

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

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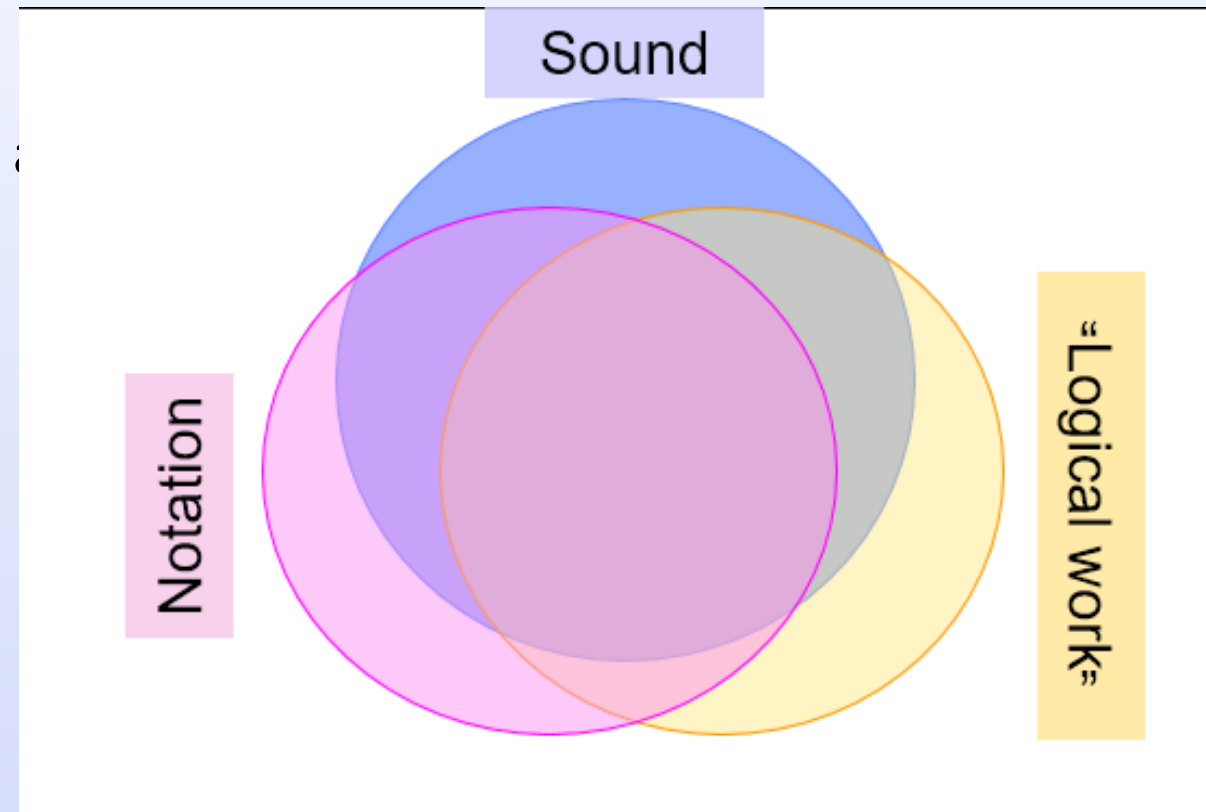
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Structural problems in musical IP

- **Domain confusion**
 - Lack of differentiation between notation and sound 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**
- **Instrumentation**



