Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement

Jeffrey Cadwell
EXPERT TESTIMONY, SCÈNES À FAIRE, AND TONAL MUSIC: A (NOT SO) NEW TEST FOR INFRINGEMENT

Jeffrey Cadwell*

I. INTRODUCTION

Jollie v. Jaques1 was one of the first music infringement cases reported in the United States.2 Its music infringement inquiry set the basis used by later courts in evaluating such cases.3 Although much has changed in terms of culture, technology, and musical style since the 1850s, the general test for infringement of copyrighted musical works has changed very little. Jollie set a precedent for treating music in the same manner as any other work protectible by copyright.4 In Jollie, the court held that infringement occurred whenever there was “appropriation of the whole [of plaintiff’s work] or of any substantial part of it without the license of the author.”5 Joll-

* Senior Technical Editor, Santa Clara Law Review, Volume 46; J.D. Candidate, Santa Clara University School of Law; M.A., Music Composition, University of Minnesota; B.M., Individualized Major: Interdisciplinary Study of Music Theory and Literary Theory, Drake University.


3. Id.

4. Keyes, supra note 2, at 411. Copyright protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a) (2000). Protectible works of authorship include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Id. § 102(a)(1)-(8).

5. Jollie, 13 F. Cas. at 913. Jollie was decided under the Copyright Act of 1831. See id. at 911. Under the 1831 Act, copyright protection extended to “any book or books, map, chart, or musical composition.” Copyright Act, § 1, 4 Stat. 436 (1831) (current version at 17 U.S.C. § 102(a) (2000)). Printed music was first specifically protected under the 1831 Act, although before 1831, composers registered their sheet music under the books category. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 31-32, 136 (2000).
lie also contained issues similar to those found in more recent music infringement cases, including the key factors of substantial similarity and expert testimony. As this comment will discuss, because of the unique nature of musical works, reliance on evolving variations of the Jollie test has been problematic and must be refined.

This comment will first provide background on the two major approaches to copyright infringement that have been developed by the case law. Second, because both approaches limit expert testimony, this comment will identify the problems that arise from this limitation. Third, this comment will analyze the traditional approaches to music infringement, focusing on the unique nature of music and the reasons expert testimony should not be limited. Finally, this comment proposes a restructured test for music infringement that includes expert testimony throughout.

II. BACKGROUND: FROM TIN PAN ALLEY TO MCDONALD'S: THE TWO MAJOR APPROACHES TO INFRINGEMENT

A. Copyright Infringement

Copyright infringement is "an unpermitted exercise by the defendant of a right or rights in a copyrighted work accorded to the plaintiff by the Copyright Act itself." Under the Copyright Act of 1976, an owner of a valid copyright has several exclusive rights, including the right of publication, the right to prepare derivative works, and the right of public performance. Recently, the United States Supreme Court has

6. When works are substantially similar, the defendant has generally taken "a substantial and material amount of plaintiff's protected expression." MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 386 (3d ed. 1999).

7. Keyes, supra note 2, at 412.

8. See discussion infra Part IV.

9. See discussion infra Part II.

10. See discussion infra Part III.

11. See discussion infra Part IV.

12. See discussion infra Part V.

13. For more background on most of the cases discussed in this comment, including sound clips to compare and contrast, as well as the full text of most opinions, see Columbia Law School, Arthur W. Diamond Law Library Music Plagiarism Project, http://www.ccnmtl.columbia.edu/projects/law/library/caselist.html (last visited Sept. 6, 2005).


instructed that a plaintiff must show two elements to prove copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.\textsuperscript{16} These elements have remained quite similar throughout the history of copyright infringement actions and are the basis of two important copyright infringement cases that have formed the backdrop for many music infringement lawsuits.\textsuperscript{17} These two cases are discussed below.

B. The Arnstein Approach

In 1945, Ira B. Arnstein brought suit against the American songwriter Cole Porter,\textsuperscript{18} alleging that a number of Porter's songs, including "Begin the Beguine," "Night and Day," "I Love You Madly," and "You'd Be So Nice to Come Home To," infringed the copyrights of songs written by Arnstein.\textsuperscript{19} The influential\textit{Arnstein v. Porter}\textsuperscript{20} case set forth two elements a plaintiff must prove to establish a prima facie case of infringement.\textsuperscript{21} First, the plaintiff must demonstrate that the

\begin{footnotesize}
\begin{enumerate}
\item 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 (2004). "Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant." Id. Nimmer notes that, prior to the\textit{Feist} decision, the previous sentence was "probably the most oft-cited passage of this treatise." Id. at 13-5 n.5.1.
\item Cole Porter (1891-1964) wrote songs for both the Broadway stage and the film screen. THEODORE BAKER, BAKER'S BIOGRAPHICAL DICTIONARY OF MUSICIANS 2843 (Nicolas Slonimsky & Laura Kuhn eds., Centennial ed. 2001) (1900). He is perhaps best known for his musical comedy "Kiss Me Kate." Id. Porter was also the subject of the 2004 film DE-LOVELY starring Kevin Kline as Porter and Ashley Judd as Porter's wife, Linda. Internet Movie Database (IMDb), DE-LOVELY (2004), http://www.imdb.com/title/tt0352277 (last visited Jan. 23, 2005).
\item Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). Arnstein was "a litigious immigrant from the Soviet Union who for ten years dogged the likes of various songwriters, 20th Century Fox, ASCAP, and BMI, claiming that they all had infringed on his music copyrights." Keyes, supra note 2, at 416. Other reported cases brought by Arnstein include: 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); Arnstein v. ASCAP, 29 F. Supp. 388 (S.D.N.Y. 1939); Arnstein v. Broadcast Music, Inc., 137 F.2d 410 (2d Cir. 1943); Arnstein v. Twentieth Century Fox Film, Corp., 52 F. Supp. 114 (S.D.N.Y. 1943).
\item Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).
\item Arnstein, 154 F.2d at 468. See also Alice J. Kim, Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases, 19 COLUM.-VLA J.L. & ARTS 109, 112 (Fall 1994/Winter 1995) (citing 3 NIMMER, NIMMER ON COPYRIGHT §13.03[E], at 13-101 n.234 (1994)) (noting that
\end{enumerate}
\end{footnotesize}
defendant copied from the plaintiff's copyrighted work. Second, the plaintiff must show that the copying constituted improper appropriation.

1. The Copying Prong

According to Arnstein, the plaintiff must first show that the defendant copied from the plaintiff's copyrighted musical work. This showing is satisfied by either the defendant's direct admission of copying or circumstantial evidence from which the trier of fact may reasonably infer copying. Since direct evidence of copying is unlikely to be available, the copying prong of the infringement test almost always involves the use of circumstantial evidence. Generally, circumstantial evidence requires a showing of two separate elements: (1) that the defendant had access to the plaintiff's work, and (2) that the defendant's work is similar to the plaintiff's work.

a. The Access Element

The plaintiff in a copyright infringement action must first show that the defendant had access to the plaintiff's work. An early writer on musical copyright defined access in terms of whether the accused composer had an opportunity to become acquainted with the plaintiff's work. Further, one of the leading copyright treatises states that access should not be inferred through speculation or conjecture, but rather there must be a reasonable possibility of access to the plaintiff's work. Arnstein similarly points out that no amount of

Arnstein has been a very influential case).

22. Ownership of a valid copyright was later enumerated as a separate element by the Supreme Court in Feist. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Arnstein's first prong would necessarily assume that the plaintiff has ownership of a valid copyright since it refers to "plaintiff's copyrighted work." See Arnstein, 154 F.2d at 468 (emphasis added). The Copyright Act of 1976 indicates that registration before or within five years of publication constitutes prima facie proof of copyright validity. 17 U.S.C. § 410(c) (2000).

