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COMMENT

IDEA-EXPRESSION IN MUSICAL ANALYSIS AND THE ROLE OF THE INTENDED AUDIENCE IN MUSIC COPYRIGHT INFRINGEMENT†

ABSTRACT

This Comment discusses the nature of music, its traditional recurrence and lending of material, and the practical evil of having a distant finder of fact in music copyright infringement cases. Within this framework, the Comment concludes that the burdens attendant to properly implementing the intended audience are relatively minor compared to the temptation to bring suits of marginal merit, the impact of the changing media industry, and the potential of an erroneous finding, chilling the creation of new musical works. This Comment advocates the use of the intended audience in all music copyright cases.

INTRODUCTION

“Of all the arts, music is perhaps the least tangible”¹ It is elusive.² You cannot see, smell, taste or touch it; you hear it. Aristotle believed that music “can be formed in such a way that it imitates the character of man as it manifests itself in some action or state of mind. When a particular musical form is repeated, it can, if it is a true representation,

† An earlier version of this work received first prize in the 1991 Nathan Burkan Memorial Competition at California Western School of Law.

1. *Wihtol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956). See also JOSEPH MACHLIS, *THE ENJOYMENT OF MUSIC* 6 (3d ed. 1970) (art, in general, is “easier to experience than define”); *Arnstein v. Porter*, 154 F.2d 464, 476 n.2 (2d Cir. 1946) (Clark, J., dissenting) (quoting STEWART MACPHERSON, *FORM IN MUSIC* 1, 2 (rev. ed. 1930)) (Music is associated perhaps with “certain events or crisis in our own lives, or is the expression—probably the very imperfect expression—of some sentiment with which we are in sympathy and accord.”); See also David May, Note, “*So Long as Time is Music*”: *When Musical Compositions are Substantially Similar*, 60 S. CAL. L. REV. 785, 806 (1987) (discussing the “emotive experience,” the interaction of musical elements and their ability to trigger a corresponding aesthetic experience in the listener).

2. OSWALD JONAS, *INTRODUCTION TO THE THEORY OF HEINRICH SCHENKER* 2 (J. Rothgeb trans. 1982).

Lacking any association to the outer spatial world, lacking purpose, the tone conjures up only the tone itself. The purely emotional reactions it evokes in the individual are of so vague a nature, and yet so varied, that cause and effect could never be unequivocally related to one another. . . . It was the lack of direct association with Nature that delayed the development of music as an independent art for such a long time. When poetry and visual arts had already reached their highest maturity, music remained in its infancy.

Id.

arouse a similar or related action or emotion in a person who might not otherwise be so aroused."³ "The principle of repetition in music, then, grew out of the urge to imitate."⁴ In a sense, music has become a language for conveying, through the use of organized pitch, ideas for which words are, perhaps, inadequate. "[T]he desire to create such a language appears to be universal."⁵ But ironically, despite this universal desire, the language "has been subject to a constant attempt to translate its message into words. Yet it is hardly possible."⁶ Nevertheless, the expression of ideas in music is protected by copyright, just like the expression of ideas in words.

Music copyright infringement cases have long dotted the American legal landscape. Courts recognize that "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."⁷ Because the musical language is limited, it is difficult to determine what portion of the language is at the disposal of the public to use and where the permission to use it stops, the point at which free use of the language becomes impermissible, if for no other reason than because it has been used the same way by someone previously.

In identifying infringement of musical expression, the "lay observer test" has become the cornerstone of music copyright infringement.⁸ Unfortunately, the test has largely been misunderstood and misapplied as an *ordinary* lay observer test.⁹ In contrast to this misperception, the test actually requires that a finding of infringement be made by those lay persons for whom the music was composed,¹⁰ the work's intended audience.¹¹ Courts, however, are hesitant to apply this standard unless specialized knowledge is involved in a particular case because of the burden of determining a work's intended audience. Yet, this burden is not an appropriate reason for denying substantial justice in a case requiring such a determination.

Although music requires no specialized knowledge to simply appreciate, the same is not true in comparing two works for infringement. Music's natural appeal masks the complexities involved in both its creation and its analysis. The analytical problems which arise from the limited language of music require that determination of music copyright infringement be made by the intended audience. As the dissent in *Arnstein v. Porter* observed,

3. CHARLOTTE ROEDERER, ET. AL, SCHIRMER HISTORY OF MUSIC 10 (Leonie Rosenstiel ed., 1982).

4. JONAS, *supra* note 2, at 2 (as in birdsong).

5. MACHLIS, *supra* note 1, at 6.

6. *Id.*

7. *Darrell v. Joe Morris Music Co.*, 133 F.2d 80 (2d. Cir. 1940).

8. *Arnstein*, 154 F.2d. 464. See also *infra* notes 61-79 and accompanying text.

9. See *infra* notes 99-101 and accompanying text.

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

11. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 737 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 511 (1990). See also *infra* note 96 and accompanying text.

“artistic repugnance or boredom, or mere distance . . . causes all sounds to merge,”¹² even involuntarily, such that persons outside the intended audience may be unable to appreciate similarity or dissimilarity in the works being compared. The result is a finding of infringement where perhaps none exists, chilling the creation of new musical works.¹³ Or, equally as unfortunate, a finding of no infringement where unlawful copying has actually occurred.

The specialized nature of music and the necessity of applying the intended audience test properly in cases of music copyright infringement are the focus of this Comment. Accordingly, Section I discusses the substantive issues involved in the prima facie case of copyright infringement and the origin of the lay observer test. Section II looks at the factors that have transformed the lay observer test into the intended audience test, within the context of the “idea-expression dichotomy” which dominates copyright infringement case law. Section III examines the problems inherently involved in music copyright infringement from a historical and analytical perspective, considering the fundamental similarity of popular music, the role of the expert, and the role of the intended audience. Section IV considers the problems likely to be encountered in practically implementing the test. This Comment concludes that so long as courts hesitate to apply the intended audience test in music infringement cases, courts run the risk of too often finding infringement where none actually exists, or vice versa.

I. ELEMENTS OF COPYRIGHT INFRINGEMENT IN MUSIC

Notwithstanding the actual reason a person chooses to express an idea through music, courts explain the choice of musical material in terms of commercial success. *Bright Tunes Music v. Harrisongs Music*¹⁴ described it this way:

Seeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does . . . is a fascinating inquiry. . . . I conclude that the composer . . . [a]s he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious mind knew it already had worked in a song his conscious

12. *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting).

13. First Amendment freedom of expression is among those rights most precious. Courts traditionally disdain action which chills it. *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989).

14. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.*, *ABKCO Music v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

mind did not remember."¹⁵

A piece would not be successful commercially but for its appeal to the public. The public's "approbation" of the author's efforts, their expression of approval through purchasing, is the protected property right.¹⁶ A successful artist, in this context, is one who is able to strike that nerve which compels people to reach into their pocketbooks; the desire to possess the experience. Otherwise, there is no interest to protect.¹⁷

In order to protect this property interest through a copyright infringement action a plaintiff must prove: (1) ownership of a copyright (i.e., originality) and (2) copying by the defendant.¹⁸ The copying element is further broken down into proof of access to the work through its availability on the market or some other source and "substantial" or "striking similarity" between the two works. Likewise, striking similarity is further broken down into two component parts, an objective and a subjective inquiry.¹⁹ Although the subjective inquiry lies at the heart of the intended audience test, the subjective inquiry is difficult to talk about without discussing the objective inquiry. The objective inquiry into similarity (involving the use of experts) is intended to aid the fact finder's subjective inquiry.

A. Originality

*Feist Publications v. Rural Telephone Service Company*²⁰ is a recent Supreme Court case involving a copyright infringement suit by the publisher of a telephone directory against a competitor.²¹ *Feist* held that to qualify for copyright protection, a work must be original to the author.²² This means a minimum amount of independent creativity is required even if the work very closely resembles or is identical to "other works so long as the

15. *Id.* at 180. In *Bright Tunes*, George Harrison's *My Sweet Lord* was found to infringe upon the copyrights of Ronald Mack's earlier work, *He's So Fine*. The judge's theory was unconscious copying based on the popularity of the plaintiff's work some fourteen years earlier and the unique treatment of a rather simple melody as testified to by the defendant's experts.

16. *Arnstein*, 154 F.2d at 473. See also *infra* note 71 and accompanying text.

17. Of course this overlooks the artist's moral or other dignitary rights. Copyright law is only concerned with the author's rights in intangible property.

18. *Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1296 (1991). See also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (1991). The ownership element is broken down into various inquiries into the citizenship, statutory requirements, and originality of the material. For the purposes of this paper, assume that a valid copyright has been obtained. With the exception of originality, the other concerns are incidental to the subject of this Comment.

19. NIMMER & NIMMER, *supra* note 18, §§ 13.01-.03. For the *Arnstein* formulation, see *infra* note 69-72 and accompanying text. For the *Krofft-Hinshaw* formulation, see *infra* note 88-90 and accompanying text.

20. *Feist*, 111 S. Ct. 1282.

21. *Id.* at 1286.

22. *Id.* at 1287 (citing *Harper & Row, Publishers v. Nation Enter.*, 471 U.S. 539, 547-49 (1985)).

resemblance is fortuitous, not the result of copying."²³ The constitutional protection afforded authors for their writings²⁴ has been liberally construed to include any work sparked by "the creative powers of the mind"²⁵ belonging to "he to whom [it] owes its origin."²⁶ It makes no difference "how crude, humble or obvious" the work is.²⁷

Although *Feist* deals with the publication of a telephone directory, the concept of originality, what is and is not original, can be illustrated by *Feist's* distinction between facts, which are merely discovered, and creative expression. The defendant in *Feist* had copied the raw data from the plaintiff's telephone directory, a compilation of names, towns, and telephone numbers. That no one may copyright facts or ideas is fundamental to copyright law.²⁸ "[C]opyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."²⁹ Because facts are merely discovered, not created, they are not original and, therefore, not copyrightable. Facts belong in the public domain.³⁰ Facts that speak for themselves are no less part of the public domain because of the labor involved in compiling them.³¹ Only the author's original contributions are protected.³² So too with ideas, "which, apart from their expression," are not copyrightable.³³ This policy balances an author's interest against the competing interests of science and art, the need for society at large to build upon, and benefit from the use of, ideas.³⁴

In music copyright infringement cases, the concept of originality is intimately tied to the copying aspect of copyright infringement.³⁵ Ownership of a copyright gives rise to a presumption of originality.³⁶ This presumption may be overcome, for example, by a defendant showing a common source of both pieces in the public domain.³⁷ That does not,

23. *Feist*, 111 S. Ct. at 1287 (citing 1 NIMMER & NIMMER, *supra* note 18, §§ 2.01[A]-[B]).