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

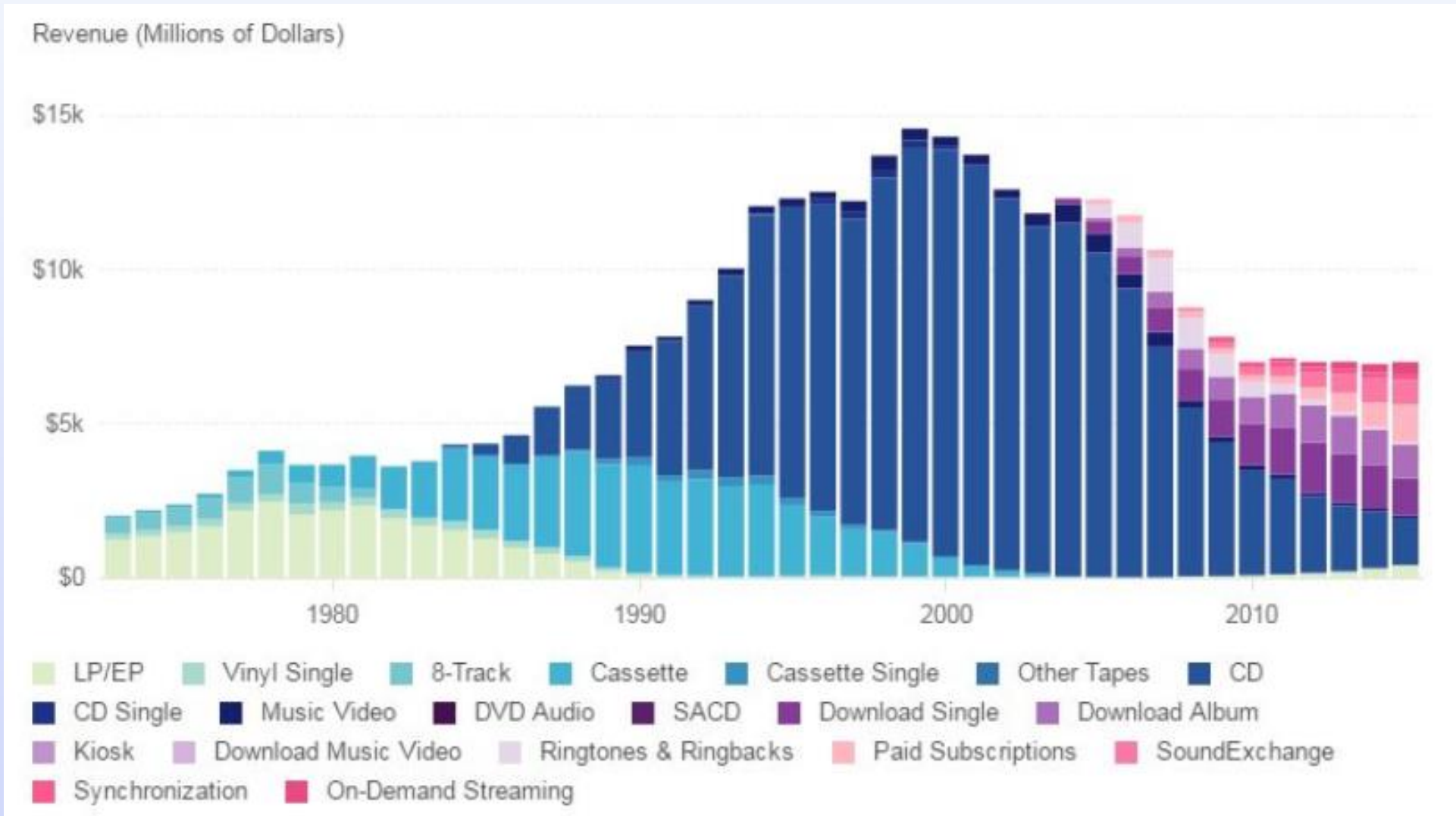
Sound-based evaluation

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



