PARAMETRIC ISOLATION IN

MUSICAL WORKS COPYRIGHT INFRINGEMENT

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Abstract

In cases of copyright infringement of musical works by reproduction, courts in the UK have increasingly relied on forensic musicological analysis by experts. This has invited courts to engage in an incomplete form of reasoning, which this thesis defines as "parametric isolation". Having analysed and identified musical elements by musical parameters (such as pitch, rhythm, harmony), courts falsely make general conclusions about the music based solely on scrutinising musical elements while they are isolated from their contexts. While studying musical parameters separately is often helpful in musical analysis, the proper objective of such parametric analysis should be to assist and inform the study of the relevant musical passage as a whole. Parametric isolation causes the court to miss the wood for the trees.

In setting up the concept of parametric isolation, its flaw is demonstrated by psychological studies and its emergence as a dominant mode of reasoning in British jurisprudence over the last century is illustrated. This culminates in a detailed case study of *Sheeran v Chokri* (2022), arguing that parametric isolation contributed to the court's failure to infer copying.

The central claim of the thesis recommends a doctrinal refinement to Lord Millett's copyright infringement test in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* (2000). As part of the argument, significant distinctions are made to articulate the legal concept of originality more sharply. Furthermore, it is also argued that parametric isolation should play no role in any part of the copyright infringement test.

Author background

The author is a violinist and holds a PhD from the Royal College of Music, London. He is a qualified solicitor and barrister in England and Wales and an Advocate of the Royal Court of Guernsey, though not practising while undertaking research.

To Ludovic Franz

Have courage to be different and

See the wood as well as the trees

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Designers Guild (CA): *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)* (1999) [2000] F.S.R. 121 (CA).

Designers Guild (Ch): *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)* [1998] F.S.R. 803 (Ch).

Levola: Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] ECLI:EU:C:2018:899.

Infopaq: Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

Painer: Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533.

Sheeran: *Sheeran v Chokri* [2022] EWHC 827. (Referring to the case only where italicised.)

Statutes and directives

CDPA: Copyright Designs and Patents Act 1998.

Information Society Directive: Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

Defined terms

Parametric analysis: See Section 1 of Chapter II (*Definition*).

Parametric isolation: See Section 1 of Chapter II (*Definition*).

Disregarding Statement: See Section 2.4 of Chapter III (*The Disregarding Statement in Lord Millett's* Designers Guild).

Proposition of relative protection: See Section 2.1.1 of Chapter III (The author's own intellectual creation as originality).

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Chapter I: Introduction

1. Objectives

Polly the opera had a sensational premiere on 30th December 1922 at the Kingsway Theatre. It was a complete reconstruction of *Polly*, written by John Gay in 1729. The story was dramatically upended by the production's director, changing its lyrics and mood from lament to frolicking entertainment.[1] Frederic Austin arranged and composed music to fit this revised story, also drastically altering 50 of 71 tunes that Austin selected from Gay's original.[2]

Though the resulting comedy resembled little of the 1729 version, Austin's was so successful that the Columbia Graphophone Company wanted to release a record of it quickly. Instead of waiting for Austin's reluctant consent, it commissioned Albert Ketelbey to complete an adaptation of the original *Polly* that might match the popularity as the Kingsway version. However, the resulting music resembled Austin's work. Austin sued for copyright infringement of his musical work and won.

Remarkably, this appears to be the last time a UK court found infringement of an authorial musical work by copying—over one hundred years ago.[3] Although reported cases may not represent all disputes, this motivated me, from a musicology background, to ask: *can the UK legal test for musical works copyright infringement by copying be improved in its operation or its doctrine*?

This thesis focuses on an important factor: parametric isolation. This term, coined in this thesis, is explained in the dedicated Chapter II. In brief, it refers to making decisions about music based solely on studying musical elements isolated from their contexts. As music is made up of combinations of relatively commonplace elements, isolating these elements can mislead courts into flawed conclusions if not recombined. Important musical characteristics

[1] *Austin v Columbia Graphophone Company, Ltd* (1923) MacGillivray's Copyright Cases (1917-1923) 398 (Ch).
[2] For example, Air 69's lyrics were changed from "Why that languish! Ah, he's dead; he's lost forever" to "Drink, laugh, sing, boys, for the soldier has no fellow". See *Ibid*. 399.
[3] See subsection 4 of this chapter for further details. Also, reported cases may represent only a small proportion of disputes. For example, in settlement with Oasis of a copyright dispute in 1996, songwriter Neil Innes was given co-songwriting credit for Oasis's "Whatever". See: https://transatlanticmodern.com/2013/06/24/interview-neil-innes/.

might be dismissed prematurely as commonplace. This observation leads to a proposed doctrinal refinement to the classic copyright infringement test given by Lord Millett in *Designers Guild v Russell Williams* (2000), which identifies and distinguishes parts that might encourage parametric isolation.[4]

2. Structure and scope

Following the introduction in this chapter, Chapter II is dedicated to "parametric isolation". After defining and explaining the term, its significance in the context of music is explained through psychological studies. This is followed by an illustration of how parametric isolation emerged in UK musical works copyright jurisprudence.

The core of the thesis is Chapter III, a detailed discussion about the relevant legal doctrine as informed by an understanding of parametric isolation. It culminates in a case study of *Sheeran v Chokri* (2022), which argues the court erred in failing to infer copying.[5] Specific doctrinal refinements are proposed, forming the heart of this thesis's contribution to knowledge. The final Chapter IV is a brief discussion of policy concerns around copyright, particularly in the context of popular music.

In scope, the thesis concerns the copyright of musical works as authorial works only, not as entrepreneurial works (that is, recordings). Jurisdictionally, the doctrinal aspects of the thesis are limited to the United Kingdom, though it may draw on judicial material from elsewhere.

3. Remarks on methodology and literature

The core of the thesis proceeds by doctrinal analysis and argument, though it is a deeply interdisciplinary project. Musicology is my academic field. Therefore, musicology informs discussions throughout the thesis, including the development of the concept of parametric isolation. In Chapter II, the effect of parametric isolation is appreciated musicologically and

[4] *Designers Guild* (HL) (Lord Millett).
[5] *Sheeran*.

supported by empirical psychological studies. A brief glossary of musical terms used in the thesis is included.

No interdisciplinary literature between law and music uses parametric isolation as a lens to examine UK copyright doctrine, and no legal literature engages directly with the doctrinal claims and clarifications of this thesis. The most relevant literature is a paper by US scholar Peter Nicolas, who notes that "it is wrong to think merely of the sequence of pitches divorced from their rhythmic values".[6] However, courts are isolating musical elements with respect to many more parameters, and courts should be making decisions with all these parameters in mind. Most notably, here parametric isolation leads to recommendations regarding specific refinements in legal doctrine, which is unique within the literature.[7]

An important and fascinating collection of essays, *Music Borrowing and Copyright Law* edited by Enrico Bonadio and Chen Wei Zhu,[8] was published in 2023 and summarised in a recently published review by the author of this thesis.[9] It contains studies across at least 20 musical genres, focusing on how the Anglo-American copyright system interacts with musical creative processes. A key idea is that copyright in musical works developed within a Western tradition and legal culture with little awareness of other genres of music. Music borrowing is

[6] Peter Nicolas, 'Harmonizing Music Theory and Music Law' (2022) 108 Iowa L. Rev. 1247. p. 22.

[7] There are many interesting articles in the intersection of law and music but are not in direct engagement with the main claims in this thesis. These include (not exhaustively) writings of Andreas Rahmatian (see 'Music and Creativity as Perceived by Copyright Law' (2005) 3 Intellectual Property Quarterly 267; 'The Concepts of "Musical Work" and "Originality" in UK Copyright Law—Sawkins v. Hyperion as a Test Case' (2009) 40 International Review of Intellectual Property and Competition Law 560; and 'The Musical Work in Copyright Law' (2023) 73 GRUR International 18); Anne Barron, 'Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice' (2006) 15 Social & Legal Studies 25; Lauren DeVlieger (see 'Promoting Creativity: How the Use of Music Analysis Affects Value Judgments in Copyright Litigation' (PhD Thesis, University of Minnesota 2020); and 'Searching for Similarity: Confirmation Bias in Forensic Analyses of Popular Music' (2022) 34 Journal of Popular Music Studies 91); Katherine Leo (see 'Blurred Lines: Musical Expertise in the History of American Copyright Litigation' (PhD Thesis, The Ohio State University 2016); and *Forensic Musicology and the Blurred Lines of Federal Copyright History* (Lexington Books 2020)); Christopher Jon Sprigman and Samantha Fink Hedrick, 'The Filtration Problem in Copyright's Substantial Similarity Infringement Test' (2019) 23 Lewis & Clark L. Rev. 571; Nicole Lieberman, 'Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law' (2016) 6 New York University Journal of Intellectual Property & Entertainment Law 91. This thesis stands against Joseph P Fishman, 'Music as a Matter of Law' (2017) 131 Harvard Law Review 1861, which argues for the primacy of melody in infringement determinations.

[8] Enrico Bonadio and Chen Wei Zhu (eds), *Music Borrowing and Copyright Law: A Genre-by-Genre Analysis* (Hart 2023).

[9] Max HY Wong, 'Enrico Bonadio and Chen Wei Zhu (Eds), Music Borrowing and Copyright Law: A Genre-by-Genre Analysis' (2024) 87 MLR 1058.

at the heart of many of these genres and is not accommodated by music copyright without substantial adjustments. However, popular music is often brought to court because the use of copyright principles can lead to significant financial outcomes. As a corollary, the great majority of legal study materials relates to popular music.

4. Musical works copyright infringement cases in the UK

Year	Case	Citation	Claimant work	Defendant work	Infringement finding
1923	*Austin v Columbia Graphophone*	Macg.C.C. (1917–1923) 398	Polly	Polly	Yes
1930	*G Ricordi & Co v Clayton & Waller Ltd*	Macg.C.C. (1928–1935) 154	Madame Butterfly	Asleep in my Heart	No
1960	*Roberton v Lewis*	[1960] 5 WLUK 134	Westering Home	Travellin' Home	No
1963	*Francis Day and Hunter v Sydney Bron*	[1963] Ch. 587	In A Little Spanish Town	Why	No
1987	*EMI v Papathanasiou*	[1993] E.M.L.R. 306 (EWHC (Ch))	Theme to *The City of Violets*	Theme to *The Chariots of Fire*	No
2002	*Creagh v Hit and Run*	[2002] EWHC (Ch)	Where Are You Now	Where Are You	No
2002	*Malmstedt v EMI*	[2002] EWHC 3228 (Ch)	Jenny and I	Sleeping In My Car	No
2006	*Coffey v Warner Chappell Music*	[2006] EWHC (Ch) 449	Forever After	Nothing Really Matters	No (summary judgment)
2022	*Sheeran v Chokri**	[2022] EWHC 827 (Ch.)	Oh Why	Shape Of You	No

Table 1: List of UK cases on musical works copyright.[10]

The search for relevant cases focused on the modern copyright era after the Copyright Act of 1911, which unified a disparate set of prior copyright legislation. This was assisted by electronic case collections (such as Westlaw) and various databases, such as the Music Copyright Infringement Resource (MCIR) of the George Washington University and Columbia Law Schools and Lost in Music by Westminster Law School.[11] References in educational and practitioners' texts were also followed. Nine UK cases (shown in Table 1) were found that share the features below, bringing them into particular relevance to this thesis.

- The subject of the case is plagiarism from another musical work.

[10] Asterisk denotes claimant-defendant names appear reversed, because Sheeran sued for a declaration of non-infringement.

[11] https://blogs.law.gwu.edu/mcir/ and https://www.lostinmusic.org/.

- Musical passages are studied comparatively, often with the assistance of musicological experts.
- The court concluded fully on the matter of copyright infringement, rather than, for example, as a matter of interlocutory injunction where an applicant would only need to demonstrate a prospect of success to succeed in the application.[12]

Although it is accepted that the number of cases is insufficient to support general hypotheses, general trends can be discerned.[13] One example is the observation that no such infringement action has been successful in court since *Austin* (1922).[14] Another is the increasing dominance of parametric isolation, illustrated in Chapter II.

Several other UK cases pertaining to musical works are noteworthy. In chronological order, *Hawkes & Son v Paramount Film Service* (1934) first ruled a substantial part depended on quality rather than quantity in musical works.[15] Here, the musical work was reproduced by video footage rather than compositional activity. *Williamson v Pearson* (1987) was an injunction application involving detailed musical comparisons, including an interesting discussion of the sounds of lyrics as orchestration.[16] *Sawkins v Hyperion* (2005) is often cited as a seminal case on the nature of a musical work.[17] However, the arguments therein are well-rehearsed in musicology, with conceptual parallels already discussed in *Austin*. Furthermore, a detailed enquiry into the nature of the musical work in copyright law is a hugely complex interdisciplinary topic of a doctoral scale.

Although this thesis is situated in UK legal doctrine, it contains references to other jurisdictions. For example, the EU's harmonisation of intellectual property at the turn of the 21st century profoundly changed UK legal doctrine. Australian jurisprudence continued to develop British principles without EU influence.[18] While recognising the international

[12] *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396 (HL).
[13] A p-value of 0.05 would, roughly speaking, require a sample size of at least 20.
[14] Although also see note 3, *supra*, in relation to cases that do not reach the courts.
[15] *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch. 593 (CA).
[16] *Williamson Music Ltd v Pearson Partnership Ltd* (1986) [1987] F.S.R. 97 (Ch).
[17] *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.
[18] For example, *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* [2011] FCAFC.

influence of US copyright culture, US authorities are cited sparingly due to a limited thesis scope and differences in legal principles.[19]

[19] A recent US case that engaged cultural consciousness was *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018), concerning the song "Blurred Lines". Also, around the same time as Ed Sheeran's UK case, he also had a US case relating to a different song "Thinking Out Loud", where no infringement was found: *Structured Asset Sales, LLC v. Sheeran*, No. 23-905 (2d Cir. 2024). However, a case study of a non-UK case is not within the scope of this thesis.

Chapter II: Parametric Isolation

1. Definition

"Parametric isolation" is a central concept coined in this thesis.[20] This chapter first defines and explains the concept without legal language, including through psychological experiments to demonstrate the inextricable link between musical parameters. This is followed by tracing the emergence of parametric isolation in UK copyright infringement cases of musical works over the last century.

Parametric isolation is a process that dissects music but omits to put it back together. As its definition, "**parametric isolation**":

a) dissects a musical passage by means of its musical parameters;
b) analyses musical elements identified by each parameter in isolation from the musical context of the musical passage as a whole; and
c) fails to collate back together what is learned by this study before coming to a conclusion that has a general, determinative effect about the music.

A non-exhaustive list of parameters includes: pitch, rhythm, tempo, dynamics, articulation, harmony, orchestration, texture, phrase structure, meter, and tonality. Brief meanings of these terms can be found in this thesis's musical glossary. In step (c), examples of final conclusions include that musical element X is no longer relevant to the remainder of the case, or more generally, that passage A is (not) similar to passage B.

There is nothing wrong with steps (a) and (b) *per se*; they are often helpful as discussed shortly. Together, steps (a) and (b) are hereafter referred to as "**parametric analysis**". Parametric analysis can be a musicologically helpful (or even necessary) process because it enriches the picture when we return to study the musical passage as a whole. However, the omission that is step (c) deprives the chance of the musical passage to be understood and evaluated as a whole. This is important because the audience hears the music as a whole, not

[20] For the avoidance of doubt, "parametric isolation" in this thesis is not a critique of short extracts attracting copyright protection, or as coined by Justin Hughes, "microworks". See Justin Hughes, 'Size Matters (Or Should) in Copyright Law' (2005) 74 Fordham Law Review 575.

as a sum of its elements. In other words, parametric isolation causes the court to fail to see the wood for the trees.

2. One must eat the cake

Music is surprisingly like cakes. For example, Nigella Lawson's Victoria Sponge Cake has flour, eggs, butter, sugar, a little salt, a little milk, vanilla extract, baking powder and cornstarch.[21] Similarly, music has pitch, rhythm, and all the various parameters mentioned before. There can be variations within each parameter. Different musical passages have different rhythms, harmonies, textures, *et cetera*. Different cakes call for different ingredients. These ingredients are convened and go into an oven, just as the various musical elements are composed in the mind of the composer.

There are, of course, some limitations to this analogy. It may be argued that different types of rhythm might influence a musical passage more than different types of butter might to a cake, or that different cakes can call for different balances between ingredients, such as more eggs and less butter. It may also be argued that the ingredients in a cake transform in the oven beyond the recognition of their original forms, whereas one can often hear what the rhythm is when one listens to the music.

However, these do not detract from the purpose of this analogy in this thesis: just as one cannot learn much about what makes a cake special by staring at the ingredients themselves, one cannot learn much about what makes a musical passage tick by staring at the parameters. Making a general conclusion about a musical passage by staring at the pitch sequence of its melody is, to the musicologist, as farcical as staring at the roundness of an egg to try to understand what makes a cake taste good. Rather, one can only consider individual musical elements in the context of listening to the musical passage as a whole; or, in other words, one must eat the cake to understand the cake.

[21] Nigella Lawson, 'Victoria Sponge' (*Nigella.com*) <http://www.nigella.com/recipes/victoria-sponge> accessed 2 February 2025.

3. Psychological studies

The inextricable link between musical elements that makes parametric isolation an incomplete process is supported by psychology. In this section, three sets of experiments are presented to illustrate the inseparability of pitch sequence and rhythm (the last experiment also involves pitch contour). The invention of electronically synthesised sounds in the 1970s and 1980s, enabled a wave of psychological experimentation on how music is perceived.

The earliest experiments were relatively simple. In 1973 Walter Jay Dowling played a computer-synthesised melody of twenty tones to participants, organised in groups of five tones with the rhythm: short-short-short-short-long.[22] After a two-second pause, the participant would hear a five-tone sequence for that trial (the "test probe"). The participant would be asked whether the test probe sequence was contained in the melody just played. Dowling found a significant deterioration in performance when the test probe spanned across both sides of a long note rather than being within the original rhythmic group. This demonstrated that rhythm affected melodic perception and recall: in perception, experimental subjects organised pitch sequences in melodic "chunks" suggested by the rhythm.

In 1980 Diana Deutsch's experiments demonstrated the effect of "chunking" with more complexity. Participants were required to listen to a sequence of 12 synthesised pitches and notate them from memory. These sequences had systematic patterns, as illustrated by the examples in Figure 1 and Figure 2. Figure 1 had four groups of three notes each, and Figure 2 had three groups of four notes each. The systematic pattern here happens to be adjacent descending notes, which is shared by both the higher sequences (circles) and the subsequences (underlines), but these sequences can be of any systematic pattern.

[22] WJ Dowling, 'Rhythmic Groups and Subjective Chunks in Memory for Melodies' (1973) 14 Perception & Psychophysics 37.
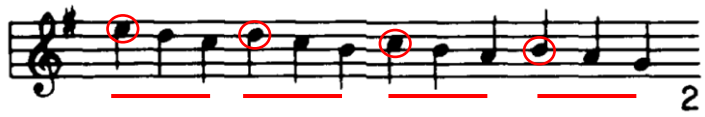


Figure 1: Higher sequence of four elements of three sub-elements each.[23]
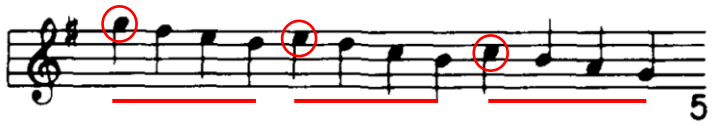


Figure 2: Higher sequence of three elements of four sub-elements each.[24]

Deutsch wanted to test if playing these sequences contrarily against these structured groupings would cause participants to hear them differently. Her trick was to play each sequence in three temporal configurations: in groups of 2, 3 or 4 with pauses in between.

Table 2
Percent Correct Recall (PC) of Tones in Correct Serial Positions in Experiment 2

Condition	PC
Sequences Structured in Groups of Three	
3-2. Temporally segmented in groups of two	45.4
3-3. Temporally segmented in groups of three	93.1
3-4. Temporally segmented in groups of four	50.6
Sequences Structured in Groups of Four	
4-2. Temporally segmented in groups of two	80.8
4-3. Temporally segmented in groups of three	52.9
4-4. Temporally segmented in groups of four	85.4

Figure 3: Results of Deutsch's "Experiment 2".[25]

The results in Figure 3 indicate that participants excelled when the presented temporal segmentation coincided with the sequence's natural grouping, but poorly when it went against. The rectangle in Figure 3 indicates the high percentage of correct answers when a sequence of three-note subgroups was played in groups of three, thereby going with the sequence structure. The circle in Figure 3 indicates the low percentage of correct answers when a sequence of four-note subgroups was played in groups of three, thereby going against the sequence structure. This strongly demonstrated that the perception of pitch sequence is

[23] Diana Deutsch, 'The Processing of Structured and Unstructured Tonal Sequences' (1980) 28 Perception & Psychophysics 381, 386.
[24] *Ibid*.
[25] Deutsch (1980) 386.

highly dependent on its rhythmic context, without which an isolated analysis of pitch sequence is itself meaningless.

