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The Abrogation of Expert Dissection in Popular Music Copyright Infringement Cases: Suggested Modifications for the Implementation of the Lay Listener Standard

Matthew W. Daus

THE ABROGATION OF EXPERT DISSECTION IN POPULAR MUSIC COPYRIGHT INFRINGEMENT CASES: SUGGESTED MODIFICATIONS FOR THE IMPLEMENTATION OF THE LAY LISTENER STANDARD*

INTRODUCTION

Music is an exceptional art form which deserves separate treatment under the copyright laws. In the well-informed words of Aaron Copland, music is "[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."[1] However, popular music is extremely limited as a result of its simple nature and form.[2] One must not forget that "music has its disciplines: its strict forms and regular rhythms, and even in some cases its programmatic content."[3] Hence, popular music should receive special treatment independent from complex musical styles.

Litigation is a crucial area where popular music should be afforded increased protection. The current use of expert witnesses in copyright infringement actions must conform to the unique character of popular music. This Comment argues that the existing lay listener standard for copyright infringement actions cannot be effectively implemented where a particular method of expert testimony and popular music is involved, namely the dissection and analysis of musical compositions to detect substantial simi-

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1. AARON COPLAND, MUSIC AND IMAGINATION 17 (1952).
2. *See infra* notes 49-53 and accompanying text.
3. COPLAND, *supra* note 1, at 17.

larity.[4] The costs of the confusion created by this technique clearly outweigh the benefits received from the utilization of such expert testimony.[5]

Section I of this Comment explains the application of expert dissection and the lay listener standard within the substantive law of copyright infringement.[6] Section II contains an overview of the criticism levied against the lay listener standard and its current application by the courts.[7] Section III describes in detail the special attributes of popular music and the recognition of these characteristics by various legal authorities.[8] Section IV argues that where popular music is involved: (a) the lay listener standard is justified;[9] (b) expert dissection should be eliminated;[10] and (c) certain modifications would compensate for the absence of expert dissection.[11]

I. THE CURRENT ROLE OF EXPERT DISSECTION IN MUSICAL COPYRIGHT INFRINGEMENT ACTIONS

In order to properly analyze the role of expert witnesses in musical copyright infringement cases, the substantive framework of such an action must first be explored. The use of experts has been approved by the courts with regard to both the elements of "copying" and "substantial similarity."[12]

The element of copying is normally established through reliance upon circumstantial evidence because "direct evidence of copying is rarely available."[13] Proof of access to the allegedly

4. *See infra* notes 20-22 and accompanying text.
5. *See infra* notes 108-21 and accompanying text.
6. *See infra* notes 12-32 and accompanying text.
7. *See infra* notes 33-41 and accompanying text.
8. *See infra* notes 42-59 and accompanying text.
9. *See infra* notes 62-96 and accompanying text.
10. *See infra* notes 97-122 and accompanying text.
11. *See infra* notes 123-44 and accompanying text.
12. *See infra* notes 15-20, 27-30 and accompanying text.
13. Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984); *see* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B], at 13-7 (1990) [hereinafter NIMMER] ("It is generally not possible to establish copying by direct evidence, as it is rare that the plaintiff has available a witness to the

infringed work may provide such circumstantial evidence to prove copying.[14] An inference of access may be established by proof of "striking similarity" between both songs, coupled with "some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer."[15] The United States Court of Appeals for the Seventh Circuit, in *Selle v. Gibb*,[16] approved of experts in dealing with proof of the "extremely technical issue" of striking similarity.[17] The United States Court of Appeals for the Second Circuit, in *Arnstein v. Porter*,[18] the seminal case on the use of experts in musical copyright infringement actions, defined the scope of expert testimony in proving the element of copying:

> [I]f there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.[19]

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act of copying."). *Id.* (footnotes omitted).

14. *Selle*, 741 F.2d at 901 ("[T]he most important component of this sort of circumstantial evidence is proof of access."). *Id.*

15. *Id.* ("Striking similarity" has been defined as "a term of art signifying 'that degree of similarity as will permit an inference of copying even in the absence of proof of access . . . .'"). *Id.* at 903 (quoting Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 2 COPYRIGHT L. SYMP. 81, 96 (1977)).

16. 741 F.2d 896 (7th Cir. 1984).

17. *Id.* at 904. The court noted that:

> 'To prove that certain similarities are 'striking', plaintiff must show that they are the sort of similarities that cannot satisfactorily be accorded for by a theory of coincidence, independent creation, prior common source, or any theory other than that of copying. Striking similarity is an extremely technical issue -- one with which, understandably, experts are best equipped to deal.'

Id. (quoting Sherman, *supra* note 15, at 96).

18. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

19. *Id.* at 468.

The term "dissection" refers to the comparison by musical experts of the claimant's musical piece and the alleged infringing musical piece.[20] Often this analysis includes 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."[21] "Substantial similarity" between songs also seeps into the element of improper appropriation, even though it might be of limited value.[22] The core of the improper appropriation requirement is the "illicit copying"[23] of "protected elements in the plaintiff's composition."[24] Issues may arise as to whether the similarities are justifiable or, in other words, not substantial. It has been held that "common musical forms" constitute "non-in-

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20. *See* Eugene L. Girden, *The Role of Experts in Proving Copyright Infringement*, in INFRINGEMENT OF COPYRIGHTS 1981, at 255 (PLI Patents, Copyrights, Trademarks & Literary Property Practice Course Handbook Series No. 134, 1981) ("'Dissection' of two works may take the form of comparing parallel column charts and attempting to pinpoint similarities therein."). *Id.*

21. Hirsch v. Paramount Pictures, Inc., 17 F. Supp. 816, 818 (S.D. Cal. 1937). In *Hirsch*, the district court, noting that "it is difficult to describe by words similarities or differences in musical compositions," attached a portion of the sheet music exhibits utilized by the experts during the trial to the reported opinion. *Id.* at 818-19. For a definition of musical "bars," "accents," and "harmony," see *infra* notes 123, 126.

22. *See* Michelle V. Francis, *Musical Copyright Infringement: The Replacement of Arnstein v. Porter -- A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test*, 17 PEPP. L. REV. 493, 497 (1990) ("Substantial similarity lies *somewhere* between no similarity and literal similarity . . . . '[T]he determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law . . . .'" *Id.* (quoting NIMMER, *supra* note 13, at 13-8)).

23. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 85 (1947) ("If copying is established, then only does there arise the second issue, that of illicit copying."). *Id.*

24. *See* Francis, *supra* note 22, at 505 n.104, stating that:

> Although two works may in fact be identical in every detail, if the alleged infringer created his work independently, or if both works were copied from a common source available in the public domain, there is no illicit copying or improper appropriation, and therefore, no infringement. Such copying is permissible.

