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Ear, Mind, or Brain?

Reflections on Musical Similarity

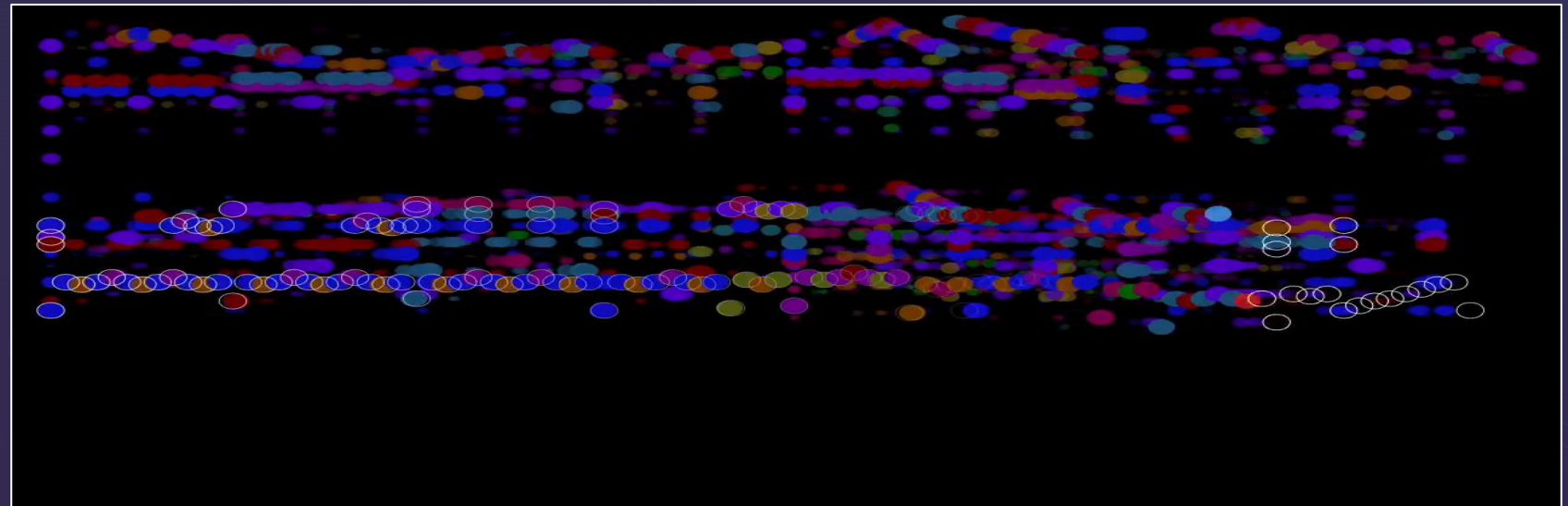
Melodic elaboration in Mozart

Visual realizations by Stephen Malinowski, Music Animation Machine, after Mozart:
“Ah vous dirai-je Maman”, K. 265 (YouTube: Musam 2016)

Example 1:



Example 2:



Human factors in assessments of similarity

- **Cognitive weights** of feature-based comparisons
- **Perceptual factors** in the experience of “similarity”
- **Cultural conditions**

- We shall overcome
- Morehouse College Glee Club 2009
- [arr. Wendell P. Whalum]



