sound above that chord to pitches belonging to the underlying chord.²⁸⁶ That chord is a triad, which means there are just three possible choices.²⁸⁷ Scholars describe musical style as the interplay between compositional constraints and compositional choices;²⁸⁸ importantly, "few of the constraints that limit choice are newly invented or devised by those who employ them," and the choices are not limitless.²⁸⁹ A particular musical style's limited vocabulary must remain available to any creator who wishes to compose in that style.

280. *See id.*

281. *See id.* at 102; *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1079–80 (9th Cir. 2020) (Watford, J. concurring).

282. *See Hudson*, 28 F.4th at 102.

283. *See id.* at 101.

284. *See id.* at 102.

285. *See Griffin v. Sheeran*, 351 F. Supp. 3d 492, 497 (S.D.N.Y. 2019); *Skidmore*, 952 F.3d at 1075; *Johannsongs-Publ'g Ltd. v. Lovland*, No. CV 18-10009-AB (SSx), 2020 U.S. Dist. LEXIS 82464, at *14 (C.D. Cal. Apr. 3, 2020); *Swirsky v. Carey*, 376 F. 3d 841, 851 (9th Cir. 2004).

286. *See Hudson*, 28 F.4th at 102.

287. *See Triad*, GROVE MUSIC ONLINE (Jan. 20, 2001), <https://doi.org/10.1093/gmo/9781561592630.article.28347> [<https://perma.cc/Z5HK-KSB3>].

288. MEYER, *supra* note 21, at 3 ("[S]tyle is a replication of patterning . . . that results from a series of choice made within some set of constraints.").

289. *Id.*

B. Musical Objects Belong in the Public Domain

Since musical objects are communally created and commonplace, they ought to be subject to a copyright regime that reflects these qualities. They should fail to satisfy copyright's originality requirement because they are not independently created and, on their own, they lack the small amount of creativity the doctrine requires for protection.²⁹⁰ The creativity in a new work instead comes from the selection and combination of objects over the course of a song. More importantly, musical objects like those in the cases discussed in this Article are essential to creating Western popular music. They form a foundational part of the vocabulary necessary to write new compositions; they are not themselves the creative part of the compositions. To keep them available for all creators to use, they must belong to the public domain.

The public domain houses a host of materials that enable future compositional creation. In addition to once-protected works that “fall” into the public domain after their copyright expires, Jessica Litman has explained that the public domain includes the “raw material that makes authorship possible.”²⁹¹ These materials did not enter the public domain after a period of prior ownership—they were never subject to ownership at all.²⁹² In this sense, the public domain is the passive “opposite” of property.²⁹³ For such “raw materials” to enter the public domain, the copyright regime requires no action on the part of society, though maintaining this equilibrium requires vigilance throughout the musical and legal community to prevent “creeping” ownership by norm violators like Gray or Swirsky.²⁹⁴ The public domain hosts a “commons” of elements available for any author to use and not merely a place to relegate old works or works society perceives as low quality.²⁹⁵

In observing how scholars have defined the public domain, Pamela Samuelson recognizes many different characterizations.²⁹⁶ Musical objects meet several: insofar as musical objects are not creative according to the *Feist* test for originality, they are constitutionally

290. See *Hudson*, 28 F.4th at 96.

291. Litman, *supra* note 24, at 965, 967.

292. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 38 (2008).

293. *Id.*

294. See *id.* at 135.

295. Litman, *supra* note 24, at 967, 975.

296. Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 *DUKE L.J.* 783, 786–813 (2006).

unprotectable as a matter of law;²⁹⁷ additionally, assigning a work public domain status confers a “presumptive right of creative appropriation.”²⁹⁸ The musical objects at issue in cases like *Perry*, *Swirsky*, or *Dillingham* are each common ways of opening a musical phrase.²⁹⁹ They function to establish the song’s tonic chord, which contains just three notes. In each case, the parties cite evidence that composers have used those same objects in other works for decades prior, across other Western genres, and even in other songs within the plaintiff parties’ oeuvres.³⁰⁰ These objects are not new and original material that two composers suspiciously wrote close in time—they are the backbone of tonal vocabulary.

