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Musical Musings: The Case for Rethinking Music Copyright Protection

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MUSICAL MUSINGS: THE CASE FOR RETHINKING MUSIC COPYRIGHT PROTECTION

J. Michael Keyes*

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* Gonzaga University School of Law, Adjunct Professor; Technology & Intellectual Property Attorney, Preston Gates & Ellis. See <http://www.prestongates.com/meetpge/pro.asp?proID=608>. My appreciation and thanks to Sheri Engelken for her insight and comments, the excellent editorial staff at the University of Michigan, and my outstanding law clerk Brooke Kuhl for her sage editorial comments.

“The man that hath no music in himself,
Nor is not moved with concord of sweet sounds,
Is fit for treasons, stratagems and spoils.”¹

INTRODUCTION

Under the law’s current formulation, musicians and composers alike can be held liable for infringement when they incorporate pre-existing musical snippets into their musical works, or when the two pieces are said to be “substantially similar.”² The ultimate test for assessing when two pieces are substantially similar is whether the second composer has taken what is “pleasing to the ears” of the lay listener.³ Although this legal standard ostensibly comports with our traditional understanding of how copyright law should function, there are both persuasive policy and pragmatic justifications for recalibrating this legal test and providing a retrofitted legal standard that harmonizes more beautifully with the realities of the world of music.

With the demise of Napster, the rise of peer-to-peer networking, and the onslaught of litigation orchestrated by the RIAA, the topic of music copyright has been thrust to the fore in business, scholarly, and policy-making circles. Copyright holders are scrambling to protect their coveted music monopolies.⁴ Scholars are grappling with intricate and nuanced legal and sociological issues regarding the Internet community’s penchant for sharing music files and how that reality should be addressed.⁵ Policy makers are grasping for the ever-evasive answers as to how the

1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 5, sc. 1.

2. See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

3. See *Arnstein v. Porter* 154 F.2d 464, 473 (2d Cir. 1946) (“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 which belongs to the plaintiff.”).

4. As of the date this Article was printed, the Recording Industry Association of America (“RIAA”) has filed approximately 900 individual lawsuits in an attempt to dissuade individuals from using Peer-to-Peer (“P2P”) networking capabilities to download music files protected by copyright. See <http://www.heraldtribune.com/apps/pbcs.dll/article> (last visited Feb. 25, 2004). Interestingly enough, the NDP Group, Inc., a New York-based sales and marketing company that measures trends in music consumption by the masses, indicated that there was an *increase* in the number of households and individual consumers using P2P services to download digital music files in the final months of 2003. http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20040116005098&newsLang=en (last visited Feb. 25, 2004).

5. See, e.g., David L. Lange, *Student, Music and The Net: A Comment on Peer-to-Peer File Sharing*, 2003 DUKE L. & TECH. REV. 21 (2003); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003); Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505 (2003).

law should be deployed and applied in the world of networked file-swapping, particularly in the context of music copyrights.⁶

This Article focuses on the topic of music copyright, but addresses this legal issue from a different vantage point than that of the industry insiders, insightful scholars, and policy makers that have weighed in on the debate. Instead of focusing on the issues regarding wholesale digital reproduction and dissemination of music protected by copyright, this Article focuses on music copyright infringement when the claim is that a given piece of music is “substantially similar” to another piece of music protected by copyright.

Part I of this Article touches on the history of the music industry and copyright in this country, as well as the legal standard developed and used by the federal judiciary in assessing whether a given piece of music infringes upon another musical work. Examination of these histories will help illuminate the shortcomings of the music copyright legal doctrine in the succeeding sections.

Part II of this Article discusses the unique attributes possessed by music and why these attributes call for treating music differently than other works of authorship under copyright law.

Part III shifts from policy to pragmatics. Not only is the current test for copyright infringement ill-suited based on the unique characteristics of music, the test also has significant practical problems that need to be addressed and remedied. This test—the “substantially similar” test—is flawed because it assumes that there is only one reasonable⁷ way to perceive a piece of music. This flaw is perpetuated by two factual assumptions underlying the analysis: not-so-expert testimony and aurally challenged jurors.⁸

Part IV posits a new paradigm for dealing with music copyright when the claim is that a piece of music is “substantially similar” to a pre-existing musical work protected by copyright. Instead of having a regime that restricts musical borrowing, we should have a system that encourages this practice, so long as the second composer pays the first composer pursuant to a compulsory license. Implementing this compulsory license requirement squares with the underlying realities of the music world. Moreover, the beneficial byproducts of such a system are manifest and include predictability, judicial economy, and pecuniary incentives flowing to music copyright holders and the music copyright borrowers.

6. In late 2003, the Senate Judiciary Committee held hearings on the issue of peer-to-peer networking, its problems, and some solutions. See <http://www.copyright.gov/docs/regstat090903.html> (last visited Feb. 25, 2004).

7. *Id.*

8. See *infra* Part IVII.C.

I. A HISTORICAL SKETCH OF MUSIC COPYRIGHT

For the copyright and music enthusiast, the history and development of the legal regime regarding music copyright is a fascinating and fiendishly complex one.⁹ In looking at the development of music copyright law, it is evident that both Congress and the courts have historically treated music just like other types of works of authorship, and, consequently have approached the legal issues of protection and infringement of music like those other types. While this like-treatment rationale may have had a superficial appeal in days gone by, sociological and technological changes, as well as a survey of the historical practices of the music composition process, challenge the efficacy of this "one-size-fits-all" formulation.

To fully appreciate how music copyright coverage developed, and to understand its shortcomings in its present form, it is helpful to examine the music industry's complex transformation and growth, and how copyright protection has canvassed the interests of that industry along the way.

A. *The Nascent Years of Music Copyright, 1800–1850*

In the early days of the 1800s, American diversion and entertainment was far different than it is today, and music played a far different role in the life of the average American. One of the primary modes of musical entertainment then consisted of parlor settings where the American family would gather around the piano or the family instrument of choice and listen to the anointed musician play works by the masters as well as other musical compositions of the day.¹⁰ Thus, the music that was consumed by the public of those days was primarily printed sheet music.¹¹ Music publishers consisted primarily of classical music publishers, music store owners, and local printing shops that would sell music along side other printed materials such as books and magazines.¹² Popular sheet music was sold in stores owned by these music publishers and traveling salesmen were commissioned to carry music selections with them on their travels to various geographic outposts.¹³

9. See Loren, *supra* note 5, at 699.

10. See Vladimir J. Konecni, *Social Interaction and Musical Preference*, in *THE PSYCHOLOGY OF MUSIC* 499 (Diana Deutsch ed. 1982).

11. The public also attended performances of such musical offerings as ballad-operas and minstrel shows. See DAVID EWEN, *PANORAMA OF AMERICAN POPULAR MUSIC* 64 (1957).

12. DAVID A. JASEN, *TIN PAN ALLEY: THE COMPOSERS, THE SONGS AND THEIR TIMES*, at xvi (1988).

13. *Id.* As Mr. Jasen noted, "[o]ne thinks of Meredith Willson's Professor Harold Hill in *The Music Man* as a humorous caricature of these early music publishers." *Id.*

Pursuant to the efforts of those in the music publishing enterprise, copyright law first intersected with music in 1831.¹⁴ Under this newly-minted law, the owner of the copyright in a musical composition was provided the same rights as enjoyed by the copyright owner of a book or a map, viz., “the sole right and liberty of reprinting, publishing and vending such . . . [work] . . . in the whole or in part.”¹⁵ Exactly how much copying of a musical work would be actionable back then, just like now, was within the province of the judiciary.¹⁶ In deciding that question, the courts tended to analyze music infringement claims much like they had analyzed infringement claims involving other works of authorship under the copyright laws.

For example, *Jollie v. Jaques*¹⁷ was one of the very first music copyright cases reported. The dispute in *Jollie* was based on a claim that the second musical work was “similar in plan or matter to, or [was] a substantial copy” of the plaintiff’s work.¹⁸ In explaining the protection afforded to musical works under the Copyright Act, *Jollie* noted that:

The appropriation of the whole or of any substantial part of it without the license of the author is a piracy. How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case. If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty

The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copy-right would be worthless.¹⁹

Jollie represents a significant development of the legal standard for music copyright infringement in at least two respects. First, *Jollie* set the judicial precedent for treating music in the exact same fashion as any other work protected by copyright. This precedent subsists to this very

14. Act of Feb. 3, 1831, Ch. XVI, § 4.

15. *Id.* Ch. XVI, § 1.

16. The Copyright Act has never explicitly defined what constitutes “music copyright infringement.” Instead, the copyright statute “leaves the development of the fundamentals to the judges” who have been consulted at nearly every turn. See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 40 (1967).

17. 13 F.Cas 910 (C.C.S.D.N.Y. 1850) (No. 7437).

18. *Id.* at 913.

19. *Id.* at 913–14.

day. Second, the legal framework employed by *Jollie*—the “substantially similar” metric, the use of expert testimony, and the protection of the plaintiff’s market—is essentially the same framework under which the federal judiciary currently labors when assessing music copyright infringement claims.²⁰

It is important to note that at this time in American history, the music “industry” functioned much like other industries that were providing works of authorship to the public: printing copies and selling those hard copies to the public through retail outlets and roving salesmen.²¹ Because music had similar commercial qualities to books, it made conceptual sense that Congress and the courts would treat music just like any other work protected by copyright.²² As social and technological realities changed, however, music began to take on a different function in the lives of the American citizenry in the latter part of the nineteenth century. Yet, despite these changes, Congress and the courts did not alter their positions as to what constituted music copyright infringement.

B. *The Music Industry Gains Steam, 1850–1900*

In the later years of the 1800s, popular music began to gain prominence with the rank-and-file American household. At the end of the Civil War, piano sales began to increase every year and by 1887 there were over 500,000 youths studying piano.²³ During this steady rise in piano purchasing, demand for sheet music began to increase as well. By the end of the nineteenth century, New York City was becoming an important hub of musical and artistic culture.²⁴ Far-flung music publishers began flocking to Manhattan and steadily built a mecca of music publishing on Twenty-eighth Street, ultimately dubbed “Tin Pan Alley.”²⁵

20. *See infra* Part III.

21. *See* JASEN, *supra* note 12, at xvi.

22. As argued *infra*, treating works of music like any other artistic or literary endeavor for purposes of copyright infringement necessarily ignores a long-stranding tradition and history of the music composition process. *See infra* Part II.A.

23. *See* America’s Music Publishing Industry, *The Story of Tin Pan Alley*, at <http://www.parlorsongs.com/insearch/tinpanalley/tinpanalley.asp> (last visited February 25, 2004).

24. *Id.*

25. WILLIAM G. HYLAND, *THE SONG IS ENDED: SONGWRITERS AND AMERICAN MUSIC, 1900–1950* 5 (1995). Music world lore provides that songwriter and journalist Monroe Rosenfeld coined the term “Tin Pan Alley.” As the legend goes, one day just before 1900, Rosenfeld passed the publishing houses on Twenty-eighth and was taken aback by the cacophony of pianos and voices emanating therefrom. The coalescence of all these sounds reminded him of “tin pans clanging together.” Later that day, Rosenfeld return to his desk at the New York Herald to type a story about the place he just visited, the “Tin Pan Alley.” *See* R. GRANT SMITH, *FROM SAGINAW VALLEY TO TIN PAN ALLEY, SAGINAW’S CONTRIBUTION TO AMERICAN POPULAR MUSIC, 1890–1955* 24 (1998).

