Music as written, music as heard in music-infringement litigation

Eleanor Selfridge-Field
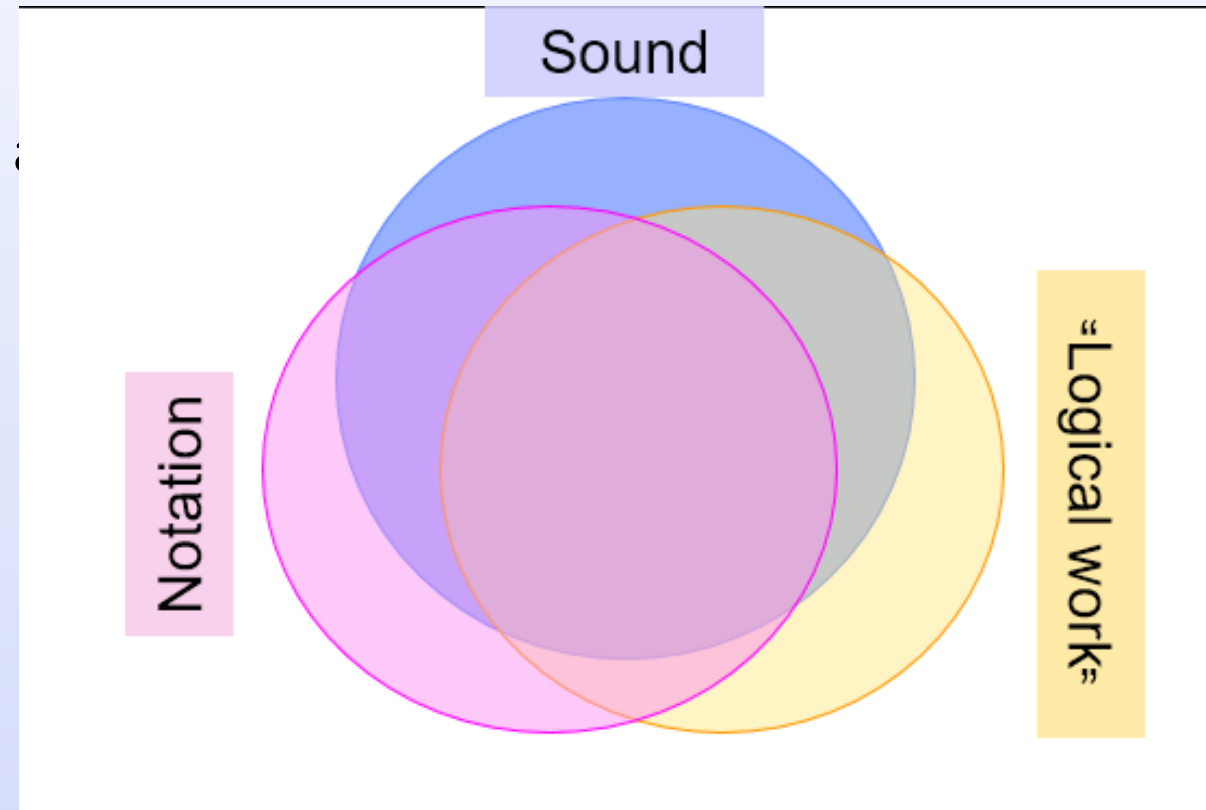
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Structural problems in musical IP

- **Domain confusion**
  - Lack of differentiation between notation [as] primary/sound as primary

- **Inherent conflict**
  - **Sound vs. bases for judgment**

  Music exists only in sound BUT
  Sound is its least stable element

Domains of musical substance

Domain conflict in copyright evaluation

Notation-based evaluation

- **Melody**
- **Harmony**
- **Rhythm**
- Instrumentation

Sound-based evaluation

- **Tempo**
- **Dynamics**
- **Timbre**/sonority/genre
- Beat/genre

Properties of **composition**

Properties of **performance**

Domain conflict in copyright evaluation

Notation-based evaluation

- **Melody**
- **Harmony**
- **Rhythm**
- Instrumen-tation

Sound-based evaluation

- **Tempo**
- **Dynamics**
- **Timbre**/sonority/ genre
- Beat/genre

Properties of **composition**
Judgment of **readers**

Properties of **performance**
Judgment of **listeners**

Revenue by delivery medium (RIAA 2016)