The function of musical objects within the compositional process explains the importance of excluding these objects from individual ownership. They are the building blocks of a song’s foundation. But this benefit to future creators may be cold comfort to artists frustrated that the music they deeply believe they created is not legally theirs to own. I advocate that the history of musical objects’ communal creation offers a necessary theoretical explanation. Several authors have discussed the gaps between how particular communities think about authorship and how the law controls it.³⁰¹ Julie Cohen has argued that treatment of the public domain with regard to a particular creative field “must make sense when measured against the ways that creative practice works.”³⁰² Similarly, Daniela Simone’s recent book recognizes that “[c]ultural ideas have a place within legal notions of authorship.”³⁰³ As an example of this observation, Simone cites musicians as having a better idea of what constitutes a creative contribution in a musical work than judges or lawyers, and she argues courts should take this understanding seriously.³⁰⁴ Crucially, she notes that copyright law needs alignment

297. *Id.* at 792–93.

298. *See id.* at 802.

299. *See Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313, at *33 (C.D. Cal. Mar. 16, 2020), *aff’d sub nom.* *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022); *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 148 (S.D.N.Y. 1924).

300. *Fred Fisher, Inc.*, 298 F. at 148 (finding appearances of the object at issue in works of Robert Schumann and Richard Wagner (though ultimately finding these examples unconvincing)); *Swirsky*, 376 F.3d at 850 (citing “For He’s a Jolly Good Fellow”); *Perry*, 2020 U.S. Dist. LEXIS 46313, at *33 (noting that one of the plaintiffs had used the ostinato in their own prior songs).

301. *E.g.*, SIMONE, *supra* note 165, at 67.

302. Julie E Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121, 137 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

303. SIMONE, *supra* note 165, at 69 (2019).

304. *Id.*

between legal and social understandings of authorship to maintain its legitimacy and credibility with the communities it governs.³⁰⁵

Among the different ways that a court might determine whether one artist's use of a particular object infringes another's, a rule that musical objects belong to the public domain is the most honest. It avoids a disingenuous overemphasis on trivial differences between two artists' use of an object by acknowledging that the objects *do* sound very similar; if they did not, there would be no lawsuit. At the same time, it recognizes that the objects are so compositionally rudimentary that they need to remain available for all creators. The cumulative authorship narrative of how musical objects arrive in the public domain also supplies the objects' unowned status with a sense of credibility. As the dominant narrative of musical creation among artists, it provides artists with a sense that copyright is on their side, that it fosters innovation rather than hinders it. This rationale will, of course, not appease plaintiffs like Gray or Swirsky.³⁰⁶ But the weight of evidence from the musical community at large indicates that these plaintiffs are more likely norm defectors whose behavior does not align with the values of the community.³⁰⁷ Across the spectrum of music makers, fans, and commentators, borrowing is the norm.³⁰⁸

An alternative argument explored in *Perry 2020* offers an example of parties using more disingenuous reasoning focused on a lack of similarity to arrive at the same outcome of noninfringement.³⁰⁹ If the court in *Perry* had followed the reasoning of Perry's expert in reaching its conclusion, the decision would have been based on a belief that the final notes of Gray's and Perry's ostinati meaningfully differentiated

305. *Id.*

306. See Gray v. Perry, No. 15-05642, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020), *aff'd sub nom.*, Gray v. Hudson, 28 F.4th 87 (9th Cir. 2022); Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004).

307. See, e.g., Tyler Jenke, *Nick Cave Talks Originality and Musical Plagiarism in New Fan Letter*, ROLLING STONE (May 4, 2020, 1:52 PM), <https://au.rollingstone.com/music/music-news/nick-cave-originality-plagiarism-red-hand-files-10578/> [<https://perma.cc/B3WS-MNUP>] (Artist Cave describes composing as a “feeding frenzy of borrowed ideas that goes toward the advancement of rock music—the great artistic experiment of our era.”); Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550 (2006) (Legal scholar Arewa notes “Musical borrowing . . . is a pervasive aspect of musical production.”); @Jackoosh, REDDIT (2016), https://www.reddit.com/r/EDM/comments/4v6dcw/the_hook_in_the_chainsmokers_new_song_closer/ [<https://perma.cc/GD5D-KXVP>] (explaining “I don't know if the Chainsmokers did actually ‘rip off’ the Fray, but it is worth remembering that sampling [sic] has always been a pretty big part of dance music, so it wouldn't be a huge problem if they did”).