Alley publishers began hiring skilled musicians to write songs that would be sold in sheet music form to the public.²⁶ Alley publishers retained singers to canvas music venues to “plug” these new songs to help drive consumer demand for the publishers’ sheet music.²⁷ Publishers began dressing up their sheet music with filigreed artwork, pictures of well-known crooners, and other alluring articles that would help leverage transactions with the consuming public.²⁸ By the waning days of the 19th Century, American popular music was in full-tilt mode and sheet music sales were blossoming.²⁹

It was at this time that the music industry started functioning differently than it had over the last several decades. Music no longer catered to a one-dimensional desire that could be fulfilled through the sales of printed music. Vaudeville entertainment shows, as well as similar types of public musical diversion, were beginning to attract wider audiences.³⁰ Music copyright holders began to realize the potential revenue streams that were available for public performances of their musical pieces that were being voraciously consumed by the public. Consequently, in 1897, at the behest of those in the music industry, copyright law was amended to give the copyright holder the exclusive right to publicly perform the music “for profit.”³¹ At first, this right was difficult for music copyright holders to enforce, as restaurants and many other public venues did not charge a price for admission. Consequently, several key players in the music publishing industry came together and formed the American Society of Composers, Authors and Publishers (ASCAP), a collective of music copyright holders that would band together to help enforce their public performance copyrights.³² It would be several years and several court battles later until ASCAP would be able to effectively administer and enforce the public performance rights owned by its constituents.³³

26. Musical giants such as George Gershwin, Jerome Kern, Cole Porter and Irving Berlin were all Alley men. See JASEN, *supra* note 12.

27. The name of the business game was “song promotion.” As one author pointed out “anywhere and everywhere people congregated was fair game: vaudeville, bars, lobster palaces, theaters, beer gardens, brothels, nickelodeons.” JASEN, *supra* note 12, at xvii.

28. *Id.* at xviii.

29. See *id.* at xvi.

30. EWEN, *supra* note 11, at 79–82.

31. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481–82; amended by Act of Mar. 4, 1909, ch. 320, § 25, 35 Stat. 1081.

32. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 68–69 (1994).

33. See *id.* at 68–70; see also *Herbert v. Shanley Co.*, 242 U.S. 593–95 (1917) (holding that “the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission . . . infringes the exclusive right of the owner of the copyright to perform the work publicly for profit” (citing Act of March 4, 1909, c.320, § 1 (e), 35 Stat. 1075)).

By the end of the nineteenth century, music copyright holders enjoyed the right to vend copies of their sheet music and to publicly perform their musical compositions. Further, the legal analysis deployed in *Jollie* was alive and well and the judiciary was ostensibly ready to declare any musical work that was “substantially similar” to another work as a violation of the copyright laws.³⁴ Thus, the copyright holders had control over the two main modes by which the public consumed music during the day, but the granting of additional rights by Congress and a strengthening of those rights by the judiciary was still in the offing.

C. Innovation and Popular Music, 1900–1950

Technology. That one word encapsulates a confluence of forces that permanently altered the musical landscape in 20th Century America. From the invention of the phonograph to the radio, and other music implements in between, music began to seep into the American culture unlike at any other time up to that point in our history.

The seeds were sewn for the music industry’s trajectory change in the latter part of the 1800s. In 1877, Thomas Edison invented the phonograph, a recording device using a metal cylinder with tin foil to capture and record sound.³⁵ One of the many uses immediately foreseen by Edison for the phonograph was the “reproduction of music.”³⁶ A few years later, Alexander Graham Bell invented the graphophone, an improvement upon the original Edison invention.³⁷ In 1887, the German immigrant Emile Berliner invented the “gramophone”, a recording mechanism that used flat discs or “records” to capture sound.³⁸ The gramophone had the distinct advantage that would allow copies to be made from the original imprint on the disk, which would facilitate mass copying.³⁹ Berliner founded the “The Gramophone Company” and started the process of recruiting musical artists to record music for

34. See, e.g., *Blume v. Spear*, 30 F. 629, 631 (C.C.N.Y. 1887). The court stated:

Upon the question of infringement there is not much room for doubt. The theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces. The measure of the former is followed in the latter, and is somewhat peculiar. When played by a competent musician, they appear to be really the same. There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.

Id.

35. See The History of the Edison Cylinder Phonograph, at <http://memory.loc.gov/ammem/edhtml/edcylldr.html> (last visited Feb. 25, 2004).

36. *Id.*

37. *Id.*

38. See Emile Berliner—The History of the Gramophone, at <http://inventors.about.com/library/inventors/blgramophone.htm>

39. *Id.*

gramophonic reproduction and sale to the public.⁴⁰ By 1893, these coin operated talking machines had spread throughout the country and were beginning to crop up in “parlors, hotel lobbies, and train stations.”⁴¹ Similarly, the consuming public began to acquire these new talking machines as well.⁴²

In 1894, Edwin Votey invented the pianola, the precursor to the player piano,⁴³ and within less than a decade there were approximately “seventy-five thousand player pianos in the United States and about one million piano rolls sold.”⁴⁴ By 1910, and after the U.S. Supreme Court and Congress had dealt with the underlying copyright issues,⁴⁵ the player piano had significant attraction in the American market and sales of these instruments would flourish for several years.⁴⁶ This flourishing would eventually wane due to the rise in popularity of recorded and broadcast music. In 1922, RCA introduced “radio music box,” the “radiola,” into the consumer market.⁴⁷ By 1937 there were “twenty-seven million [radio] sets in general use, and more than 500 stations supply[ing] them with programs throughout the United States.”⁴⁸ All of these inventions added new layers of musical infusion into all sectors of society.

As music became more common place in the work-a-day world and as music composers continued churning out made-to-order music, lawsuits ballooned over claims that pieces of music were “substantially similar” to other pieces. In just a thirty-five year increment between 1915 and 1950, there were twenty-three reported federal cases directly centered on this specific music copyright issue.⁴⁹ This is nearly a ten-fold

40. *Id.*

41. See Thomas Edison, Intellectual Property, and the Recording Industry, at <http://www.mp3newswire.net/stories/2003/monopoly.html> (last visited Feb. 25, 2004).

42. *Id.*

43. ARTHUR REBLITZ, *PLAYER PIANO* 1 (1985).

44. EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 34 (2000).

45. See *White-Smith Music Publishing Co. v. Apollo*, 209 U.S. 1 (1908) (holding that mechanical reproduction of musical works protected by copyright did not infringe copyright holders' exclusive rights). Congress amended the Copyright Act the following year to expressly overrule the Court's determination.

46. See REBLITZ, *supra* note 43, at 1.

47. See EDWARD BLISS, JR., *NOW THE NEWS* 6 (1991). In 1915, David Sarnoff, the then-future chairman of RCA, wrote what has been dubbed “the most renowned piece of paper in the history of broadcasting.” This memorandum declared Sarnoff's idea that the radio could act as a purveyor of music instead of just a transmitter of messages. The memorandum states in part, “I have in mind a plan of development which would make radio a ‘household utility’ in the same sense as the piano or phonograph. The idea is to bring music into the home by wireless The box can be placed on a table in the parlor or living room, the switch set accordingly and the music received.” See *id.* at 5.

48. See ROBERT EICHBERG, *RADIO STARS OF TODAY* 1 (1937).

49. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *Brodsky v. Universal Pictures Co.*, 149 F.2d 600 (2d Cir. 1945);

increase compared to the preceding eighty-four year period.⁵⁰ Although the courts began refining the actual legal test for music copyright infringement, the basic analytical blueprint handed down from *Jollie* decades earlier would remain the same. Of these twenty-three reported cases, the most significant of the lot is likely the venerable *Arnstein v. Porter*,⁵¹ handed down by the U.S. Court of Appeals for the Second Circuit.

In *Arnstein v. Porter*, the claim was that the vaunted American songwriter Cole Porter had infringed several musical copyrights of the irascible Ira Arnstein. Arnstein was a litigious immigrant from the Soviet Union who for ten years dogged the likes of various songwriters, 20th Century Fox, ASCAP, and BMI, claiming that they all had infringed on his music copyrights.⁵² *Arnstein v. Porter* was the final music copyright case pursued by Arnstein and the court's decision gave Arnstein a nearly imperfect 1–4 record in music copyright litigation cases.⁵³

Porter is significant to the history of music copyright infringement because it sets forth a refined legal standard for music copyright infringement claims, the standard that is still used by the federal judiciary today. Under *Porter*, music copyright infringement analysis is grounded in a two-part test. Accordingly, the plaintiff must establish: (a) that defendant copied from plaintiff's copyrighted work and (b) "that the copying (assuming it to be proved) went to[sic] far as to constitute improper appropriation."⁵⁴ On the first issue, "analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of

Arnstein v. Broadcast Music, Inc., 137 F.2d 410 (2d Cir. 1943); *Darrell v. Joe Morris Music Co.*, 113 F.2d (2d Cir. 1940); *Arnstein v. Edward B. Marks Music Corp.*, 82 F. 2d 275 (2d Cir. 1936); *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937); *Marks v. Leo Feist, Inc.*, 290 F. 959 (2d Cir. 1923); *Baron v. Leo Feist*, 78 F. Supp. 686 (S.D.N.Y. 1948); *Jewel Music v. Leo Feist*, 62 F. Supp. 596 (S.D.N.Y. 1945); *Arnstein v. Twentieth Century-Fox Film*, 52 F. Supp. 114 (S.D.N.Y. 1943); *McMahon v. Harms, Inc.*, 42 F. Supp. 779 (S.D.N.Y. 1942); *Carew v. R.K.O. Radio Pictures*, 43 F. Supp. 199 (S.D. Cal. 1942); *Allen v. Walt Disney Prod. Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941); *Davilla v. Harms, Inc.*, 36 F. Supp. 843 (S.D.N.Y. 1940); *Arnstein v. Am. Soc'y of Composers, Authors, and Publishers*, 29 F. Supp. 388 (S.D.N.Y. 1939); *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415 (D. Mass. 1936); *Wilkie v. Santly Bros., Inc.*, 13 F. Supp. 136 (S.D.N.Y. 1935); *Italian Book Co., v. Rossi*, 27 F.2d 1014 (S.D.N.Y. 1928); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916); *Boosey v. Empire Music Co.*, 224 F. 646 (S.D.N.Y. 1915); *Hein v. Harris*, 175 F. 875 (C.C.S.D.N.Y. 1910), *aff'd*, 183 Fed. 107 (2d Cir. 1923).

50. See *Reed v. Carusi*, 20 F. Cas. 431 (C.C.D. Md. 1845) (No. 11,642); *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7, 437); *Blume v. Spear*, 30 F. 629 (C.C.S.D.N.Y. 1887); *Cooper v. James*, 213 F. 871 (N.D. Ga. 1914).

51. See *Porter*, 154 F.2d at 464.

52. See Columbia Law School Music Plagiarism Project, at http://www.library.law.columbia.edu/music_plagiarism/case_page.html (last visited February 25, 2004).