Revenue (Millions of Dollars)

Legend: LP/EP, Vinyl Single, 8-Track, Cassette, Cassette Single, Other Tapes, CD, CD Single, Music Video, DVD Audio, SACD, Download Single, Download Album, Kiosk, Download Music Video, Ringtones & Ringbacks, Paid Subscriptions, SoundExchange, Synchronization, On-Demand Streaming
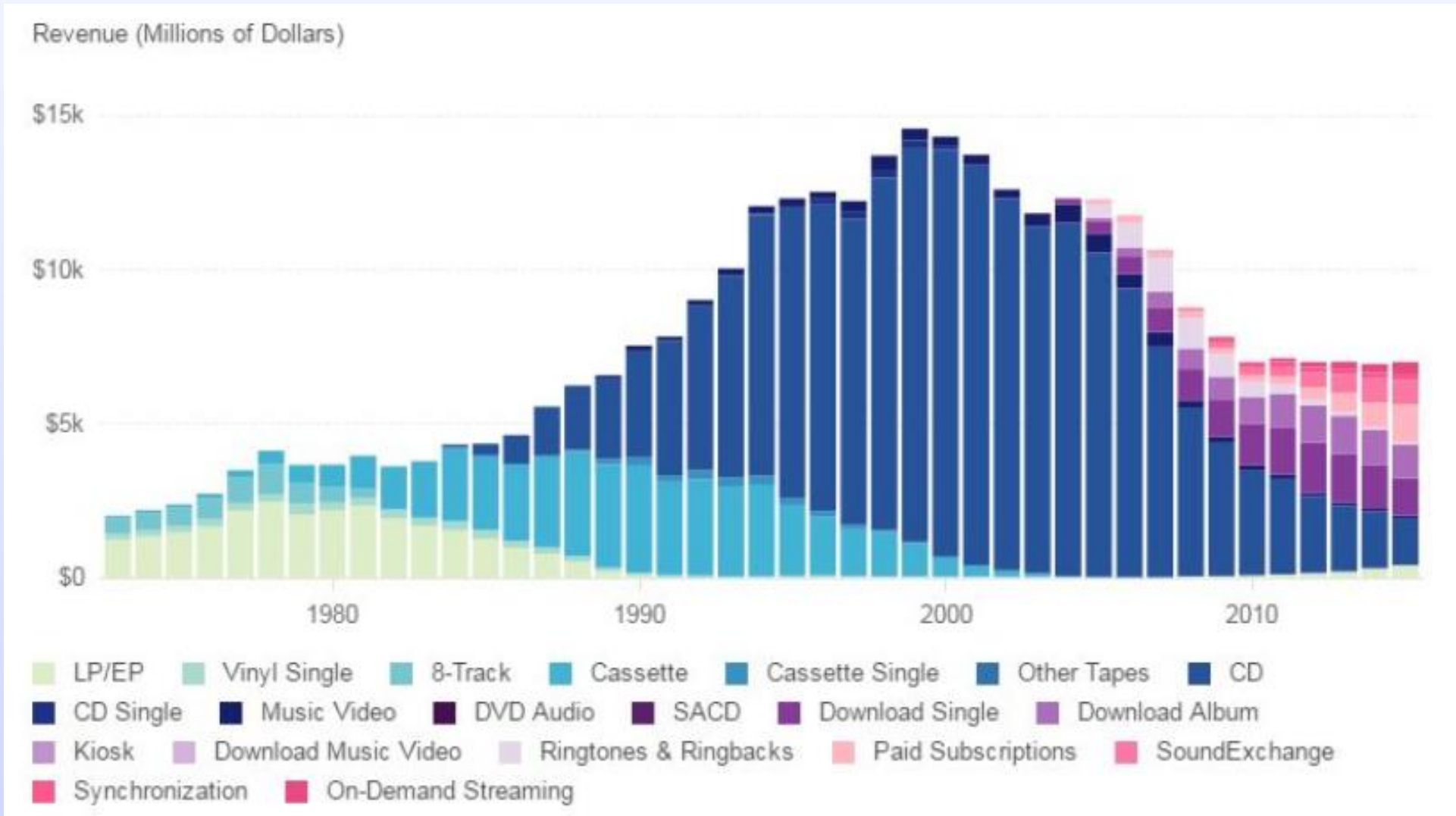
Changing bases for registration