308. See *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1071 (9th Cir. 2020).

309. *Perry*, 2020 U.S. Dist. LEXIS 46313, at *36.

them.³¹⁰ The district court explored this approach, highlighting that the eighth pitch of each ostinato is different.³¹¹ It emphasized that the determinative question is “whether the identified and allegedly protected concrete elements . . . are . . . objectively similar in articulable ways.”³¹² The district court offered this reasoning in addition to its holding that the combination of elements within the ostinato was not original,³¹³ but its inclusion is still a notable glimpse into an alternative, less musically sound method of resolving this case that does not embrace the communal nature of musical objects. Rather than acknowledge that the ostinati owe their similarities to a common musical object of repeated, scalar pitches over a tonic chord, the district court proposed to treat them as two separate objects, one belonging to Gray and the other to Perry.³¹⁴ Using minute, trivial details to differentiate instances of the same musical object leaves objects vulnerable to private capture. This approach threatens to continually shrink the public domain of musical objects, as each variation would pull material from the public domain to create a new, copyrightable object.

Future courts understanding musical objects as belonging to the public domain would avoid the problem of authors capturing objects previously available to all creators by subjecting them to slight variations. It would allow the public domain to grow, rather than shrink, as composers tinker with objects in familiar ways. While copyright law does not protect “utterly conventional” musical differences because they lack the innovation that creativity requires,³¹⁵ the district court’s alternative reasoning in *Perry 2020* suggests that a court may find differences, like the final note of the “Joyful Noise” and “Dark Horse” ostinati, to surpass this minimal requirement.³¹⁶ It is

310. *Id.* at *39–40.

311. *Id.* at *32–33.

312. *Id.* at *38.

313. *Id.* at *39–40 (“[E]ven if the ‘Joyful Noise’ ostinato were entitled to combination copyright protection in the aggregate and the Court concludes that it is not the Court concludes that defendants would still be entitled to judgment as a matter of law.”).

314. *Id.* at *38–40.

315. See MEYER, *supra* note 21.

316. See *Perry*, 2020 U.S. Dist. LEXIS 46313, at *33–34. The particular difference between final pitches should be easily discarded by the “utterly conventional” prohibition. The “Joyful Noise” ostinato has the scale degrees 3-3-3-3-2-2-2-1, while the “Dark Horse” ostinato is 3-3-3-3-2-2-5, each over a tonic chord which is itself composed of scale degrees 1, 3, and 5. The difference the defendant’s expert and the district court emphasized is a choice of one scale degree consonant with the underlying chord over another. Both ostinati had already used scale degree 3 at the beginning, leaving only 1 and 5. Both choices accomplish an uncreative goal of moving to a new member of the underlying chord. An ostinato that ended with a more exotic choice of pitch may have been creative enough for protection.

therefore important that the law understands musical objects in a way that avoids attaching ownership to negligible differences like those Perry's expert offered.

C. The Role of Prior Art in Identifying Musical Objects

To keep musical objects in the public domain, courts will need a way to identify them. Judges should view the works before them with sensitivity to those works' creative context, and studying preexisting music—prior art—can help.³¹⁷ Previously, prior art has had “no work to do in copyright” beyond offering evidence that a defendant drew the material at issue from a previous source, not plaintiff's.³¹⁸

At least one recent court decision has found the study of prior art an essential part of the infringement analysis for music.³¹⁹ In *Johannsongs v. Lovland*, the Central District of California declined to consider the plaintiff's expert report because the expert failed to conduct a prior art analysis.³²⁰ There, the owner of the rights to a popular Icelandic song titled “Soknudur” accused Rolf Lovland of copyright infringement, alleging substantial similarity between the melody of “Soknudur” and Lovland's “You Raise Me Up,” a song made popular worldwide after singer Josh Groban's 2003 recording.³²¹ The defendant's expert conceded that the songs' melodies did share similarities but noted that all the melodies appeared in well-known prior art.³²² The court considered the expert's prior art analysis to satisfy an essential component of the extrinsic test, which requires, according to the court's understanding, filtering out prior art from the similarity comparison.³²³ The plaintiff's expert, however, failed to adequately consider prior art to the court's satisfaction.³²⁴ Their omission led the court to determine that the expert did not accurately apply the extrinsic test, “rendering the Reports unreliable, unhelpful, and inadmissible.”³²⁵ With the defendant's expert testimony un rebutted, the court granted summary judgment for the defendants.³²⁶

317. See Fishman & García, *supra* note 32, at 1164.

318. *Id.* at 1161.

