

Getting it Wrong: Juror Assessments of Similarity in a Music Copyright Experiment



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Outline

- What do jurors listen to/for?
- How well do understand jurors understand the jury instruction?
- How do jurors consider evidence of similarity for proving copying vs. substantial similarity?

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The Experiment: Lay listener test

- ◉ How much can we sway jurors with superficial performance similarities?



Performance elements

MUSIC COMPOSITION

- ◉ Rhythm
- ◉ Melody
- ◉ Harmony
- ◉ Lyrics

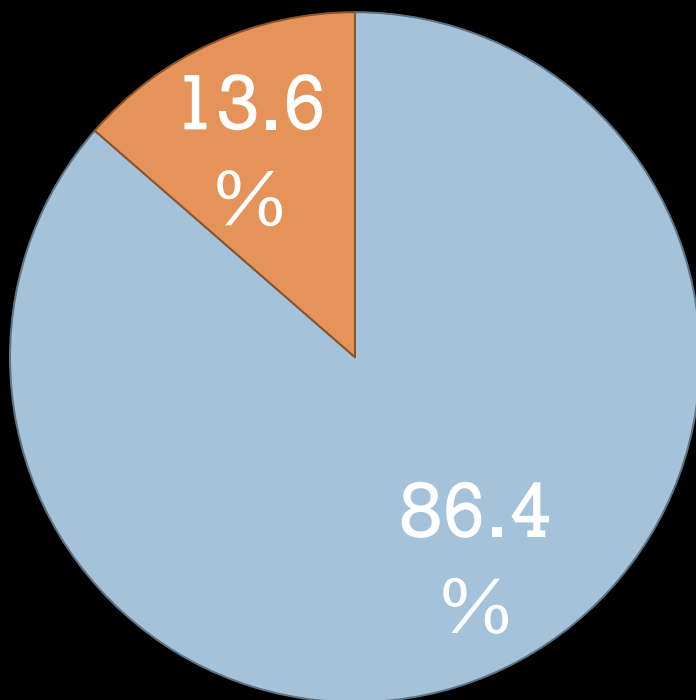
MUSIC PERFORMANCE

- ◉ Tempo
- ◉ Key
- ◉ Orchestration
- ◉ Genre/style

Results—Mariah Carey

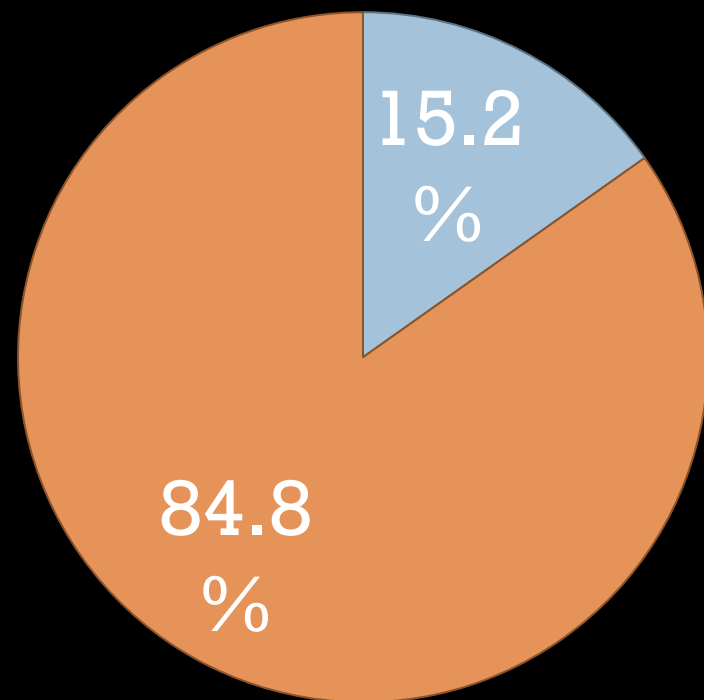
SIMILAR

■ Yes ■ No



DIFFERENT

■ Yes ■ No



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What do they listen to?

- Looked at responses of the 178 participants to this question:
“What was it about the songs that you heard that led you to rate them as you did?”