Sound vs notation in registrations

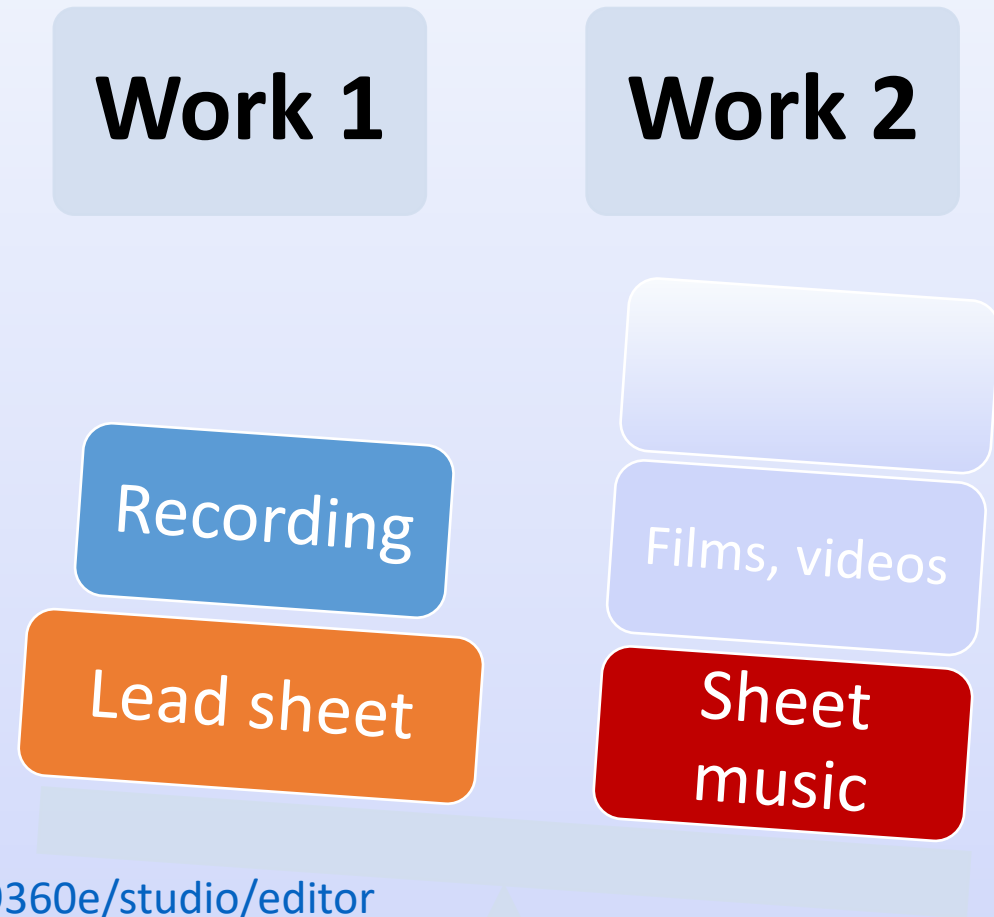Drift in registration media (US, 1940–2017)
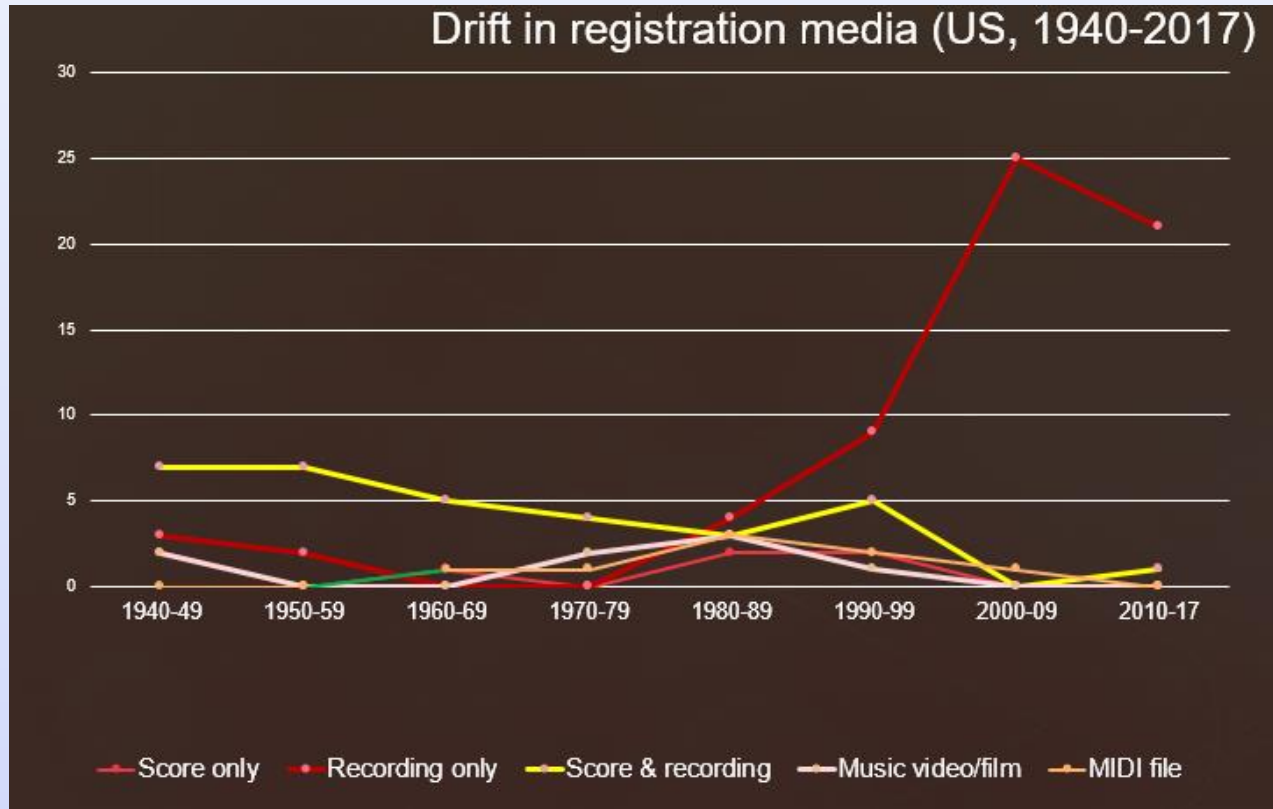
>Satin Doll (reg. 1953; lit. 1993)

- Estate of Duke Ellington vs. Estate of Billy Strayhorn

- Concrete vs universal

- Ostensible Issue: scope of copyrights in derivative works

- The nature of jazz/swing/blues/bebop
  - Harmony, melody, rhythm integral
  - Tempo, timbres, dynamics collaborative/spontaneous

