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THE SUCCESSFUL MUSICAL COPYRIGHT INFRINGEMENT SUIT: THE IMPOSSIBLE DREAM

DEBRA PRESTI BRENT*

Music, of all the liberal arts, has
the greatest influence over the
passions and is that to which the
legislator ought to give the
greatest encouragement. - Napoleon

INTRODUCTION

Musical copyright protection is a misnomer. A plaintiff seeking to protect his property interest finds little sympathy from the judiciary. Popular music gets virtually no respect.¹ The purposes of copyright law are "to foster the creation and dissemination of intellectual works for the public welfare . . . [and] . . . to give authors the reward due them for their contribution to society."² Discouraging judicial attitudes, however, inevitably stifle prospective creative activity and artistic incentive.

When confronted with musical plagiarism, the courts mistreat and disregard music's inherently unique qualities. In fact, a musical infringement case is judged by the same principles that are applied in suits involving other copyrightable works including plays, novels, sculptures, maps, television programs, directories, photographs, and paintings. Although courts have recognized this prob-

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1. *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199, 200 (S.D. Cal. 1942) ("[A] phrase from Beethoven, or from any other great composer, might linger in the mind of a student of music for many years [but] the trite phrasing of an ordinary popular song, with its limitations [could not]"); *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (Judge Learned Hand stated that "[s]uccess in [popular music] is by no means a test of rarity or merit").

2. A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES* 13 (1985) [hereinafter LATMAN].

lem, they have been reluctant to change their approach.³

Musical copyright protection has been slowly undermined by debasing legislative and judicial principles. For example, the protection given to copyrighted compositions is suffocated by the compulsory license exemption,⁴ the juke box exemption,⁵ and the minimal protection afforded sound recordings under federal statutory law.⁶ As with other infringement cases, a variety of affirmative de-

3. *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978) ("Troublesome, too, is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings").

4. The compulsory licensing exemption is codified at 17 U.S.C. § 115 (1982), and sets out the conditions under which the exclusive rights to make and distribute phonorecords of nondramatic musical works are subject. The section provides, in pertinent part:

When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

17 U.S.C. § 115 (1982).

5. 17 U.S.C. § 116 (1982) sets out what is commonly referred to as the "juke box exemption." § 116(a) provides that the exclusive right to perform a nondramatic musical work publicly by means of a coin-operated record player is a limited one:

The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless: (A) such proprietor is the operator of the phonorecord player; or (B) such proprietor refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

17 U.S.C. § 116 (1982).

6. Under 17 U.S.C. § 106 (1982), the owner of copyright has the exclusive rights to do and to authorize the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. 17 U.S.C. § 106 (1982). However, 17 U.S.C. § 114 limits the exclusive rights of the owner of a copyright in a sound recording:

fenses⁷ substantially reduce the limited remaining rights afforded musical compositions. Moreover, legal precedents are continually eroded and manipulated to produce result-oriented judicial decisions.⁸

Two major cases provide the general framework for most copyright infringement disputes: *Arnstein v. Porter*⁹ and *Sid & Marty Krofft T.V. Productions v. McDonalds Corp.*¹⁰ The tests announced in these cases comprise the basic analyses employed in copyright infringement cases, and will be discussed in this Article. Part I describes and analyzes the *Arnstein* test and its application in several recent music cases. In Part II, the *Krofft* test is outlined and applied to illustrate its inadequacies and inapplicability to musical copyright infringement cases. Part III identifies several defects and weaknesses of the *Arnstein* test. In particular, the "lay

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonographs, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

17 U.S.C. § 114 (1982).

7. See 3 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* §§ 10–13 (1990) [hereinafter *NIMMER*].

8. For example, the standard in musical copyright infringement cases that summary judgment is improper where "there is the slightest doubt as to the facts" has been largely abandoned by the courts. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). Professor Nimmer summed up the problem: "[T]he 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." Nimmer, *Inroads on Copyright Protection*, 4 *COPYRIGHT L. SYMP. (ASCAP)* 2, 45 (1952). See also Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 *FORDHAM L. REV.* 127, 130 n.26 (1988) [hereinafter *Note*].

9. 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

10. 562 F.2d 1157 (9th Cir. 1977).

listener" test and its exclusion of expert testimony will be examined along with an overview of music's unique qualities and components. Part IV outlines a proposal for a more equitable test specifically designed to discern musical copyright infringement.

I. THE *Arnstein* TEST

*Arnstein v. Porter*¹¹ continues to be the most influential and widely-quoted musical copyright infringement test.¹² In that case, the Second Circuit Court of Appeals proposed a copyright infringement test that continues to be employed by courts whenever plagiarism is the issue. Commonly referred to as the *Arnstein* test, the analysis relies on isolated findings of copying and unlawful appropriation to determine copyright infringement.¹³ To pass the *Arnstein* test, a plaintiff has the burden of proving three distinct elements:¹⁴ (1) that the plaintiff's song is protected by a valid copyright; (2) that the defendant copied the plaintiff's song; and (3) that the defendant's copying constitutes an "unlawful appropriation."¹⁵

As a prerequisite for a copyright infringement suit, a plaintiff must demonstrate ownership of a valid copyright.¹⁶ Evidence that the copyright has been registered in the Copyright Office is usually sufficient to fulfill this requirement.¹⁷ Under the Copyright Act of 1976, the owner of a valid copyright is afforded the exclusive rights to (1) reproduce the copyrighted work; (2) make derivative works; (3) distribute copies of the work to the public; (4) perform the

11. 154 F.2d 464 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947). *Arnstein* involved a copyright infringement action brought against composer Cole Porter. Ira Arnstein, holder of copyright in various musical compositions, alleged that several of Porter's compositions were plagiarized from his copyrighted material. *Id.* at 467. Porter denied that he had ever seen or heard any of plaintiff's compositions. *Id.* The trial court granted Porter's motion for an order striking out Arnstein's demand for a jury trial, and then dismissed the action on Porter's motion for summary judgment. *Id.* The issue on appeal was whether the lower court properly deprived plaintiff of a trial on his copyright infringement action. *Id.* at 468.

12. Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 34 COPYRIGHT L. SYMP. (ASCAP) 139 (1987) [hereinafter Metzger].

13. *Arnstein*, 154 F.2d at 468. "Unlawful appropriation" is also referred to as illicit copying and improper appropriation.