Concepts about the interactions between musical parameters continued to increase in sophistication over the 1980s. For example, an experiment was done to prove that the human ear perceives general structures of musical phrases rather than precise pitch or rhythmic sequences. However, this relies on an elaborate theoretical framework that must be explained.

Proceeding on the hypothesis that melodic and rhythmic contour contribute to each other beyond an additive way, Mari Riess Jones coined the term "dynamic shape".[26] A dynamic shape can be partly modelled by a "joint accent structure", the combination of "melodic accents" and "temporal accents". The joint accent structure is an inextricable relation between pitch and rhythm, giving effect to the hypothesis.

A melodic accent can happen in three ways. One is when the melodic contour changes direction from ascending ("+") to descending ("-"), or vice-versa (see panel (a) in Figure 4). Another is when the melodic contour experiences a sudden and large change in interval (see panel (b) in Figure 4). The first note, which actions the interval change, is perceived as stronger. The second (m) in panel (b) is both a contour and a pitch interval accent. Third, a melodic accent can come from a tonal accent, a more complex concept about whether notes fall outside local tonal expectations (not relevant here).

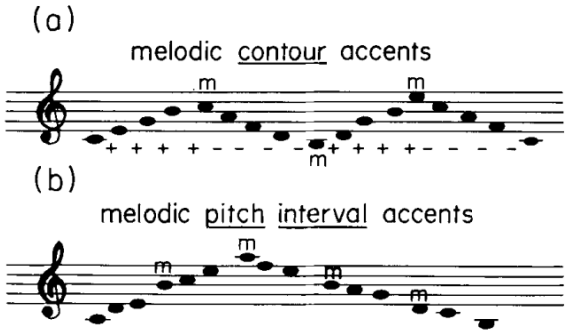


Figure 4: Melodic contour and pitch interval accents.[27]

[26] See Mari Riess Jones, 'Dynamic Pattern Structure in Music: Recent Theory and Research' (1987) 41 Perception & Psychophysics 621 and Mari Riess Jones, Lee Summerell and Elizabeth Marshburn, 'Recognizing Melodies: A Dynamic Interpretation' (1987) 39 The Quarterly Journal of Experimental Psychology Section A 89.
[27] Jones (1987) 623.

A temporal accent occurs with long notes or after rests.[28] In Figure 5, panel (a)'s rhythm is "short-short-short-pause", with temporal accents on the first note (C) and the fourth note (A), which comes after the pause. In panel (b) the rhythm is "short-short-long", with temporal accents on the long notes of E and C'.

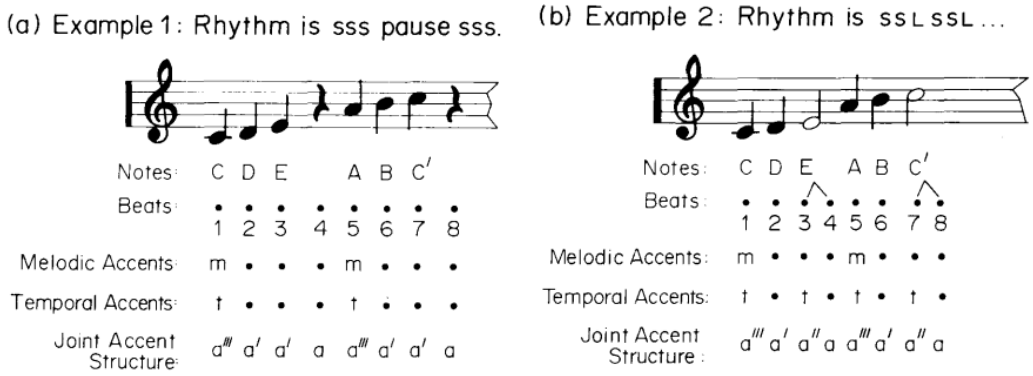


Figure 5: Joint accent structures (reformatted to be horizontal).[29]

As can be seen in Figure 5, the combination of melodic and temporal accents enables the construction of a "joint accent structure". Looking at the line in Figure 5 "Joint Accent Structure", the joint accent is strongest when melodic and temporal accents coincide (a‴) and weakest when there is neither accent (a'). The sequence of joint accent structures is a model of "dynamic shape". Although it is an incomplete model because it only encompasses pitch and rhythmic aspects, even this relatively simple model of dynamic shape enables interesting and important psychological conclusions.

An example was the first experiment in Jones, Summerell and Marschburn (1987), which studied whether participants could be tricked into misrecognising a melody by a decoy, and if so, what properties the best decoys might share.[30] The experiment played 48 test trials, comprising a mixture of original and decoy melodies of all types. Participants would simply be asked whether the melody just heard was "old" (original) or "new" (modified/decoy).

In creating decoys melodies, they varied the original melodies by pitch, pitch contour and rhythm—the elements of the joint accent structure. Figure 6 shows an example of an

[28] This is Jones's assertion, which is helpful for the construction of the "dynamic shape" concept. However, in musicology, such an assertion may require further justification.
[29] Jones (1987) 625.
[30] Jones et al. (1987) 96.

original melody (left hand side of panel (a)) and its decoys, and the left- and right-hand sides represent the same pitch sequences by in the original rhythm Rx and a new, varied rhythm Ry. Panel (b) are decoy melodies that maintain the same pitch contour, but four notes are varied (see circles in Figure 6 panel (b)). In particular, the left-hand side of panel (b) does not change the rhythm, which means the dynamic shape is maintained despite having a different pitch sequence (see large circle in Figure 6). Panel (c) are decoy melodies that vary pitch contour, with the notes in squares in Figure 6 changing the direction from the pitch contour of the original melody.

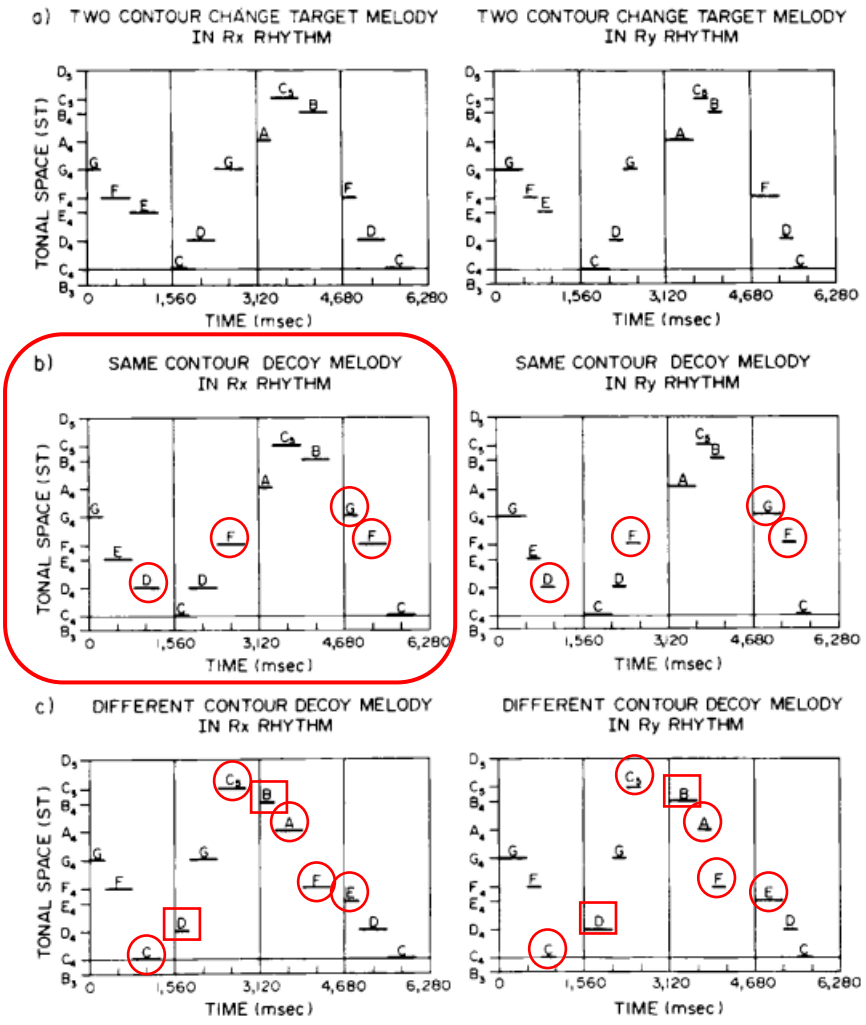


Figure 6: Tonal-space and time graphs illustrating the construction of decoy melodies.[31]

The numerical results are detailed in Figure 7, which shows the proportion of correct answers by all the participants. A change in rhythm decreased the hit rate from 0.875 to 0.635

[31] *Ibid*. 96.

(see square in Figure 7), demonstrating that playing the same pitch sequence in a different rhythm makes a substantial difference in musical perception. Where the decoy melodies differed in rhythm or contour only, such that the dynamic shape of the original melody was not maintained, the expected result of that difference being discerned by participants obtained. However, the most important result was that indicated by the circle in Figure 7. This was where the pitches varied but the dynamic shape and joint accent structure were maintained (see large circle in Figure 6). 33.3% of respondents were tricked: they thought, erroneously, that this was the original melody.

Table II

PC Values for Experiment 1

	Melody			
	Target	Same Contour	Different Contour	Means
Original rhythm	0.875	0.666	0.853	0.798
New rhythm	0.635	0.780	0.896	0.770
Means	0.755	0.723	0.874	0.784

Figure 7: Numerical results of Jones's experiment 1.

This result demonstrated that the best decoy melodies were ones that maintained dynamic shape. As long as the dynamic shape was the same, participants overlooked details such as exact pitches. In the context of parametric isolation in music, this result demonstrated that dynamic shapes of musical phrases mattered more than exact correspondences in pitch.

The link to music copyright here is not about aural recognisability, a scientific metric that is employed in these experiments but does not have a place in the legal doctrine. What these experiments show is that the court's reliance on forensic comparisons, along with its fixations upon isolated musical parameters such as pitch sequences, can lead to outcomes that are disconnected from the human experience of music. This matters because ultimately, it is the human experience that confers value on commodities in a commercial market: consumers buy things they like. Putting it all together, it is revealing to bear this in mind when looking at recent UK copyright jurisprudence, where courts frequently concluded that musical works were different because pitch sequences did not match exactly.

4. The emergence of parametric isolation in UK musical copyright jurisprudence

4.1 The early cases

This part illustrates how parametric isolation emerged in UK litigation over the last century, drawing on the cases of musical works copyright infringement in Table 1 in the first chapter.

The first case in the modern era of copyright was *Austin v Columbia* (1922), whose facts introduced the thesis.[32] Perhaps with the opportunity to develop new jurisprudence, this case was very rich in insights. In relation to music and parametric isolation, the court set out two important principles. First, the court recognised it would be wrong to make conclusions prematurely while musical elements are isolated into ordinary-looking materials, because it is the combination of these materials that attract copyright.

> "But the combination of these ordinary materials may nevertheless be original, and when such a combination has arrived at a certain degree of complexity it becomes practically impossible that it should have been arrived at independently by a second individual".[33]

Second, the court held that "music must be treated by the ear as well as by the eye", and "it is not a question of note for note comparison at all, but whether the substance of the original copyright work is taken or not".[34] This contrasts with the more recent cases described later in this section, where increasingly forensic methods of comparing music meant that conclusions were being drawn from dissecting scores in priority to the aural phenomenon of the actual music, which is holistic and not the result of parametric isolation.

Austin also foreshadowed other legal developments. For example, the court discussed the possibility of subconscious copying, noting that when Ketelbey was writing his own arrangement of *Polly*, "it was impossible for him to divorce his mind sufficiently" from Austin's version of *Polly*.[35] Altered copying was also discussed, where a copyright work is copied but altered, possibly deliberately to avoid copyright infringement. The court noted that

[32] *Austin v Columbia* (1922)
[33] *Ibid*. 420.
[34] *Austin* 409, 415.
[35] *Ibid*. 417.

Ketelbey's version of *Polly* was "garbled to a certain extent, but it is nothing better than a copy", and that one should be "debarred from doing anything that is a mere colourable alteration".[36] Finally, the recognition of *Austin*'s adaptation of *Polly* as a new work attracting its own copyright protection is not dissimilar to Lionel Sawkins's arrangement of Lalande's work in *Sawkins v Hyperion* (2005). Both Austin's and Sawkins's works were arrangements of Baroque-period works that were out of copyright. Astbury J was a thoughtful judge who considered all aspects of the case before him with arguments that were ahead of his time.

G Ricordi & Co. (London) Ltd. v Clayton & Waller Ltd. (1930) contained a sophisticated yet succinct musical comparison that arguably remains unmatched today.[37] Though an injunction application, the court concluded the matter of infringement negatively, precluding the claim generally. Eight bars of the defendant's song, "Asleep in My Heart" from a musical comedy *Silver Wings* at the Dominion Theatre, was alleged to have copied a musical passage (the "Waiting Motif") in Puccini's opera *Madam Butterfly*. Copying was alleged on the basis of a shared pitch sequence.[38] However, a finding of copyright infringement was denied because:

> The originality of the [Plaintiff's] Waiting Motif is due, not to the sequence of the notes, but to the treatment, the accentuation, and the orchestration by Puccini; it is the music as a whole which is entitled to the protection afforded by the Copyright Act.[39]

It is worth reproducing the musical comparison that led to this conclusion. In the quotations below, references to various musical elements are underlined to illustrate how well different parameters were integrated into holistic musical descriptions. In the plaintiff's music:

> First, they say that the resemblance is in the melody, the same sequence of musical notes is employed. This is admitted. The notes consist of a major scale, the first part ascending and the second part descending. It is admitted that each of these scale passages forms a musical cliché which itself contains nothing original or novel. The sequence of notes has been treated by Puccini in a particular manner; they are <u>accented</u> in a particular way and are given different <u>values</u>, and have added to them a distinctive orchestral <u>accompaniment</u>. The feature of that accompaniment is the

[36] *Ibid*. 417.
[37] *G Ricordi & Co v Clayton & Waller Ltd* (1930) MacGillivray's Copyright Cases (1928-1935) 154 (Ch).
[38] *Ibid*. 159.
[39] *Ibid*. 162.

> playing of the air by the strings pizzicato, with one of the violins and one viola in each case playing the air in octaves. There are a few sustained chords or notes on the harp. The passage in question in Puccini is introduced by an up beat rising from the key-notes of the scale to the fourth.[40]

In comparison, in the defendant's music:

> The refrain of the song "Asleep in my Heart" consists of the same sequence of notes, but passing notes, I think, are introduced. The accent and the rhythm are different; it is in treble time, whereas the Waiting Motif is in common time; the notes have different values and, to some extent, at any rate, different accentuation. The orchestration of the refrain "Asleep in my Heart" has the air played by all the violins and 'cellos in octaves, but this is not played pizzicato. The harp in the refrain plays a number of arpeggios, and they are played really in quite a different manner to the pizzicato of the strings of the [Plaintiff's] Waiting Motif.[41]

Although these descriptions were short, they continue to exemplify how parametric analysis of various musical elements can be brought together into an integrated description of music. These parameters included articulation (accents), rhythms and note values, orchestration and accompaniment, playing modes (pizzicato), orchestral textures (one violin and viola or all violins and cellos), and sonic textures (sustained chords or harp-like arpeggios). The economy of description did not sacrifice precision. For example, the second description discussed how the harp plays arpeggios in a different manner to the strings pizzicato in the plaintiff's work. While implying the shared feature of arpeggios, the court observed that the manner and effect were dissimilar. None of the various aspects was considered in isolation.

4.2 *Francis Day and Hunter v Sydney Bron* (1963)

Francis Day and Hunter v Sydney Bron (1963) was an interesting and important case where the Court of Appeal confirmed a High Court judgment by Wilberforce J (as he was then). The plaintiff alleged that the defendant copied the first eight bars of the chorus to "Spanish Town", first published in 1926 and since then widely played in the UK and the US. The whole of the defendant's song, "Why", is a development of its original theme that was said to be similar to

[40] *Ibid*. My underline.
[41] *Ibid*. My underline.

"Spanish Town".[42] The defendant denied any knowledge of "Spanish Town",[43] but it was common ground that the allegedly copied part would form a substantial part if indeed copied.[44] Therefore, the focus of the case was to determine copying, consciously or subconsciously.[45]

Detailed parametric analysis was carried out, with Wilberforce J considering nine musical aspects:

1) structural forms of the songs;
2) how the theme was developed;
3) the role of musical commonplaces and clichés;
4) a pitch sequence comparison of the opening melody;
5) harmonic structure;
6) time and rhythm;
7) metre;
8) sustained length of the first melodic note in the defendant's work; and
9) structural points of difference within the opening phrase.

Throughout, the court appreciated the complexities of music. For example, Wilberforce J recognised in item (3) that even though much of the relevant musical phrase in the copyright work was constructed by ordinary musical elements, what resulted was "a combination which gives character and charm" to it.[46] In the end, Wilberforce J subordinated this parametric analysis study to the whole.

> These are perhaps in themselves small points; some of them are what I may call "professionals' points" and one must resist the temptation, which I think some of the defendants' witnesses did not fully resist, to atomise what is a living phrase. One must not lose sight of the musical character and the aural appeal of the sentence as a whole.

[42] *Francis Day & Hunter v Sydney Bron* [1963] Ch. 587 (CA) 609.
[43] *Ibid*. 610.
[44] *Ibid*. 609.
[45] *Ibid*. 610–611. See Chapter III for a detailed analysis of the UK copyright infringement test.
[46] *Ibid*. 609.

This amounts to a warning against parametric isolation. Wilberforce J recognised a temptation to analyse and, in his words, atomise a living musical phrase, and warned against losing sight of the musical character of the whole. In the Court of Appeal, the court went on to cite *Austin*'s principle that infringement is to be determined by the ear and is not a question of note for note comparison.[47]

Through a holistic comparison of the music, the court indicated it felt the two works were similar. The Court of Appeal summarised Wilberforce J's conclusion.

> Having stated these various points of similarity and difference (which I wholly accept) the judge expressed the view that, in relation to the aural appeal of the sentence as a whole, there is an undoubted degree of similarity between the two songs, the only question being what adjective to put before the word "degree." He expressed his conclusion as follows: "On the whole, I think Mr. Palmer's word 'definite' or 'considerable' is the right weight to put upon the degree of similarity; it is such that an ordinary reasonably experienced listener might think that perhaps one had come from the other." With that conclusion I entirely agree.[48]

Here, the Court of Appeal described a healthy process of how Wilberforce J compared the music. First, various points of similarity and difference were noted, but then related this to "the aural appeal of the sentence as a whole". This passage was also helpful in pointing out that the court judged it from the perspective of "an ordinary reasonably experienced listener", who would presumably listen to the music as a whole. This contrasts with a forensic musicologist, who might rely more on dissecting the score for their reasoning than on the aural musical phenomenon. As for the Court of Appeal, it also demonstrated its own holistic approach when addressing a different argument that the opening bar of "Spanish Town" contained an identical sequence of notes as a traditional Austrian dance melody.

> By itself it would not be sufficient to warrant the inference that, if the phrase was copied, it was copied from the plaintiffs' work rather than some other composition. What is significant is the fact that both in "Spanish Town" and "Why" the opening phrase enunciated in the first bar is developed over the remainder of the first eight bars by the use of the same devices or tricks of composition, namely, repetition followed by a pause, followed again by further repetition with a slight variation. It

[47] *Ibid*. 608.
[48] *Ibid*. 610.

> is this circumstance which produces the degree of similarity between the two compositions.

Again contrary to parametric isolation, the Court of Appeal recognised that the pitch sequence in itself was not a meaningful basis for inference, nor were the "tricks of composition" used to develop the theme. It was the combination of the two that led to the inference of similarity.

Although ultimately the infringement action failed due to the inability to demonstrate that the defendant was sufficiently aware of "Spanish Town", this case marked both the last time courts indicated two musical works to be similar and the last time parametric isolation did not occur. It is argued that this was not a coincidence.

4.3 Chariots of Fire

The emergence of parametric isolation could be observed during the course of reading the case of *EMI v Papathanasiou* (1987).[49] This was about the famous theme tune to *Chariots of Fire*, which is alleged to have copied the theme tune to the *City of Violets*, a well-known television show in Greece. "Chariots of Fire" was written by Evangelos Papathanasiou, a composer of international repute professionally known as Vangelis. Vangelis denied he was aware of "City of Violets" when he wrote "Chariots of Fire". This denial was upheld in court and infringement was not found.

