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COPYRIGHT INFRINGEMENT OF MUSICAL COMPOSITIONS: A SYSTEMATIC APPROACH

by

E. SCOTT FRUEHWALD*

INTRODUCTION

This article addresses the problems that courts face when dealing with copyright infringement of musical compositions. Infringement of music presents special problems for judges and juries because music is an intuitive art that is nonverbal and nonvisual. Consequently, traditional methods of establishing infringement are often unreliable when applied to music.

This paper will concentrate on the question of whether a composition that is similar to, but not the same as, another work infringes on the other work.¹ This inquiry is both qualitative and quantitative. First, one must establish that the first work employs material from the second work. Determining whether copying has occurred is often difficult, and the majority of this paper will deal with this problem. Second, once copying has been established, one must determine whether the quantity copied is sufficient to constitute illegal appropriation.

Part I of this paper examines and criticizes the methods courts have employed to determine copyright infringement of musical compositions. Part II shows how some scholars have dealt with this question. Part III presents this author's solutions to determining infringement of musical works.

This paper will concentrate on infringement of popular music. Such suits have been common and have involved such well-known musicians as George Harrison, Yoko Ono, the Bee Gees, Mick Jagger, and Cole Porter. One commentator has written that:

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¹ This paper will not discuss the most common type of *copyright infringement of musical works*-- the situation where an infringer performs a copyrighted work without the permission of the copyright holder or its agent, such as ASCAP or BMI. With this type of infringement, there is no question of authorship; the usual issue is whether the infringer performed the piece.

"popular music has built-in factors that make it an especially tempting, increasingly complex battleground for copyright issues. The main one is pop's colloquial, derivative, aural tradition . . . if a song doesn't have some familiar element in its opening seconds, radio programmers and most record-company executives are likely to pass it by. The way it creates familiarity, however, is the stuff of which lawsuits are made."²

The typical situation occurs when the composer of an unknown work files suit claiming that a popular, financially successful piece has been copied from his work. The plaintiff will claim that it should be clear to all the world that the defendant has stolen his masterpiece, while the defendant will allege that he has never heard plaintiff's composition and has independently composed his piece. Both sides will call musical experts that will either categorically demonstrate that the defendant is a thief or is as innocent as a lamb. The court is then faced with the herculean task of deciding which party is correct.

PART ONE

Arnstein v. Porter

Arnstein v. Porter is the seminal case on copyright infringement.³ Plaintiff, a minor composer of sacred and popular music and a frequent plaintiff in infringement actions, alleged that Cole Porter stole several of his pieces. The alleged infringing works included some of Porter's best-known compositions, such as "Begin the Beguine" and "Night and Day." The trial court rendered summary judgment for Porter.

The appellate court required proof of two factors to establish copyright infringement: "(a) that the defendant copied from the plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation."⁴ Proof of copying may be shown by direct evidence, such as an admission, or circumstantial evidence. The most common form of circumstantial evidence is access, but "if there are no similarities, no amount of evidence of access will suffice to prove copying."⁵ On the other hand, "if there is evidence of access and some similarities exist, then the trier of facts must determine whether the similarities are sufficient to prove copying."⁶ One may use

² Jon Pareles, *Critic's Notebook; A Zillion Dollar Question: Who Did What in a Song?*, N.Y. TIMES, April 28, 1988, at C21 (inspired by a suit in which a court found that a song by Mick Jagger did not infringe on one written by Patrick Alley, a reggae singer).

³ 154 F.2d 464 (2d. Cir. 1946).

⁴ *Id.* at 468.

⁵ *Id.*

⁶ *Id.*

analysis (often called dissection by the courts) and expert testimony in determining copying. "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."⁷

Once copying has been proven, the court must determine whether that copying is unlawful; that is, whether a sufficient portion of protected material has been copied. "On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant."⁸ "[I]f copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying."⁹

Using this approach, the court examined the parties' works. The court believed that recordings of the compositions exposed similarities, but that these similarities by themselves were insufficient to infer copying. However, the court reasoned that, if evidence of access existed, a jury might infer that the similarities were not coincidental. Since there was some possibility of access and since plaintiff's credibility was a question for the jury, a genuine issue of material fact existed on the question of copying.¹⁰

On the issue of whether the copying constituted improper appropriation, the court stated:

[t]he plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something that belonged to the plaintiff.¹¹

This determination is particularly appropriate for a jury.

Based on the existence of a genuine issue of material fact, the appellate court reversed the trial court's grant of summary judgment.¹² The court, however, did not preclude the possibility of summary judgment in infringement actions-- cases

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 469.

¹⁰ *Id.*

¹¹ *Id.* at 473.

¹² *Arnstein* lost on remand. 158 F.2d 795 (2d Cir. 1946).

could exist in which the absence of similarities is so patent as to make summary judgment appropriate.¹³

The main flaw in *Arnstein* is the application of its rules to the facts.¹⁴ The court stated that there were similarities between the pairs of compositions, but that standing alone these similarities were insufficient to infer copying.¹⁵ But the court then declared that if there is some evidence of access, the jury may infer that these similarities are not coincidental. This author believes that this statement is illogical. Access, especially the weak evidence of access presented in *Arnstein*, cannot create similarity. There must be sufficient similarity between the pieces to raise the possibility of copying (i.e., that the jury could infer copying from the similarities), before access becomes relevant. If works are not similar enough that copying is possible, then no amount of access can infer copying.

The court's analysis of access is also questionable. The lower court characterized *Arnstein's* statements on access as "fantastic." For example, *Arnstein* had declared that Porter had hired "stooges" to follow him and live in his apartment. On the other hand, the court of appeals thought that the real question was credibility, which is an issue for the jury. However, the proper question was not credibility, but whether the evidence, after eliminating *Arnstein's* wild and unsupported allegations, was sufficient to allow a jury to infer a reasonable possibility of access. The court could have decided this issue as a matter of law, as the lower court did.

Test for Copyright Infringement

While one may criticize *Arnstein's* application of the rules to the facts, it settled the standard for proving copying when there is no direct evidence of infringement-- access and similarity.¹⁶ It also raised the issue of the role of expert testimony in establishing copying. The discussion below will divide the analysis of how courts determine copying into the two parts set forth in *Arnstein*-- access and similarity.

¹³ *Id.*

¹⁴ For other criticism of *Arnstein*, see Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 *FORDHAM L. REV.* 127 (1988). This article is especially critical of *Arnstein's* use of expert testimony only on the issue of copying, rather than employing it for both the issue of copying and the ultimate issue of whether the copying constitutes infringement; see also Raphael Metzger, *Name that Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 5 *LOY. L.A. ENT. L.J.* 61, 70-71 (1985).

¹⁵ In his dissent, Judge Clark found no significant similarities. *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting).

¹⁶ Many courts hold that evidence of access and substantial similarity create a rebuttable presumption of copying. *E.g.*, *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); *Novak v. National Broadcasting Co.*, 752 F. Supp. 164, 168 (S.D.N.Y. 1990).

1. Access

Most courts consider access a significant element of proof of copying.¹⁷ In fact, *Selle v. Gibb* declares that it is the most important component of circumstantial evidence of copying.¹⁸ Yet, courts disagree whether proof of access is always required, what access is, and what constitutes proof of access.

a. Can access be proven from striking similarity?

Some courts state that there can be no inference of copying without proof of access.¹⁹ Other courts declare that access can be inferred from striking similarity.²⁰

Selle, which involved the Bee Gees' song "How Deep is Your Love," tends toward the former position.²¹ The court admitted that "inference of access may still be established circumstantially by proof of similarity which is so striking that the possibility of independent creation, coincidence and prior common source are, as a practical matter, precluded."²² However, the court added that "striking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation."²³

Selle states that there must be evidence of access, other than striking similarity, "which would establish a reasonable possibility that the complaining work was *available* to the alleged infringer."²⁴ This is because "two works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement."²⁵ The court felt that "although it had frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual."²⁶ The court concluded that "[t]he plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of

¹⁷ Access may be defined as the opportunity that an alleged infringer had to view or hear the copyrighted work. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Selle v. Gibb*, 567 F. Supp. 1173, 1181 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

¹⁸ 741 F.2d at 901.

¹⁹ *E.g.*, *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1986); *Zimmerman v. Tennille*, 1988 Copyright L. Dec. (CCH) ¶26, 267 (S.D.N.Y. 1988).