23. Arnstein, 154 F.2d at 468.
24. Id.
25. Id.
26. JOYCE ET AL., supra note 14, at 668.
27. See Arnstein, 154 F.2d at 468.
28. Id.
29. ALFRED M. SHAFTER, MUSICAL COPYRIGHT 219 (2d ed. 1939).
30. NIMMER, supra note 17.
31. 4 Id. § 13.02[B], at 13-19 to 13-20.
evidence of access can be used to show copying if there are no similarities.\textsuperscript{32} The opinion also notes that if there is no evidence of access, then "the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."\textsuperscript{33}

b. The Similarity Element

With regard to the similarity circumstantial evidence prong, striking similarity will generally be required if the plaintiff has little or no evidence of access.\textsuperscript{34} Striking similarity has been defined as "that degree of similarity as will permit an inference of copying even in the absence of proof of access."\textsuperscript{35} In order to prove striking similarity, the plaintiff must show that the similarities between the two works in question are of the sort that cannot be accounted for by coincidence, independent creation, or prior common source.\textsuperscript{36} Arnstein allows the use of expert testimony to demonstrate striking similarity: "On [the issue of striking similarity], analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of facts."\textsuperscript{37} Typically, in a music infringement case, the expert will attempt to show how certain melodic fragments, phrases, harmonic progressions, or any combination thereof are similar between the musical works at issue.

The evidentiary burden is on the plaintiff to demonstrate that the similarities between the plaintiff's work and the defendant's work "are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source."\textsuperscript{38} Once the plaintiff makes out a prima facie case of copying, there are two primary defenses a defendant may raise to rebut the plaintiff's allegations. First, the defendant may claim that he created the work independently.\textsuperscript{39} Second, the defendant may claim that both the plain-

\begin{itemize}
\item[] \textsuperscript{32} Arnstein, 154 F.2d at 468.
\item[] \textsuperscript{33} Id.
\item[] \textsuperscript{34} Jeffrey G. Sherman, \textit{Musical Copyright Infringement: The Requirement of Substantial Similarity}, 22 COPYRIGHT L. SYMP. (ASCAP) 81, 84 & n.15 (1977).
\item[] \textsuperscript{35} Id.
\item[] \textsuperscript{37} Arnstein, 154 F.2d at 468.
\item[] \textsuperscript{38} See Stratchborneo, 357 F. Supp. at 1403.
\item[] \textsuperscript{39} See LEAFFER, supra note 6, at 385.
\end{itemize}
tiff's work and the defendant's work have their origins in a prior common source, such as a piece of music in the public domain.40

c. The Relationship Between Access and Similarity

In many music infringement cases, tension arises as to whether a strong case of striking similarity can overcome lack of evidence of access. Selle v. Gibb41 provides a noteworthy example of this tension.42 Ronald H. Selle brought suit against the Bee Gees,43 alleging that the Bee Gees' song "How Deep Is Your Love" infringed his song "Let it End."44 Selle's song was written and copyrighted in 1975 and was played two or three times in the Chicago area.45 Selle also sent a tape of the song to eleven recording and publishing companies, eight of whom returned the tape while three did not even respond.46 Although the jury originally returned a verdict in favor of Selle, the district court judge granted the defendants' motion for judgment notwithstanding the verdict primarily due to Selle's inability to demonstrate that the Bee Gees had access to "Let it End."47

On appeal, Selle relied primarily on striking similarity as argued by his expert witness.48 Selle's expert witness testified that "the two songs had such striking similarities that they could not have been written independent of one another."49 Selle claimed that when such a strong case of strik-

40. Id.
41. Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984).
42. Another famous example involving the tension between access and striking similarity involved Broadway composer Andrew Lloyd Webber. Repp v. Webber, 132 F.3d 882 (2d Cir. 1997). Ray Repp, an American church music composer, claimed Lloyd Webber's "Phantom Song" copied Repp's "Till You." Id. at 884. Despite Repp's music having limited distribution in religious markets and the lack of a case of access by Lloyd Webber to Repp's song, the court allowed an inference of access to stand based on a strong case of striking similarity. Id. at 891.
43. The Bee Gees were formed by the brothers Robin, Maurice, and Barry Gibb and were "perhaps the most successful white soul act of all time during the disco era." The Bee Gees, VH1.com, http://www.vh1.com/artists/az/bee_gees/bio.jhtml (last visited Sept. 17, 2005).
44. Selle, 741 F.2d at 898.
45. Id.
46. Id.
47. Id. at 900.
48. Id. at 900-01.
49. Id. at 899 (quoting Transcript at 202). For a more detailed description of Selle, including discussion of the expert testimony, see Michael Der
The court responded to this argument by noting that "although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable." Here, Selle was unable to meet this minimum threshold of proof because the court deemed the availability of Selle's song as de minimis. Furthermore, since there was no evidence that any of the Bee Gees or their associates were in Chicago at any of the times Selle's song was performed, Selle could not meet the threshold.

Courts have also been willing to infer access based on the widespread popularity of the allegedly infringed piece of music. A notable instance of this type of inference involved former Beatles member George Harrison. In Bright Tunes Music Corp. v. Harrisongs Music, Ltd., the plaintiff alleged that Harrison's "My Sweet Lord" infringed the plaintiff's song "He's So Fine." In 1963, "He's So Fine" was a number one hit for five weeks in the United States and, in Harrison's home country of the United Kingdom, it was a number one song for seven weeks. Even though Harrison defended himself by claiming independent creation, a verdict was returned for the plaintiff on a theory of "subconscious copy-

50. Selle, 741 F.2d at 900.  
51. Id. at 902 (emphasis added).  
52. Id. Generally, de minimis in the copyright context is "a technical violation of a right so trivial that the law will not impose legal consequences." Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).  
53. Selle, 741 F.2d at 903.  
54. See LEAFFER, supra note 6, at 384.  
56. Id.  
57. Id. at 178. "He's So Fine" was written by Ronald Mack and made famous when recorded by the Chiffons in 1962. Id.  
58. Id. at 179. Coincidentally, on June 1, 1963, "He's So Fine" was number twelve on the British charts while a song by The Beatles held the number one slot. Id.  
59. Harrison testified that "My Sweet Lord" developed when he began vamping on two chords after a press conference and singing the words "Hallelujah" and "Hare Krishna" over the chords. Id. He then developed the idea further with his band. Id. Approximately one week later, the group molded the idea into a song during a recording session with an American gospel singer named Billy Preston. Id.
The court determined that the plaintiff's song, "He's So Fine," was so widely known that Harrison must have had heard it at some point. Coupled with the fact that "He's So Fine" was so well known was the strong musical similarity between the songs. The songs not only shared two similar melodic motives, but "My Sweet Lord" also repeated those motives in nearly the exact same pattern as did "He's So Fine." As for the subconscious copying charge, the court noted that Harrison must have known subconsciously that the musical expression in "He's So Fine" had been successful in terms of popularity with the public.

While the Selle decision demonstrates that the copying prong requires proof of minimal access in addition to striking similarity, in some instances, such as with music of wide popularity, similarity can be so striking as to render proof of access nominal or even unnecessary because it can be inferred. It is unclear from the case law whether the inverse,

60. Id. at 180-81.
61. Bright Tunes, 420 F. Supp. at 180-81. Bright Tunes was not the first time subconscious copying appeared in the context of music infringement cases. It also arose in a 1924 case involving the famous American songwriter Jerome Kern, wherein Judge Learned Hand wrote: "Everything registers somewhere in our memories, and no one can tell what may evoke it." Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).
62. Id. at 178. The court noted, "[w]hile neither motif is novel, the four repetitions of [the A motif], followed by four repetitions of [the B motif], is a highly unique pattern." Id.
63. Id. at 180-81. Judge Owen concluded the following:
I conclude that the composer in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.
64. Id.
65. Selle, 741 F.2d at 905.
that a strong case of access would require a lesser showing of striking similarity, is true. This would, however, appear to violate Arnstein's rule that "if there are no similarities, no amount of evidence of access will suffice to prove copying."

