

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

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RALPH VARGAS and
BLAND-RICKY ROBERTS,

Plaintiffs,

- against -

PFIZER, INC., PUBLICIS, INC., FLUID
MUSIC, EAST WEST COMMUNICATIONS,
INC. and BRIAN TRANSEAU p/k/a "BT",

Defendants.
----- x

Case No. 04 CV 9772 (WHP)

SUPPLEMENTAL DECLARATION OF ANTHONY RICIGLIANO

I, Anthony Ricigliano, declare:

1. This declaration supplements (and, in one minor respect, corrects) my Declaration dated June 29, 2005, which was provided to the Court with the Defendants' Joint Motion for Summary Judgment ("June 29 Declaration"). (The correction concerns a typographical error in my June 29 Declaration, which is discussed at paragraph 10 below).

2. Since my June 29 Declaration, I have reviewed the following additional material:

- a. Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment;
- b. Declaration of Matthew Ritter;
- c. Declaration of Ivan A. Rodriguez;
- d. Affidavit of Ralph Vargas.

3. In addition to my credentials described in the June 29 Declaration, I should note that my undergraduate degree in Music Education included a minor in percussion. In addition, I

have practical experience as a drummer, having played the snare drum and numerous other percussion instruments in various concert bands and orchestras.

4. In his declaration, Plaintiffs' drum expert, Matthew Ritter, states that drums can be tuned and therefore "produce pitch... albeit in a way that is different from a guitar or piano (e.g. specific 'C sharp, 'B flat," etc." (Ritter Declaration, ¶ 26.) This statement, apparently made by Mr. Ritter to suggest that it was somehow incorrect for me to notate *Bust Dat Groove* using "Xs" instead of "round" note heads, is incomplete for the reasons described in ¶ 5 below. Even though incomplete, it is important to note that this statement remains fully consistent with the statement in my June 29 Declaration (at ¶ 6) that the percussion instruments used to create *Bust Dat Groove* do not have "specific pitch." Pitch— which is simply the perceived frequency of a musical sound — can be either specific or non-specific. Specific (or definite) pitch is produced by a vibration having a regular and consistent frequency. For example, a musical sound vibrating at 440 cycles per second has a specific pitch recognizable as the pitch A above middle C. Specific pitch is created by pitched instruments, such as guitars or pianos, in which striking the same key or string consistently produces the same perceived note sound. Non-specific (or indefinite) pitch occurs when the vibrations are irregular. It is only in this non-specific sense that a snare drum — or any percussion sound (for example, the clap of a hand, or dropping a rock on the ground) — has any pitch at all. A snare drum is not considered an instrument with a specific pitch. (See, for example the description of "Drums of indefinite pitch" in *The New Harvard Dictionary of Music*, a leading musical reference work, which is attached as Exhibit A.) Although a drum can be tuned such that the sound can be perceived as higher or lower, it does not produce a specific pitch in the traditional sense. Mr. Ritter acknowledges as much when he concedes that drums "do not have a standard

system of tuning,” and that “drums often times produce pitches that fall in between the traditional *specific pitches*.” (Ritter Decl. ¶¶ 11, 26(emphasis added)).

5. It is specific pitch, or, more precisely, a succession of specific pitches that vary from note to note – that creates one of the components of melody. See, for example, Turek, *The Elements of Music: Concepts and Applications* Volume 1 (an authoritative musicology text), selected pages attached as Exhibit B. The percussion sounds that are created by the instruments used to create *Bust Dat Groove* do not produce melody.

6. For that reason, I am surprised that Mr. Ritter takes issue with my use of Xs rather than “round” note heads in my transcription of the drum notes of the works at issue. (Ritter Decl. ¶ 24-25.) This is a distinction without a difference. As I explained in my June 29 Declaration (¶ 6), it is not uncommon to transcribe non-specifically pitched instruments in this manner, but either method is acceptable to show rhythmic notation. The use of “round” note heads may be more common where a transcription is being used for instructional purposes, or to guide an actual musical performance, but these were not the purposes for the transcriptions contained in my June 29 Declaration.

