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Musical Copyright Infringement: The Replacement of *Arnstein v. Porter*—A More Comprehensive Use of Expert Testimony and the Implementation of an “Actual Audience” Test

I. INTRODUCTION

Historically, composers have freely copied the musical compositions of their colleagues and of the great masters.¹ A composer may seek similarity in his own musical work to that of a pre-existing work because “only a few [permutations of musical notes] are pleasing; and much fewer still suit the infantile demands of the popular ear.”² The emphasis on productivity and professional skill overshadowed the importance of the originality³ of a musical work.⁴ Borrowing was permitted “so long as the composer used the material to good effect; the focus was not on the source of the components, but on the quality of the whole.”⁵

This practice continues. For example, Paul McCartney has stated

1. A. SHAFTER, *MUSICAL COPYRIGHT* 146 (2d ed. 1932). Shafter notes:

Bach, who would probably turn over in his grave at the knowledge, has furnished the melodic ideas for scores of popular hits he would shudder to hear. Beethoven, Chopin, Wagner, Liszt—all the great ones have contributed similarly to the unholy prosperity of Tin Pan Alley copyists who possess not a tithe of their genius or industry.

Id. at 146-47.

2. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80, 80 (2d Cir. 1940) (defendant did not infringe plaintiff's musical composition despite a substantially identical sequence of eight notes found in defendant's composition). “Reoccurrence [of musical notes] is not therefore an inevitable badge of plagiarism.” *Id.*

3. An original work need not be novel; rather, the work need only be original to its creator and, therefore, not copied from another. “‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’” *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951) (footnote omitted) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1883)). “All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” *Id.* at 102-03 (footnote omitted) (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945)).

“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .” 17 U.S.C. § 102 (1982 & Supp. IV 1986) (successor to Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075 (1909)).

4. See generally A. SHAFTER, *supra* note 1, at 147-50.

5. Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 425 (1988) (emphasis in original); see also B. KAPLAN, *AN UNHURRIED*

that “[the Beatles] were the biggest nickers in town. Plagiarists *extraordinaires*.”⁶ The copying of musical works has thus been accepted by some as commonplace. However, today, while a composer may copy a colleague’s work, when that same composer suspects another of copying his *own* work, the alleged infringer is sued immediately for copyright infringement.⁷ The music industry’s tremendous growth since the late 1970s,⁸ and the increased revenues from the creative exploitation of musical works have caused this attitude change among composers toward the infringement of their copyright.⁹

Consequently, musical plagiarism¹⁰ or musical copyright infringement¹¹ is the subject of much comment. “The determination of [copyright] infringement is one of the most difficult of all legal questions”¹² The Second Circuit’s 1946 decision in *Arnstein v. Porter*¹³ imposed significant judicial guidelines¹⁴ by limiting the interplay between the use of expert witnesses and the lay listener

VIEW OF COPYRIGHT 53 (1967) (advocating “cross-lifting,” which is the use of one work in the creating of a new, independent work).

6. Comment, *supra* note 5, at 427 n.33.

7. A. SHAFER, *supra* note 1, at 146-47.

8. Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 127-28 & n.4 (1988); see J. TAUBMAN, IN TUNE WITH THE MUSIC BUSINESS 51 (1980) (discussing the rapid growth of the recording industry); H. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 156 (1986). A popular song may be licensed for advertising purposes, such as Kodak’s use of Cyndi Lauper’s popular song “True Colors.” Technological advances also have increased the potential uses of music.

9. See, e.g., *Gaste v. Kaiserman*, 683 F. Supp. 63 (S.D.N.Y. 1988). “[T]he jury found that the song ‘Feelings’ infringed plaintiffs’ copyright in the musical composition ‘Pour Toy’ and awarded plaintiffs damages in excess of \$500,000.” *Id.* at 64. The defendants’ motion to reduce the jury’s award was granted. *Id.* at 66.

10. Although the terms “plagiarism” and “copyright infringement” are used interchangeably, plagiarism most often refers to literary or dramatic copying, whereas copyright infringement usually refers to music copying. Plagiarism also refers to an area of copyright infringement which involves the appropriation of another’s work, ideas, or language—either in whole or part—and passing such work off as the product of one’s own mind. It is not necessary to copy another’s work verbatim to be liable for plagiarism. Also, plagiarism is not to be confused with the area of copyright infringement referred to as “piracy,” which is the reproduction and sale of unauthorized literal copies of a work. See generally A. SHAFER, *supra* note 1, at 151-54.

11. Copyright infringement refers to a violation of any right granted to a copyright owner by the Copyright Act of 1976. 17 U.S.C. § 501(a) (1982). “[A]n infringement is not confined to the literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred or reproduced, with more or less colorable alterations to disguise the piracy.” *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947) (quoting 18 C.J.S. *Copyright and Literary Property* § 34, at 217 (1943)). See generally 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][2] (1989); A. SHAFER, *supra* note 1, at 151-54.

12. A. SHAFER, *supra* note 1, at 146.

13. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947); see *infra* notes 110-20 and accompanying text.

14. The federal courts have exclusive jurisdiction over actions for statutory copyright infringement, as copyright is governed by federal statute. 17 U.S.C. §§ 101-914 (1976).

test¹⁵ within the framework of musical copyright infringement litigation.¹⁶

Expert witnesses analyze and dissect the original work and the allegedly infringing work to ensure that the plaintiff has brought suit against the proper defendant, and to assist in proving that the defendant has copied the plaintiff's work.¹⁷ Experts, however, are used only in the determination of whether a defendant has copied.¹⁸ To prove illicit copying or improper appropriation,¹⁹ the trier of fact, having heard the expert testimony, places itself in the position of the average lay listener to decide the ultimate issue of copyright infringement. This issue is whether the defendant's work is substantially similar²⁰ to that of the plaintiff and, thus, whether the defendant has illicitly or improperly copied or appropriated the plaintiff's work.²¹ The use of the lay listener test results from the notion that general audience reactions are a gauge of whether the defendant has taken from the plaintiff's work that which is aurally recognizable and pleasing to those listeners who comprise the plaintiff's target audience.²² If this is found, the defendant has wrongfully appropriated the plaintiff's work and liability attaches.²³

Although *Arnstein* has been followed by the federal courts for over

15. The counterpart of the lay listener test in literary and dramatic plagiarism infringement suits is the average and ordinary lay observer test. Courts have used the terms "average lay observer," "ordinary reasonable person," "ordinary lay observer," or in the context of *music*, the terms "average lay listener," "average listener," "ordinary lay listener," "spectator reactions," and "the audience test," interchangeably. Decisions using the average or ordinary observer test include: *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983) ("Star Wars"); *Meta-Film Assoc., Inc. v. MCA, Inc.*, 586 F. Supp. 1346 (C.D. Cal. 1984) ("Animal House"); *Universal City Studios, Inc. v. Film Ventures Int'l, Inc.*, 543 F. Supp. 1134 (C.D. Cal. 1982) ("Jaws"); *Warner Bros., Inc. v. ABC*, 523 F. Supp. 611 (S.D.N.Y.), *aff'd*, 654 F.2d 204 (2d Cir. 1981) ("Superman").

16. Sections 103 and 106 exclusively govern what constitutes a copyright. 17 U.S.C. §§ 103, 106 (1976). The copyright statute invites incorporation and evolution of judicial doctrine on the subject of plaintiff's burden of proof regarding copyright infringement. M. NIMMER, *supra* note 11, § 12.11[D].

17. *Arnstein*, 154 F.2d at 468.

18. *Id.*

19. These terms are used interchangeably and mean that the defendant copied illegally.

20. See generally Cohen, *Masking Copyright Decision Making: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719 (1987); Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 2 COPYRIGHT L. SYMP. 81, 94-98 (1977).

21. *Arnstein*, 154 F.2d at 468-69.

22. *Id.* at 473.

23. *Id.*

forty years,²⁴ and the *general* law regarding copyright infringement is relatively settled,²⁵ *Arnstein* is criticized for its impracticality.²⁶ Despite judicial agreement that the determination of substantial similarity on the issue of improper appropriation is a question of fact, disagreement remains as to the most effective method of analyzing this issue. The federal courts have been in conflict over musical comparison in copyright infringement litigation for more than a century.²⁷ Since *Arnstein*, this controversy has focused primarily upon the use of expert witnesses and lay listener reactions within musical copyright infringement litigation.²⁸

Music has been considered "the most baffling of the arts, . . . [and the product of the] most apparently precise and rationale techniques."²⁹ Consequently, musical copyright infringement analysis has suffered from "poor legal and musical analysis."³⁰ Because of the unique nature of music and the recent *significant* increase in the financial stakes surrounding the music industry, the judicial limitations on the use of experts and lay listener reactions as set out in *Arnstein* are no longer sufficient. A more reliable means of ascertaining musical copyright infringement must be implemented.

