

# The University of New Hampshire Law Review

---

Volume 7  
Number 1 *Pierce Law Review*

Article 7

---

December 2008

## The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation

Austin Padgett

*Franklin Pierce Law Center, Concord, NH*

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)

 Part of the [Communication Technology and New Media Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Music Commons](#)

---

### Repository Citation

Austin Padgett, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 *Pierce L. Rev.* 125 (2008), available at [http://scholars.unh.edu/unh\\_lr/vol7/iss1/7](http://scholars.unh.edu/unh_lr/vol7/iss1/7)

This Notes is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [ellen.phillips@law.unh.edu](mailto:ellen.phillips@law.unh.edu).

# The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation

AUSTIN PADGETT\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	125
II. HISTORICAL DEVELOPMENT .....	126
A. <i>Creating the “Modern” Test for Infringement</i> .....	127
B. <i>The Arnstein Test</i> .....	129
C. <i>The Krofft Test</i> .....	131
D. <i>The Dawson Variation</i> .....	132
III. THE DIFFICULTIES OF MUSIC .....	133
A. <i>The Alleged Problems with the Tests</i> .....	134
B. <i>Proposed Solutions</i> .....	136
1. <i>Procedural Solutions</i> .....	137
2. <i>Substantive Solutions</i> .....	138
IV. ANALYSIS.....	146
V. CONCLUSION .....	148

## I. INTRODUCTION

Some things cannot be described. This is the theory that recent literary criticism has placed as its cornerstone. Philosopher-critic Roland Barthes identified this trend in his *Mythologies*, stating that critics often “suddenly decide that the true subject of criticism is ineffable, and criticism, as a consequence, unnecessary.”<sup>1</sup> Unfortunately, this view has become singular within the legal academy whenever an author discusses music copyright infringement analysis. It seems that scholars fear the thought of trusting a jury with such an “ineffable” subject as music and must propose alternatives, such as expert testimony, specialized courts, or mechanical analysis,

---

\* J.D. Candidate, Franklin Pierce Law Center (2009); M.M., College-Conservatory of Music, University of Cincinnati (2007); B.M., Samford University (2004). This note was the winning entry in the second annual Pierce Law Student Symposium writing competition.

1. ROLAND BARTHES, *MYTHOLOGIES* 34 (Annette Lavers trans., 1972).

that will diminish the ability of a jury of lay ears to determine what is or is not substantially similar.<sup>2</sup>

This article proposes that the simplest and best approach to music copyright infringement litigation is to accept the jury's determination of substantial similarity in its most classic form. Part II of this paper will explore the development of the current standards that the federal courts use in music copyright infringement cases. Part III will survey scholarly reactions to these standards, detailing and categorizing the variety of proposals put forth by different authors. Part IV will describe the shortcomings and unnecessary complexity of these proposals, advocating for the simplest and original approach put forth by the courts in Part II.

## II. HISTORICAL DEVELOPMENT

Article I, Section 8 of the U.S. Constitution gives Congress the power to "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."<sup>3</sup> Congress utilizes this power to grant rights and protection to owners of "original works of authorship fixed in any tangible medium of expression."<sup>4</sup>

The Copyright Act of 1976 grants several rights to a copyright holder: the right of reproduction, the right to prepare derivative works, the right to distribution, and the rights to perform, display, or transmit a work.<sup>5</sup> Therefore, a defendant may infringe any of these rights when she performs any of these actions and has "done so without either the copyright owner's authorization or the benefit of one of the limitations contained in §§ 107 through 122."<sup>6</sup>

In 1991's *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court announced the two-prong test for a prima facie copyright infringement action.<sup>7</sup> First, the plaintiff must prove "ownership of a valid copyright" and, second, "copying of constituent elements that are original."<sup>8</sup> In order to meet the second prong of the *Feist* standard, the plaintiff

---

2. Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM. J.L. & ARTS 109, 109–10 (1995); Yvette Joy Liebesman, *Using Innovative Technologies to Analyze for Similarity between Musical Works in Copyright Infringement Disputes*, 35 AIPLA Q.J. 331, 334–35 (2007).

3. U.S. CONST. art. I, § 8, cl. 8.

4. 17 U.S.C. § 102 (2006).

5. 17 U.S.C. § 106 (2006).

6. CRAIG JOYCE ET AL., COPYRIGHT LAW 575 (7th ed. 2006).

7. 499 U.S. 340, 361 (1991).

8. *Id.*

must prove two separate elements. The plaintiff must first prove that the defendant copied her work—that is, that the defendant “used the plaintiff’s material as a model, template, or even inspiration.”<sup>9</sup> The plaintiff must also demonstrate that the copying is “actionable” because the defendant copied the *protected* material.<sup>10</sup>

A plaintiff may use several methods to prove that the defendant copied the work. The most effective, and the most atypical, course is to present direct evidence of the copying.<sup>11</sup> Another option requires the plaintiff to prove that the defendant had access to the copyrighted work and that there is “probative similarity” between the two works that would indicate copying of the protected work.<sup>12</sup> However, the plaintiff may forego the access requirement if the trier of fact finds that the defendant’s work is “strikingly similar” (a greater amount of similarity than “probative similarity”) to the copyrighted work.<sup>13</sup>

In order to prove that the defendant’s copying is “actionable,” the plaintiff must demonstrate that there is “substantial similarity” between the defendant’s work and the *protected* portions of the copyrighted work.<sup>14</sup> “The determination of the extent of similarity that will constitute a *substantial*, hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.”<sup>15</sup> As discussed below, the difficulty of determining substantial similarity has led to many proposed models in academic writing, and many commentators argue that the judicial development of the substantial similarity analyses has led to continued uncertainty and poor frameworks for litigation.<sup>16</sup>

#### A. Creating the “Modern” Test for Infringement

The first case to formulate a test for actionable infringement was *Emerson v. Davies*,<sup>17</sup> where the court held that the plaintiff must prove that “resemblances in those parts and pages are so close, so full, so uniform and striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it.”<sup>18</sup> The question remained as to

---

9. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (2008).

10. *Id.*

11. *Lisa Frank, Inc. v. Impact Int’l, Inc.*, 799 F. Supp. 980, 998 (D. Ariz. 1992).

12. Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189–90 (1990).

13. *See Repp v. Webber*, 132 F.3d 882, 891 (2d Cir. 1997).

14. *Dan River, Inc. v. Sanders Sale Enters., Inc.*, 97 F. Supp. 2d 426, 429 (S.D.N.Y. 2000).

15. 4 NIMMER, *supra* note 9, § 13.03.

16. *See infra* Part II.

