

COMPOSING NUMEROSITY: DEFINING THE NUMEROSITY REQUIREMENT IN MUSICAL COMPOSITION COPYRIGHT CASES*

I. INTRODUCTION

In 2014, a songwriter, mourning the death of his grandfather, began writing what would later become the hit song “Thinking Out Loud”—that songwriter was, of course, Ed Sheeran.¹ By 2023, that same song had become the subject of multiple copyright infringement lawsuits.² The cases involving Ed Sheeran’s “Thinking Out Loud” exemplify a troubling trend in the music industry—the attempted monopolization of the public domain.³ The mechanism used by copyright owners to seek this monopolistic control is the selection and arrangement doctrine.⁴ This doctrine holds that a combination of unprotectable elements can be protected if the elements are selected or arranged in an original way.⁵ To be “original,” the selection and arrangement must demonstrate some small amount of creativity.⁶ This vague notion of creativity led to the Ninth Circuit’s adoption of the numerosity requirement,⁷ which states that for a combination of unprotected elements to be eligible for copyright protection, the elements must be “numerous.”⁸

Since the Ninth Circuit first raised the issue of numerosity in *Satava v. Lowry*,⁹ no court attempted to define “numerosity” or to set its outer bounds until *Structured Asset*

* Andrew L. Rosen, J.D. Candidate, Temple University Beasley School of Law, 2025. I thank Professor Laura Little, for her wisdom; my family, for their support; and my fellow *Temple Law Review* colleagues for their dedication and hard work. A special thanks goes to my co-editor, Haley Platt. I would also like to thank all those who mentored me over the years, fueling my drive, passion, and enduring love of music; without them this Comment would not have come to pass.

1. Daniel Kreps, *Ed Sheeran Wins ‘Thinking Out Loud’ Copyright Trial*, ROLLING STONE (Sept. 25, 2023), <https://www.rollingstone.com/music/music-news/ed-sheeran-not-liable-thinking-out-loud-trial-1234724464/>.

2. See Ben Sisario, *6 Takeaways from Ed Sheeran’s ‘Let’s Get It On’ Copyright Case*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/arts/music/ed-sheeran-marvin-gaye-copyright-trial.html>; Chris Willman, *Ed Sheeran Prevails in a Second ‘Thinking Out Loud’ Lawsuit, as Judge Dismisses Similar Copyright Case*, VARIETY (May 17, 2023, 8:38 AM), <https://variety.com/2023/music/news/ed-sheeran-second-copyright-lawsuit-dismissed-thinking-out-loud-1235616116/> [https://perma.cc/EY9W-ZM4F].

3. See, e.g., *Structured Asset Sales, LLC v. Sheeran (Sheeran II)*, 673 F. Supp. 3d 415, 422 (S.D.N.Y. 2023) (describing the claim as “an impermissible attempt to copyright what is already in the public domain and capture what is freely available to all to use”), *aff’d*, 120 F.4th 1066 (2d Cir. 2024).

4. See, e.g., *id.* at 424 (describing a selection and arrangement claim as an attempt to gain an “impermissible monopoly over a basic musical building block”).

5. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

6. *Id.*

7. Diane Leenheer Zimmerman, *It’s an Original! (?)*: In Pursuit of Copyright’s Elusive Essence, 28 COLUM. J.L. & ARTS 187, 189 n.18 (2005).

8. *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

9. 323 F.3d 805 (9th Cir. 2003).

Sales, LLC v. Sheeran (Sheeran II)—twenty years later.¹⁰ While the court in *Sheeran II* found that two elements cannot be enough to establish originality in a combination of unprotectable musical elements, one question still lingers: How many elements are enough?¹¹

Determining numerosity in the musical composition context is particularly troublesome because of music's inherent complexities and technicalities that are foreign to lay juries and judges.¹² Music is rarely, if ever, created from nothing. When a composer or songwriter puts pen to page, or strikes the keys of their MIDI keyboard,¹³ some aspect of the resulting work was likely borrowed from the public domain or was the product of inspiration.¹⁴ Music is a combination of various elements, the most basic of which are melody, harmony, and rhythm.¹⁵ Harmony, especially, is made up of many different musical elements that are consistently borrowed from one work to the next due to the strict rules and traditions governing their usage.¹⁶ The chord progression is one such element that is both heavily recycled and frequently litigated in the copyright infringement space.¹⁷ In *Sheeran II*, the combination in dispute was that of a chord progression and its harmonic structure.¹⁸

Without a more defined numerosity requirement, copyright owners will be able to continuously attempt to gain control over elements that have long been part of the public domain.¹⁹ This Comment seeks to further define numerosity in the musical composition context to ensure protection of the public domain so up-and-coming songwriters can practice their creativity without constant fear that their efforts will land them in court unnecessarily. Part II.A explores the origins of the selection and arrangement doctrine and the numerosity requirement, culminating in its application to musical compositions. Part II.B explains the various elements in musical compositions and how they are interpreted within the domain of copyright law. Part II.C then traces through a handful of cases applying the selection and arrangement doctrine to musical

10. See *Sheeran II*, 673 F. Supp. 3d 415, 421–22 (S.D.N.Y. 2023), *aff'd*, 120 F.4th 1066 (2d Cir. 2024).

11. *Id.* at 422–23. See *infra* note 167 for reference to the Second Circuit's November 2024 decision.

12. RONALD S. ROSEN, MUSIC AND COPYRIGHT 152 (2008).

13. MIDI stands for “Musical Instrument Digital Interface.” Rob Wreglesworth, *A Beginner's Guide to MIDI: What Is It? How Does It Work?*, MUSICIAN'S HQ, <https://musicianshq.com/a-beginners-guide-to-midi/> [https://perma.cc/CY84-YFR5] (last visited Aug. 20, 2024). Put simply, a MIDI keyboard connects to a computer as a method for translating keys struck into musical notes through music notation software. See *id.*

14. See Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 254 (2013); Suzanne Kessler, Ramona DeSalvo, Sara Ellis & Loren Mulraine, *Bringing Blurred Lines into Focus*, 3 BELMONT L. REV. 103, 107 (2016) (explaining that “inspiration in the past has always been a part of the creative process in the songwriter's craft”).

15. ROSEN, *supra* note 12, at 153.

16. Peter Nicolas, *Harmonizing Music Theory and Music Law*, 108 IOWA L. REV. 1247, 1268 (2023); Livingston & Urbinato, *supra* note 14, at 254.

17. See ROSEN, *supra* note 12, at 164–65 (explaining what a chord progression is and noting its appearances in litigation).

18. *Sheeran II*, 673 F. Supp. 3d 415, 420 (S.D.N.Y. 2023), *aff'd*, 120 F.4th 1066 (2d Cir. 2024).

19. See *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *Gray v. Hudson*, 28 F.4th 87, 102 (9th Cir. 2022).

compositions to determine how courts analyze such cases and how numerosity factors into judicial decisions.

Part III.A argues that a brighter line regarding numerosity is warranted for the safeguarding of the public domain, creativity, and innovation in the musical composition space. Part III.B then analyzes the cases in Part II.C to determine where that brighter line should be and addresses other factors a court should consider when faced with a copyright suit based on the selection and arrangement of unprotectable elements.

II. OVERVIEW

A. *Copyright Law, Originality, and the Selection and Arrangement Test*

Before delving into the weeds of protecting the unprotectable, a few basic principles of copyright law must be established. First, copyright law does not protect facts.²⁰ Additionally, the Copyright Act has made explicitly clear that “[i]n no case does copyright protection for an original work of authorship extend to any idea.”²¹ If facts and ideas are unprotectable, then what exactly does copyright protect? Expression.²² Section 102(a) establishes that the Copyright Act protects “original works of authorship fixed in any tangible medium of expression.”²³ Expression, as Justice Holmes described, “is the personal reaction of an individual upon nature.”²⁴ Such a personal reaction would produce a potentially copyright-worthy expression, as one’s personality is inherently unique and singular.²⁵

1. Origins of Originality in U.S. Copyright Law

Closely tied to the concept of expression is that of originality. Section 102(a) of the Copyright Act states that only “original works” may garner protection.²⁶ The inclusion of originality as a requisite for copyright protection was first discussed in 1879 by the Supreme Court in the *Trade-Mark Cases*.²⁷ The question before the Court was whether Congress had constitutional authority to legislate regarding trademark.²⁸ The Court held that the relationship between trademark²⁹ and copyright was too attenuated to accept that the intellectual property clause of the Constitution also applied

20. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (emphasizing that it is “universally understood” that “facts are not copyrightable”).

21. 17 U.S.C. § 102(b).

22. *Id.* § 102(a).

23. *Id.*

24. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

25. *Id.* (“[A] very modest grade of art has in it something irreducible, which is one man’s alone.”).

26. 17 U.S.C. § 102(a).

27. Zimmerman, *supra* note 7, at 200 (citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)) (explaining that the Supreme Court addressed originality as a constitutional prerequisite for copyrightability in the *Trade-Mark Cases*).

28. *The Trade-Mark Cases*, 100 U.S. 82, 91–92 (1879).

29. 15 U.S.C. § 1127 (providing trademark protection for any “word, name, symbol, or device, or any combination thereof” that is used or intended to be used by a person in commerce “to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods”).

to trademark.³⁰ The Constitution's intellectual property clause provides Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³¹

In distinguishing copyright from trademark, the Court emphasized that a copyright must be original and that such originality results from "the fruits of intellectual labor," "founded in the creative powers of the mind."³² While originality was elucidated in the 1879 *Trade-Mark Cases*, the legislature did not explicitly mandate an originality requirement in the 1909 version of the Copyright Act ("1909 Act") that followed shortly after.³³ Despite this lack of a statutory originality definition or requirement, courts repeatedly found that the requirement of originality was implicit in the designation that only an "author" may claim copyright protection.³⁴ If an author conceived of the work, it would be considered original.³⁵ However, as later clarified by the U.S. Supreme Court, independent creation by an author is only half of the originality equation—this creation must also "possess[] at least some minimal degree of creativity" to be considered original and warrant copyright protection.³⁶

2. Copyrightable Compilations and the Rise of the Selection and Arrangement Test

Also recognized in the 1909 Act was the protection for compilations of original works.³⁷ The 1909 Act stated that "compilations . . . shall be regarded as new works subject to copyright under the provisions of this Act."³⁸ However, it qualified that such protection "shall not . . . be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."³⁹ Absent from this language is the now-recognized notion that not only can an individual gain copyright protection over a compilation of previously copyrighted works or works in

30. *The Trade-Mark Cases*, 100 U.S. at 94.