7. My transcriptions accurately depict the rhythms of each work at issue in this case. Those sounds and rhythms are shown not by the particular type of note symbols used, but rather by where they are placed relative to each other. In this respect, Mr. Ritter’s transcriptions except for the so called “ghost notes” are almost identical to my own (specific exceptions are discussed in the next two paragraphs). Mr. Ritter suggests that transcription with “round” note heads is appropriate to show pitch. (Ritter Decl. ¶ 25). However, none of Mr. Ritter’s transcriptions contain any indication of pitch. (Ritter Decl. Ex. B.) Every note he transcribes for each percussion element is shown on a musical staff without a clef. A clef designates a particular line or space as a specific

pitch. See, for example, Turek, *The Elements of Music: Concepts and Applications* Volume 1, selected pages attached as Exhibit B. Instead, that both Mr. Ritter and I transcribed the drum strikes in *Bust Dat Groove* on a single line shows the same, undisputed fact: *Bust Dat Groove* is a musical composition that has no specific pitch and therefore no melody or harmony.

8. Mr. Ritter claims that there is no tom-tom being played on *Bust Dat Groove*, but that instead, what may be perceived as a tom-tom is in fact a “ghost note” created by playing “multiple bounce strokes” on a tightened snare drum. (Ritter Decl. ¶ 19.) This is another distinction without a difference. The purpose of my transcription was to visually depict the works in dispute, to compare them to each other, and compare them to other, previously created, standard rhythms. For this purpose, it does not matter what type of drum was used. Whether the sound was created by a real tom-tom, a snare drum, a synthesizer or in some other way – the transcription of the rhythm remains the same, and shows nothing other than a standard drum-beat rhythm, large portions of which come straight out of the instructional books. See June 29 Decl. ¶¶ 5-13. For all of his criticism, however, I do note that Mr. Ritter admits that what he is characterizing as a snare drum “ghost note” in fact “sound[s] like a cross between a snare drum and a tom-tom...” (Ritter Decl. ¶¶ 5, 6). That I characterized it as sounding more like a tom-tom is immaterial to this central point.

9. The more important point is that Mr. Ritter’s transcription is less precise than mine. According to Mr. Ritter, the snare drum on *Bust Dat Groove* contains “multiple bounce strokes” created by ricocheting the drumstick across the snare drum. It is this stroke that Mr. Ritter transcribes as a single, non-specific “ghost note.” (Ritter Decl. ¶¶ 20-22 & Ex. B.) My transcription of *Bust Dat Groove* shows this same sound as a four-stroke combination that I characterize as a “ruff.” (June 29 Decl. ¶¶ 9, 16.) In other words, Mr. Ritter and I are using

different symbols to describe this same sound, but Mr. Ritter shows it as a single note (despite admitting that it consists of “multiple bounce strokes”), whereas I show each individual hit. (Moreover, as I noted in my June 29 Declaration, this rhythmic figure is often notated in different ways in musical transcriptions and drum set books. (June 29 Decl., ¶ 9, p. 5.) Again, none of these transcription methods is exclusively the correct method, although I chose a method that reflects the sounds and rhythm of *Bust Dat Groove* in more detail than Mr. Ritter’s depiction.)

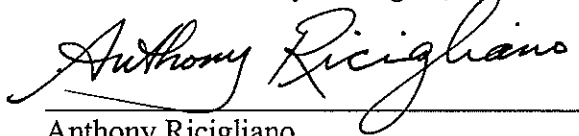
10. In my June 29 Declaration, I stated (at ¶ 18) that the entire four-note bass figure appearing in *Aparthenonia* is so basic that it appears within an exercise in one of the instructional drum books attached to Exhibit C. Due to a typographical error, I misidentified the exercise in question as “Exhibit C7, number *14*.” As Mr. Ritter correctly points out in his declaration (at ¶ 30), that exercise number 14 is in fact dissimilar to the bass pattern used in *Aparthenonia*. The correct citation should have been to Exhibit C7, number *11*, which is the same as *Aparthenonia*’s bass drum figure. I apologize for any confusion that this typographical error may have caused.

11. Snare drums are designed so that the drum wires and drum heads can be tightened or loosened as the drummer desires. Such adjustments are part of the design of the drum, and tightening or loosening a snare drum is not considered to be musical expression.