This discussion does not critique the general outcome but focuses on the musical reasoning, which appears in several places throughout the judgment. At first, the court began promisingly by the judge describing his listening experience of the two openings.

> On hearing these two works for the first time, I was at once struck by the identity of 'the turn', as indeed was Dr Bush who gave evidence for the defendants.
>
> . . .
>
> For my own part, on first hearing both works, what struck me was that if one considers what Mr Dodgson referred to as 'the motif' of CITY OF VIOLETS, the whole of Bars 1 and 2, you have this very distinctive drop of a sixth from E to G preceding 'the turn', followed by a rise to middle C after the turn. In CHARIOTS OF FIRE you start with a repetition, against a throbbing bass, of the notes low C to

[49] *EMI Music Publishing Ltd v Papathanasiou* (1987) [1993] E.M.L.R. 306 (Ch).

> G which generally speaking give the effect of a horn call, and this leads into a passage in which you rise from low C to 'the turn', F G A G, the second and third notes of the turn of course echoing the horn theme. This is followed by a drop.

Although this description was primarily melodic, it was informed by references to musical elements of other parameters, such as the throbbing bass (accompaniment), a horn call (orchestration) and how these are related by phrase structure. The court did not, however, expand upon this helpful discussion, and did not give an indication about similarity other than a general acknowledgement of some resemblance.

After upholding Vangelis's claim that he was not aware of the plaintiff's work, the court went on to consider subconscious copying. Although the bar for evidence to support a subconscious copying claim would be higher (as discussed in Chapter III), the court appears to have taken the requirement for more detail as a cue to change its mode of reasoning, namely singling out musical parameters. Without explanation, the judge asserted that all the defendant could have remembered was a pitch sequence called "the turn". (As a conjecture, this might merely be a projection of the judge's own listening experience, when earlier he had been "at once struck by the identity of 'the turn'".[50])

> Let me assume that what Mr Dodgson described as 'the motif'—the seven-note sequence in the first two bars of CITY OF VIOLETS—having been played to Mr Vangelis [the defendant's pseudonym], was retained in his subconscious memory. At the most, all that he can be said to have retrieved is the 'turn'. Now, the turn is a musical commonplace. Innumerable examples were produced by Mr Protheroe, the defendants' second expert witness. Mr Vangelis had himself used the turn long before the composition of CITY OF VIOLETS by Mr Logarides, and I was referred to one example where we get the turn in a song composed by Mr Vangelis called WAKE UP. . . .[51]

Musically, this was the significant turning point of the judgment. From here on, "the turn" became the sole focus of the remainder of the musical discussions, in isolation from all the other musical elements and parameters in both works. Gone were the helpful discussions about other elements such as the "throbbing bass". This allowed the court to argue that "the

[50] See previous quotation from *EMI v Papathanasiou*.
[51] *EMI v Papathanasiou* 313 (Whitford J). My emphasis.

turn" was commonplace. As a mere pitch sequence of F-G-A-G divorced from its rhythmic and other context, this became the subject of parametric isolation, with conclusions being made on the basis of musical elements isolated out of its original meaning.

This is demonstrated by investigating the allegedly similar musical work cited in the quotation, "Wake Up" (sung by Aphrodite's Child). The music is so dissimilar that even the argument for the existence of "the turn" is very tenuous. The relevant motif in "Wake Up" is best described as a Lombard rhythm where the F of "the turn" is on a short note and the A on a long note. To the extent it is a note, the G in between is either a passing grace note filling in an interval of a third, or a pitch elision travelling through the third. Either way, it is not part of the melodic structure of "Wake Up", and is illustrated in Figure 9 and Figure 10 in these two aforementioned ways (my transcriptions).
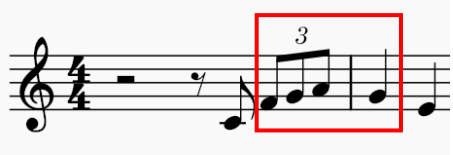


Figure 8: "The turn" in Chariots of Fire.[52]
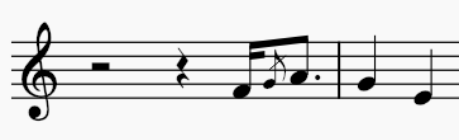


Figure 9: The motif in "Wake Up", transcribed with a grace note.[53]
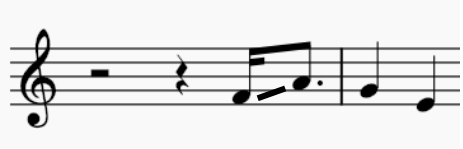


Figure 10: The motif in "Wake Up", transcribed with an elision.[54]

However, there are notable features that characterise the musical context of "the turn" in the Chariots of Fire theme. For example, the triplet (see triangle in Figure 11) in is set against a duple accompaniment, which gives "the turn" a syncopated (against the beat) effect (see

[52] Vangelis, 'Chariots of Fire' (1981). My transcription.
[53] Aphrodite's Child, 'Wake Up' (1969). My transcription.
[54] *Ibid*.

rectangle in Figure 11). In the recording, the triplet is also played with arpeggiation in the piano's right hand (see circle in Figure 11), drawing attention to "the turn" much like a thick line in a painting. These are important features that make "the turn" in the *Chariots of Fire* not commonplace.
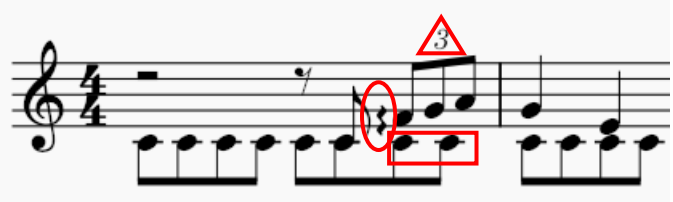


Figure 11: Duple in the accompaniment to Chariots of Fire theme.[55]

Unfortunately, in the whole of *EMI v Papathanasiou* judgment, "the turn" itself only received treatment in the parametrically isolated terms of pitch sequence.[56] Nowhere was the musical context of that motif discussed. It was isolated, held to be commonplace, and dismissed from further consideration.

4.4 Beyond the Chariots of Fire

EMI v Papathanasiou appears to be the first instance of parametric isolation in UK musical works copyright jurisprudence. Thereafter, parametrically isolated forensic analysis became the dominant factor in judicial musical factfinding. For example, the court in *Malmstedt v EMI* (2002) persisted in relying on pitch sequence analysis despite observations from both the claimant and an independent expert witness observing that the song "often fluctuates in terms of actual pitches used and that the melody is in places difficult to find".[57] The court relegated the claimant's valid concerns as "minor points relating to the transcription of the music".

In *Malmstedt*, this was part of a process the court undertook of comparing various musical parameters separately without combining them to construct musical context.[58] The court concluded, separately, that: the chord sequences were common; the similarities in

[55] Vangelis, 'Chariots of Fire' (1981). My transcription.
[56] *EMI v Papathanasiou*.
[57] *Malmstedt v EMI Records Ltd* [2002] EWHC 3228 (Ch) [30](c) (Strauss QC) and [30](a) (summarising the expert report of Peter Oxendale).
[58] *Ibid.*

duration of choruses were insignificant; the pitch sequences were different (due to an unfavourable reading of the aforementioned transcription issues); the melodic shapes were common; the call and response structures of the choruses were common; and the harmonic rhythms, given the conclusions reached in the other factors, were insignificant and in any case not identical. However, this use of parametric isolation was fallacious, in the same way as it is fallacious to judge whether two cakes are similar by looking at the eggs and the butter.

History was likewise forgotten. The insightful case of *Austin*, the superb descriptions in *G Ricordi* and the detailed example of *Francis Day & Hunter* were nowhere referred to in this case, *Malmstedt*, or *Coffey v Warner* (2005).[59]

5. Conclusion

This chapter defined "parametric isolation" as a concept and provided an analogy of the cake. Scientific evidence was presented to demonstrate the inextricable relationship between musical parameters in human musical perception. This established the futility of making determinations that would affect the general musical and judicial conclusion without re-integrating findings into a holistic understanding of the music. The chapter then illustrated the trend of increasingly detailed but disconnected approach by UK courts in studying music over the past century, identifying a case (*EMI v Papathanasiou* (1987)) where parametric isolation first emerged.[60]

Having defined, explained and illustrated the concept of parametric isolation, this now informs the next chapter's examination of the legal doctrine of musical works copyright.

[59]*Creagh v Hit and Run Music Publishing Ltd* [2002] 5 WLUK 618 (Ch); *Coffey v Warner/Chappell Music Ltd* [2005] EWHC 449.
[60] *EMI v Papathanasiou*.

Chapter III: Legal doctrine and *Sheeran v Chokri* (2022)

1. Introduction

This chapter is in two halves. First, it presents the doctrinal framework of the thesis, which provides the basis for examining *Sheeran v Chokri* (2022) as a case study of parametric isolation.[61] It ends with doctrinal recommendations which form the main claims of the thesis.

The presentation of doctrinal framework is not exhaustive and does not extend beyond the scope of providing doctrinal context to the chapter's discussions.

2. Legal doctrine

2.1 Preliminary matters

2.1.1 The role of EU law in UK copyright law after the UK's withdrawal from the EU

An understanding of current UK copyright law requires an appreciation of how and to what extent EU concepts and doctrines persisted after the UK's withdrawal from the EU. While the UK was still in the EU, the EU had embarked on a broad programme of harmonisation of intellectual property laws and systems. In copyright law, this stretched back to the first computer programs directive in 1991 (replaced in 2009) and included the current Information Society Directive (2001).[62] The Information Society Directive was the legislation concerned in the seminal case of *Infopaq* (2009).[63] Important principles from *Infopaq* were first applied in UK courts by Proudman J in *Newspaper Licensing Agency v Meltwater* (2010) and Arnold J (as he was then) in *SAS v World Programming* (2010 and 2013), decisions that were confirmed in the Court of Appeal.[64]

The UK withdrew formally on 31st January 2020, and following an 11-month transition period, completely on 1st January 2022. By this time, several other important decisions had

[61] *Sheeran*.
[62] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs was replaced by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[63] *Infopaq*.
[64] *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829; and *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69.

been handed down by the CJEU, including but not limited to *Painer* (2011), *Levola* (2019) and *Cofemel v G-Star Raw* (2019).[65] In July 2023, the UK case of *Wright v BTC Core* came before Arnold LJ (as he is now), where he applied many of the main European copyright concepts to post-withdrawal UK copyright law.[66] This was reaffirmed, also by Arnold LJ, in unequivocal fashion in November 2023 in *THJ Systems v Sheridan*.[67]

Arnold LJ's justification for this had been based on section 5(2) of the European Union (Withdrawal) Act 2018, which stated that supremacy of EU law applied in the interpretation of European law made before the end of the withdrawal transition period. Arguably however, this should have been thrown into question when this provision was repealed with effect on 1 January 2024.[68] In fact, the provision that replaced it reversed this spirit, stating that supremacy of EU law no longer applies in relation to any law whenever passed or made.[69]

Despite this, in February 2024 Arnold LJ in *LIDL v Tesco* held to the same European principles of copyright as he had in *Wright* and *THJ*. These parts of his speech were endorsed by influential judges, Birss and Lewison LJJ.[70] Therefore, many European concepts of copyright law now prevail over their British predecessors.

2.1.2 Idea-expression dichotomy

Copyright protects expressions but not ideas, though the distinction between the two is far from clear.[71] Lord Hoffmann dedicated a section of his speech in *Designers Guild* (HL) to this and warned against the simplistic notion that an idea is what subsists in the head and not expressed in copyrightable form.[72] Copyright can protect a combination of features of a work that is abstracted from the work itself. Copyright can also be infringed by copying original elements of a plot, even if not a single sentence of the original is reproduced. This was the

[65] *Painer*, *Levola* and Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019] ECLI:EU:C:2019:721.
[66] *Wright v BTC Core* [2023] EWCA Civ 868, especially [34].
[67] *THJ Systems Ltd v Daniel Sheridan* [2023] EWCA Civ 1354, especially at [23].
[68] Section 3(3)(a)(i) of the Retained EU Law (Revocation and Reform) Act 2023.
[69] Section 3(1)(1) Retained EU Law (Revocation and Reform) Act 2023.
[70] *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262 [38]–[43].
[71] See Article 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (**"TRIPS"**).
[72] *Designers Guild* (HL) 2422C–2422H (Lord Hoffmann).

basis on which the claimants of *Baigent v Random House* attempted to claim for copyright infringement, though their action lost because the court found the elements of the relevant plot were largely comprised of historical facts and not a product of skill and labour.[73] On the other hand, it was found in *Designers Guild* (concerning wallpapers with vertical stripes and flowers) that "the combination of combination of the flowers and the stripes, the way in which they related to each other, the way in which they were painted, and the way in which there was a 'resist' effect" formed a substantial part.[74] (The "resist" effect was caused by flower petals being painted not entirely opaquely, allowing stripes to show through from beneath.)

In Australia, *Elwood Clothing v Cotton On Clothing* (2008) developed this further, enabling the "look and feel" of a t-shirt design to form a protectable substantial part of an artistic work. The artwork consisted largely of text in various arrangements and fonts, and the defendants copied the arrangements but none of the text. The first judgment of the Federal Court of Australia under a single judge had found that "the idea of the V shaped graphic and the placement of the text and symbols within that V shaped graphic" was blatantly copied, but what was copied remained an idea that was not capable of forming a substantial part in copyright infringement.[75] On appeal to a full three-judge Federal Court, this finding was reversed. They held that the layout and elements that gave rise to the design's "look and feel" were "matters of expression, not merely matters of idea or concept".[76] With respect to copyright infringement, they held that "[e]ven though the logo and numbers were different, by taking the layout and other elements of expression that created the desired 'look and feel', Cotton On took a substantial part of the copyright work". The full Federal Court was assisted by authorities from the US, which admits the notion of "total concept and feel".[77]

The policy reason behind the idea-expression dichotomy is that providing monopoly over an idea (say, depicting a rider on a horse) would prevent anyone else from expressing that idea (for example, nobody else can draw a rider on a horse). A clear and succinct

[73] *Baigent v Random House Group Ltd* [2007] EWCA Civ 247 [99(iv)] (Lloyd LJ).
[74] *Designers Guild* (Ch) [80] (Collins QC).
[75] *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* [2008] FCAFC 197 [28]–[29]. (See [63] for the description "blatantly".)
[76] *Ibid*. [76].
[77] *Ibid*. [79].

articulation of the rationale is found in Advocate-General Bot's opinion in *BSA* (2009),[78] which concerned how elements of graphical interface are represented in the fulfilment of various functions. The following comment arose from a discussion about the very limited ways a mouse and a cursor can be used to issue a command to open a text file, arguing that copyright protection should not be available where the choice of expression is dictated by technical function. Effectively, this would be tantamount to giving monopoly over the idea of a mouse-driven cursor.

> [76] In such cases, it seems to me that the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable. If such a possibility were offered, it would have the consequence of conferring a monopoly on certain companies on the computer program market, thus significantly hampering creation and innovation on that market, which would run contrary to the objective of Directive 2001/29.[79]

For music, the idea-expression dichotomy offers a helpful paradigm. The vertical stripes in *Designers Guild* or the V-shaped graphic in *Elwood* may, by themselves, be mere ideas that cannot be protected by copyright. Likewise, a scale-like sequence of pitches or a particular rhythm, by themselves, are mere ideas that are building blocks for matters of expression. From a policy point of view, it would not be right to grant monopolies over such building blocks. However, the combination of a certain sequence of pitches, set in a particular rhythm, harmonic environment, orchestration, articulation and so on becomes, in the words of *Elwood*, a matter of expression and not merely a matter of idea or concept.[80] This can be illustrated by analogy through the well-known picture presented by Judge Learned Hand in the US in 1930.

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the

[78] *BSA*.
[79] The opinion of Advocate-General Bot in *BSA* ECLI:EU:C:2010:611 (see note 78 *supra*) [76], affirmed by the CJEU's judgment at [49]. (The "objective" referred to the second and fourth recitals to the Information Society Directive.)
[80] See note 76 *supra* (*Elwood*).

> playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.[81]

Similarly (and in reverse of Judge Learned Hand's order), a great number of musical phrases will fit a particular pitch sequence. That pitch sequence, set to a particular rhythm, reduces the generality. Setting that combination to a particular harmony, a particular orchestration, a particular articulation again reduces the generality progressively. Somewhere along this spectrum, this becomes a matter of expression, not a matter of idea or concept. However, by dissecting a complete musical expression and analysing each of them by parametric isolation, this trivially leads to the result that the contents of each parameter on its own is a mere idea and therefore not protectable.

2.2 Copyright subsistence: originality and work

Section 1(1)(a) CDPA provides that copyright can subsist in an original literary, dramatic, musical or artistic work. After the EU Withdrawal, the question of what counts as an original authorial work arose in *Wright v BTC Core* (2023) which concerned the Bitcoin File Format as a literary work (the claimant claimed to have invented Bitcoin). In the case's High Court ruling, there had been doubt as to whether early examples of Bitcoin files could be fixations of the Bitcoin File Format structure.[82] In the Court of Appeal, Arnold LJ applied *Levola* from the CJEU, which concerned whether the taste of a particular herb-flavoured cream cheese could be protected by copyright. The CJEU held that for something to qualify as a work for copyright purposes, it had to satisfy two necessary conditions: it must be original and it must be an expression of that originality.[83] This subsection treats each of these in turn.

2.2.1 The author's own intellectual creation as originality

Before the influence of European harmonisation, the UK had traditionally defined originality as something containing the skill, labour and judgment of an author. In *Walter v Lane* (1900) a reporter recorded a speech by a politician in shorthand, and later reproduced it verbatim in

[81] *Nichols v. Universal Pictures Corp* [1930] F.2d 119 (2d Cir. 1930), 121 (Hand, J).
[82] *Wright v BTC Core* (2023). This case was about service out of the jurisdiction, so the court only had to establish there was a real prospect that there was fixation of the Bitcoin File Format.
[83] *Levola* [35]–[37].

writing, adding his own punctuation.[84] The court was required to determine whether the reporter was the author of the report. The majority ruling of the court held that what qualified someone as the author of a work was not any literary merit but whether the author employed skill and labour in producing it. In *University London Press v University Tutorial Press* (1916) where examination questions were copied, the court decided it was the skill and judgment in deciding the appropriate questions rather than novelty that enabled copyright to subsist.[85] This case was cited and affirmed in the house in *Ladbroke v William Hill* (1964), where all judges variously held that originality was a matter of skill, labour and judgment.[86]

In a highly influential decision by the CJEU in 2009, *Infopaq* ruled that authorial works are protected from reproduction only if the subject matter is "original in the sense that it is its author's own intellectual creation".[87] With a different origin from the British concept of originality, the phrase "intellectual creation" had first appeared in the Berne Convention in Article 2(5), which provides copyright protection to collections of works insofar as they "constitute intellectual creations".[88] Later, various European directives employed this expression as the test for originality. The first of these had been the now-replaced Directive 91/250/EEC (Computer programs) (quoted below), followed by Directive 93/98/EEC (Copyright terms, here applying to photographs) and Directive 96/9/EC (Databases).[89]

> 1(3) A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.[90]

[84] *Walter v Lane* [1900] A.C. 539 (HL).
[85] *University London Press v University Tutorial Press* (1916) 2 Ch. 601 (Ch) 611.
[86] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 W.L.R. 273 (HL) 277–278 (Lord Reid), 281–282 (Lord Evershed), 285–287 (Lord Hodson), 289 (Lord Devlin), and 292 (Lord Pearce, where he also mentions "ingenuity").
[87] *Infopaq* [37].
[88] Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended variously up to 1979) ("**Berne Convention**"). However, the Berne Convention did not apply this universally.
[89] Article 1(3) of Directive 91/250/EEC (On computer programs), which was replaced by the identical Article 1(3) of Directive 2009/24/EEC (On computer programs). Also see Article 6 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, replaced by Article 6 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights and Article 3 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[90] Council Directive 91/250/EEC (On computer programs) replaced by Directive 2009/24/EC (On computer programs).