31. U.S. CONST. art. I, § 8, cl. 8.

32. *The Trade-Mark Cases*, 100 U.S. at 94 (emphasis omitted).

33. Act of March 4, 1909, Pub. L. No. 60-349, §§ 4, 6, 35 Stat. 1075, 1076–77 ("That the works for which copyright may be secured under this Act shall include all the writings of an author."); *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991) ("The 1909 Act embodied the originality requirement, but not as clearly as it might have. . . . By using the word 'writings' and 'author' . . . the statute necessarily incorporated the originality requirement articulated in the Court's decisions [in the *Trade-Mark Cases* and *Burrow-Giles Lithographic Co. v. Sarony*]. It did so implicitly, however, thereby leaving room for error.").

34. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[A] (2023).

35. *Id.* (explaining that "[o]riginality in the copyright sense means only that the work owes its origin to the author").

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

37. Act of March 4, 1909, Pub. L. No. 60-349, § 6, 35 Stat. 1075, 1077.

38. *Id.*

39. *Id.*

the public domain,⁴⁰ but one can also potentially protect a compilation of facts or otherwise unprotectable material.⁴¹

Unfortunately, due to the ambiguity in the statute regarding originality and compilations, some courts misread the 1909 Act provision, inferring that compilations were “copyrightable *per se*, ‘without any further or precise showing of original—personal—authorship.’”⁴² This confusion also led to the now defunct “sweat of the brow” doctrine which put originality aside and claimed that hard work was rewarded with copyright protection.⁴³

In 1976, Congress repealed the 1909 Act and replaced it with the Copyright Act of 1976 (“1976 Act”).⁴⁴ Two relevant changes were the inclusion of a “compilation” definition in Section 101⁴⁵ and the addition of Section 103, which further explained compilation copyright protection.⁴⁶ The 1976 Act defined “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁴⁷ Section 103 of the 1976 Act stated that a “copyright in a compilation . . . extends only to the material contributed by the author . . . and does not imply any exclusive right in the preexisting material.”⁴⁸ If any ambiguity remained as to what a compilation could include, the House report to the 1976 Act crystalized the legislative intent that a compilation may include all kinds of existing material even if such material is protectable by copyright.⁴⁹

In 1991, the Supreme Court faced the intersection between compilations, originality, and creativity in the seminal case, *Feist Publications, Inc. v. Rural Telephone Service Co.*⁵⁰ The facts of this case, as well as the allegedly copyrighted facts at issue, are rather mundane. Rural was a telephone service provider with a monopoly over its northwest Kansas territory.⁵¹ It published an ordinary phone book with white and yellow pages.⁵² Feist was a company that specialized in the publication of such phone books.⁵³ Having failed to receive a license to use Rural’s white pages

40. *Id.* (stating that compilations may consist of “versions of works in the public domain” and “copyrighted works when produced with the consent of the proprietor of the copyright in such works”).

41. *Feist*, 499 U.S. at 344 (explaining that a compilation of facts being generally protectable is a “well-established proposition[]”).

42. *Id.* at 352 (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1895 (1990)).

43. *Id.* at 352–53.

44. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in Title 17 of the U.S. Code).

45. 17 U.S.C. § 101 (1976).

46. *Id.* § 103.

47. *Id.* § 101.

48. *Id.* § 103.

49. H.R. REP. NO. 94-1476, 57–58 (1976) (“A ‘compilation’ results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright.”).

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

51. *Id.* at 342.

52. *Id.*

53. *Id.*

listings, Feist used them anyway.⁵⁴ After Rural sued Feist for copyright infringement, the district court granted Rural's motion for summary judgment reasoning that "[c]ourts have consistently held that telephone directories are copyrightable."⁵⁵

In reversing the decision of the lower courts, the Supreme Court reestablished the importance of originality and attempted to clarify the role of creativity both generally and regarding compilations.⁵⁶ The Court stated that originality, through its implied existence within the meaning of "writings" and "authors" as used in the Intellectual Property Clause of the Constitution,⁵⁷ is itself a constitutionally mandated requirement.⁵⁸ To support this contention, the Court pointed to the fact that the *Trade-Mark Cases* required originality for a writing to receive copyright protection.⁵⁹ The Court also highlighted *Burrow-Giles Lithographic Co. v. Sarony* "defin[ing], 'author,' in a constitutional sense, to mean 'he to whom anything owes its origin; originator; maker.'"⁶⁰

The Court then reaffirmed that facts can never be original—that they "are part of the public domain available to every person."⁶¹ At the same time, the Court recognized that "[f]actual compilations . . . may possess the requisite originality" necessary for copyright protection.⁶² The Court articulated what is known today as the selection and arrangement test—if a selection and arrangement of material is made independently and is minimally creative, the selection and arrangement would be considered original and copyright protection may be justified.⁶³ The copyright, if granted, would be "thin," meaning the copyright protection only extends to the specific selection and arrangement, rather than to the material being selected and arranged.⁶⁴

"The key," as the Court put it, to succeeding on a copyright infringement claim involving a factual compilation, is selecting and arranging the factual material in an original way.⁶⁵ The Court concluded that the language of the statute should be read to render some "selection[s], coordination[s], and arrangement[s] . . . not sufficiently original to trigger copyright protection."⁶⁶ Since originality is understood to require independent creation and a "minimal level of creativity," it is not a difficult obstacle to

54. *Id.* at 343.

55. *Id.* at 344 (alteration in original) (citation omitted).

56. *See id.* at 363–64.

57. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .").

58. *Feist*, 499 U.S. at 346 (first citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879); and then citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

59. *Id.* (citing *The Trade-Mark Cases*, 100 U.S. at 94).

60. *Id.* (citing *Sarony*, 111 U.S. at 58).

61. *Id.* at 348 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981)).

62. *Id.*

63. *Id.*

64. *Id.* at 349.

65. *Id.* at 358 (explaining that "[n]ot every selection, coordination, or arrangement will pass muster," and that the statute "implies that some 'ways' will trigger copyright, but that others will not").

66. *Id.*

overcome.⁶⁷ However, as shown by the outcome, some works will lack even that necessary hint of creativity or risk being “so trivial as to be virtually nonexistent.”⁶⁸

As for the facts at issue in *Feist*, to succeed on its copyright infringement claim, Rural had to prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶⁹ It was quickly recognized that Rural owned a valid copyright in its telephone book as a whole.⁷⁰ The dispositive question, however, was whether the material that Feist copied was sufficiently original.⁷¹ Because Rural held no copyright protection over the factual material, its only route to success was to show that its selection and arrangement of the white page listings was done in an original way.⁷² Regarding arrangement, the Court determined that the alphabetical nature of the listings was too “typical,” “mechanical,” and “routine,” to be sufficiently creative.⁷³ Likewise, the “obvious” basic information in the listings could not be said to possess the “modicum of creativity necessary to transform mere selection into copyrightable expression.”⁷⁴ The Court reversed the infringement finding in the lower court, holding that “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity” and that “Rural’s white pages . . . fall short of the mark.”⁷⁵

Notably, most of the Supreme Court’s discussion in *Feist* regarding compilations was specific to those of a factual nature.⁷⁶ Yet its holding, generalized to “elements of a work,” effectively applies to the selection and arrangement of all unprotectable elements.⁷⁷ Since *Feist*, courts across the country have had to figure out how to measure the undefined creativity standard in selection and arrangement cases.⁷⁸ Frustratingly, *Feist* clarified what sort of selection and arrangement would not be sufficiently creative—an alphabetical listing of basic information—but it did not provide further insight into what would be satisfactory.⁷⁹

67. *Id.* at 358–59.

68. *Id.* at 359.

69. *Id.* at 361.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 362.

74. *Id.*

75. *Id.* at 363–64.

76. *See id.* at 358 (“[T]he facts must be selected, coordinated, or arranged ‘in such a way’ as to render the work as a whole original.” (emphasis added)).

77. *See id.* at 361.

78. Zimmerman, *supra* note 7, at 189 (“Lower courts have spent the past decade struggling to make sense of the creativity requirement in *Feist*”); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 1999 (2011) (explaining that the legal profession is ill-equipped to grapple with the concept of creativity).

79. *See Feist*, 499 U.S. at 363; Zimmerman, *supra* note 7, at 188 (explaining that *Feist* “offered no real answer” as to what the necessary minimum level of creativity is).

3. The Numerosity Requirement Enters the Fray

In 2003, the Ninth Circuit instituted the numerosity requirement as a potential answer to the problem that *Feist*'s purposely vague creativity requirement created.⁸⁰ *Satava v. Lowry* involved a copyright infringement suit between two dueling glass artists.⁸¹ Richard Satava, a glass artist from California, created and sold "glass-in-glass jellyfish sculptures," some of which appeared in Hawaiian tourist brochures and art magazines.⁸² Around the same time, Hawaii-based sculpturer Christopher Lowry began selling similar glass-in-glass jellyfish sculptures.⁸³ Satava filed suit shortly after discovering his competition.⁸⁴ Recognizing that facts and ideas cannot be copyrighted, the Ninth Circuit made note that "expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law."⁸⁵ The court found that Satava could not claim copyright over the "centuries-old art form" of glass-in-glass sculpture, nor could he claim copyright over the elements common to jellyfish physiology.⁸⁶ Each element present was part of the public domain and unavailable to Satava for copyright.⁸⁷

Having found that no singular element was subject to copyright protection, the next question became whether the "combination of unprotectable elements may qualify for copyright protection."⁸⁸ At this juncture, the court referenced the numerosity test.⁸⁹ It held "that a combination of unprotectable elements is eligible for copyright protection only if those elements are *numerous* enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."⁹⁰ The court reasoned that, due to the "commonplace" and "trivial" nature of the elements, protecting a combination of those elements would be akin to a monopoly.⁹¹ The Ninth Circuit reversed the trial court's infringement determination, concluding that due to the lack of originality present in the combination no protection was justified.⁹²

80. Zimmerman, *supra* note 7, at 189 n.18 ("One recent, creative attempt [to make sense of *Feist*'s creativity requirement] is the development of a 'numerosity' test in the 9th Circuit.").

81. *Satava v. Lowry*, 323 F.3d 805, 809 (9th Cir. 2003).

82. *Id.* at 807–09.