Part II of this comment discusses the unique nature of musical comparison.³¹ Part II also suggests that *Arnstein's* use of experts and hypothetical lay persons to prove copying and improper appropria-

24. The Seventh Circuit's opinion in *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984), demonstrates the federal courts' recent substantial adherence to the principles laid out in *Arnstein*.

25. For a plaintiff to bring a copyright infringement suit, three elements must be proved: (1) the plaintiff's work is his own and, therefore, original and subsequently entitled to valid copyright protection; (2) the defendant copied the plaintiff's work; and (3) the defendant's copying is substantial enough to qualify as infringement, *i.e.*, the plaintiff must prove illicit copying or improper appropriation. If the plaintiff successfully proves these elements, the defendant is liable for copyright infringement. See *infra* notes 77-109 and accompanying text. See generally 3 M. NIMMER, *supra* note 11, §§ 13.01-.03; W. PATRY, *LATMEN'S THE COPYRIGHT LAW* 192-202 (1986).

26. See, *e.g.*, *Whelan Assocs. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1232-33 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (infringement of computer software programs). "[T]he distinction between the two parts of the *Arnstein* test may be of doubtful value when the finder of fact is the same person for each step . . ." *Id.* at 1232.

27. See, *e.g.*, *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552) (plaintiff, a playwright, who composed and properly copyrighted a dramatic composition entitled "Under the Gaslight" was granted an injunction against defendant who partly copied plaintiff's work in his play "After Dark"); *Emerson v. Davies*, 8 F. Cas. 615 (No. 4,436), *reh'g denied*, 8 F. Cas. 626 (C.C.D. Mass. 1845) (No. 4,437) (copyright infringement of plaintiff's book, *Emerson's North American Arithmetic*).

28. See, *e.g.*, *Cohen*, *supra* note 20; *Orth, The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232 (1955); *Sorensen & Sorensen, Re-examining the Traditional Legal Test of Literary Similarity: A Proposal for Content Analysis*, 37 CORNELL L.Q. 638 (1952).

29. A. COOKE, *A GUIDE TO MUSICAL ANALYSIS* 1 (1987).

30. Comment, *supra* note 5, at 463.

31. See *infra* notes 44-65 and accompanying text.

tion respectively, is inappropriate for musical copyright infringement litigation.³²

Part III introduces the Second Circuit's majority decision in *Arnstein*. This section includes a complete discussion of how a plaintiff proves copyright infringement through ownership,³³ copying,³⁴ and improper appropriation,³⁵ as well as a brief explanation of the way in which expert witnesses and the lay listener test are used in this process.³⁶ Part III also outlines the Ninth Circuit's attempt to modify *Arnstein* and the framework of copyright infringement litigation by the use of the idea-expression dichotomy, as found in *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*³⁷ *Krofft's* use of experts and lay listener reactions is rejected as it applies to musical comparison.³⁸

Part IV advocates Judge Clark's avid dissent³⁹ in *Arnstein*. To this day, Judge Clark's dissatisfaction with the *Arnstein* formula has considerable merit, especially with regard to *musical* copyright infringement litigation.

Part V analyzes the use of experts and, specifically, their role in musical copyright infringement litigation.⁴⁰ This section concludes that the expert is an *essential* player in the technical comparison of musical works. Part VI of this comment then discusses the application and validity of the lay listener test with regard to musical copyright infringement litigation.⁴¹

Finally, Part VII proposes modifications to the current musical copyright infringement litigation framework. This section advocates a more comprehensive use of expert witnesses in musical copyright infringement cases and proposes that the trier of fact be presented with expert testimony, not only on the issue of copying, but also on the issue of improper appropriation.⁴² In the event that the extended use of expert testimony on the issue of improper appropriation does

32. See *infra* notes 66-76 and accompanying text.

33. See *infra* notes 77-78 and accompanying text.

34. See *infra* notes 79-102 and accompanying text.

35. See *infra* notes 103-09 and accompanying text.

36. See *infra* notes 110-20 and accompanying text.

37. 562 F.2d 1157 (9th Cir. 1977).

38. See *infra* notes 121-44 and accompanying text.

39. See *infra* notes 145-51 and accompanying text; see also Metzger, *Name that Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 5 LOY. ENT. L.J. 61, 80-83 (1985); Orth, *supra* note 28, at 249-57; Sherman, *supra* note 20, at 94-98.

40. See *infra* notes 152-57 and accompanying text.

41. See *infra* notes 158-76 and accompanying text.

42. See *infra* notes 177-86 and accompanying text.

not eliminate the lay listener test, Part VI also proposes that the trier of fact no longer hypothetically assume the role of a lay listener, but instead be offered testimony from a sampling of an "actual audience" of plaintiff's music.⁴³

II. THE UNIQUE NATURE OF MUSIC AND MUSICAL COMPARISON

A. *Music, in a Class by Itself*

Music has been described as a science, despite the fact that its essence is "an art and indefinable."⁴⁴ Justice Holmes has defined a musical composition as a "rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention."⁴⁵ This definition has been deemed the "classic judicial description"⁴⁶ of music.

Whereas the English language consists of a twenty-six letter alphabet, creating a language with hundreds of thousands of words, music is limited to combinations of chords taken from a scale of only thirteen notes.⁴⁷ Musical range is further limited because the average singing voice is only one octave and most musical instruments are confined to three to five octaves.⁴⁸ Consequently, there is a limit to musical expression. It is claimed that all possible combinations of these thirteen notes already exist in the public domain, and that original music can no longer be created.⁴⁹ Difficulty in achieving originality in a musical work creates equal difficulty in ascertaining whether a work has been copied. "Practically every original idea the composer can think of has appeared somewhere before; it is a matter of probabilities, and every day the number of new possibilities grows less."⁵⁰

Because use of musical tones and octaves are limited, composers turn to the variation of other musical elements to obtain originality. However, even this is limited. The most basic of these elements are rhythm, harmony, and melody. "Originality, if it exists, must be found in one of these."⁵¹ Thus, they are important in musical copy-right infringement analysis.

43. See *infra* notes 187-98 and accompanying text.

44. A. SHAFER, *supra* note 1, at 154 (citing *Bach v. Longman*, 1 Chit. 26 (1777); *Dunbar v. Spratt-Snyder Co.*, 208 Iowa 490, 226 N.W. 22 (1929)).

45. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 20 (1908) (Holmes, J., concurring).

46. A. SHAFER, *supra* note 1, at 154.

47. See *generally id.* at 155-69.

48. *Id.* at 157; Orth, *supra* note 28, at 234.

49. A. SHAFER, *supra* note 1, at 155.

50. *Id.*

51. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952).

Rhythm involves the duration of musical sounds within a musical composition. It is "time, the beats per bar; everything that can be checked by the metronome,"⁵² including accent,⁵³ tempo,⁵⁴ and meter.⁵⁵ An allegedly infringing work may differ in rhythm from the infringed work, and consequently camouflage an infringement, creating the appearance of originality. "[O]ne may copy a melody by changing the rhythm—and still be infringing."⁵⁶

Melody⁵⁷ is the arrangement or succession of musical notes which are "the fingerprints of the composition, and establish its identity."⁵⁸ In essence, it is the "tune" of a song. A song's melody usually determines its commercial success or failure.⁵⁹ There is, however, a limitation of human ingenuity as far as the creation of melody.

Harmony is generally the "blending of tones":⁶⁰ the formation of chords and the way in which the tones and chords work together as accompaniment to melody. "Harmony and melody, inextricably interwoven as they are, usually form the basis of an infringement suit together."⁶¹

Several other elements also contribute to the creation of a musical work. These include "[t]imbre . . . [s]patial organization . . . rhythm, phrasing, bass lines, instrumentation and new technological effects, all of which can play an important role in a song's originality."⁶²

Originality may be viewed as "a function of the interaction and

52. A. SHAFER, *supra* note 1, at 158.

53. "The creation of regularly recurring accents of this type depends on the manipulation of groups of pitches and chords." HARVARD CONCISE DICTIONARY OF MUSIC 3 (1978) [hereinafter HARVARD]. Thus, placing emphasis on one pitch or chord by accenting notes at regular intervals allows a composer to set the rhythm of a musical composition. Accents may be strong or weak. Weak accents assist in building rhythm by creating anticipation for strong accents. *Id.*

54. Tempo is the pace or rate of speed at which a musical piece is played, determining the general nature of the piece. Time gives musical works their tempo, 4/4 or 3/4 or 6/8. There are only a limited number of tempos, however, making originality of tempo rare. *Northern Music*, 105 F. Supp. at 400; HARVARD, *supra* note 53, at 504.

55. Meter is rhythm characterized by reoccurrence of a systematic arrangement of basic musical patterns. "The pattern of fixed tempoed units, called beats . . . by which the time span of a piece of music or a section thereof is measured." HARVARD, *supra* note 53, at 308.