Id.

fringing similarities,"[25] and are therefore not substantial or material enough to support a finding of improper appropriation. An example of a common musical form would be those musical elements, such as chord progressions and rhythm, which are standard similarities of the style of the songs involved in the litigation.[26] Although substantial similarity is involved in both the elements of copying and improper appropriation, expert testimony is allowed in the former situation, but not the latter.[27] In *Arnstein*, Judge Jerome N. Frank stated that where the issue of "unlawful appropriation" is involved, "the test is the response of the ordinary lay hearer."[28] Hence, it was concluded that "'dissection' and expert testimony are irrelevant" or inconsistent with the lay listener standard.[29] However, Judge Frank did observe that "[e]xpert testimony of musicians may also be received, but . . . should be utilized only to assist in determining the reactions of lay auditors."[30] The underlying rationale for

25. MCA, Inc. v. Wilson, 425 F. Supp. 443, 451 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981). In *MCA*, plaintiff succeeded in proving copyright infringement of the song "Boogie Woogie Bugle Boy." *Id.* The court held that defendant's song was not only copied from the original, but was also substantially similar in context. *Id.* The court found that the similarities between the plaintiff's song and the defendant's song were not simply limited to the use of the common musical form, namely the "Boogie Woogie." *Id.*

26. *See, e.g., id.* at 451 ("It is not in dispute that if the only similarity between the songs is due to common music forms, such as are in defendant's 'boogie woogie' books, then plaintiff's copyright infringement claim would fall."). *Id.* For a definition of "rhythm" and "chord," see *infra* note 123.

27. *See Arnstein*, 154 F.2d at 468.

28. *Id.*

29. *Id.*

30. *Id.* at 473. In Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (1977), the United States Court of Appeals for the Ninth Circuit applied a test similar in form to the *Arnstein* approach. This "extrinsic/intrinsic test" is as follows:

> The 'extrinsic test' [to find similarity of ideas] depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed . . . . Since it is an extrinsic test, analytic dissection and expert testimony are appropriate . . . . [The intrinsic test is] to be applied in determining whether there is substantial similarity in expressions . . . depending on the response of the ordinary reasonable

precluding the use of expert dissection to prove improper appropriation is economically based. "The plaintiff's legally protected interest is not . . . his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."[31] The existence of the improper appropriation element stems from the effect of the alleged infringement upon a lay audience's appreciation of the artist's work, and the resulting economic loss therefrom. Hence, substantial similarity in the eyes of a lay listener is "an issue of fact which a jury is peculiarly fitted to determine"[32] because this body is normally comprised of musically untrained members of the public.

The pecuniary justification set forth by Judge Frank does not

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person . . . . Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate.

Krofft, 562 F.2d at 1164.

The extrinsic test, allowing expert dissection, is similar to the toleration of such testimony on the issue of copying in *Arnstein*, 154 F.2d at 468. Additionally, the intrinsic test's disallowance of expert dissection bears a resemblance to *Arnstein's* abrogation of such testimony on the element of unlawful appropriation. *Arnstein*, 154 F.2d at 468. *Krofft*, however, goes astray in its rationale and purpose behind the extrinsic/intrinsic test. The Ninth Circuit misconstrues the Second Circuit's rule when it states that *Arnstein* alluded to the idea-expression dichotomy. *Krofft*, 562 F.2d at 1165. No such dichotomy exists in the *Arnstein* application. When experts are permitted to dissect on the issue of copying, they are attempting to detect similarities of expression, not ideas.

It seems fair to state that *Krofft* is a judicial aberration and does not warrant continued discussion. Besides, the *Krofft* case is factually distinguishable from the musical orientation of this Comment. In *Krofft*, "[t]he complaint alleged, *inter alia*, that the McDonaldland advertising campaign infringed the copyrighted H. R. Pufnstuf television episodes as well as various copyrighted articles of Pufnstuf merchandise." *Krofft*, 562 F.2d at 1162.

31. *Arnstein*, 154 F.2d at 473. The reasoning behind the holding in *Arnstein* will be explored further in section IV(A) of this Comment. Because the justification for the rule is so closely intertwined with the lay listener standard, separate treatment is warranted. *See infra* notes 62-66 and accompanying text.

32. *Arnstein*, 154 F.2d at 473 ("Indeed, even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory judge on this question."). *Id.*

apply to the element of "copying" because the effect upon the lay public is irrelevant to whether the plaintiff's work was actually copied. It is presumed that the trier of fact cannot determine substantial similarity on the issue of "copying" without the assistance of expert dissection.

II. CRITICISM OF THE LAY LISTENER STANDARD

Widespread criticism of the *Arnstein v. Porter*[33] standard began with Judge Charles E. Clark's verbose dissent, which tacitly disapproved of the absence of experts on the issue of improper appropriation.[34] Judge Clark, generalizing the concepts involved, stated that "[m]usic is a matter of the intellect as well as the emotions; that is why eminent musical scholars insist upon the employment of the intellectual faculties for a just appreciation of music."[35] Hence, the intellectual approach of analytical "dissection" by musical experts is given credence by the very nature of music itself. Accordingly, Judge Clark concluded that the intellect should not be abolished,[36] implicitly referring to the majority decision excluding expert dissection to prove improper appropriation.

Five days after the *Arnstein* decision, in *Heim v. Universal Pictures Co.*,[37] Judge Clark elucidated the logical flaws in the majority's application of the lay listener standard. According to Judge Clark, musical copyright infringement cases have been transformed into the following issues: "[F]irst, of copying, to be decided more or less intelligently [with experts], and second, of illicit copying, to be decided blindly on a mere cacophony of

33. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947); *see, e.g.*, Whelan Assocs. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1232-33 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (In deciding a computer software program infringement suit, the court stated: "[T]he distinction between the two parts of the *Arnstein* test may be of doubtful value when the finder of fact is the same person for each step . . . ."). *Id.* at 1232.

34. *Arnstein*, 154 F.2d at 478, 480 (Clark, J., dissenting).

35. *Id.* at 476 (Clark, J., dissenting).

36. *Id.* at 476-77 (Clark, J., dissenting).

37. 154 F.2d 480 (2d Cir. 1946).

sounds [without experts]."[38] As discussed earlier, similarities between songs are relevant on both the issues of copying and improper appropriation.[39] In effect, Judge Clark suggests that similarities pointed out through expert dissection on the issue of "copying" will infect the trier's decision when analyzing the same similarities from a hypothetical lay listener's standpoint in determining the "improper appropriation" question. Because the element of "improper appropriation" may not be established by expert testimony under *Arnstein*,[40] the rule appears to be based upon an unrealistic theoretical precept that a judge or jury will ignore prior expert testimony when deciding functionally equivalent elements of a cause of action. Hence, it is not surprising that some critics suggest the consideration of expert dissection on the issue of improper appropriation.[41]

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38. *Id.* at 491 (Clark, J., concurring). For a discussion of illicit copying, see *supra* text accompanying notes 23-26.

39. *See Arnstein*, 154 F.2d at 468.

40. *Id.*

41. *See* Francis, *supra* note 22, at 497 ("Due to the necessity of a visual examination of a musical composition's tangible expression, the musical literacy of an expert is *indispensable*. Indeed, '[w]ithout the benefit of expert analysis and dissection, the fact-finder is ill-equipped' to detect significant substantial similarity in comparing two musical compositions."). *Id.* at 513 (emphasis added) (quoting Michael Der Manuelian, *The Role of The Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 146 (1988)); *see also* Manuelian, *supra*, at 129, stating that:

> [B]ecause of the general impracticability of the *Arnstein* limitations and the dubious applicability of the *Krofft* standards in music infringement litigation, analytic testimony by experts should not be limited to the issue of copying as required under *Arnstein*, but should also be considered on the ultimate issue of whether the copying constitutes an infringement.

Id.

These authorities, and the author of this paper, realize that the *Arnstein* approach is unworkable. However, the alternatives suggested by both of the cited Notes differ from those enunciated in this Comment. Both of the above authors argue that experts should play a greater role in musical copyright infringement litigation. To the contrary, this Comment contends that expert dissection should be eliminated from musical copyright infringement litigation where popular music is involved.