83. *Id.* at 808–09.

84. *Id.* at 809.

85. *Id.* at 810 (citing *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983)).

86. *Id.* at 811.

87. *Id.* (listing the following jellyfish-centric depictions as unprotectable because they are common to most jellyfish or aquatic animals: "tendrill-like tentacles or rounded bells," "bright colors," "swimming vertically," housed in a clear glass setting. Also listing the following elements standard in glass-in-glass sculpture work and thus unprotectable: "depicting jellyfish 'almost filling the entire volume' of the outer glass shroud," and "tapering the shape of the[] shrouds").

88. *Id.*

89. *See id.*

90. *Id.*

91. *Id.* at 812.

92. *Id.* at 812–13.

Through its holding, the court instituted a two-part conjunctive test: To gain copyright protection, a combination of elements must be both numerous *and* original.⁹³ However, in applying the rule, the court did not address the numerosity requirement; it only discussed whether the combination was sufficiently original.⁹⁴ There are two potential reasons for this omission: (1) the court thought addressing numerosity was unnecessary since the sculpture would not meet the originality requirement, or (2) the court tacitly determined that the sculpture passed the numerosity requirement and therefore felt no need to address it.⁹⁵

Shortly after *Satava*, a similar case involving a combination of elements in a lamp came before the Ninth Circuit: *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*⁹⁶ The lamp consisted of “four preexisting ceiling-lamp elements with a preexisting table-lamp base.”⁹⁷ In its discussion of whether a combination of five unprotectable elements may be eligible for copyright protection, the court brought in *Satava* to assist.⁹⁸ The court noted that in *Satava* it found “that the combination of six unprotectable elements did not rise to the level of originality sufficient to merit copyright protection.”⁹⁹ Thus, the *Lamps Plus* court determined that a “mechanical combination” of five preexisting elements “did not result in the expression of an original work of authorship,” rendering the copyright invalid.¹⁰⁰

Again, the standard set forth by the Ninth Circuit is as follows: “[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.”¹⁰¹ While both *Satava* and *Lamps Plus* referenced the number of elements at work in their respective combinations, both dispositions rested on the lack of originality rather than the actual number of elements.¹⁰²

Notably, the specific nature of the works in *Satava* and *Lamps Plus* rendered them highly susceptible to uncopyrightability.¹⁰³ The jellyfish sculpture in *Satava* consisted mostly of elements common to jellyfish and routine in glass-in-glass sculpture¹⁰⁴ and the lamp in *Lamps Plus* was assembled in a purely mechanical way,¹⁰⁵ reminiscent of

93. *See id.* at 811.

94. *See id.* at 811–12.

95. *See id.* at 811.

96. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140 (9th Cir. 2003).

97. *Id.* at 1147.

98. *See id.* (citing *Satava*, 323 F.3d 805).

99. *Id.*

100. *Id.*

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

102. *See id.* at 812 (stating that “[b]ecause the quantum of originality *Satava* added in combining these standard and stereotyped elements must be considered ‘trivial’ under our case law, *Satava* cannot prevent other artists from combining them”); *Lamps Plus*, 345 F.3d at 1147 (“The Victorian Tiffany table lamp ‘lacks the quantum of originality needed to merit copyright protection.’” (quoting *Satava*, 323 F.3d at 811)).

103. *See Satava*, 323 F.3d at 811; *Lamps Plus*, 345 F.3d at 1147.

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

105. *Lamps Plus*, 345 F.3d at 1147.

the alphabetical listing in *Feist*.¹⁰⁶ In fact, the *Satava* court acknowledged that such works might even fall within merger doctrine territory—although it found application of that rule unnecessary.¹⁰⁷

This Comment is not about sculptures or lamps—it is about music. However, the *Satava* test applies not just to sculptural works, but to all works featuring element combinations—including musical compositions.¹⁰⁸

4. The Ninth Circuit Introduces the Numerosity Requirement to Musical Works

In 2020, *Skidmore v. Led Zeppelin* allowed the Ninth Circuit to apply the numerosity requirement to musical compositions.¹⁰⁹ *Skidmore* involved a copyright battle in which it was alleged that Led Zeppelin's "Stairway to Heaven" infringed upon the copyright of Randy Wolfe's "Taurus."¹¹⁰ After Led Zeppelin won at trial, many issues were raised on appeal—one being whether the district court erred in omitting a selection and arrangement jury instruction.¹¹¹ While the Ninth Circuit showed there was no error,¹¹² the court nevertheless engaged in a substantive analysis of why there was no original combination worthy of copyright protection.¹¹³

The court clarified that, to present a successful selection and arrangement argument, a relationship among the particular elements must be shown to "create [an] overall design, pattern, or synthesis."¹¹⁴ The five elements put forth were found not to have "form[ed] a holistic musical design" but were instead likened to "random similarities scattered throughout [the relevant portions of] the works."¹¹⁵ The court opined that allowing copyright protection over a disparate set of unprotectable elements would be contrary to the court's efforts to "maintain[] a vigorous public domain."¹¹⁶ While the court did not provide a holding regarding the numerosity requirement, it

106. *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

107. *Satava*, 323 F.3d at 812 n.5 ("Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea." (citing *CDN Inc. v. Kapes*, 197 F.3d 1256, 1261 (9th Cir. 1999))).

108. *See id.* at 811 (discussing the "combination of unprotectable elements" in broad language so as to encompass all compilations, not just those pertaining to sculpture).

109. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1074 (9th Cir. 2020) ("We have extended copyright protection to 'a combination of unprotectable elements . . . only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.'" (omission in original) (quoting *Satava*, 323 F.3d at 811)).

110. *Id.* at 1056.

111. *See id.* at 1056, 1072.

112. *Id.* at 1072–73 (finding first that the objection to the jury instruction omission was not preserved, and second, that the omission was not erroneous in that failing to give the instruction would likely not have prejudiced the jury).

113. *See id.* at 1074.

114. *Id.*

115. *Id.* at 1075 (second alteration in original) (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990)).

116. *Id.* at 1075–76.

reaffirmed that elements must be “numerous enough and their selection and arrangement original enough” for their combination to be protectable.¹¹⁷

B. Music and Copyright Law

A preliminary question to the issue of numerosity in musical works is what constitutes an *element* for purposes of copyright protection.¹¹⁸ The second question is whether the musical element is original or merely commonplace.¹¹⁹ Regarding the musical element determination, “courts have been swimming in a sea of uncertainty.”¹²⁰ This uncertainty likely stems from the complexity inherent in musical compositions—especially since to many, music is a foreign language.¹²¹ Additionally, the frequent blending of idea and expression is common in musical works.¹²² Despite these issues, courts have continued to apply the same generalized copyright infringement tests to musical compositions and have yet to clarify the universe of elements available for copyright infringement analysis.¹²³ Since music comprises many elements that may be combined in various ways, these elements merit some explanation.¹²⁴

1. The Musical Elements: Melody, Rhythm, and Harmony

As a starting point, a musical work¹²⁵ may be split into three basic elements: melody, rhythm, and harmony.¹²⁶ In fact, the *Compendium of U.S. Copyright Office*

117. *Id.* at 1074.

118. See *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004) (explaining how a work must be broken down into “constituent elements” so a comparison may be conducted to determine substantial similarity). “Substantial Similarity” is a test conducted in copyright infringement cases once protectability has been established that determines whether the elements in a potentially infringing work are “substantially similar” to the elements in the protected work. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2023). As this Comment pertains only to the determination of originality via numerosity in a combination of unprotected elements, substantial similarity is not discussed.

119. See *Swirsky*, 376 F.3d at 845 (“[I]t is essential to distinguish between the protected and unprotected material in a plaintiff’s work.”).

120. ROSEN, *supra* note 12, at 152; see also *Skidmore*, 952 F.3d at 1075 n.11 (explaining that in *Swirsky*, “the court was trying to fathom which aspects of a musical composition can be used for a similarity analysis, given that no definitive list of musical elements existed in the case law” (citing *Swirsky*, 376 F.3d at 849)).

121. See ROSEN, *supra* note 12, at 32 (noting that expert witnesses are “necessary to translate and interpret musical ideas and language so the jury will know the difference between unprotectable musical ideas available to all composers and original protected expression”).

122. See *Swirsky*, 376 F.3d at 848 (noting that musical works “lack distinct elements of idea and expression”).

123. See *id.* at 849 (stating that the court will not create “a uniform set of factors” as “music is comprised of a large array of elements” that should not be limited).

124. See, e.g., *id.* at 849.

125. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.1 (3d ed. 2021) [hereinafter COMPENDIUM] (“For purposes of copyright registration, musical works (which are also known as musical compositions) are original works of authorship consisting of music and any accompanying words.”).

*Practices*¹²⁷ only lists melody, rhythm, and harmony (along with lyrics) as the main elements of a musical work.¹²⁸ One scholar has duly noted that “*Melody* is extraordinarily difficult to define” but conceded that it may be sufficiently described as “an organised sequence of sounds that are perceived as intrinsically connected.”¹²⁹ A more technical description of melody would be “the combination of linear successive musical notes . . . and their corresponding durational values.”¹³⁰ The musical notes that make up a melody are often called pitches, which “refer[] to how relatively ‘high’ or ‘low’ a note sounds.”¹³¹ The Copyright Office describes rhythm as “the linear succession of durational sounds and silences.”¹³² Rhythm consists of notes of varying durational values, such as “whole, half, quarter, eighth, and sixteenth notes or rests,” represented by corresponding symbols.¹³³ Without rhythm a musical line lacks both structure and organization.¹³⁴ Last, harmony is the vertical structure or combination of pitches to form chords and their progression or movement through a musical line.¹³⁵ When it comes to copyrightability, harmony is perhaps the most troublesome of these three fundamental musical elements due to the many rules and restrictions that govern its usage.¹³⁶

2. Additional Musical Elements

While melody, rhythm, and harmony are high-level fundamental elements, scholars and courts have recognized several other elements that make up musical works

126. ROSEN, *supra* note 12, at 153. *But see* Nicolas, *supra* note 16, at 1260 (“[T]he boundaries between [melody, rhythm, and harmony] are fuzzy, and they are best thought of as three overlapping circles in a Venn diagram.”).

127. *Introduction* to COMPENDIUM, *supra* note 125, at 1 (“The *Compendium* . . . is the administrative manual of the Register of Copyrights concerning Title 17 of the United States Code . . . and provides expert guidance to copyright applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law.”).