14. *Id.*

15. *Id.*

16. NIMMER, *supra* note 7, at § 13.01[A]. In order to prove ownership of a valid copyright, the plaintiff must show: (1) originality in the author; (2) copyrightability of subject matter; (3) citizenship status of the author such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of right or other relationship between the author and the plaintiff so as to constitute the plaintiff as the valid copyright claimant. *Id.*

17. 17 U.S.C. § 410(c) (1982).

copyrighted work publicly; and (5) display the work publicly.¹⁸ These rights are exclusive unless restricted by a specific statutory limitation.¹⁹

The second and third requirements of the *Arnstein* test are not as easily established. The second element compels a plaintiff to prove that the defendant copied the plaintiff's copyrighted work.²⁰ In order to prove copying, evidence must be adduced that the defendant had access to the plaintiff's work, together with a showing of sufficient similarity between the works in question.²¹ If no evidence of access can be shown, copying may be found if the similarities in the works are "striking."²²

An infringer is rarely caught in the act of copying. In the absence of the defendant's admission or some credible testimony that actual plagiarism occurred, copying may be inferred from circumstantial evidence.²³ Some courts, however, are reluctant to find infringement without evidence that the defendant had or could have had access.²⁴ Two works may undoubtedly be identical, but if the defendant created his work independently, or if both works were copied from a common source in the public domain, there can be no copyright infringement.²⁵ Likewise, "[i]f one hundred monkeys sat down at one hundred typewriters, and one of them eventually produced *Hamlet*, this remarkable result could not be copyright infringement."²⁶

Most courts will infer access if the defendant had the opportu-

18. 17 U.S.C. § 106 (1982).

19. The following provisions of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), set out the limitations on the exclusive right of copyright: § 107—fair use; § 108—reproduction by libraries or archives; § 109—transfer of an owner's personal copy; § 110—certain performances, i.e., non-profit educational institutions, systematic instructional activities of the government; § 111—secondary transmissions; § 112—ephemeral recordings, i.e., radio stations; § 113—limited rights in pictorial, graphic, and sculptural works; § 114—limited rights in sound recordings; § 115—compulsory license for making and distributing phonorecords; § 116—public performances by means of coin-operated phonorecord players; § 117—computer programs; § 118—use of certain works in connection with noncommercial broadcasting, i.e., public broadcasters.

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

21. *Id.*

22. *Id.*

23. NIMMER, *supra* note 7, at § 13.02[A].

24. *Arnstein*, 154 F.2d at 468. According to Professor Nimmer, some courts have defined access as the "actual viewing and knowledge of plaintiff's work by the person who composed defendant's work." NIMMER, *supra* note 7, at § 13.02[A]. For example, if the plaintiff had never shown his work to anyone and kept it locked in a vault on a deserted island, no amount of similarity will sustain a verdict of infringement.

25. NIMMER, *supra* note 7, at § 13.02[B].

26. LATMAN, *supra* note 2, at 28.

nity to see or hear the plaintiff's copyrighted work.²⁷ Direct proof that the alleged infringer actually saw or physically possessed the accused work is not required.²⁸ The plaintiff's work need only be "available" with some "reasonable possibility of access."²⁹ The criteria to determine access may at first seem fairly broad. In application, however, courts have required more stringent proof of access: "Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing plaintiff's work—not a bare possibility."³⁰

Access has frequently been found when a plaintiff's song had been widely disseminated, such as by sheet music publication, recording distribution, or public broadcast.³¹ Unless a plaintiff's composition has received a sufficient amount of notoriety, the court will scrutinize the evidence regarding the availability of the plaintiff's work and the possibility of access very carefully.³² For example, in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,³³ plaintiff claimed that George Harrison's song "My Sweet Lord" infringed on his copyrighted song "He's So Fine." The court held that because "He's So Fine" had achieved international success in the United States and in England, and both songs were virtually identical, Harrison's composition unlawfully infringed on plaintiff's copyright.³⁴

In contrast, a plaintiff will have difficulty proving access if his composition received only local or limited recognition. In *Selle v.*

27. See, e.g., *Gaste v. Kaiserman*, 863 F.2d 1061, 1067 (2d Cir. 1988) (no error in trial judge instructing jurors that they could find access only if defendant had a reasonable opportunity to see or hear plaintiff's copyrighted work).

28. See *Golding v. R.K.O. Pictures*, 208 P.2d 1, 3 (Cal. 1949).

29. *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

30. NIMMER, *supra* note 7, at § 13.02[A].

31. See, e.g., *Cholvin v. B & F Music Co.*, 253 F.2d 102 (7th Cir. 1958) (plaintiff's song was reproduced on 2000 copies of sheet music, four recordings were made of the song, 200,000 total records were sold, and the song was performed on several nationwide broadcasts). But see *Jewel Music Pub. Co. v. Leo Feist, Inc.*, 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (although 10,000 copies of the song were distributed or sold, and the music was broadcast nationally, the court refused to infer access).

32. In older cases, sheet music, radio, and limited public performances were the usual means to achieve public recognition. Today, courts consider access in light of recent technological advances. Only when a plaintiff's song has been produced and distributed on records or tapes, performed on television or in movies, published in books or magazines, or played on the radio will courts find a reasonable possibility of access. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983); *Edward B. Marks Music Corp. v. Borst Music Pub. Co.*, 110 F. Supp. 913 (D.N.J. 1953).

33. 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

34. *Harrisongs*, 420 F. Supp. at 180-81.

Gibb,³⁵ Ronald Selle, an unknown composer, claimed the Bee Gees' popular song "How Deep is Your Love" infringed on his copyrighted song "Let It End."³⁶ Selle admitted that his composition was played publicly on only two or three occasions in the Chicago area, and could not prove that any of the Bee Gees or any of their staff members were in the vicinity during that time.³⁷

Proof that a plaintiff mailed his composition to a defendant's principal office may be circumstantial evidence that the material was in fact received and that the alleged infringer had prior access to a plaintiff's work.³⁸ In *Gibb*, plaintiff sent tapes and music lead sheets to eleven recording and publishing companies about a year before the Bee Gees claimed to have written their song.³⁹ Although eight companies returned copies of his work,⁴⁰ Selle only needed to demonstrate that at least some of those company employees listened to his unsolicited music, either because company policy warranted it or because it was common practice to do so in the music industry.⁴¹ The *Gibb* court addressed this issue by noting that the parties (in particular, the Bee Gees) had not elicited testimony from the employees of the recipient companies, and stated that "[s]uch evidence might have conclusively disproved access."⁴²

A defendant is permitted to rebut the presumption that solicited music had been reviewed. For example, such an inference may be rebutted if the recipient company proves that decision-making and creative personnel are insulated from unsolicited compositions.⁴³ Policies and procedures showing that materials are automatically rejected and returned to the senders would be convincing evidence.⁴⁴ However, if a plaintiff shows that a defendant, her company, or her agent received an actual copy, read the material, or had the opportunity to receive it, a defendant then has the burden to prove that the song was independently created.⁴⁵

35. 741 F.2d 896 (7th Cir. 1984).