- **Registration trail: lead sheet vs full sheet version**

Satin Doll:
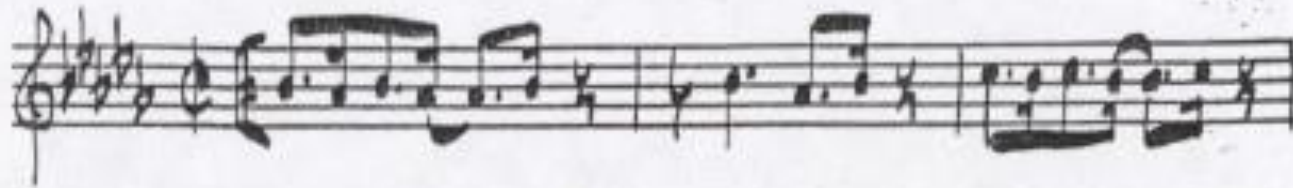# Ellington estate vs Strayhorn estate

Work 1

Work 2

Non-synchronous evidence

Recording

Films, videos

Lead sheet

Sheet music

https://www.kapwing.com/5e6973da1a00da0015b9360e/studio/editor

Satin Doll (Tempo Music vs. Famous Music, 1993):
Ellington estate vs Strayhorn estate

Ellington lead sheet (1953)

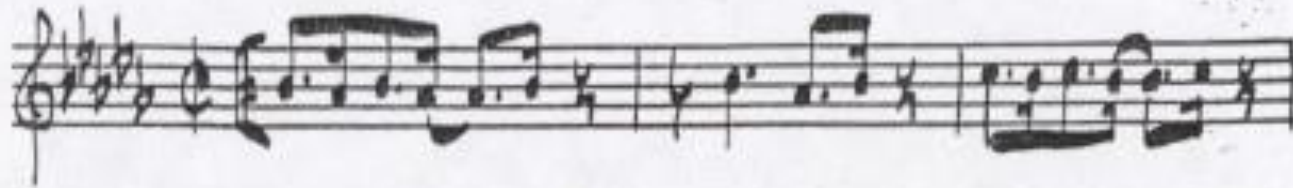Claim of interest in **added harmony** and **revised melody**.

Strayhorn realization, 1958, Tempo Music

Lyrics by Johnny Mercer

Satin Doll (Tempo Music vs. Famous Music, 1993):
Ellington estate vs Strayhorn estate

Ellington lead sheet (1953)

Claim of interest in **added harmony** and **revised melody**.

Strayhorn realization, 1958, Tempo Music

Lyrics by Johnny Mercer

Satin Doll (Tempo Music vs. Famous Music, 1993):
Ellington estate vs Strayhorn estate

Ellington lead sheet (1953)

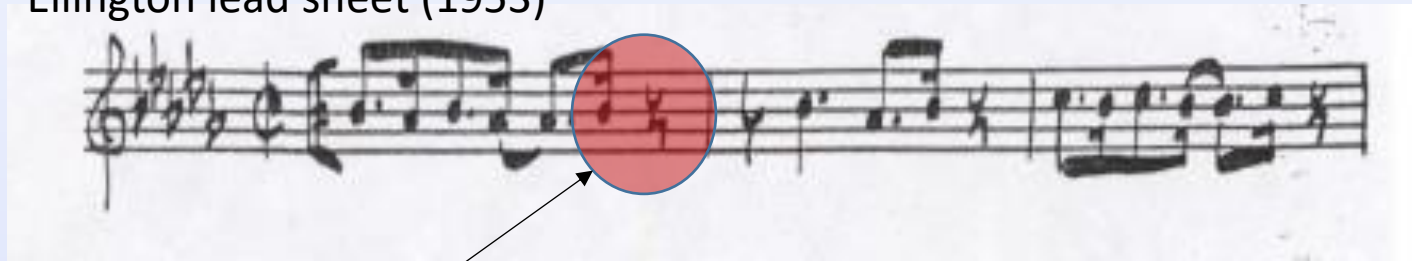Claim of interest in **added harmony** and **revised melody**.