53. *Id.*

54. See *Porter*, 154 F.2d at 468.

the facts.”⁵⁵ In this regard, the “judgment of trained musicians” is used to compare the “respective musical compositions” in order to help the plaintiff establish that copying occurred.⁵⁶ If there is copying, the analysis proceeds to the next issue of whether this copying can be considered “illicit appropriation.” Illicit appropriation ultimately turns on “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”⁵⁷ The “lay listener” is an ordinary reasonable person.⁵⁸ Expert testimony is not allowed on the second prong to prove illicit appropriation, however, the expert testimony of musicians may be presented to the trier of fact “to assist in determining the reactions of lay auditors.”⁵⁹ As *Porter* was becoming ensconced in the federal reporter at the dawn of the 1950s, the music copyright holders were in a prime economic position. By this time, music copyright holders owned the exclusive rights to sheet music reproductions, mechanical reproductions of their music,⁶⁰ public performances, and arrangements or adaptations of their musical compositions. All of these elements of control would inhere to the benefit of music copyright holders as the next wave of technological and social changes would occur.

D. *The Soaring Musical Decades, 1950–Today*

By the 1950s, the music industry was a multi-dimensional being that had at its disposal many techniques and abilities to reach the consuming public with music. The industry had far outpaced its humble beginnings of simply offering copies of sheet music for sale. Indeed, music publishing was no longer the preeminent method of choice for the music industry to peddle its wares to the masses. The parlor piano eventually gave way to 22,000 phonographs, millions of radios, multitudes of disk jockeys, and 500,000 jukeboxes.⁶¹ Country Western and Rhythm & Blues were beginning to fuse to create the phenomenon of Rock ‘n’ Roll, which was receiving the attention and admiration of younger audiences.⁶² The advent of the television and its relevance and prominence in the

55. *Id.*

56. *Id.* at 473.

57. *Id.*

58. *See Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 397 (D.C.N.Y. 1952) (noting that the standard is whether the “average hearer” would detect noticeable resemblance).

59. *Porter*, 154 F.2d at 473.

60. Subject to the compulsory license provisions.

61. *See IRVING SABLOSKY, AMERICAN MUSIC 175 (1969).*

62. *See JASEN, supra* note 12, at 280–81.

American household, once again, added a new mouthpiece to the musical mix of the average American life. The rise of these disk jockey personalities, the brash new sounds of the music emanating from radios and TVs, and the new and innovative techniques used in recording music permanently altered the landscape of the popular music industry.⁶³ A new and lucrative musical era was born, and the music industry was perfectly poised to tap into this treasure trove that was awaiting it.⁶⁴ And tapped it did.

Since the 1950s, musical inundation of the public has increased with every technological and social turn. The advent of the cassette deck and, ultimately, compact disks helped facilitate rapid-fire copying by, and exchange of musical compositions between, the consuming public.⁶⁵ Personal listening devices such as the Sony Walkman, the next generation Apple iPod, and other like-minded devices have allowed and encouraged individualized music consumption not only at home, but at school, work, exercise venues, and every and any public or private venue in between.⁶⁶ The Internet has made procurement of all types of music incredibly easy, and monstrously cost effective, which has lured users to this new medium in unparalleled droves.⁶⁷ In addition to the technological advances that helped the catapulting of music consumption in the last decade in particular, marketing and merchandising efforts of the music industry reinforced the musical messages and helped drive demand for more music, in more venues, for more consumers.⁶⁸

During this continued rise of the tides in the market for music since the 1950s, music copyright infringement suits have continued to become more plentiful. From 1950 through 2000, there were forty-three reported cases dealing with music copyright infringement—nearly twice as many as compared to the period between 1900-1950—and many more disputes that never ripened into litigation as a result of out-of-court settlements.⁶⁹

63. *Id.*

64. It would still be several years before copyright protection would exist for sound recordings, but these too were eventually given protection in 1971 under an amendment to the Copyright Act. See The Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

65. See Martin F. Halstead, *The Regulated Become the Regulators, Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L.J. 195, 199 (2001).

66. Ida C. Shum, *Getting "Ripped" Off By Copy-Protected CDs*, 29 J. LEGIS. 125, 129 (2002).

67. See Strahilevitz, *supra* note 5, at 507 ("[A]t its peak Napster had approximately 70 million users.")

68. See Shae Yatta Harvey, *National, Multi-District Preliminary Tour Injunctions: Why the Hesitation?*, 40 IDEA 195, 217 (2000).

69. For example, Vanilla Ice, Brian Wilson of The Beach Boys, and Ray Parker Jr. were all accused of music copyright infringement. See <http://www.rollingstone.com/features/featuregen.asp?pid=1901>.

Several renowned musical artists⁷⁰ were accused of infringement during this period and, by and large the judiciary responded and handed down opinions that were wholly consistent with the prevailing notions of what constituted music copyright infringement. In other words, the standard for music copyright infringement was the same in 2000 as it had been in 1850, viz., “appropriation of the whole or of any substantial part of [a piece of music] without the license of the author is a piracy.”⁷¹

E. Coda

The above recitation is certainly not a complete picture of the interplay between Congress, the courts, and music copyright holders over the years. It does, however, provide enough of a context to demonstrate three key points. First, music copyright law came into existence in the early 1800s when music played a far less significant role in the American existence and when music was far more of a one-dimensional entity, much like a book, a map, or other work of authorship. Thus, it superficially made sound policy to treat music like those other commodities. Second, as music evolved from mere diversion into obtaining a far more prominent stature in society, music copyright law remained stagnant and did not take into account, at either the congressional or judicial levels, the cultural and technological changes that fundamentally altered the way music is consumed by the public. Further, Congress and the courts have never given much attention to the historical practices of musicians and how this practice is at fundamental odds with the past and current formulation of music copyright law. As discussed in Part II, it is now time to consider these countervailing interests and whether the current balance struck between music copyright holders and society should still hold sway.

II. COPYRIGHT COLLISIONS

This country has witnessed numerous social and technological changes over the last 100 years. Notwithstanding this transformation, music copyright law has remained a consistently static entity. The basic and essentially exclusive philosophical inquiry posed by music copyright

70. See *Fogerty v. Fantasy*, 510 U.S. 517 (1994) (John Fogerty); *Three Boys Music v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (Michael Bolton); *Repp v. Webber*, 132 F.3d 882 (2d Cir. 1997) (Andrew Lloyd Weber); *Crystal Cartier v. Jackson*, 59 F.3d 1046 (10th Cir. 1995) (Michael Jackson); *Baxter v. MCA, Inc.*, 812 F.2d 421 (9th Cir. 1987) (John Williams); *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (Bee Gees); *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976) (George Harrison).

71. Compare *Jollie v. Jaques*, 13 F. Cas. 910, 913–14 (C.C.S.D.N.Y. 1850) (No. 7, 437), with *Three Boys Music*, 212 F.3d at 485–87.

legislators and judicial decision makers has been this: are music copyright owners being adequately protected from others' use of the musical material?⁷² This persistent question has neither been deviated from when Congress has passed laws effecting music copyright owners nor on the judiciary's watch when it has been faced with questions of music copyright infringement.

Although ensuring that music copyright holders are being adequately incentivized to create additional works of music is undeniably important, so too is the effect of this music on those who consume and listen to it. Copyright law is to exist for the singular purpose of enriching the public domain and the music copyright holders' interests—pecuniary or otherwise—are subordinate to that important end game.⁷³ For far too long copyright laws, though, have been too heavily calibrated in favor of the music copyright holders and have overlooked at least three important sociological and cultural aspects of how the world of music functions.⁷⁴ Those three considerations are discussed here and when cumulatively considered they provide a compelling justification for reexamining the scope and reach of the current copyright laws pertaining to music.

A. *There's Something About Music*

The first consideration that has been essentially left out of the music copyright calculus in both the congressional and judicial spheres is the important distinction between music and other art forms.⁷⁵ More so than

72. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 36 (2001). Noting that:

A century ago, Congress confronted the dilemma of updating and simplifying a body of law that seemed too complicated and arcane for legislative revision. To solve that problem, Congress and the Copyright Office settled on a scheme for statutory drafting that featured meetings and negotiations among representatives of industries with interests in copyright.

Id.

73. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good”).

74. Additionally, one author has noted that copyright law is a self-perpetuating cycle that “works a disservice on unestablished songwriters.” See Aaron Keyt, *An Improved Framework For Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 423 (1988) (arguing that infringement suits are costly and, therefore, established record companies are loathe to listen to submissions from artists for fear of being sued, which ultimately hurts the industry in the long run).

75. *Id.* at 422 (opining that “[w]hile the copyright system applies to many sorts of intellectual property, from music to industrial sculpture, the ideal balance may differ according to the expressive medium involved. Thus, to effectuate the balance, different rules and factual inquires may be necessary depending on the type of creative work at issue”); see also Matthew W. Daus, *The Abrogation of Expert Dissection In Popular Music Copyright Infringement Cases: Suggested Modifications For The Implementation of The Lay Listener Standard*, 8

any other artistic endeavors, music possesses ethereal qualities that infiltrates and permeates multiple facets of our existence in a complex manner.⁷⁶ As the social philosopher Theodor Adorno wrote, “of all the arts, music is the prototypical example of this: It is at once completely enigmatic and totally evident. It cannot be solved, only its form can be deciphered”⁷⁷ The famous American composer Aaron Copeland has written that music constitutes “[t]he freest, the most abstract, the least fettered of all the arts: no story content, no pictorial representation, no regularity of meter, no strict limitation of frame need hamper the intuitive functioning of the imaginative mind.”⁷⁸ These sentiments are borne out as evidenced by the significant chasm of disagreement between many scientists and musicologists as to the origins of music and why we humans produce it.⁷⁹ Although the qualities music possesses may still be largely enigmatic to those who toil over the topic, there is widespread consensus cutting across academic disciplines regarding the effects that music has.⁸⁰

There is no question that music speaks to us in mysterious and profound ways and invokes within us numerous physiological and emotional responses. Even before birth, humans respond to music.⁸¹ Shortly thereafter, music moves babies to relax, clap, sway with the beat, and even sing (albeit usually in a non-tuneful manner).⁸² Indeed, mounting evidence suggests that babies—both born and unborn—are “as responsive to music as the most avid concertgoers.”⁸³ No other artistic stimulus enjoys a response of this nature from such a young and uninitiated group.

TOURO L. REV. 615 (1992) (observing that “[m]usic is an exceptional art form which deserves separate treatment under the copyright laws”).

76. Since ancient times, music has been treated as an art form different from the others. See, e.g., THE GREAT DIALOGUES OF PLATO 197–217 (W.H.D. Rouse trans., 1956); L. MEYER, EMOTION AND MEANING IN MUSIC (1956); John W. Holt, *Protecting America's Youth: Can Rock Music Lyrics Be Regulated*, 16 J. CONTEMP. L. 53, 75 (1990).

77. See Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999).

78. See AARON COPLAND, MUSIC AND IMAGINATION 17 (1952).

79. See, e.g., STEVEN PINKER, HOW THE MIND WORKS 526–28 (1997) (arguing that music is simply a technology or “auditory cheesecake” that is crafted to tickle the sensitive spots of mental faculties and arguing that other claims about music’s origin are incorrect). But see, Jean Molino, *Toward an Evolutionary Theory of Music*, in THE ORIGINS OF MUSIC 165 (Nils L. Wallin et al. eds., 2000) (arguing that music and language have a common origin and evolution).