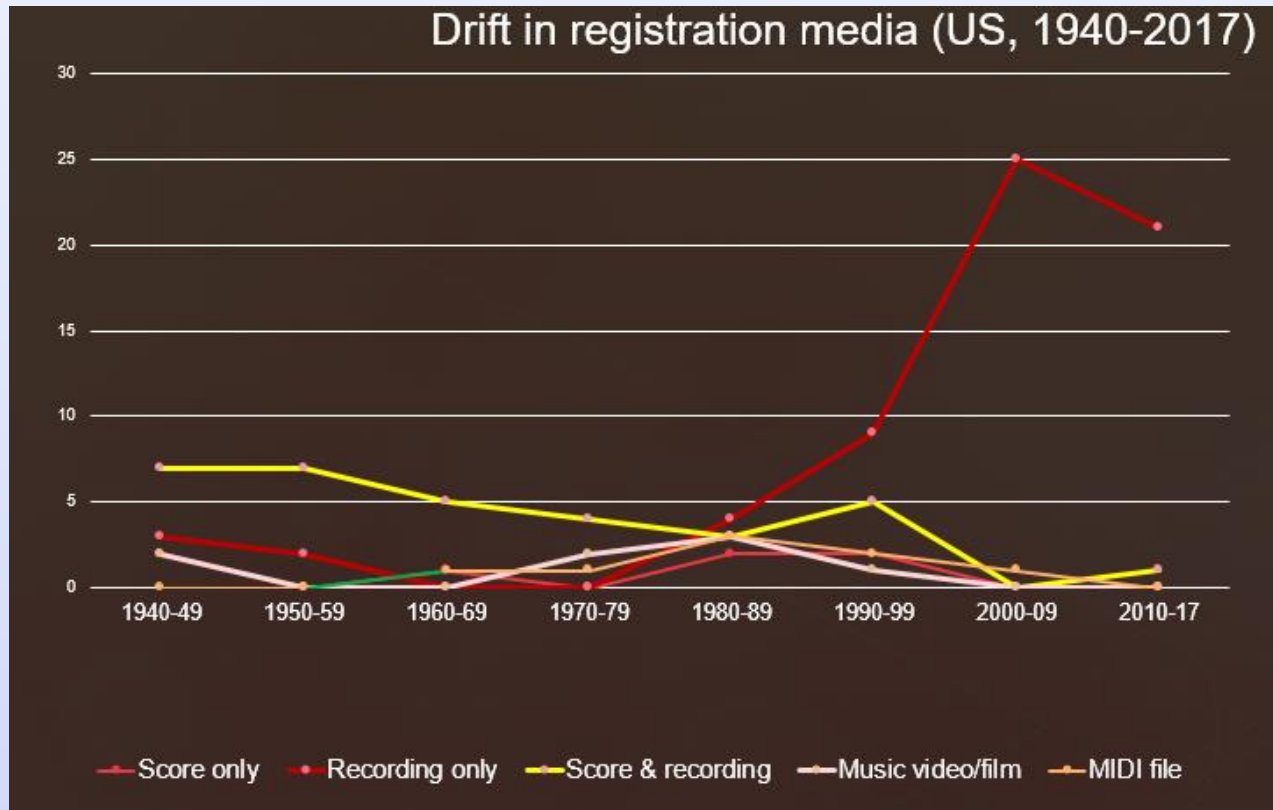
Properties of **performance**
Judgment of **listeners**

Revenue by delivery medium (RIAA 2016)