²⁰ *E.g.*, *Gaste v. Kaiserman*, 863 F.2d 1061, 1067-68 (2d Cir. 1988); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Allen v. Walt Disney Productions*, 41 F. Supp. 134, 137 (S.D.N.Y. 1941).

²¹ 741 F.2d at 896.

²² *Id.* at 901.

²³ *Id.*

²⁴ *Id.* (emphasis in original).

²⁵ *Id.*

²⁶ *Id.* (emphasis in original).

access based upon speculation and conjecture alone."²⁷ "[A] defendant's opportunity to view the copyrighted work must exist by a reasonable possibility--not a bare possibility."²⁸

In *Zimmerman v. Tennille*, a case involving the Captain and Tennille, the plaintiff had argued that striking similarity was sufficient to raise a genuine issue of fact despite the lack of any evidence of access.²⁹ The plaintiff's expert had testified that portions of the songs were identical, and that the possibility of independent creation was remote. While recognizing that striking similarity could sometimes create an inference of access, the court held that striking similarity could not produce such an inference "when the evidence affirmatively negates access."³⁰

The case of *Gaste v. Kaiserman*, involving the song "Feelings," disagrees with *Selle* and similar cases, and exemplifies those cases that infer access from striking similarity.³¹ The court wrote that "[i]f two works are so strikingly similar as to preclude the possibility of independent creation, 'copying' may be proved without a showing of access."³² The appellant had argued that allowing striking similarity to infer access fails to protect an author who independently creates his work. The court countered by stating that "the jury is only permitted to infer access from striking similarity; it need not do so."³³ The court then declared that "[a] plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation."³⁴

Gaste's position-- that access *can* be inferred from striking similarity -- is surely correct.³⁵ If two complicated pieces have exactly the same melodies and accompaniments, one must have been copied from the other. The question, then, is how strikingly similar the works must be. Again, *Gaste* is correct that they must be so strikingly similar as to "preclude any reasonable possibility of independent creation."

²⁷ *Id.*

²⁸ *Id.* at 902 (citing *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980)).

²⁹ *Zimmerman*, 1988 Copyright L. Dec. ¶26, 267 at 21,800.

³⁰ *Id.*

³¹ 863 F.2d at 1067-78.

³² *Id.* at 1068 (quoting *Ferguson v. Nat'l Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1987); see also *Siskind v. Newton-John*, 1987 Copyright L. Dec. (CCH) ¶26,113 at 21,102-03 (S.D.N.Y. 1987).

³³ *Gaste*, 863 F.2d at 1068.

³⁴ *Id.*

³⁵ It will be argued below that too much emphasis is placed on access in establishing copyright infringement.

b. Access in general

Cases vary greatly on what can constitute access. Some cases require only the slightest possibility of access, while others require proof of direct access. Cases also differ significantly on what can comprise evidence of access.

In *Gaste*, the plaintiff's theory of access was that the defendant composer's publisher, Fermata, received a copy of the infringed piece, "Pour Toi," in the 1950's when the plaintiff was trying to market the song.³⁶ A former employee of Gaste had given a recording of "Pour Toi" to Lebendiger, owner of Fermata, in the 1950's, and *Gaste* had sent sheet music to Lebendiger in Brazil. The defendant composer, Kaiserman, then allegedly obtained it from Lebendiger in 1973.

Regarding access, the court wrote that "it is well established that there must be evidence of a reasonable possibility of access. Access must be more than a bare possibility and may not be inferred through speculation or conjecture."³⁷ The court admitted that the plaintiff's theory was based on an attenuated chain of events, but it believed that a reasonable jury could conclude that the defendant had had access to the plaintiff's song. The court stated that "[a]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant's access to a plaintiff's work."³⁸ The court also pointed out that an infringer is more likely to steal from an obscure song.

The court, by allowing an inference of access based "on an attenuated chain of events," seems to contradict its requirements of a "reasonable possibility of access" and the fact that "access may not be conferred through speculation and conjecture."³⁹ It is possible that the defendant obtained "Pour Toi" through this attenuated chain. But if this quantum of evidence can satisfy the access requirement, then perhaps there should be no access requirement.

Selle is converse to *Gaste* in its application of the standard for access to the facts. *Selle* gives examples of direct access, such as where "the work was sent directly to the defendant . . . or a close associate of the defendant."⁴⁰ Concerning circumstantial evidence, the court stated that a plaintiff could show a reasonable possibility of access where the piece has been widely disseminated. However, the plaintiff must meet "some minimum threshold of proof which demonstrates that

³⁶ *Gaste*, 863 F.2d at 1066.

³⁷ *Id.*

³⁸ *Id.* at 1067 (citing *De Acosta v. Brown*, 146 F.2d 408, 410 (2d Cir. 1944), cert. denied, 325 U.S. 862 (1945)).

³⁹ *Gaste*, 863 F.2d at 1067 n.3 (quoting *Gaste v. Kaiserman*, No. 86-5671, 1987 WL 14457 (S.D.N.Y. July 19, 1987)).

⁴⁰ 741 F.2d at 901.

the inference of access is reasonable."⁴¹ The greatest difficulty exists when there is no direct link between the plaintiff's and defendant's works, but the plaintiff's "work has been so widely disseminated that it is not unreasonable to infer that the defendant might have had access to it."⁴²

Musicians had performed Selle's song two or three times in the Chicago area, and Selle had sent a tape or lead sheet to eleven music recording or publishing companies. However, there was no evidence that the Bee Gees or their associates were in Chicago when the piece was performed, or that they had had access to the recording or lead sheet. Based on this evidence, the court concluded that the possibility of access was "de minimis."⁴³

An examination of other cases demonstrates that courts have not established a clear standard for access. Several cases declare that wide-spread dissemination permits an inference of access.⁴⁴ In *Abko Music v. Harrisongs Music Ltd.*, the plaintiff alleged that George Harrison had copied "My Sweet Lord" from the plaintiff's "He's So Fine." Harrison argued that temporal remoteness precluded a finding of access since six years had elapsed between the composition of "He's So Fine" and "My Sweet Lord." The court disagreed. In addition to Harrison's admission that he heard "He's So Fine" in 1963, the court believed that access had been shown by the wide dissemination of the song. "He's So Fine" had been number one in the United States for five weeks and on the "Top Thirty Hits" in Great Britain for seven weeks.

A recent non-music case, *Novak v. National Broadcasting, Co.*, rejects the expansive view of access contained in *Gaste* and *Harrisongs*.⁴⁵ In *Novak*, writers and producers of comedy skits that were broadcast over WOR-TV, a New York television station, sued NBC and several persons connected with Saturday Night Live for infringing comedy skits. The plaintiffs claimed that access was shown because a tape of the skits had been sent to an NBC executive and because the skits had been broadcast over local television.

Like several other courts, the *Novak* Court said that "[t]o support a finding of access on a motion for summary judgment, the plaintiff must show a reasonable possibility of access, not a bare possibility."⁴⁶ On the issue of access by the audition tape, the court believed the NBC executive's statement that he had never

⁴¹ *Id.* at 902.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *E.g.*, *Abko Music, Inc. v. Harrisongs Music Ltd.*, 722 F.2d 988, 997-98 (2d Cir. 1983); *Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*, 452 F. Supp. 429, 438 (W.D.N.Y. 1978)(Widespread telecasting of commercial in United States demonstrates access by producer of Canadian commercials).

⁴⁵ *Novak v. Nat'l Broadcasting Co.*, 752 F. Supp. 164, 168-69 (S.D.N.Y. 1990).

⁴⁶ *Id.* at 168.

seen the tape and that he had a policy of handling such tapes without viewing them.⁴⁷ On the issue of access through broadcasting, the court believed that, although the skits had been broadcast, there was no evidence that the defendants had viewed the broadcasts.⁴⁸ The court distinguished *Harrisons* on the ground that in that case, the plaintiff's song had been number one for five weeks in the United States and seven weeks in Great Britain. In *Novak*, the skits were only broadcast four times over local television.⁴⁹ However, this author does not view this distinction of degree as significant.

In *Benson v. Coca-Cola Co.*, which involved "I'd Like to Teach the World to Sing," the plaintiff claimed that access was satisfied because the song's principal writer had travelled extensively throughout the country at the time the plaintiff was popularizing his song through public performances.⁵⁰ The plaintiff also claimed that one of the song's writers had been a record company executive when the plaintiff had sent copies of his song to various music publishers and recording companies.