<https://www.youtube.com/watch?v=Aor6-DkzBJ0>

Cultural dissonance

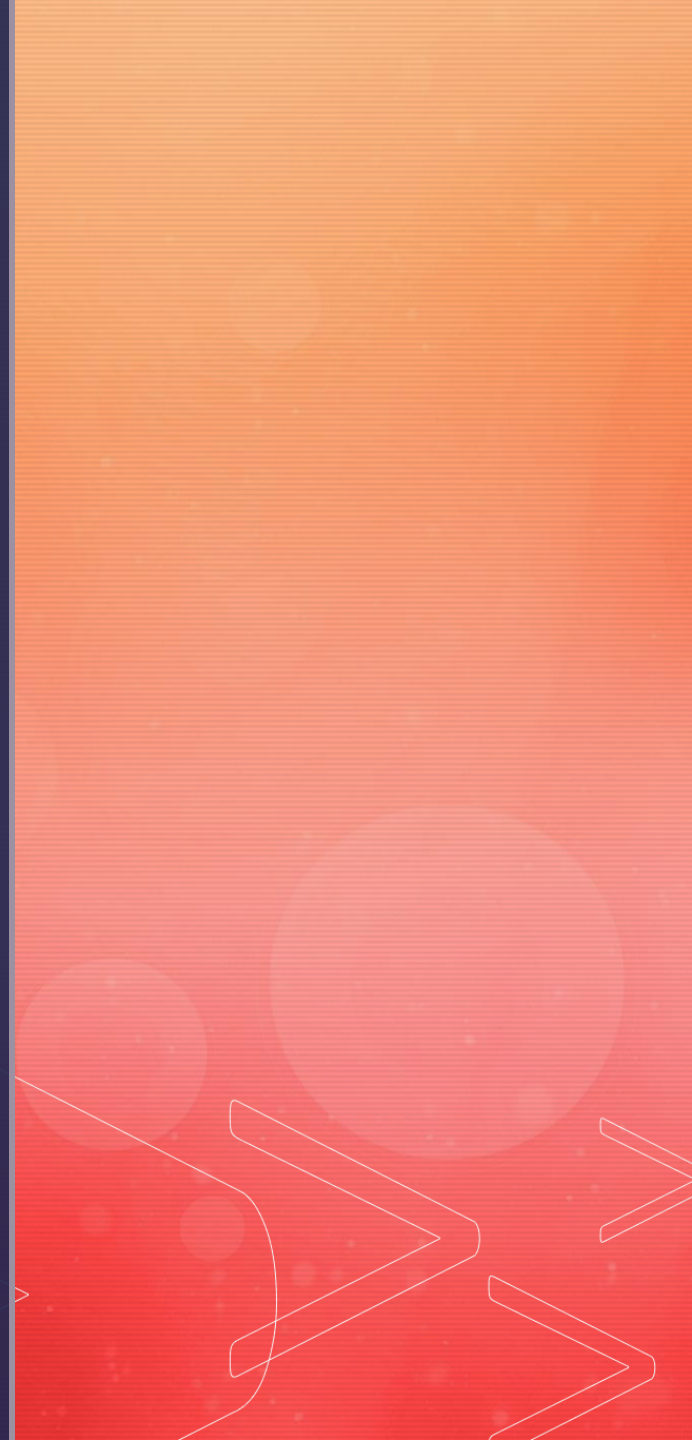
O Sanctissima (after Beethoven,
WoO 157)



Coro Città di Castellarano, dir.
Marco Giudorizzi, 2017

Topic 2 of 2

Musical similarity in music-copyright infringement



Seminal cases

Arnstein vs. Porter (1946)

- establishes concept of **substantial musical similarity** (SMS)
- establishes idea of **lay listener** test

Gaye vs. Williams and Thicke (2013)

- Verdict on appeal—March 2018
- Provisionally **prohibits similarity of style** in protected work

Skidmore vs Zeppelin (2020) “Taurus” vs “Stairway to Heaven”