By applying this definition of originality to the interpretation of Article 2(a) of the Information Society Directive, *Infopaq* imposed a different concept of originality to the traditional British notions of skill, labour and judgment.[91] In the context of databases, it was held by the CJEU in *Football Dataco v Yahoo! UK* (2012) that "the significant labour and skill required for setting up [football fixture lists] cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains".[92] The Advocate-General noted "there is no doubt that, as regards copyright protection, the Directive espouses a concept of originality which requires more than the mere 'mechanical' effort needed to collect the data", and the EU concept of originality "echoes a formula which is typical of the continental tradition".[93] In the context of photographs, *Painer* (2011) further extended the distance between the British and EU concepts by drawing on the recitals to previous directives that a photographic work is "original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account".[94] In the UK, Arnold J (as he was then) suggested in *SAS* (2013) that the reflection of the author's personality would be a requirement to originality in copyright works more generally beyond the realm of photography.[95]

The wider application of the personality requirement was confirmed by the CJEU by two cases ruled a month apart in 2019, in *Funke Medien v Germany* on literary works and *Cofemel v G-Star Raw* on works of applied art, industrial designs and works of design (as a category of work provided for in Portuguese law). In *Funke Medien* the German government sued the news media group *Funke Medien* for copyright infringement in publishing classified military status reports. The CJEU ruled that these reports would not have the requisite originality if their choice of words were dictated entirely by their function of reporting

[91] The Information Society Directive and *Infopaq*.
[92] Case C-604/10 *Football Dataco Limited v Yahoo! UK Limited* [2012] ECLI:EU:C:2012:115 [46].
[93] Case C-604/10 *Football Dataco Limited v Yahoo! UK Limited (AG Opinion)* [2012] ECLI:EU:C:2011:848 [37] (AG Mengozzi).
[94] *Painer* cited Recital 17 to Directive 93/98/EEC (On copyright terms), though this directive was replaced in 2006 by Directive 2006/116/EC (On copyright terms) that replicates the same recital as Recital 16.
[95] See *SAS* (2013) [41] (Arnold J). The context was a discussion about whether a data file format could be a copyright work, which was not a database. As discussed later, in 2023 Arnold LJ revisited the question of file formats in *Wright*, but with the benefit of later EU case law developments.

information, just like in *BSA* where there were only very limited ways by which a mouse cursor can open a text file.[96] These reports could receive copyright protection as literary works only if they were "an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting those reports".[97] In a comment that detaches from British notions of originality, Advocate-General Szpunar noted that "[a] degree of effort and skill is required to draw [the reports] up, but those elements on their own cannot justify copyright protection".[98] *Cofemel* concerned the designs of jeans and T-shirts by G-Star Raw allegedly being copied by the products of the Portuguese clothing company Cofemel. With respect to originality, the CJEU held that "it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices".[99] Although implied by various EU directives and case law, *Cofemel* now held clearly that reflecting the personality of the author is both the necessary and the sufficient condition for originality, in the EU sense that the subject matter of copyright is the author's own intellectual creation.

After the completion of UK's withdrawal from the EU in 2022, Arnold LJ confirmed the UK's alignment with these developments in the EU in a series of three cases in the Court of Appeal. Although *Wright v BTC Core* (July 2023) concerned service outside the jurisdiction and the claimant only needed to demonstrate a real prospect of success, Arnold LJ embarked on a detailed explanation of the evolving jurisprudence on originality. He concluded that the correct test was the EU test: "[w]hat is required is that the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch".[100] *THJ v Sheridan* (November 2023), which concerned graphical charts in financial software as artistic works, cited *Wright* extensively and applied the same test in finding that the charts were original (and ultimately, infringed). The

[96] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623 [24].
[97] *Funke Medien* [25]. The reasoning for this conclusion cited *Painer* [19], *Football Dataco* [23] and *BSA* [24].
[98] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland (AG Opinion)* [2018] ECLI:EU:C:2018:870 [19] (A-G Szpunar).
[99] *Cofemel* [30]. The CJEU ultimately concluded that G-Star's designs did not qualify as copyrightable works. This was amidst policy considerations about whether subject matter could enjoy both copyright and design rights protections.
[100] *Wright v BTC Core* [55] (Arnold LJ).

interest in this case was that although Arnold LJ's ultimate finding was the same as the High Court's, he explicitly overturned the High Court's use of the British notion of originality as now wrong.

> In my judgment the Defendants are right that the judge did not apply the correct test, which I have set out in paragraph 16 above. This is not because of his reference to "functionality" in [214], which appears to be a slip of the pen having regard to what he went on to say in the last sentence of [215]. It is because the test he applied was that of "skill and labour", which was the test applied by the English courts prior to Infopaq, including in Navitaire Inc v easyJet Airline Co Ltd [2004] EWHC 1725 (Ch), [2006] RPC 3 and Nova Productions Ltd v Mazooma Games Ltd [2006] EWHC 24 (Ch), [2006] RPC 14, and not the test of "author's own intellectual creation" laid down by the Court of Justice. As can be seen from cases such as Football Dataco and Funke Medien, these two tests are not the same, and the European test is more demanding; although Painer establishes that even a simple portrait photograph may satisfy it in an appropriate case.[101]

As if rounding a circle, this now appears to vindicate Lord Robertson's dissenting speech over a hundred years before in *Walter v Lane*. He spoke of that which "belongs" to an author, as if an author must leave his mark to be considered an author for the purposes of copyright.

> . . . I am in no way disparaging the gifts of the shorthand writer. . . . But I fail entirely to see how, in the widest sense of the term "author", we are in the region of authorship. . . . When it is remembered that there is no manner of composition, as the term is generally used, even in the sense of arrangement, by a shorthand reporter, I find it difficult to understand what attribute of an author belongs to him.[102]

Beyond the straightforward application of EU jurisprudence, Arnold LJ advanced a further proposition that was arguably a new interpretation by him. He suggested that "[t]he consequence of the low degree of creativity is that the scope of protection conferred by copyright in the R & P Charts is correspondingly narrow, so that only a close copy would infringe: see *Infopaq* at [45]–[48]".[103] The proposition can be generalised to the following: a low

[101] *THJ v Sheridan* [23] (Arnold LJ), my emphasis.
[102] *Walter v Lane* [1900] A.C. 539 (HL), [1900-03] All ER Rep Ext 1666, 1676–1677 (Lord Robertson).
[103] *THJ v Sheridan* [27].

level of creativity narrows the scope of copyright protection, such that only a close copy would infringe (hereafter the **"proposition of relative protection"**).

This is not the most apparent interpretation of paragraphs [45]–[48] of *Infopaq*, which explained that what was relevant to originality was the existence of the degree of freedom of choice of words rather than the words themselves. However, they did not suggest a relative relationship between the degree of creativity and the scope of protection, in a linear fashion or otherwise.[104] Moreover, in restricting the scope of protection under various circumstances, Arnold LJ's interpretation overlooks the context set by paragraph [40] in *Infopaq*. This set out the hermeneutical framework that relevant provisions must be given a broad interpretation in order to give effect to the policy objective of high levels of protection in the recitals of the Information Society Directive.[105] On the other hand, Andreas Rahmatian offered a different view: although Arnold LJ's interpretation was liberal, he noted the early British precedent of *Kenrick v Lawrence* (1890), where for extremely common subject matter, only an exact literal reproduction could be infringing.[106] On this view, Arnold LJ's interpretation harks back to a British tradition.

Notwithstanding this debate, the proposition of relative protection was applied in a determinative capacity by the Court of Appeal in *LIDL v Tesco* (2024), this time being supported by judges experienced in cases of intellectual property, Lewison and Birss LJJ.[107] This case concerned LIDL's logo and Tesco's sign for Clubcard discounts, both comprising a single large yellow circle in a blue square. The court held that because there was limited room for creativity in expressing the idea of a yellow circle in a blue square, the scope of copyright protection was narrow, and Tesco's sign would have needed to be a very close copy for it to

[104] The closest discussion in EU jurisprudence is, arguably, the discussion on the idea-expression dichotomy in relation to the degrees of freedom in *BSA* (see note 79, *supra*).
[105] *Infopaq*, and for example, see Recital 9 of the Information Society Directive, which states that "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large".
[106] Andreas Rahmatian, '"European" Originality in Copyright Law in the English Case of THJ Systems Ltd. v. Sheridan' (2024) 55 IIC - International Review of Intellectual Property and Competition Law 1166, 1171 fn. 42. *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99 (Queen's Bench Division).
[107] *Lidl v Tesco* (2024).

have infringed LIDL's logo. Because the shades of blue and the distances between the edges of the circles and squares differed, the court held that Tesco did not copy a substantial part of LIDL's logo, resulting in a finding of no infringement.[108]

The application of relative protection in *LIDL v Tesco* illustrates the idea-expression dichotomy. The defendant's argument, which succeeded in court, was that Tesco copied merely the idea of a yellow circle in a blue square, but not LIDL's expression of it. Just as nobody should have monopoly over illustrating a rider on a horse or using a cursor to open a text file, nobody should have monopoly over a yellow circle in a blue square.[109] By keeping ideas in the public domain, the UK Court of Appeal attempted to balance of the interests of authors and the interests of the general public—with the proposition of relative protection being an instrumental tool to achieve it. This is further discussed later in Chapter IV.

2.2.2 Works and music

Levola held that a copyright work must be an expression of the author's own intellectual creation. Continuing from the discussions on the idea-expression dichotomy, the subject matter must be precisely and objectively identifiable for it to be an expression protectable by copyright.

> Accordingly, for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form.[110]

Two reasons were given for this requirement. First, objective precision is required for the effective enforcement of copyright, and economic operators require it to conduct business. Second, subjectivity engenders legal uncertainty. With respect to taste, the CJEU held that it did not satisfy these requirements.

> The taste of a food product cannot, however, be pinned down with precision and objectivity. Unlike, for example, a literary, pictorial, cinematographic or musical work, which is a precise and objective form of expression, the taste of a food product

[108] *Ibid*. [194]
[109] c.f. *BSA*.
[110] *Levola* [40].

> will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed.[111]

Cofemel articulated the concerns about subjectivity further, in answering whether an aesthetic visual effect intended by a clothing design could be sufficient to qualify it as a copyright work. Other than confirming *Levola*'s requirements of originality and expression in a copyright work, the court noted that an aesthetic effect is "an intrinsically subjective sensation of beauty experienced by each individual" that "does not, in itself, permit a subject matter to be characterised as existing and identifiable with sufficient precision and objectivity within the meaning of [*Levola*]".[112] It made the distinction between a product that was created by an aesthetically-aware process and depending on a beholder's perception and recognition of an intended aesthetic effect in qualifying a design for copyright protection.[113] Whether a subject matter qualifies for copyright protection cannot be a subjective matter.

However, contrary to the CJEU's assertion quoted in *Levola*, it is not obvious that the details of a musical work can be "pinned down with precision and objectivity" any better than taste.[114] On precision, a musical work only comes to life in a performance, but performances and recordings of the same song inevitably have variations. None of these performances can be definitive as to what any musical work is. A suggestion can be made that a score is the musical work. However, outside the narrow confines of Western classical music (and even there scores are not definitive), the score has little relevance in the creative process of music. Popular music is often composed on an instrument or voice, recorded and distributed, without the need to write it down in a score. Compared to the rich aural phenomenon of a performance, a score can only be said to be an approximate and highly reductive record of a musical work. For example, it notates a pitch and rhythmic scheme, but only has discrete

[111] *Ibid*. [42].
[112] *Cofemel* [53], *Levola*.
[113] *Cofemel* [54].
[114] See note 111 *supra* (*Levola*).

indications of dynamics (for instance, *mezzo forte*, *forte*, *fortissimo*), and almost no indication at all about timbre.

Music is also no less subjective than taste as both performance and listening are subjective and interpretive acts. The experience of listening to music is highly moderated by a listener's musical history, through exposure, pedagogy and embodiment. For example, this played a significant role in this chapter's case study, *Sheeran*, where the judge found that a small intervening note as heard in the recording should be notated as a full semiquaver (see circle in Figure 12). Arguably, from a musicological point of view, at most this should have been notated as an ornamental grace note, if at all. A specialist in harmony, such as an organist, might recognise that this intervening note had no harmonic significance. A singer who thinks melodically may have seen that intervening note as an inevitable but infinitesimal moment when a voice rises by an interval of a third. Nonetheless, this questionable score transcription was used by the court to mark one of the principal differences between Chokri's and Sheeran's musical works, which eventually found against copying.
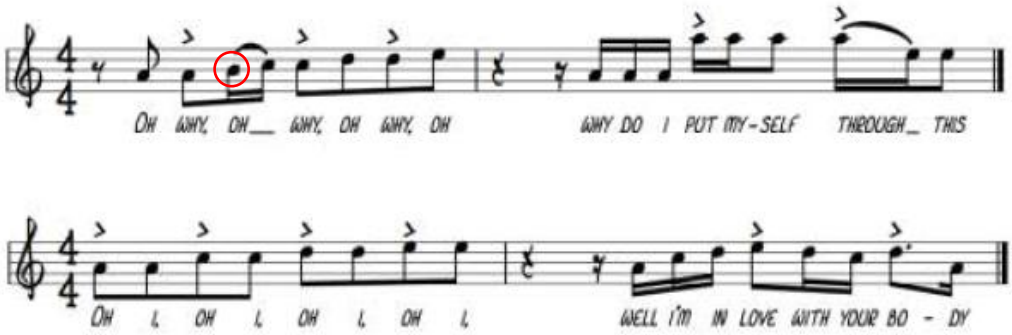


Figure 12: score transcriptions from the judgment of Sheeran.[115]

The question of what a musical work is, generally and ontologically, is a perennial one in musicology. The same question of what a musical work is, as a legal fiction that operates in copyright law, is a different and complex question that is outside the scope of this thesis, though there will be awareness of such issues.

[115] *Sheeran* [30].

2.3 Anatomy of the UK Copyright Infringement Test

This section outlines the anatomy of the UK test for copyright infringement by reproduction, as the arguments of the chapter highlight structural subtleties of the test. The test proceeds in two stages, with Lord Millett's formulation of the test in *Designers Guild* (HL) often cited.[116] The first stage establishes whether the defendant copied the copyright work. If copying is established, the second stage establishes whether that which is copied comprises a substantial part of the copyright work.

2.3.1 Copying

From an evidential standpoint, the establishment of copying itself also proceeds in two stages. First, the court makes an inference of copying based on a cumulative balance of two aspects: the objective similarity between the copyright work and the allegedly infringing work, and the strength of causal connection between the two works.[117] Causal connection refers to the extent to which the defendant had access to the copyright work and copied it. Greater similarity makes an inference of copying more likely.[118] An old case held that in the absence of evidence of independent creation, high similarity can itself be sufficient to infer copying.[119]

If copying is inferred, the burden of proof to demonstrate that the similarities did not result from copying passes to the defendant. For example, there would not be a causal connection if the defendant can demonstrate a different and equally likely source of the similarity claimed by the claimant, which could be another work or wider creative practices in the field.[120] If the defendant is unable to satisfy the court that the similarities did not result

[116] *Designers Guild* (HL) 2425E–2425H (Lord Millett) and Lionel Bently and others, *Intellectual Property Law* (Oxford University Press 2022) 212.
[117] See Nicholas Caddick KC, Gwilym Harbottle and Uma Suthersanen, *Copinger and Skone James on Copyright* (19th edn, Sweet & Maxwell 2024), paragraph 6-14. This formulation into two aspects seems to stem as early as F. E. Skone James's submission in *Francis Day and Hunter v Sydney Bron* (1963), which was accepted by Willmer LJ on 614: "In order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the two works, and (b) some causal connection between the plaintiffs' and the defendants' work".
[118] *IPC Media Ltd v Highbury Leisure Publishing Ltd (No2)* [2004] EWHC 2985 [10] (Laddie J).
[119] *King Features Syndicate Inc v O&M Kleeman Ltd* [1941] A.C. 417 (HL) 436.
[120] *IPC v Highbury* [10].

from copying, copying is established and the court proceeds to the next stage of the infringement test.

2.3.2 Copying of a substantial part

The copy does not have to be identical to the copyright work for it to infringe copyright. Otherwise, copyright liability can be avoided by altered copying—that is, modifying a copy in an attempt to avoid infringement. It is sufficient for copyright infringement if a substantial part of the copyright work has been copied.[121] The question of how much copying constitutes a substantial part was heavily influenced by the developments of European harmonisation as discussed earlier in the chapter.

The original proposition in English law had been that substantiality depended on quality rather than quantity.[122] This depended on whether what was copied constituted a significant part of the copyright work.[123] The significance was judged with reference to what made the copyright work original.[124] In a case about typographical arrangement copyright, Lord Hoffmann noted that copyright should generally protect that which conferred protection to the copyright work in the first place.[125] The Australian clothing case of *Elwood v Cotton On* answered this clearly in the case of artistic works: quality is "identified by reference to what elements made the copyright work an **original artistic** work" (the court's emphasis).

The influential case of *Infopaq* (2009) held that an eleven-word part of a literary work can attract copyright protection, if and only if this part expresses the originality of the work in the sense of the author's own intellectual creation.[126] No other criterion was relevant. As

[121] CDPA 1988 s. 16(3)(a).
[122] In *Ladbroke v William Hill* (HL) on 276, Lord Reid stated that "the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken". Lord Hodson stated the same test on 288: "[s]ubstantiality depends on quality, not quantity". Lord Pearce also stated on 293: "[w]hether a part is substantial must be decided by its quality rather than its quantity".
[123] In *Ladbroke v William Hill* (HL) on 283 Lord Evershed explained that it is about the "substantial significance of that which is taken". In *Designers Guild* (HL), Lord Millett echoed that "[i]t depends upon its importance to the copyright work".
[124] The best articulation of the concept was in the Australian case of *Elwood v Cotton On* (2008) [66]: quality is "identified by reference to what elements made the copyright work an **original artistic** work" (the court's emphasis). This cited the dissenting opinion of Mason CJ in *Autodesk Inc v Dyason (No 2)* [1993] HCA 6 which was approved in *Data Access Corporation v Powerflex Services Pty Ltd* [1999] HCA 49 [83]–[84].
[125] *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] UKHL 38 [19] per Lord Hoffman.
[126] *Infopaq* [30]–[51].

discussed earlier in this chapter, over the subsequent decade EU jurisprudence elaborated on the concept of originality in the sense of the author's own intellectual creation: that "it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices".[127] Having been applied in the UK through *Wright v BTC*, *THJ v Sheridan* and *LIDL v Tesco*, these principles from the EU now also apply in full in the UK, overturning traditional British jurisprudence.[128] Also applicable is Arnold LJ's interpretation of certain passages of *Infopaq*, which (as discussed in section 2.2.1 (*The author's own intellectual creation as originality*)) resulted in the proposition of relative protection: a low level of creativity narrows the scope of copyright protection, such that only a close copy would infringe.[129]

Infopaq also indicated that the size of the part copied can be extremely small. It is noteworthy that the EU Information Society Directive simply prohibits the reproduction of a copyright work "in whole or in part", without reference to the British concept of a "substantial" part.[130] Just how small this part can be was discussed by Advocate-General Szpunar in his opinion for the 2019 case of *Pelham GmbH v Ralf Hütter*.[131] Although this was an entrepreneurial works case concerning phonograms, Szpunar addressed *Infopaq* directly, noting it was "difficult to find recognition of any *de minimis* threshold in that case-law", referring to *Infopaq*.[132] As Szpunar was also Advocate-General in the later EU authorial works cases of *Funke Medien* and *Cofemel*, there is good authority that under EU law there is no *de minimis* threshold for how small a part must be to infringe copyright.

Summarising the test for reproduction copyright infringement now applicable in the UK, it must be shown that (1) there is copying, and (2) the copying is of a substantial part (within the meaning of s. 16(3)(a) CDPA) if the copied part expresses originality in the sense of the author's own intellectual creation, however small that copied part may be. A copied

[127] See note 99, *supra* (*Cofemel*), and also note 97, *supra* (*Funke Medien*).
[128] *Wright v BTC Core*, *THJ v Sheridan* and *Lidl v Tesco*.
[129] See note 103, *supra* (*THJ*).
[130] Art. 2 of Information Society Directive: "reproduction by any means and in any form, in whole or in part". C.f. Section 16(3)(a) CPDA: "in relation to the work as a whole or any substantial part of it".
[131] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* ECLI:EU:C:2019:624.
[132] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben (AG Opinion)* [2018] ECLI:EU:C:2018:1002 [29] (AG Szpunar); *Infopaq*.

part expresses such originality if and only if it reflects the author's personality, through creative choices made freely by the author. Where the degree of creativity is low, the scope of protection may also be low, such that only a close copy would infringe. Although arguably the quality required for something to be a substantial part is now higher, the EU policy of strong protection for authors is reflected in its lack of *de minimis* threshold. This contrasts with US legal literature advocating for a *de minimis* threshold in various forms.[133] (This is discussed further in Chapter IV's section 3 (*The doctrinal solution: from Sorites to Infopaq*)).