The court held that these facts did not constitute proof of access. The plaintiff had not shown that the defendant had been in the places where the work had been performed. Moreover, the plaintiff had not sent the piece to the defendant's company, and there was no evidence that one of the companies to which it had been sent had forwarded it to the defendant.

Similarly, in *Heim v. Universal Pictures Co.*, the evidence showed that the plaintiff had never had any contact with the defendant, the defendant had never been to California, and the plaintiff's piece had never been performed outside California.⁵¹ Moreover, the plaintiff's composition had "a very narrow field in the United States."⁵² Based on this lack of evidence of access, the court found for the defendant.

Contrary to *Harrisons*, some courts emphasize the time element in determining access.⁵³ In *Carew v. R.K.O. Radio Pictures, Inc.*, the court felt that a period of eleven years between the composition of the songs, and the fact that plaintiff's song had never been published, made access unlikely.⁵⁴ The court found

⁴⁷ *Id.* at 169.

⁴⁸ *Id.* at 169-70.

⁴⁹ *Id.*

⁵⁰ 795 F.2d 973, 975 (11th Cir. 1986).

⁵¹ 51 F. Supp. 233 (S.D.N.Y. 1943).

⁵² *Id.* at 233.

⁵³ *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940); *Northern Music Corp. v. King Record Distributing Co.*, 105 F. Supp. 393, 398 (S.D.N.Y. 1952); *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199, 200 (S.D. Cal. 1942).

⁵⁴ *Contra Abko Music, Inc. v. Harrisons Music Ltd.*, 722 F.2d 988 (2d Cir. 1984); *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988).

similarly in *Darrell*. However, *Northern Music Corp. v. King Record Distributing Co.*, makes the odd statement that "[p]riority of publishing of itself raises a presumption that the defendant had contact."⁵⁵ If other courts had adopted this ill-reasoned presumption, copyright infringement cases would be more frequent.

c. Evaluation

The above discussion demonstrates that there is considerable disagreement and confusion concerning access. However, the main problem is not the lack of a clear standard for evaluating access, but whether there should be an access requirement at all.

It is doubtful that an inference of access adds much to a finding of similarity. Numerous cases correctly hold that access without similarity cannot constitute infringement.⁵⁶ Summary judgment is proper if the court determines as a matter of law that two works are not similar, despite a genuine factual dispute regarding access. On the other hand, as has been discussed above, many cases allow an inference of access based solely on striking similarity.

Take the situation where a composition has been widely disseminated. Some courts view this as a significant fact in inferring access.⁵⁷ But the fact that a work has been widely disseminated does not mean that the alleged infringer heard it or, if he did hear it, that he remembered it. In today's society with a multitude of media outlets and kinds of entertainment, it is hard to determine what percentage of the population may have heard a particular song.

Take the opposite scenario. Suppose the defendant has presented substantial evidence of lack of access, but the melodies of the two songs are identical. Are we to say that the plaintiff cannot recover without at least looking at what the probability of independent creation is?

If access is to be used as a major criteria in inferring copying, the standard should be a reasonable opportunity for access. Courts should not accept the tenuous evidence offered by plaintiffs in such cases as *Gaste* and *Arnstein* to establish access.

The main use of access is probably for summary judgment. If songs are not similar, and there is no possibility of access, then summary judgment should be rendered for the defendant. Additionally, access may be useful when it is direct

⁵⁵ 105 F. Supp. at 398.

⁵⁶ E.g., *Arc Music Corp. v. Lee*, 296 F.2d 186, 186-87 (2d Cir. 1961). However, the Ninth Circuit has declared that a higher degree of proof of access "justifies a lower standard of proof to show substantial similarity." *Shaw v. Lindheim*, 908 F.2d 531, 534 (9th Cir. 1990), *modified*, 919 F.2d 1353 (9th Cir. 1990).

⁵⁷ See cases cited *supra* note 44.

evidence rather than simply circumstantial. A jury should be allowed to examine direct evidence of access while considering infringement. Still, similarity should be the main factor in judging copying. Even if the defendant held the plaintiff's music in his hands while he was writing his song, there can be no inference of copying without similarity. There is no infringement when a defendant is inspired by a plaintiff's composition, as long as there is no illegal copying.⁵⁸

2. Probative Similarity

The other prong of the standard test for copyright infringement is probative similarity.⁵⁹ As was true of access, the tests and standards for probative similarity differ radically.

Determining copying based on probative similarity is difficult. As one court has declared, "[w]ith the relatively few musical intervals that exist and the vast amount of music in the public domain it is rash to infer that a sequence that may be found in a melody is copied from any particular song containing the same sequence, rather than taken from other sources."⁶⁰ Despite this problem, courts have developed ways to judge similarity.

a. *Prior art*

Several cases form a negative inference of copying from the fact that the materials that are similar between two works are also contained in earlier works.⁶¹ In *Granite Music Corp. v. United Artists Corp.*, the court found that a sequence of four notes that was common to the two compositions was also present in earlier works.⁶² In *Hirsch v. Paramount Pictures*, the source of similar phrases in two compositions was said to be Strauss's "Die Fledermaus."⁶³

⁵⁸ *Black v. Gosdin*, 740 F. Supp. 1288, 1290 (M.D. Tenn. 1990)(country song lyrics). The court printed the texts of the two songs in an appendix. Although the two lyrics concern the same subject and create the same mood, the texts of the songs contain no similarities. Even if the defendant was inspired by the plaintiff's lyrics, there can be no infringement. Mood and subject matter resemble ideas; they are not copyrightable.

⁵⁹ I have borrowed the term "probative similarity" from an article by Alan Latman, '*Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*', 90 COLUM. L. REV. 1187 (1990). Most courts and commentators use the term "substantial similarity." *E.g.*, 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01[B] at 13-8; § 13.03[A] at 13-23 (1992). I believe that the term probative similarity is preferable because substantial is a quantitative term. The initial question for infringement is not how much has been copied, but whether there has been copying. I retain "substantial similarity" when a court or commentator uses the term.

⁶⁰ *Arnstein v. Broadcast Music, Inc.*, 137 F.2d 410, 412 (2d Cir. 1943).

⁶¹ *E.g.*, *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976); *Darrell*, 113 F.2d at 80; *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 282 (S.D.N.Y. 1991); *McMahon v. Harms*, 42 F. Supp. 779, 780 (S.D.N.Y. 1942); *Perlman v. Remick Music Corp.*, 61 U.S.P.Q. (BNA) 227, 228-29 (S.D.N.Y. 1944); *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 817-18 (S.D. Cal. 1937).

⁶² 532 F.2d at 721.

⁶³ 17 F. Supp. at 817-18.

The above cases ignore rules of logic and basic principles of copyright law. That two similar pieces resemble a third earlier piece does not prove that the two works were not copied from each other.⁶⁴ Originality for copyright only means that a work must be from the mind of the author, that the author created it by his own skill, labor, and judgment.⁶⁵ "The originality requirement for obtaining a copyright is an extremely low threshold . . . a showing of virtually any independent creativity will do."⁶⁶ Moreover, there is no requirement of novelty or invention as there is with patents.⁶⁷

Even a compilation, such as a yellow pages directory, can receive copyright protection.⁶⁸ Thus, if a composer in 1992 were to write a symphony exactly like Beethoven's Fifth Symphony, without having copied Beethoven's work, he could obtain a copyright in his composition.⁶⁹ Of course, the composer could not prevent anyone from playing Beethoven's Fifth Symphony, but he could stop someone from playing his own.⁷⁰ Thus, the proper inquiry is not whether the defendant might have copied the passage from an earlier piece, but whether he copied plaintiff's work.⁷¹

One could argue that some cases did not employ prior works to directly negate copying, but rather used them to show that the shared material was common place or trivial. This proposition can still deprive a composer of copyright protection. A composer has a right to copyright protection if his work is original, even if it is commonplace;⁷² songs with commonplace melodies frequently become big hits. A composer can even obtain copyright protection if his piece

⁶⁴ Of course, when the evidence indicates that the alleged infringing work was copied from a composition in the public domain, it has been proven that copyright infringement has not occurred. *See Heim v. Universal Pictures Co.*, 51 F. Supp. 233 (S.D.N.Y. 1943), *aff'd*, 154 F.2d 480 (2d Cir. 1946).

