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NAME THAT TUNE: A PROPOSAL FOR AN INTRINSIC TEST OF MUSICAL PLAGIARISM*

by Raphael Metzger**

I. INTRODUCTION: THE BEE GEES CASE

Does the song, "How Deep Is Your Love," by the Bee Gees infringe the copyright of a song titled "Let It End" by Ronald Selle, a dealer in antiques, part-time musician, and unknown composer of popular and religious songs? This was the essential question to be decided in the case of *Selle v. Gibb*.¹

Musical plagiarism² is an area of copyright law which has long troubled the federal courts.³ In the typical musical plagiarism case, a little known musician claims that the successful composer of a popular tune has plagiarized his song.⁴ The plaintiff in such cases usually has little, if

* An abbreviated version of this Article was awarded first prize in the 1984 Nathan Burkan Memorial Competition in Copyright Law at Southwestern University and was also awarded fourth prize in the national competition. The author dedicates this Article to the memory of his teacher, colleague and friend, Irving Lowens (1916-1983), Dean of the Peabody Conservatory of the Johns Hopkins University from 1977 to 1980, President of the American Music Critics Association from 1971 to 1975, Music Critic of the *Washington Star* from 1953 to 1978, and Chief Librarian of the Music Division of the Library of Congress from 1959 to 1966.

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1. 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

2. "Musical plagiarism" is used in this Article to indicate infringement of a musical composition by a work in which the alleged infringer claims ownership.

3. The earliest American musical plagiarism cases date from the middle of the nineteenth century. See, e.g., *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437); *Atwill v. Ferrett*, 2 F. Cas. 195 (C.C.S.D.N.Y. 1846) (No. 460); *Reed v. Carusi*, 20 F. Cas. 431 (C.C. Md. 1845) (No. 11,642).

4. See, e.g., *Ferguson v. National Broadcasting Co.*, 584 F.2d 111 (5th Cir. 1978); *Schultz v. Holmes*, 264 F.2d 942 (9th Cir. 1959); *Brodsky v. Universal Pictures Co.*, 149 F.2d 600 (2d Cir. 1945); *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 849 (1980); *Nordstrom v. Radio Corp. of Am.*, 251 F. Supp. 41 (D. Colo. 1965); *Jones v. Supreme Music Corp.*, 101 F. Supp. 989 (S.D.N.Y. 1952); *Weissman v. Radio Corp. of Am.*, 80 F. Supp. 612 (S.D.N.Y. 1948); *Gingg v. Twentieth Century-Fox Film Corp.*, 56 F. Supp. 701 (S.D. Cal. 1944); *Carew v. R.K.O. Radio*

any, evidence to show that the defendant has heard his song or seen a written copy of it; the defendant typically denies ever having heard of the plaintiff's song. If the songs sound quite similar or are in fact identical, should a federal court find that the defendant infringed the plaintiff's song despite plaintiff's inability to show that the defendant ever heard or saw a copy of his song?

Were plaintiff complaining that defendant copied his patented invention, judgment would be for the plaintiff because the owner of a valid patent has the exclusive right to produce his invention, subsequent invention by others notwithstanding.⁵ Such is not the case with copyright. Whereas an invention is patentable only if novel,⁶ "copyright protects an original work and is not dependent upon novelty."⁷ Thus, copyright will subsist in two identical songs that were independently composed, because each song is original to its composer.

Unlike the owner of a valid patent who need only prove defendant's subsequent invention to establish infringement, the copyright plaintiff must prove that defendant in fact copied his work.⁸ In musical plagiarism cases "it is virtually impossible to adduce direct proof of copying."⁹ For this reason "the plaintiff generally proves this element by showing that the person who composed the defendant's work had access^[10] to the copyrighted work and that the defendant's work is substantially similar to the plaintiff's."¹¹ Access has been found where a plaintiff's song has been widely disseminated, either by publication of sheet music,¹² distribution of recordings,¹³ or public broadcast of performances.¹⁴ But what

Pictures, Inc., 43 F. Supp. 199 (S.D. Cal. 1942); *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941); *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937); *Smith v. Berlin*, 207 Misc. 862, 141 N.Y.S.2d 110 (Sup. Ct. 1955).

5. *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976).

6. *Baker v. Selden*, 101 U.S. 99, 102 (1879).

7. *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956).

8. *Mazer v. Stein*, 347 U.S. 201, 218 (1954).

9. *Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960).

10. "Access exists when a defendant had a reasonable opportunity to view the copyrighted work." *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980); *Stratchborneo V. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).

11. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978).

12. *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *O'Brien v. Thall*, 127 U.S.P.Q. (BNA) 325 (D. Conn. Mar. 7, 1960), *aff'd*, 283 F.2d 741 (2d Cir. 1960); *Edward B. Marks Music Corp. v. Borst Music Publishing Co.*, 110 F. Supp. 913, 915 (D.N.J. 1953).

13. *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *Bright Tunes Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976); *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973).

14. *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *Dorchester Music Corp. v. National Broadcasting Co.*, 171 F. Supp. 580, 583 (S.D. Cal. 1959).

of our typical unsuccessful song composer? Is his action to fail merely because his song has not achieved popularity?

Courts have generally been reluctant to hold a defendant liable for plagiarism solely on the basis of musical similarity.¹⁵ Basing liability merely on the similarity of two works presents the possibility that a composer will be liable to another under the very law which is intended to protect his creative efforts. However, allowing one who plagiarizes from an unsuccessful composer to escape liability is also unjust. Although the plagiarized unsuccessful composer is just as wronged as the plagiarized successful composer, he cannot establish the plagiarist's access to his composition in the same manner as the successful composer because his song has not been widely disseminated.

Lest the unsuccessful composer be denied a remedy because his status as an unsuccessful composer precludes a finding of access, courts have held that a defendant's access may be inferred where the similarity between plaintiff's and defendant's works is both substantial and striking.¹⁶ However, to ensure that the innocent defendant is not held liable, the plaintiff "must demonstrate that such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source."¹⁷ Thus, to prevail without proof of access, a composer alleging plagiarism must prove not only that the defendant's song bears a substantial and striking similarity to his own, but that defendant's song could not have been independently composed.

In the *Bee Gees* case, *Selle*, the plaintiff, had sent a tape recording

15. Thus, one court wrote that "[t]his type of plagiarism is extremely difficult to prove." *Jones v. Supreme Music Corp.*, 101 F. Supp. 989, 990 (S.D.N.Y. 1951). See also *Schultz v. Holmes*, 264 F.2d 942 (9th Cir. 1959); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *Brodsky v. Universal Pictures Co.*, 149 F.2d 600 (2d Cir. 1945); *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984); *Jewel Music Publishing Co., v. Leo Feist, Inc.*, 62 F. Supp. 596 (S.D.N.Y. 1945); *Gingg v. Twentieth Century-Fox Film Corp.*, 56 F. Supp. 701 (S.D. Cal. 1944); *Carew v. R.K.O. Pictures, Inc.*, 43 F. Supp. 199 (S.D. Cal. 1942); *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941). However, in two cases where plaintiffs were unable to offer evidence of access, infringement was found because of musical similarity, even though plaintiffs' compositions were unpublished and had been only privately performed. See *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (2d Cir. 1949); *Wilkie v. Santly Bros.*, 13 F. Supp. 136 (S.D.N.Y. 1935), *aff'd*, 91 F.2d 978 (2d Cir. 1937).

16. *Schultz v. Holmes*, 264 F.2d 942, 943 (9th Cir. 1959); *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 103 (7th Cir. 1958); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (2d Cir. 1946); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *Nordstrom v. Radio Corp. of Am.*, 251 F. Supp. 41, 43 (D. Colo. 1965); *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686, 689 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 288 (2d Cir. 1949).

17. *Stretchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973); see also *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

and lead sheet¹⁸ of his song to eleven recording and publishing companies. Eight of the companies returned these materials to Selle; the other three did not respond at all.¹⁹ Selle, therefore, conceded that he could offer no evidence that the Bee Gees had the opportunity to hear his song or see his music.²⁰ The Bee Gees testified that they had composed "How Deep Is Your Love" at a recording studio in the Chateau d'Herouville near Pontoise, a remote village near Paris.²¹ They also denied ever having heard of Selle or his song before this time.²² However, the Bee Gees did not call an expert witness to testify on their behalf.²³

Selle called two witnesses on his behalf. First, he called a musical expert²⁴ who gave his opinion that the songs were strikingly similar and could not have been independently created.²⁵ Second, he called Maurice Gibb, one of the Bee Gees, as an adverse party witness. After playing a recorded excerpt from Selle's song, "Let It End," Selle's attorney asked Gibb if he could identify the music he had just heard. Gibb identified the music as the Bee Gees' song, "How Deep Is Your Love."²⁶

The jury returned a verdict for Selle. However, in the court's view, Selle's "claim that the Bee Gees had access to his song . . . [was] rebutted by the undisputed fact that [the Bee Gees], before composing [their] song, had never heard of [Selle] or his music."²⁷ Reasoning that the inference on which Selle relied was "not a logical, permissible deduction from proof of 'striking similarity' or substantial similarity," but was "at war with the undisputed facts,"²⁸ the court granted the Bee Gees judgment notwithstanding the verdict.

In support of its conclusion, the trial court cited the rule in two recent cases²⁹ that "reasonable opportunity of access does not mean . . .

18. A lead sheet is a manuscript of a song in which only melody, lyrics and harmonic symbols are notated.

19. *Selle v. Gibb*, 567 F. Supp. 1173, 1175 (N.D. Ill. 1983), *aff'd*, 74 F.2d 896 (7th Cir. 1984).

20. 567 F. Supp. at 1181.

21. *Id.* at 1176.

22. *Id.* at 1181.

23. *Id.* at 1178.

24. Arrand Parsons, Professor of Music at Northwestern University, music theorist, and program annotator of the Chicago Symphony Orchestra. The opinion states that Professor Parsons "has never made a comparative analysis of two popular songs." *Id.* at 1177. The author, who is acquainted with Professor Parsons, questions the accuracy of this statement.

25. *Id.* at 1178.

26. *Id.*

27. *Id.* at 1182.

28. *Id.* at 1183.

29. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

bare possibility.”³⁰ In each of these cases, this rule was invoked to reject a plaintiff’s proof of access which was based on nothing more than speculation and conjecture.³¹ However, both cases went on to state that even without direct proof of access, a plaintiff could make out his case by showing that the two works were not only substantially similar, but were so strikingly similar as to preclude independent creation.³² By confusing copying established by direct proof of access with copying established by proof of striking similarity from which access is inferred, the trial court erred.

Selle’s primary contention on appeal was that “the district court misunderstood the theory of proof of copyright infringement on which he based his claim.”³³ In considering Selle’s theory, the Court of Appeals for the Seventh Circuit wrote as follows:

One difficulty with plaintiff’s theory is that no matter how great the similarity between the two works, it is not their similarity *per se* which establishes access; rather, their similarity tends to prove access in light of . . . other circumstantial evidence of access. In other words, striking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access.

As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was *available* to the alleged infringer. . . . [A]lthough it has frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.³⁴

By rejecting Selle’s theory of establishing an inference of access based upon striking similarity alone, the court of appeals not only tacitly disap-

30. *Selle v. Gibb*, 567 F. Supp. at 1181.

31. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 202 (W.D. Pa. 1980).

32. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

33. *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984).

34. *Id.* at 901.

proved those cases which established this rule, but implicitly negated the proposition that musical compositions themselves may serve as reliable evidence of copying. In effect, the court precluded the unrecognized composer who can offer no direct evidence of access by the defendant from maintaining an action for copyright infringement.

Striking similarity of two compositions is relevant evidence of copying because such similarity is rare in the absence of copying. However, striking similarity may occur in the absence of copying. For this reason it has been held that to establish copying without direct proof of access, a plaintiff must prove that the similarity of two compositions could not have occurred in the absence of copying.³⁵ It is a logical fallacy to attempt to prove an impossibility. The cases which hold that copyright infringement may be proved by such striking similarity as negates independent creation must therefore be interpreted as requiring musical similarity which negates any *reasonable* possibility of independent creation. Certainly it strains credulity that such unique musical compositions as Rice and Webber's "Jesus Christ Superstar" or Gershwin's "Porgy and Bess" could be independently created by others.³⁶ Until the existence of parallel universes is proved, such remote possibilities must be disregarded as having no basis in human experience and no place in the law.

The best available evidence on the issue of independent creation is undoubtedly testimony of experts in musical composition. For this reason it has been held that such testimony is required when a plaintiff seeks to establish copying without proof of access.³⁷ What the Bee Gees court failed to recognize is that substantial and striking similarity, coupled with expert testimony which negates independent creation, is substantial evidence upon which a finding of infringement may be based, even in the absence of direct proof of access.

The songs in the Bee Gees case were substantially and strikingly similar to the jury, as well as to one of the Bee Gees. Additionally, Selle's musical expert testified that the songs could not have been independently composed. Finally, the Bee Gees did not attempt to contradict

35. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

36. Although Learned Hand once theorized that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,'" *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), and therefore have a valid copyright in his work, were such a man to appear before Hand as a defendant accused by Keats of copyright infringement, it is doubtful whether Hand, the ultimate pragmatist, would have believed the defendant's testimony of independent creation.

37. *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980).

this testimony. The verdict for Selle was thus based upon substantial evidence, even in the absence of direct proof of access. It is therefore submitted that the district court erred in overturning the jury's verdict and the Seventh Circuit erred in affirming the grant of judgment notwithstanding the verdict.

As is illustrated by the Bee Gees case, a reliable means of ascertaining musical plagiarism is sorely needed. Fairness precludes granting judgment for defendants solely on the basis of the plaintiff's status as an unrecognized composer. To be sure, access is an important factor in these cases. However, the unsuccessful composer simply has no means of proving this element directly. To require him to do so is therefore tantamount to condoning plagiarism and accepting a system of justice based upon the plaintiff's famed status.