2.3.3 Subconscious copying

It may be recalled that the first, copying, stage begins with establishing an inference of copying. This is a cumulative balance between objective similarity and the existence of a causal connection, such that the defendant had access to the copyright work and copied it.[134] However, *Francis Day and Hunter v Bron* (1963) noted that it was irrelevant whether the defendant was aware of a causal connection.[135] It also noted that a defendant's denial of conscious copying is not conclusive proof that he did not copy.[136] What if a defendant did not deliberately copy the copyright work but was so familiar with it that he reproduced it unconsciously?[137]

Francis Day and Hunter answered that infringement could theoretically be found if supported by the right kind of evidence. Willmer LJ affirmed the approach of the first instance judge, Wilberforce J (as he was then), who listed a complex combination of factors that contributed to deciding on the issue.[138] At the forefront of this list were the themes of

[133] Most notably, Hughes (2005) proposes that a threshold be set in each case by considering economic value of the relevant part and whether that part has a "sense of composition" such that it can stand as a work on its own, and Paul Goldstein, 'What Is a Copyrighted Work? Why Does It Matter?' (2010) 58 UCLA L. Rev. 1175 discourages larger works from being split into smaller works in the context of the US having statutory damages for infringement on a per work basis.

[134] See section 2.2.1 of this chapter, *supra*.

[135] See item (2) in *Francis Day and Hunter* 614 (Willmer LJ).

[136] See item (4) in *Ibid*.

[137] This was found in the US in *Bright Tunes Music Corp v. Harrisongs Music, Ltd* [1976] F. Supp. 177 (S.D.N.Y. 1976).

[138] *Francis Day and Hunter* 614–615 (Willmer LJ citing Wilberforce J). "[T]he answer can only be reached by a judgment of fact upon a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendants' work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiffs' work."

familiarity and how a copyright work might impress the mind or quality (perhaps in colloquial terms, catchy) appear to be important. Ultimately, however, the court found the evidence to be insufficient.[139]

Jurisprudence on subconscious copying appeared to have developed by the time of *Mitchell v BBC* (2011), where Birss J (as he was then) unequivocally stated that both the nature of the test and the standard of the test for subconscious copying was different to ordinary copying.[140] In ordinary copying, evidence is first evaluated to create a presumption of copying, which the defendant can rebut by a satisfactory account of independent creation. In subconscious copying, evidence is evaluated to determine copying conclusively immediately. Therefore, "the evidence which would be necessary to support an inference of subconscious copying is likely to be a good deal more substantial than the evidence needed simply to shift the onus onto a defendant in a copyright case".[141]

Before the modern era of UK copyright, an old case had found subconscious infringement based on familiarity. *Moffat and Paige v George Gill and Sons* (1902) was about study aids for examinations. The author working for the defendant publisher, Francis Marshall, had first written an infringing reproduction of Thomas Page's copyright work, after which Marshall was asked to produce a non-infringing second edition. However, the court found this second edition to be also infringing: "I think it was impossible for Mr Marshall to compile a second edition on the same lines as the first which should not infringe the copyright. I think it was impossible for him to divorce his mind sufficiently for that purpose . . .".[142] This amounts to an almost staggering proposition: the subconscious impressions in Marshall's mind were deemed to be so deeply seated that no amount of conscious avoidance of copying could have avoided a conclusion of copying. Familiarity plays an important and powerful

[139] *Francis Day and Hunter* 615, Willmer LJ citing Wilberforce J.
[140] *Mitchell v BBC* (2011) [2011] EWPCC 42 [39].
[141] *Ibid*.
[142] *Moffatt and Paige Limited v George Gill and Sons Limited and Francis Marshall* (1902) 50 WR 528 (CA) 468 (Collins MR citing Kekewich J). The Court of Appeal reversed the first instance decision, not because they disagreed with the facts Kekewich J found but that he did not go far enough to apply those facts to his judgment, granting an injunction that the High Court did not grant.

part in subconscious copying. In this case, Marshall's familiarity with Page's work was so palpable that it became a sufficient condition for subconscious copying all by itself.

The prospect of subconscious copying has become more pertinent since the advent of the internet. The internet presents an evidentiary challenge because if a copyright work is widely available, it is difficult to show that a defendant did not access it. This is not like the time of *Francis Day and Hunter* where ownership of sheet music might have formed some basis of familiarity. If a defendant does not possess a written or recorded copy of a musical work, that is no longer any indication of familiarity or a lack thereof. The internet has made such kinds of inferences difficult.[143]

2.4 The Disregarding Statement in Lord Millett's *Designers Guild*

This section forms the heart of this thesis's doctrinal argument. On the face of it, there seems to be a clear difference between the two stages of copying and substantial part. For example, these stages operate on different material. The first stage compares the copyright work and the allegedly infringing work. The second stage considers the copied part in relation to the copyright work only and does not refer to the allegedly infringing work. However, this structure is not enshrined in legislation but rather evolved in case law. In 1934 the court was asked whether the inclusion of twenty seconds of a musical work constituted a substantial part, as a separate question from copying for the first time.[144] The first instance judgment of *Ladbroke (Football) v William Hill (Football)* in the early 1960s adopted two distinct stages, finding that although Ladbroke had copied, it was not a substantial part of William Hill's coupon.[145] (This would later be overturned to find infringement.)

But some have questioned the distinction. As recently as in *Designers Guild*, Lord Scott contended that in cases of altered copying the two stages are not distinct. Although subsequent case law has sought to distinguish this in favour of Lord Millett's articulation of

[143] This was also subject to discussion by the court in *Sheeran* [24]–[25].
[144] *Hawkes and Son (London) v Paramount Film Service* (1934).
[145] See Denning MR's description of the case's findings in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1962) [1962] 12 WLUK 80 (CA), at lines 42–46 on 541. The first instance judgment was reversed in the Court of Appeal, whose finding of infringement was affirmed by the House of Lords.

the two-stage test, Lord Scott's perspective remains thought-provoking.[146] Lord Scott's fundamental suggestion was that in altered copying, the questions that would usually be asked in the substantial part stage would have already been answered in the copying stage.[147] In other words, the evidence required to establish altered copying would itself already suffice to also support copying of a substantial part, so the second stage of the test is superfluous. This debate highlights the subtleties in the infringement test.

Lord Millett made clear his differences with Lord Scott and insisted on the distinction between the two stages of the test.[148] It is worthwhile reflecting and expanding upon the reasons. Although the material of evidence involved in the two stages of the test may be similar (or even the same), the functions of the two stages are different, so the uses of this material are also different. As the purpose of the first stage is to determine whether the defendant copied the claimant, their works are compared against each other to see if they are similar. On the other hand, as the purpose of the second stage is to determine whether what has been copied is a substantial part, the part that is copied is assessed against the copyright work only, with no reference to the defendant's work.[149] This separation is important because evidence that suggests copying may not form a substantial part of the copyright work at all. For example, in a journalist's report of the court proceedings in *Austin*, it was noted that a mistake in the title of the plaintiff's score also existed in the defendant's score ("The Buss Coat" rather than "The Buff Coat").[150] While this was highly suggestive of copying, the title of one air out of a copyright work of many airs would not be a substantial part of the copyright work.

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[146] *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219 (CA) [26] (Jacob LJ).

[147] *Designers Guild* (HL) 2432F–2432G (Lord Scott).

[148] *Designers Guild* (HL) 2426D–2426E (Lord Millett). In academic discussion, Zhu and Protheroe also support the distinction between the two stages: "Legally speaking, it is important to differentiate two types of music similarity. The first is known as probative similarity for inferring copying, while the second is substantial similarity that is actually used for establishing infringement. These two types of similarity need to be assessed sequentially. If one fails to prove probative similarity, then there is no need to go to the next step to assess substantial similarity". See Chen Zhu and Guy Protheroe, 'More than Just a Tune: Music Copyright and Forensic Musicology' (Social Science Research Network, 7 April 2025).

[149] *Designers Guild* (HL) 2426B per Lord Millett: "There is no need to look at the infringing work for this purpose".

[150] *The Stage*, Thursday 26th July 1923. Also see discussion in Alan Latman, '"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement' (1990) 90 Columbia Law Review 1187, for example, "[c]opied errors of fact can be probative of copying", 1205–1206.

Returning to Lord Millett's own narrative, however, closer inspection reveals that not even he himself separated the two stages as clearly as he might have thought. The quotation below is the copying stage of Lord Millett's test, and it highlights (by my underline) a statement that is particularly confusing. This underlined statement is hereafter referred to as "the **Disregarding Statement**".

> The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. <u>It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas.</u> If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying. [151]

In the context of an artistic work, the test begins with a visual comparison noting similarities and differences. Noting similarities is a natural starting point: something that is copied would usually emerge as a similarity in a comparative analysis, and the lack of similarity would usually indicate lack of copying. Lord Millett clarified that what matters in this comparison is not whether the artworks look similar overall, but to identify what is copied. This was a relevant clarification on the facts of *Designers Guild*, where the two wallpapers did not look identical but yet shared many features. It is possible for many elements of a copyright work to be copied but for an infringing work to look different. In stating this, Lord Millett may also have been pointing out a disagreement with the Court of Appeal judgment of *Designers Guild*, where the court dismissed a finding of the High Court on the basis that "the visual result is not the same".[152] Lord Millett allowed for all these possibilities, as long as the nature of the similarities are more likely to come from copying than coincidence. After the underlined

[151] *Designers Guild* (HL) at 2425E–F (Lord Millett), my emphasis.
[152] *Designers Guild* (CA) [33].

Disregarding Statement, Lord Millett explained the anatomy of the first part of the test, that similarity coupled with access gives rise to an inference of copying whereby the burden to show independent creation passes to the defendant.

Focusing on the Disregarding Statement, it indicates that similarities may be disregarded at the copying stage because they are "commonplace", "unoriginal", or "consist of general ideas". However, these three concepts are very different things, and it is important to examine them further.

- "Commonplace" means that something may have a third source other than the claimant's copyright work. A feature may be shared between the claimant's and defendant's works, but it may also be found elsewhere, for example in another prior work known to the defendant or in common creative practice in the field. I refer to this criterion of something originating uniquely from the claimant's copyright work as "**exclusive origination**" (to avoid confusion with "originality").
- "Unoriginal" can have multiple meanings and it is unclear which was intended by Lord Millett. In a legal context, the technical meaning would refer to originality as a legal concept. At the time of *Designers Guild*, this would have referred to an author's skill, labour and judgment. Post-EU harmonisation, this would now refer to originality in the sense of the author's own intellectual creation. However, in the context of the sentence in Lord Millett and in the spirit of *ejusdem generis*, "unoriginal" could also simply mean lack of exclusive origination.
- "Consist of general ideas" refers to the idea-expression dichotomy. In the legal sense, something can be an idea in the *Levola* sense of not being specific, precise or objective enough to be protected as an expression. Or again, in the spirit of *ejusdem generis*, something can become an idea if it is so commonplace that it should belong to the public domain, as building blocks for protectable expression. In music, this might be the general idea of a scale.

It is argued in this thesis that of these three concepts, the only one that should be applicable in the copying stage of infringement test is exclusive origination. The purpose of

the copying stage is to establish whether the defendant copied the claimant's work, not whether the copied parts possess the qualities that attract copyright protection as a matter of law. If a similarity is not unique to the claimant's copyright work, the defendant may not have copied this feature from the claimant. On the other hand, the concerns of *Levola*, namely originality in the legal sense and the specificity of expression, pertain to the legal question of whether something possesses the qualities that attract copyright protection. As such, these questions are only properly asked in the second, substantial part stage of the copyright infringement test. Accordingly, the European developments on originality in the sense of the author's own intellectual creation should only be applicable to the substantial part stage of the test.

Confusing the two stages or (returning to Lord Scott's proposition) collapsing the two stages would not only confuse the work that is done in each stage of the test. It would also blind us from understanding the impact of parametric isolation where different questions are asked. In the copying stage, parametric isolation can lead to false negatives where there are no similarities when elements are compared in isolation but elements are combined to give a similar and potentially, copied, expression. For example, in *Elwood v Cotton On* the t-shirts shared the same look and feel even though none of the actual text was copied. Logically, it can also lead to false positives, where lots of elements share similarities but they are combined in different ways to give rise to different expressions. In the substantial part stage, parametric isolation also leads to false negatives but in a different way. It leads the court into the danger of considering elements on their own and, when isolated from its context, finding individual elements to be building block ideas and prematurely dismissing them as unprotectable. A serious error would be to isolate similarities at the copying stage, and by parametric isolation, determine in the legal sense that the isolated feature is unoriginal or a building block idea, and dismissing them from further consideration. At this stage, what the court should be doing is simply to conclude whether the defendant copied the claimant.

It is a central claim of this thesis that Lord Millett's Disregarding Statement should be removed from future jurisprudence, and should not be applied in any stage of the infringement test. Cases that apply the Disregarding Statement literally, as the court in *Sheeran*

did, misunderstand the reason why Lord Millett made the statement, which relates to the particular appellate history of *Designers Guild*. When the case arrived at the Court of Appeal from the High Court, the defendants did not question the finding of copying, only the finding of substantial part. In overturning the Court of Appeal's decision, the House of Lords were criticising the Court of Appeal for reopening the case for copying. The Court of Appeal had taken the combination of elements that the High Court had found to form a substantial part and re-examined each of those elements in turn.[153] Each element was dismissed either as a general idea or by re-opening a visual comparison between the two works. It is argued that in making the Disregarding Statement, Lord Millett's motive was criticising the Court of Appeal for dissecting and re-comparing works at the substantial part stage of the infringement test. The Disregarding Statement should not be interpreted as a call to ask questions of a legal nature prematurely in the copying stage of the infringement test. Better yet, the potential for its language to mislead means the Disregarding Statement should be removed from future applications of the infringement test.

In the second half of this chapter, the case study of *Sheeran* demonstrates how the application of the Disregarding Statement led to both parametric isolation and confusion between the various steps of the infringement test.

3. *Sheeran v Chokri* (2022)

3.1 Synopsis and claims

The musical content at issue are the chorus from the song "Oh Why" (2015) (hereafter **"OW"**), performed and co-written by Sami Chokri and the post-chorus of the song "Shape of You" (2017) (hereafter **"Shape"**), performed and co-written by Ed Sheeran. Sheeran sued Chokri for a declaration of non-infringement amidst allegations that Sheeran had copied Chokri, which caused the Performing Rights Society to suspend payments to Sheeran. In case-naming, the traditional association of the defendant as the alleged infringer is reversed; it is the defendants,

[153] *Designers Guild* (CA) [29]–[35].

Chokri and his team, who are claiming for infringement. For the avoidance of confusion, the parties in this case are hereafter simply referred to as **"Sheeran"** (non-italicised) and **"Chokri"**.

The court concluded that there was insufficient evidence to infer copying by Sheeran and to shift the burden of proof to him. Therefore, the infringement claim failed to advance into the second (substantial part) stage of the copyright infringement test. In reaching this conclusion, the court first compared the relevant musical passages for similarities and differences,[154] conjectured upon an alternative source of the contested musical motifs in Shape,[155] and presented Sheeran's narrative of how he and his team came up with their music independently.[156] The court then considered various arguments by Chokri about how Sheeran had access to Chokri's music and how it might have come to Sheeran's attention, including allegedly through mutual acquaintances.[157] The court also dealt with Chokri's contention that Sheeran had a propensity to copy others.[158] Finally, the court dealt with Chokri's complaints about Sheeran's evidence.[159]

With respect to this case study, it is argued that the court erred in not inferring copying and shifting the burden of proof to Sheeran. The court misinterpreted the Disregarding Statement from *Designers Guild*, which in itself is also argued to be misguided on the part of Lord Millett. This led the court down the path of parametric isolation and asking the wrong questions at the wrong junctures. The negative conclusion resulting from this process, combined with an unjustified high bar with respect to access, led the court to fail to infer copying. The court held that if copying had been established, the copying would have been sufficient to be copying of a substantial part.[160]

[154] *Sheeran* Part E1.
[155] *Ibid*. Part E1(2).
[156] *Ibid*. Part E1(3).
[157] *Ibid*. Part E2.
[158] *Ibid*. Part E3.
[159] *Ibid*. Part E4.
[160] *Ibid*. [206(2)].

3.2 The court's framework

3.2.1 The court's approach to musical scores

The court's judgment presented the indicative material for comparative analysis in score form. Containing just the melodic line, the relevant musical passages were transposed to the same key to ease comparison. Chokri's passage (first line in Figure 13) was referred to as the OW Hook and Sheeran's (second line in Figure 13) as the OI Phrase.
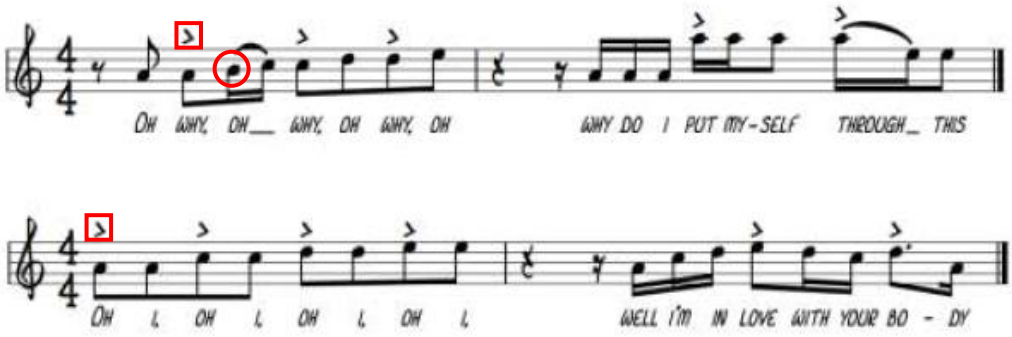


Figure 13: score transcriptions from the judgment of Sheeran.[161]

Crucially, there was no indication of whom these transcriptions were by: one side's expert, the other side's expert, or the judge himself. As a basic musicological proposition, any musical score is a limited approximation of the music as heard, so the reductive process of transcription is necessarily subjective.[162] For example, relevant to the court's discussions were the accents (square in Figure 13), the semiquaver (circle in Figure 13), and the lack of harmonic information. Although this thesis does not delve into the court's musicological reasoning, it is noted that the court made conclusions based on supposed musicological facts that were merely asserted in an anonymous musical score transcription.

3.2.2 The court's approach to *Designers Guild*

As the source of the infringement test, *Sheeran* adopted and quoted the copying stage of Lord Millett's two-stage test in *Designers Guild*. However, as noted below, the court quoted only

[161] *Ibid*. [30].
[162] For an accessible introduction on musicological issues around the musical score, see Thomas Forrest Kelly, *Capturing Music: The Story of Notation* (WW Norton & Company 2014).

part of the copying stage of the test but not all of it. The strikeout font indicates what the court omitted to quote. The Disregarding Statement is underlined.

> The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. ~~If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.~~ [163]

The court then interpreted this test (including the Disregarding Statement), setting out its process of evaluating similarities in three steps.

> In considering the significance of similarities between the works as an indication of the likelihood of copying, it is necessary to take into account the following: (1) the extent of the similarities and differences between the two works; (2) possible sources for the OI phrase [sic] other than the OW Hook, by reference to the rest of Shape and the extent to which it is comprised of elements that are commonplace in music; and (3) the evolution of the OI Phrase, according to the evidence of the claimants and contemporaneous evidence.[164]

The first step and the first half of the second step were sensible steps towards establishing an inference of copying. However, those were also the only necessary steps. The underlined part further articulated the court's approach to the second step, but it is argued that it was not only erroneous but also partial: it already anticipated the outcome that the court envisioned. In the end, the court would go on to find that the OI Phrase derived from other parts of Sheeran's song and not from Chokri. As demonstrated later, this in itself was a problematic finding.[165] But to the extent it might have been valid, this was a finding that needed to be reached by a

[163] *Designers Guild* (HL) 2425E–F (Lord Millett), my emphasis and my strikeout.
[164] *Sheeran* [32], my emphasis.
[165] See section 3.3.2 (*Building a (double-edged) frame*).

neutral methodology, rather than something to be presumed as a judicial methodology leading to that finding.

The second part of the underlined part resembles the Disregarding Statement from Lord Millett, which suggested that this as the stage where "similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas".[166] *Sheeran* interpreted this to mean assessing the musical *elements* and whether the elements *themselves* were commonplace in music. This is paramount to parametric isolation, and the operation of this process enacted the central fallacy of parametric isolation. It is trite that music generally combines basic building blocks that are commonplace. The examination of any musical element, on its own, naturally leads to a conclusion that it is commonplace, whatever reasons the court may end up providing to reach this conclusion. As such, it is argued that the underlined part was unnecessary, unhelpful and should have been removed. The court should have simply proceeded to look for other sources of similarities neutrally, in the context of the whole combination of elements that comprise a musical passage rather than assessing each musical element for banality individually.