⁶⁵ *E.g.*, *Doran v. Sunset House Distributing Corp.*, 197 F. Supp. 940, 944 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962).

⁶⁶ *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988).

⁶⁷ *E.g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 53 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936); *see also Gaste*, 863 F.2d at 1066.

⁶⁸ 11 U.S.C. § 103 (1992); *see also Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 111 S. Ct. 1282 (1991).

⁶⁹ *Sheldon*, 81 F.2d at 54.

⁷⁰ *Hartfield v. Peterson*, 91 F.2d 998, 1000 (2d Cir. 1937)(if plaintiff copied from defendant's work, the existence of a prior source is irrelevant to whether copying has occurred); *Golding v. R.K.O. Pictures, Inc.*, 208 P.2d 1, 4-5 (Cal. 1949), *vacated by*, 221 P.2d 95 (Cal. 1950) (that defendant *could* have taken material from prior work is irrelevant, if defendant copied plaintiff's song).

⁷¹ Of course, if the defendant claims that he copied from an existing work in the public domain, evidence of prior art is relevant to prove that copying has not occurred. *See Novack v. Nat'l Broadcasting Co.*, 752 F. Supp. 164, 168 (S.D.N.Y. 1990); *Rizzi v. Robbins Music Corp.*, 58 U.S.P.Q. 315 (S.D.N.Y. 1943).

⁷² *See Levine v. McDonald's Corp.*, 735 F. Supp. 92 (S.D.N.Y. 1990); *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F. Supp. 285, 287-88 (E.D. Pa. 1960); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951). However, some cases state that ordinary elements are not subject to copyright protection. *E.g.*, *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

consists entirely of non-copyrightable materials, as long as he has arranged or used these elements in an original way.⁷³

b. Ordinary listener test

Many courts have adopted the average observer (or, in music, the ordinary listener test).⁷⁴ Sometimes courts use this test to determine copying; sometimes, to establish illegal appropriation, as in the *Arnstein* case. When used to determine copying, courts find probative similarity only if the average listener can hear the probative similarity. Courts employing this test distrust expert testimony. As one court stated: technical analysis "is not the proper approach to a solution: it must be more ingenuous, more like that of a spectator, who would rely upon the complex of his impressions."⁷⁵ As noted above, some courts believe that the proper focus is on the plaintiff's financial interest. "The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in financial returns from his compositions which derive from the lay public's approbation of his efforts."⁷⁶

At first glance, the ordinary listener test has several advantages. It brings in the reasonable man, so greatly beloved in tort law. It also avoids experts who can hoodwink a jury with their eruditeness and learning.

But, those courts that employ the ordinary listener test to establish copying ignore that the ordinary listener is ill-equipped to hear copying. They also confuse the purpose of the first prong of the *Arnstein* test. This purpose is not to determine whether the ordinary listener can hear the similarity, but whether there has been copying. Some courts have acknowledged that a clever composer-thief can vary a melody so that the average listener can not be sure whether copying has occurred.⁷⁷ On the other hand, an educated musician usually can distinguish whether a piece has been newly composed or is based on an existing one.

Theoretically, if a thief stole the plaintiff's theme and wrote it backwards, the plaintiff would be entitled to copyright protection. Copying an entire theme is certainly substantial. In such an event, the ordinary listener would be unable to hear

⁷³ *Levine*, 735 F. Supp. at 97.

⁷⁴ *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n.2 (9th Cir. 1987), *cert. denied*, 484 U.S. 954 (1987) (case involved the theme from the movie *E.T.*); *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980)(toys); *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir. 1974)(fabric design); *Arnstein v. Broadcast Music*, 137 F.2d 410, 412 (2d Cir. 1943); *Heyman v. Salle*, 743 F. Supp. 190, 193 (S.D.N.Y. 1989); *Jones v. CBS, Inc.*, 733 F. Supp. 748, 752 (S.D.N.Y. 1990) (television script); *Carew v. R.K.O.*, 43 F. Supp. 199 (S.D. Cal. 1949); *Hirsch v. Paramount Pictures*, 17 F. Supp. 816, 818 (S.D. Cal. 1937).

⁷⁵ *Arnstein*, 137 F.2d at 412 (quoting *Nicholas v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931)) (a similar view concerning the infringement of literary works).

⁷⁶ *Arnstein*, 154 F.2d at 473; *see also Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 733 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 511 (1990).

⁷⁷ *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984); *Blume v. Spear*, 30 F. 629, 631 (S.D.N.Y. 1887).

that the theme had been copied. Yet, an educated musician upon examining the score should be able to discern the copying.

Courts that employ the ordinary listener test find appealing an economic argument that copyright laws are intended to protect an author's financial interest, not his reputation. However, this theory does not justify using the ordinary listener test, even on the question of illegal appropriation. Further, it contradicts congressional intent as indicated in the copyright law.⁷⁸ The law provides for statutory damages without proof of actual damages.⁷⁹

Still, those courts that are suspicious of expert opinions raise legitimate concerns. Like most expert witnesses, experts in musical copyright cases frequently disagree. However, the point is not that copying should not be found if it requires complex analysis, as the average-listener courts seem to argue. Copying is copying. Rather, the problem is that unethical analysis can be used to show similarity and the likelihood of copying where none exists. A rigorous method of judging substantial similarity, such as the one presented below, can help avoid this problem.

Sensing some of the problems with the average listener test, the court in *Dawson* developed a variation on the test called the "intended audience" test.⁸⁰ The court agreed with *Arnstein* that copyright law should protect the plaintiff's financial interest.⁸¹ Yet, the court felt that the ordinary listener test does not always protect that financial interest; the intended audience is not always the average listener. "[A] court should not be hesitant to find that the lay public does not fairly represent a work's intended audience."⁸² Therefore, when conducting the second prong of the *Arnstein* test -- the unlawful copying prong -- one must determine whether the piece's *intended* audience perceives the copying.⁸³ The court remanded the case because the trial court had not considered the intended audience of the compositions involved -- spiritual arrangements.⁸⁴

The intended audience test shares most of the problems of the ordinary listener test. First, *Dawson* states that generally the intended audience will be the

⁷⁸ One court has even stated that the lack of the effect of a play and motion picture on the sale of a sociological study is one factor in not finding infringement. *Rokeach v. Avco Embassy Pictures Corp.*, 197 U.S.P.Q. (BNA) 155, 161-62 (S.D.N.Y. 1978). Obviously, this is incorrect; the effect of the infringing work's sales should be considered in calculating damages or a fair use defense, not whether infringement has occurred.

⁷⁹ 17 U.S.C. § 504(c) (1988).

⁸⁰ 905 F.2d 731; see also Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385 (1981).

⁸¹ 905 F.2d at 736.

⁸² *Id.* at 737.

⁸³ *Id.* at 736-37.

⁸⁴ *Id.* at 737.

ordinary listener.⁸⁵ More importantly, the test still ignores that the key inquiry is whether copying has occurred, not whether the plaintiff has been economically damaged.

Another problem with the ordinary listener test is that courts using it have confused or telescoped the two prongs of the *Arnstein* test. As stated above, *Arnstein* first establishes whether copying has occurred, then determines whether the quantity copied is sufficient to constitute improper appropriation. According to *Arnstein*, expert testimony can be used with the former; the ordinary listener test, with the latter. Some courts, however, have ignored the distinction between whether copying has occurred and the quantity copied, and applied the average listener test to the copying prong.

This confusion may be due to a looseness of terminology by courts employing the *Arnstein* test.⁸⁶ Many courts use the term "substantial" similarity to describe what this paper calls probative similarity-- similarity that is probative of whether copying has occurred. The question of whether copying has occurred is qualitative, not quantitative. Thus, the use of substantial, a quantitative term, is confusing when applied to the question of whether copying has occurred.

3. Musical Analysis and Opinions of Musical Experts

Numerous musical copyright infringement cases use musical analysis and expert testimony. This analysis ranges from poor or unsophisticated to complex and musically insightful.

Arnstein v. Twentieth Century Fox Film Corp. falls into the former category, mainly because the plaintiff, using questionable analytical techniques, attempts to show similarity between patently dissimilar pieces.⁸⁷ Despite the plaintiff's analysis, the court states that the pieces do not sound alike: their melodies, harmonies, accents, and rhythms are completely different. But then the court goes too far; it points out that the compositions were written for entirely different purposes. This last point is irrelevant, as a popular song can be copied from a sacred piece, or a symphony, from an opera.