7-149

I would now like you to compare the two songs in SONG PAIR ONE using the following jury instruction.

Jury Instruction:

To find music copyright infringement between plaintiff's and defendant's songs, you must find that the songs are substantially similar. Two works are substantially similar if the original expression of ideas in the plaintiff's (Song #1) copyrighted work and the expression of ideas in the defendant's work (Song #2) that are shared are substantially similar. Original expression are those unique aspects of plaintiff's song that are not common or ordinary to the genre or to music generally. The amount of similarity must be both quantitatively and qualitatively significant, that is the defendant's song copied either a substantial portion of the original expression of the plaintiff's song, or copied a smaller but qualitatively important portion of the plaintiff's song.

5. Based on the definition of Substantial Similarity in the jury instruction above, are the two song clips you heard substantially similar?

1. Yes
2. No

6. What exactly do you think is meant by the term 'original expression' as used in the jury instruction?

that it was an original idea which came from the mind of the Plaintiff (or other sources copyrighted or claimed as theirs)

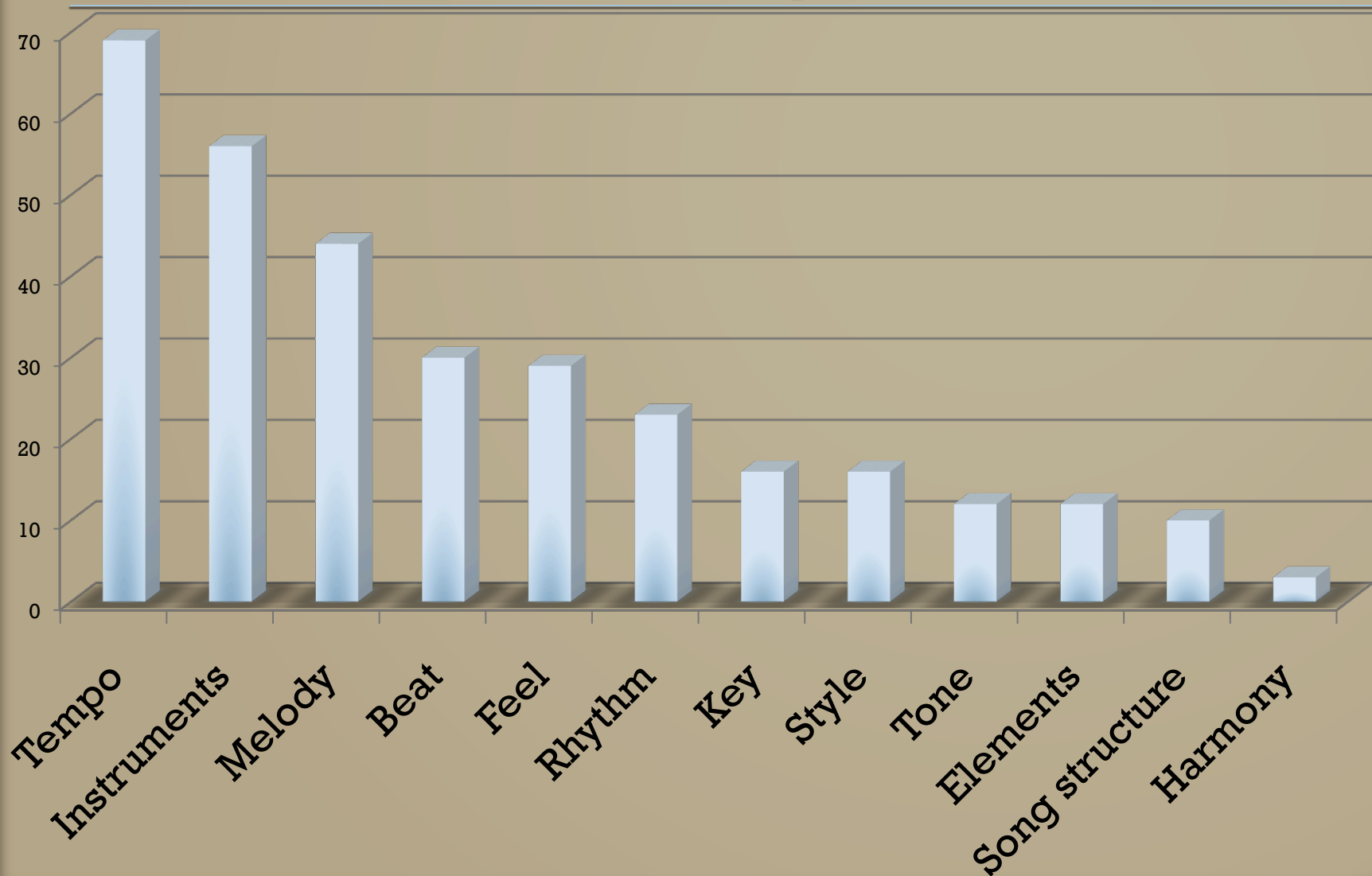
7. What exactly do you think is meant by the term 'quantitatively and qualitatively significant' as used in the jury instruction?