Revised melody

Strayhorn realization, 1958, Tempo Music

Lyrics by Johnny Mercer

Satin Doll:
Ellington estate vs Strayhorn estate

Ellington introduction (all 7ths, 6ths)

1. *Chan xian ge*, Asia, China, Henan, Xinxiang

Crowd-sourced judgment:

Most performers of this piece use the Ellington intro, even though it is not in his lead sheet. **No one uses Strayhorn's introduction.**

Performances*
- DE **1953*, 1959*, 1962***
- Th Monk 1969
- O Peterson **1963***, 1989
- C Terry **1989***
- Jerry Mulligan
- Count Basie

Strayhorn written introduction (downward chromatic line)
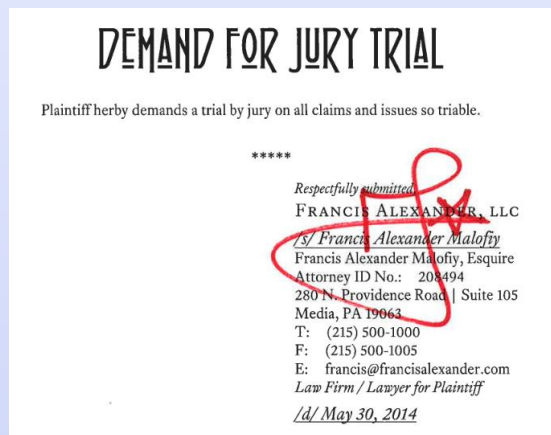

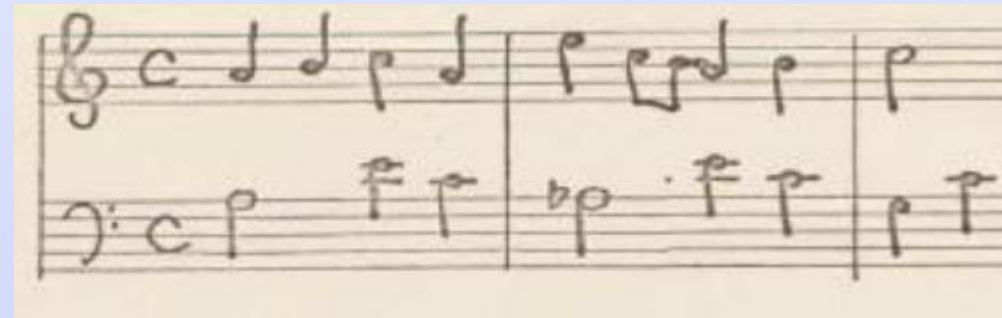Moderately, with a beat

"Added harmony"

Similar issues in
Michael Skidmore vs. Led Zeppelin (2014-2020):
"Taurus" (1968) vs. "Stairway to Heaven" (1971)

- Judgment in LZ's favor on 3/9/20 by Ninth Circuit meeting *en banc:*
- *Finding: only commonality a descending chromatic bass line (a minor)*