24. U.S. CONST. art. I, § 8, cl. 8.

25. *Feist*, 111 S. Ct. at 1287-88 (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879)).

26. *Id.* at 1287-88 (citing Burrow-Giles Lithographic Co. v. Saroni, 11 U.S. 53, 58 (1884)).

27. *Id.* at 1287 (citing 1 NIMMER & NIMMER, *supra* note 18, § 1.08[C][1]).

28. *Id.* at 1287 (citing *Harper & Row*, 471 U.S. at 556).

29. *Id.* at 1290 (citing *Harper & Row*, 471 U.S. at 547-48).

30. *Id.* at 1288-90. Although this is really only true of disclosed facts, facts that are kept confidential may be protected as trade secrets.

31. It is consoling to know that the theory of unfair competition may provide a remedy. *See id.* at 1292.

32. *Id.* at 1290.

33. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). *See also Hinshaw-Kroff* discussion, *infra* note 82 and accompanying text.

34. *Feist*, 111 S. Ct. at 1290.

35. Therefore, it is also tied to substantial similarity.

36. *Gaste v. Morris Kaiserman*, 863 F.2d 1061, 1064-65 (2d Cir. 1988).

37. *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 149 (S.D.N.Y. 1924); *Darrell*, 133 F.2d at 80. For a comparative analysis of these two cases, *see also infra* note 149 and accompanying text.

however, per se, defeat the originality requirement of the plaintiff's work,³⁸ or the infringement claim. In the past, courts have articulated this requirement of originality, the contribution a composer must make to public domain material, in a variety of ways. In *Wihtol v. Wells*,³⁹ the court found that the author must have added something to bring an old folk tune from the public domain back into popularity. That "something" was the required originality. The piece did not have to be novel, merely original. In such a case, it was improper to copy the new piece.⁴⁰ In striking a balance between the schooled musician and those who simply make music, originality is "little more than a prohibition of actual copying." When an author adds something recognizable as a "distinguishable variation" to music that is in the public domain, "no matter how poor artistically the author's addition is, it is enough that it be his own."⁴¹ An "impression of newness" added to a theme that has been expressed in other works, is sufficient to permit copyright; it does not need to bear the "imprint" of musical genius.⁴²

Yet, to be protected under copyright the "impression of newness" or "distinguishable variation"—originality—must be more than simple trite themes likely to recur spontaneously. While they may not impair the copyright, they will not support a finding of infringement. Mere recurrence in music is not "an inevitable badge of plagiarism."⁴³

In addition, originality cannot be found in merely skillful changes. In *Jollie v. Jaques*,⁴⁴ the court stated: "[A] mere mechanic in music, it is said, can make [an] adaptation or accompaniment."⁴⁵ A musical composition must be "substantially a new and original work; and not a copy of a piece already produced with additions and variations, which a writer of music with

38. *Wihtol*, 231 F.2d at 553-54; *Alfred Bell & Co., Ltd. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951); *Jollie v. Jaques*, 13 F. Cas. 910, 913-14 (C.C.S.D.N.Y. 1850).

39. *Wihtol*, 231 F.2d 550.

40. *Id.* at 553-54. The trial court found only the melody and a few isolated words between the two works similar. The court also found that the plaintiff's work was incapable of being copyrighted because it was in the public domain and ruled for the defendant. The appellate court reversed finding the additions the plaintiff made to the old folk tune sufficient to meet the originality requirements of copyright law. Some of the similarities were so unusual that the court could not believe them to be the result of chance. The defendant had also testified that he was familiar with the plaintiff's religious work. *Id.* at 552.

41. *Id.* (citing *Alfred Bell & Co.*, 191 F.2d at 102). *Bell*, however, involved the improper reproduction of paintings. The case gives interesting historical background on patents versus copyrights and a comparison of translations, directories, and maps.

42. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952). Many of the performers of the plaintiff's work were the same performers for the defendant's recording, including the band leader. The composer of the infringing work was likewise an occasional performer in the band.

43. *Darrell*, 133 F.2d at 80. Essentially, simple, trite themes are mere ideas, though they may be original. For a comparative analysis of *Darrell*, see *infra* note 149 and accompanying text.

44. *Jollie*, 13 F. Cas. 910.

45. *Id.* at 913. An adaptation consists of transferring it from one instrument to another, or changing the work from one form into another. The defendant had merely taken an old polka and adapted the tune to the piano without changes.

experience and skill might readily make."⁴⁶ An arrangement or an adaptation does not require the genius of the original composer and "must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author."⁴⁷

On the use of public domain material, the court in *Shapiro, Bernstein & Co. v. Miracle Record Co.*,⁴⁸ put it this way:

We need not decide if [the defendant] is the composer; whether he is or not, it is clear from the evidence that the bass is now in the public domain. . . . [I]t is a mechanical application of a simple harmonious chord; and . . . the purpose of the copyright law is to protect creation, not mechanical skill.⁴⁹

Thus, though the originality threshold is clearly not very high, the point at which the work becomes protected is obscure. Identifying such a vague threshold potentially differs from court to court. For example, the court in *Northern Music v. King Record Distributors*⁵⁰ has been criticized for its inaccurate, uneducated, and layman-like approach to originality.⁵¹ The *Northern* court described rhythm as simply tempo, a background for the melody, and described harmony as the mere blending of tones according to long established rules.⁵² Finding that originality must be found in the melody, the court was exhibiting the precise kind of distance to music that the *Arnstein* dissent cautioned causes sound to merge.⁵³ The result was a blurring of the originality and the substantial similarity aspects of the music copyright infringement analysis.

The *Northern* court was apparently unaware that just six years prior, Arnold Schönberg had published his Five Pieces for Orchestra.⁵⁴ His Klangfarbenmelodie (tone-color melody) was created primarily by changing the timbre of a single note through the different instruments of the orches-

46. *Id.* at 913-14.

47. *Id.* at 914.

48. 91 F. Supp. 473 (N.D. Ill. 1950).

49. *Shapiro, Bernstein & Co.*, 91 F. Supp. at 474-75 (Where the melodies of the two works were different but the bass lines identical, the court held that the bass was too simple to be copyrightable).

50. *Northern*, 105 F. Supp. 393.

51. For a critical analysis of the elements in *Northern*, see Ronald P. Smith, Note, *Arrangements and Editions of Public Domain Music: Originality in a Finite System*, 34 CASE W. RES. 104, 117-18 (1983).

52. For comment on these elements, see *infra* notes 109-133 and accompanying text.

53. *Northern*, 105 F. Supp. at 400. See also *Arnstein* dissent, discussed *infra* note 170 and accompanying text.

54. Arnold Schönberg, Opus 16 (1909) (re-arranged for conventional orchestra in 1949).

tra.⁵⁵ Under *Northern*, this single note melody could hardly be considered original.⁵⁶ The early twentieth century musicians, however, found great interest in unusual rhythms, tone colors, and dissonances.⁵⁷ Reacting to this interest, Igor Stravinsky wrote: "We find ourselves confronted with a new logic of music that would have appeared unthinkable to the masters of the past. This new logic has opened our eyes to riches whose existence we never suspected."⁵⁸ Yet, under *Northern*, these "riches" would be unprotected.

Though *Northern's* technical understanding of music left much to be desired, perhaps because of the court's lack of understanding, it has something to offer: "Perhaps, the best test [of] originality is to inquire whether the composition is a new and different treatment . . . or merely a colorable attempt to use someone else's work."⁵⁹ Piracy is committed by incorporating "that portion which is the whole meritorious part of the song, . . . without any material alteration."⁶⁰

B. Copying

The second prong of the prima facie case is proof of copying. The element has several sub-aspects and is the more complex of the two inquiries. In addition, the test has evolved. A proper discussion of copying must begin (and end) with an examination of *Arnstein v. Porter*.⁶¹

Misguided by the fact that the plaintiff had brought five earlier unsuccessful suits for infringement, the trial court in *Arnstein* dismissed the case as vexatious.⁶² In reversing the lower court's summary judgment for

55. ROGER KAMIEN, MUSIC: AN APPRECIATION 447 (3d ed. 1984). Timbre and tone refer to the quality of the sound produced without reference to the pitch. Different instruments produce different qualities of the same pitch, much the same way that the tone control on a home radio controls bass and treble without changing the pitches of the work being played. Tone, as in color, should not be confused with tone, as in pitch.

56. Schönberg's treatment of the elements could hardly be considered according to rules long established.

57. A discordant sound lacking agreement with the underlying chordal structure.

58. KAMIEN, *supra* note 55, at 403-04.

59. *Northern*, 105 F. Supp. at 399 (Suggesting that originality and copying are merely opposite sides of the same coin: both involve a comparison of a work to a prior work. Note that the judge in *Northern* describes himself, or rather judges, as musical laymen and the test as applied to the average hearer.).

60. *Id.* at 397.

61. *Arnstein*, 154 F.2d 464.

62. *Arnstein*, 154 F.2d at 467, 474. In *Arnstein*, the plaintiff alleged that several of his songs had been pirated by the defendant. He also alleged that the defendant had "stooges" follow him, watch him, and live in the same apartment with him. *Id.*

Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936), was one of those five earlier cases and involved some of the same songs. Judge Hand was sitting on both courts. See also, *infra* notes 109, 133, & 171 and accompanying text. Likewise, *Arnstein v. Broadcast Music, Inc.*, 137 F.2d 410 (2d Cir. 1943) and *Arnstein v. American Society of Composers*, 29 F.Supp. 388 (S.D.N.Y. 1939) were other cases involving similar fantastical facts and some of the same songs.

the defendant, the *Arnstein* court delineated two separate but essential issues of fact: did the defendant copy and, if proved, was it an improper appropriation?⁶³ Impliedly then, there is copying which is not infringement.⁶⁴

As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of facts may reasonably infer copying. Of course, if there are no similarities, no amount of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis (“dissection”) is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.⁶⁵

At first glance, the application seems to be at odds with the underlying social policies permitting independent creation.⁶⁶ It attempts, however, to avoid the difficulties involved in proving copying and thus strikes a balance between the ideal and the practical.⁶⁷ The *Arnstein* court permits expert testimony in terms of analysis or dissection on this first issue as an aid to the trier of fact in its determination.⁶⁸ A jury is permitted to infer that the similarities did not result from coincidence.⁶⁹

The *Arnstein* court described the issue in the second prong and identified the test as follows:

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation.) On that issue (as noted more in detail below) *the test is the response of the*

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

64. Copying ideas is not prohibited. See also, *supra* notes 28-34 and accompanying text; *infra* note 86 and accompanying text.