80. See WHITE HOUSE COMMISSION ON COMPLEMENTARY AND ALTERNATIVE MEDICINE, FINAL REPORT 1 (2002), available at http://www.whccamp.hhs.gov/pdfs/fr2002_document.pdf. See also Kathleen M. Boozang, *National Policy on CAM: The White House Commission Report*, 31 J.L. MED. & ETHICS 251, 253 (2003).

81. See DON CAMPBELL, THE MOZART EFFECT 18–26 (1997).

82. *Id.*

83. *Id.* at 23.

Over the last couple of decades in particular, collegiate studies and documented clinical experiments have examined the myriad ways that music works its effects. For example, one clinician has noted that because “music reaches multiple areas of the brain” it can bring about beneficial effects far different than other forms of communication.⁸⁴ Another noted scholar has indicated “there is something about its sheer power to heal and revive the human spirit that seems to set it apart from other arts.”⁸⁵ Dr. Oliver Sachs, the renowned neurologist who treated patients with severe mental and physical maladies, indicated in his famous book, *Awakenings*, that music was the most profound “non-chemical medication.”⁸⁶ In commenting on how music allowed his patients to function, he noted that “[t]he therapeutic power of music is very remarkable, and may allow an ease of movement otherwise impossible.”⁸⁷

Other scientists and researchers have observed that music can accelerate the learning process,⁸⁸ boost productivity of a workforce,⁸⁹ heighten immunological responses of cells,⁹⁰ reduce muscle tension and improve body movement,⁹¹ and alter heartbeats, pulse rates, and blood pressure.⁹² One psychologist poignantly observed that “music can penetrate the core of our physical being.”⁹³ Because “music is a powerful communicative force,”⁹⁴ it also evokes a vast array of emotional responses from the recipients of it. It inspires, consoles, motivates, awakens, and energizes us

84. See The Mozart Effect Resource Center, at <http://www.mozarteffect.com/learn/read.html> (last visited Feb. 25, 2004).

85. See Josie Glausiusz, *The Genetic Mystery of Music*, *DISCOVER*, Vol. 22, No. 8 (Aug. 2001), available at <http://www.spiritsound.com/mystery.html> (last visited Feb. 25, 2004).

86. OLIVER SACHS, *AWAKENINGS* 237 (1981).

87. *Id.*

88. See generally, GEORGI LOZANOV, *SUGGESTOLOGY AND OUTLINES OF SUGGESTOPEDY* (1978); SHEILA OSTRANDER & LYNN SCHROEDER, *SUPERLEARNING 2000* (1994).

89. The University of Washington indicated that in a study of ninety individuals copy-editing a manuscript while listening to classical music, accuracy increased by approximately 21.3 percent. See *Business Music, A Business Tool For The Office/Workplace* (1991); see also CAMPBELL, *supra* note 81, at 75.

90. In 1993, researchers from Michigan State University reported that listening to music for fifteen minutes could increase levels of interleukin-1 in the blood from 12.5 to 14 percent. Interleukins are the body of proteins associated with blood and platelet production, lymphocyte stimulation, and cellular protection against maladies such as AIDS and cancer. See CAMPBELL, *supra* note 81, at 72.

91. See Michael Thaut et al., *Analysis of EMG Activity in Biceps and Triceps Muscle in an Upper Extremity Gross Motor Task under the Influence of Auditory Rhythm*, 28 *J. OF MUSICAL THERAPY* 64, 64–68 (1991).

92. BILL GOTTLIEB, *SOUND THERAPY: NEW CHOICES IN NATURAL HEALING* 127 (1995).

93. See ANTHONY STORR, *MUSIC AND THE MIND* 4 (1992).

94. See Holt, *supra* note 76, at 75.

unlike other artistic endeavors. "It can make us weep or give us intense pleasure."⁹⁵

Although it is readily admitted by those who study music that we still know relatively little about why music evokes such effects within us,⁹⁶ there is no question that music enjoys a unique place among artistic endeavors and the human experience associated therewith. Notwithstanding this unique nature of music, it has traditionally been placed within the economically-driven confines of copyright law and been defined as simply another "work of authorship" commodity.⁹⁷ This myopic view of music is particularly problematic given the widely-held view that we know relatively little about why music exerts the effects that it does upon us.

Because of this lack of knowledge, and because we know for certain that music can have enormously beneficial effects on people, the law should be tailored to provide greater flexibility in the manner in which people are allowed to respond to music that they perceive.⁹⁸ Music should not simply be viewed through a financial prism, but should also be viewed through the lenses of the recipients of that music. Music effects people in profound ways, and the law should expect and allow the responses to that art form to be of equal profundity.⁹⁹

B. Music in Society

The second fundamental problem with our music copyright law is that Congress and the courts have overlooked the reality that music is inextricably intertwined in the daily lives of society and invades every facet of our experience. The American musical experience of today is far different than it was back in the 1800s and early 1900s.¹⁰⁰

95. See STORR, *supra* note 93, at 4.

96. See, e.g., PINKER, *supra* note 79, at 538.

97. See Christine Lepera and Michael Maneulin, *Music Plagiarism: Notes on Preparing For Trial*, 17 ENT. & SPORTS LAW 10, 11 (Fall 1999) (noting that copyright decisional law "creates an all-purpose infringement analysis that is intended to apply to all subject matters of copyright. That law was not specifically tailored to, and does not necessarily suit, music").

98. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 88-89 (2001) (arguing that when society is uncertain how a given piece of intellectual property is going to be used "we have more reason to keep that resource in the commons"); see also J. Michael Keyes, *Whatever Happens to Works Deferred?: Reflections on the Ill-Given Deferments of the Copyright Term Extension Act*, 26 SEA. L. REV. 97, 116 (2002).

99. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 72-73 (1987) (arguing that music in the days of Plato and Aristotle was "at the center of education" and that "[c]lassical philosophy did not censor the singers. It persuaded them.").

100. See Konecni, *infra* note 111, at 498 ("Consider first the conditions prevailing in the eighteenth and nineteenth centuries, when non-folk music was performed almost exclusively in salons of the wealthy and later in the concert halls and opera houses accessible only to the privileged few. Enjoyment of music was a special occasion, something carefully planned in advance, each performance a unique, fleeting event.").

“Music appreciation has been radically altered by the technological and social changes in the twentieth century.”¹⁰¹ Music continually finds us through numerous musical mouthpieces and across multiple public and private venues.¹⁰² From the clock radio awaking us with music in the morning to the classical music that sends us off to sleep in the evening, music has come to be a permeating art form. Gone are the days where sheet music and the radio were the primary vehicle for artists to “expose their crafts.”¹⁰³ Now, more so than ever before, there are numerous musical playing implements such as satellite radio stations, cds, cassettes, music TV channels,¹⁰⁴ television commercials,¹⁰⁵ Internet radio and streaming channels,¹⁰⁶ and peer-to-peer computer networks,¹⁰⁷ all of which are incredibly effective at bringing music to the masses. There are numerous venues where music finds us, such as at work, in elevators, doctor’s offices, home, restaurants, shopping malls, sporting events, and other social gatherings, to name just a few. Music, especially “popular” music is simply “impossible to avoid”¹⁰⁸ and has “pervaded every aspect of modern life.”¹⁰⁹ In fact, “[m]usic is so freely available today that we take it for granted and may underestimate its power.”¹¹⁰ As one noted University of California psychologist has observed, it is simply impossible to have an appreciation for how music effects individuals without

101. Konecni, *infra* note 111, at 498.

102. See Lepera and Maneulin, *supra* note 97, at 12 (“[I]t is virtually inescapable in our daily lives. We are bombarded with it, by radio and television broadcast, in supermarkets, department stores, the dentist’s office, and virtually everywhere else we may chance to wander.”).

103. See Lauren J. Katunich, *Time to Quit Paying The Payola Piper: Why Music Industry Abuse Demands a Complete system Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 655 (2002).

104. See Margaret Brown, *Bringing Down A Giant: The Monopoly of Music Television?* 5 VAND J. ENT. L. & PRAC. 63, 65 (2002) (“MTV is unique in that it not only provides a forum for music artists to have their songs displayed to the public, but it has a profound influence on the tastes of the public in music, culture, and celebrity.”).

105. See Nora Miles, *Pop Goes The Commercial: The Evolution of The Relationship Between Popular Music and Television Commercials*, 5 VAND. J. ENT. L. & PRAC. 121, 122 (2002) (noting the increase use of pop songs in commercial ads).

106. The music industry is a multi-billion dollar a year industry. According to the RIAA’s available statistics, the total value of the music business in 1999 was \$14.3 billion. See Jenny Toomey, *The Future of Music*, 10 TEX. INTELL. PROP. L.J. 221, 230 (2002).

107. Jennifer Norman, *Staying Alive: Can The Music Industry Survive Peer-To-Peer*, 26 COLUMBIA-VLA J.L. & ARTS 371, 373 (2003).

108. STORR, *supra* note 93, at 21.

109. Adam Fernandez, *Let It Be: A Comparative Study of The Content Regulation of Recorded Music in The United States And The United Kingdom*, 21 PENN ST. INT’L L. REV. 227, 228 (2002).

110. STORR, *supra* note 93.

first appreciating that there has been a “penetration of music into every corner of people’s lives, literally and metaphorically.”¹¹¹

Notwithstanding that music has steadily and increasingly invaded all facets of our existence over the series of several decades (and nothing suggests this infiltration has reached its zenith), music copyright law has not at all altered its fundamental balance in the last 150 years. The standard for music copyright infringement is essentially the same today as when Justice Nelson handed down the decision in *Jollie*.¹¹²

Music copyright holders have been given broad powers over their copyrights, which has allowed holders to leverage significant financial gains from these exclusivities. A byproduct of this enormous commercial success is a culture infused with the music that has been foisted upon it. Even though there has been a total musical inundation, music copyright law expects that no one will respond to this music by using or otherwise incorporating this music into new works. This is an unrealistic expectation for at least two reasons.

First, music informs a culture, affects how individuals behave, and necessarily motivates them to respond. Yet, for some reason, the architects of musical infusion have ostensibly been allowed to reap the economic benefits that Congress and the courts have sewn by muzzling the responses of those affected by the music. This is what one author has referred to as the “copyright lockdown,” which has the far-reaching implications of controlling “innovations in the marketplace” of music making.¹¹³

Second, two famous music copyright cases have showcased that “copying” portions of a given work can happen as a result of the subconscious mind.¹¹⁴ With the degree of music infiltrating our daily lives, musicians are going to be—at a bare minimum—subconsciously affected. As Judge Learned Hand recognized long ago, “[e]verything registers somewhere in our memories, and no one can tell what may evoke it.”¹¹⁵ Yet, our music copyright laws are set up to punish this subconscious conduct, even though it is likely due, at least in some material degree, to the process of musical inundation that was created by the copyright holders to begin with.