III. POPULAR MUSIC

Popular music encompasses a "broad domain . . . with no clearly defined frontiers."[42] It "consist[s] basically of works designed to please the general public."[43] The musical forms which constitute popular music change with the public's tastes over time.[44] Various forms of music have come within the definition of popular music throughout the first half of the twentieth century, including "blues, country music, jazz, musical comedy, operetta, ragtime, rhythm and blues, and rock."[45] Two major distinctive qualities of popular music are its non-serious nature and its commercial success.[46] "Symphonies, concertos and other longer, serious forms" of music fall within the realm of serious, or unpopular music.[47] Composers of serious music "rarely consider[] money a primary goal, hoping rather to create a work of art that will endure long beyond [one's] own lifetime."[48]

Popular music is an exceptional form of music due to its overall simplistic nature and musical limitations.[49] The physical limitations of popular music have been recognized by the courts and its existence tacitly disfavored. A classic example appears in *Darrell v. Joe Morris Music Co.*,[50] in which the court stated: "[W]hile there are an enormous number of possible permutations

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42. 14 THE NEW ENCYCLOPEDIA BRITANNICA 807 (15th ed. 1982) [hereinafter BRITANNICA].

43. CHRISTINE AMMER, HARPER'S DICTIONARY OF MUSIC 272 (1972).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See, e.g.*, Paul W. Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232, 234 (1955) ("'Popular songs, particularly, lie within a very small radius. In a confined space, similarity of tone construction is inevitable. Practically every original idea the composer can think of has appeared somewhere before; it is a matter of probabilities, and every day the number of new possibilities grows less.'") *Id.* (quoting SHAFTER, MUSICAL COPYRIGHT 187, at 196 (2d ed. 1939)); *see also* Carew v. R.K.O. Radio Pictures, Inc., 43 F. Supp. 199, 200 (S.D. Cal. 1942) (An ordinary popular song consists of trite phrasing and is thus limited.).

50. 113 F.2d 80 (2d Cir. 1940).

of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."[51] The effect of such physical limitations on the popular music market was aptly expressed by the prose of Judge Learned Hand in *Arnstein v. Edward B. Marks Music Corp.*:[52] "[M]awkish verses [in popular love songs] are reeled off by hundreds of poetasters all over the country."[53]

The unique nature of popular music created problems in applying the substantive law of copyright infringement. First, the element of improper appropriation appears to be affected by the generic features of popular music. If the similarities in one particular composition are due to "common musical forms,"[54] then there is no originality and hence no "illicit copying."[55] Since "originality in the realm of popular music lies within a very narrow scope,"[56] there is particular difficulty in ascertaining which similarities are to be afforded protection and which are part of the public domain.

Second, the use of experts in popular music infringement cases may give rise to different views. A proponent of expert testimony might argue that since "[s]light variations in the use of rhythm, or harmony -- of accent and tempo -- may achieve"[57] originality, a lay listener would be unable to recognize such minute similarities or differences between two popular songs.

In *Selle v. Gibb*,[58] the Seventh Circuit approved of the use of expert testimony in proving copying of popular music because

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51. *Id.* at 80.

52. 82 F.2d 275 (2d Cir. 1936).

53. *Id.* at 276.

54. MCA, Inc. v. Wilson, 425 F. Supp. 443, 451 (S.D.N.Y. 1976), *aff'd and modified*, 677 F.2d 180 (2d Cir. 1981).

55. *See supra* notes 24-25 and accompanying text.

56. Hirsch v. Paramount Pictures, 17 F. Supp. 816, 817 (S.D. Cal. 1937). The court, holding that defendants had not appropriated eight bars of plaintiff's musical composition, found that: "[T]he evidence show[ed] conclusively that the source of the eight bars in [plaintiff's] composition . . . lay in previously published material, some of which had become a part of the public domain of music, through the absence of copyright protection." *Id.*

57. *Id.*

58. 741 F.2d 896 (7th Cir. 1984).

"all [such] songs are relatively short and tend to build on or repeat a basic theme."[59] However, opponents of expert testimony might argue that popular music is written for the lay listener and is completely within the trier of fact's understanding. According to this view, expert testimony would be superfluous, or would confuse and mislead the trier of fact.

IV. PROPOSED MODIFICATIONS TO THE LAY LISTENER TEST

There are basically two logical approaches that one could take in regard to modifying the role of experts in musical copyright infringement actions. The *Arnstein v. Porter*[60] approach is inconsistent because it allows expert testimony on the issue of copying but not on the issue of improper appropriation.[61] Therefore, in order to maintain consistency, one might argue that expert testimony should be allowed on either both or neither element.

Where popular music infringement actions are involved, expert dissection should be completely eliminated. However, where relatively complex or obscure music is involved, expert dissection may be of considerable assistance to the trier of fact, and such testimony should be allowed on both the elements of copying and improper appropriation.

A. Lay Listener Standard is Justified

In order to argue that experts should be abrogated in popular music copyright infringement actions, a fundamental premise is the validity of the lay listener standard. The rationale for the lay listener standard was set forth in *Arnstein:*

> The plaintiff's legally protected interest is not, as such, his repu-

59. *Id.* at 905.

60. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 85 (1947).

61. *Id.* at 468 (The court reasoned that on the issue of improper appropriation "the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant."). *Id.*; *see supra* text accompanying notes 27-29.

> tation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.[62]

The *Arnstein* justification appears to be based on an economic interest in one's work. Therefore, experts are not necessary[63] because the lay listener trier of fact is the target for the enjoyment of music when it is written. This is particularly true when popular music is involved because the musical forms of such songs are designed for a lay listener market.[64] Popular music artists, record companies, producers, studio engineers, and other individuals or entities that have input into the creative process must constantly tailor the music they manufacture to the desires of the lay listener market in order to profit from their product.

The economic interest theory underlying the lay listener standard also appears to be consistent with the spirit behind the Copyright Clause in the United States Constitution. This clause

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

63. Under *Arnstein*, experts may not give testimony as to similarities between songs on the issue of illicit copying. Experts may, however, so testify "to assist in determining the reactions of lay auditors." *Id.* In other words, expert testimony is allowed to explain the impact of various similarities on the market, or whether an average lay listener would perceive them.

An expert is not permitted to testify that she is of the opinion that two songs are similar. However, this restriction is a fallacy and a paradox because in order for an expert to testify that a hypothetical lay listener would perceive similarities, she must first see these similarities herself. Therefore, an expert's musically enhanced opinion (which may contain similarities that an ordinary listener would not realize), could be considered by the trier of fact under the guise of testimony that an imaginary lay listener would perceive such similarities. *See supra* notes 45-49 and accompanying text.

64. Although *Arnstein* involved the infringement of two popular songs ("The Lord Is My Shepherd" and "A Mother's Prayer") by another popular song ("Begin and Beguine"), the holding concerning the lay listener standard and the use of experts in this case was not limited to popular music and should therefore be extendable to forms of music that are not popular. *Arnstein*, 154 F.2d at 464-75.

states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[65]

The self-evident purpose behind granting authors the protection of an exclusive copyright is to provide them with an incentive to create original works. Economic benefit appears to be the only reason for affording authors such a constitutional right.[66] Moreover, a profitable return on one's musical work is certainly a strong incentive to create more compositions. This construction of the Copyright Clause was recognized by the United States Supreme Court in *Mazer v. Stein*:[67]

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.[68]

Therefore, assuming *arguendo* that non-economic benefit was a

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65. U.S. CONST. art. I, § 8, cl. 8.