36. *Gibb*, 741 F.2d at 898.

37. *Id.* The *Gibb* court stated that "it [was] not necessary for us, given the facts of this case, to determine the number of copies which must be publicly distributed to raise a reasonable inference of access. Nevertheless, in this case, the availability of Selle's song, as shown by the evidence, was virtually *de minimus*." *Id.* at 902 (emphasis in original).

38. *Id.* at 901.

39. *Id.* at 898.

40. *Id.*

41. *Id.*

42. *Id.* at 902.

43. *NIMMER*, *supra* note 7, at § 13.02[C] n.26. See *Vantage Point, Inc. v. Parker Brothers, Inc.*, 529 F. Supp. 1204 (E.D.N.Y. 1981).

44. *NIMMER*, *supra* note 7, at § 13.02[C] n.26.

45. *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063 (4th Cir. 1988).

In *Gaste v. Kaiserman*,⁴⁶ the Second Circuit Court of Appeals stated that "[a]ccess through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant's access to a plaintiff's work."⁴⁷ In *Gaste*, plaintiff, the composer of "an obscure French song,"⁴⁸ claimed that Morris Kaiserman's song "Feelings,"⁴⁹ written nearly twenty years after plaintiff's work, improperly infringed on his musical copyright.⁵⁰ In the 1950s, Gaste's employee presented a tape of Gaste's song to Enrique Lebendiger, the owner of defendant's publishing company, and soon after sent copies of the sheet music and a record to Lebendiger's Brazilian office.⁵¹ Lebendiger claimed he had never seen or heard copies of plaintiff's song, and had no contact with Kaiserman until September 1973 when "Feelings" was submitted for publication.⁵² Even with this "somewhat attenuated chain of events extending over a long period of time and distance,"⁵³ the court conceded that plaintiff had adduced sufficient evidence of access.⁵⁴

Unusual speed in the creation of a defendant's work may also constitute circumstantial evidence of access because there was no time for independent creation.⁵⁵ Conversely, it is arguable that if a defendant created the work with excessive speed, time for copying may be very unlikely and thus any inference of copying would be negated.⁵⁶ Additionally, similarity between the plaintiff's work and materials created by the defendant which are *not* the subject of litigation may confirm access.⁵⁷ For instance, if the plaintiff for-

46. 863 F.2d 1061 (2d Cir. 1988).

47. *Gaste*, 863 F.2d at 1067.

48. *Id.* at 1063.

49. Morris Kaiserman, known professionally as Morris Albert, was a Brazilian singer and composer who wrote the song "Feelings" in 1973. *Id.* "Feelings" became a world-wide hit, and won gold records in many countries. *Id.*

50. *Id.* Gaste alleged at trial that defendant gained access to the song "Pour Toi" through Enrique Lebendiger, the owner of Fermata, which was defendant Kaiserman's publisher. *Id.* Evidence presented at trial established that Fermata "had some dealings with Gaste's publishing company, Les Editions Louis Gaste, in the 1950's." *Id.*

51. *Id.* at 1066.

52. *Id.* Kaiserman claimed that he composed "Feelings" in September of 1973. *Id.* Both Kaiserman and the publishing company's owner claimed they did not have contact with each other before this time. *Id.* However, their testimony was sufficiently contradicted when a contract dated a few months earlier was submitted. *Id.* at 1066-67.

53. *Id.* at 1067.

54. *Id.* The Second Circuit stated: "[W]e cannot say as a matter of law that the jury could not reasonably conclude that Kaiserman had access to the song through Lebendiger. Access through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant's access to a plaintiff's work." *Id.*

55. *Scott v. WKJG, Inc.*, 376 F.2d 467 (7th Cir.), *cert. denied*, 389 U.S. 832 (1967).

56. *NIMMER*, *supra* note 7, at § 13.02[C].

57. *Id.*

warded two songs to the defendant and the defendant bought one of them, it would be apparent that the defendant also had access to the other song.

Assuming that a reasonable possibility of access exists, the next inquiry under the *Arnstein* test is whether there are enough similarities to constitute copying.⁵⁸ If there are no similarities, "no amount of evidence of access will suffice to prove copying."⁵⁹ To determine the extent of similarities, expert testimony and "dissection" of the works in question should be employed.⁶⁰

Expert testimony in musical infringement suits is commonplace and often vitally necessary.⁶¹ Technical examinations of minute details may serve not only to prove copying but also "unlawful appropriation."⁶² Where access is weak, expert testimony may be mandatory to show striking similarity in order to establish actual copying.⁶³ For example, in *Gibb*, plaintiff's expert attempted to illustrate the striking similarities in the two works at issue.⁶⁴ In the first eight bars of both songs (Theme A), Selle had thirty-four notes and the Bee Gees had forty notes.⁶⁵ The expert pinpointed twenty-four notes in Theme A that were identical in pitch and in symmetrical positions.⁶⁶ Thirty rhythmic impulses (out of thirty-five for Selle and forty for the Bee Gees) were shown to be identical.⁶⁷ In the last four bars of both songs (Theme B), fourteen notes in each were identical in pitch. Of the fourteen rhythmic impulses

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

59. *Id.*

60. *Id.* "Dissection" refers to the cutting up of the musical work into smaller units for the purpose of music analysis. See Note, *supra* note 8, at 131.

61. Note, *supra* note 8, at 127-28.

62. In *Arnstein*, the court distinguished the elements of copying and unlawful appropriation, and indicated the types of evidence permissible to prove each. Note, *supra* note 8, at 130. On the issue of copying, "[w]here plaintiff relies on similarities to prove copying (as distinguished from improper appropriation) paper comparisons and the opinions of experts may aid the court." *Arnstein*, 154 F.2d at 473. On the issue of improper or unlawful appropriation, however, the test is one based upon the response of the ordinary lay hearer. *Id.* at 468. While expert testimony may be received to assist in determining the reactions of lay auditors, such testimony "will in no way be controlling on the issue of illicit copying." *Id.*

Although a jury is usually asked to disregard the expert dissection and analysis when determining the unlawful appropriation prong, in *Gibb* the jury was not instructed in this way. *Gibb*, 741 F.2d at 901. See also, *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 447-51 (S.D.N.Y. 1976), *aff'd and modified on other grounds*, 677 F.2d 180 (2d Cir. 1981) (court's discussion of substantial similarity hardly differs from its prior discussion of copying).

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

64. Note, *supra* note 8, at 141.

65. *Gibb*, 741 F.2d at 899.