111. Vladimir J. Konecni, *Social Interaction and Musical Preference*, in *THE PSYCHOLOGY OF MUSIC* 499 (Diana Deutsch ed., 1982); see also BLOOM, *supra* note 99, at 68 (“Today, a very large proportion of young people between the ages of ten and twenty live for music.”).

112. See *supra* text accompanying notes 17–19.

113. See Toomey, *supra* note 106, at 231–32.

114. See *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (George Harrison); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (Jerome Kern).

115. *Fred Fisher*, 298 F. at 147.

The point here is not to rail against big corporations that have libraries full of music copyrights. Rather, the thrust of this section is to emphasize the prominence that music has attained in society, which is due in no small part to the music copyright holders' diligent efforts at peddling these musical works to the public. Music is disseminated through a vast reservoir of media. Because of this, music bombards individuals on a systemic and daily basis. The law should anticipate and expect that the responses to this incredible music infiltration will be varied and abundant and it should encourage such responses.

C. Musical Borrowings

Finally, the world of music composition has historically enjoyed a healthy diet of musical borrowings where one composer takes musical material from another. Notwithstanding this history, our copyright laws have been passed and interpreted as imposing liability even when relatively small amounts of musical material have been taken from a work protected under Title 17.¹¹⁶

There is no doubt that "[t]he artistic world has developed its own informal rules for borrowing."¹¹⁷ Nowhere is this more true than in the world of music. "Musical stealing is as old as music itself."¹¹⁸ Indeed, one does not need to scour the annals of music history very long to be washed over by the glut of musical compositions whose specific melodic origins can be traced back to pre-existing pieces of music. The history of western music, in particular, demonstrates this phenomenon of musical borrowing to prodigious proportions. Perhaps it was this prodigiousness that caused one noted music copyright scholar to suggest that music was likely not protected by copyright historically because of the notion that music represented a "common heritage" shared by all peoples irrespective of their places in various social and economic strata.¹¹⁹ Whether this sentiment be accurate, there can be no question that musical borrowings have existed in significant quantities dating back at least into the first millennium.

For example, consider the earliest days of sacred Western Music. "Gregorian Chant" is a genre of modal music emanating from, and

116. For example, one court opined that even a six-note melodic sequence could be the basis of an infringement claim if the copied portion was "qualitatively important" to the plaintiff's work. See *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (John Williams).

117. Keyt, *supra* note 74, at 422.

118. See ALFRED M. SHAFTER, *MUSICAL COPYRIGHT* 187 (1932); E. DeMatt Henderson, *The Law of Copyright Especially Musical*, 1 *COPYRIGHT LAW SYMPOSIUM* 125, 150 (1939).

119. SHAFTER, *supra* note 118, at 1.

flourishing during, medieval times.¹²⁰ Throughout the first millennia, chant melodies spread throughout Europe and Asia and various regions altered these melodies to suit their own particular tastes and interests.¹²¹ Secular music of this time period also demonstrates the notion that the folk music du jour was based on melodies borrowed by and between the troubadours, the wandering minstrels that traveled from hamlet to hamlet to perform musical works.¹²²

Other examples of musical borrowings abound in the world of music that is commonly referred to as “classical music.”¹²³ For example, Handel perpetually used pre-existing musical material to the point where books were written concerning this “open and notorious thief.”¹²⁴ Bach borrowed material from Remken, Vivaldi, and Telemann.¹²⁵ Brahms borrowed from Haydn and Beethoven.¹²⁶ Beethoven borrowed from Bach, and Mozart borrowed from DuPort.¹²⁷ Rachmaninoff borrowed from Brahms, who in turn had borrowed from Liszt, who in turn had borrowed from Paganini.¹²⁸ In fact, Brahms noted that “imitation” has significant pedagogical benefits in that it “is the best way to understand how music is written and structured.”¹²⁹ The list of borrowings by the masters from the masters and others is immense and faithfully reproduced elsewhere.¹³⁰

Musical snatchings are not just endemic to medieval and classical music genres. The earliest days of American music are marked with numerous instances where songwriters borrowed melodies and music from pre-existing tunes to write new melodies.¹³¹ During the colonial days, ballad-operas used melodies which were “tunes then popular with the

120. See <http://www.beaufort.demon.co.uk/chant.htm>. Chant is a style of music used during liturgical celebrations consisting of a single melodic line without accompaniment.

121. See <http://www.beaufort.demon.co.uk/chant.htm>.

122. *Id.*

123. Most people, when they refer to “classical music” mean just about any type of music written from the late seventeenth century all the way into the twentieth century. Technically, music written during this time frame is divided into four discreet categories, viz., Baroque Period from 1685–1750, Classical Period from 1750–1825; Romantic Period from 1825–1900; and 20th Century, 1900—Present.

124. Henderson, *supra* note 118, at 150; see also PERCY ROBINSON, *HANDEL AND HIS ORBIT* (1908); SEDEY TAYLOR, *THE INDEBTEDNESS OF HANDEL TO OTHER COMPOSERS* (1908).

125. Shafter, *supra* note 118, at 187.

126. *Id.* at 188.

127. Henderson, *supra* note 118, at 150.

128. See <http://www.paganini.com/nicolo/nicindex.htm> (last visited Feb. 25, 2004).

129. See <http://members.aol.com/dmarko1/brahms/composition.htm> (last visited Feb. 25, 2004).

130. See N. CARRELL, *BACH THE BORROWER 227–365* (1967) (listing sources of some of Bach’s material); see also SHAFER, *supra* note 118, at 188.

131. Take for example the music that came about in the 1600s in the Massachusetts Bay settlement. There, music melodies were taken and set to new texts of the biblical psalms. See SABLOSKY, *supra* note 61, at 6.

public but adapted to new lyrics.”¹³² African American spirituals were adopted from “Irish and Scotch-Irish Hymnody.”¹³³ As patriotic fervor swept the Country in the 19th Century, it engendered a series of musical compositions whose melodies were taken from pre-existing material. The music of our very own national anthem, “The Star Spangled Banner”, is actually the music to an old English song.¹³⁴ The nationalistic number “America” is also a patriotic song owing its melody to a song written on the other side of the Atlantic.¹³⁵ The music to “My Country ‘tis of Thee” is the same as the music to “God Save the Queen,”¹³⁶ an English anthem.

Even as the end of the 19th Century approached, musical borrowings heavily dotted the musical landscape. Publications of African American spiritual and cowboys songs in the late 1800s and early 1900s “opened to composers a goldmine of nostalgic feelings and melodies that would be exploited during the 1930s.”¹³⁷ In the latter part of the 20th Century, several American composers used pre-existing musical works to create new musical compositions. Aaron Copeland and Virgil Thompson are but two in a vast sea of composers.¹³⁸ George Gershwin, film score writer Miklos Rosza, and popular song composers Eric Carmen and Billy Joel all used pre-existing material to create hit songs that were wildly popular.¹³⁹

Consider also the world of jazz music, a genre of music that is indigenous to America and that developed and flourished at the end of the 19th Century and continues with great significance today. One of the key compositional techniques that has been used in jazz is “interpolation”, the process of borrowing pre-existing musical material and then improvising on it to create a new musical work. Years ago, one author poignantly captured the essence of this compositional technique:

In New Orleans, Jazz was a performing as well as a creative art. Jazz musicians brought colorations to ragtime and the blues never before realized on their instruments by others, and through personal and unique methods of performance. These New

132. See EWEN, *supra* note 11, at 64.

133. VIRGIL THOMPSON, *AMERICAN MUSIC SINCE 1910* 4 (1970).

134. The Star Spangled Banner was written to the music of “To Anacreon in Heaven” and “America” was written to the tune of “God Save the King.” See Henderson, *supra* note 118, at 133.

135. *Id.*

136. STORR, *supra* note 93, at 22.

137. THOMPSON, *supra* note 133, at 3.

138. *Id.* at 56.

139. Eric Carmen borrowed music written by Rachmaninoff to write his hit singles “All By Myself” and “Never Gonna Fall In Love Again.” Billy Joel’s chorus to “This Night” is taken directly from Beethoven’s Pathétique Piano Sonata.

Orleans musicians further opened new horizons for their music through their fabled gift of improvisation. One man would provocatively throw out an idea; it would be seized and embellished by another. The two would join forces, each proceeding in his own direction without losing sight of the other . . . Improvisation, then, became not only an art for the solo instrument, but for combinations of instruments, in which different rhythms were daringly combined, conflicting tonalities assembled, dissonant sounds blended . . . The musical imagination would be given full freedom of movement.¹⁴⁰

Jazz musicians have always borrowed the music from “Bach to Schonberg” to create this “third stream music.”¹⁴¹ It is precisely this “full freedom of movement”¹⁴² that has allowed the jazz art form to flourish and thrive.

Consider further the current technological realities that have ushered in the relatively new phenomenon of music sampling, the practice of manipulating existing sound recordings and extracting from them short musical interludes and snippets.¹⁴³ This technological reality has led to significant amounts of infringement suits and legions of law review articles.¹⁴⁴ These sampling wars and scholarly ruminations aptly underscore the ineffective nature of music copyright laws to fully address and be sensitive to the social realities of music making as brought about by technological innovations.

Whether considering the plain chant melodies of medieval times, the complex contrapuntal works of J.S. Bach, or the popular musical works of 20th Century composers and musicians, music borrowing has been an historical practice that has been part of numerous compositional palettes and is actually woven into the psyche of the composer’s existence.¹⁴⁵ Yet,

140. EWEN, *supra* note 11, at 147.

141. SABLOSKY, *supra* note 61, at 174–75; *see also*, THOMPSON, *supra* note 133, at 5 (“Jazz is instrumental—a communal improvisation in four four time on some popular tune—usually a commercial one which the players have no qualms about turning inside out.”)

142. EWEN, *supra* note 11, at 147.

143. *See* Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347 (2002).

144. The enormous loads of journal articles written on digital sampling caused one author to quip that “the legality of digital sampling and its implications has been perhaps the student author’s favorite dead horse.” *See* Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and The Courts*, 88 CAL. L. REV. 1145 n.121 (2000).

145. P. GRIFFITHS, *MODERN MUSIC: THE AVANT GARDE SINCE 1945* 200 (1981) (“[T]he more significant reasons for such borrowings have been those of an aesthetic or even moral order: the need to test the present against the past and vice versa, the desire to improve contact with audiences by offering known subjects for discussion, the wish to find musical analogues for the multiple and simultaneous sensory bombardment in the world.”).

our copyright laws have wholly discounted this historical practice and have, in fact, exacted penalties for the meager use of musical material from a pre-existing work.¹⁴⁶ Not only has this legal regime overlooked this historical practice, it has cooled expressive musical activity in the process.

D. Recapitulation

In short, somewhere along the line, the law of music copyright forgot to check in with the world of music. Music copyright law has been largely about shielding economic interests of those within the music making industry, while others such as the musicians and the rank-and-file members of society, have been largely left out of the music copyright equation.¹⁴⁷ But “[m]usic is a creative force and a rigorous art”¹⁴⁸ and, consequently, “our legal thinking should also be imaginative and rigorous.”¹⁴⁹ While untold efforts have been invested in creating the laws pertaining to music copyright over the years, these efforts have overlooked important social realities about the nature of music, its ever-increasing ubiquity in society, and the history of the musical composition process. When these unique attributes and realities are explored, they suggest that music copyright law needs to be reconsidered and shifted from its present static, copyright-holder-take-all state to a fluid paradigm that more faithfully acknowledges pluralistic interests of others outside the small confines of the music industry and the broader social norms and realities that inform our culture. Part III of this Article proffers such an alternative construct.