65. *Id.* at 468. The court's discussion of access is important to the concept of copying. A person simply cannot copy what he or she has not, either directly or indirectly, seen or heard. In contrast, a person might not have improperly copied something even if it was before them as they created a similar but original work, using the idea. As an evidentiary matter, proof of access serves the purpose of indicating whether the similarities in the works were coincidental (if no access) or copied (as a result of access). As proof of access decreases, the more striking the similarity needs to be. The reverse is *not* true because if there are no similarities, no amount of access will support copyright infringement. *Id.* at 473 n.23. On access, see *infra* note 149.

66. See *supra* note 34 and accompanying text.

67. “[C]opiers are rarely caught redhanded.” *Gaste*, 863 F.2d at 1066.

68. As in detecting earlier sources in the public domain or detecting technical differences such as retrograde inversion. See musical examples beginning at *infra* note 155 and accompanying text.

69. *Arnstein*, 154 F.2d at 469.

ordinary lay hearer; accordingly, on that issue, “dissection” and expert testimony are irrelevant.⁷⁰

This quotation appears to have been the source of much confusion. If one were to stop there, one would be lead to the application of an ordinary lay observer test even where inappropriate. But the court was not finished in describing the test. In the “(as noted more in detail below)” part, the court clarified the statement and the test:

The Plaintiff’s legally protected interest is not . . . his reputation as a musician but his interest in the potential financial returns . . . which derive from the lay public’s approbation of his efforts. The question . . . therefore, is whether the defendant took from the plaintiff’s work so much of what was pleasing *to the ears of lay listeners who comprise the audience for whom such popular music is composed*, that the defendant wrongfully appropriated something which belongs to the Plaintiff.⁷¹

The court further explained that “testimony may aid the jury in reaching its conclusion about the responses of such audiences” but expert testimony “will in no way be controlling” because, “[t]he impression made on the refined ears of experts or their views as to . . . musical excellence . . . are utterly immaterial on the issue.”⁷² Therefore, the court’s full explanation is critical to recognizing that the lay observer test means lay (i.e., non-expert) observers who comprise the audience for whom such music was composed. *Arnstein* did not simply divide the issue of copying between experts and lay people, the court divided the issue between experts and the intended audience.

II. THE DEVELOPMENT OF THE INTENDED AUDIENCE TEST

Somewhere along the line, *ordinary* lay observers, those for whom the work was not composed, crept into the picture. The precise point in time is not obvious, but the development of high-tech industries has exposed the wrinkle, and accordingly, courts have been forced to take a second look at *Arnstein*. The need to have specialized ordinary observers who can appreciate the value of the medium for expression, such as computer software, has become apparent. To determine whether a program is infringed, one had to understand the computer language and the internal structure of the program. In one computer case, *Whelan Associates v.*

70. *Id.* at 468 (footnote omitted) (emphasis added).

71. *Id.* at 473 (footnotes omitted) (emphasis added).

72. *Id.* at 473. Perhaps as a reaction to experts’ generally unique abilities to present two dramatically different analyses of the same situation, the observers must appraise the situation to find the facts. The observers best suited to perform this appraisal are the intended audience.

Jaslow Dental Laboratory,⁷³ the plaintiff developed a record-keeping program for the defendant. The court considered the purpose of the program, record-keeping, to be the program's idea, which was not copyrightable.⁷⁴ But "[w]here there are various means of achieving the desired purpose, then the particular means chosen" is considered the expression of the idea.⁷⁵ The expression in this context is tied to the "manner in which the program operates, controls, and regulates the computer in receiving, assembling, calculating, retaining, correlating, and producing" the end result.⁷⁶ Having identified the complexity and the special nature of the work before it, the court stated:

[W]e believe that the ordinary observer test is not useful and is potentially misleading when the subjects of the copyright are particularly complex, such as computer programs. We therefore join the growing number of courts which do not apply the ordinary observer test in copyright cases involving exceptionally difficult materials, like computer programs.⁷⁷

Apparently, courts have mistaken the standard to be what the name indicates: an *ordinary lay* observer test.⁷⁸ The Fourth circuit, in *Hinshaw*, used the reasoning of cases like *Whelan* in renaming the test the "intended audience test."⁷⁹ Like the computer cases, cases involving music are sufficiently complex to require the application of the intended audience test.

A. *The Idea-Expression Analysis*

The idea-expression concept helps to clarify what is meant by permissible copying, that is, copying which is not an improper appropriation. To understand this concept, consider the familiar "boy meets girl" theme. The theme itself is an idea which is not copyrightable. How the boy goes about meeting the girl, however, is the expression of the idea and may be copyrightable. Works as diverse as Shakespeare's *Romeo and Juliet*, Nabokov's *Lolita*, and almost any gothic romance novel all include the boy meets girl theme. Yet the expression in each is dramatically different. In order to see the similarities in the works, they must be stripped of their expression: that portion of the work that reflects the writer's own elaboration on the theme. In this stripping or abstracting process, there may be any

73. 797 F.2d 1222 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

74. *Id.* at 1236, 1238.

75. *Id.* at 1236.

76. *Id.* at 1239 (quoting the lower court, 609 F. Supp. 1307, 1320).

77. *Whelan*, 797 F.2d at 1233.

78. *See infra* notes 99-101 and accompanying text.

79. *See infra* note 96 and accompanying text.

number of steps, each one shaking out some of the incident and moving further from the way the author expressed the idea and closer to the idea itself. The greater the number of abstractions needed to get to the similarities in the idea, the less likely infringement is.

This concept of moving from the expression to the idea by stripping out incident, has been called the "abstractions test."⁸⁰ In *Sid and Marty Krofft Television Productions v. McDonald's*,⁸¹ the court observed:

No court or commentator . . . has been able to improve upon Judge Learned Hand's famous "abstractions test." . . . Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may be no more than the most general statement of what the [piece] is about . . . but there is a point in this series of abstractions where they are no longer protected, since otherwise the [composer] could prevent the use of his "ideas" to which, apart from their expression, his property is never extended.⁸²

The investigation into the similarity in ideas has sometimes been referred to as an extrinsic or objective inquiry.⁸³ Expert testimony is permitted on this aspect of substantial similarity only, in the same way the *Arnstein* court permitted expert testimony only on the issue of copying.⁸⁴ In contrast, the comparison of expression has been referred to as the intrinsic or subjective inquiry into of the works as determined by the "ordinary observer" without the aid of expert testimony.⁸⁵

Krofft believed that the court in *Arnstein* was alluding to the idea-expression dichotomy which *Krofft* made explicit. "When the court in *Arnstein* refers to 'copying' which is not itself an infringement, it must be suggesting copying merely of the work's idea. . . ."⁸⁶ The test in either

80. *Nichols*, 45 F.2d at 121.

81. 562 F.2d 1157 (9th Cir. 1977) (The case involved a copyright infringement action by the holders of the copyright in "H.R. Pufnstuf" puppet characters (the stars of a television program for children) against McDonald's for its use of similar "McDonaldland" characters in television commercials.)

82. *Id.* at 1163 (citing *Nichols*, 45 F.2d at 121) (emphasis added). Note that *Hinshaw* relies on *Krofft* and both cases rely heavily on *Arnstein*.

83. *Hinshaw*, 905 F.2d at 733.

84. The tests are nearly identical. Essentially, the "was it copied?" inquiry is the same as the idea/extrinsic/objective inquiry; and the "was it a wrongful appropriation?" inquiry is the same as the expression of the idea/intrinsic/subjective inquiry.

85. *Hinshaw*, 905 F.2d at 733.

86. *Krofft*, 562 F.2d at 1165. It is unclear why the *Arnstein* court, on which Judge Hand was still sitting, did not expressly state improper appropriation as such. Perhaps they thought it was apparent, or perhaps they thought that music required some special concept of its own. Regardless, the idea/expression dichotomy is merely different terminology for distinguishing music copying which is not improper from that which is. The principle protecting and rewarding "an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from the use of the same subject matter" remains the same. *Id.*

case is *Arnstein*. Analysis is meant only as a guide to the trier of fact in determining what the idea is. The test of whether the expression has been improperly appropriated is “*whether the defendant took from plaintiff’s work so much of what was pleasing to the ears of lay listeners who comprise the audience for whom such popular music is composed, that the defendant wrongfully appropriated something which belongs to the Plaintiff.*”⁸⁷

*B. Incorporation of the Idea-Expression Analysis
Into the Intended Audience Test*

*Dawson v. Hinshaw Music*⁸⁸ described the prima facie case of copyright infringement as consisting of “possession of a valid copyright, the defendant’s access to the plaintiff’s work, and substantial similarity between the [two] works.”⁸⁹ The substantial similarity inquiry has two legs, both of which must be proven. There must be substantial similarity not only in the idea, but also in the expression of the idea.⁹⁰

The *Hinshaw* court was faced with a unique problem. The infringement did not involve a recording, rather only sheet music.⁹¹ The persons likely to purchase the rendition of the work were persons who could read and play piano music, without which, no comparison of the similarities could be made. “The district court [judge] found that, as an *ordinary lay* observer, with nothing before him other than the sheet music, he could not determine that the two works were substantially similar.”⁹²

Looking to the computer cases, the *Hinshaw* court noted that a specialized ordinary observer who can appreciate the value of the medium for expression has been replacing the *ordinary observer* who may be uninterested or misinformed, therefore lacking the necessary expertise to make an adequate appraisal.⁹³ *Hinshaw* observed that the *Krofft* court understood the test to require a child’s standard where the alleged infringement involved puppet characters, because the works were directed at children. “[T]he impact . . . on the minds and imaginations” of children was therefore the relevant perspective.⁹⁴

“Under *Arnstein*’s sound logic, the lay listeners are relevant only because

at 1163.

87. *Arnstein*, 154 F.2d at 473 (emphasis added).

88. *Hinshaw*, 905 F.2d 731.

89. *Hinshaw*, 905 F.2d at 732.

90. *Id.* See also *Krofft*, 562 F.2d at 1162-64 (where the prima facie case consists of a valid copyright and copying, copying itself being shown by access and substantial similarity).

91. Sheet music is merely the formula by which the music is made. It can be analogized to the recipe instead of the cake. There was no recording.

92. *Hinshaw*, 905 F.2d at 733, 737.