The placement of the third stage, without reference to an inference of copying and a shift of burden to Sheeran, disregards the part of Lord Millett's test that *Sheeran* failed to quote. It is argued that the proper place for a detailed narrative of Sheeran's compositional process would have been after copying was inferred and the burden of proof shifted to the alleged copier. Considering this narrative in detail before shifting the burden had the effect of either creating a new requirement of inferring copying, or collapsing the difference between the inference of copying (with the consequence of shifting the burden of proof) and the establishment of copying (with the consequence of satisfying the copying part of the infringement test).

[166] *Designers Guild* (HL) 2425F (Lord Millett).

3.3 The court's operation of the infringement test

3.3.1 Similarities and differences identified in *Sheeran*

The court went on to list five principal similarities and five principal differences. As the discussion here focuses on the similarities, these are quoted from the judgment itself.[167] Throughout the remainder of the chapter, these individual similarities are referred to by the names defined in the parentheses.

> 34. The principal similarities consist of the following ("**the court's principal similarities**").
>
> (1) The tune in each song comprises the first four tones of a rising minor pentatonic scale: A, C, D and E ("**pitch sequence similarity**").
>
> (2) In each song the first three tones of the scale are repeated so as to sound: A-A; C-C; D-D (although the fourth tone – E – is repeated only in Shape) ("**repetition similarity**").
>
> (3) Both phrases are vocalised similarly: the diphthong in the OI Phrase means that although it is sung to the words "Oh I", it sounds the same as "Oh why" ("**diphthong similarity**").
>
> (4) They are both harmonised with the melody being doubled an octave above and/or below. The defendants label this a "vocal chant pitched in a low register". I accept that both involve a vocal chant of some kind, I do not agree that the OI Phrase is in a low register: to my ear both the low and high harmonies can be heard equally ("**octave doubling similarity**").
>
> (5) In both songs, the phrase is used as part of a "call and response" (although the only similarities in the responses are that they start on the second offbeat of the following bar and last for the remainder of that bar) ("**phrase structure similarity**").

The five principal differences identified by the court were, in its opinion, metric stress, mood, an intervening note, a harmonic difference, and differences in the second halves of the OI Phrase and the OW Hook.[168] However, less focus is placed on the differences in this chapter's discussion as it has been observed that it is the similarities that enable an inference

[167] *Sheeran* [34].
[168] There are musicological concerns with these differences that are outside the scope of this discussion.

of copying.[169] It is a peculiarity of the *Sheeran* judgment that the court appeared to devote more text to justifying the differences alleged than to explain the similarities.

3.3.2 Building a (double-edged) frame

In a first step towards parametric isolation, the court fixated upon the pitch sequence of A-C-D-E. Extrapolating these pitches from their contexts, the court proceeded to build a frame from the fact these notes form the first four notes of a pentatonic scale.

This appeared to enable several arguments alleging that the OI Phrase derived from other parts of Shape rather than from OW, but only with varied success. For example, the court observed that the pre-chorus, chorus and post-chorus contained phrases that ascended (from A to E) then descended (from E to A) a pentatonic scale frame, without using notes outside the minor pentatonic scale. Another observation, though weak, was that the chorus was introduced by three degrees of the pentatonic scale. A contrived observation was that the bass line of the song repeats the pitches E-A-C-D as an ostinato, which on loop can be perceived in its shifted form, A-C-D-E, the first four degrees of the minor pentatonic scale. However, this was logically inconsistent with the remainder of the judgment because the court had earlier used the opposing argument to find a difference based on metric stress. It had argued that the OI Phrase started on the first beat whereas the OW Phrase did not, marking the court's first principal difference between the two passages.[170] Applying the same argument, the fact that the ostinato has the E on the downbeat should also be important.

However, the most significant feature of the court's pentatonic frame argument is that it is double-edged. Just as it may be arguable that the OI Phrase derived from other parts of Sheeran's song, it is also arguable that the song generally had been inspired by the OI Phrase. For example, in his collaboration with Stormzy, Sheeran recorded the first bar of the OI Phrase before taking to the guitar for the harmony.[171] Although it is not argued here that this reflected

[169] See *Designers Guild* (HL) at 2425G–H (Lord Millett): "Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. . . . They were not taken from the copyright work, and the plaintiffs make no compliant in respect of them. They make a significant difference to the overall appearance of the design. But this is not material where the complaint is of infringement of copyright and not passing off".
[170] *Sheeran* [35(1)].
[171] Ed Sheeran feat. Stormzy—Shape Of You' (Capital Live Session).

Sheeran's original compositional process, it is argued that the court's confidence in the OI Phrase's alleged derivation from other parts of the song is less secure than the court believed.

3.3.3 Parametric isolation in action

Continuing the fixation of the A-C-D-E pitch sequence (ultimately to eliminate it from further consideration), the court noted that there existed many songs that contain or revolve around this pitch sequence and provided some examples. However, while these examples share the same pitch sequence building block, some of their musical contexts made them entirely different musical comparators. For instance, Led Zeppelin's "Heartbreaker" was an outlandish example for the court to have raised. The guitar riff here had an entirely different rhythm from the OI Phrase and the OW Hook, played by electric guitar with no vocals, and even the pitch sequence was the same only if some notes were ignored (circles in Figure 14). Unless the court was taking a very narrow reading of similarity in pitch sequence only, it is impossible to consider this riff a "close approximation" to the OI Phrase or the OW Hook.[172]
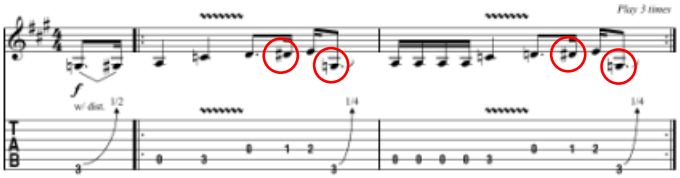


Figure 14: Introductory bars to Led Zeppelin's "Heartbreaker".[173]

Although the court also provided some examples that were more helpful (discussed later), the court ultimately redirected the discussion to Sheeran's other songs that contained the same A-C-D-E pitch sequence, but again in vastly different musical contexts that shared little in common other than the general idea of building a musical passage out of a pentatonic frame.[174] By this point, the court was truly dealing with an idea rather than any specific expression. The purpose of coming back to Sheeran's work in this way was to show that, allegedly, the pitch sequence was pervasive even within Sheeran's own music.[175] However,

<https://youtu.be/mKGsRjbqhHo?si=8NocSydEpjzl18O1> (accessed 2 February 2025).

[172] *Sheeran* [43].

[173] https://www.sheetmusicdirect.com/se/ID_No/403864/Product.aspx?.

[174] *Sheeran* [44].

[175] To my ear, the inclusion of the A-C-D-E pitch sequence in most of these songs are extremely tangential. However, this does not affect the substance of the legal discussion here.

this was to be the last reference to the pitch sequence in the remainder of the court's judgment. Pitch sequence did not play a part again for the remainder of the judgment, either on its own or in combination with other musical parameters. Pitch sequence similarity, the first similarity of the court's principal similarities, was now dismissed as having no significance as evidence towards inferring copying.[176]

This was parametric isolation *par excellence*. The overall effect of this discussion was that because the pitch sequence A-C-D-E occurred pervasively throughout the pop and rock genres, the court considered it too commonplace to stay relevant in further considerations. But this discussion isolated the pitch sequence from other important musical parameters such as, *inter alia* (and taking the Led Zeppelin example), rhythm and instrumentation, and came to a final conclusion. This final conclusion was that the pitch sequence A-C-D-E, as well as pitch sequence similarity, were taken off the scales of justice and out of any further equations. In this sense, it also gave effect to Lord Millett's Disregarding Statement, to disregard similarities because they are "commonplace, unoriginal or consist of general ideas". Here, the court isolated the A-C-D-E pitch sequence into a general idea and then rejected it because it was an idea.

After this involved treatment of the pentatonic pitch sequence, the court proceeded to remove other musical elements from the judicial scales in quick succession. Again, this was done by isolating musical elements to the extent of them being considered as general ideas. For example, with remarkably dismissive language, the court regarded the use of multiple quavers in a bar as "hardly an indication of copying". It is trite that the use of multiple quavers generally is commonplace, but if the court isolates this to such a generality, then it fails to give rhythm any chance to remain relevant. Furthermore, this dismissal is wrong because the use of multiple quavers exclusively (as in the case of the OW Hook and the OI Phrase) is a feature that others have taken to the extreme and made defining. An example is the cadenza of the *First Violin Concerto* by Dmitri Shostakovich, a performance of close to three minutes almost exclusively of quavers (see Figure 15). When used in certain ways, the exclusive use of quavers

[176] The five similarities were listed in *Sheeran* [34]. See note 167 *supra*.

can be a crucial ingredient to music that is extraordinarily unique. Of course, the use of quavers is not, *by itself*, an indication of copying. But it is a profound mistake to dismiss it as being incapable as an ingredient to a musical passage or a combination of musical features that can be indicative of copying.

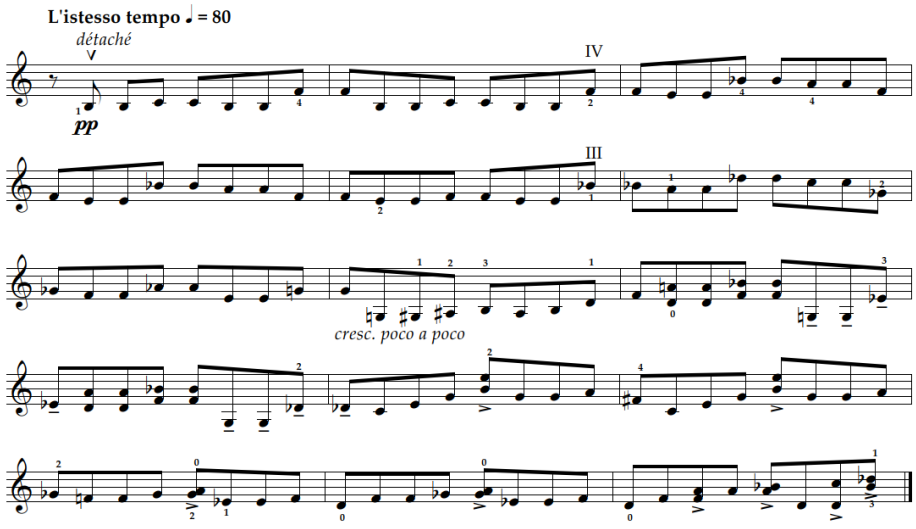


Figure 15: Extract from the cadenza of the First Violin Concerto *by Dmitri Shostakovich.*[177]

Having dismissed multiple quavers, and seemingly with that also dismissing the repetition similarity from the court's principal similarities, the court then targeted the octave doubling similarity. Although Chokri contended this as a point of instrumentation (a male lead with backing vocals at low and high registers), the court unhelpfully misinterpreted and transformed it into a point of "octave harmonies".[178] Musically, this was incorrect. Octaves without intervening notes have no harmonic significance because, for example, it is the third scale degree that defines a major or a minor chord. The less obvious but more important observation is that the court entirely changed and neglected the parameter originally at issue. It should have focused on the instrumentation: the melody was led by a male voice above a specific accompaniment involving backing vocals singing in a certain way. Instead, the court dismissed the octave doubling similarity on the basis that this, again as an idea by itself, had been used by Sheeran himself in previous songs. However, this does not stop instrumentation from being capable of being an ingredient of musical expression. After all, both Sheeran and

[177] Cadenza from Dmitri Shostakovich, *Violin Concerto No. 1 in A Minor*, Op. 77 (1948), transcr. François Cloete (2025).
[178] See *Sheeran* [45] for what Chokri contended. See *Sheeran* [47] for the transformation into octave harmonies.

Chokri selected very particular moments where they employed this instrumentation. This instrumentation was one of the degrees of freedom in musical choice and expression.

The court's approach of successively eliminating musical elements by parametric isolation was made abundantly clear in the judgment's last paragraph on musical comparison. The court noted "[t]hat leaves just the oscillating vowel sounds, where 'Oh I' and 'Oh why' sound materially the same". Dealing with the diphthong similarity from the court's principal similarities, the court simply noted that the use of these phrases, even in repetition, was "nothing original". In the end, everything was dismissed without the opportunity to combine musical elements back together and consider the result as a whole—in direct contravention of the warnings of Lord Reid in *Ladbroke* that "it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be.[179]

Although the Disregarding Statement may have come from *Designers Guild*, that case in fact did not proceed in the same fashion. In visual comparison, the court found seven similarities, just as *Sheeran* found five principal similarities.[180] In brief, these similarities were: even vertical stripes with flowers and leaves scattered between the stripes; a neo-Impressionistic style and brushstroke; rough edges to the stripes that merged into the background; similar brushstrokes for flower petals; semi-transparent petals through which stripes remained visible; flower heads were blob-like rather than detailed; and two-shade green leaves.[181] However, the court did not undertake an exercise to systematically eliminate elements or similarities. Showing awareness that "it must show much more than a similarity of style or 'handwriting'", it examined and debated the various similarities before bringing them together in combination to contribute to an inference of copying.[182]

> In my judgment, Designers Guild has clearly shown relevant similarity. The similarities are apparent. They go far beyond the similarities which would be expected simply from both being based on an impressionistic style or from both

[179] *Ladbroke v William Hill* (HL) 277 (Lord Reid).
[180] As noted in discussions above, copying was found by the first instance court of *Designers Guild* (Ch), and the first stage of the infringement test was not challenged in the subsequent appeals. Therefore this discussion relates to the High Court proceedings.
[181] *Designers Guild* (Ch) (Collins QC).
[182] *Designers Guild* (Ch) [26]. After considering access, the inference of copying was made.

> being based on a combination of stripes and scattered flowers and leaves. But the combination of, in particular, (1) the way in which the petals and leaves are scattered; (2) the use of the brush-stroke technique showing the brush marks; (3) the similarity of the flowers (especially the depiction of the petals and centre of the flowers) and leaves; (4) the way in which the stripes can be seen through the petals, involve a similarity which, despite the differences of dimension, is very close. [183]

While "being based on an impressionistic style" or "a combination of stripes and scattered flowers and leaves" might, by themselves, be commonplace or mere ideas, the similarities from the combination of the four aspects selected by the judge went "far beyond" what would have been expected if just one or two of these features had been similar.

The court in *Sheeran* did not bring the elements back for a similar kind of integrated and holistic reasoning. If the court in *Designers Guild* had looked at *Sheeran*, it is argued that an integrative analysis might have concluded differently. The combination of (1) the pitch sequence similarity, (2) the repetition similarity, (3) the diphthong similarity and (4) the similarity in instrumentation (which, as discussed above, the court misunderstood as the octave doubling similarity) should have been sufficient for the court to conclude that this went beyond the similarities expected from just the pitch sequence of A-C-D-E, beyond multiple quavers in a bar, beyond sharing the same diphthongs of "Oh I/Why", and beyond being sung by a male singer with vocal backing. In other words: beyond coincidental.

3.3.4 An illustration from Down Under

A helpful comparison can be made with the Australian case of *Larrikin v EMI*, which concerned the use of a musical phrase from a well-known children's round "Kookabura" in the defendant's work "Down Under". [184] In applying the first stage of Lord Millett's test to determine what it calls "objective similarity", the court considered melody, key, tempo, harmony and structure successively.

In contrast to *Sheeran*, however, the court's process was one of parametric analysis and not parametric isolation. The difference in musical keys was considered in the social context

[183] *Designers Guild* (Ch) [31].
[184] *Larrikin v EMI*.

that children typically sing rounds in whatever key suits the group.[185] The stylised rhythm in the defendant's accompaniment was considered as one of many interpretive possibilities of the simple, unaccompanied nature of the claimant's work.[186] Amidst this discussion, the parameter of articulation was brought in, noting that both works share a distinctive slur at the end of the relevant musical phrase.[187] Differences in harmony and an added punctuation between two parts of the claimant's phrase were found not to obscure what was taken from the claimant's work.[188]

The discussion and analysis of each parameter was placed and considered in the wider context of other musical factors. In the end, it led to a finding of infringement.

3.4 The standard of access in *Sheeran* and the inference of copying

Although at this point *Sheeran* proceeded to discuss Sheeran's positive case of independent creation, this chapter departs from this order of events by considering Sheeran's potential access to Chokri's song. The court in *Sheeran* reversed the order of steps by considering Sheeran's narrative of independent creation before the possibility of Sheeran's access to Chokri's work. As discussed earlier in section 3.2.2 (*The court's approach to Designers Guild*), this reversed order disrupts the process of inferring copying. Either it creates a new requirement in inferring copying (the claimant must defeat the defendant's claims of independent creation), or it collapses the difference between the inference of copying and the establishment of copying. Therefore, the inference of copying should come first before the burden of proof shifts to the alleged copier to provide a persuasive narrative of independent creation. The conventional process of inferring copying was also laid out by Lord Millett in *Designers Guild* (HL), which appears later in the same paragraph that *Sheeran* quoted (but which, itself, *Sheeran* did not quote).

> If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant

[185] *Ibid.* [177].
[186] *Ibid.* [184].
[187] *Ibid.* [186].
[188] *Ibid.* [188] and [199].

> had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.[189]

A well-known case that clearly demonstrates the shifting of burden is *Mitchell v BBC* (2011), which is taken here as a model of the copying stage and the process to evaluate access.[190] In creating the children's television show Kerwhizz (first aired in November 2008), the BBC was alleged to have copied a set of five characters called the Bounce Bunch created by Michael Mitchell in 2005. The court began by declaring its approach to the first part of the infringement test in stages. The first was to consider the claimant's case about access and similarities. Only if this case was shown would the onus shift onto the defendant to show independent creation. Unlike in *Sheeran*, the defendant's case for independent creation played no part in the similarities analysis or anything before the burden of proof shifted.

> I will approach the issues in this case in stages. First I will consider Mr Mitchell's case about access and his case that the similarities are such as to shift the onus onto the BBC to explain how their designs arose. Next, I will consider the BBC's positive case, that the Kerwhizz characters were designed independently of the Bounce Bunch.

In relation to access, the court in *Mitchell* set a rigorous bar as to what a defendant could have had access to. However, once possibility of access was established, this contributed to an inference of copying. The court's standards for access are shown by the multifaceted facts around the accessibility of Mitchell's designs. The most direct access alleged was a proposal supplied by Mitchell himself to the BBC in October 2007.[191] Controversy surrounded this as the BBC contended that Mitchell had sent his proposal to the wrong department.[192] The BBC then misfiled the proposal, making it impossible to serve as the source of Kerwhizz.[193] Ultimately, the court sided with the BBC and eliminated this as a source of access.[194]

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[189] *Designers Guild* (HL) 2425F–G (Lord Millett). Also see *Francis Day and Hunter* 612 (Willmer LJ): "proof of similarity, coupled with access, raises a prima facie case for the defendant to answer".
[190] The judge was Birss QC HHJ, who is now Birss LJ and influential on intellectual property matters.
[191] *Mitchell v BBC* [8].
[192] *Ibid*. [17].
[193] *Ibid*. [18].
[194] *Ibid*. [107]–[108].

As for the internet, Mitchell contended there were several ways his designs were accessible to the BBC through it. Eventually, only one was found satisfactory by the court. Least convincingly, Mitchell asserted that a side view of one of the characters appeared on his eBay page on a couple of occasions. This was too insignificant.[195] Mitchell also asserted that before 2007 the characters appeared on his profile on a freelance work portal ifreelance.com. This site had thousands of entries, of which the court did not complain as an obstacle in itself, but evidence was insufficient to support this avenue.[196] Eventually, the court established positively that three of the characters were available online in 2007, on his own website mikes-studio.co.uk.[197] This alone sufficed to satisfy the court on access generally and enabled the court to proceed with considering similarity. Particularly, the court did not require Mitchell to demonstrate that the BBC actually accessed the website; merely the possibility of access was enough.

> Absent evidence from the BBC about how Kerwhizz was produced, Mr Mitchell's evidence establishes that it was possible for someone at the BBC to have seen the Bounce Bunch artwork before Kerwhizz was broadcast. Given the access, the similarities between the Bounce Bunch and Kerwhizz which [sic] call for an explanation.[198]

If *Sheeran* had adopted the same standards, access should have been satisfied, as what Chokri demonstrated surpassed what Mitchell demonstrated. By 19 March 2015, OW had been uploaded to YouTube, a music blog called Noisey, and the Facebook pages of Chokri, his music manager and the managing director of that management company.[199] It was subsequently uploaded to various blogs and music platforms. Over the course of the next two years or so, the YouTube video had 12,914 views.[200] This was interpreted negatively by the court as a low number, but compared with the facts of *Mitchell*, there was no suggestion there that Mitchell's personal website had been viewed by anyone in particular, not least the BBC.