12. None of the material submitted by the Plaintiffs alters the opinion I stated in my June 29 Declaration. *Bust Dat Groove* consists entirely of non-original percussion patterns that are so basic that they can be found in elementary drum instructional books dating back to the 1960s, and that are fundamental rhythms that have long been in the public domain.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statement is true and correct.

Executed this 1st day of August, 2005.

A handwritten signature in cursive script that reads "Anthony Ricigliano". The signature is written in black ink and is positioned above a horizontal line.

Anthony Ricigliano
Musicologist

EXHIBIT A

EDITED BY *DON MICHAEL RANDEL*

*THE NEW
HARVARD
DICTIONARY
OF MUSIC*

*THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASSACHUSETTS
LONDON, ENGLAND*

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Printed in the United States of America

10 9 8 7 6 5

Designed by Marianne Perlak and typeset in APS-5 Times Roman.

Instrument drawings by Carmela Ciampa and Laszlo Meszoly.

Musical examples by A-R Editions, Inc.

This book is printed on acid-free paper, and its binding materials have been chosen for strength and durability.

Library of Congress Cataloging-in-Publication Data

Randel, Don Michael.

The new Harvard dictionary of music.

Rev. ed. of: Harvard dictionary of music /

Willi Apel. 2nd ed. 1969.

Includes bibliographies.

I. Music—Dictionaries.

I. Apel, Willi, 1893–. Harvard dictionary of music. II. Title.

ML100.R3 1986 780'.3'21 86-4780

ISBN 0-674-61525-5 (lib. bdg.: alk. paper)

modated by the designations *opéra comique* or *grand opéra*. Massenet called his opera *Werther* a *drame lyrique*, as did Debussy his *Pelléas et Mélisande*. *Dramma lirico* is used as a subtitle occasionally by Verdi (*Nabucco*, *I Lombardi*, *Ernani*, *Otello*, among others) and Puccini (*Manon Lescaut*, *Turandot*).

Dramma giocoso [It.]. A comic opera with some serious elements. The term was introduced in the middle of the 18th century by Carlo Goldoni to describe his librettos in which serious characters, from an aristocratic social class, interacted with comic servants and peasants. The most famous example of *dramma giocoso* is Mozart's *Don Giovanni*.

Dramma lirico [It.]. See *Drame lyrique*.

Dramma per musica [It.]. A designation that commonly follows the title in 17th- and 18th-century librettos, usually meaning that the text has been written expressly to be set to music. It is sometimes used to refer to the text alone and sometimes to refer to the entire opera, but the former is more common. Bach used the term for secular cantatas in dialogue form that were designed for a modest stage performance (e.g., *Der Streit zwischen Phöbus und Pan* and the *Coffee Cantata*).

Dramma sacro. [It.]. An *oratorio*.

Drängend [Ger.]. Pressing on, quickening.

Draw stop. A knob mounted on a shaft of wood, connected to a *slider* in the organ wind-chest, and employed to draw or retire a stop. In some electric-action organs, small tabs of ivory or plastic are used instead of the more traditional arrangement.

Dreher [Ger.]. A dance in 3/4 meter related to the *Ländler*.

Drehleier [Ger.]. *Hurdy-gurdy*.

Drehorgel [Ger.]. *Barrel organ*.

Dreigroschenoper, Die [Ger., The Threepenny Opera]. Opera in a prologue and eight scenes by Kurt Weill (libretto by Bertolt Brecht after *The Beggar's Opera*), produced in Berlin in 1928. An English adaptation by Marc Blitzstein was first produced in 1952.

Dreiklang [Ger.]. *Triad*.

Dreitaktig [Ger.]. Three-beat.

Drone. (1) Any instrument that plays only a constant pitch or pitches. See *Tamburā*. (2) On a *bagpipe*, those pipes that have no finger holes and thus sound a single pitch. They may be pitched above or below the *chanter*, which plays the melody. (3) A long, sustained tone in a piece of music, often intended to imitate the sound of (1), usually pitched below the melody. See also *Bourdon*, *Pedal point*.