93. *Id.* at 735.

94. *Id.* at 734-35 (quoting *Krofft*, 562 F.2d at 1166).

they comprise the relevant audience."⁹⁵ In reading *Arnstein* as requiring a specialized audience where a product is directed at a pool narrower than merely the "lay" listener, the *Hinshaw* court labeled the test as an intended audience test which more accurately described the relevant inquiry into the relevant reaction,⁹⁶ but cautioned, "[w]e intend to make the rule more precise, not to change it."⁹⁷ That "a district court must consider the nature of the intended audience of the plaintiff's work"⁹⁸ is a step in the right direction. *Hinshaw* merely clarified the test with more appropriate terminology.

The *Hinshaw* court felt that the standard which the courts have applied has not always been apparent because the imprecision of the label itself has been cause for misinterpretation of the standard actually applied.⁹⁹ In most cases the general lay public is a fair representation of the intended audience.¹⁰⁰ But, the court admits that the imprecision of the old label has led to a lay observer application even where inappropriate.¹⁰¹ "The lay observer test spares a court of the burden of inquiring into, and drawing conclusions regarding, the nature of the works' intended audience."¹⁰² Despite being a substantial burden with unwieldy potential, *Hinshaw* holds that "a district court must consider the nature of the intended audience of the plaintiff's work."¹⁰³ In the end, however, the *Hinshaw* court hedged in applying the test exactly as *Arnstein* formulated it. Focusing on knowledge relevant to the purchasing decision,¹⁰⁴ "departure from the lay characterization is warranted only where the intended audience possesses 'specialized expertise' that goes beyond mere differences in taste and instead must rise to the level of possession of knowledge that the lay public lacks."¹⁰⁵ "[A] court should be hesitant to conclude that the lay public does not fairly represent a work's intended audience."¹⁰⁶ Admittedly, a straight forward application of the test is difficult at best to achieve.

95. *Hinshaw*, 905 F.2d at 734.

96. *Id.* at 734, 737.

97. *Id.* at 737.

98. *Id.* at 736.

99. *Id.* at 737.

100. *Id.* at 735.

101. *Id.* at 737.

102. *Id.* at 736.

103. *Id.*

104. *Id.* (quoting *Arnstein*, 154 F.2d at 473) (the legally protected interest is the potential financial returns).

105. *Hinshaw*, 905 F.2d at 737.

106. *Id.* at 737.

III. THE UNIQUE NATURE OF MUSIC REQUIRES A LITERAL APPLICATION OF THE INTENDED AUDIENCE TEST

All popular music has certain fundamental similarities because it is made up of the same fundamental elements, such as pitch and rhythm. Regardless of these fundamental similarities, within music, various subdivisions, styles, or forms tend to resemble each other more than a piece from another subdivision. Works in styles like folk, rock, rock-n-roll, blues, bluegrass, country, ragtime, jazz, dixie, swing, new age, new wave, heavy metal, rap, and thrash each have particular characteristics that make them more similar to works within the genre than without. Altering a work to fit one genre rather than another does not mean that it is similar or dissimilar to a work outside the genre.¹⁰⁷ In fact, often mere mechanical manipulation can move a work from one genre to another. Rather, it is the similarity of expression between the two works that counts, regardless of the style. A plaintiff will try to prove similarity in the ideas of the two works, via an expert, with as few abstractions as possible to establish facial similarity in the ideas. The defendant, on the other hand, will try to compare the works to other works in the public domain to show a common origin of both pieces, or, concentrating on the differences between the works, try to show a greater number of abstractions to get to the similarities, thus bringing both works closer to public domain material. But, because an expert's analysis of a piece could make it seem like there are similarities where none otherwise exist, something more is needed to corroborate the expert's "education."

Substantial similarity is determined by comparing the way the two works sound. This comparison should be made by the intended audience because "artistic repugnance or boredom, or mere distance . . . causes all sounds to merge."¹⁰⁸ Only after a finding of substantial similarity by the intended audience can such a determination be valid.

A. *An Explanation of the Nature of Music*

1. Historical Introduction

"Success in music . . . is by no means a test of rarity or merit; . . . the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes, even though the

107. A mere mechanic can make an adaptation. *Jollie*, 13 F. Cas. at 913-14. See also, *supra* note 45 and accompanying text.

108. See *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting).

identity extend through a sequence of twelve notes."¹⁰⁹ To understand this observation, one needs to understand music in general.¹¹⁰

Certain internal organizations of pitch, relative to each other, regardless of the tonal center, have commonly appeared throughout musical history.¹¹¹ Certain sounds simply "go together," they sound like they belong, for whatever desired effect the composer is trying to produce, not because the notes make theoretical sense, but because they sound good to the composer. Theory developed in an effort to describe the phenomena and relationships between these types of sounds that kept recurring; as an observation of what was being done. Similarities were observed in the pitch relationships regardless of how those sounds were treated by different composers. There can be no doubt that music came first, not music theory. If there were no music, there would be no need to explain it. An understanding of theory, as a set of rules, is such only for the music student interested in analyzing what he or she hears. It is a way of thinking about music.¹¹² Theory is hardly necessary to simply make music.

A sound is merely an air vibration, the pitch of which is determined by how fast it vibrates, measured in cycles per second. The faster it vibrates, the higher the pitch. In western music, the distance between two tones, the smallest meaningful increase in pitch, is considered a half step.¹¹³ There are twelve tones. Every thirteenth tone is that tone whose cycles per second is exactly twice the first, or exactly half the string length. Popular music generally has this trait,¹¹⁴ although there are systems which operate microtonally,¹¹⁵ in smaller meaningful increases in pitch. Also, popular music tends to operate within a key, a selection of seven of the twelve tones with a particular relationship to each other that conveys a desired sensation. The collection of tones whose relationship is typically referred to as "Do, Re, Mi, Fa, Sol, La, Ti, and Do" is such a key, a musical "scale."¹¹⁶

109. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d at 277. See also *infra* note 62 and accompanying text. Although the plaintiff was possibly exploited by unscrupulous publishers, there were too many middlemen, the song never achieved any popularity and the court found the plaintiff's proof of access unpersuasive. The case therefore rested on substantial similarity, which the court rejected.

110. A basic understanding of music, historically and theoretically, is essential, especially where courts, perhaps having heard days of expert testimony, tend not to elaborate on the historical reasons for the *experts* conclusions concerning music. For those who are familiar with the language of music, I have tried to make this as painless as possible, for those who are not, I have tried to make this as concise as possible.

111. Perhaps because of Aristotle's concept of "common experience." See *supra* note 3 and accompanying text.

112. Note the critical comments on *Northern's* approach, *supra* note 51 and accompanying text.

113. At least in western civilization music.

114. Despite note bending in blues, the microtonal slurring of a note. Note-bending in blues or rock also qualifies as "smaller meaningful" pitches.

115. The music of India operates within a quarter-tone system. There are also other systems such as the thirty-one-tone system.

116. A graduated series of tones with a specific relationship.

This relationship is described as a mode, the major mode for relatively happy, bright sounds compared to the minor mode for darker, sadder sounds.¹¹⁷ The tones are identified as notes by reference to the first seven letters of the alphabet, A through G, while the remaining five pitches are accounted for through sharps and flats that raise or lower the indicated note. Every eighth note, that pitch whose cycles per second is twice the first (the thirteenth tone), is the same note only higher, thus the term "octave." The eight notes evolve around "Do," the tonal center of the key, the point of departure, point of rest.¹¹⁸ The relationship between the pitches in any particular key and the tone upon which this relationship begins, is exactly the same. There are schools of thought in music which operate atonally, chromatically, using all twelve notes as opposed to a select mode, dispersing the tonal center.¹¹⁹ Operating without a tonal center, however, results in an "unsettled" sound. Historically, popular western music exhibits a decided preference for tonally centered music.

The earliest forms of notated music consisted of only melodies,¹²⁰ notes played one at a time, evolving around the tonal center, the resting point.¹²¹ Some of the permutations of the melody lines were very common, especially where all the note values were the same.¹²² The first use of

117. The minor mode is derived from an alteration in the relationships between the collection of pitches making up the key, or shifting the focal point of a major key to the 6th degree, the relative minor. I realize that some music professors might find these colloquial descriptions of music's effects unsettling.

118. Usually that point of finality that tells the listener the piece is over, "Do." The system looks like:

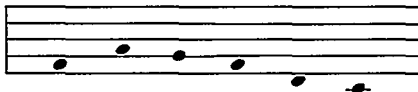
1	2	3	4	5	6	7	8	9	10	11	12	13 . . .
C	C#	D	D#	E	F	F#	G	G#	A	A#	B	C
C	D	E	F	G	A	B	C					
Do	Re	Mi	Fa	Sol	La	Ti	Do					
1	2	3	4	5	6	7	8					

119. Such that it is not so readily discernable.

120. KAMIEN, *supra* note 55, at 89 (medieval music and Gregorian chant (named after Pope Gregory I, a promoter of the arts about 590-604 A.D.)). A melody is a thread of individual notes. *Id.*

121. MACHLIS, *supra* note 1, at 17, 223 (The tonic serves as a point of departure as well as a goal, a point of rest. "After generations of conditioning we feel a decided expectation that an active chord will resolve to a chord of rest."). See also *Kamien, supra* note 55, at 89 (The church modes tended to make the resting point on any one of the seven notes of the scale.).

122. KAMIEN, *supra* note 55, at 96. During the twelfth century precise rhythms were indicated for the first time. Until that time, there were no durational values to indicate how long a note lasted. A melodic phrase might have looked like:



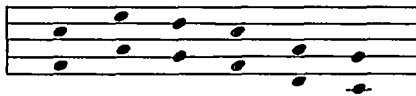
Only later were tempos and rhythms indicated. The tempo describes the nature of the "beat."

harmony, the sounding of two notes simultaneously, centered around the use of the fourth and the fifth as "perfect" intervals.¹²³ These intervals are explained mathematically as perfect because of the "in phase" nature of their wavelengths, there is no destructive interference (beat patterns) when the two tones are perfectly in tune.¹²⁴ But they are also explained aesthetically because of the "open" quality of the sound produced. The church, which held a "virtual monopoly" on music, could find no better term for such heavenly open sounds so "perfectly" suited for the setting of reverence.¹²⁵ As the use of harmony developed, the old melody lines became known as a *cantus firmus*, a "fixed melody," forming the basis for which harmonic and melodic movement could be varied and embellished. "Perotin (late twelfth to early thirteenth century) was the first known composer to write music with more than two voices" using a chant, a pre-existing melody, as the *cantus firmus*.¹²⁶ "As many as sixty-six tones of the upper voices [were] sung against one long sustained tone of the chant."¹²⁷

The first uses of chordal harmony, the sounding of three notes simultaneously, also centered around the 1st, 4th and 5th degrees of the

Rhythm pertains to how the beat is subdivided.