The science of musical analysis has reached a state where it can serve an important function in the musical plagiarism trial. To lend integrity to musical plagiarism decisions, the author proposes adoption of an intrinsic test of musical plagiarism based upon the science of musical analysis.³⁸ In Part II the unique nature of musical plagiarism will be considered. Musical plagiarism tests of the past and present will be discussed in Part III. In Part IV the audience test, the essence of the present test of musical plagiarism, will be criticized; recent proposals for modification of this test will also be discussed. Finally, in Part V, a new, intrinsic test of musical plagiarism will be proposed.

II. THE UNIQUE NATURE OF MUSICAL PLAGIARISM

A. Justice Holmes' Definition of Music

In the first musical infringement case before the Supreme Court,³⁹ Justice Holmes formulated an admirable definition of music:

A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continu-

38. This Article also proposes that testimony of musical experts be admitted not only on the issue of copying, but on the issue of substantial similarity as well. Expert testimony has not yet been admitted on this issue. See *infra* note 51 and text accompanying note 109.

39. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). The issue in this case was whether defendant's piano rolls, which could be played on a player piano so as to reproduce the melodies of compositions whose copyrights were held by the plaintiff, were copies of these compositions within the meaning of the Copyright Act then in effect and hence infringing articles. The Court held that the piano rolls were not copies of the compositions and therefore concluded that plaintiff's copyrights had not been infringed. The Supreme Court has yet to consider a case of musical plagiarism, as opposed to infringement by mechanical reproduction.

ous human intervention.⁴⁰

Holmes' definition shows great insight into the nature of music which renders it unique among the fine arts. Music, as a "collocation of sounds," is primarily addressed to the aural sense, unlike all but the communicative arts of speech and perhaps poetry. As a "rational collocation," music is a specifically human creation in which sounds are bound together according to a conscious plan. Thus far, Justice Holmes' definition is accurate, but hardly noteworthy. However, Holmes next proceeds to define music as being "apart from concepts."⁴¹

This is an interesting point. Unlike speech and literature, music does not communicate ideas, but exists as pure expression. It may be argued that music imparts something to its listeners and is thus conceptual in nature. However, this argument fails to consider the distinction between idea and impression. Music does not communicate ideas, but engenders impressions among its listeners. Whereas speech and literature communicate concrete ideas which engage the human intellect, music conveys general impressions which affect human sensibilities.

Let us take the dropping of the first nuclear bomb on Hiroshima as an example. When Jonathan Schell writes about this subject,⁴² his work may be read and understood. Even those who fail to understand *The Fate of the Earth* are usually able to discern that about which Schell is writing. However, when Krzysztof Penderecki⁴³ writes an orchestral composition about the bombing of Hiroshima,⁴⁴ his ideas on this subject

40. *Id.* at 19-20 (Holmes, J., concurring specially). Reduction to tangible expression, also known as "fixation," may take the form of a written score, record, tape recording, film sound track, computer program, music box, or any other means from which the collocation of sounds can be reproduced. The author disagrees with Holmes insofar as he considers reduction to tangible form an essential element of music. Certainly a jazz improvisation is a form of musical composition even though it may not exist in tangible form. Although fixation is not a prerequisite to musical existence, it is of legal significance. Under the Copyright Act of 1976, "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1982).

41. In defining music "apart from concepts," Holmes was not stating that music is devoid of ideas, but rather expressing his view that music does not communicate ideas. That Holmes did not consider music to be devoid of ideas is evident from his recognition of music as "rational," *i.e.*, a product of ideas.

42. J. SCHELL, *THE FATE OF THE EARTH* (1982).

43. Penderecki is the foremost Polish composer of the avant-garde.

44. "Tren pamieci ofiarom Hiroszimy" (Threnody in Memory of the Victims of Hiroshima), composed in 1959-60 for 52 string instruments, has been described as "Penderecki's most impressive and most frequently performed work, rich in dynamic contrasts and ending on a tone cluster of two octaves of icositetrachordal harmony." N. SLONIMSKY, *BAKER'S BIOGRAPHICAL DICTIONARY OF MUSICIANS 1305* (6th ed. 1978).

are not conveyed, nor are listeners able to know that about which he is writing. A listener might remark: "That was an ugly piece. It must have been about something horrible." The listener has not understood Penderecki's thoughts on the dropping of the Hiroshima bomb. Nor has he discerned the subject of Penderecki's work. It is for this very reason that Penderecki titled his work, "Threnody in Memory of the Victims of Hiroshima." By giving his composition a descriptive title, Penderecki informs the concert goer who purchases a program of the subject of his work. One might ask why Penderecki gave his work a descriptive, rather than an abstract title such as "De Natura Sonoris," which he was to use a few years later. The answer to this question is that Penderecki wanted his audience to know that about which he was writing and realized that his subject would not be comprehended by mere listening.

Because our hypothetical listener without program thought Penderecki's composition was "ugly" and "about something horrible," one might argue that "Threnody" does communicate ideas. However, this argument is fallacious. Our listener's impression of "Threnody" as "ugly" does not signify his recognition of Penderecki's subject, but rather reflects his impression of the work's extreme dissonance and dynamic contrasts. Rather than relating ideas communicated by the musical expression of "Threnody," our listener describes the expression of the work itself. Likewise, our listener's supposition that "Threnody" must be about something horrible merely expresses his distaste for the expression of the work he has heard. Our listener simply has no idea that "Threnody" is about the bombing of Hiroshima. It follows that Justice Holmes is correct in his assertion that music exists "apart from concepts."

B. *The Difficulty of Ascertaining Musical Plagiarism*

"Of all the arts, music is perhaps the least tangible."⁴⁵ Music is also unique in its affinity for plagiarism. Richard De Wolf has written: "The plea of 'unconscious memory' so often invoked to excuse or explain an apparent reproduction of a passage of music, is perhaps not so disingenuous as it may seem, for musical memory seems to work at a deeper instinctive level than the memory of words."⁴⁶

De Wolf also writes that "[i]t is probably more difficult to detect musical than literary plagiarism."⁴⁷ This statement is true for at least three reasons. First, because music is incapable of independently communicating ideas, one cannot examine two compositions for similarities

45. *Wihtol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956).

46. De Wolf, *Copyright in Music*, 1 MUSIC LIBR. A. NOTES 7 (1943).

47. *Id.*

of idea as indicia of plagiarism. One can only consider similarity of expression. In this respect musical plagiarism differs considerably from literary and dramatic plagiarism. Because similarity of idea cannot be considered in musical infringement cases, there is less information available in musical than literary plagiarism cases upon which a determination of infringement may be based.

Second, musical plagiarism is difficult to detect because of music's essentially "self-plagiaristic" nature. The process of musical composition consists of the creation or lawful appropriation of a musical motif, *i.e.*, a fragment or brief collocation of sounds, and the development of this motif by various technical means. The musical plagiarist employs the same method except that he neither creates his initial material nor appropriates it from the public domain. The plagiarist instead steals musical material from one who holds title to it, thereupon disguising his theft by employing the same compositional techniques which the composer uses for legitimate developmental purposes.

Finally, the common lack of musical ability of the trier of fact, whether judge or jury, renders musical plagiarism more difficult to detect than literary plagiarism. The aural sense of most people is largely undeveloped. While we are early taught to read and commonly refine this skill through continuous use and practice, aural skills are generally taught only in the conservatory and university. As untutored listeners, most people do not know what similarities for which to listen in comparing two musical compositions, nor even that which constitutes musical similarity. Because the human ear is so widely untutored, one might consider determining musical similarity by visual examination of music's tangible expression, *i.e.*, the score. Here we are faced with a kindred problem, musical illiteracy. Moreover, the visual comparison of musical scores is of limited utility as a means of detecting musical plagiarism because it is only the most skillful experts who can "hear" a composition by reading its score.

In view of the special problem of detecting musical plagiarism, courts have traditionally recognized a greater need for expert testimony in musical than in literary infringement cases.⁴⁸ It is significant that the admission of expert testimony on the issue of copying was first formally approved in the musical plagiarism case of *Arnstein v. Porter*.⁴⁹ Indeed, it was only after *Arnstein* that experts came to be approved in literary in-

48. Judge Yankwich once wrote: "Expert testimony is helpful, especially in matters involving musical composition." *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 818 (S.D. Cal. 1937).

49. 154 F.2d 464, 469 (2d Cir. 1946).

fringement cases.⁵⁰ To this day, however, testimony by musical experts is not admissible on the issue of substantial similarity, the ultimate issue in musical plagiarism cases.⁵¹

Due to the special problems associated with the detection of musical plagiarism, it is the position of the author that testimony by musical experts should be admitted in musical plagiarism cases not only on the issue of copying, but in the ultimate determination of infringement as well. Further, the author contends that the problem of detecting musical plagiarism is so great that a special test of infringement should be employed in these cases.

III. MUSICAL PLAGIARISM TESTS PAST AND PRESENT

Over the years the federal courts have developed three different standards for determining what conduct constitutes actionable musical plagiarism. These standards will be referred to as the "substantiality test," the "derivation test," and the "audience test." Each will be considered in turn.⁵² The present test of musical plagiarism, which was formulated in the case of *Arnstein v. Porter*,⁵³ will then be discussed. Finally, consideration will be given to the new infringement test of the Ninth Circuit known as the *Krofft* test.⁵⁴

A. The Substantiality Test

The substantiality test⁵⁵ has rarely been employed in musical plagia-

50. Dana Bullen has observed that "the New York district court in *Morse v. Fields*, 126 F. Supp. 63 (S.D.N.Y. 1954) . . . employed the acceptance of experts in music cases to legitimize the use of the literary expert." Bullen, *The Role of Literary Experts in Plagiarism Trials*, 7 AM. U.L. REV. 55, 63 (1958).

51. Thus, the Court of Appeals for the Ninth Circuit recently quoted the statement in *Arnstein* that on the issue of substantial similarity "'dissection' and expert testimony are irrelevant," commenting that in this respect "*Arnstein* is still good law." *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977) (citing *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)).

52. In addition, an "identity test," which might be considered a fourth test of musical plagiarism, will be discussed as an aberrant variant of the audience test. See *infra* text accompanying notes 163-67.

53. 154 F.2d 464 (2d Cir. 1946).

54. The *Krofft* test derives from the case of *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

55. The substantiality test is related to the audience test in that both prohibit substantial copying. However, the substantiality test prohibits all substantial copying, whereas the audience test forbids only substantial copying which is aurally perceptible to the average person. Because the audience test is based on the substantiality principle, the criticism of the substantiality test which follows is also applicable to the audience test.

rism cases.⁵⁶ Under this test, plagiarism is established by proving substantial copying.⁵⁷ The test derives from the equitable doctrine of substantiality under which courts of equity commonly denied equitable relief to plaintiffs who suffered only insubstantial injury.⁵⁸ Professor Nimmer has demonstrated that application of the substantiality principle in copyright infringement actions for damages is historically incorrect. He writes as follows:

Plagiarism actions [in England] usually were brought in courts of Equity, which of course, applied the equitable rule that unless substantial injury is shown relief must be had in the Law courts. . . . Likewise, in the United States during the nineteenth century when courts of Equity required substantial injury in copyright cases they usually did so because of the equitable rule, not because they were trying a copyright case. Thus, in *Lawrence v. Dana*,^[59] the court stated: "equity will not [ordinarily] interpose by injunction . . . where the amount copied is small and of little value."⁶⁰

As recently as the early years of this century, courts recognized that substantiality was a doctrine of equity rather than copyright.⁶¹ However,

56. The only musical plagiarism cases which have expressed the substantiality test are *Marks v. Leo Feist, Inc.*, 290 F. 959 (2d Cir. 1923), *modified on other grounds*, 8 F.2d 460 (2d Cir. 1925) and *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941). Moreover, it is not entirely clear whether these cases applied the substantiality test or the audience test. In *Allen*, after extensively analyzing the songs in question, the court concluded that the plaintiff had failed to prove that the defendant had copied "to such an extent that it constituted piracy or plagiarism." *Id.* at 139-40. Only after reaching this conclusion did the court refer to its aural impression of similarity. Thus, it appears that at least this one court rested its decision on the substantiality test rather than the audience test.

57. The substantiality test was formulated in *Marks v. Leo Feist, Inc.*, 290 F. 959 (2d Cir. 1923), as follows: "To constitute an infringement of the [plaintiff's] composition, it would be necessary to find a substantial copying of a substantial and material part of it." *Id.* at 960. The *Marks* court concluded that the defendant had not infringed the plaintiff's copyright because "[t]he exclusive right granted . . . by . . . copyright . . . does not exclude the [defendant] from the use of 6 similar bars, when used in a composition of 450 bars." *Id.* However, the decision seems to have been based on the fact that four of these bars were in the public domain. *See id.*

58. Nimmer, *Inroads on Copyright Protection*, 4 COPYRIGHT L. SYMP. (ASCAP) 2, 8 (1952).

59. 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8136).

60. Nimmer, *supra* note 58, at 8 (emphasis added).

61. Thus, the court in *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908), wrote: "[T]he proportion copied is so insignificant compared with the injury from stopping [defendants'] use . . . that an injunction would be unconscionable. In such cases the copyright owner should be remitted to his remedy at law." 144 F. at 84-85 (citing *Mead v. West Publishing Co.*, 80 F. 380 (C.C.D. Minn. 1896); E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 413 (1879)).

this distinction was lost upon subsequent courts.⁶²

The significance of Nimmer's research is that application of the substantiality test properly depends upon the type of relief a copyright plaintiff seeks. When a composer claiming plagiarism seeks injunctive relief, a court may properly invoke the equitable doctrine of substantiality to deny his claim. When, however, a composer seeks recovery of money damages, application of the substantiality test is incorrect.