56. A. SHAFER, *supra* note 1, at 159.

57. A melody consists of a series of tones played in a fixed pattern of pitches and rhythms; a rhythmic succession of single tones organized as an aesthetic whole. HARVARD, *supra* note 53, at 304.

58. *Northern Music*, 105 F. Supp. at 400.

59. A. SHAFER, *supra* note 1, at 164.

60. *Northern Music*, 105 F. Supp. at 400.

61. A. SHAFER, *supra* note 1, at 166.

62. Comment, *supra* note 5, at 432.

conjunction of these elements than of any element alone; a change in one element necessarily affects our perception of all others.”⁶³ The way in which these elements interact creates originality. Two musical works, in comparison to one another, may sound different when analysis of only one element which makes up the work may be identical. This is because listeners “tend not to hear merely acoustical sounds *per se*, but rather *structural relations* among sounds.”⁶⁴ Alteration of a single element can affect these structural relations.⁶⁵ These subtle technical intricacies between two compared works are difficult to recognize.

B. *Musical Comparison in Musical Copyright Infringement Litigation*

“Of all the arts, music is perhaps the least tangible.”⁶⁶ Due to the limited amount of musical permutations, music has a “self-plagiarist nature.”⁶⁷ Consequently, musical copyright infringement is difficult to detect. There is a limited amount of information upon which a trier of fact may determine infringement of a musical work because music is aurally perceived, not visually perceived. Therefore, a trier of fact may only consider similarity of musical expression, as opposed to comparison of ideas, such as in comparing works for literary or dramatic plagiarism.

As a rational collocation,⁶⁸ music is the result of the various elements discussed above, intentionally placed together in a specific manner. As Justice Holmes pointed out, music is “apart from concepts.”⁶⁹ Because music is aurally perceived, it “is incapable of independently communicating ideas. . . .”⁷⁰ As a result, only comparisons of the similarity of the *expression* of a musical work are possible.

Music is, in fact, a product of impressions which influence human sensibilities because it is addressed solely to the aural sense. However, the aural musical sense of most individuals is undeveloped. Only those who pursue an education in musical theory or composition acquire the knowledge necessary to make a true musical comparison. Consequently, the lay listener has an untutored ear and is musically illiterate.

63. *Id.*

64. *Id.* at 434 (emphasis in original).

65. *Id.*

66. *Wihitol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956) (corporate defendant’s publication in 1951 of plaintiff’s musical composition “My God and I,” copyrighted in 1935, was an infringement of plaintiff’s song (words and music)).

67. *Metzger*, *supra* note 39, at 70.

68. *See supra* note 45 and accompanying text.

69. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 20 (1908) (Holmes, J., concurring); *see supra* note 45 and accompanying text.

70. *Metzger*, *supra* note 39, at 69.

The self-plagiaristic nature of music necessitates a reevaluation of the legal analysis used in copyright infringement cases involving musical comparison. Copyright law must adjust to the imprecise and yet technical nature of music.⁷¹ Under the static law of *Arnstein*, whether a defendant has improperly appropriated a plaintiff's work is decided by the untutored, illiterate lay ear of the trier of fact.⁷² Testimony by musical experts, who truly have "tutored" ears and are fully literate in musical comparison, is prohibited on this issue.⁷³

Indeed, the determination of the existence of substantial similarity and, thus, improper appropriation rests on the trier of fact's *interpretation* of whether the lay listener would find substantial similarity between the alleged infringing work and plaintiff's complaining work. It seems ludicrous that in an area clearly involving technical subject matter that the federal courts continue to idly apply the lay listener test even though the trier of fact is devoid of the proper listening skills necessary to make a comparison between musical works. After the trier of fact decides, with the aid of experts, whether the two musical works are substantially similar, it is left, without continued expert assistance, to decide whether the defendant has illicitly or improperly copied the plaintiff's work. This ultimate issue is thus decided by a trier of fact who may be unfamiliar with the style of music which is the subject of the litigation.

The unique nature of musical comparison requires that the federal courts adopt a more precise and effective method in their use of expert witnesses and the lay listener test in determining alleged copyright infringement of musical compositions. However, before proceeding further, it is necessary to outline how a plaintiff proves copyright infringement, and review the Second Circuit's decision in *Arnstein v. Porter*,⁷⁴ as well as the Ninth Circuit's more recent decision in *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*⁷⁵ *Krofft* unsuccessfully attempts to modify the *Arnstein* approach through its application of the idea-expression dichotomy to copyright infringement litigation.⁷⁶

71. Comment, *supra* note 5, at 464.

72. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

73. *Id.*

74. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

75. 562 F.2d 1157 (9th Cir. 1977).

76. *Id.* at 1167-68.

III. THE FRAMEWORK OF COPYRIGHT INFRINGEMENT LITIGATION AND THE LIMITATIONS OF *ARNSTEIN V. PORTER*

A. *Proving Copyright Infringement*

1. Ownership

In musical copyright infringement litigation, the plaintiff must first establish ownership of a valid copyright in his work.⁷⁷ However, this is not a difficult requirement to fulfill. A copyright certificate of registration made before or within five years of first publication of the work is prima facie evidence of the copyright's validity and the plaintiff's ownership.⁷⁸

2. Copying

Once the plaintiff proves ownership, the plaintiff must show that the defendant copied the plaintiff's work. Proof of copying is essential to any claim of copyright infringement. If the defendant did not copy the complaining work, then no infringement has occurred.⁷⁹ Because infringers are "rarely caught red handed,"⁸⁰ direct evidence of copying⁸¹ is seldom possible.⁸² The federal courts have thus approved the use of indirect proof to show copying.⁸³

Indirect copying occurs when the defendant has had access to the

77. See, e.g., *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486, 1490 (N.D. Cal. 1987) (citing *Krofft*, 562 F.2d at 1162) (plaintiff awarded profits of \$54,000, permanent injunctive relief, and reasonable costs and attorney's fees for defendant's continued use of plaintiff's fabric design).

78. 17 U.S.C. § 410(c) (1982). Melville Nimmer states that proof of ownership includes: "[O]riginality [of the work] in the author; copyrightability of subject matter; citizenship status of the author such as to permit a claim of copyright; compliance with applicable statutory formalities; and, (if the plaintiff is not the author) transfer of rights . . . between the author and the plaintiff . . ." 3 M. NIMMER, *supra* note 11, § 13.01[A], at 13-4 (footnotes omitted); see *Ferguson v. National Broadcasting Co.*, 584 F.2d 111 (5th Cir. 1978).

79. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, *motion to set aside decree denied*, 86 F.2d 715 (2d Cir. 1936) (plaintiff lost appeal of decree dismissing suit for copyright infringement).

80. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988).

81. Direct evidence of copying, though rare, would consist of proof that the defendant had the plaintiff's work in his possession or had seen it at one time before creating his own work. Direct copying may be found where a plaintiff's song has been widely disseminated, such as by publication of sheet music, public broadcast, or distribution. See *Ferguson*, 584 F.2d at 113; *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976).

82. *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 815 (S.D. Fla. 1988) ("It is rarely possible for a plaintiff to muster direct proof of copying."); *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980) (because direct evidence of copying is seldom found, proof of copying is found if defendant had access to the copyrighted work and it is substantially similar to that work); *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960).

83. See *Gaste*, 863 F.2d at 1066; *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1988); *Evans*, 681 F. Supp. at 816.

plaintiff's work and substantial similarity⁸⁴ exists between them. Access may be proved by demonstrating that the defendant had a reasonable opportunity to view or copy plaintiff's work.⁸⁵ A reasonable opportunity means neither the "bare possibility"⁸⁶ of access nor the inference of access through mere speculation or conjecture.⁸⁷ For example, evidence that the plaintiff's work is physically in the same location as the alleged infringer does not create a reasonable opportunity to view and, therefore, does not constitute access.⁸⁸ Access, then, may be proved indirectly if the defendant has had an opportunity to view or copy the plaintiff's work, but this opportunity must be *more* than a bare possibility.

Absent proof of access, copying also may be proved indirectly if the similarity between the plaintiff's work and the allegedly infringing work is striking.⁸⁹ Striking similarity is defined as the finding of some characteristic in both works which "preclude[s] the possibility that the defendant independently arrived at the same result."⁹⁰ A plaintiff must demonstrate that "such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation or prior common source."⁹¹ Striking similarity is not simply the matching of identical notes in two similar compositions.⁹² Important factors in determining the degree of similarity include: the uniqueness of the sections of the work, an unexpected

84. The term "substantial similarity," used here in reference to proof of copying, is not the same as the use of the term in reference to proof of improper appropriation.