123. KAMIEN, *supra* note 55, at 94 ("[S]ometime between 700 and 900, . . . [m]onks in monastery choirs began to add a second melodic line . . . parallel in motion, note against note, at the interval of a fourth or a fifth," as in two melodies sounded simultaneously."). An example is shown below:



Note that a fifth is the distance between two intervals; where C to D is a second, C to E a third, C to F a fourth and C to G a fifth, etc. Note also that the return distance, from G back to C, is a fourth instead of a fifth. This is illustrated below:

				1	2	3	4
C	D	E	F	G	A	B	C
1	2	3	4	5			

124. ROEDERER, *supra* note 3, at 4 ("Pythagoras (c. 550 B.C.) is credited with having demonstrated that simple numerical ratios produce all the intervals necessary to create a musical scale. . . . [T]wo lengths of string in the ratio of 2:1 produce notes an octave apart." *Id.* Similarly the ratio of a fifth is 3:2 and the fourth is 4:3. Also note the models by his student Aristotle.).

125. KAMIEN, *supra* note 55, at 86-87 (Education was "associated with churches and cathedrals." "[M]onasteries held a virtual monopoly on learning. . . . Just as the cathedral dominated the medieval landscape and mind, so was it the center of musical life" where there was a "constant struggle between composers, who wanted to create elaborate compositions, and church authorities, who wanted music only as a discreet accompaniment to the religious service."). See also ROEDERER, *supra* note 3, at 416 ("[C]hurches provided the only elaborate music heard by most Europeans" and "had a far greater stylistic variety than that heard elsewhere, because it retained and revived traditions consecrated by decades or centuries of use and at the same time incorporated the latest fashions.").

126. KAMIEN, *supra* note 55, at 96.

127. *Id.*

scale, and the chords built upon those degrees.¹²⁸ As polyphonic music¹²⁹ and the use of harmony developed, the same *canti firmi* were re-used and became a foundation upon which the artist would try embellishing (perhaps improving) a sound that was already there.¹³⁰ One could change the character of the melody depending on the vertical, chordal structures (underlying harmony) which accompanied it and how the line was embellished. At an extreme, the underlying chant becomes embedded in the product, with so many notes in between that it is disguised and at times unrecognizable.¹³¹ The elaborations were notated by masters and analyzed by theoreticians.

The *cantus firmus* is still used by music students today who study the technique of embellishing a melody line in learning the art of underlying harmonies. It can be compared to the theme of a literary work (the idea) upon which variations exist and can be improvised around (the treatment or expression of the idea).¹³²

“True, it is the themes which catch the popular fancy, but their invention is not where musical genius lies, as is apparent in the work of all the great masters.”¹³³ Only with this historical context in mind can originality in music really be understood. A court could hardly begin to make a determination of what is original without the insight with which to put originality into historical perspective.

2. The Organization of Music into Styles or Genre:

In comparing a popular song to a Wagnerian score, telling that there is a difference in complexity is not difficult. Wagner’s elaborations on musical ideas are so extensive that use of the expression could easily be detected.

128. A chord is formed by taking the root (any note) and sounding above it a 3rd and a 5th. (i.e., do-mi-sol; re-fa-la; mi-sol-ti; etc.). Thus the chord built upon the 4th is fa-la-do, and the fifth is sol-ti-re. Note that one is a fifth above the tonic (home base or “do”) and the other is a fifth below. For example:



Simply stated, the chordal harmony is a vertical structure, a wall of sound created by those notes sounded simultaneously with the melody. Counterpoint is a technique whereby the chordal structures are created by several interwoven melodies, conceptually described as a blanket of sound woven by the melodies. A sophisticated technique characteristic of the baroque period (1600-1750) of which Bach is the master.

129. Multiple voices as in example given *supra*, note 128.

130. See the Bach example, *infra* notes 154-57 and accompanying text.

131. Such might be the case in Perotin’s sixty-six note example, *supra* notes 126-27. See also the Mozart example, *infra* note 159 and accompanying text.

132. Note that a standard art form is the “theme and variations.”

133. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d at 277.

But such complexity is not so true of popular music. Of course, the more elaborate the expression the less likely an identical work was independently created. But even the great composers' works can analytically be reduced to a I-IV-V progression.¹³⁴ Indeed *not finding* a work of Bach, Mozart, or Brahms that did not exploit the progression would be difficult.¹³⁵ The I-IV-V progression has been the most widely used progression in western civilization.

Today, in popular music, the progression is used in much the same way that it was centuries ago. Countless examples exist. Blues, country, rock-n-roll, folk; the repertoire is replete with the progression (or its minor equivalent).¹³⁶ In this fundamental sense, Bach and Rock are the same. Nevertheless, each genre has particular characteristics, rhythm and instrumentation for example, that make them more similar to works within the genre than without.

Blues, perhaps the most predictable (invariably a I-IV-V progression),¹³⁷ has a distinctive feel because of its treatment of the progression. The use of mode mixing¹³⁸ gives blues its distinctive "bluesy" feeling.¹³⁹ Yet, other forms have their peculiarities also. "[B]lues is a fundamental form in jazz,"¹⁴⁰ but the use of extended harmonies and successive key changes gives jazz its unique feeling. Modern rock sometimes uses the progression reminiscent of the modalities used centuries ago.¹⁴¹ Bela Bartok's study of folk music in his native Hungary fired his imagination.¹⁴² Although Arnold Schoenberg, Igor Stravinsky, John Cage, and others enjoyed success as "serious" musicians,¹⁴³ it could be said that heavy metal is the first atonal¹⁴⁴ music on a truly "popular" scale.¹⁴⁵ Yet, atonal mu-

134. The I-IV-V progression refers to the chords that are built upon the 1st, 4th, and 5th degrees of the scale. The term "progression," in general, refers to the way the chords progress through the piece in relation to each other. It is a generic term denoting the kind of movement in general rather than precisely.

135. See generally JONAS, *supra* note 2. See also *infra* notes 155-68 and accompanying text.

136. The most popular minor progression today is the VIII-VII-VI progression, the chords built on those degrees of the scale.

137. KAMIEN, *supra* note 55, at 519. Also note that blues scales, somewhat misnamed, use pentatonic scales which have their origin in the orient. There are five note scales that superimpose on the seven note major-minor system: DO RE MI fa SO LA ti DO, where fa and ti are the notes missing. Their modal (open sound) effect was explored by Debussy.

138. Mixing the major and the minor scales. Superimposing the parallel minor on the major gives the blues effect.

139. ROEDERER, *supra* note 3, at 922.

140. MACHLIS, *supra* note 1, at 579.

141. KAMIEN, *supra* note 55, at 547.

142. KAMIEN, *supra* note 55, at 399.

143. KAMIEN, *supra* note 55, at 398 (Igor Stravinsky's first performance of *The Rite of Spring* (*Le Sacre du Printemps*) literally ended in a riot. He was subject to much ridicule, yet there is no doubt that today he is considered a master, and the work, a masterpiece.).

144. Using all twelve notes without a tonal center in the major/minor tradition. See also, *supra* note 118 and accompanying text.

sic on a serious level has been around for more than a century. None of the concepts by themselves are new.

In these respects then, historically speaking, the popular ear is 100 years or more behind "serious" music. But "growing confusion exists . . . about where 'serious' music stops and 'popular' music begins."¹⁴⁶ Interestingly enough, more and more popular musicians are formally trained. Never before in history have so many musicians devoted so much time to the art.¹⁴⁷ It will be increasingly difficult to determine whether someone has independently created a work. Radio and television are uniquely intrusive into the home.¹⁴⁸ Access to a work will be easily inferred, unconscious, unwilling, or otherwise.¹⁴⁹

145. KAMIEN, *supra* note 55, at 411 (Perhaps this is because of the extent to which the recording industry has evolved. "Long playing records gave access to works that had seemed incomprehensible; they could now be played repeatedly until they were understood and enjoyed.")

146. ROEDERER, *supra* note 3, at 918.

147. Wars, economics, and modern technology have all played a role.

148. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

149. Even with identity, "if the defendant did not copy the accused work, there is no infringement." *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1988). It may be easy for a court to overlook *Feist's* requirements for originality: even with identity, it is enough that the work be the artist's own, no matter how crude, humble, or obvious it is. *Feist*, 111 S. Ct. at 1287.

On access as an element to the prima facie case and the odds of independent creation: If a similarity is so striking that the only reasonable explanation for the similarity is copying, "then access does not have to be proven." *Gaste*, 863 F.2d at 1067 n.3 (quoting the trial court 683 F. Supp. 63 (1988)). In *Gaste*, the trial jury rendered a verdict against the defendant where the plaintiff presented an "attenuated chain of events extending over a long period of time and distance" which made "copying less likely but not an unreasonable conclusion." *Id.* at 1066-67. The district court's instruction to the jury was "if [the pieces] are so nearly alike that it is virtually inconceivable that the second was independently composed without knowledge of the first, then you may find that there was infringement without finding actual access." *Id.* at 1067 n.3. The appellate court affirmed the trial court decision. Since "copiers are rarely caught redhanded," as a practical matter, it may be reasonable for a jury to infer access from similarities that can't be explained any other way. *Id.* at 1066. In this respect, The *Gaste* court admits that the test in the second circuit "is less rigorous." *Id.* at 1067. The court explains that "the jury is only permitted to infer access, it need not do so. Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence." *Id.* at 1068 (emphasis in original). Absent evidence of access, it is only reasonable where the similarities are so striking as to "preclude any reasonable possibility of independent creation." *Id.*

The defendant's appeal in *Gaste* principally relied on the *Selle* case. *Gaste*, 863 F.2d at 1067. Relying on *Armstein*, *Selle* held that a copyright claim cannot prevail without "some minimum threshold of proof which demonstrates that the inference of access is reasonable." *Selle*, 741 F.2d at 902. Even with identity, "if the defendant did not copy the accused work, there is no infringement." *Selle*, 741 F.2d at 901. The similarities were such that one of the defendants identified the plaintiff's song as the defendant's during deposition testimony. *Id.* at 903 n.3.