66. *Id.*

67. *Id.*

in both songs, eleven were identical.⁶⁸ The expert also demonstrated that the themes of both songs were in the same positions,⁶⁹ and testified that he did not know of any two songs composed by two different composers that contained as many striking similarities.⁷⁰ Notably, during questioning, plaintiff's attorney played a tape for Maurice Gibb, one of the Bee Gees.⁷¹ When asked if he recognized the tune being played, Mr. Gibb positively identified the song as "How Deep is Your Love," even though it was in fact plaintiff's song "Let It End."⁷²

Although a trial judge may allow expert testimony, he is not bound by it.⁷³ The *Gibb* court refused the expert's contention that defendants had no possibility of independent creation.⁷⁴ Judging by the *Gibb* standard, no logical explanation for the disqualification of the expert's testimony need be given.⁷⁵

If there is no evidence of access, "the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."⁷⁶ In other words, "the two songs [must be] so much alike that the only reasonable explanation for such a great degree of similarity is that the later song was copied from the first."⁷⁷

Striking similarity alone will not imply copying if both works are trite or commonplace.⁷⁸ Evidence of the relative complexity or innate uniqueness of the two compositions is decisive when demonstrating striking similarities. For example, in *Bright Tunes Music*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Selle v. Gibb*, 567 F. Supp. 1173, 1178 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

72. *Id.*

73. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (2d Cir. 1946).

74. *Gibb*, 741 F.2d at 905. See Note, *supra* note 8, at 142 ("[The expert witness] Parsons had concluded that the similarities [were] so great, the similarities [were] so vivid and striking that they would preclude independent composition"). The *Gibb* court, in addressing the expert's testimony, declared:

More significantly, however, although Parsons used the magic formula, 'striking similarity,' he only ruled out the possibility of independent creation; he did not state that the similarities could only be the result of copying. In order for proof of 'striking similarity' to establish a reasonable inference of access, especially in a case such as this one in which the direct proof of access is so minimal, the plaintiff must show that the similarity is of a type which will preclude any explanation other than that of copying.

Gibb, 741 F.2d at 905.

75. *Id.* at 904.

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

77. *Gaste*, 863 F.2d at 1067 n.3.

78. *Gibb*, 741 F.2d at 904.

Corp. v. Harrisongs Music, Ltd.,⁷⁹ the court examined two very short musical phrases that, by themselves, would not be considered novel.⁸⁰ The sequential repetitions of the phrases were deemed to constitute a "highly unique pattern."⁸¹ Plaintiff's song "He's So Fine" contained four repetitions of "motif A," the first musical phrase (sol-mi-re), followed by four repetitions of "motif B," the second musical phrase (sol-la-do-la-do).⁸² In comparison, defendant's song "My Sweet Lord" also had four repetitions of "motif A" but only three repetitions of "motif B." In place of the fourth repetition of "motif B" in "He's So Fine," "My Sweet Lord" had "a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition [and] [t]he harmonies of both songs [were also] identical."⁸³

In *Heim v. Universal Pictures, Co.*,⁸⁴ the Second Circuit would have found infringement if even a "single brief phrase, contained in both pieces, was so idiosyncratic in its treatment, it would preclude coincidence."⁸⁵ Judge Clark, concurring only in the result because defendant's copyright was invalid, found plaintiff's work to be "quite different in rhythmic values, setting, and arrangement,"⁸⁶ adding that "[s]urely, if the *Arnstein* case teaches us anything, it must be that banality is no bar to a claim for plagiarism."⁸⁷

In *Gibb*, the Seventh Circuit expanded *Arnstein* and insisted that striking similarity should not be considered in isolation, but rather together with other circumstantial evidence relating to access.⁸⁸ The Second Circuit in *Gaste v. Kaiserman*⁸⁹ declined to use this more rigorous test and continued to follow *Arnstein*, emphasizing that "[i]n some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, *without more*, both to justify an inference of copying and to prove im-

79. 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983).

80. *Harrisongs*, 420 F. Supp. at 178.

81. *Id.*

82. *Id.*

83. *Id.*

84. 154 F.2d 480 (2d Cir. 1946).

85. *Heim*, 154 F.2d at 488.

86. *Id.* at 490 (Clark, J., concurring).

87. *Id.* at 491.

88. *Gibb*, 741 F.2d at 904.

89. 863 F.2d 1061 (2d Cir. 1988).

proper appropriation."⁹⁰

After a plaintiff has set forth evidence of copying, the defendant may rebut it. The trier of fact is likely to find copying unless the defendant shows that the work was independently created.⁹¹ The defendant must rebut this presumption with a "high standard of proof of independent creation."⁹² The defendant may himself or through witnesses explain his training and his process of creating the independent work, including the manner and speed in which the creating process evolved.⁹³ In *Gibb*, the Bee Gees presented testimony of several witnesses who were in Paris during the collaboration on "How Deep is Your Love."⁹⁴ A work tape was submitted that had "an unexplained gap" in the beginning of the creative process but nonetheless depicted the process by which ideas, notes, lyrics and bits of the tune were gradually put together.⁹⁵

If the plaintiff proves striking similarity, it is irrebuttable proof of copying.⁹⁶ Therefore, when the plaintiff shows striking similarities between the two compositions, substantiated by expert testimony affirming the complexities of the plaintiff's work, the defendant's contention that the work was independently created should be negated.

The plaintiff's final task under the remaining prong of the *Arnstein* test is to convince the court that the defendant unlawfully infringed on the plaintiff's copyright.⁹⁷ Assuming the copying was impermissible and the similarities were rebuttable, *Arnstein* requires a showing that the copying was so material or substantial as to constitute unlawful appropriation.⁹⁸ The question submitted to the factfinder on this issue 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

90. *Gaste*, 863 F.2d at 1067-68 (quoting *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947)) (emphasis in original). Striking similarity may also be found where there has been "suspicious" copying. Thus, an apparent effort to mask or hide the appearance of similarity may itself be evidence of copying. Such striking similarity is often revealed in common errors. In fact, common errors have been found to be "the strongest evidence of piracy," thereby creating a prima facie case of copying. *NIMMER*, *supra* note 7, at § 13.03 [C].

91. *NIMMER*, *supra* note 7, at § 13.01[B].

92. *Id.*

93. *Id.*

94. *Gibb*, 741 F.2d at 899.

95. *Selle v. Gibb*, 567 F. Supp. 1173, 1177 (N.D. Ill. 1983), *aff'd*, 741 F.2d 896 (7th Cir. 1984).

96. *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 303 (S.D.N.Y. 1977).