17. 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

18. *Id.* at 622.

whom would be led to this conclusion, which would first be answered by the “audience test.”

The first announcement of the “audience test” came in 1868’s *Daly v. Palmer*,<sup>19</sup> where the author of the play *Under the Gaslight* alleged that theatre owners copied a scene from his play and placed it in their own work, *After Dark*.<sup>20</sup> The *Daly* court determined that infringement occurs when the two works are “recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.”<sup>21</sup> Later courts used the *Daly* formulation, particularly the word “spectator,” to create an ordinary observer standard.<sup>22</sup> For instance, the court in *Harold Lloyd Corp. v. Witwer*<sup>23</sup> clearly proposed that the lay observer should measure whether there is substantial similarity between the two works in question:

The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. 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.<sup>24</sup>

Though this model continued to serve as a foundation or starting point, the standard began to change as time passed and other jurisdictions created their own formulations.

Judge Learned Hand waded through the difficulty of how to create a test for substantial similarity when he authored the *Nichols v. Universal Pictures Corp.* opinion.<sup>25</sup> In that case, Judge Hand examined two plays that, while maintaining distinct elements, involved forbidden romance be-

---

19. 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

20. *Id.* at 1133–34. The scene involved a character being bound to railroad tracks and saved at the last possible moment. *Id.* This suspenseful device, or variations of it, has often been used in movies and television programming. See generally LYNNE KIRBY, *PARALLEL TRACKS: THE RAILROAD AND SILENT CINEMA* (1997).

21. *Daly*, 6 F. Cas. at 1138.

22. 4 NIMMER, *supra* note 9, § 13.03[E][2].

23. 65 F.2d 1 (9th Cir. 1933).

24. *Id.* at 18.

25. 45 F.2d 119, 121 (2d Cir. 1930). Thirty years after *Nichols*, however, Judge Hand stated that “[o]bviously, no principle can be stated as to when an imitator has gone beyond the ‘idea,’ and has borrowed its ‘expression.’” *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

tween Irish and Jewish lovers with the requisite family feuding.<sup>26</sup> When attempting to frame the elements for similarity, he wrote:

Upon any work and especially upon a play a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about and at times consist of only its title, but there is a point in this series of abstractions where they are no longer protected since otherwise the playwright could prevent the use of his ideas to which apart from their expression his property is never extended.<sup>27</sup>

This doctrine mandates that finders of fact must separate the protected elements of expression from the unprotected idea that the work expresses. Judge Hand also determined that the question of similarity was to be determined in the fashion of a “spectator” and without expert testimony, which he thought “cumbers the case and tends to confusion.”<sup>28</sup> Although this model was later criticized within its own circuit and was never universally adopted, it has become the cornerstone of the modern infringement test formations.<sup>29</sup>

#### B. *The Arnstein Test*

A songwriter brought the first case that would reshape and craft the “audience test.” Ira B. Arnstein was a composer in the Tin Pan Alley era who “believed plagiarists had deprived him of the rewards of his talent by infringing upon the copyrights to his compositions to their personal aggrandizement.”<sup>30</sup> Arnstein often pursued his infringement actions *pro se* and, as the *New York Times* often reported, played music before the court.<sup>31</sup> Indeed, his hostility towards defendants led to the papers printing his courtroom spats. After playing music before the court, the defending attorney argued that Arnstein had manipulated his playing to magnify the existing similarities:

“Is it not my privilege,” the plaintiff asked, “to present my case before I am cross-examined?” Judge Conger silenced the attorney

---

26. *Nichols*, 45 F.2d at 120.

27. *Id.* at 121.

28. *Id.* at 123.

29. *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 537 (2d Cir. 1938) (“It is naturally difficult to compare literary works by using the terminology of metaphysics, and the rule thus provided does not seem to have been used since its suggestion.”).

30. B. MacPaul Stanfield, Note, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 *DRAKE L. REV.* 489, 489 (2001).

31. *Song Writer Plays Piano For Court*, *N.Y. TIMES*, Mar. 7, 1939, at 25.

and assured Arnstein that he was entitled to his day in court. “How can I talk to that man?” the plaintiff asked when he was interrupted again. “He is stupid. Knows nothing of music.”<sup>32</sup>

Arnstein’s suits (and he brought several) involved and angered many of his contemporary composers. The *Times* reported that “habitués of Tin Pan Alley came in swarms yesterday to Federal court and exchanged charges and angry glances during the last day of the trial of Ira B. Arnstein’s plagiarism suit against the E. B. Marks Music Corporation.”<sup>33</sup> It would be his suit against Cole Porter, however, that would shape the substantial similarity test.<sup>34</sup>

In *Arnstein v. Porter*, the court divided the “copying” analysis into the two-part test described above.<sup>35</sup> The trier of fact must determine: “(a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.”<sup>36</sup> Besides the critical standard, the *Arnstein* court separates the analyses for evidentiary allowances. To prove the copying prong, *Arnstein*, comparing the works in their entirety, allows for expert testimony and dissection within some limitations.<sup>37</sup> The second analysis, however, forbids these types of admissions of evidence. Here, the *Arnstein* court determined that the critical inquiry 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.”<sup>38</sup> This is to be performed with the limited aid of expert testimony or dissection:

At the trial, plaintiff may play, or cause to be played, the pieces in such manner that they may seem to a jury to be inexcusably alike, in terms of the way in which lay listeners of such music would be likely to react. . . . Expert testimony . . . should be utilized only to assist in determining the reactions of lay auditors. The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff’s or defendant’s works are utterly immaterial on the issue of misappropriation.<sup>39</sup>

---

32. *Id.*

33. *Music Suit Ends As Experts Scowl*, N.Y. TIMES, June 7, 1935, at 25.

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

35. *Id.*

36. *Id.*

37. *See id.* at 468.

38. *Id.* at 473.

39. *Id.*

However, courts and commentators have found that this prohibition does not suit a lay audience standard where non-literal copying is alleged and, therefore, allow for more generous expert testimony in such circumstances.<sup>40</sup> These distinct analyses also warrant particular attention to the trier of fact for each. The *Arnstein* court determined that the second analysis—improper appropriation—is “an issue of fact which a jury is peculiarly fitted to determine.”<sup>41</sup> As discussed below, this distinction also yields a wealth of criticism from scholars, but the *Arnstein* test is not the only recalculation of the “audience test.”