The court was correct in rejecting the plaintiff's stretched analysis:

By ingenious manipulation of his composition the plaintiff attempts to establish similarity. For instance to do so, he transfers notes from

⁸⁵ *Id.*

⁸⁶ For problems in terminology in copyright cases, see Latman, *supra* note 59. This article will be discussed in detail below.

⁸⁷ 52 F. Supp. 114 (S.D.N.Y. 1943).

the accompaniment in the bass to the melody in the treble, he omits and changes notes and rhythms of some of the phrases, and separates parts of some of his phrases and places them in different parts of his composition.⁸⁸

Manipulative analysis of this sort has made courts suspicious of musical experts.

Northern Music first states that it will mainly rely on the average listener test, but then it goes into an extended and unsound analysis.⁸⁹ The court in this case points out that there are sixteen common notes in the A strains of both compositions. However, statistical similarity cannot prove copying. It is not the number of notes that are the same that matters, but the notes' structural significance and relation to each other.

The court also erred in allowing too many recorded comparisons of the songs. The plaintiff alone brought in eleven specially-prepared records. It is legitimate to play the melody or harmony without any accompaniment, but courts should be wary of being manipulated by clever recordings; musical performance can make dissimilar pieces sound similar.

Other cases have musically-sophisticated analyses, although sometimes these cases make significant analytical mistakes. Some cases emphasize the uniqueness of the compositions.⁹⁰ Obviously, if two pieces contain the same rare trait, the likelihood that one composer copied from the other is greatly increased. Of course, copying a trite theme is infringement, but proof of that copying is more difficult than with a rare trait.

In *Harrisons*, Harrison himself conceded that the two pieces were "strikingly similar" when played by a pianist at the trial.⁹¹ Equally important, the court found repetition of a "highly unique pattern."⁹²

Gaste recognized "the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music."⁹³ Consequently, "striking similarity between pieces of popular music must exist beyond themes that could

⁸⁸ *Id.* at 115.

⁸⁹ 105 F. Supp. at 393.

⁹⁰ *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988); *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984); *Abko Music, Inc. v. Harrisons Music Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983).

⁹¹ *Id.*

⁹² *Id.*

⁹³ 863 F.2d at 1068.

have been derived from a common source or themes that are so trite as to reappear in many compositions."⁹⁴

Gaste employed both oral renditions and expert testimony. *Gaste's* expert testified that "there is not one measure of 'Feelings' which . . . cannot be traced back to 'Pour Toi.'"⁹⁵ He also found:

[A] unique musical 'fingerprint' that evaded resolution-- it occurred in the same place in the two songs. The witness said that while modulation from a minor key to its relative major was very common, he had never seen this particular method of modulation in any other composition.⁹⁶

However, this author does not agree that the two patterns are similar.⁹⁷

The defendant's expert attacked the methods of *Gaste's* expert and contradicted his conclusions.⁹⁸ As the court rightly pointed out, deciding which expert to believe goes to the weight of the evidence and is for the jury to decide. The problem, though, is how the jury can decide which expert to believe when they lack the expertise needed to make this determination. The question is not which expert is more believable, but which expert's method is more accurate in determining copying.

The defendant also examined prior art to demonstrate that many of the similarities between the two works also appeared in other compositions.⁹⁹ But *Gaste's* expert stated that the prior works were not substantially similar; and the court declared that this contrary evidence comprised a question for the jury. However, as mentioned above, this author does not believe that similarity to prior works is significant. Similarity between the allegedly infringed and infringing pieces is noteworthy, but similarity to earlier unrelated compositions is not. This

⁹⁴ *Id.* at 1068-69. Of course, this language wrongfully implies that only unique compositions receive protection.

⁹⁵ *Id.* at 1068-69.

⁹⁶ *Id.* at 1068.

⁹⁷ This author agrees with *Gaste's* expert that the two patterns are somewhat unique, but I disagree that they are similar. The patterns are functionally different within the harmony of the two pieces. In "Pour Toi," a dominant seventh chord on B resolves to C in the key of G major. (The fact that both patterns occur in G major is irrelevant. A large percentage of popular music is in G major.) Functionally, the pattern in "Pour Toi" would be diagrammed: V⁷ of vi-VI of vi (IV). In other words the composer is using a secondary dominant to deceptively resolve to the submediant of tonic; a deceptive resolution being where a root movement of a second upwards (B-C) replaces the expected resolution of a root movement of a fourth upwards (B-E). In "Feelings," the pattern is V⁷ of ii-III of ii (IV). This is not a deceptive resolution (E-F[#] or B-C), rather it is a root movement by a third (E-C). While this analysis may be foreign to those not versed in analytical techniques, the point is the analyst must be careful not to find similarities that don't exist.

⁹⁸ *Gaste*, 863 F.2d at 1068.

⁹⁹ *Id.* at 1069.

author believes that almost any musical pattern, especially those of popular music, can be found in prior works.

In *Selle*, the plaintiff relied almost entirely on the expert testimony of Arrand Parsons, a well-known musical theorist.¹⁰⁰ The Bee Gees, who did not employ an expert, claimed that Dr. Parsons, although eminent in classical music, was not equally qualified in popular music. However, the court believed the key point was that while Dr. Parsons stated that the pieces were strikingly similar, he could not rule out the possibility of independent creation. In addition, the court believed there was insufficient evidence to allow an inference of access. Whether the court would have considered the similarities sufficient to prove substantial similarity remains unclear.

Although not involving music, *Sid & Marty Krofft Television v. McDonald's Corp.*¹⁰¹ developed a sophisticated, but often criticized, method of examining copying. The court here points out that "[t]he real task in a copyright infringement action, then, is to determine whether there has been copying of the expression of an idea rather than just the idea itself."¹⁰² Consequently, there "must be substantial similarity not only of the general ideas but of the expression of these ideas as well."¹⁰³

There are two steps in determining substantial similarity under this Ninth Circuit test. First, one employs an extrinsic test that examines substantial similarity of ideas.¹⁰⁴ "It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed."¹⁰⁵ One can use analysis and expert testimony with the extrinsic test, and it can be established as a matter of law.

The intrinsic test examines the substantial similarity between the forms of expression. "If there is substantial similarity of ideas, then the trier of fact must determine whether there is substantial similarity in the expression of the ideas so as to constitute infringement."¹⁰⁶ This intrinsic test depends on the responses of the ordinary person; thus, analysis and expert testimony are inappropriate.¹⁰⁷

¹⁰⁰ 741 F.2d at 904.

¹⁰¹ 562 F.2d 1157 (9th Cir. 1977). This method has been applied to music in *Baxter v. MCA, Inc.* 812 F.2d 421 (9th Cir. 1987).

¹⁰² *Krofft*, 562 F.2d at 1163.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1164.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ One might note the similarity between *Krofft* and *Arnstein v. Porter*, but *Krofft*, while recognizing the similarity, states that it is not trying to resurrect *Arnstein*. *Id.* at 1165 n.7.

The *Krofft* test uses the important principle that ideas cannot be copyrighted; only the expression of those ideas receive copyright protection. However, while this principle is a basic tenet of copyright law, it, at least as expressed in *Krofft*, does not form a valid method of establishing copying. Looking first to see whether there is a similarity of ideas adds an unnecessary step to the analysis. In addition, when applied to music it is particularly meaningless since it is difficult to decide what constitutes an idea in music. Moreover, the criticisms applied to the ordinary listener test also apply to the *Krofft* test-- it is the existence of copying that matters, not the reaction of the ordinary listener.

Krofft did note a significant flaw in the defendant's reasoning; the defendant tried to show the differences in the expression of the pieces and ignored their similarities.¹⁰⁸ Yet, *Krofft* could have focused on the similarity, rather than resorting to its intrinsic test. The court correctly states that the overall impact of a work is entitled to protection, in addition to the protection of the individual elements.¹⁰⁹ Nevertheless, one can determine the overall impact of a composition by a reasoned analysis that recognizes the interaction of the elements of a work.