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

98. *Heim v. Universal Pictures, Co.*, 154 F.2d 480, 487 (2d Cir. 1946).

composed, that defendant wrongfully appropriated something which belongs to the plaintiff."⁹⁹

The lay listener test reviews the musical work as a whole and employs the reaction of the ordinary observer to determine if the copying is substantial or material, or both.¹⁰⁰ Aural examinations and comparisons of the similarities and differences between the works in question are permitted.¹⁰¹ However, expert testimony is forbidden to dissect, analyze, or assist the court in its final evaluation.¹⁰² In addition, as in the test for striking similarity, the more valuable the material taken, the more likely that the taking will be found to be unlawful.¹⁰³

The *Arnstein* court suggested the following procedures when employing the lay listener test:

At the trial, plaintiff may play, or cause to be played, the pieces in such manner that they may seem to a jury to be inexcusably alike, in terms of the way in which lay listeners of such music would be likely to react. The plaintiff may call witnesses whose testimony may aid the jury in reaching its conclusion as to the responses of such audiences.¹⁰⁴

The lay listener test may be extended to include third party observations and responses rather than depending solely on the reactions of the factfinder.¹⁰⁵ In *MCA, Inc. v. Wilson*,¹⁰⁶ the court

99. *Arnstein*, 154 F.2d at 473. The court explained that the issue of unlawful appropriation was one of fact, and thereafter advanced the policy underlying the lay listener test: The proper criterion on [the issue of unlawful appropriation] is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. 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.

Id.

100. See *Arnstein*, 154 F.2d at 464.

101. *Id.* at 473.

102. *Id.* at 468.

103. See Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 439 (1988) [hereinafter Comment].

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

105. See *Atari Inc. v. North Am. Phillips Consumer Elec. Corp.*, 672 F.2d 607, 619 (7th Cir.), cert. denied, 459 U.S. 880 (1982). But see *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982) (in a preliminary injunction hearing, 100 newspaper film reviews stating that the MGM film, *Tarzan the Ape Man*, was the same as Edgar R. Burrough's story of *Tarzan of the Apes* found inadmissible).

106. 425 F. Supp. 443, 450-51 (S.D.N.Y. 1976). *MCA, Inc. v. Wilson* involved an action by MCA for copyright infringement and wrongful appropriation of its copyrighted song "Boogie Woogie Bugle Boy" by defendants, who made the song part of their musical piece entitled "The Cunnilingus Champion of Co. C." *Id.* at 445. The latter song was one of several pieces performed in defendants' play "Let My People Come—A Sexual Musical." *Id.*

ruled that reactions of the cast and audience of the play in question were admissible:

Since one of the crucial tests in a copyright infringement case is whether the allegedly infringing work is recognizable by ordinary observation as having been pirated from the copyrighted source, any evidence directly bearing on the observations of the audience of [defendant's play] and the cast members to the rendition of [the allegedly infringing song] is clearly relevant.¹⁰⁷

Unlawful appropriation has caused the courts considerable concern and confusion. The *Arnstein* court refrained from defining unlawful appropriation, and subsequent courts have struggled with its application. In particular, the Ninth Circuit Court of Appeals in *Sid & Marty Krofft T.V. Productions v. McDonalds Corp.*¹⁰⁸ explored the *Arnstein* decision, and ultimately produced an even more confusing, problematic test for copyright infringement.

II. THE *Krofft* TEST

Since 1977, the Ninth Circuit Court of Appeals has employed a variation of the *Arnstein* test, commonly known as the *Krofft* test.¹⁰⁹ Under the *Krofft* test, ownership of a valid copyright and access to the copyrighted work must be established by the plaintiff.¹¹⁰ In adding a "new dimension" to the test for infringement, the Ninth Circuit proposed that "there also must be [shown] substantial similarity not only of the general ideas but of the expressions of those ideas as well."¹¹¹

107. *Wilson*, 425 F. Supp. at 450.

108. 562 F.2d 1157 (9th Cir. 1977).

109. In *Krofft*, Sid & Marty Krofft Productions sued McDonalds Corp., alleging that defendant's McDonaldland TV commercials infringed on its copyrighted "H.R. Pufnstuf" children's TV show in that defendants had used several of plaintiff's characters in its commercials. *Id.* at 1161-62. The complaint alleged that "the McDonaldland advertising campaign infringed the copyrighted H.R. Pufnstuf television episodes as well as various copyrighted articles of Pufnstuf merchandise." *Id.* at 1162.

110. *Id.* at 1164.

111. *Id.* The *Krofft* court expressed its dissatisfaction with the general test for copyright infringement, that is, that "infringement would be established upon proof of ownership, access, and substantial similarity." *Id.* at 1162. Stating that this rule would produce some untenable results, the court declared that a limiting principle was needed. *Id.* at 1163. The Ninth Circuit found this limitation in "the classic distinction between an 'idea' and the 'expression' of that idea," adding that "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. *Id.* (citing *Mazer v. Stein*, 347 U.S. 210, 217-18 (1954), and *Baker v. Selden*, 101 U.S. 99, 102-03 (1879)). Thus, "[t]he real task in a copyright infringement action, then, is to determine whether there has been copying of the expression of an idea rather than just the idea itself. . . . Only this expression may be protected and only it may

The *Krofft* test has been criticized as being an incorrect interpretation of *Arnstein's* infringement test.¹¹² The *Krofft* test is based on an idea-expression dichotomy in place of *Arnstein's* copying and improper appropriation requirements:

We believe that the court in *Arnstein* was alluding to the idea-expression dichotomy which we make explicit today. 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.¹¹³

After a plaintiff produces evidence of a valid copyright and proves access, the *Krofft* test recites two more requirements. First, an "extrinsic test" is employed to analyze the two works for substantial similarities of ideas.¹¹⁴ The court explained its use of the term "extrinsic" and its definition:

We shall call this test 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. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.¹¹⁵

Under *Krofft*, a finding of similar ideas in both the plaintiff's and defendant's works satisfies the extrinsic test.¹¹⁶ Second, an "intrinsic test" compares the two compositions for substantial similarity of expressions,¹¹⁷ and determines the substantial similarity between the forms of expression which are "more subtle and complex."¹¹⁸ Like the *Arnstein* improper appropriation prong, the intrinsic test depends on the response of the ordinary, reasonable person, and not on the type of external criteria and analysis which

be infringed." *Krofft*, 562 F.2d at 1163.

112. See Metzger, *supra* note 12, at 168.

113. *Krofft*, 562 F.2d at 1165.

114. *Id.* at 1164.

115. *Id.* The extrinsic test, however, was not applied by the *Krofft* court: "Defendants attempt to apply an extrinsic test by the listing of dissimilarities in determining whether the expression they used was substantially similar to the expression used by the plaintiffs. That extrinsic test is inappropriate; an intrinsic test must here be used." *Id.* at 1165.