Quantitatively - quantity, an amt of the song, so many bars, mins, seconds etc.
Qualitatively - quality, a part that may not be as large as amount, but a more important part - e.g. chorus.

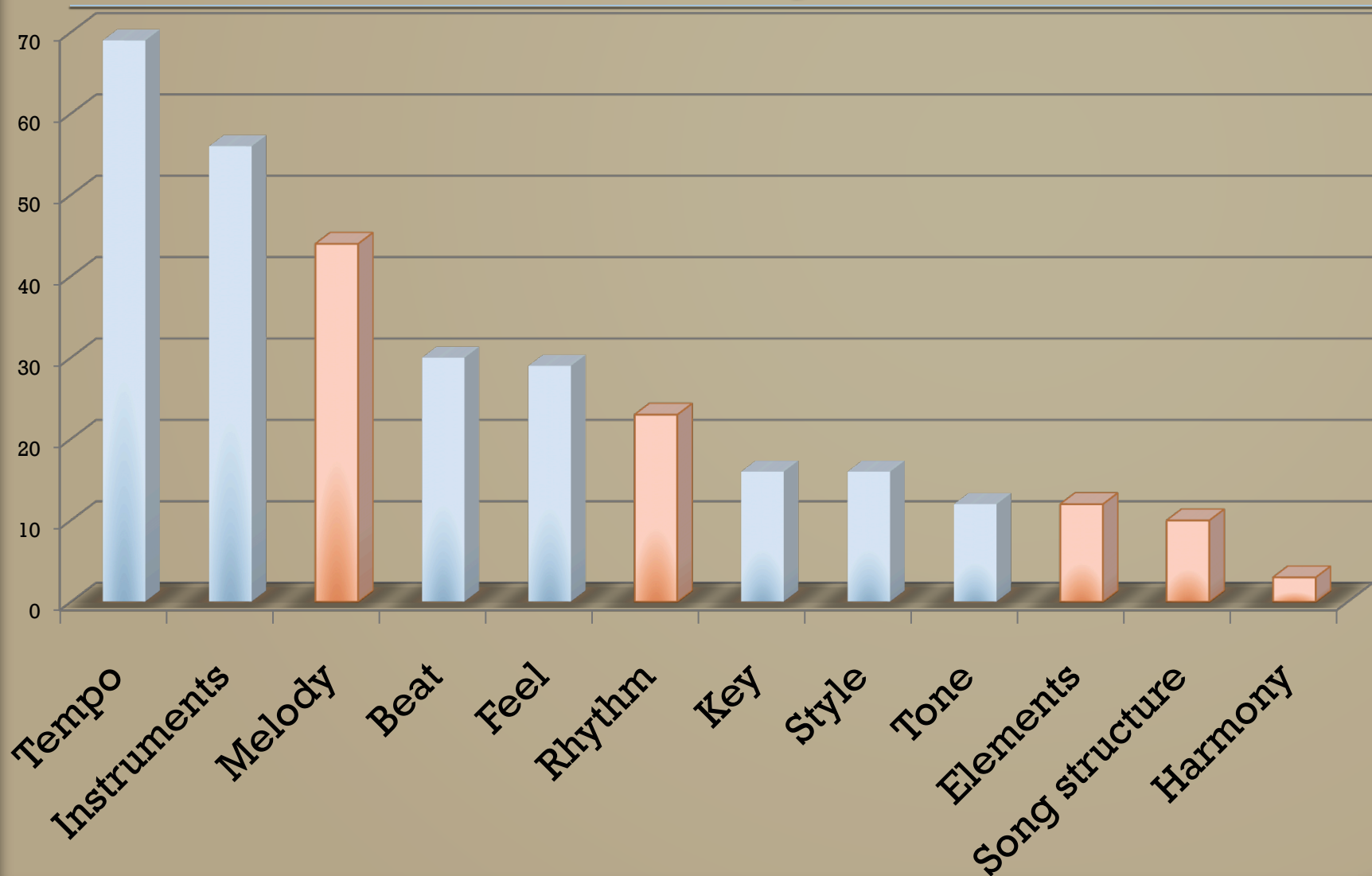
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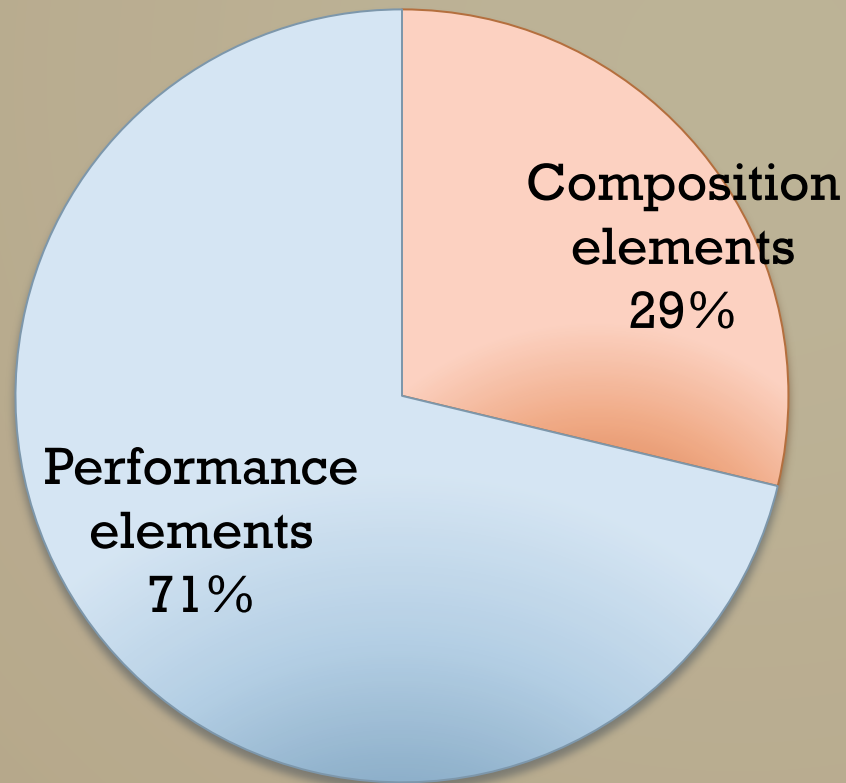
What jurors listen to



What jurors listen to



What do jurors listen to?



Troubling?

- "The reason I could tell it's different is the first song sounded like puppies and kittens and what society tells me to be and the second one -- I thought if hell exists, this is what should be played."
 - Comment during jury deliberation after the songs were played similarly.

Next project

- Can you educate jurors to actively listen to music?