128. *Id.* § 802.3.

129. Andreas Rahmatian, *The Elements of Music Relevant for Copyright Protection*, in CONCEPTS OF MUSIC AND COPYRIGHT 78, 94 (Andreas Rahmatian ed., 2015).

130. ROSEN, *supra* note 12, at 153; *see also* COMPENDIUM, *supra* note 125, § 802.3(A) (“Melody is a linear succession of pitches.”). *But see* Nicolas, *supra* note 16, at 1263 (explaining that “music theorists explicitly identify melody as consisting of two key elements: (1) pitch and (2) rhythm, in the sense of note durations”).

131. Nicolas, *supra* note 16, at 1256 (“In Western music, musical pitches are organized into ‘octave[s]’ that are ‘divided into twelve equal semitones, or half steps,’ which form the bases of musical scales.” (alteration in original) (quoting KRISTINE FORNEY, ANDREW DELL’ANTONIO & JOSEPH MACHLIS, *THE ENJOYMENT OF MUSIC* 17 (Maribeth Payne & Chris Freitag eds., 12th ed. 2015))).

132. COMPENDIUM, *supra* note 125, § 802.3(B).

133. Nicolas, *supra* note 16, at 1256 (explaining how durational values are depicted in music).

134. Rahmatian, *supra* note 129, at 94 (“Rhythm is an organisational principal of sounds.”).

135. COMPENDIUM, *supra* note 125, § 802.3(C); ROSEN, *supra* note 12, at 153.

136. Rahmatian, *supra* note 129, at 95 (“[H]armony consists largely of rules that guide us in which way one may achieve a musically satisfying harmonic progression”); *see also* *Sheeran II*, 673 F. Supp. 3d 415, 423 (S.D.N.Y. 2023) (explaining that there are “few[] ways to combine . . . elements in a manner that is pleasing to the ears”).

and form the combinations at issue in this Comment.¹³⁷ These elements are typically considered “building blocks” and by themselves are generally too commonplace to garner individual protection: pitch, form, phrases and motifs, tempo and dynamic markings, and counterpoint.¹³⁸ One element that is often disputed in copyright infringement cases is the chord progression.¹³⁹ The majority of chord progressions (and other similar elements) used in musical works today have fallen into the public domain due to the many compositional rules that govern their implementation and the relatively few that have proven musically and emotionally effective.¹⁴⁰ Three harmonic chord progressions in particular have proven to be staples in nearly every genre of music and are typically considered blatantly unoriginal and unprotectable: the I-V-I¹⁴¹ progression, the I-IV-I progression, and the I-IV-V-I progression.¹⁴² These progressions are just examples. Over the years, a myriad of harmonic progressions have been categorized as “popular” due to their heavy usage in popular music and specific musical styles such as gospel and rock.¹⁴³

137. See *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (recognizing that potentially protectable combinations can be formed from a large assortment of musical elements); Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 248–49 (1990) (“[M]usical compositions . . . consist of more than only melody, harmony and rhythm.”).

138. ROSEN, *supra* note 12, at 154–58 (describing pitch as “the specific location of notes in the tonal scale”; form as “the organizing element of musical composition”—i.e., binary and ternary form; phrases as “the smallest *structural* component”—likened to a clause within a written sentence; a motif as a short, repeated “sequence of notes/pitches . . . [that] conveys a rhythmic, melodic, or harmonic idea”; tempo and dynamic markings as instruction regarding speed, expression, and volume; counterpoint as “a combination of simultaneous but independent voices or parts created pursuant to a logical system of rules”); see also Presti Brent, *supra* note 137, at 249 (“Timbre (tonal quality), tone, pitch, tempo, spatial organization, consonance, dissonance, phrasing, accents, note choice, combinations, . . . [and] bass lines . . . are sample elements of a musical composition.”).

139. See ROSEN, *supra* note 12, at 164 (describing a chord progression as “[a] succession of chords or chord-like constructions having coherence as an expression of harmony” and listing a series of cases that dealt with the copyrightability of chord progressions (alteration in original) (quoting 20 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 402 (Stanley Sadie ed., 2d ed. 2001))).

140. See Livingston & Urbinato, *supra* note 14, at 254 (explaining that the evolution of music over the centuries has caused musicians to follow “a common standard” and rely on “the most common and effective . . . chord progressions, resolutions of dissonance, melodic and harmonic shapes, and sequences with corresponding rhythms and accents”); see also Nicolas, *supra* note 16, at 1268 (“[T]here are descriptive ‘rules’ of harmonic or chord progression that often preordain the appropriate movement from one chord to the other.”).

141. In music theory, chords are represented by Roman numerals: I is the tonic, IV is the subdominant, and V is the dominant. In the key of C, the pitch C would be the tonic—the first step of the scale. The dominant note is the fifth note in the scale, so G. The subdominant is the step just before the dominant, so in this case, F. Therefore, a I-V-I (tonic-dominant-tonic) chord progression in the key of C would be C-G-C.

142. Sergiu Gherman, *Harmony and Its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 483, 489 (2009) (explaining the I-V-I, I-IV-I, and I-IV-V-I chord progressions as being “too unoriginal in law to justify the grant of monopolies through copyright protection”).

143. See *Chord Progression List – Extensive*, STORY COMPOSITIONS, www.storycompositions.com/2008/06/common-chord-progressions.html [https://perma.cc/6GFW-VJZ9] (2016) (providing a comprehensive list of popular chord progressions).

3. The Scènes à Faire Doctrine as Applied to Music

The oft used copyright principles that bar such commonplace material from receiving protection are the merger and scènes à faire, or “scene to be made,” doctrines.¹⁴⁴ The merger doctrine is an exception to the idea-expression dichotomy: the general rule that ideas cannot be protected—only expressions of ideas can.¹⁴⁵ As expressed by the Eleventh Circuit, “The [merger] doctrine holds that, when there are so few ways of expressing an idea, not even the expression is protected by copyright.”¹⁴⁶ The scènes à faire doctrine, like the merger doctrine, holds that “when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore [are] not protected by copyright.”¹⁴⁷

Although both doctrines stand for the principle of “preventing a monopoly on commonplace ideas,” the “merger [doctrine] applies when the idea and expression are inseparable while [the] scènes à faire [doctrine] applies when the similarity of expression results from stock scenes or elements that necessarily flow from a common idea.”¹⁴⁸ In music, many elements would be considered unprotectable under the scènes à faire doctrine.¹⁴⁹ This is because there are a severely limited number of musical notes, acceptable harmonies, sensible rhythms, and musically pleasing combinations available to compose with that fall within the stringent rules that guide most musical composition.¹⁵⁰

C. The Numerosity Requirement in Music Copyright Infringement Cases

1. *Structured Asset Sales, LLC v. Sheeran*: Two Elements Is Not Enough

In *Sheeran II*, the Southern District of New York was tasked with determining whether, under the selection and arrangement test, two “commonplace musical building blocks” could form a protectable combination.¹⁵¹ This copyright infringement lawsuit involved two massively popular songs: Marvin Gaye and Ed Townsend’s “Let’s Get It On” and Ed Sheeran and Amy Wadge’s “Thinking Out Loud.”¹⁵² The owner of the copyright on “Let’s Get It On” sued Ed Sheeran, alleging that “Thinking Out Loud”

144. See *Williams v. Gaye*, 895 F.3d 1106, 1119 n.6, 1141 (9th Cir. 2018).

145. *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007).

146. *Id.* In *BUC*, the Eleventh Circuit provided an example of the merger doctrine at work: “[P]ublic signs displaying a circle with a diagonal line crossed through it.” *Id.* The court explained that “[s]ince there are effectively only a few ways of visually presenting the idea that an activity is not permitted, copyright law would not protect the expression in th[at] case.” *Id.*

147. *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004).

148. *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1522 n.25 (1st Cir. 1996).

149. See *Williams v. Gaye*, 895 F.3d 1106, 1142 (9th Cir. 2018) (Nguyen, J., dissenting).

150. See *id.* (“[T]he range of musical expression is necessarily more circumscribed when music is written down”); see also Nicolas, *supra* note 16, at 1252–53 (expressing the view of courts that harmonic chord progressions “lack protection under the scènes à faire doctrine because the choices are generally dictated by conventions within the field of music” and that “most rhythms either lack basic originality or lack protection under the scènes à faire doctrine”).

151. *Sheeran II*, 673 F. Supp. 3d 415, 420 (S.D.N.Y. 2023), *aff’d*, 120 F.4th 1066 (2d Cir. 2024).

152. *Id.* at 419.

copied an original combination of two elements: a chord progression and a harmonic rhythm.¹⁵³ The court originally denied Sheeran's motion for summary judgment, holding that there was a genuine dispute as to whether "the selection and arrangement of the combination of two commonplace musical building blocks" could be original.¹⁵⁴ On reconsideration, the court rejected the previous holding, finding that the two-element combination was itself "commonplace," rendering it unprotectable.¹⁵⁵

The court based its rationale on the Ninth Circuit's numerosity requirement¹⁵⁶ despite its recognition that the Second Circuit had yet to formally adopt the rule and the fact that "[t]here have been few opportunities to apply the principle of numerosity to musical compositions."¹⁵⁷ Recall from *Feist* that a selection and arrangement copyright is "thin," meaning it only applies to the arrangement of the elements, not to the elements themselves.¹⁵⁸ Seeking to claim copyright protection over the combination of commonplace elements "is nothing more than an impermissible attempt to copyright what is already in the public domain and capture what is freely available to all to use."¹⁵⁹ The numerosity requirement seeks to prevent this misuse.¹⁶⁰ Although courts have yet to define how many unprotectable elements are "sufficiently numerous" to create an original selection and arrangement, the court determined that "a commonplace chord progression and harmonic rhythm" alone do not secure copyright protection.¹⁶¹

In musical compositions, the universe of permissible combinations that follow compositional rules and are "pleasing to the ears" is small—so small that "many combinations have themselves become commonplace, especially in popular music."¹⁶² It follows that even a combination of elements could become "a basic musical building block," ineligible for copyright protection.¹⁶³ The court thus found that the chord progression and harmonic rhythm "d[id] not form a pattern, but . . . merge[d] into one element"—proving itself to be a musical building block that should be available to all.¹⁶⁴

153. *Id.* at 419–20.

154. *Id.* at 420.

155. *Id.* at 424.