- Dispute concerns only introductory descending sequence

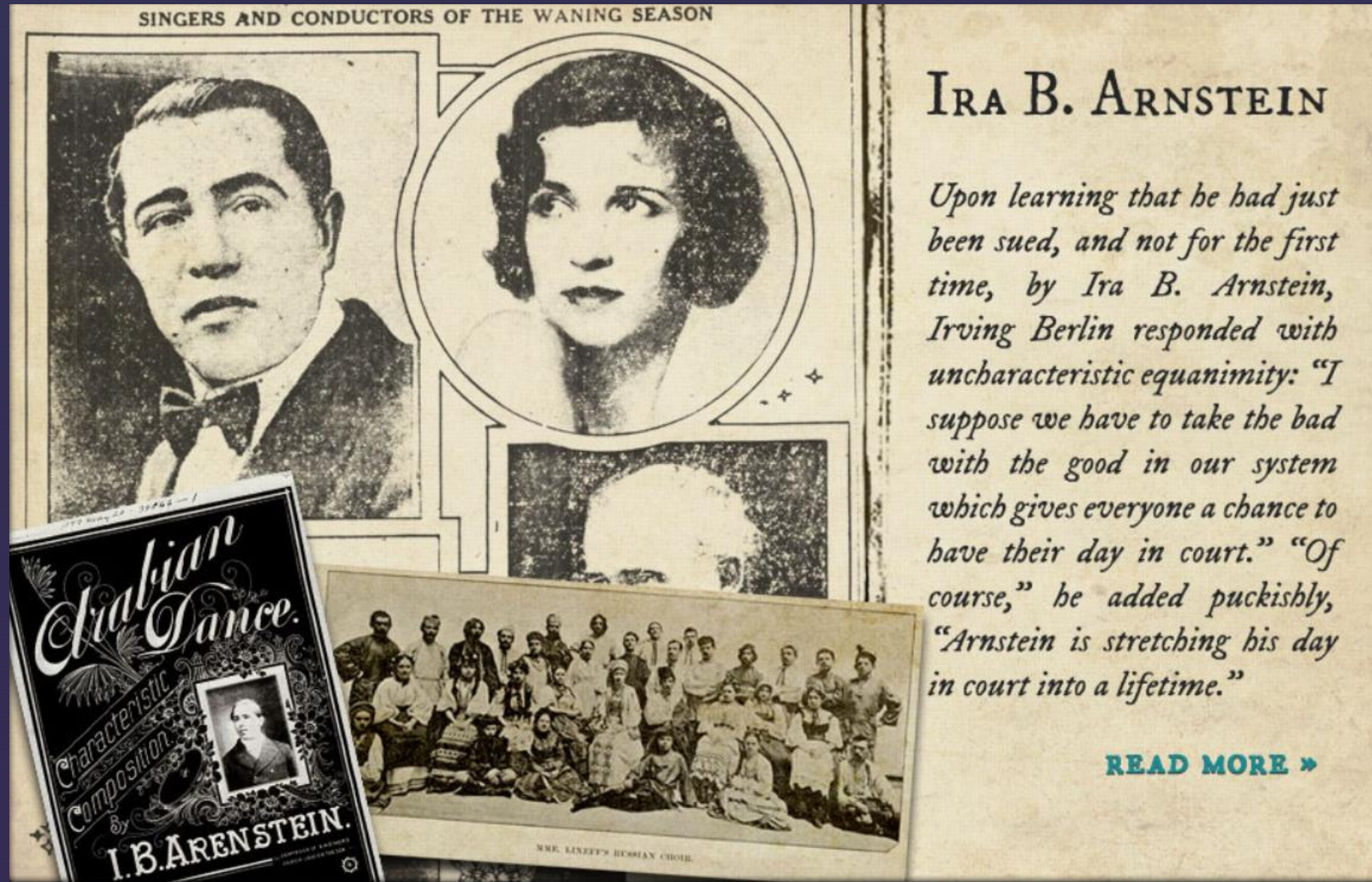
Ira Arnstein and the concept of substantial musical similarity

Arnstein vs. Porter (1946)

- Long series of cases (1940...) in which Arnstein was the plaintiff. (He always lost.)
- **1946 ruling by Jerome Frank** established two principles:
 - Similarity must be “**substantial**”
 - Likeness must be determined by “**lay listeners**”