III. OF COURTROOMS AND COPYRIGHTS

In addition to the policy shortcomings inherent in the current music copyright protection regime, there are three significant practical hurdles that consistently and systematically appear when music copyright claims wind their ways into federal courthouses. First, the “reasonable listener” model inherited is an ill-suited legal construct that simply is out of place in the context of music copyright infringement analysis. Second, the

146. See, e.g., *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924) (eight note musical ostinato held to be an infringement); *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (taking six note sequence could be infringement if “qualitatively important” to Plaintiff’s work).

147. See Toomey, *supra* note 106, at 225 (explaining how “citizens and creators” have been left out of the debate between Congress and the music industry).

148. Desmond Manderson & David Caudill, *Modes of Law: Music and Legal Theory, An Interdisciplinary Workshop Introduction*, 20 *CARDOZO L. REV.* 1325, 1328 (1999).

149. *Id.*

overabundant (and almost exclusive) reliance on the opinions of music experts has turned music copyright litigation into a “battle of the experts” forum. While musicologists can certainly add valuable testimony at trial, they have been allowed to testify far beyond their respective fields of expertise, which necessarily distorts the judicial process.¹⁵⁰ Third, the current legal test of “substantial similarity” overlooks some of the inherent problems that are possessed by jurors, viz., the inability to perceive and process musical sounds. When all three of these deficiencies are examined, they suggest that a recalibrated legal test for music copyright infringement should be considered.

A. *The Reasonable Listener Model*

Ever since *Porter* forged the current legal framework for determining music copyright infringement in a given case, courts have deployed some variation of the “reasonable person” model as the ultimate arbiter as to whether music copyright infringement takes place.¹⁵¹ Accordingly, the ultimate issue that is to be decided is whether a reasonable listener would find that the two pieces of music at issue are the same.¹⁵² This test is not centered on what the individuals in the jury box or on the bench subjectively think; rather, the trier of fact is asked “to suppress [its] own perception[] and to listen as [it] supposes someone else might.”¹⁵³

The historical and philosophical underpinnings of the “reasonable person” model illustrate that this construct is a fish out of the common law waters that has been blindly cast into the music copyright infringement sea. As Professor Corbin stated years ago, the philosophical justification for the reasonable person in the realm of legal analysis is that the “law of contract as in the law of tort, men are expected to live up

150. See Michael D. Manuelian, *The Role of The Expert Witness in Music Copyright Litigation*, 57 *FORDHAM L. REV.* 127, 128 (1988) (“Both parties usually come armed with experts, and the ensuing battle often constitutes a significant segment of a music infringement trial.”).

151. See, e.g., *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 736 (4th Cir. 1990) (applying an intended audience test). The influence of the *Porter* test has “rippled far beyond the music context” and is now used in a variety of copyright infringement analyses. See Alice J. Kim, *Expert Testimony And Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 *COLUM.-VLA J.L. & ARTS* 109, 112 (1995).

152. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (“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 which belongs to the plaintiff.”).

153. See Reynolds M. Fletcher, *Music Analysis For Expert Testimony in Music Copyright Infringement Litigation* 477 (1991) (unpublished Ph.D. dissertation, University of Kansas) (on file with University of Kansas and author).

to the standard of the reasonably prudent man.”¹⁵⁴ Other scholars have echoed that this “reasonable person” is a vehicle for assessing social norms and whether the litigants in a given case have fallen below that minimum threshold. For example, the reasonable person formulation is a model that provides meanings to “status and roles within a given social order.”¹⁵⁵ Another has noted that “[t]he reasonable person standard is an empty vessel that jurors fill with community norms.”¹⁵⁶ All of these sentiments underscore one salient truism about the reasonable person standard: it has utility as a legal mechanism because it is used as the prism through which conduct is viewed. In other words, the jurisprudential fiction of the reasonable person exists for the purpose of assessing the conduct of a given set of parties and then applying legal maxims or precepts accordingly. The need to be able to assess conduct and arrive at resulting legal conclusions is obvious. Because we live in a society our actions must necessarily be judged against some criteria if we are to experience the tranquil administration of justice. Thus, the justification for this “all-knowing arbiter of reasonableness” is a social and legal necessity and presupposes that there is a “right way” and a “wrong way” for us to carry out our affairs in society.¹⁵⁷

The overriding problem with the reasonable listener model in the context of music copyright litigation is that this reasonable listener is not being called upon to gauge conduct of parties to the litigation; rather, the standard is being used to determine how a reasonable listener would aurally perceive a given piece of music.¹⁵⁸ However, there is no accepted “social norm” that would provide any meaningful standard on how a piece of music would be perceived by a “reasonable listener.” In fact, music perception is an inherently subjective process that differs from individual to individual.¹⁵⁹ “The same sound that magically empowers one person can scare another nearly to death.”¹⁶⁰ A piece of music may be perceived differently by two individuals, but that does not mean that one perception is “right” and one is “wrong.” Yet, the “reasonable

154. Arther L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 265 YALE L.J. 169, 205 (1917).

155. MICHAEL SALTMAN, *THE DEMISE OF THE REASONABLE MAN* 21 (1991).

156. See Steven Hetcher, *Non-Utilitarian Negligence Norms And The Reasonable Person Standard*, 54 VAND. L. REV. 863, 864 (2001).

157. See Larry A. Dimatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and The Subjectivity of Judgment*, 48 S.C. L. REV. 293, 294 (1997).

158. See, e.g., *Baxter v. MCA, Inc.*, 812 F.2d 421 (9th Cir. 1987).

159. See Fletcher, *supra* notes 153 (opining that music perception is really an aesthetic determination); see also CAMPBELL, *supra* note 81, at 38–39, 45 (observing that diet, environment, day-to-day health, and climate all effect the process of how sound is heard and processed).

160. CAMPBELL, *supra* note 81, at 43.

listener” standard presupposes that there is a “right and a wrong way” to hear a piece of music. This simply is not the case.¹⁶¹ Thus, the trier of fact is “not equipped” to make the determination that is being asked of it.¹⁶²

*Baxter v. MCA*¹⁶³ illustrates the point that music perception cannot accurately be objectified, at least with any accuracy, through deployment of a reasonable listener standard. In *Baxter*, the renowned film music composer John Williams was accused of copyright infringement. The allegedly-infringing work was Williams’ “Theme from E.T.,” which had garnered Williams much praise and a Grammy in 1982.¹⁶⁴ An old acquaintance of Williams’, Leslie Baxter, claimed that the Theme from E.T. was taken from Baxter’s 1953 composition entitled “Joy.” Williams moved for summary judgment and conceded that he had access to the work, but claimed there was no substantial similarity and that reasonable minds could not differ on this point. In granting summary judgment to Williams, the trial court observed that:

This court’s “ear” is as lay as they come. The court cannot hear any substantial similarity between defendant’s expression of the idea and plaintiff’s. Until Professor Bacal’s tapes were listened to, the Court could not even tell what the complaint was about. Granted that Professor Bacal’s comparison exposes a musical similarity in sequence of notes which would, perhaps, be obvious to experts, the similarity of expression (or impression as a whole) is totally lacking and could not be submitted to a jury.¹⁶⁵

The grant of summary judgment was reversed by the 9th Circuit. In reversing, the court claimed that its “ears” were no more “sophisticated than those of the district court.”¹⁶⁶ Nevertheless, the court believed that “reasonable minds could differ as to whether Joy and Theme from E.T. are substantially similar.”¹⁶⁷

161. There are no “bright lines” when “comparing musical works;” instead, there is “a spectrum of similarity and difference.” Keyt, *supra* note 74, at 443; *see also*, KAPLAN, *supra* note 16, at 53 (noting that various aspects of a given piece of music “may influence [the] perception” of the individual).

162. Michael Sitzer, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determinating Substantial Similarity*, 54 S. CAL. L. REV. 385, 390 (1981).

163. 812 F.2d 421 (9th Cir. 1987).

164. <http://www.johnwilliams.org/reference/grammyawards.html> (last visited Feb. 25, 2004).

165. *See Baxter*, 812 F.2d at 423.

166. *Id.* at 424.

167. *Id.*

Baxter illustrates the intrinsic problems with attempting to fit an inherently subjective inquiry into an objective mold: it cannot be done based on any collective judgment or sense of what is right and wrong.

Because the use of the reasonable listener necessarily presupposes that there is a right and a wrong way to perceive a given piece of music, this legal fiction is ill-suited for the task at hand.

B. *Expert Testimony*

Music copyright claimants would be significantly hobbled by attempting to joust over whether a given piece of music is substantially similar without the aid of expert testimony.¹⁶⁸ As such, it would be difficult to overstate the importance of experts in music copyright litigation.¹⁶⁹ Experts provide layers of testimony that not only help educate the jury on the particularities and peculiarities of music, but also on how these experts believe the music in question would be perceived by a “reasonable listener.” Thus, the expert takes on at least two different roles in music copyright litigation, both of which are inextricably intertwined with the Plaintiffs’ burden of proof.

First, the expert helps establish that “objective” copying occurred. As *Porter* noted, “[o]n this issue, analysis (‘dissection’) is relevant, and the testimony of experts may be received to aid the trier of the facts.”¹⁷⁰ Typically, the expert dissection involves the expert’s preparation of “visual exhibits of portions of the sheet music of both songs in order to show similar ‘grouping of notes, similarity of bars, accent, harmony, or melody.’”¹⁷¹ With analysis in hand, the expert seeks to convince the fact finder that there are “objective similarities” between the two works.¹⁷² If the copyright owner’s expert fails in convincing the trier of fact that there

168. See Manuelian, *supra* note 150, at 127.

169. Indeed one musicologist and attorney has indicated that in *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984), the plaintiff’s expert’s imprecision lead to the trial judge granting the defendant’s motion notwithstanding the jury’s verdict. See M. Fletcher Reynolds, *Selle v. Gibb and the Forensic Analyst of Music Plagiarism* (1993), at http://www.musicanalyst.com/selle_v_gibb.htm (last visited Feb. 25, 2004) (noting that the plaintiff’s expert “seemed to be using the term ‘striking similarity’ loosely and would not state unequivocally that the similarities could result only from copying,” which meant that “[w]ithout expert testimony on this point, plaintiff could not meet his burden of proof”).

170. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

171. See Daus, *supra* note 75, at 618 (citing *Hirsch v. Paramount Pictures, Inc.*, 17 F.Supp. 816, 818 (S.D. Cal. 1937)).

172. The defense experts seek to refute this evidence by arguing there are no objective similarities, or that any evidence of objective copying is a result of independent creation or coincidence. See M. Fletcher, *supra* note 153.

are objective similarities between the two pieces in question, there can be no finding of infringement.¹⁷³

Second, once the expert assists in establishing “objective similarities,” the expert can help establish that these objective similarities constitute “illicit appropriation.” As noted above, the ultimate touchstone for determining whether there has been an illicit appropriation is based on “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”¹⁷⁴ In this regard, “expert testimony of musicians may also be received, but . . . should be utilized only to assist in determining the reactions of lay auditors.”¹⁷⁵ Thus, the net effect of the *Porter* standard is that experts are allowed to testify as to how they believe a reasonable lay listener would hear a given piece of music.