116. *Id.* at 1164.

117. *Id.* at 1165.

118. *Id.* at 1164.

mark the extrinsic test.¹¹⁹ Analytic dissection and expert testimony are inappropriate.¹²⁰ Moreover, if the ideas of the works are dissimilar, the expressions of the work cannot be substantially similar.¹²¹

Arguments against the use of the idea-expression test focus on the concept that "music does not communicate ideas."¹²² A composer has his own ideas when composing a song, and a listener will have his own ideas when listening to the song.¹²³ Ideas cannot be found in music because, to have an idea, there must first be a form or a description. Music is an oblique art that produces sounds and expresses moods. Except for the written notes, music cannot be seen or felt, and whatever is conjured in the mind is a mere personal image. If any ideas are present in music, they are perceived in the minds of the listeners. Therefore, any examination of music for ideas has the inherent danger of studying the style of the composition or its expression to determine whether the ideas are similar.¹²⁴ In music, idea and expression cannot be distinguished.¹²⁵

The *Krofft* court recognized the difficulties underlying the idea-expression test, quoting Judge Learned Hand's observation that "no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.'"¹²⁶ Not surprisingly, federal judges have found the doctrine difficult to apply because precision in marking the boundary between the unprotected idea and the protected expression is rarely possible.¹²⁷ As a result, the ability of a jury to adequately comprehend the idea-expression dichotomy is dubious.

Although the *Krofft* test is not often applauded, particularly when applied in music cases, it has received some support because of the underlying idea-expression principles involved in its analysis.¹²⁸ Idea-expression inquiry has been especially recommended for works with plot and character interaction.¹²⁹ Accordingly, the

119. *Id.*

120. *Id.*

121. Metzger, *supra* note 12, at 169.

122. *Id.* at 170. See Comment, *supra* note 103, at 442-43.

123. Metzger, *supra* note 12, at 170.

124. *Id.*

125. Comment, *supra* note 103, at 443.

126. *Krofft*, 562 F.2d at 1164 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 271 F.2d 487, 489 (2d Cir. 1960)).

127. *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

128. Metzger, *supra* note 12, at 170.

129. *Id.* at 171.

Krofft test may be appropriate when the infringement issue centers on literature.¹³⁰

Reminiscent of *Krofft*'s "clarification" of the Arnstein opinion, one interesting theory proposed that the *Krofft* test attempted to distinguish the objective and subjective similarities between the expressions in the two works.¹³¹ Thus, "idea" was not really what the *Krofft* court meant. This hypothesis suggested that the *Krofft* court intended a detailed, analytical comparison of the expression in the two works to determine if the defendant appropriated its essential, original expression. The court would make an initial quantitative conclusion, and thereafter the jury would apply the intrinsic test to weigh the subjective elements of the expressions.¹³²

Particularly noteworthy is that in application, the *Krofft* test may endanger the status of copyright protection in general. The *Krofft* court, concerned that *Arnstein* overextended the scope of copyright protection, reshaped and adjusted the law in order to intentionally limit findings of infringement.¹³³ As a result, analysis under the *Krofft* test has reduced findings of copyright infringement.

The *Krofft* test has not improved on *Arnstein*'s infringement test. The Ninth Circuit's approach is a limited one that cannot be adapted to musical infringement suits and should not be applied in other copyright cases when it deteriorates the copyright owner's ability to enforce exclusive statutory rights. Therefore, the *Arnstein* test should remain as the standard for musical copyright infringement cases.¹³⁴

130. *Id.* The problem of the vague line between the idea and its expression has even been argued in dramatic works. In *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985), plaintiff alleged that the Steven Spielberg film *E.T.—The Extra-Terrestrial* infringed on plaintiff's copyright in the musical play *Likey from Maldemar*. *Id.* at 1354. Both plays concerned aliens who had telekinetic powers and had made friends with some Earth children. *Id.* at 1354-55.

The Ninth Circuit, in applying the idea-expression test of *Krofft*, referred to "the sequence of events, the dialogue, the characters, and the mood of the works." Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 754-55 (1987). Although the extrinsic test for ideas was applied, "these factors [were] arguably elements of expression." *Id.* at 755. Again, because of the difficulty in distinguishing the idea from the expression, the expression of the work was intermeshed with its idea and descriptive plot.

131. Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas in Copyright?* 8 SAN FERN. V.L. REV. 109, 132-34 (1980).

132. *Id.* at 140, 153-66.

133. *Krofft*, 562 F.2d at 1162-63.

134. See NIMMER, *supra* note 7, at § 13.03[E].

III. THE INHERENT WEAKNESS OF THE *Arnstein* TEST

Notwithstanding the inconsistent and sometimes improper applications, *Arnstein's* requirement that copying be proven is an equitable and fairly reliable doctrine. There is, however, a problematic element of the *Arnstein* test concerning its unlawful appropriation analysis. Most criticism has focused on this final prong for three reasons. First, the lay listener test is both an elusive doctrine when applied in music cases and an incorrect application of the reasonable man test.¹³⁵ Second, expert testimony, which is vital to ensure that copyright infringement does not go undetected,¹³⁶ is not permitted under this prong. Third, music's unique qualities must be considered when the issue at hand concerns musical copyright infringement.¹³⁷

A. *The Lay Listener Test*

In today's technological world, most adults use sophisticated equipment, but few know how the electronic parts work. Likewise, few music listeners know what elements and factors go into music's creation. Similarly, judges and juries are rarely musically educated and are less sensitive to the intricacies involved in musical creativity. Courts have increasingly recognized that they need assistance in the technical field of analyzing copyright protection of musical works. For example, courts have not hesitated to admit expert testimony when similarity between computer programs is at issue.¹³⁸ Yet these same courts are still relying on the lay listener test in music copyright cases.

The lay listener test cannot be an effective standard because it presupposes that the average person is knowledgeable enough to detect musical plagiarism.¹³⁹ Nevertheless, the Ninth Circuit in *Baxter v. MCA, Inc.*¹⁴⁰ declined to consider plaintiff's argument that the lay listener test was unsatisfactory in technical fields such as music because an infringer can easily deceive the unsophisticated by immaterial variations in the copyrighted work.¹⁴¹ As Professor Nimmer pointed out, the problem with the *Arnstein* lay lis-

135. See Note, *supra* note 8, at 144-47.

136. *Id.*

137. *Id.*

138. *Id.* at 133-34.

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

140. 812 F.2d 421 (9th Cir. 1987).