85. See *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) (access occurs if "a reasonable possibility [exists] that the complaining work was *available* to the alleged infringer") (emphasis in original); *Testa*, 492 F. Supp. at 202 (citing *Universal Athletic Sales Co. v. Salkeld*, 340 F. Supp. 899 (W.D. Pa. 1972), *rev'd on other grounds*, 511 F.2d 904 (3d Cir. 1975)).

86. *Testa*, 492 F. Supp. at 203 (citing *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978)).

87. See *id.* at 202; *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 849 (1980).

88. *Columbia Pictures Corp. v. Krasna*, 65 N.Y.S.2d 67 (Sup. Ct. 1946), *aff'd*, 271 A.D. 1008, 69 N.Y.S.2d 796 (App. Div. 1947).

89. See M. NIMMER, *supra* note 11, § 13.02[B], at 13-14 to 13-15; see also *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n.2 (9th Cir.), *cert. denied*, 484 U.S. 954 (1987).

90. See M. NIMMER, *supra* note 11, § 13.02[B], at 13-15; see also *Doran v. Sunset House Distrib. Corp.*, 197 F. Supp. 940, 948 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962) ("[A]ccess is but a means of eliminating coincidence or independent effort as an explanation for likeness between the copyrighted article and the infringing article . . ."). See generally *Sherman*, *supra* note 20 (similarities may be so idiosyncratic as to be considered striking).

91. *Strachborneo v. Arc Car Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973) (citation omitted).

92. *Selle v. Gibb*, 741 F.2d 896, 903 (7th Cir. 1984).

departure from the normal metric structure,⁹³ common errors,⁹⁴ particularly intricate similarities⁹⁵ and, occasionally, suspicious dissimilarities.⁹⁶

Two views exist regarding one work's striking similarity to another. To eliminate the possibility that an unsuccessful composer is denied a remedy, because his unknown status precludes a finding of access,⁹⁷ some courts have held that the defendant's access may be proved when the similarity between the plaintiff's and the defendant's work is both substantial and striking. In this situation, the "trier of fact may be permitted to *infer* copying notwithstanding the plaintiff's failure to prove access."⁹⁸

The Seventh Circuit rejected this inference in *Selle v. Gibb*.⁹⁹ *Selle* states that when striking similarity is at issue, "there must be at least some *other* evidence that would establish a 'reasonable possibility' that the plaintiff's work was available to the alleged infringer."¹⁰⁰ Striking similarity is seen as only one piece of circumstantial evidence tending to show access; therefore, it must not be considered "in isolation."¹⁰¹ Thus, according to the Seventh Circuit, despite the presence of striking similarity, a plaintiff must still demonstrate that the inference of access is reasonable.¹⁰²

93. *Id.* at 904; *see, e.g.*, *Nordstrom v. Radio Corp. of Am.*, 251 F. Supp. 41, 42 (D. Colo. 1965).

94. *See, e.g.*, *Nordstrom*, 251 F. Supp. at 42.

95. *Selle*, 741 F.2d at 904 (citations omitted).

96. *Id.*; *see, e.g.*, *Joshua Meier Co. v. Albany Novelty Mfg. Co.*, 236 F.2d 144, 146 (2d Cir. 1956) ("[T]he inversion of certain words or the substitution of one word for another . . . [is a] crude effort to give the appearance of dissimilarity . . ."); *see also* *Sherman*, *supra* note 20, at 84-88.

97. It is very difficult for an unknown composer to prove that his work has been viewed by anyone because his work is unknown and not well distributed.

98. *M. NIMMER*, *supra* note 11, § 13.02[B], at 13-14 (emphasis added) (footnotes omitted); *see also* *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487-88 (2d Cir. 1946); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813 (S.D. Fla. 1988). Allowing inference of access permits the finder of fact to find "an ultimate fact to be true upon proof of another fact if upon consideration of all of the circumstances revealed by the evidence [it is] satisfied that in logic and common experience the ultimate fact is more likely than not to follow from the fact proved." *Selle v. Gibb*, 567 F. Supp. 1173, 1182 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984) (citations omitted).

99. 741 F.2d 896 (7th Cir. 1984).

100. *Gaste v. Kaiserman*, 863 F.2d 1061, 1067 (2d Cir. 1988) (emphasis added) (citing *Selle*, 741 F.2d at 901).

101. *Selle*, 741 F.2d at 901. "[A]lthough proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable." *Id.* at 902; *accord* *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir.), *cert. denied*, 329 U.S. 716 (1946).

102. As Meville Nimmer pointed out, the *Selle* court stated that:

[E]ven if the similarity is verbatim this may not constitute striking similarity if that which is common between the two works is commonplace. . . . In such circumstances the similarity between the two works may be explained by a common source, or even by coincidental similarity. . . . This means that evi-

3. Improper Appropriation

Only after copying has been established does the issue of improper appropriation arise.¹⁰³ Copying is permissible unless proved to be illicit or improper.¹⁰⁴ To prove improper appropriation, the plaintiff must show that the defendant's infringement is "substantial and material enough . . . to constitute an unlawful appropriation,"¹⁰⁵ and that the works are substantially similar.

Substantial similarity lies *somewhere* between no similarity and literal similarity. Justice Learned Hand once stated "wherever [the line] . . . is drawn, will seem arbitrary"¹⁰⁶ and that "the test for infringement of a copyright is of necessity vague."¹⁰⁷ Professor Melville Nimmer has stated that "the determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law"¹⁰⁸ Yet, the level of similarity which is deemed substantial

dence of striking similarity must include "some testimony or other evidence of the relative complexity or uniqueness of the two compositions."

3 M. NIMMER, *supra* note 11, § 13.02[B], at 13-18 (quoting *Selle*, 741 F.2d at 905).

103. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

104. Although two works may in fact be identical in every detail, if the alleged infringer created his work independently, or if both works were copied from a common source available in the public domain, there is no illicit copying or improper appropriation, and therefore, no infringement. Such copying is permissible. Consequently, a presumption of infringement may be rebutted by proof of independent creation or common source defense. In proving independent creation, one must consider the "defendant's training, his past conduct in independently creating works, or conversely, his record of copying." M. NIMMER, *supra* note 11, § 13.01[B], at 13-8 (footnotes omitted).

Unconscious copying, however, is not a defense to copyright infringement. In *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 997-99 (2d Cir. 1983), the court found that there had been a copyright infringement based upon a theory of subconscious copying. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924).

105. *Arnstein*, 154 F.2d at 466.

106. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

107. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). The definition of "substantial" varies from case to case, and the Copyright Act of 1976 offers no guidance. Note, *Copyright: Hollywood v. Substantial Similarity*, 32 OKLA L. REV. 177, 177 (1979).

108. 3 M. NIMMER, *supra* note 11, § 13.03[A], at 13-20 (emphasis in original); see *E.E. Johnson Co. v. Uriden Corp. of Am.*, 623 F. Supp. 1485, 1492 (D. Minn. 1985). For example, the courts in *Ideal Toy Corp. v. Fab Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.), *on remand*, 261 F. Supp. 238 (S.D.N.Y. 1966), and *Ideal Toy Corp. v. Kenner Prod. Div. of General Mills Fun Group, Inc.*, 443 F. Supp. 291 (S.D.N.Y. 1977), both misapplied the bifurcated analysis of *Arnstein* as a "single lay observer test for substantial similarity." This is an example of the misunderstanding of the term "substantial similarity."

enough to constitute improper appropriation depends upon the impression made by the protected material upon the trier of fact as a lay listener for whom the work has been created. If the plaintiff fails to prove improper appropriation, the defendant's alleged copying is then permissible.¹⁰⁹

*B. Limitations Placed Upon Proof of Copyright Infringement:
Arnstein v. Porter*

In 1946, *Arnstein v. Porter*¹¹⁰ provided the Second Circuit with the "opportunity to expound on, formulate and perhaps make sense of the requirements and applicable standards for infringement actions."¹¹¹ The distinction between copying and improper appropriation as developed in *Arnstein* resulted in the judicial modification and refinement of guidelines determining the permissible scope of expert testimony and the lay listener test in both musical copyright infringement cases and copyright infringement litigation generally.¹¹²

Arnstein provided the avenue for expert witnesses to play a significant role in establishing the element of copying.¹¹³ Expert dissec-

109. Permissible copying includes the copying of an idea, de minimis copying, or the fair use of plaintiff's work. See *supra* note 104 and accompanying text.

110. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). *Arnstein* marked the sixth case in which Arnstein brought suit for copyright infringement; it concerned the alleged infringement by Cole Porter of six songs composed by Arnstein. It was the first musical plagiarism case since *Reed v. Carusi*, 20 F. Cas. 431 (C.C. Md. 1845) (No. 11,642), in which a plaintiff requested a jury trial. Also, it was the first instance that an appellate court had reversed the lower court. After five unsuccessful cases, Arnstein brought his cause before a jury. However, the jury found against him and dismissed his complaint.