Subject of dispute: **First 2.5 bars of music**

10 Matches in RISM, notably Gibbons and Weelkes

New action on the **inverse ratio rule**
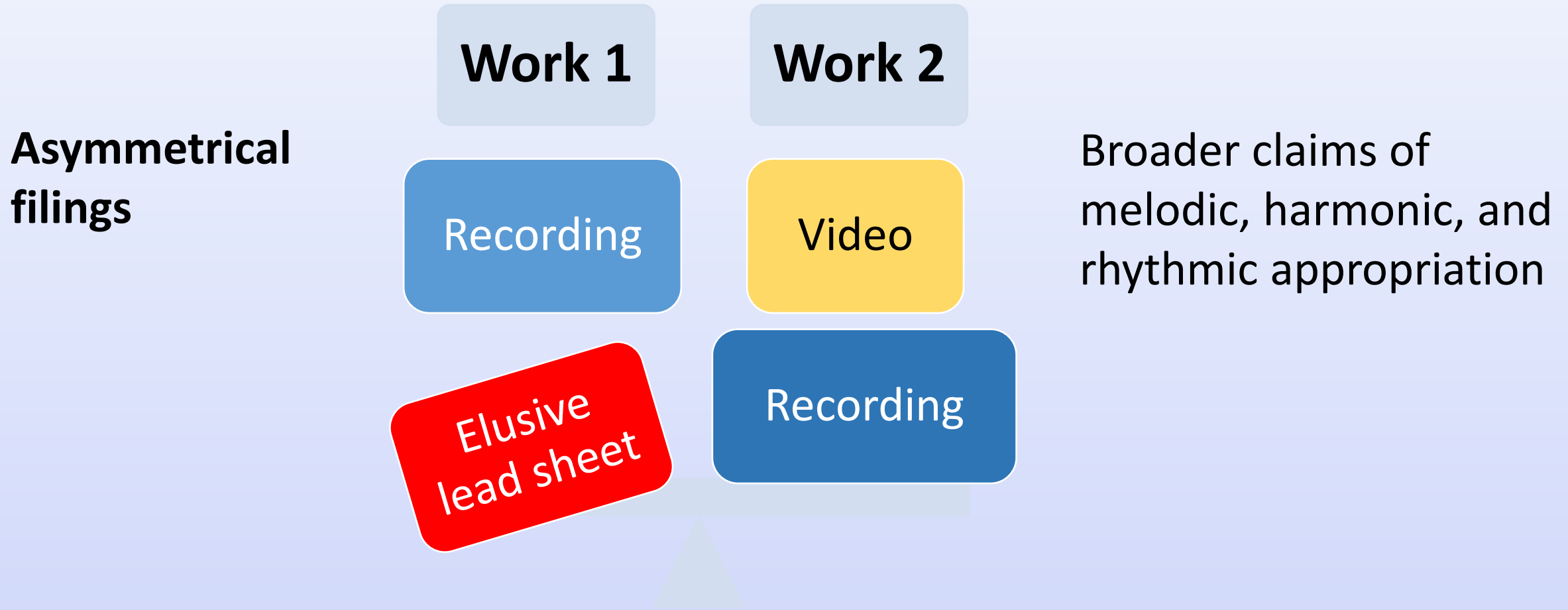
- Allowed earlier obscure works to **claim infringement** by currently famous groups

- **Threshold** for finding of infringement **lowered if** alleged infringer can be shown to have had **access** to the earlier work.

- Changed examination technique: required new rendition of music as filed in copyright registration

News flash: both provisions overturned on March 9, 2020

Read the case at the MCIR blog

- https://blogs.law.gwu.edu/mcir/case/inplay-michael-skidmore-v-led-zeppelin/

Similar issues in Griffin vs Sheeran (2016—): "Let's get it on" (1973) vs. "Thinking out loud"

Asymmetrical filings

Work 1

Work 2

Recording

Video

Elusive lead sheet

Recording

Broader claims of melodic, harmonic, and rhythmic appropriation

Sheeran case: resolved May 2023

- Sheeran's points in trial:
  - Most pop songs use a comment palette of chords
  - Easy to fit one new melody to this palette or overlay new melody on old harmonic framework

Critical issue:
Which features are interdependent, which independent...and when

- **Interdependency** of harmony, melody, and rhythm

- These relationships vary with
  - Repertory
  - Medium
  - Era
  - **Sound-based vs notation-based judgments**

- Possible **independence** of sound and notation instantiations

On the horizon: a new kind of question

- Virtual voices
  - Who owns a virtual voice?
  - What us a virtua voice?
    - Sound synthesis/AI mix
  - Who owns a virtual voice?
  - On AI side, many analogs in text, speeches, films….