The substantiality test has never been adequately justified. It seems utterly incredible that a court would be receptive to one who converts tangible property and thereupon seeks to disclaim his liability on grounds of the insubstantiality of his conversion. Nevertheless, insubstantial plagiarism has evidently been condoned by the federal courts.⁶³

Once it is established that a defendant has appropriated original material from a plaintiff's composition,⁶⁴ liability should ensue,⁶⁵ the substantiality of the taking being considered in the calculation of damages.⁶⁶ Due to its inherent fairness this procedure has been universally accepted among our courts for conversions of tangible property. There is little reason why copyright infringement should be treated differently. Certainly a distinction may be drawn between tangible property, which is

62. One such court was the Court of Appeals for the Sixth Circuit. In *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943), this court accepted the district court's determination that the plaintiff, who sought money damages, had proved defendant's appropriation of its work. The *Mathews* court purported to follow *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906), *aff'd*, 209 U.S. 20 (1908), which it in fact cited as follows: "[W]here the proportion taken is insignificant compared to the injury which would result from stopping use, an injunction will be denied." 135 F.2d at 84-85. Misinterpreting its own words, the *Mathews* court dismissed plaintiff's claim for damages. *Id.* at 85.

63. See *supra* note 56.

64. Infringement does not occur unless original material is copied. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 399 (S.D.N.Y. 1952). Therefore, copying of material which is in the public domain will not constitute infringement. *Shapiro, Bernstein & Co., v. Miracle Record Co.*, 91 F. Supp. 473, 474 (N.D. Ill. 1950). Nor will copying a sequence of a few notes be an infringement. *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940). The reason why such copying is not an infringement is that a brief sequence of notes constitutes musical syntax much as letters of the alphabet are the syntax of speech. Thus, one court wrote that "there can no more be a copyright in mere sounds than there can be in mere words, which are only conventional sounds affording a means of communicating ideas." *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535, 536 (S.D.N.Y. 1935), *aff'd*, 82 F.2d 275 (2d Cir. 1936).

65. Thus, Learned Hand wrote: "Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights." *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 148 (S.D.N.Y. 1924).

66. This was the approach employed in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), in which Judge Hand found defendant's song infringing, but awarded plaintiff only the minimum in statutory damages because plaintiff had evidently suffered no injury. *Id.* at 152.

susceptible to conversion, and copyright, which is not. However, this distinction is without significance because the interests of owners of tangible and intangible property are equivalent and public policy supports the protection of both forms of property ownership.⁶⁷ Thus, when a defendant incorporates an insubstantial part from a plaintiff's song into his own song which then earns a profit, the plaintiff should therefore be awarded a share of defendant's profits in the amount his appropriated material contributed to the success of the defendant's song.

This approach is consistent with long established remedies for conversion of tangible property. The owner of such property may sue in replevin and reclaim his property in kind; he may sue in trover and recover damages measured by the value of the property at the time of its conversion; or, he may sue in quasi-contract and recover any profit the tortfeasor has realized which is attributable to the conversion. The remedies of replevin and trover are not available for copyright infringement because a copyright is intangible and has no value independent of its royalties. Quasi-contract, however, is both a realistic and suitable remedy for the wronged composer. Indeed, the rationale underlying quasi-contract—that a tortfeasor should not profit from his wrongdoing—is as applicable to copyright infringement as it is to the conversion of personal property. It is therefore submitted that the substantiality test is unjustifiable and an improper standard of musical plagiarism.

The question arises why courts have fully protected rights in tangible property, yet diminished the value of copyright by adopting the substantiality standard. The answer seems to lie in the difficulty of ascertaining derivation. The conversion of tangible property is easily ascertained because such property exists in physical form. Such is not the case with copyright. It has already been noted that a court faces a difficult problem when the defendant in a plagiarism case denies derivation and the plaintiff cannot prove his access.⁶⁸ Where the defendant in such a case has at most taken an insubstantial amount of plaintiff's composition, the substantiality test enables a court to grant judgment for the defendant rather than speculating whether the plaintiff's composition was a source of the defendant's work.⁶⁹

67. The public policy underlying copyright is promotion of "the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. The word "Science" should here be understood in its literal, archaic meaning, *i.e.*, "knowledge."

68. *See supra* text accompanying notes 15-17.

69. The same is true of the audience test because this test is likewise based on the substantiality principle.

B. The Derivation Test

The derivation test⁷⁰ was devised by Learned Hand during his early years on the bench.⁷¹ According to this test, infringement occurs when it is shown that original material in plaintiff's composition was a source of the defendant's work.⁷² Some of the advantages of the derivation test have already been mentioned in considering the injustice of the substantiality test.⁷³ The advantages of the derivation test include the fairness of compensating the composer to the extent his music has made the plagiarist's work valuable, the policy of preventing unjust enrichment of the musical plagiarist, and the protection of a composer's property interest in his work, thereby fostering creativity to the benefit of society in general.

An additional point in favor of the derivation test is its consistency with congressional intent that copyright proprietors possess exclusive rights of ownership in their creations. The Copyright Act of 1909 granted copyright owners "the exclusive right: (a) [t]o print, reprint, publish, copy, and vend the copyrighted work; [and] (b) [t]o . . . arrange or adapt it if it be a musical work."⁷⁴ Moreover, the Act provided that copyright "shall protect all the copyrightable component parts of the work copyrighted."⁷⁵ Thus, the Copyright Act of 1909 clearly indicated congressional intent that the rights of the copyright proprietor should not be curtailed.

The Copyright Act of 1976 provides further support for the derivation test by granting the copyright owner "exclusive rights . . . to prepare derivative works^[76] based upon the copyrighted work."⁷⁷ This

70. The derivation test was so named by Alfred Shafter. See A. SHAFER, *MUSICAL COPYRIGHT* 170 (1st ed. 1932). Shafter evidently derived this appellation from Learned Hand's statement in *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916), that "derivation seems to me proved." *Id.* at 107.

71. Hand first employed the derivation test in *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916).

72. Hand stated the derivation test as follows:

The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith. Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights.

Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924).

73. See *supra* text accompanying notes 63-67.

74. Act of July 30, 1947, Pub. L. No. 80-281, § 1, 61 Stat. 652, 652-53 (codifying Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075) (amended 1976).

75. Act of July 30, 1947, § 3.

76. The Act defines a derivative work as "a work based upon one or more pre-existing works such as a translation, musical arrangement, dramatization, fictionalization, condensation, or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101 (1982).

77. 17 U.S.C. § 106(2) (1982).

provision is significant because the word "derivative" occurs nowhere in the 1909 Act.⁷⁸ The exclusive right to prepare derivative works which Congress has granted the copyright owner is thus a strong indication of congressional intent that the derivation test be employed as the standard of copyright infringement.⁷⁹

It may be argued that sections 107 through 112 of the 1976 Act, which provide for limitations on exclusive rights,⁸⁰ indicate congressional intent that the copyright proprietor's rights not be absolute. However, these limitations are clearly defined in scope and have no bearing on the act of plagiarism.⁸¹ Moreover, since Congress has specified particular limitations on copyright, yet provided no limitation for insubstantial plagiarism, it is logical to infer that Congress intended no such limitation on copyright.

78. Derivative works were, however, protected under § 7 of the 1909 Act.

79. The author disagrees with Professor Nimmer's view. Nimmer writes that "[a] work is not derivative unless it has *substantially* copied from a prior work," and that "a work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work." 1 M. NIMMER, NIMMER ON COPYRIGHT § 3.01, at 3-3 (1984). Nimmer thus rewrites the definition of a derivative work in § 101 of the 1976 Act to read "a work *substantially* based upon one or more pre-existing works." Because the House Report nowhere mentions a substantiality limitation on derivative works, the author perceives Nimmer's modification as tinkering with congressional legislation.

Nevertheless, two courts have cited Nimmer's gloss with approval. See *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976); *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 849 (S.D.N.Y. 1982), *rev'd on other grounds*, 720 F.2d 733 (2d Cir. 1983). To the extent that these cases incorporate a substantiality standard into the definition of a derivative work, the author disapproves of them as contrary to the clearly expressed intent of Congress that copyright proprietors possess the exclusive right to prepare works based upon their preexisting copyrighted works. See 17 U.S.C. § 106(1) (1982).

Nimmer rationalizes his modification by reasoning that "[t]he reference to 'preexisting works' in [the] definition [of a derivative work], as compared with the reference to 'preexisting materials' in the definition of a 'compilation' (see 17 U.S.C. Sec. 101 . . .) implies that a derivative work, unlike a compilation, must incorporate that which itself is the subject of copyright." 1 M. NIMMER, *supra*, at § 3.01 n.10. The author does not dispute Nimmer's distinction which is, in fact, clearly supported by the House Report. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 57, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5670. However, Nimmer's distinction merely points out that a derivative work must incorporate copyrightable subject matter from a preexisting work. It does not justify the conclusion that a derivative work must incorporate *substantial* copyrightable subject matter from a preexisting work.

80. The principal limitation on the copyright owner's exclusive rights is fair use. 17 U.S.C. § 107 (1982).

81. Substantiality is one of the factors specified in the Act which may give rise to fair use. 17 U.S.C. § 107 (1982). The Act states that fair use is not an infringement of copyright. *Id.* However, "[f]air use is generally considered an affirmative defense to a prima facie case of infringement . . . since the predominant concept of fair use today comes into play only when all the other indicia of infringement are met." Faaland, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 168 n.29 (1981).

The primary disadvantage of the derivation test is, of course, the difficulty of ascertaining musical plagiarism. Because defendants in musical plagiarism cases rarely concede derivation, and because eyewitness testimony of actual copying is rare,⁸² an analytic means of ascertaining derivation must be employed in conjunction with the derivation test. Learned Hand developed such a method of analysis,⁸³ which has been referred to as the "comparative method."⁸⁴ It is apparently the only analytical test of musical plagiarism ever devised.

C. *The Comparative Method*

Learned Hand's comparative method is conducted by transposing the melodies of the compositions in question to the same key, assigning equal values to the notes, and comparing the notes one after another. The method has been lauded as "worked out . . . with great success"⁸⁵ and derided as "pseudo-scientific."⁸⁶

The focus of the comparative method is melody, the musical element most easily perceived by the layman. Because the aural impressions of the average person constitute the basis of the audience test, melody figures most prominently in this test. By emphasizing the importance of melody, Hand's "comparative method" therefore functions much as an enhanced audience test.

In providing a framework for comparing the melodies of two compositions, Hand's "comparative method" has some merit. However, because Hand's concern is with melody to the exclusion of all other musical elements, the "comparative method" is quite primitive and inadequate as a means of reliably detecting musical plagiarism.⁸⁷ In focusing entirely on the melodic element, Hand's test is also susceptible to a finding of plagiarism where melodic similarities are present despite their occurrence in an entirely different rhythmic context.⁸⁸ Because of its excessive em-

82. See *supra* note 9.

83. Hand first employed the comparative method in the case of *Hein v. Harris*, 175 F. 875 (C.C.S.D.N.Y.), *aff'd*, 183 F. 107 (2d Cir. 1910).

84. A. SHAFTER, *supra* note 70, at 164.

85. *Id.*

86. Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232, 235 (1955).

87. Thus, Hand found infringement in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), although he was unable to employ the comparative method because there was "no similarity between the melodies of the two pieces in any part." *Id.* at 146.

88. Jeffrey Sherman has demonstrated this point by recasting the national anthem in triple meter and changing the values of the individual notes, thereby rendering the anthem unrecognizable. See Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. (ASCAP) 81, 133 (1977).

phasis on melody, Hand's "comparative method" is both insufficient as a means of detecting musical plagiarism⁸⁹ and prone to abuse.⁹⁰

Hand's use of the comparative method did enable him to apply the derivation test.⁹¹ However, Hand himself recognized that the comparative method could not be employed to determine derivation in every case.⁹² Moreover, in his later years on the bench Hand apparently questioned the validity of his method.⁹³ Another problem with the comparative method is its insusceptibility to uniform application among the courts. Under the comparative method, plagiarism is determined by musical analysis conducted by the court. The fact that few federal judges possess Hand's musical knowledge is undoubtedly one reason why the comparative method has never been adopted outside the Second Circuit.

D. *The Audience Test*

The audience test⁹⁴ stands for the proposition that liability for plagiarism should ensue when the average person is able to perceive substantial similarity among the works in question.⁹⁵ The test has been accepted by modern courts as the proper standard for determining copyright infringement⁹⁶ and has been incorporated into the present test of musical plagiarism.⁹⁷

The audience test is related to the substantiality test because both

89. See *supra* note 87 and accompanying text.

90. Thus, in *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916), Hand found infringement in a "parallelism," *id.* at 107, arising from a common shape in melodic line, although the songs in question had few notes in common and at no point did more than two such notes occur in succession. Excerpts from these songs are printed in A. SHAFER, *supra* note 70, at 165.

91. See *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916).

92. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), Hand found the use of an 8-note ostinato accompaniment figure an infringement under the derivation test. However, he was unable to determine derivation by means of the comparative method because the melodies of the songs were completely dissimilar. *Id.* at 146.

93. See *infra* note 113 and accompanying text.

94. The audience test has also been referred to as the "average listener" and "ordinary observer" test.

95. The audience test has been stated as follows: "[I]t is not the dissection to which a musical composition might be submitted under the microscopic eye of a musician which is the criterion of similarity, but the impression which the pirated song or phrase would carry to the average ear." *Arnstein v. Broadcast Music, Inc.*, 46 F. Supp. 379, 381 (S.D.N.Y. 1942), *aff'd*, 137 F.2d 410 (2d Cir. 1943).