2. The Improper Appropriation Prong

As Arnstein notes, only after the copying prong is established "does there arise the second issue, that of illicit copying (unlawful appropriation)." This second prong requires the plaintiff to show that the defendant improperly appropriated the plaintiff's music. Requiring proof of improper appropriation is important because there can also be non-illicit, or permissible, copying. Thus, adequate proof of copying is not enough to win a case. Arnstein holds that expert testimony and "dissection" are irrelevant during the improper appropriation inquiry. The test suggested by the court is "the response of the ordinary lay hearer."

The lay listener test did not originate with Arnstein, however, but rather had been used in music infringement cases for several years. In a 1915 case, the judge noted that he was "[s]litting for the moment as the uninformed and technically untutored public..." In an earlier case involving Ira Arnstein, the court wrote that the appropriation must be "substantial and capable of apprehension by the music loving public."
public” to justify a finding of infringement.78

Arnstein v. Porter’s innovation is that it casts the foundation for the lay listener test as primarily an economic consideration:

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 plaintiff.79

In other words, the court places the primary value of a piece of music in the portion that makes it popular with, or at least recognizable to, the public.

Under Arnstein’s logic, improper appropriation occurs where the defendant has appropriated the portion of the plaintiff’s music that made it pleasing and popular. One commentator has described this as the “catchy part” of the music.80 This is essentially a quasi-unjust enrichment rationale based on whether the defendant has appropriated the catchy part of the music. The Arnstein court notes the importance of this economic consideration, stating that “[t]he impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff’s or defendant’s works are utterly immaterial on the issue of misappropriation.”81

Ultimately, Arnstein does not completely bar expert testimony, but instead limits it to “assist in determining the reactions of lay auditors”82 because expert testimony is “utterly immaterial on the issue of misappropriation.”83

Thus, as generally applied, the improper appropriation prong includes two elements. First, the plaintiff must show that the defendant appropriated protected expression from

78. Id. at 412.
81. Arnstein, 154 F.2d at 473.
82. Id.
83. Id.
the plaintiff's copyrighted work. Second, the plaintiff must show that there is substantial similarity between the defendant's work and the plaintiff's protected expression.

3. The Broader Application of Improper Appropriation and Approaches to Determining Whether it Has Occurred

In addition to Arnstein's lay listener approach and limited use of expert testimony, several other methods have been developed to determine improper appropriation. One such method, discussed in Part II.C, is the "total concept and feel" approach. The Ninth Circuit developed this approach and it was brought to prominence by Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. The Krofft court rooted its approach directly in the idea-expression dichotomy and provided a new way of approaching the lay listener test.

Another important method for determining improper appropriation is known as the subtractive approach. The subtractive approach involves analyzing the allegedly infringed work to determine which of its elements are protected by copyright and which are not. After the unprotected elements are removed from consideration, the trier of fact then determines whether there is significant similarity between the allegedly infringing work and what remains of the allegedly infringed work, namely the protectible elements. The permissible copying described by Arnstein occurs where there is similarity between the defendant's work and nonprotectible elements of the plaintiff's work.

A further concept of which courts must be mindful is the idea-expression dichotomy essential to copyright law. The

84. JOYCE ET AL., supra note 14, at 668.
85. Id. at 668-69.
86. See Arnstein, 154 F.2d at 468.
87. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970).
88. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). See also discussion infra Part II.C.
89. See infra text accompanying notes 94-101 for a discussion of the idea-expression dichotomy.
90. See Krofft, 562 F.2d at 1165.
91. JOYCE ET AL., supra note 14, at 686.
92. Id.
93. Arnstein, 154 F.2d at 488.
idea-expression dichotomy is embodied in the theory that, while ideas themselves are not copyrightable, the expression of those ideas is copyrightable. This creates an essential tension in copyright law between idea and expression. To respond to allegations of improper appropriation, a defendant will often argue that the portions of the plaintiff's work that the defendant appropriated were not protectible expression.

The idea-expression dichotomy was addressed by the United States Supreme Court as early as 1880 in Baker v. Selden. In that case, Charles Selden created a unique system of bookkeeping and published charts and tables in a book that explained how to implement the system. Baker published a book that contained a similar system and was accused of infringement by Selden's heir. The Court held that Selden could protect the expression of his system as it was found in the book he published, but he could not protect the system itself from being used or discussed by others. The Supreme Court's decision ultimately means that copyright protection cannot be granted to the ideas underlying certain systems.

Finally, nonprotectible elements can also include material traceable to scènes à faire. Although not a music infringement case, Alexander v. Haley, involving writer Alex Haley, defines scènes à faire in the following manner: "These are incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic... Nobody writes books of purely original

94. See JOYCE ET AL., supra note 14, at 118; LEAFFER, supra note 6, at 77-79.
95. The idea-expression dichotomy is codified in the 1976 Copyright Act, which states: "In no case does copyright protection for an original work of authorship extend to any idea... regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2000).
96. JOYCE ET AL., supra note 14, at 668. In other words, the defendant would be asserting that the portions allegedly appropriated were ideas rather than expression.
98. Id. at 99-100.
99. Id. at 100.
100. Id. at 104-05. "But there is a clear distinction between the book, as such, and the art which it is intended to illustrate." Id. at 102.
101. See generally LEAFFER, supra note 6, at 81.
102. See discussion infra Part IV (noting that these elements can also be grafted onto music).
Music written in the tonal system contains its own scènes à faire and “clichés” that must be taken into account in music plagiarism cases. A recent case involving pop singer Mariah Carey discusses scènes à faire in the context of music. The plaintiff alleged that Carey’s “Thank God I Found You” infringed the song “One of Those Love Songs,” written by the plaintiffs and recorded by the group Xscape. The district court held that “One of Those Love Songs” could not be protected by copyright because the elements allegedly infringed were scènes à faire elements. The court’s scènes à faire analysis was based on the premise that the pitch sequence of “One of Those Love Songs” had a similar pitch sequence to portions of the folk song “For He’s a Jolly Good Fellow.” On appeal, the plaintiffs contested the scènes à faire analysis and the Ninth Circuit remanded the case to the district court.

C. The Krofft Approach

Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp. represents the second key approach to copyright infringement. Krofft was a suit against McDonald’s by the owners of the rights to the children’s television show “H.R. Pufnstuf.” The plaintiffs claimed that McDonald’s

104. Id. at 45 (citing Reyher v. Children’s Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976)).
105. The tonal system is a hierarchical system of pitches and harmony. See discussion infra Part IV.C.
106. See discussion infra Part IV.C.
107. Swirsky v. Carey, 376 F.3d 841, 849-50 (9th Cir. 2004). The scènes à faire concept was also raised in a 1996 case involving pop star Michael Jackson. Smith v. Jackson, 84 F.3d 1213, 1216 (9th Cir. 1996).
108. Swirsky, 376 F.3d at 843-44.
109. Id. at 849-50.
110. Id. at 850. The problems with relying solely on comparison of melodies will be discussed infra Part IV.C.
111. Id. at 853. Subsequent to the remand, there has been no reported decision from the district court, nor has there been any news of a settlement. The Ninth Circuit did, however, release an amended opinion. Swirsky v. Carey, 2004 U.S. App. LEXIS 17969 (9th Cir. Aug. 24, 2004). The amended opinion contains no significant changes.
112. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).
113. Id. at 1160. “H.R. Pufnstuf” was a children’s television show that aired on NBC from 1969-1971 and on ABC from 1972-1974. Hal Erickson, Sid and Marty Krofft 17 (1998). The show featured two human characters and sev-
characters in the “McDonaldland” television commercials infringed H.R. Pufnstuf characters. According to the court, the real task in an infringement action “is to determine whether there has been copying of the expression of an idea rather than just the idea itself.” Thus, the court determined that copyright infringement actions require two distinct tests: an extrinsic test and an intrinsic test. The Krofft opinion also brought the “total concept and feel” approach to prominence.