Drum [Fr. *tambour*; Ger. *Trommel*; It. *tamburo*; Sp. *tambor*]. Any of the instruments known as *membranophones*, with skin (or plastic) stretched over a

frame or vessel of, usually, wood or metal; a few instruments also termed drums are *idiophones* (e.g., the *slit drum*). While most drums are struck with the hand(s) or a beater, in some cultures they are also shaken (*rattle drums*), rubbed (*friction drums*), or plucked (drums with a tensioned string attached [see *String drum*]). These instruments are found in a large variety of sizes and shapes ranging from bowls, cylinders, and barrels to cones, hourglasses, and simple frames. They have one or two heads that are either laced, nailed, or glued to the body, or in their modern form, held in place by a counterhoop and bolts. Drums are found throughout the world, from the most primitive African or South American tribal cultures to sophisticated cultures of China, India, and Muslim lands. In most musical cultures, drums are of indefinite pitch, though in *Africa*, the *Near East*, *Southeast Asia*, and elsewhere, the contrast of two or more higher and lower indefinite pitches on one, two, or more drums is a central feature of drumming. European *kettledrums*, however, must be tuned to definite pitches, as must drums used in the art music of *South Asia*, such as the *tabla* and *mrdaṅgam*. Drums play an important role in communication and ceremony as well as in high art. As ritual instruments, they have often been imbued with magical powers.

I. *Drums of indefinite pitch in Western art music* [see ills. under *Percussion instruments*]. 1. Side drum, snare drum [Fr. *caisse claire*, *tambour militaire*; Ger. *kleine Trommel*; It. *tamburo militare*; Sp. *tambor*, *caja militar*]. A cylindrical shell made of wood or metal with two heads, the lower being furnished with snares—gut strings or wires running parallel to one another across the center of the head. When the upper or batter head is struck, the snares, if appropriately adjusted, vibrate against the lower or snare head. The two heads were tensioned in earlier times by ropes laced between them around the shell. Today threaded rods are employed, sometimes permitting separate adjustment of the tension on each head. Most modern instruments also have a lever for the quick release of the snares. The instrument used in the modern orchestra and in the *drum set* of jazz and popular music is about 35 cm. (14 in.) in diameter and about 13 cm. (5 in.) deep. It is mounted on a stand horizontally or at a slight angle. The instrument used in marching is about 30 cm. (12 in.) in diameter and about 38 cm. (15 in.) deep. It is suspended at an angle at the player's left side (whence the term *side drum*) from a strap worn over the right shoulder. The side drum is played with wooden sticks that taper to a slightly elongated knob at the tip. In jazz and popular music, the side drum may also be played with wire brushes. For characteristic strokes employed on the side drum, see *Drag*, *Flam*, *Paradiddle*, *Roll*, *Ruff*.

The side drum developed from the big *tabor* [see II below] and appeared toward the end of the Middle Ages as an important military instrument popular-

EXHIBIT B

**THE ELEMENTS OF MUSIC:
CONCEPTS AND APPLICATIONS**
Volume One

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CHAPTER ONE PITCH AND ITS NOTATION

Lesson one (0111)
rudiments and
renew of pitch and
notation

TERMS TO KNOW

accidental	enharmonic	natural
chromatic alteration	flat	neumes
chromatic scale	grand staff	ottava sign
clef	half step	sharp
double flat	interval	staff
double sharp	ledger lines	whole step
	loco	

- x The *pitch* of a musical tone is a measurement of how high or low it sounds. When we hear a melody, we are hearing a series of pitches. Most musical sounds have a very well-defined pitch. In sounds such as normal human speech, and in the sounds produced by drums and some other percussive instruments, the pitch is not so well defined.

PITCH

Musical notation is the written language of music. The symbols of this language indicate the precise pitch and the duration (length) of every note. Other musical qualities, such as tempo, loudness, tone quality, or style of playing, also can be indicated through the notation. By notating an idea, a composer gives it permanence and enables performers to recreate it.