### C. *The Krofft Test*

In the 1960s and 70s, Sid & Marty Krofft Productions ran the H. R. Pufnstuf show on Saturday morning television, which, historically, draws children audiences.<sup>42</sup> The show had a “generally psychedelic atmosphere,” and “people have joked that ‘H. R.’ stood for hand rolled.”<sup>43</sup> The *New York Times* described the show as “the most ambitious of the Saturday morning event” but described and criticized the show as “[employing] live actors and animation in which trees and castles talk” and “[seeming] a bit confusing—the fusion of reality and fantasy sometimes results in not one element or the other dominating.”<sup>44</sup> After McDonald’s unveiled McDonaldland, its own fantasy world where Ronald McDonald lives, thieves steal hamburgers, and volcanoes erupt with milkshake, Krofft Productions sued for copyright infringement.<sup>45</sup>

The court in *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, like the *Arnstein* court, creates two categories for its analysis, which is formulated around Judge Learned Hand’s dichotomy between ideas and expressions. First, the court applies an “extrinsic test,” in which the court examines “specific criteria which can be listed and analyzed” to determine whether the “general ideas” of the works are substantially similar.<sup>46</sup> The court also allows for “analytic dissection and expert testimony” and determines that “this question may often be decided as a matter of law.”<sup>47</sup> After the court scrutinizes the ideas, it moves on to the expression

---

40. 4 NIMMER, *supra* note 9, § 13[E][3][a].

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

42. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1160 (9th Cir. 1977).

43. TIMOTHY BURKE & KEVIN BURKE, *SATURDAY MORNING FEVER* 89, 130 (1999).

44. *TV: More of the Same*, N.Y. TIMES, Sept. 15, 1969, at 95.

45. *McDonald’s*, 562 F.2d at 1161.

46. *Id.* at 1164; 4 NIMMER, *supra* note 9, § 13[E][3][b].

47. *McDonald’s*, 562 F.2d at 1164.



and applies the “intrinsic test.”<sup>48</sup> This test “[depends] on the response of the ordinary reasonable person” and asks “whether there is substantial similarity in the expressions of the ideas so as to constitute infringement.”<sup>49</sup> The court, for the intrinsic test, prohibits “analytic dissection and expert testimony.”<sup>50</sup> Though the *Arnstein* and *Krofft* courts remained faithful to the ordinary or lay observer standard, one jurisdiction has abandoned, or reformulated, that standard.

#### D. *The Dawson Variation*

In *Dawson v. Hinshaw Music, Inc.*, the famed spiritual arranger William Dawson sued Hinshaw Music, Inc. and composer Gilbert Martin for infringement of his arrangement of “Ezekiel Saw De Wheel.”<sup>51</sup> The *Dawson* court examined the *Arnstein* opinion and found that the “lay listener” standard was for the protection of a work where the general public was the targeted audience—a popular work.<sup>52</sup> To the *Dawson* court, this suggests that the jury should consist of a sample of the market that creates the economic incentive for the creation of the work.<sup>53</sup> Therefore, a lay jury will be proper “only where the lay public fairly represents the works’ intended audience.”<sup>54</sup> Otherwise, “the ultimate comparison of the works at issue [should] be oriented towards the works’ intended audience.”<sup>55</sup> The court then attempted to apply its own test, determining possible intended audiences for the work:

It may be that a popular recording of a love ditty pitched at the broadest of audiences is marketed to the general public far more so than is a spiritual arrangement. It is quite possible that spiritual arrangements are purchased primarily by choral directors who possess specialized expertise relevant to their selection of one arrangement instead of another. Whereas a lay person’s reaction may be an accurate indicator of the extent to which those in the market for a popular recording will perceive another recording to be substantially similar, a lay person’s reaction might not be an ac-

---

48. *Id.*

49. *Id.*

50. *Id.*

51. 905 F.2d 731, 732 (4th Cir. 1990).

52. *Id.* at 734.

53. *Id.*

54. *Id.* at 733.

55. *Id.* at 734.

curate indicator of how expert choral directors would compare two spiritual arrangements.<sup>56</sup>

Though these formulations are variations on the ordinary or lay listener standards, scholars have proposed a variety of ways to limit or remove the jury's role in this infringement analysis when it is applied to cases that involve music.

### III. THE DIFFICULTIES OF MUSIC

Generally, the authors who have written about substantial similarity in music copyright infringement cases agree that music is unique among the arts. However "unique" an author might find music, authors rarely attempt to explain the complexities, relying instead on the social cliché that music is difficult, and, when they do explain, they merely list the common elements listed in the first chapter of any music appreciation textbook:

[T]he *Krofft* test for similarity of ideas, as drafted, applies to all forms of expression, yet ignores the unique aspects of certain types of expression. Music is particularly ill-suited to the analysis designed by Krofft; due to music's inherently distinctive features which dictate a different inquiry to determine substantial similarity.<sup>57</sup>

As simplistic as any given popular tune might sound, it, like all pieces of music, contains elements of "melody, harmony, . . . rhythm(.) . . . (t)imbre (tonal quality), tone, pitch, tempo, spatial organization, consonance, dissonance, phrasing, accents, note choice, combinations, interplay of instruments, . . . bass lines, and the new technological sound."<sup>58</sup>

A more convincing argument would be to document music critics' own battles with how to describe music for their readers. If a critic cannot properly explain, in *precise* language, what happens in a musical composition, the ability of jurors to comprehend and have a dialogue about what they perceive should be even more improbable. Still, these authors fail to explain how music is different from a movie or a play, which, in their own right, have "inherently distinctive features" and "elements" that comprise the unit. However, scholars find that music's complexity lies beyond any human understanding, which makes the result of an infringement suit un-

---

56. *Id.* at 737.

57. Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 278 (1993).

58. Kim, *supra* note 2, at 124–25 (quoting Debra Presti Brent, *The Successful Music Copyright Infringement Suit: The Impossible Dream*, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 248–49 (1990)).

predictable.<sup>59</sup> This unpredictability, scholars argue, leads to the “unnecessary stifling of creativity.”<sup>60</sup>

Another trope within the literature on this topic is that the trier of fact is not to be trusted with the interpretation of art. The most straightforward incantation of this theme is the following:

[C]ourts should consider using new tools to help determine the level of similarity between two musical works in infringement suits. With regard to musical works, the current method relies too heavily on each judge’s subjective value judgment or the jury acting as a proxy for the intended audience of the music.<sup>61</sup>

Some commentators even fear that a juror’s tone-deafness could destroy a party’s case.<sup>62</sup> Therefore, the authors propose a variety of means, which are explored below, that will limit or remove the subjective insights of the trier of fact. Often, however, the authors support their proposals by alleging that the judicial formulations are deficient.