An important aspect of this musical copyright infringement case involved the defendant's motion for summary judgment, which was resolved in Arnstein's favor. The court held that where "there is the slightest doubt as to the facts" of whether "there is enough evidence of access to permit the case to go to jury" and whether "similarities . . . are sufficient so that . . . the jury may properly infer the similarities did not result from coincidence," summary judgment is improper. *Arnstein*, 154 F.2d at 468-69 (citations omitted). This "slightest doubt standard" regarding summary judgment proceedings has been recently disapproved by several courts. See, e.g., *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 n.5 (W.D. Pa. 1980); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 849 (1980).

The first five *Arnstein* cases which went to trial were found to lack merit: *Arnstein v. Broadcast Music, Inc.*, 137 F.2d 410 (2d Cir. 1943); *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275 (2d Cir. 1936); *Arnstein v. Twentieth Century-Fox Film Corp.*, 52 F. Supp. 114 (S.D.N.Y. 1943); *Arnstein v. ASCAP*, 29 F. Supp. 388 (S.D.N.Y. 1939); *Arnstein v. Nathaniel Skillert*, No. 8152 (S.D.N.Y. Dec. 20, 1933). For a more complete discussion of these cases, see Orth, *supra* note 28.

111. Note, *supra* note 8, at 130.

112. The *Arnstein* bifurcated test was opposed 13 years earlier in *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 23 (9th Cir. 1933); see Note, *supra* note 107 (additional information on bifurcated tests).

113. After the *Arnstein* decision, experts were approved in literary infringement

tion¹¹⁴ and analysis¹¹⁵ on the issue of copying aid the trier of fact in deciding whether the defendant had access to plaintiff's work, and whether the two works are similar. In addition, when the plaintiff dispenses with the direct proof of access and instead proves striking similarity, expert testimony to prove copying is often "required."¹¹⁶ Striking similarity is an extremely technical aspect of proof used to find copying. Consequently, experts are solely qualified to handle the striking similarity comparison. Expert testimony is not admissible, however, on the issue of improper appropriation—the "ultimate issue in musical plagiarism cases."¹¹⁷ The *Arnstein* court stated:

The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation; for the views of such persons are caviar to the general—and plaintiff's and defendant's compositions are not caviar.¹¹⁸

Arnstein qualified the response of the lay listener, as perceived by the trier of fact, as the deciding factor in determining whether a defendant's copying was substantial and material enough to qualify as improper appropriation and, therefore, as infringement. The Second Circuit stated in *Arnstein* that the key issue regarding improper appropriation is "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."¹¹⁹

The trier of fact, therefore, determines the issue of improper appropriation based on a "hypothetical lay listener's aural comparison."¹²⁰ The trier of fact measures a hypothetical lay listener's

cases. See Bullen, *The Role of Literary Experts in Plagiarism Trials*, 7 AM. U.L. REV. 55, 62-63 (1958).

114. Dissection of music is defined as the "cutting up of the musical work into smaller units for the purpose of music analysis." Note, *supra* note 8, at 131 n.34.

115. Expert analysis of music is the "study of a composition with regard to form, structure, thematic material, harmony, melody, phrasing, orchestration, style, technique, etc." HARVARD DICTIONARY OF MUSIC 36 (1961). An in depth discussion of musical dissection and analysis is beyond the scope of this article; however, for further information, see generally A. COOKE, *supra* note 29; A. SHAFTER, *supra* note 1.

116. *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

117. Metzger, *supra* note 39, at 71.

118. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947) (footnotes omitted). However, a plaintiff may call expert witnesses to aid the trier of fact in reaching its conclusion as to the responses of lay listeners and to predict and interpret possible spectator reactions. *Id.*

119. *Id.* (footnote omitted).

120. Note, *supra* note 8, at 132.

perception by assuming the level of dissection in which a lay listener engages. Based on this, the trier of fact supposedly gains an impression as to whether the defendant has materially and substantially copied the plaintiff's work so that the plaintiff's audience would buy the defendant's work over that of the plaintiff's. If this has occurred, the defendant has improperly appropriated the plaintiff's work.

C. Krofft's Idea-Expression Dichotomy and Its Misapplication to Musical Copyright Infringement

In *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,¹²¹ the Ninth Circuit devised a two-tiered copyright infringement analysis purportedly based, in part, on the bifurcated infringement analysis of *Arnstein*.¹²² The *Krofft* decision was based upon the idea-expression dichotomy.¹²³ Though *Arnstein* was viewed

121. 562 F.2d 1157 (9th Cir. 1977). In 1968, the National Broadcasting Company approached Sid and Marty Krofft to create a children's television program. They spent the following year creating "H.R. Pufnstuf," which was broadcast on NBC in September of 1969. The series generated a line of products and endorsements.

In 1970, Marty Krofft was contacted by an executive from Needham, Harper & Steers, Inc., an advertising agency, who asked whether the Kroffts were interested in working together to procure an advertising account from McDonald's. Needham wanted to base its advertising campaign for McDonald's on the "H.R. Pufnstuf" characters.

The two worked together for a while, until Marty Krofft was notified by Needham that the McDonald's campaign had been cancelled. Needham, however, was deceiving the Kroffts. The McDonald's advertising account had already been awarded to the Needham agency. In fact, Needham hired former employees of the Kroffts to design costumes and to construct sets for McDonaldland, and also hired the same voice expert who worked on the Krofft "H.R. Pufnstuf" characters.

The first McDonaldland commercials were broadcast in January 1971. The Kroffts filed suit in September 1971, seeking compensatory damages in the amount of \$25,000, and an order for an accounting of profits attributable to the infringements, or in the alternative, statutory damages. The plaintiffs were awarded damages of \$50,000. The district court, however, denied plaintiffs' claim for additional monetary recovery in the form of profits or statutory "in lieu" damages. The Ninth Circuit reversed, remanded the case for an accounting, and directed that the district court could, in its own discretion, award statutory "in lieu" damages. *Id.* at 1161-62, 1178.

122. As indicated in *Arnstein*, the elements required to prove copyright infringement are: (1) ownership, (2) access (including similarity evidencing copying), and (3) improper appropriation. *Arnstein*, 154 F.2d at 468. However, according to *Krofft*, the necessary elements are: (1) ownership, (2) access, (3) substantial similarity of ideas, and (4) substantial similarity of expression of those ideas. *Krofft*, 562 F.2d at 1162, 1164.

123. The Copyright Act of 1976 adopted the judicially created idea-expression dichotomy, which is essentially the distinction between "idea" and "expression." An idea is not protected, whereas the expression of an idea is protected. *See, e.g., Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121-22 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

The idea-expression dichotomy has been criticized because it was developed under more narrow statutes which have since been broadened. *See, e.g., Collins, Some Obsolete Doctrines of Copyright Law*, 1 S. CAL. L. REV. 127 (1928). The criticism tends to be more toward the application of the idea-expression dichotomy than to the theory itself.

as good law,¹²⁴ *Krofft* did not "resurrect the *Arnstein* approach . . . [but instead] formulate[d] an extrinsic-intrinsic test for infringement based on the idea-expression dichotomy."¹²⁵ The Ninth Circuit suggests that the *Arnstein* court was "alluding to the idea-expression dichotomy"¹²⁶ in its decision.

The extrinsic test addresses whether the *ideas* of two works are substantially similar.¹²⁷ The test focuses upon specific criteria such as "the type of artwork involved, the materials used, the subject matter and the setting for the subject . . . [as well as] analytic discretion and expert testimony" to determine if there is substantial similarity in ideas.¹²⁸ If no similarities exist in the ideas of the compared works, no infringement has occurred.

However, if substantial similarity of ideas is found, the intrinsic test is then applied. The intrinsic test addresses whether the tangible expression of the compared works is substantially similar.¹²⁹ The test relies upon the subjective response of the "ordinary reasonable person"¹³⁰ to detect the presence of substantial similarity in expression. Here, there is no external criterion or expert analysis in the analytical process requiring the trier of fact to decide by itself whether substantial similarity exists in the expression of the ideas, so as to constitute infringement.¹³¹

Krofft attempted a "bold refinement"¹³² of *Arnstein*. However, the idea-expression dichotomy, which is tenuous at best, is not adaptable to musical copyright infringement litigation. In fact, courts other than the Ninth Circuit generally have not adopted the *Krofft* approach.¹³³ Although most musical copyright infringement cases ig-

124. *Krofft*, 562 F.2d at 1165.

125. *Id.* at 1165 n.7.

126. *Id.* at 1165.

127. *Id.* at 1164-65. The extrinsic test is extrinsic "because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed." *Id.* at 1164.

128. *Id.*; 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-56.