1. The Extrinsic and Intrinsic Tests

Krofft created a bifurcated extrinsic-intrinsic approach rooted in the idea-expression dichotomy. The Ninth Circuit was careful to note that it was not resurrecting the Arnstein approach in creating its bifurcated infringement test. Rather, the court stated: “We believe that the court in Arnstein was alluding to the idea-expression dichotomy which we make explicit today.”

As with all infringement tests, Krofft requires ownership of a valid copyright and access to the copyrighted work. The focal inquiry of the extrinsic test is whether there is substantial similarity of ideas between the plaintiff's work and the defendant's work. The test is extrinsic "because it de-

114. Krofft, 562 F.2d at 1160.
116. Krofft, 562 F.2d at 1163.
117. Id. at 1164.
118. See discussion infra Part II.C.2.
120. Krofft, 562 F.2d at 1165 n.7.
121. Id. at 1165.
122. Id. at 1164.
123. Id. The Krofft test has been criticized for using the terminology “sub-
pends not on the responses of the trier of fact, but on specific
criteria which can be listed and analyzed," such as the type of
artwork involved, materials used, and the subject matter. Expert testimony and analytic dissection are allowed for de-
termining similarity. Thus, the plaintiff will utilize an ex-
pert to point out the similarities between the plaintiff’s work
and the allegedly infringing work by the defendant.

Once the plaintiff demonstrates substantial similarity of
ideas, the trier of fact must determine whether there is sub-
stantial similarity in the expression of those ideas so as to
constitute infringement. This inquiry is known as the in-
trinsic test. Determination under the intrinsic test is not to
be made by analytic dissection or expert testimony, but
rather, by “the response of the ordinary reasonable person”
using the “total concept and feel” approach. Krofft also ap-
ppears to suggest that the ordinary reasonable person ap-
proach be geared toward a more specific, rather than a gen-
eral or lay audience.

2. The “Total Concept and Feel” Approach

Krofft is most notable for its application of the “total con-
cept and feel” approach to the intrinsic, or improper appro-
priation, prong of copyright infringement. This approach
involves looking not at each protectible element individually,
but rather the total concept and feel of the allegedly infringed

stational similarity” confusingly because it applies the term both to actual copy-
ing and improper appropriation. See Laureysens v. Idea Group, Inc., 964 F.2d
131, 140 (2d Cir. 1992). One commentator suggests the first prong be referred
to as “probative similarity,” while the second prong remains an inquiry into
“substantial similarity.” See Alan Latman, “Probative Similarity” as Proof of
Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM.

124. Krofft, 562 F.2d at 1164.
125. Id.
126. See generally id.
127. Id.
128. Id.
129. Id.
130. Krofft, 562 F.2d at 1166 (“The present case demands an even more in-
trinsc determination because both plaintiffs’ and defendants’ works are di-
rected to an audience of children.”). Later, the court noted: “We do not believe
that the ordinary reasonable person, let alone a 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 (emphasis added).
131. JOYCE ET AL., supra note 14, at 688.
work. Next, a determination is made by the trier of fact as to whether the defendant's work is substantially similar to the total concept and feel of the plaintiff's work. In *Krofft*, the court viewed samples of both Pufnstuf characters and McDonaldland characters and found that the McDonaldland characters were substantially similar to the Pufnstuf characters. The court ruled that the defendants had "captured the 'total concept and feel' of the Pufnstuf show."

**D. Further Development of the Lay Listener Test**

The ordinary lay listener test for improper appropriation was melded with the *Krofft* approach by the Fourth Circuit in *Dawson v. Hinshaw Music, Inc.* *Dawson* involved alleged infringement of a musical arrangement of the spiritual "Ezekiel Saw De Wheel." The court determined that the ordinary listener test should be oriented "to the works' intended audience, permitting an ordinary lay observer characterization of the test only where the lay public fairly represents the works' intended audience." In this case, because the work at issue was a choral arrangement of a spiritual, the intended audience was deemed to be choral directors who were in the position of choosing one of the arrangements of "Ezekiel Saw De Wheel" over the other. The court noted that tailoring the observer test to the intended audience of the works in question harmonized the *Arnstein* and *Krofft* approaches because "the *Krofft* court believed that the perspective of the specific audience for the products... was the rele-

---

132. *Id.*
133. *Krofft*, 562 F.2d at 1167.
134. *Id.* at 1167.
135. *Id.*
139. *Id.* at 733 (emphasis in original). The court continued:

[We read] *Arnstein's* logic to require that where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended audience would be the relevant inquiry. In light of the copyright law's purpose of protecting a creator's market, we think it sensible to embrace *Arnstein's* command that the ultimate comparison of the works at issue be oriented towards the works' intended audience.

*Id.* at 734.
140. *Id.* at 737-38.
vant perspective for the ordinary observer test."¹⁴¹ Unlike Krofft, however, and more akin to Arnstein, Dawson allowed expert testimony "from those who possess expertise with reference to the tastes and perceptions of the intended audience."¹⁴²

E. Scènes à Faire in Music: A Basic Primer on Tonal Music Theory

Because scènes à faire in music is a central element of the analysis presented in Part IV.C of this comment, a background primer on tonal music theory may be helpful to the reader. Although there are a number of compositional systems available to composers, such as the dodecaphonism¹⁴³ developed by Arnold Schoenberg¹⁴⁴ or the octatonicism¹⁴⁵ found in much of the music of Béla Bartók,¹⁴⁶ most of the music that finds its way into music plagiarism cases is based on the tonal system.¹⁴⁷

Tonal music is composed in a system with a hierarchical structure where pitches and harmony relate to one another.¹⁴⁸

¹⁴¹. Id. at 735.
¹⁴². Id. at 736. Courts were cautioned to be hesitant to find that the lay public is not a work's intended audience and that they should only depart from the lay characterization where the intended audience has "specialized expertise." Id. at 737. This "specialized expertise" must "go beyond mere differences in taste and instead must rise to the level of the possession of knowledge that the lay public lacks." Id. See also supra note 139.
¹⁴³. This system is meant to negate a sense of tonal center by utilizing all twelve possible pitches. STEFAN KOSTKA & DOROTHY PAYNE, TONAL HARMONY 535 (4th ed. 2000).
¹⁴⁴. Arnold Schoenberg (1874-1951) was an Austrian-born composer, music theorist, writer, and teacher who later came to America and taught both at the University of Southern California and the University of California, Los Angeles. BAKER, supra note 18, at 1629-31. He is credited with creating the twelve-tone system of composition, discussed supra note 143. Id. at 1629.
¹⁴⁵. Octatonic music is based on an eight note scale that alternates half steps (adjacent keys on the piano keyboard) and whole steps (the distance between every other key on the piano keyboard). See KOSTKA & PAYNE, supra note 143, at 497-98.
¹⁴⁶. Béla Bartók (1881-1945) was a Hungarian composer who made enormous contributions to the study of folk music in Eastern Europe. BAKER, supra note 18, at 115-16 ("Indeed, he regarded his analytical studies of popular melodies as his most important contribution to music.").
¹⁴⁸. See generally KOSTKA & PAYNE, supra note 143, at xii-xiv.
Tonal music is rooted in a particular key, or tonal center. Each key is served by a particular scale that represents the pitches available in that key. Scales are built in patterns of half steps (directly adjacent keys on the piano keyboard) and whole steps (the distance between every other key on the piano). For example, the key of C Major is centered on the pitch ‘C’ and begins and ends on ‘C.’ This distance is called an octave because it spans eight notes. Each note in the scale is given a number, or a scale degree. Scale degree 1 is the tonal center and is appropriately labeled the “tonic.”