Irving Berlin's opinion of Arnstein

SINGERS AND CONDUCTORS OF THE WANING SEASON

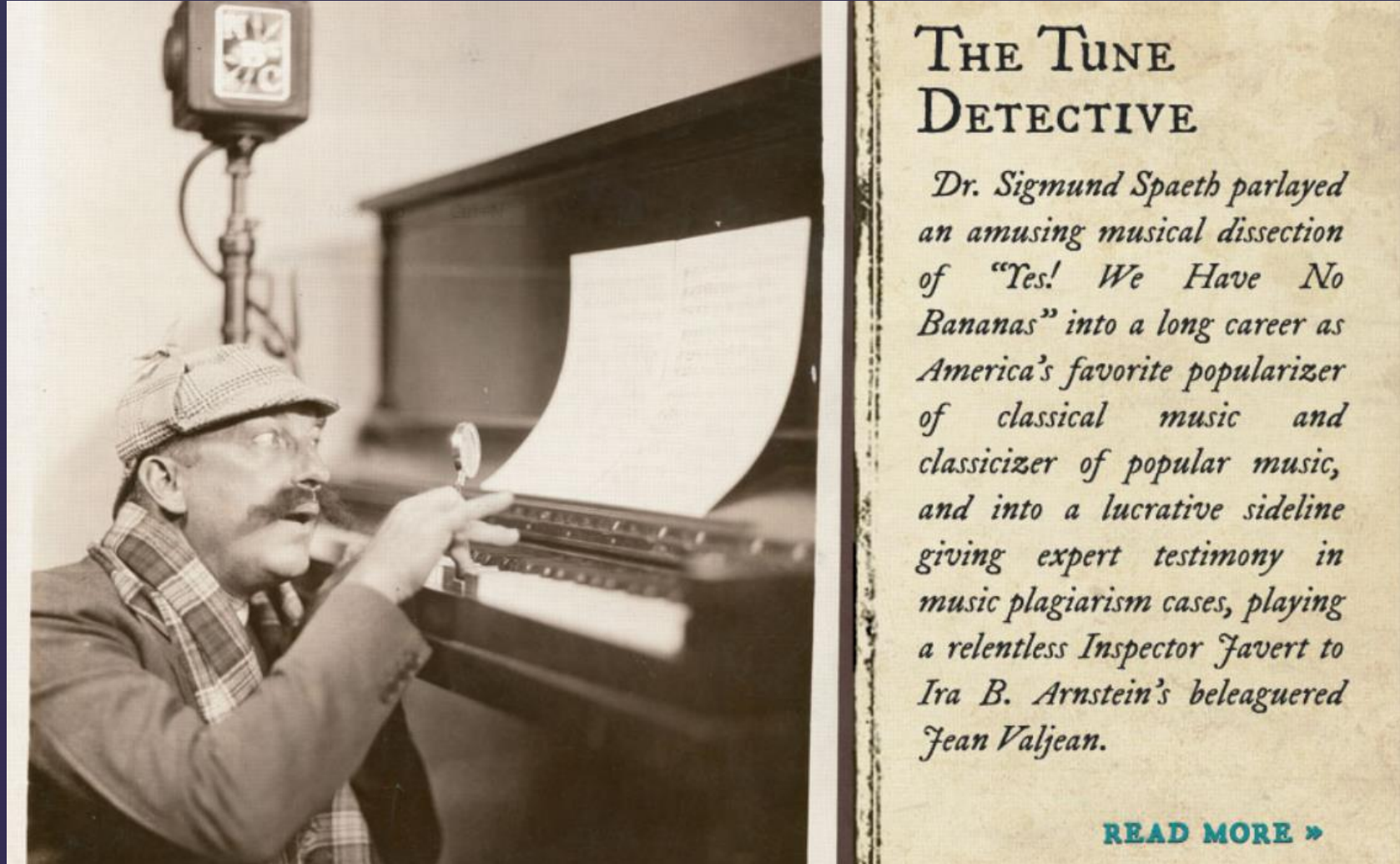


IRA B. ARNSTEIN

Upon learning that he had just been sued, and not for the first time, by Ira B. Arnstein, Irving Berlin responded with uncharacteristic equanimity: "I suppose we have to take the bad with the good in our system which gives everyone a chance to have their day in court." "Of course," he added puckishly, "Arnstein is stretching his day in court into a lifetime."

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Detectives investigate musical similarity



Similarity of which features?

1946: Notation base

Main parameters

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

2013: Audio/video base

Main parameters

- **Timbre**
- **Tempo**
- **Dynamics**

Contractual disagreements

- We shall overcome (2015)
- Audio-visual synchronization rights: \$100,000 [film = The Butler, Lee Daniels, 2013]



► Gaye (L) vs Williams, Thicke (R) (2013; appeal, 2015; re-appeal pending)

Estate of Marvin Gaye RE: “Got to Give it Up (1976/1977). This photo: Birmingham, UK 1976



Pharrell Williams and Robin Thicke (2013).