66. *See* Michael F. Sitzer, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 392 n.36 (1981) (There is no legal recognition for a non-economic or moral right of an author flowing from the copyright clause.). *Id.*

Of course, a non-economic rationale is flawed because affording moral protection would not provide an adequate incentive to create artistic works. *See id.* at 392. The only possible way one could obtain a form of moral recognition would be if there is widespread distribution and an amount of respect emanating from such distribution. *Id.* Making one's name known is closely intertwined with protecting an economic interest because this end cannot be achieved without investing capital for publication to make the product available to the public. *Id.*

67. 347 U.S. 201 (1954).

68. *Id.* at 219; *see also* Manuelian, *supra* note 41, at 132 ("Under *Arnstein*, an action for infringement of a music copyright serves to compensate the plaintiff for the deprivation of potential returns that results from the defendant's copying."); Sitzer, *supra* note 66, at 392 ("[C]opyright protection does not exist for the gratification of the artist's ego; it exists for the gratification of the artist's pocketbook.").

consideration of the framers of the Constitution, the technological and economic advances that resulted from the industrial revolution may have changed the meaning of this malleable document. Furthermore, although non-economic benefit may have provided one with an incentive to create in the past, personal gain appears to be a more compelling incentive in modern times.

Despite the reasoning in *Mazer*, one might argue that the purpose of the Copyright Clause is not economic, but one of literal musical progress. Hence, the promotion of simple forms of music, such as popular music, might hinder the creation of new and more complicated styles envisioned by the framers of the Constitution. Musical genius and worldwide musical supremacy may have been the goal behind the clause instead of the pleasure of the ordinary lay listener.

However, further constitutional support for the lay listener test may be found in Congress' power to "provide for the . . . general Welfare of the United States."[69] The general welfare of the United States would be promoted by endorsing the progress of music tailored to the ears of the general population instead of a

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69. U.S. CONST. art. I, § 8, cl. 1. Reference to the "General Welfare" appears to specifically encompass only Congress' taxing, spending, and fiscal powers. Historically, the courts have held that this provision pertains only to article I, section 8, clause I. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 5-10, at 321-23 (2d ed. 1988). Tribe argues that:

> "As a matter of semantics, the power of Congress to 'provide for the . . . general Welfare' could be interpreted as unconnected to the power to 'lay and collect Taxes' and 'pay the Debts.' But if the general welfare clause were thus a separate grant of congressional power, the remainder of article I, § 8, would seem to be superfluous: any exercise of power, in whatever form, could be justified as being 'for the . . . general Welfare' if it could be justified at all."

Tribe, *supra*, at 321.

However, considering the nature and spirit of the Constitution, as well as the close proximity of the phrase "General Welfare" to the remaining enumerated congressional powers in article I, section 8, Congress, when enacting laws pursuant to the copyright clause, should look to the general welfare. In effect, all congressional legislation peripherally protects the general welfare, and more so here, where its mention appears at the beginning of article 8, followed by a list of congressional powers that appear in the conjunctive and which could conceivably refer to the first sentence containing this phrase.

small segment of society blessed with musically trained ears or superior listening abilities. The majority of American citizens are lay listeners and the promotion of popular music would certainly be within the scope of the constitutional interest in providing for the general[70] welfare.

Support for the idea that music is written for the overall majority of the population, who happen to be lay listeners, is found in *Gingg v. Twentieth Century-Fox Film Corp.*:[71]

> The great group of music lovers listen not for similarity in a bar or two; and, after all, music is written for that great multitude and not for the few who listen to music either to criticize, or with a critical ear to detect variations from the manuscript, or discords, or some other change which to his or her technical ear may seem a sin.[72]

While this justification for the lay listener test may be valid with respect to popular music, this is not so when other forms of music are involved. For instance, progressive jazz compositions are often written with other musicians in mind.[73] This seems to

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70. The word "general" is defined as "[r]elating to, concerned with, or applicable to the whole or every member of a class or category." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 548 (2d College ed. 1985). Although the word "general" does not encompass a preference for a majority of a class, this definition does not affect the proposition stated that lay listeners are the primary intended benefactors of constitutional interests.

First, the word "general" in a modern dictionary may not signify a majority. However, the meaning and usage of this word at the time the Constitution was drafted might have encompassed such a meaning. Second, assuming *arguendo* that the word "general" does not signify a majority, the interests of both lay listeners and musicians, as an entire class, may be furthered by creating an incentive to produce popular music. This mutual benefit would consist of pleasure for the lay listener, and economic reward for the musically trained segment of society resulting from the composition of simplistic songs for profit.

71. 56 F. Supp. 701 (S.D. Cal. 1944).

72. *Id.* at 710.

73. *Cf.* Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026 (2d Cir. 1989). The court held that Toyota's use of the mark "Lexus" on one of its new automobile models was not likely to dilute the distinctive quality of plaintiff's mark of "Lexis" for its computerized legal

be the only reasonable assumption to draw because this type of music is of such a complicated nature. Progressive jazz is so unsuitable to the lay listener's untrained ear that its enjoyment could not have been intended for an audience[74] who would not under-

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research service. *Id.* at 1030. One of the court's major considerations in this case was the sophistication of attorneys, who are the principal users of the Lexis legal research service. *Id.* at 1031. This decision is analogous to the law of musical copyright infringement because certain styles, such as progressive jazz, may be composed exclusively for the enjoyment of sophisticated consumers (i.e., musicians). A distinction between classes of listeners should be drawn when formulating an effective musical copyright infringement standard because other areas of intellectual property (i.e., unfair competition) have recognized the importance of such differences.

74. A recent Fourth Circuit case, Dawson v. Hinshaw Music Inc., 905 F.2d 731 (4th Cir.), *cert. denied*, 111 S. Ct. 511 (1990), departed substantially from the lay listener test by substituting a broader intended audience approach. *See generally* Sitzer, *supra* note 66, at 386 ("By definition [the 'audience test'] would seem to restrict the spectator reactions used in the substantial similarity determination to those of the works' audience."). *Id.*

The United States Supreme Court has left the issue of substantial similarity and the proper standard to be applied in musical copyright infringement cases for another day. The disputed ruling of the Fourth Circuit in *Dawson* is as follows:

> When conducting the second prong of the substantial similarity inquiry, a district court must consider the nature of the intended audience of the plaintiff's work. If, as will most often be the case, the lay public fairly represents the intended audience, the court should apply the lay observer formulation of the ordinary observer test.

Dawson, 905 F.2d at 736. However, this modification of *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947), does not affect the proposals of this Comment. If the *Dawson* test is applied to popular music, the intended audience would always be composed of lay listeners, and hence, the *Arnstein* standard would control.

The intended audience standard is an extremely broad test which can be applied across the board to all types of music. For example, the intended audience for a jazz composition is likely to be other jazz musicians or relatively experienced listeners. However, this test might be so broad as to become over-inclusive when an overlap of different audiences is capable of appreciating a particular song. Popular music gives us a perfect illustration of the deficiencies inherent in an intended audience approach; although the ordinary lay listener will undoubtedly be capable of comprehending such compositions, an experienced listener or musician might also enjoy listening to simple popular songs.

stand or appreciate its sometimes intentional discord and abnormal time changes.