96. Holtzmuller, *Current Tests of Similarity in Infringement Proceedings*, 10 WM. & MARY L. REV. 186, 194 (1968). However, the Second Circuit recently departed from the audience test in *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982), prompting a sharp dissent from Judge Lumbard.

97. See *infra* text accompanying notes 107-09.

tests require more than derivation before liability for musical plagiarism ensues. However, the tests are noticeably different. Whereas the substantiality test prohibits all substantial appropriation, the audience test prohibits only substantial appropriation which is aurally perceptible to the average person. Under the substantiality test, the trier of fact may hear expert analytic testimony and examine scores of the musical compositions in question in order to determine how much has been taken. Under the audience test, such evidence is inadmissible because it is irrelevant to the aural impression of the trier of fact.⁹⁸ Because the audience test prohibits the plaintiff from introducing analytic evidence to establish infringement, it is more difficult to establish musical plagiarism under the audience test than under the substantiality test.⁹⁹

The audience test derives from the reasonable man doctrine.¹⁰⁰ The reasonable man doctrine assumes that people are capable of measuring the care exercised by a defendant in a tort action according to the standard of care that they, as average reasonable persons, would have employed under like circumstances. The assumption that people are capable of this task is proper because the exercise of care to fellow human beings is very much a part of daily life. However, plagiarism of a musical composition is conduct with which the average person is unfamiliar. For this reason he "cannot meaningfully answer whether, if he were in the defendant's shoes, he would have been constrained to copy from the plaintiff."¹⁰¹ The audience test is therefore an improper adaptation of the reasonable man doctrine to copyright law.

As is the case with the substantiality test, the audience test owes its existence to misinterpretation of case precedent. The audience test is said¹⁰² to have originated in *Daly v. Palmer*,¹⁰³ an early case of dramatic plagiarism. "[I]t is a piracy, if the appropriated series of events . . . is 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."¹⁰⁴ In this dictum the *Daly* court expressed its opinion that the

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

99. Harold Fox has written that "if [the audience test] were strictly applied, substantial injustice would often result and many wilful plagiarists escape the penalty of their acts." Fox, *Evidence of Plagiarism in the Law of Copyright*, 6 U. TORONTO L.J. 414, 417 (1946).

100. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 7 F. Supp. 837, 842 (S.D.N.Y. 1934), *rev'd*, 81 F.2d 49 (2d Cir. 1936).

101. Nimmer, *supra* note 58, at 30.

102. *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 536 (2d Cir. 1938).

103. 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552).

104. *Id.* at 1138.

defendant's plagiarism was so substantial as to be apparent even to the "spectator." It was simply not the intent of the court to advocate adoption of an infringement test based on audience impressions. This fact is conclusively proved by the paragraph immediately following the *dictum* quoted above in which the *Daly* court propounded the derivation test:

The true test of whether there is piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject.¹⁰⁵

Thus, to construe the oft-quoted *dictum* from *Daly* as a test of plagiarism is to perpetuate a misreading of the historic case.

It has been shown that the audience test is based on an improper application of the reasonable man doctrine and misinterpretation of case precedent. Before considering the application and effect of the audience test,¹⁰⁶ the present law of musical plagiarism will be discussed.

E. The Arnstein Test

In the landmark musical plagiarism case of *Arnstein v. Porter*,¹⁰⁷ the

105. *Id.* (citing *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436)).

106. The audience test is criticized *infra* in Part IV.

107. 154 F.2d 464 (2d Cir. 1946). The case concerns the alleged infringement by Cole Porter of six songs composed by Ira Arnstein. Fascinating in many respects, it is evidently the first musical plagiarism case since *Reed v. Carusi*, 20 F. Cas. 431 (C.C. Md. 1845) (No. 11,642), in which a plaintiff requested a jury trial.

Also of interest is the question of summary judgment in infringement cases, an issue the court resolved in *Arnstein's* favor, holding that where "there is the slightest doubt as to the facts" of whether "there is enough evidence of access to permit the case to go to the jury" (assuming the plaintiff attempts to make out his case by proving access and substantial similarity) and whether "similarities . . . are sufficient so that . . . the jury may properly infer that the similarities did not result from coincidence," summary judgment is improper. 154 F.2d at 468-69. The "slightest doubt" standard adopted by the *Arnstein* court in summary judgment proceedings has recently been disapproved by several courts. See, e.g., *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978); *Testa v. Janssen*, 492 F. Supp. 198, 203 n.5 (W.D. Pa. 1980); *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 849 (1980).

Most fascinating of all, at least in terms of human interest, is the plaintiff himself. As a composer of popular and Jewish songs, Arnstein earned a modest reputation. However, he achieved true distinction as a copyright plaintiff. Believing that several more successful composers were appropriating his music, Arnstein repeatedly attempted to prove their plagiarism in court by pointing out fragments, usually of between three and five notes, common to the compositions. See *Arnstein v. Twentieth Century-Fox Film Corp.*, 52 F. Supp. 114 (S.D.N.Y. 1943); *Arnstein v. Broadcast Music, Inc.*, 46 F. Supp. 379 (S.D.N.Y. 1942), *aff'd*, 137 F.2d 410 (2d Cir. 1943); *Arnstein v. American Soc'y of Composers*, 29 F. Supp. 388 (S.D.N.Y. 1939); *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535 (S.D.N.Y. 1935), *aff'd*, 82 F.2d

Court of Appeals for the Second Circuit, speaking through Judge Frank, formulated what has become the accepted test for actionable plagiarism: "(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."¹⁰⁸ Regarding implementation of this bifurcated test, the court provided:

As to the first [issue]—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. Of course, if 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 copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, "dissection" and expert testimony are irrelevant.¹⁰⁹

The *Arnstein* court thus incorporated the audience test into the second part of its bifurcated plagiarism test. The court also approved the admission of expert testimony in the musical plagiarism case, but only on the issue of copying in the first part of its test.

In his dissenting opinion, Judge Charles Clark sharply criticized the majority for its bifurcation of the plagiarism determination:

I find nowhere any suggestion of two steps in [the] adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury^[110]—the now chosen instrument of

275 (2d Cir. 1936); *Arnstein v. Shilkret*, No. 8152 (S.D.N.Y. Dec. 20, 1933). In the instant case *Arnstein* alleged that Porter "had stooges right along to follow me, watch me, and live in the same apartment with me." He also claimed that his room had been ransacked several times, but conceded: "[M]any of my compositions had been published. No one had to break in to steal them. They were sung publicly." 154 F.2d at 467. Alas, *Arnstein* abandoned his rather unprofitable and dubious second career after losing this, his sixth case, upon remand.

108. 154 F.2d at 468.

109. *Id.*

110. The court held that the question of copying is "an issue of fact which a jury is pecu-

detection—could be expected to separate those issues and the evidence accordingly. If there is actual copying, it is actionable, and there are no degrees; what we are dealing with is the claim of similarities sufficient to justify the inference of copying. This is a single deduction to be made intelligently, not two with the dominating one to be made blindly.¹¹¹

Thus, we see two circuit judges from the nation's foremost copyright court advocating diametrically opposite standards of plagiarism. Frank, favoring the audience test, saw two clear issues—copying and improper appropriation—to be decided in the determination of plagiarism. Clark, favoring the derivation test, saw but one issue—copying. And what of the most distinguished member of the court? Learned Hand, the creator of the derivation test¹¹² and its erstwhile ardent supporter,¹¹³ cast his vote with Frank. The famed judge had evidently become disenchanted with the derivation test, probably because of the greater likelihood that a composer who independently creates a work similar to that of the plaintiff will be held liable under the derivation test than under the substantiality or audience tests.

Precisely what the *Arnstein* court meant by "improper appropriation"¹¹⁴ has been a matter of considerable confusion. Indeed, the Second and Ninth Circuits have interpreted "improper appropriation" in two entirely different ways.

In *Ideal Toy Corp. v. Fab-Lu, Ltd.*,¹¹⁵ a case concerning the infringement of dolls, Judge Leonard Moore of the Second Circuit interpreted the *Arnstein* court's "improper appropriation" standard as "merely an alternative way of formulating the issue of substantial similarity."¹¹⁶ Substantial similarity is that degree of similarity which constitutes ac-

liarily fitted to determine," stating that "it would . . . be proper to exclude tone-deaf persons from the jury." *Id.* at 473 & n.22. The court also remarked that "even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on [the] question [of copying]." *Id.* at 473.

111. *Id.* at 476 n.1 (Clark, J., dissenting).

112. *See supra* note 71 and accompanying text.

113. Hand was the principal advocate of the derivation test during his years as a district court judge. *See Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924); *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916). After his appointment as a circuit judge, Hand neither reversed district judges for failing to apply the derivation test nor wrote of the test in his opinions.

114. The court alternatively and indiscriminately referred to "improper appropriation" as "illicit copying," "unlawful appropriation," "illicit appropriation," and "misappropriation." Unfortunately, these terms are nowhere defined in the *Arnstein* opinion.

115. 360 F.2d 1021 (2d Cir. 1966).

116. *Id.* at 1023 n.2.

tionable plagiarism under the audience test.¹¹⁷ That Judge Moore was correct in his interpretation of *Arnstein* is demonstrated by the widely overlooked restatement of the *Arnstein* test in *Heim v. Universal Pictures Co.*,¹¹⁸ a musical plagiarism case decided five days after *Arnstein* by the same panel of the Second Circuit wherein the court referred to "copying so 'material' or 'substantial' as to constitute unlawful appropriation."¹¹⁹ Thus, it is clear that by "improper appropriation" the *Arnstein* court meant substantial copying perceived by the average listener under the audience test.

Unaware of the explanation of *Arnstein* in *Heim*, the Court of Appeals for the Ninth Circuit recently misconstrued "improper appropriation" in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*¹²⁰ as the copying of a work's protected expression:

We believe that the Court in *Arnstein* was alluding to the idea-expression dichotomy When the court in *Arnstein* refers to "copying" which is not itself an infringement, it must be suggesting copying merely of the work's idea, which is not protected by the copyright. To constitute an infringement, the copying must reach the point of "unlawful appropriation," or the copying of the protected expression itself.¹²¹

Even without reading the explanation of *Arnstein* in *Heim*, the *Krofft* court should have realized that the *Arnstein* court did not equate the copying of expression with improper appropriation. Nowhere does the *Arnstein* opinion speak of the idea-expression dichotomy. Moreover, since music is incapable of communicating ideas,¹²² two compositions cannot be compared for similarity of idea. Thus, it is difficult to conceive how the *Krofft* court concluded that *Arnstein* was based upon the idea-expression dichotomy.¹²³

117. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[E], at 13-46 to 13-47 (1984).

118. 154 F.2d 480 (2d Cir. 1946).

119. *Id.* at 487.

120. 562 F.2d 1157, 1163 (9th Cir.), *cert. denied*, 330 U.S. 851 (1977). The issue in *Krofft* was whether defendant's "McDonaldland" television commercials infringed the copyright in plaintiff's "H.R. Pufnstuf" children's television show.

121. 562 F.2d at 1165.

122. *See supra* text following note 41.

123. Some justification for the *Krofft* interpretation may, however, be found in the *Arnstein* opinion. In support of its proposition that "there can be 'permissible copying,' copying which is not illicit," the *Arnstein* court cited four cases. 154 F.2d at 472 & n.18. The first of these, *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926), concerned the alleged infringement of a play. In finding no infringement, the *Dymow* court held that "[i]f there was copying . . . it was permissible because this mere subsection of a plot was not susceptible of copyright." *Id.* at 692. While the opinion is somewhat unclear, the context of this holding seems to indicate that the court based its decision upon the unprotectability of ideas as opposed to the insubstantial-

F. *The Krofft Test*

In *Krofft*, the Ninth Circuit established a new test of infringement based on the idea-expression dichotomy.¹²⁴ Under the *Krofft* test, first the issue of whether the ideas of the works in question are substantially similar is considered as a question of fact.¹²⁵ If this issue is decided in the negative, the accused work is held not infringing under the rationale that the tangible expressions of the work's ideas cannot be substantially similar where the ideas themselves are dissimilar. If this issue is decided affirmatively, the issue of whether the tangible expressions of the works are substantially similar is then considered, also as a question of fact.¹²⁶ Only when this issue is also answered in the affirmative is the accused work held to be infringing.

Although the *Krofft* court erroneously derived its infringement test from the bifurcated *Arnstein* test,¹²⁷ the test announced in *Krofft* is the law of the Ninth Circuit. Its impact on musical plagiarism should therefore be assessed. The *Krofft* test has yet to be applied in a musical infringement case. Should a court attempt to apply the *Krofft* test in a musical plagiarism case, severe problems would be encountered due to

ity of the alleged taking. Whether the *Arnstein* court so interpreted *Dymow* is doubtful, because each of the remaining three cases cited by the court in support of permissible copying (*Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84 (6th Cir. 1943); *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 692 (2d Cir. 1938); *Eggers v. Sun Sales Co.*, 263 F. 373, 375 (2d Cir. 1920)) was decided on the basis of the substantiality test.

124. It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself. *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

125. However, the *Krofft* court provided that "this question may often be decided as a matter of law." 562 F.2d at 1164. The court referred to this part of its infringement test as an "extrinsic test":

The determination of whether there is substantial similarity in ideas may often be a simple one We shall call this the "extrinsic test." It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. . . . Since it is an extrinsic test, analytic dissection and expert testimony are appropriate.

Id.

126. The *Krofft* court referred to this part of its infringement test as an "intrinsic test":

The test to be applied in determining whether there is substantial similarity in expressions shall be labeled an intrinsic one—depending on the response of the ordinary reasonable person. . . . It is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test. . . . Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate.

Id.