Example 1:

Upon each note in the scale, a chord can be constructed, the most basic chord being a triad. Triads are built and identified by their root, or the bottom note of the triad. As can be seen in Example 2, only certain pitches make up certain triads, limiting the number of pitches that can be used melodically in conjunction with any particular chord. Although by

149. Id. at xii-xiii.
150. Of course, composers may use pitches that do not fall in this set of pitches.
151. See HUGH M. MILLER, INTRODUCTION TO MUSIC: A GUIDE TO GOOD LISTENING 227 (1971).
152. See KOSTKA & PAYNE, supra note 143, at 7.
153. The triad is by no means the only type of chord construction available. Another common type of chord is the seventh chord, which contains four notes, the fourth of which is the interval of a seventh above the root, or lowest note, of the chord.
154. Triads constructed in this manner are said to be in “root position.” Triads can also be inverted, which is achieved by successively removing the bottom note of the triad and placing it “on top” of the remaining pitches. For example, a first inversion C Major triad looks like this:
no means is it impossible or unpleasant to harmonize a particular chord with a "non-chord tone," the most harmonically stable sounds will be created by using pitches contained in the chord.

In traditional analysis, each of these chords is given a roman numeral designation. The roman numeral corresponds to the root of the chord, which in turn corresponds to the scale degree of the root. For example, the chord built on C, consisting of the notes C-E-G, is a C Major triad and is given the roman numeral designation "I." Capital roman numerals are often used to indicate major triads and lowercase roman numerals represent minor triads. These chords are also given names that generally reflect their importance in the overall tonal hierarchy. The three most important chords in order of importance are the Tonic (I), the Dominant (V), and the Subdominant (IV).

Example 2:

\[ \text{I ii iii IV V vi vii}^\circ \text{ I} \]

Tonal music tends to be composed in phrases and periods, which are analogous to sentences and paragraphs. The construction of the phrases lends structure to the whole of the

---

155. To harmonize means using pitches in conjunction with chords.
156. Pleasant sounds are often described as consonant, while unpleasant sounds are described as dissonant. See KOSTKA & PAYNE, supra note 143, at 24 (emphasis added).
157. Traditional analysis is that which is taught in music theory courses at most colleges and universities across the country.
158. This practice varies from academic institution to institution as well as from theorist to theorist. I was taught the lowercase-uppercase usage as an undergraduate, but strictly made use of uppercase roman numerals as a graduate student. The reason for choosing one usage over the other is often a choice based on one's philosophy about harmonic function and is beyond the scope of this comment.
159. See MILLER, supra note 151, at 30. The other chord name designations are: Supertonic (ii); Mediant (iii); Submediant (vi); and Leading Tone (vii\(^\circ\)).
160. It should be noted that the chord bearing the designation vii\(^\circ\) is a diminished chord, which is neither major nor minor.
161. See MILLER, supra note 151, at 80.
musical work. The end of a phrase is generally signified by a cadence.\textsuperscript{162} Two of the most common cadences in tonal music are the “whole” cadence and the “half” cadence. The whole cadence is most analogous to a period,\textsuperscript{163} signifying a relaxed moment in the music. This is because the music has returned to the Tonic harmony (I), or the tonal center of the piece.\textsuperscript{164} The half cadence, also called an open cadence, is most analogous to a semi-colon,\textsuperscript{165} indicating that there is material to follow that will make the phrase complete. Half cadences come to a rest on the Dominant harmony (V).\textsuperscript{166}

Furthermore, in the hierarchy of the tonal system, certain chords have a tendency to move to certain other chords. This is due also to the tendencies of the notes which are commonly used to harmonize certain chords.\textsuperscript{167} Analysis of hundreds of years of tonal music has revealed that composers very frequently follow these tendencies.\textsuperscript{168} In fact, Leonard Meyer, writing primarily about classical music, describes these tendencies in terms of listener expectations.\textsuperscript{169} He writes that, by listening to music, listeners have been conditioned to expect certain sounds and/or patterns to follow other sounds and/or patterns.\textsuperscript{170} Placing the discussion in terms of probability, Meyer notes:

Musical events take place in a world of stylistic probability. If we hear only a single tone, a great number of different tones could follow it with equal probability. If a se-

\begin{itemize}
\item \textsuperscript{162} A cadence is a “harmonic goal, specifically the chords used at the goal.” KOSTKA & PAYNE, \textit{supra} note 143, at 156.
\item \textsuperscript{163} MILLER, \textit{supra} note 151, at 80-81.
\item \textsuperscript{164} \textit{See} KOSTKA & PAYNE, \textit{supra} note 143, at 156-57. Note that Kostka & Payne refer to the whole cadence as an “authentic” cadence. \textit{Id.}
\item \textsuperscript{165} MILLER, \textit{supra} note 151, at 80.
\item \textsuperscript{166} \textit{See} KOSTKA & PAYNE, \textit{supra} note 143, at 159.
\item \textsuperscript{167} For example, a dominant (V) chord is often harmonized by the note represented by scale degree 7. This note is commonly called the “leading tone” because it leads to the tonic. Since scale degree 7 generally moves to scale degree 1, the number of chords that can be used to follow the dominant (V) chord is limited. This is also the reason the dominant chord tends most often to move to the tonic chord. This concept is generally referred to as “voice leading.” \textit{See generally id. at 75.}
\item \textsuperscript{168} For an excellent discussion of tonal harmonic movement, see KOSTKA & PAYNE, \textit{supra} note 143, ch. 5. The Kostka & Payne text also has a very useful chart detailing typical chord movement in the tonal setting. KOSTKA & PAYNE, \textit{supra} note 143, at 116.
\item \textsuperscript{169} LEONARD MEYER, MUSIC, THE ARTS, AND IDEAS 7-16 (1967).
\item \textsuperscript{170} \textit{See generally id. at 7-21.}\
\end{itemize}
quence of two tones is heard, the number of probable consequent tones is somewhat reduced—how much depends upon the tones chosen and the stylistic context—and hence the probability of the remaining alternatives is somewhat increased. As more tones are added and consequently more relationships between tones established, the probabilities of a particular goal become increased.171

The above discussion, while presenting a very simplified introduction to tonal harmony, progresses from single pitches to harmonic movement. What makes music interesting is the manner in which composers use the tendencies of the tonal system to create unique and creative pieces of music. Composers can create new chords, borrow chords from other keys, or disperse the notes they use in interesting ways among the instruments for which they compose. This type of deviation from expectations is perhaps the point at which musical scènes à faire become expression, a point explored in Part IV.C.

III. THE INHERENT PROBLEMS WITH THE ARNSTEIN AND KROFFT APPROACHES

There are two problems with the Arnstein and Krofft tests to music infringement. First, music’s unique nature makes it difficult to draw a distinction between idea and expression.172 Krofft itself noted that there is a difficulty in attempting “to distill the unprotected idea from the protected expression.”173 The idea-expression dichotomy, central to copyright law, is not easily applied to the copyright analysis of music. Popular music,174 the most frequent subject of copyright disputes, is especially problematic when considering idea and expression. For instance, popular music is primarily written in the tonal system,175 which, as discussed in Part

171. Id. at 27.
172. It is, however, necessary to recognize some distinction between idea and expression. Otherwise, no musical compositions would be copyrightable because they would be subject to the merger doctrine. The merger doctrine holds that when idea and expression cannot be separated, they merge and copyright protection is unavailable. See LEAPFER, supra note 6, at 81-82.
173. Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1163 (9th Cir. 1977).
174. I am using the term “popular music” broadly to include many genres such as Rock & Roll, Gospel, Country, Film Scores, and Showtunes.
175. KOSTKA & PAYNE, supra note 143, at xii.
II.E, is a hierarchical structure of chords and pitches. Because there are a finite number of viable possibilities of pitch and harmonic relationships, the tonal system is somewhat limited. Further, since the tonal system is built on a hierarchy where certain chords and pitches are more important than other chords and pitches, there are certain prevalent patterns and tendencies that are common to virtually all musical works composed in the tonal system. These patterns and tendencies can be described as the ideas, or scènes à faire, in a musical work. It is the manner in which the composer makes use of these ideas in constructing a piece of music that constitutes expression. However, because the distinction between idea and expression in music is not as simple as it seems, the expert testimony of music theorists is important in music infringement litigation.