The *Gingg* court, somewhat anticipating the ruling of *Arnstein* two years prior to that decision, stated that "in the last analysis [of improper appropriation, there must be] . . . a substantial appropriation that the general public will detect the same air in the new arrangement."[75] The reference here to the general public tacitly approves of and clears the path for the formulation of the lay listener standard. However, even though the holding in *Gingg* was not expressly applied to popular music, it is reasonable to assume that it was referring to this form of music because the litigation at hand involved the infringement of a popular song.[76]

An analogy to literary copyright infringement is helpful in justifying the lay listener test. The "ordinary observer or audience"[77] test, originally formulated in literary cases,[78] has been utilized in musical infringement cases.[79] In *Harold Lloyd Corp. v. Witwer*,[80] a literary copyright infringement action, the court expounded the rationale for the use of the ordinary observer test:

The argument that a musician would only need a lay ear to listen to popular music ignores the impossible task of such a listener forgetting his in-depth musical knowledge. The inner workings of a musician's mind when listening to a popular song is beyond the realm of precise definition and could include such observations as an appreciation for the composing musician's skill in producing a simple, yet contagious melody that appeals to the musically uneducated public.

For purposes of this Comment, it is sufficient to recognize that the intended audience approach in *Dawson* differs from the lay listener approach because: (1) The former encounters problems in ascertaining the correct audience where there is an overlap between experienced and inexperienced listeners; and (2) it is unclear whether "intent" is to be determined based upon the composer's subjective motive or through objective manifestations. On the other hand, this Comment addresses the stable principle that where popular music is involved, the lay listener standard should always apply.

75. *Gingg*, 56 F. Supp. at 710.

76. *Id.* at 702.

77. *See* MCA, Inc. v. Wilson, 425 F. Supp. 443, 454 (S.D.N.Y. 1976).

78. *See* Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933).

79. *See MCA*, 425 F. Supp. at 454 & n.20.

80. 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933).

> [T]he effect of the alleged infringing play upon the public, that is, upon the average reasonable man [must be ascertained]. If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate.[81]

This standard is identical to the lay listener test introduced in *Arnstein v. Porter*,[82] where the element of improper appropriation is to be determined more or less by public audience reaction instead of by expert dissection.[83]

In *Selle v. Gibb*,[84] the court generally supported the literature/music analogy when stating that the "concepts are borrowed from literary copyright analysis, [therefore,] they would seem equally applicable to an analysis of music."[85] Although it is true that music is a more limited and unique art form than literature,[86] both are written for the public and should be analyzed according to similar standards. The similarity is especially viable where mainstream literature and popular music are involved.[87]

Further support for the justification of the lay listener test can be found by comparing it to the purposes behind the ordinary reasonable person standard utilized in negligence actions. In *Harold*

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81. *Id.* at 18.

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

83. *Id.*; *see supra* text accompanying notes 18-19.

84. 741 F.2d 896 (7th Cir. 1984).

85. *Id.* at 904.

86. *See* Francis, *supra* note 22, at 498, stating that:

> Whereas the English language consists of a twenty-six letter alphabet, creating a language with hundreds of thousands of words, music is limited to combinations of chords taken from a scale of only thirteen notes. Musical range is further limited because the average singing voice is only one octave and most musical instruments are confined to three to five octaves. Consequently, there is a limit to musical expression.

Id. (footnotes omitted).

87. A lay listener standard applied to musical and literary works designed for special audiences (such as jazz, operas, etc.) may weaken the analogy, but those works produced for a general audience do not.

Lloyd Corp. v. Witwer,[88] the court alluded to reasonableness in determining audience reactions;[89] after all, if a public audience reaction test is used, common sense dictates that it must be a reasonable audience.

The underlying elements of "substantial similarity" in a copyright infringement action and "foreseeability" in a negligence action are both incapable of definition.[90] Hence, these elements must be applied on a case-by-case basis.[91] To accomplish this task, the element of "foreseeability" is applied by the utilization of the ordinary reasonable man standard.[92] One of the advantages of this standard is its ability to be applied to new factual situations.[93]

The flexible negligence standard is not one of mere judicial preference, rather, it is dictated by necessity since "foreseeability" is incapable of definition.[94] Similarly, since the copyright infringement element of "substantial similarity" is incapable of definition,[95] the existence of the lay listener standard is also due to necessity. This vital need is intensified by the notion that the "number of possible permutations of the musical notes of the scale"[96] could far exceed the number of different

88. 65 F.2d 1 (9th Cir.), *cert. dismissed*, 296 U.S. 669 (1933).

89. *Id.* at 18.

90. *See* Sitzer, *supra* note 66, at 385, noting that: "[O]ne writer has commented that 'substantial similarity' is no more capable of comprehensive definition than is 'foreseeability' in the law of negligence."). *Id.* (quoting Theodore Burock, *Copyright: Hollywood v. Substantial Similarity*, 32 OKLA. L. REV. 177, 177 (1979)).

91. *See, e.g.*, Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir.), *cert. denied sub nom.*, Williams v. Baxter, 484 U.S. 954 (1987) ("[N]o bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity.").

92. Sitzer, *supra* note 66, at 385-86.

93. *See generally* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 146 (4th ed. 1971).

94. *See supra* note 90.

95. *Id.*

96. Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) (the court held that defendant's musical composition did not infringe upon plaintiff's musical composition despite a virtually identical sequence of eight notes found in both works).

factual situations which may arise in negligence actions. Therefore, since musical copyright infringement actions necessitate a case-by-case analysis -- resulting from the nature of music itself -- utilization of the lay listener standard might entail greater justification than the use of the ordinary reasonable man standard in negligence actions.

B. The Abrogation of Expert Dissection in Popular Music

Various principles of the law of evidence dictate that expert testimony regarding the dissection of compositions in musical copyright infringement actions should not be admissible where popular songs are involved in the litigation. Federal Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."[97] Expert dissection of popular music would not "assist the trier of fact"[98] because this type of song is written for lay listeners and is generally within their musical understanding.[99]

In *Carew v. R.K.O. Radio Pictures, Inc.*,[100] Judge Leon R. Yankwich wisely declared that "[a]nyone can take apart a piece of music, and, as with a microscope, discern certain similarity in

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97. FED. R. EVID. 702.

98. *See id.*

99. What is meant by a lay listener's "musical understanding" is not that a particular song is aesthetically pleasing to a person of such capacity, but the ability of the listener, without any musical training whatsoever, to recognize similarities between two relatively simple popular songs without the assistance of expert opinion.

For example, a lay listener might enjoy listening to a complex jazz masterpiece with several melody lines being played at once, but when asked to detect similarities between two compositions of this nature, he or she would not possess the musical knowledge and understanding to do so. The inexperienced listener would be unable to follow one of the melody lines without becoming confused by the overlap of other melodies and sounds played by different instruments, while a competent musician could mentally complete such a task. For a definition of "melody," see *infra* note 126.

100. 43 F. Supp. 199 (S.D. Cal. 1942).

compositions of a popular nature, where the limit of originality is very narrow."[101] The advisory committee note to Rule 702 reveals that:

> "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[102]

After accepting the premise that the lay listener standard is justified, it follows as a natural result that a lay jury would be able to do without expert dissection because the focus of the standard is the effect of a song on an untrained ear.

One might contend that it seems absurd to allow experts to testify as to their opinion of what similarities an untrained ear would detect. This task in itself is impossible because a musically trained expert is forever detached from the lay listener as a result of her ear's increased awareness.[103] Although a musician adequately versed in musical theory is inclined to detect similarities that a lay person would not perceive, when popular music is involved the existence of such similarities becomes readily apparent as a result of the limitations of this musical style.[104]

The advisory committee note for Rule 701 also reveals that experts are to be utilized and viewed in a broad sense.[105] A liberal application of the rule would allow musicians to draw upon their

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101. *Id.* at 202.