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[195] *Ibid*. [46].
[196] *Ibid*. [44]: "However there is no hard evidence that the Bounce Bunch characters were ever actually available on that site at that time. Mr Mitchell produced no evidence to back it up. I am not satisfied that Bounce Bunch characters were available on this site before 2007".
[197] *Ibid*. [50].
[198] *Ibid*. [57].
[199] *Sheeran* [85].
[200] *Ibid*. [86].

Mitchell also found that the Bounce Bunch had no significant presence other than on mikes-studio.co.uk, whereas OW was publicised by a music management company which promoted it across a range of online platforms. On this basis alone, the court in *Sheeran* should have found that there was sufficient access to support an inference of copying.

However, *Sheeran* took a thoroughly different approach. It actively looked for occasions where Sheeran would have actually heard Chokri's music, not just whether Chokri's music was on a platform freely accessible to Sheeran. Arguably, this was a consequence of the court's reversal of steps. Because the court had presented Sheeran's case of independent creation first, *Sheeran*'s presentation about access now had to address Sheeran's claim that he had never heard Chokri's OW.

The other reason may have been that the court in *Sheeran* felt the similarity was so low that the standard for access had to be very high. The inference of copying is always a balance and combination between similarity and access, and the purpose is to ascertain whether there is a prima facie case for the defendant to answer.[201] The amount needed for one (say, access) is inversely proportional to the extent of the other (say, similarity). However, as argued earlier, the apparent lack of similarity in *Sheeran* was due to incomplete reasoning caused by parametric isolation. Therefore, parametric isolation not only had a detrimental effect on the outcome on similarity; it also went on to set the wrong standard for access.

For more context about similarity, let us consider the similarities in *Mitchell*. The court was satisfied by a combination of similarities at a high level of generality. This combination comprised of the characters all wearing a form of armour with helmets and microphones, the colour schemes of three of the characters, the presence of a mixture of ethnicities and the flick of hair on the blue characters.[202] As shown in the illustrations below, it would be difficult to find more similarities than that. Therefore, it is argued that the similarity found in *Mitchell* at this stage did not exceed the similarity that should have been found in *Sheeran*. However, the court in *Mitchell* integrated and combined these individual similarities in a way that *Sheeran*

[201] See *Francis Day and Hunter* 612 (Willmer LJ), supra note 189. *Sheeran* also recognised this in [25].
[202] *Mitchell* [54].

did not, noting that "although none of these points on their own would be sufficient to raise an inference of copying, when they are considered as a combination, it seems to me that the onus shifts to the BBC to explain how the Kerwhizz characters were produced".[203]



Figure 16: The Bounce Bunch (please note the colours).[204]



Figure 17: The characters in Kerwhizz (please note the colours).[205]

3.5 Sheeran's narrative of independent creation

Mitchell was an exemplary illustration of the separation between the inference of copying and the establishment of copying, because although copying was inferred, the defendant was able to rebut that inference. This led to a finding of no copying, failing the first stage of the infringement test. The BBC showed that the salient features of the Kerwhizz characters had already been formed before Mitchell's Bounce Bunch characters became available online.

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[203] *Mitchell*.

[204] Catherine Lee, 'Kerwhizz Kapows Copyright Infringement Claim' (23 December 2011) <https://ipkitten.blogspot.com/2011/12/kerwhizz-kapows-copyright-infringement.html> (accessed 2 February 2024).

[205] *Mitchell*.

Although the court in *Sheeran* felt that there was only a speculative possibility that Chokri's OW would have been brought to Sheeran's attention, it could not completely rule out that possibility.[206] OW had been released in March 2015, and Sheeran did not begin work on Shape until October 2016.[207] Nonetheless, the characterisation of "speculative" could be seen as fair. In determining whether Sheeran would likely have heard Chokri's music, the court considered (1) the efforts of Chokri's team to promote his music and (2) the likelihood that Sheeran would have discovered Chokri's music by himself. In considering the former, the court also considered in detail whether OW might have been passed onto Sheeran through mutual friends and colleagues in the industry. While these mutual connections certainly existed, there was no hard evidence that Sheeran heard OW through these connections.

However, with respect to whether Sheeran might have come across OW through simply navigating the internet and song-sharing platforms, Sheeran's case needed further evidence. Although 12,914 views seemed few, it would have been helpful to put this in the context of Sheeran's own music listening habits generally.[208] For example, if he used internet radio platforms such as Spotify, this would have suggested and played next songs without explicit input from the user. Alternatively, as an artist he may have had different listening habits from a layman consumer of music. As a personal example, as an ex-professional violinist, I spent most of my time listening to little-known recordings as inspiration for my own performance practice and interpretations. It is not argued this was shared by Sheeran's listening habits, but more evidence of this kind would have assisted in understanding the probability of Sheeran coming across OW on his own.

One particularly uneasy moment in Sheeran's creation narrative was a comment he made during a recording session at 11:46 on 12 October 2016: ". . . it might be a bit close to the bone . . . so, what about this . . .".[209] After the comment, the melody of the OI Phrase's first bar was sung, but to "heya" and not "Oh I", which evolved to "hey now" by the end of that take. This evidenced a process of exploration as to what words and sounds should have been said

[206] *Sheeran* [146].
[207] See note 199, *supra* for Chokri, and *Sheeran* [49] onwards for Sheeran.
[208] See note 200, *supra*, for 12,914 views.
[209] *Sheeran* [54(5)].

to the chorus motif subject to litigation. The question was what Sheeran had been singing before the comment, as there was no recording of what he had sung before. Under cross-examination, Sheeran answered, "Well, what was I singing in the recording? 'Hey now' probably". The order of Sheeran's recollection seemed confused at best.

Chokri's counsel took issue that Sheeran did not deny that this could have been "Oh I". The court, however, disagreed with Chokri's submissions, arguing that the alleged lack of denial was not a fair reflection of the context of questioning. The court preferred Sheeran's evidence that there had indeed been concern about resemblance, but it was with another song, "No Diggity", which Sheeran had performed. The court then connected this as the explanation of the comment "it might be a bit close to the bone". Although this was at odds with Sheeran's answer that before "heya" he had probably sung "hey now" (in Figure 18, No Diggity's "heyo" is closer to "heya" than "hey now"), the court put this down to an understandable confusion on the part of Sheeran about the precise order of events.[210]
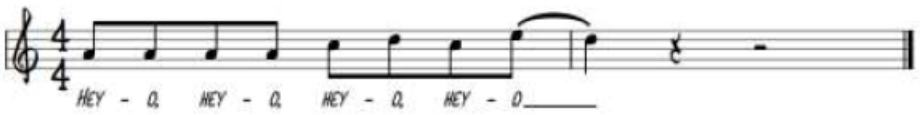


Figure 18: Post-chorus of "No Diggity".[211]

Importantly, however, no answer was ever forthcoming on the question of what Sheeran had been singing before the comment at 11:46. The "close to the bone" discussion is a reminder that there is often room for evidence to be interpreted in favour of either party. It should be borne in mind that by this point, the tone of the *Sheeran* case had become unfavourable to *Chokri* as the court had already begun with an adverse finding with respect to similarity.

[210] *Sheeran* [63].
[211] *Sheeran* [60].

3.6 Substantial part and subconscious copying

The court in *Sheeran* indicated that if Chokri's claim had passed the copying stage of the infringement test, the combination of the various elements would have been sufficient to represent the intellectual creation of Chokri and his songwriters.

> I accept the claimants' contention that none of the elements of similarity on which the defendants rely in itself represents that which confers originality on Oh Why as a musical work. The use of the rising minor pentatonic scale is a generic and commonplace building block in many musical genres. The fact that each note of the scale is repeated does not in my judgment alter that conclusion. The use of a vocal chant and its harmonisation with low and high octaves are equally generic and commonplace ideas. Nevertheless, if it had been necessary to decide the point, I would have concluded that the combination of these features did sufficiently represent the intellectual creativity of Mr Chokri and Mr O'Donoghue. Although there is no claim to infringement of copyright in the lyrics, I think that the setting of music to a distinct vocal sound (e.g. humming, "ahh", "ooh", etc) can be considered part of the orchestration of a musical work: see, for example, Hayes v Phonogram Ltd [2003] ECDR 11, per Blackburne J at [60]. [212]

This seems sound generally. However, although the court appeared aware that parametric isolation would not be an appropriate methodology for the second stage, it also supported parametric isolation for the copying stage by listing all the prematurely concluded outcomes and the dismissals parameter by parameter. It is argued that this is wrong. As argued earlier in section 2.4 (*The Disregarding Statement in Lord Millett's Designers Guild*), the Disregarding Statement should be understood in the context of the particular appellate history of Designers Guild, not as an invitation to engage in parametric isolation.

Where the court found no infringement, Chokri made the alternative claim of subconscious copying, which was denied correctly.[213] *Mitchell* categorised the complexity of subconscious copying factors that Wilberforce J articulated in *Francis Day and Hunter* into three factors: the degree of familiarity, the character of the work, and objective similarity.[214] *Mitchell* is particularly helpful as it re-interpreted the principles of *Francis Day and Hunter* in the age of

[212] *Ibid*. [206(2)], my underlines.
[213] *Sheeran* [205(6)].
[214] *Mitchell* [121].

the internet, noting that "[s]ince everything is available to everyone on the world wide web, no evidence can ever rule it out as a subconscious influence".[215]

As discussed in section 2.2.3 (*Subconscious copying*), *Mitchell* set higher standards across all aspects of subconscious infringement claims. In relation to the degree of familiarity, the court required hard evidence of the defendant's familiarity, as opposed to mere possibility of access.[216] This was not satisfied by the evidence in *Mitchell*. By "character of the work", *Mitchell* referred to Wilberforce J's qualities that might impress the mind and memory. The court concluded Mitchell's characters were too generic and simple in their details to possess these qualities. In relation to objective similarity, *Mitchell* required a considerable degree higher to establish subconscious copying.

> In terms of a shifting onus, I have already held that the objective similarities between the Bounce Bunch and Kerwhizz are sufficient to mean that the BBC need to explain how Kerwhizz came about. That is very different from saying that the similarities are sufficiently striking to support a case of subconscious copying. For that latter proposition I need to consider the similarities in the context of whether they support an inherent probability that such similarity as is found could be due to coincidence.[217]

To assess "inherent probability", *Mitchell* embarked on a renewed exercise of comparing the Kerwhizz characters with the Bounce Bunch, but this time much more critically about the differences rather than just looking for similarities. In relation to similarities, the court also assessed how likely those choices were in the context of the relevant degree of design freedom. For example, on the choice of colour of one of the characters, the court concluded that there was little alternative to the choice of yellow.[218] Other choices of colour were eliminated for various reasons, and it could not be said that the choice of yellow was a result of subconscious copying.

Notwithstanding objective similarity and character of the work, it is recognised that the degree of familiarity in *Sheeran* may not have been sufficiently strong to support an overall

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[215] *Ibid*. [122], *Francis Day and Hunter* 614–615.
[216] *Mitchell*. [122]: "The legal process can only operate on evidence".
[217] *Ibid*. [127].
[218] *Ibid*. [140].

finding of subconscious copying. More significantly, however, this analysis showed that the standards the court of *Sheeran* applied on the defendant resembled more of the higher standards *Mitchell* applied in the context of subconscious copying.

4. Doctrinal recommendations

The discussions in this chapter lead to three clear doctrinal recommendations. First, it is argued that the Disregarding Statement of Lord Millett in *Designers Guild* should be distinguished on the basis of the appellate history of that particular case. To the extent it exists as text in Lord Millett's speech, it should be regarded as a targeted criticism of the erroneous general approach by the Court of Appeal. The Disregarding Statement should not play a part in future cases in the way it was followed by *Sheeran*, as struck out in Lord Millett's description of the first (copying) stage of the infringement test below. It is also suggested that unlike the court in *Sheeran* which only quoted and implemented the first half of this test, future courts should have regard to the whole paragraph, passing the burden of proof to the defendant when the conditions are satisfied.

> The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. ~~It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas.~~ If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying. [219]

By extension, future cases referring to *Sheeran* should also distinguish from the second half of paragraph 32, which set out the process by which the court would go on to evaluate musical similarities. The first half of the passage struck out below puts the court at risk of

[219] *Designers Guild* (HL) at 2425E–F (Lord Millett).

carrying out the Disregarding Statement and parametric isolation. The second half of the struck-out passage is a premature consideration before copying is inferred.

> In considering the significance of similarities between the works as an indication of the likelihood of copying, it is necessary to take into account the following: (1) the extent of the similarities and differences between the two works; (2) possible sources for the OI phrase [sic] other than the OW Hook~~, by reference to the rest of Shape and the extent to which it is comprised of elements that are commonplace in music; and (3) the evolution of the OI Phrase, according to the evidence of the claimants and contemporaneous evidence~~.[220]

Second, it is argued that parametric isolation should not be allowed in any part of the copyright infringement test. While it is one thing to study elements on their own to understand them better in the context of the musical passage as a whole, it is another to make judicial conclusions purely as a sum of individual and premature determinations with respect to isolated elements, examined outside the context of their existence. As demonstrated in various passages in the chapter, *Designers Guild* itself did not do this, and neither did *Mitchell* nor *Ladbroke v William Hill*, which warned of the dangers of the parametric isolation fallacy: "it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be".[221]

Third, it is argued that courts must follow the various stages and sub-stages of the infringement test in the correct order. Not doing so risks asking the wrong questions of the wrong material. It is incorrect to ask questions about legal originality when similarities are compared to determine copying. Legal originality should be asked of the parts that have been identified as copied material, and at this stage of determining whether this forms a substantial part, the court should ask whether this copied material expresses originality in the sense of the author's own intellectual creation.

Finally, it is argued that although these discussions of the *Sheeran* case study did not conclusively overturn the overall verdict of non-infringement, it was still important to get each stage within the infringement test right. From a legal perspective, the erroneous processes that

[220] *Sheeran* [32].
[221] See note 179, *supra* (*Ladbroke*).

Sheeran followed could have resulted in the wrong conclusion had a claimant's case for direct access been stronger. The rule of law requires the correct and consistent application of legal doctrine, with which the discussions in this chapter hope to have assisted.

Chapter IV: Music and Copyright

1. Introduction

This chapter discusses the policy implications of the doctrinal recommendations in Chapter III, as it is recognised that these recommendations may also make infringement findings more likely. This chapter proceeds in three parts: justifications of music copyright, justifications of UK-EU doctrine, and discussions on the public domain. A recent doctrinal development, already referred to in Chapter III, is embraced as a tool to mitigate against policy concerns. The discussions in this chapter play a supporting role to the core discussions in Chapter III.

2. Does music need copyright?

As noted in Chapter I, Bonadio and Chen (2023) published a comprehensive set of essays about creative practices in more than twenty musical genres around the world and how these practices relate to copyright.[222] Largely, copyright is irrelevant to most of these genres. Musical copyright began life with the 1777 English case of *Bach v Longman*, in the context of the Western classical tradition of music.[223] Many genres developed outside of that ecology, and the concepts of musical copyright do not fit these genres naturally.

An easily relatable example is jazz, where the art is collaborative improvisation upon a melody borrowed elsewhere.[224] Often this is not an insult but a tribute to the author of the borrowed melody. Therefore, a copyright system that regards jazz's core practices as infringement is not suited to jazz. However, jazz also has its own version of unacceptable borrowing. Katherine Leo notes that "[u]ncreative musicians, or those performers who borrow too much from others without inserting their own new or transformed expressions without permission, develop bad professional reputations. They can eventually become unwelcomed in jazz communities, ultimately risking professional ostracization".[225] Therefore,

[222] Enrico Bonadio and Chen Wei Zhu (eds), *Music Borrowing and Copyright Law: A Genre-by-Genre Analysis* (Hart 2023). For a summary, see Wong (2024).
[223] *Bach v Longman et al* (1777) 2 Cowp. 623 (KB) 1274.
[224] Katherine M Leo, 'How Jazz Persists at the Periphery of Copyright' in Enrico Bonadio and Chen Wei Zhu (eds), *Music Borrowing and Copyright Law: A Genre-by-Genre Analysis* (Hart 2023).
[225] Leo (2023) 170.

jazz is just subject to a different understanding of different conventions, and genres that do not rely on copyright can have their own enforcement mechanisms.

Although much can be learned from these genres, popular music has consistently appeared in musical works copyright litigation. One factor is that unlike some other genres such as jazz and hip-hop, it does not have explicit musical borrowing as its core creative practice. This makes it more amenable to copyright law analysis. It also does not have a consistent set of conventions like jazz, making it less amenable to self-regulation. The sheer scale of its number of songs and its economy is also different. For a new song to attract attention, massive financial investment is required in producing it and marketing it. While record labels face the challenge of internet streaming platforms, they still very much hold the key to any song finding fame and financial success. And when a song earns a large payout for its success, they also control how it is distributed.

This is illustrated by the tragic story of Marianne Cray, who was the claimant in *Creagh v Hit and Run Music* (2000). This case was between the songs "Where Are You Now", written by Cray in 1985, and "Where Are You". Cray's song had been her greatest creative asset when she entered a 15-month relationship with an employee of Hit & Run Music, who personally arranged for Cray to make several recordings of the song. Meanwhile, the management of Hit & Run liked the song but did not like Cray singing it. Rather, they felt the song should be sung by a singer of a certain racial profile. They tried to coerce Cray to sign the song over to Hit & Run with physical threats but she refused.[226] In 1998, a remarkably similar song was presented in the Eurovision song contest with great success, coming second for the United Kingdom. Hit & Run was credited as the songwriters, and the song was performed by Imaani, a singer of Hit & Run's preferred racial profile. Meanwhile, Marianne Cray was never known to create music again.

The case's facts illustrate the immense imbalance of power between individual creators and corporations in popular music. Even though Marianne Cray arguably lost the case due to

[226] She was threatened that if she was seen singing her song on stage she would be "singing it in a wheelchair". See *Creagh v Hit and Run Music* [13], [60], affirmed by the court in [62].

poor advocacy, the copyright she had in "Where Are You Now" was the only glimmer of hope she had in pursuing her justice.[227] Without it, she would not even have had the chance to fight, and the case of every Marianne Cray would end in the copyright critic's nightmare: unfettered power yielded by corporations.

Economists Michele Boldrine and David Levine (2008) argue that first-mover advantage works just as well as the monopoly conferred by intellectual property.[228] However, it is difficult to see how someone like Marianne Cray could have taken that advantage. She would have needed the production team and connections of a record label to gain attention in a popular music world where thousands of songs are uploaded per month. Marianne Cray was in an awkward position where she must rely to the very people who can copy her song in order to bring her product to market.

Many copyright critics have also arrived at the conclusion that copyright is a necessity. The views of the likes of James Boyle and Lawrence Lessig are that copyright is necessary but imperfect.[229] The necessity of copyright was eloquently expressed by Lord Macaulay in his parliamentary speeches of 1841: authors "must be remunerated for their literary labour. And there are only two ways in which they can be remunerated. One of those ways is patronage; the other is copyright".[230] In relation to patronage, he "can conceive of no system more fatal to the integrity and independence of literary men than one under which they should be taught to look for their daily bread to the favour of ministers and nobles". Therefore, "[w]e have, then, only one resource left. We must betake ourselves to copyright, be the inconvenience of copyright what they may".[231]

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[227] Poor advocacy relates to Cray's expert's focus on musical material (the "descending third") that did not feature in all versions of her song.

[228] Michele Boldrin and David K Levine, *Against Intellectual Monopoly* (Cambridge University Press 2008) 137–144.

[229] For example, see James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008), 6 where he notes he is not an enemy but a fan of intellectual property, and "[i]t is precisely *because* I am a fan that I am so alarmed about the direction we are taking"; and Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic 2008), 253 "Neither RW nor RO culture can truly flourish without copyright. But the form and reach of copyright law today are radically out of date".

[230] Thomas Babington Macaulay, *The Life and Works of Lord Macaulay, Complete in Ten Volumes*, vol 8 (Longmans, Green, and Co 1897) 198.

[231] *Ibid*.

3. The doctrinal solution: from Sorites to *Infopaq*

If copyright is a necessity, how should legal doctrine provide it? The EU's (and now the UK's) answer is that copyright is infringed if and only if B copies A's expression of A's own intellectual creation reflecting A's personality. Is that a reasonable and justifiable standard?

An important issue is altered copying. In *Bach v Longman*, the defendant reprinted Johann Christian Bach's compositions note for note.[232] However, surely copyright infringement could not be avoided by minimal changes to a few notes. But what if only half the notes were copied, or 10%, or even 2%? This is a hard problem because this is the Ancient Greek Sorites' paradox: how many grains of sand is a "heap" of sand? In a process of induction, one grain of sand is not a heap; adding one grain of sand to that is not a heap; therefore, a million grains of sand still do not form a heap. Philosophically, no straightforward solution has been found. The most direct approach to the paradox is to bite the bullet and decide on an arbitrary number of grains of sand, which would serve as an artificial threshold as to whether a collection of grains forms a heap.