127. The *Krofft* court explicitly stated that it did not base its test on *Arnstein*: "We do not resurrect the *Arnstein* approach today. Rather, we formulate an extrinsic-intrinsic test for infringement based on the idea-expression dichotomy. We believe that the *Arnstein* court was doing nearly the same thing. But the fact that it may not have been does not subtract from our analysis." *Id.* at 1165 n.7.

the impossibility of ascertaining from the compositions under consideration what ideas their composers sought to express.

A court could compare the lyrics if the compositions are songs. Because lyrics are metric, they may be added to a song after its composition or even transferred from one song to another. Comparing the lyrics of two songs for similarity of ideas is therefore irrelevant to the issue of musical plagiarism.

A court could ask the composers what ideas they sought to communicate in their compositions. Such questions would undoubtedly invite self-serving testimony of dubious value. Moreover, because music does not communicate ideas,¹²⁸ the ideas a composer intends to express bear no relationship to the ideas a listener might conceive while listening to the composer's music.

Finally, a court could identify the styles of the compositions as the composers' ideas. This would be fallacious because the style of a musical work is merely a composite of its expressive features. In effect, the court would be examining the expressions of the compositions to determine whether their ideas are similar. Since the purpose of the *Krofft* test is to compare the ideas in two works in order to determine whether their expressions may be similar, a comparison of the styles of two compositions would be ludicrous indeed.

This discussion demonstrates that the *Krofft* test should not be applied in musical plagiarism cases. The idea-expression dichotomy is a cardinal principle of copyright law, but simply has no relevance to works of authorship which, by their very nature, do not communicate ideas. Although erroneously derived from *Arnstein*, the *Krofft* test is nevertheless a valid and efficient means of adjudicating cases involving plagiarism of works which do communicate ideas. It is therefore recommended that the *Krofft* test be employed in cases concerning literary and dramatic infringement, but not musical plagiarism.

IV. CRITICISM OF THE AUDIENCE TEST

Due to its incorporation of the audience test as the ultimate factor in determining liability for musical plagiarism, the *Arnstein* test has been the subject of much controversy. The audience test has been criticized for several reasons.¹²⁹ First, it represents an improper transference of the

128. See *supra* text following note 41.

129. The basic flaw in the audience test has been explained by Professor Nimmer as follows:

Certainly, there can be no dispute that the "spontaneous and immediate" reactions of the ordinary observer are relevant evidence in determining the existence of copying. There is, however, reason to dispute the doctrine in so far as it makes the

reasonable man doctrine to copyright law.¹³⁰ Second, it lacks precedential validity due to misinterpretation of the early case from which it derives.¹³¹ Third, the rationale by which the test is justified does not support its existence.¹³² Fourth, the test contravenes circumspect jurisprudence in its exclusion of expert testimony.¹³³ Fifth, it is impractical.¹³⁴ Sixth, its impracticability has often resulted in accurate and inequitable application.¹³⁵ Lastly, it has never been adopted by the Supreme Court.¹³⁶ Such criticism invites a thorough analysis of the audience test.

A. *The Economic Rationale*

The audience test has been defended on the ground that copyright should only protect the creative artist's financial interest in his creation and hence should extend no further than the market for which his work is created. This rationale was, in fact, espoused by the *Arnstein* court:

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

visceral reactions of the trier *the* ultimate test of copying (assuming access). The Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's "spontaneous and immediate" *impression* that the fruits have been stolen. To be sure the ordinary observer's impression that there has been a theft is important evidence in establishing that in fact there was a theft, but the two are not the same.

3 M. NIMMER, *supra* note 117, § 13.03[E] at 13-49.

130. *See supra* text accompanying notes 100-01.

131. *See supra* text accompanying notes 102-06.

132. *See infra* text accompanying notes 137-40.

133. *See infra* text accompanying notes 141-52. The *Arnstein* test allows expert testimony on the issue of copying, but not on the issue of substantial similarity, the ultimate issue in musical plagiarism cases.

134. *See infra* text accompanying notes 153-61.

135. *See infra* text accompanying notes 162-71.

136. Sorensen & Sorensen, *Re-examining the Traditional Legal Test for Literary Similarity: A Proposal for Content Analysis*, 37 CORNELL L.Q. 638, 643 (1952). However, the Supreme Court once quoted the definition of a copy, given by Judge Bailey in *West v. Francis*, 106 Eng. Rep. 1361, 1363 (K.B. 1822), as "that which comes so near to the original as to give to every person seeing it the idea created by the original." *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 17 (1907).

plaintiff.¹³⁷

The primary purpose of copyright is "to promote the Progress of Science and useful Arts,"¹³⁸ not to enrich authors.¹³⁹ Because the economic rationale provides a financial incentive for creative work, it is consistent with the purpose underlying copyright and is therefore valid. However, it is submitted that the economic rationale does not justify application of the audience test.

When a plagiarist appropriates material from a composer to his own use and thereby realizes a profit, he does not share his profit with the composer. It is true that the plagiarist often purchases a copy of the composer's work and that the composer receives a royalty from the plagiarist's purchase. However, this royalty does not adequately compensate the composer, because it does not include a share of the plagiarist's profits.

The composer's market for his work certainly extends as far as the plagiarist's market audience. However, the audience test excludes from the composer's market audience purchasers of the plagiarist's work who do not perceive substantial similarity between the works in question. That the plagiarist's market audience may not perceive such similarity means neither that the composer's appropriated material is lacking in value, nor that the composer should be uncompensated for his contribution to the plagiarist's work.¹⁴⁰

If the composer's work truly lacked value, the plagiarist would not plagiarize it. Indeed, the plagiarist appropriates the composer's work precisely because it is valuable to him. The value of the composer's work is reflected in the profit which the plagiarist derives from his appropriation. This value far exceeds the meager royalty which the composer receives from the plagiarist's purchase of his work, because the price at which the composer's work is sold is not calculated to include plagiarism. Were the plagiarist forced to bargain with the composer for a sale price which would include plagiaristic use, the composer would be adequately compensated. However, the plagiarist does not bargain; he steals.

It is the very function of our courts to recompense the victim of such

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

138. U.S. CONST., art. I, § 8, cl. 8.

139. The Supreme Court has written: "The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

140. This point has been made by Professor Nimmer. See Nimmer, *supra* note 58, at 37.

theft by awarding damages to the composer, in effect conducting the bargaining for the parties after the fact. To adequately compensate the composer for his contribution to the plagiarist's work and to prevent the plagiarist's unjust enrichment, the composer should be awarded as damages a share of the plagiarist's profits in the amount his appropriated music contributed to the success of the plagiarist's work.

B. Expert Testimony

In his *Arnstein* dissent, Judge Clark sharply rebuked the majority of the court for rejecting expert testimony in the second part of its test:

[M]y brothers reject as "utterly immaterial"¹⁴¹ the help of musical experts as to the music itself (as distinguished from what lay auditors may think of it, where, for my part, I should think their competence least), contrary to what I had supposed was universal practice, . . . thereby adding a final proof of the anti-intellectual and book-burning nature of their decision.¹⁴²

Before *Arnstein* the admission of expert testimony in infringement cases had been a subject of much controversy among the federal courts. "Exclusion . . . resulted from the fact that, by dissection, abstraction, and analysis, the most dissimilar topics may be synthesized into a theme to show identity."¹⁴³ The *Arnstein* court's approval of expert testimony on the issue of copying was in fact a progressive, albeit ineffectual step towards the circumspect jurisprudence advocated by Judge Clark.

The argument against the introduction of experts in infringement cases had been forcefully advanced by Learned Hand sixteen years before *Arnstein* in *Nichols v. Universal Pictures Corp.*,¹⁴⁴ a case concerning dramatic plagiarism:

We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert upon such issues, especially his cross-examination, greatly extends the trial and contributes 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, for the more the court is led into the intricacies of . . . craftsmanship, the less likely it is to stand upon the

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

142. *Id.* at 478 (Clark, J., dissenting).

143. Holtzmuller, *supra* note 96, at 193.

144. 45 F.2d 119 (2d Cir.), *cert. denied*, 282 U.S. 902 (1930).

firmer, if more naive, ground of its considered impressions upon its own perusal. We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the copyrighted work was original, and whether the defendant copied it, so far as the supposed infringement is identical.¹⁴⁵

It is unclear whether by "this class of cases" Hand meant to bar expert witnesses from all plagiarism cases or merely from cases involving dramatic plagiarism.¹⁴⁶ Hand's argument makes some sense when limited to cases involving literary and dramatic plagiarism. Because the trier of fact is literate, he is generally capable of comparing literary texts and dramatic sequences for copying and similarity. However, the trier of fact experiences considerable difficulty resolving the question of substantial similarity in musical plagiarism cases because of his musical illiteracy and unskilled ear.¹⁴⁷ In musical plagiarism cases, unlike cases involving literary or dramatic plagiarism, the admission of expert testimony is therefore a necessity.

The federal courts have, in fact, traditionally admitted expert testimony in musical plagiarism cases.¹⁴⁸ Although testimony of musical experts has often been complex,¹⁴⁹ courts have generally found it to be helpful,¹⁵⁰ even when experts of the opposing parties have disagreed extensively.¹⁵¹ Moreover, on certain issues in musical plagiarism cases, ex-

145. 45 F.2d at 123.

146. There is, however, no indication in Hand's opinions that musical experts ever appeared in his court during his years as a district judge.

147. See *supra* text preceding note 48.

148. In the earliest American musical plagiarism case "the testimony of various experts in music was introduced." *Reed v. Carusi*, 20 F. Cas. 431, 432 (C.C. Md. 1845) (No. 11,642). In another early case it was said that "[p]ersons of skill in the art must be called in to assist in the determination of the question [of originality]." *Jollie v. Jaques*, 13 F. Cas. 910, 914 (C.C.S.D.N.Y. 1850) (No. 7,437). An affidavit of a musical expert was introduced in *Marks v. Leo Feist*, 290 F. 959, 960 (2d Cir. 1923). Since *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535 (S.D.N.Y. 1935), *aff'd*, 82 F.2d 275 (2d Cir. 1936), testimony of experts has been a regular feature of the musical plagiarism trial.

149. See, e.g., *Allen v. Walt Disney Prods., Ltd.*, 41 F. Supp. 134, 137 (S.D.N.Y. 1941); *Arnstein v. American Soc'y of Composers*, 29 F. Supp. 388 (S.D.N.Y. 1939).

150. Even Judge Yankwich, who would not find infringement in the absence of identity, conceded that "[e]xpert testimony is helpful, especially in matters involving musical composition." *Hirsch v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 818 (S.D. Cal. 1937). However, Judge Rifkind criticized the testimony of experts in one case, writing that "musical experts for each side demonstrated, in their zealous partisanship, the doubtful function of the expert as an aid to the court in this class of litigation." *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686 (S.D.N.Y. 1948).

151. Judge Conger once wrote: "True the experts differed greatly. Nevertheless, they were an aid to the Court." *Arnstein v. American Soc'y of Composers*, 29 F. Supp. 388, 397

pert testimony has been considered indispensable.¹⁵² By now the testimony of musical experts is well accepted as evidence relevant to the issue of copying. However, it appears that no court has admitted expert testimony on the critical issue of substantial similarity.

C. *Impracticality of Application*

Judge Martin Manton of the Second Circuit once wrote of the impracticality of the audience test and the consequent reluctance of courts to apply it:

It would be expected that this audience test would, however impracticable to effectuate, be considered by the courts, but the test, perhaps because of its impracticability, has had an artificial and disappointingly inaccurate application. [The instant] case, which set it up, immediately ignored it by considering, in determining whether there was a piracy, whether the identity of impression conveyed might be due to the "nature of the subject" or because both authors used "common materials and common sources." Thus, the audience test is acknowledged as inconclusive.¹⁵³

The difficult task which the plaintiff undertakes in attempting to prove plagiarism under the audience test has been noted by a number of authors.¹⁵⁴ Paul Holtzmuller writes: "The crux of the problem lies in the strict application of the ordinary observer test, which renders the burden faced by the plaintiff almost insurmountable. Unless the offending work has lifted an entire scene, the creative author has no chance against a clever paraphraser."¹⁵⁵ Holtzmuller also notes the dilemma which the plaintiff claiming infringement inevitably faces:

(S.D.N.Y. 1939). *Accord* Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 397 (S.D.N.Y. 1952).

152. "Persons of skill and experience in the art must be called in to assist in the determination of the question [of musical originality]." *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437). "[W]hen a plaintiff seeks to dispense with direct proof of access and attempts to establish that two works are 'strikingly similar,' [expert musical] testimony is required." *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980). Additionally, one court wrote that "the testimony of expert witnesses conclusively proves that it would have been impossible for [defendants] to have reduced [the song] to writing with the exactness and identity shown by the musical score of both songs." *McKay v. Barbour*, 199 Misc. 893, 896, 107 N.Y.S.2d 113, 115 (Sup. Ct. 1950).

153. *Shipman v. R.K.O. Pictures, Inc.*, 100 F.2d 533, 536 (2d Cir. 1938).

154. Harold Fox, for example, writes that "if [the audience test] were strictly applied, substantial injustice would often result and many wilful plagiarists escape the penalty of their acts." Fox, *supra* note 99, at 417.