102. FED. R. EVID. 702 advisory committee's note (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

103. *Accord* Manuelian, *supra* note 41, at 133 ("Whether an expert, highly educated in the field of music theory, analysis and history, can in fact hear again as a lay listener is speculative at best."). *Id.*

104. *See supra* text accompanying notes 49-53.

105. FED. R. EVID. 702 advisory committee's note, stating that:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specified' knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training or education.

Id.

knowledge of music to dissect compositions even if they have never done so before.[106] However, if the lay listener standard is the focus for determining substantial similarity, the rule suddenly becomes narrow in application. Instead of allowing any musician to testify, only musicians or other experts who have had experience in determining lay audience reactions to popular music would qualify as passing the test of relevance.

Assuming, *arguendo*, that the expert dissection of musical compositions does assist the trier of fact under Rule 702, it may nevertheless be subject to the rigors of Rule 403. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[107] Clearly, expert dissection would be relevant under the Federal Rules' extremely permissible definition.[108] However, the tendency of such testimony to confuse issues and mislead the jury suggests inadmissibility under Rule 403.[109]

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106. *See* Stratchborneo v. ARC Music Corp., 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973) (Although plaintiff's expert, Mr. Reuben Phillips, was the musical director of the Apollo Theater in New York City since 1952, played with various bands including Andy Kirk, Lionel Hampton, Louis Jordan and Count Basie, was a musical conductor with Eartha Kitt and Josephine Baker, played saxophone in the Roxy Theater house band, and currently writes original rock and roll arrangements for the house band at the Apollo Theater, there is no mention in the court's opinion regarding any prior experience in dissecting musical compositions for litigation or other purposes.). *Id.*

107. FED. R. EVID. 403.

108. Federal Rule of Evidence 401's definition of "Relevant Evidence" provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Expert dissection, at first glance, makes more probable the determination of the element of substantial similarity in a copyright infringement action. Therefore, such testimony does satisfy Congress' intention that a broad range of evidence be deemed relevant. As the advisory committee's note to Rule 401 points out, "[a]ny more stringent requirement is unworkable and unrealistic." FED. R. EVID. 401 advisory committee's note.

109. *See supra* text accompanying note 107.

First, the proper issue of whether a lay listener would find substantial similarity may be confused with whether the expert himself perceives substantial similarity. Second, the trier of fact may be misled by the analytic dissection of relatively simple popular songs; similarities might be revealed which do not exist for a lay listener. Hence, the standard itself would be defeated and the trier, due to the musician's expert status, might be misled into believing such false similarities exist.

One might contend that these erroneous similarities can be countered with cross-examination and the presentation of other expert witnesses. However, the abstract content which is likely to accompany such techniques would further mislead the trier of fact. In *Nichols v. Universal Pictures Corp.*,[110] Judge Learned Hand viewed expert testimony in infringement cases, "especially [upon] cross-examination, [as] greatly extend[ing] the trial and contribut[ing] nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion."[111]

In jury cases, the utilization of a limiting instruction would probably not clarify the true purpose of the expert testimony. Instead, the jury would wonder why they are not analyzing the songs themselves since the standard is the reaction of the lay listener. Therefore, an explanatory instruction might have the contrary effect of creating additional confusion, especially when the jury evaluates its role in the fact finding process.

To illustrate the possible confusion which could result by allowing expert testimony where relatively simple musical forms are concerned, the testimony of an expert witness in *MCA, Inc. v. Wilson*[112] is helpful:

> "Generally both compositions employ . . . a 12-bar structure which is used in repetition involving notes in the main that are 8 beats to the bar in certain areas of the melody and certain areas of the bass. There is a general harmonic similarity and certain specialized rhythmic patterns are also in common in the two

110. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).
111. *Id.* at 123.

compositions . . . ."[113]

This case involved two "boogie-woogie" songs,[114] a musical style similar to blues,[115] which is arguably one of the most simple forms of popular music.

Two basic characteristics of boogie-woogie music are the use of twelve-measure sections and an ostinato[116] rhythmic bass accompaniment.[117] Also, a major characteristic of the related blues form of music is a short phrased melody separated by pauses.[118] These common characteristics, which are naturally present in all boogie-woogie songs, are identified as unique indications of similarity by the expert in *Wilson*. The 12-bar structure, bass similarities, and breaks or pauses that are highlighted are likely to deceive the trier of fact. The trier might rely upon this protected catalogue of unfamiliar terminology as conclusive evidence of copyright infringement. One might argue that the deceptive practice encountered in *Wilson* could be resolved through cross-examination and/or the introduction of other experts to counter such testimony, thereby rendering the ultimate determination one for the trier of fact in evaluating the weight of such evidence.[119] Yet, blues and boogie-woogie songs are so inherently similar -- as a result of being elemental forms of popular music -- that there would be *de minimis* testimony of actual similarities after a proper exclusion of common similarities. An attack by an opposing party on such expert testimony, the majority of which is likely to contain references to common non-infringing similarities, would be superfluous and run counter to the interests of ju-

112. 425 F. Supp. 443 (S.D.N.Y. 1976).

113. *Id.* at 449 (quoting trial transcript 25, at 1.12-20).

114. *Id.* at 446.

115. "Boogie-woogie" is defined as "[a] style of piano playing popular in the 1930's, in which the pianist played a kind of music very similar to blues." AMMER, *supra* note 43, at 41.

116. "Ostinato" is defined as a "a bass part that is repeated over and over throughout a composition or section while the upper part (or parts) change." *Id.* at 250.

117. *Id.* at 41.

118. *Id.* at 40.

119. *See, e.g.*, Gaste v. Kaiserman, 863 F.2d 106, 108 (2d Cir. 1988) (criticism of expert analytical methods go to the weight of the evidence). *Id.*

dicial economy.[120]

The confusion that would occur whenever the expert dissection of popular songs is involved should lead to *per se* exclusion of this testimony as a matter of law in all such situations. The inherent conflict between such testimony and the lay listener standard can only be resolved by the action of an exclusionary rule. The power to exclude, despite relevance, is found in Federal Rule of Evidence 402, which states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules, prescribed by the Supreme Court pursuant to statutory authority."[121] The Rule 403 problems previously discussed and the Copyright Clause's economic rationale justifying the lay listener test[122] provide an adequate basis for congressional action excluding expert musical dissection in all popular music infringement cases.

C. Limited Use of Experts in Popular Music Infringement Actions

This Comment has argued that expert musical testimony should be completely eradicated with respect to the analytical dissection for popular musical compositions. However, there is a place for experts in musical copyright infringement actions. There are two possible areas where experts might be helpful: (1) a pre-trial or preliminary hearing for the purpose of classifying the style of the songs involved in the litigation; and (2) rendering an opinion as to what similarities a lay listener would perceive based upon concrete evidence other than dissection.

1. Theoretical Approaches By The Courts

Traditionally, federal courts have emphasized selected musical theory in determining the element of substantial similarity.

120. The general policy considerations of judicial economy may be inferred from the "waste of time" provision in Rule 403. *See* FED. R. EVID. 403; *supra* text accompanying note 107.

121. FED. R. EVID. 402.

122. *See supra* text accompanying notes 65-68.

However, it is not clear whether this emphasis arose from application on a case-by-case basis or whether certain components of music theory were intended to formulate a common law standard to govern future cases. Regardless of the rationale or intention comprising these early court decisions, such an analysis might assist in replenishing the void created by the elimination of expert dissection.