#### A. *The Alleged Problems with the Tests*

The authors attack the substantial similarity tests, described in Part II of this article, in three ways: by alleging that the test is too vague, by alleging the test is confusing, and alleging that it creates an expert testimony battle. The most simplistic criticism of the tests is that they are too vague. For instance, Stephanie Jones, in her analysis of the *Krofft* formulation, argues that the test fails because “the courts have offered no sound guidelines for defining or interpreting musical ideas in copyright actions.”<sup>63</sup> While Jones finds it “necessary” to create a “consistent definition of musical idea,” however, she fails to do so beyond the broadest generalities:

[A] musical idea is a musical thought which implies a self-contained entity; however, it generally represents only a portion or fragment of a musical work which usually contains multiple ideas. A musical idea may be: 1) a single line of pitch or rhythm (melodic); 2) a vertical group of pitches (harmonic or chordal); 3) a series

---

59. Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 181–82 (1994).

60. *Id.* at 182.

61. Liebesman, *supra* note 2, at 334–35.

62. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 436 (2004).

63. Jones, *supra* note 57, at 295.

of time values without pitch (rhythmic); or 4) a combination of pitch, rhythm and chord(s).<sup>64</sup>

While her definition may remain consistent, it fails to offer any clearer picture of what a musical idea is. Furthermore, it reaffirms Judge Learned Hand's requirement that each case be evaluated on its own merits—on an *ad hoc* basis.<sup>65</sup>

Stephanie Jones also criticizes the *Arnstein/Krofft* framework as inherently confusing, arguing that the two-tiered analysis serves to confuse juries.<sup>66</sup> Both portions of each test require that the trier of fact analyze the similarity between the music. However, the results of finding similarity are different for each stage.<sup>67</sup> In the *Arnstein* analysis, for example, a finding of similarity proves only that the defendant copied the work, but a finding of similarity in the second part serves to prove that the copying is actionable.<sup>68</sup> Jones argues that the trier of fact's finding of similarity in the first prong might bleed over into the analysis under the second prong: “[a]s a result, the test is confusing at best and at worst can distort and skew the outcome of music copyright actions.”<sup>69</sup> However, Jones fails to address the fact that, under the *Arnstein* standard, the second prong (actionability analysis) is a question of fact while the first prong (copying) may be an issue of law.<sup>70</sup> The fact that the judge and jury could separately evaluate the two prongs should alleviate the ability of one finding to influence the other. Further, Jones does not mention that scholars, influencing both judges and attorneys, are clear to draw a difference between the two similarity analyses' nomenclature.<sup>71</sup> The copying analysis looks for “probative similarity” while the actionable analysis determines whether “substantial similarity” exists.<sup>72</sup> While this language is not uniform across courts, it surely helps to alleviate the confusion and overlap between the analyses.

The final criticism of the deficiency of the substantial similarity tests is that the vague standards lead to conflicting expert testimony, resulting in a contest where the credibility of the expert is the determining factor of the case—a contest determined by the academic credentials (not the particular expertise) of the witness.<sup>73</sup> Further, “[t]he witnesses called to present tes-

---

64. *Id.*

65. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

66. Jones, *supra* note 57, at 295–96.

67. *See supra* Part I.

68. *Id.*

69. Jones, *supra* note 57, at 295–96.

70. *Arnstein v. Porter*, 154 F.2d 464, 472–73 (2d Cir. 1946).

71. *See Latman, supra* note 12, at 1189–90.

72. *Id.*

73. John R. Autry, Note, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113, 120 (2002).

timony regarding musicological and theoretical comparisons are uniformly classically trained and educated. . . . [E]ven when the compositions being compared are ‘pop’ songs and the expert has little knowledge of the specific genre.” But “[c]ourts tend to afford greater deference to the empirical findings of an expert whose curriculum vitae includes professorial appointments at universities which traditionally symbolize a high level of musical scholarship (The Juilliard School, Indiana University, Eastman School of Music, etc.).”<sup>74</sup>

John Autry, the author who discusses this problem at length, relies on empirical knowledge to criticize the experts’ knowledge and the courts’ deference towards them.<sup>75</sup> While such generalities may seem to echo a “common sense” conclusion, one look at Donald J. Grout’s *A History of Western Music*, the staple music history textbook, reveals that there are entire chapters that explore the popular idiom, demonstrating that popularly conceived distinctions between “popular” and “artistic” styles do not exist in musicology.<sup>76</sup> Autry does land a valid criticism that conflicting expert testimony requires the trier of fact to determine which of the experts is most credible. This fact, however, is a problem in any kind of case that involves expert testimony.<sup>77</sup> Additionally, the substantial similarity tests impose significant restraints on expert testimony, which serve to eliminate much of Autry’s concern.<sup>78</sup>

### B. Proposed Solutions

These concerns guide scholars’ approaches to proposing solutions to address what each particular scholar perceives to be the problem with the substantial similarity tests. Generally, the propositions fall into two categories: substantive solutions and procedural solutions. The names of these categories, however, depart from their familiar meanings. Substantive solutions are those proposals that would alter the substantial similarity tests. In contrast, procedural solutions would change who determines whether substantial similarity exists in a particular case. This section will

---

74. *Id.* at 120–21.

75. Autry was classically trained at Samford University and pursued a professional career in opera before initiating his legal career.

76. J. PETER BURKHOLDER ET AL., *A HISTORY OF WESTERN MUSIC* 844–64 (7th ed. 2006).

77. Dwight J. Davis et al., *Expert Opinion in Class Certifications: Second Circuit Revisits, Disavows in re Visa Check and Joins Majority Rule*, 74 DEF. COUNS. J. 253, 257 (2007) (discussing class certification cases); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 431–32 (2007) (discussing administrative law cases); Yane Svetiev, *Antitrust Governance: The New Wave of Antitrust*, 38 LOY. U. CHI. L.J. 593, 612 (2007) (discussing antitrust cases).

78. *See supra* Part I.

first explore these procedural solutions and then move to the substantive solution proposals.