155. Holtzmuller, *supra* note 96, at 199.

[T]he author's ordinary course of proof is to bring to the court's attention certain similarities between his work and the defendant's. However, if these similarities are too broad, he will be denied recovery on the grounds that the matter is not original.¹⁵⁶ . . . Conversely, if the proposed similarities are too narrow, they become expert testimony, and the author runs afoul of the ordinary observer rule.¹⁵⁷

When administered as part of the *Arnstein* test a basic problem arises. The *Arnstein* test requires that the issue of improper appropriation be determined by the average listener without analysis or the assistance of experts. However, the audience test is administered only after evidence of copying has been introduced. The trier of fact therefore hears the works not as a lay auditor, but as a spectator who has heard testimony by musical experts and observed the cross-examination of witnesses. Thus exposed to critical analysis, the trier of fact cannot realistically decide the question of improper appropriation as would an average listener "without any aid or suggestion or critical analysis."¹⁵⁸

Another problem in the application of the audience test is that most musical plagiarism cases are heard before a judge rather than a jury,¹⁵⁹ the trier of fact most akin to the lay audience.¹⁶⁰ Such is the case for two reasons. First, many plaintiffs seek the cessation of an alleged ongoing infringement and therefore file their complaints in equity. Second, both parties frequently choose to forego a jury trial.¹⁶¹ Plaintiffs claiming mu-

156. What Holtzmuller apparently means is that if the similarities claimed are too broad, the similar material will be deemed uncopyrightable and hence not subject to infringement. For example, if plaintiff claims that defendant's song is similar to his because they are both love ballads, even though plaintiff's song is original, he will be denied recovery for this similarity because the style of love ballads is not copyrightable. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 397 (S.D.N.Y. 1952).

157. Holtzmuller, *supra* note 96, at 199.

158. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933).

159. Apparently only six musical plagiarism cases have been tried in federal court before a jury. See *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718 (9th Cir. 1976); *Arc Music Corp. v. Lee*, 296 F.2d 186 (2d Cir. 1961) (count for equitable relief heard by judge, count seeking damages for infringement tried before jury); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (reversing summary judgment and remanding for jury trial); *Reed v. Carusi*, 20 F. Cas. 431 (C.C. Md. 1845) (No. 11,642); *Selle v. Gibb*, 567 F. Supp. 1173 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984); *O'Brien v. Thall*, 127 U.S.P.Q. (BNA) 325 (D. Conn. Mar. 7, 1960) *aff'd*, 283 F.2d 741 (2d Cir. 1960).

160. "[Improper appropriation is] an issue of fact which a jury is peculiarly fitted to determine." *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

161. After trial before a jury in plagiarism cases was recognized as a matter of right in *Arnstein*, only four of about twenty-four musical plagiarism cases have been heard before a jury. See *supra* note 159. Common law musical plagiarism actions in state courts have been tried before juries somewhat more frequently. See, e.g., *Rich v. Paramount Pictures, Inc.*, 130

sical plagiarism are naturally reluctant to entrust their claims to lay auditors and may therefore opt for a hearing by judicial ears. Defendants also prefer a judicial hearing because they fear a jury's impressionability and are confident of a favorable judgment from a judge harboring even the slightest doubts. This reluctance of the parties to present their cases before a jury illumines both the capricious nature of the audience test and the disfavor with which it is regarded.

D. Abuse in Application

Application of the audience test has been abusive in a number of musical plagiarism cases. In one case a court held a defendant's song non-infringing, not because the similarities among the songs in question were imperceptible to the average listener, but because they were not cognizable on first hearing.¹⁶²

Even greater abuse was inflicted by Judge Leon Yankwich who implemented a harsh variant of the audience test which might well be called an "identity test." Applying this test for the first time¹⁶³ in the case of *Hirsch v. Paramount Pictures, Inc.*,¹⁶⁴ Yankwich acknowledged the audience test as the correct test of musical plagiarism,¹⁶⁵ but held the defendant's song noninfringing because it was not identical to that of the plaintiff. "The playing of the two compositions, both in recorded form and on the piano in the courtroom, carried no identity of melody to me, even when . . . they were played in the same key and tempo. The plaintiff's own expert admitted that the melodies were not identical."¹⁶⁶ Fortunately, this aberrant variation of the audience test devised by Judge Yankwich has not been followed by any other federal judge.¹⁶⁷

In recent years the audience test has also been the subject of abuse. The court in *Ideal Toy Corp. v. Fab-Lu, Ltd.*¹⁶⁸ wrote that "[i]n applying

Cal. App. 2d 775, 279 P.2d 782 (1955); *Navara v. M. Witmark & Sons*, 17 Misc. 2d 174, 185 N.Y.S.2d 563 (Sup. Ct. 1959).

162. The judge hearing this case wrote: "My conclusion on the facts is, that the similarity found to exist between the two pieces is not apparent upon the first rendering of the two pieces of music, but that the listener does become conscious thereof after several playings of the same in whole and in part." *Arnstein v. Edward B. Marks Music Corp.*, 11 F. Supp. 535, 536 (S.D.N.Y. 1935).

163. Yankwich also employed this test in denying an infringement claim in *Carew v. R.K.O. Pictures, Inc.*, 43 F. Supp. 199, 201 (S.D. Cal. 1942).

164. 17 F. Supp. 816 (S.D. Cal. 1937).

165. *Id.* at 818.

166. *Id.*

167. However, following Yankwich, one state court did apply the "identity test" in a common law musical plagiarism case. See *Smith v. Berlin*, 207 Misc. 862, 141 N.Y.S.2d 110 (Sup. Ct. 1955).

168. 261 F. Supp. 238 (S.D.N.Y.), *aff'd*, 360 F.2d 1021 (2d Cir. 1966).

the test of the average lay observer, . . . [children] are not to be excluded—indeed they are the ‘far-flung faithful . . . audience.’”¹⁶⁹ The case involved the alleged infringement of copyrighted dolls. The court supported its inclusion of children in the audience by means of the economic rationale:

[I]f youngsters were excluded in applying the lay public test, the underlying reason for the test would be frustrated. For, as Judge Frank stated in *Arnstein v. Porter*, . . . the copyright laws protect not the reputation of the copyright holder, but the commercial value of his creation. Just as the relevant public there was held to be the “lay listeners . . . for whom such popular music is composed,” the relevant public here must include the children for whom the dolls are created.¹⁷⁰

It is true that in both this case and, more recently, in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,¹⁷¹ which also considered the child audience,¹⁷² infringement was found because the similarities were such as the courts believed would be readily apparent, even to children. However, the inclusion of children in the lay audience constitutes a dangerous precedent for two reasons. First, children might mistake differences for similarity,¹⁷³ thereby improperly finding infringement. Second, because their perceptive skills are not fully developed, children might overlook important similarities which do merit a finding of infringement.

The “child audience” test is particularly ripe for abuse in the field of music where the child’s exposure is often severely limited. Indeed, some children would experience difficulty perceiving musical similarity and might be inclined to resolve such a question in terms of familiarity. Children are in fact incompetent to serve as jurors and are not charged with such tasks. The child audience test is therefore little more than a legal fiction. Nevertheless, the very fiction of employing the child audience as an approved legal tool for resolving complex factual issues such as musical plagiarism casts doubt upon the validity of both the audience test and its juvenile progeny.

169. 261 F. Supp. at 241 (quoting *Rushton v. Vitale*, 218 F.2d 434, 436 (2d Cir. 1955)).

170. 261 F. Supp. at 241 n.13.

171. 562 F.2d 1157 (9th Cir. 1977).

172. *Id.* at 1166.

173. Thus, in *Krofft*, Judge Carter wrote: “We do not believe that the . . . child . . . viewing these works will even notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat’s sash.” *Id.* at 1167.

E. Proposals for a New Audience

Various proposals for modification of the audience test have been proffered. Judge Clark believed that application of the test should be limited to repulsing "the charge of plagiarism where a minute 'dissection' might dredge up some points of similarity."¹⁷⁴ As previously mentioned, when children comprise a significant segment of a creator's market interest, some courts have seen fit to include them in the audience.¹⁷⁵

Along these same lines, Michael Sitzer has proposed that the audience be clearly distinguished from the lay observer "whenever the audience is composed of people who possess significantly specialized tastes, skills, or knowledge, as compared with those of the general public."¹⁷⁶ Sitzer advocates use of such a refined audience to precisely assess the impact of an allegedly infringing work upon the actual market of the work infringed. However, despite the refinement of his proposed audience, he believes expert testimony should be admitted in the determination of substantial similarity:

While the basic division of issues in *Arnstein*, as well as the employment of expert testimony on the threshold question of copying, are quite acceptable, courts should go one step further and admit expert testimony and dissection on the issue of illicit copying. Courts should take care, however, to focus their application of such analytical tools on the enhancement and illumination of the audience test, rather than apply these tools as individual tests of infringement. Technical dissection could be allowed on the contemporary symphonic music audience, because this kind of audience would engage in considerable dissection themselves. In these kinds of cases, the audience *is* the expert, and dissection should be engaged in to the extent that the particular audience would dissect the works involved.¹⁷⁷

This is patently absurd. The average person who attends symphony concerts is no more a musical expert than is the person who enjoys attending trials a legal expert. Moreover, Sitzer neglects to explain how experts could assist the audience without addressing the issue of infringement.

One court which dutifully applied the audience test wrote, as if in protest, that "the investigation should be gauged to the kind of man who

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

175. See *supra* text accompanying notes 168-73.

176. Sitzer, *Copyright Infringement Actions: The Proper Role of Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 386 (1981).

177. *Id.* at 408-09 (footnotes omitted).

does the sort of work under consideration."¹⁷⁸ This statement implies an audience comprising an artist's fellow creators, in effect, a jury of experts.¹⁷⁹ It therefore stands for abandonment of the very essence of the audience test.

Advocating abandonment of the test, Paul Holtzmuller proposes a compromise:

Perhaps the best compromise between the expert witness and the lay observer is the judge himself, a theory espoused by Judge Yankwich of the Ninth Circuit. Under this theory, the court itself determines the question of similarity by a comparative analysis of the two themes followed by a study of the prior use of similar situations in literature and the arts. Thus, the judge is placed in the seat of the lay observer, but he is a more sophisticated, better versed lay observer, and the main objection to the expert witness disappears.¹⁸⁰

To his credit Holtzmuller acknowledges the inherent weakness of his proposal, conceding that "[t]he question remains, however, whether the method would be effective with a less enlightened judge on the bench than Judge Yankwich."¹⁸¹ Certainly no judge can be enlightened in every field of artistic creation. Some judges possess little knowledge of music, nor appreciation for it. A few are in fact musical illiterates. As musical laymen, the judiciary cannot be considered an acceptable compromise between the average person and the expert.

Each of the writers who has proposed improvement of audience constituency has done so because of the layman's inability to perceive musical plagiarism. However, the problem lies not with the composition of the body, but with the audience itself. Because the test is based upon an untenable premise, mere reconstitution of the entity which administers the test cannot render the test either equitable or valid. Whether its role is assumed by judge or jury, the audience is simply incapable of accurately assessing musical plagiarism.

It has been shown that the audience test represents a misapplication of the reasonable man doctrine,¹⁸² that it is based upon misreading of

178. *Frankel v. Irwin*, 34 F.2d 142, 145 (S.D.N.Y. 1918).

179. See *infra* note 210.

180. Holtzmuller, *supra* note 96, at 196.

181. *Id.* Since Judge Yankwich devised and implemented the aberrant "identity test" (see *supra* text accompanying notes 163-67), it is the opinion of this author that Yankwich is neither an example of an enlightened judge, nor is his test an acceptable compromise between the average listener and the musical expert.

182. See *supra* text accompanying notes 100-01.

case precedent,¹⁸³ that it contravenes circumspect jurisprudence by excluding expert testimony in the ultimate determination of infringement,¹⁸⁴ that it is impracticable¹⁸⁵ and prone to abusive application,¹⁸⁶ and that the valid rationale by which it is defended does not justify its existence.¹⁸⁷ The various proposals for modification of the audience test¹⁸⁸ address none of these shortcomings. Thoroughly discredited and irremediably deficient, especially when applied in musical infringement cases, the audience test should be abandoned as the ultimate factor in the determination of musical plagiarism.

V. PROPOSAL FOR AN INTRINSIC TEST OF MUSICAL PLAGIARISM

For the foregoing reasons a new test of musical plagiarism is needed. Because of its inherent fairness¹⁸⁹ and consistency with congressional intent,¹⁹⁰ the derivation test¹⁹¹ should be adopted as the standard of actionable musical plagiarism. To determine whether an accused work has appropriated original material from a plaintiff's composition, a new analytic test of musical plagiarism based upon the work of Professor Jan La Rue¹⁹² is proposed. The plagiarism determination would be made in the following manner.

As in all plagiarism cases, the plaintiff must first prove that he holds a valid copyright in the composition allegedly infringed. Next he must prove that defendant copied original, copyrightable material from his work. Plaintiff may prove copying in two ways. First, plaintiff may prove copying circumstantially by showing that the defendant had access to his composition and that the works are substantially similar. Since derivation is the standard of liability, plaintiff need not depend on the aural skill of the trier of fact to establish substantial similarity, but may prove substantial similarity analytically under the La Rue test which is hereafter set forth. Second, plaintiff may establish copying inferentially by proving that the compositions are so strikingly similar that they could not have been independently created¹⁹³ and that his composition was cre-

183. See *supra* text accompanying notes 102-06.

184. See *supra* text accompanying notes 141-52.

185. See *supra* text accompanying notes 153-61.

186. See *supra* text accompanying notes 162-73.

187. See *supra* text accompanying notes 137-40.

188. See *supra* text accompanying notes 174-81.

189. See *supra* text following note 73.

190. See *supra* text accompanying notes 74-81.

191. See *supra* text accompanying note 72.

192. Jan La Rue is Professor of Music at New York University.

193. Striking similarity negating independent creation may be proved in musical plagiarism cases by a showing of common compositional errors. Thus, the court in one early musical

ated first in time.

When the plaintiff proves copying to the satisfaction of the trier of fact, the defendant's work will be deemed to have infringed plaintiff's copyright. Absent valid affirmative defenses¹⁹⁴ raised by the defendant, plaintiff would be granted judgment. Damages would then be determined according to the role plaintiff's appropriated music played in the success of the infringing work. The untutored aural impressions of the layman are relevant evidence on this issue. Considering the impressions of the average person, the trier of fact may properly determine the percentage of defendant's profits which are attributable to the plaintiff's work. Where plaintiff's material is aurally imperceptible to the average person, damages would obviously be minimal. Limited to application in this context, the audience test performs a proper and valid role in the musical plagiarism case.