129. *Krofft*, 562 F.2d at 1164; *see also* *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). "To constitute infringement of expression, the total concept and feel of the works must be substantially similar." *Id.* at 1357.

130. Note, *supra* note 8, at 137 (citing *Krofft*, 562 F.2d at 1164).

131. *Krofft*, 562 F.2d at 1164; 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-56.

132. Note, *supra* note 8, at 135.

133. The only case outside of the Ninth Circuit which follows *Krofft* is *MGM, Inc. v. Showcase Atlanta Cooperative Prods.*, 479 F. Supp. 351 (N.D. Ga. 1979) (defendant's "Scarlett Fever," asserted as a parody of "Gone With the Wind," infringed plaintiff's copyright in the novel and film, "Gone With the Wind").

nore *Krofft*,¹³⁴ *Krofft* is the law of the Ninth Circuit and, consequently, will be applied in musical copyright infringement cases in that circuit.

One Ninth Circuit musical copyright infringement case following *Krofft* is *Baxter v. MCA, Inc.*¹³⁵ In *Baxter*, the defendants conceded their access to the plaintiff's musical composition and that substantial similarity existed between the ideas in the two works, but they contended that there was no substantial similarity of expression of ideas.¹³⁶ The Ninth Circuit recognized that "[d]eterminations of substantial similarity of expression [in music] are subtle and complex,"¹³⁷ and that "no bright line rule exists."¹³⁸

The *Baxter* court, however, adhered to the *Krofft* guidelines regarding expert dissection analysis and the response of the ordinary lay listener. The Ninth Circuit did not address the fact that ideas do *not* directly exist in musical compositions. Indeed, the *Baxter* analysis assumed the idea-expression dichotomy as a matter of legal theory, despite the fact that there simply is no "idea" or "expression" to be distinguished within musical compositions.¹³⁹

In addition, *Arnstein* and *Krofft* clearly view the role of expert witnesses differently. In *Krofft*, expert analysis goes to the determination of whether substantial similarity of ideas exists between two works.¹⁴⁰ Alternatively, *Arnstein* states that expert testimony may be considered on the issue of copying, thus identifying similarities through proof of access which evidences copying.¹⁴¹ In *Krofft*, expert testimony is relevant only to show substantial similarity of expres-

134. See, e.g., *Benson v. Coca-Cola Co.*, 795 F.2d 973 (11th Cir. 1986); *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984); *Testa v. Janssen*, 492 F. Supp. 198 (W.D. Pa. 1980). But see *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir.), *cert. denied*, 108 S. Ct. 346 (1987) (following *Krofft*).

135. 812 F.2d 421 (9th Cir. 1987). Plaintiff Leslie Baxter and defendant John Williams, a successful composer and conductor of music, had known each other for many years. Baxter was the sole owner of all rights to the title and interest in the copyright to "Joy," the musical composition which was the subject of this litigation. In the 1960's, Williams "participated as the pianist in the orchestra for a public performance of 'Joy'." *Id.* at 422. In 1982, Williams composed the "Theme from E.T." in the motion picture, "E.T.: The Extra-Terrestrial." In 1983, Baxter filed a complaint for copyright infringement, alleging that the "Theme from E.T." was largely copied from his copyrighted song "Joy." In September 1984, the defendants moved for summary judgment on the ground that as a matter of law, the "Theme from E.T." was not substantially similar to the protected expression in "Joy" and, therefore, did not infringe it. The district court granted summary judgment, but the Ninth Circuit reversed and remanded the proceedings. *Id.* at 422-23, 425.

136. *Id.* at 423.

137. *Id.* at 424.

138. *Id.* at 425.

139. Comment, *supra* note 5, at 443.

140. *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

141. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

sion of ideas;¹⁴² whereas, *Arnstein's* use of expert testimony should never be considered on the finding of substantial similarity and the issue of improper appropriation.¹⁴³

The idea-expression dichotomy, therefore, does not have any logical application to musical compositions, and the question as to what part of a song's music is "idea" and what part is "expression" remains. The *Krofft* and *Baxter* decisions have no relevance to either musical compositions or other works of authorship which do not communicate ideas. As one commentator stated, "[m]usic does not communicate ideas, but engenders impressions among its listeners."¹⁴⁴

IV. JUDGE CLARK'S DISSENT IN *ARNSTEIN V. PORTER*

Judge Clark was outraged at his colleagues for disregarding expert testimony to prove improper appropriation in *Arnstein*.¹⁴⁵ The majority opinion of Judge Frank and Judge Learned Hand suggested that the assistance of musical experts was "utterly immaterial"¹⁴⁶ in proving improper appropriation. However, Judge Clark stated that the disregard for musical expert testimony on the issue of improper appropriation represented "the anti-intellectual and book-burning nature of [the majority's] decision."¹⁴⁷

Judge Clark also questioned the capabilities of a jury to settle issues of infringement and, specifically, questions of musical comparison without proper training and qualification in the particular artistic area.¹⁴⁸ He argued that reliance upon the ordinary lay listener to decide the issue of illicit copying was the complete antithesis of the use of expert witnesses in the issue of copying.¹⁴⁹ He stated that "[i]f . . .

142. *Krofft*, 562 F.2d at 1164.

143. *Arnstein*, 154 F.2d at 473.

144. Metzger, *supra* note 39, at 68.

145. The most frequently quoted section of Judge Clark's dissenting opinion in *Arnstein* is the following:

I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury—the now chosen instrument of musical detection—could be expected to separate those issues and the evidence accordingly. . . . This is a single deduction to be made intelligently, not two with the dominating one to be made blindly.

Arnstein, 154 F.2d at 476 n.1 (Clark, J., dissenting).

146. *Id.* at 478 (Clark, J., dissenting).

147. *Id.* (Clark, J., dissenting).

148. *Id.* at 479 (Clark, J., dissenting).

149. *Id.* at 478 (Clark, J., dissenting).

all decisions of musical plagiarism [are to be] made by ear, the more unsophisticated and musically naive the better, then it seems . . . we are reversing our own precedents to substitute chaos, judicial as well as musical."¹⁵⁰

Judge Clark's dissent in *Arnstein* was echoed in his concurring opinion in *Heim v. Universal Pictures Co.*,¹⁵¹ decided five days after *Arnstein*. It drew attention to, and cast significant doubt upon, the Second Circuit's analysis and conclusions regarding the use of expert witnesses and the lay listener test in musical copyright infringement litigation. This doubt remains today.

V. THE EXPERT WITNESS

Judge Clark was clearly an advocate of using expert testimony in determining the issue of copying in musical copyright infringement litigation as set forth by the *Arnstein* majority. The federal courts continue to cite the *Arnstein* guidelines for expert testimony and its effectiveness in determining copyright infringement.¹⁵² The use of expert testimony in proof of copying has been "a progressive . . . step toward the circumspect jurisprudence advocated by Judge Clark."¹⁵³

Judge Learned Hand, however, has expressed disagreement with the use of experts in copyright cases.¹⁵⁴ While presiding over the Second Circuit, Judge Hand stated:

The testimony of an expert upon [copyright infringement], especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of . . . craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical.¹⁵⁵

Perhaps Judge Hand meant only to bar the use of expert witnesses

150. *Id.* at 480 (Clark, J., dissenting).

151. 154 F.2d 480 (2d Cir. 1946). In *Heim*, Clark once again expressed his vehement opinion regarding the majority's bifurcated test announced in *Arnstein*:

[T]he issue is no longer one of musical similarity or identity to justify the conclusion of copying—an issue to be decided with all the intelligence, musical as well as legal, we can bring to bear upon it—but is one, first, of copying, to be decided more or less intelligently, and, second, of illicit copying, to be decided blindly on a mere cacophony of sounds.

Id. at 491 (Clark, J., concurring).

152. See *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988); *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984).

153. Metzger, *supra* note 39, at 88.

154. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

155. *Id.* at 123.

from literary and dramatic plagiarism, as the trier of fact has the complete capability to deal with the nontechnical nature of literary or dramatic plagiarism. The trier of fact, however, is generally not literate in the technical and theoretical nature of music and, therefore, is absolutely dependent upon the admission of expert testimony in musical copyright infringement litigation.

Due to the necessity of a visual examination of a musical composition's tangible expression, the musical literacy of an expert is indispensable. Indeed, "[w]ithout the benefit of expert analysis and dissection, the fact-finder is ill-equipped"¹⁵⁶ to detect significant substantial similarity in comparing two musical compositions.¹⁵⁷ Consequently, expert testimony in musical infringement litigation is accepted and supported by the federal judicial system and most legal critics.