In sum, the cases discussed above range from simplistic or inaccurate analyses to the use of well-respected experts in music theory. Yet not one of these cases is completely satisfying to this writer. Even the most sophisticated analyses appear somewhat suspect. Depending on whether they are to be used for the plaintiff or the defendant, the analyses seem to start with the proposition that the songs are (or are not) similar, then they try to build the method of analysis to prove (or disprove) the similarity. This is putting the cart before the horse.¹¹⁰ One must start with a reliable system that can prove similarity or dissimilarity, then proceed to show whether the pieces have been copied or not.

4. Proof of Independent Creation

A defendant may present evidence of independent creation to counter evidence of copying.¹¹¹ Of course, a defendant need not present such evidence if the plaintiff has not established an inference of copying.¹¹² Evidence of independent creation may comprise an examination of the defendant's creative process, evidence that the work was written before possibility of access, a recital of

¹⁰⁸ *Id.* at 1165.

¹⁰⁹ *Id.* at 1169. This does not mean that the mood created by a piece is copyrightable. Nor does it mean that a common accompaniment pattern or a style of orchestration is subject to protection.

¹¹⁰ Obviously, such problems are not limited to musical copyright cases. It is for the court to determine whether a particular test is reliable in proving a fact in dispute or whether the test was developed to prove the fact in dispute. The key is whether the test is reliable over a wide variety of situations.

¹¹¹ *E.g.*, *Selle v. Gibb*, 741 F.2d 896, 903 (7th Cir. 1984); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 66 (3rd Cir. 1978), *cert. denied*, 439 U.S. 880 (1978).

¹¹² *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 501 (2d Cir. 1982).

a defendant's musical training, or any other evidence that indicates that the defendant did not copy the plaintiff's work.¹¹³ Evidence of independent creation is not an affirmative defense, but rather comprises rebuttal evidence to the plaintiff's case.¹¹⁴ Courts sometimes require a "high standard of proof of independent creation where the plaintiff has clearly established access and substantial similarity."¹¹⁵

Evidence of independent creation will often consist of the testimony of the defendant or his colleagues. This obviously presents a question of credibility for the fact finder.¹¹⁶

5. Amount Copied

Most courts do not discuss how much copying is required to find infringement; rather, they focus on whether copying has occurred. This is probably because if there is not substantial copying, it is difficult to discern that copying has occurred. Moreover, the effect of the amount of copying on liability is usually dealt with in the fair use defense.

A few courts do confront this question. As discussed earlier, the amount copied is part of the *Arnstein* test. The Ninth Circuit has declared that it is not the amount copied that is important, but whether the portion copied is qualitatively important.¹¹⁷ One court has stated that copying a horror movie slogan is infringement because of a slogan's significance.¹¹⁸ Similarly, copying one phrase of a song can constitute infringement.¹¹⁹ This author believes that the test of whether sufficient copying has occurred to find liability is both qualitative and quantitative.

A related issue is whether the portion copied is subject to copyright protection. The copied portion may be in the public domain or consist of uncopyrightable material, such as a simple chord progression or rhythmic pattern.

¹¹³ NIMMER, *supra* note 59, at § 13.01[B] at 13-9, 13-10; *Selle*, 741 F.2d at 903; *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 280-84 (S.D.N.Y. 1991); *Black v. Gosdin*, 740 F. Supp. 1288, 1290 (M.D. Tenn. 1990). *Intersong-USA* involved evidence that an early version of defendants' song existed prior to the composition of the plaintiff's song.

¹¹⁴ *Keeler*, 862 F.2d at 1066; *Novak v. Nat'l Broadcasting Co.*, 752 F. Supp. 164, 168 (S.D.N.Y. 1990); *Flag Fables*, Copy L. Rep. (CCH) ¶26,533.

¹¹⁵ NIMMER, *supra* note 59, at 13.01[B] at 13-9.

¹¹⁶ Some of the reasons courts put forth for believing one expert over another are suspicious. *Intersong-USA*, 757 F. Supp. at 280, believed defendant's expert because he was less of a "cheerleader."

¹¹⁷ *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987).

¹¹⁸ *Dawn Associates v. Links*, 203 U.S.P.Q. (BNA) 831, 835 (N.D. Ill. 1978).

¹¹⁹ *Boosey v. Empire Music Co.*, 224 F. 646 (S.D.N.Y. 1915).

There is no infringement when the only similarities between two works involve non-copyrightable elements.¹²⁰

PART TWO

Other Commentators on Problems of Musical Copyright Infringement

A few commentators have criticized the way courts have approached problems of musical copyright infringement. A. Keyt attacks the application of concepts concerning movies, books, and cartoons to cases involving music.¹²¹ Keyt, rather than trying to determine where and when the line of "too similar is crossed," tries to deal with the problem at the remedy stage.¹²² He advocates apportioning profits based on the musically creative contribution to the work, ignoring the drawing power of the artist.¹²³

Keyt's approach is difficult to apply. It is hard to decide what contribution may take a composition from being banal to unique. Moreover, success is often based on luck. The artist that records the song, the timing of the release, or the artist's connections in the musical community may be just as important as the quality of the song. In addition, the author relies too heavily on classical analysis: that Handel may make changes in a composition that would alter it from being banal to great does not mean that Morris Albert ("Feelings") can.

Keyt also advocates compulsory licensing rather than enjoining the infringement because of society's interest in new compositions.¹²⁴ But this argument ignores an artist's right to control his work. Colorizing an old movie may seem better to some, but to the original artists-- the director, actors, and writers -- such changes may destroy their conceptions.

R. Metzger recommends using expert testimony to determine copying, and believes that similarity alone can establish copying.¹²⁵ He states:

The best available evidence on the issue of independent creation is undoubtedly testimony of experts in musical composition. For this reason it has been held that such testimony is required when a plaintiff seeks to establish copying without proof of access. What the Bee Gees Court [*Selle*] failed to recognize is that substantial and

¹²⁰ *Levine v. McDonald's Corp.*, 735 F. Supp. 92, 96 (S.D.N.Y. 1990).

¹²¹ Aaron Keyt, Comment, *An Improved Framework for Musical Plagiarism Litigation*, 76 CAL. L. REV. 421, 463 (1988).

¹²² *Id.* at 443.

¹²³ *Id.* at 454-56.

¹²⁴ *Id.* at 456-63.

¹²⁵ Metzger, *supra* note 14, at 66.

striking similarity, coupled with expert testimony which negates independent creation, is substantial evidence upon which a finding of infringement may be based, even in the absence of direct proof of access.¹²⁶

Metzger criticizes existing tests for ascertaining copyright infringement.¹²⁷ Instead, he advocates musicologist Jan La Rue's style-analytical approach that considers all aspects of a composition-- sound, harmony, melody, rhythm, and growth (form).¹²⁸ Using this system, he compares "My Sweet Lord" with "He's So Fine" and finds copying.

While this author applauds Metzger's adoption of a well-established system in testing infringement, I believe that he has chosen the wrong system. Undoubtedly, La Rue's analytical system is a highly respected method of studying musical compositions. But his system is not well-suited for the purpose for which Metzger tries to use it-- determining authorship. La Rue has turned to a different method-- a quantitative approach that examines the correlation of certain musical rhythms-- when he has been faced with problems of musical authorship.¹²⁹

La Rue's analytical system is mainly employed to discern the style of a composer, genre, or period. It is ill-suited to compare two compositions to try to determine whether one has been copied from the other. Moreover, his system is intended for use with classical music, especially eighteenth-century music, not modern popular music. Furthermore, its emphasis on examining all parameters of musical style does not help much with musical infringement problems. If a composer has stolen all portions of another composition, the theft will be obvious and analysis will be unnecessary.

This author views Metzger's comparison of "My Sweet Lord" and "He's So Fine" as unsatisfying. Many of the elements he finds to be shared by the pieces-- principal intervals of a fourth and identical phrase structures-- are common in pop music. Still, Metzger's goal of developing a more rigorous approach to copyright infringement of musical compositions is commendable.

Alan Latman criticizes those courts that, applying the *Arnstein* test, use the term "substantial similarity" to refer to the similarity that is required, along with access, to infer copying.¹³⁰ Instead, he proposes the term, "probative similarity."¹³¹

¹²⁶ *Id.*

¹²⁷ *Id.* at 71-96.

¹²⁸ *Id.* at 96-101. See also Jan La Rue, GUIDELINES FOR STYLE ANALYSIS (1970).