Melodic comparison (involves slipping positions)

- Timbre
- Tempo
- Dynamics

Note position,
Scale degrees



Fig. 1. Marvin Gaye, "Got to give it up," Bars 8-11.³⁹¶



Fig. 2. Pharrell Williams and Robin Thicke, "Blurred Lines," Bars 25-28.¶

What is a substantial melody?

- Timbre
- Tempo
- Dynamics

Note position,
Scale degrees

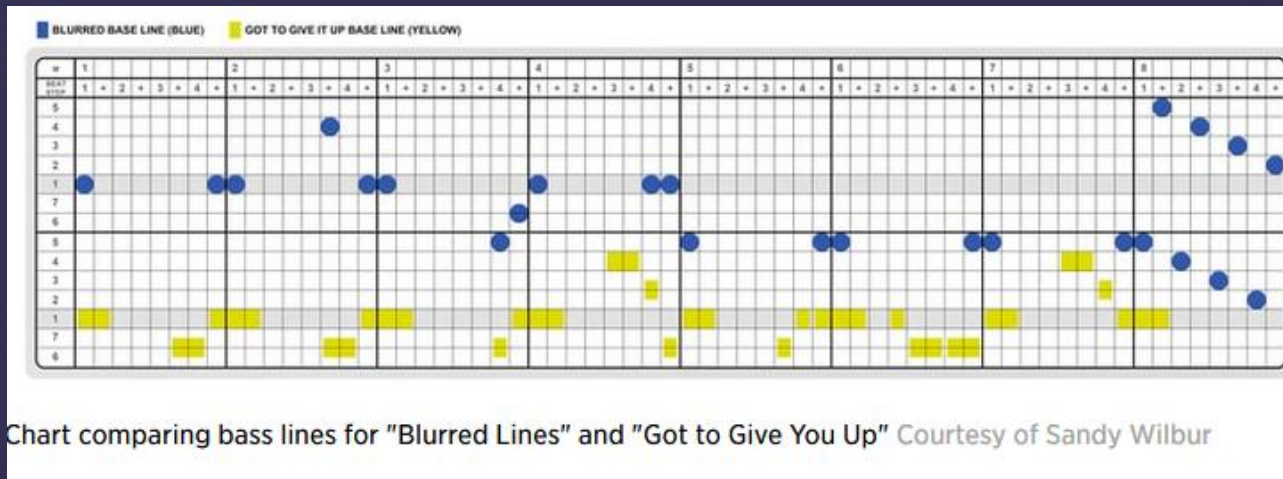


Fig. 1. Marvin Gaye, "Got to give it up," Bars 8-11.³⁹¶



Fig. 2. Pharrell Williams and Robin Thicke, "Blurred Lines," Bars 25-28.¶

Notated vs. performed music in copyright litigation



Sandi Wilbur's diagram
of rhythmic activity

► **Gaye estate vs Williams and Thicke; Williams et al vs Gaye estate***

2013 (copyright), 2015 (suit), 2018 (appeal),

Standing judgment:

***Musical style is a protectable element**

Notated vs performed music in (US) copyright registrations, 1940-2017

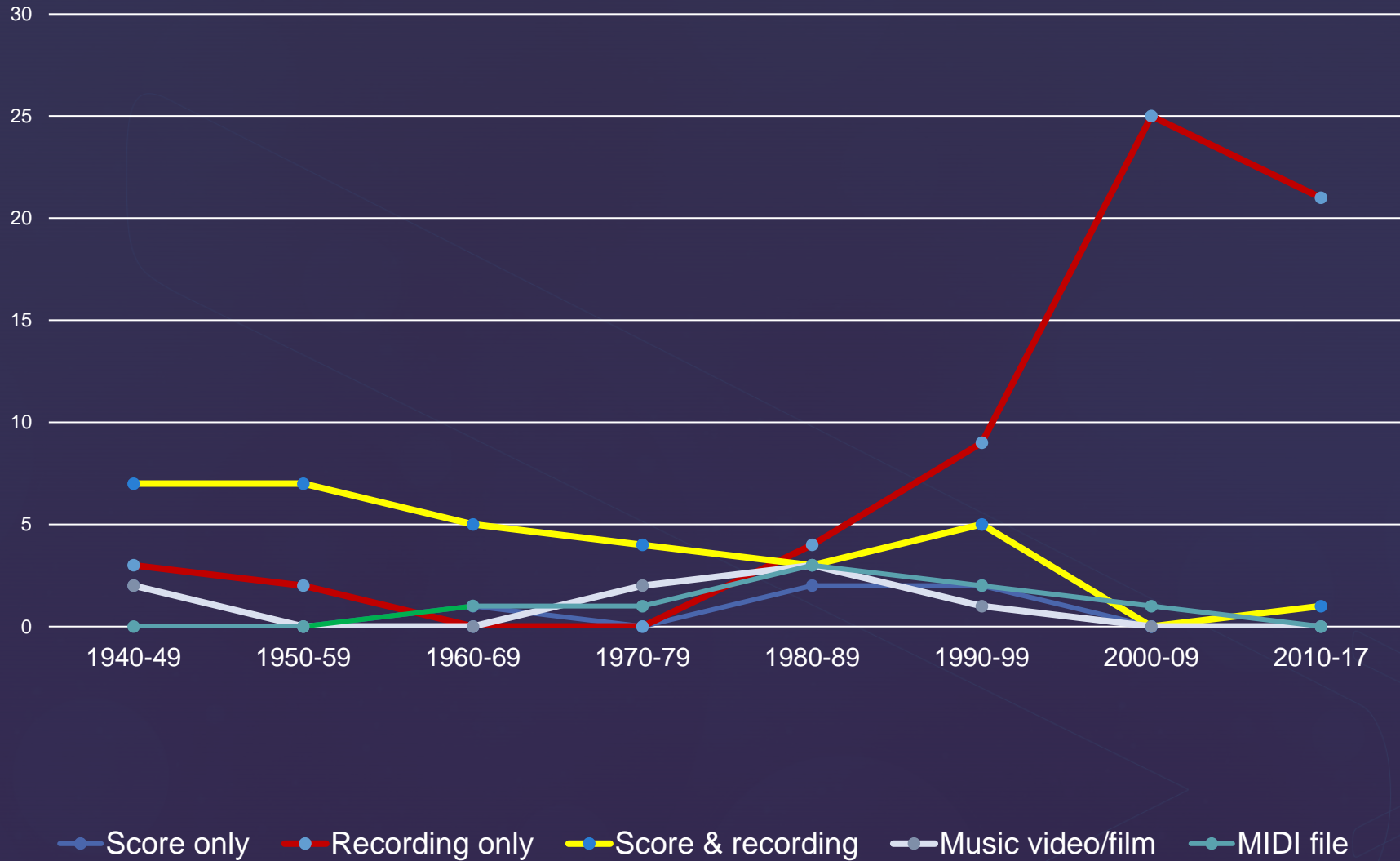
Decade	Score only	Recording only	Score & recording	Music video/film	MIDI file
1940-49	2	3	7	2	0
1950-59	0	2	7	0	0
1960-69	1	0	5	0	1
1970-79	1	0	4	2	1
1980-89	2	4	3	3	3
1990-99	2	9	5	1	2
2000-09	0	25	0	0	1
2010-17	0	21	1	0	0

Source: Charles Cronin's

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MUSIC COPYRIGHT INFRINGEMENT RESOURCE

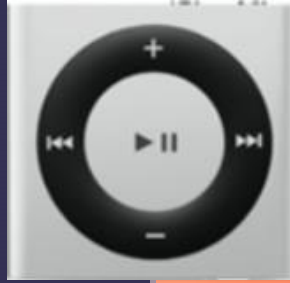
Drift in registration media (1940-2017)





Changing music technology as pivot

- 1999 Record sales peak
- 2009 Streaming music downloads peak
- 2015 Digital downloads = 90% of music sales