141. *Id.* at 424 n.2.

tener test is that "very real appropriation" can go undetected.¹⁴²

Both parties in an infringement suit must synthesize the technical factors that constitute a musical composition into concise, lay-person language to avoid confusing or misleading the factfinder. For instance, on the issue of improper appropriation, the factfinder focuses on the similarities of the songs, ideally ignoring those phrases and verses already in the public domain.¹⁴³ However, the untrained, possibly incompetent ears of the factfinder may incorrectly determine qualitatively important similarities that are actually in the public domain and thus uncopyrightable and unprotectable.¹⁴⁴ Expert testimony and explanations would help to safeguard against these misguided findings of unlawful appropriation.

Additionally, the lay listener test requires the factfinder to place himself in the position of the person who listens to the type of music at issue. The factfinder then decides how that person would respond.¹⁴⁵ This is a confusing instruction and is far removed from "the reasonable man under the circumstances" standard used in negligence law.¹⁴⁶ The negligence standard measures the defendant's conduct,¹⁴⁷ whereas the average lay hearer standard considers not the defendant but an average listener who is assumed to be qualified to respond like the actual audience for whom the music has been composed.¹⁴⁸ Because expert testimony is not allowed to lend guidance to the factfinder in making an informed response, the average lay listener standard is extremely difficult to apply.

B. Expert Testimony in Musical Copyright Cases

The second problem with the *Arnstein* test is its restriction on expert analysis and dissection. The court can hear expert testimony on the issue of copying, but not on misappropriation.¹⁴⁹ Judge Clark, dissenting in *Arnstein*, argued for an increased use of music experts, stating that "[m]usic is a matter of the intellect as well as the emotions."¹⁵⁰

142. Note, *supra* note 8, at 145.

143. *Id.* at 146.

144. *Id.*

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

146. Note, *supra* note 8, at 144.

147. *Id.*

148. *Id.*

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

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

The admission of expert testimony can assist a court in understanding the technical field of music. But expert testimony is only admitted to prove that copying has occurred.¹⁵¹ Theoretically, the finder of fact must apply the lay listener test by disregarding expert testimony. This doctrine is impractical because it is questionable whether the jury can disregard the expert's detailed testimony. Even if the lay listener test is performed precisely as outlined in *Arnstein*, copyright infringement can easily go undetected.¹⁵²

Judicial treatment of expert testimony in musical copyright infringement cases is well illustrated in the *Gibb* case. In *Gibb*, the Seventh Circuit rejected plaintiff's expert testimony on several grounds. First, the court agreed with defendants' argument that although the expert was "eminently qualified in the field of classical music theory, [he] was not equally qualified to analyze popular music tunes."¹⁵³ The *Gibb* court made that finding even though the expert's testimony was elaborate and focused on the compositions' similarities of pitch, rhythm, and melody.¹⁵⁴

Second, the court condemned the expert's lack of elaboration on the complexity or uniqueness of the works in question.¹⁵⁵ The *Gibb* court stated that songs in the popular music field were "relatively short and tend[ed] to build on or repeat a basic theme," and concluded that such testimony "would seem particularly necessary."¹⁵⁶ The assertion that music, especially popular songs, lacks complexity is abundant in judicial opinions, including *Gibb*.¹⁵⁷ The court reiterated this attitude in *Gaste v. Kaiserman*, when it stated that "[i]n assessing this evidence, we are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music."¹⁵⁸

C. The Complexity of Musical Compositions

Although the judiciary has not recognized the numerous elements that comprise musical compositions, the fact remains that

151. See Note, *supra* note 8, at 130-31.

152. *Id.* at 145.

153. *Gibb*, 741 F.2d at 904.

154. *Id.* at 899.

155. *Id.* at 905.

156. *Id.*

157. Note, *supra* note 8, at 141.

158. *Gaste*, 863 F.2d at 1068.

they consist of more than only melody, harmony and rhythm.¹⁵⁹ Timbre (tonal quality), tone, pitch, tempo, spatial organization, consonance, dissonance, phrasing, accents, note choice, combinations, interplay of instruments such as playfulness of the strings in a symphony, bass lines, and the new technological sounds are sample elements of a musical composition.

Many highly original compositions would lose much of their protection if copyright did not extend to these elements.¹⁶⁰ Because these elements involve mood and style, some may consider them as only peripheral. But it is the very expression of these elements, not their ideas, that is protected by the Copyright Act.¹⁶¹ In addition, because these musical elements are enmeshed with the composer's personal moods and feelings in the creative process of composing the song, they are vital to the overall feeling of the piece.

Furthermore, originality is better viewed as a function of the interaction and conjunction of these different musical elements than of any one element alone.¹⁶² A change in one element necessarily affects perception of all others.¹⁶³ A musical work is a structural creation of sound; the important thing is what the sounds do and how they are used, rather than what they are in acoustical terms.¹⁶⁴ Musical analysis is by no means simple, and it does not suffice to count the number of changed notes and beats to determine the degree of difference between two musical works.¹⁶⁵

Even if one chooses to follow some critics and most current judicial thinking that musical compositions have limited possible combinations, music should still be given its own specialized test.¹⁶⁶ Due to their nature, written literary works are afforded wide latitude and scope when tested for copyright infringement, whereas music should be closely dissected. This is especially true because it is probably more difficult to detect musical rather than literary plagiarism.¹⁶⁷

Musical analysis in copyright infringement cases requires consistent procedures for accepting and utilizing expert testimony, al-

159. *Id.*

160. Comment, *supra* note 103, at 431.

161. *Id.* at 432.

162. *Id.*

163. *Id.*

164. *Id.* at 436.

165. *Id.*

166. See 2 A. SHAFER, *MUSICAL COPYRIGHT* (2d ed. 1939).

167. De Wolfe, *Copyright in Music*, 1 *MUSIC LIBR.* 145 n.7 (1943).

though in actuality the courts continue to be inconsistent. For example, the *Gibb* court placed the burden on plaintiff to prove both the relative complexity of his song and that only a minimal amount of his song could have been taken from a common source.¹⁶⁸ The expert in *Gibb* was not prepared to testify on the uniqueness of the rhythmic similarities.¹⁶⁹ He did, however, rule out the possibility that defendants independently created their song.¹⁷⁰ But the expert did not state that the similarities could only be the result of copying.¹⁷¹ The fact that the expert described the works as strikingly similar was not enough to sustain the infringement claim.¹⁷²

A more equitable approach is to require a defendant to rebut the expert's testimony with a showing that the song had no inherent or unique qualities, as was done by the Second Circuit in *Gaste*. There, the court correctly relied on expert testimony to explain and compare the similarities of the common musical phrases in the two works, then placed the burden of a common source on defendant.¹⁷³ Defendant failed to convince the court that the similar portions were commonplace and already in the public domain.¹⁷⁴

Moreover, the *Gaste* court found that plaintiff's proof precluded any reasonable possibility of independent creation on the basis of all of the evidence, even after defendant's experts demonstrated similarities between "Feelings" and other musical compositions ranging from Bach to Stan Kenton.¹⁷⁵ Plaintiff's expert explained the uniqueness of the compositions by testifying there was not one measure of "Feelings" which could not be traced back to something which occurred in "Pour Toi," and while modulation from a minor key to its relative major was very common, he had never seen this particular method of modulation in any other compositions.¹⁷⁶ Unlike *Gibb*,¹⁷⁷ the *Gaste* court did not require a de-

168. *Gibb*, 741 F.2d at 905.