Overview

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Jury instruction

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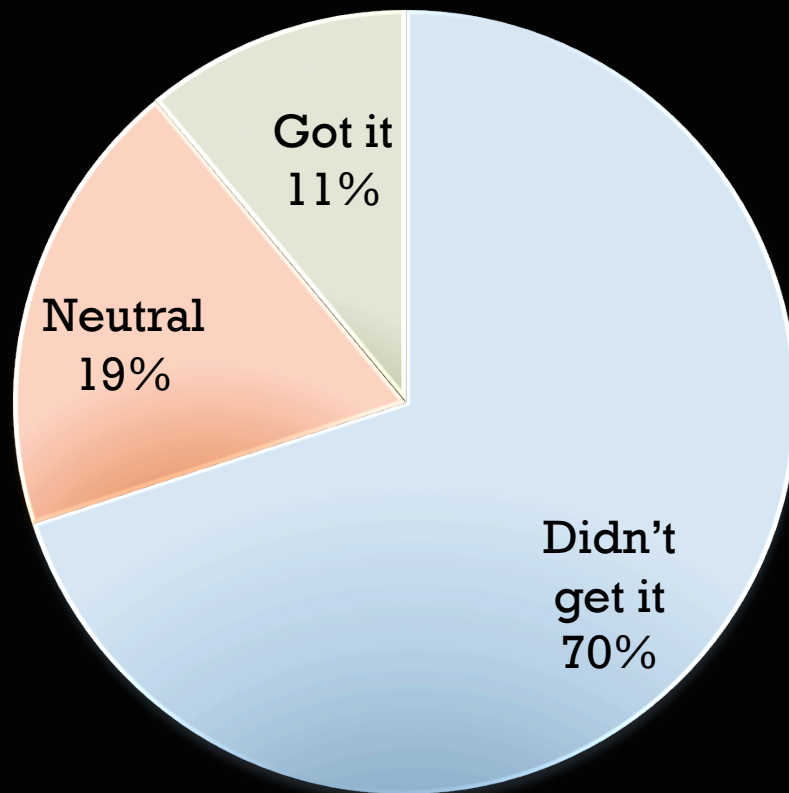
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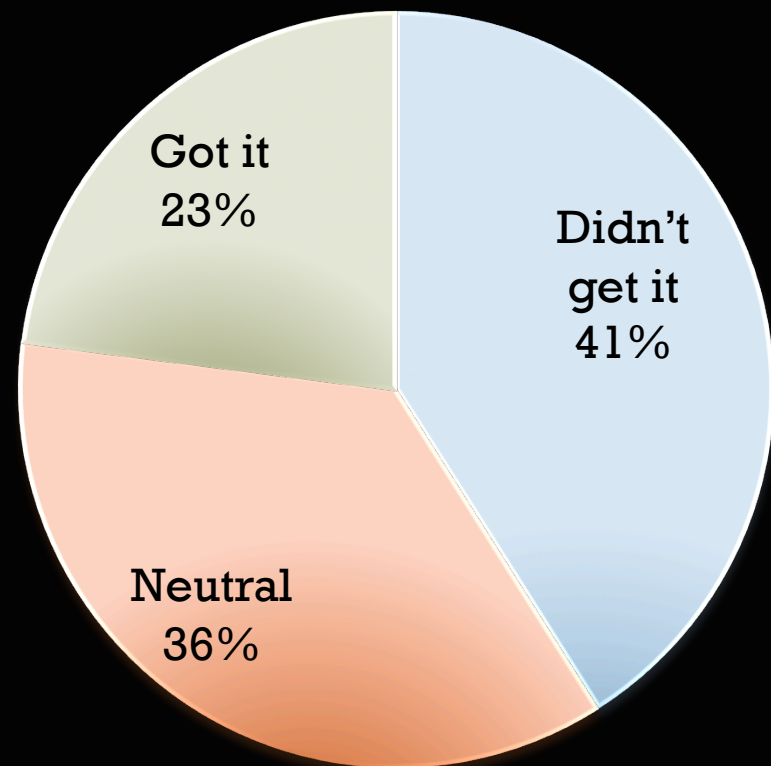
Which of these is a term of art?