Certainly there appears to be no absolute uniformity as far as judicial music theory is concerned. In the Second Circuit, similarity of rhythm, chords and bass,[123] as well as the mode[124] and frequency of note sequences,[125] are emphasized. The Ninth Circuit has emphasized a host of factors, suggesting that either may yield a finding of substantial similarity -- "grouping of notes, similarity of bars, accent, harmony, or melody."[126] The musical variables that these courts utilized in their analyses are not tailored to the styles of the songs involved. This haphazard

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123. *See* Jones v. Supreme Music Corp., 101 F. Supp. 989, 992 (S.D.N.Y. 1951).

"Rhythm" is defined as: "The movement of musical tones with respect to time, that is, how fast they move (tempo) and the patterns of long and short notes as well as of accents. The concept of rhythm thus takes in 'meter' (the patterns of time values), 'beat' (accents), and 'tempo' (rate of speed)." AMMER, *supra* note 43, at 297. A "chord" is defined as "[a] group of three of more notes sounded at the same time. The different kinds of chord and the ways in which they are related to one another make up the study of 'harmony.'" *Id.* at 66. "Bass" is defined, in musical compositions, as the "lowest part, the upper part being called treble." *Id.* at 30.

124. *See* Hein v. Harris, 175 F. 875, 876 (S.D.N.Y.), *aff'd*, 183 F. 107 (2d Cir. 1910).

"Mode" is defined as a "[a] pattern of pitches within the octave that makes up the basic melodic material of a composition. A sequence of these tones in ascending order of pitch (from lowest pitch to highest) is called a 'scale.'" AMMER, *supra* note 43, at 204.

125. *See* Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940).

126. Hirsch v. Paramount Pictures, 17 F. Supp. 816, 818 (S.D. Cal. 1937).

A "bar" or "measure" is defined as "[a] group of musical beats (units used to measure musical time) that appears over and over throughout a composition." AMMER, *supra* note 43, at 196. "Melody" is defined as "[a] group of musical tones sounded one after another, which together make up a meaningful whole." AMMER, *supra* note 43, at 98. For a definition of "accent," and "harmony," see *supra* note 123.

application does further a pragmatic case-by-case approach. However, when popular music is involved, a well-defined set of musical variables should be recognized by the courts.[127] These variables should be isolated in order to avoid misleading the trier of fact when applying the lay listener standard.

2. Proposed Theoretical Standard to Assist in the Application of the Lay Listener Test

The proposed absence of expert dissection could be supplemented, as a matter of law, by factors specifically tailored to appropriate styles of popular music. To illustrate how such a theoretical standard would be formulated, the blues, a relatively austere form of popular music, would be an excellent starting point.

The first logical step is to identify the common characteristics that classify a particular song as belonging to a certain musical style. Some common characteristics of all blues songs are: (1) the 12 measure form;[128] (2) the presence of blue notes;[129] (3) short-phrased melodies separated by pauses;[130] and (4) the I-IV-V harmonic chord progression.[131]

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127. *See* Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282, 283 (8th Cir. 1939) ("The chorus of a musical composition may constitute a material and substantial part of the work and it is frequently the very part that makes it popular and valuable.").

A chorus of a song is not a proper musical variable because this amorphous term describes a section of a particular song which may contain other numerous variables. Nevertheless, this early judicial attempt to isolate the chorus of a popular song as a musical variable is a step in the right direction.

128. *See* AMMER, *supra* note 43, at 40.

129. "Blue notes" are "half-flatted notes (somewhere between natural and flat) on the third, fifth, or seventh degrees of the scale (in the scale of C major, E, G, or B). The use of these notes gives an effect of wavering between the major and minor modes." *Id.*; *see supra* note 123 for the definition of "mode."

130. *See* AMMER, *supra* note 43, at 40.

131. *See* BRITANNICA, *supra* note 42, at 101 ("I, IV, and V refer respectively to chords on the first or tonic note of the scale; the fourth, or subdominant; and the fifth, or dominant [utilized within the 12 measure blues form as] Phrase 1 (measures 1-4) I-I-I-I; Phrase 2 (measures 5-8) IV-IV-I-I; Phrase 3 (measures 9-12) V-V-I-I.").

The second step is to isolate the common characteristics which are essential to the style of the song and which leave little or no room for originality. The blues meter, namely the 12 measure form, combined with the harmonic I-IV-V progression, is the basis for all blues songs and is essential in defining the rhythm and feel which is so enjoyable to the listener.[132] However, the phrasing of the melody and the notes utilized are not written in stone. There is a tremendous amount of creative space within these variables. Hence, originality amongst blues songs is found in the melody and the lyrics, which often follow along with or supplement the melody.

The third step is to formulate a simple rule to guide the trier of fact in applying the lay listener standard without the use of experts. A sample rule would state:

> In order to find substantial similarity between two blues style songs, the following musical variables may not be considered:
>
> (1) Harmonic chord structure;
> (2) The number of measures in the songs.
>
> Instead, the emphasis must be placed upon:
>
> (1) Melody; and
> (2) Lyrics.

Of course, simple definitions of the various musical terms mentioned would accompany this rule. In general, the isolation of melody[133] and lyrics would appear to be the controlling variables in most popular song styles. In *Strachborneo v. ARC Music Corp.*,[134] the court alluded to this concept when stating: "[I]n determining whether an accused, short popular song consisting of words and music . . . replicates the essence of a complaining work, initial focus should be placed on music and lyrics taken

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132. *Id.*

133. *See, e.g.*, Paul W. Orth, *The Use of Expert Witnesses In Musical Infringement Cases*, 16 U. PITT. L. REV. 232, 234 (1955) ("Except in rare instances, it is in the melody -- the arrangement of notes and tones -- that originality must be found."). *Id.*

134. 357 F. Supp. 1393 (S.D.N.Y. 1973).

together, as necessary parts of the composition."[135]

a. Complicated Music

The scheme used to draw up the proposed rule for blues may also be employed to formulate rules for other styles of popular music. However, this uniform method should be limited to popular music and cannot be feasibly applied to complicated musical compositions.

This Comment argues for the absence of expert dissection where popular music is involved; the proposed rules are intended to provide a more efficient means to compensate for the absence of such testimony. However, expert dissection might prove useful when the songs involved in the litigation are of a complicated or serious nature. Here, the lay listener standard would not apply because the intended and actual audience for such music is composed of sophisticated listeners and musicians. The common characteristics of musical styles such as progressive jazz are based upon complicated time changes, rhythms, atonal melodies and discord. The presence of multitudinous and intricate musical strata in such compositions allow only sophisticated listeners and experts to detect substantial similarity.

b. Pre-Trial or Preliminary Hearings

Experts can play a vital role in popular musical infringement actions by participating in preliminary or pre-trial hearings where the musical styles of the disputed songs are initially classified. Before the proposed theoretical standards described earlier can be applied, the styles of the litigated songs must be determined. Not only must popular and unpopular songs be distinguished, but different styles of popular music must also be identified. A preliminary hearing would serve this purpose and would narrow the issues of the case by designating the applicable musical rules.

In a preliminary musical style classification hearing, expert dissection would be utilized in a different manner. The traditional

135. *Id.* at 1405.

reference to expert dissection includes the analytical breakdown of each song and comparison between the two. However, in the pre-trial hearing, each song would be separately analyzed in order to detect characteristics which it has in common with certain musical styles. This method is less complicated than the traditional use of expert dissection. Yet, it would be a wise choice to leave the ultimate determination of the musical styles of the litigated songs to a judge.[136]

One might argue that there is no bright line separating one musical style from another and that the potential for overlap between styles is tremendous. However, the interests of judicial economy dictate that this ambiguous area be resolved at the outset of the litigation rather than by putting the issue aside and risking confusion during the trial.