169. Note, *supra* note 8, at 142.

170. *Gibb*, 741 F.2d at 899.

171. *Id.* at 905.

172. *Id.*

173. *Gaste*, 863 F.2d at 1069.

174. However, an important part of the expert testimony focused on a unique musical "fingerprint" that occurred in the same place in both songs. *Gaste*, 863 F.2d at 1068-69.

175. *Id.*

176. *Id.* at 1068.

177. Justifiably, the *Gibb* decision has received some criticism. See Metzger, *supra* note 12, at 146 ("What the Bee Gees court failed to recognize is that substantial and striking similarity, coupled with expert testimony that negates independent creation, is substan-

finitive opinion that copying had occurred.¹⁷⁸ Rather, the court relied on the weight of the evidence and the trier of fact's balancing ability.¹⁷⁹

IV. A PROPOSAL FOR A MUSICAL INFRINGEMENT TEST

The spontaneous and immediate reactions of the ordinary observer are relevant in determining the existence of copying.¹⁸⁰ An aesthetic test, which looks to the total aesthetic appeal of a work when conducting the ordinary lay listener test, is an alternative proposal for infringement cases. The basic theory of the aesthetic test is that the ordinary observer may subjectively determine the overall effect of the work. The factfinder would not have to determine whether the person who listens to the music would find the two songs alike; that is, she would not have to decide the issue from the point of view of the intended audience. Rather, the factfinder would listen to both compositions in their totality and make her own personal determination.

Applying this aesthetic test in music copyright cases would transform it to an aural test that would be a part of the evidence required to prove copying, rather than being a separate hurdle to overcome. As such, this test would be melded into the findings concerning copying, helping to confirm the copyright infringement rather than being set off separately as the final prong of the overall infringement test. In this way, the aesthetic test would only be part of the analysis to determine copying, serving as the subjective listening aspect of the copying prong of the total infringement test. Unlike the *Arnstein* test, the factfinder would not step into the shoes of the listener for whom the music was written and attempt to determine what a mythical member of the intended audience would or would not hear.

The *Arnstein* test should be amended. The unlawful appropriation prong, while remaining a part of the total copyright infringement analysis, should become a less powerful test than presently prescribed. It should not be a separate element to overcome, but rather another consideration for the trier of fact to use when bal-

tial evidence upon which a finding of infringement may be based, even in the absence of direct proof of access"). See also NIMMER, *supra* note 7, at § 13.02[B] n.24.6 (Gibb required that defendants' evidence of independent creation be directly countered by more than plaintiff showing striking similarity, and "[t]o thus put the burden on plaintiff to disprove a matter peculiarly within defendants' knowledge seems unfair").

178. *Gaste*, 863 F.2d at 1068.

179. *Id.*

180. NIMMER, *supra* note 7, at § 13.03[E].

ancing and weighing the evidence to determine if musical copyright infringement has occurred. In other words, unlawful appropriation should be incorporated into the copying analysis and not set off as a separate prong. As to the ultimate question of infringement, the determinative issue should be whether or not copying occurred. In this way, expert dissection and analysis would be a prerequisite when comparing similarities. Thereafter, the ordinary lay observer listens to the works for their aesthetic effects, and then determines whether the plaintiff has proven his case.

This approach is not new to the American court system.¹⁸¹ In fact, the manner in which the *Arnstein* test is applied in practice is exactly what this proposal recommends. Because copying and improper appropriation are separate prongs, a court is theoretically required to isolate them.¹⁸² However, because expert testimony often infiltrates the lay listener test, the expert limitation in *Arnstein* has been more theoretical than practical.¹⁸³ Most courts have not adhered to the *Arnstein* test in its literal terms; rather, they have combined and altered the *Arnstein* test into this more viable, workable approach.

The jury instructions in *Gibb* provide a convenient prototype for this proposed musical infringement test. In *Gibb*, the court's jury instructions either injected the lay listener test into the issue of copying, or merged the elements of copying and improper appropriation.¹⁸⁴ The jury instructions suggest the former proposition:

If you find that the defendants had access to plaintiff's song so that they were able to copy it, then plaintiff must also establish a substantial similarity in the two works. To prove substantial similarity plaintiff must establish . . . that the average person would recognize [defendant's song] as having been appropriated from parts of [plaintiff's song].¹⁸⁵

Even though the jury in *Gibb* returned a verdict in favor of plaintiff, the trial court granted defendants a judgment notwithstanding the verdict.¹⁸⁶ As noted previously, *Gibb* has been criticized for this reversal.¹⁸⁷ The contention is that *Gibb* was correctly

181. See Note, *supra* note 8, at 143.

182. *Id.* at 144.

183. *Id.* at 145.

184. *Id.* at 143.

185. *Id.* at 144.

186. *Gibb*, 741 F.2d at 898.

187. Metzger, *supra* note 12, at 34. See *supra* note 177 for further criticism of the *Gibb* case.

decided by the jury, and the jury was correctly instructed to use the expert's dissection when considering the substantiality of the similarities.¹⁸⁸

In sum, a plaintiff must submit a valid copyright and then prove copying. This proposal recommends that the lay listener test become an overall aesthetic aural test and be combined with the copying prong of the copyright infringement analysis. Under the copying element, expert analysis and dissection determine the extent of the copying. The aesthetic test should be employed only after evidence of copying has been established, ultimately demonstrating musical copyright infringement.

V. CONCLUSION

This is a proposal for a slightly restructured *Arnstein* test that produces a musical infringement analysis specifically tailored to music's special qualities and needs. The aesthetic test, along with vital expert testimony, makes for a well-rounded musical infringement test. Expert testimony must be used virtually in every instance, as the technical nature of music warrants expert guidance. This proposal makes a court's task easier by being a more malleable and consistent test to apply. More importantly, the artist who produces a work that is totally of his own creation will be protected from misappropriation, and will have the remedial powers necessary to reap the benefits due him.

188. Note, *supra* note 8, at 143.