The second, and perhaps more serious, problem with the Arnstein and Krofft approaches is that expert testimony is limited, or even proscribed, where it is most needed: during the improper appropriation inquiry. Musical experts are trained to analyze music by examining the way chords and pitches interact. They are knowledgeable about the patterns and tendencies of tonal music. This expertise can be invaluable in a music infringement suit because the expert can examine the two pieces of music at issue to determine the actual level of their similarity. The expert can comment on everything from melodic similarity to similarity of chord progressions to overall pattern similarity. The expert can also determine whether the similarity occurs because of infringement of another's music (infringement of expression), or whether the similarity occurs because both pieces of music have been written within the tonal system and are subject to its constraints and tendencies (merely similarity of idea).

Unfortunately, the expert is generally proscribed from commenting on the deeper nature of the similarities between the plaintiff's and defendant's musical works because this in-

---

176. See supra notes 166-70 and accompanying text.
177. For a more detailed discussion of musical "ideas," see discussion infra Part IV.C.
178. See discussion infra Part IV.A.
179. Although most often a pop song is not written, or often even notated, in the same manner as a piece of traditional classical music, the methods of musical analysis used to understand the two works are quite similar. See generally KOSTKA & PAYNE, supra note 143, at xii-xiii.
quiry happens during the improper appropriation stage of infringement cases. *Arnstein* allows an expert to comment only on how a lay listener might experience a musical work, but does not allow the expert to discuss improper appropriation directly.\(^{180}\) In contrast, *Krofft* eradicates expert testimony entirely from its second, improper appropriation, prong.\(^{181}\) Allowing expert testimony in the copying stage of music infringement cases but not in the improper appropriation stage is, quite simply, counterproductive. After an expert reveals what is similar about the musical works during the first stage, the trier of fact is left on his or her own in the second stage to make a determination as to whether the defendant improperly appropriated protected expression from the plaintiff's work.\(^{182}\) The trier of fact is also ostensibly supposed to forget about the expert's testimony during this second stage and focus on how a lay listener would perceive the two pieces of music.\(^{183}\) Because triers of fact often lack musical training, especially the sort necessary to make a meaningful comparison of musical works, their decisions may not reflect whether the two works at issue have any substantial similarity of protected expression.

### IV. Analysis

#### A. A Basic Comparison of the Arnstein and Krofft Approaches

Although the *Krofft* approach differs somewhat from the *Arnstein* approach, both are still comparable in several respects. The extrinsic test set forth by *Krofft* is akin to the copying prong of the *Arnstein* approach.\(^{184}\) As in the *Arnstein* approach, "analytic dissection and expert testimony are appropriate"\(^{185}\) for determining similarity. The *Krofft* intrinsic test is similar to the improper appropriation prong of *Arn-

181. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).
182. *See discussion infra Part IV.A.*
183. *Arnstein*, 154 F.2d at 468.
184. Recall that *Arnstein* requires the plaintiff to demonstrate that the defendant copied from plaintiff's copyrighted work. *Id.*
In terms of expert testimony, however, Krofft and Arnstein differ. Arnstein allows expert testimony as to how a lay listener might perceive a musical work, but not directly with respect to improper appropriation. In contrast, Krofft forbids expert testimony in its second, intrinsic, prong. Krofft also seems to indicate that the ordinary lay observer test should be refined to include the intended audience for the work at issue.

B. The Problems of Limited Expert Testimony and the Lay Listener Test

Both Arnstein and Krofft, by attempting to set forth refined tests for infringement, have done more harm than good for music infringement jurisprudence. First, both approaches dramatically limit the type of testimony allowed by expert witnesses. Second, both Arnstein and Krofft place a lay listener, either the judge or a jury, in the position of having to make a determination of substantial similarity between two musical works, even though judges and juries generally lack the musical knowledge to make such a meaningful determination. Consequently, Krofft’s attempt to make the infringement analysis reflect the idea-expression dichotomy gives rise to the possibility that lay listeners will mistake scènes à faire elements in music as evidence of improper appropriation. This final problem would not be so troublesome if expert testimony were allowed on the issue of improper appropriation. Through use of the Krofft “total concept and feel” approach, experts can identify whether substantial similarity

---

186. Under the Arnstein approach, once a plaintiff successfully demonstrates copying, the plaintiff must also show that defendant’s copying constituted improper appropriation. Arnstein, 154 F.2d at 468.


188. See Krofft, 562 F.2d at 1166. Arnstein may also have indicated a tailoring of the lay listener test by using the phrase “lay listeners, who comprise the audience for whom such popular music is composed.” Arnstein, 154 F.2d at 473. Arnstein is certainly not as explicit as Krofft regarding tailoring the approach, however.

189. Arnstein, as noted, allows expert testimony in both prongs of its test, but limits the testimony in the second prong solely to comments on how a lay listener might perceive the two pieces of music. See discussion supra Part II.B. Krofft completely removes expert testimony from its second prong. See discussion supra Part II.C.

190. See discussion supra Part II.
is present between the allegedly infringing musical work and the plaintiff’s musical work.

One of the most frequent criticisms of both the Arnstein and Krofft approaches is that they proscribe expert testimony where it is needed most.\textsuperscript{191} During the improper appropriation prong, Arnstein allows an expert to comment on how a lay listener might hear the two pieces of music at issue in the case, but not as to improper appropriation itself.\textsuperscript{192} Krofft entirely disallows expert testimony during its intrinsic prong.\textsuperscript{193} Therefore, after the expert presents testimony as to whether elements of the plaintiff’s music have been copied by the defendant, the trier of fact must make a decision without the aid of the expert as to whether the defendant has improperly appropriated from the plaintiff’s music.

Judge Clark explained the flaws in the majority approach in Arnstein in his dissenting opinion.\textsuperscript{194} He took issue both with the court’s two-pronged approach to infringement and with using the lay listener test at the expense of expert guidance:

I find nowhere any suggestion of two steps in 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—the now chosen instrument of musical 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.\textsuperscript{195}

Thus, Judge Clark immediately saw the problem with barring expert testimony during the illicit copying inquiry.

Although Arnstein does not allow the expert to comment on the issue of improper appropriation,\textsuperscript{196} the expert can offer an opinion as to how a lay listener might hear the two pieces

\begin{itemize}
\item \textsuperscript{191} See, e.g., Kim, supra note 21, at 120.
\item \textsuperscript{192} See Arnstein, 154 F.2d at 468; see also discussion supra Part II.B.2.
\item \textsuperscript{193} Krofft, 562 F.2d at 1164. See also discussion supra Part II.C.1.
\item \textsuperscript{194} Arnstein, 154 F.2d at 475-80 (Clark, J., dissenting).
\item \textsuperscript{195} Id. at 476 n.1 (Clark, J., dissenting).
\item \textsuperscript{196} Arnstein, 154 F.2d at 468.
\end{itemize}
of music at issue in the case. However, expert analysis of how a lay listener might hear the music at issue is also problematic. Experts in music infringement cases often have several years of musical training and practical experience. In addition, many experts are music theorists who devote their lives to analyzing and understanding music. As a result, the expert's ear is acutely attuned to the inner complexities of music. In contrast, the average listener, especially a listener whose regular musical listening includes music of the popular genres, generally does not listen to music with this level of sophistication. One commentator has highlighted the trouble with asking such an expert to comment about how a lay listener would perceive a piece of music: "Whether an expert, highly educated in the field of music theory, analysis, and history, can in fact hear again as a lay listener is speculative at best."