Changing bases for registration

Sound vs notation in registrations

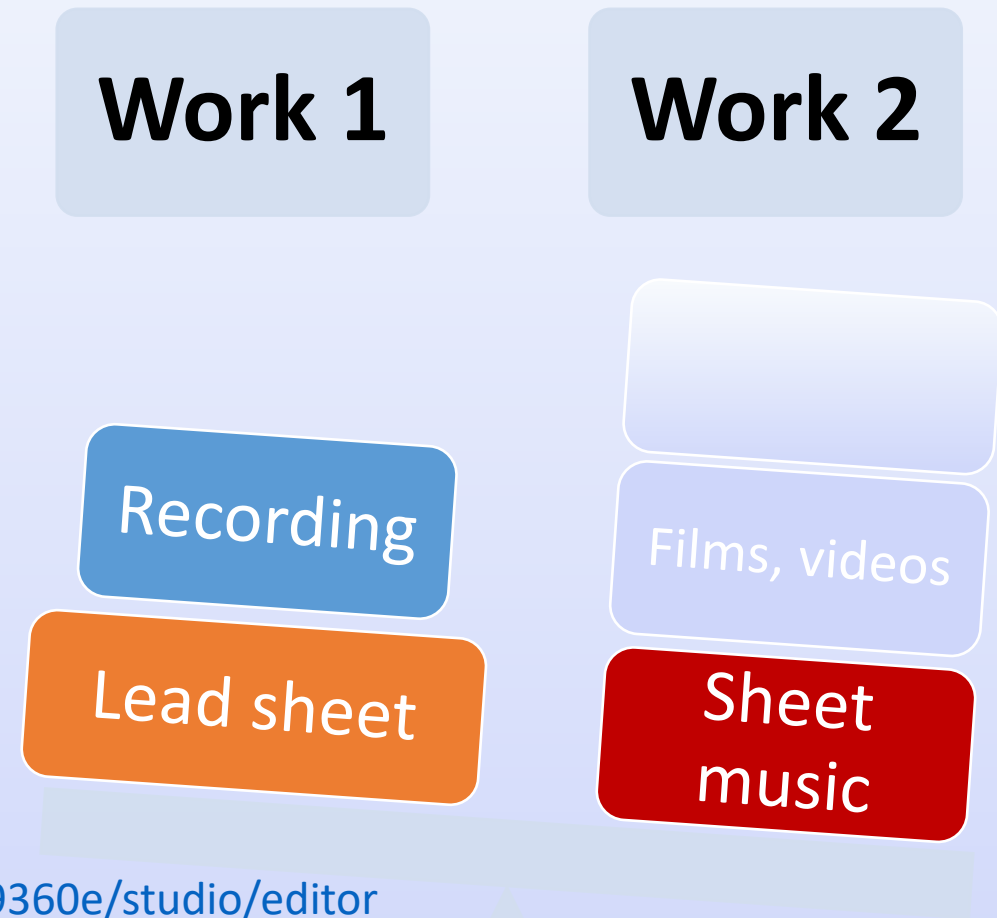


>Satin Doll (reg. 1953; lit. 1993)

- 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

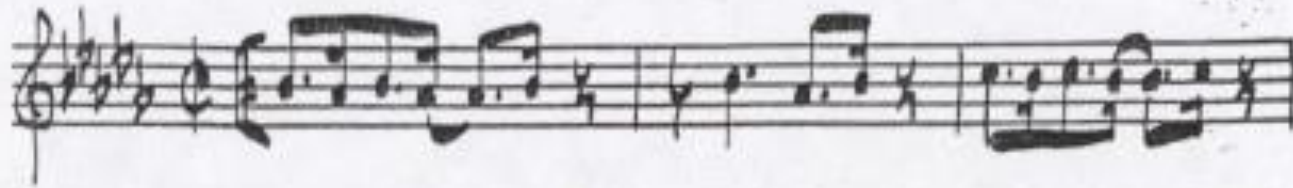
Non-synchronous evidence



<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**.

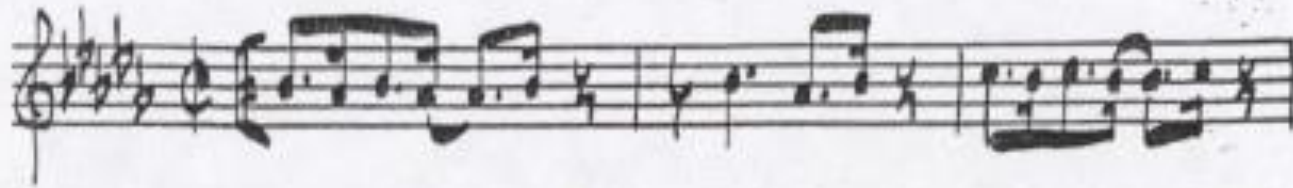
Strayhorn realization, 1958, Tempo Music

Lyrics by Johnny Mercer

Musical score for Strayhorn realization, 1958, Tempo Music. The score consists of three staves: a vocal line with lyrics, a piano accompaniment line, and a bass line. The lyrics are: "Cig-arette hold - er, which was me, u - ser should - er, she digs me". Above the vocal line, chord symbols are written: Dm7, G7, Dm7, G7, Em7, A7, Em7, A7. The piano accompaniment and bass lines provide harmonic support for the melody.