A. *The La Rue Test*

In 1971 W.W. Norton published Jan La Rue's *Guidelines for Style Analysis*.¹⁹⁵ The first comprehensive approach to analysis of musical style, La Rue's book has been well received among musical scholars.¹⁹⁶

plagiarism case wrote that "[t]he imitations, in some instances extending even to errors, seem too remarkable to be accidental." *Schuberth v. Shaw*, 21 F. Cas. 738, 739 (C.C.E.D. Pa. 1879) (No. 12,482).

194. Affirmative defenses which may be raised in infringement actions include fair use, abandonment of copyright, estoppel, unclean hands, and laches. See generally 3 M. NIMMER, *supra* note 117, §§ 13.04-13.09 (1984). See also Wyckoff, *Defenses Peculiar to Actions Based on Infringement of Musical Copyrights*, 5 COPYRIGHT L. SYMP. (ASCAP) 256 (1954).

195. J. LA RUE, *GUIDELINES FOR STYLE ANALYSIS* (1971).

196. Carolyn Raney began her book review of La Rue's work as follows:

Since the days of the pioneer Guido Adler in Vienna, scholars and musicians have been attempting to refine the process by which the musical style of a composer could be isolated and recognized, much in the way a geometrician might be attempting to square a circle. Each study comes closer to the goal of universal validity. This particular work has applicability to musical styles from the Gregorian chant to the electronic composition (and even to the "happening"), when applied by the discriminating practitioner. The circle may never be squared, but Jan La Rue has come so close to defining the undefinable that his *Guidelines* will easily approach the computer in exactitude.

Raney, Book Review, 58 *MUSIC EDUCATORS J.* 73 (1971).

Roland Jackson perceives two shortcomings in La Rue's work. Jackson, Book Review, 24 *J. OF THE AM. MUSICOLOGICAL SOC'Y* 489, 490 (1971). First, Professor Jackson considers La Rue's orientation towards tonal music excessive. La Rue certainly analyzes tonal music in great depth. However, every musical plagiarism case to date has involved tonal compositions. Professor Jackson's first criticism, therefore, does not detract from the applicability of La Rue's work as a test of musical plagiarism. Jackson next criticizes La Rue's evaluation of musical styles as lacking penetrating insights. Jackson's second criticism likewise does not detract from the La Rue test's practicability because it is not the function of courts to judge the merits of artistic creation. Of significance to the test's practicality is Professor Jackson's com-

In addition to serving as a guide for analysis of musical style, La Rue's work provides a serviceable method for the comparison of various types of musical compositions.

In *Guidelines for Style Analysis*, Professor La Rue recognizes four elements of music—sound, harmony,¹⁹⁷ melody, and rhythm—which function interactively, resulting in a fifth element, growth.¹⁹⁸ La Rue views each of these five principal elements generically. For example, rhythm is considered in terms of surface rhythm, continuum, interactions, patterns of change, and fabrics.¹⁹⁹ Each of these elements is also considered generically. Continuing with the chosen example, fabrics is considered in terms of homorhythm, polyrhythm, polymeter and variant rhythmic density. When La Rue's several elements are taken as a whole, a comprehensive set of factors for the analysis of music emerges.²⁰⁰

Professor La Rue's achievement lies not merely in his identification and categorization of music's component parts. He also espouses "an 'environmental analysis' (i.e. harmony exists in an environment of melody and rhythm)"²⁰¹ whereby the various elements that La Rue has identified are considered in relation to each other. Because La Rue analyzes musical elements interactively, no single factor is accorded undue emphasis. In this respect, La Rue's analytic method represents a considerable improvement over Learned Hand's comparative method.²⁰² Moreover, Professor La Rue specifies that each musical element is to be considered in "three general dimensions: large, middle and small."²⁰³ This method of observation obviates the commonly voiced judicial fear of

ment that "[t]he basic attitude of the book might be characterized as scientific or *a posteriori*: examine the evidence, test each piece on the basis of the notes themselves, and thereby arrive at an objective appraisal of it." *Id.* at 491. See also George, Book Review, 28 NOTES OF THE MUSIC LIBR. A. 680 (1972).

197. For a recent discussion of harmony as a musical element worthy of copyright protection and hence an important factor in the determination of musical plagiarism, see Woody, *Harmony as the Basis for Music Copyright*, 20 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 389 (1982).

198. J. LA RUE, *supra* note 195, at 3.

199. *Id.* at 230-31.

200. *Id.*

201. Letter from Jan La Rue to Raphael Metzger (July 20, 1983).

202. See *supra* text accompanying notes 85-93.

203. J. LA RUE, *supra* note 195, at 6. La Rue writes:

The first axiom for the analyst seeking completeness is to begin by looking at the piece as a whole, not as parts, not even as a collection of parts. We can come much closer to the sense of flow in a movement if we try first to grasp its entirety. Furthermore, once we comprehend the wholeness, the parts fall into a proper perspective. The opposite process yields less insight, for a study of the parts does not usually help us to sense the whole; in fact, it tends to fragment any broader view, obscuring it with a multiplicity of detail. Hence, it becomes essential to begin with large overviews.

Id. at 5-6.

basing a plagiarism decision on the inevitable similarities which appear upon minute dissection of any two works.²⁰⁴ For these reasons Professor La Rue's method provides a proper perspective for the comparison of two musical compositions.

Professor La Rue's work is also catholic in nature. His analytic method may be applied with success to all types of music: classical, popular, electronic, rock, jazz, folk, country western, etc. Moreover, compositions may be compared regardless of their medium of production. Thus, a composition for piano may be compared with a motion picture score for symphonic orchestra as successfully as with another piano piece. Finally, the works need not be compared from written scores. Where one or both of the compositions under consideration does not exist in notated form, the test may be conducted aurally, the quality of the test being limited only by the aural and analytic skills of the examiner.

B. Implementation of the La Rue Test

The quality of a comparative analysis of two compositions inevitably depends upon the ability of the persons conducting the comparison. Because music is a highly technical and specialized field, a proper comparison of two musical works must be conducted by musical experts. While a judge hearing a musical plagiarism case could read La Rue's book and is certainly advised to do so, his comparison of two works according to La Rue's method would likely yield unreliable findings. However, given a competent examiner, the La Rue test affords a reliable means of assessing musical plagiarism.

Under the proposed test, musical experts of the parties would conduct analytic comparisons of the compositions, determining whether similarities are present with respect to each of La Rue's factors. Where similarities are present the experts would offer their opinions as to whether the similarities are substantial and whether they are indicative of derivation. The experts would also assist the trier of fact in aurally ascertaining whether and to what degree the works are similar. Based on all this evidence, the trier of fact would decide the issues of substantial similarity and independent creation.

Expert testimony has occasionally been contradictory in musical plagiarism cases.²⁰⁵ Conflicting testimony by musical experts would be minimized under the La Rue test because the experts would each conduct their analysis according to the same objective method. When expert

204. See *supra* text accompanying note 143.

205. See *supra* note 151.

testimony is in conflict, recourse may be had to the musical elements categorized by La Rue. Upon identifying the elements which are the subject of disagreement, the experts could explain their analyses of these elements. With the assistance of cross-examination by knowledgeable counsel, the trier of fact would resolve disputed points in favor of the party whose expert provides the most persuasive analysis.

Where the plaintiff seeks to establish access by inference, the trier of fact would consider whether the compositions are so strikingly similar as to preclude the possibility of independent creation. The trier of fact would be aided in resolving this issue by opinion testimony of the musical experts.²⁰⁶ Where experts disagree on the possibility of independent creation, it is only to be expected that the trier of fact would be inclined to find for the defendant. Relevant to the issue of independent creation is the nature of the works in question. Where strikingly similar compositions are lengthy and complex, independent creation is inherently incredible. Where, however, the compositions are brief and simple, independent creation is much more likely. Nearly all musical plagiarism cases have involved the alleged plagiarism of one song by another. Songs are generally short and often simple.²⁰⁷ In some cases a finding of independent creation would therefore be unwarranted in the absence of proof of access.²⁰⁸ However, some songs possess unique features which support a finding against independent creation, despite their brevity and simplicity.²⁰⁹ The fact that songs are the subject of most plagiarism suits

206. Because resolution of the issue of independent creation is ultimately a question of probability, testimony of statistical mathematicians might also prove helpful to the trier of fact.

207. Thus, one court noted that "the structural similarity in [rock and roll] music . . . poses a close question of copying." *Nom Music, Inc. v. Kaslin*, 227 F. Supp. 922, 926 (S.D.N.Y. 1964).

208. Thus, in *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940), where plaintiff's "showing of access was not very persuasive," it was said that "such simple, trite themes as these are likely to recur spontaneously. Recurrence is not therefore an inevitable badge of plagiarism." *Id.* at 80.

209. Thus, *Learned Hand* found infringement in defendant's use of a figure of eight notes in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), writing: "Not only is the figure in each piece exactly alike, but it is used in the same way; that is as an 'ostinato' accompaniment. Further, the defendants have been able to discover in earlier popular music neither this figure, nor even any 'ostinato' accompaniment whatever." *Id.* at 147. Likewise, one court wrote that certain phrases at issue were "so unusual that we cannot believe the similarity was merely the result of chance." *Wihtol v. Wells*, 231 F.2d 550, 552 (7th Cir. 1956). *See also* *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), where a court recently found "substantial significance," *id.* at 178 n.5, in a single "telltale grace note," *id.* at 180 n.10, which occurred "in the identical place in each song." *Id.* at 180 n.11.

therefore does not preclude application of the La Rue test where plaintiff lacks evidence of access.

The utility of the jury in musical plagiarism cases may well be questioned.²¹⁰ Juries function best in deciding simple, easily comprehended questions of fact and in considering behavior under the reasonable man standard.²¹¹ The relevance of both these functions is absent in the musical plagiarism case. However, a jury can hear the testimony of the parties, their witnesses and experts, and base its conclusion upon all such evidence.

The major problem in retaining the jury as trier of fact is its tendency to become confused with complex factual issues.²¹² However, juries have heard analyses of musical experts on the issue of copying for almost thirty years.²¹³ None of the opinions in the six musical plagiarism cases tried before juries²¹⁴ indicates that juries have been unable to comprehend the testimony of musical experts.²¹⁵ Although the jury is put to task in musical plagiarism cases, the record of this period indicates that juries should not encounter insurmountable difficulties in adjudicating musical plagiarism cases under the proposed test.

C. *The La Rue Test Applied: The George Harrison Case*

A full scale comparison of two compositions according to the La Rue method is beyond the scope of this Article. However, to demonstrate how the test functions, two songs that have been the subject of a musical plagiarism case will be compared, considering the major factors

210. Because the seventh amendment affords a constitutional right to trial by jury in civil cases in federal court where the amount in controversy exceeds twenty dollars, a difficult problem would be encountered were abandonment of the lay jury in favor of a panel of musical experts proposed. See Mecklenborg, *Complex Civil Litigation and the Right to Trial By Jury*, 7 N. KY. L. REV. 205 (1980); Walker-Dittman, *The Right to Trial By Jury in Complex Civil Litigation*, 55 TUL. L. REV. 491 (1981).

211. Woods, *Copyright: Hollywood v. Substantial Similarity*, 32 OKLA. L. REV. 177, 185 (1979).

212. See *supra* note 210.

213. See *supra* note 159.

214. See *supra* note 159.

215. O'Brien v. Thall, 127 U.S.P.Q. (BNA) 325 (D. Conn. Mar. 7, 1960), *aff'd*, 283 F.2d 741 (2d Cir. 1960), is the only musical plagiarism case in which a jury was unable to reach a verdict. However, this was evidently due to the fact that the songs in question were both settings of Lincoln's "Gettysburg Address." In affirming the district court's grant of defendant's motion for a directed verdict, the Court of Appeals for the Second Circuit correctly observed that "just as the text of the address is in the public domain so is the natural rhythm of the words in which its thoughts are articulated." 283 F.2d at 743. Due to the unique problem of assessing plagiarism where two songs employ identical texts, O'Brien does not indicate that juries will be unable to render musical plagiarism determinations.

employed in the La Rue test. The George Harrison case²¹⁶ is a logical choice for such a comparison because the songs involved in this case, "He's So Fine"²¹⁷ and "My Sweet Lord,"²¹⁸ were both recorded "hits" and should thus be generally familiar to the reader.

In analyzing two compositions for infringement, the similarities alone are the proper subject of inquiry.²¹⁹ Accordingly, only those features of the songs which are similar will be discussed. Musical factors comprising each of La Rue's five principal elements will be considered. The author's opinion as to the significance of each factor in establishing substantial similarity and derivation will be indicated. Each similarity will be classified as insignificant, indicative in some measure of substantial similarity, or determinative of derivation. While certain musical experts might disagree with the significance of individual factors, the author believes his assessment of the significance of each factor is fairly representative of that of the community of musical theorists.

1. Sound

Considering La Rue's first principal element, sound, it is apparent that the songs bear certain similarities, but that these similarities are relatively insignificant in assessing musical plagiarism in these works. The timbre²²⁰ of each composition is identical, namely unspecified voice with accompaniment of piano or guitar as indicated by keyboard notation with guitar chords. The texture of the songs is almost identical, each song being comprised of melody and fairly consistent three-voiced accompaniment. Finally, the instrumental introduction of each song has a dynamic indication of mezzo-forte,²²¹ but the songs are otherwise of unspecified dynamic intensity. In sum, similarities are evident among each of the musical factors which comprise the element of sound, but these

216. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

217. "He's So Fine" was composed by Ronald Mack and published by Bright Tunes Music Corp. in 1962. Copies of the song may be obtained through Charles Hansen Music & Books, Inc., 1842 West Avenue, Miami Beach, Florida 33139.