The added advantage the law has here, though, is that while sand grains are indistinguishable, not all parts of a work are the same. However, it is surprisingly difficult (and an arguably perilous journey) to utilise this advantage, as qualitative judgments often involve more subjectivity than one realises. For example, an obviously tricky solution is to ask whether what is copied has aesthetic merit. In this regard, courts are alive to the dangers of subjectivity. For instance, in the context of the meaning of a copyright work, *Cofemel* held that whether something attracts copyright protection cannot depend on an "intrinsically subjective sensation of beauty experienced by each individual"[233].

It may seem that the British concept of quality in a substantial part might be a safer way out: a copied part is infringing if it is important to the copyright (not copying) work.[234] Certainly, the UK has a century of jurisprudence to show for it. However, deeper reflection

[232] *Bach v Longman et al (1777)* 2 Cowp. 623 (KB).
[233] *Cofemel* [53].
[234] *Designers Guild* (HL) 2426A–B (Lord Millett).

reveals that this, too, is precarious. What is important in a work is also subjective because literary theory does not support the notion of absolute, objective meaning.[235] Autonomous works are capable of meanings not envisaged by the author.[236] For example, famously a stellar cast including Benedict Cumberbatch, Dame Judi Dench, Sir Ian McKellan, and Prince Charles (as he was then) explored different ways of performing Shakespeare's "To be, or not to be, that is the question" by simply emphasising different words of the phrase, imbuing a different meaning to the phrase in each case.[237] Returning to legal doctrine, a literary, dramatic, musical or artistic work can have entirely different meanings depending on the reader, listener or beholder. Therefore, no part of a work can be said to be more important than another with complete objectivity. Arguably, the low common denominator for universal meaning explains why the bar for the British style "substantial part" test has always been very low.

It is argued that in contrast, the EU's doctrinal solution from *Infopaq* is objective.[238] Whether something is the expression of the author's own intellectual creation reflecting the personality of the author is an objective question of whether there is anything individual about what is copied. This is not the same as the subjective question of whether a copied part is important based on the court's interpretation as to the meaning of the work. The distinction can be seen from *Funke Medien*'s example of military reports: a reader can interpret the meaning of a sentence differently (for example, if a battalion "went west", how far did they go?).[239] However, this does not undermine the judgment that the nature of the text was functional, impersonal and not an author's intellectual own creation. Therefore, it is argued that this is a justifiable doctrinal standard for determining copyright infringement.

However, as a question of degree, the EU went far in *Infopaq* in ruling that as small an extract as eleven words can attract copyright protection, as long as that extract satisfies the

[235] See, as amongst the first to notice this, WK Wimsatt and MC Beardsley, 'The Intentional Fallacy' (1946) 54 The Sewanee Review 468.
[236] See Roland Barthes, *The Death of the Author* (Stephen Heath tr, Fontana 1977).
[237] "*Hamlet with Prince Charles and Benedict Cumberbatch | Shakespeare Live! From the RSC - BBC* (Directed by BBC, 2016) < https://www.youtube.com/watch?v=kEs8rK5Cqt8> (accessed 2 February 2025); William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (1564–1616 author).
[238] *Infopaq*.
[239] *Funke Medien* (2018).

doctrinal standard.[240] From a point of policy, the EU legislators made clear its view that it "must take as a basis a high level of protection, since such rights are crucial to intellectual creation".[241] Its justification was a mixture of incentive theory and personality theory, arguing that authors "have to receive an appropriate reward for the use of their work" and noting the importance of "safeguarding the independence and dignity of artistic creators".[242]

Some have pursued the question of degree, arguing that we must postulate a *de minimis* threshold size. The finest arguments are perhaps from Justin Hughes, who advocates for the question of size to be separated from the question of originality.[243] For example, Hughes makes an interesting separation between economic and artistic viability.[244] However, the force of that argument is diminished by a second suggestion that a threshold for a minimum size of a work might be guided by whether it has some value as a composition.[245] This move converges back towards relying on some qualitative measure to determine a quantitative threshold, undermining Hughes's separation of the questions of size and originality. After all, "value as a composition" and "the author's own intellectual creation" are not dissimilar qualitative standards. Therefore, not even the subtleties and sensitivities in these arguments could escape the fundamental question of Sorites' paradox. Hughes argues we should bite the bullet, but does not actually bite it by giving us a number. This is unsurprising: the paradox has remained unsolved for millennia, and a legal manifestation of it is tackled at one's peril.

4. The public domain

The public domain has been defined as "a sphere in which contents are free from intellectual property rights".[246] Broadly speaking, several types of material comprise the public domain. Most obviously, it contains previously copyrighted material whose duration of protection has

[240] *Infopaq* [47]–[48].
[241] Recital 9, Information Society Directive.
[242] *Ibid*., recitals 10 and 11.
[243] Hughes.
[244] *Ibid*., 623.
[245] *Ibid*., 630.
[246] Pamela Samuelson, 'Mapping the Digital Public Domain: Threats and Opportunities' (2003) 66 Law & Contemp. Probs. 147, p. 149. Her definition is much more complex than this quotation suggests, as she enumerates different kinds of public domains and how each of them might work.

now expired, which makes it free for everyone to use. It may also contain material that, by its nature, cannot attract copyright protection.[247] A simple example is that, in the UK, only a closed list of types of authorial works can attract copyright attention (literary, dramatic, musical and artistic works).[248] Most pertinently to our discussions, material can also belong to the public domain because it is an idea rather than an expression, falling on the idea side of the idea-expression dichotomy. In the context of this thesis, parametric isolation deconstructs a musical phrase into various constituent elements, each of which if considered alone may be a general building block in music and therefore ideas.[249]

4.1 The public domain in creativity and authorship

A major concern of a stronger copyright is the potential for increased encroachment into the public domain, stunting creativity of humankind generally. Material protected by copyright is material that other creators cannot use without licence. Therefore, the larger the realm of copyrighted material, the smaller the domain of material freely available to the public.

In *The Public Domain: Enclosing the Commons of the Mind* (2010), James Boyle calls intellectual property the "second enclosure". This is an analogy to humankind's first enclosure, the fencing-off of common land for private use. The worry is that this parallel is not justified, because unlike land, intellectual material is neither tangible nor scarce. Therefore, the extensive and perpetual enclosure of land would be wrong and unhelpful to creativity if applied to intellectual material. The material available for everyone's creativity might diminish as more musical material is "enclosed" in the name of copyright protection.

Boyle's work is situated within a concern about the public domain that began with David Lange (1981), after a decade of rapid expansion in the scope of copyright through a series of US decisions favouring copyright plaintiffs.[250] One of these, *Instrumentalist Co. v.*

[247] See Wednesday Eden, 'The "Unpropertizable" Public Domain in UK and EU Copyright Law' [2024] J. Copyright Soc'y 147 for a sophisticated and detailed discussion.
[248] Section 1(1) CDPA.
[249] See US Judge Learned Hand's reasoning in abstractions discussed earlier in this thesis, section 2.1.2 of Chapter III (*Idea-expression dichotomy*)
[250] David Lange, 'Recognizing the Public Domain' (1981) 44 Law and Contemporary Problems 147.

Marine Corps League (1981), was particularly poignant with irony.[251] The plaintiff was a publisher of a national music magazine that had since the 1950s an award for outstanding high school bands called the "John Philip Sousa Band Award", named after the author of "Semper Fidelis", the official march of the US Marine Corps. The US Marine Corps started giving awards in 1980 for its own musicians called the "John Philip Sousa Award for Musical Excellence". Despite Sousa own life being inextricable from the defendant's institution, a nationwide injunction was granted against the US Marine Corps using Sousa's name and likeness, in a judgment that was affirmed upon appeal.[252]

In his 1981 article, Lange had proposed five measures for courts to give greater recognition to the public domain: say "no" to overreaching plaintiffs; require plaintiffs to demonstrate a *prima facie* case; accompany this with an impact statement on the effect on subsequent cases; appointing counsel to act as a guardian for the public domain; and courts should specify what material is not included in copyright protection, to clarify what falls in the public domain.[253] However, in 2003 Lange published a further sequel article, partly in reaction to and expanding upon Boyle's work.[254] Lange now takes an even more forward position that "it is protection, not merely recognition or definition, that we need".[255] He first proposes an idea relating the activity of creation to citizenship, that just as citizens have certain inalienable rights in a country, creators have certain rights to create.[256] He then proposes a massive adoption of fair use: all creative activity should be presumed fair use and transformative unless it is found to be straightforward piracy.[257]

If Lange's advocacy for the public domain is fervent, Jessica Litman's observations about the public domain are more dispassionate but perhaps more incisive.[258] She notices that the Romantic notions of creation *ex nihilo* and originality are mythical fictions that underlie

[251] *Instrumentalist Co v. Marine Corps League* 509 F. Supp. 323 (N.D. Ill. 1981)
[252] *Instrumentalist Co v. Marine Corps League* 694 F.2d 145 (7th Cir. 1982)
[253] Lange (1981) 173–177.
[254] David Lange, 'Reimagining the Public Domain' (2003) 66 Law and Contemporary Problems 463.
[255] Lange (2003) 475.
[256] Lange (2003) coins "Civis musarum sum" (p. 483), as an analogy to the Roman maxim "Civis Romanus sum" (p. 476).
[257] Lange (2003) 479–482.
[258] Jessica Litman, 'The Public Domain' (1990) 39 Emory LJ 965.

the foundations of authorship in copyright law. As much as EU law refers to "originality" as "the author's own intellectual creation", every new work is in fact a combination and transformation of past expressions and ideas. The public domain is what enables and sustains the fiction of authorship, by allowing the possibility of someone creating something using material that is not restricted by copyright. Therefore, the public domain is crucial to the survival of copyright law, without which the Romanticised concepts of authorship and originality would collapse. Or, in other words, if the public domain does not have sufficient material in it, copyright law as we know it would not work.

4.2 Mitigating impact on the public domain

An excellent example of the court balancing the interests of copyright holders and the public domain is the recent UK case of *LIDL v Tesco* in the Court of Appeal (2024). Discussed earlier in Chapter III (2.2.1 (*The author's own intellectual creation as originality*)), the case concerned the artwork of a yellow circle in a blue square, which functioned as LIDL's logo and the Clubcard discount sign for Tesco.



Figure 19: LIDL Logo.[259]



Figure 20: Tesco Clubcard signage.[260]

[259] *LIDL v Tesco* [2].
[260] *Ibid*. [3].

Having passed the first stage of copying in the infringement test, the claim failed at the last, substantial part stage of the test.

> Tesco have not copied at least two of the elements that make the Stage 3 Work original, namely the shade of blue and the distance between the circle and the square. . . . Although Tesco have copied the visual concept of a blue square surrounding (among other material) a yellow circle, that is all they have done.[261]

The particular shades of blue and the distances between the circles' perimeters and the squares seem very fine margins on which to determine the question of substantial part. However, this was only the legal language of achieving a policy objective: should someone just be able to claim monopoly over any yellow circle on any blue square? Or would that be tantamount to protecting an idea that should properly belong to the public domain, so that others can also use that idea? For Arnold LJ, his judgment suggests that at least two, if not all three of the elements that make this work original must have been copied before a substantial part finding could be enabled. These are: "(i) the precise shade of blue, (ii) the positioning of the Stage 2 Work centrally within the square and (iii) the distance between the edge of the Stage 2 Work and the edges of the square".[262]

Arnold LJ explained this was required here because "[a]lthough the Stage 3 Work is sufficiently original to attract copyright, the scope of protection conferred by that copyright is narrow".[263] The doctrinal crux of this is the proposition of relative protection that, as discussed earlier, Arnold LJ reintroduced into British jurisprudence through the case of *THJ v Sheridan* (2023): a low level of creativity narrows the scope of copyright protection, such that only a close copy would infringe.[264] In *LIDL v Tesco*, the placement of a yellow circle in a blue square represented such a low level of creativity that only a close copy, as in one that satisfied a combination of the three attributes, could infringe.

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[261] *Ibid*. [194]. The omitted sentence concerned subtleties between the "Stage 2" and "Stage 3" works.
[262] *Ibid*. [191]
[263] *Ibid*. [194].
[264] See *THJ v Sheridan* and see discussion in Chapter III Section 2.2.1 (*The author's own intellectual creation as originality*). This is arguably a reintroduction because, as Andreas Rahmatian argues, this is a British concept that had been recognised as early as *Kenrick v Lawrence* (see note 106 *supra*).

The proposition of relative protection is a powerful and necessary tool to rebalance public domain interests and should be applied to other cases of copyright. For example, it was argued earlier that in *Sheeran* the combination of the shared features of (1) the pitch sequence similarity, (2) the repetition similarity, (3) the diphthong similarity of "Oh I/Why" and (4) the similarity in instrumentation should have led the court to infer copying.[265] However, it is also observed that it should require the combination of *all* four features for the hypothetical consideration of substantial part to be viable. For example, without the diphthong similarity, the remainder of the musical phrase would simply be an evenly played ascending pentatonic scale—a motif of very low creativity. It is only upon the combination with a very specific palette of sounds ("Oh I/Why") that makes this a particularised musical phrase, taking it from the realm of ideas to the realm of a precise expression. Therefore, according to Arnold LJ's proposition of relative protection, the precise diphthongs must also be very similar to infringe.

Music turns on extremely fine margins. For classical musicians, countless hours are devoted to the practise of a seemingly minor musical nuances or mastering awkward difficulties. For Sheeran, we know that he himself spent time debating and exploring what exact words to sing in the chorus, journeying through "heya", "hey now", "Oh I", and possibly some others.[266] These fine margins mean that the copyright protection attracted by musical phrases should also be extremely thin, like tiny pores in a massive and rich manifold of all possible musical expressions.

What this resists is the wide-sweeping protection that was given in the US case of *Williams v. Gaye* concerning "Blurred Lines", where infringement was given despite the two songs not sharing so much as a complete musical phrase. The plaintiff argued for a "constellation" of eight musical elements from different parts of the defendant's song, the most important of which was "Theme X", a simple backup vocals motif of little distinction involving two adjacent pitches lasting shorter than a bar.[267] The dissenting judge summed up why this was the incorrect outcome:

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[265] See Chapter III Section 3.3.3 (*Parametric isolation in action*).
[266] *Sheeran* [54(5)].
[267] *Williams v. Gaye* 12.

> That might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these "constellations" is that they're both compositions of stars.[268]

On the contrary, the four features I have argued that the OW Hook and the OI Phrase share combine to make a single musical phrase, which can be identified with precision as a musical unit that might be taken from one work to another. If the Ninth Circuit had also insisted on a narrow scope of protection on the alleged "constellation", that would have prevented a judicial decision that overreached excessively into the public domain.

The policy implications of copyright doctrine are invariably complex, if not controversial. By allowing the court to relate the scope of copyright protection with the level of creativity in the relevant work, the proposition of relative protection is a powerful balancing tool at the court's disposal.

[268] *Ibid*. 57 per Judge Nguyen.

Chapter V: Conclusion

The research question for this thesis was: *can the UK legal test for musical works copyright infringement by copying be improved in its operation or its doctrine*? Having set up parametric isolation as a concept through explanation and science, the thesis argued for its main doctrinal claim: the Disregarding Statement should be removed from the first, copying stage of Lord Millett's copyright infringement test in *Designers Guild*. This removes the encouragement to carry out parametric isolation in the process of carrying out the infringement test, refining the doctrine and improving the operation of the UK legal test for musical works copyright infringement. It was also argued that parametric isolation is inappropriate for any part of the copyright infringement test. It causes courts to miss the wood for the trees.

The thesis also made several subsidiary claims. It was argued that parametric isolation became increasingly dominant in UK musical works copyright jurisprudence over the last century, particularly after the case of *EMI v Papathanasiou* (1987). In relation to the case study of *Chokri v Sheeran* (2022), it was argued that the court erred in not inferring copying, by misapplying Lord Millett's test from *Designers Guild*, carrying out parametric isolation, and not following the proper structure of the infringement test. Most significantly, the discussion around originality clarified that it is important to reserve the use of "originality" to refer to legal originality, of expressing the author's own intellectual creation reflecting their personality. A use of the same term to refer to the non-legal concept of exclusive origination—whether an expression might already exist elsewhere—can create unhelpful confusion. Finally, the thesis adopted the proposition of relative protection as a powerful tool to balance interests between copyright holders and the public domain.

Going further, a thorough investigation into copyright doctrine in relation to musical works cannot escape a profound exploration of what a "musical work" means in the context of copyright law. Reference is made to the discussion in section 2.2.2 in Chapter III (*Works and music*). Whatever the musical work is—be it an idea in the composer's head, an idealised sound, or an actual collection of sound recordings—it cannot be the musical score that is transcribed for the court and its expert witnesses to dissect, as they have in parametric

isolation. In other words, a deeper reflection on parametric isolation reveals that it is not even studying the right thing: the music that we all hear, enjoy and embrace to be part of our lives.

Musical Glossary

This musical glossary is provided to assist with understanding the musical terms referred to in the thesis. These explanations have that purpose only and are not designed to withstand the scrutiny of musicology, wherein the precise meanings of these terms are often controversial.[269]

Articulation means the way that notes are performed, usually relating to the start, end and length of a note. Examples are accents, staccato and legato.

Call and response means a structure where two musical phrases have a paired relationship, with one as an answer to the other.

Chorus means a recurring part of the song that comes after each verse. It often has lyrics and a mood that encapsulates the core message of a song.

Crotchet means a note the length of a beat in common time (four beats in a bar), which is drawn with an independent stem and a filled notehead.

Dynamics means volume. Dynamics of a phrase can refer to the contour of volume across it.

Elision means a connection between notes that may sound like a slide. In the linguistic world, this might be analogous to contractions, such as "I'm".

Grace note means a very short decorative note that does not form a part of the structure of the melody or music.

Harmony is usually associated with the accompaniment to a melody, the multiple notes of which can assign a key to a musical moment. For example, these notes can form major or minor chords.

Interval means the pitch distance between two notes.

Legato means a type of articulation where multiple notes are linked together smoothly.

Major chord means a chord that includes the major third in the scale.

Major third means an interval of four semitones.

Melodic line means the line that carries the melody, usually the line sung by the lead singer in popular music.

Meter means the rhythmic structure of a bar, such as four crotchets in a bar for common time.

Metric stress means the notion that the first beat of a bar is usually the strongest beat.

Minor chord means a chord that includes the minor third in the scale.

Minor third means an interval of three semitones.

[269] See Thomas Christensen (ed), *The Cambridge History of Western Music Theory* (Cambridge University Press 2002); and Alexander Rehding and Steven Rings (eds), *The Oxford Handbook of Critical Concepts in Music Theory* (Oxford University Press 2020).

Octave doubling means the simultaneous existence of two notes of the same pitch letter name but in different registers. It does not contain sufficient information to define harmony because, without intervening notes like the third, it is ambiguous as to, for example, major or minor.

Orchestration means the choice of instruments or voice.

Ostinato means an element that repeats ceaselessly throughout a musical passage, usually as an element in the accompaniment.

Passing note means an unimportant note, usually occurring between two chords, that does not form a part of the harmonies of the chords between which it sits.

Pentatonic scale means a shorter scale made of five notes comprising of the first, third, fourth, fifth and seventh degrees of the normal scale.

Phrase structure means how a phrase is constructed, of which call and response is an example.

Pitch means a sound frequency usually denoted by a letter between A and G in a cyclical manner across registers or octaves.

Pitch Contour means the shape of upward and downward travel in pitch over a phrase.

Pitch Sequence means a sequence of pitches.

Pre- or Post-chorus means a recurring musical passage before or after a chorus that usually does not have the same importance in conveying the message of a song.

Quaver means a note half the length of a crotchet, denoted by a stem with a single flag and a solid notehead.

Register is a description of how high a note is. As an intuitive analogy, it refers to the region on the piano's keyboard in which a note lies.

Rhythm means the temporal aspect of a musical motif that defines the length of each pitch, denoted by note lengths such as crotchets and quavers.

Scale degree means the ordinal element number of a note in a scale. For example, in a C major scale, C is the first degree, D is the second degree, and B is the seventh degree.

Semitone means the smallest defined pitch distance that can be notated in normal score notation.

Staccato means a type of articulation where notes are played sharply and not sustained for the entire notated length.

Tempo means the speed of beats.

Texture means the thickness and richness of a musical moment of phrase. In extremis, a solo voice is a thin texture and a full orchestra is a thick texture. Texture can also be created by complexity in harmony.

Tonality means the key that a musical passage or locality occupies.

Transposition means the transportation of pitches to a different key by maintaining the scale degree of each note.

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