### 1. *Procedural Solutions*

The procedural solutions generally seek to change the characteristics of the trier of fact: the judge or jury. Each of the proposals discussed below suggests that the triers of fact should consist of a group that has a particular understanding or sophistication regarding copyright law. First, Michael Landau and Donald Biederman argue for a specialized copyright court with nationwide jurisdiction.<sup>79</sup> Though their analysis does not focus on music cases only, the authors are particularly concerned with inconsistencies between various courts and the complexity of copyright law—themes repeated by the other authors at hand.<sup>80</sup> In this proposal, the authors would remove many issues from the jury at the trial level and would “[follow] the model of the Court of Appeals for the Federal Circuit as the vehicle through which uniformity of treatment could be achieved.”<sup>81</sup>

The second type of procedural proposal, suggesting that the jury should be more informed, is specifically targeted towards music infringement cases. Paul Grinvalsky’s proposal requires that the jury consist of the intended audience for the work.<sup>82</sup> His reasoning is based on the dissenting opinion in *Arnstein*, which states that where there exists “artistic repugnance or boredom, or mere distance . . . all sounds . . . merge.”<sup>83</sup> Grinvalsky examines the jury’s familiarity with the works and determines that “distance to music skews the substantial similarity plane and affects the ultimate findings of fact. An unintended audience may find that the two works sound substantially alike where an intended audience may find the two works fall short of substantial similarity.”<sup>84</sup> Further, he supports his claim with *Dawson*, which found that a trier of fact that was not composed of the intended audience of a spiritual arrangement “was incapable of detecting, much less appreciating, their similarity or dissimilarity.”<sup>85</sup> Grinvalsky determines that only the intended audience for the work should determine whether there is substantial similarity between the two works.<sup>86</sup>

---

79. Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 719 (1999).

80. *Id.*

81. *Id.*

82. 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, 396 (1992).

83. *Arnstein v. Porter*, 154 F.2d 464, 476 (2d Cir. 1946) (Clark, J., dissenting).

84. Grinvalsky, *supra* note 82, at 423.

85. *Id.* at 428.

86. *Id.* at 396.

There are similar arguments in the procedural category, discussed below, that support further expert testimony to create a more informed jury. Grinvalsky's approach, however, is likely unmanageable. To create the sort of jury that Grinvalsky desires means that the copyright infringement case becomes more complex with another layer of analysis. In fact, the question of substantial similarity between the two works will remain, but will be preceded by whether the jury is substantially knowledgeable. Further, there is no proof that this will lead to more accurate or more uniform results.

## 2. Substantive Solutions

Substantive solutions are those proposals that would alter the substantial similarity tests. This category represents a wider range of proposals—from simply changing the order of the tests' application to requiring technological analysis of the music. However, each solution addresses the author's perceived problem with the current test or application of the test.

The first substantive proposal that this section will consider is to reverse the order of the *Krofft* analysis, the suggestion of Stephanie Jones.<sup>87</sup> Particularly, Jones wants the jury to first determine copying without the aid of any expert testimony; then, the jury will hear evidence, including expert testimony, as to whether the defendant copied protected elements.<sup>88</sup>

Certainly, such expert testimony could be taken prior to listening to the songs; however, it would probably be necessary for the jury to listen to the material in order to follow and understand the expert testimony. Therefore, the fact finders' aural impressions of the material would likely be affected by the expert's own impressions of the material. If the jury first listens to the material without any outside influence, however, the decision it would render would be far more pristine than if it considers the songs after hearing expert testimony. It is less likely that the jury's determination that the material sounds similar would influence their consideration of the objective expert testimony than that the expert testimony would influence the jury's aural impressions.<sup>89</sup>

While Jones's proposition is sound in its ideals, it is founded on the principle that the jury is the trier of fact for both prongs of the analysis when *Arnstein* suggests that a portion of the question is a question of law.<sup>90</sup>

---

87. Jones, *supra* note 57, at 303–04.

88. *Id.*

89. *Id.* at 304.

90. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

Jones's second idea is for the substantial similarity test to adopt a precise definition of "musical idea."<sup>91</sup> As quoted above, Jones suggests that we adopt the following definition:

[A] musical idea is a musical thought which implies a self-contained entity; however, it generally represents only a portion or fragment of a musical work which usually contains multiple ideas. A musical idea may be: 1) a single line of pitch or rhythm (melodic); 2) a vertical group of pitches (harmonic or chordal); 3) a series of time values without pitch (rhythmic); or 4) a combination of pitch, rhythm and chord(s).<sup>92</sup>

The problem on the face of this proposal is that each musical idea is different. Jones admits as much by trying to list examples of musical ideas:

A musical idea may consist of a single note, rhythm or chord. For example, the opening "idea" of the song "One" consists of a single note, followed by [a] rest.

More often, however, a melodic or musical idea consists of two or more notes (pitch and rhythm). Some examples of compositions that contain such ideas are:

2-Note Musical Ideas: "Feelings" "People" "Sunny" "Lady"

3-Note Musical Ideas: "Yesterday"

4-Note Musical Ideas: "Sleepy Time Gal" "We Are the World"

10-Note Musical Ideas: "They All Laughed (At Christopher Columbus)"<sup>93</sup>

Jones's definition and examples do not solve any of the problems; rather, she only reinforces the idea that fact-finding is necessary on a case-by-case basis. Further, Jones's definition has essentially already been adopted because it is so broad that it describes nearly every musical event that could exist in any work, infringing or not. To adopt this definition would only be to codify a redundant definition because the case would already be limited to the vocabulary of music. While Jones seems to want to limit the amount of information the jury might have, other authors propose that expert testimony should be allowed throughout the entire analysis.

---

91. Jones, *supra* note 57, at 301.

92. *Id.*

93. *Id.* at 301-02.



Jeffrey Cadwell admits that the “idea-expression dichotomy” is difficult to analyze in music infringement cases.<sup>94</sup> This, he argues, means that juries must have expert testimony to guide them through the analysis:

One of the most frequent criticisms of both the *Arnstein* and *Krofft* approaches is that they proscribe expert testimony where it is needed most. During the improper appropriation prong, *Arnstein* allows an expert to comment on how a lay listener might hear the two pieces of music at issue in the case, but not as to improper appropriation itself. *Krofft* entirely disallows expert testimony during its intrinsic prong. Therefore, after the expert presents testimony as to whether elements of the plaintiff’s music have been copied by the defendant, the trier of fact must make a decision without the aid of the expert as to whether the defendant has improperly appropriated from the plaintiff’s music.<sup>95</sup>

Additionally, Cadwell emphasizes, as Jones did, that the jury, assuming they did hear the expert testimony in the first prong of the analysis, must have “conveniently short memory” in order to find appropriately in the second prong’s analysis.<sup>96</sup> To Cadwell, the answer, instead of reversing the order as Jones suggests, is to offer expert testimony at each juncture of the finding: “[t]hus, the trier of fact is not asked to ignore the expert’s testimony, but rather to embrace it in order to make a more fully informed decision as to whether infringement has occurred.”<sup>97</sup>

Alice Kim joins in the conclusion that expert testimony should be offered throughout the entire analysis but departs in the reasoning. Kim, like Gravinsky, contends that “the judgment should be informed by people who are familiar with the media at issue.”<sup>98</sup> Where Gravinsky sought to limit the jury pool to those who were the intended audience, Kim proposes that the jury must be brought to that standard by allowing expert testimony:

When not informed by expert testimony, the lay-observer test is improperly narrow in scope, protecting the copyright holder only when, according to the caprice of the general public (as represented by the jury or trier of fact) an impression of theft is deemed extant. It is not only underinclusive but also overinclusive: by not providing the factfinder with expert guidance, the system could trap as infringers those whose musical creations bear no

---

94. Jeffrey Cadwell, *Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 157 (2005).

95. *Id.* at 161 (italics added, citations omitted).