319. See *Johannsongs-Publ'g Ltd. v. Lovland*, No. CV 18-10009-AB (SSx), 2020 U.S. Dist. LEXIS 82464, at *16 (C.D. Cal. Apr. 3, 2020).

320. *Id.*

321. *Id.* at *2.

322. *Id.* at *10.

323. *Id.* at *9.

324. *Id.* at *15.

325. *Id.* at *18.

326. *Id.* at *20.

Artists allege theft of a musical object when their infringement case revolves around a specific passage of music that meets the criteria established in Part III above.³²⁷ When this is the case, judges and experts should be prepared to assess the cumulative origins of the object. They can conduct such an evaluation by analyzing whether the object owes its identity to “common property musical material[s]” drawn from general principles of a cumulatively built system of tonal harmony or to prior art.³²⁸ While courts such as the *Dillingham* court have rejected the relevance of prior art to determining a work’s originality, the trend is changing, particularly in the Ninth Circuit.³²⁹ In both *Swirsky* and *Perry*, the court gave serious consideration to the Defendant experts’³³⁰ presentation of instances of the accused objects in prior art.³³¹ *Johannsongs*’ outright dismissal of an expert’s testimony for failure to consider prior art adds another recent, albeit extreme, example.³³² Prior art is important because, although appearances of an object in earlier works might increase the chance that the plaintiff conceived of the object independently (because the patterns are so common),³³³ it also lessens the chance that the object satisfies copyright’s criteria of creativity. For the artist’s use of the object to be protectable, copyright law requires both originality and creativity.³³⁴

Including prior art in an infringement analysis can make the process of communal creation that develops musical objects more concrete to judges and juries.³³⁵ Experts may present the prior works alongside testimony that the object at issue is merely a conventional assemblage of unprotectable musical elements, which gives fact finders a chance to see for themselves that the object comes from a shared vocabulary.³³⁶ Judges untrained in music may find prior art a useful

327. Recall: a short, discrete segment of pitches, harmony, and rhythm that remains recognizable between pieces of music. See discussion in notes 83–85 *supra*. A recent example of a case that does *not* revolve around a musical object is *Williams v. Gaye*, 895 F.3d 1106 (2018).

328. COMPENDIUM, *supra* note 23, § 802.5(A).

329. See *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Fishman & García*, *supra* note 32, at 1177.

330. Notably Lawrence Ferrara, in both cases.

331. *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004); *Gray v. Hudson*, 28 F.4th 87, 94–95 (9th Cir. 2022).

332. *Johannsongs-Publ’g Ltd. v. Lovland*, No. CV 18-10009-AB (SSx), 2020 U.S. Dist. LEXIS 82464, at *14 (C.D. Cal. Apr. 3, 2020).

333. *Fishman & García*, *supra* note 32, at 1168–69.

334. See *id.* at 1169–70.

335. See *id.* at 1206–07 (suggesting that prior art can be useful to juries by making discussion of the music undertaken at trial more concrete).

336. See *Hudson*, 28 F.4th at 100 (explaining that the two songs predating Gray’s that include the ostinato object “underscored” the point that the object is an employment of the “standard tools” popular music uses to “build and resolve dramatic tension”).

tool in assessing whether the musical object before them derives its content from commonplace elements of tonal harmony. These elements, as the court observed in *Perry 2022*, may be unprotectable even in combination, but evaluating the combination requires expertise.³³⁷ Examples of the object combining the commonplace elements in prior art provide a useful way to evaluate how common a particular combination might be, and thus whether either party's version was original. Prior art can support a finding that a musical object consists entirely of commonplace musical elements, and such a finding should indicate to the court that the object should remain available for others to use.