But despite *Selle* citing NIMMER ON COPYRIGHT, Nimmer criticizes the decision. 3 NIMMER & NIMMER, *supra* note 18, § 13.02[B]. Nimmer, however, attempts to justify the outcome on the court's "alternative holding." The similarity should not be considered as striking if the similarity may be explained through a common source or coincidental similarity. The plaintiff in *Selle* failed to counter evidence on a common source with evidence on the complexity/uniqueness. *Id.* See also *Selle*, 741 F.2d at 905. The defendant in *Selle* also had competent testimony on independent creation that wasn't impeached or contradicted. *Selle*, 741 F.2d at 899-900. Striking similarity, by definition would preclude both those possibilities.

3. Application of Music Analysis Techniques to Identify "Ideas"

An artist may use an idea, but may not appropriate for his or her own the way someone else expressed the idea. When dealing with words, the concept seems simple enough. It is difficult to be distanced from words. Music, however presents problems in identifying the idea, and then translating it into words a fact finder will understand. The notes, chords,¹⁵⁰ and rhythms, by themselves, like words in literature, are in the public domain. They cannot be copyrighted.¹⁵¹ Likewise, the presence of the musical idea in the public domain may rebut a charge of infringement, but there are many techniques for isolating the concept of a musical work's idea. Yet, if these techniques are applied repetitively, it is possible to oversimplify the music, and reduce it to the point where fundamental similarities are all that remain. Thus, an oversimplification can make it appear that similarities exist where there are, in fact, none.¹⁵²

Some very elaborate techniques have been developed to analyze the way a composer manipulates musical ideas. Schenkerian analysis,¹⁵³ for example, reduces a work through a series of abstractions to its basic essential elements in an effort to capture the "essence" of the work in terms of harmonic and melodic movement. The resulting visual aid, preserves a generalized statement of what the piece is about (the idea) upon which the composer articulated his particular elaboration (the treatment or expression of the idea). As the expert's series of abstractions, referred to by Judge Hand, leave out more and more of the incident, what remains approaches the most generalized idea of what the musical work is about. The musical works begin to look more and more like each other. The expert, therefore, helps identify the musical idea and explain its historic significance.

These techniques are not merely used by trial experts. Rather, they are tools of the skilled musician. As part of their daily exercise, music students take a composer's expression, separate out the idea upon which it is based, and play with it. For the musician, it is second nature; embellishments and elaborations are a way of life. An illustration of these analytical techniques follows. The works and their reductions expose the ideas upon which they

Compare Darrell, 133 F.2d 80 (where the defendant had heard it seven and a half years earlier "[t]he showing of access was not very persuasive.") with *Fisher*, 298 F. at 149, 152 (where the court upheld the plaintiff's independent creation because the defendant couldn't prove that the earlier public domain work was the source of the plaintiff's work and applied a theory of unconscious copying).

150. Blocks of sound consisting of three or more tones sounded simultaneously. See *supra* note 128.

151. See JONAS, *supra* note 2, at 2 (describing the motive as "music's analog to the word," in which case the notes are the alphabet).

152. Recognized by the dissent in *Arnstein*, 154 F.2d at 476. See *infra* note 168 and accompanying text.

153. See generally JONAS, *supra* note 2.

were built.

Traditionally, a dissonance, a discordant note lacking agreement with the underlying chordal structure, “had to be carefully ‘prepared’ by stating one of its [neighboring] notes as a consonance beforehand, and by resolving the dissonant note by step.” Therefore, “dissonant formations could be seen as linear elaborations of underlying consonances.”¹⁵⁴ The example shown in Figure 1 is excerpted from J. S. Bach’s Organ Fugue in G minor.¹⁵⁵

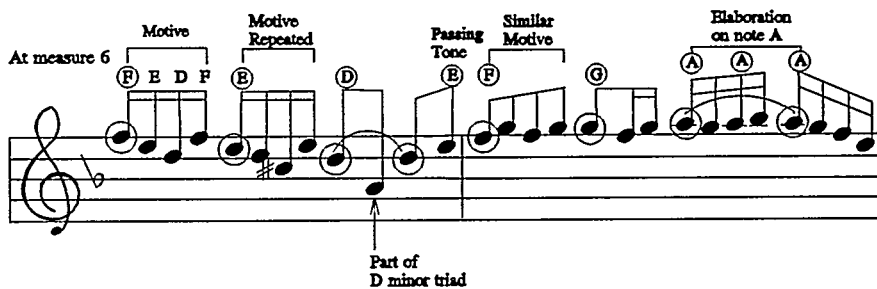


Figure 1

The melody line at the entrance of the second theme begins on F. The F-E-D-F in measure 6 is a motive, a musical word.¹⁵⁶ The E (second note of the motive) is a passing tone (the dissonance) filling in the minor 3rd between D and F as an elaboration of the underlying consonance (D minor), as just described. The F-E-D-F motif then descends to E, on which the motive is repeated, which descends to D. The E, again a passing tone, returns us to F in measure 7 before climbing upward, embellishing in a similar manner as it moves. The A in measure 5 fills in the D minor chord (D-F-A) as a vertical harmonic structure and should not be seen as part of the linear movement.

The basic movement of the line (the idea) is a mere stepwise motion down the scale but Bach’s treatment (expression) bears the “imprint of his gifts.”¹⁵⁷ Compare this, however, with the line reduced to its basic linear movement, shown in Figure 2.

154. NICHOLAS COOK, *A GUIDE TO MUSICAL ANALYSIS* 26 (1987). A dissonance is a note that sounds like it does not belong. If a note B was a dissonance, it had to be preceded by the note A and followed by the note C, or vice versa. Thus A, B and C would all appear together as linear (rising line) elaborations of an underlying harmony (the chord accompanying the melody), that chord necessarily containing the two notes A and C. An F major chord would contain these notes (F-A-C) as well as an A minor chord (A-C-E), the two possibilities. See *supra* note 128 and accompanying text on chord construction.

155. 6 Johann Sebastian Bach, *Fuga in g*, in *NEUE AUSGABE SÄMTLICHER WERKE* 55 (Johann Sebastian Bach Institut & Bach Archiv eds., 1964) (BWV 578).

156. See *supra* note 151 and accompanying text.

157. *Northern*, 105 F. Supp. at 400.

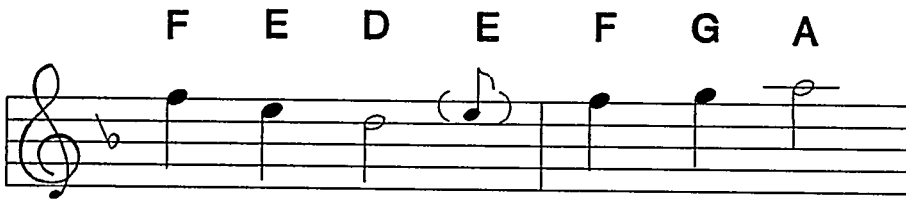


Figure 2

Stripped of embellishment, a Gregorian chant, *cantus firmus* results. The fixed melody is unquestionably public domain material.¹⁵⁸ Bach elaborated on someone's old idea, if not their expression in total, but hardly infringed.

Now consider a piano sonata by Mozart, Sonata in C Major.¹⁵⁹ The piano score, starting at measure 5, is shown in Figure 3.

Figure 3

158. But then so is Bach.

159. 2 Wolfgang Amadeus Mozart, *Sonata in C*, in W.A. MOZART, *KLAVIERSONATEN* 266 (Walther Lampe ed.) (Köchel 545).

Here, the basic melody is a scalar A-G-F-E-D. The elaboration is the 7 note scales in between each note in the melody, scales within a mere descending scale. Each descending note runs the octave and returns to itself before stepping down and repeating the sequence, a simple enough elaboration or embellishment of the melody. If there were sixty-six notes between each descending note, the stepwise linear motion might be difficult to detect even for an expert.¹⁶⁰ The score, reduced in part, is shown in Figure 4.

Figure 4 shows a musical score with two staves. The top staff is in treble clef and contains a melody of five notes: A, G, F, E, D. Above each note is a quarter note symbol. The bottom staff is in bass clef and contains four notes: F, E, D, C. Arrows point from these notes up to the corresponding notes in the melody above. Below the bass staff are chord symbols: IV, I₆, II₇(v!), I, and II₅.

Figure 4

As shown in Figure 5, the work is reduced further, leaving out “more of the incident,” as “the most general statement of what the [piece] is about.”¹⁶¹ The work, reduced to its idea, is hardly recognizable as something copyrightable. It is a scale in harmony.

Figure 5 shows a musical score with a single treble clef staff. It contains a scale in harmony, represented by pairs of notes (dyads) on adjacent lines and spaces of the staff, moving from a higher pitch to a lower pitch.

Figure 5

Another example is J.S. Bach’s 5th Cello Suite, Gavotte II, shown in

160. See discussion of Perotin, *supra* notes 126-27 and accompanying text.

161. *Nichols*, 45 F.2d at 121.

Figure 6.¹⁶² The E-D-E-F-E-D-E in the opening bar is merely an elaboration on the note E using the upper and lower neighbors:¹⁶³

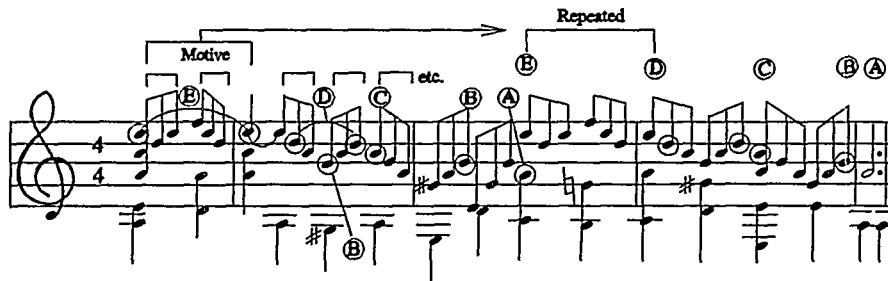


Figure 6

The full Schenkerian analysis analyzing the melodic and harmonic movement of the piece is shown in Figure 7.