96. *Id.* at 163 (internal quotes omitted).

97. *Id.* at 169.

98. Kim, *supra* note 2, at 109.

true substantial similarity to the complainant's work but seem to do so because, for example, the performers' vocal styles are similar, or—more problematically—because both works use material so commonplace that it is considered public domain.<sup>99</sup>

Rather, Kim suggests, the courts should allow expert testimony into the second prong analysis so juries will be able to make sophisticated judgments and not be led astray by irrelevant similarities.<sup>100</sup>

There are two distinct problems with expanding the roles of expert testimony. First, judges have indicated that the most prevalent problem associated with expert testimony is that experts do not independently appraise the case at hand but, rather, “become advocates for the side that hired them.”<sup>101</sup> Indeed, further expanding the role of the expert witness and her exposure to the jurors would only serve, as John Autry discussed, to create a battle to hire the most credible expert witness.<sup>102</sup> The second problem is “the excessive expense of hiring [these] experts.”<sup>103</sup> While this argument may be dampened by the fact that the parties will likely already have hired experts for the first prong analysis, the need for experts for both questions will increase fees by requiring the expert to be retained for a longer period of time and by increasing the importance of hiring the best expert that a party can (or cannot) afford. While this proposal creates some difficulties, others seek to replace experts with mathematical models that will provide objective data instead of a subjective opinion.

Yvette Joy Liebesman concludes that the primary reason that many cases turn on adverse evidence is that the act of “analyzing a song under the broad, artistic categories of harmony, melody, structure, and rhythm . . . leads to contradictory results and conflicting expert testimony.”<sup>104</sup> Liebesman proposes two methods by which to alleviate this disparity. First, she proposes a “Mega-Element Analysis,” whereby each song will be analyzed with hundreds of predetermined criteria along the lines of the Music Genome Project (MGP).<sup>105</sup> In the MGP:

Each song is analyzed by a *trained musical expert* for up to 400 distinct musical characteristics and grouped into larger categories such as harmony, rhythm, structure, melody, vocals, and lyrics. For example, the harmony aspect of a song is analyzed for about

---

99. *Id.* at 128.

100. *Id.* at 122.

101. Christina L. Stuebaker et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 327 (2002).

102. Autry, *supra* note 73, at 120–21.

103. Stuebaker, *supra* note 101, at 327.

104. Liebesman, *supra* note 2, at 345.

105. *Id.* at 346–47.

twenty attributes, including keys, modality, and general harmonic structure; vocals is broken down into approximately thirty-five attributes, such as vibrato, range, and gender.<sup>106</sup>

Liebesman believes that providing an expansive list of criteria will lead to greater uniformity among results and that an excessive amount of subjective data will become objective in its totality.<sup>107</sup> The most troubling aspect of this approach is its dependence on a recorded performance of the music. Indeed, the underlying work behind every recording is the actual composition, rendering elements like “vibrato, range, and gender” meaningless within an infringement action on the underlying work.<sup>108</sup>

Liebesman’s second proposal is to create a “Mathematical Modeling Analysis,” which would “analyze the distinct characteristics of a musical tune.”<sup>109</sup> Using what Liebesman refers to as “the physics of music,” courts or parties using this test must “[dissect the songs] into mathematical formulas representing their physical components.”<sup>110</sup> Further, they must classify works by genre and create a base-level of similarity among the works in that genre, representing the unprotected elements of a song.<sup>111</sup> The fact finder must then look at the similarities between the two works in question that go beyond this base level and place it against a pre-determined scale.<sup>112</sup> Liebesman offers this illustration:

For example, if there were an infringement dispute regarding two country-western songs, one could mathematically compare the two songs as well as other country-western tunes. One might learn that all country-western tunes are at least 60% alike, yet there is a 95% correlation between the two songs in question with no other song greater than 70% similar.<sup>113</sup>

This data would then be used in the copying and improper appropriation inquiries.<sup>114</sup> Liebesman suggests that the higher burden for striking similarity would be adjusted within the mathematical findings, requiring a higher percentage of correlation between the two songs.<sup>115</sup>

---

106. *Id.* at 347 (emphasis added).

107. *See id.*

108. *Id.* at 347; *see* JOYCE ET AL., *supra* note 6, at 165–66.

109. Liebesman, *supra* note 2, at 353.

110. *Id.*

111. *Id.* at 354.

112. *Id.* at 354–55.

113. *Id.* at 354.

114. *Id.* at 355.

115. *Id.* at 355 (“[I]t could be assumed that any similarity below a certain percentage is that of non-copyrightable material. It is only when the similarity would rise above a determined percentage, either overall or from the separate components, that the work would be considered substantially similar enough to the allegedly infringed work to be considered infringing.”).

Liebman's proposed solution doesn't address the problem that she identified. As noted above, she criticized copyright cases that turn on adverse evidence, and determined that the underlying problem is that "analyzing a song under the broad, artistic categories of harmony, melody, structure, and rhythm . . . leads to contradictory results and conflicting expert testimony."<sup>116</sup> Her solutions, however, are rooted in this same type of analysis and simply turn that data into another form. The Mega-Element Analysis is simply a fuller-bodied analysis of harmony, melody, structure, and rhythm. Liebman, it seems, is only giving names and categories to the analysis that already occurs in the courtroom. The Mathematical Modeling Analysis is no different. When she discusses the types of characteristics that the mathematical algorithms would analyze, she offers an "overall similarity" or a more categorized analysis: "several algorithms could compare the similarity of recognized characteristics of the two songs, such as harmony, melody, and structure."<sup>117</sup> If this is true, then Liebman is merely suggesting that the court involve mathematicians in a trial to transform what is ordinarily expressed in prose into a mathematical formula. For example, the plaintiff's musicologist, in the traditional manner, would tell the jury what was happening in the music and claim that a majority of these events were similar between the two works. Liebman would replace the musicologist with a mathematician who would have prepared a mathematical formula and give a precise statistic that captures the same outcome that the musicologist was describing. In an adversarial system, surely Liebman intends that both parties will have mathematicians present evidence. Therefore, Liebman's proposal leaves the court with adverse evidence that describes the musical works, as must be done, in "broad, artistic categories."<sup>118</sup> Her plan also faces other problems.