156. *Id.* at 421–22 (citing *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020)) (framing the issue as "whether two common elements are numerous enough to make their combination eligible for copyright protection").

157. *Id.* at 422.

158. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

159. *Sheeran II*, 673 F. Supp. 3d at 422.

160. *Id.* ("Requiring numerous elements prevents the misapplication of copyright law and ensures it is not being used to protect combinations that occur routinely without any minimal creative contribution attributable to the author.").

161. *Id.* at 423.

162. *Id.*

163. *Id.* at 424.

164. *Id.* at 423–24 (finding that the combination had been used in songs written before and after "Let's Get It On," which "illustrate[s] how multiple songwriters have combined the two commonplace elements in the same manner for years").

Sheeran II has helped to shine light on the difficulty inherent in determining whether the combination of unprotectable elements is original and protectable.¹⁶⁵ It has also elucidated the importance of a numerosity requirement in making this determination.¹⁶⁶ Last, *Sheeran II* has explicated that “two” does not equal “numerous.”¹⁶⁷ The question thus remains: How many elements is enough to open the door to copyright protection? Part II.C.2 of this Comment analyzes cases involving, directly and indirectly, the selection and arrangement of musical elements to determine what factors courts consider when assessing the copyrightability of such combinations.

2. Review of Selection and Arrangement Application in the Music Copyright Context

a. Three Boys Music Corp. v. Bolton

In 2000, the Ninth Circuit decided *Three Boys Music Corp. v. Bolton*, which involved a copyright infringement dispute as to whether “Michael Bolton’s 1991 pop hit, ‘Love Is a Wonderful Thing,’ infringed on the copyright of a 1964 Isley Brothers’ song of the same name.”¹⁶⁸ The central issue was whether a combination of five unprotectable elements in the song was protectable.¹⁶⁹ The five elements were “(1) the title hook phrase . . . ; (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.”¹⁷⁰ In the lower court, the jury determined that the five-element combination was a “unique compilation” based on expert testimony that the combination was not found “anywhere in the prior art.”¹⁷¹ The court did not question the jury’s determination that the combination was protectable, nor did it disagree with the finding of substantial similarity.¹⁷²

b. Tisi v. Patrick

While the Ninth Circuit was deciding *Three Boys*,¹⁷³ across the country, the Southern District of New York was handling its own music copyright infringement suit in *Tisi v. Patrick*.¹⁷⁴ *Tisi* involved a dispute between the composer of an unpublished song, “Sell Your Soul,” and the composer and distributors of an allegedly infringing

165. See *id.* at 422 (“Deciphering what constitutes a protectable, original selection and arrangement from a combination of unprotected properties has long vexed the courts.”).

166. See *id.*

167. *Id.* at 422–23. On appeal, the Second Circuit affirmed the district court, but not on the basis of numerosity. *Structured Asset Sales, LLC v. Sheeran (Sheeran III)*, 120 F.4th 1066, 1082 n.9 (2d Cir. 2024). It concluded that “[a]lthough the number of elements in combination is an aspect of the distinctiveness of music, originality is not a concept that is easily reducible to a simple test like numerosity.” *Id.* This Comment does not equate numerosity with originality. It instead argues that in selection and arrangement cases based on musical compositions, numerosity should be met before reaching originality.

168. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480 (9th Cir. 2000), *overruled in part by* *Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

169. *Id.* at 485.

170. *Id.*

171. *Id.*

172. *Id.* at 485–86.

173. *Three Boys*, 212 F.3d 477.

174. 97 F. Supp. 2d 539 (S.D.N.Y. 2000).

song entitled “Take a Picture.”¹⁷⁵ The court determined that the only similar elements between the two songs were those that are common to rock compositions and used by “other groups and composers such as U2 . . . and Bon Jovi.”¹⁷⁶ The court emphasized five elements that were each found to be “basic, non-protectable musical elements” and showed that none had the right to copyright protection.¹⁷⁷ Unfortunately, no selection and arrangement theory was articulated by the parties or referenced by the court.¹⁷⁸

c. *Peters v. West*

In 2012, the Seventh Circuit faced a copyright infringement suit in *Peters v. West*, in which Vincent Peters, “Vince P,” an “up-and-coming hip-hop artist” and author of a song entitled “Stronger,” alleged that Kanye West’s later released and hugely successful song by the same name infringed the copyright in his work.¹⁷⁹ Vince P’s copyright infringement allegation was based on three elements: the shared title “Stronger,” the shared implementation of the common Nietzsche maxim¹⁸⁰ and similar rhyme scheme, and the shared references to Kate Moss, a well-known British model.¹⁸¹

The court was quick to conclude that “the name alone cannot constitute protectable expression.”¹⁸² The court next found that the Nietzsche phrase had been used repeatedly in other songs, including in Kelly Clarkson’s similarly titled “Stronger (What Doesn’t Kill You),” and as such, its usage was too commonplace to be original.¹⁸³ Regarding the similar rhyme scheme, the court noted that as a method of expression, it was not subject to any protection despite its originality.¹⁸⁴ In terms of the reference to Kate Moss, the court found that in addition to the apparent differences between the lines,¹⁸⁵ “analogizing to models as a shorthand for beauty is, for better or for worse, commonplace in our society” and “[t]he particular selection of Kate Moss . . . adds little to the creative choice.”¹⁸⁶

Having determined that none of the elements raised were individually worthy of protection, the question became whether protection could be found in their

175. *Id.* at 541.

176. *Id.* at 545.

177. *Id.* at 548–49 (listing the following elements as “basic, non-protectible musical elements” not entitled to copyright protection: “the key of A major, tempo . . . , a chord structure/harmonic progression common to much rock music . . . , the guitar rhythm . . . , and the fact that the chords of both songs are in ‘root’ position”).

178. *See id.*

179. 692 F.2d 629, 631 (7th Cir. 2012) (“[W]hat does not kill me, makes me stronger.”).

180. FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS* 6 (Richard Polt trans., Hackett Publ’g Co. 1997) (1889) (“What doesn’t kill me makes me stronger.”).

181. *Id.* at 635.

182. *Id.* at 636 (citing *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991)).

183. *Id.* at 635–36.

184. *Id.* at 636 (“Just as a photographer cannot claim copyright in the use of a particular aperture and exposure setting on a given lens, no poet can claim copyright protection in the form of a sonnet or a limerick. Similarly, Vince P cannot claim copyright protection over a tercet.”).

185. *Id.* (comparing Vince P’s line, “Trying to get a model chick like Kate Moss” with Kanye West’s line, “You could be my [B]lack Kate Moss tonight”).

186. *Id.*

combination.¹⁸⁷ The court answered in the negative, holding that even when viewed in combination, the shared usage of the above elements was nothing more than “small cosmetic similarities” outweighed by a host of differences.¹⁸⁸

d. Williams v. Gaye

In 2013, the Marvin Gaye estate sued Pharell Williams and Robin Thicke after hearing their chart-topping song, “Blurred Lines.”¹⁸⁹ The Gayes contended that “Blurred Lines” infringed the copyright of Marvin Gaye’s 1976 hit song, “Got To Give It Up.”¹⁹⁰ In 2015, a jury returned a verdict in favor of the Gayes, finding that the Gayes’ copyright in “Got To Give It Up” was infringed.¹⁹¹ On appeal, the Ninth Circuit majority affirmed in part the district court’s decision in *Williams v. Gaye*.¹⁹² This affirmance caused upheaval and ire within the music industry and legal community, spurring criticisms from scholars,¹⁹³ journalists,¹⁹⁴ and most importantly, dissenting Judge Nguyen.¹⁹⁵

The majority ultimately determined that its conclusion “turn[ed] on the procedural posture of the case, which require[d] [them] to review the relevant issues under deferential standards of review.”¹⁹⁶ This let the court avoid any substantive analysis of the protectability of the relevant elements.¹⁹⁷

In affirming the district court’s decision to deny Williams and Thicke’s motion for summary judgment, the majority, as Judge Nguyen put it, “allow[ed] the Gayes to accomplish what no one has before: copyright a musical style.”¹⁹⁸ The majority relied on *Swirsky*’s language that music is “comprised of a large array of elements” to determine that the Gayes’ copyright in “Got To Give It Up” was broad, thus allowing infringement without “virtual identity” between the two works.¹⁹⁹ While the majority provided a rote recitation of the principles underlying copyright protection in musical

187. *Id.*

188. *Id.*

189. *Williams v. Gaye*, 895 F.3d 1106, 1116 (9th Cir. 2018).

190. *Id.*

191. *Id.* at 1118–19.

192. *Id.* at 1138. The Ninth Circuit reversed the district court’s ruling on a separate vicarious liability issue but affirmed in all other respects. *Id.* at 1132, 1138.

193. See, e.g., Emily Ranger-Murdock, Comment, “*Blurred Lines*” to “*Stairway to Heaven*”: Applicability of Selection and Arrangement Infringement Actions in Musical Compositions, 67 UCLA L. REV. 1066, 1079 (2020) (“The Ninth Circuit’s upholding of the ‘Blurred Lines’ verdict shocked both the legal and music communities.”).

194. See, e.g., Ben Sisario, “*Blurred Lines*” on Their Minds, Songwriters Create Nervously, N.Y. TIMES (Mar. 31, 2019) <https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html> (describing the “chilling effect” the “Blurred Lines” decision created within the songwriting community).

195. *Gaye*, 895 F.3d at 1138 (Nguyen, J., dissenting) (“[T]he majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.”).

196. *Id.* (majority opinion).

197. See *id.* (“[O]ur decision hinges on settled procedural principles and the limited nature of our appellate review, dictated by the particular posture of this case and controlling copyright law.”).

198. *Id.* (Nguyen, J., dissenting).