- ◉ Original expression
- ◉ Quantitative or qualitative similarity

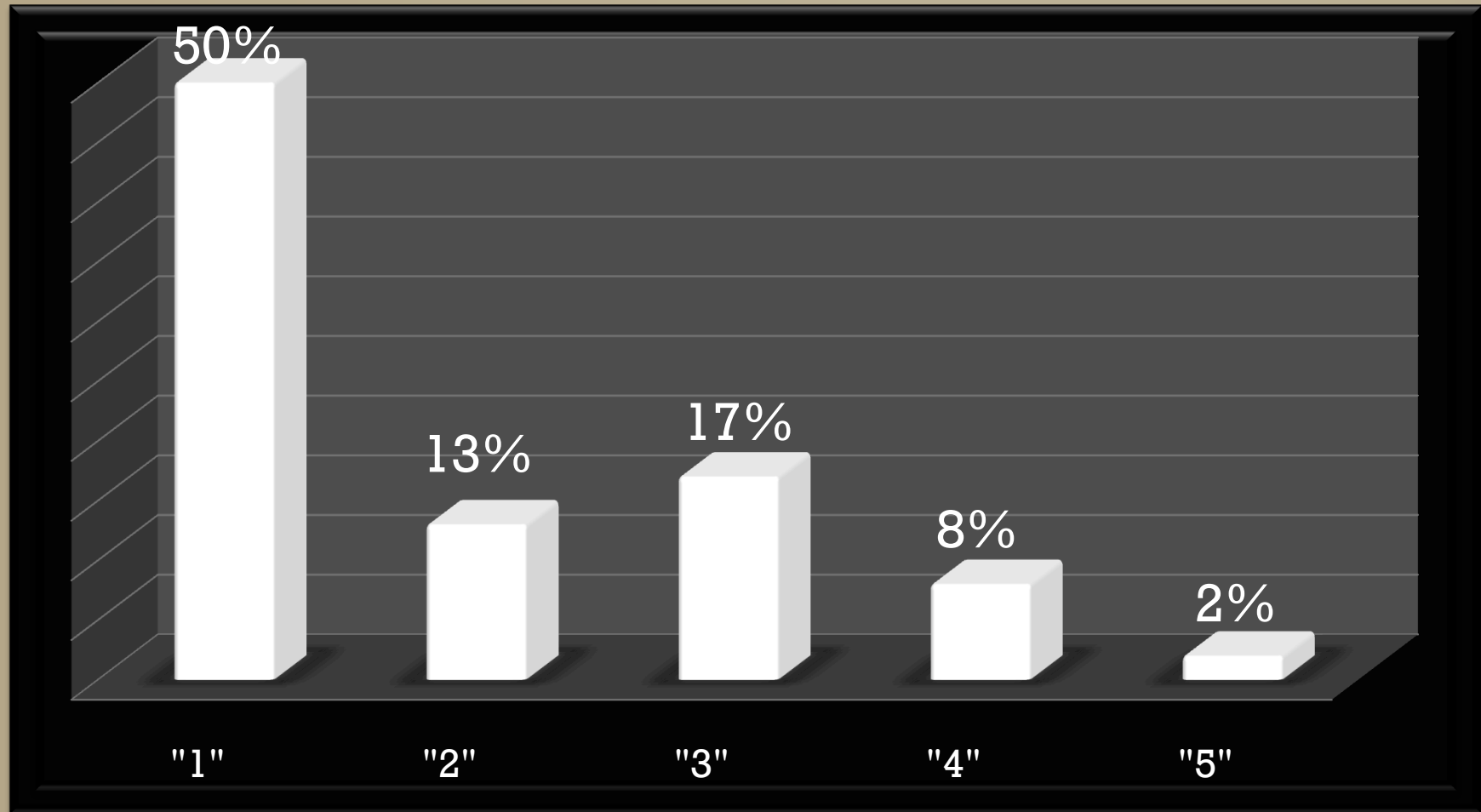
Comprehension of Original Expression



Comprehension of Qualitative and Quantitative Significance



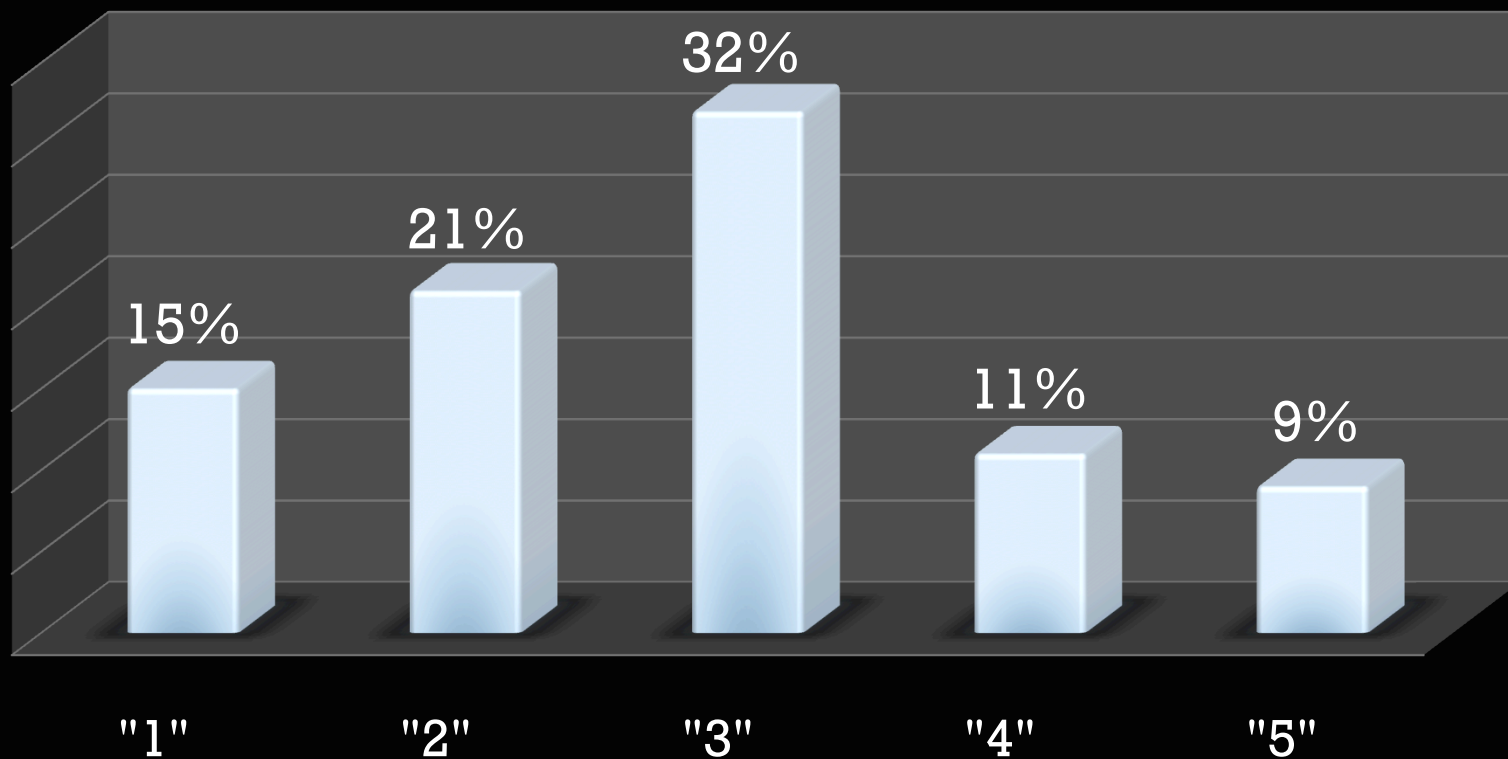
Original expression: got it?



Sample of juror responses

- “It means having not related to the music they are trying to produce, hence creating a different type of genre.”
- “These are key chords or sections that define the song, typically found in the chorus section.”
- “I would say that original expression means that the idea of the work is original to and from the composer. Also, here it sounds as though it means it is different from any genre of music”
- “Original expression means, the song does not fit any of the current genres. It can create a new one.”

Quantitative/qualitative: got it?



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Illogical?

COPYING

	Similar (Group C)	Different (Group D)
Yes	72.7%	19.6%
No	27.3%	80.4%

SUBSTANTIAL SIMILARITY

	Similar (Group C)	Different (Group D)
Yes	86.4%	15.2%
No	13.6%	84.8%

Similarity

- “But the solutions of engineers are much alike. Everything we think can in principle be thought by someone else. The real ideas, as evolution shows, come about by chance.”
- Theo Jansen



Next project

- ◉ Does it matter which order jurors decide copying vs. substantial similarity?