NOTATION

The origins of our notational system are found in music manuscripts dating from about the tenth century. Symbols called *neumes* were included above the words to be sung or chanted, as a memory aid for the singers. Some of these neumes, along with their present-day forms, are shown in the following illustration.

g m

loco

Illustration 1.1

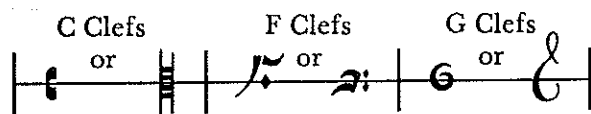
<i>Neume</i>	<i>Later shape (ca. 1250)</i>	<i>Present-day form</i>
/	┆	♪
✓	┆	♪
∩	┆	♪
∪	┆	♪

**THE
STAFF
AND
CLEFS**

By themselves, note symbols can indicate only the *general* upward and downward movement of a melody. When placed on the lines and spaces of a five-line *staff*, however, these same symbols can indicate precise pitches. A *clef sign*, placed at the left-hand side of the staff, is used to denote the general range of the notes and, more important, a reference pitch. With this point of reference, all of the lines and spaces of a staff can indicate specific pitches.

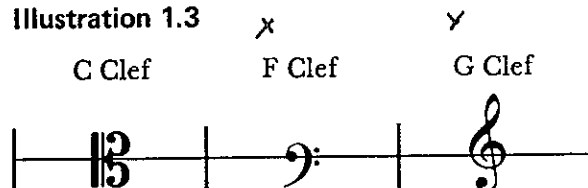
Letters of the alphabet are used to designate particular pitches. During the period when our notational system was first developing, most melodies contained fewer discrete pitches than today's melodies. Thus, the letters A through G were apparently considered sufficient, and clef signs were used to designate the pitches C, F and G. Early clef signs looked like this:

Illustration 1.2



and eventually evolved into our present-day symbols.

Illustration 1.3



Originally, the clefs could be placed on any line of the staff. In current notational practice, however, only the C clefs are movable. The four clefs that remain in common use are shown below. The black notes represent *middle C*—the C closest to the middle of the piano keyboard.

Illustration 1.4

The diagram illustrates the relationship between musical staves and a piano keyboard. At the top, a Treble Clef staff shows notes C, D, E, F, G, A, B, C, D, E, F, G. A handwritten '440' with an arrow points to the A note. Below it, an Alto Clef staff shows notes E, F, G, A, B, C, D, E, F, G, A. In the center is a piano keyboard with 'Middle C' labeled on the white key between the two black keys in the middle. Below the keyboard, a Tenor Clef staff shows notes C, D, E, F, G, A, B, C, D, E, F. At the bottom, a Bass Clef staff shows notes F, G, A, B, C, D, E, F, G, A, B, C. Vertical lines connect the notes on the staves to their corresponding positions on the piano keyboard.

Notice that the treble and bass clefs place middle C lowest and highest respectively on the staff. In fact, middle C must be notated in *either* of these clefs with a *ledger line*. Ledger lines are short horizontal lines representing an upward or downward extension of the staff. They are drawn through the stems of notes too high or too low to be located directly *on* the staff.

LEDGER LINES

Illustration 1.5

The diagram shows a treble clef staff. Two notes are placed above the top line of the staff, and two notes are placed below the bottom line. Arrows labeled 'ledger lines' point to the horizontal lines that extend from the staff to accommodate these notes.

NOTE: Since ledger lines represent an extension of the staff, they should be spaced the same distance apart as the lines of the staff. They should also completely intersect the stem and be slightly longer than the notehead itself.

Together, the treble and bass clefs encompass the widest possible range. In keyboard music, they are used together to form the *grand staff*.

CHAPTER FIVE MELODY

TERMS TO KNOW

antecedent	double period	phrase extension
cadence	figure	phrase member
cadential elision	inconclusive cadence	range
cadential extension	melody	real sequence
chromatic tendency tone	modified sequence	repeated phrase
conclusive cadence	motive	sequence
conjunct motion	parallel period	tendency tone
consequent	period	tonal
contrasting period	phrase	tonal sequence
disjunct motion	phrase compression	

In the majority of musical works, melody is the element that impresses us most immediately and remains longest in our minds. A melody is, in the most general sense, a succession of pitches in rhythm. These pitches are usually organized into one or more larger units. Thus, pitch, rhythm, and form are the essence of most melodies.

A. General Melodic Characteristics

CONTOUR One of the more general aspects of a melodic line is its *contour*—its overall shape. Most melodies present a combination of certain basic contours, illustrated below.

Example 5.1

(a) Mozart: *Piano Sonata, K. 332 (I)**

Ascending contour



*This movement is contained in its entirety in *Analytical Anthology of Music*, by this author (Alfred A. Knopf, Inc., 1984).