VI. THE LAY LISTENER TEST

The lay listener test has drawn the most criticism in musical copyright infringement litigation.¹⁵⁸ However, before addressing this issue, the test's mechanics and origin must be understood. The *Arnstein* majority clearly explained the policy supporting the average lay listener test: "The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."¹⁵⁹ Therefore, the "proper criterion on . . . [the issue of improper appropriation] is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians."¹⁶⁰

Instead, the average lay listener test first rests upon the impression which the stolen musical composition carries to the average lay ear.¹⁶¹ The test then requires the trier of fact to decide whether the defendant appropriated from the plaintiff's work that which is famil-

156. Note, *supra* note 8, at 146.

157. See *supra* note 148 and accompanying text.

158. See generally Metzger, *supra* note 39; Comment, *supra* note 5; Note, *supra* note 8; Note, *Copyright Infringement Actions: The Proper Role for the Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385 (1981) [hereinafter *Copyright Infringement Actions*].

159. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947) (footnote omitted).

160. *Id.* (footnote omitted).

161. *Arnstein v. Broadcast Music, Inc.*, 46 F. Supp. 379, 381 (S.D.N.Y. 1942), *aff'd*, 137 F.2d 410 (2d Cir. 1943).

iar to a lay listener who is a member of plaintiff's potential general audience. If so, the defendant improperly copied the plaintiff's work.¹⁶² Liability for musical copyright infringement attaches only when the lay listener perceives substantial similarity among the works being compared.

The "*sine qua non* of the ordinary . . . [lay listener] test . . . is the overall similarities rather than the minute differences between the two works."¹⁶³ Consequently, advocates of the lay listener test believe that unless an infringement is recognizable by the lay listener, the infringement is not substantial enough to matter¹⁶⁴ and, thus, the plaintiff's suit for copyright infringement lacks merit.¹⁶⁵

The average lay listener test partially owes its origin to the reasonable person doctrine. Much of the criticism surrounding the test arises because of the improper adaptation of that doctrine to copyright law.¹⁶⁶ In other areas of the law, a trier of fact compares a defendant's actions with what a reasonable person would have done under the circumstances surrounding the defendant at the time and place of the incident. Although the lay listener test requires the trier of fact to decide whether the defendant substantially or materially copied from the plaintiff, it does *not* require the trier of fact to decide what a reasonable person in the defendant's position would have done. Indeed, the lay listener test requires the trier to assume the identity of one familiar enough with the plaintiff's music that he would buy the defendant's musical composition instead of the plaintiff's, thinking it was, in fact, the plaintiff's because of the substantial similarity between the two works.¹⁶⁷

In musical copyright infringement litigation, the trier of fact can only inquire whether the result of the defendant's work gives the appearance of having been copied from the plaintiff. This is, therefore, the trier of fact's *opinion* as to the lay listener's *impression* of effect, not of effect itself.¹⁶⁸

This basic, yet substantial flaw in the lay listener test has been explained by Professor Melville Nimmer:

[T]here can be no dispute that the "spontaneous and immediate" reactions of the ordinary observer are relevant evidence in determining the existence of

162. *Id.*

163. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 618 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (emphasis in original) (rejected district court's rationale focusing on dissimilarities).

164. Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?*, 8 SAN FERN. V.L. REV. 109, 142 (1980).

165. *Id.*

166. *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 536 (2d Cir. 1938); *Sheldon v. MGM Pictures Corp.*, 7 F. Supp. 857 (S.D.N.Y. 1954), *rev'd*, 8 F.2d 49 (2d Cir. 1956); 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-50.

167. 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-50.

168. *Id.*

copying. There *is*, however, reason to dispute the doctrine in so far as it makes the visceral reactions of the trier *the* ultimate test of copying (assuming access). The Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's "spontaneous and immediate" *impression* that the fruits have been stolen. To be sure the ordinary observer's impression that there has been a theft is important evidence in establishing that in fact there was a theft, but the two are not the same.¹⁶⁹

The lay listener test also receives criticism as a result of its association with the 1868 case of *Daly v. Palmer*.¹⁷⁰ The federal courts have mistakenly pointed to *Daly* by misinterpreting its case law precedent and dictum as being the origin of the lay listener test. In *Daly*, the Second Circuit stated that copyright infringement or piracy occurs "if the appropriated series of events . . . is *recognized* by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order."¹⁷¹ This only reveals the Second Circuit's opinion that the copyright infringement involved in *Daly* was so substantial as to be apparent *even* to the spectator.

However, the Second Circuit's intention in *Daly* was not to develop a copyright infringement test based on lay spectator impressions. This reality is emphasized by the fact that the court was actually advocating the derivation test,¹⁷² not a lay spectator/listener test:

The true test of whether there is piracy or not, is to ascertain whether there is servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject.¹⁷³

In addition, Nimmer notes that *Daly* did *not* indicate whether there must be expert dissection or analysis in considering the issue of

169. *Id.* at 13-49 (emphasis added and in original) (footnote omitted); see also *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982); *Harold Lloyd Corp. v. Witmer*, 65 F.2d 1, 18 (9th Cir. 1933); *Echevarria v. Warner Bros. Pictures*, 12 F. Supp. 632, 634 (S.D. Cal. 1935).

170. 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

171. *Id.* at 1138 (emphasis added).

172. The derivation test was given its name by Alfred Shafter. A. SHAFER, *supra* note 1, at 170. It was first applied by Judge Learned Hand in *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916), and has been defined as follows:

The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith. Once it appears that another has in fact used the copy-right as the source of his production, he has invaded the author's rights.

Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924).

173. *Daly*, 6 F. Cas. at 1138 (citing *Emerson v. Davies*, 8 F. Cas. 615 (D.C.S.D.N.Y. 1863) (No. 4,436)).

improper appropriation, as far as aural impressions are concerned.¹⁷⁴ The proper determination of whether improper appropriation exists is a far greater concern than whether the lay listener can aurally perceive the improper appropriation. Consequently, cases citing *Daly* as the origin of the lay listener test have misinterpreted its precedent and dictum.

Finally, opponents to the average lay listener test for musical copyright infringement cases staunchly assert that a member of the lay or general public is incapable of accurately comparing two musical compositions. Indeed, the lay listener may recognize findings of infringement based on similarities which may in fact be attributable to common sources, independent creation, or simply coincidence. On the other hand, because of the unique nature of musical comparison, real appropriation could go undetected.¹⁷⁵ “[B]ecause of its impracticability, [the lay listener test] has had an artificial and disappointingly inaccurate application. . . . Thus, the . . . [average lay listener test] is acknowledged as inconclusive.”¹⁷⁶

VII. PROPOSALS

This comment has argued that: (1) traditionally, expert testimony is widely accepted on the issue of copying in musical copyright infringement litigation; and (2) although the trier of fact, sitting as a lay listener, has decided the ultimate issue of substantial similarity for over forty years, the lay listener test is not accepted as the most logical or effective way to prove improper appropriation.

The use of expert testimony in musical copyright infringement litigation should *not* be limited to the issue of copying as required by *Arnstein*. Due to the impracticality of the *Arnstein* limitations, and the misapplication of the *Krofft* idea-expression dichotomy test in musical copyright infringement cases, expert testimony should be admissible when considering the ultimate issue of substantial similarity and whether copying is improper and, therefore, an infringement.

The *Arnstein* guidelines regarding the use of experts raise significant questions as to the intention behind the limitation. The first issue concerns whether the trier of fact, “exposed to expert evidence in the first step [copying], . . . [can] ignore or ‘forget’ that evidence in analyzing the problem [raised] under the second step [improper appropriation].”¹⁷⁷ After witnessing the direct and cross-examinations

174. 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-49.

175. *Id.* at 13-52.

176. *Shipman v. R.K.O. Pictures*, 100 F.2d 533, 536 (2d Cir. 1938). The court uses the term “audience test” but actually intends the average lay listener test.

177. *Whelan Assoc. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1232-33 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1986).

of an expert, a trier of fact no longer hears the works as a lay listener, but instead as a listener who has been "exposed to critical analysis."¹⁷⁸ As a result, the trier of fact has already been influenced by the expert opinion and, therefore, deprivation of continued expert assistance is not logical.

Secondly, excluding expert testimony on the issue of improper appropriation "precludes a meaningful evaluation of the quality and quantity of similarities"¹⁷⁹ by the trier of fact. To find substantial similarity under *Arnstein*, the trier of fact, as lay listener, has the burden of finding actual substantial similarities. Because the trier makes this judgment without the benefit of expert testimony, it is questionable whether the trier can successfully distinguish between similarities resulting from a common source, independent, or illicit copying. The trier of fact, therefore, may favor the defendant by not recognizing real appropriation or may favor the plaintiff by misidentifying similarities which do not result from improper copying. The supposed danger of causing confusion among the triers of fact¹⁸⁰ with expert testimony is surely outweighed by the increased knowledge the trier of fact gains from the expert testimony. There is simply no reason why expert testimony should not be considered in deciding the issue of improper appropriation.