Liebman describes two "hurdles" that her proposals must overcome before being effectively implemented: meeting the standard for evidentiary admissibility and familiarizing jurors with the system so that they are "sufficiently comfortable."<sup>119</sup> Her proposal, however, particularly the Mathematical Modeling Analysis, suffers from a conceptual flaw: it is rooted in a sound recording rather than the underlying work. *Nimmer on Copyright* is vigilant in maintaining this distinction:

A sound recording must be distinguished from, on the one hand, the material object on which the sound is recorded, and, on the other, the underlying musical composition, or dramatic or literary

---

116. *Id.* at 345.

117. *Id.* at 354.

118. *Id.* at 345.

119. *Id.* at 356-57.

work that is recorded and transposed into aural form by the sound recording. Clearly, a sound recording copyright vests no proprietary rights in the material object as such. Likewise, the sound recording copyright does not attach to the underlying work *per se*, but only to the aural version of such work as fixed on the material object. A sound recording is, in this sense, a derivative work.<sup>120</sup>

Still, the foundation of Liebesman's math-based proposal is that, "[a]t its most fundamental level, music is sound."<sup>121</sup> This is true to some extent, but it is not necessarily true in copyright law. There, a "musical work," not defined in the Copyright Act, may be embodied in any tangible medium—not necessarily an audio medium.<sup>122</sup> Liebesman, however, relies on the sonic qualities of a musical work for her analysis: "[m]usical sounds can be broken down to their most elemental musical tones and represented through mathematical equations."<sup>123</sup> However, if there is an underlying work beyond the recording that the mathematician uses, then the results are skewed by this derivative work. Under copyright law principles, therefore, Liebesman's Mathematical Modeling Analysis has little, if any, actual utility.

Beyond this point, Liebesman herself recognizes that there will be an issue with a jury's comfort with her proposals.<sup>124</sup> To mean anything, her new tests must either be fully accepted by the jury (because they are "objective") or they must be merely more evidence that the jury may weigh. Faced with the Seventh Amendment, Liebesman chooses the latter.<sup>125</sup> If the jury is bound by the evidence presented, then there would be no meaningful jury trial because the jury would be resigned to affirming a finding that it did not truly make. Liebesman's solution, however, furthers the problem that she attempts to remedy. She offers that "the MMA test could lead to the presentation of more objective testimony with which a jury may be more comfortable—they may want to rely less on emotions and more on facts."<sup>126</sup> However, the "emotions" that Liebesman identifies are the opinions offered by expert musicologists; she never identifies the true difference between the analytical tools used by musicologists and mathematicians.<sup>127</sup> Rather, she relies on a rhetoric that categorizes music as "emo-

---

120. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10[A][2] (2008).

121. Liebesman, *supra* note 2, at 349.

122. 1 NIMMER, *supra* note 120, § 2.05 [A].

123. Liebesman, *supra* note 2, at 353.

124. *See id.* at 356–57 (stating that making juries "sufficiently comfortable" with either the MEA or MMA test is one of two legal "hurdles" that must be overcome).

125. *See id.* at 360 ("The Supreme Court has affirmed that, under the Seventh Amendment, parties to an infringement suit have the right to have their case tried by a jury.").

126. *Id.* at 361.

127. *Id.* at 360–61.

tional” or “ineffable.” While the musicologist’s opinion is “subjective,” it surely isn’t “emotional.” How does the mathematician’s testimony differ in any significant way? Surely the music theory texts and mathematical texts are more similar than Liebesman allows for.

Laura Lape calls for another type of substantive change in the copyright infringement analysis: replace the substantial similarity requirement with a substantial harm test.<sup>128</sup> Lape perceives that the current tests do not have any real meaning or predictability and that this leads to “overprotection of copyright, with consequent unnecessary stifling of creativity.”<sup>129</sup> Lape argues that the protection of copyright should only be allowed to the extent that the Constitution allows Congress to inspire further creation by protecting creation.<sup>130</sup> From there, she explains that the right should be limited by its “rational ends” and that, if no harm comes from infringement, the plaintiff should not have a cause of action.<sup>131</sup>

Lape instructs adherers to “consider any injury that may have an impact on authors’ incentive to create, including: economic harm, harm to reputation, loss of privacy, and loss of artistic control,” arguing that “infringement will be found less frequently than is currently the case.”<sup>132</sup> Lape safeguards this conclusion by requiring that the harm found be “substantial.”<sup>133</sup> Lape’s argument becomes unsettled when she describes how the substantialness requirement will interact with the plaintiff’s loss of control injury:

For example, due to his relentless self-promotion, L. Ron Hubbard, the founder of the Church of Scientology, should not be able to establish infringements of portions of his unpublished letters and diaries, copied by a critical biographer, on grounds of loss of privacy. Similarly, infringement should not be based on loss of artistic control where the defendant has purchased prints and books lawfully reproducing the plaintiff’s works of art and has glued each print or page to a ceramic tile. In such a case, no change was made in plaintiff’s works other than the framing device. While protection of the copyright owner from negligible harm offers little or no incentive to create, such protection affirmatively impoverishes our

---

128. Lape, *supra* note 59, at 182. It should be noted that Lape’s article discusses substantial similarity in general terms—not only with music. *See generally id.* I have included her perspective because of the seriousness of her arguments and their weight in the literature.

129. *Id.*

130. *Id.* at 195–96.

131. *Id.* at 196.

132. *Id.* at 202.

133. *Id.* at 204–05.

cultural interchange by diminishing the tools of communication available to later creators.<sup>134</sup>

Lape fails to realize that, though the plaintiff's creative work is complete, there is nothing to stop the plaintiff from creating another work—except the realization that she would lose control of how it would be framed. Therefore, Lape's proposal would require the court to make a valuation of the artistic merit of each party. If the plaintiff could offer more creative works in quantity or quality than the defendant, then the plaintiff should win because there is a perceived harm and the plaintiff needs further assurance as an incentive to create. Any other holding, the plaintiff could argue, would impoverish her ability to confidently create further work. Surely, this system would fail or require Lape to abandon the Constitutional purpose of incentivizing further creation.

#### IV. ANALYSIS

Courts should continue to employ the *Arnstein* lay listener inquiry in its purest form. The academic articles on this topic confuse the jury with the "lay listener." Further, the only problem they identify with the current tests is that litigation outcomes are difficult to predict. Courts should accept the lay listener test along with the non-specialized jury's involvement in that determination. This approach agrees with the concept that an important element of musical composition is the audience's perception.