D. Other Systems for Handling Communal Authorship

Music makers are not the only group that works with communally authored materials, and other groups use a mix of socially and legally constructed rules to shape how they work with common property. Some have described the process of developing communally created works as “commons-based peer production.”³³⁸ Under such a system, “[n]o single entity ‘owns’ the product or manages its direction.”³³⁹ Rather, the product “emerges from the collaboration” of large groups of contributors.³⁴⁰ In their article on peer production, Yochai Benkler and Helen Nissenbaum offer Wikipedia and the NASA Clickworkers experiment websites as examples, which each involve tens of thousands of contributors.³⁴¹ Central to both projects is an agreement among contributors that no author shall exclude others from using the work, even those who did not contribute to the project.³⁴² Music lacks a formal agreement of this nature, but those who follow communal norms operate on a similar understanding. The absence of a formal system to assign projects or otherwise direct the creation of the

337. See Fishman & García, *supra* note 32, at 1209.

338. See Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394 (2006).

339. *Id.* at 395

340. *Id.* at 394.

341. *Id.* at 397; see also *Welcome to the Clickworkers Site, Where You Can do Volunteer Image Analysis to Help Planetary Science*, <http://www.nasaclickworkers.com/classic/> [<https://perma.cc/CJ85-VGRJ>] (last visited Feb. 11, 2024) [hereinafter *NASA Clickworkers Site*]. NASA created the Clickworkers program to determine whether members of the public had the interest and ability to execute “some routine science analysis that would normally be done by a scientist.” *Id.* It aimed to use the labor of volunteers to “help scientists and researchers build an extensive database of landforms from data captured by *Mars Reconnaissance Orbiter’s (MRO) High Resolution Science Experiment (HiRISE)*.”

342. Benkler & Nissenbaum, *supra* note 338, at 396.

work is also a key feature, and the authors liken the process to a communal “barn raising” method of production.³⁴³ The relationships among participants in peer production endeavors have three essential attributes. First, the “potential objects” of the group efforts can be divided into smaller components, which allows “incremental and asynchronous” production.³⁴⁴ Second, the individual modules must be “granular” to ensure that individuals participating can make meaningful contributions to the project without becoming steeped in the entire enterprise.³⁴⁵ Third, the peer production process needs an efficient way to integrate individual contributions into the whole.³⁴⁶ Overall, systems of peer production like those described by Benkler and Nissenbaum center on the concentrated efforts of many diversely motivated individuals.³⁴⁷

The creation of musical objects involves similarly diverse, motivated individuals, but also differs from the Benkler and Nissenbaum model.³⁴⁸ Most significantly, the intentionality of the contributors and the expansive timeline involved in developing musical objects differs from the Wikipedia and NASA projects.³⁴⁹ Those projects are formally established and discretely contained. A Wikipedia author writes an article, or part of one, and purposely places it on the website; they make their contribution intentionally.³⁵⁰ Similarly, contributors to the NASA Clickworkers project can only participate in the project by visiting the website and doing the analytical tasks the program instructs.³⁵¹

The process of creating musical objects, however, is a more gradual process of accretion, with new developments and contributions becoming clearer in retrospect than as they take place.³⁵² While artists may consciously choose to follow particular conventions in writing their music—Gray or Perry may have purposely selected ostinato pitches that fit with the underlying chord, for example—their work can also

343. *Id.*

344. *Id.* at 400–01.

345. *Id.* at 401 (contrasting the ability of participants to make small contributions with works more “resistant to peer production” like the novel, which would require more coordinated efforts to create a cohesive product).

346. *Id.*

347. *See id.* at 394–401.

348. *See id.*

349. *See id.*

350. Benkler & Nissenbaum, *supra* note 338, at 397.

351. *See NASA Clickworkers Site*, *supra* note 341.

352. *See MEYER*, *supra* note 21, at 119 (“[B]ecause incompatibilities give rise to change, their significance can only be understood diachronically, and often only in retrospect.”).

contribute to developing objects unintentionally.³⁵³ The creation of musical objects has taken place over hundreds of years, emerging alongside the development of the harmonic and melodic conventions that they contain.