There is a chance that a difference of opinion might result on what style of popular music a particular song may be. But this concern is minimal because regardless of the popular song style, the lay listener standard would still apply, and the trier of fact

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136. *See, e.g.*, Orth, *supra* note 133, at 236 ("[J]udges should be more perceptive than laymen."). *Id.*

In Hein v. Harris, 175 F. 875 (S.D.N.Y. 1910), Judge Learned Hand deferred to the opinion of state supreme court Judge Henry Bischoff in rendering his decision:

> In directing the writ to go, I am much fortified in the opinion of Mr. Justice Bischoff of the Supreme Court of the state, whose qualifications as a musician are so well known, and whose judgment is so excellent, not only upon this peculiar matter, but in general upon anything which concerns the administration of justice, that it gives me much assurance of the correctness of my own opinion when I find myself in accord with him.

Id. at 877. Clearly, it would be absurd to require every judge that sits through the proposed pre-trial hearing be a musician. However, "it is fair to suppose that only in rare instances does the man on the bench represent the average listener of popular music." Orth, *supra* note 133, at 250. Therefore, one might argue that the issues determined in the pre-trial hearing should be considered preliminary questions of fact, jury involvement thus being consistent with the lay listener standard. However, since the suggested musical rules that are to be applied in the preliminary hearing are subject to a determination as a matter of law, a judge and not a jury would be appropriate. It is irrelevant whether or not the judge is an average listener because the lay listener test applies only to questions of fact during the actual trial.

can determine substantial similarity without such classifications during the trial. This problem would only affect the application of the proposed theoretical rules, a device which could be ignored if a difficult situation arises.

If there is a strong dispute as to what style of popular song a composition might be, the distinction is probably infinitesimal. All styles of popular music have one major element in common, namely simplicity.[137] The small spectrum on which all popular song is located is due to its tendency to be tailored for the average lay listener.

True, a judge might err in making a preliminary determination that a particular popular song is of the blues genre as opposed to a strongly argued position that the song should be classified as a rock song. Nevertheless, the numerous musical elements that both styles have in common would mitigate the repercussions of this finding because the error would be quite slight indeed. Therefore, such inconsequential or harmless mistakes do not justify the abandonment of the pre-trial approach.

It appears highly unlikely that a difference of opinion would result on whether a particular song is a popular or a serious composition. The complex qualities which separate both categories leave little room for a gray area.[138] However, if experts disagree on such matters during a preliminary hearing, a judge may make a determination that one song is popular and the other serious or unpopular. When this situation arises, it might be practicable to allow traditional expert dissection during the trial.

It is logical to abandon the lay listener test and allow such expert testimony where either or both of the litigated compositions are highly complicated or technical. Certainly, a finding of substantial similarity in this situation would be beyond a lay listener's comprehension and capabilities and would warrant expert dissection.

Another obstacle that may arise concerns the definition of popular music. Since what is popular changes with the musical

137. *See supra* text accompanying notes 49-53.

138. *Id.*

taste of the times,[139] one might argue that the definition of popular music itself is so amorphous that experts would have difficulty applying it in the proposed preliminary hearing. However, since the existence of general public acceptance and a resulting economic manifestation is included within the definition,[140] whether a particular song has met such requirements can be accomplished through other evidence, i.e., record sales, sheet music sales, and radio airplay, to name a few.

Moreover, for purposes of classifying styles of popular music that may have been popular in the past but are now outdated or not in vogue, a liberal interpretation should be applied. It would be consistent with the economic foundations of the Copyright Clause[141] and the elementary character of a popular song regardless of when it was popular, to construe the definition in a broad fashion.

c. Scope of Expert Testimony Other than Musical Dissection

Experts may be employed to facilitate the lay listener test during trial through testimony other than dissection. The scope of such testimony, however, must be limited to substantial similarities which an ordinary listener would perceive. Such an approach appears to be consistent with the mandate of *Arnstein v. Porter*,[142] which permits the "expert testimony of musicians . . . [to] be utilized only to assist in determining the reactions of lay auditors."[143]

If the expert happens to be a musician, she must rely on some sort of extrinsic evidence when giving her opinion. This reliance amply reduces the danger that the expert's sophisticated musical opinion would become enmeshed with her analysis of what a lay

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139. *See* AMMER, *supra* note 43, at 272.

140. *Id.*

141. U.S. Const. art I, § 8, cl. 8; *see* Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also supra* text accompanying note 65.

142. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

143. *Id.* at 473; *but cf.* Manuelian, *supra* note 41, at 133 ("It is . . . questionable whether the witness' qualifications as a music expert establish an expertise in the aural perceptions of the lay hearer."). *Id.*

listener perceives. Of course, the extrinsic evidence cannot be the sheet music of the songs or any other method which would tend to dilute the very narrow opinion which must be given.

One example of permissible expert testimony is that given by a professional survey conductor or market analyst. An explanation of the data in a survey of the lay community -- as to whether there is similarity between the litigated songs -- would greatly assist the trier of fact. "Survey evidence is treated as an exception to the hearsay rule, and the courts have approved expert opinions as founded upon facts or data upon which experts may reasonably rely when based, *inter alia*, on surveys of consumers."[144]

Not only should the trier listen to the songs and make her own determination, but the opinions of other lay listeners would greatly enhance the reliability and truth of the fact finding process. In applying the lay listener test, a reliance on survey evidence and explanatory expert testimony would be a considerable improvement from the confusing and misleading process of dissection.

CONCLUSION

It must be realized that the courts face an arduous task in musical copyright infringement litigation. The abstract analysis and potential for confusion in these cases will exist despite the absence of expert dissection. Yet, the possibility for courtroom chaos caused by a theoretical battle amongst musical experts will result in many inequitable results. Therefore, the elimination of expert dissection would be a considerable improvement to the

144. 18 AM. JUR. 2D *Copyright and Literary Property* § 213 (1985) ("Although survey evidence on the question of substantial similarity may be admissible, some courts refuse to admit such evidence on the ground that surveys are not needed to determine how ordinary, reasonable persons view similarity."). *Id.* However, this qualification does not affect the suggested use of survey evidence argued for in this Comment. The refusal of certain courts to admit survey evidence as unnecessary is premised on the use of expert dissection, and this position has been deemed invalid herein, as far as popular music is concerned.

judicial process. The law should recognize the simplicity which inheres in popular song and capitalize on this notion to preclude it from being transformed into a complex web by over-zealous musicians.

The proposed recommendations in this Comment to compensate for the proposed abrogation of expert dissection are intended to avoid misleading the trier of fact. This suggested means must be applied by the courts in order to determine whether this end can be accomplished. Nevertheless, the goal of eradicating confusion, the end, may be accomplished simply by the absence of expert dissection. Hence, the implementation of the suggested theoretical standard is merely an additional tool which does not weaken the strength of the argument calling for the extinction of expert dissection.

The lay listener standard has constitutional foundations and is the appropriate standard for popular music. Consequently, the judicial system should place faith in the ear of the lay listener. Where popular songs are involved, it would probably suffice to allow the trier of fact to listen to both songs to determine substantial similarity. This is a simple approach to a simple form of music, which can lead to expeditious and equitable results.

Matthew W. Daus