Furthermore, whether judges and juries can make a distinction of improper appropriation by acting as lay listeners is even more suspect. Judges and juries are unlikely to have a high degree of musical training, let alone the tools to distinguish whether a defendant's copying constitutes improper appropriation of a plaintiff's protected expression. Although language skills such as reading and writing are used and refined through continuous practice, the aural skills necessary to making a meaningful determination of similarity in the

197. Id.
198. The plaintiff's expert in Selle v. Gibb exemplifies the typical expert. Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984). At the time of trial, Dr. Arrand Parsons was a music professor at Northwestern University. Id. at 899. He wrote program notes for both the Chicago Symphony and the New Orleans Symphony, and also wrote about music theory. Id.
199. Experts used in music infringement cases undoubtedly have undergraduate and graduate degrees in music. Students who obtain formal music education such as this are expected to develop a refined ear to hear the inner complexities of music. In fact, most undergraduate music majors are required to take at least two years each of both music theory and aural skills.
200. Der Manuelian, supra note 49, at 133
202. One commentator notes that there is an inconsistency between the use of expert testimony in computer cases and music cases. Debra Presti Brent, The Successful Musical Copyright Infringement Suit: The Impossible Dream, 7 U. MIAMI ENT. & SPORTS L. REV. 229, 246 (1990) ("For example, courts have not hesitated to admit expert testimony when similarity between computer programs is at issue. Yet, these same courts are still relying on the lay listener test in music copyright cases.").
musical context go largely undeveloped in most people.\textsuperscript{203}

In his dissent, Judge Clark also took issue with the inadequacy of asking untrained laypersons to make decisions about illicit copying in music, describing the \textit{Arnstein} decision as exhibiting an "anti-intellectual and book burning" philosophy.\textsuperscript{204} Building on the comments made by Judge Clark, one commentator has observed:

If plaintiff's "striking similarity" proof (required absent access) is a technical issue and therefore requires expert guidance, does not the jury need expert guidance just as much (if not even more) when it reaches the heart of the analytic journey—at the moment where it must consider the actual "illicitness" level of the similarity? Surely this must be so.\textsuperscript{205}

Finally, by barring expert testimony in assessing the improper appropriation prong, judges or juries must essentially forget what the expert has told them during the copying inquiry and, instead, make a decision based on how an ordinary lay listener would hear the musical works at issue.\textsuperscript{206} The ideal judge or jury, then, must have a "conveniently short" memory in order to separate the testimony presented by the expert on copying from their decision on improper appropriation.\textsuperscript{207} It is unlikely that any trier of fact can make such a separation.\textsuperscript{208}

\textsuperscript{203} See Metzger, \textit{supra} note 201, at 151-52. Metzger goes on to note that even if similarity were to be based on the visual elements of music, i.e., the musical score, there is a kindred problem of musical illiteracy among the general public. \textit{Id.}

\textsuperscript{204} Arnstein v. Porter, 154 F.2d 464, 478 (2d Cir. 1946) (Clark, J., dissenting) ("Further, my brothers reject as 'utterly immaterial' 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)... ").

\textsuperscript{205} Kim, \textit{supra} note 21, at 120-21.

\textsuperscript{206} See \textit{id.} ("[I]n contemplating similarity between two works, triers of fact with properly operating intellects cannot necessarily 'turn off,' during the second-prong analysis, whatever experts may have shown them during the first-prong analysis."); see also Metzger, \textit{supra} note 201, at 178 ("The trier of fact therefore hears the works, not as a lay auditor, but as a spectator who has heard testimony by musical experts.... Thus exposed to critical analysis, the trier of fact cannot realistically decide the question of improper appropriation as would an average listener....").

\textsuperscript{207} LEAFFER, \textit{supra} note 6, at 397.

\textsuperscript{208} Id. See also Brent, \textit{supra} note 202, at 248 (noting that asking the lay listener to disregard expert testimony is not only a questionable practice, but also impractical).
C. Idea-Expression and Scènes à Faire in Music

The court in *Krofft* stated that it was attempting to craft a test rooted in the idea-expression dichotomy.\(^{209}\) However, the overwhelming problem with practical application of the *Krofft* test is that the idea-expression dichotomy is hard to navigate when it comes to music. Two concerns arise when considering the idea-expression dichotomy as it relates to music. The first concern involves a determination of which musical elements should be considered. Second, there must be a determination of whether those musical elements should be considered individually or contextually. Under this second determination, *scènes à faire* patterns also merit consideration.

As discussed in Part II.E, two important elements that must be considered when examining music are melody and harmony. Another highly important element is rhythm.\(^{210}\) One early writer called rhythm, harmony, and melody the "three essential elements" of music.\(^{211}\) D. Anthony Ricigliano, a frequent expert in music infringement cases, has identified four elements: (1) melody, (2) harmony, (3) rhythm, and (4) a combination of pitch, rhythm, and chords.\(^{212}\) While rhythm, harmony, and melody are indeed essential elements of music, they should not be the only elements eligible for consideration. In many instances, numerous other elements merit notice, including timbre,\(^{213}\) tone, spatial organization, phrasing,\(^{214}\) accents, and interplay of instruments.\(^{215}\)

The tendencies and commonalities found in tonal music

---

209. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1165 (9th Cir. 1977).
210. For a basic discussion of rhythm, see KOSTKA & PAYNE, supra note 143, at 28-40.
211. SHAFTER, supra note 29, at 197.
213. Timbre is the quality or tone color of a sound. See THE NEW HARVARD DICTIONARY OF MUSIC, supra note 137, at 858.
214. Phrasing is to be distinguished from phrases, discussed supra text accompanying notes 160-65. Phrasing refers to the manner in which the performer of the music expresses the musical ideas during a performance, aside from the phrases constructed by the composer in writing the music. See THE NEW HARVARD DICTIONARY OF MUSIC, supra note 137, at 629.
215. See Brent, supra note 202, at 249.
can be described as scènes à faire. Because composers, knowingly or unknowingly, tend to utilize the same basic patterns, such as chord progressions and cadences, music can often sound similar without actually being similar at all.\(^\text{216}\) Judge Learned Hand once wrote: "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear."\(^\text{217}\)

Simply because two musical works sound similar does not necessarily mean that the similarity is due to improper appropriation. What the fact-finder hears as similarity might actually be scènes à faire elements of music that are unprotectible by copyright.\(^\text{218}\) Because copyright does not protect ideas, but rather the expression of ideas,\(^\text{219}\) and because scènes à faire elements represent the "ideas" from which a composer may draw when writing music, these elements are unprotectible.\(^\text{220}\) Expert testimony that discusses and takes into account elements common to tonal music would allow the fact-finder to distinguish more meaningfully musical "ideas," or musical scènes à faire, from expression.\(^\text{221}\)

The most important consideration is how each of these elements should be considered during an inquiry into improper appropriation. Even though the Krofft approach to infringement is itself flawed, the "total concept and feel" approach\(^\text{222}\) it advocates can prove useful in the context of

\(^{216}\) Moreover, it should be noted that each genre has its own larger structural forms and patterns which can be classified as scènes à faire. For instance, pop songs tend to contain some variation of the structure verse-chorus-verse-chorus-bridge-verse-chorus, while classical music has its own stylized forms such as sonata form, ternary form and rondo form. For more on traditional classical forms, see KOSTKA & PAYNE, supra note 143, at 335-47.

\(^{217}\) Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940). Of the thirteen chromatic pitches available (all of the notes on the piano between one 'C' and the next 'C' spanning an octave), there are "the amazing total of 6,227,020,800 combinations, of which only a small fraction may be used ordinarily." SHAFTER, supra note 29, at 196.

\(^{218}\) Der Manuelian, supra note 49, at 146; Brent, supra note 202, at 247.

\(^{219}\) See supra text accompanying notes 94-101.

\(^{220}\) See Jones, supra note 212, at 301. Jones attempts a definition of a musical idea, positing that "[a] musical idea may consist of a single note, rhythm or chord." Id. (citing personal correspondence between Jones and D. Anthony Ricigliano dated February 3, 1992).

\(^{221}\) Kim, supra note 21, at 122.