The informal, gradual development of a body of musical objects fundamentally differs from the intentional, formalized process of building a body of knowledge like Wikipedia.³⁵⁴ There is no agreement between musicians throughout time that they will forgo claims of individual ownership in musical objects, but there are norms undergirding the musical community that operate in the absence of such an agreement.³⁵⁵ Despite the much longer historical scale and informal process involved in the development of musical objects than of an online repository like Wikipedia, the central idea of peer production remains: the contributions of many artists have resulted in the present corpus of works, and these contributions belong to anyone who has a use for them.³⁵⁶

Instances of multiple authors creating objects of authorship might appropriately fall under several regimes of control. One is the public domain proposed above for musical objects, but stories of collective creation can also be realized through a variation on private ownership: joint authorship. Joint authorship is a copyright ownership regime intended to accommodate multiple authors.³⁵⁷ In the wake of high profile lawsuits like *Perry*, joint authorship has also become a concession artists employ in attempt to avoid infringement allegations.³⁵⁸ For example, the Chainsmokers revised the authorship credits on their Grammy-nominated song “Closer” after facing allegations that their song “sounded similar to” The Fray’s “Over My Head (Cable Car).”³⁵⁹ The Fray is now an “author” of the Chainsmokers’ song.³⁶⁰ The portion the plaintiff thought most similar between the two songs can be heard in the opening piano part of each work.³⁶¹ The most

353. Gray v. Hudson, 28 F.4th 87, 94 (9th Cir. 2022).

354. Benkler & Nissenbaum, *supra* note 338, at 395.

355. See *supra* note 199.

356. Benkler & Nissenbaum, *supra* note 338, at 395.

357. See 17 U.S.C. § 101 (defining “joint work”).

358. See *Extra Credit: Hit Songs Get Added Writers as Lawsuits Loom*, SFGATE (Dec. 16, 2016), <https://www.sfgate.com/music/article/Extra-credit-Hit-songs-get-added-writers-as-10801413.php> [<https://perma.cc/5ZVM-E8RE>]; Gray v. Perry, No. 15-05642, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020), *aff’d sub nom*, Gray v. Hudson, 28 F.4th 87 (9th Cir. 2022).

359. *Extra Credit: Hit Songs Get Added Writers as Lawsuits Loom*, *supra* note 358.

360. *Id.*

361. See Matthew Meadow, *The Fray Talk About Getting Credit on The Chainsmokers’ “Closer”*, YOURED M (Oct. 27, 2016), <https://www.youredm.com/2016/10/27/fray-talk-getting-credit-chainsmokers-closer/> [<https://perma.cc/9MNG-V2ZZ>]; THE CHAINSMOKERS FT. HALSEY,

salient similarities between these works are that they begin on a D \flat major chord, move to the dominant chord A \flat , and then return to D \flat . While these openings admittedly sound similar, the infringement allegations completely fail to mention that harmonic movement from a home chord, to its dominant, and back to the home chord is the most fundamental harmonic pattern in all of tonal music.³⁶²

If The Fray justly deserved authorship credits for the harmonic progression in the Chainsmokers' song, they would by similar logic be entitled to authorship credits for *literally every tonal popular song* since they released "Over My Head (Cable Car)" in 2005.³⁶³ The Chainsmokers' decision to grant authorship credits was preventative, and no court ordered them to do so.³⁶⁴ The amusical treatment courts give to musical objects has created legal uncertainty as to whether another artist's ownership claim is viable, and most artists, especially those who are less established in the industry, cannot afford to risk even a weak claim.³⁶⁵ If the case had come before a court, it seems highly unlikely that a judge would find The Fray to be a joint author of "Closer."³⁶⁶ And an understanding of musical objects as common property would nearly guarantee preclusion of such a finding.

Courts have held that creation of a joint work requires that each author (1) made an independent copyrightable contribution to the work, and (2) intended to be a coauthor.³⁶⁷ The Fray would fail both elements of this test.³⁶⁸ First, the harmonic progression shared between the two songs is a commonplace musical object necessary for the creation of almost any work of tonal music. Second, there is no evidence that The Fray intended to be a coauthor to "Closer."³⁶⁹ If they had, the

Closer, on COLLAGE EP (Disruptor Records & Columbia Records 2016), https://www.youtube.com/watch?v=PT2_F-1esPk [<https://perma.cc/FM6F-6QCG>] (link directs to recording of the song posted on The Chainsmokers' YouTube account); THE FRAY, *Over My Head (Cable Car)*, on HOW TO SAVE A LIFE (Sony Music Ent. 2005), <https://www.youtube.com/watch?v=fFRkpvop3I> [<https://perma.cc/D8GL-AYZL>] (link directs to recording of the song posted on The Fray's YouTube account).