The proposals detailed in Part III confuse the jury for the "lay listener" of the infringement test. For instance, Stephanie Jones suggested that the jury should make an initial determination of copying without expert testimony.<sup>135</sup> Jones seems to root her proposal in the proposition that the jury is the lay listener. Rather, the "lay listener" test is similar to a "reasonable person" inquiry in other areas of law. While a jury will not always consist of "reasonable persons" or "lay listeners," it is the ideal body to apply those standards.<sup>136</sup>

The academic positions surveyed above must remain in academia—locked in the Ivory Tower. The cited scholars have constructed, with good intentions, methods that would eliminate the jury's role in determining music copyright infringement. What each of the authors identify is a prob-

---

134. Lape, *supra* note 59, at 204–05.

135. Jones, *supra* note 57, at 303–04 ("If the jury first listens to the material without any outside influence, . . . the decision it would render would be far more pristine than if it considers the songs after hearing expert testimony.").

136. See *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) ("[W]e have an issue of fact which a jury is peculiarly fitted to determine.").

lem with the test—that it is unpredictable, vague, confusing, or reliant on expert testimony.<sup>137</sup> The authors also argue that these difficulties are multiplied by the fact that music has a “unique” quality that sometimes makes it impossible to discuss in concrete terms.<sup>138</sup> The authors, however, fail to take the next and most critical step, which is to allege that these difficulties result in errant outcomes in the cases. What the authors truly desire, then, is a predictable roadmap to the results; they want an “is” or “isn’t”—not a “maybe” or “maybe not.” To be sure, that is not the nature of music.

While music may be “difficult” in some respects, it is an art with an established and relatively consistent vocabulary, and musicians have been trying to remove the preconceived barriers from the public mind.<sup>139</sup> Composer Aaron Copland, concerned with growing popular confusion about concert-hall music, formulated a treatise to guide listeners through their discomfort with the genre.<sup>140</sup> After explaining his concern that music tends to elicit more feelings of confusion than the theatre or novels, he assures his readers that “[i]f [they] have any feelings of inferiority about [their] musical reactions, [they should] try to rid [themselves] of them. They are often not justified.”<sup>141</sup> Copland only asks that his readers learn to “recognize a melody.”<sup>142</sup> However, the authors that this paper discusses employ the rhetoric that music is “difficult” and incapable of proper analysis by a jury. Once again, the argument turns in on itself because the authors cannot explain why music is too difficult for a jury or why any other fact-finding body would be better suited to relate to the lay listener.

As an art or a science, music requires a listener. Psychologist Carl E. Seashore explored the scientific aspects of “the musical mind” in his *Psychology of Music*.<sup>143</sup> When he described the esthetics of music in terms of a normative science, he defined four aspects: “the musical medium, the musical form, the musical message, and the musical response.”<sup>144</sup> In Seashore’s formulation, the listener is the party who determines the same questions that we ask when we look for copyright infringement:

What is the characteristic of the musical message as it is received?  
What are the factors, physiological, physical, psychological, and esthetic, which determine this response in hearing, interpretation,

---

137. See *supra* Part II.

138. *Id.*

139. STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* 186 (Cambridge Univ. Press 2002) (1969); AARON COPLAND, *WHAT TO LISTEN FOR IN MUSIC* 4–5 (Penguin Books 1999) (1953).

140. COPLAND, *supra* note 139, at 4–5.

141. *Id.* at 4.

142. *Id.* at 5.

143. CARL E. SEASHORE, *PSYCHOLOGY OF MUSIC* 1 (Dover Publ’ns 1967) (1938).

144. *Id.* at 377.



and enjoyment of music? . . . Central among these [problems that the listener's perspective determines], however, are the psychology of musical appreciation, the limits of the capacity for hearing, for interpreting and reliving the musical emotion which the artist has attempted to convey.<sup>145</sup>

Those that wish to remove the jury or diminish its ability to make a fact-based finding, therefore, remove the questions that a listener's perspective can answer from the legal inquiry. Mladen Milicevic has framed this position by completely removing structural analysis from the question, concluding that there are no perceived objective elements of music.<sup>146</sup> Much like Seashore, Milicevic argues that the relationship between the structure and human perception is the meaning of the music and is essential and, ideally, inseparable.<sup>147</sup> Therefore, it is essential that music infringement cases have a listener's standard.

Critics have failed to offer any proof that music presents a problem that juries, in their classical sense, cannot conquer. In fact, there have been no methodological or empirical studies that demonstrate disparate outcomes. The true difficulty for practitioners is that they do not have a method to predict the outcome of the case. The answer they and the above authors seek, however, would start creating a "roadmap to infringement." The proposals set forth would also remove a critical inquiry about the music at hand: the relationship between the structural analysis and the audience's perception.

## V. CONCLUSION

This article began by describing the critics' concern about describing or analyzing an "ineffable" art form. Philosopher Stanley Cavell adds an important observation:

The serious attempt to articulate a *response* to a piece of music where, more than reverie, has characteristically stimulated mathematics or metaphysics—as though music has never quite become one of the facts of life, but shunts between an overwhelming directness and an overweening mystery. Is this because music, as we know it, is the newest of the great arts and just has not had the time to learn how to criticize itself; or because it inherently resists verbal transcriptions? (Both have been said, as both are said in ac-

---

145. *Id.* at 26.

146. Mladen Milicevic, *Deconstructing Musical Structure*, 3 ORGANISED SOUND 27, 27 (1998).

147. *Id.*

counting for the lack of a canon of criticism about the cinema.) Whatever the cause, the absence of humane criticism (of course there are isolated instances) seems particularly striking against the fact that music has, among the arts, the most, perhaps the only, systematic and precise vocabulary for the description and analysis of its objects. Somehow that possession must itself be liability; as though one now undertook to criticize a poem or novel armed with complete control of medieval rhetoric but ignorant of the modes of criticism developed in the past two centuries.<sup>148</sup>

Cavell describes the debate that has historically aligned in camps that write or describe music programmatically (using extra-music imagery or subject matter) or absolutely (without extra-musical devices).<sup>149</sup> As described in Part III, modern legal scholars would align with Cavell's "mathematics" category, placing a jury within the variety of confines described above. Because the authors are often driven towards predictable results, they would seek to abate any sort of metaphysical or "ineffable" reaction that a lay ear might have to a piece of music. However, the lay ear should be the "gold standard," and artists, publishers, and record companies (and their lawyers) should accept the risk that their industry operates within a realm where art and commerce may lead to "indescribable" results.

---

148. CAVELL, *supra* note 139, at 185–86.

149. BURKHOLDER ET AL., *supra* note 76, at 603–05 (describing the programmatic and absolutist camps).