¹²⁹ E.g., *Mozart Authentication by Activity Analysis: A Progress Report*, MOZART-JAHRBUCH 1978/79, 209-214; *Mozart or Dittersdorf*, MOZART-JAHRBUCH 1971/72, 40-49.

¹³⁰ See Latman, *supra* note 59.

¹³¹ *Id.* at 1190.

Professor Latman first presents the elements that are necessary for a finding of infringement:

1) "The defendant must have seen or heard the plaintiff's work at some time prior to creating his or her own work and have used plaintiff's work in some fashion as a model;"

2) "The material copied by defendant from plaintiff's work must be such as enjoys protection under copyright;" and

3) "Not only must defendant copy, rather than independently create, and not only must he or she copy protected material, but also such protected material must be 'substantial.'"¹³²

Latman next points out that substantial should describe only the third requirement. In other words,

'substantial similarity,' while said to be required for indirect proof of copying, is actually required only after copying has been established to show that enough copying has taken place. A similarity, which may or may not be substantial, is probative of copying if, by definition, it is one that under all circumstances establishes an inference of copying.¹³³

Arnstein does not use the term "substantial" with either prong of its test. Rather, it was first used by the same court in a case decided five days after *Arnstein*-- *Heim v. Universal Pictures Company*--¹³⁴ with the unlawful appropriation prong of *Arnstein*.¹³⁵ While the usage of the term is clear in *Heim*, later courts transplanted it to the first prong of *Arnstein*.

Latman explains that the similarity required to prove copying need not be substantial; rather, it must justify an inference of copying.¹³⁶

In an appropriate case, copying might be demonstrated, with no proof or weak proof of access, by showing that a single brief phrase, contained in both pieces, was so idiosyncratic in its treatment as to preclude coincidence.¹³⁷

¹³² *Id.* at 1189.

¹³³ *Id.* at 1189-90.

¹³⁴ 154 F.2d 480 (2d Cir. 1946).

¹³⁵ Latman, *supra* note 59, at 1197 ("(b) that, if copying is proved, it was so 'material' or 'substantial' as to constitute unlawful appropriation.") *Id.*

¹³⁶ *Id.* at 1191.

¹³⁷ *Id.* at 1197 (*quoting Heim v. Universal Pictures*, 154 F.2d 480, 485 (2d Cir. 1946)).

In addition, the copying of uncopyrightable elements may help prove copying of protected elements.¹³⁸

In sum, Latman's article criticizes the way some courts use the term "substantial similarity" in the test for inferring copying. It also presents a three-part test for establishing infringement-- 1) copying, 2) copying of protected elements, and 3) substantial copying. Most importantly, it creates the term "probative similarity," which refers to similarities that justify an inference of copying.

PART THREE

A Proposal for a More Rigorous Method of Determining Copyright Infringement of Musical Compositions

The above discussion has criticized existing methods of determining copyright infringement of musical compositions. First, this author disagrees with the importance many courts place on a possibility of access. I believe that a possibility of access standing alone means nothing, and that a possibility of access adds little to a showing of probative similarity. Access is only probative when it is certain or likely that the defendant had access to the plaintiff's work, or where a lack of access combined with a lack of similarity permits a summary judgment. Second, this author agrees with Latman's criticism of using the term "substantial similarity" in regard to whether copying has occurred. Third, this author feels that some courts' reliance on prior art is misplaced. The question is whether one composer copied from another, not whether a composer could have copied from a prior piece. Fourth, this author believes that the ordinary listener test is not a valid test of copying; establishing whether the ordinary listener can discern copying does not prove or disprove illegal copying. Finally, this author believes that the analytical methods used by courts and experts have not been rigorous enough. If analysis is to be employed (and it will have to be used absent direct proof of copying), then the method of analysis must be able to accurately discern copying. In other words, the reliability of the analytical method must be beyond question.

Several musicologists, mainly working with eighteenth century music, have developed methods of determining authorship based on style.¹³⁹ These methods

¹³⁸ Latman, *supra* note 59, at 1095.

¹³⁹ See, e.g., E. Scott Fruchwald, *Authenticity Problems in Joseph Haydn's Early Instrumental Works: A Stylistic Investigation* (1988); *The Authenticity of the Symphony in A Minor (K16a) Attributed to Mozart: A Stylistic Study*, 28 COLLEGE MUSIC SYMPOSIUM 24 (1988); *A Method For Determining Authenticity by Style*, V J. MUSIC. R. 297 (1985). See La Rue, *supra* note 128; M. Paymer, *The Instrumental Music Attributed to Giovanni Battista Pergolesi: A Study in Authenticity* (1977); E. Wolf, *Authenticity and Stylistic Evidence in the Early Symphony: A Conflicting Attribution between Richter and Stamitz*, in E. Clinkscale, ed., *A Musical Offering* (1977). See also D. Brantley, *Disputed Authorship of Musical Works: A Quantitative Approach to the Attribution of the Quartets Published as Haydn's Opus 3* (1977); W. Paisley, *Identifying the Unknown Communicator in Painting, Literature, and Music: The Significance of Minor Encoding Habits*, 14 J. COMMUNICATION 219 (1964). I would define style as the materials-- melodic, harmonic, rhythmic, etc.--

are systematic approaches and concentrate on minor aspects of a composer's style, "hidden communicators" that remain constant from piece to piece. Several of the methods use quantitative or statistical techniques.

This author's method consists of looking at minor details of style and examining musical rhythms, such as harmonic rhythm or the rate of textual change.¹⁴⁰ The key to this method is its scientific approach: it looks not only at the work or works whose authorship is in question, but also at a control group whose authorship is definitively established. The method tests and retests compositions, and provides a margin of error.

The above approaches to musical authorship probably cannot be applied to the present problem. They were developed for classical music, which is stylistically more complex than popular music. More importantly, they were created to determine whether a composition is by a particular composer or not, or which of two composers wrote a piece. They were not developed to show that one work was partially copied from another; they probably cannot deal with the situation where a piece may be by two composers. A composer might combine the purloined material with his unconscious communicators.

Still, from a practical viewpoint, courts must determine whether copying has occurred. The approach suggested below, while not as rigorous nor as reliable as the methods briefly described above, draws on the above approaches to attempt to develop a method that will accurately establish infringement.

A test for determining whether one composition has been copied from another must be rigorous. The analyst must carefully compare the similarities between the works, and decide the significance of those similarities. The analyst should not only note the similarities between pieces, but show how the similar passages function within the structure of the compositions. Moreover, the analyst should consider whether other factors, such as the rhythmic structure of the text, can explain the similarities.

A major problem with most experts' analyses is that they limit their inquiries to the alleged infringed and infringing compositions.¹⁴¹ A proper approach would

that a composer usually employs, combined with the frequency of the use of those materials and the ways these materials interact and are organized.

¹⁴⁰ A detailed description of my method is beyond the scope of this article. The brief description I give herein is intended to serve as background to my suggested approach to establishing copyright infringement of musical works.

¹⁴¹ *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 280-81 (S.D.N.Y. 1991) points out that Iglesias had used a descending scale step motive in other songs, and that many of the other elements shared by the songs were based on common compositional techniques.

also examine all other available works by the alleged infringer.¹⁴² By looking at other pieces by the defendant, the analyst can discern whether the defendant might have written the alleged infringing work. In other words, is the alleged infringing passage in the defendant's style?

Another important inquiry is the extent to which the material shared by the pieces is common to the style of the genre (type of piece).¹⁴³ Certain types of melodies, harmonies, phrase structures, or other musical elements are common to particular genres or styles. For example, triadic melodies (C-E-G) are common in popular music. Likewise, phrase structures of 4 measures, 4 measures, 4 measures, 4 measures is the usual structure of pop music. That pieces have similar triadic melodies arranged in four measure phrases does not necessarily indicate copying.

An examination of the defendant's other works combined with an understanding of the style of the genre of the relevant compositions makes the probative similarity test more rigorous. A proper approach to probative similarity would begin by listing all similarities between the alleged infringing and infringed pieces. The analyst would then show how the similarities function within the structure of the pieces. The analyst would next examine other compositions by the defendant to determine whether the similarities are common to the defendant's style, and decide whether to eliminate them from the list. The analyst would next examine the similarities to see whether they are common to the genres or styles the composers are using. He would not necessarily eliminate those elements that are common to the genre or style, but he would consider this fact when he is evaluating the significance of the similarities.