2000



2018

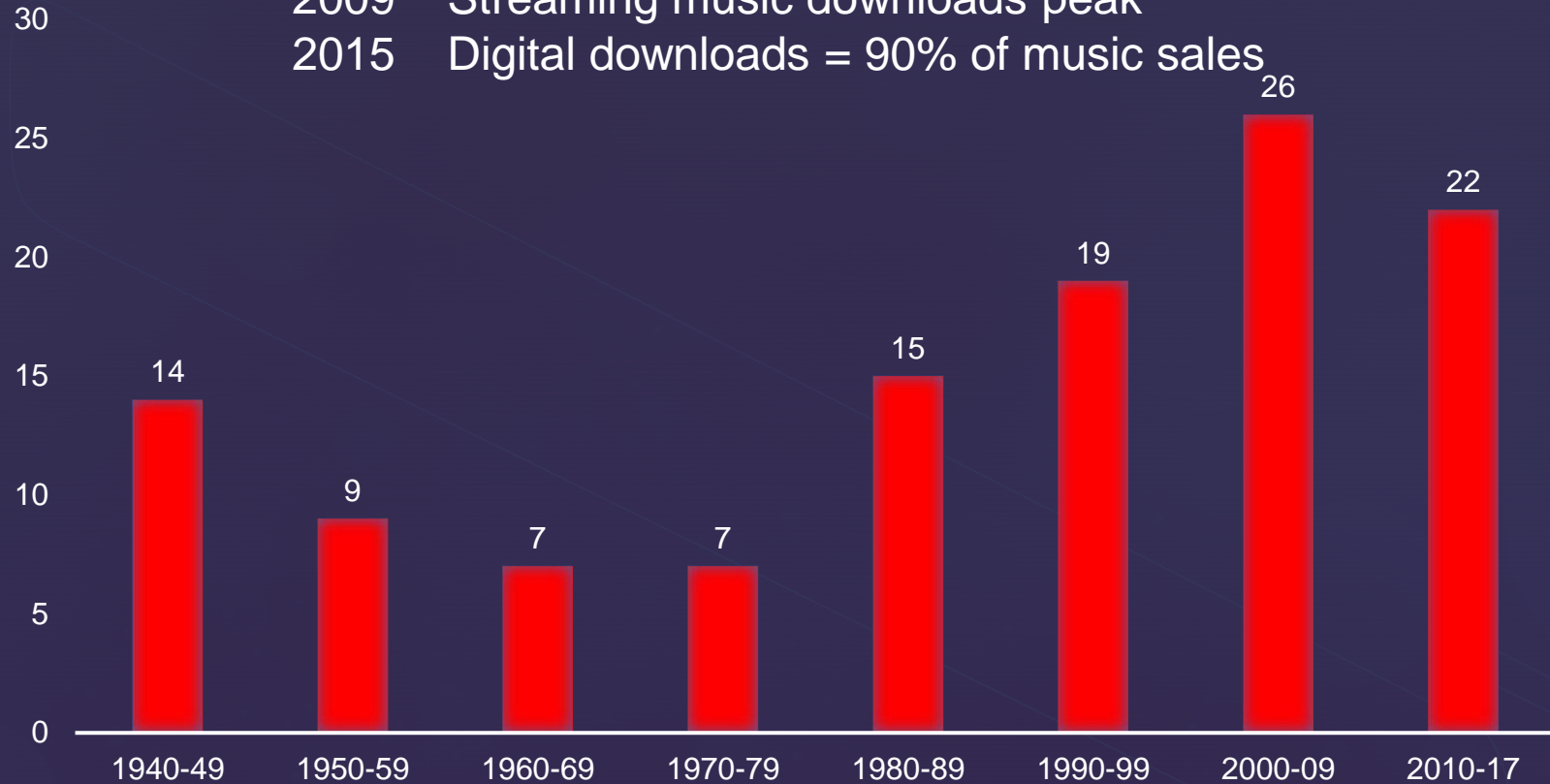
1900



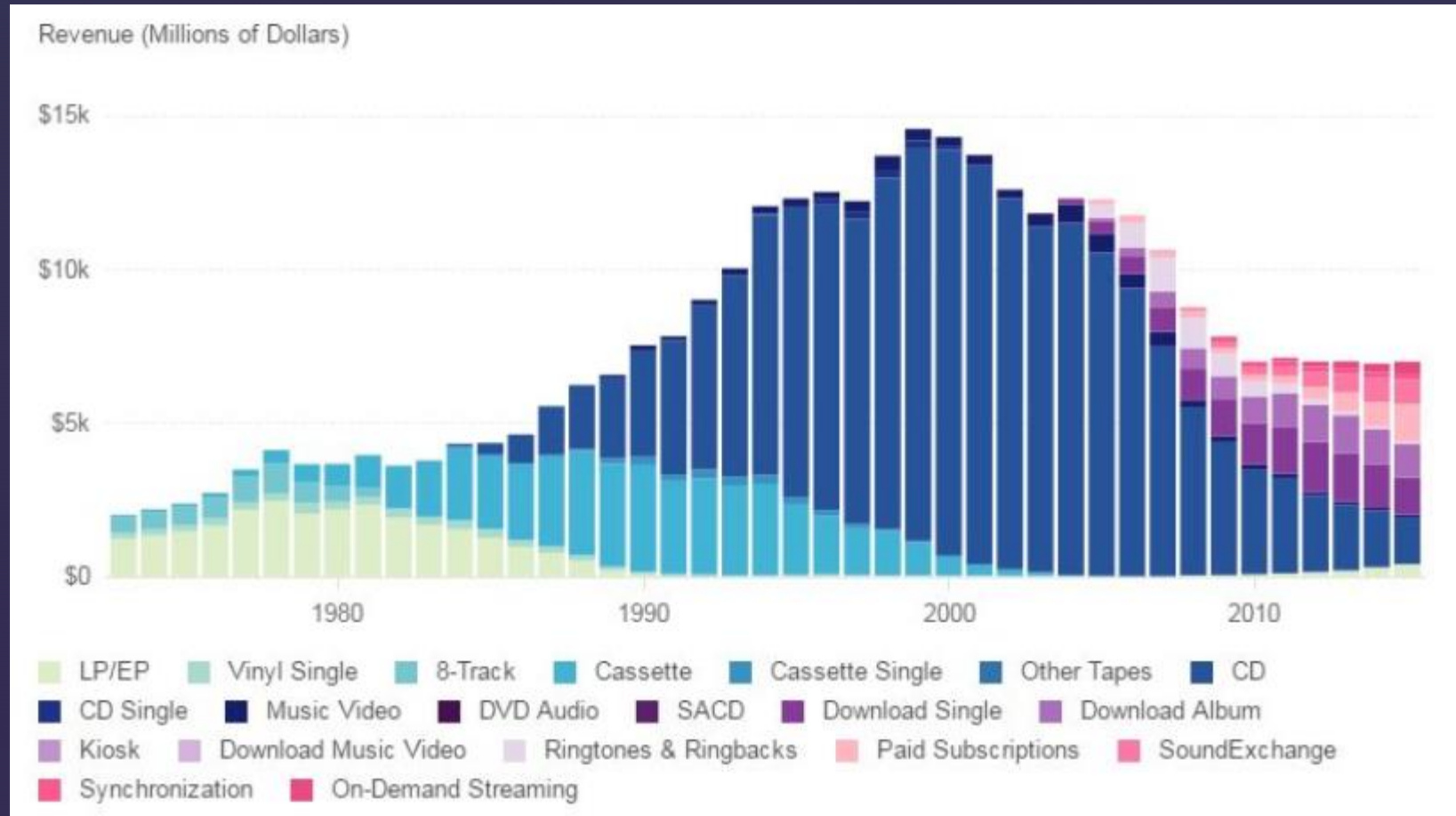
1920



1950



RIAA revenue by delivery medium (2016)



Controversial points (“Blurred Lines”)

Should cases be argued on the basis of **registered copies** only?

What is fair when competing registrations are in different mediums (**media...**)?

Should every “**style**” be exclusive to its own creator?

Improvisatory pastiche
(18th/20th centuries)

Ethan Uslan, 2012