If the federal courts were to allow expert testimony on the issue of improper appropriation, a question would arise as to whether the lay listener test should be entirely eliminated. There would be argument against this. As discussed previously, the improper application of the reasonable person doctrine to copyright law and the misinterpretation of case law precedent have caused the lay listener test to be misunderstood and, consequently, misused. The test, however, is not completely devoid of merit. To understand the test's merit, it is important to understand its policy.

The copyright and patent clause of the United States Constitution¹⁸¹ and the Copyright Act of 1976¹⁸² promote the creativity of au-

178. Metzger, *supra* note 39, at 91.

179. Note, *supra* note 8, at 146; *see also* Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir.), *cert. denied*, 108 S.Ct. 346 (1987) (when a small portion of one work is similar to another and that similarity is qualitatively important, the trier of fact may find substantial similarity); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924) (similarity of an eight note ostinato in two compared works was sufficient to prove substantial similarity).

180. *See supra* notes 138-39 and accompanying text.

181. U.S. CONST. art. I, § 8, cl. 8.

182. 17 U.S.C. §§ 101-914 (1976).

thors and inventors by protecting and rewarding their creativity. The copyright and patent clause specifically encourages the free flow of ideas by promoting creativity through the granting of monopoly status, limited in time, which excludes others from using the works without authority.¹⁸³ Consequently, authors and composers know that they may create and publish works while securing federal protection from misuse which, in turn, encourages copyright owners to sue for infringement.

Because published works are purchased by the public, the plaintiff may suffer a potential loss of income from the public's purchase of the defendant's work. Thus, because that defendant's work is substantially similar to, and misidentified as, the plaintiff's, much credence is given to the existence of the lay listener test.

Judge Clark's dissent in *Arnstein* declares the use of an expert test and the lay listener test as an unwelcome dichotomy within the evidentiary process.¹⁸⁴ However, an expert may become so technical in his musical comparison, that *obvious* similarities aurally recognized by the lay ear may be overlooked if the lay listener test were completely abolished. In addition, some question remains as to whether Judge Clark's dissent in *Arnstein*, emphasizing the incapability of the untutored and illiterate lay listener, may be too intellectual an approach in deciding the issue of improper appropriation.¹⁸⁵ The lay listener test is bolstered by the belief that, despite the unique nature of an art form such as music, the "question of infringement . . . should be determined by the very people who comprise the audience for which it is composed."¹⁸⁶

Consequently, complete elimination of the lay listener test may not, in fact, be the most effective solution. Instead, perhaps a compromise may be devised through the implementation of a more comprehensive use of expert testimony, as discussed above, and a refinement of the lay listener test.

Federal courts generally have applied what is called the "ordinary observer [and in musical infringement cases, the ordinary listener] or audience test."¹⁸⁷ The courts have not clearly indicated whether the terms "lay listener test" and "audience test" are synonymous, or whether the average lay listener, being a member of the general public, differs from the plaintiff's *actual* audience.¹⁸⁸

This comment contends that a distinction clearly exists between an

183. *Harper and Row Publishers v. National Enter.*, 471 U.S. 539, 546 (1985).

184. *See supra* notes 145-50 and accompanying text.

185. Orth, *supra* note 28, at 252-53.

186. *Id.* at 253.

187. 3 M. NIMMER, *supra* note 11, § 13.03[E], at 13-47 (emphasis added); *see also Metzger, supra* note 39, at 71.

188. *See supra* note 15.

ordinary lay person and an actual member of the plaintiff's audience. The "audience test" is, therefore, *not* synonymous with the lay listener test. A member of the plaintiff's audience differs from a hypothetical lay listener who is found as a member of the general public, sitting as the trier of fact. An audience test clearly "restrict[s] the spectator reactions used in the substantial similarity determination to those of the works' audience."¹⁸⁹

A musical composition within a certain genre, such as classical, country western, new age, or jazz, may sound indistinguishable to an individual unfamiliar with that style of music and a particular artist within that style. The reaction of an individual who is familiar with a style of music "is a more valid indicator of substantial similarity than that of the ordinary [listener]."¹⁹⁰ "The ear moves beyond surface similarities to hear more subtle distinctions."¹⁹¹ It is within this area of subtle distinctions that an alleged musical copyright infringer works to camouflage his composition.

If the plaintiff's actual audience is used to decide improper appropriation and "is composed of people who possess significantly specialized tastes, skills, or knowledge, as compared with those of the general public,"¹⁹² then the trier of fact should no longer assume the role of a lay listener. Instead, the trier of fact should receive evidentiary testimony from a sampling of the actual audience of the plaintiff's music.

One author has proposed a method which identifies the plaintiff's intended audience and distinguishes it from the general public.¹⁹³ One consideration is the medium of expression, *e.g.*, books, television, motion pictures, or sound recordings, used to communicate the plaintiff's work to the audience.¹⁹⁴ A second consideration is the audience's subject matter taste, *e.g.*, popular music, science fiction, or

189. *Copyright Infringement Actions*, *supra* note 158, at 386 (emphasis in original); see also *Whelan Assoc. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1232-33 (3d Cir.), *cert. denied*, 479 U.S. 1031 (1986) (citing *Copyright Infringement Actions*, *supra* note 158, at 386) ("criticizing lay observer standard when objects in question are intended for particular, identifiable audiences"); *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 454 (S.D.N.Y. 1976).

190. Comment, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1290 n.91 (1983).

191. Comment, *supra* note 5, at 428.

192. *Copyright Infringement Actions*, *supra* note 158, at 386.

193. See generally *id.* at 404-07.

194. *Id.* at 406.

comedy.¹⁹⁵

In truth, a true audience test, consisting of an actual audience of the musical works being considered, more closely parallels the goals of copyright protection.¹⁹⁶ A member of the plaintiff's actual audience is more likely to purchase the plaintiff's work than the average lay listener. Even if a purchase is not made, the actual audience member still is likely to be more familiar with the plaintiff's work than the trier of fact sitting as an average lay listener.

An actual audience test narrows the field of individuals who are qualified to compare the two musical works for substantial similarity.¹⁹⁷ Narrowing the lay listener test to an actual audience test causes the individuals considering improper appropriation to be representative of a "distinct and significant consumer group."¹⁹⁸

VIII. CONCLUSION

"Music is a highly technical yet often imprecise field."¹⁹⁹ In addition, as its financial stakes have risen, the music industry has become a significant player in the world of copyright infringement. Copyright law must adapt to the unique nature of music and its industry so that the law may continue to offer the protection which artistic and music creators expect.

This comment has addressed the unique nature of music and the inadequacy of the copyright law, as set out in both *Arnstein* and *Krofft*, to effectively provide a composer with the rights to which he is entitled. Under the current test for musical copyright infringement, the use of expert testimony is confined to the issue of copying. Such testimony is inadmissible on the issue of whether the complaining and allegedly infringing work are so substantially similar as to constitute improper appropriation. The trier of fact, assuming the position of a hypothetical lay listener, decides this ultimate issue of infringement.

195. *Id.*; accord, Orth, *supra* note 28, at 253-54 (recognizing the need to narrow the audience).

196. *Copyright Infringement Actions*, *supra* note 158, at 394.

197. One critic advocates that the audience test be clearly distinguished from the lay observer test "whenever the audience is composed of people who possess significantly specialized tastes, skills, or knowledge, as compared to those of the general public." *Id.* at 386. Another commentator states that "the average person who attends symphony concerts is no more a musical expert than is the person who enjoys attending trials a legal expert." Metzger, *supra* note 39, at 94.

198. *Copyright Infringement Actions*, *supra* note 158, at 411; see Note, *Copyright Infringement of Computer Programs: A Modification of the Substantial Similarity Test*, 68 MINN. L. REV. 1264, 1285-88 (1984). "The ordinary observer test . . . is of doubtful value in cases involving computer programs on account of the programs' complexity and unfamiliarity to most members of the public." *Whelan Assoc. v. Jaslow Laboratory*, 797 F.2d 1222, 1232 (3d. Cir.), cert. denied, 479 U.S. 1031 (1986).

199. Comment, *supra* note 5, at 464.

Recognizing the necessity to modify the test used to prove musical copyright infringement, this comment advocates the use of expert dissection and analysis on the issue of improper appropriation. If experts were allowed to testify on this issue, increased reliability in the outcome of the litigation would occur as the trier of fact would be less likely to overlook the similarities between two works or to be otherwise misled.

Due to the underlying economic philosophy of copyright law, which intimates that copyright protection exists to provide a creator with the economic incentive to create, it is unrealistic to expect the complete replacement of the lay listener test with expert testimony on the issue of improper appropriation. Consequently, the combination of expert testimony and a refined "actual audience" test, as previously outlined, provides a feasible solution to the outdated and impractical application of the *Arnstein* standards to musical copyright infringement litigation.

MICHELLE V. FRANCIS