The final step in establishing copying is to determine the significance of the similarities that remain on the list. The principal question is whether these similarities are sufficient to infer copying. In other words, do the similarities constitute evidence that would allow a jury to find that copying has occurred? The analyst may also consider differences between the works, but the differences should not be overemphasized.

Of course, probative similarity is not the only factor to consider in establishing infringement. If the plaintiff produces direct evidence of copying, then that evidence is as important or more important than probative similarity. Likewise, if the defendant presents evidence of independent creation, that evidence can prove lack of infringement.

¹⁴² This inquiry should probably be limited to pieces earlier than the alleged infringing work since the style of the alleged infringing piece may become part of the alleged infringer's style.

¹⁴³ This is what some courts are trying to do when they examine prior art, but this approach avoids much of the confusion that is created by looking at prior art.

This author believes that a plaintiff's burden in proving infringement should be high. As stated above, a party is not liable for copyright infringement unless he has copied another's work. Consequently, considering the limited range of materials used in most pop music, infringement should be found only with clear and convincing evidence.

1. Comparison of "My Sweet Lord" and "He's So Fine"

A comparison of George Harrison's "My Sweet Lord" and Ronald Mack's "He's So Fine" will illustrate the above method. The gross form (organization of melodic materials) of both songs is relatively simple. One can diagram the gross form of "He's So Fine" as A-B-A¹-B¹-C-B²-A²-CODA, and the gross form of "My Sweet Lord" as A-B-A¹(C)-B¹-A¹(C)-CODA.¹⁴⁴ These forms are common in popular music.

The A sections of "My Sweet Lord" and "He's So Fine" contain probative similarities. The motives (kernels of the melody) are similar; the contours of both are descending fourths (Bb-F and G-D). Moreover, the rhythms of the melodies are similar: both involve syncopation, and the patterns of both are basically long-short-long.

There are significant differences between the motives. "My Sweet Lord" consists of four pitches (Bb-A-G-F), while "He's So Fine" comprises only three (G-E-D). One might argue, however, that while this is a difference of detail, the background structures of the melodies are the same.

The rhythms of the motives also exhibit differences. While both motives employ syncopation, the syncopation is used in different ways. Most significantly, in "He's So Fine" there is syncopation over the downbeat, while in "My Sweet Lord" there is not.

The harmonies supporting the motives are different. "He's So Fine" consists of a chord progression of d⁷ min-G⁷ (a root relationship of a 4th up), while "My Sweet Lord" consists of a progression of Bb-f min (a root relation of a 5th up). Also, the harmonies change at different points in the melodies.

The combination of the motives into the first phrase group (A) in the songs is similar. Both songs vary the motives at least twice. The structure of A in "My Sweet Lord" is a-a¹-a², while in "He's So Fine" it is a-a¹-a²-a³. However, in the

¹⁴⁴ Each letter stands for different melodic material. The use of the superscript with a letter means that the melodic material is similar but not exactly the same. I have put C in parenthesis on the Harrison song because this section can be considered either a variant on A or new melodic material. Instrumental interludes have been ignored in the above diagrams.

Mack tune, there are three varied repetitions of the motive, while in the Harrison song, there are only two.

There are also probative similarities between the B sections of the songs. The main motives in the B sections are very similar, especially rhythmically. Moreover, the underlying harmonies are the same (V^7-I), and the harmonies change at the same time (on the down beats of the measure).

While the B groups in both works are developed by varying the motives, the combinations differ. The Harrison B section has a structure of $a-a^1-a^2-b$, while the Mack has a phrase structure of $a-a^1-a^2-a^3$.

Both songs contain one further motive: the "Hallelujah" motive in "My Sweet Lord" and the C section motive in "He's So Fine." These motives do not resemble each other.

In sum, the probative similarities between "My Sweet Lord" and "He's So Fine" appear in the motives of the A and B sections.¹⁴⁵

An examination of other works by Harrison reveals that he likes to use syncopated rhythms, although there are no rhythmic patterns exactly like that seen in "My Sweet Lord" in the same context. Harrison also likes to use descending melodic patterns to begin phrases. There is a phrase in "For Yer Blues" that is similar to the "My Sweet Lord" A motive, but it is employed in a different context. I have found no other motives in Harrison's works from before "My Sweet Lord" that resemble the B motive.¹⁴⁶

In comparing "My Sweet Lord" and "He's So Fine," one is struck by the greater sophistication, complexity and imagination of the Harrison piece. This sophistication, complexity and imagination is characteristic of Harrison's music; it is obvious that Ronald Mack could not have written "My Sweet Lord." However, this is not a defense to infringement. If Harrison copied "He's So Fine" motives, even subconsciously, there is copyright infringement. The motivic material of a composition is its most important trait, and it is protected by the copyright laws.

The similarities of the A motives standing alone are not sufficient to infer copying. Descending patterns of a 4th are not uncommon. Moreover, while both employ syncopated rhythms, the use of syncopation is different. Most importantly,

¹⁴⁵ The district court's finding that "My Sweet Lord" is the very same song as "He's So Fine" with different words is ridiculous. *Abko Music, Inc. v. Harrison's Music Ltd.*, 722 F.2d 988, 997 (2d Cir. 1983). While there are significant similarities between the pieces, especially in the melodic material, the works often differ markedly.

¹⁴⁶ I did not have all of Harrison's works.

the rhythm of the music may be dictated by the rhythm of the text. Both texts comprise three words, and the most natural rhythm of both texts is probably long-short-long.

The song's B motives seem even more similar than the A motives. Again, standing alone, the similarities of the B sections may be coincidental. However, the appearance of two sets of similar motives in the pieces is striking, and it is very unlikely that this is due to coincidence. Accordingly, one may infer that "My Sweet Lord" is based in part on motivic material from "He's So Fine," and that Harrison has infringed on the Mack piece, albeit subconsciously.

Possible Solutions to Other Problems Connected with the Infringement of Musical Compositions

The above has presented a rigorous test for establishing copyright infringement of musical compositions. Nevertheless, developing a rigorous test does not solve all problems connected with musical copyright infringement. Even with the help of musical experts, judges and juries are often not equipped to deal with problems involving music. Musical judgment requires years to develop and, to a certain extent, is an inborn talent. In addition, juries may have problems deciding which expert to believe. The most convincing evidence in evaluating copying should be that produced by the expert with the most reliable methods, but juries are ill-equipped to determine which analytical system or analyst is the most reliable.¹⁴⁷

The easiest solution to this problem would be for the court to appoint its own experts. This would not make the court more musically knowledgeable, but it would allow the court to hear an unbiased expert.

Further changes would require radical alterations in the way courts operate. The ideal solution would be to appoint a musically-educated temporary magistrate. This magistrate would compare the relevant compositions using a reliable method, and also hear testimony of the parties' experts. The magistrate would then make recommendations to the judge who could adopt the magistrate's recommendations, make his own decision, or ask for further information.

This proposition would involve major changes in the way courts are structured, and an amendment to the seventh amendment of our Constitution (unless the parties waived a jury trial).¹⁴⁸ Still, it would be an ideal solution,

¹⁴⁷ Of course, this can be a problem in any complex case.

¹⁴⁸ This is not to imply that problems of musical copyright are so unique or so important by themselves as to require changes in our constitution. This author advocates changes in our court system to deal with the multitude of problems created by living in a complex and specialized world.

combining the musical expertise of the temporary magistrate and the legal expertise of the judge.

CONCLUSION

The purpose of this paper has been to present a proper framework to determine whether one musical composition has been copied from another. This paper has discussed and criticized methods courts have adopted to judge copyright infringement of musical compositions. This author is especially critical of the emphasis courts have placed on the possibility of access and the lack of rigor employed by experts and courts in analyzing compositions. This paper has also examined other commentators' suggestions on how to deal with the problems of copyright infringement without finding a satisfying solution.

This author has proposed a method of establishing copyright infringement of musical compositions that relies almost entirely on musical analysis. The method consists of listing the common elements of the two pieces, eliminating those elements that are probably part of the defendant's style, deciding whether the similarities might be caused by the common language or genre of the works, and determining whether the remaining similarities are sufficient to infer copying. This paper has also suggested a greater reliance on musical experts, including the court's appointment of its own expert, and even the establishment of temporary magistrates who are musically educated.