218. "My Sweet Lord" was composed by George Harrison and published in 1970 by Harrisongs, Ltd.

219. Thus, Learned Hand wrote in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Id.* at 56. See also *Warner Bros. v. American Broadcasting Co.*, 654 F.2d 204, 209-11 (2d Cir. 1981).

220. "Timbre" is the sound quality of a composition. The term is also used to connote the particular quality of a note produced on a specific instrument in contradistinction to the quality of the same note produced on a different instrument.

221. "Mezzo-forte" is a dynamic indication of "medium strength," indicating that a moderately loud performance is called for.

similarities are common to most popular songs and therefore do not constitute significant indicia of plagiarism.

2. Harmony

Proceeding to the next principal musical element, harmony, the main tensional goal is differently expressed, but occurs immediately before the reprise²²² in both songs. In "He's So Fine" the harmonic climax occurs on the dominant²²³ with the voice accentuating its highest pitch through repetition;²²⁴ in "My Sweet Lord" the climax occurs on the sole diminished chord.²²⁵ Each song presents one instance of notable harmonic color. In "He's So Fine" a contrasting section²²⁶ is introduced in the subdominant;²²⁷ in "My Sweet Lord" the diminished chord supplies the dash of harmonic color in the absence of a contrasting section.

222. The term "reprise" or "recapitulation" indicates a repetition of the expository material following a contrasting or developmental section.

223. The "dominant" is the major chord built upon the fifth scale degree which resolves into the tonic triad. It is one of the most prevalent chords in popular music.

224.

A musical score for the song "I just can't wait, I just can't wait To be held in his arms." The score is written in 4/4 time and consists of three systems. The first system shows the vocal line and piano accompaniment. The lyrics are "I just can't wait, I just can't wait To be held in his arms." The piano accompaniment features a steady bass line and chords in the right hand.

225. A "diminished" chord is a chord in which all the intervals are minor thirds. The diminished chord which occurs in "My Sweet Lord" is built upon the pitch C# as follows:

A musical notation showing a diminished chord built on the pitch C#. The chord is represented by a treble clef, a key signature of one sharp (F#), and a chord symbol consisting of a C# followed by a natural sign and a sharp sign (C#°). The notes are C#, D, E, and F#.

226.

A musical score for the song "He's So Fine, Got-ta be mine. etc." The score is written in 4/4 time and consists of two systems. The first system shows the vocal line and piano accompaniment. The lyrics are "He's So Fine, Got-ta be mine. etc." The piano accompaniment features a steady bass line and chords in the right hand.

227. The "subdominant" is the major chord built upon the fourth scale degree which leads to the dominant. It is one of the most prevalent chords in popular music.

The tonality²²⁸ of each song is unified,²²⁹ both songs are in the key of C Major. Although there are twelve major and twelve minor keys, the identical choice of key is relatively insignificant because most popular songs are in major keys and C Major is one of the most common keys. The harmonic movement is somewhat unusual in its alternate repetition of the supertonic minor²³⁰ and dominant chords. While this factor is a significant similarity, it would only justify a conclusion of substantial similarity in conjunction with several other similarities of similar importance. The harmonic vocabulary of each song, consisting primarily of the tonic,²³¹ supertonic minor, and dominant, constitutes a similarity, but one without significance. Likewise, the harmonic rhythm in each song is consistently by the bar, but is hardly a notable similarity. In sum, movement is the sole harmonic feature significant in determining plagiarism.

3. Melody

Melody, the third principal musical element, presents more fruitful ground for inquiry. The range of both songs is approximately one octave with a tessitura²³² of a fourth in the lower region. Motion is stepwise and triadic,²³³ common for popular songs written for singers of limited range. Considering the melodic patterns, however, we find truly significant similarities. Both songs have two identical principal motives²³⁴ each of which is based on the interval²³⁵ of a fourth. The first motive consists of

228. "Tonality" is the tonal center of a piece to which all other tones are related. The term is also used synonymously with "key" or to indicate that a composition is constructed with a tonal center as opposed to being "atonal."

229. Tonality is "unified" when one tonal center is prevalent throughout a composition.

230. The "supertonic minor" is the minor chord built upon the second scale degree. Like the subdominant, the supertonic minor leads to the dominant and is one of the most prevalent chords in popular music.

231. The "tonic" is the principal tone of a composition, that note upon which the tonic chord is built.

232. "Tessitura" is "the general 'lie' of a vocal part, whether high or low in its average pitch. It differs from range in that it does not take into account a few isolated notes of extraordinarily high or low pitch." W. APEL, *HARVARD DICTIONARY OF MUSIC* 839 (2d rev. ed. 1969).

233. "Triadic" indicates melodic movement in intervals of major or minor thirds or chords constructed from these intervals.

234. A "motive" or "motif" is "a short figure of characteristic design that recurs throughout a composition or a section as a unifying element." W. APEL, *HARVARD DICTIONARY OF MUSIC* 545 (2d rev. ed. 1969).

235. An "interval" is "the distance in pitch between two tones." W. APEL, *HARVARD DICTIONARY OF MUSIC* 418 (2d rev. ed. 1969).

three descending notes, G, E, and D.²³⁶ The second motive consists of five notes, G,A,C,A,C,²³⁷ the first three of which are a retrograde²³⁸ of the first motive transposed up a fourth.²³⁹ While the eight identical notes are hardly determinative of plagiarism, the fact that they occur in two identical motives is certainly indicative of substantial similarity. Another melodic feature indicative of substantial similarity is the grace note²⁴⁰ on the pitch D which occurs before the last note of the second motive²⁴¹ upon its second repetition during the reprise of the second section in the first recordings of both songs.²⁴² In sum, the identical principal interval of a fourth, the identical two motives, and the identical grace note occurring at the same point in both songs suffice to establish substantial similarity which, with proof of access, justifies a finding of infringement.

236.

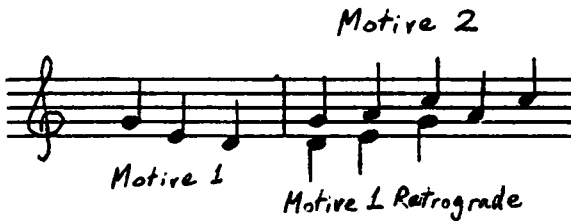


237.



238. A "retrograde" is "a melody read backward, *i.e.*, beginning with the last note and ending with the first." W. APEL, HARVARD DICTIONARY OF MUSIC 728 (2d rev. ed. 1969).

239.



240. A "grace note" is "a note printed in small type to indicate that its time value is not counted in the rhythm of the bar and must be subtracted from that of an adjacent note." W. APEL, HARVARD DICTIONARY OF MUSIC 350 (2d rev. ed. 1969).

241.



242. "My Sweet Lord" was first recorded by Billy Preston. "[W]hen Harrison later recorded the song himself, he chose to omit the little grace note, not only in his musical recording but in the printed sheet music that was issued following that particular recording." *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 n.9 (S.D.N.Y. 1976). The grace note does not appear in the sheet music which the author has located of either "He's So Fine" or "My Sweet Lord."

4. Rhythm

Proceeding to the fourth principal element, rhythm, we find similarities most of which are insignificant in determining plagiarism. The most significant rhythmic feature in common to the songs is the locally repetitive rhythmic patterns two bars in length. The meter of "He's So Fine" is *alla breve*²⁴³ with a tempo²⁴⁴ indication of "moderately," the functional equivalent of the "My Sweet Lord" "bright" common time.²⁴⁵ Both songs are polyrhythmic²⁴⁶ and syncopated.²⁴⁷ Finally, the patterns of rhythmic change are both repetitive and static in each song. In sum, the pieces are rhythmically similar, but the similarities are commonplace.

5. Growth

The fifth musical element is growth which, in La Rue's view, is a considerably broader concept than form.²⁴⁸ The form of the two songs is quite similar.²⁴⁹ Each song begins with a brief instrumental introduction.

243. *Alla breve* or "cut time" is a metric indication equivalent to 2/2 meter, *i.e.*, two beats to the bar with a half note as the beat.

244. "Tempo" is "the speed of a composition or a section there." W. APEL, HARVARD DICTIONARY OF MUSIC 836 (2d rev. ed. 1969).

245. "Common time" is the name for 4/4 meter, *i.e.*, four beats to the bar with a quarter note as the beat.

246. A composition is "polyrhythmic" if contrasting rhythms are employed in different parts of the musical fabric.

247. "Syncopation is, generally speaking, any deliberate disturbance of the normal pulse of meter, accent, and rhythm." W. APEL, HARVARD DICTIONARY OF MUSIC 827 (2d rev. ed. 1969).

248. "Form" simply expresses "the basic fact that music, like all art, is not a chaotic conglomeration of sounds but consists of elements arranged in orderly fashion according to numerous obvious principles as well as a still greater number of subtle and hidden relationships." W. APEL, HARVARD DICTIONARY OF MUSIC 326 (2d rev. ed. 1969).

249. The form of the songs is graphically illustrated as follows:

"He's So Fine"

Section	Intro	A	B	A'	B	Trans.	C	A'	Coda (B)
Length	3 1/2	7 1/2	8	8	8	1	15 1/2	7 1/2	1 + fade-out
Harmony	ii V	ii ⁷ V ⁷	I	ii ⁷ V ⁷	I	V ⁷ /IV	IV	ii ⁷ V ⁷	V ⁷ I

"My Sweet Lord"

Section	Intro	A	B	A'	B	-	-	A'	Coda
Length	7 1/2	5 1/2	8	6	8	-	-	6	1
Harmony	I	ii V	I	ii V	I	-	-	ii V	I

The first motive is then presented in an expository "A section." A "B section" of eight bars in each follows during which the second motive is presented. The first motive then recurs in a reprise "A' section." The "B section" and "A' section" are repeated in each song, "He's So Fine" alone having a contrasting section before the last "A' section." Finally, both songs end instrumentally with the second motive. The general ABA'BA' scheme which the songs share is a formal similarity, but one which is quite common in popular as well as classical music.

The one truly significant growth factor is repetition. In "He's So Fine" the two primary motives are presented repetitively, each motive occurring a total of four times consecutively. In "My Sweet Lord" both motives are also presented repetitively, but each occurs only three times. Such blatant repetition constitutes a truly unique example of construction. Indeed, the author has never before encountered such a pattern of repetition in music of any period.²⁵⁰ The construction is simple, even primitive, but entirely unique. It is one thing for two composers to happen upon two identical motives; it is quite another for them to use them in the same truly novel manner. The unique repetitive pattern of the identical motives constitutes a striking similarity which, in the author's opinion, negates any reasonable possibility of independent creation. The author would therefore deem "My Sweet Lord" an infringement of "He's So Fine," even in the absence of direct proof of access.

VI. CONCLUSION

The science of musical analysis has advanced to the point where it can serve as a reliable means of detecting musical plagiarism. The work of Jan La Rue constitutes a solid foundation for an intrinsic test of musical plagiarism, *i.e.*, a test based on analysis of the musical compositions themselves. This Article proposes adoption of an intrinsic test of musical plagiarism, based upon La Rue's work, in which musical experts would play a significant role. Under the current test of musical infringement, testimony of musical experts is confined to the issue of copying and is inadmissible on the issue of substantial similarity, the ultimate issue in the musical plagiarism trial. In order to give the proposed intrinsic test

250. George Harrison's own expert witness, Harold Barlow, came to the same conclusion. At trial Barlow "acknowledged that although the two motifs were in the public domain, their use . . . was so unusual that he, in all his experience, had never come across this unique sequential use of these materials." *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180 n.11 (S.D.N.Y. 1976).

of musical plagiarism a meaningful role in the plagiarism determination, it is therefore necessary to modify the present test of musical infringement.

Due to its inherent fairness, derivation, rather than substantial similarity, would be adopted as the standard of infringement in musical plagiarism cases. Derivation would be established by proof that defendant copied original, copyrightable material from the plaintiff's work. Copying would be proved in either of two ways. First, copying could be proved circumstantially by evidence that the defendant had access to the plaintiff's composition and that the works are substantially similar. Second, copying could be proved inferentially by proving that the two works are so strikingly similar that they could not have been independently created and that plaintiff's work was created first in time. In proving copying circumstantially, the analyses of musical experts conducted according to the proposed intrinsic test would be admissible on the issue of substantial similarity. In establishing copying by the inferential method, expert testimony based upon the intrinsic test would be not only admissible, but required.

When the plaintiff proves copying to the satisfaction of the trier of fact, the defendant's work would be deemed to have infringed plaintiff's copyright. Absent valid affirmative defenses raised by the defendant, plaintiff would be granted judgment. Damages would then be determined according to the role plaintiff's appropriated music played in the success of the infringing work. Considering the impressions of the average person (the audience test), the trier of fact would determine the percentage of defendant's profits which are attributable to the plaintiff's work. Where plaintiff's material is aurally imperceptible to the average person, damages would obviously be minimal. Limited to application in this context, the audience test would perform a proper and valid role in the musical plagiarism case.

Thirty years ago Professor Nimmer lamented that "the line of infringement has been drawn with too much leeway given to the defendant's privilege and too little recognition of the plaintiff's rights."²⁵¹ In light of the Bee Gees decision, Nimmer's statement is more pertinent today than the day it was written. The time has come for the judiciary to recognize the inadequacy of the audience test and limit this principle in adjudicating musical plagiarism cases. To protect and encourage the creative work of composers, especially those who are unable to offer direct evidence of access due to their lack of artistic recognition, the federal

251. Nimmer, *supra* note 58, at 45.

judiciary should adopt the intrinsic test of musical plagiarism herein proposed and modify the law of musical plagiarism accordingly.

