

# *COPYRIGHT AND THE DILEMMA OF DEFINING MUSICAL WORKS IN THE ERA OF FIXED SOUND*

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The musical work, as a category of work or authorship, was created in an era when written notation, in the form of musical scores, was the only technology available to fix musical expression; copyright law protected those scores, but did not protect unfixed performances. As sound recording technologies developed, musical practices changed, but federal copyright law continued to protect only musical works embodied in scores. Then, in the 1970s, Congress did three things which, taken together, create what this article calls the “dilemma of defining musical works.” First, it recognized a new category of work of authorship, the sound recording. Second, it granted sound recordings more limited copyright protection than musical works, including reproduction and derivative works rights only against “dubbing,” direct electronic or mechanical copying, and no public performance right. Third, it provided that musical works need no longer be fixed in scores, but will be granted protection even if fixed only in sound recordings. Thus, because of the difference in scope of protection of musical work and sound recording, one must determine which elements of a sound recording form the musical work, and which don’t; but in many cases there is no longer a score to guide that determination. This Article argues that the principal approaches to making such a determination, which it calls “essentialist,” “traditionalist,” “proceduralist,” and “holist,” are all flawed, and that the only thoroughgoing solution to the dilemma is recognition of a new category of creative work, the audio work.