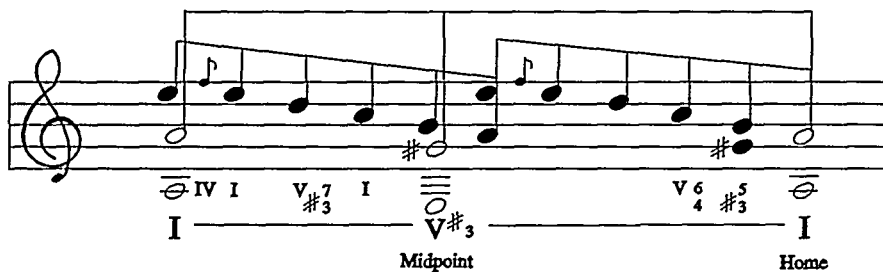


Figure 7

"[O]ne of the best ways to understand any analytical approach is in terms of

162. Johann Sebastian Bach, *Sechs Suiten für Violoncello: Suite V, Gavotte II*, in JOHANN SEBASTIAN BACH'S WERKE 86 (Bach Gesellschaft ed., 1947). This is a guitar transcription of which there are several. The original consists of only the melody line in the key of E flat. The chordal structures are implied by the linear movement. Whether the artist's additions rise above those of a mere mechanic is a question of fact.

163. Note that an expert could disagree as to the focus of some of the notes. In the second measure for example, instead of the note E descending stepwise to C via D, one could argue that the focus is B in which case the line as it continues would be B-C-B instead of D-C-B. In either case the motion would be stepwise. The B appears to be part of the underlying harmony rather than the focus of the melody. The experts could pursue this point for as long as a court will tolerate it.

what it aims to do . . . what kind of questions it sets out to answer.”¹⁶⁴
 All graphs are not Schenkerian in nature, there are other kinds of models.
 A closer look at the *voice leadings*, incorporating octave displacement,¹⁶⁵
 is shown in Figure 8.



Figure 8

In either case, the basic *idea* of the piece is a I-(IV)-V progression and the basic melodic movement is shown in Figure 9. Again a mere falling line; stepwise motion straight down the scale; undoubtedly in the public domain.



Figure 9

These techniques for reduction are essentially the same whether the piece involved is a keyboard piece or an orchestral score. Reduced under these techniques, a complex classical masterpiece could resemble a popular song in total. Note, however, that although the above pieces may structurally resemble other works in their idea, they may not even remotely sound the same. Something more is needed than the mere visual representation to

164. COOK, *supra* note 154, at 28.

165. Octave displacement refers merely to taking a note from its original position and dropping, or raising, it to a convenient place for analytical purposes.

substantiate that kind of conclusion.¹⁶⁶ What the eyes and ears report may conflict.¹⁶⁷ A word of caution is wise: “[O]ne may look to the total impression to repulse the charge of plagiarism where a minute “dissection” might dredge up some points of . . . tonal resemblance which [do] not otherwise exist.”¹⁶⁸ The ultimate determination of infringement is based upon whether the two works also sound the same.

*B. Recognizing Substantial Similarity in Music:
The Role of the Intended Audience*

The special nature of music copyright infringement cases may be better understood when the musical theory discussed above is presented through a visual aid. The concepts of unlawful copying in music may be visualized as a pyramid. At the pyramid's base is fundamental similarity, the general language, techniques, and means of expression. Near the apex is substantial similarity, a level above which copyright infringement exists. The pyramid is subdivided into areas of the musical elements; rhythm, tone, instrumentation, etc., with simple characteristics, public domain material, at the base, progressively more unique higher up the pyramid. Any element that differs between the two works, pulls the ultimate finding of fact down from the “identical works” point.

Increasing in similarity as we progress up the pyramid from the base, genre would be the second level. Since the various musical styles and forms, by definition, resemble each other more than a work from another subdivision.

On the next level of the pyramid, lie similarity of ideas, either in sound or on paper, the conclusions of the experts. The fewer the abstractions, the more likely that the finding of fact will lie above this plane. A copyright action on a work that falls below this plane should not have been brought. To rise above the substantial similarity plane, a comparison of the way the two works sound, done by the intended audience, must corroborate the conclusions of the plaintiff's expert. The model pyramid is shown in Figure 10.

166. *Arnstein*, 154 F.2d at 476 n.1 (Clark, J., dissenting) (Referring to analytical sketches used in *Hirsch v. Paramount Pictures*, 17 F. Supp. 816 (S.D. Cal. 1937), where the expert witness presented the melodies of ten songs, with sections superimposed. The sketches look very persuasive, yet questions remain.).

167. *Arnstein*, 154 F.2d at 475 (Clark, J., dissenting).

168. *Id.* at 476 (Clark, J., dissenting). More accurately, one *should* look at the total impression.

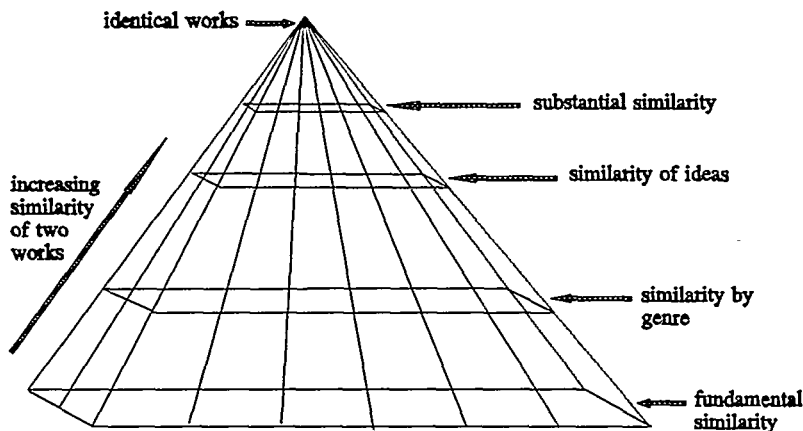


Figure 10

An “unintended audience,” drawing conclusions from a comparison of the two works, creates the potential to skew the point at which substantial similarity should be found, resulting in a risk of error that otherwise should not be there.¹⁶⁹ The focal point for the finding of fact then falls above or below the substantial similarity plane. Looking at it another way, distance to music skews the substantial similarity plane and affects the ultimate findings of fact.

An unintended audience may find that the two works sound substantially alike where an intended audience may find the two works fall short of substantial similarity. Where the styles are similar, for example, an unintended audience creates a risk of a lower substantial similarity plane. On the other hand, where the styles are different, the risk shifts in the other direction. The result may be a finding of no infringement where there perhaps should be, where the unintended audience simply could not believe that the works contained similarity of expression because, based on a mechanical change of tempo or instrumentation, the works did not sound alike. Of course, this skewing will not always occur. But having an unaided, uninformed, disinterested or distanced finder of fact creates a potential risk of error that should not be there. As the dissent in *Arnstein* cautioned:

[P]lagiarism [c]ould be suggested by the mere drumming of repetitious sound from our usual popular music . . . particularly when ears may be dulled by long usage, possibly *artistic repug-*

169. Because “artistic repugnance or boredom, or mere distance . . . causes all sounds to merge.” *Id.*

nance, or boredom, or mere distance which causes all sounds to merge. And the judicial eardrum may be peculiarly insensitive after long years of listening to "beat, beat, beat" (I find myself plagiarizing from defendant and thus in danger of my brothers' doom) of sound upon it, though perhaps no more than the ordinary citizen juror - even if tone deafness is made a disqualification for jury service, as advocated. . . . [I]t seems to me, . . . that after repeated hearings of the records, I could not find therein what my brothers found.¹⁷⁰

The dissent in *Arnstein* was very critical of the majority's decision. The dissent believed that the case was appropriate for summary judgement because there were no similarities that he could hear and the result of using this case to delineate a test ran the risk of leaving the impression that there were similarities.¹⁷¹ Defense counsel on appeal apparently felt that infringement could be suggested by the similar "beat, beat, beat" of two musical works. The dissent agreed, copying the defense counsel's phrase to illustrate the idea ("thus in danger of [his] brothers' doom").

Although the majority felt that the trial judge was improperly motivated by the plaintiff's prior history in copyright actions,¹⁷² the court also found similarities from which a jury could infer more than mere coincidence.¹⁷³ The plaintiff may at trial "play, or cause to be played the pieces in such a manner that they may seem to a jury to be inexcusably alike, in terms of the way in which *lay listener's of such music* would be likely to react."¹⁷⁴ This is an issue "which a jury is peculiarly fitted to determine. Indeed, even if it were to be trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question."¹⁷⁵ The jury would not be necessary if the judge were part of that target group so as to safeguard against an erroneous conclusion.

The court was aware of the potential to manipulate sound. Other court's should do the same. One should be skeptical of the outcome where *Northern* "suffered through the playing of the commercial recordings," however warranted the observation might have been.¹⁷⁶ *Northern* painstakingly

170. *Id.* (emphasis added).

171. "And I take it as conceded that these trifling bits of similarities will not permit an inference of copying. My brothers . . . rely upon a trial to develop more." *Id.* at 478. Under Judge Hand's opinion in *Arnstein v. Edward* the work would not get protection. *Id.* at 476. See also *supra* notes 63, 109 & 133 and accompanying text.

172. It was "entirely improper to give any weight to other actions lost by plaintiff." *Id.* at 475. The granting of summary judgement was therefore inappropriate for that reason among others. The plaintiff's "fantastical" story also was no reason to dismiss it because a jury could find it credible in trial. *Id.* at 469. See also *supra* note 62 and accompanying text.

173. *Id.*

174. *Id.* at 473 (emphasis added). It is a second reference to the intended audience.

175. *Id.*

176. *Northern*, 45 F.2d at 398.

described the extensive efforts of counsel they “endured” during trial,¹⁷⁷ bells, blocks, tympany, and whistles among them, after which two pianos might suddenly sound the same no matter what they were playing. An interesting strategy worth trying on “ordinary lay” observers.¹⁷⁸

Arnstein’s dissent described the defendant’s attempts to help the court by presenting all the recordings in question through the medium of the piano as a fatal tactical error.¹⁷⁹ Could it have been the tone the majority was listening to?¹⁸⁰ There are too many other reasons why works might seem the same. The dissent’s words of caution should be taken seriously.

Of course, courts can do only what they can to insure due process, but they should do no less. The intended audience is explicit in its terms, and helps safeguard against erroneous conclusions.

IV. PRACTICAL APPLICATION OF THE INTENDED AUDIENCE TEST

“Under *Arnstein*’s sound logic, the lay listeners are relevant only because they comprise the relevant audience.”¹⁸¹ Because the plaintiff in *Hinshaw* sold sheet music to persons who based the purchasing decision not on what they heard, but rather on what they saw on the printed page,¹⁸² and based their decision upon possible different interpretations in the way it could be performed,¹⁸³ the plaintiff made a tactical decision not to submit recordings of the two works. There were none. A lay listener’s reaction to recorded versions of the works would not necessarily reflect the basis for the purchasing decision and recordings could represent something more than mere differences and similarities in the arrangements themselves, rendering a comparison even more misleading.¹⁸⁴ So the *Hinshaw* court remanded “with instructions that the district court determine whether definition of a *distinct* audience is appropriate in this case.”¹⁸⁵

Th[e] burden would be a substantial one if our holding were read as an invitation to every litigant in every copyright case to put before the court the seemingly unanswerable question of whether a product’s audience is sufficiently specialized to justify departure

177. *Id.*

178. The court also took steps to insure that they were not influenced by these antics, relistening to the recordings two months later in closed chambers. *Id.* Courts should be aware of that potential.