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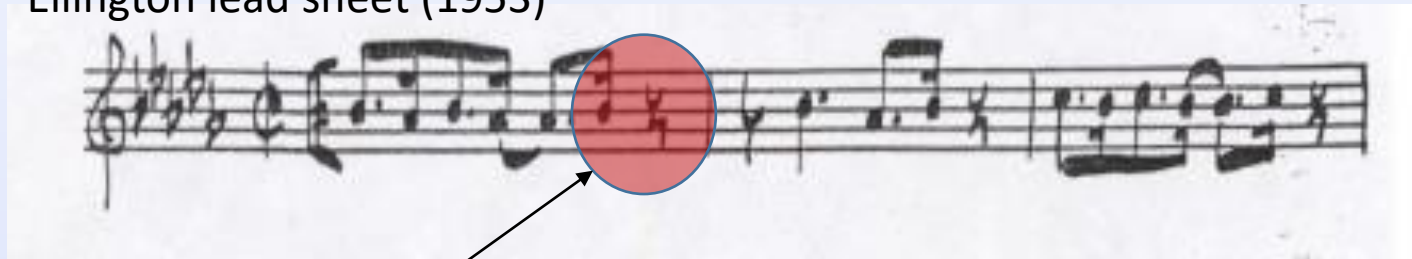
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Strayhorn realization, 1958, Tempo Music



Chord symbols: Dm7, G7, Dm7, G7, Em7, A7, Em7, A7

Lyrics: Cig - ar tte hold - er, which was me, u - cer her should - er, she digs me

Revised melody

Lyrics by Johnny Mercer

<https://www.kapwing.com/workspace/s/9272cd0999cd7d284f23400118d8a7d02842a75cb3682cff6623acb7256a94f2>

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

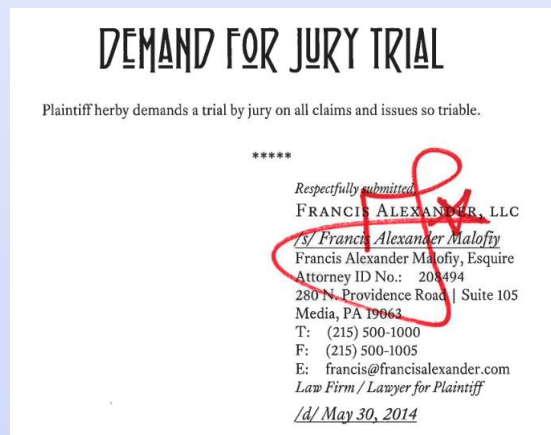
Musical notation for the Strayhorn written introduction of 'Satin Doll'. It is a piano introduction in 4/4 time, marked 'Moderately, with a beat'. The notation shows a downward chromatic line in the right hand and a steady bass line in the left hand.

“Added harmony”

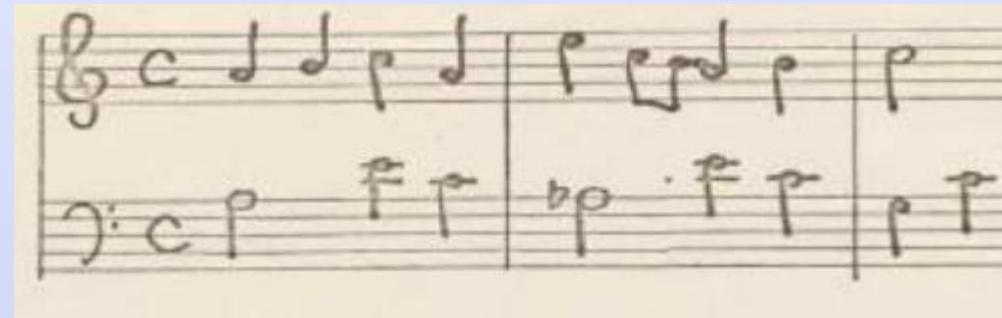
Similar issues in
Michael Skidmore vs. Led Zeppelin (2014-2020):
“Taurus” (1968) vs. “Stairway to Heaven” (1971)