199. *Id.* at 1120 (majority opinion) (quoting *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004)).

works,²⁰⁰ it refused to engage in an actual analysis of the eight elements claimed to form a protectable combination, or “constellation,” as an expert witness artfully put it.²⁰¹ In so doing, “the majority implicitly dr[ew] the line between protectable and unprotectable expression ‘so broadly that future authors, composers and artists w[ould] find a diminished store of ideas on which to build their works.’”²⁰²

Unlike the majority, Judge Nguyen engaged in a thorough examination of the musical elements and concluded that “[t]he only similarity between the[] ‘constellations’ [was] that they’re both compositions of stars.”²⁰³ The dissent compared the expert witness’s similarity analysis, which the majority relied on, to “finding substantial similarity between two pointillist paintings because both have a few flecks of similarly colored paint.”²⁰⁴

One of the claimed similarities was a melodic phrase called “The Signature Phrase.”²⁰⁵ Within this phrase were four identified elements: (1) a series of repeated notes, (2) a shared ascending three note pattern and descending two note pattern, (3) the beginning rhythm, and (4) “a melisma, (one word sung over multiple pitches).”²⁰⁶ The dissent analyzed each of the above elements and easily determined them to be individually unprotectable.²⁰⁷ The dissent then recognized that “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”²⁰⁸ However, given this case was about substantial similarity rather than protectability or originality, the dissent did not determine whether this combination was protectable.²⁰⁹

The next phrase that the dissent dissected was the “Hook Phrase.”²¹⁰ A “hook” is generally considered “the most important and memorable melodic material of a piece of popular music.”²¹¹ The hook in “Got To Give It Up” consisted of four melodic pitches and the lyrics “keep on dancin’.”²¹² The dissent quickly determined that the hook was unoriginal because the particular sequence had been used previously in other popular songs.²¹³ The last melodic phrase that was analyzed, “Theme X,” was also

200. *Id.* at 1119–20.

201. *Id.* at 1138–39 (Nguyen, J., dissenting) (“Pharrell Williams and Robin Thicke don’t contest the existence of the[] similarities. Rather, they argue that the[] similarities are insufficient to support a finding of substantial similarity as a matter of law. The majority fails to engage with this argument.”).

202. *Id.* at 1141 (quoting *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1225 (11th Cir. 2008)).

203. *Id.* at 1138.

204. *Id.* at 1139.

205. *Id.* at 1143.

206. *Id.*

207. *Id.* at 1143–45.

208. *Id.* at 1145 (alteration in original) (quoting *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002), *overruled in part by Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)).

209. *See id.* at 1141, 1145 (“[E]ven assuming that the Signature Phrase as a whole is protectable, its protection is thin.”).

210. *Id.* at 1146.

211. *Id.* at 1117 n.2 (majority opinion).

212. *Id.* at 1146 (Nguyen, J., dissenting).

213. *Id.* (explaining that the sequence of pitches in the “Hook Phrase” was used by Beyoncé, Jennifer Hudson, and Anika Noni Rose in the song “Dreamgirls”).

found to be unprotectable.²¹⁴ It contained four pitches found to be “identical to those sung to ‘Happy Birthday.’”²¹⁵

Beyond these three melodic phrases, a series of other individually unprotectable elements were put forth: (1) keyboard parts, (2) bass line, (3) word painting,²¹⁶ (4) parlando,²¹⁷ and (5) lyrics. The dissent concluded that there was no substantial similarity even when viewing each of the eight elements together.²¹⁸ In coming to her decision, Judge Nguyen pointed to several factors that prove to be rather pertinent. First, “[t]he discrete elements . . . don’t occur at the same time within the musical theme or phrase in each piece.”²¹⁹ Second, “the various themes and phrases . . . don’t occur in corresponding places in each piece.”²²⁰ While not precedential, this suggests that the proximity of elements, as well as their placement within a work, are important factors to consider when viewing such elements in combination.

e. Gray v. Hudson

Unlike the passive approach taken by the majority in *Gaye*, the Ninth Circuit, in *Gray v. Hudson*, thoughtfully engaged in an analysis of the protectability of the allegedly infringed expression.²²¹ In *Gray*, the members of a Christian hip-hop group sued Katy Perry for copyright infringement in connection with her chart-topping song, “Dark Horse.”²²² It was alleged that “Dark Horse” contained a wrongfully-copied ostinato²²³ that also appeared in the plaintiff’s 2008 song, “Joyful Noise.”²²⁴ At trial, the jury found in favor of the plaintiffs and awarded damages in the amount of roughly \$2.8 million, premised on the expert testimony that the ostinato was an original and protectable combination.²²⁵ However, on motion for judgment as a matter of law, the district court vacated the jury’s verdict and damage award after finding that the combination did not amount to original expression.²²⁶

On appeal, the Ninth Circuit engaged in a thorough element analysis, finding that “the threshold issue [was] what—if anything—about the Joyful Noise ostinato qualifies as original expression.”²²⁷ Based on the plaintiff-side expert witness’s findings, the court identified five to six musical elements that were each found to be individually

214. *Id.* at 1147.

215. *Id.* at 1148.

216. *Id.* at 1149 n.10 (“[A] compositional technique in which the music . . . illustrate[s] the words in the lyrics, such as setting the word ‘higher’ to an ascending melody.”).

217. *Id.* (“Parlando is spoken word or rap in the middle of a song.”).

218. *Id.* at 1150.

219. *Id.*

220. *Id.*

221. 28 F.4th 87, 87 (9th Cir. 2022).

222. *Id.* at 92; see also Chris Molanphy, *Why Is Katy Perry’s “Dark Horse” No. 1?*, SLATE (Feb. 4, 2014, 3:54 PM), <https://slate.com/culture/2014/02/katy-perrys-dark-horse-hit-no-1-on-billboard-hot-100-why-video.html> [<https://perma.cc/3T6X-FGN5>].

223. An ostinato is a “repeating musical figure.” *Gray*, 28 F.4th at 93.

224. *Id.*

225. *Id.* at 95.

226. *Id.*

227. *Id.* at 97.

unprotectable.²²⁸ The court determined that each element, individually, was a “common musical ‘building block[]’ belonging to the public domain” and hence unprotectable.²²⁹ The court categorized the choices made as to number of notes and rhythm used as “trite,” and found that any similarity involving “textures” was “far too abstract of a similarity to be legally cognizable.”²³⁰ Regarding “timbre,” the court clarified that quality or color of sound relates more to a copyright over performance rather than a musical composition.²³¹ As such, a copyright over a composition would not extend to the instrumentation that may be used in a performance of that work.²³²

Arguably, the most important element was the actual pitch sequence used in both ostinatos—as it speaks to melody, one of the core musical elements.²³³ The court found it “necessary to distinguish between an abstract sequence of pitches and a melody,”²³⁴ concluding that “[w]hile an eight-note *melody* may be copyrightable, the abstract eight-note *pitch sequence* that is a component of the melody is not.”²³⁵ The court analogized the unprotectable nature of a pitch sequence with that of a chord progression, finding that “[i]f [a] chord progression cannot be protected, the individual pitch sequences forming the progression cannot be either.”²³⁶

The last element discussed was the melodic shape.²³⁷ While the court felt this element was likely too abstract to obtain protection, it recognized that the way notes move through a musical line reflects the “rules of consonance common in popular music.”²³⁸ This idea harkens back to the principle underlying the use of chord progressions: “[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing.”²³⁹

Having found each element to be individually unprotectable, the court next considered whether the elements formed a protectable combination.²⁴⁰ In explaining the precedent underlying the selection and arrangement doctrine, the court notably left out *Satava*’s numerosity requirement.²⁴¹ Perhaps because there was no question of numerosity. Instead, the court found that the relatively short length of the ostinato “[d]id not foreclose the possibility of a protected arrangement of commonplace musical

228. *Id.* at 98 (listing the following elements as explained by the expert testimony: (1) length of the ostinato, (2) rhythm of the ostinato, (3) scale degrees, (4) melodic shape, (5) timbre or color and quality of sound, (6) placement of ostinato within the musical space or texture).

229. *Id.* (citing *Skidmore v. Zeppelin*, 952 F.3d 1051, 1070–71 (9th Cir. 2020)).

230. *Id.* at 99.

231. *Id.*

232. *See id.*

233. *See id.*

234. *Id.* (“Creating a melody involves more than writing down a sequence of pitches; at a minimum, that sequence must also be ‘rhythmically organized’ so as to form an ‘esthetic whole.’” (quoting *Melody*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002))).

235. *Id.* at 100.

236. *Id.*

237. *Id.* (explaining melodic shape to encompass the tendencies of certain scale degrees or notes to want to move to other notes to create and release tension).

238. *Id.*

239. *Id.* (quoting *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (per curiam)).

240. *Id.* at 101.

241. *See id.*

elements.”²⁴² The court likened the ostinato to the jellyfish sculpture in *Satava*, finding that the “ostinato consist[ed] of a manifestly conventional arrangement of musical building blocks.”²⁴³ The ostinato was found to be unoriginal as it was essentially a segment of a minor scale with repeating notes.²⁴⁴ “Allowing a copyright over [the ostinato] would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure.”²⁴⁵ The court then held the ostinato did not establish the originality and creativity necessary to receive protection.²⁴⁶

f. Nwosuocha v. Glover

The final case in this batch of selection and arrangement cases is the most recent aside from *Sheeran II*. *Nwosuocha v. Glover* involved a copyright infringement dispute between Nwosuocha, the composer of “Made in America,” and the writers of “This is America,” which garnered massive acclaim upon its debut in 2018.²⁴⁷ Unfortunately, because Nwosuocha’s copyright was over the sound recording, as opposed to the musical composition, the infringement claim failed as a matter of law.²⁴⁸ The court, however, humored Nwosuocha and engaged in a brief element analysis—only to find that the elements were “insufficiently original to warrant protection.”²⁴⁹ The court recognized that the arrangement of “numerous” unprotectable elements could be entitled to copyright protection.²⁵⁰ However, of the ten or so elements presented, the court found they individually, as well as collectively, lacked originality,²⁵¹ therefore “impl[y]ing a high threshold for numerosity.”²⁵²

III. DISCUSSION

Tracing through the preceding selection and arrangement cases demonstrates the necessity of a well-defined numerosity requirement in the musical composition context.

242. *Id.* (citing *Swirsky v. Carey*, 376 F.3d 841, 852 (9th Cir. 2004)).

243. *Id.* at 101–02.

244. *Id.* at 102.

245. *Id.* (citing *Satava v. Lowry*, 323 F.3d 805, 812 & n.5 (9th Cir. 2003)).

246. *Id.*

247. *Nwosuocha v. Glover*, 21 Civ. 04047, 2023 WL 2632158, at *1–2 (S.D.N.Y. Mar. 24, 2023), *aff’d*, No. 23-703, 2024 WL 2105473 (2d Cir. 2024).

248. *Id.* at *5–6.

249. *Id.* at *6.

250. *Id.* at *4 (explaining that a court can find substantial similarity when “numerous aesthetic decisions embodied in the plaintiff’s work of art—the excerpting, modifying, and arranging of unprotectible components—are considered in relation to one another” (quoting *McDonald v. West*, 138 F. Supp. 3d 448, 456 (S.D.N.Y. 2015), *aff’d*, 669 Fed.Appx. 59 (2d Cir. 2016))).