179. *Arnstein*, 154 F.2d at 475. Judge Clark was also aware of the weaknesses of an uninformed jury susceptible to the “clever tricks.” *Id.* at 479 (Clark, J., dissenting).

180. See *supra* note 55 and accompanying text.

181. *Hinshaw*, 905 F.2d at 734.

182. *Id.* at 737.

183. *Id.* at 734.

184. *Id.* In the recipe instead of the cake analogy, the cakes themselves differ from baker to baker.

185. *Id.* (emphasis added).

from the lay characterization of the ordinary observer test. Although the existence of difficulties attendant to application of a test that a doctrine compels is an insufficient reason not to use the test, concerns about copyright actions becoming unwieldy are legitimate.¹⁸⁶

As a result, "a court should be hesitant to find that the lay public does not fairly represent a work's intended audience."¹⁸⁷ *Hinshaw* declares "departure from the lay characterization is warranted only where the intended audience possesses 'specialized expertise' [that goes] beyond mere differences in taste and instead . . . rise[s] to the level of possession of knowledge that the lay public lacks."¹⁸⁸ *Arnstein* simply calls for the use of an intended audience, those with knowledge sufficient to make the purchasing decision. The use of a *distinct* audience may well be warranted, above and beyond an intended audience, in an extraordinary case,¹⁸⁹ but nowhere did the *Arnstein* court refer to *specialized* knowledge sufficient to make the purchasing decision.

Thus, the *Hinshaw* court, despite its apparent empathy with an intended audience test,¹⁹⁰ resists holding that *Arnstein* should be applied as it was formulated. The problems attendant to compiling a cross section of the community that represents choral directors of spiritual music who are also piano players for this case would be even more difficult than compiling a jury of computer programmers for the computer cases. The case apparently calls for a jury of experts, so to speak. The burden seems overwhelming but the case does not accurately reflect the burden that might more typically be involved in comparing commercial recordings.

Not uncommonly, a listener will prefer one musical style over another, or indeed dislike a particular style altogether. Still others care little about

186. *Id.* at 736-37.

187. *Id.* at 737.

188. *Id.*

189. A distinction should be made between the intended audience and the distinct audience as in the computer cases. Computer programmers, may certainly appreciate the medium for expression more than the users of the program, but may not necessarily reflect the intended audience, the users.

190. The court cites with favor a list of commentators supporting the intended audience test. *Id.* at 736. Among them, Michael F. Sitzer, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 392 (1981).

[I]n cases dealing with works of broad public appeal, the best representative of the audience may in fact be the average lay person. But in all other cases identification of the audience, and the subsequent decision about whether to narrow the group of average lay observers to this particular audience, should enter into the determination of substantial similarity.

Id.

music in general, if at all.¹⁹¹ Regardless, the justice system must deal with these persons when choosing a jury, and the attorneys must confront the issue when standing before a judge. In the context of a jury then, the first step for a party is to consider the judge's familiarity with, and attitude toward, music in deciding whether to exercise the right to a trial by jury.¹⁹² The parties may prefer the purely intellectual approach of a judge in the determination of infringement and may stipulate to such.¹⁹³ However, where a judge exhibits distance or indifference to music, the judge may not be an adequate appraiser of similarity or dissimilarity.

Even if a judge is chosen, the judge has the option to use an advisory jury.¹⁹⁴ Indeed, the *Arnstein* court suggests it.¹⁹⁵ Presumably an advisory jury would be called upon where the judge personally feels too far removed from music, or the particular style. But the need for an advisory jury may not always be apparent to a judge who cannot appreciate his or her own distance to music. Further, an advisory jury consisting of the work's unintended audience would defeat the purpose for which it was summoned, and would be unable to make any better a comparison than could the judge.

"In most [cases] the general lay public fairly represents the work's intended audience."¹⁹⁶ That may have been a true observation once upon a time, perhaps at a time when radio was in its infancy. And of course there are times where the observation is still true. In the 1960s, the *Beatles* composed music of broad public appeal, perhaps because it had so much diversity. There was something for everyone, sweet, sad, love, peace, nonsense, and noise songs. Some of the music could even be considered a predecessor to today's heavy metal. But that was an era where there was little if any distinction between rock, rock-n-roll, heavy metal, and the like. The media and recording technology have since undergone tremendous changes. The recording industry keeps cranking the tunes out, and radio stations target their audiences, playing one style instead of another. There are crossover songs that make both the pop charts and the country charts, but these situations are rare. A country song will certainly not make the heavy metal rock charts, unless it were altered stylistically. If a member of the lay audience does not like a song that one station is playing, he or she merely changes to another station.

Indeed, a court should be hesitant to find that the lay public *is* the

191. Sad, but true. The reasons are speculative, ranging from tone deafness to merely other interests.

192. Guaranteed by the Seventh Amendment. U.S. CONST. amend. VII. See also FED. R. CIV. P. 38.

193. A jury trial may also be waived if not demanded within the proper time. FED. R. CIV. PRO. 38.

194. FED. R. CIV. P. 39(c).

195. But declares that it is not essential. *Arnstein*, 154 F.2d at 473. See also *supra* note 175 and accompanying text.

196. *Hinshaw*, 905 F.2d at 735.

intended audience. Today each musical slice of the market targets a particular audience that generates millions of dollars. The temptation to bring a suit of marginal merit is great.¹⁹⁷ In such a case, a plaintiff will want as "lay" an observer as possible, with as much distance to music as possible. The *Arnstein* dissent describes it as "the more unsophisticated and musically naive the better."¹⁹⁸ In an extreme case, where a spiritual song alleges infringement by a rock work, for example, the jury should consist of persons from both audiences with a minimum level of musical sophistication,¹⁹⁹ whether the trial is by jury as of right or advisory of the judge's own accord. Above and beyond tone deafness as a disqualification for jury service,²⁰⁰ a few well tailored questions would suffice to target a potential jurist's interests, attitudes towards music, and potential as a trustworthy jurist.²⁰¹ A response of "it's the only kind of music worth listening too" is surely a red flag to a challenge for cause.²⁰² An expression of distance or indifference likewise can be the same. Further, a judge should be aware of his or her own such feelings towards music, as they suggest that an advisory jury is warranted.

Hinshaw's concerns about the unwieldy potential can be tempered by the court maintaining control of the voir dire process. A judge should be able to recognize when the process goes too far astray.²⁰³ These relatively few safeguards would deter suits of questionable merit and protect, not chill, society's need to create new musical works.

CONCLUSION

The chain of events which exposed the wrinkles in the application of the lay observer test culminated with *Hinshaw*. There, a judge, sitting at bar, holding two pieces of sheet music, simply could not understand their language, and so was incapable of detecting, much less appreciating, their similarity or dissimilarity. He was simply not part of "the audience for whom such . . . music [was] composed."

Whether the music is represented by sheet music or a sound recording

197. Perhaps a court should consider this potential burden instead.

198. *Arnstein*, 154 F.2d at 480 (Clark J., dissenting). He further describes the process as judicial and musical chaos. *Id.*

199. Any musical training or early exposure or involvement in musical organizations is indicative of that level of sophistication.

200. *Arnstein*, 154 F.2d at 473 n.22. But the court makes no suggestions on how that would be accomplished. Perhaps a preliminary test of the jury pool is warranted. The jurists could be asked to distinguish between different tones in terms of pitch. Many beginning students in music have trouble distinguishing whether one tone is higher or lower than another.

201. The oath to perform their duties may not be an adequate indicator of a jurist's potential in a case of this nature.

202. FED. R. CIV. P. 47(a) (gives discretion to the court in conducting voir dire of the potential jurists).

203. *Id.*

should make no difference in the application of the test. A musician may build on the ideas of the past, so long as the expression is not borrowed. That may be enough to make the music the musician's own. But, so long as an ordinary lay observer standard is used to review the artist's work, the music may have to pass muster with a court like *Northern* which demonstrated its distance by the language it spoke. Such a hurdle is unacceptable. The relevant perspective for determining substantial similarity in music copyright infringement must be the perspective of the intended audience. Courts need to pay more attention to the application of the test.²⁰⁴ This need is "motivated by . . . the theoretical impropriety of looking to the defendant's work on the plaintiff's market and the practical evil of having an unaided, uninformed finder of fact deciding the crucial issue in a case."²⁰⁵ If the reaction of children is the relevant perspective when determining the infringement of puppet characters, then certainly, the reaction of rock-n-roll fans is the relevant perspective when determining infringement of rock-n-roll music.

From my experience, a heavy metal thrasher lover could hardly have the patience to listen to a folk tune, let alone a sweet one.²⁰⁶ I regret to say that I have little patience for *their* art.²⁰⁷ As I was growing up, my parents swore that all rock-n-roll sounded the same.²⁰⁸ Could it have been the "beat, beat, beat" they were listening to?²⁰⁹

*Paul M. Grinvalsky**

204. *Krofft*, 562 F.2d at 1163 n.6. The idea-expression dichotomy has been criticized more for what the *Krofft* court describes as "the application of the distinction than of the distinction itself, and can be alleviated by the courts being more deliberate in their consideration of this issue." See, e.g., Steve P. Handler, Note, *Copyright Protection for Mass-Produced Commercial Products: A Review of the Developments Following Mazer v. Stein*, 38 U. CHI. L. REV. 807, 822 (1971) (criticizing the "misapplication or non-application of the idea-expression concept" in commercial copyright, extending protection to ideas).

205. *Hinshaw*, 905 F.2d at 737. The court also referred to "non-interested" fact finders as a part of this practical evil. *Id.* at 735.

206. "Boredom." *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting).

207. "Artistic repugnance." *Id.*

208. "Or mere distance which causes all sounds to merge." *Id.*

209. Rock-n-roll is, after all, "often known as the 'big beat.'" ROEDERER, *supra* note 3, at 918.

* Dedicated to Mom and Dad. Much thanks to Professor Arthur Campbell, Victor J. Cosentino, and Lorie Marshall, without whose patience this Comment would hardly have been possible.