- 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**

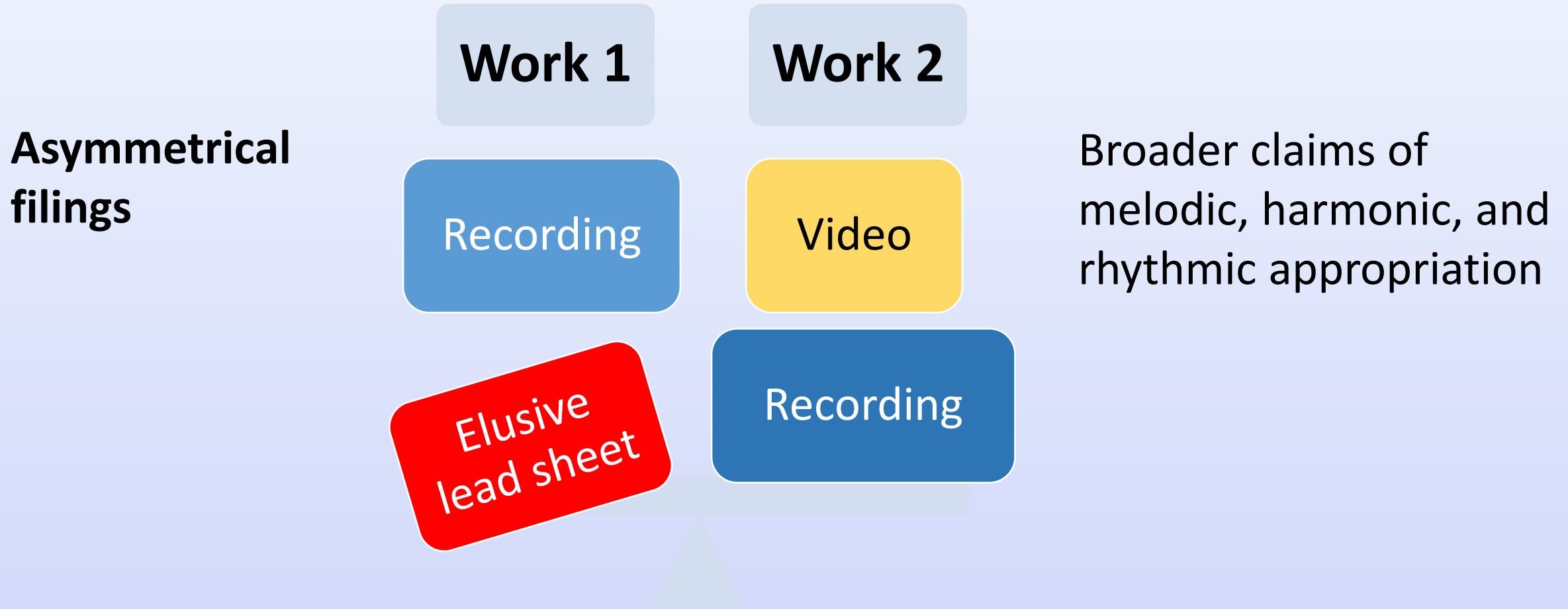
- Allowed earlier obscure works to **claim infringement** by currently famous groups
- **Threshold** for finding of infringement **lowered** if alleged infringer can be shown to have had **access** to the earlier work.
- Changed examination technique: required new rendition of music as filed in copyright 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-zepelin/>

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



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