251. *Id.* at *7 (“The Court finds that the ‘distinct and unique vocal cadence, delivery, rhythm, timing, phrasing, meter and/or pattern’ or ‘flow’ as well as the ‘lyrical theme’ and ‘structure’ of the chorus in Plaintiff’s Composition lack sufficient originality alone, or as combined, to merit compositional copyright protection or are categorially ineligible for copyright protection.”).

252. *Sheeran II*, 673 F. Supp. 3d 415, 422 (S.D.N.Y. May 16, 2023), *aff’d*, 120 F.4th 1066 (2d Cir. 2024). *But see Sheeran III*, 120 F.4th at 1073 n.4 (explaining that on appeal, the Second Circuit did not affirm on the basis of numerosity).

Given the strict rules and traditions governing songwriters and composers, a well-defined numerosity requirement for combinations of unprotectable elements is essential to determining whether the “creativity” threshold has been met. A well-defined numerosity requirement will also help to incentivize further creativity and innovation by minimizing the risk of copyright holders succeeding in attempts to control elements best left in the public domain.

Part III.A of this Discussion highlights the necessity of the numerosity requirement as demonstrated through case law. Part III.B recognizes two different approaches to forming an element combination: the “specific section” and the “constellation” approach. It then recommends two different numerosity floors dependent on which approach is used, grounded in legal conclusions.

A. *The Necessity of Numerosity*

The numerosity requirement in selection and arrangement cases is necessary for two interconnected reasons. A numerosity requirement would prevent authors from acquiring monopolies over elements best left to the public domain, which, in turn, would prevent the chilling of innovation that may otherwise occur.

When authors seek protection through *Feist*’s selection and arrangement theory, a numerosity requirement is necessary to prevent them from gaining monopolistic control over commonplace elements meant to be free for all.²⁵³ *Feist* clarified copyright law by explicating the contours of originality.²⁵⁴ But, in its holding that originality requires a “modicum of creativity,” it failed to articulate a more precise threshold for creativity.²⁵⁵ Perhaps this should come as no surprise, as “understanding creativity is hardly something within the competent domain of law.”²⁵⁶ Thankfully, the Ninth Circuit in *Satava* understood that further guidance was necessary to establish a requisite level of creativity by constructing the numerosity requirement.²⁵⁷ While the court in *Satava* tacitly found the combination of jellyfish and sculptural elements to be sufficiently numerous, it noted that protection would award a “monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles.”²⁵⁸

In musical compositions, awarding protection over a dual-element combination of a commonplace chord progression and harmonic rhythm, for example, would have the same effect.²⁵⁹ The court in *Sheeran II* explained that seeking this protection is merely “an impermissible attempt to copyright what is already in the public domain and capture what is freely available to all to use.”²⁶⁰ The public domain is essential for the

253. See *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003); *Gray v. Hudson*, 28 F.4th 87, 102 (9th Cir. 2022).

254. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

255. *Id.* at 362–63; see also Zimmerman, *supra* note 7, at 188.

256. Mandel, *supra* note 78, at 1999.

257. See *Satava*, 323 F.3d at 811.

258. *Id.* at 812.

259. See *Sheeran II*, 673 F. Supp. 3d 415, 424 (S.D.N.Y. May 16, 2023), *aff’d*, 120 F.4th 1066 (2d Cir. 2024); Gherman, *supra* note 142, at 489 (explaining the impropriety of allowing monopolies over commonplace chord progressions).

260. *Sheeran II*, 673 F. Supp. 3d at 422.

furtherance of art and creativity—a notion that courts strive to uphold.²⁶¹ The numerosity requirement, if further articulated and followed consistently, would prevent authors from taking advantage of the copyright system to gain protection without contributions showing at least a minimal level of creativity.²⁶²

Unfortunately, given the ambiguity revolving around numerosity as it currently stands, high-profile copyright infringement cases that should have been dismissed for lack of originality have passed muster, allowing such monopolies to be obtained.²⁶³ One high profile example is *Gaye*.²⁶⁴ While the case focused on substantial similarity, Judge Nguyen’s detailed element analysis demonstrated that had a numerosity requirement been followed and upheld, the verdict would either have been reversed or dismissed at trial.²⁶⁵ Of the eight similarities claimed, three were musical phrases which formed their own element combinations.²⁶⁶ Each phrase had no more than four commonplace elements, each of which were individually unprotectable.²⁶⁷ Judge Nguyen noted that had a “significant number of unprotectable elements” been present, a protectable combination may have been formed.²⁶⁸ However, she did not make a further determination regarding the protectability of the combinations.²⁶⁹ Had a more defined numerosity threshold existed, however, these combinations could have been considered unprotectable at face value, thus decreasing the likelihood that infringement would be found prematurely.

Connected to the risk of authors obtaining undeserved monopolistic control is the chilling effect on creativity and innovation that would resultingly ripple through the relevant artistic communities.²⁷⁰ The purpose behind U.S. copyright law, as set forth by the Framers of the Constitution, is “[t]o promote the Progress of Science.”²⁷¹ Copyright law’s *intended* goal is to promote innovation through the facilitation and encouragement of creativity.²⁷² By letting the numerosity requirement remain undefined, innovation and creativity would be hampered rather than promoted—a result contrary to the vision of the Framers.²⁷³ This hindrance reared its head in the aftermath of *Gaye*. After the court boldly determined that an individual could “copyright a musical style,”²⁷⁴ artists who once prioritized creativity and art became

261. See *Tisi v. Patrick*, 97 F. Supp. 2d 539, 545 (S.D.N.Y. 2000); *Gray v. Hudson*, 28 F.4th 87, 98 (9th Cir. 2022) (citing *Skidmore v. Zeppelin*, 952 F.3d 1051, 1070–71 (9th Cir. 2020)).

262. See *Sheeran II*, 673 F. Supp. 3d at 424.

263. See, e.g., *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

264. *Id.*

265. See *id.* 1138–50 (9th Cir. 2018) (Nguyen, J., dissenting).

266. See *id.* at 1143–49. See also *supra* Part II.C.2.d for a discussion of the similarities and elements at issue in *Gaye*.

267. See *Gaye*, 895 F. Supp. 3d at 1143–48 (Nguyen, J., dissenting). See also *supra* Part II.C.2.d for a discussion of the court’s analysis of the three musical phrases.

268. *Id.* at 1145.

269. See *id.*

270. See *id.* at 1141–42 (quoting *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1225 (11th Cir. 2008)).

271. U.S. CONST. art. I, § 8, cl. 8.

272. Mandel, *supra* note 78, at 1999.

273. See U.S. CONST. art. I, § 8, cl. 8; Mandel, *supra* note 78, at 1999.

274. *Gaye*, 895 F.3d at 1138 (Nguyen, J., dissenting).

consumed by the looming threat of plagiarism claims and copyright infringement lawsuits.²⁷⁵

The increase in infringement lawsuits was not just a threat, but a reality; the initiation of the lawsuit involving Ed Sheeran’s “Thinking Out Loud” and Marvin Gaye’s “Let’s Get It On,” was likely inspired by the “success” in *Gaye*.²⁷⁶ This lawsuit, with numerosity in mind, was a frivolous one.²⁷⁷ Had the initial trial court, which spurred Sheeran’s motion for reconsideration, considered whether the combination of two unprotected elements was sufficiently numerous, it would likely have decided in the negative.²⁷⁸ Unfortunately, the court merely stated that since there was “no bright-line rule that the combination of two unprotectable elements is insufficiently numerous to constitute an original work,” then the question of originality and protection was one of fact rather than law.²⁷⁹

While there is no bright-line rule regarding numerosity,²⁸⁰ there should at least be a brighter line to prevent cases like *Sheeran* from being initiated—and if initiated, from being sent to a jury.

B. A Brighter Line Approach to Numerosity

So, if a brighter line rule determines how many elements are necessary to have a protectable combination, the ultimate question is what that threshold should be. The answer is not so simple. At least in musical compositions, one thing is known with near certainty: Two musical elements are not enough to form a protectable combination.²⁸¹ This makes sense because for a selection and arrangement of elements to merit protection it must demonstrate some minimum amount of creativity.²⁸² It would be absurd to claim that an artist had to flex their creative muscles much at all to determine the arrangement of only two musical elements—especially considering the strict rules undergirding the art of composition²⁸³ and the fact that only so many note, chord, and rhythmic combinations are pleasing to the ears.²⁸⁴

There are two avenues in which one may seek to apply the selection and arrangement theory in a musical composition context: the “specific section”

275. See Sisario, *supra* note 194; Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020, 2:09 PM), <https://www.rollingstone.com/music/music-features/music-copyright-lawsuits-chilling-effect-935310>; Kessler et al., *supra* note 14, at 107–08 (explaining that songwriters after the “Blurred Lines” verdict have become paranoid and scared to practice their craft).

276. Sisario, *supra* note 194.

277. *Sheeran II*, 673 F. Supp. 3d 415, 423 (S.D.N.Y. 2023) (“[C]ommon sense dictates that in the context of a musical composition, ‘numerous’ requires more than just a commonplace chord progression and harmonic rhythm to warrant protecti[on] . . .”), *aff’d*, 120 F.4th 1066 (2d Cir. 2024).

278. See *Structured Asset Sales, LLC v. Sheeran (Sheeran I)*, 632 F. Supp. 3d 192, 196–97 (S.D.N.Y. 2022).

279. *Id.*

280. *Sheeran II*, 673 F. Supp. 3d at 423.

281. *Id.* at 423–24. But see *supra* note 167 and accompanying text.

282. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

283. Rahmatian, *supra* note 129, at 94–95 (explaining that compositional rules regarding harmony exist to create “musically satisfying harmonic progression[s]”).

284. *Sheeran II*, 673 F. Supp. 3d at 423.

approach²⁸⁵ and the “constellation” approach.²⁸⁶ The numerosity requirement may differ depending on the approach used.