There are significant procedural and logistical drawbacks to allowing experts to testify as to how they subjectively believe a lay, reasonable listener would hear a piece of music. This entire inquiry presupposes that there actually is an objective standard through which music perception can be gauged and arrived at with any degree of accuracy. As music perception is a subjective process, there simply is no quintessential or objective way to perceive a piece of music.¹⁷⁶

Moreover, allowing expert testimony in this regard arguably collides with the Federal Rules of Evidence and the seminal *Daubert v. Merrell Dow Pharmaceuticals*¹⁷⁷ decision, which redirected the federal judiciary’s stance on admissibility of expert testimony.¹⁷⁸ In *Daubert*, the Court held that the Federal Rules of Evidence impose a special obligation upon a trial judge to “ensure that any and all scientific testimony . . . is not only relevant, *but reliable*.”¹⁷⁹ Expert testimony is admissible if it is

173. See, e.g., *Selle*, 741 F.2d at 901 (“Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement.”).

174. *Porter*, 154 F.2d at 473.

175. *Id.* at 473.

176. “There is perhaps no art so subject to every man’s judgment as music.” JOHANN HOACHIM QUANTZ, *VERSUCH EINER ANWEISUNG DIE FLOTE TRAVERSIERE ZU SPEILEN* (1752), in *Source Readings in Music History* (1950).

177. 509 U.S. 579 (1993).

178. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999); see also *Artemio Rivera, Testing The Admissibility of Trademark Surveys After Daubert*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 661, 662 (2002) (“*Daubert* created a doctrinal change in the law of evidence by moving the focus of the admissibility inquiry from the general acceptability test to a test of reliability and relevance.”).

179. *Daubert*, 509 U.S. at 589 (emphasis added).

based on “scientific, technical, or other specialized knowledge.”¹⁸⁰ “Knowledge” is the “sum of the principles and facts generally accepted as well grounded within a given field, and not just “‘subjective belief or unsupported speculation.’”¹⁸¹ Clearly, an expert’s testimony as to objective similarities between two pieces of music squares with this definition. The expert’s opinion as to how a lay, reasonable listener *might* hear a given piece of music is more tenuous.¹⁸² This is precisely the type of subjective opinion masquerading as “expert testimony” that *Daubert* sought to eradicate.¹⁸³

Even if it could be established that music perception could be accurately objectified, and even if expert testimony as to illicit appropriation could satisfy the *Daubert* test, it still seems questionable as to whether an expert musicologist would be the appropriately-credentialed person to testify as to how music is perceived by a lay listener.¹⁸⁴ Having a musically-learned individual testify as to how a reasonable lay listener might hear a piece of music is akin to asking a trained scientist to testify as to how a reasonable individual might interpret a scientific formula. It seems questionable that either expert could divorce themselves from the years of training and somehow labor under the confines of a less experienced and a less initiated intellect.¹⁸⁵

C. Tone Deafness

The final problem with the current test for music copyright infringement is its reliance on the fact finder’s aural abilities when, in fact, those abilities may be lacking or seriously deficient.¹⁸⁶ Tone deafness or

180. FED. R. EVID. 702.

181. See Rivera, *supra* note 178, at 666.

182. See FED. R. EVID. 702 Advisory Committee Notes, 2000 Amendment (“*Daubert* set forth a non-exclusive checklist for trial court to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert’s technique or theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability.”); see also *Goebel v. Denver and Rio Grande Western R. Co.*, 346 F.3d 987, 991 (10th Cir. 2003) (“[A]n inference or assertion must be derived by the scientific method . . . [and] must be supported by appropriate validation—i.e. ‘good grounds,’ based on what is known.”).

183. *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) (“[D]istrict court’s gate keeping role separates expert opinion evidence based on ‘good grounds’ from subjective speculation that masquerades as scientific knowledge.”).

184. See Manuelian, *supra* note 150, at 133 (“[W]hether an expert highly educated in the field of music theory, analysis, and history can in fact hear again as lay listener is speculative at best.”).

185. See Maureen Baker, *A Note to Follow So: Have We Forgotten The Federal Rules of Evidence in Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583, 1589 (1992) (claiming that music expert testimony distorts the process of finding infringement).

186. *Arnstein v. Porter* 154 F.2d 464, 473 n.22 (2d Cir. 1946) (“[I]t would, accordingly, be proper to exclude tone-deaf persons from the jury.”).

“amusia” is the broad clinical term referring to a spectrum of maladies effecting the brain and its ability to process music.¹⁸⁷ Specifically, tone deafness effects an individual’s ability to perceive, produce, or remember musical sounds.¹⁸⁸ Although amusia can be caused by traumas to the brain,¹⁸⁹ it can also exist in those that have never experienced a head injury of any sort. In fact, recent studies are suggesting that it is an inherited trait passed down from preceding generations.¹⁹⁰ “Tone deafness is an evolving and expanding issue” and speech and hearing therapists are discovering that it is a more common deficiency than previously believed.¹⁹¹ In fact, recent studies have suggested that as many as one in four adults have problems in “recognizing tunes” and that one in twenty have “severe tone deafness.”¹⁹²

Although it was recognized years ago by *Porter* that excluding “tone deaf” individuals would be appropriate in music copyright infringement cases, this rule of exclusion could potentially eliminate twenty-five percent of all prospective jurors and jurists of today. Empanelling a jury for a given case can be a Herculean task in and of itself. It has been estimated that “as many as two-thirds of the approximately 15 million Americans summoned to jury service each year fail to report for jury duty.”¹⁹³ But even those that appear “strive to get out of jury duty once they enter the courthouse.”¹⁹⁴ Thus, lopping off an additional twenty-five percent of the pool is not going to make the process of empanelling a jury any easier.

Moreover, even if excluding tone deaf individuals would not deplete such a large portion of prospective jurors from consideration, the process of voir dire on this issue could get complicated and more complex as every potential juror would need to be examined for musical sound processing aptitude. For bench trials, the prospect of tone deafness testing

187. See Oscar S. M. Martin, *Neurological Aspects of Music Perception and Performance*, in *PSYCHOLOGY OF MUSIC*, *supra* note 10, at 454.

188. See Christopher Frazier, *Tone Deafness* (2002), at <http://hubel.sfasu.edu/courseinfo/SL02/tone-deafness.htm> (last visited Feb. 25, 2004).

189. Martin, *supra* note 187, at 454.

190. *Born to be Tone Deaf? Searching For The Cause of Musical Dysfunction* (NPR Radio Broadcast, January 16, 2002), available at <http://www.npr.org/programs/atc/features/2002/jan/tonedeaf/020116.tonedeaf.html> (last visited Feb. 25, 2004).

191. See Frazier, *supra* note 188.

192. See <http://notes.utk.edu/bio/greenberg.nsf/e972592203c877ef8525676b005ded2d/86675dbb4051040b852569d400613054?OpenDocument> (last visited Feb. 25, 2004); see also Daniel J. Levitin, Ph.D., *Tone Deafness: Failures of Musical Anticipation and Self-Reference*, 4 *INT’L J. OF COMPUTING AND ANTICIPATORY SYSTEMS* 243 (1999), available at http://ego.psych.mcgill.ca/levitin.html/pubspages/TD_casys.html.

193. See David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider’s View*, 36 *JUDGES’ J.* 23 (Fall 1997).

194. See Mark A. Behrens & Cary Silverman, *Five Ways The Kentucky Legislature Can Improve Jury Service*, 42 *BRANDEIS L.J.* 1, 11 (2003).

becomes even more sensitive as the litigants face the uncomfortable task of screening the ears of the judge that has been assigned to the case.

D. *Finale*

In conclusion, there are significant drawbacks to the current legal standard for determining whether a given piece of music can be said to infringe on the copyright of another piece. The current standard is predicated on the faulty premise that there is a single “reasonable” way to perceive a piece of music. Additionally, the liberal deployment of experts to guide the jury has, to a large extent, exacerbated the problem. Finally, setting up the legal standard so that the jury is required to make its infringement assessment based solely on its subjective perception is problematic because as many as twenty-five percent of the jurors may be physically unable to make such an assessment. These shortcomings of the legal test for infringement can be significantly ameliorated as provided in the following section.

IV. A NEW VARIATION ON A THEME

Music copyright is broken and we should, therefore, reconsider the current framework built by Congress and interpreted by the courts. By its very nature, music copyright law does not take into account social, technological, and historical realities that have formed and shaped the world of music and the creative process attendant thereto. Instead, the law has proceeded along an economically-guided path that—while adding to the coffers of the music industry power brokers—has not adequately addressed the complex and myriad issues and concerns of our pluralistic society.¹⁹⁵ Moreover, the actual legal test for music copyright infringement is not sensitive to the underlying realities as to how music is and can be perceived in different ways by different individuals. Thus, the overarching policy and the application of the legal standard combine to create a flawed music copyright protection regime. But there are potential solutions with many possible benefits. Those suggested solutions are discussed here.

195. LITMAN, *supra* note 72, at 36 (“A century ago, Congress confronted the dilemma of updating and simplifying a body of law that seemed too complicated and arcane for legislative revision. To solve that problem, Congress and the Copyright Office settled on a scheme for statutory drafting that featured meetings and negotiations among representatives of industries with interests in copyright.”).

A. Music Use Compulsory License

Instead of having a copyright system that wholly restricts use of pre-existing musical material protected by copyright, we should have a system that encourages or allows this practice so long as the music borrower pays a fee for its use.¹⁹⁶ The legal contours of such a system could be similar to the phonorecords compulsory license provision already embedded in the Copyright Act.¹⁹⁷ This proposed “musical use compulsory license” could be obtained by anyone so long as notice was given to the copyright owner and the statutorily established fee was paid by the borrower. The fee for such a compulsory borrowing could be based on two elements: (1) the amount of music borrowed, and (2) the number of phonorecords produced by the borrower. Thus, if an enterprising young musician wanted to borrow 10 seconds of a Jimi Hendrix guitar solo in the process of creating a new musical work, the young musician is welcome to do so, as long as the fee is paid to the copyright holder pursuant to the statutory rate.

The benefits of such a system are numerous and represent a multilateral win for all involved. First, such a system would expressly take into account the complexities and realities of the current social tide of musical infusion. Second, this compulsory fee would be more sensitive to the underlying historical practices that have been part of the musical composition tradition for centuries.¹⁹⁸ Third, the availability of this license would help stem the swelling tide of music copyright infringement

196. One scholar suggests that a compulsory license fee would make sense in the music context if the use by the second composer were outside the market of the first composer. See Keyt, *supra* note 74, at 459.