\(^{222}\) See discussion supra Part II.C.2.
music. Due to the common ideas, or scènes à faire, that pervade tonal music, the "total concept and feel" approach can deliver better results than the subtractive approach. ²²³ This is because combinations of elements may be overlooked by strictly employing the subtractive approach to determine improper appropriation. As the Supreme Court instructed in a case involving compilation of factual information, "even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement."²²⁴

Selection and arrangement highlights the importance of the "total concept and feel" approach precisely because music is a contextual and hierarchical art where every note relates to every other note to some degree. Because the subtractive approach often does not consider the combination of elements, but rather seeks to remove from consideration everything not protectible by copyright, it is ill-suited for the music context.²²⁵ In this respect, then, Arnstein was correct in pronouncing that "dissection" should not be allowed when inquiring about improper appropriation.²²⁶

Using the "total concept and feel" approach is also consistent with the way composers construct music. Most composers do more than write an individual melody. Often, they write a melody in the context of harmonic progression.²²⁷ As a result, music is best understood through context.²²⁸ Music cannot be experienced in one moment, as can a painting; music requires hearing the whole work over time to understand how its individual parts relate to the whole.²²⁹ In the Swirsky case involving Mariah Carey, the Ninth Circuit noted that relying solely on individual elements results in an "incomplete

²²³. The subtractive approach is discussed supra Part II.B.3.
²²⁵. See discussion supra Part II.B.3.
²²⁷. Although he was found guilty of subconscious infringement, this is the creative process described by George Harrison in Bright Tunes. See supra note 59.
²²⁸. Several commentators have also discussed the importance of preservation of context when it comes to musical works. See, e.g., Keyt, supra note 80, at 437-38.
²²⁹. See generally discussion supra Part II.E.
Any meaningful comparison of two musical works must be made contextually, not as single "strings of acoustical events." Unfortunately, judges have demonstrated that they do not have the tools to conduct the contextual analysis of music needed to determine improper appropriation. One judge has demonstrated this inability: "It is in the melody of the composition—or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical tones, which are the fingerprints of the composition, and establish its identity." Some judges, however, such as those on the panel in Swirsky, have been more enlightened, noting that "to disregard chord progression, key, tempo, rhythm, and genre is to ignore the fact that a substantial similarity can be found in a combination of elements, even if those elements are individually unprotected."

V. PROPOSAL: A (NOT SO) NEW TEST FOR MUSIC INFRINGEMENT

The test proposed by this comment is not truly new, but rather borrowed from the past. This proposal resembles the test used before Arnstein suggested a bifurcated approach to infringement. The proposed test consists of three elements: access, expert testimony regarding similarity, and ultimate determination of infringement by the trier of fact. A 1939 volume devoted specifically to musical copyright issues written by Alfred M. Shafter indicated that these are the basic elements to be proved in an infringement suit.

Access is a crucial element. The plaintiff should be required to prove that the defendant had access to the plaintiff's

---

230. Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004).
231. Keyt, supra note 80, at 437.
233. Swirsky, 376 F.3d at 848.
234. SHAFTER, supra note 29. The attentive reader will note that the second edition of Shafter's text was published in 1939, seven years before the 1946 Arnstein decision.
musical work. While a great amount of similarity may be used to infer access, courts enter dangerous territory when they allow a great amount of access to infer similarity. If a musical work has reached a certain level of pervasiveness in society, then this can serve as strong evidence of access. In these situations, however, strong evidence of access should not be allowed to compensate for a weak case of similarity.

When making a case regarding similarity, expert testimony is crucial to demonstrate similarities between the work of the plaintiff and the work of the defendant. Aside from simply demonstrating similarity, however, the plaintiff's expert must also account for those similarities as similarities to protected expression in the plaintiff's work. This will involve looking at both works from the standpoint of a "total concept and feel" analysis in such a manner that analytically explores each important musical element in context. The elements on which the expert chooses to focus are left to his or her discretion. Finally, the plaintiff's expert must demonstrate why the elements he or she has shown to be substantially similar are the product of unique expression, rather than the product of musical scènes à faire common to the genre of music or to tonal music in general. The defendant is then entitled to

235. See discussion of striking similarity supra text accompanying notes 35-65.
236. See supra note 67.
237. See supra notes 222-28 and accompanying text.
238. Though beyond the scope of this comment, there are a wide variety of analytical systems available for use by experts. Because music analysis can be highly technical and is often not easily understood by even the most learned person if he or she is untrained in music, there is the possibility that the plaintiff's expert could skew the analysis of the two musical works in question to make the works seem more similar than they actually are. It is, of course, incumbent upon the defendant's expert to debase the plaintiff's analysis if this happens.

Unfortunately, one cannot expect jurors and judges to distinguish which expert's analysis is more correct. Nor can one expect jurors and judges to distinguish which type of musical analysis is best suited to comparison of the musical works in question.

For an excellent discussion of both traditional and nontraditional modes of analysis that have been used in music infringement cases, see Baker, supra note 147, at 1596-1615.

Baker also suggests that "a uniform standard [of analysis] should be adopted. The choice of a standard should be influenced by educated music experts in both copyright and academic fields. Guidelines are necessary to prevent misleading and unreliable interpretations of evidence to reach the jury on the issue of similarity." Id. at 1614.
present his own expert to rebut any of the arguments made by the plaintiff.

Relying upon each side’s expert testimony, the trier of fact is left to make the ultimate decision. This decision must not only take into account the fact-finder’s own impressions, but also the evidence offered by the expert. Thus, the trier of fact is not asked to ignore the expert’s testimony, but rather to embrace it in order to make a more fully informed decision as to whether infringement has occurred.

This approach, while diminishing somewhat the importance of the lay listener, preserves its economic rationale. In other words, if that which the defendant appropriated unlawfully was protected expression, and if that protected expression was what made the musical work popular, then the defendant will be found guilty of infringement. This approach also provides defendants a safeguard by allowing experts to testify as to both the elements of copying and improper appropriation. Since experts will be encouraged to comment on improper appropriation, the lay listener will not be caught in the trap of finding similarity merely because both musical works sound similar or because both musical works are “catchy.” This approach will also serve to encourage artists to continue to develop and expand that which makes the genre of music in which they compose popular in the first place. Composers will not be punished for writing music that sounds similar to other music because they know it will be popular. They will only be punished when their copying goes so far as to constitute improper appropriation.

VI. CONCLUSION

By limiting expert testimony during the improper appro-

239. See supra text accompanying notes 79-81.

Since composers of popular music are often limited to the smaller pool of musical possibilities common to a popular style when composing works which, if successful, will reach the largest audience and yield huge commercial returns, the economic and artistic repercussions from even a relatively minor musical choice may be substantial. To complicate matters, similarities between compositions in the same genre are not only inevitable, but may also be somewhat desirable, as popular composers feed off of each other’s musical influence, and public demand, to take the genre in innovative new directions.

Id.
priation inquiry, the Arnstein and Krofft approaches have proscribed expert testimony where it is needed most. Consequently, these approaches have done more harm than good for music infringement jurisprudence. Even more problematic is that the determination of improper appropriation is placed in the hands of a fact-finder who is supposed to act as a lay listener. Because tonal music is constructed from a foundation of common scènes à faire elements, two musical works, especially those of the same popular genre, may sound deceivingly similar. A musically untrained fact-finder may find the similarities to be the product of improper appropriation rather than simply a product of similar scènes à faire elements. Expert musical testimony should be used to reveal whether the similarities are due to improper appropriation. Allowing expert testimony will ensure that the fact-finder will make a more informed decision regarding whether or not infringement has occurred. The refined test for infringement suggested by this comment includes three elements: (1) proof of access; (2) proof of substantial similarity; and (3) a determination by the trier of fact as to whether infringement has occurred. It is critical that the first two elements involve the use of expert testimony in order for the trier of fact's ultimate decision to be as informed and insightful as possible.