1. The Specific Section Approach

When claiming copyright infringement based on the alleged copying of a specific section of a musical composition, such as a two-measure phrase or a specific repeating sequence, the numerosity requirement may be more relaxed. To determine where the numerosity line should be drawn, what is and is not clearly numerous should first be established. After *Sheeran II*, two musical elements are not enough to form a protectable combination.²⁸⁷ On the upper end are five-element combinations. The Ninth Circuit specifically found a five-element combination to be protectable in *Three Boys*.²⁸⁸ On the other hand, in *Tisi*, no infringement was found after the court evaluated the five musical elements at issue.²⁸⁹ However, the *Tisi* court did not analyze whether the elements formed a protectable combination since no selection and arrangement theory was argued.²⁹⁰ There thus remains a possibility that the combination in *Tisi* would have been deemed protectable. If a five-element combination meets the numerosity requirement, this does not mean that the combination is original on its face—the combination must still be found sufficiently creative.²⁹¹

Determining whether a three-element or four-element combination should be sufficiently numerous is a more difficult question. The court in *Sheeran II* noted that when courts have evaluated combinations of three and sometimes four musical elements, they have more often than not found the combinations to be unprotectable.²⁹² While *Sheeran II* cited *West* as one such example, the combination at issue there was different in kind from the combination in *Sheeran II*. *Sheeran II* involved a chord

285. See, e.g., *Williams v. Gaye*, 895 F.3d 1106, 1143–47 (9th Cir. 2018) (Nguyen, J., dissenting) (examining the three specific phrases individually); *Gray v. Hudson*, 28 F.4th 87, 101–02 (9th Cir. 2022) (isolating the discussion to the ostinato, as opposed to the entire composition); *Sheeran II*, 673 F. Supp. 3d at 423; *Tisi v. Patrick*, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000).

286. See, e.g., *Skidmore v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Gaye*, 895 F.3d at 1138 (Nguyen, J., dissenting); *Peters v. West*, 692 F.2d 629 (7th Cir. 2012).

287. *Sheeran II*, 673 F. Supp. 3d at 423–24. But see *Sheeran III*, 120 F.4th 1066, 1082 n.9 (2d Cir. 2024) (affirming on grounds other than numerosity).

288. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000), *overruled in part by Skidmore*, 952 F.3d 1051; see also *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (citing *Three Boys*, 212 F.3d at 485). Note that *Three Boys* does not fall within the specific section approach as the combination at issue consisted of elements spanning the entire composition. The case is still relevant, however, because if five elements are sufficient to form a protectable combination under the constellation approach, they would be more than sufficient under the specific section approach, where the elements are less detached and not sporadically dispersed throughout the piece.

289. *Tisi*, 97 F. Supp. 2d at 548–49.

290. See *id.*

291. See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (explaining that a combination must be both numerous *and* original); *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir. 2003) (finding a combination of five elements to be too “mechanical” to be original).

292. *Sheeran II*, 673 F. Supp. 3d at 423 (first citing *Gray v. Hudson*, 28 F.4th 87, 102 (9th Cir. 2022); then citing *Peters v. West*, 776 F. Supp. 2d 742, 751 (N.D. Ill. 2011), *aff’d*, 692 F.3d 629 (7th Cir. 2012); and then citing *Cottrill v. Spears*, No. 02-3646, 2003 WL 21223846, at *9 (E.D. Pa. May 22, 2003), *aff’d* 87 F. App’x 803 (3d Cir. 2004)).

progression and harmonic rhythm (the duration each chord in the progression is held).²⁹³ These two elements appeared close together in a particular section of the piece.²⁹⁴ In *West*, the three elements were disjointed and unrelated—in which case a more demanding numerosity analysis would be necessary.²⁹⁵

In *Gray*, the infringement claim revolved around a singular ostinato or repeating musical figure, which consisted of at least four individual elements.²⁹⁶ In consideration of the sequence of pitches, melodic shape, number of notes, and rhythm of the ostinato, the court found there was no protectable combination.²⁹⁷ There were in actuality two additional elements, yet the court found they were too abstract or not covered by relevant copyright law.²⁹⁸

Thus, a combination consisting of four musical elements might not warrant protection under the selection and arrangement doctrine. But in *Gray*, the notes of the ostinato were arranged in a wholly uncreative way—a minor scale.²⁹⁹ This is akin to the white pages listings in *Feist*.³⁰⁰ As the court duly noted, granting protection over the combination would “essentially . . . allow[] an improper monopoly over . . . the minor scale itself.”³⁰¹ While a pitch sequence, even without a melodic structure, can potentially have a more creative rather than scale-like sequence, such compositional techniques tend to be more common in contemporary classical rather than popular music.³⁰²

In *Gaye*, of the three melodic phrases that Judge Nguyen dissected in her dissent, the “Signature Phrase” is most helpful in determining whether four elements are sufficiently numerous.³⁰³ The melodic phrase consisted of ten notes and featured a repeated series of pitches, an ascending and descending pattern, rhythm, and a melisma.³⁰⁴ Judge Nguyen assumed that the combination of these four unprotectable elements may have been protectable so as to justify a substantial similarity determination.³⁰⁵ This suggests that four elements may be enough to create a

293. *See id.*

294. *See id.* (explaining how “the chord progression and the harmonic rhythm . . . essentially merge into one element”).

295. *See West*, 692 F.2d at 635.

296. *Gray*, 28 F.4th at 92.

297. *Id.* at 102.

298. *Id.* at 99 (stating that “texture” was too abstract and “timbre” was more related to copyright over performance).

299. *Id.* at 102.

300. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

301. *Gray*, 28 F.4th at 102.

302. For example, Twelve-tone technique, a compositional style developed by Arnold Schoenberg, required that all twelve pitches in an octave be placed in an order and that “[o]nce a pitch was sounded, it was not to be repeated until the entire row had unfolded.” Anthony Tommasini, *Unraveling the Knots of the 12 Tones*, N.Y. TIMES (Oct. 14, 2007), <https://www.nytimes.com/2007/10/14/arts/music/14tomm.html>. Twelve-tone music and other similar styles are often polarizing to lay audiences and those without advanced degrees in music theory. *See id.*

303. *Williams v. Gaye*, 895 F.3d 1106, 1143 (9th Cir. 2018) (Nguyen, J., dissenting).

304. *Id.*

305. *Id.* at 1145.

combination sufficiently creative to be original.³⁰⁶ The presence of this possibility demonstrates that the numerosity requirement for combinations within a specific section of a composition should be set at four elements. Due to the small number of cases that have found four-element combinations to be protectable, it would be unwise to lower the numerosity requirement any further.³⁰⁷ Doing so would risk exacerbating the fears that the numerosity requirement was designed to combat in the first place: undeserved monopolies over elements in the public domain and the hindrance of innovation and creativity.

2. The Numerosity Requirement Under the Constellation Approach

Under the constellation approach, a combination is sought over elements spread throughout a composition, lacking the generally tight-knit and more easily discernable relationship between those restricted to a more confined section.³⁰⁸ To be effective, the combination of elements must create “a holistic musical design” rather than appear as random elements strewn throughout a work as if picked out of a hat.³⁰⁹ When a court faces a selection and arrangement claim based on a constellation of elements, a higher threshold is necessary to avoid impermissible monopolistic control.³¹⁰ The issue in these situations is primarily the potentially strained relationship between the elements rather than their numerosity.

So, when considering the protection of a constellation of elements, a court should consider one additional factor: the proximity of the elements to one another within a given composition.³¹¹ For a constellation of elements to be sufficiently creative, some thought must have gone into its arrangement—it must have been purposeful.³¹² The closer in proximity the elements are to one another, the more likely their arrangement was purposeful and thus representative of creativity.³¹³ And the more numerous the elements are, the more likely they are to be in closer proximity.

In *West*, three unrelated scattered elements were found unworthy of protection, with the court describing them as “small cosmetic similarities.”³¹⁴ In *Skidmore*, the combination of five musical elements was denied protection for, in part, its lack of proximity.³¹⁵ Had the majority in *Gaye* engaged in a more thorough analysis of the elements, as did dissenting Judge Nguyen, it may have determined that the

306. *See id.*

307. *See id.* But see *Nwosuocha v. Glover*, 21 Civ. 04047, 2023 WL 2632158, at *7 (S.D.N.Y. Mar. 24, 2023) (finding a combination of ten musical elements to be unprotectable), *aff’d*, No. 23-703, 2024 WL 2105473 (2d Cir. 2024).

308. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1075 (9th Cir. 2020) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990)).

309. *Id.* (citing *Shaw*, 919 F.2d at 1362 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984))).

310. *See id.*

311. *See Gaye*, 895 F.3d at 1150 (Nguyen, J., dissenting).

312. *See Skidmore*, 952 F.3d at 1075–76.

313. *See id.* (demonstrating that the more disparate or random the elements are, the more likely their combination is unprotectable).

314. *Peters v. West*, 692 F.2d 629, 636 (7th Cir. 2012).

315. *Skidmore*, 952 F.3d at 1075.

eight-element combination was deserving of protection, but it should have recognized that any protection would be “thin” and find a lack of substantial similarity.³¹⁶

Skidmore, the foundational case on numerosity and originality in musical composition copyright cases, regarded a five-element combination to lack protection due in part to an absence of proximity.³¹⁷ As such, courts should take proximity and existing case law into account when determining whether the numerosity requirement has been met.

IV. CONCLUSION

As copyright law stands today, creators, lawyers, and judges are in the dark as to how numerosity interacts with the selection and arrangement doctrine in musical composition cases.³¹⁸ This confusion is exacerbated by the variables and intricacies inherent in music.³¹⁹ Although some courts correctly rely on common sense,³²⁰ further guidance regarding the numerosity requirement is necessary. If the numerosity requirement is not consistently followed, or is applied erroneously, the legal system risks breaching the sanctity of the public domain and acting contrary to the goals of the U.S. Constitution.³²¹ By setting the bar higher, copyright holders will be less inclined to bring frivolous lawsuits based on disjointed, unrelated elements, thus allowing songwriters and composers to stretch their musical minds without being distracted by the potential legal ramifications of their art.

316. *Gaye*, 895 F.3d at 1138 (Nguyen, J., dissenting); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (explaining that a “thin” copyright only extends to the selection and arrangement and not the underlying material).

317. *Skidmore*, 952 F.3d at 1075.

318. ROSEN, *supra* note 12, at 152 (explaining that courts are chronically uncertain as to how to approach music as it pertains to copyright law).

319. *Id.*

320. See *Sheeran II*, 673 F. Supp. 3d 415, 423 (S.D.N.Y. 2023), *aff'd*, 120 F.4th 1066 (2d Cir. 2024).

321. See U.S. CONST. art. I, § 8, cl. 8.