197. See 17 U.S.C. § 115(a)(1) (2002). “When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.” *Id.*

198. See *supra* Part III.C. Moreover, allowing this practice of musical borrowing would bring the U.S. in line with several other countries that have already acknowledged the utility of allowing small amounts of copyrighted works to be used for inclusion into new works. See, e.g., Austria, Urheberrechtsgesetz [UrhG] § 5(2) (“The use of a work in creating another work shall not make the latter an adaptation, provided it constitutes an independent new work as compared to the work used”); UrhG § 52(1) (permitting use of single passages of a published musical work in an independent new musical work); Brazil, Código Civil, lei n. 5.988 of Dec. 14, 1973, art. 50 (“Pastiche and parodies shall be lawful in so far as they are not real reproductions of the work on which they are based and do not discredit it.”); Bulgaria, Zakon za avtorskoto pravo, Nov. 16, 1951, § 6 (“[N]either consent of author nor payment to him required for use of work in the creation of a new, independent work, except for literary-dramatic adaptations.”); Zakon za avtorskoto pravo, Nov. 16, 1951, § 7(b) (“[C]omposers can use literary texts without author’s consent, but must pay author a fee upon publication.”) (all aforementioned statutes are translated in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1984)).

cases. The economic motivations of the borrowing composer would likely gravitate toward paying the compulsory fee as opposed to facing a potential lengthy and costly court battle. This would, in turn, help relieve pressure on the federal judiciary as music copyright infringement suits would be less prevalent.

Undoubtedly there will be those that would decry the above proposal as too extreme and a serious erosion and affront to music copyright holders everywhere.¹⁹⁹ However, there are several poignant examples as to how relaxing copyright controls can lead to increased artistic output.²⁰⁰ Moreover, under this proposed compulsory license formulation, the composer or musician from whom material is borrowed would still receive a financial benefit. If this borrowing results in piece of music that attains commercial success for the borrower, then the composer from whom the material was borrowed would likewise share in that banquet in a proportionate manner. Therefore, it would be hard to argue that the compulsory license would disincentivize the copyright holder from whom music is being borrowed.

In an ideal world, if a composer always sought this compulsory license before borrowing musical material from a pre-existing piece, the need for a legal test for music copyright infringement would disappear. There will always be those, however, that for one reason or another forego the requirement of securing a compulsory license or paying the necessary fee or are otherwise accused of wrong doing by taking someone else's musical material. It is for those individuals and for those instances that the following proposal is suggested.

B. *Intended Audience Test*

Music is not composed in a vacuum,²⁰¹ and it certainly is not composed for the ears of a hypothetical reasonable listener. Whether the music be a banal, largely incoherent popular song or a lyrical, programmatic piece in the classical music genre, it was ultimately intended to be heard by some audience that probably can be identified with a significant

199. Richard Parsons, the President of Time-Warner in 2000 stated that "[t]his is a very profound moment historically. This isn't about a bunch of kids stealing music. It's about an assault on everything that constitutes the cultural expression of or society. If we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won't be the only ones hurt. Artists will have no incentive to create. Worst-case scenario: The county will end up in a sort of cultural Dark Ages." Quoted in Chuck Phillips, *Music Industry Giants Miss a Beat on the Web*, L.A. TIMES, July 17, 2000, at A1.

200. See Keyes, *supra* note 98, at 115–16.

201. See Faith D. Kasparian, *The Constitutionality of Teaching and Performing Sacred Choral Music in Public Schools*, 46 DUKE L.J. 1111, 1153 (1997) ("Music never exists in a vacuum; it is always the product of a variety of forces—historical, political, literary, or religious—affecting the composer.").

degree of precision.²⁰² Thus, does it make sense for music copyright infringement to turn on the ultimate reaction of a hypothetical listener whose auditory predilections are not at all clear or even objectively defined? The answer is no.

Instead, music copyright infringement should be gauged by determining whether a “substantial” or an “appreciable” number of individuals that listen to the type of music in question would find illicit copying to have occurred.²⁰³ In other words, the fact finder would no longer be asked to opine as to how some mythical person might hear the music at issue; rather, the fact finder would be asked to assess the similarities using actual responses of actual people. This is essentially the same legal standard used in trademark cases, and its application in the music copyright context makes sense for several reasons.

First, music—much like a trademark or a piece of advertising—is targeted at a specific market segment.²⁰⁴ Thus, calibrating the inquiry to focus on the reactions of those in that market would provide a stronger indication as to whether a piece of music can be said to be borrowing from another piece. Second, music—much like a trademark or a piece of advertising—will be perceived differently depending on who is doing the listening within that market. Thus, scrapping the observations of a “hypothetical” listener and supplanting it with the actual responses from a broad spectrum of listeners will be more sensitive to these auditory realities. Third, this “intended audience” test would not only square with the reality that music is intended to be listened to by a particular set of individuals, but also is aligned with a significant amount of scholarship and recent judicial pronouncements on the issue.²⁰⁵

In determining whether a “substantial” or “appreciable” number of listeners would find illicit appropriation, once again trademark law can

202. See Paul M. Grinvalsky, *Idea-Expression in Musical Analysis and The Role of The Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 427 (1992) (suggesting that record companies and radio stations have been able to successfully identify markets for different types of musical genres).

203. See *Dawson v. Hinshaw Music Inc.* 905 F.2d 731, 734 (4th Cir. 1990) (“In light of the copyright law’s purpose of protecting a creator’s market, we think it sensible to embrace *Porter’s* command that the ultimate comparison of the works at issue be oriented towards the works’ intended audience.”).

204. See Fletcher, *supra* note 153, at 477 (noting that the evidentiary problems faced in music copyright litigation “more nearly approximate those of trademark law, which judges similarities according to ‘likelihood of confusion’”).

205. See, e.g., DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E], at 13–62.4 n.202 (1989) (“If the works in issue are directed to a particular audience, then the ‘spontaneous and immediate’ reaction of that audience is determinative.”); Steven G. McNight, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1290 n.91 (1983); Anthony L. Clapes et al., *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA. L. REV. 1493, 1571 (1986–87); *Dawson*, 905 F.2d at 736.

be of assistance. As Professor McCarthy has acknowledged, “in cases of trademark infringement, unfair competition, and false advertising, the subjective mental associations and reactions of prospective purchasers are often an issue.”²⁰⁶ Although impressions of the trier of fact and a recognized expert may shed some light on the ultimate inquiry, “a more scientific means of evidencing mental association is to introduce the actual responses of a group of people who are typical of the target group whose perceptions are at issue.”²⁰⁷ Similarly, in cases of music copyright infringement, the “reactions” of listeners is at the heart of the inquiry as to whether there is an infringement.²⁰⁸ Because surveys “create an experimental environment from which to make informed inferences,” they could be used by the trier of fact in music copyright infringement actions to make the ultimate determination of illicit copying.

The use of surveys in music copyright cases could also be deployed without substantial practical drawbacks. There is a large body of literature on the use of surveys in litigation,²⁰⁹ and the federal judiciary has set forth recommendations as to how a survey should be conducted to ensure trustworthiness.²¹⁰ Thus, there would be significant guidance for the music copyright litigator. Moreover, the use of surveys in this context would arguably be less complicated than in the realms of trademark, unfair competition, and unfair advertising litigation.

In those realms, there are different types of surveys that need to be conducted depending on the claims and causes of action at issue in a given case.²¹¹ In cases involving dilution, “[t]here is no standard criteria for surveying.”²¹² Often times in the trademark arena, surveys are challenged because of an alleged failure to survey the correct “universe” of people.²¹³ “Word choice” and imprecision in considering the exact

206. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:158 (2003); see also Richard J. Leighton, *Using (And Not Using) The Hearsay Rules to Admit and Exclude Surveys in Lanham Act False Advertising and Trademark Cases*, 92 TRADEMARK REP. 1305 (1992) (“Expert testimony in the form of surveys and related opinion is routinely proffered in Lanham Act cases to prove how advertisements or trademarks influence perceptions.”).

207. MCCARTHY, *supra* note 206, at § 32:158.

208. See NIMMER, *supra* note 205, at § 13.03.

209. See MCCARTHY, *supra* note 206, at § 32.58 (exhaustive list cited there).

210. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 264–65 (Federal Judicial Center 1994). The manual suggests nine points be included in the survey report.

211. See William G. Barber, *How To Do a Trademark Dilution Survey (Or Perhaps How Not To Do One)*, 89 TRADEMARK REP. 616, 617 (1999) (noting that surveys and standard methodology has been developed and differs for assessing the “likelihood of confusion” between two marks, whether a mark has “secondary meaning”, and whether a mark is “generic”).

212. See *Hershey Foods Corp. v. Mars, Inc.*, 998 F. Supp. 500, 518 (M.D. Pa 1998).

213. See, e.g., *Gillette Co. v. Norelco Consumer Prods. Co.*, 69 F. Supp. 2d 246, 261 (D. Mass. 1999) (“Another flaw in the Razor Commercial Study is that the universe of consumers

contours of the commercial dispute at issue can often cause a survey to fail.²¹⁴ In the music copyright infringement realm, these problems would not be as acute. The identification of the relevant universe of listeners could probably be defined with a significant degree of precision in music copyright cases.²¹⁵ Because the music industry has more or less established certain pre-defined markets for different types of music, vetting potential survey candidates would not be overly onerous and time consuming. Moreover, the complexities of the issues in other types of litigation often leads to complexities in surveys, which inherently makes the survey more subject to challenge by both opposing counsel and the court. In the music copyright case, though, the inquiry would always be the same, and a streamlined and coherent body of music copyright survey case law could likely be developed in relative short order.

CONCLUSION

It is time to reconsider whether the current copyright law pertaining to music still makes sense in light of the social, technological, and historical realities of the world of music. Because music plays a far more prominent role in shaping society now than at any other time in this country's history, it simply is no longer necessary nor practical for copyright holders to lock down their copyrights in the same way that they have been able to for decades. Instead, we should consider a compulsory license system that allows borrowing from pieces of music so long as the borrower pays a fee for doing so. Such a system would be more sensitive to the realities of today and the historical practices and idiosyncrasies of the world of music. We should also consider altering the test for music copyright infringement by having it be guided by the reactions of actual auditors for whom the music was composed. Shifting the focus away

surveyed was improperly limited in that it excluded important segments of the universe of prospective purchasers of the Reflex Action.”); see also Shashank Upadhye, *Trademark Surveys: Identifying The Relevant Universe of Confused Consumers*, 8 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 549, 591 (1998) (“It can be difficult to identify the relevant universe of consumers whose confusion must be proved in a trademark infringement case.”).

214. See, e.g., *Coca-Cola Co. v. Tropicana Products, Inc.*, 583 F. Supp. 1091, 1094 (S.D.N.Y. 1982). In *Coca-Cola*, despite Coca-Cola's submission of survey evidence purporting to show that an advertisement misled consumers into believing that Tropicana juice was unprocessed, the court denied Coca-Cola's motion for a preliminary injunction of the defendant's television advertising for its ready-to-serve Premium Pack orange juice. Although the survey indicated that 43 percent of the responses of 500 subjects said that Tropicana's juice was “fresh,” the survey failed to elicit evidence of what people meant by the freshness concept. As noted by the court, “[Coca-Cola's expert witness] admitted that ‘fresh’ is capable of several connotations, among them ‘not processed,’ ‘not made from concentrate,’ ‘refreshing’ and ‘100 percent pure.’” *Id.* at 1096–97.

215. See Grinvalsky, *supra* note 202, at 427.

from the hypothetical listener would be more sensitive to auditory realities and would provide a more predictable gauge for assessing the complex question of whether a piece of music appropriates protectable expression.