362. This is not an exaggeration. Nineteenth-century theorist Heinrich Schenker devised a method of analysis that broadly conceives of all Western tonal compositions as movement between tonic and dominant. *See generally* HEINRICH SCHENKER, *FREE COMPOSITION (DER FREIE SATZ): VOLUME III OF NEW MUSICAL THEORIES AND FANTASIES* (Ernst Oster trans., Longman Inc. 1979) (1935). Modern popular music maintains this structure, with variations. *See* DOLL, *supra* note 102, at 25–49.

363. THE FRAY, *supra* note 361.

364. *See* Meadow, *supra* note 361.

365. *See Extra Credit: Hit Songs Get Added Writers as Lawsuits Loom*, *supra* note 358.

366. 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 255 (2d Cir. 2015).

367. *Id.*

368. *See* Meadow, *supra* note 361.

369. *See id.*

Chainsmokers' amendment of the song's authorship credit to reflect The Fray's supposed contribution would not have occurred only after it became a hit.

The story of "Closer" is generalizable to represent the unfeasibility of a joint authorship scheme to cover musical objects.³⁷⁰ In the first place, they are not original under the definition established at the beginning of Part IV,³⁷¹ and thus not copyrightable. Even if they were, they lack the affirmative agreement required between joint authors; an intentional agreement for a party to be a coauthor cannot transpire when the process of coauthorship occurs over hundreds of years and between authors who may not even know of each other's existence. But this is, as I have argued, how musical objects develop. Keeping this shared heritage in the public domain provides the best way to retain the vocabulary necessary for musical composition, thus ensuring such materials are available to all artists. Treating musical objects as belonging to a commons offers a theory to solidify the Ninth Circuit's characterization of the *Perry* ostinato: it is not merely that Perry's use of the ostinato does not infringe Gray's copyright, but that no use of the ostinato could.³⁷² He does not own the ostinato.

Using a communal creation framework to justify placing musical objects in the public domain recognizes that musical objects are valuable parts of a shared musical vocabulary. Some objects, like the schema of the Classical Era, have existed for centuries and fall squarely in the public domain because of their age.³⁷³ But these and other objects remain active as ongoing sources of musical material. Affording artists individual protection as they continue to employ these objects in their work would remove essential building blocks from a shared language.³⁷⁴ This concept requires a view of the public domain as more than a repository for expired works. It is not a thrift store record bin for one to peruse without real hope of finding something exciting. Rather, it is an ever-evolving, vibrant source of material that artists can subject to combination and manipulation in new, original musical works. This view of the public domain keeps even new musical objects in circulation as they develop, while a more limited view of the public domain would force current composers to wait until those objects age into the public domain to use them. New objects are most useful, however, when

370. *See id.*

371. (1) They are independently created; and (2) they are sufficiently creative.

372. *Gray v. Hudson*, 28 F.4th 87, 100–01 (9th Cir. 2022).

373. *See, e.g., GJERDINGEN, supra* note 94, at 453–63 (identifying eleven prominent objects of the Classical Era).

374. *See* THOMAS A. DOWNING, *MUSIC AND THE ORIGINS OF LANGUAGE: THEORIES FROM THE FRENCH ENLIGHTENMENT* 104 (1995) ("language is and can only be a shared and public event").

musicians can immediately assimilate them into musical language as the building blocks artists use to write songs; they keep musical development in motion by providing raw materials for innovation while simultaneously preserving connections to previous creators.

VII. CONCLUSION

Music copyright operates on the fiction that sound can be isolated, owned, and stolen like any other fixed, tangible object.³⁷⁵ This fiction is workable if we recognize it, but it will require the law to accept the norms of gradual co-composition that the music-compositional community practices. Bringing the music theoretical concept of the musical object into dialogue with music copyright cases concerning common musical building blocks can create meaningful change in the way courts analyze infringement. Musical objects belong in the public domain—music-theoretical history suggests objects develop through accretion as the work of many authors accumulates. While artists may incorporate musical objects into their song in original combinations, the objects themselves comprise conventional arrangements of unprotectable pitches, rhythms, and harmonies. These arrangements derive from conventions of musical composition that must remain available to subsequent artists to use in their works. Treating musical objects as common property belonging to the public domain would bring the law's understanding of these objects into alignment with existing theories of musical composition and keep them in compositional circulation, even as they evolve.

375. See Litman, *supra* note 24.